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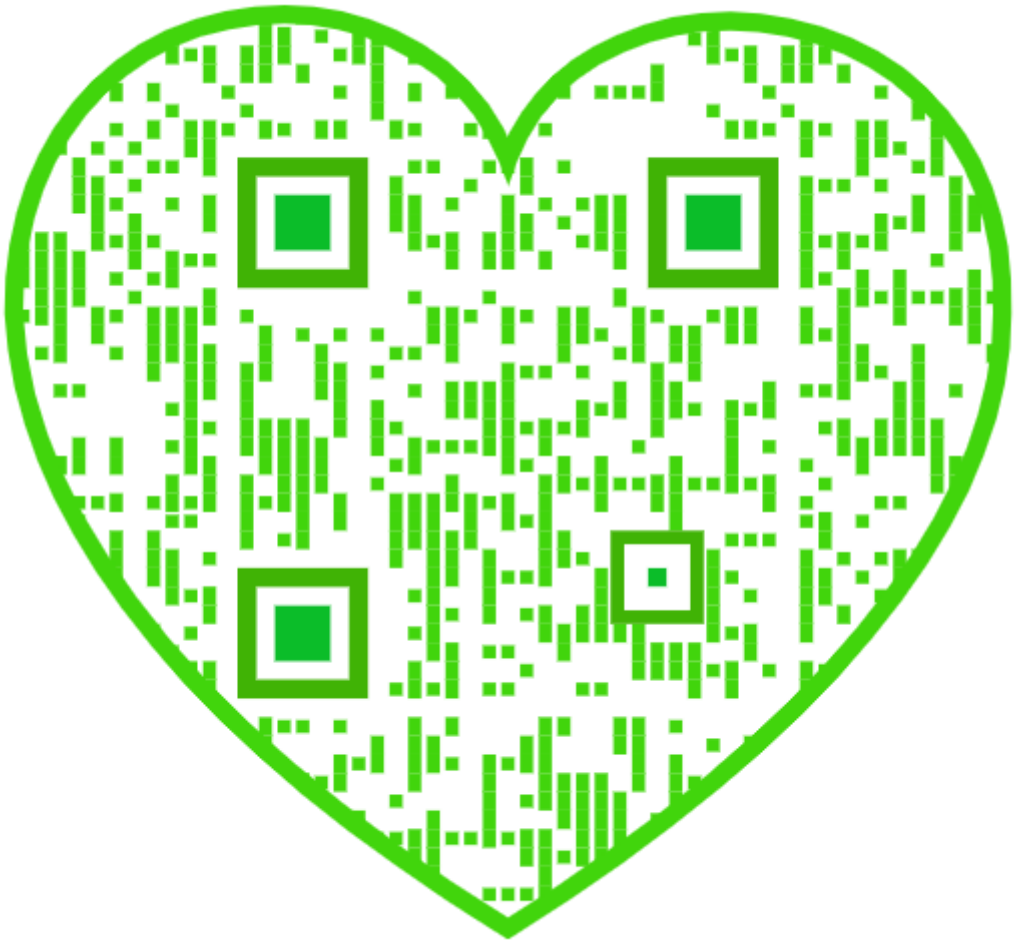

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EXECUTORS AND ADMINISTRATORS

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I. Administration in General.

A. Modern Settlement of Estates. When a person dies leaving property, his estate is usually set apart to be administered or settled under the immediate supervision of the courts. The jurisdiction, powers, and functions connected with such settlement are usually confided to special tribunals, ordinarily styled probate, surrogate, or orphans' courts, which are usually county tribunals with jurisdiction and powers defined or created by statute;[1] although in sparsely settled states the county court sometimes exercises such functions as a special branch of jurisdiction, and in addition to this the chancery courts have both in England and in some of the United States a considerable supervision of such matters.[2] The main objects of such jurisdiction are that the personalty of the deceased, together with income and profits, be properly collected, preserved, and duly accounted for, that his just debts and the charges consequent upon his death and the settlement of his estate be paid and adjusted, and that the residue of the estate be distributed among such persons and in such proportions as the will of the deceased, if there be one, or, if not, the statutes of distribution, may have prescribed. Where the deceased left what purports to be a will, the solemn establishment of that will and its public authentication require further attention from such tribunals.[3]

B. Personal Representatives — 1. Classes. The duty of settling and distributing the estate, under the supervision of the courts, is confided to persons who are termed the "personal representatives" of the deceased.[4] These personal representatives are of two classes, executors and administrators. An executor is

1. Schouler Ex. § 1. And see Roman *v.* Roman, 4 La. 202; Dupey *v.* Greffin, 1 Mart. N. S. (La.) 198.

In the absence of statutory directions the modes of procedure adopted by the ecclesiastical courts of England are necessarily in force in our probate courts. Cowden *v.* Dobyns, 5 Sm. & M. (Miss.) 82.

Rules established by supreme court.— The supreme judicial court (which is the supreme court of probate) may frame and promulgate general rules to which each local probate tribunal must conform. Baker *v.* Blood, 128 Mass. 543.

2. Search *v.* Search, 27 N. J. Eq. 137. See also New England Trust Co. *v.* Eaton, 140 Mass. 532, 4 N. E. 69, 54 Am. Rep. 493. And see Equity, 16 Cyc. 1 *et seq.*

Statutes relating to probate jurisdiction will not be presumed to divest the usual chancery courts of their equitable jurisdiction, even though a concurrent jurisdiction be conferred, and in matters of purely equitable cognizance relating to estates the probate court has presumably no jurisdiction without an enabling act. Butler *v.* Lawson, 72 Mo. 227; Winton's Appeal, 111 Pa. St. 387, 5 Atl. 240.

A court of equity will not intervene at the instance of an executor or an administrator and take jurisdiction of the settlement of his administration unless it is affirmatively shown that the court of probate cannot because of its limited powers afford adequate relief. Draper *v.* Draper, 64 Ala. 545; McNeil *v.* McNeil, 36 Ala. 109, 76 Am. Dec. 320; Moore *v.* Lesueur, 33 Ala. 237; Horton *v.* Moseley, 17 Ala. 794.

3. Schouler Ex. § 1.

A petition to revise a decree establishing a will, which has been affirmed by the supreme court, must be heard in the first instance in the probate court. Gale *v.* Nickerson, 144 Mass. 415, 11 N. E. 714.

4. **As ordinarily used,** in statutes or otherwise, the term "personal representatives" means executors or administrators.

Georgia.— Gunn *v.* Pettygrew, 93 Ga. 327, 20 S. E. 328 [*quoted* in Austin *v.* Collier, 112 Ga. 247, 250, 37 S. E. 434].

Minnesota.— Atkinson *v.* Duffy, 16 Minn. 45; Boutiller *v.* The Milwaukee, 8 Minn. 97.

Missouri.— Oates *v.* Union Pac. R. Co., 104 Mo. 514, 16 S. W. 487, 24 Am. St. Rep. 348.

England.— *In re* Cohen, [1902] 1 Ch. 187, 71 L. J. Ch. 164, 86 L. T. Rep. N. S. 73, 50 Wkly. Rep. 117; Smith *v.* Barneby, 2 Coll. 728, 736, 10 Jur. 748, 33 Eng. Ch. 728.

Canada.— Simpson *v.* Stewart, 10 Manitoba 176.

But *compare In re* Wilcox, etc., Co., 70 Conn. 220, 231, 39 Atl. 163 (where the court said: "The words 'personal representatives' standing alone, do not necessarily include only executors and administrators; they have acquired no such fixed, definite, technical meaning. A trustee in insolvency and an assignee in bankruptcy, for many purposes stands in the shoes of the debtor and represents him, and speaking generally is, to the extent of the estate committed to his charge and for such purposes, as truly the personal representative of the debtor, as the executor or administrator is the personal representative of the deceased; and for all practical purposes, and speaking generally, no

a person appointed by a testator to carry out the directions and requests in his will, and to dispose of the property according to his testamentary provisions after his decease.[5] An administrator is a person appointed by the court to perform similar functions.[6]

2. Source of Powers. The executor was formerly said to derive his authority from the will rather than any judicial appointment,[7] while an administrator's

distinction can be made, in this respect, between a trustee in insolvency or an assignee in bankruptcy, and a receiver appointed under our statutes. We think the words 'personal representatives,' as used in this statute, may reasonably be held to include in addition to executors and administrators, at least trustees in insolvency and receivers"); Wells *v.* Bente, 86 Mo. App. 264 (where the court said that the words "personal representatives" may sometimes mean "heirs" and may include "assigns" within their meaning).

Next of kin not personal representatives.— Shaver *v.* Shaver, 1 N. J. Eq. 437.

5. Black L. Dict.

For other definitions see *In re* Lamb, 122 Mich. 239, 241, 80 N. W. 1081; Compton *v.* McMahan, 19 Mo. App. 494, 505; Conklin *v.* Egerton, 21 Wend. (N. Y.) 430, 447; Worth *v.* McAden, 21 N. C. 199, 209.

Distinction between executor and testamentary trustee.— A person who takes a trust as a devisee under a will is a trustee; and one who takes under the probate of the will is an executor. The title of a devisee never depends upon the probate of the will; he becomes vested with all his title the moment the testator dies. An executor is not vested with any title or power until he becomes so vested by letters testamentary. When a testator by his will devises his real estate to an executor in trust, to recover the rents and profits, or to accumulate the same, such executor takes as trustee by devise the instant the testator dies, and becomes vested with all the estate and all the power conferred in respect to the same. The probate of the will or letters, neither add to, nor subtract from, his estate, or his powers over it. If such exeeutor die, the court of chancery must supply his place, for he is a trustee. No letters of administration with the will annexed could confer any rights over such an estate upon the person to whom they would be granted, for there is a fee or a devise of land involved, and a fee never can be held under letters testamentary or of administration. When a testator devises his real estate to his executor in trust to sell the same to pay debts or legacies, the executor takes no estate by the will, as trustee or otherwise. It is a mere power, and is an incident of the office of executor, as executor enabling him to convert into actual personalty that which is made equitably so by the will. This being merely a power in trust without an interest, pertains to the office and the duties of executor *ex officio*, and cannot be exercised without letters testamentary, no matter what terms the testator uses. He may make the grant to the executor, his heirs and assigns in the strongest language of feoffment known to the common law, in trust to pay debts or legacies, and he takes no title or trust estate by such devise, but the title and estate descends to the heirs at law, if not otherwise devised, subject to the execution by the executor of the trust (so called) as a power merely. Hence it will be seen that he only is a trustee in the sense of a statute which distinguishes such office from the office of executor, to whom an estate is devised in trust to receive the rents and profits thereof, and apply them, or to accumulate them. Where any other power or (nominal) trust is conferred upon an exeeutor in his name of executor, he takes, holds, and exercises it in the capacity of exeeutor under the probate of the will and not under the will. Matter of Anderson, 5 N. Y. Leg. Obs. 302. See also Simpson *v.* Cook, 24 Minn. 180, 187, where the court said: "When a power or trust beyond that requisite to the duties of executor is granted to an executor, *eo nomine*, he may accept and execute the trust or power without accepting and qualifying as exeeutor, unless the will expressly annex the trust or power to the office of executor."

Right of executor to administer estate undisposed of by will.— In cases of partial intestacy, or where provisions of a will have become inoperative, the executor is entitled to administer and distribute the property undisposed of, and it is not necessary or even proper to appoint an administrator for that purpose. McGreevy *v.* McGrath, 152 Mass. 24, 25 N. E. 29; *In re* Haughian, 37 Misc. (N. Y.) 457, 75 N. Y. Suppl. 932; Parris *v.* Cobb, 5 Rich. Eq. (S. C.) 450.

6. See Smith *v.* Gentry, 16 Ga. 31, 32 (where the court said: "An administrator 'is a person lawfully appointed to manage and settle the estate of a deceased person, who has left no executor'"); Matter of Sudds, 32 Misc. (N. Y.) 182, 186, 66 N. Y. Suppl. 231 (where the court said: "The word 'exeeutor' merely distinguishes one who is named in a will as the person who administers the estate from one who administers either under the law of intestacy or under the will without being named therein").

The administrator represents the person of the intestate in relation to his personal estate, which vests in him immediately on the grant of letters of administration, and such grant has relation to the time of the intestate's death. McVaughters *v.* Elder, 2 Brev. (S. C.) 307.

Particular kinds of administrators see *infra*, II, C, D, E, G.

7. Schouler Ex. § 2.

An executor is not a public officer, his office is a private trust. *Ex p.* Powell, 8 Rob. (La.) 95.

authority came wholly from his appointment made by the court. But the modern tendency is to assimilate the powers and duties of these two classes of legal representatives, and to require both executors and administrators to take out letters and qualify in the same special court, rendering their accounts upon a similar plan and under a like judicial supervision.[8]

C. Real Representatives. At common law the heir succeeded to the real estate of the deceased ancestor, and was for this reason sometimes called a "real" representative,[9] but the term "real representative" has also been used to designate a representative of the deceased who is invested by statute with the same powers with respect to real estate of the deceased, with a slight exception, as he already has in respect to personal estate.[10]

D. Administration. "Administration" means the management of the estate of a decedent and expresses the jurisdiction assumed by the proper court over it.[11] It includes more than the mere collection of the assets, the payment of debts and legacies, and distribution to the next of kin. It involves all that may be done rightfully in the preservation of the assets, and all which may be done legally by the administrator in his dealings with creditors, distributees, or legatees, or which may be done by them in securing their rights; and it includes all which may be done, and rightfully done, in relation to adverse claims to assets which have come to the possession of the administrator as the property of the testator or intestate.[12]

E. Estates Testate and Intestate. The estates of deceased persons fall into two classes: first testate, which includes those estates as to the settlement of which the deceased has left directions embodied in a will, in which case the deceased is termed the testator;[13] and second intestate, which includes the estates of persons

8. See McNeely's Succession, 50 La. Ann. 823, 24 So. 338; *In re* Haughian, 37 Misc. (N. Y.) 457, 75 N. Y. Suppl. 932.

Similarity of office of executor and administrator.— See Finney *v.* Barnes, 97 Mass. 401; Sheldon *v.* Smith, 97 Mass. 34; Cooper *v.* Robinson, 2 Cush. (Mass.) 184; Trethewy *v.* Helyar, 4 Ch. D. 53, 46 L. J. Ch. 125.

9. *In re* Wilcox, etc., Co., 70 Conn. 220, 39 Atl. 163.

10. *In re* Cohen, [1902] 1 Ch. 187, 71 L. J. Ch. 164, 86 L. T. Rep. N. S. 73, 50 Wkly. Rep. 117.

11. Crossan *v.* McCrary, 37 Iowa 684.

In a strict sense the term means the management of the estate of an intestate or of a testator who has no executor, but it is also applied broadly to denote the management of an estate by an executor. See Bouvier L. Dict. (Rawle ed.).

Jurisdiction is assumed by the appointment of the administrator; when that is done, administration is said to have been granted. Crossan *v.* McCrary, 37 Iowa 684.

Second appointment.— The term "administration" does not refer simply to the act of appointment of the administrator, although that act is included in the thought expressed, for administration, or management of the estate, is assumed by the appointment. The word would not be applicable to an administrator appointed to fill a vacancy occurring in the office on account of the death or removal of a former incumbent, or on account of one appointed refusing to qualify and discharge its duties. Upon the court assuming jurisdiction of the estate and making the appointment of an administrator it may be said that administration has been granted. The person so appointed is under the control and power of the court and may be removed or he may resign, and his place may in such cases be filled. The power of the court to make a second appointment does not depend upon jurisdiction to be newly acquired by proper application, etc., although that may be necessary to call into exercise such authority. The court having jurisdiction of the estate may do all things necessary for its proper administration and settlement, and to this end may appoint such administrators as are authorized by law and necessary to the discharge of its probate powers. It cannot be said that, in the case of the appointment of a second administrator, administration is then assumed by the court over the estate. It was possessed and exercised before, and such an appointment is simply made in discharge of proper authority. Crossan *v.* McCrary, 37 Iowa 684.

12. Martin *v.* Ellerbe, 70 Ala. 326.

The mere conversion of specific assets into money does not consummate administration, the application of the proceeds according to law in payment of debts and in distribution is also essential to its completion. Rhame *v.* Lewis, 13 Rich. Eq. (S. C.) 269.

"Matters of administration."— The object of administration is to pay the debts of the deceased, and distribute his personal estate among those entitled to it, and any act that may properly be performed by an administrator looking to this end is a matter of administration. Herndon *v.* Moore, 18 S. C. 339.

13. See Black L. Dict.

who have left no wills.[14] The term "intestate" is also used to designate a person who has died without leaving a valid will.[15] There may, however, also be cases of partial intestacy, where the deceased has left a will containing directions as to the disposition of a portion of his property, but such instrument leaves a portion undisposed of.[16] In the collection and preservation of effects, and the payment of debts, charges, and allowances, there is little or no difference between the two classes, the essential difference being that testate estates are distributed, after the payment of debts, and the like, according to the directions of the testator,[17] while intestate estates are distributed according to the rules established by the various statutes of distribution.[18]

F. Property Subject to Administration. It may be laid down as a general rule that all property which a deceased person owned at the time of his death is properly subject to administration and is regarded as being in the custody of the law for the benefit of all persons interested therein.[19] At the common law it was held that real property descended directly to the heir of the decedent, and with that the executor or administrator had no concern, the management, settlement, or administration of the estates of deceased persons relating primarily and fundamentally to personal property alone.[20] But nevertheless debts and charges remain obligatory upon the estate so long as property of the deceased may be found for their satisfaction, and hence if the personal assets prove insufficient the real estate may be applied to make up the deficiency on license of the court, modern statutes in England and the United States greatly enlarging all earlier facilities in this respect.[21] And while, in the absence of a will making inconsistent provisions, the land may still be said, as formerly, to vest at once in the heir, upon the owner's death, an encumbrance or cloud upon the title thereto remains, until it appears, from lapse of time or otherwise, that the representative will not be compelled to resort to the land because of some deficiency in the personal assets, for settling debts, legacies, or other legal charges against the estate.[22]

G. Retroactive Effect of Statutes. It has been held that statutes relating to the administration and settlement of the estates of deceased persons may have a retroactive effect so that their provisions may govern the administration of the estates of persons who died before such statutes were adopted.[23]

H. When Administration Necessary or Proper — 1. In General. As a general rule all estates of decedents are subject to administration, as the policy and intent of the statutes on the subject clearly contemplate that property of decedents left undisposed of at death shall, for the purpose of collecting the same, ascertaining and protecting the rights of creditors and heirs, and properly

Testatrix means a female testator; and the term "testator" includes testatrix. Walker *v.* Hyland, (N. J. Sup. 1903) 56 Atl. 268.

14. See Black L. Dict.

What law governs as to intestacy.— In determining the question whether or not a decedent died intestate, the law of the place where he was domiciled at the time of his death governs. Moultrie *v.* Hunt, 23 N. Y. 394. See, generally, Wills.

15. See Matter of Cameron, 47 N. Y. App. Div. 120, 62 N. Y. Suppl. 187 [*affirmed* in 166 N. Y. 610, 59 N. E. 1120]; *In re* Haughian, 37 Misc. (N. Y.) 457, 75 N. Y. Suppl. 932.

16. See *In re* Haughian, 37 Misc. (N. Y.) 457, 75 N. Y. Suppl. 932.

17. See Wills.

18. See Descent and Distribution, 14 Cyc. 1 *et seq.*

19. See Bartlett *v.* Hyde, 3 Mo. 490; and *infra*, III.

20. *In re* Lawrence, 1 Redf. Surr. (N. Y.) 310; *In re* Place, 1 Redf. Surr. (N. Y.) 276. See also Farrington *v.* Knightly, 1 P. Wms. 548, 24 Eng. Reprint 509. See *infra*, III, B, C.

21. See *infra*, III, C, 1; X, D, 8, b; XII.

22. *Alabama.*— Thornton *v.* Moore, 61 Ala. 347.

Kentucky.— Renfro *v.* Trent, 1 J. J. Marsh. 604.

Massachusetts.— Opinion of Justices, 117 Mass. 603.

Missouri.— French *v.* Stratton, 79 Mo. 560.

Tennessee.— Brien *v.* Hart, 6 Humphr. 131.

England.— Charter *v.* Charter, L. R. 7 H. L. 364, 43 L. J. P. & M. 73.

23. People *v.* Senter, 28 Cal. 502.

Death previous to organization of state government.— The statute of California with

transmitting the title of record, be subjected to the process of administration in the probate court, and indeed there is no other method provided by statute whereby the existence of creditors or heirs of decedent may be conclusively established and the estate distributed.[24] So also where anything remains to be done in execution of a will after the death of the executor, the appointment of an administrator *de bonis non* with the will annexed is proper, even though the debts and all charges of administration have been paid.[25] But the principle that the title to the personal estate of a decedent can be transmitted only through the instrumentality of letters of administration has no application where neither the title or right to possession to the property in question was in the decedent,[26] and

reference to the settlement of the estates of deceased persons had no application to the estates of persons who died previous to the organization of the state government. Tevis *v.* Pitcher, 10 Cal. 465; Grimes *v.* Norris, 6 Cal. 621, 65 Am. Dec. 545; Hardy *v.* Harbin, 11 Fed. Cas. No. 6,060, 4 Sawy. 536. See also Downer *v.* Smith, 24 Cal. 114.

24. *Alabama.*— Marshall *v.* Gayle, 58 Ala. 284.

Arkansas.— Pryor *v.* Ryburn, 16 Ark. 671.

California.— Strong's Estate, 119 Cal. 663, 51 Pac. 1078; Pina's Estate, 112 Cal. 14, 44 Pac. 332.

Connecticut.— Munson *v.* Munson, 3 Day 260, holding that the estate of a decedent cannot be distributed by arbitrators appointed by the heirs and devisees, and a distribution so made confers no title on the distributees.

Kansas.— Cox *v.* Grubb, 47 Kan. 435, 28 Pac. 157, 27 Am. St. Rep. 303.

Louisiana.— See Lumsden's Succession, 17 La. Ann. 38.

Maryland.— Barnitz *v.* Reddington, 80 Md. 622, 24 Atl. 409; Rockwell *v.* Young, 60 Md. 563; Hagthorp *v.* Hook, 1 Gill & J. 270.

Mississippi.— Marshall *v.* King, 24 Miss. 85.

Missouri.— Jacobs *v.* Maloney, 64 Mo. App. 270; Becraft *v.* Lewis, 41 Mo. App. 546, 552 (where the court said: "The heir or devisee of personal property can only secure the title through administration. And this is true though there are no debts, and the heir be the sole distributee"); State *v.* Moore, 18 Mo. App. 406. See also Craslin *v.* Baker, 8 Mo. 437, where the court recognized the general rule stated in the text, although it considered that, under the peculiar circumstances of the case, the widow having taken the property of the deceased, which was less in amount than the allowance to which she was entitled, and having paid the debts and applied the property to the maintenance of the children, it would be unjust to allow an administrator appointed eight years later to take from her the property, which had meanwhile been increased by her labor.

New York.— Woodin *v.* Bagley, 13 Wend. 453; Jenkins *v.* Freyer, 4 Paige 47.

North Carolina.— Mitchell *v.* Mitchell, 132 N. C. 350, 43 S. E. 914; Patterson *v.* High, 43 N. C. 52.

Pennsylvania.— Beatty *v.* Henry, 10 Phila. 35, holding that, where a person purchased a claim from the claimant's widow who simply signed the receipt for the purchase-money with her name but not as widow, or as acting for herself and the heirs of claimant, and no administrator was appointed to the estate of claimant, the purchaser was not legally entitled to the claim.

South Carolina.— Richardson *v.* Cooley, 20 S. C. 347; McVaughters *v.* Elder, 2 Brev. 307; Elders *v.* Vauters, 4 Desauss. 155.

Tennessee.— Thurman *v.* Shelton, 10 Yerg. 383.

Wisconsin.— Clark *v.* Clark, 76 Wis. 306, 45 N. W. 121.

See 22 Cent. Dig. tit. "Executors and Administrators," § 3.

A mortgagee of chattels cannot take possession of the same after the death of the mortgagor under a power contained in the mortgage, for upon the death of the mortgagor all his personal estate in possession passed into the custody of the law to be administered for the benefit of all persons interested. Kater *v.* Steinruck, 40 Pa. St. 501.

Where no personal estate or debts.— Where a decedent has left no personal estate to be administered or debts to be paid, there is no necessity for an administration. See Redmond *v.* Redmond, 112 Ky. 760, 66 S. W. 745, 23 Ky. L. Rep. 2161.

Texas statutes concerning estates of deceased soldiers.— The Texas acts of May 18, 1838, and Jan. 14, 1841, restricting the right of administration upon estates of deceased soldiers did not apply to the estates of soldiers who were citizens of Texas (Vogelsang *v.* Dougherty, 46 Tex. 466), and the latter statute did not apply to the estates of soldiers who died after its passage (Hill *v.* Grant, (Civ. App. 1898) 44 S. W. 1016).

25. Cushman *v.* Albee, 183 Mass. 108, 66 N. E. 590, holding that where a testatrix bequeathed to her executrix the use of her house for life, and provided that after the decease of the executrix the house should fall into the residue of the estate and be disposed of as provided by the will with reference to such residue, and the will also gave to the executrix power to sell and dispose of any or all real estate, the appointment of an administrator *de bonis non* with the will annexed was proper after the death of the executrix, the house not having yet been disposed of as provided in the will. See *infra*, II. D.

26. Biemuller *v.* Schneider, 62 Md. 547, holding that where A intrusted certain chattels to B to use and replenish as occasion arose for B's benefit, with the privilege of

where, after the estate of a decedent has been administered as intestate, the debts all paid, and the property assigned to a certain person as sole heir, a will is discovered and admitted to probate by which the real estate is devised to other persons, there is no need for the appointment of a new administrator.[27] It may be stated generally that the question of necessity for administration is one for the court having probate jurisdiction,[28] and it appears to be a matter resting largely in the discretion of the court, especially where there are no debts, whether an administration shall be had or the estate awarded to the persons entitled to it without any administration.[29] In some states there are statutes providing that administration shall not be granted after a certain time from the death of the decedent,[30] and even in the absence of statute a long lapse of time since the death of the decedent without administration may raise a presumption against the necessity for any administration.[31]

2. EXISTENCE OF DEBTS. Administration is usually a necessity where a person dies leaving unpaid debts and property which may be made available to pay them,[32] and, where a person claiming to be a creditor of the estate applies for the

repossession at any time, on the death of B and the retention of the chattels by his widow A could bring replevin before the appointment of an administrator.

27. Thompson's Estate, 57 Minn. 109, 58 N. W. 682.

28. Ferguson *v.* Templeton, (Tex. Civ. App. 1895) 32 S. W. 148 (holding that a grant of administration will not be held void on collateral attack on the ground that there was no necessity for it, but the question of necessity being one for the probate court, its judgment will be upheld until reversed on appeal or writ of error); Saul *v.* Frame, 3 Tex. Civ. App. 596, 22 S. W. 984 (holding that in administration proceedings under the Texas Probate Act of 1848 to determine whether or not an administration is void, the court should consider not only the time which elapsed before it was applied for but also the entire record of the proceedings, and ascertain therefrom whether there was a necessity for the administration, and whether the application to administer was made in good faith to benefit the estate by persons interested in taking care of it and who were entitled to administer).

29. Story's Succession, 3 La. Ann. 502; Schrack's Estate, 9 Pa. Dist. 149; Rittenhouse's Estate, 8 Pa. Dist. 700.

Money in possession of creditor of distributee.— Where a creditor of the distributees of an estate has rightfully in his possession moneys belonging to the estate, and there are no unpaid debts of the estate, the court may appropriate the fund immediately to the payment of such creditor's claim, without requiring it to be paid over to the administrator. Elliott *v.* Lewis, 3 Edw. (N. Y.) 40.

30. Under Conn. Gen. St. (1902) § 321, providing that administration shall not be granted after ten years from the death of a person unless the probate court finds on petition and notice that administration ought to be granted, the probate court may and should determine whether the claim on which application made after ten years is based is an existing and available one, and on appeal from its decision the superior court has a similar power and duty. Colburn's Appeal, 76 Conn. 378, 56 Atl. 608. Under Iowa Code, § 3305, providing that administration will not be originally granted after five years from the death of the decedent, an application for the appointment of an administrator more than five years after decedent's death, which failed to show that the applicant had any interest in the estate either as an heir or a creditor, and alleged that deceased left no personal property, but that the object of the application was to complete the title to real estate left by deceased, which was untrue, was insufficient to justify an order appointing an administrator. Cummings *v.* Lynn, 121 Iowa 344, 96 N. W. 857.

31. Anderson *v.* Smith, 3 Metc. (Ky.) 491 (twenty-eight years); Duncan *v.* Veal, 49 Tex. 603 (fourteen years).

32. *Alabama.*— Brennan *v.* Harris, 20 Ala. 185.

Georgia.— Conyers *v.* Bruce, 109 Ga. 190, 34 S. E. 279.

Illinois.— Leamon *v.* McCubbin, 82 Ill. 263.

Indiana.— Bowen *v.* Stewart, 128 Ind. 507, 26 N. E. 168, 28 N. E. 73 (holding that the heirs of a decedent, although of full age, cannot by agreement among themselves settle his estate so as to defeat the right of a county to which decedent was largely indebted for taxes to have such estate administered in due course of law); Leonard *v.* Blair, 59 Ind. 510.

Louisiana.— Bulliard's Succession, 111 La. 186, 35 So. 508; Barber's Succession, 52 La. Ann. 957, 27 So. 361; Clark's Succession, 30 La. Ann. 801; McMicken *v.* Ficklin, 1 La. 45. But see Wintz's Succession, 111 La. 40, 35 So. 377, holding that where the largest claim against a succession is one made by an heir, and the debts to third persons are insignificant, and one of the heirs offers to secure them by bond, and the heirs are all majors, it is proper to refuse to appoint an administrator.

Massachusetts.— Royce *v.* Burrell, 12 Mass. 395.

Pennsylvania.— Lee *v.* Wright, 1 Rawle 149; Bungard *v.* Miller, 5 Pa. Cas. 122, 8 Atl. 209.

appointment of an administrator, it is not necessary that he should conclusively prove the existence of the alleged debt, but if he makes a *prima facie* case this is sufficient to authorize and require the appointment of an administrator;[33] but in order for an alleged debt to form the basis of a grant of administration it must be a legal claim upon the deceased or his estate.[34] It is to be noted, however, that the power to grant administration is not restricted to cases in which the estate is indebted.[35]

3. For Collection of Assets. It has been frequently asserted that where debts or assets of the estate are to be collected or choses in action are to be sued upon

Texas.— Gurley *v.* Ward, 37 Tex. 20.

See 22 Cent. Dig. tit "Executors and Administrators," § 8.

Estates of married women.— The Married Women's Acts which have conferred upon married women the right to contract in relation to their property render administration upon the estate of a married woman necessary to protect creditors, and have to this extent modified the Md. Test. Act (1798), c. 101, subc. 5, in so far as it relieved the husband of an intestate wife from the necessity of taking out letters of administration on her estate. McCarthy *v.* McCarthy, 20 App. Cas. (D. C.) 195.

Where a creditor wishes to avail himself of the lands of the deceased for the payment of his debt he should apply for administration where the next of kin refuses to take it. Mitchel *v.* Lunt, 4 Mass. 654.

A creditor cannot attach property in Louisiana left by a decedent who died in another state. The succession is considered vacant, and should be administered by a curator. Brown *v.* Richardson, 1 Mart. (La.) 202.

Where an estate is insolvent the family can make no legal disposition of it of any kind except through an administrator. Beatty *v.* Henry, 10 Phila. (Pa.) 35.

Where there may be debts an administration is proper. Cobb *v.* Brown, Speers Eq. (S. C.) 564.

A statute casting the descent immediately upon the heirs and distributees, both of the real and personal property subject to an administration, does not change the rule that there must be an executor or administrator representing the estate, in order to enable a creditor to bring suit and subject the property of the estate to the payment of his debt. Green *v.* Rugely, 23 Tex. 539.

A creditor has no right to collect a debt due the estate from another person and apply it on his own demand. Richardson *v.* Dreyfus, 64 Mo. App. 600; Cook *v.* Jordan, 21 Tex. 221. See also Louaillier *v.* Castille, 14 La. Ann. 777.

A creditor cannot maintain an action upon his claim, where there has been no administration, either against the heirs of the decedent (Leonard *v.* Blair, 59 Ind. 510; Royce *v.* Burrell, 12 Mass. 395) or against the estate of his deceased debtor unless a person in possession of the estate has rendered himself executor *de son tort* (Screven *v.* Bostick, 2 McCord Eq. (S. C.) 410, 16 Am. Dec. 664).

Order putting heirs in unconditional possession.— The *ex parte* action of the widow and heirs of a deceased debtor in obtaining an order putting them in unconditional possession of the property of the deceased does not deprive the creditor of his right to promptly demand security or an administration under the Louisiana code. Bray's Succession, 50 La. Ann. 1209, 24 So. 601.

Debt apparently barred by limitation.— On appeal from a decree granting administration on the estate of a person dead more than ten years, it appeared of record that there was a note belonging to the estate to be collected, and while it was apparently barred by limitation there was nothing to show that it was in fact so barred. The petition to the probate court was not in the record, nor did it appear, aside from the reasons of appeal filed, that grounds other than the existence of the note induced the grant of administration. It was held that there was nothing to show that the probate court erred or abused its discretion in granting administration, or that the superior court erred in affirming its decree. Colburn's Appeal, 76 Conn. 378, 56 Atl. 608, holding further that where the court finds that the claim on which an application, under Conn. Gen. St. (1902) § 321, for administration on the estate of a person dead more than ten years is based, has no foundation, or that administration will be unavailable, or will be used for an illegitimate or improper purpose, administration should not be granted.

33. Conyers *v.* Bruce, 109 Ga. 190, 34 S. E. 279.

34. Hunt *v.* Holden, 2 Mass. 168 (holding that where a testator authorized his executor to sell lands for the support of his widow under certain circumstances and upon the contingency happening after the executor's death a stranger supplied the widow such person did not have a legal claim upon the estate so as to authorize an administration *de bonis non*); Duncan *v.* Veal, 49 Tex. 603 (holding that costs of a previous abandoned attempt to obtain administration, or of a previous void administration, are not justly chargeable against the deceased or his property and hence are not such debts as may form a basis for an administration); Summerlin *v.* Rabb, 11 Tex. Civ. App. 53, 31 S. W. 711 (holding that a debt incurred for the expenses of procuring a land certificate to which the heirs are entitled by law on the death of their intestate is not a debt against the estate, nor a ground for granting administration). See *infra*, X, A.

35. Ferguson *v.* Templeton, (Tex. Civ. App. 1895) 32 S. W. 148. But see Saul *v.* Frame, 3 Tex. Civ. App. 596, 22 S. W. 984, where

an administration is necessary in order that there may be some authorized representative of the decedent to act in the premises, as the heirs are not, merely as such, entitled to sue for the recovery of his property or of debts due to him.[36] But on the other hand there are many cases holding that where there are no debts of the estate the heirs may collect, and even if necessary sue for, the debts due to and the property of the decedent,[37] although the existence of this right does not prevent the appointment of an administrator for the purpose of collecting such debts.[38]

4. FOR PURPOSE OF DISTRIBUTION. In a number of states it is held that administration is unnecessary where there are no debts of the estate or the debts have all been paid, the courts considering that when the only duty devolving on an administrator would be to make a distribution of the estate, and the heirs or distributees make or are able to make a satisfactory distribution or disposition thereof themselves, or there is only one heir, administration would be merely a useless ceremony involving unnecessary expense,[39] and the same is true where no administration has been applied for and the claims of creditors, if any exist, are barred because they have not been presented to the probate court within the time

the court referred to "the jurisdictional fact of debts."

36. Roberts *v.* Eales, 10 Ky. L. Rep. 360; Lee *v.* Wright, 1 Rawle (Pa.) 149; Brown *v.* Niethammer, 2 Pa. Cas. 54, 4 Atl. 918 (holding that a husband cannot sue for the personal estate of his deceased wife without taking out letters of administration); Bradford *v.* Felder, 2 McCord Eq. (S. C.) 168; Clark *v.* Clark, 76 Wis. 306, 45 N. W. 121.

Where the administrator refuses on demand to sue for debts due to or upon choses in action of the intestate the heir at law may do so, but in such case the administrator must be made a defendant. Roberts *v.* Eales, 10 Ky. L. Rep. 360.

Benefit of covenants in equity suits.— Although a surviving husband is entitled to his wife's choses in action and only the equitable right thereto passes to his executors, so that they cannot maintain an ordinary action thereon without administering upon her estate; in a suit in equity brought against the executors, where the heirs of the deceased wife were parties, and it might be inferred from the record that she owed no debts rendering administration on the estate necessary, the husband's executors were entitled to the benefits of covenants in favor of the wife. Nunnally *v.* White, 3 Metc. (Ky.) 584.

37. *Alabama.*— McGhee *v.* Alexander, 104 Ala. 116, 16 So. 148.

Colorado.— Austin *v.* Snider, 17 Colo. App. 182, 68 Pac. 125.

Indiana.— Holzman *v.* Hibben, 100 Ind. 338; Langsdale *v.* Woollen, 99 Ind. 575.

Mississippi.— Ricks *v.* Hilliard, 45 Miss. 359.

Texas.— McIntyre *v.* Chappell, 4 Tex. 187 [*distinguishing* Moore *v.* Morse, 2 Tex. 400] (holding administration not necessary to enable a guardian of an heir to recover property of the decedent); Angier *v.* Jones, 28 Tex. Civ. App. 402, 67 S. W. 449 (holding that an application for administration of a decedent's estate by one not interested therein, which merely shows that there are debts due the estate, and does not show any creditors or heirs under disability, should be denied, since in such case the heirs may sue and make distribution).

See 22 Cent. Dig. tit. "Executors and Administrators," § 10.

The right of a husband to sue for choses in action of his wife without taking out letters of administration, given by Md. Test. Act (1798), c. 101, subc. 5, § 8, is a special statutory power and does not extend by construction to any case other than that expressly declared by the statute. Ferguson *v.* Washington, etc., R. Co., 6 App. Cas. (D. C.) 525.

Specific legacy.— Where a mortgage is bequeathed to an infant subject to a life-estate in the income in the executrix and the estate is solvent the principal may be paid to the infant on the death of the executrix without the appointment of an administrator with the will annexed of the testator. *In re* Robinson, 37 Misc. (N. Y.) 336, 75 N. Y. Suppl. 490.

38. Langsdale *v.* Woollen, 99 Ind. 575.

39. See DESCENT AND DISTRIBUTION, 14 Cyc. 132 note 13.

A court of chancery may decree a distribution of the property and assets of a decedent among the distributees when no administration has been granted in the state, without any letters of administration being taken out. Wood *v.* Ford, 29 Miss. 57.

A suit for partition of personalty among the heirs of the deceased owner is maintainable where the estate is not indebted, the heirs are all of age, and there is no administration upon the estate and no necessity therefor. Jordan *v.* Jordan, 2 Tex. App. Civ. Cas. § 830.

Even where there is a will the parties interested, all being adults, may pay the debts and divide the property among themselves according to the directions of the will without probating the same, and the effect of such division is to invest each party with a complete equitable title to the property allotted to him. Carter *v.* Owens, 41 Ala. 217.

limited for that purpose,[40] or by the statute of limitations.[41] But if any of the heirs or distributees demand an administration it must be had.[42]

5. Providing Party to Suit. It has been held that where a defendant dies pending a suit and no administrator is appointed plaintiff may have one appointed for the purpose of providing a proper party defendant to his suit.[43]

6. Particular Kinds of Estates — a. Estates of Husband and Wife.[44] Some statutes have dispensed with the necessity of administration upon the estate of a married person who dies leaving his or her wife or husband as sole heir, in case there are no debts,[45] or, if there are debts, in case the heir will pay them.[46]

b. Estates of Infants. Administration may be granted upon the estate of an infant notwithstanding the fact that infants are usually without legal capacity to make a will,[47] but in some jurisdictions an administration is not necessary upon the estate of a person who died in infancy leaving no debts.[48]

40. Granger *v.* Harriman, 89 Minn. 303, 94 N. W. 869. See *infra*, X, B, 1.

41. Ogden's Estate, 9 Kulp (Pa.) 412; Mott *v.* Riddell, 2 Tex. Unrep. Cas. 107. See also Sarrazin's Succession, 34 La. Ann. 1168. And see Limitations of Actions.

42. Blake *v.* Kearney, 30 La. Ann. 388. See also Marshall *v.* Crow, 29 Ala. 278.

43. Parshall *v.* Moody, 24 Iowa 314. But see *In re* Murray, Myr. Prob. (Cal.) 208, holding that an application for appointment of an administrator merely to be a party to a suit to quiet title should be denied.

44. See, generally, Husband and Wife.

45. *In re* Lee, 76 Md. 108, 24 Atl. 422.

Debtors to the estate are protected in making payment to the husband as sole heir of his deceased wife without any administration upon the estate. *In re* Lee, 76 Md. 108, 24 Atl. 422.

A written agreement of separation does not deprive the husband of his rights, or render administration on the wife's estate proper, where it contains nothing showing an intention of the husband to abandon his rights. Willis *v.* Jones, 42 Md. 422.

Where the husband dies after the wife, but before administration, his executor, administrator, or assignee is entitled under the North Carolina code to receive the personal property of the wife as part of the estate of the husband, subject to the payment of the wife's debts, and in such case the appointment of an administrator of the wife's estate is improper. Wooten *v.* Wooten, 123 N. C. 219, 31 S. E. 491.

A cause of action for libel, against the decedent who died pending a suit thereon, is not such a debt as will prevent the widow as sole heir at law from taking possession of the decedent's estate, without administration. McElhaney *v.* Crawford, 96 Ga. 174, 22 S. E. 895.

46. McElhaney *v.* Crawford, 96 Ga. 174, 22 S. E. 895.

Failure to pay debts.— Although where a wife dies leaving her husband as her sole heir at law he is upon payment of her debts entitled to her whole estate without administration, yet where the wife has been separated from her husband and provision has been made for her separate support debts contracted by her are her own individual debts, and if the husband fails to take out administration himself or to pay the debts the legal necessity of the case, so far as it concerns the payment of creditors, requires that administration should be taken out by someone. McLaren *v.* Bradford, 52 Ga. 648.

47. Horton *v.* Trompeter, 53 Kan. 150, 35 Pac. 1106; Wheeler *v.* St. Joseph, etc., R. Co., 31 Kan. 640, 3 Pac. 297; Roberts *v.* Eales, 10 Ky. L. Rep. 360; Kennedy *v.* Ryall, 67 N. Y. 379; Edwards *v.* Halbert, 64 Tex. 667.

Administration before final settlement of guardian.— Where a ward dies owing debts and owning property the county court of the county where the death occurred has jurisdiction to appoint an administrator of the estate, although the guardian has not made final settlement. Alford *v.* Halbert, 74 Tex. 346, 12 S. W. 75.

48. *Alabama.*— Campbell *v.* Conner, 42 Ala. 131.

Illinois.— McCleary *v.* Menke, 109 Ill. 294.

Louisiana.— Hair *v.* McDade, 10 La. Ann. 534.

Missouri.— Norton *v.* Thompson, 68 Mo. 143.

South Carolina.— Cobb *v.* Brown, Speers Eq. 564.

See 22 Cent. Dig. tit. "Executors and Administrators," § 4.

Married minor.— The provision of Mo. Rev. St. (1855) p. 829, § 34, that no letters of administration shall be granted on the estate of a minor, must be construed with reference to the statutes concerning dower and administration, and so construed it is apparent that it refers only to the estates of minors dying unmarried; when a minor who is married dies there must be administration on his estate in order that the widow may be able to claim and receive the dower and allowances to which she is entitled. Norton *v.* Thompson, 68 Mo. 143.

Where there are demands for which the minor would have been liable to an action administration is necessary for the prohibition in the Missouri act concerning guardians and curators (Rev. Code (1845), § 552), against the issuing of letters of administration upon the estate of a deceased minor applies to those cases only where there are no debts except those which the guardian himself has allowed to be created. George *v.* Dawson, 18 Mo. 407.

c. Estates of Indians. The power of a state court to issue letters of administration upon the estate of a deceased Indian has been both asserted [49] and denied.[50]

d. Escheated Estates. The appointment of an administrator is unnecessary in the case of an escheated estate.[51]

e. Small Estates. Under the statutes of some states, where the estate of a decedent does not exceed a specified amount, administration is dispensed with and the whole set apart to the widow or minor children,[52] and even independent of statute it has been held that where the estate was not sufficient to defray the expenses of administration the widow was not bound to have it administered.[53]

7. Withholding or Withdrawing Estate From Administration. In some states statutes have been enacted empowering a testator, by provisions to that effect in his will, to withhold the settlement of his estate from the probate court [54] or permitting the heirs by giving bond for the payment of the debts of the deceased to withdraw the estate from administration.[55]

I. Nature of Administration Proceedings. The probate of a will is technically and purely a proceeding *in rem*, for it defines and fixes the status of the

49. Reed *v.* Brasher, 9 Port. (Ala.) 438, holding that under Ala. Act (1829), § 3, extending the jurisdiction of the state of Alabama over the Creek nation, and the statute (Aikin Dig. p. 251, § 28), providing for administration upon the estates of persons having no known place of residence within any county of this state, the county court has jurisdiction of the estate of a deceased Indian of the Creek tribe.

50. Dole *v.* Irish, 2 Barb. (N. Y.) 639; U. S. *v.* Payne, 27 Fed. Cas. No. 16,014, 4 Dill. 387.

51. Smith *v.* Gentry, 16 Ga. 31. See Escheat, 16 Cyc. 548 *et seq.*

52. See *infra*, IX, D, 5.

53. Soubiran *v.* Rivollet, 4 La. Ann. 328.

54. Hogue *v.* Sims, 9 Tex. 546; Newport *v.* Newport, 5 Wash. 114, 31 Pac. 428. See also Lininger's Appeal, 101 Pa. St. 161, holding that where a testator explicitly declared in his will that the executors named should not assume or exercise any duties as such until after the death of his widow to whom he gave the use of his property for life with the right to use the principal of the personalty if she chose and there were no creditors the children to whom the property was given after the widow's death could not compel the executors to assume any functions during the widow's life. See *infra*, XXIII.

Appointment of administrator de bonis non. — Tex. Rev. St. (1895) art. 1995, authorizing a person to provide by will that no other action shall be had in the county court in relation to the settlement of the estate than the probate of the will and the return of the inventory and list of claims, withdraws the estate from the court's jurisdiction only so far as its settlement is concerned and does not deprive the county court of jurisdiction to appoint an administrator *de bonis non* in place of an independent executor who has resigned. Roy *v.* Whitaker, 92 Tex. 346, 49 S. W. 367, 48 S. W. 892.

The Texas statute requires in order to take the administration of the estate out of the probate court not only that the will should contain a provision to that effect but also that there should be the assent of the persons entitled to the estate and that they should if required by creditors give bond to pay the debts of the testator to the extent of the estate. Unless they comply with the provisions of the statute in this respect the estate must be settled in the probate court as in other cases. Henderson *v.* Van Hook, 25 Tex. Suppl. 453; Hogue *v.* Sims, 9 Tex. 546. See also Rummels *v.* Kownslar, 27 Tex. 528.

Jurisdiction of the probate court is presumed where administration is had therein notwithstanding a provision in the will for independent administration, where the record is silent as to whether the heirs gave bond to pay the testator's debts to the extent of the estate as required by statute on the application of creditors. Wood *v.* Mistretta, 20 Tex. Civ. App. 236, 49 S. W. 236, 50 S. W. 135.

55. Harris *v.* McClure, (Tex. Civ. App. 1894) 25 S. W. 1095, holding that where on an application by the heir to withdraw the estate from administration the administrator files his account and the heir files objections thereto action by the court on the account is not a prerequisite to the withdrawal of the estate from administration but the court should order an immediate delivery to the heir.

Liability of sureties.— Sureties on the bond of an heir given for the purpose of withdrawing the estate from administration under the Texas statute are liable for all the unpaid debts of the estate, and their liability is not limited by the assets of the estate or to the share of the estate to which the heir whose sureties they are is personally entitled on the distribution. Thomas *v.* Bonnie, 66 Tex. 635, 2 S. W. 724.

Defense in action on withdrawal bond.— In an action brought by a creditor against one of the heirs and his sureties on a bond given for the purpose of withdrawing the estate from administration such heir cannot be heard to say in defense that the bond is

estate,[56] and in the grant of letters testamentary or of administration, while the proceeding is in some aspects *in personam* it is in its most important bearing a proceeding *in rem*, for property must have a living owner and when the owner dies his title ceases, and as to personalty the title remains undefined and in abeyance until a personal representative is appointed and qualifies. When that is done the title of the decedent vests *eo instanti* in such personal representative, not by virtue of a conveyance, for there is none, but the appointment effects the transfer *proprio vigore*.[57]

J Jurisdiction — 1. No Federal Jurisdiction. In the United States each state regulates the settlement of the estates of decedents in its own jurisdiction, and no administration is extraterritorial. The United States courts have no constitutional jurisdiction to affirm or set aside the probate of a will in the proper state forum, nor to disturb or interfere with the due administration of an estate under state probate direction.[58] But to some extent an equitable jurisdiction incidental to the enforcement of trusts or the construction of wills is there recognized.[59]

2. Particular Courts or Officers. In determining what particular courts have jurisdiction in the administration of estates, the statute regulating such matters in the particular jurisdiction must govern.[60] In some states the clerk of the court having probate jurisdiction has power to appoint an administrator during a vacation or recess of the regular sessions of such court.[61]

3. Jurisdictional Requisites[62] — a. Death. It is absolutely essential to the validity of a grant of administration that the person upon whose estate the

invalid because the inventory and list of claims have not been returned. Thomas *v.* Bonnie, 66 Tex. 635, 2 S. W. 724.

56. Nelson *v.* Boynton, 54 Ala. 368. See, generally, Wills.

57. Nelson *v.* Boynton, 54 Ala. 368; Steen *v.* Steen, 25 Miss. 513. See also Hutchins *v.* St. Paul, etc., R. Co., 44 Minn. 5, 46 N. W. 79.

58. Dickinson *v.* Seaver, 44 Mich. 624, 7 N. W. 182; Byers *v.* McAuley, 149 U. S. 608, 13 S. Ct. 906, 37 L. ed. 867; Ellis *v.* Davis, 109 U. S. 485, 3 S. Ct. 327, 27 L. ed. 1006; Kieley *v.* McGlynn, 21 Wall. (U. S.) 503, 22 L. ed. 599.

59. Hayes *v.* Pratt, 147 U. S. 557, 13 S. Ct. 503, 37 L. ed. 279; Colton *v.* Colton, 127 U. S. 300, 8 S. Ct. 1164, 32 L. ed. 138.

60. See the following cases which are of purely local importance:

Alabama.— *Ex p.* Lunsford, 117 Ala. 221, 23 So. 528, 122 Ala. 242, 25 So. 171.

Arizona.— Territory *v.* Mix, 1 Ariz. 52, 25 Pac. 528.

Arkansas.— Hynds *v.* Imboden, 5 Ark. 385.

California.— Hardy *v.* Harbin, 11 Fed. Cas. No. 6,060, 4 Sawy. 536, prefect under Mexican government in California without jurisdiction over decedents' estates.

Illinois.—Kennedy *v.* Kennedy, 105 Ill. 350.

Louisiana.— McManus *v.* West, 18 La. 41.

Missouri.— Miller *v.* Woodward, 8 Mo. 169.

New Jersey.— *In re* Bracher, 60 N. J. Eq. 350, 51 Atl. 63.

North Carolina.— Kirkman *v.* Phipps, 86 N. C. 428.

Ohio.— Schumacher *v.* McCallip, 69 Ohio St. 500, 69 N. E. 986.

South Carolina.— Swandale *v.* Swandale, 25 S. C. 389; Roberts *v.* Johns, 10 S. C. 101.

Tennessee.— Ragio *v.* Collins, 101 Tenn. 662, 49 S. W. 750.

Wisconsin.— Meyer *v.* Garthwaite, 92 Wis. 571, 66 N. W. 704.

See 22 Cent. Dig. tit. "Executors and Administrators," § 26.

61. Picard's Succession, 33 La. Ann. 1135; Rayburn *v.* Rayburn, 34 W. Va. 400, 12 S. E. 493.

It need not affirmatively appear by the appointment that it was made in vacation. Drake *v.* Sigafoos, 39 Minn. 367, 40 N. W. 257.

Status of administrator.— In Indiana it has been held that an appointment of an administrator by a clerk during vacation must be confirmed by an order of the court at its next succeeding term or the appointment will then cease to be of effect. State *v.* Chrisman, 2 Ind. 126. In West Virginia, however, where the clerk appoints an administrator, taking from him the necessary bond, the powers of such administrator are not inchoate, needing confirmation by the court before he can act, but he becomes at once the administrator as of right as well as in fact for the time being, who may and should at once proceed to discharge the duties of his office. If his appointment is not confirmed, yet, if valid in the beginning, the order of appointment made by the clerk should not be set aside and annulled, but the court should revoke his letters of administration, or rather order that his powers cease. Rayburn *v.* Rayburn, 34 W. Va. 400, 12 S. E. 493.

Duty of court to ratify.— By the express provisions of the Indiana statute the acts of the clerk in vacation in granting letters should be ratified by the court unless good cause be shown for vacating such acts. Barricklow *v.* Stewart, 31 Ind. App. 446, 68 N. E. 316.

62. As to intestacy see *infra*, II, B, 1.

administration is granted should be dead; any administration upon the estate of a living person is void,[63] and while it is true that the presumption of death arising from a person's absence, unheard from, for a considerable length of time[64] may present a *prima facie* case sufficient to warrant a grant of administration on his estate,[65] the arising of such presumption does not take the case out of the opera-

63. *Alabama.*— Duncan *v.* Stewart, 25 Ala. 408, 60 Am. Dec. 527.
Illinois.— Thomas *v.* People, 107 Ill. 517, 47 Am. Rep. 458.
Louisiana.— Burns *v.* Van Loan, 29 La. Ann. 560.
Massachusetts.— Jochumsen *v.* Suffolk Sav. Bank, 3 Allen 87.
New Hampshire.— Morgan *v.* Dodge, 44 N. H. 255, 82 Am. Dec. 213.
New Jersey.— Quidort *v.* Pergeaux, 18 N. J. Eq. 472.
North Carolina.— Springer *v.* Shavender, 116 N. C. 12, 21 S. E. 397, 47 Am. St. Rep. 791, 33 L. R. A. 772, 118 N. C. 33, 23 S. E. 976, 54 Am. St. Rep. 708.
North Dakota.— Clapp *v.* Houg, 12 N. D. 600, 98 N. W. 710, 65 L. R. A. 757.
Pennsylvania.— Devlin *v.* Com., 101 Pa. St. 273, 47 Am. Rep. 710; McPherson *v.* Cunliff, 11 Serg. & R. 422, 14 Am. Dec. 642; Cummins *v.* Reading School Dist., 25 Pa. Co. Ct. 17.
South Carolina.— Moore *v.* Smith, 11 Rich. 569, 73 Am. Dec. 122.
Tennessee.— D'Arusment *v.* Jones, 4 Lea 251, 40 Am. Rep. 12.
Texas.— Fisk *v.* Norvel, 9 Tex. 13, 58 Am. Dec. 128; Schleicher *v.* Guthrod, (Civ. App. 1896) 34 S. W. 657.
Vermont.— Manning *v.* Leighton, 65 Vt. 84, 26 Atl. 258, 24 L. R. A. 684.
Virginia.— Andrews *v.* Avory, 14 Gratt. 229, 73 Am. Dec. 355.
Wisconsin.— Melia *v.* Simmons, 45 Wis. 334, 30 Am. Rep. 746.
United States.— Scott *v.* McNeal, 154 U. S. 34, 14 S. Ct. 1108, 38 L. ed. 896 [*reversing* 5 Wash. 309, 31 Pac. 873, 34 Am. St. Rep. 863]; U. S. *v.* Payne, 27 Fed. Cas. No. 16,014, 4 Dill. 387.
England.— *In re* Napier, 1 Phillim. 83. See also Allen *v.* Dundas, 3 T. R. 125.
See 22 Cent. Dig. tit. "Executors and Administrators," § 15.

Certification of death.— R. I. Gen. Laws (1896), tit. xiv, c. 101, § 15, provides that "no letters of administration or letters testamentary shall be granted by any court of probate, upon the estate of any person, until the death of such person, or the facts from which the same is presumed, shall be duly certified, as near as may be, to the town clerk, in order that the same may be duly registered according to the provisions of this chapter." Under this statute the death must be certified to the town clerk of the town where the court of probate is held, and not of the town where the person died. Baker *v.* Coventry Probate Ct., 15 R. I. 400, 401, 6 Atl. 865.

Money paid to an administrator appointed to take charge of the estate of a living person may be recovered back where the administrator voluntarily undertook to act as such, and does not claim to have paid the money over to the persons entitled. U. S. *v.* Payne, 27 Fed. Cas. No. 16,014, 4 Dill. 387. So also payment to an administrator upon the presentation of ancillary letters duly issued by a surrogate upon proof of the original letters issued under a statute of a sister state, providing that administration may be granted upon the estate of a person who has been absent and unheard of for a specified time as if he were dead, is not available as a defense to a subsequent demand of the creditor who proves to be alive. Lavin *v.* Emigrant Industrial Sav. Bank, 1 Fed. 641, 18 Blatchf. 1. But in New York, on the other hand, it has been held that under the statute (2 Rev. St. 74, §§ 23, 26) conferring upon surrogates jurisdiction over the granting of letters of administration, the inquiry by the surrogate as to the death of the person upon whose estate administration is applied for is judicial in its nature; and letters of administration issued upon due proof are conclusive evidence of the authority of the administrator to act until the order granting them is reversed, or the letters are revoked or set aside, so far at least as to protect innocent persons acting upon the faith of them; and that consequently where a savings institution, upon demand and presentation of letters of administration, paid over in good faith to the administrator the amount of a deposit made by the person upon whose estate the administration was granted, an action could not afterward be maintained to recover the deposit, although it appeared that the person who made the same was not dead at the time of the administration. Roderigas *v.* East River Sav. Inst., 63 N. Y. 460, 20 Am. Rep. 555 [*reversing* 48 How. Pr. 166]. In a subsequent unreported decision of this same case, however, the court of appeals held that to sustain the letters of administration, where the person was alive, there must have been produced to the surrogate some competent evidence of the person's death, and the surrogate must himself have passed on the question judicially, and therefore as it appeared that this had not been done the defense of payment to the person holding such letters was overruled. See Lavin *v.* Emigrant Industrial Sav. Inst., 1 Fed. 641, 18 Blatchf. 1, where these facts are stated in the opinion by Choate, J.

A decree of distribution made in case of a fairly presumed death may protect the representative himself. Schaub *v.* Griffin, 84 Md. 557, 36 Atl. 443.

64. See DEATH, 13 Cyc. 297 note 14.

65. *Georgia.*— Adams *v.* Jones, 39 Ga. 479.
Indiana.— Baugh *v.* Boles, 66 Ind. 376.
New York.—*In re* Nolting, 43 Hun 456.

tion of the general rule on the subject, and if it be made to appear that the person was in fact alive at the time such administration was granted, the administration is absolutely void.[66]

b. Assets. It has been broadly asserted that in order to render administration upon the estate of a decedent proper, the decedent must have died possessed of some assets or property.[67] This cannot be held to be established beyond dispute where administration is sought in the domicile of the decedent,[68] but there is no doubt that assets within the jurisdiction are necessary when administration is sought elsewhere than in the domicile.[69]

c. Determination of Fundamental Facts. The probate court has a sound discretion to investigate and determine on due proof as to fundamental facts.[70]

4. Where Administration May Be Granted — a. Domicile. The general rule is that the place of a decedent's last domicile shall determine the probate jurisdiction to grant letters and supervise the settlement of his estate, and the sole, or at least the principal, grant of letters ought to be taken out and the will proved in the country, the state, and indeed the very county where decedent was domiciled at the time of his death.[71] In case one dies while traveling, outside the state or

Pennsylvania.— Renner's Estate, 6 Pa. Dist. 84 [*disapproving* Beck's Estate, 4 Pa. Dist. 222].

Wisconsin.— Wisconsin Trust Co. *v.* Wisconsin M. & F. Ins. Co.'s Bank, 105 Wis. 464, 81 N. W. 642.

See 22 Cent. Dig. tit. "Executors and Administrators," § 15.

66. *California.*— Stevenson *v.* San Francisco Super. Ct., 62 Cal. 60.

North Dakota.— Clapp *v.* Houg, 12 N. D. 600, 98 N. W. 710, 65 L. R. A. 757.

Pennsylvania.— Devlin *v.* Com., 101 Pa. St. 273, 47 Am. Rep. 710.

South Carolina.— Moore *v.* Smith, 11 Rich. 569, 73 Am. Dec. 122.

United States.— Scott *v.* McNeal, 154 U. S. 34, 14 S. Ct. 1108, 38 L. ed. 896 [*reversing* 5 Wash. 309, 31 Pac. 873, 34 Am. St. Rep. 863].

See 22 Cent. Dig. tit. "Executors and Administrators," § 15.

Proof of identity.— Where a person is supposed to be dead, and his estate is settled upon that supposition, but afterward someone turns up claiming to be that person, and seeks to have the settlement set aside, the burden of proof is on him to establish his identity. Rachel *v.* Jones, 34 La. Ann. 108.

Estoppel of supposed decedent.— Where a husband deserted his family for fifteen years, and an administrator appointed on the supposition of his death collected one hundred and seventy-four dollars from the sale of the husband's property, it was held in an action by the husband against such administrator, that, in the absence of a showing to the contrary, the presumption was that the money was paid to the wife, who was entitled to a year's support, on the supposition that her husband was dead, and that, as she was entitled to support out of the husband's property if he was alive, his conduct estopped him from claiming that the payment to her was unauthorized. Brent *v.* First, 41 Ohio St. 436.

67. *In re* Murray, Myr. Prob. (Cal.) 208; Merriweather *v.* Kennard, 41 Tex. 273.

A mere contingency on the happening of which a certain amount would be payable to a decedent or his estate does not constitute such an estate as will authorize the appointment of an administrator. Guerry *v.* Pullen, 112 Ga. 314, 37 S. E. 391.

The interest of the wife in the common property while the community exists is a mere expectancy and after death constitutes neither a legal nor an equitable estate which the probate court can act on in granting administration. Packard *v.* Arellanes, 17 Cal. 525.

68. See *infra*, I, J, 4, a.

69. See Watson *v.* Collins, 37 Ala. 587; Williams *v.* Ripley, 25 R. I. 510, 56 Atl. 777; and *infra*, I, J, 4, d.

70. *Illinois.*— Hobson *v.* Ewan, 62 Ill. 146.

Louisiana.— Burns *v.* Van Loan, 29 La. Ann. 560; Vogel's Succession, 16 La. Ann. 139, 79 Am. Dec. 571.

Massachusetts.— McFeely *v.* Scott, 128 Mass. 16.

New Jersey.— Plume *v.* Howard Sav. Inst., 46 N. J. L. 211.

New York.— Roderigas *v.* East River Sav. Inst., 76 N. Y. 316, 32 Am. Rep. 309.

71. *California.*— *In re* Harlan, 24 Cal. 182, 85 Am. Dec. 58; *In re* Milliken, Myr. Prob. 88.

Colorado.— Liddicoat *v.* Treglown, 6 Colo. 47.

Georgia.— McBain *v.* Wimbish, 27 Ga. 259; Royston *v.* Royston, 21 Ga. 161.

Indiana.— Jeffersonville R. Co. *v.* Swayne, 26 Ind. 477.

Iowa.— *In re* King, 105 Iowa 320, 75 N. W. 187. See also McFarland *v.* Stewart, 109 Iowa 561, 80 N. W. 657, holding that want of jurisdiction in a district court over the administration of an estate of a deceased person is not shown from the fact that deceased died in another county, leaving real and personal property therein, in the absence of any evidence that he was a resident of that county.

Kansas.— Ewing *v.* Mallison, 65 Kan. 484, 70 Pac. 369, 93 Am. St. Rep. 299.

country of his domicile, the foreign court should take no jurisdiction, unless it be

Kentucky.— McChord *v.* Fisher, 13 B. Mon. 193; Jones *v.* Lay, 66 S. W. 720, 23 Ky. L. Rep. 2113.

Louisiana.— Carney's Succession, 15 La. Ann. 699; Williamson's Succession, 3 La. Ann. 261. See also Gary *v.* Sandoz, 16 La. 11.

Maine.— Moore *v.* Philbrick, 32 Me. 102, 52 Am. Dec. 642.

Massachusetts.— Holyoke *v.* Haskins, 5 Pick. 20, 16 Am. Dec. 372.

Nebraska.— Atkinson *v.* Hasty, 21 Nebr. 663, 33 N. W. 206.

New Hampshire.— Tilton *v.* O'Connor, 68 N. H. 215, 44 Atl. 303.

New York.— Kennedy *v.* Ryall, 67 N. Y. 379 [*affirming* 40 N. Y. Super. Ct. 347]; Matter of Hyland, 24 Misc. 357, 53 N. Y. Suppl. 717; James *v.* Adams, 22 How. Pr. 409.

North Carolina.— Johnson *v.* Corpenning, 39 N. C. 216, 44 Am. Dec. 106.

Ohio.— Limes *v.* Irwin, 16 Ohio St. 488.

Oregon.— See Henkle *v.* Slate, 40 Oreg. 349, 68 Pac. 399.

Pennsylvania.— Lewis' Estate, 10 Pa. Co. Ct. 331; Watts' Appeal, 31 Leg. Int. 182; *In re* Ash, 29 Pittsb. L. J. N. S. 61.

Tennessee.— Wilson *v.* Frazier, 2 Humphr. 30; Nelson *v.* Griffin, 2 Yerg. 624.

Wisconsin.— *In re* Hess, 97 Wis. 244, 72 N. W. 638.

United States.— Providence Rubber Co. *v.* Goodyear, 9 Wall. 788, 19 L. ed. 566; Fletcher *v.* McArthur, 68 Fed. 65, 15 C. C. A. 224.

See 22 Cent. Dig. tit. "Executors and Administrators," § 22.

Legal residence or inhabitancy is often used as though synonymous with domicile; but these terms are not in strictness convertible. See Krone *v.* Cooper, 43 Ark. 547; Hallet *v.* Bassett, 100 Mass. 167; Udny *v.* Udny, L. R. 1 H. L. Sc. 441; King *v.* Foxwell, 3 Ch. D. 518, 45 L. J. Ch. 693, 24 Wkly. Rep. 629.

Special administrator.— The same showing as to residence of the deceased is required for the appointment of a special as for the appointment of a general administrator. Nash *v.* Sawyer, 114 Iowa 742, 87 N. W. 707.

Where the decedent was a minor the court of the county where his guardian resides has jurisdiction to grant administration. Trumbo *v.* Richardson, 38 S. W. 700, 18 Ky. L. Rep. 878.

Domicile of person non compos mentis.— Where a *non compos mentis* removed from the county where her guardian resided with his implied consent and lived in another county as a part of her brother's family many years before her death her domicile was in the county to which she removed, and letters of administration granted in the county where the guardian lived were void for want of jurisdiction. Holyoke *v.* Haskins, 5 Pick. (Mass.) 20, 16 Am. Dec. 372.

The fact that a petition is filed in another county prior to the filing of a petition for administration in the proper county is no objection to the appointment of an administrator under the latter petition. Tilton *v.* O'Connor, 68 N. H. 215, 44 Atl. 303.

By marriage the wife acquires the domicile of the husband, and the fact that she remains for a while in the state of her former residence for the purpose of winding up her business, and dies while so engaged and before her actual removal to the state where her husband resides, in no way affects the question of her legal domicile in the latter state for the purpose of administration. McPherson *v.* McPherson, 70 Mo. App. 330.

County where real estate "devised" located. — Hill Annot. Laws Oreg. § 1085, provides that administration of the estate of a decedent may be granted by the county court which would have been empowered to admit his will to probate if he had died testate, and section 1083 provides that the proof of a will may be made before the county court of the county in which the decedent was an inhabitant at his death, or in any county where there was real estate "devised by the testator," if no other court had gained jurisdiction under the preceding portions of the section. Under these statutes, where the owner of land in one county of the state died intestate in another county in which he was a resident, the county court of the county in which the land was situated had not jurisdiction to grant administration of his estate, there being no real estate "devised" in such county. Henkle *v.* Slate, 40 Oreg. 349, 68 Pac. 399.

If a decedent had no fixed residence in the state his estate should be opened in the parish where he died unless, if he have effects in different parishes, his principal property be in another parish. Gary *v.* Sandoz, 16 La. 11.

Change of county boundaries.— The probate court of the county where the decedent was domiciled at the time of his death has jurisdiction over the administration of his estate notwithstanding the fact that by reason of the subsequent formation of a new county or a change of county boundaries the place where he actually lived has become a part of another county. Harlan's Estate, 24 Cal. 182, 85 Am. Dec. 58; Clemens *v.* Comfort, 26 La. Ann. 269; Beale *v.* Walden, 11 Rob. (La.) 67; Harang *v.* Harang, 7 Mart. N. S. (La.) 51; Bugbee *v.* Yates County, 2 Cow. (N. Y.) 471. The provision of N. Y. Code Civ. Proc. § 2479, that where territory is transferred from one county to another the jurisdiction of the surrogate's court of each of the counties affected thereby to take the proof of a will or to grant letters depends on the locality, "when the petition is presented," of the place where the property of the decedent is situated or the event occurred which determines jurisdiction refers to the time when the petition came before the surrogate on the return of the citation, and not to the time when it was filed. Matter of McGinness, 13 Misc. (N. Y.) 714, 35 N. Y. Suppl. 820.

ancillary merely,[72] although one who roams after leaving permanently one domicile is sometimes held to have settled down where he died.[73] It has been held that where jurisdiction is based upon domicile it is not necessary that there should be assets in order for the administration to be properly granted.[74]

b. Place of Death. In some states, where the deceased had no fixed residence within the state, jurisdiction over the administration of his estate is conferred upon the probate court of the county where he died,[75] but such jurisdiction is usually given in the alternative, to such court or to the court of the county wherein the decedent's property or the greater part thereof is situated.[76]

c. Place Where Assets Located — (i) *In General.* Locality of personal assets belonging to the estate of a decedent confers a local probate jurisdiction, regardless of the consideration of last domicile or residence, although ancillary as matter of comity. Such jurisdiction being founded in universal convenience, the courts of one country or state do not feel compelled to wait until those of another have acted, nor remit their own domestic claimants to foreign jurisdictions.[77]

How jurisdiction contested.— Under Mass. Pub. St. c. 156, § 4, providing that the jurisdiction assumed by the probate court so far as it depends on the residence of a person shall not be contested except by appeal a decree appointing an administrator cannot be declared void on a petition on the ground that the intestate did not reside in the county. Cummings *v.* Hodgdon, 147 Mass. 21, 16 N. E. 732.

Evidence.— Where an infant about five years old died in New York on the day of his arrival but it was shown that his father lived and for seven months prior thereto had lived in New York and that his wife and child, the decedent, were coming to join and live with him, it was held that the evidence was *prima facie* sufficient to show that the father was domiciled in New York and so that his child was an inhabitant thereof and letters of administration were properly issued to the father by the surrogate of New York. And it was further held that evidence of the father that he came to New York for the purpose of making a home and living there was proper and material on the question of residence. Kennedy *v.* Ryall, 67 N. Y. 379 [*affirming* 40 N. Y. Super. Ct. 347].

Status of administration in county other than that of domicile.— A grant of administration by the probate court of a county other than that in which decedent had his domicile is not void and cannot be disregarded by the probate court of another county in the same state where the decedent was actually domiciled. *In re* Davidson, 100 Mo. App. 263, 73 S. W. 373. See also McDonnell *v.* Farrow, 132 Ala. 227, 31 So. 475.

A private act of the legislature removing the administration of a decedent's estate from the county of his residence at the time of his death to another county does not violate any constitutional provision. Wright *v.* Ware, 50 Ala. 549.

Circumstances not showing residence in county.— See *In re* Damke, 133 Cal. 433, 65 Pac. 888.

Engaging in business.— Under a statute providing for the appointment of an administrator for a non-resident who had been engaged in the prosecution of business in the state at the time of his decease it is not sufficient to show that at some time the deceased had been so engaged in business, but the fact that he was so engaged at the time of his death must be shown. *In re* McCreight, 9 Ohio S. & C. Pl. Dec. 450, 6 Ohio N. P. 479.

72. Armstrong *v.* Bakewell, 18 La. Ann. 30; Aspinwall *v.* Queen's Proctor, 2 Curt. Eccl. 241. See *infra*, XVI.

73. Olson's Will, 63 Iowa 145, 18 N. W. 854; Leake *v.* Gilchrist, 13 N. C. 73; Hearn *v.* Camp, 18 Tex. 545.

74. Watson *v.* Collins, 37 Ala. 587; Holburn *v.* Pfanmiller, 114 Ky. 831, 71 S. W. 940, 24 Ky. L. Rep. 1613. See also Taylor *v.* Public Administrator, 13 N. Y. St. 176, 6 Dem. Surr. (N. Y.) 158, holding that the provision of the Public Administrator's Act (Laws (1871), c. 335, as amended by Laws (1882), c. 124) that the person dying must leave assets or effects in Kings county in order to confer jurisdiction upon the surrogate to grant letters of administration to the public administrator related exclusively to persons who were not residents of the state. But see *supra*, I, J, 3, b.

75. Bliler *v.* Boswell, 9 Wyo. 57, 61 Pac. 867, 59 Pac. 798, holding that where a non-resident dies within the state leaving personal property, the court of the county where the decedent died leaving estate therein has jurisdiction to grant administration.

76. Burnett *v.* Meadows, 7 B. Mon. (Ky.) 277, 46 Am. Dec. 517; Louisville, etc., R. Co. *v.* Shumaker, 108 Ky. 263, 56 S. W. 155, 21 Ky. L. Rep. 1701, 53 S. W. 12, 21 Ky. L. Rep. 803; Wright *v.* Beck, 10 Sm. & M. (Miss.) 277; Angier *v.* Jones, 28 Tex. Civ. App. 402, 67 S. W. 449. See *infra*, I, J, 4, c, (v).

77. *Alabama.*— Equitable L. Assur. Soc. *v.* Vogel, 76 Ala. 441, 52 Am. Rep. 319.

Georgia.— Wright *v.* Roberts, 116 Ga. 194, 42 S. E. 369; Ott *v.* Hutchinson, 91 Ga. 31, 16 S. E. 106.

Illinois.— Bowles *v.* Rouse, 8 Ill. 409.

(II) *TANGIBLE ASSETS NOT NECESSARY.* It is not necessary for the purpose of conferring local jurisdiction that there should be tangible assets,[78] but administration may be granted where it appears that the estate has a right of action for the death of the decedent,[79] even though strictly speaking such right of action may not be an asset of the estate.[80] But such a claim will not warrant administration in one state where the decedent was a resident of another state in which the death and the negligence causing the same occurred and under the statutes of which the right of action arose.[81]

(III) *JURISDICTION BASED ON REAL ESTATE.* Administration may be granted

Iowa.— Christy *v.* Vest, 36 Iowa 285.

Kentucky.— Turner *v.* Louisville, etc., R. Co., 110 Ky. 879, 62 S. W. 1025, 23 Ky. L. Rep. 340; Fletchers *v.* Sanders, 7 Dana 345, 32 Am. Dec. 96; Morrison *v.* Hampton, 49 S. W. 781, 20 Ky. L. Rep. 1573.

Louisiana.— Linton's Succession, 27 La. Ann. 351.

Maine.— *In re* Shaw, 81 Me. 207, 16 Atl. 662.

Massachusetts.— Bowdoin *v.* Holland, 10 Cush. 17.

Mississippi.— Still *v.* Woodville, 38 Miss. 646.

Missouri.— Wood *v.* Matthews, 73 Mo. 477; Bartlett *v.* Hyde, 3 Mo. 490.

Nebraska.— Missouri Pac. R. Co. *v.* Bradley, 51 Nebr. 596, 71 N. W. 283.

New York.— Lawrence *v.* Elmendorf, 5 Barb. 73.

North Carolina.— Jones *v.* Gerock, 59 N. C. 190; Hyman *v.* Gaskin, 27 N. C. 267.

United States.— Cincinnati, etc., R. Co. *v.* Thiebaud, 114 Fed. 918, 52 C. C. A. 538.

England.— Ewing *v.* Ewing, 9 App. Cas. 34.

See 22 Cent. Dig. tit. "Executors and Administrators," § 24; and *infra*, XVI.

A bona fide claim of the deceased will sustain the jurisdiction, even though it should prove invalid after letters are actually issued. Sullivan *v.* Fosdick, 10 Hun (N. Y.) 173.

A right to a distributive share of an intestate's estate constitutes such *bona notabilia* as will authorize administration on the estate of the distributee in the county where the intestate died and where his administrator resides. Smith *v.* Munroe, 23 N. C. 345.

A claim against the United States is not a local asset in the District of Columbia. King *v.* U. S., 27 Ct. Cl. 529. But see Manning *v.* Leighton, 65 Vt. 84, 26 Atl. 258, 24 L. R. A. 684, holding that a claim enforceable in the District of Columbia and nowhere else, such as an "Alabama" claim, is an asset there upon which administration may be granted, especially where the court having jurisdiction to pass upon such claim refuses to give judgment save in the name of an administrator appointed in that district.

Special deposits.— United States bonds deposited for safe-keeping in one state by a person who at the time of his death is domiciled in another state under a special certificate of deposit are not a part of the decedent's estate in the state where they are deposited. Shakespeare *v.* Fidelity Ins., etc., Co., 97 Pa. St. 173.

78. Toledo, etc., R. Co. *v.* Reeves, 8 Ind. App. 667, 35 N. E. 199.

79. *Alabama.*— Griswold *v.* Griswold, 111 Ala. 572, 20 So. 437.

Connecticut.— Hartford, etc., R. Co. *v.* Andrews, 36 Conn. 213.

District of Columbia.— Washington Asphalt Block, etc., Co. *v.* Mackey, 15 App. Cas. 410.

Illinois.— Chicago, etc., R. Co. *v.* Smith, 77 Ill. App. 492.

Indiana.— *Ex p.* Jenkins, 25 Ind. App. 532, 58 N. E. 560, 81 Am. St. Rep. 114; Toledo, etc., R. Co. *v.* Reeves, 8 Ind. App. 667, 35 N. E. 199. *Contra*, Jeffersonville R. Co. *v.* Swayne, 26 Ind. 477.

Iowa.— Morris *v.* Chicago, etc., R. Co., 65 Iowa 727, 23 N. W. 143, 54 Am. Rep. 39.

Kentucky.— Brown *v.* Louisville, etc., R. Co., 97 Ky. 228, 30 S. W. 639, 17 Ky. L. Rep. 145.

Massachusetts.— Pinney *v.* McGregory, 102 Mass. 186.

Michigan.— Findley *v.* Chicago, etc., R. Co., 106 Mich. 700, 64 N. W. 732; Merkle *v.* Bennington, 68 Mich. 133, 35 N. W. 846.

Minnesota.— Hutchins *v.* St. Paul, etc., R. Co., 44 Minn. 5, 46 N. W. 79.

Nebraska.— Missouri Pac. R. Co. *v.* Bradley, 51 Nebr. 596, 71 N. W. 283; Missouri Pac. R. Co. *v.* Lewis, 24 Nebr. 848, 40 N. W. 401, 2 L. R. A. 67.

New York.— Lang *v.* Houston, etc., R. Co., 75 Hun 151, 27 N. Y. Suppl. 90.

South Carolina.— *In re* Mayo, 60 S. C. 401, 38 S. E. 634, 54 L. R. A. 660.

See 22 Cent. Dig. tit. "Executors and Administrators," § 25.

Contra.— Perry *v.* St. Joseph, etc., R. Co., 29 Kan. 420.

Claim that right barred by limitation.— Where an application for letters of administration alleged that the only asset of the estate was a cause of action for the death of decedent it was error to deny the application on the ground that limitations had run against such an action since the applicant was only required to show a *prima facie* right to letters, and limitations might not prevent the prosecution of the action in that they might have been waived or might not be relied on. *Ex p.* Jenkins, 25 Ind. App. 532, 58 N. E. 560, 81 Am. St. Rep. 114.

80. Toledo, etc., R. Co. *v.* Reeves, 8 Ind. App. 667, 35 N. E. 199; Brown *v.* Louisville, etc., R. Co., 97 Ky. 228, 30 S. W. 639.

81. Hall *v.* Louisville, etc., R. Co., 102 Ky. 480, 43 S. W. 698, 80 Am. St. Rep. 358 [*fol-*

upon the basis of local real property alone under suitable circumstances conformably to the legislative policy of many American states.[82]

(iv) *Value of Assets.* In some states the mere existence of local assets irrespective of their value may support a local grant of administration,[83] and even articles or money rights of trifling consequence, if *bona fide* within the local jurisdiction, will suffice;[84] but in others there must be personal property of a specified value, or debts to a fixed amount and local real estate chargeable therewith.[85]

(v) *County Jurisdiction.* In a good many states jurisdiction over the administration of the estate of a decedent who had no fixed residence within the state is given to the probate court where his property or the greater part thereof is situated,[86] but even within the same sovereign jurisdiction the locality of personal property may sometimes afford occasion for probate jurisdiction in two or more local courts, as where one domiciled abroad and intestate leaves effects in two different counties, in which case local statute regulates the matter of jurisdic-

lowed in Turner *v.* Louisville, etc., R. Co., 110 Ky. 879, 62 S. W. 1025, 23 Ky. L. Rep. 340].

82. *Alabama.*— Beasley *v.* Howell, 117 Ala. 499, 22 So. 989; Nicrosi *v.* Giuly, 85 Ala. 365, 5 So. 156; Bishop *v.* Lalouette, 67 Ala. 197.

Arkansas.— Apperson *v.* Bolton, 29 Ark. 418.

Georgia.— Sprayberry *v.* Culberson, 32 Ga. 299.

Illinois.— Rosenthal *v.* Renick, 44 Ill. 202.

Iowa.— Lees *v.* Wetmore, 58 Iowa 107, 12 N. W. 238; Little *v.* Sinnett, 7 Iowa 324.

Massachusetts.— Prescott *v.* Durfee, 131 Mass. 477.

Michigan.— Sheldon *v.* Rice, 30 Mich. 296, 18 Am. Rep. 136.

Mississippi.— Temples *v.* Cain, 60 Miss. 478.

Nebraska.— Moore *v.* Moore, 33 Nebr. 509, 50 N. W. 443.

New York.— Hart *v.* Colrain, 19 Wend. 378. But see Hollister *v.* Hollister, 10 How. Pr. 532.

Texas.— Grande *v.* Herrera, 15 Tex. 533.

See 22 Cent. Dig. tit. "Executors and Administrators," § 25.

Real estate fraudulently conveyed.— If a judge of probate is satisfied that a creditor of a deceased non-resident has reasonable grounds for an averment that the debtor has fraudulently conveyed his real estate within the state administration should be granted upon the estate of the debtor. Bowdoin *v.* Holland, 10 Cush. (Mass.) 17.

83. Horton *v.* Trompeter, 53 Kan. 150, 35 Pac. 1106; Union Pac. R. Co. *v.* Dunden, 37 Kan. 1, 14 Pac. 501; Wheeler *v.* St. Joseph, etc., R. Co., 31 Kan. 640, 3 Pac. 297; Pinney *v.* McGregory, 102 Mass. 186; Missouri Pac. R. Co. *v.* Bradley, 51 Nebr. 596, 71 N. W. 283; Welch *v.* New York Cent. R. Co., 53 N. Y. 610.

84. Emery *v.* Hildreth, 2 Gray (Mass.) 231; White *v.* Nelson, 2 Dem. Surr. (N. Y.) 265; Wilkins *v.* Ellett, 108 U. S. 256, 2 S. Ct. 641, 27 L. ed. 718.

85. Watson *v.* Collins, 37 Ala. 587; Harlan's Estate, 24 Cal. 182, 85 Am. Dec. 58; Murphy *v.* Creighton, 45 Iowa 179; Gross *v.* Howard, 52 Me. 192; Bean *v.* Bumpus, 22 Me. 549.

The property must be assets of the deceased liable for his individual debts or to be distributed among his widow and heirs; partnership property which is insufficient to pay the debts of the firm or property held in trust will not suffice. Shaw's Appeal, 81 Me. 207, 16 Atl. 662.

A prior appointment of an administrator who never qualified is not conclusive as to the amount and location of the property at the time of a subsequent petition for administration, for there might have been sufficient assets at the time of the first application, and yet not be at the time of the second. Shaw's Appeal, 81 Me. 207, 16 Atl. 662.

86. Harrington *v.* Brown, 5 Pick. (Mass.) 519; Smith *v.* Munroe, 23 N. C. 345; *In re* Mayo, 60 S. C. 401, 38 S. E. 634, 54 L. R. A. 660. See *supra*, I, J, 4, b.

Residents and non-residents.— Ky. St. §§ 3894, 4849, establishing the rule stated in the text with reference to the estates of persons having "no known place of residence in this commonwealth" has reference to residents of the state (Louisville, etc., R. Co. *v.* Shumaker, 108 Ky. 263, 56 S. W. 155, 21 Ky. L. Rep. 1701, 53 S. W. 12, 21 Ky. L. Rep. 803 [*following* Thumb *v.* Gresham, 2 Metc. 306]) but it also applies to non-residents (Louisville, etc., R. Co. *v.* Shumaker, 108 Ky. 263, 56 S. W. 155, 21 Ky. L. Rep. 1701 [*following* Hyatt *v.* James, 8 Bush 9, and *modifying* the former opinion in Louisville, etc., R. Co. *v.* Shumaker, 53 S. W. 12, 21 Ky. L. Rep. 803, so far as apparently in conflict therewith]).

Claim against state as sole asset.— It has been held that where a non-resident intestate left no property within the state except a claim against the state, the court of the county where the seat of government was located had jurisdiction to grant administration on his estate (Com. *v.* Hudgin, 2 Leigh (Va.) 248), but it has also been asserted that in such case any judge of a court of probate within the state might grant administration, and that the administration which was first granted should hold good (*Ex p.* Dauthereau, 2 Brev. (S. C.) 459).

Assets in custody of United States court.— Unclaimed assets of a decedent which are in the registry of a United States district court, although sitting customarily or always in a

tion, which usually, however, belongs to the court of the county where proceedings are first commenced.[87]

(vi) *Property Brought Into Jurisdiction After Decedent's Death.* The old rule assumed that the thing was in the jurisdiction at the time of the deceased owner's or creditor's death, but such an interpretation was found too narrow to meet the practical wants of modern administration, and hence for the welfare of creditors or other interested persons local jurisdiction is usually upheld where there are local *bona notabilia* at the time when letters are applied for, notwithstanding the goods were brought into the county or the debtor removed thither after the death of the owner or creditor.[88]

(vii) *Where Particular Assets Deemed Located.* The general rule is that simple contract debts are, for the purpose of founding administration, assets where the debtor resides,[89] and as bills of exchange and promissory notes are merely evidence of indebtedness or of title the debts due on these instruments

particular county, may be administered on in the absence of special determining circumstances, such as residence, priority of proceedings, etc., in any county in the district, as the fund is ubiquitous in each county, and the fact that a dead body floating on the high seas is brought to shore in a certain county, the assets found thereon being libeled by the salvors in the United States district court usually sitting in another county, does not make the first county the place of administration to the exclusion of the second. U. S. *v.* Tyndale, 116 Fed. 820, 54 C. C. A. 324.

87. Arnold *v.* Arnold, 62 Ga. 627; *In re* Worthington, 4 Ohio S. & C. Pl. Dec. 381. See also Rutherford *v.* Clark, 4 Bush (Ky.) 27; *In re* Holt, 11 Phila. (Pa.) 13.

Appointment of special administrator. — The court of a particular county, in taking jurisdiction over the administration for the purpose of appointing a special administrator, does not thereby secure jurisdiction over the estate for the purpose of appointing a general administrator, and if subsequently a petition for general administration is first filed in the court of another county the latter court has jurisdiction of the general administration. *In re* Damke, 133 Cal. 430, 65 Pac. 888, 889.

88. *Alabama.*— Varner *v.* Bevil, 17 Ala. 286. *Contra,* Treadwell *v.* Rainey, 9 Ala. 590.

Iowa.— Christy *v.* Vest, 36 Iowa 285.

Massachusetts.— Pinney *v.* McGregory, 102 Mass. 186.

New Hampshire.— See Ela's Appeal, 68 N. H. 35, 38 Atl. 501, holding that even though the probate court had no power to appoint an administrator for the reason that the deceased left no property in the county the subsequent bringing of property into the county by the administrator would confer jurisdiction of the subject-matter upon the court and authorize it to charge him with the property in the exercise of its common-law jurisdiction over the estates of deceased persons.

New York.— Fox *v.* Carr, 16 Hun 434; Hollister *v.* Hollister, 10 How. Pr. 532; Matter of Hopper, 5 Dem. Surr. 242.

Texas.— Green *v.* Rugely, 23 Tex. 539. See also Minter *v.* Burnett, 90 Tex. 245, 38 S. W. 350.

England.— Scarth *v.* London, 1 Hagg. Eccl. 625.

See 22 Cent. Dig. tit. "Executors and Administrators," § 24.

Contra.— Burnett *v.* Meadows, 7 B. Mon. (Ky.) 277, 46 Am. Dec. 517; Embry *v.* Millar, 1 A. K. Marsh. (Ky.) 300, 10 Am. Dec. 732; Wright *v.* Beck, 10 Sm. & M. (Miss.) 277.

Property brought in temporarily or for a special purpose and removed before an administrator is appointed cannot serve as a basis for a grant of administration. Christy *v.* Vest, 36 Iowa 285; Kohler *v.* Knapp, 1 Bradf. Surr. (N. Y.) 241.

89. *Georgia.*— Arnold *v.* Arnold, 62 Ga. 627.

Iowa.— Murphy *v.* Creighton, 45 Iowa 179.

Massachusetts.— Pinney *v.* McGregory, 102 Mass. 186; Emery *v.* Hildreth, 2 Gray 228; *In re* Picquet, 5 Pick. 65.

New York.— Holyoke *v.* Union Mut. L. Ins. Co., 22 Hun 75; Fox *v.* Carr, 16 Hun 434; Kohler *v.* Knapp, 1 Bradf. Surr. 241.

Vermont.— Abbott *v.* Coburn, 28 Vt. 663, 67 Am. Dec. 735; Vaughan *v.* Barret, 5 Vt. 333, 26 Am. Dec. 306.

A claim against a corporation arising out of a contract (in the case at bar, an insurance policy not under seal) entered into in one state may serve as assets for the purpose of founding administration in another state in which the corporation does business and, as required by the statute of such latter state, has an agent on whom process against it may be served. New England Mut. L. Ins. Co. *v.* Woodworth, 111 U. S. 138, 4 S. Ct. 364, 28 L. ed. 379.

Debts due from the government of the United States have no locality at the seat of government and are not to be treated like the debts of a private debtor, which constitute local assets at his own domicile, but may be received wherever the government may choose to pay, and therefore a claim against the government does not furnish the foundation for local administration in the District of Columbia. *In re* Coit, 3 App. Cas. (D. C.) 246.

are assets where the debtor lives and not where the instrument is found.[90] Specialty debts are assets for the purpose of jurisdiction where the instrument happens to be.[91] It has been laid down as the rule that judgment debts are assets for the purpose of jurisdiction where the judgments are recorded,[92] but it has also been held that a judgment, like a simple contract debt, is an asset where the debtor resides, and hence will support a grant of administration in the state and county of the debtor's residence upon the estate of the deceased creditor who lived in another state,[93] and that for the purposes of administration the *situs* of a judgment follows the owner's residence.[94] Cash, furniture, and other corporeal chattels are *bona notabilia* where they happen to lie,[95] and this is true, although a bill of sale transferring the chattel to the decedent may be found in another state.[96] For the purpose of determining where administration is proper, shares of corporate stock have been considered personal property in the county where the corporate property is located,[97] but shares in the capital stock of a railroad corporation have been held to be *bona notabilia* in the county where the stock-books are kept, transfers made, and dividends paid.[98]

d. Where Neither Domicile Nor Assets Within Jurisdiction. A court cannot grant administration upon the estate of a non-resident decedent who left no property within the jurisdiction.[99]

90. Becraft *v.* Lewis, 41 Mo. App. 546; Owen *v.* Miller, 10 Ohio St. 136, 75 Am. Dec. 502; Wyman *v.* Halstead, 109 U. S. 654, 3 S. Ct. 417, 27 L. ed. 1068; Atty.-Gen. *v.* Bouwens, 1 H. & H. 319, 7 L. J. Exch. 297, 4 M. & W. 171. But see St. John *v.* Hodges, 9 Baxt. (Tenn.) 334 [*followed* in Ellis *v.* Northwestern Mut. L. Ins. Co., 100 Tenn. 177, 43 S. W. 766; Goodlett *v.* Anderson, 7 Lea (Tenn.) 286], holding that promissory notes are *bona notabilia* at the domicile of the decedent when left there at the time of his death and that administration taken out in another state does not draw thereto the title or right to the notes unless they actually come to the hands of the administrator.

91. Beers *v.* Shannon, 73 N. Y. 292; Owen *v.* Miller, 10 Ohio St. 136, 75 Am. Dec. 502; Vaughan *v.* Barret, 5 Vt. 333, 26 Am. Dec. 306; Atty.-Gen. *v.* Bouwens, 1 H. & H. 319, 7 L. J. Exch. 297, 4 M. & W. 171.

A life-insurance policy is not a specialty within the rule stated in the text. Sulz *v.* Mutual Reserve Fund L. Assoc., 7 Misc. (N. Y.) 593, 28 N. Y. Suppl. 263 [*affirmed* in 83 Hun 139, 31 N. Y. Suppl. 1133 (*reversed* on other grounds in 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379)]. See also *Re* Ontario Mut. L. Assur. Co., 30 Ont. 666, holding that the assignees of an insurance policy are entitled to have an administrator for the insured appointed in the country of their residence, although the insured died in a foreign country where he had been domiciled for some time with the policy in his actual possession, especially where the insurance company could not be sued in such foreign country.

92. Owen *v.* Miller, 10 Ohio St. 136, 75 Am. Dec. 502; Vaughan *v.* Barrett, 5 Vt. 333, 26 Am. Dec. 306; Atty.-Gen. *v.* Bouwens, 1 H. & H. 319, 7 L. J. Exch. 297, 4 M. & W. 171.

93. Swancy *v.* Scott, 9 Humphr. (Tenn.) 327.

94. Angier *v.* Jones, 28 Tex. Civ. App. 402, 67 S. W. 449, holding that, where a decedent had no fixed domicile and no property save a judgment, administration should be taken in the county where the decedent died and was not authorized in the county where the judgment was rendered.

95. Emery *v.* Hildreth, 2 Gray (Mass.) 228; White *v.* Nelson, 2 Dem. Surr. (N. Y.) 265; Wilkins *v.* Ellett, 108 U. S. 256, 2 S. Ct. 641, 27 L. ed. 718.

96. Holyoke *v.* Union Mut. L. Ins. Co., 22 Hun (N. Y.) 75.

97. *In re* Fitch, 160 N. Y. 87, 54 N. E. 701, 30 N. Y. Civ. Proc. 1 [*affirming* 39 N. Y. App. Div. 609, 57 N. Y. Suppl. 786].

98. Arnold *v.* Arnold, 62 Ga. 627.

99. *Georgia.*—Adams *v.* Brooks, 35 Ga. 63; Patillo *v.* Backsdale, 22 Ga. 356.

Illinois.— Illinois, etc., R. Co. *v.* Cragin, 71 Ill. 177.

Iowa.— Christy *v.* Vest, 36 Iowa 285.

Kansas.— Mallory *v.* Burlington, etc., R. Co., 53 Kan. 557, 36 Pac. 1059; Perry *v.* S. Joseph, etc., R. Co., 29 Kan. 420.

Kentucky.— Thumb *v.* Gresham, 2 Metc. 306. See also Hall *v.* Louisville, etc., R. Co., 102 Ky. 480, 43 S. W. 698, 19 Ky. L. Rep. 1529, 80 Am. St. Rep. 358.

Louisiana.— Moise *v.* Mutual Reserve Fund L. Assoc., 45 La. Ann. 736, 13 So. 170; Miltenberger *v.* Knox, 21 La. Ann. 399.

New York.—Goodrich *v.* Pendleton, 4 Johns. Ch. 549.

Pennsylvania.— Van Dyke's Appeal, 31 Leg. Int. 69.

Vermont.— Manning *v.* Leighton, 65 Vt. 84, 26 Atl. 258, 24 L. R. A. 684.

United States.— Union Mut. L. Ins. Co. *v.* Lewis, 97 U. S. 682, 24 L. ed. 1114; Tryon *v.* U. S., 32 Ct. Cl. 425.

See 22 Cent. Dig. tit. "Executors and Administrators," § 22.

Discretion of court.— It has been held that the granting of letters of administration to a creditor of an intestate dying within the state was discretionary with the court when

5. Action Under Confederate Authority. The probate of a will and qualification of executors or the appointment of administrators by a probate court of one of the Confederate states during the Civil war cannot be regarded by the courts of the same state after the close of the war as the acts of a foreign court but such acts are in every respect legal and binding.[1]

K. What Law Governs. With regard to creditors the administration of the assets of a deceased person is governed exclusively by the law of the place where the executor or administrator acts and from which he derives his authority, and the domicile of the decedent or of the creditor cannot authorize the introduction of another law to defeat the law of the *situs* of the administration.[2] With regard to heirs and distributees the rule is that personal estate is to be administered according to the law of the decedent's last domicile while real estate is administered according to the law of the place where it is situated.[3]

II. Appointment, Qualification, and Tenure.

A. Executors — 1. Appointment — a. Nomination by Will in General. An executor derives his authority primarily from the will.[4] Whenever one commits by will the execution of a trust to the executors named therein no other person can execute the trust while any of the executors is living and has not declined the office nor been shown to be unsuitable.[5] The interest of every executor in his testator's estate is what the testator gives him, and a testator may make the trust absolute or qualified respecting either the subject-matter, the place where the trust shall be discharged, or the time when the executor shall begin, or during which he shall continue to act as such.[6] The executor's appointment also may be made

the intestate was not a resident and at the time of the application there was no personalty belonging to him within the state; but as the surrogate was not required to issue letters of administration, when it was made to appear that they must for all purposes prove to be entirely ineffectual, it was a proper exercise of discretion to refuse the application. *In re* Schoonmaker, 18 N. Y. Wkly. Dig. 410.

1. Nelson *v.* Boynton, 54 Ala. 368 [*overruling* Bibb *v.* Avery, 45 Ala. 691]; Erwin *v.* Hill, 51 Ala. 580; Berry *v.* Bellows, 30 Ark. 198. But letters of administration issued by a clerk of probate under the authority of a Confederate state constitution, after it had been superseded by a new and valid one, are null and void. Page *v.* Cook, 26 Ark. 122.

2. Jones *v.* Drewry, 72 Ala. 311.

3. Gaines' Succession, 45 La. Ann. 1237, 14 So. 223; De Roffignac's Succession, 21 La. Ann. 364; Fay *v.* Haven, 3 Metc. (Mass.) 109; Lewis *v.* Chester County, 60 Pa. St. 325. See also Hamilton *v.* Dallas, 38 L. T. Rep. N. S. 215, 26 Wkly. Rep. 326. And see Descent and Distribution, 14 Cyc. 1 *et seq.*

4. Schouler Ex. § 30.

A reference in a marginal note to certain persons as executors, whose express appointment as executors has been canceled, but who are left trustees of the will, may have the effect of appointing them executors. *In re* Nussey, 78 L. T. Rep. N. S. 169.

Will not showing appointment.— Where a will did not name any executor, but contained the following clause: "I leave the sum of one sovereign each to the executor and witness of my will for their trouble," and opposite the signatures of the witnesses were the words "witnesses and executors" written by one of the witnesses, who it was testified wrote them at the request of the testatrix, it was held that there was no appointment of an executor. *In re* Woods, L. R. 1 P. 556.

Identifying executor.— There should be some means of identifying the person designated by the will to serve as executor, else the designation cannot operate. But extrinsic evidence may be adduced to identify the person actually intended wherever the description of the executor is imperfect or ambiguous. Matter of Hardy, 2 Dem. Surr. (N. Y.) 91; Clayton *v.* Nugent, 13 L. J. Exch. 363, 13 M. & W. 200; *In re* De Rosaz, 2 P. D. 66, 46 L. J. P. & Adm. 6, 36 L. T. Rep. N. S. 263, 25 Wkly. Rep. 352.

When appointment inoperative.— When the legatees die before the testator and the latter leaves no debts to be paid, the appointment of an executor becomes inoperative. Dupuy's Succession, 4 La. Ann. 570.

5. Hayes *v.* Pratt, 147 U. S. 557, 13 S. Ct. 503, 37 L. ed. 279.

6. Hill *v.* Tucker, 15 How. (U. S.) 458, 14 L. ed. 223.

For example a testator may appoint or designate different executors for different jurisdictions in which his effects may lie or different executors as to different parts of his estate in the same jurisdiction (Hunter *v.* Bryson, 5 Gill & J. (Md.) 483, 25 Am. Dec. 313; Despard *v.* Churchill, 53 N. Y. 192; Mordecai *v.* Boylan, 59 N. C. 365. See also *In re* Green, 79 L. T. Rep. N. S. 738) or one executor for general purposes and another for some limited or special purpose (Velho *v.* Leite, 33 L. J. P. & M. 107, 3 Swab. & Tr. 456; Lynch *v.* Bellew, 3 Phillim. 424). So

conditional, as upon his giving security for paying the debts and legacies, or possessing certain qualifications at the time of the testator's decease, or provided he prove the will within a specified time after the testator's death, or otherwise, and unless the conditions are fulfilled the nomination goes for naught.[7] Where several executors are named or designated together they are presumably intended to be coexecutors and should be qualified together, all being thus legally regarded as an individual in place of a sole executor, and of various persons named as coexecutors he or they who may be alive and willing and competent to accept the trust on the testator's decease can alone be deemed qualified for the office.[8] The appointment of an executor may be by way of request or suggestion rather than mandate, on the testator's part.[9] The appointment of executors under a will may be revoked by the substitution of others in a codicil[10] or a subsequent will,[11] or a reappointment with others may be made instead.[12]

b. Appointment by the Tenor. It is not necessary to the designation of an executor that the word "executor" should be used, but any words which substantially confer upon a person, whether expressly or by implication, the rights, powers, and duties of an executor, amount to a due appointment under the will; and the person thus clothed with the essential functions of the office is said to be an executor under the will according to the tenor.[13] But executorship according to

too one may be appointed for a designated period of time only, as during a son's minority or a wife's widowhood, or for so many years, or while one instituted executor is absent from the country. Carte *v.* Carte, Ambl. 28, 27 Eng. Reprint 15, 3 Atk. 174, 26 Eng. Reprint 902, Ridg. 210; Pemberton *v.* Cony, Cro. Eliz. 164.

Extension of power by codicil.— A person expressly appointed executor for limited purposes may by a codicil receive expressly or by implication full general powers. *In re* Aird, 1 Hagg. Eccl. 336.

Where authority of executor is restricted this should appear in letters testamentary. Gibbons *v.* Riley, 7 Gill (Md.) 81; *In re* Barnes, 7 Jur. N. S. 195.

7. Knox *v.* Newman, 44 N. J. Eq. 309, 15 Atl. 415; *In re* Wilmot, 1 Curt. Eccl. 1.

Successive nominations.— Instead of appointing coexecutors to serve together a testator may name two or more, substituting one after another in order, so that if the first dies or cannot act, the next may act, and so on. *In re* Cornell, 17 Misc. (N. Y.) 468, 41 N. Y. Suppl. 255; Edwards' Estate, 12 Phila. (Pa.) 85; *In re* Langford, L. R. 1 P. 458, 37 L. J. P. & M. 20, 17 L. T. Rep. N. S. 415; *In re* Wilmot, 2 Rob. Eccl. 579. A direction in a will that if the executor appointed thereby should die a certain other person should be his successor with all the authority and power that he would have had if appointed in the first instance requires the appointment of such person on the death of the executor, although it occurred after testator's death. *In re* Cornell, 17 Misc. (N. Y.) 468, 41 N. Y. Suppl. 255. A successor thus duly appointed to discharge duties which were left unperformed by the predecessor or to act in case the predecessor cannot is an executor by substitution and not a mere administrator *de bonis non.* State *v.* Rogers, 1 Houst. (Del.) 569; Kinney *v.* Keplinger, 172 Ill. 449, 50 N. E. 131 [*reversing* 71 Ill. App. 334].

8. Schouler Ex. § 40.

Different nominations in will and codicil.— Joint letters have been granted to two persons of whom one was named as sole executor in the will, and the other as sole executor in a codicil. Geaves *v.* Price, 32 L. J. P. & M. 113, 8 L. T. Rep. N. S. 610, 3 Swab. & Tr. 71, 11 Wkly. Rep. 809; *In re* Leese, 31 L. J. P. & M. 169, 5 L. T. Rep. N. S. 848, 2 Swab. & Tr. 442. See also Stolzel *v.* Cruikshank, 4 Dem. Surr. (N. Y.) 352, where under such circumstances, but the codicil not having been proved, letters were issued to the person named in the will, the court not deciding, however, whether his functions would cease upon the codicil being proved and letters issued to the person named therein.

9. *In re* Brown, 2 P. D. 110, 46 L. J. P. & Adm. 31, 36 L. T. Rep. N. S. 519, 25 Wkly. Rep. 431.

Adviser or counsel.— One whom the will authorizes or directs the executor to consult or employ as adviser is not thereby constituted an executor, although he may advise, complaining to the court if his advice is injuriously neglected or if another is employed instead of himself. But a will is not readily construed to require peremptorily the employment of any particular person as legal adviser or absolute guidance by his counsel. *In re* Ogier, 101 Cal. 381, 35 Pac. 900, 40 Am. St. Rep. 61; Foster *v.* Elsley, 19 Ch. D. 518, 51 L. J. Ch. 275, 30 Wkly. Rep. 596. See also Young *v.* Alexander, 16 Lea (Tenn.) 108.

10. *In re* Ringot, 124 Cal. 45, 56 Pac. 781; Bowles' Succession, 3 Rob. (La.) 31; *In re* Baily, L. R. 1 P. 628.

11. Nelson's Estate, 147 Pa. St. 160, 23 Atl. 373, even though it reënacts some parts of the former will.

12. *In re* Leese, 31 L. J. P. & M. 169, 5 L. T. Rep. N. S. 848, 2 Swab. & Tr. 442.

13. *California.*— *In re* Ringot, 124 Cal. 45, 56 Pac. 781.

Delaware.— State *v.* Rogers, 1 Houst. 569.

the tenor will not be granted where the will does not import that the person named shall collect dues, pay debts and legacies, and settle the estate, like an executor, as in the mere designation to perform some trust or to be guardian,[14] or where the will makes the nugatory direction that the testator's property shall go at once to the legatees or to trustees as if to dispense with administration and the payment of debts altogether,[15] or where the will does not sufficiently confer an executor's rights and duties upon any one or upon the person claiming the office;[16] and it may be stated generally that the appointment of executors by construction or implication from the terms of the will should not be favored, but in doubtful cases administration with the will annexed should be resorted to.[17]

c. Delegation of Power to Nominate. In England and in some of the United States the testator may delegate to some person or persons named in the will or to the probate court the power to name an executor, and letters testamentary may be issued by a person nominated pursuant to such power.[18]

Kentucky.— Myers *v.* Daviess, 10 B. Mon. 394.

Mississippi.— Grant *v.* Spann, 34 Miss. 294.

Missouri.— *In re* Hill, 102 Mo. App. 617, 77 S. W. 110.

New York.— Hartnett *v.* Wandell, 60 N. Y. 346, 19 Am. Rep. 194; Baker *v.* Baker, 18 N. Y. App. Div. 189, 45 N. Y. Suppl. 870 (holding that a direction in a will that the public administrator shall "sell out all real and personal estate" is an appointment of the public administrator as executor of the will); *Ex p.* McDonnell, 2 Bradf. Surr. 32. And see Matter of Blancan, 4 Redf. Surr. 151; *Ex p.* McCormick, 2 Bradf. Surr. 169. But *compare* Conklin *v.* Egerton, 21 Wend. 430.

Pennsylvania.— Carpenter *v.* Cameron, 7 Watts 51; *In re* Hayes, 7 Pa. Super. Ct. 160.

South Carolina.—Nunn *v.* Owens, 2 Strobh. 101.

Texas.— Stone *v.* Brown, 16 Tex. 425.

Virginia.— Fleming *v.* Bolling, 3 Call 75.

England.— *In re* Kirby, [1902] P. 188, 71 L. J. P. & Adm. 116, 87 L. T. Rep. N. S. 141; *In re* Cook, [1902] P. 114, 71 L. J. P. & Adm. 49, 86 L. T. Rep. N. S. 537; *In re* Way, [1901] P. 345, 71 L. J. P. & Adm. 13, 85 L. T. Rep. N. S. 643; *In re* Bell, 4 P. D. 85.

See 22 Cent. Dig. tit. "Executors and Administrators," § 29.

One named "trustee" may be thus substantially invested with powers as executor by the tenor; or even be executor, trustee, and testamentary guardian, although such offices should be kept distinct and letters issued accordingly.

Kentucky.— Myers *v.* Daviess, 10 B. Mon. 394.

Maine.— Knight *v.* Loomis, 30 Me. 204.

Minnesota.— Simpson *v.* Cook, 24 Minn. 180.

New Jersey.— Mulford *v.* Mulford, 42 N. J. Eq. 68, 6 Atl. 609.

New York.— Bayeaux *v.* Bayeaux, 8 Paige 333; Richards *v.* Moore, 5 Redf. Surr. 278.

Pennsylvania.— Wheatly *v.* Badger, 7 Pa. St. 459.

Joint letters with an executor expressly named may be issued to an executor by the tenor. Grant *v.* Leslie, 3 Phillim. 116.

14. *In re* Hill, 102 Mo. App. 617, 77 S. W. 110; State *v.* Watson, 2 Speers (S. C.) 97. But *compare* Wheatly *v.* Badger, 7 Pa. St. 459; Watson *v.* Mayrant, 1 Rich. Eq. (S. C.) 449; *In re* Punchard, L. R. 2 P. 369, 41 L. J. P. & M. 25, 26 L. T. Rep. N. S. 526, 20 Wkly. Rep. 446.

15. Hunter *v.* Bryson, 5 Gill & J. (Md.) 483, 25 Am. Dec. 313; Drury *v.* Natick, 10 Allen (Mass.) 169; Newcomb *v.* Williams, 9 Metc. (Mass.) 525; *In re* Toomy, 34 L. J. P. & M. 3, 3 Swab. & Tr. 562, 13 Wkly. Rep. 106.

16. Frisby *v.* Withers, 61 Tex. 134 (holding that a request in a will that certain executors shall serve until the testator's son is twenty-one is not an appointment of the son at majority); *In re* Adamson, L. R. 3 P. & D. 253; *In re* Oliphant, 6 Jur. N. S. 256, 30 L. J. P. & M. 82, 1 L. T. Rep. N. S. 446, 1 Swab. & Tr. 525.

17. *In re* Hill, 102 Mo. App. 617, 77 S. W. 110; Hartnett *v.* Wandell, 2 Hun (N. Y.) 552. See *infra*, II, C.

18. *Connecticut.*— Bishop *v.* Bishop, 56 Conn. 208, 14 Atl. 808.

Delaware.— State *v.* Rogers, 1 Houst. 569.

Indiana.— Wilson *v.* Curtis, 151 Ind. 471, 51 N. E. 913, 68 Am. St. Rep. 236.

Michigan.— Brown *v.* Just, 118 Mich. 678, 77 N. W. 263.

New Jersey.— Mulford *v.* Mulford, 42 N. J. Eq. 68, 6 Atl. 609.

New York.— Hartnett *v.* Wandell, 60 N. Y. 346, 19 Am. Rep. 194; Matter of Alexander, 16 Abb. Pr. N. S. 9. *Contra*, Hartnett *v.* Wandell, 5 Thomps. & C. 98; Matter of Bronson, Tuck. Surr. 464.

England.— *In re* Cringan, 1 Hagg. Eccl. 548. See also Jackson *v.* Paulet, 2 Rob. Eccl. 344.

See 22 Cent. Dig. tit. "Executors and Administrators," § 30.

Person authorized to nominate executor may nominate himself. *In re* Ryder, 7 Jur. N. S. 196, 31 L. J. P. & M. 215, 3 L. T. Rep. N. S. 756, 2 Swab. & Tr. 127.

Approval by court.— Where a will directs that, whenever the number of the executors and trustees shall from any cause be reduced to two, they shall petition the orphans' court to appoint another and nominate to the court "such person as shall be a satisfactory colleague and be approved by the court for

2. Qualification. Although executors are designated by the testator's will [19] and a court of probate has no power to appoint as executor a person not so nominated,[20] the full powers of an executor according to modern English and American practice come from the court of probate jurisdiction, which recognizing and confirming the testator's selection clothes the executor therein named with plenary authority by issuing to him letters testamentary, which are usually granted in connection with the probate of the will.[21] Where a will is proved it is the duty of the court to issue letters testamentary to the person named as executor upon his application, unless he is for some reason incompetent.[22] Where a testator nominates two or more persons as executors but only one qualifies, that one has all the authority which all would have had if all had qualified.[23]

3. Competency.[24] All persons, generally speaking, who are capable of making wills are capable of becoming executors,[25] and indeed the favor of the law extends even further in this respect.[26] Thus for example under the common law a mar-

capability and good character," the court should not approve the nomination unless it clearly appears to be to the interest and advantage of the estate and the beneficiaries under the trusts created. Lafferty's Estate, 9 Pa. Dist. 385.

Where the power is delegated to several persons, each is entitled to notice of the time and place when and where the appointment is to be made and if some of them refuse to join in making an appointment the court may direct them to do so upon the application of the others. Hutton *v.* Hutton, 41 N. J. Eq. 267, 3 Atl. 882.

When the king is appointed executor letters testamentary are issued to a person appointed by him for that purpose. *In re* Kirkpatrick, 22 N. J. Eq. 463, 466 [*citing* 4 Inst. 335; Toller 30; Went. 29 note *a*].

19. See *supra*, II, A, 1, a.

20. Blakely *v.* Frazier, 20 S. C. 144.

21. Stagg *v.* Green, 47 Mo. 500; Tappan *v.* Tappan, 30 N. H. 50; Sabine *v.* Rounds, 50 Vt. 74. See also Hunter *v.* Bryson, 5 Gill & J. (Md.) 483, 25 Am. Dec. 313; Matter of Richardson, 8 Misc. (N. Y.) 140, 29 N. Y. Suppl. 1079.

Powers before qualification see *infra*, V, L.

Powers pending appeal from appointment or probate see *infra*, V, M.

A person claiming under a will proved in one state cannot intermeddle with or sue for the effects of the testator in another state unless the will be proved in such other state or unless he is permitted to do so by some law of that state. Kerr *v.* Moon, 9 Wheat. (U. S.) 565, 6 L. ed. 161.

When qualification unnecessary. — Executors in whom a legal estate is vested merely for the purpose of sale and conveyance need not qualify fully nor report their proceedings to the probate court. Hogan *v.* Wyman, 2 Oreg. 302.

22. Farmers' L. & T. Co. *v.* Smith, 74 Conn. 625, 51 Atl. 609; Bowman's Succession, 28 La. Ann. 611 (holding that the person named as executor in the will of the testator is entitled to the office in preference to the public administrator, and the fact that the executor has by mistake qualified in a court which had no jurisdiction does not deprive him of the right to the office); *In re* Sultzbach, 5 Ohio S. & C. Pl. Dec. 516, 5 Ohio N. P. 218; Holladay *v.* Holladay, 16 Oreg. 147, 19 Pac. 81.

Letters must necessarily issue to the executor named if the will has been admitted to probate; the remedy in case of his unfitness is by motion to remove. *In re* Oskamp, 5 Ohio S. & C. Pl. Dec. 584, 7 Ohio N. P. 665.

Misdescription of executor.— Where a testator has misdescribed the name and residence of an executor probate may be granted to the executor in his real name and as of his real residence. *In re* Baskett, 78 L. T. Rep. N. S. 843.

Time for application.— Under Ala. Code, § 52, which provides that if any person named in a will as executor fails to apply for letters testamentary within thirty days after probate of the will, and any others named therein as executors apply for such letters, they must issue to such persons, where one of several executors failed to apply for letters within thirty days after probate the exclusive right to administration was vested in the executors who applied within such period and the court had no jurisdiction to grant letters to the executor who failed to apply within the thirty days. Pruett *v.* Pruett, 131 Ala. 578, 32 So. 638.

The fact that a contest is pending to set aside a will or that the person named in the will as executor is opposed by a large number of the devisees and his interests are hostile to theirs will not prevent his appointment. *In re* Sultzbach, 5 Ohio S. & C. Pl. Dec. 516, 5 Ohio N. P. 218.

Appointment by court of one of two executors named.— Where a probate court has made a decree appointing one of two executors named in a will as sole executor its power in the premises is exhausted and while such decree stands it cannot appoint the other person named as coexecutor. Cogswell *v.* Hall, 183 Mass. 575, 67 N. E. 638 [*following* Jewett *v.* Turner, 172 Mass. 496, 52 N. E. 1082].

23. Bodley *v.* McKinney, 9 Sm. & M. (Miss.) 339; Phillips *v.* Stewart, 59 Mo. 491.

24. **Of administrators** see *infra*, II, B, 3.

25. Smith's Appeal, 61 Conn. 420, 24 Atl. 273, 16 L. R. A. 538; Stewart's Appeal, 56 Me. 300. See also Holbrook *v.* Head, 6 S. W. 592, 9 Ky. L. Rep. 755.

26. 2 Blackstone Comm. 503.

ried woman, although incapable of making a valid will or contract, might become an executrix provided her husband concurred in her appointment.[27] An infant too, although not of full testamentary capacity, might, however young, and even while *en ventre sa mere*, be appointed executor,[28] but statutes often disqualify an infant from performing the functions of sole executor so that some other person must be appointed administrator until the executor reaches his majority.[29] The fact that a person named as executor is an alien or a non-resident does not disqualify him or the office either at common law or, as a general rule, under the various statutes.[30] By both the common and civil law, and under the statutes, idiots and lunatics are incapable of becoming executors, and if one who has been appointed becomes insane the court may commit administration to another.[31] It has been held that a partnership firm may be nominated as executors and that letters testamentary will be granted to the individual members of the firm.[32] Mere poverty or even insolvency constitutes no legal cause for refusing the executorship to the testator's chosen appointee and courts have thus respected the testator's choice even where the insolvency occurred after the testator's death.[33] But courts of equity have intervened in consequence of the hardships thus inflicted upon creditors and legatees, and appointed receivers under strict judicial direction, restraining the bankrupt or insolvent from committing acts injurious to the estate,[34] or they have required the insolvent executor to furnish secu-

Power or right of corporation to act as executor or administrator see CORPORATIONS, 10 Cyc. 1141, 1142.

27. *Louisiana.*— Dussumier *v.* Coiron, 2 Rob. 368.

Maine.— Stewart's Appeal, 56 Me. 300.

Massachusetts.— Barber *v.* Bush, 7 Mass. 510.

Michigan.— Palmer *v.* Oakley, 2 Dougl. 433, 47 Am. Dec. 41.

Mississippi.— Edmundson *v.* Roberts, 1 How. 322.

South Carolina.— See Lindsay *v.* Lindsay, 1 Desauss. 150.

See 22 Cent. Dig. tit. "Executors and Administrators," § 34.

Joinder of husband in bond.— Statutes sometimes require the husband to join in his wife's bond as executrix. Cassedy *v.* Jackson, 45 Miss. 397; Airhart *v.* Murphy, 32 Tex. 131.

If a married woman may not become legally bound on her bond as executrix this constitutes still a practical objection to her appointment, especially if the bond taken is without sureties. Hammond *v.* Wood, 15 R. I. 566, 10 Atl. 623.

A man marrying an executrix becomes executor in her right and as such accountable. Wood *v.* Chetwood, 27 N. J. Eq. 311. See *infra*, II, N, 6.

Letters may be granted to the wife's attorney where she was named as sole executrix and the husband objects to her serving in that capacity. Clerke *v.* Clerke, 6 P. D. 103, 45 J. P. 588, 50 L. J. P. & Adm. 78, 29 Wkly. Rep. 823.

Disqualification of husband.— The appointment of a wife as executrix does not *ipso facto* make her husband a coexecutor, so that his disqualification to act as such will disqualify her to act alone. Lippincott *v.* Wikoff, 54 N. J. Eq. 107, 33 Atl. 305.

28. Piggot's Case, 5 Coke 29*a*.

29. See *infra*, I, E, 2, a.

The policy of modern legislation in this respect is to curb the former rights of an infant. See Christopher *v.* Cox, 25 Miss. 162.

Grant of probate to infant executor along with adult not a nullity.—Cumming *v.* Landed Banking, etc., Co., 20 Ont. 382.

30. *California.*— Brown's Estate, 80 Cal. 381, 22 Pac. 233.

Montana.— *In re* Connor, 16 Mont. 465, 41 Pac. 271.

Pennsylvania.— Sarkie's Appeal, 2 Pa. St. 157.

Rhode Island.— Hammond *v.* Wood, 15 R. I. 566, 10 Atl. 623.

Wisconsin.— Cutler *v.* Howard, 9 Wis. 309.

See 22 Cent. Dig. tit. "Executors and Administrators," § 33.

Contra.— Matter of Taylor, 3 Redf. Surr. (N. Y.) 259.

Even an alien enemy is not disqualified at common law. Cutler *v.* Howard, 9 Wis. 309. But see Smith's Appeal, 61 Conn. 420, 24 Atl. 273, 16 L. R. A. 538.

Citizens of United States.— A statute making "an alien, not being an inhabitant of this state," incompetent to serve as an executor, has been held to apply only to persons not citizens of the United States and not to disqualify a citizen of the United States who resided out of the state. McGregor *v.* McGregor, 3 Abb. Dec. (N. Y.) 92, 1 Keyes (N. Y.) 133, 33 How Pr. (N. Y.) 456; Demarest's Estate, 1 N. Y. Civ. Proc. 302.

31. Evans *v.* Tyler, 2 Rob. Eccl. 128. See also McGregor *v.* McGregor, 3 Abb. Dec. (N. Y.) 92, 1 Keyes (N. Y.) 133, 33 How. Pr. (N. Y.) 456. See *infra*, II, N, 12, b.

32. *In re* Fernie, 6 Notes of Cas. 657.

33. Hovey *v.* McLean, 1 Dem. Surr. (N. Y.) 396; Hathornthwaite *v.* Russel, 2 Atk. 126, 26 Eng. Reprint 480.

34. Elmendorf *v.* Lansing, 4 Johns. Ch. (N. Y.) 562; Stairley *v.* Rabe, McMull. Eq. (S. C.) 22; *Ex p.* Ellis, 1 Atk. 101, 26 Eng.

rity,[35] although aside from statute they have hesitated to control the executor thus, where it was shown that the testator made his choice while fully aware of his appointee's insolvency.[36] Certainly the mere fact that the executor named is worth less than the testator affords no ground for withholding letters.[37] The common law paid so great regard to a testator's wishes, that crime, drunkenness, or dissolute habits seldom disqualified one from serving as executor.[38] Modern statutes, however, consider detriment to the estate more carefully and have enlarged the discretionary powers of the probate tribunal so that it may refuse to qualify persons who are dissolute, lacking in integrity, or otherwise evidently unsuitable.[39] But although the courts are invested with considerable discretion as to refusing to qualify persons named as executors for the reasons set forth in the various statutes they are not at liberty to invent new causes of disqualification, or to add to those prescribed by statute, or to refuse to qualify an executor who is not within any of the classes declared incompetent by statute.[40]

Reprint 66; Utterson *v.* Mair, 4 Bro. Ch. 270, 29 Eng. Reprint 887, 2 Ves. Jr. 95, 30 Eng. Reprint 540; Rex *v.* Simpson, 1 W. Bl. 456.

35. Mandeville *v.* Mandeville, 8 Paige (N. Y.) 475; Slanning *v.* Style, 3 P. Wms. 334, 24 Eng. Reprint 1089.

36. Bowman *v.* Wootton, 8 B. Mon. (Ky.) 67; Mandeville *v.* Mandeville, 8 Paige (N. Y.) 475; Wilkins *v.* Harris, 60 N. C. 592; Fairbairn *v.* Fisher, 57 N. C. 390; Hathornthwaite *v.* Russel, 2 Atk. 126, 26 Eng. Reprint 480.

37. Grubb *v.* Hamilton, 2 Dem. Surr. (N. Y.) 414; Ballard *v.* Charlesworth, 1 Dem. Surr. (N. Y.) 501.

38. Berry *v.* Hamilton, 12 B. Mon. (Ky.) 191, 54 Am. Dec. 515; Sill *v.* McKnight, 7 Watts & S. (Pa.) 244.

39. Bauquier's Estate, 88 Cal. 302, 26 Pac. 178, 532; *In re* Cady, 103 N. Y. 678, 9 N. E. 442; Matter of Cady, 36 Hun (N. Y.) 122; Webb *v.* Dietrich, 7 Watts & S. (Pa.) 401.

Gross immorality as shown by the mode of life of the person named as executor is evidence of such "lack of integrity" as will authorize the court to refuse to qualify him under the California statute. *In re* Plaisance, Myr. Prob. (Cal.) 117.

Person charged with murder.— An applicant for confirmation as a testamentary executor who is in duress under a prosecution for the murder of the testatrix is not in a condition of body and mind to discharge the functions of the office in the manner in which the law expects an executor to do so, and letters will not be issued to him. Townsend's Succession, 36 La. Ann. 535.

Person maintaining suit against estate.— A person named in a will as a coexecutor should not be appointed as such by the court pending a suit by him on a claim against the estate. Cogswell *v.* Hall, 183 Mass. 575, 67 N. E. 638, 97 Am. St. Rep. 450, where it was further held, however, that the court having already appointed the other executor named in the will as sole executor had exhausted its powers in the premises and could not while such decree remained in force appoint a coexecutor. But see Perry *v.* De Wolf, 2 R. I. 103, holding that it is no disqualification of an executor that he is the executor of a prior executor between whom and the estate of the testator there are unsettled accounts, or that he is a trustee under the will of a large amount of real and personal estate respecting which there are unsettled accounts, or that a lawsuit is pending between him and the estate of the testator, respecting the title of certain real estate which he holds adversely to the claimants under the will of said testator.

A mere inability to speak English and lack of instruction as to the constitution of the state does not constitute such a want of understanding as will disqualify under the California statute. Li Po Tai's Estate, 108 Cal. 484, 41 Pac. 486.

Clear and convincing evidence is necessary to establish the want of integrity which will under the California statute authorize the court to refuse to appoint an executor named in the will. Bauquier's Estate, 88 Cal. 302, 26 Pac. 178, 532.

Proof of disqualification should be brought down to date. Drake *v.* Green, 10 Allen (Mass.) 124. And see Lynch *v.* Lively, 32 Ga. 575; Levan's Appeal, 112 Pa. St. 294, 3 Atl. 804; Cornpropst's Appeal, 33 Pa. St. 537.

40. *Alabama.*— Kidd *v.* Bates, 120 Ala. 79, 23 So. 735, 74 Am. St. Rep. 17, 41 L. R. A. 154.

California.— Bauquier's Estate, 88 Cal. 302, 26 Pac. 178, 532, holding that a simple conflict of interest in regard to the estate between the legatees and the executor does not show a "want of integrity" on the part of the latter so as to authorize the court under the California statute in refusing to qualify him.

Connecticut.— Smith's Appeal, 61 Conn. 420, 24 Atl. 273, 16 L. R. A. 538, holding that a lack of honesty, integrity, or business experience did not render a person "incapable to accept the trust" within the meaning of the Connecticut statute.

New York.— McGregor *v.* McGregor, 3 Abb. Dec. 92, 1 Keyes 133, 33 How. Pr. 456.

Wisconsin.— Saxe *v.* Saxe, 119 Wis. 557, 97 N. W. 187, holding that under the Wisconsin statute an executor named in a will who is capable of performing his duties, on accepting the trust and presenting the requisite bond, cannot be denied appointment because

4. Acceptance or Renunciation[41] — **a. In General.** A person nominated as an executor cannot be compelled to act as such,[42] but the office may be accepted or refused at discretion, although one should refuse entirely or not at all.[43] An executor has, however, no right to the property of the testator unless he accepts the executorship.[44]

b. What Constitutes. Although there may be a formal acceptance or renunciation in writing of the office of executor[45] and in some jurisdictions it has been required that the renunciation must appear of record,[46] the general rule is that no formal or particular act of the person named as executor is necessary.[47] Any acts of the executor with relation to his decedent's estate showing his intention to assume the trust confided to him may be alleged as evidence that he

of objections to his disposition and moral character by heirs to whom he is obnoxious.

Illiteracy does not render one incompetent. Li Po Tai's Estate, 108 Cal. 484, 41 Pac. 486.

41. Renunciation by persons entitled to administer see *infra*, II, B, 4, a.

42. Steel *v.* Steel, 4 J. J. Marsh. (Ky.) 231.

43. *Kentucky.* — Steel *v.* Steel, 4 J. J. Marsh. 231.

New York. — Matter of Baldwin, 27 N. Y. App. Div. 506, 50 N. Y. Suppl. 872 [appeal *dismissed* in 158 N. Y. 713, 53 N. E. 218].

North Carolina. — Mitchell *v.* Adams, 23 N. C. 298.

Pennsylvania. — Ross *v.* Barclay, 18 Pa. St. 179, 55 Am. Dec. 616; Miller *v.* Meetch, 8 Pa. St. 417.

South Carolina. — Ashe *v.* Ashe, Rich. Eq. Cas. 380.

Virginia. — Thornton *v.* Winston, 4 Leigh 152.

Wisconsin. — Finch *v.* Houghton, 19 Wis. 149.

See 22 Cent. Dig. tit. "Executors and Administrators," § 37.

Where two or more are designated under a will simply as coexecutors, each has equally the right to serve or refuse the office. The refusal of one coexecutor does not exclude the others, nor prevent succession, substitution, or a sole execution of the trust, as the testator's wishes or the interests of the estate may require. But one coexecutor having renounced and refused the joint trust, letters will be granted to the others named in the will who consent to serve, and unless it appears imprudent to the court a sole executor may thus receive the office. Matter of Stevenson, 3 Paige (N. Y.) 420; Miller *v.* Meetch, 8 Pa. St. 417; Briggs *v.* Westerly Probate Ct., 23 R. I. 125, 50 Atl. 335.

The time of exercising such discretion is postponed to the testator's death, whatever might have been promised to him during his lifetime. Doyle *v.* Blake, 2 Sch. & Lef. 392.

Renunciation after probate. — Renunciation has been accepted in suitable instances after the probate of the will and before qualification, and if a bond with sureties must be furnished under the local code, the inconvenience of giving such a bond may induce one's renunciation at the last moment. Davis *v.* Inscoe, 84 N. C. 396; Miller *v.* Meetch, 8 Pa. St. 417.

Renouncing after qualification. — While an executor may resign or be removed (Thayer *v.* Homer, 11 Metc. (Mass.) 104; Morgan *v.* Dodge, 44 N. H. 255, 82 Am. Dec. 213; Harrison *v.* Henderson, 7 Heisk. (Tenn.) 315. See *infra*, II, N, 9, 11, 12) one who qualifies as executor and receives letters testamentary cannot afterward renounce (Sears *v.* Dillingham, 12 Mass. 358; Matter of Suarez, 3 Dem. Surr. (N. Y.) 164; Washington *v.* Blunt, 43 N. C. 253. But *compare* Miller *v.* Meetch, 8 Pa. St. 417; Finch *v.* Houghton, 19 Wis. 149; Easby *v.* Easby, 30 Fed. Cas. No. 18,293, 2 Hayw. & H. 207).

Although the effect of renunciation be to deprive others of certain benefits intended under the will, the executor is left free to accept or refuse. Beekman *v.* Bonsor, 23 N. Y. 298, 80 Am. Dec. 269.

Agreements to renounce. — An agreement to renounce an executorship for a consideration is generally regarded in courts of equity as illegal and unenforceable (Nelson *v.* Boynton, 54 Ala. 368; Ellicott *v.* Chamberlin, 38 N. J. Eq. 604, 48 Am. Rep. 327; Staunton *v.* Parker, 19 Hun (N. Y.) 55. See *infra*, II, B, 4, a), but a renunciation in consideration of a share of the commissions from a coexecutor has been upheld as legal (Ohlendorf *v.* Kanne, 66 Md. 495, 8 Atl. 351).

44. Calloway *v.* Doe, 1 Blackf. (Ind.) 372.

45. See *In re* Cornell, 17 Misc. (N. Y.) 468, 41 N. Y. Suppl. 255, as to the requirements under the New York code.

A renunciation in writing, although not sealed, made before the surrogate and produced from his office is sufficient to entitle the remaining executors to act under 21 Hen. VIII, c. 4. Doe *v.* McGill, 8 U. C. Q. B. 224.

46. Newton *v.* Cocke, 10 Ark. 169.

Any wrting which shows the intention of the executor to renounce is sufficient for that purpose provided it be filed in the proper office. Com. *v.* Mateer, 16 Serg. & R. (Pa.) 416.

47. Herme's Estate, 32 Pittsb. Leg. J. (Pa.) 474, holding that it is not necessary to the acceptance of office by the executor that he should be formally sworn and recognized by the register but it may be made by any act of administration. See also Thornton *v.* Winston, 4 Leigh (Va.) 152.

Executor may renounce by oral statement in open court. Matter of Baldwin, 27 N. Y. App. Div. 506, 50 N. Y. Suppl. 872.

elected to take the office,[48] and where the executor intermeddles with the estate, he loses his right to renounce, and may be compelled to take up probate.[49] In general the probate of a will by the executor therein named and his taking out letters testamentary are sufficient evidence of his acceptance of the trust, and the proof becomes the stronger if he has duly qualified by giving bond under the local statute.[50] So also to constitute a renunciation of the executorship an express declaration to that effect is not requisite, but one's refusal to act may be implied from circumstances, such as lapse of time and neglect to qualify in connection with his conduct after becoming aware of the testator's death and his own appointment under the will, and upon such a showing the court may accordingly commit the trust to others.[51]

c. Retraction of Renunciation.[52] An executor's retraction of his refusal is indulged, so long as no grant of letters has issued to another, or if such other grant was founded upon some error or misapprehension deserving correction, or was allowed for some temporary purpose not inconsistent with an appointment under letters testamentary;[53] but where upon his own request and due renuncia-

48. Van Horne *v.* Fonda, 5 Johns. Ch. (N. Y.) 388; Vickes *v.* Bell, 4 De G. J. & S. 274, 69 Eng. Ch. 213, 46 Eng. Reprint 924.

Representing himself as prepared to act on behalf of the estate has been held sufficient. Vickers *v.* Bell, 4 De G. J. & S. 274, 69 Eng. Ch. 213, 46 Eng. Reprint 924; Long *v.* Symes, 3 Hagg. Eccl. 771.

Merely assisting as agent or attorney one who is regularly appointed is not sufficient. Orr *v.* Newton, 2 Cox Ch. 274, 2 Rev. Rep. 44, 30 Eng. Reprint 127.

49. *In re* Coates, 78 L. T. Rep. N. S. 820 (so holding, although from his conduct the person named appeared to be an undesirable person to fill the office of executor); *In re* Badenach, 10 Jur. N. S. 521, 33 L. J. P. & M. 179, 11 L. T. Rep. N. S. 275, 3 Swab. & Tr. 465.

An application by the executor for the payment of a debt due the estate before probate, although unsuccessful, constitutes a sufficient act of intermeddling to preclude a subsequent renunciation. *In re* Stevens, [1897] 1 Ch. 422, 66 L. J. Ch. 155, 76 L. T. Rep. N. S. 18, 45 Wkly. Rep. 284.

50. Hanson *v.* Worthington, 12 Md. 418; Worth *v.* McAden, 21 N. C. 199.

51. *Connecticut.*— Solomon *v.* Wixon, 27 Conn. 520; Ayres *v.* Weed, 16 Conn. 291.

Illinois.— Ayres *v.* Clinefelter, 20 Ill. 465.

Iowa.— *In re* Van Vleck, 123 Iowa 89, 98 N. W. 557.

Kentucky.— Muldrow *v.* Fox, 2 Dana 74.

New York.— Beekman *v.* Bonsor, 23 N. Y. 298, 80 Am. Dec. 269.

North Carolina.— Wood *v.* Sparks, 18 N. C. 389; Marr *v.* Peay, 6 N. C. 84, 5 Am. Dec. 521.

South Carolina.— Uldrick *v.* Simpson, 1 S. C. 283.

Tennessee.— See also Drane *v.* Bayliss, 1 Humphr. 174, holding that under the Tennessee statute the failure of the executor of an executor to give bond for the administration of the first testator's estate was a renunciation of his executorship of that estate, although he gave bond for the administration of the estate of his own testator.

Virginia.— Thornton *v.* Winston, 4 Leigh 152.

Wisconsin.— Finch *v.* Houghton, 19 Wis. 149.

See 22 Cent. Dig. tit. "Executors and Administrators," § 37.

Where a person named executor and trustee qualifies in one capacity only it is presumed that he declines in the other. Deering *v.* Adams, 37 Me. 264; Williams *v.* Cushing, 34 Me. 370.

The Iowa statute providing that if a person nominated as executor refuses to accept or neglects to appear within ten days after his appointment the office shall be vacant has no application to the right to appointment of one who was nominated but who had never been appointed. *In re* Van Vleck, 123 Iowa 89, 98 N. W. 557.

Circumstances not showing renunciation.— Acting as administrator under due appointment of the court is not to be deemed renunciation of the executorship under a will, should such a will be afterward proved (Taylor *v.* Tibbatts, 13 B. Mon. (Ky.) 177), nor is filing a caveat or otherwise opposing the probate of a will equivalent to a renunciation (Gaither *v.* Gaither, 23 Ga. 521; *In re* Maxwell, 3 N. J. Eq. 611. *Contra*, Briggs *v.* Westerly Probate Ct., 23 R. I. 125, 50 Atl. 335, holding that where one named as a joint executor in a will does not accept but appeals from the order admitting the will to probate such acts are a constructive declination of the trust, and authorize the appointment of the other executor alone).

52. By persons entitled to administer see *infra*, II, B, 4, b.

53. *California.*— *In re* True, 120 Cal. 352, 52 Pac. 815.

Kentucky.— Taylor *v.* Tibbatts, 13 B. Mon. 177.

New York.— Matter of Baldwin, 27 N. Y. App. Div. 506, 50 N. Y. Suppl. 872 [appeal *dismissed* in 158 N. Y. 713, 53 N. E. 218]; *In re* Cornell, 17 Misc. 468, 41 N. Y. Suppl. 255; Robertson *v.* McGeoch, 11 Paige 640; Casey *v.* Gardiner, 4 Bradf. Surr. 13.

tion, not only has the designated executor been excused from the office but another has been appointed and qualified instead, his election once made is for the time being irrevocable,[54] although a fresh opportunity to accept the office is afforded him whenever a vacancy occurs, especially should a new state of things arise, as in case of the death, resignation, or removal of the person appointed in his stead.[55]

B. Administrators — 1. Intestacy a Requisite to Appointment. There may of course be a grant of administration with the will annexed,[56] and the law also provides for various kinds of special administration which recognize the existence or possible existence of a valid will;[57] but it is a necessary prerequisite to a grant of ordinary administration on the estate of a decedent that he should have died intestate.[58] That fact is ordinarily proved by showing that no will can be found,[59] but such a determination does not preclude any party in interest from subsequently instituting proceedings to establish a will.[60] A grant of administration as in case of intestacy, where the decedent left a valid will which was not known of at the time, but is afterward produced and probated, is voidable only and not void;[61] but general letters of administration granted during the pendency of a

United States.— *In re* Benton, 30 Fed. Cas. No. 18,234, 2 Hayw. & H. 315.

England.— Thompson *v.* Dixon, 3 Add. Eccl. 272; McDonnell *v.* Prendergast, 3 Hagg. Eccl. 212.

See 22 Cent. Dig. tit. "Executors and Administrators," § 39.

Retraction may be oral if renunciation was. Matter of Baldwin, 27 N. Y. App. Div. 506, 50 N. Y. Suppl. 872 [appeal *dismissed* in 158 N. Y. 713, 53 N. E. 218].

Acceptance of retraction discretionary with surrogate.— Matter of Baldwin, 27 N. Y. App. Div. 506, 50 N. Y. Suppl. 872 [appeal *dismissed* in 158 N. Y. 713, 53 N. E. 218].

54. Matter of Baldwin, 27 N. Y. App. Div. 506, 50 N. Y. Suppl. 872; Trow *v.* Shannon, 59 How. Pr. (N. Y.) 214; Briggs *v.* Westerly Probate Ct., 23 R. I. 125, 50 Atl. 335, holding that where the probate court has issued letters testamentary to one of two joint executors on the other declining the trust, its authority to appoint is thereby exhausted and a subsequent petition by the declining executor cannot be entertained); *In re* Thornton, 1 Add. Eccl. 273. And see Jewett *v.* Turner, 172 Mass. 496, 52 N. E. 1082.

55. *New Jersey.*— *In re* Maxwell, 3 N. J. Eq. 611.

New York.— Codding *v.* Newman, 63 N. Y. 639; *In re* Cornell, 17 Misc. 468, 41 N. Y. Suppl. 255; Judson *v.* Gibbons, 5 Wend. 224; Robertson *v.* McGeoch, 11 Paige 640; Dempsey's Will, Tuck. Surr. 51.

North Carolina.— Davis *v.* Inscoe, 84 N. C. 396.

Pennsylvania.— Gallagher *v.* Gallagher, 6 Watts 473.

Rhode Island.— Perry *v.* De Wolf, 2 R. I. 103.

England.— *In re* Stiles, [1898] P. 12, 67 L. J. P. & Adm. 23, 78 L. T. Rep. N. S. 82, 46 Wkly. Rep. 444; *In re* Wheelwright, 3 P. D. 71, 45 L. J. P. & Adm. 87, 39 L. T. Rep. N. S. 127, 27 Wkly. Rep. 139.

See 22 Cent. Dig. tit. "Executors and Administrators," § 39.

Contra.— Thornton *v.* Winston, 4 Leigh (Va.) 152.

Discretion of court.— An application for letters testamentary by an executor who formerly renounced but who revokes such renunciation is addressed to the discretion of the surrogate and is properly denied where the person applying is aged and infirm and the estate is large and complicated. *In re* Cornell, 17 Misc. (N. Y.) 468, 41 N. Y. Suppl. 255.

Right to possession of assets.— The grant of letters to a succeeding executor entitles him to the possession of the assets of the estate of his testator, including those in the hands of the prior executrix at the date of her death. Kinney *v.* Keplinger, 172 Ill. 449, 50 N. E. 131 [*reversing* 71 Ill. App. 334].

56. See *infra*, II, C.

57. See *infra*, II, E.

58. *In re* Davis, 11 Mont. 196, 28 Pac. 645; Bulkley *v.* Redmond, 2 Bradf. Surr. (N. Y.) 281; Slade *v.* Washburn, 25 N. C. 557; Graysbook *v.* Fox, Plowd. 276.

Where decedent left a document purporting to be a will it has been held in New York that administration cannot be granted until the question of the validity of the will has been disposed of even though the next of kin declare their purpose not to offer it for probate. Matter of Taggart, 16 N. Y. Suppl. 514, Pow. Surr. (N. Y.) 8. But in England the settlement of the estate cannot be thus retarded, for if the validity of an alleged will is disputed and those interested therein decline to take steps to establish its validity the court may grant administration to the next of kin as in cases of intestacy. *In re* Dennis, [1899] P. 191, 68 L. J. P. & Adm. 67; *In re* Quick, [1899] P. 187, 68 L. J. P. & Adm. 64, 80 L. T. Rep. N. S. 808.

59. Bulkley *v.* Redmond, 2 Bradf. Surr. (N. Y.) 281.

60. Bulkley *v.* Redmond, 2 Bradf. Surr. (N. Y.) 281.

61. Sands *v.* Hickey, 135 Ala. 322, 33 So. 827; Floyd *v.* Clayton, 67 Ala. 265; Broughton *v.* Bradley, 34 Ala. 694, 73 Am. Dec. 474; Shephard *v.* Rhodes, 60 Ill. 301; Schluter *v.* Bowery Sav. Bank, 117 N. Y. 125, 22 N. E.

contest respecting the probate of an alleged will are utterly null and void,[62] and the same is necessarily true where such letters are issued after a will has been admitted to probate and an executor qualified, and while the action of the court in respect to the will remains unrevoked and unreversed.[63]

2. Persons Entitled to Appointment — a. Statutory Regulation. The right of particular persons to administer on the estate of a decedent and the priority of right between two or more persons who ask for the issuance of letters to them are matters which are entirely regulated by statute; and the grant of administration must be to the persons in the order and under the contingencies provided by the local statute,[64] the court having as a rule no discretion in the matter,[65] save where there are two or more persons equally entitled under the

572, 15 Am. St. Rep. 494, 5 L. R. A. 541. See *infra*, II, N, 4.

Persons acting in good faith are protected in dealing with the administrator prior to the revocation of his letters. Schluter *v.* Bowery Sav. Bank, 117 N. Y. 125, 22 N. E. 572, 15 Am. St. Rep. 494, 5 L. R. A. 541. See *infra*, II, N, 11, f.

62. Slade *v.* Washburn, 25 N. C. 557, and cannot be supported as a grant of administration *pendente lite*. See also *In re* Davis, 11 Mont. 196, 28 Pac. 645, holding that where an alleged will was presented for probate and a contest over the same commenced after an order had been made directing letters of administration to issue to a certain person who failed to qualify, another person should not be appointed general administrator during the pendency of the contest over the will.

Where an alleged will has been finally adjudged invalid a considerable time before and the condition of the estate is not adapted to a special or limited administration the court of probate may rightfully grant general administration, although the judgment annulling the will has not been certified to it according to statutory requirements. Green *v.* Clark, 24 Vt. 136.

63. Ryno *v.* Ryno, 27 N. J. Eq. 522. See also Landers *v.* Stone, 45 Ind. 404. But see Watson *v.* Glover, 77 Ala. 323, 325, where upon its being made to appear that letters of administration had been granted to a certain person upon his representation that the decedent died intestate whereas the fact was that the last will and testament of the decedent had previously been admitted to probate the court said: "The grant was voidable, and it was both the right and duty of the Probate Court to revoke such letters, as having been irregularly and improvidently granted."

64. *Georgia.*— Watson *v.* Warnock, 31 Ga. 694.

Maryland.— Dalrymple *v.* Gamble, 66 Md. 298, 7 Atl. 683, 8 Atl. 468.

Michigan.— Breen *v.* Pangborn, 51 Mich. 29, 16 N. W. 188.

New York.— Sweezy *v.* Willis, 1 Bradf. Surr. 495.

Virginia.— Thornton *v.* Winston, 4 Leigh 152.

Washington.— McLean *v.* Roller, 33 Wash. 166, 73 Pac. 1123.

See 22 Cent. Dig. tit. "Executors and Administrators," § 44.

The situation at the time of the application for administration and not that at the time of the intestate's death governs in determining who is entitled to administer. Griffith *v.* Coleman, 61 Md. 250; *In re* Sprague, 125 Mich. 357, 84 N. W. 293.

Where a decedent left a valid will which did not name any executor he did not die intestate within the meaning of a statute prescribing the order in which persons were entitled to administer upon the estate of a person dying intestate, and hence the court in granting administration with the will annexed was not limited to the order prescribed in such statute. *In re* Barton, 52 Cal. 538, where administration with the will annexed was under such circumstances granted to the public administrator.

The law of the place where the estate is to be administered and not the law of the domicile of the decedent governs in determining who is entitled to administer. Public Administrator *v.* Hughes, 1 Bradf. Surr. (N. Y.) 125.

Necessity for interest.— In order to entitle one to letters of administration he must have some interest in the estate either as heir or creditor or as assignee of an heir or creditor which would entitle him to recover something in the distribution of the estate, or in an action against the estate. Brann's Estate, 7 Kulp (Pa.) 369.

Grant to wrong person not void.— Wilson *v.* Frazier, 2 Humphr. (Tenn.) 30.

Attorney of person entitled.— Where the person solely entitled to a grant of administration was resident in the country and able to take it himself the court declined to decree it to his attorney for his benefit. *In re* Burch, 30 L. J. P. & M. 171, 4 L. T. Rep. N. S. 451, 2 Swab. & Tr. 139, 9 Wkly. Rep. 639.

Where the verified application shows the applicant to be entitled to letters, the proceeding being purely *ex parte*, letters should be granted. *Ex p.* Jenkins, 25 Ind. App. 532, 58 N. E. 560, 81 Am. St. Rep. 114.

65. *Indiana.*— Hayes *v.* Hayes, 75 Ind. 395.

Maryland.— Owings *v.* Bates, 9 Gill 463.

Missouri.— State *v.* Collier, 62 Mo. App. 38.

Nevada.— *In re* Nickal, 21 Nev. 462, 34 Pac. 250.

New York.— Coope *v.* Lowerre, 1 Barb. Ch. 45; Matter of Williams, 5 Dem. Surr. 292.

Pennsylvania.— *In re* Swart, 189 Pa. St.

statute,[66] or where a question arises as to the fitness or qualifications of the person or persons primarily entitled to the appointment,[67] or where the preference is given to two or more persons or classes of persons in the alternative. Where all the persons who under the statute have a right to administer have renounced or otherwise lost their right, the court has a considerable discretion in the appointment of the administrator.[68]

b. Husband. The almost universal rule is that where it becomes necessary or proper to appoint an administrator of the estate of a deceased married woman, her surviving husband is entitled to the appointment in preference to all other persons.[69] Both in England and the United States a marriage voidable only and neither void nor annulled before the wife died leaves the surviving husband entitled to administer; nor is his right affected by a mere judicial decree of sepa-

71, 41 Atl. 1000; *In re* Guldin, 81* Pa. St. 362. But *compare* Spencer's Estate, 7 Pa. Dist. 216.

See 22 Cent. Dig. tit. "Executors and Administrators," § 43.

"Special circumstances" are recognized in England as affording ground for departure from the rule of priority. *In re* Keane, 1 Hagg. Eccl. 692.

66. *Alabama.*— Davis *v.* Swearingen, 56 Ala. 539.

Kentucky.— Halley *v.* Haney, 3 T. B. Mon. 141.

Louisiana.— Boudreaux's Succession, 42 La. Ann. 296, 7 So. 453; Martin's Succession, 13 La. Ann. 557, holding that a judge is not bound to appoint two beneficiary heirs, even with equal claims, administrators of a succession, the law leaving it discretionary with him to appoint one or two, regard being had to the solidity of the appointee.

Michigan.— See Rajnowski *v.* Detroit, etc., R. Co., 74 Mich. 20, 41 N. W. 847, holding that where both parents are equally interested in the fund recoverable under a local statute for negligently killing a child the mother is entitled to administration equally with the father and her appointment as administratrix is not objectionable.

Pennsylvania.— Lœffler's Estate, 8 Kulp 199.

See 22 Cent. Dig. tit. "Executors and Administrators," § 43; and *infra*, II, B, 2, d, (II).

Choice limited to those who apply for administration.— Halley *v.* Haney, 3 T. B. Mon. (Ky.) 141.

Selection by jury.— Upon an appeal to the superior court from the court of ordinary, the evidence being such as to authorize a finding in favor of either of two brothers seeking letters of administration upon their father's estate, the selection is a matter for the jury. Jackson *v.* Jackson, 101 Ga. 132, 28 S. E. 608.

67. See *In re* Nickal, 21 Nev. 462, 34 Pac. 250; Matter of Williams, 5 Dem. Surr. (N. Y.) 292; Spencer's Estate, 7 Pa. Dist. 216, 20 Pa. Co. Ct. 657; and *infra*, II, B, 3.

68. Davis *v.* Swearingen, 56 Ala. 539; Byrd *v.* Gibson, 1 How. (Miss.) 568.

69. *California.*— *In re* Dow, 132 Cal. 309, 64 Pac. 402; Carmody's Estate, 88 Cal. 616, 26 Pac. 373.

Georgia.— Miller *v.* Reinhart, 18 Ga. 239.

Illinois.— O'Rear *v.* Crum, 135 Ill. 294, 25 N. E. 1097.

Kentucky.— Hart *v.* Soward, 12 B. Mon. 391.

Maryland.— Willis *v.* Jones, 42 Md. 422; Hubbard *v.* Barcas, 38 Md. 175.

Michigan.— Osmun *v.* Galbraith, 131 Mich. 577, 92 N. W. 101.

Missouri.— *In re* Hill, 102 Mo. App. 617, 77 S. W. 110.

Montana.— *In re* Stewart, 18 Mont. 595, 46 Pac. 806.

New Hampshire.— Probate Judge *v.* Chamberlain, 3 N. H. 129.

New Jersey.— Donnington *v.* Mitchell, 2 N. J. Eq. 243.

New York.— Dewey *v.* Goodenough, 56 Barb. 54; Shumway *v.* Cooper, 16 Barb. 556; Gilman *v.* McArdle, 49 N. Y. Super. Ct. 463; McCosker *v.* Golden, 1 Bradf. Surr. 64.

North Carolina.— Hoppiss *v.* Eskridge, 37 N. C. 54.

Pennsylvania.— Clark *v.* Clark, 6 Watts & S. 85; Biggert *v.* Biggert, 7 Watts 563; Brittain's Appeal, 1 Am. L. J. 426.

Rhode Island.— Battey *v.* Mathewson, 23 R. I. 474, 51 Atl. 102; Weaver *v.* Chace, 5 R. I. 356.

Tennessee.— Fairbanks *v.* Hill, 3 Lea 732.

Texas.— Truesdale *v.* Putegnat, (Civ. App. 1900) 59 S. W. 307.

Washington.— *In re* Sutton, 31 Wash. 340, 71 Pac. 1012.

West Virginia.— Bridgman *v.* Bridgman, 30 W. Va. 212, 3 S. E. 580.

England.— Copeland *v.* Simister, [1893] P. 16, 62 L. J. P. & Adm. 38, 68 L. T. Rep. N. S. 257, 1 Reports 469, 41 Wkly. Rep. 269.

See 22 Cent. Dig. tit. "Executors and Administrators," § 45.

Under the codes of some states the husband is not entitled to administer on his wife's estate to the exclusion of her children also beneficially entitled therein. Randall *v.* Shrader, 17 Ala. 333; Goodrich *v.* Treat, 3 Colo. 408; Williamson's Succession, 3 La. Ann. 261. See *infra*, II, B, 2, d, (I).

The wife's will, when limited in operation, calls for a limited probate and administration of the rest belongs to her husband. Stevens *v.* Bagwell, 15 Ves. Jr. 139, 33 Eng. Reprint 707.

ration from bed and board; but where a divorce is absolute or where the marriage is void or else annulled during the lifetime of the spouses the survivor has no right to administer.[70]

c. Widow. The right of a widow to administer upon the estate of her deceased husband is not so absolute as that of a husband to administer on the estate of his deceased wife; for while under some statutes the widow is entitled to administer in preference to the next of kin, the right is usually given in the alternative to the widow or next of kin, although as a matter of practice the widow is usually accorded the preference if she is a suitable person to perform the trust.[71] The widow should, however, be the legal and *bona fide* surviving

Husband may be excluded for misconduct. Coover's Appeal, 52 Pa. St. 427; Cooper *v.* Maddox, 2 Sneed (Tenn.) 135; *In re* Ardern, [1898] P. 147, 67 L. J. P. & Adm. 70, 78 L. T. Rep. N. S. 536. See *infra*, II, B, 3.

Representative of husband.— It has been held that where a husband survives his wife but afterward dies, his executor is entitled to administration upon the estate of the wife. Matter of Harvey, 3 Redf. Surr. (N. Y.) 214. But see Matter of O'Neil, 2 Redf. Surr. (N. Y.) 544, holding the contrary in the case of an administrator.

70. *Alabama.*— Williams *v.* McConico, 27 Ala. 572.

Iowa.— Read *v.* Howe, 13 Iowa 50.

New York.— *In re* Ensign, 103 N. Y. 284, 8 N. E. 544, 57 Am. Rep. 717; Wyles *v.* Gibbs, 1 Redf. Surr. 382; White *v.* Lowe, 1 Redf. Surr. 376; Davis *v.* Brown, 1 Redf. Surr. 259.

Ohio.— Garretson *v.* Garretson, 4 Ohio Cir. Ct. 336, 2 Ohio Cir. Dec. 581.

Pennsylvania.— Zerfass' Appeal, 135 Pa. St. 522, 19 Atl. 1056; Parker's Appeal, 44 Pa. St. 309; Clark *v.* Clark, 6 Watts & S. 85; Altemus' Case, 1 Ashm. 49.

Washington.— *In re* Smith, 4 Wash. 702, 30 Pac. 1059, 17 L. R. A. 573.

England.— Copeland *v.* Simister, [1893] P. 16, 62 L. J. P. & Adm. 38, 68 L. T. Rep. N. S. 257, 1 Reports 469, 41 Wkly. Rep. 269. But see *In re* Stephenson, L. R. 1 P. 287, 36 L. J. P. & M. 20, 15 L. T. Rep. N. S. 296, 15 Wkly. Rep. 286, where a married woman who lived separate from her husband and had obtained a protection order died leaving the husband and a minor son surviving and the court granted administration to a guardian elected by the son without citing the father.

See 22 Cent. Dig. tit. "Executors and Administrators," § 45.

A decree of divorce nisi or otherwise incomplete does not deprive the husband of his right to administer. Barry's Succession, 47 La. Ann. 838, 17 So. 307; Nusz *v.* Grove, 27 Md. 391.

Property acquired after separation.— Where a married woman was deserted by her husband and obtained a protection order by reason of such desertion and afterward died intestate during the life of her husband the court decreed that letters of administration limited to such property as she had acquired or become possessed of since the desertion be granted to one of her next of kin. *In re* Worman, 1 Swab. & Tr. 513.

71. *Alabama.*— Curtis *v.* Williams, 33 Ala. 570; Dunham *v.* Roberts, 27 Ala. 701; Brennan *v.* Harris, 20 Ala. 185.

Arkansas.— Grantham *v.* Williams, 1 Ark. 270.

California.— *In re* Dow, 132 Cal. 309, 64 Pac. 402; Carmody's Estate, 88 Cal. 616, 26 Pac. 373.

Louisiana.— Barber's Succession, 52 La. Ann. 957, 27 So. 361; Block's Succession, 6 La. Ann. 810. But see Coste's Succession, 43 La. Ann. 144, 9 So. 62 (holding that in a contest for administration the mother has preference over the wife); Richardson *v.* Hook, 4 La. 568 (holding that the widow cannot be appointed curatrix of her husband's succession and be allowed to administer it when the mother and sisters of the husband present themselves as heirs and claim administration and acceptance of the estate with benefit of inventory); and *infra*, II, B, 2, d, (I).

Massachusetts.— Cobb *v.* Newcomb, 19 Pick. 336; McGooch *v.* McGooch, 4 Mass. 348.

Mississippi.— Pendleton *v.* Pendleton, 6 Sm. & M. 448.

Missouri.— *In re* Hill, 102 Mo. App. 617, 77 S. W. 110.

Montana.— *In re* Stewart, 18 Mont. 595, 46 Pac. 806.

Nebraska.— Atkinson *v.* Hasty, 21 Nebr. 663, 33 N. W. 206.

New York.— Lathrop *v.* Smith, 24 N. Y. 417.

Ohio.— Garretson *v.* Garretson, 4 Ohio Cir. Ct. 336, 2 Ohio Cir. Dec. 581 [*affirming* Ohio Prob. 187].

Pennsylvania.—*In re* Gyger, 65 Pa. St. 311.

South Carolina.— McBeth *v.* Hunt, 2 Strobh. 335.

Tennessee.— Rodes *v.* Boyers, 106 Tenn. 434, 61 S. W. 776; Swan *v.* Swan, 3 Head 163. See also Wilson *v.* Frazier, 2 Humphr. 30.

West Virginia.—Bridgman *v.* Bridgman, 30 W. Va. 212, 3 S. E. 580.

England.— Webb *v.* Needham, 1 Add. Eccl. 494; Widgery *v.* Tepper, 5 Ch. D. 516; Goddard *v.* Cressonier, 3 Phillim. 637; Wells *v.* Brook, 25 Wkly. Rep. 463. But *compare In re* Rogerson, 2 Curt. Eccl. 656.

See 22 Cent. Dig. tit. "Executors and Administrators." § 45.

But see Govane *v.* Govane, 1 Harr. & M. (Md.) 346, holding that administration will be granted to natural children who are residuary legatees in preference to the widow.

Remarriage of the widow since her husband's death is *per se* no valid objection to

wife, and not the partner of a void or annulled marriage nor the survivor of a conjugal pair who have been absolutely and finally divorced.[72]

d. Next of Kin — (i) *In General.* Apart from the claim of a surviving spouse, the right to administer belongs usually to the next of kin of the decedent, that is to say those persons who are entitled under the statute of distributions to the decedent's property, the theory of the law being that the right to administer should follow the interest or right of property in the estate.[73]

her claim to administer, but if the children unite against her they ought in fairness to have at all events a coadministrator appointed. Webb *v.* Needham, 1 Add. Eccl. 494.

Disagreements between a widow and her husband during his lifetime and with other members of the family after his death are insufficient to deprive her of her right to administer his estate. Scanlon's Estate, 2 Pa. Dist. 742, 12 Pa. Co. Ct. 339.

A contest over the necessity of administration on the ground that no debt existed against the estate does not defeat the right of a surviving wife to priority over creditors, although the existence of the debt is established. Truesdale *v.* Putegnat, (Tex. Civ. App. 1900) 59 S. W. 307.

The fact that a wife lived apart from her husband for a few years previous to his death without objection on his part does not amount to desertion nor deprive her of her statutory preference in the administration of her husband's estate. Ross' Estate, 1 Pa. Dist. 744, 11 Pa. Co. Ct. 601.

When next of kin preferred.— Where it appears that there are minors concerned, that the heirs of age are from different marriages, that there are debts due by and to the succession, that the heirs of age and the widow do not agree, and that there exists property which must be under control of one person for its preservation and notes the payment of which may have to be judicially enforced, the preference in appointing an administrator should be given to the heirs of age present, over the widow. Romero's Succession, 42 La. Ann. 894, 8 So. 632.

Misconduct or other cause of unsuitableness for the trust may debar the widow from the appointment. Nusz *v.* Grove, 27 Md. 391; Odiorne's Appeal, 54 Pa. St. 175, 93 Am. Dec. 683 (desertion); *In re* Stevens, [1898] P. 126, 67 L. J. P. & Adm. 60, 78 L. T. Rep. N. S. 389 (dissipation and eloping); *In re* Davies, 2 Curt. Eccl. 628 (adultery after divorce from bed and board). See *infra*, II, B, 3.

72. Estill *v.* Rogers, 1 Bush (Ky.) 62; *In re* Ensign, 103 N. Y. 284, 8 N. E. 544, 57 Am. Rep. 717; O'Gara *v.* Eisenlohr, 38 N. Y. 296.

A widow's right is not defeated by a void divorce (Platt's Appeal, 80 Pa. St. 501), or one which is void in the state of their domicile (Andrews *v.* Andrews, 176 Mass. 92, 57 N. E. 333; *In re* House, 14 N. Y. Suppl. 275, 20 N. Y. Civ. Proc. 130, 2 Connoly Surr. (N. Y.) 524), or one which has been vacated and annulled even after the husband's death (Boyd's Appeal, 38 Pa. St. 246).

Voidable marriage.—The nullity of a merely voidable marriage must be pronounced by a court of competent jurisdiction before the fact of its invalidity can be taken advantage of in any proceeding. If not declared void it remains good and legal for all purposes and either party surviving the other has a prior right under the statute to letters of administration. White *v.* Lowe, 1 Redf. Surr. (N. Y.) 376.

Valid marriage after slave marriage see Randall's Succession, 26 La. Ann. 163.

Second marriage while former wife living.— Where a marriage was duly solemnized in Texas according to law while Texas was subject to the laws of Mexico, but the husband had a former wife living in Missouri, of which fact the second wife was ignorant until after the death of the husband, such second wife was entitled to administration to the exclusion of the son of her husband by the first marriage. Smith *v.* Smith, 1 Tex. 621, 46 Am. Dec. 121.

73. *Alabama.*— Brennan *v.* Harris, 20 Ala. 185.

Georgia.— Leverett *v.* Dismukes, 10 Ga. 98; Clay *v.* Jackson, T. U. P. Charlt. 71.

Indiana.— See Hayes *v.* Hayes, 75 Ind. 395.

Kentucky.— Hawkins *v.* Robinson, 3 T. B. Mon. 143; Halley *v.* Haney, 3 T. B. Mon. 141.

Louisiana.— Under Civ. Code, arts. 1042, 1121, the beneficiary heir of age, present or represented in the state, is to be preferred to the surviving husband or wife in the appointment of an administrator. Bulliard's Succession, 111 La. 186, 35 So. 508.

Massachusetts.— Cobb *v.* Newcomb, 19 Pick. 336.

Missouri.— *In re* Hill, 102 Mo. App. 617, 77 S. W. 110.

Nebraska.— Atkinson *v.* Hasty, 21 Nebr. 663, 33 N. W. 206.

North Carolina.— Carthey *v.* Webb, 6 N. C. 268.

Pennsylvania.— Cantlin's Estate, 2 Pa. Dist. 522; Snowden's Estate, 25 Pittsb. Leg. J. 81. See also Gause's Estate, 1 Chest. Co. Rep. 105.

Tennessee.— Fitzgerald *v.* Smith, (Sup. 1904) 78 S. W. 1050.

Virginia.— Thornton *v.* Winston, 4 Leigh 152.

See 22 Cent. Dig. tit. "Executors and Administrators," § 44.

Marriage relation distinguished.— Neither husband nor wife can be regarded as next of kin one to the other by virtue of the marriage tie alone, and this reservation extends to all marriage connections, since common blood is the test of consanguinity. Whitaker *v.* Whitaker, 6 Johns. (N. Y.) 112; Watt *v.* Watt, 3 Ves. Jr. 244, 30 Eng. Reprint 992.

(II) *Preferences.*[74] The right to administration arising from kinship being usually dependent upon the right to share in the distribution of the decedent's estate,[75] the nearest of kin to the decedent are as a rule preferred to those more remotely related.[76] From among two or more persons equally akin to the deceased who seek the appointment the court may choose the most suitable, judging fairly as to each one's fitness for the trust and exercising a sound discretion in the interests of the distributees generally.[77] The policy of some states distinctly places the male next of kin before the female for receiving the appointment.[78] In some jurisdictions a *feme sole* is preferred to a married

A distributee must be preferred to a creditor as administrator when they both apply together. Haxall *v.* Lee, 2 Leigh (Va.) 267. See also Barber's Succession, 52 La. Ann. 957, 27 So. 361; Matter of Barr, 38 Misc. (N. Y.) 355, 77 N. Y. Suppl. 935, holding that a creditor has no right to administer if there are any next of kin.

In cases of adoption of illegitimacy the peculiar rules of distribution as established by statute usually but not necessarily determine the right to administer.

California.— *In re* Pico, 56 Cal. 413.

New Jersey.— *In re* Potter, 8 N. J. L. J. 137, holding that an illegitimate *feme covert*, entitled under the statute to all her deceased mother's estate, should be preferred in the administration to the decedent's non-resident brother.

New York.— Ferrie *v.* Public Administrator, 3 Bradf. Surr. 249; Public Administrator *v.* Hughes, 1 Bradf. Surr. 125, holding that under the New York statute giving the right to administer to the next of kin entitled to share in the distribution of the estate, where the intestate was domiciled in a foreign country, the law of the domicile determining who succeeds to the estate also determines who has that interest which by the New York law is a necessary qualification to administer, and that hence where an illegitimate person domiciled in England died intestate and unmarried leaving assets in New York, as there was by the law of England an absolute obstruction in the course of succession, she having no lineal descendants and no lawful ancestors or collateral relatives, a son of the decedent's mother was not entitled to letters of administration.

Pennsylvania.—McCully's Estate, 13 Phila. 296, holding that the next of kin is entitled to preference over an adopted child with no right in the estate.

England.— *In re* Goodman, 17 Ch. D. 266, 50 L. J. Ch. 425, 44 L. T. Rep. N. S. 527, 29 Wkly. Rep. 586.

A stepson of an intestate has no right to administer on his estate, that right passing to the next of kin. Pfarr's Estate, 38 Misc. (N. Y.) 223, 77 N. Y. Suppl. 326.

Assignee.— Where the sole next of kin of an intestate has renounced her right to administration and assigned her rights in the property of the decedent to a certain person, letters of administration may be granted to such person. *In re* Quilliam, 68 L. J. P. & Adm. 17, 79 L. T. Rep. N. S. 472. See also Osmun *v.* Galbraith, 131 Mich. 577, 92 N. W. 101, holding that the trustee in bankruptcy of a person having an interest in an unadministered estate may be appointed administrator.

74. See *infra*, II, B, 3.

75. *In re* Eggers, 114 Cal. 464, 46 Pac. 380; Matter of Seymour, 33 Misc. (N. Y.) 271, 68 N. Y. Suppl. 638; Matter of Haug, 29 Misc. (N. Y.) 36, 60 N. Y. Suppl. 382; Rapp's Estate, 3 Pa. Dist. 521. But *compare* Lathrop *v.* Smith, 24 N. Y. 417; Butler *v.* Perrott, 1 Dem. Surr. (N. Y.) 9.

In a contest between relatives whose priority is not settled by the statute the single point to be ascertained is who will be entitled to the surplus of the personal estate and that person is entitled to administer. Sweezey *v.* Willis, 1 Bradf. Surr. (N. Y.) 495.

76. Anderson *v.* Potter, 5 Cal. 63; *In re* Hawley, 37 Misc. (N. Y.) 667, 76 N. Y. Suppl. 461; Matter of Williams, 5 Dem. Surr. (N. Y.) 292; Churchill *v.* Prescott, 2 Bradf. Surr. (N. Y.) 304; Carthey *v.* Webb, 6 N. C. 268; McClellan's Appeal, 16 Pa. St. 110.

Preferences between particular relations.— A grandparent is preferred to an uncle or aunt. Matter of Afflick, 3 MacArthur (D. C.) 95; Blackborough *v.* Davies, 1 Ld. Raym. 684. If one dies leaving parents but no children the parents are of the first degree by reckoning and their rights are accordingly superior to those of brothers and sisters who stand in the second degree. Brown *v.* Hay, 1 Stew. & P. (Ala.) 102. When the widow is incompetent by reason of her minority a child of the decedent *in ventre sa mere* will deprive the father of the decedent of a share in the personal estate and consequently of the right to letters. Fulmer's Estate, 2 C. Pl. (Pa.) 65. A daughter has been preferred to the son of the eldest son of intestate. Lee *v.* Sedgwick, 1 Root (Conn.) 52.

77. Taylor *v.* Delancy, 2 Cai. Cas. (N. Y.) 143; Moore *v.* Moore, 12 N. C. 352; Bridgman *v.* Bridgman, 30 W. Va. 212, 3 S. E. 580.

Moral fitness is to be regarded in a selection of individuals from the same class. McMahon *v.* Harrison, 6 N. Y. 443; Coope *v.* Lowerre, 1 Barb. Ch. (N. Y.) 45.

78. *California.*— *In re* Brundage, 141 Cal. 538, 75 Pac. 175; *In re* Coan, 132 Cal. 401, 64 Pac. 691.

Maryland.— Cook *v.* Carr, 19 Md. 1.

New Jersey.— *In re* Hill, 55 N. J. Eq. 764, 37 Atl. 952.

woman.[79] So also the older may properly be given a preference over the younger and less discreet, especially if the one be an adult and the other a minor.[80] One determining consideration as between next of kin in cases of doubt may be their relative extent of interest,[81] but another is the confidence reposed by kindred and hence it is not uncommon to appoint the one upon whom a majority of the parties in interest agree,[82] and the wishes of the person or persons having the largest amount of interest may in certain respects preponderate in the selection.[83] It has also been held that the person first seeking the appointment has some claim to precedence.[84]

e. Guardian or Trustee of Person Entitled. In some states where a person entitled to administration is a minor or incompetent, letters of administration may be granted to the guardian of such person.[85] But it is not necessary that the guardian should be appointed administrator,[86] and in general a *cestui que trust* if rational and competent is entitled rather than his trustee.[87]

New York.— *In re* Hawley, 37 Misc. 667, 76 N. Y. Suppl. 461.

Pennsylvania.— Lœffler's Estate, 8 Kulp 199.

See 22 Cent. Dig. tit. "Executors and Administrators," § 44.

Superior personal fitness may strengthen this preference. *In re* Hill, 55 N. J. Eq. 764, 37 Atl. 952.

An assignee of a daughter's interest in the estate acquires no greater right to administration than she had as against a son of the decedent. *In re* Brundage, 141 Cal. 538, 75 Pac. 175.

Joint letters to male and female.— Under the California statute providing that of several persons claiming and equally entitled to administer males must be preferred to females, an order appointing both son and daughter of deceased to administer her estate is error notwithstanding the fact that another section of the statute authorizes the court to grant letters to one or more of several persons equally entitled to the administration. *In re* Coan, 132 Cal. 401, 64 Pac. 691.

Other considerations, such as the minority or non-residence of the male next of kin, may control this rule. Wickwire *v.* Chapman, 15 Barb. (N. Y.) 302.

Brothers of the half blood take precedence over sisters of the whole blood where the code treats half-blood and whole-blood kindred alike. Matter of Moran, 5 Misc. (N. Y.) 176, 25 N. Y. Suppl. 702; Single's Appeal, 59 Pa. St. 55.

The discretion of the register will not be disturbed where he has granted letters to a niece and refuses to revoke them in favor of a nephew, it appearing that the niece, but for the disability of sex, is preëminently entitled to them. Spencer's Estate, 7 Pa. Dist. 216, 20 Pa. Co. Ct. 657.

Where male dissolute, etc.— Administration of an estate will be granted to a non-resident married daughter in preference to a dissolute, irresponsible, and dishonest son of the intestate, although a resident of the state. *In re* Selling, 2 N. Y. Suppl. 634.

79. Owings *v.* Bates, 9 Gill (Md.) 463; Smith *v.* Young, 5 Gill (Md.) 197; *In re* Curser, 89 N. Y. 401.

This applies to children of the decedent as well as to collaterals. Smith *v.* Young, 5 Gill (Md.) 197.

80. Owings *v.* Bates, 9 Gill (Md.) 463; *In re* Hill, 55 N. J. Eq. 764, 37 Atl. 952; Wickwire *v.* Chapman, 15 Barb. (N. Y.) 302.

Hence the minor's guardian is postponed. Sloane's Succession, 12 La. Ann. 610; Cottle *v.* Vanderheyden, 56 Barb. (N. Y.) 622; Levan's Appeal, 112 Pa. St. 294, 3 Atl. 804.

81. Leverett *v.* Dismukes, 10 Ga. 98.

82. Mandeville *v.* Mandeville, 35 Ga. 243; *In re* Stainton, L. R. 2 P. 212; Wetdrill *v.* Wright, 2 Phillim. 243; Budd *v.* Silver, 2 Phillim. 115.

83. McClellan's Appeal, 16 Pa. St. 110.

84. Baraud's Succession, 21 La. Ann. 666; Cordeux *v.* Trasler, 11 Jur. N. S. 587, 34 L. J. P. & M. 127, 4 Swab. & Tr. 48.

85. *California.*— Clough *v.* Borello, (1897) 48 Pac. 330; *In re* McLaughlin, 103 Cal. 429, 37 Pac. 410.

Louisiana.— Sutton's Succession, 20 La. Ann. 150; Vincent *v.* D'Aubigne, 19 La. Ann. 528; McKinney's Succession, 4 La. Ann. 25; Bryan *v.* Atchison, 2 La. Ann. 462; Arthur *v.* Cochran, 12 Rob. 41; Beale *v.* Walden, 11 Rob. 67; Hall *v.* Parks, 9 Rob. 138; Self *v.* Morris, 7 Rob. 24; Tildon *v.* Dees, 1 Rob. 407; Jacobs *v.* Tricou, 17 La. 104; Erwin *v.* Orillion, 6 La. 205.

Mississippi.— Langan *v.* Bowman, 12 Sm. & M. 715.

Montana.— See *In re* Stewart, 18 Mont. 595, 46 Pac. 806.

New Jersey.— Woodruff *v.* Snoover, (Prerog. 1900) 45 Atl. 980.

New York.— Blanck's Estate, 3 How. Pr. N. S. 58.

Rhode Island.— Mowry *v.* Latham, 20 R. I. 786, 40 Atl. 236, 341; Mowry *v.* Latham, 17 R. I. 480, 23 Atl. 13.

United States.— Thomas *v.* Tensas Police Jury, 14 Fed. 390, 4 Woods 167.

England.— *In re* Leese, [1894] P. 160, 63 L. J. P. & Adm. 124, 70 L. T. Rep. N. S. 810.

See 22 Cent. Dig. tit. "Executors and Administrators," § 48.

86. See Manson's Succession, 1 Rob. (La.) 235.

87. *In re* Thompson, 33 Barb. (N. Y.) 334.

f. Creditors. The statutes generally provide for the appointment of a creditor of the deceased as administrator where no application is made within a suitable time by those having legal priority or where the latter prove incompetent. Under some statutes the creditor first applying takes the precedence, but under others it is rather the largest or some principal creditor.[88] The reason

88. *Alabama.*— Curtis *v.* Williams, 33 Ala. 570; Brennan *v.* Harris, 20 Ala. 185.

Georgia.— Tanner *v.* Huss, 80 Ga. 614, 6 S. E. 18.

Illinois.— Rosenthal *v.* Prussing, 108 Ill. 128.

Indiana.— Bowen *v.* Stewart, 128 Ind. 507, 26 N. E. 168, 28 N. E. 73; Gale *v.* Corey, 112 Ind. 39, 13 N. E. 108, 14 N. E. 362; Brown *v.* King, 2 Ind. 520.

Louisiana.— Martin's Succession, 13 La. Ann. 557; Nicolas' Succession, 2 La. Ann. 97; Turner *v.* Kirkman, 11 La. 289; Chew *v.* Flint, 7 La. 395.

Massachusetts.— Stebbins *v.* Palmer, 1 Pick. 71, 11 Am. Dec. 146; Mitchel *v.* Lunt, 4 Mass. 654.

Michigan.— Carpenter *v.* Wood, 131 Mich. 314, 91 N. W. 162; Wilkinson *v.* Conaty, 65 Mich. 614, 32 N. W. 841; Aldrich *v.* Annin, 54 Mich. 230, 19 N. W. 964.

Nebraska.— Atkinson *v.* Hasty, 21 Nebr. 663, 33 N. W. 206.

Tennessee.— Fitzgerald *v.* Smith, (Sup. 1904) 78 S. W. 1050; Rodes *v.* Boyers, 106 Tenn. 434, 61 S. W. 776. See also Smiley *v.* Bell, Mart. & Y. 378, 17 Am. Dec. 813.

Texas.— Nickelson *v.* Ingram, 24 Tex. 630. But see Cain *v.* Haas, 18 Tex. 616, holding that a creditor as such has no special claim to the appointment.

Washington.— *In re* Sullivan, 25 Wash. 430, 65 Pac. 793, holding that where one creditor's claim is for sixty thousand dollars, and the claims of other creditors are each less than one hundred dollars, the former is entitled to administer as a "principal creditor."

West Virginia.— Bridgman *v.* Bridgman, 30 W. Va. 212, 3 S. E. 580.

England.— By English practice a creditor may take out administration on an intestate estate if none of the next of kin or others in legal priority do so, but this rule rests in custom and not statute law, and the court frequently selects another and larger creditor than the one applying. Maidman *v.* All Persons, 1 Phillim. 51.

See 22 Cent. Dig. tit. "Executors and Administrators," § 653.

But *compare* McCandlish *v.* Hopkins, 6 Call (Va.) 208.

One who has a cause of action against the decedent which by law survives is a creditor entitled to administration if the next of kin do not administer (Smith *v.* Sherman, 4 Cush. (Mass.) 408; Royce *v.* Burrell, 12 Mass. 395; Mitchel *v.* Lunt, 4 Mass. 654), but it is otherwise if the cause of action does not survive (Smith *v.* Sherman, 4 Cush. (Mass.) 408; Stebbins *v.* Palmer, 1 Pick. (Mass.) 71, 11 Am. Dec. 146).

The largest creditor is preferred in the court's discretion to one desired by the majority of the creditors and by the intestate's widow. *Ex p.* Ostendorff, 17 S. C. 22. See further Hoffman *v.* Gold, 8 Gill & J. (Md.) 79.

A relative who becomes sole creditor has a strong claim. Lentz *v.* Pilert, 60 Md. 296, 45 Am. Rep. 732.

Under the Georgia code which provides that "among creditors as a general rule, the one having the greatest interest will be preferred," it is error in a contest between two creditors of an insolvent estate for administration to exclude evidence showing that a large portion of the other creditors, some of whom hold claims of superior dignity to those of the creditors seeking administration, prefer the appointment of the applicant holding the smallest claim, for the language of the code implies that the rule of preference is not imperative but that other circumstances may be considered and the wishes of the majority of those in interest are material, especially the wishes of those who by reason of the superiority of their claims have the largest interest in the estate. Freeman *v.* Worrill, 42 Ga. 401.

Formal filing of claim not requisite.— *In re* Miller, 32 Nebr. 480, 49 N. W. 427.

The creditor should make affidavit and be prepared to prove his claim before the probate court as a prerequisite to obtaining the appointment. Aitkin *v.* Ford, 3 Hagg. Eccl. 193.

Payment of one claimant by another.— If during a contest for appointment one applicant receives from the other payment of his claims against the succession he is no longer a creditor and loses his right to be appointed. Rust *v.* Randolph, 5 Mart. (La.) 89.

A tender by the heirs of the amount of his claim deprives the creditor of his right to be appointed. Culley *v.* Mohlenbrock, 36 Ill. App. 84.

Where the claim is a doubtful one and must be established by parol evidence and expensive litigation the claimant's application for administration will be rejected. Bourgeois' Succession, 43 La. Ann. 247, 9 So. 34.

That claim would be barred if limitations were pleaded is no objection. *Ex p.* Caig, T. U. P. Charlt. (Ga.) 159; Coombs *v.* Coombs, L. R. 1 P. 288, 36 L. J. P. & M. 21, 15 Wkly. Rep. 286.

A creditor of an alleged distributee has no right as such to apply for letters of administration upon the personal estate of the intestate. *In re* Pitchlynn, 20 D. C. 55.

The holder of a promissory note of a married woman in the execution of which her husband did not join is, without evidence as to its consideration, such a creditor of her

why a creditor is selected under these circumstances is that should the estate be plainly inadequate for yielding a surplus over the debts the next of kin have comparatively but slight interest in settling it, while under no circumstances ought an honest creditor's claim to be lost for want of an administrator,[89] and indeed administration has been granted to a creditor in preference to the next of kin, where it has been made to appear that the estate of the decedent was insolvent or barely sufficient for the payment of debts.[90] One may be a creditor by representation, entitled to administer in certain cases,[91] and a claimant whose claim arises in strictness after the death of the intestate and yet in close connection with the last offices, like an undertaker, has been held entitled to administration.[92] A creditor will be preferred to a person not a creditor,[93] although the latter is supported in his application by some of the creditors.[94] The creditor appointed should be a suitable and competent person for the trust

estate as entitles him to assert a right to letters of administration thereon. Nickelson *v.* Ingram, 24 Tex. 630.

A person indebted to the estate of a decedent in a sum greater than his claim against the estate is not a "creditor" within the meaning of the Illinois statute so as to be entitled to be appointed administrator. *In re* Wilson, 80 Ill. App. 217.

Circumstances not showing applicant to be a creditor see Matter of Frye, 75 Hun (N. Y.) 402, 27 N. Y. Suppl. 14.

An unsuccessful applicant for letters of administration cannot thereafter be granted letters because of the fact that he has paid out his own money in seeking the appointment. State *v.* Woody, 20 Mont. 413, 51 Pac. 975.

Necessity of assets within jurisdiction.— A creditor will not be granted letters of administration to defeat the right of retainer of the next of kin unless he can show the existence of assets in the jurisdiction. A general allegation of information and belief as to the existence of assets is useless. *In re* Foy, 78 L. T. Rep. N. S. 49.

89. Stevens *v.* Gaylord, 11 Mass. 256; Elme *v.* Da Costa, 1 Phillim. 173.

90. Sturges *v.* Tufts, R. M. Charlt. (Ga.) 17. But *compare* Lynch *v.* Lively, 32 Ga. 575, holding that if the widow of an intestate, seeking the administration, join with herself in the application one of acknowledged probity and capacity having no personal interest in the estate but representing the wishes and interests of a portion of the creditors, they jointly will be preferred to a creditor having a large claim and sustained by other creditors, whether the estate be insolvent or not.

In cases of doubtful insolvency, depending upon the solvency of divers debtors of the intestate, or upon the validity of intestate's title to property held by him at the time of his death but claimed by strangers, or upon the validity of disputed claims against his estate, or like doubtful questions, insolvency should not be recognized as a sufficient ground of caveat against the claim of the heir at law to the administration. Lynch *v.* Lively, 32 Ga. 575, 579, where the court said, however: "We do not now rule that under all circumstances (e. g., the admitted insolvency of the intestate) the heir-at-law shall be preferred over a creditor in a contest for administration."

91. Vick's Succession, 19 La. Ann. 75 (holding that by the death of a creditor his universal legatee who is one of the forced heirs becomes a creditor in his stead); *Ex p.* Ostendorff, 17 S. C. 22; *In re* Lowe, 78 L. T. Rep. N. S. 566 (assignee of claim charged on estate); Downward *v.* Dickinson, 3 Swab. & Tr. 564 (assignee in bankruptcy of a creditor).

The treasurer of a county which has a claim against the estate for taxes may be appointed administrator. Bowen *v.* Stewart, 128 Ind. 507, 26 N. E. 168, 28 N. E. 73.

Representative as "largest creditor." — A person claiming as a trustee or fiduciary and not in his individual capacity is not entitled as "largest creditor" (Glenn *v.* Reed, 74 Md. 238, 24 Atl. 155), nor is the president of a corporation so preferred where the corporation is a creditor (Myers *v.* Cann, 95 Ga. 383, 22 S. E. 611. And see Holland *v.* Wheaton, 6 La. 443, 26 Am. Dec. 481).

Assignment after death.— Debts from a deceased person assigned after the death of the debtor will not constitute the assignee such a creditor as to entitle him to administration. Pearce *v.* Castrix, 53 N. C. 71.

92. Newcombe *v.* Beloe, L. R. 1 P. 314, 36 L. J. P. & M. 37, 16 L. T. Rep. N. S. 33 [*explaining In re* Fowler, 16 Jur. 894]. *Contra,* Sullivan's Estate, 25 Wash. 430, 65 Pac. 793.

Payment for burial clothes with the purpose of obtaining administration does not constitute a person making such payment a creditor so as to entitle him to appointment. *In re* Neubert, 58 S. C. 469, 36 S. E. 908.

93. Tanner *v.* Huss, 80 Ga. 614, 6 S. E. 18; Kaiser *v.* Hoffman, 18 La. 493.

A special agent or attorney of a creditor is not entitled to such a preference. Pitet's Succession, 9 La. Ann. 207; Chew *v.* Flint, 7 La. 395.

Resident creditor of non-resident intestate preferred to public administrator. Rosenthal *v.* Prussing, 108 Ill. 128.

94. Tanner *v.* Huss, 80 Ga. 614, 6 S. E. 18. But *compare* Brown *v.* King, 2 Ind. 520, holding that, where the largest creditor of an es-

as in other cases, and he should give security to administer justly or otherwise comply with the legal requirements as to qualifying for the office.[95]

g. Strangers. Some codes designate such "proper person" as may be willing to accept, without preference of creditors, and the general rule has been more or less confirmed by legislation both in England and the United States, that if there is no husband, widow, next of kin, or creditor willing and competent to undertake the trust, administration may be granted to such other person as the court deems fit.[96] But administration cannot in general be granted to a creditor or other third person until after the lapse of the statute time allowed for the application of husband, widow, next of kin, or others entitled to priority and suitable, nor except upon their failure to pursue their respective rights notwithstanding a due citation.[97]

h. Nominee of Person Entitled. In some jurisdictions the statutes give to the persons primarily entitled to administration the right to nominate a person to serve in their stead who, if suitable for the office, should be appointed by the

tate applied for administration, and asked that two persons who were not creditors be associated with her, the clerk was authorized to appoint such persons as requested and it was error to revoke such appointment at the instance of other creditors.

95. *In re* Brackenbury, 2 P. D. 272, 46 L. J. P. & Adm. 42, 36 L. T. Rep. N. S. 744, 25 Wkly. Rep. 698. See *infra*, II, B, 3; II, J, 1, b.

96. *California.*— Clough *v.* Borello, (1897) 48 Pac. 330.

Maryland.— Jones *v.* Harbaugh, 93 Md. 269, 48 Atl. 827.

Michigan.— Wilkinson *v.* Conaty, 65 Mich. 614, 32 N. W. 841.

Missouri.— *In re* Hill, 102 Mo. App. 617, 77 S. W. 110; *In re* Gerstacker, 57 Mo. App. 71.

New York.— Matter of Paola, 36 Misc. 514, 73 N. Y. Suppl. 1062, holding that where it was desired to bring an action to recover for the death of a decedent by negligence, and his children and widow lived in Italy and the children were minors, letters of administration would be granted to a person described in the petition as the nearest friend of the decedent.

North Carolina.— Garrison *v.* Cox, 95 N. C. 353.

South Carolina.— Thompson *v.* Hucket, 2 Hill 347.

Texas.— Cain *v.* Haas, 18 Tex. 616.

Virginia.— McCandlish *v.* Hopkins, 6 Call 208.

Washington.—*In re* Sullivan, 25 Wash. 430, 65 Pac. 793.

West Virginia.— Bridgman *v.* Bridgman, 30 W. Va. 212, 3 S. E. 580.

England.— See *In re* Tyndall, 46 J. P. 169, 51 L. J. P. & Adm. 12, 30 Wkly. Rep. 231.

See 22 Cent. Dig. tit. "Executors and Administrators," § 53.

But *compare* Tanner *v.* Huss, 80 Ga. 614, 6 S. E. 18.

An impartial stranger may be preferable to widow or kindred where these are unsuitable (Hassinger's Appeal, 10 Pa. St. 454) or bitterly antagonistic (*In re* Warner, 207 Pa. St. 580, 57 Atl. 35, 99 Am. St. Rep. 804).

Widow may have stranger associated with her in trust. Shropshire *v.* Withers, 5 J. J. Marsh. (Ky.) 210.

Stranger not entitled to letters as matter of right.— *In re* Hill, 102 Mo. App. 617, 77 S. W. 110.

A coroner has no right by virtue of his office to ask to be appointed as administrator of a person found dead within his jurisdiction. Jones *v.* Harbaugh, 93 Md. 269, 48 Atl. 827.

One not a debtor to the estate will be preferred for the curatorship of a succession to another who is, even though the latter deposit in court the amount due by him. Lindner *v.* Goldenbow, 4 La. 143.

Appointee under marriage settlement.— Where a married woman died leaving a will which was not executed according to the law of her domicile, but was valid as an execution of a power of appointment in her marriage settlement, the court granted administration to the executrix named in the will as appointee under the settlement, but limited the grant to such property as the deceased had power to dispose of and did dispose of to her by the will, saying, however, that if the consent of the husband could be obtained a full grant might be taken. *In re* Trefond, [1899] P. 247, 68 L. J. P. & Adm. 82, 81 L. T. Rep. N. S. 56.

97. *Alabama.*— Markland *v.* Albes, 81 Ala. 433, 2 So. 123; Davis *v.* Swearingen, 56 Ala. 539.

Massachusetts.—Cobb *v.* Newcomb, 19 Pick. 336.

Missouri.— Mullanphy *v.* St. Louis County Ct., 6 Mo. 563.

Nebraska.— *In re* Miller, 32 Nebr. 480, 49 N. W. 427.

New Hampshire.— Munsey *v.* Webster, 24 N. H. 126.

North Carolina.— Hill *v.* Alspaugh, 72 N. C. 402.

See 22 Cent. Dig. tit. "Executors and Administrators," § 53.

Time for application see *infra*, II, H, 2.

Citation and notice see *infra*, II, H, 4.

Incompetency or unwillingness need not be alleged with reference to those entitled to the

court;[98] but in others a person entitled to precedence in administration cannot himself renounce the office and vest the right of appointment in his nominee to the exclusion of those who are next entitled in the statute order.[99] Where, however, some or all of the persons to whom the statute gives the right to administer agree in nominating for the office or express a preference for the appointment of a certain person, whether one of their number or a stranger, the court, while it must be governed by its own sound discretion in the premises and is under no absolute duty to appoint the person so selected, will as a rule give great con-

preference after such statute time has expired. Atkinson *v.* Hasty, 21 Nebr. 663, 33 N. W. 206.

98. *California.*— *In re* Wakefield, 136 Cal. 110, 68 Pac. 499; *In re* Shiel, 120 Cal. 347, 52 Pac. 808; *In re* Donovan, 104 Cal. 623, 38 Pac. 456; Dorris' Estate, 93 Cal. 611, 29 Pac. 244; Stevenson's Estate, 72 Cal. 164, 13 Pac. 404; *In re* Cotter, 54 Cal. 215; *In re* Robie, Myr. Prob. 226; *In re* Wyche, Myr. Prob. 85.

Illinois.— Strong *v.* Dignan, 207 Ill. 385, 69 N. E. 909, 99 Am. St. Rep. 225.

Montana.— *In re* Craigie, 24 Mont. 37, 60 Pac. 495; State *v.* Woody, 20 Mont. 413, 51 Pac. 975; *In re* Stewart, 18 Mont. 595, 46 Pac. 806.

Nebraska.— Atkinson *v.* Hasty, 21 Nebr. 665, 33 N. W. 206.

North Carolina.— Williams *v.* Neville, 108 N. C. 559, 13 S. E. 240; Little *v.* Berry, 94 N. C. 433; Wallis *v.* Wallis, 60 N. C. 78; Pearce *v.* Castrix, 53 N. C. 71; Ritchie *v.* McAuslin, 2 N. C. 220.

Washington.— McLean *v.* Roller, 33 Wash. 166, 73 Pac. 1123.

Wisconsin.— Sargent's Estate, 62 Wis. 130, 22 N. W. 131.

See 22 Cent. Dig. tit. "Executors and Administrators," § 57.

When the next of kin resides abroad it is within the power and is the duty of the probate court to grant administration to the appointee of the next of kin. Smith *v.* Munroe, 23 N. C. 345; Ritchie *v.* McAuslin, 2 N. C. 220. See also Strong *v.* Dignan, 207 Ill. 385, 69 N. E. 909, 99 Am. St. Rep. 225.

A widow who has married again before letters of administration are issued has nevertheless, under the California statute, the right to have the person whom she has nominated in writing appointed. *In re* Dow, 132 Cal. 309, 64 Pac. 402.

The guardian of a minor heir does not belong to any of the classes specified in Cal. Code Civ. Proc. § 1365, to whom administration shall be granted, and hence section 1379 which provides that "administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled" does not entitle a guardian, conceding that he himself has a right to letters, to confer upon another person the right to administer. Woods' Estate, 97 Cal. 428, 32 Pac. 516.

Appointment of nominee is within discretion of court. *In re* Healy, 122 Cal. 162, 54 Pac. 736.

Right of nominee to have letters previously issued revoked.— Under Cal. Code Civ. Proc. § 1383, when letters of administration have been granted to "any person other than the surviving husband or wife, child, father, mother, brother, or sister of the intestate, any one of them who is competent or any competent person at the written request of any one of them may obtain the revocation of the letters and be entitled to the administration. Under section 1386 the surviving husband or wife, when letters of administration have been granted to "a child, father, brother, or sister of the intestate," may assert his or her prior right and obtain letters of administration. But neither the section last referred to nor any other gives to a nominee of the surviving husband or wife the right to obtain a revocation of letters which have been previously issued to a child, father, brother, or sister of the intestate and the appointment of himself as administrator in the stead of such person. *In re* Shiels, 120 Cal. 347, 52 Pac. 808.

A nomination may be revoked at any time before it has been acted upon. *In re* Shiels, 120 Cal. 347, 52 Pac. 808; Bedell's Estate, 97 Cal. 339, 32 Pac. 323.

When nomination too late.— On an appeal from an order of a county court granting letters of administration to one person and refusing them to another a petition, then first filed, asking the appointment of a third person may properly be disregarded, as the request comes too late. Sargent's Estate, 62 Wis. 130, 22 N. W. 131.

In English practice the right to select a third person appears not favored when the person entitled is resident in the jurisdiction and able to take letters himself, although it is otherwise in the case of non-residents. *In re* Burch, 30 L. J. P. & M. 171, 4 L. T. Rep. N. S. 451, 2 Swab. & Tr. 139, 9 Wkly. Rep. 639. See also Chambers *v.* Bicknell, 2 Hare 536, 7 Jur. 167, 24 Eng. Ch. 536.

Nominee of the crown.— In England where a person died intestate leaving no next of kin and the personal estate thus belonged to the crown administration has been granted to the nominee of the crown. See Atty.-Gen. *v.* Kohler, 9 H. L. Cas. 654, 8 Jur. N. S. 467, 5 L. T. Rep. N. S. 35, 9 Wkly. Rep. 933, 11 Eng. Reprint 885.

99. *Kentucky.*— Triplett *v.* Wells, Litt. Sel. Cas. 49.

Maryland.— Georgetown College *v.* Browne, 34 Md. 450.

Massachusetts.—Cobb *v.* Newcomb, 19 Pick. 336.

New Jersey.— Cresse's Case, 28 N. J. Eq. 236.

sideration to the wishes of the persons entitled to administer,[1] and under some statutes it is the absolute duty of the court to appoint the person selected by the majority of those entitled.[2] Administration may be granted to a person nominated by one who has a power of nomination expressly given by statute, notwithstanding the person making the nomination would himself be incompetent to serve as administrator;[3] but a statute merely permitting letters to issue to any competent person upon a written request of a person entitled to letters does not authorize the issuance of letters to a person nominated by one who for some reason is himself disqualified for the office.[4]

i. Joint Administrators. As the court ordinarily prefers a sole to a joint administration,[5] it has been held that, in order to authorize a joint grant to the widow and one of the next of kin, all the other next of kin must consent that the grant shall be so made.[6]

3. Competency or Suitableness to Serve[7]— a. In General. In many jurisdictions the court may pass over a person whose relation to the decedent would otherwise entitle him to preference, because of his unsuitableness for the trust.[8] Unsuitableness may consist in an adverse interest of some kind or hostility to

New York.— Matter of Root, 1 Redf. Surr. 257.

Pennsylvania.— McClellan's Appeal, 16 Pa. St. 110; William's Appeal, 7 Pa. St. 259; Lœffler's Estate, 8 Kulp 199. See also Heron's Estate, 6 Phila. 87.

South Carolina.— See McBeth *v.* Hunt, 2 Strobh. 335.

See 22 Cent. Dig. tit. "Executors and Administrators," § 57.

1. *Louisiana.*— Chaler's Succession, 39 La. Ann. 308, 1 So. 820. See also McNeely *v.* McNeely, 50 La. Ann. 823, 24 So. 338.

New Hampshire.— See Munsey *v.* Webster, 24 N. H. 126.

New Jersey.—Cramer *v.* Sharp, 49 N. J. Eq. 558, 24 Atl. 962. *Compare* Rinehart *v.* Rinehart, 27 N. J. Eq. 475.

New York.— Sheldon *v.* Wright, 5 N. Y. 497.

Pennsylvania.— *In re* Swarts, 189 Pa. St. 71, 41 Atl. 1000; Woods' Appeal, 55 Pa. St. 332; Scaufuss' Estate, 5 Kulp 275; Jones' Appeal, 10 Wkly. Notes Cas. 249.

South Carolina.— *Ex. p.* Ostendorff, 17 S. C. 22; McBeth *v.* Hunt, 2 Strobh. 335.

England.— Williams *v.* Wilkins, 2 Phillim. 100.

Creditor may select if next of kin do not. Lovering *v.* King, 97 Ind. 130.

Nominee of persons not next of kin.— Where the register of wills has improvidently issued letters of administration to one who was nominated by persons who were not the next of kin of the decedent it is proper for the orphans' court to revoke the letters so granted on the petition of the next of kin and direct the register to issue letters to the person nominated by the next of kin. *In re* Neidig, 183 Pa. St. 492, 38 Atl. 1033.

2. Halliday *v.* Du Bose, 59 Ga. 268; Mandeville *v.* Mandeville, 35 Ga. 243.

In a selection by attorneys for next of kin the special authority of the attorneys should appear in writing. Long *v.* Huggins, 72 Ga. 776.

3. Dorris' Estate, 93 Cal. 611, 29 Pac. 244; Stevenson's Estate, 72 Cal. 164, 13 Pac. 404; *In re* Cotter, 54 Cal. 215; *In re* Stewart, 18 Mont. 595, 46 Pac. 806; McLean *v.* Roller, 33 Wash. 166, 73 Pac. 1123.

Nomination by minor.— Mont. Prob. Pr. Act, § 58, gave the right of administration, first to "the surviving husband or wife, or some competent person whom he or she may request to have appointed." Section 59 provided that if the person entitled to letters was a minor, letters must issue to his guardian or any other person entitled to letters of administration in the discretion of the court. This latter section applied only to minors generally and not to a surviving husband or wife under the age of majority yet old enough to lawfully contract the marital relation, and as to minors sustaining such relation the section giving the right to nominate was special and controlled. *In re* Stewart, 18 Mont. 595, 46 Pac. 806.

4. *In re* Donovan, 104 Cal. 623, 38 Pac. 456; *In re* Muersing, 103 Cal. 585, 37 Pac. 520; State *v.* Woody, 20 Mont. 413, 51 Pac. 975; Sutton *v.* Public Administrator, 4 Dem. Surr. (N. Y.) 33.

Incompetency resulting from non-residence.— Under Mont. Code Civ. Proc. § 2434, a person who is a non-resident of the state and for that reason incompetent to serve as administrator may, if incompetent only by reason of such non-residence, request the appointment of a resident and letters may issue to such resident. *In re* Craigie, 24 Mont. 37, 60 Pac. 495, where the court, however, recognized the decision in State *v.* Woody, 20 Mont. 413, 51 Pac. 975, holding that a non-resident could not nominate, as correct under the statute by which it was governed.

5. See *infra*, II, F, 2.

6. *In re* Newbold, L. R. 1 P. 285, 36 L. J. P. & M. 14, 15 L. T. Rep. N. S. 248, 15 Wkly. Rep. 262, holding that the consent of children who are minors is not sufficient to justify the court in making such a joint grant.

7. **As to executors** see *supra*, II, A, 3.

8. Chaler's Succession, 39 La. Ann. 308, 1 So. 820; Sears *v.* Wilson, 5 La. Ann. 689;

those immediately interested in the estate, whether as creditors or distributees,[9] or of an interest adverse to the estate itself;[10] but a person otherwise suitable is not to be deemed incompetent merely because he is or represents a creditor,[11] nor is a person who is indebted to the estate necessarily disqualified.[12] That a person habitually industrious and solvent owes something or is poor does not disqualify him, but a bankrupt or insolvent, especially one who is habitually shiftless or embarrassed, would be an unsuitable person.[13] Weakness of mind or will, such as would or might subject one to sinister influence or coercion against the general interest of the estate, will constitute a sufficient objection.[14] Drunkenness may constitute a disqualification,[15] but something more gross than occasional intoxication must appear in order to preclude the appointment of the person entitled.[16] A person may also be disqualified by reason of improvidence,[17] a lack of integ-

Stearns *v.* Fiske, 18 Pick. (Mass.) 24; Pendleton *v.* Pendleton, 6 Sm. & M. (Miss.) 448; Fitzgerald *v.* Smith, (Tenn. Sup. 1904) 78 S. W. 1050.

Readiness to give bond does not overcome the objection of unsuitableness or incompetency. Stearns *v.* Fiske, 18 Pick. (Mass.) 24; *In re* Diller, 6 Ohio S. & C. Pl. Dec. 182.

9. *California.*— Cornell *v.* Gallaher, 16 Cal. 367.

Georgia.— Moody *v.* Moody, 29 Ga. 519.

Louisiana.— Weis' Succession, 43 La. Ann. 475, 9 So. 95.

Michigan.— Carpenter *v.* Wood, 131 Mich. 314, 91 N. W. 162.

Missouri.— State *v.* Reinhardt, 31 Mo. 95.

New Hampshire.— Drews' Appeal, 58 N. H. 319; Pickering *v.* Pendexter, 46 N. H. 69.

New Mexico.— Territory *v.* Valdez, 1 N. M. 548.

New York.— Churchill *v.* Prescott, 2 Bradf. Surr. 304.

Ohio.— *In re* Brennan, 5 Ohio S. & C. Pl. Dec. 499, 5 Ohio N. P. 490.

Pennsylvania.— *In re* Schmidt, 183 Pa. St. 129, 38 Atl. 464; Bieber's Appeal, 11 Pa. St. 157; Robertson's Estate, 1 Pa. Dist. 317; Heron's Estate, 6 Phila. 87; Fulmer's Estate, 2 C. Pl. 65.

West Virginia.—Bridgman *v.* Bridgman, 30 W. Va. 212, 30 S. E. 580.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 66, 67.

But *compare* Wright *v.* Wright, 72 Ind. 149.

The case should be a clear one. Bauquier's Estate, 88 Cal. 478, 26 Pac. 373.

10. Harris' Estate, 3 Pa. Co. Ct. 220, 19 Wkly. Notes Cas. 538, holding that an administrator having such an interest should either abandon his own private claim against the interest of his trust or settle up his accounts and resign the trust. *Contra, In re* Brundage, 141 Cal. 538, 75 Pac. 175, holding that as between two persons, one of whom has as against the other an absolute right to letters of administration, the fact that he makes an adverse claim to property claimed by the estate, which is not made a ground of disqualification by the statute, does not authorize the denial of letters to him and the granting of them to the other.

11. Bowen *v.* Stewart, 128 Ind. 507, 26 N. E. 168, 28 N. E. 73. See *supra*, II, B, 2, f.

12. Weis' Succession, 43 La. Ann. 475, 9 So. 95; Kailer *v.* Kailer, 92 Md. 147, 48 Atl. 712; Morgan's Estate, 8 N. Y. Civ. Proc. 77, 2 How. Pr. N. S. (N. Y.) 194; Churchill *v.* Prescott, 2 Bradf. Surr. (N. Y.) 304. But *compare* Territory *v.* Valdez, 1 N. M. 548.

13. Levan's Appeal, 112 Pa. St. 294, 3 Atl. 804; Cornpropst's Appeal, 33 Pa. St. 537; Failor's Estate, 10 Pa. Super. Ct. 253; Robert's Estate, 3 Montg. Co. Rep. (Pa.) 212; Bell *v.* Timiswood, 2 Phillim. 22.

Insolvency is not to be inferred in doubtful cases. Lynch *v.* Lively, 32 Ga. 575.

14. Stearns *v.* Fiske, 18 Pick. (Mass.) 24, holding this especially so in choosing out of a class.

15. See Matter of Reichert, 34 Misc. (N. Y.) 288, 69 N. Y. Suppl. 644, 9 N. Y. Annot. Cas. 472.

16. Root *v.* Davis, 10 Mont. 228, 25 Pac. 105; Matter of Reichert, 34 Misc. (N. Y.) 288, 69 N. Y. Suppl. 644, 9 N. Y. Annot. Cas. 472; Matter of Manley, 12 Misc. (N. Y.) 472, 34 N. Y. Suppl. 258; Elmer *v.* Kechele, 1 Redf. Surr. (N. Y.) 472; *In re* Kechele, Tuck. Surr. (N. Y.) 52.

17. Carmody's Estate, 88 Cal. 616, 26 Pac. 373; Root *v.* Davis, 10 Mont. 228, 25 Pac. 105; Cramer *v.* Sharp, 49 N. J. Eq. 558, 24 Atl. 962; Matter of Ferguson, 41 Misc. (N. Y.) 465, 84 N. Y. Suppl. 1102.

What constitutes improvidence.— The improvidence which constitutes a ground of exclusion is that want of care or foresight in the management of property which would be likely to render the estate and effects of the intestate unsafe and liable to be lost or diminished in value by imprudence in case administration thereof should be committed to the improvident person. Emerson *v.* Bowers, 14 N. Y. 449; Coggshall *v.* Green, 9 Hun (N. Y.) 471; Coope *v.* Lowerre, 1 Barb. Ch. (N. Y.) 45; Matter of Cutting, 5 Dem. Surr. (N. Y.) 456. Thus gambling habits might establish improvidence. Emerson *v.* Bowers, 14 N. Y. 449; McMahon *v.* Harrison, 6 N. Y. 443 [*affirming* 10 Barb. 659 (*reversing* 1 Bradf. Surr. 283)]. But vicious conduct, improper and dishonest acquisition of property, and even loose habits of business do not constitute improvidence within the meaning of the statute, nor does the fact that the petitioner is indebted to the estate. Emerson *v.* Bowers, *supra*; Coggshall *v.* Green, *supra*; McMahon *v.* Harrison, 10 Barb. (N. Y.) 659; Coope *v.* Lowerre, *supra*. A conviction of larceny cannot of itself afford satisfactory evi-

rity,[18] bad character,[19] or illiteracy,[20] although one who is intelligent and upright in accounts and business is not necessarily not incompetent simply because of illiteracy.[21] Under some statutes letters of administration must not be granted to a person who has been convicted of an infamous crime.[22] In some jurisdictions a surviving partner of the deceased is not competent as his administrator.[23] Insane persons are incompetent to be appointed or serve as administrators,[24] and so too are infants.[25] A corporation cannot lawfully be appointed unless the right to administer has been conferred by its charter.[26] For a judge of probate to be concerned in his own appointment as administrator is plainly unsuitable, and so also would be his appointment of an immediate relative, for the disqualification of personal interest applies to a judge even though wrong motive be absent.[27] Old age or merely physical disability does not disqualify,[28] nor does the fact that a woman entitled to the appointment is a nun.[29] A technical intermeddling with the effects before appointment does not of itself where not wilfully wrong disqualify the intermeddler from being appointed.[30]

b. Aliens or Non-Residents. Alienage is considered no incapacity in England as concerns personal property,[31] and in the United States also a citizen of a

dence of the person so convicted being incompetent for appointment as administrator by reason of improvidence. O'Brien *v.* Neubert, 3 Dem. Surr. (N. Y.) 156. A lack of property does not necessarily show improvidence. Root *v.* Davis, 10 Mont. 228, 25 Pac. 105. But see Matter of Ferguson, 41 Misc. (N. Y.) 465, 84 N. Y. Suppl. 1102.

18. See Carmody's Estate, 88 Cal. 616, 26 Pac. 373.

Circumstances not showing lack of integrity.— See Carmody's Estate, 88 Cal. 616, 26 Pac. 373 (claim of entire estate); Root *v.* Davis, 10 Mont. 228, 25 Pac. 105.

19. *In re* Diller, 6 Ohio S. & C. Pl. Dec. 182.

Infidelity of wife.— That a wife has been unfaithful and violated her marital obligation does not disqualify her to act as administratrix of her husband's estate. *In re* Newman, 124 Cal. 688, 57 Pac. 686, 45 L. R. A. 780.

Undue intimacy with a distributee of the estate does not sufficiently import unsuitableness. Bennett *v.* Howard, 18 R. I. 384, 28 Atl. 333.

A suspicion that he will abuse his trust will not warrant the exclusion of a person not excluded by law. Rust *v.* Randolph, 5 Mart. (La.) 89.

20. Matter of Haley, 21 Misc. (N. Y.) 777, 49 N. Y. Suppl. 397 (person unable to read, write, or count money); Stephenson *v.* Stephenson, 49 N. C. 472.

21. Li Po Tai's Estate, 108 Cal. 484, 41 Pac. 486; *In re* Pacheco, 23 Cal. 476; *In re* Shilton, Tuck. Surr. (N. Y.) 73; Bowersox's Appeal, 100 Pa. St. 434, 45 Am. Rep. 387; Altemus' Case, 1 Ashm. (Pa.) 49.

22. McMahon *v.* Harrison, 6 N. Y. 443; Coope *v.* Lowerre, 1 Barb. Ch. (N. Y.) 45.

Actual conviction necessary.— Coggshall *v.* Green, 9 Hun (N. Y.) 471; Coope *v.* Lowerre, 1 Barb. Ch. (N. Y.) 45; O'Brien *v.* Neubert, 3 Dem. Surr. (N. Y.) 156.

A conviction of crime in a foreign state does not disqualify a person under the New York statute as being "a person convicted of an infamous crime," for that statute refers only to crimes which are infamous within the meaning of the New York statutes. O'Brien *v.* Neubert, 3 Dem. Surr. (N. Y.) 156.

23. Garber's Estate, 74 Cal. 338, 16 Pac. 233; Cornell *v.* Gallaher, 16 Cal. 367; Heward *v.* Slagle, 52 Ill. 336; Tilden *v.* Kendrick, 3 La. 471; Brown's Estate, 11 Phila. (Pa.) 127.

24. McGooch *v.* McGooch, 4 Mass. 348; McMahon *v.* Harrison, 6 N. Y. 443.

25. Collins *v.* Spears, Walk. (Miss.) 310; Carow *v.* Mowatt, 2 Edw. (N. Y.) 57.

A minor is not qualified by reason of the fact that he or she is married (Briscoe *v.* Tarkington, 5 La. Ann. 692), that she is a widow (Collins *v.* Spears, Walk. (Miss.) 310; Wallis *v.* Wallis, 60 N. C. 78), or that there are no other next of kin capable of administering (Rea *v.* Englesing, 56 Miss. 463).

Letters to a minor are voidable only and not void and by duly ratifying upon reaching majority the late infant continues in effect an adult administrator. Davis *v.* Miller, 106 Ala. 154, 17 So. 323. *Contra*, Knox *v.* Nobel, 77 Hun (N. Y.) 230, 28 N. Y. Suppl. 355.

26. Fidelity Ins., etc., Co. *v.* Niven, 5 Houst. (Del.) 163; Georgetown College *v.* Browne, 34 Md. 450; *In re* Thompson, 33 Barb. (N. Y.) 334.

Express grant of power to administer.— Certain corporations chartered of late years in England and in American states are expressly empowered to serve as executor or administrator. See *In re* Goddard, 94 N. Y. 544; Union Bank, etc., Co. *v.* Wright, (Tenn. Ch. App. 1900) 58 S. W. 755; *In re* Hunt, [1896] P. 288, 66 L. J. P. & Adm. 8.

27. Thornton *v.* Moore, 61 Ala. 347; Plowman *v.* Henderson, 59 Ala. 559; Echols *v.* Barrett, 6 Ga. 443; Hall *v.* Thayer, 105 Mass. 219, 7 Am. Rep. 513.

28. Matter of Berrien, 3 Dem. Surr. (N. Y.) 263; Wilkey's Appeal, 108 Pa. St. 567.

29. Smith *v.* Young, 5 Gill (Md.) 197.

30. Bingham *v.* Crenshaw, 34 Ala. 683.

31. Schouler Ex. § 109.

foreign country has been appointed administrator;[32] but some of the states exclude or restrict the right of aliens, and particularly non-resident aliens to administer.[33] Mere non-residence as distinguished from alienage in the sense of citizenship in a foreign country is a disqualification in some states,[34] but in others a non-resident may be appointed administrator if he is a citizen of the United States.[35] Even where non-residence is not expressly made a disqualification it is a matter to be considered in determining the propriety of the appointment,[36] and as a general rule in the absence of special circumstances a non-resident should not be appointed so long as any other distributee competent to act and willing to assume the trust is within the jurisdiction of the court.[37]

c. Married Women. Under the common law and even under some codes a married woman is not competent to be an administratrix unless her husband consents or is joined with her in the trust,[38] but the general rule in modern

32. *In re* Picquet, 5 Pick. (Mass.) 65; Tanas *v.* Municipal Gas Co., 88 N. Y. App. Div. 251, 84 N. Y. Suppl. 1053, holding that N. Y. Code Civ. Proc. § 2661, enumerating the persons who shall not be appointed administrators and providing that letters shall not be issued "to a person not a citizen of the United States, unless he is a resident of the state," permits the appointment of one not a citizen if a resident of the state.

33. Schouler Ex. § 109. And see Tanas *v.* Municipal Gas Co., 88 N. Y. App. Div. 251, 84 N. Y. Suppl. 1053; Sutton *v.* Public Administrator, 4 Dem. Surr. (N. Y.) 33.

34. *California.*— Stevenson's Estate, 72 Cal. 164, 13 Pac. 404; *In re* Beech, 63 Cal. 458.

Illinois.— Child *v.* Gratiot, 41 Ill. 357.

Ohio.— *In re* Ulhorn, 12 Ohio Cir. Ct. 765, 4 Ohio Cir. Dec. 526.

Pennsylvania.— Frick's Appeal, 114 Pa. St. 29, 6 Atl. 363; *In re* Bullock, 28 Pittsb. Leg. J. 252.

South Carolina.— *In re* Neubert, 58 S. C. 469, 36 S. E. 908 [*distinguishing* Jones *v.* Jones, 12 Rich. 623, as having been decided prior to the act of 1878, Rev. St. (1893) §§ 2067, 2068].

See 22 Cent. Dig. tit. "Executors and Administrators," § 65.

Intention as bearing on residence.— Where a non-resident goes to a state to procure letters of administration on the estate of her husband, declaring her intention to remain there, the question of her residence depends on her intentions. *In re* Newman, 124 Cal. 688, 57 Pac. 686, 45 L. R. A. 780.

Evidence insufficient to show non-residence see *In re* Gordon, 142 Cal. 125, 75 Pac. 672.

35. *Alabama.*— Fulgham *v.* Fulgham, 119 Ala. 403, 24 So. 851.

Iowa.— Foley *v.* Cudahy Packing Co., 119 Iowa 246, 93 N. W. 284; Chicago, etc., R. Co. *v.* Gould, 64 Iowa 343, 20 N. W. 464.

Louisiana.— Penney's Succession, 10 La. Ann. 290.

Maryland.— Ehlen *v.* Ehlen, 64 Md. 360, 1 Atl. 880.

New York.— Libbey *v.* Mason, 112 N. Y. 525, 20 N. E. 355, 2 L. R. A. 795; *In re* Williams, 111 N. Y. 680, 19 N. E. 284; *In re* Page, 107 N. Y. 266, 14 N. E. 193; *In re* Williams, 44 Hun 67; Sterling's Estate, 9 N. Y. Civ. Proc. 448; Matter of Williams, 5 Dem. Surr. 292.

Rhode Island.— Weaver *v.* Chace, 5 R. I. 356.

Virginia.— *Ex p.* Barker, 2 Leigh 719.

West Virginia.— Bridgman *v.* Bridgman, 30 W. Va. 212, 3 S. E. 580.

Wisconsin.— Sargent's Estate, 62 Wis. 130, 22 N. W. 131.

See 22 Cent. Dig. tit. "Executors and Administrators," § 65.

Actual presence when application made sufficient.— Penney's Succession, 10 La. Ann. 290.

Non-residence within parish.— Persons living out of the parish where a succession is opened but within the state may be appointed curators. Tilden *v.* Kendrick, 3 La. 471.

36. Chicago, etc., R. Co. *v.* Gould, 64 Iowa 343, 20 N. W. 464.

37. *Iowa.*— Chicago, etc., R. Co. *v.* Gould, 64 Iowa 343, 20 N. W. 464; O'Brien's Estate, 63 Iowa 622, 19 N. W. 797.

Kentucky.— Radford *v.* Radford, 5 Dana 156.

Virginia.— *Ex p.* Barker, 2 Leigh 719.

West Virginia.— Bridgman *v.* Bridgman, 30 W. Va. 212, 3 S. E. 580.

Wisconsin.— Sargent's Estate, 62 Wis. 130, 22 N. W. 131.

Non-residence does not deprive one of statutory priority of right to administration nor authorize the court to appoint a resident whose right is subordinate where the non-resident has applied for the appointment. Matter of Williams, 5 Dem. Surr. (N. Y.) 292.

38. *Alabama.*— Dowty *v.* Hall, 83 Ala. 165, 3 So. 315; English *v.* McNair, 34 Ala. 40.

Arkansas.— Ferguson *v.* Collins, 8 Ark. 241.

Georgia.— Leverett *v.* Dismukes, 10 Ga. 98, absolute disqualification under act of 1828.

Indiana.— Jenkins *v.* Jenkins, 23 Ind. 79; Keister *v.* Howe, 3 Ind. 268.

Maine.— Stewart's Appeal, 56 Me. 300.

New York.— Woodruff *v.* Cox, 2 Bradf. Surr. 153.

Texas.— Nickelson *v.* Ingram, 24 Tex. 630.

England.— *In re* Barber, 11 Ch. D. 442, 40 L. T. Rep. N. S. 649, 27 Wkly. Rep. 813.

See 22 Cent. Dig. tit. "Executors and Administrators," § 72.

times is that coverture does not constitute a disqualification for the office of administratrix.[39]

4. Renunciation or Waiver of Right[40]— a. In General. Renunciation or waiver of a precedent right to administer is clearly permissible.[41] Such renunciation should usually appear by writing[42] or as the result of non-appearance when duly cited.[43] Whether a writing amounts to renunciation or not depends upon its fair and reasonable import.[44] Long delay to assert priority may amount to tacit acquiescence in another's appointment,[45] and under some statutes persons entitled to priority in administration must assert their right within a fixed time or be deemed to have relinquished it.[46] A renunciation or waiver is shown by endeavoring to

When administratrix marries she and husband must give bond. Cramer *v.* Sharpe, 49 N. J. Eq. 558, 24 Atl. 962.

A wife living apart from her husband under a deed of separation may be appointed. *In re* Hardinge, 2 Curt. Eccl. 640. And see *In re* Maychell, 4 P. D. 74, 47 L. J. P. & Adm. 31, 39 L. T. Rep. N. S. 94, 26 Wkly. Rep. 439.

A married woman may resign without the concurrence of her husband and her resignation necessarily terminates the co-administration of her husband. Rambo *v.* Wyatt, 32 Ala. 363, 70 Am. Dec. 544.

39. Binnerman *v.* Weaver, 8 Md. 517; *In re* Guldin, 81* Pa. St. 362; *In re* Gyger, 65 Pa. St. 311; *In re* Nurnberger, 40 S. C. 334, 18 S. E. 935. And see Sloane's Succession, 12 La. Ann. 610, holding that a woman, although she cannot be a curatrix, may yet administer as a beneficiary heir.

40. **Renunciation by executors** see *supra*, II, A, 4.

41. See Triplett *v.* Wells, Litt. Sel. Cas. (Ky.) 49.

A creditor entitled to administer may, like persons prior in right, renounce the trust or fail to respond when cited in. Carpenter *v.* Jones, 44 Md. 625.

Person may renounce without appearing in court. Triplett *v.* Wells, Litt. Sel. Cas. (Ky.) 49.

Ineffective renunciation.— Where a son renounces in the common form his right to letters of administration in favor of a stranger, but the other children do not ratify his nomination, his renunciation does not have the effect of depriving him of his right to letters of administration. Lœffler's Estate, 8 Kulp (Pa.) 199.

Conditional renunciation.— Where a person legally entitled to administration on the estate of a deceased person renounces in favor of another and requests that letters be granted to him such renunciation is conditional and not absolute and, the letters granted to such person having been subsequently revoked, the person so renouncing is entitled to claim administration. Gause's Estate, 1 Chest. Co. Rep. (Pa.) 105.

Agreement to renounce.— The law considers an agreement whose consideration is the relinquishment of the right to administer by one party to another against sound policy. Bowers *v.* Bowers, 26 Pa. St. 74, 67 Am. Dec. 398. See also Brown *v.* Stewart, 4 Md. Ch. 368; Swiggertt *v.* White, 8 Ohio Dec. (Reprint) 452, 8 Cinc. L. Bul. 22; and *supra*, II, A, 4, a. But *compare* Bassett *v.* Miller, 8 Md. 548 [*explaining* Owings *v.* Owings, 1 Harr. & G. (Md.) 484].

42. Barbee *v.* Converse, 1 Redf. Surr. (N. Y.) 330. See also Muirhead *v.* Muirhead, 6 Sm. & M. (Miss.) 451.

Renunciation by attorney.—In England the usual practice of the registry has been to require renunciations of the right to administer on the estate of an intestate to be under the hand of the person entitled to the grant, but in a case where the person entitled to the grant, being resident out of England, had by a power of attorney specially authorized his brother to execute for him an instrument of renunciation and consent the court acted on a renunciation and consent so executed. *In re* Rosser, 33 L. J. P. & M. 155, 10 L. T. Rep. N. S. 695, 3 Swab. & Tr. 490, 12 Wkly. Rep. 1014.

43. See Stebbins *v.* Lathrop, 4 Pick. (Mass.) 33.

44. *Maryland.*— Carpenter *v.* Jones, 44 Md. 625.

Massachusetts.— Arnold *v.* Sabin, 1 Cush. 525.

New Jersey.— Rinehart *v.* Rinehart, 27 N. J. Eq. 475.

North Carolina.— Williams *v.* Neville, 108 N. C. 559, 13 S. E. 240.

Pennsylvania.— McClellan's Appeal, 16 Pa. St. 110.

See 22 Cent. Dig. tit. "Executors and Administrators," § 78.

45. McColgan *v.* Kenny, 68 Md. 258, 11 Atl. 819; Hill *v.* Alspaugh, 72 N. C. 402; Jinkins *v.* Sapp, 48 N. C. 510; Sutton's Estate, 31 Wash. 340, 71 Pac. 1012.

It is a question of law for the court whether the delay to take out letters of administration by one having the prior right thereto is so unreasonable as to entitle another person to letters. Hughes *v.* Pipkin, 61 N. C. 4.

46. *Alabama.*— Forrester *v.* Forrester, 37 Ala. 398; Curtis *v.* Burt, 34 Ala. 729; Curtis *v.* Williams, 33 Ala. 570.

Arkansas.— Grantham *v.* Williams, 1 Ark. 270.

Kentucky.— Cotton *v.* Taylor, 4 B. Mon. 357.

Michigan.— *In re* Sprague, 125 Mich. 357, 84 N. W. 293.

Nebraska.— Spencer *v.* Wolfe, 49 Nebr. 8, 67 N. W. 858.

North Carolina.— Williams *v.* Neville, 108 N. C. 559, 13 S. E. 240.

procure the appointment of another,[47] and the right to administration of the estate of a spouse may also be either expressly or impliedly renounced by antenuptial or post-nuptial agreements.[48]

b. Retraction of Renunciation.[49] In some jurisdictions a renunciation of the right to administer may be retracted at any time before a grant of administration is made to another;[50] but as a general rule a retraction of a renunciation is not favored,[51] and it is certainly not permissible after another person has been appointed to the office[52] or even while proceedings for such appointment are pending.[53]

C. Administrators With Will Annexed[54] — **1. In General.** Where a decedent has left a will but such will does not nominate any executors, or none of the persons named as executors can or will act as such, the court appoints a person to perform the necessary duties connected with the settlement of the estate, and such appointee is termed an administrator "with the will annexed," or "*cum testamento annexo*."[55] Administration with the will annexed should

Rhode Island.— Johnson *v.* Johnson, 15 R. I. 109, 23 Atl. 106.

Washington.— McLean *v.* Roller, 33 Wash. 166, 73 Pac. 1123.

See 22 Cent. Dig. tit. "Executors and Administrators," § 79.

47. *In re* Silvar, (Cal. 1896) 46 Pac. 296; *In re* Sullivan, 25 Wash. 430, 65 Pac. 793.

48. *California.*— *In re* Davis, 106 Cal. 453, 39 Pac. 756.

Maryland.— Ward *v.* Thompson, 6 Gill & J. 349. And see Maurer *v.* Naill, 5 Md. 324.

Mississippi.— Fowler *v.* Kell, 14 Sm. & M. 68.

New York.— See Matter of Wilson, 92 Hun 318, 36 N. Y. Suppl. 882.

Virginia.— Charles *v.* Charles, 8 Gratt. 486, 56 Am. Dec. 155; Bray *v.* Dudgeon, 6 Munf. 132.

See 22 Cent. Dig. tit. "Executors and Administrators," § 80.

Agreement not showing renunciation.— An antenuptial agreement allowing the wife in case she survived her husband a certain share in his personal estate and the income from his real estate and providing that she would not claim any further interest in the estate did not deprive her of the right to administer. Sieber's Appeal, 1 Pennyp. (Pa.) 191.

A marriage settlement merely modifying or relinquishing the husband's property rights in his wife's estate does not deprive him of his right of administration. Miller *v.* Reinhart, 18 Ga. 239; O'Rear *v.* Crum, 135 Ill. 294, 25 N. E. 1097; Hart *v.* Soward, 12 B. Mon. (Ky.) 391.

Separation agreement.— The fact that a wife agreed with her husband for a consideration to live separate from him during their natural lives, and did so, and to make no claim against his estate, does not deprive her of her first right to administer on the estate of such husband. *In re* Garrettson, 10 Ohio Dec. (Reprint) 396, 21 Cinc. L. Bul. 54.

49. By executors see *supra*, II, A, 4, c.

50. *In re* Treadwell, 37 Misc. (N. Y.) 584, 75 N. Y. Suppl. 1058; Casey *v.* Gardiner, 4 Bradf. Surr. (N. Y.) 13; West *v.* Willby, 3 Phillim. 374.

Grant to person not entitled.— A renunciation by decedent's next of kin in favor of one who was subsequently held not entitled to letters of administration will not preclude the next of kin from intervening and claiming letters as against a contestant in a proceeding to revoke the letters erroneously granted. Matter of Haug, 29 Misc. (N. Y.) 36, 60 N. Y. Suppl. 382.

The right of retraction is not absolute, but the renunciation cannot be withdrawn without the consent of the surrogate. *In re* Clute, 37 Misc. (N. Y.) 710, 76 N. Y. Suppl. 456.

51. *In re* Kirtlan, 16 Cal. 161; Triplett *v.* Wells, Litt. Sel. Cas. (Ky.) 49; Lutz *v.* Mahan, 80 Md. 233, 30 Atl. 645.

52. Lewis' Estate, 15 Pa. Co. Ct. 397.

Renunciation by mistake.— Where one entitled to administration has renounced and recommended another who has been appointed and it afterward appears to the satisfaction of the orphan's court that such renunciation was executed by mistake the court will cancel the appointment and restore the person entitled to the right of administration. Thomas *v.* Knighton, 23 Md. 318, 87 Am. Dec. 571.

53. *In re* Silvar, (Cal. 1896) 46 Pac. 296.

54. Powers and duties see *infra*, XIX.

55. *California.*— *In re* McCullough, Myr. Prob. 76.

Kentucky.— Peebles *v.* Watts, 9 Dana 102, 33 Am. Dec. 531.

Louisiana.— Rice's Succession, 21 La. Ann. 614; Girod *v.* Girod, 18 La. 394.

Massachusetts.— Stebbins *v.* Lathrop, 4 Pick. 33.

Mississippi.— Vick *v.* Vicksburg, 1 How. 379, 31 Am. Dec. 167. See also Cox *v.* Cox, 8 Sim. & M. 292.

New Hampshire.— Leavitt *v.* Leavitt, 65 N. H. 102, 18 Atl. 920.

New Jersey.— *In re* Maxwell, 3 N. J. Eq. 611.

New York.— *In re* Depau, Tuck. Surr. 290.

North Carolina.—Suttle *v.* Turner, 53 N. C. 403; Springs *v.* Erwin, 28 N. C. 27.

England.— *In re* Crawshay, [1893] P. 108, 62 L. J. P. & M. 91, 68 L. T. Rep. N. S. 260, 1 Reports 477, 41 Wkly. Rep. 303; *In re* Alston, [1892] P. 142, 61 L. J. P. & Adm. 92, 66 L. T. Rep. N. S. 591.

See 22 Cent. Dig. tit. "Executors and Administrators," § 107.

not be granted unless the exigency is made apparent;[56] and executors named, if alive and competent, should have full opportunity to take or renounce the trust.[57] It is also necessary that there should be a valid will,[58] but where there is such a will a grant of administration must be with the will annexed.[59]

2. Persons Entitled to Appointment — a. Statutory Regulation. The selection of an administrator with the will annexed, like that of an ordinary administrator, is largely regulated by statutes prescribing the order in which particular persons shall be entitled to preference.[60] The governing principle is that the person most beneficially interested under the will shall have the preference, and as a general

Dative testamentary executor.— Under La. Civ. Code (1900), arts. 1678–1679, if a testator has omitted to name a testamentary executor or if the one named refuses to accept, a person is appointed by the court to execute the will and such appointee is termed the "dative testamentary executor." In so far, however, as there are distinctions between executors and administrators such appointee appears to belong more properly to the latter class. See Gusman's Succession, 35 La. Ann. 404.

Where the executor dies without having applied for letters, administration with the will annexed must be granted. *In re* McDonald, 118 Cal. 277, 50 Pac. 399.

Letters should be granted in proper jurisdiction for probating will. *In re* Eyster, 5 Watts (Pa.) 132.

Record should show cause for granting such administration. See Peebles *v.* Watts, 9 Dana (Ky.) 102, 33 Am. Dec. 531; Van Giessen *v.* Bridgford, 83 N. Y. 348.

Where the testator withdraws administration from the county court as he has a right to do under the Texas statutes, he cannot delegate the power to nominate an executor to succeed the executor named in the will and keep his estate under the administration of such successor free from the control of the county court, but upon the death of the executor or executors named in the will an administrator *de bonis non* with the will annexed is properly appointed and the estate administered under the orders of the court notwithstanding a provision in the will that if the executors fail to qualify or die after qualification the probate court shall appoint one or more executors with the will annexed, in which case the independent character of the administration shall be maintained. *In re* Grant, 93 Tex. 68, 53 S. W. 372.

Time for application.— A grant of administration with the will annexed is governed by the statute providing that "no will shall be proved after ten years from the death of the testator," and not by the statute providing that "administration upon the estate of any person shall not be granted after seven years from his decease," the latter being applicable only to intestate estates. *In re* Lawrence, 49 Conn. 411.

Executor whose nomination revoked.— A person originally appointed executor by a will but whose name was afterward stricken out by direction of the testator has not a sufficient interest to warrant the issuing of a supersedeas at his request to reverse an order appointing an administrator with the will annexed in default of executors. Sayre *v.* Grymes, 1 Hen. & M. (Va.) 404.

56. See *In re* Butler, [1898] P. 9, 67 L. J. P. & Adm. 15, 46 Wkly. Rep. 445; Goods of Ponsonby, [1895] P. 287, 64 L. J. P. & Adm. 119, 11 Reports 613, 44 Wkly. Rep. 240, where, an executor being bodily incapacitated by illness, temporary letters were granted to a residuary legatee for the use of the executor until his recovery.

Where an executor dies after qualification administration with the will annexed will not be granted to the next of kin of the testator as the chain of executorship may be continued in the executors of the deceased executor. *In re* Reid, [1896] P. 129, 65 L. J. P. & Adm. 60, 74 L. T. Rep. N. S. 462.

Previous qualification of executor.— The appointment of an administrator with the will annexed is not necessarily void because an executor had previously been duly qualified and letters testamentary issued to him, for the executor may have resigned or been removed before the administrator was appointed. Printup *v.* Patton, 91 Ga. 422, 18 S. E. 311. But such an appointment while an executor properly appointed and qualified is in office is absolutely void. Kane *v.* Paul, 14 Pet. (U. S.) 33, 10 L. ed. 311.

57. Wheeler *v.* Stifler, 82 Md. 648, 33 Atl. 434; Baldwin *v.* Buford, 4 Yerg. (Tenn.) 16; Thompson *v.* Meek, 7 Leigh (Va.) 419.

58. Coleman's Estate, 2 Pa. Dist. 206, 13 Pa. Co. Ct. 81. See *infra*, II, N, 4.

Pending an appeal from probate of the will administration with the will annexed cannot properly be granted. *In re* Fisher, 15 Wis. 511.

59. Ewing *v.* Sneed, 5 J. J. Marsh. (Ky.) 459, holding that after a will made in another state has been recorded in the court of appeals an appointment of an administrator by a county court without the will annexed is void.

60. See *In re* Clute, 37 Misc. (N. Y.) 710, 76 N. Y. Suppl. 456; Matter of Beakes, 5 Dem. Surr. (N. Y.) 128; Quintard *v.* Morgan, 4 Dem. Surr. (N. Y.) 168; *In re* Ward, 1 Redf. Surr. (N. Y.) 254.

The same order as in case of intestacy prevails in some states. Garber's Estate, 74 Cal. 338, 16 Pac. 233; *In re* Meyers, 113 N. C. 545, 18 S. E. 689.

In the case of a testate non-resident, if the executor neglects or refuses to act in the state where property is located, the appointment of the administrator with the will annexed should be left wholly to the discretion of the judge of probate the same as the ap-

rule to cover the cases not specially provided for the person having the right to the estate ought to have the right of administration.[61]

b. Residuary Legatee. As a general rule the residuary legatee is preferred in the appointment before all other persons.[62] Even though the estate be such that the residuary legatee is not likely to have a residue or by the terms of the will he must hold that residue with limitations the presumption of the testator's favor upholds his claim to be first considered,[63] and where a person is not only sole residuary legatee but sole beneficiary under the will, his claim for appointment where an executor is wanting becomes still stronger.[64]

c. Principal or Specified Legatee. In New York the right to administration with the will annexed belongs, subject only to the prior right of the residuary legatee, to a principal or specified legatee.[65]

pointment of the administrator in the case of a non-resident intestate. In such case the statute providing that "when a person living out of a state shall die intestate, leaving property within the state, administration may be granted in any district where the estate or some part thereof shall be, to such person as the court shall see fit" governs, and not the statute providing that "upon the refusal of an executor to accept the trust or give a bond the court shall commit administration of the estate with the will annexed to the widow or next of kin of the deceased, and may cite them to appear before it, and upon their refusal, or neglect of appearance, or incapacity, may grant administration to one of the principal creditors, or on their refusal to such other person as the court shall think fit"; for the latter statute is a rule for the guidance of the probate court only in confiding administration upon the estates of deceased residents. Lawrence's Appeal, 49 Conn. 411, 420.

Removal of appointee not primarily entitled.—The California statute providing that when letters of administration have been granted to any person other than the surviving wife, child, etc., of the intestate any one of them may obtain the revocation of letters and become entitled to the administration, is expressly limited to the estates of those who died intestate, and does not apply to letters of administration with the will annexed. Li Po Tai's Estate, (Cal. 1895) 39 Pac. 30.

61. Long *v.* Huggins, 72 Ga. 776.

62. *Mississippi.*— Jordan *v.* Ball, 44 Miss. 194.

New Hampshire.— Leavitt *v.* Leavitt, 65 N. H. 102, 18 Atl. 920.

New Jersey.— *In re* Booraem, 55 N. J. Eq. 759, 37 Atl. 727; *In re* Kirkpatrick, 22 N. J. Eq. 463.

New York.— *In re* Clute, 37 Misc. 710, 76 N. Y. Suppl. 456; Matter of Milhau, 28 Misc. 366, 59 N. Y. Suppl. 910; Matter of Place, 4 N. Y. St. 533.

Pennsylvania.— *In re* Padelford, 189 Pa. St. 634, 42 Atl. 287.

England.— *In re* Campion, [1900] P. 13, 69 L. J. P. & Adm. 19, 81 L. T. Rep. N. S. 790, 48 Wkly. Rep. 288; *In re* McAuliffe, [1895] P. 290, 64 L. J. P. & Adm. 126, 73 L. T. Rep. N. S. 193, 11 Reports 610; Jones *v.* Beytagh, 3 Phillim. 635; Atkinson *v.* Barnard, 2 Phillim. 316.

See 22 Cent. Dig. tit. "Executors and Administrators," § 108.

Upon the death of a sole executor the residuary legatee is first entitled to letters, as against the widow, in like manner as if the executor had renounced. Bradley *v.* Bradley, 3 Redf. Surr. (N. Y.) 512.

Where there are several residuary legatees any one or more of them may be appointed as the courts may see fit (Matter of Powell, 5 Dem. Surr. (N. Y.) 281; Matter of Beakes, 5 Dem. Surr. (N. Y.) 128) and where one legatee refuses to act the other must be appointed (Matter of Place, 4 N. Y. St. 533).

Who is the residuary legatee.— Where a will creates a residuary estate and places it in trust for the wife of the testator during her life or until her marriage and after her decease or marriage gives the residuary estate to other persons, such persons are the residuary legatees and not the widow. Matter of Drowne, 3 N. Y. Suppl. 279, 1 Connoly Surr. (N. Y.) 163. See also Matter of Ferguson, 41 Misc. (N. Y.) 465, 84 N. Y. Suppl. 1102.

Testamentary provisions constituting one residuary legatees.— See Elliott's Estate, 2 Pa. Dist. 382, 12 Pa. Co. Ct. 410.

63. Mallory's Appeal, 62 Conn. 218, 25 Atl. 109; Hutchinson *v.* Lambert, 3 Add. Eccl. 27; Atkinson *v.* Barnard, 2 Phillim. 316.

A mere trustee of the residue is not entitled to appointment, for in that case the *cestui que trust* should be preferred as the real beneficiary. Girod *v.* Girod, 18 La. 394; *In re* Thompson, 33 Barb. (N. Y.) 334; Matter of Roux, 5 Dem. (N. Y.) 523; *In re* Ditchfield, L. R. 2 P. 152, 23 L. T. Rep. N. S. 325, 18 Wkly. Rep. 1144.

64. Horskins *v.* Morel, T. U. P. Charlt. (Ga.) 69; Robert's Estate, 3 Montg. Co. Rep. (Pa.) 212; *In re* Campion, [1900] P. 13, 69 L. J. P. & Adm. 19, 81 L. T. Rep. N. S. 790, 48 Wkly. Rep. 288; *In re* Crawshay, [1893] P. 108, 62 L. J. P. & Adm. 91, 68 L. T. Rep. N. S. 260, 1 Reports 477, 41 Wkly. Rep. 303.

65. *In re* Clute, 37 Misc. (N. Y.) 710, 76 N. Y. Suppl. 456; Matter of Milhau, 28 Misc. (N. Y.) 366, 59 N. Y. Suppl. 910.

The word "principal" as used in the New York statute is not used as a synonym for chief or most important, but has the force and

d. Surviving Spouse. In some jurisdictions the surviving husband or widow has the first right,[66] but as a general rule the right of the surviving spouse is subsequent to that of persons interested under the will.[67]

e. Next of Kin. The next of kin of a testator, especially if they have a beneficial interest in the estate or if the will contains no clear disposition of the residue, have a right to administration with the will annexed, which right is usually subsequent to that of legatees or the surviving spouse but prior to that of any creditor or stranger.[68]

f. Creditors. In some jurisdictions a creditor may be appointed, his right being, however, subsequent to that of all the classes previously discussed.[69]

g. Other Persons. In case no person belonging to any one of the classes before mentioned applies for or is willing to take administration with the will annexed the court may appoint some other suitable person.[70]

effect rather of the word "general" and is meant to be descriptive of all legatees who are neither specific nor residuary. Morgan's Estate, 8 N. Y. Civ. Proc. 77.

One who is a legatee, although not named in the will, is entitled to apply for letters of administration with the will annexed. Wood's Estate, 17 N. Y. Suppl. 354, 27 Abb. N. Cas. (N. Y.) 329, so holding where a bequest was made to M and others and the issue of such as should be dead and application was made by a child of M after his death.

Beneficiary of trust.— Where testator devised his real estate equally to his seven children, and to a trustee for the eighth for life, with remainder over to his issue, the beneficiary was entitled equally with the other children to be appointed administrator. *In re* Treadwell, 37 Misc. (N. Y.) 584, 75 N. Y. Suppl. 1058.

Preferences.— Where a testator devised his entire estate "as provided by the laws in case of intestacy" and the legatees entitled thereunder are of the same grade and character no one of them has any absolute legal right as such to be chosen in preference to any other as administrator with the will annexed, although the one having the greatest interest has a superior claim to the appointment. Morgan's Estate, 8 N. Y. Civ. Proc. 77.

66. Brodie *v.* Mitchell, 85 Md. 516, 37 Atl. 169; *In re* Meyers, 113 N. C. 545, 18 S. E. 689.

67. Thornton *v.* Winston, 4 Leigh (Va.) 152; *In re* Bailey, 30 L. J. P. & M. 190, 4 L. T. Rep. N. S. 90, 9 Wkly. Rep. 540, 2 Swab. & Tr. 135. *Contra*, Salmon *v.* Hays, 4 Hagg. Eccl. 382.

Under the New York code the surviving spouse and the next of kin are placed on an equality with reference to the right to administration with the will annexed, their right coming after that of legatees. See Bradley *v.* Bradley, 3 Redf. Surr. 512. But the widow is entitled to preference over the guardian of an infant next of kin, who is not a residuary or specified legatee. Cluett *v.* Mattice, 43 Barb. (N. Y.) 417.

Preference of trustee under will.— In a case where testatrix had been deserted by her husband fifteen years prior to her death and had not heard of or from him after such desertion the court passed over the husband without citation of any kind and granted administration with the will annexed to the son of the testatrix who by the will was nominated trustee and manager of certain property which represented substantially the whole estate of testatrix. *In re* Shoosmith, [1894] P. 23, 63 L. J. P. & Adm. 64, 70 L. T. Rep. N. S. 809, 6 Reports 567.

68. *Massachusetts.*—Stebbins *v.* Lathrop, 4 Pick. 33.

New York.— Kircheis *v.* Scheig, 3 Redf. Surr. 277, holding that where the sole legatee of the testatrix died letters of administration which had been issued to sisters of the half blood of the testatrix who were her only next of kin could not be revoked on the petition of one claiming under the will of the sole legatee.

North Carolina.— Little *v.* Berry, 94 N. C. 433.

Pennsylvania.— See Job's Estate, 23 Pa. Super. Ct. 611.

Wisconsin.— Finch *v.* Houghton, 19 Wis. 149.

England.— *In re* Alston, [1892] P. 142, 61 L. J. P. & Adm. 92, 66 L. T. Rep. N. S. 591; *In re* Aston, 6 P. D. 203, 45 J. P. 816, 46 J. P. 104, 50 L. J. P. & Adm. 77, 30 Wkly. Rep. 92; Kooystra *v.* Buyskes, 3 Phillim. 531.

See 22 Cent. Dig. tit. "Executors and Administrators," § 108.

69. *In re* Clute, 37 Misc. (N. Y.) 710, 76 N. Y. Suppl. 456.

A claimant under a contract with executors is not a creditor of the estate in such sense as to entitle him to appointment. Fowler *v.* Walter, 1 Dem. Surr. (N. Y.) 240.

70. *In re* Neave, 9 Serg. & R. (Pa.) 186 (where the son of an executor who was administrator to his father was appointed); *In re* Butler, [1898] P. 9, 67 L. J. P. & Adm. 15, 46 Wkly. Rep. 445 (where a testator having died insolvent, after executing a deed of assignment for the benefit of his creditors, his executors having renounced, and no one interested under the will applying for a grant of administration with the will annexed, but a personal representative being required for the purpose of conveying certain leaseholds to the trustee of the deed of

h. Representative of Person Entitled. The right to administration with the will annexed has been held to pass to the assignee of the person entitled,[71] or in case of such person's death to his personal representative,[72] and where the person entitled is a minor administration should, it has been held, be granted to his guardian.[73] Letters have also been granted to the attorney of the person entitled,[74] and a custom has been recognized in some courts to grant letters to the attorney of a foreign executor.[75]

i. Nominee of Person Entitled. In some jurisdictions the right of the person entitled to administration with the will annexed to nominate a person to act as such administrator in his stead has been sustained,[76] and it has also been held that a person having a prior right to be appointed administrator with the will annexed may have another person appointed with him as his co-administrator, even though such person be a stranger.[77]

j. Person Nominated as Executor. Under certain circumstances a person nominated as executor by the will may be unwilling or unable to act as such and yet may serve as administrator with the will annexed.[78]

k. Preferences. The preferences which are recognized in the appointment of ordinary administrators[79] obtain where there are several persons equally entitled to administration with the will annexed,[80] and the will, or even the tes-

assignment, it was held proper to make a grant of administration with the will annexed to the trustee or his nominee, limited to the property to be conveyed).

71. *In re* Clute, 37 Misc. (N. Y.) 710, 76 N. Y. Suppl. 456. See also *In re* Campion, [1900] P. 13, 69 L. J. P. & Adm. 19, 81 L. T. Rep. N. S. 790, 48 Wkly. Rep. 288.

72. *In re* Booraem, 55 N. J. Eq. 759, 37 Atl. 727. *Contra, In re* Brown, 11 N. Y. Suppl. 785, 19 N. Y. Civ. Proc. 278, 2 Connoly Surr. (N. Y.) 386, holding that, where a residuary legatee survives the testator but dies before the will is admitted to probate, letters will not be issued to his personal representatives, but the right to administration will pass to the next class named in the statute.

73. Gusman's Succession, 36 La. Ann. 299; *In re* Lasak, 8 N. Y. Suppl. 740; Matter of Tyler, 19 N. Y. St. 897, 6 Dem. Surr. (N. Y.) 48; Blanck *v.* Morrison, 4 Dem. Surr. (N. Y.) 297.

A trust company which is the guardian of the sole residuary legatee is not entitled to letters of administration with the will annexed in preference to a general legatee under the will. Matter of Milhau, 28 Misc. (N. Y.) 366, 59 N. Y. Suppl. 910.

74. Rice's Succession, 21 La. Ann. 614 (holding that an attorney to collect a legacy has a sufficient interest in the estate of the testator to entitle him to be appointed dative testamentary executor); Russell *v.* Hartt, 87 N. Y. 19.

75. St. Jurjo *v.* Dunscomb, 2 Bradf. Surr. (N. Y.) 105; *In re* Bayard, 1 Rob. Eccl. 768.

76. *In re* Padelford, 189 Pa. St. 634, 42 Atl. 287. See also Job's Estate, 23 Pa. Super. Ct. 611.

The nominee of the guardian of infant residuary legatees should be appointed. Gunton's Estate, 3 Kulp (Pa.) 34.

The nominee of an assignee of the residuary legatee has been appointed. *In re* Campion, [1900] P. 13, 69 L. J. P. & Adm. 19, 81 L. T. Rep. N. S. 790, 48 Wkly. Rep. 288.

An executor cannot nominate a person for appointment as administrator with the will annexed. Garber's Estate, 74 Cal. 338, 16 Pac. 233. See also Brodie *v.* Mitchell, 85 Md. 516, 37 Atl. 169. *Contra,* Coleman's Estate, 3 Pa. Dist. 558, 15 Pa. Co. Ct. 252.

Where several are equally entitled one of them who desires the appointment is entitled thereto in preference to a stranger whom others desire to act. Williams' Appeal, 7 Pa. St. 259, where letters which had been granted to the nominee of the executor were revoked and administration granted to one of the children of the deceased, although some of the other children did not wish the appointee removed.

In Maryland the right of administration cannot be delegated. Brodie *v.* Mitchell, 85 Md. 516, 37 Atl. 169; Georgetown College *v.* Browne, 34 Md. 450.

77. Matter of Moehring, 24 Misc. (N. Y.) 418, 53 N. Y. Suppl. 730; Morgan's Estate, 8 N. Y. Civ. Proc. 77; *In re* Meyers, 113 N. C. 545, 18 S. E. 689.

78. Murphy *v.* Murphy, 24 Mo. 526 (where an executor's appointment was avoided because he was an attesting witness); *In re* Kirkpatrick, 22 N. J. Eq. 463; *In re* Blisset, 44 L. T. Rep. N. S. 816 (where a surviving husband and universal legatee renounced the executorship and afterward probated the will).

One may decline to be sole executor and yet be appointed jointly with some other person as administrator with the will annexed. Briscoe *v.* Wickliffe, 6 Dana (Ky.) 157; Quintard *v.* Morgan, 4 Dem. Surr. (N. Y.) 168.

79. See *supra,* II, B, 2, d, (II).

80. See Matter of Drowne, 3 N. Y. Suppl. 279, 1 Connoly Surr. (N. Y.) 163.

Males preferred to females.— Wood's Estate, 17 N. Y. Suppl. 354, 27 Abb. N. Cas. (N. Y.) 329, Pow. Surr. (N. Y.) 25; Matter of Drowne, 3 N. Y. Suppl. 279, 1 Connoly Surr.

tator's expressed wish as between persons having equal rights, may also conclude the choice in case of doubt.[81]

3. Competency. With reference to the eligibility and qualifications of persons for the office of administrators with the will annexed, the rules are practically the same as with respect to ordinary administrators,[82] and a person who would have been ineligible for appointment as administrator if the decedent had died intestate cannot be appointed administrator with the will annexed.[83]

4. Proceedings For Appointment. Notice of the application for letters must be given to persons having a right prior to the applicant,[84] but a written petition for probate of the will is not necessary to give the court jurisdiction to appoint an administrator with the will annexed.[85]

5. Renunciation. The right to administration with the will annexed may of course be renounced,[86] but the fact that a person who is entitled to administer generally renounced that right when it was supposed that the decedent had died intestate does not deprive him of the right to administration with the will annexed, upon the subsequent discovery of a will and renunciation by the executor.[87]

D. Administrators De Bonis Non[88]**— 1. In General.** In case the office of an executor or administrator becomes vacant before the estate is completely settled there is a new appointment by the court to complete the settlement of the estate, the appointee in such case being termed an administrator "*de bonis non*,"[89]

(N. Y.) 163; Williams' Appeal, 7 Pa. St. 259.

Where some of the legatees are infants any claim that might be made by their guardian is secondary to the claim of an adult legatee legally qualified. Morgan's Estate, 8 N. Y. Civ. Proc. 77.

Discretion of court.— Where there are two or more persons equally entitled to the appointment the selection rests in the discretion of the court. Huie's Succession, 23 La. Ann. 401; Bernard's Succession, 3 La. Ann. 565.

81. Womack *v.* Watson, 4 Ky. L. Rep. 907; Matter of Powell, 5 Dem. Surr. (N. Y.) 281; Quintard *v.* Morgan, 4 Dem. Surr. (N. Y.) 168; Groves' Estate, 2 Del. Co. (Pa.) 64.

Reversal of grant already made.— While an expressed wish of decedent that a certain person should settle up her estate would be strong ground to sustain the appointment of such person or to secure it pending a question of discretion before the register, it is not of any weight to reverse a grant of letters already made to a fit person of the right class. Groves' Estate, 2 Del. Co. (Pa.) 64.

82. See *supra*, II, B, 3.

A married woman may be appointed dative testamentary executrix with the consent of her husband. Cordeviolle's Succession, 24 La. Ann. 47.

Contestant in proceeding involving will.— A legatee is not disqualified under the statute from being appointed as administrator with the will annexed merely because he is the contestant in a proceeding involving the construction of the will and the ascertainment of the amount to which the several legatees are entitled. Morgan's Estate, 8 N. Y. Civ. Proc. 77.

Adverse interest.— Where a testator leaves a will without naming an executor and it appears that in his lifetime he had begun a suit against his daughter which suit was pending at his death it is improper to appoint the daughter as administratrix with the will annexed. Job's Estate, 23 Pa. Super. Ct. 611.

Where husband of legatee engaged in contest with estate.— The fact that a demand against the husband of a residuary legatee had been put in suit and resulted in a judgment in his favor from which the personal representatives had appealed is no objection to appointing the residuary legatee administratrix with the will annexed. Matter of Place, 4 N. Y. St. 533.

83. Garber's Estate, 74 Cal. 338, 16 Pac. 233.

84. Pfarr *v.* Belmont, 39 La. Ann. 294, 1 So. 681; Brodie *v.* Mitchell, 85 Md. 516, 37 Atl. 169.

A contingent appointment of a dative executor on the condition that public notices shall be given and that it be not opposed is of no avail where after the advertisements have been published, although the application has not been opposed, the appointment is not confirmed by a subsequent formal decree conferring it on the petitioner. Pfarr *v.* Belmont, 39 La. Ann. 294, 1 So. 681.

Persons having no prior right need not be cited. *In re* Treadwell, 37 Misc. (N. Y.) 584, 75 N. Y. Suppl. 1058; *In re* Wood, 17 N. Y. Suppl. 354, 27 Abb. N. Cas. (N. Y.) 329, Pow. Surr. (N. Y.) 25.

85. Seery *v.* Murray, 107 Iowa 384, 77 N. W. 1058.

For general rules governing proceedings for appointment of all representations see *infra*, II, H.

86. See Brodie *v.* Mitchell, 85 Md. 516, 37 Atl. 169.

87. Brodie *v.* Mitchell, 85 Md. 516, 37 Atl. 169.

88. Powers and duties see *infra*, XVIII.

89. *Alabama.*— Clemens *v.* Walker, 40 Ala. 189.

or in case he represents a testate estate "*de bonis non* with the will annexed," or "*cum testamento annexo*."[90] Every administrator after the first is an administrator *de bonis non* in fact, even though the record should not show it.[91]

2. When Appointment Necessary or Proper. Succession to a vacancy in the office is essential to the validity of a grant of administration *de bonis non*; there must have been a previous grant of letters,[92] and the previous incumbency must have actually ended, leaving the administration of the estate incomplete.[93] When-

Arkansas.— Barkman *v.* Duncan, 10 Ark. 465.

Connecticut.— Chamberlin's Appeal, 70 Conn. 363, 39 Atl. 734, 41 L. R. A. 204.

Georgia.— Jepson *v.* Martin, 116 Ga. 772, 43 S. E. 75.

Maryland.— Neal *v.* Charlton, 52 Md. 495; Scott *v.* Fox, 14 Md. 388.

Massachusetts.— Chapin *v.* Hastings, 2 Pick. 361.

Mississippi.—Hendricks *v.* Snodgrass, Walk. 86.

Missouri.— Scott *v.* Crews, 72 Mo. 261.

Pennsylvania.—Tucker *v.* Horner, 10 Phila. 122.

See 22 Cent. Dig. tit. "Executors and Administrators," § 267.

This title is an abbreviation of "*de bonis non administratis*" which means of the goods not administered. Black L. Dict.

Nature of office.— The administrator *de bonis non* is appointed to finish a business already commenced (Hinton *v.* Bland, 81 Va. 588), but he derives his title from the deceased and not from his predecessor in office (Weeks *v.* Love, 19 Ala. 25; *In re* Foreign Missions American Bd., 27 Conn. 344; Echols *v.* Barrett, 6 Ga. 443; Blake *v.* Dexter, 12 Cush. (Mass.) 559; Catherwood *v.* Chabaud, 1 B. & C. 150, 8 E. C. L. 65). He, and not the widow or distributees of the estate, is the new personal representative of the deceased. Smith *v.* Billing, 22 Fed. Cas. No. 13,014, 3 Cranch C. C. 355.

Grant may be limited to particular interest. *In re* Hammond, 6 P. D. 104, 45 J. P. 619, 50 L. J. P. & Adm. 70, 73, 44 L. T. Rep. N. S. 649, 29 Wkly. Rep. 807; *In re* Burdett, 1 P. D. 427, 45 L. J. P. & Adm. 71, 34 L. T. Rep. N. S. 855.

The old rule as to the executor of an executor being the proper person to continue the administration of the estate of the first decedent (see *In re* Reid, [1896] P. 129, 65 L. J. P. & Adm. 60, 74 L. T. Rep. N. S. 462; *In re* Grant, 1 P. D. 435, 45 L. J. P. & Adm. 88, 24 Wkly. Rep. 929) does not prevail in the United States, but upon the death of an executor the appointment of an administrator *de bonis non* is proper. Jepson *v.* Martin, 116 Ga. 772, 43 S. E. 75.

Appointment presumed valid in absence of contrary showing.—Jepson *v.* Martin, 116 Ga. 772, 43 S. E. 75. But *compare* Sitzman *v.* Pacquette, 13 Wis. 291.

Where the administrator has become bankrupt and absconded and the estate is not fully settled administration *de bonis non* should be granted. Brattle *v.* Gustin, 1 Root (Conn.) 425.

Under the New Jersey statute, Act March 22, 1901, § 4, providing for the appointment of a substituted administrator, an administration *de bonis non* is no more to be granted in that state. Hoagland *v.* Cooper, 65 N. J. Eq. 407, 56 Atl. 705.

90. Clemens *v.* Walker, 40 Ala. 189. See also Tucker *v.* Horner, 10 Phila. (Pa.) 122.

When appointment proper.— When the sole executor or sole administrator with will annexed, whose functions have ceased, has not completed the administration of the estate, as where he has not paid all the legacies, satisfied all the lawful claims, and delivered over the balance in his hand to the residuary legatees or other persons entitled thereto, an administrator *de bonis non* with the will annexed may be rightfully appointed. Brattle *v.* Converse, 1 Root (Conn.) 174; Alexander *v.* Stewart, 8 Gill & J. (Md.) 226. The old common law may have stopped somewhat short of this conclusion, but according to the tenor of modern legislation the prevailing rule is substantially as stated. Chamberlin's Appeal, 70 Conn. 363, 39 Atl. 734, 41 L. R. A. 204.

91. *Ex p.* Maxwell, 37 Ala. 362, 79 Am. Dec. 62; Moseley *v.* Martin, 37 Ala. 216; Grande *v.* Herrera, 15 Tex. 533; Steen *v.* Bennett, 24 Vt. 303; Veach *v.* Rice, 131 U. S. 293, 9 S. Ct. 730, 33 L. ed. 163. See also Sands *v.* Hickey, 135 Ala. 322, 33 So. 827, holding that although, under the direct provisions of the code, an administration *de bonis non* should be granted when a vacancy occurs in the administration in chief, the appointment of a second administrator without such restriction has only the effect of an excess of power, and is not void *in toto*.

92. Chase *v.* Ross, 36 Wis. 267.

93. *Alabama.*— Sands *v.* Hickey, 135 Ala. 322, 33 So. 827; Sims *v.* Waters, 65 Ala. 442; McDowell *v.* Jones, 58 Ala. 25; Rambo *v.* Wyatt, 32 Ala. 363, 70 Am. Dec. 544; Matthews *v.* Douthitt, 27 Ala. 273, 62 Am. Dec. 765.

Indiana.— Croxten *v.* Renner, 103 Ind. 223, 2 N. E. 601; Pate *v.* Moore, 79 Ind. 20.

Kentucky.— Creath *v.* Brent, 3 Dana 129.

Minnesota.— Wilkinson *v.* Winne, 15 Minn. 159.

Missouri.— Macey *v.* Stark, 116 Mo. 481, 21 S. W. 1088.

Texas.—Brockenborough *v.* Melton, 55 Tex. 493.

See 22 Cent. Dig. tit. "Executors and Administrators," § 268.

So long as there remains a single survivor under an original joint grant of letters administration *de bonis non* should not be granted. Lewis *v.* Brooks, 6 Yerg. (Tenn.) 167. See also Packer *v.* Owens, 164 Pa. St. 185, 30 Atl. 314, holding that where one of

ever in case of a vacancy in the office of executor or administrator it appears that full settlement and distribution has not been properly made a *de bonis non* successor should be appointed to finish and set matters right,[94] and *prima facie* proof of unadministered assets is all that is required;[95] but no such appointment

two co-executors or co-administrators dies and a *de bonis non* appointment is made in his stead this does not vacate the letters of the survivor.

Good cause for making a vacancy is insufficient. Hooper *v.* Scarborough, 57 Ala. 510.

Where an executor was removed without compliance with the statute for removal an administrator *de bonis non* appointed to succeed him had no authority over the estate. Godwin *v.* Hooper, 45 Ala. 613.

Appointment of previous incumbent.— Where application for letters *de bonis non* showed that the applicant had been the former administrator, but did not show that he had been discharged, his appointment as administrator *de bonis non* was not void, as such appointment and qualification thereunder was a relinquishment or resignation of the former letters. Henley *v.* Johnston, 134 Ala. 646, 32 So. 1009, 92 Am. St. Rep. 48, holding further that where the application showed that the applicant had rendered his final accounts which had been approved, but did not show his discharge, the appointment was not void, as the rendition of final account was not inconsistent with the presumption of resignation or removal.

In a collateral proceeding the appointment by the court of an administrator *de bonis non* is *prima facie* evidence that there was a vacancy, that the estate had not been fully administered, and that the order of appointment was valid. Sands *v.* Hickey, 135 Ala. 322, 33 So. 827; Henley *v.* Johnson, 134 Ala. 646, 32 So. 1009, 92 Am. St. Rep. 48; Morgan *v.* Casey, 73 Ala. 222; Bean *v.* Chapman, 73 Ala. 140; Sims *v.* Waters, 65 Ala. 442; Chappell *v.* Doe, 49 Ala. 153; Clemens *v.* Wilson, 40 Ala. 219; Warfield *v.* Brand, 13 Bush (Ky.) 77; Rogers *v.* Johnson, 125 Mo. 202, 28 S. W. 635.

94. Brattle *v.* Converse, 1 Root (Conn.) 174; Alexander *v.* Stewart, 8 Gill & J. (Md.) 226; Taylor *v.* Brooks, 20 N. C. 273; Frost *v.* Frost, 45 Tex. 324; Adams *v.* Richardson, 5 Tex. Civ. App. 439, 27 S. W. 29; Baker *v.* De Zavalla, 1 Tex. Unrep. Cas. 621.

Reducing assets to cash is not necessarily a full settlement of the estate. Donaldson *v.* Raborg, 26 Md. 312.

The facts that allowed claims have not been paid in full, and that there remains property unsold, give a probate court jurisdiction to appoint an administrator *de bonis non,* although the first administrator has made a final settlement. Howell *v.* Jump, 140 Mo. 441, 41 S. W. 976.

Existence of claims against estate not necessary.— Francisco *v.* Wingfield, 161 Mo. 542, 61 S. W. 842; Strickland *v.* Sandmeyer, 21 Tex. Civ. App. 351, 52 S. W. 87.

Where personal property remains undisposed of after the decedent's debts have been paid and the property has been delivered by the executor to a testamentary trustee an administrator *de bonis non* is necessary, since an estate must be pending for settlement in the probate court before that court, which alone can decide the question, can determine who are the distributees. Chamberlin's Appeal, 70 Conn. 363, 39 Atl. 734, 41 L. R. A. 204.

Assets subsequently discovered.— An appointment *de bonis non* is proper whenever, after the former executor or administrator has been discharged, assets of the estate are discovered (Ratliff *v.* Magee, 165 Mo. 461, 65 S. W. 713), even though the original administrator was unable to discover assets and was discharged in consequence (Langsdale *v.* Woollen, 99 Ind. 575). But although a deed of homestead by a husband to his wife which is void to the extent of one thousand dollars in value because she did not join is not attached until after the discharge of the executrix, the one-thousand-dollar homestead is not subsequently discovered assets so as to require an administration *de bonis non* and the intervention of such an administrator in a suit by the heir attacking the deed. Stickel *v.* Crane, 189 Ill. 211, 59 N. E. 595. See also Derge *v.* Hill, 103 Mo. App. 281, 77 S. W. 105.

Pendency of proceeding to test validity of will.— Where, in consequence of the death of an executor, there is no legal representative of an estate, the probate court may grant letters of administration *de bonis non,* even while an appeal from a proceeding to test the validity of the will is pending. Finn *v.* Hempstead, 24 Ark. 111.

Retroactive effect of statute.— The Indiana act of March 5, 1891 (Rev. St. (1894) § 2395), providing that on a showing that an administrator has been finally discharged, that no administration is pending, and that there are assets within the jurisdiction of the state which have not been but should be administered, a court of probate having jurisdiction may on the application of any unpaid creditor or legatee or of any one entitled to share in the estate appoint an administrator *de bonis non* with the powers of an administrator, applies to estates administered upon and in which final reports had been made and approved before the passage of the act. Wahl *v.* Schierling, 11 Ind. App. 696, 39 N. E. 533.

Necessity of appointment cannot be questioned collaterally. Ormsbee *v.* Piper, 123 Mich. 265, 82 N. W. 36; Barney *v.* Babcock, 115 Wis. 409, 91 N. W. 982.

95. Postal *v.* Kreps, 23 Ind. App. 101, 54 N. E. 816; Scott *v.* Fox, 14 Md. 388; Pumpelly *v.* Tinkham, 23 Barb. (N. Y.) 321.

Prima facie showing of assets necessary.— Owen *v.* Ward, 127 Mich. 693, 87 N. W. 70.

The approval of the final account of an administrator is not an adjudication that he

should be made where the estate has already been fully administered.[96] Protection of the rights of distributees may give occasion for the appointment,[97] or an administrator may be appointed to give good title to specific assets.[98] A right of action which survives for the benefit of the estate may suffice for such appointment,[99] and so also may a lawful claim with right of action against the predecessor.[1] Where after the death of a general administrator who has not fully administered litigation arises respecting the validity of a will the new appointees for such a litigation should be designated as *de bonis non*.[2] Administration *de bonis non* may be granted for bringing a suit to recover assets which the predecessor refused to prosecute,[3] where the predecessor had advanced from his own funds without opportunity to reimburse himself,[4] or where the predecessor had reported debts as desperate which prove collectable, or had turned over as belonging elsewhere personalty which proves recoverable for the estate.[5] But a personal trust conferred under a will upon the executrix after settling the estate is not in case of a vacancy following such settlement to go *de bonis non*.[6]

3. Right to Appointment. The general rule is that persons are entitled to administration *de bonis non* in the same order as they would have been entitled to an original grant in case of intestacy or to letters with the will annexed in case there is a will.[7] In the case of administration granted to the surviving spouse,

has turned into the estate all the assets belonging to it, but, without setting a final settlement aside, an administrator *de bonis non* may be appointed to take charge of any assets omitted from the former administration. Michigan Trust Co. *v.* Probasco, 29 Ind. App. 109, 63 N. E. 255.

Whether claims if collected will render estate solvent need not be considered. Mallory's Appeal, 62 Conn. 218, 25 Atl. 109.

96. Myers *v.* Baltimore Safe-Deposit, etc., Co., 73 Md. 413, 21 Atl. 58; Wilcoxon *v.* Reese, 63 Md. 542; *In re* Hess, 4 Ohio S. & C. Pl. Dec. 413; *In re* Herckelrath, 1 Ohio S. & C. Pl. Dec. 696. See also Haven *v.* Haven, 69 N. H. 204, 39 Atl. 972.

Where the only office of administration would be distribution and there is but one distributee the estate will not be subjected to the unnecessary costs and expenses of an administration *de bonis non*. Glover *v.* Hill, 85 Ala. 41, 4 So. 613.

Where an estate has been practically settled, although irregularly, administration *de bonis non* will not be granted when not requested by someone having an interest in the estate. Mercer *v.* Pike, 58 N. H. 286.

Debts due from decedent.— A legacy is not a debt within the meaning of a statute authorizing a grant of administration *de bonis non*, where there are "debts due from the deceased person unpaid." Chapin *v.* Hastings, 2 Pick. (Mass.) 361.

Order not showing complete administration see Barney *v.* Babcock, 115 Wis. 409, 91 N. W. 982.

Lapse of time and other circumstances may raise a presumption that all debts against an estate are either barred or paid and that the remaining assets belong to the distributee, and in such a case the court is indisposed to reopen the estate by an appointment *de bonis non*. San Roman *v.* Watson, 54 Tex. 254; Frost *v.* Frost, 45 Tex. 324; Gilleland *v.* Drake, 36 Tex. 676; Murphy *v.* Menard, 14 Tex. 62. See also *In re* Hubbard, 185 Mass. 22, 69 N. E. 349; Derge *v.* Hill, 103 Mo. App. 281, 77 S. W. 105.

Where no valid subsisting claims are shown against the estate on an application for administration *de bonis non* by a person claiming to be a creditor letters should be refused. Chandler *v.* Hudson, 11 Tex. 32.

The unwise exercise of a legal discretion vested in the court as to whether an administrator *de bonis non* should be appointed cannot vacate the appointment. Frost *v.* Frost, 45 Tex. 324.

97. Byerly *v.* Donlin, 72 Mo. 270, where the final settlement of a deceased administrator was set aside by the court.

98. Deans *v.* Wilcoxon, 25 Fla. 980, 7 So. 163; Kirby *v.* State, 51 Md. 383 (foreclosure of a mortgage); Alexander *v.* Stewart, 8 Gill & J. (Md.) 226; Hinton *v.* Bland, 81 Va. 588.

99. Merkle *v.* Bennington, 68 Mich. 133, 35 N. W. 846; Hayward *v.* Place, 4 Dem. Surr. (N. Y.) 487.

1. Newcomb *v.* Williams, 9 Metc. (Mass.) 525; Scott *v.* Crews, 72 Mo. 261; *In re* Nesmith, 1 N. Y. Suppl. 343.

2. Clemens *v.* Walker, 40 Ala. 189; Finn *v.* Hempstead, 24 Ark. 111.

3. Merkle *v.* Bennington, 68 Mich. 133, 35 N. W. 846.

4. Munroe *v.* Holmes, 13 Allen (Mass.) 109.

5. Mallory's Appeal, 62 Conn. 218, 25 Atl. 109; Adams *v.* Internal Imp. Fund, 37 Fla. 266, 20 So. 266; Hinton *v.* Bland, 81 Va. 588.

6. Hinson *v.* Williamson, 74 Ala. 180; Enlow *v.* Bethel College, 67 S. W. 989, 24 Ky. L. Rep. 31.

7. *Alabama.*— Burke *v.* Mutch, 66 Ala. 568.
Connecticut.— Mallory's Appeal, 62 Conn. 218, 25 Atl. 109.
Georgia.— Jones *v.* Whitehead, 66 Ga. 290.
Maryland.—Wilcoxon *v.* Reese, 63 Md. 542;

especially when granted for his or her own benefit, followed by the death of the latter, administration *de bonis non* ordinarily goes by the interest as between kindred of the wife and husband, and hence the representatives of the spouse who survived are as a rule preferred unless others have really the beneficial interest.[3] The person appointed must of course be qualified to act.[9] It has been held that a renunciation of the right to letters *de bonis non* cannot be retracted.[10]

4. Jurisdiction. The court which granted the original letters testamentary or of administration and holds supervision of the estate has alone the right to grant administration *de bonis non*.[11]

5. Time For Application. A broad period is usually allowed for granting administration *de bonis non*, according as the opportunity to realize something for the estate may present itself; nor does even statutory limit to original administration bar by inference the grant of letters *de bonis non*.[12]

6. Proceedings. Before a grant of administration *de bonis non* to a person

Kearney *v.* Turner, 28 Md. 408; Thomas *v.* Knighton, 23 Md. 318, 87 Am. Dec. 571.

Michigan.— Buss *v.* Buss, 75 Mich. 163, 42 N. W. 688. See also Cole *v.* Shaw, (1903) 96 N. W. 573, holding an unpaid legatee entitled to appointment.

New Jersey.— Donahay *v.* Hall, 45 N. J. Eq. 720, 18 Atl. 163.

New York.— Bradley *v.* Bradley, 3 Redf. Surr. 512.

Pennsylvania.— Padelford's Estate, 7 Pa. Dist. 711.

Rhode Island.— Emsley *v.* Young, 19 R. I. 65, 31 Atl. 692.

See 22 Cent. Dig. tit. "Executors and Administrators," § 270.

Contra.— Russell *v.* Hoar, 3 Metc. (Mass.) 187, holding that under Rev. St. c. 64, § 14, the probate court has discretionary authority to grant letters of administration *de bonis non* to any suitable person.

As between persons having an equal right the choice lies in the discretion of the court. Bowie *v.* Bowie, 73 Md. 232, 20 Atl. 916. And the same is true as to the nominees of such persons. Matter of Muhlenburg, 4 Phila. (Pa.) 192, where a joint grant was made to two such nominees.

An executrix who has renounced has no preferential right to be appointed administratrix *de bonis non* with the will annexed after the death of the administratrix with the will annexed. Thornton *v.* Winston, 4 Leigh (Va.) 152.

Creditors of an estate, insolvent or desperate, have a fair right to be considered.

Alabama.— Long *v.* Easly, 13 Ala. 239.

Illinois.— Tillson *v.* Ward, 46 Ill. App. 179.

Maryland.— McGuire *v.* Rogers, 71 Md. 587, 18 Atl. 888.

New York.— Spinning's Will, Tuck. Surr. 78.

North Carolina.— Cutlar *v.* Quince, 3 N. C. 60.

Pennsylvania.— Coyle's Estate, 16 Phila. 350.

See 22 Cent. Dig. tit. "Executors and Administrators," § 270.

Under "special circumstances" the usual priority may be disregarded. *In re* Grundy, L. R. 1 P. 459, 37 L. J. P. & M. 21, 17 L. T. Rep. N. S. 451, 16 Wkly. Rep. 406.

Second appointment of person having equal right with appointee.— Where an executor has been removed from office and an administrator *de bonis non* has been substituted in his place, another person having an equal claim with the one substituted cannot come in at a subsequent term and be allowed administration, the power of the court over the subject-matter having ceased. *Ex p.* Clarke, 2 Va. Cas. 230.

8. *Georgia.*— Bryan *v.* Rooks, 25 Ga. 622, 71 Am. Dec. 194.

New York.— *In re* Sturtzkober, 14 N. Y. Suppl. 501; Whitaker *v.* Whitaker, 6 Johns. 112; Matter of Harvey, 3 Redf. Surr. 214. See also Lockwood *v.* Stockholm, 11 Paige 87.

North Carolina.— Patterson *v.* High, 43 N. C. 52.

Virginia.—Hendren *v.* Colgin, 4 Munf. 231; Cutchin *v.* Wilkinson, 1 Call 1.

England.— Fielder *v.* Hanger, 3 Hagg. Eccl. 769.

See 22 Cent. Dig. tit. "Executors and Administrators," § 270.

9. McDevitt's Estate, 9 Pa. Dist. 474, holding that letters of administration *de bonis non* cannot be granted to a non-resident of the state.

10. Stockdale *v.* Conaway, 14 Md. 99, 74 Am. Dec. 515.

11. *Alabama.*— Beasley *v.* Howell, 117 Ala. 499, 22 So. 989.

Illinois.— People *v.* White, 11 Ill. 341.

Kentucky.— Burnett *v.* Meadows, 7 B. Mon. 277, 46 Am. Dec. 517; Pawling *v.* Speed, 5 T. B. Mon. 580.

Missouri.— Byerly *v.* Donlin, 72 Mo. 270.

Virginia.— *Ex p.* Lyons, 2 Leigh 761.

See 22 Cent. Dig. tit. "Executors and Administrators," § 273.

Change in district boundaries.— An administration *de bonis non* granted by the probate court of a district other than the one in which administration was first granted, but to which the town where the deceased resided had been attached by a later statute, is not void but only voidable on appeal. Clapp *v.* Beardsley, 1 Vt. 151.

12. *In re* Holmes, 33 Me. 577; Neal *v.* Charlton, 52 Md. 495; Bancroft *v.* Andrews, 6 Cush. (Mass.) 493; Adams *v.* Richardson, 5 Tex. Civ. App. 439, 27 S. W. 29. But

not primarily entitled thereto there should be a summons or legal notice to persons having a prior right to the appointment.[13] It is not essential to the validity of the appointment of such an administrator that the necessity therefor should appear on the face of the application for letters.[14] As a general rule it may be laid down that the rules governing proceedings for the appointment of an administrator *de bonis non* are substantially the same as obtain in proceedings for the appointment of an ordinary administrator.[15]

E. Temporary or Special Administrators[16] — **1. In General.** Administration limited to a certain time, certain specific effects of the deceased, or the performance of some particular acts may be granted in various appropriate instances.[17]

2. Classes — a. Durante Minoritate. Where the person entitled by prece-

compare Dodge *v.* Phelan, 2 Tex. Civ. App. 441, 21 S. W. 309.

13. Wilcoxon *v.* Reese, 63 Md. 542; Thomas *v.* Knighton, 23 Md. 318, 87 Am. Dec. 571.

Notice of resignation of former incumbent. — The Mississippi statute requiring notice to distributees or legatees of a surrender of his trust by an executor or administrator as a condition precedent to a valid settlement with the court of the administration account of the person resigning is not inconsistent with the right of the court to accept a resignation and appoint a successor at once, requiring the outgoing executor or administrator to give notice and make settlement, until which he remains liable on his bond, and hence the appointment of an administrator *de bonis non* with the will annexed, without notice to the legatees of the surrender of his trust by the executor, is not void. Sivley *v.* Summers, 57 Miss. 712.

Under the Maryland code the largest creditor is not required to be notified or summoned before administration is granted to a stranger, although he is entitled to administration if he applies for the same and the law fixes no time within which he must assert his claim, nor is the court required to wait any time for him to do so. Consequently this is a matter left to the discretion of the court, and while as a general rule it is proper for the orphans' court to give some reasonable time for creditors and other persons who are not required to be notified to assert their claim, there may be cases where the security of the estate and the rights of creditors require immediate action, and of this the orphans' court is the best judge. Hence the court has a right if it sees proper to appoint an administrator *de bonis non* on the same day that original letters of administration are revoked. McGuire *v.* Rogers, 71 Md. 587, 18 Atl. 888.

Where letters of administration are revoked as being informally or illegally granted new letters may be granted to the same person, or, it seems, to any other without a new application. Delany *v.* Noble, 3 N. J. Eq. 559.

14. Williams *v.* Verne, 68 Tex. 414, 4 S. W. 548, holding further that even if this were necessary an application alleging that a certain person had been appointed and qualified as administrator of the estate and had died before winding up the same was sufficient.

15. See *infra*, II, H.

An appointment made on a day different from that fixed in the order and notice of a hearing for the appointment is void. Kammerer *v.* Morlock, 125 Mich. 320, 84 N. W. 319, where the appointment was made four days earlier than the date fixed in the order for the hearing.

Who may oppose grant. — A trustee receiving property of an estate under a judgment of a competent court still in force and unappealed from is such an interested party as to be entitled under the Texas statute to contest a grant of administration *de bonis non*. San Roman *v.* Watson, 54 Tex. 254.

Objection to mere informality should be seasonably made. Moore *v.* Willamette Transp., etc., Co., 7 Oreg. 359.

The court should not try title to property nor determine questions of estoppel or other collateral points in such proceedings. Mallory's Appeal, 62 Conn. 218, 25 Atl. 109.

Who may appeal. — A purchaser of the reversionary interest in land of a deceased insolvent person assigned to his widow as dower may appeal from a decree appointing an administrator *de bonis non*. Bancroft *v.* Andrews, 6 Cush. (Mass.) 493. Where an intestate's widow, being administratrix of his estate, has married, whereby her authority as administratrix is extinguished, and she applies for the appointment of her husband as administrator, but the children apply for the appointment of another person, and such other person is appointed, the widow may appeal. Hilliard *v.* McDaniels, 48 Vt. 122.

Presumption of regularity on collateral attack see Lyon *v.* Odom, 31 Ala. 234; Oakes *v.* Buckley, 49 Wis. 592, 6 N. W. 321.

16. **Powers and duties** see *infra*, XX.

17. *Georgia.* — Dean *v.* Biggers, 27 Ga. 73.

Louisiana. — De Flechier's Succession, 1 La. Ann. 20.

Mississippi. — Browning *v.* Watkins, 10 Sm. & M. 482.

New York. — Martin *v.* Dry Dock, etc., R. Co., 92 N. Y. 70.

Tennessee. — Jordan *v.* Polk, 1 Sneed 430; McNairy *v.* Bell, 6 Yerg. 302.

Texas. — Alexander *v.* Barfield, 6 Tex. 400; Ball *v.* Ball, (Civ. App. 1898) 45 S. W. 605.

England. — *In re* Hammond, 6 P. D. 104, 45 J. P. 619, 50 L. J. P. & Adm. 70, 44 L. T. Rep. N. S. 649, 29 Wkly. Rep. 807.

dence to administration or the executor named in a will is an infant, the court may appoint an administrator to serve until such person attains his majority, who is termed an administrator *durante minoritate* or *durante minore ætate*.[18] If several executors are named and one of them is of full age and capacity, administration during minority need not be granted, because the person of full age may serve, notwithstanding the non-age of the others.[19]

b. Durante Absentia. A temporary appointment is recognized during the absence from the jurisdiction of the designated executor or the person entitled to administration, the appointee being termed an administrator *durante absentia*.[20]

c. Pendente Lite. In case litigation arises over the right to administration or the probate of the will, an administrator may be appointed to take charge of the estate while such contest is pending and until its termination, the appointee being termed an administrator *pendente lite*.[21] Upon the termination of the litigation,

See 22 Cent. Dig. tit. "Executors and Administrators," § 116.

Where no application for administration in chief is pending temporary letters cannot be granted. Dock's Estate, 7 N. Y. Civ. Proc. 237, 3 Dem. Surr. (N. Y.) 55.

Qualified appointment.— Where a supposed deceased had not been heard of for about six years and ten months, and there was no other evidence of death, and a grant of administration was required for use in certain chancery proceedings, the court gave the applicant leave to swear that the death had occurred on the date the alleged deceased was last heard of, but directed that the grant should, except in so far as it might be required in the chancery division, remain in the registry until the expiration of seven years from that date. *In re* Winstone, [1898] P. 143, 67 L. J. P. & Adm. 76, 78 L. T. Rep. N. S. 535.

Errors in temporary administration proceedings.—Errors and irregularities in a judgment rendered in a temporary administration cannot be corrected in the permanent administration, as they are distinct proceedings and a judgment in one cannot be collaterally attacked in the other. Ball *v.* Ball, (Tex. Civ. App. 1898) 45 S. W. 605.

Estoppel to object to appointment.—Where parties interested in the estate fail to move to set aside the appointment of a temporary administrator in apt time, they cannot claim that the appointment was not properly made. Stone *v.* Haskins, 97 Ill. App. 3.

Limited grants should not be made unless strong reason given.— *In re* Somerset, L. R. 1 P. 350; *In re* Watts, 29 L. J. P. & M. 108, 1 Swab. & Tr. 538, 8 Wkly. Rep. 340.

18. *Mississippi.*—Pitcher *v.* Armat, 6 Miss. 288.

Missouri.— State *v.* Guinotte, 156 Mo. 513, 57 S. W. 281, 50 L. R. A. 787.

New Hampshire.— Taylor *v.* Barron, 35 N. H. 484.

North Carolina.—Wallis *v.* Wallis, 60 N. C. 78; Ritchie *v.* McAuslin, 2 N. C. 220.

Pennsylvania.— *In re* Ellmaker, 4 Watts 34; Riegel's Appeal, 2 Pa. Cas. 58, 4 Atl. 173.

England.— *In re* Cope, 16 Ch. D. 49, 50 L. J. Ch. 13, 43 L. T. Rep. N. S. 566, 29 Wkly. Rep. 98.

See 22 Cent. Dig. tit. "Executors and Administrators," § 118.

19. Schouler Ex. § 132; 1 Williams Ex. (7th Am. ed.) 577 [*citing* Pigot's Case, Brownl. & G. 46]. But see Cartright's Case, 1 Freem. 258 (where four persons being equally entitled to administration, and only one of them being of age, the court granted administration *durante minore ætate* to the mother of the other three as guardian); Colborne *v.* Wright, 2 Lev. 239 (holding that, where one of the executors is an infant and cannot prove the will, administration *durante sua minoritate* may be granted to the other).

20. *Missouri.*— State *v.* Guinotte, 156 Mo. 513, 57 S. W. 281, 50 L. R. A. 787; *In re* Estes, 65 Mo. App. 38.

North Carolina.— Ritchie *v.* McAustin, 2 N. C. 220.

Pennsylvania.— Willing *v.* Perot, 5 Rawle 264.

United States.— Griffith *v.* Frazier, 8 Cranch 9, 3 L. ed. 471.

England.— *In re* Ruddy, L. R. 2 P. D. 330, 41 L. J. P. & M. 63, 25 L. T. Rep. N. S. 950, 20 Wkly. Rep. 319; *In re* Swarez, [1897] P. 82, 66 L. J. P. & Adm. 98, 77 L. T. Rep. N. S. 137, 45 Wkly. Rep. 704; *In re* Richardson, 35 L. T. Rep. N. S. 767; Clare's Case [*cited* in Major *v.* Peck, 1 Lutw. 338, 342].

See 22 Cent. Dig. tit. "Executors and Administrators," § 121.

Person entitled may qualify on return. *In re* Estes, 65 Mo. App. 38; Rainsford *v.* Taynton, 7 Ves. Jr. 460, 32 Eng. Reprint 186. *Aliter*, where, after an unreasonable absence, the person entitled finds upon his return that the estate has been fully settled. Nicholson's Succession, 5 La. Ann. 358.

21. *Alabama.*— McDonnell *v.* Farrow, 132 Ala. 227, 31 So. 475; Breeding *v.* Breeding, 128 Ala. 412, 30 So. 881; Clemens *v.* Walker, 40 Ala. 189.

Arkansas.— Wade *v.* Bridges, 24 Ark. 569.

Georgia.— Walker *v.* Dougherty, 14 Ga. 653.

Maryland.— Harrison *v.* Clark, 95 Md. 308, 52 Atl. 514; Munnikhuysen *v.* Magraw, 35 Md. 280.

Michigan.— Greece *v.* Helm, 91 Mich. 450, 51 N. W. 1106.

Missouri.— State *v.* Guinotte, 156 Mo. 513,

there is no further need of the services of the administrator *pendente lite* and his authority ceases.[22]

d. Ad Litem. A special administrator is sometimes appointed for the sole purpose of supplying a necessary party to an action to which the deceased was or his

57 S. W. 281, 50 L. R. A. 787; Lamb *v.* Helm, 56 Mo. 420.

Montana.— Quinn *v.* Quinn, 22 Mont. 403, 56 Pac. 824.

New York.— Matter of Eddy, 10 Misc. 211, 31 N. Y. Suppl. 423; Lawrence *v.* Parsons, 27 How. Pr. 26; West *v.* Mapes, 14 N. Y. Wkly. Dig. 92.

Pennsylvania.— Ellmaker's Estate, 4 Watts 34; Wickersham's Estate, 4 Leg. Gaz. 331.

Tennessee.— Crozier *v.* Goodwin, 1 Lea 368.

England.— Smyth *v.* Smyth, 3 Keb. 54; Robins' Case, Moore 636; Walker *v.* Woollaston, 2 P. Wms. 576, 24 Eng. Reprint 868.

See 22 Cent. Dig. tit. "Executors and Administrators," § 120.

Where probate has been granted a further contest over the will does not, in Kentucky, authorize the appointment of a special administrator. McClure *v.* Allphin, 41 S. W. 1, 19 Ky. L. Rep. 576; Worthington *v.* Worthington, 35 S. W. 113, 18 Ky. L. Rep. 62. But in Missouri the rule is otherwise and the probate court has jurisdiction to suspend an executor and appoint a temporary administrator pending a contest of the will. State *v.* Moehlenkamp, 133 Mo. 134, 34 S. W. 468; Lamb *v.* Helm, 56 Mo. 420; Rogers *v.* Dively, 51 Mo. 193.

Where an appeal has been taken from the appointment of an administrator the probate court should on application appoint a special administrator. People *v.* Wayne Probate Judge, 39 Mich. 302.

Where a decree for the probate of a will has been reversed the surrogate has jurisdiction to appoint a temporary administrator and may make such an appointment, although letters testamentary had been issued at the time of the probate. Matter of Hopkins, 41 Misc. (N. Y.) 83, 83 N. Y. Suppl. 890.

Pending an appeal of a general appointee upon the question of bonds, etc., the probate court may appoint a special administrator. People *v.* Wayne Probate Judge, 39 Mich. 302; Sarle *v.* Scituate Probate Ct., 7 R. I. 270.

Power of surrogate after transfer of cause. — Where proceedings for the probate of a will have been transferred by the surrogate to the court of common pleas under a statute authorizing such transfer for the purpose of trying by jury issues of fact arising therein, the surrogate's court, while the proceeding is pending in the common pleas, is not deprived of the power to appoint a temporary administrator in order to preserve the estate. Matter of Blair, 60 Hun (N. Y.) 523, 15 N. Y. Suppl. 212.

Jurisdiction must appear. The facts giving jurisdiction to the county court, under the statute regulating its power to appoint curators, must be made to appear, and in the absence of such facts, it is not error for the circuit court to render judgment on appeal holding an order of the county court appointing a curator to be void. McClure *v.* Allphin, 41 S. W. 1, 19 Ky. L. Rep. 576.

When appointment unnecessary.— No appointment *pendente lite* should be made after the general administrator has fully settled the estate, or where it otherwise appears that there is no occasion for such administration (Elwell *v.* Universalist Church, 63 Tex. 220; Fisk *v.* Norvel, 9 Tex. 13, 58 Am. Dec. 128); nor should a decedent's estate be subjected to the cost and encumbrance of such an administration when a rightful and regular executor or administrator whose appointment is not questioned can discharge the duties of the office during the emergency, but the consent of the contesting parties to the special appointment *pendente lite* obviates objections of this character (Patton's Appeal, 31 Pa. St. 465; Mortimer *v.* Paull, L. R. 2 P. 85, 39 L. J. P. & M. 47, 22 L. T. Rep. N. S. 631, 18 Wkly. Rep. 901). Where, on an appeal from a decree removing an executor, it appears that the estate consists of securities and cash deposited in a bank, and that an order made by the lower court restraining the removed executor from disposing of the estate during the pendency of the proceedings has not been appealed from, and there is no claim that the estate has been diminished in value since the appeal was taken, the prerogative court will not appoint an administrator *pendente lite* on a motion based on the misconduct for which the executor was removed. *In re* Marsh, (N. J. Prerog. 1903) 55 Atl. 299. Where a will names no executor and merely devises real estate a controversy over the probate thereof does not warrant the appointment of a temporary administrator or receiver under a statute providing for a temporary appointment "where delay necessarily occurs in the granting letters testamentary or of general administration." Tooker *v.* Bell, 1 Dem. Surr. (N. Y.) 52.

22. *Maryland.*— Baldwin *v.* Mitchell, 86 Md. 379, 38 Atl. 775.

Missouri.— RoBards *v.* Lamb, 89 Mo. 303, 1 S. W. 222.

New Jersey.— Cole *v.* Wooden, 18 N. J. L. 15.

Pennsylvania.— *In re* Ellmaker, 4 Watts 34.

England.— Wieland *v.* Bird, [1894] P. 262, 63 L. J. P. & Adm. 162, 71 L. T. Rep. N. S. 267, 6 Reports 574.

Notice in court of settlement not necessary. — RoBards *v.* Lamb, 89 Mo. 303, 1 S. W. 222.

Where an appeal is taken after judgment entered the administration *pendente lite* continues or revives. Offutt *v.* Gott, 12 Gill & J. (Md.) 385; State *v.* Guinotte, 156 Mo. 513, 57 S. W. 281, 50 L. R. A. 787; Brown *v.* Ryder, 42 N. J. Eq. 356, 7 Atl. 568.

Contest over two wills propounded.—Under

estate is a necessary party, and the administrator so appointed is termed an administrator *ad litem*.[23]

e. Ad Colligendum. Administration is sometimes granted for the sole purpose of collecting and preserving the goods of the decedent, and such a grant is termed "*ad colligendum*" or more properly "*ad colligendum bona defuncti*." [24]

f. Other Temporary or Special Appointments. Various other occasions may arise for requiring a temporary administrator; as where the testator appoints a person to be his executor at the expiration of five years,[25] or the representative

a statute providing for letters of administration *pendente lite* where a will is contested, and that the grant of letters testamentary or of administration shall revoke a previous grant of letters *pendente lite*, where two wills were offered for probate, and both contested, letters of administration *pendente lite* issued before the trial of the contest over the last will were not revoked by the mere termination of that contest, but the administrators were entitled to serve, unless removed for cause, until the issuance of letters testamentary or of administration at the conclusion of the controversy over the other will. Harrison *v.* Clark, 95 Md. 308, 52 Atl. 514, holding further that the court was not required, on the termination of the first contest, to appoint as administrator *pendente lite* the executor named under the other will, to enable him to use the assets of the estate to defend the caveat thereto.

23. *Alabama.*— Malone *v.* Hill, 68 Ala. 225.

Michigan.— See *In re* Nugent, 77 Mich. 500, 43 N. W. 889.

Tennessee.— McKamy *v.* McNabb, 97 Tenn. 236, 36 S. W. 1091. But *compare* Bandy *v.* Walker, 3 Head 568.

England.— See *In re* Hesse, 1 Hagg. Eccl. 93.

Canada.— See Hunter *v.* Boyd, 3 Ont. L. Rep. 183; *Re* Tobin, 6 Ont. Pr. 40, 9 Can. L. J. 191.

See 1 Cyc. 88 note 34.

Where the regular administrator is interested adversely to the estate it is the duty of the court under some statutes to appoint an administrator *ad litem*. *Ex p.* Baker, 118 Ala. 185, 23 So. 996; Denning *v.* Todd, 91 Tenn. 422, 19 S. W. 228. But an administrator *ad litem* will not be appointed where all the parties interested in the final settlement of the estate are before the court. *Ex p.* Baker, 118 Ala. 185, 23 So. 996.

A temporary administrator may be appointed to sue the administrator as an individual and prosecute the suit to final judgment. Stone *v.* Haskins, 97 Ill. App. 3.

Power of court when suit pending.— Where a party dies pending a suit, the court in which the suit is pending has power to appoint a special administrator to conduct or defend the case. Mangum *v.* Cooper, 28 Ark. 253. *Contra*, Chartier *v.* Plaquemines Police Jury, 9 La. Ann. 42.

Administrator ad prosequendum.—In a foreclosure suit by a prior mortgagee the court has granted letters of limited jurisdiction on the estate of a deceased subsequent mortgagee, such letters being limited to the purpose only of attending, supplying, substantiating, and confirming the proceedings already had or which might thereafter be had in the foreclosure suit or any other suit or suits which might thereafter be commenced in that or any other court for the relief sought by the bill in the chancery foreclosure suit, the letters to continue until a final decree should be made therein and such decree carried into execution and the execution thereof fully completed, the administrator being termed administrator *ad prosequendum*. *In re* Lothrop, 33 N. J. Eq. 246, 247, where the court said further: "The administrator *ad prosequendum* thus appointed will have no authority to receive any money realized on the mortgage which he represents, or on the decree or execution."

24. Flora *v.* Mennice, 12 Ala. 836; *In re* Bolton, [1899] P. 186, 68 L. J. P. & Adm. 63, 80 L. T. Rep. N. S. 631; *In re* Schwerdtfeger, 1 P. D. 424, 45 L. J. P. & Adm. 46, 34 L. T. Rep. N. S. 72, 24 Wkly. Rep. 298; *In re* Clarkington, 8 Jur. N. S. 84, 7 L. T. Rep. N. S. 218, 2 Swab. & Tr. 380, 10 Wkly. Rep. 124. See also Dean *v.* Biggers, 27 Ga. 73; McNairy *v.* Bell, 6 Yerg. (Tenn.) 302.

When there are neither kindred nor creditors this class of administration only is authorized. Thompson *v.* Buckner, 2 Hill Eq. (S. C.) 499.

Where a sole next of kin refuses to take administration, the court, on cause shown, will decree letters *ad colligendum* limited according to the special circumstances of the case. *In re* Radnall, 2 Add. Eccl. 232.

Nature of office.— The administrator *ad colligendum* is the mere agent or officer of the court and may be compelled at any time to give way to an administrator in chief. Flora *v.* Mennice, 12 Ala. 836.

French spoliation claim.—The probate court can appoint an administrator for the sole purpose of collecting and receiving a claim under the French spoliation act, although the fund will not be general assets of the estate of the intestate or liable for his debts but will belong to particular persons who by law or contract with decedent will be entitled thereto. Sargent *v.* Sargent, 168 Mass. 421, 47 N. E. 121.

Proof of death.— Much weaker proof is sufficient to raise the presumption of the death of an intestate on an application for the appointment of a temporary administrator to collect than a permanent administrator. Czech *v.* Bean, 35 Misc. (N. Y.) 729, 72 N. Y. Suppl. 402.

25. Godolph, pt. 2, c. 30, § 5.

duly appointed has become disabled by sickness or temporarily insane.[26] So also an administrator may be appointed to act until a will is presented and proved,[27] especially where the will is left in some distant place, or is missing, so as to require a long search for it.[28]

g. Special Administration Under Statutes. Under modern policy, and more especially as the result of legislation in various American states, the enumerated occasions for temporary or limited grants lose much of their force, inasmuch as the appointment of a special or temporary administrator wherever an emergency arises which calls for such appointment is distinctly provided for.[29]

h. Appointment of Receiver. Under certain circumstances and upon a proper showing being made, the court of probate may appoint a receiver for the estate of a decedent, who usually corresponds to a sort of special administrator.[30]

3. Selection. In the selection of a temporary or special administrator the surviving spouse, next of kin, legatees, and beneficiaries have as a rule no such absolute right to preference as in case of a general grant of letters;[31] but the selection is rather controlled by the sound discretion of the court in view of the situation,[32] aided by the consent and confidence of those who may be interested in

26. *In re* Ponsonby, [1895] P. 287, 64 L. J. P. & Adm. 119, 11 Reports 613, 44 Wkly. Rep. 240; *In re* Phillip, 2 Add. Eccl. 335; *Ex p.* Evelyn, 2 Myl. & K. 3, 7 Eng. Ch. 3, 39 Eng. Reprint 846; Hills *v.* Mills, 1 Salk. 36.

27. Sager *v.* Mead, 164 Pa. St. 125, 30 Atl. 284.

28. Howell *v.* Metcalfe, 2 Add. Eccl. 348.

29. *Alabama.*— *Ex p.* Lyon, 60 Ala. 650.

California.—Schroeder *v.* San Mateo County Super. Ct., 70 Cal. 343, 11 Pac. 651.

Indiana.— Bruning *v.* Golden, 159 Ind. 199, 64 N. E. 657.

Iowa.— Pickering *v.* Weiting, 47 Iowa 242.

Louisiana.— Rogers *v.* Beiller, 3 Mart. 665.

Michigan.—People *v.* Wayne Probate Judge, 39 Mich. 302.

Mississippi.— See Boyd *v.* Swing, 38 Miss. 182.

Missouri.— Lamb *v.* Helm, 56 Mo. 420.

Rhode Island.— Sarle *v.* Scituate Probate Ct., 7 R. I. 270.

A "special collector" is thus recognized in New York practice, wherever by reason of contest or other cause there is likely to be delay in the general grant. Crandall *v.* Shaw, 2 Redf. (N. Y.) 100; Mootrie *v.* Hunt, 4 Bradf. (N. Y.) 173.

No such officer as "provisional administrator" is known to the law of Louisiana, but, if such an officer be appointed by the court pending a contest, he has only the functions of a keeper, and may be set aside at the discretion of the court. Clark's Succession, 30 La. Ann. 801.

30. Price *v.* Price, 23 N. J. Eq. 428 (waste and misappropriation of funds by executor); Harmon *v.* Wagener, 33 S. C. 487, 12 S. E. 98 (waste and mismanagement by executor). See, generally, Receivers.

Exclusive possession by one of two executors.— The mere fact that one of two joint executors maintains exclusive possession of the securities belonging to the estate, and refuses to deliver them, or any of them, to his coexecutor, there being no evidence of maladministration, or that the interests of the estate are endangered, is not sufficient ground for removing the securities of the estate from the custody of such executor, and transferring them to a special receiver. Burt *v.* Burt, 41 N. Y. 46.

Where the application is based upon the incompetency of the executrix her resignation and the appointment of an administrator *de bonis non* by the probate court will defeat the application. Lunsford *v.* Lunsford, 122 Ala. 242, 25 So. 171.

31. Lamb *v.* Helm, 56 Mo. 420.

32. Dietz *v.* Dietz, 38 N. J. Eq. 483; Pratt *v.* Kitterell, 15 N. C. 168; McClanahan *v.* McClanahan, 12 Heisk. (Tenn.) 379; *In re* Stewart, L. R. 3 P. 244, 44 L. J. P. & M. 37, 33 L. T. Rep. N. S. 72, 23 Wkly. Rep. 683; *In re* Burchmore, L. R. 3 P. 139, 43 L. J. P. & Adm. 1, 29 L. T. Rep. N. S. 377, 22 Wkly. Rep. 70.

Appointment of executor.— There is no law preventing the appointment of a person named as executor in the will as temporary administrator of the estate (*In re* Bankard, 19 N. Y. Wkly. Dig. 452), but whether it is proper to appoint such person is a question that must be decided in each case that presents itself upon its own peculiar facts and circumstances (Jones *v.* Hamersley, 2 Dem. Surr. (N. Y.) 286). It has been held that the executor should not be appointed collector of the estate against the objection of the contestants of the will, especially where he has an interest in any degree hostile to the estate (Howard *v.* Dougherty, 3 Redf. Surr. (N. Y.) 535), and also that an executor who is charged with undue influence in procuring the execution of the will should not be appointed (*In re* Wanninger, 3 N. Y. Suppl. 137; Cornwell *v.* Cornwell, 1 Dem. Surr. (N. Y.) 1. See also *In re* Stearn, 9 N. Y. Suppl. 748, 2 Connoly Surr. (N. Y.) 272, where in addition to the charge of undue influence, the executor had large unsettled transactions with the estate and his relations with certain members of the testator's family were unfriendly), but it has also been held that where the allegations of improper

the estate or in the permanent appointment.[33] As a general rule the choice should fall upon some person who is disinterested[34] and not one of the litigants.[35] In some jurisdictions there are statutory provisions as to who shall be entitled to appointment as temporary or special administrator.[36]

4. Proceedings.[37] A special or temporary administrator should be appointed by the court having authority to grant letters testamentary or of general administration.[38] An application for such appointment pending proceedings for the revocation of letters testamentary is premature.[39] No petition is necessary to the validity of the appointment.[40] An appeal will lie from a refusal to appoint a temporary administrator.[41] Any party interested in the estate may move to set aside an appointment.[42]

F. Second Appointment and Co-Administration — 1. Second Appointment. As a general rule there cannot be two valid grants of administration on the same estate at the same time, within the same state jurisdiction, but the second appointment is a nullity, while the first continues.[43] Even though the first appointment in one county be erroneous to the extent of being voidable (although not void) another appointment cannot properly be made until due revocation of the former

influence are general and conjectural and the majority of persons interested both numerically and in amount of interest desire the appointment of the executor as special administrator pending the contest, and it is to the interest of the estate so to appoint him, he should be appointed (Matter of Hilton, 29 Misc. (N. Y.) 532, 61 N. Y. Suppl. 1073. See also Haas *v.* Childs, 4 Dem. Surr. (N. Y.) 137), and the court has even gone so far as to say that where the only ground of opposition to the appointment of a person as temporary administrator was the bare fact that he would be entitled to letters testamentary if the paper in dispute should be established as a will, that fact of itself tended rather to support than to defeat his claim to the appointment, for, other things being equal, it was advisable to save to the estate the increased expense which would result from the selection of any person other than one of those named as executors (Jones *v.* Hamersley, 2 Dem. Surr. (N. Y.) 286).

Greater interest.— Where two brothers applied for administration *pendente lite* while there was a dispute as to which of two wills of decedent was entitled to probate, and one brother was named as executor in both wills, and the other brother was entitled to the residue under both wills, letters were granted to the latter, as having the greater interest in the estate. Winpenny's Estate, 5 Leg. Gaz. (Pa.) 140.

Selection not limited to those entitled to ordinary administration.— Matter of Plath, 56 Hun (N. Y.) 223, 9 N. Y. Suppl. 251.

33. Matter of Hilton, 29 Misc. (N. Y.) 532, 61 N. Y. Suppl. 1073.

34. Matter of Eddy, 10 Misc. (N. Y.) 211, 31 N. Y. Suppl. 423. See also Mootrie *v.* Hunt, 4 Bradf. Surr. (N. Y.) 173.

35. Mootrie *v.* Hunt, 4 Bradf. Surr. (N. Y.) 173.

36. Maryland.— See Harrison *v.* Clark, 95 Md. 308, 52 Atl. 514.

Montana.— See *In re* Ming, 15 Mont. 79, 38 Pac. 228; State *v.* Judge Second Judicial Dist. Ct., 10 Mont. 401, 25 Pac. 1053.

The statutory right to letters is not renounced by signing and filing a petition consenting to the probate of the will and asking for the appointment of the executors therein named. McIntire *v.* Worthington, 68 Md. 203, 12 Atl. 251.

37. See, generally, *infra*, II, H.

38. Cadman *v.* Richards, 13 Nebr. 383, 14 N. W. 159.

39. Sohn's Estate, 1 N. Y. Civ. Proc. 373.

40. Breeding *v.* Breeding, 128 Ala. 412, 30 So. 881, holding that consequently the fact that a petition did not show sufficient grounds for the issue of letters of special administration in the contest of a will was immaterial.

41. Long *v.* Richardson, 26 Tex. Civ. App. 197, 62 S. W. 964.

"Party aggrieved."— Where two persons, each presenting a will and objecting to the will presented by the other, each applied for the appointment of an administrator *pendente lite*, and the court appointed a disinterested person not related to either petitioner, neither petitioner was "a party aggrieved" by the order, entitled to appeal. Dietz *v.* Dietz, 38 N. J. Eq. 483.

42. Stone *v.* Haskins, 97 Ill. App. 3.

43. *Alabama.*— Nelson *v.* Boynton, 54 Ala. 368.

Georgia.— Justices Morgan County Inferior Ct. *v.* Selman, 6 Ga. 432.

Mississippi.— Watkins *v.* Adams, 32 Miss. 333.

North Carolina.— *In re* Bowman, 121 N. C. 373, 28 S. E. 404.

Oregon.— Oh Chow *v.* Brockway, 21 Oreg. 440, 28 Pac. 384.

Pennsylvania.— Ubil *v.* Miller, 16 Pa. Super. Ct. 497.

Texas.— Grande *v.* Chaves, 15 Tex. 550.

United States.— Kane *v.* Paul, 14 Pet. 33, 10 L. ed. 311; Holmes *v.* Oregon, etc., R. Co., 5 Fed. 523, 6 Sawy. 262; Paul *v.* Kane, 18 Fed. Cas. No. 10,843, 5 Cranch C. C. 549 [*affirmed* in 14 Pet. 33, 10 L. ed. 311].

See 22 Cent. Dig. tit. "Executors and Administrators," § 129.

letters;[44] nor is an existing executor or administrator removed simply by the appointment of another person to his place in the same jurisdiction; but the office must have first been made vacant by an accepted resignation or a removal of the first appointee, or by the occurrence of such events as by law create a vacancy.[45] Where, however, the appointment of an administrator is void because of a lack of jurisdiction in the probate court of the county where it was granted, the court having jurisdiction may properly ignore such appointment and take any necessary steps for the settlement of the estate,[46] and if a sole administrator has become incapable as distinguished from incompetent, as where he becomes and is adjudged to be insane, the court may grant new letters without citing the incapable person.[47] If the procedure be regular in the various steps, the probate court may at the same term appoint an administrator, remove him, and reappoint him, with or without an additional administrator, or appoint another in his place.[48]

2. Co-Administration.[49] It has been laid down that all other things being equal a sole administration is preferred to a joint one;[50] but where the estate is large, or from any cause an intricate and perplexing one to settle, the appointment of two or more administrators may be wise and preferable; hence in American practice at least the court may exercise a liberal discretion in this respect, even though interested parties should oppose.[51]

G. Public Administrators[52] **— 1. In General.** In a number of states the statutes provide for the appointment or election of an officer known as a public administrator, to whom is committed the administration of the estates of decedents under certain circumstances, usually where there is no relative

44. *Alabama.*— Coltart *v.* Allen, 40 Ala. 155, 88 Am. Dec. 757. See also Ragland *v.* King, 37 Ala. 80.

Indiana.— Razor *v.* Mehl, 25 Ind. App. 645, 57 N. E. 274, 58 N. E. 734.

Kentucky.— White *v.* Brown, 7 T. B. Mon. 446.

Minnesota.— Culver *v.* Hardenbergh, 37 Minn. 225, 33 N. W. 792.

South Carolina.— Petigru *v.* Ferguson, 6 Rich. Eq. 378.

Texas.— Lovering *v.* McKinney, 7 Tex. 521.

See 22 Cent. Dig. tit. "Executors and Administrators," § 129.

On collateral attack a second grant of administration will not be declared void on the ground that there was no formal order for the removal of the first administrator, when the facts necessary to sustain such an order are recited in the minutes of the court as the reason for such second grant. Ragland *v.* King, 37 Ala. 80.

45. *Alabama.*— Allen *v.* Kellam, 69 Ala. 442.

California.— Haynes *v.* Weeks, 20 Cal. 288.

Indiana.— Jones *v.* Bittinger, 110 Ind. 476, 11 N. E. 456; Landers *v.* Stone, 45 Ind. 404.

North Carolina.— Springs *v.* Erwin, 28 N. C. 27.

Pennsylvania.— Brubaker's Appeal, 98 Pa. St. 21.

See 22 Cent. Dig. tit. "Executors and Administrators," § 129.

46. *In re* King, 105 Iowa 320, 75 N. W. 187.

47. *In re* Blinn, 99 Cal. 216, 33 Pac. 841.

48. Harris *v.* Henderson, 7 Heisk. (Tenn.) 315; Lingle *v.* Cook, 32 Gratt. (Va.) 262; Goff *v.* Norfolk, etc., R. Co., 36 Fed. 299.

49. Powers, duties, and liabilities of co-executors and co-administrators see *infra*, XXI.

50. Brubaker's Appeal, 98 Pa. St. 21; *In re* Newbold, L. R. 1 P. 285, 36 L. J. P. & M. 14, 15 L. T. Rep. N. S. 248, 15 Wkly. Rep. 262; Coppin *v.* Dillon, 4 Hagg. Eccl. 361; Bell *v.* Timiswood, 2 Phillim. 22.

51. *Iowa.*— Read *v.* Howe, 13 Iowa 50, where an additional administrator was appointed against the protest of one already appointed.

Kentucky.— Shropshire *v.* Withers, 5 J. J. Marsh. 210, where a stranger to the blood was appointed co-administrator with the widow at her request, although the blood relations objected.

Maryland.— Thomas *v.* Knighton, 23 Md. 318, 87 Am. Dec. 871.

Mississippi.— Jordan *v.* Ball, 44 Miss. 194.

New York.— *In re* Williams, Tuck. Surr. 8.

North Carolina.— *In re* Meyer, 113 N. C. 545, 18 S. E. 689.

Tennessee.— Phillips *v.* Green, 4 Heisk. 350.

See 22 Cent. Dig. tit. "Executors and Administrators," § 130.

Discretion to refuse.— An order denying the joint petition of a widow and a son of deceased to appoint the son co-administrator with the widow will not be disturbed on appeal in the absence of evidence that the trial court abused its discretion. Shrum *v.* Naugle, 22 Ind. App. 98, 53 N. E. 243.

Executor and administrator cannot be joined, and the appointment of an administrator as the associate of an executor would be void. Terry's Appeal, 67 Conn. 181, 34 Atl. 1032.

52. As to oath see *infra*, II, I.

As to bond see *infra*, II, J, 1, b.

within the jurisdiction who is competent or willing to take out letters of administration.[53]

2. Right to Administer. A public administrator is authorized to take charge of and administer on an estate only when property of the estate was in his county at the time of the decedent's death.[54] The court is not limited, in appointing the public administrator to take charge of an estate, to the estate of such persons as die within his county, but he is competent to administer upon the estate within his county of any decedent, irrespective of the place of death.[55] In California the public administrator has a right to letters only in case of intestacy and in the case of a decedent who left a will the court may exercise its discretion.[56] When the heirs are present or represented, administration cannot, in Louisiana, be committed to the public administrator,[57] and in Wisconsin the statute authorizes the appointment of the public administrator only until those authorized by statute to administer the estate apply for letters.[58] The fact that the public administra-

53. *Alabama.*— McGuire *v.* Buckley, 58 Ala. 120; Russell *v.* Erwin, 41 Ala. 292.

California.— *In re* Morgan, 53 Cal. 243; Beckett *v.* Selover, 7 Cal. 215, 68 Am. Dec. 237.

Illinois.— Langworthy *v.* Baker, 23 Ill. 484.

Louisiana.— Townsend's Succession, 36 La. Ann. 535.

Missouri.— State *v.* McDonald, 38 Mo. 529; Callahan *v.* Griswold, 9 Mo. 784, holding that the county court may order the public administrator to take possession of an estate in any case in which no administration has been taken out under the general law.

New York.— Douglass *v.* New York, 56 How. Pr. 178; Public Administrator *v.* Watts, 1 Paige 347.

North Carolina.— Taylor *v.* Biddle, 71 N. C. 1.

Tennessee.— State *v.* Anderson, 16 Lea 32.

See 22 Cent. Dig. tit. "Executors and Administrators," § 132.

Time of election.— Where the court, by oversight, failed to elect a public administrator at the term when the term of office of the prior incumbent expired, it was proper to elect at a subsequent term of court, the duty being a continuing one. State *v.* Anderson, 16 Lea (Tenn.) 321.

Appointment for unexpired term.—One who is appointed to the office of public administrator at any time during an unexpired term of that office is entitled to hold it, in virtue of such appointment, only to the end of the unexpired term. State *v.* Parker, 30 La. Ann. 1182.

Continuance in office.— Under a statute providing that each probate judge shall appoint a general administrator in his county, whose office shall expire at the end of the term of the appointing judge, unless the succeeding judge shall continue him in office; where a judge who had appointed a general administrator was reëlected at the end of his term and neither appointed any other person as general administrator nor made nor entered any formal order continuing the previous incumbent, but continued to treat him as the continuing administrator, and committed the administration of estates to him as such, there was a sufficient continuance of the incumbent, notwithstanding a statute making it the duty of the probate judge to keep minutes of all his official acts and proceedings, and to record them in books, and there was no hiatus in the administrator's tenure of office. Daly *v.* Mallory, 123 Ala. 170, 26 So. 217.

54. McCabe *v.* Lewis, 76 Mo. 296.

Assets in custody of United States court.— Unclaimed assets of a decedent, which are in the custody of a United States district court, are within the purview of a statute providing that the public administrator in each county shall administer on the estates of persons who die leaving property to be administered and not leaving a known husband, widow, or heir in the commonwealth. U. S. *v.* Tyndale, 116 Fed. 820, 54 C. C. A. 324.

55. *In re* Richardson, 120 Cal. 344, 52 Pac. 832; *In re* Hickman, 101 Cal. 609, 36 Pac. 118.

56. *In re* Nunan, Myr. Prob. (Cal.) 238.

Will naming no executor.— A person who dies leaving a will wherein no executor is named does not die intestate so as to give the public administrator the right to letters upon his estate. *In re* Barton, 52 Cal. 538 [*followed* in *In re* Von Buncken, 120 Cal. 343, 52 Pac. 819]. But *compare In re* Yee Yun, Myr. Prob. (Cal.) 181.

57. Smith's Succession, 40 La. Ann. 105, 3 So. 539; Miller's Succession, 28 La. Ann. 573 (where the heir was in possession); Daiglee's Succession, 27 La. Ann. 524; Gee's Succession, 26 La. Ann. 666.

Temporary absence from the state of the surviving wife or heirs of the deceased gives the public administrator no right to administer his succession (Longuefosse's Succession, 34 La. Ann. 583), and the heir is entitled to the appointment if present in time to oppose the appointment of the public administrator, although absent at the time of the latter's application for administration (White's Succession, 45 La. Ann. 632, 12 So. 758).

58. Welsh *v.* Manwaring, 120 Wis. 377, 98 N. W. 214.

tor is a creditor or holds a demand against the estate does not disqualify him.[59] The public administrator's right to administer the estate cannot be collaterally attacked,[60] nor can the question whether the person appointed was the public administrator be raised in a collateral proceeding.[61]

3. Preference. The order of preference of the public administrator as against other persons having or claiming the right to administer is a matter which is regulated by local statutes differing in some particulars in the various jurisdictions.[62] As a general rule, however, his right is subsequent to that of persons beneficially interested in the estate,[63] but prior to that of kindred having no beneficial interest.[64] He is also usually entitled to administration in preference to

59. *In re* Muersing, 103 Cal. 585, 37 Pac. 520.

60. *In re* Strong, 119 Cal. 663, 51 Pac. 1078; Vermillion *v.* Le Clare, 89 Mo. App. 55.

61. Simmons *v.* Saul, 138 U. S. 439, 11 S. Ct. 369, 34 L. ed. 1054; McNitt *v.* Turner, 16 Wall. (U. S.) 352, 21 L. ed. 351; Comstock *v.* Crawford, 3 Wall. (U. S.) 396, 18 L. ed. 34.

62. See *In re* Goddard, 94 N. Y. 544.

Foreign administrator.— An administrator with the will annexed appointed according to the laws of another state cannot be appointed dative testamentary executor to administer property of the succession situated in Louisiana, but in such case the public administrator for the parish where the property belonging to the succession is situated must be appointed to administer it. Taylor's Succession, 23 La. Ann. 22.

Where an appointment has been made under Mo. Rev. St. § 8, authorizing the court under certain circumstances to grant letters to any person who may be deemed suitable, before the public administrator has taken charge of the estate, the appointee cannot be removed on the ground that the public administrator's right to administer is superior; for the purpose of the statute relating to public administrators is merely to provide a bonded officer who shall take charge of the estates of decedent in cases where they are liable to be wasted by reason of the fact of no executor qualifying or no administrator being appointed under the general law, and it is auxiliary to the general law relating to administration and was intended merely to supply its deficiency in the particular named and not to repeal or supplant any of its provisions. Tittman *v.* Edwards, 27 Mo. App. 492, where the court said further that, if the public administrator had taken charge of the estate, it would not be a proper exercise of power for the probate court to subsequently appoint an administrator under the statute in question.

63. *In re* Engle, 124 Cal. 292, 56 Pac. 1022; Reynolds *v.* McMullen, 55 Mich. 568, 22 N. W. 41, 54 Am. Rep. 386; Public Administrator *v.* Peters, 1 Bradf. Surr. (N. Y.) 100; Welsh *v.* Manwaring, 120 Wis. 377, 98 N. W. 214.

If the next of kin is legally disqualified the public administrator is entitled. *In re* Muersing, 103 Cal. 585, 37 Pac. 520; Public Administrator *v.* Watts, 1 Paige (N. Y.) 382; Matter of Blank, 2 Redf. Surr. (N. Y.) 443.

Guardian of incompetent kindred may be preferred. *In re* McLaughlin, 103 Cal. 429, 34 Pac. 410; *In re* Hudson, 37 Misc. (N. Y.) 539, 75 N. Y. Suppl. 1053.

Nominee.— In California the nominee of the next of kin is not, as a matter of right, entitled to administration in preference to the public administrator (*In re* Morgan, 53 Cal. 243), especially where the next of kin is incompetent (*In re* Muersing, 103 Cal. 585, 37 Pac. 520; *In re* Kelly, 57 Cal. 81; *In re* Morgan, *supra*), but the nominee of a nonresident widow should be preferred (*In re* Cotter, Myr. Prob. (Cal.) 179). See *supra*, II, B, 2, h.

The attorney in fact of an heir who applies for administration and tenders the requisite security is properly appointed in preference to the public administrator, especially if the heir be present. Henry's Succession, 31 La. Ann. 555. But see Matter of Blank, 2 Redf. Surr. (N. Y.) 443, holding that the public administrator had a right to administration with the will annexed in preference to the attorney in fact of a disqualified next of kin, except where the will was made by a testator dying domiciled abroad, and was proved by exemplification of a foreign probate.

A resident devisee under a will probated abroad is preferred to the public administrator. *In re* Bergin, 100 Cal. 376, 34 Pac. 867.

A judgment, rendered after public notice, regularly appointing a public administrator as administrator of an apparently vacant estate will not be reversed on appeal because of subsequent evidence tending to show the existence of heirs. St. Hubert's Succession, 36 La. Ann. 388.

General and local statutes.— Where under a general act the guardian of the next of kin would be entitled to administer, but under a later local act the right is conferred upon the public administrator, the latter is entitled to letters. Speckles *v.* Public Administrator, 1 Dem. Surr. (N. Y.) 475.

64. Matter of Gilchrist, 79 N. Y. App. Div. 637, 80 N. Y. Suppl. 1135 [*affirming* 37 Misc. 543, 75 N. Y. Suppl. 1055]; Public Administrator *v.* Peters, 1 Bradf. Surr. (N. Y.) 100. See also Public Administrator *v.* Watts, 1 Paige (N. Y.) 347. But *compare* Langworthy *v.* Baker, 23 Ill. 484.

In cases of illegitimacy the public administrator is preferred. Ferrie *v.* Public Administrator, 3 Bradf. Surr. (N. Y.) 249.

creditors,[65] or strangers.[66] As between the public administrator and another person applying for administration the choice sometimes rests in the discretion of the court.[67]

4. Duty to Administer. A public administrator cannot refuse to enter upon or to continue the administration of an estate which by law he should administer.[68]

5. Appointment. A public administrator is not merely as such entitled to take charge of and administer estates,[69] although he may under certain circumstances take charge temporarily;[70] but it is ordinarily necessary that he should be appointed administrator by the court[71] upon his petition being duly filed[72] and due notice being given.[73] In appointing the public administrator to administer any particular estate the court exercises the same jurisdiction that it does in the grant of letters in ordinary cases,[74] and when he is so appointed he holds the same

Persons entitled to "succeed" to property. — Under a statute giving the brothers of a decedent "when they are entitled to succeed to his personal estate, or some portion thereof," a right of administration prior to that of the public administrator, the brothers are not entitled to priority where the deceased died leaving her mother as her sole heir at law and the mother thereafter died leaving a will bequeathing her property to her two sons, for in such case the brothers do not "succeed" to the decedent's estate. *In re* Wakefield, 136 Cal. 110, 68 Pac. 499.

65. Hyde's Estate, 64 Cal. 228, 30 Pac. 804; McKinnon's Estate, 64 Cal. 226, 30 Pac. 437; Matter of Blank, 2 Redf. Surr. (N. Y.) 443; Public Administrator *v.* Peters, 1 Bradf. Surr. (N. Y.) 100. See also *In re* Doak, 46 Cal. 573, holding that if there is a contest between the public administrator and a creditor as to which shall administer, and other creditors request the court to appoint the public administrator, it is within the discretionary power of the court to appoint him. *Contra*, Rosenthal *v.* Prussing, 108 Ill. 128; Langworthy *v.* Baker, 23 Ill. 484.

A public administrator who is also a creditor does not by applying for letters in his individual capacity as creditor waive his right to make a subsequent application in his official capacity. McKinnon's Estate, 64 Cal. 226, 30 Pac. 437.

66. Hyde's Estate, 64 Cal. 228, 30 Pac. 804; Public Administrator *v.* Peters, 1 Bradf. Surr. (N. Y.) 100.

67. *In re* Yee Yun, Myr. Prob. (Cal.) 181, holding that where applications were made by the public administrator and by a Chinaman who did not intend to reside permanently in the state, and did not speak English, letters should be issued to the public administrator.

68. State *v.* Kennedy, 73 Mo. App. 384. See also Johnson *v.* Tatum, 20 Ga. 775, clerk of court may be forced to serve.

69. *In re* Hamilton, 34 Cal. 464. See also Williamson *v.* Furbush, 31 Ark. 539; Wilson *v.* Dibble, 16 Fla. 782.

70. See McCabe *v.* Lewis, 76 Mo. 296, holding that while the public administrator may in the first instance act on his own judgment in taking charge of an estate, his determination is by no means final and conclusive on the question of his authority to do so.

Notice of taking charge.— Where the statute requires the public administrator immediately upon taking charge of an estate, except where he acts under the order of court, for the purpose of administering the same, to file a notice of the fact in the office of the clerk having probate jurisdiction, the public administrator's omission to file the notice would not render the whole administration void, especially in view of a provision in the statute that failure to file the notice shall subject the public administrator to a penalty. Adams *v.* Larrimore, 51 Mo. 130.

71. *In re* Hamilton, 34 Cal. 464; Sandifer *v.* Mackey, (Miss. 1888) 3 So. 570. *Contra*, *In re* Hill, 102 Mo. App. 617, 77 S. W. 110.

Presumption of appointment.— In the absence of evidence to the contrary it will be presumed that a public administrator taking charge of an estate procured letters of appointment as required by statute. State *v.* Woody, 20 Mont. 413, 51 Pac. 975.

Where a public administrator is reëlected and qualifies, he becomes his own successor as guardian of an estate committed to him during his first term, and there is no necessity of a special order of the probate court, after his reëlection. State *v.* Kennedy, 163 Mo. 510, 63 S. W. 678.

72. *In re* Hamilton, 34 Cal. 464.

73. Proctor *v.* Wanmaker, 1 Barb. Ch. (N. Y.) 302.

Notice to a relative not entitled to share in estate is unnecessary, although such person's claim to administration is superior to that of the public administrator. Matter of Brewster, 5 Dem. Surr. (N. Y.) 259.

Where no order was made on the day named in the citation and notice, either adjourning the hearing or determining the matter, the surrogate lost jurisdiction to proceed further without either due service of another citation or a voluntary appearance of the widow and next of kin, and an order made on a day subsequent granting the public administrator's application for appointment without such notice or appearance was void. *In re* Page, 107 N. Y. 266, 14 N. E. 193.

74. State *v.* Anderson, 16 Lea (Tenn.) 321.

Trial of right to appointment.— Where a public administrator made application to be

relation to each individual estate that a private administrator would.[75] In some states the public administrator cannot apply for administration or be appointed to the trust until the lapse of a specified time after the death of the decedent.[76]

6. Termination of Office. Under the statutes of some jurisdictions a public administrator to whom the administration of an estate has been committed during his term of office has the right to continue in charge of the estate after his term of office expires and his successor is elected and qualified,[77] but upon his resignation and the appointment of his successor his functions cease and he should settle and turn over the assets to his successor.[78] A public administrator, by filing his application to administer an estate, does not acquire a vested right to administer, and to the fees pertaining thereto, as against his successor acquiring the office before an appointment is made.[79]

7. Administration by Other Public Officials. In states or counties where there is no public administrator the administration of vacant estates is frequently committed to some other public officer, such as the sheriff or clerk of the court.[80]

appointed administrator of a vacant estate it was error to refuse to take any judicial action in relation to the application merely because a person representing himself to be the brother and heir of the deceased had appeared praying to be appointed administrator, but the application of the public administrator should have been filed and after due notice given tried contradictorily with the application of any other person and the rights of all parties settled by a judicial decree. State *v.* Plaquemines Parish Judge, 25 La. Ann. 329.

75. Olsen *v.* Rich, 2 Ky. L. Rep. 257; Tymon *v.* Cromwell, 2 Dem. Surr. (N. Y.) 650.

76. Underwood *v.* Underwood, 111 Ky. 966, 65 S. W. 130, 23 Ky. L. Rep. 1287; Varnell *v.* Loague, 9 Lea (Tenn.) 158.

77. *Alabama.*— Eubank *v.* Clark, 78 Ala. 73. See also King *v.* Griffin, 6 Ala. 387.

California.— Rogers *v.* Hoberlein, 11 Cal. 120.

Georgia.— Beale *v.* Hall, 22 Ga. 431.

Kentucky.— Olsen *v.* Rich, 2 Ky. L. Rep. 257.

Louisiana.— Cabrol's Succession, 28 La. Ann. 602.

Mississippi.— Hull *v.* Neal, 27 Miss. 424.

Missouri.— State *v.* Kennedy, 163 Mo. 510, 63 S. W. 678; Garner *v.* Tucker, 61 Mo. App. 427; State *v.* Holman, 93 Mo. App. 611, 67 S. W. 747; State *v.* Kennedy, 73 Mo. App. 384.

Montana.— *In re* Craigie, 24 Mont. 37, 60 Pac. 495.

South Carolina.— Levi *v.* Huggins, 14 Rich. 166.

Tennessee.— Thornton *v.* Loague, 95 Tenn. 93, 31 S. W. 986.

See 22 Cent. Dig. tit. "Executors and Administrators," § 189.

Contra.— Cocke *v.* Harrison, 3 Rand. (Va.) 494, holding that a sheriff to whom the estate of a decedent is committed is not administrator and is not responsible for the due administration of the estate after his office of sheriff expires.

78. State *v.* Kennedy, 163 Mo. 510, 63 S. W. 678 (holding that in Rev. St. (1889) § 301, which declares that, when the public administrator has been appointed to take charge of an estate, he shall continue the administration until finally settled, unless he resigns, dies, is removed for cause, or is discharged in the course of law, the word "resigns" has reference to his office as public administrator, and not his appointment by the probate court to take charge of any particular estate; and hence, on his resignation, accepted by the governor, and his successor having been appointed, he becomes incapacitated to administer estates in his hands); State *v.* Kennedy, 73 Mo. App. 384.

79. *In re* Pingree, 100 Cal. 78, 34 Pac. 521; State *v.* Woody, 20 Mont. 413, 51 Pac. 975. See also Landford *v.* Dunklin, 71 Ala. 594; Wilson *v.* Wiltz, 32 La. Ann. 688.

80. *Arkansas.*— Williamson *v.* Furbush, 31 Ark. 539.

Florida.— Wilson *v.* Dibble, 16 Fla. 782; Davis *v.* Shuler, 14 Fla. 438.

Georgia.— Johnston *v.* Tatum, 20 Ga. 775.

Kentucky.— Scarce *v.* Page, 12 B. Mon. 311; Hammon *v.* Pearl, 6 T. B. Mon. 410.

Mississippi.— Cocke *v.* Finley, 29 Miss. 127.

New York.— *In re* Ward, 1 Redf. Surr. 254, county treasurer.

Virginia.— Hutcheson *v.* Priddy, 12 Gratt. 85.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 138, 139.

The powers of commissioners of emigration in cases where the minor children of alien passengers have become orphans by their parents or last surviving parent dying on their passage to the port of New York see *Ex p.* Emigration Com'rs, 1 Bradf. Surr. (N. Y.) 259.

The consul-general of a foreign country has been appointed administrator of a citizen of that country who died intestate in New York leaving no resident next of kin or creditors, the public administrator, although duly cited, having made default. But the consul-general was required to give bond. Matter of Logirato, 34 Misc. (N. Y.) 31, 69 N. Y. Suppl. 507.

H. Proceedings For Appointment — 1. Who May Apply For Administration. A probate court having jurisdiction is bound to commit the estate to administration on the application of any one having an interest therein,[81] and a person claiming the right to be heard in proceedings for the appointment of an administrator must show that he has an interest in the choice of an appointee.[82] But a grant of administration on the application of one who is neither next of kin nor creditor is valid unless reversed on appeal.[83]

2. Time For Application. The time within which original administration may or must be applied for is expressly limited by statute in some jurisdictions,[84] and, even apart from statute, long acquiescence by persons *sui juris* in an informal distribution of an estate in which they are interested will debar them from seeking administration merely to disturb such settlement, there being no creditors interested.[85] But an application for administration by a creditor a considerable number of years after the death of decedent has been held not too late.[86] In

District marshal.— Under a statute, providing that if all executors shall refuse, or in case of intestacy if no person apply for administration, the general court, or other court having jurisdiction of probate, shall order the sheriff or other officer of the county to take the estate in his possession and make sale thereof for the payment of debts, the orphans' court of the county of Alexandria had no authority to order the marshal of the District of Columbia to administer the estate of any deceased person, he not being a county or corporation officer, but the officer of the whole district. *Ex p.* Ringgold, 20 Fed. Cas. No. 11,841, 3 Cranch C. C. 86.

81. Brennan *v.* Harris, 20 Ala. 185; *In re* Sprague, 125 Mich. 357, 84 N. W. 293.

A kinsman of the decedent, even though not entitled to administration, has been held to have such an interest as entitles him to appeal from an order refusing to set aside an order made the day after the decedent's death placing the estate in the hands of the public administrator. Underwood *v.* Underwood, 111 Ky. 966, 65 S. W. 130, 23 Ky. L. Rep. 1287.

A creditor has such an interest in the estate as gives him a legal right to demand that it shall be administered (Brennan *v.* Harris, 20 Ala. 185), even though such creditor is a non-resident (Branch *v.* Raukin, 108 Ill. 444 [*following* Rosenthal *v.* Renick, 44 Ill. 202]), and where a testator has authorized his executor to carry on his business, it has been held that an order for administration of the estate may be made at the suit of a subsequent creditor of the business, although there are no creditors of the testator himself (*Re* Shorey, 79 L. T. Rep. N. S. 349, 47 Wkly. Rep. 188). But an attorney's claim for services performed for the administrator is a claim against the administrator personally to be charged against the estate upon the accounting, and if the administrator is discharged without payment for such services the attorney is not a creditor of the estate so as to be entitled to apply for the appointment of an administrator *de bonis non*. Wiesmann *v.* Daniels, 114 Wis. 240, 90 N. W. 162.

82. Williams *v.* Williams, 113 Ga. 1006, 39 S. E. 474.

83. Mowry *v.* Latham, 20 R. I. 786, 40 Atl. 236, 341.

84. *Connecticut.*— Lawrence's Appeal, 49 Conn. 411.

Idaho.— Gwinn *v.* Melvin, (1903) 72 Pac. 961.

Iowa.— Crossan *v.* McCrary, 37 Iowa 684.

Massachusetts.— Parsons *v.* Spaulding, 130 Mass. 83.

Michigan.— *In re* Brook, 110 Mich. 8, 67 N. W. 975.

North Carolina.— Whit *v.* Ray, 26 N. C. 14.

Pennsylvania.— Foster *v.* Com., 35 Pa. St. 148; Hambest's Estate, 21 Pa. Super. Ct. 427, holding that the act of March 15, 1832, providing that "no letters of administration shall in any case be originally granted upon the estate of any decedent after the expiration of twenty-one years from the day of his decease except by the order of the register's (orphans') court upon due cause shown," applies not only to cases in which no letters of administration have been previously granted, but also to cases in which previous letters have been issued.

Tennessee.— Rice *v.* Henly, 90 Tenn. 69, 15 S. W. 748; Townsend *v.* Townsend, 4 Coldw. 70, 94 Am. Dec. 185.

Texas.— Martin *v.* Robinson, 67 Tex. 368, 3 S. W. 550; Loyd *v.* Mason, 38 Tex. 212.

See 22 Cent. Dig. tit. "Executors and Administrators," § 83.

In some states there is no express provision limiting the time for granting original administration. See Healy *v.* Buchanan, 34 Cal. 567; Langmade *v.* Tuggle, 78 Ga. 770, 3 S. E. 666.

85. Wales *v.* Willard, 2 Mass. 120 (holding that an original grant of administration is void, if made more than twenty years after the deceased's death); Beardslee *v.* Reeves, 76 Mich. 661, 43 N. W. 677; Ledyard *v.* Bull, 119 N. Y. 62, 23 N. E. 444; Stone Land, etc., Co. *v.* Boon, 73 Tex. 548, 11 S. W. 544 (holding that administration opened fifteen years after the death of the intestate, without any allegation of indebtedness, and when, under the longest period allowed by law, any debt that he may have owed and that had matured at the time of his death would have been barred, is void). See also Harwood *v.* Wylie, 70 Tex. 538, 7 S. W. 789.

86. Ray *v.* Strickland, 89 Ga. 840, 16 S. E. 90, where a judgment debtor having died in-

some states there are also statutory provisions that administration shall not be granted until the expiration of a certain period after the decedent's death,[87] but in the absence of some such statute letters granted after the decedent's death, no matter how soon after, are valid.[88]

3. Parties. In a contest as to the right of administration, there are strictly no plaintiffs or defendants. All applicants are actors, and some may withdraw and others come in at any time during the progress of the cause, even after an appeal.[89] Filing a caveat against an application does not amount to making one a party to such application in the full sense.[90] A person who is neither a creditor, legatee, nor distributee of the estate cannot make himself a party to the petition filed in the probate court for letters of administration.[91]

4. Citation and Notice. Before creditors or strangers in interest can be admitted to the trust it is usual to require proceedings on the part of the petitioner tantamount to citing in or summoning those entitled to preference to appear and exercise their right if they so desire.[92] To dispense with such citation, those of

testate and an execution on the judgment having become dormant after his death, it was held that about twenty years after the decedent's death, no administration having ever been granted and all the heirs being of age, it was not too late for the owner of the judgment and fieri facias to apply as a creditor for administration, since, although the judgment was dormant and the right to sue on it barred, the bar having attached after the debtor's death could be waived by the administrator. But *compare* Roth *v.* Holland, 56 Ark. 633, 20 So. 521, 35 Am. St. Rep. 126, holding that unnecessary delay for the period of more than seven years on the part of the creditor in procuring letters of administration to be issued upon the estate of his debtor was such laches as would defeat an application of the administrator to sell lands of the estate which had been in the possession of the decedent's heirs during that period of time.

87. Brunson *v.* Burnett, 2 Pinn. (Wis.) 185, 1 Chandl. (Wis.) 136.

"Supposed" intestacy.—The Maryland statute applies only to cases of "supposed" intestacy and not where the intestacy is admitted (Williams *v.* Addison, 93 Md. 41, 48 Atl. 458) or is notorious or satisfactorily proven, which will be presumed from the making of the appointment (Jones *v.* Harbaugh, 93 Md. 269, 48 Atl. 827). The question whether there is a notorious intestacy, so as to justify the appointment of the administrator forthwith, is for the appointing court alone, and cannot be raised in a proceeding by the administrator as claimant in the court of claims. Eslin *v.* District of Columbia, 22 Ct. Cl. 160.

Application before expiration of time.—The appointment of an administrator after the lapse of the prescribed period is not invalidated by the mere fact that the application therefor was made before such time. Mowry *v.* Latham, 20 R. I. 786, 40 Atl. 236, 341.

In Louisiana an administrator cannot be appointed until after the heirs have been called on by the creditors of the succession to renounce or to take the inheritance and asked time to deliberate. Lamm's Succession, 40 La. Ann. 312, 4 So. 53.

88. Comfort's Estate, 12 Pa. Co. Ct. 571.

The pendency of a bill for the construction of a will is no objection to a defendant making application for the appointment of an executor according to the requirements of the will before the question of construction is concluded. Hutton *v.* Hutton, 41 N. J. Eq. 267, 3 Atl. 882.

89. De Lorme *v.* Pease, 19 Ga. 220; Atkins *v.* McCormick, 49 N. C. 274; Woerner Adm. § 263.

90. *Ex p.* Crafts, 28 S. C. 281, 5 S. E. 718.

91. Miller *v.* Keith, 26 Miss. 166.

92. *Georgia.*— Rusk *v.* Hill, 117 Ga. 722, 45 S. E. 42; Torrance *v.* McDougald, 12 Ga. 526.

Louisiana.— See Elkins *v.* Canfield, 5 Mart. N. S. 505.

Massachusetts.—Cobb *v.* Newcomb, 19 Pick. 336.

New Jersey.— Gans *v.* Dabergott, 40 N. J. Eq. 184.

New York.— *In re* Page, 107 N. Y. 266, 14 N. E. 193; Batchelor *v.* Batchelor, 1 Dem. Surr. 209.

England.— Windeatt *v.* Sharland, L. R. 2 P. 217; *In re* Bruce, 68 L. J. P. Adm. 120, 81 L. T. Rep. N. S. 458; *In re* Harper, [1899] P. 59, 68 L. J. P. & Adm. 48, 80 L. T. Rep. N. S. 294; *In re* Megson, 80 L. T. Rep. N. S. 295.

See 22 Cent. Dig. tit. "Executors and Administrators," § 85.

Rules of court may require due notice of application even when the statute is silent. Sayre *v.* Sayre, 48 N. J. Eq. 267, 22 Atl. 198.

Notice to guardian of next of kin necessary. — Maupay's Estate, 2 Brewst. (Pa.) 491.

Notice to creditor's next of kin not necessary.— *In re* McCreight, 9 Ohio S. & C. Pl. Dec. 450, 6 Ohio N. P. 479.

Notice to husband's administrator.— Under the New York statute providing that if the husband dies leaving assets of the estate of his deceased wife unadministered such assets shall pass to the husband's executor or administrator as part of his personal property if the wife left no descendant, letters of admin-

the class entitled to preference should renounce their claim or else signify their assent to the grant of the petitioner's request for appointment by indorsement of his petition or by other writing of record.[93] The grant of letters by the court should follow reasonably soon upon such citation, as otherwise a new citation or notice may be requisite.[94] Citation is required only where there are persons having a right prior to the person applying for letters of administration,[95] and formal citation is sometimes dispensed with where several are equally entitled, among whom the court is free to select.[96] On the hearing letters may be denied to the original applicant and granted to another person, and in such case no new citation is necessary with reference to those already cited.[97] On a petition for the probate of a will and letters testamentary to an executor, citation to the next of kin and others interested is likewise proper.[98] Under some statutes it is not necessary that the citation should state the name of any person as contemplated for appointment as administrator.[99] One who has actual notice and seasonably appears cannot complain that the citation was insufficient.[1] It is usual to publish the citation in a newspaper, or post copies thereof in conspicuous places, or both, the manner of publication and the time at which it must be made or during which it must continue being regulated by statute or rule of court or even by particular directions of the court in individual cases.[2] It will be presumed in the absence of evidence

istration should not be granted on the wife's estate after the husband's death without notice to the husband's administrator. Matter of Thomas, 33 Misc. 729, 68 N. Y. Suppl. 1116.

Persons not entitled to share in the estate must be cited if they have a right to administer prior or equal to that of the petitioner. Matter of Lowenstein, 29 Misc. (N. Y.) 722, 62 N. Y. Suppl. 819.

An administrator and receiver pendente lite will not be appointed without notice to the heir at law. Wiggins *v.* Hudson, 80 L. T. Rep. N. S. 296.

Administrator with will annexed.—In a case where a minor executor elected his stepmother, the widow of the testator, his guardian for the purpose of taking administration with the will annexed for his use and benefit, such administration was granted to her under the circumstances without citing those having a prior right. *In re* Widger, 3 Curt. Eccl. 55.

In small estates citation is sometimes dispensed with and informal notice if actual is held sufficient so as to save expense. *In re* Teece, [1896] P. 6, 65 L. J. P. & Adm. 41, 73 L. T. Rep. N. S. 631, 44 Wkly. Rep. 400.

93. *Georgia.*— Torrance *v.* McDougald, 12 Ga. 526.

Louisiana.— Talbert's Succession, 16 La. Ann. 230.

Massachusetts.— Arnold *v.* Sabin, 1 Cush. 525; Cobb *v.* Newcomb, 19 Pick. 336.

Oregon.— Ramp *v.* McDaniel, 12 Oreg. 108, 6 Pac. 456.

Pennsylvania.— Frick's Appeal, 114 Pa. St. 29, 6 Atl. 363.

South Carolina.— *Ex p.* White, 38 S. C. 41, 16 S. E. 286.

Texas.— Cole *v.* Dial, 12 Tex. 100.

See 22 Cent. Dig. tit. "Executors and Administrators," § 85.

94. McGehee *v.* Ragan, 9 Ga. 135 (holding that letters of administration must be granted at the term immediately succeeding the publication of the notice and citation unless the application is regularly continued by the action of the court); Elgutter *v.* Missouri Pac. R. Co., 53 Nebr. 748, 74 N. W. 255.

95. *In re* Curser, 89 N. Y. 401; Cobb *v.* Beardsley, 37 Barb. (N. Y.) 192; Matter of Gooseberry, 52 How. Pr. (N. Y.) 310; West *v.* Mapes, 4 Redf. Surr. (N. Y.) 496.

Where the widow has lost her right by lapse of time, she is not entitled to a citation. Grantham *v.* Williams, 1 Ark. 270.

Under the Maryland statute it is not necessary to give notice to collateral relations more remote than brothers or sisters of the intestate in order to exclude them from administration, but such persons are not considered as entitled to letters unless they apply for the same. Williams *v.* Addison, 93 Md. 41, 48 Atl. 458.

96. Decker *v.* Decker, 74 Me. 465; Bean *v.* Bumpas, 22 Me. 549; Peters *v.* Public Administrator, 1 Bradf. Surr. (N. Y.) 200.

97. Mandeville *v.* Mandeville, 35 Ga. 243; Shannon *v.* Shannon, 111 Mass. 331.

98. King *v.* Lastrapes, 13 La. Ann. 582; Shannon *v.* Shannon, 111 Mass. 331; Perry *v.* De Wolf, 2 R. I. 103.

Acting under will.— A judge of probate may, in some appointment designated by a will, act under the will instead of as a court, and in that sense dispense with a citation. National Webster Bank *v.* Eldridge, 115 Mass. 424.

99. Robinson *v.* Epping, 24 Fla. 237, 4 So. 812.

1. Arnold *v.* Sabin, 1 Cush. (Mass.) 525; *In re* Brooks, 110 Mich. 8, 67 N. W. 975; Spencer *v.* Wolfe, 49 Nebr. 8, 67 N. W. 858; Davis *v.* Smith, 58 N. H. 16.

2. Robinson *v.* Epping, 24 Fla. 237, 4 So. 812 (newspaper publication and posting for six weeks); *In re* Talbert, 16 La. Ann. 230 (ten days' advertisement); Chew *v.* Flint, 7 La. 395 (publication and posting).

Where there is no local newspaper posting a notice is favored in probate orders. Herriman *v.* Janney, 31 La. Ann. 276.

Reading in church.—Citation in South Caro-

to the contrary that the required publication was made,[3] and a statement or recital in the order granting administration that citation has been published as required by law is an adjudication that this has been done which cannot be inquired into in a collateral proceeding.[4]

5. Petition or Bill. The usual and regular method of applying for administration is by a petition or bill[5] asking the appointment of the petitioner,[6] or in some cases of some other person; and it has been held that an administrator can be appointed only when a proper petition is filed for that purpose.[7] Jurisdiction to appoint should appear affirmatively on the face of the petition[8] and the necessary facts should be alleged,[9] such as death,[10] last residence of decedent,[11] the existence and *situs* if need be of assets,[12] intestacy, where this is relied on,[13] the right of the person who seeks administration, as next of kin, creditor, or other-

lina, as from a spiritual court, has been published by being read in church by an officiating clergyman. Sargent *v.* Fox, 2 McCord (S. C.) 309.

Failure to publish notice for prescribed period a jurisdictional defect.— Hartley *v.* Glover, 56 S. C. 69, 33 S. E. 796.

Evidence of publication.— Where the order appointing an administrator refers to an affidavit of publication, filed as authorized by statute, as evidence of publication, and such affidavit does not conform to the statutory requirements, the appointment is invalid because the court has acted without evidence on the jurisdictional fact of notice. Gillett *v.* Needham, 37 Mich. 143.

3. Hendrix *v.* Holden, 58 S. C. 495, 36 S. E. 1010.

4. Robinson *v.* Epping, 24 Fla. 237, 4 So. 812.

5. See Robinson *v.* Epping, 24 Fla. 237, 4 So. 812; Moore *v.* Moore, 33 Nebr. 509, 50 N. W. 443.

Affidavit in connection with petition.— Under a statute providing that application for letters of administration shall be made by petition in writing, signed by the applicant or his attorney, and filed in the superior court, which petition shall set forth the facts essential to give the court jurisdiction of the case, and such applicant at the time of making the application shall make an affidavit stating to the best of his knowledge and belief the names and places of residence of the heirs of the deceased, and that deceased died without a will, it has been held that the jurisdiction of the superior court was based on the petition required and was not dependent on the affidavit specified, and hence where a petition for letters set out all the facts required the court was not deprived of jurisdiction by reason of the petitioner's failure to make the affidavit at the time of filing the petition. McLean *v.* Roller, 33 Wash. 166, 73 Pac. 1123.

6. Matter of Batchelor, 64 How. Pr. (N. Y.) 350.

7. Haug *v.* Primeau, 98 Mich. 91, 57 N. W. 25. *Contra*, Robinson *v.* Epping, 24 Fla. 237, 4 So. 812.

8. Shipman *v.* Butterfield, 47 Mich. 487, 11 N. W. 283; Moore *v.* Moore, 33 Nebr. 509, 50 N. W. 443.

9. See Paul *v.* Willis, 69 Tex. 261, 7 S. W. 357.

Details unessential to jurisdiction need not be averred. *Florida.*— Emerson *v.* Ross, 17 Fla. 122.

Nebraska.— *In re* Miller, 32 Nebr. 480, 49 N. W. 427.

Tennessee.—Baker *v.* Huddleston, 3 Baxt. 1.

Texas.— George *v.* Watson, 19 Tex. 354.

Washington.— Scott *v.* McNeal, 5 Wash. 309, 31 Pac. 873, 34 Am. St. Rep. 863.

Wisconsin.— Sargent's Estate, 62 Wis. 130, 22 N. W. 131.

See 22 Cent. Dig. tit. "Executors and Administrators," § 88.

The only necessary averments in a petition for administration are that decedent died intestate, and was at the time of his death a resident or inhabitant of the county where the petition is filed, or if he was a non-resident of the state that he left an estate in such county to be administered. Larson *v.* Union Pac. R. Co., (Nebr. 1903) 97 N. W. 313.

10. See Beckett *v.* Selover, 7 Cal. 215, 68 Am. Dec. 237; and *supra*, I, J, 3, a.

Allegation on belief.— An allegation that petitioner "verily believed" that the alleged decedent had departed this life has been held sufficient. Pleasants *v.* Dunkin, 47 Tex. 343. But *compare* Roderigas *v.* East River Sav. Inst., 76 N. Y. 316, 32 Am. Rep. 309 [*affirming* 43 N. Y. Super. Ct. 217].

11. Townsend *v.* Gordon, 19 Cal. 188 (holding that a petition addressed to the probate court of Santa Clara county, stating that decedent was late a resident of "the county aforesaid" sufficiently showed that decedent was a resident of Santa Clara county); Beckett *v.* Selover, 7 Cal. 215, 68 Am. Dec. 237 (holding an allegation that the decedent was "late" a resident of the county where the petition was brought sufficient); Larson *v.* Union Pac. R. Co., (Nebr. 1903) 97 N. W. 313. See also Sargent's Estate, 62 Wis. 130, 22 N. W. 131; and *supra*, I, J, 4, a.

When jurisdiction is not founded on residence but on locality of assets an allegation of residence is not necessary. Rankin *v.* Anderson, 8 Baxt. (Tenn.) 240.

12. See Larson *v.* Union Pac. R. Co., (Nebr. 1903) 97 N. W. 313; Sargent's Estate, 62 Wis. 130, 22 N. W. 131; and *supra*, I, J, 3, b; I, J, 4, c.

13. See Beckett *v.* Selover, 7 Cal. 215, 68 Am. Dec. 237; Larson *v.* Union Pac. R. Co., (Nebr. 1903) 97 N. W. 313; Sargent's Es-

wise, to be appointed,[14] and, it has been held, the fact that he is qualified for the office;[15] but it is not necessary that the petition should contain a description of either the real or the personal property belonging to the estate.[16] As jurisdictional facts and their correctness may be determined at the hearing, a misnomer or inaccuracy in the petition, or even the omission of essential allegations, is often indulgently treated.[17] Verification of the petition has been held not necessary.[18]

6. Answer or Traverse. An answer or traverse to the petition, or a demurrer, is found in the practice of some states.[19]

7. Objections to Appointment. Objections, more or less formal, to a petition may be offered at or before the open hearing, and parties in opposition duly enter an appearance, by attorney or otherwise, in token that they desire to be heard; the caveat customary in some jurisdictions being filed for similar effect.[20] Objections to the issuance of letters testamentary or of administration can be made only by persons having an interest in the estate.[21] The objection must

tate, 62 Wis. 130, 22 N. W. 131; and *supra*, II, B, 1.

14. Towner *v.* Griffin, 115 Ga. 965, 42 S. E. 262; Shipman *v.* Butterfield, 47 Mich. 487, 11 N. W. 283. But *compare* Pollet's Succession, 1 Rob. (La.) 559, holding that an applicant for the curatorship of a succession, if legally opposed, may show in a supplemental petition the grounds of his claim, but he need not do so until then.

As to right to appointment see *supra*, II, B, 2.

Unnecessary allegations.— After the expiration of the thirty days provided by the Nebraska statute within which the widow or next of kin of intestate may apply for administration of the estate, it is not necessary that a petition for the appointment of an administrator should allege that the person whose appointment is sought is the next of kin, or selected by the next of kin, to the intestate. Nor would it be necessary after the expiration of about two years after the decease to allege that there were no creditors competent or willing to accept the trust, in order to confer jurisdiction to appoint some other suitable person whom the county judge might think proper. Atkinson *v.* Hasty, 21 Nebr. 663, 33 N. W. 206.

15. Andis *v.* Lowe, 8 Ind. App. 687, 34 N. E. 850. *Contra, In re* Gordon, 142 Cal. 125, 75 Pac. 672.

As to competency see *infra*, II, A, 3; II, B, 3.

16. *In re* Miller, 32 Nebr. 480, 49 N. W. 427.

17. *Alabama.*— Davis *v.* Miller, 106 Ala. 154, 17 So. 323.

Illinois.— Judd *v.* Ross, 146 Ill. 40, 34 N. E. 631.

Louisiana.— Ford *v.* Newcomer, 14 La. Ann. 706.

Maine.— Danby *v.* Dawes, 81 Me. 30, 16 Atl. 255.

Michigan.— Wilkinson *v.* Conaty, 65 Mich. 614, 32 N. W. 841.

Nebraska.— Stacks *v.* Crawford, 63 Nebr. 662, 88 N. W. 852.

New York.— Johnston *v.* Smith, 25 Hun 171.

Tennessee.— Hall *v.* Calvert, (Ch. App. 1897) 46 S. W. 1120.

Texas.— Odell *v.* Kennedy, 26 Tex. Civ. App. 439, 64 S. W. 802.

See 22 Cent. Dig. tit. "Executors and Administrators," § 88.

18. Davis *v.* Miller, 106 Ala. 154, 17 So. 323; *In re* Miller, 32 Nebr. 480, 49 N. W. 427. But *compare In re* Pina, (Cal. 1902) 71 Pac. 171.

19. *In re* Wooten, 56 Cal. 322; *In re* Brooks, 110 Mich. 8, 67 N. W. 975.

20. *In re* Aronstein, 51 La. Ann. 1052, 25 So. 932.

Allegations of fraud cannot be noticed in an opposition to an application for administration as they form the subject of an independent litigation and should not be tried collaterally. Martin's Succession, 13 La. Ann. 557.

A limitation of time within which opposition to the appointment of a curator must be made has been held to apply only to cases where due and regular notice has been given of the application to be appointed. Yilden *v.* Kendrick, 3 La. 471.

21. Augusta, etc., R. Co. *v.* Peacock, 56 Ga. 146; Williams' Succession, 107 La. 610, 32 So. 65; *In re* De Armas, 1 Rob. (La.) 461; Matter of Willink, 4 Phila. (Pa.) 188; Angier *v.* Jones, 28 Tex. Civ. App. 402, 67 S. W. 449.

The Louisiana code requires the opposer to state objections in writing and show a better right in himself. *In re* De Armas, 1 Rob. (La.) 461.

Under the North Carolina statute no one except a person entitled to administer can object to the appointment of another. Garrison *v.* Cox, 95 N. C. 353.

The public administrator is a person "interested" who may contest a petition for administration. *In re* Healy, 122 Cal. 162, 54 Pac. 736.

A person claiming under oath to be a creditor may be heard to object to the issuing of letters testamentary, although the person named as executor in the will alleges the objector to be a debtor instead of a creditor. *In re* Ferris, Tuck. Surr. (N. Y.) 15.

A person in possession of certain of the property under circumstances indicating a claim of right has such an interest in the matter as entitles him to appear and oppose

show that the applicant for letters is incompetent upon some ground specified by statute or is not entitled to the appointment.[22] Where objection has been duly made by a party in interest, the issue of letters should be suspended until the determination of the objection or its withdrawal.[23]

8. TRIAL OR HEARING. The proceedings in county probate courts are often somewhat informal, as though in the disposition of executive business, and may be conducted without even the employment of legal counsel,[24] yet the essentials of judicial investigation and decree should be preserved.[25] The probate court has in each case a sound discretion to investigate and determine as to death and other facts fundamental to the grant of administration;[26] but it is not within the province of the court on an application for letters of administration to determine questions of title or property rights,[27] or other matters not directly involved in the application before it.[28]

9. EVIDENCE. It is incumbent upon the person seeking administration to establish the facts showing administration to be necessary or proper.[29] He must also show his right to the administration,[30] and evidence which tends to establish this right is always admissible,[31] as is also evidence to show the superior claims of

the application. Wiesmann *v.* Daniels, 114 Wis. 240, 90 N. W. 162.

A debtor to the estate is not "a party in interest" in such sense (Swan *v.* Picquet, 3 Pick. (Mass.) 443), nor is the garnishee of a debtor (Veazie Bank *v.* Young, 53 Me. 555).

The objector's right to appear may be disputed notwithstanding his affidavit. Burwell *v.* Shaw, 2 Bradf. Surr. (N. Y.) 322. And see *In re* Welch, Myr. Prob. (Cal.) 202; Burton *v.* Waples, 4 Harr. (Del.) 73.

22. Bauquier's Estate, 88 Cal. 302, 26 Pac. 178, 532.

23. McGregor *v.* Buel, 24 N. Y. 166, holding that this applies to all where the petition is for joint letters and objection is made to one of them.

24. De Lorme *v.* Pease, 19 Ga. 220.

25. See Burns *v.* Van Loan, 29 La. Ann. 560; Vogel's Succession, 16 La. Ann. 139, 79 Am. Dec. 571; Roderigas *v.* East River Sav. Inst., 63 N. Y. 460, 20 Am. Rep. 555. But *compare* Pleasants *v.* Dunkin, 47 Tex. 343.

Original applicant entitled to open and close. — Weeks *v.* Sego, 9 Ga. 199.

A proceeding for the appointment of an administrator is an action within the meaning of that term as used in the Idaho statutes. Gwinn *v.* Melvin, (Ida. 1903) 72 Pac. 961.

26. Ferrie *v.* Public Administrator, 3 Bradf. Surr. (N. Y.) 151, legitimacy of son claiming appointment.

Inquiry into time, place, and manner of death see Farley *v.* McConnell, 7 Lans. (N. Y.) 428 [*affirmed* in 52 N. Y. 630].

27. *California.*— Pina's Estate, 112 Cal. 14, 44 Pac. 332.

Maryland.— Grimes *v.* Talbert, 14 Md. 169.

Michigan.— *In re* McCarty, 81 Mich. 460, 45 N. W. 996; *In re* Nugent, 77 Mich. 500, 43 N. W. 889.

North Carolina.— See *In re* Tapp, 114 N. C. 248, 19 S. E. 150.

Texas.— Chapman *v.* Chapman, 88 Tex. 641, 32 S. W. 871 [*affirming* 11 Tex. Civ. App. 392, 32 S. W. 564].

See 22 Cent. Dig. tit. "Executors and Administrators," § 97.

28. Kearney *v.* Turner, 28 Md. 408, holding that a court of probate has no power to try the question of the alleged unsoundness of mind of a person entitled to administration but this question must be decided by a writ *de lunatico inquirendo*.

29. Grimes *v.* Talbert, 14 Md. 169 (death, existence, and locality of assets, and intestacy); Wright *v.* Smith, 19 Nev. 143, 7 Pac. 365 (existence and locality of assets).

As to intestacy it has been held that as the existence of a valid will cannot be presumed, the burden of proving a will is upon the person denying the intestacy. Matter of Cameron, 47 N. Y. App. Div. 120, 62 N. Y. Suppl. 187 [*affirmed* in 166 N. Y. 610, 59 N. E. 1120], holding the facts shown not sufficient to prove the authenticity and due execution of an alleged will and codicil. But *compare* Farley *v.* McConnell, 7 Lans. (N. Y.) 428 [*affirmed* in 52 N. Y. 630].

Claim that will was made and destroyed.— A person who opposes an application for letters of administration and is interested under a will of the decedent claimed to have been destroyed must in the same proceeding prove the will and that it has never been revoked; and where the petitioner for letters has made the proof required by statute that the decedent died without leaving a will, and the person opposing the application adduces no evidence, the petition for administration should be granted. Matter of Demmert, 5 Redf. Surr. (N. Y.) 299. See also *In re* Ellis, 55 Minn. 401, 56 N. W. 1056, 43 Am. St. Rep. 514, 23 L. R. A. 287, holding that proof that a decedent executed a will, which he afterward destroyed, will not defeat an application for an administration, unless its contents can be proved with such degree of certainty that it may be established as a will.

30. Berfuse's Succession, 34 La. Ann. 599.

31. Boe *v.* Filleul, 26 La. Ann. 126.

one applicant over those of another,[32] or to disprove the applicant's right to administer.[33] The person opposing the application is entitled to introduce evidence of any facts which tend to show that administration is not necessary.[34]

10. Order or Decree of Appointment. It is necessary to the appointment of an administrator that there should be an order to that effect,[35] which must of course designate the estate upon which administration is granted.[36] But even though an order does not in apt language show the appointment of an administrator it will be held sufficient if the language used shows that the appointment was intended.[37] A court cannot attach to an order granting administration any conditions[38] save such as are provided by law,[39] but an order granting administration will not be construed as conditional where the language does not render this construction necessary.[40]

11. Review or Appeal. The various state codes usually provide for an appeal from an appointment or refusal to appoint a representative, by any aggrieved party in interest, the usual effect of such appeal being to stay proceedings under the appointment.[41] The appellate courts are not, however, disposed to set aside

A marriage with the deceased may be proved by evidence of cohabitation, declarations, and repute. Renholn *v.* Public Administrator, 2 Redf. Surr. (N. Y.) 456, holding further that evidence of the declaration of the deceased that she was not married is not necessarily inconsistent therewith, for that may have referred to a ceremonial marriage.

Where a creditor applies for administration evidence to show the existence of the debt should be admitted. Einstein *v.* Latimer, 46 Ga. 315, holding that the court should not exclude notes and a mortgage securing the same made by the debtor and offered in evidence to show the indebtedness, on the ground that no affidavit of payment of taxes thereon had been filed under the Georgia act of Oct. 13, 1870.

Proof of debts may be by book of account and suppletory oath. Arnold *v.* Sabin, 1 Cush. (Mass.) 525; *In re* Miller, 32 Nebr. 480, 49 N. W. 427.

32. Rust *v.* Randolph, 4 Mart. (La.) 370.

33. *In re* Davis, 106 Cal. 453, 39 Pac. 756, holding that where the right to inherit is necessarily involved in the application for letters a contract showing that the applicant has released her inheritable interest in the decedent's estate is admissible.

34. Pratt's Succession, 11 La. Ann. 201, holding that the opponent was entitled to show that she was publicly acknowledged and upheld as the decedent's wife, and that all property belonging to the succession was community property for the administration of which and for the payment of all the debts of the succession, the opponent had the right to give security, which security the creditors of the succession were willing to accept.

35. Picard's Succession, 33 La. Ann. 1135. See also Callahan *v.* Fluker, 49 La. Ann. 237, 21 So. 253.

General or special grant.— An order reciting an applicant's former appointment as "general administrator of the county," and then directing that "special letters on the estate of the decedent issue to him," shows a grant of general, and not of limited, letters, the word "special" being used in contradistinction to "general" or county administrator. Jones *v.* Ritter, 56 Ala. 270.

A statute giving clerks of court power to appoint administrators does not dispense with the necessity of rendering an order in making the appointment. Picard's Succession, 33 La. Ann. 1135.

36. Harwood *v.* Wylie, 70 Tex. 538, 7 S. W. 789.

37. Louisville, etc., R. Co. *v.* Edmund, 64 S. W. 727, 23 Ky. L. Rep. 1049 (where an order of a county court reciting that a certain person, "having been appointed" administratrix, executed bond, was treated as making the appointment); Moseley *v.* Stucken, 26 Tex. Civ. App. 290, 62 S. W. 1103 (holding that the action of the probate court after a certain person had given bond and taken oath as administrator, recognizing him as such administrator, directing him to make a sale, and approving his report of sale, should be deemed equivalent to a formal appointment of him as such administrator).

38. Hoskins *v.* Miller, 13 N. C. 360; Cain *v.* Haas, 18 Tex. 616.

39. Cain *v.* Haas, 18 Tex. 616, holding that the court cannot annex a condition that the administrator shall pay the costs of a *pro tem.* appointment or a privileged claim.

40. Tucker *v.* Harris, 13 Ga. 1, 58 Am. Dec. 488; Spencer *v.* Cohoon, 18 N. C. 27; Hoskins *v.* Miller, 13 N. C. 360.

41. *Alabama.*— Alexander *v.* Nelson, 42 Ala. 462. But see Phillips *v.* Peteet, 35 Ala. 696 (holding the refusal of the probate court to grant letters of administration to a petitioner not entitled to administer of right not appealable); Brennan *v.* Harris, 20 Ala. 185.

Arkansas.— See Bankhead *v.* Hubbard, 14 Ark. 298.

California.— Wood's Estate, 94 Cal. 566, 29 Pac. 1108.

an appointment regularly made by the probate judge except where the latter has abused the wide discretion which the law confides to him,[42] and where the judg-

Connecticut.— Richardson *v.* Richardson, 2 Root 219.

Georgia.— Glisson *v.* Carter, 28 Ga. 516.

Indiana.— See Wallis *v.* Cooper, 123 Ind. 40, 23 N. E. 977.

Kentucky.— See Mitchell *v.* Apperson, 4 Ky. L. Rep. 368.

Louisiana.— Wintz's Succession, 111 La. 40, 35 So. 377; State *v.* Plaquemines Parish Judge, 22 La. Ann. 23; State *v.* Judge New Orleans Probate Ct., 18 La. 392. But see State *v.* Hingle, 50 La. Ann. 683, 23 So. 616.

Maine.— See Shaw's Appellant, 81 Me. 207, 16 Atl. 662.

Massachusetts.— Swan *v.* Piquet, 3 Pick. 443.

Mississippi.— See Lee *v.* Bennett, 31 Miss. 119.

New Jersey.—Holmes *v.* Morris, 16 N. J. L. 526; Quidort *v.* Pergeaux, 18 N. J. Eq. 472.

New York.— Devin *v.* Patchin, 26 N. Y. 441. See *In re* Chase, 32 Hun 318. But *compare* McGregor *v.* Buel, 24 N. Y. 166.

North Carolina.— Ledbetter *v.* Lofton, 5 N. C. 224.

Pennsylvania.— Wood's Appeal, 55 Pa. St. 332.

Rhode Island.— Emsley *v.* Young, 19 R. I. 65, 31 Atl. 692, appointment of administrator *de bonis non* with will annexed.

South Carolina.—State *v.* Mitchell, 3 Brev. 520.

Tennessee.— Wright *v.* Wright, Mart. & Y. 43.

Texas.— Hall *v.* Claiborne, 27 Tex. 217.

See 22 Cent. Dig. tit. "Executors and Administrators," § 102.

But *compare* State *v.* Fowler, 108 Mo. 465, 18 S. W. 968; Covey *v.* Charles, 49 Md. 314.

Interest necessary to sustain appeal.—Jones *v.* Jones, 12 Utah 72, 41 Pac. 563.

The widow and sole distributee may appeal from an adverse decree in an action for the appointment of an administrator and settlement of the estate. Stanley *v.* McKinzer, 7 Lea (Tenn.) 454.

The guardian of the next of kin who is *non compos mentis* has a sufficient interest to entitle him to appeal from a grant of administration. Mowry *v.* Latham, 20 R. I. 786, 40 Atl. 236, 341.

A creditor, although served by citation only, is a party to the proceeding and may within the time prescribed by law appeal from the decision of the ordinary appointing an administrator, whether he objected to it in court or not. Mitchell *v.* Pyron, 17 Ga. 416.

A public administrator of one county who claims the right to administer on an estate has the right to appeal from an order of the court of another county appointing another person as administrator. *In re* Damke, 133 Cal. 433, 65 Pac. 888.

Person liable to suit by administrator.— A person against whom an administrator brings or is entitled to bring suit under statute for the killing of an intestate cannot appeal from the order appointing such administrator. *In re* Hardy, 35 Minn. 193, 28 N. W. 219.

A failure to demur below to a petition to set aside the appointment of an administrator is a waiver of the objection that, under a statute providing that any party to a judgment or decree may appeal therefrom, the petitioner cannot appeal from a denial of his petition because not a party to the probate proceedings. *In re* Tasanen, 25 Utah 396, 71 Pac. 984.

There is no such acquiescence as will prevent an appeal from a judgment contradictorily rendered in a contest between two applicants for the appointment of an administrator because the unsuccessful party has thereafter joined issue on the merits with the successful party in a suit instituted by him as administrator of the succession. Lamm's Succession, 40 La. Ann. 312, 4 So. 53.

Remedy by appeal rather than writ of prohibition.— State *v.* Ayer, 17 Wash. 127, 49 Pac. 226.

Death of appellant.— Where letters of administration on the estate of a deceased person were resisted, and the issue was decided in favor of the claimant, from which the exceptant appealed, and died pending such appeal, the applicant, before decision of the appeal, was not entitled to have orders granted authorizing him to proceed with the administration; but such other parties as were interested should have been brought in, and the appeal determined, before the administration proceeded. Glisson *v.* Carter, 28 Ga. 516.

Appeal as to discretionary matters.— An appeal which does not call in question the necessity for the appointment of an administrator *pendente lite*, but questions only the selection of the person appointed and the amount of security to be given, is ineffective, these matters being within the discretion of the court. *In re* Davenport, (N. J. Prerog. 1903) 56 Atl. 295.

Grounds for dismissal of appeal see *In re* Damke, 133 Cal. 433, 65 Pac. 888; Hancock *v.* Minshew, 111 Ga. 843, 36 S. E. 296; Headman *v.* Rose, 63 Ga. 458.

42. *Arkansas.*— Bankhead *v.* Hubbard, 14 Ark. 298.

Indiana.— Wallis *v.* Cooper, 123 Ind. 40, 23 N. E. 977.

Louisiana.— Chaler's Succession, 39 La. Ann. 308, 1 So. 820.

Mississippi.— Lee *v.* Bennett, 31 Miss. 119.

New York.— *In re* Chase, 32 Hun 318.

Pennsylvania.— Wood's Appeal, 55 Pa. St. 332.

Rhode Island.— Knowles *v.* Lester, 16 R. I. 542, 18 Atl. 159.

Texas.— Hall *v.* Claiborne, 27 Tex. 217.

ment below was erroneous they incline to reverse only so far as may be needful, once more remanding the cause so that the probate judge may proceed to exercise a sound discretion in making the due appointment accordingly.[43] In some jurisdictions, however, the matter may be tried *de novo* in the appellate court.[44] The time within which an appeal must be taken is regulated by statute.[45] Pending an appeal from an order granting letters of administration the court is without jurisdiction to order the discharge of the administrators so appointed and appoint others in their stead.[46]

12. Costs. It has been held that a party failing in his application for a curatorship, from whatever cause, must pay costs,[47] and where the probate court finds that a party to a proceeding to appoint an administrator did not act in good faith in contesting the petitioner's right to the appointment, costs are properly awarded against such contestant.[48]

I. Oath of Office. As a general rule an executor or administrator is required, before entering upon his duties as such, to take an oath of office prescribed by statute,[49] but informalities in the taking of the oath are regarded with

See 22 Cent. Dig. tit. "Executors and Administrators," § 102.

Some codes expressly declare that the judgment of the probate court shall be conclusive on the facts of appointment except on original appeal or where no jurisdiction appears on the face of the record. Shaw's Appellant, 81 Me. 207, 16 Atl. 662.

The objection that letters were issued without due notice to all persons interested ought not as a rule to be made for the first time on appeal. *In re* Nesmith, 1 N. Y. Suppl. 343.

43. *In re* Wood, 36 Cal. 75 (holding that where probate of a will has been refused but the supreme court on appeal directs it to be admitted to probate, the probate court will not be directed to issue letters of administration with the will annexed to the petitioner unless the probate court has found that he is a proper person to receive letters); Dexter *v.* Brown, 3 Mass. 43 (holding that upon an appeal from a decree of the probate court granting letters of administration to a certain person, the appellate court may reverse the decree as to the appointment of such person and affirm it as to the residue and remand the case to the probate court with directions to grant administration to one of two or more named persons); Wallis *v.* Wallis, 60 N. C. 78 (holding that the proper course upon reversal of an order appointing an administrator is for the appellate court not to grant administration but to direct a procedendo to the court of probate jurisdiction). But *compare* Blunt *v.* Moore, 18 N. C. 10, holding that, on appeal from an order of the county court granting letters of administration, the appellate court may grant letters to one who was not originally a party to the contest.

44. *In re* Miller, 32 Nebr. 480, 49 N. W. 427; Gause's Estate, 1 Chest. Co. Rep. (Pa.) 105, holding that where an order granting letters of administration on the estate of a deceased person is entered by the register of wills, and an appeal is taken to the orphans' court, such court has jurisdiction to direct to whom letters of administration shall be granted, but in its discretion may remit the matter to the register, although his order is reversed. See also Jackson *v.* Jackson, 101 Ga. 132, 28 S. E. 608. But *compare* Devin *v.* Patchin, 26 N. Y. 441, 445, holding that upon an appeal from the decree of a surrogate on an application for letters of administration, the supreme court is to review the determination upon the proofs before the surrogate, and it cannot receive further evidence or award an issue to be tried by jury at circuit, the court saying: "The only cases in which the Supreme Court is authorized by statute to direct that an issue be made up and tried by a jury at a circuit court, on appeals from the decisions of surrogates, are those by which wills have been admitted to probate or refused to be admitted to record or probate."

45. *In re* Heldt, 98 Cal. 553, 33 Pac. 549 (sixty days); Mitchell *v.* Pyron, 17 Ga. 416.

Allowance of appeal after statutory time.— Under a statute providing that if without fault on his part a party failed to appeal within the statutory period of thirty days, the appellate court might still allow the appeal, it has been held that where administration was taken out on the estate of a non-resident eighteen years after his death, it was not improper to grant an application made by the heirs and others interested, within sixty days of the order of appointment, praying the right of appeal therefrom and showing that they knew nothing of the administrator's intention nor of his appointment until after the expiration of the thirty days and that it was a question of importance whether the administrator was entitled to be appointed. Reynolds *v.* Miller, 6 Iowa 459.

46. *In re* Hill, 55 N. J. Eq. 764, 37 Atl. 952.

47. Kaiser *v.* Hoffman, 18 La. 493; Hook *v.* Richardson, 4 La. 569.

48. *In re* Clark, 15 N. Y. Suppl. 370.

49. Echols *v.* Barrett, 6 Ga. 443; Questi *v.* Rills, 8 Mart. N. S. (La.) 581.

lenience,[50] and one who takes charge of an estate as administrator cannot escape liability by reason of his having failed to take the oath and file the bond required by law.[51] Letters of administration are presumptive evidence that the requisite oath has been taken, and that letters were not issued until the duty was performed.[52]

J. Bond — 1. Requirement — a. Of Executors — (I) *English Rule.* In English practice the spiritual court exerted from early times so little authority over an executor that it could not require him to give bond, but chancery came to afford better protection to those interested beneficially, and it became the rule that an executor could be compelled, in chancery, to furnish security before entering actively upon the discharge of his trust.[53]

(II) *American Rule* — (A) *Bond Required.* In the United States, however, the jurisdiction of the probate courts is greater in this respect, and an executor is very generally required to give bond satisfactory to that court,[54] although in some

Oath must be taken before court of ordinary. Echols *v.* Barrett, 6 Ga. 443.

General official oath of public administrator sufficient.— Healy *v.* Lassen County Super. Ct., 127 Cal. 659, 60 Pac. 428; Beckett *v.* Selover, 7 Cal. 215, 68 Am. Dec. 237.

When oath unnecessary.— Under the Oregon statute requiring an executor to take an oath to faithfully fulfil his trust, where the will dispenses with a bond, such oath is not necessary where the will fixes the amount of the bond at a sum which is reasonable in proportion to the value of the estate, although considerably less than what the law would require in the absence of any testamentary provision, and such bond is given. *In re* Conser, 40 Oreg. 138, 66 Pac. 607.

50. Penny's Succession, 13 La. Ann. 94.

Informalities not invalidating appointment. —An appointment is not void because the oath was taken before the actual appointment (Morris *v.* Chicago, etc., R. Co., 65 Iowa 727, 23 N. W. 143, 54 Am. Rep. 39; Gallagher *v.* Holland, 20 Nev. 164, 18 Pac. 834), filed with the judge instead of the clerk (Emerson *v.* Ross, 17 Fla. 122), or sworn before a notary instead of a clerk of court (Picken *v.* Hill, 30 Ind. 269); because of the omission of the name of the succession in the body of the oath (Herriman *v.* Janney, 31 La. Ann. 276); nor because unessential recitals are omitted (*In re* Maxwell, 3 N. J. Eq. 611; Williams *v.* Verne, 68 Tex. 414, 4 S. W. 548).

51. Harris *v.* Coates, (Ida. 1902) 69 Pac. 475.

52. Brooks *v.* Walker, 3 La. Ann. 150; Dayton *v.* Johnson, 69 N. Y. 419.

53. Slanning *v.* Style, 3 P. Wms. 334, 24 Eng. Reprint 1089, 1 Equity Cas. Abr. 238, pl. 21.

54. *Alabama.*— Gardner *v.* Gantt, 19 Ala. 666.

Arkansas.— Bankhead *v.* Hubbard, 14 Ark. 298.

Georgia.— Echols *v.* Barrett, 6 Ga. 443.

Kentucky.— Moore *v.* Ridgeway, 1 B. Mon. 234.

Louisiana.— Peale *v.* White, 7 La. Ann. 449.

Maine.— Pettingill *v.* Pettingill, 60 Me. 411.

Massachusetts.— Hall *v.* Cushing, 9 Pick. 395.

Michigan.— Gray *v.* Franks, 86 Mich. 382, 49 N. W. 130.

New Hampshire.— Davis *v.* Davis, 72 N. H. 326, 56 Atl. 747 (holding that under Pub. St. (1901) c. 188, § 12, providing that no person shall be considered as having the trust of a decedent's estate until he has given bond, where letters have been issued by the probate court to an executor, but no bond has been given, the probate court has no jurisdiction to require him to account for property of the decedent lost through his negligence); Heydock *v.* Duncan, 43 N. H. 95.

New York.—Matter of Roffo, 51 N. Y. App. Div. 35, 64 N. Y. Suppl. 455; Shields *v.* Shields, 60 Barb. 56; Freeman *v.* Kellogg, 4 Redf. Surr. 218; Senior *v.* Ackerman, 2 Redf. Surr. 302.

Pennsylvania.— Webb *v.* Dietrich, 7 Watts & S. 401.

Rhode Island.— Sarle *v.* Scituate Probate Ct., 7 R. I. 270.

Vermont.— Trask *v.* Donoghue, 1 Aik. 370.

Virginia.— Fairfax *v.* Fairfax, 7 Gratt. 36.

See 22 Cent. Dig. tit. "Executors and Administrators," § 144.

Where executors are also trustees they must give bonds in both capacities. Deering *v.* Adams, 37 Me. 264; P. C. & St. L. R. Co. *v.* Schmidt, 8 Ohio Cir. Ct. 355, 4 Ohio Cir. Dec. 535.

The bond is for the benefit of all interested in the testator's estate, and not merely for those who ask for security. Holmes *v.* Cock, 2 Barb. Ch. (N. Y.) 426.

An executor who is life-tenant of the estate cannot be compelled to give security unless waste or other circumstances require it. *In re* Sherer, 3 Walk. (Pa.) 284; *In re* Lindsay, 14 Phila. (Pa.) 269.

Foreign wills.— The Michigan statute providing for the probate of foreign wills does not require any bond on the part of the executor. Gray *v.* Franks, 86 Mich. 382, 49 N. W. 130.

The executor must have notice and an opportunity to be heard on the question whether a bond or an additional bond is necessary. Leonard *v.* Clark, 24 R. I. 470, 53 Atl. 636.

jurisdictions statutes requiring executors to give bond have been considered as directory merely, leaving it within the discretion of the court in some instances to dispense with security.[55] Among reasons which may lead to a person nominated as executor being required to give bond may be mentioned the fact that he is a non-resident,[56] that he is insolvent,[57] or that his financial circumstances are precarious[58] or not such as to afford adequate security for the due administration of the estate.[59] A bond is also properly required where the conduct of the executor shows a want of fidelity in the execution of the trust,[60] or where he has wasted or mismanaged the estate, or there is reasonable ground for apprehending that he will do so.[61]

Except for the reasons specified by statute executors cannot be called upon to furnish bonds. Matter of Lowery, 19 Misc. (N. Y.) 83, 43 N. Y. Suppl. 972.

55. Bankhead *v.* Hubbard, 14 Ark. 298; Demarest's Estate, 1 N. Y. Civ. Proc. 302, where all persons interested in the estate consent or offer no objection upon being cited. See also Sharp's Appeal, 7 Pa. Cas. 123, 9 Atl. 860.

The clerk has no such discretion but must always take bond and security when he issues letters. Bankhead *v.* Hubbard, 14 Ark. 298.

56. Grigsby *v.* Cocke, 85 Ky. 314, 3 S. W. 418, 9 Ky. L. Rep. 12; Davis' Succession, 12 La. Ann. 399; Yerkes *v.* Broom, 10 La. Ann. 94; Van Wyck *v.* Van Wyck, 22 Hun (N. Y.) 9; Emery's Estate, 13 N. Y. Civ. Proc. 365; Wood *v.* Wood, 4 Paige (N. Y.) 299; Freeman *v.* Kellogg, 4 Redf. Surr. (N. Y.) 218; Harberger's Appeal, 98 Pa. St. 29; Forster's Estate, 2 Lanc. L. Rev. 206.

Where the executor is about to remove from the state security should be required of him, even though the testator by his will directed the executor to remove with the property bequeathed to another state. Wood *v.* Wood, 4 Paige (N. Y.) 299.

In the absence of any objection letters testamentary may be issued to a non-resident without security. Sterling's Estate, 9 N. Y. Civ. Proc. 448, 4 Dem. Surr. (N. Y.) 492 [*disapproved* in Emery's Estate, 13 N. Y. Civ. Proc. 365]; Vernon's Estate, 1 N. Y. Civ. Proc. 304 note; Demarest's Estate, 1 N. Y. Civ. Proc. 302.

57. Johns *v.* Johns, 23 Ga. 31; Levan's Estate, 1 Woodw. (Pa.) 104, holding insolvency occurring after testator's death a sufficient ground for requiring security. *Contra*, Wilson *v.* Whitfield, 38 Ga. 269, holding that the insolvency of executors is not *per se* a sufficient ground to require security, especially when it appears that their pecuniary condition is as good as it was at the time of their appointment by the testator.

58. Freeman *v.* Kellogg, 4 Redf. Surr. (N. Y.) 218; Colton's Appeal, 2 Pa. Cas. 477, 5 Atl. 55.

59. Wood *v.* Wood, 4 Paige (N. Y.) 299; Freeman *v.* Kellogg, 4 Redf. Surr. (N. Y.) 218.

The testator's knowledge of the executor's pecuniary condition at the time the will was executed does not prevent a bond being required. Wood *v.* Wood, 4 Paige (N. Y.) 299; Freeman *v.* Kellogg, 4 Redf. Surr. (N. Y.) 218. *Contra*, Neighbors *v.* Hamlin, 78 N. C. 42; Levan's Estate, 1 Woodw. (Pa.) 104.

A mere allegation of irresponsibility is not enough to compel an executor to give security but if the allegation is denied the charge must be proved. Cotterell *v.* Brock, 1 Bradf. Surr. (N. Y.) 148.

In determining the question, whether or not the executor is in such precarious circumstances as to make it proper to require security, the proportion of the estate belonging to the executor by the provisions of the will may be taken into consideration in estimating the executor's pecuniary means — regard also being had to the extent of the claims existing against the estate. Cotterell *v.* Brock, 1 Bradf. Surr. (N. Y.) 148.

The fact that the executor's property is not equal to the estate to be administered is not a sufficient ground for requiring him to give security if he is otherwise unobjectionable, especially if his property exceeds the amount which he will probably have in his hands unadministered at any one time. Mandeville *v.* Mandeville, 8 Paige (N. Y.) 475; Martin *v.* Duke, 5 Redf. Surr. (N. Y.) 597 [*criticizing* Freeman *v.* Kellogg, 4 Redf. Surr. (N. Y.) 218].

60. Holcomb *v.* Coryell, 12 N. J. Eq. 289.

61. *Georgia.*— Johns *v.* Johns, 23 Ga. 31.

Iowa.— *In re* Holderbaum, 82 Iowa 69, 47 N. W. 898.

New Jersey.— Bird *v.* Wiggins, 35 N. J. Eq. 111; Holcomb *v.* Coryell, 12 N. J. Eq. 289.

Pennsylvania.— McKennan's Appeal, 27 Pa. St. 237, 1 Grant 364; Cryder's Appeal, 11 Pa. St. 72.

West Virginia.— Amiss *v.* Williamson, 17 W. Va. 673.

See 22 Cent. Dig. tit. "Executors and Administrators," § 147.

Decrepitude.— A widow appointed executrix, and given by the will the entire personal estate, and the use for life, and power of sale of the real estate, will be required to give bond or be removed where she has fallen into a state of mental and physical decrepitude rendering her incapable of transacting business. Cohen's Estate, 9 Kulp (Pa.) 116.

Solvency of the executor is no answer to an established charge of mismanagement.

(B) *Limited Bond Where Executor Is Residuary Legatee.* When the executor is residuary legatee and it appears that so extensive a security is not needful for the protection of any person interested in the estate, the usual bond is sometimes dispensed with, and the executor allowed at his option to give a bond with condition merely to pay all funeral charges, debts, legacies, and statutory allowances.[62]

(C) *Testamentary Provisions Dispensing With Security.* A testamentary provision that the executor need give no bond or need have no sureties on the bond given merely empowers the court to dispense with the bond or sureties which it would otherwise be its duty to require in case the court deems it prudent to do so, but does not deprive the court of power to require the executor to give bond or sureties if this is deemed necessary or prudent, or some person interested in the estate demands it;[63] but the testator's directions in this respect will be regarded unless good reason to the contrary is made to appear.[64]

McKennan's Appeal, 27 Pa. St. 237, 1 Grant (Pa.) 364.

Where the husband of an executrix misconducted himself so as to endanger the assets of the intestate he was compelled to give security for the property. Powell *v.* Thompson, 4 Desauss. (S. C.) 162.

Circumstances not showing mismanagement. — Upon an application to require three executors to give bond on the ground of mismanagement, the fact that one of them had received a large amount of evidences of debt belonging to the estate, which he continued to hold with the consent of the two others, but against the wishes and protest of a fourth executor, showed no mismanagement. Willson *v.* Whitfield, 38 Ga. 269.

62. State *v.* Snowden, 7 Gill & J. (Md.) 430; Colwell *v.* Alger, 5 Gray (Mass.) 67; Stebbins *v.* Smith, 4 Pick. (Mass.) 97; Morgan *v.* Dodge, 44 N. H. 255, 82 Am. Dec. 213; Heydock *v.* Duncan, 43 N. H. 95; Leonard *v.* Clark, 24 R. I. 470, 53 Atl. 636, holding that where the executor is residuary legatee a bond for an inventory cannot be required.

Such bond does not vest the assets in the residuary legatee or close the administration in any such sense as to prejudice other legatees and creditors. Kreamer *v.* Kreamer, 52 Kan. 597, 35 Pac. 214; Lafferty *v.* People's Sav. Bank, 76 Mich. 35, 43 N. W. 34; Moody *v.* Davis, 67 N. H. 300, 38 Atl. 464.

Such a bond renders the executor absolutely liable, to the extent of the penalty, for the payment of all debts, legacies, and allowances, regardless of the actual amount or value of the assets. Kreamer *v.* Kreamer, 52 Kan. 597, 35 Pac. 214; Jones *v.* Richardson, 5 Metc. (Mass.) 247. See also Cleaves *v.* Dockray, 67 Me. 118; Morgan *v.* Dodge, 44 N. H. 255, 82 Am. Dec. 213.

Cancellation.— A bond of this character given by an executor and residuary legatee who has thus been excused from returning an inventory within three months cannot be canceled or surrendered after the expiration of a year and a half. Alger *v.* Colwell, 2 Gray (Mass.) 404.

63. *Kentucky.*— Grigsbey *v.* Cocke, 85 Ky. 314, 3 S. W. 418, 9 Ky. L. Rep. 12; Atwell *v.* Helm, 7 Bush 504; Busch *v.* Rapp, 63 S. W. 479, 23 Ky. L. Rep. 605; Gibson *v.* Fishback, 60 S. W. 396, 22 Ky. L. Rep. 1267; Million *v.* Million, 13 Ky. L. Rep. 143.

Mississippi.— Clark *v.* Niles, 42 Miss. 460.

New York.— Freeman *v.* Kellogg, 4 Redf. Surr. 218.

Oregon.— Bellinger *v.* Thompson, 26 Oreg. 320, 37 Pac. 714, 40 Pac. 229.

Vermont.— Felton *v.* Sowles, 57 Vt. 382.

See 22 Cent. Dig. tit. "Executors and Administrators," § 148.

The discretion of the court is not limited to cases of insolvency, or of fraud or bad faith, but extends to all cases where the circumstances show it to be proper that a bond should be executed. Gibson *v.* Fishback, 60 S. W. 396, 22 Ky. L. Rep. 1267.

Special bond on sale of realty.— A testator cannot exonerate his executor from giving such special bonds as may be needful where land must be sold in order to pay debts. Buckner *v.* Wood, 45 Miss. 57.

The clerk of the probate court who grants letters testamentary upon the estates of deceased persons cannot in any case dispense with the bond and security required by statute but is bound to require it even though the will directs otherwise. Bankhead *v.* Hubbard, 14 Ark. 298.

Notice to persons beneficially interested.— Persons beneficially interested in the estate are sometimes entitled to notice and an opportunity to oppose before letters testamentary are issued to the executor named without a bond or without sureties pursuant to the provisions of the will. Wells *v.* Child, 12 Allen (Mass.) 330 (holding publication in a newspaper addressed to the heirs at law, next of kin, and all other persons interested sufficient, even though a minor who has no guardian is interested in the estate); Abercrombie *v.* Sheldon, 8 Allen (Mass.) 532.

Effect of testamentary provisions.— Where a will appointed executors and directed that they should not be required to give the security provided by statute, and a subsequent codicil appointed an additional executor but contained no express direction as to security, the executor named in the codicil should not qualify without giving security. Fairfax *v.* Fairfax, 7 Gratt. (Va.) 36.

64. Bowman *v.* Wooton, 8 B. Mon. (Ky.) 67; Dengler *v.* Dengler, 1 S. W. 645, 8 Ky. L.

b. Of Administrators. It is the universal rule to require an administrator to give bond,[65] and this is true not only in the case of an ordinary administrator, but also of an administrator *de bonis non*,[66] or with the will annexed,[67] or a special or temporary administrator.[68] As a general rule the official bond of a public administrator covers estates committed to his care and he is not required to give further security,[69] although the court may exact it when deemed necessary.[70] An administrator's failure to give a bond merely makes the appointment voidable and does not render it void or subject to collateral attack.[71]

2. Amount. The amount of the penalty of an executor's or administrator's bond is usually regulated by statute, being as a general rule double the estimated value of the personalty.[72] In computing the value of the estate on which the

Rep. 344; Amiss *v.* Williamson, 17 W. Va. 673.

65. *California.*— Healy *v.* Lassen County Super. Ct., 127 Cal. 659, 60 Pac. 428.

Indiana.— Salyer *v.* State, 5 Ind. 202.

Louisiana.— Levy's Succession, 48 La. Ann. 1520, 21 So. 82.

Tennessee.— Feltz *v.* Clark, 4 Humphr. 79.

Virginia.— Morrow *v.* Peyton, 8 Leigh 54.

See 22 Cent. Dig. tit. "Executors and Administrators," § 158.

Tutor of minor heirs.— The tutor, natural or otherwise, who, as representing the minor beneficiary heirs, claims the administration, must give the same security as any other administrator. Arthur *v.* Cochran, 12 Rob. (La.) 41; Hall *v.* Parks, 9 Rob. (La.) 138; Self *v.* Morris, 7 Rob. (La.) 24; Tildon *v.* Dees, 1 Rob. (La.) 407; Jacobs *v.* Tricou, 17 La. 104.

Sale of real estate.— The general bond given by an administrator on receiving his letters renders the obligors responsible for the proper application by the administrator of the assets derived from the sale of real estate. Salyer *v.* State, 5 Ind. 202 (holding further that, although it was discretionary with the court to require an additional bond upon the sale of real estate, a suit could not, under the Tennessee statute of 1831, be maintained upon such additional bond until the penalty of the original bond had been exhausted); Wade *v.* Graham, 4 Ohio 126.

66. Morrow *v.* Peyton, 8 Leigh (Va.) 54; *In re* Oakey, [1896] P. 7, 65 L. J. P. & Adm. 38, 44 Wkly. Rep. 432; Rous *v.* Noble, 2 Vern. Ch. 249, 23 Eng. Reprint 761.

67. *Louisiana.*— Girod *v.* Girod, 18 La. 394.

New York.— *Ex p.* Brown, 2 Bradf. Surr. 22.

Pennsylvania.— Small *v.* Com., 8 Pa. St. 101.

Virginia.— Frazier *v.* Frazier, 2 Leigh 642.

England.— Rous *v.* Noble, 2 Vern. Ch. 249, 23 Eng. Reprint 761.

See 22 Cent. Dig. tit. "Executors and Administrators," § 158.

A testamentary exemption of the executor from furnishing security cannot operate for the benefit of an administrator with the will annexed. Langley *v.* Harris, 23 Tex. 564; Fairfax *v.* Fairfax, 7 Gratt. (Va.) 36.

68. *In re* Colvin, 3 Md. Ch. 278; Bloomfield *v.* Ash, 4 N. J. L. 314.

69. Healy *v.* Lassen County Super. Ct., 127 Cal. 659, 60 Pac. 428; Beckett *v.* Selover, 7 Cal. 215, 68 Am. Dec. 237. See also Buckley *v.* McGuire, 58 Ala. 226; State *v.* Purdy, 67 Mo. 89.

The official bond of a sheriff may cover administration committed to him *ex officio*. Payne *v.* Thompson, 48 Ala. 535.

70. Healy *v.* Lassen County Super. Ct., 127 Cal. 659, 60 Pac. 428.

71. *Alabama.*—Leatherwood *v.* Sullivan, 81 Ala. 458, 1 So. 718; Cunningham *v.* Thomas, 59 Ala. 158; *Ex p.* Maxwell, 37 Ala. 362, 79 Am. Dec. 62.

California.— Ions *v.* Harbison, 112 Cal. 260, 44 Pac. 572.

New York.— Sullivan *v.* Tioga R. Co., 112 N. Y. 643, 20 N. E. 569, 8 Am. St. Rep. 793; Bloom *v.* Burdick, 1 Hill 130, 37 Am. Dec. 299.

Ohio.— Mitchell *v.* Albright, 10 Ohio Dec. (Reprint) 301, 20 Cinc. L. Bul. 101.

Utah.— Harris *v.* Chipman, 9 Utah 101, 33 Pac. 242.

See 22 Cent. Dig. tit. "Executors and Administrators," § 170; and *infra*, II, L, 4.

Failure to give bond cannot relieve from liability as administrator. Harris *v.* Coates, (Ida. 1902) 69 Pac. 475.

The cancellation of an administrator's bond by the probate court does not revoke the appointment of the administrator nor disqualify him from bringing suit as such. Clarke *v.* Rice, 15 R. I. 132, 23 Atl. 301.

72. *California.*— *In re* Kidd, Myr. Prob. 239.

Louisiana.— Feray's Succession, 31 La. Ann. 727.

Maryland.— Alexander *v.* Stewart, 8 Gill & J. 226.

Mississippi.— Ellis *v.* Witty, 63 Miss. 117.

New York.— Matter of Nesmith, 6 Dem. Surr. 333, 15 N. Y. St. 436; Peck *v.* Peck, 3 Dem. Surr. 548; Sutton *v.* Weeks, 5 Redf. Surr. 353; Matter of Hart, 2 Redf. Surr. 156.

Ohio.— Chatfield *v.* Swing, 6 Ohio Dec. (Reprint) 666, 7 Am. L. Rec. 326.

Rhode Island.— Sarle *v.* Scituate Probate Ct., 7 R. I. 270.

Texas.— Williams *v.* Verne, 68 Tex. 414, 4 S. W. 548; *In re* Bowden, 33 Tex. 730.

Virginia.— Beckwith *v.* Avery, 31 Gratt. 533; Atkinson *v.* Christian, 3 Gratt. 428, holding that the general practice of requiring security in double the estimated value of

penal sum is based, property personally possessed as well as choses in action and all other property to the actual possession of which the decedent was entitled as legal owner should be considered,[73] and the whole amount of the assets, not the surplus of assets over debts, furnishes the criterion;[74] but security should not be required on an estimate of more property than that which the local administration will cover,[75] and on an application for letters *de bonis non* the court may properly allow security to be given in only double the amount of so much of the estate as remains unadministered.[76] Exempt property which does not form any part of the estate of the decedent should not be considered,[77] nor should property of the legal title to which the decedent divested himself in his lifetime whether such transfer was procured by fraud or otherwise.[78] Where property has been pledged only its value in excess of the debt for which it is pledged should be considered.[79] After the amount of the bond has once been fixed it cannot be reduced by showing that property of the succession has been sold at less than its inventoried value, that the assets have been reduced by the payment of debts, and that the debts presently due do not require for their payment a bond as large as that furnished.[80] Statutory provisions for modified security, that is for a smaller bond than is usually required, are strictly construed.[81]

the estate is a proper exercise of the discretion vested in the courts by statute as to the amount of the security.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 152, 162.

When a special bond is required of a public administrator in addition to his official bond it is not incumbent upon the court to require a bond in twice the amount of the value of the personal property of the estate. Healy *v.* Lassen County Super. Ct., 127 Cal. 659, 60 Pac. 428.

On a grant of limited administration a bond is sometimes taken in a merely nominal penal sum. *In re* Bowlby, 45 L. J. P. & Adm. 100. And a special administrator is sometimes permitted to deposit the personalty in court and thus have his bond reduced. *In re* Lewis, 28 N. J. Eq. 234.

Requiring bond for more than double estimated value of property is error. Sarle *v.* Scituate Probate Ct., 7 R. I. 270; *In re* Bowden, 33 Tex. 730.

Discretion of court.— The provision of La. Civ. Code. § 1041, that the court shall require an administrator to give bond with "sufficient security," justifies the court under certain circumstances in exercising its discretion to some extent, as to the amount of the bond, although section 1048 declares that the bond shall be for one fourth more than the estimated value of the decedent's property, less the bad debts. Levy's Succession, 48 La. Ann. 1520, 21 So. 82.

The bond to be required from one of several co-executors is to be fixed in view of the actual amount of the fund, and cannot be reduced by reason of an arrangement between him and his colleagues by which they assume the exclusive control and responsibility of the trust. Senior *v.* Ackerman, 2 Redf. Surr. (N. Y.) 302.

The value of the property of the succession, and not the amount of the claims against it, furnishes the criterion by which the amount of the bond of the administrator is measured. Weeks' Succession, 104 La. 573, 29 So. 219.

73. Peck *v.* Peck, 3 Dem. Surr. (N. Y.) 548.

Amount of assigned insurance policies.— Where an insured assigned policies on his life for a valuable consideration, and the assignees agreed to pay the subsequent premiums, the insured's administratrix could not be compelled to give security for the amount of such policies until the rights of creditors, who claimed that the assignments were fraudulent and void, could be determined. McCord *v.* Noyes, 3 Bradf. Surr. (N. Y.) 139.

74. Senior *v.* Ackerman, 2 Redf. Surr. (N. Y.) 302.

75. Lewis *v.* Grognard, 17 N. J. Eq. 425.

76. *In re* Oakey, [1896] P. 7, 65 L. J. P. & Adm. 38, 44 Wkly. Rep. 432.

77. *In re* Bowden, 33 Tex. 730.

78. Peck *v.* Peck, 3 Dem. Surr. (N. Y.) 548.

79. *In re* Kidd, Myr. Prob. (Cal.) 239.

80. Weeks' Succession, 104 La. 573, 29 So. 219, so holding on the ground that an administrator's bond is a continuing one to cover the performance of duty until final discharge, and is an entirety.

81. *In re* Le Roy, 5 N. Y. Suppl. 555, 16 N. Y. Civ. Proc. 343, 1 Connoly Surr. (N. Y.) 491 [*disapproving* Allen's Estate, 7 N. Y. Civ. Proc. 159, 3 Dem. Surr. 63] (holding that a statute providing for modified security "where all the next of kin to the intestate consent thereto" did not apply to the case of an application for a grant of administration with the will annexed); Weeks' Estate, 1 N. Y. Civ. Proc. 164 (holding that modified security could not be taken on any terms except those provided for in the statute); Matter of Malloy, 1 Dem. Surr. (N. Y.) 421 (holding that a statute providing that, where a right of action was granted to an executor or administrator by special provision of law and it appeared to be impracticable to give a bond sufficient to cover the probable amount to be recovered, the surrogate might in his discretion accept modified security, did not

3. Sureties. Under the present English policy the judge has discretion to dispense with sureties at his discretion, although this is done only by way of rare exception to the rule, and so at all events as to insist upon a bond.[82] In the United States sureties are necessary and the number is regulated by statute, two or more being usually required;[83] but the fact that a bond is accepted without sureties, or without the requisite number of sureties, does not render the appointment invalid.[84] Who may or may not be sureties is a matter of statutory regulation.[85] In England sureties should be residents of the country,[86] and in the United States they are usually required to be residents of the state,[87] although they need not reside in the county where letters are granted.[88] Approval of the sureties by the court or judge is sometimes required.[89] Each surety ought to be worth at least the amount of the penalty of the bond over and above all debts and property exempt from execution.[90] A bond which divides up the penal liability of sureties

authorize the surrogate to accept less security than double the value of the personal property of the deceased exclusive of such claim).

82. *In re* Powis, 34 L. J. P. & M. 55; *In re* Cleverly, 31 L. J. P. & M. 53, 5 L. T. Rep. N. S. 689, 2 Swab. & Tr. 335, 10 Wkly. Rep. 265 (where administration *de bonis non* with the will annexed was granted to a residuary legatee for life, bond to be given by her husband without sureties); Astbury's Estate, 80 L. T. Rep. N. S. 296 (holding that letters of administration may be granted to the trustee in bankruptcy of the next of kin without requiring sureties); *In re* Leach, 80 L. T. Rep. N. S. 170.

Bond with one surety may be allowed under some circumstances. *In re* Bellamy, 44 L. J. P. & M. 49, 33 L. T. Rep. N. S. 71, 23 Wkly. Rep. 552.

A limited company has been accepted as sole security for its manager who has been appointed administrator. *In re* Hunt, [1896] P. 288, 66 L. J. P. & Adm. 8, 45 Wkly. Rep. 236.

83. Tappan *v.* Tappan, 24 N. H. 400; State *v.* Brasher, 3 Ohio Dec. (Reprint) 346; Bradley *v.* Com., 31 Pa. St. 522; McRae *v.* David, 5 Rich. Eq. (S. C.) 475.

A corporation authorized by statute to become sole surety for the faithful performance of any trust, etc., is a sufficient surety on an executor's bond, although a prior general statute requires two sureties. Com. *v.* Miller, 195 Pa. St. 230, 45 Atl. 921.

84. Jones *v.* Gordon, 55 N. C. 352; Slagle *v.* Entrekin, 44 Ohio St. 637, 10 N. E. 675. See also Steele *v.* Tutwiler, 68 Ala. 107; Delk *v.* Punchard, 64 Tex. 360. But *compare* McWilliams *v.* Hopkins, 4 Rawle (Pa.) 382.

85. See Cuppy *v.* Coffman, 82 Iowa 214, 47 N. W. 1005; Wright *v.* Schmidt, 47 Iowa 233; Hicks *v.* Chouteau, 12 Mo. 341.

Husband of administratrix competent.— Matter of Grove, 13 N. Y. St. 179, 6 Dem. Surr. (N. Y.) 369.

Fidelity insurance companies, suitably chartered, are sometimes expressly allowed to act as surety on fiduciary bonds. See *In re* Hunt, [1896] P. 288, 66 L. J. P. & Adm. 8, 45 Wkly. Rep. 236.

86. Herbert *v.* Shill, 33 L. J. P. & M. 142, 3 Swab. & Tr. 479; *In re* Reed, 3 Swab. & Tr. 439.

Where the administrator was the only person beneficially interested and there were no creditors the court allowed bond to be given with non-resident sureties. *In re* Houston, L. R. 1 P. 85, 35 L. J. P. & M. 41; *In re* Fernandez, 4 P. D. 229, 48 L. J. P. & Adm. 31, 40 L. T. Rep. N. S. 366, 27 Wkly. Rep. 664.

87. Clarke *v.* Chapin, 7 Allen (Mass.) 425. But see Jones *v.* Jones, 12 Rich. (S. C.) 623.

Where there are a sufficient number of resident sureties the bond is not rendered less effectual because a non-resident has also joined in it as a surety. Clarke *v.* Chapin, 7 Allen (Mass.) 425.

If there is no statute expressly requiring that the sureties be residents of the state the fact that they are all non-residents will not render the bond invalid. Rutherford *v.* Clark, 4 Bush (Ky.) 27.

88. Barksdale *v.* Cobb, 16 Ga. 13.

89. See Mathews *v.* Patterson, 42 Me. 257, holding that under a statute providing that no bonds filed with the judge of probate shall be deemed sufficient until they have been approved by the judge under his official signature, approval of sureties on a prior bond is not an approval of the same sureties on a subsequent bond. See *infra*, II, J, 4.

Jurisdiction over exceptions.— Under the Pennsylvania act of March 5, 1832, providing that bonds taken by the register may be excepted to before him by persons interested in respect to the sufficiency of the sureties therein, the jurisdiction over exceptions to bond of the administrator is in the register of wills, and not the orphans' court. Simmons' Estate, 3 Phila. (Pa.) 172.

90. Sutton *v.* Weeks, 5 Redf. (N. Y.) 353.

Ability of sureties only should be considered. McRae *v.* David, 5 Rich. Eq. (S. C.) 475.

Proof of sufficiency.— Sureties are usually permitted to prove their sufficiency under their own oaths, as in the qualifying of bail, and it then devolves on the opponent to show insufficiency if he can by cross-examination or evidence *aliunde*. Carpenter *v.* Ottawa County, 48 Mich. 318, 12 N. W. 197; Ross *v.* Mims, 7 Sm. & M. (Miss.) 121; *In re* Thompson, 6 Dem. Surr. (N. Y.) 56, 19 N. Y. St. 900. See also Bissell *v.* Wayne County, 58

so as to limit it to a fixed amount for each is not favored, but such a bond if approved holds good.[91]

4. Form and Requisites. The form and requisites of an executor's or administrator's bond are usually prescribed by statute.[92] The bond is usually executed with the state or the judge of probate and his successors as obligee,[93] and approval of the bond by the probate court is ordinarily required.[94] Where sureties are necessary, the bond should be signed and executed by both the principal and the sureties.[95] A substantial compliance with the statutory requirements is usually deemed sufficient, and mere informalities or immaterial omissions will not necessarily invalidate the bond or defeat the appointment,[96] nor will the fact that a

Mich. 237, 24 N. W. 886; Garrison *v.* Cox, 96 N. C. 353.

Incorporeal rights owned by the surety are to be considered in testing solvency, if within the state and liable to seizure. Weeks' Succession, 104 La. 573, 29 So. 219.

Insufficient surety.—Where the surety upon an administrator's bond is not insolvent, but simply insufficient, she should not be released and a new bond given. The administrator should be compelled to make the suretyship sufficient and a judgment of court to that effect should decree to what extent the existing suretyship is deemed sufficient. Weeks' Succession, 104 La. 573, 29 So. 219.

Acceptance of insolvent surety does not invalidate appointment. Herriman *v.* Janney, 31 La. Ann. 276.

Liability of ordinary.— The ordinary is liable for loss resulting from his having accepted insufficient sureties, unless such loss has resulted from causes which he could not foresee and not from his negligence, as to which the burden of proof is on him. McRae *v.* David, 5 Rich. Eq. (S. C.) 475.

91. Baldwin *v.* Standish, 7 Cush. (Mass.) 207.

92. See Holbrook *v.* Bentley, 32 Conn. 502; Newton *v.* Cox, 76 Mo. 352.

Where there are several executors.— Under the Rhode Island statute authorizing the probate court to prescribe the forms of bonds to be given by executors, the court may, when there are two or more executors, require a joint bond or several bonds as it may deem proper. Chamberlain *v.* Anthony, 21 R. I. 331, 43 Atl. 646.

93. Johnson *v.* Fuquay, 1 Dana (Ky.) 514; Vanhook *v.* Barnett, 15 N. C. 268; Cowling *v.* Nansemond County, 6 Rand. (Va.) 349.

Where the will requires executors to give security the bond should be to the legatees and not to the people of the state. *In re* Sullivan, Tuck. Surr. (N. Y.) 94.

A bond naming no obligee is void since it is neither a statutory nor a common-law bond. Tidball *v.* Young, 58 Nebr. 261, 78 N. W. 507, 76 Am. St. Rep. 98; Cowling *v.* Nansemond County, 6 Rand. (Va.) 349.

94. Ford *v.* Adams, 43 Ga. 340; Austin *v.* Austin, 50 Me. 74, 79 Am. Dec. 597; Spencer *v.* Cahoon, 15 N. C. 225. See *supra*, II, J, 3.

Prima facie evidence of approval is furnished by the signing, sealing, and delivering of an administration bond, in the absence of specific statute requirement beyond this. Wilson *v.* Ireland, 4 Md. 444.

Approval in writing is not in all states an essential. Brown *v.* Weatherby, 71 Mo. 152; State *v.* Farmer, 54 Mo. 539; James *v.* Dixon, 21 Mo. 538.

Approval not essential to validity of bond. — Brown *v.* Weatherby, 71 Mo. 152; State *v.* Creusbauer, 68 Mo. 254; State *v.* Farmer, 54 Mo. 439; Cameron *v.* Cameron, 15 Wis. 1, 82 Am. Dec. 652.

95. Weir *v.* Mead, 101 Cal. 125, 35 Pac. 567, 40 Am. St. Rep. 46; Heydock *v.* Duncan, 43 N. H. 95.

The bond must be executed by the principal in order to bind the sureties. Wood *v.* Washburn, 2 Pick. (Mass.) 24.

A requirement that the administrator shall "give" bond with sureties does not imply that he must necessarily and in all contingencies execute the bond, for an administrator may literally comply with the law by giving a bond with the necessary sureties without executing it himself. English *v.* McNair, 34 Ala. 40, where the court said that a construction which required an executor or administrator to execute or sign the bond in every case would render nugatory the statute allowing a married woman to be the representative of an estate when her husband consented thereto.

Administrator may execute bond by attorney in fact. Hall *v.* Monroe, 27 Tex. 700.

A sworn justification of sureties is sometimes requisite, besides the executor's oath. Foley *v.* Hamilton, 89 Iowa 686, 57 N. W. 439.

A mere expression of willingness to become a surety is not sufficient to render a person liable as such. Canal, etc., Co. *v.* Grayson, 4 La. Ann. 511.

96. *Alabama.*—Burnett *v.* Nesmith, 62 Ala. 261; Moore *v.* Chapman, 2 Stew. 466, 20 Am. Dec. 56.

Georgia.— White *v.* Spillers, 85 Ga. 555, 11 S. E. 616; Columbia Inferior Justices *v.* Wynn, Dudley 22.

Kansas.— Johnson *v.* Clark, 18 Kan. 157.

Kentucky.— Johnson *v.* Fuquay, 1 Dana 514.

Maine.— Frye *v.* Crockett, 77 Me. 157; Cleaves *v.* Dockray, 67 Me. 118.

Maryland.—Hamilton *v.* State, 3 Harr. & J. 503.

Minnesota.— Lanier *v.* Irvine, 21 Minn. 447.

Mississippi.— Paddleford *v.* State, 57 Miss. 118; Cohen *v.* State, 34 Miss. 179.

bond contains conditions and recitals in addition to those required by statute invalidate it,[97] and even though the bond is fatally defective as a statute bond it may be upheld as a common-law bond;[98] and the appointment of the repre-

Missouri.— State *v.* Price, 15 Mo. 375; Hall *v.* Chouteau, 12 Mo. 341.

Nebraska.— Buel *v.* Dickey, 9 Nebr. 285, 2 N. W. 884, omission of name of probate judge.

New Hampshire.— Probate Judge *v.* Claggett, 36 N. H. 381, 72 Am. Dec. 314.

New Jersey.— Ordinary *v.* Cooley, 30 N. J. L. 179; Vroom *v.* Smith, 14 N. J. L. 479.

New York.— Farley *v.* McConnell, 52 N. Y. 630; Farley *v.* McConnell, 7 Lans. 428; McManus *v.* Harrigan, 41 Misc. 615, 85 N. Y. Suppl. 220, omission of amount of penalty.

North Carolina.— Vanhook *v.* Barnett, 15 N. C. 268; Spencer *v.* Cahoon, 15 N. C. 225.

Ohio.— Newberger *v.* Twiney, 17 Ohio Cir. Ct. 215, 9 Ohio Cir. Dec. 720.

Pennsylvania.— Com. *v.* Miller, 195 Pa. St. 230, 45 Atl. 921; Small *v.* Com., 8 Pa. St. 101. See also Carl *v.* Com., 9 Serg. & R. 63.

Tennessee.— Hibbits *v.* Canada, 10 Yerg. 465.

Texas.— Rose *v.* Winn, 51 Tex. 545.

Virginia.— Gibson *v.* Beckham, 16 Gratt. 321 [*explaining* Roberts *v.* Colvin, 3 Gratt. 358; Frazier *v.* Frazier, 2 Leigh 642, and *disapproving* Morrow *v.* Peyton, 8 Leigh 54]; Luster *v.* Middlecoff, 8 Gratt. 54, 56 Am. Dec. 129.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 151, 160, 2361, 2362.

But *compare* Security Co. *v.* Pratt, 65 Conn. 161, 32 Atl. 396, holding that a statutory provision that all probate bonds "shall be conditioned for the faithful discharge, by the principal in the bond, of the duties of his trust according to law" left no room for variation in the language of the condition, but this must be the same in every bond.

The bond of an administrator with the will annexed has been upheld, although in the ordinary form required of general administrators. Probate Judge *v.* Claggett, 36 N. H. 381, 72 Am. Dec. 314; Casoni *v.* Jerome, 58 N. Y. 315.

The bond of an administrator de bonis non expressed to be "with the will annexed" and with conditions to make a true inventory, administer according to law, account, and pay over the balance to the person appointed by the decree of the orphans' court is valid, although in other respects in the form of an ordinary administration bond except that the clauses relating to collateral inheritances and surrendering the letters in case a will shall be found, are omitted. Hartzell *v.* Com., 42 Pa. St. 453.

The failure of the principal to file the bond with the surrogate as required by law does not affect the liability of the surety. Haywood *v.* Townsend, 4 N. Y. App. Div. 246, 38 N. Y. Suppl. 517.

A bond which by mistake names the surrogate of the wrong county but is further conditioned to obey the orders of that surrogate "or of any other officer or court having jurisdiction in the premises" is valid. Gerould *v.* Wilson, 81 N. Y. 573 [*affirming* 16 Hun 530].

An omission beneficial to the obligor cannot be set up by him as a ground of invalidity. Columbia Inferior Justices *v.* Wynn, Dudley (Ga.) 22.

Bonds fatally defective.— A bond which does not name any obligee and in which the name of the executor and the court to which he is to return his account are left blank is fatally defective and no action can be maintained thereon. Cowling *v.* Nansemond County Justices, 6 Rand. (Va.) 349. A bond signed in blank but in which the date, amount, name of the principal obligor, and obligation are never filled in has no legal signification upon which any claim of obligation can rest. Chretien *v.* Bienvenu, 41 La. Ann. 728, 6 So. 553. A bond which does not name any amount for which the obligors are to be bound and contains no blank for the filling in of such amount is not binding upon the sureties and equity will not reform the bond by inserting a penalty therein. Evarts *v.* Steger, 6 Oreg. 55. But see Soldini *v.* Hyams, 15 La. Ann. 551, holding that sureties by signing a bond in which the amount of the penalty is not named impliedly bind themselves for the amount for which the law requires the bond to be given. See also McManus *v.* Harrigan, 41 Misc. (N. Y.) 615, 85 N. Y. Suppl. 220.

97. Hall *v.* Cushing, 9 Pick. (Mass.) 395; Woods *v.* State, 10 Mo. 698; Gandolfo *v.* Walker, 15 Ohio St. 251; Gibson *v.* Beckham, 16 Gratt. (Va.) 321.

If the bond be given for more than is required by law it is void as to the surplus only. Denys *v.* Armitage, 5 Mart. (La.) 629.

The bond may be sued on as a statutory bond, although it contains more conditions than the statute prescribes, the unauthorized conditions being rejected as surplusage. Woods *v.* State, 10 Mo. 698. *Contra*, Cleaves *v.* Dockray, 67 Me. 118, holding that such a bond is enforceable as a common-law bond but not as a statutory bond.

98. *Georgia.*— Awtrey *v.* Campbell, 118 Ga. 464, 45 S. E. 301.

Kentucky.— McChord *v.* Fisher, 13 B. Mon. 193.

Maine.— Frye *v.* Crockett, 77 Me. 157; Cleaves *v.* Dockray, 67 Me. 118; Pettingill *v.* Pettingill, 60 Me. 411.

North Carolina.— Vanhook *v.* Barnett, 15 N. C. 268; Gabie *v.* Meilan, 4 N. C. 346.

Oregon.— Bellinger *v.* Thompson, 26 Oreg. 320, 37 Pac. 714, 40 Pac. 229.

Pennsylvania.— Shalter's Appeal, 43 Pa. St. 83, 82 Am. Dec. 552.

South Carolina.— Kershaw Dist. *v.* Blanchard, 3 Brev. 136; Walker *v.* Crosland, 3 Rich. Eq. 23.

sentative will not be a nullity but may be effective as being *de facto* and voidable only.[99]

5. New or Additional Security. Statutes frequently provide for requiring new bonds or additional security to be furnished by the executor or administrator in certain cases where the interest of the estate requires it, and especially where some new situation arises, as an increase of assets, or the insufficiency of one or both sureties since qualification;[1] and even after an executor has been qualified

Virginia.— See Frazier *v.* Frazier, 2 Leigh 642.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2362.

99. *Ex p.* Maxwell, 37 Ala. 362, 79 Am. Dec. 62; Herriman *v.* Janney, 31 La. Ann. 276; Mumford *v.* Hall, 25 Minn. 347; Jones *v.* Gordon, 55 N. C. 352.

1. *Alabama.*— Nelson *v.* Boynton, 54 Ala. 368.

Arkansas.— Renfro *v.* White, 23 Ark. 195.

California.— Barrett *v.* Placer County Super. Ct., 111 Cal. 154, 43 Pac. 519.

District of Columbia.— Cropper *v.* McLane, 6 App. Cas. 119.

Louisiana.— Weeks' Succession, 104 La. 573, 29 So. 219 (holding that where certain property has been omitted from the inventory upon which the bond is based additional security may be required); Hardy's Estate, 46 La. Ann. 1309, 16 So. 208. See also Broom's Succession, 14 La. Ann. 67.

Massachusetts.— Dunham *v.* Dunham, 16 Gray 577.

Mississippi.— Ward *v.* State, 40 Miss. 108; Meyer *v.* Dorrance, 32 Miss. 263; Ellis *v.* McBride, 27 Miss. 155; Killcrease *v.* Killcrease, 7 How. 311.

New Jersey.— Camden Mut. Ins. Assoc. *v.* Jones, 23 N. J. Eq. 171.

New York.— Berkeley *v.* Kennedy, 62 N. Y. App. Div. 609, 70 N. Y. Suppl. 762 (holding that where an administratrix alleged in her application for letters that the estate amounted to one hundred dollars, and gave bond for two hundred dollars, it was error to order one thousand and eighty dollars paid to her as administratrix without requiring additional security); Sutton *v.* Weeks, 5 Redf. Surr. 353; *In re* Patullo, Tuck. Surr. 140.

North Carolina.— *In re* Sellars, 118 N. C. 573, 24 S. E. 430.

Oregon.— Palicio *v.* Bigne, 15 Oreg. 320.

Pennsylvania.— Longenberger's Estate, 148 Pa. St. 564, 24 Atl. 120; Sharkey's Estate, 2 Phila. 276.

West Virginia.— See Amiss *v.* Williamson, 17 W. Va. 673.

United States.— Richardson *v.* Cameron, 20 Fed. Cas. No. 11,780*a*, 2 Hayw. & H. 155, holding that where a large sum of money may be appropriated by congress the administrator should be required to enlarge his bond in an amount sufficient to cover what is in equity due to the representatives of the deceased.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 157, 167.

Statute held prospective only see Weigel's Estate, 4 Wkly. Notes Cas. (Pa.) 92.

The marriage of an administratrix may warrant an order requiring a new bond. See Cassedy *v.* Jackson, 45 Miss. 397.

Where the executor takes a life-interest in the personalty a bond in the ordinary form is no continuing security to those entitled in remainder for their interest in the property, and other special security may be desirable. Sarle *v.* Scituate Probate Ct., 7 R. I. 270. And see Atmore *v.* Walker, 46 Fed. 429 [*affirmed* in 50 Fed. 644, 1 C. C. A. 595].

The death of one of the two sureties on an executor's bond is not a cause requiring an additional bond or surety if the ability to pay the amount of the bond is not impaired, although two sureties are required by the statute, since the heirs of the deceased surety are bound by the bond. State *v.* Brasher, 3 Ohio Dec. (Reprint) 346.

When additional security not necessary see Wilson's Estate, 9 Pa. Dist. 742.

New bonds may be permitted by substitution, upon due procedure, for the prospective relief of those already bound. People *v.* Lott, 27 Ill. 215; Norris *v.* Fristoe, 3 La. Ann. 646.

Proceeding may be by rule. Block *v.* Bordelon, 39 La. Ann. 872, 2 So. 833.

Court may proceed of its own motion. Million *v.* Million, 13 Ky. L. Rep. 143; Ward *v.* State, 40 Miss. 108.

Service of the order requiring a new bond on the administrator is not required under the California statute, and even if it were it is waived by taking an exception to the order when made and subsequently requesting the court to approve a bond executed pursuant to such order. Barrett *v.* Placer County Super. Ct., 111 Cal. 154, 43 Pac. 519.

Jurisdiction vested in clerk of superior court as judge of probate.— Hunt *v.* Sneed, 64 N. C. 180.

Discretion of clerk.— The necessity for requiring an administrator to give a better bond is a matter for the clerk before whom the special proceeding for that purpose is had. *In re* Sellars, 118 N. C. 573, 24 S. E. 430.

Error in respect to new bond.— Where an administratrix married and the probate court passed an order requiring her husband and herself to execute a new bond, the error of the court in requiring her to join in the bond did not affect her rights as administratrix by virtue of her original appointment nor deprive her of authority, in conjunction with her husband, to prosecute a suit on a cause of action due to her intestate. Cassedy *v.* Jackson, 45 Miss. 397.

The administrator may plead no funds in his hands belonging to the estate in an ac-

without a bond, if some change in the situation or circumstances of the executor or his conduct of the trust appear to render this a prudent measure, the court may in its discretion subsequently require a bond to be given.[2] In determining the amount to which additional security should be required, regard ought to be had to the value of the estate remaining unadministered, including any accessions thereto beyond the original estimate, and to the extent of the available security still furnished by the original bond.[3]

6. WHO MAY REQUIRE BOND. The court may of its own motion require security, either in the first instance or in addition to that already given,[4] or this may be demanded by any person interested in the estate whether as creditor, legatee, or distributee.[5] Proceedings may also be entertained at the instance of sureties, after due notice to all interested, for their discharge, reserving existing rights

tion by the heirs to compel him to give a new bond. Hanlon *v.* Wheeler, (Tex. Civ. App. 1898) 45 S. W. 821.

Powers of representative after service of notice to give new bond see Hitson *v.* Dillahunty, 38 Tex. 585.

2. *Alabama.*— Smith *v.* Phillips, 54 Ala. 8.

Georgia.— Sheehan *v.* Kennelly, 32 Ga. 145.

Mississippi.— Clark *v.* Niles, 42 Miss. 460.

New York.— Matter of Wischmann, 80 N. Y. App. Div. 520, 80 N. Y. Suppl. 789.

North Carolina.—Gray *v.* Gaither, 74 N. C. 237.

Vermont.— Felton *v.* Sowles, 57 Vt. 382.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 157, 167.

A change is not necessary in the circumstances of the executor in order to warrant requiring a bond, but if the circumstances are such as to render the taking of a bond proper this may be done even though there has been no material change since he was qualified without bond. See Freeman *v.* Kellogg, 4 Redf. Surr. (N. Y.) 218. *Contra*, Bowman *v.* Wootton, 8 B. Mon. (Ky.) 67.

Issue as to testamentary capacity.— Where a will has been admitted to probate, and letters testamentary granted to the executor, he will not be required to give security merely because of the pendency of an issue as to testator's testamentary capacity. Smith's Estate, 14 Pa. Co. Ct. 161.

Investigation necessary before an executor who has been properly qualified without giving security can thereafter be required to give security it should upon investigation appear proper to require it. Farmers Nat. Bank *v.* McFerran, 11 Ky. L. Rep. 183, holding that consequently an order made in the absence of an executrix and without notice to her, requiring her to appear on a certain day and give security, must be regarded as a preliminary step to an investigation thereafter to be had in which the propriety of requiring the security would be determined.

Effect of order for security.— An order requiring an executor to give security does not have the effect of suspending his right to exercise the functions of his office in the interim between the time of his appointment and the time fixed at which he is to give security. Farmers' Nat. Bank *v.* McFerran, 11 Ky. L. Rep. 183.

3. Atkinson *v.* Christian, 3 Gratt. (Va.) 448.

4. Smith *v.* Phillips, 54 Ala. 8.

5. Smith *v.* Phillips, 54 Ala. 8; Duggan *v.* Lamar, 106 Ga. 855, 33 S. E. 43.

A creditor may require security (Smith *v.* Phillips, 54 Ala. 8; Frazier's Succession, 33 La. Ann. 593) and his right in this respect is not tested by the amount of his claim (Weeks' Succession, 104 La. 573, 29 So. 219).

A judgment creditor of an insolvent estate has the right to proceed against the administrator for better security, although he has not presented his judgment before the commissioner of insolvency, if the time for such presentation has not elapsed. Meyer *v.* Dorrance, 32 Miss. 263.

A single legatee may require the giving of the full bond required by law, although other legatees may be satisfied with less security. Weeks' Estate, 1 N. Y. Civ. Proc. 164.

Legatee under alleged later will.— The proponent who is also the executrix and a legatee under an alleged will of the testator of a later date than that already admitted to probate has such an interest in the estate of the deceased, pending proceedings for the probate of the paper propounded by her, as entitles her to petition for an order compelling the executrix of the will already admitted to give security or be superseded. Cunningham *v.* Souza, 1 Redf. Surr. (N. Y.) 462.

A remainder-man has such an interest as authorizes him to move the court to require a bond of the executrix. Amiss *v.* Williamson, 17 W. Va. 673.

One who has the right to interest on a bequest but no right to the principal until a future day cannot demand that the executor shall give security. Johnson's Appeal, 12 Serg. & R. (Pa.) 317.

The interest of a claimant will be assumed prima facie proven when sworn to and will not be tried on an application for the giving of security. Merchant's Will, Tuck. Surr. (N. Y.) 17.

The right to demand security may be waived, but not by the guardian of infants

to others, so as to compel the executor or administrator to file a new bond or else vacate the office.[6]

7. Proceedings. Proceedings to compel the giving of security by an executor who has received letters without a bond, or to compel the giving of new or additional security may be by petition, allegation, and answer,[7] or in some cases by an order to show cause without petition.[8] The decree made in the premises may be opened, vacated, or modified where sufficient cause is shown.[9] An appeal will usually lie from the action of the probate court.[10]

K. Issuance of Letters. The authority of an executor or administrator is evidenced by letters testamentary or of administration[11] issued to him pursuant

beneficially interested. Freeman *v.* Kellogg, 4 Redf. Surr. (N. Y.) 218.

Escheated estates.— Under the Georgia statutes providing that the estate of one dying intestate and without heirs shall escheat to the state, for the distribution of such estate to the school fund of the county, and that, where one is appointed administrator without being required to give bond and security, any person interested in such estate as creditor, distributee, or legatee may require the administrator to give bond as such, the county school commissioner and treasurer of the public school fund in the county of the residence of one dying intestate without heirs has such interest, in his official capacity, as distributee of such estate, as entitles him to maintain a proceeding to require the administrator to give bond. Duggan *v.* Lamar, 106 Ga. 855, 33 S. E. 43.

Requiring bond of public officer.—The Georgia statute providing that where one is appointed administrator without being required to give bond one interested in the estate may require the administrator to give bond applies to a clerk of the superior court who has been appointed administrator and has given no bond as such. Duggan *v.* Lamar, 106 Ga. 855, 33 S. E. 43.

6. See Stevens *v.* Stevens, 2 Dem. Surr. (N. Y.) 469; Bellinger *v.* Thompson, 26 Oreg. 320, 37 Pac. 714, 40 Pac. 229.

7. *Alabama.*— Allen *v.* Draper, 98 Ala. 590, 13 So. 529; Phillips *v.* Smith, 62 Ala. 575; Smith *v.* Phillips, 54 Ala. 8.

California.— *In re* White, 53 Cal. 19.

Louisiana.—Bobb's Succession, 27 La. Ann. 344.

New York.— Colegrove *v.* Horton, 11 Paige 261; Cotterell *v.* Brock, 1 Bradf. Surr. 148.

North Carolina.— Neighbors *v.* Hamlin, 78 N. C. 42.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 153, 157, 168.

Irrelevant answer.—Where testator's widow filed a petition asking that the executor be required to give bond on the ground that her interest would be endangered unless security were given, an answer alleging that defendant was a merchant and that he furnished testator's widow and children with supplies at cost, for which reason it would not be to petitioner's interest to remove him, was insufficient as containing matter wholly irrelevant to the petition. Johnson *v.* Clements, (Ala. 1893) 14 So. 14.

8. Bird *v.* Wiggins, 35 N. J. Eq. 111.

9. *In re* Filley, 20 N. Y. Suppl. 427, Pow. Surr. (N. Y.) 234.

Showing not sufficient to warrant modification.— Where a decree requiring an executor to give a bond was made on the theory that testator owned certain land, as alleged by a creditor, and the executor did not deny testator's title, but submitted proof that the land was of less value than alleged, the penalty of the bond should not be reduced on the application of the executor alleging that decedent had conveyed the land to him, and that he had transferred it to another, as the executor should have so alleged on the application to require bond. *In re* Filley, 20 N. Y. Suppl. 427, Pow. Surr. (N. Y.) 234.

10. Grigsby *v.* Cocke, 85 Ky. 314, 3 S. W. 418, 9 Ky. L. Rep. 12; Williams *v.* Pointer, 3 Lea (Tenn.) 366; Fairfax *v.* Fairfax, 7 Gratt. (Va.) 36. See also Vreedenburgh *v.* Calf, 9 Paige (N. Y.) 128. *Contra*, Cropper *v.* McLane, 6 App. Cas. (D. C.) 119.

11. See Schouler Ex. §§ 52, 119.

Letters of administration are to be considered as process. Denver, etc., R. Co. *v.* Woodward, 4 Colo. 1.

General letters cannot issue while an appeal is pending concerning the right to administration or the probate of the will. State *v.* Williams, 9 Gill (Md.) 172; Slade *v.* Washburn, 25 N. C. 557.

Letters should issue in conformity to law then existing. Peters *v.* Public Administrator, 1 Bradf. (N. Y.) 200.

Originals certified as copies.— Letters testamentary, which when granted were entered of record, and were afterward, when delivered to the executor, certified by the clerk to be true copies of the record, were valid as the original letters. Bales *v.* Binford, 6 Blackf. (Ind.) 415.

Variance from the usual form is immaterial where the law prescribes no specific form in which appointments are to be made. Carlon's Succession, 26 La. Ann. 329.

When issuance of letters presumed see Lancaster *v.* Washington L. Ins. Co., 62 Mo. 121; Foulks *v.* Foulks, 2 Silv. Supreme (N. Y.) 516, 6 N. Y. Suppl. 112; Piatt *v.* McCullough, 19 Fed. Cas. No. 11,113, 1 McLean 69.

When issuance of letters not presumed see Smith *v.* Wilson, 17 Md. 460, 79 Am. Dec. 665.

Letters as evidence of appointment.— Let-

to order of the court upon his appointment and qualification.[12] Such letters are, however, usually considered merely as credentials furnished him for his own convenience, and are not necessary where the decree and records of the court show his right to act.[13] Letters should be granted by the proper judicial authority without delegation of power,[14] and in general they bear the seal of the court and the signature of the judge, and are countersigned by the register or clerk.[15]

L. Operation and Effect of Appointment — 1. In General. The estate of a decedent, wherever he may reside at the time of his death, and in whatsoever different states or countries portions of the property and assets may be situated, is a unit; but, where administrations are granted in different states or countries, in which part of the property is situated, they are separate and independent of one another,[16] for a grant of administration strictly speaking operates only within

ters of administration are *prima facie* evidence of appointment. Eller *v.* Richardson, 89 Tenn. 575, 15 S. W. 650. And in some jurisdictions they are conclusive. Johnson *v.* Kyser, 127 Ala. 309, 27 So. 784 (so holding under the Alabama statute, even though the letters showed the testator to have been a resident of another state at the time of her death and failed to show proper antecedent proceedings necessary to authorize the issuance of such letters); Hamblin's Succession, 3 Rob. (La.) 130.

12. See Glover *v.* Lyon, 57 Ala. 365; Wirt *v.* Pintard, 40 La. Ann. 233, 4 So. 14; Mumford *v.* Hall, 25 Minn. 347.

Order necessary.— There can be no valid appointment of an administrator except under authority of an order therefor signed either by the judge or clerk. Letters otherwise issued are null and void. Wirt *v.* Pintard, 40 La. Ann. 233, 4 So. 14.

Duty of register to issue letters.— When, in case of removal or discharge of an executor or administrator, the court awards new letters, it is the duty of the register to issue the same, and in so doing he is protected from liability. Forster's Estate, 2 Lanc. L. Rev. (Pa.) 206.

Issuance to wrong person.— Where the court orders letters to issue to one person, an issue of letters to another is unauthorized and void. *In re* Frey, 52 Cal. 658.

13. *Alabama.*— Hosey *v.* Brasher, 8 Port. 559, 33 Am. Dec. 299.

California.—Beckett *v.* Selover, 7 Cal. 215, 68 Am. Dec. 237.

Georgia.— See Burkhalter *v.* Ector, 25 Ga. 55, holding that an order of the court appointing a certain person administrator of an estate, on his giving bond and security in a certain sum, with a subsequent order granting such person leave to sell land as such administrator, was admissible to prove the administration, and that such person was in fact a legal administrator of the estate.

Mississippi.— Weir *v.* Monahan, 67 Miss. 434, 7 So. 291. See also Barr *v.* Sullivan, 75 Miss. 536, 23 So. 772, holding that the record of administration is admissible on an issue whether defendant is an administrator.

Missouri.— State *v.* Price, 21 Mo. 434.

See 22 Cent. Dig. tit. "Executors and Administrators," § 171.

An administrator's authority and qualification may be presumed after the lapse of more than thirty years, from the existence of an inventory and a schedule of claims in the probate office, attested by his oath, and a petition preferred by him to the court of common pleas for license to sell the real estate of his intestate, with the original certificate of the judge of probate thereon, recognizing him as an administrator; the probate records and files of that period appearing to have been loosely kept, and no other vestige of his appointment being discoverable. Battles *v.* Holley, 6 Me. 145.

A receipt of a husband, as administrator of his deceased wife, for money due her is *prima facie* evidence that he was such administrator. Murray *v.* Barden, 132 N. C. 136, 43 S. E. 600.

Letters need not be issued to public administrator. Abel *v.* Love, 17 Cal. 233 [*explaining* Rogers *v.* Hoberlein, 11 Cal. 120]; Weir *v.* Monahan, 67 Miss. 434, 7 So. 291.

14. Roderigas *v.* East River Sav. Inst., 76 N. Y. 316, 32 Am. Rep. 309, holding that letters which the judge signs in blank by way of delegating his power of appointment to the clerk are absolutely void.

The clerk exercises functions of appointment in North Carolina. Edwards *v.* Cobb, 95 N. C. 4.

A deputy clerk cannot grant letters of administration in his own name. Stewart *v.* Cave, 1 Mo. 752.

15. See Sharp *v.* Dyre, 64 Cal. 9, 27 Pac. 789; Witzel *v.* Pierce, 22 Ga. 112; Bales *v.* Binford, 6 Blackf. (Ind.) 415.

The want of the clerk's signature renders letters in due form purporting to be duly granted and bearing the official seal merely voidable. Post *v.* Caulk, 3 Mo. 35.

The omission of a seal from letters of administration cannot be called in question in proceedings by heirs attacking a sale by the administratrix duly confirmed, where the letters recite that the seal is affixed, and the administratrix has acted as such, and the court has repeatedly made orders recognizing her as such. Dennis *v.* Bint, 122 Cal. 39, 54 Pac. 378, 68 Am. St. Rep. 17.

16. Equitable L. Assur. Soc. *v.* Vogel, 76 Ala. 441, 52 Am. Rep. 344. See, generally, *infra*, XVI.

the jurisdiction where it is made.[17] The appointment of an administrator may relate back so as to preclude his questioning an agreement made with a creditor of the estate, with reference to the settlement of the claim, before the appointment.[18] A grant of administration cannot be regarded as an adjudication that the deceased died intestate where the form of oath provided by statute for administrators expressly provides for the surrender of the letters of administration, if it subsequently appears that a last will and testament was made by the deceased and the same is proved according to law.[19] The responsibilities of the representative are fixed by the appointment.[20] An executor, whether named in the will or by delegated power, has the right to defend in the courts his authority to act.[21]

2. MATTERS CONCLUDED AND PRESUMPTIONS. Letters testamentary or of administration are presumed to have been rightfully issued after due judicial investigation and procedure save so far as this is contradicted by the record, and they are *prima facie* evidence of all they purport to show, and conclusive of the appointment and qualification of the legal representative, in the absence of rebutting evidence.[22] It will be presumed that an appointment was necessary[23] and was made on sufficient grounds,[24] that the court acted on proof of facts essential to its jurisdiction,[25] that the proceedings were in all respects regular,[26] and that the person appointed administrator was a proper person for the appointment, both in respect to his possessing the qualifications rendering him suitable to

17. Normand *v.* Grognard, 17 N. J. Eq. 425.

18. Bennett *v.* Lyndon, 8 N. Y. App. Div. 387, 40 N. Y. Suppl. 786.

19. Buchle's Estate, 3 Pa. Dist. 16, 14 Pa. Co. Ct. 99.

20. Brownson *v.* Baker, 11 La. 409, holding that the appointment of a curator to a succession as a vacant estate fixes conclusively the capacity in which he acts, although in fact the estate is not vacant and the minor heirs are known.

21. Brown *v.* Just, 118 Mich. 678, 77 N. W. 263.

22. *Alabama.*— Burke *v.* Mutch, 66 Ala. 568; Burnett *v.* Nesmith, 62 Ala. 261; English *v.* McNair, 34 Ala. 40.

California.— Griffith's Estate, 84 Cal. 107, 23 Pac. 523, 24 Pac. 381.

Iowa.— Masters *v.* Brown, 51 Iowa 442, 1 N. W. 791; Milligan *v.* Bowman, 46 Iowa 55; Shawhan *v.* Loffer, 24 Iowa 217.

Louisiana.— Davis *v.* Greve, 32 La. Ann. 420.

Missouri.— Lackland *v.* Stevenson, 54 Mo. 108.

New York.— Roderigas *v.* East River Sav. Inst., 63 N. Y. 460, 20 Am. Rep. 555; Farley *v.* McConnell, 52 N. Y. 630; Westcott *v.* Cady, 5 Johns. Ch. 334, 9 Am. Dec. 306.

North Carolina.—Brickhouse *v.* Brickhouse, 33 N. C. 404.

Virginia.— Burnley *v.* Duke, 2 Rob. 102; Thompson *v.* Meek, 7 Leigh 419. See also Reherd *v.* Long, 77 Va. 839.

See 22 Cent. Dig. tit. "Executors and Administrators," § 181.

Lapse of time strengthens presumption. Gantt *v.* Phillips, 23 Ala. 275; Lawrence *v.* Englesby, 24 Vt. 42.

How questions raised.— Matters of this kind may be disputed on appeal or in direct proceedings to revoke, etc., although not collaterally. *In re* Haskell, Myr. Prob. (Cal.) 204; Moreland *v.* Lawrence, 23 Minn. 84. See *infra*, II, L, 4, 5.

23. Stewart *v.* Smiley, 46 Ark. 373.

24. Peterson *v.* Erwin, 28 Ind. App. 330, 62 N. E. 719; McCooey *v.* New York, etc., R. Co., 182 Mass. 205, 65 N. E. 62.

25. *Alabama.*— Kling *v.* Connell, 105 Ala. 590, 17 So. 121, 53 Am. St. Rep. 144.

Illinois.— People *v.* Cole, 84 Ill. 327; Hobson *v.* Ewan, 62 Ill. 146; Langworthy *v.* Baker, 23 Ill. 484.

Kentucky.— Brents *v.* Vittatoe, 8 Ky. L. Rep. 427.

Mississippi.— Weir *v.* Monahan, 67 Miss. 434, 7 So. 291.

Missouri.— Hall *v.* Harrison, 21 Mo. 227, 64 Am. Dec. 225.

South Carolina.— Heyward *v.* Williams, 57 S. C. 235, 35 S. E. 503.

Texas.— State *v.* Zanco, 18 Tex. Civ. App. 127, 44 S. W. 527.

United States.— Holmes *v.* Oregon, etc., R. Co., 9 Fed. 229, 7 Sawy. 380.

See 22 Cent. Dig. tit. "Executors and Administrators," § 181.

A grant not showing affirmatively that a vacancy existed in the administration is not void, for such vacancy must be presumed. Wolffe *v.* Eberlein, 74 Ala. 99, 49 Am. Rep. 809. See also in this connection Bean *v.* Chapman, 62 Ala. 58, where the appointment of an administrator *de bonis non* was sustained.

26. Barclay *v.* Kimsey, 72 Ga. 725 (holding that it cannot be presumed that the bond required by law was not given because it is not recited in the order appointing the administrator); Pendleton *v.* Shaw, 18 Tex. Civ. App. 439, 44 S. W. 1002; Halbert *v.* De Bode, 15 Tex. Civ. App. 615, 40 S. W. 1011 (holding that one who has been recognized as the administrator of an estate, both by the court in which the administration is pending and by all parties interested in the estate, for a period of about eighteen years, is con-

undertake and capable of performing the duties of the office, and there being no available person having a prior right to administer.[27]

3. Validity of Representative's Acts. As a general rule all acts by an executor or administrator done in the due and legal course of administration are valid and binding, even though the appointment is voidable and the letters issued by the court are afterward revoked or the incumbent discharged from his trust,[28] and he will be protected in all lawful and *bona fide* acts done before revocation of his letters.[29]

4. Collateral Attack. As a general rule a grant of administration which is not void, although it may be voidable, is not open to collateral attack,[30] either on

clusively presumed the legal administrator, when his acts are collaterally attacked).

Conformity to statutory delays, etc., will be presumed. Judd *v.* Ross, 146 Ill. 40, 34 N. E. 631; Lees *v.* Wetmore, 58 Iowa 170, 12 N. W. 238.

27. Wheat *v.* Fuller, 82 Ala. 572, 2 So. 628; Burnett *v.* Nesmith, 62 Ala. 261; Davis *v.* Swearingen, 56 Ala. 31; Flinn *v.* Chase, 4 Den. (N. Y.) 85; Wilson *v.* Hoos, 3 Humphr. (Tenn.) 142; Caujolle *v.* Curtiss, 13 Wall. (U. S.) 465, 20 L. ed. 507; Berney *v.* Drexel, 12 Fed. 393.

28. *Illinois.*— Shephard *v.* Rhodes, 60 Ill. 301; Wight *v.* Wallbaum, 39 Ill. 554.

Indiana.— Bowen *v.* Stewart, 128 Ind. 507, 26 N. E. 168, 28 N. E. 73; Ray *v.* Doughty, 4 Blackf. 115.

Iowa.— Chicago, etc., R. Co. *v.* Gould, 64 Iowa 343, 20 N. W. 464.

Kentucky.—Gilbert *v.* Bartlett, 9 Bush 49.

Louisiana.—Robertson's Succession, 49 La. Ann. 80, 21 So. 197; Vinet *v.* Bres, 48 La. Ann. 1254, 20 So. 693.

Maryland.— Phippard *v.* Forbes, 4 Harr. & M. 481.

Nebraska.— Missouri Pac. R. Co. *v.* Bradley, 51 Nebr. 596, 71 N. W. 283.

New Hampshire.— Sherburne *v.* Goodwin, 44 N. H. 271; Boody *v.* Emerson, 17 N. H. 577.

New Jersey.— See Quidort *v.* Pergeaux, 18 N. J. Eq. 472.

North Carolina.— See Hyman *v.* Gaskins, 27 N. C. 267.

Ohio.— Bigelow *v.* Bigelow, 4 Ohio 138, 19 Am. Dec. 591.

Oregon.— Brown *v.* Brown, 7 Oreg. 285.

South Carolina.— Foster *v.* Brown, 1 Bailey 221, 19 Am. Dec. 672.

Virginia.— Fisher *v.* Bassett, 9 Leigh 119, 33 Am. Dec. 227.

See 22 Cent. Dig. tit. "Executors and Administrators," § 177.

The receipt of an administrator regularly appointed will bar any subsequent action for the recovery of the debt, notwithstanding irregularities may have intervened in the appointment of the administrator which would be fatal upon appeal or error. People *v.* Cole, 84 Ill. 327.

Rule otherwise where appointment void.— Gay *v.* Minot, 3 Cush. (Mass.) 352.

29. Meek *v.* Allison, 67 Ill. 46; Woods *v.* Nelson, 9 B. Mon. (Ky.) 600; Hughes *v.* Hodges, 94 N. C. 56; Ralston *v.* Telfair, 22 N. C. 414; Brown *v.* Brown, 7 Oreg. 285.

Acts done after notice of will appointing another person executor.—An executor or administrator is not protected in his acts done under his appointment after notice of a will or a subsequent will by which another person is appointed as executor. Woolley *v.* Clark, 5 B. & Ald. 744, 7 E. C. L. 405.

30. *Alabama.*— Bromberg *v.* Sands, 127 Ala. 411, 30 So. 510; Wolffe *v.* Eberlein, 74 Ala. 99, 49 Am. Rep. 809; Broughton *v.* Bradley, 34 Ala. 694, 73 Am. Dec. 474.

Delaware.— Wilcox *v.* Wilmington City R. Co., (1898) 42 Atl. 704.

District of Columbia.— Richmond, etc., R. Co. *v.* Gorman, 7 App. Cas. 91.

Georgia.— Bryan *v.* Walton, 14 Ga. 185; Harris *v.* Wynne, 4 Ga. 521.

Illinois.— Salomon *v.* People, 191 Ill. 290, 61 N. E. 83 [*affirming* 89 Ill. App. 374]; Walker *v.* Welker, 55 Ill. App. 118.

Indiana.— Ferguson *v.* State, 90 Ind. 38.

Louisiana.— Duson *v.* Dupré, 32 La. Ann. 896; *In re* Altemus, 32 La. Ann. 364; Dougart's Succession, 30 La. Ann. 268; Morgan *v.* Locke, 28 La. Ann. 806; Lee's Succession, 28 La. Ann. 23; Wilson *v.* Imboden, 8 La. Ann. 140; Maskell *v.* Roussel, 5 Rob. 500; Roboaum's Succession, 1 Rob. 258; Derbigny *v.* Peirce, 18 La. 551; Ferrari *v.* Lambeth, 11 La. 101; Stewart *v.* Row, 10 La. 530; Rils *v.* Questi, 2 La. 249.

Maine.— Clark *v.* Pishon, 31 Me. 503.

Maryland.— Donohue *v.* Daniel, 58 Md. 595; Fishwick *v.* Sewell, 4 Harr. & J. 393.

Massachusetts.— McCooey *v.* New York, etc., R. Co., 182 Mass. 205, 65 N. E. 62; McFeely *v.* Scott, 128 Mass. 16; Emery *v.* Hildreth, 2 Gray 228.

Missouri.— Dunn *v.* German-American Bank, 109 Mo. 90, 18 S. W. 1139; Naylor *v.* Moffatt, 29 Mo. 126.

Nebraska.— Lasson *v.* Union Pac. R. Co., (1903) 97 N. W. 313; Elgutter *v.* Missouri Pac. R. Co., 53 Nebr. 748, 74 N. W. 255; Bradley *v.* Missouri Pac. R. Co., 51 Nebr. 653, 71 N. W. 282, 66 Am. St. Rep. 474; Moore *v.* Moore, 33 Nebr. 509, 50 N. W. 443; Missouri Pac. R. Co. *v.* Lewis, 24 Nebr. 848, 40 N. W. 401, 2 L. R. A. 67. See also Missouri Pac. R. Co. *v.* Jay, 53 Nebr. 747, 74 N. W. 259; Missouri Pac. R. Co. *v.* Bradley, 51 Nebr. 596, 71 N. W. 283.

New Hampshire.— Stearns *v.* Wright, 51 N. H. 600.

the ground of irregularity in the proceedings,[31] a mistake in the character of letters granted where a proper case for administration existed,[32] that the grant was

New Jersey.— Quidort *v.* Pergeaux, 18 N. J. Eq. 472.

New Mexico.— See Huntington *v.* Moore, 1 N. M. 489.

New York.— Tanas *v.* Municipal Gas Co., 88 N. Y. App. Div. 251, 84 N. Y. Suppl. 1053; Van Gaasbeek *v.* Staples, 85 N. Y. App. Div. 271, 83 N. Y. Suppl. 225 [*affirmed* in 177 N. Y. 524, 69 N. E. 1132]; More *v.* Finch, 65 Hun 404, 20 N. Y. Suppl. 164; Sullivan *v.* Fosdick, 10 Hun 173.

North Carolina.— London *v.* Wilmington, etc., R. Co., 88 N. C. 584.

Pennsylvania.— Cunnius *v.* Reading School Dist., 206 Pa. St. 469, 56 Atl. 16, 98 Am. St. Rep. 790; Ubil *v.* Miller, 16 Pa. Super. Ct. 497.

Tennessee.— Kendrick *v.* Mason, (Ch. App. 1901) 62 S. W. 359.

Texas.— See Claiborne *v.* Yoeman, 15 Tex. 44. But *compare* Cain *v.* Haas, 18 Tex. 616.

Vermont.— See Taylor *v.* Phillips, 30 Vt. 238.

United States.— Veach *v.* Rice, 131 U. S. 293, 9 S. Ct. 730, 33 L. ed. 163; McGehee *v.* McCarley, 91 Fed. 462, 33 C. C. A. 629.

See 22 Cent. Dig. tit. "Executors and Administrators," § 178.

Question as to right to possession of personalty.— In an action by the public administrator to recover personalty paid to one of the heirs under a written agreement of all the heirs, who were of age, assigning their interests to such heir, the defense that there were no debts and that the personalty had been rightfully assigned to defendant was not a collateral attack on the order of the probate court directing plaintiff to take charge of the estate. Richardson *v.* Cole, 160 Mo. 372, 61 S. W. 182, 83 Am. St. Rep. 479.

In an action by a public administrator the defendant may properly put in an answer which does not ask a revocation of plaintiff's letters of administration or dispute the validity of his appointment as public administrator, but, recognizing his right to perform all the functions which by the laws of the state pertain to that office, denies that plaintiff had any authority under the statutes of the state or by virtue of his appointment as such administrator, to take charge of the particular estate in question. Union Mut. L. Ins. Co. *v.* Lewis, 97 U. S. 682, 24 L. ed. 1114.

31. *Alabama.*— Winter *v.* London, 99 Ala. 263, 12 So. 438; Savage *v.* Benham, 17 Ala. 119; Eslava *v.* Elliott, 5 Ala. 264, 39 Am. Dec. 326.

Colorado.— Denver, etc., R. Co. *v.* Woodward, 4 Colo. 1.

District of Columbia.—Tucker *v.* Nebecker, 2 App. Cas. 326.

Georgia.— Barclay *v.* Kimsey, 72 Ga. 725; Bryan *v.* Walton, 14 Ga. 185.

Illinois.— Frothingham *v.* Petty, 197 Ill. 418, 64 N. E. 270; Wight *v.* Wallbaum, 39 Ill. 554; Brink *v.* O'Donnell, 88 Ill. App. 459.

Kansas.— Ewing *v.* Mallison, 65 Kan. 484, 70 Pac. 369, 93 Am. St. Rep. 299; Taylor *v.* Hosick, 13 Kan. 518.

Louisiana.— Davie *v.* Stevens, 10 La. Ann. 496.

Maine.— Clark *v.* Pishon, 31 Me. 503.

Maryland.— Edelen *v.* Edelen, 6 Md. 288.

Massachusetts.— McCooey *v.* New York, etc., R. Co., 182 Mass. 205, 65 N. E. 62; Emery *v.* Hildreth, 2 Gray 228. See also Dickey *v.* Taft, 175 Mass. 4, 55 N. E. 318.

Michigan.— Johnson *v.* Johnson, 66 Mich. 525, 33 N. W. 413.

Minnesota.— Pick *v.* Strong, 26 Minn. 303, 3 N. W. 697.

Mississippi.— Grant *v.* Spann, 34 Miss. 294.

Missouri.— Johnson *v.* Beazley, 65 Mo. 250, 27 Am. Rep. 276; Riley *v.* McCord, 24 Mo. 265.

Nebraska.— Jackson *v.* Phillips, 57 Nebr. 189, 77 N. W. 683.

New Hampshire.— Boody *v.* Emerson, 17 N. H. 577.

New York.— O'Connor *v.* Huggins, 113 N. Y. 511, 21 N. E. 184; Kelly *v.* West, 80 N. Y. 139; James *v.* Adams, 22 How. Pr. 409.

Ohio.— Toledo, etc., R. Co. *v.* Beard, 20 Ohio Cir. Ct. 681, 11 Ohio Cir. Dec. 406.

South Carolina.— Petigru *v.* Ferguson, 6 Rich. Eq. 378.

Texas.— Templeton *v.* Ferguson, 89 Tex. 47, 33 S. W. 329.

Utah.— Chilton *v.* Union Pac. R. Co., 8 Utah 47, 29 Pac. 963.

Vermont.—McFarland *v.* Stone, 17 Vt. 165, 44 Am. Dec. 325.

Virginia.— Fisher *v.* Bassett, 9 Leigh 119, 33 Am. Dec. 227.

United States.— Garrett *v.* Boeing, 68 Fed. 51, 15 C. C. A. 209; Francisco *v.* Chicago, etc., R. Co., 35 Fed. 647.

See 22 Cent. Dig. tit. "Executors and Administrators," § 180.

The action of the court in extending the time for qualification of an administrator cannot be collaterally attacked. Willard *v.* Cleveland, 14 Tex. Civ. App. 557, 38 S. W. 222.

Where two or more estates are included in one administration this is a manifest irregularity but does not render the grant void or subject to collateral attack. Templeton *v.* Ferguson, 89 Tex. 47, 33 S. W. 329; Grande *v.* Herrera, 15 Tex. 533.

32. Jackson *v.* Reeve, 44 Ark. 496; Wight *v.* Wallbaum, 39 Ill. 554; Smith *v.* Pistole, 10 Humphr. (Tenn.) 205.

General grant of administration where decedent left will.— A grant of general letters of administration on the estate of a nonresident decedent, who died in the state of his residence, leaving a valid last will and testament, and owning property in the county in which such letters of administration were granted, although irregular and voidable,

premature,[33] or that the person to whom letters of administration have been granted was not entitled by priority to administer[34] or lacked the required qualifications.[35] Even a want of jurisdiction, when not apparent on the face of the record, is not as a rule a ground of collateral attack,[36] for where, as is usually the case, the probate court is a court of general jurisdiction in regard to probates and the grant of administrations, and has jurisdiction in regard to the whole subject-matter, although it may err in taking jurisdiction of a particular case, yet the order is generally not void but only voidable.[37] But the appointment may be attacked collaterally when the record affirmatively shows that the court granting the letters acted without jurisdiction,[38] and indeed any appointment which is void, as distinguished from voidable merely, may be collaterally

cannot be held void when collaterally attacked. Broughton *v.* Bradley, 34 Ala. 694, 73 Am. Dec. 474.

33. Hutcheson *v.* Priddy, 12 Gratt. (Va.) 85.

34. *Delaware.*— Burton *v.* Waples, 4 Harr. 73.

Nebraska.— Larson *v.* Union Pac. R. Co., (1903) 97 N. W. 313.

North Carolina.— Lyle *v.* Siler, 103 N. C. 261, 9 S. E. 491; Garrison *v.* Cox, 95 N. C. 353.

Oregon.— Ramp *v.* McDaniel, 12 Oreg. 108, 6 Pac. 456.

Pennsylvania.— Clark *v.* Clark, 6 Watts & S. 85.

Tennessee.— Wilson *v.* Frazier, 2 Humphr. 30.

United States.—Simmons *v.* Saul, 138 U. S. 439, 11 S. Ct. 369, 34 L. ed. 1054.

See 22 Cent. Dig. tit. "Executors and Administrators," § 178.

35. Davis *v.* Miller, 109 Ala. 589, 19 So. 699; Maybin *v.* Knighton, 67 Ga. 103; Missouri, etc., R. Co. *v.* McWherter, 59 Kan. 345, 53 Pac. 135; Caujolle *v.* Curtiss, 13 Wall. (U. S.) 465, 20 L. ed. 507.

36. *Alabama.*— McGhee *v.* Willis, 134 Ala. 281, 32 So. 301; Beasley *v.* Howell, 117 Ala. 499, 22 So. 989; Kling *v.* Connell, 105 Ala. 590, 17 So. 121, 53 Am. St. Rep. 144. *Contra,* Miller *v.* Jones, 26 Ala. 247. And see Barclift *v.* Treece, 77 Ala. 528, 531, where the court said: "In support of the jurisdiction, everything which the record does not disprove is presumed, and the presumption is conclusive on a collateral attack, when the record asserts the jurisdictional fact. But, when it is silent, it may be that the entire want of jurisdiction can be shown."

California.— Irwin *v.* Scriber, 18 Cal. 499.

Florida.— Robinson *v.* Epping, 24 Fla. 237, 4 So. 812; Epping *v.* Robinson, 21 Fla. 36.

Iowa.— Murphy *v.* Creighton, 45 Iowa 179.

Kentucky.— Gilchrist *v.* Williams, 1 B. Mon. 133. *Contra,* Hall *v.* Louisville, etc., R. Co., 102 Ky. 480, 43 S. W. 698, 19 Ky. L. Rep. 1529, 80 Am. St. Rep. 358; Jacobs *v.* Louisville, etc., R. Co., 10 Bush 263.

Louisiana.— Hamblin's Succession, 3 Rob. 130.

Maine.— Record *v.* Howard, 58 Me. 225, so holding "unless there is fraud."

Massachusetts.— McFeely *v.* Scott, 128 Mass. 16.

Nebraska.— Bradley *v.* Missouri Pac. R. Co., 51 Nebr. 653, 71 N. W. 282, 66 Am. St. Rep. 473.

New Hampshire.— Ela's Appeal, 68 N. H. 35, 38 Atl. 501. But *compare* Stearns *v.* Wright, 51 N. H. 600.

New Jersey.— Plume *v.* Howard Sav. Inst., 46 N. J. L. 211; Buecker *v.* Carr, 60 N. J. Eq. 300, 47 Atl. 34.

New York.— Van Gaasbeek *v.* Staples, 85 N. Y. App. Div. 271, 83 N. Y. Suppl. 225 [*affirmed* in 177 N. Y. 524, 69 N. E. 1132]; Kelly *v.* Jay, 79 Hun 535, 29 N. Y. Suppl. 933, holding this to be true in the absence of any charge of fraud or collusion.

South Carolina.— *In re* Mayo, 60 S. C. 401, 38 S. E. 634, 54 L. R. A. 660.

Tennessee.— Eller *v.* Richardson, 89 Tenn. 575, 15 S. W. 650; East Tennessee, etc., R. Co. *v.* Mahoney, 89 Tenn. 311, 15 S. W. 652; Ferrell *v.* Grigsby, (Ch. App. 1899) 51 S. W. 114.

Texas.— Strickland *v.* Sandmeyer, 21 Tex. Civ. App. 351, 52 S. W. 87.

Vermont.— Abbott *v.* Coburn, 28 Vt. 663, 67 Am. Dec. 735.

Virginia.— Andrews *v.* Avory, 14 Gratt. 229, 73 Am. Dec. 355.

United States.— Boston, etc., R. *v.* Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193; Garrett *v.* Boeing, 68 Fed. 51, 15 C. C. A. 209.

See 22 Cent. Dig. tit. "Executors and Administrators," § 179.

Contra.— Griffith *v.* Wright, 18 Ga. 173; People's Sav. Bank *v.* Wilcox, 15 R. I. 258, 3 Atl. 211, 2 Am. St. Rep. 894.

37. Andrews *v.* Avory, 14 Gratt. (Va.) 229, 73 Am. Dec. 355, where administration had been granted on the estate of a decedent who was not a resident of the county, and did not die or have any estate therein. And see Sager *v.* Lindsey, 118 Pa. St. 25, 13 Atl. 211.

Where probate courts are courts of limited jurisdiction a lack of jurisdiction may be shown collaterally. People's Sav. Bank *v.* Wilcox, 15 R. I. 258, 3 Atl. 211, 2 Am. St. Rep. 894.

38. *Georgia.*— Griffith *v.* Wright, 18 Ga. 173.

Iowa.— Nash *v.* Sawyer, 114 Iowa 742, 87 N. W. 707.

Maine.— Record *v.* Howard, 58 Me. 225; Moore *v.* Philbrick, 32 Me. 102, 52 Am. Dec. 642.

Michigan.— Gillett *v.* Needham, 37 Mich. 143.

Minnesota.— Davis *v.* Hudson, 29 Minn. 27, 11 N. W. 136.

attacked.[39] Thus it may be shown collaterally that the alleged decedent was not dead at the time of the grant of administration,[40] that the estate had already been fully administered and closed,[41] or that at the time of the grant the probate court of another county had previously taken jurisdiction of and granted administration on the same estate, and that there was no vacancy in the administration;[42] and where an appointment is void because of a lack of jurisdiction in the county where it is made, the court of the county having jurisdiction may ignore the former appointment and take any necessary steps to settle the estate.[43]

5. DIRECT ATTACK. Any person may directly attack a void grant of administration,[44] but a grant of administration valid on its face can be attacked only by a creditor or next of kin of the decedent or some other person in some way interested in the estate.[45] Where a direct attack on an appointment is made, and such appointment is claimed to be void and *ultra vires*, no right or title to the property of the succession can absolutely vest in the appointee so long as the opposition remains undisposed of.[46]

M. Failure to Qualify or Act. In the absence of statute no action will lie by heirs to compel the person nominated as executor to either qualify or formally renounce,[47] but in general the court itself takes cognizance that the person nominated as executor or appointed administrator has not qualified within a reasonable time, and appoints another person to serve in his place,[48] and this having

Nebraska.— Elgutter *v.* Missouri Pac. R. Co., 53 Nebr. 748, 74 N. W. 255; Moore *v.* Moore, 32 Nebr. 509, 50 N. W. 443.

New York.— Flinn *v.* Chase, 4 Den. 85.

See 22 Cent. Dig. tit. "Executors and Administrators," § 179.

39. Griffith *v.* Wright, 18 Ga. 173; *In re* King, 105 Iowa 320, 75 N. W. 187; Wilson *v.* Imboden, 8 La. Ann. 140. See also Harwood *v.* Wylie, 70 Tex. 538, 7 S. W. 789.

Lapse of time cannot validate letters of administration which were originally void for want of jurisdiction, and evidence showing such want of jurisdiction is admissible in a collateral suit brought after the lapse of twenty years. Holyoke *v.* Haskins, 5 Pick. (Mass.) 20, 16 Am. Dec. 372, 9 Pick. (Mass.) 259.

A court of equity may enjoin a special administrator whose appointment is void, from acting thereunder. Hussey *v.* Southard, 90 Me. 296, 38 Atl. 221.

40. Fisk *v.* Norvel, 9 Tex. 13, 58 Am. Dec. 128. But *compare* Plume *v.* Howard Sav. Inst., 46 N. J. L. 211, holding that a grant of administration founded on petition and proofs presenting a colorable case of the decease of the alleged intestate could not be collaterally questioned. It is to be noticed, however, that in this case not only was there no affirmative showing that the alleged decedent was actually alive at the time of the issuance of letters, but there was no reason for even surmising such to be the fact. See *supra*, I, J, 3, a.

In a grant of temporary administration it is not to be expected, so far as the presumption of death is concerned, that there should be the same certainty as in cases of general administration, and slight proof of death will suffice to preclude a collateral attack on the appointment of such an administrator. Czech *v.* Bean, 35 Misc. (N. Y.) 729, 72 N. Y. Suppl. 402.

41. Fisk *v.* Norvel, 9 Tex. 13, 58 Am. Dec. 128.

42. Beasley *v.* Howell, 117 Ala. 499, 506, 22 So. 989, where the court said: "There cannot be at the same time and in the same jurisdiction two administrations of the same estate, yet this would be the effect if the presumption arising from the second grant was conclusive against the non-existence of any former grant."

43. *In re* King, 105 Iowa 320, 75 N. W. 187. See also *Ex p.* Barker, 2 Leigh (Va.) 719.

44. Stewart *v.* Golden, 98 Ga. 479, 25 S. E. 528 (holding that where letters of administration were granted on the estate of a deceased non-resident, and the administrator, under an order of the court appointing him, sold land as the property of the estate, third persons claiming to own the land, against whom the alleged title acquired at the administrator's sale was being asserted, were entitled to petition the court granting administration to have the judgment granting the letters set aside because void *ab initio* for want of jurisdiction); Griffith *v.* Wright, 18 Ga. 173.

45. Breen *v.* Pangborn, 51 Mich. 29, 16 N. W. 188. See also Buecker *v.* Carr, 60 N. J. Eq. 300, 47 Atl. 34.

46. State *v.* Hingle, 50 La. Ann. 683, 23 So. 616.

47. Cable *v.* Cable, 76 Iowa 163, 40 N. W. 700.

48. *Louisiana.*— Gusman's Succession, 35 La. Ann. 404.

Mississippi.— Wingate *v.* Wooten, 5 Sm. & M. 245.

Pennsylvania.— Jakey's Estate, 3 Pa. Dist. 750, 15 Pa. Co. Ct. 377.

South Carolina.— Smith *v.* Wingo, 1 Rice 287.

Tennessee.— Crozier *v.* Goodwin, 1 Lea 125.

See *supra*, I, A, 4, b; I, B, 4, a.

been done the person who was primarily entitled to letters loses his right and cannot subsequently have the appointee removed merely because he becomes prepared to qualify and desires the appointment,[49] nor can he even intervene in a subsequent contest for administration.[50]

N. Termination of Authority[51] — **1. Statutory Limitation.** In a few jurisdictions the statutes set a limit for the administration of an estate, whether by an executor or administrator; but extensions are provided for in suitable cases,[52] and it is not readily to be presumed that at the expiration of the period named by statute the estate shall vest immediately by mutation of title in the heirs, as though fully settled, or that the legal representative becomes discharged by operation of law.[53]

2. Final Discharge. Action of the probate court evidenced by order or decree is necessary to close administration and relieve executors or administrators from their responsibility or change their possession as representatives into possession as legatees or distributees.[54] The court has no legal authority to discharge the executor or administrator, pending a complete settlement of the estate, except as the statute may have permitted, and the usual rule is that a representative is not entitled to his final discharge until after full settlement of the estate, including final payment and delivery of all the property by way of distribution to those entitled to the balance, and the rendering and approval of his final accounts.[55]

Court should not wait for complaint. White's Succession, 9 Rob. (La.) 353.

Notice to executor or administrator necessary.—Gusman's Succession, 35 La. Ann. 404; King *v.* Lastrapes, 13 La. Ann. 582.

A second appointment before the lapse of ten days after the first is null and void under the Louisiana statute providing that whenever an administrator shall suffer ten days to elapse after his appointment without having qualified or caused an inventory to be begun a successor shall forthwith be appointed, etc. Horlor's Succession, 23 La. Ann. 396.

The court may refuse to allow an administrator to qualify where he does not take the oath nor obtain an order for the inventory until more than ten days after the appointment, but if it permits the oath to be taken it is too late to object afterward. Hart's Succession, 7 Rob. (La.) 534.

Where the heirs have consented to the executor's acting without qualifying and he has acted, the fact that he has not qualified within the time limited by statute does not amount to a waiver of his right. Hays *v.* Vickery, 41 Ind. 583.

49. Williams' Case, 18 Abb. Pr. (N. Y.) 350.

50. Howard *v.* Worrill, 42 Ga. 397.

51. Of administrator pendente lite see *supra*, II, E, 2, c.

Of public administrator see *supra*, II, G, 6.

52. Deranco *v.* Montgomery, 13 La. Ann. 513; Furguson *v.* Glaze, 12 La. Ann. 667; Brown *v.* Williams, 16 La. 344; Citizens' Nat. Bank *v.* Sharp, 53 Md. 521; Bayne *v.* Garrett, 17 Tex. 330; Bartlett *v.* Cocke, 15 Tex. 471; Moody *v.* Looscan, (Tex. Civ. App. 1898) 44 S. W. 621. See also Drapean *v.* St.-Denis, 15 Quebec Super. Ct. 179.

The functions of an administrator do not, like those of an executor, cease at the end of a year, but continue until the administration is finished. Furguson *v.* Glaze, 12 La. Ann. 667.

A testamentary provision giving an executor five years to wind up the estate has been held not to fix an arbitrary limit beyond which the administration could not extend if necessary, but to have been merely intended as an enlargement of the time allowed by law and an expression of opinion that the estate could not be wound up in less than five years. Ensley *v.* Ensley, 105 Tenn. 107, 58 S. W. 288.

Duration of extended authority.— An executor who is authorized to act beyond the year and settle the estate may act as long as is necessary for that purpose. Gayoso de Lemos *v.* Garcia, 1 Mart. N. S. (La.) 324.

53. Citizens' Nat. Bank *v.* Sharp, 53 Md. 521.

54. *In re* Scheffer, 58 Minn. 29, 59 N. W. 956. And see Green v. Brown, 146 Ind. 1, 44 N. E. 805.

Conditional order of discharge.— An order discharging an administratrix upon the condition of paying a certain sum to the heirs of the estate and filing vouchers therefor does not, under the statutes of Kansas, effect the discharge until the money is paid and the vouchers filed. Cosgrove *v.* U. S., 33 Ct. Cl. 167.

When revocation of discharge presumed.— Where an administrator on settlement of his final account was discharged by the probate court, but he was afterward recognized by and acted in such court as administrator, it was held that it was to be presumed, in an action to compel an accounting, that the order of discharge was revoked. Bayne *v.* Garrett, 17 Tex. 330. See also Poor *v.* Boyce, 12 Tex. 440; Townsend *v.* Munger, 9 Tex. 300.

55. *California.*— Clary's Estate, 112 Cal. 292, 44 Pac. 569.

Colorado.— Green *v.* Taney, 16 Colo. 398, 27 Pac. 249.

Florida.— Lott *v.* Meacham, 4 Fla. 144.

3. Final Account and Settlement. The functions of an executor or administrator do not necessarily cease upon a final settlement and approval of his account, but he may if occasion arises pursue his duties further for the benefit of the estate, unless the probate records show a formal discharge from the trust.[56]

Illinois.— People *v.* Lanham, 189 Ill. 326, 59 N. E. 610 [*reversing* 91 Ill. App. 101]; Blanchard *v.* Williamson, 70 Ill. 647; Dunaway *v.* Campbell, 59 Ill. App. 665.

Louisiana.— Bry *v.* Dowell, 1 Rob. 111. See also Conery's Succession, 111 La. 113, 35 So. 479.

Nebraska.— Cowherd *v.* Kitchen, 57 Nebr. 426, 77 N. W. 1107.

New York.— Matter of Van Wyck, 1 Barb. Ch. 565.

Ohio.—Flickinger *v.* Saum, 40 Ohio St. 591.

Pennsylvania.— Matter of Taggart, 1 Ashm. 321; Wiseman's Estate, 4 Wkly. Notes Cas. 59, 12 Phila. 11; Gready's Estate, 14 Phila. 259. See also Buzby's Estate, 2 Wkly. Notes Cas. 31.

Final accounting of co-administrator.— An administrator who, having been ruled by his co-administrator into a settlement because he had become a non-resident, appears and makes a final settlement of his administration, accounting fully for all assets which had come into his hands, and showing their proper administration, is entitled to a discharge from the trust and all liability on account thereof, so far as his administration is concerned and no further. Jones *v.* Jones, 42 Ala. 218.

Publication of citation for three months is required in Georgia before final discharge. Anderson *v.* Seifert, 112 Ga. 912, 38 S. E. 346.

Order of discharge before administration completed.— An order of the probate court, made on what purports to be the settlement of an administrator's final account, directing that he be discharged from his trust, does not extinguish his authority to administer choses in action and other assets belonging to the estate which remain in his hands unadministered, since such an order is not a removal of the administrator for good cause, or an acceptance of his resignation, which are the only methods prescribed by the Ohio statutes by which an administrator's authority may be terminated before the estate is fully administered. Weyer *v.* Watt, 48 Ohio St. 545, 28 N. E. 670.

Consent of parties interested.— In Pennsylvania it has been held that the petition of an executor or administrator for his final discharge must be accompanied by an agreement in writing of all interested parties consenting to the discharge, and signed, in the case of an administrator, by his sureties. Wiseman's Estate, 4 Wkly. Notes Cas. (Pa.) 59, 12 Phila. (Pa.) 11.

Insufficient objection see De Berry *v.* Wootters, (Tex. Civ. App. 1900) 57 S. W. 885.

Conditional order for discharge.— An order directing that an administrator be discharged upon making distribution, and obtaining from the heirs receipts for their respective shares, does not discharge the administrator until the order is made absolute. State *v.* Walla Walla County Super. Ct., 13 Wash. 25, 42 Pac. 630.

Payment into court.— An order directing that an administrator on payment to the clerk of the court of all moneys of the estate in his hands for distribution shall be entitled to his discharge is erroneous, for the administrator is responsible for the assets in his hands, and so long as he remains in office is entitled to retain them in his possession until disposed of to the parties entitled thereto under the directions of the court, and upon the entry of an order for the payment of the claims against the estate, the administrator becomes liable therefor to the creditors both personally and upon his bond, and cannot escape liability by complying with an order which the court had no power to make. *In re* Sarment, 123 Cal. 331, 55 Pac. 1015.

56. Whetstone *v.* McQueen, 137 Ala. 301, 34 So. 229; Ligon *v.* Ligon, 84 Ala. 555, 4 So. 405; Carter *v.* Carter, 53 Ala. 365; Simmons *v.* Price, 18 Ala. 405; Norman *v.* Norman, 3 Ala. 389; McCrea *v.* Haraszthy, 51 Cal. 146; Lowry *v.* Tilleny, 31 Minn. 500, 18 N. W. 452; Francisco *v.* Wingfield, 161 Mo. 542, 61 S. W. 842; Clough *v.* Clark, 63 N. H. 403, 1 Atl. 201; Security Trust Co. *v.* Dent, 104 Fed. 380, 43 C. C. A. 594; Fewlass *v.* Keeshan, 88 Fed. 573, 32 C. C. A. 8; McClaskey *v.* Barr, 79 Fed. 408. See also Clay's Estate, 112 Cal. 292, 44 Pac. 569; Barr *v.* Sullivan, 75 Miss. 536, 23 So. 772; Alexander *v.* Maverick, 18 Tex. 179, 67 Am. Dec. 693; Denny *v.* Sayward, 10 Wash. 422, 39 Pac. 119; Hazelton *v.* Bogardus, 8 Wash. 102, 35 Pac. 602. *Contra*, Decuir's Succession, 26 La. Ann. 222; Anderson's Succession, 12 La. Ann. 95. And see Vandever's Appeal, 42 Pa. St. 74; Krogman's Estate, 14 Pa. Co. Ct. 567.

Representative's liability continues until account settled and estate fully administered. — Wallber *v.* Wilmanns, 116 Wis. 246, 93 N. W. 47. See also *In re* Higgins, 15 Mont. 474, 39 Pac. 506, 28 L. R. A. 116.

Order setting aside all property to widow concludes administration. Floyd *v.* Terrell, 60 Tex. 284.

Ineffective order of distribution.— Where an order of distribution is ineffectual to bind the heirs, the administrator is not thereby discharged. Scruggs *v.* Scruggs, 105 Fed. 28.

The assumption of possession during the administration by a universal legatee, who is also the testamentary executor, of the property bequeathed to him by the will does not have effect *ipso facto* of closing the succession and discharging the executor. McNeely *v.* McNeely, 50 La. Ann. 823, 24 So. 338.

Court cannot discharge representative merely on settlement of final account. Hazlett *v.* Blakely, (Nebr. 1903) 97 N. W. 808, holding further that, as the trust of an administrator

4. Testacy or Intestacy Apparent After Action Based on Contrary Supposition. The office of an executor ceases when the will is set aside,[57] and the same has been held true of an administrator with the will annexed.[58] On the other hand administration granted on the assumption of intestacy is held in some jurisdictions to be *ipso facto* superseded by the admission of a will to probate,[59] although the more general view is that the subsequent establishment of a will is only ground for revocation of the letters of administration.[60]

5. Cessation of Reason For Temporary or Special Grant. The powers of a temporary or special administrator are determined when the reason for his appointment ceases to exist and a general administrator is appointed or an executor qualified.[61] In such case it is usually considered by the courts that a formal

is an enduring one, his discharge in a decree on final accounting does not destroy the relation, but merely discharges him from liability for the past.

57. Heffner's Succession, 49 La. Ann. 407, 21 So. 905; Clagett *v.* Hawkins, 11 Md. 381; Schwilke's Appeal, 100 Pa. St. 628; Kilton *v.* Anderson, 18 R. I. 136, 25 Atl. 907, 49 Am. St. Rep. 751. But *compare* Morgan *v.* Dodge, 44 N. H. 255, 82 Am. Dec. 213.

The court may order a delivery of the property of the succession in the hands of the displaced executor to the heirs, and it is no answer to such an order for the executor to avow that he has violated his trust by disposing of the property. Heffner's Succession, 49 La. Ann. 1443, 22 So. 380.

Revocation of will by birth of posthumous child.— Implied revocation of letters testamentary is held to have arisen where after the letters have been issued the birth of a posthumous child revokes the will. Hart *v.* Hart, 70 Ga. 764.

58. Smith *v.* Stockbridge, 39 Md. 640; Kilton *v.* Anderson, 18 R. I. 136, 25 Atl. 907, 49 Am. St. Rep. 751. *Contra*, Ward *v.* Oates, 42 Ala. 225 (holding that if the decedent died intestate or the probate of an instrument as his will is void administration with the will annexed would not be void but only voidable); Floyd *v.* Herring, 64 N. C. 409.

59. Thomas *v.* Morrisett, 76 Ga. 384; *In re* Davis, 11 Mont. 196, 28 Pac. 645; Bigelow *v.* Bigelow, 4 Ohio 138, 19 Am. Dec. 591.

60. *Alabama.*— Sands *v.* Hickey, 135 Ala. 322, 33 So. 827; Watson *v.* Glover, 77 Ala. 323. See also Broughton *v.* Bradley, 34 Ala. 694, 73 Am. Dec. 474.

Arkansas.— Clark *v.* Holt, 16 Ark. 257, holding that where letters of administration have been granted on the estate of a decedent, and afterward his will is probated in another state, being that of his domicile, and letters testamentary granted, the letters of administration previously granted are not thereby vacated.

Kentucky.— McChord *v.* Fisher, 13 B. Mon. 193.

Louisiana.— Dwight *v.* Simon, 4 La. Ann. 490.

Maryland.— Dalrymple *v.* Gamble, 66 Md. 298, 7 Atl. 683, 8 Atl. 468.

New York.— Bulkley *v.* Redmond, 2 Bradf. Surr. 281.

South Carolina.— Moore *v.* Smith, 11 Rich. 569, 73 Am. Dec. 122.

England.— Jacob *v.* Allen, 1 Salk. 27. But see Abram *v.* Cunningham, 2 Lev. 182; Graysbrook *v.* Fox, Plowd. 275.

See 22 Cent. Dig. tit. "Executors and Administrators," § 191; and *supra*, II, B, 1.

Where the deceased left a nuncupative will a general grant of administration upon his estate as in cases of intestacy is voidable and revocable. Jennings *v.* Moses, 38 Ala. 402.

Rejection of will subsequently proved.— Where a will offered for probate in common form is adjudged not proved and letters of administration issued, and the will is, upon appeal, subsequently proved in solemn form, the letters of administration should be revoked. Kittredge *v.* Folsom, 8 N. H. 88; Patton's Appeal, 31 Pa. St. 465.

61. *Louisiana.*— See Hook *v.* Richardson, 4 La. 569, holding that as the heirs present have a preference in the administration over everyone, the powers of a curator unadvisedly appointed cease when they present themselves.

Maryland.— *Ex p.* Worthington, 54 Md. 359; State *v.* Williams, 9 Gill 172.

Missouri.— *In re* Estes, 65 Mo. App. 38.

New Jersey.— Cole *v.* Wooden, 18 N. J. L. 15; Woolley *v.* Pemberton, 41 N. J. Eq. 394, 5 Atl. 139.

New York.— *In re* Lewis, 17 N. Y. Wkly. Dig. 311, collector.

North Carolina.— Wallis *v.* Wallis, 60 N. C. 78.

Pennsylvania.— Riegel's Appeal, 2 Pa. Cas. 58, 4 Atl. 173.

United States.— Yeaton *v.* Lynn, 5 Pet. 224, 8 L. ed. 105.

See 22 Cent. Dig. tit. "Executors and Administrators," § 188.

A special administrator to collect is usually the mere agent or officer of the court liable to supersedure at any time. Flora *v.* Mennice, 12 Ala. 836.

If the general appointment is contested and an appeal taken or if otherwise the executor or general administrator is hindered in qualifying and receiving letters, the special appointee is not yet superseded. Briarfield Iron Works Co. *v.* Foster, 54 Ala. 622.

Qualification necessary.— A special administrator of an estate who is appointed administrator with the will annexed will hold the property and be responsible therefor in his former capacity until the security required of an administrator with the will annexed has been given by him or expressly waived

order of removal is not necessary,[62] although the letters are often revoked under such circumstances.[63]

6. Marriage of Executrix or Administratrix. In some jurisdictions the marriage of an executrix or administratrix has the effect of casting the administration upon her husband;[64] but in others the marriage extinguishes her authority,[65] and where this is the case her authority is not revived by her subsequently becoming a widow.[66] A familiar distinction is that, where a *feme sole* is executrix or administratrix with others and afterward marries, her power is determined; but that, where she is sole administratrix, her power does not determine, but her husband becomes by the marriage jointly interested with her in the trust.[67] In Rhode Island the marriage of an administratrix does not affect her status as such in any way.[68]

7. Death of Representative. The death of an executor or administrator necessarily terminates his functions as such,[69] and, where the representative is a married woman, the right of her husband as such to administer the estate terminates upon her death.[70]

8. Insanity of Representative. The office of executor or administrator may terminate by the insanity of the incumbent.[71]

9. Resignation and Discharge — a. In General. An executor or administrator

by the persons in interest. *In re* Fisher, 15 Wis. 511.

62. Briarfield Iron Works Co. *v.* Foster, 54 Ala. 622; *In re* Lewis, 17 N. Y. Wkly. Dig. 311.

63. Morgan *v.* Dodge, 44 N. H. 255, 82 Am. Dec. 213; Kittredge *v.* Folsom, 8 N. H. 98; Howell *v.* Metcalfe, 2 Add. Eccl. 348; *In re* Metcalfe, 1 Add. Eccl. 343; Pipon *v.* Wallis, 1 Cas. t. Lee 402; *In re* Newton, 3 Curt. Eccl. 428; *In re* Campbell, 2 Hagg. Eccl. 555; Slater *v.* May, 2 Ld. Raym. 1071, 1 Salk. 42; Freke *v.* Thomas, 1 Ld. Raym. 667, 1 Salk. 39; Offley *v.* Best, 1 Sid. 370; Rainsford *v.* Taynton, 7 Ves. Jr. 460, 32 Eng. Reprint 186.

64. Kavanaugh *v.* Thompson, 16 Ala. 817; Pistole *v.* Street, 5 Port. (Ala.) 64; Wood *v.* Chetwood, 27 N. J. Eq. 311; Hamilton *v.* Levy, 41 S. C. 374, 19 S. E. 610; Gates *v.* Whetstone, 8 S. C. 244, 28 Am. Rep. 284; Lindsay *v.* Lindsay, 1 Desauss. (S. C.) 150.

65. *Arkansas.*— Whittaker *v.* Wright, 35 Ark. 511. See also Ferguson *v.* Collins, 8 Ark. 241.

California.— McMillan *v.* Hayward, 94 Cal. 357, 29 Pac. 774; Schroeder *v.* San Mateo Super. Ct., 70 Cal. 343, 11 Pac. 651; Teschemacher *v.* Thompson, 18 Cal. 11, 79 Am. Dec. 151.

Indiana.— Jenkins *v.* Jenkins, 23 Ind. 79.

Kentucky.— Duhme *v.* Young, 3 Bush 343. But *compare* Carrol *v.* Connet, 2 J. J. Marsh. 195.

Mississippi.— Yates *v.* Clark, 56 Miss. 212.

Missouri.— Frye *v.* Kimball, 16 Mo. 9.

Nevada.— Buckley *v.* Buckley, 16 Nev. 180.

Ohio.— Matter of Fagin, 10 Ohio Dec. (Reprint) 180, 19 Cinc. L. Bul. 149.

See 22 Cent. Dig. tit. "Executors and Administrators," § 226.

Proceedings for removal necessary.— The California statute providing that upon the marriage of an executrix "her authority is extinguished" has been construed to mean simply that in such case she becomes incompetent and must be proceeded against for suspension and removal, and not that the marriage deprives her *eo instanti* of all her powers. Schroeder *v.* San Mateo Super. Ct., 70 Cal. 343.

Possession after marriage.—While the marriage of an administratrix extinguishes her authority as such, she has the right to retain possession of the property of the estate until the appointment of her successor, or until otherwise ordered by the court. Buckley *v.* Buckley, 16 Nev. 180.

66. Matter of Fagin, 10 Ohio Dec. (Reprint) 180, 19 Cinc. L. Bul. 149.

67. *Alabama.*— Dowty *v.* Hall, 83 Ala. 165, 3 So. 315.

Georgia.— Fields *v.* Carlton, 84 Ga. 597, 11 S. E. 124.

Kentucky.— Tribble *v.* Broaddus, 23 S. W. 349, 15 Ky. L. Rep. 324.

Massachusetts.— Barber *v.* Bush, 7 Mass. 510.

Missouri.— Frye *v.* Kimball, 16 Mo. 9.

Ohio.— Cadwallader *v.* Evans, 1 Disn. 585, 12 Ohio Dec. (Reprint) 811.

68. Weaver *v.* Industrial Trust Co., 24 R. I. 35, 51 Atl. 1050.

69. See Forster's Estate, 2 Lanc. L. Rev. (Pa.) 206, holding that, when a vacancy in the office of executor or administrator occurs by death, the register may issue new letters without a decree of the orphans' court.

70. Sands *v.* Hickey, 135 Ala. 322, 33 So. 827; Edmundson *v.* Roberts, 1 How. (Miss.) 322.

71. See *In re* Moore, 68 Cal. 281, 9 Pac. 164, holding that under the California statute providing that the office should become vacant on the happening of the incumbent's insanity, "found upon a commission of lunacy issued to determine the fact," the fact that an administrator was sent to an insane asylum by order of a judge of the superior court did not create an entire vacancy in the administration where no commission of lunacy

who has once fully accepted and entered upon his trust cannot resign it unless the statute permits him to do so;[72] but in many jurisdictions the statutes permit the resignation of an executor or administrator, usually leaving it within the discretion of the probate court whether or not this shall be allowed in individual cases, and ordinarily requiring a correct settlement of accounts and a transfer of the balance as the court may direct as a condition.[73] Where there is a personal

had issued; and that while the administrator became incapable of executing the trust for the time being, and if during the time of his insanity another person entitled to letters had petitioned for them, she would doubtless have received them, yet a petition by such other person presented after the administrator had been restored to sanity and had again entered upon the discharge of his duties as administrator and had been recognized as such by the court and others was too late.

72. *Georgia.*— See *In re* Mussault, T. U. P. Charlt. 259.

Massachusetts.— Sears *v.* Dillingham, 12 Mass. 358.

Minnesota.— Rumrill *v.* St. Albans First Nat. Bank, 28 Minn. 202, 9 N. W. 731.

New York.— Flinn *v.* Chase, 4 Den. 85.

North Carolina.— Washington *v.* Blunt, 43 N. C. 253.

Pennsylvania.—Strobel's Estate, 11 Phila. 122.

South Carolina.— Chapman *v.* Charleston, 30 S. C. 549, 9 S. E. 591, 3 L. R. A. 311; Haigood *v.* Wells, 1 Hill Eq. 59.

Wisconsin.—Sitzman *v.* Pacquette, 13 Wis. 291.

England.— Anonymous, 1 Vent. 335.

See 22 Cent. Dig. tit. "Executors and Administrators," § 213.

Resignation before taking control.— Aside from statute, an executor or administrator who has already qualified has sometimes been permitted to terminate his trust before he has taken actual possession of the assets or attempted to exercise any control whatever over the estate; in which case the acceptance of his resignation is followed, as usual, by the appointment of a successor; the power in the court to accept the resignation and to make the second appointment under such circumstances being deemed incidents of the power to make the first appointment. Comstock *v.* Crawford, 3 Wall. (U. S.) 396, 18 L. ed. 34. Due proof should, however, appear that the representative has not received any of the assets. Buckley's Case, 1 Browne (Pa.) 289.

73. *Alabama.*— Rambo *v.* Wyatt, 32 Ala. 363, 70 Am. Dec. 544; Driver *v.* Riddle, 8 Port. 343.

California.— Allen's Estate, 78 Cal. 581, 21 Pac. 426; Haynes *v.* Meeks, 10 Cal. 110, 70 Am. Dec. 703.

Georgia.— Carter *v.* Anderson, 4 Ga. 516.

Massachusetts.— Thayer *v.* Homer, 11 Metc. 104.

Nebraska.— Hazlett *v.* Blakely, (1903) 97 N. W. 808; Trumble *v.* Williams, 18 Nebr. 144, 24 N. W. 716.

New Hampshire.— Morgan *v.* Dodge, 44 N. H. 255, 82 Am. Dec. 213.

North Carolina.— Tulburt *v.* Hollar, 102 N. C. 406, 9 S. E. 430.

Pennsylvania.— Marley's Estate, 18 Pa. Super. Ct. 303.

Tennessee.— Coleman *v.* Raynor, 3 Coldw. 25.

See 22 Cent. Dig. tit. "Executors and Administrators," § 213.

Executor cannot resign without consent of court. Forster's Estate, 2 Lanc. L. Rev. (Pa.) 206.

Power to remove includes power to accept resignation. Thayer *v.* Homer, 11 Metc. (Mass.) 104.

Independent executor may resign. Roy *v.* Whitaker, 92 Tex. 346, 48 S. W. 892, 49 S. W. 367.

Resignation of co-executor or co-administrator.— Some statutes extend this permission to co-executors or co-administrators, in which case the probate court has discretion to leave the colleague remaining in office sole executor or administrator. Davenport *v.* Reynolds, 6 Ill. App. 532; Veach *v.* Rice, 131 U. S. 293, 9 S. Ct. 730, 33 L. ed. 163.

An executor to whose office a trust is attached cannot resign the executorship and retain the trust. Strobel's Estate, 11 Phila. (Pa.) 122.

Resignation cannot be accepted until accounts settled.—Haynes *v.* Meeks, 10 Cal. 110, 70 Am. Dec. 703, holding, however, that improper action of the court in the premises was merely voidable and not void and could not be collaterally attacked. But an administrator who invokes an order accepting his resignation and appointing his successor cannot complain that the order was made before his accounts were settled. *In re* McDermott, 127 Cal. 450, 59 Pac. 783.

Presumption of acceptance.— Where an executor files his resignation and final account and the court appoints an administrator *de bonis non* the acceptance of the resignation and the revocation of the letters testamentary will be inferred in the absence of the record or the court minutes. Jennings *v.* Le Breton, 80 Cal. 8, 21 Pac 1127.

Presumption of delivery of assets.— Where an executor's resignation has been accepted it will be presumed that he complied with the statute requiring him to deliver up all assets in his hands as a condition precedent to his right to resign. Jennings *v.* Le Breton, 80 Cal. 8, 21 Pac. 1127.

Executor cannot retract resignation. Matter of Beakes, 5 Dem. Surr. (N. Y.) 128.

Diverse interests.— In a case where a copartner of the testator was appointed one of his executors and unwittingly assumed his duties as such he was held to be entitled

trust reposed in an executor under the will, he ought not to be discharged upon the tender of his resignation until he has performed that duty; nor in general ought one's resignation to be accepted on trivial grounds, regardless of the detriment which the estate may suffer in consequence of such action, or the wishes of its beneficiaries.[74]

b. Application and Procedure. The representative desiring to resign should apply to the court which appointed him and in which the administration of the estate is pending,[75] by petition in due form,[76] setting forth his reasons for wishing to be relieved from the trust,[77] and requesting the appointment of some suitable person in his place.[78] It would also seem proper to file an account with such petition.[79] Notice to the parties in interest is necessary unless waived.[80] The acceptance of the resignation is properly in the form of an order[81] made and entered of record.[82]

c. Operation and Effect. The acceptance by the court of an executor's or administrator's resignation or his discharge has in general the effect of a revocation of his letters.[83] Discharge from office by resignation relieves from further responsibility, but not from the consequences of malfeasance and neglect while in office. One cannot by resigning avoid the rendition of judgments or decrees against him in suits already begun, for assets unadministered upon at the time of

to a discharge on a petition by him showing that his interests as partner of the deceased and as fiduciary were diverse. Malone's Estate, 9 Pa. Dist. 115.

Insufficient grounds of opposition.— The discharge of an executor cannot be resisted by the life-tenant of the estate because he failed to sue for a certain debt due the estate and took credit for certain legal expenses, where it appears that the estate was in no way injured by the neglect to bring suit and that the expenses complained of were occasioned by the life-tenant herself. Marley's Estate, 18 Pa. Super. Ct. 303.

74. Lott *v.* Meacham, 4 Fla. 144; Matter of Van Wyck, 1 Barb. Ch. (N. Y.) 565; Baier *v.* Baier, 4 Dem. Surr. (N. Y.) 162.

75. Wells *v.* Houston, (Tex. Civ. App. 1900) 56 S. W. 233, holding that no other court has power to accept the resignation. See also Lunsford *v.* Lunsford, 122 Ala. 242, 25 So. 171, holding that an executrix appointed by the probate court may at any time file her resignation with such court, although the administration has been removed to the chancery court, since the court from which she received her appointment is the proper tribunal in which to file the resignation.

76. See Balch *v.* Hooper, 32 Minn. 158, 20 N. W. 124.

77. See Balch *v.* Hooper, 32 Minn. 158, 20 N. W. 124.

78. See Balch *v.* Hooper, 32 Minn. 158, 20 N. W. 124.

79. See Balch *v.* Hooper, 32 Minn. 158, 20 N. W. 124.

80. Head *v.* Bridges, 67 Ga. 227; Brasfield *v.* French, 59 Miss. 632. See also Balch *v.* Hooper, 32 Minn. 158, 20 N. W. 124; Vail *v.* Male, 37 N. J. Eq. 521, where a decree of the orphans' court discharging an executor on his own application was reversed because it did not appear that any notice was given nor that for any reason it was deemed proper by the orphans' court to dispense with notice.

Giving of proper notice presumed.— Macey *v.* Stark, 116 Mo. 481, 21 S. W. 1088.

81. See Balch *v.* Hooper, 32 Minn. 158, 20 N. W. 124.

Order amounting to acceptance.— See Haynes *v.* Meeks, 10 Cal. 110, 70 Am. Dec. 703.

82. See Balch *v.* Hooper, 32 Minn. 158, 20 N. W. 124.

83. Upton *v.* Dennis, 133 Mich. 238, 94 N. W. 728; Balch *v.* Hooper, 32 Minn. 158, 20 N. W. 124. See *infra*, II, N, 11, f.

Right of resigning executor to realize on assets.— Where an executor who had deposited bonds with a bank resigned, and a decree was entered charging him with the assets in his possession, including the bonds, and providing that he should be discharged on payment of the money, it was held that, although the bonds would remain assets of the estate until payment of the decree, the resigning executor could recover them from the bank, since he was entitled to realize on them in order to pay the decree, and since his successor could not be entitled to both the bonds and the money. Van Buren *v.* Cooperstown First Nat. Bank, 53 N. Y. App. Div. 80, 65 N. Y. Suppl. 703 [*affirmed* in 169 N. Y. 610, 62 N. E. 1101].

Administration de bonis non.— Where an executrix, who was residuary legatee, obtained her discharge without filing or publishing notice of the hearing of her application, and no notice thereof was given to a legatee whose legacy the executrix had failed to pay, such discharge was no bar to the legatee's right to the appointment of an administrator *de bonis non*. Cole *v.* Shaw, (Mich. 1903) 96 N. W. 573.

A decree against an administrator who has been discharged by a judgment of the court of ordinary and a successor appointed during the pendency of the cause is a nullity so far as the estate is concerned. Groce *v.* Field, 13 Ga. 24.

resignation, nor can he thereby escape personal liability for official acts and contracts in his own name.[84]

d. Vacation of Order. An order dismissing an administrator on his own application may be vacated by the court where it has been procured by the fraud of the parties or was irregularly or improvidently passed.[85]

e. Collateral Attack. An order accepting the resignation of an executor or administrator cannot be collaterally attacked.[86]

10. Forfeiture of Office. It has been held that an executor forfeited his trust by joining the Confederate army,[87] and also that he became *functus officio* by refusing to take the oath of allegiance and going beyond the jurisdiction of the proper authorities.[88] But the office of an administrator is not forfeited by the mere omission to file an account.[89]

11. Revocation of Letters — a. Power to Revoke. The probate court has always exercised a plenary jurisdiction in revoking or vacating its own decrees improperly rendered, and even after the time for an appeal has expired letters testamentary or of administration which have been issued illegally or without jurisdiction may be revoked.[90]

b. Distinction Between Revocation and Removal. Strictly speaking a revocation of letters testamentary or of administration is proper when it is made to appear that for some reason the letters should not have been issued or were improperly issued and were thus either void or voidable *ab initio*,[91] while removal is proper where the letters were perfectly valid when issued, but some circumstances arising since the issuance of the letters render it improper or unadvisable to continue the person to whom they were issued in office any longer.[92] As a matter of fact, however, this distinction is not observed to any great extent,[93] and many instances may be found in the reports where letters have been

84. Grimball *v.* Mastin, 77 Ala. 553; Tomkies *v.* Reynolds, 17 Ala. 109; Starke *v.* Keenan, 5 Ala. 590; Thomason *v.* Blackwell, 5 Stew. & P. (Ala.) 181; Gadsden *v.* Jones, 1 Fla. 332. See also Driver *v.* Riddle, 8 Port. (Ala.) 343.

85. Collier *v.* Cross, 20 Ga. 1.

Who may oppose vacation.— A person who had been sued by an administrator has not such an interest in the settlement of the estate as will authorize him to resist an application made to vacate an order discharging the administrator. Edney *v.* Baum, 59 Nebr. 147, 80 N. W. 502.

86. Luco *v.* Commercial Bank, 70 Cal. 339, 11 Pac. 650; Trumble *v.* Williams, 18 Nebr. 144, 24 N. W. 716.

87. Gilbert *v.* Hebert, 28 La. Ann. 429; Hebert *v.* Jackson, 28 La. Ann. 377.

88. Vogel's Succession, 20 La. Ann. 81; Poindexter's Succession, 19 La. Ann. 22.

89. McCleland *v.* Bideman, 5 La. Ann. 563.

90. *Massachusetts.*— Waters *v.* Stickney, 12 Allen 1, 90 Am. Dec. 122.

Missouri.— Skelly *v.* Veerkamp, 30 Mo. App. 49.

New Hampshire.— Morgan *v.* Dodge, 44 N. H. 255, 82 Am. Dec. 213.

New York.— Kerr *v.* Kerr, 41 N. Y. 272; *In re* Wood, 8 N. Y. Suppl. 884; Barber *v.* Converse, 1 Redf. Surr. 330.

Texas.— Vance *v.* Upson, 64 Tex. 266.

Statutory authority not necessary.— McCabe *v.* Lewis, 76 Mo. 296.

Pending an appeal the probate court should not revoke its own letters and make an inconsistent appointment. Gause's Estate, 1 Chest. Co. Rep. (Pa.) 105.

Letters should not be revoked except for sufficient cause. Brubaker's Appeal, 98 Pa. St. 21.

This power does not affect the conclusiveness of the decree of a court of probate in any other court nor in any way impair the probate jurisdiction, but it renders that jurisdiction more complete and effectual so as to entitle it better to the confidence of other courts. Waters *v.* Stickney, 12 Allen (Mass.) 1, 90 Am. Dec. 122.

91. Waters *v.* Stickney, 12 Allen (Mass.) 1, 90 Am. Dec. 122; Prosser *v.* Wagner, 1 C. B. N. S. 289, 26 L. J. C. P. 81, 5 Wkly. Rep. 146, 87 E. C. L. 289. See also Curtis *v.* Williams, 33 Ala. 570, holding that statutory provisions specifying certain causes for which an administrator may be removed do not apply to a case where letters were granted prematurely to a person not primarily entitled thereto or destroy the inherent right of the court to revoke letters improvidently granted.

92. See *infra*, II, N, 12, b.

93. See *In re* Rathgeb, 125 Cal. 302, 57 Pac. 1010; *In re* Kelley, 122 Cal. 379, 55 Pac. 136; Rumrill *v.* St. Albans First Nat. Bank, 28 Minn. 202, 9 N. W. 731; Matter of Jacob, 5 N. Y. App. Div. 508, 38 N. Y. Suppl. 1083 (where the court held that certain misconduct of executors was sufficient to call for their "removal" and ordered that a motion to "revoke" the letters testamentary should be granted); People *v.* Hart-

"revoked" when, according to the distinction noted, removal would have been proper.[94]

c. Grounds For Revocation. Letters testamentary or of administration are properly revoked whenever it is made to appear that they were irregularly or improperly granted,[95] and, even though the grant of letters may be void, revocation may still be proper before a new appointment is made, in order to prevent abuses and preserve order in the record.[96] Revocation is proper when it is made to appear that the supposed decedent was living at the time the letters were issued,[97] that his last residence or the *situs* of his property conferred the whole jurisdiction elsewhere than in the court by which the letters were issued,[98] that the letters were procured by fraud[99] or a false statement or suggestion as to a material fact,[1] that the issuance of letters was premature,[2] improvident,[3] or without authority of law,[4] that letters of administration were issued without regard

man, 2 Sweeny (N. Y.) 576; Wilson *v.* Hoss, 3 Humphr. (Tenn.) 142.

94. Letters have been "revoked" because of the representative's abandonment of his home and business and enlistment in the army (Berry *v.* Bellows, 30 Ark. 198), embezzlement and breach of trust (*In re* Walsh, Myr. Prob. (Cal.) 251), improvidence and drunken habits (*In re* Connors, 110 Cal. 408, 42 Pac. 906; Harrison *v.* Clark, 87 N. Y. 572; Emerson *v.* Bowers, 14 N. Y. 449), or insanity (see Matter of Taggart, 1 Ashm. (Pa.) 321), and because of a failure to account (*In re* Stow, Myr. Prob. (Cal.) 97; Biddison *v.* Mosely, 57 Md. 89; Jones *v.* Jones, 41 Md. 354). A power to revoke for failure to file an inventory within the prescribed time has also been recognized. Graber's Estate, 111 Cal. 432, 44 Pac. 165, holding revocation discretionary with the court under such circumstances. See also *infra*, notes 16, 17.

95. *Massachusetts.*—Waters *v.* Stickney, 12 Allen 1, 90 Am. Dec. 122.

Missouri.— Skelly *v.* Veerkamp, 30 Mo. App. 49.

New Hampshire.— Morgan *v.* Dodge, 44 N. H. 255, 82 Am. Dec. 213; Kittredge *v.* Folsom, 8 N. H. 98.

North Carolina.— Ritchie *v.* McAuslin, 2 N. C. 220.

England.— Prosser *v.* Wagner, 1 C. B. N. S. 289, 26 L. J. C. P. 81, 5 Wkly. Rep. 146, 87 E. C. L. 289; Packman's Case, 6 Coke 18*b*, Cro. Eliz. 459; Blackborough *v.* Davies, 1 Ld. Raym. 684, 1 Salk. 38; Semine *v.* Semine, 2 Lev. 90; Wilson *v.* Pateman, Moore 396.

See 22 Cent. Dig. tit. "Executors and Administrators," § 191.

The fact that an administrator is accountable as trustee for the fund upon which he is required to administer furnishes no sufficient cause for revoking letters granted him before he commits any default in the course of the administration. Ehlen *v.* Ehlen, 64 Md. 360, 1 Atl. 880.

96. Pruett *v.* Pruett, 131 Ala. 578, 32 So. 638, holding that it is the duty of the probate court to revoke void letters. See also Gasque *v.* Moody, 12 Sm. & M. (Miss.) 153; Morgan *v.* Dodge, 44 N. H. 255, 82 Am. Dec. 213. But *compare* Caperton *v.* Ballard, 4 W. Va. 420, holding that a grant of administration void for want of jurisdiction need not be set aside in order to give effect to a grant by a competent tribunal.

97. Duncan *v.* Stuart, 25 Ala. 408, 60 Am. Dec. 527; *In re* Napier, 1 Phillim. 83. See *supra*, I, J, 3, a.

98. Holyoke *v.* Haskins, 5 Pick. (Mass.) 20, 16 Am. Dec. 372; Cutts *v.* Haskins, 9 Mass. 543; Johnson *v.* Corpenning, 39 N. C. 216, 44 Am. Dec. 106; Wilson *v.* Frazier, 2 Humphr. (Tenn.) 30. See *supra*, I, J, 4, a, c, d.

Analogous cases in England would be the grant of letters testamentary or of administration by a bishop where there were *bona notabilia* or by an archbishop where there were none. Allens *v.* Andrews, Cro. Eliz. 283; Blackborough *v.* Davies, 1 Ld. Raym. 684, 1 Salk. 38.

99. McArthur *v.* Matthewson, 67 Ga. 134.

1. Lutz *v.* Mahan, 80 Md. 233, 30 Atl. 645; Corn's Estate, 9 N. Y. Civ. Proc. 243, 3 How. Pr. N. S. (N. Y.) 357, 4 Dem. Surr. (N. Y.) 394.

2. *Alabama.*— Ward *v.* Cameron, 37 Ala. 691.

Indiana.— Mills *v.* Carter, 8 Blackf. 203.

Maryland.— Owings *v.* Bates, 9 Gill 463.

Missouri.— Skelly *v.* Veerkamp, 30 Mo. App. 49.

Ohio.— Todhunter *v.* Stewart, 39 Ohio St. 181.

See 22 Cent. Dig. tit. "Executors and Administrators," § 194.

Where the person entitled fails to apply within the time prescribed by law for a grant of letters, a grant made before the expiration of such time to another person, although premature, will not be revoked. Sowell *v.* Sowell, 41 Ala. 359.

3. *Alabama.*— Curtis *v.* Williams, 33 Ala. 570.

Maryland.— Owings *v.* Bates, 9 Gill 463.

Massachusetts.— Waters *v.* Stickney, 12 Allen 1, 90 Am. Dec. 122.

Tennessee.— Wilson *v.* Hoss, 3 Humphr. 142.

England.— Prosser *v.* Wagner, 1 C. B. N. S. 289, 26 L. J. C. P. 81, 5 Wkly. Rep. 146, 87 E. C. L. 289.

4. McCabe *v.* Lewis, 76 Mo. 296.

to the legal priorities[5] without a renunciation of the person primarily entitled[6] or upon a renunciation executed by mistake,[7] that a person having a right to intervene was not cited or cognizant of the proceedings,[8] that the person appointed does not bear the relationship to the decedent which was made the basis of the grant of administration,[9] that administration with the will annexed was granted regardless of the executor's rights,[10] that an administrator *de bonis non* has been appointed while there was an executor acting with powers not limited by the will,[11] that letters of general administration have been issued when letters *de bonis non* were proper,[12] that letters have been issued to a disqualified person[13] or one having no right whatever to letters,[14] that no security had been given or that which was given is insufficient,[15] that the representative has since

5. *Alabama.*— Ward *v.* Cameron, 37 Ala. 691.

California.— Li Po Tai's Estate, 108 Cal. 484, 41 Pac. 486, 39 Pac. 30 (administration with will annexed); *In re* Pacheco, 23 Cal. 476.

Indiana.— Mills *v.* Carter, 8 Blackf. 203.

Massachusetts.— Stebbins *v.* Lathrop, 4 Pick. 33.

Missouri.— Skelly *v.* Veerkamp, 30 Mo. App. 49.

New Hampshire.— Munsey *v.* Webster, 24 N. H. 126.

New Jersey.— Gans *v.* Dabergott, 40 N. J. Eq. 184. See also Rinehart *v.* Rinehart, 27 N. J. Eq. 475.

New York.— See Matter of Tyer, 41 Misc. 378, 84 N. Y. Suppl. 934.

Ohio.— Todhunter *v.* Stewart, 39 Ohio St. 181.

Pennsylvania.— Williams' Appeal, 7 Pa. St. 259; *In re* Saulnier, 3 Whart. 442; Comfort's Estate, 12 Pa. Co. Ct. 571; Jones' Appeal, 10 Wkly. Notes Cas. 249; McCaffrey's Estate, 4 Phila. 194.

South Carolina.— Rollin *v.* Whipper, 17 S. C. 32; Thompson *v.* Hucket, 2 Hill 347.

Tennessee.— Wilson *v.* Hoss, 3 Humphr. 142.

England.— Copeland *v.* Simister, [1893] P. 16, 62 L. J. P. & Adm. 38, 68 L. T. Rep. N. S. 257, 1 Reports 469, 41 Wkly. Rep. 269; Anonymous, Het. 48; Price *v.* Parker, 1 Lev. 157

See 22 Cent. Dig. tit. "Executors and Administrators," § 195; and *supra*, II, B, 2.

Maladministration of appointee not necessary.— Thompson *v.* Hucket, 2 Hill (S. C.) 347.

Where there has been selection from a class primarily entitled the letters issued ought not to be revoked without good cause. Brubaker's Appeal, 98 Pa. St. 21.

Grant to another at instance of person entitled.— Where at the instance and request of the person entitled to administration letters have been granted to another person who has nearly completed the settlement of the estate, the letters will not be revoked at the instance of the person entitled. Pollard *v.* Mohler, 55 Md. 284, 290, where the court said: "To revoke letters of administration under such circumstances, would be a fraud upon the rights of an administrator."

6. Gans *v.* Dabergott, 40 N. J. Eq. 184.

7. Thomas *v.* Knighton, 23 Md. 318, 87 Am. Dec. 571.

8. Elkins *v.* Canfield, 5 Mart. N. S. (La.) 505; Gans *v.* Dabergott, 40 N. J. Eq. 184; Matter of Tyer, 41 Misc. (N. Y.) 378, 84 N. Y. Suppl. 934; Proctor *v.* Wanmaker, 1 Barb. Ch. (N. Y.) 302; Young *v.* Holloway, [1895] P. 87, 64 L. J. P. & Adm. 55, 72 L. T. Rep. N. S. 118, 11 Reports 596, 43 Wkly. Rep. 429; Harrison *v.* Mitchell, Fitzg. 303; Ravenscroft *v.* Ravenscroft, 1 Lev. 305; Harrison *v.* Weldon, 2 Str. 911. See *supra*, II, H, 4.

9. Kerr *v.* Kerr, 41 N. Y. 272; Stanley *v.* Stanley, 4 Dem. Surr. (N. Y.) 416.

10. Thomas *v.* Knighton, 23 Md. 318; Patton's Appeal, 31 Pa. St. 465; Baldwin *v.* Buford, 4 Yerg. (Tenn.) 16.

11. Matthews *v.* Douthitt, 27 Ala. 273, 62 Am. Dec. 765; Creath *v.* Brent, 3 Dana (Ky.) 129; Springs *v.* Erwin, 28 N. C. 27; Griffith *v.* Frazier, 8 Cranch (U. S.) 9, 3 L. ed. 471.

12. Gasque *v.* Moody, 12 Sm. & M. (Miss.) 153. But see *supra*, II, D, 1.

13. Carow *v.* Mowatt, 2 Edw. (N. Y.) 57. But see Sterling's Estate, 9 N. Y. Civ. Proc. 448, holding that where letters testamentary have been issued to a non-resident they cannot be revoked because of his continued non-residence.

14. Curtis *v.* Williams, 33 Ala. 570; Carew's Case, And. 303; Harrison *v.* Mitchell, Fitzg. 303.

15. Wingate *v.* Wooten, 5 Sm. & M. (Miss.) 245; *In re* O'Brien, 19 N. Y. Suppl. 541, Pow. Surr. (N. Y.) 41; Cottrell *v.* Brock, 1 Bradf. Surr. (N. Y.) 148; Laird *v.* Dick, 14 Fed. Cas. No. 7,990, 4 Cranch C. C. 666, holding that letters testamentary, granted without security, agreeably with the will of the testator, may be revoked by the orphans' court upon the petition of creditors.

The administrator should be given an opportunity to perfect his bond or give further security before the letters are revoked on the ground that good security was not required or that the security has afterward become insufficient. Collier *v.* Kilcrease, 27 Ark. 10; Wingate *v.* Wooten, 5 Sm. & M. (Miss.) 245.

Letters cannot be revoked pending an appeal from an order requiring further security, on account of the administrator's neglect to comply. Vreedenburgh *v.* Calf, 9 Paige (N. Y.) 128.

his appointment removed from the state,[16] that the administrator has not given notice to creditors as required by statute,[17] or that the judge who granted the letters was disqualified by interest.[18] Where the estate has not suffered and is not likely to suffer any evil results from the executor's imperfect knowledge of the English language, his letters will not be revoked for that cause.[19]

d. Proceedings — (1) *JURISDICTION.* The court granting the letters is as a general rule the proper one to revoke them, and proceedings for revocation (appeal not having been resorted to) should be commenced in that court.[20] This

16. Haynes *v.* Semmes, 39 Ark. 399; McCreary *v.* Taylor, 38 Ark. 393; *In re* Kelley, 122 Cal. 379, 55 Pac. 136 (holding that while the phrase "has permanently removed from the state" in the California statute may more properly refer to a resident executor who has permanently removed from the state, the reason for revoking the letters in such case applies equally to a non-resident executor who comes to the state to receive his appointment and then permanently withdraws from the state and remains away); Walker *v.* Torrance, 12 Ga. 604; Sohn's Estate, 1 N. Y. Civ. Proc. 373.

Removal does not ipso facto vacate letters. *Alabama.*— Hooper *v.* Scarborough, 57 Ala. 510.

Arkansas.— McCreary *v.* Taylor, 38 Ark. 393.

Georgia.—Brown *v.* Strickland, 28 Ga. 387; Walker *v.* Torrance, 12 Ga. 604.

Kansas.— Missouri, etc., R. Co. *v.* McWherter, 59 Kan. 345, 53 Pac. 135.

Missouri.— Chouteau *v.* Burlando, 20 Mo. 482.

United States.— See Rice *v.* Houston, 13 Wall. 66, 20 L. ed. 484; Edmonds *v.* Crenshaw, 14 Pet. 166, 10 L. ed. 402.

17. See Atwood's Estate, 127 Cal. 427, 59 Pac. 770, holding, however, that letters granted to a widow could not be revoked for this reason when the value of the estate was less than fifteen hundred dollars, because of the statutory provision that when the estate did not exceed this amount the whole should be assigned to the widow and there should be no further proceedings in the administration unless further estate was discovered. See *infra*, IX, D, 5.

18. Koger *v.* Franklin, 79 Ala. 505; Echols *v.* Barrett, 6 Ga. 443; Sigourney *v.* Sibley, 21 Pick. (Mass.) 101, 32 Am. Dec. 248, 22 Pick. (Mass.) 507, 33 Am. Dec. 762; Coffin *v.* Cottle, 9 Pick. (Mass.) 287; *In re* Cottle, 5 Pick. (Mass.) 480. See also Whitworth *v.* Oliver, 39 Ala. 286.

19. Hassey *v.* Keller, 1 Dem. Surr. (N. Y.) 577.

20. *Alabama.*— Pruett *v.* Pruett, 131 Ala. 578, 32 So. 638.

Illinois.— Marston *v.* Wilcox, 2 Ill. 60.

Louisiana.—Graham *v.* Gibson, 14 La. 146; McCombs *v.* Dunbar, 1 La. 18.

Maryland.— Raborg *v.* Hammond, 2 Harr. & G. 42.

Mississippi.— Gasque *v.* Moody, 12 Sm. & M. 153.

New Jersey.— Rinehart *v.* Rinehart, 27 N. J. Eq. 475, holding that the orphans' court cannot revoke letters granted by the surrogate except when his proceedings are brought before it by appeal, and in certain cases provided by statute.

New York.— Corn's Estate, 9 N. Y. Civ. Proc. 243, 3 How. Pr. N. S. 357, 4 Dem. Surr. 394; Perley *v.* Sands, 3 Edw. 325; Hood *v.* Hood, 2 Dem. Surr. 583.

North Carolina.— Ledbetter *v.* Lofton, 5 N. C. 224.

Oregon.— Henkle *v.* Slate, 40 Oreg. 349, 68 Pac. 399.

Pennsylvania.— *In re* McCaffrey, 38 Pa. St. 331; Matter of Taggart, 1 Ashm. 321.

South Carolina.— Thompson *v.* Hucket, 2 Hill 347.

Tennessee.— Wilson *v.* Frazier, 2 Humphr. 30.

Virginia.— Hutcheson *v.* Priddy, 12 Gratt. 85.

Canada.— McPherson *v.* Irvine, 26 Ont. 438, holding that the high court of justice for Ontario has no jurisdiction to revoke the grant of letters by a surrogate court.

See 22 Cent. Dig. tit. "Executors and Administrators," § 202.

Court may revoke and grant letters elsewhere during same term. Moore *v.* Moore, 12 N. C. 352.

Revocation of letters issued pendente lite before contest terminated.— Where suit is brought in a circuit court to contest the validity of a will, the jurisdiction of the court is not original, but derivative, the matter being transferred to that tribunal from the probate court as if on appeal; and hence on the institution of such suit the probate court loses jurisdiction to revoke letters of administration issued *pendente lite*, and cannot regain such jurisdiction until the result of the will contest had been officially certified to it from the appellate tribunal; and an order revoking such letters, made by the probate court in the interim, is *coram non judice* and void. State *v.* Guinotte, 156 Mo. 513, 57 S. W. 281, 50 L. R. A. 787.

The district court has jurisdiction of a suit by a surviving wife, as guardian of her children, to revoke an order granting letters of administration on the estate of her deceased husband, to vacate a judgment allowing a claim against the estate, and to enjoin the administrator from acting as such. Ramirez *v.* McClane, 50 Tex. 598.

A court of equity has jurisdiction to set aside a grant of letters of administration by the ordinary. McArthur *v.* Matthewson, 67 Ga. 134; Wallace *v.* Walker, 37 Ga. 265, 92 Am. Dec. 70.

power is not affected by the pendency of proceedings for relief elsewhere,[21] or by the fact that a court of equity has assumed jurisdiction of the administration of the estate.[22] Where the court of probate is a court of general jurisdiction every presumption is in favor of the jurisdiction until the contrary appears,[23] but where it is a court of limited jurisdiction its jurisdiction to revoke letters testamentary will not be presumed but jurisdictional facts must be averred and proved by the party relying upon the decree of revocation.[24]

(II) *TIME FOR APPLICATION.* It would seem on principle that where a person entitled to priority in administration must assert such priority within a specified time after the death of the decedent or lose his right, the same limitation of time would apply to an application by him for the revocation of letters granted to another person, on the ground that they were prematurely granted to a person not entitled to priority.[25] But it has been held that the application to revoke letters of administration can be made within the same time after the applicant has knowledge that letters have been granted as that provided by law within which an original application for letters is to be made,[26] and also that a motion to set aside the appointment of an administrator, filed within a reasonable time after the appointment, should be considered when made by one not having had notice of the appointment.[27]

(III) *WHO MAY APPLY.* While a court of probate jurisdiction may upon its own mere motion institute and carry on proceedings to revoke letters testamentary,[28] the revocation of letters testamentary or of administration can be asked for only by those who are interested in the estate.[29] A person who is entitled to administration in preference to the one who has been appointed has always the right to procure the revocation of the appointment and the issuance of letters to himself,[30] unless his right to do this has been waived or lost by a failure to apply for letters within the time prescribed by law,[31] but revocation on the ground that priorities were not observed can be asked only by one having a right prior to the appointee.[32] Persons entitled to citation or notice in proceed-

21. Hood *v.* Hood, 2 Dem. Surr. (N. Y.) 583.

22. Pruett *v.* Pruett, 131 Ala. 578, 32 So. 638.

23. Langmade *v.* Hamilton, 89 Ga. 441, 15 S. E. 535.

24. People *v.* Hartman, 2 Sweeny (N. Y.) 576.

25. See Sowell *v.* Sowell, 41 Ala. 359; Curtis *v.* Williams, 33 Ala. 570.

26. Stocksdale *v.* Conaway, 14 Md. 99, 74 Am. Dec. 515; Edwards *v.* Bruce, 8 Md. 387 [*followed* in Clagett *v.* Hawkins, 11 Md. 381], holding that an application to revoke can be made only within such time.

27. *In re* McCreight, 9 Ohio S. & C. Pl. Dec. 450, 6 Ohio N. P. 479.

28. Gasque *v.* Moody, 12 Sm. & M. (Miss.) 153; Mecklenburg County Ct. *v.* Bissell, 47 N. C. 387. See also Jeffersonville R. Co. *v.* Swayne, 26 Ind. 477.

Revocation may be upon suggestion of amicus curiæ. Gasque *v.* Moody, 12 Sm. & M. (Miss.) 153. See also Jeffersonville R. Co. *v.* Swayne, 26 Ind. 477.

29. *In re* Atwood, 127 Cal. 427, 59 Pac. 770; Woodruff *v.* Woodruff, 3 Dem. Surr. (N. Y.) 505.

Assignment of interest — Allegation of fraud. — A widow who has assigned her interest in the estate of the decedent cannot maintain proceedings for the revocation of letters of administration, notwithstanding an allegation that the assignment was procured by fraud, for the question of fraud cannot be tried by the surrogate's court, and until the instrument is set aside for fraud the widow is not a person interested or even contingently interested. Woodruff *v.* Woodruff, 3 Dem. Surr. (N. Y.) 505.

A debtor cannot intervene as one interested in mere irregularities of appointment. Drexel *v.* Berney, 1 Dem. Surr. (N. Y.) 163.

30. Li Po Tai's Estate, 108 Cal. 484, 41 Pac. 486, 39 Pac. 30 (so holding in a case of a grant of administration with the will annexed); *In re* Pacheco, 23 Cal. 476; Gans *v.* Dabergott, 40 N. J. Eq. 184; Rollins *v.* Whipper, 17 S. C. 32; Wilson *v.* Hoss, 3 Humphr. (Tenn.) 142.

One who was incompetent when letters were issued to another cannot subsequently obtain a revocation of such letters. Sharpe's Appeal, 87 Pa. St. 163.

31. *Alabama.*— Sowell *v.* Sowell, 41 Ala. 359.

California.— *In re* Keane, 56 Cal. 407.

Maryland.— Ehlen *v.* Ehlen, 64 Md. 360, 1 Atl. 880.

North Carolina.— Stoker *v.* Kendall, 44 N. C. 242.

Texas.— Cole *v.* Dial, 12 Tex. 100.

32. *Alabama.*— Ward *v.* Cameron, 37 Ala. 691.

California.— *In re* Carr, 25 Cal. 585.

Illinois.— Myatt *v.* Myatt, 44 Ill. 473.

ings for letters testamentary or of administration may ask revocation on the ground that letters were issued without these formalities or prematurely as to them. And the same holds true where a will is admitted to solemn probate in disregard of statute formalities.[33] A creditor of the estate is sometimes given the right to ask for the revocation of letters.[34] It has been asserted that a corporation, against whom an action is being prosecuted by an administrator for injuries causing the death of the intestate, has a right to petition the court for a revocation of the letters of administration.[35]

(IV) *PARTIES.* The letters cannot be revoked without making the executor or administrator a party to the proceedings.[36]

(V) *NOTICE. Ex parte* proceedings for the revocation of letters testamentary or of administration are improper,[37] the representative being entitled to citation and notice.[38] But his appearance may be a waiver of citation.[39]

(VI) *SUSPENSION.* Under a statute providing that the court may suspend the

Louisiana.— Saloy's Succession, 44 La. Ann. 433, 10 So. 872.

Mississippi.— Hardaway *v.* Parham, 27 Miss. 103; Edmundson *v.* Roberts, 1 How. 322.

New York.— Kelly *v.* West, 80 N. Y. 139; Quin *v.* Hill, 6 Dem. Surr. 39, 19 N. Y. St. 830; Stapler *v.* Hoffman, 1 Dem. Surr. (N. Y.) 63.

North Carolina.— Mecklenburg County Ct. *v.* Bissell, 47 N. C. 387.

South Carolina.— De Lane's Case, 2 Brev. 167.

Vermont.—Woodward *v.* Spear, 10 Vt. 420.

See 22 Cent. Dig. tit. "Executors and Administrators," § 203.

The nominee of decedent's wife cannot obtain the revocation of letters issued to decedent's brother. *In re* Shiels, 120 Cal. 347, 52 Pac. 808.

33. *Georgia.*— Wallace *v.* Walker, 37 Ga. 265, 92 Am. Dec. 70.

Massachusetts.— Waters *v.* Stickney, 12 Allen 1, 90 Am. Dec. 122.

New Hampshire.— Morgan *v.* Dodge, 44 N. H. 255, 82 Am. Dec. 213.

New Jersey.— *In re* Lawrence, 7 N. J. Eq. 215.

New York.— Kerr *v.* Kerr, 41 N. Y. 272.

Pennsylvania.—*In re* McCaffrey, 38 Pa. St. 331.

34. Gillingham's Estate, 10 N. Y. St. 864. See also Curtis *v.* Burt, 34 Ala. 729; Matter of Stern, 9 N. Y. Suppl. 445, 2 Connoly Surr. (N. Y.) 204.

A right to administer given to a creditor by statute necessarily includes the right to ask for the revocation of letters prematurely and improvidently issued to another. Curtis *v.* Williams, 33 Ala. 570.

Court must be satisfied that petitioner is a creditor. *In re* McCreight, 9 Ohio S. & C. Pl. Dec. 450, 6 Ohio N. P. 479.

Surrogate has jurisdiction to determine whether petitioner is a creditor. Gillingham's Estate, 10 N. Y. St. 864.

Who is a creditor of the estate.— One who sold goods to a firm composed of a surviving partner and the executors of a deceased partner, under whose will the executors could devote to the firm business only so much of the estate as was invested in the firm at testator's death, could not apply for revocation of the letters, as he could not sue the executors as such on his claim, but could subject thereto only the particular fund embarked in the business. Matter of Stern, 9 N. Y. Suppl. 445, 2 Connoly Surr. (N. Y.) 204.

35. Jeffersonville R. Co. *v.* Swayne, 26 Ind. 477; Mallory *v.* Burlington, etc., R. Co., 53 Kan. 557, 36 Pac. 1059. *Contra*, Kent *v.* Pennsylvania R. Co., 6 Mackey (D. C.) 335; Missouri Pac. R. Co. *v.* Jay, 53 Nebr. 747, 74 N. W. 259; Missouri Pac. R. Co. *v.* Bradley, 51 Nebr. 596, 71 N. W. 283.

36. Watson *v.* Mayrant, 1 Rich. Eq. (S. C.) 449.

37. Bieber's Appeal, 11 Pa. St. 157.

38. *California.*— Schroeder *v.* San Mateo County Super. Ct., 70 Cal. 343, 11 Pac. 651.

Mississippi.— Gasque *v.* Moody, 12 Sm. & M. 153; Wingate *v.* Wooten, 5 Sm. & M. 245.

New York.— People *v.* Hartman, 2 Sweeny 576.

Pennsylvania.— Schwilke's Appeal, 100 Pa. St. 628; Hostetter's Appeal, 6 Watts 244.

Tennessee.— Wilson *v.* Hoss, 3 Humphr. 142.

Virginia.— Hutcheson *v.* Priddy, 12 Gratt. 85.

See 22 Cent. Dig. tit. "Executors and Administrators," § 207.

Where the representative is a fugitive from justice his letters may be revoked by the surrogate upon petition of a creditor without issuing a citation. Sutherland *v.* St. Lawrence County, 42 Misc. (N. Y.) 38, 85 N. Y. Suppl. 696.

When notice of order of revocation unnecessary.— Under a statute providing that if sufficient security is not given within the time fixed, the right of an administrator to the administration shall cease, an administratrix who fails to comply with an order requiring her to furnish additional security, and obtains no further time, is not entitled to notice of an order revoking her letters after the limitation has expired. Barrett *v.* Placer County Super. Ct., (Cal. 1897) 47 Pac. 592.

39. Wilson *v.* Hoss, 3 Humphr. (Tenn.) 142. But see Briggs *v.* Westerly Probate Ct., 23 R. I. 125, 50 Atl. 335.

powers of an executor for various causes, and upon so doing must cite the executor to appear and show cause why his letters should not be revoked, it has been held that suspension is not a necessary step toward the revocation of the letters.[40]

(VII) *PLEADING.* It is necessary in order to a revocation of letters that there should be a petition or complaint,[41] which must state reasons sufficient to warrant such action on the part of the court.[42]

(VIII) *TRIAL OR HEARING.* Letters can be revoked only for cause shown after due hearing.[43] On the trial the court has power to pass upon all matters brought in issue and properly involved in the questions before it for decision;[44] but it cannot determine matters not involved in the issue,[45] or not affecting the right to letters.[46]

(IX) *EVIDENCE.* On an application for the revocation of letters the facts necessary to induce the court to act should be made to appear by proof,[47] and a mere statement of such facts in the petition is not to be regarded as evidence thereof.[48]

(X) *ORDER OR DECREE.* As a rule the order of revocation is not required to be in any particular form, but it is sufficient if it shows a purpose that the powers of the representative shall cease.[49] It is proper to incorporate in a decree of

40. *In re* Kelley, 122 Cal. 379, 55 Pac. 136.

41. Briggs *v.* Westerly Probate Ct., 23 R. I. 125, 50 Atl. 335.

One statement of charges sufficient.—When charges sufficient to warrant removal have been formulated in a sworn statement on the basis of which the executor has been suspended and cited to show cause why he should not be removed, there is no reason why they should be afterward reiterated in a separate document. *In re* Rathgeb, 125 Cal. 202, 52 Pac. 1010.

42. *In re* Craigie, 24 Mont. 37, 60 Pac. 495.

Sufficiency.— A complaint alleging generally that an administrator failed to administer an estate according to law, and to inventory personalty of the estate, and to wind up the estate within the time prescribed by statute, is sufficient after verdict to support a judgment revoking the letters. Lewellyn *v.* Lewellyn, 87 Mo. App. 9. But a petition alleging simply that executors are "men of inconsiderable means not themselves transacting any business or having any place of business" is not sufficient to warrant revocation on the ground that the executors' circumstances are such that they do not afford adequate security for the due administration of the estate. Sterling's Estate, 9 N. Y. Civ. Proc. 448. It is not sufficient to allege that the decedent at the time of his death was not a resident of the county in which the administration was granted, for this allegation would not show affirmatively that the ordinary of that county had no jurisdiction, inasmuch as the decedent may have been a non-resident of the state, and may have left property or effects in the county in which administration was granted, so as to invest the ordinary of that county with jurisdiction. Langmade *v.* Hamilton, 89 Ga. 441, 15 S. E. 535.

43. Schwilke's Appeal, 100 Pa. St. 628.

44. *In re* Hetherington, 25 N. Y. Wkly. Dig. 4, holding that on an application to revoke letters issued to a widow of the decedent, the surrogate can pass upon the validity of a former marriage of such widow, where the question affects the validity of her marriage with the decedent.

45. *In re* Neidig, 183 Pa. St. 492, 38 Atl. 1033, holding that where a petition to the register of wills prayed that letters of administration improvidently issued to R be revoked, and in his answer R denied that they were improvidently granted, and averred that those by whom he was nominated were the next of kin of the intestate and that petitioners were not such next of kin as were entitled to administer, it was the register's duty to revoke the letters as soon as it was shown that the persons who nominated R were not the next of kin, and that petitioners were, and it was error to refuse to do so because the next of kin were incompetent to administer.

46. *In re* King, 105 Iowa 320, 75 N. W. 187, holding that in proceedings to annul letters of administration granted without jurisdiction, the court has no power to pass on the validity of a settlement made by the administrator.

47. Collier *v.* Kilcrease, 27 Ark. 10; Hassey *v.* Keller, 1 Dem. Surr. (N. Y.) 577; Wilson *v.* Hoss, 3 Humphr. (Tenn.) 142. See also Hood *v.* Hood, 1 Dem. Surr. (N. Y.) 392.

48. Holland *v.* Ferris, 2 Bradf. Surr. (N. Y.) 334; Wilson *v.* Hoss, 3 Humphr. (Tenn.) 142.

49. Barrett *v.* Placer County Super. Ct., (Cal. 1897) 47 Pac. 592 (holding that when there has been a failure by an administratrix to comply with an order requiring her to give additional security an order "that the right of the administratrix to the administration of this estate cease" cuts off her powers and ousts her from office); Vosler *v.* Brock, 84 Mo. 574 (holding that where one of two executors removes from the state, and the court treats the other as the sole testamentary representative of the deceased the former is in effect discharged, although no formal entry of discharge is made); State *v.* Rucker, 59 Mo. 17 (holding that in the absence of any appeal from the final settlement of an ad-

revocation an order for the issuance of letters to the persons who are entitled thereto.[50]

(xi) *APPEAL.* An appeal will lie from a decree revoking letters testamentary or of administration,[51] but can be taken only by parties in interest, or as sometimes recited "aggrieved."[52] An appeal suspends the operation of the decree and leaves the executor or administrator in office as before.[53] On appeal the matter should be tried *de novo*.[54] Where the appeal was not seasonable or the court of review has not before it all the evidence upon which the revocation was based, or where it does not appear manifest that the probate court abused its discretion or disregarded its duty in the premises, an appellate court is disinclined to reverse the decree rendered below.[55] Where the appeal is dismissed on the sole ground that

ministrator made during the non-residence of his co-administrator, an order approving the settlement and completely ignoring the co-administrator has the force and effect of an order revoking his letters); Scott *v.* Burch, 6 Harr. & J. (Md.) 67 (holding that where counter security has been ordered and not given, an order of the court directing that the intestate's goods be delivered to the surety of the administrator divests and extinguishes the right of the administrator derived from the administration); McLaurin *v.* Thompson, Dudley (S. C.) 335 (holding that an order granting administration to another person without any other formality is a sufficient judgment of revocation of the authority of the first administrator).

Conditional order of revocation.— An order of the surrogate directing an executor to file a bond contained this provision: "If the said executor fail to execute and file said bond within twenty days . . . it is hereby ordered that the letters testamentary . . . be revoked and annulled." Before the expiration of the twenty days the executor perfected an appeal to the supreme court, and an application was subsequently made for an absolute decree revoking the letters testamentary on the ground that the twenty days had elapsed and no bond had been placed on file. The court refused to enter such order on the ground that if the first order was "a decree revoking letters" no further decree was necessary, while if it was not the appeal had operated as a stay. Halsey *v.* Halsey, 3 Dem. Surr. (N. Y.) 196.

Entry not showing revocation.—Acceptance by the probate court indorsed on the resignation of an administrator, and filed, there being no entry in the record of appointments of administrators, etc., and orders relating to the same, and nothing further being done, is not equivalent to an order of removal or revoking the letters. Rumrill *v.* St. Albans First Nat. Bank, 28 Minn. 202, 9 N. W. 731.

50. *In re* Neidig, 183 Pa. St. 492, 38 Atl. 1033.

51. Duncan *v.* Hawks, 18 La. 548; Mullanphy *v.* St. Louis County Ct., 6 Mo. 563; Schwilke's Appeal, 100 Pa. St. 628; Atkinson *v.* Christian, 3 Gratt. (Va.) 448.

Order refusing to revoke appealable.— Donaldson *v.* Lewis, 7 Mo. App. 403. *Contra, In re* Keane, 56 Cal. 407; Montgomery's Estate, 55 Cal. 210.

52. Missouri Pac. R. Co. *v.* Bennett, 58 Kan. 499, 49 Pac. 606 [*affirming* 5 Kan. App. 231, 47 Pac. 183]; Forney *v.* Shriner, 60 Md. 419; *In re* Henriques, 5 N. M. 169, 21 Pac. 80; Krummel's Estate, 2 Lanc. L. Rev. (Pa.) 247.

A corporation against which a right of action is claimed on behalf of the estate may suggest to the probate court the invalidity of the appointment of an executor or administrator, but it cannot appeal from the decision of the court refusing to revoke such appointment. Missouri Pac. R. Co. *v.* Bennett, 58 Kan. 499, 49 Pac. 606 [*affirming* 5 Kan. App. 231, 47 Pac. 183].

53. Biddison *v.* Story, 57 Md. 96; State *v.* Williams, 9 Gill (Md.) 172; Muirhead *v.* Muirhead, 8 Sm. & M. (Miss.) 211. *Contra,* Harney *v.* Scott, 28 Mo. 335.

Appeal from revocation of probate.—An appeal by an executor from an order revoking the probate of the will does not continue the powers of the executor pending the appeal, but the court may appoint a special administrator. Crozier's Estate, 65 Cal. 332, 4 Pac. 109; *In re* Marsh, (N. J. Prerog. 1903) 55 Atl. 299.

54. Collier *v.* Kilcrease, 27 Ark. 10; Fitzgerald *v.* Smith, (Tenn. Sup. 1904) 78 S. W. 1050.

R. I. Gen. Laws (1896), c. 248, § 7, authorizes the appellate court in probate matters to ignore any want of jurisdiction appearing on the face of the papers if the court from which the appeal was taken had jurisdiction in fact, and also authorizes the appellate court in any such matter to enter such decree as the justice of the case may require. Under this statute it has been held that where the municipal court of Providence revoked letters issued by it on the ground that the decedent was not a resident of Rhode Island and had no assets within the state at the time of death, and on the trial in the appellate court the jury found simply that the decedent was at the time of death possessed of personal estate in Rhode Island but the verdict did not show that the decedent left assets in the city of Providence, the appellate court might nevertheless reverse the decree of revocation if the evidence submitted to the jury established the fact that the decedent did leave personal estate in that city. Williams *v.* Ripley, 25 R. I. 510, 56 Atl. 777.

55. Mitchell *v.* Duncan, 94 Ala. 192, 10 So. 331; Alexander *v.* Nelson, 42 Ala. 462;

the appellant is not entitled to appeal the decree stands as if not appealed from.[56]

(xii) *Costs.* The imposition of costs in proceedings to revoke is a matter largely within the discretion of the court.[57]

e. Powers of Representative Pending Proceedings For Revocation. Under a statute providing that, pending proceedings for the revocation of probate, the executor must suspend all proceedings relating to the estate except for the recovery or preservation of property, the collection and payment of debts, and such other acts as he is expressly allowed to perform by an order of the surrogate, the mere fact that the executor, pending such proceedings, has withdrawn or proposes to withdraw from a savings bank money deposited by the testator, affords no warrant for the interposition of the surrogate to restrain him.[58]

f. Effect of Revocation. Where letters testamentary are revoked the appointment of the executor ceases to exist as completely as if he had never been named by the testator.[59] But all *bona fide* acts done previously by the legal representative in the course of administration remain valid and binding; while on the other hand the revocation of his letters does not shield him from liability for his previous official acts.[60] The representative whose letters have been revoked is entitled to be reimbursed for moneys which he has expended and services which he has rendered in good faith pursuant to his appointment.[61]

g. Issuance of New Letters. Upon the revocation of letters of administration the surrogate is authorized to grant new letters to other persons,[62] but if the estate has been settled or partly settled by the former incumbent the new letters should be *de bonis non*.[63]

12. Removal — a. In General. An executor or administrator is subject to the jurisdiction of the probate court and may be removed from his office whenever a

Delany *v.* Noble, 3 N. J. Eq. 559; *In re* O'Brien, 145 N. Y. 379, 40 N. E. 18; Wilkey's Appeal, 108 Pa. St. 567.

56. Cleveland *v.* Quilty, 128 Mass. 578.

57. *In re* Page, 107 N. Y. 266, 14 N. E. 193 (holding that where an application for the revocation of letters issued to the public administrator was refused by the surrogate and his order affirmed by the supreme court, but on appeal the court ordered the revocation of the letters, the costs should be paid out of the estate, as the decision in the lower courts afforded fair justification for the public administrator's conduct and his entire good faith was not questioned); *In re* O'Brien, 19 N. Y. Suppl. 541, Pow. Surr. (N. Y.) 41 (holding that under a statute providing that a proceeding to revoke letters of an executor may be dismissed if a bond be filed "upon such terms as to costs as justice requires," the executors will be adjudged to pay costs where they are largely the result of their unwillingness to furnish a bond).

58. Bray *v.* Smith, 1 Dem. Surr. (N. Y.) 168.

59. Matter of Dearing, 4 Dem. Surr. (N. Y.) 81, where the court refused to reinstate an executor whose letters had been revoked because of his insanity upon his being restored to sanity.

60. *Illinois.*— Meek *v.* Allison, 67 Ill. 46.

Mississippi.— Brown *v.* Hill, 27 Miss. 44.

Missouri.— Schwecke *v.* Mathias, 8 Mo. App. 569.

New Hampshire.— Kittredge *v.* Folsom, 8 N. H. 98.

New Jersey.— Smith *v.* Axtell, 1 N. J. Eq. 494.

Oregon.— Brown *v.* Brown, 7 Oreg. 285.

South Carolina.— Price *v.* Nesbit, 1 Hill Eq. 445.

See 22 Cent. Dig. tit. "Executors and Administrators," § 212.

Distribution with knowledge of will.—An administrator appointed on an affidavit alleging the intestacy of decedent, who, knowing of the existence of a paper purporting to be decedent's will, distributes the estate among the next of kin, cannot be said to have acted in good faith, within the meaning of the statute providing that the revocation of letters shall not affect the validity of any act within the lawful powers of the administrator previously done by him in good faith, even though he had good grounds for supposing that such paper was not legally executed. *In re* Nesmith, 1 N. Y. Suppl. 343.

Jurisdiction to assess damages on an injunction bond against a public administrator and his sureties is not lost by reason of the revocation of the letters of administration pending the motion to assess such damages, and an order that the "cause now proceed in the name of" the substituted administrator. Nolan *v.* Johns, 108 Mo. 431, 18 S. W. 1107.

61. Brown *v.* McGee, 117 Wis. 389, 94 N. W. 363.

62. Gasque *v.* Moody, 12 Sm. & M. (Miss.) 153.

63. Harrison *v.* Clark, 87 N. Y. 572. See *supra*, II, D.

proper occasion arises,[64] and one of two or more joint executors or administrators may be removed, leaving the others in office without him.[65]

b. Grounds. Removal of an executor or administrator is proper whenever from any cause he proves to be incapable of discharging his trust or unsuitable for the office,[66] or such removal becomes advisable for the interest of the estate.[67] Misconduct of the representative is always ground for removal;[68] and he may be

64. Hazlett *v.* Blakely, (Nebr. 1903) 97 N. W. 808; Greentree's Estate, 12 Phila. (Pa.) 10. See also State *v.* Pitot, 2 La. 266; Holcomb *v.* Coryell, 12 N. J. Eq. 289.

Statutes providing for removal are cumulative merely and do not take away any common-law remedy. Thomas *v.* Hardwick, 1 Ga. 78.

An order requiring additional security, made on the hearing of a petition for the removal of an executor, the further hearing of the matter being postponed, and the executor's compliance with such order, did not oust the court of its jurisdiction to remove him. Shreve *v.* Wampole, 38 N. J. Eq. 490.

Acts not in fiduciary capacity.— Where the acts complained of for the removal of an executor relate to the realty of the testator held by such executor, not in a fiduciary capacity but as tenant in common with others in his own right as residuary devisee, the remedy is not by removal from the executorship but by severance of the cotenancy by proceedings in partition. Bradley's Estate, 17 Phila. (Pa.) 455.

65. Hesson *v.* Hesson, 14 Md. 8; Winship *v.* Bass, 12 Mass. 199.

Cause for such removal would be found in perverse refusal, although ill-will to his associates, to join in some needful act of administration, or the perverse withholding of papers from joint inspection, or assets which ought to be disposed of, or his sole maladministration generally. *In re* West, 111 N. Y. 687, 19 N. E. 286; Chew's Estate, 2 Pars. Eq. Cas. (Pa.) 153; Bicking's Estate, 14 Pa. Co. Ct. 661. See also Seed *v.* Tait, 9 Quebec 145. But, for mere disagreements between such joint fiduciaries, without misconduct one's removal is not favored. See Bronson *v.* Bronson, 48 How. Pr. (N. Y.) 481; Oliver *v.* Frisbie, 3 Dem. Surr. (N. Y.) 22; Fairbairn *v.* Fisher, 57 N. C. 390.

66. *Alabama.*— Forrester *v.* Forrester, 37 Ala. 398.

Kentucky.— Davenport *v.* Irvine, 4 J. J. Marsh. 60.

Louisiana.— Rogers *v.* Morrison, 21 La. Ann. 455.

Massachusetts.— Drake *v.* Green, 10 Allen 124; Thayer *v.* Homer, 11 Metc. 104.

New Hampshire.— Morgan *v.* Dodge, 44 N. H. 255, 82 Am. Dec. 213.

New York.— Matter of Ferrigan, 42 N. Y. App. Div. 1, 58 N. Y. Suppl. 920 [*affirmed* in 160 N. Y. 689, 55 N. E. 1095]; Shields *v.* Shields, 60 Barb. 56.

North Carolina.— McFadyen *v.* Council, 81 N. C. 195.

Pennsylvania.— Simon's Estate, 155 Pa. St. 215, 26 Atl. 424.

See 22 Cent. Dig. tit. "Executors and Administrators," § 227.

Unsuitableness must exist at the time of removal. The representative cannot be removed simply on proof that he was unsuitable at the time of his appointment and without proof that he continues to be so. Drake *v.* Green, 10 Allen (Mass.) 124.

Unsuitableness at time of appointment.— An executor or administrator may be removed upon proof of unsuitableness, notwithstanding he was equally unsuitable when appointed or qualified. Drake *v.* Green, 10 Allen (Mass.) 124. *Contra*, Lehr *v.* Tarball, 2 How. (Miss.) 905.

Removal can be only for defined statutory cause. Muirhead *v.* Muirhead, 6 Sm. & M. (Miss.) 451.

67. *In re* Wheaton, 37 Misc. (N. Y.) 184, 76 N. Y. Suppl. 938; Fox *v.* Keister, 9 Ohio S. & C. Pl. Dec. 316, 6 Ohio N. P. 327; Morgan's Estate, 26 Wkly. Notes Cas. (Pa.) 236, 20 Phila. (Pa.) 28; Silberman's Estate, 14 Wkly. Notes Cas. (Pa.) 259; Greentree's Estate, 12 Phila. (Pa.) 10.

68. *In re* Hood, 104 N. Y. 103, 10 N. E. 35; Matter of Wallace, 68 N. Y. App. Div. 649, 74 N. Y. Suppl. 33; Matter of Havemeyer, 3 N. Y. App. Div. 519, 38 N. Y. Suppl. 292; Matter of Patterson, 41 Misc. (N. Y.) 66, 83 N. Y. Suppl. 649; Matter of Place, 4 N. Y. St. 533.

Active hostility to a creditor constitutes such misconduct as calls for the removal of executors. Matter of Jacob, 5 N. Y. App. Div. 508, 38 N. Y. Suppl. 1083.

An omission to file an inventory is a strong circumstance in support of a charge of improper conduct. Hart *v.* Ten Eyck, 2 Johns. Ch. (N. Y.) 62.

Circumstances not showing sufficient misconduct to authorize removal see Jones *v.* Harbaugh, 93 Md. 269, 48 Atl. 827.

Claiming benefit of improper contract with testator.— The fact that an executor claims the benefit of a contract between himself and the testator as to which there is strong evidence that the testator was of unsound mind at the time of its execution and by which the executor secured great pecuniary advantage to the detriment of the estate is misconduct rendering the executor unfit for the execution of his office, for which he may be removed. Matter of Gleason, 17 Misc. (N. Y.) 510, 41 N. Y. Suppl. 418, holding further that such fact did not render the executor "incompetent" or "disqualified."

Claim of benefit to estate.— An executor cannot be heard to defend against a removal, on the ground that his violation of duty has benefited the estate. Hake *v.* Stott, 5 Colo.

removed for neglect or refusal to perform the duties of his office,[69] waste,[70] negligence,[71] unfaithfulness,[72] mismanagement,[73] maladministration,[74] or because he has

140. See also *In re* Marsh, (N. J. Prerog. 1904) 56 Atl. 886.

The fact that the representative has made up the loss sustained by the estate out of his own funds does not relieve him from the effect of his dereliction of duty. *In re* Marsh, (N. J. Prerog. 1904) 56 Atl. 886.

69. *Illinois.*— Marsh *v.* People, 15 Ill. 284.

Massachusetts.— Glines *v.* Weeks, 137 Mass. 547.

Nevada.— Lucich *v.* Medin, 3 Nev. 93, 93 Am. Dec. 376.

New York.— *In re* Wheaton, 37 Misc. 184, 74 N. Y. Suppl. 938.

Oregon.— Knight *v.* Hamaker, 40 Oreg. 424, 67 Pac. 107; *In re* Partridge, 31 Oreg. 297, 51 Pac. 82.

Pennsylvania.— *In re* Kellberg, 86 Pa. St. 129; Brophy's Estate, 12 Phila. 18.

Canada.— Cook *v.* Banque de Quebec, 2 Quebec Super. Ct. 172.

See 22 Cent. Dig. tit. "Executors and Administrators," § 229.

A failure to publish notice to present claims as required by statute is such unfaithfulness or neglect as warrants the removal of an administrator. *In re* Barnes, 36 Oreg. 279, 59 Pac. 464.

Delays or omissions satisfactorily explained are no cause for removal. Harris *v.* Seals, 29 Ga. 585; Andrews *v.* Carr, 2 R. I. 117.

A refusal to aid heirs outside the scope of his official duty is no cause for removal. Richards *v.* Sweetland, 6 Cush. (Mass.) 324.

70. *Colorado.*— Miller *v.* Hider, 9 Colo. App. 50, 47 Pac. 406.

Georgia.— *In re* Mussault, T. U. P. Charlt. 259.

Missouri.— Haynes *v.* Carpenter, 86 Mo. App 30.

Nevada.— Lucich *v.* Medin, 3 Nev. 93, 93 Am. Dec. 376.

New Jersey.— Gray *v.* Gray, 39 N. J. Eq. 332.

New York.— Matter of Fernbacher, 17 Abb. N. Cas. 339, 4 Dem. Surr. 227, holding that where an executrix having a life-estate only in the property wastes it, and co-executors have surrendered it to her, knowing that she intended wasting, all should be removed at the instance of a remainder-man.

Pennsylvania.— Morgan's Estate, 26 Wkly. Notes Cas. 236, 20 Phila. 28; Silberman's Estate, 14 Wkly. Notes Cas. 259.

See 22 Cent. Dig. tit. "Executors and Administrators," § 245.

71. Lucich *v.* Medin, 3 Nev. 93, 93 Am. Dec. 376; Knight *v.* Hamakar, 40 Oreg. 424, 67 Pac. 107, holding that an administrator selling real estate under order of court, and ordered by the court to deliver the deed to the vendee on receipt of the purchase-price, may be removed as being guilty of neglect of his trust in delivering such deed without receiving the purchase-price.

Failure to deposit funds in bank, in connection with other improper acts and omissions, may be sufficient ground for removal. Benton's Succession, 106 La. 494, 31 So. 123.

72. Bicking's Estate, 14 Pa. Co. Ct. 661, 15 Pa. Co. Ct. 284 (holding that where an executor, as the result of resentment toward his co-executors, refuses to join in a mortgage for the support of the widow of testator, he may be removed); *In re* Partridge, 31 Oreg. 297, 51 Pac. 82.

Employment of attorney.— An administrator violates no obligation to his trust by retaining in his service as attorney one who is attorney for one of the heirs in a contest respecting the distribution of the estate, and hence this circumstance does not warrant his removal. *In re* Healy, 137 Cal. 474, 70 Pac. 455, (1901) 66 Pac. 175.

73. *Colorado.*— Miller *v.* Hider, 9 Colo. App. 50, 47 Pac. 406.

Illinois.— Frothingham *v.* Petty, 197 Ill. 418, 64 N. E. 270.

Missouri.— Lewellyn *v.* Lewellyn, 87 Mo. App. 9; Haynes *v.* Carpenter, 86 Mo. App 30.

Nevada.— Lucich *v.* Medin, 3 Nev. 93, 93 Am. Dec. 376.

New York.— Matter of Heyen, 40 Misc. 511, 82 N. Y. Suppl. 791.

Pennsylvania.— Morgan's Estate, 26 Wkly. Notes Cas. 236, 20 Phila. 28; Silberman's Estate, 14 Wkly. Notes Cas. 259.

See 22 Cent. Dig. tit. "Executors and Administrators," § 245.

A denial of indebtedness to the estate and refusal to pay is sufficient mismanagement to warrant the removal of an executor where there is evidence to sustain a finding that he is indebted to the estate. Haines *v.* Christie, 17 Colo. App. 272, 68 Pac. 669. *Contra,* Molony's Estate, 1 Phila. (Pa.) 294.

A refusal to take proper steps to recover money of the conversion of which during the lifetime of the testator the executor is apprised is such gross mismanagement and waste as warrants the removal of the executor. Haynes *v.* Carpenter, 86 Mo. App. 30.

Funeral expenses.— That an administratrix incurred a large indebtedness for funeral expenses of her husband does not constitute such mismanagement of the estate as would justify her removal in a suit by creditors. Bloomer's Estate, 11 Phila. (Pa.) 30.

74. Fox *v.* Keister, 9 Ohio S. & C. Pl. Dec. 316, 6 Ohio N. P. 327.

Collusive settlement of claim in favor of estate warrants removal. Bozeman *v.* May, 132 Ala. 233, 31 So. 491.

Continuing decedent's business without authority ground for removal.— Matter of Hutchinson, 10 N. Y. St. 10.

Facts not showing maladministration.— See Fox *v.* Keister, 9 Ohio S. & C. Pl. Dec. 316, 6 Ohio N. P. 327.

Misstatement in petition for sale.— An intentional misstatement of the names of the heirs at law in a petition for the sale of real estate for the purposes of division is not

committed or is about to commit a fraud on the estate.[75] The representative may be removed because of his improvidence,[76] incompetency,[77] dissolute or drunken habits,[78] or even because he has removed his residence away from the state in which letters were granted.[79] He should be removed where his personal interests conflict with his official duties,[80] or even where there is such a hostile feeling between him and the beneficiaries as would or might interfere with the proper management of the estate.[81] Removal is proper in case of failure to file a proper

such maladministration as authorizes removal. Forrester *v.* Forrester, 37 Ala. 398.

An isolated act of maladministration will not cause the court to remove an executor when it is proved that he acted in good faith, that no loss is likely to result to the estate from what he did, and that his administration was in all other respects most satisfactory. Devine *v.* Griffin, 25 L. C. Jur. 249.

75. *In re* Rathgeb, 125 Cal. 302, 57 Pac. 1010 (holding that under a statute authorizing the removal of an executor for this cause an executor who without sufficient reason asserted title to the property of the estate and refused to inventory it as property of the estate might be removed from office); Fox *v.* Keister, 9 Ohio S. & C. Pl. Dec. 316, 6 Ohio N. P. 327.

76. Emerson *v.* Bowers, 14 Barb. (N. Y.) 658; Freeman *v.* Kellogg, 4 Redf. Surr. (N. Y.) 218.

The fact that a trust in real estate has greatly diminished in value and income while in the hands of an administrator will not warrant his removal as being "improvident." *In re* Treadwell, 37 Misc. (N. Y.) 584, 75 N. Y. Suppl. 1058.

77. Emerson *v.* Bowers, 14 Barb. (N. Y.) 658; Fox *v.* Keister, 9 Ohio S. & C. Pl. Dec. 316, 6 Ohio N. P. 327.

Inability to read or write does not of itself show such incompetency as warrants the removal of an administrator (Gregg *v.* Wilson, 24 Ind. 227), but this taken in connection with other facts showing him to be unsuitable may warrant his removal (Emerson *v.* Bowers, 14 Barb. (N. Y.) 658).

78. Gurley *v.* Butler, 83 Ind. 501 (holding habitual drunkenness a sufficient cause for the removal of an administrator without an affirmative showing that he had thereby become incapable of discharging his duties); Fox *v.* Keister, 9 Ohio S. & C. Pl. Dec. 316, 6 Ohio N. P. 327.

79. Matter of McKnight, 80 N. Y. App. Div. 284, 80 N. Y. Suppl. 251; James' Estate, 10 Pa. Co. Ct. 220. See also Scott *v.* Lawson, 10 La. Ann. 547. But *compare* Walker *v.* Torrence, 12 Ga. 604.

A temporary residence outside the state, maintained for the benefit of the health of the executor's family, is not such a removal from the state as to necessitate his removal as executor. Matter of McKnight, 80 N. Y. App. Div. 284, 80 N. Y. Suppl. 251. See also Matter of Magoun, 41 Misc. (N. Y.) 352, 84 N. Y. Suppl. 940.

Non-residence at time of grant of letters. — Where the fact that executors lived out of the state was known at the time of granting the letters testamentary, the court should not remove them on account of non-residence, upon the application of a person against whom they have commenced a suit to recover a claim. Wiley *v.* Brainerd, 11 Vt. 107.

Claim of benefit to estate. — On an application to remove an executor because of his removal from the state and the subsequent resignation of the resident executor, it is no ground for denying the application that the executor who has removed states that he changed his residence to the place where a large portion of the property of the estate was situated for the purpose of managing it to better advantage. Ewing *v.* Ewing, 38 Ind. 390.

80. *California.*—Bauquier's Estate, 88 Cal. 302, 26 Pac. 178, 532.

Massachusetts.— Putney *v.* Fletcher, 148 Mass. 247, 19 N. E. 370; Hussey *v.* Coffin, 1 Allen 354; Thayer *v.* Homer, 11 Metc. 104.

New Jersey.— Gray *v.* Gray, 39 N. J. Eq. 332, holding that evidence of a determination on the part of an executor to invoke the aid of the courts of another state to obtain an allowance of a claim rejected by the court wherein he filed it and which had jurisdiction, afforded grounds for his removal from office, especially where it was otherwise apparent that he had wasted and misapplied the estate.

Oregon.— Marks *v.* Coats, 37 Oreg. 609, 62 Pac. 488; *In re* Mills, 22 Oreg. 210, 29 Pac. 443.

Pennsylvania.— *In re* Kellberg, 86 Pa. St. 129.

See 22 Cent. Dig. tit. "Executors and Administrators," § 236.

But *compare* Murray *v.* Angell, 16 R. I. 692, 19 Atl. 246.

Conflicting interest should clearly appear. Randle *v.* Carter, 62 Ala. 95; Gray's Estate, 4 Kulp (Pa.) 157.

Claim to property.— Where an administrator claims substantially the whole estate as his property, he should be removed, and the fact that he has given bond, and that the question of title may be settled by the surrogate on the final accounting does not justify his retention, since the heirs are entitled to an administrator who can, if so advised, bring suit against such claimant. Matter of Wallace, 68 N. Y. App. Div. 649, 74 N. Y. Suppl. 33.

81. *In re* Kellberg, 86 Pa. St. 129; Bicking's Estate, 3 Pa. Dist. 454; *In re* Pike, 45 Wis. 391. See also Seed *v.* Tait, 9 Quebec 145.

inventory, accounts, or returns, within the required time or after due citation and order,[82] improprieties in regard to the collection or disposition of the assets,[83] failure to prosecute or defend actions,[84] fraudulent or unjust allowance or payment of claims against the estate,[85] culpable failure to sell or to sell prop-

82. *Alabama.*— Hubbard *v.* Smith, 45 Ala. 516; Oglesby *v.* Howard, 43 Ala. 144. But see Hightower *v.* Moore, 46 Ala. 466.

Indiana.— Evans *v.* Buchanan, 15 Ind. 438; Pace *v.* Oppenheim, 12 Ind. 533.

Louisiana.— Benton's Succession, 106 La. 494, 31 So. 123; Brown *v.* Ventress, 24 La. Ann. 187.

Massachusetts.—Andrews *v.* Tucker, 7 Pick. 250.

Mississippi.— Dowdy *v.* Graham, 42 Miss. 451.

New Jersey.— Gray *v.* Gray, 39 N. J. Eq. 332.

New York.— Matter of Hickey, 34 Misc. 360, 69 N. Y. Suppl. 844.

North Carolina.— Armstrong *v.* Stowe, 77 N. C. 360.

Oregon.— *In re* Barnes, 36 Oreg. 279, 59 Pac. 464; *In re* Holladay, 18 Oreg. 168, 22 Pac. 750.

Pennsylvania.— Rice's Estate, 14 Phila. 327; Brophy's Estate, 12 Phila. 18.

Texas.— Willis *v.* Ferguson, 46 Tex. 496.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 233, 241.

Where there is nothing to return it is no cause for removal that he makes no returns. Harris *v.* Seals, 29 Ga. 585.

Matter for which executor not accountable. — A refusal of an executor to account as to a matter for which he was not accountable is not a sufficient ground for his removal. Matter of Pye, 18 N. Y. App. Div. 309, 45 N. Y. Suppl. 836.

The failure of an executor to include a debt owing by him to the estate in his inventory is not sufficient to justify his removal in the absence of any evidence of a fraudulent intent. Lancaster's Estate, 7 Del. Co. (Pa.) 584.

Special inventory.—The proceedings for the removal of an executor failing to return an inventory of the estate within three months after his qualification, authorized by the Maryland statute, apply only to the ordinary inventory, and not to any special inventory which the court may order, and should not be rigorously construed against an executor so failing, when no damage has resulted from the delay, and satisfactory reasons are given therefor, but an extension of time should be granted him in which to make the return. *In re* Patten, 7 Mackey (D. C.) 392.

Sufficient excuse for failure to file inventory.— In a proceeding by several co-executrices to remove one of their number for failure to file an inventory within the prescribed time, the excuse of defendant was her sickness, and the failure of her co-executrices to exhibit evidence of assets of the estate in their custody. It was held that the excuse was sufficient, although not made until more than two months after the filing of her co-executrices' inventory. *In re* Patten, 7 Mackey (D. C.) 392.

Omission not constituting ground for removal.— Where an administratrix was appointed, and the entire personal estate was inventoried and appraised at less than three hundred dollars and was thereupon set off to the wife for the use of herself and family, the fact that it was charged that the administratrix had omitted to conclude certain of the real estate in the inventory was no ground for her removal, as if such was the fact, she might be surcharged therewith in her final account. Bloomer's Estate, 11 Phila. (Pa.) 30.

Mere omission to present an account is not ground for removing an administrator, but it must also be shown that he has disobeyed an order of court requiring him to account. Head's Succession, 28 La. Ann. 800.

83. *Alabama.*— Oglesby *v.* Howard, 43 Ala. 144.

Louisiana.— Travis *v.* Insley, 28 La. Ann. 784; Peale *v.* White, 7 La. Ann. 449.

New Jersey.— Lett *v.* Emmett, 37 N. J. Eq. 535.

New York.— Campbell *v.* Allen, 142 N. Y. 484, 37 N. E. 517; Fleet *v.* Simmons, 3 Dem. Surr. 542; Moore's Estate, Tuck. Surr. 41.

Pennsylvania.— James' Estate, 10 Pa. Co. Ct. 220.

See 22 Cent. Dig. tit. "Executors and Administrators," § 234.

84. *Maryland.*— Cox *v.* Chalk, 57 Md. 569.

Massachusetts.—Glines *v.* Weeks, 137 Mass. 547; Andrews *v.* Tucker, 7 Pick. 250.

New York.— Emerson *v.* Bowers, 14 N. Y. 449.

North Carolina.— Simpson *v.* Jones, 82 N. C. 323.

Pennsylvania.— *In re* Kellberg, 86 Pa. St. 129.

Rhode Island.— Andrews *v.* Carr, 2 R. I. 117.

Virginia.— Reynolds *v.* Zink, 27 Gratt. 29.

See 22 Cent. Dig. tit. "Executors and Administrators," § 235.

Failure to prosecute an appeal taken by his predecessor in a suit instituted on behalf of the estate may warrant the removal of an administrator. Matter of Place, 4 N. Y. St. 533.

Failure to prosecute doubtful claims is not ground for removal of an executor, especially if the estate be small and no one will indemnify him for the costs. *In re* Stow, Myr. Prob. (Cal.) 97.

85. Killam *v.* Costley, 52 Ala. 85; Foltz *v.* Prouse, 17 Ill. 487; Benton's Succession, 106 La. 494, 31 So. 123; Owens *v.* Link, 48 Mo. App. 534.

Improper payment of an attorney's fee is not ground for removal. Matter of Welch, 110 Cal. 605, 42 Pac. 1089.

erly,[86] failure to complete administration,[87] squandering or embezzling the estate,[88] or making improper use of property belonging thereto.[89] A representative may be removed for failure to obey an order of court,[90] and a prime cause for removal arises where the representative fails to seasonably comply with an order requiring him to give a bond or increase the security previously given.[91] But the fact that the bond given by an executor or administrator is invalid is no ground for his removal, the most that could be required of him being a new bond.[92] Bankruptcy or insolvency of an executor or administrator is usually considered sufficient to warrant his removal,[93] but it is otherwise of mere poverty or indebtedness to the estate, although even these circumstances taken in connection with others may warrant such action.[94] The court is usually invested with consider-

86. Travis *v.* Insley, 28 La. Ann. 784; Levering *v.* Levering, 64 Md. 399, 2 Atl. 1; Haight *v.* Brisbin, 96 N. Y. 132; *In re* Parson, 82 Pa. St. 465; Silverthorn *v.* McKinster, 12 Pa. St. 67; Peck's Estate, 5 Kulp (Pa.) 204; Haslam's Estate, 4 Wkly. Notes Cas. (Pa.) 526; Morris' Estate, 16 Phila. (Pa.) 344.

87. Moore's Estate, 83 Cal. 583, 23 Pac. 794; Ford *v.* Ford, 88 Wis. 122, 59 N. W. 464.

88. Levering *v.* Levering, 64 Md. 399, 2 Atl. 1; Newcomb *v.* Williams, 9 Metc. (Mass.) 525.

89. Greentree's Estate, 3 Wkly. Notes Cas. (Pa.) 519, holding that the use of money of the estate by an executor in his own business will warrant his removal.

90. Fuhrer *v.* State, 55 Ind. 150; Van Dusen's Appeal, 102 Pa. St. 224; Wright *v.* McNatt, 49 Tex. 425.

A refusal to comply with a void order of sale is not a sufficient ground for removal. Shook *v.* Zentmyer, 90 Md. 705, 45 Atl. 1006.

91. *Kentucky.*—Davenport *v.* Irvine, 4 J. J. Marsh. 60.

Louisiana.— De Flechier's Succession, 1 La. Ann. 20.

Maryland.— Carey *v.* Reed, 82 Md. 383, 33 Atl. 633.

New Hampshire.— Morgan *v.* Dodge, 44 N. H. 255, 82 Am. Dec. 213.

New Jersey.— See Shreve *v.* Wampole, 38 N. J. Eq. 490.

New York.— Postley *v.* Cheyne, 4 Dem. Surr. 492.

North Carolina.— McFadyen *v.* Council, 81 N. C. 195.

Pennsylvania.—Hodge's Appeal, 1 Am. L. J. 169.

Texas.— Perkins *v.* Wood, 63 Tex. 396; Bills *v.* Scott, 49 Tex. 430.

See 22 Cent. Dig. tit. "Executors and Administrators," § 232.

Removal pending appeal from order.— Conceding an order requiring an executor to give an additional bond to be appealable, he may be removed for failure to comply with it during the pendency of an appeal by him therefrom, where no supersedeas bond was given. Betts *v.* Cobb, 121 Ala. 154, 25 So. 692.

No proceedings are necessary to remove an executor who has failed to furnish security, when ordered to do so, as mere failure to furnish the security within the time fixed *ipso facto* removes the delinquent. Guidry's Succession, 40 La. Ann. 671, 4 So. 893.

Offer to renew.— A public administrator, not otherwise in default, cannot be removed for failure to renew his bond, where he offers to renew it in response to the notice served upon him. Matter of Trotter, 115 N. C. 193, 20 S. E. 443.

92. Barricklow *v.* Stewart, 31 Ind. App. 446, 68 N. E. 316.

93. *Georgia.*— *In re* Mussault, T. U. P. Charlt. 259. And see Gibson *v.* Maxwell, 85 Ga. 235, 11 S. E. 615.

Louisiana.— Dwight *v.* Simon, 4 La. Ann. 490, holding further that the administrator's bankruptcy does not *ipso facto* vacate the office.

New York.— Matter of Truesdell, 40 Misc. 336, 81 N. Y. Suppl. 1038.

Pennsylvania.—Greentree's Estate, 3 Wkly. Notes Cas. 519.

England.— See Bowen *v.* Phillips, [1897] 1 Ch. 174, 66 L. J. Ch. 165, 75 L. T. Rep. N. S. 628, 4 Manson 370, 45 Wkly. Rep. 286.

Canada.— McIntosh *v.* Dease, 2 L. C. Rep. 71, where executor has become insolvent and is making away with estate. *Aliter*, in case of mere insolvency. Lespérance *v.* Gingras, 15 Quebec Super. Ct. 462.

See 22 Cent. Dig. tit. "Executors and Administrators," § 244.

Contra.— Schanck *v.* Schanck, 7 N. J. Eq. 140.

It might be otherwise where the representative, especially if executor, is a man of integrity and the estate is so protected that it cannot suffer loss. Loxley's Estate, 14 Phila. (Pa.) 317.

An executor who is a member of an insolvent firm and who is unable to sustain harmonious relations with his co-executors may be removed. Silberman's Estate, 14 Wkly. Notes Cas. (Pa.) 259.

Where an executor was insolvent when the will was made, and this was known to the testator, the court refused to remove the executor, but required him to execute a bond for the proper administration of the estate, in default of which he would be removed. McFadyen *v.* Council, 81 N. C. 195. See also Lancaster's Estate, 7 Del. Co. (Pa.) 584.

94. Shields *v.* Shields, 60 Barb. (N. Y.) 56; Fairbairn *v.* Fisher, 57 N. C. 390; Fox *v.* Keister, 9 Ohio S. & C. Pl. Dec. 316, 6 Ohio N. P. 327.

able discretion in determining whether or not an executor or administrator shall be removed,[95] and is reluctant to remove where no strong cause therefor exists and it does not clearly appear that retaining the representative in office will jeopardize the interests of the estate.[96]

c. Proceedings — (i) *JURISDICTION.* Jurisdiction for the removal of an executor or administrator belongs to the probate court by which he was appointed or qualified and in which the administration of the estate is pending.[97] In general chancery has no power to remove an executor, although in a suitable case it has restrained him from acting and taken the estate out of his hands, placing it in the hands of a receiver.[98]

95. *Alabama.*— Harris *v.* Dillard, 31 Ala. 191.

California.— *In re* Bell, 135 Cal. 194, 67 Pac. 123.

Georgia.— Collins *v.* Carr, 112 Ga. 868, 38 S. E. 346; Cosby *v.* Weaver, 107 Ga. 761, 33 S. E. 656. And see Gibson *v.* Maxwell, 85 Ga. 235, 11 S. E. 615.

Pennsylvania.— Young's Estate, 4 Pa. Dist. 44, 16 Pa. Co. Ct. 54; James' Estate, 10 Pa. Co. Ct. 220; Edward's Estate, 12 Phila. 85.

Texas.— Hall *v.* Monroe, 27 Tex. 700. But see Willis *v.* Ferguson, 46 Tex. 496, holding that it was the duty of the court to remove an executrix upon her failure to return an inventory within sixty days of the grant of letters.

Washington.—Clancy *v.* McElroy, 30 Wash. 567, 70 Pac. 1095.

Wisconsin.— Cutler *v.* Howard, 9 Wis. 309.

Contra.— Miller *v.* Hider, 9 Colo. App. 50, 47 Pac. 406, holding that the removal of an administrator can only be for statutory cause and the court can exercise no discretionary power.

96. Willis' Succession, 109 La. 281, 33 So. 314; Matter of Kasson, 46 N. Y. App. Div. 348, 61 N. Y. Suppl. 569; Morgan's Estate, 26 Wkly. Notes Cas. (Pa.) 236, 20 Phila. (Pa.) 28. See also Jones *v.* Harbaugh, 93 Md. 269, 48 Atl. 827; Molony's Estate, 1 Phila. (Pa.) 294.

Undoubted proof of his utter improvidence and unfitness for the trust will be required for the removal of an executor. Matter of Johnson, 15 N. Y. St. 752.

A slight departure from duty merely is not sufficient to warrant the removal of an executor, but he should be removed only for some devastavit or other dishonest, corrupt, or improper neglect or maladministration of the estate. McFadyen *v.* Council, 81 N. C. 195.

Errors of judgment not amounting to malfeasance are not sufficient cause for the removal of administrators. Sparrow's Succession, 39 La. Ann. 696, 2 So. 501.

Errors in accounts or in his construction of the will do not furnish sufficient ground for the removal of an executor unless there is wilful misconduct, waste, or improper disposition of the assets. Witherspoon *v.* Watts, 18 S. C. 396.

The executor should not be held to any greater diligence, care, foresight, and caution than is usual among ordinarily prudent men in the conduct of their business. McFadyen *v.* Council, 81 N. C. 195.

Matters occurring prior to the appointment of an administrator and having no connection with the administration can furnish no ground for his removal. Miller *v.* Hider, 9 Colo. App. 50, 47 Pac. 406, holding that the fact that an administrator, while attorney for his predecessor, was paid an exorbitant fee for his services, was not ground for his removal.

97. *Indiana.*— Bowen *v.* Stewart, 128 Ind. 507, 26 N. E. 168, 28 N. E. 73.

Kentucky.—Clemens *v.* Caldwell, 7 B. Mon. 171.

Louisiana.— Sheppard *v.* Barron, 28 La. Ann. 799.

Minnesota.— Culver *v.* Hardenbergh, 37 Minn. 225, 33 N. W. 792.

New York.— Hosack *v.* Rogers, 11 Paige 603. See also Campbell *v.* Allen, 142 N. Y. 484, 37 N. E. 517.

North Carolina.— *In re* Brinson, 73 N. C. 278; Taylor *v.* Biddle, 71 N. C. 1.

Pennsylvania.—Chew *v.* Chew, 3 Grant 289.

Tennessee.— McGowan *v.* Wade, 3 Yerg. 375.

Vermont.— Holmes *v.* Holmes, 26 Vt. 536.

Wisconsin.— Cutler *v.* Howard, 9 Wis. 309.

See 22 Cent. Dig. tit. "Executors and Administrators," § 249.

The supreme court has no power to remove an executor. Greenland *v.* Waddell, 5 N. Y. St. 835.

The clerk of the superior court cannot, upon the filing of a caveat, remove the executor and appoint a collector for the estate, without a hearing, as his authority is limited to the issuance of an order staying all further proceedings except the preservation of the property and the collection of the debts until a decision of the issue is had. *In re* Palmer, 117 N. C. 133, 23 S. E. 104.

The parish court has not jurisdiction of a suit to remove an administrator. Only the probate court that appointed can remove him, as such suit is purely probate in its character. Sheppard *v.* Barron, 28 La. Ann. 799. *Contra,* Williams' Succession, 26 La. Ann. 207.

98. Holbrook *v.* Campau, 22 Mich. 288; Bentley *v.* Dixon, 60 N. J. Eq. 353, 46 Atl. 689; Bolles *v.* Bolles, 44 N. J. Eq. 385, 14 Atl. 593; Leddel *v.* Starr, 19 N. J. Eq. 159; Hosack *v.* Rogers, 11 Paige (N. Y.) 603; *Ex p.* Galluchat, 1 Hill Eq. (S. C.) 148.

(II) *DIRECT PROCEEDINGS NECESSARY.* Removal cannot be demanded by way of opposition or indirect procedure, but it must be by direct proceedings against the incumbent of the office.[99]

(III) *WHO MAY APPLY.* While an executor or administrator may sometimes be removed by the court on its own motion,[1] an application for such removal can be made only by a person interested in the estate.[2] But application may be made by any person interested;[3] such as the widow of decedent,[4] an heir or distributee,[5] legatee or devisee,[6] a co-executor or co-administrator,[7] a surety on the representative's bond,[8] or a creditor of the estate.[9] A person who might otherwise be

Even if a court of chancery has power to remove an executor or administrator, only an extreme case will justify its exercise. Kidd *v.* Bates, 124 Ala. 670, 27 So. 491. See also Randle *v.* Carter, 62 Ala. 95.

99. Guilbeau's Succession, 25 La. Ann. 474; Boyd's Succession, 12 La. Ann. 611.

1. Crawford *v.* Tyson, 46 Ala. 299; *In re* Kelley, 122 Cal. 379, 55 Pac. 136; *In re* Partridge, 31 Oreg. 297, 51 Pac. 82.

Proceeding not instituted for purpose of removal.— Where an administrator files his final account, and asks to be discharged, and the court removes him for sufficient cause, although not in a proceeding instituted directly for that purpose, the decree will not be disturbed. *In re* Partridge, 31 Oreg. 297, 51 Pac. 82.

2. Godwin *v.* Hooper, 45 Ala. 613; Vail *v.* Givan, 55 Ind. 59; Williams' Succession, 22 La. Ann. 94; McLaurin *v.* McLaurin, 106 N. C. 331, 10 S. E. 1056. But see *In re* Kelley, 122 Cal. 379, 383, 55 Pac. 136, holding that under the California code providing that an executor may be suspended "whenever . . . from his own knowledge, or from credible information," the judge of the superior court learns that there is cause for such action, it is immaterial that the person petitioning therefor has no interest in the estate.

Debtor to estate cannot apply.— Chicago, etc., R. Co. *v.* Gould, 64 Iowa 343, 20 N. W. 464.

The public administrator has no authority in law to invoke the removal of an executor or administrator of a succession. Burnside's Succession, 34 La. Ann. 728.

Guardian of infants.— An application for the removal of an administrator cannot be made by a guardian in his own name. The proper mode of proceeding in such a case is in the name of the infants by the guardian or next friend. Blackman *v.* Davis, 42 Ala. 184. But see McComas *v.* Ronquillo, 4 La. Ann. 123.

3. Knight *v.* Hamakar, 40 Oreg. 424, 67 Pac. 107; *In re* Partridge, 31 Oreg. 297, 51 Pac. 82; Perrett's Estate, 14 Pa. Super. Ct. 611.

4. Evans *v.* Buchanan, 15 Ind. 438.

Waiver of right to administer.— Where a widow fails to take out letters of administration within six months, as required by statute, her right to priority is considered to be waived, it is improper to remove, on her petition, an administrator appointed after such time. Withrow *v.* De Priest, 119 N. C. 541, 26 S. E. 110.

5. Burnside's Succession, 34 La. Ann. 728; Reed *v.* Crocker, 12 La. Ann. 445; Overton *v.* Overton, 10 La. 472; *In re* Partridge, 31 Oreg. 297, 51 Pac. 82.

6. Burnside's Succession, 34 La. Ann. 728; Newhouse *v.* Gale, 1 Redf. Surr. (N. Y.) 217; Barnes *v.* Brown, 79 N. C. 401.

An assignee of a legatee or devisee may apply. Yeaw *v.* Searle, 2 R. I. 164.

Denial of existence of legatee.— Where the assignee of one claiming to be a legatee seeks the removal of an executor, the executor cannot, by denying the existence of such a person as the legatee named in the will, and by asserting that the proceeding is in effect one to enforce payment of a legacy, oust the surrogate of jurisdiction. Susz *v.* Forst, 4 Dem. Surr. (N. Y.) 346.

7. Vail *v.* Givan, 55 Ind. 59; Hesson *v.* Hesson, 14 Md. 8; *In re* Wheaton, 37 Misc. (N. Y.) 184, 74 N. Y. Suppl. 938. But see Dowdy *v.* Graham, 42 Miss. 451.

The executors of a deceased co-executor cannot apply for the removal of the surviving executor from office. Shook *v.* Shook, 19 Barb. (N. Y.) 653.

8. Vail *v.* Givan, 55 Ind. 59.

A surety cannot merely for his own relief ask the removal of the administrator without proof of mismanagement. Girardey *v.* Dougherty, 18 Ga. 259.

9. *Louisiana.*— Burnside's Succession, 34 La. Ann. 728; Carroll *v.* Huie, 21 La. Ann. 561.

Massachusetts.— Brachett *v.* Williams, 110 Mass. 549.

New York.— *In re* Wheeler, 46 Hun 64.

North Carolina.—Barnes *v.* Brown, 79 N. C. 401.

Oregon.—Knight *v.* Hamakar, 40 Oreg. 424, 67 Pac. 107.

See 22 Cent. Dig. tit. "Executors and Administrators," § 248.

An attorney who has performed services for the deceased and thus acquired a claim against the administrator which may upon the approval of the court at the final settlement become a valid claim against the estate has an interest therein sufficient to authorize him to petition for the removal of the administrator, notwithstanding the fact that he is not a creditor of the estate until his claim is approved. Knight *v.* Hamakar, 40 Oreg. 424, 67 Pac. 107.

One whose claim as a creditor is denied cannot disturb an administration in which those interested have acquiesced. Connolly's Succession, 5 La. Ann. 753.

entitled to insist upon removal of an executor may by his conduct become estopped to do so.[10]

(iv) *Time For Application.* An application for the removal of an executor or administrator must be made within a reasonable time or in some jurisdictions within a time fixed by statute, and an application made later will not be effective.[11]

(v) *Citation and Notice.* Due service of citation should be made upon the party complained of, or such other precaution taken as the court may order so as to give the latter due notice and a fair opportunity to make defense, unless he appears voluntarily.[12]

(vi) *Pleading.* There should be a petition,[13] showing that the court has jurisdiction of the cause of complaint and power to grant the relief which is sought in the manner and form prayed for,[14] and that the applicant has a real and existing interest in the decedent's estate,[15] alleging some one or more of the statutory causes for the removal of the representative,[16] and asking that he be

10. Jones *v.* Harbaugh, 93 Md. 269, 48 Atl. 827, holding that where the sole distributee of an estate induces the administrator to make a distribution before the time for filing claims has expired, which he is under no obligation to do, and whereby he assumes a risk, and the distributee agrees that the administrator may retain a certain compensation for services of himself and his attorney, the distributee cannot afterward insist on the removal of the administrator on the ground of fraud in retaining such agreed compensation.

11. Miller *v.* Hider, 9 Colo. App. 50, 47 Pac. 406; Tuohay *v.* Public Administrator, 2 Dem. Surr. (N. Y.) 412; Mayes *v.* Houston, 61 Tex. 690.

12. *Alabama.*— Crawford *v.* Tyson, 46 Ala. 299.

District of Columbia.— *In re* Patten, 7 Mackey 392.

Georgia.— Girardey *v.* Dougherty, 18 Ga. 259.

Illinois.— Hanifan *v.* Needles, 108 Ill. 403 [*affirming* 11 Ill. App. 303] (holding that the county court has no power to remove an executor on a citation to appear and settle his accounts, without giving him any notice of the intention to remove him); Munroe *v.* People, 102 Ill. 406.

Indiana.— Crabb *v.* Atwood, 10 Ind. 331.

Kentucky.— Murray *v.* Oliver, 3 B. Mon. 1.

Louisiana.— Guilbeau's Succession, 25 La. Ann. 474; White's Succession, 9 Rob. 353.

Mississippi.— Wingate *v.* Wooten, 5 Sm. & M. 245.

New York.— Kelly *v.* West, 80 N. Y. 139; Matter of Engelbrecht, 15 N. Y. App. Div. 541, 44 N. Y. Suppl. 551; Matter of Wadsworth, 2 Barb. Ch. 381.

North Carolina.— Trotter *v.* Mitchell, 115 N. C. 190, 20 S. E. 386.

Oregon.— *In re* Partridge, 31 Oreg. 297, 51 Pac. 82.

See 22 Cent. Dig. tit. "Executors and Administrators," § 251.

Notice waived by voluntary appearance.— Ferris *v.* Ferris, 89 Ill. 452.

13. Guilbeau's Succession, 25 La. Ann. 474; Matter of Engelbrecht, 15 N. Y. App. Div. 541, 44 N. Y. Suppl. 551.

The petition must be supported by affidavit or testimony before a citation can issue thereon. Moorhouse *v.* Hutchinson, 2 Dem. Surr. (N. Y.) 429.

14. Cohen's Appeal, 2 Watts (Pa.) 175.

15. Vail *v.* Givan, 55 Ind. 59, holding this to be necessary where the applicant is not a co-administrator or surety on the administrator's bond.

A creditor seeking the removal of another creditor who has been appointed administrator and the appointment of himself as being the principal creditor must plead the facts that make him such; a general averment that he is such is not enough. Cusick *v.* Hammer, 25 Oreg. 472, 36 Pac. 525.

Sufficiency of allegation.— An allegation that petitioner had obtained a judgment against the estate for —— dollars and —— cents is too vague and indefinite to show that he has any interest in the estate. Vail *v.* Givan, 55 Ind. 59.

16. Vail *v.* Givan, 55 Ind. 59.

General charge of waste and mismanagement sufficient.— Miller *v.* Hider, 9 Colo. App. 50, 47 Pac. 406. *Contra,* Fox *v.* Keister, 9 Ohio S. & C. Pl. Dec. 316, 6 Ohio N. P. 327, holding that facts constituting mismanagement must be alleged.

Statement of belief.— An affidavit upon which an application is based for requiring an executor to give bond or for his removal is insufficient if it states merely a belief that such executor will misapply the funds which may come into his hands; it should set out the facts or circumstances or state the reasons upon which such belief is grounded. Neighbors *v.* Hamlin, 78 N. C. 42. See also Atkinson *v.* Striker, 2 Dem. Surr. (N. Y.) 261.

The strict rules of pleading are not to be applied to petitions to a probate court; and where by fair and reasonable intendment it appears that executors or administrators are conducting themselves to the injury of the beneficiaries or heirs at law of an estate the petition will be sufficient. Treat's Appeal, 40 Conn. 288.

Sufficiency.— Where a complaint alleges generally that an administrator failed to administer an estate according to law, and to

removed.[17] The petition should be verified.[18] An answer and other pleadings necessary to form an issue may be filed.[19]

(VII) *SUSPENSION.* Where on a petition for the removal of an administrator for misfeasance and malfeasance, the facts alleged are denied by the administrator, the court is not required, under the California statute, to make an order of suspension until the truth of the allegations has been established.[20]

(VIII) *TRIAL OR HEARING.* Before an executor or administrator is removed he must be accorded a hearing,[21] which should be a distinct and separate proceeding from the settlement of his accounts.[22] A demurrer to a petition to remove should be passed on before hearing the cause on its merits and allowing an appeal.[23] The issues are to be tried by the court and the administrator is not entitled to demand a jury.[24] A reference may be ordered to obtain needed information on questions of fact involved.[25] Where the representative admits and attempts to excuse the matters because of which his removal is asked, the court may properly determine the case without evidence.[26] An order of the

inventory personalty of the estate, and to wind up the estate within the time prescribed by statute, it charges mismanagement for which an administrator may be removed. Lewellyn *v.* Lewellyn, 87 Mo. App. 9. A bill by residuary distributees against the executor, the widow, and a third person, which alleges that the executor is unfaithful to his trust, and that he is controlled by a desire to unfairly protect and promote the interests of the other defendants, to the injury of plaintiffs, and that his relations with plaintiffs are such that they dare not confer with him, lest any information they might impart would be used to their disadvantage, and that, controlled by these influences, he will make no effort to require the other defendants to account for money possessed by decedent at his death, and which it is distinctly charged they took and appropriated to their own use, states a case for equitable relief, notwithstanding interrogatories are propounded which defendants are justified in declining to answer as criminating. Dulaney *v.* Smith, 97 Va. 130, 33 S. E. 533.

Waiver of objection.— An objection that a petition for removal of an administrator does not allege that his neglect has resulted or will result in loss to petitioners, or set out the facts showing that petitioners are creditors of the estate, or that the person whom the court is asked to appoint administrator is a resident of the county, is waived by the administrator appearing and submitting an excuse, without objection to the sufficiency of the petition. *In re* Barnes, 36 Oreg. 279, 59 Pac. 464.

17. Vail *v.* Givan, 55 Ind. 59.

18. Vail *v.* Givan, 55 Ind. 59.

Amendment.— Where heirs filed a petition denying the validity of a claim allowed, and asking the removal of the administrator, a subsequent motion that the allowance of the claim be set aside, and that the administrator be removed, while irregular, was an amendment of the petition, and did not require verification. Riordan *v.* White, 42 Iowa 432.

19. McFadden *v.* Ross, 93 Ind. 134. See also Moore's Estate, 6 Pa. Dist. 5, 19 Pa. Co. Ct. 208. But *compare* Williams *v.* Tobias, 37 Ind. 345.

A denial on information and belief, in the answer, of charges that the administrator made certain admissions showing disobedience of an order of court, may be stricken out as such matters are presumptively within defendant's knowledge. Knight *v.* Hamakar, 40 Oreg. 424, 67 Pac. 107.

Allegations which are immaterial or not responsive to the petition will be stricken out. Knight *v.* Hamakar, 40 Oreg. 424, 67 Pac. 107.

Answer after reversal on appeal.— Where an application was filed to remove an administrator, and, no answer being filed, the court refused the motion, and the order was reversed on appeal, and the case remanded, the court had power to allow the administrator to answer. Patterson *v.* Wadsworth, 94 N. C. 538.

20. Healy's Estate, 137 Cal. 474, 70 Pac. 455.

21. Partridge's Estate, 31 Oreg. 297, 51 Pac. 82. See also Moore's Estate, 6 Pa. Dist. 5, 19 Pa. Co. Ct. 208, holding that an executrix who fails to file an answer to a petition for a decree for her dismissal cannot be summarily dismissed by the entry of a decree *pro confesso* against her, but the proper proceeding is to enter a decree that the petition be taken *pro confesso*, and then to take testimony to prove the facts alleged in the petition before an examiner, after which a final decree dismissing her may be entered.

22. *In re* McIntire, 1 Alaska 73.

23. *In re* McIntire, 1 Alaska 73.

24. *In re* Doyle, Myr. Prob. (Cal.) 68. But see Capwell *v.* Murphy, 21 R. I. 262, 43 Atl. 32.

25. Matter of Hale, 45 N. Y. App. Div. 578, 61 N. Y. Suppl. 596, holding further, however, that it is improper to insert, in an order of reference made by a surrogate on his own motion on application to remove an executor, a recital that the petitioner has an unbarred claim; this and other questions being for the determination of the surrogate on the coming in of the referee's report.

26. McFadden *v.* Ross, 93 Ind. 134, where removal was asked because of the failure of the representative to file an inventory and reports.

probate court removing an executor, made, not at a regular term, but at a special term to which the cause had not been adjourned or appointed, is void.[27]

(IX) *EVIDENCE.* The person seeking the removal of an executor or administrator must establish the existence of the facts relied upon for such removal,[28] and any proper evidence which tends to establish or refute the charges relied on is admissible.[29]

(X) *ORDER OR DECREE.* The only judgment which a court can render in proceedings to remove an executor or administrator is one either removing or refusing to remove him.[30] In the former case the intent to remove must be apparent.[31]

(XI) *APPEAL AND REVIEW.* Any one aggrieved may appeal from the decree of the court making or refusing to make the removal,[32] but the appeal must be

27. Boynton *v.* Nelson, 46 Ala. 501.

28. Gregg *v.* Wilson, 24 Ind. 227.

Sufficiency of evidence as to interest.— An order of the county court allowing certain attorney fees against an estate which is not set aside, modified, or reversed is sufficient evidence of the attorney's interest in the estate to support a petition to remove the administrator thereof. Knight *v.* Hamakar, 40 Oreg. 424, 67 Pac. 107.

Evidence of neglect held sufficient to authorize removal see Knight *v.* Hamakar, 40 Oreg. 424, 67 Pac. 107.

29. See Betts *v.* Cobb, 121 Ala. 154, 25 So. 692, holding that on the hearing of an application to remove an executor for misconduct, evidence that he has disposed of lands of the estate without authority from the probate court is admissible.

Derogatory questions asked one of the petitioners for removal as a witness *de bene esse* in an action in another court, not available to executrix in resistance of her removal, should be stricken out. Matter of Magoun, 41 Misc. (N. Y.) 352, 84 N. Y. Suppl. 940.

30. Williams *v.* Tobias, 37 Ind. 345.

31. See Karn *v.* Seaton, 62 S. W. 737, 23 Ky. L. Rep. 101, holding that where the court ordered an administrator to execute a new bond on or before a certain day, and in case of his failure to do so "to cease in the further discharge of his duties as administrator," he continued, notwithstanding his failure to execute bond by the time fixed, to be administrator until the court made an order removing him.

32. *Alabama.*— See Holtzclaw *v.* Ware, 34 Ala. 307.

Alaska.— *In re* McIntire, 1 Alaska 73.

Arizona.— See *In re* Baldridge, 2 Ariz. 299, 15 Pac. 141.

California.— See *In re* Healy, (1901) 66 Pac. 175. *Contra,* as to order refusing to remove. *In re* Moore, 68 Cal. 394, 9 Pac. 315.

Georgia.— See Walker *v.* Maddox-Rucker Banking Co., 97 Ga. 386, 23 S. E. 897.

Illinois.—See Witter *v.* Witter, 65 Ill. App. 335.

Indiana.— See McFadden *v.* Ross, 93 Ind. 134.

Iowa.— See *In re* Moore, 103 Iowa 474, 72 N. W. 674.

Kentucky.— See White *v.* Brown, 7 T. B. Mon. 446.

Louisiana.— Bedford's Succession, 38 La. Ann. 244.

New York.—Matter of Thompson, 11 Paige 453. *Contra,* Rogers *v.* Hosack, 18 Wend. 319, refusal to remove.

Ohio.—See *In re* Still, 15 Ohio St. 484. But *compare* Munger *v.* Jeffries, 10 Ohio S. & C. Pl. Dec. 12, 7 Ohio N. P. 55, holding that one not interested in the estate otherwise than as executor is not prejudiced by an order for his removal so as to enable him to present error in the common pleas.

Pennsylvania.— Simon's Estate, 155 Pa. St. 215, 26 Atl. 424.

Rhode Island.— O'Rourke *v.* Elsbree, 11 R. I. 430.

Vermont.— *In re* Bellows, 60 Vt. 224, 14 Atl. 697.

Wisconsin.— Bailey *v.* Scott, 13 Wis. 618.

See 22 Cent. Dig. tit. "Executors and Administrators," § 259.

Appointment of successor.— The administrator may appeal from a further order appointing another person to succeed him in the administration of the succession, which appeal will be treated as auxiliary to the first. Bedford's Succession, 38 La. Ann. 244.

Inadmissible objection.— Where an executrix petitioned for the removal of her co-executor, and the petition was granted, and both were dismissed, the co-executor on appeal cannot object to the dismissal of the executrix. Simon's Estate, 155 Pa. St. 215, 26 Atl. 424.

Appeal-bond.— On appeal from an order removing an administrator, the appeal-bond must be filed in the county court. Witter *v.* Witter, 65 Ill. App. 335.

Parties.— The county judge and county clerk are not proper parties to an appeal from an order removing an administrator. Witter *v.* Witter, 65 Ill. App. 335.

Record.— Under the California code providing that in proceedings for the removal of an administrator the petition and answer must be in writing, a record on appeal is properly authenticated, although the petition, answer, and order are not incorporated in the bill of exceptions, where the same are in the record certified to by the clerk. *In re* Healy, (Cal. 1901) 66 Pac. 175.

Review on appeal when error proper.— Where a judgment of the probate court removing an executor is tried in the common

taken within the time allowed by statute.[33] The evidence offered to the court below ought to be shown on the record.[34] An appellate court is disinclined to interfere with the action taken by the probate court in the matter of the removal of an executor or administrator unless positive error or gross abuse of discretion is shown.[35] The appellate court does not acquire jurisdiction to appoint or remove, but if a removal is necessary, it must, after determining the question presented by the record, issue a procedendo to the probate court requiring it to appoint some proper person to administer the estate.[36] The authority of a representative is suspended, pending an appeal from an order removing him,[37] and he is not authorized to proceed with the administration,[38] even though he has given an appeal-bond;[39] but he is merely suspended from office and no general administrator can be appointed in his stead, but a special one only.[40] When the right to certain legacies has been established by a decree properly rendered, the court may order their payment by administrators appointed during the pendency of an appeal from an order removing the executor.[41]

(XII) *COSTS.* The costs of proceedings to remove should not be allowed against the estate when the application is made by persons having no right to apply,[42] and when the charges on which removal is asked are not sustained, costs should not be allowed to both parties against the estate.[43] An executrix has been personally charged with the costs of proceedings to remove her when it was apparent that she had carelessly and wastefully managed the estate and was not a fit person to be executrix.[44]

d. Operation and Effect. The removal of an executor or administrator deprives him of the right to do anything further with respect to the administra-

pleas on appeal, when it could only be heard on error, the proceedings in the common pleas are void for want of jurisdiction, and the reversal of such judgment does not operate to reinstate the executor. Walker *v.* Webb, 2 Ohio Dec. (Reprint) 568, 4 West. L. Month. 32.

33. Holtzclaw *v.* Ware, 34 Ala. 307; White *v.* Brown, 7 T. B. Mon. (Ky.) 446.

34. Flora *v.* Mennice, 12 Ala. 836; *In re* Moore, 103 Iowa 474, 72 N. W. 674.

35. *Arizona.*—*In re* Baldridge, 2 Ariz. 299, 15 Pac. 141.

California.— *In re* Healy, 137 Cal. 474, 70 Pac. 455, 66 Pac. 175; *In re* Bell, 135 Cal. 194, 67 Pac. 123; Deck *v.* Gherke, 6 Cal. 666.

Indiana.— McFadden *v.* Ross, 93 Ind. 134; Whitehall *v.* State, 19 Ind. 30.

New York.— Matter of Wood, 70 Hun 230, 24 N. Y. Suppl. 64.

Ohio.— Munger *v.* Jeffries, 10 Ohio S. & C. Pl. Dec. 12, 7 Ohio N. P. 55.

Pennsylvania.— Perrett's Estate, 14 Pa. Super. Ct. 611.

See 22 Cent. Dig. tit. "Executors and Administrators," § 259.

Where no exception was taken in the court below by an administrator to an order removing him he must be deemed on appeal by him to have acquiesced therein. *Ex p.* Simpson, 55 Ind. 415.

36. Pearce *v.* Lovinier, 71 N. C. 248.

37. Knight *v.* Hamakar, 33 Oreg. 154, 54 Pac. 277, 659.

Protection of estate from waste.— Pending an appeal from a decree of the orphans' court removing an executor the prerogative court has power to make proper orders to protect the estate from waste, and can resort to the evidence in the transcript to determine whether the case requires the exercise of the power. *In re* Marsh, (N. J. Prerog. 1903) 55 Atl. 299.

An administrator pendente lite may be appointed by the prerogative court pending an appeal from a decree removing an executor. *In re* Marsh, (N. J. Prerog. 1903) 55 Atl. 299, where, however, the court held the circumstances not such as to call for such an appointment.

38. Walker *v.* Maddox-Rucker Banking Co., 97 Ga. 386, 23 S. E. 897; State *v.* Judge Second Dist. Ct., 5 La. Ann. 518, holding that an administrator who has been dismissed cannot take a suspensive appeal from the order of dismissal, although he may from such part of the judgment as condemns him in pecuniary damages.

39. Walker *v.* Maddox-Rucker Banking Co., 97 Ga. 386, 23 S. E. 897.

40. *California.*— *In re* Moore, 86 Cal. 72, 24 Pac. 846.

Georgia.— Walker *v.* Maddox-Rucker Banking Co., 97 Ga. 386, 23 S. E. 897.

Louisiana.— Townsend's Succession, 37 La. Ann. 405.

New York.— Matter of Wood, 70 Hun 230, 24 N. Y. Suppl. 64.

Vermont.— Banfill *v.* Banfill, 27 Vt. 557.

41. Bowers *v.* Emerson, 14 Barb. (N. Y.) 652.

42. Shook *v.* Shook, 19 Barb. (N. Y.) 653.

43. Matter of Engelbrecht, 15 N. Y. App. Div. 541, 44 N. Y. Suppl. 551.

44. Matter of Stanton, 2 N. Y. Suppl. 342, 1 Connoly Surr. (N. Y.) 108.

tion or settlement of the estate.[45] He should settle his accounts in court and turn over the estate in suitable condition to his successor or to the court without delay, and the court has jurisdiction to compel him to do so.[46] An order of removal cannot be collaterally attacked.[47]

III. ASSETS.

A. In General — 1. What Are Assets. The word "assets," in both English and American law, usually applies to such property belonging to the estate of a deceased person as may rightfully be charged with the obligations which his executor or administrator is bound to discharge. In modern practice, and conformably to modern legislation, all the property of a deceased person, whether real, personal, or mixed, is held liable for his debts and the usual charges incidental to death and the settlement of his estate; but a fundamental distinction has always been recognized between the real and personal estate, in the application of this rule, for the personal estate left by the deceased constitutes the primary fund for the payment of his debts and all purposes of administration and his real estate is merely a secondary fund, which is not available for assets until the personalty has been exhausted leaving obligations still undischarged; nor is it avail-

45. Collins *v.* Greene, 67 Ala. 211; Dunham *v.* Grant, 12 Ala. 105; Davenport *v.* Irvine, 4 J. J. Marsh. (Ky.) 60. See also Townsend's Succession, 37 La. Ann. 405.

Consent of successor.— Where foreclosure of a mortgage by advertisement was commenced by an administrator, who, pending the proceedings, was removed and a special administrator appointed, but the former administrator completed the proceedings by a sale, it was held that, it not appearing that the special administrator objected to the sale, it would be assumed that it was with his approbation and consent, and therefore valid. Baldwin *v.* Allison, 4 Minn. 25.

An executor who is also a trustee under the will may be removed as trustee and still exercise the office of executor. Deraismes *v.* Dunham, 22 Hun (N. Y.) 86.

Where an administrator took a note payable to himself in compromise of a claim due the estate he could sue on the note in his own name after his removal until discharged from liability. McGehee *v.* Slater, 50 Ala. 431.

Judgment against representative after removal.— After the removal of an administrator from his trust he ceases to have any connection with the estate and no judgment rendered against him while removed can bind the estate or have any validity as evidencing the existence of a claim against the estate. More *v.* More, 127 Cal. 460, 59 Pac. 823: Troy Nat. Bank *v.* Stanton, 116 Mass. 435. But if the suit was commenced before his removal, the judgment would be binding on him personally, notwithstanding his removal pending the suit, whether or not such judgment would have any validity as against the assets of the estate. Gibbs v. Hodge, 65 Ala. 366.

Where an administrator is removed after recovering judgment in a suit against a debtor of the estate, and the sheriff has collected the money on the execution upon the judgment, he is entitled to receive the money so collected nevertheless, and to demand it on motion in his own name. Gray *v.* Keill, 14 Sm. & M. (Miss.) 186.

46. *Arkansas.*— West *v.* Waddill, 33 Ark. 575.

Louisiana.— Overton *v.* Overton, 10 La. 472.

New Jersey.— Aldridge *v.* McClelland, 34 N. J. Eq. 237. See also Union Nat. Bank *v.* Poulson, 31 N. J. Eq. 239.

New York.— *In re* Hood, 104 N. Y. 103, 10 N. E. 35.

Ohio.— Morrison's Estate, 68 Ohio St. 252, 67 N. E. 567.

Pennsylvania.—Schlecht's Estate, 2 Brewst. 397.

See 22 Cent. Dig. tit. "Executors and Administrators," § 260.

Court may settle accounts without appointing successor. Prentiss *v.* Weatherly, 68 Hun (N. Y.) 114, 22 N. Y. Suppl. 680.

Court may appoint temporary or special administrator to take immediate charge. De Flechier's Succession, 1 La. Ann. 20.

Form of judgment.— Where an administrator is removed, and a judgment is entered against him for the amount due to the estate in the form of an order to pay the amount over to his successor, the judgment should be against him as an individual and in favor of the estate. McDonald *v.* Holdom, 99 Ill. App. 656.

47. *Alabama.*— Boynton *v.* Nelson, 46 Ala. 501.

Florida.— Mathews *v.* Durkee, 34 Fla. 559, 16 So. 411. See also Hart *v.* Bostwick, 14 Fla. 162.

Illinois.— Frothingham *v.* Petty, 197 Ill. 418, 64 N. E. 270.

Minnesota.— Simpson *v.* Cook, 24 Minn. 180, holding this to be true even though the decree states a reason for the discharge, which is not under the statute cause for discharge.

Pennsylvania.— Buehler *v.* Buffington, 43 Pa. St. 278.

Texas.— Grant *v.* McKinney, 36 Tex. 62.

able at all, without proceedings which courts of equity pursue with strict care and even reluctantly.[48]

2. Legal and Equitable Assets. A distinction has been drawn, particularly in the English law of administration, between legal and equitable assets of an estate; legal assets being those which a creditor may subject to his claim in a court of law, and equitable assets being those which a creditor can subject to his claim only by resorting to a court of equity.[49] The point of the distinction was this, that with regard to the legal assets certain rules of preference or priority among creditors were clearly established, but equity disapproved of those rules and ranked all debts alike, whether founded in specialty or simple contract, and hence the distinction between legal and equitable assets was important in determining rights of creditors among themselves.[50] In the United States, however, the distinction between legal and equitable assets is rarely enforced, the old rules of priority among creditors having been altered by suitable enactments and general rules providing the order in which creditors shall be entitled to share in all assets of the estate regardless of whether they might be strictly termed legal or equitable.[51]

B. Personal Property — 1. In General. The personalty of the deceased goes primarily to the executor or administrator as assets and not to the heir,[52]

48. Schouler Ex. § 198.

49. Schouler Ex. § 221. And see the following cases:

Connecticut.— Catlin *v.* Eagle Bank, 6 Conn. 233.

Kentucky.— Cloudas *v.* Adams, 4 Dana 603.

Mississippi.— Pulliam *v.* Taylor, 50 Miss. 551.

Missouri.— St. Louis *v.* O'Neil Lumber Co., 114 Mo. 74, 21 S. W. 484; Heiman *v.* Fisher, 11 Mo. App. 275.

New York.— Matter of Place, 7 N. Y. Leg. Obs. 217.

South Carolina.— Rutledge *v.* Hazlehurst, 1 McCord Eq. 466.

United States.— Backhouse *v.* Patton, 5 Pet. 160, 8 L. ed. 82.

England.— Deg *v.* Deg, 2 P. Wms. 412, 24 Eng. Reprint 791.

Moneys received from the sale of personal property are sometimes called "legal assets," while those arising from the sale of real property are "equitable assets." Blackhouse *v.* Patton, 5 Pet. (U. S.) 160, 8 L. ed. 82. See also Speed *v.* Nelson, 8 B. Mon. (Ky.) 499; Bain *v.* Sadler, L. R. 12 Eq. 570, 40 L. J. Ch. 791, 25 L. T. Rep. N. S. 202, 19 Wkly. Rep. 1077. But *compare* Lovegrove *v.* Cooper, 2 Smale & G. 271.

Conversion of real estate into equitable assets was effected where a testator subjected his whole estate to the payment of his debts and empowered his executors to sell his land and convey to the purchaser. Black *v.* Scott, 3 Fed. Cas. No. 1,464, 2 Brock. 325.

The interest which a creditor has in land of his debtor fraudulently conveyed is of a legal not of an equitable character. Pulliam *v.* Taylor, 50 Miss. 551. See also Orendorf *v.* Budlong, 12 Fed. 24.

For English decisions as to whether particular assets are legal or equitable see *In re* Burrell, L. R. 9 Eq. 443, 39 L. J. Ch. 544, 22 L. T. Rep. N. S. 263; Barker *v.* May, 9 B. & C. 489, 4 M. & R. 386, 17 E. C. L. 223; Clay *v.* Willis, 1 B. & C. 364, 2 D. & R. 539, 1 L. J. K. B. O. S. 144, 8 E. C. L. 156; Christy *v.* Courtenay, 26 Beav. 140; Nash *v.* Bryant, 25 Beav. 533, 4 Jur. N. S. 550, 27 L. J. Ch. 748, 6 Wkly. Rep. 573; Batson *v.* Lindegreen, 2 Bro. Ch. 94, 29 Eng. Reprint 55; Lucas *v.* Calcraft, 1 Bro. Ch. 134, 28 Eng. Reprint 1034; Lowe *v.* Peskett, 16 C. B. 500, 1 Jur. N. S. 1049, 24 L. J. C. P. 196, 3 Wkly. Rep. 481, 81 E. C. L. 500; *In re* Poole, 6 Ch. D. 739, 46 L. J. Ch. 803, 37 L. T. Rep. N. S. 119, 25 Wkly. Rep. 862; Shakels *v.* Richardson, 2 Coll. 31, 33 Eng. Ch. 31; Lyon *v.* Colville, 1 Coll. 449, 28 Eng. Ch. 449; Mutlow *v.* Mutlow, 4 De G. & J. 539, 61 Eng. Ch. 426, 45 Eng. Reprint 209; Cook *v.* Gregson, 3 Drew 547, 2 Jur. N. S. 510, 25 L. J. Ch. 706, 4 Wkly. Rep. 581; Price *v.* North, 5 Jur. 1147; Duignan *v.* Croome, 41 L. T. Rep. N. S. 672; Cox's Case, 3 P. Wms. 341, 24 Eng. Reprint 1092; Lovegrove *v.* Cooper, 2 Smale & G. 271; Hanley *v.* McDermott, Ir. R. 9 Eq. 35.

50. Benson *v.* Le Roy, 4 Johns. Ch. (N. Y.) 651; Schouler Ex. § 221.

51. Lash *v.* Hauser, 37 N. C. 489; Matter of Sperry, 1 Ashm. (Pa.) 347.

Proceeds of the sale of real estate are equitable assets. Speed *v.* Nelson, 8 B. Mon. (Ky.) 499; Clay *v.* Hart, 7 Dana (Ky.) 1.

52. *Alabama.*— Huddleston *v.* Huey, 73 Ala. 215; Randall *v.* Lang, 23 Ala. 751; Snodgrass *v.* Cabaniss, 15 Ala. 160.

Illinois.— Wells *v.* Miller, 45 Ill. 382.

Indiana.— Pond *v.* Sweetser, 85 Ind. 144.

Kansas.— Presbury *v.* Pickett, 1 Kan. App. 631, 42 Pac. 405.

Kentucky.— Brunk *v.* Means, 11 B. Mon. 214; Coons *v.* Nall, 4 Litt. 263.

Michigan.— Hollowell *v.* Cole, 25 Mich. 345.

Missouri.— Smith *v.* Denny, 37 Mo. 20.

New York.—Rockwell *v.* Saunders, 19 Barb. 473. See also Matter of McCabe, 84 N. Y. App. Div. 145, 82 N. Y. Suppl. 180 [*affirmed* in 177 N. Y. 584, 69 N. E. 1126].

North Carolina.— Foster *v.* Cook, 8 N. C. 509.

and the title of the representative relates back to the time of the decedent's death.[53]

2. PERSONAL ASSETS ENUMERATED. The executor or administrator becomes vested with the title to all corporeal personal property or things in possession and visible and tangible,[54] such as cash,[55] household provisions, if of appreciable value,[56] furniture,[57] wearing apparel, where no rights of widow or children are involved,[58] jewels,[59] cattle,[60] tools and implements,[61] merchandise or stock in trade,[62] and standing timber specifically reserved in a bill of sale.[63] The representative is also vested with the title to incorporeal property or things in action, whether evidenced by any written instrument or not,[64] such as corporate stock,[65] municipal or other corporate securities,[66] notes or bonds,[67] debts due to the

Ohio.— Luce *v.* McDonald, Wright 654; *In re* Sattler, Ohio Prob. 183.

South Carolina.— Kaminer *v.* Hope, 9 S. C. 253.

Texas.— Richardson *v.* Vaughn, (Civ. App. 1893) 22 S. W. 1112.

United States.— Bodemuller *v.* U. S., 39 Fed. 437; Kidder *v.* U. S., 19 Ct. Cl. 561; Chaplin *v.* U. S., 19 Ct. Cl. 424.

See 22 Cent. Dig. tit. "Executors and Administrators," § 279.

53. Bullock *v.* Rogers, 16 Vt. 294; Engle *v.* Richards, 28 Beav. 366, 6 Jur. N. S. 117, 8 Wkly. Rep. 697.

54. See Bullock *v.* Rogers, 16 Vt. 294.

A graveyard monument sold to decedent in his lifetime is part of the assets of his estate, and may be sold on the application of creditors to pay debts. Matter of Willard, 9 Ohio S. & C. Pl. Dec. 824.

Letters.— The receiver of letters has but a qualified property in them. They pass to the executor or administrator but not in the full sense of assets. Eyre *v.* Higbee, 35 Barb. (N. Y.) 502.

Personal property of widow.— The executor of a deceased husband cannot recover from the widow the value of presents to her by her husband and others or articles owned by her in her own right at the time of the marriage. Huey *v.* Huey, 26 Iowa 525.

55. Schouler Ex. § 200.

Where an administrator has charged himself with funds, the *prima facie* presumption is that such funds are assets belonging to the estate of the decedent, and the orphans' court has jurisdiction over them. Fague's Estate, 19 Pa. Super. Ct. 638.

Money of testator received during his lifetime.— Where it appears that an executor received payment on one of testator's notes before testator's death, and there is no evidence to show payment over to the testator, the executor will be held liable. Hill *v.* Fly, (Tenn. Ch. App. 1899) 52 S. W. 731.

Confederate treasury notes, having been issued in violation of law, cannot be considered as forming part of a decedent's estate. Cockburn *v.* Wilson, 20 La. Ann. 39.

56. Griswold *v.* Chandler, 5 N. H. 492. *Aliter* under Indiana statute. Coffinberry *v.* Madden, 30 Ind. App. 360, 66 N. E. 64, 96 Am. St. Rep. 349.

57. Schouler Ex. § 200.

58. Steen's Estate, 1 Pa. Co. Ct. 473. But see Carroll *v.* Connet, 2 J. J. Marsh. (Ky.) 195.

Wearing apparel of married woman.— An executor should not be charged with the wardrobe of testatrix, where it is not shown how she acquired it, the presumption being that the husband gave it to her, and hence that the title remained in him. *In re* Hall, 70 Vt. 458, 41 Atl. 508.

59. Coffinberry *v.* Madden, 30 Ind. App. 360, 66 N. E. 64, 96 Am. St. Rep. 349, holding that a watch, chain, and charm, a ring, and a diamond stud worth five hundred dollars were not within the meaning of a statute providing that wearing apparel of the decedent should not be considered assets.

60. Schouler Ex. § 200.

61. Schouler Ex. § 200.

62. Schouler Ex. § 200.

63. McClintock's Appeal, 71 Pa. St. 365.

64. See Bullock *v.* Rogers, 16 Vt. 294.

Estate pur autre vie.—Under the Kentucky statute an estate held by a deceased person for the life of another goes to the personal representative of the deceased as assets, and should be applied as personal estate. Fox *v.* Long, 8 Bush (Ky.) 551.

The benefit of a license to keep a cart is personalty and belongs to executor. Hunt *v.* Hunt, 2 Vern. Ch. 83, 23 Eng. Reprint 663.

65. Weyer *v.* Franklin Second Nat. Bank, 57 Ind. 198; Hobbs *v.* Western Nat. Bank, 12 Fed. Cas. No. 6,551*a*; Drybutter *v.* Bartholomew, 2 P. Wms. 127, 24 Eng. Reprint 668; Bligh *v.* Brent, 2 Y. & C. Exch. 268.

Under a mere contract to deliver stock or bonds it is the right of action under the contract that constitutes assets. Hitchcock *v.* Mosher, 106 Mo. 578, 17 S. W. 638.

66. Chapman *v.* Charleston, 30 S. C. 549, 9 S. E. 591, 3 L. R. A. 311.

67. *Illinois.*—Hickox *v.* Frank, 102 Ill. 660.

Kansas.— Presbury *v.* Pickett, 1 Kan. App. 631, 42 Pac. 405.

Mississippi.— Morse *v.* Clayton, 13 Sm. & M. 373.

Tennessee.— Martin *v.* Stovall, 103 Tenn. 1, 52 S. W. 296, 48 L. R. A. 130.

Texas.— Whithed *v.* McAdams, 18 Tex. 551.

Where notes are delivered to an executor to indemnify the estate against a liability arising from the testator being a surety such notes and the money collected on them are not the property of the estate and the estate is not liable for the misconduct of the execu-

decedent,[68] the good-will of a business, with the books, addresses, etc., incident thereto,[69] and patent rights or copyrights.[70] Tolls received from a ferry after the death of one of the owners of the exclusive ferry privilege are funds in the hands of his administrator and liable for his debts.[71] The income of a trust fund invested in real estate for decedent's benefit should be treated as assets going to the executor.[72] A liquor license has been held not an asset of the estate of the deceased licensee.[73]

3. Income, Increase, and Accretions. Personal assets are not necessarily restricted to personalty which the deceased owned in his lifetime, but embrace also the proper and just earnings, income, increase, accretions, and accessions of and to those assets, even after the death of the decedent.[74]

4. Legacies and Distributive Shares. A legacy due one under a will without restriction, or the share of a residuary legatee or distributee in an unsettled estate, goes upon his death before receiving payment to his executor or administrator, as the proper representative to collect and receive the fund, irrespective of the persons who may finally inherit;[75] and the same is true as to any portion of a

tor with respect to such notes and money. Arbuckle *v.* Tracy, 15 Ohio 432.

68. See *infra*, III, B, 5.

Proceeds of a sale of coal made in the lifetime of the testator become personalty passing to his executors. *In re* Brown, 27 Pittsb. Leg. J. (Pa.) 228.

69. Thompson *v.* Winnebago County, 48 Iowa 155; Matter of Randell, 8 N. Y. Suppl. 652, 2 Connoly Surr. (N. Y.) 29; Reilly's Estate, 6 Pa. Dist. 252. See also *In re* Mueller, 190 Pa. St. 601, 42 Atl. 1021; *In re* Buck, 185 Pa. St. 57, 39 Atl. 821, 64 Am. St. Rep. 616.

The subscription list and good-will of a printing office are not assets, as they are of inappreciable value and of too uncertain and contingent a nature to be the subject of appraisement and estimation. Seighman *v.* Marshall, 17 Md. 550.

The good-will of an inn is local, and does not exist independently of the house in which it is kept. Hence where a husband kept a tavern in his wife's house, and she became his administratrix upon his death, and continued to keep the tavern, and subsequently sold the good-will, the price of such good-will was not assets of his estate. Elliot's Appeal, 60 Pa. St. 151. But *compare* Worral *v.* Hand, Peake 74.

70. Bradley *v.* Dull, 19 Fed. 913; Shaw Relief Valve Co. *v.* New Bedford, 19 Fed. 753.

A right to use a patent or copyright, although styled a license, goes to the licensee's estate as assets, unless clearly a personal license. Oliver *v.* Morgan, 10 Heisk. (Tenn.) 322.

71. Schonberg's Succession, 28 La. Ann. 137.

72. Fassitt's Estate, 2 Wkly. Notes Cas. (Pa.) 571.

73. *In re* Mueller, 190 Pa. St. 601, 42 Atl. 1021; *In re* Buck, 185 Pa. St. 57, 39 Atl. 821, 64 Am. St. Rep. 816; *In re* Grimm, 181 Pa. St. 233, 37 Atl. 403; Blumenthal's Petition, 125 Pa. St. 412, 18 Atl. 395. *Contra*, Reilly's Estate, 6 Pa. Dist. 252.

74. *Illinois.*— Wingate *v.* Pool, 25 Ill. 118.

Indiana.— Ray *v.* Doughty, 4 Blackf. 115.

Massachusetts.— Johnson *v.* Bridgewater Iron Mfg. Co., 14 Gray 274, dividends of stock and coupon warrants.

New Jersey.— *In re* Merchant, 39 N. J. Eq. 506 [*affirmed* in 41 N. J. Eq. 349, 7 Atl. 633], lambs born and wool shorn from a flock of sheep.

Pennsylvania.— Sweigart *v.* Berk, 8 Serg. & R. 308.

England.— Gibblett *v.* Read, 9 Mod. 459.

See 22 Cent. Dig. tit. "Executors and Administrators," § 279.

75. *Alabama.*— Bromberg *v.* Sands, 127 Ala. 411, 30 So. 510; Sullivan *v.* Lawler, 72 Ala. 68.

Arkansas.—Purcelly *v.* Carter, 45 Ark. 299.

Florida.— Bluett *v.* Nicholson, 1 Fla. 384.

Georgia.— Blair *v.* Dickerson, 73 Ga. 146.

Indiana.— See Turner *v.* Campbell, 34 Ind. 317.

Iowa.— Rhodes *v.* Stout, 26 Iowa 313.

Louisiana.— Marcenaro *v.* Mordella, 10 La. Ann. 772.

Maine.— Grant *v.* Bodwell, 78 Me. 460, 7 Atl. 12; Storer *v.* Blake, 31 Me. 289.

Maryland.— Hanson *v.* Hanson, 4 Gill 69; Duvall *v.* Harwood, 1 Harr. & G. 474.

Massachusetts.— Gale *v.* Nickerson, 151 Mass. 428, 24 N. E. 400, 9 L. R. A. 200; Osgood *v.* Foster, 5 Allen 560.

Missouri.— Hanenkamp *v.* Borgmier, 32 Mo. 569.

New Hampshire.— Weeks *v.* Jewett, 45 N. H. 540.

New Jersey.—Shaver *v.* Shaver, 1 N. J. Eq. 437. See also Cohen *v.* Moss, (Ch. 1894) 29 Atl. 194.

New York.— *In re* Murphy, 144 N. Y. 557, 69 N. E. 691; Berkeley *v.* Kennedy, 62 N. Y. App. Div. 609, 70 N. Y. Suppl. 762; Sterrit *v.* Lee, 44 N. Y. App. Div. 619, 60 N. Y. Suppl. 219; Matter of Maybee, 40 Misc. 518, 82 N. Y. Suppl. 809; Beecher *v.* Crouse, 19 Wend. 306; Smith *v.* Lawrence, 11 Paige 206.

Pennsylvania.— *In re* Moran, 13 Pa. Super. Ct. 251; Wagner's Estate, 2 Pa. Dist. 238; Parson's Estate, 13 Phila. 406; Levy's Estate, 6 Phila. 122; Kemp's Estate, 2 Woodw. Dec. 428.

legacy or distributive share remaining unpaid at the death of the heir or legatee.[76] Where, however, there are no creditors of the heir, legatee, or distributee, and no claim of husband or widow to adjust, a payment directly to his next of kin is valid, for this accomplishes by a more direct method the same result as though payment had been made to the administrator and the fund distributed by him to those entitled.[77]

5. Debts and Rights of Action — a. In General. All debts, claims, and surviving rights of action of the decedent, of every kind, reducible to money, vest in the executor or administrator, to be collected or sued upon or transferred for the benefit of the estate.[78] The representative thus becomes entitled to balances, royalties, and the like, due under contracts,[79] and is also vested with the right to

Tennessee.— Puckett *v.* James, 2 Humphr. 565.

Vermont.— Probate Ct. *v.* Winch, 57 Vt. 282.

Wisconsin.— Pease *v.* Walker, 20 Wis. 573.

See 22 Cent. Dig. tit. "Executors and Administrators," § 298.

Surviving heirs or distributees cannot recover directly. Balley *v.* Duncan, 4 T. B. Mon. (Ky.) 256. But see Maxwell *v.* Craft, 32 Miss. 307; Brokaw *v.* Hudson, 27 N. J. Eq. 135; Hays *v.* Hays, 5 Munf. (Va.) 418.

Widow's allowance.— Under a statute providing that the widow of a decedent, whether he died testate or intestate, may select out of his personal estate articles to the value of five hundred dollars, or, on failure or refusal so to do, be entitled to the same amount in cash, etc., the personal representatives of a widow who has not received such amount during her life, nor elected to take under the husband's will, are entitled to prosecute a claim for such amount against the husband's estate, where it does not affirmatively appear from his will that the provisions thereof were intended to be in lieu of the widow's statutory rights. Welch *v.* Collier, 27 Ind. App. 502, 61 N. E. 757.

76. Atkins *v.* Guice, 21 Ark. 164; Hamilton *v.* Levy, 41 S. C. 374, 19 S. E. 610.

77. Matter of Maybee, 40 Misc. (N. Y.) 518, 82 N. Y. Suppl. 809.

78. *Arkansas.*— Byrd *v.* Lipscomb, 20 Ark. 19; Worsham *v.* Field, 18 Ark. 447; Johnson *v.* Pierce, 12 Ark. 599.

Illinois.— Garvy *v.* Coughlan, 92 Ill. App. 582.

Indiana.— Walpole *v.* Bishop, 31 Ind. 156.

Kentucky.— Mitchel *v.* Mitchel, 4 B. Mon. 380, 41 Am. Dec. 237; Fowler *v.* Lewis, 3 A. K. Marsh. 443; Rowland *v.* Doolin, 10 Ky. L. Rep. 684; Roberts *v.* Eales, 10 Ky. L. Rep. 360.

Massachusetts.— Webster *v.* Lowell, 139 Mass. 172, 29 N. E. 543; Clapp *v.* Stoughton, 10 Pick. 463; Towle *v.* Lovet, 6 Mass. 394.

Michigan.— Bourget *v.* Monroe, 58 Mich. 563, 25 N. W. 514; Hollowell *v.* Cole, 25 Mich. 345.

New Hampshire.— Smith *v.* Knowlton, 11 N. H. 191.

New Jersey.— Noice *v.* Brown, 39 N. J. L. 569; Hayes *v.* Berdan, 47 N. J. Eq. 567, 21 Atl. 339; Hayes *v.* Hayes, 45 N. J. Eq. 461, 17 Atl. 634; Miller *v.* Henderson, 10 N. J. Eq. 320.

New York.— Heidenheimer *v.* Wilson, 31 Barb. 636. See also Kohler *v.* Knapp, 1 Bradf. Surr. 241.

Ohio.— Rousch *v.* Hundley, 2 Ohio Dec. (Reprint) 445, 3 West. L. Month. 126.

Pennsylvania.— *In re* Colgan, 160 Pa. St. 140, 28 Atl. 646; Linsenbigler *v.* Gourley, 56 Pa. St. 166, 94 Am. Dec. 51; Fretz's Appeal, 4 Watts & S. 433.

South Carolina.— Kaminer *v.* Hope, 9 S. C. 253; Rutledge *v.* Hazlehurst, 1 McCord Eq. 466.

South Dakota.— Bem *v.* Shoemaker, 10 S. D. 453, 74 N. W. 239, holding that where the heirs sue on an appeal-bond given in an action to recover property of the estate, after the administrator's refusal to sue, the judgment on such bond should be paid to the administrator.

Texas.— Sanders *v.* Devereux, 25 Tex. Suppl. 1.

Virginia.— Chichester *v.* Vass, 1 Munf. 98, 4 Am. Dec. 531.

Wisconsin.— Evans *v.* Enloe, 70 Wis. 345, 34 N. W. 918, 36 N. W. 22.

See 22 Cent. Dig. tit. "Executors and Administrators," § 301.

Damages recovered in an action for personal injuries which is revived on plaintiff's death are assets of his estate. Missouri Pac. R. Co. *v.* Bennett, 5 Kan. App. 231, 47 Pac. 183.

Cause of action for death of decedent not an asset of estate.— Friend *v.* Burleigh, 53 Nebr. 674, 74 N. W. 50.

The testator's declarations that he never intended to require payment of a promissory note do not prevent its being held a part of the assets where such assets are insufficient. Byrn *v.* Godfrey, 4 Ves. Jr. 6, 4 Rev. Rep. 155, 31 Eng. Reprint 3.

Proceedings for accounting.— Where a former guardian of a deceased infant is to be called to account for a fund, the administrator of the infant and not the infant's distributees should proceed. Davis *v.* Rhame, 1 McCord Eq. (S. C.) 191.

The administrator of a deceased agent cannot collect as assets a claim which vested in the principal. The Brig Hiram, 23 Ct. Cl. 431.

79. East *v.* Ferguson, 59 Ind. 169; Pitts *v.* Jameson, 15 Barb. (N. Y.) 310; Richmond

recover bank deposits,[80] arrears of wages or salary,[81] dividends on corporate stock due and payable before decedent's death,[82] and other claims lawfully surviving.[83] A claim against the government constitutes assets for the payment of debts,[84] but it has been held otherwise of a sum appropriated to decedent's heirs or estate as a pure gratuity.[85] Causes of action accruing after the decedent's death, but before letters testamentary or of administration were granted, vest in the executor or administrator upon his appointment.[86]

v. Railway Register Mfg. Co., 12 N. Y. Suppl. 358.

The performance of a contract for the construction of a railroad made by a decedent cannot be enforced by his heirs, although the profits are partly in lands, since the contract forms a part of his personalty, and belongs to his personal representatives. Crane *v.* Kansas Pac. R. Co., 131 U. S. appendix clxviii, 25 L. ed. 782.

80. Holt *v.* Augusta Bank, 13 Ga. 341; Rhoton's Succession, 34 La. Ann. 893 (holding that money deposited in a bank by a firm to the credit of the intestate, their principal, previous to his death, becomes at his decease an asset of the succession, and cannot be withdrawn by the administrator, one of the firm, and treated as belonging to said firm); Schluter *v.* Bowery Sav. Bank, 1 N. Y. Suppl. 655.

81. *Georgia.*— Hawkins *v.* McCalla, 95 Ga. 192, 22 S. E. 141.

Kansas.— Lappin *v.* Mumford, 14 Kan. 9.

Kentucky.— Grider *v.* Rodes, 5 Bush 277.

Michigan.— *In re* Joslyn, 117 Mich. 442, 75 N. W. 930.

Pennsylvania.— Maitland *v.* Grissinger, 1 Woodw. 294.

Tennessee.— Ketchum *v.* Dew, 7 Coldw. 532.

See 22 Cent. Dig. tit. "Executors and Administrators," § 301.

Salary voted after decease in general terms should be deemed assets. Loring *v.* Cunningham, 9 Cush. (Mass.) 87.

Uncollected fees of a deceased public officer go to his administrator and not to his widow. Stewart *v.* Taylor, 9 Lea (Tenn.) 352.

82. Welles *v.* Cowles, 4 Conn. 182, 10 Am. Dec. 115; People's Nat. Bank *v.* Cleveland, 117 Ga. 908, 44 S. E. 20.

Dividends declared and payable after decedent's death are usually collected by the executor or administrator for the purposes of his trust, accounting in a proper manner as the directions of the testator or the general law of administration may require. Welles *v.* Cowles, 4 Conn. 182, 10 Am. Dec. 115.

83. Schouler Ex. § 200.

The representative succeeds to a right of action under a marriage settlement of the decedent (Brunk *v.* Means, 11 B. Mon. (Ky.) 214; Mitchel *v.* Mitchel, 4 B. Mon. (Ky.) 380, 41 Am. Dec. 237), a claim for interest due at the time of decedent's death (Sweigart *v.* Frey, 8 Serg. & R. (Pa.) 299), a judgment in favor of decedent which is collectable (Matter of Jacob, 5 N. Y. App. Div. 508, 38 N. Y. Suppl. 1083), an action for breach of covenant in a sale of decedent's business, where breach occurred before the death of the seller (Mott *v.* Mott, 11 Barb. (N. Y.) 127), a right under a vendor's lien (Evans *v.* Enloe, 70 Wis. 345, 34 N. W. 918, 36 N. W. 22), a right of election in a vendor on default of the vendee to sue for the price or avoid the contract (Oakes *v.* Gillilan, (Nebr. 1901) 95 N. W. 511), a succession claim (Dunbar *v.* Thomas, 14 La. 332), a suit on a recognizance (Pauley *v.* Pauley, 7 Watts (Pa.) 159), a claim under a guaranty (Walsh *v.* Packard, 165 Mass. 189, 42 N. E. 577, 52 Am. St. Rep. 508, 40 L. R. A. 321), or a valuable right of injunction of which equity takes cognizance (Peabody *v.* Norfolk, 98 Mass. 452, 96 Am. Dec. 664).

84. *Louisiana.*— Hardy's Estate, 46 La. Ann. 1309, 16 So. 208; Hall *v.* Emerson, 11 La. 1.

Maine.— Grant *v.* Bodwell, 78 Me. 460, 7 Atl. 12; Thurston *v.* Doane, 47 Me. 79; Thurston *v.* Lowder, 40 Me. 197.

Massachusetts.— Foster *v.* Fifield, 20 Pick. 67.

Missouri.— Hickey *v.* Dallmeyer, 44 Mo. 237.

New Jersey.— Price *v.* Forrest, 54 N. J. Eq. 669, 35 Atl. 1075.

New York.— Rogers *v.* Hosack, 18 Wend. 319.

United States.— Briggs *v.* Walker, 171 U. S. 466, 19 S. Ct. 1, 43 L. ed. 243 [*affirming* 102 Ky. 359, 43 S. W. 479, 19 Ky. L. Rep. 1490]; Bodemuller *v.* U. S., 39 Fed. 437; Thompson *v.* U. S., 20 Ct. Cl. 276.

See 22 Cent. Dig. tit. "Executors and Administrators," § 301.

The arrears of a bounty payable by the United States to a volunteer who died in service are payable to the administrator, as part of the assets of the estate, and not to the relatives of the decedent. Seidel's Estate, 2 Woodw. (Pa.) 259.

Accrued pension or arrears of pension do not constitute assets of the pensioner's estate. Donnelly *v.* U. S., 17 Ct. Cl. 105. But *compare* Slade *v.* Slade, 11 Cush. (Mass.) 466; Foot *v.* Knowles, 4 Metc. (Mass.) 386.

85. Mulledy's Succession, 47 La. Ann. 1580, 18 So. 633; Gillan *v.* Gillan, 55 Pa. St. 430. See also Eastland *v.* Lester, 15 Tex. 98; Burton *v.* Burton, 10 Leigh (Va.) 597.

For a similar distinction as to land grants see *infra*, III, C, 8.

Money appropriated to the "legal representatives" of a person goes to the administrator and not to the heirs. Thompson *v.* U. S., 20 Ct. Cl. 276.

86. Daniel *v.* Holland, 4 J. J. Marsh. (Ky.) 18; Wooldridge *v.* Draper, 15 Mo. 470; David *v.* Bells, Peck (Tenn.) 135.

b. Debts Due From Representative.[87] At common law the appointment of one's debtor as executor was held to extinguish the debt, and the rule was applied even where such executor died before probate or was one of several joint debtors.[88] In equity, however, the effect of the appointment of a debtor to the office of executor was that the debt due from the debtor executor was considered to have been paid by him to himself and upon this supposition the rule was established in equity that the executor was accountable for the amount of his debt as assets.[89] In the United States the rule is well settled that debts owing from executors stand upon the same footing with debts due the decedent's estate from other sources and are to be regarded as assets.[90] An administrator who is indebted to his intestate must account for the debt, and even at common law his appointment, not being through the act and favor of his creditor, does not appear to have extinguished his debt.[91] It is sometimes said that when a debtor becomes

87. See also *infra*, VII, N.

88. Allin *v.* Shadburne, 1 Dana (Ky.) 68, 25 Am. Dec. 121; Mitchell *v.* Rice, 6 J. J. Marsh. (Ky.) 623; Gardner *v.* Miller, 19 Johns. (N. Y.) 188; Ferebee *v.* Doxey, 28 N. C. 448; Cheetham *v.* Ward, 1 B. & P. 630; Wankford *v.* Wankford, 1 Salk. 299.

If the debtor renounced the executorship before the ordinary the debt due by him to the testator was not extinguished. Mitchell *v.* Rice, 6 J. J. Marsh. (Ky.) 623.

89. 2 Williams Ex. (7th Am. ed.) 628. And see Gardner *v.* Miller, 19 Johns. (N. Y.) 188; Freakley *v.* Fox, 9 B. & C. 130, 7 L. J. K. B. O. S. 148, 4 M. & R. 18, 17 E. C. L. 66; Carey *v.* Goodinge, 3 Bro. Ch. 110, 29 Eng. Reprint 439; Simmons *v.* Gutteridge, 13 Ves. Jr. 262, 33 Eng. Reprint 292; Byrn *v.* Godfrey, 4 Ves. Jr. 6, 4 Rev. Rep. 155, 31 Eng. Reprint 3.

90. *Alabama.*— Weems *v.* Bryan, 21 Ala. 302.

California.— *In re* Walker, 125 Cal. 242, 57 Pac. 991, 73 Am. St. Rep. 40.

Connecticut.— Bacon *v.* Fairman, 6 Conn. 121.

Iowa.— Kaster *v.* Pierson, 27 Iowa 90, 1 Am. Rep. 254.

Massachusetts.— Ipswich Mfg. Co. *v.* Story, 5 Metc. 310; Hobart *v.* Stone, 10 Pick. 215; Winship *v.* Bass, 12 Mass. 199.

Missouri.— McCarty *v.* Frazer, 62 Mo. 263.

New Jersey.— Wood *v.* Tallman, 1 N. J. L. 153. See also Poukon *v.* Johnson, 29 N. J. Eq. 529.

New York.— Adair *v.* Brimmer, 74 N. Y. 539; Everts *v.* Everts, 62 Barb. 577.

North Carolina.— Moore *v.* Miller, 62 N. C. 359.

Ohio.— McGanhey *v.* Jacoby, 54 Ohio St. 487, 44 N. E. 231; Tracy *v.* Card, 2 Ohio St. 431; Bigelow *v.* Bigelow, 4 Ohio 138, 19 Am. Dec. 591; Martin *v.* Train, 6 Ohio Cir. Ct. 49, 3 Ohio Cir. Dec. 344; Collins *v.* Nugent, 7 Ohio Dec. (Reprint) 485, 3 Cinc. L. Bul. 519; Slagle *v.* Slagle, 3 Ohio Dec. (Reprint) 549; Mitchell *v.* Towner, 1 Ohio Dec. (Reprint) 352, 7 West. L. J. 581; *In re* Dair, Ohio Prob. 233.

Pennsylvania.— Anderson *v.* Anderson, 183 Pa. St. 480, 38 Atl. 1007.

South Carolina.— Hall *v.* Hall, 2 McCord Eq. 269; Farys *v.* Farys, Harp. Eq. 261.

Tennessee.— Spurlock *v.* Earles, 8 Baxt. 437.

Wisconsin.— Robinson *v.* Hodgkin, 99 Wis. 327, 74 N. W. 791; Finch *v.* Houghton, 19 Wis. 149.

See 22 Cent. Dig. tit. "Executors and Administrators," § 302.

Security given for such debt is not thus discharged. Soverhill *v.* Suydam, 59 N. Y. 140.

Lost note.— The executor will be charged in his account with a note against himself set down in the inventory and alleged to be lost or destroyed by the testator, where the amount, existence, and loss of the note are proved and there are no circumstances sufficient to raise the presumption that it was intentionally destroyed by the testator. Clark *v.* Hornbeck, 17 N. J. Eq. 430.

Purchase of property at foreclosure sale.— Where, on foreclosure of a mortgage belonging to the estate, the land was bid in by the executor and other legatees, he was chargeable at the instance of creditors with the proceeds of the sale. Davis *v.* Jackson, (Tenn. Ch. App. 1897) 39 S. W. 1067.

Specific legacy of debt.— Where testator appointed his covenantor his executor, but expressly reserved the obligation, willing it to his wife, an action on the covenant would not lie against the executor in his representative capacity; but the obligation could be enforced against him, in an action of assumpsit on an implied agreement for its performance. Fishel *v.* Fishel, 7 Watts (Pa.) 44.

Set-off.— An executor who is found to be indebted to the estate should be allowed to set off against such debt an indebtedness to him from the testator. *In re* Cunningham, 1 Hun (N. Y.) 214.

91. *Alabama.*— Purdom *v.* Tipton, 9 Ala. 914; Duffee *v.* Buchanan, 8 Ala. 27.

Iowa.— Savery *v.* Sypher, 39 Iowa 675.

Massachusetts.— Bassett *v.* Granger, 136 Mass. 174.

New York.— Day *v.* Leal, 14 Johns. 404.

North Carolina.— Ferebee *v.* Doxey, 28 N. C. 448, holding that when a court appoints one of the obligors to be the administrator of the obligee this only suspends the

executor or administrator of the estate of his creditor the debt is extinguished at law,[92] but becomes at once assets in his hands,[93] and the representative is chargeable with the amount thereof as cash,[94] as under such circumstances equity will

debt on the bond during the administration of that administrator and does not release or extinguish it. See also Hines *v.* Hines, 95 N. C. 482.

Pennsylvania.— Simon *v.* Albright, 12 Serg. & R. 429.

Virginia.— Utterback *v.* Cooper, 28 Gratt. 233.

England.— Wankford *v.* Wankford, 1 Salk. 299.

See 22 Cent. Dig. tit. "Executors and Administrators," § 302.

A special administrator who was individually indebted to the deceased must charge himself with the amount in his special administrator's account. *In re* Armstrong, 69 Cal. 239, 10 Pac. 335.

The appointment of a surviving partner as administrator does not extinguish an indebtedness of the firm to the estate of the decedent. *In re* Dair, Ohio Prob. 233.

92. *Alabama.*— Arnold *v.* Arnold, 124 Ala. 550, 27 So. 465, 82 Am. St. Rep. 199.

Louisiana.— Boyce *v.* Davis, 13 La. Ann. 554.

Massachusetts.— Tarbell *v.* Jewett, 129 Mass. 457.

Ohio.— Shields *v.* Odell, 27 Ohio St. 398.

South Carolina.— Jacobs *v.* Woodside, 6 S. C. 490.

See 22 Cent. Dig. tit. "Executors and Administrators," § 302.

A judgment is extinguished when the judgment debtor becomes administrator of the judgment creditor. Lane *v.* Westmoreland, 79 Ala. 372; Thomas *v.* Thompson, 2 Johns. (N. Y.) 471. See also Charles *v.* Jacobs, 9 S. C. 295.

Resignation before payment.— Where an administrator has purchased land from the estate, but before making payment therefor has resigned and been discharged by the probate court, his co-administrator may subsequently sue him for the debt, which is an asset of the estate. Langley *v.* Langley, 121 Ala. 70, 25 So. 707.

93. *Connecticut.*— Davenport *v.* Richards, 16 Conn. 310.

Kentucky.— Hickman *v.* Kamp, 3 Bush 205.

Maine.— Hodge *v.* Hodge, 90 Me. 505, 38 Atl. 535, 60 Am. St. Rep. 285, 40 L. R. A. 33.

Massachusetts.— Tarbell *v.* Jewett, 129 Mass. 457; Martin *v.* Smith, 124 Mass. 111; Alvord *v.* Marsh, 12 Allen 603; Leland *v.* Felton, 1 Allen 531, holding that debts due to the estate of a testator from the executor named in his will, and from a firm of which he is a member, are to be treated and accounted for as assets, although he and his firm were insolvent at the time when he accepted the trust, and although he has never charged them in his account, and an account has been allowed in which they were not included, but were mentioned as notes which it had been impossible to collect, and although he has resigned his trust, and an administrator *de bonis non* has been appointed in his place.

Michigan.— Crow *v.* Conant, 90 Mich. 247, 51 N. W. 450, 30 Am. St. Rep. 427.

New Hampshire.—Norris *v.* Towle, 54 N. H. 290.

New York.— *In re* Rugg, 3 N. Y. St. 224. See also Adair *v.* Brimmer, 74 N. Y. 539.

Ohio.— Shields *v.* Odell, 27 Ohio St. 398.

South Carolina.— Jacobs *v.* Woodside, 6 S. C. 490; Charles *v.* Jacobs, 6 S. C. 295.

Wisconsin.— Robinson *v.* Hodgkin, 99 Wis. 327, 74 N. W. 791.

See 22 Cent. Dig. tit. "Executors and Administrators," § 302.

Administrator bound to account for whole debt.— Norris *v.* Towle, 54 N. H. 290.

Firm or corporation debt.— Even where a partner in a firm, or an officer of a corporation owing the deceased a debt, becomes executor or administrator, the indebtedness becomes assets in his hands. Leland *v.* Telton, 1 Allen (Mass.) 531; Eaton *v.* Walsh, 42 Mo. 272; *In re* Consalus, 95 N. Y. 340. But see James *v.* West, 67 Ohio St. 28, 65 N. E. 176.

A debt created after the death of the testator becomes assets in the hands of the debtor who is appointed administrator *de bonis non* with the will annexed. Martin *v.* Train, 6 Ohio Cir. Ct. 49, 3 Ohio Cir. Dec. 344.

Fact that debt was not included in inventory or accounts immaterial.— Tarbell *v.* Jewett, 129 Mass. 457; Gilson's Estate, 18 Wkly. Notes Cas. (Pa.) 570; Robinson *v.* Hodgkin, 99 Wis. 327, 74 N. W. 791 [*disapproving* Lynch *v.* Divan, 66 Wis. 490, 29 N. W. 213].

The question whether such debt is due, and the amount of it, becomes a question of probate administration, in the first instance, to be decided by the judge of probate, on all questions of law and fact, subject to an appeal. Hodge *v.* Hodge, 90 Me. 505, 38 Atl. 535, 60 Am. St. Rep. 285, 40 L. R. A. 33.

Appointment of surety on bond of previous executor.— The appointment as administrator with the will annexed of one who was surety on the bond of the previous executor does not make a debt due the estate from such predecessor assets in his hands by reason of his suretyship. Shields *v.* Odell, 27 Ohio St. 398.

Death of representative.— An indebtedness from an administrator to the estate, having been converted into assets by his appointment, is not revived by the death or removal of the administrator, so that it can be sued by an administrator *de bonis non.* Hodge *v.* Hodge, 90 Me. 505, 38 Atl. 535, 60 Am. St. Rep. 285, 40 L. R. A. 33. But *compare* Purcelly *v.* Carter, 45 Ark. 299.

94. *Alabama.*— Arnold *v.* Arnold, 124 Ala. 550, 27 So. 465, 82 Am. St. Rep. 199. See also Ward *v.* Oates, 42 Ala. 225.

raise a trust[95] or presume that the debt is paid.[96] This rule is, however, subject to some limitations.[97]

c. Rights of Action Connected With Realty. With regard to rights of action relating to or arising out of real property, such as for a breach of covenants relating thereto, for a trespass on or other injury to the real estate, or for damages for the condemnation of or injury to the land in the exercise of the right of eminent domain, the governing consideration is whether the injury accrued and the right of action became complete before the death of the owner. Rights of action

Louisiana.— Boyce *v.* Davis, 13 La. Ann. 554.

Massachusetts.— Ipswich Mfg. Co. *v.* Story, 5 Metc. 310.

New York.— Baucus *v.* Stover, 89 N. Y. 1 [*reversing* 25 Hun 109].

Ohio.— James *v.* West, 67 Ohio St. 28, 65 N. E. 156; McGanhey *v.* Jacoby, 54 Ohio St. 487, 44 N. E. 231; Cheney *v.* Powell, 20 Ohio Cir. Ct. 398, 11 Ohio Cir. Dec. 279.

Wisconsin.— Robinson *v.* Hodgkin, 99 Wis. 327, 74 N. W. 791.

See 22 Cent. Dig. tit. "Executors and Administrators," § 302.

Note signed by another as surety.— The representative's debt as principal on a note signed by another as surety is chargeable to him as money in his hands. James *v.* West, 67 Ohio St. 28, 65 N. E. 156.

An insolvent executor is properly charged with the full amount of notes executed by him to the testator. Davisson *v.* Akin, 42 Oreg. 177, 70 Pac. 507. But *compare* Matter of Georgi, 21 Misc. (N. Y.) 419, 47 N. Y. Suppl. 1061; Brown *v.* Harshman, 9 Ohio Cir. Ct. 1, 6 Ohio Cir. Dec. 10.

Debt returned as solvent presumed to have been collected.— U. S. *v.* Eggleston, 25 Fed. Cas. No. 15,027, 4 Sawy. 199.

Debt of co-executor.— Where an executor includes in the final account an indebtedness of his co-executor to the testator, which was incurred prior to the testator's death, the co-executor being insolvent, and the assets are turned over to him as trustee, he is not to be surcharged with the debt on its proving uncollectable. James' Estate, 3 Pa. Dist. 373.

95. Hall *v.* Pratt, 5 Ohio 72; Eichelberger *v.* Morris, 6 Watts (Pa.) 42; Porter *v.* Cheesborough, 1 Strobh. Eq. (S. C.) 275.

96. *Alabama.*— Cook *v.* Cook, 69 Ala. 294 (holding that this presumption arises irrespective of the debtor's solvency or the duration of his administration); Flinn *v.* Carter, 59 Ala. 364.

Maryland.— Lambrecht *v.* State, 57 Md. 240.

Michigan.— Crow *v.* Conant, 90 Mich. 247, 51 N. W. 450, 30 Am. St. Rep. 427.

Ohio.— See McGanhey *v.* Jacoby, 54 Ohio St. 487, 44 N. E. 231.

South Carolina.— Newman *v.* Clyburn, 41 S. C. 534, 19 S. E. 913; Black *v.* White, 13 S. C. 37.

See 22 Cent. Dig. tit. "Executors and Administrators," § 302.

The presumption of payment is greatly strengthened when the administrator enters the debt in the inventory as a debt due from himself to the estate, charges himself with it in account, and assents to a decree in which it is ordered to be distributed as money. Ipswich Mfg. Co. *v.* Story, 5 Metc. (Mass.) 310.

Where the representative is merely a surety the presumption of payment does not arise until the time of settlement. Flinn *v.* Carter, 59 Ala. 364.

The rule applies only to legal obligations and not to mere moral obligations, such as debts barred by limitations. Black *v.* White, 13 S. C. 37.

For a fuller statement of the rule see Charles *v.* Jacobs, 9 S. C. 295 [*reviewing* Ipswich Mfg. Co. *v.* Story, 5 Metc. (Mass.) 310; Kinney *v.* Ensign, 18 Pick. (Mass.) 232; Winship *v.* Bass, 12 Mass. 198; Stevens *v.* Gaylord, 11 Mass. 255; Jacobs *v.* Woodside, 6 S. C. 490; Clowney *v.* Cathcart, 2 S. C. 395; Griffin *v.* Bonham, 9 Rich. Eq. (S. C.) 71; Schnell *v.* Schroder, Bailey Eq. (S. C.) 334].

97. Limitations of the rule.— While the debt must be treated as money in the executor's hands for the purpose of administration it will not for all purposes stand on the same footing as if he had actually received so much money. If wholly unable to pay the money in pursuance of the order or decree of the surrogate on account of his insolvency, he cannot be attached and punished for contempt as he could be if the money had actually been received from some other debtor. Baucus *v.* Stover, 89 N. Y. 1 [*reversing* 25 Hun 109]; *In re* Rugg, 3 N. Y. St. 224. See also Walker's Estate, 125 Cal. 242, 57 Pac. 991, 73 Am. St. Rep. 40. It is also clear that an executor unable to pay his own debt, and thus unable to comply with the decree of the surrogate charging him with it as so much money in his hands, would not be guilty of embezzling the money and could not be convicted of crime as he could be if he embezzled money or property which actually came into his hands. Baucus *v.* Stover, *supra.*

In Missouri the courts, while considering a debt due from the executor or administrator as assets of the estate, do not go so far as to hold the representative chargeable with such debts in his trust capacity as for so much money until he has by some unequivocal act, as by charging himself in his account with so much money, canceling the evidence of indebtedness, or otherwise, expressed a plain intention of paying the debt. McCarty *v.* Frazer, 62 Mo. 263; Young *v.* Theasher, 48 Mo. App. 327; McManus *v.* McDowell, 11 Mo. App. 436.

accruing before the death of the owner go to the personal representative as assets,[98] but where the injury occurred or the right of action accrued subsequent to such death, the claim vests in the heirs who were at the time the owners of the property.[99]

C. Real Property and Interests Therein — 1. In General. Real estate at the common law vests at once on the death of the owner in his heirs or devisees; it is not in a primary sense legal assets, and the executor or administrator has as

98. *California.*— Haight *v.* Green, 19 Cal. 113.

Connecticut.— Welles *v.* Cowles, 4 Conn. 182, 10 Am. Dec. 115.

Florida.— Scott *v.* Lloyd, 16 Fla. 151.

Illinois.— Penn Mut. L. Ins. Co. *v.* Heiss, 141 Ill. 35, 31 N. E. 138, 33 Am. St. Rep. 273.

Indiana.— Indianapolis, etc., R. Co. *v.* Price, 153 Ind. 31, 53 N. E. 1018; Harshbarger *v.* Midland R. Co., 131 Ind. 177, 27 N. E. 352, 30 N. E. 1083; Wilson *v.* Peelle, 78 Ind. 384; Burnham *v.* Lasselle, 35 Ind. 425; Frink *v.* Bellis, 33 Ind. 135, 5 Am. Rep. 193.

Kentucky.— Brown *v.* Wilson, 12 B. Mon. 100; Abney *v.* Brownlee, 2 Bibb 170; Swart *v.* Reveal, 29 S. W. 24, 16 Ky. L. Rep. 503.

Maine.— Brooks *v.* Goss, 61 Me. 307; Hill *v.* Penny, 17 Me. 409.

Maryland.— Barton Coal Co. *v.* Cox, 39 Md. 1, 17 Am. Rep. 525; Kennerly *v.* Wilson, 1 Md. 102; McLaughlin *v.* Dorsey, 1 Harr. & M. 224.

Minnesota.— Lowry *v.* Tilleny, 31 Minn. 500, 18 N. W. 452; Connolly *v.* Connolly, 26 Minn. 350, 4 N. W. 233.

Missouri.— Kellogg *v.* Malin, 62 Mo. 429.

New York.— Griswold *v.* Metropolitan El. R. Co., 122 N. Y. 102, 25 N. E. 331; Ballou *v.* Ballou, 78 N. Y. 325; Van Zandt *v.* New York, 8 Bosw. 375; Beddoe *v.* Wadsworth, 21 Wend. 120; Hamilton *v.* Wilson, 4 Johns. 72, 4 Am. Dec. 253.

North Carolina.— Grist *v.* Hodges, 14 N. C. 198.

Ohio.— Lawrence R. Co. *v.* Harra, 50 Ohio St. 667, 36 N. E. 14.

Pennsylvania.— O'Brien *v.* Pennsylvania Schuylkill Valley R. Co., 119 Pa. St. 184, 13 Atl. 74, holding that the personal representative may sue for an injurious excavation during the decedent's lifetime, even though the excavation was not then completed.

Tennessee.— Hurt *v.* Dougherty, 3 Sneed 418.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 303–305.

A right of action for injury to the rental value of adjoining real property caused by the operation of an elevated railway is a personal asset accruing to the owner upon the happening of the injury, and upon the owner's death this right of action passes to his personal representatives rather than to his heirs or devisees. Mortimer *v.* Manhattan R. Co., 129 N. Y. 81, 29 N. E. 5; Paret *v.* New York El. R. Co., 60 N. Y. Super. Ct. 441, 18 N. Y. Suppl. 580. See also Mitchell *v.* Metropolitan El. R. Co., 134 N. Y. 11, 31 N. E. 260.

Mere entry under the right of eminent domain without divesting title has not this effect. Oliver *v.* Pittsburgh, etc., R. Co., 131 Pa. St. 408, 19 Atl. 47, 17 Am. St. Rep. 814.

99. *Georgia.*— Chattanooga R., etc., Co. *v.* McLendon, 86 Ga. 517, 12 S. E. 941; Parker *v.* Chestnutt, 80 Ga. 12, 5 S. E. 289.

Illinois.— Todemier *v.* Aspinwall, 43 Ill. 401.

Kentucky.— South *v.* Hoy, 3 T. B. Mon. 88.

Maine.— Neal *v.* Knox, etc., R. Co., 61 Me. 298.

Massachusetts.— Boynton *v.* Peterborough, etc., R. Co., 4 Cush. 467; Kent *v.* Essex County Com'rs, 10 Pick. 521.

New York.— Kernochan *v.* New York El. R. Co., 128 N. Y. 559, 29 N. E. 65; Ballou *v.* Ballou, 78 N. Y. 325.

Ohio.— Lawrence R. Co. *v.* O'Harra, 50 Ohio St. 667, 36 N. E. 14.

Pennsylvania.— Oliver *v.* Pittsburg, etc., R. Co., 131 Pa. St. 408, 19 Atl. 47, 17 Am. St. Rep. 814; Pennsylvania Schuylkill Valley R. Co. *v.* Ziemer, 124 Pa. St. 560, 17 Atl. 187; Mumma *v.* Harrisburg, etc., R. Co., 1 Pearson 65.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 303–305.

But *compare* St. Albans *v.* Seymour, 41 Vt. 579.

A breach of covenant running with the land may be sued on by the heirs (see Bourget *v.* Monroe, 58 Mich. 563, 25 N. W. 514), and the personal representative should only sue when some special damage to his decedent appears (Martin *v.* Baker, 5 Blackf. (Ind.) 232; United New Jersey R., etc., Co. *v.* Hoppock, 28 N. J. Eq. 261; Hamilton *v.* Wilson, 4 Johns. (N. Y.) 72, 4 Am. Dec. 253).

Representative should not sue for permanent injury to inheritance. Paducah R. Co. *v.* Dipple, 16 Ky. L. Rep. 62; Hill *v.* Penny, 17 Me. 409; Chalk *v.* McAlily, 10 Rich. (S. C.) 92. See also Ford *v.* Livingston, 140 N. Y. 162, 35 N. E. 437 [*affirming* 70 Hun 178, 24 N. Y. Suppl. 412].

Appraisal before death and payment afterward.— Where land taken by a railroad company has been appraised before the owner's death, but is not paid for until afterward, the devisees and not the executor have a right to recover the appraised value, and this right is not affected by the fact that in the proceedings to obtain the appraisal judgment was entered for the appraised value. Buckner *v.* Savannah, etc., R. Co., 7 S. C. 325.

Award payable to executor for distribution. — In condemnation proceedings against a testator's estate in which legatees under the will are interested the award should be paid to the executor to be distributed in the pro-

such no inherent power over it.[1] Modern enactments, however, usually permit the lands of a decedent to be subjected to the satisfaction of his just debts and charges when the personalty is insufficient, and make provision for sale by the executor or administrator under a judicial license accordingly,[2] and in a few states legislation permits of considerable control and dominion by the executor or administrator besides, so as in effect to treat one's real estate as assets to be administered quite like personalty.[3]

2. Proceeds of Sale. In a suitable case of conversion from real to personal property, as where a fund is derived from the rightful sale, after decedent's death, of land whose title had vested in decedent, where a sale by the executor of such land is confirmed by all the decedent's heirs, where surplus proceeds are derived from land sold for taxes, or where one dies having a vested interest in the proceeds of land duly sold already on behalf of himself and others, the particular

bate court. Detroit *v.* Schilling, 93 Mich. 429, 53 N. W. 565.

Even though the money be paid to the personal representatives, in such a case it is paid for the use of heirs and cannot be used as assets. Hankins *v.* Kimball, 57 Ind. 42.

A naked power to sell real estate does not entitle an executor to whom it is given to sue for an award for lands taken by right of eminent domain, but he must in addition show that he is entitled to possession of the money either for administration or as trustee under the will. Cashman *v.* Wood, 6 Hun (N. Y.) 520.

Insolvent estate.— If land belonging to an estate decreed to be administered as an insolvent estate be taken for a highway the damages should be awarded to the personal representative and not to the heirs. Goodwin *v.* Milton, 25 N. H. 458. But see Boynton *v.* Peterborough, etc., R. Co., 4 Cush. (Mass.) 467.

1. *Georgia.*— See Burke *v.* Huff, 103 Ga. 598, 30 S. E. 546.

Illinois.— Le Moyne *v.* Quimby, 70 Ill. 399.

Indiana.— Hankins *v.* Kimball, 57 Ind. 42.

Kentucky.— Heeter *v.* Jewell, 6 Bush 510; Mason County *v.* Lee, 1 T. B. Mon. 247.

Massachusetts.—Drinkwater *v.* Drinkwater, 4 Mass. 354.

Michigan.— Sheldon *v.* Rice, 30 Mich. 296, 18 Am. Rep. 136.

Mississippi.— Ashley *v.* Young, 79 Miss. 129, 29 So. 822; McPike *v.* Wells, 54 Miss. 136; Hargrove *v.* Baskin, 50 Miss. 194.

New Hampshire.—Lucy *v.* Lucy, 55 N. H. 9.

Ohio.— Carr *v.* Hull, 65 Ohio St. 394, 62 N. E. 439, 87 Am. St. Rep. 623, 58 L. R. A. 641.

West Virginia.— Laidley *v.* Kline, 8 W. Va. 218.

Canada.— Arbec *v.* Lamarre, 5 Montreal Super. Ct. 7 [*affirming* 4 Montreal Super. Ct. 447]. See also Ruggles *v.* Carfrae, Taylor (U. C.) 211.

See 22 Cent. Dig. tit. "Executors and Administrators," § 280.

Real estate includes the rails of a fence (Clark *v.* Burnside, 15 Ill. 62), manure piled upon the land (Fay *v.* Muzzey, 13 Gray (Mass.) 53, 74 Am. Dec. 619), and a monument on the land (Sabin *v.* Harkness, 4 N. H. 415, 17 Am. Dec. 437).

A pew is real estate at common law, but statute sometimes changes this. McNabb *v.* Pond, 4 Bradf. Surr. (N. Y.) 7.

A sheriff's deed of sale of realty for taxes or under an execution should be made to the heirs at law of the purchaser who dies holding a certificate of purchase. Potts *v.* Davenport, 79 Ill. 455; Rice *v.* White, 8 Ohio 216.

Conversion of realty into personalty.— Where a testator directs that certain of his realty shall be occupied for a time by a certain person after his death, at the expiration of which the executors shall convert it into money, which they shall distribute in a specified manner, such realty, at the expiration of such time, becomes personalty, and vests in the executors for the purpose of carrying out the provisions of the will. Shumway *v.* Harmon, 6 Thomps. & C. (N. Y.) 626.

2. See Haines *v.* Price, 20 N. J. L. 480; Miller *v.* Harwell, 7 N. C. 194; Matter of St. George's Steam Packet Co., 2 De G. M. & G. 366, 16 Jur. 555, 21 L. J. Ch. 832, 51 Eng. Ch. 287, 42 Eng. Reprint 913; Forsyth *v.* Hall, Draper (U. C.) 291; Gardiner *v.* Gardiner, 2 U. C. Q. B. O. S. 520. And see *infra*, XII, D.

Proof that land required for payment of debts necessary.— An administrator, seeking to recover from the purchaser from an heir land of which he has never had possession, must show that it is necessary for him to have possession for the purpose of paying debts or making proper distribution. Dixon *v.* Rogers, 110 Ga. 509, 35 S. E. 781.

Land squatted on by decedent.— Where a person enters on land as a squatter, at the time declaring that he has no title or right of possession, although he builds himself a home and lives thereon, he is not seized and possessed of the land; hence on his death the land should not be administered as part of his estate. Holton *v.* Holton, 99 Ga. 250, 25 S. E. 468.

3. *Arkansas.*— Tate *v.* Norton, 94 U. S. 746, 24 L. ed. 222.

California.— Meeks *v.* Vassault, 16 Fed. Cas. No. 9,393, 3 Sawy. 206 [*affirmed* in 100 U. S. 564, 25 L. ed. 735].

Delaware.— Vincent *v.* Platt, 5 Harr. 164.

Texas.— Thompson *v.* Duncan, 1 Tex. 485.

Washington.— *In re* Lowe, 17 Wash. 675, 50 Pac. 587.

fund or surplus proceeds should be considered personalty, and the representative, not the heir, is entitled thereto.[4] But in general, so far as executors or administrators are concerned, and except for such conversion, the character of property, whether as real or personal, is that impressed upon it at the death of the decedent and does not change by any subsequent technical conversion in the course of administration.[5]

3. Rents and Profits, Etc. The rents, profits, and income of a decedent's real property accruing before his death vest in the personal representative as assets,[6] but those accruing after his death are not assets, but vest in the heir

See *infra*, VIII, O; and Descent and Distribution, 14 Cyc. 111 note 94.

4. *Georgia.*— Carr *v.* Berry, 116 Ga. 372, 42 S. E. 726.

Kentucky.— Rockford *v.* Rockford, (1890) 56 S. W. 992.

Massachusetts.—Hammond *v.* Putnam, 110 Mass. 232; Grout *v.* Hapgood, 13 Pick. 159.

Missouri.— State *v.* Harper, 54 Mo. App. 286.

Nebraska.— Solt *v.* Anderson, (1903) 93 N. W. 205.

North Carolina.— Heckstall *v.* Powell, 11 N. C. 216.

Pennsylvania.— Morrison's Case, 9 Watts & S. 116.

United States.— Chaplin *v.* U. S., 19 Ct. Cl. 424.

See 22 Cent. Dig. tit. "Executors and Administrators," § 282.

Proceeds paid into court.— Where, after a sale of land and payment of the proceeds into court to abide the result of a suit as to title, the party in actual interest dies intestate, her interest in such proceeds is personal estate which vests in her administrator and not in her heirs. Denham *v.* Cornell, 67 N. Y. 556 [*affirming* 7 Hun 662].

Sale of ward's land under act of legislature.— Where the land of one under guardianship is sold under an act of the legislature, the proceeds, remaining in personalty, will go on his death to his personal representatives. Smith *v.* Bayright, 34 N. J. Eq. 424; Snowhill *v.* Snowhill, 3 N. J. Eq. 20.

5. *Kentucky.*— Hughes *v.* Standeford, 3 Dana 285.

Maryland.— Johns Hopkins University *v.* Williams, 52 Md. 229.

Mississippi.— Franks *v.* Wanzer, 25 Miss. 121.

Missouri.— Carriger *v.* Whittington, 26 Mo. 311, 72 Am. Dec. 212.

New Jersey.— Flagg *v.* Teneick, 29 N. J. L. 25; Jacobus *v.* Jacobus, 37 N. J. Eq. 17.

New York.— Rogers *v.* Paterson, 4 Paige 409; Matter of Woodworth, 5 Dem. Surr. 156.

North Carolina.— State *v.* Robinson, 78 N. C. 222; Moore *v.* Shields, 68 N. C. 327; Foster *v.* Cook, 8 N. C. 509.

South Carolina.—Hamer *v.* Bethea, 11 S. C. 416.

Tennessee.— Smalling *v.* King, 5 Lea 585.

See 22 Cent. Dig. tit. "Executors and Administrators," § 282.

Where firm real estate is sold by the surviving partner, the share of the deceased partner in such proceeds goes properly to his heir and not to his executor or administrator. Griffey *v.* Northcutt, 5 Heisk. (Tenn.) 746.

Rescinded sale.— Where real property, the conveyance of which was obtained by fraud and misrepresentation, is sold during the life of the grantor, on suit by the heirs and administrator of the deceased grantor to rescind the original conveyance, the administrator is entitled to the proceeds of the sale as against the grantee, although as between the administrator and the heirs such proceeds are deemed realty. Parker *v.* Simpson, 180 Mass. 334, 62 N. E. 401.

6. *Alabama.*—Brewster *v.* Buckholts, 3 Ala. 20.

Georgia.— Autrey *v.* Autrey, 94 Ga. 579, 20 S. E. 431.

Indiana.— Humphries *v.* Davis, 100 Ind. 369; Dorsett *v.* Gray, 98 Ind. 273; King *v.* Anderson, 20 Ind. 385.

Iowa.— Crawford *v.* Ginn, 35 Iowa 543.

Kentucky.— Ball *v.* Covington First Nat. Bank, 80 Ky. 501; Rank *v.* Hill, 8 Bush 66; Combs *v.* Branch, 4 Dana 547.

Mississippi.— Bloodworth *v.* Stevens, 51 Miss. 475.

Missouri.— Bealey *v.* Blake, 70 Mo. App. 229.

New York.— Jay *v.* Kirkpatrick, 26 Misc. 550, 57 N. Y. Suppl. 476; Miller *v.* Crawford, 14 N. Y. Suppl. 358, 26 Abb. N. Cas. 376; Van Rensselaer *v.* Platner, 2 Johns. Cas. 17.

North Carolina.— King *v.* Little, 77 N. C. 138; Fleming *v.* Chunn, 57 N. C. 422.

Pennsylvania.— Young *v.* Jones, 1 Lehigh Val. L. Rep. 175.

Tennessee.— Rowan *v.* Riley, 6 Baxt. 67.

See 22 Cent. Dig. tit. "Executors and Administrators," § 283.

Rents payable in advance have "accrued" within the meaning of a statute providing that rents reserved to a decedent which shall have accrued at the time of his death shall be deemed assets and pass as such to his executors and administrators, where they become due before the death of the decedent, although not collected at that time. Miller *v.* Crawford, 14 N. Y. Suppl. 358, 26 Abb. N. Cas. (N. Y.) 376, holding further [*following* Matter of Weeks, 5 Dem. Surr. (N. Y.) 194, and *disapproving* Matter of Eddy, 10 Abb. N. Cas. (N. Y.) 396], that a statute providing for the apportionment of rents on the death of the landlord before they are due does not apply to such a case.

or devisee,[7] even though the rent was expressly reserved to the lessor, his

7. *Illinois.*— Dixon *v.* Niccolls, 39 Ill. 372, 89 Am. Dec. 312; Foltz *v.* Prouse, 17 Ill. 487; Sherman *v.* Dutch, 16 Ill. 283; Crosby *v.* Loop, 13 Ill. 625; Green *v.* Massie, 13 Ill. 363.

Indiana.— Dorsett *v.* Gray, 98 Ind. 273; Trimble *v.* Pollock, 77 Ind. 576; Evans *v.* Hardy, 76 Ind. 527; King *v.* Anderson, 20 Ind. 385.

Iowa.— Crane *v.* Guthrie, 47 Iowa 542; Shawhan *v.* Long, 26 Iowa 488, 96 Am. Dec. 164.

Kansas.— Head *v.* Sutton, 31 Kan. 616, 3 Pac. 280.

Kentucky.— Ball *v.* Covington First Nat. Bank, 80 Ky. 501; Rank *v.* Hill, 8 Bush 66; Vance *v.* Vance, 76 S. W. 370, 25 Ky. L. Rep. 741.

Maine.— Mills *v.* Merryman, 49 Me. 65; Stinson *v.* Stinson, 38 Me. 593.

Massachusetts.—Gibson *v.* Farley, 16 Mass. 280.

Mississippi.— Bloodworth *v.* Stevens, 51 Miss. 475.

Missouri.— Bealey *v.* Blake, 70 Mo. App. 229; Shouse *v.* Krusor, 24 Mo. App. 279; Lewis *v.* Carson, 16 Mo. App. 342.

New Hampshire.— Sparhawk *v.* Allen, 25 N. H. 261.

New Jersey.— Allen *v.* Van Houton, 19 N. J. L. 47; Bittle *v.* Clement, (Ch. 1903) 54 Atl. 138.

New York.—Peck *v.* Ingersoll, 7 N. Y. 528; Priester *v.* Hohloch, 70 N. Y. App. Div. 256, 75 N. Y. Suppl. 405; Matter of Spears, 89 Hun 49, 35 N. Y. Suppl. 35; Fay *v.* Holloran, 35 Barb. 295; Jay *v.* Kirkpatrick, 26 Misc. 550, 57 N. Y. Suppl. 476; Matter of Hughey, 7 N. Y. St. 732; Van Rensselaer *v.* Hayes, 5 Den. 477; Wright *v.* Williams, 5 Cow. 501; Van Rensselaer *v.* Platner, 2 Johns. Cas. 17; Kohler *v.* Knapp, 1 Bradf. Surr. 241.

North Carolina.— King *v.* Little, 77 N. C. 138; Womble *v.* George, 64 N. C. 759; Fleming *v.* Chunn, 57 N. C. 442. See also Scroggs *v.* Stevenson, 100 N. C. 354, 6 S. E. 111.

Ohio.— Overturf *v.* Dugan, 29 Ohio St. 230, rents accruing between death of decedent and sale of land to pay debts.

Pennsylvania.— Robb's Appeal, 41 Pa. St. 45; Haslage *v.* Krugh, 25 Pa. St. 97; Adams *v.* Adams, 4 Watts 160; Burnell's Estate, 13 Phila. 387; Young *v.* Jones, 1 Lehigh Val. L. Rep. 175.

Tennessee.— Rowan *v.* Riley, 6 Baxt. 67.

Virginia.— Lightner *v.* Speck, (1897) 28 S. E. 326.

See 22 Cent. Dig. tit. "Executors and Administrators," § 283.

The above rule applies where rent is payable in kind (Cobel *v.* Cobel, 8 Pa. St. 342; Huff *v.* Latimer, 33 S. C. 255, 11 S. E. 758), except as to payment in crops not yet ripe (Wadsworth *v.* Allcott, 6 N. Y. 64. *Contra,* McDowell *v.* Addams, 45 Pa. St. 430).

The probate court has no jurisdiction of rents of real estate devised until the personal property of the deceased is exhausted in the payment of debts and legacies. Jones *v.* East Greenwich Probate Ct., 25 R. I. 361, 55 Atl. 881.

Rents received by the executor from the realty are not assets, even though the land be subsequently sold for payment of debts. Towle *v.* Swasey, 106 Mass. 100. See also Kimball *v.* Sumner, 62 Me. 305.

Land leased from the Seneca Indians is real estate for the purpose of administration and rent received therefor by the executors of the lessee under the mistaken idea that his leasehold interest is personalty belongs to the devisee of such leasehold interest. Matter of McKay, 33 Misc. (N. Y.) 520, 68 N. Y. Suppl. 925.

The fact that the land is farmed will not convert the rent into emblements, and as between the devisee of the owner, dying between the two of the times for the payment of the semiannual rent, and the executor, the devisee is entitled to the rent payable on the following rent day. Dye *v.* Dimick, 6 Ohio S. & C. Pl. Dec. 231, 4 Ohio N. P. 185.

Agreement not constituting lease.— The owner of land entered into an agreement with one J providing that the owner agreed to "rent" his farm, with the stock thereon, to J for a certain period; that J should take the milk to the cheese factory, enter it in the name of the owner, to whom the proceeds should be payable, and do all the work on the place as the owner should direct; that each party should furnish half the seed and pay half the taxes; and that "otherwise the place is to be let to the halves." It was held that such agreement was not a lease and therefore the proceeds of the milk sold to the cheese factory were personal assets and did not go to the heirs as rent. Matter of Strickland, 10 Misc. (N. Y.) 486, 32 N. Y. Suppl. 171.

No apportionment is allowable between the executor of a lessor owning the fee and the remainder-man. Fay *v.* Holloran, 35 Barb. (N. Y.) 195.

A statute providing for the apportionment of the rent of a freehold or other uncertain interest in land between the personal representative and the successor, in case of the lessor's death within the year, should be treated as merely declaratory of what was already the law, and should not be held to invest personal representatives with the right to take as assets rents accruing after the death of the owner of the realty, even though he may have held the same in fee. Rand *v.* Hill, 8 Bush (Ky.) 66.

Peculiar leases may according to their covenants have a different effect. McDowell *v.* Hendrix, 67 Ind. 513.

Where the representative has taken charge of the realty, although without authority, the rents collected by him are considered as assets in Missouri. See Dix *v.* Morris, 66 Mo. 514 [*affirming* 1 Mo. App. 93]; Gamble *v.* Gibson, 59 Mo. 585; Lewis *v.* Carson, 16 Mo. App. 342; Gamage *v.* Bushell, 1 Mo.

executors, administrators, and assigns,[8] or although the decedent died insolvent.[9] The same distinction governs claims for damages to the land.[10] The testator may of course by his will prevent the application of the usual rule,[11] and where the executor or administrator is empowered to rent the decedent's lands for the convenience and on behalf of all concerned while the estate is being settled the rents collected are deemed assets for the payment of debts.[12]

4. Crops and Products. It is well established that growing and unharvested crops on the land of a decedent at the time of his death, such as are raised annually or periodically by labor and planting, go to the personal representative as assets rather than to the heir at law where the land is not specifically devised.[13] Where, however, there is a devise of the land, the authorities are not uniform, some holding that in such case the crops go with the land to the devisee unless the will provides otherwise,[14] and others asserting that notwithstanding the

App. 416. But it is otherwise in Indiana. Kidwell *v.* Kidwell, 84 Ind. 224.

8. Fay *v.* Holloran, 35 Barb. (N. Y.) 295.

9. Brown *v.* Fessenden, 81 Me. 522, 17 Atl. 709; Gibson *v.* Farley, 16 Mass. 280; Wood *v.* Bott, 56 Miss. 128; Boyd *v.* Martin, 9 Heisk. (Tenn.) 382.

10. Louisville, etc., R. Co. *v.* Hill, 115 Ala. 334, 22 So. 163; Kernochan *v.* New York El. R. Co., 128 N. Y. 559, 29 N. E. 65; Hotchkiss *v.* Auburn, etc., R. Co., 36 Barb. (N. Y.) 600.

11. Tickel *v.* Quinn, 1 Dem. Surr. (N. Y.) 425; Ingrem *v.* Mackey, 5 Redf. Surr. (N. Y.) 357.

Where a will disposes only of the proceeds of sale of real estate and there is no disposition of the intervening rents these go to the heirs until the sale by the executor. Hallowell's Estate, 9 Pa. Dist. 90.

12. *Alabama.*— Palmer *v.* Steiner, 68 Ala. 400; Griffin *v.* Bland, 43 Ala. 543; Harkins *v.* Pope, 10 Ala. 493.

California.— Washington *v.* Black, 83 Cal. 290, 23 Pac. 300.

Missouri.— Logan *v.* Caldwell, 23 Mo. 372; Bealey *v.* Blake, 70 Mo. App. 229.

North Carolina.— Shell *v.* West, 130 N. C. 171, 41 S. E. 65.

Pennsylvania.—Schlecht's Estate, 2 Brewst. 397.

See 22 Cent. Dig. tit. "Executors and Administrators," § 283.

The administrator may bring an action for rent, and it is not absolutely necessary that his declaration should set forth the authority under which the lease was made and the permission of the court for the granting thereof, nor is it competent for one who has possessed and enjoyed premises by the permission of and under an agreement with an administrator to controvert his right of recovery. Rector *v.* Ranken, 1 Mo. 371.

13. *Alabama.*—Marx *v.* Nelms, 95 Ala. 304, 10 So. 551; Mitcham *v.* Moore, 73 Ala. 542.

Connecticut.— See Kinsman *v.* Kinsman, 1 Root 180, 1 Am. Dec. 37.

Georgia.— Thornton *v.* Burch, 20 Ga. 791.

Illinois.— Cheney *v.* Roodhouse, 32 Ill. App. 49.

Indiana.— Humphrey *v.* Merritt, 51 Ind. 197.

Maine.—Dennett *v.* Hopkinson, 63 Me. 350, 18 Am. Rep. 227.

Massachusetts.— Penhallow *v.* Dwight, 7 Mass. 34, 5 Am. Dec. 21.

Michigan.— McGee *v.* Walker, 106 Mich. 521, 64 N. W. 482.

Mississippi.— A crop growing at the time of the decedent's death is assets and may be dealt with by the administrator in two modes; he may either obtain an order for the sale of the crop or an order allowing him to cultivate and complete it, in which event all property on the plantation may be employed for that purpose. Farley *v.* Hord, 45 Miss. 96; McCormick *v.* McCormick, 40 Miss. 760. But if the administrator proceeds in neither of these ways, the heir, who by the death of the ancestor is entitled to the possession, may consider the right of the administrator abandoned and take possession of the land and cultivate and complete the crop, in which case the administrator would not be entitled to the crop completed and matured by the labor and at the expense of the heir. McCormick *v.* McCormick, *supra.*

New Jersey.—Budd *v.* Hiler, 27 N. J. L. 43.

New York.— Wadsworth *v.* Allcott, 6 N. Y. 64; Matter of Kick, 11 N. Y. St. 688.

North Carolina.— Bradshaw *v.* Ellis, 22 N. C. 20, 32 Am. Dec. 686.

Pennsylvania.— Kupp's Estate, 2 Woodw. 228.

South Carolina.— McLaurin *v.* McColl, 3 Strobh. 21; Gwin *v.* Hicks, 1 Bay 503.

Tennessee.— Shofner *v.* Shofner, 5 Sneed 94.

England.— Evans *v.* Roberts, 5 B. & C. 829, 8 D. & R. 611, 4 L. J. K. B. O. S. 313, 11 E. C. L. 700.

See 22 Cent. Dig. tit. "Executors and Administrators," § 284.

The fact that the crop is growing on exempt property does not change its character as assets. Dickey *v.* Wilkins, (Miss. 1895) 17 So. 374.

The executor of a life-tenant who dies between the planting and severance is entitled to the crop. Thornton *v.* Burch, 20 Ga. 791.

Right of gathering crops optional with representative.— Wright *v.* Watson, 96 Ala. 536, 11 So. 634; Blair *v.* Murphree, 81 Ala. 454, 2 So. 18.

14. *Maine.*—Hathorn *v.* Eaton, 70 Me. 219; Dennett *v.* Hopkinson, 63 Me. 350, 18 Am. Rep. 227.

devise the crops go to the personal representative.[15] In some jurisdictions statutes have been enacted under which the time of the decedent's death or of severance of the crops determines whether the crops or assets go to the personal representative or not.[16] Natural products of the soil not sown or planted by the decedent, such as clover, grass, fruit, and the like, when not severed from the soil at the time of the decedent's death, go to the devisee or heir.[17] Crops and products of whatever character, actually severed before the death of the decedent, go to the representative,[18] and conversely crops planted after the decedent's death belong to the heir or devisee.[19]

5. Mortgages and Mortgage Interests. A mortgage of real property before foreclosure passes to the executor or administrator of the mortgagee like the money right evidenced by bond or note, which it was given to secure;[20] but

Missouri.— Pratte *v.* Coffman, 27 Mo. 424.
New Jersey.—Budd *v.* Hiler, 27 N. J. L. 43.
North Carolina.—Thomas *v.* Lines, 83 N. C. 191; Tayloe *v.* Bond, 45 N. C. 5; Jones *v.* Jones, 17 N. C. 287.
Tennessee.— Shofner *v.* Shofner, 5 Sneed 94.
See 22 Cent. Dig. tit. "Executors and Administrators," § 284.

15. *Indiana.*— Humphrey *v.* Merritt, 51 Ind. 197.
Mississippi.—See Dickey *v.* Wilkins, (1895) 17 So. 374.
New York.— Bradner *v.* Faulkner, 34 N. Y. 347, holding that growing crops are assets for the payment of debts and legacies, but if not wanted for that purpose they go to the devisee of the land.
South Carolina.— McLaurin *v.* McColl, 3 Strobh. 21; Waring *v.* Purcell, 1 Hill Eq. 193.
Virginia.— Shelton *v.* Shelton, 1 Wash. 53, holding that crops growing on land devised at the time of the testator's death did not pass to the devisees under the word "appurtenances."
See 22 Cent. Dig. tit. "Executors and Administrators," § 284.

16. See Green *v.* Cutright, Wright (Ohio) 738; Berry *v.* Berry, 55 S. C. 303, 33 S. E. 363; Thompson *v.* Thompson, 6 Munf. (Va.) 514.

17. *Alabama.*— Eubank *v.* Clark, 78 Ala. 73.
Connecticut.— Maples *v.* Millon, 31 Conn. 598.
Indiana.— Evans *v.* Hardy, 76 Ind. 527; Rodman *v.* Rodman, 54 Ind. 444.
Maryland.— Evans *v.* Iglehart, 6 Gill & J. 171.
North Carolina.—Gee *v.* Young, 2 N. C. 17.
England.— Rodwell *v.* Phillips, 1 Dowl. P. C. N. S. 885, 11 L. J. Exch. 217, 9 M. & W. 501.
See 22 Cent. Dig. tit. "Executors and Administrators," § 284.

Oil.— On the death of the owner of land on which there are producing oil wells, the right to the oil thereafter produced descends to the heirs. Johnson's Estate, 30 Pittsb. Leg. J. (Pa.) 365.

18. Edwards *v.* Rainier, 17 Ohio St. 897.

19. Kidwell *v.* Kidwell, 84 Ind. 224; Rodman *v.* Rodman, 54 Ind. 444; Fetrow *v.* Fetrow, 50 Pa. St. 253; Thompson *v.* Thompson, 6 Munf. (Va.) 514.

20. *Alabama.*— Terry *v.* Ferguson, 8 Port. 500.
Colorado.— Buck *v.* Fischer, 2 Colo. 182.
Iowa.— Burton *v.* Hintrager, 18 Iowa 348.
Kentucky.— Pemberton *v.* Riddle, 5 T. B. Mon. 401.
Maine.— Bird *v.* Keller, 77 Me. 270.
Maryland.— Chase *v.* Lockerman, 11 Gill & J. 185, 35 Am. Dec. 277.
Massachusetts.— Taft *v.* Stevens, 3 Gray 504. But see *Ex p.* Blair, 13 Metc. (Mass.) 126.
Mississippi.— Griffin *v.* Lovell, 42 Miss. 402.
Vermont.— Pierce *v.* Brown, 24 Vt. 165.
West Virginia.— Curry *v.* Hill, 18 W. Va. 370, trust deed.
United States.— Dexter *v.* Arnold, 7 Fed. Cas. No. 3,857, 1 Sumn. 109.
England.— Noy *v.* Ellis, 2 Ch. Cas. 220, 22 Eng. Reprint 918; Ellis *v.* Guavas, 2 Ch. Cas. 50, 22 Eng. Reprint 841; Thornbrough *v.* Baker, 1 Ch. Cas. 283, 22 Eng. Reprint 802, 2 Freem. 143, 22 Eng. Reprint 1117, 3 Swanst. 628, 36 Eng. Reprint 1000; Pawlett *v.* Atty.-Gen., Hardres 465.
See 22 Cent. Dig. tit. "Executors and Administrators," § 286.

Rule applies to assignee of unforeclosed mortgage. Hemmenway *v.* Lynde, 79 Me. 209, 9 Atl. 620; Steel *v.* Steel, 4 Allen (Mass.) 417.

Equitable mortgages.— A statute providing that lands mortgaged to secure the payment of debts and the debts so secured are on the death of the mortgagee assets in the hands of his executors or administrators, of which they shall have control as of a personal pledge, applies to equitable as well as legal mortgages. But when there is no evidence of a debt from the mortgagor that can be enforced at law independent of the security, equitable mortgages may be inventoried as real estate, and only when reduced to cash by redemption or sale would the proceeds become chargeable to the executor or administrator. Hawes *v.* Williams, 92 Me. 483, 43 Atl. 101.

If the mortgage is paid off by the mortgagor, it is the executor or administrator and not the heirs who should receive payment, and release and acknowledge satisfaction. Woodruff *v.* Mutschler, 34 N. J. Eq.

where foreclosure has been had in the decedent's lifetime, the rule is otherwise, and the mortgaged land itself having vested absolutely in the mortgagee his heirs take the property on his decease.[21]

6. Widow's Dower Interest. Where the wife survives her husband, and thus becomes entitled to her dower or corresponding interest in his real and personal estate, but dies before it is set off to her, the right to recover, if surviving her death at all,[22] passes to her executor or administrator and not to her heirs or next of kin.[23]

7. Leaseholds. A lease for years, since this is no freehold interest, but a chattel real, vests in the executor or administrator of the lessee,[24] and the same is true of rights incidental to or given by the lease, such as a privilege of renewal[25]

33; Ely *v.* Scofield, 35 Barb. (N. Y.) 330. And the money received by an administrator of an equitable mortgagee, in redemption of the mortgage, should be charged by the probate court to the administrator, and ordered distributed as personal estate. Hawes *v.* Williams, 92 Me. 483, 43 Atl. 101.

Foreclosure proceedings should be by representative. Roath *v.* Smith, 5 Conn. 133; Fay *v.* Cheney, 14 Pick. (Mass.) 399; Dewey *v.* Van Deusen, 4 Pick. (Mass.) 19; Hathaway *v.* Valentine, 14 Mass. 501; Copper *v.* Wells, 1 N. J. Eq. 10; Bickford *v.* Daniels, 2 N. H. 71.

The representative may maintain trespass against the heir if the latter enters and commits waste upon the mortgaged premises. Palmer *v.* Stevens, 11 Cush. (Mass.) 147.

21. See Osborne *v.* Tunis, 25 N. J. L. 633. But *compare* Canning *v.* Hicks, 2 Ch. Cas. 187, 22 Eng. Reprint 905, 1 Vern. Ch. 412, 23 Eng. Reprint 553.

22. See Dower, 14 Cyc. 1009 notes 90, 91.

23. Woodberry *v.* Matherson, 19 Fla. 778; Coons *v.* Nall, 4 Litt. (Ky.) 263; Renner *v.* Bird, 7 Ohio Dec. (Reprint) 290, 2 Cinc. L. Bul. 76; Paul *v.* Paul, 36 Pa. St. 270; Edwards *v.* Hoopes, 2 Whart. (Pa.) 420. See also Unangst *v.* Kraemer, 8 Watts & S. (Pa.) 391.

Interest on dower fund.—The personal representative of a widow may distrain for arrears of interest due on her dower fund at the time of her death, but not for that which may subsequently accrue. Henderson *v.* Boyer, 44 Pa. St. 220.

24. *District of Columbia.*— Bean *v.* Reynolds, 15 App. Cas. 125.

Georgia.— Cody *v.* Quarterman, 12 Ga. 386.

Illinois.— Thornton *v.* Mehring, 117 Ill. 55, 25 N. E. 958.

Indiana.— Cunningham *v.* Baxley, 96 Ind. 367.

Kentucky.—Lewis *v.* Ringo, 3 A. K. Marsh. 247.

Louisiana.— Journe's Succession, 21 La. Ann. 391.

Mississippi.— Faler *v.* McRae, 56 Miss. 227; Webster *v.* Parker, 42 Miss. 465; Dillingham *v.* Jenkins, 7 Sm. & M. 479.

Missouri.— Sutter *v.* Lackmann, 39 Mo. 91.

New Jersey.— McCormick *v.* Stephany, 57 N. J. Eq. 257, 41 Atl. 840.

Ohio.— Becker *v.* Walworth, 45 Ohio St. 169, 12 N. E. 1; Murdock *v.* Ratcliff, 7 Ohio 119. But a perpetual lease, having been divested by statute of its chattel qualities, is no longer an asset in the hands of the administrator. Gansen *v.* Moorman, 5 Ohio S. & C. Pl. Dec. 287, 5 Ohio N. P. 254.

Pennsylvania.— Keating *v.* Condon, 68 Pa. St. 75; Wiley's Appeal, 8 Watts & S. 244.

South Carolina.— Payne *v.* Harris, 3 Strobh. Eq. 39.

Texas.— Wilcox *v.* Alexander, (Civ. App. 1895) 32 S. W. 561.

Vermont.— Rickard *v.* Dana, 74 Vt. 74, 52 Atl. 113.

England.— See Reynolds *v.* Wright, 25 Beav. 100, 4 Jur. N. S. 198, 27 L. J. Ch. 392, 6 Wkly. Rep. 301.

See 22 Cent. Dig. tit. "Executors and Administrators," § 288.

Contra, under Colorado statute. McKee *v.* Howe, 17 Colo. 538, 31 Pac. 115.

A lease for ninety-nine years is of no higher dignity than a lease or term for one year; both are mere chattels, and go to the administrator to be administered. Dillingham *v.* Jenkins, 7 Sm. & M. (Miss.) 479.

The rent is a first charge upon the profits of the land, and only what remains after deducting sufficient for the payment of the rent can be regarded as assets of the estate. Becker *v.* Walworth, 45 Ohio St. 169, 12 N. E. 1; Mickle *v.* Miles, 1 Grant (Pa.) 320. But *compare* Harris *v.* Meyer, 3 Redf. Surr. (N. Y.) 450.

The assignee of a lessee for life holds an estate *pur autre vie,* which is a freehold during the assignee's life, but on his death a chattel real and assets in the hands of his administrator. Mosher *v.* Yost, 33 Barb. (N. Y.) 277.

How lease valued.—A lease for years owned by the testator should be charged to the executor at the price it would have produced if sold at the testator's death. Cary *v.* Macon, 4 Call (Va.) 605.

A summary action for an unlawful detainer cannot be brought under Cal. Code Civ. Proc. § 1161, against an executor who succeeds to the possession of leased premises held by the decedent at the time of his death, but makes default in the payment of rent. Martel *v.* Meehan, 63 Cal. 47.

25. McCormick *v.* Stephany, 57 N. J. Eq. 257, 41 Atl. 840; Green *v.* Green, 4 Redf. Surr. (N. Y.) 357.

If representative renews new lease becomes assets. Fisher *v.* Fisher, 1 Bradf. Surr. (N. Y.) 335.

or an unexercised option to purchase the demised premises,[26] these also being mere chattel interests.

8. Interests in Public Land. A preëmption or homestead right with occupancy, or a land patent as usually expressed, is treated as real estate and descends to the heirs;[27] but a mere right to enjoy possession or a land claim is treated as personalty, and as such goes to the representative.[28]

9. Contracts For Sale. Where the vendor in a contract for the sale of land dies before the payment of the purchase-money and the execution of the conveyance, his personal representatives and not his heirs will be entitled to receive the purchase-money,[29] unless a contrary intent is shown by the contract

26. McCormick *v.* Stephany, 57 N. J. Eq. 257, 41 Atl. 840.

27. *Alabama.*— Johnson *v.* Collins, 12 Ala. 322.

California.— Hartley *v.* Brown, 51 Cal. 465. But see McDonald *v.* Burton, 68 Cal. 445, 9 Pac. 714.

Illinois.— Lester *v.* White, 44 Ill. 464.

Indiana.— Shanks *v.* Lucas, 4 Blackf. 476.

Kentucky.— Moore *v.* Dodd, 1 A. K. Marsh. 140.

Minnesota.— Dawson *v.* Mayall, 45 Minn. 408, 48 N. W. 12.

Pennsylvania.— Duncan *v.* Walker, 2 Dall. 205, 1 L. ed. 350. But see Campbell *v.* Rheim, 2 Yeates 123.

Tennessee.— See Gray *v.* Davis, 2 Head 360.

Virginia.— Morrison *v.* Campbell, 2 Rand. 206.

Wisconsin.—Bowen *v.* Burnett, 1 Pinn. 658.

United States.— Ware *v.* Brush, 29 Fed. Cas. No. 17,171, 1 McLean 533 [*affirmed* in 15 Pet. 93, 10 L. ed. 672].

See 22 Cent. Dig. tit. "Executors and Administrators," § 289.

But see Pelham *v.* Wilson, 4 Ark. 289; Burch *v.* McDaniel, 2 Wash. Terr. 58, 3 Pac. 586.

Land acquired by heirs.— A land-office certificate issued in favor of the heirs of a decedent cannot be assigned by his administrator. Hawkins *v.* Johnson, 4 Blackf. (Ind.) 21. Where lands were acquired, under the donation law of 1850, upon the death of the settler, by his heirs, the administrator had no right or interest therein. Delay *v.* Chapman, 3 Oreg. 459.

Resulting trust.— The right to enter land under the preëmption laws of congress descending to the heir at law, no trust on the land results to the administrator of a deceased occupant, or the creditors of his estate, from the fact that the administrator voluntarily paid the purchase-money out of the assets of the estate, when he could not have been called on to do so. Johnson *v.* Collins, 12 Ala. 322.

In Texas the personal representatives have considerable power with respect to land certificates and the like. See Jones *v.* Lee, 86 Tex. 25, 22 S. W. 386, 1092 [*reversing* (Civ. App. 1892) 20 S. W. 863]; Allen *v.* Clark, 21 Tex. 404; Poor *v.* Boyce, 12 Tex. 440; Pendleton *v.* Shaw, 18 Tex. Civ. App. 439, 44 S W. 1002; Williams *v.* Howard, 10 Tex. Civ. App. 527, 31 S. W. 835. Thus headright certificates become assets in the hands of administrators. State *v.* Zanco, 18 Tex. Civ. App. 127, 44 S. W. 527. A distinction is, however, to be observed that land granted by the government to the heirs of an individual, pursuant to a right existing in him to receive such grant, is an asset of his estate (Lyne *v.* Sanford, 82 Tex. 58, 19 S. W. 847, 27 Am. St. Rep. 852 [*followed* in Pendleton *v.* Shaw, 18 Tex. Civ. App. 439, 44 S. W. 1002]), but land granted as a mere gratuity to the heirs of one who has rendered public service, as a recognition of such service, is not a part of his estate subject to sale by the administrator to pay debts (Todd *v.* Masterson, 61 Tex. 618). For a similar distinction as to claims or grants other than of land see *supra*, III, B, 5, a.

28. McDonald *v.* Burton, 68 Cal. 445, 9 Pac. 714; Grover *v.* Hawley, 5 Cal. 485; Corbett *v.* Berryhill, 29 Iowa 157; Bowers *v.* Keesecker, 14 Iowa 301; Stewart *v.* Chadwick, 8 Iowa 463; Moody *v.* Hutchinson, 44 Me. 57; Hubbard *v.* Horne, 24 Tex. 270; Howard *v.* Republic, 2 Tex. 311.

29. *Illinois.*— Skinner *v.* Newberry, 51 Ill. 203.

Indiana.— Henson *v.* Ott, 7 Ind. 512.

Iowa.— Grimmell *v.* Warner, 21 Iowa 111.

Kansas.— Gilmore *v.* Gilmore, 60 Kan. 606, 57 Pac. 505.

Kentucky.— Muldrow *v.* Muldrow, 2 Dana 386.

Nebraska.— Solt *v.* Anderson, (1903) 93 N. W. 205.

New York.— Swartwout *v.* Burr, 1 Barb. 495; Wagstaff *v.* Marcy, 25 Misc. 121, 54 N. Y. Suppl. 1021, holding that the personal representative is entitled to receive the price, and hold it for the decedent's creditors, if necessary, but otherwise it goes to his heirs or devisees.

North Dakota.— Clapp *v.* Bower, 11 N. D. 556, 92 N. W. 862.

Ohio.— Stang *v.* Newberger, 8 Ohio S. & C. Pl. Dec. 80, 6 Ohio N. P. 60.

Pennsylvania.— Simmons' Estate, 140 Pa. St. 567, 21 Atl. 402; Sutter *v.* Ling, 25 Pa. St. 466.

See 22 Cent. Dig. tit. "Executors and Administrators," § 290; and Descent and Distribution, 14 Cyc. 26 note 87.

Where specific performance is enforced against the heirs or devisees the money consideration goes to the personal representative. Matter of Everit, 2 Edw. (N. Y.) 597.

An option to rescind on the vendee's default goes to the personal representative.

itself,[30] or by the will of the vendor.[31] The executor or administrator will be entitled to enforce the contract and to hold the proceeds of any unpaid balance thereof, whether as assets of the estate or in trust for heirs or devisees, according as the terms of sale may justify.[32] It has even been held that where the executors have canceled the contract of sale for default of the purchase, and regained title, they may sell and convey such realty, and account for the proceeds as personalty.[33] But it has been asserted that where the contract of sale is void or cannot be enforced the land descends to the vendor's heirs on his death.[34]

10. Contracts For Purchase. Where the purchaser of land pays for it but dies before taking a deed, the land, upon a suitable conveyance thereof, belongs beneficially to his heirs or devisees;[35] and a bond or contract for the conveyance of land passes on the vendee's death to his heir or devisee rather than to his executor or administrator.[36] It has also been held that the purchase-money paid upon an agreement for the sale of land is in equity considered as land, and if the contract is vacated after the death of the vendee it goes to the heir, who is the proper person to sue therefor.[37] But for a mere right to acquire an interest in land, or for breach of condition during the obligee's lifetime, with failure to make title, the personal representative may sue.[38]

11. Buildings or Improvements. Where the decedent has begun erecting an expensive dwelling-house for his personal residence, the personal representative may in his discretion and for the best interests of the estate stop such work and treat materials purchased and furnished as personal assets to be disposed of

Stang *v.* Newberger, 8 Ohio S. & C. Pl. Dec. 80, 6 Ohio N. P. 60.

Where the land sold is a homestead, so that the proceeds would stand as exempt and in lieu of the land, the purchase-money, not exceeding two thousand dollars, should be turned over to those to whom the homestead would have descended by operation of law. Solt *v.* Anderson, (Nebr. 1903) 93 N. W. 205.

30. Stevens *v.* Flannagan, 131 Ind. 122, 30 N. E. 898, where the contract provided that the price should be paid to the vendor's heirs after his decease.

31. Wright *v.* Marshall, 72 Ill. 584, holding that where a testator devises land which he has sold, but to which he still holds the legal title, the purchase-money goes to the devisee.

32. Stevenson *v.* Polk, 71 Iowa 278, 32 N. W. 340; Flagg *v.* Teneick, 29 N. J. L. 25; Williams *v.* Haddock, 145 N. Y. 144, 39 N. E. 825; McCarty *v.* Myers, 5 Hun (N. Y.) 83; Moore *v.* Burrows, 34 Barb. (N. Y.) 173. See *infra*, VIII, O, 8, b.

33. Clapp *v.* Tower, 11 N. D. 556, 93 N. W. 862. See also McMillan *v.* Reeves, 102 N. C. 550, 9 S. E. 449, holding that where a decedent sold land, giving a bond for title, and taking notes for the purchase-money, and after his death his administrators compromised with the vendees, who were insolvent, by surrendering the notes, and receiving in return the title bond, this did not release the legal title in the heirs from the lien of the title bond, since the administrators were entitled to a sale of the land to reimburse the personal estate for the surrender of the notes.

34. McKay *v.* Carrington, 16 Fed. Cas. No. 8,841, 1 McLean 50.

35. Hoel *v.* Coursery, 26 Miss. 511.

36. Cowan *v.* Hite, 2 A. K. Marsh. (Ky.) 238; Buck *v.* Buck, 11 Paige (N. Y.) 170; Stephenson *v.* Yandle, 3 Hayw. (Tenn.) 109.

Certificate of purchase at execution sale.—On the death of a purchaser at an execution sale the legal title to the certificate passes to his executor, whose assignment carries such title. Palmer *v.* Riddle, 180 Ill. 461, 54 N. E. 227.

Redemption of property purchased at execution sale.—Upon the death of the purchaser of real estate at execution sale, no conveyance having been made to him for the land by the sheriff, if the land is redeemed by the debtor or his assignee, the redemption money would go to the personal representative and constitute a fund in his hands for the payment of debts and for distribution under the statute. Campbell *v.* Campbell, 3 Head (Tenn.) 325.

37. Young *v.* Young, 81 N. C. 91; Tate *v.* Conner, 17 N. C. 224. *Contra*, Castleberry *v.* Pierce, 5 Stew. & P. (Ala.) 150, 24 Am. Dec. 774; Laufler *v.* Ashley, 6 Ky. L. Rep. 748.

A right to enforce a lien for taxes paid on an invalid sale given by statute to "the grantee, his heirs and assigns" belongs to the purchaser's heirs and not to his personal representatives. Stephenson *v.* Martin, 84 Ind. 160.

38. *Alabama.*—Allen *v.* Greene, 19 Ala. 34.

Kentucky.— Ewing *v.* Handley, 4 Litt. 346, 14 Am. Dec. 140.

Michigan.— Gustin *v.* Bay City Union School-Dist., 94 Mich. 502, 54 N. W. 156, 34 Am. St. Rep. 361.

Missouri.— Brueggeman *v.* Jurgensen, 24 Mo. 87; Laberge *v.* McCausland, 3 Mo. 585.

Pennsylvania.— Irwin *v.* Hamilton, 6 Serg. & R. 208.

accordingly.[39] And while improvements put upon land ordinarily become part of the realty, the owner of erections upon land of another may, by agreement with the owner of the land, provide otherwise, so that upon the death of either party equity shall provide due reimbursement as for personal property.[40]

12. Mortgaged Property — a. In General. Where the owner of real estate encumbered by a mortgage dies, the land descends to his heirs or devisees, subject to the special encumbrance, or in other words the equity of redemption vests in them.[41] Hence to bar the equity of redemption by a sale of land under foreclosure the proceedings must be against the heirs.[42]

b. Surplus Proceeds of Sale. In case of foreclosure and sale, any surplus proceeds are regarded as realty and go directly to the heirs and devisees, and the representative cannot regard such proceeds as personal assets, nor as a rule sue to recover them.[43]

13. Property as to Which Power of Sale Given.[44] In some states the rule is that an authority given by will to an executor to sell land, unless accompanied with the right to receive the rents and profits, vests no estate in the executor, but the lands descend to the heirs or pass to the devisees subject to the execution of the power;[45] but in others the view prevails that where a testator authorizes or directs his executors to sell his real estate for certain purposes, the legal title to that real estate vests in the executors upon the death of the testator.[46]

D. Interests in Partnerships.[47] Before the liquidation of a partnership its effects are considered personalty not realty, although invested in land; and when a partner dies, his personal representative not his heir succeeds to his unliquidated interest therein;[48] but the legal title to property belonging to the copartnership vests in the surviving partner or partners, who alone should be deemed chargeable at law with the partnership debts, and entitled to realize upon the partnership assets, and who are, unless the articles of agreement provide otherwise, vested with

Tennessee.— Shaw *v.* Wilkins, 8 Humphr. 647, 49 Am. Dec. 692.

See 22 Cent. Dig. tit. "Executors and Administrators," § 291.

39. Gray *v.* Hawkins, 8 Ohio St. 449, 72 Am. Dec. 600.

40. See Washburn *v.* Sproat, 16 Mass. 449; Brown *v.* Turner, 113 Mo. 27, 20 S. W. 660.

41. Holden *v.* Dunn, 144 Ill. 413, 43 N. E. 413, 19 L. R. A. 481; Shaw *v.* Hoadley, 8 Blackf. (Ind.) 165; Snow *v.* Warwick Sav. Inst., 17 R. I. 66, 20 Atl. 94; Stark *v.* Brown, 12 Wis. 572, 78 Am. Dec. 762. But see Doe *v.* Pendleton, 15 Ohio 735; Merriam *v.* Barton, 14 Vt. 501, holding that a bill to redeem mortgaged premises should be brought in the name of the personal representative.

42. Stark *v.* Brown, 12 Wis. 572, 78 Am. Dec. 762. *Contra,* Dixon *v.* Cuyler, 27 Ga. 248; Magruder *v.* Offutt, Dudley (Ga.) 227.

43. Dunning *v.* Ocean Nat. Bank, 61 N. Y. 497, 19 Am. Rep. 293 (so holding even though the mortgage provided that the surplus should be paid to the mortgagor, his executors, or administrators); Moses *v.* Murgatroyd, 1 Johns. Ch. (N. Y.) 119; Snow *v.* Warwick Sav. Inst., 17 R. I. 66, 20 Atl. 94; Charleston Bank *v.* Inglesby, Speers Eq. (S. C.) 399 (where, however, the proceeds were directed to be delivered to the administrator for the payment of debts upon his giving additional security). See also Cox *v.* McBurney, 2 Sandf. (N. Y.) 561. But *compare* Sheldon *v.* Bradley, 37 Conn. 324; Varnum *v.* Meserve, 8 Allen (Mass.) 158.

The surplus reassumes its character as personalty when it has vested in the person entitled to it, and at the death of such person it passes to his own personal representatives in its actual form. Sweezey *v.* Willis, 1 Bradf. Surr. (N. Y.) 495; Sayers' Appeal, 79 Pa. St. 428; Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553.

44. **Sale under testamentary authority** see *infra,* VIII, O, 9, d.

45. Ross *v.* Barr, 53 S. W. 658, 21 Ky. L. Rep. 974; Morse *v.* Morse, 85 N. Y. 53; Crittenden *v.* Fairchild, 41 N. Y. 289; Post *v.* Benchley, 15 N. Y. St. 618; Dunn *v.* Renick, 33 W. Va. 476, 10 S. E. 810.

46. Arlington State Bank *v.* Paulsen, 57 Nebr. 717, 78 N. W. 303; Dundas' Appeal, 64 Pa. St. 325.

47. **As to including such interests in inventory** see *infra,* IV, D.

48. Fairchild *v.* Fairchild, 5 Hun (N. Y.) 407 [*affirmed* in 64 N. Y. 471, and *disapproving* Cox *v.* McBurney, 2 Sandf. (N. Y.) 561]; Leaf's Appeal, 105 Pa. St. 505; Griffey *v.* Northcutt, 5 Heisk. (Tenn.) 746. See also Goodburn *v.* Stevens, 1 Md. Ch. 420; Brown *v.* Morrill, 45 Minn. 483, 48 N. W. 328. But *compare* Roulston *v.* Washington, 79 Ala. 529, holding that as to real estate purchased with the partnership funds or taken in payment of a partnership debt the legal title vested in the deceased partner descends to his heirs, although as respects a settlement of the partnership debts and accounts it possesses many of the incidents of personal property and will

the exclusive right to and management of the firm assets for the purpose of closing the business and distributing such surplus as may remain.[49]

E. Foreign Assets.[50] In general the granting of administration is limited to property within the state or country of the grant so far as the authority conferred is concerned,[51] and hence the representative's failure to return foreign property in his inventory is no breach of his bond;[52] but the domiciliary representative should hold accountable, so far as he reasonably may, those who receive or hold such foreign assets;[53] while if he himself receives such property it becomes assets

be treated as such in equity so far as it may be applied to such purpose.

49. *Alabama.*—Roulston *v.* Washington, 79 Ala. 529.

Illinois.— Kimball *v.* Lincoln, 99 Ill. 578 [*affirming* 7 Ill. App. 470].

Indiana.— Anderson *v.* Ackerman, 88 Ind. 481.

Missouri.— See Darby *v.* Swartz, 11 Mo. 217.

New York.— Egberts *v.* Wood, 3 Paige 517, 24 Am. Dec. 236.

Utah.— *In re* Auerbach, 23 Utah 529, 65 Pac. 488.

See 22 Cent. Dig. tit. "Executors and Administrators," § 295; and, generally, PARTNERSHIP.

Partnership books.—The surviving partner, not the decedent's estate, is entitled to possession of the books of the firm. Waring *v.* Waring, 1 Redf. Surr. (N. Y.) 205.

Bond.— Under the statutes of some states the surviving partner may be cited and required to give a bond, and if he fails to do so the administrator of the deceased partner is entitled to the possession of the partnership property on giving a bond prescribed by statute. Teney *v.* Laing, 47 Kan. 297, 27 Pac. 976; Putnam *v.* Parker, 55 Me. 235; James *v.* Dixon, 21 Mo. 538.

The executor is not to be deemed an intermeddler where he takes charge of property of a partnership of which his testator was a member, the other partners giving the property no attention. Hewes *v.* Baxter, 48 La. Ann. 1303, 20 So. 701, 36 L. R. A. 531.

The executor or administrator of a surviving partner stands in the same position as the surviving partner during the latter's lifetime. Although here he has the legal title to the partnership assets, yet they are the legal assets of the firm, and not of his decedent, and should neither be inventoried nor accounted for directly as property of the estate. Such executor or administrator is in fact a trustee, whose duty it is to collect the partnership property and pay the debts of the firm, selling out in a suitable case the good will and stock of the business; and after the surplus is ascertained and the interests of the firm settled he should pay the share of the partner first deceased to his personal representatives and bring the share of the partner last deceased into his account of the estate. Thomson *v.* Thomson, 1 Bradf. Surr. (N. Y.) 24.

50. **Foreign and ancillary administration** see *infra*, XVI.

51. State *v.* Campbell, 10 Mo. 724; Ordronaux *v.* Helie, 3 Sandf. Ch. (N. Y.) 512. See also McBride *v.* Choate, 37 N. C. 610.

Situs of debt.— Where one of two persons dies indebted to another, both being subjects of and domiciled in the same foreign country, and an original administration is granted in such foreign country and an ancillary one in the state where the debt was contracted, such debt will be referred for settlement to the original administration. Dawes *v.* Head, 3 Pick. (Mass.) 128. Where administration is granted on an estate in two states, what was due to the decedent as partner in a firm carrying on business in one state is payable to the administrator in that state, although the payment is made in the other state where the decedent lives. Jones *v.* Warren, 70 Miss. 227, 14 So. 25.

The title to a bond or other document of evidence of a foreign debt vests by relation in the executor or administrator where that document lies. Bartlett *v.* Gray, 4 Ky. L. Rep. 615; Bullock *v.* Rogers, 16 Vt. 294.

52. *Kentucky.*— Purdy *v.* Purdy, 42 S. W. 89, 19 Ky. L. Rep. 823.

Louisiana.— St. John's Succession, 6 La. Ann. 192.

Mississippi.— Anderson *v.* Gregg, 44 Miss. 170; Riley *v.* Moseley, 44 Miss. 37.

North Carolina.— Young *v.* Kennedy, 95 N. C. 265; Grant *v.* Reese, 94 N. C. 720; Colson *v.* Martin, 62 N. C. 125; Sanders *v.* Jones, 43 N. C. 246.

Pennsylvania.— Mothland *v.* Wireman, 3 Penr. & W. 185, 33 Am. Dec. 71.

Tennessee.— Bowman *v.* Carr, 5 Lea 571.

See 22 Cent. Dig. tit. "Executors and Administrators," § 299.

Appointment of separate executors.—Where a testator appoints one executor to take charge of property within the state or country, and another to take charge of foreign property, the former is only bound to account for the property within the state or country. Sherman *v.* Page, 85 N. Y. 123.

Lands situate and descending in another state, or their rents, or proceeds of their sale, are not usually to be deemed assets in the state of last domicile. Smith *v.* Smith, 13 Ala. 329; Hubbard *v.* Hinkley, 1 Root (Conn.) 413; Morrill *v.* Morrill, 1 Allen (Mass.) 132; Austin *v.* Gage, 9 Mass. 395; Peck *v.* Mead, 2 Wend. (N. Y.) 470. But see Dickson *v.* U. S., 125 Mass. 311, 28 Am. Rep. 230.

A power under a will may confer authority to convey land situated in another state. Newton *v.* Bronson, 13 N. Y. 587, 67 Am. Dec. 89.

53. Colson *v.* Martin, 62 N. C. 125.

in his hands which must be accounted for as such.[54] An executor or administrator qualifying in the state of the domicile of the testator has title ultimately to the assets, wherever they may be situated, subject, however, to the satisfaction of local creditors and claimants,[55] and ought to consider all the chattels of his decedent wheresoever situated as assets if by reasonable diligence he may pursue and possess himself of them.[56]

F. Proceeds of Insurance Policies. The right to the proceeds of a policy of insurance as between the personal representative of a decedent and his heirs and others will be treated elsewhere.[57]

G. Exempt Property.[58] On the death of a debtor property which would have been set apart for him under his exemption had he lived remains a part of his estate and goes to his administrator;[59] but in most states there are statutory provisions by which certain property, or property up to a certain value, is not considered assets, but goes to the widow or children free from the decedent's debts.[60]

H. Ownership of Property — 1. In General. In order that property may constitute assets, the decedent must have owned the same at the time of his death,[61] and similarly debts or claims can be assets only where the decedent at

54. Sampson *v.* Graham, 7 J. J. Marsh. (Ky.) 497 (proceeds of sale); Collins *v.* Bankhead, 1 Strobh. (S. C.) 25; Borer *v.* Chapman, 119 U. S. 587, 7 S. Ct. 342, 30 L. ed. 532; Van Bokkelen *v.* Cook, 28 Fed. Cas. No. 16,831, 5 Sawy. 587.

Notes or bonds owned by deceased at the time of his death and secured by mortgages on land in another state or country are properly assets in the hands of the domiciliary executor or administrator, who should there account for them and who may sue and enforce them in the state where the land lies. Gray's Estate, 1 Kulp (Pa.) 449; Eells *v.* Holder, 12 Fed. 668, 2 McCrary 622.

Foreign assets transmitted in trust, etc.— If foreign property is remitted after due administration upon a certain trust or for a certain purpose conformably to law or a testator's direction, the domiciliary court will respect that trust or purpose and disregard such property as assets. Wheelock *v.* Pierce, 6 Cush. (Mass.) 288; Sedgwick *v.* Ashburner, 1 Bradf. Surr. (N. Y.) 105.

55. Matter of McCabe, 84 N. Y. App. Div. 145, 82 N. Y. Suppl. 180 [*affirmed* in 177 N. Y. 584, 69 N. E. 1126]; Pulliam *v.* Pulliam, 10 Fed. 23. But *compare* Carmichael *v.* Ray, 40 N. C. 365.

56. Gayle *v.* Blackburn, 1 Stew. (Ala.) 429; *In re* Ortiz, 86 Cal. 306, 24 Pac. 1034, 21 Am. St. Rep. 44; Suarez *v.* New York, 2 Sandf. Ch. (N. Y.) 173; Gray *v.* Swain, 9 N. C. 15.

Policies of life insurance issued by a Connecticut company, and held in possession by it in that state as collateral security for a loan to the insured, who was domiciled in New York, are not exclusively Connecticut assets of the deceased insured, but may be sued on in New York by the domiciliary administrator if the insurer can be served in the latter state. Steele *v.* Connecticut Gen. L. Ins. Co., 31 N. Y. App. Div. 389, 52 N. Y. Suppl. 373.

57. See, generally, Fire Insurance; Insurance; Life Insurance; Marine Insurance; Mutual Benefit Insurance.

58. See, generally, Exemptions.

59. *In re* Seabolt, 113 Fed. 766.

60. See Armstrong *v.* Cavitt, 78 Ind. 476; Crawford *v.* Nassoy, 55 N. Y. App. Div. 433, 67 N. Y. Suppl. 108 (holding that the question whether certain property falls within the meaning of a statute providing that certain property specified shall not be appraised or deemed assets of the estate, but shall be left in the possession of the widow, and, if there be no minor child the property mentioned shall belong to the widow, cannot be determined in an action against the administrator for its conversion, it being a question for the determination of the appraisers in the first instance, subject to review by the surrogate); and *infra*, IX.

61. Cooper *v.* White, 19 Ga. 554; *In re* Miller, 73 Iowa 118, 34 N. W. 769; Day *v.* Stone, 15 Abb. Pr. N. S. (N. Y.) 137. See also Beazley *v.* Kendrick, 78 Ga. 121.

The surrender of property by the person in possession upon the representative's demand does not estop him from afterward asserting that he is the owner and reclaiming it. Adler *v.* Pin, 80 Ala. 351; Sherman *v.* Sherman, 3 Ind. 337.

Election exercised by decedent.— Where a consignee had a right to purchase the goods he held at a stipulated price, but elected rather to hold them as consignee, his executor or administrator could not after his death elect to hold them as a purchaser. Bacon *v.* Sondley, 3 Strobh. (S. C.) 542, 51 Am. Dec. 646.

Claim by wife of decedent based on declaration of ownership.— Mere declarations of a husband that property purchased by his wife belongs to her, unaccompanied by any explanation as to how she acquired and paid therefor, are insufficient to vest the property in the wife as against the husband's next of kin so as to entitle her to exclude the same from the inventory of her husband's estate

such time was the creditor or claimant,[62] for otherwise the title cannot devolve upon the personal representative.[63] But personal property belonging to the deceased which is in the possession or control of a third person at the time of his death vests as assets in the executor or administrator of the owner.[64] Property *bona fide* and regularly transferred to others by the decedent during his lifetime with mutual intent that the title should pass, whether by way of sale or gift, does not vest in the executor or administrator,[65] although he may maintain an equita-

as his administratrix. Bradford's Appeal, 29 Pa. St. 513.

Bequest of income of deposit.— Where the income of a deposit was bequeathed to A for life and testator declared that the principal should be paid to A's executor or administrator and go to A's heirs, the principal of the fund did not, on A's death, constitute assets of his estate in the hands of his executors but was held by them in trust to distribute to A's heirs. Thayer *v.* Fairchild, 25 R. I. 509, 56 Atl. 772.

Stock standing in name of decedent.— That stock stands on the transfer book of a corporation in the name of a decedent is not conclusive evidence that it belongs to his estate, but is equally consistent with his holding the stock as collateral, as clearly indicated by circumstances, especially when he kept a careful book-account of his investments, which did not include such stock. Van Winkle *v.* Blackford, 54 W. Va. 621, 46 S. E. 589.

62. Schouler Ex. § 204.

Effect of inventory.— Where an administrator returns in his inventory as having come into his possession among the effects of the intestate certain packages containing money, each one indorsed with a memorandum indicating that the money contained in it belonged to some third person particularly named, the administrator should not be charged with the money contained in such packages as assets merely upon the strength of his inventory. Judge *v.* Tison, 42 Ala. 401.

Evidence as to ownership.— Evidence that certain notes were payable to decedent or bearer is not sufficient to establish that they belonged to the estate where at decedent's death they were found in the possession of another person and there is other proof besides such person's possession of his right to the notes. Williams *v.* Thomas, 65 Iowa 183, 21 N. W. 509.

63. Schouler Ex. § 204.

64. Bean *v.* Bumpus, 22 Me. 549; Green *v.* Collins, 28 N. C. 139; Shakespeare *v.* Fidelity Ins., etc., Co., 97 Pa. St. 173.

65. *Alabama.*— Wood *v.* Wood, 3 Ala. 756.

California.— Cunningham's Estate, Myr. Prob. 76.

Georgia.— Howes *v.* Whipple, 41 Ga. 322.

Illinois.— Harmon *v.* Harmon, 63 Ill. 512.

Indiana.— Garner *v.* Graves, 54 Ind. 188.

Louisiana.— Burke *v.* Bishop, 27 La. Ann. 465, 21 Am. Rep. 567; Hart *v.* Boni, 6 La. 97.

Maine.— See Thorndike *v.* Barrett, 2 Me. 312.

Massachusetts.— Coverdale *v.* Aldrich, 19 Pick. 391 (holding that where property attached in the hands of trustees was assigned by the owner for the benefit of creditors and the attachment was afterward dissolved by his death, the assignee and not the administrator was entitled to the property); Dawes *v.* Boylston, 9 Mass. 337, 6 Am. Dec. 72.

Missouri.— Scruggs *v.* Alexander, 72 Mo. 134 (holding that where decedent sold certain property before his death, stipulating that the price should be paid to his wife in a certain manner, the widow and not the executor was entitled to receive the proceeds of the sale); Tye *v.* Tye, 88 Mo. App. 330.

New York.— Matter of McAleenan, 53 N. Y. App. Div. 193, 65 N. Y. Suppl. 970 [*affirmed* in 165 N. Y. 645, 59 N. E. 1125]; Anderson *v.* Thomson, 38 Hun 394; Matter of Hildebrand, 1 Misc. 245, 23 N. Y. Suppl. 148.

North Carolina.— Biddle *v.* Carraway, 59 N. C. 95.

Oregon.— Deneff *v.* Helms, 42 Oreg. 161, 70 Pac. 390.

Pennsylvania.—Thomas *v.* Smith, 3 Whart. 401.

South Carolina.— Sullivan *v.* Latimer, 38 S. C. 158, 17 S. E. 701; Anderson *v.* Belcher, 1 Hill 246, 26 Am. Dec. 174.

Texas.— Steven *v.* Lee, 70 Tex. 279, 8 S. W. 40.

Vermont.— Rutland, etc., R. Co. *v.* Powers, 25 Vt. 15.

Virginia.— Perdue *v.* Dillon, 89 Va. 182, 15 S. E. 385.

United States.— Morancy *v.* Palms, 68 Fed. 64, 15 C. C. A. 223.

See 22 Cent. Dig. tit. "Executors and Administrators," § 308.

Check cashed after decedent's death.— An administrator of a solvent estate cannot recover moneys obtained from a bank, after decedent's death, upon a check given by him before death, in payment of debts, although the holder knew of his death and failed to inform the bank thereof. McMurray *v.* Ennis, 10 N. Y. Suppl. 698.

A gift causa mortis is not to be ignored by the representative (Westerlo *v.* De Witt, 36 N. Y. 340, 93 Am. Dec. 517; Michener *v.* Dale, 23 Pa. St. 59), although in case of a deficiency of assets the personal representative may pursue a gift *causa mortis* in the hands of the donee, but he must show the facts constituting the necessity and his recovery will be limited to the extent of such necessity (Seybold *v.* Grand Forks Nat. Bank, 5 N. D. 460, 67 N. W. 682).

Where part of a fund is absolutely transferred by decedent, the other portion not so transferred may be recovered by the repre-

ble action to cancel an assignment by the decedent on the ground that it was obtained from him by undue influence,[66] or contest the validity of an alleged gift.[67] Conversely, since legal transfer implies parting with dominion over the thing, any professed transfer during one's lifetime which left the possession, control, and power to revoke in the transferee, keeps his title virtually undivested, so that at his decease the chattel must be administered as assets.[68]

2. Presumption as to Ownership. It is a presumption of law that personal property of all kinds found in a person's possession or under his dominion and control at the time of his death belongs to him and constitutes assets of his estate, especially if he has had possession for a long time under circumstances favorable to strengthening his title; and it devolves upon any one claiming any of the property adversely to establish his title.[69]

3. Property Held in Fiduciary Capacity. Property which a decedent held in a fiduciary capacity does not at his death properly constitute assets, but should be devoted to the purposes of the trust,[70] although the account of the trust should

sentative after his death. Beals *v.* Crowley, 59 Cal. 665; Matter of Conklin, 20 N. Y. Suppl. 59, 2 Connoly Surr. (N. Y.) 176.

Money accepted in trust.— Where decedent gave A certain money stating to him that it was a gift and if he was unwilling to accept it as such to keep it in trust for certain purposes, and A accepted the money, electing to treat it as a trust, the administrator of the decedent was not entitled to the fund. Reyburn *v.* Bakewell, 88 Mo. App. 640.

Money given for funeral expenses.— Where a decedent gave money to a certain person in trust to expend the same after her death for her funeral, and he thus expended it, the administrator cannot recover such sum where all preferred claims have been paid and it does not appear that the probate court has disapproved of the payments made by such person. Bedell *v.* Scoggins, (Cal. 1895) 40 Pac. 954.

Attack on title of claimant.— An administrator, in answer to a suit to enjoin the sale of property inventoried as belonging to the succession, may allege and show the simulated character of plaintiff's title. Grant's Succession, 23 La. Ann. 741.

A savings bank deposit belonging to a donee is not assets of the donor, even though the donee may have to recover it from the bank in the name of the donor's representative. Watson *v.* Watson, 69 Vt. 243, 39 Atl. 201.

A deed delivered after decedent's death does not affect creditor's rights as to his realty. Rosseau *v.* Bleau, 131 N. Y. 177, 30 N. E. 52, 27 Am. St. Rep. 578.

As to property fraudulently conveyed see *infra*, III, H, 7.

66. Derrick *v.* Emmens, 14 N. Y. Suppl. 360; Clapp *v.* Clark, 49 Fed. 123.

67. Kiff *v.* Weaver, 94 N. C. 274, 55 Am. Rep. 601. But see Ford *v.* Hennessy, 70 Mo. 580.

68. *Georgia.*— Bothwell *v.* Dobbs, 59 Ga. 787.

Iowa.— Madison *v.* Shockley, 41 Iowa 451.

Louisiana.— Burke *v.* Bishop, 27 La. Ann. 465, 21 Am. Rep. 567, undrawn check.

Massachusetts.— Cummings *v.* Bramhall, 120 Mass. 552.

Michigan.— Bigelow *v.* Paton, 4 Mich. 170.

Mississippi.— French *v.* Davis, 38 Miss. 167.

Missouri.— Tye *v.* Tye, 88 Mo. App. 330.

New Jersey.— Roberts *v.* Wills, 20 N. J. L. 591.

New York.—Matter of Ward, 2 Redf. Surr. 251.

Virginia.— Spooner *v.* Hilbish, 92 Va. 333, 23 S. E. 751.

West Virginia.— Tennant *v.* Headlee, 31 W. Va. 585, 8 S. E. 544.

See 22 Cent. Dig. tit. "Executors and Administrators," § 308.

A bailment under instructions which death countermands does not divest the bailee's title. Bigelow *v.* Paton, 4 Mich. 170; Gilman *v.* McArdle, 99 N. Y. 451, 2 N. E. 464, 52 Am. Rep. 41.

69. *Kentucky.*— Robbins *v.* Robbins, 1 S. W. 152, 8 Ky. L. Rep. 54.

Louisiana.—Alexander's Succession, 18 La. Ann. 337; Waters *v.* Grayson, 3 La. Ann. 595; Lynch *v.* Benton, 12 Rob. 113.

Maryland.— Getty *v.* Long, 82 Md. 643, 33 Atl. 639, holding that the fact that a bank-account stands in one's own name is *prima facie* evidence that it belongs to his estate.

Mississippi.— See Buie *v.* Buie, 67 Miss. 456, 7 So. 344.

Missouri.— Criddle *v.* Criddle, 21 Mo. 522.

Pennsylvania.— Cummings' Estate, 153 Pa. St. 397, 25 Atl. 1125.

See 22 Cent. Dig. tit. "Executors and Administrators," § 306.

The record of a mortgage running to decedent without evidence that he owned it at his death does not support a finding of assets. Steele *v.* Connecticut Gen. L. Ins. Co., 31 N. Y. App. Div. 389, 52 N. Y. Suppl. 373 [*affirmed* in 160 N. Y. 703, 57 N. E. 1125].

70. *California.*— Stanwood *v.* Sage, 22 Cal. 516.

Colorado.— Central City First Nat. Bank *v.* Hammel, 14 Colo. 259, 23 Pac. 986, 20 Am. St. Rep. 272, 8 L. R. A. 788.

Florida.— Bloxam *v.* Crane, 19 Fla. 163.

Georgia.— Perkins *v.* Keith, 33 Ga. 525.

be settled by the personal representative.[71] But if any trust fund which the decedent held in his lifetime be gone, or its identity lost at his death, the personal representative does not stand in the relation of trustee to the *cestui que trust*, beyond the obligation imposed by his office as executor or administrator; and no remedy lies against him except such as belongs to a general creditor of the estate, unless assets exist to which the lien of the *cestui que trust* in equity can properly attach.[72]

4. Life-Estates. Property in which decedent had only a life-estate does not go to his personal representative.[73]

5. Reversions or Remainders. A decedent's interest in reversion or remainder in property may constitute assets.[74]

6. Equitable Estates or Interests. Equitable interests generally in property are recoverable for the decedent's estate by his personal representative;[75] but an

Kansas.— Hubbard *v.* Alamo Irrigating, etc., Co., 53 Kan. 637, 36 Pac. 1053, 37 Pac. 625.

Kentucky.— Schoolfield *v.* Rudd, 9 B. Mon. 291.

Louisiana.— L'Hommedieu *v.* Penny, 6 La. 599.

Maine.— Thompson *v.* White, 45 Me. 445; Richardson *v.* Woodbury, 43 Me. 206.

Massachusetts.— Childs *v.* Jordan, 106 Mass. 321; Johnson *v.* Ames, 11 Pick. 173.

Michigan.—Mains *v.* Webber, 131 Mich. 213, 91 N. W. 172.

New York.— Crowe *v.* Brady, 5 Redf. Surr. 1.

North Carolina.— Alamance *v.* Blair, 76 N. C. 136; Simmons *v.* Whitaker, 37 N. C. 129; Green *v.* Collins, 28 N. C. 139.

Ohio.— Quinby *v.* Walker, 14 Ohio St. 193.

Pennsylvania.— Work *v.* Work, 14 Pa. St. 316; Merrick's Estate, 8 Watts & S. 402.

South Carolina.— Gary *v.* People's Nat. Bank, 26 S. C. 538, 2 S. E. 568, 4 Am. St. Rep. 733; Charleston *v.* Duncan, 3 Brev. 386; Gage *v.* Allison, 1 Brev. 495, 2 Am. Dec. 682.

Vermont.— Sherman *v.* Dodge, 28 Vt. 26.

Washington.— *In re* Belt, 29 Wash. 535, 70 Pac. 74, 92 Am. St. Rep. 916.

United States.—Robison *v.* Codman, 20 Fed. Cas. No. 11,970, 1 Sumn. 121; U. S. *v.* Cutts, 25 Fed. Cas. No. 14,912, 1 Sumn. 133. See also De Valengin *v.* Duffy, 14 Pet. 282, 10 L. ed. 457.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 296, 307.

Trust must be shown where not express.— Belknap *v.* Caldwell, 82 Ind. 270.

Land subject to resulting trust.— Land nominally of the decedent in which a resulting trust is established may in equity be held fully answerable for what was owing the *cestui que trust* before decedent's estate can derive benefit therefrom. See Sheldon *v.* Bradley, 37 Conn. 224; West *v.* Howard, 20 Conn. 581.

A trust fund wrongfully mingled by a trustee with his other funds and property and retained by him may be followed and reclaimed from the administrator of his estate. Hubbard *v.* Alamo Irrigating, etc., Co., 53 Kan. 637, 36 Pac. 1053, 37 Pac. 625.

71. Baird's Appeal, 3 Watts & S. (Pa.) 459.

Bank deposits standing in one's own name as "trustee" or with other fiduciary indication are properly recoverable from the bank upon his death by his executor or administator, who may thereupon be held responsible at the instance of his beneficiary for performing such trusts, if any, as had attached to the deposit. Boone *v.* Citizens' Sav. Bank, 84 N. Y. 83, 38 Am. Rep. 498; Ray *v.* Simmons, 11 R. I. 266, 23 Am. Rep. 447.

The executor of a consignee is not liable to the consignor for debts due on his account unless there be gross negligence. McConnico *v.* Curzen, 2 Call (Va.) 358, 1 Am. Dec. 540.

72. Lathrop *v.* Bampton, 31 Cal. 17, 89 Am. Dec. 141; O'Brien *v.* New England Trust Co., 183 Mass. 186, 66 N. E. 794; Johnson *v.* Ames, 11 Pick. (Mass.) 173; Bobbitt *v.* Jones, 107 N. C. 658, 12 S. E. 267; Trecothick *v.* Austin, 24 Fed. Cas. No. 14,164, 4 Mason 16.

Where a life beneficiary has mingled principal and income as one fund, the division of the property at her death becomes largely a matter of convenience. Kimball *v.* New Hampshire Bible Soc., 65 N. H. 139, 23 Atl. 83, 85.

73. *Connecticut.*— See Connecticut Trust, etc., Co. *v.* Security Co., 67 Conn. 438, 35 Atl. 342.

Georgia.— Sawyer *v.* Flemister, 29 Ga. 347.

Indiana.— Jester *v.* Gustin, 158 Ind. 287, 63 N. E. 471.

Kentucky.—Simrall *v.* Graham, 1 Dana 574.

Michigan.— See Salter *v.* Sutherland, 123 Mich. 225, 81 N. W. 1070, 50 L. R. A. 140.

Pennsylvania.— King's Estate, 12 Wkly. Notes Cas. 109; Tucker *v.* Horner, 10 Phila. 122.

See 22 Cent. Dig. tit. "Executors and Administrators," § 285.

74. Kinaston *v.* Clark, 2 Atk. 204, 26 Eng. Reprint 526 (reversion come into possession); Warwick *v.* Edwards, Dick. 51, 21 Eng. Reprint 186 (reversion in fee after tail spent); Tyndale *v.* Warre, Jac. 212, 4 Eng. Ch. 212 (reversion expectant upon an estate for life and upon estates tail limited to unborn children).

75. *Maine.*— Bean *v.* Bumpus, 22 Me. 549.

Missouri.— Atkison *v.* Henry, 80 Mo. 670.

North Carolina.— Uzzle *v.* Wood, 54 N. C. 226.

Ohio.— Craig *v.* Jennings, 31 Ohio St. 84; Avery *v.* Dufrees, 9 Ohio 145; Duly *v.* Duly,

estate held specifically in trust follows usually the terms of the trust, and is not upon the death of the *cestui que trust* to be conveyed to his personal representatives to pay such beneficiary's debts.[76]

7. Property Fraudulently Conveyed.[77] The death of the grantor or donor in a sale, transfer, or gift which is fraudulent as to creditors does not have the effect of barring their rights, but the sale or gift may be avoided,[78] although only, it has been held, where otherwise there is or will be a deficiency of assets,[79] and then only to the extent necessary to pay debts,[80] for, if the gift or transfer was

2 Ohio Dec. (Reprint) 425, 3 West. L. Month. 42.

Pennsylvania.— *In re* Johnson, 2 Whart. 120.

See 22 Cent. Dig. tit. "Executors and Administrators," § 296.

But see Rhea *v.* Tucker, 56 Ala. 450, holding that where a plaintiff in a suit to establish a resulting trust in lands died before a final decree the suit should be revived in the name of his heirs and a decree in favor of his personal representative was erroneous.

Income of trust fund.— The administrator of one for whose benefit during life the income of a trust fund has been given by will, can, if time has elapsed between the last payment and the beneficiary's death, recover a part proportionate to that time. Haraden *v.* Larrabee, 113 Mass. 430.

76. Leiper *v.* Irvine, 26 Pa. St. 54.

77. See, generally, Fraudulent Conveyances.

78. *Alabama.*— Smith *v.* Cockrell, 66 Ala. 64; Marler *v.* Marler, 6 Ala. 367.

California.—Field *v.* Andrada, 106 Cal. 107, 39 Pac. 323.

Indiana.— Bottorff *v.* Covert, 90 Ind. 508; Burtch *v.* Elliot, 3 Ind. 99.

Iowa.— Harlin *v.* Stevenson, 30 Iowa 371.

Kentucky.— Smith *v.* Pollard, 4 B. Mon. 66.

Louisiana.— Walworth *v.* Snodgrass, 7 La. Ann. 136.

Maine.— McLean *v.* Weeks, 61 Me. 277.

Massachusetts.— Welsh *v.* Welsh, 105 Mass. 229; Wall *v.* Provident Sav. Inst., 3 Allen 96; Martin *v.* Root, 17 Mass. 222.

Mississippi.— Blake *v.* Blake, 53 Miss. 182.

Nebraska.— Becker *v.* Anderson, 6 Nebr. 499.

New Hampshire.— Preston *v.* Cutter, 65 N. H. 85, 18 Atl. 92.

New York.— Gilman *v.* McArdle, 99 N. Y. 451, 2 N. E. 464, 52 Am. Rep. 41; Reade *v.* Livingston, 3 Johns. Ch. 481, 8 Am. Dec. 520.

Ohio.— Hampson *v.* Sumner, 18 Ohio 444.

Vermont.— Peaslee *v.* Barney, 1 D. Chipm. 331, 6 Am. Dec. 743.

Wisconsin.— Cornell *v.* Radway, 22 Wis. 260.

United States.— Yeaton *v.* Lynn, 5 Pet. 224, 8 L. ed. 105 [*affirming* 15 Fed. Cas. No. 8,642, 3 Cranch C. C. 182].

See 22 Cent. Dig. tit. "Executors and Administrators," § 309.

If decedent dies in possession of property fraudulently transferred by deed the property is to be deemed assets. Kent *v.* Lyon, 4 Fla. 474, 54 Am. Dec. 404; Hunt *v.* Butterworth, 21 Tex. 133, 73 Am. Dec. 223. And see Babcock *v.* Booth, 2 Hill (N. Y.) 181, 38 Am. Dec. 578; Spooner *v.* Hilbish, 92 Va. 333, 23 S. E. 751.

The representative may resist the collection of a demand against the estate founded upon a fraudulent transfer by decedent. Welsh *v.* Welsh, 105 Mass. 229; Cross *v.* Brown, 51 N. H. 486.

Action for money had and received, wrongful taking, etc.— Not only direct proceedings to set aside by bill in equity may be justified, but also actions in assumpsit against the transferee as for money had and received or tortwise as for a wrongful taking, etc.

Maine.— McLean *v.* Weeks, 61 Me. 277.

Massachusetts.— Wall *v.* Provident Sav. Inst., 6 Allen 320.

Minnesota.— Bennett *v.* Schuster, 24 Minn. 383.

New Hampshire.— Everett *v.* Read, 3 N. H. 55.

New York.— McKnight *v.* Morgan, 2 Barb. 171.

See 22 Cent. Dig. tit. "Executors and Administrators," § 309.

Representative not liable for allowing donee to take.— It is not a devastavit for a personal representative to deliver to the donee or suffer the donee to take property conveyed by the decedent in his lifetime, although it turns out that the conveyance was fraudulent. Greenlee *v.* Hays, 1 Overt. (Tenn.) 300.

Administrator may disaffirm mortgage fraudulent as to creditors. Hangen *v.* Huchmeister, 114 N. Y. 566, 21 N. E. 1046, 11 Am. St. Rep. 691, 5 L. R. A. 137.

Receiving payment of the consideration by the personal representative does not of itself ratify the transfer in fraud of creditors, unless, perhaps, where the payment is received with full knowledge of all the facts and the representative is a party in interest. Norton *v.* Norton, 5 Cush. (Mass.) 524.

79. *California.*— Murphy *v.* Clayton, 114 Cal. 526, 43 Pac. 613, 46 Pac. 460; Field *v.* Andrada, 106 Cal. 107, 39 Pac. 323.

Indiana.— Jarrell *v.* Brubaker, 150 Ind. 260, 49 N. E. 1050.

Missouri.— Bagley *v.* Harmon, 91 Mo. App. 22.

Vermont.—Allen *v.* Mower, 17 Vt. 61.

West Virginia.—Boggs *v.* McCay, 15 W. Va. 344.

Wisconsin.— Ecklor *v.* Wolcott, 115 Wis. 19, 90 N. W. 1081.

See 22 Cent. Dig. tit. "Executors and Administrators," § 309.

80. Schwalber *v.* Ehman, 62 N. J. Eq. 314, 49 Atl. 1085.

good as against the decedent, it is good as against his heirs, distributees, legatees, or devisees, even though it may be fraudulent as to creditors, and hence the donee or transferee is entitled to what remains after the demands of creditors and the expenses of administration are paid,[81] and if the creditors of the estate all waive their right to impeach a conveyance or transfer by the decedent, no cause for setting it aside appears.[82] If the transferee or donee relinquish or fail to assert his own claim the property should be treated as belonging to the estate of the decedent.[83] It has been laid down in some jurisdictions that the executor or administrator may bring proceedings to avoid a fraudulent conveyance by his decedent,[84] while in others the right of a personal representative to impeach a

81. *California.*— Murphy *v.* Clayton, 114 Cal. 526, 43 Pac. 613, 46 Pac. 460.

Connecticut.— Bassett *v.* McKenna, 52 Conn. 437; Andruss *v.* Doolittle, 11 Conn. 283.

Indiana.— U. S. Bank *v.* Burke, 4 Blackf. 141.

Maine.— McLean *v.* Weeks, 61 Me. 277.

Massachusetts.—Welsh *v.* Welsh, 105 Mass. 229.

Michigan.— Reed *v.* Jourdan, 109 Mich. 128, 66 N. W. 947; Morris *v.* Morris, 5 Mich. 171.

New Hampshire.—Cross *v.* Brown, 51 N. H. 486.

Vermont.— Pease *v.* Shirlock, 63 Vt. 622, 22 Atl. 661.

See 22 Cent. Dig. tit. "Executors and Administrators," § 309.

82. Winn *v.* Barnett, 31 Miss. 653; Snodgrass *v.* Andrews, 30 Miss. 472, 64 Am. Dec. 169.

83. Warren *v.* Hall, 6 Dana (Ky.) 450; Sharp *v.* Caldwell, 7 Humphr. (Tenn.) 415.

84. *California.*— Emmons *v.* Barton, 109 Cal. 662, 42 Pac. 303. See also Field *v.* Andrada, 106 Cal. 107, 39 Pac. 323; Ohm *v.* San Francisco Super. Ct., 85 Cal. 545, 26 Pac. 244, 20 Am. St. Rep. 245.

Connecticut.—Andruss *v.* Doolittle, 11 Conn. 283.

Idaho.— See Brown *v.* Perrault, 5 Ida. 729, 51 Pac. 752.

Indiana.— Jarrell *v.* Brubaker, 150 Ind. 260, 49 N. E. 1050; Wilson *v.* Boone, 136 Ind. 142, 35 N. E. 1096; Bottorff *v.* Covert, 90 Ind. 508; Johnson *v.* Jones, 79 Ind. 141; Martin *v.* Bolton, 75 Ind. 295; Hess *v.* Hess, 19 Ind. 238. But *compare* Garner *v.* Graves, 54 Ind. 188.

Iowa.— Doe *v.* Clark, 42 Iowa 123; Cooley *v.* Brown, 30 Iowa 470.

Maine.— Frost *v.* Libby, 79 Me. 56, 8 Atl. 149; McLean *v.* Weeks, 61 Me. 277; Caswell *v.* Caswell, 28 Me. 232.

Massachusetts.— Putney *v.* Fletcher, 148 Mass. 247, 19 N. E. 370; Parker *v.* Flagg, 127 Mass. 28; Wall *v.* Provident Sav. Inst., 6 Allen 320; Tenney *v.* Poor, 14 Gray 500, 77 Am. Dec. 340; Norton *v.* Norton, 5 Cush. 524; Holland *v.* Cruft, 20 Pick. 321; Gibbens *v.* Peeler, 8 Pick. 254; Martin *v.* Root, 17 Mass. 222.

Michigan.— Beith *v.* Porter, 119 Mich. 365, 78 N. W. 336, 75 Am. St. Rep. 402 (holding that an administrator can recover property for which the deceased paid, but the title to which he caused to be taken in the name of another person, in fraud of creditors); White *v.* Newhall, 68 Mich. 641, 36 N. W. 699.

New Hampshire.— Matthews *v.* Hutchins, 68 N. H. 412, 40 Atl. 1063; Clark *v.* Clough, 65 N. H. 43, 23 Atl. 526; Preston *v.* Cutter, 64 N. H. 461, 13 Atl. 874; Janvrin *v.* Curtis, 63 N. H. 312; Abbott *v.* Tenney, 18 N. H. 109.

New York.— West Troy Nat. Bank *v.* Levy, 127 N. Y. 549, 28 N. E. 592 [*reversing* 2 N. Y. Suppl. 162]; Harvey *v.* McDonnell, 113 N. Y. 526, 21 N. E. 695; Lichtenberg *v.* Herdtfelder, 103 N. Y. 302, 8 N. E. 526; Bate *v.* Graham, 11 N. Y. 237; Barton *v.* Hosner, 24 Hun 467; Dennison *v.* Ely, 1 Barb. 610; *In re* Hathaway, 24 N. Y. Suppl. 468, Pow. Surr. 447; Kendall *v.* Mellen, 13 N. Y. Suppl. 207; Gilleland *v.* Failing, 5 Den. 308; Brownell *v.* Curtis, 10 Paige 210. See also Phelps *v.* Platt, 50 Barb. 430. But *compare* Osborne *v.* Moss, 7 Johns. 161, 5 Am. Dec. 252; Ordronaux v. Helie, 3 Sandf. Ch. 512.

North Carolina.— Webb *v.* Atkinson, 122 N. C. 683, 29 S. E. 949; Tuck *v.* Walker, 106 N. C. 285, 11 S. E. 183. But *compare* Burton *v.* Farinholt, 86 N. C. 260; Coltraine *v.* Causey, 38 N. C. 246, 42 Am. Dec. 168; Rhem *v.* Tull, 35 N. C. 57.

Ohio.— Doney *v.* Clark, 55 Ohio St. 294, 45 N. E. 316; Hoffman *v.* Kiefer, 19 Ohio Cir. Ct. 401, 10 Ohio Cir. Dec. 304. And see Kilbourne *v.* Fay, 29 Ohio St. 264, 23 Am. Rep. 741. But *compare* Benjamin *v.* Le Baron, 15 Ohio 517; Doney *v.* Dunnick, 8 Ohio Cir. Ct. 163, 4 Ohio Cir. Dec. 380.

Pennsylvania.— Stewart *v.* Kearney, 6 Watts 453, 31 Am. Dec. 482; Gross' Estate, 6 Pa. Co. Ct. 113.

South Carolina.— Kirkpatrick *v.* Atkinson, 11 Rich. Eq. 27; King *v.* Clarke, 2 Hill Eq. 611. But *compare* Hargroves *v.* Meray, 2 Hill Eq. 222.

Tennessee.— Martin *v.* Crosby, 11 Lea 198; Boxly *v.* McKay, 4 Sneed 286. But *compare* Mulloy *v.* Young, 10 Humphr. 298; Lassiter *v.* Cole, 8 Humphr. 621; Gilliam *v.* Spence, 6 Humphr. 160; Moody *v.* Fry, 3 Humphr. 567.

Vermont.— McLane *v.* Johnson, 43 Vt. 48; Allen *v.* Mower, 17 Vt. 61. But *compare* Martin *v.* Martin, 1 Vt. 91, 18 Am. Dec. 675; Peaslee *v.* Barney, 1 D. Chipm. 331, 6 Am. Dec. 743.

Wisconsin.— Ecklor *v.* Wolcott, 115 Wis. 19, 90 N. W. 1081. See also O'Malley *v.* O'Malley, 102 Wis. 639, 78 N. W. 753.

transfer of property made by the decedent on the ground that it was fraudulent as to creditors is denied.[85]

IV. Inventory and Appraisal.

A. In General. In England there are statutes requiring every executor or administrator to file an inventory of all the goods and chattels of the deceased,[86] but in modern practice the custom of filing an inventory appears to have fallen into disuse, although the theory still is to compel such exhibit on the petition of any party in interest.[87] In the United States, on the other hand, the inventory has become a settled feature of modern probate practice, and the first duty of an

United States.— Smith *v.* New York L. Ins. Co., 57 Fed. 133; Clapp *v.* Clark, 49 Fed. 123. See 22 Cent. Dig. tit. "Executors and Administrators," § 309.

Personal representative may be compelled to bring suit. Ohm *v.* San Francisco Super. Ct., 85 Cal. 545, 26 Pac. 244, 20 Am. St. Rep. 245 (holding, however, that a person whose claim has been disallowed by the representative and for the establishment of whose claim an action is pending and undetermined is not a creditor within the meaning of the statute providing for the compelling of suit by an executor or administrator to set aside a fraudulent conveyance on application of creditors); Lichtenberg *v.* Herdtfelder, 103 N. Y. 302, 8 N. E. 526.

The right of a creditor to attack a conveyance by a decedent which is fraudulent as to creditors is not taken away by the statute authorizing the administrator to attack such a conveyance, but when the assets are reached at the suit of a creditor they will be placed in the hands of the administrator to be distributed according to law. Hoffman *v.* Kiefer, 19 Ohio Cir. Ct. 401, 10 Ohio Cir. Dec. 304.

An administrator is not entitled to a reconveyance of the land, for the law gives him, not a title to the land of his intestate but merely a right to sell the same in a prescribed mode and for certain specified purposes. Crocker *v.* Smith, 32 Me. 244.

Where the alleged fraudulent grantee is the executrix of the grantor a suit in equity will lie in favor of the creditors to set aside the conveyance. Emmons *v.* Barton, 109 Cal. 662, 42 Pac. 303.

Where the representative denies the existence of an intent to defraud creditors the conveyance will not be set aside at his instance. Brown *v.* Perrault, 5 Ida. 729, 51 Pac. 752.

85. *Alabama.*— Davis *v.* Swanson, 54 Ala. 277, 25 Am. Rep. 678; Roden *v.* Murphy, 10 Ala. 804.

Arkansas.—Anderson *v.* Dunn, 19 Ark. 650; Eubanks *v.* Dobbs, 4 Ark. 173.

District of Columbia.— Tierney *v.* Corbett, 2 Mackey 264. But *compare* Central Nat. Bank *v.* Hume, 3 Mackey 360.

Georgia.—Anderson *v.* Brown, 72 Ga. 713; Crosby *v.* De Graffenreid, 19 Ga. 290; Evans *v.* Lampkin, Dudley 193. See also Beale *v.* Hall, 22 Ga. 431.

Illinois.— Majorowicz *v.* Payson, 153 Ill. 484, 39 N. E. 127; Harmon *v.* Harmon, 63 Ill. 512; Choteau *v.* Jones, 11 Ill. 300, 50 Am. Dec. 460; Ellis *v.* Petty, 51 Ill. App. 636; Eads *v.* Mason, 16 Ill. App. 545. See also Dearth *v.* Bute, 71 Ill. App. 487.

Kansas.— Crawford *v.* Lehr, 20 Kan. 509.

Kentucky.— Com. *v.* Richardson, 8 B. Mon. 81.

Louisiana.— Carroll *v.* Castleman, 47 La. Ann. 1364, 17 So. 862; Van Wickle *v.* Calvin, 23 La. Ann. 205. But *compare* Walworth *v.* Snodgrass, 7 La. Ann. 136.

Maryland.— Dorsey *v.* Smithson, 6 Harr. & J. 61; Kinnemon *v.* Miller, 2 Md. Ch. 407.

Mississippi.— Blake *v.* Blake, 53 Miss 182; Winn *v.* Barnett, 31 Miss. 653; Gully *v.* Hull, 31 Miss. 20; Armstrong *v.* Stovall, 26 Miss. 275.

Missouri.— Hall *v.* Callahan, 66 Mo. 316; Merry *v.* Fremon, 44 Mo. 518; George *v.* Williamson, 26 Mo. 190, 72 Am. Dec. 203; McLaughlin *v.* McLaughlin, 16 Mo. 242; Lewis *v.* American L. Ins. Co., 7 Mo. App. 112.

Rhode Island.— Gardner *v.* Gardner, 17 R. I. 751, 24 Atl. 785; Estes *v.* Howland, 15 R. I. 127, 23 Atl. 624.

Texas.— Wilson *v.* Demander, 71 Tex. 603, 9 S. W. 678; Willis *v.* Smith, 65 Tex. 656; Moore *v.* Minerva, 17 Tex. 20; Connell *v.* Chandler, 13 Tex. 5, 62 Am. Dec. 545; Cobb *v.* Norwood, 11 Tex. 556. But *compare* Danzey *v.* Smith, 4 Tex. 411.

Virginia.— Spooner *v.* Hilbish, 92 Va. 333, 23 S. E. 751; Thomas *v.* Soper. 5 Munf. 28.

West Virginia.—Jones *v.* Patton, 10 W. Va. 653.

See 22 Cent. Dig. tit. "Executors and Administrators," § 309.

An executor in possession may defend his possession against a claim which by statute is void as against creditors for the sole benefit of creditors. Kilbourne *v.* Fay, 29 Ohio St. 264, 23 Am. Rep. 741.

An administrator cannot justify a trespass in taking slaves from the possession of one to whom they had been conveyed by his intestate, on the ground that the estate was represented insolvent and that the deed was made to delay creditors. Roden *v.* Murphy, 10 Ala 804.

86. St. 22 & 23 Car. II, c. 10; 21 Hen. VIII, c. 5. See Phillips *v.* Bignell, 1 Phillim. 239.

The executors of a deceased executor may be compelled to bring in an inventory of the effects of the original testator. Gale *v.* Luttrell, 2 Add. Eccl. 234.

87. Schouler Ex. § 229. See Orr *v.* Kaines, 2 Ves. 194, 28 Eng. Reprint 125.

executor or an administrator as relates to the probate court is, after obtaining his credentials, to prepare and file an inventory of the assets of the estate.[88] The object of an inventory is to fix presumptively, although not conclusively, the amount and value of items of property constituting the estate, and their respective totals, as to real and personal property, and moreover to furnish from a disinterested appraisal a reasonable basis upon which the accounting and liability of the executor or administrator shall proceed.[89]

B. Time For Making. The time after appointment within which an inventory and appraisement should be made and filed is fixed by statutes, varying somewhat in different jurisdictions, although three months is the usual period;[90] but such statutes do not render invalid an inventory and appraisement filed after the prescribed time.[91] Where an executor is excused for failure to file an inventory within the prescribed time by reason of his having received no assets in that time, it his duty to file an inventory within a reasonable time after he first receives assets.[92]

C. Form and Requisites. An inventory should be specific in its enumera-

88. Moore *v.* Holmes, 32 Conn. 553; Ludwig *v.* Blackinton, 24 Me. 25; *In re* Holladay, 18 Oreg. 168, 22 Pac. 750.

Statute providing for compulsory inventory merely declaratory of existing law.— Matter of McIntyre, 4 Redf. Surr. (N. Y.) 489.

Appraisal as well as inventory necessary.— *In re* Selma, Myr. Prob. (Cal.) 233.

It is the duty of the personal representative and not of the heirs or legatees to furnish an inventory and appraisal. Turner *v.* Ellis, 24 Miss. 173; Mills *v.* Smith, 141 N. Y. 256, 36 N. E. 178.

Administration on estate of one of several joint owners.— When a stranger administers on the estate of one of several wards owning a common fund, he can and ought to procure an actual division of the fund with the guardian of the surviving wards, and file in court an inventory and descriptive list of the items comprising the estate. Calvert *v.* Peebles, 71 N. C. 274.

The probate court has jurisdiction to hear and determine all controversies respecting the inventory and appraisal. Pickel *v.* Alpaugh, 42 N. J. Eq. 630, 11 Atl. 16; Langley *v.* Harris, 23 Tex. 564.

Even where the will directs a special appraisement, it is to be presumed that the appraisement shall be under the direction and control of the probate or corresponding court. Myers' Appeal, 62 Pa. St. 104; Boshart *v.* Evans, 5 Whart. (Pa.) 551.

Where the local statutes dispense with an administrator in small estates but require an appraisal, if the estate turns out large enough to require an administrator to be appointed, he must proceed *de novo* to have an appraisal and inventory. Pace *v.* Oppenheim, 12 Ind. 533.

Executor holding as trustee.—Where on the death of an executor another person nominated in the will as executor qualifies and takes letters testamentary, he must file an inventory, although he has taken no property into his possession as executor, but is holding the property and effects of the estate as trustee solely. *In re* Dana, Tuck. Surr. (N. Y.) 113.

If the will contains a full inventory of all the effects of the testator, it is unnecessary, under the Mexican law, for the executor to make a new inventory. Panaud *v.* Jones, 1 Cal. 488.

The executor may take temporary custody of articles given to the widow by statute for the purpose of making an inventory as required by statute, and the widow cannot maintain trespass against him therefor unless he keeps the articles from her an undue length of time or otherwise abuses his right. Voelckner *v.* Hudson, 1 Sandf. (N. Y.) 215.

In courts other than those of probate jurisdiction, the neglect of an administrator to cause an inventory and appraisal to be made of choses in action of the intestate is of no importance. Adams *v.* Adams, 22 Vt. 50.

Under the Louisiana code a public inventory, a ministerial act, must be made by a parish judge or public notary; but to decide whether one should be made is a judicial act. State *v.* Favrot, 1 La. 49.

89. See Thompson *v.* Thompson, 77 Ga. 692, 3 S. E. 261; Pitkin's Succession, 7 La. Ann. 617; and *infra*, IV, I.

90. *California.*— Phelan *v.* Smith, 100 Cal. 158, 34 Pac. 667.

Iowa.— Where the executor fails to file his inventory within fifteen days after his appointment, as required by Code, § 2370, the court will order it to be filed, although the facts on which the order is based are brought to the court's knowledge by one having no interest in the estate. Poole *v.* Burnham, 99 Iowa 493, 68 N. W. 816.

Louisiana.— Hart's Succession, 7 Rob. 534.

Massachusetts.— Forbes *v.* McHugh, 152 Mass. 412, 25 N. E. 622.

Oregon.— *In re* Conser, 40 Oreg. 138, 66 Pac. 607.

See 22 Cent. Dig. tit. "Executors and Administrators," § 313.

Time may be extended. *In re* Patten, 7 Mackey (D. C.) 392.

91. Phelan *v.* Smith, 100 Cal. 158, 34 Pac. 667.

92. Forbes *v.* McHugh, 152 Mass. 412, 25 N. E. 622.

tion of such chattels or other property of the deceased as the law may require, not needlessly minute, and yet so full as to separate large items of value, and set out by themselves such special classes as chattels real, household furniture, cattle, stock in trade, cash, and securities of the incorporeal sort, such as notes and bonds.[93] It should be signed by the personal representative[94] and the appraisers,[95] and should also be verified.[96]

D. Property to Be Included. It is the duty of the personal representative to include in his inventory all property belonging to or claimed by the decedent or his estate which has come to the representative's knowledge,[97] but property held in trust by the decedent need not be inventoried.[98] It has been asserted that the inventory should include all the personal property of the decedent, even that situated out of the state;[99] but it would seem proper that where letters are granted in different states or countries, the inventory of each executor or administrator should include only the property within the jurisdiction where his letters are issued, for which alone he is immediately accountable.[1] In some states the statutes require the personal representative to inventory the real estate of the decedent, two separate schedules being made, and the schedule of personal property alone serving as the basis of his accounts;[2] but in the absence of statutory requirement the personal representative is not bound to inventory real estate.[3] The inventory should include property which the decedent's will treats as part of his estate,[4] the decedent's interest in a partnership,[5] a judgment in favor of the

93. Schouler Ex. § 233. And see Harty *v.* Harty, 8 Mart. N. S. (La.) 518; Pursel *v.* Pursel, 14 N. J. Eq. 514; Vanmeter *v.* Jones, 3 N. J. Eq. 520.

Liability for imperfect inventory.— Where an administrator listed a note signed by himself among the assets as "three thousand nine hundred dollars less payments," he was not chargeable with the whole sum of three thousand nine hundred dollars for having failed to file an inventory showing the precise amount claimed as credits, although if the heirs had desired they could have compelled him to file such inventory. Emerick *v.* Hileman, 71 Ill. App. 512.

94. Parks *v.* Rucker, 5 Leigh (Va.) 149; Carr *v.* Anderson, 2 Hen. & M. (Va.) 361.

95. See Michel *v.* Michel, 11 La. 149.

Lack of formalities.— The fact that the inventory does not mention the residence, ages, and sex of the appraisers and witnesses to it, and that it was made in the presence of the attorney for the absent heirs, does not invalidate it when it is signed by the attorney of absent heirs, and the appraisers and witnesses. Michel *v.* Michel, 11 La. 149.

96. Phelan *v.* Smith, 100 Cal. 158, 34 Pac. 667; Matter of Ahrens, 3 Dem. Surr. (N. Y.) 358.

Clerical error does not vitiate affidavit of representative. Phelan *v.* Smith, 100 Cal. 158, 34 Pac. 667.

An inventory sworn to by only one of two executors will be considered the act of both where it appears on its face to be returned by both. Hamilton *v.* Serra, 6 Mackey (D. C.) 168.

97. Potter *v.* Titcomb, 10 Me. 53; Turner *v.* Ellis, 24 Miss. 173.

Notes deposited in the hands of a stranger should be inventoried by the administrator if he knows of their existence. Potter *v.* Titcomb, 10 Me. 53.

Even though the representative asserts a claim to property it should be inventoried. Potter *v.* Titcomb, 10 Me. 53. But he can note his claim on the inventory. Simms *v.* Guess, 52 Ill. App. 543.

Property claimed by third persons.— If property found among the effects of the decedent and coming to the possession of the representative is yet claimed by others under a title not yet established, it is proper to include the same in the inventory, with perhaps words or memoranda indicating a doubt concerning the representative's title. Gold's Case, Kirby (Conn.) 100; Carcagno's Succession, 43 La. Ann. 1151, 10 So. 251; Water house *v.* Bourke, 14 La. Ann. 358; Dilts *v.* Stevenson, 17 N. J. Eq. 407.

Property given by will to the widow but belonging to the estate should be appraised, for the will may be set aside and the personal representatives required to account for it. Mayrand *v.* Mayrand, 96 Ill. App. 478.

Effect of failure to appraise.— A failure to appraise certain property belonging to the testator's estate cannot affect the validity of the executor's final account, where it appears that all the property received, or which by reasonable diligence should have been received, has been punctiliously accounted for. *In re* Conser, 40 Oreg. 138, 66 Pac. 607.

98. *In re* Belt, 29 Wash. 535, 70 Pac. 74.

99. *In re* Butler, 38 N. Y. 397, Tuck. Surr. (N. Y.) 87.

1. Normand *v.* Grognard, 17 N. J. Eq. 425; Sherman *v.* Page, 21 Hun (N. Y.) 59. See also Strong *v.* White, 19 Conn. 238.

2. Schouler Ex. § 233.

3. Henshaw *v.* Blood, 1 Mass. 35.

4. Grounx *v.* Abat, 7 La. 17.

5. *In re* Auerbach, 23 Utah 529, 65 Pac. 488. *Contra*, Shipe's Appeal, 114 Pa. St. 205, 6 Atl. 103.

estate,[6] and property, the right of possession in which was vested in the decedent, although it never came into his actual possession;[7] but it need not include property conveyed by the decedent in fraud of creditors[8] unless it was conveyed to the representative himself,[9] nor, it has been asserted, property held by the executor as life-tenant.[10] A payment made by a decedent for the benefit of another should not be inventoried where the circumstances attending such payment are such as to raise a presumption that he did not intend to charge it, but intended that it should inure to the benefit of such other person and there is no proof to the contrary.[11]

E. Additional or Supplementary Inventory. The general rule is that only one inventory need be returned, and that for additional property coming to the representative's knowledge or control, charging himself in his accounts is sufficient;[12] but in some states an additional or supplementary inventory is recognized,[13] and a representative who has filed an erroneous inventory has been allowed to subsequently file a second inventory correcting the errors.[14]

F. How Appraisal Made. Local statutes ordinarily provide for the appointment by the court[15] of a specified number of suitable disinterested appraisers, usually three,[16] who, having been duly sworn to the faithful discharge of their duties, proceed to appraise the estate of the decedent.[17] The result of the appraisement is noted upon the inventory blank which accompanies the order, and the schedules filled up, and the document when completed is delivered to the executor or administrator by whom it should be returned to the probate court for

Form of inventory.— The inventory of an administrator of a deceased partner should only refer to his interest in the partnership as of a certain character, and where located, without undertaking to give the items of property belonging to such partnership, since the administrator cannot have control of it until the partnership affairs are settled. Loomis *v.* Armstrong, 63 Mich. 355, 29 N. W. 867. See also Thompson *v.* Thompson, 1 Bradf. Surr. (N. Y.) 24. But *compare* Justices Muscogee County Inferior Ct. *v.* McLaren, 1 Ga. 289.

6. *In re* Conser, 40 Oreg. 138, 66 Pac. 607.

Foreign judgments.— A judgment debt, being *bona notabilia* only in the state where judgment was rendered, need not be inventoried by the representative appointed in a different jurisdiction. Strong *v.* White, 19 Conn. 238.

7. Orangeburgh Dist. *v.* Geiger, 1 Brev. (S. C.) 484.

8. Bourne *v.* Stevenson, 58 Me. 499; Andrews *v.* Tucker, 7 Pick. (Mass.) 250; Snodgrass *v.* Andrews, 30 Miss. 472, 64 Am. Dec. 169; Gardner *v.* Gardner, 17 R. I. 751, 24 Atl. 785.

9. Minor *v.* Mead, 3 Conn. 289.

10. Brooks *v.* Brooks, 12 S. C. 422, holding further that the right of a remainder-man to demand an inventory of such property depends upon waste.

11. *In re* Glenn, 23 Ohio Cir. Ct. 397.

12. Panaud *v.* Jones, 1 Cal. 488; Hooker *v.* Bancroft, 4 Pick. (Mass.) 50. See also Emory *v.* Thompson, 2 Harr. & J. (Md.) 244.

13. Frisbie *v.* Preston, 67 Conn. 448, 35 Atl. 278; Moore *v.* Holmes, 32 Conn. 553; Beach *v.* Norton, 9 Conn. 182; Com. *v.* Bryan, 8 Serg. & R. (Pa.) 128; *In re* Moke, 11 York Leg. Rec. (Pa.) 162; Texas Loan Agency *v.* Dinges, (Tex. Civ. App. 1903) 75 S. W. 866.

Where the administrator denies the existence of further assets an application to compel him to file a further inventory will be refused. Matter of McIntyre, 4 Redf. Surr. (N. Y.) 489.

14. *In re* Bradford, 1 Browne (Pa.) 87. But see Gallian *v.* Cox, 9 La. Ann. 500.

15. Schouler Ex. § 230.

Administrator has nothing to do with appointment of appraisers. O'Brien *v.* Wilson, 82 Miss. 93, 33 So. 946.

Testamentary provisions as to appraisers. — The Pennsylvania act of April 17, 1869, section 1, providing that where a testator directs any part of his estate to be appraised appraisers will be appointed by the orphans' court upon petition of any person interested, applies only when the testator has not indicated by whom the appraisement shall be made, and an appraisement made by competent persons, chosen by the executors under a clause in the will providing that an appraisement of the residuary estate should be made by the executors in such manner as might seem best to them, will not be set aside in the absence of any allegation of fraud or lack of good faith. Supplee's Estate, 5 Pa. Dist. 41, 17 Pa. Co. Ct. 335.

16. Schouler Ex. § 230.

Two sufficient in New York see Salomon *v.* Heichel, 4 Dem. Surr. 176.

17. Schouler Ex. § 230.

Appraisers presumed to have been sworn. — Horn *v.* Grayson, 7 Port. (Ala.) 270.

Surrogate cannot order personal representative to estimate value of property. Matter of McCaffrey, 50 Hun (N. Y.) 371, 3 N. Y. Suppl. 96.

Legatees or next of kin cannot interfere with an appraisal, they must wait until the accounting. Vogel *v.* Arbogast, 4 Dem. Surr. (N. Y.) 399.

record with his own oath that the list is just and perfect.[18] Property of the estate should be appraised at its market value,[19] but the surrogate has no power to direct the appraisers as to the manner in which they shall estimate the value.[20] For their services appraisers are allowed compensation from the estate at a rate ordinarily fixed by statute.[21]

G. Proceedings to Compel. The court of probate jurisdiction has power to compel the filing of an inventory and appraisal,[22] and to determine whether property *prima facie* belongs to the estate;[23] and intervention by a court of equity, or on appeal, in such matters is not favored.[24] The court may act of its own motion,[25] or on the petition of one interested as heir, devisee, or creditor,[26] but persons not so interested cannot apply for the filing of an inventory.[27] A petition setting forth facts which if true show the petitioner to be interested in the estate is suf

18. Schouler Ex. § 230. See Dilts *v.* Stevenson, 17 N. J. Eq. 407.

19. Matter of Shipman, 82 Hun (N. Y.) 108, 31 N. Y. Suppl. 571, holding that bonds should be estimated at their market and not their face value.

Period for averaging market price of securities.— The three months preceding decedent's death is a reasonable period within which to average the market price of securities under a statute providing that such securities as are customarily sold in open market shall be valued by ascertaining the range of the market and the average of prices running through a reasonable period of time. *In re* Crary, 31 Misc. (N. Y.) 72, 64 N. Y. Suppl. 566.

20. Matter of McCaffrey, 50 Hun (N. Y.) 371, 3 N. Y. Suppl. 96.

21. See *In re* Harriott, 145 N. Y. 540, 40 N. E. 246 (holding that in fixing the fees of appraisers of personal property belonging to a decedent's estate, under a statute providing that they shall receive not over five dollars per day and expenses, the value of the estate cannot be considered); Bradley's Estate, 11 Phila. (Pa.) 87 (holding that appraisers appointed to appraise the personal estate of a decedent can only be paid from the estate one dollar per day for their services).

The fees of experts who appraise succession property at a second or third appraisement ordered by the court cannot be larger than those allowed by law to the appraisers appointed to take the inventory. Hautau's Succession, 32 La. Ann. 54.

The legatees have a right to be heard upon an application to tax the fees of appraisers. *In re* Harriott, 145 N. Y. 540, 40 N. E. 246.

Allowance held excessive see *In re* Harriott, 145 N. Y. 540, 40 N. E. 246.

22. *Illinois.*— Simms *v.* Guess, 52 Ill. App. 543, county court.

Louisiana.— Le Boeuf *v.* Webre, 40 La. Ann. 380, 4 So. 223.

Mississippi.— Killcrease *v.* Killcrease, 7 How. 311.

Missouri.— Walter *v.* Ford, 74 Mo. 195, 41 Am. Rep. 312.

New York.— *In re* Steward, 10 N. Y. Suppl. 24; Matter of Nutt, 3 Dem. Surr. 170.

See 22 Cent. Dig. tit. "Executors and Administrators," § 314.

23. *In re* Belt, 29 Wash. 535, 70 Pac. 74, 92 Am. St. Rep. 916.

Adjudication not binding on one subsequently claiming property.— *In re* Belt, 29 Wash. 535, 70 Pac. 74, 92 Am. St. Rep. 916.

The court cannot try an issue as to the ownership of property claimed by the representative in his own right, in proceedings to compel the filing of an inventory. Matter of Goundry, 57 N. Y. App. Div. 232, 68 N. Y. Suppl. 155; Miers *v.* Betterton, 18 Tex. Civ. App. 430, 45 S. W. 430. See also Greenhough *v.* Greenhough, 5 Redf. Surr. (N. Y.) 191, application to amend inventory. *Contra*, Martin *v.* Martin, 170 Ill. 18, 48 N. E. 694 [*reversing* 68 Ill. App. 169].

24. Davis *v.* Davis, 4 Mo. 204; Morse *v.* Smith, 17 N. Y. Suppl. 385.

Reappraisal.— Since N. Y. Laws (1896), c. 908, § 232, providing that within two years after appraisal of an estate by a surrogate it may be reappraised by order of a justice of the supreme court, does not provide for a review of the order of appraisal, the supreme court has no jurisdiction to set aside an order of reappraisal made by a justice. Matter of Smith, 40 N. Y. App. Div. 480, 58 N. Y. Suppl. 128.

25. Thompson *v.* Thompson, 1 Bradf. Surr. (N. Y.) 124.

It is the duty of the court to require an inventory. *In re* Pickards, 7 Ohio S. & C. Pl. Dec. 476, 5 Ohio N. P. 493.

26. Woodruff *v.* Snowden, 10 Ohio S. & C. Pl. Dec. 123, 7 Ohio N. P. 520; Melizett's Appeal, 8 Leg. Int. (Pa) 86 (widow); Langley *v.* Harris, 23 Tex. 564 (creditor).

Heir or devisee under no duty to compel inventory.— Woodruff *v.* Snowden, 10 Ohio S. & C. Pl. Dec. 123, 7 Ohio N. P. 520.

A joint executor or administrator who is obstructed by his associates in the performance of the duty to make a true inventory should take proceedings to enforce the making of it. Eager *v.* Roberts, 2 Redf. Surr. (N. Y.) 247.

27. Matter of Huntington, 39 Misc. (N. Y.) 477, 80 N. Y. Suppl. 220, where the allegations were held insufficient to show the necessary interest in the applicant.

County commissioners have no such interest as entitles them to ask that the executors of a decedent be cited to file an inventory in order that they may have a basis from

ficient, even though such facts be disputed, but the court may require the petitioner to show his interest to its satisfaction.[28]

H. Defects and Corrections. The omission of an executor or administrator to disclose some asset is a neglect of duty and authorizes a keen inquiry into his administration, but this does not as a matter of law charge him with that asset regardless of its actual value.[29] The probate court is the proper place, and on the settlement of his administration accounts is as a rule the proper time to charge the representative with property belonging to the estate which he has not inventoried or accounted for, or to otherwise correct errors.[30] Where, however, the inventory is attacked because of items inserted by mistake or omitted through fraud or error, an amendment or correction is sometimes allowed;[31] but the inventory is presumed to be a true and full statement of all the personal property of the decedent, and the burden of proving otherwise is upon the person seeking to falsify it.[32]

I. Operation and Effect. The inventory returned by the personal representative is *prima facie* evidence as to the items included therein and their respective values, and as to the total of the estate comprised within the jurisdiction;[33] but it is not conclusive as to these matters, and may always be explained

which to make an assessment. Stevens' Estate, 2 Lanc. Bar (Pa.) Feb. 4, 1871.

28. Matter of Comins, 9 N. Y. App. Div. 492, 41 N. Y. Suppl. 323; Schmidt *v.* Heusner, 4 Dem. Surr. (N. Y.) 275; Matter of Waite, 3 Dem. Surr. (N. Y.) 261; Creamer *v.* Waller, 2 Dem. Surr. (N. Y.) 351; Langley *v.* Harris, 23 Tex. 564.

The granting of the petition is not compulsory merely because it sets forth an interest in the petitioner and is verified, but the surrogate may first pass on the question of the petitioner's interest. Matter of Comins, 9 N. Y. App. Div. 492, 41 N. Y. Suppl. 323.

29. Moses *v.* Moses, 50 Ga. 9.

30. Hurlburt *v.* Wheeler, 40 N. H. 73.

The administrator cannot be proceeded against by rule, but an ordinary action must be resorted to where he refuses to place on the inventory property which he claims as his own. McKinney's Succession, 5 La. Ann. 748.

Failure to set apart allowance.— If on taking the inventory the statutory amount of property was not set apart for the minor children, the error may be corrected on accounting. Clayton *v.* Wardell, 2 Bradf. Surr. (N. Y.) 1.

Judgment in proceedings to charge.—Where legatees institute proceedings in the probate court to charge an executor with a slave, not included in his inventory, but which he claims as his own property, and the jury find the value of the slave, and for plaintiff, the court cannot render judgment against the executor for the value of said property, but only that the slave belonged to the decedent. and is a part of the assets of the estate, and that the executor stands chargeable with him as such. Mims *v.* Sturdevant, 36 Ala. 636.

31. Matter of Payne, 78 Hun (N. Y.) 292, 28 N. Y. Suppl. 911; Hallstead's Estate, 2 Kulp (Pa.) 508.

Correction in probate court.— An administrator on discovering a mistake in his inventory should apply to the court of probate for a correction of the error, and if his application is denied may take an appeal. Cronshaw *v.* Cronshaw, 21 R. I. 54, 41 Atl. 563.

Estoppel to amend.— An administrator returning slaves in his inventory as belonging to the estate, and hiring them out, taking notes payable to himself as administrator, was not thereby estopped from amending his inventory by leaving them out, if they did not belong to the estate. McWilliams *v.* Ramsay, 23 Ala. 813.

Where possessory rights of another are involved, his remedy is before other appropriate tribunals rather than by an application to the probate court to have the value of such rights stricken from the inventory or appraisement. Spencer *v.* Ragan, 9 Gill (Md.) 480.

Power of court to order additional items to be inserted.— The judge of probate has the power, after hearing evidence on the facts, to order an executor or administrator to include in the inventory, as property of deceased, articles claimed by other persons; but he cannot require the executor or administrator to swear to an inventory thus amended by his order. *In re* Ralston, 3 Nova Scotia 195.

32. *In re* Mullon, 145 N. Y. 98, 39 N. E. 821 [*affirming* 74 Hun 358, 26 N. Y. Suppl. 683].

Quantum of proof necessary.— On appeal of an administrator on the ground that his inventory includes property not of the deceased, he must show clearly that it is not assets. That there is occasion for doubt is not sufficient. Briggs *v.* Probate Decree, Brayt. (Vt.) 103.

Evidence held admissible see Mims *v.* Sturdevant, 36 Ala. 636.

33. *Alabama.*— Craig *v.* McGehee, 16 Ala. 41; Steele *v.* Knox, 10 Ala. 608.

Georgia.— *In re* Jones, 25 Ga. 414.

Indiana.— Rodman *v.* Rodman, 54 Ind. 444.

Kentucky.—Carrol *v.* Connet, 2 J. J. Marsh. 195.

or shown to be incorrect in certain particulars.[34] Thus the fact that the representative has inventoried property as belonging to the estate does not preclude a subsequent showing that it belongs elsewhere,[35] or even estop the representative

Massachusetts.—Chenery *v.* Davis, 16 Gray 89.

Mississippi.— McWillie *v.* Van Vacter, 35 Miss. 428, 72 Am. Dec. 127.

New York.— Matter of Shipman, 82 Hun 108, 31 N. Y. Suppl. 571; Bellinger *v.* Potter, 13 N. Y. Suppl. 9; *In re* Hodgman, 10 N. Y. Suppl. 491; Hasbrouck *v.* Hasbrouck, 37 Barb. 579, 24 How. Pr. 24 [*reversed* on other grounds in 27 N. Y. 182]; Matter of Van Sise, 38 Misc. 155, 77 N. Y. Suppl. 266; Matter of Baker, 27 Misc. 126, 57 N. Y. Suppl. 398; Matter of Child, 5 Misc. 560, 26 N. Y. Suppl. 721; Willoughby *v.* McCluer, 2 Wend. 608.

Texas.— Devine *v.* U. S. Mortg. Co., (Civ. App. 1898) 48 S. W. 585; Hamm *v.* Hutchins, 19 Tex. Civ. App. 209, 46 S. W. 873 (holding the inventory and appraisal of certain land as part of a testator's estate *prima facie* evidence that it was not his homestead); Ross *v.* Harbert, 1 Tex. App. Civ. Cas. § 1019.

Virginia.— Rogers *v.* Chandler, 3 Munf. 64.

West Virginia.— Hooper *v.* Hooper, 29 W. Va. 276, 1 S. E. 280.

See 22 Cent. Dig. tit. "Executors and Administrators," § 321.

An appraisal of corporate stock in the hand of an administrator by three householders appointed by such administrator is not, as between him and the distributees, *prima facie* the actual value of the stock at the time of the appraisal. Moffitt *v.* Hereford, 132 Mo. 513, 34 S. W. 252.

34. *Alabama.*— Craig *v.* McGehee, 16 Ala. 41.

Georgia.— Hall *v.* Carter, 8 Ga. 388.

Louisiana.—Dean's Succession, 33 La. Ann. 867; Pipkin's Succession, 7 La. Ann. 617; Babin *v.* Nolan, 4 Rob. 278.

Maine.— Weed *v.* Lermond, 33 Me. 492; Reed *v.* Gilbert, 32 Me. 519; Shirley *v.* Walker, 31 Me. 541.

Michigan.— Peckham *v.* Hoag, 57 Mich. 289, 23 N. W. 818; Hilton *v.* Briggs, 54 Mich. 265, 20 N. W. 47.

Missouri.— Moffitt *v.* Hereford, 132 Mo. 513, 34 S. W. 252; Camp *v.* Camp, 74 Mo. 192 [*affirming* 6 Mo. App. 563].

Nevada.— McNabb *v.* Wixom, 7 Nev. 163.

New Jersey.—Horton *v.* Howell, (Ch. 1903) 56 Atl. 702; Duncan *v.* Davison, 40 N. J. Eq. 535, 5 Atl. 93.

New York.— In re Mullon, 145 N. Y. 98, 39 N. E. 821 [*affirming* 74 Hun 358, 26 N. Y. Suppl. 683]; Hasbrouck *v.* Hasbrouck, 37 Barb. 579, 24 How. Pr. 24 [*reversed* on other grounds in 27 N. Y. 182]; Willoughby *v.* McCluer, 2 Wend. 608; Thorn *v.* Underhill, 1 Dem. Surr. 306; Applegate *v.* Cameron, 2 Bradf. Surr. 119; Ames *v.* Downing, 1 Bradf. Surr. 321.

North Carolina.— Hoover *v.* Miller, 51 N. C. 79.

Oregon.— *In re* Conser, 40 Oreg. 138, 66 Pac. 607.

Pennsylvania.— Nicely's Estate, 2 Kulp 47; Frey's Estate, 6 Pa. Co. Ct. 84. See also Campbell's Estate, 28 Pittsb. Leg. J. 436.

South Carolina.— Williams *v.* Mower, 29 S. C. 332, 7 S. E. 505.

Texas.— Little *v.* Birdwell, 21 Tex. 597, 73 Am. Dec. 242.

Virginia.— Carr *v.* Anderson, 2 Hen. & M. 361.

Wisconsin.— Cameron *v.* Cameron, 15 Wis. 1, 82 Am. Dec. 652.

United States.— Gormley *v.* Bunyan, 138 U. S. 623, 11 S. Ct. 453, 34 L. ed. 1086.

See 22 Cent. Dig. tit. "Executors and Administrators," § 321.

Debts inventoried as collectable or good may be shown to be otherwise. Tompkins *v.* Tompkins, 18 S. C. 1; Anderson *v.* Piercy, 20 W. Va. 282. But for whatever the representative obtains he is of course accountable. Summers *v.* Reynolds, 95 N. C. 404.

Record in another state.— The inventory of an estate, part of the record of a probate court in another state, is no more than *prima facie* evidence to show what property belonged to the estate in that jurisdiction. Sumner *v.* Child, 2 Conn. 607.

Returns to the ordinary made by an administrator are only *prima facie* evidence as to what amounts of money had been received by him from various sources, and are not conclusive on him in a settlement between him and the heirs of the estate. Arendale *v.* Smith, 107 Ga. 494, 33 S. E. 669.

Where the executor converts property to his own use he should be charged with its actual and not its appraised value. Frey's Estate, 6 Pa. Co. Ct. 84.

With reference to debts, the representative cannot take them to his own use absolutely at the appraisal, nor is he bound to account for them absolutely at the appraisal, but his responsibility is that of reasonable diligence in realizing upon them. Weed *v.* Lermond, 33 Me. 492. And see Hooper *v.* Hooper, 29 W. Va. 276, 1 S. E. 280.

35. *California.*— Heydenfeldt *v.* Jacobs, 107 Cal. 373, 40 Pac. 492, holding that a third person is not estopped to claim property or funds by reason of a failure to object to the same being inventoried and treated as assets of the estate, where there is no allegation that the personal representatives did not know and had no means of knowing to whom such property or funds belonged or were induced to treat the same as assets by reason of a reliance on the acts of the claimant.

Georgia.— Fulcher *v.* Mandell, 83 Ga. 715, 10 S. E. 582.

Maryland.— Harriett *v.* Ridgely, 9 Gill & J. 174.

New York.— Hasbrouck *v.* Hasbrouck, 37 Barb. 579, 24 How. Pr. 24 [*reversed* on other grounds in 27 N. Y. 182].

from claiming title to the same himself,[36] and certainly the mere fact that property is not included in the inventory is not conclusive that it does not belong to the estate.[37] Debts or claims may properly be inventoried as doubtful, desperate, or worthless, where the facts warrant this,[38] and an item so inventoried is not *prima facie* a charge against the representative;[39] but a debt or claim returned at face value without comment will be presumed collected or collectable,[40] although before an administrator should be charged with notes marked by the appraisers on the inventory as good there should be some proof of their collection or of negligence in collection.[41] An inventory filed by an executor is evidence *inter alios* to show his consent to the will and transmission of title thereunder.[42] Where the representative inventories a debt owing by himself to the estate, this is evidence of the existence of the debt as a valid and enforceable claim.[43] Where an administrator buys property with the effects of his intestate and inventories it in the probate court and the inventory is recorded in that court, such record is notice of the fiduciary character of the property so pur-

Pennsylvania.— Buchanan *v.* Buchanan, 46 Pa. St. 186.

Texas.— Little *v.* Birdwell, 21 Tex. 597, 73 Am. Dec. 242.

Virginia.— Carr *v.* Anderson, 2 Hen. & M. 361.

See 22 Cent. Dig. tit. "Executors and Administrators," § 321.

Sureties of the representative are not precluded by the return of the inventory from showing the true ownership of alleged assets. Sanders *v.* Forgasson, 3 Baxt. (Tenn.) 249.

36. *Alabama.*— Craig *v.* McGehee, 16 Ala. 41.

California.— Whelan *v.* Brickell, (1893) 33 Pac. 396; Baker *v.* Brickell, 87 Cal. 329, 25 Pac. 489, 1067; Anthony *v.* Chapman, 65 Cal. 73, 2 Pac. 889.

Georgia.— Dillard *v.* Ellington, 57 Ga. 567.

Massachusetts.— Dodge *v.* Lunt, 181 Mass. 320, 63 N. E. 891.

Montana.— Rausch *v.* Rausch, 14 Mont. 325, 36 Pac. 312.

New York.— See Matter of Maack, 13 Misc. (N. Y.) 368, 35 N. Y. Suppl. 109, holding that on a settlement of an executor's accounts it may be shown that amounts charged in the inventory as assets were part of the income to which the executor was entitled under the will.

Pennsylvania.— Oertlett's Estate, 7 Pa. Dist. 678, 21 Pa. Co. Ct. 616; Hallstead's Estate, 2 Kulp 508; Eichborn's Estate, 7 Pa. Co. Ct. 433.

Texas.— Haley *v.* Gatewood, 74 Tex. 281, 12 S. W. 25; Teal *v.* Sevier, 26 Tex. 516; Little *v.* Birdwell, 21 Tex. 597, 73 Am. Dec. 242; Ross *v.* Halbert, 1 Tex. App. Civ. Cas. § 1019.

Washington.— *In re* Murphy, 30 Wash. 9, 70 Pac. 109.

See 22 Cent. Dig. tit. "Executors and Administrators," § 321.

A widow is not deemed to have made an election and thereby modified her right to community property by returning, as executrix, an inventory of the whole property as the estate of the deceased. Carroll *v.* Carroll, 20 Tex. 731.

Where the administrator claims a right in movable property apparently belonging to a succession on account of an alleged partnership with the deceased, the proof of the partnership must be explicit. Sutton *v.* Mock, 18 La. Ann. 597.

In the absence of any mistake a representative who inventories his own property as property of the decedent will be held to have inventoried it either to defraud his creditors, he being a bankrupt, or to pay a debt of his own to the estate, and he will be held responsible for it in an action on his bond. Wattles *v.* Hyde, 9 Conn. 10.

37. Walker *v.* Walker, 25 Ga. 76; Lewis *v.* Lusk, 35 Miss. 696, 72 Am. Dec. 153; McWillie *v.* Van Vacter, 35 Miss. 428, 72 Am. Dec. 127; Allen *v.* Ormsby, 1 Tyler (Vt.) 345. See also Ewers *v.* White, 114 Mich. 266, 72 N. W. 184.

38. Black *v.* Whitall, 9 N. J. Eq. 572, 59 Am. Dec. 423; Finch *v.* Ragland, 17 N. C. 137.

39. Gay *v.* Grant, 101 N. C. 206, 8 S. E. 99, 106, where a bond was inventoried as "doubtful."

40. Hickman *v.* Kamp, 3 Bush (Ky.) 205; Graham *v.* Davidson, 22 N. C. 155.

41. Pettus *v.* Clawson, 4 Rich. Eq. (S. C.) 92.

42. Phillips *v.* Short, 2 Harr. (Del.) 339.

43. Lloyd *v.* Lloyd, 1 Redf. Surr. (N. Y.) 399, holding that the inventory and appraisal by an executor of a note owing by himself to the decedent's estate, without reciting the existence of any set-off thereto, is evidence of the settlement of any claims theretofore existing which might have been set off.

Including barred debts in inventory.— Where the representative includes in his inventory a debt from himself to the testator which was barred by the statute of limitations, this is a sufficient acknowledgment to take the case out of the statute. Clark *v.* Van Amburgh, 14 Hun (N. Y.) 557; Morrow *v.* Morrow, 12 Hun (N. Y.) 386; Ross *v.* Ross, 6 Hun (N. Y.) 80; Matter of Daggett, 1 Misc. (N. Y.) 248, 22 N. Y. Suppl. 911 [*affirmed* in 75 Hun 612, 28 N. Y. Suppl. 1127]. *Contra*, In re Bell, 25 Pa. St. 92; Black *v.* White, 13 S. C. 37.

chased.[44] The appraisal of land is not an eviction of those holding by adverse possession, nor is it a reduction to possession by the administrator,[45] nor does the mere fact that a rental proportion of certain crops growing on land owned by a devisee has been returned by the executor as part of the personal property of the testator's estate show such an invasion of the devisee's rights as entitles him to seek redress in any judicial tribunal.[46]

J. Dispensing With Inventory. A testamentary provision that no inventory need be filed should be disregarded by the court,[47] although an executor will not be required to file an inventory except as to the personalty, where the will leaves it to his discretion and makes his appraisement final.[48] Even the fact that all the personal property of the decedent or its proceeds have been disposed of in the payment of debts does not render an inventory unnecessary,[49] nor is it sufficient to excuse the filing of an inventory that the representative professes to have a large surplus over all debts and offers to deposit security sufficient to pay any debt which may be established.[50] But an inventory may be dispensed with where all the parties in interest waive it,[51] and is unnecessary where no assets or estate have come with the representative's possession or charge.[52] An inventory and account may also be dispensed with if not applied for until after so long a period that the lapse of time, in conjunction with other circumstances, affords a reasonable presumption that there were no assets or that the estate has been fully administered,[53] nor is the court required to order an inventory and account where it appears that the estate was duly settled and distributed among the persons entitled without any proceedings in court.[54]

K. Failure to Make. A mere failure to return an inventory is not alone sufficient to charge the representative absolutely with assets or debts of the decedent; but the question is essentially one of culpable negligence or misconduct on his part, occasioning a loss to some person in interest;[55] neither does such failure deprive the representative of his rights as such,[56] or as a creditor of the

44. Shaw *v.* Thompson, Sm. & M. Ch. (Miss.) 628.

45. Hall *v.* Armor, 68 Ga. 449.

46. Spencer *v.* Ragan, 9 Gill (Md.) 480.

47. Chase *v.* Mathews, 12 La. 357; Potter *v.* McAlpine, 3 Dem. Surr. (N. Y.) 108. *Compare* Garrity's Estate, 108 Cal. 463, 38 Pac. 628, 41 Pac. 485; Logan's Estate, 1 Pa. Co. Ct. 76.

48. Brainerd *v.* Birdsall, 2 Dem. Surr. (N. Y.) 31.

49. Silverbrandt *v.* Widmayer, 2 Dem. Surr. (N. Y.) 263 [*overruling* Matter of Robbins, 4 Redf. Surr. (N. Y.) 144], where the court said, however, that a verified statement in the form of an inventory showing such matters might be deemed a sufficient inventory if accompanied by an affidavit.

50. Forsyth *v.* Burr, 37 Barb. (N. Y.) 540.

51. Barnes' Estate, 1 N. Y. Civ. Proc. 59. *Contra,* Schmeltz *v.* Garey, 49 Tex. 49.

52. Langton's Estate, 16 Phila. (Pa.) 368.

53. Leroy *v.* Bayard, 3 Bradf. Surr. (N. Y.) 228 (lapse of twenty-nine years); Ritchie *v.* Rees, 1 Add. Eccl. 144; Scurrah *v.* Scurrah, 2 Curt. Eccl. 919; Bowles *v.* Harvey, 4 Hagg. Eccl. 241.

54. *In re* Wagners, 119 N. Y. 28, 23 N. E. 200.

55. *Georgia.*— Moses *v.* Moses, 50 Ga. 9.

Maryland.— Leeke *v.* Beanes, 2 Harr. & J. 373.

Pennsylvania.— Connelly's Appeal, 1 Grant 366.

Texas.— Patten *v.* Cox, 9 Tex. Civ. App. 299, 29 S. W. 182.

Vermont.— Boyden *v.* Ward, 38 Vt. 628.

England.— Stearn *v.* Mills, 4 B. & Ad. 657, 2 L. J. K. B. 106, 24 E. C. L. 289.

See 22 Cent. Dig. tit. "Executors and Administrators," § 322.

A sworn declaration instead of an inventory, setting forth desperate debts, may suffice to discharge the representative where no valuable assets ever came to his possession or knowledge. See Higgins *v.* Higgins, 4 Hagg. Eccl. 242.

Person without interest cannot complain. Probate Judge *v.* Southard, 62 N. H. 228.

Estoppel.— An executor who has filed no inventory and appraisement as required by law cannot claim that the value of the property of the estate as stated in his petition for letters testamentary is fictitious. Humphrey *v.* Conger, 7 App. Cas. (D. C.) 23.

56. Campbell *v.* Cox, 1 Tex. App. Civ. Cas. § 526. But *compare* Jeroms *v.* Jeroms, 18 Barb. (N. Y.) 24.

Special inventory.— A statute providing that where there are two or more representatives any one or more of them, on neglect of the rest, may return an inventory, and the representative neglecting shall not thereafter interfere with the administration, has been held to apply only to the ordinary inventory required by statute, and not to a special inventory ordered by the court. *In re* Patten, 7 Mackey (D. C.) 392.

estate.[57] Nevertheless the failure to file an inventory by the time specified amounts technically to an official delinquency or a breach of the condition of the administration bond, which may prove serious, but rarely can, if upon citation the executor or administrator performs his duty, or shows good cause why an inventory should be deferred or dispensed with.[58]

V. AUTHORITY AND DUTY IN GENERAL.

A. Representative Capacity. The executor or administrator is not only the personal representative of the decedent,[59] but is also to a very great extent the representative of the creditors,[60] and of the heirs or legatees.[61]

B. Duty to Prove Will. It is of course the right and duty of a person named in a will as executor to propound the paper for probate.[62]

C. Burial of Decedent. One of the first duties of an executor or administrator is to attend to the decent and proper interment of the remains of his decedent,[63] and a reasonable and judicious expenditure for this purpose will always be approved.[64]

D. Title to Property. The executor or administrator is the legal owner, for the time being, of the personal property of which the decedent died possessed,[65]

57. Sutton *v.* Read, 176 Ill. 69, 51 N. E. 801.

58. McKim *v.* Harwood, 129 Mass. 75; Lewis *v.* Lusk, 35 Miss. 696, 72 Am. Dec. 153; Adams *v.* Adams, 22 Vt. 50; Ellis *v.* Johnson, 83 Wis. 394, 53 N. W. 691.

Damages may be assessed for a failure to make and return an inventory (Scott *v.* Governor, 1 Mo. 686) or for failure to make it "a true and perfect" inventory (Bourne *v.* Stevenson, 58 Me. 499; Potter *v.* Titcomb, 10 Me. 53).

Circumstances excusing failure see Dowdy *v.* Graham, 42 Miss. 451 (co-executor); Mulford *v.* Mulford, (N. J. Ch. 1902) 53 Atl. 79.

Attachment for not filing — Discharge.—An administrator, who is in prison under an attachment for not filing his inventory and accounts, will not be discharged upon filing a sufficient inventory and account except upon payment of costs. Marshman *v.* Brookes, 32 L. J. P. & M. 95, 11 Wkly. Rep. 549.

59. See Harris *v.* Harris, 92 Ill. App. 455; Case *v.* Spencer, 86 N. Y. App. Div. 454, 83 N. Y. Suppl. 697 (holding that where an administrator discovered in a safety-deposit box belonging to the deceased certain securities which deceased held as another person's depositary, the administrator held such securities in his capacity as administrator, and not as a "finder" thereof); Conrad *v.* Fuller, 98 Va. 16, 34 S. E. 893.

An executor is entitled to administer all the property of the testator, even though a part of it be not disposed of by the will. Landers *v.* Stone, 45 Ind. 404; Hays *v.* Jackson, 6 Mass. 149; Patton's Appeal, 31 Pa. St. 465; Wilson *v.* Wilson, 3 Binn. (Pa.) 557.

60. Ford *v.* Stuart First Nat. Bank, 201 Ill. 120, 66 N. E. 316 [*reversing* 100 Ill. App. 70]; Gragard's Succession, 106 La. 298, 30 So. 885; Veazy *v.* Trahan, 26 La. Ann. 606; Hemley *v.* Harmon, 103 Mo. App. 233, 77 S. W. 136; Hughes *v.* Menefee, 29 Mo. App. 192.

Creditors of partnership.— Where after the property of an intestate, not exceeding three hundred dollars in value, had been vested in his minor child by order of the probate court, the administrator moved to rescind the order, alleging that the property was partnership property and liable for the debts of the partnership, it was held that the administrator had no right to represent the interest of the creditors of the partnership. Bell *v.* Lawson, 28 Ark. 140.

61. Williams *v.* Wiggand, 53 Ill. 233; Coulter *v.* Cresswell, 7 La. Ann. 367; Renwick *v.* Renwick, 1 Bradf. Surr. (N. Y.) 234.

Executor or administrator not as such guardian of decedent's minor children.— Menifee *v.* Ball, 7 Ark. 520; Kelley *v.* Helmkamp, 40 Ill. App. 35.

In assumpsit against executors and heirs for money paid to their use, an averment that it was paid at the request of the executors is not sufficient to charge the heirs, but an allegation that it was paid at their request is necessary. Searcy *v.* Reardon, 3 Bibb (Ky.) 528.

62. See Gibson *v.* Brown, 1 Nott & M. (S. C.) 326.

Right to oppose attack on will see, generally, WILLS.

63. Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384; Meyer's Estate, 18 Phila. (Pa.) 42; Williams *v.* Williams, 20 Ch. D. 659, 15 Cox C. C. 39, 46 J. P. 726, 51 L. J. Ch. 385, 46 L. T. Rep. N. S. 275, 30 Wkly. Rep. 438, holding that the executors have a right to the possession of the body and their duty is to bury it, although there is a direction in the will that some other person shall cause the body to be burned.

64. See *infra*, VIII, I, 8, b, (I), (V).

65. Beecher *v.* Buckingham, 18 Conn. 110, 44 Am. Dec. 580; Carroll *v.* U. S., 13 Wall. (U. S.) 151, 20 L. ed. 565 [*reversing* 5 Ct. Cl. 620].

Papers of decedent.— An executor or administrator is not bound to give to per-

and his title and authority extends so completely to all such property as to exclude for the time being creditors, legatees, and all others beneficially interested in the estate.[66] They cannot follow such property specifically into the hands of others, much less dispose of it; but the executor or administrator is the only true representative thereof whom the law will regard.[67]

E. Executing Provisions of Will. While any will which purports to extend an executor's powers beyond those conferred by law must be so far disregarded, a testator's wishes and directions, not precatory merely, must be followed if possible in all particulars, unless some appropriate tribunal authorize the executor to swerve aside.[68] Where trusts are raised by the will, but no trustee is appointed by the testator, the law charges the executor with carrying out the trust until the court appoints some other trustee; and consequently the executor may retain funds in his hands for that purpose and otherwise prepare to fulfil the trust.[69]

F. Delegation of Powers. An executor or administrator cannot delegate his authority, and thus avoid any of the liabilities or escape any of the duties imposed on him by law;[70] but he may when necessary employ and pay agents of

sons contesting his authority free access to the private papers of decedent in his possession. Sargent *v.* Sanborn, 66 N. H. 30, 25 Atl. 541.

66. Webre *v.* Lorio, 42 La. Ann. 178, 7 So. 460.

The legal and equitable title to all the personal property of the deceased, including choses in action and incorporeal rights (and under the provisions of some codes or under the power that may be given by a testator's will, to real property of the decedent, besides, in a measure), vests in fact in the executor or administrator during the suitable period of administration, and he holds this property as a trustee and representative for all persons interested therein. Beecher *v.* Buckingham, 18 Conn. 110, 44 Am. Dec. 580; Neale *v.* Hagthorp, 3 Bland (Md.) 551; Alston *v.* Cohen, 1 Fed. Cas. No. 265, 1 Woods 487. See also Palmer *v.* Palmer, 55 Mich. 293, 21 N. W. 352.

Specific bequest.— Where articles are given by one's will to persons at the inventoried valuation, the executor is chargeable with them until they are duly appraised and set apart. Matter of Pollock, 3 Redf. Surr. (N. Y.) 100.

In California both real and personal estate vest in the heir subject to the representative's lien for the payment of debts, etc., and to his right of present possession. Beckett *v.* Selover, 7 Cal. 215, 68 Am. Dec. 237.

In Michigan the personal representative is not bound to take possession further than is needful for paying debts, etc.; and the probate court may then set off the residue to the parties thereto entitled, vesting thereby a right of action for direct recovery of such property. McDermott *v.* Copeland, 9 Fed. 536.

67. Beattie *v.* Abercrombie, 18 Ala. 9; Goodwin *v.* Jones, 3 Mass. 514, 3 Am. Dec. 173; Nugent *v.* Gifford, 1 Atk. 463, 26 Eng. Reprint 294; Haynes *v.* Forshaw, 11 Hare 93, 17 Jur. 930, 22 L. J. Ch. 1060, 1 Wkly. Rep. 346, 45 Eng. Ch. 95.

An heir cannot create a lien on assets in favor of another person as against the personal representative. Boynton *v.* Payrow, 67 Me. 587.

68. Percy *v.* Provan, 15 La. 69; Hall *v.* Cushing, 9 Pick. (Mass.) 395; Voorhees *v.* Stoothoff, 11 N. J. L. 145; Covenhoven *v.* Covenhoven, 1 N. J. L. 210; Hutton *v* Hutton, 41 N. J. Eq. 267, 3 Atl. 882; Matter of Bull, 5 Dem. Surr. (N. Y.) 461; Matter of Shepard, 3 Dem. Surr. (N. Y.) 183. See, generally, WILLS.

Duty to pay over.— Executors of a will bequeathing a fund in trust, the income thereof to be paid to one for life, have no authority to make any settlement with the life-tenant; their only duty in the premises being to pay over the fund, with accumulations, to the trustee. Fitzgerald *v.* Rhode Island Hospital Trust Co., 24 R. I. 59, 52 Atl. 814.

69. Haskell *v.* Hill, 169 Mass. 124, 47 N. E. 586; Dorr *v.* Wainwright, 13 Pick. (Mass.) 328; Hall *v.* Cushing, 9 Pick. (Mass.) 395; Saunderson *v.* Stearns, 6 Mass. 37.

Testamentary provision for investment.— Where property is willed to one for life, remainder to minor children, with the provision that the minors shall not come into possession or have the use or enjoyment of their shares until they attain their majority, but that the income of their shares during minority shall be withheld and kept at interest until majority, when the same shall be paid to them, there is no occasion for the appointment of a trustee, on the death of the life-tenant, to care for the shares of the minor remainder-men, as that duty may be performed by the executor. Brewster *v.* Mack, 69 N. H. 52, 44 Atl. 811.

Protection of trust.— The executor should endeavor to protect and maintain a trust declared under a will, against a beneficiary in possession who disregards the rights of other beneficiaries. Lucas *v.* Lockhart, 10 Sm. & M. (Miss.) 466, 48 Am. Dec. 766.

70. *Alabama.*— Pearson *v.* Darrington, 32 Ala. 227; Driver *v.* Riddle, 8 Port. 343.

Georgia.— Neal *v.* Patten, 47 Ga. 73.

Illinois.—Hungate *v.* Reynolds, 72 Ill. 425; Christy *v.* McBride, 2 Ill. 75.

Louisiana.— Bird *v.* Jones, 5 La. Ann 643.

his own, such as professional counsel, collectors, bookkeepers, etc., who respond to him alone for their acts, and for whose acts he as principal must answer.[71]

G. Supervision and Guidance of Courts. It is always the right and frequently becomes the duty of an executor or administrator to apply to the courts for direction and guidance in the performance of the duties of his trust,[72] and the

Michigan.— Cheever *v.* Ellis, (1903) 96 N. W. 1067, even though the agent employed is a person in whom the testator placed great confidence.

New York.— *In re* Bronson, Tuck. Surr. 464.

Texas.— See Dyer *v.* Winston, (Civ. App. 1903) 77 S. W. 227.

See 22 Cent. Dig. tit. "Executors and Administrators," § 333.

Turning over an estate to the residuary legatees upon their agreement to pay debts and legacies does not release an executor from liability to a creditor or legatee of the estate. Brown *v.* Phelps, 48 Hun (N. Y.) 219 [*affirmed* in 113 N. Y. 658, 21 N. E. 415].

Where the husband of an administratrix takes exclusive control and management of the estate, excluding the wife from any participation in the same, makes reports for her, and uses the trust funds or places them to his own private account, the heirs may in equity call him to account for funds coming into his hands as agent of the administratrix. Lehmann *v.* Rothbarth, 111 Ill. 185.

Action by attorney in fact.— The attorney in fact of an executor or administrator cannot maintain an action for the benefit of the estate in his own name. Neely *v.* Robinson, 17 Fed. Cas. No. 10,082*a*, Hempst. 9.

71. *Alabama.*— Henderson *v.* Simmons, 33 Ala. 291, 70 Am. Dec. 590.

Arkansas.— Crowley *v.* Mellon, 52 Ark. 1, 11 S. W. 876.

Colorado.— Ingham *v.* Ryan, 18 Colo. App. 347, 71 Pac. 899.

Illinois.— Bucher *v.* Bucher, 86 Ill. 377; Christy *v.* McBride, 2 Ill. 75.

Louisiana.— Moise's Succession, 107 La. 717, 31 So. 990; Denegre *v.* Denegre, 33 La. Ann. 694.

Missouri.— See Julian *v.* Abbott, 73 Mo. 580.

New Hampshire.— Dodge *v.* Stickney, 62 N. H. 330.

New York.— O'Gara *v.* Clearkin, 58 N. Y. 663 [*reversing* 2 Thomps. & C. 675]; Noe *v.* Gregory, 7 Daly 283; Wells *v.* Disbrow, 20 N. Y. Suppl. 518. See also Rayner *v.* Pearsall, 3 Johns. Ch. 578.

Pennsylvania.—See Webb's Appeal, 165 Pa. St. 330, 30 Atl. 827.

South Carolina.— Jones *v.* Jenkins, 2 McCord 494.

Texas.— Armstrong *v.* O'Brien, 83 Tex. 635, 19 S. W. 268; O'Brien *v.* Armstrong, 79 Tex. 602, 15 S. W. 681; Dyer *v.* Winston, (Civ. App. 1903) 77 S. W. 227.

Vermont.— See McCloskey *v.* Gleason, 56 Vt. 264, 48 Am. Rep. 770.

Virginia.— Mills *v.* Talley, 83 Va. 361, 5 S. E. 368.

United States.—Green *v.* Hanberry, 10 Fed. Cas. No. 5,759, 2 Brock. 403.

Canada.— Low *v.* Gemley, 18 Can. Supreme Ct. 685 [*affirming* 5 Montreal Q. B. 186, 4 Montreal Super. Ct. 92, 21 Rev. Lég. 44].

See 22 Cent. Dig. tit. "Executors and Administrators," § 333.

Due care should be exercised in choice of agent. Wakeman *v.* Hazleton, 3 Barb. Ch. (N. Y.) 148; McCloskey *v.* Gleason, 56 Vt. 264, 48 Am. Rep. 770.

Representative accountable for what his authorized attorney receives.— Abercrombie *v.* Skinner, 42 Ala. 133; Lipscomb *v.* District of Columbia, 20 Ct. Cl. 135.

The usual limitations as to the liability of a principal for the acts of his agent apply where a debt is lost to an estate by the mismanagement or failure of an agent suitably employed by him. Julian *v.* Abbott, 73 Mo. 580; Webb's Appeal, 165 Pa. St. 330, 30 Atl. 827. See *infra*, VIII, L, 6; and, generally, PRINCIPAL AND AGENT.

Liability of agent.— Where an agent appointed by an administratrix has always complied with her directions, he is not chargeable, in an action against him by the heirs, with interest on sums remaining in his hands as such agent; but for sums received by him as rents, over which the administratrix had no control, he is chargeable with interest. Mason *v.* Roosevelt, 5 Johns. Ch. (N. Y.) 534.

A power of attorney by an executrix to control a fund bestowed by the will should not be given in her individual name but as executrix. Baldwin *v.* Wylie, 30 Fed. Cas. No. 18,228, 2 Hayw. & H. 126.

An administrator has power to revoke an ordinary power of attorney to manage the affairs of the estate, and acts done by the attorney after revocation and notice thereof are not binding on the principal. Babin's Succession, 27 La. Ann. 114.

An executor may ratify a contract made by his attorney so as to bind himself. Newton *v.* Bronson, 13 N. Y. 587, 67 Am. Dec. 89. See also Dyer *v.* Winston, (Tex. Civ. App. 1903) 77 S. W. 227.

72. *Alabama.*— Clay *v.* Gurley, 62 Ala. 14.

Georgia.— Gaines *v.* Gaines, 116 Ga. 476, 42 S. E. 763; Trammell *v.* Johnston, 54 Ga. 340; Rogers *v.* Bottsford, 44 Ga. 652.

Illinois.— Bridges *v.* Rice, 99 Ill. 414.

New Hampshire.— Stevens *v.* Clough, 70 N. H. 165, 47 Atl. 615.

New Jersey.— Holcombe *v.* Holcombe, 13 N. J. Eq. 413.

North Carolina.— Robinson *v.* McDiarmid, 87 N. C. 455; Horah *v.* Horah, 60 N. C. 650.

South Carolina.— James *v.* Spann, 35 S. C. 614, 14 S. E. 955.

courts have jurisdiction to direct and control his acts in the premises.[73] But as a rule the courts will not of their own motion interfere with advice and directions in the details of management, but will rather review the representative's whole course of conduct, should a contest arise, upon his due accounting and settlement,[74] and the representative is not usually chargeable with mismanagement for acting

Canada.— See *Re* Caldwell, 2 Ch. Chamb. (U. C.) 150.

See 22 Cent. Dig. tit. "Executors and Administrators," § 335.

Even though individual transactions of an executor may be involved, a petition by him asking the direction of the court is sustainable, it appearing that the estate is interested in all of the property covered, that the persons made defendants are or may be interested in such property, and that all the allegations of the petition are connected with the distribution of the estate. Gaines *v.* Gaines, 116 Ga. 476, 42 S. E. 763.

The propriety of past conduct of the representative should not be passed on till the termination of the trust. Tierney *v.* Tierney, (N. J. Ch. 1897) 38 Atl. 971.

There cannot be an accounting to date in the court of chancery, on a bill filed by executors for directions relating to the management of the estate in their hands, unless all the parties are before the court for the construction of the will. Tierney *v.* Tierney, (N. J. Ch. 1897) 38 Atl. 971.

Representative not obliged to seek assistance of court see *In re* Stahl, 11 York Leg. Rec. (Pa.) 105.

73. Hunter *v.* Bryson, 5 Gill & J. (Md.) 483, 25 Am. Dec. 313; Holcomb *v.* Holcomb, 11 N. J. Eq. 281; Matter of Gilman, 3 N. Y. St. 342 (holding that it is the duty of the surrogate to guard against the probability as well as the possibility of loss); *In re* John, 30 Oreg. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242.

The fact that infants are interested in an estate is sufficient to make it the duty of the surrogate to make any order necessary concerning the safety of the estate. Matter of Gilman, 3 N. Y. St. 342.

Limitation of powers.— A statute enabling the surrogate to control the conduct of executors and administrators does not extend to property which they had no right to take possession of. Calyer *v.* Calyer, 4 Redf. Surr. (N. Y.) 305. See also Kidder *v.* Kidder, (N. J. Ch. 1903) 56 Atl. 154.

A proceeding to revoke the probate of a will, brought more than five years after the original probate, may be considered as a prayer for the direction of the executor in the administration of the personalty. *In re* John, 30 Oreg. 494, 47 Pac. 341, 50 Pac. 226, 37 L. R. A. 242.

A creditor can call on the courts of competent jurisdiction to see that the administration is properly conducted. Ford *v.* Kittredge, 26 La. Ann. 190.

What court has jurisdiction.— Courts of probate, being of statutory establishment, are of local and limited authority, while courts of equity on the other hand take a wide range in supervising and directing all fiduciaries in their course of conduct, various decisions of local application are found in consequence, denying jurisdiction to local courts of probate. See *In re* Welch, 110 Cal. 605, 42 Pac. 1089; People *v.* Arapahoe County Ct., 3 Colo. App. 425, 34 Pac. 166; Colyer *v.* Colyer, 4 Redf. Surr. (N. Y.) 305; Matter of Cohn, 5 Dem. Surr. (N. Y.) 338. But *compare* Jones *v.* Jones, 41 Md. 354.

Discretion of court as to enjoining administrator from acting see Sanders *v.* Slaughter, 89 Ga. 34, 14 S. E. 873.

Adjournment of hearing.— Where the papers in a proceeding by executors of an estate for instructions showed without dispute that B, one of the executors, was individually entitled to certain money in the hands of the others, it was not error for the surrogate to make an order adjourning the hearing, conditional on the payment of such money to B. Matter of Bodkin, 88 N. Y. App. Div. 33, 84 N. Y. Suppl. 552, holding further that where such order was subsequently amended so as to recite that the answer of two of the executors was one of the papers on which it was made, the addition of another clause, reciting that "the order so amended remain in full force and effect," was immaterial.

Conclusiveness of recitals.— Where an order giving instructions to executors recited that it was made after hearing G, attorney for petitioner, K, attorney for appellants, appearing and not opposing, such recital was conclusive, and precluded appellants from attacking the order. Matter of Bodkin, 88 N. Y. App. Div. 33, 84 N. Y. Suppl. 552.

An order of the orphans' court as to the investment of money is not appealable where the court has not exceeded its jurisdiction. Jones *v.* Jones, 41 Md. 354.

The direction of the court properly obtained will protect the representative in his acts done pursuant thereto. Waller *v.* Barrett, 24 Beav. 413, 4 Jur. N. S. 128, 27 L. J. Ch. 214; Dean *v.* Allen, 20 Beav. 1; Bennett *v.* Lytton, 2 Johns. & H. 155; Lowndes *v.* Williams, 24 L. T. Rep. N. S. 465. But see Brewer *v.* Pocock, 23 Beav. 310; Dobson *v.* Carpenter, 12 Beav. 370; Cochrane *v.* Robinson, 5 Jur. 4, 10 L. J. Ch. 109, 11 Sim. 378, 34 Eng. Ch. 378; Garratt *v.* Lancefield, 2 Jur. N. S. 177.

74. Vernor *v.* Coville, 54 Mich. 281, 20 N. W. 75; Hirst's Estate, 12 Wkly. Notes Cas. (Pa.) 323; Wood *v.* Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198.

A testamentary provision that the decision of the executors "shall be final and conclusive" on all matters in the will is insufficient to prevent a review by the court. Reilly's Estate, 6 Northam. Co. Rep. (Pa.) 385.

without an order of court, if his act caused no injury or was such as the court would have ordered done.[75]

H. Rights of Action. Executors and administrators have rights of action against third persons corresponding to the liability which the law has imposed upon themselves.[76]

I. Submission to Arbitration or Reference. The personal representative has as a rule the right to agree to submit to an arbitration or reference as to claims in favor of or against the estate;[77] but some of the earlier cases, although admitting this power, held that the representative became liable as for waste if

75. Vernor *v.* Coville, 54 Mich. 281, 20 N. W. 75; *In re* Millenovich, 5 Nev. 161; Norris *v.* Fisher, 2 Ashm. (Pa.) 411; Howe *v.* Dartmouth, 7 Ves. Jr. 137, 6 Rev. Rep. 96, 32 Eng. Reprint 56. And see Lee *v.* Brown, 4 Ves. Jr. 362, 4 Rev. Rep. 208, 31 Eng. Reprint 184.

76. Halleck *v.* Mixer, 16 Cal. 574 (holding that executors have the right to institute an action of replevin for the recovery of wood removed wrongfully from lands of the testator, after it had been first cut therefrom); Snider *v.* Croy, 2 Johns. (N. Y.) 227 (holding that the representative can sue trespassers for wasting and destroying as well as for taking and carrying away assets of the estate). See also State *v.* Hogan, 2 Brev. (S. C.) 437, holding that, where the executor or administrator has the right to gather in standing crops as emblements, he may oppose by force any one interrupting him in the exercise of his right.

77. *Alabama.*— Jones *v.* Blalock, 31 Ala. 180; Jones *v.* Deyer, 16 Ala. 221.

Connecticut.— Alling *v.* Munson, 2 Conn. 691.

Kentucky.— Overly *v.* Overly, 1 Metc. 117.

Louisiana.— Lattier *v.* Rachal, 12 La. Ann. 695.

Maine.— Kendall *v.* Bates, 35 Me. 357.

Massachusetts.—Chadbourn *v.* Chadbourn, 9 Allen 173; Bean *v.* Farnam, 6 Pick. 269; Coffin *v.* Cuttle, 4 Pick. 454.

Mississippi.— Bailey *v.* Dilworth, 10 Sm. & M. 404, 48 Am. Dec. 760.

New Hampshire.—Cogswell *v.* Concord, etc., R. Co., 68 N. H. 192, 44 Atl. 293.

New Jersey.— Crum *v.* Moore, 14 N. J. Eq. 436, 82 Am. Dec. 262.

Pennsylvania.— Christy *v.* Christy, 176 Pa. St. 421, 35 Atl. 245; Peter's Appeal, 38 Pa. St. 239.

Rhode Island.— Parker *v.* Providence, etc., Steamboat Co., 17 R. I. 376, 22 Atl. 284, 23 Atl. 102, 33 Am. St. Rep. 869, 14 L. R. A. 414.

South Carolina.—Swicard *v.* Wilson, 2 Mill 218.

Vermont.— Powers *v.* Douglass, 53 Vt. 471, 38 Am. Rep. 699.

West Virginia.— Wamsley *v.* Wamsley, 26 W. Va. 45.

United States.—Hoyt *v.* Sprague, 103 U. S. 613, 26 L. ed. 585.

See 22 Cent. Dig. tit. "Executors and Administrators," § 463; and *infra*, X, C, 2.

Contra.— Reitzell *v.* Miller, 25 Ill. 67.

Right based upon power to prosecute or defend suits.— Kendall *v.* Bates, 35 Me. 357; Weston *v.* Stuart, 11 Me 326; Eaton *v.* Cole, 10 Me. 137.

What claims may be referred.— Only claims which accrued during decedent's life or would have accrued against him had he lived can be referred. Dodding *v.* Porter, 17 Abb. Pr. (N. Y.) 374. But *compare* McDaniels *v.* McDaniels, 40 Vt. 340, 94 Am. Dec. 408.

Claim for tort referable.— Brockett *v.* Bush, 18 Abb. Pr. (N. Y.) 337.

Jurisdiction of orphans' court.— A statute conferring on orphans' courts the power, with the consent of the parties, to arbitrate between a claimant and an administrator has been held to refer only to claims against the estate of the decedent which are asserted against the administrator in his fiduciary character. Browne *v.* Preston, 38 Md. 373.

The deputy of a sheriff to whom administration has been committed is not authorized to submit to arbitration a suit to which the decedent was a party and which was revived in the name of the sheriff as administrator. Thompson *v.* Thompson, 6 Munf. (Va.) 514.

Statutes specially enforcing a submission to arbitration under the authority of the probate court are in addition to and not in impairment of the common-law authority. Wamsley *v.* Wamsley, 26 W. Va. 45. See also Boynton *v.* Boynton, 10 Vt. 107.

Signing in fiduciary capacity not necessary. — The representative need not sign a submission to arbitration as "executor" or "administrator" if the body of the instrument shows clearly the capacity in which he submits. Chadbourn *v.* Chadbourn, 9 Allen (Mass.) 173.

The actual submission of a contested claim to the surrogate, all the parties in interest being present, cannot be sustained as an arbitration. Tucker *v.* Tucker, 4 Abb. Dec. (N. Y.) 428, 4 Keyes (N. Y.) 136.

Arbitration not a proper mode to establish rejected claim against estate.— Yarborough *v.* Leggett, 14 Tex. 677.

A surviving partner who is also administrator of the deceased partner cannot submit to arbitration a matter between the partnership and the estate, because in such case he would be acting in the double capacity of a representative and a debtor or creditor of the estate. Boynton *v.* Boynton, 10 Vt. 107.

If the representative is a mere trustee of another, having the legal title, but no beneficial interest in the matter in controversy, the court will control his action and protect

the estate was eventually injured by the award.[78] Where matters are properly submitted the award is binding on the representative in his fiduciary capacity,[79] and also on the legatees or distributees and creditors of the estate.[80] Where claims against a person both individually and in his capacity as executor or administrator are submitted to arbitration, the award should clearly distinguish between moneys which are to be paid by him in his fiduciary character and those for which he is personally bound.[81]

J. Confession of Judgment. The courts view with disfavor a confession of judgment by an executor or administrator, and the usual result should be to charge him in the first place *de bonis propriis*;[82] but in some states the representative is permitted in a proper case to confess judgment for a debt contracted by the decedent so as to bind the estate.[83]

K. Estoppel. An executor or administrator, in his capacity as such, is as

the interest of the *cestui que trust*. Crumb *v.* Moore, 14 N. J. Eq. 436, 82 Am. Dec. 262.

78. McKeen *v.* Oliphant, 18 N. J. L. 442; Crum *v.* Moore, 14 N. J. Eq. 436, 82 Am. Dec. 262; Nelson *v.* Cornwell, 11 Gratt. (Va.) 724; Wheatley *v.* Martin, 6 Leigh (Va.) 62.

79. Cogswell *v.* Concord, etc., R. Co., 68 N. H. 192, 44 Atl. 293; Wheatley *v.* Martin, 6 Leigh (Va.) 62.

Construction of award.— Where an administrator submitted to arbitration disputed accounts of his intestate, binding himself and his heirs to abide and perform the award, an award ordering him to pay a specified sum "out of the estate of said deceased" only bound him to pay out of that fund as much as he could pay consistently with the law and rights of other creditors, such being the clear intention of the parties. McKeen *v.* Oliphant, 18 N. J. L. 442.

Personal liability.— Where an administrator and an heir of the estate submitted their differences to arbitration, it was held that assumpsit would lie against the administrator personally upon the award. Powers *v.* Douglass, 53 Vt. 471, 38 Am. Rep. 699.

80. Cogswell *v.* Concord, etc., R. Co., 68 N. H. 192, 44 Atl. 293; Strodes *v.* Patton, 23 Fed. Cas. No. 13,538, 1 Brock. 228.

81. Lyle *v.* Rodgers, 5 Wheat. (U. S.) 394, 5 L. ed. 117.

82. *California.*— *In re* Isaac, 30 Cal. 105.

Indiana.— Hanna *v.* Dunham, 10 Ind. App. 611, 38 N. E. 343.

Louisiana.— Decuir's Succession, 23 La. Ann. 166; Ashcraft *v.* Flint, 4 La. 496.

New York.— Columbus Watch Co. *v.* Hodenpyl, 61 Hun 557, 16 N. Y. Suppl. 337 [*affirmed* in 135 N. Y. 430, 32 N. E. 239].

North Carolina.— Finch *v.* Ragland, 17 N. C. 137 (confession in favor of a co-administrator); Richardson *v.* Fleming, 4 N. C. 341.

Pennsylvania.— Young *v.* Weed, 154 Pa. St. 316, 26 Atl. 420, 35 Am. St. Rep. 839; Loud *v.* Bull, 1 Whart. 238. But see *infra*, note 83.

Vermont.— Nason *v.* Smalley, 8 Vt. 118.

Virginia.—Freelands *v.* Royall, 2 Hen. & M. 575.

See 22 Cent. Dig. tit. "Executors and Administrators," § 464.

The addition of the word "executor" in a judgment confessed is mere surplusage and does not prevent defendant being charged *de bonis propriis* with the amount. Hall *v.* Craige, 65 N. C. 51, 68 N. C. 305.

Equity will take cognizance, if necessary, to prevent a wrongful confession from operating against the estate. Nason *v.* Smalley, 8 Vt. 118.

Debts of firm of which decedent a member. — The rule that executors have no power to confess judgment is not applicable to offers of judgments to firm creditors by a firm composed of a surviving partner and the executor of a deceased partner conducting the interest of the deceased therein, for such creditors are not creditors of the estate of the deceased partner. Columbus Watch Co. *v.* Hodenpyl, 61 Hun (N. Y.) 557, 16 N. Y. Suppl. 337 [*affirmed* in 135 N. Y. 430, 32 N. E. 239].

Presumption.— A judgment obtained by confession against the representative will be presumed well founded until the contrary is shown. Powell *v.* Myers, 21 N. C. 502.

83. Little *v.* Brannin, 4 N. J. L. 288; Bennett *v.* Fulmer, 49 Pa. St. 155; Dickey *v.* Trainer, 43 Pa. St. 509. But see *supra*, note 82.

Power under will see Miller *v.* Ege, 8 Pa. St. 352.

Substitution of creditors.— Where an executor who as such was indebted to one of the legatees confessed judgment to one of the legatees' creditors in lieu of the latter's judgment against the legatee, the amount of the judgment so confessed being less than the amount due the legatee, and took a receipt from the legatee for the amount of the confessed judgment, to be accounted for upon the final settlement of the estate and the accounts, this amounted to a mere change of creditors and the judgment creditor had the right to levy his execution upon the personal property of the estate. Miller *v.* Ege, 8 Pa. St. 352.

Equity will not relieve executors where assets insufficient.— Where executors confess judgment for a debt of their testator, upon a miscalculation of the amount of the assets in their hands, and with a full understanding of their personal liability in case of a deficiency of assets, they will not be relieved in equity against the judgment, after it appears that the assets are insufficient to sat-

much bound by the laws of estoppel as if he were acting in his individual capacity;[84] but his acts merely as an individual cannot operate as an estoppel against him in his representative capacity,[85] although the law of estoppel denies to the personal representative who takes a just possession of property in his fiduciary capacity the right to subsequently deny the title of his decedent or set up adverse title to the injury of those beneficially interested.[86] The laws of estoppel may also operate in favor of an executor or administrator against other persons.[87]

L. Powers Before Qualification — 1. In General. Although the executor has been, and in some jurisdictions still is, somewhat favored in this respect,[88] the

isfy it. Freelands *v.* Royall, 2 Hen. & M. (Va.) 575.

84. *Alabama.*— Butler *v.* Gazzam, 81 Ala. 491, 1 So. 16; Williamson *v.* Ross, 33 Ala. 509; Duncan *v.* Stewart, 25 Ala. 408, 60 Am. Dec. 527; McLane *v.* Spence, 6 Ala. 894.

Illinois.— McDonough *v.* Hanifan, 7 Ill. App. 50.

Indiana.— Hackleman *v.* Miller, 4 Blackf. 322.

Iowa.— Jones *v.* Blumenstein, 77 Iowa 361, 42 N. W. 321; Clark *v.* Tallman, 68 Iowa 372, 27 N. W. 261.

Louisiana.— Scott *v.* Briscoe, 36 La. Ann. 278; Richmond's Succession, 35 La. Ann. 858.

Mississippi.— Pittman *v.* Pittman, 59 Miss. 203.

New York.— Deegan *v.* Von Glahn, 75 Hun 39, 26 N. Y. Suppl. 989; Riley *v.* Albany Sav. Bank, 36 Hun 513; Hall *v.* Richardson, 22 Hun 444.

Texas.— Thomas *v.* Brooks, 6 Tex. 369.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 465, 466.

Circumstances not amounting to estoppel. — Mere silence of the representative, or his failure to assert title, or an ambiguous and doubtful election on his part, do not constitute an estoppel. McLane *v.* Spence, 11 Ala. 172; Lewis *v.* Lusk, 35 Miss. 696, 72 Am. Dec. 153. A succession is not estopped to dispute title claimed under a void tax-sale by the fact its administrator and attorney were present at the sale and confirmed it. Gulf State Land, etc., Co. *v.* Fasnacht, 47 La. Ann. 1294, 17 So. 800. If an executor induces a third person to trade for a note of his testator by representing that there is no offset against it, and that it will certainly be paid, such representations will not bind the estate of the testator, or preclude the executor from showing a failure of the consideration for which the note was executed. Glenn *v.* Thistle, 23 Miss. 42. The acceptance, by the executor of a creditor of a corporation, of corporate bonds, purporting on their face to be first mortgage bonds, and retention thereof after learning that such bonds were secondary to purchase-money bonds held by his testator for another claim due from the corporation, do not prevent the executor from asserting the priority of the purchase-money bonds; the rights of *bona fide* purchasers for value not intervening. Moore *v.* Ensley, 112 Ala. 228, 20 So. 744. Where a judgment rendered against intestate during his lifetime was afterward reversed, the fact that the administratrix purchased part of the decedent's property at the sale under the judgment did not estop her from asserting her right to restitution under a statute providing for restitution when a judgment is reversed. Black *v.* Vermont Marble Co., 137 Cal. 683, 70 Pac. 776.

85. Baird *v.* Harper, (Del. Sup. 1902) 51 Atl. 141; Dutcher *v.* Dutcher, 88 Hun (N. Y.) 221, 34 N. Y. Suppl. 653.

86. Cooper *v.* Lindsay, 109 Ala. 338, 19 So. 379; Gayle *v.* Johnson, 80 Ala. 388; Irby *v.* Kitchell, 42 Ala. 438; Boyd *v.* Harrison, 36 Ala. 533; Thompson *v.* Bondurant, 15 Ala. 346, 50 Am. Dec. 136; Miller *v.* Wilkins, 79 Ga. 675, 4 S. E. 261; Clayton *v.* McKinney, 10 Heisk. (Tenn.) 72 (receiving rent accruing after testator's death); Drexel *v.* Berney, 35 Fed. 805; Prince *v.* Towns, 33 Fed. 161. But *compare* Crowe *v.* Brady, 5 Redf. Surr. (N. Y.) 1.

87. Mackey *v.* Ballou, 112 Ind. 198, 13 N. E. 715; Whitford *v.* Crooks, 50 Mich. 40, 14 N. W. 675; *In re* Alfstad, 27 Wash. 175, 67 Pac. 593.

Heirs, devisees, or distributees may be estopped by their own acts. Payne *v.* Payne, 5 Mo. App. 188; Tucker *v.* Tucker, 29 N. J. Eq. 286.

88. *Mississippi.*— Emanuel *v.* Norcum, 7 How. 150.

New Hampshire.— Shirley *v.* Healds, 34 N. H. 407; Strong *v.* Perkins, 3 N. H. 517.

New Jersey.— Thiefes *v.* Mason, 55 N. J. Eq. 456, 37 Atl. 455.

New York.— Valentine *v.* Jackson, 9 Wend. 302; Judson *v.* Gibbons, 5 Wend. 224.

South Carolina.—Foster *v.* Brown, 3 Rich. 254; Williams *v.* Seabrooks, 3 McCord 371.

England.— Whitehead *v.* Taylor, 10 A. & E. 210, 4 Jur. 247, 9 L. J. Q. B. 65, 2 P. & D. 367, 37 E. C. L. 131; Wills *v.* Rich, 2 Atk. 285, 26 Eng. Reprint 575; Hudson *v.* Hudson, 1 Atk. 460, 26 Eng. Reprint 292; Woolley *v.* Clark, 5 B. & Ald. 744, 1 D. & R. 409, 24 Rev. Rep. 546, 7 E. C. L. 405; Brasier *v.* Hudson, 5 L. J. Ch. 296, 8 Sim. 67, 8 Eng. Ch. 67; Comber's Case, 1 P. Wms. 766, 24 Eng. Reprint 605; Wankford *v.* Wankford, 1 Salk. 299.

Canada.— Robinson *v.* Coyne, 14 Grant Ch. (U. C.) 561. See also Bryce *v.* Beattie, 12 U. C. C. P. 409.

See 22 Cent. Dig. tit. "Executors and Administrators," § 326.

It is only in order to assert his right to sue as such that the executor must have first probated the will. Humphreys *v.* Ingledon, 1 P. Wms. 752, 24 Eng. Reprint 599.

better view, in many jurisdictions established by statute, is that neither executor nor administrator is entitled to exercise power freely as such until he has been duly qualified in the probate court, by giving bond or otherwise, as local statute may have directed,[89] nor can he sue or be sued, either at law or in equity, until after he has been duly qualified.[90] Notwithstanding the representative's want of authority to receive assets before appointment, his taking possession of the decedent's estate for purposes of immediate protection, custody, and management is somewhat favored in practice; and for whatever assets he thus receives he is chargeable in his representative capacity when his appointment becomes completed.[91] But one who undertakes to discharge and settle accounts of the estate of a deceased person before he is appointed and duly qualified as executor or administrator does so without legal authority and at his peril, and will after his appointment be held responsible for his acts.[92]

2. Relation Back of Letters. When letters testamentary or of administration are issued, they relate back so as to vest the decedent's property in the representative as from the time of death and validate the acts of the representative done

Filing bond sufficient without taking out letters testamentary.— Montreal Bank *v.* Buchanan, 32 Wash. 480, 73 Pac. 482.

The title to the personal estate vests in the person named as executor in the will, as trustee, even before the will is probated (Richardson *v.* Bailey, 69 N. H. 384, 41 Atl. 263, 76 Am. St. Rep. 176; Shirley *v.* Healds, 34 N. H. 407); and by the filing of the bond to pay debts and legacies, the title passes to him as an individual (Richardson *v.* Bailey, 69 N. H. 384, 41 Atl. 263, 76 Am. St. Rep. 176; Mercer *v.* Pike, 58 N. H. 286; Tappan *v.* Tappan, 30 N. H. 50; Batchelder *v.* Russell, 10 N. H. 39).

Sale of interest in business pursuant to partnership articles.— Where partnership articles provide that the surviving partner may purchase the deceased partner's interest within three months after his death by executing and delivering to decedent's personal representatives a bond of specified purport, the persons named in the deceased partner's will as executors have power before probate to accept such bond. Hull *v.* Cartledge, 18 N. Y. App. Div. 54, 45 N. Y. Suppl. 450.

Service of an attachment of a legacy on one of two executors before either has qualified is good. Sandidge *v.* Graves, 1 Patt. & H. (Va.) 101.

89. *Alabama.*— Gardner *v.* Gantt, 19 Ala. 666; Cleveland *v.* Chandler, 3 Stew. 489.

California.— Aldrich *v.* Willis, 55 Cal. 81.

Louisiana.—Vogel's Succession, 20 La. Ann. 81; Labadie *v.* Guerin, 5 La. 429.

Massachusetts.— Davis *v.* Davis, 2 Cush. 111.

Michigan.— Gilkey *v.* Hamilton, 22 Mich. 283.

New York.— Humbert *v.* Wurster, 22 Hun 405 (unless necessary to preserve estate or provide for payment of funeral expenses); Thomas *v.* Cameron, 16 Wend. 579.

North Carolina.— Leach *v.* Jones, 86 N. C. 404.

Vermont.— Tucker *v.* Starks, Brayt. 99.

See 22 Cent. Dig. tit. "Executors and Administrators," § 326; and *supra*, II, A, 2.

An executor is not liable for the loss of property before his qualification unless he had such property then in his possession. Roberts *v.* Stuart, 80 Tex. 379, 15 S. W. 1108.

90. *Alabama.*— Wood *v.* Cosby, 76 Ala. 557.

Arkansas.— Cocke *v.* Walters, 6 Ark. 404.

Indiana.— Call *v.* Ewing, 1 Blackf. 301.

Maryland.—Ratrie *v.* Wheeler, 6 Harr. & J. 94.

New York.— *In re* Flandrow, 92 N. Y. 256; Thomas *v.* Cameron, 16 Wend. 579.

Tennessee.— Fay *v.* Reager, 2 Sneed 200.

England.— Tarn *v.* Commercial Banking Co., 12 Q. B. D. 294, 50 L. T. Rep. N. S. 365, 32 Wkly. Rep. 492; Grosvenor *v.* Lane, 2 Atk. 180, 26 Eng. Reprint 512; Gleeson *v.* Cooke, 1 Hog. 294; Humphreys *v.* Ingledon, 1 P. Wms. 752, 24 Eng. Reprint 599. But see Wills *v.* Rich, 2 Atk. 285, 26 Eng. Reprint 575.

See 22 Cent. Dig. tit. "Executors and Administrators," § 329.

An executor cannot bring a bill of interpleader until after probate. Mitchell *v.* Smart, 3 Atk. 606, 26 Eng. Reprint 1149.

91. *Kansas.*— Head *v.* Sutton, 31 Kan. 616, 3 Pac. 280.

Louisiana.— Locke *v.* Barrow, 25 La. Ann. 118.

New York.— Daly's Estate, Tuck. Surr. 95.

North Carolina.— Hilborn *v.* Hester, 43 N. C. 55.

Tennessee.— Killebrew *v.* Murphy, 3 Heisk. 546.

England.— Wills *v.* Rich, 2 Atk. 285, 26 Eng. Reprint 575.

See 22 Cent. Dig. tit. "Executors and Administrators," § 327.

92. Gouldsmith *v.* Coleman, 57 Ga. 425; Alvord *v.* Marsh, 12 Allen (Mass.) 603; Roumfort *v.* McAlarney, 82 Pa. St. 193.

Payment of a proper charge before one's appointment as administrator may be allowed and credited as though made after the grant of letters. Boyer *v.* Marshall, 5 N. Y. St. 431.

Action on indemnity bond.— One entitled to letters of administration may pay a claim against the estate, and after taking out let-

in the interim;[93] but such validation or ratification applies only to acts which might properly have been done by a personal representative and the estate ought not to be prejudiced by wrongful and injurious acts performed before one's appointment.[94]

M. Powers Pending Appeal From Appointment or Probate. An appeal from an order admitting a will to probate or appointing an administrator, or the pendency of an action to set aside a will, suspends the powers of the representative for the time being,[95] but it does not wholly vacate the appointment, and if the appeal is discontinued, or the contest finally terminated by a decision sustaining the letters issued, the representative is restored to full powers, which relate

ters maintain an action on a bond given the intestate to indemnify him against the claim. Leber *v.* Kauffelt, 5 Watts & S. (Pa.) 440.

93. *Alabama.*— Johnson *v.* Blair, 132 Ala. 128, 31 So. 92.

Arkansas.— McDearmon *v.* Maxfield, 38 Ark. 631.

Georgia.— Liptrot *v.* Holmes, 1 Ga. 381.

Illinois.— Globe Acc. Ins. Co. *v.* Gerisch, 163 Ill. 625, 45 N. E. 563, 54 Am. St. Rep. 486.

Iowa.— Haynes *v.* Harris, 33 Iowa 516.

Kentucky.—Baird *v.* Rowan, 1 A. K. Marsh. 214.

Maine.— Gage *v.* Johnson, 20 Me. 437.

Maryland.— Dempsey *v.* McNabb, 73 Md. 433, 21 Atl. 378.

Massachusetts.— Lawrence *v.* Wright, 23 Pick. 128; Jewett *v.* Smith, 12 Mass. 309.

New Hampshire.— Brackett *v.* Hoitt, 20 N. H. 257.

New Jersey.— Brown *v.* Howell, 66 N. J. L. 25, 48 Atl. 1020.

New York.— Denton *v.* Sanford, 103 N. Y. 607, 9 N. E. 490; Smith *v.* Robinson, 30 Hun 269; Allen *v.* Eighmie, 9 Hun 201; Rockwell *v.* Saunders, 19 Barb. 473; Thomas *v.* New York L. Ins. Co., 50 N. Y. Super. Ct. 225; Joyce *v.* McGuire, 2 N. Y. City Ct. 422. But see Conrad *v.* Archer, 7 N. Y. St. 646.

North Carolina.— Filhour *v.* Gibson, 39 N. C. 455.

Pennsylvania.—Holcomb *v.* Roberts, 57 Pa. St. 493; Shoenberger *v.* Lancaster Sav. Inst., 28 Pa. St. 459.

Rhode Island.— Brown *v.* Lewis, 9 R. I. 497.

South Carolina.— Cook *v.* Cook, 24 S. C. 204; Dealy *v.* Lance, 2 Speers 487; Miller *v.* Reigne, 2 Hill 592; McVaughters *v.* Elder, 2 Brev. 307.

Vermont.— Taylor *v.* Phillips, 30 Vt. 238; Bullock *v.* Rogers, 16 Vt. 294.

England.— Brasier *v.* Hudson, 5 L. J. Ch. 296, 8 Sim. 67, 8 Eng. Ch. 67; Humphreys *v.* Humphreys, 3 P. Wms. 349, 24 Eng. Reprint 1096.

Canada.— Trice *v.* Robinson, 16 Ont. 433; Deal *v.* Potter, 26 U. C. Q. B. 578.

See 22 Cent. Dig. tit. "Executors and Administrators," § 326.

A creditor for needful immediate supplies or other benefit to the estate may hold the representative liable by relation back. Tucker *v.* Whaley, 11 R. I. 543.

An administrator may ratify the act of a stranger in receiving money due to an intestate's estate before the administrator's appointment, and sue such person as for money had and received to his use. Dempsey *v.* McNabb, 73 Md. 433, 21 Atl. 378.

Representative may sue for injury to estate done before appointment. *California.*—Ham *v.* Henderson, 50 Cal. 367.

Georgia.— Gouldsmith *v.* Coleman, 57 Ga. 425.

Indiana.— Gerard *v.* Jones, 78 Ind. 378.

Maine.— Hutchins *v.* Adams, 3 Me. 174.

Michigan.— Morton *v.* Preston, 18 Mich. 60, 100 Am. Dec. 146.

New Hampshire.— Brackett *v.* Hoitt, 20 N. H. 257.

Pennsylvania.—Holcomb *v.* Roberts, 57 Pa. St. 493.

See 22 Cent. Dig. tit. "Executors and Administrators," § 326.

A conveyance made before probate of the will, under a power of sale given by the will, is good if the will be afterward probated. Wilson *v.* Wilson, 54 Mo. 213.

94. *Louisiana.*— Sparrow's Succession, 39 La. Ann. 696, 2 So. 501.

Minnesota.— Wiswell *v.* Wiswell, 35 Minn. 371, 29 N. W. 166.

New York.— Bellinger *v.* Ford, 21 Barb. 311.

Texas.— Mills *v.* Herndon, 60 Tex. 353.

United States.— Wall *v.* Bissell, 125 U. S. 382, 8 S. Ct. 979, 31 L. ed. 772.

See 22 Cent. Dig. tit. "Executors and Administrators," § 326.

The widow cannot give away property of her deceased husband's estate before letters are granted. Jahns *v.* Nolting, 29 Cal. 507; Roumfort *v.* McAlarney, 82 Pa. St. 193.

An unlawful delivery as an individual of property of a decedent, by his widow, who is afterward appointed administratrix, does not estop her from recovering the same as administratrix after her appointment. Gouldsmith *v.* Coleman, 57 Ga. 425.

95. *Georgia.*— Thompson *v.* Knight, 23 Ga. 399.

Massachusetts.— Arnold *v.* Sabin, 4 Cush. 46.

Missouri.— Carroll *v.* Reid, 158 Mo. 319, 59 S. W. 69.

New York.— Newhouse *v.* Gale, 1 Redf. Surr. 217; Matter of Place, 5 Dem. Surr. 228.

Tennessee.— Byrn *v.* Fleming, 3 Head 658.

Texas.— Garrett *v.* Garrett, (Civ. App. 1898) 47 S. W. 76.

back as though there had been no contest.[96] So also it has been held that in case of a contest as to the validity of a will, the representative is not relieved from his duties except so far as rights under the will are concerned.[97]

VI. DISCOVERY OF ASSETS.[98]

A. Proceedings in General. Statutory provisions are ordinarily found authorizing the personal representative to bring a bill or petition for the discovery of assets of the estate of the decedent.[99] The proceeding is in the nature of a bill of discovery and should be governed by the principles and practice of equity.[1]

B. Right to Institute. The statutes indicate who has the right to institute such proceedings, ordinarily the executor or administrator.[2] The existence of

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 330–332.

The executor is not entitled to possession of the estate as against an administrator *pendente lite*. Carroll *v.* Reid, 158 Mo. 319, 59 S. W. 69.

The public administrator may be allowed to sell property placed in his hands, pending a contest over the administration, if such sale will be for the preservation and benefit of the estate, even though the title to the property be in dispute. Public Administrator *v.* Burdell, 4 Bradf. Surr. (N. Y.) 252.

General appointee may be continued on pendente lite footing. Bradford *v.* Boundinot, 3 Fed. Cas. No. 1,765, 3 Wash. 122, Pennsylvania statute. See also Thompson *v.* Tracy, 60 N. Y. 174.

Special orders of court sometimes apply to such emergencies for the benefit of the estate. See Townshend *v.* Brooke, 9 Gill (Md.) 90; Fonte *v.* Horton, 36 Miss. 350; Hawke *v.* Hawke, 74 Hun (N. Y.) 370, 26 N. Y. Suppl. 803; *In re* Hoyt, 31 Hun (N. Y.) 176; Swenarton *v.* Hancock, 22 Hun (N. Y.) 43; Stone *v.* Spillman, 16 Tex. 432.

96. Fletcher *v.* Fletcher, 29 Vt. 98.

Contest as to validity of codicil.— Where the sole legatee disputed the validity of a codicil to the will which deprived him of some of the property, and while the litigation was pending took possession of the property and sold some of it, on the codicil being declared valid the executor was entitled to recover in trespass against the legatee. Hathorn *v.* Eaton, 70 Me. 219.

97. Edmondson *v.* Carroll, 2 Sneed (Tenn.) 678.

Payment of income to legatee.— Where an action pending by the son of a decedent to revoke the probate of his father's will would, if the son were successful, increase the interest which he has under the will in the income of the estate as legatee, such action is no bar to an order on the executor to pay to the son for his support a balance of income due him under the will. Matter of Hughes, 41 Misc. (N. Y.) 75, 83 N. Y. Suppl. 646.

98. **Proceedings for recovery** see *infra*, VII, C.

99. See Kinney *v.* Keplinger, 172 Ill. 449, 50 N. E. 131 [*reversing* 71 Ill. App. 334]; Caleb *v.* Mearn, 72 Me. 231; Craig *v.* Dougherty, 61 Miss. 96; O'Brien *v.* Baker, 65 N. Y. App. Div. 282, 72 N. Y. Suppl. 1001.

Statutory remedy does not supersede equitable jurisdiction. Grimes *v.* Hilliary, 38 Ill. App. 246; Starkweather *v.* Williams, 21 R. I. 55, 41 Atl. 1003.

Whether proceedings are summary or plenary is determined by the rule that whenever a petition or bill is filed, whether or not the parties are cited to appear, if in point of fact they do appear and answer, the proceedings are plenary. Cannon *v.* Crook, 32 Md. 482.

The jurisdiction of registers of probate to act in disclosure proceedings, as given by Me. Pub. Laws (1887), c. 137, § 3, is not repealed by Me. Pub. Laws (1897), c. 330, providing for the appointment of disclosure commissioners by the governor, instead of by the supreme judicial court, who should perform the duties required by the former statute. Alden *v.* Thompson, 92 Me. 86, 42 Atl. 227.

Where a public administrator is in charge of an intestate's estate, not by virtue of his office but under letters issued to him out of the surrogate's court, a proceeding on application by him for the discovery of property of such estate alleged to be concealed or withheld is regulated by the statute relating to such an application by executors and administrators generally, and not by the statute relating to such an application by public administrators only. Public Administrator *v.* Rollins, 4 Dem. Surr. (N. Y.) 139.

All incidental authority necessary to make the principal grant effective is included in a grant of power to a probate court to proceed for the discovery of assets of an estate. Eckerle *v.* Wood, 95 Mo. App. 378, 69 S. W. 45.

Discretion of court.— Under the Illinois statute the court in its discretion may or may not examine the person against whom such proceedings are had, since the provision as to examination is not mandatory. Mahoney *v.* People, 98 Ill. App. 241.

1. Adams *v.* Adams, 81 Ill. App. 637.

2. Robey *v.* Prout, 7 D. C. 81.

Administrator de bonis non with the will annexed may petition, under Mass. Pub. St. c. 133, § 1, for an examination of a person suspected of having fraudulently received, concealed, and conveyed away certain of testator's real estate. Dickey *v.* Taft, 175 Mass. 4, 55 N. E. 318.

Court may proceed upon its own information. Hughes *v.* People, 5 Colo. 436.

Interest.— Mo. Rev. St. (1899) § 74, au-

reasonable grounds for inquiry justifies such proceedings,[3] and they are proper when the representative has no adequate remedy at law.[4] Proceedings may commonly be brought against one within the same general jurisdiction, although a resident of a different county,[5] and an application to compel a foreign temporary administrator of a resident decedent to disclose information necessary to enable the domestic administrator to prepare his inventory has been granted.[6] Even a considerable lapse of time has been held not to bar such proceedings.[7]

C. Property or Claims as to Which Proceeding Proper. The proceeding for discovery properly extends to papers of the estate which are withheld from the executor or administrator,[8] books which it is necessary for him to examine,[9] or property or money placed in the hands of a third person on deposit;[10] and a bill will lie against the general agent of the decedent for an account of his transactions with his principal.[11] But the proceeding does not relate, except for special needs, to real estate.[12]

D. Scope of Inquiry and Relief.[13] The usual object of legislation empowering a probate judge on application to cite and examine on oath persons suspected of having concealed, embezzled, converted, or transferred personal property of the deceased is to provide for the discovery of the identical property,[14] and not for collecting debts[15] or settling disputes over legal title,[16] and this power extends only to compelling such discovery, upon a legal examination, as may serve as a basis for further proceedings, and not to compelling recovery of the property itself.[17] Nevertheless the statutes of some states permit the court to

thorizes a "person interested" to file an affidavit preliminary to proceedings for the discovery of assets. Where the probate court issues a citation, in a proceeding for discovery, it necessarily decides that the petitioner is a person interested in the estate, authorized to bring such proceeding. Eckerle *v.* Wood, 95 Mo. App. 378, 69 S. W. 45. Under Mo. Rev. St. (1899) § 2938, entitling a husband, where there are no children, to one half of the wife's estate absolutely, the husband is a person interested in the estate. *Ex p.* Gfeller, 178 Mo. 248, 77 S. W. 552.

Aid from judgment creditor.— A judgment creditor of a decedent may not, by proceeding in attachment execution against debtors of the decedent, aid the administrator in the disclosure of assets, if by so doing the effect would be to violate the principle that one such creditor cannot obtain a lien or preference over other creditors by an execution against a personal representative. United Firemen's Ins. Co. *v.* McCartney, 8 Pa. Dist. 110.

3. Mead *v.* Sommers, 2 Dem. Surr. (N. Y.) 296.

4. See Schrafft *v.* Wolters, 61 N. J. Eq. 467, 48 Atl. 782.

5. Pierpont *v.* Threlkeld, 13 Tex. 244.

6. Matter of O'Brien, 34 Misc. (N. Y.) 436, 69 N. Y. Suppl. 1022, holding further that an answer by such foreign administrator that he has not possession of any assets in the state, and that as to the assets in the foreign state he is entitled to possession, is insufficient where it does not set out the extent of his special title or describe correctly the property.

7. O'Dee *v.* McCrate, 7 Me. 467, thirty years. But *compare* Matter of Cunard, 6 N. Y. Suppl. 883, 2 Connoly Surr. (N. Y.) 16.

8. Donley *v.* Cundiff, 35 Tex. 741.

9. Perrin *v.* Judge Calhoun County Cir. Ct., 49 Mich. 342, 13 N. W. 767, partnership books.

10. Mulvihill *v.* White, 89 Ill. App. 88; Matter of Richardson, 31 Misc. (N. Y.) 666, 66 N. Y. Suppl. 94.

11. Simmons *v.* Simmons, 33 Gratt. (Va.) 451.

12. Pease *v.* Pease, 8 Metc. (Mass.) 395.

13. See *infra*, VI, I.

14. Williams *v.* Conley, 20 Ill. 643; Dinsmoor *v.* Bressler, 56 Ill. App. 207; Matter of Cunard, 6 N. Y. Suppl. 883, 2 Connoly Surr. (N. Y.) 16 [*affirmed* in 4 Silv. Supreme 409, 7 N. Y. Suppl. 553].

Extent of right.— When the administrator is given an opportunity to examine documents in the possession of a third person which tend to disclose decedent's interest in property, he obtains all that he is entitled to, and the person in possession of the documents cannot be compelled to furnish a schedule of them and a description of their character. Manly *v.* Washtenaw County, 99 Mich. 441, 58 N. W. 367.

15. Ives' Appeal, 28 Conn. 416; Williams *v.* Conley, 20 Ill. 643; Matter of Stewart, 77 Hun (N. Y.) 564, 28 N. Y. Suppl. 1048; Matter of Knittel, 5 Dem. Surr. (N. Y.) 371. See also Wilson *v.* Ruthrauff, 82 Mo. App. 435.

16. Moss *v.* Sandefur, 15 Ark. 381; Johnson *v.* Johnson, 82 Mo. App. 350; *In re* Curry, 25 Hun (N. Y.) 321; Matter of Carey, 11 N. Y. App. Div. 289, 42 N. Y. Suppl. 346; Summerfield *v.* Howie, 2 Redf. Surr. (N. Y.) 149; Public Administrator *v.* Ward, 3 Bradf. Surr. (N. Y.) 244.

17. *Ex p.* Casey, 71 Cal. 269, 12 Pac. 118; O'Dee *v.* McCrate, 7 Me. 467; Dodge *v.* McNeil, 62 N. H. 168; Saddington *v.* Hewitt, 70 Wis. 240, 35 N. W. 552.

order the property in question to be delivered to the executor or administrator, where it finds as a fact that the property belongs solely to the estate, although not otherwise.[18]

E. Parties. The executor or administrator, or in case of joint letters, both or all of the co-executors or co-administrators, should be parties to such proceedings.[19] The heirs are not necessary parties to a bill by an administrator praying an account from alleged agents of the decedent.[20]

F. Citation. Citation or summons should issue and all subsequent proceedings must await its return.[21]

G. Petition or Affidavit. A petition or affidavit for the examination of one charged with withholding assets is naturally based upon information and belief, and the allegations thereof are liberally regarded.[22]

H. Answer or Demurrer. An answer may be filed,[23] the immediate effect of which may be to render a dismissal necessary,[24] but a purely technical demurrer should be overruled.[25]

I. Hearing and Examination.[26] Proceedings of this kind are to be deemed special proceedings; and a probate court once acquiring jurisdiction retains it until the proceeding has been finally disposed of or regularly discontinued.[27] The distributees of the estate cannot file interrogatories to the person cited where the executor or administrator fails to do so.[28] The interrogatories and answers are sometimes required to be in writing,[29] but under other statutes the court has the right to allow the person cited to be examined under oath and may believe and act on his uncontradicted statements.[30] The court is authorized merely to examine a person suspected of having wrongfully taken possession of goods belonging to the decedent, and cannot try and determine the question whether such person has taken wrongful possession as an issue of fact upon general evidence.[31] A person cited for examination has the right to counsel.[32] Attachment and imprisonment are compulsory means sometimes sanctioned by statute, where the defendant fails inexcusably to appear and submit himself, or refuses to answer questions lawfully propounded to him.[33]

J. Dismissal. Where it appears by answer or on examination that the situation is not within the scope of the statutory proceedings, as where there is a mere indebtedness or an admitted possession of property under a claim of rightful title,

Statute authorizing search and seizure unless security given unconstitutional.— *In re* Beebe, 20 Hun (N. Y.) 462.

18. Tilton *v.* Ormsby, 10 Hun (N. Y.) 7; Mapes *v.* Fleming, 6 N. Y. St. 668; Gaffney *v.* Public Administrator, 4 Dem. Surr. (N. Y.) 223.

Property to be delivered should be specified with certainty. Mahoney *v.* People, 98 Ill. App. 241.

19. *In re* Slingerhead, 36 Hun (N. Y.) 575.

20. Sturgeon *v.* Burrall, 1 Ill. App. 537.

21. *In re* Paramore, 15 N. Y. St. 449; Mauran *v.* Hawley, 2 Dem. Surr. (N. Y.) 396.

22. Blair *v.* Sennott, 134 Ill. 78, 24 N. E. 969; Walsh *v.* Downs, 3 Dem. Surr. (N. Y.) 202; Sadington *v.* Hewitt, 70 Wis. 240, 35 N. W. 552.

Form of petition see Saddington *v.* Hewitt, 70 Wis. 240, 35 N. W. 552.

Time for objection.— Objections to the statements in such an affidavit ought to be urged by defendant before submitting himself to a trial, since otherwise he is assumed to waive all defects. Wade *v.* Pritchard, 69 Ill. 279.

Amendment.— One's affidavit as petitioner may be amended, where he finds himself misinformed, and any order subsequently made can refer only to the amended affidavit. Blair *v.* Bennett, 134 Ill. 78, 24 N. E. 969.

23. See Basch's Estate, 24 N. Y. Civ. Proc. 264, 33 N. Y. Suppl. 424.

In proceedings by the public administrator for discovery under the New York statute no answer is contemplated. *In re* Paramore, 15 N. Y. St. 449.

24. See Basch's Estate, 24 N. Y. Civ. Proc. 264, 33 N. Y. Suppl. 424; and *infra*, VI, J.

25. Markle's Estate, 4 Pa. Dist. 348.

26. See *supra*, VI, D.

27. Spreen's Estate, 1 N. Y. Civ. Proc. 375, holding that the proceeding is not thrown out of court by a failure to adjourn it to a given day, but the party is not bound to further appear and testify unless his examination has been duly adjourned and his witness' fees paid.

28. Brotherton *v.* Spence, 52 Mo. App. 664.

29. Palmer *v.* Jackson County, 90 Mich. 1, 50 N. W. 1086.

30. Kraher *v.* Launtz, 90 Ill. App. 496.

31. Rickman *v.* Stanton, 32 Iowa 134.

32. Martin *v.* Clapp, 99 Mass. 470.

33. Welsh *v.* Lloyd, 5 Ark. 367.

the proceedings should be dismissed,[34] and the same action is proper where the court is unable to decide whether or not the property belongs to the estate.[35]

K. Appeal. From proceedings of the present character an appeal will usually lie as in other cases.[36]

L. Proceedings Against Executor or Administrator. The summary process for discovery given by local codes may sometimes be invoked against the personal representative himself, if he be suspected of embezzlement or conversion; and statutes are sometimes specific in making such provision.[37]

VII. COLLECTION OF ASSETS.

A. Authority and Duty in General. It is a primary duty of the executor or administrator, to the performance of which his authority of course extends, to collect the assets of the estate, whether corporeal or incorporeal,[38] for the

34. Matter of Peyser, 35 N. Y. App. Div. 447, 54 N. Y. Suppl. 832; Matter of Lynch, 83 Hun (N. Y.) 39, 31 N. Y. Suppl. 767; *In re* Wing, 41 Hun (N. Y.) 452; Matter of McCarthy, 47 N. Y. Suppl. 1127, 26 N. Y. Civ. Proc. 397; Matter of Nay, 19 N. Y. St. 259, 6 Dem. Surr. (N. Y.) 346; Masterton's Estate, 6 Dem. Surr. (N. Y.) 460, 3 N. Y. Suppl. 209; Public Administrator *v.* Elias, 4 Dem. Surr. (N. Y.) 139; Metropolitan Trust Co. *v.* Rogers, 1 Dem. Surr. (N. Y.) 365.

The surrogate cannot continue the proceedings after the filing of an answer stating that the person sought to be examined is the owner of the property. Basch's Estate, 33 N. Y. Suppl. 424, 24 N. Y. Civ. Proc. 264.

Answers held not sufficient to warrant dismissal.— See O'Brien *v.* Baker, 65 N. Y. App. Div. 282, 72 N. Y. Suppl. 1001; Matter of Peyser, 35 N. Y. App. Div. 447, 54 N. Y. Suppl. 832; Hastings' Estate, 2 N. Y. Suppl. 22, 6 Dem. Surr. (N. Y.) 423.

35. Saddington *v.* Hewitt, 70 Wis. 240, 35 N. W. 552.

36. Grimes *v.* Hilliary, 38 Ill. App. 246; *In re* Behren, 104 Iowa 29, 73 N. W. 351; McFeely *v.* Scott, 128 Mass. 16. But see Palmer *v.* Jackson County, 90 Mich. 1, 50 N. W. 1086.

37. *Alabama.*— Blakey *v.* Blakey, 9 Ala. 391.

Connecticut.— Case's Appeal, 35 Conn. 115.

Maine.— O'Dee *v.* McCrate, 7 Me. 467.

Missouri.— Stewart *v.* Glenn, 58 Mo. 481.

New Jersey.— Perrine *v.* Petty, 34 N. J. Eq. 193.

See 22 Cent. Dig. tit. "Executors and Administrators," § 345.

Equity may take jurisdiction to compel a discovery of assets by an administrator where an execution is returned "no property found," and no inventory of the estate has been returned. Pilkington *v.* Gaunt, 5 Dana (Ky.) 410.

Affidavit — Variance.— After the filing of interrogatories and answers thereto, it is immaterial that the affidavit only charged the concealing of assets, whereas the interrogatories and answers did not refer to the concealing of assets, but only to the withholding of the same. Tygard *v.* Falor, 163 Mo. 234, 63 S. W. 672.

Burden of proof as to gift.— In proceedings against an executor for withholding assets, where defendant admits having received money alleged to have been withheld, but states that it was a gift to him, the burden is on him to establish such fact. Tygard *v.* Falor, 163 Mo. 234, 63 S. W. 672.

Instructions.— In proceedings against an executor to recover assets alleged to have been withheld, where the executor claims that such property was given to him by his testator, an instruction that if deceased gave it during his lifetime to the executor he was not required to inventory it was as favorable to defendant as the facts authorized. Tygard *v.* Falor, 163 Mo. 234, 63 S. W. 672.

Where the court finds in the executor's favor after his examination under oath in a proceeding against him to discover assets, he is entitled to an immediate dismissal without further examination of himself or other witnesses. *In re* Stuart, 67 Mo. App. 61.

38. See Schouler Ex. § 264; McCargar *v.* McKinnon, 15 Grant Ch. (U. C.) 361.

In discovering assets an administrator is bound to know his intestate's last domicile, the place where his assets are presumed to be, and where the principal administration should be. McNichol *v.* Eaton, 77 Me. 246.

Personal interest of the representative in assets does not affect his right to recover them. Trimmier *v.* Thomson, 10 S. C. 164.

Administrator entitled to possession of bond in which he is obligor.— Halstead *v.* McChesney, 2 Abb. Dec. (N. Y.) 310, 2 Keyes (N. Y.) 92 [*affirming* 50 Barb. 34].

Property conveyed by distributees.—Where there are no creditors of an estate, and the distributees have conveyed a good equitable title to slaves belonging to the intestate, at a time when no administration has been granted, equity will restrain a subsequent administrator from prosecuting trover for the conversion of the slaves against the equitable owner. Miles *v.* Wise, 11 Rich. Eq. (S. C.) 536, 78 Am. Dec. 461.

Right of administrator to decide as to ownership.— Where an agent credited the account of a husband with the proceeds of the sale of certain land belonging to the wife, and turned the sum over to the administrator of the husband, the administrator had the right to determine for himself whether the

benefit both of the creditors and of the next of kin or legatees.[39] In general he has the right to and should take into his possession or custody all personal chattels,[40] even though specifically bequeathed,[41] and proceed to collect all debts or claims due the estate.[42] Wherever assets come to the possession or knowledge of the personal representative, he becomes liable to account for the same satisfactorily or else stand chargeable in the probate court with its full value,[43] although it is otherwise where no knowledge of the thing is brought home to him.[44] The collection and gathering into possession of the assets of an estate call often for

fund belonged to the estate of his decedent, and properly refused to be governed by the credit made by the agent. Pattison *v.* Coons, 56 Mo. 169.

Acceptance of certificate of stock indorsed subject to lien.— An administrator has authority to accept a certificate of corporate stock owned by his intestate, although it bears an indorsement by the corporation purporting to charge it with a lien for an indebtedness by decedent, since, if unauthorized, such indorsement is a nullity. Van Liew *v.* Barrett, etc., Beverage Co., 144 Mo. 509, 46 S. W. 202.

39. Fortunato *v.* New York, 31 N. Y. App. Div. 271, 52 N. Y. Suppl. 872 [*reversing* 23 Misc. 82, 50 N. Y. Suppl. 429]. See also Lore *v.* Dierkes, 16 Abb. N. Cas. (N. Y.) 47, holding that where an administrator sets aside a conveyance by his decedent because made under undue influence, the recovery will be for the next of kin as well as for the creditors.

40. Bohrer's Estate, 7 Pa. Dist. 307.

Adverse possession by surviving widow or next of kin, while there was no administration taken out, does not bar the administrator's right, when appointed, to claim the assets. Whit *v.* Ray, 26 N. C. 14.

Where a decedent leaves property in the sheriff's custody under attachment, the circuit court may require the sheriff to turn the property over to the administrator. Kendrick *v.* Huff, 71 Mo. 570.

An administrator is not necessarily entitled to recover all personal estate of which his intestate died seized. Reeves *v.* Matthews, 17 Ga. 449.

41. Bohrer's Estate, 7 Pa. Dist. 307; Perry *v.* Meddowcraft, 4 Beav. 197, holding that it is the duty of executors to get in property specifically bequeathed at the expense of the general estate.

When legatee permitted to retain possession.— Where certain chattels are in the possession of a son to whom they were bequeathed, and a manual delivery would entail hardship, and it is doubtful whether the chattels will be needed for payment of debts, the legatee will be permitted, upon giving a refunding bond, to have the custody thereof, subject to be delivered if needed to pay debts. Bohrer's Estate, 7 Pa. Dist. 307.

42. See Craig *v.* Moorhead, 44 Pa. St. 97.

Executor authorized to collect claims until discharged or estate closed.— Keane *v.* Goldsmith, 14 La. Ann. 349.

Forbearance enjoined by will.— Whether an executor should be compelled to observe directions contained in a will to forbear the collection of a debt due the testator for a specified time depends on the condition of the estate, and he cannot be compelled to do so unless his refusal is a violation of his trust; and such question cannot be determined in a law action. Howze *v.* Davis, 76 Ala. 381.

Money received by others should be accounted for to the representative, however expended. Pate *v.* Oliver, 104 N. C. 458, 10 S. E. 709; Griffin *v.* Simpson, 33 N. C. 126; Springer's Appeal, 29 Pa. St. 208.

Debts due from the United States have no locality, and an administrator may receive a debt from the United States wherever the government elects to pay it and is liable to account therefor only to the court from which he received his appointment. Vaughan *v.* Northrup, 15 Pet. (U. S.) 1, 10 L. ed. 639.

Letters granted in the District of Columbia on the assets of a deceased non-resident within the District authorize the administrator to receive and receipt for moneys due his intestate in the treasury of the United States at Washington. U. S. *v.* Wyman, 2 Mackey (D. C.) 368.

Revival of dormant judgment.— An administrator of a judgment creditor cannot revive the judgment after such a lapse of time as would bar the right of the decedent, were he living, to revive it. Palmer *v.* Jones, 50 Miss. 657.

Enforcing contribution.— Notes executed jointly by a decedent and another, and which have been allowed against and paid in full by the administrator, must, in the absence of any showing to the contrary, be presumed to be what they purport to be, joint debts created for the equal benefit of the parties, and the administrator should use all reasonable efforts to enforce contribution. The burden of proof is on him to show that he did so, or to show that there was in fact no liability to the estate. Myers *v.* Myers, 98 Mo. 262, 11 S. W. 617.

Difficulty of collecting arrears of rent does not excuse executors for not collecting them, without some evidence that in fact they could not have been recovered. *In re* Alexander, 13 Ir. Ch. 137.

43. Milam *v.* Ragland, 19 Ala. 85; Duffy *v.* Neale, 7 Fed. Cas. No. 4,119, Taney 271. See also Grubb *v.* Henderson, 1 Rob. (La.) 4; Longbottom *v.* Babcock, 9 La. 44.

44. Malinda *v.* Gardner, 24 Ala. 719; Jones *v.* Ward, 10 Yerg. (Tenn.) 160. See also Grubb *v.* Henderson, 1 Rob. (La.) 4.

the aid or interposition of the courts of common law or equity,[45] and statutes sometimes give a certain jurisdiction in these matters to the probate courts;[46] but the representative cannot be authorized by the court to take possession of any property of which the title or right of possession is not in the estate of his decedent.[47]

B. Attempting Collection by Suit. An executor or administrator has of course the right to sue on debts due to or claims of his decedent or the estate,[48] and the rule of reasonable diligence and good faith[49] applies to the decision of the representative as to attempting collection of claims or debts by suit.[50] He is not bound to attempt the collection of bad debts nor to sue on doubtful claims at the undue risk or waste of the estate or of his private means,[51] at least without being indemnified for the costs and expenses of suit,[52] but he should sue where

45. Leigh *v.* Everheart, 4 T. B. Mon. (Ky.) 379, 16 Am. Dec. 160.

46. See Blair *v.* Sennott, 134 Ill. 78, 24 N. E. 969.

47. Longbottom *v.* Babcock, 9 La. 44; Crescent City Ice Co. *v.* Stafford, 6 Fed. Cas. No. 3,387, 3 Woods 94.

48. See Sanders *v.* Devereux, 25 Tex. Suppl. 1; Marshall *v.* Dorsett, 16 Fed. Cas. No. 9,128, 4 Cranch C. C. 696.

Entire fund recoverable.— A petitioner, as administratrix, represents not only herself but other legatees entitled to participate in a fund, in a proceeding to recover such fund from the administrator of another estate, and is entitled to recover not only her own share but the entire fund for subsequent administration by her. Matter of Post, 30 Misc. (N. Y.) 551, 64 N. Y. Suppl. 369.

Judgment.— In a suit by an executor upon a receipt given by defendant for notes which upon their face are payable to plaintiff's testator, judgment for the restoration of the claims, and such sums as defendant received upon them since the date of the receipt, and an order of reference to ascertain the amount, with interest, were proper. Knight *v.* Killebrew, 86 N. C. 400.

A public administrator who has unlawfully taken charge of an estate cannot sue to recover the assets. Lewis *v.* McCabe, 76 Mo. 307.

Widow cannot sue. Sanders *v.* Devereux, 25 Tex. Suppl. 1.

Funds placed in agent's hands by decedent. — Where money is placed with an agent, with instructions, for a particular purpose, and such agent has acted in pursuance of such instructions, the administrator of the person so placing the fund cannot sustain an action against such agent for the particular fund, as the administrator had no greater rights than his intestate, who would have had no right of action against such agent, unless he had refused, on demand made, to account for the fund. Simpson *v.* Barry, 2 McMull. (S. C.) 369.

49. See *infra*, VIII, A, 1.

50. Orr *v.* Orr, 34 S. C. 275, 13 S. E. 467; Lupton *v.* Janney, 15 Fed. Cas. No. 8,607, 5 Cranch C. C. 474 [*affirmed* in 13 Pet. 381, 10 L. ed. 210].

If he takes professional advice and follows it, his course is better justified as to a suit.

51. *Alabama.*— Bowen *v.* Montgomery, 48 Ala. 353.

New York.— Gifford *v.* Carrigan, 117 N. Y. 275, 22 N. E. 756, 15 Am. St. Rep. 508, 6 L. R. A. 610. But see Matter of Hosford, 27 N. Y. App. Div. 427, 50 N. Y. Suppl. 550.

Pennsylvania.— Neff's Appeal, 57 Pa. St. 91.

South Carolina.— Martin *v.* Jefcoat, 10 Rich. Eq. 118.

Virginia.— Lovett *v.* Thomas, 81 Va. 245; Mitchell *v.* Trotter, 7 Gratt. 136.

See 22 Cent. Dig. tit. "Executors and Administrators," § 363.

52. *Alabama.*— Munden *v.* Bailey, 70 Ala. 63.

Florida.— Sherrell *v.* Shepard, 19 Fla. 300.

Georgia.— Roberts *v.* Summers, 47 Ga. 434.

Illinois.— Egan *v.* Clark, 87 Ill. App. 246.

Kentucky.— Thomas *v.* White, 3 Litt. 177, 14 Am. Dec. 56.

Louisiana.— Pool's Succession, 14 La. Ann. 677.

New Hampshire.— Sanborn *v.* Goodhue, 28 N. H. 48, 59 Am. Dec. 398; Griswold *v.* Chandler, 5 N. H. 492.

New York.— Matter of Johnston, 74 Hun 618, 26 N. Y. Suppl. 966 [*affirmed* in 144 N. Y. 563, 39 N. E. 643]; Shultz *v.* Pulver, 3 Paige 182; Collamer *v.* Smith, 2 Dem. Surr. 147; Hepburn *v.* Hepburn, 2 Bradf. Surr. 74.

North Carolina.— Patterson *v.* Wadsworth, 89 N. C. 407.

Pennsylvania.— Charlton's Appeal, 34 Pa. St. 473, 75 Am. Dec. 673; Keller's Appeal, 8 Pa. St. 288, 49 Am. Dec. 516.

West Virginia.— Harris *v.* Orr, 46 W. Va. 261, 33 S. E. 257, 76 Am. St. Rep. 815.

United States.— Lupton *v.* Janney, 13 Pet. 381, 10 L. ed. 210 [*affirming* 15 Fed. Cas. No. 8,607, 5 Cranch C. C. 474].

See 22 Cent. Dig. tit. "Executors and Administrators," § 363.

Where a perfect defense exists the administrator is not required to sue. Egan *v.* Clark, 87 Ill. App. 246; Matter of Johnston, 74 Hun (N. Y.) 618, 26 N. Y. Suppl. 966 [*affirmed* in 144 N. Y. 563, 39 N. E. 643].

there is a fair chance to realize something by that course,[53] and it is his duty to litigate a claim of the estate where parties interested in the estate demand this and indemnify him for any expense which may be incurred.[54]

C. Proceedings For Recovery of Assets.[55] The representative has necessarily the right to institute and maintain such proceedings as may be necessary for the recovery of the assets of the estate,[56] and in some states the statutes provide for summary proceedings for recovering assets withheld, concealed, or embezzled, by complaint in the probate court.[57] Such statutes have been held to be applicable

53. Jennings *v.* Weeks, 1 Rice (S. C.) 452.

Duty to enforce judgment.— Where a judgment assigned to a decedent appears valid on its face, it is the duty of the administrator to enforce it, and he cannot justify his failure to do so on the ground that land had been conveyed to deceased in payment of such judgment. Egan *v.* Clark, 87 Ill. App. 246.

54. Griswold *v.* Chandler, 5 N. H. 492.

55. **Proceedings for discovery** see *supra*, VI.

56. See Schouler Ex. § 269.

A demand is not necessary before the institution of a suit by an administrator to recover personal property of the decedent held by a transferee under color of title by gift. Knight *v.* Tripp, (Cal. 1897) 49 Pac. 838. Neither is any demand necessary to the maintenance of a suit either at law or in equity to recover money of the estate from a third person whose receipt thereof was wrongful *ab initio*. Marshall *v.* De Cordova, 26 N. Y. App. Div. 615, 50 N. Y. Suppl. 294.

License to sell particular real estate.— An executor, licensed by the probate court to sell for the payment of debts certain real estate conveyed by his testator in fraud of creditors, may maintain a writ of entry to recover it, without first selling the other real estate of his testator. Tenney *v.* Poor, 14 Gray (Mass.) 500, 77 Am. Dec. 340.

Jurisdiction and venue.— In Kentucky an action by a personal representative to recover possession of land of his decedent is properly brought in the county in which the representative qualified, even though the land be situated and the person in possession thereof resides in another county. De Haven *v.* De Haven, 104 Ky. 41, 46 S. W. 215, 47 S. W. 597, 20 Ky. L. Rep. 663.

Burden of proof.— Where, in a suit by an executor against a third person to recover moneys belonging to the estate, it is established that the money was received by defendant under circumstances imputing notice to him of its origin, the burden is upon defendant to show that such payments had been made as absolve him from accounting to the estate for its property which he has wrongfully received. Marshall *v.* De Cordova, 26 N. Y. App. Div. 615, 50 N. Y. Suppl. 294.

Evidence.— In an action by an administrator for possession of notes of his decedent, assessment lists made by decedent in his life would be competent evidence, as tending to prove ownership of the property listed. McAfee *v.* Montgomery, 21 Ind. App. 196, 51 N. E. 957.

Defenses.— It is no defense to an action brought by an administrator, to recover assets of the estate in the hands of defendant, or for the conversion thereof, that plaintiff has in his individual capacity been guilty of wrong-doing. Lawyers' Surety Co. *v.* Reinach, 23 Misc. (N. Y.) 242, 51 N. Y. Suppl. 162. In an action by an administrator to recover land of his decedent, an averment by defendant that such land "is held and claimed by her as her own, and was so held and claimed by her prior to the institution of this action" is not a sufficient averment of either title or ownership to constitute a defense or to divest the court of jurisdiction. De Haven *v.* De Haven, 104 Ky. 41, 45, 46 S. W. 215, 47 S. W. 597, 20 Ky. L. Rep. 663.

Set-off.— Where property of a decedent was retained by defendant, who boarded and nursed her prior to her death, and there was no sufficient evidence showing the amount or value of the property, and defendant in answer to the administrator's claim therefor claimed a large amount for boarding and nursing decedent and for property necessarily destroyed on account of her sickness, but there was no evidence of the value of the property, or of the amount defendant was entitled to for nursing, it was proper to set off one claim against the other and dismiss both bills. Cates *v.* Gilmer, (Tenn. Ch. App. 1898) 48 S. W. 280.

Acceptance of reparation for conversion.— Where certain bonds belonging to an estate were exchanged by intestate's husband for other bonds, which latter bonds were delivered to the administrator and retained by him with knowledge of the transaction and without any effort to return them, an assumption that the latter bonds were accepted by the administrator as a *pro tanto* reparation for the conversion of the original bonds was justified, and in estimating the damages for the conversion the value of the substituted bonds should be considered. Storrs *v.* Robinson, 74 Conn. 443, 51 Atl. 135.

Where the probate of a will has been set aside the property of the deceased vests in the administrator and he can recover it from any one in possession, or its value from any one who has sold it. Poag *v.* Miller, Dudley (S. C.) 11.

57. Moore's Succession, 18 La. Ann. 512; Taylor *v.* Bruscup, 27 Md. 219; Eans *v.* Eans, 79 Mo. 53 (holding that under the Missouri statute providing for the recovery of assets of a decedent's estate where "any person has concealed or embezzled any goods, chattels, money, papers or evidence of debt of the deceased, and has them in his possession or under his control," recovery may be had even

only where the person brought before the court has actual possession of or control over the property alleged to be embezzled or concealed,[58] and to be limited to property remaining unchanged and in specie.[59] While the probate court has not always under such statutes jurisdiction to determine the ultimate right to the property,[60] an order requiring the delivery of property to the administrator is *prima facie* evidence of his right to recover the same.[61] An order for the surrender of property may be enforced by a commitment to jail until compliance.[62]

D. Possession or Transfer by Heirs or Distributees. While an executor or administrator in general takes title to the personal property of his decedent, such title is nevertheless the title of a trustee for creditors and those beneficially entitled; and hence where property is rightfully in the hands of heirs, distributees, or other residuary parties, the courts are not disposed to aid him to dispossess such persons unless he can show that he needs the assets for paying debts or otherwise duly administering the estate.[63] And so too, while the sale of personal property of a decedent by his widow or other residuary beneficiary may be disturbed and the assets or their value pursued by the executor or administrator, when needful to settle debts of the estate, intervention on his part is not favored where no need therefor is shown.[64]

where such person openly holds under claim of title); Matter of Scott, 34 Misc. (N. Y.) 446, 70 N. Y. Suppl. 425.

Double penalty recoverable for wrongful alienation.— Spaulding *v.* Cook, 48 Vt. 145.

The orphans' court has jurisdiction to appoint an examiner to take testimony where the claim that respondent is in possession of personal property belonging to an estate is denied by answer. Friedman's Estate, 7 Pa. Dist. 517, 21 Pa. Co. Ct. 309.

Against whom judgment obtainable.— Under the Ohio statute an executor or administrator can recover judgment against any person charged with the concealing or embezzling of assets of the estate, but not against any person aiding or assisting the person so charged in obtaining possession thereof. *In re* Sattler, Ohio Prob. 183.

Proceeding commenced by person without interest.— Where a person not shown to have any interest in an estate files an affidavit charging another person with embezzling the property of a decedent, and defendant appeals to the circuit court, the administrator cannot there for the first time appear and file a new affidavit and compel the party accused to proceed to trial thereon. Shaw *v.* Groomer, 60 Mo. 495.

The statute is not applicable in the case of an attorney for a decedent's estate who has collected money on a claim due the estate while acting in the employ of the administrator. Dinsmoor *v.* Bressler, 164 Ill. 211, 45 N. E. 1086.

58. Howell *v.* Howell, 37 Mo. 124; Dameron *v.* Dameron, 19 Mo. 317.

59. *In re* Wolford, 10 Kan. App. 283, 62 Pac. 731. *Contra*, Dinsmoor *v.* Bressler, 164 Ill. 211, 45 N. E. 1086.

60. Hoehn *v.* Struttmann, 71 Mo. App. 399, holding that the court can determine only whether one holds under color of title.

Openness and notoriety of possession under a claim of title is not of itself a defense unless such claim is of a valid title and made in good faith. Gordon *v.* Eans, 97 Mo. 587, 4 S. W. 112, 11 S. W. 64, 370.

61. Bright *v.* Ecker, 9 S. D. 449, 69 N. W. 824.

62. Martin *v.* Martin, 170 Ill. 418, 48 N. E. 694 [*reversing* 68 Ill. App. 169].

63. *Connecticut.*— Woodhouse *v.* Phelps, 51 Conn. 521.

Illinois.— Lewis *v.* Lyons, 13 Ill. 117.

Indiana.— Raugh *v.* Weis, 138 Ind. 42, 37 N. E. 331.

Louisiana.— O'Neal *v.* Oakes, 8 La. Ann. 78. But see Boone's Succession, 7 La. Ann. 127.

New York.— Newton *v.* Stanley, 28 N. Y. 61; Toch *v.* Toch, 81 Hun 410, 30 N. Y. Suppl. 1003.

South Carolina.— Williams *v.* Mower, 29 S. C. 332, 7 S. E. 505.

Virginia.— Lewis *v.* Overby, 31 Gratt. 601.

See 22 Cent. Dig. tit. "Executors and Administrators," § 364.

But *compare* Bean *v.* Bumpus, 22 Me. 549; Carter *v.* Greenwood, 58 N. C. 410; Ferrell *v.* Underwood, 13 N. C. 111; *In re* Sattler, 10 Ohio Dec. (Reprint) 440, 21 Cinc. L. Bul. 161; Marsden's Appeal, 102 Pa. St. 199; Eisenbise *v.* Eisenbise, 4 Watts (Pa.) 134; King *v.* Morrison, 1 Penr. & W. (Pa.) 188.

Where some of the heirs have purchased property of the succession, and the other assets are sufficient to pay all the debts and charges due by the estate, the administratrix is not bound to take any steps to enforce the payment of the purchase-money due by the heirs, and consequently cannot be held liable for any loss or damage which may arise from such purchase, by insolvency or otherwise. Harrell's Succession, 12 La. Ann. 337.

Where such assets are needed for the payment of debts, it is the duty of the representative to use all possible diligence in obtaining possession of the same. O'Connor *v.* Gifford, 3 N. Y. Suppl. 207, 6 Dem. Surr. (N. Y.) 71.

64. Reid *v.* Butt, 25 Ga. 28; Wilmington

E. Payments to Heirs or Distributees. A person who pays a debt due to the decedent or delivers assets of the estate to the lawful heir or distributee does not thereby discharge his liability to the personal representative;[65] but the transaction will not readily be set aside or disturbed where no need appears for procuring such assets or holding such person again liable for the debt for the purposes of administration.[66]

F. Secured Claims. An executor or administrator may foreclose a mortgage by peaceable entry and possession or otherwise, just as his decedent might have done, wherever this becomes needful for realizing upon the secured debt or claim.[67] A representative who carelessly or dishonestly parts with security to a debtor of the estate renders himself liable for all ensuing loss to the estate.[68] Statutes in various jurisdictions provide for releasing mortgages upon payment of the secured debt.[69]

G. Interest on Debts. Interest-bearing debts due the estate are to be collected, with the usual observance of due diligence and good faith, with interest as well as principal.[70] The representative is liable for any interest which he may have collected on debts due the estate, and for default in collecting interest justly owing from a debtor the usual principle applies as to charging him individually with the loss.[71]

H. Foreign Assets. The general executor or administrator is bound to take due measures for the collection of foreign demands due the estate and other foreign assets;[72] and wherever the general representative may enforce by domestic

v. Sutton, 6 Iowa 44; Walworth *v.* Abel, 52 Pa. St. 370. But see Davis *v.* Davis, 30 Ga. 296.

65. McCustian *v.* Ramey, 33 Ark. 141; Tucker *v.* Ronk, 43 Iowa 80.

Distributees have no power to compromise a suit brought by the executor or administrator. Lewis *v.* Brooks, 6 Yerg. (Tenn.) 167.

A practice of the post-office department to pay small amounts to widows or children without requiring administration does not justify a payment to the widow of a deceased postmaster of salary due him at the time of his death, where an administrator has been appointed and has filed an application for the adjustment of the decedent's salary. Holt *v.* U. S., 29 Ct. Cl. 36.

A release obtained from the heir while an administration properly exists is not a bar to the administrator's right to recover. Garman *v.* Shugar, 3 Lanc. L. Rev. (Pa.) 121.

Circumstances showing ratification by representative see Ruby *v.* Chesapeake, etc., R. Co., 8 W. Va. 269.

66. Vail *v.* Anderson, 61 Minn. 552, 64 N. W. 47; Langley *v.* Farrington, 66 N. H. 431, 27 Atl. 224, 49 Am. St. Rep. 624; Dolman *v.* Cook, 14 N. J. Eq. 56.

67. *Illinois.*— Scott *v.* Moore, 4 Ill. 306.

Maryland.— Chilton *v.* Brooks, 71 Md. 445, 18 Atl. 868; Harnickell *v.* Orndorff, 35 Md. 341.

New Hampshire.—Gibson *v.* Bailey, 9 N. H. 168.

New York.— *In re* Hobson, 131 N. Y. 575, 30 N. E. 63.

Virginia.— Wilson *v.* Barclay, 22 Gratt. 534.

See 22 Cent. Dig. tit. "Executors and Administrators," § 367.

68. *Alabama.*— Baldwin *v.* Hatchett, 56 Ala. 461; Willis *v.* Willis, 16 Ala. 652.

Missouri.— Booker *v.* Armstrong, 93 Mo. 49, 4 S. W. 724.

New Jersey.— Fisher *v.* Skillman, 18 N. J. Eq. 229.

New York.— Matter of Hunt, 3 N. Y. St. 346.

Virginia.— Nelson *v.* Page, 7 Gratt. 160.

See 22 Cent. Dig. tit. "Executors and Administrators," § 367.

69. Treadwell *v.* Brooks, 50 Conn. 262; Connecticut Mut. L. Ins. Co. *v.* Talbot, 113 Ind. 373, 14 N. E. 586, 3 Am. St. Rep. 655.

70. Borland *v.* Sharp, 1 Root (Conn.) 178; Roberts *v.* Prior, 20 Ga. 561; Findlay *v.* Smith, 7 Serg. & R. (Pa.) 264; Allen *v.* White, 17 Vt. 69.

When the representative has assumed debts of others they ought to be considered as paid to him, and he should, if they were not payable when assumed, be charged as of the time when they became payable. McCall *v.* Peachy, 3 Munf. (Va.) 288.

71. *Indiana.*— Ray *v.* Doughty, 4 Blackf. 115.

Kentucky.— Oldham *v.* Collins, 4 J. J. Marsh. 49.

Louisiana.— Kemp *v.* Kemp, 11 La. 19.

Missouri.— Stong *v.* Wilkson, 14 Mo. 116.

New York.— Stephens' Estate, 2 N. Y. Suppl. 36.

Virginia.— Cavendish *v.* Fleming, 3 Munf. 198.

See 22 Cent. Dig. tit. "Executors and Administrators," § 369; and *infra*, VIII, L.

Representative chargeable with interest unless he shows that he received none.—Graham *v.* Davidson, 22 N. C. 155.

72. Bingham *v.* Marine Nat. Bank, 112 N. Y. 661, 19 N. E. 416; Schultz *v.* Pulver, 11 Wend. (N. Y.) 361; Shinn's Estate, 166 Pa. St. 121, 30 Atl. 1026, 1030, 45 Am. St. Rep. 656; Pulliam *v.* Pulliam, 10 Fed. 23.

suit the payment of a debt due from a foreign debtor by means of the voucher or document of title he holds, or because the debtor may be locally reached by process without resorting to the courts where such debtor is domiciled, such suit by him will be locally upheld.[73]

I. Property Claimed by Third Persons. Where an executor or administrator receives by mistake and applies as assets of the estate money or chattels belonging to another, the true owner may proceed against him personally, and the representative must at his peril regard notice of adverse claims of title and a demand.[74] As to property found among the assets and *prima facie* part of the estate the representative should assert title so far as may be proper;[75] but with respect to litigating the title of his decedent to property claimed by third persons, the usual rule of honest and prudent discretion applies.[76] Wherever possible the court will summarily compel the representative to deliver such money or property to the true owner, or at any time before distribution permit the sum due the rightful claimant to be withdrawn and paid over.[77]

J. Receiving Payment — 1. In General. The *bona fide* payment of a debt due the estate to the executor or administrator is in general a legal discharge to the debtor, even though such appointment be voidable, or perhaps void, or the representative be insolvent, and the representative must account for the amount.[78] On the other hand a payment of assets to any one but the personal representative of the deceased is a mispayment.[79]

2. Medium of Payment — a. In General. In order to discharge a debt to a decedent, payment to the personal representative must usually be in lawful

Where the will names different executors for different jurisdictions the rule is otherwise. Sherman *v.* Page, 85 N. Y. 123.

Where joint debtors reside in different jurisdictions, an administrator in either may effectually settle and release the demand as against all of them. Beattie *v.* Abercrombie, 18 Ala. 9.

73. Equitable L. Assur. Soc. *v.* Vogel, 76 Ala. 441, 52 Am. Rep. 344; Barnes *v.* Brashear, 2 B. Mon. (Ky.) 380; Saunders *v.* Weston, 74 Me. 85.

74. *Alabama.*— Bettis *v.* Taylor, 8 Port. 564.

Arkansas.— McCustian *v.* Ramey, 33 Ark. 141.

Maine.— Thompson *v.* White, 45 Me. 445. But *compare* Woodward *v.* Perry, 85 Me. 440, 27 Atl. 345, holding that where an administrator had, as such, collected a judgment of commissioners of Alabama claims for war premiums alleged to have been paid by another person through the intestate, his liability, if there was any, was in his representative capacity only.

Mississippi.— Clayton *v.* Boyce, 62 Miss. 390, holding that an administrator who receives money not belonging to the estate is not liable to the owner in his representative capacity, unless the money has been appropriated to the use of the estate.

Vermont.— Blanchard *v.* Sheldon, 43 Vt. 512.

Virginia.— Newsum *v.* Newsum, 1 Leigh 86, 19 Am. Dec. 739.

See 22 Cent. Dig. tit. "Executors and Administrators," § 371.

75. Grounx *v.* Abat, 7 La. 17; Pickle *v.* Pickle, 10 N. J. L. J. 207; Mulford *v.* Mulford, 40 N. J. Eq. 163.

76. Chappell *v.* Brown, 1 Bailey (S. C.) 528. And see *infra*, VIII, A, 1.

77. Marston *v.* Paulding, 10 Paige (N. Y.) 40; Brink *v.* Layton, 2 Redf. Surr. (N. Y.) 79; Brubaker's Estate, 4 Lanc. Bar (Pa.) 90.

78. *Kentucky.*— Moore *v.* Tanner, 5 T. B. Mon. 42, 27 Am. Dec. 35.

Mississippi.—Riley *v.* Moseley, 44 Miss. 37.

North Carolina.— London *v.* Wilmington, etc., R. Co., 88 N. C. 584; Hyman *v.* Gaskins, 27 N. C. 267.

Tennessee.— Bowers *v.* Thomas, 6 Heisk. 553.

Texas.— Roan *v.* Raymond, 15 Tex. 78.

United States.— Kane *v.* Paul, 14 Pet. 33, 10 L. ed. 311.

See 22 Cent. Dig. tit. "Executors and Administrators," § 374.

Receipt for money not actually received.— Where an intestate's effects were sold under an execution by a sheriff who, after satisfying the debts, etc., had a surplus in his hands, for which the administrator gave a receipt, although he never actually received the money, it was held that in whatever manner such surplus might have been applied the administrator must account for it, and unless he did so his security would be liable on his administration bond. Chouteau *v.* Hill, 2 Mo. 177.

Payment received by administrator after removal.— An administrator is chargeable on final settlement with money received by him after his removal from office from an attorney who had collected it on debts of the estate which had been placed in his hands for collection by the administrator before his removal. Sloan *v.* McKinney, 19 Ala. 115.

79. Eisenbise *v.* Eisenbise, 4 Watts (Pa.) 134.

money, or a legal tender currency, in the absence of any contrary direction in the will of the deceased creditor or the instrument evidencing the debt.[80]

b. Payment Otherwise Than in Money. It has been held that the executor or administrator, instead of receiving payment in money, may in the exercise of good faith and due prudence settle with the debtor by accepting other security or property or by novating or extending the claim,[81] although in some states the right of accepting other property in payment, except perhaps under authority of the probate court, is denied.[82]

c. Acceptance of Depreciated Currency. The executor or administrator will not be upheld in receiving payment in depreciated currency,[83] unless the circumstances show that he acted in good faith and with due prudence for the best interest of the estate.[84] Thus in regard to Confederate money, it has been held that when the representative might have collected the assets in good money before or after the Civil war and failed to do so, he cannot discharge the balance found due from him by payment in Confederate treasury notes,[85] but when he acted in good faith he is not responsible for the loss of funds received by him in Confederate money or notes which at the time he was obliged to accept.[86]

80. Means *v.* Harrison, 114 Ill. 248, 2 N. E. 64; Jackson *v.* Chase, 98 Mass. 286; Parham *v.* Stith, 56 Miss. 465; Rogers *v.* Tullos, 51 Miss. 685; Scott *v.* Atchison, 36 Tex. 76.

Notes of bank subsequently failing.—Where an executor receives bank-notes, in good faith and with reasonable prudence, which are the genuine notes of a bank, solvent and paying at the time, the legatees are bound by his act, and cannot demand that he should submit specie in payment to them, although the bank failed in the meantime. Hasting's Estate, 4 Pa. L. J. Rep. 471, 10 Pittsb. Leg. J. 216.

81. *Georgia.*— Adams *v.* Reid, 56 Ga. 214.
Indiana.— Hancock *v.* Morgan, 34 Ind. 524.
Louisiana.— Turnbull *v.* Freret, 5 Mart. N. S. 703.
Massachusetts.— Gardiner *v.* Callender, 12 Pick. 374.
Mississippi.— Parham *v.* Stith, 56 Miss. 465; Anderson *v.* Gregg, 44 Miss. 170.
New Jersey.— Stark *v.* Hunton, 3 N. J. Eq. 300.
Vermont.— Blaisdell *v.* Stevens, 16 Vt. 179.
Canada.—McCargar *v.* McKinnon, 17 Grant Ch. (U. C.) 525.
See 22 Cent. Dig. tit. "Executors and Administrators," § 374.

82. *Illinois.*— Means *v.* Harrison, 114 Ill. 248, 2 N. E. 64.
Missouri.— Haynes *v.* Carpenter, 86 Mo. App. 30.
North Carolina.—Poston *v.* Jones, 122 N. C. 536, 29 S. E. 951; Grant *v.* Bell, 90 N. C. 558; Weir *v.* Pate, 39 N. C. 264, holding that where an executor takes land in payment of debts, it will be considered as a purchase of his own, and he will be charged with the price allowed by him for the land.
South Carolina.— Cook *v.* Cook, 24 S. C. 204, holding that an estate is not bound by an administrator's agreement to allow work done on the land as credit on a note due the estate.
Texas.— Atcheson *v.* Scott, 51 Tex. 213; Edmonson *v.* Garnett, 33 Tex. 250; Trammell *v.* Swan, 25 Tex. 473.
Virginia.— Harman *v.* McMullin, 85 Va. 187, 7 S. E. 349.
West Virginia.— Anderson *v.* Piercy, 20 W. Va. 282.
See 22 Cent. Dig. tit. "Executors and Administrators," § 374.

83. Hannah *v.* Boyd, 25 Gratt. (Va.) 692. See also Myrick *v.* Adams, 4 Munf. (Va.) 366.

Payment in continental money held good.— Hopkins *v.* Wilson, 2 Yeates (Pa.) 291.

84. Bailey *v.* Dilworth, 10 Sm. & M. (Miss.) 404, 48 Am. Dec. 760 (holding, however, that a decree of the probate court allowing an executor's account and charging him with a certain amount without qualification must be held to have intended constitutional currency and not depreciated issue); Hannah *v.* Boyd, 25 Gratt. (Va.) 692; Opie *v.* Castleman, 32 Fed. 511.

85. Horn *v.* Lockhart, 17 Wall. (U. S.) 570, 21 L. ed. 657 [*affirming* 15 Fed. Cas. No. 8,445, 1 Woods 628]; Lipse *v.* Spears, 88 Fed. 952.

86. *Alabama.*—Anderson *v.* Wynne, 62 Ala. 329; Hutchinson *v.* Owen, 59 Ala. 326; Morris *v.* Morris, 58 Ala. 443; McQueen *v.* McQueen, 55 Ala. 433.
Arkansas.— Jones *v.* Graham, 36 Ark. 383; Hendry *v.* Cline, 29 Ark. 414.
Georgia.— Brandon *v.* Rowe, 58 Ga. 536; Sharp *v.* Bonner, 36 Ga. 418.
Louisiana.— Lagarde's Succession, 20 La. Ann. 148.
North Carolina.— Currie *v.* McNeill, 83 N. C. 176; Whitley *v.* Alexander, 73 N. C. 444; Wells *v.* Sluder, 72 N. C. 435.
South Carolina.— Chick *v.* Farr, 31 S. C. 463, 10 S. E. 176, 390; Koon *v.* Monro, 18 S. C. 374; Manning *v.* Manning, 12 Rich. Eq. 410.
Tennessee.— Rockhold *v.* Blevins, 6 Baxt. 115; Dietz *v.* Mitchell, 12 Heisk. 676; Morris *v.* Morris, 9 Heisk. 814.
Texas.— Casey *v.* Turner, 32 Tex. 64.
Virginia.— Wimbish *v.* Rawlins, 76 Va. 48; Douglass *v.* Stephenson, 75 Va. 747; Williams *v.* Skinker, 25 Gratt. 507; Campbell *v.* Camp-

d. Payments Received in Gold at Premium. That a representative who receives payment in gold at a time when it is at a premium is chargeable with such premium has been both asserted[87] and denied.[88]

3. Extension of Time For Payment. It has been held that the representative may extend the time for payment of a debt due his decedent.[89]

4. Application of Payments.[90] A debtor of the estate cannot be required to see to the proper application of payments which he makes to the representative.[91] Where an executor or administrator receives money from a person who is indebted to the estate, he may, in case the debtor has not exercised his prior right, avail himself of the power to apply the payment,[92] but he must make the application to debts that are held in the same right as that in which he received the money; that is to say, when he receives the money in his fiduciary capacity he must apply it to the extinguishment of debts due the estate and cannot apply it to a debt due to him personally.[93] In case neither of the parties has made any application of the payment the law will apply it to the items of indebtedness to the estate which are oldest or least secure.[94]

K. Compromise of Claims — 1. Authority in General.[95] As incidental to the power to sue and collect, the executor or administrator has the right to compromise any demand of the decedent,[96] provided he acts honestly and within the

bell, 22 Gratt. 649. But *compare* Patteson *v.* Bondurant, 30 Gratt. 94.

West Virginia.— Estill *v.* McClintic, 11 W. Va. 399; Williams *v.* Buster, 5 W. Va. 342.

United States.— McKenzie *v.* Anderson, 16 Fed. Cas. No. 8,855, 2 Woods 357. But *compare* Opie *v.* Castleman, 32 Fed. 511.

See 22 Cent. Dig. tit. "Executors and Administrators," § 378.

When liable for scaled value.— Although an executor may not have made himself responsible by receiving in 1862 Confederate money for the distributees, yet, if he did not invest it when received, or make special deposit of it, or keep the identical money separate from all other, he will be liable for the then value of what was received. Shipp *v.* Hettrick, 63 N. C. 329.

When liable for full amount.— An administrator who received Confederate money in 1862, and does not, by his returns or on the trial of a suit commenced against him in 1871, give any explanation of what became of the money, or what he did with it, cannot complain of being held liable for the full amount so received, especially when the verdict is for four years' less interest than was due. King *v.* Newton, 48 Ga. 150.

87. *Ex p.* Glenn, 20 S. C. 64, holding that where the administrator received rents in gold when it was at a premium, he should be required to account at the premium rate, unless the gold was held for estate purposes until it depreciated without fault on his part.

Representative chargeable only with premium actually received.—Cunningham *v.* Cauthen, 37 S. C. 123, 15 S. E. 917, 44 S. C. 95, 21 S. E. 800.

88. Matter of Shipman, 82 Hun (N. Y.) 108, 31 N. Y. Suppl. 571.

89. Martin *v.* Tarver, 43 Miss. 517; Campbell *v.* Linder, 50 S. C. 169, 27 S. E. 648. *Contra*, Maddock *v.* Russell, 109 Cal. 417, 42 Pac. 225; Landry *v.* Delas, 25 La. Ann. 181.

90. See, generally, PAYMENT.

91. Becker's Estate, 13 Phila. (Pa.) 378; Wanner *v.* Roth, 1 Woodw. (Pa.) 13.

92. *In re* White, 13 Pa. Super. Ct. 201.

Draft on account of particular debt.— A debtor of a decedent upon whom the administrator draws an order to pay a certain sum to be credited on a particular debt has no right without the administrator's consent to so change the order as to make such payment on a different debt; and in case of his paying the order the law will apply it to the debt designated by the administrator. Long *v.* Miller, 93 N. C. 233.

93. *In re* White, 13 Pa. Super. Ct. 201. See also Evans' Estate, 1 Pa. Super. Ct. 37 (holding that an executrix who holds an individual claim and also a claim as executrix against the same person, and cannot collect both, must apply money received from him in payment of the claim due the estate in preference to her individual claim); *In re* Zuéidinger, 29 Pittsb. Leg. J. (Pa.) 63.

94. *In re* White, 13 Pa. Super. Ct. 201.

95. **Release of claims** see *infra*, VII, L.

96. *Alabama.*— Woolfork *v.* Sullivan, 23 Ala. 548, 58 Am. Dec. 305.

Arkansas.— Wilks *v.* Slaughter, 49 Ark. 235, 4 S. W. 766.

California.— Siddall *v.* Clark, 89 Cal. 321, 26 Pac. 829; Moulton *v.* Holmes, 57 Cal. 337. See also McKeeby *v.* Los Angeles, 125 Cal. 639, 58 Pac. 263.

Connecticut.— Johnson's Appeal, 71 Conn. 590, 42 Atl. 662.

Georgia.— Neal *v.* Lamar, 18 Ga. 746.

Illinois.— Washington *v.* Louisville, etc., R. Co., 136 Ill. 49, 26 N. E. 653.

Indiana.— Pittsburgh, etc., R. Co. *v.* Gipe, 160 Ind. 360, 65 N. E. 1034.

Iowa.— Jenkins *v.* Shields, 47 Iowa 708.

Michigan.— See *In re* Beecher, 113 Mich. 667, 72 N. W. 11.

Mississippi.— Bailey *v.* Dilworth, 10 Sm. & M. 404, 48 Am. Dec. 760; Berry *v.* Parkes, 3 Sm. & M. 625.

New York.— Chouteau *v.* Suydam, 21 N. Y.

range of a reasonable discretion for the true interests of the estate.[97] Nevertheless the responsibility is a perilous one,[98] and at common law the compromise or release of a debt or claim due the estate was regarded as a waste on the part of the personal representative if it resulted in a loss to the estate.[99] In modern times, however, the universal test is whether, in compromising, the representative acted with due prudence; if he did he is protected,[1] even though it seems probable that the settlement was not the best that could have been made,[2] while, if he

179; Auken *v.* Kiener, 9 N. Y. St. 669; Matter of Oatman, 5 N. Y. Leg. Obs. 378.

Pennsylvania.— Pusey *v.* Clemson, 9 Serg. & R. 204.

Rhode Island.— Parker *v.* Providence, etc., Steamboat Co., 17 R. I. 376, 22 Atl. 284, 23 Atl. 102, 33 Am. St. Rep. 869, 14 L. R. A. 414.

Tennessee.— Alexander *v.* Kelso, 3 Baxt. 311.

Virginia.— Boyd *v.* Oglesby, 23 Gratt. 674; McCall *v.* Peachy, 3 Munf. 288.

United States.— Jeffries *v.* New York Mut. L. Ins. Co., 110 U. S. 305, 4 S. Ct. 8, 28 L. ed. 156, holding that an administrator who has employed an attorney to prosecute a doubtful claim in favor of the estate may authorize the attorney to compromise the claim.

England.— *In re* Warren, 53 L. J. Ch. 1016, 51 L. T. Rep. N. S. 561, 32 Wkly. Rep. 916.

See 22 Cent. Dig. tit. "Executors and Administrators," § 384.

It is the representative's duty to compound and release the debt of the decedent when the interests of the estate require it. Matter of Oatman, 5 N. Y. Leg. Obs. 378.

Statutory power limited to claims existing at the time of death.— Fairbanks *v.* Mann, 19 R. I. 499, 34 Atl. 1112.

Claim for wrongfully causing death of decedent may be compromised. Hartigan *v.* Southern Pac. R. Co., 86 Cal. 142, 24 Pac. 851; Washington *v.* Louisville, etc., R. Co., 136 Ill. 49, 26 N. E. 653 [*affirming* 34 Ill. App. 658]; Brink's Express Co. *v.* O'Donnell, 88 Ill. App. 459; Pittsburgh, etc., R. Co. *v.* Gipe, 160 Ind. 360, 65 N. E. 1034; Parker *v.* Providence, etc., Steamboat Co., 17 R. I. 376, 22 Atl. 284, 23 Atl. 102, 33 Am. St. Rep. 869, 14 L. R. A. 414.

A composition deed giving a long term of payment is not sanctioned by a statute empowering the surrogate to authorize executors or administrators to compromise or compound debts. Matter of Loper, 2 Redf. Surr. (N. Y.) 545.

Ancillary administrator without authority to compromise under peculiar circumstances of case see De Diemar *v.* Van Wagenen, 7 Johns. (N. Y.) 604.

Settlement by widow.— Where a decedent left a widow and child, but no creditors, a settlement by the widow of a claim against a certain person by an instrument purporting to be a settlement between such person and the decedent of all their accounts, being known of by the child on the day it was made, and not objected to till the claim was, thirty months thereafter, asserted by the child as administratrix, will prevent recovery thereon. Herrington *v.* Lowman, 22 N. Y. App. Div. 266, 47 N. Y. Suppl. 863.

97. *Georgia.*— Neal *v.* Lamar, 18 Ga. 746.

Mississippi.— Bailey *v.* Dilworth, 10 Sm. & M. 404, 48 Am. Dec. 760.

South Carolina.— Verdier *v.* Simons, 2 McCord Eq. 385.

Virginia.— Boyd *v.* Oglesby, 23 Gratt. 674; McCall *v.* Peachy, 3 Munf. 288.

England.—See Blue *v.* Marshall, 3 P. Wms. 381, 24 Eng. Reprint 1110.

See 22 Cent. Dig. tit. "Executors and Administrators," § 384.

Necessity for compromise must exist. Brosnan *v.* Kramer, 135 Cal. 36, 66 Pac. 979, where the executors of a lessor had reduced the rent.

An authority given by will to compound for, compromise, and settle debts due to the testator authorizes the executor to accept less than is due only when in his judgment this may avoid the loss of the whole or a greater part of the debt. Buerhaus *v.* De Saussure, 41 S. C. 457, 19 S. E. 926, 20 S. E. 64.

Part payment to one of several administrators will not be allowed as a satisfaction for the whole debt unless it appears that such settlement was beneficial to the estate and free from fraud, negligence, or misconduct. Gulledge *v.* Berry, 31 Miss. 346.

98. Johnson's Appeal, 71 Conn. 590, 42 Atl. 662; Wyman's Appeal, 13 N. H. 18. See also Blue *v.* Marshall, 3 P. Wms. 381, 24 Eng. Reprint 1110.

99. See De Diemar *v.* Van Wagenen, 7 Johns. (N. Y.) 404.

1. *Iowa.*— Jenkins *v.* Shields, 47 Iowa 708.

Mississippi.— Bailey *v.* Dilworth, 10 Sm. & M. 404, 48 Am. Dec. 760; Berry *v.* Parkes, 3 Sm. & M. 625.

Missouri.— Jacobs *v.* Jacobs, 99 Mo. 427, 12 S. W. 457.

Pennsylvania.— Pusey *v.* Clemson, 9 Serg. & R. 204; Scully's Estate, 31 Pittsb. Leg. J. N. S. 307.

Virginia.—Turpin *v.* Chesterfield Coal, etc., Min. Co., 82 Va. 74.

England.— Pennington *v.* Healey, 1 Cromp. & M. 402, 2 L. J. Exch. 98, 3 Tyrw. 319; Blue *v.* Marshall, 3 P. Wms. 381, 24 Eng. Reprint 1110.

See 22 Cent. Dig. tit. "Executors and Administrators," § 384.

As to compromising secured debts the test seems to lie in the actual value of the security. Sanford *v.* Story, 15 Misc. (N. Y.) 536, 38 N. Y. Suppl. 104; Buerhaus *v.* De Saussure, 41 S. C. 457, 19 S. E. 926, 20 S. E. 64.

2. Jenkins *v.* Shields, 47 Iowa 708.

has been guilty of negligence or fraud in accepting less than the full amount due, he is chargeable with the loss.[3] In general, however, it is only non-assenting parties in beneficial interest who can pursue the representative for an improper release or compromise.[4]

2. SANCTION OF COURT. The power of the representative to compromise debts due the estate which he represents is not dependent upon the previous sanction of the probate court,[5] although where he acts without such sanction the burden is upon him, if interested parties object, to show that he has acted judiciously and for the benefit of the estate.[6] In many jurisdictions, however, probate tribunals have been expressly clothed with jurisdiction to authorize such acts on the part of the representative,[7] and he obtains a more complete immunity from personal

3. Klein *v.* French, 57 Miss. 662; People *v.* Pleas, 2 Johns. Cas. (N. Y.) 376; Jones *v.* Jones, 118 N. C. 440, 24 S. E. 774. See also Rountree *v.* Stephens, 8 Ky. L. Rep. 433.

That the representative acted under advice of counsel will not excuse him where he has been guilty of negligence. Klein *v.* French, 57 Miss. 662.

4. Delabigarre *v.* New Orleans Second Municipality, 3 La. Ann. 230; Jones *v.* Jones, 118 N. C. 440, 24 S. E. 774; Black's Appeal, 25 Pa. St. 238.

5. *California.*— Moulton *v.* Holmes, 57 Cal. 337.

Illinois.— Washington *v.* Louisville, etc., R. Co., 136 Ill. 49, 26 N. E. 653 [*affirming* 34 Ill. App. 658]; Brink's Express Co. *v.* O'Donnell, 88 Ill. App. 459.

New Hampshire.— Wyman's Appeal, 13 N. H. 18.

New York.— Wood *v.* Tunnicliff, 74 N. Y. 38; Chouteau *v.* Suydam, 21 N. Y. 179; Auken *v.* Kiener, 9 N. Y. St. 669.

South Carolina— Geigers *v.* Kaigler, 9 S. C. 401.

Virginia.— Kee *v.* Kee, 2 Gratt. 116.

See 22 Cent. Dig. tit. "Executors and Administrators," § 387.

Contra.— Ætna L. Ins. Co. *v.* Swayze, 30 Kan. 118, 1 Pac. 36.

The Indiana statute requires an administrator to secure an order of the probate court authorizing him to settle or compound claims due the estate before he can legally proceed to do so, but this requirement does not apply to a right of action given for wrongfully causing the death of the decedent. Pittsburgh, etc., R. Co. *v.* Gipe, 160 Ind. 360, 65 N. E. 1034.

6. *Arkansas.*— Wilks *v.* Slaughter, 49 Ark. 235, 4 S. W. 766.

Louisiana.— Fridge *v.* Buhler, 6 La. Ann. 272.

Maine.— Chase *v.* Bradley, 26 Me. 531.

Massachusetts.— Chadbourn *v.* Chadbourn, 9 Allen 173.

Montana.— See *In re* Ricker, 14 Mont. 153, 35 Pac. 960, 29 L. R. A. 622.

New Hampshire.— Wyman's Appeal, 13 N. H. 18.

New York.— Chouteau *v.* Suydam, 21 N. Y. 179; Matter of Farley, 15 N. Y. St. 727.

See 22 Cent. Dig. tit. "Executors and Administrators," § 387.

7. *California.*— Hartigan *v.* Southern Pac. R. Co., 86 Cal. 142, 24 Pac. 851; Moulton *v.* Holmes, 57 Cal. 337.

Connecticut.— Johnson's Appeal, 71 Conn. 590, 42 Atl. 662, holding that under the Connecticut statute conservators as well as executors and administrators may be authorized by the probate court to settle and adjust disputed or doubtful claims.

Georgia.— Fraley *v.* Thomas, 98 Ga. 375, 25 S. E. 446.

Montana.— Mulville *v.* Pacific Mut. L. Ins. Co., 19 Mont. 95, 47 Pac. 650.

New York.— Chouteau *v.* Suydam, 21 N. Y. 179; Matter of Gilman, 82 N. Y. App. Div. 186, 81 N. Y. Suppl. 713 [*reversing* 39 Misc. 762, 80 N. Y. Suppl. 1122].

See 22 Cent. Dig. tit. "Executors and Administrators," § 387.

The superior court as an appellate court of probate can authorize an administrator to compromise claims. Johnson's Appeal, 71 Conn. 590, 42 Atl. 662.

Authority may be granted to public or private administrator without distinction. Mulville *v.* Pacific Mut. L. Ins. Co., 19 Mont. 95, 47 Pac. 650.

When compromise may be authorized.—The surrogate may authorize a compromise wherever there is doubt either of the debtor's solvency or as to the validity of the claim. Shepard *v.* Saltus, 4 Redf. Surr. (N. Y.) 232; *In re* Patten, Tuck. Surr. (N. Y.) 56.

Sufficiency of application.— An *ex parte* application by an executor for leave to compromise a debt due the estate of his testator will be denied where no facts are stated beyond the existence and status of the debt and its nature, and that one of the executors and the attorney in the suit believe the compromise to be advantageous. Matter of Richardson, 9 N. Y. Suppl. 638, 2 Connoly Surr. (N. Y.) 276.

Oath of representative.— Under the Georgia code the ordinary's direction to compromise a doubtful debt is not available without the executor's oath that the settlement was made in good faith and to the best interest of the parties represented. Ponce *v.* Wiley, 62 Ga. 118.

Order authorizing compromise merely interlocutory and not conclusive.— *In re* Hutton, 92 Mo. App. 132.

Authority to compromise to best advantage.— The compromise of a claim against a life-insurance company on a policy issued to

liability by thus securing in advance a judicial sanction of the compromise which he proposes to make.[8]

3. Enforcement. A court of equity will not aid in carrying into effect the composition or release of claims by a fiduciary, unless the party praying it makes disclosure sufficient to convince the court that no fraud or mistake existed.[9]

4. Attack. Error or fraud should be alleged in order to reopen a compromise or release effected in due form, and avoidance in such a case should be judicially sought.[10]

L. Release of Claims.[11] The representative has power to release a claim in favor of the estate,[12] where he acts in good faith[13] and upon a sufficient consideration,[14] although he may render himself liable as for a devastavit by so doing.[15]

M. Release of Liens. The representative has also been held to have power to release a lien in favor of the estate.[16]

the decedent may be authorized to be made "to the best possible advantage," although the terms have not been definitely ascertained. Mulville *v.* Pacific Mut. L. Ins. Co., 19 Mont. 95, 47 Pac. 650.

Vacation of order.— An order of the surrogate authorizing settlement of an action by an administratrix for the death of her husband, by whom she had then had no issue, should not be vacated on the birth of a posthumous child, there being nothing but an affidavit on information and belief to show that the parties settling with her knew of her pregnancy, and this being denied, the settlement having been made and the money paid to her, and the facts on which the order was made indicating that acceptance of the sum received would be advantageous to those for whose benefit the action was brought remaining unaffected and substantially uncontroverted. Matter of Anderson, 84 N. Y. App. Div. 550, 82 N. Y. Suppl. 763.

Surrogate may authorize compounding whether debtor solvent or insolvent.— Berrien's Estate, 16 Abb. Pr. N. S. (N. Y.) 23 [*disapproving* Howell *v.* Blodgett, 1 Redf. Surr. (N. Y.) 323].

8. Johnson's Appeal, 71 Conn. 590, 42 Atl. 662. See also Taylor *v.* Frink, 2 Iowa 84.

The object of such statutes is not to confer upon executors and administrators any power which otherwise they would not possess, nor to restrict their common-law power as to compromising, but merely to afford them an additional protection when acting in good faith in the exercise of their common-law powers. Wilks *v.* Slaughter, 49 Ark. 235, 4 S. W. 766; Moulton *v.* Holmes, 57 Cal. 337; Wyman's Appeal, 13 N. H. 18; Chouteau *v.* Suydam, 21 N. Y. 179.

Previous negligence.— An order of the ordinary, properly granted, authorizing an executor to compromise a contested claim due the estate, will not relieve the executor from liability for his previous negligence in bringing about the state of affairs rendering the compromise necessary. Fraley *v.* Thomas, 98 Ga. 375, 25 S. E. 446.

9. Cleere *v.* Cleere, 82 Ala. 581, 3 So. 107, 60 Am. Rep. 750; Clay *v.* Williams, 2 Munf. (Va.) 105, 5 Am. Dec. 453.

10. Haile *v.* McGhee, 29 La. Ann. 350; Struthers *v.* Peltz, 18 Pa. St. 278; Ellis *v.* Appleby, 4 R. I. 462; Weir *v.* Mosher, 19 Wis. 311.

Bill in equity.— One who seeks to set aside a compromise granted by the court, as for alleged fraud or mistake, should bring a bill in equity. Henry County *v.* Taylor, 36 Iowa 259.

11. As to compromise see *supra*, VII, K.

12. Caldwell *v.* McVicar, 12 Ark. 746; Cogswell *v.* Concord, etc., R. Co., 68 N. H. 192, 44 Atl. 293. But *compare* Scott *v.* Scott, 61 Ill. App. 103.

Administrator may release one of the makers of a note. Latta *v.* Miller, 109 Ind. 302, 10 N. E. 100.

Validity of release.— *Prima facie* the release by an executor of a claim of the estate is valid and comes within his power to dispose of the effects of the estate. Davenport *v.* First Cong. Soc., 33 Wis. 387, 390.

Effect of release.— In an action by an administrator seeking to charge defendant on a note on which another person was liable, a release given by the administrator to the latter does not necessarily imply that payment was made to the administrator. Huntington *v.* Wilder, 6 Vt. 334.

Contract of estate.— A release of a debt due a testator, executed and delivered by the executor under his seal, and signed and acknowledged by him as executor, is a contract of the estate, and not of the executor personally. Auken *v.* Kiener, 9 N. Y. St. 669.

13. Latta *v.* Miller, 109 Ind. 302, 10 N. E. 100.

14. Latta *v.* Miller, 109 Ind. 304, 10 N. E. 100.

Sufficiency of consideration.— Withdrawing objection by an heir to the allowance of the representative's account is a sufficient consideration for the discharge of a debt held by the representative as such against such heir, in a case of good faith. Holbrook *v.* Blodget, 5 Vt. 520. And see Jones *v.* Jones, 118 N. C. 440, 24 S. E. 774.

15. Caldwell *v.* McVicar, 12 Ark. 746.

16. McCleary *v.* Chipman, 32 Ind. App. 489, 68 N. E. 320; Gill *v.* Anglo-American Assoc., 58 S. W. 929, 21 Ky. L. Rep. 690 (holding that an executrix empowered by the will to sell any part of the testator's estate and make title thereto has power to release a lien for purchase-money on land sold by

N. Debts Due From Representative[17] — **1. In General.** The duty of the personal representative to collect debts due the estate of his decedent is not changed by the fact that he is the debtor;[18] but he must, if solvent or able to pay, pay the debt and account for the amount thereof as assets.[19] He is not, however, debarred from showing that the claim against him is unfounded or unjust or has been paid,[20] and he may also return the debt as uncollectable when the facts warrant this.[21]

the testator; and it is immaterial, as affects the validity of the release, whether she in fact collected the unpaid purchase-money); Mosman *v.* Bender, 80 Mo. 579 (holding that an administrator may release a second lien for one half the debt if the arrangement is for the best interest of the estate); Stribling *v.* Splint Coal Co., 31 W. Va. 82, 5 S. E. 321.

Mortgage lien on administrator's property. — A release by an administrator, from a mortgage given by him to intestate, of one of the lots covered thereby, is ineffectual to make a subsequent mortgage given by him thereon a first lien, the mortgagee knowing that the release was merely to enable him to make a loan thereon, and he having failed to see that the administrator used the money, as he said he was going to, to make a payment on the debt he owed the estate. Eastham *v.* Landon, 17 Wash. 48, 48 Pac. 739.

An executor of a surety cannot consent to the discharge of a mortgage given to secure the debt, for which testator was surety, until all the conditions have been complied with. Monroe *v.* De Forest, 53 N. J. Eq. 264, 31 Atl. 773.

17. See *supra*, III, B, 5, b.

18. Condit *v.* Winslow, 106 Ind. 142, 5 N. E. 751; Haines *v.* Haines, (N. J. Ch. 1888) 15 Atl. 839. See also Leggett *v.* Leggett, 24 Hun (N. Y.) 333.

Executor may not favor himself more than other debtors. Matter of Gray, 3 Dem. Surr. (N. Y.) 208.

Burden of proof as to debt. — The mere fact that an executor during the lifetime of his testator has received certain property from her without paying for it does not show that he received it as her agent or under such circumstances as created an indebtedness to her for the same, but the burden of showing this is upon the persons claiming that such indebtedness exists. Matter of Mitchell, 36 N. Y. App. Div. 542, 55 N. Y. Suppl. 725 [*affirmed* in 161 N. Y. 654, 57 N. E. 1117].

Evidence insufficient to show indebtedness see Matter of Briggs, 31 Misc. (N. Y.) 486, 65 N. Y. Suppl. 660.

19. Howell *v.* Anderson, 66 Nebr. 575, 92 N. W. 760, 61 L. R. A. 313; Gay *v.* Grant, 101 N. C. 206, 8 S. E. 99, 106. See also Farmer *v.* Yates, 23 Gratt. (Va.) 145.

Security for debt may be made available by parties interested. *In re* Gilbert, 104 N. Y. 200, 10 N. E. 148; Soverhill *v.* Suydam, 59 N. Y. 140; Raynor *v.* Gordon, 16 Hun (N. Y.) 126; Utterback *v.* Cooper, 28 Gratt. (Va.) 233.

A collusive or fraudulent payment will not avail so as to shift the loss upon the estate. Covington *v.* Lattimore, 88 N. C. 407.

A pretentious payment to himself as representative in worthless currency will not discharge his individual debt. Wilson *v.* Powell, 75 N. C. 468. See also Koon *v.* Munro, 11 S. C. 139.

Facts amounting to payment see Ipswich Mfg. Co. *v.* Story, 5 Metc. (Mass.) 310; Strantom *v.* Farmers', etc., Bank, 24 N. Y. 424 [*affirming* 33 Barb. 527].

Circumstances not amounting to payment see Neustadt's Estate, 12 Phila. (Pa.) 8.

Statutes of limitation. — Where the representative is individually indebted to the estate, no bar of limitation should operate in his favor so long as he remains accountable for the general assets of the estate. Whitlock *v.* Whitlock, 25 Ala. 543; Thompson *v.* Thompson, 77 Ga. 692, 3 S. E. 261; Haines *v.* Haines, (N. J. Ch. 1888) 15 Atl. 839.

20. Everts *v.* Everts, 62 Barb. (N. Y.) 577, holding further that the question must be tried in the surrogate's court in the same way and for the same reason that claims against the estate in favor of the executor must be tried in that court.

Burden of proof. — Where an executor or administrator claims that the money received by him of the decedent during the latter's life was a gift, he must prove it. Ruth *v.* Owens, 2 Rand (Va.) 507. And so also where an administrator inventories a debt due from himself to his intestate, and on final settlement contends that such debt was in fact paid to the intestate while living, the burden is on him to show that it was erroneously included in the inventory by mistake or otherwise. Dickie *v.* Dickie, 80 Ala. 57.

Possession by the representative of notes formerly given by him to his decedent does not alone raise the presumption of payment. Speed *v.* Nelson, 8 B. Mon. (Ky.) 499; Love *v.* Dilley, 64 Md. 238, 610, 1 Atl. 59, 4 Atl. 290, 6 Atl. 168.

Effect of testator's possession of commercial paper. — Where an executor included in the inventory of the estate commercial paper made by him and found in the possession of the testator at his death, but in accounting the executor did not charge himself with the amount of such paper, it was held that the evidence to explain away and overcome the presumption arising from the possession of such paper and the solemn admission of liability arising from proving the inventory ought to be clear, consistent, and preponderating, and in the absence of such evidence the executor should be charged therewith. Tichenor *v.* Tichenor, 45 N. J. Eq. 303, 17 Atl. 631.

21. Henry *v.* Fiske, 11 R. I. 318, but his liability as an individual will not be af-

2. Interest. An interest-bearing debt[22] due by the representative to the estate follows the rule of similar debts due from others; and the fact that the debt is inventoried does not stop the running of interest *per se*, but only the fact that the debt is paid or its amount shown to be actually in the hands of the representative as such.[23]

O. Failure to Collect Assets — 1. Liability in General. The personal representative is liable in his accounts for failure to collect assets or realize upon notes or other debts due to the estate if such failure is due to a lack of good faith or due diligence, but not otherwise;[24] and if certain debts are inventoried

fected. See also Howell *v.* Anderson, 66 Nebr. 575, 92 N. W. 760, 61 L. R. A. 313. *Contra*, Cheney *v.* Powell, 20 Ohio Cir. Ct. 398, 11 Ohio Cir. Dec. 279.

Claim which might have been collected.— Where, at the time of his appointment, an administrator was in debt to the estate and it appeared that at no time thereafter was his property sufficient to pay his debt, but that had a third person been administrator with the knowledge of the administrator's affairs which he himself had, such person would probably have been able to collect the debt, the administrator could not return the claim as uncollectable. *In re* Haffey, 10 Mo. App. 232.

Burden of proof as to insolvency.— Where an administrator seeks to be discharged from his official liability for an antecedent debt, because of his insolvency, the burden is on him to establish the fact. Howell *v.* Anderson, 66 Nebr. 575, 92 N. W. 760, 61 L. R. A. 313.

How ability to pay determined.— The representative's ability or lack of ability to pay should be determined by appointing a special administrator to try to enforce the demand. May *v.* Leighty, 36 Ill. App. 17.

22. See Webb *v.* Webb, 6 T. B. Mon. (Ky.) 163, for a state of facts under which an administrator was held chargeable with interest.

Where a note provided for more than legal interest, the executor was charged with the unpaid principal together with interest at the legal rate to the time of his qualification. Slagle *v.* Slagle, 3 Ohio Dec. (Reprint) 549.

23. *Kentucky.*— Com. *v.* Bracken, 32 S. W. 609, 17 Ky. L. Rep. 785.

Louisiana.—Sharp *v.* Klienpeter, 7 La. Ann. 264.

New Jersey.— Terhune *v.* Oldie, 44 N. J. Eq. 146, 14 Atl. 638; Tichenor *v.* Tichenor, 43 N. J. Eq. 163, 10 Atl. 867; Ackerman's Case, 40 N. J. Eq. 533, 5 Atl. 91.

New York.— *In re* Davis, 37 Misc. 326, 75 N. Y. Suppl. 493; *In re* Clark, 11 N. Y. Suppl. 911.

Pennsylvania.— Rodenbach's Appeal, 102 Pa. St. 572; Clark's Appeal, 2 Watts 405; Brenneman's Estate, 14 York Leg. Rec. 14.

South Carolina.— Sebring *v.* Keith, 2 Hill 340. See also Koon *v.* Munro, 11 S. C. 139.

See 22 Cent. Dig. tit. "Executors and Administrators," § 393½.

Where the debt bears interest until maturity, credit of the debt to the estate as collected before maturity does not relieve. Clifford *v.* Davis, 22 Ill. App. 316.

24. *Alabama.*— Jenks *v.* Terrell, 73 Ala. 238; Smyley *v.* Reese, 53 Ala. 89, 25 Am. Rep. 598; Abercrombie *v.* Skinner, 42 Ala. 633; Wilkinson *v.* Hunter, 37 Ala. 268; Douthitt *v.* Douthitt, 1 Ala. 594. See also Dickie *v.* Dickie, 80 Ala. 57; Sheppard *v.* Gill, 49 Ala. 162; Ivey *v.* Coleman, 42 Ala. 409.

California.— Moore's Estate, 96 Cal. 522, 31 Pac. 584; *In re* Sanderson, (1887) 13 Pac. 497.

Florida.— Sanderson *v.* Sanderson, 20 Fla. 292.

Georgia.— Prior *v.* Prior, 113 Ga. 1154, 39 S. E. 474; Hall *v.* Carter, 8 Ga. 388.

Iowa.— Lippert *v.* Lippert, 110 Iowa 550, 81 N. W. 777.

Kentucky.—Fleming *v.* Jones, 12 Bush 503; Tuggle *v.* Gilbert, 1 Duv. 340; Scarce *v.* Page, 12 B. Mon. 311; Blair *v.* Dade, 9 B. Mon. 61; Moore *v.* Beauchamp, 4 B. Mon. 71; Johnson *v.* Beauchamp, 5 Dana 70; Steele *v.* Morrison, 4 Dana 617; Frazier *v.* Cavanaugh, 4 Ky. L. Rep. 711.

Louisiana.— Conery's Succession, 111 La. 113, 35 So. 479; Coco's Succession, 32 La. Ann. 325; Whittikam *v.* Swain, 9 La. Ann. 122; Davis *v.* Thompson, 9 Rob. 198; Longbottom *v.* Babcock, 9 La. 44; Lafon *v.* His Executors, 3 Mart. N. S. 707.

Maryland.— Hoffman *v.* Armstrong, 90 Md. 123, 44 Atl. 1012.

Michigan.— Hall *v.* Grovier, 25 Mich. 428.

Mississippi.— Tell City Furniture Co. *v.* Stiles, 60 Miss. 849; Cole *v.* Leake, 27 Miss. 767; Smith *v.* Hurd, 8 Sm. & M. 682. See also Stone *v.* Morgan, 65 Miss. 247, 3 So. 580.

Missouri.— Myers *v.* Myers, 98 Mo. 262, 11 S. W. 617; Julian *v.* Abbott, 73 Mo. 580; Williams *v.* Petticrew, 62 Mo. 460; Powell *v.* Hurt, 31 Mo. App. 632.

Nevada.— See *In re* Millenovich, 5 Nev. 161.

New Jersey.— Mulford *v.* Mulford, (Ch. 1902) 53 Atl. 79; Wilson *v.* Staats, 33 N. J. Eq. 524; Cooley *v.* Vansyckle, 14 N. J. Eq. 496; Holcomb *v.* Holcomb, 11 N. J. Eq. 281; Stark *v.* Hunton, 3 N. J. Eq. 300.

New York.— Harrington *v.* Keteltas, 92 N. Y. 40; *In re* Van Alstyne, 62 N. Y. App. Div. 626, 71 N. Y. Suppl. 163; Matter of Hosford, 27 N. Y. App. Div. 427, 50 N. Y. Suppl. 550; Matter of Washbon, 60 Hun 576, 14 N. Y. Suppl. 672; Milk *v.* Hoffman, 26 Hun 594; Hollister *v.* Burritt, 14 Hun 91; Matter of Guldenkirch, 35 Misc. 123, 71 N. Y. Suppl. 310; Matter of Baker, 27 Misc. 126,

as worthless, desperate, or doubtful, the presumption is more favorable to him

57 N. Y. Suppl. 398; Matter of Child, 5 Misc. 560, 26 N. Y. Suppl. 721; *In re* Millard, 9 N. Y. Suppl. 126, 2 Connoly Surr. 91; Schultz *v.* Pulver, 11 Wend. 361; Ruggles *v.* Sherman, 14 Johns. 446.

North Carolina.— Wilson *v.* Lineberger, 88 N. C. 416; Williams *v.* Williams, 79 N. C. 417, 28 Am. Rep. 330; Camp *v.* Smith, 68 N. C. 537; Lee *v.* Brown, 58 N. C. 379; Hobbs *v.* Craigie, 23 N. C. 332.

Pennsylvania.— Shaffer's Appeal, 46 Pa. St. 131; *In re* Long, 6 Watts 46; Edenborn's Estate, 10 Pa. Dist. 184; Morrell's Estate, 8 Wkly. Notes Cas. 183.

South Carolina.—Brooks *v.* Brooks, 12 S. C. 422; Gates *v.* Whetstone, 8 S. C. 244, 28 Am. Rep. 284. See also Cunningham *v.* Cauthen, 37 S. C. 123, 15 S. E. 917; Turbeville *v.* Flowers, 27 S. C. 331, 3 S. E. 542; Tompkins *v.* Tompkins, 18 S. C. 1.

Tennessee.— Davis *v.* Jackson, (Ch. App. 1897) 39 S. W. 1067; James *v.* Wingo, 7 Lea 148; Molloy *v.* Elam, Meigs 590; Cartwright *v.* Cartwright, 4 Hayw. 134.

Texas.— Townsend *v.* Munger, 9 Tex. 300.

Vermont.— Holmes *v.* Bridgman, 37 Vt. 28.

Virginia.— Lacy *v.* Stamper, 27 Gratt. 42; Southall *v.* Taylor, 14 Gratt. 269. See also Crouch *v.* Davis, 23 Gratt. 62.

West Virginia.— Evans *v.* Shroyer, 22 W. Va. 581. See also Estill *v.* McClintic, 11 W. Va. 399.

England.—*Re* Owens, 47 L. T. Rep. N. S. 61.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 360, 394.

The burden of proof is upon the representative to show that the failure to collect was not due to his lack of good faith or diligence.

Alabama.— Wilkinson *v.* Hunter, 37 Ala. 268. But *compare* Sheppard *v.* Gill, 49 Ala. 162; Ivey *v.* Coleman, 42 Ala. 409.

Kentucky.—Moore *v.* Beauchamp, 4 B. Mon. 71; Steele *v.* Morrison, 4 Dana 617.

Mississippi.— Stone *v.* Morgan, 65 Miss. 247, 3 So. 580; Tell City Furniture Co. *v.* Stiles, 60 Miss. 849.

Missouri.— Julian *v.* Abbott, 73 Mo. 580; Williams *v.* Petticrew, 62 Mo. 460.

Pennsylvania.—Billheimer's Estate, 3 Kulp 278. But *compare* Ritter's Estate, 11 Phila. 12.

South Carolina.— Cunningham *v.* Cauthen, 37 S. C. 123, 15 S. E. 917; Turbeville *v.* Flowers, 27 S. C. 331, 3 S. E. 542. But *compare* Tompkins *v.* Tompkins, 18 S. C. 1.

Vermont.— Walworth *v.* Bartholomew, 76 Vt. 1, 56 Atl. 101.

Virginia.— Crouch *v.* Davis, 23 Gratt. 62.

West Virginia.— Estill *v.* McClintic, 11 W. Va. 399.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 394, 2172.

But *compare In re* Millenovich, 5 Nev. 162, where no value was placed on debts in the inventory.

The extension by executors of a note due testator on the personal security of the debtor, he being solvent at its maturity, is at their own risk. *In re* Gardner, 199 Pa. St. 524, 49 Atl. 346.

A judgment recovered by an administrator against a solvent debtor of the estate does not constitute assets in his hands with which he can be charged at the instance of a creditor of the estate. Rogers *v.* Grant, 88 N. C. 440.

An executor's failure to pay a note executed by himself in favor of the testator is not a fraudulent misapplication of funds of the estate. Culbreth *v.* Smith, 124 N. C. 289, 32 S. E. 714.

Where a sheriff, as administrator ex officio, neglects to collect notes due the estate until his term of office expires, he will not be chargeable with the amount thereof if the makers of the notes were perfectly solvent for a considerable time after his administration ceased. Bondurant *v.* Thompson, 15 Ala. 202.

Failure to offset.— Executors who lose a debt due the estate by negligently failing to offset it against a bequest to the debtor are properly surcharged with the amount of the debt. Shearer's Estate, 13 Montg. Co. Rep. (Pa.) 98.

Justifiable delay.—Where general letters of administration were granted in ignorance of the existence of a will, which was afterward produced and proven, a delay of the administrator to prosecute a claim due the estate, after he had been informed of the existence of the will and before its production and probate, during which delay the debtor became insolvent and the debt was lost, was not such negligence as to subject the administrator to the payment of the amount. Hartsfield *v.* Allen, 52 N. C. 439.

For loss through indulgence granted by distributees or others in interest, they cannot complain. Perry *v.* Wooten, 5 Humphr. (Tenn.) 524.

A second administrator takes the goods which remain in specie at decedent's death, and cannot call his predecessor to account for his preceding disposition of the estate, and hence cannot be surcharged because he did not recover assets which the previous administrator had administered. Hartson *v.* Elden, 58 N. J. Eq. 478, 44 Atl. 156. Neither is he liable for any accounts or notes included in the inventory returned by the former administrator, unless it is shown that he collected or could have collected them by the exercise of due care and proper diligence. Adkins *v.* Hutchings, 79 Ga. 260, 4 S. E. 887.

Facts showing negligence see Chambers' Appeal, 11 Pa. St. 436.

Waiver of neglect.— The joinder of the heirs in the prayer for the homologation of a tableau is not a waiver of their rights against the administrator for his maladministration, in not proceeding to collect a debt at an earlier date, which was prescribed at the time it was placed on the tableau. Serret *v.* Labauve, 15 La. Ann. 186.

where he fails to collect than if nothing appearing in the inventory had indicated that such debts were not good.[25]

2. Extent of Liability. Where an executor or administrator was not culpably careless or dishonest, he is chargeable in his accounts for what he actually collects, aside from any prior estimate.[26] But where loss occurs through his want of due diligence, he should be charged with the amount he should have received, and as of the time when he should have received it had he used due diligence.[27] Accrued interest should be collected by him on interest-bearing claims; but otherwise it is not usual to charge the representative absolutely with interest, and still less with compound interest, unless either he received it or some misconduct or gross delinquency be shown against him.[28]

VIII. CUSTODY AND MANAGEMENT OF ESTATE.

A. In General — 1. Fundamental Rule. An executor or administrator is required to use reasonable diligence and act in entire good faith in performing the duties of his trust,[29] and the prudence, care, and judgment which one of fair average capacity and ability exercises in the transaction of his own business — or, as sometimes stated, the prudence, care, and judgment of fiduciaries ordinarily capable under like circumstances — furnishes the standard by which his conduct

25. *In re* Millenovich, 5 Nev. 161; Finch *v.* Ragland, 17 N. C. 137. See also Wrightson *v.* Tydings, 94 Md. 358, 51 Atl. 44.

26. Fauber *v.* Gentry, 89 Va. 312, 15 S. W. 899.

27. Sterling *v.* Wilkinson, 83 Va. 791, 3 S. E. 533; Anderson *v.* Piercy, 20 W. Va. 282.

Where the representative leaves goods with the widow or heirs, he should be charged with them at the appraised value, and cannot show that the value was less. Reiff's Appeal, 2 Pa. St. 256.

Only the actual loss and not a penalty for mismanagement can be charged. Landis' Estate, 4 Phila. (Pa.) 349.

28. *Florida.*— Sherrell *v.* Shepard, 19 Fla. 300.

Louisiana.— Stafford *v.* McIntosh, 39 La. Ann. 836, 2 So. 596.

Mississippi.— Banks *v.* Machen, 40 Misc. 256.

New Jersey.— Craig *v.* Manning, 8 N. J. Eq. 806.

New York.— Schultz *v.* Pulver, 11 Wend. 361 [*affirming* 3 Paige 182].

Tennessee.— Torbet *v.* McReynolds, 4 Humphr. 215.

Virginia.— Chapman *v.* Shepherd, 24 Gratt. 377.

United States.— Taylor *v.* Benham, 5 How. 233, 12 L. ed. 130.

See 22 Cent. Dig. tit. "Executors and Administrators," § 395.

Interest on funds collected see *infra*, VIII, F.

When interest chargeable.— A person who collected and appropriated some of testator's notes, and was afterward appointed executor, is liable for interest on these accounts from the time of collection, and cannot avoid it on the ground of his exemption as executor. Hill *v.* Fly, (Tenn. Ch. App. 1899) 52 S. W. 731.

29. *Alabama.*— Clark *v.* Eubank, 80 Ala. 584, 3 So. 49.

Illinois.— Caruthers *v.* Caruthers, 99 Ill. App. 402.

Louisiana.— Stafford *v.* McIntosh, 39 La. Ann. 836, 2 So. 596; Triche's Succession, 39 La. Ann. 289, 2 So. 52; Connolly's Succession, 6 La. Ann. 795.

New Hampshire.— Lane *v.* Thompson, 43 N. H. 320; Moulton *v.* Wendell, 37 N. H. 406; Davis *v.* Lane, 11 N. H. 512.

New Jersey.— Stark *v.* Hunton, 3 N. J. Eq. 300.

New York.— Hollister *v.* Burritt, 14 Hun 291.

Pennsylvania.— King *v.* Morrison, 1 Penr. & W. 188.

South Carolina.— Rainsford *v.* Rainsford, Dudley Eq. 57.

Tennessee.— Forsey *v.* Luton, 2 Head 183.

Texas.— Cock *v.* Carson, 38 Tex. 284.

Virginia.— McCall *v.* Peachy, 3 Munf. 288.

See 22 Cent. Dig. tit. "Executors and Administrators," § 360; and *infra*, note 30.

Allowing debt to remain for investment.— If the personal representative allows a debt due the estate to remain for the purposes of investment, he should give due heed to the character of the security afforded. Lacy *v.* Stamper, 27 Gratt. (Va.) 42.

A worthless conveyance by an executor in his individual capacity which does not transfer any interest belonging to the estate is not a violation of the executor's duty as such. Wheeler *v.* Bolton, 92 Cal. 159, 28 Pac. 558.

The administrator of an intestate who was security for the payment of a debt has authority to consent to the creditors granting to the principal debtor an extension of the time of payment if it be for the interest of the estate. Smarr *v.* McMaster, 35 Mo. 349.

Taking security.— It is proper for an administrator whose intestate had signed certain notes as surety to take from the principal debtor, without an order of court therefor, a chattel mortgage to indemnify the estate against loss on account of such notes. Walling *v.* Lewis, 119 Ind. 496, 21 N. E. 1108.

is to be judged.[30] The acts of the representative must, however, be judged according to the circumstances which existed at the time,[31] and the trust confided to him is defined by the letters, testamentary or of administration, constituting the commission under which he acts; the mode in which his trust is to be performed being prescribed by the court in accordance with the local statute.[32]

2. **Custody of Assets.** The personal representative is of course entitled to the custody of the assets of the decedent,[33] and he should not be required to surrender the estate committed to him before a distribution is ordered unless for grave reasons.[34]

3. **Custody of Books and Papers.** The representative is entitled to the custody of the books and papers of the estate, but must allow parties interested to inspect

30. *Illinois.*—Whitney *v.* Peddicord, 63 Ill. 249.

Minnesota.— Harding *v.* Canfield, 73 Minn. 244, 75 N. W. 1112.

Mississippi.— O'Brien *v.* Wilson, 82 Miss. 93, 33 So. 946; Bailey *v.* Dilworth, 10 Sm. & M. 404, 48 Am. Dec. 760.

Nebraska.— Dundas *v.* Chrisman, 25 Nebr. 495, 41 N. W. 449.

New Jersey.— Voorhees *v.* Stoothoff, 11 N. J. L. 145.

North Carolina.— Williams *v.* Harrell, 43 N. C. 123, 55 Am. Dec. 442.

Pennsylvania.— Getz's Estate, 12 Phila. 143.

South Carolina.— Mikell *v.* Mikell, 5 Rich. Eq. 220.

Texas.— Noble *v.* Jones, 35 Tex. 692.

Virginia.— Kee *v.* Kee, 2 Gratt. 116.

West Virginia.— Harris *v.* Orr, 46 W. Va. 261, 33 S. E. 257, 76 Am. St. Rep. 815.

See 22 Cent. Dig. tit. "Executors and Administrators," § 397.

Executors and administrators are liable like bailees for the management of their trusts and must answer for actual or constructive neglect or wilful misconduct only. Frazier *v.* Cavanaugh, 4 Ky. L. Rep. 711.

31. Hall's Estate, 8 Pa. Dist. 8.

32. White *v.* Wayne, T. U. P. Charlt. (Ga.) 94; Gibbons *v.* Riley, 7 Gill (Md.) 81.

The personal representative cannot change the nature of his obligations, or increase or diminish the legal responsibilities of the trust. Morgan *v.* Locke, 28 La. Ann. 806; State Bank *v.* Dejean, 12 Rob. (La.) 16.

Knowledge chargeable to persons dealing with representative.— Those who deal with such fiduciaries are chargeable with all the knowledge that one would have acquired by reading the will (if any) and the decree of appointment as expressed on the probate records. Lowry *v.* Commercial, etc., Bank, 15 Fed. Cas. No. 8,581, Brunn. Col. Cas. 331, Taney 310.

33. Normandeau *v.* McDonnell, 4 Montreal Q. B. 319, 30 L. C. Jur. 120. See Schouler Ex. § 312.

Where a guardian is appointed administrator of his deceased ward and continues to hold the assets of his estate, such continued holding is as administrator and not as guardian, and his right and duty to account as guardian do not affect the title to the property on the death of the ward. Harrison *v.* Perea, 168 U. S. 311, 18 S. Ct. 129, 42 L. ed. 478. See also Hutton *v.* Williams, 60 Ala. 107.

The probate court cannot as a rule restrain or control the representative's right to assets; but where occasion for interference arises the bond of the representative and his liability to removal furnish a recourse. Crawford *v.* Elliott, 1 Bailey (S. C.) 206.

The administrator of a bailee is entitled to continue the possession of his decedent, and has an action to revendicate this possession as against a mere trespasser. Gragard's Succession, 106 La. 298, 30 So. 885.

Custody before appointment made.— Until an appointment of a personal representative is duly made, one in due possession of assets of the decedent remains rightfully in charge of them on a principle analogous to that of a finder or other bailee, and is accountable correspondingly. Crum *v.* Williams, 29 Ala. 446.

Where receiver appointed before decedent's death.— Where, before the death of an intestate, a receiver of his property has been appointed and qualified, it is the duty of the administratrix to disclose to the receiver the fact of the existence of assets which have come to her possession as administratrix. Reynolds *v.* Ætna L. Ins. Co., 28 N. Y. App. Div. 591, 51 N. Y. Suppl. 446.

Where a testator directs that his widow shall remain in possession and enjoyment of all his estate, she is entitled to the possession of the moneys and securities for moneys, and the executors are not answerable for her unjust and improvident conduct unless they can be implicated in a fraudulent or collusive management with her in the disposition which she has made of the funds. Van Pelt *v.* Veghte, 14 N. J. L. 207.

34. Reed *v.* Reed, 74 S. W. 207, 24 Ky. L. Rep. 2438, holding that where an executor had distributed an estate of some eighty thousand dollars, and was abundantly solvent, an order requiring him to pay into court before distribution a sum of about twenty-one hundred dollars in his hands, on the ground that he was going for a trip out of the state and that it was feared he might not pay over the money promptly if not ordered to do so before his return was erroneous and should be reversed.

Assets subject to seizure on execution.— Weeks *v.* Gibbs, 9 Mass. 74.

the deeds and other documents relating to lands devised for which purpose the court may require him to produce them.[35]

4. Keeping Accounts. Executors and administrators should keep separate books of accounts of the estate,[36] and if they fail to keep their accounts properly they will be held to a strict liability.[37]

5. Deposits. It is proper for the executor or administrator, for the purpose of safely keeping the funds of the estate during administration, to deposit the same in a bank,[38] and indeed he is sometimes required by law to do so;[39] but the

35. *In re* Tompkin, 6 Kulp (Pa.) 99.

Right of representative of deceased co-executor to retain papers as vouchers.— Where one of the executors of a decedent has died, the court will not interfere with the possession by his personal representative of satisfied mortgages, insurance policies, and receipts which remained in the possession and custody of that executor at the time of his death, for the reason that such papers may be necessary to enable the representative of the deceased executor to file the executor's account should this be required, and in settlement of such an account the papers may be required as vouchers for payments made by him. Thomas' Estate, 8 Pa. Dist. 400, 22 Pa. Co. Ct. 518.

Ordering deposit of documents not safely kept.— Where it is established on the petition of one of the executors that the documents and papers connected with the estate are not kept by the co-executor in a safe place, the court will order that they be deposited in a place sufficiently secure, subject to the joint control of the executors. Papineau *v.* Papineau, 10 Quebec Super. Ct. 205.

36. Mandeville *v.* Arnoult, 9 Rob. (La.) 447.

Separate accounts for each beneficiary are unnecessary where it appears by the will that a testator intended that his family should be kept together and his children educated and supported out of the same fund. Wood *v.* Lee, 5 T. B. Mon. (Ky.) 50.

37. Kee *v.* Kee, 2 Gratt. (Va.) 116.

38. Officer *v.* Officer, 120 Iowa 389, 94 N. W. 947, 98 Am. St. Rep. 365.

A deposit so as to draw interest in a savings bank or other bank or trust company is sometimes justifiable as by way of temporary investment. Matter of Maxwell, 3 N. Y. Suppl. 422, 1 Connoly Surr. (N. Y.) 230. And if the representative can readily deposit temporarily in a good bank at a fair rate of interest, he ought at least to do this within a reasonable time. Dalrymple *v.* Gamble, 68 Md. 156, 11 Atl. 718; Holcomb *v.* Coryell, 11 N. J. Eq. 476.

Deposit instead of paying debts.— Where, instead of using cash on hand of the estate to pay debts, the personal representative deposits the cash in bank and uses his own money to pay the debts, he incurs the risk of the bank's failure, as for imprudence on his part. Guthrie *v.* Wheeler, 51 Conn. 207.

Withdrawal by donee.— Where an administrator, who is also sole heir, has agreed with the surety on his bond to deposit the funds of the estate in a certain manner, and not withdraw them except with the surety's consent, the administrator's donee cannot withdraw the funds without consent of the surety. Dickinson *v.* Colonial Trust Co., 33 Misc. (N. Y.) 668, 68 N. Y. Suppl. 909.

39. See Mt. Carmel Church *v.* Farrelly, 34 La. Ann. 533; Pasquier's Succession, 11 La. Ann. 279; D'Aquin's Succession, 10 La. Ann. 780; Peytavin's Succession, 7 Rob. (La.) 477.

Claim of retaining amount of legacy.— An administrator cannot keep in his hands the funds which according to law he is bound to deposit in bank on the plea of retaining only the amount of a legacy to him, when according to the will such legacy is to be paid out of a particular fund of which he has not the seizin. Caballero's Succession, 25 La. Ann. 646.

Under the New York statutes, where it appears that the securities belonging to the estate are not safe in the executor's hands, the surrogate may direct him to deposit them with a trust company, subject to the order of the court. *In re* O'Connor, 1 N. Y. Suppl. 110. See also Matter of Gilman, 3 N. Y. St. 340. A deposit with a trust company may also be ordered so that the estate may have the benefit of interest on the funds. Lockhart *v.* Public Administrator, 4 Bradf. Surr. (N. Y.) 21. Where executors disagree as to the custody of the estate, the surrogate may make an order directing the property to be deposited in a safe place in the joint custody of the executors or subject to their joint order, and the money to be deposited in a specified bank or trust company to their joint credit and to be drawn out upon their joint order. Matter of Hoagland, 51 N. Y. App. Div. 347, 64 N. Y. Suppl. 920 [*affirmed* in 164 N. Y. 573, 58 N. E. 1088]; Matter of Delaplaine, 19 Abb. N. Cas. (N. Y.) 413; Hassey *v.* Keller, 1 Dem. Surr. (N. Y.) 577 (holding that executors may be enjoined from disposing of property in the meantime); Guion *v.* Underhill, 1 Dem. Surr. (N. Y.) 302 (holding that the surrogate has no power to order the deposit of money of an estate with a trust company, except in the instance specified by statute). Whether or not such deposit shall be directed is within the discretion of the surrogate. Matter of Hoagland, 51 N. Y. App. Div. 347, 64 N. Y. Suppl. 920 [*affirmed* in 164 N. Y. 573, 58 N. E. 1088] (holding that where all the parties interested in the estate and two of the executors consented to the deposit, and there was a doubt as to the responsibility of the dissenting executor, who was neither a resident nor a householder of the state, an order directing

deposit should always be made with a designation of his fiduciary capacity.[40] If the funds are so deposited and due care is used in selecting the depositary, the representative is not necessarily responsible for a loss resulting from the subsequent failure of the bank,[41] the test being whether he has exercised such care as men of common prudence ordinarily exercise in their own affairs;[42] but if the deposit is made in his individual name, without any designation of the trust, he

such deposit was not an abuse of discretion); Matter of Delaplaine, 19 Abb. N. Cas. (N. Y.) 413. The most satisfactory test by which to determine whether the deposit should or should not be ordered is whether the circumstances are such that a joint custody pursuant to an agreement of the executors themselves would commend itself to the surrogate as suitable and wise. Matter of Delaplaine, 19 Abb. N. Cas. (N. Y.) 413.

Suggestions for removal.— Where funds received by an administrator have been deposited or invested by order of the orphans' court under the Maryland statute it is the duty of the court to hear suggestions from those interested for the purpose of having the money removed if in danger of being lost to the estate. *Ex p.* Shipley, 4 Md. 493.

Right to interest.— Where funds are deposited in bank by the public administrator to the credit of himself and the controller of the city of New York as required by statute, the interest allowed on such deposit up to the time of settlement and distribution belongs to the estate and not to the city. Sullivan *v.* Herrera, 7 Hun (N. Y.) 309.

40. See Officer *v.* Officer, 120 Iowa 389, 94 N. W. 947, 98 Am. St. Rep. 365.

41. *Connecticut.*— Guthrie *v.* Wheeler, 51 Conn. 207.

Illinois.— Caruthers *v.* Caruthers, 99 Ill. App. 402.

Indiana.— Norwood *v.* Harness, 98 Ind. 134, 49 Am. Rep. 739.

Missouri.— Atterberry *v.* McDuffee, 31 Mo. App. 603.

New Jersey.— Cox *v.* Roome, 38 N. J. Eq. 259; Jacobus *v.* Jacobus, 37 N. J. Eq. 17.

New York.— Sheerin *v.* Public Administrator, 2 Redf. Surr. 421.

Pennsylvania.— *In re* Hanbest, 92 Pa. St. 482; Seymour's Estate, 43 Leg. Int. 58; Robinson's Appeal, 2 Walk. 544; *In re* Seaman, 2 Lack. Leg. N. 271.

South Carolina.— Twitty *v.* Houser, 7 S. C. 153; Morton *v.* Smith, 1 Desauss. 123.

Washington.— *In re* Kohler, 15 Wash. 613, 47 Pac. 30, 55 Am. St. Rep. 904.

See 22 Cent. Dig. tit. "Executors and Administrators," § 399; and *infra*, VIII, L, 1.

Executor continuing deposit made by testator not liable for loss.— Cook *v.* Barnes, 43 S. W. 682, 19 Ky. L. Rep. 1533; *In re* Hanbest, 92 Pa. St. 482; Seidler's Estate, 5 Phila. (Pa.) 85.

A deposit in a bank in another state is not necessarily culpable waste or negligence. Moore *v.* Eure, 101 N. C. 11, 7 S. E. 471, 9 Am. St. Rep. 17.

The representative is not liable for interest on a fund lost through the failure of a bank in which it was properly deposited any more than for the fund itself. Fitzsimons *v.* Fitzsimons, 1 S. C. 400. See *infra*, VIII, L, 1.

42. Harding *v.* Canfield, 73 Minn. 244, 75 N. W. 1112. See *supra*, VIII, A, 1.

Circumstances under which representative held liable for loss see Matter of Scudder, 21 Misc. (N. Y.) 179, 47 N. Y. Suppl. 101.

Circumstances under which representative held not liable for loss see Harding *v.* Canfield, 73 Minn. 244, 75 N. W. 1112; *In re* Seaman, 2 Lack. Leg. N. (Pa.) 271.

Trust company as administrator.— While it was the duty of a trust company acting as administrator to deposit the funds of the estate in a bank, it was guilty of negligence in depositing them in an insolvent bank, and therefore liable for loss resulting therefrom, where its president had actual knowledge at the time of the insolvent condition of the bank, and its officers whose duty it was to look after deposits of trust accounts had heard rumors sufficient to put them on inquiry, which if made would have revealed to them the true condition of the bank. And in view of these facts the fact that the clerk of the trust company having immediate charge of the deposits acted in good faith, believing the bank to be solvent, did not exonerate the company; nor was the trust company authorized to rely on the general reputation of the bank, where its president was also president of the bank, and thus had the means at hand, coupled with the duty, to acquaint himself with its condition. Germania Safety Vault, etc., Co. *v.* Driskill, 66 S. W. 610, 23 Ky. L. Rep. 2050.

Estoppel.— The fact that one of the distributees agreed to the appointment of the administrator, and was to receive a part of the administrator's commission for special services rendered by him, does not estop him from questioning the act of the administrator in selecting a bank in which to deposit the funds of the estate, where he had no knowledge of or control over deposits. Germania Safety Vault, etc., Co. *v.* Driskill, 66 S. W. 610, 23 Ky. L. Rep. 2050.

Effect of settlement in court.— The fact that an *ex parte* settlement made by the administrator with the county court included as a part of the administrator's receipts the amount the estate had on deposit when the bank closed, as evidenced by a certificate of the receiver of the bank, does not preclude the distributees from claiming from the administrator any balance resulting from the loss of the deposit, after crediting dividends received, where it does not appear that the certificate was ever accepted otherwise than as a memorandum entitling the holder to dividends in the distribution of the assets of the bank. Germania Safety Vault, etc.,

is liable for any loss which results from such disposition of the funds.[43] There are circumstances under which deposits may be needlessly made or be left too long for a prudent course of administration; and in such a case, or where the representative lends for a fixed time to a bank instead of making a deposit subject to withdrawal at pleasure or lending as payable on demand, he may incur liability for loss in case of the bank's failure.[44]

6. Disposing of Property. The personal representative can dispose of personal property belonging to the estate, being responsible for the faithful execution of the trust.[45]

7. Liability For Assets Received. A personal representative is of course liable and accountable to the estate for all assets which have come into his hands,[46] and where there are two executors one who has received debts due to the estate cannot discharge himself from liability to the estate by a payment of the sums received to his co-executor.[47] An executor has been held authorized, upon the verbal order of the county judge, to pay over to him any moneys in his hands belonging to the estate or legatees thereof, after which the judge will be liable on his bond for the proper disbursement thereof, such payment discharging the executor from all further liability for the moneys so paid over.[48]

8. Persons Acting in Different Capacities. One who is executor or administrator may also act in another capacity concerning the estate, in which case the due sequence of the trusts varies with his present status. Thus if an executor be also a devisee or residuary legatee, or an administrator be next of kin to the decedent, and he enters generally into possession of the property, he does so in his representative capacity.[49] If one is executor or administrator of the estate

Co. *v.* Driskill, 66 S. W. 610, 23 Ky. L. Rep. 2050.

43. *Alabama.*— Ditmar *v.* Boyle, 53 Ala. 169.

California.— Arguello's Estate, 97 Cal. 196, 31 Pac. 937.

Delaware.— Allen *v.* Leach, 7 Del. Ch. 83, 29 Atl. 1050.

Illinois.—Harward *v.* Robinson, 14 Ill. App. 560.

Louisiana.— Milmo's Succession, 47 La. Ann. 126, 16 So. 772.

Missouri.— *In re* Horner, 66 Mo. App. 531.

North Carolina.— Summers *v.* Reynolds, 95 N. C. 404.

Pennsylvania.— McAllister *v.* Com., 30 Pa. St. 536; Com. *v.* McAlister, 28 Pa. St. 480.

Virginia.—Vaiden *v.* Stubblefield, 28 Gratt. 153.

Wisconsin.— Williams *v.* Williams, 55 Wis. 300, 12 N. W. 465, 13 N. W. 274, 42 Am. Rep. 708.

See 22 Cent. Dig. tit. "Executors and Administrators," § 399.

Representative liable regardless of care or prudence.— Arguello's Estate, 97 Cal. 196, 31 Pac. 937.

The representative is not relieved from liability by the fact that it was his intention to use such deposit for the fiduciary account alone (Ditmar *v.* Boyle, 53 Ala. 169), or that he had no money of his own on deposit in such bank, and hence did not mingle the trust funds with his own (Arguello's Estate, 97 Cal. 196, 31 Pac. 937).

44. *Louisiana.*— Mandeville *v.* Arnoult, 9 Rob. 447.

Minnesota.— Wood *v.* Myrick, 17 Minn. 408.

Nevada.— McNabb *v.* Wixom, 7 Nev. 163.

North Carolina.— Woodley *v.* Holley, 111 N. C. 380, 16 S. E. 419.

Pennsylvania.— Baer's Appeal, 127 Pa. St. 360, 18 Atl. 1, 4 L. R. A. 609.

See 22 Cent. Dig. tit. "Executors and Administrators," § 399.

45. Beecher *v.* Buckingham, 18 Conn. 110, 44 Am. Dec. 580; Lappin *v.* Mumford, 14 Kan. 9; Neale *v.* Hagthrop, 3 Bland (Md.) 551. See Schouler Ex. § 240.

Sale, mortgage, or pledge for individual debt.— In equity an executor or administrator can make no valid sale, mortgage, or pledge of the assets in payment of or as a security for his own debts, because the transaction itself gives the purchaser, mortgagee, or pledgee notice of the misapplication and necessarily involves his participation in the breach of duty. Williamson *v.* Morton, 2 Md. Ch. 94.

46. See Thomason *v.* Thomason, 1 Metc. (Ky.) 51; and *infra*. XV, C.

For the proceeds of an estate converted into money the personal representative remains accountable as before and his control continues. Thomason *v.* Thomason, 1 Metc. (Ky.) 51.

47. Edmonds *v.* Crenshaw, 14 Pet. (U. S.) 166, 10 L. ed. 402. See *infra*, XXI.

48. Doogan *v.* Elliott, 43 Iowa 342.

49. *California.*— Abila *v.* Burnett, 33 Cal. 658.

Kentucky.— Palmer *v.* Kemp, 2 A. K. Marsh. 355.

Michigan.— See Proctor *v.* Robinson, 33 Mich. 284.

South Carolina.— Tinklea *v.* Jordan, 14 Rich. Eq. 160.

and also guardian of a beneficiary he holds the estate first of all as executor or administrator, and does not hold anything as guardian which is not separated from the assets of the estate or placed properly to his account as guardian.[50] So too if an executor be also the designated trustee under a will he comes into possession as executor, and his election afterward to hold as trustee must be manifested by some plain and unequivocal act.[51] Of course, when the functions of the executor or administrator as such have ceased, he holds whatever balance there may be in his hands in his other capacity, whether as trustee, guardian, legatee, distributee, or otherwise.[52] In case of the representative's misappro-

United States.— Labitut *v.* Prewett, 14 Fed. Cas. No. 7,962, 1 Woods 144; Hanson *v.* Cox, 11 Fed. Cas. No. 6,040, 1 Hayw. & H. 167.

But *compare* Camp *v.* Coleman, 36 Ala. 163.

A representative who is the husband of one of the legatees or distributees holds in his representative capacity. Guier *v.* Kelly, 2 Binn. (Pa.) 294; Blakey *v.* Newby, 6 Munf. (Va.) 64. See also Witters *v.* Sowles, 32 Fed. 130, 24 Blatchf. 550.

An election to take as legatee or distributee may be implied where the executor has exclusive possession of the goods and exercises acts of ownership over them (Palmer *v.* Kemp, 2 A. K. Marsh. (Ky.) 355), or where there has been a lapse of time sufficient for the settlement of the estate (Gardner *v.* Simmes, 1 Gill (Md.) 425), or where he brings a suit for partition (Poindexter *v.* Jeffries, 15 Gratt. (Va.) 363).

50. *Alabama.*—Davis *v.* Davis, 10 Ala. 299.

Delaware.— See Burton *v.* Tunnell, 4 Harr. 424.

Illinois.— Wadsworth *v.* Connell, 104 Ill. 369.

Indiana.— See Burtch *v.* Thorn, 7 Ind. 508.

Kentucky.— McCracken *v.* McCracken, 6 T. B. Mon. 342.

Louisiana.—*In re* Scarborough, 44 La. Ann. 288, 10 So. 858; Sample *v.* Scarborough, 43 La. Ann. 315, 8 So. 940; Goux *v.* Moucla, 30 La. Ann. 743.

Massachusetts.— See Conkey *v.* Dickinson, 13 Metc. 51.

New Mexico.— Perea *v.* Harrison, 7 N. M. 666, 41 Pac. 529.

Tennessee.— Drane *v.* Bayliss, 1 Humphr. 174.

West Virginia.— Hedrick *v.* Tuckwiller, 20 W. Va. 489.

See 22 Cent. Dig. tit. "Executors and Administrators," § 398.

Where money is payable to a ward on reaching majority, the executor has no right to transfer the fund to his account as guardian before it becomes payable. Livermore *v.* Bemis, 2 Allen (Mass.) 394.

A guardian of infant beneficiaries who marries the executrix while she has property of the estate in her possession holds the same as guardian and not as executor in right of his wife. Clancy *v.* Dickey, 9 N. C. 497.

An order of court is not necessary to entitle an executor or administrator, who is also the guardian of a person interested in the estate, to charge himself in the capacity of guardian with the ward's share or interest. *In re* Scott, 36 Vt. 297.

51. *Alabama.*—Perkins *v.* Moore, 16 Ala. 9.

Georgia.— Mastin *v.* Barnard, 33 Ga. 520.

Kentucky.— Lasley *v.* Lasley, 1 Duv. 117.

Maine.— Briggs *v.* East Auburn Baptist Church, (1887) 8 Atl. 257.

New Hampshire.— Felton *v.* Sawyer, 41 N. H. 202.

New York.— *In re* Hobson, 131 N. Y. 575, 30 N. E. 63; Dupre *v.* Thompson, 8 Barb. 537; Chiff's Estate, 7 N. Y. St. 751.

See 22 Cent. Dig. tit. "Executors and Administrators," § 398.

A bequest to one in trust as "executor and trustee" keeps the two trusts distinct and in due sequence. Wheatly *v.* Badger, 7 Pa. St. 459.

How change of capacity shown.— An appointment or qualification as trustee or guardian after that as executor or administrator, together with the rendering of accounts and setting apart a fund for the specific purpose, usually shows the change of capacity. Crocker *v.* Dillon, 133 Mass. 91; Fisher *v.* Fisher, 1 Bradf. Surr. (N. Y.) 335; Anderson *v.* Earle, 9 S. C. 460.

Where the administrator receives funds as trustee and not as administrator, he is not chargeable as administrator and cannot as such settle an account with the *cestui que trust*. *In re* Aston, 5 Whart. (Pa.) 228.

Testamentary direction devolving duties as trustee.— Where an executor was directed by will to manage and control the estate, after collection, for the benefit of the testator's children, this duty devolved on him as trustee and not as executor. Stamp *v.* Parrish, 15 Ky. L. Rep. 55. Where a testator charges his devisees of land with the payment of certain annual sums to his executors for a number of years, to be paid by his executors to certain persons named, the fund arising from such charge is not subject to the general executorial power of the executor. Jackson *v.* Updegraffe, 1 Rob. (Va.) 107.

52. *Alabama.*— See Sankey *v.* Sankey, 8 Ala. 601.

Connecticut.— State *v.* Whitehouse, 75 Conn. 410, 53 Atl. 897.

District of Columbia.— See U. S. *v.* May, 4 Mackey 4.

Illinois.— Bell *v.* People, 94 Ill. 230.

Kentucky.— Karr *v.* Karr, 6 Dana 3.

Maryland.— State *v.* Cheston, 51 Md. 352; Seegar *v.* State, 6 Harr. & J. 162, 14 Am. Dec. 265; *In re* Williams, 1 Md. Ch. 25.

priation or default the loss should be sustained in what was then his true character.[53]

B. Performance of Decedent's Obligations. Executors or administrators are in general bound by all the covenant or contract obligations of their decedents,[54] except such as are personal in their nature and of which personal

Missouri.— State *v.* Hearst, 12 Mo. 365, 51 Am. Dec. 167. See also Walker *v.* Walker, 25 Mo. 367.

North Carolina.— Ruffin *v.* Harrison, 81 N. C. 208.

South Carolina.— Johnson *v.* Johnson, 2 Hill Eq. 277, 29 Am. Dec. 72.

United States.— Taylor *v.* Deblois, 23 Fed. Cas. No. 13,790, 4 Mason 131.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1167½.

Expiration of time limited for settlement of estate.— Where the same person sustains the twofold character of executor and guardian, the law will adjudge the ward's proportion of the property in such person's hands after the time limited by law for the settlement of the estate, to be in his hands in his capacity of guardian, whether a final account has been passed by the orphans' court or not. Watkins *v.* State, 2 Gill & J. (Md.) 220. See also Karr *v.* Karr, 6 Dana (Ky.) 3; State *v.* Jordan, 3 Harr. & M. (Md.) 179; Lark *v.* Linstead, 2 Md. Ch. 162; *In re* Williams, 1 Md. Ch. 25.

53. *Illinois.*— Stillman *v.* Young, 16 Ill. 318.

Kentucky.— See Banton *v.* Campbell, 9 B. Mon. 587.

Massachusetts.— Crocker *v.* Dillon, 133 Mass. 91.

Mississippi.— Buckingham *v.* Walker, 48 Miss. 609.

New York.— *In re* Blauvelt, 131 N. Y. 249, 30 N. E. 194.

North Carolina.— Muse *v.* Sawyer, 4 N. C. 637.

Virginia.— Dillard *v.* Dillard, 77 Va. 820.

Wisconsin.— Cameron *v.* Cameron, 15 Wis. 1, 82 Am. Dec. 652.

See 22 Cent. Dig. tit. "Executors and Administrators," § 398.

54. *Georgia.*— Parker *v.* Barlow, 93 Ga. 700, 21 S. E. 213, sale of cut lumber.

Illinois.— Mecartney *v.* Carbine, 108 Ill. App. 282.

Indiana.— Cummins *v.* Peed, 109 Ind. 71, 9 N. E. 603.

Kentucky.— Roach *v.* Ames, 3 Ky. L. Rep. 498.

Maine.— How *v.* How, 48 Me. 428.

Michigan.— McKeown *v.* Harvey, 40 Mich. 226.

Mississippi.— Woods *v.* Ridley, 27 Miss. 119.

New Jersey.— Corle *v.* Monkhouse, 50 N. J. Eq. 537, 25 Atl. 157; Petrie *v.* Voorhees, 18 N. J. Eq. 285.

New York.— Denton *v.* Sanford, 103 N. Y. 607, 9 N. E. 490; Matter of Davis, 43 N. Y. App. Div. 331, 60 N. Y. Suppl. 315; Duff *v.* Gardner, 7 Lans. 165; Kline *v.* Low, 11 Johns. 74.

North Carolina.—Earle *v.* Dickson, 12 N. C. 16.

Pennsylvania.— *In re* Orne, 192 Pa. St. 626, 44 Atl. 287 (holding that where one to whom shares of stock were given for life only pledges them as security for his debt, his property is rightly used by his executor in paying the debt and releasing the stock); *In re* Derbyshire, 81 Pa. St. 18; Quain's Appeal, 22 Pa. St. 510. See also Gravenstine's Estate, 4 Pa. Co. Ct. 388.

Rhode Island.— Newton *v.* Newton, 11 R. I. 390, 23 Am. Rep. 476.

South Carolina.— Brisbane *v.* McCrady, 1 Nott & M. 104, 9 Am. Dec. 676.

Virginia.— Harrison *v.* Sampson, 2 Wash. 155; Lee *v.* Cooke, 1 Wash. 306.

United States.— Scott *v.* Lunt, 7 Pet. 596, 8 L. ed. 797 [*reversing* 21 Fed. Cas. No. 12,540, 3 Cranch C. C. 285].

See 22 Cent. Dig. tit. "Executors and Administrators," § 403.

Covenant of warranty.— An evicted vendee has a remedy against the personal representative of the vendor on a covenant of warranty. Chapman *v.* Holmes, 10 N. J. L. 20; Townsend *v.* Morris, 6 Cow. (N. Y.) 123; McClure *v.* Gamble, 27 Pa. St. 288, covenant for himself and his heirs.

A covenant running with the land conveyed gives no remedy for a breach against the personal representative of the vendor. Carr *v.* Lowry, 27 Pa. St. 257; Bland *v.* Umstead, 23 Pa. St. 316.

Contracts for repairs or improvements.— A contract made by decedent during his lifetime for the making of repairs and improvements on his real estate binds his personal representative (Burton's Estate, 16 Pa. Co. Ct. 246; Halyburton *v.* Kershaw, 3 Desauss. (S. C.) 105) even though nothing has been done during the decedent's lifetime (Pringle *v.* McPherson, 2 Desauss. (S. C.) 524); but special facts and circumstances will be considered as justifying a discontinuance of such work, where enforcement of specific performance is sought against the executor or administrator and the estate is injuriously affected (Gray *v.* Hawkins, 8 Ohio St. 449, 72 Am. Dec. 600) or where other arrangements manifestly beneficial to the estate are made (Moore *v.* O'Brannin, 14 Ohio St. 177); nor can the representative necessarily bind the estate regardless of its interests by a new contract for completing a building, the erection of which the deceased had contracted for (Chicago Lumber Co. *v.* Tomlinson, 54 Kan. 770, 39 Pac. 694. See also Sturgeon *v.* Schaumburg, 40 Mo. 486).

Leases.— A lease is not a personal contract (Walker's Estate, 6 Pa. Co. Ct. 515); and hence where a lessee of lands devised to him, his heirs and assigns, dies before the

performance by the decedent is of the essence;[55] and where the personal representative neglects or refuses to carry out the contract of his decedent, the other party has the usual remedies, as in electing to treat it as rescinded and claiming damages.[56] Conversely the executor or administrator has the right to carry out the contracts of his decedent,[57] and enforce the fulfilment of obligations to his

end of the term, his executor or administrator becomes assignee of the term at law and is liable on the covenants of the lease (Montague *v.* Smith, 13 Mass. 396), and occupation of the premises renders the representative of the lessee liable personally as well as in his representative capacity for the rent accruing after the decedent's death (Howard *v.* Heinerschit, 16 Hun (N. Y.) 177; Hill's Appeal, 31 Pittsb. Leg. J. (Pa.) 375; Wollaston *v.* Hakewill, 3 M. & G. 297, 3 Scott N. R. 593, 42 E. C. L. 161); although the personal liability has been limited to the extent of the profits of the land (Fisher *v.* Fisher, 1 Bradf. Surr. (N. Y.) 335), and a technical distinction has been made between an executor and an administrator as to taking possession so as to incur liability (see Inches *v.* Dickinson, 2 Allen (Mass.) 71, 79 Am. Dec. 765; Pugsley *v.* Aikin, 11 N. Y. 494; Wollaston *v.* Hakewill, 3 M. & G. 297, 3 Scott N. R. 593, 42 E. C. L. 161).

Ground-rent.—Where a testator directs his executors to sell certain realty subject to a ground-rent, and such executors accept the trust, prove the will, and make partial payment of such ground-rent, they will be deemed to have taken such possession of the land that an action of covenant may be maintained against them for arrears of such rent accruing during their possession, and the judgment therein need not be confined to the land out of which the rent issues. Newkumet *v.* Davidson, 13 Wkly. Notes Cas. (Pa.) 10.

Order expiring with death of testator.— An order given by a testator for the delivery of certificates to a third person expires with the death of the testator. McKee *v.* Myers, Add. (Pa.) 31.

Right to terminate contract.— If an administrator continues a contract of employment of his decedent under the mistaken belief that it is binding after the death of one of the parties to it, he has a right to terminate it without liability thereafter. Zinnel *v.* Bergdoll, 9 Pa. Super. Ct. 522, 44 Wkly. Notes Cas. (Pa.) 54, 7 Del. Co. (Pa.) 369.

55. *Illinois.*— Smith *v.* Wilmington Coal Min., etc., Co., 83 Ill. 498.

Kentucky.— McGill *v.* McGill, 2 Metc. 258.

Massachusetts.— Marvel *v.* Phillips, 162 Mass. 399, 38 N. E. 1117, 44 Am. St. Rep. 370, 26 L. R. A. 416.

Missouri.—Sturgeon *v.* Schaumburg, 40 Mo. 482, 93 Am. Dec. 311.

North Carolina.— Siler *v.* Gray, 86 N. C. 566.

Pennsylvania.— White *v.* Com., 39 Pa. St. 167; Patton *v.* Patton, 2 Pennyp. 394.

England.—Siboni *v.* Kirkman, 5 L. J. Exch. 212, 1 M. & W. 418, 1 Tyrw. & G. 777.

See 22 Cent. Dig. tit. "Executors and Administrators," § 405.

Personal contract to convey on contingency. — Where one covenants for himself without naming his heirs to convey land on the happening of a certain event, and dies before that event happens, his administrators are not liable. Earle *v.* Dickson, 12 N. C. 16.

Even though the decedent has in terms bound his personal representatives they are released by his death where the covenant was for the performance of an act personal to himself growing out of his skilled labor in any business. Jaquett's Estate, 13 Lanc. Bar (Pa.) 13.

Building contract not personal to owner of building.— Russell *v.* Buckhout, 87 Hun (N. Y.) 46, 34 N. Y. Suppl. 271.

56. Miller *v.* Thompson, 22 Ark. 258; Parker *v.* Barlow, 93 Ga. 700, 21 S. E. 213; Merchants' Bank *v.* Taylor, 21 Ga. 334.

57. *Illinois.*— Jessup *v.* Jessup, 102 Ill. 480; Smith *v.* Wilmington Coal Min., etc., Co., 83 Ill. 498. See also Mecartney *v.* Carbine, 108 Ill. App. 282, holding that where a contract made prior to decedent's death is of a personal nature, the administrator may be directed by the probate court to perform it, or he may on his own responsibility and risk undertake to do so for the benefit of the estate.

Missouri.— Bambrick *v.* Webster Groves Presb. Church Assoc., 53 Mo. App. 225, holding that an ordinary building contract, near completion and not at that stage calling for services personal to the contractor, does not abate by his death, and his executor, even before the issue of letters, has the power to complete it and so realize for the estate the money to become due on its completion, and save it the penalty which would otherwise accrue on the bond.

Ohio.— Gray *v.* Hawkins, 8 Ohio St. 449, 72 Am. Dec. 600.

Tennessee.— Oliver *v.* Morgan, 10 Heisk. 322.

England.— Marshall *v.* Broadhurst, 1 Cromp. & J. 403, 9 L. J. Exch. O. S. 105, 1 Tyrw. 348; Garrett *v.* Noble, 3 L. J. Ch. 159, 6 Sim. 504, 9 Eng. Ch. 504.

See 22 Cent. Dig. tit. "Executors and Administrators," § 403.

Approval of court.— Where the executor or administrator proposes performing some executory contract made by his decedent on which the representative was not necessarily bound, or where in some onerous or difficult obligation of the decedent which bound the estate some practical adjustment becomes available which it is desirable to carry out, the approval or direction of the court may be properly sought in advance; and under some statutes this course must be taken by a representative who would avoid a personal responsibility in the transaction. See Jessup

decedent where likely to prove beneficial to the estate.[58] But the representative is not empowered to make anew or enlarge a contract for his decedent, to ratify his void transactions, or to waive defenses to which he is entitled by law.[59] If a contract of the decedent carries with it an option to accept or reject, the exercise of such option passes properly to the personal representative.[60] Where the personal representative performs the contract or covenant of his decedent and completes the transaction, the estate will be held bound for any loss sustained thereby, and will be entitled to any profit realized in consequence.[61] The personal representative may avoid his decedent's contract or covenant on the usual grounds of incapacity or fraud,[62] or suspend performance where the other party is bound to proceed first,[63] and in some instances an executory contract inequitable in its consequences to the estate may be avoided or compromised,[64] or an onerous obligation may by its own terms admit sometimes of a legal or equitable rescission to which the personal representative is a party.[65]

C. Engaging in Business — 1. General Rule. The general rule is that neither an executor nor an administrator is justified in placing or leaving assets in trade, for this is a hazardous use to permit of trust moneys; and trading lies outside the scope of administrative functions.[66] So great a breach of trust is it for the representative to engage in business with the funds of the estate that the law charges him with all the losses thereby incurred without on the other hand allowing him to receive the benefit of any profits that he may make, the rule being that the persons beneficially interested in the estate may either hold the representative liable for the amount so used with interest, or at their election

v. Jessup, 102 Ill. 480; Gray *v.* Hawkins, 8 Ohio St. 449, 72 Am. Dec. 600.

When performance improper.— An executory contract of the decedent should not be performed where the performance will result in giving some of the creditors of the decedent's estate an advantage over others. Jessup *v.* Jessup, 102 Ill. 480.

58. Catland *v.* Hoyt, 78 Me. 355, 5 Atl. 775; Duff *v.* Gardner, 7 Lans. (N. Y.) 165.

The personal representative may ratify a contract of his decedent made during infancy, although the death occurred before the decedent reached majority. Jefford *v.* Ringgold, 6 Ala. 544.

Failure to renew lease.— The executors are not chargeable with loss from a failure to renew a lease of the testator, where the latter had during his lifetime failed to perform certain covenants of the lease in consequence of which the lessor was not bound to renew. Fisher *v.* Fisher, 1 Bradf. Surr. (N. Y.) 335.

59. Chicago Lumber Co. *v.* Tomlinson, 54 Kan. 770, 39 Pac. 694; Smith *v.* Brennan, 62 Mich. 349, 28 N. W. 892, 4 Am. St. Rep. 867; Woods *v.* Ridley, 27 Miss. 119.

60. Adams Radiator, etc., Works *v.* Schnader, 155 Pa. St. 394, 26 Atl. 745, 35 Am. St. Rep. 893; Newton *v.* Newton, 11 R. I. 390, 23 Am. Rep. 476.

Election to declare contract forfeited.— Where the administratrix of the vendor in a contract for the sale of land elects, on default of the vendee, to declare the contract forfeited, and the vendee acquiesces in her election, her act is binding on the estate and a subsequent administrator cannot revoke it except for fraud. Oakes *v.* Gillilan, (Nebr. 1901) 95 N. W. 511.

61. Smith *v.* Wilmington Coal Min., etc., Co., 83 Ill. 498.

62. Vaughan *v.* Parr, 20 Ark. 600; Eubanks *v.* Dobbs, 4 Ark. 173.

63. Shultz *v.* Johnson, 5 B. Mon. (Ky.) 497.

64. Jessup *v.* Jessup, 102 Ill. 480. See also Billings *v.* Billings, 42 Leg. Int. (Pa.) 132.

65. Maher *v.* Garry, 15 Misc. (N. Y.) 359, 37 N. Y. Suppl. 605 [*affirmed* in 3 N. Y. App. Div. 480, 38 N. Y. Suppl. 436, 448]; Dougherty *v.* Stephenson, 20 Pa. St. 210.

66. *Alabama.*— Griffin *v.* Bland, 43 Ala. 542.

Illinois.— Field *v.* Colton, 7 Ill. App. 379.

Louisiana.—Florsheim *v.* Holt, 32 La. Ann. 133.

New York.— Stedman *v.* Feidler, 20 N. Y. 437; Matter of McCollum, 80 N. Y. App. Div. 362, 80 N. Y. Suppl. 755.

Pennsylvania.— Corr's Estate, 8 Pa. Dist. 209; *In re* Kalbfell, 27 Pittsb. Leg. J. N. S. 280.

United States.— Smith *v.* Harvey, 13 Fed. 16; Gum *v.* Frost, 4 Fed. 745.

England.— Kirkman *v.* Booth, 11 Beav. 273, 13 Jur. 525, 18 L. J. Ch. 25.

See 22 Cent. Dig. tit. "Executors and Administrators," § 407.

The orphans' court has no power to authorize administrators of a decedent's estate to operate mines belonging to such estate except by and with the consent of creditors of the decedent. Jones' Estate, 23 Pa. Co. Ct. 513. But *compare* Perry *v.* Perry, Ir. R. 3 Eq. 452, holding that the court has jurisdiction in an administration suit to direct a trade or business in which minors are interested to be continued, and will so direct if it is clearly for their benefit.

take all the profits which the representative has made by such unauthorized use of the funds of the estate.[67]

2. Limitations of the Rule — a. In General. Good discretion, however, may require some latitude in closing out the decedent's business, and this a probate court will duly consider when passing upon the representative's accounts.[68] The personal representative may be justified in continuing the business of the decedent so far as is necessary for the purpose of winding up the same and converting the assets into money[69] or carrying out existing contracts of the decedent.[70] In agricultural states a temporary management of the plantation by the personal representative of the deceased owner under judicial supervision for the benefit of all concerned is sometimes permitted.[71] A personal representative who finds a commodity on hand may lawfully, acting in good faith, put it in a condition in

67. *Alabama.*— McAllister *v.* McAllister, 37 Ala. 484; McCreeliss *v.* Hinkle, 17 Ala. 459; Steele *v.* Knox, 10 Ala. 608.

Georgia.— See Poullian *v.* Brown, 82 Ga. 412, 9 S. E. 1131.

Mississippi.— French *v.* Davis, 38 Miss. 167.

New Jersey.— Merchant *v.* Comback, 41 N. J. Eq. 349, 7 Atl. 633.

New York.— Matter of Peck, 79 N. Y. App. Div. 296, 80 N. Y. Suppl. 76 [*affirmed* in 177 N. Y. 538, 69 N. E. 1129]; *In re* Suess, 37 Misc. 459, 75 N. Y. Suppl. 938.

Pennsylvania.— Robinett's Appeal, 36 Pa. St. 174; Matter of Wood, 1 Ashm. 314.

See 22 Cent. Dig. tit. "Executors and Administrators," § 407.

Only actual net profits need be accounted for. Matter of Peck, 79 N. Y. App. Div. 296, 80 N. Y. Suppl. 76 [*affirmed* in 177 N. Y. 538, 69 N. E. 1129]; *In re* Suess, 37 Misc. (N. Y.) 459, 75 N. Y. Suppl. 938. But the representative is not entitled to a salary for his own services to be deducted out of the gross receipts, since he is not entitled to deal with the trust property to his own advantage. Matter of Peck, 79 N. Y. App. Div. 296, 80 N. Y. Suppl. 76 [*affirmed* in 177 N. Y. 538, 69 N. E. 1129].

Where assets of decedent were embarked in a stock speculation and the representative by carrying the account realized at length a profit, such profit belongs to the estate. Breckenridge's Appeal, 127 Pa. St. 81, 17 Atl. 874.

Where an administrator continues the farming, instead of selling the immature crops on the land, the burden is on him to show that the estate was benefited by his management. Casner's Estate, 2 Kulp (Pa.) 474.

68. *Connecticut.*— Martin *v.* New York, etc., R. Co., 62 Conn. 331, 25 Atl. 239.

Georgia.— Lawton *v.* Fish, 51 Ga. 647.

Massachusetts.— Smith *v.* Faulkner, 12 Gray 251.

Mississippi.— Tell City Furniture Co. *v.* Stiles, 60 Miss. 849.

New Jersey.— Laible *v.* Ferry, 32 N. J. Eq. 791 [*reversing* 31 N. J. Eq. 566].

New York.—Brennan *v.* Lane, 4 Dem. Surr. 322; Gilman *v.* Wilber, 1 Dem. Surr. 547.

Pennsylvania.— Shinn's Estate, 166 Pa. St. 121, 30 Atl. 1026, 1030, 45 Am. St. Rep. 656; Orne's Estate, 7 Pa. Dist. 337, holding that an executor may in his discretion continue his testator's business, when an immediate sale does not appear advisable.

England.— See Garrett *v.* Noble, 3 L. J. Ch. 159, 6 Sim. 504, 9 Eng. Ch. 504, where executors who were directed by the will to call in the testator's personal estate, with all convenient speed, continued his trade for some years after his death, and ultimately a considerable loss was sustained, but the court refused to charge them with the loss, as they had acted *bona fide*, and according to the best of their judgment.

See 22 Cent. Dig. tit. "Executors and Administrators," § 407.

69. Matter of McCollum, 80 N. Y. App. Div. 362, 80 N. Y. Suppl. 755; Newton *v.* Poole, 12 Leigh (Va.) 112.

Sale of goods at retail.—It may be prudent and advantageous to the estate to sell out a stock of goods at retail, keeping up the store and a clerk, instead of making a forced sale. Cornwell *v.* Deck, 2 Redf. Surr. (N. Y.) 87; Bowker's Estate, 12 Phila. (Pa.) 88; McKee *v.* Mobley, 3 S. C. 242.

When continuance not incidental to winding up.— The continuance by an executor of the business of deceased could not be regarded as merely incidental to the winding up of the business, where the executor testified that he continued the business in accordance with the decedent's oral request that he should do so. Matter of McCollum, 80 N. Y. App. Div. 362, 80 N. Y. Suppl. 755.

70. Matter of Benedict, 13 Abb. N. Cas. (N. Y.) 67. And see *supra*, VIII, B.

71. *Alabama.*— Pinckard *v.* Pinckard, 24 Ala. 250.

Georgia.— Stephens *v.* James, 77 Ga. 139, 3 S. E. 160.

Louisiana.— Myrick's Succession, 38 La. Ann. 611.

South Carolina.— Herbemont *v.* Percival, 1 McMull. 59; Huson *v.* Wallace, 1 Rich. Eq. 1.

Tennessee.— Allen *v.* Shanks, 90 Tenn. 359, 16 S. W. 715.

Texas.— Reinstein *v.* Smith, 65 Tex. 247.

See 22 Cent. Dig. tit. "Executors and Administrators," § 407.

Method of settlement with croppers see Nicholson *v.* Whitlock, 57 S. C. 36, 35 S. E. 412.

which it is usual to sell it, or in which under the circumstances it can best be sold.[72] The rule is also subject to some limitations where the executor is also the residuary legatee[73] or the business has been specifically bequeathed to him.[74] And it has been held that the consent of all persons interested may authorize the personal representative to carry on the business of the decedent in good faith so as fairly to be allowed for all assets so consumed.[75]

b. Testamentary Directions. Under circumstances not clearly imprudent, an executor may pursue an authority plainly conferred upon him by the will in continuing a decedent's business; although less as an executor perhaps than as one specially empowered and so honored or burdened by his testator's personal confidence;[76] and executors who have carried on a testator's business in obedience to the direction of the will, and have acted in good faith and with ordinary prudence in conducting the same, are not accountable for losses.[77]

3. Liability For Debts — a. In General. It has been laid down that where the personal representative is authorized to carry on the business of the decedent, the debts incurred in so doing are chargeable against the estate and not against

72. McLeod *v.* Griffis, 45 Ark. 505; Whitney *v.* Alexander, 73 N. C. 444.

Caring for live stock.— The expense of caring for live stock belonging to the decedent in a good and businesslike manner until they can be advantageously sold is not such a carrying on of the business of the decedent as will render the administrator liable for loss and expense to the estate incurred on account thereof. *In re* Fernandez, 119 Cal. 579, 51 Pac. 851.

73. *In re* Mullon, 145 N. Y. 98, 39 N. E. 821 [*affirming* 74 Hun 358, 26 N. Y. Suppl. 683], holding that where an executor who is also residuary legatee, after having paid all claims under the will and all claims presented in usual course, pursuant to notice, applies to his own use the assets remaining, he can be held accountable only for the actual value of such assets, and cannot be charged with the profits of a business into which he put such assets.

74. Matter of Van Houten, 18 N. Y. App. Div. 301, 46 N. Y. Suppl. 190, holding that where an executor to whom the business of the testator had been specifically bequeathed took possession thereof and conducted it as his own, he would, on the assets proving insufficient to pay the testator's debts, be charged only with the value of the property as appraised and the good-will of the business, and not with the profits of the business conducted by him.

75. Poole *v.* Munday, 103 Mass. 174; French *v.* Davis, 38 Miss. 167; Smith's Estate, 30 Pittsb. Leg. J. N. S. (Pa.) 188; Dowse *v.* Gorton, [1891] A. C. 190, 60 L. J. Ch. 745, 64 L. T. Rep. N. S. 809, 40 Wkly. Rep. 17; *In re* Brooke, [1894] 2 Ch. 600, 64 L. J. Ch. 21, 71 L. T. Rep. N. S. 398, 8 Reports 444.

76. *Alabama.*— Hollingsworth *v.* Hollingsworth, 65 Ala. 321.

Connecticut.— Hallock *v.* Smith, 50 Conn. 127.

Georgia.— Stephens *v.* James, 77 Ga. 139, 3 S. E. 160; Johnson *v.* Parnell, 60 Ga. 661.

Kentucky.— Burgess *v.* Green, 7 Bush 263.

Maryland.— Bennett *v.* Rhodes, 58 Md. 78.

New York.— Matter of Hickey, 34 Misc. 360, 69 N. Y. Suppl. 844; *In re* Rumsey, 18 N. Y. Suppl. 402.

North Carolina.— Lambertson *v.* Vann, 134 N. C. 108, 46 S. E. 10.

Pennsylvania.— Cline's Appeal, 106 Pa. St. 617. See also Theis's Case, 6 Pa. Co. Ct. 396.

Texas.— Dwyer *v.* Kalteyer, 68 Tex. 554, 5 S. W. 75.

West Virginia.— Hooper *v.* Hooper, 29 W. Va. 276, 1 S. E. 280.

England.—Kirkman *v.* Booth, 11 Beav. 273, 13 Jur. 525, 18 L. J. Ch. 25; *Re* Kidd, 70 L. T. Rep. N. S. 648, 8 Reports 261, 42 Wkly. Rep. 571.

Canada.— Smith *v.* Smith, 13 Grant Ch. (U. C.) 81.

See 22 Cent. Dig. tit. "Executors and Administrators," § 407.

There ought to be the most distinct and positive authority and direction given by the will itself for that purpose. Kirkman *v.* Booth, 11 Beav. 273, 13 Jur. 525, 18 L. J. Ch. 25.

An oral request of a decedent that his executors continue his business after his death does not confer on them authority to do so. Matter of McCollum, 80 N. Y. App. Div. 362, 80 N. Y. Suppl. 755. See also Malone *v.* Kelley, 54 Ala. 532.

What property may be employed in business.— Where a testator gave his estate in trust for his son, after payment of debts and testamentary expenses, and directed the executor to carry on some legitimate business for the benefit of the son, the executor was not authorized to employ the entire estate in continuing the executor's business, but only the residue after the payment of debts and testamentary expenses. Matter of Sharp, 5 Dem. Surr. (N. Y.) 516.

Executors are not absolved from liability to account by a direction in the will to continue the testator's business. *In re* Jones, 103 N. Y. 621, 9 N. E. 493, 57 Am. Rep. 775 [*affirming* 37 Hun 430 (*affirming* 2 Dem. Surr. 602)].

77. *In re* Waddell, 196 Pa. St. 294, 46 Atl.

the representative individually.[78] But there is more authority for the view that the executor is personally liable for debts contracted in carrying on the business under the directions of the will, although the estate should indemnify him.[79] In a proper case the creditors may be subrogated to the representative's right of indemnity,[80] and it has also been held that they may maintain a suit in equity to charge the estate where the executor is insolvent.[81]

b. What Assets Liable. Where the representative is authorized to carry on the decedent's business after his death, only such assets of the estate as are invested in the business at the time of the decedent's death can be considered as trade assets, and in the absence of some clear authority in the will the other prop-

304; *In re* Whitman, 195 Pa. St. 144, 45 Atl. 673.

78. Fleming *v.* Kelly, 18 Colo. App. 23, 69 Pac. 272; M. Eisenstadt Jewelry Co. *v.* Mississippi Valley Trust Co., 72 Mo. App. 514; Reakirt *v.* Flanagan, 6 Pa. Dist. 402, 40 Wkly. Notes Cas. 375; McMillan *v.* Hendricks, (Tex. Civ. App. 1898) 46 S. W. 859; Primm *v.* Mensing, 14 Tex. Civ. App. 395, 38 S. W. 382 [*following* Reinstein *v.* Smith, 65 Tex. 247], holding that executors authorized to carry on a plantation have power to incur indebtedness for supplies for the tenants to enable them to make crops.

Liability of widow's share.— Where the widow has not elected to take against the will, but has accepted profits accruing from the management of the estate by the executrix under power given in the will to carry on testator's business, her interest, declared by the will to be what she would be entitled to under the intestate laws, is subject to debts contracted by the executrix in carrying on the business. Furst *v.* Armstrong, 202 Pa. St. 348, 51 Atl. 996, 90 Am. St. Rep. 653.

Authority must be shown. The authority of the executor to carry on a plantation, furnish it with supplies, etc., must be shown; otherwise the estate is not liable for supplies furnished under his direction. Miltenberger *v.* Taylor, 23 La. Ann. 188.

Continuance of business without authority. — Where an administrator is carrying on the business of the decedent without any authority a person extending credit to him in the conduct of such business does so on the administrator's own credit, irrespective of whether he acts for the estate or not. Corr's Estate, 8 Pa. Dist. 209.

79. *Alabama.*— Foxworth *v.* White, 72 Ala. 224. See also Colvin *v.* Owens, 22 Ala. 782.

California.— Rose's Estate, 80 Cal. 166, 22 Pac. 86.

Illinois.— See Miller *v.* Didisheim, 95 Ill. App. 321, holding that the executor, although conducting the testator's business by an order of the probate court, binds himself personally unless he exacts an agreement from the person with whom he deals to look to the funds of the estate exclusively.

New Jersey.— Laible *v.* Ferry, 32 N. J. Eq. 791; Krueger *v.* Ferry, 3 N. J. L. J. 280.

New York.— Willis *v.* Sharp, 113 N. Y. 586, 21 N. E. 705, 4 L. R. A. 493 [*affirming* 43 Hun 434]; Delaware, etc., R. Co. *v.* Gilbert, 112 N. Y. 673, 20 N. E. 416; Kenyon *v.* Olney, 15 N. Y. Suppl. 416; Boulle *v.* Tompkins, 5 Redf. Surr. 172. But see Clapp *v.* Clapp, 10 N. Y. St. 733.

England.— *In re* Johnson, 15 Ch. D. 548, 49 L. J. Ch. 745, 43 L. T. Rep. N. S. 372, 29 Wkly. Rep. 168; Lucas *v.* Williams, 3 Giff. 150, 8 Jur. N. S. 207; *Re* Kidd, 70 L. T. Rep. N. S. 648, 8 Reports 261, 42 Wkly. Rep. 571; Lumsden *v.* Buchanan, 4 Macq. H. L. 950; Labouchere *v.* Tupper, 11 Moore P. C. 198, 5 Wkly. Rep. 597, 14 Eng. Reprint 670; Barker *v.* Parker, 1 T. B. 287, 1 Rev. Rep. 201.

Canada.— Braun *v.* Braun, 14 Manitoba 346.

See 22 Cent. Dig. tit. "Executors and Administrators," § 408.

Fraudulent misrepresentations.— A claim that an executor, carrying on the business of his testator under the will, made fraudulent representations as to the value of the estate to obtain credit gives no right of action against the estate, but only against the executor personally. Matter of Hickey, 34 Misc. (N. Y.) 360, 69 N. Y. Suppl. 844.

80. *In re* Johnson, 15 Ch. D. 548, 49 L. J. Ch. 745, 43 L. T. Rep. N. S. 372, 29 Wkly. Rep. 168; *Re* Kidd, 70 L. T. Rep. N. S. 648, 8 Reports 261, 42 Wkly. Rep. 571; Braun *v.* Braun, 14 Manitoba 346. See also *Re* Shorey, 79 L. T. Rep. N. S. 349, 47 Wkly. Rep. 188.

Where the executor is in default to the specific trust estate devoted to the trade the rule does not apply. In such case, the defaulting executor not being himself entitled to an indemnity except upon terms of making good his default, the creditors are in no better position, and are therefore not entitled to have their debts paid out of the specific assets unless the default is made good. *In re* Johnson, 15 Ch. D. 548, 49 L. J. Ch. 745, 43 L. T. Rep. N. S. 372, 29 Wkly. Rep. 168.

The executor's inability to account does not result in a loss of his right to indemnity from the estate for debts incurred in the business, and consequently creditors do not lose their right of claiming through that indemnity against the estate. *Re* Kidd, 70 L. T. Rep. N. S. 648, 8 Reports 261, 42 Wkly. Rep. 571.

81. Willis *v.* Sharp, 43 Hun (N. Y.) 434 [*affirmed* in 113 N. Y. 586, 21 N. E. 705, 4 L. R. A. 493].

Rights of decedent's creditors.— Unless the creditors existing at the death of the decedent in some way consented to the carrying on of the business by the executor, they have the right to insist that the estate, as it existed at decedent's death, shall be used for the payment of their debts and the expenses of

erty of the estate cannot be subjected to the risks of trade, or be made liable for debts contracted by the representative in carrying on the business.[82]

4. Partnership. The personal representative of a decedent has as a rule no more right to continue in a business in which the decedent was a partner than he has to continue a business of which the decedent was the sole proprietor.[83] The executor of a deceased copartner may, however, continue in the business where the will directs him to do so;[84] and the liability of a deceased copartner as well as his interest in the profits of the concern may by the copartnership contract be continued beyond his death,[85] although in the absence of such a stipulation the death of one of the partners would dissolve the firm even though the copartnership was expressed to be for a term of years.[86] With such a contract the effect must naturally be to bind the estate of the deceased partner in the hands of his executor or administrator without compelling such representative to become a partner personally.[87] Where there are no valid provisions by will or contract for further

administration to the exclusion of debts subsequently created by the executor. But if the business was carried on by the executor with the consent of the original creditors, the creditors of the business must either share *pro rata* with the other creditors in the whole estate (which is probably the correct rule) or be first paid out of the portion of the estate used in the business. Willis *v.* Sharp, 115 N. Y. 396, 22 N. E. 149, 5 L. R. A. 636 [*reversing* 46 Hun 540].

82. *Florida.*—Wilson *v.* Fridenberg, 21 Fla. 386; Fridenburg *v.* Wilson, 20 Fla. 359.

Michigan.— See Frey *v.* Eisenhardt, 116 Mich. 160, 74 N. W. 501, holding that, where the representative exceeds his powers by carrying on the decedent's business, trade debts incurred after the decedent's death can reach only trade assets.

Mississippi.— Brasfield *v.* French, 59 Miss. 632.

Missouri.— Merritt *v.* Merritt, 62 Mo. 150.

New Jersey.— Krueger *v.* Ferry, 3 N. J. L. J. 280.

New York.— Matter of Hickey, 34 Misc. 360, 69 N. Y. Suppl. 844.

Ohio.— Lucht *v.* Behrens, 28 Ohio St. 231, 22 Am. Rep. 378.

United States.— Smith *v.* Ayer, 101 U. S. 320, 25 L. ed. 955.

England.— *Ex p.* Richardson, Buck 202, 3 Madd. 138, 18 Rev. Rep. 204; Thompson *v.* Andrews, 2 L. J. Ch. 46, 1 Myl. & K. 116, 7 Eng. Ch. 116, 39 Eng. Reprint 625; *Ex p.* Garland, 10 Ves. Jr. 110, 7 Rev. Rep. 352, 1 Smith K. B. 220, 32 Eng. Reprint 786.

Canada.— Smith *v.* Smith, 13 Grant Ch. (U. C.) 81.

See 22 Cent. Dig. tit. "Executors and Administrators," § 408.

Money cannot be raised by pledging or mortgaging general assets. Smith *v.* Ayer, 101 U. S. 320, 25 L. ed. 955.

Charges against profits.— Bad debts and losses and the expense of replacing old articles with new are properly charged against the profits and not against the capital. *In re* Jones, 37 Hun (N. Y.) 430 [*affirmed* in 103 N. Y. 621, 9 N. E. 493, 57 Am. Rep. 775].

Under adequate authority given by the will a purchase of goods on credit for the business may bind the general assets for payment. Willis *v.* Sharp, 113 N. Y. 586, 21 N. E. 705, 4 L. R. A. 493 [*affirming* 43 Hun 434].

Where an executor is given "full power" to conduct the business in which testator was engaged he may carry on all testator's business interests and in doing so is not limited to capital invested in the business. Furst *v.* Armstrong, 202 Pa. St. 348, 51 Atl. 996, 90 Am. St. Rep. 653.

83. See Brown *v.* Farnham, 55 Minn. 27, 56 N. W. 352.

The executors of a special partner in a limited partnership, which is indebted to such partner for money lent for the partnership business, represent him in his individual claim for money lent and also represent him in any interest the estate may have in carrying on the partnership; and it is for such executors to determine, with or without the sanction of the court, whether it is most for the interest of the estate they represent to continue the partnership or urge their claim for money lent. Walkenshaw *v.* Perzel, 32 How. Pr. (N. Y.) 233.

84. Laughlin *v.* Lorenz, 48 Pa. St. 275, 86 Am. Dec. 592; Burwell *v.* Cawood, 2 How. (U. S.) 560, 11 L. ed. 378.

85. Laughlin *v.* Lorenz, 48 Pa. St. 275, 86 Am. Dec. 592; Scholefield *v.* Eichelberger, 7 Pet. (U. S.) 586, 8 L. ed. 793. See, generally, Partnership.

Where the surviving partner is also executor of his deceased copartner, he cannot as executor agree with himself as copartner as to the matters referred to in partnership articles, providing that in case of the death of either partner the business should be continued or sold as might be agreed by the survivor and the legal representatives of the deceased partner. Leavitt's Estate, 20 N. Y. Suppl. 58, 28 Abb. N. Cas. (N. Y.) 457.

86. Schofield *v.* Eichelberger, 7 Pet. (U. S.) 586, 8 L. ed. 793. And see, generally, Partnership.

87. See McArdle *v.* West Philadelphia Title, etc., Co., 7 Pa. Super. Ct. 328, 42 Wkly. Notes Cas. (Pa.) 238.

Construction of statute.— A statute authorizing partners to stipulate that, in case of the death of one, the firm should continue as between "the heir of the deceased and the

continuing a partnership, either the surviving partner or partners, or else if necessary the personal representative of the decedent, should see that the business is duly wound up and adjusted.[88] A settlement of partnership affairs made with the surviving partners by the personal representative of a deceased partner is binding on the latter's estate, its creditors and beneficiaries, except in cases of fraud or mistake, and for only the share thus received is the representative presumably liable.[89] The rules which have already been stated with reference to the result of the personal representative engaging in business or continuing the decedent's business[90] apply where the personal representative has participated in the business of a partnership of which the decedent was a member during his lifetime, whether he has been duly empowered to do so,[91] or has done so in violation

surviving partners" cannot be construed to authorize a stipulation binding an executor of a deceased partner to continue the firm along with the surviving partners. Hart *v.* Anger, 38 La. Ann. 341.

88. *Alabama.*— Costley *v.* Wilkerson, 49 Ala. 210.

California.— Smith *v.* Walker, 38 Cal. 385, 99 Am. Dec. 415.

Indiana.— Brandon *v.* Judah, 7 Ind. 545.

Kansas.— Teney *v.* Laing, 47 Kan. 297, 27 Pac. 976; Boston, etc., Glass Co. *v.* Ludlum, 8 Kan. 40.

Maine.— Hamlin *v.* Mansfield, 88 Me. 131, 33 Atl. 788; Cook *v.* Lewis, 36 Me. 340.

Massachusetts.— Walker *v.* Maxwell, 1 Mass. 104.

Michigan.— Merritt *v.* Dickey, 38 Mich. 41.

Mississippi.— Citizens' Mut. Ins. Co. *v.* Lyon, 59 Miss. 305.

Missouri.— *In re* Ames, 52 Mo. 290.

New Jersey.—Wild *v.* Davenport, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552; Shipman *v.* Lord, 58 N. J. Eq. 380, 44 Atl. 215.

New York.— Montgomery *v.* Dunning, 2 Bradf. Surr. 220.

Pennsylvania.— Stern's Appeal, 95 Pa. St. 504; Laughlin *v.* Lorenz, 48 Pa. St. 275, 86 Am. Dec. 592.

United States.— Smith *v.* Ayer, 101 U. S. 320, 25 L. ed. 955; Wickliffe *v.* Eve, 17 How. 468, 15 L. ed. 163.

England.— Downs *v.* Collins, 6 Hare 418, 31 Eng. Ch. 418.

See 22 Cent. Dig. tit. "Executors and Administrators," § 409.

Surviving partner should usually wind up affairs of firm. Wickliffe *v.* Eve, 17 How. (U. S.) 468, 15 L. ed. 163. See *supra*, III, D.

Administrator must keep individual and partnership accounts separate. Boston, etc., Co. *v.* Ludlum, 8 Kan. 40.

Remedies of personal representative.— The executor or administrator may maintain a bill against the surviving partner for an account of profits (Freeman *v.* Freeman, 136 Mass. 260), but a remedy in the probate court does not usually lie (Searles *v.* Scott, 6 Sm. & M. (Miss.) 246; Scott *v.* Searles, 5 Sm. & M. (Miss.) 25; Bennett *v.* Crain, 41 Hun (N. Y.) 183).

Surviving partner deals with personal representative.— While a surviving partner is usually entitled to control the partnership debts after the death of his copartner, yet his dealings and liability for a settlement should be with the latter's personal representative alone, and not with heirs, distributees, or a surviving widow; and partner or representative must use due diligence and good faith. Gardner *v.* Cummings, Ga. Dec. 1, Pt. I; Skillen *v.* Jones, 44 Ind. 136; Alline *v.* Franz, 91 Iowa 746, 60 N. W. 646; Hosmer *v.* Burke, 26 Iowa 353; Robertshaw *v.* Hanway, 52 Miss. 713.

Compensation paid to the surviving partner for winding up the business is not to be allowed to the representative. Loomis *v.* Armstrong, 49 Mich. 521, 14 N. W. 505; Brown *v.* McFarland, 41 Pa. St. 129, 80 Am. Dec. 598.

Arbitration.— The personal representative may submit to arbitration the question as to the value of decedent's interest in the partnership. Hoyt *v.* Sprague, 103 U. S. 613, 26 L. ed. 585. See *supra*, V, I.

Terms of settlement.— The executor or administrator may settle with the surviving partner on such terms as in the exercise of good faith and reasonable diligence he may choose to accept. Hoyt *v.* Sprague, 103 U. S. 613, 26 L. ed. 585.

89. *Missouri.*— Buckham *v.* Singleton, 10 Mo. 405.

New York.— Sage *v.* Woodin, 66 N. Y. 578; Montgomery *v.* Dunning, 2 Bradf. Surr. 220. See also Palmer *v.* Kingsford, 112 N. Y. 337, 19 N. E. 815.

North Carolina.— Ralston *v.* Telfair, 22 N. C. 414.

Ohio.— Ludlow *v.* Cooper, 4 Ohio St. 1.

Pennsylvania.— Holmes' Appeal, 79 Pa. St. 279.

Virginia.— See Shackelford *v.* Shackelford, 32 Gratt. 481.

Wisconsin.— Roys *v.* Vilas, 18 Wis. 169.

See 22 Cent. Dig. tit. "Executors and Administrators," § 409.

90. See *supra*, VIII, C, 3.

91. *Kentucky.*— Walker *v.* Walker, 88 Ky. 615, 11 S. W. 718, 11 Ky. L. Rep. 80.

New Jersey.— Wild *v.* Davenport, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552.

New York.—Palmer *v.* Kingsford, 112 N. Y. 337, 19 N. E. 815; Browne *v.* Bedford, 4 Dem. Surr. 304; Luers *v.* Brunjes, 5 Redf. Surr. 32.

United States.— Burwell *v.* Cawood, 2 How. 560, 11 L. ed. 378.

England.— *In re* Leeds Banking Co., L. R. 1 Ch. 231, 12 Jur. N. S. 60, 35 L. J. Ch. 307, 13 L. T. Rep. N. S. 694, 14 Wkly. Rep. 255;

of the general rule forbidding an executor or administrator to engage in business with the funds of the estate.[92]

D. Contracts — 1. General Rule. The general rule is that the contracts of an executor or administrator, although made in the interest and for the benefit of the estate he represents, are, if made upon a new and independent consideration moving between the promisee and the representative as promisor, the personal contracts of the executor or administrator and do not bind the estate.[93] Hence the executor or administrator cannot make any agreement enlarging the liability of the estate in his hands, nor creating against it a debt, charge, or lien enforceable at the suit of the person with whom he contracts, since the immediate

Labouchere *v.* Tupper, 11 Moore P. C. 198, 5 Wkly. Rep. 597, 14 Eng. Reprint 670.

See 22 Cent. Dig. tit. "Executors and Administrators," § 409.

Advancing money under order of court to protect business.— Where the probate court in the due exercise of its statutory jurisdiction authorizes an executor or administrator to advance or borrow money to preserve a bankrupt business in which the estate is interested, such decree is a protection to the representative and those dealing with him. *In re* Mustin, 188 Pa. St. 544, 41 Atl. 618.

92. *Connecticut.*—Alsop *v.* Mather, 8 Conn. 584, 21 Am. Dec. 703.

Mississippi.— Avery *v.* Myers, 60 Miss. 367; Citizens' Mut. Ins. Co. *v.* Ligon, 59 Miss. 305.

New Jersey.— Wild *v.* Davenport, 43 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552.

United States.— Smith *v.* Ayer, 101 U. S. 320, 25 L. ed. 955.

England.— *In re* Morgan, 18 Ch. D. 93, 50 L. J. Ch. 834, 45 L. T. Rep. N. S. 183; *Ex p.* Garland, 1 Smith K. B. 220, 10 Ves. Jr. 110, 7 Rev. Rep. 352, 32 Eng. Reprint 786.

See 22 Cent. Dig. tit. "Executors and Administrators," § 409.

93. *Alabama.*— Sanford *v.* Howard, 29 Ala. 684, 68 Am. Dec. 101; Harding *v.* Evans, 3 Port. 221, 29 Am. Dec. 255.

Arkansas.— Pike *v.* Thomas, 65 Ark. 437, 47 S. W. 110.

California.— Dwinelle *v.* Henriquez, 1 Cal. 387.

Connecticut.— Taylor *v.* Mygatt, 26 Conn. 184.

Delaware.— See Baird *v.* Harper, (1902) 51 Atl. 141.

Georgia.— Hughes *v.* Treadaway, 116 Ga. 663, 42 S. E. 1035. See also Rhodes *v.* Harrison, 60 Ga. 428.

Illinois.— Bauerle *v.* Long, 187 Ill. 475, 58 N. E. 458, 52 L. R. A. 643 [*affirming* 88 Ill. App. 177]; Vincent *v.* Morrison, 1 Ill. 227; McAuley *v.* O'Connor, 92 Ill. App. 592.

Indiana.— Moody *v.* Shaw, 85 Ind. 88; Holderbaugh *v.* Turpin, 75 Ind. 84, 39 Am. Rep. 124.

Iowa.— Valley Nat. Bank *v.* Crosby, 108 Iowa 651, 79 N. W. 383, holding that an order of the judge on an *ex parte* hearing, in the absence of any statute, adds nothing to the powers of the administrator.

Kentucky.— Bland *v.* Gaither, 11 S. W. 423, 10 Ky. L. Rep. 1033; Bland *v.* Wintersmith, 11 Ky. L. Rep. 52.

Massachusetts.— Durkin *v.* Langley, 167 Mass. 577, 46 N. E. 119; Phillips *v.* Blatchford, 137 Mass. 510; Kingman *v.* Soule, 132 Mass. 285; Luscomb *v.* Ballard, 5 Gray 402, 66 Am. Dec. 374.

Michigan.— See Roscoe *v.* McDonald, 91 Mich. 270, 51 N. W. 939.

Mississippi.— Farley *v.* Hord, 45 Miss. 96; Woods *v.* Ridley, 27 Miss. 119. But see Steele *v.* McDowell, 9 Sm. & M. 193.

Nebraska.— Craig *v.* Anderson, (1902) 92 N. W. 640.

New York.— O'Brien *v.* Jackson, 167 N. Y. 31, 60 N. E. 238 [*reversing* 42 N. Y. App. Div. 171, 58 N. Y. Suppl. 1044]; Austin *v.* Munroe, 47 N. Y. 360; Hillman *v.* Stephens, 16 N. Y. 278; Chisolm *v.* Toplitz, 82 N. Y. App. Div. 346, 82 N. Y. Suppl. 1081; Bloodgood *v.* Gregory, 38 N. Y. Super. Ct. 132; Cary *v.* Gregory, 38 N. Y. Super. Ct. 127; Olcott *v.* De Jorrin, 36 Misc. 735, 74 N. Y. Suppl. 393; Van Zandt *v.* Myers, 7 N. Y. Wkly. Dig. 390. See also Bull *v.* Bull, 31 Hun 69.

North Carolina.— Lindsay *v.* Darden, 124 N. C. 307, 32 S. E. 678; Kerchner *v.* McRae, 80 N. C. 219.

Ohio.— West *v.* Dean, 15 Ohio Cir. Ct. 261, 8 Ohio Cir. Dec. 797.

Pennsylvania.— Masterson *v.* Masterson, 5 Rawle 137.

South Carolina.— Harrell *v.* Witherspoon, 3 McCord 486; Nehbe *v.* Price, 2 Nott & M. 328.

Vermont.— Rich *v.* Sowles, 64 Vt. 408. 23 Atl. 723, 15 L. R. A. 850; Lovell *v.* Field, 5 Vt. 218.

Virginia.— Daingerfield *v.* Smith, 83 Va. 81, 1 S. E. 599; Fitzhugh *v.* Fitzhugh, 11 Gratt. 300, 62 Am. Dec. 653.

Wisconsin.— Williams *v.* Troop, 17 Wis. 463.

United States.— Kelley *v.* Kelley, 84 Fed. 420; Thompson *v.* Canterbury, 12 Fed. 485, 2 McCrary 332.

England.— Farhall *v.* Farhall, L. R. 7 Ch. 123, 41 L. J. Ch. 146, 25 L. T. Rep. N. S. 685, 20 Wkly. Rep. 157; Brice *v.* Wilson, 8 A. & E. 349 note, 35 E. C. L. 626.

See 22 Cent. Dig. tit. "Executors and Administrators," § 410.

Contract giving other party right to file mechanic's lien.— The executor cannot make a contract which would give the other party a right to file a mechanic's lien on property

liability incurred is a personal one on his part.[94] If the contract was one which he had no right to make, all the more is it he who must respond for it and not the estate;[95] nor will his express promise "as executor" or "as administrator" change his individual liability in regard to it or amount to more than surplusage.[96] But debts incurred for the incidental charges of the due course of administration have been held obligatory upon the estate,[97] and an executor may sometimes create debts against the estate for expenses incurred in complying with the directions of the will,[98] and the necessities of the case may sometimes be such as to

of the estate without an order of the court, and the subsequent consent of the heirs does not validate such a contract. San Francisco Pav. Co. *v.* Fairfield, 134 Cal. 220, 66 Pac. 255.

Renewal of lease.— The administrator of a lessee in a lease which provides for a renewal only at the option of the lessee, on a valuation of the land only, the improvements belonging to the lessee, and makes no provision for compensation therefor if there is no renewal, cannot bind the estate by a renewal and is properly sued personally for the rent on a lease made by him. Chisolm *v.* Toplitz, 82 N. Y. App. Div. 346, 82 N. Y. Suppl. 1081.

Warranty.— The personal representative cannot bind the estate by a warranty, but only binds himself. Sumner *v.* Williams, 8 Mass. 162, 5 Am. Dec. 83. But see Welch *v.* Hoyt, 24 Ill. 117.

The estate is not liable in damages for a breach of a contract entered into by the executrix. Sterrett *v.* Barker, 119 Cal. 492, 51 Pac. 695.

Stipulation against individual liability.— Where the executors of one of the makers of a note, by agreement under seal with the other maker, assume as executors all liability on the note, but it is expressly stipulated that they shall not be held liable individually, a judgment on such agreement against the executors individually is erroneous. Beattie *v.* Latimer, 42 S. C. 313, 20 S. E. 53.

Contract held to be in capacity of legatee.— Where an executrix who was also sole legatee contracted with an attorney to prosecute a suit for land devised to her, and not needed for the payment of the testator's debts, the attorney to receive a certain proportion of the amount recovered, the contract was considered to be that of the legatee and not of the executrix, and hence not be voidable by a succeeding administrator *de bonis non* with the will annexed, as made by an executrix without direction of court. Bell *v.* Welch, 38 Ark. 139.

94. *Alabama.*—Steele *v.* Steele, 64 Ala. 438, 38 Am. Rep. 15.

Arkansas.—Underwood *v.* Milligan, 10 Ark. 254.

Maine.— Davis *v.* French, 20 Me. 21, 37 Am. Dec. 36.

Mississippi.— Hagan *v.* Barksdale, 44 Miss. 186.

South Carolina.— Johnson *v.* Henagan, 11 S. C. 93; Guerry *v.* Capers, Bailey Eq. 159.

Tennessee.— Hoss *v.* Crouch, (Ch. App. 1898) 48 S. W. 724.

Texas.— McMahan *v.* Harbert, 35 Tex. 451.

Vermont.— Rich *v.* Sowles, 64 Vt. 408, 23 Atl. 723, 15 L. R. A. 850.

Virginia.— Staples *v.* Staples, 85 Va. 76, 7 S. E. 199.

See 22 Cent. Dig. tit. "Executors and Administrators," § 410.

Representative cannot execute note so as to bind estate. Boyd *v.* Johnston, 89 Tenn. 284, 14 S. W. 804; East Tennessee Iron Mfg. Co. *v.* Gaskell, 2 Lea (Tenn.) 742.

Promise without consideration.— For an executor's or administrator's promise without consideration touching the estate he is not liable. McElwee *v.* Story, 1 Rich. (S. C.) 9.

Admission of personal liability.— Where an administrator charged the price of a coffin in his administration account, and had it allowed to him by the judge of probate, it was an admission by him that he was personally liable for the price. Trueman v. Tilden, 6 N. H. 201.

95. *Alabama.*— Colvin *v.* Owens, 22 Ala 782.

Illinois.— Mason *v.* Caldwell, 10 Ill. 196, 48 Am. Dec. 330.

Kentucky.— Proctor *v.* Terrill, 8 B. Mon. 451.

Mississippi.— Weathersby *v.* Sinclair, 43 Miss. 189, building materials for a house.

Rhode Island.— See Brown *v.* Lewis, 9 R. I. 497.

Utah.— Cain *v.* Young, 1 Utah 361.

Virginia.— Childress *v.* Morris, 23 Gratt. 802. See also Staples *v.* Staples, 85 Va. 76, 7 S. E. 199.

See 22 Cent. Dig. tit. "Executors and Administrators," § 410.

96. *Kentucky.*— Ellis *v.* Merriman, 5 B. Mon. 296.

Louisiana.— Dean *v.* Wade, 8 La. Ann. 85.

Mississippi.— Steele *v.* McDowell, 9 Sm. & M. 193; Sims *v.* Stilwell, 3 How. 176.

New York.— Chouteau *v.* Suydam, 21 N. Y. 179.

Pennsylvania.— Gebler *v.* Culin, 6 Phila. 130.

Vermont.— Rich *v.* Sowles, 64 Vt. 408, 23 Atl. 723, 15 L. R. A. 850.

See 22 Cent. Dig. tit. "Executors and Administrators," § 410.

97. Farley *v.* Hord, 45 Miss. 96.

98. See Little *v.* Bennett, 58 N. C. 156. But *compare* O'Brien *v.* Jackson, 167 N. Y. 31, 60 N. E. 238 [*reversing* 42 N. Y. App. Div. 171, 58 N. Y. Suppl. 1044].

Will held not to give power to create debts. — See Ward *v.* Harrington, 29 Miss. 238.

permit of the representative binding the estate by his contract made for its benefit,[99] or he may sometimes bind the estate by his contract made with the sanction of the probate court,[1] and statutes sometimes give to the representative certain powers in this respect.[2] Any contract which the personal representative makes relating to the estate will at all events inure to the advantage of its beneficiaries, subject to the due payment of creditors of the estate.[3]

2. Services — a. In General. The personal representative and not the estate is as a rule directly liable to one whom he employs incidentally in the discharge of his trust, as for selling, custody of, or suitable work upon the assets, or clerical or other services in managing the property and the like.[4] Where, however, services are rendered under an employment or agreement by which the person rendering them has confined himself to the estate or the personal representative administering it as his debtor, he will not be at liberty afterward to resort to the personal representative individually.[5]

b. Services of Attorney. The principle that debts contracted by the personal representative are obligatory upon him as individual obligations and do not primarily bind the estate applies to the fees of attorneys and counsel employed by him in the course of administration. The executor or administrator makes himself personally liable to such attorney or counsel and reimburses himself in his accounts subject to the court's allowance.[6] But statutes or local practice

99. Brannon *v.* G. Ober, etc., Co., 106 Ga. 168, 32 S. E. 16; Murrell *v.* Wright, 78 Tex. 519, 15 S. W. 156, holding that an executor might employ another person to locate a land certificate belonging to the estate and bind the heirs by his agreement to allow the locator a share in the land so secured. See also Van Zandt *v.* Myers, 7 N. Y. Wkly. Dig. 390.

1. Halbert *v.* De Bode, (Tex. Civ. App. 1894) 28 S. W. 58. See also Roscoe *v.* McDonald, 91 Mich. 270, 51 N. W. 939.

2. See Bowen *v.* Bonner, 45 Miss. 10.

3. Stewart *v.* Chadwick, 8 Iowa 463; Shearon *v.* Henderson, 38 Tex. 245.

4. *Alabama.*— See Vann *v.* Vann, 71 Ala. 154; Matthews *v.* Matthews, 56 Ala. 292.

Arkansas.— Belfour *v.* Raney, 8 Ark. 479.

California.— Maxon *v.* Jones, 128 Cal. 77, 60 Pac. 516.

Indiana.— Bott *v.* Barr, 95 Ind. 243.

Louisiana.— McWilliams *v.* Elder, 52 La. Ann. 995, 27 So. 352.

Maryland.— Gwynn *v.* Dorsey, 4 Gill & J. 453.

Michigan.— Byrne *v.* Hume, 73 Mich. 392, 41 N. W. 331.

Mississippi.—Hardee *v.* Cheatham, 52 Miss. 41.

Missouri.— Yeakle *v.* Priest, 61 Mo. App. 47.

New York.— Parker *v.* Day, 155 N. Y. 383, 49 N. E. 1046 [*reversing* 12 Misc. 510, 33 N. Y. Suppl. 676]; Martin *v.* Platt, 51 Hun 429, 4 N. Y. Suppl. 359; Foland *v.* Dayton, 40 Hun 563; Ross *v.* Harden, 44 N. Y. Super. Ct. 26; McMahon *v.* Allen, 4 E. D. Smith 519; Balz *v.* Underhill, 19 Misc. 215, 44 N. Y. Suppl. 419; Douglass *v.* Leonard, 17 N. Y. Suppl. 491; Lunt *v.* Lunt, 8 Abb. N. Cas. 83.

Texas.— Halton *v.* Simmell, 43 Tex. 585.

Vermont.— Gordon *v.* Clapp, 5 Vt. 129.

See 22 Cent. Dig. tit. "Executors and Administrators," § 411.

Mere intention does not govern.— The question whether an administrator is personally liable for services rendered by another person does not depend on such person's intention merely. Foland *v.* Dayton, 40 Hun (N. Y.) 563.

Persons dealing with representative chargeable with notice.— Under a statute authorizing the administrator to procure indispensable labor to care for live stock, crops, etc., left by decedent, "until the meeting of the court," and providing that the court may authorize the employment of further labor, all persons dealing with such administrator are chargeable with notice of the fact that he can exercise such power only in vacation. Powell *v.* Powell, 23 Mo. App. 365.

An agreement to allow a broker all over a certain amount which he may obtain for property of the estate is invalid and cannot be enforced. Danielwitz *v.* Sheppard, 62 Cal. 339; *In re* Ballentine, Myr. Prob. (Cal.) 86.

Reimbursement of representative see *infra*, VIII, I, 8, f.

5. Martin *v.* Platt, 51 Hun (N. Y.) 429, 4 N. Y. Suppl. 359; Foland *v.* Dayton, 40 Hun (N. Y.) 563.

6. *Alabama.*— Taylor *v.* Crook, 136 Ala. 354, 34 So. 905, 96 Am. St. Rep. 26, except in cases of insolvency of the representative.

Arkansas.— Bry *v.* Craig, 64 Ark. 438, 44 S. W. 348; Pike *v.* Thomas, 62 Ark. 223, 35 S. W. 212, 54 Am. St. Rep. 292; Tucker *v.* Grace, 61 Ark. 410, 33 S. W. 530.

California.— McKee *v.* Soher, 138 Cal. 367, 71 Pac. 438, 649; *In re* Page, 57 Cal. 238. See also Briggs *v.* Breen, 123 Cal. 657, 56 Pac. 633, 886.

Colorado.— Lusk *v.* Patterson, 2 Colo. App. 306, 30 Pac. 253.

District of Columbia.—MacKie *v.* Howland, 3 App. Cas. 461.

Florida.—McHardy *v.* McHardy, 7 Fla. 301.

Georgia.— Lester *v.* Mathews, 56 Ga. 655;

come sometimes in aid of an attorney's recovery of recompense or costs by way of allowance out of a particular fund collected, where the suit itself was duly authorized, although this may not necessarily give an attorney the full recompense to which the representative had bound himself personally;[7] and it seems that the representative may also make a special agreement that the attorney employed to render services beneficial to the estate shall look to the estate alone for recompense.[8]

3. Funeral Expenses, Tombstones, Etc. While the general rule denying the power of the representative to bind the estate by his contracts[9] has been applied so as to hold the executor or administrator who has ordered the funeral of or a tombstone for his decedent liable only personally and not in his representative capacity,[10] although with a right of reimbursement for his expenditure against the

Williams *v.* Walker, 31 Ga. 195. But see Stansell *v.* Lindsay, 50 Ga. 360.

Illinois.— Barker *v.* Kunkel, 10 Ill. App. 407.

Indiana.— Long *v.* Rodman, 58 Ind. 58.

Iowa.— Rickel *v.* Chicago, etc., R. Co., 112 Iowa 148, 83 N. W. 957; Argo *v.* Blondel, 100 Iowa 353, 69 N. W. 534. See also *In re* Bruning, 122 Iowa 8, 96 N. W. 780.

Mississippi.— Clopton *v.* Gholson, 53 Miss. 466.

New Hampshire.— Wait *v.* Holt, 58 N. H. 467; Livermore *v.* Rand, 26 N. H. 85.

New York.— Platt *v.* Platt, 105 N. Y. 488, 12 N. E. 22; Mygatt *v.* Wilcox, 45 N. Y. 306, 6 Am. Rep. 90; Matter of Blair, 34 Misc. 444, 69 N. Y. Suppl. 1013 [*affirmed* in 67 N. Y. App. Div. 116, 73 N. Y. Suppl. 675]; Bowman *v.* Tallman, 2 Rob. 385; Budlong *v.* Clemens, 3 Dem. Surr. 145.

North Carolina.— Kessler *v.* Hall, 64 N. C. 60; McKay *v.* Royal, 52 N. C. 426. See also Lindsay *v.* Darden, 124 N. C. 307, 32 S. E. 678.

Ohio.— Thomas *v.* Moore, 52 Ohio St. 200, 39 N. E. 803; Mellen *v.* West, 5 Ohio Cir. Ct. 89, 3 Ohio Cir. Dec. 46; McBride *v.* Brucker, 5 Ohio Cir. Ct. 12, 3 Ohio Cir. Dec. 7.

Oregon.— Waite *v.* Willis, 42 Oreg. 288, 70 Pac. 1034; *In re* McCullough, 31 Oreg. 86, 49 Pac. 886.

Texas.— McGloin *v.* Vanderlip, 27 Tex. 366.

See 22 Cent. Dig. tit. "Executors and Administrators," § 411½.

Right to reimbursement see *infra*, VIII, I, 8, g.

Prosecuting slayer of decedent.— The personal representative has no power to employ counsel to prosecute the alleged murderer of his decedent at the expense of the estate. Lusk *v.* Anderson, 1 Metc. (Ky.) 426. And see Sparrow's Succession, 40 La. Ann. 484, 4 So. 513; Anderson's Succession, 28 La. Ann. 335. But *compare* Killebrew *v.* Murphy, 3 Heisk. (Tenn.) 546.

The attorney has no lien on the property of the estate for his services. Waite *v.* Willis, 42 Oreg. 288, 70 Pac. 1034.

Administrator cannot agree to give attorney an interest in land of estate for services. Bryan *v.* Craig, 64 Ark. 438, 44 S. W. 348. But see Stansell *v.* Lindsay, 50 Ga. 360.

The probate court has no jurisdiction to render judgment against an administrator for services rendered by an attorney employed by such administrator to prosecute a claim on behalf of the estate, because the liability of the administrator is personal and not in his representative capacity. Pike *v.* Thomas, 62 Ark. 223, 35 S. W. 212, 54 Am. St. Rep. 292. See also State *v.* Second Judicial Dist. Ct., 25 Mont. 33, 63 Pac. 717. Nor can its sanction sustain a conveyance of land of the estate in payment for professional services rendered. Teal *v.* Terrell, 48 Tex. 491.

Contract releasing executor from liability. — A contract between an executor and his attorney that the latter's fee shall be fixed by the court is a release of the executor from any liability therefor. *In re* Kasson, 119 Cal. 489, 51 Pac. 706.

Any allowance made should be to the representative and not directly to the attorney. Matter of Welling, 51 N. Y. App. Div. 355, 64 N. Y. Suppl. 1025.

7. *Arkansas.*—Tucker *v.* Grace, 61 Ark. 410, 33 S. W. 530.

California.— *In re* Page, 57 Cal. 238.

Illinois.— Greene *v.* Grimshaw, 11 Ill. 389.

Missouri.— Nichols *v.* Reyburn, 55 Mo. App. 1.

Pennsylvania.— See *In re* Lafferty, 23 Pittsb. Leg. J. 157.

Texas.—Jones *v.* Lewis, 11 Tex. 359; Portis *v.* Cole, 11 Tex. 157.

See 22 Cent. Dig. tit. "Executors and Administrators," § 411½.

Under the Michigan statute an executor may procure the aid of legal advisers when necessary and bind the estate for the payment of a reasonable compensation for their services. Jackson *v.* Leech, 113 Mich. 391, 71 N. W. 846.

8. *California.*— Briggs *v.* Breen, 123 Cal. 657, 56 Pac. 633, 886.

Indiana.— Long *v.* Rodman, 58 Ind. 58.

New York.— See Clapp *v.* Clapp, 44 Hun 451.

Pennsylvania.— See Wilson's Appeal, 3 Walk. 216.

West Virginia.— See Hoke *v.* Hoke, 12 W. Va. 427.

See 22 Cent. Dig. tit. "Executors and Administrators," § 411½.

9. See *supra*, VIII, D, 1.

10. Fitzhugh *v.* Fitzhugh, 11 Gratt. (Va.) 300, 62 Am. Dec. 653. See also Brice *v.*

estate,[11] the better view is that such expenses are charges against the estate, which the representative must pay out of the assets and for which he is liable in his representative capacity.[12]

4. Payment of Decedent's Debts.[13] As a rule the executor or administrator is not bound to pay the debts of his decedent beyond the assets which he receives, nor is he presumed to intend binding himself for payment in a more extensive sense; and even his unequivocal promise, written or oral, to pay a debt of his decedent does not make him personally liable, unless founded on other sufficient consideration;[14] but in various instances, such as extension, forbearance by the creditor, or a substitution of securities, the executor or administrator may make himself personally liable by his direct promise to pay, as for a new and sufficient consideration,[15] and his direct promise may bind him absolutely if the debt of the decedent was already barred by limitations.[16]

5. Borrowing Money.[17] An executor or administrator, as such, has no inherent authority to borrow money, and such loans to the representative do not constitute

Wilson, 8 A. & E. 349 note, 35 E. C. L. 626, ratification of orders given by another. And see *infra*, X, A, 19, c.

11. Fitzhugh *v.* Fitzhugh, 11 Gratt. (Va.) 300, 62 Am. Dec. 653. And see *infra*, VIII, I, 8, b; X, A, 19, c-e.

12. See *infra*, X, A, 19, c–e.

13. See, generally, *infra*, X.

14. *Alabama.*— Russell *v.* Wright, 98 Ala. 652, 13 So. 594; Martin *v.* Black, 20 Ala. 309; Hester *v.* Wesson, 6 Ala. 415.

Connecticut.—Pratt *v.* Humphrey, 22 Conn. 317.

Indiana.— Vogel *v.* O'Toole, 2 Ind. App. 196, 28 N. E. 209.

Kentucky.— Crews *v.* Williams, 2 Bibb 262, 4 Am. Dec. 701.

Louisiana.— Talmage *v.* Patterson, 6 Mart. N. S. 604.

Minnesota.— Germania Bank *v.* Michaud, 62 Minn. 459, 65 N. W. 70, 54 Am. St. Rep. 653, 30 L. R. A. 286.

Mississippi.— Waul *v.* Kirkman, 13 Sm. & M. 599; Byrd *v.* Holloway, 6 Sm. & M. 199.

New York.— Troy Bank *v.* Topping, 9 Wend. 273; Ten Eyck *v.* Vanderpoel, 8 Johns. 120.

North Carolina.— Williams *v.* Chaffin, 13 N. C. 333.

Pennsylvania.— Hollenback *v.* Clapp, 103 Pa. St. 60.

Tennessee.— Bedford *v.* Ingram, 5 Hayw. 155.

Virginia.— Taliaferro *v.* Robb, 2 Call 258.

See 22 Cent. Dig. tit. "Executors and Administrators," § 413.

A promise to pay in consideration of assets will support a judgment *de bonis testatoris*. Faxon *v.* Dyson, 8 Fed. Cas. No. 4,705, 1 Cranch C. C. 441. And see Adams *v.* Whiting, 1 Fed. Cas. No. 69, 2 Cranch C. C. 132.

15. *Georgia.*— Harrison *v.* McClelland, 57 Ga. 531; Poole *v.* Hines, 52 Ga. 500.

Indiana.— Cornthwaite *v.* Rockville First Nat. Bank, 57 Ind. 268.

Iowa.— Thompson *v.* Maugh, 3 Greene 342.

Kentucky.— Mosely *v.* Taylor, 4 Dana 542.

Louisiana.— Beatty *v.* Tete, 9 La. Ann. 129.

Maryland.— Steuart *v.* Carr, 6 Gill 430.

Massachusetts.—Wilton *v.* Eaton, 127 Mass. 174.

Mississippi.— Robinson *v.* Lane, 14 Sm. & M. 161.

Missouri.—Webster *v.* Switzer, 15 Mo. App. 346.

New York.— Hall *v.* Richardson, 22 Hun 444.

North Carolina.— Noblet *v.* Green, 13 N. C. 517, 21 Am. Dec. 347; Sleighter *v.* Harrington, 4 N. C. 679, 7 Am. Dec. 715. See also Ball *v.* Felton, 51 N. C. 202.

Pennsylvania.— *In re* Claghorn, 181 Pa. St. 600, 37 Atl. 918.

Vermont.— Moar *v.* Wright, 1 Vt. 57.

See 22 Cent. Dig. tit. "Executors and Administrators," § 413.

Promise on which decedent could not be sued.— Although a husband could not be sued at law on his promise to repay to his wife money received by him for her during her coverture, his executors might be sued on their promise to repay such money. Rusling *v.* Rusling, 47 N. J. L. 1.

Sufficiency of consideration.— The surrender to an administrator of a promissory note made by his intestate, whether the note at the time of the surrender is capable or incapable of being enforced at law, is a sufficient consideration for the giving of a new note by the administrator, and he is personally liable thereon, although, when the new note is given, his final account has been allowed, and no new assets have since come into his hands. Wilton *v.* Eaton, 127 Mass. 174.

A covenant releasing the representative from personal liability on notes given by him to take up notes of the decedent will be given effect. McNairy *v.* Thompson, 1 Sneed (Tenn.) 141.

16. Baker *v.* Fuller, 69 Me. 152; Oates *v.* Lilly, 84 N. C. 643 (if in writing and founded on a sufficient consideration); McGrath *v.* Barnes, 13 S. C. 328, 36 Am. Rep. 687. See also Matter of Miller, 5 Pa. L. J. 265. But see Perry *v.* Booth, 7 Tex. 493.

17. As to mortgage of realty see *infra*, VIII, O, 11.

As to pledge or mortgage of personalty see *infra*, VIII, P, 3.

valid claims against the estate or entitle the lender to interest thereon, although the representative may make himself personally liable;[18] but an equity arises in behalf of the lender where the money has in fact been applied to pay debts or otherwise so as to benefit the estate, and in such case the creditor of the executor or administrator may fairly be subrogated to the latter's rights.[19] Power to borrow money on lien security may, however, be given by will,[20] and moreover statutes are sometimes found which sanction borrowing with the creation of a lien, although usually upon due investigation and a previous order from the court.[21]

6. BILLS AND NOTES. An executor or administrator has no inherent authority to bind the estate directly by giving a note or accepting a bill, nor is such authority deducible from an express power to sell and reinvest the assets.[22] Even

18. *Georgia.*— McMillan *v.* Cox, 109 Ga. 42, 34 S. E. 341.

Mississippi.— Farley *v.* Hood, 45 Miss. 96. Ford *v.* Russell, Freem. 42.

Nevada.— *In re* Millenovich, 5 Nev. 189.

New York.— Croft *v.* Williams, 88 N. Y. 384 (especially if the money borrowed be misapplied); Glenn *v.* Burrows, 54 Hun 634, 7 N. Y. Suppl. 180.

North Carolina.— Morehead Banking Co. *v.* Morehead, 116 N. C. 410, 21 S. E. 190, 122 N. C. 318, 30 S. E. 331.

Ohio.— Smith *v.* Hayward, 5 Ohio S. & C. Pl. Dec. 462, 5 Ohio N. P. 501.

South Carolina.— Nicholson *v.* Whitlock, 57 S. C. 36, 35 S. E. 412.

Tennessee.— Allen *v.* Shanks, 90 Tenn. 359, 16 S. W. 715.

Virginia.— Robertson *v.* Breckinridge, 98 Va. 569, 37 S. E. 8.

England.— Farhall *v.* Farhall, L. R. 7 Ch. 123, 41 L. J. Ch. 146, 25 L. T. Rep. N. S. 685, 20 Wkly. Rep. 157.

See 22 Cent. Dig. tit. "Executors and Administrators," § 414.

The insolvency of the representative does not make the estate the more liable for the borrowing. Merchants' Nat. Bank *v.* Weeks, 53 Vt. 115, 38 Am. Rep. 661.

Acknowledgment as distinguished from creation of debt.— A father having died largely in debt, the representative of his succession, in order to pay off his indebtedness, was authorized by the judge, on the recommendation of a family meeting, to borrow a sufficient sum to discharge this indebtedness; and notes were given upon this loan. It was held that this was not the creation of a debt, but was the acknowledgment of one, and providing means to pay it, all of which was done in the interest of the heirs; and the liability of a son therefore was fixed by his interest in his father's succession. Stevenson *v.* Edwards, 27 La. Ann. 302.

19. Nathan *v.* Lehman, 39 Ark. 256; Deery *v.* Hamilton, 41 Iowa 16; Woods *v.* Ridley, 27 Miss. 119; Johnson *v.* Kellog, 8 N. Y. St. 413. See *infra*, VIII, D, 8.

20. Prieto *v.* Leonards, (Tex. Civ. App. 1903) 74 S. W. 41; Jameson *v.* Myles, 7 W. Va. 311. See also Robertson *v.* Breckinridge, 98 Va. 569, 37 S. E. 8. And see *infra*, VIII, O, 11, a.

Borrowing more than necessary.— Where a will authorizes an executor to raise, in such way as seems best to him, sufficient money to pay testator's debts, and he borrows a short time after testator's death more money than is necessary to pay the debts, the estate is liable to the lender for the full amount, if there is no fraud or collusion between the executor and the lender, and the latter had no notice of the amount of the debts, since he is not bound to ascertain whether there are debts of the testator or not. Fletcher *v.* American Trust, etc., Co., 111 Ga. 300, 36 S. E. 767, 78 Am. St. Rep. 164.

Will not giving authority to borrow see McMillan *v.* Cox, 109 Ga. 42, 34 S. E. 341.

A testamentary provision authorizing the executor to make advances to certain legatees does not authorize him to negotiate a loan for that purpose. La Banque Jacques-Cartier *v.* Gratton, 30 Can. Supreme Ct. 317.

21. See Stevenson *v.* Edwards, 27 La. Ann. 302; *In re* Lambie, 94 Mich. 489, 54 N. W. 173. And see *infra*, VIII, O, 11, a.

22. *Georgia.*— Lynch *v.* Kirby, 65 Ga. 279.

Iowa.— Valley Nat. Bank *v.* Crosby, 108 Iowa 651, 79 N. W. 383; Winter *v.* Hite, 3 Iowa 142.

Louisiana.— Carroll *v.* Davidson, 23 La. Ann. 428; Livingston *v.* Gaussen, 21 La. Ann. 286, 99 Am. Dec. 731; Hestres *v.* Patrovic, 1 Rob. 119.

Mississippi.— Yerger *v.* Foote, 48 Miss. 62, renewal of decedent's note.

Missouri.— Stirling *v.* Winter, 80 Mo. 141; Rittenhouse *v.* Ammerman, 64 Mo. 197, 27 Am. Rep. 215.

New Jersey.— Hellier *v.* Lord, 55 N. J. L. 367, 26 Atl. 986.

North Carolina.— See Latham *v.* Moore, 59 N. C. 167.

Virginia.— Whitten *v.* Fincastle Bank, 100 Va. 546, 42 S. E. 309.

Washington.— Montreal Bank *v.* Buchanan, 32 Wash. 480, 73 Pac. 482.

United States.— Boggs *v.* Wann, 58 Fed. 681.

See 22 Cent. Dig. tit. "Executors and Administrators," § 415.

The insolvency of the executor or administrator who gives his note does not affect the rule. Merchants' Nat. Bank *v.* Weeks, 53 Vt. 115, 38 Am. Rep. 661.

Notes as new promise to pay debts of estate.— Notes executed by an executor, payable to the cashier of a bank, cannot be

where he signs as "executor" or "administrator," the rule remains that the obligation is his own, and that assets of the estate are only bound for the debts contracted by the decedent during life.[23] But although the executor or administrator be bound out of his own property in the first instance, he may reimburse himself out of the assets where the consideration was just and beneficial to the estate and the obligation was honestly incurred.[24] Statutes sometimes permit of borrowing upon note, usually with the assent of the probate court.[25]

7. Guaranty or Suretyship. The usual rights and liabilities of guaranty or suretyship are protected and enforced in the case of a decedent's assets;[26] but the executor or administrator cannot directly bind the estate by his own new promise by way of guaranty or suretyship, although the transaction be one affecting the decedent's own promise and liability, but charges himself primarily and personally by his undertaking.[27]

8. Subrogation of Contracting Party. While a person who lends or advances money to an executor or administrator upon a promise by note or other contract acquires no right at law or in equity against the estate, unless the money has in fact been applied to pay debts or otherwise to benefit the estate, he will in such case be permitted to take the representative's place and be subrogated to his right of reimbursement from the estate.[28]

E. Investments — 1. Right or Duty to Invest. As a general rule the duty of an executor or administrator is confined to collecting and paying out or dis-

treated as constituting a new promise to pay notes held by the bank against the estate, where each purports to be an original undertaking by the executor, and in none of them is there an acknowledgment by him that the bank held any valid claim against the estate, and the notes held by the bank against the estate are not surrendered. Hughes *v.* Treadaway, 116 Ga. 663, 42 S. E. 1035.

Discounting.— An executor cannot bind the estate by indorsing and discounting promissory notes. Farmers' Nat. Bank *v.* Griel, 12 Lanc. L. Rev. (Pa.) 28.

Stipulation limiting liability.— The representative's note may by its express terms stipulate for payment from the estate only, as in other contracts, and so limit his liability. Studebaker Bros. Mfg. Co. *v.* Montgomery, 74 Mo. 101; Schmittler *v.* Simon, 25 Hun (N. Y.) 76 [*affirmed* in 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737].

23. *Florida.*— Higgins *v.* Driggs, 21 Fla. 103.

Georgia.— Harrison *v.* McClelland, 57 Ga. 531; McFarlin *v.* Stinson, 56 Ga. 396.

Iowa.— Tryon *v.* Oxley, 3 Greene 289.

Missouri.— Studebaker Bros. Mfg. Co. *v.* Montgomery, 74 Mo. 101.

Montana.— White Sulphur Springs First Nat. Bank *v.* Collins, 17 Mont. 433, 43 Pac. 499, 52 Am. St. Rep. 695.

New York.—Schmittler *v.* Simon, 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737; Darling *v.* Powell, 20 Misc. 240, 45 N. Y. Suppl. 794.

See 22 Cent. Dig. tit. "Executors and Administrators," § 415.

Consideration.— Under the law merchant, a negotiable note made by a fiduciary in his official capacity imports sufficient consideration to bind him personally to the holder of the instrument. Germania Bank *v.* Michaud, 62 Minn. 459, 65 N. W. 70, 54 Am. St. Rep. 653, 30 L. R. A. 286.

Form of indorsement not binding executor. — An indorsement of negotiable paper, "Estate of Wheeler, Wing Executor," does not bind the executor individually, although the estate may not be bound. Grafton Nat. Bank *v.* Wing, 172 Mass. 513, 52 N. E. 1067, 70 Am. St. Rep. 303, 43 L. R. A. 831.

An administrator may defeat his personal liability on a note given for the debt of his intestate by showing that he had, when it was executed, no assets of the intestate sufficient to pay it. Jenkins *v.* Phillips, 41 N. Y. App. Div. 389, 58 N. Y. Suppl. 788.

24. Grimes *v.* Blake, 16 Ind. 160; Dunne *v.* Deery, 40 Iowa 251. *Aliter* where consideration not justly a liability of estate. Steele *v.* McDowell, 9 Sm. & M. (Miss.) 193.

25. See McCalley *v.* Wilburn, 77 Ala. 549; Wilburn *v.* McCalley, 63 Ala. 436; Brightwell *v.* Jordan, 74 Ga. 486.

26. Stewart *v.* Davis, 18 Ind. 74; Shiff *v.* Shiff, 20 La. Ann. 269; Kingman *v.* Soule, 132 Mass. 285; Johnston *v.* Union Bank, 37 Miss. 526; Robinson *v.* Lane, 14 Sm. & M. (Miss.) 161.

27. See Shiff *v.* Shiff, 20 La. Ann. 269; Johnston *v.* Union Bank, 37 Miss. 526.

Taking security.— Where an administrator of a surety who has been released erroneously supposes his intestate still liable, he does not, by taking security against the liability, bind the estate to the extent of the security. Hoss *v.* Crouch, (Tenn. Ch. App. 1898) 48 S. W. 724.

28. Steele *v.* Steele, 64 Ala. 438, 38 Am. Rep. 15 (where the personal representative becomes insolvent); Woods *v.* Ridley, 27 Miss. 231; Williamson's Appeal, 94 Pa. St. 231. *Compare* Merchants' Nat. Bank *v.* Weeks, 53 Vt. 115, 38 Am. Rep. 661.

tributing the assets of the estate,[29] and it is no part of his duty to invest funds belonging to the estate.[30] This duty may, however, be imposed upon him by will[31] or by statute,[32] or a duty to invest may sometimes arise from the necessities of the case, where there is considerable and unavoidable delay in settling up the estate and making final distribution.[33]

2. Duties and Liabilities With Respect to Investments. In making investments of the funds of the estate, however, the representative acts as trustee rather than as executor or administrator[34] and his duties and liabilities in respect to such investments are governed by the same rules as apply to other trustees. If the will contains directions as to the investments to be made these must be followed. The representative is entitled, although not obliged, to apply to the court for advice and directions, and the sanction of the court for any investment, procured before the investment is made, will, in the absence of fraud in procuring such sanction, protect the representative. Where he acts upon his own judgment he is held to absolute good faith and is required to exercise such prudence and good judgment as ordinarily prudent persons exercise in making investments of their own funds, and if he has done this he is not responsible for a resulting loss. But he is liable for all losses resulting from unauthorized or improper investments, or from his lack of good faith, prudence, or diligence; while on the other hand, if any unauthorized or improper investment or use of the funds of the estate result in a profit, such profit belongs, at the election of those interested, to the estate.[35]

3. Liability For Investing Without Authority. Where the executor or administrator lends or invests assets without authority of law or some power conferred under the will, the beneficiaries may elect to charge him with the fund thus used or to accept the investment with all its accretions of value; and this is the general doctrine where assets are misappropriated by the fiduciary, since his good faith will not shield him if the transaction was unauthorized.[36] Where the fund is thus repudiated and the representative charged personally, the fund, as offset to such a charge, will virtually belong to him.[37]

29. Brenham *v.* Story, 39 Cal. 179.

30. Brenham *v.* Story, 39 Cal. 179; Bishop's Estate, 1 Lanc. L. Rev. (Pa.) 115.

Temporary administrator.— It is the duty of a temporary administrator to deposit moneys which may come into his hands in a trust company, and on his failure to do so he is chargeable with such interest as a trust company would have paid had the deposit been made. Matter of Philp, 29 Misc. (N. Y.) 263, 61 N. Y. Suppl. 241.

31. Mitchell *v.* Thomson, 7 Mackey (D. C.) 130; Voorhees *v.* Stoothoff, 11 N. J. L. 145; Calkins *v.* Calkins, 1 Redf. Surr. (N. Y.) 337. And see *supra*, V, E.

Testamentary provision not giving power to invest see Ballantyne *v.* Turner, 59 N. C. 224.

32. Moore *v.* Felkel, 7 Fla. 44; *In re* Thornton, 5 Ohio S. & C. Pl. Dec. 151, 7 Ohio N. P. 335.

33. Wootter *v.* Burch, 2 Md. Ch. 190; Dortch *v.* Dortch, 71 N. C. 224; McGonnigle's Estate, 31 Pittsb. Leg. J. (Pa.) 27.

In case of inability to invest a considerable fund to advantage, or other special circumstances of delay, the personal representative should apply to the court for directions and abide by the result. *Ex p.* Walsh, 26 Md. 495; Worthington *v.* Owings, 9 Gill (Md.) 195; Hetfield *v.* Debaud, 54 N. J. Eq. 371, 34 Atl. 882; Bruner's Appeal, 57 Pa. St. 46.

34. Stamp *v.* Parrish, 15 Ky. L. Rep. 55; Grinnell *v.* Baker, 17 R. I. 41, 20 Atl. 8, 23 Atl. 911.

35. See, generally, Trusts.

36. *Alabama.*— Waring *v.* Lewis, 53 Ala. 615.

Florida.—Moore *v.* Felkel, 7 Fla. 44; Moore *v.* Hamilton, 4 Fla. 112.

Indiana.— Gilbert *v.* Welsch, 75 Ind. 557.

Maine.— Hanscom *v.* Marston, 82 Me. 288, 19 Atl. 460.

Maryland.— McCoy *v.* Horwitz, 62 Md. 183.

Missouri.— Garesche *v.* Priest, 78 Mo. 126.

New Jersey.— Woodruff *v.* Lounsberry, 42 N. J. Eq. 699, 11 Atl. 113; Ward *v.* Kitchen, 30 N. J. Eq. 31; Gray *v.* Fox, 1 N. J. Eq. 259, 22 Am. Dec. 508; *In re* Voorhees, 3 N. J. L. J. 211; *In re* Mundy, 3 N. J. L. J. 185.

Pennsylvania.— *In re* Strong, 160 Pa. St. 13, 28 Atl. 480; *In re* Nyce, 5 Watts & S. 254, 40 Am. Dec. 498.

See 22 Cent. Dig. tit. "Executors and Administrators," § 422.

The beneficiaries reap all the benefits of an unlawful or unauthorized investment. Norris' Appeal, 71 Pa. St. 106; Watson *v.* Whitten, 3 Rich. (S. C.) 224; Norman *v.* Storer, 18 Fed. Cas. No. 10,301, 1 Blatchf. 593.

Election must be made on final settlement of administration. Waring *v.* Lewis, 53 Ala. 615.

37. Waring *v.* Lewis, 53 Ala. 615; Tompkins *v.* Weeks, 26 Cal. 50. See also Harwood *v.* Harper, 54 Ala. 659.

F. Interest on Funds of Estate — 1. In General. Executors and administrators are not chargeable with interest on assets in their hands as of course, unless interest was actually received; but there must be special circumstances to warrant such a charge, as where they make some misuse of the funds for intended profit, or unreasonably detain them, or fail duly to invest and make the funds productive, or are guilty of negligence in collecting or in accounting for them.[38]

38. *Alabama.*— Noble *v.* Jackson, 124 Ala. 311, 26 So. 955; Johnson *v.* Holifield, 82 Ala. 123, 2 So. 753.

Georgia.— Truett *v.* Williams, 101 Ga. 311, 27 S. E. 851.

Illinois.— Rowan *v.* Kirkpatrick, 14 Ill. 1.

Iowa.— Dorris *v.* Miller, 105 Iowa 564, 75 N. W. 482.

Kentucky.— Briggs *v.* Walker, 102 Ky. 359, 43 S. W. 479, 19 Ky. L. Rep. 1490; Karr *v.* Karr, 6 Dana 3; Overstreet *v.* Potts, 4 Dana 138; Prewett *v.* Prewett, 4 Bibb 266.

Louisiana.— Featherstone *v.* Robinson, 7 La. 596.

Massachusetts.— Boynton *v.* Dyer, 18 Pick. 1; Stearns *v.* Brown, 1 Pick. 530; Wyman *v.* Hubbard, 13 Mass. 232.

Mississippi.— Williams *v.* Campbell, 46 Miss. 57; Cason *v.* Cason, 31 Miss. 578.

Missouri.— Myers *v.* Myers, 98 Mo. 262, 11 S. W. 617; Scott *v.* Crews, 72 Mo. 261; Madden *v.* Madden, 27 Mo. 544. See also James *v.* Withinton, 7 Mo. App. 575.

New Hampshire.— Mathes *v.* Bennett, 21 N. H. 188; Wendell *v.* French, 19 N. H. 205.

New Jersey.— Mathis *v.* Mathis, 18 N. J. L. 59; State *v.* Mayhew, 9 N. J. L. 70; Hartson *v.* Elden, 58 N. J. Eq. 478, 44 Atl. 156.

New York.—Greeno *v.* Greeno, 23 Hun 478; Matter of Woodbury, 40 Misc. 143, 81 N. Y. Suppl. 503; Dunscomb *v.* Dunscomb, 1 Johns. Ch. 508, 7 Am. Dec. 504.

North Carolina.— Coggins *v.* Flythe, 113 N. C. 102, 18 S. E. 96; Smith *v.* Smith, 101 N. C. 461, 8 S. E. 128, 131, 133; Chambers *v.* Kerns, 59 N. C. 280.

Ohio.— James *v.* West, 67 Ohio St. 28, 65 N. E. 156.

Pennsylvania.—Wither's Appeal, 16 Pa. St. 151; Betz's Estate, 15 Pa. Super. Ct. 563; Pratt's Estate, 3 Lanc. L. Rev. 203; Pyle's Estate, 3 Lanc. L. Rev. 55.

South Carolina.— Chestnut *v.* Strong, 1 Hill Eq. 122; McCaw *v.* Blewitt, Bailey Eq. 98. See also Gee *v.* Humphries, 49 S. C. 253, 27 S. E. 101.

Tennessee.— Turney *v.* Williams, 7 Yerg. 172.

Texas.—Stonebreaker *v.* Friar, 70 Tex. 202, 7 S. W. 799; Davis *v.* Thorn, 6 Tex. 482.

Vermont.— Morse *v.* Slason, 16 Vt. 319; Phelps *v.* Slade, 10 Vt. 192.

Virginia.— Dilliard *v.* Tomlinson, 1 Munf. 183; Granberry *v.* Granberry, 1 Wash. 246, 1 Am. Dec. 455.

United States.— Dexter *v.* Arnold, 7 Fed. Cas. No. 3,855, 3 Mason 284.

England.— Dawson *v.* Massey, 1 Ball & B. 231; Atty.-Gen. *v.* Alford, 4 De G. M. & G. 843, 1 Jur. N. S. 361, 3 Wkly Rep. 200, 53 Eng. Ch. 659, 43 Eng. Reprint 737.

See 22 Cent. Dig. tit. "Executors and Administrators," § 423.

The principle upon which the court acts in charging executors with interest is not that of punishment, but of compensating the *cestui que trust* and depriving the trustee of the advantage he has wrongfully obtained. Inglis *v.* Beaty, 2 Ont. App. 453.

Burden of proof.— Where an executor is excused from making interest on the funds in his hands, the burden is upon those who would charge him with interest to show that he has received it. Chestnut *v.* Strong, 2 Hill Eq. (S. C.) 146. But *compare* Burnside *v.* Robertson, 28 S. C. 583, 6 S. E. 843.

This rule may be affected by statute. See the following cases:

Alabama.— King *v.* Cabiness, 12 Ala. 598.

Florida.— Sanderson *v.* Sanderson, 20 Fla. 292.

Louisiana.— Thomas *v.* Bourgeat, 1 Rob. 403.

New York.— *In re* Myers, 131 N. Y. 409, 30 N. E. 135.

North Carolina.— See Peyton *v.* Smith, 22 N. C. 325.

An oath or affidavit that he has not used the funds is sometimes required to relieve the representative from liability for interest. Smyley *v.* Reese, 53 Ala. 89, 25 Am. Rep. 598; Bendall *v.* Bendall, 24 Ala. 295, 60 Am. Dec. 469; Hollis *v.* Caughman, 22 Ala. 478; McCreeliss *v.* Hinkle, 17 Ala. 459; Parker *v.* McGaha, 11 Ala. 521.

When interest should be charged.— Interest should be charged for a premature conversion of assets into cash before paying claims or distributees (*In re* Verner, 6 Watts (Pa.) 250), or where an administrator has been negligent in the collection of a judgment and guilty of unusual and culpable delay in filing his account (Crouse's Estate, 16 Pa. Super. Ct. 212), or in case of an improper investment so that interest was not yielded (Lockhart *v.* Horn, 15 Fed. Cas. No. 8,446, 3 Woods 542). Interest is also properly charged where a widow or heir takes profitable possession long before receiving letters of appointment (Wilkes *v.* Rogers, 6 Johns. (N. Y.) 566), or where the representative sets up a claim to funds in his hands, which is decided against him (Howard *v.* Schmidt, Rich. Eq. Cas. (S. C.) 452. But *compare* Bruere *v.* Pemberton, 12 Ves. Jr. 386, 33 Eng. Reprint 146). Where the representative withdraws money from the estate for his commissions before settlement or the due allowance of commissions, he is chargeable with interest thereon (Kenan *v.* Graham, 135 Ala. 585, 33 So. 699; Matter of Franklin, 26 Misc. (N. Y.) 107, 56 N. Y. Suppl. 858; *In re* Herrick, 12 N. Y.

Upon general principles the personal representative is bound to render account

Suppl. 105; Whitney *v.* Phœnix, 4 Redf. Surr. (N. Y.) 180. *Contra, In re* Carter, 132 Cal. 113, 64 Pac. 123, 64 Pac. 484; *In re* Parker, 64 Pa. St. 307), although it has been held otherwise where the commissions were retained after having, with the consent of the legatees, distributed nearly all of the estate out of court (Matter of Franklin, 26 Misc. (N. Y.) 107, 56 N. Y. Suppl. 858). Misconduct of the representative warrants charging him with interest (Ringgold *v.* Stone, 20 Ark. 526. See also Nixon *v.* Nixon, 8 Dana (Ky.) 5; Singleton *v.* Singleton, 5 Dana (Ky.) 87) even though the principal of the sums lost through his misconduct never reached his hands (Sovereign *v.* Sovereign, 15 Grant Ch. (U. C.) 559. But *compare* Vanston *v.* Thompson, 10 Grant Ch. (U. C.) 542). An administrator is properly charged with interest on a sum which stands on the record charged to him with his consent as money which he should have put into his account and held as an identified fund. McIntire *v.* McIntire, 192 U. S. 116, 24 S. Ct. 196, 48 L. ed. 369 [*affirming* 20 App. Cas. (D. C.) 134]. Executors or administrators may be charged interest on sums wrongly paid in an erroneous distribution of the assets (*In re* Hulkes, 33 Ch. D. 552, 55 L. J. Ch. 846, 55 L. T. Rep. N. S. 209, 34 Wkly. Rep. 733, 35 Wkly. Rep. 194 [*disapproving* Saltmarsh *v.* Barrett, 31 Beav. 349]; Atty.-Gen. *v.* Kohler, 9 H. L. Cas. 654, 8 Jur. N. S. 467, 5 L. T. Rep. N. S. 35, 9 Wkly. Rep. 933, 11 Eng. Reprint 885); or on sums in their hands while exceptions to their accounts are pending (Yundt's Appeal, 13 Pa. St. 575, 53 Am. Dec. 496. See also Galloway *v.* McPherson, 76 Mich. 318, 43 N. W. 449. But *compare* Hoopes *v.* Brinton, 8 Watts (Pa.) 73). Where a temporary administrator has paid a creditor more than a *pro rata* share of the available assets of the estate, he is chargeable with the amount paid above such *pro rata* share, and interest thereon at such rate as would have been earned if the money had been deposited in a trust company. Philip's Estate, 29 Misc. (N. Y.) 263, 61 N. Y. Suppl. 241. Where a legatee has charged an administrator with the receipt of certain cash, which he has omitted from his inventory of the estate, and after the passage of a consent decree referring the controversy to arbitrators, and providing that, if their finding be against the administrator, he shall be charged with interest on the money, he admits its receipt, and shows that it was disbursed to certain other and special legatees, on his final accounting the administrators should be charged with interest on the money while it was in his possession. McIntire *v.* McIntire, 14 App. Cas. (D. C.) 337. Interest has also been charged on the balance found to be due the estate upon a settlement. Pettit *v.* Pettit, 32 Ala. 288; Smith *v.* Hurd, 8 Sm. & M. (Miss.) 682; *In re* Brinton, 10 Pa. St. 408. See also Burwell *v.* Anderson, 3 Leigh (Va.) 348.

When interest should not be charged.— Interest should not be charged against a representative who manages the estate honestly and well for mere neglect to render an account (Binion *v.* Miller, 27 Ga. 78. See also Blogg *v.* Johnson, L. R. 2 Ch. 225, 36 L. J. Ch. 859, 16 L. T. Rep. N. S. 306, 15 Wkly. Rep. 626); neither should an executor or administrator be charged absolutely for interest on money in his hands, if it is in dispute to whom he should pay it, and no negligence or bad faith is to be imputed to him (Dilliard *v.* Tomlinson, 1 Munf. (Va.) 183); nor should unearned interest be charged on a distribution earlier than the regular time (Thrasher *v.* Lewis, 13 Ky. L. Rep. 926). Interest is not chargeable on money deposited in bank by order of court (Springer *v.* Oliver, 21 Ga. 517 (or on collections of trifling amount as compared with anticipated outlay (Eubank *v.* Clark, 78 Ala. 73; Petty *v.* Taylor, 5 Dana (Ky.) 598) or small balances where neither default in payment nor misconduct appears (Matter of Butler, 9 N. Y. Suppl. 641, 1 Connoly Surr. (N. Y.) 58; Wood *v.* Garnett, 6 Leigh (Va.) 271), or on a sum improperly paid by the executor as counsel fees, for which he is refused credit in his account (*In re* Clauser, 84 Pa. St. 51). Where the representative lived during war in the midst of active hostilities where nearly all business was suspended, he is not readily chargeable for interest not actually received by him. Brent *v.* Clevinger, 78 Va. 12. Where the executor had no money of the estate, and was compelled to borrow at times to meet the expenses of administration, he should not be held to pay interest on amounts charged to him by reason of his neglecting to collect assets, if he acted honestly and in good faith, and it is not shown that the assets would have realized any interest had he collected them. *In re* Hall, 70 Vt. 458, 41 Atl. 508. Where testator's will gave his wife the income of his property for life, and the executor invested moneys earned by the estate, the income therefrom being paid to the widow, she was not entitled to charge the executor with interest on the sum invested. Matter of Chapman, 32 Misc. (N. Y.) 187, 66 N. Y. Suppl. 235.

Interim between successive administrations. — Where an administrator died with funds of the estate in his hands, and administration was not granted again for three years, the estate of the first administrator was not liable for interest during the time the estate of his intestate was unrepresented. Davis *v.* Wright, 2 Hill (S. C.) 560.

Waiver of claim to interest.— Where an administrator's final report accurately indicated the amount of money held by him at different periods during the five years of his administration, such report was sufficient to put persons interested in the estate on inquiry with respect to the administrator's use of the funds and his liability for interest, and their consent to his discharge constituted a

of all interest or profit received by him out of the assets of the estate,[39] and may also be charged with interest on an interest-bearing investment made by order of the court, unless it be made to appear that the interest could not be collected by the use of reasonable diligence;[40] but where interest has not been received by him the question recurs as to the exercise of good faith and due diligence on his part as custodian of the particular fund.[41] Where money has been kept on deposit, the representative is chargeable with interest which he might have obtained on such deposit.[42] The allowance of interest against an executor or administrator is within the discretion of the court.[43]

2. FAILURE TO INVEST OR DEPOSIT. An executor or administrator who fails to invest or deposit funds as he might or should have done in the exercise of ordinary care and diligence with the assets is chargeable with interest thereon; and this the more especially if he has been wanting in good faith.[44] A reasonable

waiver of their claim thereto. Tucker *v.* Stewart, 121 Iowa 714, 97 N. W. 148 [*withdrawing* opinion in 86 N. W. 371].

39. *Illinois.*— See Haines *v.* Hay, 169 Ill. 93, 48 N. E. 218 [*reversing* 67 Ill. App. 445].

Louisiana.— Soldini *v.* Hyams, 15 La. Ann. 551.

Michigan.— Hall *v.* Grovier, 25 Mich. 428.

New Hampshire.— Griswold *v.* Chandler, 5 N. H. 492.

North Carolina.— Pickens *v.* Miller, 83 N. C. 543; Finch *v.* Ragland, 17 N. C. 137; Arnett *v.* Linney, 16 N. C. 369.

Pennsylvania.— Gable's Appeal, 40 Pa. St. 231; Oswald's Appeal, 3 Grant 300.

South Carolina.— McClendon *v.* Gomillon, Dudley 48.

Tennessee.— Turney *v.* Williams, 7 Yerg. 172.

See 22 Cent. Dig. tit. "Executors and Administrators," § 423.

Where usury was stipulated for on a loan, the extra interest should not be charged where the representative has not collected it. White *v.* White, 3 Dana (Ky.) 374.

Where the administrator is also a distributee he need not account for interest which he has received on his proportion of the fund lent out after he was ready to settle the estate. Spruill *v.* Cannon, 22 N. C. 400.

40. McIntire *v.* McIntire, 14 App. Cas. (D. C.) 337.

41. Schieffelin *v.* Stewart, 1 Johns. Ch. (N. Y.) 620, 7 Am. Dec. 507; Dunscomb *v.* Dunscomb, 1 Johns. Ch. (N. Y.) 508, 7 Am. Dec. 504; Griffin *v.* Bonham, 9 Rich. Eq. (S. C.) 71; Cavendish *v.* Fleming, 3 Munf. (Va.) 198.

As to a balance on hand for distribution, the representative is not chargeable with interest until after a demand for distribution has been made. Thompson *v.* Sanders, 6 J. J. Marsh. (Ky.) 94; Hall *v.* Sims, 2 J. J. Marsh. (Ky.) 509.

42. Van Dyke's Appeal, 183 Pa. St. 647, 39 Atl. 2; *In re* Wirt, 11 York Leg. Rec. (Pa.) 145.

43. *In re* Gloyd, 93 Iowa 303, 61 N. W. 975; Clyce *v.* Anderson, 49 Mo. 37; Nicholson *v.* Whitlock, 57 S. C. 36, 35 S. E. 421.

Court of last domicile should decide such questions. Stevens *v.* Gaylord, 11 Mass. 256.

Reasonableness of charge.— It was error to arbitrarily charge an administrator, in auditing his account, with interest at ten per cent on all moneys received by him from ten days after receipt thereof, without any investigation as to whether it was reasonable to do so. Howard *v.* Manning, 65 Ark. 122, 44 S. W. 1126.

Executor indebted to and holding claim against estate.— Where, on an accounting by an executor, it was found that he was indebted to the estate, and that he had a valid claim against the estate for an amount in excess of his indebtedness, it was error to charge him with interest on his debt without allowing him interest on his claim. *In re* Sutton, 200 Pa. St. 158, 49 Atl. 775.

44. *Alabama.*— Pearson *v.* Darrington, 32 Ala. 227.

Florida.— Eppinger *v.* Canepa, 20 Fla. 262.

Kentucky.— Jennings *v.* Davis, 5 Dana 127.

Louisiana.— Saunders' Succession, 37 La. Ann. 769.

Maryland.— Ing *v.* Baltimore Poor Imp. Assoc., 21 Md. 425.

New Hampshire.—Bartlett *v.* Fitz, 59 N. H. 502.

New Jersey.— Fluck *v.* Lake, 54 N. J. Eq. 638, 35 Atl. 643; Frey *v.* Frey, 17 N. J. Eq. 71.

New York.— Blauvelt *v.* De Noyelles, 25 Hun 590; Matter of Phip, 29 Misc. 263, 61 N. Y. Suppl. 241; Williamson *v.* Williamson, 6 Paige 298; Dunscomb *v.* Dunscomb, 1 Johns. Ch. 508, 7 Am. Dec. 504.

Pennsylvania.— Bruner's Appeal, 57 Pa. St. 46; Mayberry's Appeal, 33 Pa. St. 258; Light's Appeal, 24 Pa. St. 180; McGonnigh's Estate, 31 Pittsb. L. J. 28.

South Carolina.—Lenoir *v.* Winn, 4 Desauss. 65, 6 Am. Dec. 597; Darrel *v.* Eden, 3 Desauss. 241, 4 Am. Dec. 613; Stock *v.* Stock, 1 Desauss. 191.

Tennessee.— Turney *v.* Williams, 7 Yerg. 172.

Vermont.— Riley *v.* McInlear, 61 Vt. 254, 17 Atl. 729, 19 Atl. 996.

Virginia.— Handly *v.* Snodgrass, 9 Leigh 484.

United States.— Hook *v.* Payne, 14 Wall. 252, 20 L. ed. 887.

England.— Gresley *v.* Heathcote, 3 L. J. Ch. O. S. 107.

period may be allowed him for exercising this duty, at the expiration of which his liability becomes fixed.[45] But a court disinclines to charge the personal representative, aside from statute, where his conduct was honest and not unreasonable, if he has made no personal use of the fund, where circumstances justify him in not actively investing or placing it at interest, and even where he was merely inert in failing to do so.[46]

3. Improper Use of Funds. An executor or administrator who appropriates money of the estate to his own use is properly charged with interest thereon,[47] and mingling trust moneys with those which the fiduciary owns as an individual

See 22 Cent. Dig. tit. "Executors and Administrators," § 424.

The representative should be charged with interest where he suffers funds to lie idle, while outstanding demands draw interest (Pearson *v.* Darrington, 32 Ala. 227), neglects unreasonably long to invest or deposit, after being directed or authorized to do so by a court (Nunn *v.* Nunn, 66 Ala. 35; Monk *v.* Pinckney, 9 Rich. Eq. (S. C.) 279) or by the decedent's will (Benson *v.* Bruce, 4 Desauss. (S. C.) 463; Jenkins *v.* Fickling, 4 Desauss. (S. C.) 369; Lenoir *v.* Winn, 4 Desauss. (S. C.) 65, 6 Am. Dec. 597; Handly *v.* Snodgrass, 9 Leigh (Va.) 484; Garrett *v.* Carr, 3 Leigh (Va.) 407), or keeps funds of the estate unproductive, when they ought reasonably to have been made productive (Blake *v.* Pegram, 100 Mass. 541; Darrel *v.* Eden, 3 Desauss. (S. C.) 241, 4 Am. Dec. 613; Riley *v.* McInlear, 61 Vt. 254, 17 Atl. 729, 19 Atl. 996; Hook *v.* Payne, 14 Wall. (U. S.) 252, 20 L. ed. 887), or where he knows that balances will be long in his hands before he pays over (Sunday's Appeal, 131 Pa. St. 584, 18 Atl. 931; Woods *v.* Creditors, 4 Vt. 256), or his excuse is trivial and not pertinent to the issue (Duncan *v.* Dent, 5 Rich. Eq. (S. C.) 7).

Withdrawing the fund from where it drew interest safely, and keeping it idle is an unfavorable circumstance. Matter of Bradley, 2 N. Y. Suppl. 751, 1 Connoly Surr. (N. Y.) 106.

Estoppel to deny performance of duty to invest see Saunders' Succession, 37 La. Ann. 769.

45. Nunn *v.* Nunn, 66 Ala. 35 (six months); Chase *v.* Lockerman, 11 Gill & J. (Md.) 185, 35 Am. Dec. 277 (more than a year); Mulford *v.* Mulford, (N. J. Ch. 1902) 53 Atl. 79; Gilman *v.* Gilman, 2 Lans. (N. Y.) 1; De Peyster *v.* Clarkson, 2 Wend. (N. Y.) 77 (six months); Cogswell *v.* Cogswell, 2 Edw. (N. Y.) 231 (one year).

For statutes applicable to such cases see Moore *v.* Felkel, 7 Fla. 44; Clifford *v.* Davis, 22 Ill. App. 316; Christy's Succession, 6 La. Ann. 427.

46. *Georgia.*— Springer *v.* Oliver, 21 Ga. 517.

Kentucky.— Webb *v.* Conn, Litt. Sel. Cas. 475.

Missouri.— Scudder *v.* Ames, 89 Mo. 496, 14 S. W. 525.

New Hampshire.— Lund *v.* Lund, 41 N. H. 355.

New York.— Matter of Clark, 16 Misc. 405, 39 N. Y. Suppl. 722; Matter of Black, 19 N. Y. Suppl. 260, 6 Dem. Surr. 331; Burtis *v.* Dodge, 1 Barb. Ch. 77.

Pennsylvania.— Johnston's Appeal, 8 Pa. St. 205, 11 Atl. 78.

Virginia.— Carter *v.* Cutting, 5 Munf. 223.

See 22 Cent. Dig. tit. "Executors and Administrators," § 424.

Where the representative may have to pay over funds very soon, he is not required to invest them and is not liable for interest. Sunday's Appeal, 131 Pa. St. 584, 18 Atl. 931; Woods *v.* Creditors, 4 Vt. 256.

Where an application for an order to lend has been refused by the court the representative cannot thereafter be charged with interest on the money. *Ex p.* Walsh, 26 Md. 495.

47. *Alabama.*— Pearson *v.* Darrington, 32 Ala. 227.

Iowa.— *In re* Brown, 113 Iowa 351, 85 N. W. 617.

New Jersey.— Fluck *v.* Lake, 54 N. J. Eq. 638, 35 Atl. 643.

New York.— Matter of Adams, 51 N. Y. App. Div. 619, 64 N. Y. Suppl. 591 [*modifying* 30 Misc. 184, 61 N. Y. Suppl. 751, and *affirmed* in 166 N. Y. 623, 59 N. E. 1118].

Pennsylvania.— Heck's Estate, 31 Pittsb. Leg. J. 347.

Tennessee.— Turney *v.* Williams, 7 Yerg. 172.

Canada.— Smith *v.* Roe, 11 Grant Ch. (U. C.) 311, loan by executors to themselves.

See 22 Cent. Dig. tit. "Executors and Administrators," § 425.

Affidavit not denying use.— Where an administrator, wishing to avoid the payment of interest on the funds in his hands, makes affidavit "that he always had on hand, or within his immediate control, a sum sufficient to pay the amount due by him as administrator," but does not deny that he used the trust funds, he is chargeable with interest. Farmer *v.* Farmer, 26 Ala. 671.

Failure to account for the funds raises a presumption of private use and misapplication by the fiduciary. Camp *v.* Camp, 74 Mo. 192.

Presumption of use for profit.— A presumption arises from the representative's so using the funds of the estate that he intended to use them for his own profit, but this presumption may be repelled by the evidence. *In re* Beideman, Myr. Prob. (Cal.) 66.

Debt due by representative.— The penalty imposed on an executor for improper use of the funds of an estate cannot be imposed on the amount of a debt due by him individually to himself officially, which is not shown to

is so reprehensible that the executor or administrator who blends the funds of the estate with his own or uses the same in his business is chargeable with interest during the whole time of such mingling and indiscriminate use.[48] But the distributees or other beneficiaries of the estate may elect either to charge the per-

have been actually paid. *In re* Dimmick, 111 La. 655, 33 So. 801.

48. *Alabama.*— Ivey *v.* Coleman, 42 Ala. 409.

Arkansas.— Ringgold *v.* Stone, 20 Ark. 526.

California.— Herterman's Estate, 73 Cal. 545, 15 Pac. 121; *In re* Stott, Myr. Prob. 168.

District of Columbia.— Mades *v.* Miller, 2 App. Cas. 455.

Illinois.— Whitney *v.* Peddicord, 63 Ill. 249. But see *In re* Schofield, 99 Ill. 513.

Indiana.— Johnson *v.* Hedrick, 33 Ind. 129, 5 Am. Rep. 191.

Kentucky.— Grigsby *v.* Wilkinson, 9 Bush 91; Weir *v.* Weir, 3 B. Mon. 645, 39 Am. Dec. 487; Webb *v.* Conn, Litt. Sel. Cas. 475.

Maine.— Paine *v.* Paulk, 39 Me. 15.

Maryland.— Gwynn *v.* Dorsey, 4 Gill & J. 453.

Massachusetts.— Stearns *v.* Brown, 1 Pick. 530.

Mississippi.— Troup *v.* Rice, 55 Miss. 278.

Missouri.— Cruce *v.* Cruce, 81 Mo. 676; *In re* Burke, 96 Mo. App. 295, 70 S. W. 156; Ulrici *v.* Boeckeler, 72 Mo. App. 661.

New Hampshire.— Griswold *v.* Chandler, 5 N. H. 492.

New Jersey.— Hetfield *v.* Debaud, 54 N. J. Eq. 371, 34 Atl. 882; Aldridge *v.* McClelland, 36 N. J. Eq. 288.

New York.— Matter of Stanton, 41 Misc. 278, 84 N. Y. Suppl. 46; Manning *v.* Manning, 1 Johns. Ch. 527; Garniss *v.* Gardiner, 1 Edw. 128; Ogilvie *v.* Ogilvie, 1 Bradf. Surr. 356; Hood's Estate, Tuck. Surr. 396. See also Matter of Mairs, 4 Redf. Surr. 160.

North Carolina.—Peyton *v.* Smith, 22 N. C. 325.

Ohio.— Cooch *v.* Irwin, 7 Ohio St. 22.

Pennsylvania.— *In re* Clauser, 84 Pa. St. 51; Robinett's Appeal, 36 Pa. St. 174; Fox *v.* Wilcocks, 1 Binn. 194, 2 Am. Dec. 433; Flynn's Estate, 21 Pa. Super. Ct. 126; Myers' Estate, 13 Pa. Super. Ct. 476; Sourin's Estate, 11 Phila. 14.

Tennessee.— Turney *v.* Williams, 7 Yerg. 172.

Vermont.— Walworth *v.* Bartholomew, 76 Vt. 1, 56 Atl. 101; Davis *v.* Eastman, 68 Vt. 225, 35 Atl. 73.

United States.— Union Bank *v.* Smith, 24 Fed. Cas. No. 14,352, 4 Cranch C. C. 509.

England.— Melland *v.* Gray, 2 Call 295, 33 Eng. Ch. 295; Goodchild *v.* Tenton, 3 Y. & J. 481.

See 22 Cent. Dig. tit. "Executors and Administrators," § 425.

Evidence of wrongful intent not essential. — *In re* Stott, 52 Cal. 403; Wolfort *v.* Reilly, 133 Mo. 463, 34 S. W. 847.

Deposit in bank in which representative interested.— The representative has been held not liable for interest merely because he deposited money of the estate in a bank of which he was president (Matter of Johnson, 57 N. Y. App. Div. 494, 67 N. Y. Suppl. 1004. But *compare* Matter of McKay, 5 Misc. (N. Y.) 123, 25 N. Y. Suppl. 725) or cashier (see Matter of Sudds, 32 Misc. (N. Y.) 182, 66 N. Y. Suppl. 231), but it has been held otherwise when the deposit was in his own private bank (Johnson *v.* Pulver, 1 Nebr. (Unoff.) 290, 95 N. W. 697; Matter of Thorp, 31 Misc. (N. Y.) 581, 65 N. Y. Suppl. 575; Dolan's Estate, 15 Pa. Super. Ct. 20) or with a banking firm of which he was a member (*In re* Brewster, 113 Mich. 561, 71 N. W. 1085).

Lending to one's own firm or corporation is a misapplication. St. Paul Trust Co. *v.* Kittson, 62 Minn. 408, 65 N. W. 74; *In re* Myers, 131 N. Y. 409, 30 N. E. 135; Du Bois *v.* Brown, 1 Dem. Surr. (N. Y.) 317; Prescott's Estate, Tuck. Surr. (N. Y.) 430; Cannon *v.* Apperson, 14 Lea (Tenn.) 553.

Paying mortgage on property in which representative interested.— Where an administrator converted dividend-paying stock of the estate into money, and paid off a mortgage on real estate in which he was interested as heir, and the payment was disallowed, he was charged with interest on the amount from the day of payment, including the period of litigation. Mount *v.* Van Ness, 35 N. J. Eq. 113.

Mingling with funds of strangers.— An administrator who mingles the funds of the estate with those of strangers in his possession and under his control may be charged with interest thereon, although he receives no individual benefit therefrom. Westover *v.* Carman, 49 Nebr. 397, 68 N. W. 501.

When interest not chargeable.— Where an executor was garnished, and during the four years for which he held the funds occasionally mingled them with his own for a short time and in no certain amount, but had the amount always at hand and ready to be taken, and the money in his hands had never earned any interest, and the time when the money might be payable under the garnishment was uncertain, it was error to charge him with interest. Candee *v.* Skinner, 40 Conn. 464. Where an executor took goods from his own store and added to the stock of his intestate, in order to make the intestate's stock bring more, and the goods so furnished were not kept separate from the others, and the proceeds of the sale of both were deposited alike in his own name, but it was not charged that he received interest on the trust funds, or unreasonably detained them, he was not chargeable with interest thereon. Field *v.* Colton, 7 Ill. App. 379. An administrator will not be charged with interest where it is not certain that he used the money of the estate, there being only a suspicion that he did. Grant *v.* Edwards, 93 N. C. 488.

sonal representative with interest during the whole period, or with the profits actually accruing from his misapplication if these can be ascertained.[49]

4. Delay in Settling Estate. Where there has been long and culpable delay by the representative in accounting or in settling the estate and distributing the residue, interest is chargeable after a reasonable time has elapsed;[50] but the representative should not be charged with interest not actually received where the delay was not unreasonable under the circumstances of the case,[51] or was not due to any culpable neglect or misconduct on his part, but was otherwise occasioned, as by some needful judicial preliminaries, the sickness or absence of the judge,

49. *Alabama.*— Harrison *v.* Harrison, 39 Ala. 489.

Arkansas.—Ringgold *v.* Stone, 20 Ark. 526.

Illinois.—Whitney *v.* Peddicord, 63 Ill. 249.

Minnesota.— St. Paul Trust Co. *v.* Kittson, 62 Minn. 408, 65 N. W. 74.

Mississippi.— Anderson *v.* Gregg, 44 Miss. 170; Crowder *v.* Shackelford, 35 Miss. 321.

Missouri.— Julian *v.* Wrightsman, 73 Mo. 569.

New Jersey.— Boulton *v.* Scott, 3 N. J. Eq. 231.

New York.— Brown *v.* Rickets, 4 Johns. Ch. 303, 8 Am. Dec. 567.

Pennsylvania.— Robinett's Appeal, 36 Pa. St. 174.

See 22 Cent. Dig. tit. "Executors and Administrators," § 425.

50. *Alabama.*— Noble *v.* Jackson, 124 Ala. 311, 26 So. 955; Clark *v.* Hughes, 71 Ala. 163; Mims *v.* Mims, 39 Ala. 716; Harrison *v.* Harrison, 39 Ala. 489.

Arkansas.— Jacoway *v.* Hall, 67 Ark. 340, 55 S. W. 12.

California.— *In re* Hilliard, 83 Cal. 423, 23 Pac. 393. See also *In re* Armstrong, 125 Cal. 603, 58 Pac. 183.

Idaho.— Harris *v.* Coates, 8 Ida. 491, 69 Pac. 475.

Illinois.—Marshall *v.* Coleman, 187 Ill. 556, 58 N. E. 628 [*modifying* 89 Ill. App. 41].

Kentucky.— Blakey *v.* Blakey, 3 J. J. Marsh. 674; Crawford *v.* Thomas, 54 S. W. 197, 21 Ky. L. Rep. 1100; Clark *v.* Newman, 1 S. W. 880, 8 Ky. L. Rep. 515. See also Nixon *v.* Nixon, 8 Dana 5.

Maryland.— Lyles *v.* Hatton, 6 Gill & J. 122.

Michigan.— Hall *v.* Grovier, 25 Mich. 428.

Missouri.— *In re* Danforth, 66 Mo. App. 586.

Montana.— See *In re* Ricker, 14 Mont. 153, 35 Pac. 960, 29 L. R. A. 622.

New York.— Dunford *v.* Weaver, 84 N. Y. 445; Hasler *v.* Hasler, 1 Bradf. Surr. 248.

Ohio.— Cooch *v.* Irwin, 7 Ohio St. 22. See also *In re* Thornton, 5 Ohio S. & C. Pl. Dec. 151.

Pennsylvania.—Wilson's Appeal, 8 Pa .Cas. 579, 11 Atl. 678; Fow's Estate, 3 Pa. Dist. 316, 14 Pa. Co. Ct. 648.

South Carolina.— Tucker *v.* Richards, 58 S. C. 22, 36 S. E. 3.

Tennessee.— Davis *v.* Jackson, (Ch. App. 1897) 39 S. W. 1067; Turney *v.* Williams, 7 Yerg. 172.

Texas.— McKinney *v.* Nunn, 82 Tex. 44, 17 S. W. 516.

West Virginia.— Van Winkle *v.* Blackford, 54 W. Va. 621, 46 S. E. 589.

United States.— McIntire *v.* McIntire, 192 U. S. 116, 24 S. Ct. 196, 48 L. ed. 369 [*affirming* 20 App. Cas. (D. C.) 134].

England.— Holgate *v.* Haworth, 17 Beav. 259; Franklin *v.* Frith, 3 Bro. Ch. 433, 29 Eng. Reprint 627; Littlehales *v.* Gascoyne, 3 Bro. Ch. 73, 29 Eng. Reprint 416; Kildare *v.* Hopson, 4 Bro. P. C. 550, 2 Eng. Reprint 374.

See 22 Cent. Dig. tit. "Executors and Administrators," § 426.

Failure to pay debt.— Where an administrator appointed Aug. 31, 1895, had a considerable amount of money and cotton belonging to the estate on hand on Jan. 21, 1896, and knew that the principal part of the money in his hands would be credited on a bond which he held against the estate bearing a high rate of interest, he should be charged with interest on the amount in his hands on Jan. 1, 1896, after deducting all expenditures made by him prior to Aug. 31, 1896. Nicholson *v.* Whitlock, 57 S. C. 36, 35 S. E. 412.

Failure to bring into court.— When the assets of an estate are ordered to be brought into court, and are subsequently intrusted to receivers, by consent of all parties, to be invested pending a contest over the validity of the will, an administrator with the will annexed is chargeable with interest on money retained by him, where it is not shown that it was used or kept for the necessary benefit of the estate. McIntire *v.* McIntire, 14 App. Cas. (D. C.) 337.

Demand for settlement not necessary.— Haskins *v.* Martin, 103 Ill. App. 115.

Death of representative.— Where delay in settling an administrator's account after his death is not due to his method of handling the estate, or chargeable to his estate, it will be considered settled as of the date of his death, and his estate will be charged with simple interest only on the balance in his hands at the time. Walworth *v.* Bartholomew, 76 Vt. 1, 56 Atl. 101.

Damages beyond interest cannot be charged where the delay in the settlement of the estate resulted in no loss to the heirs. *In re* Armstrong, 125 Cal. 603, 58 Pac. 183.

Penalties for failure to account, etc., are provided by statute in Louisiana. See *In re* Dimmick, 111 La. 655, 35 So. 801; Conery's Succession, 111 La. 113, 35 So. 479.

51. Siniard *v.* Green, 123 Ala. 527, 26 So. 661.

litigation, or interference among rival claimants to the fund, the non-ascertainment of those actually entitled, the fact that the person entitled could not be found, or similar causes, and he has not used or made any profit on the funds in his hands.[52]

5. Reserving For Contingencies. An executor or administrator is not necessarily liable to pay interest on a reasonable sum retained in his hands or on deposit to meet expenses and pay judgments recovered against the estate, or so as to abide the contingencies of some litigation concerning assets and the title of parties claimant;[53] but circumstances may arise where, not having procured the protection of the probate court, he may make himself chargeable for interest which the fund would fairly have earned had he dealt prudently with the assets.[54]

6. Time From Which Interest Runs. The time from which an executor or administrator will be charged with interest must depend to a large extent upon the circumstances of the particular case.[55] A reasonable time to collect and apply money or to render accounts should be allowed before interest is charged,[56] and so also a reasonable time should be allowed after appointment or receiving a fund before the representative should be held obliged to make interest, and hence he is not chargeable with interest meanwhile if he receives none.[57] Interest ought not as a rule to be required from him before he actually receives the fund, nor upon an interest-bearing security before the interest thereon begins properly to

52. *Alabama.*— Kenan *v.* Graham, 135 Ala. 585, 33 So. 699; Johnson *v.* Holifield, 82 Ala. 123, 2 So. 753.

California.— *In re* Seligman, Myr. Prob. 8.

Georgia.— Rogers *v.* Bottsford, 44 Ga. 652; Binion *v.* Miller, 27 Ga. 78.

Kentucky.— Miller *v.* Simpson, 8 Ky. L. Rep. 518, 2 S. W. 171.

Massachusetts.— Forward *v.* Forward, 6 Allen 494; Lamb *v.* Lamb, 11 Pick. 371.

Missouri.— *In re* Davis, 62 Mo. 450.

New Jersey.— *In re* Corle, 61 N. J. Eq. 409, 48 Atl. 1027.

North Carolina.— Roper *v.* Burton, 107 N. C. 526, 12 S. E. 334; Smith *v.* Smith, 101 N. C. 461, 8 S. E. 128, 131, 133.

Pennsylvania.— Reed's Estate, 22 Pa. Super. Ct. 635; *In re* Breeswine, 11 York Leg. Rec. 141.

Virginia.— Fitzgerald *v.* Jones, 1 Munf. 150.

See 22 Cent. Dig. tit. "Executors and Administrators," § 426.

53. *Alabama.*— Noble *v.* Jackson, 124 Ala. 311, 26 So. 955.

Georgia.— Doster *v.* Arnold, 60 Ga. 316.

Maryland.— Wilson *v.* Wilson, 3 Gill & J. 20.

Missouri.— Booker *v.* Armstrong, 93 Mo. 49, 4 S. W. 727.

North Carolina.— Hester *v.* Hester, 38 N. C. 9; Downey *v.* Smith, 17 N. C. 535.

Pennsylvania.— Davis' Appeal, 23 Pa. St. 206.

South Carolina.— Pace *v.* Burton, 1 McCord Eq. 247.

United States.— Wade *v.* Wade, 28 Fed. Cas. No. 17,030, 1 Wash. 477.

See 22 Cent. Dig. tit. "Executors and Administrators," § 427.

The burden of proof is on an administrator, who, retaining funds to meet probable liabilities of the estate, would avoid being charged with interest, to show that he kept the funds unemployed, and that it was prudent to do so. Burnside *v.* Robertson, 28 S. C. 583, 6 S. E. 843. But *compare* Chesnut *v.* Strong, 2 Hill Eq. (S. C.) 146.

54. *Georgia.*— Doster *v.* Arnold, 60 Ga. 316.

Maryland.— Monteith *v.* Baltimore Poor Imp. Assoc., 21 Md. 426; Lyles *v.* Hatton, 6 Gill & J. 122.

New York.— Dunscomb *v.* Dunscomb, 1 Johns. Ch. 508, 7 Am. Dec. 504.

Pennsylvania.— *In re* Lloyd, 82 Pa. St. 143; Foster *v.* Harris, 10 Pa. St. 457.

Vermont.— Spaulding *v.* Wakefield, 53 Vt. 660, 38 Am. Rep. 709.

See 22 Cent. Dig. tit. "Executors and Administrators," § 427.

55. See the following cases:

California.— *In re* Marre, 127 Cal. 128, 59 Pac. 385.

Kentucky.— Wood *v.* Nelson, 10 B. Mon. 229; Moore *v.* Beauchamp, 4 B. Mon. 71.

New York.—Sherwood *v.* Wooster, 11 Paige 441.

Pennsylvania.— Gable's Appeal, 40 Pa. St. 231; Flintham's Appeal, 11 Serg. & R. 16; Reed's Estate, 22 Pa. Super. Ct. 635; Kline's Estate, 8 Lanc. L. Rev. 356.

Virginia.— Peale *v.* Hickle, 9 Gratt. 437.

United States.— Pulliam *v.* Pulliam, 10 Fed. 53; Norman *v.* Storer, 18 Fed. Cas. No. 10,301, 1 Blatchf. 593.

See 22 Cent. Dig. tit. "Executors and Administrators," § 428.

56. *Maryland.*— Gwynn *v.* Dorsey, 4 Gill & J. 453.

Pennsylvania.— Bitzer *v.* Hahn, 14 Serg. & R. 232.

South Carolina.— Taveau *v.* Ball, 1 McCord Eq. 456.

Virginia.— Dilliard *v.* Tomlinson, 1 Munf. 183.

United States.— Pulliam *v.* Pulliam, 10 Fed. 53.

See 22 Cent. Dig. tit. "Executors and Administrators," § 428.

57. *Georgia.*— Allen *v.* Hardee, 30 Ga. 463.

Illinois.— *In re* Schofield, 99 Ill. 513.

run, unless interest comes to his hands or he has converted the fund to his personal use.[58] Where the representative has applied funds of the estate to his own use and profit, he may be charged with interest from the time he received the same,[59] or even from the time of the decedent's death,[60] and a charge of interest from the time of the receipt of the fund may be proper in other cases of neglect or misconduct.[61]

7. Rate of Interest. In general the personal representative if liable for interest is liable simply for the current interest that may be fairly obtained, or else for the interest he has actually made;[62] but the circumstances of each case should be considered in determining the rate to be charged.[63] Where the representative has merely neglected to make the fund productive, the court may not

Kentucky.— Weir *v.* Weir, 3 B. Mon. 645, 39 Am. Dec. 487.

Maryland.— Smithers *v.* Hooper, 23 Md. 273.

Mississippi.—Brandon *v.* Hoggatt, 32 Miss. 335.

New Jersey.— Frey *v.* Frey, 17 N. J. Eq. 71.

New York.— Gilman *v.* Gilman, 2 Lans. 1; Matter of Mapes, 5 Dem. Surr. 446.

Pennsylvania.— Fox *v.* Wilcocks, 1 Binn. 194, 2 Am. Dec. 433; Matter of Merrick, 1 Ashm. 305.

South Carolina.—Brooks *v.* Brooks, 12 S. C. 422; Davis *v.* Wright, 2 Hill 560; Taveau *v.* Ball, 1 McCord Eq. 456.

Virginia.— Rosser *v.* Depriest, 5 Gratt. 6, 50 Am. Dec. 94.

See 22 Cent. Dig. tit. "Executors and Administrators," § 428.

58. Dyer *v.* Jacoway, 50 Ark. 217, 6 S. W. 902; *In re* Sarment, 123 Cal. 331, 53 Pac. 1015; McCall *v.* Peachy, 3 Munf. (Va.) 288; Hooper *v.* Hooper, 32 W. Va. 326, 9 S. E. 937; Reitz *v.* Bennett, 6 W. Va. 417.

59. Gwynn *v.* Dorsey, 4 Gill & J. (Md.) 453.

60. *In re* Myers, 131 N. Y. 409, 30 N. E. 135, 508 [*modifying* 58 Hun 173, 11 N. Y. Suppl. 543, 14 N. Y. Suppl. 535]. See also Bassett *v.* Maryland Fidelity, etc., Co., 184 Mass. 210, 68 N. E. 205.

61. Jackson *v.* Shields, 87 N. C. 437; Arnett *v.* Linney, 16 N. C. 369, holding that where an executor neglects to render proper accounts, and to swear that he has not made a profit on the funds in his hands, he will be charged with interest on receipts from the time they came in.

62. *Illinois.*— Hough *v.* Harvey, 71 Ill. 72.

New Jersey.— Voorhees *v.* Stoothoff, 11 N. J. L. 145. But see Frey *v.* Demarest, 17 N. J. Eq. 71, holding that an administrator is not entitled to a diminution in the legal rate of interest upon funds retained in his hands uninvested on the ground that it would have been difficult to invest in his neighborhood small sums except at less than the legal rate.

New York.— *In re* Myers, 131 N. Y. 409, 30 N. E. 135; Young *v.* Brush, 28 N. Y. 667; Matter of Mairs, 4 Redf. Surr. 160; Haskin *v.* Teller, 3 Redf. Surr. 316.

North Carolina.— See Grant *v.* Edwards, 92 N. C. 442.

Pennsylvania.—English *v.* Harvey, 2 Rawle 305.

South Carolina.— Turnipseed *v.* Sirrine, 60 S. C. 272, 38 S. E. 423.

Virginia.— Wills *v.* Dunn, 5 Gratt. 384.

See 22 Cent. Dig. tit. "Executors and Administrators," § 429.

63. King *v.* Talbot, 40 N. Y. 76.

Illustrative cases.— For rulings as to the proper rate of interest to be charged under the particular circumstances of each case see the following cases:

Illinois.— Marshall *v.* Coleman, 187 Ill. 556, 58 N. E. 628 [*modifying* 89 Ill. App. 41].

Missouri.— Ulrici *v.* Boeckeler, 72 Mo. App. 661; James *v.* Withinton, 7 Mo. App. 575.

New York.— Matter of Stanton, 41 Misc. 278, 84 N. Y. Suppl. 46; Matter of Downs, 39 Misc. 621, 80 N. Y. Suppl. 659; Matter of Scudder, 21 Misc. 179, 47 N. Y. Suppl. 101; Matter of Knower, 1 N. Y. St. 482.

Pennsylvania.— Bollinger's Estate, 10 Pa. Dist. 223.

England.—Heathcote *v.* Hulme, 1 Jac. & W. 122, 20 Rev. Rep. 248, 37 Eng. Reprint 322; Gresley *v.* Heathcote, 3 L. J. Ch. O. S. 107; *Re* Jones, 49 L. T. Rep. N. S. 91; Piety *v.* Stace, 4 Ves. Jr. 620, 31 Eng. Reprint 319; Williams *v.* Williams, 1 Wkly. Rep. 237.

Canada.— Fielder *v.* O'Hara, 14 Grant Ch. (U. C.) 223; Smith *v.* Roe, 11 Grant Ch. (U. C.) 311.

See 22 Cent. Dig. tit. "Executors and Administrators," § 429.

Agreement to pay interest.— Where it is agreed by executors and an objectant to their account "that the executors shall be charged with interest on all unexpended balances," the interest is chargeable at the legal rate, although the executors may have the money deposited at a lower rate. *In re* Meikle, 20 N. Y. Suppl. 88, 2 Connoly Surr. (N. Y.) 97.

Refusal of beneficiaries to accept investment.— Where minor heirs have the right on coming of age to refuse to accept investments of trust funds for their benefit made by the executors, and to require the executors to pay the amount of such funds, the rate of interest with which the executors should be charged is six per cent, with annual rests. King *v.* Talbot, 40 N. Y. 76.

Sum too small for investment.— Where the sum held by an executor in trust is too small

visit him with a heavy penalty, while if he has used the money for his own purposes, or has otherwise misconducted himself in the use of it, a higher rate of interest may be imposed.[64]

8. Computation. In charging an executor or administrator with interest on funds in his hands at a final settlement, his commission or recompense, or if he is a distributee his distributive share, should be deducted before a balance is struck and the interest is finally computed against him.[65] Where no account is rendered as to funds which should have been placed at interest, either as to their disposition or as to what was actually received, the representative ought to be charged, as nearly as the sum can be ascertained, with all he might have made or received in the honest exercise of due diligence and exertion, periodical computation being made less the proper deductions.[66] It is proper to make periodical rests for computing balances and charging interest, and annual rests are common in such cases, although the length of periodical rests will depend on circumstances,[67] and a balance should be struck between the receipts for a given period, as a year, and payments and charges for that period.[68]

9. Compound Interest. If compound interest has been received by the representative, he must of course account for it;[69] but otherwise compound interest is rarely charged against an executor or administrator by way of penalty, unless something more appears than ordinary neglect of duty,[70] although where there has been a wilful breach of trust or gross delinquency, or where the representa-

to allow an advantageous investment on mortgage, he is not chargeable with any more than the interest paid to him on the fund by a savings bank. Collyer *v.* Collyer, 6 N. Y. St. 693.

64. *Iowa.*— *In re* Young, 97 Iowa 218, 66 N. W. 163; Lommen *v.* Tobiason, 52 Iowa 665, 3 N. W. 715.

Massachusetts.— Brigham *v.* Morgan, 185 Mass. 27, 69 N. E. 418.

Missouri.— *In re* Davis, 62 Mo. 450; James *v.* Withinton, 7 Mo. App. 575.

Montana.— See *In re* Ricker, 14 Mont. 153, 35 Pac. 960, 29 L. R. A. 622.

New Jersey.— Salisbury *v.* Colt, 27 N. J. Eq. 492.

Pennsylvania.— Flynn's Estate, 21 Pa. Super. Ct. 126.

Vermont.— Spaulding *v.* Wakefield, 53 Vt. 660, 38 Am. Rep. 709.

England.— Woodhead *v.* Marriott, C. P. Coop. 62; Heathcote *v.* Hulme, 1 Jac. & W. 122, 20 Rev. Rep. 248, 37 Eng. Reprint 322; Rocke *v.* Hart, 11 Ves. Jr. 58, 32 Eng. Reprint 1009.

Canada.— Fielder *v.* O'Hara, 14 Grant Ch. (U. C.) 223; Smith *v.* Roe, 11 Grant Ch. (U. C.) 311.

See 22 Cent. Dig. tit. "Executors and Administrators," § 429.

Discretion of court as to rate see Cuffe *v.* Cuffe, 3 Ir. Eq. 469; Flanagan *v.* Nolan, 1 Molloy 84.

Allowance of less than rate provided for by statute.— In an action for an account against an executor, although he has grossly abused his trust and is liable under the statute for ten per cent interest, a less rate, if prayed for, may be allowed. Bass *v.* Chambliss, 9 La. Ann. 376.

65. Miller *v.* Simpson, 2 S. W. 171, 8 Ky. L. Rep. 518; Mathis *v.* Mathis, 18 N. J. L. 59; Callaghan *v.* Hall, 1 Serg. & R. (Pa.) 241.

66. Voorhees *v.* Stoothoff, 11 N. J. L. 145; Spear *v.* Tinkham, 2 Barb. Ch. (N. Y.) 211; Richardson *v.* Richardson, 9 Pa. St. 428; Heister's Appeal, 7 Pa. St. 455.

67. *Florida.*— Young *v.* McKinnie, 5 Fla. 542.

Kentucky.— Clemens *v.* Caldwell, 7 B. Mon. 171; Johnson *v.* Beauchamp, 5 Dana 70, triennial rests.

New Jersey.— McKnight *v.* Walsh, 24 N. J. Eq. 498.

South Carolina.— Buerhaus *v.* De Saussure, 41 S. C. 457, 19 S. E. 926, 20 S. E. 64; Dixon *v.* Hunter, 3 Hill 204; Oswald *v.* Givens, Riley Eq. 38; Black *v.* Blakely, 2 McCord Eq. 1.

Virginia.— Burwell *v.* Anderson, 3 Leigh 348.

See 22 Cent. Dig. tit. "Executors and Administrators," § 431.

68. Koon *v.* Munro, 11 S. C. 139; Pettus *v.* Clawson, 4 Rich. Eq. (S. C.) 92.

Where disbursements exceed receipts in a particular year the amount on which the administrator is to be charged interest is to be determined by adding to the annual balance in his hands on January 1 the receipts for that year and deducting from the result the amount of the disbursements during the year. Tucker *v.* Richards, 58 S. C. 22, 36 S. E. 3.

69. Hester *v.* Hester, 38 N. C. 9; Ryan *v.* Blount, 16 N. C. 382; Edmonds *v.* Crenshaw, Harp. Eq. (S. C.) 224.

70. *Alabama.*— Smith *v.* Kennard, 38 Ala. 695; Powell *v.* Powell, 10 Ala. 900.

California.— *In re* Sarment, 123 Cal. 331, 55 Pac. 1015.

Kentucky.—Johnson *v.* Beauchamp, 5 Dana 70.

tive has mingled the trust funds with his own or used the same for his own benefit, in order to derive profit therefrom, a charge of compound interest may be proper.[71]

G. Loans. Aside from a loan made under due authority as an investment, an executor or administrator who lends to other persons the money or assets in his hands does so at his own individual risk and may be held personally liable as for conversion or to make good a resulting loss.[72] But it has been held that the executor or administrator may in proper case lend or advance to a distributee

Massachusetts.— Forbes *v.* Allen, 166 Mass. 569, 44 N. E. 1065; Chapin *v.* Waters, 116 Mass. 140.

Mississippi.— Crowder *v.* Shackelford, 35 Miss. 321.

Missouri.— Scudder *v.* Ames, 89 Mo. 496, 14 S. W. 525.

New Jersey.— Frost *v.* Denman, 41 N. J. Eq. 47, 2 Atl. 926; King *v.* Berry, 3 N. J. Eq. 261.

New York.— Thorn *v.* Garner, 42 Hun 507; Lansing *v.* Lansing, 45 Barb. 182; Ackerman *v.* Emott, 4 Barb. 626; Garniss *v.* Gardiner, 1 Edw. 128; *In re* Kennedy, 9 N. Y. Suppl. 552, 2 Connoly Surr. 216; Freeman *v.* Freeman, 4 Redf. Surr. 211.

North Carolina.— Mitchell *v.* Robards, 17 N. C. 478.

Pennsylvania.— English *v.* Harvey, 2 Rawle 305; Matter of McCall, 1 Ashm. 357; Fink's Estate, 4 Phila. 191.

South Carolina.— Wright *v.* Wright, 2 McCord Eq. 185; Black *v.* Blakely, 2 McCord Eq. 1.

Virginia.— Lovett *v.* Thomas, 81 Va. 245; Kelly *v.* Love, 20 Gratt. 124. See also Sheppard *v.* Starke, 3 Munf. 29.

West Virginia.— Van Winkle *v.* Blackford, 54 W. Va. 621, 46 S. E. 589.

Canada.— See Inglis *v.* Beaty, 2 Ont. App. 453.

See 22 Cent. Dig. tit. "Executors and Administrators," § 432.

Production of new principal.— An administrator will be charged with compound interest only where a new principal has been produced by the settlement of the accounts, by a judgment, or by express agreement. *In re* Wilson, 1 Pa. Co. Ct. 509.

Funds retained pursuant to testamentary directions.— Where an executor held property of the estate for fifteen years, and did not obtain interest thereon, but used the funds in his own business, the retention having been made in pursuance to an instruction in the will that distribution should not be made until all the heirs attained their majority, he was not chargeable with compound interest on the funds so retained. Cruce *v.* Cruce, 81 Mo. 676.

Keeping on deposit.— The fact that an administrator kept the funds of the estate on deposit in a bank managed by his brother, who was surety on his bond, and that such funds were used by the bank as the funds of other depositors, does not show that he embezzled the funds, so as to justify charging him with compound interest. *In re* Sarment, 123 Cal. 331, 55 Pac. 1015.

71. *Alabama.*— Smith *v.* Kennard, 38 Ala. 695.

California.— Merrifield *v.* Longmire, 66 Cal. 180, 4 Pac. 1176; *In re* Clark, 53 Cal. 355, even though the representative was always ready to respond on demand.

Kentucky.— Clemens *v.* Caldwell, 7 B. Mon. 171.

Massachusetts.— Fay *v.* Howe, 1 Pick. 527.

Mississippi.— Troup *v.* Rice, 55 Miss. 278.

Missouri.— Camp *v.* Camp, 74 Mo. 192.

New Jersey.— Male *v.* Williams, 48 N. J. Eq. 33, 21 Atl. 854; McKnight *v.* Walsh, 23 N. J. Eq. 136.

New York.— Gilman *v.* Gilman, 2 Lans. 1; Schieffelin *v.* Stewart, 1 Johns. Ch. 620, 7 Am. Dec. 507; Berwick *v.* Halsey, 4 Redf. Surr. 18.

North Carolina.— Swindall *v.* Swindall, 43 N. C. 285.

Vermont.— Foster *v.* Stone, 67 Vt. 336, 31 Atl. 841.

West Virginia.— Van Winkle *v.* Blackford, 54 W. Va. 621, 46 S. E. 589.

Canada.— See Inglis *v.* Beaty, 2 Ont. App. 453.

See 22 Cent. Dig. tit. "Executors and Administrators," § 432.

Compound interest not necessarily chargeable for mingling see Perkins *v.* Hollister, 59 Vt. 348, 7 Atl. 605.

72. *Alabama.*— Walls *v.* Grigsby, 42 Ala. 473; Gerald *v.* Bunkley, 17 Ala. 170; Tomkies *v.* Reynolds, 17 Ala. 109.

California.— Tomkins *v.* Weeks, 26 Cal. 50; *In re* Lacoste, Myr. Prob. 67.

Illinois.— Wadsworth *v.* Connell, 104 Ill. 369; Caruthers *v.* Caruthers, 99 Ill. App. 402.

Indiana.— State *v.* Johnson, 7 Blackf. 529.

Mississippi.—Cason *v.* Cason, 31 Miss. 578.

Missouri.— Garesche *v.* Priest, 78 Mo. 126.

New Jersey.— Vreeland *v.* Vreeland, 16 N. J. Eq. 512.

Virginia.— McCall *v.* Peachy, 3 Munf. 288.

See 22 Cent. Dig. tit. "Executors and Administrators," § 433.

The representative may be liable for interest to the beneficiaries. Cason *v.* Cason, 31 Miss. 578. But see Moore's Estate, 72 Cal. 335, 13 Pac. 880, holding that the representative should not be charged with interest agreed to be paid on such loan unless he has collected or could have collected the same. And see, generally, *supra*, VIII, F.

Deposit amounting to loan.— Where an administrator deposits the funds of the estate he represents in a bank, and receives a certificate payable to his order at a specified time after its date, with interest, such a deposit

upon the security of his interest,[73] or in the exercise of due prudence lend to a failing debtor of the estate for the sake of getting security which could not be otherwise obtained.[74] For whatever the representative may receive from the borrower he is duly accountable to the estate.[75]

H. Gifts. The executor or administrator has no right to give away any assets even though of trifling value, nor will the law give effect to such transfer.[76]

I. Expenditures — 1. In General. The executor or administrator is entitled to credit in his accounts for expenses necessarily and properly incurred by him in good faith, in transacting with reasonable care and diligence the business of his trust, upon due proof of the particular items of expense claimed.[77] The practical situation is usually that the executor or administrator makes himself liable *de bonis propriis* to others by incurring expense, but that he may reimburse himself under appropriate circumstances out of the assets of the estate.[78]

is evidence of a loan by him of such funds, and if the bank subsequently becomes insolvent he will be responsible for any loss resulting therefrom. Caruthers *v.* Caruthers, 99 Ill. App. 402.

The heirs have no privity in the promise of the borrower to the representative, but their remedy is against the latter. Abbott *v.* Kensett, 33 Conn. 509; Neubrecht *v.* Santmeyer, 50 Ill. 74. But see Melvain *v.* Tomes, 14 Hun (N. Y.) 31.

Adoption of contract by administrator de bonis non.— Where an administrator in chief makes an unauthorized loan of money belonging to the estate of his intestate, if the administrator *de bonis non* accepts such loan, and seeks to hold the borrower as a trustee *in invitum*, he thereby elects to adopt the contract, and cannot subsequently treat the loan as a devastavit. Wilson *v.* Stevens, 129 Ala. 630, 29 So. 678, 87 Am. St. Rep. 86.

Testamentary direction as to a loan — Security.— Where a testator before his death was a special partner of a certain person and by his will directed his executors to allow such person to retain as a loan to him the amount contributed by testator to the capital of the firm, such person could not be compelled to give security for the loan. Denike *v.* Harris, 84 N. Y. 89 [*reversing* 23 Hun 213].

Returning specific assets lent.— Where a firm borrowed of an executor as part of the estate of his testator shares of the stock and evidences of the loan of a public corporation, under an express agreement to restore to the executor, or his successor in the trust of executing the will, the assets and securities borrowed, the borrowers are compellable in equity to restore to the executor the loan and stock, with the interest and dividends thereon not already received by the executor. Abbott *v.* Reeves, 49 Pa. St. 494, 88 Am. Dec. 510.

73. People *v.* Atkins, 7 Ill. App. 105; Delafield *v.* Schuchardt, 2 Dem. Surr. (N. Y.) 435. And see *infra*, XI, H.

Fraud in such transaction not presumed as matter of law.— Moye *v.* Petway, 76 N. C. 327.

74. Torrence *v.* Davidson, 92 N. C. 437, 53 Am. Rep. 419.

75. Savage *v.* Gould, 60 How. Pr. (N. Y.) 217.

Note for money lent inures to benefit of estate. Kalckhoff *v.* Zœhrlaut, 40 Wis. 427.

76. Radovich's Estate, 74 Cal. 536, 16 Pac. 321, 5 Am. St. Rep. 466; Dickinson *v.* Colonial Trust Co., 33 Misc. (N. Y.) 668, 68 N. Y. Suppl. 909; Powers *v.* Powers, 48 How. Pr. (N. Y.) 389. But see Washington *v.* Emery, 57 N. C. 32.

77. *Alabama.*— Pearson *v.* Darrington, 32 Ala. 227.

California.— *In re* Smith, 118 Cal. 462, 50 Pac. 701.

Louisiana.—Milne's Succession, 1 Rob. 400; Young *v.* Chaney, 3 La. 462.

Maryland.— Bantz *v.* Bantz, 52 Md. 686.

New Hampshire.— Wendell *v.* French, 19 N. H. 205.

New Jersey.—Bechtold *v.* Read, (Ch. 1893) 28 Atl. 264.

New York.— Shaffer *v.* Bacon, 35 N. Y. App. Div. 248, 54 N. Y. Suppl. 796 [*affirmed* in 161 N. Y. 635, 57 N. E. 1124]; *In re* Public Parks, 14 N. Y. Suppl. 347.

North Carolina.—Clarke *v.* Cotton, 17 N. C. 51, in addition to commissions.

Pennsylvania.— Hoopes' Estate, 1 Brewst. 462.

Texas.— Dyer *v.* Winston, (Civ. App. 1903) 77 S. W. 227.

See 22 Cent. Dig. tit. "Executors and Administrators," § 435.

Medium in which disbursements made.— Upon an administrator's accounting as to transactions from 1862 to 1865, he cannot receive credit in good and lawful money for disbursements made then, without proof that his payments were not in the depreciated money then current. Stokes *v.* Wallace, 16 S. C. 619.

While there is a balance due by the representative individually as for waste, he cannot claim to be reimbursed for his payments. Moore *v.* Davidson, 22 S. C. 92.

Relief where disbursements exceed receipts. — Aside from local probate authority, chancery may give relief out of the assets to a representative whose cash disbursements exceed his cash receipts. Bailey *v.* Mundin, 58 Ala. 104; Reaves *v.* Garrett, 34 Ala. 558; Wright *v.* Wright, 2 McCord Eq. (S. C.) 185.

78. Rittenhouse *v.* Ammerman, 64 Mo. 197, 27 Am. Rep. 215. And see *supra*, VIII, D.

2. Allowance a Question For the Court. The allowance or disallowance of expenditures is a question of law for the court and not a question of fact for the jury.[79]

3. Sanction of Court. The representative is always entitled to credit for expenditures made by the order of or with the approval and sanction of the court,[80] even though the court was indiscreet in making the order pursuant to which he acted;[81] but the fact that the representative has expended money upon the faith of an order of the court making an allowance for certain expenses does not preclude the court from annulling such order upon evidence that the petition upon which it was made did not fully and truly state the facts.[82]

4. Necessity of Actual Payment. Credit for an administration expense should not as a rule be allowed to the executor or administrator on his accounting in court, until or unless the amount has been actually paid,[83] and where partial payment only has been made, credit will be allowed as to that part only.[84]

5. Unnecessary Expenditures. As a general rule the representative will not be allowed credit for unnecessary payments or expenditures made by him,[85] especially in the case of needless and extravagant outlays over a small and simple estate,[86] and, although disbursements which ultimately prove to have been unnecessary may be sometimes allowed if made in good faith and under a reasonable belief of their necessity,[87] the representative must show some just explanation before he can legally claim their allowance.[88]

6. Expenses Caused by Misconduct or Unauthorized Acts.[89] Positive misconduct on the part of the representative bars any claim by him against the estate for reimbursement of his expenses caused thereby,[90] nor will he be allowed credit for expenditures which became necessary by reason of his own negligence[91] or were made in the course of or resulted from acts done by him without authority.[92]

7. Representative Improperly Appointed. Due credit or reimbursement for beneficial acts performed in good faith or expenditures properly made will be allowed to an administrator who was appointed upon the assumption that the decedent died intestate before it was discovered that he left a will, or

79. Hapke *v.* People, 29 Ill. App. 546.

80. *In re* Millenovich, 5 Nev. 161.

81. *In re* Millenovich, 5 Nev. 161.

82. Watkins *v.* Romine, 106 Ind. 378, 7 N. E. 193.

83. *Alabama.*— Modawell *v.* Holmes, 40 Ala. 391.

Louisiana.— Gayles *v.* Gray, 6 Mart. N. S. 693.

Massachusetts.— Thacher *v.* Dunham, 5 Gray 26; Jennison *v.* Hapgood, 14 Pick. 345.

New York.— Matter of Spooner, 86 Hun 9, 33 N. Y. Suppl. 136; *In re* Bailey, 47 Hun 477; *In re* Van Nostrand, 3 Misc. 396, 24 N. Y. Suppl. 850, Pow. Surr. 495; *In re* Ingersoll, 20 N. Y. St. 356, 6 Dem. Surr. 184.

Pennsylvania.— Benner's Estate, 3 Brewst. 398.

Rhode Island.— Moulton *v.* Smith, 16 R. I. 126, 12 Atl. 891, 27 Am. St. Rep. 728.

Vermont.— Pelton *v.* Johnson, 52 Vt. 138.

See 22 Cent. Dig. tit. "Executors and Administrators," § 446.

84. Matter of White, 15 N. Y. St. 729, 6 Dem. Surr. (N. Y.) 375.

85. Bare's Estate, 5 Lanc. L. Rev. (Pa.) 36; Johnson *v.* Henagan, 11 S. C. 93.

86. *In re* Barber, 12 N. Y. Suppl. 538; Bradley's Estate, 11 Phila. (Pa.) 87; Villard *v.* Roberts, 2 Strobh. Eq. (S. C.) 40, 49 Am. Dec. 654.

87. Robbins *v.* Wolcott, 27 Conn. 234.

88. Robbins *v.* Wolcott, 27 Conn. 234.

89. See *infra*, VIII, I, 8, g, (IX), (B).

90. Robbins *v.* Wolcott, 27 Conn. 234.

91. Marshall *v.* Coleman, 187 Ill. 556, 58 N. E. 628 [*modifying* 89 Ill. App. 41]; Brackett *v.* Tillotson, 4 N. H. 208.

92. Pearson *v.* Darrington, 32 Ala. 227.

Thus an allowance has been refused for expenditures in the unauthorized management of real estate and care of infant children (Benford *v.* Daniels, 13 Ala. 667; Hennessy's Estate, Tuck. Surr. (N. Y.) 335. *Compare* Henning *v.* Conner, 2 Bibb (Ky.) 188), in protecting investments by the representative which should not have been made (Lacey *v.* Davis, 4 Redf. Surr. (N. Y.) 402), in surveying a line between the property of decedent and that of an adjoining proprietor where the administrator had not been ordered to take charge of the decedent's real estate (Springfield Grocer Co. *v.* Walton, 95 Mo. App. 526, 69 S. W. 477), and in conducting leased premises after the decedent's death where the lease terminated upon his death (Jaquette's Estate, 1 Chest. Co. Rep. (Pa.) 197).

Those interested cannot accept profits of improper investment without assuming inci-

to an executor who acted under a will which was subsequently decided to be invalid and the probate thereof revoked.[93]

8. Particular Expenditures Considered — a. Expenses of Last Illness. The representative is entitled to credit for payment of the expenses of the last illness of the decedent,[94] but an allowance on this account which is clearly excessive in view of the circumstances of the case will be reduced.[95]

b. Funeral Expenses, Tombstones, Etc. — (i) *Funeral Expenses.*[96] Reasonable and proper funeral expenses are to be allowed, where incurred with ordinary prudence and regard of decency and respectability, according to the condition in life of the decedent and the apprehended extent of his fortune;[97] but where a beneficial association of which decedent was a member pays or contributes to the payment of the funeral expenses, the executor or administrator is not entitled to credit in his account for the amount so paid or contributed.[98]

(ii) *Tombstones and Monuments.*[99] Credit should be allowed to a reason-

dental outlays. Wheelwright *v.* Rhoades, 28 Hun (N. Y.) 57.

93. Edwards *v.* Ela, 5 Allen (Mass.) 87; Read *v.* Franklin, (Tenn. Ch. App. 1900) 60 S. W. 215.

94. McNeely *v.* McNeely, 50 La. Ann. 823, 24 So. 338.

95. Matter of Ogden, 41 Misc. (N. Y.) 158, 80 N. Y. Suppl. 977.

Apparently extravagant charges will be allowed an executor where they are no more than the usual charges for like services at the time. *In re* Millenovich, 5 Nev. 161.

96. See *infra*, X, A, 19, c.

97. *California.*— Galland's Estate, 92 Cal. 293, 28 Pac. 287.

District of Columbia.— See Sinnott *v.* Kenaday, 14 App. Cas. 1 [*reversed* on other grounds in 179 U. S. 606, 21 S. Ct. 233, 49 L. ed. 339].

Louisiana.— McNeely *v.* McNeely, 50 La. Ann. 823, 24 So. 338.

Massachusetts.— Sweeney *v.* Muldoon, 139 Mass. 304, 31 N. E. 720, 52 Am. Rep. 708.

Nevada.— *In re* Millenovich, 5 Nev. 161.

New York.—Matter of Ogden, 41 Misc. 158, 83 N. Y. Suppl. 977; Matter of Very, 24 Misc. 139, 53 N. Y. Suppl. 389, 28 N. Y. Civ. Proc. 163; Matter of Hildebrand, 1 Misc. 245, 23 N. Y. Suppl. 148.

Pennsylvania.—*In re* Malony, 11 Serg. & R. 204; Meyer's Estate, 18 Phila. 42; Bradley's Estate, 11 Phila. 87.

Tennessee.— See Loftis *v.* Loftis, 94 Tenn. 232, 28 S. W. 1091.

England.— Edwards *v.* Edwards, 2 Cromp. & M. 612, 3 L. J. Exch. 204, 4 Tyrw. 438; Pitchford *v.* Hulme, 3 L. J. Ch. O. S. 223, even though the estate is insolvent.

See 22 Cent. Dig. tit. "Executors and Administrators," § 436.

The expenses of a wake, if not unreasonable, have been held to constitute a proper item of funeral charges. Johnson's Estate, 8 Pa. Co. Ct. 1. *Contra,* White's Estate, 13 Phila. (Pa.) 287.

Commandery parade.— A donation of two hundred and fifty dollars, made by an executor to his testator's commandery for parading at the funeral, is not a proper charge against the estate, where it does not appear that the commandery required the payment of that sum or any other as a condition of their participation in the funeral. *In re* Reynolds, 124 N. Y. 388, 26 N. E. 954.

Transportation of body.— An allowance of six hundred and fifty dollars against decedent's estate for funeral expenses incurred in the transportation of the bodies of decedent and his wife and child from Texas to New Jersey, and their burial, has been held not an unreasonable allowance. Sullivan *v.* Horner, 41 N. J. Eq. 299, 7 Atl. 411.

Funeral expenses incurred before appointment.— Under the Massachusetts statute an administrator is bound to pay, out of the assets in his hands, the funeral expenses, including the purchase of a burial lot, at the request of the widow and next of kin, although such expenses are incurred before his appointment. Sweeney *v.* Muldoon, 139 Mass. 304, 31 N. E. 720, 52 Am. Rep. 708.

A husband acting as executor of his deceased wife may be allowed funeral expenditures made by him from her separate estate. Freeman *v.* Coit, 27 Hun (N. Y.) 447.

Expenditures not allowed.— An administrator will not be allowed, on the settlement of his account, for money paid out for car or coach fare for himself and wife, or for a sister and her husband, to attend the funeral of a brother; nor will the administrator be allowed pay for his time or services in attending such funeral. Lund *v.* Lund, 41 N. H. 355.

Changing place of burial.— An allowance to an administratrix, who was the second wife of the decedent, for expenses incurred in removing the body of the decedent from one cemetery to another has been set aside where it was shown that the place where decedent was first interred was a suitable one, selected by him prior to his death, was the place where his children desired that he should be interred, was in the same cemetery in which his first wife was buried, and was nearer to his home than the place chosen by the second wife. Watkins *v.* Romine, 106 Ind. 378, 7 N. E. 193.

98. Haas' Estate, 3 Pa. Co. Ct. 345; Nixon's Appeal, 6 Wkly. Notes Cas. (Pa.) 496; Sharp's Estate, 2 Wkly. Notes Cas. (Pa.) 631.

99. See *infra*, X, A, 19, d.

able amount for a tombstone for the decedent, and in suitable cases of sufficient means even for a monument,[1] and this notwithstanding the objection of some of the legatees and next of kin where the expenditure has been approved by the majority of those beneficially interested.[2] A moderate expenditure for a tombstone is sometimes allowed, even though title to the estate is insolvent,[3] although in some states the rule is otherwise.[4]

(III) *BURIAL LOTS.*[5] The cost of a suitable burial lot follows the same general rule of allowance;[6] and it has been held that an administratrix should be allowed the sum paid for a grave for the decedent even though the lot was taken in her own name personally.[7]

(IV) *MOURNING FOR FAMILY.* It has been held that the executor or administrator is entitled to a moderate allowance for moneys which he has properly

1. *Alabama.*— Hatchett *v.* Curbow, 59 Ala. 516; Bendall *v.* Bendall, 24 Ala. 295.

California.— Van Emon *v.* Tulare County Super. Ct., 76 Cal. 589, 18 Pac. 877, 9 Am. St. Rep. 258.

Connecticut.— Fairman's Appeal, 30 Conn. 205.

District of Columbia.—Sinnctt *v.* Kenaday, 14 App. Cas. 1 [*reversed* on other grounds in 179 U. S. 606, 21 S. Ct. 233, 45 L. ed. 339].

Illinois.— Spire *v.* Lovell, 17 Ill. App. 559.

Iowa.— Lutz *v.* Gates, 62 Iowa 513, 17 N. W. 747; Crapo *v.* Armstrong, 61 Iowa 697, 17 N. W. 41.

Michigan.—Pistorius' Appeal, 53 Mich. 350, 19 N. W. 31.

Mississippi.— Donald *v.* McWhorter, 44 Miss. 124.

New Hampshire.— Bell *v.* Briggs, 63 N. H. 592, 4 Atl. 702.

New Jersey.— Griggs *v.* Veghte, 47 N. J. Eq. 179, 19 Atl. 867.

New York.— Owens *v.* Bloomer, 14 Hun 296; Matter of Howard, 3 Misc. 170, 23 N. Y. Suppl. 836; Matter of Beach, 1 Misc. 27, 22 N. Y. Suppl. 1079; Campbell *v.* Purdy, 5 Redf. Surr. 434.

Pennsylvania.— Webb's Appeal, 165 Pa. St. 330, 30 Atl. 827; *In re* Porter, 77 Pa. St. 43; Conway's Estate, 10 Pa. Dist. 509; Barclay's Estate, 11 Phila. 123; Sheetz's Estate, 2 Woodw. 407; Connelly's Estate, 28 Pittsb. Leg. J. 352.

Tennessee.— Cannon *v.* Apperson, 14 Lea 553.

See 22 Cent. Dig. tit. "Executors and Administrators," § 436.

Testamentary direction to erect monument not a legacy.—Wood *v.* Vandenburgh, 6 Paige (N. Y.) 277.

The widow is not entitled to an injunction to prevent the executor from putting up a tombstone, although she is sole devisee and legatee and is willing to put up a tombstone herself, and to give bond to the court that she will do so. Duffy's Estate, 9 Kulp (Pa.) 409.

Keeping tomb in repair.— A statute allowing an executor of a solvent estate to erect a monument at the testator's grave at the expense of the estate includes a power of making reasonably necessary repairs on the tomb of the deceased during the time of the administration, although the cost thereof exceeds the sum set apart by decedent's will for the maintenance of the monument. Bell *v.* Briggs, 63 N. H. 592, 4 Atl. 702.

Place of erecting monument.— Where an administratrix, the widow of the intestate, obtained leave of the court to spend a certain sum for the erection of a monument "on the burial lot of said intestate," but afterward, preferring that her husband should be buried elsewhere, bought another lot with her own money, moved her husband's body there, and put up the monument there, she was allowed the amount expended. Dudley *v.* Sanborn, 159 Mass. 185, 34 N. E. 181.

Provision by decedent in his lifetime.— An executor cannot be allowed the expense of procuring a burial lot and monument where the testator in his lifetime provided one himself. Matter of Woodbury, 40 Misc. (N. Y.) 143, 81 N. Y. Suppl. 503.

2. Barclay's Estate, 11 Phila. (Pa.) 123.

3. Owens *v.* Bloomer, 14 Hun (N. Y.) 296; Cornwell *v.* Deck, 2 Redf. Surr. (N. Y.) 87. See also Burbridge *v.* Rogers, 7 Ky. L. Rep. 42.

4. Lund *v.* Lund, 41 N. H. 355; Moyer's Estate, 5 Kulp (Pa.) 167; Villee's Estate, 9 Lanc. L. Rev. (Pa.) 353.

5. See *infra*, X, A, 19, e.

6. Sinnott *v.* Kenaday, 14 App. Cas. (D. C.) 1 [*reversed* on other grounds in 179 U. S. 606, 21 S. Ct. 233, 45 L. ed. 339]; Sweeney *v.* Muldoon, 139 Mass. 304, 31 N. E. 720, 52 Am. Rep. 708; *In re* Frazer, 92 N. Y. 239 (authority under will); Chalker *v.* Chalker, 5 Redf. Surr. (N. Y.) 480; Valentine *v.* Valentine, 4 Redf. Surr. (N. Y.) 265; Matter of Erlacher, 3 Redf. Surr. (N. Y.) 8.

The cost of improvement and inclosure of a burial lot will not be allowed an executor against objection. Barclay's Estate, 11 Phila. (Pa.) 123. See also Tuttle *v.* Robinson, 33 N. H. 104. But where the will directs the executors to erect and maintain a fence around a cemetery and charges all expenses directed by it upon lands devised, the executors can maintain a suit in equity against the devisees of the land or their assigns for the expenses of erecting such fence. Cool *v.* Higgins, 23 N. J. Eq. 308.

7. Birkholm *v.* Wardwell, 42 N. J. Eq. 337, 7 Atl. 569.

expended in obtaining suitable mourning apparel for the widow and children of the decedent.[8]

(v) *Amount of Expenditure.* The expenditure for funeral expenses, tombstones, and the like must be reasonable in amount, taking into consideration the value of the estate left by the decedent, his solvency or insolvency, and his station in life;[9] and as there is more time for circumspection and prudence in selecting a tombstone or even perhaps a permanent burial lot than with reference to the immediate funeral or interment, consultation in regard to such matters with the family of the decedent, in addition to a consideration of the actual condition of the estate, is prudent and desirable.[10] An executor is of course to be allowed expenditures for the funeral, a monument, or similar expenses which are expressly authorized by the will,[11] and a testamentary direction authorizing the executors to expend not more than a fixed sum has the effect of prohibiting the expenditure of a greater sum,[12] but the executor's duty does not require him to expend the entire sum mentioned.[13]

c. Expenditures For Benefit of Particular Legatees or Distributees. The representative has been held not entitled to credit in his general account of the

8. Allen *v.* Allen, 3 Dem. Surr. (N. Y.) 524; Matter of Wood, 1 Ashm. (Pa.) 314 (even though estate insolvent); Paice *v.* Canterbury, 14 Ves. Jr. 364, 33 Eng. Reprint 560. See also Badillo *v.* Tio, 7 La. Ann. 487, mourning dresses for slaves. *Contra,* Griswold *v.* Chandler, 5 N. H. 492; Johnson *v.* Baker, 2 C. & P. 207, 31 Rev. Rep. 663, 12 E. C. L. 530.

9. *Colorado.*— Clemes *v.* Fox, 6 Colo. App. 377, 40 Pac. 843.

New Hampshire.— Lund *v.* Lund, 41 N. H. 355.

New York.— Matter of Shipman, 82 Hun 108, 31 N. Y. Suppl. 571; Owens *v.* Bloomer, 14 Hun 296; Burnett *v.* Noble, 5 Redf. Surr. 69; Matter of Luckey, 4 Redf. Surr. 95.

Pennsylvania.— Bradley's Estate, 11 Phila. 87; McKenna's Estate, 1 Leg. Gaz. 12; Connolly's Estate, 28 Pittsb. Leg. J. 352.

England.—Hancock *v.* Podmore, 1 B. & Ad. 260, 8 L. J. K. B. O. S. 403, 20 E. C. L. 477; Edwards *v.* Edwards, 2 Cromp. & M. 612, 3 L. J. Exch. 204, 4 Tyrw. 438.

See 22 Cent. Dig. tit. "Executors and Administrators," § 436.

Allowance limited by law and to be made by court.— Scott *v.* Dorsey, 1 Harr. & J. (Md.) 227.

Statute limiting funeral expenses.— Expenses incurred for a cemetery lot and monument for the decedent are not funeral expenses within the meaning of a statute limiting funeral expenses to three hundred dollars. Sinnott *v.* Kenaday, 14 App. Cas. (D. C.) 1 [*reversed* on other grounds in 179 U. S. 606, 21 S. Ct. 233, 45 L. ed. 339].

The usual allowance from an insolvent estate for funeral expenses has been stated in England to be twenty pounds. Yardley *v.* Arnold, C. & M. 434, 2 Dowl. P. C. N. S. 311, 6 Jur. 718, 11 L. J. Exch. 413, 41 E. C. L. 239.

Expenditures held reasonable see the following cases:

Alabama.— Bendall *v.* Bendall, 24 Ala. 295.

New York.—Matter of Ogden, 41 Misc. 158, 83 N. Y. Suppl. 977; Matter of Howard, 3 Misc. 170, 23 N. Y. Suppl. 863; Hildebrand's Estate, 1 Misc. 245, 23 N. Y. Suppl. 148; Matter of Beach, 1 Misc. 27, 22 N. Y. Suppl. 1079; Chalker *v.* Chalker, 5 Redf. Surr. 480; Campbell *v.* Purdy, 5 Redf. Surr. 434; Valentine *v.* Valentine, 4 Redf. Surr. 265.

Pennsylvania.— Geiger's Estate, 12 Wkly. Notes Cas. 439; Conway's Estate, 18 Lanc. L. Rev. 129.

Tennessee.— Cannon *v.* Apperson, 14 Lea 553.

England.— Reeves *v.* Ward, 2 Bing. N. Cas. 235, 1 Hodges 300, 5 L. J. C. P. 67, 2 Scott 390, 29 E. C. L. 516.

See 22 Cent. Dig. tit. "Executors and Administrators," § 436; and *infra,* X, A, 19, c–e.

Expenditures held excessive see Burbridge *v.* Rogers, 7 Ky. L. Rep. 42; Matter of Shipman, 82 Hun (N. Y.) 108, 31 N. Y. Suppl. 571; Matter of Luckey, 4 Redf. Surr. (N. Y.) 95; Matter of Mount, 3 Redf. Surr. (N. Y.) 9 note; Matter of Erlacher, 3 Redf. Surr. (N. Y.) 8; Bradley's Estate, 11 Phila. (Pa.) 87; Hancock *v.* Podmore, 1 B. & Ad. 260, 8 L. J. K. B. O. S. 403, 20 E. C. L. 477; Bissett *v.* Antrobus, 4 Sim. 512, 6 Eng. Ch. 512; Bridge *v.* Brown, 2 Y. & Coll. 181, 21 Eng. Ch. 181. And see *infra,* X, A, 19, c–e.

10. See Little *v.* Williams, 7 Ill. App. 67; Hisem *v.* Lemel, 19 La. 425; Lund *v.* Lund, 41 N. H. 355; Brackett *v.* Tillotson, 4 N. H. 208.

11. See *In re* Frazer, 92 N. Y. 239.

Discretion of executor see Bainbridge's Appeal, 97 Pa. St. 482.

12. Canfield *v.* Canfield, 62 N. J. Eq. 578, 50 Atl. 471.

Will not received until after expenditure made.— Where a will directed that the testator's funeral expenses should not exceed a certain amount, but the will was not received by the executor until after the funeral, it was error to refuse reasonable and proper charges in excess of the sum named. Galland's Estate, 92 Cal. 293, 28 Pac. 287.

13. Canfield *v.* Canfield, 62 N. J. Eq. 578, 50 Atl. 471. See also *In re* Frazer, 92 N. Y. 239; Bainbridge's Appeal, 97 Pa. St. 482.

administration for disbursements made or expenses incurred for the benefit of particular legatees or distributees,[14] or payments or advances to them,[15] beyond the statutory allowance to the widow and children,[16] although where such payments or expenditures are made under order of court or pursuant to statute or directions in the will credit may be allowed,[17] and in any event such disbursements may be allowed as credits on the distributive share of the heir or legatee when a settlement with him is made.[18]

d. Payment of Decedent's Debts. An executor or administrator is of course entitled to credit for debts of the decedent which he has paid,[19] or for the amount paid out in settling a *bona fide* claim against the estate, whereby a saving has

14. *Alabama.*— Martin *v.* Foster, 38 Ala. 688; Willis *v.* Willis, 9 Ala. 330.

California.— Rose's Estate, 80 Cal. 166, 22 Pac. 86.

Pennsylvania.— *In re* Acor, 29 Leg. Int. 398. See also *In re* Frauenfelt, 3 Whart. 415. But *compare* Pettit's Appeal, 39 Pa. St. 324.

Tennessee.— See Read *v.* Franklin, (Ch. App. 1900) 60 S. W. 215.

Washington.— In re Murphy, 30 Wash. 9, 70 Pac. 109.

But *compare* Finley *v.* Pearson, 76 S. W. 374, 25 Ky. L. Rep. 766; Rogers *v.* Traphagen, 42 N. J. Eq. 421, 11 Atl. 336; Sparrow's Succession, 42 La. Ann. 500, 7 So. 611, 44 La. Ann. 475, 10 So. 882; Hyland *v.* Baxter, 42 Hun (N. Y.) 9 (holding that the surrogate has power to allow an administrator for payments made by him in good faith for the support of infant beneficiaries who have no guardian, if at the time of such payments they were substantially without means for support except from the estate); Matter of Gearns, 27 Misc. (N. Y.) 76, 58 N. Y. Suppl. 200; Matter of Butler, 9 N. Y. Suppl. 641, 1 Connoly Surr. (N. Y.) 58 (burial expenses of minor legatee).

15. *Alabama.*— Dickie *v.* Dickie, 80 Ala. 57; Parker *v.* McGaha, 11 Ala. 521.

Georgia.— See Williams *v.* Adams, 94 Ga. 270, 21 S. E. 526, payment to mother of minor for his education and support.

Maine.— Hanscom *v.* Marston, 82 Me. 288, 19 Atl. 460.

Massachusetts.— Granger *v.* Bassett, 98 Mass. 462.

New York.— Atlantic Trust Co. *v.* Powell, 23 Misc. 289, 50 N. Y. Suppl. 866; Matter of Smith, 1 Misc. 269, 22 N. Y. Suppl. 1067. See also Matter of Butler, 9 N. Y. Suppl. 641, 1 Connoly Surr. 58, holding that payments of cash to a minor legatee for whose support there is ample provision, the purpose of which is not explained, and for which no receipts are shown, are not allowable to the executor; but that he is entitled to credit for a payment made to a minor legatee to provide her a wedding outfit which it does not appear she was able to provide otherwise, where she long acquiesced in such payment and does not claim that it was not for necessaries.

Pennsylvania.— Rittenhouse *v.* Levering, 6 Watts & S. 190.

16. *In re* Acor, 29 Leg. Int. (Pa.) 298. See also Watts *v.* Watts, 38 Ohio St. 480. And see *infra*, IX.

17. *Indiana.*— See Powell *v.* North, 3 Ind. 392, 56 Am. Dec. 513.

Kentucky.— Trigg *v.* Daniel, 2 Bibb 301; Finley *v.* Pearson, 76 S. W. 374, 25 Ky. L. Rep. 766.

Maryland.— Scott *v.* Dorsey, 1 Harr. & J. 227.

New York.— Matter of Scherrer, 24 Misc. 58, 53 N. Y. Suppl. 392. See also Matter of Lancaster, 28 Misc. 595, 59 N. Y. Suppl. 1022.

Pennsylvania.— *In re* Semple, 189 Pa. St. 385, 42 Atl. 28; Bourguignon's Estate, 28 Wkly. Notes Cas. 315. But *compare In re* Yundt, 6 Pa. St. 35.

Power of court to order advance see Dubois *v.* Sands, 43 Barb. (N. Y.) 412; Hoyt *v.* Jackson, 1 Dem. Surr. (N. Y.) 553; Lockwood *v.* Lockwood, 3 Redf. Surr. (N. Y.) 330.

Manner of crediting payments to distributees see Adair *v.* Brimmer, 74 N. Y. 539.

Payment to widow before order for family allowance.— When the court grants an order for family allowance for a past period pending administration, payable in twenty days, the executors, having without an order paid the widow more than the sum allowed, are entitled to a present credit for the sum allowed. *In re* Lux, 100 Cal. 606, 35 Pac. 345.

Where an administrator has received an allowance out of the estate for the maintenance of his minor child, the sum thus expended is a proper subject of credit in his administrator's account. Groome's Estate, 14 Phila. (Pa.) 246.

Payment to mother of beneficiaries.—Where an administrator paid a portion of a trust fund due to infant beneficiaries to their mother, he was not entitled to credit for the same unless it appeared that such moneys were devoted to the support, maintenance, and education of such infants. It was not enough that it appeared that they were devoted to the support of the mother and children. Matter of Hobson, 61 Hun (N. Y.) 504, 16 N. Y. Suppl. 371 [*affirmed* in 131 N. Y. 575, 30 N. E. 63].

18. See *supra*, XI, H.

19. See *infra*, XV, D.

Payment by surety who waives claim for reimbursement.— Where one who is a surety on a debt due by the estate of a decedent, and also surety on the bond of the administrator of that estate, after paying off the debt waives all claim for reimbursement, either from the estate or the administrator, the latter is not, in a settlement with the heirs, entitled to credit for the amount paid by such surety in

been effected,[20] but he cannot be allowed for an illegal claim which he paid to avoid family disgrace;[21] and where the assets are insufficient to pay all the demands of one class, and such demands must, under the statute, be paid proportionately, a representative who pays on any one claim more than its just proportion without an order of court must make good to the estate the excessive payment.[22]

e. Repairs and Improvements. With regard to personal property, an executor or administrator may be properly credited with amounts necessarily expended for repairs while it was in his custody.[23] With respect to real estate, however, the personal representative is not as a rule entitled to the immediate possession and control thereof,[24] and hence he is usually entitled to no credit for amounts expended in repairs or improvements of said property.[25] Where, however, he is duly invested with the control or management of such property, he may be allowed credit for what he has expended in good faith in necessary repairs,[26] unless he has personally received benefits from such control and possession commensurate with the amounts expended,[27] although expenditures and outlays in improvements are less favored, especially where the corresponding enhancement

satisfaction of that debt. Ross *v.* Battle, 113 Ga. 742, 39 S. E. 287.

20. Matter of Wagner, 40 Misc. (N. Y.) 490, 42 N. Y. Suppl. 797.

21. Jones *v.* Ward, 10 Yerg. (Tenn.) 160.

22. Springfield Grocer Co. *v.* Walton, 95 Mo. App. 526, 69 S. W. 477. And see *infra*, X.

23. Pearson *v.* Darrington, 32 Ala. 227; Pinckard *v.* Pinckard, 24 Ala. 250.

24. See *infra*, VIII, O, 2, a.

25. *Alabama.*— Cannon *v.* Copeland, 43 Ala. 252.

Massachusetts.— Cobb *v.* Muzzey, 13 Gray 57.

Missouri.—Langston *v.* Canterbury, 173 Mo. 122, 73 S. W. 151.

New Hampshire.— Lucy *v.* Lucy, 55 N. H. 9; Brackett *v.* Tillotson, 4 N. H. 208.

New Jersey.— Aldridge *v.* McClelland, 36 N. J. Eq. 228.

New York.— Matter of Very, 24 Misc. 139, 53 N. Y. Suppl. 389, 28 N. Y. Civ. Proc. 163.

Pennsylvania.— Walker's Appeal, 116 Pa. St. 419, 9 Atl. 654; McKinney *v.* Watson, 8 Serg. & R. 347; O'Donnell's Estate, 9 Kulp 123; Benner's Estate, 3 Brewst. 398; Montier's Estate, 7 Phila. 491; Dunkle's Estate, 17 Lanc. L. Rev. 61.

South Carolina.— Trimmier *v.* Darden, 61 S. C. 220, 39 S. E. 373.

Tennessee.— Wilson *v.* Whitman, 3 Tenn. Ch. 37.

Utah.— Rolfson *v.* Cannon, 3 Utah 232, 2 Pac. 205.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 437, 545.

Where the estate is insolvent the administrator must not repair the real estate but can only sell it as it stands for payment of debts. Brackett *v.* Tillotson, 4 N. H. 208.

An executor who is also life-tenant of decedent's real estate has no right to pay insurance, taxes, and cost of repairs thereon out of decedent's personal estate. Matter of Very, 24 Misc. (N. Y.) 139, 53 N. Y. Suppl. 389, 28 N. Y. Civ. Proc. 163.

Under exceptional circumstances a widow and administratrix who acted in perfect good faith in applying the personalty for repairs to and other expenditures for the benefit of the realty, in order to protect it for herself and her children, of whom she was guardian and who lived with her on the property, has been allowed credit therefor. Matter of Rolph, 9 N. Y. Suppl. 293, 2 Connoly Surr. (N. Y.) 191.

Expenditures for repairs credited out of rents collected.—Taylor *v.* Roulstone, 60 S. W. 867, 61 S. W. 354, 22 Ky. L. Rep. 1515.

26. *Alabama.*— Henderson *v.* Simmons, 33 Ala. 291, 70 Am. Dec. 590.

Connecticut.— Atwater *v.* Barnes, 21 Conn. 237.

Louisiana.— Sparrow's Succession, 40 La. Ann. 484, 4 So. 513; Henderson's Succession, 24 La. Ann. 435.

Maine.— Webber *v.* Webber, 6 Me. 127.

Maryland.— Sewell *v.* Slingluff, 62 Md. 592.

New Jersey.— Dey *v.* Codman, 39 N. J. Eq. 258.

New York.— Matter of Thomson, 14 N. Y. St. 615.

Ohio.— *In re* Turpin, 5 Ohio S. & C. Pl. Dec. 410, 7 Ohio N. P. 569.

Pennsylvania.— Schrack's Estate, 9 Pa. Dist. 149.

Rhode Island.— Almy *v.* Newport Probate Ct., 18 R. I. 612, 30 Atl. 458.

South Carolina.— *Ex p.* Palmer, 2 Hill Eq. 215; Myers *v.* Myers, Bailey Eq. 23.

Canada.— Hill *v.* Hill, 6 Ont. 244.

See 22 Cent. Dig. tit. "Executors and Administrators," § 437.

A previous order from the probate court will strengthen the representative's position in a doubtful case, although this may not be essential. Gerald *v.* Bunkley, 17 Ala. 170; *In re* Clos, 110 Cal. 494, 42 Pac. 971; *In re* Millenovich, 5 Nev. 161.

When erection of new buildings considered as repairs see *In re* Clos, 110 Cal. 494, 42 Pac. 971.

27. *In re* Graff, 123 Mich. 456, 82 N. W. 248; Clough *v.* Clough, 71 N. H. 412, 52 Atl. 449; Villee's Estate, 9 Lanc. L. Rev. (Pa.) 353.

in value seems remote and uncertain, and where he sacrifices the personal property for the benefit of the realty, or otherwise disturbs the just equilibrium of a beneficial settlement of the estate, the representative makes expenditures at his peril.[28] An executor is of course protected in carrying out the provisions of the will with reference to the improvement of the testator's real estate,[29] and, without considering whether an administrator had authority to collect rents, it has been held that administrators who have charged themselves with the rents are entitled to a credit for repairs.[30]

f. Services.[31] An executor or administrator should be allowed credit for amounts paid for the services of agents, clerks, assistants, bookkeepers, and other persons employed by him to assist him in the performance of his duties, where the employment of such persons is reasonably necessary and the employment is *bona fide* for the benefit of the estate;[32] but the estate cannot be charged for serv-

28. *Alabama.*—Cannon *v.* Copeland, 43 Ala. 252.

California.— Moore's Estate, 72 Cal. 335, 13 Pac. 880; *In re* Knight, 12 Cal. 200, 73 Am. Dec. 531.

Massachusetts.— Cobb *v.* Muzzey, 13 Gray 57.

Missouri.— Clark *v.* Bettelheim, 144 Mo. 258, 46 S. W. 135.

Washington.— *In re* Alfstad, 27 Wash. 175, 67 Pac. 593.

See 22 Cent. Dig. tit. "Executors and Administrators," § 437.

But *compare* Armstrong *v.* Cashion, (Ark. 1891) 16 S. W. 666; Henderson's Succession, 24 La. Ann. 435.

Division fence.— An administrator is not personally liable for a portion of the cost of a division fence bordering the land of his intestate. Cummings *v.* Brock, 56 Vt. 308.

Concurrence of heirs may justify expenditure for improvement. Hall *v.* Anthony, 13 R. I. 221.

Assessment upon permanent beneficiaries.— In the permanent improvement of real estate, the cost may be equitably assessed upon the permanent beneficiaries rather than charged generally to the estate. Englehardt *v.* Yung, 76 Ala. 534; Foteaux *v.* Lapage, 6 Iowa 123; Stevens *v.* Burgess, 61 Me. 89; Hudson *v.* Hudson, 5 Munf. (Va.) 180.

Improvements which court would have ordered.— An executor will be entitled to remuneration for improvements which the court would have ordered him to make, although made without an order of court. Palmer *v.* Miller, Cheves Eq. (S. C.) 62, 34 Am. Dec. 602.

Standard of allowance when credit given.— An administrator, being also a tenant in common as a distributee of the estate, will be allowed credit, not for the cost, but for the value to the premises, of improvements put by him on the land. Lewis *v.* Price, 3 Rich. Eq. (S. C.) 172.

29. Finley *v.* Pearson, 76 S. W. 374, 25 Ky. L. Rep. 766.

30. Matter of Turpin, Ohio Prob. 124.

31. See also *infra*, VIII, I, 8, g.

32. *Alabama.*— Eubank *v.* Clark, 78 Ala. 73; Pinckard *v.* Pinckard, 24 Ala. 250.

California.— Moore's Estate, 72 Cal. 335, 13 Pac. 880.

Florida.— Sherrell *v.* Shepard, 19 Fla. 300.

Louisiana.— Hautau's Succession, 32 La. Ann. 54; Dorville's Succession, 30 La. Ann. 133; Schmidt's Succession, 16 La. Ann. 256.

Mississippi.— Byrd *v.* Wells, 40 Miss. 711.

Missouri.— Ansley *v.* Richardson, 95 Mo. App. 332, 68 S. W. 609.

New Jersey.— Dey *v.* Codman, 39 N. J. Eq. 258; Howard *v.* Francis, 30 N. J. Eq. 444.

New York.— Merritt *v.* Merritt, 32 N. Y. App. Div. 442, 53 N. Y. Suppl. 127 [*affirmed* in 161 N. Y. 634, 57 N. E. 1117]; Matter of Harbeck, 81 Hun 26, 30 N. Y. Suppl. 521, 1 N. Y. Annot. Cas. 51 [*affirmed* in 145 N. Y. 648, 41 N. E. 89]; Willcox *v.* Smith, 26 Barb. 316; Matter of Wagner, 40 Misc. 490, 82 N. Y. Suppl. 797; Bronson *v.* Bronson, 48 How. Pr. 481; McWhorter *v.* Benson, Hopk. 28; Meeker *v.* Crawford, 5 Redf. Surr. 450; Glover *v.* Holley, 2 Bradf. Surr. 291.

North Carolina.— Edwards *v.* Love, 94 N. C. 365; Clarke *v.* Cotton, 17 N. C. 51.

South Carolina.— Garrett *v.* Garrett, 2 Strobh. Eq. 272.

Texas.— Armstrong *v.* O'Brien, 83 Tex. 635, 19 S. W. 268.

Vermont.— Sowles *v.* Hall, 73 Vt. 55, 50 Atl. 550.

Virginia.— Crouch *v.* Davis, 23 Gratt. 62; Hipkins *v.* Bernard, 4 Munf. 83.

England.— Henderson *v.* McIver, 3 Madd. 275. See also Weiss *v.* Dill, 3 Myl. & K. 26, 10 Eng. Ch. 26, 40 Eng. Reprint 10, only under very special circumstances.

See 22 Cent. Dig. tit. "Executors and Administrators," § 438.

The allowance of such charges is the exception and not the rule, and when they are brought forward it is the duty of the court to scrutinize them with a jealous and watchful eye. O'Neill *v.* Donnell, 9 Ala. 734.

Representative must show that services were necessary. See Journault *v.* Ferris, 2 Dem. Surr. (N. Y.) 320.

Executor may employ his own son to collect rents. Matter of Wagner, 40 Misc. (N. Y.) 490, 82 N. Y. Suppl. 797.

Estoppel to object.— Where services not obviously alien to the administration have been rendered at the special request and advice of a person interested in the estate, such person is estopped from objecting to the allowance of a just compensation for them in

ices which the representative should have performed himself and for which his general recompense ought to be ample remuneration, and which he procured to be performed by others for his own benefit or convenience.[33] With respect to the amount to be allowed, it must be reasonable and such as is usually or customarily paid for such services.[34]

g. Counsel Fees and Costs[35] — (i) *General Rule.* Subject to the general requirement of good faith and reasonable prudence, an executor or administrator is entitled to employ and pay an attorney for advice in reference to the management of the estate,[36] the performance of legal services which the representative cannot himself perform,[37] and the prosecution or defense of actions or suits on behalf of or against the estate,[38] and is entitled to credit in his account or indemnity from the estate for the reasonable charges of counsel and the costs and other expenses of litigation.[39] It is not necessary to entitle the representative to this

the settlement of the administrator's account. Wendell *v.* French, 19 N. H. 205.

Discretion of court.— The question whether an administrator is entitled to employ a bookkeeper depends on the circumstances of the estate and should be left to the discretion of the court. *In re* More, 121 Cal. 609, 54 Pac. 97.

33. *Alabama.*— Noble *v.* Jackson, 132 Ala. 230, 31 So. 450; Pearson *v.* Darrington, 32 Ala. 227; O'Neill *v.* Donnell, 9 Ala. 734.

California.— Moore's Estate, 72 Cal. 335, 13 Pac. 880.

Georgia.— Miles *v.* Peabody, 64 Ga. 729.

Louisiana.— Kernan's Succession, 105 La. 592, 30 So. 239.

New York.— *In re* Harbeck, 145 N. Y. 648, 41 N. E. 89; Matter of Ogden, 41 Misc. 158, 83 N. Y. Suppl. 977; Matter of Beach, 1 Misc. 27, 22 N. Y. Suppl. 1079; Matter of Ingersoll, 20 N. Y. St. 356, 6 Dem. Surr. 184; *In re* Brown, 16 Abb. Pr. N. S. 457; Fowler *v.* Lockwood, 3 Redf. Surr. 465; Larrour *v.* Larrour, 2 Redf. Surr. 69.

South Carolina.— McGougan *v.* Hall, 21 S. C. 600; Jenkins *v.* Hanahan, Cheves Eq. 129.

See 22 Cent. Dig. tit. "Executors and Administrators," § 463; and *infra*, VIII, I, 8, g, (IX), (F).

The fact that the executors are busy men and have not as much time to give to the management of the estate as other individuals cannot be permitted to affect the rule that executors must perform within reasonable limits the actual manual labor requisite to the due execution of the trust, nor can such rule be affected by the fact that the executors in employing a bookkeeper and fixing his compensation acted precisely as they would have done in the management of their own affairs. Matter of Harbeck, 81 Hun (N. Y.) 26, 30 N. Y. Suppl. 521, 1 N. Y. Annot. Cas. 51 [*affirmed* in 145 N. Y. 648, 41 N. E. 89].

34. Jacobs *v.* Jacobs, 99 Mo. 427, 12 S. W. 457; Matter of Wagner, 40 Misc. (N. Y.) 490, 32 N. Y. Suppl. 797.

Compensation held proper see Matter of Ogden, 41 Misc. (N. Y.) 158, 83 N. Y. Suppl. 977; Meeker *v.* Crawford, 5 Redf. Surr. (N. Y.) 450; Kennedy's Appeal, 4 Pa. St. 149.

35. **On accounting and settlement** see *infra*, XV, K.

36. *Alabama.*— Smyley *v.* Reese, 53 Ala. 89, 25 Am. Rep. 598; Pickens *v.* Pickens, 35 Ala. 442.

Florida.— Eppinger *v.* Canepa, 20 Fla. 262.

New Jersey.— King *v.* Berry, 3 N. J. Eq. 261.

Ohio.— *In re* McAlpin, 8 Ohio S. & C. Pl. Dec. 654.

Pennsylvania.— McGregor's Estate, 131 Pa. St. 359, 18 Atl. 902; Sterrett's Appeal, 2 Penr. & W. 419.

See 22 Cent. Dig. tit. "Executors and Administrators," § 448.

But *compare* Satterwhite *v.* Littlefield, 13 Sm. & M. (Miss.) 302.

37. Langston *v.* Canterbury, 173 Mo. 122, 73 S. W. 151; Ansley *v.* Richardson, 95 Mo. App. 332, 68 S. W. 609; *In re* McAlpin, 8 Ohio S. & C. Pl. Dec. 654. See *infra*, VIII, I, 8, g, (IX), (F).

38. Satterwhite *v.* Littlefield, 13 Sm. & M. (Miss.) 302; Scudder *v.* Ames, 142 Mo. 187, 43 S. W. 659; Turnipseed *v.* Sirrine, 60 S. C. 272, 38 S. E. 423. See also Crutcher *v.* Board of Missions M. E. Church, 62 S. W. 895, 23 Ky. L. Rep. 257.

Although a special administrator is an attorney it is not his duty to act as such in his own defense. Powell *v.* Foster, 71 Vt. 160, 44 Atl. 96.

39. *Alabama.*— Noble *v.* Jackson, 124 Ala. 311, 26 So. 955; Clark *v.* Eubank, 80 Ala. 584, 3 So. 49; Moore *v.* Randolph, 70 Ala. 575; Smyley *v.* Reese, 53 Ala. 89, 25 Am. Rep. 598; Holman *v.* Sims, 39 Ala. 709; Pickens *v.* Pickens, 35 Ala. 442; Pearson *v.* Darrington, 32 Ala. 227; Pinckard *v.* Pinckard, 24 Ala. 250; Hutchinson *v.* Gamble, 12 Ala. 36; Bettis *v.* Taylor, 8 Port. 564.

California.— *In re* Simmons, 43 Cal. 543; Hicox *v.* Graham, 6 Cal. 167.

Florida.—Eppinger *v.* Canepa, 20 Fla. 262; Sherrell *v.* Shepard, 19 Fla. 300.

Indiana.— Bruning *v.* Golden, 159 Ind. 199, 64 N. E. 657; Mackey *v.* Ballou, 112 Ind. 198, 13 N. E. 715.

Kansas.— Sill *v.* Sill, 31 Kan. 248, 1 Pac. 556; Whitford *v.* Horn, 18 Kan. 455.

Kentucky.— Floyd *v.* Floyd, 7 B. Mon. 290; Cox *v.* Doty, 45 S. W. 1044, 20 Ky. L. Rep. 287.

allowance that he should have been successful in the litigation which he undertook, but he is entitled thereto regardless of whether he succeeds or fails,[40] provided the litigation relates to property of or claims in favor of or against the estate,[41] was undertaken in good faith,[42] for the benefit of the estate,[43] and was reasonably necessary,[44] either because the rights concerned were complicated and conflicting,[45] or because the questions involved in the dispute were such that there

Louisiana.— McNeely *v.* McNeely, 50 La. Ann. 823, 24 So. 338; Harris' Succession, 29 La. Ann. 743, public administrator.

Maine.— Ticonic Nat. Bank *v.* Turner, 96 Me. 380, 52 Atl. 793; Healey *v.* Cole, 95 Me. 272, 49 Atl. 1065; Crofton *v.* Ilsley, 6 Me. 48.

Maryland.— Edelen *v.* Edelen, 11 Md. 415.

Michigan.— Porter *v.* Long, 124 Mich. 584, 83 N. W. 601.

Mississippi.— See Satterwhite *v.* Littlefield, 13 Sm. & M. 302.

Missouri.— Scudder *v.* Ames, 142 Mo. 187, 43 S. W. 659; *In re* Soulard, 141 Mo. 642, 43 S. W. 617; *In re* Handfield, 16 Mo. App. 332; Garnett *v.* Carson, 11 Mo. App. 290.

Nevada.— *In re* Nicholson, 1 Nev. 518.

New Hampshire.— Tuttle *v.* Robinson, 33 N. H. 104; Wendell *v.* French, 19 N. H. 205.

New Jersey.— Liddel *v.* McVickar, 11 N. J. L. 44, 19 Am. Dec. 369; Dey *v.* Codman, 39 N. J. Eq. 258; Kingsland *v.* Scudder, 36 N. J. Eq. 284; Keeler *v.* Keeler, 18 N. J. Eq. 267; King *v.* Berry, 3 N. J. Eq. 261.

New York.— Gilman *v.* Gilman, 63 N. Y. 41; Wilcox *v.* Smith, 26 Barb. 316; Matter of Miller, 4 Redf. Surr. 302. See also Matter of Welling, 51 N. Y. App. Div. 355, 64 N. Y. Suppl. 1025, 53 N. Y. App. Div. 639, 65 N. Y. Suppl. 1060.

North Carolina.— Young *v.* Kennedy, 95 N. C. 265; Poindexter *v.* Gibson, 54 N. C. 44; Clarke *v.* Cotton, 17 N. C. 51.

Ohio.— *In re* McAlpin, 8 Ohio S. & C. Pl. Dec. 654.

Pennsylvania.— McGregor's Estate, 131 Pa. St. 359, 18 Atl. 902; Sterrett's Appeal, 2 Penr. & W. 419; Neal's Estate, 17 Phila. 486. See also Sunday's Appeal, 131 Pa. St. 584, 18 Atl. 931.

South Carolina.— Turnipseed *v.* Sirrine, 60 S. C. 272, 38 S. E. 423; McKnight *v.* Wright, 12 Rich. Eq. 229; Capehart *v.* Huey, 1 Hill Eq. 405.

Texas.— Gammage *v.* Rather, 46 Tex. 105.

Vermont.— Foster *v.* Stone, 67 Vt. 336, 31 Atl. 841; Wilson *v.* Bates, 28 Vt. 765; Woods *v.* Creditors, 4 Vt. 256.

West Virginia.—Turk *v.* Hevener, 49 W. Va. 204, 38 S. E. 476; Hoke *v.* Hoke, 12 W. Va. 427.

Wisconsin.— Opitz *v.* Karel, 118 Wis. 527, 95 N. W. 945, 99 Am. St. Rep. 1004, 62 L. R. A. 582.

England.— Macnamara *v.* Jones, Dick. 587, 21 Eng. Reprint 399.

Canada.— See Story *v.* Dunlop, 13 Grant Ch. (U. C.) 375.

See 22 Cent. Dig. tit. "Executors and Administrators," § 448.

An administrator who was removed on account of his infancy at the time of appointment, after the commencement of a suit against him, has been allowed his costs out of the estate. Carow *v.* Mowatt, 2 Edw. (N. Y.) 57.

In what account allowance to be made.— Where an executor under a will, the probate of which was reversed, became liable for fees of counsel engaged to prosecute an appeal, and afterward, on being appointed administrator, actually paid such counsel fees, he was not entitled to include the fees in his account as administrator, and receive reimbursement from the estate, without first having the item of the fees allowed in his account as executor. Matter of Blair, 67 N. Y. App. Div. 116, 73 N. Y. Suppl. 675 [*affirming* 34 Misc. 444, 69 N. Y. Suppl. 1013].

40. Noble *v.* Jackson, 124 Ala. 311, 26 So. 955; Bruning *v.* Golden, 159 Ind. 199, 64 N. E. 657; Mackey *v.* Ballou, 112 Ind. 198, 13 N. E. 715; Capehart *v.* Huey, 1 Hill Eq. (S. C.) 405; Woods *v.* Creditors, 4 Vt. 256. And see *infra*, note 64.

Where effect is to throw expense on successful party.— On the final account of a special administrator of a testator, he claimed credits for fees in a suit brought by him against an heir for a partnership accounting, in which suit the administrator was defeated. The heir in question had obtained a decree enforcing a lien on all real estate descending to the only other heir; and he contended that the items of the account should not be allowed, because the amount of the lien being greater than the property devised to the other heir, an allowance of the items would in effect compel him to pay the whole of the items. It was held, however, that this contention was of no merit. Bruning *v.* Golden, 159 Ind. 199, 64 N. E. 657.

41. Cullen *v.* State, 28 Ind. App. 335, 62 N. E. 759; Porter *v.* Long, 124 Mich. 584, 83 N. W. 601.

42. *Alabama.*—Alexander *v.* Bates, 127 Ala. 328, 28 So. 415; Pickens *v.* Pickens, 35 Ala. 442.

Florida.— Eppinger *v.* Canepa, 20 Fla. 262.

Kansas.— Whitford *v.* Horn, 18 Kan. 455.

New Jersey.— King *v.* Berry, 3 N. J. Eq. 261.

New York.— Wilcox *v.* Smith, 26 Barb. 316.

Pennsylvania.— Sterrett's Appeal, 2 Penr. & W. 49.

West Virginia.—Turk *v.* Hevener, 49 W. Va. 204, 38 S. E. 476.

See 22 Cent. Dig. tit. "Executors and Administrators," § 448.

43. Sherrell *v.* Shepard, 19 Fla. 300.

44. Cox *v.* Doty, 45 S. W. 1044, 20 Ky. L. Rep. 287; Ticonic Nat. Bank *v.* Turner, 96 Me. 380, 52 Atl. 793.

45. Scudder *v.* Ames, 142 Mo. 187, 43 S. W. 659.

might reasonably be an honest and sincere difference of opinion as to the proper solution thereof.[46]

(II) *Personal Liability For Costs.* In general executors or administrators are individually responsible for costs recovered against them, but are allowed to be reimbursed from the estate;[47] but in some states the statutes have relieved them from individual liability for costs.[48]

(III) *Showing Necessary For Allowance.* In order that a representative may be allowed for attorney's fees he must show what the services were[49] and that the fees or charges have been actually paid.[50]

(IV) *Approval of Court.* It is not necessary that attorney's fees paid by an executor or administrator should have been fixed or approved by the court before payment in order to entitle him to credit therefor;[51] but aside from a sanction previously given, the probate court may in its just discretion allow a credit for professional services reasonably and honestly employed.[52]

(V) *Consent of Persons Beneficially Interested.* The consent or instance of the heirs, distributees, or others beneficially interested in the estate may be adduced to justify expenses incurred by the personal representative in engaging counsel or pursuing a litigation.[53]

(VI) *Employment by Co-Fiduciaries.* For co-executors or co-administrators separate counsel are not usually allowed;[54] but circumstances may arise to justify a separate employment, if the cost to the estate be not duplicated thereby.[55]

(VII) *Charges in Particular Matters.* Executors are entitled to be allowed for the services of an attorney to assist in obtaining the probate of the will,[56] and it has also been held that they are entitled to charge the estate with counsel fees and costs prudently and honestly incurred or paid by them in

46. Porter *v.* Long, 124 Mich. 584, 83 N. W. 601.

Erroneous advice of attorney.— Reasonable compensation for the services of an eminent attorney engaged by a special administrator in good faith to interplead in a suit against the executors, in which the special administrator was summoned as trustee, was properly allowed the administrator, although the expense was unnecessary, and the bill of interpleader would not have been advised if the attorney had not been afflicted with a mental disability of which the administrator was unaware. Powell *v.* Foster, 71 Vt. 160, 44 Atl. 96.

47. *California.*— Briggs *v.* Brun, 123 Cal. 657, 56 Pac. 633, 886; Hicox *v.* Graham, 6 Cal. 167.

Kentucky.— Frazier *v.* Cavanaugh, 4 Ky. L. Rep. 711.

Louisiana.— Rolland's Succession, 1 La. Ann. 224.

Mississippi.— Williamson *v.* Childress, 26 Miss. 328.

New York.—Seaman *v.* Whitehead, 78 N. Y. 306.

See 22 Cent. Dig. tit. "Executors and Administrators," § 448.

48. See Bruning *v.* Golden, 159 Ind. 199, 64 N. E. 657.

49. Matter of Baker, 27 Misc. (N. Y.) 126, 57 N. Y. Suppl. 398.

50. *In re* Blair, 49 N. Y. App. Div. 417, 63 N. Y. Suppl. 678 [*modifying* and *affirming* 28 Misc. 611, 59 N. Y. Suppl. 1090]; Matter of Baker, 27 Misc. (N. Y.) 126, 57 N. Y. Suppl. 398. And see *supra*, VIII, I, 4.

Note not operating as payment.— Where an executor of a will, who was unsuccessful in procuring its admission to probate, employed additional counsel to prosecute the case in the court of appeals, and gave his note for such services, which was not delivered until after the letters were revoked, such note did not constitute an actual payment, and was properly disallowed by the referee in passing on the allowance of payments made by such executor. Matter of Blair, 28 Misc. (N. Y.) 611, 59 N. Y. Suppl. 1090.

51. Filbeck *v.* Davies, 8 Colo. App. 320, 46 Pac. 214.

52. Reynolds *v.* Canal, etc., Co., 30 Ark. 520; Turner *v.* Tapscott, 30 Ark. 312.

The judge who passes finally upon the account has ample discretion and is not bound by the refusal of another judge (not appellate) in an earlier stage of the cause. Brooks *v.* Brooks, 12 S. C. 422.

Interested parties may object to such allowance when the account is rendered. Tell City Furniture Co. *v.* Stiles, 60 Miss. 849.

53. Moore *v.* Moore, 8 Ky. L. Rep. 57; Matter of Hauxhurst, 76 Hun (N. Y.) 36, 27 N. Y. Suppl. 613; Matter of Butler, 9 N. Y. Suppl. 641, 1 Connoly Surr. (N. Y.) 58.

54. McDaniel's Estate, 9 Pa. Co. Ct. 232.

55. Matter of Delaplaine, 3 N. Y. Suppl. 202, 1 Connoly Surr. (N. Y.) 1.

56. Gairdner *v.* Tate, 110 Ga. 456, 35 S. E. 697; Reed *v.* Reed, 74 S. W. 207, 24 Ky. L. Rep. 2438.

Where probate in another state becomes essential, the counsel fees, costs, and expenses of such probate follow the general rule. Young *v.* Brush, 28 N. Y. 667.

attempting to sustain the will against attacks on its validity.[57] But it has been held that an administrator who opposes the probate of a paper offered as the last will of the decedent cannot, although contesting honestly, be allowed reimbursement for the costs, expenses, and counsel fees for which he has made himself liable, in case the will becomes established.[58] The better opinion appears to be that an executor or administrator is entitled to reimbursement for the just and reasonable legal expenses incurred in procuring his appointment or qualification in the probate court,[59] although in some jurisdictions this is denied.[60] Executors and adminis-

Where probate refused.— One who in good faith and in the exercise of a reasonable discretion has failed in establishing a will naming him as executor, is entitled to reimbursement from the estate of counsel fees and proper expenditures as well as taxable costs. Phillips *v.* Phillips, 81 Ky. 328. But *compare* Brown *v.* Eggleston, 53 Conn. 110, 2 Atl. 321.

57. *Georgia.*— Gairdner *v.* Tate, 110 Ga. 456, 35 S. E. 697.

Illinois.—Methodist Episcopal Church Missionary Soc. *v.* Goheen, 84 Ill. App. 474; Shaw *v.* Camp, 56 Ill. App. 23 [*following* Pingree *v.* Jones, 80 Ill. 177, and *refusing* to follow Moyer *v.* Swygart, 125 Ill. 262, 17 S. E. 450, and Shaw *v.* Moderwell, 104 Ill. 64, further than to concede that the rule that an executor cannot be held individually liable for costs is not an inflexible one, but may in any particular case be departed from if the peculiar circumstances warrant such a course, as if the executor acts in bad faith, or is personally interested in the result or makes the defense for his own protection or advantage or other like reason].

Kentucky.— Phillips *v.* Phillips, 81 Ky. 328.

Louisiana.— McNeely *v.* McNeely, 50 La. Ann. 823, 24 So. 338; Heffner's Succession, 49 La. Ann. 407, 21 So. 905.

Maryland.— Glass *v.* Ramsey, 9 Gill 456; Compton *v.* Barnes, 4 Gill 55, 45 Am. Dec. 115.

New York.— Young *v.* Brush, 28 N. Y. 667; Douglas *v.* Yost, 64 Hun 155, 18 N. Y. Suppl. 830; Frith *v.* Campbell, 53 Barb. 325; Matter of Blair, 28 Misc. 611, 59 N. Y. Suppl. 1090.

North Carolina.— Mariner *v.* Bateman, 4 N. C. 350.

Pennsylvania.— *In re* Scott, 9 Watts & S. 98. *Contra,* Mumper's Appeal, 3 Watts & S. 441.

Rhode Island.—Hazard *v.* Engs, 14 R. I. 5.

South Carolina.— Butler *v.* Jennings, 8 Rich. Eq. 87. *Contra,* Brown *v.* Vinyard, Bailey Eq. 460.

Tennessee.— Bowden *v.* Higgs, 9 Lea 343.

England.— See *In re* Prince, [1898] 2 Ch. 225, 67 L. J. Ch. 531, 78 L. T. Rep. N. S. 790, 47 Wkly. Rep. 25.

Canada.— See Hill *v.* Hill, 6 Ont. 244.

See 22 Cent. Dig. tit. "Executors and Administrators," § 451.

Contra.— Gayle *v.* Johnson, 80 Ala. 388; Kelly *v.* Davis, 37 Miss. 76; *In re* Soulard, 141 Mo. 642, 43 S. W. 617; *In re* Fry, 96 Mo. App. 208, 70 S. W. 172; Andrews *v.* Andrews, 7 Ohio St. 143.

Rule applies to administrator with will annexed. McIntire *v.* McIntire, 14 App. Cas. (D. C.) 337.

Rule applies although executor personally interested in result.— Matter of Blair, 28 Misc. (N. Y.) 611, 59 N. Y. Suppl. 1090.

Contesting will subsequently propounded.— Where a person named as an executor in a will which has been proved contests the probate of another paper produced as a will after a considerable interval, and under circumstances fitted to awaken suspicion, he will be permitted to charge the expense of litigation to the estate, although the second will be afterward established. Mariner *v.* Bateman, 4 N. C. 350.

The test of the right of the executor to allowance is not so much his good or bad faith as whether or not the litigation was for the benefit of those entitled to the estate. Sheetz's Appeal, 100 Pa. St. 197. See also Yerkes' Appeal, 99 Pa. St. 401.

Where the will directs payment by the executors of "testamentary charges and expenses," charges incurred for legal services rendered the executors in proceedings for the revocation of probate are chargeable to the *corpus* of the estate. Wolfe *v.* Wolfe, 2 Dem. Surr. (N. Y.) 305.

58. Lester *v.* Mathews, 56 Ga. 655; Edelen *v.* Edelen, 11 Md. 415; Edwards *v.* Ela, 5 Allen (Mass.) 87; Matter of Black, 19 N. Y. St. 260, 6 Dem. Surr. (N. Y.) 331.

59. *Ex p.* Young, 8 Gill (Md.) 285; Matter of Pond, 42 Misc. (N. Y.) 165, 85 N. Y. Suppl. 1080; Matter of Van Nostrand, 3 Misc. (N. Y.) 396, 24 N. Y. Suppl. 850, Pow. Surr. (N. Y.) 495; Huston *v.* King, 7 Ohio Dec. (Reprint) 575, 3 Cinc. L. Bul. 1142; Chatfield *v.* Swing, 6 Ohio Dec. (Reprint) 666, 7 Am. L. Rec. 326. But *compare In re* Bankard, 19 N. Y. Wkly. Dig. 452.

Administrator entitled to expenses incurred in setting aside alleged will.—Huston *v.* King, 7 Ohio Dec. (Reprint) 575, 3 Cinc. L. Bul. 1142.

60. *In re* Barton, 55 Cal. 87; Gourjon's Succession, 10 Rob. (La.) 541; Bowman *v.* Bowman, (Nev. 1904) 76 Pac. 634, 636 (where the court, although holding in deference to the authority of cases cited that a fee to an attorney for procuring letters of administration cannot be allowed, said: "The reasoning of the cases does not give complete satisfaction"); *In re* Nicholson, 1 Nev. 518; Wilbur *v.* Wilbur, 17 Wash. 683, 50 Pac. 589. See also *In re* Simmons, 43 Cal. 543, 548, where the court said: "Where a *bona fide* contest as to the right to admin-

trators may take the opinion of the court or procure its advice, aid, protection, or sanction at the expense of the estate, in cases where their rights and duties are left in reasonable doubt; and so too in similar proceedings commenced by others to which they are made parties their reasonable counsel fees and expenses will be allowed.[61] The representative is entitled to credit for attorney's fees paid in an action necessary to collect debts or assets of the estate,[62] and counsel fees and costs incurred in asserting or defending title to assets are properly allowed.[63] The usual standard of reasonable prudence and good faith, and not necessarily the successful or unsuccessful result of the suit, applies in determining whether or not the personal representative shall be reimbursed for his counsel fees and expenses in resisting a claim brought against the estate he represents.[64] An executor or administrator is not entitled to credit in his account for counsel fees paid by him for services rendered in contesting a proper charge against him;[65] but he is entitled to credit for reasonable counsel fees and other expenses incurred in resisting improper charges,[66] opposition to his proper official acts,[67] or an attempt to remove him.[68] The representative may be allowed for his counsel fees and costs in probate proceedings in the line of his duty,[69] an appeal justly taken,[70] continuing in good faith a suit begun by his decedent,[71] foreclosing a mortgage,[72] or enforcing notes or contracts running to himself for the benefit of the estate,[73] or in a suit properly brought by an administrator *de bonis non* for a settlement

ister has arisen and been determined, in which the employment of counsel was necessary, it may be in the discretion of the Court to allow the necessary expenses of all the parties concerned, including a reasonable counsel fee; but this has no reference to the mere ordinary proceedings to obtain letters of administration."

61. *Massachusetts.*— Dudley *v.* Sanborn, 159 Mass. 185, 34 N. E. 181.

New Jersey.— Baxter *v.* Baxter, 43 N. J. Eq. 82, 10 Atl. 814 [*affirmed* in 44 N. J. Eq. 298, 18 Atl. 80].

New York.— Matter of Hutchinson, 84 Hun 563, 32 N. Y. Suppl. 869; *In re* Washbon, 14 N. Y. Suppl. 672; Irving *v.* De Kay, 9 Paige 521; Decker *v.* Miller, 2 Paige 149; Rogers *v.* Ross, 4 Johns. Ch. 608.

South Carolina.— De Leon *v.* Barrett, 22 S. C. 412; Bryson *v.* Nickols, 2 Hill Eq. 113.

Wisconsin.— Heiss *v.* Murphey, 43 Wis. 45.

See 22 Cent. Dig. tit. "Executors and Administrators," § 453.

When full reimbursement denied.— For a judicial direction sought needlessly or in bad faith or with needless accumulation of expense, full reimbursement from the estate will not be granted. Baxter *v.* Baxter, 43 N. J. Eq. 82, 10 Atl. 814 [*affirmed* in 44 N. J. Eq. 298, 18 Atl. 80]; Colson *v.* Martin, 62 N. C. 125.

62. *Alabama.*— Chandler *v.* Chandler, 87 Ala. 300, 6 So. 153.

Colorado.— Filbeck *v.* Davies, 8 Colo. App. 320, 46 Pac. 214, where the fee was contingent on collection.

Florida.— Sherrell *v.* Shepard, 19 Fla. 300.

Massachusetts.— Newell *v.* West, 149 Mass. 520, 21 N. E. 954, prosecuting "Alabama claims."

South Carolina.— Watson *v.* Mayrant, 1 Rich. Eq. 449.

See 22 Cent. Dig. tit. "Executors and Administrators," § 449.

63. Branham *v.* Com., 7 J. J. Marsh. (Ky.) 190; Drysdale's Appeal, 14 Pa. St. 531; Hapgood *v.* Jennison, 2 Vt. 294.

64. *Alabama.*— Clark *v.* Guard, 73 Ala. 456; Henderson *v.* Simmons, 33 Ala. 291, 70 Am. Dec. 590; Green *v.* Fagan, 15 Ala. 335.

Connecticut.— Clement's Appeal, 49 Conn. 519.

Delaware.— Davis *v.* Rawlins, 2 Harr. 346.

New Jersey.— Polhemus *v.* Middleton, 37 N. J. Eq. 240.

New York.— Grout *v.* Carver, 15 Hun 361; McKee *v.* Lavery, 58 N. Y. Suppl. 990.

Pennsylvania.— Ammon's Appeal, 31 Pa. St. 311; *In re* Armstrong, 6 Watts 236; Donnelly's Estate, 3 Phila. 18.

Canada.—See Griffith *v.* Paterson, 20 Grant Ch. (U. C.) 615.

See 22 Cent. Dig. tit. "Executors and Administrators," § 454; and *supra*, note 40.

65. Anderson *v.* Anderson, 37 Ala. 683; Jacoway *v.* Hall, 67 Ark. 340, 55 S. W. 12; Crawford *v.* Thomas, 54 S. W. 197, 21 Ky. L. Rep. 1100.

66. Harris *v.* Parker, 41 Ala. 604; Leigh *v.* Lockwood, 15 N. C. 577; Atcheson *v.* Robertson, 4 Rich. Eq. (S. C.) 39.

67. Rudolph *v.* Underwood, 88 Ga. 664, 16 S. E. 55; Miller *v.* Simpson, 2 S. W. 171, 8 Ky. L. Rep. 518.

68. Noble *v.* Jackson, 124 Ala. 311, 26 So. 955; *In re* Watkins, 2 Lack. Leg. N. (Pa.) 255. But *compare In re* Byrne, 122 Cal. 260, 54 Pac. 957.

69. Williamson *v.* Mason, 23 Ala. 488; Warden *v.* Burts, 2 McCord Eq. (S. C.) 73.

70. Pearson *v.* Darrington, 32 Ala. 227; Marston *v.* Marston, 21 N. H. 491.

71. Clapp *v.* Coble, 21 N. C. 177.

72. *In re* Miner, 46 Cal. 564.

73. Brown *v.* Dortch, 12 Heisk. (Tenn.) 740; Abingdon *v.* Tyler, 6 Coldw. (Tenn.) 502.

of the estate,[74] or criminal proceedings against an impostor or one personating an heir, when proper for the protection of the estate.[75] Expenses incurred in preparation for expected litigation will be allowed, although the dispute results in a compromise,[76] as will also the costs of setting aside a sale of decedent's real estate where a subsequent sale realizes more than the first.[77] Where the nominated executor in good faith appeals from an order of the court rejecting the will, it is proper for him to bring a suit in equity to prevent a threatened distribution of the estate by the administrator, and he is entitled to be reimbursed for the costs thereof, although he does not succeed on his appeal.[78] Reasonable and necessary traveling expenses of the attorney have also been allowed.[79] The representative should not be allowed for counsel fees and costs in proceedings undertaken merely to vindicate the good name of the decedent,[80] litigation with reference to real estate not in his charge,[81] resisting payment of a bill for reasonable funeral expenses,[82] or attempting to enforce a contract by which the widow agrees to take a child's share in lieu of dower, the contract having been set aside as fraudulent.[83] No allowance should be made for a payment merely as a retainer,[84] for attendance of counsel at sales of land by the executor when no necessity therefor is shown,[85] for the services of an attorney in the management of the estate while the representative was enjoined from transacting the business of the estate,[86] or in procuring evidence in actions brought against the estate.[87] The expense incurred in a controversy between executors, one opposing the qualification of the others, is not a proper charge against the estate.[88] The counsel fees and expenses of an executor in attending a reference for distribution when there was a contest with the legatees have been disallowed.[89] The attorney's fees of an executor in a contested will case, which was amicably settled without trial, are not a proper subject of charge against the estate, when the settlement did not distribute the testator's property in accordance with the provisions of the will.[90]

(VIII) *AMOUNT OF ALLOWANCE.* In order to entitle an executor or administrator to credit for counsel fees and other expenses of litigation, his expenditures must be reasonable,[91] and in passing upon the question of reasonableness the court

74. Seibert *v.* Bloomfield, 63 S. W. 584, 23 Ky. L. Rep. 646.

75. Gerald *v.* Bunkley, 17 Ala. 170.

76. *In re* Semple, 28 Pittsb. Leg. J. (Pa.) 431.

77. Ennis' Estate, 2 Del. Co. (Pa.) 498.

78. Phillips *v.* Phillips, 7 Ky. L. Rep. 679.

79. Moore's Estate, 72 Cal. 335, 13 Pac. 880. See also *infra*, VIII, I, 8, l.

80. Woodard *v.* Woodard, 36 S. C. 118, 15 S. E. 355, 16 L. R. A. 743.

81. Rudolph *v.* Underwood, 88 Ga. 664, 16 S. E. 55; Reeves *v.* McMillan, 101 N. C. 479, 7 S. E. 906.

82. Matter of Huntley, 13 Misc. (N. Y.) 375, 35 N. Y. Suppl. 113, 25 N. Y. Civ. Proc. 78.

83. Corbett *v.* Johnson, 6 Ky. L. Rep. 596.

84. Matter of Collyer, 9 N. Y. Suppl. 297, 1 Connoly Surr. (N. Y.) 546; Pate *v.* Maples, (Tenn. Ch. App. 1897) 43 S. W. 740.

85. McGregor's Estate, 131 Pa. St. 359, 18 Atl. 902.

86. Matter of O'Brien, 5 Misc. (N. Y.) 436, 25 N. Y. Suppl. 704.

87. Matter of Collyer, 9 N. Y. Suppl. 297, 1 Connoly Surr. (N. Y.) 546.

88. *In re* Millenovich, 5 Nev. 161.

89. Heister's Appeal, 7 Pa. St. 455.

90. Matter of Seeger, 1 Ohio S. & C. Pl. Dec. 113, 7 Ohio N. P. 207.

91. *Alabama.*— Holman *v.* Sims, 39 Ala. 709.

California.— Levinson's Estate, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479. See also *In re* Brignole, 133 Cal. 162, 65 Pac. 294.

Colorado.— Filbeck *v.* Davies, 8 Colo. App. 320, 46 Pac. 214.

Georgia.— See Gairdner *v.* Tate, 110 Ga. 456, 35 S. E. 697.

Louisiana.— Porche *v.* Banks, 8 La. Ann. 65.

Missouri.— Langston *v.* Canterbury, 173 Mo. 122, 73 S. W. 151.

New York.— Matter of Collyer, 9 N. Y. Suppl. 297, 1 Connoly Surr. 546.

Pennsylvania.— Mutchmore's Estate, 9 Pa. Dist. 293, 24 Pa. Co. Ct. 257.

See 22 Cent. Dig. tit. "Executors and Administrators," § 456.

The burden of proof is upon the representative to show that the sum paid for the services and advice of counsel is reasonable and proper under all the circumstances of the case. Mutchmore's Estate, 9 Pa. Dist. 293, 24 Pa. Co. Ct. 257.

Time for fixing amount.— The amount to be allowed an executor for attorney's fees may be fixed by the court during the progress of the administration before settlement of the executor's account. *In re* Kasson, 119 Cal. 489, 51 Pac. 706.

should not be governed absolutely by the opinion of professional men, the charge made by the counsel, or the contract of employment, but should exercise its own fair judgment and fix the amount allowable with reference to the labor, skill, and care required, the value of the estate, the advantages gained or sought by the services or litigation, and the good faith and reasonable prudence shown by the representative who claims the allowance.[92]

(IX) *WHEN ALLOWANCE REFUSED* — (A) *In General.* The representative will not be allowed credit where the services were not for the benefit of the estate,[93] where the advice of counsel was taken and inexcusably disregarded,[94] where the representative exceeded his powers in acting in reference to the matter as to which the fees are claimed,[95] or where the charges paid or incurred by the personal representative were illegal or grossly excessive.[96] So also an allowance of credit may properly be refused where the litigation was improper,[97] unnecessary,[98]

Allowances held reasonable see the following cases:

Arkansas.— Pike *v.* Thomas, 65 Ark. 437, 47 S. W. 110.

Kentucky.— Clarke *v.* Garrison, 79 S. W. 240, 25 Ky. L. Rep. 1999; Clark *v.* Young, 74 S. W. 245, 24 Ky. L. Rep. 2395.

New York.— Matter of Hosford, 62 N. Y. App. Div. 626, 71 N. Y. Suppl. 163; Gross *v.* Moore, 14 N. Y. App. Div. 353, 43 N. Y. Suppl. 945; Matter of Ogden, 41 Misc. 158, 83 N. Y. Suppl. 977; Matter of O'Neill, 28 Misc. 599, 59 N. Y. Suppl. 1020.

Ohio.—*In re* Wolffe, 7 Ohio S. & C. Pl. Dec. 220, 4 Ohio N. P. 336.

Oregon.— *In re* Osburn, 36 Oreg. 8, 58 Pac. 521; Muldrick *v.* Galbraith, 31 Oreg. 86, 49 Pac. 886.

See 22 Cent. Dig. tit. "Executors and Administrators," § 456.

Fees held excessive see Clarke *v.* Garrison, 79 S. W. 240, 25 Ky. L. Rep. 1999; Clark *v.* Young, 74 S. W. 245, 24 Ky. L. Rep. 2395; Matter of Peck, 79 N. Y. App. Div. 296, 80 N. Y. Suppl. 76 [*affirmed* in 177 N. Y. 538, 69 N. E. 1129]; Frith *v.* Campbell, 53 Barb. (N. Y.) 325; Matter of O'Neill, 28 Misc. (N. Y.) 599, 59 N. Y. Suppl. 1020; Matter of Collyer, 9 N. Y. Suppl. 297, 1 Connoly Surr. (N. Y.) 546; Fairbairn *v.* Fisher, 58 N. C. 385; McGregor's Estate, 131 Pa. St. 359, 18 Atl. 902; Becher's Estate, 5 Pa. Co. Ct. 115.

92. *Alabama.*— Bendall *v.* Bendall, 24 Ala. 295.

California.— *In re* Kasson, 119 Cal. 489, 51 Pac. 706; Freese *v.* Pennie, 110 Cal. 467, 42 Pac. 978; Painter *v.* Painter, 78 Cal. 625, 21 Pac. 433.

Louisiana.— Henry's Succession, 45 La. Ann. 156, 12 So. 365; Osborn's Succession, 40 La. Ann. 615, 4 So. 580; Linton's Succession, 31 La. Ann. 130; Mager's Succession, 12 Rob. 413; Labatut *v.* Rogers, 6 Mart. 416; Morel *v.* Misotiere, 3 Mart. 363.

Mississippi.— Noel *v.* Harvey, 29 Miss. 72.

New York.— Matter of Hutchinson, 84 Hun 563, 32 N. Y. Suppl. 869; Frith *v.* Campbell, 53 Barb. 325; Matter of Jones, 28 Misc. 599, 59 N. Y. Suppl. 1020; Matter of Collyer, 9 N. Y. Suppl. 297, 1 Connoly Surr. 546; Matter of White, 15 N. Y. St. 729, 6 Dem. Surr. 375.

North Carolina.— Fairbairn *v.* Fisher, 58 N. C. 385.

Oregon.— Steel *v.* Holladay, 20 Oreg. 462, 26 Pac. 562.

Pennsylvania.— McGregor's Estate, 131 Pa. St. 359, 18 Atl. 902; St. Clair's Appeal, (1888) 15 Atl. 914.

Virginia.— Baker *v.* Baker, 87 Va. 180, 12 S. E. 346; Lindsay *v.* Howerton, 2 Hen. & M. 9.

England.— Johnson *v.* Telford, 3 Russ. 477, 27 Rev. Rep. 116, 3 Eng. Ch. 477, 38 Eng. Reprint 654.

See 22 Cent. Dig. tit. "Executors and Administrators," § 456.

The value of the services is the sole test without reference to the size of the estate. Becher's Estate, 5 Pa. Co. Ct. 115.

Court fees.— No allowance can be made to an administrator for court fees by way of expenses for the judges beyond the items fixed by statute. Liddel *v.* McVickar, 11 N. J. L. 44, 19 Am. Dec. 369.

93. Cullen *v.* State, 28 Ind. App. 335, 62 N. E. 759; Renshaw *v.* Stafford, 34 La. Ann. 1138; Hasler *v.* Hasler, 1 Bradf. Surr. (N. Y.) 248; Stout's Estate, 16 Montg. Co. Rep. (Pa.) 193. See also Matter of Welling, 51 N. Y. App. Div. 355, 64 N. Y. Suppl. 1025, 53 N. Y. App. Div. 639, 65 N. Y. Suppl. 1060; Matter of Collyer, 9 N. Y. Suppl. 297, 1 Connoly Surr. (N. Y.) 546.

94. Munden *v.* Bailey, 70 Ala. 63.

95. *In re* Wincox, 186 Ill. 445, 57 N. E. 1073 [*affirming* 85 Ill. App. 613].

96. Sherrell *v.* Shepard, 19 Fla. 300. See also Matter of Gates, 2 Redf. Surr. (N. Y.) 144. And see Schouler Ex. § 544.

Ordering attorney to refund.— The probate court, on a hearing in the matter of an estate and guardianship, has no jurisdiction to peremptorily order an attorney to refund money received from the executrix and guardian in payment of attorney's fees in excess of what the court considers reasonable for the services performed, since the attorney has a right to be heard with reference thereto. Tomsky *v.* San Francisco Super. Ct., 131 Cal. 620, 63 Pac. 1020.

97. Pryor *v.* Davis, 109 Ala. 117, 19 So. 440.

98. *In re* Koch, 121 Mich. 667, 80 N. W. 641; *In re* Stevens, 3 Silv. Supreme (N. Y.)

or unnecessarily protracted,[99] where a proceeding instituted by the representative has been allowed to fail for lack of reasonable diligence in prosecuting it,[1] where the action should not have been brought by the representative in his fiduciary capacity,[2] where the representative's contentions were groundless,[3] or where it was understood that the fees and costs would be paid elsewhere and not by the estate.[4] Where more counsel than were necessary have been employed, the court has refused to allow all the fees paid,[5] and a charge for an attorney's services in attempting to rectify his own neglect in failing to interpose a proper plea has been disallowed.[6]

(B) *Litigation Caused by Representative's Fault or Misconduct.* An executor or administrator is not entitled to any allowance or credit for his fees, costs, or other expenses in a litigation made necessary by his own negligence, misconduct, or maladministration.[7]

(C) *Litigation For Benefit of Particular Persons.* The costs, fees, and expenses attending a litigation for the benefit of particular heirs, legatees, next of kin, or other persons, should be allowed, if at all, as against their own particular funds or interests, proportionately or wholly, as the case may be, rather than out of the general estate.[8]

(D) *Personal Benefit of Representative.* An executor or administrator can-

305, 6 N. Y. Suppl. 638; McGregor's Estate, 131 Pa. St. 359, 18 Atl. 902. See also Sutton *v.* Sutton, (Tenn. Ch. App. 1900) 58 S. W. 891.

99. See Phillips *v.* Phillips, 7 Ky. L. Rep. 679.

1. Clark *v.* Guard, 73 Ala. 456.

2. Thompson *v.* Thompson, 65 S. W. 457, 23 Ky. L. Rep. 1535.

3. Bendall *v.* Bendall, 24 Ala. 295; Whitford *v.* Horn, 18 Kan. 455; Williamson *v.* Childress, 26 Miss. 328; Hosack *v.* Rogers, 9 Paige (N. Y.) 461.

Advice of counsel.— Where an executor conducts fruitless suits, he will not be allowed the expense thereof, although they were brought under advice of counsel. Matter of Stanton, 41 Misc. (N. Y.) 278, 84 N. Y. Suppl. 46.

4. *In re* Stephens, 2 N. Y. Suppl. 36.

5. *California.*— *In re* Byrne, 122 Cal. 260, 54 Pac. 957.

Louisiana.—Gayle's Succession, 27 La. Ann. 547. See also Porche *v.* Banks, 8 La. Ann. 65.

Mississippi.— Crowder *v.* Shackelford, 35 Miss. 321.

New York.— Matter of Collyer, 9 N. Y. Suppl. 297, 1 Connoly Surr. 546.

Oregon.— Muldrick *v.* Galbraith, 31 Oreg. 86, 49 Pac. 886.

Pennsylvania.— *In re* Kalbfell, 30 Pittsb. Leg. J. 325.

See 22 Cent. Dig. tit. "Executors and Administrators," § 448.

6. Matter of Collyer, 9 N. Y. Suppl. 297, 1 Connoly Surr. (N. Y.) 546.

7. *Alabama.*— Morrow *v.* Allison, 39 Ala. 70; Pearson *v.* Darrington, 32 Ala. 227; Green *v.* Fagan, 15 Ala. 335.

California.— Stuttmeister's Estate, 75 Cal. 346, 17 Pac. 223; *In re* Holbert, 48 Cal. 627.

Georgia.— Ross *v.* Battle, 113 Ga. 742, 39 S. E. 287; Lilly *v.* Griffin, 71 Ga. 535.

Illinois.— Switzer *v.* Kee, 69 Ill. App. 499.

New Jersey.— Fluck *v.* Lake, 54 N. J. Eq. 638, 35 Atl. 643; Post *v.* Stevens, 13 N. J. Eq. 293.

New York.— Matter of Van de Veer, 63 N. Y. App. Div. 495, 71 N. Y. Suppl. 849; Matter of Swart, 2 Silv. Supreme 585, 6 N. Y. Suppl. 608; Matter of Baker, 27 Misc. 126, 57 N. Y. Suppl. 398; Matter of O'Brien, 5 Misc. 136, 25 N. Y. Suppl. 704.

North Carolina.— Stonestreet *v.* Frost, 123 N. C. 640, 31 S. E. 846. See also Johnson *v.* Marcom, 121 N. C. 83, 28 S. E. 58.

Pennsylvania.— Sterrett's Appeal, 2 Penr. & W. 419; Koehler's Estate, 8 Kulp 529; Hoffman's Estate, 21 Pa. Co. Ct. 203; *In re* Shuck, 30 Pittsb. Leg. J. 431; *In re* Brenneman, 14 York Leg. Rec. 14.

South Carolina.— Thomson *v.* Palmer, 3 Rich. Eq. 139.

West Virginia.— Cranmer *v.* McSwords, 26 W. Va. 412.

Canada.— See Kennedy *v.* Pingle, 27 Grant Ch. (U. C.) 305; McGill *v.* Courtice, 17 Grant Ch. (U. C.) 271; Ashbough *v.* Ashbough, 10 Grant Ch. (U. C.) 433.

See 22 Cent. Dig. tit. "Executors and Administrators," § 460; and *supra*, VIII, I, 6.

Negligence which did not cause the litigation will not prevent the allowance of sums paid for counsel fees. Forward *v.* Forward, 6 Allen (Mass.) 494.

8. *Alabama.*— Johnson *v.* Holifield, 82 Ala. 123, 2 So. 753; Hicks *v.* Barrett, 40 Ala. 291.

California.— Jessup's Estate, 80 Cal. 625, 22 Pac. 260.

Illinois.— Shaw *v.* Moderwell, 104 Ill. 64.

Kentucky.— Hart *v.* Hart, 2 Bibb 609.

New Jersey.— Kingsland *v.* Scudder, 36 N. J. Eq. 284.

New York.— Platt *v.* Moore, 1 Dem. Surr. 191.

North Carolina.— Harrell *v.* Davenport, 58 N. C. 4.

Pennsylvania.— McGregor's Estate, 131 Pa. St. 359, 18 Atl. 902.

not be allowed as against the estate the costs and expenses of litigation or the employment of counsel for his own individual benefit.[9] Such is the rule where the fiduciary has a special interest as legatee, devisee, heir, or distributee, to protect which he contests against others,[10] and to some extent the same rule applies to the asserting of his personal claims in the probate court for allowance against the estate where he was reasonably opposed by others and failed of success.[11] Apportionment of such costs and expenses as between representative and estate may, however, be sometimes proper.[12]

(E) *Services of Representative as Attorney.* In many jurisdictions the view prevails that an executor or administrator cannot be allowed credit for his services to the estate as an attorney,[13] or even for attorney's fees incurred by him

See 22 Cent. Dig. tit. "Executors and Administrators," § 461.

9. Noble *v.* Jackson, 132 Ala. 230, 31 So. 450.

The representative is not entitled to an allowance from the estate for the services of an attorney in advising him as to his charges for administering (*In re* McAlpin, 8 Ohio S. & C. Pl. Dec. 654), in litigation with respect to his compensation (Bell *v.* Goss, (Tex. Civ. App. 1903) 76 S. W. 315), or in an unsuccessful attempt to retain ancillary administration, where false statements were made in the application therefor (Dorris *v.* Miller, 105 Iowa 564, 75 N. W. 482); and an allowance has also been refused for the costs of a suit by him to determine the right to administer (Cate *v.* Cate, (Tenn. Ch. App. 1899) 43 S. W. 365), or for the expense of a suit brought, not against the estate but against him individually (*Ex p.* Allen, 89 Ill. 474).

10. *Alabama.*— Mims *v.* Mims, 39 Ala. 716; Henderson *v.* Simmons, 33 Ala. 291, 70 Am. Dec. 590.

California.— Firebaugh *v.* Burbank, 121 Cal. 186, 53 Pac. 560; Marrey's Estate, 65 Cal. 287, 3 Pac. 896; *In re* Stott, Myr. Prob. 168; *In re* Chinmark, Myr. Prob. 128.

Illinois.— Wilkinson *v.* Ward, 42 Ill. App. 541.

Kentucky.— Wood *v.* Goff, 7 Bush 59; Caldwell *v.* Hampton, 53 S. W. 14, 21 Ky. L. Rep. 793; Wakefield *v.* Gilliland, 18 S. W. 768, 13 Ky. L. Rep. 845.

Minnesota.— *In re* Glynn, 57 Minn. 21, 58 N. W. 684.

Missouri.— Hughes *v.* Hughes, 8 Mo. 38.

New York.— Gross *v.* Moore, 14 N. Y. App. Div. 353, 43 N. Y. Suppl. 945.

North Carolina.— Ralston *v.* Telfair, 22 N. C. 414.

Pennsylvania.— Wither's Appeal, 13 Pa. St. 582.

South Carolina.— Pell *v.* Ball, Speers Eq. 48; Wham *v.* Love, Rice Eq. 51.

Tennessee.— German *v.* German, 7 Coldw. 180.

Washington.— Wilbur *v.* Wilbur, 17 Wash. 683, 50 Pac. 589.

See 22 Cent. Dig. tit. "Executors and Administrators," § 462.

11. *Connecticut.*— Clement's Appeal, 49 Conn. 519.

Maryland.— Dalrymple *v.* Gamble, 68 Md. 156, 11 Atl. 718; Billingslea *v.* Henry, 20 Md. 282.

New York.— Shakespeare *v.* Markham, 72 N. Y. 400.

Pennsylvania.— Fox's Appeal, 125 Pa. St. 518, 17 Atl. 451; Stephens' Appeal, 56 Pa. St. 409; Geiger's Appeal, (1889) 18 Atl. 851.

South Carolina.— Garrett *v.* Garrett, 2 Strobh. Eq. 272; Villard *v.* Robert, 1 Strobh. Eq. 40, 49 Am. Dec. 654.

Tennessee.— German *v.* German, 7 Coldw. 180.

See 22 Cent. Dig. tit. "Executors and Administrators," § 462.

12. Clement's Appeal, 49 Conn. 519; Nelson *v.* Bush, 9 Dana (Ky.) 104; Reeser's Appeal, 100 Pa. St. 79.

Attempt to uphold will.— Where an executor who is also a beneficiary under the will employs counsel to uphold the will against a contest in which the will is set aside, it is proper for the court to apportion such counsel fees as between such person in his individual capacity and as executor. Bruning *v.* Golden, 159 Ind. 199, 64 N. E. 657; Roll *v.* Mason, 9 Ind. App. 651, 37 N. E. 298.

13. *California.*— See *In re* Coursen, (1901) 65 Pac. 965, holding that services rendered by an executor as attorney "did not necessarily entitle him to extra compensation."

Colorado.— Doss *v.* Stevens, 13 Colo. App. 535, 59 Pac. 67.

Illinois.—Hough *v.* Harvey, 71 Ill. 72; Willard *v.* Bassett, 27 Ill. 37, 79 Am. Dec. 393.

Indiana.— Taylor *v.* Wright, 93 Ind. 121.

Kentucky.— Sims *v.* Birdsong, 59 S. W. 749, 22 Ky. L. Rep. 1049.

Louisiana.— Lile's Succession, 24 La. Ann. 490; Key's Succession, 5 La. Ann. 567; Baldwin *v.* Carleton, 15 La. 394.

New York.— Lent *v.* Howard, 89 N. Y. 169; Collier *v.* Munn, 41 N. Y. 143 [*affirming* Tuck. Surr. 136]; Matter of Howard, 3 Misc. 170, 23 N. Y. Suppl. 836; Matter of Reed, 12 N. Y. St. 139; *In re* Valentine, 9 Abb. N. Cas. 313; Campbell *v.* Mackie, 1 Dem. Surr. 185; Campbell *v.* Purdy, 5 Redf. Surr. 434.

Tennessee.— It has been held that a public administrator ought not to be allowed compensation as attorney in addition to his commission. Loague *v.* Brennan, 86 Tenn. 634, 9 S. W. 693. And Fulton *v.* Davidson, 3 Heisk. 614, which held that where there were three executors, one of whom was a

and paid to a firm of lawyers of which he is a member where his membership entitles him to a share in such fees;[14] but in other jurisdictions an executor or administrator who performs legal services for the estate is held entitled to an allowance therefor by way of extra compensation.[15]

(F) *Services Which Representative Should Perform.* An executor or administrator is not entitled to devolve his own fiduciary duties upon an attorney engaged at the cost of the estate; nor to claim allowance from the estate for extravagant counsel hire, nor for his payments made to others for doing work of the estate which did not require professional or expert skill, but was within his own general province as personal representative, and might fairly be compensated for by the usual allowance to a fiduciary.[16]

lawyer, who by agreement was to attend to the legal duties, he could be allowed for legal services rendered the estate, while not overruled, was questioned and limited to its precise facts in State *v.* Butler, 15 Lea 113.

Utah.— *In re* Evans, 22 Utah 366, 62 Pac. 913, 93 Am. St. Rep. 794, 53 L. R. A. 952.

England.— Burge *v.* Brutton, 2 Hare 373, 7 Jur. 988, 12 L. J. Ch. 368, 24 Eng. Ch. 373.

Costs against the adversary may be recovered by the executor or administrator who prevails as attorney; but where the judgment for costs cannot be collected by him, he cannot be allowed the amount thereof out of the estate, although he may have his disbursements and expenses. Campbell *v.* Purdy, 5 Redf. Surr. (N. Y.) 434.

If one named as executor has never taken out letters nor exercised any control over the estate, his relations thereto as counsel are the same as those of any other person. Campbell *v.* Mackie, 1 Dem. Surr. (N. Y.) 185.

14. Taylor *v.* Wright, 93 Ind. 121; Parker *v.* Day, 155 N. Y. 383, 49 N. E. 1046 [*reversing* 12 Misc. 510, 33 N. Y. Suppl. 676, and *affirming* 9 Misc. 298, 30 N. Y. Suppl. 267]; Burge *v.* Brutton, 2 Hare 373, 7 Jur. 988, 12 L. J. Ch. 368, 24 Eng. Ch. 373.

Employment of copartner as individual.— An executor may employ his partner as an individual to do work for him in matters relating to the estate, and services rendered pursuant to such employment give the partner a right to payment, and render the executor liable, with the right of reimbursement from the estate, if he is excluded from all participation in the compensation. Parker *v.* Day, 155 N. Y. 383, 49 N. E. 1046 [*reversing* 12 Misc. 510, 33 N. Y. Suppl. 676, and *affirming* 9 Misc. 298, 30 N. Y. Suppl. 267].

15. *Alabama.*—Alexander *v.* Bates, 127 Ala. 328, 28 So. 415; Clark *v.* Knox, 70 Ala. 607, 45 Am. Rep. 93; Teague *v.* Corbitt, 57 Ala. 529; Morgan *v.* Nelson, 43 Ala. 586; Harris *v.* Martin, 9 Ala. 895.

Massachusetts.— Newell *v.* West, 149 Mass. 520, 21 N. E. 954.

Michigan.— Wisner *v.* Mabley, 74 Mich. 143, 41 N. W. 835.

Ohio.— Chatfield *v.* Swing, 6 Ohio Dec. (Reprint) 666, 7 Am. L. Rec. 326.

Pennsylvania.— If an executor prefers to act as his own counsel, he cannot charge the estate therefor and receive compensation for professional services in the nature of advice; but if an executor, who is an attorney, institutes or defends suits or other legal proceedings for the protection and benefit of the estate, these services, not being required of him as executor or administrator, or within the line of his duty as such, he is entitled to compensation therefor. McCloskey's Estate, 11 Phila. 95. See also *In re* Mumma, 6 Am. L. Reg. 489.

Wisconsin.— Sloan *v.* Duffy, 117 Wis. 480, 94 N. W. 342.

Amount of allowance.— The representative should be deemed entitled, not to the usual professional charges as a specific sum, but to a fair and reasonable allowance for his own services. Clark *v.* Knox, 70 Ala. 607, 45 Am. Rep. 93.

Extra fees.— Where an executor, in accepting the trust, is compelled to abandon his general practice at law, such fact is not a ground for the allowance of extra fees, unless his time has been occupied in performing extraordinary services. Chatfield *v.* Swing, 6 Ohio Dec. (Reprint) 666, 7 Am. L. Rec. 326.

16. *California.*— *In re* Brignole, 133 Cal. 162, 65 Pac. 294.

Louisiana.— Macarty's Succession, 3 La. Ann. 517.

Nevada.— Lucich *v.* Medin, 3 Nev. 93, 93 Am. Dec. 376.

New Jersey.— Hurlbut *v.* Hutton, 44 N. J. Eq. 302, 15 Atl. 417; Kingsland *v.* Scudder, 36 N. J. Eq. 284.

New York.— Matter of Murray, 40 Misc. 433, 82 N. Y. Suppl. 394; Matter of Arkenbaugh, 13 Misc. 744, 35 N. Y. Suppl. 251; Matter of Van Nostrand, 3 Misc. 396, 24 N. Y. Suppl. 850, 2 Pow. Surr. 495; Matter of Knapp, 59 How. Pr. 367; Raymond *v.* Dayton, 4 Dem. Surr. 333; O'Reilly *v.* Meyer, 4 Dem. Surr. 161.

Pennsylvania.—Kalbfell's Estate, 30 Pittsb. Leg. J. 325.

South Carolina.— Edmonds *v.* Crenshaw, 1 Harp. Eq. 224.

Texas.— Trammel *v.* Philleo, 33 Tex. 395.

England.— Harbin *v.* Darby, 28 Beav. 325, 6 Jur. N. S. 906, 29 L. J. Ch. 622, 2 L. T. Rep. N. S. 531, 8 Wkly. Rep. 512, holding that where a solicitor who is appointed executor is authorized by the will to charge for his professional services he is only entitled to charge for what are strictly professional services, and not for work or services which ought to be done or rendered by an executor in a lay capacity.

(x) *Fund Out of Which Allowance Made.* Where an executor brought a suit to test the validity of a bequest and the bequest was upheld, he was not entitled to costs and counsel fees out of the proceeds of the sale of the property bequeathed.[17] Where an action by an executor to determine the rights of defendants to share in certain fund in his hands was determined in favor of defendants, the executor was not entitled to deduct counsel fees from the fund before distribution, where there was a sufficient estate left in his hands for that purpose.[18] Where a will was admitted to probate, and one of the heirs was appointed executor, and by undue means an election by the widow to take under the will was procured, but on suit brought by her was afterward set aside, the costs and attorney's fees incurred by the executor in defending the action could not be paid out of the estate until after the widow obtained her share.[19] Where, on partition of realty for purposes of distribution, the court ordered one portion thereof sold, the executor who made the sale had no authority to pay attorney's fees, except so far as the court might order them to be paid out of the proceeds of the sale.[20] In a case where a substituted trustee, accounting for the acts of a prior deceased trustee, was also executor to that trustee, the court divided between the estates a bill of his attorneys for services which were beneficial to both estates.[21]

h. Taxes and Assessments. An executor or administrator is entitled to credit for taxes and assessments properly paid by him in the exercise of his duties as such,[22] and this notwithstanding the fact that there is some technical defect in the

See 22 Cent. Dig. tit. "Executors and Administrators," § 455.

Allowance has been denied for ordinary legal services in preparing an inventory (Matter of Collyer, 9 N. Y. Suppl. 297, 1 Connoly Surr. (N. Y.) 546; Pullman *v.* Willets, 4 Dem. Surr. (N. Y.) 536), in the matter of the execution of the bond (Matter of Collyer, 9 N. Y. Suppl. 297, 1 Connoly Surr. (N. Y.) 546), or for depositing mortgages in the recorder's office for record (McGregor's Estate, 131 Pa. St. 359, 18 Atl. 902).

A transfer of securities held by the decedent as trustee, to which no claim was made by the heirs, when all that the administrator was required to do was to require identification of the securities in trust, is not a matter requiring the services of an attorney. *In re* McAlpin, 8 Ohio S. & C. Pl. Dec. 654.

17. Stevens *v.* Stevens, 37 N. J. Eq. 3.

18. Briggs *v.* Walker, 102 Ky. 359, 43 S. W. 479, 19 Ky. L. Rep. 1490.

19. Sill *v.* Sill, 31 Kan. 248, 1 Pac. 556.

20. Snyder's Appeal, 54 Pa. St. 67.

21. Matter of Rowe, 42 Misc. (N. Y.) 172, 86 N. Y. Suppl. 253.

22. See Armstrong *v.* Cashion, (Ark. 1891) 16 S. W. 666; Howle *v.* Anderson, 44 S. W. 37, 19 Ky. L. Rep. 1748; Bowers *v.* Williams, 34 Miss. 324; Atlantic Trust Co. *v.* Powell, 23 Misc. (N. Y.) 289, 50 N. Y. Suppl. 866.

As to what taxes representative should pay see *infra*, X, A, 15.

The duty of the representative to pay taxes at his peril depends upon whether he has or ought to have the money with which to do so. Thompson *v.* Thompson, 77 Ga. 692, 3 S. E. 261.

Working out highway tax.— Where an executor works out a highway tax personally instead of paying the money or hiring another person to do the work he should be allowed therefor in his account. Lansing *v.* Lansing, 45 Barb. (N. Y.) 182, 1 Abb. Pr. N. S. (N. Y.) 280, 31 How. Pr. (N. Y.) 55.

Time for payment of transfer tax see Matter of Sudds, 32 Misc. (N. Y.) 182, 66 N. Y. Suppl. 231.

Taxes accruing after commencement of action to settle estate.— In an action by a legatee to settle testator's estate, the personal representative was entitled to credit for taxes paid by her which accrued after the action was instituted. Hood *v.* Maxwell, 66 S. W. 276, 23 Ky. L. Rep. 1791.

Where title proves defective.— Where an executor had in good faith paid taxes upon lands supposed to belong to the testator, and purchased by himself, but the testator's title proved defective, he was allowed such taxes in his account upon his conveying all his interest in the lands to the parties interested in the estate, with warranty against encumbrances created by himself. Jennison *v.* Hapgood, 10 Pick. (Mass.) 77.

Where testator did not die seized of all the property on which taxes were paid, the executor is not entitled to credit for the payment of taxes where it is not shown what portion was on the testator's property. *In re* Selleck, 111 N. Y. 284, 19 N. E. 66.

Property out of the state.— Payment of taxes by an executor on lands in a state where he had not taken out administration, being voluntary and without authority, is like the payment of a debt by any stranger, and furnishes no foundation of a legal claim by him. Jennison *v.* Hapgood, 10 Pick. (Mass.) 77.

Penalty.— A claim by a personal representative for money paid as a penalty on taxes should be disallowed where the penalty accrued by reason of the representative's neg-

assessment,[23] or the law under which the assessment was paid is afterward declared unconstitutional.[24] Even where the personal representative has paid out taxes not strictly in the line of his official duty, an adjustment of taxes among the persons in interest may properly reimburse him, and the land may be subjected to his lien or a set-off allowed.[25]

i. Insurance Premiums. The personal representative is not entitled to credit for the payment of assessments on a policy in which his decedent had no interest and in which his estate has none;[26] but where, in the exercise of good faith and reasonable prudence, he insures personal property, as assets of the estate, against fire, he is entitled to reimbursement for the premium paid,[27] and while he is usually not concerned in insurance upon the real property, since that belongs rather to the heirs or devisees,[28] yet where he has direction and control of the property, or reasonably expects that an insufficiency of the personal assets to pay the debts of the estate may render a sale of the real estate necessary, the insurance by him of the buildings may be prudent and an allowance therefor justified.[29] The court may refuse to allow credit for money paid for insurance where the amount paid is so greatly out of proportion to the amount realized by a sale of the property as to indicate that the payment was imprudent and reckless.[30]

j. Judgments Against Representative. Where a creditor of the estate has recovered and collected a judgment against the executor or administrator, the representative will be allowed credit in his accounts for the amount thereof, including costs, when it appears that he acted within the rule of reasonable prudence and discretion and was not guilty of negligence, bad faith, or other improper conduct;[31] but it is otherwise where the circumstances indicate bad faith or culpable remissness on the part of the representative.[32]

k. Interest Paid. Where it is not shown that the personal representative had

lect. Williams *v.* Petticrew, 62 Mo. 460; Tickel *v.* Quinn, 1 Dem. Surr. (N. Y.) 425.

23. Sanderson *v.* Sanderson, 20 Fla. 292. See also Adams *v.* Monroe County, 154 N. Y. 619, 49 N. E. 144.

24. Dey *v.* Chapman, 39 N. J. Eq. 258.

25. *Arkansas.*— Armstrong *v.* Cashion, (1891) 16 S. W. 666.

California.— *In re* Mogan, Myr. Prob. 80.

Florida.— Merritt *v.* Jenkins, 17 Fla. 593.

New York.—Matter of Sworthout, 38 Misc. 56, 76 N. Y. Suppl. 961.

Vermont.— See Hapgood *v.* Jennison, 2 Vt. 294.

See 22 Cent. Dig. tit. "Executors and Administrators," § 439.

26. Pryor *v.* Davis, 109 Ala. 117, 19 So. 440.

Property which is security for debt to estate.— An executor having insured property which was the security for his debt to the estate, pursuant to an order requiring him to do so at his own expense or file a bond, the estate is not chargeable with the cost thereof. Good's Estate, 150 Pa. St. 307, 24 Atl. 623.

27. Cornwell *v.* Deck, 2 Redf. Surr. (N. Y.) 87.

28. *Missouri.*— Langston *v.* Canterbury, 173 Mo. 122, 73 S. W. 151.

New York.— Matter of Very, 24 Misc. 139, 53 N. Y. Suppl. 389, 28 N. Y. Civ. Proc. 163. See also Cornwell *v.* Deck, 2 Redf. Surr. 87.

North Carolina.—Hahn *v.* Mosely, 119 N. C. 73, 25 S. E. 713.

Pennsylvania.— *In re* Dunkle, 17 Lanc. L. Rev. 61.

England.— Bailey *v.* Gould, 9 L. J. Exch. Eq. 43, 4 Y. & C. Exch. 221. See also Fry *v.* Fry, 27 Beav. 144, 5 Jur. N. S. 1047, 28 L. J. Ch. 593.

See 22 Cent. Dig. tit. "Executors and Administrators," § 440; and *supra*, III, C, 1; *infra*, VIII, O, 1, a.

29. Sparrow's Succession, 40 La. Ann. 484, 4 So. 513; Wiggin *v.* Swett, 6 Metc. (Mass.) 194, 39 Am. Dec. 716; Howard *v.* Francis, 30 N. J. Eq. 444; Matter of Fould, 35 Misc. (N. Y.) 171, 71 N. Y. Suppl. 473; Matter of Van Houten, 18 Misc. (N. Y.) 524, 42 N. Y. Suppl. 1115; Rolph's Estate, 9 N. Y. Suppl. 293, 2 Connoly Surr. (N. Y.) 191; Cornwell *v.* Deck, 2 Redf. Surr. (N. Y.) 87.

Where assessments for fire insurance constitute a lien upon the property insured, but the value of the property exceeds the amount of the lien, it is the duty of the administrator of the insured to remove the lien by paying the assessments if there are sufficient assets. Tuttle *v.* Robinson, 33 N. H. 104. And see Kimball *v.* Sumner, 62 Me. 305.

30. *In re* Nicholson, 1 Nev. 518.

31. Pearson *v.* Darrington, 32 Ala. 227; White *v.* White, 3 Dana (Ky.) 374; Scott *v.* Dorsey, 1 Harr. & J. (Md.) 227; Lambert *v.* Hobson, 56 N. C. 424.

32. Pearson *v.* Darrington, 32 Ala. 227; George *v.* Bean, 30 Miss. 147; Hurlbut *v.* Hutton, 44 N. J. Eq. 302, 15 Atl. 417; Tucker *v.* Tucker, 29 N. J. Eq. 286; Moulson's Estate, 1 Brewst. (Pa.) 296.

moneys in hand sufficient to take up notes of the decedent, he is entitled to credit for interest paid to procure the extension of such notes;[33] and where, under the terms of a will, the executor had large discretionary powers, the court has allowed him to charge the estate with usurious interest paid in order to prevent the sacrifice of the property.[34] But where a special administrator has been ordered not to pay out money without an order of court, he is not entitled to credit for money paid without an order, as interest on notes held against the estate.[35] As a rule the representative should not, after the death of the decedent, pay interest on mortgages or other encumbrances on the land, accruing after the decedent's death.[36]

l. Traveling Expenses. In the settlement of an executor's or administrator's account, reasonable and necessary traveling expenses incurred in performing the duties of his trust should be allowed;[37] but it is otherwise where the expenses were needlessly or unreasonably incurred, or the representative was put to no actual cost, or journeyed rather upon his own business, or that of the heirs.[38]

m. Procuring Bond. The amount paid by the personal representative to a guaranty or indemnity company or to individual bondsmen, in order to procure sureties on his official bond is not, in the absence of some statute so providing, chargeable against the estate, in addition to his usual recompense,[39] and an allowance of the amount expended in procuring a revenue stamp for the bond has also been refused.[40]

n. Redemption of Property. Where the personal representative honestly and in the exercise of due prudence and diligence redeems mortgaged property, the value of which is fairly in excess of the mortgage debt, he may be allowed credit

33. Hale's Succession, 26 La. Ann. 195.

34. Coffee *v.* Ruffin, 4 Coldw. (Tenn.) 487.

35. James *v.* Craighead, (Tex. Civ. App. 1902) 69 S. W. 241.

36. Springfield Grocer Co. *v.* Walton, 95 Mo. App. 526, 69 S. W. 477.

Right to reimbursement from heirs.—Where an administratrix pays out of the personalty mortgage interest accruing after her intestate's death, she is entitled to be reimbursed by the heirs out of the realty. Matter of Sworthout, 38 Misc. (N. Y.) 56, 76 N. Y. Suppl. 961.

37. *Alabama.*— Pinckard *v.* Pinckard, 24 Ala. 250.

California.— *In re* Byrne, 122 Cal. 260, 54 Pac. 957; Rose's Estate, 80 Cal. 166, 22 Pac. 86.

Georgia.— Thomas *v.* Payne, 88 Ga. 246, 14 S. E. 573.

Kentucky.— Quaintance *v.* Darnell, 14 Ky. L. Rep. 238, 322.

Missouri.— Ladd *v.* Stephens, 147 Mo. 319, 48 S. W. 915; Williams *v.* Petticrew, 62 Mo. 460.

New Hampshire.— Wendell *v.* French, 19 N. H. 205.

New Jersey.— Dey *v.* Codman, 39 N. J. Eq. 258. But *compare* King *v.* Berry, 3 N. J. Eq. 261.

New York.—Everts *v.* Everts, 62 Barb. 577.

North Carolina.—Clarke *v.* Cotton, 17 N. C. 51.

Oregon.— Muldrick *v.* Galbraith, 31 Oreg. 86, 49 Pac. 886.

South Carolina.—Roberts *v.* Johns, 24 S. C. 580.

See 22 Cent. Dig. tit. "Executors and Administrators," § 443.

Expenses of messenger.— Where part of the assets of an estate consist of a note made by a resident of another state, the executor is entitled to be allowed the expenses incurred by a messenger sent to the residence of the maker in an attempt to collect. Bowman *v.* Carr, 5 Lea (Tenn.) 571.

38. Purdy *v.* Purdy, 42 S. W. 89, 19 Ky. L. Rep. 823; Lafon *v.* His Creditors, 3 Mart. N. S. (La.) 707; Matter of Biggars, 39 Misc. (N. Y.) 426, 80 N. Y. Suppl. 214; *In re* Ingersoll, 20 N. Y. St. 356, 6 Dem. Surr. (N. Y.) 184; Pullman *v.* Willets, 4 Dem. Surr. (N. Y.) 536; Marsh *v.* Gilbert, 2 Redf. Surr. (N. Y.) 465; Berryhill's Appeal, 35 Pa. St. 245.

39. Jenkins *v.* Shaffer, 19 N. Y. St. 900, 6 Dem. Surr. (N. Y.) 59; *In re* Eby, 164 Pa. St. 249, 30 Atl. 124; Pickering's Estate, 4 Pa. Dist. 263; Miller's Estate, 13 Pa. Co. Ct. 137; Wilson's Estate, 1 Pa. Co. Ct. 509, 18 Wkly. Notes Cas. (Pa.) 483. But see *In re* Lucas, [1900] 1 Ir. 292.

In Louisiana the rule stated in the text has been asserted (Rabasse's Succession, 51 La. Ann. 590, 25 So. 326 [*followed* in Kernan's Succession, 105 La. 592, 30 So. 239]), but act 76 of 1900 allows such a payment to be charged among the expenses of administration.

Testamentary provision dispensing with bond.— A non-resident executor nominated by the will "without bond," will, on being appointed ancillary executor, be allowed the fee expended in obtaining security which is required of non-residents who are appointed as ancillary executors, provided such allowance has not already been made by the domiciliary court. Yerkes' Estate, 8 Pa. Dist. 36.

40. *In re* Ford, 29 Mont. 283, 74 Pac. 735. *Contra*, Edelen *v.* Edelen, 11 Md. 415.

for the outlay in his accounts,[41] but outlays because of his own bad judgment or remissness of duty and without benefit to the estate are not thus favored.[42]

o. Miscellaneous Expenditures. The personal representative has been allowed credit for advertising and printing done in the course of official duty,[43] special transactions which were prudent in protecting assets or settling debts of the estate,[44] the expenses of the journey of decedent's wife or near relative for whom decedent sent during his last illness,[45] the rent of an office used exclusively for the business of the estate,[46] the rent of a box in a safe deposit vault where necessary,[47] the charges of reasonable storage and custody,[48] tools, machinery, and hard ware purchased for the decedent's farm with the approval of the county judge,[49] buying out the interest of tenants of the decedent where necessary,[50] dues paid on building and loan stock belonging to the estate and pledged to a bank as security,[51] payments made for the preservation of the real property of the estate,[52] rent paid on an outstanding lease,[53] the expenses of acquiring title to land which the executor was obliged to purchase at judicial sale in collecting a debt to the estate,[54] expenses incurred in good faith in taking steps to recover foreign assets,[55] and expenses incurred in good faith, with the knowledge of and without objection from the heirs at law in securing growing fruit and crops and taking care of stock upon decedent's farm.[56] Where an administrator is allowed by the probate court to keep the estate together, he should be allowed credit for the expense which he has necessarily incurred in cultivating the plantation and disposing of the crops.[57] The court has refused to allow the representative credit for money paid out at the mere verbal request of the decedent on his death-bed,[58] or for

41. Cummings *v.* Bradley, 57 Ala. 224; Russell *v.* Wheeler, 129 Mich. 41, 88 N. W. 73; Meeker *v.* Straat, 38 Mo. App. 239.

42. Brackett *v.* Tillotson, 4 N. H. 208.

43. Reynolds *v.* Reynolds, 11 Ala. 1023.

44. *Alabama.*— Walker *v.* Walker, 26 Ala. 262.

Illinois.— Wingate *v.* Pool, 25 Ill. 102.

Kentucky.— Branham *v.* Com., 7 J. J. Marsh. 190.

Massachusetts.— Ripley *v.* Sampson, 10 Pick. 371.

New York.— Adair *v.* Brimmer, 74 N. Y. 539.

See 22 Cent. Dig. tit. "Executors and Administrators," § 435.

45. Jennison *v.* Hapgood, 10 Pick. (Mass.) 77.

46. Newell *v.* West, 149 Mass. 520, 21 N. E. 954; Bronson *v.* Bronson, 48 How. Pr. (N. Y.) 481; *In re* Semple, 189 Pa. St. 385, 42 Atl. 28.

47. Dudley *v.* Sanborn, 159 Mass. 185, 34 N. E. 181.

48. Nicholson *v.* Whitlock, 57 S. C. 36, 35 S. E. 412 (holding that an allowance for storage and insurance of cotton should not be refused because it was stored in a warehouse of which the administrator was part owner, in the absence of bad faith); Foster *v.* Stone, 67 Vt. 336, 31 Atl. 841.

Rent of apartments where goods are at decedent's death.— Where, on the contest of a will, the contestant alleged that the main provision of the will was void, and that the executor was an unfit person, the account of the latter should not be surcharged with the difference between the rent of a warehouse to store the goods of the decedent and the rent of the apartments in which she died and in which he allowed her goods to remain. Matter of Murray, 40 Misc. (N. Y.) 433, 82 N. Y. Suppl. 394.

49. James *v.* Craighead, (Tex. Civ. App. 1902) 69 S. W. 241.

50. Lambertson *v.* Vann, 134 N. C. 108, 46 S. E. 10.

51. State *v.* Taylor, 100 Mo. App. 481, 74 S. W. 1032, holding such payment proper without any order of court.

52. Hall's Estate, 10 Pa. Dist. 215.

Searching title.— An executor who necessarily incurs expense in searching the title of land belonging to his testator's estate for the purpose of paying off and obtaining an assignment of a mortgage thereon should be allowed the sum so paid. *In re* Bettels, 4 N. Y. Suppl. 393.

53. Matter of Peck, 79 N. Y. App. Div. 296, 80 N. Y. Suppl. 76 [*affirmed* in 177 N. Y. 538, 69 N. E. 1129].

54. Bowler's Estate, 8 Pa. Co. Ct. 522.

55. Bowman *v.* Carr, 5 Lea (Tenn.) 571.

56. Edwards *v.* Ela, 5 Allen (Mass.) 87.

57. Hinson *v.* Williamson, 74 Ala. 180.

Expenditures exceeding proceeds of sale.— Where an intestate had planted and at the time of his death was engaged in cultivating crops, the administrator, under Ala. Code (1876), §§ 2439, 2440, might be compelled to continue the cultivation of the crops and gather them for the market, and was entitled to credit on settlement for his reasonable expenses, although on account of natural causes the expenditures largely exceeded the proceeds of the sale of the crops. Tayloe *v.* Bush, 75 Ala. 432.

58. Matter of Teyn, 2 Redf. Surr. (N. Y.) 306; Turnipseed *v.* Sirrine, 60 S. C. 272, 38

pew-rent,[59] expenses incurred upon property while in another jurisdiction,[60] liquors used at an auction sale of assets,[61] money expended in carrying out a void trust,[62] the administrator's expenses preliminary to applying for letters,[63] or his time and money expended while endeavoring to effect a private settlement with the heirs.[64] An executor has no right to buy off contestants of the will and charge the expense against the estate.[65]

9. Interest on Expenditures. Under due circumstances the advance of money to the estate by an executor or administrator will not only be justified but commended, so as to entitle him to a fair allowance of interest thereon;[66] but such a charge will be viewed with caution and the circumstances scrutinized, and where no necessity existed justifying such advance, or where the advantage claimed did not actually exist, interest may be disallowed.[67]

J. Individual Interest in Transactions — 1. In General. An executor or administrator cannot be allowed to acquire individual interests inconsistent with the representative capacity he sustains for the benefit of the estate, nor to make a personal profit out of his dealings with the property of the estate,[68] and trans-

S. E. 423; Kerr *v.* Hill, 2 Desauss. (S. C.) 279.

59. Milmo's Succession, 47 La. Ann. 126, 16 So. 772.

60. Roberts *v.* Rogers, 28 Miss. 152, 61 Am. Dec. 542.

61. Griswold *v.* Chandler, 5 N. H. 492.

62. O'Connor *v.* Gifford, 3 N. Y. Suppl. 207, 6 Dem. Surr. (N. Y.) 71.

63. *In re* Byrne, 122 Cal. 260, 54 Pac. 957.

64. Clarke *v.* Clay, 31 N. H. 393.

65. Bolles *v.* Bacon, 3 Dem. Surr. (N. Y.) 43.

66. *Alabama.*— Pearson *v.* Darrington, 32 Ala. 227.

Arkansas.— Trimble *v.* James, 40 Ark. 393, simple interest only.

New Jersey.— Liddel *v.* McVickar, 11 N. J. L. 44, 19 Am. Dec. 369.

New York.— Mann *v.* Lawrence, 3 Bradf. Surr. 424.

Pennsylvania.— Callaghan *v.* Hall, 1 Serg. & R. 241.

Virginia.— Jackson *v.* Jackson, 1 Gratt. 143.

See 22 Cent. Dig. tit. "Executors and Administrators," § 447.

67. *Kentucky.*— McCracken *v.* McCracken, 6 T. B. Mon. 342.

Missouri.— Booker *v.* Armstrong, 93 Mo. 49, 4 S. W. 727.

New Jersey.— Liddel *v.* McVickar, 11 N. J. L. 44, 19 Am. Dec. 369.

North Carolina.—Arnett *v.* Linney, 16 N. C. 369.

Tennessee.— Royston *v.* McCulley, (Ch. App. 1900) 59 S. W. 725, 52 L. R. A. 899.

England.— See Gordon *v.* Trail, 8 Price 416.

See 22 Cent. Dig. tit. "Executors and Administrators," § 447.

68. *Arkansas.*— Jacoway *v.* Hall, 67 Ark. 340, 55 S. W. 12.

Louisiana.— See Thomas *v.* Bienvenu, 35 La. Ann. 936.

Michigan.— Loomis *v.* Armstrong, 49 Mich. 521, 14 N. W. 505.

New York.— Parker *v.* Day, 155 N. Y. 383, 49 N. E. 1046 [*reversing* 12 Misc. 510, 33 N. Y. Suppl. 676]; Matter of Rainforth, 40 Misc. 609, 83 N. Y. Suppl. 57.

Ohio.— Cox *v.* John, 32 Ohio St. 532.

Pennsylvania.— Low's Estate, 3 Pa. Dist. 316.

South Carolina.— Turnipseed *v.* Sirrine, 60 S. C. 272, 38 S. E. 423.

Tennessee.— Johnson *v.* Kay, 8 Humphr. 142.

Virginia.— Cross *v.* Cross, 4 Gratt. 257.

England.— *Ex p.* James, 8 Ves. Jr. 337, 7 Rev. Rep. 56, 32 Eng. Reprint 385.

Canada.— *In re* Sinclair, 2 Ont. L. Rep. 349.

See 22 Cent. Dig. tit. "Executors and Administrators," § 467.

Purchase of claims at discount see *infra*, X, A, 21.

The representative is presumed to act for the benefit of the estate and not for his individual benefit when acting in reference to the subject of his trust. Johnson *v.* Blackman, 11 Conn. 342. See, generally, Trusts.

Subscription to additional corporate stock in individual capacity.— An executor of a deceased stock-holder of a corporation which has increased its stock has no right to make a profit for himself by taking additional shares which the estate is entitled to subscribe for in his own name, and he must surrender such shares, with the dividends earned thereon; but he is entitled to credit his accounts for the amount paid on the stock from his own funds. Turnipseed *v.* Sirrine, 60 S. C. 272, 38 S. E. 423. See also *In re* Sinclair, 2 Ont. L. Rep. 349.

Salary as corporate officer.— Where the majority of the stock and bonds of a corporation belonged to an estate, and the executors elected one of their number president at the same salary as was paid the president during the lifetime of deceased, they were entitled to allowance for their proportion of the amount paid for such salary. Matter of Fidelity Loan, etc., Co., 23 Misc. (N. Y.) 211, 51 N. Y. Suppl. 1124. See also Matter of Schaefer, 65 N. Y. App. Div. 378, 73 N. Y. Suppl. 57 [*modifying* 34 Misc. 34, 69 N. Y.

actions in which the representative as an individual deals with himself in his representative capacity are always regarded with suspicion and will be set aside if inequitable.[69] Thus while his general right to dispose of assets is conceded the executor or administrator should not purchase or speculate with property of the estate for his individual benefit,[70] divert the funds of the estate into business or investment for his own private gain,[71] buy out for himself his decedent's share in a partnership,[72] or sell his own property to the estate.[73] The representative cannot settle his own debts to the estate at undue personal advantage to himself,[74] take secret fees, commissions, or discounts, from creditors or others with whom he deals as representative, at the cost of the estate,[75] use money of the estate for his individual benefit,[76] sell or pledge assets as special security for or payment of his individual debt or for some individual advantage,[77] or in general take for his own benefit a position regarding the estate in which his interest will conflict with his duty.[78] The representative may, however, properly apply the assets of the

Suppl. 489, and *affirmed* in 171 N. Y. 686, 64 N. E. 1125].

Purchase of mortgage at discount in belief that property belongs to estate.— Where an executor in the belief that mortgaged property belongs to the estate purchases the mortgage at a discount with his own individual money but makes no profit out of the transaction the mortgagor will not be entitled to a rebate of the discount. Pinneo *v.* Goodspeed, 120 Ill. 524, 12 N. E. 196 [*affirming* 22 Ill. App. 50].

69. Hyland *v.* Baxter, 42 Hun (N. Y.) 9; Bryan *v.* Kales, 134 U. S. 126, 10 S. Ct. 435, 33 L. ed. 829.

70. *Kentucky.*—Kellar *v.* Beelor, 5 T. B. Mon. 573.

Maryland.— Scott *v.* Burch, 6 Harr. & J. 67.

Minnesota.— St. Paul Trust Co. *v.* Kittson, 62 Minn. 408, 65 N. W. 74.

New Jersey.— Arrowsmith *v.* Van Harlingen, 1 N. J. L. 26; King *v.* Berry, 3 N. J. Eq. 261.

New York.— Ackerman *v.* Emott, 4 Barb. 626.

Pennsylvania.—Haberman's Appeal, 101 Pa. St. 329.

See 22 Cent. Dig. tit. "Executors and Administrators," § 467; and *infra*, VIII, O, 9, d, (VI), (B); VIII, O, 12, a; VIII, P, 2, f, (I); VIII, P, 4, b; XII, M, 4, a.

Transfer of corporate stock.— Where an executor holding shares in bank-stock as such transfers them to himself, he will be liable for the value of the stock as of the time of such transfer, and interest thereon afterward. Jameson *v.* Shelby, 2 Humphr. (Tenn.) 198.

71. Malone *v.* Kelley, 54 Ala. 532; Williamson *v.* Mobile Branch Bank, 7 Ala. 906, 42 Am. Dec. 617; Field *v.* Colton, 7 Ill. App. 379; Wiley's Appeal, 8 Watts & S. (Pa.) 244. See also St. Paul Trust Co. *v.* Kittson, 62 Minn. 408, 65 N. W. 74.

72. Bagwell *v.* Bagwell, 72 Ga. 92; Moses *v.* Moses, 50 Ga. 9. See also Matter of Barlow, 15 N. Y. St. 721; Hall's Appeal, 40 Pa. St. 409.

73. Baldwin *v.* Carleton, 15 La. 394.

74. Grant *v.* Reese, 94 N. C. 720.

Settlement of claim against executor's wife. — Where a testatrix herself had invested one thousand dollars on mortgage, and there was no reason to suppose that she was unaware that the terre-tenant was the wife of her executor, and a legatee who was ignorant of the ownership joined in a written request to the executors to accept five hundred dollars in full settlement rather than incur the expense incident to foreclosure, the validity of the agreement was not affected by such ignorance, after it had been acted on by the executors, especially when on a sale of the property the amount realized was only about nine dollars in excess of what was received under the settlement. Edenborn's Estate, 10 Pa. Dist. 184.

75. Reeside *v.* Reeside, 6 Phila. (Pa.) 507; Chapman *v.* Comings, 43 Vt. 16.

76. Matter of Meagley, 39 N. Y. App. Div. 83, 56 N. Y. Suppl. 503.

77. *Alabama.*—Williamson *v.* Mobile Branch Bank, 7 Ala. 906, 42 Am. Dec. 617.

Missouri.— State *v.* Berning, 74 Mo. 87.

Pennsylvania.— Miller *v.* Ege, 8 Pa. St. 352.

South Carolina.— Simons *v.* Bryce, 10 S. C. 354.

Virginia.—Dodson *v.* Simpson, 2 Rand. 294.

See 22 Cent. Dig. tit. "Executors and Administrators," § 467.

Transaction held not void as mortgage for individual debt see Roarty *v.* McDermott, 146 N. Y. 296, 41 N. E. 30 [*reversing* 84 Hun 527, 32 N. Y. Suppl. 853].

Who may attack mortgage.—Where a legatee, who was also the executor of an estate, gave to a stranger a mortgage on personal property of the estate to secure his individual debt, it could not be questioned by the mortgagee for want of title in the mortgagor, for being legatee in possession he had an inchoate title, and none but persons interested in the estate could dispute his right as executor to give the mortgage. Boeger *v.* Langenberg, 42 Mo. App. 7.

78. *California.*— *In re* Adams, 131 Cal. 415, 63 Pac. 838.

Kentucky.— Floyd *v.* Massie, 4 Bibb 427.

Michigan.— Sheldon *v.* Rice, 30 Mich. 296, 18 Am. Rep. 136.

New York.— Kyle *v.* Kyle, 67 N. Y. 400.

Pennsylvania.— Mueller's Estate, 8 Pa. Dist. 70.

estate to the payment of a debt of his decedent in its due order, although he is individually liable as the decedent's surety,[79] or even, it has been held, where he is in his individual capacity the principal debtor, and the decedent the surety.[80] The representative cannot of course acquire title by adverse holding to any of the assets,[81] nor is he entitled to retain assets of the estate at their inventoried value;[82] but he may retain assets at a fair rate of valuation of which the appraisement is *prima facie* proof,[83] although he cannot make a profit by retaining them at a price lower than what others have offered and he has refused.[84] An executor who without authority sells corporate stock belonging to the estate is liable only for the loss then resulting to the estate, and legatees cannot hold him to account as trustee for profits made by him some years subsequently in the repurchase and sale of such stock.[85]

2. As Affecting Person Dealing With Representative. The representative's sale or pledge of assets or other transactions made for other purposes than the due discharge of his duty as fiduciary will not be sustained against the interests of the estate, where the person with whom he dealt had notice of his bad faith or breach of trust, and in such case the transaction may be set aside and restitution enforced;[86] but a third person who in dealing with the representative acted in good faith and without notice of the representative's bad faith, and parted with consideration, will be protected in the transaction.[87]

79. Rowland *v.* Cocke, 2 J. J. Marsh. (Ky.) 79.

80. Shelton *v.* Carpenter, 60 Ala. 201.

81. Dozier *v.* McWhorter, 117 Ga. 786, 45 S. E. 61.

82. Lindsay *v.* Lindsay, 1 Desauss. (S. C.) 150; Chifflet *v.* Willis, 74 Tex. 245, 11 S. W. 1105.

83. Ely *v.* Com., 5 Dana (Ky.) 398. See also Miller *v.* Towles, 4 J. J. Marsh. (Ky.) 255 (where the court, although denying the legal right of the representative to purchase any of the estate in his hands, said that he might retain a chattel, advancing his own money, being chargeable in such case with its appraised value); Meridith *v.* Nichols, 1 A. K. Marsh. (Ky.) 595. But *compare* Hall *v.* Griffith, 2 Harr. & J. (Md.) 483.

Where the representative appropriates or makes use of personalty of the estate as his own, he will be charged with such property at its appraised value. Keenan's Estate, 6 Kulp (Pa.) 73 (with interest); Benson *v.* Bruce, 4 Desauss. (S. C.) 463.

84. Wiley's Appeal, 8 Watts & S. (Pa.) 244.

85. Hiller *v.* Ladd, 85 Fed. 703, 29 C. C. A. 394.

86. *Alabama.*—Swink *v.* Snodgrass, 17 Ala. 653, 52 Am. Dec. 190.

Georgia.— Rogers *v.* Fort, 19 Ga. 94; Carnes *v.* Jones, Ga. Dec. 170.

Indiana.— Nugent *v.* Laduke, 87 Ind. 482; Rogers *v.* Zook, 86 Ind. 237; Krutz *v.* Stewart, 76 Ind. 9; Thomasson *v.* Brown, 43 Ind. 203; Austin *v.* Willson, 21 Ind. 252.

Maryland.— Miller *v.* Williamson, 5 Md. 219; Williamson *v.* Morton, 2 Md. Ch. 94.

Mississippi.— Booyer *v.* Hodges, 45 Miss. 78; Miller *v.* Helm, 2 Sm. & M. 687; Prosser *v.* Leatherman, 4 How. 237, 34 Am. Dec. 121.

New York.— Moore *v.* American L. & T. Co., 115 N. Y. 65, 21 N. E. 681; Colt *v.* Lasnier, 9 Cow. 320.

North Carolina.— Grant *v.* Bell, 87 N. C. 34; Latham *v.* Moore, 59 N. C. 167; Smith *v.* Fortescue, 45 N. C. 127, 57 Am. Dec. 593; Wilson *v.* Doster, 42 N. C. 231; Huson *v.* McKenzie, 16 N. C. 463.

Pennsylvania.— Petrie *v.* Clark, 11 Serg. & R. 377, 14 Am. Dec. 636; Parrish *v.* Brooks, 4 Brewst. 154; Ellis' Appeal, 8 Wkly. Notes Cas. 538; Oram's Estate, 9 Phila. 358.

South Carolina.— Rhame *v.* Lewis, 13 Rich. Eq. 269; Thomas *v.* Gage, Harp. Eq. 197.

Tennessee.— Smartt *v.* Watterhouse, 6 Humphr. 158.

Texas.— Williams *v.* Verne, 68 Tex. 414, 4 S. W. 548; Bledsoe *v.* White, 42 Tex. 130.

Virginia.—Dodson *v.* Simpson, 2 Rand. 294.

United States.— Smith *v.* Ayer, 101 U. S. 320, 25 L. ed. 955.

See 22 Cent. Dig. tit. "Executors and Administrators," § 468.

In what bad faith may consist.— The bad faith of an executor or administrator, such as may charge the person with whom he deals, may consist in bad faith toward his co-executor or co-administrator (Johnson *v.* Mangum, 65 N. C. 146), or in some wrongful transaction whereby the debt one owes to the estate is set off against a private debt of the representative (Thomas *v.* Gage, Harp. Eq. (S. C.) 197).

87. Ward *v.* Lewis, 3 J. J. Marsh. (Ky.) 505; Sutherland *v.* Brush, 7 Johns. Ch. (N. Y.) 17, 11 Am. Dec. 383; Hemmy *v.* Hawkins, 102 Wis. 56, 78 N. W. 177, 72 Am. St. Rep. 863; Lowry *v.* Commercial, etc., Bank, 15 Fed. Cas. No. 8,581, Brunn. Col. Cas. 331, Taney 310.

Where equities equal law must prevail.— Thackum *v.* Longworth, 2 Hill Eq. (S. C.) 267. See, generally, Equity, 16 Cyc. 1.

K. Waste, Conversion, or Embezzlement of Assets — **1. In General.** An executor or administrator is personally liable for waste,[88] or for conversion,[89] misapplication,[90] or embezzlement of the assets of the estate,[91] and in modern practice a convenient remedy is found by action upon his official bond,[92] although statute penalties are also prescribed for conversion, embezzlement, and kindred offenses committed by the representative.[93] The beneficiaries of an estate may elect in case of conversion either to charge the representative with the value of the substituted property and its natural increase, or else to claim and pursue the converted property wherever it can be traced.[94] One cannot charge as a devastavit in the personal representative an act done with his own consent and concurrence.[95]

2. What Constitutes Waste.[96] Waste may consist in cutting timber from the land without authority,[97] or in using fallen timber for individual purposes.[98] Acquiescence in waste or conversion by another may render the representative liable.[99] The payment of interest on obligations of the decedent, although it

88. *Kentucky.*— McCracken *v.* McCracken, 6 T. B. Mon. 342; Finley *v.* Pearson, 76 S. W. 374, 25 Ky. L. Rep. 766; Harpending *v.* Daniel, 11 Ky. L. Rep. 858.

New Hampshire.— Gordon *v.* West, 8 N. H. 444.

New York.— Matter of Feierabend, 38 Misc. 524, 77 N. Y. Suppl. 1106.

Pennsylvania.— Montier's Estate, 7 Phila. 491; Zweidinger's Estate, 29 Pittsb. Leg. J. 63.

England.— Dunne *v.* Doran, 13 Ir. Eq. 545.

Canada.— Sovereign *v.* Sovereign, 15 Grant Ch. (U. C.) 559.

See 22 Cent. Dig. tit. "Executors and Administrators," § 469.

Nature of liability.— A devastavit by an administrator only creates a simple contract debt to the next of kin. Dunne *v.* Doran, 13 Ir. Eq. 545.

How waste established.— In an action of debt against an executor merely suggesting a devastavit, the executor is not to be held personally liable, as a devastavit can only be established by establishing the debt against the estate by matter of record, and showing assets admitted by defendant's plea, confession, or default, or found by the verdict of a jury, against a plea of *plene administravit* generally, and that defendant has wasted such assets. Ford *v.* Rouse, Rice (S. C.) 219.

The time of a devastavit of an administrator is properly ascertained from the return of *nulla bona* on an execution issued against him in his representative character. Greenup *v.* Woodworth, 1 Ill. 254.

Equitable assets.— An executor or administrator is not liable at law as for a devastavit in relation to equitable assets unless by force of some statute. Green *v.* Collins, 28 N. C. 139.

89. Miller *v.* Miller, 73 Md. 442, 21 Atl. 321; *In re* Buck, 185 Pa. St. 57, 39 Atl. 821, 64 Am. St. Rep. 816. See also Matter of Feierabend, 38 Misc. (N. Y.) 524, 77 N. Y. Suppl. 1106.

90. Matter of Meagley, 39 N. Y. App. Div. 83, 56 N. Y. Suppl. 503.

An agreement of distributees to indemnify against loss in defending an action does not save the executor from the consequences of a misapplication of the funds by himself or his attorney. Reilly *v.* Porcher, 46 N. Y. App. Div. 290, 61 N. Y. Suppl. 662.

91. See Connor *v.* Akin, 34 Ill. App. 431.

92. *In re* Richart, 58 Ill. App. 91; Hagthorp *v.* Hook, 1 Gill & J. (Md.) 270; Smith *v.* Jewett, 40 N. H. 513. And see, generally, *infra*, XVII.

Proceeds of sale not belonging to estate.— Where an administrator sells realty of the estate under order of court directing that one third of the proceeds be paid to the widow of the intestate, and pays out for the estate a sum exceeding two thirds of the total proceeds of the sale, but fails to account to the widow for the balance, he is not liable to the estate on his bond for a devastavit, as the sum for which he failed to account belongs to the widow, and not to the estate. Cullen *v.* State, 28 Ind. App. 335, 62 N. E. 759.

93. See Connor *v.* Akin, 34 Ill. App. 431; Phelps *v.* Martin, 74 Ind. 339; State *v.* Pannell, (Miss. 1903) 34 So. 388; Spaulding *v.* Cook, 48 Vt. 145; Roys *v.* Roys, 13 Vt. 543.

Construction of statute.— The Mississippi statute making it a felony for any executor to unlawfully convert to his own use money or other property of the estate, or to fail to immediately pay such money or deliver such thing over according to his legal obligation when lawfully required to do so, does not apply to a refusal by an executor to pay a debt due from the estate on its reduction to judgment. State *v.* Pannell, (1903) 34 So. 388.

94. Blackwell *v.* Blackwell, 33 Ala. 57, 70 Am. Dec. 556.

95. Cain *v.* Hawkins, 50 N. C. 192.

96. See, generally, Waste.

97. McCracken *v.* McCracken, 6 T. B. Mon. (Ky.) 342; Finley *v.* Pearson, 76 S. W. 374, 25 Ky. L. Rep. 766; Gordon *v.* West, 8 N. H. 444; Casto *v.* Kintzel, 27 W. Va. 750.

Cutting timber from wild lands in a careful and prudent manner is not waste. McNichol *v.* Eaton, 77 Me. 246.

98. McCracken *v.* McCracken, 6 T. B. Mon. (Ky.) 342.

99. Pearson *v.* Darrington, 32 Ala. 227.

might have been avoided, is not necessarily waste.[1] Nor is the mere fact that an administrator expends money in a reasonable effort to save property of his intestate situated in another state sufficient to convict him of a devastavit.[2] In Arkansas it has been held that there can be no devastavit which will sustain an action against an administrator until he has violated an order of the probate court to pay creditors.[3]

3. What Constitutes Conversion. Where an administrator had certain railroad stock belonging to his intestate assigned to himself personally and for his own benefit, this was a conversion of the stock for which he was responsible.[4] A *bona fide* claim by an executor that a slave which had belonged to his testatrix belonged to him by virtue of a gift from the testatrix was not such a tortious act as made the executor liable for the value of the slave, who died before the settlement of the estate.[5] Where the administrator married the widow of the intestate and there were children of the intestate in their minority, the possession and use of the property by the administrator was not evidence of a conversion.[6]

4. Mingling Trust and Personal Funds or Property. An executor or administrator should preserve the funds and property of the decedent's estate distinct from his own so that such assets may be known and readily identified;[7] and if he mingles the trust property with his own or with other property so that the two are indistinguishable, he becomes personally liable,[8] and beneficiaries may at their option elect to hold him accountable as for conversion in doing so.[9] There is, however, an inclination to respect innocent motive and the absence of intent or opportunity to make an individual profit, where due prudence was exercised under all the circumstances, so as to relieve the representative in such a case from strict liability as though for conversion.[10]

Waste by co-executor.— Where an executor saw the estate wasted from time to time by his co-executrix and an agent she had appointed, and took no steps to prevent the same, he was charged with the loss. Sovereign *v.* Sovereign, 15 Grant Ch. (U. C.) 559.

Timber cut by heir.— Where the heirs of one who died intestate, supposing that all the debts had been paid by the administrator, divided the real estate among them, after which one of them cut wood and timber on the lands to a large amount, it was held in a suit brought by a creditor against the administrator on his bond that this did not constitute waste by the administrator, and that he was not bound to account for the value of the wood and timber cut, although such estate ultimately proved insolvent and the administrator was one of the heirs and participated in the division. Fuller *v.* Young, 10 Me. 365.

1. Beale *v.* Barnett, 64 S. W. 838, 23 Ky. L. Rep. 1118; *In re* Stevens, [1898] 1 Ch. 162, 67 L. J. Ch. 118, 77 L. T. Rep. N. S. 508, 46 Wkly. Rep. 177 [*affirming* [1897] 1 Ch. 422, 66 L. J. Ch. 155, 76 L. T. Rep. N. S. 18, 45 Wkly. Rep. 284].

2. Shinn's Estate, 166 Pa. St. 121, 30 Atl. 1026, 1030, 45 Am. St. Rep. 656.

3. Outlaw *v.* Yell, 5 Ark. 468; Tate *v.* Norton, 94 U. S. 746, 24 L. ed. 222.

4. Whitley *v.* Alexander, 73 N. C. 444.

5. Smith *v.* Rosser, 37 Ga. 353.

6. Montgomery Branch Bank *v.* Wade, 13 Ala. 427.

7. Key *v.* Boyd, 10 Ala. 154; Field *v.* Colton, 7 Ill. App. 379; Brackenridge *v.* Holland, 2 Blackf. (Ind.) 377, 20 Am. Dec. 123; Hagthorp *v.* Hook, 1 Gill & J. (Md.) 270.

An executrix of a will which gives her a life-estate in the real and personal property of testator becomes a trustee for the residuary legatees, on proving the will, and under obligations to keep accurate accounts of the estate, and keep its funds separate from her own. Zion Evangelical Lutheran Church *v.* Smith, 58 N. J. Eq. 25, 43 Atl. 428.

8. Adams *v.* Westbrook, 41 Miss. 385; Zion Evangelical Lutheran Church *v.* Smith, 58 N. J. Eq. 25, 43 Atl. 428; Matter of Hayes, 40 Misc. (N. Y.) 500, 82 N. Y. Suppl. 792; Lippard *v.* Roseman, 72 N. C. 427.

The doctrine of confusion of goods does not apply so as to cause the representative to forfeit his own property in cases of mingling. Matter of Mullon, 74 Hun (N. Y.) 358, 26 N. Y. Suppl. 683 [*affirmed* in 145 N. Y. 98, 39 N. E. 821].

Mere delay by executors in calling in a debt due to the testator from a firm of which some of the executors are members does not give the estate any right to share in the profits of the business. Vyse *v.* Foster, L. R. 8 Ch. 309, 42 L. J. Ch. 245, 27 L. T. Rep. N. S. 774, 21 Wkly. Rep. 207 [*affirmed* in L. R. 7 H. L. 318, 44 L. J. Ch. 37, 31 L. T. Rep. N. S. 177, 23 Wkly. Rep. 355].

9. Henderson *v.* Henderson, 58 Ala. 582; Ditmar *v.* Bogle, 53 Ala. 169; Raines *v.* Raines, 51 Ala. 237; McElroy *v.* Thompson, 42 Ala. 656; Norwood *v.* Duncan, 10 Mart. (La.) 708.

10. State *v.* Cheston, 51 Md. 352; Coggins' Appeal, 3 Walk. (Pa.) 426; Burnham *v.* Marshall, 56 Vt. 365.

5. Extent of Liability. Actual value of the assets at the time of their waste, conversion, embezzlement, or misappropriation, computed in lawful money, is usually the measure of the liability of the executor or administrator who was at fault.[11]

6. Rank of Claims For Waste. It has been held that a creditor holding a specialty debt due from an intestate and coming against the estate of his administrator, on account of a devastavit, can only take equally with such administrator's simple contract creditors, while his sureties must make up the balance.[12]

7. Lien on Property of Representative. There is no specific lien on the property of the representative to make good his waste or embezzlement.[13]

8. Discharge From Liability. An administratrix who allows her husband to receive and convert to his own use the funds of an infant next of kin is not discharged from liability therefor upon the subsequent appointment of the husband as guardian of the said infant, but is equally liable with such guardian.[14] The fact that the representative has distributed the estate of the decedent does not relieve him from liability to a creditor who sues him for a devastavit within the period fixed by statute.[15]

9. Restraining Waste. The representative may be restrained from committing waste[16] or ruining the estate by collusion with pretended creditors.[17]

L. Loss or Depreciation of Assets — 1. In General. Executors and administrators are not insurers, nor will they be chargeable with the loss or depreciation of the assets where they have acted in good faith and with due prudence and diligence in the care and management of the estate;[18] but they are liable for

11. Glenn *v.* Glenn, 41 Ala. 571; Frey's Estate, 6 Pa. Co. Ct. 84; Moses *v.* Hart, 25 Gratt. (Va.) 795.

In case of tortious conversion, the representative is chargeable with the highest value of the property. Irby *v.* Kitchell, 42 Ala. 438.

Value and profits.— Where an administratrix permitted the saloon of her intestate to pass into the control of her husband, she was held chargeable with the value of the saloon and with its profits if it was conducted in her interest. *In re* Suess, 37 Misc. (N. Y.) 459, 75 N. Y. Suppl. 938.

When inventory value conclusive on representative.— Where an administrator, on final accounting, was charged with the inventory value of certain chattels which he had allowed the widow to take, he cannot object that such value was too high, since, if he does not subject the goods to the proper test of their value by public sale, the inventory value is conclusive on him. Reiff's Estate, 3 Pa. L. J. Rep. 310, 5 Pa. L. J. 255.

12. Carow *v.* Mowatt, 2 Edw. (N. Y.) 57.

13. Wilkes *v.* Harper, 2 Barb. Ch. (N. Y.) 338 [*affirmed* in 1 N. Y. 586].

Lien of judgment.— In an action for embezzling the estate of an intestate, the county court has no authority to make its judgment a lien on all the lands of defendants, and the circuit court on appeal has no more power. Connor *v.* Akin, 34 Ill. App. 431.

14. Altman *v.* Wile, 19 N. Y. Suppl. 500 [*affirmed* in 141 N. Y. 574, 36 N. E. 228].

15. Herpending *v.* Daniels, 11 Ky. L. Rep. 858.

16. Overton *v.* Overton, 10 La. 472.

Who may bring suit to restrain.— Minor children, who are beneficiaries of their deceased father's estate after the expiration of the life-estate of the mother, who is also executrix, may bring suit to restrain waste by the executrix in attempting to maintain a high standard of living for herself and children. Bentley *v.* Bentley, (N. J. Ch. 1897) 38 Atl. 286.

17. Overton *v.* Overton, 10 La. 472.

18. *Alabama.*— Waller *v.* Ray, 48 Ala. 468, failure to collect rent.

Arkansas.— Dyer *v.* Jacoway, 59 Ark. 217, 6 S. W. 902.

California.— *In re* Fernandez, 119 Cal. 579, 51 Pac. 851.

Kentucky.— Messmore *v.* Stone, 6 Ky. L. Rep. 596.

Louisiana.— Stirling *v.* Lawrason, 31 La. Ann. 169.

Mississippi.— Conwill *v.* Livingston, 61 Miss. 641.

Missouri.— Powell *v.* Hurt, 108 Mo. 507, 17 S. W. 985; Stong *v.* Wilkson, 14 Mo. 116.

New Hampshire.—Stevens *v.* Gage, 55 N. H. 175, 20 Am. Rep. 191.

New Jersey.— *In re* Barcalow, 29 N. J. Eq. 282.

New York.— McCabe *v.* Fowler, 84 N. Y. 314; Matter of Thompson, 41 Misc. 420, 84 N. Y. Suppl. 1111; Upson *v.* Badeau, 3 Bradf. Surr. 13.

North Carolina.— Pate *v.* Oliver, 104 N. C. 458, 10 S. E. 709; Keener *v.* Finger, 70 N. C. 35; Womble *v.* George, 64 N. C. 759; Finger *v.* Finger, 64 N. C. 183; Nelson *v.* Hall, 58 N. C. 32; Holderness *v.* Palmer, 57 N. C. 107; Deberry *v.* Ivey, 55 N. C. 370; Williams *v.* Maitland, 36 N. C. 92; Utly *v.* Rawlins, 22 N. C. 438; Perry *v.* Maxwell, 17 N. C. 488.

Oregon.— See *In re* Osburn, 36 Oreg. 8, 58 Pac. 521.

losses which are the consequence of bad faith or the want of due prudence and diligence.[19]

Pennsylvania.— Dabney's Appeal, 120 Pa. St. 344, 14 Atl. 158; *In re* Calhoun, 6 Watts 185; Donnelly's Estate, 8 Pa. Dist. 182. See also Thomas' Estate, 2 Kulp 213.

South Carolina.— Tompkins *v.* Tompkins, 18 S. C. 1; Johnson *v.* Henagan, 11 S. C. 93; Twitty *v.* Houser, 7 S. C. 153; O'Dell *v.* Young, McMull. Eq. 155; Taveau *v.* Ball, 1 McCord Eq. 456; Doud *v.* Sanders, Harp. Eq. 277; Webb *v.* Bellinger, 2 Desauss. 482.

Tennessee.— *In re* Cator, 14 Lea 408; Mickle *v.* Brown, 4 Baxt. 468.

Texas.— Townsend *v.* Munger, 9 Tex. 300.

Virginia.— Jones *v.* Jones, 86 Va. 845, 11 S. E. 426; Le Grand *v.* Fitch, 79 Va. 635; Cooper *v.* Cooper, 77 Va. 198; Tanner *v.* Bennett, 33 Gratt. 251.

West Virginia.— Van Winkle *v.* Blackford, 54 W. Va. 621, 46 S. E. 589; Anderson *v.* Piercy, 20 W. Va. 282.

United States.— Peyatte *v.* English, 19 Fed. Cas. No. 11,054*a*, Hempst. 24.

England.— Job *v.* Job, 6 Ch. D. 562, 26 Wkly. Rep. 206; Selby *v.* Bowie, 4 Giff. 300, 9 Jur. N. S. 432 [*affirmed* in 9 Jur. N. S. 425, 8 L. T. Rep. N. S. 372, 11 Wkly. Rep. 606].

Canada.— Higgins *v.* Ontario, 27 Ont. App. 432 [*affirming* 30 Ont. 684].

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 360, 472.

A failure to enter deficiency judgments in foreclosures brought by the administrator does not render him personally liable for the deficiency where the judgments would have been worthless. Matter of Hayes, 40 Misc. (N. Y.) 500, 82 N. Y. Suppl. 792.

A loss of interest arising from a debtor's refusal to pay an executor a debt before probate is too remote a consequence of a delay in proving the will to render the executor liable to account on the footing of wilful default. *In re* Stevens, [1897] 1 Ch. 422, 66 L. J. Ch. 155, 76 L. T. Rep. N. S. 18, 45 Wkly. Rep. 284 [*affirmed* in [1898] 1 Ch. 162, 67 L. J. Ch. 118, 77 L. T. Rep. N. S. 508, 46 Wkly. Rep. 177].

The fact that an administrator pays off a lien on personal property of the estate, which, on a subsequent sale at public auction, fails to bring the amount of the lien, does not establish gross mismanagement of the estate, and the administrator is not chargeable with the loss, where he acted in good faith, and with reasonable care and purdence. *In re* Armstrong, 125 Cal. 603, 58 Pac. 183.

The burden of proof is on those charging the representative with negligence. Johnson's Estate, 11 Phila. (Pa.) 83. But see *In re* Conser, 40 Oreg. 138, 66 Pac. 607, holding that it is incumbent upon the representative, if there is any loss, to show the cause thereof, so that the court can see if it was incurred without his fault.

19. *Alabama.*— Eubank *v.* Clark, 78 Ala. 73; Harris *v.* Parker, 41 Ala. 604; Dean *v.* Rathbone, 15 Ala. 328.

Indiana.— Rubottom *v.* Morrow, 24 Ind. 202, 87 Am. Dec. 324.

Kentucky.— Henderson Trust Co. *v.* Stuart, 108 Ky. 167, 55 S. W. 1082, 21 Ky. L. Rep. 1164, 48 L. R. A. 49; Foster *v.* Foster, 71 S. W. 524, 24 Ky. L. Rep. 1396.

Louisiana.—Stone's Succession, 31 La. Ann. 311; Lafon *v.* His Creditors, 3 Mart. N. S. 707.

New Hampshire.— Tuttle *v.* Robinson, 33 N. H. 104.

New Jersey.— Lindsley *v.* Dodd, 53 N. J. Eq. 69, 30 Atl. 896.

New York.— Brinckerhoff *v.* Farias, 52 N. Y. App. Div. 256, 65 N. Y. Suppl. 358; Prescott's Estate, Tuck. Surr. 430.

North Carolina.— Smith *v.* Smith, 79 N. C. 455; Beall *v.* Darden, 39 N. C. 76.

Pennsylvania.— Wilson's Appeal, 115 Pa. St. 95, 9 Atl. 473; Callaghan *v.* Hill, 1 Serg. & R. 241; Schada's Estate, 14 Wkly. Notes Cas. 360.

Vermont.— *In re* Hall, 70 Vt. 458, 41 Atl. 508.

Virginia.— Davis *v.* Chapman, 83 Va. 67, 1 S. E. 472, 5 Am. St. Rep. 251; Strother *v.* Hull, 23 Gratt. 652; Miller *v.* Jeffress, 4 Gratt. 472.

West Virginia.— Brewer *v.* Hutton, 45 W. Va. 106, 30 S. E. 81, 72 Am. St. Rep. 804.

England.— Job *v.* Job, 6 Ch. D. 562, 26 Wkly. Rep. 206; Piety *v.* Stace, 4 Ves. Jr. 620, 31 Eng. Reprint 319.

Canada.— Lawson *v.* Crookshank, 2 Ch. Chamb. (U. C.) 426.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 360, 472.

The representative has been held liable for a loss resulting from neglect to have a "vacancy permit" from an insurance company extended, the property having been destroyed by fire within the time for which the company had agreed to extend the permit upon application (Henderson Trust Co. *v.* Stuart, 108 Ky. 167, 55 S. W. 1082, 21 Ky. L. Rep. 1164, 48 L. R. A. 49), for a loss resulting from his granting a solvent surety on a note, the maker of which was insolvent, an extension of time until the note was barred (Foster *v.* Foster, 71 S. W. 524, 24 Ky. L. Rep. 1396), and for money paid under an erroneous order of court which he failed to oppose (Brewer *v.* Hutton, 45 W. Va. 106, 30 S. E. 81, 72 Am. St. Rep. 804).

Money improperly retained.— An administrator who improperly retains money which it is his duty to pay over at once to the persons entitled thereto is liable if it is subsequently lost through the failure of the bank in which he has deposited it. Harlow *v.* Mills, 58 Hun (N. Y.) 391, 12 N. Y. Suppl. 197.

Even though property never came into the representative's possession, he should be charged with its value if it was lost through his negligence. Tuttle *v.* Robinson, 33 N. H. 104.

2. Real Property. Wherever an executor or administrator becomes chargeable, under statute or otherwise, with the entire estate of the decedent, the rule stated above should apply to the real estate.[20]

3. Depreciation of Currency. In case funds of the estate become worthless through depreciation of the legal currency the usual standard of good faith and due diligence should apply.[21]

4. Loss Through War or Public Authority. The effect of war or public authority exercised *de facto* is that of *vis major*, and a personal representative who exercises good faith and such due care and diligence as the circumstances exact should not be charged personally for a loss to the estate thereby occasioned.[22]

5. Theft. The representative is not generally responsible for the loss resulting from property or funds of the estate being stolen,[23] although it is otherwise where the theft is attributable to his own negligence.[24]

The duty of the personal representative is active not passive and his negligent failure to act may charge him. *In re* Holladay, 18 Oreg. 168, 22 Pac. 750.

A testamentary limitation of the executor's liability will not readily be construed into an exemption from liability for mismanagement. Richardson's Estate, 12 Phila. (Pa.) 32.

Advice of counsel.— The fact that the representative acted *bona fide* by advice of counsel does not conclusively excuse him, although the fact is entitled to great weight in his favor. King *v.* Berry, 3 N. J. Eq. 261.

Estoppel.— Where an administrator permitted a third person to acquire a title by possession to personal property of which the intestate died possessed, it was held that he could not, in a suit by the distributees for an account, deny the title of the intestate, and set up a title in a third person which had never been enforced. Holladay *v.* Holladay, McMull. Eq. (S. C.) 279.

20. Wheeler *v.* Bolton, 92 Cal. 159, 28 Pac. 558; Herteman's Estate, 73 Cal. 545, 15 Pac. 121.

Illegally causing sale of land.—An administrator who has illegally caused to be sold at sheriff's sale land claimed by his intestate under articles of agreement of which he had possession at his death is liable to an action by the heir for damages, and the measure of damages is the value of the land at private sale at the time of its sale by the sheriff, with interest. Weiting *v.* Nissley, 13 Pa. St. 650.

21. *Alabama.*— Pitts *v.* Singleton, 44 Ala. 363.

Mississippi.— Rogers *v.* Tullos, 51 Miss. 685; Still *v.* Davidson, 51 Miss. 153; Williams *v.* Campbell, 46 Miss. 57.

North Carolina.— Coggins *v.* Flythe, 113 N. C. 102, 18 S. E. 96; Williams *v.* Williams, 73 N. C. 413; Hagans *v.* Huffsteller, 65 N. C. 443.

South Carolina.— Koon *v.* Munro, 11 S. C. 139; West *v.* Cauthen, 9 S. C. 45; Stock *v.* Stock, 1 Desauss. 191.

Virginia.—Dromgoole *v.* Smith, 78 Va. 665; Powell *v.* Stratton, 11 Gratt. 792.

See 22 Cent. Dig. tit. "Executors and Administrators," § 475.

Exchanging currency for gold.— Where an executor in order to pay a coin debt of the estate exchanged five hundred dollars in currency, the property of the estate, for three hundred and seventy dollars in gold, getting current value for the greenbacks, it was held that he was liable to account only for the three hundred and seventy dollars. Sanderson's Estate, 74 Cal. 199, 15 Pac. 753.

Money paid out.— An administrator cannot be allowed credit for payments alleged to have been received in Confederate money which "perished on his hands," when the fact of such perishing is not proved, but, on the contrary, his accounts show that he paid out a portion of the sum received. Turbeville *v.* Flowers, 27 S. C. 331, 3 S. E. 542.

The burden of proving that he could not invest Confederate money which perished on his hands is on the administrator. Dromgoole *v.* Smith, 78 Va. 665.

22. Fudge *v.* Durn, 51 Mo. 264; Gay *v.* Grant, 101 N. C. 206, 8 S. E. 99, 106; Green *v.* Barbee, 84 N. C. 69; Currie *v.* McNeill, 83 N. C. 176; Lacy *v.* Stamper, 27 Gratt. (Va.) 42; Newton *v.* Bushong, 22 Gratt. (Va.) 628, 12 Am. Rep. 553; Anderson *v.* Piercy, 20 W. Va. 282; Estill *v.* McClintic, 11 W. Va. 399.

23. State *v.* Powell, 67 Mo. 395, 29 Am. Rep. 512; Fudge *v.* Durn, 51 Mo. 264; State *v.* Meagher, 44 Mo. 356, 100 Am. Dec. 298; Stevens *v.* Gage, 55 N. H. 175, 20 Am. Rep. 191; Furman *v.* Coe, 1 Cai. Cas. (N. Y.) 96; Carpenter *v.* Carpenter, 12 R. I. 544, 34 Am. Dec. 716.

Destruction or theft of non-negotiable notes.— An administrator is not entitled to a credit for non-negotiable notes belonging to the estate which have been destroyed or stolen, as they may still be sued on and collected as lost instruments. Williams *v.* Cubage, 36 Ark. 307.

Proof of manner of loss.— Where an executor undertakes to discharge himself from responsibility for the funds in his hands on the ground that such funds have been stolen from him, the fact of the loss in the manner asserted should be made to appear as clearly as the case admits. Foster *v.* Davis, 46 Mo. 268.

24. Tarver *v.* Torrance, 81 Ga. 261, 6 S. E. 177, 12 Am. St. Rep. 311.

Money retained too long.— An administrator who retains money of the estate in his hands long after the law requires its distribu-

6. Negligence or Fault of Agents or Servants. While the representative has been held liable for loss resulting from the negligence or fault of agents or servants employed by him,[25] there are also cases in which he has been excused from liability where he was free from negligence in the selection of his employee and the loss was attributable to no act of his.[26]

7. Failure to Deposit or Safeguard. The representative should be held liable for a loss caused by his failure to deposit or safeguard funds or property according to their character, where he has been lacking in good faith or ordinary prudence, but not otherwise.[27]

8. Failure to Sell or Delay in Selling. A representative who retains property or assets of the estate instead of selling the same is not, if he acted properly and prudently in so doing, liable for loss or depreciation in value which takes place while such property is retained;[28] but it is otherwise where he acted imprudently or improperly or exceeded his powers in retaining such property.[29] It has been said that a more liberal view of a representative's discretion in converting the decedent's assets into cash will be taken as regards legatees than as regards

tion is liable for it if stolen. Black *v.* Hurlbut, 73 Wis. 126, 40 N. W. 673.

25. Harris' Succession, 29 La. Ann. 743; Noblet's Succession, 2 La. Ann. 281; Matter of Hayes, 40 Misc. (N. Y.) 500, 82 N. Y. Suppl. 792; Schott's Estate, Tuck. Surr. (N. Y.) 337; Kilbee *v.* Sneyd, 2 Molloy 186. See also Bayly's Succession, 30 La. Ann. 75.

26. *In re* Taylor, 52 Cal. 477; *In re* Sharp, 61 N. J. Eq. 601, 48 Atl. 327; *In re* Colhoun, 6 Watts (Pa.) 185. See also Dorchester *v.* Effingham, Taml. 279, 31 Rev. Rep. 97, 12 Eng. Ch. 279, 48 Eng. Reprint 111.

If the testator recommend a particular person to be employed the executor is not liable merely for his default unless there has also been laches on the executor's part in not making him account. Kilbee *v.* Sneyd, 2 Molloy 186.

27. Lehman *v.* Robertson, 84 Ala. 489, 4 So. 728; Rubottom *v.* Morrow, 24 Ind. 202, 87 Am. Dec. 324 (failure to insure); Cornwell *v.* Deck, 8 Hun (N. Y.) 122; Lawson *v.* Crookshank, 2 Ch. Chamb. (U. C.) 426 (keeping money in house for several years until destroyed by fire).

28. *Louisiana.*— Sparrow's Succession, 44 La. Ann. 475, 10 So. 882, death of live stock.

Maryland.— Dugan *v.* Hollins, 11 Md. 41.

Mississippi.— Troup *v.* Rice, 55 Miss. 278.

New Jersey.— Parker *v.* Glover, 42 N. J. Eq. 559, 9 Atl. 217.

New York.— Hancox *v.* Meeker, 95 N. Y. 528; Matter of Hosford, 27 N. Y. App. Div. 427, 50 N. Y. Suppl. 550; *In re* Gray, 27 Hun 455; Matter of Thompson, 41 Misc. 420, 84 N. Y. Suppl. 1111; Weston *v.* Ward, 4 Redf. Surr. 415; McRae *v.* McRae, 3 Bradf. Surr. 199; Shumway *v.* Graves, 13 N. Y. Wkly. Dig. 402.

Pennsylvania.— Stewart's Appeal, 110 Pa. St. 410, 6 Atl. 321; Newkirk's Appeal, 3 Grant 323; Bosio's Estate, 2 Ashm. 437; Coggin's Appeal, 3 Walk. 426; Williamson's Estate, 13 Phila. 195.

South Carolina.— Nicholson *v.* Whitlock, 57 S. C. 36, 35 S. E. 412.

Tennessee.— Pearson *v.* Gillenwaters, 99 Tenn. 462, 42 S. W. 199.

Virginia.— Watkins *v.* Stewart, 78 Va. 111.

West Virginia.— Van Winkle *v.* Blackford, 54 W. Va. 621, 46 S. E. 589.

See 22 Cent. Dig. tit. "Executors and Administrators," § 481.

Unavoidable delay in settling estate.— Where an administrator could not settle the estate until another estate in which the heirs were interested was settled, and on that account deferred the sale of bank-stock of the estate until it had greatly decreased in value, he was not liable for the loss. Matter of Thorp, 31 Misc. (N. Y.) 581, 65 N. Y. Suppl. 575.

Injunction against disposing of assets.— Where an administratrix assigned certain stock of the estate through her counsel to herself in her individual capacity, and the transaction was declared fraudulent, and the administratrix was ordered to hold the stock, and to account for it and its accumulations, and enjoined from disposing of it, she was entitled to an allowance in her account for depreciation of the stock pending the injunction. Greiner *v.* Greiner, 35 N. J. Eq. 134.

Assessments on stock.— Executors paying assessments on stock shares take the risk of the shares not being worth the assessment. If they allow the stock to be sold out for assessments, they take the risk that it is then worth more than the assessment. There is no law under which a court can authorize an executor to pay stock assessments. Unless creditors or heirs agree to hold him free from liability he should sell the stock as perishable. *In re* Stow, Myr. Prob. (Cal.) 97.

29. *New Jersey.*— *In re* Voorhees, 3 N. J. L. J. 211.

New York.— Mills *v.* Hoffman, 26 Hun 594; Matter of Macdonald, 4 Redf. Surr. 321; Gillespie *v.* Brooks, 2 Redf. Surr. 349.

Pennsylvania.— Sunday's Appeal, 131 Pa. St. 584, 18 Atl. 931; Luffbarry's Estate, 12 Phila. 6; Doyle's Estate, 2 Del. Co. 196.

England.— Davenport *v.* Stafford, 14 Beav. 319.

Canada.— Emes *v.* Emes, 11 Grant Ch. (U. C.) 325.

creditors.[30] A representative who has acted in good faith and by retaining certain assets of the estate realized large profits and eventually disposed of a portion for more than the inventoried value of the whole will not be charged with losses on another portion because of a technical violation of his duty in not disposing of them.[31]

9. Assent of Heirs or Distributees. A request or authority from the heirs or distributees or their assent to a certain course of conduct is often found an element in excusing the executor or administrator who has acted upon it, but in such case the representative's own good faith and a clear authority given him, upon due knowledge of all the material facts, must appear.[32]

M. Torts. An executor or administrator cannot as such commit a tort, but any tort committed by him is committed individually, and renders him as an individual, and not the estate, liable in damages,[33] especially where the estate has derived no benefit from the representative's tortious act.[34] But property or money actually received by the estate as assets through his tortious conduct may sometimes be reached by the injured person.[35]

N. Fraud. The same general principle applies in case of fraud by the representative. The estate of the decedent is not liable for the fraud, false representations, or misconduct of the executor or administrator, but the fiduciary who practises the fraud is answerable personally therefor to the injured per-

See 22 Cent. Dig. tit. "Executors and Administrators," § 481.

30. Coggin's Appeal, 3 Walk. (Pa.) 426.

31. Matter of Porter, 5 Misc. (N. Y.) 274, 25 N. Y. Suppl. 822. But see Gillespie *v.* Brooks, 2 Redf. Surr. (N. Y.) 349.

32. *Louisiana.*—Dickson *v.* Dickson, 23 La. Ann. 583.

Michigan.—Ward *v.* Tinkham, 65 Mich. 695, 32 N. W. 901.

New York.—Matter of Hosford, 62 N. Y. App. Div. 626, 71 N. Y. Suppl. 163; Matter of Douglas, 60 N. Y. App. Div. 64, 69 N. Y. Suppl. 687; Luers *v.* Brunjes, 5 Redf. Surr. 32.

Pennsylvania.—Seaton's Appeal, 34 Leg. Int. 87; Semple's Estate, 28 Pittsb. Leg. J. 431.

United States.—Hiller *v.* Ladd, 85 Fed. 703, 29 C. C. A. 394.

33. *Alabama.*—Clark *v.* Knox, 70 Ala. 607, 45 Am. Rep. 93; Shorter *v.* Urquhart, 28 Ala. 360; Gilmer *v.* Wier, 8 Ala. 72.

California.—Sterrett *v.* Barker, 119 Cal. 492, 51 Pac. 695.

Georgia.—Carr *v.* Tate, 107 Ga. 237, 33 S. E. 47.

Indiana.—Moore *v.* Moore, 155 Ind. 261, 57 N. E. 242; Riley *v.* Kepler, 94 Ind. 308; Rose *v.* Cash, 58 Ind. 278; Hawkins *v.* Kimball, 57 Ind. 42; Rodman *v.* Rodman, 54 Ind. 444.

Iowa.—Herd *v.* Herd, 71 Iowa 497, 32 N. W. 469.

Maine.—Goulding *v.* Horbury, 85 Me. 227, 27 Atl. 127, 35 Am. St. Rep. 357; Plimpton *v.* Richards, 59 Me. 115.

Maryland.—Spencer *v.* Ragan, 9 Gill 480.

Massachusetts.—Gridley *v.* Balston, Quincy 65.

Mississippi.—Fonte *v.* Horton, 36 Miss. 350.

New York.—Blum *v.* Dabritz, 78 N. Y. Suppl. 207 [*affirmed* in 39 Misc. 800, 81 N. Y. Suppl. 315, 33 N. Y. Civ. Proc. 290]; McCue *v.* Finck, 20 Misc. 506, 46 N. Y. Suppl. 242; Watson *v.* Moriarty, 59 N. Y. Suppl. 73.

Pennsylvania.—Moulson's Estate, 1 Brewst. 296.

Virginia.—Belvin *v.* French, 84 Va. 81, 3 S. E. 891.

See 22 Cent. Dig. tit. "Executors and Administrators," § 483.

Negligence in care of property.—Executors in full possession and control of premises under the will are personally liable for personal injuries to tenants or strangers resulting from their neglect to keep the property in good order or repair. Donohue *v.* Kendall, 50 N. Y. Super. Ct. 386; Belvin *v.* French, 84 Va. 81, 3 S. E. 891.

Remedy for tort cannot be sought in orphans' court. Spencer *v.* Ragan, 9 Gill (Md.) 480.

An executor empowered merely to receive the rent of a building until the guardian of the infant devisee is appointed, and owning no estate therein, is not personally responsible for damages caused by the overflow of water from a basin or other fixture therein, which he had no agency, active or passive, in producing. Robbins *v.* Mount, 4 Rob. (N. Y.) 553, 33 How. Pr. (N. Y.) 24.

34. Carr *v.* Tate, 107 Ga. 237, 33 S. E. 47.

35. Von Schmidt *v.* Bourn, 50 Cal. 616; Herd *v.* Herd, 71 Iowa 497, 32 N. W. 469; Simpson *v.* Snyder, 54 Iowa 557, 6 N. W. 730.

Extent of recovery.—Where a special administrator made an unauthorized sale of stock pledged to the decedent, and turned the proceeds over to executors subsequently appointed, the estate does not become liable to the pledgor for a conversion, so as to enable him to recover from it the enhanced value of the stock, although he might maintain an action against the executors to recover the proceeds of the sale or what actually became a part of the assets of the estate. Von Schmidt *v.* Bourn, 50 Cal. 616.

son.[36] The executor or administrator in the performance of his duties is, however, bound to act fairly and not fraudulently, and the estate cannot be permitted to derive any unjust or unconscionable advantage from his unauthorized or fraudulent misbehavior,[37] and where it appears that property fraudulently obtained was treated or used as assets of the estate, or that the estate received some benefit from his conduct, recourse may be had accordingly to a corresponding extent.[38] If the fraud be practised upon or at the expense of the estate or those interested therein, the representative must of course respond therefor individually.[39] The fiduciary is entitled to the presumption of good faith in the discharge of his duties, and fraud, like any other tort, ought to be proved against him.[40]

O. Real Property and Interests Therein — 1. Title and Authority in General — a. General Rule. Neither an executor nor an administrator has, as such, any inherent interest in, title to, or control over the realty of his decedent.[41] The

36. *Delaware.*— Barwick *v.* White, 2 Del. Ch. 284.

Iowa.— Hazlett *v.* Burge, 22 Iowa 535.

Kansas.— Brown *v.* Evans, 15 Kan. 88.

Kentucky.— Heath *v.* Allin, 1 A. K. Marsh. 442.

Minnesota.— Winston *v.* Young, 52 Minn. 1, 53 N. W. 1015; Fritz *v.* McGill, 31 Minn. 536, 18 N. W. 753.

North Carolina.—Pettijohn *v.* Williams, 46 N. C. 145.

Texas.— Coutlett *v.* U. S. Mortgage Co., 94 Tex. 164, 58 S. W. 997.

See 22 Cent. Dig. tit. "Executors and Administrators," § 484.

But *compare* Crowley *v.* Hicks, 98 Wis. 566, 74 N. W. 348.

37. Able *v.* Chandler, 12 Tex. 88, 62 Am. Dec. 518.

38. Fritz *v.* McGill, 31 Minn. 536, 18 N. W. 753; Able *v.* Chandler, 12 Tex. 88, 62 Am. Dec. 518.

39. Branner *v.* Nichols, 61 Kan. 356, 59 Pac. 633 (holding that where an administrator purchases property in fraud of the heirs, and erects improvements thereon with money belonging to them, it is proper in an action to recover such property to charge him with rents and profits on it in its improved condition); Porter *v.* Long, 124 Mich. 584, 83 N. W. 601.

No lien on account of fraud.— Heirs of an estate have no equitable lien upon the share of a coheir who is executor or administrator, on account of his fraudulent administration of the estate. McClellan *v.* Solomon, 23 Fla. 437, 2 So. 825, 11 Am. St. Rep. 381.

A general charge of fraud and confederation is not a sufficient ground upon which a court of equity will give aid against administrators alleged to have taken property of an intestate to the creditors of the intestate, where each defendant is sought to be made liable only for such portion of the property as he may have converted to his own use. Beck *v.* Rainey, 28 Miss. 111.

40. Roach *v.* Ames, 80 Ky. 6; Mitchell *v.* Berry, 1 Metc. (Ky.) 602.

Circumstances amounting to fraud see Sorrels *v.* Trantham, 48 Ark. 386, 3 S. W. 198, 4 S. W. 281; Ringgold *v.* Stone, 20 Ark. 526; Barwick *v.* White, 2 Del. Ch. 284; Kelly *v.* Pratt, 41 Misc. (N. Y.) 31, 83 N. Y. Suppl. 636, holding that where an administrator, having personalty in his hands sufficient to pay taxes imposed on the lands of the estate, permits the city to sell them for non-payment, and bids them in, and takes from the city in his own name an assignment of the tax lease, he is guilty of an actual fraud.

Circumstances not amounting to fraud see the following cases:

Iowa.— Hazlett *v.* Burge, 22 Iowa 535.

Kentucky.— Goodloe *v.* Rodes, 2 B. Mon. (Ky.) 86.

Michigan.— Owen *v.* Potter, 115 Mich. 556, 73 N. W. 977.

Minnesota.—Winston *v.* Young, 52 Minn. 1, 53 N. W. 1015, holding that since the paymen of money at the request of an executor to relieve the estate from an encumbrance does not create a debt, payable as such out of the estate, an action for deceit cannot be founded on a representation, made by the executor to induce plaintiff to pay such money, that the estate was solvent and able to pay all debts.

Missouri.— Baldwin *v.* Dalton, 168 Mo. 20, 67 S. W. 599, holding that the mere purchase by an administrator of claims against the estate, although improper, is not fraud of such a character as will authorize a setting aside of his final settlement.

New York.— Matter of Sprague, 40 N. Y. App. Div. 615, 57 N. Y. Suppl. 1128 [*affirmed* in 162 N. Y. 646, 57 N. E. 1125].

Pennsylvania.— Johnston *v.* McCain, 188 Pa. St. 513, 41 Atl. 592.

See 22 Cent. Dig. tit. "Executors and Administrators," § 484.

41. *Alabama.*— Brown *v.* Mize, 119 Ala. 10, 24 So. 453; Nelson *v.* Murfee, 69 Ala. 598; Turner *v.* Kelly, 67 Ala. 173; Tyson *v.* Brown, 64 Ala. 244; Crawford *v.* McLeod, 64 Ala. 240; Cockrell *v.* Coleman, 55 Ala. 583.

Arkansas.—Anderson *v.* Levy, 33 Ark. 665; Kiernan *v.* Blackwell, 27 Ark. 235.

Connecticut.— Lockwood *v.* Lockwood, 2 Root 409.

Georgia.— Sorrell *v.* Ham, 9 Ga. 55.

Illinois.— Gammon *v.* Gammon, 153 Ill. 41, 38 N. E. 890; Sebastian *v.* Johnson, 72 Ill. 282, 22 Am. Rep. 144; Le Moyne *v.* Quimby, 70 Ill. 399; Phelps *v.* Funkhouser, 39 Ill. 401; Walbridge *v.* Day, 31 Ill. 379, 83 Am. Dec. 227; Buck *v.* Eaman, 18 Ill. 529; Smith *v.*

testator may, however, by his will, give to his executor such authority and control

Hall, 19 Ill. App. 17. See also Boudinot *v.* Winter, 91 Ill. App. 106 [*affirmed* in 190 Ill. 394, 60 N. E. 553].

Indiana.— Taylor *v.* Fickas, 64 Ind. 167, 31 Am. Rep. 114; Hankins *v.* Kimball, 57 Ind. 42.

Iowa.— Gray *v.* Myers, 45 Iowa 158; Gladson *v.* Whitney, 9 Iowa 267.

Louisiana.— See Coste's Succession, 43 La. Ann. 144, 9 So. 62; Bird *v.* Jones, 5 La. Ann. 643.

Maine.— Crocker *v.* Smith, 32 Me. 244.

Massachusetts.— Brown *v.* Kelsey, 2 Cush. 243; Stearns *v.* Stearns, 1 Pick. 157; Gibson *v.* Farley, 16 Mass. 280; Drinkwater *v.* Drinkwater, 4 Mass. 354; Henshaw *v.* Blood, 1 Mass. 35.

Michigan.— Thayer *v.* Lane, Walk. 200.

Mississippi.— Hargrove *v.* Baskin, 50 Miss. 194; Farley *v.* Hord, 45 Miss. 96; Hall *v.* Hall, 27 Miss. 458; Pinson *v.* Williams, 23 Miss. 64. See also Clayton *v.* Boyce, 62 Miss. 390.

Nebraska.— State *v.* Reeder, 5 Nebr. 203.

New Hampshire.— Lane *v.* Thompson, 43 N. H. 320; Gregg *v.* Currier, 36 N. H. 200.

New York.— Matter of Woodard, 13 N. Y. St. 161.

Ohio.— Overturf *v.* Dugan, 29 Ohio St. 230; Piatt *v.* St. Clair, Wright 261.

Pennsylvania.— Landis *v.* Scott, 32 Pa. St. 495; Jones' Appeal, 3 Grant 250; Bartholet's Appeal, 1 Walk. 77.

Tennessee.— Vance *v.* Fisher, 10 Humphr. 211; Stephenson *v.* Yandle, 3 Hayw. 109.

Vermont.— Hawkins *v.* Hewitt, 56 Vt. 430; Austin *v.* Bailey, 37 Vt. 219, 86 Am. Dec. 703; Hyde *v.* Barney, 17 Vt. 280, 44 Am. Dec. 335. See also Tracy *v.* Spear, 10 Vt. 490.

Virginia.— Eppes *v.* Demoville, 2 Call 22.

Wisconsin.— Volk *v.* Stowell, 98 Wis. 385, 74 N. W. 118; Marsh *v.* Waupaca County, 38 Wis. 250; Jones *v.* Billstein, 28 Wis. 221.

United States.— Kohn *v.* McKinnon, 90 Fed. 623; Jones *v.* Lamar, 34 Fed. 454.

See 22 Cent. Dig. tit. "Executors and Administrators," § 533; and *supra*, III, C, 1; *infra*, VIII, O, 2, a.

An executor or administrator cannot release or give rights in the land (Hoagland *v.* Crum, 113 Ill. 365, 55 Am. Rep. 424; Mowe *v.* Stevens, 61 Me. 592), release a right of way over the land (Hankins *v.* Kimball, 57 Ind. 42), bind the heirs by consenting to a proceeding for laying out a highway over the land (Rush *v.* McDermott, 50 Cal. 471), dedicate land of the estate to public use (Kaime *v.* Harty, 73 Mo. 316 [*reversing* 4 Mo. App. 357]), recover the surplus realized at a tax-sale, even though he was in possession (Fripp *v.* U. S., 19 Ct. Cl. 667), bind the heir by admissions relative to the land or the title thereto (Walbridge *v.* Day, 31 Ill. 379, 83 Am. Dec. 227; Jacobs *v.* Locke, 37 N. C. 286. See also Mooers *v.* White, 6 Johns. Ch. (N. Y.) 360), object to a judgment vesting the title to the real estate in decedent's widow where the court has, on the administrator's petition to sell real estate to pay debts, found that he had no right to sell it (Shobe *v.* Brinson, 148 Ind. 285, 47 N. E. 625), or discharge from liability one who has assumed payment of the purchase-price of land sold by the testator and secured by rent privileges, which amount had been donated by the testator to a specified person, where such amount is not needed to pay the debts of the succession (Consumers' Cordage Co. *v.* Converse, 8 Quebec Q. B. 511); neither can he sue for damage done to the land subsequent to the decedent's death (Taylor *v.* Fickas, 64 Ind. 167, 31 Am. Rep. 114; Hook *v.* Garfield Coal Co., 112 Iowa 210, 83 N. W. 963; Webb *v.* Bennett's Branch Imp. Co., 161 Pa. St. 623, 29 Atl. 260), to set aside a sheriff's sale under foreclosure, on the ground of fraud (Thorp *v.* Miller, 137 Mo. 231, 38 S. W. 929), to set aside a conveyance made by decedent in his lifetime (Field *v.* Andrada, 106 Cal. 107, 39 Pac. 323), to recover real estate which once belonged to decedent, but was set off on an execution issued against him on a judgment obtained by fraud (Richards *v.* Sweetland, 6 Cush. (Mass.) 324), to adjudicate title to real estate conveyed by the will (Nelson *v.* Nelson, (N. J. Ch. 1897) 36 Atl. 280), to enforce a trust and to compel a conveyance of land to himself (Janes *v.* Throckmorton, 57 Cal. 368), to remove a cloud on the title to lands of the decedent (Gridley *v.* Watson, 53 Ill. 186; Cutter *v.* Thompson, 51 Ill. 390; Phelps *v.* Funkhouser, 39 Ill. 401; Smith *v.* McConnell, 17 Ill. 135, 63 Am. Dec. 340), to quiet title to a water-right (Travelers' Ins. Co. *v.* Childs, 25 Colo. 360, 54 Pac. 1020), to enforce a resulting trust in land not needed for payment of debts (Matlock *v.* Nave, 28 Ind. 35), or to reform a deed made to the decedent in his lifetime (Shoemate *v.* Lockridge, 53 Ill. 503); nor can he institute proceedings for the partition of land in which his decedent was interested (Terrell *v.* Weymouth, 32 Fla. 255, 13 So. 429, 37 Am. St. Rep. 94), or commence or prosecute a writ of review in a real action not brought to foreclose a mortgage (Berry *v.* Whitaker, 58 Me. 422).

If an heir or devisee conveys real estate of his decedent by a deed, he can presumably convey thereby no more than his own individual interest, even though he should purport to convey as personal representative of the decedent. Fields *v.* Bush, 94 Ga. 664, 21 S. E. 827.

Possession of deeds.— Where the executor has no power of sale or conversion of the real estate, the deeds and title papers will not be removed from the possession of one of the devisees who has equal rights with the others. Thomas' Estate, 8 Pa. Dist. 400, 22 Pa. Co. Ct. 518.

An administrator sustains no fiduciary relationship to the heirs, since he has no claim on the realty unless the debts exceed the personalty. New York, etc., Land Co. *v.* Wiedner, 3 Lack. Leg. N. (Pa.) 250.

over real estate as he sees proper;[42] and in some jurisdictions the statutes give to the executor or administrator a certain control over the land of the decedent,[43] usually either for the purpose of preserving the same from waste during the course of administration,[44] effecting a division and distribution among those entitled,[45] or of subjecting the same to the payment of the decedent's debts in case the personal assets prove insufficient for this purpose.[46] The authority of an executor in this respect is, however, strictly limited by the terms of the will,[47] while a statutory grant to the personal representative of authority or control over the real estate of his decedent, being in derogation of the common law, must be strictly construed and the rights of the representative confined to those which are clearly given to him.[48]

b. Actions For Trespass and Waste. Actions for trespass and waste accruing after the death of his decedent are maintainable by an executor or administrator where he is given the right of possession by the provisions of the will or by statute,[49] but in the absence of any testamentary or statutory provision giving him

The administrator is merely the agent of the heirs, although he assumes to act in his representative capacity in the management of the real estate and the collection of the income thereof. *In re* Morrison, 196 Pa. St. 80, 46 Atl. 257.

42. Flowers *v.* Foreman, 23 How. (U. S.) 132, 16 L. ed. 405; Kohn *v.* McKinnon, 90 Fed. 623. See also Evey *v.* Adams, 135 Ill. 80, 25 N. E. 1013, 10 L. R. A. 162; Gray *v.* Henderson, 71 Pa. St. 368; and *infra*, VIII, O, 2, a.

The actual seizin of an executor is distinct from and paramount to the fictitious seizin which is said to vest in the heir immediately upon the death of the ancestor; and when that seizin is conferred upon the executor by the will, confirmed by judicial sanction, and actually assumed by his entering upon his functions, the heir can only take it from him afterward upon the performance of certain conditions, one of which is that the heir may be compelled to give security to the creditors. Bird *v.* Jones, 5 La. Ann. 643.

43. Furlong *v.* Soule, 39 Me. 122; King *v.* Boyd, 4 Oreg. 326; Kohn *v.* McKinnon, 90 Fed. 623. And see *infra*, VIII, O, 2, a.

Administrator has no greater rights than decedent would have if alive with respect to his property. Whitworth *v.* Wofford, 73 Ga. 259.

44. King *v.* Boyd, 4 Oreg. 326.

45. Brown *v.* Mize, 119 Ala. 10, 26 So. 453.

46. Brown *v.* Mize, 119 Ala. 10, 24 So. 453; King *v.* Boyd, 4 Oreg. 326.

After all debts are discharged and the administration practically closed, the administrator has no interest in the realty, although no formal order discharging him has been entered. Reed *v.* Ash, 30 Ark. 775.

Need of land for payment of debts must be shown. Myers *v.* Jones, 4 Tex. Civ. App. 330, 23 S. W. 562.

The prayer of a bill by an administrator to divest title to land out of adverse claimants, alleging that a sale of the land is necessary to pay intestate's debts, should be that the title be vested in intestate's heirs, and not in the administrator, and then on proper showing that the land be sold for the debts. Brown *v.* Mize, 119 Ala. 10, 24 So. 453.

47. See Downing *v.* Marshall, 1 Abb. Dec. (N. Y.) 525, holding that where executors have not the legal title, but only a power in trust, if the trust is declared void, there is no necessity of a conveyance to the heirs.

Construction of testamentary powers see the following cases:

Arkansas.— Chase *v.* Cartright, 53 Ark. 358, 14 S. W. 90, 22 Am. St. Rep. 207.

California.— Bennalack *v.* Richards, 116 Cal. 405, 48 Pac. 622.

New York.— People *v.* Robinson, 29 Barb. 77, 17 How. Pr. 534; Ensign *v.* Ensign, 14 N. Y. St. 181; Matter of Sixty-seventh St., 60 How. Pr. 264; James *v.* Beesly, 4 Redf. Surr. 236.

Ohio.— Rapp *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 302, 12 Cinc. L. Bul. 119.

Pennsylvania.—Wilkinson *v.* Chambers, 181 Pa. St. 437, 37 Atl. 569.

United States.— Flowers *v.* Foreman, 23 How. 132, 16 L. ed. 405.

See 22 Cent. Dig. tit. "Executors and Administrators," § 533; and, generally, WILLS.

No title is vested by a power to sell (*In re* Journey, 7 Del. Ch. 1, 44 Atl. 795; Floyd *v.* Herring, 64 N. C. 409; Moore *v.* Bedford, (Tenn. Ch. App. 1900) 56 S. W. 1038. But *compare* Arlington State Bank *v.* Paulsen, 57 Nebr. 717, 78 N. W. 303) either to pay debts (Doe *v.* Lanius, 3 Ind. 441, 56 Am. Dec. 518; Floyd *v.* Herring, 64 N. C. 409; Thomson *v.* Gaillard, 3 Rich. (S. C.) 418, 45 Am. Dec. 778; Gordon *v.* Overton, 8 Yerg. (Tenn.) 121) or legacies (Doe *v.* Lanius, 3 Ind. 441, 56 Am. Dec. 518), or to make distribution (Doe *v.* Lanius, 3 Ind. 441, 56 Am. Dec. 518), or a grant of authority to divide the estate (McCampbell *v.* Gilbert, 6 J. J. Marsh. (Ky.) 592); nor does direction to divide rents, income, and profits vest the fee in the executor by implication (Robert *v.* Corning, 23 Hun (N. Y.) 299).

Authority to carry on a farm for a year gives no longer estate. Cohea *v.* Jemison, 68 Miss. 510, 10 So. 46.

48. Edwards *v.* Haverstick, 47 Ind. 138; Hall *v.* Farmers', etc., Bank, 145 Mo. 418, 46 S. W. 1000; King *v.* Boyd, 4 Oreg. 326.

49. *Alabama.*— Drake *v.* Lady Ensley Coal, etc., Co., 102 Ala. 501, 14 So. 749, 48 Am. St.

such a right of possession the general rule that the representative has no concern with the realty precludes the maintenance by him of such an action.[50]

c. Actions to Quiet Title. Actions to quiet or remove a cloud from the title to a decedent's real estate are also deemed authorized on the part of an executor or administrator whose right of possession of such land at the time is established by will or statute,[51] but otherwise the representative has no such right.[52]

2. Possession and Use — a. In General. While the common-law rule is that an executor or administrator is not entitled to the possession and use of the real estate of his decedent,[53] an executor is entitled thereto when the testator has by his will directed or permitted him to take possession of the realty for any purpose,[54]

Rep. 77, 24 L. R. A. 64; Sullivan *v.* Rabb, 86 Ala. 433, 5 So. 746.

Indiana.— Pittsburgh, etc., R. Co. *v.* Swinney, 97 Ind. 586.

Maine.— McNichol *v.* Eaton, 77 Me. 246.

Massachusetts.— Dascomb *v.* Davis, 5 Metc. 335.

Minnesota.— Noon *v.* Finnegan, 29 Minn. 418, 13 N. W. 197.

New York.— Ogsbury *v.* Ogsbury, 45 Hun 388; Meeks *v.* Metropolitan El. R. Co., 58 N. Y. Super. Ct. 466, 11 N. Y. Suppl. 697.

Texas.— Burdett *v.* Haley, 51 Tex. 540.

See 22 Cent. Dig. tit. "Executors and Administrators," § 535.

50. Noon *v.* Finnegan, 29 Minn. 418, 13 N. W. 197, 32 Minn. 81, 19 N. W. 391; Aubuchon *v.* Lory, 23 Mo. 99. See also McKay *v.* Broad, 70 Ala. 377.

An administrator who is out of possession of real estate, whether disseized or having surrendered the possession to the heir, can neither maintain trespass nor an action on the case in behalf of the heir for an act which is a damage to the inheritance. Lyman *v.* Webber, 17 Vt. 489.

51. *California.*— Curtis *v.* Sutter, 15 Cal. 259.

Colorado.— McKee *v.* Howe, 17 Colo. 538, 31 Pac. 115.

Connecticut.—Hall *v.* Pierson, 63 Conn. 332, 28 Atl. 544.

Iowa.— Laverty *v.* Sexton, 41 Iowa 435.

Wisconsin.— Wheeler *v.* Single, 62 Wis. 380, 22 N. W. 569.

See 22 Cent. Dig. tit. "Executors and Administrators," § 536.

Ferry franchise.— An executor directed by will to lease a ferry may maintain proceedings in equity to be quieted in the enjoyment of the franchise. Newport *v.* Taylor, 16 B. Mon. (Ky.) 699.

Necessary averments.— Under a statute providing that the real estate of an intestate shall descend to his heirs subject to the payment of debts and that if the personalty is insufficient to pay the debts resort may be had to the realty, which may be sold, mortgaged, or leased by the administrator, a complaint by an administrator in his representative capacity to remove a cloud from the title to realty which fails to aver that the estate is insolvent, or that it is necessary to dispose of the realty to pay the debts, or that there are debts against the estate, does not state facts sufficient to constitute a cause of action. McKee *v.* Howe, 17 Colo. 538, 31 Pac. 115.

A creditor of an estate cannot bring suit to remove a cloud from the title of land belonging to the estate, except by leave of court, after refusal of the administrator to bring suit. Marshall *v.* Blass, 82 Mich. 518, 46 N. W. 947, 47 N. W. 516.

52. McKee *v.* Howe, 17 Colo. 538, 31 Pac. 115; Jenkins *v.* Bacon, 30 Mich. 154; Paine *v.* First Div. St. Paul, etc., R. Co., 14 Minn. 65; King *v.* Boyd, 4 Oreg. 326.

Authority to sell.— An administrator cannot maintain a suit to quiet or remove cloud from the title to realty, even though he is authorized to sell the land for the payment of debts (Ryan *v.* Duncan, 88 Ill. 144; Gridley *v.* Watson, 53 Ill. 186; Smith *v.* McConnell, 17 Ill. 135, 63 Am. Dec. 340); nor can he sue to remove an encumbrance with a view to obtaining a better price at the sale (Cutter *v.* Thompson, 51 Ill. 531; Phelps *v.* Funkhouser, 39 Ill. 401. See also Stark *v.* Brown, 101 Ill. 395).

53. *Alabama.*— Leavens *v.* Butler, 8 Port. 380.

Arkansas.— Hill *v.* Mitchell, 5 Ark. 608.

Connecticut.—Goodrich *v.* Thompson, 4 Day 215.

Georgia.— Johnson *v.* Johnson, 80 Ga. 260, 5 S. E. 629.

Illinois.— Roberts *v.* Baker, 65 Ill. App. 111.

Indiana.—Hendrix *v.* Hendrix, 65 Ind. 329; Thompson *v.* Schenck, 16 Ind. 194; Comparet *v.* Randall, 4 Ind. 55.

Michigan.— Marvin *v.* Schilling, 12 Mich. 356; Streeter *v.* Paton, 7 Mich. 341.

Mississippi.—Billingslea *v.* Young, 33 Miss. 95.

New Hampshire.— Lucy *v.* Lucy, 55 N. H. 9; Lane *v.* Thompson, 43 N. H. 320.

Pennsylvania.— Sunday's Appeal, 131 Pa. St. 584, 18 Atl. 931.

Rhode Island.— Draper *v.* Barnes, 12 R. I. 156.

South Carolina.— Reeves *v.* Brayton, 36 S. C. 384, 15 S. E. 658; Thompson *v.* Caldwell, 2 McCord 390.

Vermont.— Tryon *v.* Tryon, 16 Vt. 313.

West Virginia.— Laidley *v.* Kline, 8 W. Va. 218.

United States.— Penn *v.* Butler, 19 Fed. Cas. No. 10,930, 4 Dall. 354, 1 L. ed. 864.

See 22 Cent. Dig. tit. "Executors and Administrators," § 537; and *supra*, III, C, 1; VIII, O, 1, a.

54. *Illinois.*— Mather *v.* Mather, 103 Ill. 607.

and in addition to this the common-law rule has been much modified by statutes giving to the personal representative, whether executor or administrator, the right under certain circumstances, or even generally, to take possession of the realty either for the purpose of sale or in order to apply as assets the proceeds realized from its use during the period of administration.[55] A representative who is authorized to sell is entitled to the control and possession of the title deeds if this is necessary to a proper discharge of his duties,[56] but a mere power of sale gives no right of possession or use of the property itself until the sale.[57]

Indiana.— Hendrix *v.* Hendrix, 65 Ind. 329.

Louisiana.—Charmbury's Succession, 34 La. Ann. 21; Dunlap *v.* Bailey, 7 La. 368.

New Jersey.— Stevens *v.* Stevens, 26 N. J. Eq. 154.

North Carolina.— Drumright *v.* Jones, 39 N. C. 253.

Ohio.— Roberts *v.* Roberts, 1 Disn. 177, 12 Ohio Dec. (Reprint) 560.

South Carolina.— Brooks *v.* Brooks, 12 S. C. 422; Lawton *v.* Hunt, 4 Strobh. Eq. 1.

See 22 Cent. Dig. tit. "Executors and Administrators," § 537; and *supra*, III, C, 1; VIII, O, 1, a.

55. *Alabama.*— Banks *v.* Speers, 97 Ala. 560, 11 So. 841; Cruikshank *v.* Luttrell, 67 Ala. 318; Calhoun *v.* Fletcher, 63 Ala. 574; Phillips *v.* Gray, 1 Ala. 226.

Arkansas.— Chowning *v.* Stanfield, 49 Ark. 87, 4 S. W. 276; Carnall *v.* Wilson, 21 Ark. 62, 76 Am. Dec. 351; Menifee *v.* Menifee, 8 Ark. 9.

California.— McCrea *v.* Haraszthy, 51 Cal. 146; Meeks *v.* Kirby, 47 Cal. 169; Meeks *v.* Hahn, 20 Cal. 620; Harwood *v.* Marye, 8 Cal. 580.

Florida.— See Johnson *v.* McKinnon, (1903) 34 So. 272.

Georgia.— Holt *v.* Anderson, 98 Ga. 220, 25 S. E. 496.

Illinois.— Mather *v.* Mather, 103 Ill. 607.

Massachusetts.—Stearns *v.* Stearns, 1 Pick. 157.

Michigan.— Wilmarth *v.* Reed, 83 Mich. 44, 46 N. W. 1031; Holbrooke *v.* Campau, 22 Mich. 288; Marvin *v.* Schilling, 12 Mich. 356; Kline *v.* Moulton, 11 Mich. 370; Streeter *v.* Paton, 7 Mich. 341.

Minnesota.— Kern *v.* Cooper, 91 Minn. 121, 97 N. W. 648; Noon *v.* Finnegan, 29 Minn. 418, 13 N. W. 197; Miller *v.* Hoberg, 22 Minn. 249; Paine *v.* First Div. St. Paul, etc., R. Co., 14 Minn. 65.

Mississippi.— Farley *v.* Hord, 45 Miss. 96.

Montana.— *In re* Higgins, 15 Mont. 474, 39 Pac. 506, 28 L. R. A. 116.

Nevada.— Gossage *v.* Crown Point Gold, etc., Min. Co., 14 Nev. 153.

Oregon.— Hanner *v.* Silver, 2 Oreg. 336.

Vermont.— Perrin *v.* Granger, 33 Vt. 101.

Washington.— Balch *v.* Smith, 4 Wash. 497, 30 Pac. 648.

Wisconsin.— McManany *v.* Sheridan, 81 Wis. 538, 51 N. W. 1011; Flood *v.* Pilgrim, 32 Wis. 376; Jones *v.* Billstein, 28 Wis. 221; Edwards *v.* Evans, 16 Wis. 181.

United States.— Meeks *v.* Olpherts, 100 U. S. 564, 25 L. ed. 735 [*affirming* 16 Fed. Cas. No. 9,393, 3 Sawy. 206]; Kohn *v.* McKinnon, 90 Fed. 623.

See 22 Cent. Dig. tit. "Executors and Administrators," § 537; and *supra*, III, C, 1; VIII, O, 1, a; XII, A.

Statute not retrospective.—Philips *v.* Gray, 1 Ala. 226.

Where there is no heir or devisee present at the time of the decedent's death to take possession of his real estate, the executor is entitled to take possession. Hendrix *v.* Hendrix, 65 Ind. 329.

There must be a necessity for possession.— The exercise of the right given to an executor by the Michigan statute to the possession of the real estate of the deceased is only permissible when the necessity therefor arises, and until then the heir or devisee who has entered upon the enjoyment of his estate cannot be disturbed. Rough *v.* Womer, 76 Mich. 375, 43 N. W. 573.

Exception of homestead.— Where real estate devised was the homestead of testator, the executor is not, under the Wisconsin statute, entitled to possession thereof as against the devisee. McManany *v.* Sheridan, 81 Wis. 538, 51 N. W. 1011. See also Cooley *v.* Jansen, 54 Nebr. 33, 74 N. W. 391, holding that as the right of an administrator to possession of the real estate of which his decedent died seized arises from its being subject to payment of debts of the decedent, such right is not of force with relation to a homestead.

When right to possession cannot be asserted against heirs.—If administration upon the estate of a deceased person has been closed, and the land surrendered to the heirs, or if enough time has elapsed since the death of the intestate (thirty years being sufficient) to show that the lands are not required for the purposes of administration, the heirs or their grantees, being in possession, cannot be disturbed by the administrator. Cox *v.* Ingleston, 30 Vt. 258.

Heir or devisee cannot as such maintain ejectment against executor. Plass *v.* Plass, 121 Cal. 131, 133, 53 Pac. 448 [*citing* Harper *v.* Strautz, 53 Cal. 655; Meeks *v.* Kirby, 47 Cal. 169; Chapman *v.* Hollister, 42 Cal. 462; Meeks *v.* Hahn, 20 Cal. 620].

Order of court necessary.— Under Fla. Rev. St. (1892) § 1917, the real estate descends to the heirs, and an administrator has no right to possession until an order of the court authorizing him to take possession has been made. Johnson *v.* McKinnon, (1903) 34 So. 272; Rose *v.* Withers, 39 Fla. 460, 22 So. 724.

56. Mills *v.* Mead, 7 Hun (N. Y.) 36.

57. Draper *v.* Barnes, 12 R. I. 156; Reeves *v.* Brayton, 36 S. C. 384, 15 S. E. 658. See

b. Actions to Recover Possession — (i) *In General.* By virtue of the directions of a will or under statute an executor or administrator may be temporarily entitled to prosecute or defend actions for recovering possession of the decedent's land, as a sort of trustee or representative of the heirs or devisees and of the general interests of the estate;[58] but, where no interest in the realty of his decedent is thus vested in him, he has no such authority.[59]

(ii) *Ejectment or Writ of Entry.* An executor or administrator entitled to temporary possession of his decedent's realty for the purpose of settling the estate may prosecute or defend an action of ejectment or a writ of entry;[60] but where he is not thus entitled to possession, or where the title vests directly in the

also Labrot *v.* Seiler, 45 S. W. 102, 20 Ky. L. Rep. 57.

58. *Alabama.*— Banks *v.* Speers, 97 Ala. 560, 11 So. 841; Waddell *v.* Lanier, 62 Ala. 347; Patton *v.* Crow, 26 Ala. 426.

Kentucky.— De Haven *v.* De Haven, 104 Ky. 41, 46 S. W. 215, 47 S. W. 597, 20 Ky. L. Rep. 663; Jennings *v.* Monks, 4 Metc. 103.

Louisiana.— Smith *v.* Sinnott, 44 La. Ann. 51, 10 So. 413; Woodward *v.* Thomas, 38 La. Ann. 238.

Montana.— Black *v.* Story, 7 Mont. 238, 14 Pac. 703.

New Jersey.— Besson *v.* Gribble, 39 N. J. Eq. 111.

New York.— Mosher *v.* Yost, 33 Barb. 277.

Texas.— Gunter *v.* Fox, 51 Tex. 383.

Vermont.— Burnell *v.* Maloney, 36 Vt. 636; McFarland *v.* Stone, 17 Vt. 165, 44 Am. Dec. 325.

See 22 Cent. Dig. tit. "Executors and Administrators," § 538.

Necessity for possession must be shown. Holt *v.* Anderson, 98 Ga. 220, 25 S. E. 496.

59. *Connecticut.*— Hubbel *v.* Prat, 1 Root 518.

Illinois.— Roberts *v.* Baker, 65 Ill. App. 111.

Indiana.— Thompson *v.* Schenck, 16 Ind. 194.

Iowa.— Kinsell *v.* Billings, 35 Iowa 154.

Maine.— Brown *v.* Strickland, 32 Me. 174.

Massachusetts.—Drinkwater *v.* Drinkwater, 4 Mass. 354.

Missouri.— Holliday *v.* Doyon, 15 Mo. 407.

North Carolina.— Floyd *v.* Herring, 64 N. C. 409.

Washington.— Dunn *v.* Peterson, 4 Wash. 170, 29 Pac. 998.

See 22 Cent. Dig. tit. "Executors and Administrators," § 538.

60. *Alabama.*—Pendley *v.* Madison, 83 Ala. 484, 3 So. 618; Russell *v.* Erwin, 41 Ala. 292; Golding *v.* Golding, 24 Ala. 122.

Arkansas.— Chowning *v.* Staufield, 49 Ark. 87, 4 S. W. 276; Culberhouse *v.* Shirley, 42 Ark. 25; Carnall *v.* Wilson, 21 Ark. 62, 76 Am. Dec. 351.

California.—Harper *v.* Strautz, 53 Cal. 655; Meeks *v.* Hahn, 20 Cal. 620; Soto *v.* Kroder, 19 Cal. 87; Curtis *v.* Herrick, 14 Cal. 117, 73 Am. Dec. 632.

Florida.— Jacksonville, etc., R. Co. *v.* Adams, 27 Fla. 443, 9 So. 2; Doyle *v.* Wade, 23 Fla. 90, 1 So. 516, 11 Am. St. Rep. 334; Sanchez *v.* Hart, 17 Fla. 507.

Georgia.— Carter *v.* Darnell, 94 Ga. 656, 21 S. E. 849; Beaver *v.* Morrison, 22 Ga. 107, 68 Am. Dec. 486; Williams *v.* Rawlins, 10 Ga. 491.

Indiana.— Doe *v.* Mace, 7 Blackf. 2; Duchane *v.* Goodtitle, 1 Blackf. 117.

Kentucky.— Chapman *v.* Headley, 4 S. W. 189, 8 Ky. L. Rep. 957.

Montana.— Black *v.* Story, 7 Mont. 238, 14 Pac. 703.

Nebraska.— Carson *v.* Dundas, 39 Nebr. 503, 58 N. W. 141.

New Hampshire.— Pierce *v.* Jaquith, 48 N. H. 231.

New York.— Landon *v.* Townsend, 60 Hun 578, 14 N. Y. Suppl. 522.

North Carolina.— Smathers *v.* Moody, 112 N. C. 791, 17 S. E. 532.

Oregon.— Humphreys *v.* Taylor, 5 Oreg. 260.

Pennsylvania.— Kirk *v.* Carr, 54 Pa. St. 285; Chew *v.* Chew, 28 Pa. St. 17; Carpenter *v.* Cameron, 7 Watts 51.

Utah.— McClelland *v.* Dickenson, 2 Utah 100.

Vermont.— Alexander *v.* Stewart, 50 Vt. 87; Burnell *v.* Malony, 36 Vt. 636.

Washington.— Hazelton *v.* Bogardus, 8 Wash. 102, 35 Pac. 602.

See 22 Cent. Dig. tit. "Executors and Administrators," § 539.

The administrator of a mortgagee who during his lifetime recovered a conditional judgment on a writ of entry to foreclose the mortgage may maintain a writ of entry in the supreme court against a disseizor to recover possession of the mortgaged premises. Richardson *v.* Hildreth, 8 Cush. (Mass.) 225.

Order of court for possession necessary.— Under the Missouri statute an administrator cannot maintain ejectment for the land, nor a suit to remove a cloud from the title, in the absence of an order authorizing him to take possession. Hall *v.* Farmers', etc., Bank, 145 Mo. 418, 46 S. W. 1000.

Proof necessary to sustain action.— Under Fla. Rev. St. (1892) § 1917, providing that real estate shall descend to the heir or devisee of a decedent, and remain in his possession until the executor or administrator shall take possession of or sell the same, under the order of the court, for the payment of debts, an administrator cannot maintain ejectment for land on proof of title and possession in his intestate at the time of his death, where the action was not commenced until after such statute took effect, and it does not appear when his decedent died, or when plain-

heirs or devisees, with at most a power of sale in the representative, he has no such authority.[61]

(III) *Forcible Entry and Detainer.* An executor or administrator is entitled to maintain an action of forcible entry and detainer where he is entitled to possession of the land,[62] or where the decedent had a mere chattel interest therein,[63] but not otherwise.[64]

3. Rents and Profits — a. In General. The personal representative has at common law no title or right to the rents and profits of the real estate of his decedent, accruing after the latter's death;[65] but possession and control of real estate such as will carry the right to rents and profits may be given to the execu-

tiff was appointed, or that he has ever been in possession. Rose *v.* Withers, 39 Fla. 460, 22 So. 724.

Construction of will.— A will which authorizes executors, not only to sell at their option, but also to make valuation, division, and allotments of the estate devised, and to make deeds of conveyance therefor, breaks the descent, and vests the estate in the executors, so that the heir at law cannot maintain ejectment therefor. Wallace *v.* Wallace, 1 Am. L. Reg. N. S. (Pa.) 42.

61. *Alabama.*— Stovall *v.* Clay, 108 Ala. 105, 20 So. 387; Morgan *v.* Carey, 73 Ala. 222.

Arkansas.— Carnall *v.* Wilson, 21 Ark. 62, 76 Am. Dec. 351; Morrill *v.* Menifee, 5 Ark. 629.

Connecticut.— Livingston *v.* Bird, 2 Root 438.

Georgia.— Head *v.* Driver, 79 Ga. 179, 3 S. E. 621.

Kentucky.— Reynolds *v.* Boyd, 92 Ky. 249, 17 S. W. 572, 13 Ky. L. Rep. 525.

Maryland.— Fredericks *v.* Cisco, 72 Md. 393, 20 Atl. 190.

Missouri.— Burdyne *v.* Mackey, 7 Mo. 374.

Montana.— Carrhart *v.* Montana Mineral Land, etc., Co., 1 Mont. 245.

New Hampshire.— Pierce *v.* Jaquith, 48 N. H. 231.

New York.— Chamberlain *v.* Taylor, 105 N. Y. 185, 11 N. E. 625; Smith *v.* Chase, 90 Hun 99, 35 N. Y. Suppl. 615; Van Rensselaer *v.* Hayes, 5 Den. 477; Jackson *v.* McVey, 15 Johns. 234.

Tennessee.— Peck *v.* Henderson, 7 Yerg. 18.

Vermont.— Roberts *v.* Morgan, 30 Vt. 319; Cushman *v.* Jordan, 13 Vt. 597; Stone *v.* Gribbin, 3 Vt. 400; Chipman *v.* Sawyer, 1 Tyler 83.

See 22 Cent. Dig. tit. "Executors and Administrators," § 539.

62. *Alabama.*— Espalla *v.* Gottschalk, 95 Ala. 254, 10 So. 755.

California.— Knowles *v.* Murphy, 107 Cal. 107, 40 Pac. 111.

Florida.— Scott *v.* Lloyd, 16 Fla. 151.

Illinois.— McDole *v.* Shepardson, 53 Ill. App. 513.

Iowa.— Beezley *v.* Burgett, 15 Iowa 192.

Vermont.— Edmonds *v.* Morrill, Brayt. 20.

See 22 Cent. Dig. tit. "Executors and Administrators," § 540.

63. Winningham *v.* Crouch, 2 Swan (Tenn.) 170.

64. McMullen *v.* Mayo, 8 Sm. & M. (Miss.) 298; Carmichael *v.* Davis, Walk. (Miss.) 221.

65. *Alabama.*— Masterson *v.* Girard, 10 Ala. 60.

Illinois.— Dixon *v.* Niccolls, 39 Ill. 372, 89 Am. Dec. 312; Foltz *v.* Prouse, 17 Ill. 487; Sherman *v.* Dutch, 16 Ill. 283.

Indiana.— Kidwell *v.* Kidwell, 84 Ind. 224; Trimble *v.* Pollock, 77 Ind. 576; King *v.* Anderson, 20 Ind. 385.

Iowa.— Crane *v.* Guthrie, 47 Iowa 542; Shawhan *v.* Long, 26 Iowa 488, 96 Am. Dec. 164; Laverty *v.* Woodward, 16 Iowa 1.

Kansas.— Head *v.* Sutton, 31 Kan. 616, 3 Pac. 280.

Kentucky.— Ball *v.* Covington First Nat. Bank, 80 Ky. 501; Combs *v.* Branch, 4 Dana 547.

Maine.— Mills *v.* Merryman, 49 Me. 65; Stinson *v.* Stinson, 38 Me. 593.

Maryland.— Getzandaffer *v.* Caylor, 38 Md. 280.

Massachusetts.— Cummings *v.* Watson, 149 Mass. 262, 21 N. E. 365; Lobdell *v.* Hayes, 12 Gray 236.

Mississippi.— Bloodworth *v.* Stevens, 51 Miss. 475.

New Jersey.— Allen *v.* Van Houten, 19 N. J. L. 47.

New York.— Matter of Speara, 89 Hun 49, 35 N. Y. Suppl. 35; Fay *v.* Holloran, 35 Barb. 295; Wright *v.* Williams, 5 Cow. 501; Kohler *v.* Knapp, 1 Bradf. Surr. 241.

North Carolina.— Fleming *v.* Chunn, 57 N. C. 422.

Pennsylvania.— Haslage *v.* Krugh, 25 Pa. St. 97; Adams *v.* Adams, 4 Watts 160; McManus' Estate, 3 Pa. Dist. 183, 14 Pa. Co. Ct. 379; O'Donnell's Estate, 9 Kulp 123; Burnell's Estate, 13 Phila. 387.

South Carolina.— Huff *v.* Latimer, 33 S. C. 255, 11 S. E. 758.

Tennessee.— Smith *v.* Thomas, 14 Lea 324; Rowan *v.* Riley, 6 Baxt. 67; Combs *v.* Young, 4 Yerg. 218, 26 Am. Dec. 225.

Vermont.— Stockwell *v.* Sargent, 37 Vt. 16.

Virginia.— Lightner *v.* Speck, (1897) 28 S. E. 326; Roberts *v.* Stanton, 2 Munf. 129, 5 Am. Dec. 463.

See 22 Cent. Dig. tit. "Executors and Administrators," § 541; and *supra*, III, C, 3.

An executor may be enjoined from leasing the real estate and collecting the rent where he has no right to do so under the will. Stevens *v.* Stevens, 69 Hun (N. Y.) 332, 23 N. Y. Suppl. 520.

Rents received by one who is both administrator and guardian go to the guardianship account. Foteaux *v.* Lepage, 6 Iowa 123.

tor or administrator by the will,[66] and statutes frequently give the representative the right under appropriate circumstances to receive the rents and profits either for the purpose of using them for payment of the debts or for other proper purposes connected with the administration.[67] In order to entitle the representative to the rents and profits under such statutes it must appear that the contingency contemplated by the statute has arisen and that the representative has complied with the requirements of the statute with reference to establishing his right,[68] one of the most usual of which is that there shall be an order of court authorizing the representative to rent or use the land and apply the rents and profits to the purposes of the administration.[69] A mere naked or contingent power to sell does not give the representative a right to the rents and profits, but in such case the heirs or devisees may enter upon the estate and receive all rents and profits until such power is appropriately exercised.[70]

Consent of heirs.— Where rents and profits of real estate have been received by the administrator with the consent of the heirs, this gives him a lawful possession and a good title against all persons except the heirs. Wilson *v.* Shearer, 9 Metc. (Mass.) 504.

Testamentary provision for payment of encumbrance out of rent.— Although ordinarily the debts of an estate are payable by executors only, where a will devised to testator's son a certain quarry, and provided that the rents arising from the quarry should be applied to discharge the encumbrance on the same, the son was entitled to the rents, in order to apply them on the debt, and they did not go to the executors. Emery *v.* Owings, 6 Gill (Md.) 191.

Distraining for rent against devisee.— Where a will directed that testator's estate be divided among the children as they came of age or married, and one child married and with her husband occupied lands of the estate, and the executors refused to pay over her share of the estate or account for it, they could not distrain against the husband for rent due. McCracken *v.* McCracken, 6 T. B. Mon. (Ky.) 342.

66. Madigan *v.* Burns, 58 N. H. 405; Hannahs *v.* Hannahs, 68 N. Y. 610; Jones' Appeal, 3 Grant (Pa.) 250; Clark *v.* Clark, 58 Vt. 527, 3 Atl. 508. See *supra*, III, C, 3.

This power may be implied where the provisions of the will are of such character as to indicate that such was the intention of the testator. Peirce *v.* Peirce, 195 Pa. St. 417, 46 Atl. 78; Bush *v.* Allen, 5 Mod. 63.

An express authority to take possession of the land, given to the executor by the will, carries with it, as a necessary incident to the possession, the right to take the rents and profits, and this right is not to be deemed as denied because the will contains no provision for their disposition when collected, the implication being that they are to go to the persons beneficially interested in the estate. Hubbard *v.* Housley, 43 N. Y. App. Div. 129, 56 N. Y. Suppl. 392 [*affirming* 27 Misc. 276, 58 N. Y. Suppl. 432, and *affirmed* in 160 N. Y. 688, 55 N. E. 1096].

Will not giving right to collect rents.— Where the only duty imposed upon the executors under the will with regard to the residuary real estate is to divide it into three equal parts and convey them to trustees, they have no right to lease or collect rents from the land, notwithstanding the fact that such residuary real estate is charged with a trust legacy in favor of one of the executors. Stevens *v.* Stevens, 69 Hun (N. Y.) 332, 23 N. Y. Suppl. 520.

67. *Alabama.*— Harkins *v.* Pope, 10 Ala. 493.

Colorado.— Rupp *v.* Rupp, 11 Colo. App. 36, 52 Pac. 290.

Georgia.— Chisolm *v.* Spullock, 87 Ga. 665, 13 S. E. 571.

Indiana.— Kidwell *v.* Kidwell, 84 Ind. 224; McClead *v.* Davis, 83 Ind. 263.

Iowa.— Laverty *v.* Woodward, 16 Iowa 1.

Louisiana.— Hoss *v.* Jones, 26 La. Ann. 659.

New Hampshire.— Gregg *v.* Currier, 36 N. H. 200.

New Jersey.— Condit *v.* Neighbor, 13 N. J. L. 83.

Pennsylvania.— Bakes *v.* Reese, 150 Pa. St. 44, 24 Atl. 634.

See 22 Cent. Dig. tit. "Executors and Administrators," § 541.

Determination of lease.—A statute authorizing administrators to receive, take possession of, sue for, and recover the rents, issues, and profits of the land of their intestates does not give an administrator power to determine an existing lease and sue for possession of the leased premises. Rupp *v.* Rupp, 11 Colo. App. 36, 52 Pac. 290.

68. Brent *v.* Chipley, 104 Mo. App. 645, 78 S. W. 270.

69. Brent *v.* Chipley, 104 Mo. App. 645, 78 S. W. 270; Bealey *v.* Blake, 70 Mo. App. 229.

Order not retrospective.— An order of the probate court directing the administrator to take possession of and rent the real estate for the payment of debts can have no retrospective effect, nor can it authorize an administrator to recover from the heir rents collected by him after the decedent's death, but prior to the order. Bealy *v.* Blake, 70 Mo. App. 229.

70. *Indiana.*— Doe *v.* Lanius, 3 Ind. 441, 56 Am. Dec. 518.

Maryland.— Guyer *v.* Maynard, 6 Gill & J. 420.

Massachusetts.— Brooks *v.* Jackson, 125 Mass. 307; Lobdell *v.* Hayes, 12 Gray 236.

b. Actions to Recover. Where the right to possess or control the decedent's land is given by will or local statute, the executor or administrator may recover rent or sue for use and occupation,[71] but he cannot do so where no such rightful control exists.[72]

c. Disposition. The representative who has collected rents may be protected where, instead of paying the same over to the heirs or other distributees, he has under prudent and reasonable circumstances applied the same beneficially for the premises, as in keeping down mortgage interest and preventing foreclosure at a sacrifice,[73] for needful labor on the premises,[74] or keeping the buildings in proper repair;[75] but it has been held that an administrator has no authority to apply rents collected to taxes and arrears of ground-rent accruing subsequent to the death of the decedent.[76] The court has also refused to call a widow who was administratrix to account for rents and profits expended in the support of infant children of the deceased.[77] It has been held that under a statute giving executors and administrators possession and control of the real estate not specifically devised during the settlement of the estate, such possession and control was for the benefit of the persons entitled to the real estate and that rents and profits not needed for the payment of debts went on distribution with the land as incident thereto, and did not go to the residuary legatees.[78]

d. Liability of Representative — (1) *In General.* An executor or administrator who has taken possession or control of the real estate of his decedent must account for the rents and profits thereof,[79] but whether his liability is to account

Michigan.— Howard *v.* Patrick, 38 Mich. 795.

Mississippi.— Bullock *v.* Sneed, 13 Sm. & M. 293.

New Hampshire.— Gregg *v.* Currier, 36 N. H. 200.

New York.—Campbell *v.* Johnston, 1 Sandf. Ch. 148.

Pennsylvania.— Peirce *v.* Peirce, 195 Pa. St. 417, 46 Atl. 78; Pennsylvania Co.'s Appeal, 168 Pa. St. 431, 32 Atl. 25, 47 Am. St. Rep. 893; Myers' Estate, 9 Phila. 310; Blight *v.* Wright, 1 Phila. 549. See also Howard's Estate, 8 Pa. Dist. 125.

See 22 Cent. Dig. tit. "Executors and Administrators," § 541.

Where the devisee is made sole executor, rents and profits of real estate belong to him as devisee, subject to the contingent duty of exercising a power of sale of the land to pay debts of the estate. Bucher *v.* Bucher, 86 Ill. 377.

71. *Alabama.*— Nicrosi *v.* Phillipi, 91 Ala. 299, 8 So. 561.

Indiana.— McDowell *v.* Hendrix, 71 Ind. 286, rents accruing upon lease from decedent.

Iowa.— Durlam *v.* Steele, 88 Iowa 498, 55 N. W. 509; Toerring *v.* Lamp, 77 Iowa 488, 42 N. W. 378.

Missouri.— Logan *v.* Caldwell, 23 Mo. 372.

Pennsylvania.— Blight *v.* Ewing, 26 Pa. St. 135; Cobb *v.* Biddle, 14 Pa. St. 444.

See 22 Cent. Dig. tit. "Executors and Administrators," § 543.

Chattel interest of testator.— An executor, in his declaration for rent falling due after the testator's death, must show that the estate of the testator in the premises was but a chattel. Williamson *v.* Richardsons, 6 T. B. Mon. (Ky.) 596.

Ownership or contract to pay.— In order to enable an administrator to maintain an action for the use and occupation of a farm, plaintiff or his intestate must have been the owner of the premises, or there must have been an express contract on the part of defendant to pay. Bailey *v.* Campbell, 2 Ill. 110.

Defenses.— That defendant paid the rent demanded to a guardian appointed in another county, where the intestate died, there being no debtors or creditors of the estate, and the heirs being minors, is a defense which should be allowed to be made to a suit by an administrator not appointed until six years after the death of the intestate. Homuth *v.* Zapp, 20 Tex. 807.

72. Stewart *v.* Smiley, 46 Ark. 373; Landree *v.* Warren, 53 Mo. App. 442; Bagwell *v.* Jamison, Cheves (S. C.) 249; Filbey *v.* Carrier, 45 Wis. 469.

73. Patapsco Guano Co. *v.* Ballard, 107 Ala. 710, 19 So. 777, 54 Am. St. Rep. 131. See also Reynolds *v.* New Orleans Canal, etc., Co., 30 Ark. 520.

74. Ferguson *v.* Collins, 8 Ark. 241.

75. See Henderson's Succession, 24 La. Ann. 435. And see *supra*, VIII, I, 8, e; *infra*, VIII, O, 4.

76. McManus' Estate, 3 Pa. Dist. 183, 14 Pa. Co. Ct. 379. And see *infra*, X, A, 15.

77. Thompson *v.* Brown, 4 Johns. Ch. (N. Y.) 619.

78. Remington *v.* American Bible Soc., 44 Conn. 512.

79. *Alabama.*— Smith *v.* King, 22 Ala. 558.

Connecticut.— See Storer *v.* Hinkly, 1 Root 182.

Missouri.— Lewis *v.* Carson, 16 Mo. App. 342.

New Jersey.— Brearley *v.* Brearley, 9 N. J. Eq. 21.

New York.— Griffith *v.* Beecher, 10 Barb. 432; Matter of Boyd, 4 Redf. Surr. 154.

in his representative or his individual capacity depends upon the facts of the particular case.[80] He is not, however, responsible for rents for a time when the real estate was not in his possession or control unless he has been guilty of some laches or lack of good faith which has resulted in a loss to those entitled to the rents.[81]

(II) *IN WHAT CAPACITY LIABLE.* The general rule is that where the representative is lawfully in possession or control under authority of the will or some local statute, he accounts in his representative capacity for the rents and profits received as assets for the payment of debts or distribution as the case may be,[82] although negligence in the management of the property may subject him to personal liability;[83] while if he has taken possession or control without authority he is not in his representative capacity chargeable with or liable to account for the rents

North Carolina.— Jennings *v.* Copeland, 90 N. C. 572.

Pennsylvania.— Straub's Appeal, 1 Pa. St. 86.

South Carolina.— Garlington *v.* Copeland, 32 S. C. 57, 10 S. E. 616.

Washington.— *In re* Alfstad, 27 Wash. 175, 67 Pac. 593.

See 22 Cent. Dig. tit. "Executors and Administrators," § 542.

Administrator not liable to widow for rents until her distributive share set aside.— *In re* Pennock, 122 Iowa 622, 98 N. W. 480.

Where the estate is unsettled and possibly insolvent, an action will not lie by devisees against the executor for rents collected by him, although he took charge of and leased the property without a formal order of the probate court. Gamage *v.* Bushell, 1 Mo. App. 416.

An executor who is also residuary devisee is not liable to account for rents and profits received by him. Newcomb *v.* Stebbins, 9 Metc. (Mass.) 540. But see McNeely's Succession, 50 La. Ann. 823, 24 So. 338, holding that an executor, who is also the universal legatee, who takes possession *ex parte* of all the property of the succession, and deals with it as his own, with knowledge of the existence of a minor forced heir, is chargeable with the rent of the portion of the succession which vested in such heir.

Executor as life-tenant.— Where an estate is left to the widow for life, she is entitled to the rents and profits until disposition by due process of law; and, if she be executrix and reside on the property, she need not charge herself in her account with rents for the same. *In re* Bare, 5 Lanc. L. Rev. (Pa.) 36. See also Clough *v.* Clough, 71 N. H. 412, 52 Atl. 449, holding that an executor who occupied real estate in which a life-interest has been devised to his co-executor is not chargeable with rent as executor and cannot be credited in that capacity with money expended for taxes, repairs, etc.

Rents collected by heirs as agents of executor.— The rule holding an executor responsible to the estate for transcending his power in taking charge of the real estate and collecting the rents applies, although the heirs collect them, if they do so as his agents and he receives a commission thereon. Gamble *v.* Gibson, 59 Mo. 585.

Occupation as tenant of person entitled.— An executor is not chargeable in his official capacity with timber, coal, and limestone taken from the testator's land, where he occupied the same as tenant of the life-tenant. Lynn's Appeal, 31 Pa. St. 44, 72 Am. Dec. 721. See also McCormick's Appeal, 104 Pa. St. 146, when the court refused in a proceeding for distribution to charge the administrator *de bonis non* with the will annexed with rent for land which he occupied before his appointment under lease from one who held it in trust for the heirs.

80. Patrick *v.* Roach, 27 Tex. 579. See *infra*, VIII, O, 3, d, (II).

81. Clark *v.* Guard, 73 Ala. 456; Jenks *v.* Terrell, 73 Ala. 238; Cross *v.* Johnson, 82 Ga. 67, 8 S. E. 56; Tunnicliffe *v.* Fox, (Nebr. 1903) 94 N. W. 1032, holding that an executor cannot be charged with the rent of real estate until it becomes necessary to reduce it to actual possession for the protection of the creditors, or until he is ordered so to do by the proper court.

A mere power to sell real estate, given to an executor, does not render him responsible for the rents thereof. Rubottom *v.* Morrow, 24 Ind. 202, 87 Am. Dec. 324.

When chargeable.— An executor who has permitted land, a life-estate in which is charged by the will with the payment of expenses of administration, to pass into the possession of the devisee for life, and suffered him to enjoy the rents and profits thereof for more than twenty years, is justly chargeable with those rents and profits to the amount of those expenses. Tilton *v.* Tilton, 41 N. H. 479. An administrator is liable for the rent of lands necessary to be sold for the payment of debts, if he fails to take the proper steps within a reasonable time. Clark *v.* Knox, 70 Ala. 607, 45 Am. Rep. 93.

82. Dix *v.* Morris, 66 Mo. 514 [*affirming* 1 Mo. App. 93]; Stagg *v.* Jackson, 1 N. Y. 206.

Agreement with devisee.— Where executors managed a farm under an arrangement with the sole devisee that they should take the products and account for them as assets, the fact that such sole devisee was also an executor would not prevent the executors from occupying the farm for the benefit of the estate so as to be chargeable with the income, and the products belonged to them in their representative capacity. Brigham *v.* Elwell, 145 Mass. 520, 14 N. E. 780.

83. Eppinger *v.* Canepa, 20 Fla. 262.

and profits or proceeds received,[84] but is held to account therefor in his individual capacity on the theory that they have been received as agent or implied trustee for those entitled to the realty.[85] Where the representative has received rents and accounted therefor or paid them out in discharge of the debts of his decedent, he is precluded from alleging that they belong to the heir and he received them without authority, and those entitled to the rents may charge him therewith in his representative capacity as for assets rightfully received;[86] and while if he received them without authority he is also chargeable in his individual capacity

84. *Connecticut.*— Goodrich *v.* Thompson, 4 Day 215.

Indiana.— Kidwell *v.* Kidwell, 84 Ind. 224.

Kansas.— Head *v.* Sutton, 31 Kan. 616, 3 Pac. 280.

New Hampshire.— Lucy *v.* Lucy, 55 N. H. 9.

Pennsylvania.— Hartz's Appeal, 2 Grant 83.

South Carolina.— See Jewell *v.* Jewell, 11 Rich. Eq. 296.

See 22 Cent. Dig. tit. "Executors and Administrators," § 542.

Sureties on bond not liable for rents and profits received by representative.— Perkins *v.* Perkins, 46 N. H. 110; Gregg *v.* Currier, 36 N. H. 200; Jewell *v.* Jewell, 11 Rich. Eq. (S. C.) 296. See also Hartz's Appeal, 2 Grant (Pa.) 83.

Executrix as devisee.— Where realty is devised to a widow for life, subject to the payment of debts and legacies, and she is appointed executrix, she is not liable to account for the rents as executrix and appropriate them to the payment of the debts and legacies, since, as she cannot collect the rent except as devisee, she cannot account for them as executrix. *In re* Stoop, 31 Pittsb. Leg. J. (Pa.) 34.

In Missouri the rule is that, although the realty descends to the heirs, and the administrator has as a general rule nothing to do with it, yet when, as a matter of fact, he does retain the realty and collects the rents, he is to account for them to the probate court and his sureties are liable. Dix *v.* Morris, 66 Mo. 514 [*affirming* 1 Mo. App. 93]; Gamble *v.* Gibson, 59 Mo. 585; Lewis *v.* Carson, 16 Mo. App. 342; Gamage *v.* Bushell, 1 Mo. App. 416. But an administrator is not chargeable as such for rents collected by him from land of the intestate in another state, where such rents accrued after the intestate's death, in the absence of any proof that the laws of such state gave him as administrator any power to collect such rents. McPike *v.* McPike, 111 Mo. 216, 20 S. W. 12.

85. *Alabama.*— Boyd *v.* Hunter, 44 Ala. 705; Powell *v.* Powell, 10 Ala. 900.

Indiana.— Evans *v.* Hardy, 76 Ind. 527; Hendrix *v.* Hendrix, 65 Ind. 329; Rodman *v.* Rodman, 54 Ind. 444.

Kansas.— Head *v.* Sutton, 31 Kan. 616, 3 Pac. 280.

Kentucky.—Wilson *v.* Unselt, 12 Bush 215.

Maine.— Kimball *v.* Sumner, 62 Me. 305.

Massachusetts.— Newcomb *v.* Stebbins, 9 Metc. 540.

Michigan.— Byrne *v.* Hume, 73 Mich. 392, 41 N. W. 331.

New Hampshire.— Lucy *v.* Lucy, 55 N. H. 9; Gregg *v.* Currier, 36 N. H. 200.

New York.— Calyer *v.* Calyer, 4 Redf. Surr. 305; Levy's Estate, Tuck. Surr. 148.

North Carolina.— Scroggs *v.* Stevenson, 100 N. C. 354, 6 S. E. 111.

Pennsylvania.— Walker's Appeal, 116 Pa. St. 419, 9 Atl. 654; Robb's Appeal, 41 Pa. St. 45; Jones' Appeal, 3 Grant 250; McCoy *v.* Scott, 2 Rawle 222, 19 Am. Dec. 640; Hall's Estate, 8 Pa. Dist. 8.

Rhode Island.— Belcher *v.* Branch, 11 R. I. 226.

South Carolina.— Jewell *v.* Jewell, 11 Rich. Eq. 296.

Virginia.— Baker *v.* Baker, 87 Va. 180, 12 S. E. 346.

See 22 Cent. Dig. tit. "Executors and Administrators," § 542.

Limitation of actions.— Where a man who is executor of his deceased wife remains in possession of her land after her death, the statute of limitations will bar her devisees from recovering from him for the use of land except for the period of five years before suit, since his liability for such use is a personal one and not as executor. Baker *v.* Baker, 87 Va. 180, 12 S. E. 346.

Presumption of occupation under homestead and dower right.— Where a husband dies leaving a farm, and his widow, who is also administratrix, continues to occupy it with their children, and the statute does not authorize an administrator to have possession of the real estate, her possession will be presumed to be under her homestead and dower right, and she should not be charged with rent in her account as administratrix. Russell *v.* Wheeler, 129 Mich. 41, 88 N. W. 73.

86. *Alabama.*— See Terry *v.* Ferguson, 8 Port. 500.

Kansas.— See Kothman *v.* Markson, 34 Kan. 542, 9 Pac. 218.

Mississippi.— Crowder *v.* Shackelford, 35 Miss. 321. See also Satterwhite *v.* Littlefield, 13 Sm. & M. 302.

Missouri.— Lyons *v.* Lyons, 101 Mo. App. 494, 74 S. W. 467.

New York.— Griffith *v.* Beecher, 10 Barb. 432.

Ohio.— Conger *v.* Atwood, 28 Ohio St. 134, 22 Am. Rep. 462.

See 22 Cent. Dig. tit. "Executors and Administrators," § 542.

But *compare* Evans *v.* Hardy, 76 Ind. 527; Hendrix *v.* Hendrix, 65 Ind. 329.

for what he has paid out,[87] the one entitled to the rents has the right to elect in which capacity he shall be charged, and he cannot defeat a recovery against him in his representative capacity on the ground that he is personally liable.[88]

(III) *EXTENT OF LIABILITY.* An executor or administrator who takes possession of and uses the land of the decedent is properly chargeable with its rental value,[89] subject, however, to the qualifications that where he manages the property honestly and with due diligence he is liable only for such rents and profits as he may have received,[90] and that rents or profits to be accounted for by the representative are net, and subject to suitable deductions for his outlays, expenses, and services,[91] although not necessarily for improvements, nor for any outlays or expenses inconsistent with an honest and prudent management of the prop-

No estoppel against creditors as to surplus. — Where an administrator, on the assumption that the rents were assets, has paid some simple contract debts out of them, he is not thereby estopped from setting up the truth as to the surplus and insisting, when called to account by a simple contract creditor, that the moneys thus received were not assets. Griffith *v.* Beecher, 10 Barb. (N. Y.) 432.

87. Conger *v.* Atwood, 28 Ohio St. 134, 22 Am. Rep. 462.

88. Conger *v.* Atwood, 28 Ohio St. 134, 140, 22 Am. Rep. 462 [*citing* Arbuckle *v.* Tracy, 15 Ohio 432; Howard *v.* Powers, 6 Ohio 92].

89. *Alabama.*— Henderson *v.* Simmons, 33 Ala. 291, 70 Am. Dec. 590.

California.— Misamore's Estate, 90 Cal. 169, 27 Pac. 68.

Georgia.— Burks *v.* Beall, 77 Ga. 271, 3 S. E. 155.

Iowa.— *In re* Holderbaum, 82 Iowa 69, 47 N. W. 898.

Massachusetts.—Stearns *v.* Stearns, 1 Pick. 157; Gibson *v.* Farley, 16 Mass. 280.

New Jersey.— Bray *v.* Neill, 21 N. J. Eq. 343.

North Carolina.— Shuffler *v.* Turner, 111 N. C. 297, 16 S. E. 417.

Tennessee.— Allen *v.* Shanks, 90 Tenn. 359, 16 S. W. 715.

Virginia.— Davies *v.* Hughes, 86 Va. 909, 11 S. E. 488.

See 22 Cent. Dig. tit. "Executors and Administrators," § 542.

Representative must account for highest rent that can be obtained. McCracken *v.* McCracken, 6 T. B. Mon. (Ky.) 342; Burns *v.* Cox, 10 Phila. (Pa.) 8.

A statute providing a mode for determining the amount due for the use or income of real estate, when the occupation is such as to create a liability therefor, and the disposition of such amount, does not make an executor or administrator liable for the use and occupation of real estate for which he would not otherwise be liable in some form. Almy *v.* Crapo, 100 Mass. 218.

Construction of parties to lease.— Where an estate consisted in part of a homestead and a lot adjoining, on which was a building, both of which were rented for a gross sum, and testator, the tenant, and the executor considered the rental of the building to be one half of such sum, it was held that the construction placed on the lease by the parties controlled, and the executor should be charged in his account with one half of the rent. Robinson *v.* Hadgkin, 99 Wis. 327, 74 N. W. 791.

Value of product taken.— Executors who enter upon land of the decedent, of which the devisee is in peaceable possession, and forcibly take possession of and carry away wheat growing thereon at the time of the testator's death, which the devisee is threshing, are liable to such devisee in an action of trover for the value of the property so taken. Rough *v.* Wormer, 76 Mich. 375, 43 N. W. 573.

Representative not chargeable with increased rental caused by improvements made by him.— *In re* Brazill, 11 Grant Ch. (U. C.) 253.

90. *Florida.*— Anderson *v.* Northrop, 44 Fla. 472, 33 So. 419.

Kentucky.— McCracken *v.* McCracken, 6 T. B. Mon. 342.

Louisiana.— Henderson's Succession, 24 La. Ann. 435.

Pennsylvania.— Burns *v.* Cox, 10 Phila. 8.

Tennessee.— Coffee *v.* Ruffin, 4 Coldw. 487.

See 22 Cent. Dig. tit. "Executors and Administrators," § 542.

Uncollected royalties.— Where a lease of coal land belonging to an estate required the mining of a certain amount each year, and the payment of royalties thereon, but did not require the payment of royalties on such amount, whether mined or not, and the leased land and all unmined coal therein were subsequently sold by order of court, the administrator of the estate could not be surcharged on accounting with uncollected royalties on coal which ought to have been but was not mined, as all such unmined coal was covered by the sale, and the estate thereby received its value. *In re* Hodgson, 158 Pa. St. 151, 27 Atl. 878.

91. *Florida.*— Anderson *v.* Northrop, 44 Fla. 472, 33 So. 419.

Kentucky.— Saunders *v.* Saunders, 2 Litt. 314.

New Hampshire.— Sparhawk *v.* Allen, 25 N. H. 261.

New York.— Matter of Meikle, 20 N. Y. Suppl. 88, 2 Connoly Surr. 97.

Pennsylvania.— Eavenson's Appeal, 84 Pa. St. 172.

See 22 Cent. Dig. tit. "Executors and Administrators," § 542.

erty.[92] Interest on the value of the rents may sometimes be charged against the representative.[93]

4. Repairs and Improvements. As a general rule the executor or administrator is not authorized to make repairs or improvements thereon and subject the estate or those beneficially interested to such expenditures,[94] but the power to make necessary repairs may of course be given to the executor by the terms of the will[95] or by statute.[96] An executor has been held authorized to make reasonable repairs and improvements on leasehold property of the decedent occupied by the legatees or parties in interest jointly, where the lease contained a covenant of renewal, and to pay the value of improvements.[97]

5. Taxes and Insurance. The personal representative should not as a general rule pay taxes assessed on real estate after the decedent's death, nor insurance on buildings, although under particular wills or by virtue of local legislation it may become his duty to do so.[98]

6. Mortgaged and Encumbered Property — a. Purchase of Encumbrance by Representative. The representative cannot buy for his own benefit a mortgage upon the land of the estate;[99] but if he has advanced his own funds to prevent the property from being sacrificed and benefited the estate thereby, the mere fact that he took a transfer of the debt to himself does not render the transaction void,[1] or preclude his being credited with the amounts advanced.[2]

b. Discharge of Encumbrance — (i) *To Protect Estate Generally.* While in some states it is considered proper for the personal representative to protect mortgaged or encumbered real estate by paying the interest or even the principal of the debt,[3] in others the courts apply more strictly the rule that the representative is not concerned with the realty,[4] and deny any right or duty of

No credit for losses incurred in management where possession unauthorized.— Allen *v.* Shanks, 90 Tenn. 357, 16 S. W. 715.

92. McCracken *v.* McCracken, 6 T. B. Mon. (Ky.) 342; Wright *v.* Wright, 2 McCord Eq. (S. C.) 185; *In re* Brazill, 11 Grant Ch. (U. C.) 253. But *compare* Morley *v.* Mathews, 14 Grant Ch. (U. C.) 551. See *supra*, VIII, I, 8, e.

93. Harrison *v.* Harrison, 39 Ala. 489; Harvin *v.* Riggs, Rich. Eq. Cas. (S. C.) 287. See *supra*, VIII, F.

94. Rolfson *v.* Cannon, 3 Utah 232, 2 Pac. 205. And see *supra*, VIII, I, 8, e.

95. Matter of Johnson, 32 N. Y. App. Div. 634, 52 N. Y. Suppl. 1081.

Power to manage and control real estate for the benefit of devisees, given to the executor by the will, may justify him in making necessary repairs or improvements. Henry *v.* Henderson, 81 Miss. 743, 33 So. 960, 63 L. R. A. 616. See also Matter of Johnson, 32 N. Y. App. Div. 634, 52 N. Y. Suppl. 1081; Rankin's Estate, 5 Pa. Co. Ct. 603.

A naked power to sell does not authorize the representative to make repairs (Ashby *v.* Ashby, 59 N. J. Eq. 547, 46 Atl. 522; Hopper *v.* Adee, 3 Duer, (N. Y.) 235. *Contra*, Corby's Estate, 5 Kulp (Pa.) 160), nor in such case is the representative liable as such for repairs made at his request (Hopper *v.* Adee, *supra*).

96. Vandegrift *v.* Abbott, 75 Ala. 487, holding that a representative who has under the statute power to lease lands of his decedent has implied power to contract to repair the leased premises.

97. Ames *v.* Downing, 1 Bradf. Surr. (N. Y.) 321.

98. See *supra*, VIII, I, 8, h; *infra*, X, A, 15.

99. McCreedy *v.* Mier, 64 Ill. 495; Evertson *v.* Tappen, 5 Johns. Ch. (N. Y.) 497; Van Horne *v.* Fonda, 5 Johns. Ch. (N. Y.) 388.

1. Furth *v.* Wyatt, 17 Nev. 180, 30 Pac. 828.

2. Burnett *v.* Lyford, 93 Cal. 114, 25 Pac. 855.

3. Matter of Van Houten, 18 Misc. (N. Y.) 524, 42 N. Y. Suppl. 1115; Matter of Rolph, 9 N. Y. Suppl. 293, 2 Connoly Surr. (N. Y.) 191; Pate *v.* Oliver, 104 N. C. 458, 10 S. E. 709, power under statute. See also Matter of Hosford, 27 N. Y. App. Div. 427, 50 N. Y Suppl. 550.

Court may order administrator to redeem. Scudder *v.* Ames, 89 Mo. 496, 14 S. W. 525.

Approval of previous redemption.— Where an administrator used the personal assets to redeem land of the intestate from a mortgage not due and paid a bonus to further his purpose, a subsequent approval by the probate court is retroactive and has the same effect as an order to redeem previously made. Scudder *v.* Ames, 89 Mo. 496, 14 S. W. 525.

4. See Nixon *v.* Seal, (Miss. 1900) 27 So. 875; and *supra*, VIII, O, 1, a.

Agreement for usury.— An administrator cannot for the purpose of preventing a sale under a decree make an agreement binding the estate for the payment of interest at a higher rate than allowed by law. Williams *v.* Troop, 17 Wis. 463.

the representative to make any payments out of the assets for the benefit of land[5] which is not needed for the payment of debts or for purposes of administration.[6] In some states the representative can maintain a bill to redeem,[7] or an action to cancel a mortgage purporting to be executed by his decedent, as fraudulent and void,[8] or to compel an assignment of a mortgage on the realty to prevent foreclosure and thus to save the estate from loss;[9] but in other states he has not these powers.[10] The representative who goes beyond his duty in such matters must bear all losses resulting to the estate.[11]

(II) *IN INTEREST OF HEIR OR DEVISEE.* The common-law rule that the personalty is the primary fund for payment of the decedent's personal debts, to the exoneration of the realty, has been extended so far as to allow the heir or devisee to call upon the executor or administrator to exonerate the realty from a debt constituting a lien thereon, unless the testator has expressed his intention to the contrary in plain and unequivocal terms.[12] The rule relates, however, only to

The right to release an equity of redemption to the holder of the mortgage who agreed to receive the equity in payment of the debt which exceeded the value of the equity, is doubtful enough to entitle the grantees to a decree confirming the arrangement. U. S. Bank *v.* Piatt, 5 Ohio 540.

5. See *In re* Holladay, 18 Oreg. 168, 22 Pac. 750.

The executor cannot extinguish a claim of dower by the payment of money without the consent of all the devisees. Forward *v.* Forward, 6 Allen (Mass.) 494.

6. Young *v.* Tarbell, 37 Me. 509.

7. Mason *v.* Daly, 117 Mass. 403. See also Aiken *v.* Morse, 104 Mass. 277. *Contra*, under earlier statute. Smith *v.* Manning, 9 Mass. 422.

8. West Troy Nat. Bank *v.* Levy, 127 N. Y. 549, 28 N. E. 592 [*reversing* 2 N. Y. Suppl. 162], where the mortgage was in fact forged, and it was further held that a creditor was entitled to bring an action to cancel the same on the refusal of the administrator to do so.

9. Mabbett *v.* Mabbett, 29 N. Y. App. Div. 609, 51 N. Y. Suppl. 529.

10. Nixon *v.* Seal, (Miss. 1900) 27 So. 875.

11. *In re* Knight, 12 Cal. 200, 73 Am. Dec. 531; Olin *v.* Arendt, 27 Misc. (N. Y.) 270, 58 N. Y. Suppl. 429. See also Williams *v.* Troop, 17 Wis. 463.

Presumptions in favor of the administrator will be indulged in the absence of proof that the condition of the estate did not warrant his redeeming mortgaged property of the decedent. Goodrich *v.* Leland, 18 Mich. 110.

Where lands never belonged to the decedent the representative is not entitled to credit for money advanced by him to disencumber them. Cary *v.* Simmons, 87 Ala. 524, 6 So. 416, where the land had come from another source to the distributees of the estate.

12. *California.*— See *In re* Woodworth, 31 Cal. 595, holding as between the legatee of the personalty and the devisee of the realty, that the executor is not authorized to appropriate rents accruing after the testator's death to the satisfaction of a mortgage.

Connecticut.— See Turner *v.* Laird, 68 Conn. 198, 35 Atl. 1124, holding that a specific devise of land mortgaged by the testator to secure his own debt *prima facie* imports an intention that such debt shall be satisfied out of the general personal assets.

Illinois.— Sutherland *v.* Harrison, 86 Ill. 363.

Indiana.— See Linton *v.* Potts, 5 Blackf. 396.

Massachusetts.—Brown *v.* Baron, 162 Mass. 56, 37 N. E. 772, 44 Am. St. Rep. 331, holding that under this rule an executor may pay a mortgage on property devised to him out of the funds of the estate.

New Hampshire.— Tuttle *v.* Robinson, 33 N. H. 104.

New Jersey.— Higbie *v.* Morris, 53 N. J. Eq. 173, 32 Atl. 372; Krueger *v.* Ferry, 41 N. J. Eq. 432, 5 Atl. 452; Slack *v.* Emery, 30 N. J. Eq. 458; Keene *v.* Munn, 16 N. J. Eq. 398. See also Whitehead *v.* Gibbons, 10 N. J. Eq. 230.

Pennsylvania.— *In re* Lennig, 52 Pa. St. 135; Meanor *v.* Hamilton, 27 Pa. St. 137.

Rhode Island.— Wood *v.* Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198.

Virginia.— Dandridge *v.* Minge, 4 Rand. 397.

England.— See Evelyn *v.* Evelyn, 2 Barn. 118, Fitzg. 131, 2 P. Wms. 659, Selw. 18, 24 Eng. Reprint 904; Tower *v.* Rous, 18 Ves. Jr. 132, 11 Rev. Rep. 169, 34 Eng. Reprint 267; Hamilton *v.* Worley, 2 Ves. Jr. 62, 30 Eng. Reprint 523.

See 22 Cent. Dig. tit. "Executors and Administrators," § 548.

The reason of the rule is said to be that the personal estate is presumed to have had the benefit of the money for which the mortgage was given and therefore has the duty of discharging the debt. See Keene *v.* Munn, 16 N. J. Eq. 398.

Interest on sums advanced by an administrator to redeem a mortgage should be allowed. Jennison *v.* Hapgood, 10 Pick. (Mass.) 77.

Testamentary direction.— If the will directs that a mortgage upon property devised shall be paid out of other property of the estate, the executor should pay off the mortgage (Bradford *v.* Forbes, 9 Allen (Mass.) 365) and the court will compel him to do

personal debts of the decedent; and if the decedent acquired land already subject to a mortgage the representative cannot be called upon to discharge it unless the decedent made the debt his own[13] or directed by his will that his personal estate should discharge the lien.[14] The common-law rule has been changed by statute in a few jurisdictions so that the person who takes land by descent or devise must satisfy a lien thereon out of his own property without resorting to the representative unless the testator expressly directs that the lien be otherwise paid.[15] The common-law rule, in modern times at least, would not apply as between the creditors of an estate and the heirs or devisees,[16] nor were the statutes referred to meant to affect the rights of creditors,[17] but only to govern

so (*In re* Heydenfeldt, 106 Cal. 434, 39 Pac. 788, holding that the probate court has jurisdiction to compel action by the executor).

Rights of strangers.— The rule exists only in favor of the heir or devisee or the widow, but not for the benefit of a stranger. A person acquiring title by purchase after the death of the decedent takes subject to the encumbrance. *In re* Swan, 54 Mo. App. 17; Krueger *v.* Ferry, 41 N. J. Eq. 432, 5 Atl. 452; Keene *v.* Munn, 16 N. J. Eq. 398.

A direction to pay the just debts and funeral expenses supports the presumed intention of the testator that all the debts, including mortgage debts, shall be paid out of the personalty. Turner *v.* Laird, 68 Conn. 198, 35 Atl. 1124. See also Shreve *v.* Shreve, 17 N. J. Eq. 487.

Specific legacy.— The heir or devisee cannot have his land exonerated out of a specific legacy. Ruston *v.* Ruston, 2 Yeates (Pa.) 54; Tankerville *v.* Fawcet, 2 Bro. Ch. 57, 1 Cox Ch. 237, 29 Eng. Reprint 31.

Where the estate is insolvent the administrator cannot apply the personal assets to the redemption of a mortgage made by the intestate for the benefit of the widow and heirs, as the lien of the creditors upon the personal assets is paramount to the claims of the widow and heirs. Gibson *v.* Crehore, 5 Pick. (Mass.) 146.

13. *Illinois.*— See Stiger *v.* Bent, 111 Ill. 328.

Massachusetts.—Creesy *v.* Willis, 159 Mass. 249, 34 N. E. 265.

Michigan.— See *In re* Wisner, 20 Mich. 442.

Rhode Island.— See Gould *v.* Winthrop, 5 R. I. 319.

England.— Evelyn *v.* Evelyn. 2 Barn. 118, Fitzg. 131, 2 P. Wms. 659, Selw. 18, 24 Eng. Reprint 904.

See 22 Cent. Dig. tit. "Executors and Administrators," § 548.

Contra, under statute. Newcomer *v.* Wallace, 30 Ind. 216.

A mere collateral undertaking is not sufficient to show that the testator has made the debt his own. *In re* Hunt, 19 R. I. 139, 32 Atl. 204, 61 Am. St. Rep. 743; Pleasants *v.* Flood, 89 Va. 96, 15 S. E. 504. See also Gould *v.* Winthrop, 5 R. I. 319.

Agreement to pay.— Where the decedent by contract with the vendor agreed to pay the debt either to the vendor directly or some third person designated by the vendor, in discharge of the preëxisting lien on the land, the heir was entitled to have the land exonerated. O'Conner *v.* O'Conner, 88 Tenn. 76, 12 S. W. 447, 7 L. R. A. 33.

14. Thompson *v.* Thompson, 4 Ohio St. 333.

15. Banks N. Y. Rev. St. (9th ed.) 1822; 17 & 18 Vict. c. 113. See Meyer *v.* Cahen, 111 N. Y. 270, 18 N. E. 852; Moseley *v.* Marshall, 22 N. Y. 200 [*reversing* 27 Barb. 42]; Willcox *v.* Smith, 26 Barb. (N. Y.) 316; House *v.* House, 10 Paige (N. Y.) 158; Halsey *v.* Reed, 9 Paige (N. Y.) 446; Williams *v.* Eaton, 3 Redf. Surr. (N. Y.) 503.

An equitable lien for the purchase-price of land bought by the decedent is not within the statute and the heir can call upon the representative to have the lien discharged out of the personalty. Wright *v.* Holbrook, 32 N. Y. 587 [*affirming* 2 Rob. 516]. See also Lamport *v.* Beeman, 34 Barb. (N. Y.) 239.

A general direction for the payment of debts as soon after testator's decease as it can conveniently be done does not affect the rule. Meyer *v.* Cahen, 111 N. Y. 270, 18 N. E. 852.

Payment under revoked will.— A payment in good faith, under direction by the will subsequently adjudged to have been revoked, will be credited to the administrator. The legatees and next of kin will be left to their claim against the land itself for the sum so paid. Bloomer *v.* Bloomer, 2 Bradf. Surr. (N. Y.) 339.

Testamentary provisions showing intention that executor shall pay.— See Sutherland *v.* Gesner, 27 Hun (N. Y.) 282.

16. See Rossiter *v.* Cossit, 15 N. H. 38; Dandridge *v.* Minge, 4 Rand. (Va.) 397; Bartholomew *v.* May, 1 Atk. 487, 26 Eng. Reprint 309.

Application of rents and profits to mortgage debt.— Creditors cannot complain of the administrator being allowed to remain in possession, where the mortgagee permitted him to take the rents and profits for the benefit of the heirs in extinguishment of the mortgage debt, and the administrator cannot be charged with the rents and profits in his account. See Reynolds *v.* New Orleans Canal, etc., Co., 30 Ark. 520.

17. Roosevelt *v.* Carpenter, 28 Barb. (N. Y.) 426, holding that the statute does not prevent a mortgagee from suing on the bond given him instead of enforcing his mortgage. See also Wright *v.* Holbrook, 32 N. Y. 587.

A reservation out of personalty will be directed by the surrogate to an amount sufficient to afford the mortgagee his proportion of his demand against the estate *pro rata*

the rule of marshaling between the personal representative and the heirs or devisees.[18]

c. Mortgagee as Administrator. Where a mortgagee becomes administrator of the mortgagor he is not precluded by his character as administrator from disposing of his mortgage in any manner he might deem best. If he sells the property and gives a general warranty he does not thereby prejudice any right of the heirs to redeem, and he is not chargeable as administrator with the proceeds of the sale.[19]

7. Leaseholds — a. In General. Since a lease of lands is a chattel interest going to the personal representative as assets,[20] it devolves upon the personal representative to perform the contract and he is liable for a breach of it,[21] while on the other hand he may maintain ejectment with relation to the leased lands,[22] sue for a trespass when he is in possession,[23] or sue the landlord for forcible entry and taking possession on the death of the lessee.[24] A sale of a lease or the unexpired term as a chattel interest in the representative's hands may be valid, although made without a license from the court,[25] but the representative cannot lawfully surrender the lease and take another lease in his own name.[26]

b. Liability For Rent. It has been laid down as the rule that the personal representative who takes possession under a lease to his decedent is personally liable for rent accruing,[27] at least to the extent of the profits of the land,[28] and in

with the other creditors where there is reason to anticipate a deficiency upon the foreclosure of the mortgage. Williams *v.* Eaton, 3 Redf. Surr. (N. Y.) 503.

18. Roosevelt *v.* Carpenter, 28 Barb. (N. Y.) 426. See also Rice *v.* Harbeson, 2 Thomps. & C. (N. Y.) 4.

19. Dexter *v.* Arnold, 7 Fed. Cas. No. 3,855, 3 Mason 284.

20. See *supra*, III, C, 7.

21. Greenleaf *v.* Allen, 127 Mass. 248; Hovey *v.* Newton, 11 Pick. (Mass.) 421; Wilcox *v.* Alexander, (Tex. Civ. App. 1895) 32 S. W. 561.

22. Duchane *v.* Goodtitle, 1 Blackf. (Ind.) 117; Mosher *v.* Yost, 33 Barb. (N. Y.) 277.

An executrix who assented to a bequest of a leasehold cannot maintain ejectment against the legatee for recovery of the leasehold. Cole *v.* Cole, 1 Harr. & J. (Md.) 572.

23. Cunningham *v.* Baxley, 96 Ind. 367; Schee *v.* Wiseman, 79 Ind. 389.

24. Smith *v.* Dodds, 35 Ind. 452.

25. Amory *v.* Francis, 16 Mass. 308; *In re* Gay, 5 Mass. 419; Dillingham *v.* Jenkins, 7 Sm. & M. (Miss.) 479; Coppels' Estate, 4 Phila. (Pa.) 378. See also Keilar *v.* Blanchard, 21 La. Ann. 38.

26. Keating *v.* Condon, 68 Pa. St. 75; Charles *v.* Byrd, 29 S. C. 544, 8 S. E. 1.

27. Inches *v.* Dickinson, 2 Allen (Mass.) 71, 79 Am. Dec. 765; Becker *v.* Walworth, 45 Ohio St. 169, 12 N. E. 1; *In re* Kemp, 34 Pittsb. Leg. J. (Pa.) 82; Hill's Appeal, 31 Pittsb. Leg. J. (Pa.) 375.

If the representative enters during a current quarter and takes the profits from an under tenant or otherwise, he is personally liable for the rent for that quarter, although it commenced before the death of the lessee. Inches *v.* Dickinson, 2 Allen (Mass.) 71, 79 Am. Dec. 765; Ipswich *v.* Martin, Cro. Jac. 411; Wollaston *v.* Hakewill, 3 M. & G. 297, 3 Scott N. R. 593, 42 E. C. L. 161; Buckley *v.* Pirk, 1 Salk. 316; Bristol *v.* Guyse, 1 Saund. 111; Jevens *v.* Harridge, 1 Saund. 1.

The representative may be relieved from personal liability if he can show an express contract on the part of the lessor to look to him as representative only, or such conduct on the part of the lessor as precludes him from enforcing personal liability. Becker *v.* Walworth, 45 Ohio St. 169, 12 N. E. 1.

When the lease is divested of its chattel qualities by statute the representative is not personally liable for rent. Gausen *v.* Moormann, 5 Ohio S. & C. Pl. Dec. 287, 5 Ohio N. P. 254.

In Arkansas, where a decedent has hired land by contract, complete and binding at the time of his death, it is the duty of his administrator to take possession of the term as assets of his estate; and he will not be personally liable on the contract, whether or not the probate court orders him to proceed with the cultivation of the land and fulfilment of the contract. But if the contract be incomplete, and not binding at the intestate's death, and be completed by his administrator, either of his own will or by order of the probate court, the claim will be against the administrator personally and not against the estate. Yarborough *v.* Ward, 34 Ark. 204.

28. Fisher *v.* Fisher, 1 Bradf. Surr. (N. Y.) 335; Becker *v.* Walworth, 45 Ohio St. 169, 12 N. E. 1.

The representative is liable only for the real worth of the premises, and while the rent reserved by the lease is *prima facie* evidence of the value of the premises and the extent of the representative's liability, it is open to him to show that the estate, during the time for which he is liable, was of less value. Inches *v.* Dickinson, 2 Allen (Mass.) 71, 79 Am. Dec. 765; Hornidge *v.* Wilson, 11 A. & E. 645, 9 L. J. Q. B. 72, 3 P. & D. 641, 39 E. C. L. 347; Rubery *v.* Stevens, 4 B. & Ad. 241, 2 L. J. K. B. 46, 1 N. & M.

such case the lessor has an election either to look to the estate alone or to hold the representative personally liable.[29] But where the representative has not entered or held possession after the death of the lessee, he is liable for rent only in his representative capacity and not personally.[30] The goods of a deceased lessee in the hands of his administrator are not subject to distress by the lessor or his representative.[31]

8. Contracts of Decedent — a. In General. While the executor or administrator cannot as a general rule maintain an action on or perform a contract or covenant relating to real property of his decedent, since this devolves rather upon heirs or devisees,[32] he may be given ample authority by statute or the express provisions of the will under which he acts.[33] The intervention of the probate court is also frequently provided for in such matters; or equity will intervene to carry into practical effect a realty transaction beneficial to the estate.[34]

183, 24 E. C. L. 112; Hopwood *v.* Whaley, 6 C. B. 744, 6 D. & L. 342, 18 L. J. C. P. 43, 60 E. C. L. 744. But see Beeman's Succession, 47 La. Ann. 1355, 17 So. 820.

For that portion of the rents which exceeds the profits the representative is chargeable only as such. Fisher *v.* Fisher, 1 Bradf. Surr. (N. Y.) 335.

29. Becker *v.* Walworth, 45 Ohio St. 169, 12 N. E. 1.

Receipts not showing election.— The mere fact that certain receipts for rent paid by the executor acknowledged the payment of the money by him as executor does not go to show that the lessor exercised an election between the personal liability of the executor and that of the estate, where the receipts were drawn in that form at the request of the executor, so that he might use them as vouchers, and where the insolvency of the estate was not known at the time the receipts were given. Becker *v.* Walworth, 45 Ohio St. 169, 12 N. E. 1.

30. Inches *v.* Dickinson, 2 Allen (Mass.) 71, 79 Am. Dec. 765. See also Traylor *v.* Cabanne, 8 Mo. App. 131.

Assumpsit will lie against the representative for the rent if the decedent entered into possession under a lease containing an agreement to pay rent. Traylor *v.* Cabanne, 8 Mo. App. 131.

The rent provided for in the lease can be recovered and the representative, having assets, cannot defend on the ground that the yearly value is less than the rent reserved. Traylor *v.* Cabanne, 8 Mo. App. 131.

An action for rent of land in another state may be brought against the representative in the state in which he was appointed where the decedent had taken a lease. Traylor *v.* Cabanne, 8 Mo. App. 131.

31. Gandy *v.* Dickson, 166 Pa. St. 422, 31 Atl. 127, holding this to be so, although the lease gives the lessor a right of distress and extends the rights and liabilities of the parties to their respective "heirs, executors, administrators, successors, and assigns."

32. *Alabama.*— Lewis *v.* Moorman, 7 Port. 522. See Porter *v.* Worthington, 14 Ala. 584.

Louisiana.— Delassus *v.* Roumage, 3 La. Ann. 510.

Massachusetts.— Caverly *v.* Simpson, 132 Mass. 462.

Michigan.— Baxter *v.* Robinson, 11 Mich. 520.

New York.— Palmer *v.* Morrison, 104 N. Y. 132, 10 N. E. 144.

North Carolina.— Thrower *v.* McIntire, 20 N. C. 493, 34 Am. Dec. 382.

Wisconsin.— Carpenter *v.* Fopper, 94 Wis. 146, 68 N. W. 874.

United States.— McKay *v.* Carrington, 16 Fed. Cas. No. 8,841, 1 McLean 50.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 551, 552.

The acceptance of a deed by the administrator of a deceased vendee does not bind the estate to pay for the land. Shire *v.* Johnson, 38 S. W. 694, 18 Ky. L. Rep. 853.

An administrator cannot sell the interest of the estate in an executory contract for the purchase of lands, except as real estate, and after a license obtained from the court. Hovorka *v.* Havlik, (Nebr. 1903) 93 N. W. 990.

33. *Alabama.*— Seabury *v.* Doe, 22 Ala. 207, 58 Am. Dec. 254.

Illinois.— Burger *v.* Potter, 32 Ill. 66.

Michigan.— King *v.* Merritt, 67 Mich. 194, 34 N. W. 689.

Missouri.— Lake *v.* Meier, 42 Mo. 389.

Ohio.— Pollock *v.* Pine, 2 Ohio Cir. Ct. 359.

Pennsylvania.— Bender *v.* Luckenbach, 162 Pa. St. 18, 29 Atl. 295, 296; Wetherill *v.* Seitzinger, 4 Pittsb. Leg. J. 189.

South Carolina.— Douglass *v.* Dickson, 11 Rich. 417.

Washington.— Hyde *v.* Heller, 10 Wash. 586, 39 Pac. 249.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 551, 552.

The heirs or devisees may confer power upon the executor or administrator in such matters, at least so as to conclude their own rights. Du Bose *v.* Ball, 64 Ga. 350.

A devise of land held under a bond for a deed shows the testator's election to complete the purchase. Dawson *v.* Clay, 1 J. J. Marsh. (Ky.) 165.

34. *Alabama.*— Stewart *v.* Stewart, 31 Ala. 207.

Illinois.— Burger *v.* Potter, 32 Ill. 66.

b. Actions. The personal representative of the vendor is generally the proper party to enforce specific performance or recover purchase-money which is unpaid at the death of the vendor,[35] although if a conveyance has to be made the vendor's heirs or devisees may also be necessary parties;[36] and in some jurisdictions a person to whom a decedent had contracted to convey land may bring suit against the personal representative for specific performance.[37] Upon the refusal of a party to convey land according to an agreement made on valuable consideration with a

Michigan.— King *v.* Merritt, 67 Mich. 194, 34 N. W. 689.

Missouri.— Lake *v.* Meier, 42 Mo. 389.

United States.— Aspley *v.* Murphy, 52 Fed. 570, 3 C. C. A. 205.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 551, 552.

If the executor carries out the transaction he is bound to account for the purchase-money received by him. Loring *v.* Cunningham, 9 Cush. (Mass.) 87.

Suit by stranger to rescind decree.— The orphans' court cannot entertain a suit to rescind its decree for the specific performance of a decedent's contract for the sale of real estate, brought by a stranger to the litigation. Rafferty's Estate, 9 Phila. (Pa.) 336.

35. *Connecticut.*— Weed *v.* Peck, 38 Conn. 86.

Illinois.— Hulshizer *v.* Lamoreux, 58 Ill. 72.

Kentucky.— Rachford *v.* Rachford, (1890) 13 S. W. 1075.

Missouri.— Scott *v.* Davis, 141 Mo. 213, 42 S. W. 714.

Nebraska.— Solt *v.* Anderson, (1903) 93 N. W. 205.

New Jersey.— Miller *v.* Miller, 25 N. J. Eq. 354.

New York.— Wheeler *v.* Crosby, 20 Hun 140.

Pennsylvania.— Simmons' Estate, 140 Pa. St. 567, 21 Atl. 402; West Hickory Min. Assoc. *v.* Reed, 80 Pa. St. 38.

See 22 Cent. Dig. tit. "Executors and Administrators," § 553.

Notice to widow and heirs not necessary.— Simmons' Estate, 140 Pa. St. 561, 21 Atl. 402; West Hickory Min. Assoc. *v.* Reed, 80 Pa. St. 38. See also Sutter *v.* Ling, 25 Pa. St. 466.

36. Scott *v.* Davis, 141 Mo. 213, 42 S. W. 714.

Where the property was a homestead the heirs should be made parties, and the decree should provide that they and not the personal representative recover the purchase-money. Solt *v.* Anderson, (Nebr. 1903) 93 N. W. 205.

Where last payment due on delivery of deed.— Where the vendees have paid all that can be required of them before the giving of a deed for the land, and the heirs of the vendor will not give the necessary deed, the administrator of the vendor may bring a suit against the vendee and the heirs for specific performance; and under such circumstances the tender of a deed is not a prerequisite to the bringing of the action. Wheeler *v.* Crosby, 20 Hun (N. Y.) 140.

37. *Iowa.*— Collins *v.* Vandever, 1 Iowa 573; Fulwider *v.* Peterkin, 2 Greene 522.

Minnesota.— *In re* Mousseau, 40 Minn. 236, 41 N. W. 977.

Missouri.— Ferguson *v.* Bell, 17 Mo. 347.

North Carolina.— Orr *v.* Irwin, 4 N. C. 351.

Ohio.— See Pollock *v.* Pine, 2 Ohio Cir. Ct. 359, 5 Ohio Cir. Dec. 695.

Texas.— Walker *v.* Myers, 36 Tex. 203; Buchanan *v.* Park, (Civ. App. 1896) 36 S. W. 807.

See 22 Cent. Dig. tit. "Executors and Administrators," § 553.

Land in another state.— A bill in equity will lie to compel executors to convey lands in another state under contract entered into by their decedent, if defendants be within the jurisdiction of the court. Orr *v.* Irwin, 4 N. C. 351.

Heirs not necessary parties.— Fulwider *v.* Peterkin, 2 Greene (Iowa) 522.

Notice to the heirs is necessary and service of the notice on resident heirs must be personal and on non-resident heirs by publication. Grudds *v.* Steele, 15 B. Mon. (Ky.) 570.

The petition should disclose that decedent was the owner of the land at the time of his death. Driver *v.* Hudspeth, 16 Ala. 348.

The petition must be verified by the affidavit of the petitioner under the Missouri statute; without such affidavit the probate court acquires no jurisdiction to make the order prayed for. Baldwin *v.* Whitcomb, 71 Mo. 651.

Proof of consideration necessary.— Lindsay *v.* Coble, 37 N. C. 602.

Where a suit is brought against the heirs of the deceased vendor for specific performance, the personal representative is a necessary party. Muldrow *v.* Muldrow, 2 Dana (Ky.) 386; Massie *v.* Donaldson, 8 Ohio 377.

Validity of order.—Under a statute providing that the vendee of a decedent, in a suit against the administrator for a conveyance, must file his complaint in writing, that the court must find that the sale was legally made, and that the order must be for title in conformity with the tenor of the bond for conveyance, an order of the probate court, in a suit by a vendee against an administrator, to execute titles to all lands for which the estate stands bound is a nullity, as it is not made on consideration of the matters presented in the particular cause, but extends to all obligations of the deceased to convey. Jones *v.* Taylor, 7 Tex. 240, 56 Am. Dec. 48.

Agreement of executor to sell at reduced price.— An agreement by the executor to sell for a less price than that fixed in the contract

decedent, the personal representative cannot as a rule proceed to compel specific performance,[38] although he may sometimes bring an action to recover the purchase-price[39] or damages for the breach of contract.[40] The vendor of land to a decedent who has not complied with the terms of sale has been held entitled to enforce specific performance against the vendee's personal representative.[41] In some states the probate court has been given jurisdiction over the specific enforcement of contracts of a decedent relative to real estate,[42] and authorized to empower the personal representative to fulfil a contract to convey real estate made by his decedent in his lifetime,[43] but it cannot compel him to do so unless

with his decedent is unauthorized and will not be enforced against the estate, even though he was given power by the will to sell the real estate, giving deeds and doing all lawful acts which the testator might do if living. Pollock *v.* Pine, 2 Ohio Cir. Ct. 359, 5 Ohio Cir. Dec. 695.

38. McKay *v.* Broad, 70 Ala. 377 (holding that an administrator cannot join with an heir to compel the conveyance of land purchased and paid for by the decedent); Cowan *v.* Hite, 2 A. K. Marsh. (Ky.) 238; Buck *v.* Buck, 11 Paige (N. Y.) 170 (holding that where testator dies before the performance of the contract to convey lands to him, his executors, although directed by the will to take all just and proper means to insure a conveyance of the land to the devisees, cannot sue to compel such conveyance). But *compare* Dougherty *v.* Goggin, 1 J. J. Marsh. (Ky.) 373; Godfrey *v.* Dwinell, 40 Me. 94. And see Estes *v.* Browning, 11 Tex. 237, 60 Am. Dec. 238. See *supra*, III, C, 10.

Suit by representative who has refused to complete contract.— Where an administrator has *bona fide* refused to complete an executory contract of the intestate to purchase land, on which a part of the purchase-money has been paid, he may afterward avoid the consequences of his refusal by praying a specific performance. Estes *v.* Browning, 11 Tex. 237, 60 Am. Dec. 238.

Allowance of claim for purchase-money.— In an action to enforce decedent's contract to purchase land, where the tender of a deed is necessary before the vendor has an absolute right to the purchase-money, the county court may allow a claim for such money against the estate of the purchaser, and direct it to be paid on condition that such deed be executed and tendered. Gale *v.* Best, 20 Wis. 44.

39. Dougherty *v.* Goggan, 1 J. J. Marsh. (Ky.) 373. See also Wise *v.* Walker, 7 Pa. Cas. 87, 10 Atl. 28, holding, however, that the heirs are necessary parties.

40. Godfrey *v.* Dwinell, 40 Me. 94.

Rescinding election of decedent.— Where, in an action for specific enforcement of a contract to assign a bond for a deed, defendant placed it out of the power of plaintiff to obtain title to a portion of the land, and he elected to accept such as could be conveyed, with damages for the loss of the remainder, but died before final decree, his executors, being substituted, might by leave of court withdraw such election and elect to take compensation in damages for the loss of all the land embraced in the contract. Pingree *v.* Coffin, 12 Gray (Mass.) 288.

41. See Corkin *v.* Blake, 4 Phila. (Pa.) 10, holding that where a vendee paid a part of the price and agreed to secure the balance by bond and mortgage on the land, but died before executing the mortgage, the vendor could maintain a bill in equity against the vendee's administrator to compel specific performance of the contract to execute the mortgage.

42. Mousseau *v.* Mousseau, 40 Minn. 236, 41 N. W. 977; Baldwin *v.* Whitcomb, 71 Mo. 651; Ferguson *v.* Bell, 17 Mo. 347; West Hickory Min. Assoc. *v.* Reed, 80 Pa. St. 38; Buchanan *v.* Park, (Tex. Civ. App. 1896) 36 S. W. 807. See also *In re* Huggins, 204 Pa. St. 167, 53 Atl. 746.

In Texas, prior to the act of Feb. 2, 1844, the probate courts had no jurisdiction in cases for specific performance of contract. Houston *v.* Killough, 80 Tex. 296, 16 S. W. 56; Hooper *v.* Hall, 30 Tex. 154; McCarty *v.* Merry, (Civ. App. 1900) 59 S. W. 304.

The power of the legislature over the succession and conveyance of land being plenary, it may provide that a court of probate shall have jurisdiction to require an executor or administrator to convey land in pursuance of the written contract or bond of his decedent. Adams *v.* Lewis, 1 Fed. Cas. No. 60, 5 Sawy. 229.

An adversary proceeding is contemplated by the Texas statute and the probate court has no jurisdiction to decree specific performance of a contract of a decedent to convey land in an *ex parte* proceeding, on petition of the administrator for authority to convey to which the holder of the contract is not a party. Buchanan *v.* Parks, (Tex. Civ. App. 1896) 36 S. W. 807.

Procedure on denying relief.— Where the court is not satisfied that it ought to direct the representative to execute a conveyance pursuant to his decedent's contract to convey real estate, it cannot decide against the applicant on the merits, but must dismiss the petition, leaving him to his ordinary remedy by action. Mousseau *v.* Mousseau, 40 Minn. 236, 41 N. W. 977.

43. Weed *v.* Peck, 38 Conn. 86; Bates *v.* Sargent, 51 Me. 423. See also Collins *v.* Vandever, 1 Iowa 573; Wythe *v.* Palmer, 30 Fed. Cas. No. 18,120, 3 Sawy. 412; and *infra*, VIII, O, 8, c.

A petition for authority to convey land according to a contract of sale by the decedent

the contract of the decedent was in writing,[44] and the other party has complied with its conditions.[45]

c. Conveyance. Ordinarily the executor or administrator has no power to execute conveyances in accordance with bonds for title or other executory contracts or covenants on the part of his decedent, this duty devolving rather upon the heir or devisee;[46] but such authority may be conferred by the will[47] or by statute.[48] A deed to an administrator in pursuance of a contract with the intestate relates back to the time of the death so far as regards the capacity of the heirs to take.[49]

d. Rescission or Revival. An executor or administrator has ordinarily no authority as such to waive or rescind a contract or covenant for the sale or purchase of land made by his decedent,[50] although such a power may be exercised pursuant to an order of the probate court where the personal property is insuffi-

need not set out such contract in terms; it is sufficient if the substance be stated. Carter *v.* Jackson, 56 N. H. 364.

Notice to persons interested necessary.— Nazro *v.* Long, 179 Mass. 451, 61 N. E. 43.

44. *Alabama.*—Griggs *v.* Woodruff, 14 Ala. 9. See also Wilkerson *v.* Vinson, 20 Ala. 131.

California.— Cory *v.* Hyde, 49 Cal. 469.

Georgia.— Ford *v.* Holmes, 61 Ga. 419, bond for title necessary.

Maine.— Bates *v.* Sargent, 51 Me. 423.

Missouri.— Schulter *v.* Bockwinkle, 19 Mo. 647.

Pennsylvania.— Lindsay's Petition, 2 Del. Co. 197.

See 22 Cent. Dig. tit. "Executors and Administrators," § 553.

Petition must state that contract was in writing. Cory *v.* Hyde, 49 Cal. 469.

45. Ford *v.* Holmes, 61 Ga. 419.

Where the vendee has defaulted in the contract the probate judge cannot empower the administrator to execute the deed, but if the vendee makes payments after the breach he can enforce his rights arising thereunder only by a bill in equity. Bates *v.* Sargent, 51 Me. 423.

46. Grimmell *v.* Warne, 21 Iowa 11.

Administrator need not join in deed given by heirs.—Gates *v.* McWilliams, 6 Dana (Ky.) 42.

The executor may deliver a deed executed by the testator in his lifetime upon the vendee's compliance with his part of the contract at the time stipulated. Loring *v.* Cunningham, 9 Cush. (Mass.) 87. But *compare* Karmane *v.* Hoober, 3 Watts & S. (Pa.) 253.

Deed prepared by decedent.— Where a deed expressing an unequivocal declaration of trust had been prepared but not executed by a decedent and was found among his papers indorsed to be delivered to certain named beneficiaries when desired, the executor was ordered to execute the deed. Raybold *v.* Raybold, 1 Phila. (Pa.) 369.

47. Hite *v.* Shrader, 3 Litt. (Ky.) 444; Rearich *v.* Swinehart, 11 Pa. St. 233, 51 Am. Dec. 540.

Effect of deed.—Where executors are vested by will with the naked power to execute a deed, in compliance with contracts to convey entered into by the testator, and a deed is executed by them, the recital in the deed of the contract is insufficient, where the grantee seeks to assert title under it without proof of such contract. Hite *v.* Shrader, 3 Litt. (Ky.) 444.

48. Chance *v.* Beall, 20 Ga. 142 (holding a statute authorizing the representative to make title permissive only and not imperative); Hodges *v.* Hodges, 22 N. C. 72; Bartlett *v.* Watson, 3 Sneed (Tenn.) 287. See *supra*, VIII, O, 8, c.

Statute held to apply only to sale for valuable consideration.— Hodges *v.* Hodges, 22 N. C. 72.

An administrator pendente lite may make a deed in execution of the contract of a decedent for the sale of lands, according to the Pennsylvania act of March 21, 1792. Park *v.* Marshall, 4 Watts (Pa.) 382.

Existence of bond for title must be established. Bartlett *v.* Watson, 3 Sneed (Tenn.) 287.

49. Blythe *v.* Easterling, 20 Tex. 565.

50. Ward *v.* Grayson, 9 Dana (Ky.) 280; Hunt *v.* Thorn, 2 Mich. 213; Owens *v.* Phelps, 92 N. C. 231; Cotham *v.* Britt, 10 Heisk. (Tenn.) 469; Wilkins *v.* Frierson, 2 Sneed (Tenn.) 701. *Contra*, Pennock *v.* Freeman, 1 Watts (Pa.) 401; Hilliard's Estate, 8 Luz. Leg. Reg. (Pa.) 237. And see Rice *v.* Spotswood, 6 T. B. Mon. (Ky.) 40, 17 Am. Dec. 115; McMillan *v.* Reeves, 102 N. C. 550, 9 S. E. 449.

An administrator's consent to a decree of rescission in a suit brought against him and the heirs of his intestate to have a purchase of land by the intestate rescinded cannot divest the interest of the heirs; nor is such a decree authorized by the additional fact that the unpaid balance of purchase-money, together with other debts of the estate, will render it insolvent. Matthews *v.* Dowling, 54 Ala. 202.

Effect of lapse of time.— Where the administrator of a vendee of real estate in good faith, and when it might reasonably be considered for the interest of the heirs of the vendee to do so, rescinds an executory contract with the vendor, a court of equity will not after the lapse of many years disturb the contract of rescission on the application of the heirs. Ludlow *v.* Cooper, 4 Ohio St. 1.

cient to pay the debts;[51] and in some jurisdictions the probate court has, under statute, power to order the rescission of such a contract under other circumstances.[52] Where a vendee has rightfully abandoned a contract for the conveyance of land, having the right to rescind, such contract is at an end, and cannot be revived by the action of his administrator in treating it as still in force.[53]

9. Sale[54] — a. In General. In the absence of some power contained in the will, or of authority derived from statute or an order of court, neither an executor nor an administrator has any power whatever to sell the real estate of his decedent,[55] and consequently a contract of sale entered into by the representative is not binding upon and cannot be enforced against the estate.[56]

b. Special Acts. From time to time the various state legislatures have passed

51. Hunt *v.* Thorn, 2 Mich. 213.

52. See Hamner *v.* Holmes, 12 Kan. 526.

Ex parte order.— An order of the probate court authorizing an administrator on his *ex parte* petition to relinquish land belonging to the estate of his decedent to the vendor thereof upon the latter's surrender of the notes given for the purchase-money does not operate to divest the title of the estate and vest it in the vendor, since it is not binding upon him. Bender *v.* Bean, 52 Ark. 132, 12 S. W. 180, 241.

53. Todd *v.* Caldwell, 10 Tex. 236.

54. **Sales under order of court** see *infra*, XII.

55. *Alabama.*— Woods *v.* Legg, 91 Ala. 511, 8 So. 342; Hall *v.* Hall, 47 Ala. 290.

Arkansas.—Burgauer *v.* Laird, 26 Ark. 256.

Georgia.— See Beaty *v.* Stapleton, 110 Ga. 580, 35 S. E. 770.

Indiana.— Moore *v.* Moore, 155 Ind. 261, 57 N. E. 242; Duncan *v.* Gainey, 108 Ind. 579, 9 N. E. 470; Kidwell *v.* Kidwell, 84 Ind. 224; Hankins *v.* Kimball, 57 Ind. 42; Edwards *v.* Haverstick, 47 Ind. 138; Ward *v.* Crane, 3 Blackf. 393.

Kentucky.—Buckner *v.* Cromie, 5 Bush 603.

Louisiana.—Townsend *v.* Sykes, 38 La. Ann. 859.

Maryland.— Carroll *v.* Andrews, 4 Harr. & M. 485.

Massachusetts.—Drinkwater *v.* Drinkwater, 4 Mass. 354.

Mississippi.— Hargrove *v.* Baskin, 50 Miss. 194; Adams *v.* Harris, 47 Miss. 144; Chew *v.* Calvert, Walk. 54, Spanish law.

New Hampshire.— Ticknor *v.* Harris, 14 N. H. 272, 40 Am. Dec. 186.

New York.— Bridgewater *v.* Brookfield, 3 Cow. 299; Craig *v.* Craig, 3 Barb. Ch. 76. See also Guthmann *v.* Meuer, 31 Misc. 810, 63 N. Y. Suppl. 971.

North Carolina.— Gay *v.* Grant, 101 N. C. 206, 8 S. E. 99, 106.

Ohio.— Ludlow *v.* Johnston, 3 Ohio 553, 17 Am. Dec. 609. See also Paine *v.* Skinner, 8 Ohio 159.

Pennsylvania.— Wildemuth *v.* Long, 196 Pa. St. 541, 46 Atl. 927; Karns *v.* Tanner, 74 Pa. St. 339. See also Gumaer *v.* Barber, 2 Lack. Leg. N. 237.

South Carolina.— Perry *v.* Brown, 1 Bailey 45.

Texas.— Bartley *v.* Harris, 70 Tex. 181, 7 S. W. 797; Ball *v.* Collins, (Sup. 1887) 5 S. W. 622; Williams *v.* San Saba County, 59 Tex. 442. See also Grimes *v.* Smith, 70 Tex. 217, 8 S. W. 33.

Washington.—Demaris *v.* Barker, 33 Wash. 200, 74 Pac. 362.

United States.— Rafferty *v.* Mallory, 20 Fed. Cas. No. 11,526, 3 Biss. 362.

England.— Bentham *v.* Wiltshire, 4 Madd. 44, 20 Rev. Rep. 271.

See 22 Cent. Dig. tit. "Executors and Administrators," § 558.

Land of an alien decedent is subject to and protected by the same rule. Mobile Cong. Church *v.* Morris, 8 Ala. 182.

An unauthorized conveyance may be enjoined at the suit of the devisees. McClane *v.* McClane, 207 Pa. St. 465, 56 Atl. 996.

Person dealing with administrator bound to take notice of disability to sell.— Rafferty *v.* Mallory, 20 Fed. Cas. No. 11,526, 3 Biss. 362.

Executors who are sole residuary devisees and legatees and give bond as such for the payment of debts and legacies acquire absolute title to the land and may sell without a license of the probate court. Clarke *v.* Tufts, 5 Pick. (Mass.) 337; Thompson *v.* Brown, 16 Mass. 172. And see Wells *v.* Wells, 30 La. Ann. 935.

Status of purchaser.— Although a sale by an administrator is void because made without an order of court for that purpose, yet the purchaser who goes into possession by consent of the administrator is not a trespasser, nor is he wrongfully in possession, and hence he cannot be subjected to a suit unless he has refused to surrender possession upon demand. Burgauer *v.* Laird, 26 Ark. 256. Although a contract of sale from an executrix was not authorized or ratified by the probate court, yet where the executrix was the sole residuary legatee of the estate, and, at the time of her agreement to sell the land, the time for claims against the estate had expired, and all debts and legacies had been paid, leaving in her hands more than sufficient to close the administration, and the executrix had thus become the sole beneficial owner of the land, the contract of sale is binding on her personally and the purchaser must be regarded in equity as the real owner of the land. Moffitt *v.* Rosencrans, 136 Cal. 416, 69 Pac. 87.

56. Logan *v.* Gigley, 9 Ga. 114 (bond of administrator to convey given in contemplation of sale under order of court); Bridgewater *v.* Brookfield, 3 Cow. (N. Y.) 229 (contract by administrator to sell upon obtaining

special or private acts authorizing or confirming in particular cases the sale of a decedent's real estate by his personal representative,[57] but, while there are decisions upholding such acts,[58] they have been frequently declared void as involving unauthorized usurpation by the legislature of judicial functions,[59] or on other constitutional grounds.[60]

c. Liability For Unauthorized Sale. Executors who sell without authority in the will or an order of court are bound to show the necessity of the sale and to account for the value of the property, whether such value was realized at the sale or not.[61]

d. Sale Under Testamentary Authority — (i) *Power to Sell* — (a) *In General.* A testator may of course by his will give to his executor power to sell his realty,[62] and when such power is given the executor may proceed to sell the

order granting leave); Litterall *v.* Jackson, 80 Va. 604.

Personal liability.— A contract of executors, not in pursuance of their official duty, to sell and convey with a clear and satisfactory title land of the testator's estate, the title to which is in the heir, subject to payment of the testator's debts and legacies and the charges of administration, is not necessarily void, but binds them individually. Dresel *v.* Jordan, 104 Mass. 107.

Contract of widow and heirs.— Where a contract for the sale of the land of a decedent is entered into by the widow and heirs, there is no such mutuality of obligation between the administrator and the vendee as will entitle the administrator to enforce the contract. Phillips *v.* Van Schaick, 37 Iowa 229.

57. As to such acts and their construction and effect see the following cases:

Alabama.— Holman *v.* Norfolk Bank, 12 Ala. 369.

Connecticut.—Manwaring *v.* Dishon, 1 Root 478.

Illinois.— Davenport *v.* Young, 16 Ill. 548, 63 Am. Dec. 320; Doe *v.* Herbert, 1 Ill. 354, 12 Am. Dec. 192.

Michigan.— King *v.* Merritt, 67 Mich. 194. 34 N. W. 689; Browning *v.* Howard, 19 Mich. 323.

Mississippi.— Williamson *v.* Williamson, 3 Sm. & M. 715, 41 Am. Dec. 636.

Missouri.—Gannett *v.* Leonard, 47 Mo. 205.

Virginia.— Corbell *v.* Zeluff, 12 Gratt. 226.

United States.— Florentine *v.* Barton, 2 Wall. 210, 17 L. ed. 782; Leland *v.* Wilkinson, 10 Pet. 294, 9 L. ed. 430; Dubois *v.* McLean, 7 Fed. Cas. No. 4,107, 4 McLean 486.

See 22 Cent. Dig. tit. "Executors and Administrators," § 559.

58. Lane *v.* Nelson, 79 Pa. St. 407; Leland *v.* Wilkinson, 10 Pet. (U. S.) 294, 9 L. ed. 430.

In Missouri, prior to the constitution of 1865, such acts were within the power of the legislature. Clusky *v.* Burns, 120 Mo. 567, 25 S. W. 585; Cargile *v.* Fernald, 63 Mo. 304.

59. Pryor *v.* Downey, 50 Cal. 388, 19 Am. Rep. 656; Rozier *v.* Fagan, 46 Ill. 404; Lane *v.* Doe, 4 Ill. 238, 36 Am. Dec. 543. See also Jones *v.* Perry, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430.

60. Pryor *v.* Downey, 50 Cal. 388, 19 Am. Rep. 656; Brenham *v.* Story, 39 Cal. 179; Hegarty's Appeal, 75 Pa. St. 503; Culbertson *v.* Coleman, 47 Wis. 193, 2 N. W. 124.

61. Wellborn *v.* Rogers, 24 Ga. 558.

Executor chargeable only with value of property and interest.— Wright *v.* Wright, 2 McCord Eq. (S. C.) 185.

62. *Alabama.*— See Walker *v.* Murphy, 34 Ala. 591.

California.— Sharp *v.* Loupe, 120 Cal. 89, 52 Pac. 134, 586.

Delaware.— *In re* Journey, 7 Del. Ch. 1, 44 Atl. 795.

District of Columbia.— Rathbone *v.* Hamilton, 4 App. Cas. 475.

Florida.— See Simmons *v.* Spratt, 26 Fla. 449, 8 So. 123, 9 L. R. A. 343.

Georgia.—Harwell *v.* Foster, 102 Ga. 38, 28 S. E. 967.

Illinois.— Mulligan *v.* Lambe, 178 Ill. 130, 52 N. E. 1052; Penn *v.* Fogler, 77 Ill. App. 365.

Kentucky.— See Waller *v.* Logan, 5 B. Mon. 515.

Maine.—See Chadbourne *v.* Rackliff, 30 Me. 354.

Maryland.— Magruder *v.* Peter, 11 Gill & J. 217.

Massachusetts.— See Allen *v.* Dean, 148 Mass. 594, 20 N. E. 314; Greenough *v.* Wells, 10 Cush. 571; Fay *v.* Fay, 1 Cush. 93.

Mississippi.— See Cohea *v.* Jemison, 68 Miss. 510, 10 So. 46.

Nebraska.— Arlington State Bank *v.* Paulsen, 57 Nebr. 717, 78 N. W. 303.

New Jersey.— See Lindley *v.* O'Reilly, 50 N. J. L. 636, 15 Atl. 379, 7 Am. St. Rep. 802, 1 L. R. A. 79.

New York.— Matter of Hosford, 27 N. Y. App. Div. 427, 50 N. Y. Suppl. 550; Carpenter *v.* Bonner, 26 N. Y. App. Div. 462, 50 N. Y. Suppl. 298; Clifford *v.* Morrell, 22 N. Y. App. Div. 470, 48 N. Y. Suppl. 83; Simmons *v.* Taylor, 19 N. Y. App. Div. 499, 46 N. Y. Suppl. 730; Campbell *v.* Jennings, 22 Misc. 406, 50 N. Y. Suppl. 278; Frost *v.* Frost, 4 Edw. 733. See also Jackson *v.* Burr, 9 Johns. 104.

North Carolina.— Johnson *v.* Johnson, 108 N. C. 619, 13 S. E. 183; Floyd *v.* Herring, 64 N. C. 409. See also Beam *v.* Jennings, 89 N. C. 451; Den *v.* Proctor, 19 N. C. 439.

Ohio.— Pollock *v.* Pine, 2 Ohio Cir. Ct. 359, 1 Ohio Cir. Dec. 529.

realty without recourse to the courts for a license,[63] although it has been said that an executor derives his power to act as such in the transfer of immovable property from a compliance with the law of the place where he attempts to operate under the will and not from the will alone,[64] and the executor must take

Pennsylvania.— Tarrance *v.* Reuther, 185 Pa. St. 279, 39 Atl. 956; Tinney's Estate, 6 Pa. Dist. 765.

Tennessee.— Fitzgerald *v.* Standish, 102 Tenn. 383, 52 S. W. 294; Moore *v.* Bedford, (Ch. App. 1900) 56 S. W. 1038; Lockhart *v.* Northington, 1 Sneed 318.

United States.— See Beadle *v.* Beadle, 40 Fed. 315, 2 McCrary 586; Lindenberger *v.* Matlock, 15 Fed. Cas. No. 8,360, 4 Wash. 278.

England.— Monsell *v.* Armstrong, L. R. 14 Eq. 423, 41 L. J. Ch. 715, 20 Wkly. Rep. 921; *In re* Clay, 16 Ch. D. 3, 43 L. T. Rep. N. S. 402, 29 Wkly. Rep. 5; Forbes *v.* Peacock, 12 L. J. Exch. 460, 11 M. & W. 630; Bentham *v.* Wiltshire, 4 Madd. 44, 20 Rev. Rep. 271.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 560, 561.

Probate court may construe power. Ogle *v.* Reynolds, 75 Md. 145, 23 Atl. 137.

The law of the testator's domicile governs in the construction of such a power rather than that of the state where the land is situated. Crusoe *v.* Butler, 36 Miss. 150.

The executor's right to sell is superior to the right of partition vested in the purchaser of an undivided interest from a devisee. Hatt *v.* Rich, 59 N. J. Eq. 492, 45 Atl. 969.

Power not limited because not coupled with interest.— Jones *v.* Lewis, 8 Ohio Dec. (Reprint) 368, 7 Cinc. L. Bul. 211.

The death of the sole beneficiary under a will before the executor has sold property of the estate to pay the debts, as directed by the will, does not deprive the executor of that power. McCown *v.* Terrell, 9 Tex. Civ. App. 66, 29 S. W. 484.

Power not affected by pendency of suit by creditor for settlement of estate.— Mersman *v.* Worthington, 72 S. W. 1094, 24 Ky. L. Rep. 2115.

Burden of proof as to power.— One who asserts a title to real estate based upon a purchase from executors must show that a power of sale was conferred on the executors by the will. Banks *v.* Johnson, 4 J. J. Marsh. (Ky.) 649.

Settlement of controversy between heirs.— Where a testator's will provided that his executors should have full power to sell, etc., and do everything for the benefit of the estate for the period of ten years, and a subsequent settlement of controversies between the heirs provided that such settlement should not preclude the executors from administering the estate to pay debts as soon as practicable, and that their power to sell was continued until provision for the payment of testator's debts had been made, the executors had full power to sell testator's real estate to pay debts. Mersman *v.* Worthington, 72 S. W. 1094, 24 Ky. L. Rep. 2115.

When power inoperative.— Where testator directs realty to be sold by his executor and the proceeds to be divided, if the devisees elect to take the same as realty, and retain it without conversion, the executor cannot sell. Trask *v.* Sturges, 170 N. Y. 482, 63 N. E. 534 [*reversing* 56 N. Y. App. Div. 625, 68 N. Y. Suppl. 1149]; Reeser's Estate, 4 Pa. Co. Ct. 417.

Where validity of alleged will in controversy.— An injunction against the sale of land is properly granted on motion of the heirs of a decedent, where the land has been advertised under a power contained in an instrument purporting to be a will, which has been admitted to probate without notice to the heirs and upon insufficient testimony, and the validity of which is in controversy. Galbreath *v.* Everett, 84 N. C. 546.

63. *California.*— *In re* Durham, 49 Cal. 490; *In re* Delaney, 49 Cal. 76; Larco *v.* Casaneuava, 30 Cal. 560; Payne *v.* Payne, 18 Cal. 291.

Maryland.— Brooks *v.* Bergner, 83 Md. 352, 35 Atl. 98. See also Magruder *v.* Peter, 11 Gill & J. 217.

Michigan.— Battelle *v.* Parks, 2 Mich. 531.

Missouri.— Wisker *v.* Rische, 167 Mo. 522, 67 S. W. 218.

Ohio.— *In re* Crawford, 21 Ohio Cir. Ct. 554, 11 Ohio Cir. Dec. 605; Wanzer *v.* Widow, 2 Ohio Dec. (Reprint) 323, 2 West. L. Month. 426.

Pennsylvania.— See Tinney's Estate, 6 Pa. Dist. 765.

See 22 Cent. Dig. tit. "Executors and Administrators," § 560.

Bond.—A statute requiring persons licensed by the probate court to give bond before proceeding to make sales of real estate does not apply to an executor who makes a sale of real estate in execution of the power vested in him by the will. Bradt *v.* Hodgdon, 94 Me. 559, 48 Atl. 179.

Interposition of claim by third persons.— The Georgia statute with reference to the interposition of claims by third persons to arrest the sale of land by executors or administrators limits the right to cases where the sale is proceeding under an order of court or where proceedings are being taken in court for legal authority to make a sale and does not apply in case of a sale by an executor under power contained in the will. Harwell *v.* Foster, 102 Ga. 38, 28 S. E. 967.

Creditors of an estate by account have no right to enjoin the executrix from selling the real estate in the due course of administration, because she is insolvent, and twelve months have not elapsed since the grant of letters of administration, and because they fear that if she receives the proceeds they will lose their claims, no waste or mismanagement, or attempt thereat, being alleged. Elam *v.* Elam, 72 Ga. 162.

64. Lucas *v.* Tucker, 17 Ind. 41.

out letters testamentary in order to lawfully exercise the power which the testator has thus conferred upon him.[65]

(B) *Implied Power.* It is not necessary that the power to sell should be expressly given in terms by the will, but it may be implied[66] when it is clear that the testator intended that his executor should have such power or the directions of the will are such that a power of sale is necessary in order that they may be properly carried out;[67] but the courts will not put a strained construction upon

65. *In re* Crawford, 21 Ohio Cir. Ct. 554, 11 Ohio Cir. Dec. 605.

66. *New Jersey.*— See Jones *v.* Jones, 13 N. J. Eq. 236.

New York.— Matter of Hesdra, 20 N. Y. Suppl. 79, 2 Connoly Surr. 514.

Pennsylvania.— Gray *v.* Henderson, 71 Pa. St. 368.

Tennessee.— Cowan *v.* Cowan, (Ch. App. 1899) 53 S. W. 1101.

England.— Gosling *v.* Carter, 1 Coll. 644, 9 Jur. 324, 14 L. J. Ch. 218, 28 Eng. Ch. 644; Greville *v.* Browne, 7 H. L. Cas. 689, 5 Jur. N. S. 849, 7 Wkly. Rep. 673, 11 Eng. Reprint 275; Mather *v.* Norton, 16 Jur. 309, 21 L. J. Ch. 15; Bench *v.* Biles, 4 Madd. 187, 20 Rev. Rep. 292; Bentham *v.* Wiltshire, 4 Madd. 44, 20 Rev. Rep. 271.

See 22 Cent. Dig. tit. "Executors and Administrators," § 562.

67. *Illinois.*— Stoff *v.* McGinn, 178 Ill. 46, 52 N. E. 1048.

Louisiana.— Hart *v.* Schmidt, 6 La. 167.

Massachusetts.— Going *v.* Emery, 16 Pick. 107, 26 Am. Dec. 645.

New Jersey.— Haggerty *v.* Lanterman, 30 N. J. Eq. 37; Cook *v.* Cook, (Ch. 1900) 47 Atl. 732.

New York.— Corse *v.* Chapman, 153 N. Y. 466, 47 N. E. 812 [*affirming* 36 N. Y. Suppl. 1124]; Cahill *v.* Russell, 140 N. Y. 402, 35 N. E. 664; Meehan *v.* Brennan, 16 N. Y. App. Div. 395, 45 N. Y. Suppl. 57; Siefke *v.* Siefke, 34 Misc. 77, 69 N. Y. Suppl. 514. See also Salmon *v.* Salmon, 24 Misc. 416, 53 N. Y. Suppl. 648.

Texas.— Carlton *v.* Goebler, 94 Tex. 93, 58 S. W. 829.

West Virginia.— Dearing *v.* Selvey, 50 W. Va. 4, 40 S. E. 478.

England.— Elton *v.* Harrison, 2 Swanst. 276, 36 Eng. Reprint 621.

See 22 Cent. Dig. tit. "Executors and Administrators," § 562.

A power of sale will be implied where a testator has devised all his property, of whatever kind, to executors, in trust "to hold and invest" as might seem best, and certain amounts "to be paid from time to time" to beneficiaries, since the use of terms applicable to personalty particularly and exclusively indicates that all the property is to be converted into personalty. Cook *v.* Cook, (N. J. Ch. 1900) 47 Atl. 732. Where a will authorizes the executor to invest, manage, and control the estate according to his best judgment, in order to combine safety and productiveness, the executor is authorized to contract for the sale of unproductive real estate. Sargent *v.* Sibley, 8 Ohio Dec. (Reprint) 434, 8 Cinc. L. Bul. 6. Where a testator, by his will, gives his executors power to do any and everything with his property that he could have done during his life, the executors have power to execute a deed confirming a deed given by their testator, but lost before registration. Coal Creek Consol. Coal Co. *v.* East Tennessee Iron, etc., Co., 105 Tenn. 563, 59 S. W. 634. Where a will directs payment of all the testator's just debts and funeral expenses and devises "all the rest, residue, and remainder" of the estate to the executor, in trust, etc., the executor has an implied power of sale for the purpose of paying the debts. Coogan *v.* Ockershausen, 55 N. Y. Super. Ct. 286, 18 N. Y. St. 366. A power of sale may also be implied from a power to manage the estate to the best advantage for the benefit of creditors. Carlton *v.* Goebler, 94 Tex. 93, 58 S. W. 829.

A charge of debts on the realty is considered in England to give the executor an implied power of sale. Bateman *v.* Bateman, 1 Atk. 421, 26 Eng. Reprint 268; Blatch *v.* Wilder, 1 Atk. 420, 26 Eng. Reprint 267; Cook *v.* Dawson, 29 Beav. 123, 7 Jur. N. S. 130, 30 L. J. Ch. 311, 3 L. T. Rep. N. S. 801, 9 Wkly. Rep. 305 [*affirmed* in 3 De G. F. & J. 127, 30 L. J. Ch. 359, 4 L. T. Rep. N. S. 226, 9 Wkly. Rep. 434, 64 Eng. Ch. 100, 45 Eng. Reprint 826]; Wrigley *v.* Sykes, 21 Beav. 337, 2 Jur. N. S. 78, 25 L. J. Ch. 458, 4 Wkly. Rep. 228; Robinson *v.* Lowater, 5 De G. M. & G. 272, 18 Jur. 363, 23 L. J. Ch. 641, 2 Wkly. Rep. 394, 54 Eng. Ch. 215, 43 Eng. Reprint 875; Colyer *v.* Finch, 5 H. L. Cas. 905, 3 Jur. N. S. 25, 26 L. J. Ch. 65, 10 Eng. Reprint 1159 (holding that where there is a general charge of debts, but no legal estate is given, the executors may have implied authority to convey the legal estate in order to raise the money to satisfy the charge; but where there is a devise of the legal estate to a particular person, and the estate is charged with payment of debts or legacies, the money must be raised through the instrumentality of the devisee, and he is the only person who can make legal title); Ball *v.* Harris, 3 Jur. 140, 8 L. J. Ch. 114, 4 Myl. & C. 264, 18 Eng. Ch. 264 [*affirming* 1 Jur. 706, 8 Sim. 485, 8 Eng. Ch. 485]. *Contra,* Doe *v.* Hughes, 6 Exch. 223, 20 L. J. Exch. 148. In the United States, however, a power to sell lands will not be implied from a charge of debts thereon. Snedeker *v.* Allen, 2 N. J. L. 35; *In re* Fox, 52 N. Y. 530, 11 Am. Rep. 751 [*affirming* 63 Barb. 157].

A charge of legacies on land devised beneficially does not give the executor an implied power to sell the same. Snedeker *v.* Allen, 2 N. J. L. 35; *In re* Rebbeck, 63 L. J. Ch. 596, 71 L. T. Rep. N. S. 741, 8 Reports 376, 42

the language of the will in order to extract such a power from it when the testator's intention to give or the necessity for such a power is not clear.[68]

(c) *General or Limited Power.* Where executors are given a general power of sale they may sell at their discretion, as prudence may dictate, during the continuance of the trust, and are not limited to a sale for purposes of administration,[69] although they must not act arbitrarily or capriciously in the matter,[70] while if the power is limited it can be exercised only under the circumstances, for the purposes, and in the manner provided for or contemplated in the will.[71] The power

Wkly. Rep. 473. See also Rambo *v.* Rumer, 4 Del. Ch. 9.

68. *Alabama.*— Williams *v.* Williams, 49 Ala. 439.

California.— Hill *v.* Den, 54 Cal. 6.

Illinois.— Poulter *v.* Poulter, 193 Ill. 641, 61 N. E. 1056.

New Jersey.— Chandler *v.* Thompson, 63 N. J. Eq. 723, 48 Atl. 583; Smalley *v.* Smalley, 54 N. J. Eq. 591, 35 Atl. 374.

New York.— Murdock *v.* Kelly, 62 N. Y. App. Div. 562, 71 N. Y. Suppl. 152.

Pennsylvania.— Clark *v.* Riddle, 11 Serg. & R. 311; Waddington's Estate, 7 Pa. Dist. 499.

United States.— See Dunlap *v.* Pyle, 8 Fed. Cas. No. 4,163, 5 McLean 322.

See 22 Cent. Dig. tit. "Executors and Administrators," § 562.

69. Busch *v.* Rapp, 63 S. W. 479, 23 Ky. L. Rep. 605; Hatt *v.* Rich, 59 N. J. Eq. 492, 45 Atl. 969; Matter of Ryder, 41 N. Y. App. Div. 247, 58 N. Y. Suppl. 635. See also Walter *v.* Tomkins, 71 N. Y. App. Div. 21, 75 N. Y. Suppl. 557.

Sale must be in usual course of administration. Clark *v.* Clark, 172 Ill. 355, 50 N. E. 101.

Testamentary provisions giving general power of sale see Walter *v.* Tomkins, 71 N. Y. App. Div. 21, 75 N. Y. Suppl. 557; McCready *v.* Metropolitan L. Ins. Co., 83 Hun 526, 32 N. Y. Suppl. 489; Manier *v.* Phelps, 15 Abb. N. Cas. (N. Y.) 123.

An executor may sell to pay debts and legacies where the will empowers him to sell the real estate, but expresses no object for the sale thereof and does not charge the payment of legacies therefrom. Wardwell *v.* McDowell, 31 Ill. 364.

70. Thomas *v.* Atty.-Gen., 2 Y. & C. Exch. 525.

71. *Colorado.*— Cowell *v.* South Denver Real Estate Co., 16 Colo. App. 108, 63 Pac. 991.

Illinois.—McFarland *v.* McFarland, 177 Ill. 208, 52 N. E. 281.

Michigan.— Petit *v.* Flint, etc., R. Co., 114 Mich. 362, 72 N. W. 238.

Nebraska.— Arlington State Bank *v.* Paulsen, 57 Nebr. 717, 78 N. W. 303.

New Jersey.— Ryan *v.* Dodds, (Ch. 1903) 56 Atl. 131; Dougherty *v.* Connolly, 61 N. J. Eq. 421, 48 Atl. 777.

New York.— Allen *v.* De Witt, 3 N. Y. 276; *In re* Duffy, 18 N. Y. Suppl. 724.

Pennsylvania.— McClane *v.* McClane, 207 Pa. St. 465, 56 Atl. 996; Columbia Ave. Sav. Fund, etc., Co. *v.* Lewis, 190 Pa. St. 558, 42 Atl. 1094; Swift's Appeal, 87 Pa. St. 502; Allshouse's Estate, 23 Pa. Super. Ct. 146; Adams' Estate, 9 Pa. Co. Ct. 664.

South Carolina.— South Carolina R. Co. *v.* Toomer, 9 Rich. Eq. 270.

Texas.— McCown *v.* Terrell, 9 Tex. Civ. App. 66, 29 S. W. 484.

Power to sell "if necessary."—Where a testator has given his executors power to sell real estate if necessary for certain purposes, a sale will not be upheld unless the necessity is made to appear. Lyons *v.* Shannahan, 64 N. Y. App. Div. 264, 72 N. Y. Suppl. 72, where the evidence was held insufficient to show such necessity. See also Roseboom *v.* Mosher, 2 Denio (N. Y.) 61. But when the power is to sell if "in their opinion" it shall become necessary for the purpose of paying debts and legacies, the necessity need not be shown, the conveyance being conclusive. Roseboom *v.* Mosher, 2 Den. (N. Y.) 61.

Power to sell for best interest of estate.— Where a power of sale was given by will to the executrix as such, and embraced only the right to make a sale for the best interests of the estate, it was a mere naked power to carry out the purposes of the will, and could not be used to divest the estates of devisees, unless such exercise was necessary in the execution of such purposes. Cowell *v.* South Denver Real Estate Co., 16 Colo. App. 108, 63 Pac. 991.

Sale of more land than necessary.— Where executors empowered by will to sell land for payment of debts sold more than enough to pay all the debts of their testator, they were liable to the heirs therefor, but *bona fide* purchasers could not be affected. Larue *v.* Larue, 3 J. J. Marsh. (Ky.) 156.

A power to sell with the consent of a designated person terminates on the death of such person before consenting. Gulick *v.* Griswold, 160 N. Y. 399, 54 N. E. 780 [*affirming* 14 N. Y. App. Div. 85, 43 N. Y. Suppl. 443].

Executor may sell for any of the purposes named. Wetherill *v.* Com., 1 Pa. Cas. 22, 1 Atl. 185.

What provisions of will govern.— Where a will provided that a specific piece of realty should be sold to create a fund for the necessities of testator's widow, and to pay a legacy, the realty, if unsold on the death of the widow because such sale was unnecessary, fell into the residue with other unsold property, under a clause of the will directing a sale after the widow's death of all the remaining real estate for certain specified purposes, and was controlled as to the manner of sale and distribution of the proceeds by the

contained in the will should, however, be given a liberal construction in order to carry into effect the true purpose of the testator.[72]

(D) *Contract of Sale.* Where the will directs an executor to sell property with discretion as to terms and conditions, he has power to make a contract of sale and to enforce specific performance thereof,[73] and a contract of sale may be enforced against him.[74]

(E) *Exchange.* A mere power to sell given to an executor does not authorize him to exchange the land, either in whole or in part, for other land.[75]

(F) *Control of Court.* Although an executor may go into court for direction and guidance in the matter,[76] unless he does so of his own accord the courts will not as a rule interpose to control him in an honest exercise of a discretion or a power with regard to the sale of the decedent's real estate vested in him by the will.[77]

(G) *Who May Exercise Power.*[78] It is axiomatic that where a testator authorizes or directs his executor to sell his real property, the executor is the proper person to make the sale,[79] although he has not power to sell after his discharge as

provisions of the latter clause. Trask *v.* Sturges, 170 N. Y. 482, 63 N. E. 534 [*reversing* 56 N. Y. App. Div. 625, 68 N. Y. Suppl. 1149].

Injunction against sale.— Grantees of devisees of land may enjoin the executrix from exercising her power to sell such land for payment of debts of the testator, which are barred by limitation; such debts constituting no claim against the estate, and it being the executrix's duty to set up the bar. Butler *v.* Johnson, 111 N. Y. 204, 18 N. E. 643 [*affirming* 41 Hun 206].

72. Ross *v.* Barr, 53 S. W. 658, 21 Ky. L. Rep. 974.

73. Strauss *v.* Bendheim, 162 N. Y. 469, 56 N. E. 1007 [*reversing* 44 N. Y. App. Div. 82, 60 N. Y. Suppl. 398 (*reversing* 28 Misc. 660, 59 N. Y. Suppl. 1054)], holding that in an action by the executor for specific performance judgment can be entered that defendant specifically perform, and if he refuses to do so that the property be sold by a referee, whose deed to the purchaser will convey all the title to the premises which the executor could have conveyed under the power in the will. See also Crouse *v.* Peterson, 130 Cal. 169, 62 Pac. 475, 615, 80 Am. St. Rep. 89.

74. Coles *v.* Kearney, 8 Ohio Dec. (Reprint) 733, 9 Cinc. L. Bul. 245.

The fact that the title is encumbered does not relieve an executor who has power to sell from liability for specific performance of his contract of sale. Jones *v.* Lewis, 8 Ohio Dec. (Reprint) 268, 7 Cinc. L. Bul. 211.

75. Ross *v.* Barr, 53 S. W. 658, 21 Ky. L. Rep. 974 (holding that consequently a contract of sale whereby the executor agrees to accept other land in part payment at a stipulated price is void); Taylor *v.* Galloway, 1 Ohio 232, 13 Am. Dec. 605; Fleischman *v.* Shoemaker, 2 Ohio Cir. Ct. 152, 1 Ohio Cir. Dec. 415; King *v.* Whiton, 15 Wis. 684.

Testamentary provisions giving power to exchange.— Where a testator expressly impresses the character of realty upon the proceeds of sale of his real estate during the existence of a life-estate given by the will, and expressly confers power upon his executor to sell his real estate and with the proceeds purchase other real estate and to continue the transfer and disposition thereof in his discretion, this power authorizes a direct exchange. Mayer *v.* McCune, 59 How. Pr. (N. Y.) 78.

76. Hinton *v.* Cole, 3 Humphr. (Tenn.) 656. See also Curren's Estate, 11 Phila. (Pa.) 59; and *supra*, V, G.

77. Andrews' Estate, 6 Pa. Dist. 24; Castor's Estate, 16 Phila. (Pa.) 360 (in the absence of proof of error or mistake, or wilful disregard of duty); Bedford *v.* Bedford, 110 Tenn. 204, 75 S. W. 1017; Dixon *v.* McCue, 14 Gratt. (Va.) 540. See also American Bible Soc. *v.* Noble, 11 Rich. Eq. (S. C.) 156, holding that the court will not direct that a sale of land which the will authorizes the executor to make shall be made by a commissioner, where there is no charge of insolvency or misconduct against the executor. See *supra*, V, G.

Jurisdiction of orphans' court to hold executor to account.— Under the Pennsylvania act of June 16, 1836, section 19, extending the jurisdiction of the orphans' court to all cases wherein executors may be in any way accountable for their testator's property, the orphans' court has exclusive jurisdiction to hold an executrix to account for the performance of a testator's trust vested in her to sell land. Erie Dime Sav., etc., Co. *v.* Vincent, 105 Pa. St. 315.

78. **Exercise of power by administrator with the will annexed** see *infra*, XIX, C.

Exercise by administrator durante minoritate see *infra*, XX.

Who may make sale under order of court see *infra*, XII.

79. See Bruce *v.* Goodbar, 104 Tenn. 638, 58 S. W. 282.

Where the power is given to two executors, only one of whom has proved the will or remains in office, such executor can exercise the power alone. Wells *v.* Lewis, 4 Metc. (Ky.) 269; *In re* Fisher, 13 L. R. Ir. 546. And where two executors named in a will were directed by it to sell a particular parcel of land to an individual named, for a specified

executor,[80] or where he has renounced the office.[81] It frequently happens, however, that a testator directs or authorizes a sale without expressly declaring by whom it shall be made, and in such case the rule is that the executor will take a power of sale by implication if the will imposes upon him the duty, or he is bound by law, to see to the application of the proceeds,[82] but not otherwise.[83] Where a will directing a sale of realty nominates no executor, there is no implied power of sale in any one, and the only way a sale can legally be made is by an application to the court.[84] An executor cannot delegate a discretionary power to sell land given him by the will,[85] but he may allow his agent or attorney in fact, subject to his supervision or approval, to negotiate and make sales.[86]

(H) *What Property May Be Sold.*[87] With reference to what property may be sold by the executor the provisions of the will must govern.[88] If the power

sum, and to sell the other estate, if deemed necessary, to pay debts, etc., and both joined in the conveyance of the particular parcel, but afterward one of them alone sold and conveyed other lands of the testator, the purchaser of the last-mentioned land was not precluded from showing that the executor who did not join in the conveyance had refused and neglected to take upon himself the execution of the will, after joining in the first-mentioned conveyance. Roseboom *v.* Mosher, 2 Den. (N. Y.) 61. At common law where there is a naked power given to coexecutors to sell land it does not survive to one executor, but where the power is coupled with an interest it will survive. Muldrow *v.* Fox, 2 Dana (Ky.) 74; Wooldridge *v.* Watkins, 3 Bibb (Ky.) 349.

Substitution of executors.— Where a will appointed certain persons executors with power to sell the testator's real estate, but a codicil annulled the section of the will in which such persons were appointed executors, and appointed certain other executors, and exonerated them from giving bond, such codicil did not annul the power to sell given the executors by the original will, but its effect was merely to substitute another set of executors with the same powers, duties, and discretion. Bruce *v.* Goodbar, 104 Tenn. 638, 58 S. W. 282.

80. Boland *v.* Tiernay, 118 Iowa 59, 91 N. W. 836.

81. Travers *v.* Gustin, 20 Grant Ch. (U. C.) 106, so holding where the power was given to the executors merely as such and not by name.

82. *Connecticut.*—State *v.* Hunter, 73 Conn. 435, 47 Atl. 665.

District of Columbia.— Rathbone *v.* Hamilton, 4 App. Cas. 475.

Illinois.— Rankin *v.* Rankin, 36 Ill. 293, 87 Am. Dec. 205.

Indiana.— Davis *v.* Hoover, 112 Ind. 423, 14 N. E. 468.

Maryland.— Magruder *v.* Peter, 4 Gill & J. 323. See also Baumeister *v.* Silver, 98 Md. 418, 56 Atl. 825.

Michigan.— Mandlebaum *v.* McDonell, 29 Mich. 78, 18 Am. Rep. 61.

Mississippi.— Clark *v.* Hornthal, 47 Miss. 434.

Missouri.— Wisker *v.* Rische, 167 Mo. 522, 67 S. W. 218.

North Carolina.— Vaughan *v.* Farmer, 90 N. C. 607. See also Hester *v.* Hester, 37 N. C. 330.

Ohio.— Martin *v.* Spurrier, 23 Ohio Cir. Ct. 110.

Pennsylvania.— Silverthorn *v.* McKinster, 12 Pa. St. 67; Maguire's Estate, 10 Pa. Dist. 238.

Tennessee.— Bedford *v.* Bedford, 110 Tenn. 204, 75 S. W. 1017; Queener *v.* Trew, 6 Heisk. 59; Parker *v.* Sparkman, 2 Tenn. Cas. 544.

Wisconsin.— Lawrence *v.* Barber, 116 Wis. 294, 93 N. W. 30.

United States.— Taylor *v.* Benham, 5 How. 233, 12 L. ed. 130; Peter *v.* Beverly, 70 Pet. 532, 9 L. ed. 522.

If the person appointed to sell refuses to perform the trust or dies before he has completed it, the sale should be made, under the Missouri statute, by the executor. Wisker *v.* Rische, 167 Mo. 522, 67 S. W. 218.

83. Lippincott *v.* Lippincott, 19 N. J. Eq. 121. See also Council *v.* Averett, 95 N. C. 131; McElroy *v.* McElroy, 110 Tenn. 137, 73 S. W. 105.

84. Baumeister *v.* Silver, 98 Md. 418, 56 Atl. 825.

85. Terrell *v.* McCown, 91 Tex. 231, 43 S. W. 2 [*reversing* (Civ. App. 1897) 40 S. W. 54].

86. Colsten *v.* Chaudet, 4 Bush (Ky.) 666; Gates *v.* Dudgeon, 173 N. Y. 426, 66 N. E. 116, 93 Am. St. Rep. 608 [*reversing* 72 N. Y. App. Div. 562, 76 N. Y. Suppl. 561]; Terrell *v.* McCown, 91 Tex. 231, 43 S. W. 2 [*reversing* (Civ. App. 1897) 40 S. W. 54].

87. **Sale under order of court** see *infra*, XII, D.

88. See Petit *v.* Flint, etc., R. Co., 114 Mich. 362, 72 N. W. 238.

Construction of particular wills see Petit *v.* Flint, etc., R. Co., 114 Mich. 362, 72 N. W. 238; Matter of Levy, 41 Misc. (N. Y.) 68, 83 N. Y. Suppl. 647; Bedford *v.* Bedford, 110 Tenn. 204, 75 S. W. 1017; Holmes *v.* Sanders, (Tex. Civ. App. 1899) 51 S. W. 333.

Under a power to sell all of testator's realty, the executors may sell all of his title and interest in the land as well as all the territorial extent of the land. Hatt *v.* Rich, 59 N. J. Eq. 492, 45 Atl. 969.

Under a provision that the homestead shall not be sold until necessary, and that the same

given is to sell only certain specified realty, or only a certain part of the realty, the executor cannot sell any of the other realty without an order of court,[89] unless a power of sale in respect thereto can be fairly implied.[90] Where an executor is empowered by the will to sell any portion of the real estate, he is vested with a discretion to determine what property shall be sold.[91]

(I) *Compelling Exercise of Power.* A mandatory direction in a will to sell lands leaves the executor no discretion; and if he refuses or neglects to sell the court may compel him to do so at the instance of an interested person.[92]

(II) *Time For Selling.*[93] Where the will contains directions as to the time at which the property shall be sold, such directions should of course be followed,[94]

shall be used by wife and children, the executors have authority to sell the homestead if it becomes necessary. Etcheborne *v.* Auzerais, 45 Cal. 121.

Land decreed to be sold under mortgage.— Although a tract of land is decreed to be sold to satisfy a mortgage, the executor of the mortgagor, authorized by the will to sell all the testator's real and personal estate, may sell it for a full and fair price, with the consent of the mortgagee or his attorney. Nelson *v.* Carrington, 4 Munf. (Va.) 332, 6 Am. Dec. 519.

89. Walker *v.* Murphy, 34 Ala. 591; Kinney *v.* Knoebel, 51 Ill. 112; Dike *v.* Ricks, Cro. Car. 335, holding that where the power was to sell all the tenements or so much as with the goods were sufficient to pay debts, etc., there must be a deficiency and a sale could only be made to the extent thereof. See also O'Reilly *v.* Platt, 80 N. Y. App. Div. 348, 80 N. Y. Suppl. 829.

Where a testator authorized his executors to sell either one of two tracts the sale of one exhausted their power and they could not subsequently sell the other. Brown *v.* Beard, 6 N. C. 125.

90. See Corse *v.* Chapman, 153 N. Y. 466, 47 N. E. 812.

After-acquired property.—Where a testator directs his executor to sell the real estate owned by him at the time he made the will, describing it as "my said home farm," and the disposition of his estate is such that the purposes disclosed by the will cannot be effectuated without a sale of all the real estate of the testator, a power of sale as to after-acquired property is implied, and should be exercised by the executor. Dearing *v.* Selvey, 50 W. Va. 4, 40 S. E. 478.

91. Sharp *v.* Loupe, 120 Cal. 89, 52 Pac. 134, 586, holding that in such case a sale by the executor of one portion of the property to pay claims secured by other portions is not an abuse of discretion.

Sale of remainder in lands devised for life. — Where a testator, having agreed with his second wife to pay her daughter three hundred dollars when she became of age or married, devised certain lands to his widow for life, with remainder over to his lawful heirs, and his estate was insolvent, his executors, under a power in the will to sell to pay debts, properly sold the remainder interest in the lands so devised to the widow to her, as guardian of her daughter, in settlement of such three-hundred-dollar claim. Sneed *v.* Russell, (Tenn. Ch. App. 1897) 42 S. W. 213.

92. Green *v.* Johnson, 4 Bush (Ky.) 164; Erie Dime Sav., etc., Co. *v.* Vincent, 105 Pa. St. 315; Houck *v.* Houck, 5 Pa. St. 273.

93. Sale under order of court see *infra*, XII, K, 2.

94. See Gehr *v.* McDowell, 206 Pa. St. 100, 55 Atl. 851.

A direction not to sell until a named price can be obtained attached to a general clause in a will authorizing executors to sell real estate is to be construed, not as a limitation upon the authority of the executors, but merely as evidencing a desire on the part of the testator to reasonably conserve the estate to the best advantage. In such case the property should be withheld a reasonable time from sale in the hope of realizing the price fixed, but, if it is not realized within a reasonable period, the sale should take its course under the general provisions of the will. Kurtz *v.* Graybill, 91 Ill. App. 76 [*affirmed* in 192 Ill. 445, 61 N. E. 475], where a sale at less than the price fixed, after a lapse of five years, was upheld. Where a will directed that certain "ore land shall remain unsold until it shall bring ten thousand dollars," and provided further that "after the death of my wife all my real estate, and the real estate and personal property hereby bequeathed to my said wife, is to be sold," the two clauses, taken together, were construed to mean that the ore land could not be sold during the life of the testator's wife for less than ten thousand dollars, but after her death it should be sold without any limitation. Knaub's Estate, 13 York Leg. Rec. (Pa.) 161.

Where a testator devised land to be sold to educate his children it may be thence inferred that he intended the sale to be made during their minority. Muldrow *v.* Fox, 2 Dana (Ky.) 74.

Extension by agreement.— The time specified in a will for the conversion of real estate may be extended by agreement of all the parties, and the court will not, on petition of an assignee of one of the parties, direct the public sale of such property in the face of a probable loss of one-third of its value. Harrah's Estate, 7 Pa. Dist. 170, 20 Pa. Co. Ct. 606.

Execution of deed.— A power of sale in an executor to be executed within a given time does not necessitate the execution of a deed within that period if the sale itself has been

and in the absence of any testamentary direction upon the subject it is the duty of the executor to sell within a reasonable time.[95] But a long lapse of time since the probate of a will does not constitute any objection to the exercise of a power to sell real estate, if the duty to sell it still exists,[96] nor is an executor's power to sell terminated by his failure to do so within the time directed by the will.[97]

(III) *MANNER AND CONDUCT OF SALE.*[98] An executor who is given a power of sale by the will has as a rule considerable discretion as to the manner and conduct thereof.[99] While public auction sales are insisted on in a few states,[1] the more general rule permits a private sale at the discretion of the executor, prudently and honestly exercised.[2] Statutes with respect to appraisement, advertisement, notice, and the like are usually held applicable only to sales under judicial license and not to those made under a power in the will;[3] and it has been held that a testamentary direction that an appraisal by the executor shall precede the sale of property under a power created by the will does not necessarily make the appraisal a positive prerequisite to the exercise of the power.[4]

(IV) *TERMS AND CONDITIONS.*[5] The power of sale given to executors by will can only be exercised by a conveyance to an actual, *bona fide*, money purchaser.[6] The safer and more prudent course when exercising a power is to sell for cash or its equivalent;[7] but where the will gives the executor power to sell on credit

within it, and parol evidence is admissible to show that a deed dated after the expiration of the period is in consummation of a sale made within the period. Harlan *v.* Brown, 2 Gill (Md.) 475, 41 Am. Dec. 436.

95. Davis *v.* Hoover, 112 Ind. 423, 14 N. E. 468. See also *In re* Weston, 91 N. Y. 502.

What is a reasonable time within which an executor should execute a direction to convert land into money depends on the circumstances of each particular case. In the absence of special modifying facts, the eighteen months within which an executor must account might be considered a reasonable time. *In re* Weston, 91 N. Y. 502.

The sale should be made as soon as possible without sacrifice where the direction to sell is imperative, and the executors, offering the land for sale a year after the probate of the will, should sell to the highest bidder, and where they have refused a reasonable price, no allowance will be made for the cost of again offering the property for sale or for after-accruing taxes and insurance. *In re* Quin, 5 N. Y. Suppl. 261, 1 Connoly Surr. (N. Y.) 381.

96. Clifford *v.* Morrell, 22 N. Y. App. Div. 470, 48 N. Y. Suppl. 83, where twenty-nine years had elapsed. And see Muldrow *v.* Fox, 2 Dana (Ky.) 74.

The statute of limitations may be invoked by an heir or devisee, or by a purchaser from either, to prevent the sale of the land to pay debts and legacies, when the executor's right to sell is derived from the will alone. Butler *v.* Johnson, 41 Hun (N. Y.) 206 [*affirmed* in 111 N. Y. 204, 18 N. E. 643].

97. Spitzer *v.* Spitzer, 38 N. Y. App. Div. 436, 56 N. Y. Suppl. 470; Myers *v.* Cady, 22 R. I. 549, 48 Atl. 797. But see Muldrow *v.* Fox, 2 Dana (Ky.) 74; Herb *v.* Walther, 6 Pa. Dist. 687.

98. Sale under order of court see *infra*, XII, K.

99. Andrews' Estate, 6 Pa. Dist. 24, 19 Pa. Co. Ct. 215, holding that the orphans' court has no power in any case to control the discretion of an executor as to the sale of real estate when it has been honestly and correctly exercised.

1. Ashurst *v.* Ashurst, 13 Ala. 781; Gaines *v.* New Orleans, 6 Wall. (U. S.) 642, 18 L. ed. 950.

2. *Georgia.*— Wright *v.* Zeigler, 1 Ga. 324, 44 Am. Dec. 656.

Indiana.— Munson *v.* Cole, 98 Ind. 502.

Mississippi.— Buckingham *v.* Wesson, 54 Miss. 526.

New York.—McDermut *v.* Lorillard, 1 Edw. 273.

South Carolina.— Huger *v.* Huger, 9 Rich. Eq. 217.

See 22 Cent. Dig. tit. "Executors and Administrators," § 576.

3. Munson *v.* Cole, 98 Ind. 502; McDermut *v.* Lorillard, 1 Edw. (N. Y.) 273. See also Jackson *v.* Williams, 50 Ga. 553; Huger *v.* Huger, 9 Rich. Eq. (S. C.) 217.

4. Clifford *v.* Morrell, 22 N. Y. App. Div. 470, 48 N. Y. Suppl. 83.

5. Sale under order of court see *infra*, XII, L.

6. Arlington State Bank *v.* Paulsen, 57 Nebr. 717, 78 N. W. 303, holding that where the executors under a will giving them power "to sell and convey" if necessary for the payment of debts conveyed the real estate to one of the testator's heirs upon the sole consideration that she would mortgage it to secure money for the use of the executors, and then reconvey to them subject to the mortgage, which was done, this transaction was not a sale and conveyance within the meaning of the will.

7. McLarty *v.* Broom, 67 N. C. 311 (holding that it is not due prudence to sell on credit or for a depreciated currency); Taylor *v.* Galloway, 1 Ohio 232, 13 Am. Dec. 605; Wayland *v.* Crank, 79 Va. 602.

he may do so at his discretion,[8] and sales with mortgage security on the land itself for deferred payment are sometimes justified, in the exercise of good faith and reasonable prudence.[9]

(v) *Confirmation.*[10] In some jurisdictions confirmation or ratification by the court is required in the case of a sale by an executor under a power in the will.[11]

(vi) *Who May Purchase*—(a) *In General.*[12] As a general rule where an executor is authorized to sell he may sell to any person.[13]

(b) *Executor or Administrator*—(1) General Rule.[14] It is well established

What is a sale for money.— Where executors made a sale of land, and a part of the consideration money was secured by a judgment of the purchaser against another man, assigned to the executors and guaranteed by the purchaser, the sale was for money and not void. Shippen *v.* Clapp, 29 Pa. St. 265.

Where some special consideration is taken in lieu of money by the representative on his own responsibility he may make himself individually liable for realizing a full equivalent. Parshall's Appeal, 65 Pa. St. 224; Mitchell's Estate, 1 Leg. Gaz. (Pa.) 74.

8. Jackson *v.* Williams, 50 Ga. 553.

Improper security.— A copartner of the purchaser is not such security for the purchase-money as the executor is authorized to take. Southall *v.* Taylor, 14 Gratt. (Va.) 269.

9. Woodruff *v.* Lounsberry, 40 N. J. Eq. 545, 5 Atl. 99.

10. **Sale under order of court** see *infra*, XII, Q.

11. *In re* Durham, 49 Cal. 490; Ogle *v.* Reynolds, 75 Md. 145, 23 Atl. 137; Northrop *v.* Marquam, 16 Oreg. 173, 18 Pac. 449. See also Provident Life, etc., Co. *v.* Mills, 91 Fed. 435, citing Washington statute to that effect, but holding it not applicable to a sale by an independent executor.

Notice of hearing.— Where a will gives the executors a naked power, not coupled with an interest, to sell the estate without any special directions, the sale must be reported to and confirmed by the probate court, and if not made at public auction the judge must make an order fixing a day for hearing the report, and the clerk must give notice thereof; and in the absence of such order and notice by the clerk, the court has no power to confirm the sale, and, if it make an order of confirmation, may, on its own motion, set it aside. Perkins *v.* Gridley, 50 Cal. 97. See also *In re* Durham, 49 Cal. 490.

Revocation or correction of ratification.— Where the order of ratification of a sale, made and reported by executors under authority conferred by the will, has been procured by an honest mistake, the orphans' court has the power of revocation and correction, provided the application be made within a reasonable time. Montgomery *v.* Williamson, 37 Md. 421.

On appeal from an order confirming a sale of real estate by executors it is the duty of appellant to furnish the return of sale. *In re* Robinson, 142 Cal. 152, 75 Pac. 777.

The orphans' court will ratify a sale of land by executors with power to sell, and allow security to be entered, in order that the lien of debts not of record may be discharged. Wainwright's Estate, 11 Phila. (Pa.) 147.

Contract for sale.— Under Cal. Code Civ. Proc. § 1552, declaring that on a return of a sale by the executors, if it appears that the price is disproportionate and a sum exceeding the bid by ten per cent can be had, the sale may be vacated, where executors acting under a power of sale in the will orally agreed to sell certain property, and received a portion of the purchase-money, such contract for sale must be confirmed, unless the price paid was disproportionate, and an increased bid of ten per cent can be obtained. *In re* Robinson, 142 Cal. 152, 75 Pac. 777.

Objections not sufficient to prevent confirmation.— As a sale by an executor passes only such interest as the testator had in the property it is not a ground of objection to a confirmation of the sale that another person has an interest in the property, nor, when it is within the discretion of the executor whether he will make a sale under the power, can confirmation be successfully opposed on the ground that the sale is not for the best interest of the estate or of some particular heir. Wickersham's Estate, 139 Cal. 652, 73 Pac. 541, (1902) 70 Pac. 1079.

Order of orphans' court approving sale will not be reviewed. Dundas' Appeal, 7 Pa. Cas. 629, 12 Atl. 485.

If a will devises real estate to the executor in trust for purposes mentioned in the will, and directs him to sell the real estate, sales made by him as executor do not require to be confirmed by the probate court. *In re* Delaney, 49 Cal. 76 [*affirming* Myr. Prob. 9].

12. **Sale under order of court** see *infra*, XII, M, 1.

13. See Mason *v.* Devenny, 30 Pittsb. Leg. J. (Pa.) 216, 14 York Leg. Rec. (Pa.) 75.

Testamentary direction to offer land to particular person.— Where the will directed the executor to offer the testator's land to a certain person at a fixed price, and if he refused to sell at public or private sale for the best price offered, the person named could refuse the option and afterward buy at a less price from the executor, and a deed from the executor to such person at a price less than that named in the will was a valid execution of the power and conveyed a good title. Mason *v.* Devenny, 30 Pittsb. Leg. J. (Pa.) 216, 14 York Leg. Rec. (Pa.) 75.

14. **Sale under order of court** see *infra*, XII, M, 4, a.

as a general rule that an executor or administrator cannot become the purchaser at his own sale of the property of his decedent.[15] Neither can one executor or administrator lawfully become the purchaser at a sale made by his co-executors or co-administrators.[16] The rule precludes the representative not only from purchasing outright but also from being interested in any purchase at a sale by him,[17] neither is it confined in its application to a direct purchase, but an indirect purchase by means of an agent or a third person who is the ostensible purchaser but who really acts for the representative in order to enable him to acquire title may also be avoided.[18]

15. *Georgia.*— Griffin *v.* Stephens, 119 Ga. 138, 46 S. E. 66; Moore *v.* Carey, 116 Ga. 28, 42 S. E. 258; Pirkle *v.* Cooper, 113 Ga. 828, 39 S. E. 289; Anderson *v.* Green, 46 Ga. 361.

Illinois.— Stickel *v.* Crane, 189 Ill. 211, 59 N. E. 595; Elting *v.* Biggsville First Nat. Bank, 173 Ill. 368, 50 N. E. 1095 [*affirming* 68 Ill. App. 204]; Ebelmesser *v.* Ebelmesser, 99 Ill. 541; Sloan *v.* Graham, 85 Ill. 26.

Kentucky.—Faucett *v.* Faucett, 1 Bush 511, 89 Am. Dec. 639; Darcus *v.* Crump, 6 B. Mon. 363.

Mississippi.— McGowan *v.* McGowan, 48 Miss. 553.

New Jersey.— Wright *v.* Wright, 7 N. J. L. 175, 11 Am. Dec. 546; Booraem *v.* Wells, 19 N. J. Eq. 87.

New York.— Reynolds *v.* Ætna L. Ins. Co., 28 N. Y. App. Div. 591, 51 N. Y. Suppl. 446; Stiles *v.* Burch, 5 Paige 132.

Virginia.— Staples *v.* Staples, 24 Gratt. 225; Bailey *v.* Robinson, 1 Gratt. 4, 42 Am. Dec. 540.

Wisconsin.— O'Dell *v.* Rogers, 44 Wis. 136.

United States.— Michoud *v.* Girod, 4 How. 503, 11 L. ed. 1076; Price *v.* Morris, 19 Fed. Cas. No. 11,414, 5 McLean 4.

England.— Crowe *v.* Ballard, 3 Bro. Ch. 117, 29 Eng. Reprint 443, 2 Cox C. C. 253, 1 Ves. Jr. 215, 30 Eng. Reprint 308, 1 Rev. Rep. 122; Fox *v.* Mackreth, 2 Bro. Ch. 400, 29 Eng. Reprint 224; Lister *v.* Lister, 6 Ves. Jr. 631, 31 Eng. Reprint 1231; *Ex p.* Hughes, 6 Ves. Jr. 617, 6 Rev. Rep. 1, 31 Eng. Reprint 1223; *Ex p.* Reynolds, 5 Ves. Jr. 707, 5 Rev. Rep. 143, 31 Eng. Reprint 816; Campbell *v.* Walker, 5 Ves. Jr. 678, 5 Rev. Rep. 135, 31 Eng. Reprint 801.

See 22 Cent. Dig. tit. "Executors and Administrators," § 579.

A contrary doctrine finds support in a few early cases. Hampton *v.* Shehan, 7 Ala. 295; Brannan *v.* Oliver, 2 Stew. (Ala.) 47, 19 Am. Dec. 39; Huger *v.* Huger, 9 Rich. Eq. (S. C.) 217 (statute authorizing purchase); Lindsay *v.* Lindsay, 1 Desauss. (S. C.) 150.

Representative cannot acquire title by paying debts from his own funds. Haslett *v.* Glenn, 7 Harr. & J. (Md.) 17; Graham *v.* Jones, 24 S. C. 241.

Matters not affecting right to set aside sale. — The right to have a purchase by the executor or administrator at his own sale set aside cannot be defeated because of the insolvency of the estate, because on a resale the property will bring less than at the first sale, because the representative used money of his own to pay debts of the estate believing that the sale to himself would be allowed to stand, or because he procured a creditor of the decedent who was secured by a deed to the land to allow it to be sold free from the encumbrance of the deed. Pirkle *v.* Cooper, 113 Ga. 828, 39 S. E. 289.

16. *Georgia.*— Newton *v.* Roe, 33 Ga. 163.

New Jersey.— Skillman *v.* Skillman, 15 N. J. Eq. 388.

New York.— Pease *v.* Creque, 15 N. Y. Wkly. Dig. 15.

Pennsylvania.— Bunting's Estate, 5 Pa. Co. Ct. 623.

Canada.— Carter *v.* Molson, 8 Montreal Leg. N. 281 [*affirming* 6 Montreal Leg. N. 372].

See 22 Cent. Dig. tit. "Executors and Administrators," § 580.

Testamentary authority.— Where a testator directs by his will that if either of his executors at public sale purchase any part of his real estate, the other executor shall execute a deed conveying the land so purchased, either of the executors has a right to purchase, and the other is bound to execute the necessary conveyance; and the latter is not entitled to insist on the payment of the purchase-money to him as a condition of his making a conveyance, but the purchaser may retain the purchase-money to be accounted for by him as executor. Fennimore *v.* Fennimore, 3 N. J. Eq. 292.

17. See Colgate *v.* Colgate, 23 N. J. Eq. 372.

Sale to firm of which representative a member.— A contract made by an executor with a firm of which he himself is a member for the sale of the whole of his testator's real estate, if opposed by any of the *cestuis que trustent*, will not be required to be specifically performed. Colgate *v.* Colgate, 23 N. J. Eq. 372.

Circumstances not sufficient to show interest see Larzelere *v.* Starkweather, 38 Mich. 96.

18. *Georgia.*— Houston *v.* Bryan, 78 Ga. 181, 1 S. E. 252, 6 Am. St. Rep. 252.

Illinois.— Elmstedt *v.* Nicholson, 186 Ill. 580, 58 N. E. 381.

Maryland.— Singstack *v.* Harding, 4 Harr. & J. 186, 7 Am. Dec. 669.

Massachusetts.— Jenison *v.* Hapgood, 7 Pick. 1, 19 Am. Dec. 258.

Mississippi.— Buckingham *v.* Wesson, 54 Miss. 526.

(2) Limitations of the Rule.[19] It has been asserted, however, that where the representative has a personal interest in the property he may become the purchaser,[20] and a purchase by the representative has also been upheld where the sale was a fair one and a fair price was given for the property.[21] Where a mortgagee was appointed administrator of the estate of the mortgagor, but did not take possession of the mortgaged premises or take any steps to have them sold for the payment of debts, but foreclosed his mortgage while he was acting as administrator, he had the right to become the purchaser at the foreclosure sale.[22] Where a member of a firm owning realty dies, the administrator of the deceased partner may, in his private or individual capacity, purchase the land from the survivor.[23] There is no reason why an administrator appointed in one state should not become the purchaser of land of his decedent situated in another state.[24] A person who was nominated as an executor in the will, but has not qualified or acted as such, may purchase the property of the testator at a sale made by the executor or executors who did qualify,[25] or a representative who has resigned or been discharged may become a purchaser at a sale subsequently made by the personal representatives remaining in office, or by his successor.[26] The representative who has sold real property of his decedent may purchase the same for himself from the purchaser at his sale, provided the first sale was real and *bona fide* and not a mere sham or pretense to enable the representative to acquire title.[27]

(3) Whether Sale Void or Voidable.[28] A purchase by an executor or administrator at his own sale is usually held to be not void but merely voidable at the option of those interested,[29] but where the transaction is tainted with actual fraud it is void.[30]

New Jersey.— Hance *v.* McKnight, 11 N. J. L. 385; Skillman *v.* Skillman, 15 N. J. Eq. 388; Winter *v.* Geroe, 5 N. J. Eq. 319.

New York.— People *v.* Open Bd. Stock Brokers Bldg. Co., 92 N. Y. 98; Reynolds *v.* Ætna L. Ins. Co., 28 N. Y. App. Div. 591, 51 N. Y. Suppl. 446; Jackson *v.* Walsh, 14 Johns. 407.

Pennsylvania.— Bunting's Estate, 5 Pa. Co. Ct. 623.

Virginia.— Davies *v.* Hughes, 86 Va. 909, 11 S. E. 488. See also Buckles *v.* Lafferty, 2 Rob. 292, 40 Am. Dec. 752, where the agent of the administratrix purchased through another person.

United States.— See Tufts *v.* Tufts, 24 Fed. Cas. No. 14,233, 3 Woodb. & M. 456, holding that a contract made by prospective purchasers with the executrix to hold the land for her benefit, on her paying the interest quarterly, till she should find it convenient to pay the principal, and then to convey to her, they purchasing the land at less than its true value at that time, was against public policy and voidable.

See 22 Cent. Dig. tit. "Executors and Administrators," § 581.

19. Sale under order of court see *infra*, XII, M, 4, b.

20. Julian *v.* Reynolds, 8 Ala. 680; McLane *v.* Spence, 6 Ala. 894; Brannan *v.* Oliver, 2 Stew. (Ala.) 47, 19 Am. Dec. 39. *Contra*, Michoud *v.* Girod, 4 How. (U. S.) 503, 11 L. ed. 1076.

21. Brannan *v.* Oliver, 2 Stew. (Ala.) 47, 19 Am. Dec. 39; McKey *v.* Young, 4 Hen. & M. (Va.) 430; Toler *v.* Toler, 2 Patt. & H. (Va.) 71.

22. Fleming *v.* McCutcheon, 85 Minn. 152, 88 N. W. 433.

23. Jones *v.* Sharp, 9 Heisk. (Tenn.) 660.

24. See Sheldon *v.* Rice, 30 Mich. 296, 18 Am. Rep. 136.

25. Valentine *v.* Duryea, 37 Hun (N. Y.) 427.

26. Clark *v.* Denton, 36 N. J. Eq. 419.

27. Silverthorn *v.* McKinster, 12 Pa. St. 67 (holding further that if executors have made a parol sale of land, and taken the vendee's notes, and one of them purchases the vendee's interest, he may if solvent use the notes taken from the vendee by the executors in payment of his purchase-money, and the original sale will not be abrogated); Wayland *v.* Crank, 79 Va. 602; Staples *v.* Staples, 24 Gratt. (Va.) 225. See also Henninger *v.* Boyer, 10 Pa. Co. Ct. 506.

28. Sale under order of court see *infra*, XII, M, 4, c.

29. *Georgia.*— Griffin *v.* Stephens, 119 Ga. 138, 46 S. E. 66; Moore *v.* Carey, 116 Ga. 28, 42 S. E. 258; Anderson *v.* Green, 46 Ga. 361; Newton *v.* Roe, 33 Ga. 163.

Illinois.— Stickel *v.* Crane, 189 Ill. 211, 59 N. E. 595; Ebelmesser *v.* Ebelmesser, 99 Ill. 541; Sloan *v.* Graham, 85 Ill. 26.

New York.— Pease *v.* Creque, 15 N. Y. Wkly. Dig. 15.

Ohio.— Harrison *v.* Heckler, 6 Ohio Cir. Ct. 443.

Pennsylvania.— Bruch *v.* Lantz, 2 Rawle 392, 21 Am. Dec. 458; Bunting's Estate, 5 Pa. Co. Ct. 623.

See 22 Cent. Dig. tit. "Executors and Administrators," § 579.

30. Sheldon *v.* Woodbridge, 2 Root (Conn.) 473.

(4) Ratification.[31] A purchase by an executor or administrator at his own sale may be ratified by the persons interested.[32] An acquiescence in the sale by the heirs for a long time will create a presumption of ratification,[33] and an heir or legatee who receives the proceeds with knowledge of the facts thereby ratifies the sale or becomes estopped to subsequently attack it;[34] but a release or formal approval given to the executor or administrator does not conclude an heir or devisee who was at the time in ignorance of the invalid sale.[35]

(5) Representative Not a Bona Fide Purchaser.[36] Even though a purchase by a representative at a sale by himself or by his co-representatives pursuant to a power in the will is not set aside, still he is not a *bona fide* purchaser and entitled to protection as such.[37]

(6) Bona Fide Purchaser From Representative.[38] Although a purchase by a representative at his own sale is voidable, a deed from him conveying the property to a *bona fide* purchaser who pays a valuable consideration will pass title,[39] and after there has been such a conveyance by the representative the original purchase by him will not be set aside.[40]

(7) Liability of Representative Who Has Purchased.[41] An executor or administrator who has purchased or been interested in the purchase of real estate of his decedent sold by him is chargeable with the actual value of the property and not merely with the amount realized at the sale,[42] and he must also account for the profits made by a resale of the property to a *bona fide* purchaser;[43] but he is not chargeable with the value of land bid off by him at his sale, but lost through want of title in the testator.[44] Where the personal representative has improperly become the purchaser at a sale unnecessarily made by him, the heirs or devisees have a remedy in equity against him to compel a reconveyance of the property

31. **Sale under order of court** see *infra*, XII, M, 4, d.

32. *Georgia.*— Brantley *v.* Cheeley, 42 Ga. 209; Newton *v.* Roe, 33 Ga. 163.

Illinois.— Stickel *v.* Crane, 189 Ill. 211, 59 N. E. 595; Ebelmesser *v.* Ebelmesser, 99 Ill. 541; Sloan *v.* Graham, 85 Ill. 26.

Louisiana.— Prothro *v.* Prothro, 33 La. Ann. 598.

New Jersey.— Hance *v.* McKnight, 11 N. J. L. 385.

New York.— Geyer *v.* Snyder, 140 N. Y. 394, 35 N. E. 784.

Pennsylvania.— Bunting's Estate, 5 Pa. Co. Ct. 623.

See 22 Cent. Dig. tit. "Executors and Administrators," § 583.

The guardian of a minor cannot consent that the administrator may purchase property of the estate at a given price; and where the administrator does so purchase the property, and pays over to the guardian the portion due to the minor, he does not estop the latter from seeking to set aside the purchase, when the minor has had no settlement with the guardian, and has received no part of the proceeds of the sale. Moore *v.* Carey, 116 Ga. 28, 42 S. E. 258, holding further that where in an action to set aside such sale it is sought to estop plaintiff on the ground that his guardian had collected the amount due him as his portion of the proceeds of the sale, and had paid it over to him on his arrival at majority after putting him in possession of all the facts, testimony of the guardian that when he made the payment it was stipulated by the ward that it should have no other effect than to pass the fund into his possession and should not estop him from seeking to set aside the sale was relevant.

33. Griffin *v.* Stephens, 119 Ga. 138, 46 S. E. 66; Brantley *v.* Cheeley, 42 Ga. 209; Newton *v.* Roe, 33 Ga. 163.

34. Crane *v.* Lowe, 59 Kan. 606, 54 Pac. 666; Pease *v.* Creque, 15 N. Y. Wkly. Dig. 15.

35. Latham *v.* Barney, 14 Fed. 433, 4 McCrary 587.

36. **Sale under order of court** see *infra*, XII, M, 4, a.

37. Bruch *v.* Lantz, 2 Rawle (Pa.) 392, 21 Am. Dec. 458, holding that the Pennsylvania act of 1794 limiting the lien of debts on a decedent's lands to seven years applies only with respect to *bona fide* purchasers and not in favor of an executor who purchased at a sale by the executors. See also Houston *v.* Bryan, 78 Ga. 181, 1 S. E. 252, 6 Am. St. Rep. 252.

38. **As to bona fide purchasers** generally see Vendor and Purchaser.

39. Moore *v.* Carey, 116 Ga. 28, 42 S. E. 258, where the administrator conveyed to his wife.

40. Harrison *v.* Heckler, 6 Ohio Cir. Ct. 443, 3 Ohio Cir. Dec. 530.

41. **Sale of personalty** see *infra*, VIII, P, 2, f, (I).

42. Matter of Yetter, 44 N. Y. App. Div. 404, 61 N. Y. Suppl. 175 [*affirmed* in 162 N. Y. 615, 57 N. E. 1128]; *In re* Scheidt, 2 Woodw. (Pa.) 355.

43. Elting *v.* Biggsville First Nat. Bank, 173 Ill. 368, 50 N. E. 1095 [*affirming* 68 Ill. App. 204].

44. Hapgood *v.* Jennison, 2 Vt. 294.

or a payment of the excess of the value, as ascertained by a second sale, over the price paid.[45]

(c) *Relative of Representative.*[46] A sale to a near relative of the representative is improper and voidable,[47] especially if the representative has unduly favored such purchaser.[48]

(d) *Agent or Partner of Representative.*[49] A sale by a personal representative to his agent or partner or to a firm of which he is a member cannot be upheld against the objection of the heirs or devisees,[50] especially where there has been bad faith in the transaction.[51]

(e) *Attorney of Representative.*[52] A sale by an executor or administrator to his own attorney is improper for the reason that the sale may be supposed to be made under the influence, if not the pressure, of legal advice and induced by confidential relations which ought to be above suspicion.[53] This is especially true where the representative is illiterate and incompetent for the trust,[54] and in such case the attorney may at the option of the parties in interest be charged as trustee of the property purchased and required to account therefor,[55] without any evidence that the sale was in fact unfair or the price inadequate.[56]

(vii) *Conveyance*—(a) *Form and Contents in General.*[57] Although it is the better practice for a conveyance by an executor pursuant to a power to include a recital of such power,[58] such a recital is not necessary to the validity of the conveyance,[59] provided that the instrument shows that the grantor had in view the subject of the power.[60] Neither is it necessary that the conveyance should show that the sale was made in the manner authorized.[61] Where the power is given to two or more executors all should join in executing the deed, if all remain in office;[62] but if one or more fail to qualify or vacate the office those who do

45. Jennison *v.* Hapgood, 7 Pick. (Mass.) 1, 19 Am. Dec. 258.

46. **Sale under order of court** see *infra*, XII, M, 5.

47. Scott *v.* Gamble, 9 N. J. Eq. 218 (husband of executrix); Schaefer's Estate, 10 Pa. Co. Ct. 100 (husband of executrix). See also Buckingham *v.* Wesson, 54 Miss. 526.

48. Oberlin College *v.* Fowler, 10 Allen (Mass.) 545.

Where the court has authorized the executor's wife to bid at a sale of real estate under testamentary power, the executor should be surcharged with the difference between the amount received on a sale to his wife and what the property would have brought at a fair sale. Dunda's Appeal, 64 Pa. St. 325.

49. **Sale under an order of court** see *infra*, XII, M, 6.

50. Jackson *v.* Larche, 11 Mart. (La.) 284; Colgate *v.* Colgate, 23 N. J. Eq. 372. See also Buckles *v.* Lafferty, 2 Rob. (Va.) 292, 40 Am. Dec. 752.

51. Buckles *v.* Lafferty, 2 Rob. (Va.) 292, 40 Am. Dec. 752; Summers *v.* Reynolds, 95 N. C. 404.

52. **Sale under order of court** see *infra*, XII, M, 6.

53. O'Dell *v.* Rogers, 44 Wis. 136. See also Cook *v.* Berlin Woolen Mill Co., 43 Wis. 433; *In re* Taylor Orphan Asylum, 36 Wis. 534; Gillett *v.* Gillett, 9 Wis. 194.

54. O'Dell *v.* Rogers, 44 Wis. 136. See also Mills *v.* Mills, 26 Conn. 213.

55. O'Dell *v.* Rogers, 44 Wis. 136.

56. O'Dell *v.* Rogers, 44 Wis. 136.

57. **Deed pursuant to sale under order of court** see *infra*, XII, U.

58. Smith *v.* Henning, 10 W. Va. 596.

59. *District of Columbia.*— Coombs *v.* O'Neal, 1 MacArthur 405.

Georgia.— Terry *v.* Rodahan, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420.

New York.— Doody *v.* Hollwedel, 22 N. Y. App. Div. 456, 48 N. Y. Suppl. 93.

Pennsylvania.— Allison *v.* Kurtz, 2 Watts 185.

West Virginia.— Smith *v.* Henning, 10 W. Va. 596.

See 22 Cent. Dig. tit. "Executors and Administrators," § 586.

60. Coombs *v.* O'Neal, 1 MacArthur (D. C.) 405; Terry *v.* Rodahan, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420. See, generally, Powers.

Deed held sufficient see Carpenter *v.* Webb, (Del. 1902) 55 Atl. 1011.

Power must be shown in evidence.— A deed from the administrator of a deceased owner of property is not evidence of title in the grantee without the authority under which the administrator acted being shown. Forrest *v.* Wallace, 3 Walk. (Pa.) 86.

61. Turnipseed *v.* Hawkins, 1 McCord (S. C.) 272.

62. Wells *v.* Lewis, 4 Metc. (Ky.) 269; Halbert *v.* Grant, 4 T. B. Mon. (Ky.) 580; Mohn *v.* King, 41 N. Y. App. Div. 611, 58 N. Y. Suppl. 97.

A deed from the devisee of the land and its proceeds tendered by the executors cannot without the purchaser's consent validate a deed under a power in the will, which was void because executed by only one of two

qualify or who remain in office may execute the deed alone.[63] A mere power to sell gives to executors power only to convey whatever title the testator had, and does not give them power to bind the estate by covenants of warranty or otherwise in the deed.[64]

(B) *Construction and Effect.*[65] In matters of description the usual rules of construction as applied to conveyances will apply to a deed of land from an executor or administrator.[66] A covenant by the representative against his own acts does not by implication warrant the title nor amount to a covenant that his decedent was seized of the premises.[67] The deed of an executor who had no estate whatever in the land, but only a power to sell, will be considered an exercise of that power;[68] but, where the executor who conveyed had an individual interest but no power of sale, his conveyance passes his individual interest only,[69] and even where he had both an individual interest and a power to convey as executor, his conveyance made without actual reference to the power has been presumed a deed of his individual interest alone.[70] Where the grantor in a conveyance styles himself the executor of a person last seized, and possession accompanies the deed, it will be presumed after the lapse of many years that the grantor had authority to make the deed.[71] Under a statute excepting out of a will the interest of any child or children not named or provided for, a sale by an executor under a power in the will, while it transfers to the purchaser all that the executor could lawfully sell, does not affect the interest of such child or children.[72] The mere form of a conveyance by an executor under a power in the will may be disregarded and the effect of the conveyance determined by the power.[73]

(VIII) *Payment and Recovery of Purchase-Money*—(A) *In General.*[74] Where real property is sold by executors under a power in the will, the executors are authorized to collect and receive the purchase-money and enforce any security given for deferred payments,[75] and they do not lose their power as such

joint executors. Wells *v.* Lewis, 4 Metc. (Ky.) 269.

63. Wells *v.* Lewis, 4 Metc. (Ky.) 269; *In re* Fisher, 13 L. R. Ir. 546.

Presumption.—Fifty years after the execution of a deed by two executors it will be presumed that all the acting executors signed it, although it is shown that there was a third executor. Fleming *v.* Burnham, 36 Hun (N. Y.) 456.

64. Bauerle *v.* Long, 187 Ill. 475, 58 N. E. 458, 52 L. R. A. 643 [*affirming* 88 Ill. App. 177]; Ramsey *v.* Wandell, 32 Hun (N. Y.) 482; Mayer *v.* McCune, 59 How. Pr. (N. Y.) 78; Grantland *v.* Wight, 5 Munf. (Va.) 295, holding that an executor, selling the lands of his testator under a power in the will, is not bound to convey with general warranty, but only with special warranty against himself and all persons claiming under him.

An executor may give his personal warranty of title, assuming the consequences, and sell accordingly. Mayer *v.* McCune, 59 How. Pr. (N. Y.) 78; Baley *v.* Measam, 2 Rev. de Lég. 337.

65. Deed pursuant to sale under order of court see *infra*, XII, U, 5, 6.

66. Floyd *v.* Adams, 1 A. K. Marsh. (Ky.) 72. See also Hiss *v.* McCabe, 45 Md. 77.

Description carrying right or easement in street see Bloomfield *v.* Ketcham, 95 N. Y. 657.

67. Sandford *v.* Travers, 7 Bosw. (N. Y.) 498.

68. Jones *v.* Wood, 16 Pa. St. 25.

69. Morrison *v.* Bowman, 29 Cal. 337.

70. Reeves *v.* Barrett, (Ark. 1890) 13 S. W. 77; Jones *v.* Wood, 16 Pa. St. 25; Hay *v.* Mayer, 8 Watts (Pa.) 203, 34 Am. Dec. 453. See also Frisby *v.* Withers, 61 Tex. 134. But *compare* Burchard *v.* Wright, 11 Leigh (Va.) 463.

Where the conveyance shows that it was intended as an execution of the trust under the will it will not be considered an individual conveyance of the executors, although they had an individual interest in the property. Arlington State Bank *v.* Paulsen, 57 Nebr. 717, 78 N. W. 303.

71. Maverick *v.* Austin, 1 Bailey (S. C.) 59, where thirty years had elapsed.

72. Northrop *v.* Marquam, 16 Oreg. 173, 18 Pac. 449.

73. Robeno *v.* Marlatt, 6 Pa. Co. Ct. 251.

74. Sale under order of court see *infra*, XII, O, 1.

75. McElroy *v.* Nucleus Assoc., 131 Pa. St. 393, 18 Atl. 1063.

Security given by legatees who purchased. —Where real estate sold by an executor as directed by the will is purchased by legatees under the will, who give a mortgage for part of the purchase-money, it is not a sufficient defense to a scire facias issued on the mortgage that the money due from the purchasers on the mortgage is due to themselves as legatees. Nelson *v.* McLaughlin, 20 Pa. Co. Ct. 385.

to receive the money, nor is the purchaser relieved of his duty to pay to them because an unsuccessful effort has been made to secure the payment of the principal sum to the persons ultimately entitled to receive it from the executors.[76] Where an executor having power under the will to sell at any time makes a sale before the time of distribution under the will has arrived, he is authorized to take notes payable to himself in payment for the property.[77]

(B) *Payment in Confederate Money.*[78] Payment of purchase-money or of a bond and mortgage given to secure the same, when due, in Confederate money, may be good and discharge the debt if the payment was made and accepted in good faith,[79] and an executor or administrator receiving such payment in good faith at a time when Confederate money was the only currency in general circulation is not liable for the resulting loss.[80]

(C) *Actions to Recover* — (1) IN GENERAL.[81] The right of the executor to sue for the purchase-money and coerce payment follows as incidental to his right to receive the same,[82] but where he had no legal right to sell he cannot maintain an action for the purchase-money.[83]

(2) DEFENSES.[84] Fraud in the sale has been held a good defense to an action by the executor for the purchase-money.[85] Where the property was sold without any contract as to encumbrances, and conveyed by deed without covenants, the fact that taxes were a lien thereon at the time of the sale, and were paid by the purchaser to remove the encumbrance thereof, constitutes no defense to an action for the price.[86] In an action on a note given to an executor for the purchase-price of property sold by the executor to defendant, an answer that the testator was indebted to defendant in a sum named is not good as a counter-claim,[87] nor can a note for a certain amount executed by one of defendants to the mother of one of the minor legatees, which was not agreed to by the executor and which has never been paid, be allowed as a credit.[88] Although an executor's deed may have been

Unauthorized sale by third person.—Where a person without authority of law sold land belonging to an estate, after the death of decedent and before administration, and received part of the purchase-money therefor, the representatives of decedent could not maintain an action against such person or his executor for money had and received to their use, nor for the use of the estate, since they had not been deprived of any legal or equitable interest in the land by such sale. Crews *v.* Heard, 7 Ga. 60.

76. McElroy *v.* Nucleus Assoc., 131 Pa. St. 393, 18 Atl. 1063.

77. Rogers *v.* Jones, 13 Tex. Civ. App. 453, 35 S. W. 812. See also Smith *v.* Blair, 5 Ky. L. Rep. 687.

78. Sale under order of court see *infra*, XII, O, 3.

79. Glasgow *v.* Lipse, 117 U. S. 327, 6 S. Ct. 757, 29 L. ed. 901.

In case of fraud the rule is otherwise. See McBurney *v.* Carson, 99 U. S. 567, 25 L. ed. 378.

80. Womack's Succession, 29 La. Ann. 577 (holding that the representative can be held for only what the money he received was at that time worth in gold); Mills *v.* Mills, 28 Gratt. (Va.) 442.

Sale for Confederate money — Scaling by property standard see Moore *v.* Harnsberger, 26 Gratt. (Va.) 667, construing and applying the Virginia statute.

81. Sale under order of court see *infra*, XII, O, 9.

82. Crouse *v.* Peterson, 130 Cal. 169, 62 Pac. 475, 615, 80 Am. St. Rep. 89; Duer *v.* Harrill, 9 N. C. 50.

83. Fambro *v.* Gantt, 12 Ala. 298; Richardson *v.* Crooker, 7 Gray (Mass.) 190.

84. Sale under order of court see *infra*, XII, O, 9, c.

85. Miller *v.* Raynard, 2 Houst. (Del.) 559, 83 Am. Dec. 168, where the executor employed a puffer, by reason of which the purchaser was compelled to bid twelve dollars an acre more for the property than he would otherwise have been compelled to pay. But see Westfall *v.* Dungan, 14 Ohio St. 276, holding that false and fraudulent representations made by the executor at the time of the sale in respect to its subject-matter are not available either as a defense or by way of recoupment or counter-claim in such an action, the remedy of the purchaser, if any, being against the executor personally.

86. Boaz *v.* McChesney, 53 Ind. 193.

87. Dunn *v.* Carpenter, 10 Ky. L. Rep. 494. See also Mellen *v.* Boarman, 13 Sm. & M. (Miss.) 100.

Advances to decedent for purchase.—Where A and B purchased land, A advancing B's part of the price and taking the title in his own name, and B afterward died insolvent, and the property was sold at auction by agreement of the executor and A, and A bought it, he was entitled to retain his advances out of the proceeds in his hands. Blanchard *v.* Lockett, 3 La. Ann. 98.

88. Wright *v.* Heffner, 57 Tex. 518.

defective, as purporting to convey his own interest only in the property, he having no legal interest in it, but only a naked power to sell, still the purchaser acquires an equitable estate by the deed which he must reconvey or offer to reconvey, before he can make any defense to the payment of notes given for the purchase-money;[89] but where the sale itself is invalid, the purchaser is not bound to offer to surrender possession to entitle him to resist the collection of the purchase-money.[90]

(D) *Resale and Recovery of Difference in Price.*[91] In most jurisdictions where the purchaser refuses to complete his purchase, the executor has a remedy in the probate court by making a resale and proceeding against the purchaser for the difference in price,[92] but this remedy is not exclusive and does not preclude an action for the purchase-money.[93]

(IX) *PROCEEDS*—(A) *Liability of Representative.*[94] An executor will be compelled to account in the probate court for the proceeds of real estate sold by him pursuant to the directions of the will,[95] and in a proper case an executor into whose hands proceeds of the sale of realty have come or are to come may be required to give security therefor;[96] but where a sale is made by the representative without authority he cannot be compelled to account in his representative capacity for the proceeds.[97]

(B) *How Far Regarded as Personalty.*[98] In case of a sale of a decedent's realty there is a conversion into personalty only to the extent to which the purchase-money may be required as personalty for the particular object for which the sale is made, otherwise such proceeds, although in the form of money, remain impressed with the character of realty so far as to determine who is entitled thereto.[99]

89. Bond *v.* Ramsey, 89 Ill. 29, holding further that where a second deed is made and tendered before the bringing of an action upon such notes, which does convey all the interest the testator had, this is all the purchaser can exact, and a recovery can be had on the notes.

90. Fambro *v.* Gantt, 12 Ala. 298; Washington *v.* McCaughan, 34 Miss. 304.

91. **Sale under order of court** see *infra*, XII, O, 10.

92. Crouse *v.* Peterson, 130 Cal. 169, 62 Pac. 475, 615, 80 Am. St. Rep. 89.

Sufficiency of averments in declaration.— An averment, in a declaration to recover a deficiency in price on resale of land previously sold to defendant, that the vendor had power to sell as executor is sufficient, without an allegation that the title of the vendor's testator was good. Adams *v.* McMillan, 7 Port. (Ala.) 73.

93. Crouse *v.* Peterson, 130 Cal. 169, 62 Pac. 475, 615, 80 Am. St. Rep. 89.

94. **Sale under order of court** see *infra*, XII, V.

95. Hood *v.* Hood, 85 N. Y. 561 [*reversing* 19 Hun 300]; Stagg *v.* Jackson, 1 N. Y. 206; Matter of Collins, 70 Hun (N. Y.) 273, 24 N. Y. Suppl. 226 [*affirmed* in 144 N. Y. 522, 39 N. E. 629]; Matter of Blauvelt, 60 Hun (N. Y.) 394, 15 N. Y. Suppl. 586 [*reversed* on other grounds in 131 N. Y. 249, 30 N. E. 194]; Mayer *v.* McCune, 59 How. Pr. (N. Y.) 78; Bloodgood *v.* Bruen, 2 Bradf. Surr. (N. Y.) 8; Nimmo *v.* Com., 4 Hen. & M. (Va.) 57, 4 Am. Dec. 488.

Proceeds not received as executor.— Where the executor sells lands under a power conferred by the will on him personally, and not as executor, he should not include the proceeds of sale in his executor's account (Matter of Brown, 5 Dem. Surr. (N. Y.) 223), nor should proceeds received as trustees and not as executor be brought into the administration account (*In re* Aston, 5 Whart. (Pa.) 228).

Conveyance of individual interest.— One who before his appointment as administrator deeds "all his rights, title, and interest of and in" land of which intestate died seized is not liable to the personal representatives or heirs of intestate for the purchase-money, since his deed neither conveys nor attempts to convey any interest of the intestate or of the heirs. Wildermuth *v.* Long, 196 Pa. St. 541, 46 Atl. 927.

Amount paid in satisfaction of dower should be credited. Meeks *v.* Thompson, 8 Gratt. (Va.) 134, 56 Am. Dec. 134.

96. Holmes *v.* Cock, 2 Barb. Ch. (N. Y.) 426.

97. Matter of Hodgman, 11 N. Y. App. Div. 42 N. Y. Suppl. 1004.

Where the interest of a devisee has been improperly sold by the executor, the devisee may waive the tort and pursue the purchase-money in an action for money had and received against the person to whom the executor paid it. Stoner *v.* Zimmerman, 21 Pa. St. 394.

98. **Sale under order of court** see *infra*, XII, V.

99. Cronise *v.* Hardt, 47 Md. 433; *In re* Raleigh, 206 Pa. St. 451, 55 Atl. 1119; Maguire's Estate, 10 Pa. Dist. 238, holding that the proceeds of a sale of real estate by an ex-

(c) *Disposition of Proceeds.*[1] Where a power of sale is lawfully exercised for certain specified purposes, it is the duty of the executor to devote the proceeds to such purposes, and to pay over the surplus, if any remains after the special purpose has been carried out, to such persons as the will intended.[2] Where the testator has authorized or directed a sale of land for the payment of debts, the money arising therefrom becomes legal assets for that purpose,[3] and it has been held that even though a sale is not made for the payment of debts the proceeds must be applicable to the debts if needed therefor because the sale cuts off the remedy of creditors against the land.[4] Where an executor by mistake or otherwise has sold land not belonging to his testator the true owner is entitled to the purchase-money.[5]

(d) *Liability of Purchaser as to Application of Proceeds.*[6] Where a purchaser from an executor who sells under a power contained in the will pays over the purchase-money in good faith to his vendor, he is under no duty or obligation to see to the proper application or distribution of the money by the latter.[7]

ecutor under a power in a will are to be regarded as realty, although greatly enhanced by the fact that the property had a retail liquor license. See also Post *v.* Benchley, 15 N. Y. St. 618.

1. Sale under order of court see *infra*, XII, V.

2. *Illinois.*— *In re* Whitman, 22 Ill. 511.

Kentucky.— Ducker *v.* Stubblefield, 9 B. Mon. 577.

Maryland.— Cronise *v.* Hardt, 47 Md. 433; State *v.* Nicols, 10 Gill & J. 27.

New Jersey.—Tonnele *v.* Zabriskie, 51 N. J. Eq. 557, 26 Atl. 808.

New York.— Bogert *v.* Hertell, 4 Hill 492.

North Carolina.— Peacock *v.* Harris, 85 N. C. 146.

See 22 Cent. Dig. tit. "Executors and Administrators," § 591.

3. *Kentucky.*— Loftus *v.* Locker, 1 J. J. Marsh. 297.

Missouri.— Governor *v.* Chouteau, 1 Mo. 731.

New Jersey.— Smith *v.* Bloomsbury First Presb. Church, 26 N. J. Eq. 132.

Ohio.— Stiver *v.* Stiver, 8 Ohio 217.

Pennsylvania.— Philadelphia's Appeal, 112 Pa. St. 470, 4 Atl. 4.

See 22 Cent. Dig. tit. "Executors and Administrators," § 591.

Payment of mortgage.— Where a testatrix charged her real estate with the payment of her debts, and empowered her executors to sell so much thereof as should be necessary for that purpose, the proceeds of land sold to pay debts could not be applied to the payment of mortgage debts, to the prejudice of creditors not secured by mortgage. Van Vechten *v.* Keator, 63 N. Y. 52.

4. Matter of Newell, 38 Misc. (N. Y.) 563, 77 N. Y. Suppl. 1116. See also *In re* Bolton, 146 N. Y. 257, 40 N. E. 737; Cahill *v.* Russell, 140 N. Y. 402, 35 N. E. 664. But see *In re* McComb, 117 N. Y. 378, 22 N. E. 1070; Mayer *v.* McCune, 59 How. Pr. (N. Y.) 78; Hannum *v.* Spear, 2 Dall. (Pa.) 291, 1 L. ed. 386.

A power to sell when for the best interests of the estate will be deemed to authorize executors to apply the proceeds to the payment of debts which would be a burden on property unsold, and this, although the power does not expressly direct such application of the property. Olyphant *v.* Phyfe, 27 Misc. (N. Y.) 64, 58 N. Y. Suppl. 217.

Right lost by limitations.— A testator who died in 1839, directed his executors to sell his real estate, but they neglected to do so till 1856. In 1842 the executors rendered their final account of the personal estate, which was insufficient to pay the debts of the testator, and a dividend was declared, and the executors were directed by the surrogate to distribute among the creditors any surplus that might be left after paying expenses of administration. It was held that creditors who received their dividend were barred by the statute of limitations from obtaining, in 1857, payment of the remainder of their claim out of the real estate sold by the executors in 1856. Warren *v.* Paff, 4 Bradf. Surr. (N. Y.) 260.

Arrangement as to discharge of liens.— Where the real estate of two deceased tenants in common was sold by their executors, and in order to make clear title the executors paid off liens on the real estate, one paying a larger amount than the other under an agreement that on the distribution of the estate a proper adjustment should be made, a simple contract creditor of one decedent could not object to this adjustment. Strough's Estate, 2 Chest. Co. Rep. (Pa.) 291.

5. Miller's Appeal, 84 Pa. St. 391.

Partnership land.— A sale by an executor of a partner of the whole of a lot of land, in ignorance of the partnership, entitles the claimant under the other partner to his proportion of the purchase-money, with interest. Lee *v.* Craig, 1 A. K. Marsh. (Ky.) 177.

6. Sale under order of court see *infra*, XII, V, 6.

7. *Arkansas.*—Ludlow *v.* Flournoy, 34 Ark. 451.

Georgia.— Wright *v.* Zeigler, 1 Ga. 324, 44 Am. Dec. 656.

Illinois.— Whitman *v.* Fisher, 74 Ill. 147 (holding that the validity of the executors' deed under a power to sell for payment of legacies is not impaired by their using the

(E) *Proceedings For Distribution.*[8] Equity formerly took exclusive jurisdiction over the proceeds of a sale of real estate under a will as to compelling distribution,[9] but probate courts are now vested by statute with authority over such matters.[10]

(X) *Nature, Validity, and Effect of Sale.*[11] A sale by an executor acting under the authority of a power conferred by the will is in no sense judicial in its character,[12] and the purchaser deals with the executor as he would with any other vendor.[13] A sale or conveyance under a power in the will transfers all title that the testator had and divests the heirs of all title by descent,[14] but where a conveyance of the testator's land by the executor is invalid because of a lack of power the title remains in the heirs or devisees.[15] A testator cannot by any power

money for paying debts); Wardwell *v.* McDowell, 31 Ill. 364.

Indiana.— Munson *v.* Cole, 98 Ind. 502.

Maryland.— Seldner *v.* McCreery, 75 Md. 287, 23 Atl. 641; Alther *v.* Barroll, 22 Md. 500.

New Jersey.— Barnes *v.* Trenton Gas Light Co., 27 N. J. Eq. 33; Dewey *v.* Ruggles, 25 N. J. Eq. 35.

New York.— Coogan *v.* Ockershausen, 55 N. Y. Super. Ct. 286, 18 N. Y. St. 366.

North Carolina.— Hauser *v.* Shore, 40 N. C. 357.

Pennsylvania.— *In re* Cochrane, 202 Pa. St. 415, 51 Atl. 989; Grant *v.* Hook, 13 Serg. & R. 259; Dinsmore *v.* Kelso, 4 Brewst. 34; McCartney's Estate, 2 Pa. Co. Ct. 202, 18 Wkly. Notes Cas. 51.

South Carolina.— Laurens *v.* Lucas, 6 Rich. Eq. 217.

Texas.— Rogers *v.* Jones, 13 Tex. Civ. App. 453, 35 S. W. 812.

Virginia.— Hughes *v.* Tabb, 78 Va. 313; Davis *v.* Christian, 15 Gratt. 11; Meeks *v.* Thompson, 8 Gratt. 134, 56 Am. Dec. 134.

United States.— Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185, 6 Call (Va.) 308; Greenway *v.* Roberts, 10 Fed. Cas. No. 5,790, 2 Cranch C. C. 246.

England.— Corser *v.* Cartwright, L. R. 7 H. L. 731, 45 L. J. Ch. 605; Robinson *v.* Lowater, 17 Beav. 592 [*affirmed* in 5 De G. M. & G. 272, 18 Jur. 363, 23 L. J. Ch. 641, 2 Wkly. Rep. 394, 54 Eng. Ch. 215, 43 Eng. Reprint 875]; Smith *v.* Guyon, 1 Bro. Ch. 186, 28 Eng. Reprint 1072; Colyer *v.* Finch, 5 H. L. Cas. 905, 3 Jur. N. S. 25, 26 L. J. Ch. 65, 10 Eng. Reprint 1159; Ball *v.* Harris, 3 Jur. 140, 8 L. J. Ch. 114, 4 Myl. & C. 264, 18 Eng. Ch. 264 [*affirming* 1 Jur. 706, 8 Sim. 485, 8 Eng. Ch. 485]; Jones *v.* Noyes, 4 Jur. N. S. 1033, 28 L. J. Ch. 47, 7 Wkly. Rep. 21; Shaw *v.* Borrer, 1 Keen 559, 5 L. J. Ch. 364, 15 Eng. Ch. 559, 48 Eng. Reprint 422; Forbes *v.* Peacock, 15 L. J. Ch. 31, 1 Phil. 717, 19 Eng. Ch. 717, 41 Eng. Reprint 805 [*reversing* 7 Jur. 688, 13 L. J. Ch. 46, 12 Sim. 528, 35 Eng. Ch. 447]; Eland *v.* Eland, 3 Jur. 474, 8 L. J. Ch. 289, 4 Myl. & C. 420, 18 Eng. Ch. 420. See also Sabin *v.* Heape, 27 Beav. 553, 5 Jur. N. S. 1146, 29 L. J. Ch. 79, 1 L. T. Rep. N. S. 51, 8 Wkly. Rep. 120.

See 22 Cent. Dig. tit. "Executors and Administrators," § 592.

Certain limitations of this rule have been recognized in England. See Horne *v.* Horne, 4 L. J. Ch. O. S. 52, 2 Sim. & St. 448, 1 Eng. Ch. 448; Abbot *v.* Gibbs, 1 Eq. Cas. Abr. 358, 21 Eng. Reprint 1101; Haynes *v.* Forshaw, 11 Hare 93, 17 Jur. 930, 22 L. J. Ch. 1060, 1 Wkly. Rep. 346, 45 Eng. Ch. 93; Johnson *v.* Kennett, 3 Myl. & K. 624, 10 Eng. Ch. 624, 40 Eng. Reprint 238 [*reversing* 6 Sim. 384, 9 Eng. Ch. 384]; Watkins *v.* Cheek, 2 Sim. & St. 199, 25 Rev. Rep. 181, 1 Eng. Ch. 199; Spalding *v.* Shalmer, 1 Vern. Ch. 301, 23 Eng. Reprint 483.

The purchaser's knowledge that the executor is embarrassed in his affairs is not such proof that the money is likely to be misapplied as to be notice to the purchaser of the bad faith of the executor. Davis *v.* Christian, 15 Gratt. (Va.) 11.

8. **Sale under order of court** see *infra*, XII, V.

9. Monroe *v.* Wilson, 6 T. B. Mon. (Ky.) 122.

10. *Ex p.* Hayes, 88 Ind. 1; Hart *v.* Durbar, 4 Sm. & M. (Miss.) 273; Holmes *v.* Cock, 2 Barb. Ch. (N. Y.) 426; *In re* Vandervoort, 1 Redf. Surr. (N. Y.) 270; Bloodgood *v.* Bruen, 2 Bradf. Surr. (N. Y.) 8.

In an action to sell certain real estate of decedent and to make distribution of the proceeds arising from the sale, moneys received by the executor from a sale of property under a power of sale in the will cannot be directed to be applied to the payment of the debts of the estate. Matter of Gedney, 30 Misc. (N. Y.) 18, 62 N. Y. Suppl. 1023.

11. **Sale under order of court** see *infra*, XII, T.

12. *In re* Pearson, 98 Cal. 603, 33 Pac. 451, 102 Cal. 569, 36 Pac. 934; Harwell *v.* Foster, 102 Ga. 38, 28 S. E. 967.

13. *In re* Pearson, 102 Cal. 569, 36 Pac. 934. See, generally, VENDOR AND PURCHASER.

14. Peebles *v.* Watts, 9 Dana (Ky.) 102, 33 Am. Dec. 531.

Judgment against heir.— The title of the purchaser goes behind the lien of a judgment against an heir or residuary legatee and cuts it off. Penn *v.* Mutual Cotton Oil Co., 106 Ga. 152, 32 S. E. 17. And even a levy against the devisee does not prevent the execution of the power of sale or affect the title of the purchaser. Smyth *v.* Anderson, 31 Ohio St. 144.

15. King *v.* Whiton, 15 Wis. 684.

of sale in his will relieve his land from liability for his debts in case the personalty is insufficient to pay them,[16] and while a sale of land by executors under a power in the will to sell for the payment of debts is good against creditors[17] and discharges the land from the lien of debts not of record,[18] or even of a judgment rendered against decedent in his lifetime,[19] a sale for purposes other than the payment of debts has been considered not to give the purchaser a title discharged from all claim and demand on account of the debts.[20] Where the will charges the debts generally upon the land and a sale is made with the collusion of the purchaser for the purpose of preventing the payment of the debts the land will remain charged with the debts in the hands of the purchaser.[21] A sale by an executor pursuant to direction in the will is not invalid because of the invalidity of the testamentary directions as to the disposition of the proceeds.[22] Where the will contains a power of sale, but gives no power to mortgage the realty, a conveyance made for the purpose of indirectly subjecting the property to a mortgage is invalid.[23]

(XI) *TITLE AND RIGHTS OF PURCHASER*—(A) *In General.*[24] After a will is admitted to probate it is the law for the administration of the testator's estate, and a sale by virtue of a power conferred thereby is as complete an administration of the property and passes title thereto as effectually as if made under an order of court.[25] A purchaser in good faith from an executor who has power to sell gets a title and possession which is good at law, even though the sale be prematurely or indiscreetly made, or the necessity for the exercise of the power has not arisen, or that the sale was made for an inadequate consideration, or in violation of the executor's duty; the relief against him, if any can be had, being only in equity and at the instance of the beneficiary whose interests have been prejudiced.[26] Neither is the purchaser's title as against beneficiaries affected by

Sale under will subsequently set aside.— A sale by executors under one will passes no title as against the universal legatee under a subsequent will duly probated. Gaines *v.* New Orleans, 6 Wall. (U. S.) 642, 18 L. ed. 950. See also Gaines *v.* De la Croix, 6 Wall. (U. S.) 719, 18 L. ed. 965.

16. See Betts *v.* Cobb, 121 Ala. 154, 25 So. 692.

Protection of bona fide purchaser.— Property in the hands of a *bona fide* purchaser from executors who have power to sell will be protected by compelling the executors if they have assets to pay claims against it. Latrobe *v.* Tiernan, 2 Md. Ch. 474.

17. Hannum *v.* Spear, 2 Dall. (Pa.) 291, 1 L. ed. 386. See also Grant *v.* Hook, 13 Serg. & R. (Pa.) 259.

18. Cadbury *v.* Duval, 10 Pa. St. 265; Connelly's Estate, 3 Del. Co. (Pa.) 402.

19. McDaniel *v.* Edwards, 56 Ga. 444; Stallings *v.* Ivey, 49 Ga. 274; Carhart *v.* Vann, 46 Ga. 389; Sims *v.* Ferrill, 45 Ga. 585.

Effect as to lands not sold.— Where land subject to the lien of a judgment against the decedent is sold by his executors and the proceeds applied to the payment of junior liens, this does not discharge, in favor of the heirs or devisees, the lien of the judgment upon other lands remaining in their possession. Konigmaker *v.* Brown, 14 Pa. St. 269 [*following* Wells *v.* Baird, 3 Pa. St. 351].

20. Hannum *v.* Spear, 2 Dall. (Pa.) 291, 1 L. ed. 386, power to sell for payment of legacies. See also Mayer *v.* McCune, 59 How. Pr. (N. Y.) 78, holding that where after testator's death judgment was entered against his executrix in a suit commenced against him in his lifetime, and under a testamentary power the executrix contracted to convey his lands in fee simple, she could not compel specific performance of the agreement before satisfaction of the judgment, since the lands might be subjected to payment of the judgment under the New York statute authorizing the surrogate to compel mortgaging of the estate to pay the debts of testator where the personal estate is insufficient for that purpose. But see *In re* Bolton, 146 N. Y. 257, 40 N. E. 737; Cahill *v.* Russell, 140 N. Y. 402, 35 N. E. 664; Matter of Newell, 38 Misc. (N. Y.) 563, 77 N. Y. Suppl. 1116.

21. Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185, 6 Call (Va.) 308.

22. Peters *v.* Bowman, 19 Fed. Cas. No. 11,029 [*affirmed* in 98 U. S. 56, 25 L. ed. 91].

23. Arnoux *v.* Phyfe, 6 N. Y. App. Div. 505, 39 N. Y. Suppl. 973 [*affirmed* in 159 N. Y. 552, 54 N. E. 1089].

24. **Sale under order of court** see *infra*, XII, T, 3.

Rights of divested purchaser see *infra*, VIII, O, 9, d, (XIII).

25. Penn *v.* Mutual Cotton Oil Co., 106 Ga. 152, 32 S. E. 17.

26. *Alabama.*— Traylor *v.* Marshall, 11 Ala. 458.

Georgia.— Reeves *v.* Bolles, 95 Ga. 402, 22 S. E. 626; Fields *v.* Carlton, 84 Ga. 597, 11 S. E. 124; Bagley *v.* Stephens, 78 Ga. 304, 2 S. E. 545; Atkinson *v.* Central Georgia Agricultural, etc., Co., 58 Ga. 227.

the executor's misappropriation of the proceeds.[27] But a sale of land by executors without consideration and outside the scope of the power given them by the will is void as to the immediate grantee, and subsequent grantees with notice, at the suit of the estate of the testator and his creditors, or at the suit of prior judgment creditors of the beneficiaries in such estate.[28]

(B) *Rule of Caveat Emptor.*[29] A sale by an executor passes only such interest as testator had in the property,[30] and a purchaser whose deed contains no covenants to cover defects in title takes at his own risk, and unless he can show fraudulent representations upon which he relied as an inducement to his purchase, he is without remedy in case the title proves defective or he otherwise gets less than he expected to secure by his purchase.[31] But where the executor assures one about to purchase that he will make him a clear title and the purchase is made accordingly the purchaser is entitled to a title free from encumbrance.[32]

(C) *Protection as Bona Fide Purchaser.*[33] Where one purchases land from an executor as such he is bound to know whether or not the latter is authorized by the will to make the sale,[34] and if the executor has no such power the purchaser is not an innocent or *bona fide* purchaser.[35] But where the executor has power to sell, a purchaser from him acquires good title notwithstanding the bad faith of the executor in making the sale where he had no knowledge of such bad faith,[36] for the purchaser has a right to presume that the executor is acting in good faith,[37] and is not bound to inquire whether a necessity for the exercise of the power given by the will exists,[38] although he must not disregard information which he cannot avoid receiving without extraordinary negligence;[39] and if he has notice that the sale is made for a purpose other than that for which the will empowers the executor to sell, or is otherwise unauthorized, the legal title of the devisees is not divested.[40] Where the sale is tainted with fraud and covin between

Kentucky.— Reed *v.* Reed, 91 Ky. 267, 15 S. W. 525, 11 Ky. L. Rep. 513; Coleman *v.* McKinney, 3 J. J. Marsh. 246.

Maryland.— Jenifer *v.* Beard, 4 Harr. & M. 73.

New Jersey.— Lindley *v.* O'Reilly, 50 N. J. L. 636, 15 Atl. 379, 7 Am. St. Rep. 802, 1 L. R. A. 79.

North Carolina.— Simpson *v.* Simpson, 93 N. C. 373.

Pennsylvania.— Corby's Estate, 4 Kulp 169.

Virginia.— Mills *v.* Mills, 28 Gratt. 442.

See 22 Cent. Dig. tit. "Executors and Administrators," § 595.

Conveyance before patent issued.— A deed executed by an executor under a will before the emanation of a patent can convey no legal title to the land; but if the patent issue in the name of the executor it operates in favor of the prior conveyance by way of estoppel. Lewis *v.* Baird, 15 Fed. Cas. No. 8,316, 3 McLean 56.

A positive showing that the executor sold as such is not necessary to show a good title in a purchaser from an executor, there being no question of good faith. Harvey *v.* Van Cott, 71 Hun (N. Y.) 394, 25 N. Y. Suppl. 25.

27. Cochrane's Estate, 202 Pa. St. 415, 51 Atl. 989. See *supra*, VIII, O, 9, d, (IX), (D).

28. Arlington State Bank *v.* Paulsen, 57 Nebr. 717, 78 N. W. 303.

29. **Sale under order of court** see *infra*, XII, T, 3, b.

30. Wickersham's Estate, 139 Cal. 652, 73 Pac. 541, (1902) 70 Pac. 1079.

31. *California.*— Miller *v.* Gray, 136 Cal. 261, 68 Pac. 770.

Georgia.— Jones *v.* Warnock, 67 Ga. 484.

Illinois.— Bond *v.* Ramsey, 89 Ill. 29.

Kansas.— Headrick *v.* Yount, 22 Kan. 344.

Nebraska.— Neary *v.* Neary, (1903) 97 N. W. 302.

Virginia.— Syme *v.* Johnston, 3 Call 558.

See 22 Cent. Dig. tit. "Executors and Administrators," § 595.

32. Reiner's Appeal, (Pa. 1888) 12 Atl. 850.

33. **Sale under order of court** see *infra*, XII, T, 3, c.

34. Johnson *v.* Porter, 115 Ga. 401, 41 S. E. 644; Brush *v.* Ware, 15 Pet. (U. S.) 93, 10 L. ed. 672.

35. Masterson *v.* Stevens, (Tex. Civ. App. 1896) 37 S. W. 364.

36. Scudder *v.* Stout, 10 N. J. Eq. 377; Staples *v.* Staples, 24 Gratt. (Va.) 225.

37. Davis *v.* Christian, 15 Gratt. (Va.) 11.

38. Rutherford *v.* Clark, 4 Bush (Ky.) 27; Smith *v.* Henning, 10 W. Va. 596; Smith *v.* McIntyre, 95 Fed. 585, 37 C. C. A. 177. See also Wright *v.* Zeigler, 1 Ga. 324, 44 Am. Dec. 656.

39. Davis *v.* Christian, 15 Gratt. (Va.) 11.

40. Johnson *v.* Porter, 115 Ga. 401, 41 S. E. 644; Rutherford *v.* Clark, 4 Bush (Ky.) 27; Luke *v.* Marshall, 5 J. J. Marsh. (Ky.) 353; Smith *v.* Henning, 10 W. Va. 596.

the executor and the purchaser, it is absolutely void and the title to the property remains unchanged.[41]

(XII) *SETTING ASIDE SALE*—(A) *Jurisdiction.*[42] In some states the probate court has power to set aside a sale of realty by an executor,[43] unless the circumstances are such that the estate is no longer interested;[44] but in others the jurisdiction of the probate court to set aside an executor's sale for fraud has been denied,[45] this being a matter of which equity takes jurisdiction.[46]

(B) *Grounds.*[47] A false representation by the executor or administrator, selling without an order of court, to the effect that the sale is authorized by the will entitles the purchaser who was thereby misled and induced to buy to a rescission of the contract in equity.[48] A sale of real estate by the executor under power conferred by a will which is imperfectly executed will be set aside.[49] A sale may be set aside where it is made to appear that it is tainted with fraud and collusion between the executor and the purchaser by reason of which the interests of the estate or of the heirs or devisees have been injuriously affected;[50] and it has been held that the mere fact that in conducting the sale the executor placed himself in antagonism to the interests of the devisees, by collusion with the real purchaser, was sufficient to entitle the devisees to have the sale set aside whether they were in fact prejudiced or not.[51] Mere inadequacy of price is not usually considered a sufficient ground for setting aside a sale by an executor,[52] but it is otherwise where the inadequacy is so gross as to indicate fraud, undue advantage, improvidence, or an abuse of the power conferred;[53] and in some states the fact that on a resale a sum at least ten per cent greater than that paid at the first sale, exclusive of the expenses of the resale, can be obtained, is a sufficient ground for setting aside the sale and ordering a resale.[54] The mere fact that an executor received Confederate currency in payment for his testator's land sold by him is

41. Wright *v.* Zeigler, 1 Ga. 324, 44 Am. Dec. 656.

42. Sale under order of court see *infra*, XII, S, 5, a.

43. Daily's Appeal, 87 Pa. St. 487 (holding that, although the orphans' court has no jurisdiction over a sale under a testamentary power when rightly executed, it has authority to set a sale of land aside under such power where it appears that one only of two executors acted in execution of the power); Dundas' Appeal, 64 Pa. St. 325; Fricke's Estate, 16 Pa. Super. Ct. 38 (inadequacy of price).

44. Barber's Appeal, 125 Pa. St. 564, 18 Atl. 394.

45. Matter of Valentine, 1 Misc. (N. Y.) 491, 23 N. Y. Suppl. 289; Hawley *v.* Tesch, 72 Wis. 299, 39 N. W. 483.

46. Hawley *v.* Tesch, 72 Wis. 299, 39 N. W. 483.

47. Sale under order of court see *infra*, XII, S, 4.

48. Stark *v.* Henderson, 30 Ala. 438; Lowry *v.* McDonald, Sm. & M. Ch. (Miss.) 620; Crisman *v.* Beasley, Sm. & M. Ch. (Miss.) 561; Woods *v.* North, 6 Humphr. (Tenn.) 309, 44 Am. Dec. 312.

An express representation is not necessary, for the mere offering of the property for sale by the executor amounts to a representation that he has power to sell. Lowry *v.* McDonald, Sm. & M. Ch. (Miss.) 620; Crisman *v.* Beasley, Sm. & M. Ch. (Miss.) 561; Woods *v.* North, 6 Humphr. (Tenn.) 309, 44 Am. Dec. 312.

49. Dunlap *v.* Dunlap, 4 Desauss. (S. C.) 305.

50. Howell *v.* Sebring, 14 N. J. Eq. 84.

The fact that the administrator purchased at his own sale, although it may not be relied on as a substantial ground of relief, may give character to his conduct in regard to the sale and thus tend to substantiate a charge of fraud. Howell *v.* Sebring, 14 N. J. Eq. 84.

Evidence not sufficient to show fraud see Brown *v.* Brown, 64 Mich. 75, 31 N. W. 34.

51. Larkin *v.* Crawford, 5 Ky. L. Rep. 326.

52. Kimball *v.* Lincoln, 99 Ill. 578 [*affirming* 7 Ill. App. 470]; Osgood *v.* Franklin, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513; Dietrich's Estate, 1 Lehigh Val. L. Rep. (Pa.) 193; Bradford *v.* McConihay, 15 W. Va. 732.

Inadequate rate of interest in purchase-money mortgage.—A trustee of persons interested in the estate cannot object to the confirmation of a sale by the executor under a power in a will on the ground that the interest provided for by the purchase-money mortgage will not furnish his beneficiaries sufficient revenue, unless he shows that an equally secure investment of the trust funds can be obtained at a higher rate of interest. Knight's Estate, 7 Pa. Dist. 469.

53. Osgood *v.* Franklin, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513; Fricke's Estate, 16 Pa. Super. Ct. 38; Dietrich's Estate, 1 Lehigh Val. L. Rep. (Pa.) 193.

Evidence not showing such inadequacy as to indicate fraud see Brown *v.* Brown, 64 Mich. 75, 31 N. W. 34; Sharp *v.* Greene, 22 Wash. 677, 62 Pac. 147.

54. Perkins *v.* Gridley, 50 Cal. 97; *In re* Durham, 49 Cal. 490; Pollard *v.* McFillen, 6 Phila. (Pa.) 125.

not ground for setting the sale aside if the payment was made and received in good faith.[55]

(c) *Who May Attack Sale.*[56] Creditors,[57] legatees,[58] or distributees[59] are in such immediate interest that if the proceeds of an improper, fraudulent, or improvident sale be insufficient to settle their specific claims in full they may seek such redress; but devisees[60] or heirs[61] are usually the persons injuriously affected by an improper sale and these may proceed by virtue of their several interests, where the sale should be set aside. Even these, however, may become estopped to attack the sale,[62] and this is the result where they have ratified or acquiesced in the sale, received their respective portions of the purchase-money, or otherwise participated knowingly in the benefits of the transaction.[63] Proceedings by the executor or administrator to set aside may be upheld in a case where he himself is free from fault;[64] but an executor or administrator who becomes a party to improper dealings with the estate or who himself is culpable as to the occasion of setting the sale aside, especially when he receives the proceeds, cannot be heard in equity to impeach the sale of the land or to deny its validity.[65]

55. Blount *v.* Moore, 54 Ala. 360.

56. Sale under order of court see *infra*, XII, S, 1.

57. Elting *v.* Biggsville First Nat. Bank, 173 Ill. 368, 50 N. E. 1095 [*affirming* 68 Ill. App. 204; Lothrop *v.* Wightman, 41 Pa. St. 297.

58. Bledsoe *v.* Bledsoe, 29 Ga. 385. But see Randle *v.* Carter, 62 Ala. 95.

59. Anderson *v.* Anderson, 64 Ala. 403.

60. Pirkle *v.* Cooper, 113 Ga. 828, 39 S. E. 289. See also Randle *v.* Carter, 62 Ala. 95.

Sale of homestead.—Where a husband dies, leaving as the only constituent member of his family his wife, in whom by law and by her husband's will the homestead rights vest, a child who is a devisee of a portion of the remainder cannot question the power of the executor to sell the homestead unless it affirmatively appears that the sale was not to pay debts and legacies. Holmes *v.* Stone, (Tex. Civ. App. 1899) 51 S. W. 518.

61. Pirkle *v.* Cooper, 113 Ga. 828, 39 S. E. 289; Woods *v.* Woods, 13 La. Ann. 189; Lothrop *v.* Wightman, 41 Pa. St. 297. But where testator provided that his lands should not be sold for distribution except under certain circumstances for thirteen years from the date of his will, but before the expiration of this period the executrix sold at a private sale, the heirs at law of the testator, as such, could not recover in ejectment against the purchaser, for if the executrix did not have authority to make the aforesaid sale the title remained in her for the purpose of executing the will of the testator and did not pass to plaintiffs. Neisler *v.* Moore, 58 Ga. 334.

What law governs as to majority of heirs. — The question when an heir became of full age so as to entitle her within a reasonable time to sue to avoid executors' sales of her ancestor's property for irregularities therein is to be determined by the law of the state where such property was situated and the testator had his domicile. O'Dell *v.* Rogers, 44 Wis. 136.

62. Cox *v.* Rust, (Tex. Civ. App. 1895) 29 S. W. 807.

When devisees not estopped.— Where there was testimony that there was ample personal estate of a testator to educate and support his children without selling any of his land, and that the money received by the executrix for land sold by her was lent out, and there was no evidence that any of the children ever received any portion of it, they were not estopped from asserting their title to the land devised to them by the father. Foote *v.* Sanders, 72 Mo. 616.

63. *Alabama.*— Creamer *v.* Holbrook, 99 Ala. 52, 11 So. 830. But see Walker *v.* Murphy, 34 Ala. 591.

Georgia.— Battle *v.* Wright, 116 Ga. 218, 42 S. E. 347; Knox *v.* Laird, 92 Ga. 123, 17 S. E. 988.

Kansas.— Crane *v.* Lowe, 59 Kan. 606, 54 Pac. 666.

Louisiana.— Ray *v.* McLain, 106 La. 780, 31 So. 315.

Michigan.— Cleland *v.* Casgrain, 92 Mich. 139, 52 N. W. 460.

Minnesota.—Lovejoy *v.* McDonald, 59 Minn. 393, 61 N. W. 320.

North Carolina.— Spainhour *v.* Walraven, 36 N. C. 352.

See 22 Cent. Dig. tit. "Executors and Administrators," § 604.

What amounts to ratification.— Where heirs at law bring an administrator to an accounting and obtain judgment against him, in part based upon the proceeds of land of the intestate purporting to have been regularly sold by him, their conduct amounts to a ratification of the sale. Battle *v.* Wright, 116 Ga. 218, 42 S. E. 347.

64. See *infra*, note 65.

65. *Alabama.*— Hopper *v.* Steele, 18 Ala. 828.

California.— Larco *v.* Casaneuava, 30 Cal. 560.

New Jersey.— Hance *v.* McKnight, 11 N. J. L. 385.

Washington.— Davis *v.* Ford, 15 Wash. 107, 45 Pac. 739, 46 Pac. 393.

Wisconsin.— O'Dell *v.* Rogers, 44 Wis. 136.

See 22 Cent. Dig. tit. "Executors and Administrators," § 604.

Strangers or third persons having no interest in the estate cannot make any attack upon the sale.[66]

(D) *Proceedings.*[67] The purchaser[68] as well as the executor[69] must be made a party to proceedings to avoid a sale of real estate by the latter. In some states there are statutes limiting the time within which an action by heirs or devisees to recover land improperly sold by an executor or administrator may be commenced.[70] The complainant must make out a case for relief in his pleadings,[71] and a party is bound by the admissions in his pleadings.[72] Where there is no showing that plaintiff secured any part of the purchase-price, the fact that there is no offer to return the price is immaterial.[73] When a representative's sale to himself is set aside by the court the annulment must be complete, it cannot be partial;[74] but a judgment setting aside such a sale affects only those who are before the court when it is rendered.[75] On setting aside a purchase by the representative at his own sale, it is the duty of the court to adjust the equities between the parties.[76] Where a will gives the executor a power of sale of land he has a

66. Hance *v.* McKnight, 11 N. J. L. 385; McDonald *v.* Hamblen, 78 Tex. 628, 14 S. W. 1042.

A creditor of one of the heirs cannot have the sale avoided. Lothrop *v.* Wightman, 41 Pa. St. 297.

In an action against a mere wrong-doer by one in possession of the land, where plaintiff offered in evidence his deed, which appeared to be a deed from one executor to another, defendant could not object that the sale by the executors had not been made as directed by the will of the testator. Hillegass *v.* Hillegass, 5 Pa. St. 97.

67. **Sale under order of court** see *infra*, XII, S, 5.

68. Dundas' Appeal, 64 Pa. St. 325.

Purchase by agent of executor.— One who bids in property as an agent for an executor at a sale made by authority of the executor is not a necessary party to a suit to set aside the sale, brought on the ground that the executor could not purchase at his own sale. Stilly *v.* Rice, 67 N. C. 178.

69. Dundas' Appeal, 64 Pa. St. 325.

Waiver of objection.— Where the widow and executrix is not made a party to a suit to set aside a sale by her of the testator's property to defendant under power in the will, the failure to take advantage of the defect either by demurrer or answer constitutes a waiver of the objection. Cowell *v.* South Denver Real Estate Co., 16 Colo. App. 108, 63 Pac. 991.

Executors under superseded will.— In a bill filed after the probate of a will to recover property sold by executors appointed by a former will, previously admitted to probate, it is not necessary to make such executors parties. Gaines *v.* Hennen, 24 How. (U. S.) 553, 16 L. ed. 770.

70. See Campbell *v.* Drais, 125 Cal. 253, 57 Pac. 994.

When statute not applicable.— Cal. Code Civ. Proc. § 1573, providing that action for recovery of an estate sold by an administrator shall be commenced within three years next after the settlement of the final account, does not prevent action after that time by children of deceased to quiet title to their half interest in the land as to which the sale was void, where the purchaser at such sale acknowledged their title and held for them as tenant in common, and the action was against the mortgagee of such purchaser, who when taking the mortgage was informed of their title and who purchased under foreclosure of the mortgage, they not being obliged to bring their action till he sought to gain possession under the title founded on the foreclosure. Campbell *v.* Drais, 125 Cal. 253, 57 Pac. 994.

71. Hughes *v.* Hughes, 87 Ala. 652, 6 So. 353, holding that a complaint in an action to set aside a sale of land on account of fraud, which alleged collusion between the executrix and the purchaser, by which they became jointly interested, although the deed was taken in the name of the purchaser alone; that the buyer afterward conveyed to the executrix a half interest in the lots for one half of the original purchase-price; that two months thereafter they both sold the lots for a large amount; and that at the time of the first sale the price of the lots was rising and there was no necessity for the sale, which allegations were denied in the answer, did not make out a case for relief, as it failed to aver that the market price of the lots when first sold exceeded the price obtained therefor, and whether any, or what, improvements were put upon them between that time and the second sale.

A failure to allege non-acquiescence in the complaint was immaterial where the answer averred that plaintiff in a suit to set aside a sale of land acquiesced in such sale, and the replication denied the allegation. Cowell *v.* South Denver Real Estate Co., 16 Colo. App. 108, 63 Pac. 991.

72. Hughes *v.* Hughes, 87 Ala. 652, 6 So. 353.

73. Cowell *v.* South Denver Real Estate Co., 16 Colo. App. 108, 63 Pac. 991.

74. Pirkle *v.* Cooper, 113 Ga. 828, 39 S. E. 289.

75. Pirkle *v.* Cooper, 113 Ga. 828, 39 S. E. 289.

76. Stickel *v.* Crane, 189 Ill. 211, 59 N. E. 595, holding that this is done by requiring

right of appeal from an order setting aside a sale made under the power.[77] A contention that a sale of real estate by an executor should be set aside because made for an inadequate sum cannot be considered on objections to his final accounting.[78]

(XIII) *Divested Purchaser's Rights, Remedies, and Liabilities.*[79] A purchaser from an executor must rely on the covenants in his deed,[80] or upon the personal liability of the executor,[81] and cannot usually have relief against the heirs or devisees in case the property is lost to him through a defect of title or a lack of authority to sell in the executor.[82] But restitution of the purchase-money or payments made is favored in equity as far as possible, where an unauthorized sale is set aside, especially if the purchaser has parted with his consideration in good faith,[83] and the estate or the beneficiaries have received benefit therefrom;[84] and where debts of the estate have been paid out of the proceeds of an invalid sale, the divested purchaser is entitled to be subrogated to the rights of such creditors and to be indemnified out of the land.[85] On the setting aside of a sale by an executor or administrator the purchaser may be called on to account for rents and profits;[86] but he has been allowed reimbursements for necessary expenditures for the preservation of the property[87] and compensation for proper improvements,[88] although interest on the purchase-money has been denied.[89] It has been

the heirs or devisees to account to the representative for the money paid by him and the debts of the estate assumed by him at the time of the conveyance.

Charging debt on land.— Where a sale by executors of the remainder interest in certain land was set aside after many years as invalid, a debt of the testator was properly fixed as a charge on such land, it appearing that such sale had been made in good faith for the purpose of paying the same. Sneed *v.* Russell, (Tenn. Ch. App. 1897) 42 S. W. 213.

77. *In re* Bagger, 78 Iowa 171, 42 N. W. 639.

78. *In re* Conser, 40 Oreg. 138, 66 Pac. 607, so holding on the ground that the purchaser is not ordinarily a party to the proceeding for final accounting, nor is there any process by which he may be brought in, and the proceeding is wholly inappropriate for the purpose of setting aside a sale.

79. **Sale under order of court** see *infra*, XII, S, 6.

Title and rights generally see *supra*, VIII, O, 9, d, (XI).

80. Nicholas *v.* Jones, 3 A. K. Marsh. (Ky.) 385; Spring *v.* Parkman, 12 Me. 127.

The purchaser cannot maintain assumpsit against the executor to recover back the consideration paid in case of a defect of title or authority. Spring *v.* Parkman, 12 Me. 127.

81. Frazier *v.* Tubb, 2 Heisk. (Tenn.) 662, holding that where land sold and intended to be conveyed by an executor is omitted from the deed, and it turns out that the executor had no title, the executor is personally liable to the vendee for the money received, although the estate of his testator is settled.

82. Nicholas *v.* Jones, 3 A. K. Marsh. (Ky.) 385.

83. Young *v.* Twigg, 27 Md. 620; Weaver *v.* Norwood, 59 Miss. 665; Frick's Estate, 16 Pa. Super. Ct. 38; Winslow *v.* Crowell, 32 Wis. 639; Blodgett *v.* Hitt, 29 Wis. 169.

Restitution not an indispensable prerequisite to setting aside wrongful sale.— Walker *v.* Quigg, 6 Watts (Pa.) 87, 31 Am. Dec. 452.

84. Mayes *v.* Blanton, 67 Tex. 245, 3 S. W. 40.

Failure of sale through executors' inability to pass clear title.— Where executors under a power of sale contained in the will have entered into a contract of sale, but such contract is not carried out because of their inability to convey a clear title, the purchaser is entitled to recover from them as executors, a portion of the purchase-price paid at or before the execution of the contract, for the estate must be deemed to have received the benefit of such amount; but the executors are not chargeable as such with the sum paid by the prospective purchaser for examination of the title. Carideo *v.* Austin, 88 N. Y. App. Div. 35, 84 N. Y. Suppl. 777.

85. Duncan *v.* Gainey, 108 Ind. 579, 9 N. E. 470; Springs *v.* Harven, 56 N. C. 96; Scott *v.* Dunn, 21 N. C. 425, 30 Am. Dec. 174; Stone *v.* Crawford, 1 Tex. Unrep. Cas. 605, holding that the purchaser is entitled to retain possession of the land until the amount he paid for it with interest has been repaid to him, although the sale was void. But *compare* Hampton *v.* Nicholson, 23 N. J. Eq. 423.

86. Wood *v.* Nicholls, 33 La. Ann. 744; Weaver *v.* Norwood, 59 Miss. 665.

Basis of accounting.— Where an executor sells lands under a defective power, the purchaser should only be required to account to the beneficiaries under the will for the rents and profits actually received, and not for the rental value. Hunter *v.* Hunter, 63 S. C. 78, 41 S. E. 33, 90 Am. St. Rep. 663.

87. Wood *v.* Nichols, 33 La. Ann. 744, where an administrator had purchased in bad faith and in breach of his trust.

88. Wood *v.* Nichols, 33 La. Ann. 744.

89. Layton *v.* Hogue, 5 Oreg. 93, purchase by executor through agent.

held that where a sale of realty has been set aside because made to the administratrix's agent, the extent of the interest of the legatees ought to be ascertained by a proper account, so that the purchaser may if he thinks proper remove the interest by paying to them the parts unsatisfied of their legacies.[90]

(XIV) *LIABILITIES OF EXECUTOR OR ADMINISTRATOR.*[91] An executor or administrator selling land is chargeable with the consideration acknowledged or shown to have been received by him in the transaction,[92] and any profit arising from such a sale beyond his just recompense belongs properly not to the representative personally, but to those beneficially interested in the estate.[93] He is ordinarily to be charged only with what was actually obtained or received by him;[94] but he may be surcharged in his account with such price as he ought to have obtained rather than with that which was actually realized, where culpable negligence or misconduct on his part induced a loss.[95] Where an executor without authority under the will to enter into covenants conveys with covenants, they do not bind the estate or the heirs or devisees, but will be deemed his personal covenants,[96] and

90. Buckles *v.* Lafferty, 2 Rob. (Va.) 292, 40 Am. Dec. 752.

91. **Sale under order of court** see *infra*, XII, W.

92. Speed *v.* Nelson, 8 B. Mon. (Ky.) 499 (price named in deed); Matter of Mitchell, 1 Pearson (Pa.) 428; Davis *v.* Wright, 2 Hill (S. C.) 560.

93. Fisher's Appeal, 34 Pa. St. 29; Rosenberger's Appeal, 26 Pa. St. 67; Lamberton *v.* Smith, 13 Serg. & R. (Pa.) 309.

94. *Louisiana.*— Pipkin's Succession, 7 La. Ann. 617.

New Jersey.— Rolfe *v.* Van Sickle, 40 N. J. Eq. 158; Dey *v.* Codman, 39 N. J. Eq. 258.

Pennsylvania.— *In re* Springer, 51 Pa. St. 342; Hinkle's Estate, 4 Pa. Co. Ct. 2, 20 Wkly. Notes Cas. 351. See also Hazzard's Estate, 6 Pa. Co. Ct. 637.

Tennessee.—Stretch *v.* McCampbell, 1 Tenn. Ch. 41.

Virginia.— Wayland *v.* Crank, 79 Va. 602; Elliott *v.* Carter, 9 Gratt. 541. See also Lawrason *v.* Davenport, 2 Call 95.

Wisconsin.— King *v.* Whiton, 15 Wis. 684.

United States.— Strodes *v.* Patton, 23 Fed. Cas. No. 13,538, 1 Brock. 228.

See 22 Cent. Dig. tit. "Executors and Administrators," § 606½.

95. *Illinois.*— *In re* Corrington, 124 Ill. 363, 16 N. E. 252; McDonough *v.* Hanifan, 7 Ill. App. 50.

Maryland.— Hurtt *v.* Fisher, 1 Harr. & G. 88.

New Jersey.— Fisher *v.* Skillman, 18 N. J. Eq. 229.

Ohio.— Reed *v.* Brown, 10 Ohio Cir. Ct. 44, 6 Ohio Cir. Dec. 15.

Pennsylvania.— Leslie's Appeal, 63 Pa. St. 355.

Vermont.— Woods *v.* Creditors, 4 Vt. 256.

United States.—Pulliam *v.* Pulliam, 10 Fed. 23.

See 22 Cent. Dig. tit. "Executors and Administrators," § 606½.

96. Jones *v.* Noe, 71 Ind. 368; Nicholas *v.* Jones, 3 A. K. Marsh. (Ky.) 385; Godley *v.* Taylor, 14 N. C. 178, holding that executors having a power to sell lands of their testator are personally bound by a covenant that they, "executors," etc., "do forever warrant and defend," etc. See also Ross *v.* Barr, 53 S. W. 658, 21 Ky. L. Rep. 974; Collins *v.* Sanders, 5 Ky. L. Rep. 860; Wurdeman *v.* Robertson, Riley Eq. (S. C.) 115. But *compare* Manifee *v.* Morrison, 1 Dana (Ky.) 208; Alexander *v.* Greacen, 36 Misc. (N. Y.) 526, 73 N. Y. Suppl. 1001 [*reversing* 36 Misc. 133, 72 N. Y. Suppl. 1085], holding that where on a sale of real estate under a power in the will the executors stipulated that all taxes, assessments, etc., would be allowed out of the purchase-money and the property conveyed free from all encumbrances, and several years afterward an unpaid assessment which was a lien on the property was discovered, the purchaser might recover the amount of such assessment from the executors as such.

Extent of liability.— Where executors conveyed land by deed and covenanted to the extent of assets to warrant and defend title, they rendered themselves personally liable to the extent of assets in their hands, and a failure to answer on a prayer for a discovery was an implied admission of assets. Nicholas *v.* Jones, 3 A. K. Marsh. (Ky.) 385. See also Manifee *v.* Morrison, 1 Dana (Ky.) 208, where the court, although considering the liability of an executor on such a covenant to be in his representative character, also considered that it was limited to the extent of the assets.

A covenant of warranty against encumbrances done or suffered by himself does not render an executor to whom a discretionary power to sell land was given, liable to his vendee where the land is sold for taxes assessed prior to his sale. Jackson *v.* Sassaman, 29 Pa. St. 106.

Knowledge of purchaser that executor is without power to sell.— An executor, selling property of the testator, with warranty, cannot protect himself against a suit for breach of the warranty on the ground that the purchaser had notice of the will, under which the executor had no power to sell. Wurdeman *v.* Robertson, Riley Eq. (S. C.) 115.

A covenant as executor, "but not otherwise," in a conveyance by an executor does not bind him personally, even though it may not be binding on the estate of the testator.

so also an agreement by an executor in a contract of sale to buy off the widow's dower right or to pay off encumbrances created by the testator binds, not the estate, but only the executor personally.[97] If the executor makes false representations concerning the land he is to sell he is personally liable.[98] Executors who have conveyed under a power of sale land of which their testator was in equity a mere trustee are liable as such to the person having the equitable title to such land for the damages sustained by him to the extent of the purchase-money.[99]

10. Lease — a. Power to Lease. As a general rule an executor or administrator is without authority to lease his decedent's land;[1] but such power may exist by virtue of testamentary or statutory provisions or an order of court,[2] or the act of an administrator in renting the lands of the decedent, with the acquiescence of heirs, who waive their rights, for the purpose of paying the debts, may be valid.[3] If such authority be conferred at all it must be strictly

Thayer *v.* Wendell, 23 Fed. Cas. No. 13,873, 1 Gall. 37.

97. Bostwick *v.* Beach, 31 Hun (N. Y.) 343 [*affirmed* in 103 N. Y. 414, 9 N. E. 41, 25 N. Y. Wkly. Dig. 98].

98. West *v.* Wright, 98 Ind. 335.

99. Wall *v.* Kellogg, 16 N. Y. 385.

1. Rutherford *v.* Clark, 4 Bush. (Ky.) 27; Murphy *v.* Thomas, 41 Miss. 429; Stevens *v.* Stevens, 69 Hun (N. Y.) 332, 23 N. Y. Suppl. 520; Ely *v.* Scofield, 35 Barb. (N. Y.) 330. See also Hill *v.* Mitchell, 5 Ark. 608.

Executors cannot modify or alter an existing lease entered into by their testator. Brosnan *v.* Kramer, 135 Cal. 36, 66 Pac. 979.

2. *Alabama.*— Nicrosi *v.* Phillipi, 91 Ala. 299, 8 So. 561; Griffin *v.* Bland, 43 Ala. 542; Harrison *v.* Harrison, 39 Ala. 489; Chighizola *v.* Le Baron, 21 Ala. 406.

Arkansas.— Hill *v.* Mitchell. 5 Ark. 608.

California.— Brosnan *v.* Kramer, 135 Cal. 36, 66 Pac. 979; Doolan *v.* McCauley, 66 Cal. 476, 6 Pac. 130.

Michigan.— Grady *v.* Warrell, 105 Mich. 310, 63 N. W. 204.

Missouri.— Lass *v.* Eisleben, 50 Mo. 122; Eoff *v.* Tompkins, 2 Mo. App. 464 [*affirmed* in 66 Mo. 225].

New York.—Killam *v.* Allen, 52 Barb. 605; Hedges *v.* Riker, 5 Johns. Ch. 163.

North Carolina.— Hoyle *v.* Stowe, 13 N. C. 318.

Ohio.— Breuer *v.* Hayes, 10 Ohio Dec. (Reprint) 391, 21 Cinc. L. Bul. 29 [*affirmed* in 10 Ohio Dec. (Reprint) 583, 22 Cinc. L. Bul. 144].

Virginia.— McCall *v.* Peachy, 3 Munf. 288.

See 22 Cent. Dig. tit. "Executors and Administrators," § 608.

Statutes not retroactive.— Philips *v.* Gray, 1 Ala. 226; Carpenter *v.* Harris, 51 Mich. 223, 16 N. W. 383; Van Fleet *v.* Van Fleet, 49 Mich. 610, 14 N. W. 566.

Lease of unopened coal-mines.— Where the chief if not the sole value of land is for coal-mining purposes, and the only profit to be derived therefrom is by sale or lease of the coal, either of which the executor in his discretion has power to do, the fact that the coal-mines were not opened in the life of the testator does not affect the authority of the executor to lease the same, so as to make the rental thereof income of the estate. Reynolds *v.* Hanna, 55 Fed. 783 [*reversed* on other grounds in 59 Fed. 923, 8 C. C. A. 370].

Implied power.— A devise to executors in trust for a *cestui que trust* for life, and in default of issue over to a third person, with power to the executors to sell and dispose of so much of the realty as will be necessary to fulfil the will, is sufficient to authorize the executors to execute leases of the realty on such terms as are reasonable and necessary to carry into effect the testator's intention as expressed in the will. Hedges *v.* Riker, 5 Johns. Ch. (N. Y.) 163. Where a testator by his will directs that certain moneys, including the rent of his lands, be invested by his executor, there is an implied authority to the executor to lease lands. McCall *v.* Peachy, 3 Munf. (Va.) 288.

A power to sell real estate in order to pay debts, and to divide the estate, given by will does not authorize executors to make a perpetual lease with privilege of purchase. Breuer *v.* Hayes, 10 Ohio Dec. (Reprint) 391, 21 Cinc. L. Bul. 29 [*affirmed* in 10 Ohio Dec. (Reprint) 583, 22 Cinc. L. Bul. 144].

Construction of power.— Where a testator directed that his widow should cultivate as much of his land during her life or widowhood as she pleased, and empowered his executors to rent out the balance, the executors had power on her decease to lease the whole of the premises. Hoyle *v.* Stowe, 13 N. C. 318.

Effect of authority to lease, etc.— An authority given by will to executors to rent and lease, to repair and insure, by necessary implication vests them with the legal title. Killam *v.* Allen, 52 Barb. (N. Y.) 605.

Acknowledgment of lease by married executrix.— An executrix who while sole enters into an agreement to lease land belonging to the estate is competent to acknowledge the lease for registration after her marriage, without being privily examined, as directed by N. C. Code, § 1246, subs. 6, in cases where the acknowledgment of any instrument concerning the interest of a married woman is taken, for such lease does not convey any interest of hers. Darden *v.* Neuse, etc., Steam-Boat Co., 107 N. C. 437, 12 S. E. 46.

3. Ashley *v.* Young, 79 Miss. 129, 29 So. 822.

pursued,[4] otherwise the rights of heirs, devisees, or other beneficiaries in such property are not controlled or concluded.[5]

b. Term. Leases by executors or administrators, when authorized, should ordinarily be for short terms,[6] and any lease by such a representative for a definite term is subject to termination by the final distribution of the estate and discharge of the representative.[7]

c. Recovery of Rent. A power to lease in the personal representative carries with it the power to receive and collect rent,[8] and a tenant who takes possession under a lease from the representative cannot in an action against him for rent dispute the representative's power to make the contract.[9] A lessee from an executor cannot purchase judgments against the testator and set them off against the rent unless the executor acknowledges a sufficiency of assets to pay all the debts of the estate.[10]

d. Recovery of Possession. The personal representative is the proper person to bring an action to recover possession from a tenant holding under a lease from him, while the estate remains unsettled.[11]

e. Actions For Waste. Although an executor who has no interest as reversioner cannot maintain an action against a lessee for waste committed on premises leased by him,[12] he may maintain an action on covenants in the lease against committing waste.[13]

f. Rights of Lessee. An executor's or administrator's lease does not imply any covenant of quiet enjoyment,[14] and if the lessee lose part or all of the land he cannot recover back from the estate the rent paid or any portion thereof.[15]

g. Liability of Representative. If the representative rents out the land of his decedent he holds the rent collected as assets of the estate, and for the use of those legally entitled to it,[16] and he cannot escape liability therefor by setting up

Acquiescence in previous acts.— The trustees of a residuary estate are not estopped to maintain an action to enjoin the executrix from leasing and collecting rents from residuary real estate by acquiescence in previous acts of the executrix of the same character. Stevens *v.* Stevens, 69 Hun (N. Y.) 332, 23 N. Y. Suppl. 520.

4. Chighizola *v.* Le Baron, 21 Ala. 406; Martin *v.* Williams, 18 Ala. 190.

Sustaining lease wherein power exceeded.— Under a statute allowing an executor to take possession of the real and personal property of his testator, and to lease the same "from year to year," a lease for two years, although void as a lease for that term, is valid as a lease from year to year. Grady *v.* Warrell, 105 Mich. 310, 63 N. W. 204.

5. Chighizola *v.* Le Baron, 21 La. 406.

6. Lass *v.* Eisleben, 50 Mo. 122.

7. Doolan *v.* McCauley, 66 Cal. 476, 6 Pac. 130.

8. Morse *v.* Morse, 85 N. Y. 53.

Covenant to repair in part payment of rent. — In an action by an administrator on a covenant to him as such to make repairs in part payment of rent, his recovery is limited to the damages from the breach, and does not extend to an injury to the inheritance or a depreciation in the rental value of the land after the term expires. Manion *v.* Lambert, 10 Bush (Ky.) 295.

Lease by executor under will subsequently set aside.— Where an executor, acting under a will which was afterward set aside, leased the land of his supposed testator for a year, and the tenant enjoyed the demised premises without interruption, neither the administrator subsequently appointed nor the heir of the intestate could maintain an action against the tenant for use and occupation. Boyd *v.* Sloan, 2 Bailey (S. C.) 311.

9. Caldwell *v.* Harris, 4 Humphr. (Tenn.) 24. But see Bowler *v.* Erhard, 4 Ohio Dec. (Reprint) 256, 1 Clev. L. Rep. 173, holding that such an objection cannot be made by demurrer, but only in the answer by way of defense.

10. White *v.* Bannister, 1 Wash. (Va.) 166.

11. Nicrosi *v.* Phillipi, 91 Ala. 299, 8 So. 561; Lass *v.* Eisleben, 50 Mo. 122; Eoff *v.* Tompkins, 2 Mo. App. 464 [*affirmed* in 66 Mo. 225].

12. Page *v.* Davidson, 22 Ill. 111.

13. Page *v.* Davidson, 22 Ill. 111.

14. Miller *v.* Gray, 136 Cal. 261, 68 Pac. 770.

15. Miller *v.* Gray, 136 Cal. 261, 68 Pac. 770.

16. Terry *v.* Ferguson, 8 Port. (Ala.) 500. See also *In re* McKee, 30 Pittsb. Leg. J. (Pa.) 392.

Lease by administrator to himself.—Where an administrator, who was also one of the heirs, publicly rented out the lands of the estate without authority, and himself became the lessee of the most valuable plantation, these facts alone do not justify a charge against him in his account of a higher rent than that bid at the public letting. Harrison *v.* Harrison, 39 Ala. 489.

that he leased the land without authority.[17] He is not liable for losses of rent which could not have been avoided by the exercise of good faith and ordinary prudence and diligence,[18] but for losses resulting from his fraud or culpable negligence, whether in reference to collection, taking security, or otherwise, he is liable.[19]

11. Mortgage[20] — a. Authority in General. The personal representative cannot, merely by virtue of his office, mortgage the lands of his decedent,[21] but authority to do so is frequently conferred by will, or by statute authorizing this to be done pursuant to an order of or license from the probate court.[22] A power

Ground-rent.— An executor who has let lands of the estate on ground-rent is not chargeable with the principal of the ground-rent. Apple's Estate, 2 Phila. (Pa.) 239.

17. Hartnett *v.* Fegan, 3 Mo. App. 1. See also Terry *v.* Ferguson, 8 Port. (Ala.) 500.

18. Patapsco Guano Co. *v.* Ballard, 107 Ala. 710, 19 So. 777, 54 Am. St. Rep. 131; Clark *v.* Eubank, 80 Ala. 584, 3 So. 49.

19. Clark *v.* Eubank, 80 Ala. 584, 3 So. 49; Eubank *v.* Clark, 78 Ala. 73; Allen *v.* Shanks, 90 Tenn. 359, 16 S. W. 715.

Extent of liability.— Where rents are lost through an executor's negligence, he is liable only for such amount as could have been realized by the use of due diligence, and not for the entire stipulated rent. Matter of Hunt, 3 N. Y. St. 346. See also Smith's Estate, 6 Kulp (Pa.) 76.

Failure to rent out property.— An administrator who has power to rent out real estate, but through whose negligence it is not rented, is chargeable with the rental value. James *v.* Faulk, 54 Ala. 184. But where executors are given a naked power to sell real estate, without the legal title or the right to possession, they are not liable for the rents which might have been made by leasing the same until a sale could be made. Dunn *v.* Renick, 33 W. Va. 476, 10 S. E. 810.

20. **Mortgage or pledge of personalty** see *infra*, VIII, P, 3.

Mortgage under order of court being largely governed by the same principles as a sale under order of the court is treated in connection with that subject. See *infra*, XII.

21. *Illinois.*— Smith *v.* Hutchinson, 108 Ill. 662.

Kansas.— Black *v.* Dressell, 20 Kan. 153, holding a mortgage by an administrator invalid, although directed by the probate court.

Michigan.— Detroit F. & M. Ins. Co. *v.* Aspinall, 45 Mich. 330, 7 N. W. 907.

Texas.— Smithwick *v.* Kelly, 79 Tex. 564, 15 S. W. 486.

Vermont.— Green *v.* Sargeant, 23 Vt. 466, 56 Am. Dec. 88.

England.— Doe *v.* Hughes, 6 Exch. 223, 20 L. J. Exch. 148.

See 22 Cent. Dig. tit. "Executors and Administrators," § 614.

Sustaining instrument as individual mortgage.— A mortgage executed upon the estate of a decedent by devisees under his will, some of whom are executors of his estate and sign as such, but who have no authority from the probate court so to do, is a valid instrument, binding the respective obligors, including the executors, in their individual capacity, and constitutes a lien upon the respective interests of the mortgagors in the mortgaged estate. Shrigley *v.* Black, 59 Kan. 487, 53 Pac. 477.

22. *California.*— Stambach *v.* Emerson, (1902) 69 Pac. 856.

Georgia.— Fletcher *v.* American Trust, etc., Co., 111 Ga. 300, 36 S. E. 767, 78 Am. St. Rep. 164.

Illinois.— Starr *v.* Moulton, 97 Ill. 525.

Indiana.— De Coudres *v.* Union Trust Co., 25 Ind. App. 271, 58 N. E. 90, 81 Am. St. Rep. 95.

Iowa.— Iowa L. & T. Co. *v.* Holderbaum, 86 Iowa 1, 52 N. W. 550.

Louisiana.— De Lerno's Succession, 34 La. Ann. 38.

Michigan.— Long *v.* Landman, 118 Mich. 174, 76 N. W. 374; Detroit F. & M. Ins. Co. *v.* Aspinall, 45 Mich. 330, 7 N. W. 907.

Minnesota.— Brown *v.* Morrill, 45 Minn. 483, 48 N. W. 328.

Mississippi.—Stokes *v.* Payne, 58 Miss. 614, 38 Am. Rep. 340.

New York.— Freifeld *v.* Mankowski, 37 Misc. 303, 75 N. Y. Suppl. 454.

Oregon.— Lawrey *v.* Sterling, 41 Oreg. 518, 69 Pac. 460.

Pennsylvania.— West *v.* Cochran, 104 Pa. St. 482; Steffy's Appeal, 76 Pa. St. 94; Burton's Estate, 16 Pa. Co. Ct. 289; Laughlin's Estate, 6 Pa. Co. Ct. 447.

South Carolina.—Spencer *v.* Godfrey, Bailey Eq. 468.

Texas.— Faulk *v.* Dashiell, 62 Tex. 642, 50 Am. Rep. 542.

United States.— Ames *v.* Holderbaum, 44 Fed. 224.

England.— *Re* Wilson, 54 L. T. Rep. N. S. 600, 34 Wkly. Rep. 512.

See 22 Cent. Dig. tit. "Executors and Administrators," § 614.

Power not exhausted by a single exercise. — Iowa L. & T. Co. *v.* Holderbaum, 86 Iowa 1, 52 N. W. 550; Ames *v.* Holderbaum, 44 Fed. 224.

Order of court not necessary where power to mortgage given by will.— Iowa L. & T. Co. *v.* Holderbaum, 86 Iowa 1, 52 N. W. 550.

Purpose for which mortgage proper.— Under Howell Annot. St. Mich. § 6105, authorizing the execution of a mortgage for the "purpose of paying the debts against the estate of any deceased person," the probate court may authorize a mortgage for the payment of debts and charges accruing after the de-

to mortgage need not be expressed in the will, but may be implied from the powers and instructions given therein to the executor,[23] but a mere naked power to sell does not include a power to mortgage.[24]

b. Stipulations and Provisions of Mortgage. Authority given to the representative by will or by statute to mortgage the realty authorizes him to stipulate for the payment of attorney's fees in the event of its becoming necessary to collect the debt by suit.[25] An executor giving a mortgage on his testator's property may in England include a power of sale.[26]

c. Construction of Mortgage. Whether or not a mortgage is that of the representative as such, or simply his individual mortgage, should, in a jurisdiction under the statutes of which a mortgage is not an instrument under seal, be determined not only from the form of the instrument itself, but by reading it in the

cease of testator. Long *v.* Landman, 118 Mich. 174, 76 N. W. 374. Under Oreg. Laws (1898), p. 34, authorizing executors and administrators to mortgage estate real property for the purpose of funding the estate debt, an administrator may mortgage estate real property to secure money to pay estate indebtedness, although it consist of but one debt. Lawrey *v.* Sterling, 41 Oreg. 518, 69 Pac. 460.

Equity may authorize a mortgage instead of a sale of lands expressly charged by the will with the payment of testator's debts. Loebenthal *v.* Raleigh, 36 N. J. Eq. 169.

Remarriage of executrix.— Where a testator appointed his widow executrix and guardian of their minor children, gave the entire estate for her own use, and the residue to the children on her death or remarriage, and authorized the executrix to mortgage and convey the whole of testator's property as she should deem best for carrying the provisions of the will into effect, a mortgage executed by her after remarriage was valid, in the absence of proof that it was for any other purpose than to carry out the provisions of the will, or that the mortgagee was chargeable with notice. Mutual L. Ins. Co. *v.* Shipman, 108 N. Y. 19, 15 N. E. 58.

Will not giving power to mortgage.— A testamentary provision that it is the wish of testatrix that certain realty be retained by her executor, as the investment of the principal of the trust, "so long as the same may be expedient in a judicious administration" of her estate, does not authorize him to mortgage the same, but is simply a request to defer a sale so long as practicable under the law. Brown *v.* Brown, 70 N. H. 623, 47 Atl. 591.

Consent to mortgage of heir's interest.— Where a will provided that the executor should keep the property together until a granddaughter should become of age, unless he should think it would be better for all the heirs to make an earlier division, such power did not authorize the executor to consent to a mortgage of the undivided interest of one of the heirs prior to the granddaughter's arrival at majority. Garman *v.* Hawley, 132 Mich. 321, 93 N. W. 871.

Persons nominated as executors but who have not qualified have no power to execute a mortgage of the testator's real estate to secure a debt owing by him, even though the will gives the executors as such power to sell and convey real estate and make such provision for the payment of debts as they deem best. Andrews *v.* Minor, 58 S. W. 443, 22 Ky. L. Rep. 561.

23. See Fletcher *v.* American Trust, etc., Co., 111 Ga. 300, 36 S. E. 767, 78 Am. St. Rep. 164.

24. *California.*— Webb *v.* Winter, (1901) 65 Pac. 1028.

Georgia.— See McMillan *v.* Cox, 109 Ga. 42, 34 S. E. 341.

Michigan.— Parkhurst *v.* Trumbull, 130 Mich. 408, 90 N. W. 25.

Nebraska.— See Arlington State Bank *v.* Paulsen, 57 Nebr. 717, 78 N. W. 303.

New Jersey.—Dubois *v.* Van Valen, 61 N. J. Eq. 331, 48 Atl. 241; Rutherford Land, etc., Co. *v.* Sannstock, 60 N. J. Eq. 471, 46 Atl. 648 [*disapproving* as to this point but *affirming* (Ch. 1899) 44 Atl. 938], where the power was to "dispose of" realty.

New York.— Arnoux *v.* Phyfe, 6 N. Y. App. Div. 605; Freifeld *v.* Mankowski, 37 Misc. 303, 75 N. Y. Suppl. 454; Olyphant *v.* Phyfee, 27 Misc. 64, 58 N. Y. Suppl. 217. See also Coutant *v.* Servoss, 3 Barb. 128.

South Carolina.—Allen *v.* Ruddell, 51 S. C. 366, 29 S. E. 198.

Contra.— Columbia Ave. Sav. Fund, etc., Co. *v.* Lewis, 190 Pa. St. 558, 42 Atl. 1094; Stevenson *v.* Roberts, (Tex. Civ. App. 1901) 64 S. W. 230.

The true principle is, that a power to sell and convey may include the power to mortgage, but it does not necessarily do so; and whether such power is or is not included depends upon the character of the estate, the words granting the power, and the purpose for which the debt was created. McMillan *v.* Cox, 109 Ga. 42, 49, 34 S. E. 341. See also Arlington State Bank *v.* Paulsen, 57 Nebr. 717, 78 N. W. 303.

25. Fletcher *v.* American Trust, etc., Co., 111 Ga. 300, 36 S. E. 767, 78 Am. St. Rep. 164; Lawrey *v.* Sterling, 41 Oreg. 518, 69 Pac. 460.

26. Cruikshank *v.* Duffin, L. R. 13 Eq. 555, 41 L. J. Ch. 317, 26 L. T. Rep. N. S. 121, 20 Wkly. Rep. 354; Russell *v.* Plaice, 18 Beav. 21, 18 Jur. 254, 23 L. J. Ch. 441, 2 Wkly. Rep. 243 [*overruling* Sanders *v.* Richards, 2 Coll. 568, 33 Eng. Ch. 568, and *followed* in Vane *v.* Rigden, L. R. 5 Ch. 663, 39 L. J. Ch. 797, 18 Wkly. Rep. 1092; *In re* Chawner,

light of the facts and circumstances attending its execution, and considering the situation of the parties.[27]

d. Title, Rights, and Liabilities of Mortgagee. The rule of *caveat emptor* applies to mortgagees of property from executors or administrators.[28] But a *bona fide* mortgagee who advances upon the security of a decedent's land is not bound to see to the representative's application of the fund realized by the mortgage,[29] nor does the fact that payment of claims against the land of a testator was made by the executor without the approbation of the court affect the validity of a mortgage given under a power in the will to secure the loan with which such payment was made.[30]

e. Estoppel to Attack Mortgage. Creditors of a testator may by their acquiescence for a number of years in the executor's management of the estate under the provisions of the will become estopped to question the validity of mortgages executed by him under authority given by the will;[31] but although an administrator by mortgaging the land of decedent, title to which had not been perfected, was enabled to purchase it for the heirs, the latter are not estopped in an action to foreclose the mortgage to plead the invalidity of the administrator's act because of the benefits resulting to them, it appearing that the money was not borrowed by the heirs or by any one in their name or at their request.[32]

f. Personal Liability of Representative. Where an executor empowered by a will to mortgage his testator's property executes a mortgage in his capacity as executor containing warranties of title and a promise to pay taxes and attorney's fees, and gives his notes for the money secured thereby, he is personally bound therefor, as giving the notes and making the warranties are not necessary to the execution of the power.[33]

12. Acquisition by Representative[34] **— a. In His Individual Capacity** — (i) *In General.* The office of an executor or administrator does not *per se* disable him as an individual from buying *bona fide* with his own money property to which the estate has no right,[35] and the heirs or devisees of the decedent cannot compel him to give them the benefit of such a purchase, even though decedent

L. R. 8 Eq. 569, 38 L. J. Ch. 726, 22 L. T. Rep. N. S. 262].

27. Ames *v.* Holderbaum, 44 Fed. 224. See also Iowa L. & T. Co. *v.* Holderbaum, 86 Iowa 1, 52 N. W. 550.

28. Neary *v.* Neary, (Nebr. 1903) 97 N. W. 302. See also Columbia Ave. Sav. Fund, etc., Co. *v.* Lewis, 190 Pa. St. 558, 42 Atl. 1094.

Where the mortgagee lends prematurely or the transaction is unauthorized he obtains no title or security as against a subsequent purchaser, although he will be entitled to repayment out of the proceeds of the sale. Dancy *v.* Duncan, 96 N. C. 111, 1 S. E. 455.

29. Iowa L. & T. Co. *v.* Holderbaum, 86 Iowa 1, 52 N. W. 550; Danziger *v.* Deline, 25 Misc. (N. Y.) 635, 56 N. Y. Suppl. 354 [*affirmed* in 51 N. Y. App. Div. 618, 64 N. Y. Suppl. 1134]; Farhall *v.* Farhall, L. R. 7 Eq. 286, 38 L. J. Ch. 281, 17 Wkly. Rep. 350; Shalcross *v.* Dixon, 7 L. J. Ch. 180.

30. Iowa L. & T. Co. *v.* Holderbaum, 86 Iowa 1, 52 N. W. 550.

31. Iowa L. & T. Co. *v.* Holderbaum, 86 Iowa 1, 52 N. W. 550; Ames *v.* Holderbaum, 44 Fed. 224.

32. Black *v.* Dressell, 20 Kan. 153.

33. De Coudres *v.* Union Trust Co., 25 Ind. App. 271, 58 N. E. 90, 81 Am. St. Rep. 95.

34. Acquisition of personalty see *infra*, VIII, P, 4.

35. Mosely *v.* Lane, 27 Ala. 62, 62 Am. Dec. 752.

Purchase of property of decedent's debtor. — Pending a suit in equity brought by an executor to subject land of his testator's debtor to the payment of the debt, the vendor of the land to the debtor obtained a decree for the sale of the land for a balance of the purchase-money, and at the sale the executor bought the land. He afterward sold it and applied a portion of the proceeds to the payment of the debt due his testator, leaving a balance in his hands more than sufficient to reimburse him for his purchase. It was held that he was bound to apply the proceeds to the payment of the debt, but was entitled to retain the surplus profits. Longest *v.* Tyler, 1 Duv. (Ky.) 192.

Purchase with assets of estate.— An executor or administrator may sustain a title to the land which he has purchased in his own name with assets of the estate upon clear proof that he was in advance to the estate for more than the amount paid. Buckingham *v.* Wesson, 54 Miss. 526. But otherwise, if he purchases lands or other property with the money of the estate, and afterward resells it at a profit, the benefit of the purchase inures to the estate and not to himself individually. Mosely *v.* Lane, 27 Ala. 62, 62 Am. Dec. 752.

in his lifetime had been in negotiation for the purchase of the same property.[36] But his duty does preclude him from purchasing an outstanding adverse title to land of which his decedent died seized and claiming title to such land for his own benefit, and any title so acquired by him will inure to the benefit of the estate;[37] and generally speaking, where he buys or redeems land with funds of the estate, or procures judgment satisfied from land in right of the estate, or in dereliction of duty abuses the confidence reposed in him by seeking an undue personal advantage in the acquisition of property from the exercise of his representative authority, he will be considered in equity, whatever may have been the formal expression of the conveyance or of notes given for the purchase-money, as holding the property in his representative capacity or as a trustee of the estate and those in interest, and his acts will inure to the benefit of those interested therein, at the same time that his rights and title are effective as against others.[38] Ratification by heirs or other parties in interest, or long acquiescence with full knowledge of the facts, may, however, estop them to object and debar third persons from questioning the transaction.[39]

36. Gay *v.* Gay, 5 Allen (Mass.) 181; Glenn *v.* Thistle, 23 Miss. 42.

37. Lucich *v.* Medin, 3 Nev. 93, 93 Am. Dec. 376; North *v.* Barnum, 10 Vt. 220.

38. *Alabama.*— Wells *v.* Elliott, 68 Ala. 183.

Arkansas.— Reeves *v.* Barrett, (1890) 13 S. W. 77; Atchley *v.* Reeves, 23 Ark. 233.

Georgia.— Benjamin *v.* Gill, 45 Ga. 110.

Illinois.— McCreedy *v.* Mier, 64 Ill. 495; Willenborg *v.* Murphy, 36 Ill. 344; Kenney *v.* Keplinger, 89 Ill. App. 570.

Indiana.— Murphy *v.* Teter, 56 Ind. 545.

Iowa.— McCrory *v.* Foster, 1 Iowa 271.

Kentucky.—Blakey *v.* Blakey, 3 J. J. Marsh. 674; Aulbach *v.* Read, 77 S. W. 204, 25 Ky. L. Rep. 1130; Stone *v.* Burge, 74 S. W. 250, 24 Ky. L. Rep. 2424; Scott *v.* Proctor, 13 S. W. 790, 12 Ky. L. Rep. 57.

Maine.— Tebbetts *v.* Estes, 52 Me. 566; Webber *v.* Webber, 6 Me. 127.

Massachusetts.— Phillips *v.* Rogers, 12 Metc. 405; Brooks *v.* Whitney, 11 Metc. 413; Johnson *v.* Bartlett, 17 Pick. 477; Hancock *v.* Minot, 8 Pick. 29; Boylston *v.* Carver, 4 Mass. 598.

Michigan.— Kunzie *v.* Wixom, 39 Mich. 384; Sheldon *v.* Rice, 30 Mich. 296, 18 Am. Rep. 136.

Mississippi.— Buie *v.* Pollock, 54 Miss. 9; Williams *v.* Stratton, 10 Sm. & M. 418.

New Hampshire.— Thurston *v.* Kennett, 22 N. H. 15; Smith *v.* Smith, 11 N. H. 459; Gibson *v.* Bailey, 9 N. H. 168.

New Jersey.— Hunt *v.* Smith, 58 N. J. Eq. 25, 43 Atl. 428; Brownlee *v.* Lockwood, 20 N. J. Eq. 239; Rutherford Land, etc., Co. *v.* Sanntrock, (Ch. 1899) 44 Atl. 938 [*affirmed* in 60 N. J. Eq. 471, 46 Atl. 648].

New York.— Zilkin *v.* Carhart, 3 Bradf. 376.

North Carolina.— Jones *v.* Slaughter, 96 N. C. 541, 2 S. E. 681.

South Carolina.— Henry *v.* Archer, Bailey Eq. 535.

Tennessee.— Phillips *v.* Terrell, 10 Heisk. 417; Cox *v.* Cox, Peck 443; Myrick *v.* Boyd, 3 Hayw. 179.

Vermont.— Shaw *v.* Partridge, 17 Vt. 626; Tryon *v.* Tryon, 16 Vt. 313.

Virginia.— Morgan *v.* Fisher, 82 Va. 417.

Wisconsin.— Gillett *v.* Gillett, 9 Wis. 194.

See 22 Cent. Dig. tit. "Executors and Administrators," § 621.

Title not void but voidable.— Murphy *v.* Teter, 56 Ind. 545.

Executor trustee for heirs and not for legatees and devisees.— Watson *v.* Child, 9 Rich. Eq. (S. C.) 129.

The heirs may bring trespass to try title after the estate has been administered as to land conveyed to the representative. Easterling *v.* Blythe, 7 Tex. 210, 56 Am. Dec. 45.

Right as against creditors.— Where a purchaser of land under a bond for title made permanent improvements upon the land, which so greatly enhanced its value that it became unquestionably worth considerably more than the amount of the purchase-money debt, and then died, his estate, although no portion of the purchase-money had been paid, had an equitable interest in the property, which his administrator could not, as against the rights of creditors, lawfully acquire by paying the purchase-money, and taking to himself personally a deed from the original vendor. Whiddon *v.* Williams, 98 Ga. 310, 24 S. E. 437.

Right of purchaser.— A purchaser of lands of a testator from the executrix with notice that she had purchased them with assets of the estate is a trustee for testator's creditors to the extent that the lands were paid for by the executrix with such assets. Buckingham *v.* Wesson, 54 Miss. 526.

A compromise between an administratrix and the heirs by which the heirs on certain considerations give a receipt "in full satisfaction of all liabilities" incurred by the administratrix on account of matters connected with the estate "discharging her from her trust as administratrix" changes her bare title as trustee of certain lands purchased by her individually with assets of the estate into a fee simple. Jones *v.* Slaughter, 96 N. C. 541, 2 S. E. 681.

39. Hicks *v.* Weems, 14 La. Ann. 629. See also Foley *v.* Leva, 101 Ala. 395, 13 So. 747, holding that in an action by the heirs of an estate to declare a lien in their favor on a

(II) *PURCHASE FROM WIDOW, HEIR, OR DEVISEE.*[40] While the purchase by an executor or administrator of real estate of his decedent or any interest therein from the widow, heirs, devisees, or others in interest is highly disfavored,[41] the judicial disposition is usually to do no more than presume strongly against the validity of such a purchase and require the fiduciary to show affirmatively adequacy of consideration and the general fairness of the transaction,[42] and if the transaction is in good faith and without fraud it may be treated as a similar transaction between strangers would be.[43]

(III) *PURCHASE OF DECEDENT'S REALTY AT JUDICIAL OR EXECUTION SALE.*[44] With reference to an executor or administrator purchasing land of the decedent for himself at a judicial or execution sale, the rule is applicable that he shall not be allowed to purchase property which he holds in trust, either directly or indirectly, nor to antagonize the interests of the estate he represents by taking an adverse interest;[45] but in cases where the representative was not a trustee of the

certain lot, alleged to have been purchased and improved by defendant administratrix with funds of the estate, and mortgaged by her to her co-defendants to secure her individual debt to them, there is no error in a decree applying the rents of the lot to the satisfaction of the mortgage, as the heirs, by electing to have a lien declared on the lot instead of claiming the lot itself, confirm the title of the administratrix to it.

40. **As to personalty** see *infra*, VIII, P, 4, b.

41. *Alabama.*—Williams *v.* Powell, 66 Ala. 20, 41 Am. Rep. 742; Coster *v.* Brack, 19 Ala. 210; Ashurst *v.* Ashurst, 13 Ala. 781.

California.— Golson *v.* Dunlap, 73 Cal. 157, 14 Pac. 576.

Kentucky.— Wright *v.* Arnold, 14 B. Mon. 638, 61 Am. Dec. 172; Black *v.* Keenan, 5 Dana 570 (purchase from a guardian of his ward's interest); Moore *v.* Moore, 5 Dana 464 (holding that the purchase by executors of the widow's dower interest will inure to the estate for the benefit of those entitled to it).

Maryland.— Pairo *v.* Vickery, 37 Md. 467.

Missouri.— State *v.* Jones, 53 Mo. App. 207.

New York.— *In re* Randall, 152 N. Y. 508, 46 N. E. 945.

North Carolina.—Peyton *v.* Smith, 22 N. C. 325.

Pennsylvania.— Parshall's Appeal, 65 Pa. St. 224; Miller's Appeal, 30 Pa. St. 478.

South Carolina.— Watson *v.* Hill, 1 Strobh. 78.

Texas.— Blackwell *v.* Blackwell, 86 Tex. 207, 24 S. W. 389 [*reversing* (Civ. App. 1893) 23 S. W. 31], holding that as an executor cannot acquire title adverse to the heirs, where testator gives a life-estate in land to his wife with remainder to his heirs, and the wife conveys her interest to the executor, on the death of the wife the remainder vests in the heirs and is held by the executor for their benefit, and is a part of the estate, subject to distribution under the will. But under the laws of the late republic of Texas in force on June 1, 1844, an administrator could purchase from an heir of his intestate the interest of such heir in the lands belonging to the succession. Erskine *v.* De la Baum, 3 Tex. 406, 49 Am. Dec. 751.

See 22 Cent. Dig. tit. "Executors and Administrators," § 622.

Where no fiduciary relation exists.—Where the executor or administrator does not hold lands for sale to pay debts nor as trustee for the heirs, and no fiduciary relation exists, he is entitled to purchase. Barker *v.* Barker, 14 Wis. 131. And see Herron *v.* Herron, 71 Iowa 428, 32 N. W. 407.

The sale is good at law, although disfavored and voidable in equity. Jackson *v.* Potter, 4 Wend. (N. Y.) 672.

While the sale remains uncontested the administrator has the usual rights against tenants. Carter *v.* Lee, 51 Ind. 292.

Who may attack purchase.— One beneficiary cannot dispute the purchase by the representative of another beneficiary's share. Peyton *v.* Smith, 22 N. C. 325.

42. *California.*— Golson *v.* Dunlap, 73 Cal. 157, 14 Pac. 576.

Illinois.— Dowdall *v.* Cannedy, 32 Ill. App. 207, holding that the expression by an administrator of his honest opinion as to a question of law in negotiating for the purchase of an heir's interest in the estate is not ground for setting aside the sale to him as obtained by fraud and misrepresentation, although he may have been mistaken in his opinion.

Kentucky.— Wright *v.* Arnold, 14 B. Mon. 638, 61 Am. Dec. 172; Handlin *v.* Davis, 4 Ky. L. Rep. 675.

Missouri.— State *v.* Jones, 53 Mo. App. 207.

New Hampshire.— Lovell *v.* Briggs, 2 N. H. 218.

New York.— Matter of Ledrich, 68 Hun 396, 22 N. Y. Suppl. 978.

Utah.— Haight *v.* Pearson, 11 Utah 51, 39 Pac. 479.

See 22 Cent. Dig. tit. "Executors and Administrators," § 622.

43. Shelby *v.* Creighton, 2 Nebr. (Unoff.) 264, 267, 96 N. W. 382; Clark *v.* Jacobs, 56 How. Pr. (N. Y.) 519.

44. **As to personalty** see *infra*, VIII, P, 4, c.

45. *Arkansas.*— Wright *v.* Campbell, 27 Ark. 637.

Georgia.— Fleming *v.* Foran, 12 Ga. 594.

Indiana.— Hunsucker *v.* Smith, 49 Ind.

real estate at the time of the purchase, and the transaction was a fair one, and the sale was not due to any neglect or failure of duty on his part, a purchase by him has been allowed to stand.[46] Where the property is purchased at the sale by a third person, who makes the purchase in good faith, there is no reason why the administrator should not subsequently purchase the property from him.[47]

b. In His Representative Capacity[48]—(i) *In General.* An executor or administrator has as a rule no power to buy land with personalty of the estate, unless authorized to do so by the will or by statute;[49] but if he so purchases the property purchased will be considered in equity as part of the decedent's estate and as impressed with the character of the purchase-money, and an equitable lien of creditors of the decedent is sometimes favorably regarded in such a connec-

114; Martin *v.* Wyncoop, 12 Ind. 266, 74 Am. Dec. 209.

Iowa.— Welch *v.* McGrath, 59 Iowa 519, 10 N. W. 810, 13 N. W. 638.

Kentucky.— Bartlett *v.* Gray, 4 Ky. L. Rep. 615.

Louisiana.— Stanbrough's Succession, 37 La. Ann. 275.

Maryland.— Turner *v.* Bouchell, 3 Harr. & J. 99.

Missouri.— Dillinger *v.* Kelley, 84 Mo. 561; Harper *v.* Mansfield, 58 Mo. 17.

New Jersey.— Rickey *v.* Hillman, 7 N. J. L. 180; Bechtold *v.* Read, 49 N. J. Eq. 111, 22 Atl. 1085; Marshall *v.* Carson, 38 N. J. Eq. 250, 48 Am. Rep. 319; Carson *v.* Marshall, 37 N. J. Eq. 213.

New York.— Prindle *v.* Beveridge, 58 N. Y. 592 [*affirming* 7 Lans. 225]; Rogers *v.* Rogers, 3 Wend. 503, 20 Am. Dec. 716 [*affirming* Hopk. Ch. 515].

North Carolina.— See Johns *v.* Norris, 27 N. J. Eq. 485.

Pennsylvania.—Guier *v.* Kelly, 2 Binn. 294.

United States.— Allan *v.* Gillet, 21 Fed. 273; Rafferty *v.* Mallory, 20 Fed. Cas. No. 11,526, 3 Biss. 362.

See 22 Cent. Dig. tit. "Executors and Administrators," § 624.

Purchase not void but voidable merely.— Welch *v.* McGrath, 59 Iowa 519, 10 N. W. 810, 13 N. W. 638.

In whose favor trust results — Participation in fraud.— A decedent's widow and his administrator agreed to procure a foreclosure sale of the intestate's land, at which the administrator was to buy the land in at an inadequate price by giving out at the sale that he was purchasing for the widow, and thus dissuading others from bidding. Thereafter the administrator purchased the land at the sale and agreed to convey it to the widow for the price at which it was struck off to him. On his refusal subsequently to do so, the widow and the intestate's only child filed a bill to redeem. It was held that, although the widow, having participated in the fraud, was not entitled to relief, the property acquired by the administrator would be regarded as held for the benefit of the child. Johns *v.* Norris, 27 N. J. Eq. 485.

Extent of liability see Dilworth's Appeal, 108 Pa. St. 92.

46. *Illinois.*—Stark *v.* Brown, 101 Ill. 395, 401, where the court upheld a purchase by the administrator of his decedent's realty at a tax-sale, as he was under no obligation to pay taxes assessed against the land, saying: "His purchase conflicting with no duty he owed the heirs at law in regard to the land, in allowing it to be made, no temptation is afforded to a betrayal of trust."

Iowa.— Welch *v.* McGrath, 59 Iowa 519, 10 N. W. 810, 13 N. W. 638.

Missouri.— Dillinger *v.* Kelley, 84 Mo. 561.

New Jersey.— Johns *v.* Norris, 22 N. J. Eq. 102. And see Rickey *v.* Hillman, 7 N. J. L. 180.

New York.— Hollingsworth *v.* Spaulding, 54 N. Y. 636.

Pennsylvania.—Meanor *v.* Hamilton, 27 Pa. St. 137; McManus' Estate, 14 Pa. Co. Ct. 379.

Tennessee.— Woman's College *v.* Horne, (Ch. App. 1900) 60 S. W. 609.

See 22 Cent. Dig. tit. "Executors and Administrators," § 624.

Burden of proof as to fairness.— Where an administrator, who was also guardian of the infant heirs, purchased the real estate of the intestate at a sale under a decree in partition, it was held that the burden of proof was on him to show that he gave a full price; and he having sold the land six years afterward at a great advance was compelled to account for the advanced price. Huson *v.* Wallace, 1 Rich. Eq. (S. C.) 1.

47. O'Brien *v.* Wilson, 82 Miss. 93, 33 So. 946.

48. **As to personalty** see *infra*, VIII, P, 4, a.

49. Wilson *v.* Mason, 158 Ill. 304, 42 N. E. 134, 49 Am. St. Rep. 162 [*affirming* 57 Ill. App. 325].

Purchase for benefit of creditors and heirs.— If the owner of an improvement on land forfeited to the state for taxes and subsequently donated dies, his administrator is entitled to be paid by the donee for the improvements, and upon failure of the donee to pay for the same may purchase the land in his representative capacity for the benefit of the creditors and heirs. Surginer *v.* Paddock, 31 Ark. 528.

Status of property purchased under power in will.— Where an executor invests the proceeds of an estate consisting of personal property in realty, under discretionary power conferred in the will, the realty thus acquired is realty in law and in fact, and subject to all the incidents of such property. Holmes *v.* Picket, 51 S. C. 271, 29 S. E. 82.

tion.[50] Where a decedent at the time of his death has an inchoate right in land under a contract of purchase or otherwise, the personal representative may complete the purchase and take a deed to himself in his representative capacity in trust for the persons interested in the estate,[51] and, even though the representative completes the purchase in his own name, the purchase may be held to be made for the benefit of the estate where it sufficiently appears from the evidence that this was the intention of the representative.[52] Where executors have a discretion in regard to investment in real property, or where there is a necessity of receiving real estate in payment of a debt, the beneficiaries are bound to accept the property thus acquired.[53]

(II) *PURCHASE AT JUDICIAL OR EXECUTION SALE.* When it is for the interest of the estate that he should do so, the executor or administrator is justified in purchasing in favor of the estate at a foreclosure sale under a mortgage belonging to the estate,[54] or an execution sale under a judgment in his favor on some debt due the decedent.[55] In such a case the representative may take a deed in his own name and by a deed executed in his own name give a good title to others which the beneficiaries of the estate cannot dispute;[56] but the purchase is presumed to be intended for the benefit of the estate, and requires him to account and turn over the property or its proceeds to the parties who would have been entitled to the mortgage or judgment debt if paid, the premises in his hands taking that character accordingly; and while he is chargeable with rents and profits later received or justly accruing, he should be reimbursed for his reasonable outlays and for such sum as he actually paid in the purchase.[57]

(III) *PROPERTY TAKEN IN PAYMENT OF DEBTS.* Where land is taken by the executor or administrator in payment of a debt due the estate, the land becomes assets in his hands and not property held in his individual right, and it should by

50. *Arkansas.*— Collins *v.* Warner, 32 Ark. 87.

Kansas.— Merket *v.* Smith, 33 Kan. 66, 5 Pac. 394.

Mississippi.—Shaw *v.* Thompson, Sm. & M. Ch. 628.

Nebraska.— Blake *v.* Chambers, 4 Nebr. 90.

Texas.— Shelton *v.* Bone, (Civ. App. 1894) 26 S. W. 224.

See 22 Cent. Dig. tit. "Executors and Administrators," § 625.

51. Lewis *v.* Wells, 50 Ala. 198. See *supra*, III, C, 10.

Legal title of representative.— A conveyance of land to which a deceased person was entitled before his death, to his administrator as such, places the legal title to the land in the administrator, and he may maintain an action to assert rights in the land. *In re* Smith, 4 Nev. 254, 97 Am. Dec. 531.

52. Avila *v.* Pereira, 120 Cal. 589, 52 Pac. 840. See also Coleman *v.* Florey, (Tex. Civ. App. 1901) 61 S. W. 412.

53. Blaisdell *v.* Stevens, 16 Vt. 179.

54. *Arkansas.*— Jones *v.* Graham, 36 Ark. 383.

California.— *In re* Miner, 46 Cal. 564.

Colorado.— Dusing *v.* Nelson, 7 Colo. 184, 2 Pac. 922.

Kansas.— Briggs *v.* Chicago, etc., R. Co., 56 Kan. 526, 43 Pac. 1131.

Louisiana.— Sojourner *v.* Fourney, 35 La. Ann. 918.

Minnesota.— Lewis *v.* Welch, 47 Minn. 193, 48 N. W. 608, 49 N. W. 665.

New Jersey.— Holcomb *v.* Coryell, 11 N. J. Eq. 476.

United States.— Rafferty *v.* Mallory, 20 Fed. Cas. No. 11,526, 3 Biss. 362.

See 22 Cent. Dig. tit. "Executors and Administrators," § 623.

55. *Arkansas.*— Williamson *v.* Furbush, 31 Ark. 539.

Georgia.— Crawford *v.* Tribble, 69 Ga. 519.

Indiana.— Murphy *v.* Teter, 56 Ind. 545.

Kentucky.— Jackson *v.* Roberts, 95 Ky. 410, 25 S. W. 879, 15 Ky. L. Rep. 831.

Louisiana.— Lafayette *v.* Preston, 3 La. Ann. 381.

Maryland.— Wilson *v.* Miller, 30 Md. 82, 96 Am. Dec. 568.

Pennsylvania.— Oeslager *v.* Fisher, 2 Pa. St. 467.

See 22 Cent. Dig. tit. "Executors and Administrators," § 623.

Contra.— Sedgwick *v.* Sedgwick, (Cal. 1884) 4 Pac. 570.

Representative may maintain forcible detainer against one withholding possession. Rice *v.* Brown, 77 Ill. 549.

56. Fifield *v.* Sperry, 20 N. H. 338; Lockman *v.* Reilly, 95 N. Y. 64; Higley *v.* Smith, 1 D. Chipm. (Vt.) 409, 12 Am. Dec. 701.

Error in making out the deed to the heirs does not preclude the title of the representative as to an asset of the estate. Bennett *v.* Kiber, 76 Tex. 385, 13 S. W. 220.

57. *Indiana.*— Murphy *v.* Teter, 56 Ind. 545.

Louisiana.— Sojourner *v.* Fourney, 35 La. Ann. 918.

Maryland.— Wilson *v.* Miller, 30 Md. 82, 96 Am. Dec. 568.

way of substitution be subjected by him to the payment of debts and legacies, and to distribution, like other personalty.[58]

(iv) *Sale or Mortgage of Property Acquired.* It has been asserted that a representative, unless of course he has a power of sale under the will, cannot sell, without an order of court, realty acquired by him in his representative capacity;[59] but the weight of authority is in support of the representative's power to sell such realty in his discretion without any order of court,[60] and a power to mortgage property so acquired has also been asserted.[61] A sale by an executor of such property may of course be set aside when tainted with fraud in which the purchaser participated.[62]

Minnesota.— Lewis *v.* Welch, 47 Minn. 193, 48 N. W. 608, 49 N. W. 665.

Missouri.— Mabary *v.* Dollarhide, 98 Mo. 198, 11 S. W. 611, 14 Am. St. Rep. 639.

New York.— Haberman *v.* Baker, 128 N. Y. 253, 28 N. E. 370, 13 L. R. A. 611; Lockman *v.* Reilly, 95 N. Y. 64; Fellows *v.* Fellows, 4 Cow. 682, 15 Am. Dec. 412; Clark *v.* Clark, 8 Paige 152, 35 Am. Dec. 676.

Pennsylvania.— Drysdale's Appeal, 14 Pa. St. 531; Oeslager *v.* Fisher, 2 Pa. St. 467.

South Carolina.— Haynsworth *v.* Bischoff, 6 S. C. 159.

Tennessee.— Phillips *v.* Terrell, 10 Heisk. 417.

See 22 Cent. Dig. tit. "Executors and Administrators," § 623.

Property so purchased remains personalty so far as estate concerned.— Mustin's Estate, 8 Pa. Dist. 180.

Executor not chargeable with land as so much money.— Bowler's Estate, 8 Pa. Co. Ct. 522.

58. *Illinois.*— Greer *v.* Walker, 42 Ill. 401.

Michigan.—Williams *v.* Towl, 65 Mich. 204, 31 N. W. 835.

New Jersey.— See Lippincott *v.* Bechtold, 54 N. J. Eq. 407, 34 Atl. 1079.

New York.—Yonkers Sav. Bank *v.* Kinsley, 78 Hun 186, 28 N. Y. Suppl. 925; *In re* Potter, 32 Hun 599.

Pennsylvania.— *In re* Billington, 3 Rawle 48.

South Carolina.— See Reynolds *v.* Rees, 23 S. C. 438.

Tennessee.— Evans *v.* Beaumont, 16 Lea 713.

See 22 Cent. Dig. tit. "Executors and Administrators," § 626.

Heirs cannot disaffirm the purchase of a debtor's realty if the representative acted prudently and for the good of the estate, especially if they delay unduly to proceed in the matter. *In re* Billington, 3 Rawle (Pa.) 48.

59. Johnson *v.* Bartlett, 17 Pick. (Mass.) 477; Foster *v.* Huntington, 5 N. H. 108; Rafferty *v.* Mallory, 20 Fed. Cas. No. 11,526, 3 Biss. 362.

Who may avoid sale.— An administrator who recovers judgment as such and levies execution on land holds the legal estate in the land to the use of the heirs of his intestate; and if he sells and conveys the same without having obtained license so to do the conveyance can be avoided only by those for whose use he was seized. Thomas *v.* Le Baron, 10 Metc. (Mass.) 403.

Heirs or devisees may be estopped to disaffirm by knowingly receiving proceeds of the sale and similar acts. Baldwin *v.* Timmins, 3 Gray (Mass.) 302; Thomas *v.* Le Baron, 10 Metc. (Mass.) 403; Ward *v.* Ward, 15 Pick. (Mass.) 511.

Effect of power of sale.— Where a testator owned two tracts of land — one in partnership with his brother and another individually — and empowered his executors to sell and convey the latter, and after his death the deed to the partnership tract, although in form absolute, was held a mortgage only, and the land being ordered sold to pay the mortgage, the executors bought it in, they took it with the same power to sell and convey it afterward as was given with reference to the other tract. Cummins *v.* Carrick, 2 S. W. 490, 8 Ky. L. Rep. 600.

60. *California.*— Christy *v.* Fisher, 58 Cal. 256, holding it immaterial whether the executors conveyed as such or in their individual capacity.

Iowa.— Stevenson *v.* Polk, 71 Iowa 278, 32 N. W. 340.

Michigan.— Little *v.* Lesia, 5 Mich. 119.

Missouri.— Hogan *v.* Welcher, 14 Mo. 177.

New Jersey.— Banta *v.* School Dist. No. 3, 39 N. J. Eq. 123.

New York.— Cook *v.* Ryan, 29 Hun 249; Valentine *v.* Belden, 20 Hun 537.

Pennsylvania.— Oeslager *v.* Fisher, 2 Pa. St. 467.

United States.— Long *v.* O'Fallon, 19 How. 116, 15 L. ed. 550.

See 22 Cent. Dig. tit. "Executors and Administrators," § 627.

The representative is chargeable with the purchase-money and should appropriate it duly and account for it. Bechtold *v.* Read, (N. J. Ch. 1893) 28 Atl. 264; Capehart *v.* Huey, 1 Hill Eq. (S. C.) 405; Harrison *v.* Henderson, 7 Heisk. (Tenn.) 315.

Purchaser not obliged to look to application of purchase-money.— Long *v.* O'Fallon, 19 How. (U. S.) 116, 15 L. ed. 550.

61. McLean *v.* Ladd, 66 Hun (N. Y.) 341, 21 N. Y. Suppl. 196; Edmonds *v.* Crenshaw, Harp. Eq. (S. C.) 224.

62. See Thomson *v.* Shackelford, 6 Tex. Civ. App. 121, 24 S. W. 980.

Partial avoidance.— Where a will directed the executor to collect the debts due testator

P. Personal Property — 1. Title and Authority — a. In General. The general rule is that the title to personal property of a decedent, testate or intestate, vests in the personal representative until administration is completed and the estate fully settled or distributed, or until he chooses or becomes forced to part with it earlier;[63] and the rule applies to contingent as well as absolute interests of the decedent in personal property, whether of a corporeal or incorporeal description, including rights in bonds, contracts, and choses in action, as well as goods and chattels.[64] The representative, as such, takes, however, no beneficial interest in the personalty, but takes it only for the purpose of administration and distribution to those entitled,[65] and as to the surplus remaining after the payment of

and divide them equally between five persons, one of whom was the executor, and to defraud one of such legatees, who was also a creditor of the executor, the latter conveyed land taken in satisfaction of such debts to one having knowledge of his intent, it was held that in a suit by such defrauded legatee alone, the conveyance would be held void only as to two fifths of the land; the executor being authorized by the will to sell any portion of the estate to satisfy legacies. Thomson *v.* Shackelford, 6 Tex. Civ. App. 121, 24 S. W. 980.

63. *Alabama.*— Beattie *v.* Abercrombie, 18 Ala. 9; Brashear *v.* Williams, 10 Ala. 630.

Arkansas.— Whelan *v.* Edwards, 31 Ark. 723; Pryor *v.* Ryburn, 16 Ark. 671; Lemon *v.* Rector, 15 Ark. 436.

California.— See Rankin *v.* Newman, 114 Cal. 635, 46 Pac. 742, 34 L. R. A. 265, where the court recognized the rule stated in the text as being the common-law rule, but said that under the California statute the title to personalty as well as to realty vests in the heirs subject only to the right of the executor to take possession of it for specific purposes.

Connecticut.— Roorbach *v.* Lord, 4 Conn. 347; Taber *v.* Packwood, 1 Day 150.

Illinois.— Lewis *v.* Lyons, 13 Ill. 117.

Indiana.— Pond *v.* Sweetser, 85 Ind. 144.

Iowa.— Wilson *v.* Breeding, 50 Iowa 629.

Kansas.— Presbury *v.* Pickett, 1 Kan. App. 631, 42 Pac. 405.

Kentucky.— Brunk *v.* Means, 11 B. Mon. 214.

Louisiana.— Cresswell's Succession, 8 La. Ann. 122; Watts *v.* Frazer, 5 La. 383.

Maryland.— Hagthorp *v.* Hook, 1 Gill & J. 270; Neale *v.* Hagthrop, 3 Bland 551.

Massachusetts.— Goodwin *v.* Jones, 3 Mass. 514, 3 Am. Dec. 173.

Michigan.—Hollowell *v.* Cole, 25 Mich. 345.

Missouri.— Brueggeman *v.* Jurgenson, 24 Mo. 87; State *v.* Moore, 18 Mo. App. 406; Rouggley *v.* Teichmann, 10 Mo. App. 257.

New York.— Robinson *v.* Adams, 30 Misc. 537, 63 N. Y. Suppl. 816.

North Carolina.— Varner *v.* Johnston, 112 N. C. 570, 17 S. E. 483; Whit *v.* Ray, 26 N. C. 14; Foster *v.* Cook, 8 N. C. 509.

Ohio.— *In re* Sattler, Ohio Prob. 183, 10 Ohio Dec. (Reprint) 440, 21 Cinc. L. Bul. 161.

Pennsylvania.— Bungard *v.* Miller, 5 Pa. Cas. 122, 8 Atl. 209; Shugar *v.* Garman, 2 Pa. Cas. 490, 4 Atl. 56.

South Carolina.— Kaminer *v.* Hope, 9 S. C. 253; Crosland *v.* Murdock, 4 McCord 217.

Tennessee.— Thurman *v.* Shelton, 10 Yerg. 383.

Texas.— Richardson *v.* Vaughn, (Civ. App. 1893) 22 S. W. 1112.

United States.— Bodemuller *v.* U. S., 39 Fed. 437; Kidder *v.* U. S., 19 Ct. Cl. 561; Chaplin *v.* U. S., 19 Ct. Cl. 424.

See 22 Cent. Dig. tit. "Executors and Administrators," § 629; and *supra*, III, B, 1.

Extent of title and authority.—At common law an executor or administrator had the same property in and the same powers over the personal effects or estate of his decedent that such decedent had at and before his death. This power has, however, been limited by statute. Weyer *v.* Franklin Second Nat. Bank, 57 Ind. 198.

Lien of factor.— If a person die in possession of goods, and they come into the hands of his administrator, the title is changed; and a factor who may afterward receive the goods from an administrator cannot hold them or their proceeds, on account of advances made to deceased in his lifetime, without the assent of the administrator. Swilley *v.* Lyon, 18 Ala. 552.

Where property is willed to executors to convert into a fund, and keep and distribute, etc., the title remains in them until it is actually distributed; and where a discretion is to be exercised before distribution the ultimate distributee has no vested interest in the property until such discretion has been exercised. *In re* Jones, 13 Fed. Cas. No. 7,444, 6 Biss. 68.

64. Clapp *v.* Stoughton, 10 Pick. (Mass.) 463; Dawes *v.* Boylston, 9 Mass. 337, 6 Am. Dec. 72.

The legal title to a note remains in the administrator of the payee, although in a division of the personal property, made before his appointment, it fell to one whose agent had demanded payment of the maker, and had agreed to accept interest at a certain rate for an unlimited length of time. Prouty *v.* Wilson, 123 Mass. 297.

65. Sinnott *v.* Kenaday, 14 App. Cas. (D. C.) 1 [*reversed* on other grounds in 179 U. S. 606, 1 S. Ct. 233, 45 L. ed. 339]; Broome *v.* Alston, 8 Fla. 307; Lessing *v.* Vertrees, 32 Mo. 431.

Rights of creditors of representative.—The effects of the decedent cannot be seized by a judgment creditor of the administrator in payment of the debt of such administrator:

debts he is a mere trustee for those beneficially entitled.[66] Where executors are also appointed trustees, their title to the testator's personalty as executors is superior to and takes precedence over that as trustees.[67]

b. Possession and Use. The right to the possession or use of the personal estate of a decedent, whether testate or intestate, vests at once in the personal representative,[68] and consequently he is the proper person to sue for property of the decedent which another person has converted to his use.[69] The mere possession of personal property, not wholly wrongful, by a decedent at the time of his death under a claim of title devolves upon his executor or administrator the immediate right of possession,[70] and the latter may recover the possession in an action of trover against any one who may have dispossessed or withheld possession from him;[71] but trover will not lie by an administrator to recover a chattel which,

nor are the makers of a note given to the administrator for goods of the decedent sold by him liable as garnishees to a judgment creditor, as being debtors of such administrator. Lessing *v.* Vertrees, 32 Mo. 431.

Where the representative charges himself with the value of goods in his administration account, this is not a conversion of the goods such as will render them subject to execution for his debts. Robinson *v.* Burton, 2 Del. Ch. 814.

66. Chamberlin's Appeal, 70 Conn. 363, 39 Atl. 734, 41 L. R. A. 204.

The representative cannot acquire the title to the property of the decedent by merely paying the debts or discharging the obligations of the estate. Wilson *v.* Taylor, 30 Fed. Cas. No. 17,840*a*, 2 Hayw. & H. 334.

67. Lockman *v.* Reilly, 95 N. Y. 64; Harris *v.* Ely, 25 N. Y. 138. See also Grasser *v.* Eckart, 1 Binn. (Pa.) 575.

68. *California.*— Freese *v.* Hibernia Sav., etc., Soc., 139 Cal. 392, 73 Pac. 172; Page *v.* Tucker, 54 Cal. 121; Jahns *v.* Nolting, 29 Cal. 507.

Connecticut.— Roorbach *v.* Lord, 4 Conn. 347; Taber *v.* Packwood, 1 Day 150.

Kentucky.— Cook *v.* Burton, 5 Bush 64.

Michigan.— Ormsbee *v.* Piper, 123 Mich. 265, 82 N. W. 36; Palmer *v.* Palmer, 55 Mich. 293, 21 N. W. 352.

Missouri.— Gillet *v.* Camp, 19 Mo. 404.

Nevada.— See Buckley *v.* Buckley, 16 Nev. 180.

New Hampshire.— Tappan *v.* Tappan, 30 N. H. 50.

North Carolina.— Anonymous, 3 N. C. 161.

Ohio.— See *In re* Sattler, 10 Ohio Dec. (Reprint) 440, 21 Cinc. L. Bul. 161.

See 22 Cent. Dig. tit. "Executors and Administrators," § 631.

Right of possession not impaired by injunction forbidding distribution.— McCutchen *v.* McCutchen, 8 Port. (Ala.) 151.

Family furniture.— Where no provision is made by will or statute for maintaining and keeping the family in possession of the family furniture or disposing of such property, and the same may be needful for sale or settlement of the estate, the representative may assume its virtual possession and control and the family can assert no title against him. Graydon *v.* Graydon, 23 N. J. Eq. 229; Moseley's Estate, 12 Phila. (Pa.) 50.

Right as between executor and guardian of legatee.— Where a testator bequeathed certain slaves to B, "should she attain the age of eighteen years," making other disposition of them if she should die before attaining that age, and gave the income to support the legatee and another person, the executor and not the guardian of the legatee was entitled to the possession of the slaves while she was under eighteen. Hanson *v.* Brawner, 2 Md. 90.

Agreement of beneficiaries to dispense with administration.— An administrator duly appointed without appeal is entitled to the possession of the uncollected choses in action belonging to the estate in the hands of the widow's administrator, although the heirs and the widow had agreed that there should be no administration. Ormsbee *v.* Piper, 123 Mich. 265, 82 N. W. 36.

Marriage of administratrix.— While the marriage of an administratrix extinguishes her authority as such (see *supra*, II, N, 6), it does not follow that she has not the right to retain possession of the property of the estate until the appointment of her successor, or until otherwise ordered by the court. Buckley *v.* Buckley, 16 Nev. 180.

Special statute not depriving administrator of right to possession see Tillinghast *v.* Holbrook, 7 R. I. 230.

When administrator cannot recover possession.— Where the personal property left by the intestate is disposed of by the sole heir and distributee, and there are no debts to be proved against the estate, an administrator subsequently appointed on the petition of such sole distributee cannot recover the property so disposed of. Cooper *v.* Hayward, 71 Minn. 374, 74 N. W. 152, 70 Am. St. Rep. 330. But *compare In re* Sattler, 10 Ohio Dec. (Reprint) 440, 21 Cinc. L. Bul. 161.

69. Niehaus *v.* Cooper, 22 Ind. App. 610, 52 N. E. 761. See also Easley *v.* Easley, 18 B. Mon. (Ky.) 86. And see *supra*, VII, C.

When suit in equity necessary.— An executor, having merely a naked power of sale of a slave, can only enforce his right to the possession of the slave, for the purpose of sale, by a suit in equity. O'Neal *v.* Beall, 10 B. Mon. (Ky.) 272.

70. Cullen *v.* O'Hara, 4 Mich. 132.

71. Cullen *v.* O'Hara, 4 Mich. 132. See *supra*, VII, C.

although inventoried and appraised as the property of the decedent, is claimed adversely, and has never been in the administrator's possession.[72]

c. Rights of Action. The personal representative is also invested with the general rights of action pertaining to such personal property.[73]

d. Pledged or Mortgaged Property. It is the duty of the personal representative in the exercise of good faith and ordinary or reasonable prudence to employ funds of the estate in redeeming from pledge or chattel mortgage whatever personalty of the estate may have been placed in security, which is worth redeeming by reason of a greater value than the secured indebtedness;[74] and contracts of pledge or mortgage which bound the decedent will also bind his executor or administrator to the extent of available assets in his hands,[75] and the pledgee's or mortgagee's rights on default must be respected by him.[76]

72. Hill *v.* Beall, 41 Ga. 607.

73. *Alabama.*— Blakeney *v.* Blakeney, 6 Port. 109, 30 Am. Dec. 574.

Arkansas.— Collins *v.* Warner, 32 Ark. 87.

California.— Ham *v.* Henderson, 50 Cal. 367.

Georgia.— Johnson *v.* Stewart, 41 Ga. 549.

Iowa.—Morrison *v.* Burlington, etc., R. Co. 84 Iowa 663, 51 N. W. 75.

North Carolina.— Allen *v.* Watson, 5 N. C. 189.

Pennsylvania.— Young *v.* Patterson, 165 Pa. St. 423, 30 Atl. 1011, holding that where a bond binds the obligor to pay to the obligee, her executors, administrators, or assigns, a certain sum "for her own interest and as trustee" for certain others, the administrator of the obligee can sue thereon.

Tennessee.— Winningham *v.* Crouch, 2 Swan 170.

See 22 Cent. Dig. tit. "Executors and Administrators," § 629.

The possession and production of a note by the executor of one of two persons to whom it was given is *prima facie* evidence that the note is his in his right as executor and that it is unpaid. Tisdale *v.* Maxwell, 58 Ala. 40.

Action to enforce performance of contract. — Upon compliance by an administrator with the conditions of a contract entered into by his intestate whereby, upon the payment of a stipulated sum within a limited time, certain stock held by another in trust was to be transferred to the intestate, the administrator may bring an action for the performance of the contract. Sayward *v.* Houghton, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44.

74. Pryor *v.* Davis, 109 Ala. 117, 19 So. 440; Chorn *v.* Chorn, 98 Ky. 627, 33 S. W. 1107, 17 Ky. L. Rep. 1178.

Property must be worth more than amount required to discharge lien. Richardson *v.* Kennedy, 74 Tex. 507, 12 S. W. 279.

Redemption before presentation of claim.— An administrator may redeem pledged property of the estate without waiting for a claim to be presented, provided he is willing to take the risk that the debt will not exceed the value of the property pledged. *In re* Eidenmuller, Myr. Prob. (Cal.) 87.

Where the estate is insolvent the executor may pay a chattel mortgage executed by the testator if this is necessary to save the property from foreclosure (Matter of Van Houten, 18 Misc. (N. Y.) 524, 42 N. Y. Suppl. 1115), but he cannot do so where the lien of the mortgage has expired by failure of the mortgagee to renew it, since the mortgagee is in such case entitled only to be paid *pro rata* with the general creditors (Matter of Van Houten, 18 Misc. (N. Y.) 524, 42 N. Y. Suppl. 1115. See also Rock Spring First Nat. Bank *v.* Ludvigsen, 8 Wyo. 230, 56 Pac. 994, 57 Pac. 934, 80 Am. St. Rep. 928).

An executor may pay dues on stock pledged by the testator as additional security for a mortgage loan, although the estate is insolvent. Matter of Van Houten, 18 Misc. (N. Y.) 524, 42 N. Y. Suppl. 1115.

Pledge by partnership.— Executors should not be surcharged with the difference between what stocks were sold for and their present value, where the stocks had been pledged as collateral by a firm of which testator was a member, and they were sold for payment of the debt by the survivor, pursuant to an agreement between the partners that if either of them died the survivor should regulate the sale at his discretion. *In re* Moore, 198 Pa. St. 611, 48 Atl. 884.

When executor not liable for failure to redeem.— Where a testator before his death had pledged stock as collateral for a loan, and the stock stood in the pledgee's name, and the executors, having no assets with which to pay the debt, without selling securities specifically bequeathed, allowed the stock to remain in the broker's name, receiving the dividends less the interest, and subsequently the broker died insolvent, and had pledged the stock, their conduct was not so negligent as to render them personally liable. McCourt's Appeal, 11 Wkly. Notes Cas. (Pa.) 161.

75. Stewart *v.* Fry, 3 Ala. 573.

Possession of pledged property.— A pledgee of certificates of stock is entitled to hold them as against an administrator of the pledgor, and is entitled to receive and enforce dividends or other benefits attaching thereto so long as his claim is unsatisfied, and a statute providing that the administrator shall have the right to the possession of the estate as it existed at the death of intestate does not authorize him to recover possession of such property. Fulton *v.* Denison Nat. Bank, 26 Tex. Civ. App. 115, 62 S. W. 84.

76. Mathew *v.* Mathew, 138 Cal. 334, 71 Pac. 344 (holding that a provision in a chat-

2. Sale — a. Power to Sell and Transfer Title — (i) *Personalty in General* — **(a)** *At Common Law.* Under the common-law rule, and in the absence of any statute providing otherwise, an executor or administrator has the absolute power to sell or dispose of the personal assets of the estate as he sees fit and can pass good title to a purchaser.[77]

(b) *Under Modern Statutes.* In many jurisdictions, however, statutes have been enacted requiring the sanction of the court before the representative can

tel mortgage that on default in the payment of the debt secured the mortgagee may take possession of the property is operative against the executor of the mortgagor, who is personally liable for a refusal to yield possession, although he was about to sell the property under an order of court); Levin *v.* Russell, 42 N. Y. 251 (holding that the public administrator of the city of New York is liable personally for the taking or detention of personal property from the possession of a mortgagee of the property, where the mortgagee had obtained possession of the property on default in payment of his mortgage during the lifetime of the mortgagor, although the public administrator acted in his official capacity and in good faith, and in the belief that the property belonged to the mortgagor at the time of his death).

77. *Alabama.*— See Waring *v.* Lewis, 53 Ala. 615; Reynolds *v.* Kirkland, 44 Ala. 312; Ikelheimer *v.* Chapman, 32 Ala. 676; Wier *v.* Davis, 4 Ala. 442.

Arkansas.— Pelham *v.* Wilson, 4 Ark. 289.

California.— See Rankin *v.* Newman, 114 Cal. 635, 46 Pac. 742, 34 L. R. A. 265.

Florida.— See May *v.* May, 7 Fla. 207, 68 Am. Dec. 431.

Illinois.— Makepeace *v.* Moore, 10 Ill. 474.

Indiana.— See Rogers *v.* Zook, 86 Ind. 237.

Iowa.— Marshall County *v.* Hanna, 57 Iowa 372, 10 N. W. 745.

Kansas.— Lappin *v.* Mumford, 14 Kan. 9.

Kentucky.— Anderson *v.* Irvine, 6 B. Mon. 231; Smith *v.* Pollard, 4 B. Mon. 66; Ward *v.* Lewis, 3 J. J. Marsh. 505; Stamps *v.* Beaty, Hard. 337.

Louisiana.—See Morrill *v.* Carr, 2 La. Ann. 807, recognizing the common-law rule as existing in Arkansas, but holding that an administrator's powers are different in Louisiana.

Maine.— Carter *v.* Manufacturers' Nat. Bank, 71 Me. 448, 36 Am. Rep. 338.

Maryland.— Miller *v.* Williamson, 5 Md. 219; Evans *v.* Iglehart, 6 Gill & J. 171; Phippard *v.* Forbes, 4 Harr. & M. 481; Lark *v.* Linstead, 2 Md. Ch. 162.

Massachusetts.— *In re* Gay, 5 Mass. 419.

Michigan.— Gustin *v.* Bay City Union School-Dist., 94 Mich. 502, 54 N. W. 156, 34 Am. St. Rep. 361.

Mississippi.— Hutchins *v.* Brooks, 31 Miss. 430; Bland *v.* Muncaster, 24 Miss. 62, 57 Am. Dec. 162.

Missouri.— Overfield *v.* Bullitt, 1 Mo. 749. See also Boeger *v.* Langenberg, 42 Mo. App. 7.

Nebraska.— Mulloy *v.* Kyle, 26 Nebr. 313, 41 N. W. 1117. See also Edney *v.* Baum, (1903) 97 N. W. 252.

New York.— Leitch *v.* Wells, 48 N. Y. 585; Sherman *v.* Willett, 42 N. Y. 146; Gibbs *v.* Flour City Nat. Bank, 86 Hun 103, 34 N. Y. Suppl. 195; *In re* Scott, 5 N. Y. Leg. Obs. 378. See also Rogers *v.* Squires, 26 Hun 388.

North Carolina.—Tyrrell *v.* Morris, 21 N. C. 559. See also Wilson *v.* Doster, 42 N. C. 231.

Ohio.—Jelke *v.* Goldsmith, 52 Ohio St. 449, 40 N. E. 467, 49 Am. St. Rep. 730.

Oregon.— Weider *v.* Osborn, 20 Oreg. 307, 25 Pac. 715.

Pennsylvania.— Bayard *v.* Farmers', etc., Bank, 52 Pa. St. 232; Jaquett's Estate, 13 Lanc. Bar 13.

South Carolina.— Rhame *v.* Lewis, 13 Rich. Eq. 269.

Tennessee.— Sneed *v.* Hooper, Cooke 200, 5 Am. Dec. 691. See also Hadley *v.* Kendrick, 10 Lea 525.

Vermont.— See Mead *v.* Byington, 10 Vt. 116.

Virginia.— Knight *v.* Yarborough, 4 Rand. 566.

Wisconsin.— An executor or administrator may dispose of the personal assets of the estate without an order from the court, but is liable for the appraised value. Munteith *v.* Rahn, 14 Wis. 210; Williams *v.* Ely, 13 Wis. 1.

United States.— See Newell *v.* West, 18 Fed. Cas. No. 10,150, 2 Ban. & A. 113, 13 Blatchf. 114.

England.— See Hill *v.* Simpson, 7 Ves. Jr. 152, 6 Rev. Rep. 105, 32 Eng. Reprint 63.

See 22 Cent. Dig. tit. "Executors and Administrators," § 634.

The common-law rule is presumed to prevail in another state in the absence of any showing that it has been changed by statute. Brannan *v.* Oliver, 2 Stew. (Ala.) 47, 19 Am. Dec. 39; Rogers *v.* Zook, 86 Ind. 237.

Non-perishable property.— Executors and administrators are not required to sell non-perishable property unless the will so directs or unless it be necessary to pay debts or legacies. Matter of Mullon, 74 Hun (N. Y.) 358, 26 N. Y. Suppl. 683 [*distinguishing* Utica Ins. Co. *v.* Lynch, 1 Paige (N. Y.) 520].

An assignment of a patent by an administrator is valid. Brooks *v.* Jenkins, 4 Fed. Cas. No. 1,953, 3 McLean 432, where the patent had been renewed in the administrator's name.

A mining contract not for a term certain, with stipulations for payment of a yearly amount until mining operations commence, is a chattel capable of sale as such by the lessee's administrator. Horn *v.* Bowen, 4 Ohio Dec. (Reprint) 419, 2 Clev. L. Rep. 133.

sell or otherwise dispose of the personalty,[78] although some of the statutory provisions as to the sale of personalty have been considered to be merely directory and for the protection of the representative, and not to affect his *jus disponendi* and power to pass a good title.[79]

(c) *Testamentary Provisions.* As a general rule statutes requiring an order of court to authorize a sale of personalty do not apply it in cases where the testator has by his will expressly authorized the executor to sell,[80] although it has been held that if the testator desires the power to be exercised without such order it should be so expressed in the will and otherwise an order is necessary.[81] An executor may sometimes, however, be justified in selling notwithstanding the sale is in opposition to a direction of the will.[82]

(II) *Perishable Property and Annual Crops.* Although the law requires the representative to obtain authority from the court to sell the personalty, yet if he is unable to obtain the order from the court in time to prevent loss and he makes a sale, the maxim *lex non cogit ad impossibilia* is applicable.[83] As a general rule when perishable property is given by a will to one for life with remainder to another it is the duty of the executor to sell the property and invest the fund, on which only the interest would belong to the person having the life-estate; but if the will indicates that the life-tenant shall enjoy the property in

78. *Alabama.*—Riddle *v.* Hill, 51 Ala. 224; Reynolds *v.* Kirkland, 44 Ala. 312; Ikelheimer *v.* Chapman, 32 Ala. 676; Wyatt *v.* Rambo. 29 Ala. 510, 68 Am. Dec. 89. And see Chandler *v.* Chandler, 87 Ala. 300, 6 So. 153; Ventress *v.* Smith, 10 Pet. (U. S.) 161, 9 L. ed. 382.

Arkansas.— Tate *v.* Norton, 94 U. S. 746, 24 L. ed. 222.

California.— Rankin *v.* Newman, 114 Cal. 635, 46 Pac. 742, 34 L. R. A. 265; Wickersham *v.* Johnston, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118; *In re* Sanderson, (1887) 13 Pac. 497.

Georgia.— Poullain *v.* Brown, 82 Ga. 412, 9 S. E. 1131; Lawrence *v.* Philpot, 27 Ga. 585.

Illinois.— Wilkinson *v.* Ward, 42 Ill. App. 541.

Indiana.— Rogers *v.* Zook, 86 Ind. 237.

Louisiana.— See De Egana's Succession, 18 La. Ann. 59.

Maryland.— Lark *v.* Linstead, 2 Md. Ch. 162.

Mississippi.— Joslin *v.* Caughlin, 32 Miss. 104; Henderson *v.* Clarke, 27 Miss. 436.

Missouri.— Weil *v.* Jones, 70 Mo. 560; Boeger *v.* Langenberg, 42 Mo. App. 7.

Nebraska.— Edney *v.* Baum, (1903) 97 N. W. 252.

South Carolina.— Rhame *v.* Lewis, 13 Rich. Eq. 269. And see Harth *v.* Heddlestone, 2 Bay 321; Saxon *v.* Barksdale, 4 Desauss. 522.

Tennessee.— Cheek *v.* Wheatley, 3 Sneed 484; Bell *v.* Speight, 11 Humphr. 451; Bryan *v.* Martin, 5 Humphr. 565; Herron *v.* Marshall, 5 Humphr. 443, 42 Am. Dec. 444.

Texas.— Mitchell *v.* De Witt, 20 Tex. 294; Robinson *v.* Martell, 11 Tex. 149; Massenberg *v.* Denison, 107 Fed. 18, 46 C. C. A. 120.

Virginia.— Green *v.* Thompson, 84 Va. 376, 5 S. E. 507.

See 22 Cent. Dig. tit. "Executors and Administrators," § 634.

Statutes changing common-law rule strictly construed.— Bland *v.* Muncaster, 24 Miss. 62, 57 Am. Dec. 162.

79. *Nebraska.*— See Edney *v.* Baum, (1903) 97 N. W. 252.

New York.— Matter of Oakman, 5 N. Y. Leg. Obs. 378.

North Carolina.— Fanshaw *v.* Fanshaw, 22 N. C. 59 note; Wynns *v.* Alexander, 22 N. C. 58.

South Carolina.— Harth *v.* Heddlestone, 2 Bay 321. But *compare* Pistole *v.* Street, 5 Port. (Ala.) 64, construing a South Carolina statute.

Wisconsin.—Munteith *v.* Rehn, 14 Wis. 210.

United States.— Newell *v.* West, 18 Fed. Cas. No. 10,150, 2 Ban. & A. 113, 13 Blatchf. 114, construing the Massachusetts statute.

80. McCollum *v.* McCollum, 33 Ala. 711; Winningham *v.* Holloway, 51 Ark. 385, 11 S. W. 579; Lawrence *v.* Philpot, 27 Ga. 585; Wright *v.* Zeigler, 1 Ga. 324, 44 Am. Dec 656; Trimble *v.* Lebus, 94 Ky. 304, 22 S. W. 329, 15 Ky. L. Rep. 85. See also Chandler *v.* Chandler, 87 Ala. 300, 6 So. 153.

Power to sell must be clearly given. Chandler *v.* Chandler, 87 Ala. 300, 6 So. 153; Neal *v.* Patten, 40 Ga. 363, holding that a mere direction to pay the debts does not authorize the executor to sell without an order of the ordinary.

The court has no authority to order a sale of the decedent's personalty if the power is vested in the executor by the will. McCollum *v.* McCollum, 33 Ala. 711.

81. Brooks *v.* Bergner, 83 Md. 352, 35 Atl. 98.

82. Stephens *v.* Milnor, 24 N. J. Eq. 358 (sale below part of constantly depreciating stock, although testator expressed a wish that it should not be sold below par); Meeker *v.* Crawford, 5 Redf. Surr. (N. Y.) 450 (sale necessary for distribution).

83. Levering *v.* Levering, 64 Md. 399, 2 Atl. 1, holding that a subsequent ratification

specie the sale should not be made.[84] The administrator has authority to sell sufficient of the annual crops to reimburse one who has made advances to him to aid in putting in the crops on the estate.[85]

(III) *CHOSES IN ACTION*—(A) *In General.* It was early decided in this country that an executor or administrator might assign a chose in action.[86] This early rule has been retained in some jurisdictions,[87] and it has been asserted that statutes requiring sales of personalty to be under order of court apply only to tangible personalty, and do not affect the representative's power to dispose of choses in action.[88] In other states, however, the right of an executor or administrator to assign choses in action of the decedent has been subjected to the same restriction as exists with reference to tangible personalty.[89]

(B) *Commercial Paper.* According to the common-law rule it is within the power of an executor or administrator to indorse over and transfer commercial paper payable to his decedent,[90] and it necessarily follows from this that he may transfer such paper when it is payable to himself in his representative capacity.[91]

of the sale would be equivalent to a prior order.

84. Woods *v.* Sullivan, 1 Swan (Tenn.) 507.

85. Starling *v.* Wyatt, (Miss. 1900) 27 So. 526.

86. Sutherland *v.* Brush, 7 Johns. Ch. (N. Y.) 17, 11 Am. Dec. 383. See also Low *v.* Burrows, 12 Cal. 181.

87. *Connecticut.*— Beecher *v.* Buckingham, 18 Conn. 110, 44 Am. Dec. 580.

Maine.— Chase *v.* Bradley, 26 Me. 531.

New York.— Petersen *v.* Chemical Bank, 32 N. Y. 21, 29 How. Pr. 240, 88 Am. Dec. 298; Matter of Fould, 35 Misc. 171, 71 N. Y. Suppl. 473.

North Carolina.— Dickson *v.* Crawley, 112 N. C. 629, 17 S. E. 158.

Virginia.— See Trevelyan *v.* Lofft, 83 Va. 141, 1 S. E. 901.

United States.— May *v.* Logan County, 30 Fed. 250.

Land certificate.— A certificate for a league and labor of land is not a chose in action, but a chose in possession, and therefore a vendible commodity for the payment of the debts of the deceased. Peevy *v.* Hurt, 32 Tex. 146.

88. Chandler *v.* Chandler, 87 Ala. 300, 6 So. 153; Curry *v.* Peebles, 83 Ala. 225, 3 So. 622; Weider *v.* Osborn, 20 Oreg. 307, 25 Pac. 715; Chapman *v.* Charleston, 30 S. C. 549, 9 S. E. 591, 3 L. R. A. 311; Rhame *v.* Lewis, 13 Rich. Eq. (S. C.) 269. See also Butler *v.* Gazzam, 81 Ala. 491, 1 So. 16; Ladd *v.* Wiggin, 35 N. H. 421, 69 Am. Dec. 551.

89. *Arkansas.*— Winningham *v.* Holloway, 51 Ark. 385, 11 S. W. 579.

California.— Wickersham *v.* Johnston, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118.

Georgia.— Smith *v.* Griffin, 32 Ga. 81.

Kansas.— Pierce *v.* Batten, 3 Kan. App. 396, 42 Pac. 924.

Missouri.— Weil *v.* Jones, 70 Mo. 560.

90. *Connecticut.*— Hough *v.* Bailey, 32 Conn. 288.

Illinois.— Walker *v.* Craig, 18 Ill. 116; Dwight *v.* Newell, 15 Ill. 533; Walker *v.* Kirk, 14 Ill. 55; Makepeace *v.* Moore, 10 Ill. 474.

Indiana.— Hamrick *v.* Craven, 39 Ind. 241; Thomas *v.* Reister, 3 Ind. 369.

Iowa.— Marshall County *v.* Hanna, 57 Iowa 372, 10 N. W. 745.

Kentucky.—Sanders *v.* Blain, 6 J. J. Marsh. 446, 22 Am. Dec. 86.

Maine.— Malbon *v.* Southard, 36 Me. 147.

Maryland.— See Lucas *v.* Byrne, 35 Md 485.

Michigan.— Drake *v.* Cloonan, 99 Mich. 121, 57 N. W. 1098, 41 Am. St. Rep. 586.

Mississippi.— Owen *v.* Moody, 29 Miss. 79; Andrews *v.* Carr, 26 Miss. 577. And see Prosser *v.* Leatherman, 4 How. 237, 34 Am. Dec. 121.

New York.— Bogert *v.* Hertell, 4 Hill 492; Wheeler *v.* Wheeler, 9 Cow. 34; Southerland *v.* Brush, 7 Johns. Ch. 17, 11 Am. Dec. 383.

North Carolina.— Cox *v.* Wilson First Nat. Bank, 119 N. C. 302, 26 S. E. 22; Bradshaw *v.* Simpson, 41 N. C. 243; Gray *v.* Armistead, 41 N. C. 74. See also Wilson *v.* Doster, 42 N. C. 231.

Ohio.— Jelke *v.* Goldsmith, 52 Ohio St. 499, 40 N. E. 167, 49 Am. St. Rep. 730.

Oregon.— Weider *v.* Osborn, 20 Oreg. 207, 35 Pac. 715.

Rhode Island.— Mackay *v.* St. Mary's Church, 15 R. I. 121, 23 Atl. 103, 2 Am. St. Rep. 881.

Texas.— See Abercrombie *v.* Stillman, 77 Tex. 589, 14 S. W. 196.

Vermont.— Griswold *v.* Barnum, 5 Vt. 269.

Wisconsin.— Cleveland *v.* Harrison, 15 Wis. 670.

United States.— See Wilkins *v.* Ellett, 108 U. S. 256, 2 S. Ct. 641, 27 L. ed. 718.

England.— Rawlinson *v.* Stone, 3 Wils. C. P. 1.

An administrator may ratify the act of decedent's wife, when decedent was unconscious from illness, in indorsing over a note of which decedent was payee, where the proceeds of the note went into the estate before the death of the decedent. Seaver *v.* Weston, 163 Mass. 202, 39 N. E. 1013.

91. *Alabama.*— Nelson *v.* Stollenwerck, 60 Ala. 140; Moses *v.* Clark, 46 Ala. 229.

Illinois.— Walter *v.* Kirk, 14 Ill. 55.

Indiana.— Daffey *v.* State, 15 Ind. 441.

In some jurisdictions the representative is held to have power to transfer negotiable paper without an order of court authorizing him to do so, although the statute requires an order of court to authorize the transfer of personalty, it being considered that such statutes do not apply to negotiable instruments,[92] but in other jurisdictions such statutes are held to include negotiable instruments.[93] In some jurisdictions the power of the executor or administrator to transfer notes is limited to certain specific cases.[94] In those states where the administrator has power to indorse and assign notes due the decedent it will be presumed that an administrator in another state has the same power,[95] unless it is alleged or shown that the administrator's power is regulated or restricted by statute in that state,[96] while in a state where the administrator must be authorized by order of court before he can assign a note it has been presumed that the law of a foreign country is the same.[97]

(iv) *Stocks and Bonds.* In some jurisdictions the representative has the common-law power to transfer stocks and bonds,[98] while in others the statutes specifically prohibit their sale without an order of court.[99] Where a transfer is to be made, it may be made in the representative's own name.[1] In the absence of ancillary administration or statutory prohibition the domiciliary administrator duly appointed has authority to sell and assign the stock of the decedent in a foreign corporation.[2]

(v) *Mortgages.* In some jurisdictions the representative of a mortgagee may assign the mortgage debt without an order of court,[3] while in others the represent-

Mississippi.— Booyer *v.* Hodges, 45 Miss. 78; Miller *v.* Helm, 2 Sm. & M. 687.

Texas.— Groce *v.* Herndon, 2 Tex. 410; Lipscombe *v.* Ward, 2 Tex. 277.

92. *Alabama.*— Nelson *v.* Stollenwerck, 60 Ala. 140.

Illinois.— Wooley *v.* Lyon, 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867.

Indiana.— Rogers *v.* Zook, 86 Ind. 237.

Mississippi.— Booyer *v.* Hodges, 45 Miss. 78; Owen *v.* Moody, 29 Miss. 79; Andrews *v.* Carr, 26 Miss. 577.

New Hampshire.— Ladd *v.* Wiggins, 35 N. H. 421, 69 Am. Dec. 551.

Oregon.— Weider *v.* Osborn, 20 Oreg. 307, 25 Pac. 715.

South Carolina.— Rhame *v.* Lewis, 13 Rich. Eq. 269.

93. Wickersham *v.* Johnston, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118; Burbank *v.* Payne, 17 La. Ann. 15, 87 Am. Dec. 513. See also Thompson *v.* Thompson, 77 Ga. 692, 3 S. E. 261; Stagg *v.* Linnenfelser, 59 Mo. 336.

If the transfer is not detrimental to the estate of the deceased it is not necessarily void. Marston *v.* Winter, 10 La. Ann. 210.

94. Arkansas.—Payne *v.* Flournoy, 29 Ark. 500. See also Whittaker *v.* Wright, 35 Ark. 511.

Missouri.— Stagg *v.* Linnenfelser, 59 Mo. 336. See also Cowgill *v.* Linville, 20 Mo. App. 138.

Ohio.— Jelke *v.* Goldsmith, 52 Ohio St. 499, 40 N. E. 167, 49 Am. St. Rep. 730.

95. Rogers *v.* Zook, 86 Ind. 237. See also Clark *v.* Blackington, 110 Mass. 369.

96. Rogers *v.* Zook, 86 Ind. 237.

97. Wickersham *v.* Johnston, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118.

98. Leitch *v.* Wells, 48 N. Y. 585. See also Hutchins *v.* State Bank, 12 Metc. (Mass.) 421; *Ex p.* Jones, 13 Fed. Cas. No. 7,443, 4 Cranch C. C. 185.

99. See Stinson *v.* Thornton, 56 Ga. 377; Weyer *v.* Franklin Second Nat. Bank, 57 Ind. 198; Trimble *v.* Lebus, 94 Ky. 304, 22 S. W. 329, 15 Ky. L. Rep. 85; Butler *v.* Butler, 10 R. I. 501.

In New Hampshire if the administrator would make a legal sale and transfer of stock as administrator, he must strictly pursue one of two courses: he must either assume the whole inventory of the personal estate of the intestate at the appraised value, or he must under the license of the judge of probate sell the same at public auction upon a sufficient previous notice of sale. French *v.* Currier, 47 N. H. 88.

1. Mahaney *v.* Walsh, 16 N. Y. App. Div. 601, 44 N. Y. Suppl. 969; Henke's Appeal, 10 Pa. Cas. 295, 14 Atl. 45, where title to certificates of state loans was in executors.

2. Luce *v.* Manchester, etc., R. Co., 63 N. H. 588, 3 Atl. 618. See also Hutchins *v.* State Bank, 12 Metc. (Mass.) 421.

3. *Maine.*— Libby *v.* Mayberry, 80 Me. 137, 13 Atl. 577; Crooker *v.* Jewell, 31 Me. 306.

Maryland.— McCauseland *v.* Baltimore Humane Impartial Soc., 95 Md. 741, 54 Atl. 918.

Massachusetts.— Burt *v.* Ricker, 6 Allen 77 [*distinguishing Ex p.* Blair, 13 Metc. 126].

Michigan.—Drake *v.* Cloonan, 99 Mich. 121, 57 N. W. 1098, 41 Am. St. Rep. 586; Reynolds *v.* Smith, 57 Mich. 194, 23 N. W. 727.

New Hampshire.—Ladd *v.* Wiggin, 35 N. H. 421, 69 Am. Dec. 551.

New York.— Smith *v.* Tiffany, 16 Hun 552. See also Washburn *v.* Benedict, 46 N. Y. App. Div. 484, 61 N. Y. Suppl. 387; Read *v.* Knell, 69 Hun 541, 23 N. Y. Suppl. 941.

ative cannot, without being duly authorized by the court, assign a mortgage given to the decedent in his lifetime.[4]

b. Time of Sale.[5] So far as an executor or administrator may be bound to sell and dispose of the decedent's personalty, he should proceed within a reasonable time to do so,[6] but an executor should not attempt to sell the personalty of his testator before probate of the will and the issuance of letters testamentary.[7] In England the lapse of many years since a testator's death may raise a presumption that all debts have been paid, so as to put a subsequent purchaser on inquiry.[8]

c. Manner and Conduct.[9] At common law the manner of sale is a matter resting in the discretion of the personal representative,[10] who may sell at either private or public sale as he may deem best;[11] but in some states the statutes require a public or auction sale unless the probate court has specially authorized a private sale.[12] It has been held in England to be a matter of indifference

Wisconsin.—Cleveland *v.* Harrison, 15 Wis. 670.

A decree of foreclosure of a mortgage on realty may be assigned by the administrator and the assignment will carry with it the note and mortgage. Brand *v.* Smith, 99 Mich. 395, 58 N. W. 363.

4. Pierce *v.* Batten, 3 Kan. App. 396, 42 Pac. 924.

Under the Pennsylvania act of 1885 it must appear to the court that all parties in interest in the land encumbered have joined in the application for the assignment. Weimer *v.* Karch, 5 Pa. Co. Ct. 203.

5. **Sale under order of court** see *infra*, XII, K, 2.

6. Griswold *v.* Chandler, 5 N. H. 492; *In re* Gray, 91 N. Y. 502; Matter of Thompson, 41 Misc. (N. Y.) 420, 84 N. Y. Suppl. 1111; Campbell *v.* Purdy, 5 Redf. Surr. (N. Y.) 434; Pulliam *v.* Pulliam, 10 Fed. 53.

Sale should be made within one year after appointment. Sunday's Appeal, 131 Pa. St. 584, 18 Atl. 931.

Liability for failure to sell or delay in selling see *supra*, VIII, L, 8.

7. Smith *v.* Barham, 17 N. C. 420, 25 Am. Dec. 721; Monroe *v.* James, 4 Munf. (Va.) 194.

8. *In re* Tanqueray-Willaume, 20 Ch. D. 465, 51 L. J. Ch. 434, 46 L. T. Rep. N. S. 542, 30 Wkly. Rep. 801. See also *In re* Molyneaux, 15 L. R. Ir. 383.

Rule not applicable to sale of leaseholds.— *In re* Venn, [1894] 2 Ch. 101, 63 L. J. Ch. 303, 70 L. T. Rep. N. S. 312, 8 Reports 220, 42 Wkly. Rep. 440; *In re* Whistler, 35 Ch. D. 561, 51 J. P. 820, 56 L. J. Ch. 827, 57 L. T. Rep. N. S. 77, 35 Wkly. Rep. 662.

9. **Sale under order of court** see *infra*, XII, K.

10. Cannon *v.* Jenkins, 16 N. C. 422. See also Wier *v.* Davis, 4 Ala. 442.

11. Johnson *v.* Kay, 8 Humphr. (Tenn.) 142.

12. *Alabama.*— Hopper *v.* Steele, 18 Ala. 828; Wier *v.* Davis, 4 Ala. 442.

Florida.— May *v.* May, 7 Fla. 207, 68 Am. Dec. 431.

Illinois.— Burnap *v.* Dennis, 4 Ill. 478.

Indiana.— Weyer *v.* Franklin Second Nat. Bank, 57 Ind. 198.

Louisiana.— Pinard *v.* George, 30 La. Ann. 384. See also Donaldson *v.* Hull, 7 Mart. N. S. 112.

Mississippi.— Ware *v.* Houghton, 41 Miss. 370, 93 Am. Dec. 258; Worten *v.* Howard, 2 Sm. & M. 527, 41 Am. Dec. 607; Baines *v.* McGee, 1 Sm. & M. 208; Cable *v.* Martin, 1 How. 558.

Ohio.— See Jelke *v.* Goldsmith, 52 Ohio St. 499, 40 N. E. 167, 49 Am. St. Rep. 730.

See 22 Cent. Dig. tit. "Executors and Administrators," § 637.

Private sale by representative void see McArthur *v.* Carrie, 32 Ala. 75, 70 Am. Dec. 529.

The North Carolina statute requiring sales by executors to be public and under an order of the county court is merely directory, and a private sale to a *bona fide* purchaser is valid. Wynns *v.* Alexander, 22 N. C. 58. See also Tyrrell *v.* Morris, 21 N. C. 559.

Liability for private sale.— An executor or administrator who sells at private sale for cash ought to be charged with such sum as the property would have sold for at public auction for cash. Hudson *v.* Hudson, 5 Munf. (Va.) 180.

Sale not within statute.— La. Code, art. 1167, providing that property belonging to vacant successions can only be sold at public auction after advertisement, does not apply to sales under article 1190, which provides that if a succession is so small that no one will accept the curatorship the judge after ordering an inventory shall appoint the district attorney curator, who shall cause the effects to be sold and the proceeds applied to payment of the debts, the whole to be done in as summary a manner as possible to diminish costs. Simmons *v.* Saul, 138 U. S. 439, 11 S. Ct. 369, 34 L. ed. 1054.

Sale of crops at market.— In Georgia an executor may sell annual crops at private sale, but they must be actually carried to market and sold there and cannot be sold at private sale on the estate. Neal *v.* Patten, 40 Ga. 363. And the crops must not be sent to a foreign market; to do this is a devastavit, for which it is no excuse that it was done to avoid seizure by the government. Poullian *v.* Brown, 82 Ga. 412, 9 S. E. 1131.

Private sale in usual course of business.— The Mississippi statute providing that when

whether an executor or trustee observes the order of sale enjoined in the will or not, provided that no depreciation takes place in the property whose sale is irregularly postponed.[13] An executor cannot delegate to another the execution of a special power of sale committed to him by the will in personal trust and confidence.[14]

d. Price. The Louisiana statute providing that unless the purchase-price of property belonging to a succession be equal to its actual value its sale for less than the amount of its appraisement is void relates only to the first offering, and when the property is readvertised for sale and at a second offering sold on a twelve-months' credit it may be validly sold for whatever it will bring.[15]

e. Terms and Conditions.[16] It has been said that if the representative sells for anything but cash, except in rare and exceptional cases, he becomes the guarantor of the results of the transaction, and if it proves unfortunate he may be charged as for a devastavit.[17] But the more general rule allows him to sell upon reasonable credit,[18] although where he does so he must take good security for the deferred payments,[19] and if he fails to take security or takes insufficient security he is liable for any resulting loss.[20]

one dies, leaving a stock of merchandise, the court may allow the executor or administrator to dispose of the same at private sale, the terms being first made known to the court, was intended to confer authority to permit a private sale, upon certain terms, and this presupposes some definite offer by one proposing to buy the whole or a portion of the stock. An order authorizing a private sale of such stock in the usual course of business is void. Tell City Furniture Co. *v.* Stiles, 60 Miss. 849. But see *In re* Osborn, 36 Oreg. 8, 38 Pac. 521.

13. Olliver *v.* King, 1 Jur. N. S. 1066.

14. Berger *v.* Duff, 4 Johns. Ch. (N. Y.) 368. See also Neal *v.* Patten, 47 Ga. 73.

15. Campbell *v.* Owens, 32 La. Ann. 265.

16. **Sale under order of court** see *infra*, XII, L.

17. Matter of Gilman, 39 Misc. (N. Y.) 762, 80 N. Y. Suppl. 1122 [*reversed* on other grounds in 82 N. Y. App. Div. 186, 81 N. Y. Suppl. 713]. See also Foster *v.* Thomas, 21 Conn. 285; Estill *v.* McClintic, 11 W. Va. 399 [*followed* in Hoke *v.* Hoke, 12 W. Va. 427], holding that where an administrator sells personalty of his decedent, and takes bonds therefor, this is a conversion of the assets of the estate, rendering the administrator liable to account for the amount of the sales, the bonds becoming his individual property; but a court of equity will relieve him from responsibility upon its being shown that they were rendered unavailable without any fault on his part, he having acted prudently, diligently, and conscientiously in the premises.

18. Matter of Woodbury, 13 Misc. (N. Y.) 474, 35 N. Y. Suppl. 485; Stone *v.* Hinton, 36 N. C. 15 (holding that where a will directed a sale and did not prescribe the terms of sale, a sale on a credit of twelve months was proper); Bradshaw *v.* Cruise, 4 Heisk. (Tenn.) 260.

Sale must be for payment of debts and legacies. N. Y. Code Civ. Proc. § 2717, authorizing executors, when necessary for the payment of debts and legacies, to sell sufficient of decedent's personalty on credit, with "approved security," does not authorize an executor to sell on credit except for the payment of debts and legacies. Matter of Woodbury, 13 Misc. 474, 35 N. Y. Suppl. 485.

Liability for not selling on credit.— Where an executor or administrator sells at private sale for cash, he ought to be charged therefor such further sum as the property would have brought upon a reasonable credit, if the situation of the estate would admit such credit. Hudson *v.* Hudson, 5 Munf. (Va.) 180.

19. Vreeland *v.* Schoonmaker, 16 N. J. Eq. 512; Matter of Woodbury, 13 Misc. (N. Y.) 474, 35 N. Y. Suppl. 485.

"Approved security."— Under a statute authorizing an executor or administrator to sell on credit "with approved security," it has been held that the security must be national or state bonds or mortgages on real estate and must be approved by the surrogate. Matter of Woodbury, 13 Misc. (N. Y.) 474, 35 N. Y. Suppl. 485.

Taking the note of a third person indorsed by the purchaser is not a compliance with a statute requiring the representative to take a bond of the purchaser with approved security. Steger *v.* Bush, Sm. & M. Ch. (Miss.) 172.

Sufficiency of security.—Where an executor sold goods of testator on credit, and accepted as security a man generally reputed as good for the amount, this was sufficient to relieve him from liability, although the security did not possess a freehold. Konigmacher *v.* Kimmel, 1 Penr. & W. (Pa.) 207, 21 Am. Dec. 374.

Failure of distributee's husband to object. — The omission of an administrator to take the security required by law on selling the property of the estate cannot be excused upon the mere ground that the distributee's husband, who may not have known what was the administrator's duty, was present and made no objection; nor is the distributee estopped from objecting to the credit. Walls *v.* Grigsby, 42 Ala. 473.

20. *Alabama.*— See Stewart *v.* Stewart, 31 Ala. 207.

Connecticut.— Foster *v.* Thomas, 21 Conn. 285.

f. Who May Purchase — (i) *Personal Representative.*[21] It has been laid down that an executor or administrator has no right to become the purchaser of assets of the estate at his own sale, whether public or private.[22] Such a purchase is, however, not void, but only voidable at the option of those interested,[23] and may be allowed to stand where it appears that the price was fair and that the

Florida.— Sherrell *v.* Shepard, 19 Fla. 300.

Indiana.— Lindley *v.* State, 116 Ind. 235, 18 N. E. 45.

New Jersey.— Vreeland *v.* Schoonmaker, 16 N. J. Eq. 512.

New York.— Matter of Beach, 1 Misc. 27, 22 N. Y. Suppl. 1079; Orcutt *v.* Orms, 3 Paige 459.

Pennsylvania.— Paul *v.* Kennedy, 1 Grant 399; McGee's Estate, 1 Phila. 443.

See 22 Cent. Dig. tit. "Executors and Administrators," § 638; and *infra*, XIII, P, 2, n.

Representative liable for whole of purchase-money.— An administrator who sells the estate of his intestate on credit, and without security, is to be charged with the whole purchase-money, and is precluded from showing that the price was too high. Hasbrouck *v.* Hasbrouck, 27 N. Y. 182 [*reversing* 37 Barb. 579].

Unauthorized approval of probate judge.— The administrator cannot shield himself by showing that the probate judge approved the security, in the absence of any law conferring such power on the probate judge. Sherrell *v.* Shepard, 19 Fla. 300.

Representative chargeable with interest.— Lindley *v.* State, 116 Ind. 235, 18 N. E. 45.

Delay in giving security.— The representative is not chargeable with the value of property sold by him and delivered to the purchaser before the latter has complied with the terms of sale as to security, if the purchaser afterward complies therewith. Dean *v.* Rathbone, 15 Ala. 328.

Sale as for cash through factors — Delivery before payment.— Where factors employed by an executor sold crops to a house of unsuspected credit, and did not require security because the sale was intended as a cash sale, and payment was demanded on the fourth day after the sale, and frequently thereafter, but the purchaser failed, it was held that the executor was not negligent in parting with the crop without security for the payment and hence was not chargeable with the loss. Taveau *v.* Ball, 1 McCord Eq. (S. C.) 456.

21. Sale under order of court see *infra*, XII, M, 4.

22. *Kentucky.*— Ely *v.* Com., 5 Dana 398; Miller *v.* Towles, 4 J. J. Marsh. 255.

Mississippi.— Baines *v.* McGee, 1 Sm. & M. 208.

New York.— Matter of Van Houten, 18 Misc. (N. Y.) 524, 42 N. Y. Suppl. 1115.

North Carolina.— Villines *v.* Norfleet, 17 N. C. 167; Carraway *v.* Burbank, 12 N. C. 306; Ryden *v.* Jones, 8 N. C. 497, 9 Am. Dec. 660; Britton *v.* Browne, 4 N. C. 332.

Pennsylvania.— Coppel's Estate, 4 Phila. 378.

Vermont.— Green *v.* Sargeant, 23 Vt. 466, 56 Am. Dec. 88; Mead *v.* Byington, 10 Vt. 116.

See 22 Cent. Dig. tit. "Executors and Administrators," § 640.

Indirect purchase within prohibition.— Matter of Bach, 12 N. Y. Suppl. 712, 2 Connoly Surr. (N. Y.) 490.

In South Carolina it is expressly provided by statute that an executor or administrator may purchase property of his decedent. Cunningham *v.* Cauthen, 37 S. C. 123, 15 S. E. 917; Finch *v.* Finch, 28 S. C. 164, 5 S. E. 348, 13 Am. St. Rep. 665. And it has been held that where an administrator purchased cotton at such a sale, and charged himself with the full market value, and then resold the cotton, taking a mortgage on land to secure the price, the distributees of the estate, on foreclosure of the mortgage and purchase of the land by the administrator, had no interest in such land, although the notes taken on the resale of the cotton were payable to the administrator in his representative capacity. Cunningham *v.* Cauthen, 37 S. C. 123, 15 S. E. 917.

Lien for price against property in the hands of subsequent purchaser.— Where an administrator becomes a purchaser at his own sale, even if the purchase be valid, the statutory lien for the price of the property still exists on the property in his hands and may be enforced against the property in the hands of his vendee, although he paid the price to the administrator, since payment to the estate is the only thing that can discharge the lien. Baines *v.* McGee, 1 Sm. & M. (Miss.) 208.

Purchase by executor who has not qualified.— A sale is not to be avoided merely because the purchaser has the power to become executor or trustee of the property purchased, as by proving the will which relates thereto, where in point of fact he never does become such. Such a purchaser is under no disability, and in order to avoid such sale it must be shown that he in fact used his power in such a way as to render it inequitable that the sale should be upheld. Clark *v.* Clark, 9 App. Cas. 733, 52 L. J. P. C. 99, 51 L. T. Rep. N. S. 750.

The representative may purchase from a purchaser, if the original transaction was in good faith and without collusion (*In re* Millenovich, 5 Nev. 161; Britton *v.* Lewis, 8 Rich. Eq. (S. C.) 271; Johnson *v.* Kay, 8 Humphr. (Tenn.) 142), but the court will look with great jealousy at such a transaction, particularly where the transfer of bids or title takes place very soon after the sale (Britton *v.* Lewis, 8 Rich. Eq. (S. C.) 271. See also *In re* Millenovich, 5 Nev. 161).

23. Tate *v.* Dalton, 41 N. C. 562; Grim's Appeal, 105 Pa. St. 375. See also Brannan *v.* Oliver, 2 Stew. (Ala.) 47, 19 Am. Dec. 39.

transaction was for the benefit of the estate, and satisfactory to those beneficially interested;[24] or the acquiescence of those beneficially interested or their failure to object within a reasonable time may amount to a ratification.[25] The representative who purchases the property of the estate becomes personally liable for the price,[26] and is chargeable with the amount as cash after the expiration of the term of credit.[27] It has been held that if the representative purchases at less than the appraised value he will be accountable for the difference,[28] and also that if he purchases and resells at a profit, such profit belongs to the estate.[29]

(II) *Relative of Representative.*[30] In England a sale by an executor or administrator to his son has been considered improper;[31] but in Pennsylvania it has been held that a public sale of the assets of an estate to the son of the executor was not invalid, where a proper notice was given, and the price obtained was the best price bid, and there was no pretense that the purchase in any way operated to the benefit of the executor.[32]

(III) *Surviving Partner of Decedent.*[33] A surviving partner who is disposing of the property of the partnership in the absence of an executor or administrator of the deceased partner cannot buy the partnership effects himself, for he cannot at the same time occupy the position of vendor and purchaser;[34] but the reason which would forbid a transaction of this character has no application to a case where a surviving partner purchases property from the executor or administrator of the deceased partner, and such a purchase is permissible.[35]

24. Raines *v.* Raines, 51 Ala. 237; Childress *v.* Childress, 3 Ala. 752; *In re* Millenovich, 5 Nev. 161; Anderson *v.* Fox, 2 Hen. & M. (Va.) 245; Whatton *v.* Toone, 5 Madd. 54.

Bona fide purchaser from representative.— Where an executor at his own sale bid fairly in order to enhance the price of the same, and the property was struck off to him, and he sold it, without collusion, to one who had bid against him, the purchaser acquired an absolute title. Cannon *v.* Jenkins, 16 N. C. 422.

25. Tate *v.* Dalton, 41 N. C. 562; Grim's Appeal, 105 Pa. St. 375; Todd *v.* Moore, 1 Leigh (Va.) 457.

26. Raines *v.* Raines, 51 Ala. 237; Mouton *v.* Beauchamp, 10 La. Ann. 666.

Liability for full price.— Where an administrator bought two slaves of the estate at his own sale in 1864, at twelve hundred dollars, he is liable therefor at such price, in the absence of proof that they were worth less in good currency. McDonald *v.* Jacobs, 85 Ala. 64, 4 So. 605.

Liability to creditors.— Where an executor makes purchases at a sale of the testator's goods, he is liable to creditors for the amount, unless he applies it to a debt of his own of as high dignity as that of the creditor who claims it. Young *v.* Wickliffe, 7 Dana (Ky.) 447.

Representative chargeable with interest.— Julian *v.* Wrightsman, 73 Mo. 569.

27. Childress *v.* Childress, 3 Ala. 752.

The obligation of an executor to account to a legatee springs out of the relation of the parties; and a purchase by the former at his own sale of chattels belonging to the estate of his testator does not convert the obligation into one arising from the contract of sale. Hence an executor who at the sale of the chattels constituting the personal estate of his testator purchased slaves belonging to such estate cannot in accounting to a legatee set up as a defense that his liability grew out of a contract the consideration of which was the purchase-money of slaves. Berry *v.* Hart, 1 S. C. 125.

28. Griswold *v.* Chandler, 5 N. H. 492.

In South Carolina it is provided by statute that if an executor or administrator purchases property of his decedent at an underprice he shall be liable to the parties interested for its actual value at the time of sale. Cunningham *v.* Cauthen, 37 S. C. 123, 15 S. E. 917; Finch *v.* Finch, 28 S. C. 164, 5 S. E. 348, 13 Am. St. Rep. 665.

29. Matter of Ver Valen, 24 N. Y. Suppl. 133, Pow. Surr. (N. Y.) 435; Coppels' Estate, 4 Phila (Pa.) 378. See also Johnson *v.* Kay, 8 Humphr. (Tenn.) 142.

A representative who subsequently acquires an interest in goods sold by him in good faith to a third person is not required to account for any profits. Johnson *v.* Kay, 8 Humphr. (Tenn.) 142.

In England an executor purchasing assets belonging to the estate with the assent of the persons then interested will not after a length of time be answerable for a profit which he has made, unless he purchased with a fraudulent intention. Whatton *v.* Toone, 5 Madd. 54.

30. Sale under order of court see *infra*, XII, M, 5.

31. John *v.* Jones, 34 L. T. Rep. N. S. 570.

32. Bowker's Estate, 5 Wkly. Notes Cas. (Pa.) 493.

33. As to rights of surviving partners generally see PARTNERSHIP.

34. Kimball *v.* Lincoln, 99 Ill. 578 [*affirming* 7 Ill. App. 470].

35. Kimball *v.* Lincoln, 99 Ill. 578 [*affirming* 7 Ill. App. 470]; Roys *v.* Vilas, 18

g. Conveyance and Transfer.[36] If a sale is made under a power created by a will, and is absolute, and possession is delivered by the executor, no bill of sale or other written evidence is necessary to transfer the title to the purchaser.[37] Where there is a written conveyance in which the executor neglects to recite his authority to convey, the conveyance will nevertheless be referred to such authority.[38]

h. Payment or Recovery of Price.[39] The giving of a note for property purchased at an administrator's sale is not a payment therefor.[40] Where the representative sells through an agent, partly for cash and partly on credit, and the vendees make a cash payment to the agent, he receives it to the use of the representative.[41] A payment in Confederate money during the Civil war might be effective,[42] and the representative is not chargeable with a loss resulting from his acceptance of such money in payment, where in so doing he acted in good faith and without negligence,[43] and where a sale was made with reference to Confederate money, and after the close of the war the executors settled with the purchaser at one-tenth of the price bid, such settlement being made in good faith and the amount realized being more than the value of the Confederate currency at the date of the purchase, the executors were accountable only for the amount actually received.[44] Fraudulent representations in the sale may be set up by a deceived purchaser, either by action as against the representative personally or by way of defense against his own note given for the purchase-money,[45] and in an action on such a note the purchaser may also show that the property for which the note was given was taken out of his possession and sold under judgments against the estate, and that the consideration of the note thus failed.[46] But the purchaser upon discovering any irregularity or defect which justifies him either in rescinding the sale or in claiming damages should act promptly and so far as possible on his part seek to place the representative and estate *in statu quo*.[47] A creditor of an intestate cannot resist payment of a note given to the administrator for goods of the estate by setting off his demands, either in law or equity, where the assets are exhausted by claims having precedence in law;[48] but the purchaser may by agreement with the representative discharge his note given for the purchase-money by applying the amount to the payment of the creditors of the

Wis. 169; Chambers *v.* Howell, 11 Beav. 6, 12 Jur. 905.

36. Sale under order of court see *infra*, XII, U.

37. Woods *v.* Burrough, 2 Head (Tenn.) 202.

38. Holladay *v.* Holladay, McMull. Eq. (S. C.) 279.

39. Sale under order of court see *infra*, XII, O.

40. Dedman *v.* Williams, 2 Ill. 154.

41. Heffernan *v.* Grymes, 2 Leigh (Va.) 512.

42. Wright *v.* Stott, 46 Ala. 200.

Liability under scaling act see Depriest *v.* Patterson, 92 N. C. 399.

43. Moffatt *v.* Loughridge, 51 Miss. 211; Williams *v.* Williams, 43 Miss. 430; Kerns *v.* Wallace, 64 N. C. 187; Finger *v.* Finger, 64 N. C. 183; Johnson *v.* Henagan, 11 S. C. 93; Kennedy *v.* Briere, 45 Tex. 305. But *compare* Bruce *v.* Strickland, 47 Ala. 192; White *v.* Gardner, 37 Tex. 407. See *supra*, VII, J, 2, c.

Improper receipt and retainer of Confederate money.— An administrator who during the Civil war was authorized by the probate court to sell property on credit, but sold for cash and instead of paying creditors, as he might have done, kept the Confederate money received in payment, which became valueless, is chargeable with the loss, although he acted in good faith and sold the property for a fair price. Williams *v.* Campbell, 46 Miss. 57.

44. Smith *v.* Prothro, 2 S. C. 371.

45. Williamson *v.* Walker, 24 Ga. 257, 71 Am. Dec. 119; Ray *v.* Virgin, 12 Ill. 216; George *v.* Bean, 30 Miss. 147. See also Phillips *v.* Keifer, 2 Metc. (Ky.) 478.

46. Buckels *v.* Cunningham, 6 Sm. & M. (Miss.) 358. See also Welch *v.* Hoyt, 24 Ill. 117.

Tax-sale.— One purchasing personal property of an administrator individually and permitting it to be sold without resistance for a tax due by the estate and repurchasing it is estopped to set up the eviction as a defense to the notes given to the administrator for the price. Johnson *v.* Dunbar, 26 La. Ann. 188.

47. Joslin *v.* Caughlin, 30 Miss. 502.

Where the sale is void in its inception the representative cannot coerce payment of the purchase-money, and the purchaser may set up the invalidity of the contract without placing the representative *in statu quo* by a return of the property. Fambro *v.* Gantt, 12 Ala. 298.

48. Willis *v.* Loan, 2 T. B. Mon. (Ky.) 141. See also Bales *v.* Hyman, 57 Miss. 330.

estate.[49] Where an administrator takes the note of a third person, indorsed by the purchaser at the sale, and also the bond of the purchaser, and agrees to collect the note and apply the proceeds to the payment of the bond, the administrator's neglect in collecting the note, and a loss thereby, cannot relieve the purchaser from the payment of his bond, or the property from the statutory mortgage thereon.[50] Where an executor sold tobacco, made on his testator's estate, and collected a part only of the money, the residue belonged to the devisees, who might pursue the debtors without recourse to the executor.[51]

i. Application of Proceeds.[52] The price of property sold, whether it be in cash or by the purchaser's note, and all other consideration or security realized, should be applied by the executor or administrator for the benefit of the estate in due course of law, and he will be held accountable accordingly;[53] but the purchaser is not bound to see to the application of the proceeds nor is he responsible for any misapplication thereof,[54] unless he had at the time of payment reasonable ground for believing that the executor intended to misapply the money or was in the very transaction applying it to his own private use, in which event he is responsible to the persons injured.[55]

j. Validity and Effect of Sale.[56] In the absence of any showing to the contrary it is presumed that an executor or administrator who has made a sale or transfer has exercised his power rightfully.[57] A sale of property by an agent appointed by a power of attorney made by an executor, but not authorized by will to be made, is illegal as against creditors.[58] A sale of property belonging to the estate by a person named as executor, but who did not qualify, is void as against an executor who did qualify;[59] but where under the existing law of a state an administrator has power to sell personalty, a sale by him is valid, although his letters are subsequently revoked upon the admission of a will to probate.[60] The fact that personalty belonging to an estate is traded by the executor for real estate without authority does not prevent the vendee getting title to the personalty which is delivered to him.[61] While a sale of personal property by an administrator without an order of court, where this is required, would be void as to distributees, if the distributees assent to it no one can complain, except per-

49. Pittman *v.* Pittman, 59 Miss. 203 [*distinguishing* Bales *v.* Hyman, 57 Miss. 330].

50. Steger *v.* Bush, Sm. & M. Ch. (Miss.) 172.

51. Cary *v.* Macon, 4 Call (Va.) 605.

52. **Sale under order of court** see *infra*, XII, V.

53. Morrison *v.* Page, 9 Dana (Ky.) 428; Montmollin *v.* Gaunt, 5 Dana (Ky.) 405; Godwin *v.* Godwin, 4 Leigh (Va.) 410.

Discharging mortgage on property sold.— The proceeds of cattle of decedent's estate, sold by his administrator, should be withdrawn from the general assets, and applied to discharging a mortgage thereon exceeding such proceeds. Baker *v.* Becker, 67 Kan. 831, 72 Pac. 860.

Sale of property of third person.— Where an administrator innocently sells another's property, believing that it belongs to his estate, the owner is entitled to the fund realized from the sale; and if its amount cannot be shown he may claim distribution *pro rata* on the value of the property with the other creditors. Kemp's Estate, 34 Pittsb. Leg. J. (Pa.) 82.

54. *Kentucky.*— Morrison *v.* Page, 9 Dana 428.

North Carolina.—Tyrrell *v.* Morris, 21 N. C. 559.

Tennessee.— Hadley *v.* Kendrick, 10 Lea 525.

Virginia.— Brockenbrough *v.* Turner, 78 Va. 438; Jones *v.* Clark, 25 Gratt. 642.

United States.— Lowry *v.* Commercial, etc., Bank, 15 Fed. Cas. No. 8,581, Brunn. Col. Cas. 331, Taney 310.

See 22 Cent. Dig. tit. "Executors and Administrators," § 643.

55. Lowry *v.* Commercial, etc., Bank, 15 Fed. Cas. No. 8,581, Brunn. Col. Cas. 331, Taney 310. See also Morrison *v.* Page, 9 Dana (Ky.) 428.

56. **Sale under order of court** see *infra*, XII, T.

57. Marshall County *v.* Hanna, 57 Iowa 372, 10 N. W. 745. See also Booyer *v.* Hodges, 45 Miss. 78.

58. Neal *v.* Patten, 47 Ga. 73.

59. Monroe *v.* James, 4 Munf. (Va.) 194. But see Legge *v.* Magwood, Harp. (S. C.) 116.

60. Phippard *v.* Forbes, 4 Harr. & M. (Md.) 481.

61. Edney *v.* Baum, (Nebr. 1903) 97 N. W. 252, holding further that the vendee, having obtained title to the goods, is liable in an action for damages by reason of fraud in the purchase if the executors elect to affirm the sale.

haps creditors whose debts are unpaid or an administrator *de bonis non* seeking the property as assets to pay debts.[62] Where an administrator acquires possession of property previously disposed of by him at a private sale, conducted in his individual capacity, he may not set up as against his vendees the invalidity of the sale made by himself.[63] Lapse of time accompanied with proof of possession under the sale will raise a presumption in favor of the regularity of the proceedings[64] and cure informalities,[65] but it cannot cure a total want of authority.[66]

k. Ratification of Unauthorized Sale. An unauthorized sale of personalty may be ratified by sanction of or confirmation by the probate court,[67] or through acquiescence of the beneficiaries,[68] or the right to attack the sale may be lost through laches;[69] but the representative cannot ratify a sale made by his own agent to the prejudice of creditors of the estate and others in interest.[70]

l. Title and Rights of Purchaser.[71] A purchaser at a sale by an executor or administrator having power to sell acquires a good title,[72] although the situation of the estate did not warrant or necessitate the sale,[73] or although the representative was committing a fraud or devastavit upon the estate,[74] unless he knew of the facts,[75]

62. Boeger *v.* Langenberg, 42 Mo. App. 7; Kelso *v.* Vance, 2 Baxt. (Tenn.) 334. See *infra*, XVIII.

63. Bragg *v.* Massie, 38 Ala. 89, 79 Am. Dec. 82.

64. Wyatt *v.* Scott, 33 Ala. 313.

65. Wyatt *v.* Scott, 33 Ala. 313; Roberts *v.* Brown, 14 La. Ann. 597.

66. Wyatt *v.* Scott, 33 Ala. 313; Robert *v.* Brown, 14 La. Ann. 597.

67. Hicks *v.* Stone, 9 Ohio Dec. (Reprint) 132, 11 Cinc. L. Bul. 67; Brewster *v.* Baxter, 2 Wash. Terr. 135, 3 Pac. 844. See also Holt *v.* Rust-Owen Lumber Co., (Nebr. 1901) 96 N. W. 613.

68. Cloud *v.* Hartridge, 28 Ga. 272.

69. Shelby *v.* Creighton, 65 Nebr. 485, 91 N. W. 369.

70. Neal *v.* Patten, 47 Ga. 73.

71. **Sale under order of court** see *infra*, XII, T, 3.

72. *Alabama.*— Nelson *v.* Stollenwerck, 60 Ala. 140. See also Moses *v.* Clark, 46 Ala. 229.

Connecticut.— Hough *v.* Bailey, 32 Conn. 288.

Iowa.— Marshall County *v.* Hanna, 57 Iowa 372, 10 N. W. 745.

Mississippi.— Miller *v.* Helm, 2 Sm. & M. 687.

Virginia.— Knight *v.* Yarborough, 4 Rand. 566.

See 22 Cent. Dig. tit. "Executors and Administrators," § 644.

After a sale by one co-administrator, and payment in full of the price, no fraud or collusion being charged, the administrators cannot maintain conversion. Kenyon *v.* Olney, 15 N. Y. Suppl. 416.

Previous contract of sale with another person by co-executor.— Where one of several executors contracted to sell slaves of the testator, and another of the executors sold and delivered the same slaves to another person, who had full knowledge of the previous sale, the first purchaser had only an equitable right, and the second sale vested the legal title, which in a court of law must prevail. Smith *v.* Mabry, 9 Yerg. (Tenn.) 313.

Previous sale by decedent without delivery of possession.— Where a bill of sale was executed by A to B, and A was permitted to remain in possession of the slaves and died in possession, a sale made to C by executors of A for valuable consideration and without notice was good against the first sale. Rocheblave *v.* Potter, 1 Mo. 561, 14 Am. Dec. 305.

Sale after levy of execution.— Where a sheriff, after levying upon the personal estate of a deceased debtor, allowed the administrators to sell the same, the execution creditor could not impeach the title of the purchaser, but must take his remedy against the sheriff. Massey *v.* Farmers' Bank, 1 Del. Ch. 399.

Valuables secreted in chattel.— The purchaser of a chattel does not obtain title to money and other valuables which had been secreted therein by the deceased and which none of the parties knew that it contained, but holds such money and valuables, on discovery thereof, as treasure trove for the personal representative of the deceased owner. Huthmacher *v.* Harris, 38 Pa. St. 491, 80 Am. Dec. 502.

73. Weyer *v.* Franklin Second Nat. Bank, 57 Ind. 198; Stamps *v.* Beaty, Hard. (Ky.) 337; Knight *v.* Yarborough, 4 Rand. (Va.) 566; Sale *v.* Roy, 2 Hen. & M. (Va.) 69; Langley *v.* Oxford, Ambl. 795.

Legatee's remedy is against executor. Sale *v.* Roy, 2 Hen. & M. (Va.) 69.

Purchaser not bound to inquire into representative's purpose in selling.— Miller *v.* Williamson, 5 Md. 219.

The purchaser cannot compel the executor to rescind a sale of property specifically bequeathed, whether or not the sale was necessary for the payment of debts. Sale *v.* Roy, 2 Hen. & M. (Va.) 69.

74. Van Hoose *v.* Bush, 54 Ala. 342; Jelke *v.* Goldsmith, 52 Ohio St. 499, 40 N. E. 167, 49 Am. St. Rep. 730; Schell *v.* Deperven, 198 Pa. St. 600, 48 Atl. 813, 82 Am. St. Rep. 820; Lipscomb *v.* Ward, 2 Tex. 277.

75. *Kentucky.*— Morrison *v.* Page, 9 Dana 428.

Maryland.— Williamson *v.* Morton, 2 Md. Ch. 94.

or is chargeable with constructive notice.[76] Neither does the fact that the representative misapplies the proceeds prevent a purchaser for value and in good faith from acquiring a good title.[77] The purchaser acquires no title, however, where the sale was made without authority or in an unauthorized manner,[78] or where the sale is tainted with fraud by reason of collusion between himself and the representative;[79] nor is even a purchaser for value protected where the conveyance by the representative was in payment of his private debt.[80] In all such

Mississippi.— Miller *v.* Helm, 2 Sm. & M. 687; Prosser *v.* Leatherman, 4 How. 237, 34 Am. Dec. 121.

North Carolina.—Wilson *v.* Doster, 42 N. C. 231; Bradshaw *v.* Simpson, 41 N. C. 243.

Pennsylvania.— See Schell *v.* Deperven, 198 Pa. St. 600, 48 Atl. 813, 82 Am. St. Rep. 820.

South Carolina.— See Rhame *v.* Lewis, 13 Rich. Eq. 269.

Virginia.— Jones *v.* Clark, 25 Gratt. 642; Pinckard *v.* Woods, 8 Gratt. 140; Sale *v.* Roy, 2 Hen. & M. 69.

Wisconsin.— Stronach *v.* Stronach, 20 Wis. 129.

United States.— Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185, 6 Call (Va.) 308.

England.— Walker *v.* Taylor, 8 Jur. N. S. 681, 4 L. T. Rep. N. S. 845; Ewer *v.* Corbet, 2 P. Wms. 148, 24 Eng. Reprint 676.

See 22 Cent. Dig. tit. "Executors and Administrators," § 644.

Actual collusion must be shown between the executor and the purchaser or creditor in order to defeat the title of the alienee of an executor in a court of law. Williamson *v.* Morton, 2 Md. Ch. 94.

If a balance is due the executor to the amount of a note transferred, it is not a fraud on his part to appropriate the note for the payment of his own debts. Ward *v.* Turner, 42 N. C. 73.

76. See Schell *v.* Deperven, 198 Pa. St. 600, 48 Atl. 813, 82 Am. St. Rep. 820.

Circumstances putting purchaser on inquiry.— The fact that an executor applies estate assets in payment of his own debt is of itself a circumstance of suspicion which ought to put a purchaser on inquiry as to the propriety of the transaction. Lang *v.* Metzger, 86 Ill. App. 117.

77. Leitch *v.* Wells, 49 N. Y. 585; Clark *v.* Coe, 52 Hun (N. Y.) 279, 5 N. Y. Suppl. 243.

78. Fambro *v.* Gantt, 12 Ala. 298 (private sale); Worthy *v.* Johnson, 10 Ga. 358, 54 Am. Dec. 393; Herron *v.* Marshall, 5 Humphr. (Tenn.) 443, 42 Am. Dec. 444.

Purchaser bound to see that representative is apparently proceeding according to law. Neal *v.* Patten, 40 Ga. 363.

Notice of contents of will.— A party dealing with an executor, as such, has notice of the existence of a will and its contents, the will being open to inspection upon the public records. Williamson *v.* Morton, 2 Md. Ch. 94.

Where representative entitled to part of property.— Where an administrator, in right of his wife, was entitled to one third of the property sold by him at private sale, the vendee acquired title to that extent. Cable *v.* Martin, 1 How. (Miss.) 558.

Sale of specific legacy.— A bequeathed a life-estate in a slave to his wife, B, with remainder over to his son C. The executor of A assented to the legacy and B had possession of the slave during her lifetime. An administrator *de bonis non* with the will annexed of A's estate, appointed after the final settlement of the executor, sold a child of the slave in question under authority from the probate court. It was held that the administrator of C was entitled to recover the slave so sold and that this right was not affected by the fact that the same persons would inherit the estates of A and C. Magee *v.* Gregg, 11 Sm. & M. (Miss.) 70.

Expense in keeping slaves.— One who purchases slaves from an executor who sells without authority is a wrong-doer, and is not entitled to compensation for the support and raising of the slaves, and for physicians' bills, taxes, etc., beyond the hire; but this relief is afforded him incidentally, by allowing him to recoup against the claim for hire. Gee *v.* Graves, 2 Head (Tenn.) 239.

Protection of subsequent bona fide purchaser.— Where an administrator sells railroad stock, the property of the estate which he represents, at private sale, and his vendee sells a *bona fide* purchaser without notice, the title of such purchaser will be protected as against the heirs of said estate. Stinson *v.* Thornton, 56 Ga. 377; Nutting *v.* Thomason, 46 Ga. 34. See, generally, SALES.

79. *Alabama.*— Waring *v.* Lewis, 53 Ala. 615.

Illinois.— Makepeace *v.* Moore, 10 Ill. 474.

Maryland.— Lark *v.* Linstead, 2 Md. Ch. 162.

Missouri.— Boeger *v.* Langenberg, 42 Mo. App. 7.

North Carolina.—Tyrrell *v.* Morris, 21 N. C. 559.

Tennessee.— Sneed *v.* Hooper, Cooke 200, 5 Am. Dec. 691.

Virginia.— Knight *v.* Yarborough, 4 Rand. 566.

See 22 Cent. Dig. tit. "Executors and Administrators," § 644.

80. Clark *v.* Coe, 52 Hun (N. Y.) 379, 5 N. Y. Suppl. 243.

Sale by executor who is also residuary legatee.— If an executor who is also residuary legatee sells or mortgages for his own purposes an asset of the testator, for valuable consideration, to a person who has no notice of unsatisfied debts of the testator, or of any grounds which render it improper for an executor so to deal with the asset, the purchase

cases the distributees may recover the property,[81] although the representative is estopped by his own act from recovering the property by an action at law in his own name.[82] The usual rule of *caveat emptor* applies to a purchase of personalty from an executor or administrator,[83] and there is no implied warranty;[84] but the representative may make a warranty and thus bind himself personally,[85] although he cannot bind the estate by a warranty.[86] A purchaser of choses in action, sold at an administrator's sale, who buys in good faith, takes them discharged of all equities which attach on them merely as assets;[87] but equity will follow the property into the hands of one who is not a purchaser for value,[88] or who, although he paid a valuable consideration, has been guilty of fraud and collusion with the representative to the injury of the estate.[89] A purchaser who has paid the purchase-money, which has been applied to the payment of debts and to exonerate other property, cannot be compelled to surrender the property because of an irregularity in the appointment of the administrator without the purchase-money being first refunded.[90] The estate of a decedent is not liable to a purchaser of property thereof on the ground that the executor induced the purchase by false representations.[91]

m. Setting Aside Sale.[92] An action to avoid a sale by an executor or administrator for his own debt may be brought by creditors, legatees, or distributees,[93]

or mortgage is valid against any unsatisfied creditor of the testator. Mead *v.* Orrery, 3 Atk. 235, 26 Eng. Reprint 937; Nugent *v.* Gifford, 1 Atk. 463, 26 Eng. Reprint 294; Storry *v.* Walsh, 18 Beav. 559; Graham *v.* Drummond, [1896] 1 Ch. 968, 65 L. J. Ch. 472, 74 L. T. Rep. N. S. 417, 44 Wkly. Rep. 596; Whale *v.* Booth, 4 T. R. 625 note, 2 Rev. Rep. 483 note. And this rule applies even though such purchaser or mortgagee has thereby acquired only an equitable interest in the asset, if perfected by giving any necessary notice to the legal owner; but it does not apply when the executor, or the court administering the estate, still retains sufficient control over the asset to apply it for the benefit of creditors. Graham *v.* Drummond, [1896] 1 Ch. 968, 65 L. J. Ch. 472, 74 L. T. Rep. N. S. 417, 44 Wkly. Rep. 596.

81. Herron *v.* Marshall, 5 Humphr. (Tenn.) 443, 42 Am. Dec. 444.

82. Fambro *v.* Gantt, 12 Ala. 298; Herron *v.* Marshall, 5 Humphr. (Tenn.) 443, 42 Am. Dec. 444.

83. *Mississippi.*— Ware *v.* Houghton, 41 Miss. 370, 93 Am. Dec. 258; Hutchins *v.* Brooks, 31 Miss. 430; George *v.* Bean, 30 Miss. 147.

Missouri.— Richardson *v.* Palmer, 36 Mo. App. 88.

New York.— Sherman *v.* Willett, 42 N. Y. 146.

North Carolina.— Andres *v.* Lee, 21 N. C. 318.

South Carolina.— See Eastland *v.* Longshorn, 1 Nott & M. 194.

Texas.— Doxey *v.* Burns, 37 Tex. 719.

See 22 Cent. Dig. tit. "Executors and Administrators," § 644.

84. Richardson *v.* Palmer, 36 Mo. App. 88.

No warranty of soundness.— George *v.* Bean, 30 Miss. 147. *Contra*, Duncan *v.* Bell, 2 Nott & M. (S. C.) 153, holding that there is an implied warranty where a full price is given, but that the estate alone is liable, and the representative is not personally liable unless for misrepresentation. See also Eastland *v.* Longshorn, 1 Nott & M. (S. C.) 194.

Circumstances negativing warranty of soundness see McLean *v.* Green, 2 McMull. (S. C.) 17.

No warranty of title.— Ware *v.* Houghton, 41 Miss. 370, 93 Am. Dec. 258; Ranney *v.* Meisenheimer, 61 Mo. App. 434.

85. Stoudenmeier *v.* Williamson, 29 Ala. 558; Huffman *v.* Hendry, 9 Ind. App. 324, 36 N. E. 727, 53 Am. St. Rep. 351; Sypert *v.* Sawyer, 7 Humphr. (Tenn.) 413.

86. Ramsey *v.* Blalock, 32 Ga. 376 (warranty of soundness); Hutchins *v.* Brooks, 31 Miss. 430; George *v.* Bean, 30 Miss. 147. And see Welch *v.* Hoyt, 24 Ill. 117.

87. Rhame *v.* Lewis, 13 Rich. Eq. (S. C.) 269.

88. Petrie *v.* Clark, 11 Serg. & R. (Pa.) 377, 14 Am. Dec. 636.

89. Barnawell *v.* Threadgill, 40 N. C. 86; Petrie *v.* Clark, 11 Serg. & R. (Pa.) 377, 14 Am. Dec. 636.

90. Ragland *v.* Green, 14 Sm. & M. (Miss.) 194.

91. Huffman *v.* Hendry, 9 Ind. App. 324, 36 N. E. 727, 53 Am. St. Rep. 351.

92. **Sale under order of court** see *infra*, XII, S.

93. Stronach *v.* Stronach, 20 Wis. 129. See also Anderson *v.* Fox, 2 Hen. & M. (Va.) 245.

Where there are no creditors or legatees, the distributees are the proper persons to bring action. Stronach *v.* Stronach, 20 Wis. 129.

When heirs cannot object.— Where succession property has been sold to pay for work done for its preservation, the sale being conducted under the direction of the executor and coöwners, and the proceeding has been recognized in the executor's final account, and the succession is insolvent, the judgment of homologation concludes the heirs, who cannot

but the personal representative cannot attack his own sale on the ground that it was made without authority.[94] If the widow of an intestate is surviving she as well as the heirs should be made a party to an action to avoid a sale.[95] Mere inadequacy of price does not invalidate a sale of personalty by an executor or administrator and is not in itself a sufficient ground for setting the sale aside,[96] but inadequacy of price coupled with other suspicious circumstances or irregularities in the sale may warrant setting the same aside.[97] It has been laid down that a sale regularly made at a public auction as required by law can be avoided only for fraud or collusion between the purchaser and the representative making the sale.[98] But on the other hand it has been held that the fact that the purchaser has chilled the bidding at a public sale may furnish ground for setting aside the sale,[99] and an unnecessary sale at which the representative becomes the purchaser may be set aside.[1]

n. Liability of Representative.[2] The usual rule requiring good faith, due diligence, and sound judgment applies in cases of sales by a personal representative.[3] Where the representative sells property of the estate he is chargeable with the price realized,[4] especially if the sale was made without author-

set the sale aside. Lesseps *v.* Lapène, 34 La. Ann. 112.

94. Bragg *v.* Massie, 38 Ala. 89, 79 Am. Dec. 82; Hopper *v.* Steele, 18 Ala. 828; Fambro *v.* Gantt, 12 Ala. 298. See also Pistole *v.* Street, 5 Port. (Ala.) 64.

95. Stronach *v.* Stronach, 20 Wis. 129.

96. Kimball *v.* Lincoln, 99 Ill. 578 [*affirming* 7 Ill. App. 470].

97. Gayle *v.* Singleton, 1 Stew. (Ala.) 566.

Circumstances not showing inadequacy see Geyer *v.* Snyder, 140 N. Y. 394, 35 N. E. 784 [*affirming* 69 Hun 115, 23 N. Y. Suppl. 200]; Matter of Bolton, 71 Hun (N. Y.) 32, 24 N. Y. Suppl. 799.

98. Weyer *v.* Franklin Second Nat. Bank, 57 Ind. 198.

99. Anderson *v.* Pedigo, 126 Ind. 564, 26 N. E. 397, holding that a widow who induces the creditors of her deceased husband to stay away from the executor's sale of the personalty by her representation that she will bid a designated sum for the property, and who bids it off for a smaller amount, and at much less than its actual value, acquires no valid title, and the sale will be set aside.

Statements by a brother of the purchaser, not authorized to act for her, that she would bid a designated sum for the property, are not binding on her, and will not affect her title, although in reliance on such statements some of the creditors absented themselves from the sale. Anderson *v.* Pedigo, 126 Ind. 564, 26 N. E. 397.

1. Anderson *v.* Fox, 2 Hen. & M. (Va.) 245. See also Rosser *v.* Depriest, 5 Gratt. (Va.) 6, 50 Am. Dec. 94.

An offer of indemnity is unnecessary where a bill in equity is filed to set aside a purchase by the representative at his own sale. Payne *v.* Turner, 36 Ala. 623.

2. **Sale under order of court** see *infra*, XII, W.

3. *New Jersey.*— Schweitzer *v.* Bonn, 55 N. J. Eq. 107, 31 Atl. 24; *In re* Green, 37 N. J. Eq. 254.

New York.— Matter of Thompson, 41 Misc. 420, 84 N. Y. Suppl. 1111; Matter of Fidelity Loan, etc., Co., 23 Misc. 211, 51 N. Y. Suppl. 1124.

North Carolina.— Tayloe *v.* Tayloe, 108 N. C. 69, 12 S. E. 836.

Pennsylvania.— Stewart's Appeal, 110 Pa. St. 410, 6 Atl. 321; Matter of McCann, 2 Pearson 486.

Virginia.— Lingle *v.* Cook, 32 Gratt. 262; Pickard *v.* Woods, 8 Gratt. 140.

See 22 Cent. Dig. tit. "Executors and Administrators," § 646½.

4. Irby *v.* Kitchell, 42 Ala. 438, holding that an administrator who finds property among the assets of the estate, takes possession of it as the property of the estate, and sells it, having no claim to it himself, and it not being claimed by any other person, is estopped from setting up a claim adverse to the estate, and is liable to the estate for the property thus sold.

If the representative sells for more than the appraised value, he is of course chargeable with the price actually realized. Radovich's Estate, 74 Cal. 536, 16 Pac. 321, 5 Am. St. Rep. 466 (with interest); Boaz *v.* Hammer, 27 Gratt. (Va.) 382.

Property not inventoried.— The representative is chargeable with the price received for property of the decedent sold by him, although it was not inventoried and he did not charge himself with the price. Shick *v.* Grote, 42 N. J. Eq. 352, 7 Atl. 852; *In re* Merchant, 39 N. J. Eq. 506 [*affirmed* in 41 N. J. Eq. 349, 7 Atl. 633].

Where sale set aside.— A representative who makes a sale is liable to his successor for the cash received by him, although the sale is set aside, where the possession of the purchaser is not interfered with, nor the sale actually disturbed, nor the cash paid or notes given by the purchaser returned, and the successor sues on and collects the notes. Musick *v.* Beebe, 17 Kan. 47.

Where title defective.— Where the representative receives money for property sold to which the title proves defective, he must be charged with the money unless he can show himself to be under a legal obligation to re-

ity,[5] in which case the failure of the security taken does not relieve him from liability.[6] Even though personal property may have been sold by the representative for less than its full value, he is not chargeable with more than the price actually realized where he has been guilty of no bad faith or negligence in the transaction;[7] but he is chargeable with the actual or appraised value where he sells for less without authority[8] or in an unauthorized manner;[9] where he is guilty of improperly making or conducting a sale at which less than the true or appraised value is realized,[10] or where he has failed to keep an account of the amount actually realized.[11] If the representative acting in good faith and without negligence takes security which is apparently good and sufficient when taken, he is not liable if it finally proves insufficient,[12] nor is he liable if otherwise a loss occurs not attributable to his fault or laches;[13] but he is liable for any loss due to his lack of diligence in collecting or realizing on the security.[14] Where a representative acting in good faith has sold at what is apparently a fair price, he is not chargeable with profits made by the purchaser on a new sale shortly afterward.[15] Where an executor sells property of the estate, together with property of his own, for a gross sum, a portion of which he receives, the amount received will be presumed to be on account of the property belonging to the estate.[16]

fund. Jennison *v.* Hapgood, 10 Pick. (Mass.) 77.

5. Smith *v.* Smith, 1 Desauss. (S. C.) 304 (where an executor who had sold without authority was decreed to account for the amount of the sale, except so much as was directed by the will to be borrowed to pay a legacy, saying that as to such amount it was immaterial whether the executor sold to pay the legacy or borrowed for that purpose, as it must have been paid, and as the estate was not sufficiently productive to do so out of the profits, recourse must ultimately have been had to a sale); Little *v.* Cook, 10 Lea (Tenn.) 715. See also Henning *v.* Conner, 2 Bibb (Ky.) 188.

6. Smith *v.* Smith, 1 Desauss. (S. C.) 304.

7. Clary *v.* Sanders, 43 Ala. 287; Bailey *v.* Penick, 10 Ky. L. Rep. 239; *In re* Bolton, 141 N. Y. 554, 35 N. E. 1079 [*affirming* 5 Misc. 475, 26 N. Y. Suppl. 333]; *In re* Semple, 189 Pa. St. 385, 42 Atl. 28. See Matter of New York L. Ins., etc., Co., 86 N. Y. App. Div. 247, 83 N. Y. Suppl. 883.

Chilling of sale by widow.— Where the personal property of an intestate is sold by the administrator, and the widow purchases many articles at the sale at a nominal price, on account of the bystanders forbearing to bid against her, the administrator cannot be charged with a devastavit if he conducted the sale fairly, after due public notice, and without connivance with the widow. Woody *v.* Smith, 65 N. C. 116.

8. Radovich's Estate, 74 Cal. 536, 16 Pac. 321, 5 Am. St. Rep. 466; Harris' Succession, 29 La. Ann. 743; Munteith *v.* Rahm, 14 Wis. 210.

Improvident sale.— Where an administrator sold at auction one eighth of a leasehold estate for one hundred and ten dollars, and it appeared from the consideration on the sale of another eighth conveyed by the intestate in his lifetime and thereafter sold, that its value was one thousand five hundred dollars, it was held that the sale by the administrator was improvidently made and he should be charged with the value of the one eighth of the leasehold estate with interest. Matter of Johnston, 74 Hun (N. Y.) 618, 26 N. Y. Suppl. 966.

9. Cannon *v.* Jenkins, 16 N. C. 422.

A statute imposing a penalty for selling otherwise than at public auction is not applicable to a case where an executor gave a part of a standing crop for hauling the remainder to the crib. McDaniel *v.* Johns, 53 N. C. 414.

10. Brackett *v.* Tillotson, 4 N. H. 208; Harvey *v.* Steptoe, 17 Gratt. (Va.) 289.

11. Hunt *v.* Smith, 58 N. J. Eq. 25, 43 Atl. 428.

12. Searcy *v.* Holmes, 45 Ala. 225; *In re* Johnston, 9 Watts & S. (Pa.) 107; Wilson's Appeal, 4 Pennyp. (Pa.) 432. See *supra*, VIII, P, 2, e.

13. *Alabama.*— Stewart *v.* Stewart, 31 Ala. 207.

Maryland.— Watkins *v.* Bevans, 6 Md. 489.

New Jersey.— Green *v.* Groocock, 35 N. J. Eq. 474.

South Carolina.—Bryan *v.* Mulligan, 2 Hill Eq. 361.

Vermont.— Mead *v.* Byington, 10 Vt. 116.

See 22 Cent. Dig. tit. "Executors and Administrators," § 646½; and *supra*, VIII, L, 1.

14. Beeman's Succession, 47 La. Ann. 1355, 17 So. 820; *In re* Johnston, 9 Watts & S. (Pa.) 107; Southall *v.* Taylor, 14 Gratt. (Va.) 269. See also Raines *v.* Raines, 51 Ala. 237.

15. Fisher's Appeal, 34 Pa. St. 29; Bewley's Estate, 12 Phila. (Pa.) 56.

Property taken by representative at appraised value.— Where an administratrix elects to take certain of the effects of the decedent at the appraised value and sells them for much more, she is accountable for the proceeds of the sale. Pilkington *v.* Gaunt, 5 Dana (Ky.) 410.

16. Rolain *v.* Darby, 1 McCord Eq. (S. C.) 472.

3. Pledge or Mortgage.[17] In the absence of any statutory or testamentary provision to the contrary, an executor or administrator has power to raise money on the security of the assets in his hands by pledge or mortgage in order to pay the debts or fulfil other purposes of administration.[18] The pledgee or mortgagee acquires good title as such where he acts in good faith;[19] but where he knew or might have known that the loan was not for any just purpose of administration he becomes a participant in the wrong and cannot hold the pledged or mortgaged property against the beneficiaries,[20] although his possession will generally hold good as against the representative.[21]

4. Acquisition by Representative — a. In General.[22] Money received or property acquired by the representative in his fiduciary capacity and in the exercise of his official duties becomes assets of the estate in his hands,[23] and the same is

17. Mortgage of realty see *supra*, VIII, O, 11.

18. *Connecticut.*— Blodgett *v.* American Nat. Bank, 49 Conn. 9; Goodwin *v.* American Nat. Bank, 48 Conn. 550.

Iowa.— Deery *v.* Hamilton, 41 Iowa 16.

Maine.— Carter *v.* Manufacturers' Nat. Bank, 71 Me. 448, 36 Am. Rep. 345.

North Carolina.— Tyrrell *v.* Morris, 21 N. C. 559.

England.— Vane *v.* Rigden, L. R. 5 Ch. 663, 39 L. J. Ch. 797, 18 Wkly. Rep. 1092; Farhall *v.* Farhall, L. R. 7 Ch. 123, 41 L. J. Ch. 146, 25 L. T. Rep. N. S. 685, 20 Wkly. Rep. 157; Russell *v.* Plaice, 18 Beav. 21, 18 Jur. 254, 23 L. J. Ch. 441, 2 Wkly. Rep. 243; Andrew *v.* Wrigley, 4 Bro. Ch. 125, 29 Eng. Reprint 812; McLeod *v.* Drummond, 17 Ves. Jr. 152, 11 Rev. Rep. 41, 34 Eng. Reprint 59 [*affirming* 14 Ves. Jr. 353, 33 Eng. Reprint 556].

See 22 Cent. Dig. tit. "Executors and Administrators," § 647.

But *compare* Jones *v.* Peebles, 133 Ala. 290. 32 So. 60,

The representative cannot pledge the credit of the estate generally, but only specific assets. Farhall *v.* Farhall, L. R. 7 Ch. 123, 41 L. J. Ch. 146, 25 L. T. Rep. N. S. 685, 20 Wkly. Rep. 157.

Power of sale.—An executor or administrator may not only pledge or mortgage the assets, but may also give to the mortgagee of leaseholds a power of sale and to give valid receipts for the purchase-money. Russell *v.* Plaice, 18 Beav. 21, 18 Jur. 254, 23 L. J. Ch. 441, 2 Wkly. Rep. 243.

19. Schell *v.* Deperven, 198 Pa. St. 600, 48 Atl. 813, 82 Am. St. Rep. 820; Schell *v.* Deperven, 198 Pa. St. 591, 48 Atl. 815.

Debt originally contracted on personal security of executor.— It is not enough to impeach a mortgage of part of the assets that it was made to secure a debt originally contracted on the personal security of the executor, and without reference to the assets. Miles *v.* Durnford, 2 De G. M. & G. 641, 21 L. J. Ch. 667, 51 Eng. Ch. 501, 42 Eng. Reprint 1022.

Property specifically bequeathed.—The fact that property fraudulently pledged by a coexecutor, without the knowledge of the pledgee, while the estate is in the course of administration, is specifically bequeathed to the executor as trustee does not impose a greater duty of making inquiry on the pledgee to prevent charging him with constructive notice of the fraud, and thus defeat his claim as a *bona fide* pledgee than if the property was a simple asset of the estate. Schell *v.* Deperven, 198 Pa. St. 600, 48 Atl. 813, 82 Am. St. Rep. 820.

20. Clagett *v.* Salmon, 5 Gill & J. (Md.) 314; Allender *v.* Riston, 2 Gill & J. (Md.) 86; Salmon *v.* Clagett, 3 Bland (Md.) 125; Leitch *v.* Wells, 48 N. Y. 585; Moore *v.* American L. & T. Co., 15 N. Y. Suppl. 382; Schell *v.* Deperven, 198 Pa. St. 591, 48 Atl. 815; Allegheny First Nat. Bank's Appeal, 19 Wkly. Notes Cas. (Pa.) 309; Ricketts *v.* Lewis, 20 Ch. D. 745, 51 L. J. Ch. 837, 46 L. T. Rep. N. S. 368, 30 Wkly. Rep. 609; Collinson *v.* Lister, 7 De G. M. & G. 634, 2 Jur. N. S. 75, 25 L. J. Ch. 38, 4 Wkly. Rep. 133, 56 Eng. Ch. 491, 44 Eng. Reprint 247. See also Downes *v.* Power, 2 Ball & B. 491; Hall *v.* Andrews, 27 L. T. Rep. N. S. 195, 20 Wkly. Rep. 799.

21. Salmon *v.* Clagett, 3 Bland (Md.) 125; Kenyon *v.* Olney, 15 N. Y. Suppl. 416. See also Lyman *v.* National Bank of Republic, 181 Mass. 437, 63 N. E. 923. But see State *v.* Berning, 74 Mo. 87.

22. Acquisition of realty see *supra*, VIII, O, 12, b.

23. Emerson *v.* Hewins, 64 Me. 297; Harper *v.* Archer, 28 Miss. 212. See also Burton *v.* Slaughter, 26 Gratt. (Va.) 914.

Proceeds of insurance policy.—Where a policy of insurance was issued in favor of a life-tenant and after her death the house was destroyed by fire and the amount of the policy was paid to her administrator, the money was held by him in trust for her estate and was a charge against him, whether or not the estate was entitled to the fund. Overstreet *v.* Reddick, 117 Ga. 331, 43 S. E. 723.

Assignment of mortgage.— An assignment taken by an administrator of a mortgage of his intestate is presumed to inure to the estate, and one claiming under it as inuring to the administrator individually must rebut the presumption, as by showing that administrator purchased with his own funds, or he must show himself ignorant of any of the circumstances raising the presumption. Clapp *v.* Beardsley, 1 Vt. 151.

Renewal of charter.— Where, upon the

true of securities taken for debts due the decedent or on a sale of the decedent's assets.[24] So also property purchased by the representative with the funds of his decedent is the property of the estate held by him in trust for the heirs and distributees.[25] Whatever may have been gained or saved by an executor or administrator to the estate by way of compromise or award, and whatever profit may have accrued to the representative acting as such, belongs rightfully to the estate and should be accounted for.[26] Where the representative recovers in his own name upon a contract made with him personally after the death of his decedent, respecting the estate, or receives money for the use of the estate, he is answerable as representative for the amount.[27]

b. Purchase of Interest of Heir or Legatee.[28] While an executor or administrator may, if the transaction is fair and the consideration adequate, purchase the interest of a legatee or distributee,[29] the relation of the parties makes such a dealing suspicious and imposes on the representative the burden of showing that

death of a person having a charter for a ferry, his wife, who was his administratrix, and had the care of the children, although not their legal guardian, obtained a renewal of the charter in her own name, she took the charter as trustee for the estate. Huson *v.* Wallace, 1 Rich. Eq. (S. C.) 1.

Extra allowance from debtor.— If an executor or administrator receives from a debtor an allowance over and above the amount of the demand, for extra trouble in the settlement and adjustment of it, he is not bound to account for it; and if he should exact and receive extra interest he could not be charged with it in his administration account. Gordon *v.* West, 8 N. H. 444.

Goods purchased to carry on decedent's business.— Where an executor, without authority to carry on a business of his testator, purchases goods for that purpose, the title to such goods vests in him individually. Eufaula Nat. Bank *v.* Manassas, 124 Ala. 379, 27 So. 258.

24. King *v.* Green, 2 Stew. (Ala.) 133, 19 Am. Dec. 46, holding that a bond payable to an administrator as such is assets in the hands of an administrator *de bonis non.*

The execution of a note to one as administrator is *prima facie* evidence that the consideration of the note was the assets of the estate of the intestate. Jones *v.* Everman, 15 B. Mon. (Ky.) 631, 63 Am. Dec. 521.

Note taken in individual name.— The court will follow a note of hand, as the property of an estate, if given for assets of the estate sold by the administrator, although taken in the private name of the administrator, and will enjoin proceedings to enforce execution on the part of the private creditors of the administrator. Glass *v.* Baxter, 4 Desauss. Eq. (S. C.) 153.

Transfer.— The representative's transfer without due consideration of a note or bond given him for a debt of the estate, even though expressed to himself individually, is a breach of trust. Krutz *v.* Stewart, 76 Ind. 9; Dalton *v.* Dalton, 51 Me. 170; Pulliam *v.* Winston, 5 Leigh (Va.) 324. See also Rhame *v.* Lewis, 13 Rich. Eq. (S. C.) 269.

Assumption of debt.— Where an administrator sells property of an intestate and takes notes therefor, it is competent for him to consider himself the debtor of the estate and hold the notes as his own. Rix *v.* Nevins, 26 Vt. 384. See also Smith *v.* Gregory, 75 Mo. 121.

25. Parker *v.* Portis, 14 Tex. 166, holding further that this is true whether or not the person acting as administrator is rightfully such. *Compare* Lyles *v.* Sims, Harp. (S. C.) 42.

26. *Louisiana.*— Longbottom *v.* Babcock, 9 La. 44.

Maryland.—Gephart *v.* Strong, 20 Md. 522.

New Jersey.— Vreeland *v.* Westervelt, 45 N. J. Eq. 572, 17 Atl. 695.

New York.— Paff *v.* Kinney, 1 Bradf. Surr. 1.

Pennsylvania.— Saeger *v.* Wilson, 4 Watts & S. 501; *In re* Heager, 15 Serg. & R. 65.

Wisconsin.— Gillett *v.* Gillett, 9 Wis. 194.

See 22 Cent. Dig. tit. "Executors and Administrators," § 650½.

27. Mowry *v.* Adams, 14 Mass. 327; Dawes *v.* Boyleston, 9 Mass. 337, 6 Am. Dec. 72.

28. As to realty see *supra,* VIII, O, 12, a, (II).

29. Crow *v.* Griffin, 6 La. Ann. 316; Ross *v.* Ross, 3 La. Ann. 533; Wilson *v.* Wilson, 17 N. C. 181; Lombard *v.* Carter, 36 Oreg. 266, 268, 59 Pac. 473.

Compromise of judgment of testator against executor.—An agreement between an executor and the beneficiaries under the will, whereby the beneficiaries agreed to assign to the executor the benefit of two judgments in favor of the testator against him upon debts in which he was surety, the executor agreeing to charge himself with one half of the judgments, has been upheld, it appearing that the agreement was entered into at the instance of the beneficiaries under the advice of their attorneys, that all defendants in the two judgments, the executor included, were insolvent, and that the beneficiaries were fully informed as to their interest in the claims. Downy *v.* Talbott, 4 Ky. L. Rep. 453.

A presumption that the representative purchased from the legatees may arise where he retains property which belonged to the estate, claiming it as his own, for a considerable time after the close of the administration. Cole *v.* Collett, Litt. Sel. Cas. (Ky.) 47.

no advantage has been taken by him,[30] and if the transaction is tainted with fraud or imposition it will not be allowed to stand.[31] In any event, however, where the personal representative purchases the interest of a particular heir or legatee, only the vendor can object to the transaction, and the other heirs or legatees have no right to object.[32]

c. Purchase of Decedent's Property at Judicial or Execution Sale.[33] A personal representative is at liberty to purchase the goods of his decedent at a judicial or execution sale,[34] unless he has in some way caused the sale to be made or is indirectly the vendor therein.[35]

IX. ALLOWANCE TO SURVIVING WIFE, HUSBAND, OR CHILDREN.

A. In General — 1. Nature and Purpose. What is commonly known as the "widow's allowance" is usually an absolute provision to which a widow is entitled in her own right and which she may dispose of as she sees proper.[36] It is usually intended for the present support only of herself, and minor children surviving the decedent until the estate is settled,[37] although the allowance itself does not depend upon whether such children exist or whether the decedent left a family with her.[38] It is given to her independent of her distributive share in her husband's estate.[39] It cannot be treated as a debt against the deceased husband's

30. State *v.* Jones, 131 Mo. 194, 33 S. W. 23; Wilson *v.* Wilson, 17 N. C. 181; *In re* Biel, L. R. 16 Eq. 577, 42 L. J. Ch. 556, 28 L. T. Rep. N. S. 835, 21 Wkly. Rep. 808.

31. Baxter *v.* Costin, 45 N. C. 262. See also Johnson *v.* Johnson, 5 Ala. 90.

32. Peyton *v.* Enos, 16 La. Ann. 135; Hale *v.* Aaron, 77 N. C. 371, holding that a purchase by an executor of a special legacy is not in fraud of the rights of the residuary legatees, and he can be held to no accountability to them for any profit he may make by such purchase.

33. Purchase of realty see *supra*, VIII, O, 12, a, (III).

34. Haddix *v.* Haddix, 5 Litt. (Ky.) 201; Earl *v.* Halsey, 14 N. J. Eq. 332; Blount *v.* Davis, 13 N. C. 19.

35. Boatwell *v.* Reynell, 3 N. C. 1.

36. Newman *v.* Winlock, 3 Bush (Ky.) 241; Miller *v.* Miller, 6 Ky. L. Rep. 738; Moore *v.* Moore, 48 Mich. 271, 12 N. W. 180; Mowser *v.* Mowser, 87 Mo. 437; Sawyer *v.* Sawyer, 28 Vt. 245.

This provision applies to cases of testacy as well as intestacy, and whether the estate is solvent or insolvent. Graves *v.* Graves, 10 B. Mon. (Ky.) 31; Turner *v.* Turner, 30 Miss. 428; McReary *v.* Robinson, 12 Sm. & M. (Miss.) 318. But see *In re* Harrison, 2 Ont. L. Rep. 217 [*following In re* Twigg, [1892] 1 Ch. 579, 61 L. J. Ch. 444, 66 L. T. Rep. N. S. 604, 40 Wkly. Rep. 297], holding that section 12 of the Devolution of Estates Act (Ont. Rev. St. (1897) c. 127), as to the widow's statutory claim for one thousand dollars, does not apply where there is a partial intestacy.

37. *California.*—Walkerley's Estate, 77 Cal. 642, 20 Pac. 150.

Connecticut.— Barnum *v.* Boughton, 55 Conn. 117, 10 Atl. 514.

Florida.— See Carter *v.* Carter, 20 Fla. 558, 51 Am. Rep. 618.

Iowa.— Zunkel *v.* Colson, 109 Iowa 695, 81 N. W. 175; Newaus *v.* Newaus, 79 Iowa 32, 44 N. W. 213.

Kentucky.— Newman *v.* Winlock, 3 Bush 241. See also Short *v.* Galway, 83 Ky. 501, 4 Am. St. Rep. 168.

Massachusetts.— Dale *v.* Hanover Nat. Bank, 155 Mass. 141, 29 N. E. 371; Paine *v.* Hollister, 139 Mass. 144, 29 N. E. 541; Drew *v.* Gordon, 13 Allen 120; Hollenbeck *v.* Pixley, 3 Gray 521; Adams *v.* Adams, 10 Metc. 170.

Michigan.— Moore *v.* Moore, 48 Mich. 271, 12 N. W. 180.

Missouri.— Mowser *v.* Mowser, 87 Mo. 437.

New Hampshire.—Foster *v.* Foster, 36 N. H. 437; Kingman *v.* Kingman, 31 N. H. 182; Mathes *v.* Bennett, 21 N. H. 188; Hubbard *v.* Wood, 15 N. H. 74.

North Carolina.—Little *v.* Bennett, 58 N. C. 156.

Pennsylvania.— Saunder's Estate, 12 Lanc. Bar 77.

Vermont.— Sawyer *v.* Sawyer, 28 Vt. 245.

See 22 Cent. Dig. tit. "Executors and Administrators," § 651.

A homestead subject to final partition and distribution is not assets in the hands of the administrator, but the use of it as a homestead is reserved to the family during the period of administration. O'Docherty *v.* McGloin, 25 Tex. 67.

38. Moore *v.* Moore, 48 Mich. 271, 12 N. W. 180; Mowser *v.* Mowser, 87 Mo. 437; Sawyer *v.* Sawyer, 28 Vt. 245.

39. Hays *v.* Buffington, 2 Ind. 369.

Discretion of court and condition at distribution.— In some states the allowance is so purely for present and immediate support that it may or may not be treated as part of the widow's share in her husband's estate, according to the court's discretion and the eventual condition at distribution. See Thompson *v.* Thompson, 51 Ala. 493; Strawn *v.* Strawn, 53 Ill. 263; Foster *v.* Foster, 36 N. H. 437.

estate,[40] nor be set off against a debt due by the widow to the estate;[41] but it may be denied her pending litigation.[42] If the decedent left no estate or assets sufficient for providing the statutory allowance, no obligation rests upon the executor or administrator to furnish it.[43]

2. NECESSITOUS CIRCUMSTANCES. Usually the allowances or exemptions granted by statute that take priority of debts due by the estate presuppose the surviving widow, children, or family to be in necessitous circumstances.[44]

3. WHAT LAW GOVERNS. The widow's allowance is to be determined by the law of the domicile of the deceased husband,[45] in force at his death.[46]

4. CONSTRUCTION OF STATUTES. Statutes providing for a widow's allowance are generally presumed to be prospective and not retrospective,[47] and should be beneficially construed.[48]

Certain assets are to be set aside as exempted for the widow, under some statutes. They are sometimes defined as the property exempt from execution. Such articles are not to be treated as assets, nor are they subject to distribution, nor can they be claimed from her by the representative of the estate.

Alabama.— Byrd *v.* Jones, 84 Ala. 336, 4 So. 375; Davis *v.* Davis, 63 Ala. 293.

California.— Walkerley's Estate, 77 Cal. 642, 20 Pac. 150.

Illinois.— Strawn *v.* Strawn, 53 Ill. 263.

Kentucky.— Ballard *v.* Ballard, 9 Ky. L. Rep. 574.

Missouri.— Hasenritter *v.* Hasenritter, 77 Mo. 162.

New York.— Kain *v.* Fisher, 6 N. Y. 597; Kapp *v.* Public Administrator, 2 Bradf. Surr. 258.

Pennsylvania.— Palethorp's Estate, 14 Pa. Co. Ct. 286; Kern *v.* Clark, 3 C. Pl. 112; Barr's Appeal, 3 Walk. 93.

See 22 Cent. Dig. tit. "Executors and Administrators," § 651.

Effect of testamentary provisions and election see *infra*, IX, I, 3.

40. Barnum *v.* Boughton, 55 Conn. 117, 10 Atl. 514; Short *v.* Galway, 83 Ky. 501, 4 Am. St. Rep. 168.

41. Leaverton *v.* Leaverton, 40 Tex. 218.

42. Cooke *v.* Barker, 1 Hopk. Ch. (N. Y.) 134.

43. Weckerly's Estate, 11 Wkly. Notes Cas. (Pa.) 287.

44. Chase *v.* Webster, 168 Mass. 228, 46 N. E. 705; Porter *v.* Porter, 165 Mass. 157, 42 N. E. 565; Dale *v.* Hanover Nat. Bank, 155 Mass. 141, 29 N. E. 371; Hollenbeck *v.* Pixley, 3 Gray (Mass.) 521; Foster *v.* Foster, 36 N. H. 437.

In Louisiana the code regards the two essential facts, that the deceased died rich, and that the surviving widow and children are in necessitous circumstances, in which case she can recover from the succession of her husband one thousand dollars. Comeau *v.* Miller, 46 La. Ann. 1324, 16 So. 172; Waddell's Succession, 44 La. Ann. 361, 10 So. 808; Tugwell's Succession, 43 La. Ann. 879, 9 So. 499; Wellmayer's Succession, 34 La. Ann. 819; De Boroblanc's Succession, 32 La. Ann. 17; Sabalot *v.* Populus, 31 La. Ann. 854; White's Succession, 29 La. Ann. 702; Claudel *v.* Palao, 28 La. Ann. 872; Newman's Succession, 27 La. Ann. 593; McCoy *v.* McCoy, 26 La. Ann. 686; Bouvet's Succession, 25 La. Ann. 431; Liles' Succession, 24 La. Ann. 490; Mangum *v.* Bacon, 24 La. Ann. 130; Cerise's Succession, 24 La. Ann. 96; Liddell's Succession, 22 La. Ann. 9; Leatt *v.* Williams, 22 La. Ann. 81; Harrell *v.* Harrell, 17 La. 374; Stewart *v.* Stewart, 13 La. Ann. 398; Yarborough's Succession, 13 La. Ann. 378 (widow without children); Hunter's Succession, 13 La. Ann. 257 (widow's claim privileged); Duchamp *v.* Butterly, 11 La. Ann. 67. If the amount of the entire property of the widow and children amounts to one thousand dollars nothing can be withdrawn from the estate for their support, although some of them have nothing. Elliott *v.* Elliott, 31 La. Ann. 31; Melancon's Succession, 25 La. Ann. 535; Stewart *v.* Stewart, 13 La. Ann. 398. But their pecuniary circumstances at any time subsequent to the decedent's death do not affect their rights. Marx's Succession, 27 La. Ann. 99. Where the mother claims the widow's homestead, and proves the necessitous circumstances of herself and the children, she is entitled to the usufruct, and the children to the amount. Fatjo's Succession, 52 La. Ann. 1561, 28 So. 135.

An allowance may be refused where no good reason is shown for granting it. Kersey *v.* Bailey, 52 Me. 198; Hollenbeck *v.* Pixley, 3 Gray (Mass.) 521.

45. Mitchell *v.* Word, 64 Ga. 208; Short *v.* Galway, 83 Ky. 501, 4 Am. St. Rep. 168; Gilman *v.* Gilman, 53 Me. 184; Richardson *v.* Lewis, 21 Mo. App. 531.

46. Taylor *v.* Pettus, 52 Ala. 287; Shumate *v.* McGarity, 83 Pa. St. 38.

47. Swayze *v.* Wade, 25 Kan. 551; Cook *v.* Sexton, 79 N. C. 305; Shumate *v.* McGarity, 83 Pa. St. 38.

48. Hamilton *v.* Matlock, 22 Ind. 47; Graves *v.* Graves, 10 B. Mon. (Ky.) 31; Van Norden *v.* Primm, 3 N. C. 149; Hill *v.* Hill, 42 Pa. St. 198; Bald's Appeal, 40 Pa. St. 328.

Cumulative grant.— A statute granting support to a widow out of the husband's estate is cumulative with a statute allowing a certain amount of a deceased insolvent's effects to the family. Bonds *v.* Allen, 25 Ga. 343.

The word "may" in a statute providing that the probate judge "may set apart" all personal property for the use of the family

B. Quarantine or Other Occupation or Use — 1. Widow's Right in General. A widow's quarantine is her right to enjoy the mansion-house together with its farm or plantation, rent free, for a fixed time after her husband's death[49] or until dower is assigned her.[50] Actual possession or affirmative assertion of such claim on her part is not essential, possession by her agent or tenant being sufficient;[51] nor is her right affected by the removal of the children.[52] The right of the widow is, however, effective only against those claiming under her deceased husband and not against those claiming under a title adverse to him.[53]

2. Nature of Right. As a general rule this right of quarantine is not an estate in land but is a mere personal privilege belonging to the widow[54] which

under certain circumstances is to be construed as "shall." *In re* Walley, 11 Nev. 260.

49. *Indiana.*— Hoover *v.* Agnew, 91 Ind. 370, one year.

Maine.— Young *v.* Estes, 59 Me. 441, ninety days.

New York.— Corey *v.* People, 45 Barb. 262; Jackson *v.* O'Donaghy, 7 Johns. 247, forty days.

Ohio.— Wanzer *v.* Smith, 2 Ohio Dec. (Reprint) 323, 2 West. L. Month. 426, one year unless dower assigned sooner.

Pennsylvania.— Kline's Estate, 1 Leg. Gaz. 428, for life.

South Carolina.— McCully *v.* Smith, 2 Bailey 103.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 655, 658.

The time was originally forty days, whence the term "quarantine" is derived. See Coke Litt. 34*b*.

Trespass or ejectment may be maintained against her if she stay beyond her time, although the dower has not been assigned her. Jackson *v.* O'Donaghy, 7 Johns. (N. Y.) 247; McCully *v.* Smith, 2 Bailey (S. C.) 103; Tool *v.* Pride, 1 Overt. (Tenn.) 234.

50. *Alabama.*— Callahan *v.* Nelson, 128 Ala. 671, 29 So. 555; Norton *v.* Norton, 94 Ala. 481, 10 So. 436; Clancy *v.* Stephens, 92 Ala. 577, 9 So. 522, 524; Renagh *v.* Turrentine, 60 Ala. 557; Perrine *v.* Perrine, 35 Ala. 644; Oakley *v.* Oakley, 30 Ala. 131; Pharis *v.* Leachman, 20 Ala. 662; Shelton *v.* Carrol, 16 Ala. 148.

Arkansas.— Reagan *v.* Hodges, 70 Ark. 563, 69 S. W. 581; Davenport *v.* Davenaux, 45 Ark. 341; Carnall *v.* Wilson, 21 Ark. 62, 76 Am. Dec. 351.

Florida.— Palmer *v.* Palmer, (1904) 35 So. 983.

Georgia.— Calhoun *v.* Calhoun, 58 Ga. 247; Rambo *v.* Bell, 3 Ga. 207.

Illinois.— Walker *v.* Doane, 108 Ill. 236; Attridge *v.* Billings, 57 Ill. 489; Trask *v.* Baxter, 48 Ill. 406.

Kentucky.—Morton *v.* Morton, 112 Ky. 706, 66 S. W. 641, 23 Ky. L. Rep. 2079; Driskell *v.* Hanks, 18 B. Mon. 855; White *v.* Clark, 7 T. B. Mon. 640; Roach *v.* Hubbard, Litt. Sel. Cas. 235.

Michigan.— *In re* Graff, 123 Mich. 456, 82 N. W. 248; Zoellner *v.* Zoellner, 53 Mich. 620, 19 N. W. 556.

Mississippi.— Wallis *v.* Doe, 2 Sm. & M. 220.

Missouri.— Casteel *v.* Potter, 176 Mo. 76, 75 S. W. 597; Quick *v.* Rufe, 164 Mo. 408, 64 S. W. 102; Westmeyer *v.* Gallenkamp, 154 Mo. 28, 55 S. W. 231, 77 Am. St. Rep. 747; Carey *v.* West, 139 Mo. 146, 40 S. W. 661; Fischer *v.* Siekmann, 125 Mo. 165, 28 S. W. 435; Gentry *v.* Gentry, 122 Mo. 202, 26 S. W. 1090; Roberts *v.* Nelson, 86 Mo. 21; Whaley *v.* Whaley, 50 Mo. 577; Orrick *v.* Pratt, 34 Mo. 226; Stokes *v.* McAllister, 2 Mo. 163, special provision for insolvent estate.

New Jersey.— Moffett *v.* Trent, (Ch. 1904) 56 Atl. 1035; De Roche *v.* Myers, 69 N. J. L. 14, 54 Atl. 558; Ackerman *v.* Shelp, 8 N. J. L. 125; Davis *v.* Lowden, 56 N. J. Eq. 126, 38 Atl. 648.

Virginia.— Devaughn *v.* Devaughn, 19 Gratt. 556.

See 22 Cent. Dig. tit. "Executors and Administrators," § 655.

A widow who has a statutory separate estate is not entitled to retain the possession of the dwelling-house as quarantine except to the extent that it may be necessary to make her separate estate equal to her dower interest. Billingslea *v.* Glen, 45 Ala. 540.

The California statute makes provision for a probate homestead and allows it to be set apart to the widow during the administration of the estate and until its final distribution. *In re* Leavy, 141 Cal. 646, 75 Pac. 301, 99 Am. St. Rep. 92.

If the widow is executrix or administratrix she should be reasonably prompt in proceeding for the allotment of dower, otherwise she may lose her right to quarantine. Benagh *v.* Turrentine, 60 Ala. 557.

51. *Alabama.*— Clancy *v.* Stephens, 92 Ala. 577, 9 So. 522, 524; Oakley *v.* Oakley, 30 Ala. 131.

Arkansas.— Davenport *v.* Devenaux, 45 Ark. 341.

Illinois.— Trask *v.* Baxter, 48 Ill. 406.

Kentucky.— White *v.* Clarke, 7 T. B. Mon. 640.

New Jersey.— Craige *v.* Morris, 25 N. J. Eq. 467.

Ohio.— Conger *v.* Atwood, 28 Ohio St. 134, 22 Am. Rep. 462.

See 22 Cent. Dig. tit. "Executors and Administrators," § 655.

52. Zoellner *v.* Zoellner, 53 Mich. 620, 19 N. W. 556.

53. Taylor *v.* McCrackin, 2 Blackf. (Ind.) 260.

54. Morton *v.* Morton, 112 Ky. 706, 66 S. W. 641, 23 Ky. L. Rep. 2079 (holding the right not subject to execution); Burk *v.* Os-

dies with her;[55] and which in general she cannot assign,[56] although in Missouri the rule is otherwise.[57] It may be forfeited by her removal from or abandonment of the premises,[58] and it has been held that a widow who occupies a portion of the decedent's premises with the family and rents the remainder is not entitled to the whole under the right of quarantine;[59] but the right is not lost by her remarriage[60] or insanity.[61] It is in addition to and independent of her allowance for support[62] and not in lieu of dower.[63]

3. Property Subject to Quarantine. In general the right extends only to houses and lands of which the widow is dowable,[64] and on which the decedent

born, 9 B. Mon. (Ky.) 579; Acor's Estate, 29 Leg. Int. (Pa.) 398; Roach *v.* Davidson, 3 Brev. (S. C.) 80 (holding that during the continuance of quarantine the widow is considered as continuing her husband's estate). But see Ackerman *v.* Shelp, 8 N. J. L. 125, holding that, under the New Jersey law, a widow before assignment of dower has a freehold estate for life in the land of her husband, unless sooner defeated by the heir.

The statute of limitations does not begin to run against a husband's heirs and in favor of the widow in possession under her right of quarantine until the assignment of dower. Westmeyer *v.* Gallenkamp, 154 Mo. 28, 55 S. W. 231, 77 Am. St. Rep. 747.

55. Clancy *v.* Stephens, 92 Ala. 577, 9 So. 522.

56. Norton *v.* Norton, 94 Ala. 481, 10 So. 436; Wallis *v.* Doe, 2 Sm. & M. (Miss.) 220.

57. In this state a widow's right to quarantine is a possessory right which may be assigned, the assignee taking all the incidents of the right belonging to her prior to the transfer, among which is a right to the use and possession of the land until dower has been assigned, or during her life if not assigned, and to defend an action of ejectment therefor. Phillips *v.* Presson, 172 Mo. 24, 72 S. W. 501; Graham *v.* Stafford, 171 Mo. 692, 72 S. W. 507 [*distinguishing* Quick *v.* Rufe, 164 Mo. 408, 64 S. W. 102]; Westmeyer *v.* Gallenkamp, 154 Mo. 28, 55 S. W. 231, 77 Am. St. Rep. 747; Carey *v.* West, 139 Mo. 146, 40 S. W. 661; Fischer *v.* Siekmann, 125 Mo. 165, 28 S. W. 435; Brown *v.* Moore, 74 Mo. 633; Jones *v.* Manly, 58 Mo. 559; Stokes *v.* McAllister, 2 Mo. 163. A deed from the widow conveys to the grantee the right to exclusive possession until dower is assigned as against adult children of the homesteader but not as against his minor children. Phillips *v.* Presson, 172 Mo. 24, 72 S. W. 501. If the assignee and his heirs have been in continuous possession since the assignment the statute of limitations does not begin to run in their favor or against the heirs of the deceased husband until assignment of dower or the death of the widow. Graham *v.* Stafford, 171 Mo. 692, 72 S. W. 507; Osborn *v.* Weldon, 146 Mo. 185, 47 S. W. 936; Carey *v.* West, 139 Mo. 146, 40 S. W. 661; Brown *v.* Moore, 74 Mo. 633.

58. Norton *v.* Norton, 94 Ala. 481, 10 So. 436; Burk *v.* Osborn, 9 B. Mon. (Ky.) 579.

59. Keeney *v.* Henning, 58 N. J. Eq. 74, 42 Atl. 807. See also Davis *v.* Lowden, 56 N. J. Eq. 126, 38 Atl. 648.

60. Westmeyer *v.* Gallenkamp, 154 Mo. 28, 55 S. W. 231, 77 Am. St. Rep. 747.

61. Clancy *v.* Stephens, 92 Ala. 577, 9 So. 522, 524.

62. Calhoun *v.* Calhoun, 58 Ga. 247.

63. Perrine *v.* Perrine, 35 Ala. 644.

64. *Alabama.*— Callahan *v.* Nelson, 128 Ala. 671, 29 So. 555; Melton *v.* Andrews, 76 Ala. 586; Slatter *v.* Meek, 35 Ala. 528; Inge *v.* Murphy, 14 Ala. 289.

Arkansas.— Reagan *v.* Hodges, 70 Ark. 563, 69 S. W. 581.

Georgia.— Hill *v.* Hill, 81 Ga. 516, 8 S. E. 879.

Kentucky.—Under the present law the right extends only to the mansion-house and curtilage, although under the former statute she had the use of the farm on which was the family residence. Morton *v.* Morton, 112 Ky. 706, 66 S. W. 641, 23 Ky. L. Rep. 2079. And see Stewart *v.* Stewart, 3 J. J. Marsh. 48.

Maine.— Young *v.* Estes, 59 Me. 441.

Missouri.— Casteel *v.* Potter, 176 Mo. 76, 75 S. W. 597; Gentry *v.* Gentry, 122 Mo. 202, 26 S. W. 1090.

See 22 Cent. Dig. tit. "Executors and Administrators," § 656.

A house erected after decedent's death is not within the statute. McClurg *v.* Turner, 74 Mo. 45.

The word "messuage" in a statute authorizing a widow to remain in possession of the mansion-house and messuage of her deceased husband includes only lands adjoining the house to the extent of a few acres. Grimes *v.* Wilson, 4 Blackf. (Ind.) 331. But see Orrick *v.* Pratt, 34 Mo. 226, where such term was held to include the plantation on which the mansion was situated.

A right of quarantine is not confined to contiguous lands, especially where the different parts have been used together and not as separate and independent holdings. Gentry *v.* Gentry, 122 Mo. 202, 26 S. W. 1090.

Mansion-house on land not owned in fee.— That the mansion-house is located on land in which the husband had only a life-estate does not affect the widow's right of quarantine in that part of the land owned by her husband in fee. Gentry *v.* Gentry, 122 Mo. 202, 26 S. W. 1090.

A probate homestead, as provided for by the California statute, extends to the dwelling-house in which the claimant resides and the land on which the same is situated, with no specified limitation of value if the estate is not insolvent. *In re* Levy, 141 Cal. 646, 75 Pac. 301, 99 Am. St. Rep. 92.

resided at the time of his death;[65] but it is not necessary that the widow should have resided in the mansion-house at the time of her husband's death.[66] It does not extend to mortgaged[67] or leased premises.[68]

4. Right to Rents and Profits. The terms "mansion" and "messuages" under the statutes entitling a widow to quarantine therein include the rents and profits thereof during the period of occupancy[69] unless, where her right continues until dower is assigned, she is at fault in delaying such assignment.[70] This right is not affected by the fact that her possession of the house and land is detrimental to the best interests of the estate.[71] If the rent of the dwelling-house and land which she is entitled to occupy has been received by the executor, administrator, or other person during the period allowed her, she may maintain an action at law against him for its recovery.[72]

5. Liabilities Incident to Occupancy. A widow in possession of quarantine property for a considerable period may be charged with her fair proportion of

That premises suitable for probate homestead purposes are indivisible and constitute in value nearly one half the estate does not impair the homestead right in the absence of a statutory limitation as to value. *In re* Levy, 141 Cal. 646, 75 Pac. 301, 99 Am. St. Rep. 92.

65. Callahan *v.* Nelson, 128 Ala. 671, 29 So. 555; Reeves *v.* Brooks, 80 Ala. 26; Melton *v.* Andrews, 76 Ala. 586; Clary *v.* Sanders, 43 Ala. 287; Waters *v.* Williams, 38 Ala. 680; McAllister *v.* McAllister, 37 Ala. 484; Oakley *v.* Oakley, 30 Ala. 131; Inge *v.* Murphy, 14 Ala. 289; Palmer *v.* Palmer, (Fla. 1904) 35 So. 983; King *v.* King, 155 Mo. 406, 56 S. W. 534.

A farm without buildings on it which adjoins and was used by the husband in connection with a farm belonging to the wife, upon which latter was a mansion-house occupied by them both until the husband's death, cannot be included in the widow's quarantine. McKaig *v.* McKaig, 50 N. J. Eq. 325, 25 Atl. 181.

66. King *v.* King, 155 Mo. 406, 56 S. W. 534, holding further that evidence of abandonment of the husband's mansion-house by the wife is not competent to show abandonment by the husband and thereby defeat her claim to quarantine.

67. Young *v.* Estes, 59 Me. 441.

68. Ogbourne *v.* Ogbourne, 60 Ala. 616; Pizzala *v.* Campbell, 46 Ala. 35; Tincher *v.* Phillips, 37 Mo. App. 621; Voelckner *v.* Hudson, 1 Sandf. (N. Y.) 215.

Where a portion of a building is rented as a store and the remainder occupied as a dwelling, the widow is not entitled to remain in possession of the rented portion. Davis *v.* Lowden, 56 N. J. Eq. 126, 38 Atl. 648.

69. *Alabama.*— Reeves *v.* Brooks, 80 Ala. 26; Inge *v.* Murphy, 14 Ala. 289. *Compare* Smith *v.* Smith, 13 Ala. 329.

Indiana.— Willetts *v.* Schuyler, 3 Ind. App. 118, 29 N. E. 273.

Kentucky.— By a recent statute the widow is entitled to one third of the rents and profits of all her husband's dowable real estate from his death until dower is assigned, without any deduction for taxes, insurance, or repairs (Morton *v.* Morton, 112 Ky. 706, 66 S. W. 641, 23 Ky. L. Rep. 2079); but under a former statute she was entitled to all the rents and profits of the farm on which was the family residence (Brewer *v.* Vanarsdale, 6 Dana 204; Graham *v.* Graham, 6 T. B. Mon. 561, 17 Am. Dec. 166).

Missouri.— Smith *v.* Stephens, 164 Mo. 415, 64 S. W. 260; Gentry *v.* Gentry, 122 Mo. 202, 26 S. W. 1090; Orrick *v.* Pratt, 34 Mo. 226.

New Jersey.— Flynn *v.* O'Malley, (Ch. 1895) 33 Atl. 402; Merchant *v.* Comback, 41 N. J. Eq. 349, 7 Atl. 633; Craige *v.* Morris, 25 N. J. Eq. 467.

Ohio.— Conger *v.* Atwood, 28 Ohio St. 134, 22 Am. Rep. 462.

See 22 Cent. Dig. tit. "Executors and Administrators," § 657.

A growing crop is included in the rents and profits. Blair *v.* Murthree, 81 Ala. 454, 2 So. 18; Engle *v.* Engle, 3 W. Va. 246. And see Jones *v.* Jones, 81 Ind. 292.

Where there is a mortgage on the premises the widow is entitled to rents until the mortgagee forecloses or takes possession. Boynton *v.* Sawyer, 35 Ala. 497.

If the widow collects rents as administratrix, and does not charge herself with them, it will be held that she takes the same under her quarantine right. Smith *v.* Stephens, 164 Mo. 415, 64 S. W. 260.

70. Benagh *v.* Turrentine, 60 Ala. 557.

71. Gentry *v.* Gentry, 122 Mo. 202, 26 S. W. 1090.

72. Reeves *v.* Brooks, 80 Ala. 26; Boynton *v.* Sawyer, 35 Ala. 497; Oakley *v.* Oakley, 30 Ala. 131; Inge *v.* Murphy, 14 Ala. 289; Orrick *v.* Pratt, 34 Mo. 226; Conger *v.* Atwood, 28 Ohio St. 134, 22 Am. Rep. 462.

Defenses.— It is no defense in a suit by the widow against the executor to recover the rent of the plantation between the time of the husband's death and the assignment of dower that he paid the debts of the estate from the income of the plantation, leaving the entire personalty to be divided, of which the widow received her share, but he is entitled to credit for the share so received by her. McAllister *v.* McAllister, 37 Ala. 484.

Action for assignment of dower may be maintained at same time with action for accounting. Gentry *v.* Gentry, 122 Mo. 202, 26 S. W. 1090.

the cost of incidental repairs upon the dwelling-house,[73] but not for the cost of permanent repairs.[74] Prior to the assignment of dower she is not chargeable with rent for her occupancy,[75] nor may an action for use and occupation be maintained against her.[76] Neither is she chargeable with interest on mortgages on the quarantine property.[77]

6. Enforcement or Defense of Right. The widow's right to the possession of the mansion-house, messuage, and plantation may be enforced by an action of ejectment,[78] but not by an action for forcible entry and detainer.[79] Until the period of her occupancy has expired she may successfully defend an action of ejectment against her.[80]

C. Maintenance and Support — 1. Liability of Estate in General. Under various statutes the property of a deceased husband and father may be used or expended, pending administration, for the necessary maintenance of his widow and young children, for a limited period, and to a reasonable amount, regardless of the solvency of the estate,[81] and even though the widow may have an income

73. Benagh *v.* Turrentine, 60 Ala. 557.

74. Nelson *v.* Barnett, 123 Mo. 564, 27 S. W. 520.

75. Slatter *v.* Meek, 35 Ala. 528 (so holding, although she was not dowable of the house for want of title in her husband); *In re* Graff, 123 Mich. 456, 82 N. W. 248; Moffett *v.* Trent, (N. J. Ch. 1904) 56 Atl. 1035. See also Clairteaux's Succession, 35 La. Ann. 1178. And see *supra*, IX, B, 1.

76. *In re* Graff, 123 Mich. 456, 82 N. W. 248.

77. Gentry *v.* Gentry, 122 Mo. 202, 26 S. W. 1090; Cronley *v.* Cronley, 40 N. J. Eq. 30.

78. Clancy *v.* Stephens, 92 Ala. 577, 9 So. 522, 524 (against a purchaser in possession); Phillips *v.* Presson, 172 Mo. 24, 72 S. W. 501; King *v.* King, 155 Mo. 406, 56 S. W. 534; Roberts *v.* Nelson, 86 Mo. 21; Miller *v.* Talley, 48 Mo. 503; Stokes *v.* McAllister, 2 Mo. 163.

The widow's neglect to apply for the assignment of dower is not a good defense against her assertion of her right of quarantine. Callahan *v.* Nelson, 128 Ala. 671, 29 So. 555.

79. Aiken *v.* Aiken, 12 Oreg. 203, 6 Pac. 682.

80. Shelton *v.* Carrol, 16 Ala. 148; Carnall *v.* Wilson, 21 Ark. 62, 76 Am. Dec. 351; Phillips *v.* Presson, 172 Mo. 24, 76 S. W. 501; Graham *v.* Stafford, 171 Mo. 692, 72 S. W. 507; Fischer *v.* Siekmann, 125 Mo. 165, 28 S. W. 435; Jones *v.* Manly, 58 Mo. 559; Kane *v.* McCown, 55 Mo. 181; Stokes *v.* McAllister, 2 Mo. 163; Den *v.* Bilderback, 16 N. J. L. 497; Den *v.* Dodd, 6 N. J. L. 367.

81. *Alabama.*— Hinson *v.* Williamson, 74 Ala. 180; Pickens *v.* Pickens, 35 Ala. 442; Pinckard *v.* Pinckard, 24 Ala. 250.

California.— *In re* Lux, 100 Cal. 593, 35 Pac. 341.

Georgia.— Cole *v.* Elfe, 23 Ga. 235; Hopkins *v.* Long, 9 Ga. 261.

Kentucky.— Bronaugh *v.* Bronaugh, 6 Dana 124.

Louisiana.—Fatjo's Succession, 52 La. Ann. 1561, 28 So. 135; Broadway's Succession, 3 La. Ann. 591.

Massachusetts.— Fellows *v.* Smith, 130 Mass. 376, forty days.

Michigan.—Marskey *v.* Lawrence, 121 Mich. 577, 80 N. W. 571.

Mississippi.—Nelson *v.* Smith, 12 Sm. & M. 662; McNulty *v.* Lewis, 8 Sm. & M. 520.

New York.— *In re* Hitchler, 21 Misc. 417, 47 N. Y. Suppl. 1069, holding that the total advance to a widow for her support during a contest of her husband's will should be deducted from her share as next of kin, if the will is broken, or from her interest under the will, if it be sustained.

Oregon.— *In re* Dekum, 28 Oreg. 97, 41 Pac. 159, holding that if the property of the decedent exempt from execution is insufficient to support her for a year, a monthly allowance may be ordered to the widow.

Pennsylvania.— Pettit's Appeal, 39 Pa. St. 324.

Wisconsin.— Henry's Estate, 65 Wis. 551, 27 N. W. 351.

See 22 Cent. Dig. tit. "Executors and Administrators," § 661.

But *compare* Scott *v.* Dorsey, 1 Harr. & J. (Md.) 227.

Expenses of sickness in family.— Expenses preliminary and incidental to the confinement of an insane adult daughter may be paid by the widow out of the deceased husband's estate. Matter of Morris, 11 N. Y. Suppl. 201, 2 Connoly Surr. (N. Y.) 372.

An allowance in lieu of provisions to which a widow is entitled under the statute out of her husband's estate is an appropriation to cover only a deficiency in grain, meat, vegetables, groceries, and other provisions, and should not include compensation for the lack of any other articles allowed her as her absolute property. See *v.* See, 66 Mo. App. 566.

Where an estate is kept together under an order of the probate court, according to the Alabama statute, the administrator has no authority to keep up the family establishment and to support the family at the expense of the estate, but the reasonable expenses of the several members of the family should be charged against each separately. Hinson *v.* Williamson, 74 Ala. 180; Pickens *v.* Pickens, 35 Ala. 442.

That the widow is a legatee under the will of her husband does not as a matter of law prevent her from obtaining such an allow-

of her own, or be financially able to support herself without any aid from her deceased husband's estate.[82]

2. Estate of Mother. Unless provided by will[83] the minor children of a deceased mother are not as a general rule entitled to maintenance and support out of her estate;[84] although in some states this is allowed where she survived the father.[85]

3. Period of Allowance. A year's support is usually the extreme statutory limit,[86] and in some states the period specified is considerably less.[87] Under a statute providing that certain specified articles shall remain in the possession of the widow during the time she lives with and provides for such minor child or children as there may be, the widow has been held entitled to such articles so long as she is able and willing to keep up the family circle and provide for minor children, although the minor children leave her without her fault.[88]

4. Maintenance Prior to Allowance. If the representative makes any advance to the widow or children before a decree of allowance, he does so at his own risk, as an advance upon such allowance as may be afterward made by the probate court,[89] but the courts generally pursue a liberal course both in permitting expenditures in advance of judicial allowance and in allowing a reasonable credit therefor to the executor or administrator in his probate accounts.[90] Where a widow

ance as a court of probate, in view of such legacy and all the circumstances, judges to be necessary. Havens' Appeal, 69 Conn. 684, 38 Atl. 795.

82. *In re* Lux, 100 Cal. 593, 35 Pac. 341, 114 Cal. 73, 45 Pac. 1023; Busby *v.* Busby, 120 Iowa 536, 95 N. W. 191.

83. Freeman *v.* Coit, 27 Hun (N. Y.) 447.

84. Phelps *v.* Daniel, 86 Ga. 363, 12 S. E. 584 (holding that a year's support for a minor child of a married woman cannot be assigned out of her estate, upon her death intestate, leaving her husband, the father of the child, surviving); Geisler's Succession, 32 La. Ann. 1289 [*overruling* Coleman's Succession, 27 La. Ann. 289]; King's Appeal, 84 Pa. St. 345. But see *In re* Murphy, 30 Wash. 9, 70 Pac. 109.

Under the Alabama statute (Acts (1894–1895), p. 1162, Code, § 2707), minor children are entitled to exemptions out of the mother's estate notwithstanding she dies leaving her husband surviving her. Quinn *v.* Campbell, 126 Ala. 280, 28 So. 676. But see Davenport *v.* Brooks, 92 Ala. 627, 9 So. 153.

85. Brown *v.* Hemphill, 74 Ga. 795; Lesher *v.* Wirth, 14 Ill. 39; Baer *v.* Pfaff, 44 Mo. App. 35; Lewis *v.* Castello, 17 Mo. App. 593; Hime's Appeal, 94 Pa. St. 381 [*distinguishing* King's Appeal, 84 Pa. St. 345].

Where a widow acquires land by devise from her husband she takes it subject to the lien of his outstanding debts, and upon her death a minor child is not entitled to three hundred dollars' exemption out of such land as the property of his mother to the exclusion of the creditors of his deceased father. Wanger's Appeal, 105 Pa. St. 346 [*distinguishing* Hime's Appeal, 94 Pa. St. 381; King's Appeal, 84 Pa. St. 345].

Under the Ohio statute children under fifteen years of age are entitled to have set off and allowed to them out of the estate of their deceased mother sufficient property or money to support them for twelve months in like manner as they were entitled to such support out of the estate of their deceased father. *In re* Hinton, 64 Ohio St. 485, 60 N. E. 621; *In re* Glenn, 23 Ohio Cir. Ct. 397. But see Hance *v.* Chappell, 20 Ohio Cir. Ct. 214, 11 Ohio Cir. Dec. 139.

86. *California.*—Walkerley's Estate, 77 Cal. 642, 20 Pac. 150; *In re* Montgomery, 60 Cal. 648.

Georgia.— Smith *v.* Foster, 119 Ga. 376, 46 S. E. 425; Miller *v.* Ennis, 107 Ga. 663, 34 S. E. 302; Hill *v.* Lewis, 91 Ga. 796, 18 S. E. 63; Phelps *v.* Daniel, 86 Ga. 363, 12 S. E. 584; Wells *v.* Wilder, 36 Ga. 194; Blassingame *v.* Rose, 34 Ga. 418; Cole *v.* Elfe, 23 Ga. 235.

Illinois.— Strawn *v.* Strawn, 53 Ill. 263.

Iowa.— Busby *v.* Busby, 120 Iowa 536, 95 N. W. 191.

Michigan.—Marskey *v.* Lawrence, 121 Mich. 577, 80 N. W. 571.

Mississippi.— Turner *v.* Turner, 30 Miss. 428; Nelson *v.* Smith, 12 Sm. & M. 662; McReary *v.* Robinson, 12 Sm. & M. 318; McNulty *v.* Lewis, 8 Sm. & M. 520.

Missouri.— *In re* Austin, 73 Mo. App. 61.

Ohio.— Bause *v.* Muhme, 13 Ohio Cir. Ct. 501, 7 Ohio Cir. Dec. 224; *In re* Diller, 6 Ohio S. & C. Pl. Dec. 182.

Texas.— Woolley *v.* Sullivan, 92 Tex. 28, 45 S. W. 377, 46 S. W. 629; Crocker *v.* Crocker, 19 Tex. Civ. App. 296, 46 S. W. 870, holding that where a widow and minor children have used sufficient personal property to live upon for one year they are properly refused an allowance under the statutes for another year.

See 22 Cent. Dig. tit. "Executors and Administrators, § 663.

87. Fellows *v.* Smith, 130 Mass. 376; Duncan *v.* Eaton, 17 N. H. 441.

88. Scofield *v.* Scofield, 6 Hill (N. Y.) 642.

89. Washburn *v.* Hale, 10 Pick. (Mass.) 429.

90. *California.*— *In re* Fernandez, 119 Cal. 579, 51 Pac. 851.

applies for an assignment of the year's support, she must be charged with the value of what she has previously consumed.[91]

5. Education and Support of Children. Strictly speaking an executor or administrator should not make expenditures for the education and maintenance of the decedent's infant children and will not be allowed the same in his administration accounts;[92] but such expenditures have frequently been allowed where they were reasonable, made in good faith, and suitable to the condition and circumstances of the children, and the decedent's estate was sufficient,[93] and where there was no appointed guardian,[94] or where the right to make them was vested in the executor or administrator by the will of the decedent.[95]

6. Maintenance During Quarantine. The widow of a decedent, while fully conforming to the statutory requirements, is entitled to her reasonable support out of the estate, whether it be solvent or insolvent, during her quarantine.[96]

Georgia.— Simmons *v.* Byrd, 49 Ga. 285.

New York.— Shepard *v.* Stebbins, 48 Hun 247; Matter of Hitchler, 21 Misc. 417, 47 N. Y. Suppl. 1069.

Pennsylvania.—Norton's Estate, 4 Pa. Dist. 198.

Vermont.— Huntley *v.* Denny, 65 Vt. 185, 26 Atl. 486; Sawyer *v.* Sawyer, 28 Vt. 245.

See 22 Cent. Dig. tit. "Executors and Administrators," § 664.

91. Wells *v.* Wilder, 36 Ga. 194.

92. *Alabama.*— Wright *v.* Wright, 64 Ala. 88.

Arkansas.— Martin *v.* Campbell, 35 Ark. 137; Harris *v.* Foster, 6 Ark. 388.

Louisiana.— Broderick's Succession, 12 La. Ann. 521.

Massachusetts.— Brewster *v.* Brewster, 8 Mass. 131.

Mississippi.— Price *v.* Mitchell, 10 Sm. & M. 179; Washburn *v.* Phillips, 5 Sm. & M. 600.

Missouri.— Clark *v.* Bettelheim, 144 Mo 258, 46 S. W. 135, where the estate is insolvent.

New Jersey.— Stiles *v.* Stiles, 2 N. J. L. 348.

New York.— Johnson *v.* Corbett, 11 Paige 265; Black's Estate, Tuck. Surr. 145.

North Carolina.— Latta *v.* Russ, 53 N. C. 111.

Texas.— Mitchell *v.* Harrison, 32 Tex. 331.

Vermont.— Mead *v.* Byington, 10 Vt. 116, children older than seven.

United States.— Patterson *v.* Phillips, 18 Fed. Cas. No. 10,829*a*, Hempst. 69.

See 22 Cent. Dig. tit. "Executors and Administrators," § 665.

93. *Alabama.*— Wright *v.* Wright, 64 Ala. 88.

Arkansas.— Martin *v.* Campbell, 35 Ark. 137.

California.— Moore *v.* Moore, 60 Cal. 526, sums paid for education of children by administrator out of amount allowed by probate court for widow and children, the widow consenting.

Georgia.— Cheney *v.* Cheney, 73 Ga. 66.

Missouri.— McPike *v.* McPike, 111 Mo. 216, 20 S. W. 12.

New York.— Clark *v.* Clark, 8 Paige 152, 35 Am. Dec. 676.

South Carolina.— Darby *v.* Darby, 2 McCord Eq. 451, before notice of insolvency.

Tennessee.— Faver *v.* Parker, 101 Tenn. 141, 46 S. W. 453.

See 22 Cent. Dig. tit. "Executors and Administrators," § 665.

It is no ground for disallowing an administrator's claim for the support of the intestate's infant children that a separate account was not kept of the expenditures for each child, where it appears that the children were given a common home and the necessaries for all supplied from the common fund. Shepard *v.* Stebbins, 48 Hun (N. Y.) 247.

A surviving widow is entitled to such allowance for the maintenance and education of minor children, according to their fortune left them by their father. Wilkes *v.* Rogers, 6 Johns. (N. Y.) 566.

94. Glover *v.* Hill, 85 Ala. 41, 4 So. 613; Munden *v.* Bailey, 70 Ala. 63; Perry *v.* Field, 40 Ark. 175; Johnston *v.* Maples, 49 Ill. 101; Browne *v.* Bedford, 4 Dem. Surr. (N. Y.) 304.

95. *In re* Van Houten, 3 N. J. Eq. 220, 29 Am. Dec. 707.

An executor may be compelled by the court to use the principal for the support of the testator's child where he is given such discretion by the decedent's will, and his refusal to do so is not honest and in good faith. Matter of Berry, 5 Dem. Surr. (N. Y.) 458.

Compelling beneficiaries to work.— It is not within the discretion of an executor under a will vesting in him discretion as to the application of an income to maintain the beneficiaries thereunder, to oblige such beneficiaries to labor for a living in order that a fund may accumulate for their future benefit, if the income is adequate for their support. Levy's Estate, 2 Phila. (Pa.) 138.

96. Lowery *v.* Rowland, 104 Ala. 420, 16 So. 88; Matter of Wachter, 16 Misc. (N. Y.) 137, 38 N. Y. Suppl. 941 (although an inventory of the estate has been made, and the statutory portion of the assets set off for the widow); Johnson *v.* Corbett, 11 Paige (N. Y.) 265.

Absence from home.— Where at the time of the husband's death the widow is away from home attending him, and does not return immediately afterward, she will not be entitled

D. Amount or Value — 1. In General. The amount of the allowance is usually left to the discretion of the court,[97] subject, however, in some jurisdictions to statutory provisions that it shall not exceed a designated sum.[98] The widow is entitled to interest, after appraisal, on an amount allotted but not turned over to her,[99] but not to rents and profits pending an appeal from the allotment.[1]

2. Dependent Upon Condition and Social Station. A reasonable amount, as allowed under some statutes, depends upon the social station and wants of the widow and children, and the degree and estate of the husband at the time of his death;[2] due regard being had to the value of the widow's expected dower or distributive interests,[3] and private estate, not received from her husband.[4] In fixing the amount due regard should also be had to the condition of the estate.[5]

3. Effect of Dower and Other Interests. In general the widow's or child's allowance is intended as a provision independent of any dower or other distribu-

to charge the estate for her support during the forty days succeeding his decease. Fisk *v.* Cushman, 6 Cush. (Mass.) 20, 52 Am. Dec. 761.

97. *California.*— *In re* Lufkin, 131 Cal. 291, 63 Pac. 469.

Illinois.— Gillett *v.* Gillett, 207 Ill. 136, 69 N. E. 942 [*affirming* 109 Ill. App. 126].

Maine.— Kersey *v.* Bailey, 52 Me. 198.

Massachusetts.— Chase *v.* Webster, 168 Mass. 228, 46 N. E. 705.

Michigan.— Maney *v.* Casserly, (1903) 96 N. W. 478.

Vermont.— Sawyer *v.* Sawyer, 28 Vt. 249.

See 22 Cent. Dig. tit. "Executors and Administrators," § 667.

98. Wilson *v.* Massie, 70 Ark. 25, 65 S. W. 942 (three hundred dollars); Hampton *v.* Physick, 24 Ark. 561; Smith *v.* Smith, 115 Ga. 692, 42 S. E. 72; Donaldson *v.* Anderson, 104 Ga. 673, 30 S. E. 883; Stewart *v.* Stewart, 74 Ga. 355; Hays *v.* Buffington, 2 Ind. 369; Daggett *v.* Daggett, 14 N. Y. Suppl. 182 [*affirming* 9 N. Y. Suppl. 652, 2 Connoly Surr. 230]; *In re* Koch, 9 N. Y. Suppl. 814, 24 Abb. N. Cas. (N. Y.) 468; Kelly *v.* Moore, 18 Abb. N. Cas. (N. Y.) 468.

The widow is not absolutely entitled to the amount named in the statute but the court may fix the allowance at less. Smith *v.* Smith, 115 Ga. 692, 42 S. E. 72.

99. Huey *v.* Huey, 26 Iowa 525; Gilman *v.* Gilman, 54 Me. 531.

1. Dyer *v.* Dyer, 17 R. I. 547, 23 Atl. 910.

2. *Alabama.*— Pinckard *v.* Pinckard, 24 Ala. 250.

California.— *In re* Lux, 100 Cal. 593, 35 Pac. 341.

Georgia.— Smith *v.* Smith, 115 Ga. 692, 42 N. E. 72; Stewart *v.* Stewart, 74 Ga. 355.

Maine.— Walker's Appeal, 83 Me. 17, 21 Atl. 176.

Massachusetts.— Porter *v.* Porter, 165 Mass. 157, 42 N. E. 565; Dale *v.* Hanover Nat. Bank, 155 Mass. 141, 29 N. E. 371; Washburn *v.* Washburn, 10 Pick. 374.

Mississippi.— Haughton *v.* Brandon, 40 Miss. 729.

New Jersey.— Read *v.* Patterson, 47 N. J. Eq. 595, 22 Atl. 1076.

New York.— Freeman *v.* Coit, 27 Hun 447; Thompson *v.* Carmichael, 3 Sandf. Ch. 120.

Ohio.— Howland's Estate, 5 Ohio S. & C. Pl. Dec. 582, 7 Ohio N. P. 606.

Pennsylvania.— Pettit's Appeal, 39 Pa. St. 324.

Tennessee.— Read *v.* Franklin, (Ch. App. 1900) 60 S. W. 215; Vincent *v.* Vincent, 1 Heisk. 333.

See 22 Cent. Dig. tit. "Executors and Administrators," § 668.

Illustrative cases.— As to the reasonableness or unreasonableness of particular allowances see the following cases:

Georgia.— Whitt *v.* Ketchum, 84 Ga. 128, 10 S. E. 503; Lang *v.* Hopkins, 10 Ga. 37.

Illinois.— Strawn *v.* Strawn, 53 Ill. 263.

Iowa.— *In re* Dewell, 88 Iowa 14, 55 N. W. 11; McReynold's Estate, 61 Iowa 585, 16 N. W. 729.

Massachusetts.— Lisk *v.* Lisk, 155 Mass. 153, 29 N. E. 375; Dale *v.* Hanover Nat. Bank, 155 Mass. 141, 29 N. E. 371; Allen *v.* Allen, 117 Mass. 27.

Michigan.— Bacon *v.* Perkins, 100 Mich. 183, 58 N. W. 835.

Mississippi.— McReary *v.* Robinson, 12 Sm. & M. 318.

New Hampshire.— Woodbury *v.* Woodbury, 58 N. H. 44; Foster *v.* Foster, 36 N. H. 437; Piper *v.* Piper, 34 N. H. 563; Buffum *v.* Sparhawk, 20 N. H. 81.

Tennessee.— Sanderlin *v.* Sanderlin, 1 Swan 441.

Vermont.— Richardson *v.* Merrill, 32 Vt. 27.

Wisconsin.— Ford *v.* Ford, 80 Wis. 565, 50 N. W. 409.

See 22 Cent. Dig. tit. "Executors and Administrators," § 727.

A trip to a summer resort, when suitable to the station of the family and customary, may be allowed. Pickens *v.* Pickens, 35 Ala. 442.

3. *In re* Hieschler, 13 Iowa 597; Duncan *v.* Eaton, 17 N. H. 441; Jones' Appeal, 62 Pa. St. 324; Minnick's Estate, 18 Phila. (Pa.) 40.

4. *In re* Lufkin, 131 Cal. 291, 63 Pac. 469; Walker's Appeal, 83 Me. 17, 21 Atl. 176; Dale *v.* Hanover Nat. Bank, 155 Mass. 141, 29 N. E. 371.

5. *In re* Mullen, 6 Ohio S. & C. Pl. Dec. 134, 5 Ohio N. P. 392.

tive interest in the estate,[6] and usually exists independent of testamentary provisions in lieu of dower or other rights.[7]

4. Specific Articles. In some jurisdictions the statutes provide certain specific articles which the widow shall be entitled to take.[8] Things thus specifically exempted to the widow are hers absolutely, irrespective of value and free from all set-off against any interest she may have in the balance of her husband's estate upon its distribution,[9] and if any of such articles are wanting she is entitled to an allowance of money or other property in lieu thereof.[10] Where, however, all the

6. Robson *v.* Lindrum, 47 Ga. 250; Nelson *v.* Wilson, 61 Ind. 255; Loring *v.* Craft, 16 Ind. 110; Cheek *v.* Wilson, 7 Ind. 354; Miller *v.* Miller, 7 Ky. L. Rep. 149; Banse *v.* Muhme, 13 Ohio Cir. Ct. 501, 7 Ohio Cir. Dec. 224.

That property has been set apart as a homestead for the benefit of the wife and minor children does not defeat their right after the husband's death to the statutory year's support, even though for more than a year succeeding his death they may have lived on the homestead estate and derived a support from it. Bardwell *v.* Edwards, 117 Ga. 824, 45 S. E. 40.

The widow is not entitled to a homestead and a year's supply where the aggregate of the two provisions exceed the amount which may be set apart as a homestead and exemption. Green *v.* Hambrick, 118 Ga. 569, 45 S. E. 420.

7. *Alabama.*— Chandler *v.* Chandler, 87 Ala. 300, 6 So. 153.

California.— *In re* Lufkin, 131 Cal. 291, 63 Pac. 469.

Maine.— Brown *v.* Hodgdon, 31 Me. 65.

Massachusetts.— Williams *v.* Williams, 5 Gray 24.

Michigan.— Moore *v.* Moore, 48 Mich. 271, 12 N. W. 180.

Missouri.— State *v.* Taylor, 72 Mo. 656.

New Jersey.— Mulford *v.* Mulford, 42 N. J. Eq. 68, 6 Atl. 609.

New York.— Vedder *v.* Saxton, 46 Barb. 188.

Ohio.— *In re* Rierdon, 5 Ohio S. & C. Pl. Dec. 606, 5 Ohio N. P. 516.

Pennsylvania.— Stineman's Appeal, 34 Pa. St. 394; Compher *v.* Compher, 25 Pa. St. 31; Snider's Estate, 16 Pa. Co. Ct. 233; *In re* Friedlinger, 12 Phila. 80.

Tennessee.— Wilson *v.* Morris, 94 Tenn. 547, 29 S. W. 966.

Vermont.— Meech *v.* Weston, 33 Vt. 561.

See 22 Cent. Dig. tit. "Executors and Administrators," § 669; and *infra*, IX, I, 3.

But *compare* Nelson *v.* Lyster, (Tex. Civ. App. 1903) 74 S. W. 54, holding that the widow was not entitled to accept a devise of the real estate, and in addition claim the right to have other property sold and to be allowed a year's support from the proceeds thereof.

8. See Matter of Allen, 36 Misc. (N. Y.) 398, 73 N. Y. Suppl. 750 (holding that a piano is household furniture, within a statute providing for the setting aside of certain household furniture to the widow); Sawyer *v.* Sawyer, 28 Vt. 245 (holding that "wearing apparel," within a statute giving the same to the widow, includes the epaulets and bosom pin of a naval officer but not his watch, watch-key, watch-chain, cords and seals, finger ring, and sword and sword-belt).

9. *Alabama.*— Jackson *v.* Wilson, 117 Ala. 432, 23 So. 521; Carter *v.* Hinkle, 13 Ala. 529.

Illinois.— Boyer *v.* Boyer, 21 Ill. App. 534; Rutledge *v.* Rutledge, 21 Ill. App. 357.

Kentucky.— Welch *v.* Lewis, 104 Ky. 531, 47 S. W. 454, 20 Ky. L. Rep. 716; Husbands *v.* Bullock, 1 Duv. 21; Harris *v.* Adams, 78 S. W. 156, 25 Ky. L. Rep. 1492; Woods *v.* Robinson, 46 S. W. 23, 19 Ky. L. Rep. 1659; Fedder *v.* Fedder, 12 Ky. L. Rep. 191.

Maryland.— Crow *v.* Hubard, 62 Md. 560.

Missouri.— State *v.* Taylor, 72 Mo. 656.

New York.— Crawford *v.* Nassoy, 173 N. Y. 163, 65 N. E. 962 [*reversing* 55 N. Y. App. Div. 433, 67 N. Y. Suppl. 108]; Brigham *v.* Bush, 33 Barb. 596. But see Matter of Perry, 38 Misc. 167, 77 N. Y. Suppl. 271 [*disapproving* Matter of Williams, 31 N. Y. App. Div. 617, 52 N. Y. Suppl. 700; *In re* Hembury, 37 Misc. 454, 75 N. Y. Suppl. 933].

Tennessee.— Bayless *v.* Bayless, 4 Coldw. 359; Curd *v.* Curd, 9 Humphr. 171.

Vermont.— Sawyer *v.* Sawyer, 28 Vt. 245.

See 22 Cent. Dig. tit. "Executors and Administrators," § 670.

Trespass may be maintained by the widow against the executor for selling such property under an order of the orphans' court. Carter *v.* Hinkle, 13 Ala. 529.

Conversion may be maintained by the widow against the representative where he has refused upon demand to make an inventory as required by the statute, and has appropriated to his own use property and money belonging to her. Crawford *v.* Nassoy, 173 N. Y. 163, 65 N. E. 962 [*reversing* 55 N. Y. App. Div. 433, 67 N. Y. Suppl. 108].

10. *Colorado.*— Pueblo Western Nat. Bank *v.* Rizer, 12 Colo. App. 202, 55 Pac. 268.

Georgia.— Taylor *v.* Flint, 35 Ga. 124.

Kentucky.— Welch *v.* Lewis, 104 Ky. 531, 47 S. W. 454, 20 Ky. L. Rep. 716; Wood *v.* Robinson, 46 S. W. 23, 19 Ky. L. Rep. 1659; Welch *v.* Welch, 44 S. W. 960, 19 Ky. L. Rep. 1945; Fedder *v.* Fedder, 12 Ky. L. Rep. 191.

New York.— Matter of Bidgood, 36 Misc. 516, 73 N. Y. Suppl. 1061. But see Matter of Keough, 42 Misc. 387, 86 N. Y. Suppl. 807.

Pennsylvania.— Hunt's Appeal, 100 Pa. St. 590.

Texas.— Linares *v.* Linares, 93 Tex. 84, 53 S. W. 578 [*affirming* (Civ. App. 1899) 51 S. W. 510] (holding the widow entitled to an allowance in lieu of homestead, although dece-

articles specified are on hand, she is entitled to all of them, but to nothing more in the way of exemptions, whatever may be their value, although the statute provides that the property or money which may be set apart in lieu of articles not on hand shall not exceed a designated amount.[11] As to other articles not exempted which she may keep or receive the general rule charging her with their value must apply.[12]

5. When Whole Estate Set Apart. In some jurisdictions statutes have been enacted providing that in case the estate of a decedent does not exceed a certain specified amount, there shall be no administration thereon, or if administration has commenced there shall be no further proceedings therein, but the whole shall be set apart to the widow or minor children of the decedent;[13] and where it is made to appear that the value of the estate brings it within the statute, all of it must be so set apart regardless of whether the estate is solvent or insolvent.[14] In

dent's residence, not being the homestead of the family, could not be awarded to her as such); Woolley *v.* Sullivan, 92 Tex. 28, 45 S. W. 377, 46 S. W. 629.

See 22 Cent. Dig. tit. "Executors and Administrators," § 670.

An allowance in money must be made on the widow's election where the inventory shows that there are only a few of the specified articles belonging to the estate, and that a half interest in them belongs to another. Pueblo Western Nat. Bank *v.* Rizer, 12 Colo. App. 202, 55 Pac. 268.

11. Welch *v.* Lewis, 104 Ky. 531, 47 S. W. 454, 20 Ky. L. Rep. 717. See also Welch *v.* Welch, 44 S. W. 960, 19 Ky. L. Rep. 1945.

12. Menifee *v.* Menifee, 8 Ark. 9; Swayze *v.* Wade, 25 Kan. 551; Drum's Succession, 26 La. Ann. 539.

The rent of a pew in church rented by the widow for the use of herself and children after the testator's death cannot be allowed to her on her accounting as executrix. Scott *v.* Monell, 1 Redf. Surr. (N. Y.) 431.

13. *Alabama.*— Quinn *v.* Campbell, 126 Ala. 280, 28 So. 676; Jackson *v.* Wilson, 117 Ala. 432, 23 So. 521; Chandler *v.* Chandler, 87 Ala. 300, 6 So. 153; Nance *v.* Nance, 84 Ala. 375, 4 So. 699, 5 Am. St. Rep. 378.

Arkansas.— Wilson *v.* Massie, 70 Ark. 25, 65 S. W. 942; Harrison *v.* Lamar, 33 Ark. 824; Hampton *v.* Physick, 24 Ark. 561. The act of Jan. 2, 1851, providing that, where the whole of a decedent's estate did not exceed in value three hundred dollars, the same should be allowed to the widow, was repealed by the act of Dec. 8, 1852, commonly known as the "Homestead Act," in so far at least as regarded the homestead rights of the minor children conferred by the latter act. Rowland *v.* Wadly, 71 Ark. 273, 72 S. W. 994.

California.— *In re* Neff, 139 Cal. 71, 72 Pac. 632; *In re* Atwood, 127 Cal. 427, 59 Pac. 770; McGuire *v.* Lynch, 126 Cal. 579, 59 Pac. 27; *In re* Bachelder, 123 Cal. 466, 56 Pac. 97; *In re* Leslie, 118 Cal. 72, 50 Pac. 29.

Georgia.— Smith *v.* Smith, 115 Ga. 692, 42 S. E. 72; Lowery *v.* Powell, 109 Ga. 192, 34 S. E. 296; Stewart *v.* Stewart, 74 Ga. 355.

Iowa.— Adkinson *v.* Breeding, 56 Iowa 26, 8 N. W. 685.

Massachusetts.— Brazer *v.* Dean, 15 Mass. 183.

Michigan.— Stanton *v.* Foster, 122 Mich. 219, 80 N. W. 1084.

Missouri.— Pidcock *v.* Buffam, 61 Mo. 370.

Pennsylvania.— Henry's Estate, 6 Pa. Co. Ct. 28; Welsh's Estate, 14 Wkly. Notes Cas. 175.

South Dakota.— See Smith *v.* Terry Peak Miners' Union, 16 S. D. 631, 94 N. W. 694.

Utah.— *In re* Farmer, 17 Utah 80, 53 Pac. 972.

Statute applicable to separate estate of wife.— *In re* Leslie, 118 Cal. 72, 50 Pac. 29.

Settlement by probate judge — Power of appointee.— Under S. D. Laws (1901), p. 205, c. 123, § 2, providing that when a person dies leaving no estate, except personal property of trifling value, the judge of the county court shall take charge of the estate personally, or by some person he may appoint, and pay out of it the burial and other expenses, and set apart to the widow and minor children, if any, the residue, the responsibility of gathering and distributing such property is on the judge, and a person appointed by him to take physical possession of the property is a mere custodian, and has not legal capacity to sue, as agent of the county court, to collect from a fraternal society of which deceased was a member a sum for funeral expenses. Smith *v.* Terry Peak Miners' Union, 16 S. D. 631, 94 N. W. 694.

Abatement of proceedings.— Proceedings by a widow to have the whole of an estate set aside to her without administration, as authorized by Cal. Code Civ. Proc. § 1469, abate on her death, where there are no minor children; and hence, where she dies pending an appeal from an order denying her application, the appeal will be dismissed. *In re* Bachelder, 123 Cal. 466, 56 Pac. 97.

Sale by husband before death.— Where a husband executed a bill of sale of his personal property immediately before his death, a decree of court setting aside the estate to the widow pursuant to a statute vesting it in her, when it does not exceed five hundred dollars, does not operate to divest title from the purchaser under the bill of sale, although possession of the property was not delivered until after the husband's death. Warner *v.* Warner, 30 Ind. App. 578, 66 N. E. 760.

14. Smith *v.* Smith, 115 Ga. 692, 42 S. E. 72.

some jurisdictions the statutes to this effect are applicable only to personal property and not to realty.[15] An order or decree of the probate court is usually necessary to vest the property in the widow,[16] but if the court fails to make such an order the widow may in a proceeding against her to account for the estate show that it does not exceed the statutory amount and thus avail herself of the benefit of the statute.[17]

E. Persons Entitled — 1. In General. The object of these statutes is to provide temporary support for those only who are dependent upon the deceased.[18] While usually only widows and minor children are within the positive intendment of this beneficial legislation, the word "family" when used may embrace such persons as constituted the domestic circle of the decedent at the time of his death, such as servants or near relatives,[19] but not mere boarders or lodgers.[20]

2. Widow. The alleged widow must have been lawfully married to the decedent, or at least must bear the responsibilities of surviving spouse under an honest belief that such was the case;[21] and must as a rule have been a member of his family at the time of his death.[22]

3. Children — a. In General. If no lawful widow survives, the allowance usually goes to the decedent's surviving children, if any.[23] Minor children, or children not over a specified age, are the usual sole objects of such legislation, next to or in connection with the widow;[24] but some statutes embrace even adult children, provided they are actually in the decedent's household and have a legal or moral right to be clothed and fed by the widow,[25] or out of the decedent's

15. Wilson *v.* Massie, 70 Ark. 25, 65 S. W. 942 (holding that the act of April 1, 1887, which is in its terms confined to personal estate, repealed the former statute. Mansfield Dig. § 3, which was construed in Harrison *v.* Lamar, 33 Ark. 824, to include both real and personal property); Pidcock *v.* Buffam, 61 Mo. 370.

16. Stanton *v.* Foster, 122 Mich. 219, 80 N. W. 1084.

17. Hampton *v.* Physick, 24 Ark. 561.

18. Miller *v.* Ennis, 107 Ga. 663, 34 S. E. 302.

19. Strawn *v.* Strawn, 53 Ill. 263; Durkin's Succession, 30 La. Ann. 669. But see Whaley *v.* Whaley, 50 Mo. 577, holding that the word "family" does not include assistants who may be necessary to the house or manage the farm.

A grandmother in destitute circumstances and without the means of support is entitled to an allowance as alimony from the estate of her grandchildren. Lyon's Succession, 22 La. Ann. 627.

20. Strawn *v.* Strawn, 53 Ill. 263.

21. *In re* Byrne, Myr. Prob. (Cal.) 1; Young's Appeal, 52 Mich. 592, 18 N. W. 373; Grimm's Estate, 131 Pa. St. 199, 18 Atl. 1061, 17 Am. St. Rep. 796, 6 L. R. A. 717; Foster's Estate, 4 Wkly. Notes Cas. (Pa.) 75; Green's Estate, 5 Pa. Co. Ct. 605.

22. See *infra*, IX, I, 6.

23. *Georgia.*— Miller *v.* Ennis, 107 Ga. 663, 34 S. E. 302.

Illinois.— Wolford *v.* Deemer, 89 Ill. App. 524.

Kentucky.— Burgett *v.* Clarke, 4 Ky. L. Rep. 518.

Pennsylvania.— Alexander's Estate, 13 Phila. 564; McElroy's Estate, 13 Phila. 320.

Texas.— Lockhart *v.* White, 18 Tex. 102.

See 22 Cent. Dig. tit. "Executors and Administrators," § 674.

24. *Alabama.*—Quinn *v.* Campbell, 126 Ala. 280, 28 So. 676; Wiggins *v.* Mertins, 111 Ala. 164, 20 So. 356; Henderson *v.* Tucker, 70 Ala. 381; Turner *v.* Whitten, 40 Ala. 530.

Arkansas.— Quattlebaum *v.* Triplett, 69 Ark. 91, 61 S. W. 162, construing the word "children" to mean minor children.

Georgia.— Miller *v.* Ennis, 107 Ga. 663, 34 S. E. 302; Whitt *v.* Ketchum, 84 Ga. 128, 10 S. E. 503.

Louisiana.— Durkin's Succession, 30 La. Ann. 669.

North Carolina.— *In re* Hayes, 112 N. C. 76, 16 S. E. 904, under fifteen years.

Ohio.— Banse *v.* Muhme, 13 Ohio Cir. Ct. 501, 7 Ohio Cir. Dec. 224, under fifteen years.

Tennessee.— Thompson *v.* Alexander, 11 Heisk. 313 (under fifteen years); Sanderlin *v.* Sanderlin, 1 Swan 441.

Texas.— Cooper *v.* Pierce, 74 Tex. 526, 12 S. W. 211.

Washington.— *In re* Murphy, 30 Wash. 9, 70 Pac. 109.

See 22 Cent. Dig. tit. "Executors and Administrators," § 674.

A child over eighteen but under twenty-one years of age is a minor within the meaning of the Alabama statute. Lanford *v.* Lee, 119 Ala. 248, 24 So. 578, 72 Am. St. Rep. 914.

A married minor daughter, not a member of her father's household but living with and supported by her husband, is not entitled to share in the allowance granted to a widow and minor children. Goss *v.* Harris, 117 Ga. 345, 43 S. E. 724; Miller *v.* Ennis, 107 Ga. 663, 34 S. E. 302. *Contra*, under Alabama statute. Lanford *v.* Lee, 119 Ala. 248, 24 So. 578, 72 Am. St. Rep. 914.

25. Strawn *v.* Strawn, 53 Ill. 263; Gillett *v.* Gillett, 109 Ill. App. 126 [*affirmed* in

estate, where there is no widow.[26] Where after a year's support has been set apart to a widow for herself and a minor child, the child voluntarily removes from the residence of her mother and relinquishes further care and support by the mother, she cannot recover for her own separate use any part of the sum so set apart.[27] It has been held that, when the family of a decedent embraces two sets of minor children by different wives, each set is entitled to an allowance, and the portion going to each should be specified.[28]

b. Posthumous Children. A posthumous child is entitled to share in the statutory apportionment with the other young children.[29]

c. Illegitimate Children. As a general rule illegitimate children are not entitled to an allowance for support, out of their deceased father's estate.[30]

d. Children of Decedent by Former Wife. Children of the decedent by a former wife have been held to share in the allowance,[31] unless they do not reside with the widow.[32]

e. Stepchildren of Decedent. A statute making provision for the widow "and her family" has been held to apply to children of the widow by a former husband, who are under age and reside with her.[33]

4. Grandchildren. Grandchildren in necessitous circumstances have been allowed to share in the allowance.[34]

5. Husband. Usually a surviving husband is not entitled to any allowance from the estate of his deceased wife.[35]

6. Non-Residents. Most statutes grant the allowance only to widows, children, or families resident within the state at the time of the decedent's death,[36] unless

207 Ill. 136, 69 N. E. 942]; Whaley *v.* Whaley, 50 Mo. 577; Lane's Estate, 6 Pa. Dist. 618; Nelson *v.* Thomson, 2 Pa. Dist. 844; Kelly's Estate, 1 Kulp (Pa.) 365; Young's Estate, 15 Pa. Co. Ct. 374, 35 Wkly. Notes Cas. (Pa.) 316; Halbe's Estate, 9 Pa. Co. Ct. 512, 20 Phila. (Pa.) 117.

A married adult daughter dependent upon the decedent for support may be entitled to the statutory allowance out of his estate. Wolford *v.* Deemer, 89 Ill. App. 524; Armstrong's Estate, 2 Chest. Co. Rep. (Pa.) 496.

Married adult children possessed of means are not entitled to the statutory exemption from their father's estate. Steel's Estate, 13 Phila. (Pa.) 398.

26. Gillett *v.* Gillett, 109 Ill. App. 126 [*affirmed* in 207 Ill. 136, 69 N. E. 942]; Wolford *v.* Deemer, 89 Ill. App. 524; Lane's Estate, 6 Pa. Dist. 618; Barr's Appeal, 1 Mona. (Pa.) 764, 3 Walk. (Pa.) 93.

27. Miller *v.* Ennis, 107 Ga. 663, 34 S. E. 302.

28. Miller *v.* Ennis, 107 Ga. 663, 34 S. E. 302; Taylor *v.* Flint, 35 Ga. 124.

29. Husbands *v.* Bullock, 1 Duv. (Ky.) 21; Womack *v.* Boyd, 31 Miss. 443. See also Shelby *v.* Shelby, 1 B. Mon. (Ky.) 266.

30. Dalton *v.* Halpin, 27 La. Ann. 382. But *compare* Collins *v.* Hallier, 12 La. Ann. 678.

31. Nevins' Appeal, 47 Pa. St. 230, holding that in such case one third of the money should be paid to the widow and the remainder applied for the benefit of the children.

32. Alexander *v.* Alexander, 86 Ky. 688, 7 S. W. 156, 9 Ky. L. Rep. 839; Major *v.* Major, 111 Tenn. 193, 76 S. W. 817. *Contra*, Lanford *v.* Lee, 119 Ala. 248, 24 So. 578, 72 Am. St. Rep. 914.

Children placed in custody of guardian.— Stepchildren of the widow provided for by the decedent's will and placed in the custody of a guardian do not constitute part of the family after his death, and the widow is not entitled to an extra allowance for their support. Holloman *v.* Holloman, 125 N. C. 29, 34 S. E. 99.

Children taken away from widow after death of father.— Where children of a decedent by a former wife, who were living in the household of their father at the time of his death, are afterward taken away against the widow's consent, it is error to direct any part of the allowance to be paid to their guardian. Vincent *v.* Vincent, 1 Heisk. (Tenn.) 333.

33. Sanderlin *v.* Sanderlin, 1 Swan (Tenn.) 441.

34. Vives' Succession, 35 La. Ann. 371; Durkin's Succession, 30 La. Ann. 669.

35. Matter of Klingler, 2 Pearson (Pa.) 533; Hall's Estate, 1 Del. Co. (Pa.) 327; Bertolet's Estate, 2 Woodw. (Pa.) 439. But see *In re* Murphy, 30 Wash. 9, 70 Pac. 109, holding a surviving husband entitled to an allowance for the maintenance of minor children.

36. *Alabama.*— *Ex p.* Pearson, 76 Ala. 521.

Illinois.— Veile *v.* Koch, 27 Ill. 129.

Mississippi.— Barber *v.* Ellis, 68 Miss. 172, 8 So. 390.

Missouri.— *In re* Austin, 73 Mo. App. 61; Richardson *v.* Lewis, 21 Mo. App. 531.

North Carolina.— Hollomon *v.* Hollomon, 125 N. C. 29, 34 S. E. 99; *In re* Hayes, 112 N. C. 76, 16 S. E. 904; Simpson *v.* Cureton, 97 N. C. 112, 2 S. E. 668; Medley *v.* Dunlap, 90 N. C. 527.

their non-residence was caused by the decedent's wrongful acts.[37] Where such provisions obtain, the right is not lost by becoming a non-resident after the decedent's death,[38] while on the other hand a widow who becomes a resident after the death of her husband does not thereby become entitled to the allowance.[39]

F. Property Subject to Allowance — 1. PERSONALTY. The statutory allowance comes from all personalty belonging unqualifiedly[40] to the decedent notwithstanding specific or general bequests elsewhere.[41] But advancements made to children during a decedent's lifetime form no part of the estate and are not subject to be brought into hotchpot for the benefit of an allowance to the widow.[42] A decedent's unascertained share in the assets of a partnership of which he was a member,[43] or in any other unliquidated fund which others share or control,[44] cannot be applied to the widow's allowance.

2. REALTY. In some jurisdictions the allowance is payable from personalty only, and even though the personalty is insufficient to pay the full amount authorized by law, the deficiency cannot be supplied from real estate, or the surplus proceeds of a sale thereof;[45] but in others the allowance is payable out of

Pennsylvania.— Platt's Appeal, 80 Pa. St. 501; Spier's Appeal, 26 Pa. St. 233; Coates' Estate, 12 Phila. 171; Troxell's Estate, 13 Montg. Co. Rep. 68; Monk's Estate, 9 Montg. Co. Rep. 113; *In re* Strain, 32 Pittsb. Leg. J. 369.

Tennessee.— Graham *v.* Stull, 92 Tenn. 673, 22 S. W. 738, 21 L. R. A. 241.

See 22 Cent. Dig. tit. "Executors and Administrators," § 679.

The rule is otherwise in Georgia (Maddox *v.* Patterson, 80 Ga. 719, 6 S. E. 581; Farris *v.* Battle, 80 Ga. 187, 7 S. E. 262; Mitchell *v.* Word, 64 Ga. 208) and Ohio (Banse *v.* Muhme, 13 Ohio Cir. Ct. 501, 7 Ohio Cir. Dec. 224).

37. Grieve's Estate, 165 Pa. St. 126, 30 Atl. 727 (desertion); Coates' Estate, 12 Phila. (Pa.) 171.

38. White's Succession, 29 La. Ann. 702; Campbell *v.* Whitsett, 66 Mo. App. 444.

39. Simpson *v.* Cureton, 97 N. C. 112, 2 S. E. 668; Medley *v.* Dunlap, 90 N. C. 527; Spier's Appeal, 26 Pa. St. 233.

40. Summerford *v.* Gilbert, 37 Ga. 59; Sterritt *v.* Lingo, 6 Ohio S. & C. Pl. Dec. 481, 4 Ohio N. P. 366; Eddy's Estate, 12 Phila. (Pa.) 17.

Proceeds of property levied upon before the husband's death cannot be taken for the widow's exemption if the property was subject to attachment against the husband. Blake *v.* Durrell, 103 Ky. 600, 45 S. W. 883, 20 Ky. L. Rep. 270.

Personal property subject to a chattel mortgage, although duly appraised and set off to a widow by order of court, may be replevied by the mortgagee; but the widow may redeem it by paying the debt or probably obtain an order for the sale of the property and payment to her of the proceeds of such sale in excess of the debt. Recker *v.* Kilgore, 62 Ind. 10.

41. *Indiana.*— Jelly *v.* Elliott, 1 Ind. 119, 1 Smith 32.

Kentucky.— Burtle *v.* Thomas, 6 B. Mon. 401.

Maine.— Paine *v.* Paulk, 39 Me. 15; Brown *v.* Hodgdon, 31 Me. 65.

Maryland.— Negro William *v.* Kelly, 5 Harr. & J. 59.

Massachusetts.— Bush *v.* Clark, 127 Mass. 111.

Missouri.— Elstroth *v.* Dickmeyer, 88 Mo. App. 418; *In re* Motier, 7 Mo. App. 514.

Nebraska.— Godman *v.* Converse, 43 Nebr. 463, 61 N. W. 756 [*overruling* 38 Nebr. 657, 57 N. W. 394].

New York.— Banks *v.* Taylor, 10 Abb. Pr. 199.

North Carolina.— Van Norden *v.* Primm, 3 N. C. 149.

Pennsylvania.— Graves' Estate, 134 Pa. St. 377, 19 Atl. 684; Nerpel's Appeal, 91 Pa. St. 334.

Tennessee.— Bayless *v.* Bayless, 4 Coldw. 359; Turner *v.* Fisher, 4 Sneed 209.

See 22 Cent. Dig. tit. "Executors and Administrators," § 681.

In Minnesota, under Gen. St. (1878) c. 51, § 1, a widow was only entitled to an allowance of such personal estate of her husband as was not lawfully disposed of by his last will. *In re* Rausch, 35 Minn. 291, 28 N. W. 920; Johnson *v.* Johnson, 32 Minn. 513, 21 N. W. 725.

Allowance to specific legatee.— A daughter is not compelled to take her exemption out of property specifically bequeathed to her, but may take it out of property bequeathed to others or to herself and others. Lane's Estate, 6 Pa. Dist. 618.

42. Miller's Estate, 2 Brewst. (Pa.) 355.

43. Stauffer's Succession, 21 La. Ann. 520; Julian *v.* Wrightsman, 73 Mo. 569; Burroughs *v.* Knutton, (R. I. 1888) 13 Atl. 108. *Contra,* Bush *v.* Clark, 127 Mass. 111.

A husband's interest in firm property in the hands of a receiver is not subject to the widow's allowance until the lien acquired thereon by means of a creditor's bill during the husband's lifetime is discharged. King *v.* Goodwin, 130 Ill. 102, 22 N. E. 535, 17 Am. St. Rep. 277.

44. Rust *v.* Billingslea, 44 Ga. 306; Summerford *v.* Gilbert, 37 Ga. 59.

45. *District of Columbia.*— Hansel *v.* Chapman, 2 App. Cas. 361.

real estate, either equally with the personalty, or whenever the latter proves insufficient.[46]

G. Priority Over Other Claims — 1. In General. The widow's allowance or claim to exempt personalty usually takes precedence over the claims of legatees or distributees,[47] and of all other claims against the estate of her deceased husband,[48] except debts due the United States,[49] liens for taxes,[50] and vendors'[51] or landlords'

Indiana.— Jelly *v.* Elliott, 1 Ind. 119, Smith 32.

Kentucky.— Bowling *v.* Shepherd, 91 Ky. 273, 15 S. W. 527, 12 Ky. L. Rep. 831.

Maine.— Paine *v.* Paulk, 39 Me. 15.

Massachusetts.— Hale *v.* Hale, 1 Gray 518.

Missouri.—Ritchey *v.* Withers, 72 Mo. 556; Drowry *v.* Bauer, 68 Mo. 155; Pidcock *v.* Buffam, 61 Mo. 370; Elstroth *v.* Dickmeyer, 88 Mo. App. 418; *In re* Lloyd, 44 Mo. App. 670; Jewell *v.* Knettle, 39 Mo. App. 262.

Tennessee.— Loftis *v.* Loftis, 94 Tenn. 232, 28 S. W. 1091; Cate *v.* Cate, (Ch. App. 1897) 43 S. W. 365.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 684, 685.

46. *California.*— *In re* Tittel, 139 Cal. 149, 72 Pac. 909.

Georgia.— Cully *v.* Bloomingdale, 68 Ga. 756.

Illinois.— Deltzer *v.* Scheuster, 37 Ill. 301; Rector *v.* Reavill, 3 Ill. App. 232.

Minnesota.— Blakeman *v.* Blakeman, 64 Minn. 315, 67 N. W. 69.

New York.— *In re* Collard, 18 N. Y. Suppl. 176, Pow. Surr. 1.

Ohio.— Allen *v.* Allen, 18 Ohio St. 234.

Pennsylvania.— Thomas' Estate, 152 Pa. St. 63, 25 Atl. 164; Graves' Estate, 134 Pa. St. 377, 19 Atl. 684; Nerpel's Appeal, 91 Pa. St. 334; Hufman's Appeal, 81 Pa. St. 329; Detweiler's Appeal, 44 Pa. St. 243; Klein's Estate No. 1, 2 Pa. Dist. 813, 14 Pa. Co. Ct. 72; Williams' Estate, 1 Kulp 362; Graves' Estate, 6 Pa. Co. Ct. 312; Raybold's Estate, 2 Pa. Co. Ct. 257; Bank's Estate, 12 Phila. 67; Bryan's Estate, 4 Phila. 228; Scott's Estate, 2 Phila. 135.

See 22 Cent. Dig. tit. "Executors and Administrators," § 684.

These statutes do not apply to real estate which decedent held at his death as trustee in another's right (Hill *v.* Hill, 81 Ga. 516, 8 S. E. 879), nor to lands in another state or country (Hopper's Estate, 2 Phila. (Pa.) 367), nor to proceeds of sale under a foreclosed mortgage which belong to the mortgagee (Nerpel's Appeal, 91 Pa. St. 334).

Where the real and personal estate together are sufficient to pay debts and leave a surplus, wants of the children may be supplied out of the personal estate, although it is not alone sufficient to satisfy the debts. *In re* Billington, 3 Rawle (Pa.) 48.

The widow is not authorized to make a selection from the real estate so as to render it liable to be sold. Scott's Estate, 2 Phila. (Pa.) 135.

Remainder interest in homestead.— Under the California statute it has been held that where a homestead has been set apart to the widow the interest of decedent's heirs in remainder in such homestead is liable to be sold to pay a family allowance made in favor of the widow. *In re* Tittel, 139 Cal. 149, 72 Pac. 909.

47. Hill *v.* Mitchell, 5 Ark. 608; Miller *v.* Stepper, 32 Mich. 194; Glenn *v.* Gunn, 88 Mo. App. 442; Williams *v.* Jones, 95 N. C. 504.

48. *Alabama.*— Wiggins *v.* Mertins, 111 Ala. 164, 20 So. 356.

Arkansas.— Hill *v.* Mitchell, 5 Ark. 608, partial priority.

Georgia.—Ullman *v.* Brunswick Title Guarantee, etc., Co., 96 Ga. 625, 24 S. E. 409; Livingston *v.* Langley, 79 Ga. 169, 3 S. E. 909.

Iowa.— Buttschaw *v.* Miller, 72 Iowa 225, 33 N. W. 642; Adkinson *v.* Breeding, 56 Iowa 26, 8 N. W. 685.

Mississippi.— O'Brien *v.* Wilson, 82 Miss. 93, 33 So. 946.

Missouri.— Glenn *v.* Gunn, 88 Mo. App. 442.

North Carolina.— Denton *v.* Tyson, 118 N. C. 542, 24 S. E. 116; Williams *v.* Jones, 95 N. C. 504.

Pennsylvania.—Peebles' Estate, 157 Pa. St. 605, 27 Atl. 792; Allentown's Appeal, 109 Pa. St. 75; Hill *v.* Hill, 32 Pa. St. 511; Beetem *v.* Getz, 5 Pa. Super. Ct. 71, 41 Wkly. Notes Cas. 69; Book *v.* O'Neil, 2 Pa. Super. Ct. 306.

Texas.— *In re* Laurence, (Civ. App. 1903) 74 S. W. 779. But see Parlin, etc., Co. *v.* Davis, (Civ. App. 1903) 74 S. W. 951.

Utah.— *In re* Farmer, 17 Utah 80, 53 Pac. 972.

See 22 Cent. Dig. tit. "Executors and Administrators," § 686.

But *compare* McDougall *v.* Brokaw, 22 Fla. 98.

A minor child's allowance out of his mother's estate is good as against his mother's debts but not as against the debts of his father who devised the estate to his mother. Lewis' Estate, 2 Chest. Co. Rep. (Pa.) 42.

Debts not liens against the husband's estate prior to the passage of the act making the allowance are postponed to the widow's claim to the statutory exemption. Hill *v.* Hill, 42 Pa. St. 198; Baldy's Appeal, 40 Pa. St. 328; Mulford *v.* Thatcher, 4 Lanc. Bar (Pa.) 46, 1 Leg. Chron. (Pa.) 97. But see Young's Estate, 1 Phila. (Pa.) 403.

49. Cupp's Estate, 14 York Leg. Rec. (Pa.) 16.

50. State *v.* Jordan, 25 Tex. Civ. App. 17, 59 S. W. 826, 60 S. W. 1008. But see Allentown's Appeal, 109 Pa. St. 75.

51. *Georgia.*— Ullman *v.* Brunswick Title Guarantee, etc., Co., 96 Ga. 625, 24 S. E. 409.

Kentucky.— Collier *v.* Kant, 15 Ky. L. Rep. 845.

liens.[52] Priority over the allowance is usually given to necessary administration expenses;[53] and also to the expenses of the last sickness and funeral,[54] although in some jurisdictions the rule is otherwise.[55] The widow's claim to an allowance out of the decedent's share in partnership assets is postponed to partnership debts.[56]

2. MORTGAGES AND PLEDGES. Unless the widow relinquishes her claim to an allowance or exemption,[57] it is usually preferred to a mortgage against the estate created by the decedent,[58] but not to a mortgage lien adhering to the title when the decedent acquired it,[59] nor to a mortgage executed by the widow as executrix for money borrowed to be used in lieu of a family allowance.[60] The same distinction has been applied to a pledge.[61]

3. MECHANICS' LIENS. A mechanic's lien creditor is usually postponed to the widow's allowance.[62]

Louisiana.— Rawls' Succession, 27 La. Ann. 560; Foulkes' Succession, 12 La. Ann. 537.

Pennsylvania.—Kauffman's Appeal, 112 Pa. St. 645, 4 Atl. 20; Hildebrand's Appeal, 39 Pa. St. 133; Beetem *v.* Getz, 5 Pa. Super. Ct. 71, 41 Wkly. Notes Cas. 69; Rizer's Estate, 11 Wkly. Notes Cas. 563; Ramberger's Estate, 14 Lanc. Bar 110; Cupp's Estate, 14 York Leg. Rec. 16.

Texas.— Mabry *v.* Ward, 50 Tex. 404; Parlin, etc., Co. *v.* Davis, (Civ. App. 1903) 74 S. W. 951 (holding that the statute giving preference to the vendor's lien applies to insolvent estates); Fulton *v.* Denison Nat. Bank, 26 Tex. Civ. App. 115, 62 S. W. 84.

See 22 Cent. Dig. tit. "Executors and Administrators," § 687.

52. Walker *v.* Patterson, (Tex. Civ. App. 1902) 77 S. W. 437, holding a landlord's lien on a tenant's crop for supplies and advances superior to a claim of the tenant's widow and children for an allowance for support.

53. Loeb *v.* Richardson, 74 Ala. 311. But see Hays *v.* Buffington, 2 Ind. 369; Denton *v.* Tyson, 118 N. C. 542, 24 S. E. 116.

54. *Illinois.*— McCord *v.* McKinley, 92 Ill. 11.

Indiana.— Weir *v.* Sanders, 124 Ind. 391, 24 N. E. 980; Fleming *v.* Henderson, 123 Ind. 234, 24 N. E. 236; Green *v.* Weever, 78 Ind. 494.

Iowa.— Buttschaw *v.* Miller, 72 Iowa 225, 33 N. W. 642.

Louisiana.— Sparrow's Succession, 44 La. Ann. 475, 10 So. 882; Foulkes' Succession, 12 La. Ann. 537.

Texas.— *In re* Laurence, (Civ. App. 1903) 74 S. W. 779, if prosecuted within sixty days. *Compare* Krueger *v.* Wolf, 12 Tex. Civ. App. 167, 33 S. W. 663.

Utah.— *In re* Thorn, 24 Utah 209, 67 Pac. 22.

See 22 Cent. Dig. tit. "Executors and Administrators," § 692.

55. *Georgia.*— Whitehead *v.* McBride, 73 Ga. 741.

Kentucky.— Russell *v.* Russell, 14 Ky. L. Rep. 236.

Massachusetts.— Kingsbury *v.* Wilmarth, 2 Allen 310.

North Carolina.— Denton *v.* Tyson, 118 N. C. 542, 24 S. E. 116.

Pennsylvania.—Norton's Estate, 4 Pa. Dist. 198; Formad's Estate, 3 Pa. Dist. 13, 14 Pa. Co. Ct. 104; Weir's Estate, 10 Pa. Co. Ct. 187, 20 Phila. 146; Groome's Estate, 7 Pa. Co. Ct. 519; Cupp's Estate, 14 York Leg. Rec. 16.

See 22 Cent. Dig. tit. "Executors and Administrators," § 692.

56. Ferris *v.* Van Ingen, 110 Ga. 102, 35 S. E. 347; Boone *v.* Sirrine, 38 Ga. 121.

57. Sumner *v.* McKee, 89 Ill. 127; McCollum *v.* Perigo, 16 Pa. Super. Ct. 566.

58. *In re* Fleury, Myr. Prob. (Cal.) 227; Derrick *v.* Sams, 114 Ga. 81, 39 S. E. 924; Miller *v.* McDonald, 72 Ga. 20; Cully *v.* Bloomingdale, 68 Ga. 756; Murphy *v.* Vaughan, 55 Ga. 361; Elfe *v.* Cole, 26 Ga. 197; Comeau *v.* Miller, 46 La. Ann. 1324, 16 So. 172; Cason's Succession, 32 La. Ann. 790; Krueger *v.* Wolf, 12 Tex. Civ. App. 167, 33 S. W. 663.

Contra.— Kauffman's Appeal, 112 Pa. St. 645, 4 Atl. 20; Nerpel's Appeal, 91 Pa. St. 334; Rowe's Estate, 22 Pa. Super. Ct. 597; Beetem *v.* Getz, 5 Pa. Super. Ct. 71, 41 Wkly. Notes Cas. (Pa.) 69; Graves' Estate, 6 Pa. Co. Ct. 312; Bilger *v.* Bilger, 4 Pa. Co. Ct. 109; Cupp's Estate, 14 York Leg. Rec. (Pa.) 16. But see Lambert's Estate, 2 Woodw. (Pa.) 239.

59. Murphy *v.* Vaughan, 55 Ga. 361.

The lien of a purchase-money mortgage is superior to the widow's claim for allowance. Fairbanks *v.* Robinson, 64 Cal. 250, 30 Pac. 812; Brigham *v.* Brigham, 113 Ga. 810, 39 S. E. 309; Lambert's Estate, 2 Woodw. (Pa.) 239. But see Wilson *v.* Peeples, 61 Ga. 218.

A purchase-money mortgage of personal property is postponed to a widow's claim for allowances. Puffer *v.* Caldwell, 111 Ga. 798, 36 S. E. 927.

60. Curtis *v.* Schell, 129 Cal. 208, 61 Pac. 951, 79 Am. St. Rep. 107.

61. Ullman *v.* Brunswick Title Guarantee, etc., Co., 96 Ga. 625, 24 S. E. 409.

Burden of proof.— The burden of showing that the pledgee's claim is of a character which does not take precedence of her demand for allowances is on the widow. Fulton *v.* Denison Nat. Bank, 26 Tex. Civ. App. 115, 62 S. W. 84.

62. Gleason *v.* Traynham, 111 Ga. 887, 36 S. E. 969; *In re* Dennis, 67 Iowa 110, 24

4. Judgments. A judgment creditor, except for purchase-money,[63] is usually postponed to the widow's allowance,[64] unless execution has been levied during the decedent's lifetime,[65] or the judgment was obtained prior to the enactment of the statute granting the allowance and continued a lien until the husband's death.[66]

5. Attachments and Executions. The widow's allowance usually takes precedence of all liens by attachment and execution,[67] except where the specific property was levied upon during the decedent's lifetime,[68] and even in such case where the particular property is exempted from levy by statute.[69]

H. How Allowance Paid.[70] The widow is usually entitled to have her statutory allowance allotted to her in money,[71] but it may sometimes be allotted in notes payable to her husband.[72] If the widow claims her allowance in cash it must be taken usually either out of money actually in possession, or from the proceeds of stocks, bonds, loans, or other investments, or of indebtedness due the decedent, when converted or reduced to money;[73] she cannot compel the legal rep-

N. W. 746 (incomplete lien); Hildebrand's Appeal, 39 Pa. St. 133; Enos *v.* Brant, 24 Pa. Co. Ct. 416; Bilger *v.* Bilger, 4 Pa. Co. Ct. 109; Bower's Estate, 18 Wkly. Notes Cas. (Pa.) 124. But see Molz's Estate, 4 Phila. (Pa.) 187.

63. Ramberger's Estate, 14 Lanc. Bar (Pa.) 110.

64. Augusta Commercial Bank *v.* Burckhalter, 98 Ga. 736, 25 S. E. 917; Jackson *v.* Corbin, 39 Ga. 102; Spicer *v.* Spicer, 21 Ga. 200; Quakenbush *v.* Taylor, 86 Ind. 270; Mead *v.* McFadden, 68 Ind. 340; Kauffman's Appeal, 112 Pa. St. 645, 4 Atl. 20; Horn's Estate, 1 Lehigh Val. Rep. (Pa.) 222; Giddings *v.* Crosby, 24 Tex. 295.

65. Mead *v.* McFadden, 68 Ind. 340.

66. Rishell *v.* Rishell, 48 Pa. St. 243.

67. James *v.* Marcus, 18 Ark. 421; Williams *v.* Jones, 95 N. C. 504; Mulford *v.* Thatcher, 1 Leg. Chron. (Pa.) 97, 4 Lanc. Bar (Pa.) April 12, 1873. But see Grant *v.* Hughes, 82 N. C. 216, 697.

68. James *v.* Marcus, 18 Ark. 421; Singleton *v.* Huff, 49 Ga. 582; Thompson's Appeal, 36 Pa. St. 418; Barrett *v.* Barrett, 9 Pa. Co. Ct. 454. But see Beetem *v.* Getz, 5 Pa. Super. Ct. 71, 41 Wkly. Notes Cas. (Pa.) 69 (judgment waiving exemption); McMullin's Estate, 15 Phila. (Pa.) 558, 11 Wkly. Notes Cas. (Pa.) 562.

69. Dixon *v.* Aldrich, 127 Ind. 296, 26 N. E. 843.

70. Money in lieu of articles specifically exempted see *supra*, IX, D, 4.

71. *Alabama.*— *Ex p.* Reavis, 50 Ala. 210.

Arkansas.— Green *v.* Ford, 17 Ark. 586, holding that the court may allow her a certain sum by way of commutation for the provisions on hand at her husband's death but which had been used by the administrator.

Indiana.— Leib *v.* Wilson, 51 Ind. 550.

Iowa.— McReynolds' Estate, 61 Iowa 585, 16 N. W. 729.

Mississippi.— Nelson *v.* Smith, 12 Sm. & M. 662; McNulty *v.* Lewis, 8 Sm. & M. 520.

New York.— Matter of Durscheidt, 65 Hun 136, 19 N. Y. Suppl. 973.

Pennsylvania.— Finney's Appeal, 113 Pa. St. 11, 4 Atl. 60.

Tennessee.— Rice *v.* Hunt, 7 Lea 33.

See 22 Cent. Dig. tit. "Executors and Administrators," § 683.

An allowance to a widow acting as personal representative may be set off on judicial settlement of her account as representative. Matter of Warner, 53 N. Y. App. Div. 565, 65 N. Y. Suppl. 1022; Williamson's Estate, 12 Phila. (Pa.) 144.

Money received on a policy of life insurance, payable to the administrator or executor, the annual premiums of which do not exceed a given amount, may be set apart for the widow as exempt from execution. *In re* Miller, 121 Cal. 353, 53 Pac. 906.

Election.— An exception by a claimant to an administrator's report, showing a money allowance to the widow, on the ground that she "had elected" to take money in lieu of the statutory personal property without accounting for the latter, is a solemn and conclusive admission that an election was made, within Colo. Gen. St. §§ 1049, 1050, requiring an allowance of either to be made "at her election." Western Nat. Bank *v.* Rizer, 12 Colo. App. 202, 55 Pac. 268.

72. Howle *v.* Edwards, 113 Ala. 187, 20 So. 956; Cummings *v.* Cummings, 51 Mo. 261; Groff's Estate, 2 Lanc. L. Rev. (Pa.) 413; Williams *v.* Hall, 33 Tex. 212.

Notes disposed of in the testator's lifetime for a specific purpose cannot be applied to the payment of the widow's statutory exemption. Matter of Hildebrand, 1 Misc. (N. Y.) 245, 23 N. Y. Suppl. 148.

A judgment on a note may be selected by the widow for her allowance. Gilman *v.* Gilman, 54 Me. 531.

73. *Iowa.*— McReynolds' Estate, 61 Iowa 585, 16 N. W. 729.

Maine.— Gilman *v.* Gilman, 54 Me. 531.

Missouri.—Cummings *v.* Cummings, 51 Mo. 261.

Pennsylvania.— Speakman's Appeal, 71 Pa. St. 25; Larrison's Appeal, 36 Pa. St. 130; McChesney's Estate, 6 Pa. Co. Ct. 663; Gensemer's Estate, 3 Lanc. L. Rev. 26.

Tennessee.— Cate *v.* Cate, (Ch. App. 1897) 43 S. W. 365.

See 22 Cent. Dig. tit. "Executors and Administrators," § 683.

In Pennsylvania a distinction is recognized, where the cash in hand does not equal the

resentative to sell goods so as to give her the amount which is exempted to her by statute.[74]

I. Bar, Waiver, or Relinquishment — **1. In General.** A widow's right to an allowance or exemption may be waived by her acts inconsistent with her assertion of the right;[75] but is not lost by acts capable of another explanation, and not amounting to an estoppel,[76] and unless she assents her right cannot be barred by her husband's waiver of his exemption rights,[77] nor by any act of his personal representative.[78] A waiver by the widow may wholly or in part conclude others of the family whom she represents.[79]

2. Antenuptial or Post-Nuptial Agreement. The widow's allowance is not commonly affected by an antenuptial agreement, relinquishing such rights as dower, homestead, or inheritance in her intended husband's estate, especially if no special consideration appears for her doing so;[80] but by appropriate and sweeping terms she may exclude all such statutory rights, so far at least as concerns herself, especially where a fair consideration is stipulated which she accepts from his estate when a widow.[81] A wife may also relinquish her right to a widow's

amount claimed, based upon whether the widow claims the exemption in money or out of moneys due; it being held that in the former case she cannot wait until the personalty has been sold and converted into cash and then apply for an exemption out of the proceeds (Hunt's Appeal, 100 Pa. St. 590; Dorscheimer's Estate, 12 Pa. Super. Ct. 34, 7 Pa. Dist. 726; Tyler's Estate, 4 Kulp 300; Groff's Estate, 2 Lanc. L. Rev. 413; Venus' Estate, 2 York Leg. Rec. 193), while if she claims her exemption out of moneys due to the estate she is entitled to have it paid out of such moneys after they have been collected by the executors, although at the time it was claimed there may have been no money in their hands (Rigby's Estate, 18 Pa. Super. Ct. 5).

74. Witmer's Estate, 2 Pearson (Pa.) 473; Gensemer's Estate, 3 Lanc. L. Rev. (Pa.) 26.

75. Salinger *v.* Black, 68 Ark. 449, 60 S. W. 229.

A waiver may be shown by her electing to retain less than the statutory amount (Baskin's Appeal, 38 Pa. St. 65; Davis' Appeal, 34 Pa. St. 256), or instituting proceedings requiring the executor to account, by which the assets of the estate are consumed (Mulhollen's Estate, 5 Pa. Dist. 70).

A widow's acts as executrix or administratrix do not bar her claim unless they amount to a mismanagement of the estate or a failure to fulfil her legal duties. King *v.* Johnson, 96 Ga. 497, 23 S. E. 500; Moore *v.* Sweeney, 28 Ill. App. 547; Matter of Hulse, 41 Misc. (N. Y.) 307, 84 N. Y. Suppl. 220; Kelly's Estate, 14 Pa. Co. Ct. 51.

76. Wissel's Appeal, 4 Pennyp. (Pa.) 236.

A waiver is not shown by a partial selection of exempt articles (Denny *v.* Denny, 113 Ind. 22, 14 N. E. 593) or by consenting to a sale without waiving her right (McCann's Estate, 9 Pa. Co. Ct. 408).

Receipt of rents.— Children of an insolvent decedent are not estopped from claiming their statutory exemption by receiving rents of the estate amounting to more than such exemption. McElroy's Estate, 8 Wkly. Notes Cas. (Pa.) 184.

77. Spencer's Appeal, 27 Pa. St. 218; Beetem *v.* Getz, 5 Pa. Super. Ct. 71, 41 Wkly. Notes Cas. (Pa.) 69; McMullin's Estate, 11 Wkly. Notes Cas. (Pa.) 562.

78. Little *v.* McPherson, 76 Ala. 552. See also Moore *v.* McLure, 124 Ala. 120, 27 So. 499.

79. Norris *v.* Dunn, 70 Ga. 796 (widow's stepchildren barred); Henkel's Estate, 13 Pa. Super. Ct. 337.

80. *Illinois.*— Brenner *v.* Gauch, 85 Ill. 368 (executory contract); Phelps *v.* Phelps, 72 Ill. 545, 22 Am. Rep. 149.

Indiana.— Claypool *v.* Jaqua, 135 Ind. 499, 35 N. E. 285.

Iowa.— *In re* Peet, 79 Iowa 185, 44 N. W. 354; Mahaffy *v.* Mahaffy, 61 Iowa 679, 17 N. W. 46; McReynold's Estate, 61 Iowa 585, 16 N. W. 729.

Maine.— Wentworth *v.* Wentworth, 69 Me. 247.

Massachusetts.— Blackinton *v.* Blackinton, 110 Mass. 461.

Michigan.— Pulling *v.* Durfee, 85 Mich. 34, 48 N. W. 48.

Missouri.— Mowser *v.* Mowser, 87 Mo. 437.

New York.— Sheldon *v.* Bliss, 8 N. Y. 31.

See 22 Cent. Dig. tit. "Executors and Administrators," § 695.

Repudiation of contract.— An executory antenuptial contract releasing the widow's award may be repudiated by her, especially where the family consists in part of a child of the deceased husband. Zachmann *v.* Zachmann, 201 Ill. 380, 66 N. E. 256, 94 Am. St. Rep. 180.

81. *Connecticut.*— Cowles *v.* Cowles, 74 Conn. 24, 49 Atl. 195; Staub's Appeal, 66 Conn. 127, 33 Atl. 615.

Illinois.— McMahill *v.* McMahill, 113 Ill. 461; Weaver *v.* Weaver, 109 Ill. 225; Brenner *v.* Gauch, 85 Ill. 368; Edwards *v.* Martin, 39 Ill. App. 145.

Indiana.—Buffington *v.* Buffington, 151 Ind. 200, 51 N. E. 328; Shaffer *v.* Matthews, 77 Ind. 83.

New Hampshire.— *In re* Heald, 22 N. H. 265.

New York.— Young *v.* Hicks, 92 N. Y. 235.

allowance or exemption by a post-nuptial agreement based upon a valid consideration.[82]

3. Testamentary Provisions and Election. If a widow elects to accept provision made for her in the decedent's will she cannot in some jurisdictions claim her statutory allowance in addition thereto;[83] but in others the widow is entitled to her statutory allowance in addition to any provision made for her by the will,[84] unless such allowance would be inconsistent with the provisions of the will.[85]

North Carolina.— Perkins *v.* Brinkley, 133 N. C. 86, 45 S. E. 465; Cauley *v.* Lawson, 58 N. C. 132.

Ohio.— Phillips *v.* Phillips, 14 Ohio St. 308; Broadstone *v.* Baldwin, 8 Ohio S. & C. Pl. Dec. 236, 5 Ohio N. P. 39.

Pennsylvania.— Ludwig's Appeal, 101 Pa. St. 535; Tiernan *v.* Binns, 92 Pa. St. 248; Dillinger's Appeal, 35 Pa. St. 357; Plank's Estate, 1 York Leg. Rec. 108. And see Bean's Appeal, 2 Leg. Gaz. 244.

See 22 Cent. Dig. tit. "Executors and Administrators," § 695.

82. *In re* Roth, 9 Ohio S. & C. Pl. Dec. 429, 6 Ohio N. P. 498; Schmitt's Estate, 5 Pa. Co. Ct. 183. And see Spangler *v.* Dukes, 39 Ohio St. 642. But see Odenwelder's Estate, 16 Pa. Co. Ct. 459, holding that a married woman cannot, without statutory authority, make a post-nuptial agreement relinquishing her right to her widow's exemption, and that the Pennsylvania Married Persons Property Act of 1893 does not give her such power.

An oral agreement by which the wife relinquishes her statutory allowance for a valuable consideration moving to a third person in the event that she survive her husband does not bind her. Yelton *v.* Kerns, 16 Ind. App. 92, 44 N. E. 687.

As to articles of separation see *infra*, IX, I, 6.

83. Cowdrey *v.* Hitchcock, 103 Ill. 262; McGaughey *v.* Eades, 78 Miss. 853, 29 So. 516 (provision in lieu of all exemptions and demands); Turner *v.* Turner, 30 Miss. 428; Flippin *v.* Flippin, 117 N. C. 376, 23 S. E. 321; Trousdale *v.* Trousdale, 35 Tex. 756; Nelson *v.* Lyster, (Tex. Civ. App. 1903) 74 S. W. 54.

An executor is not bound to advise the widow as to her best course in accepting or not accepting such provision, but if he assumes to advise her he should do so with honest purpose and good discretion. Bolin *v.* Barker, 75 N. C. 47.

84. *California.*—Walkerley's Estate, 77 Cal. 642, 20 Pac. 150.

Indiana.— Shafer *v.* Shafer, 129 Ind. 394, 28 N. E. 867; Shipman *v.* Keys, 127 Ind. 353, 26 N. E. 896; Smith *v.* Smith, 76 Ind. 236; Nelson *v.* Wilson, 61 Ind. 255; Dunham *v.* Tappan, 31 Ind. 173; Loring *v.* Craft, 16 Ind. 110; Cheek *v.* Wilson, 7 Ind. 354; Pierce *v.* Pierce, 21 Ind. App. 184, 51 N. E. 954; Whisnand *v.* Fee, 21 Ind. App. 270, 52 N. E. 229; Richards *v.* Hollis, 8 Ind. App. 353, 35 N. E. 572.

Massachusetts.— Williams *v.* Williams, 5 Gray 24.

Michigan.— Hill *v.* Kalamazoo Probate Judge, 123 Mich. 77, 87 N. W. 113, allowance for her maintenance during progress of administration. But see Miller *v.* Stepper, 32 Mich. 194.

Missouri.— Hasenritter *v.* Hasenritter, 77 Mo. 162; Glenn *v.* Gunn, 88 Mo. App. 423; *In re* Klosterman, 6 Mo. App. 314. But see Tyler *v.* Cartwright, 40 Mo. App. 378, holding that the widow's quarantine will be barred by her electing to take an undivided share of her husband's estate under his will.

New York.— Vedder *v.* Saxton, 46 Barb. 188. But see Peck *v.* Sherwood, 56 N. Y. 615.

Ohio.— Wanzer *v.* Widow, 2 Ohio Dec. (Reprint) 323, 2 West. L. Month. 426; *In re* Rierdon, 5 Ohio S. & C. Pl. Dec. 606, 5 Ohio N. P. 516.

Pennsylvania.—Peebles' Estate, 157 Pa. St. 605, 27 Atl. 792. And see Lutz's Estate, 1 Pa. Co. Ct. 157.

Wisconsin.— Baker *v.* Baker, 57 Wis. 382, 15 N. W. 425.

See 22 Cent. Dig. tit. "Executors and Administrators," § 696.

The right of minor children to have an allowance set apart for their support is not affected by a devise of all the testator's property to his widow. Woolley *v.* Sullivan, 92 Tex. 28, 45 S. W. 377, 46 S. W. 629.

An adopted son of the decedent cannot claim the statutory exemption where the widow elected to take under the will leaving her all the decedent's property. Semple's Estate, 3 Lanc. L. Rev. (Pa.) 328.

85. Like *v.* Cooper, 132 Ind. 391, 31 N. E. 1118; Shafer *v.* Shafer, 129 Ind. 394, 28 N. E. 867; Shipman *v.* Keys, 127 Ind. 353, 26 N. E. 896; Hurley *v.* McIver, 119 Ind. 53, 21 N. E. 325; Langley *v.* Mayhew, 107 Ind. 198, 6 N. E. 317, 8 N. E. 157; Whetsell *v.* Louden, 25 Ind. App. 257, 57 N. E. 952; McDonald *v.* Moak, 24 Ind. App. 528, 57 N. E. 159; Snodgrass *v.* Meeks, 12 Ind. App. 70, 38 N. E. 833; Richards *v.* Hollis, 8 Ind. App. 353, 35 N. E. 572; Matter of Allen, 36 Misc. (N. Y.) 398, 73 N. Y. Suppl. 750; *In re* Witner, 10 Ohio S. & C. Pl. Dec. 30, 7 Ohio N. P. 143; *In re* Rierdon, 5 Ohio S. & C. Pl. Dec. 606, 5 Ohio N. P. 516; Matter of Maier, 1 Pearson (Pa.) 420; McManus' Estate, 14 Phila. (Pa.) 660.

Where decedent has disposed of all his property by will a reservation under the statute for his family will conflict with the will and hence cannot be had. Carey *v.* Monroe, 54 N. J. Eq. 632, 35 Atl. 456.

Repudiation of acceptance.— The acceptance by the widow of a legacy in lieu of her dower and year's support and taking the executor's personal note in satisfaction of the legacy may be repudiated by her at any time before the record of the will and qualification

Where the widow elects not to take under the will, she is usually held entitled to her allowance.[86] If no provision is made for her in the will she may claim her allowance or exemption without dissenting from it.[87]

4. Separate Estate or Homestead. Notwithstanding the widow may have a separate estate of her own, or may continue to occupy the homestead, she is usually granted the statutory allowance and exemption, especially if the income from such separate property be insufficient for a due maintenance.[88]

5. Misconduct. A widow's allowance may be denied for her misconduct; as in case of her adultery or a separation because of her own misconduct, while the marriage existed,[89] or her fraud or misconduct during administration, especially if she be executrix or administratrix, may debar her.[90]

6. Separation. The special allowance to a widow is usually denied where she was not living in a family relation with her husband at the time of his death,[91] unless her separation was involuntary and through no fault of hers or was based

of the executor on return of the note to its maker. Hill *v.* Hill, 88 Ga. 612, 15 S. E. 674.

86. *Illinois.*— See Brack *v.* Boyd, 202 Ill. 440, 66 N. E. 1073.

Indiana.— Ratliff *v.* Baldwin, 29 Ind. 16, 92 Am. Dec. 330.

Maine.— Brown *v.* Hodgdon, 31 Me. 65.

Massachusetts.— Crane *v.* Crane, 17 Pick. 422. But see *In re* Currier, 3 Pick. 375.

Missouri.—Register *v.* Hensley, 70 Mo. 189. But see Griffith *v.* Canning, 54 Mo. 282.

Pennsylvania.— Irwin's Estate, 6 Pa. Dist. 351.

Texas.— Runnels *v.* Runnels, 27 Tex. 515; Nelson *v.* Lyster, (Civ. App. 1903) 74 S. W. 54.

Wisconsin.— *In re* Wilber, 52 Wis. 295, 9 N. W. 162.

See 22 Cent. Dig. tit. "Executors and Administrators," § 696.

But *compare* Pearson *v.* Darrington, 32 Ala. 227; Worthen *v.* Pearson, 33 Ga. 385, 81 Am. Dec. 213; Perkins *v.* Brinkley, 133 N. C. 86, 45 S. E. 465.

87. Turner *v.* Cole, 24 Ala. 364; *In re* Peet, 79 Iowa 185, 44 N. W. 354; Godman *v.* Converse, 38 Nebr. 657, 57 N. W. 394; Piper *v.* Piper, 34 N. H. 563. But see Turner *v.* Turner, 30 Miss. 428 (holding that the widow's right to an allowance of one year's provision out of her husband's property is contingent on the event of no provision being made for her by the will, but if she desires to take it she must renounce the will); Nash *v.* Young, 31 Miss. 134 (holding that if no provision be made for the widow in the will and she renounce it she will be entitled only to her share of the estate generally, and not to any specific part of it which has been disposed of by the will).

88. *Arkansas.*— Word *v.* West, 38 Ark. 243.

Iowa.— Newans *v.* Newans, 79 Iowa 32, 44 N. W. 213.

Mississippi.— Hardin *v.* Osborne, 43 Miss. 532; Wally *v.* Wally, 41 Miss. 657; Coleman *v.* Brooke, 37 Miss. 71.

Texas.— Mabry *v.* Ward, 50 Tex. 404. But see Sloan *v.* Webb, 20 Tex. 189, holding that two minor children having property valued at twenty-five hundred dollars were not entitled to an allowance for maintenance.

Vermont.— Sawyer *v.* Sawyer, 28 Vt. 249.

See 22 Cent. Dig. tit. "Executors and Administrators," § 697.

But *compare* Leavenworth *v.* Marshall, 19 Conn. 408.

89. Owen *v.* Owen, 57 Ind. 291; Shaffer *v.* Richardson, 27 Ind. 122; Lyons *v.* Lyons, 101 Mo. App. 494, 74 S. W. 467; Leonard *v.* Leonard, 107 N. C. 171, 12 S. E. 60; Cook *v.* Sexton, 79 N. C. 305; Walters *v.* Jordan, 34 N. C. 170; Hill *v.* Hill, 42 Pa. St. 198; Scullin's Estate, 5 Pa. Co. Ct. 188. But see Chase *v.* Webster, 168 Mass. 228, 46 N. E. 705; *In re* Diller, 6 Ohio S. & C. Pl. Dec. 182, holding that the wife's living in adultery does not forfeit her right where there has been no divorce. See *infra*, IX, I, 6.

The fact that the widow had been her husband's concubine does not impair her claim. Sabalot *v.* Populus, 31 La. Ann. 854.

90. King *v.* Johnson, 94 Ga. 665, 21 S. E. 895; Nowling *v.* McIntosh, 89 Ind. 593; Speakman's Appeal, 71 Pa. St. 25.

91. *California.*— *In re* Byrne, Myr. Prob. 1.

Louisiana.— Richard *v.* Lazard, 108 La. 540, 32 So. 559. But see Liddell's Succession, 22 La. Ann. 9.

Maine.— Kersey *v.* Bailey, 52 Me. 198.

Massachusetts.— Hollenbeck *v.* Pixley, 3 Gray 521. But a recent statute (Pub. St. c. 131, § 2) has been construed to establish a different rule. Welch *v.* Welch, 181 Mass. 37, 63 N. E. 982; Chase *v.* Webster, 168 Mass. 228, 46 N. E. 705.

Ohio.— *In re* Roth, 9 Ohio S. & C. Pl. Dec. 429, 6 Ohio N. P. 498.

Pennsylvania.— Nye's Appeal, 126 Pa. St. 341, 17 Atl. 618, 12 Am. St. Rep. 873; Platt's Appeal, 80 Pa. St. 501; Hettrick *v.* Hettrick, 55 Pa. St. 290; Odiorne's Appeal, 54 Pa. St. 175, 93 Am. Dec. 683; Adose *v.* Fossit, 1 Pearson 304; Ross' Estate, 6 Kulp 521; Welsh's Estate, 5 Pa. Dist. 675, 18 Pa. Co. Ct. 517, 39 Wkly. Notes Cas. 167; Kahn's Estate, 3 Pa. Dist. 806, 16 Pa. Co. Ct. 72; Price's Appeal, 2 Mona. 554; Scullin's Estate, 5 Pa. Co. Ct. 188; Nye's Appeal, 24 Wkly. Notes Cas. 121; Coates' Estate, 6 Wkly. Notes Cas. 367; *In re* Martin, 12 Lanc. Bar 504; *In re* Grove, 12 Lanc. Bar 498; Saunder's Estate, 12 Lanc. Bar 77; Sander's Es-

upon reasons constituting a sufficient ground for divorce.[92] But in some states the widow's right appears to be absolute where there is a mere separation.[93]

7. Divorce. The widow's special allowance or exemption does not apply to a woman who was divorced from her husband;[94] nor generally to a woman who has obtained an incomplete or invalid divorce, by virtue of which she has long lived voluntarily apart from her husband.[95] But a void divorce procured by the husband from a foreign tribunal does not deprive the widow of the statutory allowance.[96]

8. Relinquishment After Husband's Death. While a widow's release of her allowance and exemptions after her husband's death does not necessarily conclude the rights of the children residing with her,[97] it will debar her, especially when settlement of the estate has proceeded upon the faith of it,[98] unless she was imposed upon by others.[99] But she will not be barred unless the instrument executed by her clearly shows an intention to release these statutory rights.[1]

9. Remarriage. While the remarriage of the widow does not divest her or minor children of allowances and exemptions already vested,[2] it bars her from

tate, 1 York Leg. Rec. 115; Tozer *v.* Tozer, 2 Am. L. Reg. 510.

Texas.— Earle *v.* Earle, 9 Tex. 630.

See 22 Cent. Dig. tit. "Executors and Administrators," § 699.

Articles of separation, except where induced by the husband's cruel treatment (Linares *v.* De Linares, 93 Tex. 84, 52 S. W. 579) may bar the widow's allowance (Noah's Estate, 73 Cal. 583, 15 Pac. 287, 2 Am. St. Rep. 829; Speidel's Appeal, 107 Pa. St. 18; Dillinger's Appeal, 35 Pa. St. 357; Henkel's Estate, 13 Pa. Super. Ct. 337; Schmitt's Estate, 5 Pa. Co. Ct. 183; Linares *v.* De Linares, 93 Tex. 84, 53 S. W. 579; *In re* Park, 25 Utah 161, 69 Pac. 671), but not the right of a minor child (Henkel's Estate, 13 Pa. Super. Ct. 337).

92. Slack *v.* Slack, 123 Mass. 443; Newton *v.* Truesdale, 69 N. H. 634, 45 Atl. 646; *In re* Roth, 9 Ohio S. & C. Pl. Dec. 429, 6 Ohio N. P. 498; Nye's Appeal, 126 Pa. St. 341, 17 Atl. 618, 12 Am. St. Rep. 873; Terry's Appeal, 55 Pa. St. 344; Welsh's Estate, 5 Pa. Dist. 675, 18 Pa. Co. Ct. 517, 39 Wkly. Notes Cas. (Pa.) 167; Moore's Appeal, 40 Leg. Int. (Pa.) 350; Spence's Estate, 5 Pa. Co. Ct. 494; Simpson's Estate, 5 Pa. Co. Ct. 326, 22 Wkly. Notes Cas. (Pa.) 172; Wright's Estate, 5 Pa. Co. Ct. 228; Saunder's Estate, 12 Lanc. Bar (Pa.) 77; Groom's Estate, 6 York Leg. Rec. (Pa.) 139; Linares *v.* De Linares, 93 Tex. 84, 53 S. W. 579. But see Creighton's Estate, 7 Pa. Dist. 251, 21 Pa. Co. Ct. 83; Burkett's Estate, 5 Pa. Co. Ct. 501; Grove's Estate, 5 Pa. Co. Ct. 498.

Minor children living apart from their father at his death by reason of his desertion of and failure to provide for them are entitled to the statutory exemption notwithstanding a statute requiring residence with deceased at the time of his death. Rappe's Estate, 4 Lanc. L. Rev. (Pa.) 316.

The burden of showing that the separation was not for sufficient cause is on the person claiming that the widow has forfeited her allowance. Linares *v.* De Linares, 93 Tex. 84, 53 S. W. 579.

93. Smith *v.* Smith, 112 Ga. 351, 37 S. E. 407; Mowser *v.* Mowser, 87 Mo. 437; Comerford *v.* Coulter, 82 Mo. App. 362; King *v.* King, 64 Mo. App. 301; Shedd's Estate, 133 N. Y. 601, 30 N. E. 1147 [*affirming* 60 Hun 367, 14 N. Y. Suppl. 841].

94. Dobson *v.* Butler, 17 Mo. 87; Fyock's Estate, 9 Lanc. L. Rev. (Pa.) 89.

A decree of divorce a mensa et thoro with an order for alimony at the suit of the wife will defeat her claim to exemption. Evans' Estate, 21 Pa. Super. Ct. 430.

95. Byrne's Estate, Myr. Prob. (Cal.) 1.

96. Platt's Appeal, 80 Pa. St. 501.

97. Phelps *v.* Phelps, 72 Ill. 545, 22 Am. Rep. 149.

98. Telford *v.* Baggs, 64 Ill. 498; Berg's Estate, 1 Woodw. (Pa.) 75.

99. Mayrand *v.* Mayrand, 194 Ill. 45, 61 N. E. 1040 [*affirming* 96 Ill. App. 481]; Ellsworth *v.* Ellsworth, 33 Iowa 164; Potter's Estate, 6 Pa. Super. Ct. 627; Nace's Estate, 14 Lanc. Bar (Pa.) 42.

1. *In re* Moore, 57 Cal. 446 (holding that a bill of sale expressly limited to property owned by her "as heir at law of her said husband" did not deprive the widow of her statutory exemption); *In re* Moore, 57 Cal. 437 (holding that a quitclaim deed executed by the widow after her husband's death conveyed only her interest in the property which she received upon his death by succession, and did not deprive her of her homestead right in such property).

2. *Alabama.*— Shelton *v.* Carrol, 16 Ala. 148, quarantine before dower.

Georgia.— Swain *v.* Stewart, 98 Ga. 366, 25 S. E. 831.

Kentucky.— Burgett *v.* Clarke, 4 Ky. L. Rep. 518.

Michigan.— Bacon *v.* Perkins, 100 Mich. 183, 58 N. W. 85.

Pennsylvania.— Davis' Estate, 5 Pa. Co. Ct. 505; Somers' Estate, 9 Wkly. Notes Cas. 559; Venus' Estate, 1 York Leg. Rec. 193.

See 22 Cent. Dig. tit. "Executors and Administrators," § 702.

The interest of infant children in property set apart for the use of a widow and minor

any subsequent claim upon the estate, the order of allowance thereupon terminating without any further order of the court.[3]

10. Delay in Applying. It is the duty of a widow to make her claim for an allowance or exemption promptly,[4] and while a delay which is reasonable under existing circumstances may be allowed,[5] an unreasonable delay will usually have the effect of defeating her right,[6] at all events where the tardy assertion of her

children is not destroyed by her remarriage. Burgett *v.* Clarke, 4 Ky. L. Rep. 518.

3. Hamilton's Estate, 66 Cal. 576, 6 Pac. 493; Machemer's Estate, 140 Pa. St. 544, 21 Atl. 441; Seittenspinner's Estate, 6 Pa. Dist. 454; Davis' Estate, 5 Pa. Co. Ct. 505; Cronan *v.* Scranton, 2 Lack. Jur. (Pa.) 413.

4. Hunt's Estate, 14 Phila. (Pa.) 330. As a general rule an application for allowance can only be entertained during the time for which support is intended. Zunkel *v.* Colson, 109 Iowa 695, 81 N. W. 175.

Delay in taking out letters of administration is chargeable to the widow, and hence she cannot set up such delay as an excuse for a delay in claiming exemption of her statutory allowance. Cronan *v.* Scranton, 2 Lack. Jur. (Pa.) 413; Hughes' Estate, 1 Lack Jur. (Pa.) 85. But see *Ex p.* Rogers, 63 N. C. 110.

5. *Alabama.*— See Little *v.* McPherson, 76 Ala. 552, holding that there must concur the failure of the widow to select and the failure of the judge of probate to appoint persons to make the selection.

Arkansas.— Henry *v.* Tillar, 70 Ark. 246, 67 S. W. 310, holding that failure to cause appraisement to be made within the time required by statute does not bar her rights.

California.— *In re* Welch, 106 Cal. 427, 39 Pac. 805, four years.

Illinois.— Miller *v.* Miller, 82 Ill. 463, two years.

Massachusetts.—Welch *v.* Welch, 181 Mass. 37, 62 N. E. 982; Lisk *v.* Lisk, 155 Mass. 153, 29 S. E. 375, two years and eight months.

Missouri.— Campbell *v.* Whitsett, 66 Mo. App. 444.

New Hampshire.— Kingman *v.* Kingman, 31 N. H. 182.

North Carolina.— *Ex p.* Rogers, 63 N. C. 110.

Pennsylvania.— Terry's Appeal, 55 Pa. St. 344 (delay in learning of husband's death); Towanda Bank Appeal, 1 Mona. 463; Bower's Estate, 17 Pa. Super. Ct. 59; Potter's Estate, 6 Pa. Super. Ct. 627 (two years and eighteen days); Kelly's Estate, 3 Pa. Dist. 15, 14 Pa. Co. Ct. 51; Snider's Estate, 16 Pa. Co. Ct. 238; Birk's Estate, 11 Pa. Co. Ct. 569; McCann's Estate, 9 Pa. Co. Ct. 408; Groome's Estate, 7 Pa. Co. Ct. 519; Buddy's Estate, 7 Pa. Co. Ct. 466 (a year's delay, she being administratrix); Spence's Estate, 5 Pa. Co. Ct. 494; Koch's Estate, 12 Wkly. Notes Cas. 305; Rizer's Estate, 11 Wkly. Notes Cas. 563; Rank's Estate, 5 Wkly. Notes Cas. 555; Hurley's Estate, 12 Phila. 47; Kirkpatrick's Estate, 5 Phila 98; Nace's Estate, 14 Lanc. Bar 42; Groome's Estate, 6 York Leg. Rec. 139.

See 22 Cent. Dig. tit. "Executors and Administrators," § 703.

The burden is on the widow to show that she made her claim promptly on hearing of the decedent's death, or other facts tending to excuse the delay. Grove's Estate, 5 Pa. Co. Ct. 498; Simpson's Estate, 5 Pa. Co. Ct. 326, 22 Wkly. Notes Cas. (Pa.) 172.

Delay caused by the parties who object to the allowance to the widow of her exemption estops them from taking advantage of such delay, as against the widow. Kirchner's Estate, 6 Pa. Dist. 138, 19 Pa. Co. Ct. 216.

Where representations of heirs have prevented the widow from claiming her exemption, she may do so in her account as executrix. Ferguson's Estate, 10 Kulp (Pa.) 141.

6. *Alabama.*— Henderson *v.* Tucker, 70 Ala. 381, delay until after an administrator's sale.

Georgia.— Birt *v.* Brown, 106 Ga. 23, 31 S. E. 755.

Illinois.— Tarrant *v.* Kelly, 81 Ill. App. 118, nearly ten years.

Indiana.— Johnson *v.* Robertson, 7 Blackf. 425, application after sale of property by executor.

Iowa.— Zunkel *v.* Colson, 109 Iowa 695, 81 N. W. 175, delay until discharged as administratrix.

Mississippi.— Dease *v.* Cooper, 40 Miss. 114.

Missouri.— Drowry *v.* Bauer, 68 Mo. 155.

New Hampshire.— Kingman *v.* Kingman, 31 N. H. 182; Hubbard *v.* Wood, 15 N. H. 74, four years.

North Carolina.— Perkins *v.* Brinkley, 133 N. C. 86, 45 S. E. 465, holding that a widow who has failed to dissent from the will cannot maintain an action to recover a year's support brought six months after probate.

Pennsylvania.—Machemer's Estate, 140 Pa. St. 544, 21 Atl. 441 (more than three years); Kern's Appeal, 120 Pa. St. 523, 14 Atl. 435; Williams' Appeal, 92 Pa. St. 69; Burk *v.* Gleason, 46 Pa. St. 297; Baskin's Appeal, 38 Pa. St. 65; Elsasser's Estate, 17 Pa. Super. Ct. 622; Davies *v.* Murbach, 17 Pa. Super. Ct. 207; Beetem *v.* Getz, 5 Pa. Super. Ct. 71, 41 Wkly. Notes Cas. 69; Bayington's Estate, 5 Pa. Dist. 285; Snider's Estate, 4 Pa. Dist. 458; Hoffeditz's Estate, 4 Pa. Dist. 125; Formad's Estate, 3 Pa. Dist. 13, 14 Pa. Co. Ct. 104; Matter of Clark, 2 Pearson 491; Matter of Maier, 1 Pearson 420; McNeill's Estate, 6 Kulp 168; Fox's Estate, 5 Kulp 218; Holmes' Estate, 20 Pa. Co. Ct. 434 (two years); Ehrehart's Estate, 18 Pa. Co. Ct. 536; Neill *v.* Kuhn, 15 Pa. Co. Ct. 565; *In re* Kelly, 14 Pa. Co. Ct. 51; Davey's Estate, 9 Pa. Co. Ct. 125; Davis' Estate, 5 Pa. Co. Ct. 505; Grove's Estate, 5 Pa. Co. Ct.

claim would cause embarrassment and difficulty in settling the estate[7] or unduly prejudice intervening rights.[8]

11. Death of Beneficiary. The death of the widow before her right to the statutory allowance and exemptions has become vested causes it to lapse;[9] but in the event of her death after the right has vested in her the benefit passes to her legal representatives,[10] or to the infant children.[11]

J. Selection or Setting Apart — 1. By Persons Entitled. The right to exempted property cannot usually ripen into a full title until selection is made and the property separated from the rest of the estate,[12] although under some statutes a selection or setting apart is not necessary where the value of the dece-

498 (two years and a half unless there be sufficient excuse for her delay); Michel's Estate, 5 Pa. Co. Ct. 321; McLaughlin's Estate, 4 Pa. Co. Ct. 295; Roberts' Estate, 3 Pa. Co. Ct. 365, 20 Wkly. Notes Cas. 380; Pratt's Estate, 23 Wkly. Notes Cas. 543; Silvius' Estate, 20 Wkly. Notes Cas. 389; Weckerly's Estate, 11 Wkly. Notes Cas. 287; Donoghue's Estate, 19 Phila. 220; Heller's Estate, 11 Phila. 120; Dech's Estate, 6 Phila. 72; Cranse's Estate, 6 Phila. 71 (four months after sale); *In re* Bryan, 4 Phila. 228; John's Estate, 1 Chest. Co. Rep. 311; Berg's Estate, 1 Woodw. 75; *In re* Hughes, 1 Lack. Jur. 85; *In re* Griffiths, 1 Lack. Leg. N. 311; McLaughlin's Estate, 4 Lanc. L. Rev. 410; Pickett's Estate, 1 Susq. Leg. Chron. 39 (until property sold or converted); Maier's Estate, 1 Leg. Gaz. 475, 2 Luz. L. Obs. 66 (after appraisement); Dutch's Estate, 31 Pittsb. Leg. J. 55 (delay by guardian for five years after probate to claim exemption for minor child).

South Carolina.— Haltiwanger *v.* Windhorn, 44 S. C. 413, 22 S. E. 446.

Texas.— Tiebout *v.* Millican, 61 Tex. 514, twenty-five years' delay.

See 22 Cent. Dig. tit. "Executors and Administrators," § 703.

Where minor children allowed over two years to elapse after the remarriage of their mother before making application for statutory exemption allowances their claim was barred, notwithstanding their minority. Cronan *v.* Scranton, 2 Lack. Jur. (Pa.) 413.

Where a demand is not required of the widow and minor children in order to secure a year's allowance, mere lapse of time will not be considered as a waiver or relinquishment of such right. *In re* Rierdon, 5 Ohio S. & C. Pl. Dec. 606, 5 Ohio N. P. 516.

7. Kingman *v.* Kingman, 31 N. H. 182; Lawley's Appeal, (Pa. 1887) 9 Atl. 327; Davis' Estate, 2 Kulp (Pa.) 84; Hunt's Estate, 11 Wkly. Notes Cas. (Pa.) 123; Somer's Estate, 9 Wkly. Notes Cas. (Pa.) 559.

8. Kelly's Estate, 3 Pa. Dist. 15, 14 Pa. Co. Ct. 51; Birk's Estate, 11 Pa. Co. Ct. 569 [*distinguishing* Kern's Appeal, 120 Pa. St. 523, 14 Atl. 435]; McCann's Estate, 9 Pa. Co. Ct. 408; Scullin's Estate, 5 Pa. Co. Ct. 188; Roberts' Estate, 3 Pa. Co. Ct. 365, 20 Wkly. Notes Cas. (Pa.) 380; Koch's Estate, 12 Wkly. Notes Cas. (Pa.) 305; Hurley's Estate, 5 Wkly. Notes Cas. (Pa.) 101; Tibbin's Estate, 5 Phila. (Pa.) 100; Kirkpatrick's Estate, 5 Phila. (Pa.) 98; Pott's Appeal, 3 Walk. (Pa.) 135.

9. *Iowa.*— Zunkel *v.* Colson, 109 Iowa 695, 81 N. W. 175.

Maine.— Tarbox *v.* Fisher, 50 Me. 236.

Massachusetts.—Adams *v.* Adams, 10 Metc. 170.

North Carolina.— Simpson *v.* Cureton, 97 N. C. 114, 28 S. E. 668; *Ex p.* Dunn, 63 N. C. 137 (death after allotment but before confirmation); Kimball *v.* Deming, 27 N. C. 418; Cox *v.* Brown, 27 N. C. 194.

Pennsylvania.— Mulhollen's Estate, 5 Pa. Dist. 70; Lafferty's Estate, 12 Wkly. Notes Cas. 535, 16 Phila. 211; Beck's Estate, 7 York Leg. Rec. 118.

See 22 Cent. Dig. tit. "Executors and Administrators," § 704.

10. *Georgia.*— Brown *v.* Joiner, 77 Ga. 232, 3 S. E. 157.

Indiana.— Bratney *v.* Curry, 33 Ind. 399.

Massachusetts.— Drew *v.* Gordon, 13 Allen 120.

Missouri.— Hastings *v.* Myers, 21 Mo. 519.

New York.— Matter of Hulse, 41 Misc. 307, 84 N. Y. Suppl. 220.

Ohio.— Bane *v.* Wick, 14 Ohio St. 505; Dorah *v.* Dorah, 4 Ohio St. 292.

Pennsylvania.— Pickett's Estate, 1 Susq. Leg. Chron. 39.

Vermont.— Johnson's Estate, 41 Vt. 467.

See 22 Cent. Dig. tit. "Executors and Administrators," § 704.

11. Dickerson *v.* Nash, 74 Ga. 357; Mallory *v.* Mallory, 12 Ky. L. Rep. 684; Price *v.* Nichols, 12 Ky. L. Rep. 421; Crabtree *v.* Crabtree, 11 Ky. L. Rep. 812. But see Kimball *v.* Deming, 27 N. C. 418; Cox *v.* Brown, 27 N. C. 194, holding children entitled to support only as members of the widow's family.

12. Mitcham *v.* Moore, 73 Ala. 542; Tucker *v.* Henderson, 63 Ala. 280; Harrell *v.* Hammond, 25 Ind. 104; Jelly *v.* Elliott, Smith (Ind.) 32; Carey *v.* Monroe, 54 N. J. Eq. 632, 35 Atl. 456.

Selection may be made at appraised value of property (Harrell *v.* Hammond, 25 Ind. 104; Hays *v.* Buffington, 2 Ind. 369) notwithstanding a rise in value after appraisal (Overturf *v.* Wear, 26 Ohio St. 538).

Selection from both realty and personalty may be made at same time. Bobb's Estate, 1 Woodw. (Pa.) 317.

Widow restricted to designation made.— Dorscheimer's Estate, 12 Pa. Super. Ct. 34.

The guardian of one minor child may select

dent's property does not exceed a given amount.[13] Whether with or without an order of court, and whether before or during administration, the fact of such selection should be established as the statute may have provided.[14]

2. By Executors, Administrators, Etc.— a. In General. Under some statutes the property must be set apart by the decedent's personal representatives,[15] by commissioners appointed for that purpose,[16] or by appraisers,[17] upon the widow's seasonable and proper demand.[18]

b. Liability For Refusing to Act or Abusing Power. If the personal representative wrongfully refuses to act or abuses his power in the premises he may be controlled by the court and made to rectify,[19] or he may be held liable in an action by the widow for the recovery of the allowance or exemption,[20] or for its

as next friend of another minor child. Jones' Estate, 2 Chest. Co. Rep. (Pa.) 302.

Under a general setting apart, without specifying different sets of children, children of a former wife cannot claim a benefit. Horn *v.* Truett, 114 Ga. 995, 41 S. E. 498.

A widow who is executrix or administratrix need not make demand, but may take the exempted property and claim credit in her account. Atherton's Estate, 8 Kulp (Pa.) 150. *Contra,* Chiffet *v.* Willis, 74 Tex. 245, 11 S. W. 1105.

The right to select continues as long as the statute designates, and the representative cannot defeat such selection by prematurely or improperly using the assets for other purposes of administration. Little *v.* McPherson, 76 Ala. 552; Heller *v.* Leisse, 13 Mo. App. 180.

13. Jackson *v.* Wilson, 117 Ala. 432, 23 So. 521 (appropriation being equivalent to a selection); Gamble *v.* Kellum, 97 Ala. 677, 12 So. 82; Chandler *v.* Chandler, 87 Ala. 300, 6 So. 153; Nance *v.* Nance, 84 Ala. 375, 4 So. 699, 5 Am. St. Rep. 378. See also Toner's Estate, 5 Wkly. Notes Cas. (Pa.) 387. And see *supra,* IX, D, 5.

14. *Alabama.*— Mitcham *v.* Moore, 73 Ala. 542.

Georgia.— Horn *v.* Truett, 114 Ga. 995, 41 S. E. 498.

Indiana.— Hoover *v.* Agnew, 91 Ind. 370.

Texas.— Chifflet *v.* Willis, 74 Tex. 245, 11 S. W. 1105.

Wisconsin.— Wilcox *v.* Matteson, 53 Wis. 23, 9 N. W. 814, 40 Am. Rep. 754; Tomlinson *v.* Nelson, 49 Wis. 679, 6 N. W. 366.

See 22 Cent. Dig. tit. "Executors and Administrators," § 705.

15. *Indiana.*—Harrell *v.* Hammond, 25 Ind. 104.

New Jersey.— Read *v.* Patterson, 47 N. J. Eq. 595, 22 Atl. 1076.

Pennsylvania.— Compher *v.* Compher, 25 Pa. St. 31; Rigby's Estate, 42 Wkly. Notes Cas. 434.

Tennessee.— Rhea *v.* Creer, 86 Tenn. 59, 5 S. W. 595.

Texas.— Mitchell *v.* Harrison, 32 Tex. 331.

See 22 Cent. Dig. tit. "Executors and Administrators," § 706.

Assets not exempt should not be set apart to the widow but should be inventoried as assets of the estate. *In re* Holderbaum, 22 Iowa 69, 47 N. W. 898. An administrator cannot set apart exempt property for the use of children as against the claim of a married daughter whose interest would be affected thereby. Shannon *v.* Davis, 64 Miss. 717, 2 So. 240.

16. Vaughn *v.* Fitzgerald, 112 Ga. 517, 37 S. E. 752; Rhea *v.* Green, 86 Tenn. 59, 5 S. W. 595.

A nunc pro tunc order that the commissioners' return be entered of record may be made where it does not appear that there are any objections to the return, and the failure to enter it on the records was through the mistake or negligence of the ordinary. Vaughn *v.* Fitzgerald, 112 Ga. 517, 37 S. E. 752.

17. Jacobson *v.* Jacobson, 107 Ga. 29, 32 S. E. 877; Clark *v.* Fleming, 78 Ga. 782, 4 S. E. 12; Holliday *v.* Holland, 41 Miss. 528; Matter of Bidgood, 36 Misc. (N. Y.) 516, 73 N. Y. Suppl. 1061 (holding that the statute requiring appraisers to set apart property is mandatory and that they have no discretion except as to the nature of the property); Daggett *v.* Daggett, 14 N. Y. Suppl. 182 [*affirming* 9 N. Y. Suppl. 652, 2 Connoly Surr. 230]; Heck *v.* Heck, 6 Ohio Dec. (Reprint) 604, 7 Am. L. Rec. 13. And see *infra,* IX, J, 3.

18. Hamilton *v.* Matlock, 22 Ind. 47; McNulty *v.* Lewis, 8 Sm. & M. (Miss.) 520 (before final settlement); Lyman *v.* Byam, 38 Pa. St. 475 (before sale); Compher *v.* Compher, 25 Pa. St. 31; Torstenson's Estate, 3 Pa. Co. Ct. 13; Bryan's Estate, 4 Phila. (Pa.) 228; Groff's Estate, 2 Lanc. L. Lev. (Pa.) 413.

Demand by widow inures to benefit of her assignee. Brown *v.* Bernhamer, 159 Ind. 538, 65 N. E. 580.

19. Read *v.* Patterson, 47 N. J. Eq. 595, 22 Atl. 1076 (holding that if the executor makes an unreasonable allowance the court may interfere and make such an allowance as he in the exercise of a proper discretion ought to have made); Sheldon *v.* Bliss, 8 N. Y. 31 [*affirming* 7 Barb. 152]; Bryan's Estate, 4 Phila. (Pa.) 228.

The duty of making return to the probate court of the exemption claimed by the widow or guardian of minors rests on the personal representative and he is accountable for negligence or failure to make it. Jarrell *v.* Payne, 75 Ala. 577.

20. Brown *v.* Bernhamer, 159 Ind. 538, 65 N. E. 580; Hamilton *v.* Matlock, 22 Ind. 47 (holding that the widow is not required to

conversion,[21] or in an action for damages.[22] Interest may be allowed from the date of the representative's refusal to pay the allowance.[23]

c. Credit For Allowance in Accounts. An order of court is not always necessary to enable the executor or administrator to make reasonable and proper payments to the widow for a family allowance,[24] and if he actually appropriates assets for allowance to the widow, or proceeds fairly with her permission to appropriate, he is entitled to credit accordingly.[25]

3. Appraisement — a. Necessity. An actual appraisement of the estate is usually a prerequisite to a proper setting apart of the widow's allowance,[26] unless she elects to claim her exemption in money or out of evidences of debts,[27] or the estate had previously been appraised,[28] or unless the statute dispenses therewith.[29]

b. Demand. A seasonable demand of appraisement by the widow is required, where such appraisement is an essential preliminary to her allowance.[30]

make a specific selection before maintaining an action for the exempt property); Conger *v.* Atwood, 28 Ohio St. 134, 22 Am. Rep. 462; Neely *v.* McCormick, 25 Pa. St. 255.

21. Taylor *v.* Taylor, 53 Ala. 135; Barwick *v.* Rackley, 46 Ala. 402; Neely *v.* McCormick, 25 Pa. St. 255; Torstenson's Estate, 3 Pa. Co. Ct. 13.

Previous order for delivery necessary.— Noblett *v.* Dillinger, 23 Ind. 505.

22. Compher *v.* Compher, 25 Pa. St. 31; Torstenson's Estate, 3 Pa. Co. Ct. 13.

23. Brown *v.* Bernhamer, 159 Ind. 538, 65 N. E. 580.

24. *In re* Lux, 114 Cal. 89, 45 Pac. 1028; Dickinson *v.* Henderson, 122 Mich. 583, 81 N. W. 583.

25. *Alabama.*—Barwick *v.* Rackley, 46 Ala. 402.

Kentucky.— Grider *v.* Rodes, 5 Bush 277.

Massachusetts.— Newell *v.* West, 149 Mass. 520, 21 N. E. 954.

New Jersey.— Cooley *v.* Vansyckle, 14 N. J. Eq. 496.

Ohio.— Watts *v.* Watts, 38 Ohio St. 480.

Pennsylvania.—See Williamson's Estate, 12 Phila. 144; Avery's Estate, 1 C. Pl. 151.

See 22 Cent. Dig. tit. "Executors and Administrators," § 707.

26. *Alabama.*— Mattox *v.* Feagan, 57 Ala. 274.

Georgia.— Clark *v.* Fleming, 78 Ga. 782, 4 S. E. 12.

Indiana.— Harrell *v.* Hammond, 25 Ind. 104.

Iowa.— Adkinson *v.* Breeding, 56 Iowa 26, 8 N. W. 685, for identification only.

Ohio.— Heck *v.* Heck, 6 Ohio Dec. (Reprint) 604, 7 Am. L. Rec. 13.

Pennsylvania.— Hufman's Appeal, 81 Pa. St. 329; Beetem *v.* Getz, 5 Pa. Super. Ct. 71, 41 Wkly. Notes Cas. 69; Nixon's Appeal, 6 Wkly. Notes Cas. 496; Avery's Estate, 1 C. Pl. 151; Grove's Estate, 12 York Leg. Rec. 180, holding that personalty retained by the widow without appraisement may be surcharged against her, but is no ground for exception to the appraisement.

See 22 Cent. Dig. tit. "Executors and Administrators," § 708.

Appointment of auditor.—Where the widow has had set apart to her articles of personal property and cash from the estate, the administrator cannot pay the cash out of the proceeds of the sale of the real estate without the appointment of an auditor. Avery's Estate, 1 C. Pl. (Pa.) 751.

27. Seller's Estate, 82 Pa. St. 153; Larrison's Appeal, 36 Pa. St. 130; Towanda Bank's Appeal, 1 Mona. (Pa.) 463; Rigby's Estate, 8 Pa. Super. Ct. 108, 42 Wkly. Notes Cas. (Pa.) 434; Beetem *v.* Getz, 5 Pa. Super. Ct. 71, 41 Wkly. Notes Cas. (Pa.) 69; Weckerly's Estate, 11 Wkly. Notes Cas. (Pa.) 287; Gerrity's Estate, 1 Leg. Rec. (Pa.) 214.

Where the widow claims her exemption out of the proceeds of real estate converted into personalty appraisement is not necessary. Good's Appeal, 152 Pa. St. 63, 25 Atl. 164; Beetem *v.* Getz, 5 Pa. Super. Ct. 71, 41 Wkly. Notes Cas. (Pa.) 69; Gibson's Estate, 5 Pa. Super. Ct. 57; Silvius' Estate, 17 Wkly. Notes Cas. (Pa.) 447. It has also been held that an appraisement of real estate is not necessary. Klein's Estate No. 1, 2 Pa. Dist. 813, 14 Pa. Co. Ct. 72. But see Towanda Bank's Appeal, 1 Mona. (Pa.) 463; Torstenson's Estate, 3 Pa. Co. Ct. 13.

28. McCann's Estate, 9 Pa. Co. Ct. 408.

29. Crawford *v.* Nassoy, 173 N. Y. 163, 65 N. E. 962 [*reversing* 55 N. Y. App. Div. 433, 67 N. Y. Suppl. 108].

30. Hamilton *v.* Matlock, 22 Ind. 47; McNulty *v.* Lewis, 8 Sm. & M. (Miss.) 520; Hufman's Appeal, 81 Pa. St. 329; Larrison's Appeal, 36 Pa. St. 130; Davis' Appeal, 34 Pa. St. 256; Andress' Estate, 10 Wkly. Notes Cas. (Pa.) 52, 14 Phila. (Pa.) 263; Somer's Estate, 14 Phila. (Pa.) 261; Heller's Estate, 11 Phila. (Pa.) 120; Bryan's Estate, 4 Phila. (Pa.) 228; Gerrity's Estate, 1 Leg. Rec. (Pa.) 214.

While estate unsettled.— An appraisement will be ordered on the widow's application at any time while the estate remains unsettled. *In re* Rierdon, 5 Ohio S. & C. Pl. Dec. 606, 5 Ohio N. P. 516.

The administrator, instead of the widow, may demand the appraisement. Cash *v.* Cash, 67 Ark. 278, 54 S. W. 744; *In re* Rierdon, 5 Ohio S. & C. Pl. Dec. 606, 5 Ohio N. P. 516; Lane's Estate, 6 Pa. Dist. 618.

c. Appraisers. The appraisers should usually be disinterested persons, and the same who appraise the general estate of the decedent.[31]

d. Proceedings. Whether appraisers are to set apart specifically or merely to certify value and report to the court, they should perform their duty diligently,[32] and should make and file a true return[33] within the time limited by statute.[34] The appraisers' return is taken to be *prima facie* correct[35] and is accepted as showing the true value of the property unless fraud be made to appear.[36]

e. Confirmation and Review. The probate court has usually the power to confirm or disallow the report of appraisers; and the judge's confirmation when made is conclusive as a judgment *in rem*, binds all others in interest unless attacked on the special grounds available for such judgments, and fixes at once the widow's award as her exclusive property.[37] Some codes permit an appeal

31. Calvit *v.* Calvit, 32 Miss. 124; Vandevort's Appeal, 43 Pa. St. 462; Bushley's Estate, 20 Pa. Co. Ct. 188; Eddy's Estate, 12 Phila. (Pa.) 17.

Where the appraisers were sureties for the widow as administratrix they were not disinterested persons and their appraisement should be set aside. Grove's Estate, 12 York Leg. Rec. (Pa.) 180. But see Macaltioner's Estate, 8 Pa. Co. Ct. 252, one only being surety.

Appraisers to set off an allowance to a minor child cannot be appointed by the minor or his guardian. Eddy's Estate, 12 Phila. (Pa.) 17.

32. See *In re* Wincox, 186 Ill. 445, 57 N. E. 1073 [*affirming* 85 Ill. App. 613]; York *v.* York, 38 Ill. 522; Applegate *v.* Cameron, 2 Bradf. Surr. (N. Y.) 119 (holding that appraisers cannot set apart more than the specified value); Matter of Pollard, Ohio Prob. 216.

If any portion of the estate has been used by the widow for her support, the same should be taken into consideration by the appraisers in making her allowance. *In re* Rierdon, 5 Ohio S. & C. Pl. Dec. 606, 5 Ohio N. P. 516.

Items should be appraised separately. Drake's Estate, 1 Wkly. Notes Cas. (Pa.) 85.

Things which belong to the widow absolutely need not be appraised. Boyer *v.* Boyer, 21 Ill. App. 534; Rutledge *v.* Rutledge, 21 Ill. App. 357.

Death of widow.— Appraisers appointed on the application of the widow cannot appraise if she dies meanwhile. Brown *v.* Joiner, 77 Ga. 232, 3 S. E. 157. See also Kapp *v.* Public Administrator, 2 Bradf. Surr. (N. Y.) 258.

33. An appraisement may be invalid for uncertainty (Kiff *v.* Kiff, 95 N. C. 71. See also Galloway's Estate, 1 Pearson (Pa.) 404); or for setting down the value too low or too high (Drygalski's Estate, 6 Kulp (Pa.) 50; Davis' Estate, 5 Kulp (Pa.) 162; Wallace's Estate, 6 Wkly. Notes Cas. (Pa.) 503); but not for a mere inaccuracy in describing the property (Allen *v.* Lindsay, 113 Ga. 521, 38 S. E. 975; Smith *v.* Smith, 112 Ga. 351, 37 S. E. 407).

Alterations after filing are not permitted. Miller's Estate, 1 Leg. Gaz. (Pa.) 59.

Certificate as to feasibility of division.— A certificate in writing that the division returned can be made without injury to the whole property is required under the Pennsylvania statute. Bushley's Estate, 20 Pa. Co. Ct. 188. See also Henry's Estate, 6 Pa. Co. Ct. 28.

Effect of report.— A report purporting merely to allow the property to the widow does not exclude the children. Allen *v.* Lindsay, 113 Ga. 521, 28 S. E. 975.

34. Cowan *v.* Corbett, 68 Ga. 66; Williams' Estate, 141 Pa. St. 436, 21 Atl. 673; Rhea *v.* Greer, 86 Tenn. 59, 5 S. W. 595.

Mere delay in recording the appraisers' return does not divest interests thereunder. Roberts *v.* Dickerson, 95 Ga. 727, 22 S. E. 654.

35. Smith *v.* Smith, 115 Ga. 692, 42 S. E. 72; Birt *v.* Brown, 106 Ga. 23, 31 S. E. 755; Robson *v.* Harris, 82 Ga. 153, 7 S. E. 926; Crouch *v.* Smith, 1 Md. Ch. 401; Williams *v.* Hale, 12 Sm. & M. (Miss.) 562.

The burden of showing the return to be incorrect is on the person objecting thereto. Smith *v.* Smith, 115 Ga. 692, 42 S. E. 72; Lee *v.* English, 107 Ga. 152, 33 S. E. 39; Gunn *v.* Pettygrew, 93 Ga. 327, 20 S. E. 328; Robson *v.* Harris, 82 Ga. 153, 7 S. E. 926.

36. Drygalski's Estate, 6 Kulp (Pa.) 50.

37. *Illinois.*— Scoville's Estate, 20 Ill. App. 426; Wood *v.* Johnson, 13 Ill. App. 548.

Mississippi.— Holliday *v.* Holland, 41 Miss. 528; *Ex p.* Buck, 40 Miss. 239; Williams *v.* Hale, 12 Sm. & M. 562; McNulty *v.* Lewis, 8 Sm. & M. 520.

New York.—Applegate *v.* Cameron, 2 Bradf. Surr. 119.

Ohio.— Heck *v.* Heck, 34 Ohio St. 369 [*affirming* 6 Ohio Dec. (Reprint) 604, 7 Am. L. Rec. 13], holding that if a new appraisement is ordered notice of proceedings therein should be given to the executor or administrator.

Oregon.— McAtee *v.* McAtee, 23 Oreg. 469, 32 Pac. 297.

Pennsylvania.— Williams' Estate, 141 Pa. St. 436, 21 Atl. 673 (second appraisement); Seller's Estate, 82 Pa. St. 153; Baldy's Appeal, 40 Pa. St. 328; Runyan's Appeal, 27 Pa. St. 121; Scott's Estate, 18 Pa. Super. Ct. 375; Henry's Estate, 6 Pa. Co. Ct. 28; Frey's Estate, 6 Pa. Co. Ct. 84; Kunkle's Estate, 4 Pa. Co. Ct. 234; Berg's Estate, 1 Woodw. 75; McLaughlin's Estate, 4 Lanc. L. Rev. 410.

from the probate court,[38] either in all cases or where the allowance of the appraisers has been increased or diminished.[39]

K. Allowance by Court — 1. In General. Usually the property set off to the widow should regularly pass through the probate court with other administration of the estate;[40] and it is within the discretion of such court to apportion a reasonable allowance for the maintenance of the decedent's family pending administration,[41] either upon its own motion[42] or upon the widow's petition.[43]

See 22 Cent. Dig. tit. "Executors and Administrators," § 712.

Where the property selected is destroyed before the appraisement is approved and no interests of creditors are involved the court may decline to approve the appraisement. Kunkle's Estate, 4 Pa. Co. Ct. 234.

A claim that the property was valued too low will not suffice to set aside the appraisement except on very clear testimony. Davenport's Estate, 4 Kulp (Pa.) 255; Dixon's Estate, 1 Kulp (Pa.) 141. But an appraisement will be set aside where many articles were clearly undervalued, and some were appraised without being seen. Grove's Estate, 12 York Leg. Rec. (Pa.) 180.

Probate court cannot set aside allotment on its own motion. *Ex p.* Reavis, 50 Ala. 210.

Formal judgment necessary only where appraisers set apart a sum of money.— Cowan *v.* Corbett, 68 Ga. 66, holding that otherwise the title vests in the family after six months without judgment.

Confirmation conclusive only of matters to which it relates.— Seller's Estate, 82 Pa. St. 153.

A judgment lien against land appraised to the widow is not sufficient to prevent confirmation when the title vested in her is made subject to the lien. *In re* Simons, 11 Pa. Super. Ct. 13.

Laches may bar the widow's right to have a decree of confirmation opened, and the appraisement set aside, even as to a single item. McLaughlin's Estate, 4 Pa. Co. Ct. 295.

38. Daniel *v.* Phelps, 86 Ga. 363, 12 S. E. 584; Robson *v.* Harris, 82 Ga. 153, 7 S. E. 926. See also Durham *v.* Durham, 107 Ga. 285, 33 S. E. 76.

The objector is entitled to open and close upon appeal from the appraisers' return where both parties introduce evidence. Lee *v.* English, 107 Ga. 152, 33 S. E. 39; Gunn *v.* Pettygrew, 93 Ga. 327, 20 S. E. 328; Robson *v.* Harris, 82 Ga. 153, 7 S. E. 926. But see Cheney *v.* Cheney, 73 Ga. 66.

A caveat to the appraisers' report cannot be amended on appeal so as to bring in issue an objection not made in the lower court. Jacobson *v.* Jacobson, 107 Ga. 29, 32 S. E. 877.

39. Reidermann *v.* Tafel, 9 Ohio Dec. (Reprint) 393, 12 Cinc. L. Bul. 284, discussing the change effected by the Ohio act of Apr. 15, 1882.

40. Griswold *v.* Mattix, 21 Mo. App. 282.

41. *In re* Slade, 122 Cal. 434, 55 Pac. 158; Garrity's Estate, 108 Cal. 463, 38 Pac. 628, 41 Pac. 481 (also holding that the court may make such allowance without first setting apart a homestead); *In re* Lux, 100 Cal. 593, 35 Pac. 341; Lawrence *v.* Security Co., 56 Conn. 423, 15 Atl. 406, 1 L. R. A. 342; *In re* Power, 92 Mich. 106, 52 N. W. 298; North *v.* Van Tassel, 84 Mich. 69, 47 N. W. 663; Babcock *v.* Hopkinton Probate Ct., 18 R. I. 555, 30 Atl. 461; State *v.* Lichtenberg, 4 Wash. 231, 29 Pac. 999.

Where the widow and children live apart and the latter are elsewhere maintained, the court should apportion the statute allowance. Womack *v.* Boyd, 31 Miss. 443.

Physician's charges and funeral expenses incurred for the benefit of minor children are properly allowable. *In re* Murphy, 30 Wash. 9, 70 Pac. 109.

Expenditures made by representative.— It is error for the court to direct the executor to treat the expenditures made by him, the question for the necessity of which is reserved until a final accounting, as money in hand, and to apply the same to paying a family allowance. *In re* Smith, 118 Cal. 462, 50 Pac. 701.

Pending an appeal on the question of the marriage one claiming to be the decedent's widow, but whose claim is contested, cannot be granted an allowance. State *v.* Lichtenberg, 4 Wash. 231, 29 Pac. 999.

Contest of probate.— It has been held that a decree for maintenance pending a contest of the will, where the testamentary provision for the widow is the income of a trust fund, should be limited to the present earning capacity of such fund, with arrears for the amount so earned up to the date of the decree. Matter of Hitchler, 21 Misc. (N. Y.) 417, 47 N. Y. Suppl. 1069. And it has even been held that no allowance can be made to a widow by the surrogate pending an appeal from the probate of the will, although she is executrix and legatee. Riegelmann's Estate, 2 N. Y. Civ. Proc. 98, 1 Dem. Surr. (N. Y.) 86.

Maintenance pending a suit by an executor, for leave to account and be discharged from his trust, will not be ordered for the benefit of a person interested in the estate when there is no money in court. Bogert *v.* Bogert, 2 Edw. (N. Y.) 399.

42. Leach *v.* Pierce, 93 Cal. 614, 29 Pac. 235; People *v.* Cass County, 35 Mich. 220; Chifflet *v.* Willis, 74 Tex. 245, 11 S. W. 1105; Connell *v.* Chandler, 11 Tex. 249; Phelps *v.* Phelps, 16 Vt. 73.

43. *Alabama.*— Jordan *v.* Strickland, 42 Ala. 315.

California.— *In re* Slade, 122 Cal. 434, 55 Pac. 158.

North Carolina.— Gillespie *v.* Hymans, 15 N. C. 119.

Ohio.— Matter of Pollard, Ohio Prob. 216.

This court also has power to grant such orders or entertain such proceedings as may be necessary to enforce a setting apart of the allowance or exemption.[43]

2. JURISDICTION. A probate court has only such jurisdiction or authority in making the widow's allowance as is given by statute,[45] as in settling the accounts of executors and administrators;[46] and its jurisdiction does not usually extend to an allowance to the widow of a non-resident decedent from assets in the jurisdiction subject to ancillary administration.[47] Neither should the probate court in this connection determine matters which lie outside its own statutory jurisdiction and pertain to the ordinary courts of justice[48] or matters of which jurisdiction has previously been obtained by another court.[49]

3. NOTICE. Notice of the widow's petition and proceedings thereunder should usually be given to the executor or administrator,[50] unless he otherwise has notice[51] or has waived formal notice by his voluntary appearance;[52] but notice to general creditors is not ordinarily required.[53]

4. PARTIES. A petition for an allowance on behalf of the widow may be made by the personal representative[54] or by a committee of lunacy if she is

Pennsylvania.— Potts' Appeal, 3 Walk. 135.
Rhode Island.— Babcock *v.* Hopkinton Probate Ct., 18 R. I. 555, 30 Atl. 461.
See 22 Cent. Dig. tit. "Executors and Administrators," § 713.

The death of the widow abates her petition, if no final decree of allowance has been made. Tarbox *v.* Fisher, 50 Me. 236.

Time for filing petition.— The filing of the petition may be within a reasonable time after the decedent's death (Benagh *v.* Turrentine, 60 Ala. 557; Birt *v.* Brown, 106 Ga. 23, 31 S. E. 755; Irwin's Estate, 6 Pa. Dist. 351; Rank's Estate, 12 Phila. (Pa.) 67), at the term of the county court where letters of administration are taken out (Gillespie *v.* Hymans, 15 N. C. 119), or at the term at which final settlement is made (Coulter *v.* Lyda, 102 Mo. App. 401, 76 S. W. 720). See also *supra*, IX, I, 10.

44. Smith *v.* Smith, 96 Ga. 772, 22 S. E. 332, holding that a receiver may be appointed to rent the property and pay monthly sums to the widow where the right to the property is contested by adult children of the decedent by a former marriage.

Attachment may issue from the probate court to compel the administrator to pay to the widow money in his hands set apart for her support. Rocco *v.* Citalla, 12 Heisk. (Tenn.) 508.

45. Turner *v.* Whitten, 40 Ala. 530; North *v.* Van Tassel, 84 Mich. 69, 47 N. W. 663; Bliss *v.* Sheldon, 7 Barb. (N. Y.) 152; Wanzer *v.* Smith, 2 Ohio Dec. (Reprint) 323, 2 West. L. Month. 426.

Annulment of bequest.— A probate court has no jurisdiction of a widow's application to annul or suspend a clause bequeathing certain notes to another, and to have such notes sold and an allowance made to her from the proceeds, where she has not applied for an administration upon the estate and disclaimed all right under the will. Nelson *v.* Lyster, (Tex. Civ. App. 1903) 74 S. W. 54.

46. Burroughs *v.* Knutton, (R. I. 1888) 13 Atl. 108.

Where no executor or administrator has been appointed the orphans' court in Pennsylvania cannot entertain a petition by the decedent's widow for her exemption out of funds in the sheriff's hands representing the surplus derived from a foreclosure sale to satisfy a mortgage on decedent's lands. Cox's Estate, 11 Wkly. Notes Cas. (Pa.) 137. But *compare* Towanda Bank's Appeal, 1 Mona. (Pa.) 463.

47. Smith *v.* Howard, 86 Me. 203, 29 Atl. 1008, 41 Am. St. Rep. 537. But see Mitchell *v.* Word, 64 Ga. 208.

48. Cauley *v.* Truitt, 63 Mo. App. 356; Bulkley *v.* Staats, 4 Redf. Surr. (N. Y.) 524; Barrett *v.* Barrett, 9 Pa. Co. Ct. 454. See also Taylor *v.* Taylor, 53 Ala. 135, holding that the probate court cannot allow the widow's exemption out of funds of an insolvent estate in the hands of the administrator *de bonis non* where the administrator in chief sold the property exempt from administration and applied the proceeds in the course of administration; her remedy in such case being against the administrator for the conversion.

49. Hall *v.* Hall, (Tenn. Ch. App. 1900) 59 S. W. 203.

50. Mackie *v.* Glendenning, 49 Ga. 367; Bacon *v.* Perkins, 100 Mich. 183, 58 N. W. 835 (holding oral notice sufficient); Freeman *v.* Washtenaw Probate Judge, 79 Mich. 390, 44 N. W. 856. But see Morgan *v.* Morgan, 36 Miss. 348; Babcock *v.* Hopkinton Probate Ct., 18 R. I. 555, 30 Atl. 461, holding that an allowance will not be disturbed for want of notice to the executor.

51. Forbes *v.* Anderson, 54 Ga. 93.

52. Johnson *v.* Tyson, 45 Cal. 257; Butts *v.* Pugh, 54 Ga. 465.

53. *In re* Palomares, 63 Cal. 402; Goss *v.* Greenaway, 70 Ga. 130. *Contra*, Fischesser *v.* Thompson, 45 Ga. 459.

54. Bardwell *v.* Edwards, 117 Ga. 824, 45 S. E. 40; Brown *v.* Joiner, 77 Ga. 232, 3 S. E. 157; Forbes *v.* Anderson, 54 Ga. 93; Mackie *v.* Glendenning, 49 Ga. 367.

An adult son who is executor may petition for the widow. Garrity's Estate, 108 Cal. 463, 38 Pac. 628, 41 Pac. 485.

A new application may be made by the administrator without waiting for the entry of

insane;[55] and on behalf of minors by a guardian[56] or next friend.[57] All persons interested should be made parties, such as the administrator[58] and minor[59] or adult children.[60]

5. **Pleading.** In some states the widow's application need not be in writing;[61] and even where a written petition is required its allegations need not be precise, but informalities and omissions are treated with leniency.[62]

6. **Objections and Exceptions.** Objections and exceptions to the allowance should be clear and specific, as well as seasonably made.[63]

7. **Evidence.** It is incumbent upon the petitioner to show all facts necessary to a recovery, under the statute,[64] as that she was the decedent's lawful wife at the time of his death,[65] that the allowance is necessary,[66] or that the children have no other resources.[67] But the burden is upon the one asserting it to show the fact of divorce[68] or the non-residence of the decedent.[69]

8. **Trial.** An application for an allowance is wholly within the discretion of the court,[70] in the determination or enforcing of which it may exercise summary powers,[71] as by allowing an amendment of the petition,[72] by granting a stay of proceedings,[73] or by trying issues out of regular order.[74]

9. **Judgment or Order — a. In General.** The granting of the widow's allowance or exemption should be made by a proper judgment or order,[75] which should

a remittitur where an order vacating a judgment setting apart a widow's allowance is affirmed by the supreme court, the widow having died before the commissioners had acted. Brown *v.* Joiner, 80 Ga. 486, 5 S. E. 497.

55. Garrett's Estate, 14 Wkly. Notes Cas. (Pa.) 310.

56. Edwards *v.* McGee, 27 Miss. 92; Eddy's Estate, 12 Phila. (Pa.) 17.

57. Butts *v.* Pugh, 54 Ga. 465.

58. McElmurray *v.* Loomis, 31 Fed. 395.

59. Woolley *v.* Sullivan, 92 Tex. 28, 45 S. W. 377, 46 S. W. 629.

60. Schmitt *v.* Kahrs, 1 Dem. Surr. (N. Y.) 114.

61. Cummings *v.* Cummings, 51 Mo. 261. *Contra*, Fischesser *v.* Thompson, 45 Ga. 459.

62. Jordan *v.* Strickland, 42 Ala. 315; Freeman *v.* Washtenaw, 79 Mich. 390, 44 N. W. 856. But see Luther's Estate, 67 Cal. 319, 7 Pac. 708.

A petition stating the sum necessary for support of herself and children was not fraudulent, although the widow had means of her own when the petition was made, since the allegations as to the amount required for support did not amount to a statement that she had no resources of her own. Busby *v.* Busby, 120 Iowa 536, 95 N. W. 191.

A petition in the nature of a bill in equity for a new trial, asking that a judgment of foreclosure be set aside, and also asking the court to fix and pay an allowance out of certain property, is sufficient as to the prayer for allowance. Woolley *v.* Sullivan, 92 Tex. 28, 45 S. W. 377, 46 S. W. 629.

63. Kelly *v.* Garrett, 67 Ala. 304; Jackson *v.* Warthen, 110 Ga. 812, 36 S. E. 234; Laslie *v.* Laslie, 87 Ga. 477, 13 S. E. 596; Parks *v.* Johnson, 79 Ga. 567, 5 S. E. 243; Bray's Estate, 12 Phila. (Pa.) 54; Storey's Estate, 16 Wkly. Notes Cas. (Pa.) 571.

64. Wilson *v.* Allen, 108 Ga. 275, 33 S. E. 975.

65. Wilson *v.* Allen, 108 Ga. 275, 33 S. E. 975; King's Estate, 9 Kulp (Pa.) 56; Guyger's Estate, 8 Pa. Co. Ct. 308.

A slight preponderance of evidence in her favor is sufficient. Guyger's Estate, 8 Pa. Co. Ct. 308.

66. Caldwell *v.* Caldwell, 54 Iowa 456, 6 N. W. 714.

67. Caldwell *v.* Caldwell, 54 Iowa 456, 6 N. W. 714; Stewin *v.* Thrift, 30 Wash. 36, 70 Pac. 116.

68. *In re* Edwards, 58 Iowa 431, 10 N. W. 793.

69. O'Neill's Estate, 11 Pa. Co. Ct. 491.

Where the decedent's will recited that he was a non-resident the burden was on the widow to show that he was a resident. Shannon *v.* White, 109 Mass. 146.

70. Kersey *v.* Bailey, 52 Me. 198; Whaley *v.* Whaley, 50 Mo. 577 (holding that it should not be submitted to the jury); Sawyer *v.* Sawyer, 28 Vt. 249 (holding also that it cannot refuse an allowance altogether on the ground of the widow's ample means).

71. Smith *v.* Smith, 12 R. I. 456, holding that an examination and decision of claims against a husband's estate may be made by the court to enable it to decide whether the realty prayed for by the widow will probably be needed to pay his debts.

A new trial is not authorized where, on a widow's petition, written objections were filed and after a hearing the allowance was granted. Leach *v.* Pierce, 93 Cal. 614, 29 Pac. 235.

72. Hudson *v.* Stewart, 48 Ala. 204.

73. O'Neill's Estate, 11 Pa. Co. Ct. 491.

74. Leaverton *v.* Leaverton, 40 Tex. 218, holding that a motion filed to compel an administrator to pay over the widow's allowance may be called for disposal before it is regularly reached on the docket.

75. Dickinson *v.* Henderson, 122 Mich. 583, 81 N. W. 583, holding that a memorandum of the amount allowed the widow for her support, entered by the probate judge on his docket, does not constitute such an order.

recite notice to the personal representative,[76] and afford relief by an appropriation of assets in the hands of the executor or administrator rather than by a judgment against him personally.[77] A judgment in the alternative is improper,[78] but mere informalities or immaterial omissions in the judgment do not usually affect its validity.[79]

b. Nunc Pro Tunc Order. An order *nunc pro tunc* may be made covering the same items included in the original order upon objection thereto and due notice given of a subsequent hearing.[80]

c. Operation and Effect. An order for an allowance during settlement covers the entire period required for settlement,[81] and continues in effect, although erroneous or improper, so long as it is not set aside.[82] Every presumption is in favor of the judgment or order and it cannot be attacked collaterally.[83]

10. Costs.[84] Costs are usually in the discretion of the court.[85]

11. Review. An appeal usually lies from the judgment or decree of the probate court giving or refusing an allowance to the widow out of the estate of her husband,[86] except where the issue is as to the amount of the allowance and the kind of property of which it shall consist,[87] or where the order is merely

76. Fischesser *v.* Thompson, 45 Ga. 459, holding that a judgment not reciting that the representatives of the estate have been notified is void as against a creditor who had no notice of the application therefor.

77. Whaley *v.* Whaley, 50 Mo. 577; Cupps' Estate, 14 York Leg. Rec. (Pa.) 16. See also Bower's Estate, 17 Pa. Super. Ct. 59.

78. Cash *v.* Cash, 67 Ark. 278, 54 S. W. 744.

79. Baker *v.* Baker, 51 Wis. 538, 8 N. W. 289, holding that the fact that it is not signed by judge or entered of record does not affect its validity.

The judgment or order need not contain a finding of the necessity for the allowance (Haven's Appeal, 69 Conn. 684, 38 Atl. 795), that property exempt from execution and already set apart is insufficient (*In re* Welch, 106 Cal. 427, 39 Pac. 805), or that the value of exempt property set apart is not in excess of the statutory limit (*In re* Slade, 122 Cal. 434, 55 Pac. 158).

80. *In re* Murphy, 30 Wash. 9, 70 Pac. 109.

81. Haven's Appeal, 69 Conn. 684, 38 Atl. 795 (holding this to be true notwithstanding a previous order limiting twelve months for the settlement of the estate); Marskey *v.* Lawrence, 121 Mich. 577, 80 N. W. 571.

An order making a temporary allowance before the return of the inventory of the estate by the executors ceases to be operative upon such return notwithstanding it contains the words "until further order of this court." *In re* Bell, 142 Cal. 97, 75 Pac. 679; Crew *v.* Pratt, 119 Cal. 131, 51 Pac. 44; *In re* Lux, 100 Cal. 593, 35 Pac. 341.

82. Downs *v.* Downs, 17 Ind. 95; Mathes *v.* Bennett, 21 N. H. 188; Richardson *v.* Merrill, 32 Vt. 27.

83. *California.*— Crew *v.* Pratt, 119 Cal. 131, 51 Pac. 44.

Georgia.— Groover *v.* Brown, 118 Ga. 491, 45 S. E. 310; Fulghum *v.* Fulghum, 111 Ga. 635, 36 S. E. 602; Goss *v.* Greenaway, 70 Ga. 130; Tabb *v.* Collier, 68 Ga. 641.

Pennsylvania.— Carr's Estate, 15 Pa. Co. Ct. 354; Greenawalt's Estate, 16 Pa. Super. Ct. 263.

Texas.— Leaverton *v.* Leaverton, 40 Tex. 218; Lockhart *v.* White, 18 Tex. 102.

Vermont.—Richardson *v.* Merrill, 32 Vt. 27.

See 22 Cent. Dig. tit. "Executors and Administrators," § 721.

84. See, generally, Costs, 11 Cyc. 1.

85. See Tarbox *v.* Fisher, 50 Me. 236 (costs allowed out of estate where widow died after filing a petition); Kingman *v.* Kingman, 31 N. H. 182 (neither party allowed costs of appeal).

Decree may be amended so as to include costs. Simpson's Appeal, 1 Mona. (Pa.) 202.

86. *Alabama.*— Chandler *v.* Chandler, 87 Ala. 300, 6 So. 153.

California.— Pennie *v.* San Francisco Super. Ct., 89 Cal. 31, 26 Pac. 617. See also Stevens' Estate, 83 Cal. 322, 23 Pac. 379, 17 Am. St. Rep. 252.

Illinois.— Lane *v.* Thorn, 103 Ill. App. 215.

Kansas.— Swayze *v.* Wade, 25 Kan. 551.

Louisiana.— Easum's Succession, 49 La. Ann. 1345, 22 So. 364.

Maine.— *In re* Cooper, 19 Me. 260.

Massachusetts.— Chase *v.* Webster, 168 Mass. 228, 46 N. E. 705; Wright *v.* Wright, 13 Allen 207; Washburn *v.* Washburn, 10 Pick. 374.

Michigan.—People *v.* Cass County, 35 Mich. 220.

Missouri.— Coulter *v.* Lyda, 102 Mo. App. 401, 76 S. W. 720.

New Hampshire.— Woodbury's Appeal, 57 N. H. 483; Piper *v.* Piper, 34 N. H. 563.

Vermont.— The discretion of the probate court is subject to reëxamination on appeal by the county court but cannot be revised by the supreme court. Leach *v.* Leach, 51 Vt. 440; Frost *v.* Frost, 40 Vt. 625; Phelps *v.* Phelps, 16 Vt. 73.

See 22 Cent. Dig. tit. "Executors and Administrators," § 723.

Objection not raised in probate court cannot be considered on appeal. Johnston *v.* Davenport, 42 Ala. 317.

87. Dunn *v.* Kelley, 69 Me. 145; Litchfield *v.* Cudworth, 15 Pick. (Mass.) 23; Bordwell

interlocutory.[88] An appeal when allowed may be taken by any party aggrieved by the decree below,[89] such as the personal representative,[90] a creditor,[91] or a distributee.[92] The discretion of the probate judge will not be disturbed on appeal unless he has abused it,[93] has been guilty of manifest error,[94] or has exceeded his jurisdiction.[95]

L. Effect of Allowance — 1. In General. Property of a decedent, which is directed by statute to be set apart to a widow, vests in her at once by operation of law on the death of her husband.[96] The setting apart of property to her by way of such allowance vests in her or in her and her children a complete title under most codes,[97] and payment or delivery of the allowance or exemption should be made directly to the widow to be held in trust for the maintenance of herself and minor children.[98]

2. Right of Disposal. This title usually gives the widow the right to mortgage or dispose of the property and appropriate the proceeds for the support of herself and children in any manner[99] that does not deprive the children of the benefit thereof.[1]

3. Lien. An allowance awarded to a widow out of her husband's estate but

v. Saginaw Cir. Judge, 119 Mich. 421, 78 N. W. 468, holding that an appeal as to such issue would not lie at the instance of the heirs, although there was a dispute as to whether the person claiming the allowance was the widow or not.

88. Bond *v.* Marx, 53 Ala. 177; Catterson's Appeal, 100 Pa. St. 9.

89. *In re* Levy, 141 Cal. 646, 75 Pac. 301, 99 Am. St. Rep. 92.

90. *In re* Levy, 141 Cal. 646, 75 Pac. 301, 99 Am. St. Rep. 92; *In re* Carriger, (Cal. 1895) 41 Pac. 700; *In re* Welch, 106 Cal. 427, 39 Pac. 805; Lane *v.* Thorn, 103 Ill. App. 215; Saunders *v.* Russell, 60 N. C. 97; *In re* Cannon, 18 Wash. 101, 50 Pac. 1021.

91. Woodbury's Appeal, 57 N. H. 483.

92. *In re* Levy, 141 Cal. 646, 75 Pac. 301, 99 Am. St. Rep. 92; Perry *v.* Perry, 4 N. C. 617.

93. *In re* Lux, 100 Cal. 593, 35 Pac. 341; Power's Estate, 92 Mich. 106, 52 N. W. 298; Freeman *v.* Washtenaw, 79 Mich. 390, 44 N. W. 856.

94. Chase *v.* Webster, 168 Mass. 228, 46 N. E. 705.

95. Bliss *v.* Sheldon, 7 Barb. (N. Y.) 152.

96. Brown *v.* Joiner, 77 Ga. 232, 3 S. E. 157; Kellogg *v.* Graves, 5 Ind. 509; Mallory *v.* Mallory, 92 Ky. 316, 17 S. W. 737, 13 Ky. L. Rep. 579; Singleton *v.* McQuerry, 8 Ky. L. Rep. 782.

97. *Alabama.*— Mitcham *v.* Moore, 73 Ala. 542; Brooks *v.* Martin, 43 Ala. 360, 94 Am. Dec. 686.

California.— McGuire *v.* Lynch, 126 Cal. 576, 59 Pac. 27, holding that the children take an undivided one half.

Georgia.—Anderson *v.* Walker, 114 Ga. 505, 40 S. E. 705 (holding that where the land is set apart to the widow only the children take no beneficial interest therein); Stringfellow *v.* Stringfellow, 112 Ga. 494, 37 S. E. 767; Miller *v.* Miller, 105 Ga. 305, 31 S. E. 186; Doyle *v.* Martin, 61 Ga. 410.

Illinois.— York *v.* York, 38 Ill. 522; Kellogg *v.* Holly, 29 Ill. 437.

Kentucky.—Harris *v.* Adams, 78 S. W. 1492, 25 Ky. L. Rep. 1492, holding that where there is a widow the setting apart is to her alone, and vests in her complete title.

Minnesota.—Benjamin *v.* Laroche, 39 Minn. 334, 40 N. W. 156.

Missouri.—Cummings *v.* Cummings, 51 Mo. 261; Bryant *v.* McCune, 49 Mo. 546.

Pennsylvania.— Runyan's Appeal, 27 Pa. St. 121; Daggett's Estate, 7 Pa. Co. Ct. 338.

Texas.— Woolley *v.* Sullivan, 92 Tex. 28, 45 S. W. 377, 46 S. W. 629.

See 22 Cent. Dig. tit. "Executors and Administrators," § 724.

Contra.— Meyer *v.* Meyer, 23 Iowa 359, 92 Am. Dec. 432; Wilmington *v.* Sutton, 6 Iowa 44.

Money payable to the widow under an order of the court belongs to her estate, although payment was stayed by an appeal from the order, which was not affirmed until after her death. *In re* Lux, 114 Cal. 73, 45 Pac. 1023.

98. Lanford *v.* Lee, 119 Ala. 248, 24 So. 578, 72 Am. St. Rep. 914; Nevin's Appeal, 47 Pa. St. 230; Henkel's Estate, 13 Pa. Super. Ct. 337.

99. Bardwell *v.* Edwards, 117 Ga. 824, 45 S. E. 40; Allen *v.* Lindsey, 113 Ga. 521, 38 S. E. 975; Stringfellow *v.* Stringfellow, 112 Ga. 494, 37 S. E. 767; Swain *v.* Stewart, 98 Ga. 366, 25 S. E. 831 (holding that the widow could dispose of land, included in her allowance, to pay a fine in order to obtain her release from imprisonment and to obtain supplies for herself and child); Whitt *v.* Ketchum, 84 Ga. 128, 10 S. E. 503; Cox *v.* Cody, 75 Ga. 175; Steed *v.* Cruise, 70 Ga. 168; Cleghorn *v.* Johnson, 69 Ga. 369; Burgett *v.* Clarke, 4 Ky. L. Rep. 518; Sipes *v.* Mann, 39 Pa. St. 414. *Contra*, Meyer *v.* Meyer, 23 Iowa 359, 92 Am. Dec. 432; Gaskell *v.* Case, 18 Iowa 147; Schaffner *v.* Grutzmacher, 6 Iowa 137; Wilmington *v.* Sutton, 6 Iowa 44; Rands *v.* Brain, 5 Utah 197, 14 Pac. 129, 5 Utah 272, 15 Pac. 1.

1. Hill *v.* Van Duzer, 111 Ga. 867, 36 S. E. 966 (holding that the widow cannot apply the proceeds of such property to the payment

for which no property has been assigned constitutes a lien to be enforced like other liens.[2]

M. Increase or Further Allowance. Allowance for a limited period is allowed under some codes with a further discretionary allowance during the progress of administration upon the petition of the widow, or children, if she be dead, if the estate be solvent, and the former allowance insufficient.[3] So also a further allowance may sometimes be made where new assets have come to the estate.[4] Such increase or further allowance should be granted at a just discretion and with due regard to the rights of others who may be interested in the estate.[5]

N. Decrease or Revocation of Allowance. Upon an application within a reasonable time an order of the court may be made modifying or revoking a former order of allowance,[6] but such an order cannot be made retroactive in its effect or require the widow to account for any portion of what she may already

of her individual debts); Vandigrift *v.* Cox, 72 Ga. 665 (holding that where the widow has remarried she cannot sell the land and buy other land taking title in herself and her second husband); Nanny *v.* Allen, 77 Tex. 240, 13 S. W. 989. But see *In re* Maier, 1 Leg. Gaz. (Pa.) 455, 2 Luz. Leg. Obs. (Pa.) 65.

2. Josey *v.* Gordon, 107 Ga. 108, 32 S. E. 951; Reilly *v.* Reilly, (Ill. 1891) 26 N. E. 604 (also holding that such award does not cease to be a lien because the widow, who is also administratrix, has received more than the amount of the award from the rent of the homestead, and in settling up a claim for causing decedent's death); Scott *v.* Greathouse, 71 Ind. 581 (statutory lien upon deceased husband's real estate for the amount of the personal estate she is allowed to take at its appraised value).

An independent intervention cannot be filed by a minor son for the purpose of securing the payment of a judgment for a year's support unless the widow has failed or neglected to intervene or is in collusion with other creditors. Ferris *v.* Van Ingen, 110 Ga. 102, 28 S. E. 347.

3. *California.*— *In re* Lux, 100 Cal. 593, 35 Pac. 341; Matter of Roberts, 67 Cal. 349, 7 Pac. 733.

Georgia.— Birt *v.* Brown, 106 Ga. 23, 31 S. E. 755; Woodbridge *v.* Woodbridge, 70 Ga. 733.

Maine.— Davis *v.* Gower, 85 Me. 167, 26 Atl. 1048.

Massachusetts.— Hale *v.* Hale, 1 Gray 518.

Michigan.—Pulling *v.* Durfee, 88 Mich. 387, 50 N. W. 319.

Nebraska.— *In re* James, (1903) 97 N. W. 22.

New Hampshire.— Cummings *v.* Allen, 34 N. H. 194.

Ohio.— Moore *v.* Moore, 46 Ohio St. 89, 18 N. E. 489; Sherman *v.* Sherman, 21 Ohio St. 631.

Washington.—Griesemer *v.* Boyer, 13 Wash. 171, 43 Pac. 17.

See 22 Cent. Dig. tit. "Executors and Administrators," § 725.

Interested person.— One having a valid claim against the widow's estate for taking care of her in her last sickness is an "interested person" who may make such petition under the Ohio statute. Sherman *v.* Sherman, 21 Ohio St. 631.

4. Paine *v.* Forsaith, 84 Me. 66, 24 Atl. 590.

5. *Maine.*— Davis *v.* Gower, 85 Me. 167, 26 Atl. 1048.

Massachusetts.—Porter *v.* Porter, 165 Mass. 157, 42 N. E. 565; Hale *v.* Hale, 1 Gray 518.

Michigan.—Pulling *v.* Durfee, 88 Mich. 387, 50 N. W. 319.

New Hampshire.— Cummings *v.* Allen, 34 N. H. 194.

Ohio.— Moore *v.* Moore, 46 Ohio St. 89, 18 N. E. 489.

Pennsylvania.— Davis' Appeal, 34 Pa. St. 256.

Texas.— Marks *v.* Hill, 46 Tex. 345; Little *v.* Birdwell, 27 Tex. 688.

Washington.—Griesemer *v.* Boyer, 13 Wash. 171, 43 Pac. 17.

See 22 Cent. Dig. tit. "Executors and Administrators," § 725.

It is no ground for denying such further allowance that the widow had abundant means of her own (*In re* Lux, 100 Cal. 593, 35 Pac. 341; Griesemer *v.* Boyer, 13 Wash. 171, 43 Pac. 17), or that she and the children left the state on the decedent's death and continued to reside outside thereof (Griesemer *v.* Boyer, 13 Wash. 171, 43 Pac. 17).

An appeal lies from a modifying order making an allowance to a widow and intended to supersede the previous order similar in character containing different provisions. *In re* Cannon, 18 Wash. 101, 50 Pac. 1021.

After the probate court has overruled an application for a further allowance, unless its action is vacated by appeal of other proceeding, it cannot review and increase the allowance. Moore *v.* Moore, 46 Ohio St. 89, 18 N. E. 489.

6. Busby *v.* Busby, 120 Iowa 536, 95 N. W. 191 (holding, however, that where an executor does not make application to set aside such order until two years later his application cannot be maintained even though the widow was guilty of fraud in applying for the allowance); McDonald *v.* Hollywood, 130 Mich. 691, 90 N. W. 666.

have expended.[7] Where, upon showing a change in the condition of the estate or her own circumstances, a reasonable reduction or stoppage appears justified, all further property will fall into the general personal estate of the deceased as assets.[8] An executor or administrator is charged with knowledge of the power of the court to modify or set aside orders for allowances and pays out money without or on such orders at his own risk.[9]

O. Rights of Creditors — 1. In General. An allowance by order of the court for the widow and children is not subject to the demands of the decedent's creditors, either in the widow's own hands[10] or in the hands of her assignee.[11] But a creditor may have such judgment or order vacated for good cause shown, as for fraud or mistake.[12] Where the widow selects and claims or disposes of property to which she is not entitled as against the decedent's creditors their rights will be judicially protected.[13]

2. Laches. Creditors will be denied relief, even where the allowances are extravagant or otherwise improper, where they are guilty of laches in applying for such relief,[14] as where they fail to object thereto until after final settlement of the executor's accounts including such payments,[15] or where they do not appeal from the order granting the allowance or ask that it be set aside.[16]

P. Rights of Heirs, Distributees, or Legatees. The allowance is good as against the distributees, heirs, or legatees of the decedent, unless strong reasons are shown for setting it aside.[17]

X. Allowance and Payment of Claims.

A. Liabilities of Estate — 1. Obligations of Decedent in General. So far as assets may have reached his hands in due course every executor or administrator is bound to administer the estate committed to him according to law, by paying the debts, claims, and charges upon it, in their legal order of preference, before settling legacies or gifts or making any distribution to the heirs.[18] This duty is enjoined upon him by law, by his oath and bond, and by a sound public policy, which treats each decedent's estate, except for the widow's or children's allowance,[19] as a fund, subject to all lawful debts of and demands against him, and to all reasonable charges consequent upon his death. Obligations incurred by the decedent during his lifetime may in general be presented in the modes pointed out by local statute, against his executor or administrator and be duly enforced against the estate;[20] but in order for a claim to be allowed, it must appear that

7. Harshman *v.* Slonaker, 53 Iowa 467, 5 N. W. 685; Pettee *v.* Wilmarth, 5 Allen (Mass.) 144; Frey *v.* Eisenhardt, 116 Mich. 160, 74 N. W. 501 (holding that funds paid out of a solvent estate by order of court to the widow and minor children for their support during its settlement need not be repaid because the estate has become insolvent); Ford *v.* Ford, 80 Wis. 565, 50 N. W. 409.

8. Dessaint *v.* Foster, 72 Iowa 639, 34 N. W. 454; Paup *v.* Sylvester, 22 Iowa 371; Gaskell *v.* Case, 18 Iowa 147; Baker *v.* Baker, 51 Wis. 538, 8 N. W. 289.

9. *In re* Lux, 100 Cal. 606, 35 Pac. 345 (holding that, where an executor without an order of court pays the widow a family allowance in excess of what the court afterward allows, he is liable for interest on the excess at the legal rate compounded annually); Clemes *v.* Fox, 25 Colo. 39, 53 Pac. 225.

10. Leaverton *v.* Leaverton, 40 Tex. 218; Boyden *v.* Ward, 38 Vt. 628. And see Marshall *v.* Charland, 106 Ga. 42, 31 S. E. 791.

A minor child's attaining majority before the exemptions are selected or set apart does not entitle a creditor of the estate to that child's proportionate share of the exemption, but the entire amount will go to the other children. Wiggins *v.* Mertins, 111 Ala. 164, 20 So. 356.

11. See Schmidt *v.* Wieland, 35 Cal. 343.

12. Clemes *v.* Fox, 25 Colo. 39, 53 Pac. 225; Central Nat. Bank *v.* Fitzgerald, 94 Fed. 16.

13. Bell *v.* Hall, 76 Ala. 546.

14. Central Nat. Bank *v.* Fitzgerald, 94 Fed. 16.

15. *In re* Bell, 142 Cal. 97, 75 Pac. 679.

16. Thompson *v.* Staacke, 131 Cal. 1, 63 Pac. 81, 668; *In re* Fernandez, 119 Cal. 579, 51 Pac. 851.

17. Miller *v.* Defoor, 50 Ga. 566; Grafton *v.* Smith, 66 Miss. 408, 6 So. 209; Stonebreaker *v.* Friar, 70 Tex. 202, 7 S. W. 799; Greenawalt's Estate, 16 Pa. Super. Ct. 263.

18. See *infra*, XI, B.

19. See *supra*, IX.

20. *Alabama.*—Dean *v.* Portis, 11 Ala. 104.

there is an actual indebtedness or a just claim for compensation[21] against the decedent or his estate,[22] and it is only the legal, and not the merely moral, obliga-

Connecticut.— Kingsbury *v.* Tolland, 2 Root 355.

Georgia.— McIntosh *v.* Humbleton, 35 Ga. 94, 89 Am. Dec. 276.

Louisiana.— Union Bank *v.* McDonogh, 7 La. Ann. 231.

Maine.— Hamlin *v.* Mansfield, 88 Me. 131, 33 Atl. 788.

New York.— Riblet *v.* Wallis, 1 Daly 360.

Pennsylvania.— McNair's Appeal, 4 Rawle 148.

England.— Lee *v.* Muggeridge, 5 Taunt. 36, 1 E. C. L. 32.

See 22 Cent. Dig. tit. "Executors and Administrators," § 730.

An order on trustees who hold a fund for the decedent, although inoperative as such, may be evidence of indebtedness as against his individual estate on which the allowance of a claim may be based. Newton's Appeal, 5 Wkly. Notes Cas. (Pa.) 521.

21. *Connecticut.*— Merwin's Appeal, 72 Conn. 167, 43 Atl. 1055.

Indiana.— Fuller *v.* Fuller, 21 Ind. App. 42, 51 N. E. 373.

Iowa.— See McCormick *v.* Hanks, 105 Iowa 639, 75 N. W. 494.

Kentucky.— See Hale *v.* Howard, 38 S. W. 1085, 18 Ky. L. Rep. 1041.

Nebraska.— Brown *v.* Jacobs, 24 Nebr. 712, 40 N. W. 137, holding that where upon the removal of an administrator his sole bondsman is appointed administrator *de bonis non*, and by order of court charges himself in his account with the penalty of the bond, such penalty cannot upon his death be presented as a claim against his estate.

New York.— Matter of Warner, 53 N. Y. App. Div. 565, 65 N. Y. Suppl. 1022.

Oregon.— Muldrick *v.* Galbraith, 31 Oreg. 86, 49 Pac. 886; Weill *v.* Clark, 9 Oreg. 387.

Pennsylvania.— Kline's Estate, 9 Pa. Dist. 386; Gilman's Estate, 9 Pa. Co. Ct. 111.

Vermont.— Potter *v.* Potter, 64 Vt. 298, 23 Atl. 856.

See 22 Cent. Dig. tit. "Executors and Administrators," § 730.

Liquidated demands.— A claim acknowledged by the debtor to be correct, and so entered on his books, which were referred to on the day preceding his death as correctly stating the amount to his expected administrator, has been held to be a "liquidated demand," within the Georgia statute, upon the creditor's limiting his claim against the estate to that amount. McNulty *v.* Pruden, 62 Ga. 135. Under the Georgia statute making one-half the fee of an attorney a retainer and payable immediately, such half is a "liquidated demand" against the estate of a client who died before the services were rendered under a parol agreement of counsel to defend certain indictments at a gross sum. McNulty *v.* Pruden, 62 Ga. 135.

22. *Arkansas.*— Bender *v.* Wooten, 35 Ark. 31, holding that where a debt due one merchant was included in a mortgage taken by another from a joint customer, and the mortgage was not paid before the death of the mortgagee, the surviving merchant's debt could not be proved against the decedent's estate.

Colorado.— Pastorius *v.* Davis, 9 Colo. App. 426, 48 Pac. 833 (holding that an unliquidated claim for breach of a covenant of warranty committed by an heir of the covenantor cannot be filed and allowed as a claim against the estate of the ancestor); Hulbert *v.* Walley, 3 Colo. App. 250, 32 Pac. 985.

Kansas.— Hayner *v.* Trott, 4 Kan. App. 679, 46 Pac. 37.

Massachusetts.— Johnson *v.* Kimball, 172 Mass. 398, 52 N. E. 386, holding that to recover against the estate of a decedent for funeral expenses of his wife or for her care and nursing, it must be shown that they were incurred on the credit of the decedent, or with the intent to collect them from his estate, or that he promised to pay them.

Mississippi.— Smith *v.* Jeffreys, (1894) 16 So. 377.

Missouri.— Wernecke *v.* Kenyon, 66 Mo. 275, holding that sureties of an administrator, who have been compelled to pay a debt against the estate, and have obtained against the administrator a judgment for the amount of such debt and the costs of the suit, are not entitled to have such judgment allowed by the probate court as a claim against the estate.

North Carolina.—Baker *v.* Dawson, 131 N. C. 227, 42 S. E. 588; Lindsay *v.* Darden, 124 N. C. 307, 32 S. E. 678, holding that an attorney's claim against the administrator on his personal contract for assisting him in his duties cannot be enforced against the estate.

Oregon.— Weill *v.* Clark, 9 Oreg. 387.

Pennsylvania.— Hauck *v.* Stauffer, 31 Pa. St. 235, holding that an executor who, under a power in the will of his testator, enters into a contract to lease the real estate for a term of years, and dies without having executed the lease or given possession of the premises, does not render his own estate liable for the breach of such contract, and no action therefor can be maintained against his representatives.

See 22 Cent. Dig. tit. "Executors and Administrators," § 730.

Debts contracted by the widow or heirs of the decedent are not properly and immediately debts of the estate. Harkins *v.* Hughes, 60 Ala. 316; Hulbert *v.* Walley, 3 Colo. App. 250, 32 Pac. 985; Normand *v.* Barbin, 18 La. Ann. 611; Potter *v.* Potter, 64 Vt. 298, 23 Atl. 856.

The occupancy of a dwelling-house by a widow after the death of her husband does not render his estate liable for the rent of such house. Carter *v.* Tippins, 113 Ga. 636, 38 S. E. 946.

tions of decedent which are thus upheld.[23] Where a creditor of the decedent holds pledge, mortgage, or other lien security on his own behalf, he has the option after his debtor's death to enforce such security for his own indemnity or to file his claim as a general creditor of the estate;[24] but where a decedent dies seized of land subject to a mortgage given by a prior owner, such mortgage is not a debt of the decedent which can be paid out of his personal estate in the absence of a contract by him assuming the mortgage debt.[25] Among general obligations of the

23. *Connecticut.*— Merwin's Appeal, 72 Conn. 167, 43 Atl. 1055.

Kentucky.— Lucking *v.* Gegg, 12 Bush 298.

Massachusetts.— Stone *v.* Gerrish, 1 Allen 175.

Missouri.— Greenabaum *v.* Elliott, 60 Mo. 25. See also Wheeler *v.* Ball, 26 Mo. App. 443.

New York.— Matter of Hamilton, 34 Misc. 607, 70 N. Y. Suppl. 426; Franklin *v.* Low, 1 Johns. 396.

Pennsylvania.— Phillips' Appeal, 34 Pa. St. 489; *In re* Dettermaier, 13 Pa. Super. Ct. 170; Sutch's Estate, 31 Pittsb. Leg. J. 123.

England.— Smith *v.* White, L. R. 1 Eq. 626, 35 L. J. Ch. 454, 14 L. T. Rep. N. S. 350, 14 Wkly. Rep. 510; Gough *v.* Findon, 7 Exch. 48, 21 L. J. Exch. 58; Beyer *v.* Adams, 3 Jur. N. S. 709, 26 L. J. Ch. 841, 5 Wkly. Rep. 795; Garth *v.* Earnshaw, 3 Y. & C. Exch. 584. See also Hatch *v.* Searles, 24 L. J. Ch. 22, 3 Wkly. Rep. 49 [*affirming* 2 Sm. & G. 147].

See 22 Cent. Dig. tit. "Executors and Administrators," § 730.

Voluntary bonds and covenants are binding upon the estate at common law, although postponed in the order of payment to debts founded upon a valuable consideration. Stephens *v.* Harris, 41 N. C. 57; Jones *v.* Powell, 1 Eq. Cas. Abr. 84, 21 Eng. Reprint 896; Garrard *v.* Dinorben, 5 Hare 213, 10 Jur. 772, 15 L. J. Ch. 439, 26 Eng. Ch. 213; Clough *v.* Lambert, 3 Jur. 672, 10 Sim. 174, 16 Eng. Ch. 174; Dawson *v.* Kearton, 2 Jur. N. S. 113, 25 L. J. Ch. 166, 3 Sm. & G. 186, 4 Wkly. Rep. 222; Lomas *v.* Wright, 3 L. J. Ch. 68, 2 Myl. & K. 769, 7 Eng. Ch. 769, 39 Eng. Reprint 769; Lechmere *v.* Carlisle, 3 P. Wms. 211, 24 Eng. Reprint 1033; 2 Williams Ex. 217. See also Isenhart *v.* Brown, 2 Edw. (N. Y.) 341; Cox *v.* Barnard, 8 Hare 310, 32 Eng. Ch. 310. *Compare* Hervey *v.* Audland, 9 Jur. 419, 14 Sim. 531, 37 Eng. Ch. 531. As to the order of payment of debts see *infra*, X, D.

24. *Arkansas.*— See Lofland *v.* Cowger, 68 Ark. 274, 57 S. W. 797; Richardson *v.* Hickman, 32 Ark. 406; Barber *v.* Peay, 31 Ark. 392; Nicholls *v.* Gee, 30 Ark. 135; Hall *v.* Denckla, 28 Ark. 506.

California.— Mathew *v.* Mathew, 138 Cal. 334, 71 Pac. 344.

Iowa.— Black *v.* Black, 40 Iowa 88; Moores *v.* Ellsworth, 22 Iowa 299; Allen *v.* Moer, 16 Iowa 307.

Kansas.— Crooker *v.* Pearson, 41 Kan. 410, 21 Pac. 270.

Maryland.— See Ellicott *v.* Ellicott, 6 Gill & J. 35.

Missouri.— Cassatt *v.* Vogel, 14 Mo. App. 317.

Nebraska.— Appleget *v.* Greene, 12 Nebr. 304, 11 N. W. 322.

New York.— Wright *v.* Holbrook, 32 N. Y. 587 [*affirming* 2 Rob. 516, 18 Abb. Pr. 202]. See also Mills *v.* Mills, 50 N. Y. App. Div. 221, 63 N. Y. Suppl. 771 [*modifying* 28 Misc. 633, 59 N. Y. Suppl. 1048]; Thompson *v.* Sullivan, 60 How. Pr. 71.

Pennsylvania.— See Tubbs' Estate, 161 Pa. St. 252, 28 Atl. 1109.

Canada.— Chamberlen *v.* Clark, 1 Ont. 135 [*affirmed* in 9 Ont. App. 273].

See 22 Cent. Dig. tit. "Executors and Administrators," § 730; and *infra*, X, B, 2, g; XIII, I, 4.

Money received from the sale of the security operates as part payment of the claim. Jamison *v.* Adler-Goldman Commission Co., 59 Ark. 548, 28 S. W. 35.

A decedent's undertaking to assume an encumbrance on land purchased by him creates a debt enforceable against his estate. Pate *v.* Oliver, 104 N. C. 458, 10 S. E. 709.

Allowance of attorney's fees.—A mortgagee may present his mortgage to an auditor of the orphans' court for allowance during the pendency of a scire facias sur mortgage in the court of common pleas, and the auditor may not only allow the amount of the mortgage debt, but also the attorney's commissions specified in the mortgage. Rowe's Estate, 22 Pa. Super. Ct. 597.

Surrender or exhaustion of lien.— A mortgage creditor of a decedent cannot prove his claim against the estate without either surrendering his mortgage lien, or exhausting it by sale and applying the proceeds thereof toward the debt. Macgill *v.* Hyatt, 80 Md. 253, 30 Atl. 710; Moore *v.* Dunn, 92 N. C. 63, holding that one holding a mortgage on land of an intestate may not insist that the mortgage shall be paid out of personalty, to the exoneration of the realty, but must first enforce his lien, looking to the personal estate only for any deficiency.

25. Creesy *v.* Willis, 159 Mass. 249, 34 N. E. 265; Matter of Mason, 1 Pars. Eq. Cas. (Pa.) 129; Baldwin's Estate, 1 Chest. Co. Rep. (Pa.) 315. See also Ryan *v.* Holliday, 110 Cal. 335, 42 Pac. 891; Andrews *v.* Bishop, 5 Allen (Mass.) 490.

Even though decedent covenanted with his vendor to pay the debt, it is not payable out of his personal estate. Creesy *v.* Willis, 159 Mass. 249, 34 N. E. 265; Matter of Mason, 1 Pars. Eq. Cas. (Pa.) 129. *Compare* Newcomer *v.* Wallace, 30 Ind. 216.

decedent recoverable against the estate are the expenses of his last illness,[26] claims arising out of the relation of husband and wife[27] or the severance of such relation,[28] a judicial sale which has been set aside,[29] the receipt of usury,[30] the liability of a life-tenant to the remainder-man,[31] the personal liability of a stock-holder in a corporation,[32] the execution of an appeal-bond,[33] decedent's contract for board and lodging[34] or to support another person[35] or to contribute money for the building of a church,[36] the failure of the consideration of a contract,[37] or a note or due-bill of the decedent.[38] A check drawn[39] or note made by a husband in favor of his wife which has not been presented or paid may be allowed against his estate.[40] Equitable waste by tenant for life is a breach of trust, and his assets after his death are answerable for the same.[41] A penalty incurred by decedent in a contract made while living, or damages as for careless or wrongful performance or for a breach may be allowed against the estate.[42] A parol promise to pay a debt

For exoneration of encumbered lands, descended or devised, see DESCENT AND DISTRIBUTION, 14 Cyc. 198 *et seq.*; and, generally, WILLS.

26. McNeely *v.* McNeely, 50 La. Ann. 823, 24 So. 338.

27. *Connecticut.*— Scutt's Appeal, 43 Conn. 108.

Delaware.— Burton *v.* Rodney, 5 Harr. 441.

Indiana.— Worth *v.* Patton, 5 Ind. App. 272, 31 N. E. 1130.

Louisiana.— McCloskey's Succession, 29 La. Ann. 237.

New York.— Dalrymple *v.* Arnold, 21 Hun 110.

North Carolina.— Steel *v.* Steel, 36 N. C. 452, arrears of income from separate property of wife.

Pennsylvania.— Shield's Estate, 2 Chest. Co. Rep. 473.

See 22 Cent. Dig. tit. "Executors and Administrators," § 730.

28. Hassaurek *v.* Markbreit, 68 Ohio St. 554, 67 N. E. 1066, decree allowing divorced wife a share of husband's property.

29. Westerfield *v.* Williams, 59 Ind. 221.

30. Proctor *v.* Terrill, 8 B. Mon. (Ky.) 451.

31. Farris *v.* Stoutz, 78 Ala. 130.

32. See Cooper *v.* Ives, 62 Kan. 395, 63 Pac. 434. And see, generally, CORPORATIONS, 10 Cyc. 719, 720, 721.

33. Shepperd *v.* Tyler, 92 Cal. 552, 28 Pac. 601.

34. Nine's Estate, 2 Woodw. (Pa.) 403.

Recovery limited to agreed price.— Laird *v.* Laird, 127 Mich. 24, 86 N. W. 436.

35. Norris *v.* Archibald, 29 Pittsb. Leg. J. (Pa.) 289.

36. Anderson *v.* Kilborn, 22 Grant Ch. (U. C.) 385.

37. Garber *v.* Armentrout, 32 Gratt. (Va.) 235.

38. Savory's Succession, 32 La. Ann. 506; Clinton's Estate, 9 Pa. Dist. 455, 24 Pa. Co. Ct. 218; Dawson *v.* Kearton, 2 Jur. N. S. 113, 25 L. J. Ch. 166, 3 Sm. & G. 186, 4 Wkly. Rep. 222.

A note given for the purchase-price of land is enforceable against the personal estate of the purchaser after his decease, like any other personal debt. Smith *v.* Goodrich, 167 Ill. 46, 47 N. E. 316 [*reversing* 67 Ill. App. 418].

39. Wilkinson's Estate, 192 Pa. St. 117, 43 Atl. 466.

40. Wilkinson's Estate, 192 Pa. St. 117, 43 Atl. 466. See also Martin *v.* Curd, 1 Bush (Ky.) 327, holding that the wife holding a note on her husband which was given to her by her father as her separate estate is entitled to the same rights and privileges, to the extent of such note, as his other creditors.

Presumption as to payment.— Where a note and a check drawn by a husband in favor of his wife some time before his death are in her possession at the time of his death, and are afterward presented by her executors as claims against his estate, the fact that he was at all times able to pay them raises no presumption that they were paid, nor does the fact that she was her husband's executrix raise any presumption that they had been paid, and that she took them from among his papers after his death. *In re* Wilkinson, 192 Pa. St. 117, 43 Atl. 466.

41. Ormonde *v.* Kynersley, 5 Madd. 369, 21 Rev. Rep. 313.

42. Wabash R. Co. *v.* Ordelheide, 88 Mo. App. 589; Price *v.* Haeberle, 25 Mo. App. 201; Atkins *v.* Kinnan, 20 Wend. (N. Y.) 241, 32 Am. Dec. 534; Troup *v.* Smith, 20 Johns. (N. Y.) 33; Dougherty *v.* Stephenson, 20 Pa. St. 210. But see Fowle *v.* Barnes, 99 Mich. 8, 58 N. W. 63.

Termination of contract on death of decedent.— Where an employee was hired by the month under a parol contract, such contract was terminated by the death of his employer, and the employee could not recover damages for breach of the contract resulting from his employer's death. Womrath's Estate, 23 Wkly. Notes Cas. (Pa.) 434.

Breach by administrator.— Where decedent held lands as security for advancements to claimant, and they agreed that decedent should sell the lands or the timber therefrom to pay the debt and certain commissions, and that whatever land remained after such payments should be owned by decedent and claimant in common, a breach of the agreement by decedent's administrator did not give rise to a claim against the estate of which the probate court had jurisdiction, but

is sufficient to warrant a judgment against the assets of a decedent.[43] A personal obligation to pay an annuity secured by a deed of trust in which, as well as in his last will, the obligor manifests an intention to make it an exclusive charge against his real estate, has been held to be notwithstanding a proper claim for allowance against the estate.[44] Where the claim against the decedent has been discharged, it cannot of course be allowed.[45]

2. Joint Obligations. At common law where one of two or more joint contractors or obligors dies, the survivor alone is held liable;[46] but equity will charge the estate where some good reason therefor is shown,[47] such as the insolvency of the survivor, in which case the estate may be charged for the whole debt,[48] and in a number of states the common-law rule has been changed by statute so as to permit the creditor or obligee to enforce his claim against the estate of the decedent.[49] Where the obligation is joint and several, the estate of a deceased obligor is liable the same as he would be if living.[50]

3. Services Rendered to Decedent — a. In General. A claim for services rendered to the decedent may be allowed against his estate, whether such services were rendered upon an express contract for a fixed payment, or merely as meritorious and needful, without any express contract, but with the expectation of reasonable compensation therefor;[51] but compensation cannot be allowed where such services were performed without any claim for payment during decedent's

claimant's remedy was in equity for an accounting of the trust. Nester *v.* Ross, 98 Mich. 200, 57 N. W. 122.

43. Rann *v.* Hughes, 4 Bro. P. C. 27, 7 T. R. 350, 2 Eng. Reprint 18.

44. Doellner *v.* Schmieding, 16 Mo. App. 559.

45. Lear *v.* Friedlander, 45 Miss. 559.

Things done in satisfaction of debt.—Where the obligee in a bond requested the obligor to keep her children for the debt, and he did this until his death, when the bond was found among his private papers, it was held that the bond should not be treated as paid, but that the estate should be allowed a fair compensation for the maintenance of the children until the decedent's death, less the value of their services, and charged with the remainder, if any. Hughes *v.* Patterson, 91 Va. 664, 22 S. E. 485.

46. Gere *v.* Clark, 6 Hill (N. Y.) 350; Pecker *v.* Julius, 2 Browne (Pa.) 31; Richardson *v.* Horton, 6 Beav. 185, 12 L. J. Ch. 333, 49 Eng. Reprint 796; Other *v.* Iveson, 3 Drew. 177, 3 Eq. Rep. 562, 1 Jur. N. S. 568, 24 L. J. Ch. 654, 3 Wkly. Rep. 332. And see 9 Cyc. 653 note 24.

47. See 9 Cyc. 654 note 28.

Extent of charge.— Equity seeks to know whether the deceased was equally bound or not; and the disposition is to charge the estate with only one half at the utmost, unless it appears that the decedent was principal debtor or that the survivor is insolvent. Watkins *v.* Worthington, 2 Bland (Md.) 509; Brooks *v.* Dent, 1 Md. Ch. 523; Yorks *v.* Peck, 14 Barb. (N. Y.) 644.

When remedy against survivor barred by statute of limitations see Limitation of Actions.

48. Brown *v.* Benight, 3 Blackf. (Ind.) 39, 23 Am. Dec. 373; Richardson *v.* Draper, 87 N. Y. 337; Hauck *v.* Craighead, 67 N. Y. 432; Barnes *v.* Seligman, 55 Hun (N. Y.) 339, 8 N. Y. Suppl. 834; Bowman *v.* Kistler, 33 Pa. St. 106; Cowell *v.* Sikes, 2 Russ. 191, 26 Rev. Rep. 46, 3 Eng. Ch. 191, 38 Eng. Reprint 307.

Inability to procure satisfaction from survivor must be averred. Hauck *v.* Craighead, 67 N. Y. 432 [*reversing* 8 Hun 237].

49. *Indiana.*— Ralston *v.* Moore, 105 Ind. 243, 4 N. E. 673; Fiscus *v.* Robbins, 60 Ind. 100 (only one half against estate); Milam *v.* Milam, 60 Ind. 58.

Iowa.— Sellon *v.* Braden, 13 Iowa 365.

Massachusetts.— Foster *v.* Hooper, 2 Mass. 572.

Michigan.— Stewart *v.* Bruen, 39 Mich. 619.

New York.— Matter of Robinson, 40 N. Y. App. Div. 23, 57 N. Y. Suppl. 502.

Ohio.— Burgoyne *v.* Ohio L. Ins. Co., 5 Ohio St. 586.

Pennsylvania.— Bouman *v.* Kistler, 33 Pa. St. 106; Judd's Estate, 9 Kulp 326.

See 22 Cent. Dig. tit. "Executors and Administrators," § 731; and 9 Cyc. 653 note 25.

The creditor must exhaust his remedy against the survivor before proceeding against the estate for the full amount of the debt. Matter of Robinson, 40 N. Y. App. Div. 23, 57 N. Y. Suppl. 502. See also Voorhis *v.* Childs, 17 N. Y. 354; Hosack *v.* Rogers, 25 Wend. (N. Y.) 213; Hammond *v.* Hoffman, 2 Redf. Surr. (N. Y.) 92. And it has been held that the estate of a deceased joint debtor is not liable where it is not shown that the surviving joint debtors are insolvent. Booth Bros., etc., Granite Co. *v.* Baird, 83 N. Y. App. Div. 495, 82 N. Y. Suppl. 432.

50. Hughes' Estate, 9 Kulp (Pa.) 333; Tippins *v.* Coates, 18 Beav. 401, 52 Eng. Reprint 158.

51. *Illinois.*— Harrison *v.* Lindley, 104 Ill. 245.

Louisiana.—Alexander's Succession, 110 La.

lifetime, or any expectation of being paid specifically therefor, and without any express or implied promise of remuneration, even though their performance may have been prompted by the hope of obtaining a gift or legacy, which has not been fulfilled.[52] Where, however, persons were induced to support a decedent for several years by her fraudulent pretense that she was destitute, the fact being

1027, 35 So. 273; Schmidt's Succession, 108 La. 293, 32 So. 413; Dauenhauer *v.* Browne, 47 La. Ann. 341, 16 So. 827.

Maryland.— Wallace *v.* Schaub, 81 Md. 594, 32 Atl. 324.

Michigan.— Gray *v.* Seeley, 133 Mich. 319, 94 N. W. 1061; Van Slambrook *v.* Little, 127 Mich. 61, 86 N. W. 402.

Missouri.—Hayden *v.* Parsons, 70 Mo. App. 493; McQueen *v.* Wilson, 51 Mo. App. 138.

New York.—*In re* Stringer, 15 N. Y. Suppl. 461.

Pennsylvania.— Wall's Appeal, 38 Pa. St. 464; Rouse *v.* Morris, 17 Serg. & R. 328; Metz's Appeal, 11 Serg. & R. 204. See also Harrar *v.* Edwards, 17 Lanc. L. Rev. 223.

Utah.— Reed *v.* Hume, 25 Utah 248, 70 Pac. 998.

See 22 Cent. Dig. tit. "Executors and Administrators," § 732.

Evidence must clearly establish contract either express or implied. *In re* Weaver, 182 Pa. St. 349, 38 Atl. 12.

Void contract with wife of decedent.— Although the nursing of a husband was performed under a contract with the wife void because of her inability to contract, his estate was liable for the services under an implied promise. Flannery *v.* Chidgey, (Tex. Civ. App. 1903) 77 S. W. 1034.

Medical services to decedent's children.— Where medical services rendered to a woman's children are recognized by her as constituting a liability against her, her husband and executor may after her death pay such bills out of her estate. Baker *v.* Baker, 87 Va. 180, 12 S. E. 346.

A physician's bill for attendance on a married woman has been held not chargeable against her estate, since such bill constitutes a personal debt of her husband. *In re* Very, 24 Misc. (N. Y.) 139, 53 N. Y. Suppl. 389, 28 N. Y. Civ. Proc. 163; Moulton *v.* Smith, 16 R. I. 126, 12 Atl. 891, 27 Am. St. Rep. 728.

The fact that board is not collected when due during the lifetime of the decedent does not prevent its collection after his death where it appears that he had promised to pay all he owed and that there was a good cause for the leniency shown in collecting. Patterson's Estate, 9 Pa. Dist. 259, 23 Pa. Co. Ct. 567.

Promise of payment a question for jury.— Hamilton *v.* Hamilton, 26 Ind. App. 114, 59 N. E. 344.

The mere rendition and acceptance of services is sufficient to raise an obligation on the part of a decedent to pay therefor in the absence of proof that they were not to be paid for. Wallace *v.* Schaud, 81 Md. 594, 32 Atl. 324.

The uncontradicted testimony of one witness as to the rendition and value of services rendered a decedent is sufficient to establish the same in an action against the estate. Berry *v.* Ballard, 3 Ky. L. Rep. 58.

52. *Alabama.*— Morrow *v.* Allison, 39 Ala. 70.

California.— Hanson's Estate, 133 Cal. 38, 65 Pac. 14.

Kentucky.— Finley *v.* Keinningham, 79 S. W. 236, 25 Ky. L. Rep. 1955.

Louisiana.— See Benton's Succession, 106 La. 494, 31 So. 123, 59 L. R. A. 135.

Maryland.— Lee *v.* Lee, 6 Gill & J. 316.

Missouri.—Hayden *v.* Parsons, 70 Mo. App. 493.

New Jersey.— Egerton *v.* Egerton, 17 N. J. Eq. 419.

New York.— Weidman *v.* Thompson, 53 N. Y. App. Div. 22, 65 N. Y. Suppl. 481; Clark *v.* Todd, 16 N. Y. Suppl. 491.

Pennsylvania.— Normile *v.* Osborne, 207 Pa. St. 367, 56 Atl. 937; *In re* Weaver, 182 Pa. St. 349, 38 Atl. 12; Miller's Estate, 136 Pa. St. 239, 20 Atl. 796; Carman's Estate, 5 Pa. Co. Ct. 16; Clark's Estate, 12 Phila. 147; Cousty's Estate, 12 Phila. 98; Abercrombie's Estate, 11 Phila. 21. See also Cridland's Estate, 8 Pa. Co. Ct. 6.

Rhode Island.—Slocum *v.* Wilbour, 24 R. I. 11, 51 Atl. 1050.

See 22 Cent. Dig. tit. "Executors and Administrators," § 732.

Failure to demand payment during the decedent's lifetime will not necessarily defeat a claim against his estate for meritorious and valuable services performed at his request (Gaines *v.* Del Campo, 30 La. Ann. 245; Bugh's Estate, 9 Pa. Dist. 276, 23 Pa. Co. Ct. 660), but where a claim for services or board is first made after the decease of the alleged debtor, the presumption obtains that payment was made or that it was not intended to demand payment (Kelly's Estate, 6 Pa. Dist. 685; Sayers' Estate, 8 Pa. Co. Ct. 32. See also McGeever's Estate, 9 Kulp (Pa.) 399; Conaughton's Estate, 2 Pa. Dist. 189, 12 Pa. Co. Ct. 590), and evidence to establish a claim for services against a decedent's estate not made during his lifetime must be other than mere loose declarations, and must clearly and distinctly establish a contract between claimant and decedent (*In re* Weaver, 182 Pa. St. 349, 38 Atl. 12).

Statement of claimant that services gratuitous.— Where a claim for services for nursing is filed against a decedent's estate, the claimant's declaration to a third person that she was serving the decedent solely from the love she bore to him will bar her claim, when made in reply to the repeated proposals of the decedent's brother to furnish a nurse, and

otherwise, they were entitled to be compensated out of her estate.[53] It must of course be shown that services have been actually rendered,[54] and that the decedent consented to or contracted for the performance thereof.[55] Where services are rendered in consideration of a promise to compensate for the same by a conveyance of lands, and the promisor dies without making the conveyance, the value of the services may be recovered in an action against his personal representatives.[56] Where services have been fully paid for in the lifetime of the decedent, there cannot of course be any further recovery on that account against the estate,[57] and where the claimant has received a stated sum periodically for wages or salary, in payment of board or otherwise, the presumption is against a larger allowance, unless decedent is shown to have agreed accordingly.[58] A

when no proof is given of the value or duration of the services. Engle's Estate, 9 Pa. Dist. 743.

Agreement to compensate by will see *infra*, X, A, 3, d.

53. Eggers *v.* Anderson, 63 N. J. Eq. 264, 49 Atl. 578, 55 L. R. A. 570 [*reversing* 61 N. J. Eq. 85, 47 Atl. 727].

54. Miller's Estate, 136 Pa. St. 239, 20 Atl. 796. See also Alexander's Succession, 110 La. 1027, 35 So. 273; Johnston's Estate, 12 York Leg. Rec. (Pa.) 181.

Evidence sufficient to show rendition of services see Kellogg *v.* Ogden, 27 N. Y. App. Div. 214, 50 N. Y. Suppl. 650.

55. Johnson *v.* Kimball, 172 Mass. 398, 52 N. E. 386 (consent or ratification); McGrath *v.* Alger, 43 N. Y. App. Div. 496, 60 N. Y. Suppl. 122; Marggraf *v.* McLean, 31 Misc. (N. Y.) 820, 64 N. Y. Suppl. 1112.

Evidence sufficient to show contract or obligation to pay see Wallace *v.* Schaub, 81 Md. 594, 32 Atl. 324; and *infra*, X, C, 3, f, (III), (B).

Evidence not showing contract or obligation to pay see Carpenter *v.* Hays, 153 Pa. St. 432, 25 Atl. 1127; and *infra*, X, C, 3, f, (III), (B).

Express request not necessary.— Services may have been rendered to a decedent under such circumstances that proof of their rendition will be sufficient to charge his estate therefor, without proof of an expressed request for such services. Todd *v.* Martin, (Cal. 1894) 37 Pac. 872.

A mere bequest of money is not evidence of a contract or debt against the testator, nor, although expressed to be for a particular service, should it be regarded as evidence of a debt or previous contract to pay the money therefor. Montgomery *v.* Miller, 4 B. Mon. (Ky.) 470.

Agreement with third person.— One who cared for a decedent during her life under an agreement with a third person has no claim for his services against the estate. Montgomery *v.* Clark, (Tenn. Ch. App. 1898) 46 S. W. 466. See also Merwin's Appeal, 72 Conn. 167, 43 Atl. 1055, an express contract with the conservator of an insane person. But *compare* Flannery *v.* Chidgey, (Tex. Civ. App. 1903) 77 S. W. 1034.

56. Ritchie *v.* Bennett, 35 N. Y. App. Div. 68, 54 N. Y. Suppl. 379, holding further that a recovery therefor may be had without demanding a conveyance from the heirs.

57. See Watson's Estate, 8 Pa. Dist. 341, holding that where a contract for services alleged to have been entered into between the decedent and the claimant had apparently been abandoned, and the claimant had accepted without demur, during the lifetime of decedent, a less sum, the claimant could not be allowed to recover against the estate for services at a certain rate fixed by herself.

Donation during lifetime.— Where a physician, the relative of an aged and infirm lady, rendered her professional services extending through several years, without contract with her, but being told she would compensate him, and shortly before her death she gave into his hands five thousand dollars in cash, which he claimed was a donation to his wife, but which passed under his administration and control, it was held that said donation was the remuneration referred to, and that he was not entitled to recover on a large claim for professional services made first after her death. Littell's Estate, 50 La. Ann. 299, 23 So. 314.

Claimant must show non-payment. Harrar *v.* Edwards, 17 Lanc. L. Rev. (Pa.) 223.

58. Stanberry *v.* Robinson, 27 S. W. 973, 16 Ky. L. Rep. 309; Turnell's Succession, 34 La. Ann. 888; Stadermann *v.* Heins, 78 N. Y. App. Div. 563, 79 N. Y. Suppl. 674 (holding that an instrument signed merely by deceased reciting "I, . . . being of sound mind, desire that Mrs. Susanna Stadermann, for her sacrifices day and night and diligent nursing for me, to receive two hundred and fifty dollars," while *prima facie* an evidence of indebtedness, was shown not to be so by the fact that said party had no connection with its execution, and was at the time engaged in nursing deceased at an agreed rate per week); Ross *v.* Harden, 44 N. Y. Super. Ct. 26; Wartman's Estate, 19 Pa. Co. Ct. 143; Womrath's Estate, 6 Pa. Co. Ct. 262; Robinson's Estate, 5 Pa. Co. Ct. 578; Springer's Estate, 2 Chest. Co. Rep. (Pa.) 44; Cain's Estate, 31 Pittsb. Leg. J. 367 (holding that a claim for nursing, not made until after decedent's death, should be disallowed where board was paid regularly by the decedent, and a legacy was given to the claimant, a stranger in blood). See also Alexander's Succession, 110 La. 1027, 35 So. 273.

sufficient legacy or devise to a person who has performed services for decedent may also discharge a claim for such services.[59]

b. Persons in Family Relation. The courts regard with suspicion and disfavor claims brought against a decedent's estate for personal services rendered by relatives, especially where the latter are members of his immediate family or household, as the presumption is that such services, between persons occupying such relations, are intended to be gratuitous,[60] and hence claims against the

Statement by decedent that compensation insufficient.— A claim for extra compensation for nursing decedent, in addition to the compensation for services for general housework, cannot be sustained on expressions and indications of belief by decedent that plaintiff was not sufficiently paid under her contract for housework; these not constituting a new contract. Howard *v.* Drexler, 14 Pa. Super. Ct. 59.

59. Eaton *v.* Benton, 2 Hill (N. Y.) 576; Trinick's Estate, 8 Pa. Dist. 126, holding that where, during the last three years of decedent's life, a sister cared for her, without demanding any pay, and without the making of any contract to receive pay, other than decedent's promise to "pay her well for waiting on her," and decedent bequeathed an annuity of one hundred dollars per year to the sister, she was not entitled to any further compensation than that provided by the will. See also Benton's Succession, 106 La. 494, 31 So. 123, 59 L. R. A. 135; Cain's Estate, 31 Pittsb. Leg. J. (Pa.) 367.

60. *District of Columbia.*— Tuohy *v.* Trail, 19 App. Cas. 79.

Illinois.—Marshall *v.* Coleman, 187 Ill. 556, 58 N. E. 628 [*modifying* 89 Ill. App. 41]; Smith *v.* Birdsall, 106 Ill. App. 264; Hickman *v.* Eggmann, 53 Ill. App. 561; Patterson *v.* Collar, 31 Ill. App. 340; Ginders *v.* Ginders, 21 Ill. App. 522; Hayden *v.* Henderson, 21 Ill. App. 299; Dawdy *v.* Nelson, 12 Ill. App. 74.

Indiana.— Wright *v.* McLarinan, 92 Ind. 103; Ellis *v.* Baird, 31 Ind. App. 295, 67 N. E. 960.

Iowa.— Scully *v.* Scully, 28 Iowa 548.

Kansas.— Greenwell *v.* Greenwell, 28 Kan. 675; Ayres *v.* Hull, 5 Kan. 419; Jones *v.* Humphreys, 10 Kan. App. 545, 63 Pac. 26.

Kentucky.— Peak *v.* Grover, 14 Ky. L. Rep. 206; Griggs *v.* Love, 13 Ky. L. Rep. 175.

Louisiana.— Oubre's Succession, 109 La. 516, 33 So. 583.

Maryland.—Wallace *v.* Schaub, 81 Md. 594, 32 Atl. 324. See also Duckworth *v.* Duckworth, 98 Md. 92, 56 Atl. 490.

Massachusetts.— Marple *v.* Morse, 180 Mass. 508, 62 N. E. 966.

Missouri.— Shannon *v.* Carter, 99 Mo. App. 134, 72 S. W. 495.

New Jersey.— Disbrow *v.* Durand, 54 N. J. L. 343, 24 Atl. 545, 33 Am. St. Rep. 678; Ridgway *v.* English, 22 N. J. L. 409; Hammond *v.* Cronkright, 47 N. J. Eq. 447, 20 Atl. 847; Updike *v.* Titus, 13 N. J. Eq. 151.

New York.— Collyer *v.* Collyer, 113 N. Y. 442, 21 N. E. 114; Platt *v.* Hollands, 85 N. Y. App. Div. 231, 83 N. Y. Suppl. 556; Matter of Stevenson, 86 Hun 325, 33 N. Y. Suppl. 493; Lyon *v.* Smith, 35 Hun 275; Carpenter *v.* Weller, 15 Hun 134; Green *v.* Roberts, 47 Barb. 521; Dye *v.* Kerr, 15 Barb. 444; Ulrich *v.* Ulrich, 60 N. Y. Super. Ct. 237, 17 N. Y. Suppl. 721; Matter of Warner, 39 Misc. 432, 79 N. Y. Suppl. 363; Matter of Liddle, 35 Misc. 173, 71 N. Y. Suppl. 474; Matter of Reuter, 5 Dem. Surr. 162; Keller *v.* Stuck, 4 Redf. Surr. 294; Roblee *v.* Gallentine, 19 N. Y. Wkly. Dig. 153.

Ohio.— Hinkle *v.* Sage, 67 Ohio St. 256, 65 N. E. 999; *In re* Skelton, 20 Ohio Cir. Ct. 704, 11 Ohio Cir. Dec. 372.

Oregon.—Wilkes *v.* Cornelius, 21 Oreg. 348, 28 Pac. 135.

Pennsylvania.— *In re* Payne, 204 Pa. St. 535, 54 Atl. 337; Ulrich *v.* Arnold, 120 Pa. St. 170, 13 Atl. 831; Houck *v.* Houck, 99 Pa. St. 552; Hertzog *v.* Hertzog, 29 Pa. St. 465; Lynn *v.* Lynn, 29 Pa. St. 369; Lafferty's Estate, 2 Pa. Dist. 205, 13 Pa. Co. Ct. 82; Thomas' Estate, 5 Kulp 213; Cooper's Estate, 7 Pa. Co. Ct. 365; Lally's Estate, 4 Pa. Co. Ct. 177; Monk's Estate, 9 Montg. Co. Rep. 113; Heathcote's Estate, 16 Phila. 389; Kelly's Estate, 16 Phila. 285; Hess' Estate, 13 Phila. 285; Enoch's Estate, 3 Phila. 147. But see Ewing's Estate, 18 Lanc. L. Rev. 73 (holding that where a claimant against decedent's estate for services to the decedent in her lifetime is a niece of the decedent, the relationship tends to rebut the presumption of a contract to pay, but is not sufficient to overcome such presumption unless other circumstances against the presumption are also shown); Weber's Estate, 7 Northam. Co. Rep. 1, 13 York Leg. Rec. 66 (holding that no relationship, other than that of parent and child, between a claimant and decedent whose estate is sought to be charged for services rendered in a last illness will *per se* rebut the presumption of a promise to pay for them).

Rhode Island.— Newell *v.* Lawton, 20 R. I. 307, 38 Atl. 946.

South Carolina.— Wessinger *v.* Roberts, 67 S. C. 240, 45 S. E. 169.

Vermont.— *In re* Bryant, 73 Vt. 240, 50 Atl. 1065; Andrus *v.* Foster, 17 Vt. 556; Fitch *v.* Peckham, 16 Vt. 150.

Virginia.—Williams *v.* Stonestreet, 3 Rand. 559. But see Cary *v.* Macon, 4 Call 605 (holding that a mother's estate will be allowed from the father's estate, for her services in boarding their children during her lifetime, although she made no charge therefor); Chancellor *v.* Ashby, 2 Patt. & H. 26.

estate of a decedent made by near relatives for personal services require stronger proof to establish them than ordinary claims by strangers.[61] The rule does not, however, prevent a recovery by a person standing in such relation to a decedent for services rendered where there was an express contract or promise to pay,[62] or

West Virginia.— Hanly *v.* Potts, 52 W. Va. 263, 43 S. E. 218.

Wisconsin.— Martin *v.* Martin, 108 Wis. 284, 84 N. W. 439, 81 Am. St. Rep. 895; Leitgabel *v.* Belt, 108 Wis. 107, 83 N. W. 1111; Tyler *v.* Burrington, 39 Wis. 376; Hall *v.* Finch, 29 Wis. 278, 9 Am. Rep. 559.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 733, 901.

This rule has been applied to a claim for support or services by a child against the estate of a parent (Tuohy *v.* Trail, 19 App. Cas. (D. C.) 79; Jones *v.* Humphreys, 10 Kan. App. 545, 63 Pac. 26; Duckworth *v.* Duckworth, 98 Md. 92, 56 Atl. 490; Marple *v.* Morse, 180 Mass. 508, 62 N. E. 966; Shannon *v.* Carter, 99 Mo. App. 134, 72 S. W. 495; Ridgway *v.* English, 22 N. J. L. 409; Hammond *v.* Cronkright, 47 N. J. Eq. 447, 20 Atl. 847; Green *v.* Roberts, 47 Barb. (N. Y.) 521; Houck *v.* Houck, 99 Pa. St. 552; Wessinger *v.* Roberts, 67 S. C. 240, 45 S. E. 169) or one standing *in loco parentis* (Smith *v.* Birdsall, 106 Ill. App. 264; Fross' Appeal, 105 Pa. St. 258), by one standing *in loco parentis* against the estate of a child (Smith *v.* Birdsall, 106 Ill. App. 264. See also Marshall *v.* Coleman, 187 Ill. 556, 58 N. E. 628 [*modifying* 89 Ill. App. 41]), or by a brother or sister against the estate of a brother or sister (Oubre's Succession, 109 La. 516, 33 So. 583; Rogan's Estate, 10 Kulp (Pa.) 138; Moffett's Estate, 11 Phila. (Pa.) 79, holding that the brother of a decedent can recover from the estate for his services as physician only the usual charge, and not for an uninterrupted attendance and service, it appearing that he slept and ate at the house, and went in and out at his pleasure. See also Moore *v.* Renick, 95 Mo. App. 202, 68 S. W. 936), a claim by a wife for work done for her husband in his business (Matter of Reuter, 5 Dem. Surr. (N. Y.) 162), a claim by a son-in-law against his mother-in-law's estate for board and services (Gall *v.* Stark, 98 Ill. App. 121; Betz's Estate, 15 Pa. Super. Ct. 563; Eckert's Estate, 18 Lanc. L. Rev. (Pa.) 58), a claim by a son-in-law for nursing his father-in-law in his last illness (Williams *v.* Stonestreet, 3 Rand. (Va.) 559), a claim by a niece for services to an uncle with whom she lived (Martin *v.* Martin, 89 Ill. App. 147; Lafferty's Estate, 2 Pa. Dist. 205, 13 Pa. Co. Ct. 82; Larkins' Estate, 17 Phila. (Pa.) 503; Heathcote's Estate, 16 Phila. (Pa.) 389; Leitgabel *v.* Belt, 108 Wis. 107, 83 N. W. 1111), or for board of and attendance on an aunt (Enoch's Estate, 3 Phila. (Pa.) 147), and a claim by a nephew against the estate of his uncle for board and care furnished the latter, who made his home with the claimant on the latter's repeated invitation (Matter of Jones, 28 Misc. (N. Y.) 338, 59 N. Y. Suppl. 893). A claim for services by an adopted son will not be allowed, even though the adoption papers are defective. Martin Martin, 108 Wis. 284, 84 N. W. 439, 81 Am. St. Rep. 895.

Whether the family relation in fact exists where a person not a relative is taken into the family of another must be determined from the particular facts of the case. Boyd *v.* Starbuck, 18 Ind. App. 310, 47 N. E. 1079.

61. *Maryland.*— Wallace *v.* Schaub, 81 Md. 594, 32 Atl. 324.

Missouri.— Shannon *v.* Carter, 99 Mo. App. 134, 72 S. W. 495.

New York.—Meehan *v.* Heffernan, 73 N. Y. App. Div. 615, 76 N. Y. Suppl. 789; Ulrich *v.* Ulrich, 60 N. Y. Super. Ct. 237, 17 N. Y. Suppl. 721; Matter of Warner, 39 Misc. 432, 79 N. Y. Suppl. 363; Matter of Liddle, 35 Misc. 173, 71 N. Y. Suppl. 474; Havens *v.* Havens, 3 N. Y. Suppl. 219.

Vermont.— *In re* Bryant, 73 Vt. 240, 50 Atl. 1065.

Wisconsin.—Oates *v.* Erskine, 116 Wis. 586, 93 N. W. 444.

See 22 Cent. Dig. tit. "Executors and Administrators," § 733.

Evidence sufficient to show contract or obligation to pay see Crampton *v.* Logan, 28 Ind. App. 405, 63 N. E. 51; Allen *v.* Allen, 101 Mo. App. 676, 74 S. W. 396; Shannon *v.* Carter, 99 Mo. App. 134, 72 S. W. 495; Ely *v.* Ely, 64 N. J. Eq. 790, 53 Atl. 1125 [*affirming* (Ch. 1901) 50 Atl. 657]; and *infra*, X, C, 3, f, (III), (B).

Evidence not showing contract or agreement to pay see Landers *v.* Forbes, 70 N. Y. App. Div. 619, 74 N. Y. Suppl. 833; Newell *v.* Lawton, 20 R. I. 307, 38 Atl. 946; and *infra*, X, C, 3, f, (III), (B).

62. *New Jersey.*—Updike *v.* Ten Broeck, 32 N. J. L. 105.

New York.— See Hallock *v.* Teller, 2 Dem. Surr. 206.

Ohio.— Hinkle *v.* Sage, 67 Ohio St. 256, 65 N. E. 999.

Pennsylvania.— Ewing's Estate, 18 Lanc. L. Rev. 73. See also Dettenmaier's Estate, 8 Pa. Dist. 273.

Virginia.— Baker *v.* Baker, 3 Munf. 222.

See 22 Cent. Dig. tit. "Executors and Administrators," § 733.

Contract may be written or verbal. Updike *v.* Ten Broeck, 32 N. J. L. 105; Hinkle *v.* Sage, 67 Ohio St. 256, 65 N. E. 999.

No specific sum need be fixed in promise to pay. Baker *v.* Baker, 3 Munf. (Va.) 222.

Affirmative evidence of contract necessary. —Kelly's Estate, Tuck. Surr. (N. Y.) 28.

A person who has supported and cared for one relative at the request of another and upon the promise of the latter to pay therefor has a valid claim against the estate of

where the circumstances are such as to clearly show a mutual intention that the services should be paid for and thus raise an implied contract;[63] and where, although the decedent and the claimant were relatives, the relation was not such as imposed any special obligation on the claimant of support of, care for, or tenderness toward the decedent, a claim for compensation will be more favorably regarded, and in a suitable case upheld, especially where decedent and claimant did not live together.[64]

c. Amount of Allowance. Where the services rendered were based upon an express contract for a specified remuneration such contract must govern,[65] but where the services are rendered upon merely an implied contract to pay or in the

the latter for compensation. Grimm *v.* Taylor, 96 Mich. 5, 55 N. W. 447; *In re* Payne, 204 Pa. St. 535, 54 Atl. 337.

Absence of demand.— Where services were rendered by a niece to her aunt for four years periodically up to the time of the aunt's death, there is no presumption of payment, or of the absence of a contract to pay, because no demand for payment is shown to have been made before decedent's death; a promise to pay being shown, and the claimant not depending on these services for a living. Ewing's Estate, 18 Lanc. L. Rev. (Pa.) 73.

63. *Alabama.*— See Kinnebrew *v.* Kinnebrew, 35 Ala. 628.

Illinois.— Byers *v.* Thompson, 66 Ill. 421 (house built by son on father's land); Freeman *v.* Freeman, 65 Ill. 106; Overbeck *v.* Ahlmeier, 106 Ill. App. 606; Jones *v.* Adams, 81 Ill. App. 183; Killpatrick *v.* Helston, 25 Ill. App. 127.

Iowa.— Wence *v.* Wykoff, 52 Iowa 644, 3 N. W. 685.

Michigan.— O'Connor *v.* Beckwith, 41 Mich. 657, 3 N. W. 166.

Missouri.— Allen *v.* Allen, 101 Mo. App. 676, 74 S. W. 396; Ramsey *v.* Hicks, 53 Mo. App. 190.

New Jersey.— De Camp *v.* Wilson, 31 N. J. Eq. 656.

New York.—Benedict *v.* Sliter, 82 Hun 190, 31 N. Y. Suppl. 413, where a contract between claimant and the other children of the decedent with reference to decedent's support, which was afterward rescinded, was held not to affect claimant's right. See also Clark *v.* Brauly, 20 N. Y. Suppl. 452.

Ohio.— *In re* Skelton, 20 Ohio Cir. Ct. 704, 11 Ohio Cir. Dec. 372.

Pennsylvania.— *In re* Silvius, 3 Lack. Leg. N. 84. See also Cridland's Estate, 8 Pa. Co. Ct. 6; Embree's Estate, 18 Lanc. L. Rev. 57.

See 22 Cent. Dig. tit. "Executors and Administrators," § 733.

Loose expressions, by an infirm parent, of gratitude for the personal services of a child, and of a desire that compensation should be rendered after his death, not, however, indicative of the terms of a contract, are insufficient to entitle the child to compensation. Smith *v.* Birdsall, 106 Ill. App. 264. See also Wildonger's Estate, 2 Pa. Dist. 192, 12 Pa. Co. Ct. 616, 32 Wkly. Notes Cas. (Pa.) 184.

Claim must be proved according to law.— Declarations of a father that his son should be paid for work performed for him can be regarded as referring to an account presented by the son after the father's death, or to the services claimed for therein, only where the correctness of the claim is otherwise proved according to law. Duckworth *v.* Duckworth, 98 Md. 92, 56 Atl. 490.

That a mother and daughter were not members of the same household, while insufficient of itself to destroy the presumption that services rendered the mother by the daughter were gratuitous, may be regarded with other facts to establish an implied contract to pay for such services. Wessinger *v.* Roberts, 67 S. C. 240, 45 S. E. 169.

64. *Illinois.*— Waldron *v.* Alexander, 133 Ill. 30, 24 N. E. 557.

Mississippi.— Peeler *v.* Peeler, (1891) 11 So. 318.

Missouri.— Sprague *v.* Sea, 152 Mo. 327, 53 S. W. 1074 (second cousin of decedent); Truesdail *v.* Truesdail, 72 Mo. App. 155 (mother-in-law).

New York.— Doremus *v.* Lott, 49 Hun 284, 1 N. Y. Suppl. 793; Fleer *v.* Finken, 15 N. Y. Suppl. 514; Valentine *v.* Valentine, 4 Redf. Surr. 265.

Pennsylvania.— Smith *v.* Milligan, 43 Pa. St. 107; Lillich's Estate, 9 Pa. Co. Ct. 25; McCarty's Estate, 9 Phila. 318; Russell's Estate, 7 Phila. 64, brother's wife.

Vermont.— McDowell *v.* McDowell, 75 Vt. 401, 56 Atl. 98, 98 Am. St. Rep. 831, holding that where a grandfather hires a minor grandson at a stated monthly compensation, no presumption arises from the relationship that the grandson's services for the second month were gratuitously rendered.

See 22 Cent. Dig. tit. "Executors and Administrators," § 733.

Even a near relative may be allowed for services to or support of the decedent in the absence of any express or implied contract on his part to pay, where the claimant is under no obligation to furnish such services or support and the circumstances show such allowance to be just, as in a case of support and maintenance by a mother of an adult son possessed of means but incapable of taking care of himself or his property by reason of intemperance. Strawbridge's Appeal, 5 Whart. (Pa.) 568.

65. Hallock *v.* Teller, 2 Dem. Surr. (N. Y.) 206; Wartman's Estate, 19 Pa. Co. Ct. 143.

expectation of compensation, such compensation as is reasonable under the circumstances will be allowed.[66]

d. Agreement to Compensate by Will. An agreement of a decedent whereby he undertook to compensate another out of his estate for services rendered or to be rendered binds his estate, and the person who renders the services, failing to receive the promised legacy or bequest, may claim a reasonable recompense from the estate,[67] and even though a parol agreement of this kind would be void under the statute of frauds, it is sufficient foundation for a claim against the promisor's estate.[68]

66. Alexander's Succession, 110 La. 1027, 35 So. 273; Lacoste's Succession, 108 La. 57, 32 So. 181.

Matters to be considered.— Where a neighbor had rendered personal attendance and service to a decedent, and decedent had agreed to pay therefor, the value of the services is not to be measured by those of an ordinary house servant, who receives not only wages, but also board and lodging, but the additional labor in going to decedent whenever her services should be required must be considered. McDonough's Estate, 6 Pa. Co. Ct. 527. Where decedent allowed his son to plant an orchard and put other costly improvements on a farm as though it belonged to the son, it was inequitable, on settling decedent's estate, to charge the son with full rental value of the farm, and allow him to set off merely the cost of the trees and the planting thereof, without regard to their value when in full bearing, and the care and attention bestowed on them for years. Lightner *v.* Speck, (Va. 1897) 28 S. E. 326. The value of the succession may be considered by the court in fixing the fees due by a succession for professional services of physicians. Haley's Succession, 50 La. Ann. 840, 24 So. 285.

The amount for which the claim is placed on the account of the representative is not conclusive if it be shown that the services were really of greater value. Schmidt's Succession, 108 La. 293, 32 So. 413.

67. *Colorado.*—Snowden *v.* Clemons, 5 Colo. App. 251, 38 Pac. 475.

District of Columbia.— Robeson *v.* Niles, 7 Mackey 182.

Illinois.— See Freeman *v.* Freeman, 65 Ill. 106.

Indiana.—Bell *v.* Hewitt, 24 Ind. 280; Carroll *v.* Swift, 10 Ind. App. 170, 37 N. E. 1061.

Kentucky.— See Story *v.* Story, 61 S. W. 279, 22 Ky. L. Rep. 1731, 62 S. W. 865, 22 Ky. L. Rep. 1869.

Louisiana.—Nimmo *v.* Walker, 14 La. Ann. 581.

Michigan.—Ewers *v.* White, 114 Mich. 266, 72 N. W. 184; Rhea *v.* Meyers, 111 Mich. 140, 69 N. W. 239; Plant *v.* Weeks, 39 Mich. 117.

Minnesota.— Schwab *v.* Pierro, 43 Minn. 520, 46 N. W. 71.

New Jersey.— See Gay *v.* Mooney, 67 N. J. L. 27, 50 Atl. 596; Titus *v.* Hoagland, 39 N. J. Eq. 294.

New York.— Shakespeare *v.* Markham, 72 N. Y. 400; Leahy *v.* Campbell, 70 N. Y. App. Div. 127, 75 N. Y. Suppl. 72; Gall *v.* Gall, 27 N. Y. App. Div. 173, 50 N. Y. Suppl. 563; Shimer *v.* Kinder, 12 N. Y. St. 728.

North Carolina.— Miller *v.* Lash, 85 N. C. 51, 39 Am. Rep. 678.

Pennsylvania.— Moorhead *v.* Fry, 24 Pa. St. 37. See also Cridland's Estate, 8 Pa. Co. Ct. 6.

Tennessee.— Taylor *v.* Wood, 4 Lea 504.

Texas.—Von Carlowitz *v.* Bernstein, 28 Tex. Civ. App. 8, 66 S. W. 464.

Wisconsin.— Jilson *v.* Gilbert, 26 Wis. 637, 7 Am. Rep. 100; Bayliss *v.* Priciure, 24 Wis. 651, agreement to compensate in part by testamentary provision.

See 22 Cent. Dig. tit. "Executors and Administrators," § 737.

Promise must have been contractual and irrevocable. Eggers *v.* Anderson, 63 N. J. Eq. 264, 49 Atl. 578 [*reversing* 61 N. J. Eq. 85, 47 Atl. 727]; Jordan *v.* Dutton, 1 Phila. (Pa.) 437.

Indefinite promise.— An agreement by a testator during his lifetime to bequeath, to one who has rendered services to him, "as much as to any relative on earth," is too indefinite to be enforced against the executor. Graham *v.* Graham, 34 Pa. St. 475.

Uncorroborated evidence of a daughter that her father, to whom she had made advances for the support of his family, and her mother, had promised in consideration for the advances to leave her a portion of their property, is insufficient in equity, after the death of the father and mother, to create a charge on the estate of either. Cochrane *v.* McEntee, (N. J. Ch. 1896) 51 Atl. 279.

Revocation of will by birth of issue.— The principle stated in the text is applicable where the employer executes a will providing for the agreed compensation, which is revoked by his subsequent marriage and the birth of issue. Gall *v.* Gall, 27 N. Y. App. Div. 173, 50 N. Y. Suppl. 563.

Insufficient legacy.— Even where a legacy has been left to the claimant, a claim for compensation in addition thereto has been allowed where the legacy was clearly insufficient to compensate for the services rendered. Porter *v.* Dunn, 131 N. Y. 314, 30 N. E. 122 [*reversing* 61 Hun 310, 16 N. Y. Suppl. 77]; Reynolds *v.* Robinson, 64 N. Y. 589.

Services in mere hope or expectation of legacy or devise but without a promise see *supra*, X, A, 3, a.

68. *Indiana.*— Schoonover *v.* Vachon, 121 Ind. 3, 22 N. E. 777; Bell *v.* Hewitt, 24 Ind. 280.

It has been held that where the agreement of the decedent was specific as to the amount which the claimant should receive, such amount should be allowed without regard to the actual value of the services.[69]

4. Loans or Advances to Decedent. Money paid out for the use and benefit of the decedent, with his knowledge and consent, can be recovered against the estate without showing a positive direction or a definite writing,[70] and loans and advances are sometimes allowed in equity by way of adjustment between the estate of a deceased spouse and the survivor,[71] or to other persons standing in a family relation to the decedent.[72]

5. Covenants of Decedent. A covenant on the part of the decedent by deed, mortgage, or other instrument will bind his estate, if broken during his lifetime,[73] and for a breach of a personal covenant of the decedent the estate will be liable,

Kentucky.— See Story *v.* Story, 61 S. W. 279, 22 Ky. L. Rep. 1731, 62 S. W. 865, 22 Ky. L. Rep. 1869.

Michigan.— *In re* Williams, 106 Mich. 490, 64 N. W. 490.

New Jersey.— Updike *v.* Ten Broeck, 32 N. J. L. 105; Smith *v.* Smith, 28 N. J. L. 208, 74 Am. Dec. 49.

Wisconsin.— Martin *v.* Martin, 108 Wis. 284, 84 N. W. 439, 81 Am. St. Rep. 895.

69. Sword *v.* Keith, 31 Mich. 247; Matter of Mallory, 13 Misc. (N. Y.) 595, 35 N. Y. Suppl. 155; Cottrell's Estate, 11 Phila. (Pa.) 93, holding that under a contract with one deceased to leave the claimant in comfortable circumstances, so that she should not have to work for a livelihood, if she would take care of him and attend to him during his lifetime, the claimant is entitled to an amount from the estate sufficient to keep her without work, taking into consideration her condition in life. See also Koch *v.* Hebel, 32 Mo. App. 103, holding that if the devise or bequest was to be of specific value, or of specific property, the recovery cannot exceed such value. *Contra,* Nelson *v.* Masterson, 2 Ind. App. 524, 28 N. E. 731. And see Moorhead *v.* Fry, 24 Pa. St. 37.

70. Donovan's Appeal, 41 Conn. 551; Wilson *v.* Hotchkiss, 81 Mich. 172, 45 N. W. 838; Matter of Stringer, 60 Hun (N. Y.) 585, 15 N. Y. Suppl. 501; Broome *v.* Van Hook, 1 Redf. Surr. (N. Y.) 444; Sutton *v.* Page, 4 Tex. 142.

Relation of debtor and creditor must be established. Winter *v.* Winter, 90 Mich. 197, 51 N. W. 363.

71. *Alabama.*— Martin *v.* Foster, 38 Ala. 688; Andrews *v.* Huckabee, 30 Ala. 143.

Arkansas.— Black *v.* Black, 60 Ark. 390, 30 S. W. 755.

Illinois.—Pinneo *v.* Goodspeed, 104 Ill. 184, mortgage on wife's land to secure a husband's indebtedness.

New York.— See Herrington *v.* Robertson, 7 Hun 368.

Pennsylvania.— See Kern's Estate, 171 Pa. St. 55, 33 Atl. 129.

See 22 Cent. Dig. tit. "Executors and Administrators," § 734.

Contributions by both spouses.— Moneys derived partially from the husband, and partially from the wife's own earnings, and used in improving the real estate during the husband's lifetime, will not be allowed the widow. McMonigle *v.* McMonigle, 42 N. J. Eq. 64, 6 Atl. 314.

72. Litchfield *v.* Carpenter, 49 S. W. 22, 20 Ky. L. Rep. 1189; Titus *v.* Hoagland, 39 N. J. Eq. 294.

Measure of recovery.— Where, in consideration of the support of his parents and the payment of debts against the father existing at the date of the agreement, plaintiff was to have the use of the father's farm and the personal property thereon, and its avails were to belong to him, and he provided for the support and care of his parents, and paid the greater portion of the father's debts, and disposed of some of the personal property, the measure of his recovery against the father's estate, where the personal property had been taken by the representatives of the estate, was the value of the property taken, less the amount of the unpaid debts. Wamsley *v.* Wamsley, 48 N. Y. App. Div. 330, 62 N. Y. Suppl. 954.

Set-off.— Where A advanced money for his mother's support under an agreement that at her death he should be repaid from her estate, which money A procured from his wife, promising her that she should stand in his stead, it was held that equity would enforce the wife's claim against the mother's estate, but that the mother having a claim against her son and not being aware of the assignment this claim should be set off against the wife's claim. Titus *v.* Hoagland, 39 N. J. Eq. 294.

73. *Iowa.*— Goodnow *v.* Wells, 67 Iowa 654, 25 N. W. 864.

Massachusetts.— Estabrook *v.* Hapgood, 10 Mass. 313.

Michigan.— Sheldon *v.* Warner, 59 Mich. 444, 26 N. W. 667; Dennis *v.* Sharer, 56 Mich. 224, 22 N. W. 879.

North Carolina.— Wiggins *v.* Pender, 132 N. C. 628, 44 S. E. 362, 61 L. R. A. 772.

Virginia.—Tabb *v.* Binford, 4 Leigh 132, 26 Am. Dec. 317.

See 22 Cent. Dig. tit. "Executors and Administrators," § 735.

Costs incurred in an action against the representative on a covenant of the decedent may be allowed. Lot *v.* Parish, 1 Litt. (Ky.) 393.

although such breach occurs after his death;[74] but a claim for a breach of covenant running with the land, occurring after the death of the covenantor, is usually enforceable against the heir or devisee rather than against the estate.[75]

6. Contracts of Guaranty or Suretyship. The estate of a deceased guarantor or surety remains liable on the obligation after his death and claims growing out of the same are allowable;[76] but equity will not enforce payment out of a decedent's estate of a debt on which the decedent was surety where it does not appear that the principal is unable to pay,[77] nor while such liability remains contingent does it constitute a claim which the obligee may prove against the estate in the probate court.[78] The claim of a surety for a matured debt of a decedent is provable against his estate, after the surety has paid it.[79]

7. Claims For Trust Funds. Upon a trustee's death, his indebtedness to the trust becomes a demand against his estate, to be authenticated, allowed, classed, and paid out of the assets as other demands,[80] and where the decedent in his lifetime made improper investments, commingled trust funds with his own so that

74. Hunt's Appeal, 105 Pa. St. 128; Jones' Estate, 12 Wkly. Notes Cas. (Pa.) 388, holding further that liability on the personal covenant of a testator for the payment of money not running with the land, after his death, is not restricted to the lands affected by the covenant.

75. Booth *v.* Starr, 5 Day (Conn.) 275, 5 Am. Dec. 149; Keteltas *v.* Penfold, 4 E. D. Smith (N. Y.) 122; Scott *v.* Scott, 70 Pa. St. 244; Kershaw *v.* Supplee, 1 Rawle (Pa.) 131.

Covenant by life-tenant.— If a tenant for life makes a lease for years, and dies before its expiration, and the remainder-man evicts the lessee, no action on the implied covenant will lie against the executor of the lessor, as the covenant in law expired with the term. McClowry *v.* Croghan, 1 Grant (Pa.) 307.

76. *Kentucky.*— Black *v.* Bush, 7 B. Mon. 210.

Minnesota.— Palmer *v.* Pollock, 26 Minn. 433, 4 N. W. 1113, special statute as to presentment.

New York.— Wood *v.* Fisk, 63 N. Y. 245, 20 Am. Rep. 528.

Pennsylvania.— Jones' Appeal, 11 Wkly. Notes Cas. 554.

Rhode Island.—*In re* Hunt, 19 R. I. 139, 32 Atl. 204, 61 Am. St. Rep. 743.

Virginia.— Coleman *v.* Stone, 85 Va. 386, 7 S. E. 241.

England.— Atkinson *v.* Grey, 18 Jur. 282, 1 Sm. & G. 577.

See 22 Cent. Dig. tit. "Executors and Administrators," § 736.

Contribution at instance of cosurety.— One of several sureties who discharges the debt may enforce contribution from the estate of a deceased cosurety (McAllister *v.* Irwin, 31 Colo. 254, 73 Pac. 47; McKenna *v.* George, 2 Rich. Eq. (S. C.) 15) and the county court has jurisdiction to hear and determine such a claim for contribution (McAllister *v.* Irwin, *supra*).

Liability of estate after administration closed.— The Texas statute declaring bonds joint in form to be joint and several, and charging the "representatives" of a deceased surety with liability thereon, did not intend to charge the administrator and not the estate in the hands of the heirs, but the liability of the estate for breaches occurring after the death of the surety continues after the administration is closed. Allen *v.* Stovall, (Tex. Civ. App. 1901) 62 S. W. 87 [*affirmed* on this point but *reversed* on other grounds in 94 Tex. 618, 63 S. W. 863, 64 S. W. 777].

Stipulation prohibiting judgment against surety during principal's lifetime.— A copy or written statement of a bond payable after the death of the principal debtor, filed for the purpose of continuing the lien created by the intestate laws against the real estate of the surety after his death, will not be stricken off, notwithstanding such bond contained a stipulation that no judgment should be entered thereon against the surety during the lifetime of the principal. Stevenson *v.* Long, 23 Pa. Co. Ct. 391.

Liability on agreement and not on account.— A, of the first part, entered into an agreement, under seal, with B as principal and C as surety of the second part, that A should furnish B with merchandise, B should sell and account to A for the proceeds, A to allow him one half of the profits for his services. C died and A filed an account in the probate court for allowance against his administrator for a balance in the hands of B under the above agreement. It was held that the claim was properly rejected, as the liability of C's administrator, if any existed, was upon the agreement and not upon the account. Willamouicz *v.* Strong, 8 Ark. 467.

77. Shropshire *v.* Reno, 5 Dana (Ky.) 583.

78. Sauer *v.* Griffin, 67 Mo. 654. But see Atkinson *v.* Grey, 18 Jur. 282, 1 Sm. & G. 577, holding that a covenant by a surety for payment of a debt at a future day is not a contingent, but an actually existing debt. See, generally, as to presentation of contingent claims *infra*, X, B, 2, b.

79. Hill's Estate, 67 Cal. 238, 7 Pac. 664; Walker *v.* Drew, 20 Fla. 908.

80. Hill *v.* State, 23 Ark. 604; Gaffney's Estate, 146 Pa. St. 49, 23 Atl. 163; Moore *v.* Moore, 89 Tex. 29, 33 S. W. 217.

they cannot be identified, or wasted or embezzled the trust funds in his hands, the claims of the beneficiaries whether for a partial or total satisfaction become those of ordinary creditors against decedent's estate.[81]

8. Contracts of Purchase. Purchase-money due from a deceased vendee upon a valid contract of sale is such a debt of the decedent as the representative may rightfully pay;[82] but it has been held otherwise as to a contract of sale purely executory, under which the decedent did not receive the property, where the estate of the deceased vendee cannot complete the sale to advantage.[83]

9. Alimony to Illegitimate Child. It has been held in Louisiana that an illegitimate child has a right of action for alimony only against the parent or his heirs and it is not a debt against the succession, and hence an action therefor cannot be properly brought against the administrator.[84]

10. Claims Invalid as Against Decedent. Claims which would be illegal and void as against the decedent if living are not enforceable against the estate.[85]

11. Unmatured Claims. Unmatured claims against an estate are usually provided for by statute, and as to those which will become absolutely due at some definite future time the usual rule is to allow them to be proved.[86]

12. Debts Payable After Death. Even though a debt or obligation of a

81. *Alabama.*— Pryor *v.* Davis, 109 Ala. 117, 19 So. 440.

Arkansas.— Green *v.* Brooks, 25 Ark. 318.

Indiana.— Benson *v.* Liggett, 78 Ind. 452.

Louisiana.— Shall *v.* Foley, 27 La. Ann. 651.

Michigan.—Frank *v.* Morley, 106 Mich. 635, 64 N. W. 577.

Ohio.— *In re* Turpin, 5 Ohio S. & C. Pl. Dec. 410, 7 Ohio N. P. 569.

Pennsylvania.— Leonard's Estate, 9 Pa. Co. Ct. 410; Gaw's Estate, 12 Phila. 4.

See 22 Cent. Dig. tit. "Executors and Administrators," § 738.

82. Probasco *v.* Cook, 39 Mich. 714; Chapman *v.* Merritt, 45 Mo. App. 179; Riegelman's Estate, 174 Pa. St. 476, 34 Atl. 120; Thompson *v.* Adams, 55 Pa. St. 479; *In re* McCracken, 29 Pa. St. 426; Graham's Estate, 6 Kulp (Pa.) 269; Cox *v.* Cox, Peck (Tenn.) 443.

The assertion of a vendor's lien on the land debars the presentment of a claim against the personal assets. Pott's Appeal, 5 Pa. St. 500.

A vendor who has brought ejectment to enforce payment of the purchase-money has no claim on the personal estate of the deceased vendee. Pott's Appeal, 5 Pa. St. 500.

83. Riner *v.* Husted, 13 Colo. App. 523, 58 Pac. 793 (holding that, conceding that a tender of bonds which decedent had agreed to purchase to decedent's administratrix was sufficient acceptance by the seller, and her refusal to take them created a new liability, it was not one which could be enforced as a claim in probate against his estate, but was a liability incurred by the administratrix, enforceable in another tribunal); Miskimen *v.* Culbertson, 162 Ill. 236, 44 N. E. 396; Gantt *v.* Mechin, 30 Mo. App. 532.

84. Drouet *v.* Drouet, 26 La. Ann. 323.

85. Watrous *v.* Chalker, 7 Conn. 224; Smith *v.* Mayo, 9 Mass. 62, 6 Am. Dec. 28; Imhoff *v.* Witmer, 31 Pa. St. 243; McTier *v.* Hunter, Riley (S. C.) 159, But see *infra*, note 87.

A testamentary provision for payment of all "just debts" does not embrace illegal or invalid claims. Smith *v.* Mayo, 9 Mass. 62, 6 Am. Dec. 28; Smith's Appeal, 1 Pennyp. (Pa.) 48.

The declaration of an executor that "we will settle the account" cannot make his testatrix's estate liable for a debt, for which, being a married woman, she was not liable in her lifetime. McTier *v.* Hunter, Riley (S. C.) 159.

86. *Illinois.*— Dunnigan *v.* Stevens, 122 Ill. 396, 13 N. E. 651, 3 Am. St. Rep. 496 [*reversing* 19 Ill. App. 310]; Hall *v.* Hoxsey, 84 Ill. 616; Mackin *v.* Haven, 88 Ill. App. 434 [*affirmed* in 187 Ill. 480, 58 N. E. 448].

Indiana.— Maddox *v.* Maddox, 97 Ind. 537; Hathaway *v.* Roll, 81 Ind. 567.

Massachusetts.— Ames *v.* Ames, 128 Mass. 277 (funds to be retained by representative for payment or bond given); Haverhill Loan, etc., Assoc. *v.* Cronin, 4 Allen 141.

Missouri.— Empire Paving, etc., Co. *v.* Prather, 58 Mo. App. 487; Schmieding *v.* Doellner, 13 Mo. App. 228.

Texas.— Dunn *v.* Sublett, 14 Tex. 521.

Vermont.— Brown *v.* Dunn, 75 Vt. 264, 55 Atl. 364.

Wisconsin.— Austin *v.* Saveland, 77 Wis. 108, 45 N. W. 955.

United States.— U. S. *v.* North Carolina Bank, 6 Pet. 29, 8 L. ed. 308.

See 22 Cent. Dig. tit. "Executors and Administrators," § 745.

A rebate of interest is provided for by the Illinois statute. See Dunnigan *v.* Stevens, 122 Ill. 396, 13 N. E. 651, 3 Am. St. Rep. 496 [*reversing* 19 Ill. App. 310]; Hall *v.* Hoxsey, 84 Ill. 616.

The present value of an annuity may be proved against the estate of the obligor as a demand not yet due. Schmieding *v.* Doellner, 13 Mo. App. 228. See also Hinklebein *v.* Tatten, 60 S. W. 641, 22 Ky. L. Rep. 1357, present value of amount payable in future.

decedent contracted by a decedent in his lifetime is by its terms not payable until after his death, it may be enforced against his estate.[87]

13. Contingent Claims. A debt depending upon some contingency which may never happen is not as a general rule one which may be said to be owing by the deceased in such sense as to be an immediate burden on the assets or presently provable against the estate,[88] although it is otherwise of course where the contingency happened and the claim thus became absolute in the decedent's lifetime.[89] The presentation, proof, and allowance of contingent claims are, however, matters which in many states are regulated by statute,[90] and it is frequently provided that the personal representative must retain funds for the purpose of meeting such claims when they shall accrue.[91]

87. Corr's Appeal, 62 Conn. 403, 26 Atl. 478; Hegeman *v.* Moon, 60 Hun (N. Y.) 412, 15 N. Y. Suppl. 596; Powell *v.* Graham, 1 Moore C. P. 305, 18 Rev. Rep. 593, 7 Taunt. 580, 2 E. C. L. 501.

Promise to pay at or before death.— An express promise on valuable consideration to pay a certain sum at or before the death of the promisor may be enforced after his death against his estate. Woods *v.* Matlock, 19 Ind. App. 364, 48 N. E. 384.

Inadequacy of consideration.— Where decedent in his lifetime wrote a letter acknowledging a debt, and directing his creditor to prove it against his estate, it was held that proof of a gross deficiency of consideration would tend to show an intent to evade Minn. Gen. St. (1894) § 4426, relative to the execution of wills, in which case the claim should be allowed for only the amount of the consideration. Fitzgerald *v.* English, 73 Minn. 266, 76 N. W. 27.

Claim not enforceable in decedent's lifetime.— At common law a husband or wife might enforce against the estate of a deceased spouse claims on contract which could not be asserted at law during the lifetime of the other party. Grimes *v.* Reynolds, 94 Mo. App. 576, 68 S. W. 588. See also Corr's Appeal, 62 Conn. 403, 26 Atl. 478. But see *supra*, note 85.

88. *Arkansas.*— Walker *v.* Byers, 14 Ark. 246.

Massachusetts.— Ames *v.* Ames, 128 Mass. 277.

New Jersey.— Terhune *v.* White, 34 N. J. Eq. 98 [*followed* in Field *v.* Thisble, 58 N. J. Eq. 339, 43 Atl. 1072 (*affirmed* in 60 N. J. Eq. 444, 46 Atl. 1099)], holding that a claim against the estate of a decedent on his assumption of a mortgage is, before foreclosure, only contingent.

Texas.— Dunn *v.* Sublett, 14 Tex. 521.

Vermont.— Jones *v.* Cooper, 2 Aik. 54, 16 Am. Dec. 678, bond of indemnity, the condition of which not broken.

England.— See Henderson *v.* Gilchrist, 17 Jur. 570, 22 L. J. Ch. 970, 1 Wkly. Rep. 426; Wentworth *v.* Chevell, 3 Jur. N. S. 805, 26 L. J. Ch. 760, 5 Wkly. Rep. 743; Read *v.* Blunt, 5 Sim. 567, 9 Eng. Ch. 567.

See 22 Cent. Dig. tit. "Executors and Administrators," § 744.

Claims not contingent.— Where decedent made a written acknowledgment of an indebtedness, with an executory promise to pay it out of the proceeds of land named, and gave plaintiff an option to take the land for the debt and a certain amount in addition, and decedent's administrator subsequently sold the land, plaintiff could recover the amount of the debt from the decedent's estate, as the indebtedness was not dependent on the sale of the land. Calloway *v.* Angel, 127 N. C. 414, 37 S. E. 454. The indorser of a negotiable promissory note containing a stipulation that "the drawers and indorsers severally waive presentment for payment, protest and notice of protest, and non-payment of this note" is liable absolutely for its payment and hence it may, under the Illinois statute, be presented against the estate for settlement before maturity. Dunigan *v.* Stevens, 122 Ill. 396, 13 N. E. 651, 3 Am. St. Rep. 496 [*reversing* 19 Ill. App. 310]. *Compare* Cockrill *v.* Hobson, 16 Ala. 391.

89. *Alabama.*— McDowell *v.* Jones, 58 Ala. 25.

Illinois.— Morse *v.* Pacific R. Co., 191 Ill. 356, 61 N. E. 104 [*affirming* 93 Ill. App. 31]; Morse *v.* Gillette, 93 Ill. App. 23 [*affirmed* in 191 Ill. 371, 61 N. E. 1136].

Minnesota.— Fitzhugh *v.* Harrison, 75 Minn. 481, 78 N. W. 95.

Nebraska.— Stichter *v.* Cox, 52 Nebr. 532, 72 N. W. 848.

Vermont.— Sargent *v.* Kimball, 37 Vt. 320.

See 22 Cent. Dig. tit. "Executors and Administrators," § 744.

90. See Berryhill *v.* Peabody, 72 Minn. 232, 75 N. W. 220; Huntzch *v.* Massolt, 61 Minn. 361, 63 N. W. 1069; McKeen *v.* Waldron, 25 Minn. 466; Logan *v.* Dixon, 73 Wis. 533, 41 N. W. 713; Mann *v.* Everts, 64 Wis. 372, 25 N. W. 209; Hall *v.* Wilson, 6 Wis. 433, holding that where one presenting a claim against an estate gives credit for property received by him from the widow of the deceased, and takes judgment for the balance only, and the administrator afterward recovers from him the value of the property so received, he may prove against the estate the sum so credited, it being within the statute relating to contingent claims.

Necessity of presenting contingent claims see *infra*, X, B, 2, b.

91. Greene *v.* Dyer, 32 Me. 460; Mann *v.* Everts, 64 Wis. 372, 25 N. W. 209. And see Hoyt *v.* Bonnett, 50 N. Y. 538 [*reversing* 58 Barb. 529]. See *infra*, X, D, 13; XI, Q.

14. Claims Founded in Tort. As torts died with the person at common law claims founded in tort were not in earlier times considered in connection with the settlement of estates;[92] but in modern practice, based to some extent upon statute, a claim growing out of a tort may survive against the tort-feasor's estate, especially if the estate has been directly or indirectly increased or benefited by the tort.[93]

15. Taxes and Assessments.[94] Personal assessments charged against the decedent during his lifetime, or taxes or assessments chargeable rightfully against the personal estate in the due process of settlement, are payable by the representative on their preferential footing,[95] and the representative should also pay assessed taxes which became a lien on the decedent's real estate before his death.[96] An

92. See Abatement and Revival, 1 Cyc. 50 note 59.

93. State *v.* Givan, 45 Ind. 267; Wineburg *v.* U. S. Steam, etc., R. Advertising Co., 173 Mass. 60, 53 N. E. 145, 73 Am. St. Rep. 261; Cooper *v.* Crane, 9 N. J. L. 173. See also Stock *v.* Parker, 2 McCord Eq. (S. C.) 376. See Abatement and Revival, 1 Cyc. 51, 52.

94. See *supra*, VIII, I, 8, h.

95. *Connecticut.*— Bulkley *v.* Clark, 2 Root 60.

Iowa.— Findley *v.* Taylor, 97 Iowa 420, 66 N. W. 744.

Kentucky.— Floyd *v.* Floyd, 7 B. Mon. 290; Thrasher *v.* Lewis, 13 Ky. L. Rep. 926.

Massachusetts.— See Ratch *v.* Morgan, 105 Mass. 426; Wood *v.* Torrey, 97 Mass. 321.

Minnesota.— *In re* Jefferson, 35 Minn. 215, 28 N. W. 256.

Missouri.— State *v.* Tittmann, 103 Mo. 553, 569, 15 S. W. 936, 941.

Nevada.— *In re* Millenovich, 5 Nev. 161.

New Jersey.— Dey *v.* Codman, 39 N. J. Eq. 258; Holcombe *v.* Holcombe, 29 N. J. Eq. 597.

New York.— Matter of Sudds, 32 Misc. 182, 66 N. Y. Suppl. 231; *In re* McMahon, 67 How. Pr. 113, 152, 14 Abb. N. Cas. 405, 406; McMahon *v.* Beekman, 65 How. Pr. 427; Seabury *v.* Bowen, 3 Bradf. Surr. 207, holding that a special assessment on real estate which was confirmed at the time of decedent's decease, although a lien on the lands, was also a personal debt of the decedent, and should be paid out of her personal estate.

North Carolina.—James *v.* Withers, 126 N. C. 715, 36 S. E. 178.

Pennsylvania.— Littleton's Appeal, 93 Pa. St. 177 (income tax); Behee's Estate, 8 Kulp 157 (water rates); Casner's Estate, 2 Kulp 474; Fell's Estate, 13 Phila. 289.

Rhode Island.— Williams *v.* Herrick, 18 R. I. 120, 25 Atl. 1099.

Tennessee.— Wooten *v.* House, (Ch. App. 1895) 36 S. W. 932.

Virginia.— Nimme *v.* Com., 4 Hen. & M. 57, 4 Am. Dec. 488.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 439, 747.

Retaining funds which might have been distributed.— The fact that an executor retained in his hands during his administration funds that he might have distributed among the legatees was not ground for charging him with taxes paid by him on such funds, since it is presumed the funds would have been assessed to the legatees if in their hands. Matter of Sudds, 32 Misc. (N. Y.) 182, 66 N. Y. Suppl. 231.

Where an executor makes a false return of property of the estate for taxation, the penalty provided by statute for such an offense cannot be inflicted on the estate of the decedent. Leper *v.* Pulsifer, 37 Ill. 110.

Apportionment of tax.— Where a tax is assessed against a decedent's estate as a whole, a decree, on final accounting, apportioning the tax ratably against a trust fund and the balance of the estate is just. Matter of Kenworthy, 63 Hun (N. Y.) 165, 17 N. Y. Suppl. 655.

96. *Alabama.*— Chandler *v.* Chandler, 87 Ala. 300, 6 So. 153.

Illinois.— Shaw *v.* Camp, 56 Ill. App. 23.

Mississippi.— Bowers *v.* Williams, 34 Miss. 324.

New York.— *In re* Babcock, 115 N. Y. 450, 22 N. E. 263; Smith *v.* Cornell, 113 N. Y. 320, 21 N. E. 140 [*affirming* 52 N. Y. Super. Ct. 499]; Stewart's Estate, 90 Hun 94, 35 N. Y. Suppl. 366; Krueger *v.* Schlinger, 19 Misc. 221, 43 N. Y. Suppl. 205; Mitchell *v.* Bowne, 63 How. Pr. 1; Matter of Noyes, 3 Dem. Surr. 369; Griswold *v.* Griswold, 4 Bradf. Surr. 216; Seabury *v.* Bowen, 3 Bradf. Surr. 207; Dugan's Estate, Tuck. Surr. 338. But *compare* Matter of Hewitt, 40 Misc. 322, 81 N. Y. Suppl. 1030, holding that taxes on land in the city of New York, accruing before a testator's death, being a lien on the particular property, and not a personal charge against the owner, cannot be paid out of the personalty, under Code Civ. Proc. § 2719, as debts of the decedent.

Pennsylvania.— Fell's Estate, 13 Phila. 289.

Virginia.— Dillard *v.* Dillard, 77 Va. 820.

See 22 Cent. Dig. tit. "Executors and Administrators," § 439.

Assessment for street improvements.— A statute requiring executors to pay taxes assessed against the decedent previous to his death does not include an assessment for street improvements, which is merely a charge against the property, and not a personal debt. *In re* Hun, 144 N. Y. 472, 39 N. E. 376.

Although a tax had not become a lien at the time of decedent's death, yet the fact that he had become personally liable to pay

executor or administrator who is lawfully and properly in possession or control of the real estate belonging to his decedent may properly pay taxes assessed thereon after the decedent's death, and should receive credit therefor in his accounts,[97] unless the benefits which he has personally derived from such possession are such as to offset the expenditure for this purpose;[98] but, save so far as he may have special authority over the real estate of the decedent to sell or manage it, or may need it specially to sell for the payment of debts, he is not warranted in paying taxes on it assessed or levied after the decedent's death, since these are charges on the land for the heirs or devisees to pay.[99] If the land be sold or partitioned under order of the court, taxes or assessments accruing subsequent thereto are

it when it should be levied by the proper officers on the assessment rolls, which had become complete, made it a debt of decedent, which could be properly paid by his executors out of his estate. Matter of Franklin, 26 Misc. (N. Y.) 107, 56 N. Y. Suppl. 858.

97. *Arkansas.*— See Armstrong *v.* Cashion, (1901) 16 S. W. 666.

Michigan.—Long *v.* Landman, 118 Mich. 174, 76 N. W. 374.

New Jersey.— Dey *v.* Codman, 39 N. J. Eq. 258.

Pennsylvania.— Roup's Estate, 31 Pittsb. Leg. J. 101, executors with authority to sell.

Tennessee.— Read *v.* Franklin, (Ch. App. 1900) 60 S. W. 215, holding that where a widow, claiming under an alleged will of her husband, held the estate as life-tenant and executrix, and the will was thereafter declared invalid, on an accounting with the heir and an administrator it was proper to allow her taxes paid out of her separate estate.

See 22 Cent. Dig. tit. "Executors and Administrators," § 439.

Duty to pay taxes.— It is the duty of administrators if lands are in their possession and capable of yielding rents to pay the taxes out of the rents and not to permit the premises to be sold for taxes. Cummings *v.* Bradley, 57 Ala. 224.

98. *Delaware.*— See Spruance *v.* Darlington, 7 Del. Ch. 111, 30 Atl. 663.

Massachusetts.— Wiggin *v.* Swett, 6 Metc. 194, 39 Am. Dec. 716, holding that where testator devised to his wife, whom he appointed executrix, the use of his dwelling-house for life, directing that it should be kept in repair out of his other estate, she was not entitled to charge the estate for taxes assessed on the house when in her possession under the will.

Michigan.— *In re* Graff, 123 Mich. 456, 82 N. W. 248, holding that a widow who is also administratrix of the decedent cannot be allowed to occupy the premises of the decedent as a residence, rent free, and then charge against the estate items for taxes paid during such occupation.

New Hampshire.— Clough *v.* Clough, 71 N. H. 412, 52 Atl. 449.

Pennsylvania.— Villee's Estate, 9 Lanc. L. Rev. 353; Pratt's Estate, 3 Lanc. L. Rev. 203.

See 22 Cent. Dig. tit. "Executors and Administrators," § 439.

99. *Illinois.*— Stark *v.* Brown, 101 Ill. 395; Phelps *v.* Funkhouser, 39 Ill. 401; Shaw *v.* Camp, 56 Ill. App. 23.

Kansas.— Reading *v.* Wier, 29 Kan. 429.

Missouri.— Langston *v.* Canterbury, 173 Mo. 122, 73 S. W. 151.

New Hampshire.—Lucy *v.* Lucy, 55 N. H. 9.

New Jersey.— Polhemus *v.* Middleton, 37 N. J. Eq. 240; Howard *v.* Francis, 30 N. J. Eq. 444; Holcombe *v.* Holcombe, 29 N. J. Eq. 597.

New York.— *In re* Selleck, 111 N. Y. 284, 19 N. E. 66; Willcox *v.* Smith, 26 Barb. 316; Matter of Foulds, 35 Misc. 171, 71 N. Y. Suppl. 473 (holding this to be true even although the administrator and the next of kin are tenants in common of the realty); Matter of Very, 24 Misc. 139, 53 N. Y. Suppl. 389, 28 N. Y. Civ. Proc. 163; Matter of Hun, 7 Misc. 409, 28 N. Y. Suppl. 253; Matter of Benedict, 15 N. Y. St. 746; Matter of Kick, 11 N. Y. St. 688; Bates *v.* Underhill, 3 Redf. Surr. 365; Griswold *v.* Griswold, 4 Bradf. Surr. 216.

North Carolina.— Hahn *v.* Mosely, 119 N. C. 73, 25 S. E. 713; Young *v.* Kennedy, 95 N. C. 265.

Ohio.— Piatt *v.* St. Clair, Wright 526; Matter of Turpin, Ohio Prob. 124.

Pennsylvania.— Walker's Appeal, 116 Pa. St. 419, 9 Atl. 654; Jackson *v.* Sassaman, 29 Pa. St. 106; Dunkle's Estate, 17 Lanc. L. Rev. 61; Watson's Estate, 6 Luz. Leg. Reg. 13.

Texas.—Moore *v.* Bryant, 10 Tex. Civ. App. 131, 31 S. W. 223.

Virginia.— See Dillard *v.* Dillard, 77 Va. 820.

West Virginia.— See Creigh *v.* Boggs, 19 W. Va. 240, holding the heirs and not the administrator of a deceased vendor liable to the vendee for delinquent taxes by him paid to prevent a sale of the land for taxes.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 439, 762.

But *compare* Rudolph *v.* Underwood, 88 Ga. 664, 16 S. E. 55, holding that the estate, while not liable for taxes accruing upon land after it has been sold by the administrator, is liable for taxes assessed upon the land before it was sold, although the assessment was made in the name of one of the heirs or legatees.

When charge allowable.— The payment by the executor of taxes accruing on the real estate subsequent to the testator's death being for the benefit of the heirs, the court,

not debts of the decedent which it is the right or duty of the executor or administrator to pay.[1]

16. Continuing Obligations. The policy of the law does not favor the continuance of the liability of a deceased contracting party after the time at which estates of decedents are usually administered, and it ought not to be so continued unless the terms of the instrument and the attending circumstances are such that no other result is possible.[2]

17. Agreement of Representative to Pay. While the personal representative may render himself personally liable to pay a claim presented against the estate, he cannot bind the estate by his express or implied promise to pay a claim which was not an obligation of the decedent in his lifetime or for which the estate is not properly and directly liable.[3] But where the consideration of a representative's contract to pay is a debt due by his decedent, the representative is not liable further than he has received assets, and if he has received no assets is not liable at all.[4]

18. Claims Barred by Limitation[5] — a. In General. As a general rule a claim which was barred by the statute of limitations at the time of the debtor's death

after a long lapse of time, will presume a request, and allow it as a charge against the estate (Broome *v.* Van Hook, 1 Redf. Surr. (N. Y.) 444), especially when such payment was not objected to at the time by any of those interested (Robertson *v.* Breckinbridge, (Va. 1898) 31 S. E. 892). So also if the heirs permit real estate to be returned delinquent for the non-payment of taxes, and the executors pay such taxes to prevent the loss of the land, they will be entitled, as against the residuary legatees, to credit for the taxes so paid, whether or not the executors, having a naked power to sell, were under a duty to pay such taxes. Dunn *v.* Renick, 33 W. Va. 476, 10 S. E. 810. Where the estate is insolvent it is proper for the executor to preserve the real estate by the payment of taxes. Matter of Van Houten, 18 Misc. (N. Y.) 524, 42 N. Y. Suppl. 1115. It has also been held, without considering whether an administrator has authority to collect rents, that administrators who have charged themselves with the rents are entitled to credit for taxes paid. Matter of Turpin, Ohio Prob. 124.

Taxes paid by mortgagee purchasing at foreclosure sale.— The payment of taxes assessed upon real estate of the deceased before his death, by the mortgagee of such estate, who has bought it at a foreclosure sale at a price less than the amount due on the mortgage, the terms of the sale providing for such payment out of the purchase-money, does not entitle such purchaser to be reimbursed for the taxes out of the assets of the estate. Leviness *v.* Cassebeer, 3 Redf. Surr. (N. Y.) 491.

1. Ambleton *v.* Dyer, 53 Ark. 224, 13 S. W. 926; Rudolph *v.* Underwood, 88 Ga. 664, 16 S. E. 55; Dillard *v.* Dillard, 77 Va. 820. But *compare* Eddy's Estate, 13 Phila. (Pa.) 262, holding that where land has been sold to pay debts the executor may be allowed in his account for taxes and arrears of ground-rent accruing after the confirmation of the sale and before the execution of the deed, and for the amount of a city claim for work done to the premises during the same period.

2. Loftis' Estate, 3 Pa. Co. Ct. 195, holding that where, before the death of a lessee, and before the expiration of the lease, the business carried on by him upon the demised premises was sold under execution and purchased by his wife, who continued the business, it would be presumed that the lease was sold as part of the business, and hence the lessor was not entitled to claim rent accruing under the lease after the lessee's death against his estate.

3. *Alabama.*—Colvin *v.* Owens, 22 Ala. 782.
Arkansas.— Yarborough *v.* Ward, 34 Ark. 204.
Florida.— May *v.* May, 7 Fla. 207, 68 Am. Dec. 431.
Louisiana.— Reihl *v.* Martin, 29 La. Ann. 15.
Massachusetts.— Shepherd *v.* Young, 8 Gray 152, 69 Am. Dec. 242 [*following* Washburn *v.* Hale, 10 Pick. 429; Ripley *v.* Sampson, 10 Pick. 371].
New York.— O'Brien *v.* Jackson, 167 N. Y. 31, 60 N. E. 238; Van Slooten *v.* Dodge, 145 N. Y. 327, 39 N. E. 950.
North Carolina.— Williams *v.* Chaffin, 13 N. C. 333.
Pennsylvania.— Solliday *v.* Bissey, 12 Pa. St. 347; Beeson *v.* McNabb, 2 Pa. St. 422; Grier *v.* Huston, 8 Serg. & R. 402, 11 Am. Dec. 627; Wireman's Appeal, 7 Pa. Dist. 759, 43 Wkly. Notes Cas. 334; Bowen *v.* Miller, 3 Pa. L. J. Rep. 326.
South Carolina.— Milwer *v.* Jay, 47 S. C. 430, 25 S. E. 298; McGrath *v.* Barnes, 13 S. C. 328, 36 Am. Rep. 687.
Virginia.— Braxton *v.* Harrison, 11 Gratt. 30.
England.— See Bradley *v.* Heath, 3 Sim. 543, 30 Rev. Rep. 217, 6 Eng. Ch. 543.
See 22 Cent. Dig. tit. "Executors and Administrators," § 748.

4. Lair *v.* Miller, 2 Litt. (Ky.) 66 [*followed* in Rucker *v.* Wadlington, 5 J. J. Marsh. (Ky.) 238].

5. See, generally, Limitations of Actions.

cannot be properly allowed against his estate,[6] and the personal representative is under no legal obligation to pay it;[7] but in some jurisdictions where the period required to bar the claim expires after the decedent's death but before the presentment of the claim or the settlement and distribution of the estate, the claim is not barred[8] unless it is not enforced within the prescribed time after the issuing of letters testamentary or of administration.[9] In computing the time under the statute of limitations, when pleaded by the personal representative or heirs of the deceased, the time after the granting of letters during which the personal representative cannot be sued must be deducted.[10] If a creditor of a decedent is appointed executor or administrator of the latter's estate, the running of the statute of limitations against the representative's claim is suspended.[11]

6. *California.*— Etchas *v.* Orena, 127 Cal. 588, 60 Pac. 45; McGrath *v.* Carroll, 110 Cal. 79, 42 Pac. 466.

Florida.— Patterson *v.* Cobb, 4 Fla. 481.

Illinois.— Bromwell *v.* Bromwell, 139 Ill. 424, 28 N. E. 1057.

Louisiana.— *In re* Romero, 38 La. Ann. 947.

Massachusetts.— Grinnell *v.* Baxter, 17 Pick. 383.

Michigan.— Kimball *v.* Kimball, 16 Mich. 211.

Missouri.—Bambrick *v.* Bambrick, 157 Mo. 423, 58 S. W. 8.

Montana.— *In re* Mouillerat, 14 Mont. 245, 36 Pac. 185.

New Jersey.— Pursel *v.* Pursel, 14 N. J. Eq. 514.

New York.— Butler *v.* Johnson, 111 N. Y. 204, 18 N. E. 643; Hamlin *v.* Smith, 72 N. Y. App. Div. 601, 76 N. Y. Suppl. 258; Mooers *v.* White, 6 Johns. Ch. 360; Burnett *v.* Noble, 5 Redf. Surr. 69.

South Carolina.— Hunter *v.* Hunter, 63 S. C. 78, 41 S. E. 33, 90 Am. St. Rep. 663.

Virginia.— Tazewell *v.* Whittle, 13 Gratt. 329.

Wyoming.— See O'Keefe *v.* Foster, 5 Wyo. 343, 40 Pac. 525.

See 22 Cent. Dig. tit. "Executors and Administrators," § 749.

Rule applicable to claims of personal representative.— Grinnell *v.* Baxter, 17 Pick. (Mass.) 383; Burnett *v.* Noble, 5 Redf. Surr. (N. Y.) 59; Hoch's Appeal, 21 Pa. St. 280; Monroe's Estate, 9 Kulp (Pa.) 334. See also Gilbert *v.* Comstock, 93 N. Y. 484. *Compare* Payne *v.* Pusey, 8 Bush (Ky.) 564.

A presumption of payment for services rendered the decedent six years previously arises on account of such delay where the claim might have been made to decedent during his lifetime (Monroe's Estate, 9 Kulp (Pa.) 334; *In re* Beecher, 29 Pittsb. Leg. J. (Pa.) 84), but where the debt is one of record nothing less than the lapse of twenty years will raise such a presumption (*In re* Breeswine, 11 York Leg. Rec. (Pa.) 141). See, generally, PAYMENT.

Acknowledgments by the debtor in his lifetime may of course take a debt out of the operation of the statute so that the claim may be properly allowed against his estate. Rogers *v.* Southern, 4 Baxt. (Tenn.) 67.

7. Bambrick *v.* Bambrick, 157 Mo. 423, 58 S. W. 8; King *v.* Rogers, 31 Ont. 573. See also McGrath *v.* Carroll, 110 Cal. 79, 42 Pac. 466.

8. McClintock's Appeal, 29 Pa. St. 360; Montreal Bank *v.* Buchanan, 32 Wash. 480, 73 Pac. 482; Gleason *v.* Hawkins, 32 Wash. 464, 73 Pac. 533, holding that a mortgage debt not barred at the time of the decedent's death is payable out of the personalty, although a suit to foreclose the mortgage is barred. And see Bromwell *v.* Bromwell, 139 Ill. 424, 28 N. E. 1057; Hunter *v.* Hunter, 63 S. C. 78, 41 S. E. 33. *Contra*, Perry *v.* Munger, 7 Tex. 589.

Where a suit is abated by the death of defendant and cannot be revived against his administrator because of the insolvency of his estate the debt is not barred by limitations as a claim against the estate if at the time the suit was brought it was not so barred. Bassett *v.* McKenna, 52 Conn. 437.

9. Montreal Bank *v.* Buchanan, 32 Wash. 480, 73 Pac. 482 (holding that the qualification of the executor or administrator and filing of his bond is equivalent to taking out letters, within the meaning of this rule); Gleason *v.* Hawkins, 32 Wash. 464, 73 Pac. 533.

The fact that an executor fails to proceed with the administration does not excuse a creditor who allows his claim to become barred, inasmuch as he has a statutory remedy whereby he could enforce administrative proceedings. Montreal Bank *v.* Buchanan, 32 Wash. 480, 73 Pac. 482.

10. Lee *v.* Downey, 68 Ala. 98; Steele *v.* Steele, 64 Ala. 438, 38 Am. Rep. 15.

11. Semmes *v.* Magruder, 10 Md. 242; State *v.* Reigart, 1 Gill (Md.) 1, 39 Am. Dec. 628; Spencer *v.* Spencer, 4 Md. Ch. 456; Brown *v.* Stewart, 4 Md. Ch. 368; Matthews *v.* Matthews, 66 Miss. 239, 6 So. 201; Preston *v.* Cutter, 64 N. H. 461, 13 Atl. 874; McLaughlin *v.* Newton, 53 N. H. 531. See also Grinnell *v.* Baxter, 17 Pick. (Mass.) 383. But see *In re* Kuhlman, 178 Pa. St. 43, 35 Atl. 918. See *infra*, XIV, F. 2.

Under the New York statute suspending the running of the statute of limitations against a debt due from a decedent to his personal representative until the first judicial settlement of the latter's account (Code Civ. Proc. § 2740) a demand in the representative's favor, accruing during the decedent's lifetime, is not barred where presented

b. Power of Representative to Waive Bar — (i) *In General.* The rule in some jurisdictions is that a personal representative cannot waive the bar of the statute of limitations as to claims against the estate, but is bound to interpose the statute as a defense wherever applicable;[12] although the statute may be waived

on an accounting on his own petition fourteen years after his appointment, there having been no previous judicial settlement. *In re* Powers, 11 N. Y. Suppl. 396. The statute applies only to "a debt due from the decedent to the accounting party" and not to a debt which was owing to a third person but which has been assigned to the representative. Matter of Robbins, 7 Misc. (N. Y.) 264, 27 N. Y. Suppl. 1009.

12. *California.*— Etchas *v.* Orena, 127 Cal. 588, 60 Pac. 45; Vrooman *v.* Li Po Tai, 113 Cal. 302, 45 Pac. 470. See also McGrath *v.* Carroll, 110 Cal. 79, 42 Pac. 466.

Florida.— Patterson *v.* Cobb, 4 Fla. 481.

Illinois.— Langworthy *v.* Baker, 23 Ill. 484; McCoy *v.* Morrow, 18 Ill. 519, 68 Am. Dec. 578; Bromwell *v.* Shubert, 40 Ill. App. 330. See also Marshall *v.* Coleman, 187 Ill. 556, 58 N. E. 628 [*modifying* 89 Ill. App. 41].

Louisiana.— Romero's Succession, 31 La. Ann. 721; Villere *v.* Villere, 26 La. Ann. 380; Flanner *v.* Lecompte, 23 La. Ann. 193; Sevier *v.* Gordan, 21 La. Ann. 373.

Mississippi.— The representative cannot lawfully waive the bar or pay claims against which the statute of limitations had run at the time of his decedent's death or of his own qualification as representative (Woods *v.* Elliott, 49 Miss. 168; Byrd *v.* Wells, 40 Miss. 711; Trotter *v.* Trotter, 40 Miss. 704), but he may be allowed credit for money paid on debts of the estate which were barred by the statute of limitations at the time of their payment if they were not barred at the time of his appointment (Byrd *v.* Wells, 40 Miss. 711).

Missouri.— Bambrick *v.* Bambrick, 157 Mo. 423, 58 S. W. 8. And see Stiles *v.* Smith, 55 Mo. 363.

Montana.— *In re* Mouillerat, 14 Mont. 245, 36 Pac. 185.

Nevada.— Jones *v.* Powning, 25 Nev. 399, 60 Pac. 833.

New York.— Schutz *v.* Morette, 146 N. Y. 137, 40 N. E. 780 [*reversing* 81 Hun 518, 31 N. Y. Suppl. 39]; Butler *v.* Johnson, 111 N. Y. 204, 18 N. E. 643; Hamlin *v.* Smith, 72 N. Y. App. Div. 601, 76 N. Y. Suppl. 258; Bucklin *v.* Chapin, 1 Lans. 443; Matter of Bradley, 25 Misc. 261, 54 N. Y. Suppl. 555; Balz *v.* Underhill, 19 Misc. 215, 44 N. Y. Suppl. 419; Matter of Oosterhoudt, 15 Misc. 566, 38 N. Y. Suppl. 179; *In re* Hill, 7 N. Y. Suppl. 328, 2 Connoly Surr. 25; Burnett *v.* Noble, 5 Redf. Surr. 69. *Compare* Broome *v.* Van Hook, 1 Redf. Surr. 444.

Virginia.— Smith *v.* Pattie, 81 Va. 654; Tazewell *v.* Whittle, 13 Gratt. 329. And see Tunstall *v.* Pollard, 11 Leigh 1. But *Compare* West *v.* Smith, 8 How. (U. S.) 402, 12 L. ed. 1130, decided under the laws of Virginia.

West Virginia.— Van Winkle *v.* Blackford, 33 W. Va. 573, 11 S. E. 26.

Wyoming.— See O'Keefe *v.* Foster, 5 Wyo. 343, 40 Pac. 525.

See 22 Cent. Dig. tit. "Executors and Administrators," § 750.

No credit for payment of barred debt.— Matter of Oosterhoudt, 15 Misc. (N. Y.) 556, 38 N. Y. Suppl. 179; *In re* Hill, 7 N. Y. Suppl. 328, 2 Connoly Surr. (N. Y.) 25; Willson *v.* Willson, 2 Dem. Surr. (N. Y.) 462; Burnett *v.* Noble, 5 Redf. Surr. (N. Y.) 69; Freeman *v.* Freeman, 2 Redf. Surr. (N. Y.) 137. See also Marshall *v.* Coleman, 187 Ill. 556, 58 N. E. 628 [*modifying* 89 Ill. App. 41]; Woods *v.* Elliott, 49 Miss. 168; Van Winkle *v.* Blackford, 33 W. Va. 573, 11 S. E. 26. But where the representative has paid a debt barred by the statute before the decedent's death, the court will presume, after a lapse of more than twenty years, that the executor had evidence of a new promise by the debtor in his lifetime, and that credit should be allowed for the payment. Broome *v.* Van Hook, 1 Redf. Surr. (N. Y.) 444. Where it appeared in the settlement of an executor's account that a note executed by him and testator was barred by the statute of limitations, except for partial payments made thereon; that such payments were made by the executor with money furnished by testator for that purpose; that the note was given to aid the executor, who was testator's son, in purchasing a team; and that testator had designed paying the note himself, the executor was entitled to credit for the amount paid to cancel the note. Matter of Beach, 1 Misc. (N. Y.) 27, 22 N. Y. Suppl. 1079. Where the representative claims credit for the payment of barred debts, the allowance must be contested in the manner prescribed by law, but this must be done in the lower court and cannot be done for the first time on appeal, for La. Code, art. 3427, which declares that prescription may be pleaded in every stage of the cause, even after appeal, does not apply to such a case. Blakey's Succession, 12 Rob. (La.) 155.

Where the representative knows facts making the statute inapplicable he is not required to plead the statute of limitations, although the claim is apparently barred. Radford *v.* Fowlkes, 85 Va. 820, 8 S. E. 817.

A representative's unreasonable delay in making objections to a claim presented to him does not preclude him from asserting the statute of limitations as a bar to such claim. Bucklin *v.* Chapin, 1 Lans. (N. Y.) 443.

A former adjudication of the surrogate's court, dismissing a creditor's petition for an accounting and containing the statement that the proceeding was barred by the statute of limitations does not, under the New York statutes, constitute a final adjudication upon

with the consent of the persons interested in the estate.[13] But the rule supported by the weight of authority is that the representative may exercise his discretion, and although as a general rule it is his duty to interpose the statute as a defense where the claim was barred at the time of the decedent's death,[14] or has been judicially declared outlawed by a competent court,[15] or is so stale as to raise the presumption of payment,[16] he is not bound to do so in all cases but may waive the bar where he believes the claim to be well founded and just,[17] where the per-

the validity of the creditor's claim. Holly *v.* Gibbons, 176 N. Y. 520, 68 N. E. 889, 98 Am. St. Rep. 694 [*reversing* 67 N. Y. App. Div. 628, 74 N. Y. Suppl. 1132].

Keeping subsisting debt in force.— The rule preventing the personal representative from reviving a barred debt does not prevent him from keeping a subsisting debt in force as by making payments thereon. Holly *v.* Gibbons, 176 N. Y. 520, 68 N. E. 889, 98 Am. St. Rep. 694 [*reversing* 67 N. Y. App. Div. 628, 74 N. Y. Suppl. 1132]; Heath *v.* Grenell, 61 Barb. (N. Y.) 190.

13. Spicer *v.* Raplee, 4 N. Y. App. Div. 471, 38 N. Y. Suppl. 806, holding that a claim is relieved of the bar where, in addition to a written acknowledgment and promise by the executor, the heirs, devisees, and legatees of the deceased sign another paper requesting the executor to pay the claim, and reciting that if it is paid they will make no claim against him on account thereof.

14. Rector *v.* Conway, 20 Ark. 79; Rogers *v.* Wilson, 13 Ark. 507; McBride *v.* Hunter, 64 Ga. 655; Du Bignon *v.* Backer, 61 Ga. 206; Moore *v.* Porcher, Bailey Eq. (S. C.) 195; King *v.* Cassidy, 36 Tex. 531; Moore *v.* Hardison, 10 Tex. 467. See also Wilson *v.* Wilson, McMull. Eq. (S. C.) 329.

15. Crabtree *v.* Graham, 81 Ga. 290, 6 S. E. 426; Midgley *v.* Midgley, [1893] 3 Ch. 282, 62 L. J. Ch. 905, 69 L. T. Rep. N. S. 241, 2 Reports 561, 41 Wkly. Rep. 659.

16. Rogers *v.* Wilson, 13 Ark. 507; Barnawell *v.* Smith, 58 N. C. 168. And see McCulloch *v.* Dawes, 9 D. & R. 40, 5 L. J. K. B. O. S. 56, 30 Rev. Rep. 515, 22 E. C. L. 587.

As to presumption of payment from lapse of time see, generally, PAYMENT.

17. *Alabama.*— Steele *v.* Steele, 64 Ala. 438, 38 Am. Rep. 15; Scott *v.* Ware, 64 Ala. 174; *Ex p.* Perryman, 25 Ala. 79, 60 Am. Dec. 494; Knight *v.* Godbolt, 7 Ala. 304.

Arkansas.— Conway *v.* Reyburn, 22 Ark. 290 [*distinguishing* Rector *v.* Conway, 20 Ark. 79; Rogers *v.* Wilson, 13 Ark. 507].

Delaware.—Chambers *v.* Fennemore, 4 Harr. 368.

Kentucky.— Payne *v.* Pusey, 8 Bush 564. See also Lee *v.* Colston, 5 T. B. Mon. 238.

Maryland.— Semmes *v.* Magruder, 10 Md. 242; Quynn *v.* Carroll, 10 Md. 197; Miller *v.* Dorsey, 9 Md. 317; Chapman *v.* Dixon, 4 Harr. & J. 527; Forbes *v.* Perrie, 1 Harr. & J. 109.

Massachusetts.— Emerson *v.* Thompson, 16 Mass. 429; Scott *v.* Hancock, 13 Mass. 162.

New Hampshire.— Hodgdon *v.* White, 11 N. H. 208.

New Jersey.— Pursel *v.* Pursel, 14 N. J. Eq. 514.

North Carolina.— Halliburton *v.* Carson, 100 N. C. 99, 5 S. E. 912, 6 Am. St. Rep. 565; Barnawell *v.* Smith, 58 N. C. 168; Leigh *v.* Smith, 38 N. C. 442, 42 Am. Dec. 182; Williams *v.* Maitland, 36 N. C. 92.

Ohio.— See Joyce *v.* Hart, 11 Ohio Dec. (Reprint) 487, 27 Cinc. L. Bul. 144.

Pennsylvania.— Woods *v.* Irwin, 141 Pa. St. 278, 21 Atl. 603, 23 Am. St. Rep. 282; Ritter's Appeal, 23 Pa. St. 95; Steel *v.* Steel, 12 Pa. St. 64; Kennedy's Appeal, 4 Pa. St. 149; Fritz *v.* Thomas, 1 Whart. 66, 29 Am. Dec. 39; Smith *v.* Porter, 1 Binn. 209; Smith's Estate, 1 Ashm. 352.

South Carolina.— Bolt *v.* Dawkins, 16 S. C. 198; Walter *v.* Radcliffe, 2 Desauss. 577. *Compare* Millwee *v.* Jay, 47 S. C. 430, 25 S. E. 298.

Tennessee.— Bates *v.* Elrod, 13 Lea 156; Batson *v.* Murrell, 10 Humphr. 301, 51 Am. Dec. 707; Brown *v.* Porter, 7 Humphr. 373.

United States.— *In re* Huger, 100 Fed. 805; Fairfax *v.* Fairfax, 8 Fed. Cas. No. 4,613, 2 Cranch C. C. 25.

England.— Norton *v.* Frecker, 1 Atk. 526, 26 Eng. Reprint 330; Midgley *v.* Midgley, [1893] 3 Ch. 282, 62 L. J. Ch. 905, 69 L. T. Rep. N. S. 241, 2 Reports 561, 41 Wkly. Rep. 659; *In re* Rownson, 29 Ch. D. 358, 49 J. P. 759, 54 L. J. Ch. 950, 52 L. T. Rep. N. S. 825, 33 Wkly. Rep. 604; Hunter *v.* Baxter, 3 Giff. 214, 31 L. J. Ch. 432, 5 L. T. Rep. N. S. 46; Hill *v.* Walker, 4 Kay & J. 166; Stahlschmidt *v.* Lett, 1 Sm. & G. 415.

See 22 Cent. Dig. tit. "Executors and Administrators," § 750.

The rule applies to an appointee in trust under a will executed by a married woman who acted under a power of appointment. Leigh *v.* Smith, 38 N. C. 442, 42 Am. Dec. 182.

Although a presumption of payment may have arisen from lapse of time, the representative may properly pay the debt if he has personal knowledge or ample proof that it still subsists. Halliburton *v.* Carson, 100 N. C. 99, 5 S. E. 912, 6 Am. St. Rep. 565 [*distinguishing* Barnawell *v.* Smith, 58 N. C. 168].

Representative who has paid barred debt entitled to credit.— Halliburton *v.* Carson, 100 N. C. 99, 5 S. E. 912, 6 Am. St. Rep. 565; Anderson's Appeal, 3 Walk. (Pa.) 497; Hunter *v.* Baxter, 3 Giff. 214, 31 L. J. Ch. 432, 5 L. T. Rep. N. S. 46. See also Pursel *v.* Pursel, 14 N. J. Eq. 514.

Negligent conduct of defense.— Although the representative is not bound to plead the

sonal estate is sufficient to pay the debt without resorting to the realty,[18] where interposing the statute would cut off rights of the estate against third persons,[19] or where the bar did not accrue until after the decedent's death.[20] But it has been said that the rule allowing the personal representative to waive the bar of the statute is anomalous and ought not to be extended.[21] Where the personal representative is entitled to the entire estate as sole distributee, legatee, or devisee he has the same power to waive the statute of limitations as the debtor had in his lifetime.[22]

(II) *As to Representative's Own Claim.*[23] In some jurisdictions the representative may waive the statute of limitations as to a claim of his own, or may exercise his right of retainer although his claim is barred,[24] although in other jurisdictions the rule is otherwise where the claim was barred in the debtor's lifetime,[25] or at the date of the representative's qualification,[26] or before his intention to retain for the debt was made known.[27]

(III) *Waiver by One of Several Representatives.* In jurisdictions where the personal representative has the power to take a debt of the estate out of the operation of the statute of limitations, a promise by one of several co-executors or co-administrators may be sufficient for this purpose,[28] and likewise the statute

statute, yet if he refuses payment on the sole ground that the claim is barred, and thereby induces litigation in which he acts as his own attorney, he must exercise the same degree of diligence that would be required of him in making any other defense, especially where he stands in intimate and confidential relations to the creditor; and under such circumstances, if he so negligently conducts the defense that the creditor recovers judgment, he is not entitled to credit for the judgment, although he is forced to pay it. Teague *v.* Corbitt, 57 Ala. 529.

18. Lee *v.* Downey, 68 Ala. 98; Steele *v.* Steele, 64 Ala. 438, 38 Am. Rep. 15; Scott *v.* Ware, 64 Ala. 174; Pollard *v.* Scears, 28 Ala. 484, 65 Am. Dec. 364.

19. King *v.* Cassidy, 36 Tex. 531.

20. Jordan *v.* Brown, 72 Ga. 495; Marietta Sav. Bank *v.* Janes, 66 Ga. 286; Smith *v.* Hudspeth, 63 Ga. 212; Castellaw *v.* Guilmartin, 54 Ga. 299.

21. Midgley *v.* Midgley, [1893] 3 Ch. 282, 62 L. J. Ch. 905, 69 L. T. Rep. N. S. 241, 2 Reports 561, 41 Wkly. Rep. 659; *In re* Rownson, 29 Ch. D. 358, 49 J. P. 759, 54 L. J. Ch. 950, 52 L. T. Rep. N. S. 825, 33 Wkly. Rep. 604.

22. Suhre *v.* Benton, (Tex. Civ. App. 1894) 25 S. W. 822. See also Sumter *v.* Morse, 2 Hill Eq. (S. C.) 87.

23. As to the right of retainer generally see *infra*, X, D, 3, a.

24. *Alabama.*—Harwood *v.* Harper, 54 Ala. 659; Knight *v.* Godbolt, 7 Ala. 304.

Kentucky.— Payne *v.* Pusey, 8 Bush 564.

Maryland.— Semmes *v.* Magruder, 10 Md. 242, holding that so long as a creditor is administrator the statute of limitations can have no effect upon the demand.

England.— Hill *v.* Walker, 4 Kay & J. 166; Stahlschmidt *v.* Lett, 1 Sm. & G. 415. See also *In re* Rownson, 29 Ch. D. 358, 49 J. P. 759, 54 L. J. Ch. 950, 52 L. T. Rep. N. S. 825, 33 Wkly. Rep. 604; Hunter *v.* Baxter, 3 Giff. 214, 31 L. J. Ch. 432, 5 L. T. Rep. N. S. 46; Sharman *v.* Rudd, 4 Jur. N. S. 527, 27 L. J. Ch. 844.

Canada.— Crooks *v.* Crooks, 4 Grant Ch. (U. C.) 615. See also Emes *v.* Emes, 11 Grant Ch. (U. C.) 325.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 750–753, 1014.

25. *Arkansas.*— See Rector *v.* Conway, 20 Ark. 79.

Connecticut.—Ensign *v.* Batterson, 68 Conn. 298, 36 Atl. 51.

Florida.— Sanderson *v.* Sanderson, 17 Fla. 820, holding this to be true where the debt was not barred in the lifetime of the testator or at the date of the issuing of letters.

Georgia.— Beckham *v.* Beckham, 113 Ga. 381, 38 S. E. 817. But see Baker *v.* Bush, 25 Ga. 594, 71 Am. Dec. 193.

Massachusetts.— *In re* Richmond, 2 Pick. 567.

New York.— Rogers *v.* Rogers, 3 Wend. 503, 20 Am. Dec. 716; Burnett *v.* Noble, 5 Redf. Surr. 69. See also Gilbert *v.* Comstock, 93 N. Y. 484, holding, however, that by reason of a part payment made by the testator, the liability for whatever was unpaid six years prior thereto was renewed.

Pennsylvania.— Hoch's Appeal, 21 Pa. St. 280.

South Carolina.— Cooper *v.* Peyton, Rich. Eq. Cas. 259.

Tennessee.— Williams *v.* Williams, 15 Lea 438.

West Virginia.— See Cann *v.* Cann, 40 W. Va. 138, 20 S. E. 910.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 750–753, 1074.

26. Sanderson *v.* Sanderson, 17 Fla. 820; Godbold *v.* Vance, 14 S. C. 458; Batson *v.* Murrell, 10 Humphr. (Tenn.) 301, 51 Am. Dec. 707.

27. Harrison *v.* Henderson, 7 Heisk. (Tenn.) 315; Byrn *v.* Fleming, 3 Head (Tenn.) 658; Wharton *v.* Marberry, 3 Sneed (Tenn.) 603.

28. *Delaware.*— Conoway *v.* Spicer, 5 Harr. 425.

of limitations may be tolled by a part payment made by one of several representatives.[29]

c. Power of Heirs or Devisees to Waive Bar. Inasmuch as the heir or devisee has no authority over the estate of his decedent, he cannot by any acknowledgment, promise, or part payment, affect the operation of the statute of limitations or the presumption of payment as to a debt of the decedent, so far as the estate is concerned;[30] although he is managing the estate without letters of administration,[31] or has been appointed personal representative but has not yet qualified.[32] But so far as his own rights or property are concerned the statute of limitations is a personal defense to him, and he may of course waive it or by reason of his conduct be estopped to plead it.[33]

d. Acts Constituting Waiver — (i) *Acknowledgment of Promise to Pay* — (a) *In General.* In many jurisdictions a representative's acknowledgment and promise to pay an indebtedness barred by the statute of limitations is not sufficient to waive the bar;[34] and it is held in some of these jurisdictions that the

Kentucky.— Northcut *v.* Wilkinson, 12 B. Mon. 408; Head *v.* Manners, 5 J. J. Marsh. 255; Hord *v.* Lee, 4 T. B. Mon. 36.

New Jersey.— Shreve *v.* Joyce, 36 N. J. L. 44, 13 Am. Rep. 417.

New York.— See Hammon *v.* Huntley, 4 Cow. 493, holding that while an acknowledgment that a debt was due from the deceased might be sufficient to remove it from the statute of limitations, it was not sufficient evidence to authorize a verdict against all of the executors.

South Carolina.— Lomax *v.* Spierin, Dudley 365; Briggs *v.* Starke, 2 Mill 111, 12 Am. Dec. 659.

See 22 Cent. Dig. tit. "Executors and Administrators," § 750½.

In England the rule was formerly to the contrary (Tullock *v.* Dunn, R. & M. 416, 21 E. C. L. 784) but under Lord Tenterden's Act a promise in writing made and signed by one of several executors in his representative capacity is binding upon the decedent's estate and takes the debt out of the statute of limitations (*In re* Macdonald, [1897] 2 Ch. 181, 66 L. J. Ch. 630, 76 L. T. Rep. N. S. 713, 45 Wkly. Rep. 628).

Debt of co-representative.— One of two joint representatives cannot, by his admission and acknowledgment, revive a debt of the other against the estate which was barred at the decedent's death. Seig *v.* Acord, 21 Gratt. (Va.) 365, 8 Am. Rep. 605.

In Alabama a promise by one of two administrators to pay a debt is sufficient to take it out of the statute of limitations, when the action is against him only after the decease of his co-administrator (Hall *v.* Darrington, 9 Ala. 502), but where the promise is made by one acting alone it will not take the case out of the statute, if the action is against both representatives (Pitts *v.* Wooten, 24 Ala. 474; Caruthers *v.* Mardis, 3 Ala. 599).

In Maryland a promise or acknowledgment by one of several representatives will take the case out of the statute, where the promise or acknowledgment was made before the statute had fully run against the claim (McCann *v.* Sloan, 25 Md. 575); but the claim must be established by other proof and the promise or acknowledgment cannot be relied on for the purpose of establishing the existence of the debt as against the other representative (Pole *v.* Simmons, 49 Md. 14; McCann *v.* Sloan, *supra*); and as the promise or acknowledgment operates only to interrupt or toll the statute, it can have no effect unless made before the claim becomes barred (Pole *v.* Simmons, *supra*).

One of several representatives may plead the statute where the others stand neutral. Scull *v.* Wallace, 15 Serg. & R. (Pa.) 231; Davis' Estate, 1 Phila. (Pa.) 360. See also Midgley *v.* Midgley, [1893] 3 Ch. 282, 62 L. J. Ch. 905, 69 L. T. Rep. N. S. 241, 2 Reports 561, 41 Wkly. Rep. 659.

29. Heath *v.* Grenell, 61 Barb. (N. Y.) 190; Matter of Bradley, 25 Misc. (N. Y.) 261, 54 N. Y. Suppl. 555.

30. Gibson *v.* Lowndes, 28 S. C. 285, 5 S. E. 727; Bolt *v.* Dawkins, 16 S. C. 198. See also Smith *v.* Pattie, 81 Va. 654.

31. Bolt *v.* Dawkins, 16 S. C. 198.

32. Gibson *v.* Lowndes, 28 S. C. 285, 5 S. E. 727; Bolt *v.* Dawkins, 16 S. C. 198.

33. Grimball *v.* Mastin, 77 Ala. 553; Lengar *v.* Hazlewood, 11 Lea (Tenn.) 539. See also *infra*, X, A, 18, f, (v).

34. *Florida.*— Sanderson *v.* Sanderson, 17 Fla. 820; Patterson *v.* Cobb, 4 Fla. 481.

Louisiana.— Romero's Succession, 31 La. Ann. 721; Dickson *v.* Compton, 24 La. Ann. 83; Flanner *v.* Lecompte, 23 La. Ann. 193. But see Dejean's Succession, 8 La. Ann. 505.

Mississippi.— Huntington *v.* Bobbitt, 46 Miss. 528; Waul *v.* Kirkman, 25 Miss. 609; Bingaman *v.* Robertson, 25 Miss. 501; Sanders *v.* Robertson, 23 Miss. 389; Henderson *v.* Ilsley, 11 Sm. & M. 9, 49 Am. Dec. 41.

Missouri.— Cape Girardeau County *v.* Harbison, 58 Mo. 90.

New York.— Schutz *v.* Morette, 146 N. Y. 137, 40 N. E. 780 [*reversing* 81 Hun 518, 31 N. Y. Suppl. 39]; *In re* Kendrick, 107 N. Y. 104, 13 N. E. 762 [*affirming* 15 Abb. N. Cas. 189, 3 Dem. Surr. 301]; Bloodgood *v.* Bruen, 8 N. Y. 362; Yates *v.* Wing, 42 N. Y. App.

representative's promise to pay before the debt becomes barred does not interrupt the running of the statute in favor of the estate,[35] but that whether the promise is made before or after the expiration of the statutory period if it is supported by a valid consideration[36] it binds the representative as his personal contract,[37] and precludes him from deriving any advantage from the previous lapse of time.[38] The distinction has been made, however, that, while the representative's promise will not revive a debt barred in the debtor's lifetime, if the statutory period expires after his death the promise will remove the bar[39] or interrupt the running

Div. 356, 59 N. Y. Suppl. 78; Bucklin *v.* Chapin, 1 Lans. 443; Heath *v.* Grenell, 61 Barb. 190; Balz *v.* Underhill, 19 Misc. 215, 44 N. Y. Suppl. 419; Clark *v.* Clark, 8 Paige 152, 35 Am. Dec. 676; Stiles *v.* Burch, 5 Paige 132. But see Hammon *v.* Huntley, 4 Cow. 493; Johnson *v.* Beardslee, 15 Johns. 3.

North Carolina.— Grady *v.* Wilson, 115 N. C. 344, 20 S. E. 518, 44 Am. St. Rep. 461; Flemming *v.* Flemming, 85 N. C. 127; Oates *v.* Lilly, 84 N. C. 643. But see Cobham *v.* Administrators, 3 N. C. 6, 2 Am. Dec. 612, holding an admission by an administrator, when a note of his intestate was presented to him, in the form "it is the signature of the deceased, and all his just debts shall be paid" sufficient to take the case out of the statute of limitations.

Ohio.— Drouilliard *v.* Wilson, 1 Ohio Dec. (Reprint) 555, 10 West. L. J. 385.

Pennsylvania.— *In re* Claghorn, 181 Pa. St. 608, 37 Atl. 921; *In re* Claghorn, 181 Pa. St. 600, 37 Atl. 918, 59 Am. St. Rep. 680; Clark *v.* McGuire, 35 Pa. St. 259; Steel *v.* Steel, 12 Pa. St. 64; Forney *v.* Benedict, 5 Pa. St. 225; Reynolds *v.* Hamilton, 7 Watts 420; Fritz *v.* Thomas, 1 Whart. 66, 29 Am. Dec. 39; Matter of McWilliams, 5 Pa. L. J. 265. See also Jones *v.* Moore, 5 Binn. 573, 6 Am. Dec. 428, holding that an acknowledgment does not revive an old debt but is some evidence of a promise to pay.

South Carolina.— Bolt *v.* Dawkins, 16 S. C. 198; Reigne *v.* Desportes, Dudley 118; Pearce *v.* Zimmerman, Harp. 305; Knox *v.* McCall, 1 Brev. 531; Wilson *v.* Wilson, McMull. Eq. 329. And see Milwe *v.* Jay, 47 S. C. 430, 25 S. E. 298; Jones *v.* Jenkins, 2 McCord 494.

Tennessee.— Ricketts *v.* Ricketts, 4 Lea 163; Peck *v.* Wheaton, Mart. & Y. 353.

Virginia.— Smith *v.* Pattie, 81 Va. 654; Seig *v.* Acord, 21 Gratt. 365, 8 Am. Rep. 605; Tazewell *v.* Whittle, 13 Gratt. 329. And see Fisher *v.* Duncan, 1 Hen. & M. (Va.) 563, 3 Am. Dec. 605.

Washington.— Montreal Bank *v.* Buchanan, 32 Wash. 480, 73 Pac. 482.

West Virginia.— Findley *v.* Cunningham, 53 W. Va. 1, 44 S. E. 472; Stiles *v.* Laurel Fork Oil, etc., Co., 47 W. Va. 838, 35 S. E. 986; Van Winkle *v.* Blackford, 33 W. Va. 573, 11 S. E. 26.

United States.— Thompson *v.* Peter, 12 Wheat. 565, 6 L. ed. 730. And see Wilkins *v.* Murphey, 29 Fed. Cas. No. 17,663, Brunn. Col. Cas. 21, 3 N. C. 282.

See 22 Cent. Dig. tit. "Executors and Administrators," § 752.

Giving a new note in place of one already prescribed does not revive the debt. Dickson *v.* Compton, 24 La. Ann. 83.

A surrogate's decree establishing the indebtedness of an estate upon a promissory note given by the decedent, and ordering a *pro rata* payment thereon out of the assets, does not in law amount to a promise by the representative to pay the balance of the debt so as to deprive him of the benefit of the statute of limitations. Arnold *v.* Downing, 11 Barb. (N. Y.) 554.

35. *In re* Claghorn, 181 Pa. St. 608, 37 Atl. 921; *In re* Claghorn, 181 Pa. St. 600, 37 Atl. 918, 59 Am. St. Rep. 680; Forney *v.* Benedict, 5 Pa. St. 225; Van Winkle *v.* Blackford, 33 W. Va. 573, 11 S. E. 26. See also Oates *v.* Lilly, 84 N. C. 643.

36. Such a promise must, like other promises, have a valid consideration, but the detriment suffered by the creditor in forbearing to enforce his demand against the estate constitutes a sufficient consideration. Forney *v.* Benedict, 5 Pa. St. 225 [*explaining* Case *v.* Cushman, 1 Pa. St. 241]. See also CONTRACTS, 9 Cyc. 343.

37. *In re* Claghorn, 181 Pa. St. 608, 37 Atl. 921; *In re* Claghorn, 181 Pa. St. 600, 37 Atl. 918, 59 Am. St. Rep. 680; Forney *v.* Benedict, 5 Pa. St. 225. See also Oates *v.* Lilly, 84 N. C. 643; and *supra*, VIII, D, 4.

38. Forney *v.* Benedict, 5 Pa. St. 225.

39. Pearce *v.* Zimmerman, Harp. (S. C.) 305.

It is provided by the Georgia code (Code (1895), § 3433; Code (1892), § 2542) that the personal representative may in his discretion relieve a debt from the bar interposed by the lapse of time, by a new promise to pay, provided such bar had not occurred in the lifetime of the debtor; but that in such cases the distributees can make the representative responsible by proving that the claim against the estate was in reality unjust. Jordan *v.* Brown, 72 Ga. 495; Marietta Sav. Bank *v.* Janes, 66 Ga. 286; Du Bignon *v.* Backer, 61 Ga. 206, holding that it must appear that the cause of action was not barred before the debtor's death. Although the administrator has this discretionary power, yet where he has filed a bill to marshal assets and has brought the creditors with their claims before the court, he cannot arbitrarily relieve certain claims of the bar of the statute and plead the statute as to others. He will either be compelled to abstain from all interference in the matter, or, if allowed to interfere, it will be upon the condition

of the statute.[40] In a number of jurisdictions, however, a representative may revive a barred debt if his acknowledgment is unqualified, amounting to an implied promise to pay,[41] or if he makes an express promise to pay[42] in writing.[43]

(B) *Sufficiency of Acknowledgment or Promise.*[44] In order that the representative's acknowledgment or promise may have the effect of taking a claim out of the statute as to the estate, it must be made in his representative capacity,[45] and voluntarily;[46] must be made to the creditor himself or his agent, not to a third person,[47] or if made to a third person must be intended to be communi-

that he applies the same rule to all who have equally meritorious claims. Jordan *v.* Brown, 72 Ga. 495.

40. McLaren *v.* McMartin, 36 N. Y. 88; Matter of Robbins, 7 Misc. (N. Y.) 264, 27 N. Y. Suppl. 1009; Johnson *v.* Ballard, 11 Rich. (S. C.) 178; Lomax *v.* Spierin, Dudley (S. C.) 365; Reigne *v.* Desportes, Dudley (S. C.) 118; Wilson *v.* Wilson, McMull. Eq. (S. C.) 329; Walter *v.* Radcliffe, 2 Desauss. (S. C.) 577; Braxton *v.* Harrison, 11 Gratt. (Va.) 30; Bishop *v.* Harrison, 2 Leigh (Va.) 532. See also Sevier *v.* Gordon, 21 La. Ann. 373; Johnson *v.* Beardslee, 15 Johns. (N. Y.) 3.

A promise by a former representative is, it seems, equally available in an action against an administrator *de bonis non.* Bishop *v.* Harrison, 2 Leigh (Va.) 532 [*followed* in Braxton *v.* Harrison, 11 Gratt (Va.) 30].

In Louisiana it is held that where the claim of a creditor is duly presented and thereupon formally acknowledged by the representative, the latter becomes from that time the trustee of the creditor, and that prescription does not run against the claim as long as the decedent's heirs allow the assets of the estate to remain in the representative's custody. Renshaw *v.* Stafford, 30 La. Ann. 853 [*explaining* and *distinguishing* Sevier *v.* Gordon, 21 La. Ann. 373]; Romero's Succession, 29 La. Ann. 493; Johnson *v.* Waters, 111 U. S. 640, 4 S. Ct. 619, 28 L. ed. 547. See also Willis' Succession, 109 La. 281, 33 So. 314; Clothier *v.* Lemée, 33 La. Ann. 305. The filing by the representative of a statement of debts including the claim in question is a sufficient acknowledgment within the foregoing rule (Porter *v.* Hornsby, 32 La. Ann. 337) and so is the placing of the debt on the representative's account and asking for authority to pay it (Maraist *v.* Guilbeau, 31 La. Ann. 713). The written acknowledgment or judicial admission of a judgment debt of a succession, made by the executor before the debt is prescribed, will interrupt prescription. Patrick's Succession, 30 La. Ann. 1071.

41. *Alabama.*— Steele *v.* Steele, 64 Ala. 438, 38 Am. Rep. 15; Townes *v.* Ferguson, 20 Ala. 147; Hall *v.* Darrington, 9 Ala. 502. See also Scott *v.* Ware, 64 Ala. 174.

Delaware.— Chambers *v.* Fennemore, 4 Harr. 368; Bennington *v.* Parkins, 1 Harr. 128. But see Gailey *v.* Washington, 2 Harr. 204; Parkins *v.* Bennington, 1 Harr. 209, both decided under section 5 of the act of 1792, which has been repealed.

Kentucky.— Northcut *v.* Wilkinson, 12 B. Mon. 408; Head *v.* Manner, 5 J. J. Marsh. 255.

Massachusetts.— Emerson *v.* Thompson, 16 Mass. 429; Sullivan *v.* Holker, 15 Mass. 374. See also Baxter *v.* Penniman, 8 Mass. 133.

New Hampshire.— Preston *v.* Cutter, 64 N. H. 461, 13 Atl. 874; Brewster *v.* Brewster, 52 N. H. 52. And see Buswell *v.* Roby, 3 N. H. 468.

Texas.— Russ *v.* Cunningham, (Sup. 1891) 16 S. W. 446. But see Moore *v.* Hillebrant, 14 Tex. 312, 65 Am. Dec. 118.

England.— Phillips *v.* Beal, 32 Beav. 26; McCulloch *v.* Dawes, 9 D. & R. 40, 5 L. J. K. B. O. S. 56, 30 Rev. Rep. 515, 22 E. C. L. 587; Tullock *v.* Dunn, R. & M. 416, 21 E. C. L. 784.

Canada.— King *v.* Rogers, 31 Ont. 573, holding, however, that the acknowledgment proved was insufficient.

See 22 Cent. Dig. tit. "Executors and Administrators," § 752.

The promise of a former representative is equally available in an action against an administrator *de bonis non.* Emerson *v.* Thompson, 16 Mass. 429; Sullivan *v.* Holker, 15 Mass. 374.

42. Head *v.* Manner, 5 J. J. Marsh. (Ky.) 255; Bunker *v.* Athearn, 35 Me. 364; Oakes *v.* Mitchell, 15 Me. 360; Quynn *v.* Carroll, 10 Md. 197; Chapman *v.* Dixon, 4 Harr. & J. (Md.) 527; Forbes *v.* Perrie, 1 Harr. & J. (Md.) 109. And see Manson *v.* Gardiner, 5 Me. 108; Ecker *v.* New Windsor First Nat. Bank, 59 Md. 291.

43. Ensign *v.* Batterson, 68 Conn. 298, 36 Atl. 51; Peck *v.* Botsford, 7 Conn. 172, 18 Am. Dec. 92; Clawson *v.* McCune, 20 Kan. 337; Hewes *v.* Hurff, (N. J Err. & App. 1903) 55 Atl. 275; Shreve *v.* Joyce, 36 N. J. L. 44, 13 Am. Rep. 417. But see Hanson *v.* Towle, 19 Kan. 273. See, generally, LIMITATION OF ACTIONS.

44. See, generally, LIMITATION OF ACTIONS.

45. Chapman *v.* Dixon, 4 Harr. & J. (Md.) 527; Heath *v.* Grenell, 61 Barb. (N. Y.) 190; Bishop *v.* Harrison, 2 Leigh (Va.) 532.

An unauthorized promise of the representative's brother is not sufficient to take the debt out of the statute. Jones *v.* Jenkins, 2 McCord (S. C.) 494.

46. Everitt *v.* Williams, 45 N. J. L. 140. *Compare* Ritchey's Estate, 8 Pa. Super. Ct. 527, 43 Wkly. Notes Cas. (Pa.) 194.

47. King *v.* Rogers, 31 Ont. 573.

cated to the creditor and to influence his conduct,[48] and must be definite and unequivocal.[49] A mere recognition of the debt is not sufficient, there must be a distinct promise to pay or such an acknowledgment as amounts to a promise.[50] In jurisdictions where an acknowledgment or promise by the personal representative will toll or waive the statute of limitations, an acknowledgment contained in a petition or pleading by him in a proceeding to which the creditor is a party may be sufficient,[51] but it is otherwise where the creditor is not a party.[52]

(II) *PARTIAL PAYMENT.*[53] Partial payment of a debt affected by the statute of limitations, whether the payment is made by the debtor in his lifetime or by his personal representative after his death, is regarded as a constructive acknowledgment of the debt's existence and as an act from which a promise to pay the balance may be implied; in other words, the act of making part payment is treated as evidence of an intention to waive the benefit of the statute, and, like other facts in evidence, is given weight according to the attending circumstances.[54]

48. *In re* Kendrick, 107 N. Y. 104, 13 N. E. 762 [*affirming* 15 Abb. N. Cas. 189, 3 Dem. Surr. 301].

49. Pole *v.* Simmons, 49 Md. 14; Everitt *v.* Williams, 45 N. J. L. 140; King *v.* Rogers, 31 Ont. 573, 575, where it is said: "One of three things must be proved: (1) A distinct acknowledgment of the debt; (2) a distinct promise to pay the debt; or (3) a conditional promise as to which the condition has happened." See also Reigne *v.* Desportes, Dudley (S. C.) 118, as to the happening of the condition.

50. Reigne *v.* Desportes, Dudley (S. C.) 118; Briggs *v.* Wilson, 5 De G. M. & G. 12, 54 Eng. Ch. 10; King *v.* Rogers, 31 Ont. 573.

The principle is this: A slight acknowledgment of an existing debt is sufficient to take the case out of the statute; because the jury may, and ought to presume a new promise; but the acknowledgment is to be taken altogether, and if, on the whole, it is inconsistent with a new promise, no new promise shall be implied, and the statute shall bar. Scull *v.* Wallace, 15 Serg. & R. (Pa.) 231.

Retaining assets to pay a claim, even when the act of retainer is evidenced by the record, does not amount to such a promise, admission, or acknowledgment as will waive the statutory bar. Pole *v.* Simmons, 49 Md. 14 [*followed* in Washington Market Co. *v.* Beckley, 4 Mackey (D. C.) 163].

51. McMillan *v.* Toombs, 74 Ga. 535.

Including a debt in a petition for the sale of property to pay debts of the estate has been held a sufficient acknowledgment to interrupt the running of the statute. Troendle *v.* De Bouchel, 33 La. Ann. 753; Berens *v.* Boutee, 31 La. Ann. 112. See also Matter of Robbins, 7 Misc. (N. Y.) 264, 27 N. Y. Suppl. 1009; Woodlief *v.* Bragg, 108 N. C. 571, 13 S. E. 211. But the contrary has been held on the ground that the representative was compelled by law to insert the debt and thus that there could be no inference of an intention to renew or extend the liability. Everitt *v.* Williams, 45 N. J. L. 140.

The filing of an account by an executor in the orphans' court, whether under the compulsion of a citation sur petition or by a voluntary act, tolls the running of the statute as to the fund brought into court by the account in respect to claims presented before final adjudication. Ritchey's Estate, 8 Pa. Super. Ct. 527, 43 Wkly. Notes Cas. (Pa.) 194. But where the representative in his petition for judicial settlement of his accounts named the holder of a judgment as a creditor to be cited, merely describing him as a "judgment creditor" without specifying the amount of the judgment or the date of its recovery and without stating that any sum was due thereon, it was held that there was not such a written acknowledgment of the debt as would take it out of the operation of N. Y. Code Civ. Proc. § 376, which provides that a judgment shall be presumed to be paid after the expiration of twenty years unless within that time there be a payment made or an acknowledgment in writing signed by the party to be charged. *In re* Kendrick, 107 N. Y. 104, 13 N. E. 762 [*affirming* 15 Abb. N. Cas. 189, 3 Dem. Surr. 301].

52. Everitt *v.* Williams, 45 N. J. L. 140; *In re* Kendrick, 107 N. Y. 104, 13 N. E. 762 [*affirming* 15 Abb. N. Cas. 189, 3 Dem. Surr. 301].

Order to sell lands to pay debts.— It has been held in New Jersey that an order to sell lands to pay debts is not such an adjudication in favor of a creditor whose debt is included therein as prevents the administrator from setting up the statute of limitations in an action against him for the debt, for the creditor is not a party to the order or to the proceeding in which it is rendered; and that if the proceeds of a sale of lands under such an order are impressed with a trust for the payment of debts, the administrator is not thereby estopped from resorting to the statute at law, but if relief may be had on that ground it must be sought in a court of equity. Everitt *v.* Williams, 45 N. J. L. 140.

53. See, generally, LIMITATIONS OF ACTIONS.

54. See Cox *v.* Phelps, 65 Ark. 1, 45 S. W. 990; Foster *v.* Starkey, 12 Cush. (Mass.) 324; McLaren *v.* McMartin, 36 N. Y. 88; Arnold *v.* Downing, 11 Barb. (N. Y.) 554; *In re* Claghorn, 181 Pa. St. 608, 37 Atl. 921; Forney *v.* Benedict, 5 Pa. St. 225.

In some jurisdictions part payment by the representative will not revive a debt which was barred in the debtor's lifetime,[55] but it is generally held that a partial payment made by the personal representative on a debt of the estate before the period of limitations has expired operates to interrupt or toll the statute as to the unpaid residue,[56] and the same rule applies with respect to the common-law presumption of payment from lapse of time.[57] In order, however, that a part payment may toll the statute, it must be such a payment as can be treated as an admission of the continued existence of the debt and as an implied promise to pay the balance.[58]

e. Effect of Testamentary Provisions.[59] An explicit direction in a testator's will to disregard the statute of limitations in the payment of his debts authorizes the representative to pay all just debts, although barred by limitation,[60] and a direction to the executor to pay a specified debt is clearly a recognition of the debt, and an expression of an intention that it shall be paid regardless of the statute.[61] Likewise power may be conferred upon an executor by will which

55. McLaren *v.* McMartin, 36 N. Y. 88, 1 Transcr. App. (N. Y.) 226, 3 Abb. Pr. N. S. (N. Y.) 345, 33 How. Pr. (N. Y.) 449; Hamlin *v.* Smith, 72 N. Y. App. Div. 601, 76 N. Y. Suppl. 258; Heath *v.* Grenell, 61 Barb. (N. Y.) 190; Matter of Dunn, 5 Dem. Surr. (N. Y.) 124; *In re* Claghorn, 181 Pa. St. 608, 37 Atl. 921. See also Lafon *v.* His Executors, 3 Mart. N. S. (La.) 707; Milwee *v.* Jay, 47 S. C. 430, 25 S. E. 298.

56. *Louisiana.*— Beatty *v.* Tete, 9 La. Ann. 131.

Maryland.— Semmes *v.* Magruder, 10 Md. 242; Quynn *v.* Carroll, 10 Md. 197.

Massachusetts.— Foster *v.* Starkey, 12 Cush. 324 [*followed* in Slattery *v.* Doyle, 180 Mass. 27, 61 N. E. 264].

New Hampshire.— See Brewster *v.* Brewster, 52 N. H. 52.

New York.— Holly *v.* Gibbons, 176 N. Y. 520, 68 N. E. 889, 98 Am. St. Rep. 694 [*reversing* 67 N. Y. App. Div. 628, 74 N. Y. Suppl. 1132]; Hamlin *v.* Smith, 72 N. Y. App. Div. 601, 76 N. Y. Suppl. 258; Heath *v.* Grenell, 61 Barb. 190; Matter of Bradley, 25 Misc. 261, 54 N. Y. Suppl. 555.

See 22 Cent. Dig. tit. "Executors and Administrators," § 752.

An express promise to pay the balance is not necessary, the implied promise arising from the fact of part payment is sufficient. Foster *v.* Starkey, 12 Cush. (Mass.) 324.

Part payment by a former representative tolls the statute as against the administrator *de bonis non.* Semmes *v.* Magruder, 10 Md. 242; Quynn *v.* Carroll, 10 Md. 197. But see Miller *v.* Dorsey, 9 Md. 317.

Where a person administers both as tutor and curator, any payment which he makes upon the debt, whether made in the one capacity or the other, interrupts prescription. Ducker's Succession, 10 La. Ann. 758.

Payment on claim afterward assigned to administrator.— A payment made by an administrator on the claim of a third person stops the running of the statute against the claim, although it is afterward assigned to the administrator. Matter of Robbins, 7 Misc. (N. Y.) 264, 27 N. Y. Suppl. 1009.

Joint settlement.— The payment of interest on the individual note of a testator, given at the time of a joint settlement by him and his wife, before her death, does not operate to prevent the statute of limitations from running against his deceased wife's note, which was included in the settlement. Shipman *v.* Lord, 58 N. J. Eq. 380, 44 Atl. 215.

57. Bell *v.* Wood, 94 Va. 677, 27 S. E. 504. And see PAYMENT.

58. Cox *v.* Phelps, 65 Ark. 1, 45 S. W. 990; Arnold *v.* Downing, 11 Barb. (N. Y.) 554.

A part payment out of representative's own funds on an overdue note of his decedent will not stop the running of the statute in favor of the estate. Heath *v.* Grennell, 61 Barb. (N. Y.) 190.

A claim not authenticated by affidavit as required by the statute of non-claim cannot be legally allowed or paid by the representative, hence a part payment or the payment of interest on such a claim does not suspend the statute of limitations, although such payments be subsequently approved by the probate court. Cox *v.* Phelps, 65 Ark. 1, 45 S. W. 990.

Payment must be voluntary. Arnold *v.* Downing, 11 Barb. (N. Y.) 554.

59. Testamentary charge or trust to pay debts as affecting the statute of limitations see, generally, WILLS.

60. Williams *v.* Williams, 15 Lea (Tenn.) 438; Campbell *v.* Shotwell, 51 Tex. 27.

Claims of the representative barred by statute cannot be paid under a provision empowering him to pay if he sees proper just debts barred by the statute of limitations (Williams *v.* Williams, 15 Lea (Tenn.) 438) unless the provision empowers him to make a settlement of the account between himself and the testator without limitation as to time (Hamner *v.* Hamner, 3 Head (Tenn.) 398).

Right to interpose statute.— The executors are not precluded by such a provision from pleading the statute of limitations in bar of a suit on one of the liabilities embraced within such provision. Bosworth *v.* Smith, 9 R. I. 67.

61. Gilbert *v.* Morrison, 53 Hun (N. Y.) 442, 6 N. Y. Suppl. 491. See also McHardy

will authorize him to make an acknowledgment or promise to pay which will take a debt out of the operation of the statute.[62] An acknowledgment or admission contained in a will in which the debt is specifically mentioned may be sufficient to toll the statute of limitations, and it appears to be quite sufficient if in the form of a direction to the executor to pay the debt,[63] but it cannot have this effect if the instrument is not properly attested and therefore does not constitute a valid will,[64] or if the will is revoked before the creditor knows of the promise or acknowledgment.[65] The promise or acknowledgment in the will must be unconditional, or if coupled with terms and conditions of any kind they must be fulfilled;[66] and if a legacy or devise is relied upon as an admission of a debt, the legatee or devisee by electing to enforce his claim as creditor renounces the provision in his favor,[67] and therefore waives the admission and cannot rely upon it to prevent the operation of the statute.[68]

f. Who May Interpose Statute When Waived by Representative — (i) *CREDITORS.* As a general rule a creditor whose claim is not barred by the statute of limitations is entitled to interpose the statute against claims which are barred where the assets are insufficient to pay all in full, and the failure of the representative to interpose the statute does not affect the right of the creditor to do so.[69] Where the statute is thus interposed the personal representative has no longer any power to bind the objecting creditor by acknowledging the debt as a subsisting claim,[70] but it has been said that a creditor's resistance of a barred claim of another creditor is effectual only when it would have been effectual if made by the representative himself.[71] The rule permitting a creditor to inter-

v. McHardy, 7 Fla. 301; Perkins *v.* Seigfried, 97 Va. 444, 34 S. E. 64.

Where the will recognizes the debt and directs payment of the principal and interest by the testamentary trustee, and the trustee pays the interest, the debt is taken out of the operation of the statute. Waughop *v.* Bartlett, 165 Ill. 124, 46 N. E. 197 [*affirming* 61 Ill. App. 252].

62. Waul *v.* Kirkman, 25 Miss. 609.

63. *Illinois.*— Waughop *v.* Bartlett, 165 Ill. 124, 46 N. E. 197 [*affirming* 61 Ill. App. 252]; Miller *v.* Simons, 71 Ill. App. 369.

Iowa.— Stewart *v.* McFarland, 84 Iowa 55, 50 N. W. 221.

New York.— Gilbert *v.* Morrison, 53 Hun 442, 6 N. Y. Suppl. 491.

Pennsylvania.— Pillion's Estate, 15 Pa. Co. Ct. 8, 35 Wkly. Notes Cas. 68.

Virginia.— See Perkins *v.* Seigfried, 97 Va. 444, 34 S. E. 64.

See, generally, WILLS.

64. Allen *v.* Collier, 70 Mo. 138, 35 Am. Rep. 416.

65. Smith *v.* Camp, 58 Hun (N. Y.) 434, 12 N. Y. Suppl. 363. See also Petrie *v.* Mott, 38 Hun (N. Y.) 259.

66. Stewart *v.* McFarland, 84 Iowa 551, 50 N. W. 221; Stansbury *v.* Stansbury, 20 W. Va. 23.

67. See, generally, WILLS.

68. Stewart *v.* McFarland, 84 Iowa 55, 50 N. W. 221; Cresman *v.* Caster, 2 Browne (Pa.) 123; Stansbury *v.* Stansbury, 20 W. Va. 23.

69. *Georgia.*— See McBride *v.* Hunter, 64 Ga. 655.

Louisiana.— See Lafon *v.* His Executors, 3 Mart. N. S. 707.

New York.— *In re* Kendrick, 107 N. Y. 104, 13 N. E. 762 [*affirming* 15 Abb. N. Cas. 189, 3 Dem. Surr. 301].

North Carolina.— Oates *v.* Lilly, 84 N. C. 643. *Compare* Moore *v.* Edwards, 92 N. C. 43.

Pennsylvania.— *In re* Claghorn, 181 Pa. St. 608, 37 Atl. 921; *In re* Claghorn, 181 Pa. St. 600, 37 Atl. 918, 59 Am. St. Rep. 680 [*distinguishing* McWilliams' Appeal, 117 Pa. St. 111, 11 Atl. 383]; Ritter's Appeal, 23 Pa. St. 95; *In re* Kittera, 17 Pa. St. 416; Felton's Estate, 7 Pa. Dist. 262. But see Matter of Smith, 1 Ashm. 352.

South Carolina.— Wilson *v.* Wilson, McMull. Eq. 329.

Tennessee.— Bates *v.* Elrod, 13 Lea 156.

Virginia.— See Smith *v.* Pattie, 81 Va. 654.

Confession of judgment on barred claim.— It has been held in Pennsylvania that the representative may confess a judgment on a debt barred by the statute of limitations even though the estate is insolvent; that this does not constitute a fraud in law upon the creditors; and that unless fraud or collusion be alleged the creditors have no standing to ask that the judgment be opened so that they may interpose the statute. Woods *v.* Irwin, 141 Pa. St. 248, 21 Atl. 603, 23 Am. St. Rep. 282.

The individual creditors of a sole heir who is also administrator may plead the statute of limitations against debts of the decedent, and as against such creditors the administrator cannot by any promise revive the barred debts. Smith *v.* Pattie, 81 Va. 654.

70. *In re* Kendrick, 107 N. Y. 104, 13 N. E. 762 [*affirming* 15 Abb. N. Cas. 189, 3 Dem. Surr. 301].

71. Oates *v.* Lilly, 84 N. C. 643.

pose the statute of limitations against the claim of another creditor applies where the claimant is the personal representative.[72]

(II) *Legatees and Distributees.* In jurisdictions where the representative has a discretion as to interposing the statute of limitations,[73] it is clear on principle that his failure or refusal to plead the statute should be binding on those entitled to the personal estate as legatees or next of kin and should preclude them from taking advantage of the statute, and it has been so held,[74] although the rule has not always been strictly adhered to;[75] but in jurisdictions where the representative cannot waive the statute[76] his failure to interpose it does not bind the legatees or next of kin and the statute may be pleaded by them.[77] Where the personal representative as a creditor of the estate seeks to obtain payment of a claim barred in the decedent's lifetime, a legatee or distributee may successfully interpose the statute of limitations.[78]

(III) *Heirs and Devisees.* An heir or devisee may interpose the statute of limitations against a claim sought to be enforced against the real estate descended or devised,[79] and, since the personal representative has no power or control over the real estate of his decedent, his failure to interpose the statute of limitations to

72. Burnett *v.* Noble, 5 Redf. Surr. (N. Y.) 69; *Re* Ross, 29 Grant Ch. (U. C.) 385. See also Hoch's Appeal, 21 Pa. St. 280.

73. See *supra*, X, A, 18, b, (I).

74. *Ex p.* Perryman, 25 Ala. 79, 60 Am. Dec. 494; Leigh *v.* Smith, 38 N. C. 442, 42 Am. Dec. 182. See also Clinton *v.* Brophy, 10 Ir. Eq. 139.

In Maryland the right to interpose the statute of limitations as a technical plea against a creditor's claim in proceedings in the orphans' court is vested solely in the personal representative, although the court may consider the fact of the bar in connection with other evidence in determining the justice of the claim; but no decision of the orphans' court will divest the jurisdiction of a court of law over the same subject-matter. Bowling *v.* Lemar, 1 Gill 358, where the court did not decide whether in proceedings at law the legatee or distributee can defeat the claims of creditors by the plea of limitations. See also Yingling *v.* Hesson, 16 Md. 112.

75. See Ritter's Appeal, 23 Pa. St. 95; Hoch's Appeal, 21 Pa. St. 280; Clarke's Estate, 1 Phila. (Pa.) 356.

In England the rule appears to depend upon the proceeding in which the legatee or distributee attempts to set up the statute. See *In re* Wenham, [1892] 3 Ch. 59, 61 L. J. Ch. 565, 67 L. T. Rep. N. S. 648, 40 Wkly. Rep. 636; Briggs *v.* Wilson, 5 De G. M. & G. 12, 2 Eq. Rep. 153, 54 Eng. Ch. 10; Shewen *v.* Vanderhorst, 1 Russ. & M. 347, 5 Eng. Ch. 347, 39 Eng. Reprint 134, 1 L. J. Ch. 107, 2 Russ. & M. 75, 11 Eng. Ch. 75, 39 Eng. Reprint 323.

Acknowledgment by representative.— In South Carolina while the representative is generally not bound to plead the statute of limitations (see *supra*, X, A, 18, b, (I)) his acknowledgment or promise to pay a barred debt will not revive it against the estate (see *supra*, X, A, 18, d, (I), (A)) or against the legatees and distributees; hence his acknowledgment of a barred debt will not prevent the legatees and distributees from interposing the statute. Clarke *v.* Jenkins, 3 Rich. Eq. (S. C.) 318; Wilson *v.* Wilson, McMull. Eq. (S. C.) 329.

76. See *supra*, X, A, 18, b, (I).

77. Lafon *v.* His Executors, 3 Mart. N. S. (La.) 707; Partridge *v.* Mitchell, 3 Edw. (N. Y.) 180; Burnett *v.* Noble, 5 Redf. Surr. (N. Y.) 69; Treat *v.* Fortune, 2 Bradf. Surr. (N. Y.) 116. *Compare* Willcox *v.* Smith, 26 Barb. (N. Y.) 316.

The statute may be set up at a reference to take an account of debts and of the administration. Partridge *v.* Mitchell, 3 Edw. (N. Y.) 180.

78. Hoch's Appeal, 21 Pa. St. 280; Cooper *v.* Peyton, Rich. Eq. Cas. (S. C.) 259. See also Burnett *v.* Noble, 5 Redf. Surr. (N. Y.) 69; Treat *v.* Fortune, 2 Bradf. Surr. (N. Y.) 116; Sumter *v.* Morse, 2 Hill Eq. (S. C.) 87. But see Clinton *v.* Brophy, 10 Ir. Eq. 139.

In Maryland the legatee or distributee cannot set up the statute in the orphans' court as a plea against the representative's claim, but the court may look to the fact of such a bar as evidence to be weighed with all other testimony in relation to any claim in determining on its justice and the propriety of passing or rejecting it. Yingling *v.* Hesson, 16 Md. 112; Bowling *v.* Lemar, 1 Gill 358.

79. *Alabama.*— Steele *v.* Steele, 64 Ala. 438, 38 Am. Rep. 15; Bond *v.* Smith, 2 Ala. 660.

Illinois.— Langworthy *v.* Baker, 23 Ill. 484; McCoy *v.* Morrow, 18 Ill. 519, 68 Am. Dec. 578.

Kentucky.— Payne *v.* Pusey, 8 Bush 564.

Maryland.— Collinson *v.* Owens, 6 Gill & J. 4. See also Dent *v.* Maddox, 4 Md. 522.

New York.— Willcox *v.* Smith, 26 Barb. 316; Mooers *v.* White, 6 Johns. Ch. 360; Warren *v.* Paff, 4 Bradf. Surr. 260; Skidmore *v.* Romaine, 2 Bradf. Surr. 122. See also Butler *v.* Johnson, 111 N. Y. 204, 18 N. E. 643 [*reversing* 4 Hun 206].

South Carolina.— McKinlay *v.* Gaddy, 26 S. C. 573, 2 S. E. 497 [*distinguishing* Bolt *v.* Dawkins, 16 S. C. 198].

Tennessee.— Bates *v.* Elrod, 13 Lea 156; Peck *v.* Wheaton, Mart. & Y. 353.

a creditor's claim can have no effect to subject the real estate to the creditor's demand and cannot prevent the heir or devisee from invoking the statute.[80] So also the representative's acknowledgment of the debt or his promise to pay it does not bind the real estate belonging to the heirs or devisees or affect their right to plead the statute,[81] and the same is true of a part payment[82] or a payment of interest by the representative,[83] although the rule appears to be otherwise where there is a devise to the executor in trust to pay debts.[84] It is generally held

Texas.— See Tucker *v.* Bryan, 1 Tex. App. Civ. Cas. § 1157.

West Virginia.—See McClaugherty *v.* Croft, 43 W. Va. 270, 27 S. E. 246.

80. *Alabama.*— Steele *v.* Steele, 64 Ala. 438, 38 Am. Rep. 15; Scott *v.* Ware, 64 Ala. 174; Teague *v.* Corbitt, 57 Ala. 529.

Illinois.— Langworthy *v.* Baker, 23 Ill. 484; McCoy *v.* Morrow, 18 Ill. 519, 68 Am. Dec. 578.

Kentucky.— Grotenkemper *v.* Bryson, 79 Ky. 353; Payne *v.* Pusey, 8 Bush 564; Jones *v.* Mitchell, 9 Ky. L. Rep. 858. Under the act of Feb. 23, 1846 (Gen. Acts (1846), p. 53) the heir or devisee entitled to the real estate after the payment of debts may by a proper proceeding require the personal representative to plead the statute of limitations and upon his refusal to do so will be permitted to defend. Payne *v.* Pusey, 8 Bush 564; Lusk *v.* Anderson, 1 Metc. 426.

Louisiana.— See Lafon *v.* His Executors, 3 Mart. N. S. 707.

Maryland.— Collinson *v.* Owens, 6 Gill & J. 4. See also Dent *v.* Maddox, 4 Md. 522.

New York.— Mooers *v.* White, 6 Johns. Ch. 360. See also Butler *v.* Johnson, 111 N. Y. 204, 18 N. E. 643 [*reversing* 41 Hun 206].

North Carolina.— As to such claims as have not been reduced to judgment against the representative, the heirs and devisees may interpose the statute, although the representative has not done so. Proctor *v.* Proctor, 105 N. C. 222, 10 S. E. 1036; Smith *v.* Brown, 101 N. C. 347, 7 S. E. 890; Speer *v.* James, 94 N. C. 417; Bevers *v.* Parks, 88 N. C. 456. *Compare* Woodlief *v.* Bragg, 108 N. C. 571, 13 S. E. 211.

Pennsylvania.— See Hemphill *v.* Pry, 183 Pa. St. 593, 38 Atl. 1020.

South Carolina.— McKinlay *v.* Gaddy, 26 S. C. 573, 2 S. E. 497 [*distinguishing* Bolt *v.* Dawkins, 16 S. C. 128]. *Compare* Walter *v.* Radcliff, 2 Desauss. 577.

Tennessee.— Bates *v.* Elrod, 13 Lea 156; Peck *v.* Wheaton, Mart. & Y. 353. See also Woodfin *v.* Anderson, 2 Tenn. Ch. 331.

United States.— Ingle *v.* Jones, 9 Wall. 486, 19 L. ed. 621, applying the law of Maryland.

England.— See Briggs *v.* Wilson, 5 De G. M. & G. 12, 2 Eq. Rep. 153, 54 Eng. Ch. 10.

Contra.— Hodgdon *v.* White, 11 N. H. 208.

81. *Alabama.*— Scott *v.* Ware, 64 Ala. 174; Teague *v.* Corbitt, 57 Ala. 529; Bond *v.* Smith, 2 Ala. 660. See also Grimball *v.* Mastin, 77 Ala. 553; Steele *v.* Steele, 64 Ala. 438, 38 Am. Rep. 15; Harwood *v.* Harper, 54 Ala. 659.

Kentucky.— Grotenkemper *v.* Bryson, 79 Ky. 353; Jones *v.* Mitchell, 9 Ky. L. Rep. 858.

Maryland.— Collinson *v.* Owens, 6 Gill & J. 4. See also McDowell *v.* Goldsmith, 24 Md. 214.

New York.— Mooers *v.* White, 6 Johns. Ch. 360.

South Carolina.— Gibson *v.* Lowndes, 28 S. C. 285, 5 S. E. 727. *Compare* Walter *v.* Radcliff, 2 Desauss. 577.

Tennessee.— Peck *v.* Wheaton, Mart. & Y. 353. See also Woodfin *v.* Anderson, 2 Tenn. Ch. 331.

England.— Fordham *v.* Wallis, 10 Hare 217, 17 Jur. 228, 22 L. J. Ch. 548, 1 Wkly. Rep. 118, 44 Eng. Ch. 210.

Contra.— Hodgdon *v.* White, 11 N. H. 208; Woodlief *v.* Bragg, 108 N. C. 571, 13 S. E. 211.

Where the executors were also devisees and promised to pay the debt, the promise being made before the statutory period expired, and an action was brought to enforce the debt against the heirs and devisees, it was held upon the principle that the promise of one joint debtor will take the debt out of the statute as to the other, that the promise was binding upon the heirs and the other devisees, although they had not acknowledged the demand. Johnson *v.* Beardslee, 15 Johns. (N. Y.) 3.

82. Gibson *v.* Lowndes, 28 S. C. 285, 5 S. E. 727; Gilpin *v.* Phemmer, 10 Fed. Cas. No. 5,451, 2 Cranch C. C. 54, applying the law of Maryland. See also Grimball *v.* Mastin, 77 Ala. 553; Lafon *v.* His Executors, 3 Mart. N. S. (La.) 707.

Where a judgment had been rendered against the debtor in his lifetime and existed as a lien on the land at the time of his death, and judgment on a scire facias was rendered against the representative, it was held that a part payment by the representative would repel the presumption of payment arising from lapse of time, although it would be otherwise had the debt not been reduced to judgment. Lattimer *v.* Peterson, 2 Harr. (Del.) 366.

83. Fordham *v.* Wallis, 10 Hare 217, 17 Jur. 228, 22 L. J. Ch. 548, 1 Wkly. Rep. 118, 44 Eng. Ch. 210.

Consent.— The payment of interest by the personal representative tolls the statute as to all parties who consent to the payment, but not as to minor heirs, since they are incapable of giving their consent. Hemphill *v.* Pry, 183 Pa. St. 593, 38 Atl. 1020.

84. Waughop *v.* Bartlett, 165 Ill. 124, 46 N. E. 197 [*affirming* 61 Ill. App. 252]; Fordham *v.* Wallis, 10 Hare 217, 17 Jur. 228, 22

that where a creditor of the estate recovers judgment against the representative and payment of the judgment is claimed from the real estate, or if the personal representative has paid the judgment and claims reimbursement from land, the heir or devisee may protect his interests by showing that the debt on which the judgment is founded was barred at the time of its rendition.[85] Where the personal representative, as a creditor, seeks to enforce against the land or the proceeds thereof a claim barred in the lifetime of the decedent, the statute of limitations may be interposed by the heirs and devisees,[86] and as against them the representative cannot revive the claim.[87]

(iv) *State Holding by Escheat.* Where land of a decedent has escheated to the state neither the failure of the representative to plead the statute of limitations nor his acknowledgment of the debt affects the right of the state to interpose the statute.[88]

(v) *Estoppel to Plead Statute.*[89] Where legatees or distributees induce a creditor to delay enforcement of his claim until it becomes barred by the statute of limitations, they are estopped by their conduct from pleading the statute;[90] and, where they stand by without making inquiry into the affairs of the estate or offering any objection and permit the personal representative to pay a debt barred by the statute, they are bound by his payment and cannot object to his being credited therewith.[91] The heirs also may by their conduct be estopped to plead the statute.[92] On the other hand, although the heirs, legatees, or distributees may be estopped to plead the statute, a creditor may plead it in protection of his own claim,[93] or if the barred debt has been paid a creditor may object

L. J. Ch. 548, 1 Wkly. Rep. 118, 44 Eng. Ch. 210. See, generally, Wills.

85. *Alabama.*— Scott *v.* Ware, 64 Ala. 174; Teague *v.* Corbitt, 57 Ala. 529; Darrington *v.* Borland, 3 Port. 9. See also Steele *v.* Steele, 64 Ala. 438.

Kentucky.— See Jones *v.* Commercial Bank, 78 Ky. 413.

Maryland.— See Collinson *v.* Owens, 6 Gill & J. 4; Dent *v.* Maddox, 4 Md. 522.

New York.— See Sharpe *v.* Freeman, 45 N. Y. 802.

South Carolina.— Gilliland *v.* Caldwell, 1 S. C. 194. *Compare* Walter *v.* Radcliff, 2 Desauss. 577.

Tennessee.—Pea *v.* Waggoner, 5 Hayw. 242. See also Woodfin *v.* Anderson, 2 Tenn. Ch. 331.

West Virginia.— Saddler *v.* Kennedy, 26 W. Va. 636; Laidley *v.* Kline, 8 W. Va. 218.

United States.— Ingle *v.* Jones, 9 Wall. 486, 19 L. ed. 621, applying the law of Maryland. See also Deneale *v.* Stump, 8 Pet. 526, 528, 8 L. ed. 1032, 1033, applying the law of Virginia.

See Descent and Distribution, 14 Cyc. 212, 214.

Aliter in North Carolina, unless fraud or collusion be shown. Woodlief *v.* Bragg, 108 N. C. 571, 13 S. E. 211; Long *v.* Oxford, 108 N. C. 280, 13 S. E. 112; Proctor *v.* Proctor, 105 N. C. 222, 10 S. E. 1036; Smith *v.* Brown, 101 N. C. 347, 7 S. E. 890; Speer *v.* James, 94 N. C. 417.

86. Payne *v.* Pusey, 8 Bush (Ky.) 564; *In re* Richmond, 2 Pick. (Mass.) 567; Dring *v.* Greetham, 23 L. J. Ch. 156, 1 Wkly. Rep. 528.

Obtaining payment out of personalty.— Where the representative may waive the statute as to his own claim (see *supra*, X, A, 18, b, (II)), it has been said that if on the settlement of his accounts he obtains out of the personal estate payment of a claim which has been properly proved and allowed, the heir has no remedy, although the statute of limitations might have been pleaded by the debtor in his lifetime and the personal estate is insufficient to pay all the debts. Payne *v.* Pusey, 8 Bush (Ky.) 564.

87. *In re* Richmond, 2 Pick. (Mass.) 567.

88. Mooers *v.* White, 6 Johns. Ch. (N. Y.) 360.

89. See, generally, Estoppel, 16 Cyc. 671.

90. *In re* Claghorn, 181 Pa. St. 608, 37 Atl. 921 (where the executors were sole legatees and were held to be estopped); McWilliams' Appeal, 117 Pa. St. 111, 11 Atl. 383 [*distinguishing* York's Appeal, 110 Pa. St. 69, 1 Atl. 162, 2 Atl. 65].

91. Ritter's Appeal, 23 Pa. St. 95. *Compare* Matter of Oosterhoudt, 15 Misc. (N. Y.) 556, 38 N. Y. Suppl. 179.

92. Lengar *v.* Hazlewood, 11 Lea (Tenn.) 539.

Heirs inducing third persons to take up debts.— Where the heirs recognized certain claims as subsisting debts of the estate, and the deed of trust securing the debts as being an encumbrance upon the land, and by asserting that the debts were valid liens upon the land induced other persons to take up the debts, assuring such persons that they should have the land in satisfaction thereof, the heirs could not rely upon the statute of limitations. Lengar *v.* Hazlewood, 11 Lea (Tenn.) 539.

93. *In re* Claghorn, 181 Pa. St. 608, 37 Atl. 921 [*distinguishing* McWilliams' Appeal,

to the allowance to the representative of credit in his accounts for the payment so made.[94]

19. Claims Arising After Death of Decedent[95] — a. In General. As a general rule claims arising after a decedent's death are not allowable directly against the estate,[96] although in many cases where the representative has rendered himself personally liable on such claim, if the claim properly arose out of some matter connected with the administration, he is allowed, after paying the same, to reimburse himself from the assets.[97] But to this rule there are many exceptions.[98]

117 Pa. St. 111, 11 Atl. 383]; Felton's Estate, 7 Pa. Dist. 262.

Fraudulent concealment of right of action.— Where through the fraud of the decedent in his lifetime and of the legatees (who were also executors) after his death, the claimant's right of action was concealed and not discovered by him until the statutory period had expired, it was held that the claim dated only from the discovery of the fraud, and therefore that another creditor could not successfully interpose the statute. *In re* Claghorn, 181 Pa. St. 608, 37 Atl. 921.

94. Matter of Oosterhoudt, 15 Misc. (N. Y.) 556, 38 N. Y. Suppl. 179, holding that the consent of the heirs to payment of an outlawed debt is not binding on creditors of the estate.

95. **As to taxes and assessments** see *supra*, X, A, 15.

96. *California.*— *In re* Williams, (1893) 32 Pac. 241.

Illinois.— Smith *v.* McLaughlin, 77 Ill. 596, charge of a physician for a *post mortem* examination, made on a coroner's inquest.

Indiana.— Mills *v.* Kuykendall, 2 Blackf. 47.

Kentucky.— Lucking *v.* Gegg, 12 Bush 298.

Maryland.— Simmons *v.* Tongue, 3 Bland 341; Watkins *v.* Worthington, 2 Bland 509.

Massachusetts.— Browne *v.* McDonald, 129 Mass. 66.

Missouri.— U. S. Presbyterian Church *v.* McElhinney, 61 Mo. 540. See also Ferguson *v.* Carson, 86 Mo. 673 [*affirming* 9 Mo. App. 497].

North Carolina.— Alexander *v.* Alexander, 120 N. C. 472, 27 S. E. 121.

Pennsylvania.— See *In re* Keyzey, 9 Serg. & R. 71, holding that a devisee of unpatented land belonging to the testator cannot call on the personal estate of the testator to pay the purchase-money and fees for patenting the land on taking out title.

Texas.— Giddings *v.* Heiskill, 44 Tex. 386.

See 22 Cent. Dig. tit. "Executors and Administrators," § 754.

Conversion by executor.— A decedent's estate is not liable for the conversion by the executor of property claimed by him as part of the estate, the executor being personally liable. Van Slooten *v.* Dodge, 145 N. Y. 327, 39 N. E. 950 [*reversing* 76 Hun 55, 27 N. Y. Suppl. 666].

Costs adjudged before decedent died, although assessed after, are a valid claim against the estate. Salter *v.* Neaville, 1 Bradf. Surr. (N. Y.) 488.

Insurance of realty.— Where premises were insured five years after the owner's death, and a note for premiums was given by the heirs and indorsed by the administrator, the insurer had no claim against the estate, the title being in the heirs, and it appearing that they had insured on their own account for the benefit of the mortgagee. Freehold First Nat. Bank *v.* Thompson, 61 N. J. Eq. 188, 48 Atl. 333.

97. See *supra*, VIII, C, 3, a; VIII, I, 8.

98. *Indiana.*— Bond *v.* Orndorf, 77 Ind. 583, holding that in an action against the estate of a deceased person on a note stipulating for the payment of attorney's fees, such fees may be recovered as a proper claim against the estate.

Kentucky.— Congrove *v.* Sanders, 3 J. J. Marsh. 574, holding that if an executor receives the amount of a judgment which the testator had assigned, and charges himself with it as executor, the estate of the testator is responsible for it.

Mississippi.— Evans *v.* Robertson, 54 Miss. 683, holding that while a person who advances supplies for the making of a crop to an administrator who is carrying on the decedent's farm under orders of the court must look alone to the crop for reimbursement and cannot subject the *corpus* of the estate, still where the proceeds of the crop have been applied to the payment of general creditors, he is subrogated to their rights and is entitled to satisfaction of his demand *pro tanto* out of the general assets.

Missouri.— Ferguson *v.* Carson, 86 Mo. 673 [*affirming* 9 Mo. App. 497] (holding that, where in an action commenced against decedent before his death, his administrator gave an appeal-bond with surety, and the surety had to pay the judgment, his claim was not within the rule prohibiting the allowance of any claim against the estate not in existence at the time of the death of the deceased); Manville *v.* Edgar, 8 Mo. App. 324 (holding that where, under a charter, a stock-holder is liable for debts of a corporation to the amount of his stock, the liability arises out of a contract; and where the debt accrues after the stock-holder's death, it is a claim for which the executor is liable).

Pennsylvania.— Miller *v.* Ege, 8 Pa. St. 352, holding that where executors confessed judgment against the estate in lieu of a judgment against a creditor of the estate, who was also a legatee, and took the latter's receipt for so much, to be accounted for on settlement, such transaction, being merely a substitution of creditors, and not an undertaking to pay a third person's debt, is a

b. Claims Arising Out of Performance of Contract With Decedent. The estate of a decedent may be held liable for a claim arising out of the performance after the decedent's death of an executory contract made with him during his lifetime.[99]

c. Funeral Expenses.[1] The estate of a decedent is liable for the reasonable expenses of his funeral and burial,[2] but where the undertaker or other person furnishing work or accessaries for the funeral or burial has done so upon the order and credit of a third person, he should look immediately to such person for payment.[3] Where the representative or a third person has rendered himself

charge upon the estate, and execution may issue against the personal property thereof.

99. Toland *v.* Wells, 59 Ind. 529; Toland *v.* Stevenson, 59 Ind. 485; Nine's Estate, 2 Woodw. (Pa.) 403; Ferguson *v.* Willis, 88 Va. 136, 13 S. E. 392; Lenz *v.* Brown, 41 Wis. 172.

Notice from representative not to proceed under contract.— Where one has contracted with a person since deceased to build a church the fact that the administrator shortly after the work was commenced gave notice not to proceed therewith and that the estate would not be responsible therefor was no bar to a recovery for work done afterward when the church was completed according to the contract. Ferguson *v.* Willis, 88 Va. 136, 13 S. E. 392.

A verbal request by testator in his last illness is insufficient to bind the estate in law or equity. Deas *v.* McRae, 65 Ga. 531.

1. See *supra*, VIII, I, 8, b, (I).

2. *California.*— O'Donnell *v.* Slack, 123 Cal. 285, 55 Pac. 906, 43 L. R. A. 388.

Iowa.— Clark *v.* Sayre, 122 Iowa 591, 98 N. W. 484.

Louisiana.— McNeely's Succession, 50 La. Ann. 823, 24 So. 338.

Maine.— Fogg *v.* Holbrook, 88 Me. 169, 33 Atl. 792, 33 L. R. A. 660 (expenses incurred before appointment of administrator); Phillips *v.* Phillips, 87 Me. 324, 32 Atl. 963.

Massachusetts.— Studley *v.* Willis, 134 Mass. 155; Luscomb *v.* Ballard, 5 Gray 403, 66 Am. Dec. 374.

Missouri.— Hayden *v.* Maher, 67 Mo. App. 434.

New Hampshire.— Trueman *v.* Tilden, 6 N. H. 201.

New Jersey.— Sullivan *v.* Horner, 41 N. J. Eq. 299, 7 Atl. 411.

New York.— The decisions are not uniform, but the better supported rule appears to be that the funeral expenses, although not strictly speaking a debt of the decedent (Matter of Franklin, 26 Misc. 107, 56 N. Y. Suppl. 858) are a charge against the estate which the representatives must pay out of the assets. Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384; Benedict *v.* Ferguson, 15 N. Y. App. Div. 96, 44 N. Y. Suppl. 307; Laird *v.* Arnold, 42 Hun 136; Laird *v.* Arnold, 25 Hun 4; Dalrymple *v.* Arnold, 21 Hun 110; McCue *v.* Garvey, 14 Hun 562; Lucas *v.* Hessen, 13 Daly 347; Rappelyea *v.* Russell, 1 Daly 214; Huhna *v.* Theller, 35 Misc. 296, 71 N. Y. Suppl. 752; Matter of Smith, 18 Misc. 139, 41 N. Y. Suppl. 1093; Kessell *v.* Hapen, 8 N. Y. St. 352. But see Ferrin *v.* Myrick, 41 N. Y. 315 [*reversing* 53 Barb. 76]; Murphy *v.* Naughton, 68 Hun 424, 23 N. Y. Suppl. 52; Matter of Schulz, 26 Misc. 688, 57 N. Y. Suppl. 952; Tracy *v.* Frost, 11 N. Y. Suppl. 561. This rule is now embodied in the New York Code of Civil Procedure (Laws (1901), c. 293, amending Code Civ. Proc. § 2729), which provides a remedy for enforcing payment by the representative. Whether this statute has any retroactive operation is a question upon which the different departments of the appellate division of the supreme court have taken apparently divergent views. See Matter of Kalbfleisch, 78 N. Y. App. Div. 464, 79 N. Y. Suppl. 651; Matter of Kipp, 70 N. Y. App. Div. 567, 75 N. Y. Suppl. 589.

Pennsylvania.—Flintham's Appeal, 11 Serg. & R. 16; Hoopes' Estate, 2 Chest. Co. Rep. 67.

Rhode Island.— Moulton *v.* Smith, 16 R. I. 126, 12 Atl. 891, 27 Am. St. Rep. 728; Buxton *v.* Barrett, 14 R. I. 40, funeral expenses of deceased married woman chargeable to her estate.

Tennessee.— Nashville Trust Co. *v.* Carr, (Ch. App. 1900) 62 S. W. 204.

Vermont.— Sawyer *v.* Hebard, 58 Vt. 375, 3 Atl. 529; Shaw *v.* Hallihan, 46 Vt. 389, 14 Am. Rep. 628. But see Walton *v.* Hall, 66 Vt. 455, 29 Atl. 803.

England.— Green *v.* Salmon, 8 A. & E. 348, 2 Jur. 567, 7 L. J. Q. B. 236, 3 N. & P. 388, 1 W. W. & H. 460, 35 E. C. L. 625; Stag *v.* Punter, 3 Atk. 119, 26 Eng. Reprint 872; Hancock *v.* Podmore, 1 B. & Ad. 260, 8 L. J. K. B. O. S. 403, 20 E. C. L. 477; Rogers *v.* Price, 3 Y. & J. 28.

See 22 Cent. Dig. tit. "Executors and Administrators," § 755.

The representative is liable on an implied promise to persons furnishing a funeral suitable to the degree of the decedent, although this be done by direction of a third person. Sullivan *v.* Horner, 41 N. J. Eq. 299, 7 Atl. 411; Tugwell *v.* Heyman, 3 Campb. 298, 13 Rev. Rep. 810; Rogers *v.* Price, 3 Y. & J. 28.

3. Lucas *v.* Hessen, 13 Daly (N. Y.) 347; Hoffman *v.* Kanze, 7 Misc. (N. Y.) 237, 27 N. Y. Suppl. 260; Kessell *v.* Hapen, 8 N. Y. St. 352; Matter of Hill, 17 Abb. N. Cas. (N. Y.) 273; Quin *v.* Hill, 4 Dem. Surr. (N. Y.) 69; Green *v.* Salmon, 8 A. & E. 348, 2 Jur. 567, 7 L. J. Q. B. 236, 3 N. & P. 388, 1 W. W. & H. 460, 35 E. C. L. 625 [*explaining* Brice *v.* Wilson, 3 L. J. K. B. 93, 3 N. & M. 512, 28 E. C. L. 615].

liable for the funeral expenses and has been compelled to pay them, or has defrayed such expenses in an emergency and under proper circumstances, he is entitled to reimbursement from the estate so far as the expenditures were reasonable and proper.[4] What shall be the reasonable expenses of funeral or burial for reimbursement from the estate, and what items may be properly included in such a charge, must depend largely upon the station in life of the decedent and his family, and the condition of his estate; and justice to creditors as well as to the surviving family demands that there shall be no extravagant outlay to their loss.[5] The funeral expenses of the decedent's wife and family

A mere request by the widow for the funeral or burial does not imply a personal obligation on her part to pay therefor. Hayden *v.* Maher, 67 Mo. App. 434. See also Nashville Trust Co. *v.* Carr, (Tenn. Ch. App. 1900) 62 S. W. 204, husband of decedent.

4. *Massachusetts.*— Marple *v.* Morse, 180 Mass. 508, 62 N. E. 966; Sweeney *v.* Muldoon, 139 Mass. 304, 31 N. E. 720, 52 Am. Rep. 708; Hapgood *v.* Houghton, 10 Pick. 154.

Minnesota.— Dampier *v.* St. Paul Trust Co., 46 Minn. 526, 49 N. W. 286; McNally *v.* Weld, 30 Minn. 209, 14 N. W. 895.

New Jersey.— Sullivan *v.* Horner, 41 N. J. Eq. 299, 7 Atl. 411.

New York.— Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384; Pache *v.* Oppenheim, 93 N. Y. App. Div. 221, 87 N. Y. Suppl. 704 [*affirming* as to this point but *reversing* on other grounds 84 N. Y. Suppl. 926]; Hewett *v.* Bronson, 5 Daly 1; Rappelyea *v.* Russell, 1 Daly 214; Kessell *v.* Hapen, 8 N. Y. St. 352; Matter of Miller, 4 Redf. Surr. 302.

North Carolina.— Ray *v.* Honeycutt, 119 N. C. 510, 26 S. E. 127. But see Gregory *v.* Hooker, 8 N. C. 394, 9 Am. Dec. 646, holding that where a person of his own motion buries a deceased person, and without giving the administrator notice of the expenses, sues him, he cannot recover.

Pennsylvania.— France's Appeal, 75 Pa. St. 220; Harding's Estate, 7 Pa. Dist. 679, 21 Pa. Co. Ct. 641; Meyer's Estate, 18 Phila. 42.

Tennessee.— Loftis *v.* Loftis, 94 Tenn. 232, 28 S. W. 1091.

See 22 Cent. Dig. tit. "Executors and Administrators," § 755.

But *compare* Coleby *v.* Coleby, 12 Jur. N. S. 496, 14 L. T. Rep. N. S. 697, holding that, where an heir at law had voluntarily paid the funeral expenses of an intestate, the court would not allow the expenses to be refunded out of the intestate's personal estate.

Where a husband acting as personal representative of his deceased wife pays her funeral expenses, he is entitled to credit therefor in his accounts. McCue *v.* Garvey, 14 Hun (N. Y.) 562; Matter of Very, 24 Misc. (N. Y.) 139, 53 N. Y. Suppl. 389, 28 N. Y. Civ. Proc. 163.

Where the widow has received money from benevolent societies to defray her husband's funeral expenses, she can be reimbursed only for the excess paid over such amount. *In re* Griffiths, 1 Lack. Leg. N. (Pa.) 311; Meyer's Estate, 18 Phila. (Pa.) 42; Hyneman's Estate, 11 Phila. (Pa.) 135, 2 Wkly. Notes Cas. (Pa.) 571. See *supra*, VIII, I, 8, b, (I).

5. *District of Columbia.*— Matter of Butler, 3 MacArthur 535.

Louisiana.— Hearing's Succession, 28 La. Ann. 149.

New Jersey.— Sullivan *v.* Horner, 41 N. J. Eq. 299, 7 Atl. 411.

New York.— Kittle *v.* Huntley, 67 Hun 617, 22 N. Y. Suppl. 519.

North Carolina.— Barbee *v.* Green, 92 N. C. 471.

Pennsylvania.— Cullen's Estate, 7 Pa. Dist. 394; Gorman's Estate, 2 Kulp 61, holding that where a decedent's estate is insolvent, and a family of minor children is left, no more can be allowed for funeral expenses than is necessary for a decent christian burial.

Tennessee.— Steger *v.* Frizzell, 2 Tenn. Ch. 369.

England.— Stag *v.* Punter, 3 Atk. 119, 26 Eng. Reprint 872; Hancock *v.* Podmore, 1 B. & Ad. 260, 8 L. J. K. B. O. S. 403, 20 E. C. L. 477; Yardley *v.* Arnold, C. & M. 434, 2 Dowl. P. C. N. S. 311, 6 Jur. 718, 11 L. J. Exch. 413, 10 M. & W. 141, 41 E. C. L. 239.

See 22 Cent. Dig. tit. "Executors and Administrators," § 755; and *supra*, VIII, I, 8, b, (v).

Estate not liable beyond reasonable expenses.— Green *v.* Salmon, 8 A. & E. 348, 2 Jur. 567, 7 L. J. Q. B. 236, 3 N. & P. 388, 1 W. W. & H. 460, 35 E. C. L. 625.

Special circumstances may justify an expenditure unusually great in one or more particulars, as if one should die far from home or from his proper burial place, and transportation of the body become necessary and proper (Sullivan *v.* Horner, 41 N. J. Eq. 299, 7 Atl. 411; *In re* Parry, 188 Pa. St. 38, 41 Atl. 384, 68 Am. St. Rep. 850; Harding's Estate, 7 Pa. Dist. 679, 21 Pa. Co. Ct. 641; Carpenter's Estate, 16 Phila. (Pa.) 290; Stag *v.* Hunter, 3 Atk. 119, 26 Eng. Reprint 872) or where kindred and friends are summoned from a distance to attend the funeral or accompany remains from a distant point (Jennison *v.* Hapgood, 10 Pick. (Mass.) 77; Mann *v.* Lawrence, 3 Bradf. Surr. (N. Y.) 424; Wall's Appeal, 38 Pa. St. 464; Harding's Estate, 7 Pa. Dist. 679, 21 Pa. Co. Ct. 641; Carpenter's Estate, 16 Phila. (Pa.) 290).

Claims held excessive see Foley *v.* Brocksmit, 119 Iowa 457, 93 N. W. 344, 97 Am. St. Rep. 324, 60 L. R. A. 571; Matter of Kiernan, 38 Misc. (N. Y.) 394, 77 N. Y. Suppl.

are, by some statutes, as in Louisiana, made a charge upon his estate,[6] and they have been held to be payable out of his estate even in the absence of an express statutory provision where the decedent and his wife and children perished in a common disaster.[7]

d. Tombstones and Monuments.[8] The expense of erecting a tombstone or monument at the grave of the decedent is usually allowed against the estate,[9] especially where the estate is ample,[10] such expenditure being considered in some jurisdictions a part of the "funeral expenses."[11] But the expenditure in this

924; Cullen's Estate, 8 Pa. Super. Ct. 494; Bauman's Estate, 5 Pa. Co. Ct. 579; Hasson's Estate, 5 Pa. Co. Ct. 19.

Claims held not excessive see Kittle *v.* Huntley, 67 Hun (N. Y.) 617, 22 N. Y. Suppl. 519; Allen *v.* Allen, 3 Dem. Surr. (N. Y.) 524; Campbell's Estate, 9 Pa. Dist. 729, 24 Pa. Co. Ct. 480.

Items of expenditure.— A suit of clothes for burial seems a proper item for allowance (Steger *v.* Frizzell, 2 Tenn. Ch. 369), and flowers (O'Reilly *v.* Kelly, 22 R. I. 151, 46 Atl. 681, 84 Am. St. Rep. 833, 50 L. R. A. 483) and carriage hire, vaults, and tombstones may be added in various instances where the decedent's estate will bear it (Donald *v.* McWhorter, 44 Miss. 124), but not dinners furnished to persons attending the funeral or feed for their horses (Shaeffer *v.* Shaeffer, 54 Md. 679, 39 Am. Rep. 406; Santee's Estate, 9 Kulp (Pa.) 142). Charges for mere kindly offices or for use of one's house for funeral services, if by a relative, are looked upon with disfavor. Hewett *v.* Bronson, 5 Daly (N. Y.) 1; McHugh's Estate, 152 Pa. St. 442, 25 Atl. 875. Out of regard to particular circumstances or a decedent's last directions, an allowance from the estate has sometimes been made for items not strictly within the rules of funeral charges, such as a moderate outlay for the mourning apparel of the widow and children (Holbert's Succession, 3 La. Ann. 436; *In re* Wachter, 16 Misc. (N. Y.) 137, 38 N. Y. Suppl. 941; Allen *v.* Allen, 3 Dem. Surr. (N. Y.) 524; Matter of Wood, 1 Ashm. (Pa.) 314. But see Jenks *v.* Mathews, 31 Me. 318), or even mourning rings for the relatives, under an earlier fashion (Paice *v.* Canterbury, 14 Ves. Jr. 364, 33 Eng. Reprint 560), but where the estate is insolvent such charges seem hardly allowable (Jenks *v.* Mathews, *supra*; Flintham's Estate, 11 Serg. & R. (Pa.) 16; Johnson *v.* Baker, 2 C. & P. 207, 31 Rev. Rep. 663, 12 E. C. L. 530). In an early case where the estate was insolvent, no expenses were allowed except for coffin, ringing of the bell, and the fees of the clerk and bearers. Shelly's Case, 1 Salk. 296. A charge for disinterment and reburial has been allowed. Allen *v.* Allen, 3 Dem. Surr. (N. Y.) 524.

6. Alter *v.* O'Brien, 31 La. Ann. 452.

7. Sullivan *v.* Horner, 41 N. J. Eq. 299, 7 Atl. 441.

8. See *supra*, VIII, I, 8, b, (II).

9. *Indiana.*— Pease *v.* Christman, 158 Ind. 642, 64 N. E. 90.

Louisiana.— Smith's Succession, 9 La. Ann. 107.

Michigan.— Jackson *v.* Leech, 113 Mich. 391, 71 N. W. 846.

New York.— Laird *v.* Arnold, 42 Hun 136; Laird *v.* Arnold, 25 Hun 4. But see Ferrin *v.* Myrick, 41 N. Y. 315 [*reversing* 53 Barb. 76]; Hoctor *v.* Lavery, 51 N. Y. App. Div. 74, 64 N. Y. Suppl. 518.

Pennsylvania.— *In re* Porter, 77 Pa. St. 43; McGlinsey's Appeal, 14 Serg. & R. 64; Lutton's Estate, 17 Pa. Super. Ct. 342 [*affirming* 10 Kulp 161]; Duffy's Estate, 9 Kulp 409; Meyer's Estate, 18 Phila. 42. See also Crosson's Appeal, 125 Pa. St. 380, 17 Atl. 423.

Rhode Island.— Moulton *v.* Smith, 16 R. I. 126, 12 Atl. 891, 27 Am. St. Rep. 728.

Tennessee.— Cate *v.* Cate, (Ch. App. 1897) 43 S. W. 365, where the monument was ordered at the expense and request of decedent, who approved the contract of purchase, and promised to pay the cost.

Canada.— Menzies *v.* Ridley, 2 Grant Ch. (U. C.) 544.

See 22 Cent. Dig. tit. "Executors and Administrators," § 756.

Contra.— Walton *v.* Hall, 66 Vt. 455, 29 Atl. 803.

An executor can bind the estate for the purchase-price of a suitable tombstone for his testator. Jackson *v.* Leech, 113 Mich. 291, 71 N. W. 846. See also Menzies *v.* Ridley, 2 Grant Ch. (U. C.) 544. *Contra*, Durkin *v.* Langley, 167 Mass. 577, 46 N. E. 119.

Vendor of tombstone may subject real estate to payment of price. Laird *v.* Arnold, 42 Hun (N. Y.) 136.

A claim for a tomb is not a debt against the community but must be borne by the estate of the deceased partner. Smith's Succession, 9 La. Ann. 107.

Where the testator has created a special fund for the purpose of erecting a monument, no allowance will be made out of the general assets. Durkin *v.* Langley, 167 Mass. 577, 46 N. E. 119.

10. Allen *v.* Allen, 3 Dem. Surr. (N. Y.) 524.

11. Pease *v.* Christman, 158 Ind. 642, 64 N. E. 90; Laird *v.* Arnold, 42 Hun (N. Y.) 136; Owens *v.* Bloomer, 14 Hun (N. Y.) 296; Moulton *v.* Smith, 16 R. I. 126, 12 Atl. 891, 27 Am. St. Rep. 728. *Contra*, Sinnott *v.* Kenaday, 14 App. Cas. (D. C.) 1 [*reversed* on other grounds in 179 U. S. 606, 21 S. Ct. 233, 45 L. ed. 339], holding the expenses of a cemetery lot and monument not funeral expenses within a statute limiting such expenses.

connection which will be allowed against the estate must be reasonable, taking into consideration the amount of the estate and also its condition as to solvency or insolvency,[12] and as the erection of a monument is not a matter of such urgent and immediate necessity as the funeral and interment of the decedent, this expense should be incurred only by or at least with the consent of the personal representative, and where a person having no authority in the premises from the representative has ordered and procured the erection of a tombstone or monument, the courts have refused to hold the estate liable either to the person who actually furnished the tombstone or monument, or to the person who ordered and procured the same in case he has paid therefor.[13]

e. Burial Lots.[14] The cost of a burial lot wherein to inter the decedent, especially where the purchase of a place of burial is immediately necessary, is allowed either as a direct charge against the estate or by holding the estate liable to reimburse a person who has paid for the same,[15] subject like other similar charges to the rule that it must be reasonable;[16] but a debt incurred by the widow in inclosing the burial lot is not payable out of the estate.[17]

f. Services Rendered to Estate.[18] A reasonable compensation for services rendered to the estate after the decedent's death is payable out of the estate,[19] either

12. Fairman's Appeal, 30 Conn. 205; Lund *v.* Lund, 41 N. H. 355; Brackett *v.* Tillotson, 4 N. H. 208; Springsteen *v.* Samson, 32 N. Y. 703; Tickel *v.* Quinn, 1 Dem. Surr. (N. Y.) 425; Webb's Estate, 165 Pa. St. 330, 30 Atl. 827, 44 Am. St. Rep. 666; Lutton's Estate, 17 Pa. Super. Ct. 342; Duffy's Estate, 9 Kulp (Pa.) 409; *In re* Connolly, 28 Pittsb. Leg. J. (Pa.) 355. See *supra*, VIII, I, 8, b, (v).

Illustrative cases.— As to the reasonableness of particular claims or expenditures see the following cases:

Alabama.— Bendall *v.* Bendall, 24 Ala. 295, 60 Am. Dec. 469.

Kentucky.— Burbridge *v.* Roberts, 7 Ky. L. Rep. 42.

New Hampshire.— Lund *v.* Lund, 41 N. H. 355.

New York.— Matter of Smith, 75 N. Y. App. Div. 339, 78 N. Y. Suppl. 130, 11 N. Y. Annot. Cas. 427; Matter of Shipman, 82 Hun 108, 31 N. Y. Suppl. 571; Matter of Howard, 3 Misc. 170, 23 N. Y. Suppl. 836; Matter of Beach, 1 Misc. 27, 22 N. Y. Suppl. 1079; Campbell *v.* Purdy, 5 Redf. Surr. 434; Burnett *v.* Noble, 5 Redf. Surr. 69; Matter of Luckey, 4 Redf. Surr. 95; Matter of Erlacher, 3 Redf. Surr. 8.

Pennsylvania.— *In re* Connolly, 28 Pittsb. Leg. J. 355; Geiger's Estate, 12 Wkly. Notes Cas. 439.

Tennessee.— Cannon *v.* Apperson, 14 Lea 553.

Canada.— Archer *v.* Severn, 13 Ont. 316.

See 22 Cent. Dig. tit. "Executors and Administrators," § 756.

13. *Illinois.*— Foley *v.* Bushway, 71 Ill. 386, holding further that the fact that the administrator knew of the work being done and did not object made no difference.

Indiana.— Lerch *v.* Emmett, 44 Ind. 331.

Iowa.— Argo *v.* Donover, 80 Iowa 214, 45 N. W. 744.

Massachusetts.— Sweeney *v.* Muldoon, 139 Mass. 304, 31 N. E. 720, 52 Am. Rep. 708, holding that the Massachusetts statute does not authorize the administrator to pay for a tombstone purchased after his appointment, but not at his request.

Wisconsin.— Samuel *v.* Thomas, 51 Wis. 549, 8 N. W. 361.

See 22 Cent. Dig. tit. "Executors and Administrators," § 756.

But see Menzies *v.* Ridley, 2 Grant Ch. (U. C.) 544, where testator's sister had procured the monument, and the widow, who was the acting executrix, having in hand no funds of the estate, gave her note to the sister, and it was held that, although the note was not paid the amount thereof should be allowed to the executrix as against objections of the testamentary guardian of infant legatees.

14. See *supra*, VIII, I, 8, b, (III).

15. Marple *v.* Morse, 180 Mass. 508, 62 N. E. 966; Pettengill *v.* Abbott, 167 Mass. 307, 45 N. E. 748; Sweeney *v.* Muldoon, 139 Mass. 304, 31 N. E. 720, 52 Am. Rep. 708. And see Donald *v.* McWhorter, 44 Miss. 124; Allen *v.* Allen, 3 Dem. Surr. (N. Y.) 524.

16. Pettengill *v.* Abbott, 167 Mass. 307, 45 N. E. 748. See *supra*, VIII, I, 8, b, (v).

17. Meyer's Estate, 18 Phila. (Pa.) 42.

18. See also *infra*, X, A, 19, h.

19. McNeely *v.* McNeely, 50 La. Ann. 823, 24 So. 338; Friend *v.* Graham, 10 La. 438 (holding that services of an attorney in removing an administrator inure to the creditors and heirs, and should be paid for from the succession, although he was employed at the request of some of the heirs); Bryan's Estate, 180 Pa. St. 192, 36 Atl. 738 (holding that decedent's business manager, who, on his employer's death without known heirs, took charge of the property in good faith until the heirs were found, was entitled to compensation for his services).

Services rendered after death pursuant to previous employment.— Where an attorney was retained in a suit, and after the client's death he performed legal services in the same

by allowing a claim directly against the estate in favor of the person who has rendered such services,[20] or by allowing the representative credit in his accounts for the amount expended by him for services, which is the more usual course where the services were rendered under a contract or agreement directly with him.[21] In order to justify such an allowance, however, the services must have been performed for the estate itself; claims for services for the widow, heirs, or other

suit for the administrator, a claim presented to the administrator for fees in the suit, without going into details, must be considered as a claim against the estate for services rendered to the deceased during his lifetime. Stark *v.* Hart, 22 Tex. Civ. App. 543, 55 S. W. 378.

Services in preservation of estate.— In Missouri it is provided by statute (Rev. St. §§ 100, 101) that if a decedent leaves horses or other stock that require attention, crops ungathered, property so exposed as to be in danger of loss in value, or work in an unfinished state, so that the estate would suffer material loss from the want of care and additional labor, the personal representative may, until the meeting of the court, procure labor to be performed for the preservation of such property; and the court, on the application of any person interested, may in such cases authorize further labor to be performed as the interest of the estate requires; and all sums thus paid, if approved by the court, shall be allowed as expenses of administration. In the instances enumerated the representative has full authority to act, and whatever he does is legalized, but in other instances if he proceeds without the direction or sanction of the court he does so at his peril and will be held to a strict accountability. Merritt *v.* Merritt, 62 Mo. 150; Powell *v.* Powell, 23 Mo. App. 365.

Defense of action by cosurety of decedent. — Where the surviving cosurety on a bond has defended an action brought to collect it after decedent's death and thereby saved several hundred dollars, the estate of decedent is liable to him for one half of the counsel fees and costs incurred in such defense. Connolly *v.* Dolan, 22 R. I. 60, 46 Atl. 36, 84 Am. St. Rep. 816.

Litigation by creditor on behalf of estate. — One of the creditors of an estate, who in good faith maintains necessary litigation to save the property and secure its proper application is entitled to have the fees of his attorney paid from the estate. *In re* Weed, 163 Pa. St. 600, 30 Atl. 278.

Allowance of representative's commission to person performing services.— On a bill brought to enforce against an administratrix an agreement to give the complainant certain of the real estate of her intestate, in consideration that he would effect a compromise of certain claims against the estate, it was held that he might reasonably be allowed, as damages for non-performance, besides his advances and interest, the commission of ten per cent for extra trouble in collecting the debts which the law would have allowed the administratrix. Shepherd *v.* Hammond, 3 W. Va. 484.

Fees of auctioneer at void sale.— Where an auctioneer sold property at the request of the curator of a vacant estate, and it turned out that the estate was not vacant and the sale was therefore void for want of legal authority of the curator to sell, the auctioneer had no claim against the estate for his fees as auctioneer. Navarro's Succession, 24 La. Ann. 105.

20. *Indiana.*— Baker *v.* Cauthorn, 23 Ind. App. 611, 55 N. E. 963, 77 Am. St. Rep. 443.

Kentucky.— Newcomb *v.* Newcomb, 60 S. W. 642, 22 Ky. L. Rep. 1359; Jones *v.* Jones, 39 S. W. 251, 19 Ky. L. Rep. 129.

Louisiana.— Kernan's Succession, 105 La. 592, 30 So. 239.

Oregon.— Knight *v.* Hamaker, 40 Oreg. 424, 67 Pac. 107, holding that the failure of an administrator, authorized to employ an attorney, to perform his duties as administrator, does not prevent an attorney employed by him, and rendering services for the estate, from having a valid claim against the estate for fees, although such claim is also a personal claim against the administrator.

Pennsylvania.— *In re* Parry, 188 Pa. St. 38, 41 Atl. 384, 68 Am. St. Rep. 850.

See 22 Cent. Dig. tit. "Executors and Administrators," § 757.

Insolvency of representative.— Where services of value to an estate have been rendered by an attorney in performance of a contract with the administrator, and the administrator is insolvent, a suit in equity will lie to enforce payment for such services out of the assets, but the attorney is not entitled to relief against the estate where it is not alleged or proved that the administrator is insolvent. Pike *v.* Thomas, 65 Ark. 437, 47 S. W. 110. See also Taylor *v.* Crook, 136 Ala. 354, 34 So. 905, 96 Am. St. Rep. 26.

21. *Arkansas.*— Yarborough *v.* Ward, 34 Ark. 204. See also Pike *v.* Thomas, 62 Ark. 223, 35 S. W. 212, 54 Am. St. Rep. 292.

Iowa.— Clark *v.* Sayre, 122 Iowa 591, 98 N. W. 484, attorney's fees.

Missouri.— Stephens *v.* Cassity, 104 Mo. App. 210, 77 S. W. 1089. *Compare* Powell *v.* Powell, 23 Mo. App. 365.

New York.— See Matter of Welling, 51 N. Y. App. Div. 355, 64 N. Y. Suppl. 1025, 53 N. Y. App. Div. 639, 65 N. Y. Suppl. 1060; Balz *v.* Underhill, 19 Misc. 215, 44 N. Y. Suppl. 419.

Oregon.— Waite *v.* Willis, 42 Oreg. 288, 70 Pac. 1034; *In re* McCullough, 31 Oreg. 86, 49 Pac. 886.

South Carolina.— Nicholson *v.* Whitlock, 57 S. C. 36, 35 S. E. 412.

See 22 Cent. Dig. tit. "Executors and Administrators," § 757; and *supra*, VIII, D, 2; VIII, I, 8, f, g.

parties in interest cannot be so allowed.[22] It is also necessary that the services should have been performed either at the request of the decedent made before his death or at the instance of some person having some authority, or at least some apparent authority, to act for the decedent or his estate.[23] The person performing the services must have done so in the expectation of being compensated therefor, and one who at the time of performing the services intended them to be gratuitous cannot thereafter obtain compensation therefor against the estate.[24] The allowance must be a reasonable one, taking into consideration the amount of the estate, the value of the services, and the time and trouble which their performance entailed.[25]

22. *Arkansas.*— Paget *v.* Bergan, 67 Ark. 522, 55 S. W. 938; McPaxton *v.* Dixon, 15 Ark. 97.

California.— Matter of Marrey, 65 Cal. 287, 3 Pac. 896.

Connecticut.— *In re* Simons, 55 Conn. 239, 11 Atl. 36.

Florida.— Hedlick *v.* Hedlick, 38 Fla. 252, 21 So. 101.

Kentucky.— Clarke *v.* Garrison, 79 S. W. 240, 25 Ky. L. Rep. 1999.

Louisiana.— Benton's Succession, 106 La. 494, 31 So. 123; Kernan's Succession, 105 La. 592, 30 So. 239; Florence's Succession, 36 La. Ann. 304 (holding that in a contest for the administration of a succession, the attorney of the defeated applicant has no claim for his services against the succession, but in a case where the defeated applicant is named as an alternate executor in the will of the deceased, his attorney will be entitled to a reasonable compensation from the succession for such of his services as were beneficial to the estate, such as procuring an inventory and the appointment of an attorney of absent heirs and the like); Hughes' Succession, 14 La. Ann. 863 (holding that the expenses of litigation between the heirs of an intestate as to their respective rights cannot be made a general charge against the succession); Muntz *v.* Brown, 11 La. Ann. 472.

Michigan.— Gray *v.* Seeley, 132 Mich. 319, 94 N. W. 1061.

North Carolina.— James *v.* Withers, 126 N. C. 715, 36 S. E. 178.

Pennsylvania.— McGregor's Estate, 131 Pa. St. 359, 18 Atl. 902; Lewis' Estate, 6 Pa. Co. Ct. 457. See also Grant's Estate, 18 Lanc. L. Rev. 36.

Tennessee.— Royston *v.* McCulley, (Ch. App. 1900) 59 S. W. 725, 52 L. R. A. 899.

Wisconsin.— Ford *v.* Ford, 88 Wis. 122, 59 N. W. 464.

See 22 Cent. Dig. tit. "Executors and Administrators," § 757.

Where allowance made to suspended administrator for services.— Where, on settling the account of an administrator who had been suspended, the court allowed him a certain sum for the services of a certain attorney, such attorney cannot recover such sum from the successor of such administrator or from the estate, but he must look for pay to his employer. McKee *v.* Soher, 138 Cal. 367, 71 Pac. 438, 649.

Attorney's fees of infant who is a necessary party to suits involving estate.— Where an infant who has no property except his prospective interest in a decedent's estate is a necessary party to suits for construction of the will and involving the estate, none of which are commenced by him or on his behalf, expenses for an attorney, incurred by his guardian *ad litem* will be allowed out of the estate as part of the expenses of settlement. Ford *v.* Ford, 88 Wis. 122, 59 N. W. 464.

23. *Alabama.*— Hearrin *v.* Savage, 16 Ala. 286.

Colorado.— *In re* Currier, (App. 1903) 74 Pac. 340.

Iowa.— *In re* Officer, 122 Iowa 553, 98 N. W. 314.

Ohio.— *In re* Ward, 21 Ohio Cir. Ct. 753, 12 Ohio Cir. Dec. 44.

Pennsylvania.—Cary's Estate, 10 Kulp 227.

See 22 Cent. Dig. tit. "Executors and Administrators," § 757.

Acts of representative prior to qualification.—Acts done by an executor in the interest of his trust, prior to his qualification as such, become binding on the estate upon his qualification; hence attorneys who, previous to an executor's qualification, gave him advice as to whether he could qualify and as to his bond and rendered services in procuring such bond, are entitled to file their claim therefor against, and collect the same out of, the estate. Baker *v.* Cauthorn, 23 Ind. App. 611, 55 N. E. 963, 77 Am. St. Rep. 443.

24. Royston *v.* McCulley, (Tenn. Ch. App. 1900) 59 S. W. 725, 52 L. R. A. 899.

25. Clarke *v.* Garrison, 79 S. W. 240, 25 Ky. L. Rep. 1999 (holding that the court should also consider the fact that part of the services were not properly chargeable to the estate, but to devisees or claimants); Bickel *v.* Bickel, 79 S. W. 215, 25 Ky. L. Rep. 1945 (holding that an allowance of twelve hundred dollars to attorneys representing an estate is excessive where it appeared that their services were largely rendered in promoting the individual interests of heirs); Lynch *v.* Spicer, 53 W. Va. 426, 44 S. E. 255; Fowler *v.* Lewis, 36 W. Va. 112, 14 S. E. 447; Florida Internal Imp. Fund *v.* Greenough, 105 U. S. 527, 26 L. ed. 1157. See also *In re* Parry, 188 Pa. St. 38, 41 Atl. 384, 68 Am. St. Rep. 850, where the allowance was held reasonable.

Attorney's fee held reasonable.— Where an administrator was sued on two notes, one for fifteen thousand dollars and the other for twenty-one thousand pounds English money, and defeated the action as to the latter note,

g. Loans or Advances to Estate. While advances to an estate are not commonly recoverable by action at law against the executor or administrator,[26] the equity and probate rule favors the reimbursement of loans or advances made suitably and in good faith by the representative, the surviving spouse, kindred, distributees, or creditors for the immediate benefit of the estate.[27]

h. Expenses of Administration.[28] The legitimate expenses of administration are to be met out of the assets of the estate,[29] but the proper mode of doing this

the allowance to his attorneys of a fee of twenty-five hundred dollars will not be disturbed on appeal, there being uncontradicted evidence that the fee is reasonable and customary. Newcomb *v.* Newcomb, 60 S. W. 642, 22 Ky. L. Rep. 1359, holding further that the fact that in litigation then pending the bulk of the estate was afterward adjudged to plaintiff in such action as executrix under a foreign probate of a will of decedent, and that there would have been no occasion for her action if she had waited until the termination of that litigation, did not affect the amount of compensation to which the attorneys for the administrator were entitled for defending that action.

26. Benedict *v.* Chase, 58 Conn. 196, 20 Atl. 448, 8 L. R. A. 120; Brandon *v.* Brandon, 4 Thomps. & C. (N. Y.) 385; Hourquebie *v.* Girard, 12 Fed. Cas. No. 6,732, 2 Wash. 212.

27. *Alabama.*— Jenks *v.* Terrell, 73 Ala. 238, debts paid by widow before administrator appointed.

Arkansas.— Whittaker *v.* Wright, 35 Ark. 511, holding that a creditor may pay taxes to protect his interest and be reimbursed out of the proceeds of a foreclosure sale.

Connecticut.— Benedict *v.* Chase, 58 Conn. 196, 20 Atl. 448.

Massachusetts.— Jennison *v.* Hapgood, 10 Pick. 77.

Missouri.— Maupin *v.* Boyd, 5 Mo. 106.

New Jersey.— Van Duin *v.* Van Duin, 42 N. J. Eq. 325, 5 Atl. 647, holding that debts of a testator, paid in good faith by his executrix and residuary life legatee, will be allowed against his estate, although the legatee took possession of the estate without proving the will.

New York.— Bolton *v.* Myers, 146 N. Y. 257, 40 N. E. 737 ; Atlantic Trust Co. *v.* Powell, 23 Misc. 289, 50 N. Y. Suppl. 866. See also Brandon *v.* Brandon, 4 Thomps. & C. 385, holding that where testator bequeathed his estate to his wife, with directions to support and educate the children until they were of age, and provided that after her death the property should be divided among his children, and letters of administration were granted to the widow and testator's brother, and after the widow's death the brother continued the maintenance of the minor children as one family for two years, until the appointment of a general guardian, and in so doing expended his own money, equity could allow him to be reimbursed, he having done what on application the court would have directed him to do.

North Carolina.— Johnston *v.* Cutchin, 133 N. C. 119, 45 S. E. 522.

Ohio.— Veldman *v.* Lindeman, 7 Ohio Dec. (Reprint) 676, 4 Cinc. L. Bul. 911.

Pennsylvania.— *In re* Bentley, 196 Pa. St. 497, 46 Atl. 898; *In re* Mustin, 188 Pa. St. 544, 41 Atl. 618 (loan decree permitting executrices to borrow); McCurdy's Appeal, 5 Watts & S. 397.

United States.— Baring *v.* Putnam, 2 Fed. Cas. No. 984, 1 Holmes 261, holding that an administrator *de bonis non* is liable to a banker for money credited by mistake to the intestate in his lifetime, and drawn by and paid to the original administrator in the belief that it belonged to the estate.

England.— Robison *v.* Killey, 30 Beav. 520; Spackman *v.* Holbrook, 2 Giff. 198, 6 Jur. N. S. 881, 2 L. T. Rep. N. S. 367.

See 22 Cent. Dig. tit. "Executors and Administrators," § 758.

An allowance to reimburse an annuitant under the will for debts of the testator paid from the annuity is erroneous where there is no proof that any money from which the annuity could have been paid has been applied to the payment of testator's debts. Matter of Gedney, 33 Misc. (N. Y.) 160, 68 N. Y. Suppl. 627.

Dower in mortgaged land.— The fact that the widow of one who had given a mortgage upon realty took dower in the land does not entitle the mortgagee, in a distribution of the assets of the estate of the deceased husband, to be treated as having "contributed" anything toward the payment of its liabilities. Bellerby *v.* Thomas, 105 Ga. 477, 30 S. E. 425.

Loan to pay debt barred by limitations.— A note executed by an executor for money borrowed to pay a debt of testator's which was barred by limitations is not a charge against the estate, but is binding against the executor and the beneficiaries under the will who authorized the executor to make such loan. Hamlin *v.* Smith, 72 N. Y. App. Div. 601, 76 N. Y. Suppl. 258.

28. See also *supra*, X, A, 19, f.

Costs of administration as preferred claim see *infra*, X, D, 2, c, (II), (B), (1).

29. *Arkansas.*— Yarborough *v.* Ward, 34 Ark. 204.

Georgia.— Mapp *v.* Long, 62 Ga. 568.

Louisiana.— McNeely's Succession, 50 La. Ann. 823, 24 So. 338.

Massachusetts.— Brown *v.* Kelsey, 2 Cush. 243; Sawyer *v.* Baldwin, 20 Pick. 378.

New York.— Douglas *v.* Yost, 64 Hun 155, 18 N. Y. Suppl. 830 (expenses of probating will); *In re* Mahoney, 37 Misc. 472, 75 N. Y. Suppl. 1056.

Pennsylvania.— Cobaugh's Appeal, 24 Pa. St. 143 (compensation of executors); Cary's

is for the representative to make the necessary disbursements, for which he will be allowed credit in his accounts, rather than by allowing such expenses as a

Estate, 10 Kulp 227; France's Estate, 16 Wkly. Notes Cas. 350; Wilson's Appeal, 3 Walk. 216.

Rhode Island.— Moulton *v.* Smith, 16 R. I. 126, 12 Atl. 891, 27 Am. St. Rep. 728; Hazard *v.* Engs, 14 R. I. 5, expenses of resisting appeal from decree admitting will to probate.

West Virginia.— Crim *v.* England, 46 W. Va. 480, 33 S. E. 310, 76 Am. St. Rep. 826.

See 22 Cent. Dig. tit. "Executors and Administrators," § 759.

Expenses incurred by the executor in carrying out directions of the will stand upon the same footing as the expenses of administration. Edwards *v.* Love, 94 N. C. 365. See also Sharp *v.* Lush, 10 Ch. D. 468, 48 L. J. Ch. 231, 27 Wkly. Rep. 528.

Meaning of "testamentary expenses" as used in will see *In re* King, [1904] 1 Ch. 363, 73 L. J. Ch. 210, 90 L. T. Rep. N. S. 281, 20 T. L. R. 187, 52 Wkly. Rep. 187; *In re* St. Albans, [1900] 2 Ch. 873, 69 L. J. Ch. 863, 49 Wkly. Rep. 74; *In re* Lewis, [1900] 2 Ch. 176, 69 L. J. Ch. 406, 82 L. T. Rep. N. S. 291, 48 Wkly. Rep. 426; *In re* Maryon-Wilson, [1900] 1 Ch. 565, 69 L. J. Ch. 310, 82 L. T. Rep. N. S. 171, 48 Wkly. Rep. 338. See also, generally, WILLS.

Meaning of "executorship expenses" as used in will see Sharp *v.* Lush, 10 Ch. D. 468, 48 L. J. Ch. 231, 27 Wkly. Rep. 528. See also, generally, WILLS.

Expenses of litigation.— Expenses and costs, properly incurred by the representative in litigation on behalf of the estate, as in prosecuting suits to collect the assets or in defending actions against the estate, are properly included in the expenses of administration. *In re* Mahoney, 37 Misc. (N. Y.) 472, 75 N. Y. Suppl. 1056; France's Estate, 16 Wkly. Notes Cas. (Pa.) 350; Manning *v.* Mayes, 79 Tex. 653, 15 S. W. 638. See also *In re* Casey, 2 Silv. Supreme (N. Y.) 585, 6 N. Y. Suppl. 608. And in England a similar rule obtains as to costs in creditor's suits. Loomes *v.* Stotherd, 1 L. J. Ch. O. S. 220, 1 Sim. & St. 458, 1 Eng. Ch. 458; Barker *v.* Wardle, 2 Myl. & K. 818, 7 Eng. Ch. 818, 39 Eng. Reprint 1157; Larkins *v.* Paxton, 2 Myl. & K. 320, 7 Eng. Ch. 320, 39 Eng. Reprint 965. See also Sanderson *v.* Stoddart, 32 Beav. 155, 9 Jur. N. S. 1216, 7 L. T. Rep. N. S. 662, 11 Wkly. Rep. 275; Newbegin *v.* Bell, 23 Beav. 386, 53 Eng. Reprint 152; Sutton *v.* Doggett, 3 Beav. 9, 4 Jur. 959, 9 L. J. Ch. 335, 4 Eng. Ch. 9, 49 Eng. Reprint 4; Gaunt *v.* Taylor, 2 Hare 413, 24 Eng. Ch. 413. See *supra*, VIII, I, 8, g.

Attorney's fees for services rendered to the representative are part of the expenses of administration and are payable out of the assets of the estate (Stephens *v.* Cassity, 104 Mo. App. 210, 77 S. W. 1089; *In re* Thompson, 41 Barb. 237; Matter of Crough, 41 Misc. 349, 84 N. Y. Suppl. 936; Fitzsimmons *v.* Safe Deposit, etc., Co., 189 Pa. St. 514, 42 Atl. 41; Callaghan *v.* Grenet, 66 Tex. 236, 18 S. W. 507; Williamson *v.* Robinson, 56 Tex. 347; Gammage *v.* Rather, 46 Tex. 105; Crim *v.* England, 46 W. Va. 480, 33 S. E. 310, 76 Am. St. Rep. 826. See *supra*, VIII, I, 8, g; X, A, 19, f; and ATTORNEY AND CLIENT, 4 Cyc. 1013) and the lien of the attorney is not lost by the transfer of the assets, unadministered, to a co-executor by order of the surrogate (*In re* Crough, 41 Misc. (N. Y.) 349, 84 N. Y. Suppl. 936). A judgment recovered against an administrator for attorney's services rendered in the administration of the estate adjudges that the services constituted actual, necessary, just, and reasonable expenses of the administration, which must be borne by the estate. *In re* Thompson, 41 Barb. (N. Y.) 237 [*affirming* 1 Redf. Surr. (N. Y.) 490]. As to enforcement of judgment under New York statutes see *In re* Thompson, 41 Barb. (N. Y.) 237 [*affirming* 1 Redf. Surr. 490]. See also Hall *v.* Dusenbury, 38 Hun (N. Y.) 125.

Costs of the executors incurred in defending an action brought to obtain a revocation of probate are included within "testamentary expenses" charged by the will upon the testator's realty. *In re* Prince, [1898] 2 Ch. 225, 67 L. J. Ch. 531, 78 L. T. Rep. N. S. 790, 40 Wkly. Rep. 25. See *supra*, VIII, I, 8, g.

Claim against realty.— A claim for the expenses of having a will probated is not a liability against the real estate, except where the land has to be sold for payment of debts. Taylor *v.* Crook, 136 Ala. 354, 34 So. 905, 96 Am. St. Rep. 26.

The expense of managing a fund, the income of which is given to a legatee for life, is a general charge upon the whole estate. Brown *v.* Kelsey, 2 Cush. (Mass.) 243; Sawyer *v.* Baldwin, 20 Pick. (Mass.) 378.

A claim of an administrator whose appointment has been revoked for reimbursement for moneys expended and services rendered in good faith pursuant to his appointment is to be allowed, if at all, as a part of the expenses of administration. Brown *v.* McGee, 117 Wis. 389, 94 N. W. 363.

Expenses of administration of husband's estate not chargeable against estate of widow. — Moreland *v.* Gilliam, 21 Ark. 507.

No allowance for expenses connected with a pending contest.— Credit will not be allowed a representative for expenditures made in connection with a contest over a will which is still pending, as liability for such expenditures cannot be fixed until the contest is determined. Titlow's Estate, 11 Pa. Co. Ct. 625.

Costs of administration do not include the costs of a suit in which plaintiff, whose rights as heir, although recognized, have been extinguished by confusion, fails to take anything (Truxillo *v.* Truxillo, 11 La. Ann. 412), costs of an unsuccessful plaintiff in an action

direct charge against the estate,[30] as the expenses of administration are not debts of the decedent.[31] A statute limiting the lien of debts of a deceased person against his real estate does not run against claims of executors for compensation due them, for such a claim is not a debt of the decedent but a part of the expenses of administration.[32]

i. Support, Etc., Furnished to Decedent's Family. Support, attendance, and the like furnished by the executor or administrator to the surviving members of decedent's family should be charged by him against their respective shares or allowances in the decedent's estate; and debts incurred or expenditures made for these purposes do not constitute proper claims against the estate itself, nor entitle him to reimbursement therefrom; nor may others sue the representative on such claims;[33] but where the decedent by suitable provision in his will has imposed a

brought to obtain a revocation of a grant of probate of the will (*In re* Prince, [1898] 2 Ch. 225, 67 L. J. Ch. 531, 78 L. T. Rep. N. S. 790, 47 Wkly. Rep. 25), or the expenses of an heir, incurred after an administrator is appointed, in hunting up other heirs or next of kin (*In re* Glynn, 57 Minn. 21, 58 N. W. 684). The expenses of a sale of decedent's land by a stranger cannot be allowed against the estate, although made under color of an order of the probate court. Swan *v.* Wheeler, 4 Day (Conn.) 137. It is not proper to charge the recording of deeds to an administrator against the estate of which the grantee is administrator. Calvert *v.* Holland, 9 B. Mon. (Ky.) 458. Expenses incurred in taking testimony on a contest of a will are not expenses of the administration of an estate by a temporary administrator which it is proper for him to pay from the funds of the estate. Matter of McNamee, 25 Misc. (N. Y.) 260, 55 N. Y. Suppl. 425. An allowance will not be made for the services of an attorney employed to try to probate an invalid will. Gilbert *v.* Bartley, 9 Bush (Ky.) 49. Costs and expenses incurred in the propounding, establishing, and probate of a will by a person who is not therein named as executor and upon whom is cast no legal or moral duty to establish the will are not a proper charge against the estate. Gayle *v.* Johnson, 80 Ala. 388. The cost of raising a fund, including counsel fees, auctioneer's charges, commissions, etc., fall upon the fund, and are not chargeable as "costs of administration." Teaf's Estate, 7 Pa. Co. Ct. 463. Where a testator gave his widow the income of all his property for life for her benefit and support, but provided that out of the income she should pay all necessary repairs on the buildings and all taxes, besides insurance, and the executors were empowered to pay all debts, it was held that, the executors having under a power from the wife collected the income from the property, the estate was not chargeable with the expense of collecting the same, or with repairs, taxes, and insurance. *In re* Turfler, 24 N. Y. Suppl. 91, Pow. Surr. (N. Y.) 421.

Ascertaining pregnancy of widow see Rollwagen *v.* Powell, 8 Hun (N. Y.) 210.

Charges of detectives for collecting evidence. —An administrator should not be allowed as necessary expenses, under N. Y. Code Civ. Proc. § 2730, the charges of detectives for collecting evidence to defend an action against an estate, where the administrator is himself a lawyer and has been allowed the fees of attorneys in the action, and the testimony collected was never used. Matter of Van Buren, 19 Misc. (N. Y.) 373, 44 N. Y. Suppl. 357. See also *In re* Collyer, 9 N. Y. Suppl. 297, 1 Connoly Surr. (N. Y.) 546.

30. *Arkansas.*— Yarborough *v.* Ward, 34 Ark. 204.

Connecticut.— Chambers *v.* Robbins, 28 Conn. 544.

Iowa.— Clark *v.* Sayre, 122 Iowa 591, 98 N. W. 484.

Missouri.— See Stephens *v.* Cassity, 104 Mo. App. 210, 77 S. W. 1089.

Wisconsin.— Brown *v.* McGee, 117 Wis. 389, 94 N. W. 363.

See 22 Cent. Dig. tit. "Executors and Administrators," § 759.

Testamentary provision excluding personal liability of representative.— Where a will provided that the expenses of administration shall be charged upon and paid out of the estate of the testator both real and personal, the administratrix, to whom one half of the estate has been devised for life, and who is the assignee of the other half, is not personally liable for such expenses. Boynton *v.* Laddy, 10 N. Y. Suppl. 622.

31. Clarke *v.* Sayre, 122 Iowa 591, 98 N. W. 484; *In re* Mahoney, 37 Misc. (N. Y.) 472, 75 N. Y. Suppl. 1056; Matter of Franklin, 26 Misc. (N. Y.) 107, 56 N. Y. Suppl. 858; Brown *v.* McGee, 117 Wis. 389, 94 N. W. 363.

32. Cobaugh's Appeal, 24 Pa. St. 143.

33. *Alabama.*— Pinckard *v.* Pinckard, 24 Ala. 250, medical attendance on widow.

Arkansas.— Bomford *v.* Grimes, 17 Ark. 567, medical attendance on surviving family.

Georgia.— Pryor *v.* West, 72 Ga. 140, supplies to surviving minor child.

Indiana.— Sorin *v.* Olinger, 12 Ind. 29, board and education of surviving minor children.

New Hampshire.— Flanders *v.* Greely, 64 N. H. 357, 10 Atl. 686, services to widow.

New Jersey.— Johnston *v.* Morrow, 28 N. J. Eq. 327.

Pennsylvania.— Lawall *v.* Kreidler, 3 Rawle 300. See also Marshall's Estate, 8 Pa. Dist. 313.

duty of support upon his personal representative, reimbursement from the estate may be proper.[34]

20. Claims of Executors or Administrators. A claim of an executor or administrator against the estate stands upon an equal footing with other claims,[35] and the fact that he treats a fund as assets of the estate does not prevent him

South Carolina.— Wilson *v.* Huggins, 11 Rich. 410.

See 22 Cent. Dig. tit. "Executors and Administrators," § 763.

Compare Gee *v.* Hasbrouck, 128 Mich. 509, 87 N. W. 621.

34. Reid *v.* Porter, 54 Mo. 265; Hammond *v.* Cronkright, 47 N. J. Eq. 447, 20 Atl. 847; Wilson *v.* Staats, 33 N. J. Eq. 524.

Amount of allowance.— Where a testator has directed that his executrix, his daughter, should use so much of the proceeds of sales of his real estate as should be necessary to support his wife, the daughter, with whom the mother boarded, may recover from the estate of testator for the actual cost of the board, and for money actually paid out for attendance for the mother, but should not be allowed for profits or for her own services, and no items being furnished as to clothing and spending money alleged to have been furnished to the mother by the daughter, the latter should not be allowed anything in that behalf. Hammond *v.* Cronkright, 47 N. J. Eq. 447, 20 Atl. 847.

Testamentary direction to support out of rents and profits.— Where a will empowered the executor to use the rents and profits of the whole real estate for the support of an infant legatee until she reached the age of twenty-one, and he made certain alleged expenditures in her behalf for board and other necessities, when he did not at the time have any money in his hands to which she was entitled, and it did not appear that he was related to the infant, or owed any duty to provide her with the alleged necessaries, he was not entitled to have his claim for money paid out for the infant's support adjudged a lien on the proceeds of a sale of the realty. Johnson *v.* Weir, 72 N. Y. App. Div. 325, 76 N. Y. Suppl. 76 [*affirming* 36 Misc. 737, 74 N. Y. Suppl. 358].

35. *Florida.*— Deans *v.* Wilcoxon, 25 Fla. 980, 7 So. 163.

Georgia.— Oliver *v.* Hammond, 85 Ga. 323, 11 S. E. 655.

Illinois.— Johnson *v.* Gillett, 52 Ill. 358.

Maryland.— Edelen *v.* Edelen, 11 Md. 415.

New York.— Matter of Perry, 5 Misc. 149, 25 N. Y. Suppl. 716. See also Matter of Furniss, 86 N. Y. App. Div. 96, 83 N. Y. Suppl. 530.

United States.— Nichols *v.* Hodges, 1 Pet. 562, 7 L. ed. 263.

England.— *In re* Gilbert, [1898] 1 Q. B. 282, 67 L. J. Q. B. 229, 77 L. T. Rep. N. S. 775, 4 Manson 337, 46 Wkly. Rep. 351.

See 22 Cent. Dig. tit. "Executors and Administrators," § 760.

Proof of claim to procure order to sell realty.— Where an estate is not fully settled, and the administrator has exhausted the personal assets in the payment of debts not his own, he may prove a claim due to him personally, preparatory to obtaining an order to sell the real estate. Johnson *v.* Gillett, 52 Ill. 358.

Legacy to executor in payment — Proof of will.— Where a testator leaves to his executor, who is a creditor, a less amount than is due in payment of the debt, and the executor proves the will, he cannot claim more than the amount so given to him. Syme *v.* Badger, 92 N. C. 706.

Failure of representative to collect note on which decedent surety.— Where an administrator owns a note upon which the intestate is surety, and wilfully omits to collect it when he can, and the principal afterward becomes insolvent, the estate is discharged. Jones *v.* Graham, 36 Ark. 383.

Claim for services may be allowed. Edelen *v.* Edelen, 11 Md. 415 (holding that the personal services of a widow and administratrix after the death of her husband, in nursing his slaves and furnishing them with necessaries, are a proper subject for a claim against the estate); Evarts *v.* Nason, 11 Vt. 122 (holding that the time spent and the expenses incurred by an executor in procuring an injunction against a judgment obtained through the fraud of his co-executor and a third person against the estate, without his knowledge, may be allowed to him in his account); Rix *v.* Smith, 8 Vt. 365 (holding that it is not a sufficient objection to allowance to an administrator for services that they were for the purpose of realizing a balance supposed to be due to himself). See also Matter of McCord, 2 N. Y. App. Div. 324, 37 N. Y. Suppl. 852, 3 N. Y. Annot. Cas. 64.

Indebtedness to estate.— It is not a valid objection to a charge in an executor's account for expenses of sickness and burial of testator's wife during his lifetime that the executor was at the time he paid such expenses indebted to the estate. Titlow's Estate, 11 Pa. Co. Ct. 625.

Debts of estate paid by representative.— An executor can be allowed for debts of the estate paid by him out of his own means only as assignee of such debts in place of the original creditors. Vulte *v.* Martin, 44 How. Pr. (N. Y.) 18.

Credit on notes of representative held by others.— A debt owing an executor by the estate cannot be paid by giving the executor credit on notes against him individually, held by strangers or by the heirs. Honeywell's Estate, 10 Kulp (Pa.) 164.

Interest.— An executor having a private demand against the testator upon which the testator told him to charge reasonable interest will not be allowed compound interest. Jennison *v.* Hapgood, 10 Pick. (Mass.) 77.

from claiming a share in that fund as his own by reason of such demand.[36] Such a claim must, however, be established by legal evidence in the same manner as that of any other claimant,[37] and the representative must show that the demand is a valid[38] and existing one.[39]

21. Purchase of Claims Against Estate. An executor or administrator is not allowed to make a profit by purchasing claims against the estate for less than their face value and then procuring an allowance for the full amount, but he is entitled to credit for only the amount actually expended in the purchase of such claim,[40] and the same rule applies where the purchase is made before the appointment as

36. Buckley *v.* Buckley, 157 Mass. 536, 32 N. E. 863.

37. Matter of Furniss, 86 N. Y. App. Div. 96, 83 N. Y. Suppl. 530 (where the evidence was held insufficient); Vulte *v.* Martin, 44 How. Pr. (N. Y.) 18.

38. Clancey *v.* Clancey, 7 N. M. 405, 37 Pac. 1105, 38 Pac. 168; Cann *v.* Cann, 40 W. Va. 138, 20 S. E. 910. See also Pursel *v.* Pursel, 14 N. J. Eq. 514; Kydd *v.* Dalrymple, 2 Dem. Surr. (N. Y.) 630.

Reimbursement of sureties by administrator.— On an accounting by an administrator *de bonis non,* the principal administrator is not entitled to repayment of money paid by him to his sureties to recompense them for money paid by them on account of his devastavit. Spear *v.* Banks, 125 Ala. 227, 27 So. 979.

Representative cannot charge estate with burial lot owned by himself in which decedent buried. Bland *v.* Gollaher, (Tenn. Ch. App. 1898) 48 S. W. 320.

Claim for payment of ground-rent.— Administrators settling the accounts of an insolvent estate cannot be substituted for a ground landlord whom they have paid, and receive credit for the money so paid, although the intestate covenanted to pay the rent. *In re* Torr, 2 Rawle (Pa.) 250.

Services to decedent.— An executor is not entitled to compensation for services rendered his testator during the latter's life, where the services were mutually beneficial, and no evidence is given that any compensation was expected or intended, and the charge was not made until after the account was filed and exceptions thereto had been taken. Egerton *v.* Egerton, 17 N. J. Eq. 419.

39. Burnet *v.* Denniston, 5 Johns. Ch. (N. Y.) 35, holding that where an executor, twenty-five years after the death of the testator, set up a book debt against the estate, but it appeared that the testator possessed personal estate, and no account was given of the disposition of it by the executor, it was presumed that his debt, if any, had been satisfied out of the assets.

40. *Alabama.*— Powell *v.* Powell, 80 Ala. 11; Eubank *v.* Clark, 78 Ala. 73.

Arkansas.— Wolf *v.* Banks, 41 Ark. 104; Trimble *v.* James, 40 Ark. 393.

Kentucky.— Calvert *v.* Holland, 9 B. Mon. 458; Mitchum *v.* Mitchum, 3 Dana 260; Miller *v.* Towles, 4 J. J. Marsh. 255; Desha *v.* Desha, 11 Ky. L. Rep. 405.

Louisiana.— Draughon *v.* Quillen, 23 La. Ann. 237.

Nevada.— Furth *v.* Wyatt, 17 Nev. 180, 30 Pac. 828.

New York.— Matter of Rainforth, 40 Misc. 609, 83 N. Y. Suppl. 57. See also Paff *v.* Kinney, 1 Bradf. Surr. 1.

Pennsylvania.— *In re* Heager, 15 Serg. & R. 65; Woods *v.* Irwin, 13 Pa. Co. Ct. 276.

South Carolina.— See Robinson *v.* Gist, 2 Hill Eq. 467.

Texas.— Chevallier *v.* Wilson, 1 Tex. 161.

Wisconsin.— Gillett *v.* Gillett, 9 Wis. 194.

England.— *Ex p.* James, 8 Ves. Jr. 337, 7 Rev. Rep. 56, 32 Eng. Reprint 385.

See 22 Cent. Dig. tit. "Executors and Administrators," § 761; and *supra,* VIII, J, 1.

The transferee of a judgment against a succession, who holds it by virtue of a transfer made by the agent of the heirs and administrator of the estate who acquired the judgment by compromise with the creditor, can recover from the succession only the amount which the agent and administrator paid the judgment creditor. Draughon *v.* Quillen, 23 La. Ann. 237.

Transaction presumed to be a payment.— It being the duty of the representative to discharge claims instead of purchasing them on his own account, it will generally be presumed that where he pays a creditor and takes the latter's securities the transaction is a payment of the claim and not a purchase thereof. Therefore the securities in the representative's hands will be deemed extinguished and he can be allowed only the sum paid for them. Borst *v.* Bovee, 5 Hill (N. Y.) 219 (holding that the indorsers on the creditor's note were discharged and that evidence as to the insolvency of the estate was not admissible); Gillett *v.* Gillett, 9 Wis. 194. *Compare* Johnson *v.* Blackman, 11 Conn. 342.

Claims which may be purchased.— An executor has a right to purchase claims against his testator for moneys received by testator as a guardian and agent, where none of the funds received by the testator in such manner ever came into the hands of the executor, and there is no fraud or concealment on his part. Murray *v.* Barden, 132 N. C. 136, 43 S. E. 600.

Claim presented to representative.— Where a creditor of an intestate gave to the administratrix a receipted bill for his debt, stating that he intended to present the amount thereof to the administratrix, and not to discharge the estate, the administratrix could charge the estate with the amount of the receipt. Buxton *v.* Barrett, 14 R. I. 40.

administrator but in contemplation thereof.[41] But a third person who purchases claims against the estate becomes a creditor of the estate[42] and is entitled to receive the full amount of his claim (or in case of insolvency his percentage on the full amount) regardless of what he had paid for it;[43] and the personal representative cannot be held liable for the difference.[44]

B. Presentation and Allowance[45] — **1. Necessity For Presentation — a. In General.** In most of the states there are express statutory provisions, commonly termed statutes of non-claim, to the effect that claims against the estate of a decedent shall be exhibited or presented to the personal representative or to the probate court, usually within a specific time after the death of the debtor, the appointment of an executor or administrator of his estate, or the publication of a notice calling for claims;[46] although in some states the period for presentation is

41. Chevallier *v.* Wilson, 1 Tex. 161.

42. Moffatt *v.* Loughridge, 51 Miss. 211; Veldman *v.* Lindeman, 7 Ohio Dec. (Reprint) 676, 4 Cinc. L. Bul. 911, holding that a person who lent money to an administratrix to save the estate from forced sale and to whom the claims paid off with such money were transferred could recover thereon from the estate.

Effect of authority from administrator.— An administrator may bind himself but cannot bind the estate by authorizing a person to buy up claims against the estate, and one who incurs expense by purchasing such claims at the instance of the administrator must look to him and not to the estate for reimbursement unless they are established as valid subsisting claims against the estate in the manner prescribed by law. Johnson *v.* Brown, 25 Tex. Suppl. 120 [*distinguishing* Swenson *v.* Walker, 3 Tex. 93].

When representative precluded from contesting claim.—Where a person has purchased a claim against the estate upon the faith of its allowance and approval by the probate judge, and the assurance of the administrator that it will be paid, the administrator is precluded from contesting its original justice or that it is binding on the estate. Swenson *v.* Walker, 3 Tex. 93.

43. Owen *v.* Potter, 115 Mich. 556, 73 N. W. 977; Halsted *v.* Hyman, 3 Bradf. (N. Y.) 426 (purchase by surety on administrator's bond); Luther *v.* Hunter, 7 N. D. 544, 75 N. W. 916 (holding that a surety on the administrator's bond occupies no fiduciary relation to the estate, and may therefore purchase claims against the estate); *In re* Ralston, 158 Pa. St. 645, 28 Atl. 139 (purchase by person who was named as executor but renounced).

Applying assigned claims to purchase-price of property.— Where the testator's widow and her two brothers formed a partnership to buy at a discount claims against the estate, which was generally believed to be insolvent, and to apply them at their full value to the purchase of property belonging to the estate (an order of the probate court permitting them to be so applied to the amount of forty per cent of the purchase-price), which the parties did, thereby acquiring the bulk of the property of the estate at a large profit to themselves, it was held that these transactions were not fraudulent as to legatees and creditors whose claims remained unsatisfied. Owen *v.* Potter, 115 Mich. 556, 73 N. W. 977.

Right of debtor to set off claims purchased at a discount in action by representative see *infra*, XIV, D, 1, i.

Where a stranger and an administrator unite in the purchase at a discount of a debt due from the intestate, they stand in the same relation that the administrator would occupy if he alone had made the purchase, and can recover of the estate no more than they paid for the debt. Mitchum *v.* Mitchum, 3 Dana (Ky.) 260.

44. Owen *v.* Potter, 115 Mich. 556, 73 N. W. 977. This is true even though the assignor of the claim, being a corporation in which the executor was a stock-holder, would have sold it to the estate at the same discount allowed to the claimant. Neither is the executor culpable in sharing as a stockholder in the proceeds of the sale by the corporation. Owen *v.* Potter, 115 Mich. 556, 73 N. W. 977.

45. **Claims against insolvent estates** see *infra*, XIII, G.

Presentation of claim as condition precedent to an action thereon see *infra*, XIV, B, 1, b, (I).

Presentation as a prerequisite to an action against heirs and devisees see DESCENT AND DISTRIBUTION, 14 Cyc. 208, 209.

46. *Alabama.*— Farris *v.* Stoutz, 78 Ala. 130; Floyd *v.* Clayton, 67 Ala. 265 (describing the methods in which claims may be presented); McDowell *v.* Jones, 58 Ala. 25; Fretwell *v.* McLemore, 52 Ala. 124; Halfman *v.* Ellison, 51 Ala. 543; Erwin *v.* Mobile Branch Bank, 14 Ala. 307; Jones *v.* Lightfoot, 10 Ala. 17.

Arizona.— O'Doherty *v.* Toole, 2 Ariz. 288, 15 Pac. 28.

Arkansas.— Cox *v.* Phelps, 65 Ark. 1, 45 S. W. 990; Gist *v.* Gans, 30 Ark. 285; Meyer *v.* Quartermous, 28 Ark. 45.

California.— Barthe *v.* Rogers, 127 Cal. 52, 59 Pac. 310; Morrow *v.* Barker, 119 Cal. 65, 51 Pac. 12; *In re* Halleck, 49 Cal. 111. See also Marsh *v.* Dooley, 52 Cal. 232 [*explained* in *In re* Crosby, 55 Cal. 574].

Colorado.— Thompson *v.* White, 25 Colo. 226, 54 Pac. 718.

Florida.— May *v.* Vann, 15 Fla. 553; Ellison *v.* Allen, 8 Fla. 206.

fixed by order of court within limits prescribed by statute.[47] The provisions of some of these statutes make it necessary for the creditor not only to exhibit his claim to the personal representative within the statutory period, but also to present

Illinois.—Waughop *v.* Bartlett, 165 Ill. 124, 46 N. E. 197; Kittredge *v.* Nicholes, 162 Ill. 410, 44 N. E. 742 [*affirming* 60 Ill. App. 604]; Barnard *v.* Barnard, 119 Ill. 92, 8 N. E. 320; Blanchard *v.* Williamson, 70 Ill. 647; Harris *v.* Douglas, 64 Ill. 466; Rosenthal *v.* Magee, 41 Ill. 370; Reitzell *v.* Miller, 25 Ill. 67; Thorn *v.* Watson, 10 Ill. 26; Tinker *v.* Babcock, 107 Ill. App. 78 [*affirmed* in 204 Ill. 571, 68 N. E. 445]; Wallace *v.* Monroe, 22 Ill. App. 602. See also Wilding *v.* Rhein, 12 Ill. App. 384.

Indiana.—Armacost *v.* Lindley, 116 Ind. 295, 19 N. E. 138; Tracewell *v.* Peacock, 55 Ind. 572; State *v.* Givan, 45 Ind. 267; Hyatt *v.* Mavity, 34 Ind. 415.

Iowa.— Wickham *v.* Hull, 102 Iowa 469, 71 N. W. 352; Schlutter *v.* Duhling, 100 Iowa 515, 69 N. W. 884; Cory *v.* Gillespie, 94 Iowa 347, 62 N. W. 837; Bayless *v.* Powers, 62 Iowa 601, 17 N. W. 907; Willcox *v.* Jackson, 51 Iowa 296, 1 N. W. 536; O'Donnell *v.* Hermann, 42 Iowa 60; Braught *v.* Griffith, 16 Iowa 26; Galloway *v.* Trout, 2 Greene 595.

Kansas.— Scroggs *v.* Tutt, 23 Kan. 181; Clawson *v.* McCune, 20 Kan. 337.

Kentucky.— Holmes *v.* Lusk, 78 Ky. 548.

Maine.— Marshall *v.* Perkins, 72 Me. 343.

Massachusetts.—Aiken *v.* Morse, 104 Mass. 277.

Minnesota.— Berryhill *v.* Gasquoine, 88 Minn. 281, 92 N. W. 1121; Jorgensen *v.* Larson, 85 Minn. 134, 88 N. W. 439; Gilman *v.* Maxwell, 79 Minn. 377, 82 N. W. 669; Hill *v.* Nichols, 47 Minn. 382, 50 N. W. 367; Fern *v.* Lenthold, 39 Minn. 212, 39 N. W. 399; State *v.* Ramsey County Probate Ct., 25 Minn. 22; Kentucky Commercial Bank *v.* Slater, 21 Minn. 172.

Mississippi.—Harris *v.* Hutcheson, 65 Miss. 9, 3 So. 34; Robertson *v.* Demoss, 23 Miss. 298; Cohen *v.* Sinking Fund Com'rs, 7 Sm. & M. 437.

Missouri.— Richardson *v.* Harrison, 36 Mo. 96; State *v.* Browning, 102 Mo. App. 455, 76 S. W. 719; Waltemar *v.* Schnick, 102 Mo. App. 133, 76 S. W. 1053; Wilks *v.* Murphy, 19 Mo. App. 221; Bauer *v.* Gray, 18 Mo. App. 173.

Montana.—Melton *v.* Martin, 28 Mont. 150, 72 Pac. 414.

New Hampshire.— Amoskeag Mfg. Co. *v.* Barnes, 48 N. H. 25; Walker *v.* Cheever, 39 N. H. 420; Harris *v.* Davis, 1 N. H. 248.

New Mexico.— Janes *v.* Brunswick, 8 N. M. 105, 42 Pac. 72.

New York.— Cornes *v.* Wilkin, 79 N. Y. 129 [*affirming* 14 Hun 428]; Thayer *v.* Clark, 48 Barb. 243.

North Carolina.— See Ridley *v.* Thorp, 3 N. C. 343; Ogden *v.* Witherspoon, 18 Fed. Cas. No. 10,461, 3 N. C. 227.

Pennsylvania.— Emerick's Estate, 172 Pa. St. 191, 33 Atl. 550; Oliver's Appeal, 101 Pa. St. 299; Stoever's Appeal, 3 Watts & S. 154; Cowan's Estate, 28 Pittsb. Leg. J. 119; Wright's Estate, 5 Pa. Co. Ct. 228.

South Carolina.— Miller *v.* Mitchell, Bailey Eq. 437. See also Edwards *v.* King, 7 S. C. 370.

Texas.—Buchanan *v.* Wagnon, 62 Tex. 375; Converse *v.* Sorley, 39 Tex. 515; Green *v.* Rugely, 23 Tex. 539; Danzey *v.* Swinney, 7 Tex. 617; McDougald *v.* Hadley, 1 Tex. 490; National Guaranty Loan, etc., Co. *v.* Fly, 29 Tex. Civ. App. 533, 69 S. W. 231.

Utah.— Fullerton *v.* Bailey, 17 Utah 85, 53 Pac. 1020.

Wyoming.— O'Keefe *v.* Foster, 5 Wyo. 343, 40 Pac. 525.

See 22 Cent. Dig. tit. "Executors and Administrators," § 764; and Schouler Ex. §§ 390, 418.

An administratrix ad colligendum is not such a representative of the estate as to require a presentation of a claim against the estate within eighteen months after the grant of letters to her. Erwin *v.* Mobile Branch Bank, 14 Ala. 307.

When statutes not applicable.— The Indiana statute providing that claims against estates shall be filed in the court of common pleas does not apply to cases where the legal representative of a deceased joint obligor is a proper party defendant to an action against the survivor. Braxton *v.* State, 25 Ind. 82. See also Martin *v.* Asher, 25 Ind. 237. The Pennsylvania statute providing that a claim not exhibited to the administrator within twelve months after notice of letters of administration, or until after distribution of the assets has been made, shall be barred, does not apply where the distribution was made by the administrator without the appointment of an auditor as provided by such statute. Clunk's Estate, 5 Pa. Co. Ct. 280; Loder's Estate, 5 Pa. Co. Ct. 276; Wright's Estate, 5 Pa. Co. Ct. 228. It has been held in Kentucky that if the personal representative has no assets in his hands with which to pay debts there is no necessity for creditors to present their demands to him for payment, but that after an action to settle the estate is commenced it is within the sound discretion of the chancellor to prescribe the time within which creditors may present their claims, proved and verified according to law, and that the question of the validity of the claims is subject to his decision. Grey *v.* Lewis, 79 Ky. 453.

The fact that the personal representative includes the claim in a report made to the court as a foundation for a proceeding to sell land to pay debts does not relieve the creditor from the necessity of complying with a statute requiring that claims be exhibited to the court. Roberts *v.* Flatt, 142 Ill. 485, 32 N. E. 484 [*affirming* 42 Ill. App. 608].

47. Cone *v.* Dunham, 59 Conn. 145, 20 Atl. 311, 8 L. R. A. 647; Weeks *v.* Hull, 19 Conn. 376, 50 Am. Dec. 249; Wooden *v.* Cowles, 11

it to the probate court for allowance[48] or to file it in the court having probate jurisdiction;[49] but statutes requiring such filing have been held to be directory only, on the ground that presentation to the personal representative is of itself sufficient to prevent the claim from being barred.[50] In some states it is required that the creditor shall not only present but prove his claim within a limited period, presentation alone not being sufficient to prevent the statutory bar;[51] while in other states nothing more than formal, *ex parte* proof is required at the time of presentation.[52] By some statutes it is provided that no claim against a decedent shall be a charge against, or a lien upon, his estate, unless presented or filed within a certain time,[53] while under others, the effect of non-presentation within the statutory time is merely to postpone the claimant to those creditors who have duly presented their claims,[54] or to release the representative from liability to the creditor for payment of debts, legacies, and distributive shares before the claim is presented, and to confine the creditor to such assets as remain undistributed or, in the absence thereof, to remit him to his remedy against the heirs, devisees, legatees, and distributees to whom assets have come.[55] Where statutes of the latter character are found, it has been held that the claim may be filed and an accounting demanded at any time before the final discharge of the representative,[56] unless the circumstances are such that the creditor is estopped by his delay.[57] The statutes of non-claim are in some states considered as statutes of limitation,[58] but in others they are considered merely as special acts designed for the purpose of facilitating the speedy settlement of decedents' estates.[59] These

Conn. 292; Fitzgerald *v.* Chariton First Nat. Bank, 64 Nebr. 260, 89 N. W. 813; Young *v.* Young, 45 N. J. L. 197; Freehold First Nat. Bank *v.* Thompson, 61 N. J. Eq. 188, 48 Atl. 333; Lewis *v.* Champion, 40 N. J. Eq. 59; Gould *v.* Tingley, 16 N. J. Eq. 501; Pereles *v.* Leiser, 119 Wis. 347, 96 N. W. 799; Butler *v.* Templeton, 115 Wis. 382, 91 N. W. 969; Fields *v.* Mundy, 106 Wis. 383, 82 N. W. 343, 80 Am. St. Rep. 39; Austin *v.* Saveland, 77 Wis. 108, 45 N. W. 955 [*distinguishing* Brill *v.* Ide, 75 Wis. 113, 43 N. W. 559].

48. Farmers' Sav. Bank *v.* Burgin, 73 Mo. App. 108; Price *v.* McCause, 30 Mo. App. 627 See *infra*, X, B, 14, c.

In Arkansas it has been held that the exhibition of a properly authenticated claim to the personal representative arrests the statute of non-claim, and the law does not limit the time for presenting the claim to the probate court for classification. Randolph *v.* Ward, 29 Ark. 238.

49. Cory *v.* Gillespie, 94 Iowa 347, 62 N. W. 837.

50. Willis *v.* Farley, 24 Cal. 490. See also *In re* Schroeder, 46 Cal. 304; Bell *v.* Mills, 123 Fed. 24, 59 C. C. A. 104, construing the California statutes.

51. Collamore *v.* Wilder, 19 Kan. 67.

In Iowa a claim of the fourth class must be filed and proved within a certain time after notice of the representative's appointment or it will be barred unless the claim is pending in court or peculiar circumstances entitle the claimant to equitable relief. Pearson *v.* Christman, 93 Iowa 703, 91 N. W. 1085; Orcutt *v.* Hanson, 70 Iowa 604, 31 N. W. 950; Clark *v.* Tallman, 68 Iowa 372, 27 N. W. 261; Colby *v.* King, 67 Iowa 458, 25 N. W. 704; Brownell *v.* Williams, 54 Iowa 353, 6 N. W. 530; Lacey *v.* Loughridge, 51 Iowa 629, 2 N. W. 515; Noble *v.* Morrey, 19 Iowa 509; Woodward *v.* Laverty, 14 Iowa 381.

52. Posey *v.* Decatur Bank, 12 Ala. 802 (holding that witnesses need not then be produced); Mardis *v.* Shakleford, 4 Ala. 493; Jones *v.* Pharr, 3 Ala. 283.

53. See O'Brien *v.* Larson, 71 Minn. 371, 74 N. W. 148, holding, however, that where the probate court erroneously allows a claim not presented within the statutory period, the error does not go to the jurisdiction of the court. See also Emerick's Estate, 172 Pa. St. 191, 33 Atl. 550; Demmy's Appeal, 43 Pa. St. 155.

54. See *infra*, X, D, 2, c, (II), (B), (12).

55. *In re* Mullon, 145 N. Y. 98, 39 N. E. 821; O'Conner *v.* Gifford, 117 N. Y. 275, 22 N. E. 1036 [*affirming* 3 N. Y. Suppl. 337 (*reversing* 3 N. Y. Suppl. 207, 6 Dem. Surr. 71)]; Erwin *v.* Loper, 43 N. Y. 521; Ford *v.* Rouse, 1 Rice (S. C.) 219. See *infra*, X, B, 12.

56. *In re* Mullon, 145 N. Y. 98, 39 N. E. 821; Lawyers' Surety Co. *v.* Reinach, 25 Misc. (N. Y.) 150, 54 N. Y. Suppl. 205 [*affirming* 23 Misc. 242, 51 N. Y. Suppl. 162]. See also Ford *v.* Rouse, 1 Rice (S. C.) 219.

57. O'Conner *v.* Gifford, 117 N. Y. 275, 22 N. E. 1036 [*affirming* 3 N. Y. Suppl. 337 (*reversing* 3 N. Y. Suppl. 207, 6 Dem. Surr. 71)]. See also Matter of Crise, 7 N. Y. Suppl. 202, 2 Connoly Surr. (N. Y.) 59.

58. Williamson *v.* McCrary, 33 Ark. 470; Linthicum *v.* Tapscott, 28 Ark. 267; Cohea *v.* Sinking Fund Com'rs, 7 Sm. & M. (Miss.) 437; Ryans *v.* Boogher, 169 Mo. 673, 67 S. W. 1048. See also Whitmore *v.* San Francisco Sav. Union, 50 Cal. 145.

59. *Alabama.*— Yniestra *v.* Tarleton, 67 Ala. 126.

statutes are not usually given a retroactive effect.[60] Even independent of statute a failure to present and prove a claim against a decedent's estate within a reasonable time may amount to waiver of the same,[61] or through long failure to present the claim or to take any steps to enforce it the creditor may be barred by laches.[62] There can be no judicial determination that there are no claims against an estate until the expiration of the statutory time for filing claims.[63] If a valid presentation of a claim has once been made, a change in the administration by the appointment of another representative does not necessitate a second presentation.[64] Where a claim has been duly presented by a creditor and is afterward assigned, presentation by the assignee is unnecessary,[65] and where a creditor has duly presented or filed his claim against the estate of his deceased debtor a surety who pays the debt stands in the place of the creditor as to the steps already taken to enforce the claim and is subrogated to the creditor's rights to prosecute the claim to allowance and payment.[66] Where a claim has been originally presented or filed in time a mere substitution of parties, made necessary by a decision of the supreme court, after the expiration of the time limited for presentation, does not make the claim a new one so as to be barred because not presented within the required period.[67]

b. Effect of Representative's Knowledge of Existence of Debt. According to the weight of authority knowledge on the part of an executor or administrator of the existence of a debt or claim against the estate is not sufficient to dispense with the necessity of presentation.[68]

Illinois.— Waughop *v.* Bartlett, 165 Ill. 124, 46 N. E. 197; Morse *v.* Gillette, 93 Ill. App. 23 [*affirmed* in 191 Ill. 371, 61 N. E. 1136]; Smith *v.* Preston, 82 Ill. App. 285. See also Curry *v.* Mack, 90 Ill. 606, holding that a statutory provision that the failure of a holder of a note to present it for allowance against the deceased principal's estate within two years after the granting of letters testamentary or of administration will release the surety enters into and forms a part of the contract, and is not merely a statute of limitation.

New Jersey.— Newbold *v.* Fenimore, 53 N. J. L. 307, 21 Atl. 939.

Texas.— Standifer *v.* Hubbard, 39 Tex. 417; Ryan *v.* Flint, 30 Tex. 382.

Vermont.— Briggs *v.* Thomas, 32 Vt. 176.

60. *Alabama.*— Morrissett *v.* Carr, (1900) 27 So. 844; Aycock *v.* Johnson, 119 Ala. 405, 24 So. 543; Andrews *v.* Huckabee, 30 Ala. 143; McHenry *v.* Wells, 28 Ala. 451.

California.— Hibernia Sav., etc., Soc. *v.* Hayes, 56 Cal. 297.

Kentucky.— Holmes *v.* Lusk, 78 Ky. 548, 1 Ky. L. Rep. 259.

Minnesota.— State *v.* Ramsey County Probate Ct., 25 Minn. 22.

Missouri.— Ambs *v.* Caspari, 13 Mo. App. 587.

Pennsylvania.— Benner *v.* Phillips, 9 Watts & S. 13.

See 22 Cent. Dig. tit. "Executors and Administrators," § 767.

Estates in progress of administration.— The Texas act of 1840, requiring claims against estates of decedents to be presented to the executor or administrator for his approval, governed the procedure in the administration of the estates then in progress of administration, as well as those of which the administration was subsequently opened. Harrison *v.* Knight, 7 Tex. 47.

61. Barnard *v.* Barnard, 119 Ill. 92, 8 N. E. 320. See also Harris *v.* Douglas, 64 Ill. 466; O'Connor *v.* Gifford, 117 N. Y. 275, 22 N. E. 1036 [*affirming* 3 N. Y. Suppl. 337 (*reversing* 3 N. Y. Suppl. 207, 6 Dem. Surr. 71)].

62. *Minnesota.*— Hill *v.* Nichols, 47 Minn. 382, 50 N. W. 367; O'Mulcahy *v.* Gragg, 45 Minn. 112, 47 N. W. 543.

New York.— O'Connor *v.* Gifford, 117 N. Y. 275, 22 N. E. 1036 [*affirming* 3 N. Y. Suppl. 337 (*reversing* 3 N. Y. Suppl. 207, 6 Dem. Surr. 71)].

Pennsylvania.— Haage's Appeal, 17 Pa. St. 181; Clarke's Estate, 1 Phila. 356; Simpson's Estate, 1 Phila. 300.

Texas.— Chandler *v.* Hudson, 11 Tex. 32.

United States.— Rogers *v.* Law, 1 Black 253, 17 L. ed. 58.

63. Seery *v.* Murray, 107 Iowa 384, 77 N. W. 1058; *In re* Higgins, 15 Mont. 474, 39 Pac. 506, 28 L. R. A. 116.

64. Floyd *v.* Clayton, 67 Ala. 265; McHardy *v.* McHardy, 7 Fla. 301; Parks *v.* Lubbock, (Tex. Civ. App. 1899) 50 S. W. 466. See also Cochran *v.* Germania Bank, 10 Ky. L. Rep. 449.

65. Ryan *v.* Flanagan, 38 N. J. L. 161.

66. Braught *v.* Griffith, 16 Iowa 26, holding also that the surety is entitled to demand payment of the claim as in the class in which the claim was placed by the original filing. See also Harman *v.* Harman, 62 Nebr. 452, 87 N. W. 177.

67. McCall *v.* Lee, 120 Ill. 261, 11 N. E. 522 [*affirming* 24 Ill. App. 585].

68. *Alabama.*— Borum *v.* Bell, 132 Ala. 85, 31 So. 454; McDowell *v.* Jones, 58 Ala. 25; Jones *v.* Lightfoot, 10 Ala. 17.

c. Effect of Suit on Claim — (i) *In General.* According to the weight of authority the commencement of a suit and its continuous prosecution operates as a presentation of a claim or obviates the necessity of presentation.[69] But this result is not produced where plaintiff voluntarily submits to a nonsuit,[70] or where

Connecticut.— Dime Savings Bank *v.* McAlenney, 76 Conn. 141, 55 Atl. 1019. See also Pike *v.* Thorp, 44 Conn. 450.

Florida.— Bush *v.* Adams, 22 Fla. 177; Fillyau *v.* Laverty, 3 Fla. 72.

Illinois.— Morse *v.* Pacific R. Co. 191 Ill. 356, 61 N. E. 104 [*affirming* 93 Ill. App. 31]; Roberts *v.* Flatt, 142 Ill. 485, 32 N. E. 484 [*affirming* 42 Ill. App. 608].

Maryland.— See Steuart *v.* Carr, 6 Gill 430, statute.

Missouri.— See Madison County Bank *v.* Suman, 79 Mo. 527.

New Jersey.— Vandyke *v.* Chandler, 10 N. J. L. 49.

New York.— Niles *v.* Crocker, 88 Hun 312, 34 N. Y. Suppl. 761; Matter of Morton, 7 Misc. 343, 28 N. Y. Suppl. 82.

See 22 Cent. Dig. tit. "Executors and Administrators," § 766.

Contra.— Perry *v.* West, 40 Miss. 233; Mobile Branch Bank *v.* Rhew, 37 Miss. 110; Brown *v.* Hill, 26 Miss. 643; Ellis *v.* Carlisle, 8 Sm. & M. (Miss.) 552; Miller *v.* Jefferson College, 5 Sm. & M. (Miss.) 651; Edwards *v.* King, 7 S. C. 370.

Representative acting in dual capacity.— Where the same person is the executor or administrator of both the debtor and creditor, formal presentation of the claim appears to be unnecessary. Thomas *v.* Chamberlain, 39 Ohio St. 112. So also where A was executor of B and was also the president of a corporation which held a note given by B in his lifetime, it was held that A's knowledge and possession of the note as president of the corporation were equivalent to knowledge and possession of the note as executor, and dispensed with presentation of the claim. Brown *v.* Brown, 56 Conn. 249, 14 Atl. 718, 7 Am. St. Rep. 307, 58 Conn. 85, 19 Atl. 236.

69. *Alabama.*—Freeman *v.* Pullen, 119 Ala. 235, 24 So. 57; Floyd *v.* Clayton, 67 Ala. 265; McDougald *v.* Dawson, 30 Ala. 553; Hunley *v.* Shuford, 11 Ala. 203; Jones *v.* Lightfoot, 10 Ala. 17.

Arkansas.— See Clark *v.* Shelton, 16 Ark. 474.

Florida.— Fillyau *v.* Laverty, 3 Fla. 72.

Illinois.— Scheel *v.* Eidman, 68 Ill. 193 [*distinguishing* Gilbert *v.* Guptill, 34 Ill. 112]. The creditor is not compelled to present his claim to the probate court for allowance but may choose his forum and resort in the first instance to the circuit court if that court has jurisdiction. Rosenthal *v.* Magee, 41 Ill. 370.

Iowa.— The statute requiring claims to be filed and proved within a certain time contains an exception as to claims "pending in the district or supreme court." See Moore *v.* McKinley, 60 Iowa 367, 14 N. W. 768; O'Donnell *v.* Hermann, 42 Iowa 60; McCrary *v.* Deming, 38 Iowa 527; Cooley *v.* Smith, 17 Iowa 99. But this provision does not apply to proceedings in the district court for the establishment of the claim; the statute contemplates claims pending on the law or equity side of the district court, and not those pending within its probate jurisdiction. Farmers', etc., Bank *v.* Cleveling, 84 Iowa 677, 51 N. W. 178.

Maryland.— See Steuart *v.* Carr, 6 Gill 430.

Missouri.— Ryans *v.* Boogher, 169 Mo. 673, 69 S. W. 1048; Madison County Bank *v.* Suman, 79 Mo. 527; Farrar *v.* Comfort, 33 Mo. 44; Tevis *v.* Tevis, 23 Mo. 256; Waltemar *v.* Schnick, 102 Mo. App. 133, 76 S. W. 1053; Gewe *v.* Hanszen, 85 Mo. App. 136.

New York.— See Rauth *v.* Davenport, 18 N. Y. Suppl. 721, 22 N. Y. Civ. Proc. 121.

Contra.— Newbold *v.* Fenimore, 53 N. J. L. 307, 21 Atl. 939; Robins *v.* Arnold, 42 N. J. Eq. 511, 8 Atl. 721 (bill to discover and follow trust funds); Mutual Ben. L. Ins. Co. *v.* Howell, 32 N. J. Eq. 146 (bill to foreclose a mortgage); Dickinson's Estate, 4 Pa. Dist. 777.

The issuing of a citation in the orphans' court in the effort to collect a claim against a decedent's estate is commencing an action, and is equivalent to a suit at law in the common pleas, and hence is sufficient to toll the limitation of liens. Bartley's Estate, 6 Pa. Dist. 436.

Judgments obtained in suits against an executor or administrator begun within the period of limitation are not included within the statute requiring that claims shall be both exhibited and presented. Gewe *v.* Hanszen, 85 Mo. App. 136. So also a judgment rendered by a court of competent jurisdiction against a personal representative in an action brought within two years from the grant of letters will be as binding as if the claim had been presented and allowed in the county court. Roberts *v.* Flatt, 142 Ill. 485, 32 N. E. 484 [*affirming* 42 Ill. App. 608]; Darling *v.* McDonald, 101 Ill. 370. But in a foreclosure proceeding this effect is not produced if the decree of foreclosure merely provides for a sale on failure to pay the sum found due, and does not require the personal representative to pay any deficiency after the sale. Roberts *v.* Flatt, *supra.*

Amendment of petition.— A suit upon the agreement recited in a bond is a sufficient exhibition of plaintiff's demand to save it from the operation of the statute, although plaintiff afterward amends his petition and sues upon the bond for the penalty. Farrar *v.* Comfort, 33 Mo. 44.

70. Dilbone *v.* Moorer, 14 Ala. 426; Bigger *v.* Hutchings, 2 Stew. (Ala.) 445.

the proceedings instituted are voluntarily abandoned by him,[71] or vacated for irregularity,[72] and are not renewed.

(II) *Claims in Suit at Decedent's Death.* The mere pendency of a suit against the decedent at his death is not a presentation or exhibition of the claim within the meaning of the statute of non-claim, nor does it dispense with the necessity of presentation unless the statute so provides;[73] but where plaintiff within the time limited for the presentation of claims obtains an order of revivor or making the administrator a party to such suit, this order is generally equivalent to and dispenses with the actual presentation of the claim.[74] There must, however, be a revivor within the period limited by statute for presentation in order to prevent the claim becoming barred.[75]

If plaintiff suffers a nonsuit under the ruling of the court against his right to recover on the case as presented, it seems that the institution of the suit would, if sufficiently descriptive of the claim, be regarded as a sufficient presentation. Dilbone *v.* Moorer, 14 Ala. 426.

71. Pipkin *v.* Hewlett, 17 Ala. 291.

72. Boggs *v.* Mobile Branch Bank, 10 Ala. 970.

73. Bush *v.* Adams, 22 Fla. 177; Schlutter *v.* Dahling, 100 Iowa 515, 69 N. W. 884. *Compare* Woodward *v.* Laverty, 14 Iowa 381; Fern *v.* Leuthold, 39 Minn. 212, 39 N. W. 399; Berkey *v.* Judd, 27 Minn. 475, 8 N. W. 383.

74. *Alabama.*— Malone *v.* Hundley, 52 Ala. 147; Garrow *v.* Carpenter, 1 Port. 359.

Arkansas.— Eddins *v.* Graddy, 28 Ark. 500; McCoy *v.* Jackson, 21 Ark. 472; Goodrich *v.* Fritz, 9 Ark. 440, holding also that the statutory affidavit is unnecessary in such a case. See also Walker *v.* Byers, 14 Ark. 246.

Florida.— Anderson *v.* Agnew, 38 Fla. 30, 20 So. 766; Ellison *v.* Allen, 8 Fla. 206.

Iowa.— See O'Donnell *v.* Hermann, 42 Iowa 60.

New York.— Tindal *v.* Jones, 11 Abb. Pr. 258.

Texas.— See Simpson *v.* Knox, 1 Tex. Unrep. Cas. 569.

Presentment or demand not a prerequisite to revivor.— Clodfelter *v.* Hulett, 92 Ind. 426; Cochran *v.* Whittaker, 10 Ky. L. Rep. 495 (holding, however, that plaintiff must make the expurgatory affidavit required by statute); Gray *v.* Patton, 3 Ky. L. Rep. 393; Apperson *v.* Hazelrigg, 2 Ky. L. Rep. 64; Musser *v.* Chase, 29 Ohio St. 577; Strong *v.* Eldridge, 8 Wash. 595, 36 Pac. 696.

Where a defendant dies pending his appeal from a judgment, and his executors are substituted, and obtain a reversal, the claim need not be presented to his executors before a retrial. Megrath *v.* Gilmore, 15 Wash. 558, 46 Pac. 1032.

If plaintiff suffers a nonsuit after such revivor and institutes a new suit within a year, it is not necessary to exhibit the claim again to the administrator. McCoy *v.* Jackson, 21 Ark. 472.

The service of a scire facias to revive a judgment upon the personal representative would be in effect a presentment of the claim. See Jones *v.* Lightfoot, 10 Ala. 17. But it is otherwise if the scire facias is voluntarily abandoned (Pipkin *v.* Hewlett, 17 Ala. 291. See also Waddill *v.* John, 57 Ala. 93, where the scire facias was abandoned because void) and in such case the issuance of an alias scire facias after eighteen months from the grant of letters, on which the executor is made a party, is not such a presentation as will save the claim from the bar (Waddill *v.* John, *supra*).

Under the statutes of California and Idaho if an action is pending against the decedent at the time of his death, plaintiff must present his claim against the estate for allowance, and no recovery can be had in the action unless such presentation is shown. Frazier *v.* Murphy, 133 Cal. 91, 65 Pac. 326; Faulkner *v.* Hendy, 123 Cal. 467, 56 Pac. 99; Vermont Marble Co. *v.* Black, 123 Cal. 21, 55 Pac. 599; Falkner *v.* Hendy, 107 Cal. 49, 40 Pac. 21, 386; Derby *v.* Jackman, 89 Cal 1, 26 Pac. 610; Bollinger *v.* Manning, 79 Cal. 7, 21 Pac. 375; U. S. *v.* Hailey, 2 Ida. (Hasb.) 22, 3 Pac. 263. See also Hibernia Sav., etc., Soc. *v.* Wackenreuder, 99 Cal. 503, 34 Pac. 219. The presentation of the claim must be proved, although it is not denied in the answer. Derby *v.* Jackman, 89 Cal. 1, 26 Pac. 610. But see *In re* Page, Myr. Prob. (Cal.) 61. Where a judgment rendered against a decedent in his lifetime is reversed on an appeal taken by the administratrix as substituted defendant, the judgment creditor cannot recover from the administratrix if he has failed to present his claim against the estate, as the action is deemed to be pending until its final determination on appeal unless the judgment is sooner satisfied, and the judgment cannot be considered satisfied by an execution issued and levy made before decedent's death and a sale thereunder after the appeal was taken. Vermont Marble Co. *v.* Black, 123 Cal. 21, 55 Pac. 599. The Idaho statute applies to suits by the United States as well as to suits by private individuals. U. S. *v.* Hailey, 2 Ida. (Hasb.) 22, 3 Pac. 263.

75. Travis *v.* Tartt, 8 Ala. 574; State Bank *v.* Tucker, 15 Ark. 39; Bush *v.* Adams, 22 Fla. 177. See also Waddill *v.* John, 57 Ala. 93. But see Berkey *v.* Judd, 27 Minn. 475, 8 N. W. 383.

d. Effect of Insolvency of Estate. In the absence of special statutory provisions the ordinary statutes of non-claim requiring presentation of claims within a certain period are applicable, although the estate is declared insolvent.[76]

e. Effect of Testamentary Provisions. A formal direction in a will that all the testator's just debts shall be paid does not obviate the necessity of presenting and proving claims within the statutory period;[77] but under the statutes of some states if the will empowers and directs the executor as to the sale of property, the payment of debts and legacies, and the management of the estate, and especially if it confers upon him a power to sell, or vests in him an express trust for the purpose of paying debts, etc., or directs that the estate be managed and settled without the intervention of the court the claims of creditors need not be presented,[78] although to impose a trust on the land so as to produce this effect the intention of the testator must be clear, certain, and free from ambiguity.[79]

2. What Claims Should Be Presented — a. In General. As a general rule all claims against the deceased should be presented for allowance,[80] and as used in the statutes under discussion the word "claims" is held to include such debts or demands as existed against the decedent in his lifetime and might have been enforced against him by personal actions for the recovery of money.[81] Debts or demands not falling within this category need not as a general rule be presented.[82]

76. Cawthorne *v.* Weisinger, 6 Ala. 714. See also McDowell *v.* Jones, 58 Ala. 25. And see *infra*, XIII, G, 1, a.

The Tennessee statute limiting the time within which creditors can demand their respective accounts and claims from the personal representative of the estate is not affected by the laws regulating the administration of an insolvent estate. Marley *v.* Cummings, 5 Sneed 479.

77. Collamore *v.* Wilder, 19 Kan. 67; O'Neil *v.* Freeman, 45 N. J. L. 208

78. Abbay *v.* Hill, 64 Miss. 340, 1 So. 484; Smythe *v.* Caswell, 65 Tex. 379; Bell *v.* Farmers', etc., Bank, (Tex. Civ. App. 1903) 76 S. W. 798; Parks *v.* Lubbock, (Tex. Civ. App. 1899) 50 S. W. 466; *In re* Macdonald, 29 Wash. 422, 69 Pac. 1111; Moore *v.* Kirkman, 19 Wash. 605, 54 Pac. 24. See *infra*, XXIII.

79. Gwin *v.* Nettles, (Miss. 1895) 18 So. 798; Abbay *v.* Hill, 64 Miss. 340, 1 So. 484.

Parol evidence of destroyed will.— Where the testator's will, together with the book in which it had been recorded, had been destroyed by fire, and the contents of the will was proved by a witness, who testified that he had often examined the will, that his recollection of its contents was that it provided that the testator's debts should be paid out of his estate by his executor, and that it authorized his executor to sell any part of the estate, real or personal, for the payment of debts, it was held that the evidence was not sufficiently certain to impose upon the testator's real estate a trust for the payment of debts, so as to prevent a claim from being barred. Gwin *v.* Nettles, (Miss. 1895) 18 So. 798.

80. Fretwell *v.* McLemore, 52 Ala. 124; Walker *v.* Byers, 14 Ark. 246; *In re* Halleck, 49 Cal. 111; Cornes *v.* Wilkin, 79 N. Y. 129 [*affirming* 14 Hun 428]; Ridley *v.* Thorpe, 3 N. C. 525.

81. Fallon *v.* Butler, 21 Cal. 24, 81 Am. Dec. 140; Stichter *v.* Cox, 52 Nebr. 532, 72 N. W. 843; Rice *v.* Connelly, 71 N. H. 382, 52 Atl. 446; Sawyer *v.* Hebard, 58 Vt. 375, 3 Atl. 529.

"Claim" means legal demand. Gray *v.* Palmer, 9 Cal. 616.

82. *Alabama.*— Locke *v.* Palmer, 26 Ala. 312.

California.— Hibernia Sav., etc., Soc. *v.* Conlin, 67 Cal. 178, 7 Pac. 477 (claim on a mortgage given to secure the debt of a third person); Fallon *v.* Butler, 21 Cal. 24, 81 Am. Dec. 140.

Iowa.— Pratt *v.* Fishwild, 121 Iowa 642, 96 N. W. 1089 (holding that where a claim has been filed against an estate and the parties jointly liable are insisting that the estate shall pay the whole debt, and that their liability to the estate shall not exceed half the amount so paid, such claim is not such a claim as is required to be presented within twelve months); Rogers *v.* Gillett, 56 Iowa 266, 9 N. W. 204 (holding that the claim by an heir to an extra allowance on final distribution of the estate, by virtue of an agreement with the other heirs, not being a debt against the decedent, is not a claim against the estate, in the sense that it must be filed within a year from the granting of letters of administration).

New Hampshire.— Rice *v.* Connelly, 71 N. H. 382, 52 Atl. 446.

Vermont.— Manning *v.* Leighton, 65 Vt. 84, 26 Atl. 258, 24 L. R. A. 684.

See 22 Cent. Dig. tit. "Executors and Administrators," § 768.

But see Walker *v.* Byers, 14 Ark. 246, 253, where the court said: "We think it clear that the claims and demands which the statute contemplates shall be exhibited . . . are all claims capable of being asserted in any court of justice, either of law or equity, existing either at the time of the death of the deceased, or coming into existence at any time after the death, and before the expiration of the two years."

Among claims which should be presented may be mentioned claims founded on contract generally,[83] a claim arising out of a contract of guaranty[84] or indemnity,[85] a claim for damages for breach of contract or covenant,[86] a claim founded on a devastavit committed by an executor or administrator since deceased,[87] a claim founded on services to decedent,[88] a claim by a surety who has paid his principal's debt, for reimbursement from his estate,[89] a claim of a principal debtor against the estate of a person sued as his trustee in "trustee process,"[90] a claim against decedent as tenant in common,[91] a claim against the estate of a deceased life-tenant for dissipating the goods in which he had only the life-estate,[92] a sheriff's claim for money advanced to decedent for taxes,[93] and claims of heirs based on the appropriation of community property by one member of the community after the death of the other.[94] Debts contracted out of the state are within the statute of non-claim and must be presented.[95] Among claims which need not be presented may be mentioned purely equitable claims,[96] claims for funeral expenses,[97] claims for legacies or distributive shares[98] or the widow's award out of the personal property of the estate,[99] unliquidated claims,[1] including claims

Division of fund in claimant's hands.— Where, by the division of a fund in a certain person's hands, and a retention of his own portion, his claim is satisfied, he need not present a claim. Sharpstein *v.* Friedlander, 54 Cal. 58.

Allowance of credit on note due decedent.— An administrator may properly allow credits on a note due the decedent, which he knows to be just and such as could be established, without requiring a suit and without the credits being established in the manner prescribed by statute for other claims against the estate. Stonebreaker *v.* Friar, 70 Tex. 202, 7 S. W. 799.

83. Gilman *v.* Maxwell, 79 Minn. 377, 82 N. W. 669.

84. National Guaranty L. & T. Co. *v.* Fly, 29 Tex. Civ. App. 533, 69 S. W. 231.

85. Maddock *v.* Russell, 109 Cal. 417, 42 Pac. 139.

86. McDowell *v.* Jones, 58 Ala. 25; Ratcliff *v.* Leuning, 30 Ind. 289; Hartman *v.* Lee, 30 Ind. 281; Clark *v.* Gates, 84 Minn. 381, 87 N. W. 941 (breach of warranty); Pickett *v.* Ford, 4 How. (Miss.) 246.

A money claim arising out of a breach of contract of sale must be presented. Jorgensen *v.* Larson, 85 Minn. 134, 88 N. W. 439; Smith *v.* Hickman, Cooke (Tenn.) 330; Lewis *v.* Hickman, 2 Overt. (Tenn.) 317. *Contra*, Bullion *v.* Campbell, 27 Tex. 653; Peters *v.* Phillips, 19 Tex. 70, 70 Am. Dec. 319; Evans *v.* Hardeman, 15 Tex. 480; Robinson *v.* McDonald, 11 Tex. 385, 62 Am. Dec. 480. But see Sutton *v.* Page, 4 Tex. 142.

87. Page *v.* Bartlett, 101 Ala. 193, 13 So. 768; Taylor *v.* Robinson, 69 Ala. 269; McDowell *v.* Jones, 58 Ala. 25; Fretwell *v.* McLemore, 52 Ala. 124. *Aliter* where the claim is on the administration bond. Gordon *v.* Gibbs, 3 Sm. & M. (Miss.) 473.

Fraudulent concealment.— That the devastavit was fraudulently concealed by the deceased administrator in his lifetime does not affect the statute of non-claim. Taylor *v.* Robinson, 69 Ala. 269. See *infra*, X, B, 4, c, (II).

88. Etchas *v.* Orena, 127 Cal. 588, 60 Pac. 45; Grant *v.* Grant, 63 Conn. 530, 29 Atl. 15, 38 Am. St. Rep. 379; *In re* Kessler, 87 Wis. 660, 59 N. W. 129, 41 Am. St. Rep. 74.

89. Bauer *v.* Gray, 18 Mo. App. 164.

90. Chapman *v.* Gayle, 32 N. H. 141, holding that the claim will be barred by a failure to present it or by its disallowance and a neglect to appeal.

91. McKneely *v.* Terry, 61 Ark. 527, 33 S. W. 953.

92. Quicksall *v.* Chew, (N. J. Ch. 1897) 38 Atl. 442.

93. Brown *v.* Porter, 7 Humphr. (Tenn.) 373.

94. Rose *v.* England, 51 Tex. 617.

95. Jones *v.* Drewry, 72 Ala. 311. They were, however, expressly excepted from the operation of the Alabama statute of non-claim of 1815, which was superseded by the code of 1852. See Jones *v.* Drewry, 72 Ala. 311; Sanford *v.* Wicks, 3 Ala. 369; Bigger *v.* Hutchings, 2 Stew. (Ala.) 445.

96. Toulouse *v.* Burkett, 2 Ida. (Hasb.) 184, 10 Pac. 26; Barton Nat. Bank *v.* Atkins, 72 Vt. 33, 47 Atl. 176; Herrick *v.* Belknap, 27 Vt. 673; Heaton *v.* Thatcher, 59 Fed. 731.

97. Potter *v.* Lewin, 123 Cal. 146, 55 Pac. 783; Dampeir *v.* St. Paul Trust Co., 46 Minn. 526, 49 N. W. 286; Sawyer *v.* Hebard, 58 Vt. 375, 3 Atl. 529. *Compare* Walley *v.* Gentry, 68 Mo. App. 298.

98. Amos *v.* Campbell, 9 Fla. 187; Cook *v.* Cook, 92 Ind. 398.

Complaint for allowance of legacy may be in form of claim against estate. Fickle *v.* Snepp, 97 Ind. 289, 49 Am. Rep. 449.

99. Miller *v.* Miller, 82 Ill. 463.

1. Jacobs' Succession, 5 Rob. (La.) 270; Anderson *v.* Birdsall, 19 La. 441; King *v.* Cassidy, 36 Tex. 531; Garrett *v.* Gaines, 6 Tex. 435; National Guaranty L. & T. Co. *v.* Fly, 29 Tex. Civ. App. 533, 69 S. W. 231. But see Hamblin *v.* Hook, 6 La. 73.

A claim on a guaranty by a locator, to the obligee, of a dollar per acre for land, if he will accept of a certain selection, is a claim for unliquidated damages, being the amount which the value of the land falls short of that price; and such claim need not be presented

founded in tort,[2] and claims of title or for possession or recovery of property.[3] A right acquired by garnishment against a decedent, being a mere liability and not a "claim," need not be registered.[4]

b. Contingent Claims.[5] Within the meaning of the statutes relating to presentation of claims against a decedent's estate, a contingent claim is one under which the existence of any right or liability is not presently certain or absolute but is dependent upon some future event which may or may not happen. If the right or liability exists independent of the event, the claim is absolute, notwithstanding the fact that until the happening of the event it may be uncertain in amount or unenforceable.[6] In many jurisdictions contingent claims are not within the

to an administrator before suit. Evans *v.* Hardeman, 15 Tex. 480.

A demand for discovery and accounting, since it necessarily involves an uncertain amount, need not be presented to the administrator for allowance. Neis *v.* Farquharson, 9 Wash. 508, 37 Pac. 697.

2. Blum *v.* Welborne, 58 Tex. 157; Ferrill *v.* Mooney, 33 Tex. 219. See also Hardin *v.* Sin Claire, 115 Cal. 460, 47 Pac. 363. *Contra,* Warner *v.* Crane, 16 Vt. 79.

3. *Alabama.*— Smith *v.* Gillam, 80 Ala. 296; Andrews *v.* Huckabee, 30 Ala. 143; Locke *v.* Palmer, 26 Ala. 312.

California.— Kerns *v.* McKean, 65 Cal. 411, 4 Pac. 404 [*followed* in Kerns *v.* Dean, 77 Cal. 555, 19 Pac. 817]. But see Rowland's Estate, 74 Cal. 523, 16 Pac. 315, 8 Am. St. Rep. 464.

Massachusetts.— See Haven *v.* Haven, 181 Mass. 573, 64 N. E. 410.

New Hampshire.— Rice *v.* Connelly, 71 N. H. 382, 52 Atl. 446.

South Dakota.— Purdin *v.* Archer, 4 S. D. 54, 54 N. W. 1043.

See 22 Cent. Dig. tit. "Executors and Administrators," § 768.

Contra.— Hall *v.* McCormick, 7 Tex. 269.

4. Harris *v.* Hutcheson, 65 Miss. 9, 3 So. 34.

5. Presentation as a prerequisite to an action against heirs and devisees see DESCENT AND DISTRIBUTION, 14 Cyc. 208, 209.

As to contingent claims arising out of stock-holder's liability see CORPORATIONS, 10 Cyc. 720.

6. *Alabama.*— Farris *v.* Stoutz, 78 Ala. 130; McDowell *v.* Jones, 58 Ala. 25; Fretwell *v.* McLemore, 52 Ala. 124; Jones *v.* Lightfoot, 10 Ala. 17.

California.— Verdier *v.* Roach, 96 Cal. 467, 31 Pac. 554; *In re* Halleck, Myr. Prob. 46 [*affirmed* in 49 Cal. 111].

Illinois.— Morse *v.* Gillette, 93 Ill. App. 23 [*affirmed* in 191 Ill. 371, 61 N. E. 1136].

Maine.— Greene *v.* Dyer, 32 Me. 460.

Minnesota.— Jorgenson *v.* Larson, 85 Minn. 134, 88 N. W. 439.

Nebraska.— Stichter *v.* Cox, 52 Nebr. 532, 72 N. W. 848.

Vermont.— Brown *v.* Dunn, 75 Vt. 264, 55 Atl. 364; Curley *v.* Hand, 53 Vt. 524; Sargent *v.* Kimball, 37 Vt. 320.

Wisconsin.— South Milwaukee Co. *v.* Murphy, 112 Wis. 614, 88 N. W. 583, 58 L. R. A. 82 [*explaining* Greene *v.* Dyer, 32 Me. 460]; Austin *v.* Saveland, 77 Wis. 108, 45 N. W. 955. *Compare* Mann *v.* Everts, 64 Wis. 372, 25 N. W. 209.

See 22 Cent. Dig. tit. "Executors and Administrators," § 769.

Distinction between contingent and unmatured claims see Verdier *v.* Roach, 96 Cal. 467, 31 Pac. 554. As to claims not due see *infra,* X, B, 2, c.

A claim payable on a third person's death is an absolute and unconditional claim payable in the future, only the time of payment being uncertain; it is an accrued claim when created, payment merely being postponed until the death occurs. Farris *v.* Stoutz, 78 Ala. 130; Brown *v.* Dunn, 75 Vt. 264, 55 Atl. 364. But in Missouri such a claim has been held to be contingent. Tenney *v.* Lasley, 80 Mo. 664.

Claim dependent upon action of court.— In some states it is held that a claim dependent upon the action of a court in granting or refusing relief is not a contingent claim; that if the claimant is not entitled to a judgment or decree he has no claim, but that if he is entitled his claim cannot be regarded as contingent on whether its enforcement by suit will be granted or refused. Jones *v.* Lightfoot, 10 Ala. 17 (demand dependent upon correction of mistake in a deed); Jorgenson *v.* Larson, 85 Minn. 134, 88 N. W. 439. See also McDowell *v.* Jones, 58 Ala. 25; Fretwell *v.* McLemore, 52 Ala. 124. But in other states claims depending for their validity upon the action of a court are deemed contingent. Backus *v.* Cleaveland, Kirby (Conn.) 36; Sankey *v.* Cook, 82 Iowa 125, 47 N. W. 1077; Senat *v.* Findley, 51 Iowa 20, 50 N. W. 575. See also Atherton *v.* Fullam, 55 Vt. 388.

A subsisting demand which had matured and was capable of being enforced by suit during the lifetime of the debtor is not a contingent claim, and therefore must be presented within the ordinary period of limitation. McDowell *v.* Jones, 58 Ala. 25; Morse *v.* Pacific R. Co., 191 Ill. 356, 61 N. E. 104 [*affirming* 93 Ill. App. 31]; Morse *v.* Gillette, 93 Ill. App. 23 [*affirmed* in 191 Ill. 371, 61 N. E. 1136]; Stichter *v.* Cox, 52 Nebr. 532, 72 N. W. 848.

Note not due.— An absolute liability on a note payable at a future day is not a contingent claim and must be presented within the time limited for presenting existing

statutory requirement of presentation, but may be enforced whenever the liability becomes fixed by the happening of the contingency, even though this occurs after the time limited for presentation.[7] But this rule is often limited either by the express provisions of the statutes or by the decisions, so that the statute requiring presentation does not apply while the claim remains contingent, but begins to run upon the happening of the contingency which fixes the liability, or at the time when the claim accrues, even though this date is after the expiration of the general period limited for presenting claims,[8] or after the administration

claims. Austin *v.* Saveland, 77 Wis. 108, 45 N. W. 955. See also Pratt *v.* Lamson, 128 Mass. 528. See *infra*, X, B, 2, c.

The liability of an indorser of a promissory note is contingent until maturity, demand, and notice of dishonor, and where the indorser dies before the maturity of the note the statute of non-claim does not run until the liability becomes absolute, and the fact that the indorser without the knowledge of the indorsee was indemnified by the maker so that demand and notice were waived cannot have the effect to set the statute of non-claim in operation before the note matures. Cockrill *v.* Hobson, 16 Ala. 391.

Claim of indorser against maker's estate.— Where an unmatured negotiable note is indorsed by the payee and held by the indorsee, and after the probate court fixes the time for presenting claims against the deceased maker's estate the indorser is compelled to pay the note, he then becomes a creditor and is entitled to present his claim within the statutory period thereafter. Meriden Steam Mill Lumber Co. *v.* Guy, 40 Conn. 163.

Claim founded on executor's breach of duty. — The claim which the creditor of an estate may have against the executor, by reason of his acts or omissions as executor, is one which becomes fixed in the lifetime of the executor, and is not contingent on the fact that the estate may prove insolvent on an account taken after the death of the executor, and in the event of his death such claim must be presented for allowance to the administrator of his estate within the time fixed in the notice to creditors. *In re* Halleck, 49 Cal. 111 [*affirming* Myr. Prob. 46].

7. *Iowa.*— Easton *v.* Somerville, 111 Iowa 164, 82 N. W. 475, 82 Am. St. Rep. 502; Security F. Ins. Co. *v.* Hansen, 104 Iowa 264, 73 N. W. 596; Wickham *v.* Hull, 102 Iowa 469, 71 N. W. 352; Sankey *v.* Cook, 82 Iowa 125, 47 N. W. 1077; Senat *v.* Findley, 51 Iowa 20, 50 N. W. 575. Code, § 3343, provides, however, that "contingent liabilities must be presented and proved or the executor or administrator shall be under no obligation to make any provision for satisfying them when they accrue." See *In re* Allen, 116 Iowa 697, 88 N. W. 1091.

Mississippi.— Savings, etc., Assoc. *v.* Tartt, 81 Miss. 276, 32 So. 115; Robinett *v.* Starling, 72 Miss. 652, 18 So. 421; Jones *v.* Carrollton Bank, 71 Miss. 1023, 16 So. 344; McWilliams *v.* Norfleet, 60 Miss. 987; Gordon *v.* Gibbs, 3 Sm. & M. 473. See also Buckingham *v.* Walker, 48 Miss. 609.

Missouri.— Chambers *v.* Smith, 23 Mo. 174; Morgan *v.* Gibson, 42 Mo. App. 234.

New Jersey.— Wakeman *v.* Paulmier, 39 N. J. L. 340; Field *v.* Thistle, 58 N. J. Eq. 339, 43 Atl. 1072 [*affirmed* in 60 N. J. Eq. 444, 46 Atl. 1099]; Terhune *v.* White, 34 N. J. Eq. 98.

North Carolina.— Godley *v.* Taylor, 14 N. C. 178.

Tennessee.— Bradford *v.* McLemore, 3 Yerg. 318.

Texas.— National Guarantee L. & T. Co. *v.* Fly, 29 Tex. Civ. App. 533, 69 S. W. 231.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 769, 790.

Unauthorized investment by guardian.— Where a guardian invested funds of her ward in a note and mortgage without authority of court, the statute limiting the time of filing claims against the estate of one deceased did not apply to the filing of a claim for the amount of such mortgage with the executor of such guardian, since deceased, since such claim was contingent on the acceptance of the investment by the ward on coming of age, and also because the ward was not a creditor of the estate until coming of age. Easton *v.* Somerville, 111 Iowa 164, 82 N. W. 475, 82 Am. St. Rep. 502.

8. *Alabama.*— Glass *v.* Woolf, 82 Ala. 281, 3 So. 11; Farris *v.* Stoutz, 78 Ala. 130; McDowell *v.* Jones, 58 Ala. 25; Fretwell *v.* McLemore, 52 Ala. 124; Jones *v.* Lightfoot, 10 Ala. 17; Pinkston *v.* Huie, 9 Ala. 252; Neil *v.* Cunningham, 2 Port. 171.

Connecticut.— Gay's Appeal, 61 Conn. 445, 23 Atl. 829; Bacon *v.* Thorp, 27 Conn. 251; Hawley *v.* Botsford, 27 Conn. 80; Davis *v.* Weed, 7 Fed. Cas. No. 3,658, 44 Conn. 569. See also Meriden Steam Mill Lumber Co. *v.* Guy, 40 Conn. 163. Formerly there was no limitation of the time for presenting contingent claims, but they might be presented at any time after they accrued (Bacon *v.* Thorp, 27 Conn. 251 [*explaining* Griswold *v.* Bigelow, 6 Conn. 258; Booth *v.* Starr, 5 Day 419]; Backus *v.* Cleaveland, Kirby 36; Pendleton *v.* Phelps, 19 Fed. Cas. No. 10,923, Brunn. Col. Cas. 95, 4 Day 476), even though they accrued after settlement and distribution of the estate (Griswold *v.* Bigelow, 6 Conn. 258. But see Painter *v.* Smith, 2 Root 142).

Florida.— May *v.* Vann, 15 Fla. 553.

Michigan.— Hancock Mut. L. Ins. Co. *v.* Hill, 108 Mich. 126, 65 N. W. 758.

Missouri.— State *v.* Tittmann, 134 Mo. 162, 35 S. W. 579; Tenney *v.* Lasley, 80 Mo. 664;

has been closed or the estate settled;[9] claims arising out of suretyship frequently calling for the application of this principle.[10] It has been held, however, that if

Chambers *v.* Smith, 23 Mo. 174; Finney *v.* State, 9 Mo. 227. *Compare* State *v.* Browning, 102 Mo. App. 455, 76 S. W. 719.

Nebraska.— Hazlett *v.* Blakely, (1903) 97 N. W. 808 (in which it is said, however, that the Nebraska statute was changed by Acts (1901), c. 28, which did not affect the case at bar, inasmuch as the proceedings had been instituted before the act went into operation); Fitzgerald *v.* Union Sav. Bank, 65 Nebr. 97, 90 N. W. 994.

Wisconsin.— South Milwaukee Co. *v.* Murphy, 112 Wis. 614, 88 N. W. 583, 58 L. R. A. 82; Blakely *v.* Smock, 96 Wis. 611, 71 N. W. 1052; Webster *v.* Lawson, 73 Wis. 561, 41 N. W. 710; Ernst *v.* Nau, 63 Wis. 134, 23 N. W. 492.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 769, 790.

Accrual of claim and accrual of right of action.— In some states the meaning of these statutory provisions concerning contingent claims is not that a claim must be presented within a certain period after the right of action has accrued, but that it must be presented within that period after the claim itself has accrued. A claim may fall within the operation of the statute and thus require presentation, although the right of action thereon has not accrued; it is enough that a definite right to demand in the future exists. Glass *v.* Woolf, 82 Ala. 281, 3 So. 11; McDowell *v.* Jones, 58 Ala. 25; Jones *v.* Lightfoot, 10 Ala. 17; King *v.* Mosely, 5 Ala. 610; Austin *v.* Saveland, 77 Wis. 108, 45 N. W. 955. But in other states the period for presentation begins when the right of action accrues. Gay's Appeal, 61 Conn. 445, 23 Atl. 829; Meriden Steam Mill Lumber Co. *v.* Guy, 40 Conn. 163. Thus in Missouri the statute does not begin to run until the right to recover substantial damages accrues. State *v.* Tittmann, 134 Mo. 162, 35 S. W. 579; Tenney *v.* Lasley, 80 Mo. 664; Chambers *v.* Smith, 23 Mo. 174; Miller *v.* Woodward, 8 Mo. 169. See also Greenabaum *v.* Elliott, 60 Mo. 25. But see Burckhartt *v.* Helfrich, 77 Mo. 376. And no distinction is recognized between a merely nominal right of recovery and no right of recovery at all. Chambers *v.* Smith, *supra*. Thus while a cause of action accrues on a bond or covenant at the breach thereof, yet where the breach is merely formal and substantial damages afterward result therefrom, the statutory period begins to run only from the time when the right to recover such damages accrues. State *v.* Tittmann, *supra*; Chambers *v.* Smith, *supra*. Where there has been a change in the statutory period the statute in force when the cause of action accrued is controlling. Greenabaum *v.* Elliott, *supra*.

Presentation before maturity of the claim is sufficient. Russell *v.* Bristol, 49 Conn. 251.

The claim of surviving partners against the estate of a deceased partner for contribution for losses sustained by the firm is a contingent claim which does not become absolute until the business of the firm is settled, the assets converted, and the debts paid, and which, under Wis. Rev. St. § 3860, need not be presented for allowance before that time. Logan *v.* Dixon, 73 Wis. 533, 41 N. W. 713. See, generally, PARTNERSHIP.

9. State *v.* Tittmann, 134 Mo. 162, 35 S. W. 579; Davis *v.* Weed, 7 Fed. Cas. No. 3,658, 44 Conn. 569. The contingent claim provided for by the Wisconsin statutes is one which accrues and becomes absolute before the administration of the estate is closed and before a decree of distribution has been rendered by the county court. The statutes do not apply to a contingent claim which does not accrue and is incapable of being established by proof until after the estate has been fully administered. Such a claim need not be presented for allowance. Mann *v.* Everts, 64 Wis. 372, 25 N. W. 209 [*distinguishing* Ernst *v.* Nau, 63 Wis. 134, 23 N. W. 492]. See also South Milwaukee Co. *v.* Murphy, 112 Wis. 614, 88 N. W. 583, 58 L. R. A. 82. Where the estate has been fully settled and the assets have been distributed before a contingent claim becomes absolute, and the claim is then presented, if the executor or administrator has not sufficient assets to pay the whole of the claim the creditors may recover the balance from the heirs, devisees, or legatees who have received sufficient real and personal property from the debtor's estate. Logan *v.* Dixon, 73 Wis. 533, 41 N. W. 713; Mann *v.* Everts, 64 Wis. 372, 25 N. W. 209. See *infra*, XI, R.

Claim accruing after partial settlement of estate.— Under the Wisconsin statutes if a creditor, after a contingent claim has become absolute, presents it within the statutory period thereafter, he can be paid only out of the assets still remaining in the hands of the personal representative and not then lawfully distributed or applied to the payment of other debts previously presented and allowed against the estate. Logan *v.* Dixon, 73 Wis. 533, 41 N. W. 713.

10. **A claim of a surety for contribution from a cosurety** is contingent until payment of the debt, at which time it accrues or becomes absolute, and where the cosurety dies before the debt is paid the presentation of such claim against the estate of the deceased cosurety is governed by the rule of the text. May *v.* Vann, 15 Fla. 553; Ernst *v.* Nau, 63 Wis. 134, 23 N. W. 492. But see Burckhartt *v.* Helfrich, 77 Mo. 376.

A claim of a surety for reimbursement from the principal debtor remains contingent until the surety pays the debt, and where the principal debtor dies before payment by the surety the period in which the surety must present his claim is computed from the time of payment. Cawthorne *v.* Weisinger, 6 Ala. 714; McBroom *v.* Governor, 6 Port. (Ala.)

there is no personal representative when the claim accrues the statute does not begin to run until an administrator is appointed.[11] In some states the statutes requiring presentation of claims within a fixed period include, either expressly or by implication, contingent claims,[12] any difficulty as to the amount and time of

32; Burton *v.* Rutherford, 49 Mo. 255; Miller *v.* Woodward, 8 Mo. 169; Bauer *v.* Gray, 18 Mo. App. 164; Webster *v.* Lawson, 73 Wis. 561, 41 N. W. 710. And it has been held that the right of the surety to present his claim within the statutory period thereafter is not affected by the fact that the creditor failed to present his own claim against the deceased principal's estate. Cawthorne *v.* Weisinger, *supra*; McBroom *v.* Governor, *supra*. But the due presentation of the creditor's claim against the deceased debtor's estate relieves the surety, upon payment of the debt, of the necessity of presenting his claim against the estate; for he is subrogated to the creditor's rights and remedies and stands in the latter's place as to the steps already taken to enforce the claim. Braught *v.* Griffith, 16 Iowa 26; Fisher *v.* Columbia Bldg., etc., Assoc., 59 Mo. App. 430.

A claim against the estate of a deceased surety on a bond in favor of the obligee named therein accrues at the time when suit might have been brought against the surety if living, and not at the time of the rendition of judgment against the principal and a surviving surety. Hancock Mut. L. Ins. Co. *v.* Hill, 108 Mich. 126, 65 N. W. 758. *Compare* Atherton *v.* Fullam, 55 Vt. 388.

A claim against a surety on a trustee's bond, which is conditioned for a faithful performance of the trustee's duties, does not accrue until a breach of condition by a default of the trustee, and the statute of non-claim does not begin to run until the breach occurs. McDowell *v.* Brantley, 80 Ala. 173.

Claim against surety on agent's bond.— Where the decedent was surety on a bond given by an agent to plaintiff and conditioned for the faithful performance of his contract of agency until his final discharge, and the agent continued in the employment of plaintiff until after the decedent had died, and his estate had been settled, and then absconded in default to plaintiff, it was held that, although parts of plaintiff's claim against the agent might have been deemed due at an earlier date, yet they became merged in the one claim which accrued and matured at the termination of the agency, and the same was a proper claim to be audited and allowed against the decedent's estate, under Wis. St. § 3860, after the time limited for that purpose. Michel Brewing Co. *v.* Wightman, 97 Wis. 657, 75 N. W. 316.

Claim against surety on personal representative's bond.— A claim against the estate of a deceased surety on the bond of an insolvent executor, for a legacy which vested at the testator's death, must be presented to the surety's personal representative within the prescribed period after the grant of administration, although the time of payment of the legacy was postponed until after the surety's death. Foster *v.* Holland, 56 Ala. 474. A claim against the estate of a deceased surety of an administrator to recover for a devastavit committed by the administrator in the surety's lifetime is absolute, not contingent; such a claim accrues at the time when the devastavit is committed and is not rendered uncertain or contingent by the fact that the devastavit must be established by suit, since the suit is only for the purpose of reducing to judgment the claim against the administrator so that the right of action at law on the bond will be complete. McDowell *v.* Jones, 58 Ala. 25; Fretwell *v.* McLemore, 52 Ala. 124. See also Page *v.* Bartlett, 101 Ala. 193, 13 So. 768; Taylor *v.* Robinson, 69 Ala. 269.

A claim against a surety on a guardian's bond accrues at the time when the ward dies or attains his majority and the guardian fails forthwith to make a settlement of his accounts; the statute of non-claim begins to run at this date and is not postponed until a judicial ascertainment of the guardian's liability. Glass *v.* Woolf, 82 Ala. 281, 3 So. 11. See also State *v.* Browning, 102 Mo. App. 455, 76 S. W. 719.

See, generally, PRINCIPAL AND SURETY.

11. Gay's Appeal, 61 Conn. 445, 23 Atl. 829.

12. *Arkansas.*—Bennett *v.* Dawson, 15 Ark. 412, 18 Ark. 334; Walker *v.* Byers, 14 Ark. 246 [*overruling* Allen *v.* Byers, 12 Ark. 593; Burton *v.* Lockert, 9 Ark. 411].

California.— Verdier *v.* Roach, 96 Cal. 467, 31 Pac. 554; Janin *v.* Browne, 59 Cal. 37. By the former statute (Prob. Act, § 130) provision was made for presenting a contingent claim within ten months after it became absolute. See Verdier *v.* Roach, *supra*; Davidson *v.* Rankin, 34 Cal. 503; Gleason *v.* White, 34 Cal. 258; Pico *v.* De la Guerra, 18 Cal. 432.

Illinois.— A contingent claim must be presented within the statutory period in order that the claimant may participate in the inventoried assets; if the claim is not presented within that period the creditor will be confined to uninventoried assets subsequently discovered, even though the claim does not accrue until the period has expired. Snydacker *v.* Swan Land, etc., Co., 154 Ill. 220, 40 N. E. 466 [*reversing* 51 Ill. App. 211, *disapproving* Suppiger *v.* Gruaz, 137 Ill. 216, 27 N. E. 22]; Stone *v.* Clarke, 40 Ill. 411. See also Morse *v.* Pacific R. Co., 191 Ill. 356, 61 N. E. 104 [*affirming* 93 Ill. App. 31]; Morse *v.* Gillette, 93 Ill. App. 23 [*affirmed* in 191 Ill. 371, 61 N. E. 1136]. *Compare* Mackin *v.* Haven, 187 Ill. 480, 58 N. E. 448 [*affirming* 88 Ill. App. 434]. This rule, however, is entirely distinct from the rule applicable in suits by creditors to enforce

payment being obviated by the statutes providing for the reservation of sufficient assets to pay such claims when they shall accrue.[13] In a few states the statutes provide that contingent claims which cannot be proved or allowed as debts may be presented with the proofs thereof to the probate court, or to the commissioners for a report thereon.[14] In these states a claim which was contingent at the time of the debtor's death but became absolute before the expiration of the time limited for creditors to present their claims to the commissioners cannot thereafter, and while the commission remains open, be properly presented to the probate court for allowance as a contingent claim, but must be presented to the commissioners for allowance as an absolute debt;[15] but where the claim accrues or becomes absolute after the time for presentation to the commissioners has expired, it may be presented to the personal representative within a limited time after its accrual.[16]

against the deceased debtor's heirs and devisees claims which have accrued or become absolute after the period of presentation. Snydacker *v.* Swan Land, etc., Co., 154 Ill. 220, 40 N. E. 466 [*reversing* 51 Ill. App. 211, and *distinguishing* Dugger *v.* Ogelsby, 99 Ill. 405; Payson *v.* Hadduck, 19 Fed. Cas. No. 10,862, 8 Biss. 293]. See also Mackin *v.* Haven, *supra*. See DESCENT AND DISTRIBUTION, 14 Cyc. 208, 209.

Minnesota.— Under Gen. St. (1894) §§ 4511, 4514, it has been held a contingent claim which arises on a contract and which does not become absolute and capable of liquidation before the expiration of the time limited for creditors to present their claims is not barred; the only contingent claims barred by the statute being those which become certain and absolute before the time fixed for the presentation of claims has expired. Berryhill *v.* Peabody, 72 Minn. 232, 75 N. W. 220; Oswald *v.* Pillsbury, 61 Minn. 520, 63 N. W. 1072; Hantzch *v.* Massolt, 61 Minn. 361, 63 N. W. 1069. See also McKeen *v.* Waldron, 25 Minn. 466. But in Hunt *v.* Burns, 90 Minn. 172, 95 N. W. 1110, it was held that although the claim accrues or becomes absolute after the expiration of the time limited for the presentation of claims it will be barred if not presented before the administration is finally closed; the reason being that, under the statute (see *infra*, X, B, 12, b, (II)) the creditor may on application to the court be allowed to present his claim, although the regular period for presentation has expired. See also Jorgenson *v.* Larson, 85 Minn. 134, 88 N. W. 439.

New Hampshire.— Walker *v.* Cheever, 39 N. H. 420, construing Rev. St. c. 161, §§ 2, 3. But under the earlier statutes contingent claims were excepted. Walker *v.* Cheever, *supra*; Parker *v.* Read, 9 N. H. 121; Sibley *v.* McAllaster, 8 N. H. 389.

New York.— It appears to have been the intention of the legislature to require that claims of every name, nature, and description which exist or are likely to exist against an estate shall be presented as required, although the statutes do not define with precision the character of such claims. The requirements, however, embrace claims which are due, as well as such as are contingent and likely to become due, or which by any possibility may be established. Cornes *v.* Wilkin, 79 N. Y. 129 [*affirming* 14 Hun 428]. See also Hoyt *v.* Bonnett, 50 N. Y. 538 [*reversing* 58 Barb. 529].

Washington.— Barto *v.* Stewart, 21 Wash. 605, 59 Pac. 480 [*overruling* Neis *v.* Farquharson, 9 Wash. 508, 37 Pac. 697]. *Compare* Macdonald *v.* Frater, 29 Wash. 422, 69 Pac. 1111.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 769, 790.

13. See *infra*, XI, Q.

14. Osmun *v.* Oakland Cir. Judge, 107 Mich. 27, 64 N. W. 949 (holding that a note payable absolutely and secured by a real-estate mortgage is not, as between the holder and the estate of the maker, a contingent claim within the meaning of the statute); Brown *v.* Dunn, 75 Vt. 264, 55 Atl. 364; Curley *v.* Hand, 53 Vt. 524 (holding that under the Vermont statute an indorsement may be allowed as a contingent claim against the estate of a decedent); Lytle *v.* Bond, 39 Vt. 388; Sargent *v.* Kimball, 37 Vt. 320. See also Clark *v.* Winchell, 53 Vt. 408, holding that the liability of the decedent's widow who was his devisee and legatee, for a breach of a covenant of warranty contained in a deed executed by the testator, was not, under the facts involved, such a contingent claim as required presentation under the statute. If there is outstanding against the estate a claim which is now due to A but which upon the happening of some future event, which may or may not happen, will become due to B, then B is entitled to have it allowed as a contingent claim. Curley *v.* Hand, *supra*.

A claim against the estate of an administrator, founded upon the latter's failure to pay over to creditors the amount which was in his hands upon the settlement of his account, and which was ordered by the probate court to be paid to them, is an absolute claim which accrued in the lifetime of the administrator and must be prosecuted as such before the commissioners; it cannot properly be allowed by the probate court as a contingent claim. Sargent *v.* Kimball, 37 Vt. 320.

15. Lytle *v.* Bond, 39 Vt. 388.

16. Atherton *v.* Fullam, 55 Vt. 388. *Compare* Hancock Mut. L. Ins. Co. *v.* Hill, 108 Mich. 126, 65 N. W. 758.

c. Claims Not Due. As a general rule claims which are not yet due but run to a certain maturity should be presented within the statutory period,[17] even though they will not mature within the time limited for presenting demands.[18] Where a claim against a decedent's estate has been presented and exhibited

17. *Alabama.*— McDowell *v.* Jones, 58 Ala. 25; Jones *v.* Lightfoot, 10 Ala. 17; King *v.* Mosely, 5 Ala. 610.

Arkansas.— Bennett *v.* Dawson, 15 Ark. 412, holding that it is no objection to the law requiring claims against the estate of the deceased to be exhibited within two years after the grant of letters of administration that it may leave an unreasonably short space of time to the creditor. See also Walker *v.* Byers, 14 Ark. 246.

California.— Swain's Estate, 67 Cal. 637, 8 Pac. 497.

Florida.— May *v.* Vann, 15 Fla. 553; Fillyau *v.* Laverty, 3 Fla. 72.

Illinois.— Hall *v.* Hoxsey, 84 Ill. 616; McElroy *v.* Brooke, 104 Ill. App. 220; Johnson *v.* Tryon, 78 Ill. App. 158; Robison *v.* Harrington, 61 Ill. App. 543.

Indiana.— Maddox *v.* Maddox, 97 Ind. 537.

Mississippi.—Harris *v.* Hutcheson, 65 Miss. 9, 3 So. 34.

Missouri.— Garesché *v.* Lewis, 15 Mo. App. 565. The words "justly due," as used in Rev. St. § 195, refer to the validity of the claim and not to the time of its payment. Cassatt *v.* Vogel, 12 Mo. App. 323. See also Kavanaugh *v.* Shaughnessy, 41 Mo. App. 657; Traylor *v.* Cabanne, 8 Mo. App. 131. *Compare* Tenny *v.* Lasley, 80 Mo. 664, holding that under the Missouri statute relating to demands not due, a demand, in order to require a presentation, must exist in favor of a person in being in whose favor a judgment may be rendered upon the demand prior to the maturity of the same, and must have some fixed or certain date of maturity; and therefore, that a promissory note payable after the death of a husband and wife and to the husband's heirs, administrators, or assigns, need not be presented for allowance before its maturity.

New York.— See Cornes *v.* Wilkin, 79 N. Y. 129 [*affirming* 14 Hun 428].

Texas.— See Dunn *v.* Sublett, 14 Tex. 521.

Washington.— Barto *v.* Stewart, 21 Wash. 605, 59 Pac. 480 [*overruling* Neis *v.* Farquharson, 9 Wash. 517, 37 Pac. 697].

Wisconsin.—Austin *v.* Saveland, 77 Wis. 108, 45 N. W. 955.

See 22 Cent. Dig. tit. "Executors and Administrators," § 769.

A contract to pay rent for the whole term, containing a clause providing that for certain contingencies the term may be shortened, may be presented as a claim for allowance and settlement against an estate, under the Illinois statute. McElroy *v.* Brooke, 104 Ill. App. 220. And decisions to the same effect have been rendered under the Missouri statutes. Kavanaugh *v.* Shaughnessy, 41 Mo. App. 657; Traylor *v.* Cabanne, 8 Mo. App. 131.

Interest.— The Kentucky statute providing that no interest accruing after his death shall be allowed on any claim against the decedent's estate unless the claim be demanded of the personal representative within one year after his appointment does not apply to a claim not due until after the appointment of the administrator. Pepper *v.* Harper, 47 S. W. 620, 20 Ky. L. Rep. 837.

Uncertain contracts.— Contracts so uncertain as to be declared void at any time on default of payment of instalments are not within the purport of a statute providing for the presentation of claims not yet due. Robison *v.* Harrington, 61 Ill. App. 543.

Where time of maturity uncertain.— The Missouri statute with reference to the presentation and allowance of claims not due does not apply to a claim the time of maturity of which is uncertain, and such claim cannot be presented for payment before maturity and a rebate had thereon. Tenney *v.* Lasley, 80 Mo. 664. See also Morgan *v.* Gibson, 42 Mo. App. 234. *Compare* Kavanaugh *v.* Shaughnessy, 41 Mo. App. 657; Traylor *v.* Cabanne, 8 Mo. App. 131.

18. *Alabama.*— Farris *v.* Stoutz, 78 Ala. 130.

California.— See Verdier *v.* Roach, 96 Cal. 467, 31 Pac. 554; Janin *v.* Browne, 59 Cal. 37.

Maine.— Pettengill *v.* Patterson, 39 Me. 498. But see Sampson *v.* Sampson, 63 Me. 328.

Minnesota.— Oswald *v.* Pillsbury, 61 Minn. 520, 63 N. W. 1072.

Pennsylvania.— See Oliver's Appeal, 101 Pa. St. 299.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 771, 790.

Contra.— Middletown Fourth Ecclesiastical Soc. *v.* Mather, 15 Conn. 587; Morgan *v.* Gibson, 42 Mo. App. 234; Bradford *v.* McLemore, 3 Yerg. (Tenn.) 318; Davis *v.* Weed, 7 Fed. Cas. No. 3,658, 44 Conn. 569.

Under the Massachusetts statute a creditor whose right of action does not accrue within two years after the giving of the administration bond may present his claim to the probate court at any time before the estate is fully administered. Cobb *v.* Kempton, 154 Mass. 266, 28 N. E. 264 (holding that a claim by the executrix of a ward against the administrators of the guardian for a balance due on the guardian's final account, which was not allowed by the probate court until more than two years after the appointment of the administrators, might be presented at any time before the guardian's estate was fully administered since such claim did not "accrue" until it was allowed); Pratt *v.* Lamson, 128 Mass. 528; Hammond *v.* Granger, 128 Mass. 272.

Reservation of assets see *infra*, XI, Q.

before the time when payment is due, it is unnecessary to present and exhibit it again after maturity.[19]

d. Claims Arising After Death of Decedent.[20] The statutes of non-claim usually apply only to claims which existed against the decedent in his lifetime, and do not require the presentation of claims which come into existence after his death;[21] but some statutes which provide that such claims shall be charges against the estate require that they shall be presented to the probate court for inspection and allowance.[22]

e. Claims of Representative. In some states the only difference between the claims held by the executor or administrator against the estate and those held by others is that the presentation and proof should be made directly to the court or a judge thereof in the first instance; the representative, as well as other claimants, being required to make presentation within the time limited by statute.[23] But in other states the executor or administrator is accorded a full

19. Pease *v.* Phelps, 10 Conn. 62.

20. See *supra*, X, A, 19.

21. *Arkansas.*— Perry *v.* Field, 40 Ark. 175; Yarborough *v.* Ward, 34 Ark. 204, services rendered to estate. See also Bomford *v.* Grimes, 17 Ark. 567. But such claims may be presented to the probate court for the purpose of obtaining an order directing the representative to pay them as expenses of administration. Yarborough *v.* Ward, 34 Ark. 204.

Iowa.— Savery *v.* Sypher, 39 Iowa 675.

Tennessee.— Brown *v.* Porter, 7 Humphr. 373, advances by representative for benefit of estate.

Vermont.— Manning *v.* Leighton, 65 Vt. 84, 26 Atl. 258, 24 L. R. A. 684.

Wisconsin.— The claims which it is the duty of the court to receive, examine, and adjust are those which existed at the time of the debtor's death or result from contracts made by him; they do not include claims or liabilities incurred by the personal representative in executing the trust, but his claims for reimbursement must be presented in his accounts and allowed, if at all, as a part of the expenses of administration. Brown *v.* McGee, 117 Wis. 389, 94 N. W. 363; McLaughlin *v.* Winner, 63 Wis. 120, 23 N. W. 402, 53 Am. Rep. 273.

22. Powell *v.* Powell, 23 Mo. App. 365. Although the Texas statutes regulating the presentation and allowance of claims against a decedent's estate do not in terms apply to claims coming into existence after the debtor's death, if the holder of such a claim elects to enforce the liability of the estate instead of that of the representative personally, he must bring his case within the provisions of the statute for the establishment of claims against the estate. Price *v.* McIver, 25 Tex. 769, 78 Am. Dec. 558. See also Gammage *v.* Rathes, 46 Tex. 105.

23. *California.*— Hildebrandt's Estate, 92 Cal. 433, 28 Pac. 486; *In re* Taylor, 10 Cal. 482, 16 Cal. 434.

Indiana.— Wright *v.* Wright, 72 Ind. 149, holding this to be true whether the claim be held in his personal right, or in some other fiduciary relation. See also Chidester *v.* Chidester, 42 Ind. 469.

Iowa.— See Clark *v.* Tallman, 68 Iowa 372, 27 N. W. 261; Janes *v.* Brown, 48 Iowa 568.

Massachusetts.— Newell *v.* West, 149 Mass. 520, 21 N. E. 954.

Missouri.— Williamson *v.* Anthony, 47 Mo. 299 (holding that where an administrator acting in good faith presented to the probate judge a claim against the estate and the judge passed upon it without appointing any person to defend, this should be construed as amounting to an exhibition of the claim so as to prevent its being barred); Nelson *v.* Russell, 15 Mo. 356.

Oregon.— Farrow *v.* Nevin, 44 Oreg. 496, 75 Pac. 711.

Pennsylvania.— *In re* Clauser, 1 Watts & S. 208.

Tennessee.— See Smith *v.* Sprout, (Ch. App. 1900) 58 S. W. 376; Williams *v.* Williams, 15 Lea 438; Byrn *v.* Fleming, 3 Head 658. But the statutory requirements as to exhibiting and enforcing claims do not apply to claims of the representative for advances made on behalf of the estate. Brown *v.* Porter, 7 Humphr. 373.

Vermont.— Riley *v.* McInlear, 61 Vt. 254, 17 Atl. 729, 19 Atl. 996 [*distinguishing* French *v.* Winsor, 24 Vt. 402].

See 22 Cent. Dig. tit. "Executors and Administrators," § 770.

In Texas a special mode is provided by statute which executors and administrators shall pursue to have their claims approved for payment. See Puckett *v.* McCall, 30 Tex. 457.

If the representative has an equitable interest in a creditor's claim, presentation is properly made to the court or a judge thereof. *In re* Crosby, 55 Cal. 574. See also Hill's Estate, 67 Cal. 238, 7 Pac. 664.

Where there are several personal representatives, one of whom is a creditor of the estate, his claim should be presented to the others, not to the court or judge. Galivan *v.* Jones, 102 Fed. 423, 42 C. C. A. 408, construing Cal. Code Civ. Proc. § 1510. See also Williamson *v.* Anthony, 47 Mo. 299; Nelson *v.* Russell, 15 Mo. 356.

Estoppel of heirs to object that executor's claim was not presented and allowed see

right of retainer of the assets,[24] whether as to his own claim as an ordinary creditor against the decedent, or such demands as arise on his behalf in the due course of administration; and he is permitted, regardless of the non-claim barrier, to assert and prove his own claim in the course of an accounting.[25]

f. Judgments. As a general rule the fact that a claim against a decedent has been reduced to judgment does not preclude the necessity of presenting the claim for allowance,[26] but in some jurisdictions the presentation and filing of a

Hopkins *v.* Hopkins, 99 Mich. 56, 57 N. W. 1083.

24. See *infra*, X, D, 3, a, (I), (A).

25. *Florida.*— Sanderson *v.* Sanderson, 17 Fla. 820.

Illinois.— Millard *v.* Harris, 119 Ill. 185, 10 N. E. 387 [*affirming* 17 Ill. App. 512].

Maryland.— State *v.* Reigart, 1 Gill 1, 39 Am. Dec. 628.

New Hampshire.— See McLaughlin *v.* Newton, 53 N. H. 531.

Ohio.— Thomas *v.* Chamberlain, 39 Ohio St. 112.

See 22 Cent. Dig. tit. "Executors and Administrators," § 770.

26. *Alabama.*— Ray *v.* Thompson, 43 Ala. 434, 94 Am. Dec. 696; Ready *v.* Thompson, 4 Stew. & P. 52.

Arizona.— O'Doherty *v.* Toole, 2 Ariz. 288, 15 Pac. 28.

Arkansas.— Powell *v.* Macon, 40 Ark. 541; Keith *v.* Parks, 31 Ark. 664.

California.— Sanders *v.* Russell, 86 Cal. 119, 24 Pac. 852, 21 Am. St. Rep. 26.

Florida.— Union Bank *v.* Powell, 3 Fla. 175, 52 Am. Dec. 367.

Illinois.— Winslow *v.* Leland, 128 Ill. 304, 21 N. E. 588. See also Clingman *v.* Hopkie, 78 Ill. 152.

Iowa.— Bayless *v.* Powers, 62 Iowa 601, 17 N. W. 907, holding that before a judgment can be paid out of the personalty it must be filed and allowed as a claim against the estate.

Kansas.— Scroggs *v.* Tutt, 20 Kan. 271, 23 Kan. 181.

Louisiana.— Bertin *v.* Phillips, 1 La. Ann. 173, judgment for costs.

Missouri.— There is some apparent confusion in the Missouri cases as to whether a judgment is to be presented for allowance or merely for classification. See Beekman *v.* Richardson, 150 Mo. 430, 51 S. W. 689; McGinnis *v.* Loring, 126 Mo. 404, 28 S. W. 750; Wernse *v.* McPike, 100 Mo. 476, 13 S. W. 809 [*overruling* Wernse *v.* McPike, 76 Mo. 249; Ewing *v.* Taylor, 70 Mo. 394; Bryan *v.* Mundy, 14 Mo. 458]; Brown *v.* Woody, 64 Mo. 547; Gibson *v.* Vaughan, 61 Mo. 418; Carondelet *v.* Desnoyer, 27 Mo. 36; Gewe *v.* Hanszen, 85 Mo. App. 136. But the question seems to be finally settled in McFaul *v.* Haley, 166 Mo. 56, 65 S. W. 995 [*followed* in Wencker *v.* Thompson, 96 Mo. App. 59, 69 S. W. 743], reviewing the earlier decisions and holding that the action of the court upon the judgment presented, even if denominated merely "classifying," is a judgment, and not "a mere ministerial, or clerical or nondescript act," and the proceeding may involve a trial of fact inasmuch as while the court cannot go behind the judgment to inquire into the merits of the cause of action, yet the representative may defeat the claim if he can establish that the judgment has been paid or has for any cause ceased to subsist as a valid demand. Hence it may be considered as settled in Missouri that to this extent a judgment is to be presented for allowance.

New York.— See Matter of Morton, 7 Misc. 343, 28 N. Y. Suppl. 82.

Texas.— Jenkins *v.* Cain, 72 Tex. 88, 10 S. W. 391 (judgment foreclosing vendor's lien); Converse *v.* Sorley, 39 Tex. 515; Birdwell *v.* Kauffman, 25 Tex. 189; Hall *v.* McCormick, 7 Tex. 269. But see Cole *v.* Robertson, 6 Tex. 356, 55 Am. Dec. 784.

Wisconsin.—Fields *v.* Mundy, 106 Wis. 383, 82 N. W. 343, 80 Am. St. Rep. 39.

See 22 Cent. Dig. tit. "Executors and Administrators," § 772.

Contra.— Knott *v.* Shaw, 5 Oreg. 482. And see Berkey *v.* Judd, 27 Minn. 475, 8 N. W. 383.

Especially where the judgment has become dormant is presentation necessary. Davis *v.* Shawhan, 34 Iowa 91 (holding that a judgment rendered against a decedent prior to his death can be enforced against the real estate upon which it is a lien, without being filed as a claim against the estate, only while the judgment lien exists); Robertson *v.* Demoss, 23 Miss. 298; Hall *v.* McCormick, 7 Tex. 269.

Where suit is brought against an administrator to revive a judgment against the intestate, the lien of which has been pursued, presentation of the claim is not necessary. Cole *v.* Robertson, 6 Tex. 356, 55 Am. Dec. 784.

Judgment in another state allowing claim. — Wis. Rev. St. § 3844, barring all claims against the estate if not filed within the time limited by section 3840, applies to a judgment allowing a claim against a decedent in a proceeding to settle his estate in a court of another state. Fields *v.* Mundy, 106 Wis. 383, 82 N. W. 343, 80 Am. St. Rep. 39.

Where an execution was placed in the hands of the sheriff and the administrator of the judgment debtor on seeing the execution applied to the creditor for indulgence, which was granted to him, these facts afforded sufficient proof of a presentation of the demand to avoid a plea of the statute of nonclaim. Harrison *v.* Jones, 33 Ala. 258.

A judgment which merely forecloses a vendor's lien upon real property of the decedent, without including any personal award against the estate, need not be certified to the probate court for payment. Ferguson *v.* Mc-

judgment is necessary only in order to secure its payment out of the personal assets and a failure to file the judgment does not affect its lien upon the decedent's realty.[27]

g. Secured Claims. According to the weight of authority, a debtor whose claim is secured by mortgage, pledge, or any specific lien need not present his claim for allowance in order to preserve his right to subject the property covered by the lien to the satisfaction of his claim,[28] for the reason that such claims can-

Crary, 20 Tex. Civ. App. 529, 50 S. W. 472. But see Converse *v.* Sorley, 39 Tex. 515.

Judgment of which representative has obtained modification.— When an executrix substituted as defendant, after the death of judgment defendant, pending a motion for a new trial, appears on such motion, and obtains a modification of the judgment, such judgment need not be presented to the executrix. Brennan *v.* Brennan, 65 Cal. 517, 4 Pac. 561.

Judgments against personal representative. — In Illinois it is held that the statutory requirements for presenting claims to the county court do not apply to a judgment regularly obtained against the executor or administrator in his representative capacity. Darling *v.* McDonald, 101 Ill. 370. But in Missouri such a judgment must be filed in the probate court and there classified as required by statute; although where executors take an appeal from a judgment against them, operating as a supersedeas, so that the probate court would not have jurisdiction to classify it, a failure to file in the probate court until after affirmance on appeal is not laches. Ryans *v.* Boogher, 169 Mo. 673, 69 S. W. 1048.

A judgment for costs against an administrator does not lose its priority, although not presented in the county court within thirty days after it was rendered, as required by statute, since the statute applies only to judgments obtained on claims which have been rejected by the administrator. Manning *v.* Mayes, 79 Tex. 653, 15 S. W. 638.

27. *Illinois.*— Winslow *v.* Leland, 128 Ill. 304, 21 N. E. 588.

Iowa.— Boyd *v.* Collins, 70 Iowa 296, 30 N. W. 574 [*distinguishing* Bayless *v.* Powers, 62 Iowa 601, 17 N. W. 907]; Baldwin *v.* Tuttle, 23 Iowa 66.

Missouri.— Peters *v.* Holliday, 40 Mo. 544.

New York.— See Matter of Morton, 7 Misc. 343, 28 N. Y. Suppl. 82.

Ohio.— Ambrose *v.* Byrne, 61 Ohio St. 146, 55 N. E. 408.

Pennsylvania.— See McMurray *v.* Hopper, 43 Pa. St. 468.

See 22 Cent. Dig. tit. "Executors and Administrators," § 772.

Subjecting property fraudulently conveyed. —Although under the statute of non-claim a judgment becomes forever barred as a claim against the estate if it is not presented or filed within the time limited, the statute does not bar an action to subject property fraudulently conveyed by the decedent in his lifetime to a judgment not so presented or filed. O'Doherty *v.* Toole, 2 Ariz. 288, 15 Pac. 28; Harlin *v.* Stevenson, 30 Iowa 371.

28. *Alabama.*— Smith *v.* Gillam, 80 Ala. 296; George *v.* George, 67 Ala. 192; Flinn *v.* Barber, 61 Ala. 530 (vendor's lien); Mahone *v.* Haddock, 44 Ala. 92; Inge *v.* Boardman, 2 Ala. 331; Duval *v.* McLoskey, 1 Ala. 708.

Arkansas.— Hodges *v.* Taylor, (1890) 13 S. W. 129; McClure *v.* Owens, 32 Ark. 443; Simms *v.* Richardson, 32 Ark. 297; Barber *v.* Peay, 31 Ark. 392 (specific lien acquired by levy under execution); Nicholls *v.* Gee, 30 Ark. 135; Hall *v.* Denckla, 28 Ark. 506; Pope *v.* Boyd, 22 Ark. 535.

California.— Under the present statute (Code Civ. Proc. § 1500) the holder of a mortgage or other lien may enforce the same without presentation (Brown *v.* Sweet, 127 Cal. 332, 59 Pac. 774; Hibernia Sav., etc., Soc. *v.* Wackenreuder, 99 Cal. 593, 34 Pac. 219; More *v.* Calkins, 95 Cal. 435, 30 Pac. 583, 29 Am. St. Rep. 128; German Sav., etc., Soc. *v.* Fisher, 92 Cal. 502, 28 Pac. 591; Anglo-Nevada Assur. Corp. *v.* Nadeau, 90 Cal. 393, 27 Pac. 302; Sonoma County Bank *v.* Charles, 86 Cal. 322, 24 Pac. 1019; Mechanics' Bldg., etc., Assoc. *v.* King, 83 Cal. 440, 23 Pac. 376; Dreyfuss *v.* Giles, 79 Cal. 409, 21 Pac. 840; Bollinger *v.* Manning, 79 Cal. 7, 21 Pac. 375; Bull *v.* Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235; Hibernia Sav., etc., Soc. *v.* Conlin, 67 Cal. 178, 7 Pac. 477; Security Sav. Bank *v.* Connell, 65 Cal. 574, 4 Pac. 580; Camp *v.* Grider, 62 Cal. 20; *In re* Kibbe, 57 Cal. 407) where all recourse against any other property of the estate is expressly waived (Ryan *v.* Holliday, 110 Cal. 335, 42 Pac. 891; More *v.* Calkins, *supra*; German Sav., etc., Soc. *v.* Fisher, *supra*; Anglo-Nevada Assur. Corp. *v.* Nadeau, *supra*; Sonoma County Bank *v.* Charles, *supra*; Mechanics' Bldg., etc., Assoc. *v.* King, *supra*; Dreyfuss *v.* Giles *supra*; Security Sav. Bank *v.* Connell, *supra*), but no counsel fees can be recovered unless the claim is presented (Sonoma County Bank *v.* Charles, *supra*). If, however, there are liens or encumbrances on the homestead, the claims secured thereby must, under Code Civ. Proc. § 1475, be presented and allowed as other claims against the estate. McGahey *v.* Forrest, 109 Cal. 63, 41 Pac. 817; Wise *v.* Williams, 88 Cal. 30, 25 Pac. 1064; Perkins *v.* Onyett, 86 Cal. 348, 24 Pac. 1024; Sanders *v.* Russell, 86 Cal. 119, 24 Pac. 852, 21 Am. St. Rep. 26; Rosenberg *v.* Ford, 85 Cal. 610, 24 Pac. 779; Hearn *v.* Kennedy, 85 Cal. 55, 24 Pac. 606; Mechanics' Bldg., etc., Assoc. *v.* King, *supra*; Bollinger *v.* Manning, *supra*; Camp *v.* Grider, *supra*. See also Browne *v.* Sweet, 127 Cal. 332, 59 Pac. 774. Where a mortgage on homestead property is executed by a husband and wife, and upon the death of one

not in any just sense be considered claims against the estate, but the right to subject specific property to the claim arises from the contract of the debtor

of them the property is set apart to the survivor, the mortgagee can neither foreclose the mortgage nor have personal judgment on the notes against the survivor unless he first duly presents his claim against the estate of the decedent (Hibernia Sav., etc., Soc. *v.* Thornton, 109 Cal. 427, 42 Pac. 447, 50 Am. St. Rep. 52; Hearn *v.* Kennedy, *supra*; Mechanics' Bldg., etc., Assoc. *v.* King, *supra*; Bollinger *v.* Manning, *supra*; Camp *v.* Grider, *supra*); even though there are no other assets of the estate that can be subjected to the payment of the mortgage (Bollinger *v.* Manning, *supra*). The provisions of section 1475 do not apply, however, where the homestead did not exist at the time of decedent's death, but was set apart subsequently by the court (McGahey *v.* Forrest, *supra*), and where, in connection with a mortgage on the homestead given to a building and loan association, the stock held by the decedent in the association is also pledged, the pledge may be foreclosed without any presentation of the claim against the estate (Mechanics' Bldg., etc., Assoc. *v.* King, *supra*). For earlier decisions of little if any value at the present time see Hibernia Sav., etc., Soc. *v.* Hayes, 56 Cal. 297; Whitmore *v.* San Francisco Sav. Union, 50 Cal. 145; Harp *v.* Calahan, 46 Cal. 222; Pitte *v.* Shipley, 46 Cal. 154; Schadt *v.* Heppe, 45 Cal. 433; Sichel *v.* Carrillo, 42 Cal. 493; Wright *v.* Ross, 36 Cal. 414; Willis *v.* Farley, 24 Cal. 490; Ellissen *v.* Halleck, 6 Cal. 386.

Colorado.— In the state the general statute of non-claim (Mills Annot. St. (1891) § 4780) is held not to apply to claims secured by mortgage or deed of trust, but a statute particularly applicable to such claims (Mills Annot. St. (1891) § 4783) prohibits foreclosure within one year from the death of the decedent unless by permission of the court and in any event until the claims have been proved and allowed. Townsend *v.* Thompson, 24 Colo. 411, 51 Pac. 433; Sullivan *v.* Sheets, 22 Colo. 153, 43 Pac. 1012; Reid *v.* Sullivan, 20 Colo. 498, 39 Pac. 338.

Illinois.— Kittredge *v.* Nicholes, 162 Ill. 410, 44 N. E. 742 [*affirming* 60 Ill. App. 604]; Dodge *v.* Mack, 22 Ill. 93; Waughop *v.* Bartlett, 61 Ill. App. 252 [*affirmed* in 165 Ill. 24, 46 N. E. 197]. See also Mulvey *v.* Johnson, 90 Ill. 457; Judy *v.* Kelley, 11 Ill. 211, 50 Am. Dec. 455.

Indiana.— Beach *v.* Bell, 139 Ind. 167, 38 N. E. 819; La Plante *v.* Convery, 98 Ind. 499; McCallam *v.* Pleasants, 67 Ind. 542; Bell *v.* Hobaugh, 65 Ind. 598; Noble *v.* McGinnis, 55 Ind. 528; Cole *v.* McMickle, 30 Ind. 94.

Iowa.—Allen *v.* Moer, 16 Iowa 307.

Kansas.—Andrews *v.* Morse, 51 Kan. 30, 32 Pac. 640.

Michigan.— Willard *v.* Van Leeuwen, 56 Mich. 15, 22 N. W. 185. See also Clark *v.* Davis, 32 Mich. 154.

Minnesota.— See Hill *v.* Townley, 45 Minn. 167, 47 N. W. 653.

Mississippi.— Miller *v.* Jefferson College, 5 Sm. & M. 651; Miller *v.* Helm, 2 Sm. & M. 687; Jefferson College *v.* Dickson, Freem. 474.

Missouri.— Tucker *v.* Wells, 111 Mo. 399, 20 S. W. 114.

Nevada.— Kirnan *v.* Powning, 25 Nev. 378, 60 Pac. 834, 61 Pac. 1090; Rickards *v.* Hutchinson, 18 Nev. 215, 2 Pac. 52, 4 Pac. 702.

New York.— Matter of Eadie, 39 Misc. 117, 78 N. Y. Suppl. 967.

Ohio.— See Fisher *v.* Mossman, 11 Ohio 42.

Oregon.— Teel *v.* Winston, 22 Oreg. 489, 29 Pac. 142.

South Dakota.— Fish *v.* De Laray, 8 S. D. 320, 66 N. W. 465, 59 Am. St. Rep. 764 (mechanics' lien); Kelsey *v.* Welch, 8 S. D. 255, 66 N. W. 390.

Vermont.— Hurlbert *v.* Brigham, 56 Vt. 368; Pelton *v.* Johnson, 52 Vt. 138; Walker *v.* Baxter, 26 Vt. 710; Richmond *v.* Aiken, 25 Vt. 324; Grafton Bank *v.* Doe, 19 Vt. 463, 47 Am. Dec. 697; Putnam *v.* Russell, 17 Vt. 54, 42 Am. Dec. 478.

Washington.— Reed *v.* Miller, 1 Wash. 426, 25 Pac. 334; Scammon *v.* Ward, 1 Wash. 179, 23 Pac. 439. See also Casey *v.* Auld, 4 Wash. 167, 29 Pac. 1048.

Wisconsin.—Edgerton *v.* Schneider, 26 Wis. 385.

See 22 Cent. Dig. tit. "Executors and Administrators," § 773.

Contra.— Bush *v.* Adams, 22 Fla. 177; Wilson *v.* Harris, 91 Tex. 427, 44 S. W. 65 [*affirming* (Civ. App. 1897) 40 S. W. 868]; Buchanan *v.* Wagnon, 62 Tex. 375; Gaston *v.* Boyd, 52 Tex. 282; Cannon *v.* McDaniel, 46 Tex. 303; Cundiff *v.* Simpson, 32 Tex. 144; Robertson *v.* Paul, 16 Tex. 472; Danzey *v.* Swinney, 7 Tex. 617; Graham *v.* Vining, 1 Tex. 639, 2 Tex. 433; Tiboldi *v.* Palms, (Tex. Civ. App. 1904) 78 S. W. 726 [*affirmed* in 97 Tex. 414, 79 S. W. 23]; Texas Loan Agency *v.* Dingee, (Tex. Civ. App. 1903) 75 S. W. 866. But see Cole *v.* Robertson, 6 Tex. 356, 55 Am. Dec. 784.

A laborer's lien on saw logs arises by operation of law and stands upon an entirely different basis from a lien created by mortgage, and such a lien cannot be enforced against the estate of a decedent unless it has been first presented to the executor or administrator. Casey *v.* Ault, 4 Wash. 167, 29 Pac. 1048.

A vendor's lien reserved in the deed need not be presented (Allen *v.* Smith, 29 Ark. 74), but a vendor's equitable lien cannot be distinguished from the debt itself and requires presentation (Linthicum *v.* Tapscott, 28 Ark. 267 [*followed* in McKneely *v.* Terry, 61 Ark. 527, 33 S. W. 953]).

A mortgage existing at the time decedent purchased land is not a claim against his estate and is not within the California statute providing that mortgages can be enforced without presentation only where all recourse

whereby he has during life set aside certain property for its payment, and such property does not, except in so far as its value may exceed the debt, belong to the estate, and the instrument being of record or the property being in the possession of the creditor is notice to all the world of the contract.[29] But where a mortgagee, pledgee, or other secured creditor seeks to obtain payment either in full or of a deficiency out of the general assets of the estate and thus to enforce his claim against property not covered by his lien or held by him as security, his claim stands on the same footing with the claims of other creditors and must be presented for allowance.[30] The security of a mortgagee, pledgee, or other secured creditor is not affected by his presentation and securing the allowance of his claim.[31]

against the general estate is expressly waived. Ryan *v.* Holliday, 110 Cal. 335, 42 Pac. 891.

A power of sale contained in a deed of trust continues in full force after the grantor's death, and no judicial foreclosure is required, and hence in such case Cal. Code Civ. Proc. § 1500, allowing an action for foreclosure of a mortgage against a decedent's estate without presentation of the claim secured to the executor or administrator, only "when all recourse against any other property of the estate is expressly waived in the complaint," does not apply. More *v.* Calkins, 95 Cal. 435, 30 Pac. 583, 29 Am. St. Rep. 128. But see Robertson *v.* Paul, 16 Tex. 472.

The holder of a note secured by mortgage need not under the Texas rule present both note and mortgage for approval, but the presentation of the note is sufficient. Cannon *v.* McDaniel, 46 Tex. 303; Cundiff *v.* Simpson, 32 Tex. 144. See also Simpson *v.* Reily, 31 Tex. 298. *Aliter* under the probate law of 1840, as to a note secured by a trust deed. Wilson *v.* Harris, 91 Tex. 427, 44 S. W. 65 [*affirming* (Civ. App. 1897) 40 S. W. 868].

29. Smith *v.* Gillam, 80 Ala. 296; Reid *v.* Sullivan, 20 Colo. 498, 39 Pac. 338. See also Miller *v.* Jefferson College, 5 Sm. & M. (Miss.) 651; Miller *v.* Helm, 2 Sm. & M. (Miss.) 687; Jefferson College *v.* Dickson, Freem. (Miss.) 474.

30. *Alabama.*—Mahone *v.* Haddock, 44 Ala. 92; Duval *v.* McLoskey, 1 Ala. 708.

California.— *In re* Kibbe, 57 Cal. 407; Marsh *v.* Dooley, 52 Cal. 232; Wright *v.* Ross, 36 Cal. 414.

Illinois.— Roberts *v.* Flatt, 142 Ill. 485, 32 N. E. 484 [*affirming* 42 Ill. App. 608]; Mulvey *v.* Johnson, 90 Ill. 457.

Indiana.— See Beach *v.* Bell, 139 Ind. 167, 38 N. E. 819. *Contra*, as to mortgages. Cole *v.* McMickle, 30 Ind. 94; Swift *v.* Harley, 20 Ind. App. 614, 49 N. E. 1069.

Iowa.— Colby *v.* King, 67 Iowa 458, 25 N. W. 704, holding a claim on a note originally secured by chattel mortgage barred by reason of non-presentation notwithstanding the fact that the mortgagee had permitted the mortgaged property to be sold under the belief that there was plenty of property to pay the debts of the decedent and the agreement of the administrator that he should be paid.

Kansas.—Andrews *v.* Morse, 51 Kan. 30, 32 Pac. 640.

Michigan.— Willard *v.* Van Leeuwen, 56 Mich. 15, 22 N. W. 185; Clark *v.* Davis, 32 Mich. 154.

Minnesota.— Hill *v.* Townley, 45 Minn. 167, 47 N. W. 653.

Mississippi.— Jefferson College *v.* Dickson, Freem. 474.

Missouri.— See Tucker *v.* Wells, 111 Mo. 399, 20 S. W. 114.

Nevada.— Kirman *v.* Powning, 25 Nev. 378, 60 Pac. 834, 61 Pac. 1090. See also Rickards *v.* Hutchinson, 18 Nev. 215, 2 Pac. 52, 4 Pac. 702.

New Jersey.— Mutual Ben. L. Ins. Co. *v.* Howell, 32 N. J. Eq. 146. See also Smith *v.* Crater, 43 N. J. Eq. 636, 12 Atl. 530. But *compare* Terhune *v.* White, 34 N. J. Eq. 98 [*followed* in Field *v.* Thistle, 58 N. J. Eq. 339, 43 Atl. 1072], holding that a claim against the estate of a decedent on his assumption of a mortgage is, before foreclosure, only contingent, and consequently cannot be proved as a debt against his estate before that time.

Oregon.— Teel *v.* Winston, 22 Oreg. 489, 29 Pac. 142.

South Dakota.—Thurber *v.* Miller, 11 S. D. 124, 75 N. W. 900; Kelsey *v.* Welch, 8 S. D. 255, 66 N. W. 390.

Vermont.— Hurlbert *v.* Brigham, 56 Vt. 368; Pelton *v.* Johnson, 52 Vt. 138; Walker *v.* Baxter, 26 Vt. 710; Richmond *v.* Aiken, 25 Vt. 324; Grafton Bank *v.* Doe, 19 Vt. 463, 47 Am. Dec. 697.

Washington.— Reed *v.* Miller, 1 Wash. 426, 25 Pac. 334; Scammon *v.* Ward, 1 Wash. 179, 23 Pac. 439.

Wisconsin.— Pereles *v.* Leiser, 119 Wis. 347, 96 N. W. 799.

Wyoming.— O'Keefe *v.* Foster, 5 Wyo. 343, 40 Pac. 525.

See 22 Cent. Dig. tit. "Executors and Administrators," § 773.

Compare In re Smith, 194 Pa. St. 259, 45 Atl. 82.

Presentation of claim before enforcing security.— A claim founded upon a bond of decedent secured by mortgage may be presented to the administrator before the mortgaged premises are sold. Smith *v.* Crater, 43 N. J. Eq. 636, 12 Atl. 530.

31. *Arkansas.*— Simms *v.* Richardson, 32 Ark. 297.

h. Claims For Trust Funds and Enforcement of Trusts. The statutory requirement of presentation does not apply to the claims of a *cestui que trust* for whom the decedent was trustee so long as the trust fund or property can be traced and the trust enforced by suitable proceedings;[32] but where the fund or property cannot be traced and the *cestui que trust* seeks redress as a general creditor of the estate of the deceased fiduciary he must present his claim.[33]

i. Taxes and Assessments. The requirement of presentation does not apply to claims for taxes and assessments, whether assessed before or after the death of the decedent.[34]

3. Against Whom Statutes of Non-Claim Run. The limitation of time within which claims must be presented for allowance in the probate court is inseparable from the peculiar procedure prescribed in each jurisdiction;[35] it is a part of that procedure and so not like a general statute of limitations, and can only be applied

California.— Morton *v.* Adams, 124 Cal. 229, 56 Pac. 1038, 71 Am. St. Rep. 53; Sonoma County Bank *v.* Charles, 86 Cal. 322, 24 Pac. 1019; Moran *v.* Gardemeyer, 82 Cal. 96, 23 Pac. 6.

Illinois.— See People *v.* Phelps, 78 Ill. 147.

Indiana.— Hight *v.* Taylor, 97 Ind. 392; Clarke *v.* Henshaw, 30 Ind. 144.

Iowa.— Moores *v.* Ellsworth, 22 Iowa 299.

Kansas.— Crooker *v.* Pearson, 41 Kan. 410, 21 Pac. 270.

Vermont.— Putnam *v.* Russell, 17 Vt. 54, 42 Am. Dec. 478.

United States.— Schuelenburg *v.* Martin, 2 Fed. 747, 1 McCrary 348.

See 22 Cent. Dig. tit. "Executors and Administrators," § 773; and, generally, Mortgages.

32. *Arkansas.*— Pope *v.* Boyd, 22 Ark. 535.

California.— Elizalde *v.* Graves, (1901) 66 Pac. 369; Tyler *v.* Mayre, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196; Roach *v.* Caraffa, 85 Cal. 436, 25 Pac. 22. See also Gillespie *v.* Winn, 65 Cal. 429, 4 Pac. 411; Sharpstein *v.* Friedlander, 54 Cal. 58; Gunter *v.* Janes, 9 Cal. 643.

Colorado.— See Central City First Nat. Bank *v.* Hummel, 14 Colo. 259, 23 Pac. 986, 20 Am. St. Rep. 257, 8 L. R. A. 788.

Florida.— Bloxham *v.* Crane, 19 Fla. 163.

Illinois.— Gillett *v.* Hickling, 16 Ill. App. 392.

Missouri.— See Bramell *v.* Adams, 146 Mo. 70, 47 S. W. 931.

Nevada.—See Thompson *v.* Reno Sav. Bank, 19 Nev. 242, 9 Pac. 121, 3 Am. St. Rep. 883.

New Jersey.— Harrison *v.* Patterson, (Ch. 1901) 50 Atl. 113; Smith *v.* Combs, 49 N. J. Eq. 420, 24 Atl. 9.

Texas.— Vandever *v.* Freeman, 20 Tex. 233, 70 Am. Dec. 391.

Utah.— Hamilton *v.* Dooly, 15 Utah 280, 49 Pac. 769.

Wisconsin.— Biron *v.* Scott, 80 Wis. 206, 49 N. W. 747.

See 22 Cent. Dig. tit. "Executors and Administrators," § 777.

33. *Alabama.*— Taylor *v.* Robinson, 69 Ala. 269 (claim against estate of deceased administrator for devastavit); Rhodes *v.* Hannah, 66 Ala. 215.

Arkansas.—Nichols *v.* Shearon, 49 Ark. 75, 4 S. W. 167; Padgett *v.* State, 45 Ark. 495; Purcelly *v.* Carter, 45 Ark. 299 (holding that while an administrator is in his lifetime a trustee for the distributees of the estate, at his death he ceases to be such and his indebtedness to the trust becomes a demand against his estate, to be authenticated, allowed, classed, and paid like any other demand); Patterson *v.* McCann, 39 Ark. 577; Connelly *v.* Weatherly, 33 Ark. 658; Hill *v.* State, 23 Ark. 604.

California.— McGrath *v.* Carroll, 110 Cal. 79, 42 Pac. 466; Gillespie *v.* Winn, 65 Cal. 429, 4 Pac. 411; Lathrop *v.* Pampton, 31 Cal. 17, 89 Am. Dec. 141. See also Sharpstein *v.* Friedlander, 54 Cal. 58; *In re* Halleck, 49 Cal. 111. But see Gunter *v.* Janes, 9 Cal. 643.

Indiana.— Spicer *v.* Hockman, 72 Ind. 120.

Maine.— See Hodge *v.* Hodge, 90 Me. 505, 38 Atl. 535, 60 Am. St. Rep. 285, 40 L. R. A. 33; Fowler *v.* True, 76 Me. 43.

Massachusetts.— See Atty.-Gen. *v.* Brigham, 142 Mass. 248, 7 N. E. 851.

See 22 Cent. Dig. tit. "Executors and Administrators," § 777.

34. *California.*— Hancock *v.* Whittemore, 50 Cal. 522; People *v.* Olvera, 43 Cal. 492.

Indiana.— Graham *v.* Russell, 152 Ind. 186, 52 N. E. 806.

Iowa.— Findley *v.* Taylor, 97 Iowa 420, 66 N. W. 744.

Maryland.—Bonaparte *v.* State, 63 Md. 465.

Missouri.— State *v.* Tittmann, 103 Mo. 553, 569, 15 S. W. 936, 941.

Ohio.— Gager *v.* Prout, 48 Ohio St. 89, 26 N. E. 1013.

See 22 Cent. Dig. tit. "Executors and Administrators," § 775.

But *compare* Millett *v.* Early, 16 Nebr. 266, 20 N. W. 352.

Payments for taxes and street assessments made by a mortgagee as provided for in a mortgage made by decedent, after presentation of the claim founded on the note and mortgage, are allowable on foreclosure without presentation. Humboldt Sav., etc., Soc. *v.* Burnham, 111 Cal. 343, 43 Pac. 971 (holding the same to be true also of payments of insurance); German Sav., etc., Soc. *v.* Hutchinson, 68 Cal. 52, 8 Pac. 627.

35. Hartman *v.* Fishbeck, 18 Fed. 291.

to persons who are bound by such special mode of procedure.[36] But where the statute of non-claim makes no exception as to any persons or class of persons, the courts can make none;[37] and hence in the absence of some provision to the contrary, the statutes of non-claim run against non-resident as well as resident,[38] and infant as well as adult claimants,[39] and also against insane persons,[40] and the estate of a deceased creditor.[41] According to the weight of authority the statutes of non-claim, unlike the general statutes of limitations, run against the state,[42] and against counties.[43] Claims of the federal government sought to be enforced in the federal courts are not affected by the state statutes of non-claim,[44] but where such claims are sought to be enforced in the state or territorial courts the local statutes of non-claim are applicable.[45]

4. Time For Presentation[46]— a. In General. The statutes requiring claims against a decedent's estate to be presented or filed within a limited time vary in the different jurisdictions as to the period for presentation or filing, some statutes allowing only a few months and others allowing several years.[47] As to the time

36. Hartman *v.* Fishbeck, 18 Fed. 291.

37. *Connecticut.*— Cone *v.* Dunham, 59 Conn. 145, 20 Atl. 311, 8 L. R. A. 647.

Maine.— Rowell *v.* Patterson, 76 Me. 196.

New Hampshire.— Chapman *v.* Gale, 32 N. H. 141; Phillips *v.* Leavitt, Smith 130.

North Carolina.—Ridley *v.* Thorpe, 3 N. C. 343.

Wisconsin.— Fields *v.* Mundy, 106 Wis. 383, 82 N. W. 343, 80 Am. St. Rep. 39.

38. *Arkansas.*— Turner *v.* Risor, 54 Ark. 33, 15 S. W. 13 (holding that presentation to a foreign administrator in an ancillary administration is no presentation to the representative in the domestic state); Erwin *v.* Turner, 6 Ark. 14.

Iowa.— Roaf *v.* Knight, 77 Iowa 506, 42 N. W. 433.

New Hampshire.— Phillips *v.* Leavitt, Smith 130.

Wisconsin.— Fields *v.* Mundy, 106 Wis. 383, 82 N. W. 343, 80 Am. St. Rep. 39 (holding also that the fact that the claim of a non-resident may have been allowed against the estate of the same decedent in a foreign jurisdiction does not affect the bar of the domestic statute); Winter *v.* Winter, 101 Wis. 494, 77 N. W. 883 (holding that Rev. St. (1898) § 3844, providing that claims against decedents not presented to the probate court within the time appointed therefor shall be forever barred, applies to claims of non-resident creditors in the administration of domestic, as well as ancillary administrations of foreign estates).

United States.— Morgan *v.* Hamlet, 113 U. S. 449, 5 S. Ct. 583, 28 L. ed. 1043, construing the Arkansas statute.

Special provisions applicable to non-resident claimants have been enacted in some states. See Cullerton *v.* Mead, 22 Cal. 95; Williams *v.* Belden, 1 Root (Conn.) 464; Wilkinson *v.* Barringer, 23 Miss. 319; Grubb *v.* Clayton, 11 Fed. Cas. No. 5,849*a*, Brunn. Col. Cas. 30, 3 N. C. 378.

39. Padgett *v.* State, 45 Ark. 495; Rayner *v.* Watford, 13 N. C. 338; Morgan *v.* Hamlet, 113 U. S. 449, 5 S. Ct. 583, 28 L. ed. 1043.

Exceptions as to infants exist, however, in the statutes of non-claim in some states; the statutory period not beginning to run until the removal of the disability. Whetstone *v.* McQueen, 137 Ala. 301, 34 So. 229; Burford *v.* Steele, 80 Ala. 147; Walker *v.* Crews, 73 Ala. 412; Moore *v.* Wallis, 18 Ala. 458; People *v.* Brooks, 22 Ill. App. 594 [*affirmed* in 123 Ill. 246, 14 N. E. 39]. And under the Alabama statute the fact that the infant has a guardian does not exclude him from the benefit of the exception. Burford *v.* Steele, *supra*; Moore *v.* Wallis, *supra*.

40. Rowell *v.* Patterson, 76 Me. 196, holding also that this is true, although the insane person has no guardian for two years next after the notice of the administrator's appointment.

41. Beasley *v.* Waugh, 51 Ala. 156; Phillips *v.* Leavitt, Smith (N. H.) 130. See also Milan *v.* Pemberton, 12 Mo. 598.

The fact that administration is not granted on the estate of the creditor until after the expiration of the time limited for the presentation of claims against the estate of the debtor does not take the case out of the operation of the statute. Glass *v.* Woolf, 82 Ala. 281, 3 So. 11; Beasley *v.* Waugh, 51 Ala. 156. See also Milan *v.* Pemberton, 12 Mo. 598.

42. Hill *v.* State, 23 Ark. 604; State *v.* Edwards, 11 Ind. App. 226, 38 N. E. 544; *In re* Mitchell, 2 Watts (Pa.) 87. See also Mahone *v.* Central Bank, 17 Ga. 111; State *v.* Crutcher, 2 Swan (Tenn.) 504. *Contra*, Parmilee *v.* McNutt, 1 Sm. & M. (Miss.) 179.

A debt due to the Central Bank of Georgia has been held to be within the Georgia statute requiring presentation of claims. Mahone *v.* Central Bank, 17 Ga. 111.

43. *In re* Jacob, 119 Iowa 176, 93 N. W. 94.

44. U. S. *v.* Backus, 24 Fed. Cas. No. 14,491, 6 McLean 443. See also U. S. *v.* Hoar, 26 Fed. Cas. No. 15,373, 2 Mason 311.

45. U. S. *v.* Hailey, 2 Ida. (Hasb.) 22, 3 Pac. 263.

46. See also *supra*, X, B, 1, a.

As affecting priority see *infra*, X, D, 2, c, (II), (B), (12).

47. See the statutes of the various states.

of presentation the statutes of non-claim, not the general statutes of limitations, are controlling,[48] although where there is no statute of non-claim the general statute of limitations will be applied by analogy to furnish a limit to the time within which claims may be presented,[49] and where, through the failure of the personal representative to proceed with the usual and ordinary settlement of the estate, the statute of non-claim cannot be called into operation, the general statute of limitations will revive and run against claims from the date of the representative's appointment and qualification.[50] When the statute requires that the court shall by its order fix the times and places for receiving and examining claims, and shall give notice of such times and places and of the time limited for presenting claims, the order must state such times and places,[51] and the notice must be given according to the terms of the statute or claims not presented will not be barred.[52] The notice cannot cure defects in the original order.[53] Where the statute provides that a period for presenting claims shall be fixed by the court, and that after the expiration of this period the court shall by final decree order that all claims not presented within that period shall be barred except as to subsequently discovered assets, the fixed period is not extended by implication until the rendition of the final decree, and a claim is barred if not presented within the time limited.[54] The presentation of claims is not conditional upon the inventory; but the creditors must file their claims within the time limited or be barred, and are not entitled to wait until an inventory is filed showing property which can be devoted to the payment of debts.[55]

b. Computation of Time.[56] Under the statutes in most jurisdictions the period within which claims against an estate must be presented runs from the

Under the California statutes the time for presentation of claims varies according to the value of the estate, a longer time being allowed when the value is over a certain sum; and the time must be stated in the representative's notice to creditors. Paterson *v.* Schmidt, 111 Cal. 457, 44 Pac. 161; *In re* Loeven, Myr. Prob. (Cal.) 203. The ascertainment of the value of the estate by the personal representative cannot be impeached or contradicted by him when he has stated it in his inventory and appraisal (*In re* Loeven, *supra*), but may be impeached or contradicted by a creditor (Paterson *v.* Schmidt, *supra*).

48. *Alabama.*— Griestra *v.* Tarleton, 67 Ala. 126.

Arkansas.— Biscoe *v.* Sandefur, 14 Ark. 568; Walker *v.* Byers, 14 Ark. 246; State Bank *v.* Walker, 14 Ark. 234.

Missouri.— Montelius *v.* Sarpy, 11 Mo. 237; State *v.* Browning, 102 Mo. App. 455, 76 S. W. 719.

New Hampshire.— Walker *v.* Cheever, 39 N. H. 420 [*distinguishing* Whipple *v.* Stevens, 19 N. H. 150; Boardman *v.* Paige, 11 N. H. 431; Peaslee *v.* Breed, 10 N. H. 498, 34 Am. Dec. 178].

Texas.— Gaston *v.* Boyd, 52 Tex. 282.

Vermont.— See Grafton Bank *v.* Doe, 19 Vt. 463, 47 Am. Dec. 697.

United States.— Mills *v.* Scott, 99 U. S. 25, 25 L. ed. 294, construing the Georgia statute of March 16, 1869.

49. O'Mulcahey *v.* Gragg, 45 Minn. 112, 47 N. W. 543.

Payment will not be presumed from mere lapse of time less than the period fixed by the general statute of limitations. Grafton Bank *v.* Doe, 19 Vt. 463, 47 Am. Dec. 697. See, generally, PAYMENT.

50. Mason's Appeal, 75 Conn. 406, 53 Atl. 895.

51. Brill *v.* Ide, 75 Wis. 113, 43 N. W. 559. See also Hart *v.* Nance, 4 Ky. L. Rep. 625.

52. Brill *v.* Ide, 75 Wis. 113, 43 N. W. 559; Gardner *v.* Callaghan, 61 Wis. 91, 20 N. W. 685.

53. Brill *v.* Ide, 75 Wis. 113, 43 N. W. 559.

54. Young *v.* Young, 45 N. J. L. 197. See also Fitzgerald *v.* Chariton First Nat. Bank, 64 Nebr. 260, 89 N. W. 813; Freehold First Nat. Bank *v.* Thompson, 61 N. J. Eq. 188, 48 Atl. 333.

Earlier decisions in New Jersey were to the contrary. Ryder *v.* Wilson, 41 N. J. L. 9; Parker *v.* Combs, 34 N. J. Eq. 522; Miller *v.* Harrison, 34 N. J. Eq. 374; Terhune *v.* White, 34 N. J. Eq. 98.

For construction of the earlier New Jersey statutes on the period for presentation of claims see Ryder *v.* Wilson, 41 N. J. L. 9; Ryan *v.* Flanagan, 38 N. J. L. 161; Campfield *v.* Ely, 13 N. J. L. 150; Miller *v.* Harrison, 34 N. J. Eq. 374; Terhune *v.* White, 34 N. J. Eq. 98.

55. *In re* Jacob, 119 Iowa 176, 93 N. W. 94; Paw Paw First Nat. Bank *v.* Sherman, 117 Mich. 602, 76 N. W. 97. See also Jacobs *v.* Jacobs, 7 Ohio S. & C. Pl. Dec. 486.

56. **As to contingent claims** see *supra*, X, B, 2, b.

As to claims not due see *supra*, X, B, 2, c.

time when letters testamentary or of administration are granted,[57] not from the representative's advertisement or publication of notice;[58] and until administration has been granted the statute of non-claim does not become operative.[59] In computing the period of limitation under these statutes the day on which the letters were granted is excluded.[60] In some jurisdictions, however, the time within which claims must be presented is expressly fixed at a certain period after the publication of a notice setting forth the grant of letters or calling on creditors to present their claims,[61] but in these jurisdictions claims may nevertheless be presented before notice is published.[62] In some jurisdictions where the claim is to be filed in court rather than presented to the executor or administrator, the time for filing begins to run from the death of the decedent.[63] Under some statutes a claim is barred if not presented within a certain time before final settlement of the estate,[64] but a statute prohibiting the filing of claims against an

57. *Alabama.*— Merchants' Nat. Bank *v.* McGee, 108 Ala. 304, 19 So. 356; Halfman *v.* Ellison, 51 Ala. 543; Cawthorne *v.* Weisinger, 6 Ala. 714.

Arkansas.— Connelly *v.* Weatherly, 33 Ark. 658; Walker *v.* Byers, 14 Ark. 246 [*overruling* Allen *v.* Byers, 12 Ark. 593; Burton *v.* Lockert, 9 Ark. 411].

Illinois.— Morse *v.* Pacific R. Co., 191 Ill. 356, 61 N. E. 104 [*affirming* 93 Ill. App. 31]; Shephard *v.* Rhodes, 60 Ill. 301; People *v.* White, 11 Ill. 341; Tinker *v.* Babcock, 107 Ill. App. 78 [*affirmed* in 204 Ill. 571, 68 N. E. 445].

Missouri.— Kimm *v.* Osgood, 19 Mo. 60; State *v.* Browning, 102 Mo. App. 455, 76 S. W. 719; Waltemar *v.* Schnick, 102 Mo. App. 133, 76 S. W. 1053. *Compare* Spaulding *v.* Suss, 4 Mo. App. 541.

New Hampshire.— Walker *v.* Cheever, 39 N. H. 420.

Pennsylvania.— *In re* Cowan, 28 Pittsb. Leg. J. 119.

Texas.— Buchanan *v.* Wagnon, 62 Tex. 375; McDougald *v.* Hadley, 1 Tex. 490.

Revocation of original grant.— If, on the discovery of a will, letters of administration previously granted are revoked and letters of administration with the will annexed are issued to another person, claims against the estate, in order to share equally in the distribution, must be presented for allowance within two years from the granting of the first letters of administration. Shephard *v.* Rhodes, 60 Ill. 301.

The claim of a ward against the estate of a deceased guardian must be presented within the period prescribed by the statute of non-claim whether the guardian has made a final settlement or not. The statute of non-claim, unlike the statute of limitations, runs from the grant of administration, not from the final settlement. Connelly *v.* Weatherly, 33 Ark. 658. *Compare* Glass *v.* Woolf, 82 Ala. 281, 3 So. 11.

58. Cawthorne *v.* Weisinger, 6 Ala. 714; People *v.* White, 11 Ill. 341. See also Hooper *v.* Bryant, 3 Yerg. (Tenn.) 1.

59. Merchants' Nat. Bank *v.* McGee, 108 Ala. 304, 19 So. 356; Baker *v.* Halleck, 128 Mich. 180, 87 N. W. 100.

60. Kimm *v.* Osgood, 19 Mo. 60.

61. *California.*— Janin *v.* Browne, 59 Cal. 37.

Iowa.— Easton *v.* Somerville, 111 Iowa 164, 82 N. W. 475, 82 Am. St. Rep. 502; Wickham *v.* Hull, 102 Iowa 469, 71 N. W. 352; Schlutter *v.* Dahling, 100 Iowa 515, 69 N. W. 884.

Mississippi.— Robertson *v.* Demoss, 23 Miss. 298, holding that the act of 1846 did not change the principles of the previous statute, but altered only the period of time for presentation. The statutory bar does not attach unless publication has been made, and the statutory period does not begin to run until the expiration of the time required by law for the publication. Henderson *v.* Ilsley, 11 Sm. & M. 9, 49 Am. Dec. 41; Dowell *v.* Weber, 2 Sm. & M. 452; Helm *v.* Smith, 2 Sm. & M. 403.

New York.— O'Connor *v.* Gifford, 117 N. Y. 275, 22 N. E 1036.

Oregon.— *In re* Conant, 43 Oreg. 530, 73 Pac. 1018.

South Carolina.— Miller *v.* Mitchell, Bailey Eq. 437.

Utah.— Fullerton *v.* Baily, 17 Utah 25, 53 Pac. 1020.

See *infra*, X, B, 7.

Where there has been a change in the statute the law in force when publication was made governs as to the time within which claims must be presented. Robertson *v.* Demoss, 23 Miss. 298. See also Hibernia Sav., etc., Soc. *v.* Hayes, 56 Cal. 297.

Date of filing proof of publication.— Where the period for presentation begins to run from the first publication of the notice to creditors, it is not affected by the date of filing the proof of publication. *In re* Conant, 43 Oreg. 530, 73 Pac. 1018.

62. Janin *v.* Browne, 59 Cal. 37; Ricketson *v.* Richardson, 19 Cal. 330; Field *v.* Field, 77 N. Y. 294; Russell *v.* Lane, 1 Barb. (N. Y.) 519.

63. Janes *v.* Brunswick, 8 N. M. 105, 42 Pac. 72; Demmy's Appeal, 43 Pa. St. 155.

64. Schrichte *v.* Stites, 127 Ind. 472, 26 N. E. 77, 1009, holding that a claim filed two days before the time set for making such settlement was barred, the limit being thirty days.

The term "final settlement," as used in

estate after the order for partition and distribution permits by implication the filing of claims at any time prior thereto, although the representative's application for final settlement is on file.[65] Under a statute requiring that commissioners be appointed to allow claims against an estate, and that the court or judge fix the time and place for the presentation of claims the rights of creditors to enforce their demands are not barred so long as no commissioners are appointed and no time or place is fixed.[66] Where the statutes require that the time for exhibiting claims against an estate be fixed by an order of court, the time is computed from the making of the order and not from its publication,[67] but the day on which the order is made is excluded from the computation.[68]

c. Postponement and Interruption of Statute — (I) *In General.* It is generally held that the statute of non-claim, when once it begins to run, continues to run; no exceptions or interruptions being allowed to intervene unless expressly provided for.[69]

(II) *Fraudulent Concealment of Claim or Cause of Action.* It is generally held that unless otherwise provided by the statute, the fraudulent concealment of the existence of the claim or cause of action, either by the decedent in his lifetime[70] or by his personal representative,[71] does not affect the operation of the non-claim statute or defer the beginning of the statutory period to the time when the facts are discovered, and that provisions of the general statute of limitations on this point are not applicable by analogy.[72]

(III) *Absence of Representative From State.* In some states it is held that where the statute of non-claim has begun to run it will continue, notwithstanding the personal representative removes from the state and continues absent until the statutory period has expired;[73] and, where the statutes require that the personal representative shall notify creditors to present their claims at

a statute providing that claims not filed at least thirty days before the final settlement of the estate shall be barred, means the presentation of the account for final settlement at the time fixed by law, and claims not filed thirty days before that time will be barred. Schrichte *v.* Stites, 127 Ind. 472, 26 N. E. 77, 1009; Roberts *v.* Spencer, 112 Ind. 85, 13 N. E. 129.

A premature settlement by the representative cannot operate to defeat a creditor's right to file his claim, and the fact that the representative has no notice of the claim does not justify a settlement in advance of the time named in the statute. Shirley *v.* Thompson, 123 Ind. 454, 24 N. E. 253 [*citing* Dillman *v.* Barber, 114 Ind. 403, 16 N. E. 825; Floyd *v.* Miller, 61 Ind. 224].

A claim for contribution by a joint judgment debtor who has paid joint judgments rendered against himself and the decedent's estate cannot be defeated by the filing and approving of the representative's final settlement report; and it is not necessary that the whole of the debt be paid at the time of settlement if it is paid when contribution is sought. Harter *v.* Songer, 138 Ind. 161, 37 N. E. 595.

Effect of vacating settlement.— Where an order approving the representative's report and discharging the representative is vacated and set aside, the estate is left as if no final report had ever been filed, and the period for filing claims is reopened. Chicago, etc., R. Co. *v.* Harshman, 21 Ind. App. 23, 51 N. E. 343.

65. Bledsoe *v.* Beiler, 66 Tex. 437, 1 S. W. 164.

66. Pratt *v.* Houghtaling, 45 Mich. 457, 8 N. W. 72. See also Wilkinson *v.* Winne, 15 Minn. 159.

67. Wooden *v.* Coles, 11 Conn. 292.

68. Weeks *v.* Hull, 19 Conn. 376, 50 Am. Dec. 249.

69. *Alabama.*— Lowe *v.* Jones, 15 Ala. 545; Decatur Branch Bank *v.* Donelson, 12 Ala. 741.

Connecticut.— Cone *v.* Dunham, 59 Conn. 145, 20 Atl. 311, 8 L. R. A. 647.

Illinois.— People *v.* White, 11 Ill. 341.

Missouri.— Richardson *v.* Harrison, 36 Mo. 96.

North Carolina.— See Ridley *v.* Thorpe, 3 N. C. 343.

Wisconsin.— Butler *v.* Templeton, 115 Wis. 382, 91 N. W. 969.

See 22 Cent. Dig. tit. "Executors and Administrators," § 796.

70. Taylor *v.* Robinson, 69 Ala. 269; Yniestra *v.* Tarleton, 67 Ala. 126.

71. Roberts *v.* Spencer, 112 Ind. 85, 13 N. E. 129.

72. Yniestra *v.* Tarleton, 67 Ala. 126.

In New Hampshire the construction of the general statute of limitations is adopted, and the creditor is afforded relief in equity, if he proceeds with due diligence and institutes proceedings for relief promptly after discovering his claim. Sugar River Bank *v.* Fairbank, 49 N. H. 131.

73. Lowe *v.* Jones, 15 Ala. 545; Decatur Branch Bank *v.* Donelson, 12 Ala. 741.

the place where he resides or transacts business, claims may be legally presented at such place whether the representative is there to receive them or not, and therefore his absence from the state is immaterial.[74] In other states if the executor or administrator by his absence from the state prevents the presentation of a claim the claim will not be barred,[75] although a merely temporary absence which does not prevent the creditor from presenting his claim by the exercise of reasonable diligence will not extend the statutory period.[76] Some statutes, however, expressly provide that the period of the representative's absence from the state shall be excluded in computing the period for presentation,[77] but even under such a statute if there are two executors it is only the period during which both are absent that will be excluded.[78]

(iv) *Death of Representative.* In some states, where the statutory period begins to run from the grant of letters testamentary or of administration, the death of the personal representative after the grant of letters does not interrupt the running of the statute; the reason being that the creditor can have an administrator appointed or can himself apply in certain cases, and hence presentation of his claim is not impossible.[79]

(v) *Creditor's Death Presumed From Absence.* Where a creditor disappeared two years before his debtor's death and was never heard from, there was no presumption that he was not living during the period for presenting claims against the deceased debtor's estate, and the period was not extended.[80]

(vi) *Appeal From Probate.* Where an order is rendered limiting the time for the presentation of claims against a testator's estate, a subsequent appeal from an order admitting the will to probate does not suspend the period of limitation,[81] and, where the creditor has died, an appeal from the probate of his will does not relieve his executors from the necessity of presenting his claim against the debtor's estate within the period limited.[82]

(vii) *War.* It has been held that the statutes of non-claim did not run during the Civil war,[83] and, on the other hand, that where the statute began to run before the civil law was suspended on account of the war, it did not stop running,[84] and that constitutional provisions suspending the statute of limitations during the Civil war did not apply to the statutes of non-claim.[85] A statute passed during the war of the Revolution disabling British subjects from suing in the state courts was held to suspend the operation of the state statute of non-claim.[86]

d. Extension by Agreement With Representative. The personal representative has authority to make a contract with a creditor of the estate, whereby the time of payment of the creditor's claim is extended, provided that the contract is for the benefit of the estate, and such a contract operates to extend the period limited for the presentation of the claim and relieves the creditor from the imputation of laches if he presents his claim within the period thus extended,[87] but

74. Douglass *v.* Folsom, 21 Nev. 441, 33 Pac. 660.

75. Walker *v.* Cheever, 39 N. H. 420.

76. Walker *v.* Cheever, 39 N. H. 420.

77. Adoue *v.* Gonzales, 22 Tex. Civ. App. 73, 54 S. W. 367.

78. Adoue *v.* Gonzales, 22 Tex. Civ. App. 73, 54 S. W. 367.

79. Pipkin *v.* Hewlett, 17 Ala. 291; Lowe *v.* Jones, 15 Ala. 545; People *v.* White, 11 Ill. 341. But see Walker *v.* Byers, 14 Ark. 246.

80. Cone *v.* Dunham, 59 Conn. 145, 20 Atl. 311, 8 L. R. A. 647.

81. Butler *v.* Templeton, 115 Wis. 382, 91 N. W. 969. See also Delaplane *v.* Smith, 38 Ohio St. 413.

82. Cone *v.* Dunham, 59 Conn. 145, 20 Atl. 311, 8 L. R. A. 647.

83. Williamson *v.* McCrary, 33 Ark. 470.

84. Richardson *v.* Harrison, 36 Mo. 96.

85. Standifer *v.* Hubbard, 39 Tex. 417; Ryan *v.* Flint, 30 Tex. 382.

86. Ogden *v.* Witherspoon, 18 Fed. Cas. No. 10,461, 3 N. C. 227. *Compare* Ridley *v.* Thorpe, 3 N. C. 343.

87. North *v.* Walker, 66 Mo. 453 [*affirming* 2 Mo. App. 174]; Smarr *v.* McMaster, 35 Mo. 349. See *infra*, X, B, 12, b, (II).

where such a contract would be prejudicial to the interests of the estate it cannot be given this effect.[88]

5. Place of Presentation. Where a certain place is designated for the presentation of claims to the personal representative, presentation at that place is sufficient, although the representative is not there to receive the claim.[89] Under a statute authorizing presentation to be made to the personal representative at his residence or place of business, the words "place of business" are construed to include the place selected for the transaction of the business of the estate, although the representative may be engaged in business elsewhere,[90] and the designation in the notice to creditors of a certain place where claims shall be presented makes that place the representative's residence or place of business within the meaning of the statute.[91] In Illinois filing a copy of the claim with the clerk of the county court within the statutory period is sufficient to keep the claim from being barred,[92] and presentation to the representative has been held to be equally effective.[93]

6. By and to Whom Presentation May Be Made — a. By Whom Made. The presentation of a claim against a decedent's estate can be made only by a person having an interest in the claim and a legal or equitable right to its enforcement,[94] and it has been held that no one but the creditor himself or a person duly authorized by him can make a presentation of a claim against an estate so as to bind the creditor.[95] So where the statement of the claim shows a cause of action in favor of a person other than the claimant it is insufficient.[96] If the creditor is of full age he is the proper person to present his claim; there is no authority for his appearance by a next friend;[97] although if he is not mentally competent to make an affidavit the claim should be presented by his guardian or a committee of his person and estate.[98] The fact that a person not interested is united with the real owner of a claim filed against the decedent's estate is immaterial, since a payment to either would be by consent of the other, their association being voluntary.[99] A valid presentation may be made by the equitable owner of the claim.[1]

88. Fitzgerald *v.* Chariton First Nat. Bank, 64 Nebr. 260, 89 N. W. 813.

89. Roddan *v.* Doane, 92 Cal. 555, 28 Pac. 604. See also Douglass *v.* Folsom, 21 Nev. 441, 33 Pac. 660.

90. Roddan *v.* Doane, 92 Cal. 555, 28 Pac. 604; Bollinger *v.* Manning, 79 Cal. 7, 21 Pac. 375; Hoyt *v.* Bonnett, 58 Barb. (N. Y.) 529 [*reversed* on other grounds in 50 N. Y. 538, and *disapproving* Murray *v.* Smith, 9 Bosw. (N. Y.) 689].

The office of the representative's attorney may be the proper place for presenting claims. Roddan *v.* Doane, 92 Cal. 555, 28 Pac. 604; Bollinger *v.* Manning, 79 Cal. 7, 21 Pac. 375.

91. Douglass *v.* Folsom, 21 Nev. 441, 33 Pac. 660; Hoyt *v.* Bonnett, 58 Barb. (N. Y.) 529 [*reversed* on other grounds in 50 N. Y. 538, and *disapproving* Murray *v.* Smith, 9 Bosw. (N. Y.) 689].

92. Wallace *v.* Gatchell, 106 Ill. 315; Barbero *v.* Thurman, 49 Ill. 283, holding also that the clerk's neglect to keep the claim on the docket, and the omission of a special order to continue the case from term to term, cannot affect the validity of the exhibition of the claim.

93. Wells *v.* Miller, 45 Ill. 33 [*followed* in Mason *v.* Tiffany, 45 Ill. 392].

94. Rayburn *v.* Rayburn, 130 Ala. 217, 30 So. 365; Allen *v.* Elliott, 67 Ala. 432; McDowell *v.* Jones, 58 Ala. 25; Cook *v.* Davis, 12 Ala. 551; Walker *v.* Heller, 104 Ind. 327, 3 N. E. 114; Marshall *v.* Perkins, 72 Me. 343.

95. Whitcomb *v.* Davenport, 63 Vt. 656, 22 Atl. 723; Moore *v.* Batchelder, 51 Vt. 50.

96. Walker *v.* Heller, 104 Ind. 327, 3 N. E. 114; Marshall *v.* Perkins, 72 Me. 343.

Indorsee of note.— Where a negotiable promissory note not yet due is indorsed by the payee and held by the indorsee, the indorsee, not the indorser, is the creditor of the deceased maker's estate, and as long as he holds the note he is the only person who may present it. Meriden Steam Mill Lumber Co. *v.* Guy, 40 Conn. 163. See also Cook *v.* Davis, 12 Ala. 551.

Where a promissory note is indorsed in blank, it may be presented in the name of anybody consenting. Whitford *v.* Herting, 60 Ill. App. 413.

97. Kline's Estate, 9 Pa. Dist. 386.

98. Kline's Estate, 9 Pa. Dist. 386. See also Thurston *v.* Holbrook, 31 Vt. 354.

99. Perkins *v.* Berry, 103 N. C. 131, 9 S. E. 621.

1. Hogan *v.* Calvert, 21 Ala. 194; *In re* Crosby, 55 Cal. 574 [*distinguishing* Marsh *v.* Dooley, 52 Cal. 232]. But see Amory *v.* Greer, 58 Vt. 58, 2 Atl. 719, in which the claims were presented in the name of the legal owner and it was also held that an ap-

The assignee of a claim may present and enforce it in his own name,[2] and a claim against the estate of a deceased surety on an executor's bond may be filed in the name of the actual claimant, although it is provided by statute that actions on executors' bonds shall be prosecuted in the name of the people for the use of the persons injured.[3] The properly appointed and duly qualified[4] executor or administrator of a deceased creditor has of course full authority to present claims in favor of the estate which he represents,[5] and he may exercise this authority at any time before his formal discharge and during the period of presentation, although his final settlement has been filed and an order of distribution entered;[6] but unless otherwise provided by statute the personal representative of the deceased debtor has no authority to present the claim of a creditor against the estate,[7] and a statute providing for the presentation of claims of the estate by way of set-off to the claims of creditors does not authorize the personal representative to present a creditor's claim for the purpose of setting off against it a claim of the estate against the creditor.[8] It has been held that, if a claim is presented by the wrong person and it appears that it is a proper claim for adjustment against the estate, the court may allow the proper person to appear and prosecute the demand;[9] and where a claim presented by an unauthorized person is disallowed, it has been held that upon becoming vested with the proper authority the person who presented the claim may, by taking an appeal from the order of disallowance, ratify and make valid the original presentation.[10]

b. To Whom Made. Where letters of administration are voidable only and have not been revoked, a valid presentation of a claim may be made to the administrator thus appointed; and upon subsequent revocation of the letters and the appointment of a new representative a second presentation is unnecessary.[11] The presentation of a claim to the personal representative before his qualification[12] or after he has been discharged[13] is of no effect. As a general rule if there are two or more personal representatives presentation of a claim to one of them is sufficient.[14] If the statute requires presentation to be made to the personal representative and does not provide for presentation to his agent or attorney, claims

peal from the disallowance of the claim was properly taken in the legal owner's name.

2. Dixon *v.* Buell, 21 Ill. 203.

3. Thomson *v.* Black, 200 Ill. 465, 65 N. E. 1092 [*affirming* 102 Ill. App. 304].

4. Henry *v.* Roe, 83 Tex. 446, 18 S. W. 806, holding that before qualification the personal representative of a deceased creditor cannot make a valid presentation of a claim in favor of his decedent.

Where letters of administration on the creditor's estate are absolutely void, the administrator is without authority to make a valid presentation of claims due the estate which he purports to represent, and an attempted presentation of such claims by him is, in legal effect, the act of a stranger, and does not prevent the operation of the statute of non-claim. McDowell *v.* Jones, 58 Ala. 25.

5. Davis *v.* Browning, 91 Cal. 603, 27 Pac. 937; Tonnies *v.* McIntyre, 82 Mo. App. 268.

Foreign executor.— An executor appointed by the will of a foreign creditor may file a claim due his testator's estate against the estate of the deceased debtor in the domestic state before proving the foreign will in the latter state, since the probate of the foreign will merely furnishes evidence of the executor's existing rights, and if this evidence is furnished at the trial it is sufficient. Feustmann *v.* Gott, 65 Mich. 592, 32 N. W. 869.

6. Tonnies *v.* McIntyre, 82 Mo. App. 268.

7. Roberts *v.* Flatt, 42 Ill. App. 608 [*affirmed* in 142 Ill. 485, 32 N. E. 484]; Moore *v.* Bachelder, 51 Vt. 50.

8. Moore *v.* Bachelder, 51 Vt. 50, holding also that an unauthorized presentation of a creditor's claim by the administrator did not give the commissioners any jurisdiction over the creditor or over his claim, notwithstanding that the claim had been adjudicated by the commissioners and their report accepted and recorded by the probate court.

9. Holdridge *v.* Holdridge, 53 Vt. 546.

10. Thurston *v.* Holbrook, 31 Vt. 354, in which the claim was presented on behalf of a person *non compos mentis*, and after the disallowance the person who had presented the claim was appointed guardian of the creditor.

11. Floyd *v.* Clayton, 67 Ala. 265.

12. Mobile Branch Bank *v.* Hallett, 12 Ala. 671 [*followed* in Borum *v.* Bell, 132 Ala. 85, 31 So. 454]. See also Bambrick *v.* Bambrick, 157 Mo. 423, 58 S. W. 8. *Compare* Brown *v.* Lone, 3 N. C. 159.

13. Gibson *v.* Mitchell, 16 Fla. 519.

14. Carrington *v.* Odom, 124 Ala. 529, 27 So. 510; Mardis *v.* Shackleford, 4 Ala. 493; Acre *v.* Ross, 3 Stew. (Ala.) 288; Willis *v.* Farley, 24 Cal. 490; Barnes *v.* Scott, 29 Fla. 285, 11 So. 48; Dean *v.* Duffield, 8 Tex. 235, 58 Am. Dec. 108.

must be presented to the representative in person, and presentation to his agent or attorney is insufficient, unless it be shown that the agent or attorney delivered the demand or notice to his principal in due time.[15] The law does not contemplate that in a mere claim against a decedent's estate third persons shall be joined as defendants with the representative.[16] The allowance of a claim against a partnership is not an exhibition of the claim against the individual estate of a deceased partner.[17]

7. Notice to Creditors[18] — a. Necessity For Notice. The personal representative of a decedent is generally required by statute to publish a notice to creditors, informing them of his appointment or of the granting of letters to him, and calling upon them to present their claims; the statutes usually making express provision as to the time when the notice shall be given, the manner and period of publication, etc.[19] In some states under the statutes of which commissioners are appointed to examine claims against decedent's estates, the notice to creditors of the time limited for filing claims is required to be given by the commissioners.[20] Unless the statutes expressly so provide, the giving of notice to creditors by the personal representative is in no sense a prerequisite to his entering upon the discharge of his duties,[21] and his failure to give the notice does not operate to annul his appointment.[22] In some jurisdictions the statutes providing for the publication of notice by the personal representative are intended solely for his own protection, and, so far as concerns the rights of creditors to payment out of the estate there is no legal obligation on him to give notice at all;[23] but in these jurisdictions, as in others, if the personal representative has paid out the assets to legatees or distributees, he cannot escape personal liability to an unpaid creditor without showing full compliance with the statutes requiring notice.[24] In states where the period for presenting claims dates from some other time than the publication of notice to creditors by the representative, the omission of the repre-

15. Rawson *v.* Knight, 71 Me. 99; Douglass *v.* Folsom, 21 Nev. 441, 33 Pac. 660, 22 Nev. 217, 38 Pac. 111.

The fact that the attorney's name was appended to the notice to creditors as "attorney for the estate" does not change the rule, the law recognizing no such officer as a general attorney for a decedent's estate. Douglass *v.* Folsom, 21 Nev. 441, 33 Pac. 660.

A distinction, however, is to be observed between cases where the creditor's failure to make due and proper presentation of his claim affects his right to share in the assets of the estate, and cases where it affects merely his right of action against the personal representative, as where the statute is intended for the latter's protection; in the latter class of cases it is held that if the personal representative, without statutory authority, appoints an agent or attorney to receive claims, he cannot avail himself of the protection of the statute. Rawson *v.* Knight, 71 Me. 99; Hardy *v.* Ames, 47 Barb. (N. Y.) 413; Whitmore *v.* Foose, 1 Den. (N. Y.) 159. See also Johnson *v.* Myers, 103 N. Y. 666, 9 N. E. 55.

16. Niblack *v.* Goodman, 67 Ind. 174; Noble *v.* McGinnis, 55 Ind. 528.

17. Burton *v.* Rutherford, 49 Mo. 255. See, generally, Partnership.

18. **Notice by court** see *supra*, X, B, 4, a.

19. See the statutes of the various states.

20. See Ribble *v.* Furmin, (Nebr. 1904) 98 N. W. 420.

21. Johnson *v.* Barker, 57 Iowa 32, 10 N. W. 289; *In re* Conser, 40 Oreg. 138, 66 Pac. 607.

22. Johnson *v.* Barker, 57 Iowa 32, 10 N. W. 289.

23. Fliess *v.* Buckley, 90 N. Y. 286 [*affirming* 24 Hun 514]; Field *v.* Field, 77 N. Y. 294. See also Wood *v.* Weightman, L. R. 13 Eq. 434, 26 L. T. Rep. N. S. 385, 20 Wkly. Rep. 459.

24. *Maryland.*— Glenn *v.* Smith, 17 Md. 260; Rawlings *v.* Adams, 7 Md. 26; Steuart *v.* Carr, 6 Gill 430.

New York.— Clayton *v.* Wardell, 2 Bradf. Surr. 1.

North Carolina.— See also Lee *v.* Patrick, 31 N. C. 135; McLin *v.* McNamara, 22 N. C. 82. *Compare* Fike *v.* Green, 64 N. C. 665.

England.— Wood *v.* Weightman, L. R. 13 Eq. 435, 26 L. T. Rep. N. S. 385, 20 Wkly. Rep. 459.

Canada.— Stewart *v.* Snyder, 27 Ont. App. 423 [*affirming* 30 Ont. 110].

See 22 Cent. Dig. tit. "Executors and Administrators," § 808.

Practice under the English statutes (22 & 23 Vict. c. 35, § 29) see *In re* Bracken, 43 Ch. D. 1, 59 L. J. Ch. 18, 61 L. T. Rep. N. S. 531, 38 Wkly. Rep. 48 [*explaining* Wood *v.* Weightman, L. R. 13 Eq. 434, 26 L. T. Rep. N. S. 385, 20 Wkly. Rep. 459].

Advertisement in Ontario Gazette unnecessary.— *Re* Cameron, 15 Ont. Pr. 272 [*distinguishing* Wood *v.* Weightman, L. R. 13 Eq. 434, 26 L. T. Rep. N. S. 385, 20 Wkly. Rep. 459].

sentative to give this notice does not relieve the creditors from the necessity of presenting their demands, but the statute of non-claim runs whether the notice is published or not,[25] it being held that, so far as the statute of non-claim is concerned, the requirements as to notice are merely directory.[26] But in other states, especially those where the period for presenting the claims begins at the publication of notice to creditors,[27] the statute of non-claim does not operate to bar claims not presented unless notice has been given within the time and in the manner prescribed by law,[28] and it has been held that unless such notice has been duly given, an order cannot properly be made closing the allowance of claims.[29] If the proper statutory notice has been given, the creditor's want of actual notice is not material and will not affect the running of the non-claim statute against his demand,[30] unless the latter statute excepts from its operation, as it does in some states, creditors who have not received notice.[31] It has been said that creditors of an estate are not bound to take any cognizance of a notice the publication of which is not made within the time stated in the statute.[32] But actual notice that the debtor has died and that administration has been granted upon his estate has the same effect as the statutory notice, and necessitates the creditor's compliance with the statute of non-claim, although the personal representative wholly neglects to give the notice required by law;[33] especially where the creditor deals with the appointee as the legal representative of the estate.[34] Where the personal representative seeks to enforce a claim of his own against the estate, he cannot take advantage of his own neglect to give the statutory notice to creditors.[35] The failure of the personal representative to give notice to creditors does not affect the general statute of limitations,[36] or estop him from claiming the benefit of that statute.[37]

25. Montgomery Bank *v.* Plannett, 37 Ala. 222; Cawthorne *v.* Weisinger, 6 Ala. 714; Thrash *v.* Sumwalt, 5 Ala. 13; People *v.* White, 11 Ill. 341; Todd *v.* Wright, 12 Heisk. (Tenn.) 442; Hooper *v.* Bryant, 3 Yerg. (Tenn.) 1. See also Atkinson *v.* Settle, 5 Yerg. (Tenn.) 299.

26. Todd *v.* Wright, 12 Heisk. (Tenn.) 442; Hooper *v.* Bryant, 3 Yerg. (Tenn.) 1. See also Crabaugh *v.* Hart, 3 Yerg. (Tenn.) 431.

27. See *supra*, X, B, 4, b.

28. *California.*— Wise *v.* Williams, 88 Cal. 30, 25 Pac. 1064; Smith *v.* Hall, 19 Cal. 85.

Delaware.— Bradley *v.* Kent, 7 Houst. 372, 32 Atl. 286.

Iowa.— McConaughy *v.* Wilsey, 115 Iowa 589, 88 N. W. 1101; Easton *v.* Somerville, 111 Iowa 164, 82 N. W. 475, 82 Am. St. Rep. 502; Johnson *v.* Barker, 57 Iowa 32, 10 N. W. 289.

Mississippi.— Alabama Branch Bank *v.* Windham, 31 Miss. 317; Henderson *v.* Ilsley, 11 Sm. & M. 9, 49 Am. Dec. 41; Pearl *v.* Conley, 7 Sm. & M. 356; Dowell *v.* Webber, 2 Sm. & M. 452; Helm *v.* Smith, 2 Sm. & M. 403.

Missouri.— Wilson *v.* Gregory, 61 Mo. 421; Stiles *v.* Smith, 55 Mo. 363; Clark *v.* Collins, 31 Mo. 260; Bryan *v.* Mundy, 17 Mo. 556; Hawkins *v.* Ridenhour, 13 Mo. 125.

Montana.— See *In re* Higgins, 15 Mont. 474, 39 Pac. 506, 28 L. R. A. 116.

Nebraska.— Ribble *v.* Furmin, (1904) 98 N. W. 420.

New Jersey.— Petrie *v.* Voorhees, 18 N. J. Eq. 285.

North Carolina.— Valentine *v.* Britton, 127 N. C. 57, 37 S. E. 74.

Washington.— Failure to give notice to creditors dispenses with the presentation of a claim within the time limited by statute, but does not dispense with presentation before suit. McFarland *v.* Fairlamb, 18 Wash. 601, 52 Pac. 239 [*explaining* Donnerberg *v.* Oppenheimer, 15 Wash. 290, 46 Pac. 254].

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 806, 808.

29. See North *v.* Van Tassel, 84 Mich. 69, 47 N. W. 663, holding that an order granted under such circumstances did not operate to prevent an allowance to a decedent's widow for the support of herself and minor children during the progress of settlement.

30. Hawkeye Ins. Co. *v.* Lisker, 122 Iowa 341, 98 N. W. 127.

31. See Pacific States Sav., etc., Co. *v.* Fox, 25 Nev. 229, 59 Pac. 4.

32. Pearl *v.* Conley, 7 Sm. & M. (Miss.) 356.

33. Walker *v.* Gill, 2 Bailey (S. C.) 105.

34. Collamore *v.* Wilder, 19 Kan. 67. See also Clawson *v.* McCune, 20 Kan. 337.

A claimant who presents his claim to the administrator for allowance is estopped by his own act from denying that he had notice of the grant of administration, and in such a case it is immaterial whether publication was made or not. Danzey *v.* Swinney, 7 Tex. 617.

35. *In re* Ward, 21 Ohio Cir. Ct. 753, 12 Ohio Cir. Dec. 44.

36. McMillan *v.* Hayward, 94 Cal. 357, 29 Pac. 774.

37. York's Appeal, 110 Pa. St. 69, 1 Atl. 162, 2 Atl. 65 [*overruling In re* McCandles, 61 Pa. St. 9; McClintock's Appeal, 29 Pa. St. 360]. See also Keyser's Appeal, 124 Pa. St.

b Sufficiency of Notice and Publication — (i) *In General.* In jurisdictions where notice to creditors is necessary all the statutory requirements as to the notice and as to the time, place, and manner of its publication must be strictly complied with;[38] but the statutes should be given a construction which will be reasonable, in view of local conditions as to means and facilities for publication,[39] and slight errors and omissions which are not misleading and do not affect the substance of the notice are immaterial.[40] If the statute does not prescribe any particular form, the notice should be made so ample and clear in its terms that it will operate as a warning to creditors.[41] Publication of a notice to creditors in advance of the order directing or regulating the notice is invalid.[42] If the statute imposes upon the personal representative the duty to publish the notice in a newspaper, and does not restrict him in his choice, the selection of the newspaper rests with him.[43] Under a statute providing that the notice shall be published as often as the court or judge shall direct, but not less than a specified number of times in a stated period, the order of the court or judge need not specify the period or frequency of publication unless the court requires more than the minimum fixed by law.[44]

(ii) *Statement of Time For Presenting Claims.* Although it is better practice for the notice to specify the time for the presentation of claims,[45] this is

80, 16 Atl. 577, 2 L. R. A. 159 [*explaining* and *reaffirming* York's Appeal, *supra*].

38. Pearl *v.* Conley, 7 Sm. & M. (Miss.) 356; Stiles *v.* Smith, 55 Mo. 363; Lee *v.* Patrick, 31 N. C. 135; McLin *v.* McNamara, 22 N. C. 82.

Calendar and not lunar months are contemplated by the Maryland statute. Glenn *v.* Hobb, 17 Md. 260.

Notice by a special administrator is of no effect. Pickering *v.* Weiting, 47 Iowa 242. And where letters *pendente lite* have been revoked by the grant of letters testamentary or of administration, the new representative should give the statutory notice to creditors, although such notice may have been given by his predecessor. *In re* Worthington, 54 Md. 359.

Publication in a newspaper printed and published in the county is not a sufficient compliance with a statute requiring advertisement at the court-house and at other public places (McLin *v.* McNamara, 22 N. C. 82), although it is a substantial compliance with that part of the statute requiring advertisement at other public places (Blount *v.* Porterfield, 3 N. C. 161).

Newspaper must be printed in English.— Where the statute requires notice to be published in a newspaper the publication must be made in a newspaper printed in the English language, unless the statute makes some exception; and this has been held true, although the decedent was a German and nearly all his business transactions had been made with Germans. *In re* Ringwald, 5 Ohio S. & C. Pl. Dec. 452, 5 Ohio N. P. 496.

A change in the date of publication of a weekly newspaper from a certain day in the week to a subsequent day in the same week does not invalidate a notice published for a certain number of successive weeks as required by statute. Stœver's Appeal, 3 Watts & S. (Pa.) 154.

39. Montelius *v.* Sarpy, 11 Mo. 237, holding also that under the Missouri statute then in force the publication of the notice of the grant of letters of administration need not be completed within thirty days from the grant of letters but need only be begun in that time.

40. Acre *v.* Ross, 3 Stew. (Ala.) 288.

41. Amos *v.* Campbell, 9 Fla. 187; Ellison *v.* Allen, 8 Fla. 206.

Description of representative.— A notice given by an executor is sufficient, although it describes him as administrator. Finney *v.* Barnes, 97 Mass. 401.

42. Wise *v.* Williams, 88 Cal. 30, 25 Pac. 1064; Ribble *v.* Furmin, (Nebr. 1904) 98 N. W. 420.

Evidence of the mere fact of publication is not sufficient to establish the regularity of the notice under a statute providing that the personal representative shall give such notice as the court or clerk may direct, in the absence of any evidence showing that the publication was made pursuant to any order; and the court will not presume from the mere fact of publication that an order directing publication was made. McConaughy *v.* Wilsey, 115 Iowa 589, 88 N. W. 1101.

43. Brouse *v.* Law, 127 Cal. 152, 59 Pac. 384, holding that under Code Civ. Proc. § 1490, giving to the court the power to select a newspaper where no newspaper is published in the county, the power of the court is limited to the case specified, and that the power conferred upon the court to examine the character of a notice that has been published and to adjudge whether or not due publication has been made does not involve the power to designate in the original order the newspaper in which the notice shall be published.

44. Hensley *v.* Sacramento County Super. Ct., 111 Cal. 541, 44 Pac. 232 [*distinguishing* Wise *v.* Williams, 88 Cal. 30, 25 Pac. 1064].

45. May *v.* Mann, 15 Fla. 553; Amos *v.* Campbell, 9 Fla. 187; Ellison *v.* Allen, 8 Fla. 206.

not necessary in the absence of express statutory requirement, but it is sufficient if it calls for presentation "within the time prescribed by law."[46] If, however, the personal representative undertakes to state in the notice the period for presentation, he must do so correctly; and if the notice provides that claims shall be presented within a longer period than that prescribed by statute it is nugatory and claims will not be barred by failure to present them within the statutory period.[47] Under a statute providing for a longer period for presentation where the value of the estate exceeds a certain sum, and requiring the period to be stated in the representative's notice to creditors, if the representative erroneously states a shorter period he does not thereby affect the creditors' rights to present their claims within the longer period.[48]

(III) *STATEMENT OF PLACE FOR PRESENTING CLAIMS.* Under a statute requiring that the notice shall direct the creditors to present their claims to the personal representative at the place of his residence or business, to be specified in the notice, if the notice states the place for presentation it need not further state that the designated place is the representative's residence or place of business.[49]

c. Waiver of Irregularities. A creditor may waive irregularities in the notice or its publication, by failing to object thereto at the proper time.[50]

d. Proof of Notice. In states where due notice to creditors is a prerequisite to the operation of the non-claim statute, if the personal representative relies on the statute as a bar to a claim of a creditor, he must affirmatively prove that he gave the statutory notice to creditors in the manner and within the time prescribed by law.[51] Publication of the notice may be proved by producing the newspaper containing the same.[52] Some statutes provide that the giving of the statutory notice may be proved by affidavit,[53] but under such a statute the affidavit has been held to be only *prima facie* evidence; the newspaper in which the notice was published being more satisfactory evidence of its contents,[54] and it has been held that the giving of due notice may be proved by any competent evidence, the affidavit being deemed unnecessary.[55] The California statutes require that an order or decree be made showing that due notice to creditors has been given,[56] and performance of this requirement can be enforced by mandamus;[57] but such an order or decree is not conclusive and may be contradicted by evidence that the publi-

46. May *v.* Vann, 15 Fla. 553; Fillyau *v.* Laverty, 3 Fla. 72.

47. Wilson *v.* Gregory, 61 Mo. 421. See also Brill *v.* Ide, 75 Wis. 113, 43 N. W. 559.

48. Paterson *v.* Schmidt, 111 Cal. 457, 44 Pac. 161; *In re* Loeven, Myr. Prob. (Cal.) 203.

Representative's determination of value of estate not binding upon creditors.— Paterson *v.* Schmidt, 111 Cal. 457, 44 Pac. 161.

49. Douglass *v.* Folsom, 21 Nev. 441, 33 Pac. 660.

A notice signed by administrators and dated at a certain place sufficiently designates their place of business. Stœver's Appeal, 3 Watts & S. (Pa.) 154.

50. Bush *v.* Adams, 25 Fla. 809, 6 So. 860; Robertson *v.* Agricultural Bank, 28 Miss. 237, appearance and failure to object.

51. Pearl *v.* Conley, 7 Sm. & M. (Miss.) 356; Stiles *v.* Smith, 55 Mo. 363; Wiggins *v.* Lovering, 9 Mo. 262.

Presumption of due posting.— Where the probate court issued an order requiring an administrator to give notice of his appointment by advertising in a newspaper and by posting up notifications, and it was proved that he advertised in a newspaper but not that he posted up notifications, the presumption of due compliance with the law was not sufficient to enable the jury to find affirmatively that the administrator had obeyed the order, such a finding being necessary to sustain a title. Hudson *v.* Hulbert, 15 Pick. (Mass.) 423.

52. Wise *v.* Williams, 88 Cal. 30, 25 Pac. 1064; Hudson *v.* Hulbert, 15 Pick. (Mass.) 423, holding also that this may be done without producing evidence showing the newspaper to be genuine, provided that there is no evidence to impeach its genuineness.

53. See Brownell *v.* Williams, 54 Iowa 353, 6 N. W. 530.

The personal representative is competent to prove the giving of notice, under Iowa Code (1873), § 3698, providing that the proof may be made "by the affidavit of any competent witness." Brownell *v.* Williams, 54 Iowa 353, 6 N. W. 530.

54. Wise *v.* Williams, 88 Cal. 30, 25 Pac. 1064.

55. Estes *v.* Wilkes, 16 Gray (Mass.) 363.

56. Cal. Code Civ. Proc. § 1492.

57. Hensley *v.* Sacramento County Super. Ct., 111 Cal. 541, 44 Pac. 232. See also

cation was insufficient.[58] It has been held that a statute requiring proof of publication of the notice to be filed with the clerk of the court within a certain time is directory, not mandatory, and that where the publication has in fact been duly made the date of the filing of proof is not jurisdictional.[59] So also the jurisdiction of commissioners to hear and allow claims does not depend upon the making of proof before them that notice to creditors of the hearing and allowance has been published; but if such notice has in fact been published the commissioners may act, although no formal proof thereof is made before them.[60] The statutes requiring that notice be given and proof thereof made are intended for the benefit of creditors, and a residuary legatee, not being a creditor, is not entitled to object at the final settlement that the proof of publication of the notice was irregular, especially where he has not been injured by the irregularity.[61]

8. Notice of Presentation or Filing. In some jurisdictions notice of the filing of a claim in court is required to be given to the personal representative,[62] but in others the filing and entering of the claim constitutes sufficient notice to the representative and prevents the statutory bar, summons, or personal notice to him within the statutory period for filing or presentation not being required for this purpose,[63] although it is required in order to obtain jurisdiction of his person so that the court may adjudicate the claim.[64] Although the statutes do not provide that heirs and distributees shall have notice of claims presented for allowance against the estate, circumstances may exist under which it becomes the legal duty of the representative to give notice to the heirs, distributees, or other persons interested in the estate.[65]

9. Sufficiency of Presentation — a. In General. As a general rule a creditor can exhibit his claim against the estate of his deceased debtor only in the manner indicated by the local statute.[66] A substantial compliance with the provisions of the statute may, however, be sufficient,[67] especially where accepted by the probate court in passing upon the claim;[68] but to constitute a valid presentation the claim must not only be properly brought to the notice of the representative but the creditor must plainly show an intention to look to the deceased debtor's estate for payment.[69]

Johnston *v.* Napa County Super. Ct., 105 Cal. 666, 39 Pac. 36. See, generally, Mandamus.

58. Wise *v.* Williams, 88 Cal. 30, 25 Pac. 1064.

59. *In re* Conant, 43 Oreg. 530, 73 Pac. 1018.

60. Wilkinson *v.* Conaty, 65 Mich. 614, 32 N. W. 841.

61. *In re* Conser, 40 Oreg. 138, 66 Pac. 607.

62. Ashton *v.* Miles, 49 Iowa 564 [*distinguishing* Noble *v.* Morrey, 19 Iowa 509]; Baker *v.* Chittuck, 4 Greene (Iowa) 480.

Service on one of two administrators is sufficient. Clark *v.* Parkville, etc., R. Co., 5 Kan. 654.

Presentation of judgment.— Compliance with this requirement has been held to be necessary where a judgment is presented to the court for allowance (Gibson *v.* Vaughan, 61 Mo. 418 [*overruled* on another point in Johnson *v.* Beazley, 65 Mo. 250, 27 Am. Rep. 276]), but not where it is presented for classification (Stephens *v.* Bernays, 119 Mo. 143, 24 S. W. 46; Wernse *v.* McPike, 100 Mo. 476, 13 S. W. 809 [*overruling* Wernse *v.* McPike, 76 Mo. 249; Ewing *v.* Taylor, 70 Mo. 394; Bryan *v.* Mundy, 14 Mo. 458]).

63. Wallace *v.* Gatchell, 106 Ill. 315; Phœnix Ins. Co. *v.* Guderyahn, 20 Ill. App. 161; Noble *v.* McGinnis, 55 Ind. 528; Campbell *v.* Lindlay, 18 Ind. 234.

64. Wallace *v.* Gatchell, 106 Ill. 315; Hales *v.* Holland, 92 Ill. 494; Propst *v.* Meadows, 13 Ill. 157; Foley *v.* Wallace, 2 Ind. 174.

65. Link *v.* Link, 48 Mo. App. 345, holding that such circumstances may exist where the personal representative, after assuring the heirs and distributees that he has no claim against the estate, proceeds without their knowledge to present and have allowed a claim in his own favor.

66. Pfeiffer *v.* Suss, 73 Mo. 245; Burton *v.* Rutherford, 49 Mo. 255.

67. See Swain's Estate, 67 Cal. 637, 8 Pac. 497; Hammett *v.* Starkweather, 47 Conn. 439; Smith *v.* Smith, 3 How. (Miss.) 216; North *v.* Walker, 66 Mo. 453 [*affirming* 2 Mo. App. 174]; Hicks *v.* Jamison, 10 Mo. App. 35.

Placing a file-mark on an envelope containing claims has been held a sufficient filing. Smith *v.* Goodrich, 167 Ill. 46, 47 N. E. 316 [*reversing* on other grounds 67 Ill. App. 418].

68. Hicks *v.* Jamison, 10 Mo. App. 35 [*citing* Williamson *v.* Anthony, 47 Mo. 299].

69. Jones *v.* Peebles, 130 Ala. 269, 30 So. 564; Allen *v.* Elliott, 67 Ala. 432; Smith *v.* Fellows, 58 Ala. 467; McDowell *v.* Jones, 58

b. Statement and Verification of Claims — (i) *Statement*[70] — (a) *In General.* The statutes requiring the presentation or filing of claims against a decedent's estate usually expressly provide or clearly contemplate that the claims shall be stated in writing;[71] and even if the statute does not expressly so require, claims against an estate ought properly to be presented in writing.[72] Casual conversations with the personal representative regarding the claim do not amount to a sufficient presentation.[73] In stating a claim no fixed form is ordinarily required, nor is the technical accuracy and certainty of description which is essential in pleading necessary. All that is necessary as a general rule is that the statement shall give to the personal representative notice that a claim exists against the estate, for payment of which the creditor looks to the estate, that the statement shall be so clear and unambiguous as to distinguish the claim with reasonable certainty from all other similar claims, and that it shall give to the personal representative such information concerning the nature and amount of the demand as to enable him to act intelligently in providing for its payment or in rejecting it.[74]

Ala. 25; Dime Sav. Bank *v.* McAlenney, 76 Conn. 141, 55 Atl. 1019; Hicks *v.* Jamison, 10 Mo. App. 35; Spaulding *v.* Suss, 4 Mo. App. 541. See also Culver *v.* Yundt, 112 Ind. 401, 14 N. E. 91.

"Present" and "exhibit."— In the absence of any special statutory signification the terms "present" or "exhibit" are synonymous and when found in a statute they must be taken to have been used in their ordinary meaning; hence a statute requiring claims against a decedent's estate to be presented or exhibited has been held to mean simply a display or a profert of the claim (accompanied with a proper voucher or affidavit) with a reasonable opportunity to the representative to examine into and determine for himself the justness and validity of the demand. Willis *v.* Marks, 29 Oreg. 493, 45 Pac. 293. Under the Missouri statute a claim is not "exhibited" to an administrator unless shown with a view to procuring its allowance. An exhibition in the course of negotiations for a compromise is not the exhibition contemplated; nor is a mere delivery of the demand sufficient, nothing being said, done, or written to show the intention to procure an allowance. Neither is exhibiting a claim for classification presenting it for allowance. Pfeiffer *v.* Suss, 73 Mo. 245.

Requisites of filing.— A claim filed in the office of the probate judge must be brought to the attention of the judge or his clerk within the statutory period; merely placing it in a box appropriated for such papers without the knowledge of the judge or his clerk is insufficient. Phillips *v.* Beene, 38 Ala. 248. See also Beene *v.* Phillips, 37 Ala. 312.

70. Right to possession of claim.— Under the Oregon statutes the representative upon presentation of a claim has no right to retain the written evidence of the claim (i. e. the statement and voucher or affidavit) for a longer period of time than will be sufficient for him properly to inspect it and determine upon its justness and validity; while he can retain the claim for a reasonable time, this is the extent of his right and beyond this the creditor is entitled to the possession of the claim and may recover it by an action of replevin. Willis *v.* Marks, 29 Oreg. 493, 45 Pac. 293.

71. Marshall *v.* Perkins, 72 Me. 343; Bambrick *v.* Bambrick, 157 Mo. 423, 58 S. W. 8; Williams *v.* Gerber, 75 Mo. App. 18; Ulster County Sav. Inst. *v.* Young, 161 N. Y. 23, 55 N. E. 483 [*affirming* 15 N. Y. App. Div. 181, 44 N. Y. Suppl. 493]; Niles *v.* Crocker, 88 Hun (N. Y.) 312, 34 N. Y. Suppl. 761; Matter of Morton, 7 Misc. (N. Y.) 343, 28 N. Y. Suppl. 82; King *v.* Todd, 15 N. Y. Suppl. 156, 21 N. Y. Civ. Proc. 114. 27 Abb. N. Cas. (N. Y.) 149. See also Cruikshank *v.* Cruikshank, 9 How. Pr. (N. Y.) 350; Robert *v.* Ditmas, 7 Wend. (N. Y.) 522.

Signature.—Under the Maine statute, while the claim must be in writing it need not be signed by the party making it. Millett *v.* Millett, 72 Me. 117.

72. Smith *v.* Fellows, 58 Ala. 467; Bigger *v.* Hutchings, 2 Stew. (Ala.) 445; Pike *v.* Thorp, 44 Conn. 450; Ulster County Sav. Inst. *v.* Young, 161 N. Y. 23, 55 N. E. 483 [*affirming* 15 N. Y. App. Div. 181, 44 N. Y. Suppl. 493]. But see Lafferty *v.* Lafferty, 10 Ark. 268; Little *v.* Little, 36 N. H. 224; Mathes *v.* Jackson, 7 N. H. 259.

73. Pike *v.* Thorp, 44 Conn. 450; Matter of Morton, 7 Misc. (N. Y.) 343, 28 N. Y. Suppl. 82.

74. *Alabama.*— Kornegay *v.* Mayer, 135 Ala. 141, 33 So. 36; Borum *v.* Bell, 132 Ala. 85, 31 So. 454; Jones *v.* Peebles, 130 Ala. 269, 30 So. 564; Parker *v.* Eufaula Nat. Bank, 121 Ala. 516, 25 So. 1001; Agnew *v.* Walden, 95 Ala. 108, 10 So. 224, 84 Ala. 502, 4 So. 672; Floyd *v.* Clayton, 67 Ala. 265; Bibb *v.* Mitchell, 58 Ala. 657; Smith *v.* Fellows, 58 Ala. 467; Flinn *v.* Shackleford, 42 Ala. 202; Harrison *v.* Jones, 33 Ala. 258; Pollard *v.* Scears, 28 Ala. 484, 65 Am. Dec. 364; Hogan *v.* Calvert, 21 Ala. 194; Posey *v.* Decatur Bank, 12 Ala. 802; Hallett *v.* Mobile Branch Bank, 12 Ala. 193. See also Ransom *v.* Quarles, 16 Ala. 437.

Arkansas.— See Lafferty *v.* Lafferty, 10 Ark. 268.

California.— Etchas *v.* Orena, 127 Cal. 588, 60 Pac. 45; Faulkner *v.* Hendy, 123 Cal. 467, 56 Pac. 99; McGrath *v.* Carroll, 110 Cal.

What will be a sufficient compliance with these requirements must depend largely upon the character of each case and more or less particularity of description will

79, 42 Pac. 466. See also Duncan *v.* Thomas, 81 Cal. 56, 22 Pac. 297; Swain's Estate, 67 Cal. 637, 8 Pac. 497; Aguirre *v.* Packard, 14 Cal. 171, 73 Am. Dec. 645.

Connecticut.— Hammett *v.* Starkweather, 47 Conn. 439 (where the written statement, although somewhat informal, was accompanied by oral explanation); White *v.* Brown, 19 Conn. 577. The principle stated in the text applies to statement of claims presented to commissioners. Mead's Appeal, 46 Conn. 417. On appeal from the commissioners, however, the requirements, under a rule of court (see 58 Conn. 588) are more strict. See Merwin's Appeal, 72 Conn. 167, 43 Atl. 1055; Donahue's Appeal, 62 Conn. 370, 26 Atl. 399. Prior to this rule all that was necessary was that the claim should be so stated that it could be understood. Corr's Appeal, 62 Conn. 403, 26 Atl. 478 [*citing* Tolles' Appeal, 54 Conn. 521, 9 Atl. 402; Mead's Appeal, *supra*; American Bd. Foreign Mission Com'rs' Appeal, 27 Conn. 344; Mills *v.* Wildman, 18 Conn. 124].

Florida.— Fillyau *v.* Laverty, 3 Fla. 72.

Illinois.— Thompson *v.* Black, 200 Ill. 465, 65 N. E. 1092 [*affirming* 102 Ill. App. 304]; Wells *v.* Miller, 45 Ill. 33. See also Thorp *v.* Goewey, 85 Ill. 611, holding that written pleadings are not necessary where a claim is presented for allowance in the county court and that they are not necessary on appeal therefrom.

Indiana.— The statement must contain all the facts necessary to constitute a *prima facie* cause of action in the claimant's favor due or to become due from the decedent's estate, although a formal complaint under the ordinary rules of pleading is not necessary. Miller *v.* Eldridge, 126 Ind. 461, 27 N. E. 132; Lockwood *v.* Robbins, 125 Ind. 398, 25 N. E. 455; Thomas *v.* Merry, 113 Ind. 83, 15 N. E. 244; Culver *v.* Vundt, 112 Ind. 401, 14 N. E. 91; Walker *v.* Heller, 104 Ind. 327, 3 N. E. 114; Moore *v.* Stephens, 97 Ind. 271; Huston *v.* Centerville First Nat. Bank, 85 Ind. 21; Hileman *v.* Hileman, 85 Ind. 1; Davis *v.* Huston, 84 Ind. 272; Dodds *v.* Dodds, 57 Ind. 293; Post *v.* Pedrick, 52 Ind. 490; Ginn *v.* Collins, 43 Ind. 271; Thompson *v.* Ristine, 13 Ind. 459; Hannum *v.* Curtis, 13 Ind. 206; McCulloch *v.* Smith, 24 Ind. App. 536, 57 N. E. 143, 79 Am. St. Rep. 281; Woods *v.* Matlock, 19 Ind. App. 364, 48 N. E. 384; Hyatt *v.* Bonham, 19 Ind. App. 256, 49 N. E. 361; Cooper *v.* Griffin, 13 Ind. App. 212, 40 N. E. 710; Stewart *v.* Small, 11 Ind. App. 100, 38 N. E. 826; Parrett *v.* Palmer, 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479; Doan *v.* Dow, 8 Ind. App. 324, 35 N. E. 709; Sheeks *v.* Fillion, 3 Ind. App. 262, 29 N. E. 786; Worley *v.* Hineman, (App. 1892) 29 N. E. 570; Wolfe *v.* Wilsey, 2 Ind. App. 549, 28 N. E. 1004; Taggart *v.* Tevanny, 1 Ind. App. 339, 27 N. E. 511. See also Price *v.* Jones, 105 Ind. 543, 5 N. E. 683, 55 Am. Rep. 230; Hathaway *v.* Roll, 81 Ind. 567; Wright *v.* Jordan, 71 Ind. 1; Niblack *v.* Goodman, 67 Ind. 174; Ramsay *v.* Fouts, 67 Ind. 78; Noble *v.* McGinnis, 55 Ind. 528; Bryson *v.* Kelley, 53 Ind. 486; Crabb *v.* Atwood, 10 Ind. 322; Gibbs *v.* Ely, 13 Ind. App. 130, 41 N. E. 351. The rule that where the complaint is based upon an implied contract a recovery cannot be had on an express contract does not apply to a mere statement of a claim filed against a decedent's estate. Masters *v.* Jones, 158 Ind. 647, 64 N. E. 213. The personal representative need not be formally made a party to the statement or named therein, especially if he appears and contests the claim. Niblack *v.* Goodman, 67 Ind. 174; Taggart *v.* Tevanny, 1 Ind. App. 339, 27 N. E. 511 [*distinguishing* Wells *v.* Wells, 71 Ind. 509].

Kansas.— See Hayner *v.* Trott, 46 Kan. 70, 26 Pac. 415.

Maine.— See Millett *v.* Millett, 72 Me. 117.

Michigan.— See Grimm *v.* Taylor, 96 Mich. 5, 55 N. W. 447; Schlee *v.* Darrow, 65 Mich. 362, 32 N. W. 717, where the claim referred to orders of court rendered on specified dates.

Mississippi.— Henderson *v.* Ilsley, 11 Sm. & M. 9, 49 Am. Dec. 41; Smith *v.* Smith, 3 How. 216.

Missouri.— Watkins *v.* Donley, 88 Mo. 322; Corson *v.* Waller, 104 Mo. App. 621, 78 S. W. 656; Walker *v.* Gay, 73 Mo. App. 89; Wood *v.* Land, 35 Mo. App. 381; Lenk Wine Co. *v.* Caspari, 11 Mo. App. 382.

Nebraska.— Fitzgerald *v.* Union Sav. Bank, 65 Nebr. 97, 90 N. W. 994.

Nevada.— See Kirman *v.* Powning, 25 Nev. 378, 60 Pac. 834, 61 Pac. 1090.

New Hampshire.—Little *v.* Little, 36 N. H. 224; Tebbetts *v.* Tilton, 31 N. H. 273. See also Ross *v.* Knox, 71 N. H. 249, 51 Atl. 910; Mathes *v.* Jackson, 7 N. H. 259.

New York.— Ulster County Sav. Inst. *v.* Young, 161 N. Y. 23, 55 N. E. 483 [*affirming* 15 N. Y. App. Div. 181, 44 N. Y. Suppl. 493]; Niles *v.* Crocker, 88 Hun 312, 34 N. Y. Suppl. 761; Matter of Morton, 7 Misc. 343, 28 N. Y. Suppl. 82; King *v.* Todd, 15 N. Y. Suppl. 156, 21 N. Y. Civ. Proc. 114, 27 Abb. N. Cas. 149; Gansevoort *v.* Nelson, 6 Hill 389. See also Cruikshank *v.* Cruikshank, 9 How. Pr. 350.

Ohio.— Miller *v.* Ewing, 68 Ohio St. 176, 67 N. E. 292.

Oregon.— Goltra *v.* Penland, 42 Oreg. 18, 69 Pac. 925.

Texas.— Gaston *v.* McKnight, 43 Tex. 619; Cherry *v.* Speight, 28 Tex. 503; Chandler *v.* Meckling, 22 Tex. 36; Trigg *v.* Moore, 10 Tex. 197; Hansell *v.* Gregg, 7 Tex. 223.

See 22 Cent. Dig. tit. "Executors and Administrators," § 811.

Where a person files a claim as administrator of another estate he does so in his representative capacity and in favor only of the estate named (Barker *v.* Thompson, 98 Ill. App. 78); and where a statement of a claim is presented by a person who therein describes himself simply as an administrator,

be required according to the nature of the claim.[75] The statement must of course show that a liability exists on the part of the estate and in favor of the claimant,[76] and the claim must be exhibited or presented in its entirety; the creditor has no

without naming the estate which he represents or showing whether the claim is in favor of that estate or of himself personally, the presentation is insufficient (Bibb *v.* Mitchell, 58 Ala. 657).

A misnomer of the decedent in the statement of a claim filed in the office of the probate judge invalidates the presentation, since the statement would not on examination by the representative show that the claim was against the decedent. Halfman *v.* Ellison, 51 Ala. 543. See also Beene *v.* Collenberger, 38 Ala. 647. But the fact that a demand is made out against the decedent by name instead of against his estate or his personal representative will not justify a refusal to admit evidence to support it. Coots *v.* Morgan, 24 Mo. 522.

Statement of consideration.— Where the claim is founded upon a parol promise, the consideration must be stated with such particularity that the court may determine whether it is legally sufficient. Windell *v.* Hudson, 102 Ind. 521, 2 N. E. 303.

A personal interview between the creditor and the representative is not necessary. Gansevoort *v.* Nelson, 6 Hill (N. Y.) 389.

The claim may be presented by letter or in any other way which deals fairly with the administrator and the interests which he represents. Gansevoort *v.* Nelson, 6 Hill (N. Y.) 389. But see Adoue *v.* Gonzales, 22 Tex. Civ. App. 73, 54 S. W. 367, holding that the mailing of a claim to the personal representative is not such a presentation as is required by Tex. Rev. St. art. 2068.

A motion duly made in the circuit court pursuant to a statute against an administrator to compel him to refund money which had been paid as security for the decedent, and an appearance and resistance of the motion by the administrator, was a sufficient presentation. Smith *v.* Smith, 3 How. (Miss.) 216.

Where the creditor and the representative entered into a contract in writing in which the creditor's claim against the estate was set forth and described, and the representative bound himself to devote the rents and profits of the decedent's lands to the payment of the claim, it was held that there was a sufficient presentation. Jones *v.* Peebles, 130 Ala. 269, 30 So. 564.

Immaterial details need not be stated. Thompson *v.* Oreña, 134 Cal. 26, 66 Pac. 24.

A claim for services of a physician need not allege that the physician was licensed to practice. Cooper *v.* Griffin, 13 Ind. App. 212, 40 N. E. 710.

The insufficiency of the statement of one or more separate items in a claim does not render the entire claim insufficient. Sheeks *v.* Fillion, 3 Ind. App. 262, 29 N. E. 786; Taggart *v.* Tevanny, 1 Ind. App. 339, 27 N. E. 511.

Sufficiency of statement should be questioned by demurrer. Merwin's Appeal, 72 Conn. 167, 43 Atl. 1055.

75. See Floyd *v.* Clayton, 67 Ala. 265; Bibb *v.* Mitchell, 58 Ala. 657.

Particulars of unmatured and contingent claims.— Under Cal. Code Civ. Proc. § 1494, which requires that where an unmatured or contingent claim is presented its particulars must be stated, a claim upon an unmatured promissory note is sufficient if in usual form, containing a copy of the note and being followed by the statutory affidavit. Crocker-Woolworth Nat. Bank *v.* Carle, 133 Cal. 409, 65 Pac. 951; Landis *v.* Woodman, 126 Cal. 454, 58 Pac. 857. See also Maurer *v.* King, 127 Cal. 114, 59 Pac. 290.

Filing or presenting the original note on which the claim is based is sufficient. Floyd *v.* Clayton, 67 Ala. 265; Price *v.* Jones, 105 Ind. 543, 5 N. E. 683, 55 Am. Rep. 230. See also Borden *v.* Fowler, 14 Ark. 471; Lafferty *v.* Lafferty, 10 Ark. 268; Hansell *v.* Gregg, 7 Tex. 223, holding a presentation of the original note and the mortgage securing it accompanied by the proper affidavit sufficient.

A notice of the non-payment of a promissory note, personally served on the executor of an indorser of the note, or which is shown to have come to his hands, although it may come from a notary protesting the note, will be sufficient to withdraw the claim from the operation of the statute of non-claim, if it describes the note with accuracy, and informs the personal representative who the holder is and that he looks to the representative for payment. Mobile Branch Bank *v.* Hallett, 12 Ala. 671. See also Walker *v.* Wigginton, 50 Ala. 579 (construing Rev. Code, § 2196; Code (1896), § 133, which provides for the filing of a claim in the office of the probate judge instead of presentation); Helm *v.* Smith, 2 Sm. & M. (Miss.) 403.

Balance of account.— Unless otherwise required by statute a balance struck in an account between parties may be presented as a claim without specifying the particular items of the account. *In re* Swain, 67 Cal. 637, 8 Pac. 497 [*followed* in Parker *v.* Eufaula Nat. Bank, 121 Ala. 516, 25 So. 1001, holding the presentation of a balanced bank book sufficient]. *Compare* Roethlisberger *v.* Caspari, 12 Mo. App. 514.

A claim for "services in the care and aiding and support" of decedent's sister and minor children is broad enough to include aid and support by the contribution of money. Grimm *v.* Taylor, 96 Mich. 5, 55 N. W. 447.

Claim for back taxes.— Under Mo. Rev. St. (1889) §§ 199, 7626, no pleading other than the tax bill need be filed in the probate court on a demand for back personal taxes against the estate of a decedent. State *v.* Seehorn, 139 Mo. 582, 39 S. W. 809.

76. *Alabama.*— Cook *v.* Davis, 12 Ala. 551.

right to divide it into parts and exhibit or present it piecemeal.[77] Under the statutes in some states the statement of the claim takes the place of a petition and must be regarded as a statement of the cause of action; hence the cause of action must be sufficiently set forth in the statement filed.[78] The fact that the statement of the claim is for a larger amount than is due does not justify the exclusion of evidence to prove the actual amount of the debt.[79] Where the statute provides for filing a claim or the statement thereof in the office of the judge of probate, if the creditor properly files his claim or a proper statement thereof, he has discharged his duty, and the fact that the judge in docketing the claim describes it insufficiently cannot affect the creditor's rights.[80]

(B) *Necessity For Producing Original Instrument or Copy.* Where the claim is founded on a written instrument, such as a bill or note, it is not necessary to present or file the original instrument, unless the statute expressly so requires, if the claim and the instrument are properly and sufficiently described in the statement presented,[81] and the filing or presentation of a copy of the instrument accompanied by the statutory affidavit is generally held sufficient.[82] The presentation of even a copy of the note or other written instrument on which the claim is based is not necessary unless required by statute, but the presentation is sufficient if the claim or note is properly described.[83] Some statutes, however,

Indiana.— Walker *v.* Heller, 104 Ind. 327, 3 N. E. 114.

Iowa.— Pickrell *v.* Hiatt, 81 Iowa 537, 46 N. W. 1062.

Maine.— Marshall *v.* Perkins, 72 Me. 343.

New York.— Bloodgood *v.* Sears, 64 Barb. 71.

See 22 Cent. Dig. tit. "Executors and Administrators," § 811.

A note which is payable to a third person and which contains nothing to show that the claimant is its holder, either by indorsement, assignment, or delivery, will not support the claim unless the affidavit shows that the claimant has either a legal or equitable interest in the note. Cook *v.* Davis, 12 Ala. 551. See also Marshall *v.* Perkins, 72 Me. 343.

77. Pfeiffer *v.* Suss, 73 Mo. 245. See also Clawson *v.* McCune, 20 Kan. 337.

78. Bremer County *v.* Curtis, 54 Iowa 72, 6 N. W. 135; Baker *v.* Chittuck, 4 Greene (Iowa) 480; Headley *v.* Jenkins, 13 Ky. L. Rep. 463, holding that the proof of a claim against a decedent's estate, which the statute requires to be tendered to the personal representative, should show every fact touching its validity which it would be necessary to aver in a petition, and if it does not, the personal representative should refuse payment.

When creditor not a natural person.—Under Iowa Code, § 3338 *et seq.*, requiring claims against an estate to be entitled in the name of the claimant against the administrator of the estate, as such, with the name of the estate, etc., the claimant need not aver in what capacity — whether as a corporation, partnership, or person — it acted in presenting the claim, as is required in ordinary actions by section 3627, unless the pleading is assailed by motion. Chicago University *v.* Emmert, 108 Iowa 500, 79 N. W. 285.

Representative need not plead.— An Indiana statute providing that creditors shall file statements of their demands in the clerk's office and give notice thereof to the representative was held not to contemplate that a claim thus filed should stand for a declaration to which the representative should be compelled to plead; and therefore it was held that the representative could not be required against his consent to appear and plead to a claim so filed. Stewart *v.* Cantrall, 6 Blackf. 74.

79. Mead's Appeal, 46 Conn. 417.

80. Floyd *v.* Clayton, 67 Ala. 265. See also Barbero *v.* Thurman, 49 Ill. 283.

81. Agnew *v.* Walden, 95 Ala. 108, 10 So. 224, 84 Ala. 502, 4 So. 672; Flinn *v.* Shackleford, 42 Ala. 202; Posey *v.* Decatur Bank, 12 Ala. 802; White *v.* Brown, 19 Conn. 577. See also Rutherford *v.* Mobile Branch Bank, 14 Ala. 92.

82. *Alabama.*— Flinn *v.* Shackleford, 42 Ala. 202; Rutherford *v.* Mobile Branch Bank, 14 Ala. 92; Rowdon *v.* Young, 12 Ala. 234.

Indiana.— Pulley *v.* Perfect, 30 Ind. 379; Wolfe *v.* Wilsey, 2 Ind. App. 549, 28 N. E. 1004. See also Crabb *v.* Atwood, 10 Ind. 322.

Iowa.—Braught *v.* Griffith, 16 Iowa 26.

New Hampshire.— See Tebbetts *v.* Tilton, 31 N. H. 273.

Washington.— Olympia First Nat. Bank *v.* Root, 19 Wash. 111, 52 Pac. 521; McFarland *v.* Fairlamb, 18 Wash. 601, 52 Pac. 239, holding that where the creditor presents an affidavit setting forth the claim and a copy of the instrument, presentation of the original instrument is unnecessary unless required by the personal representative.

See 22 Cent. Dig. tit. "Executors and Administrators," § 813.

83. Agnew *v.* Walden, 84 Ala. 502, 4 So. 672, 95 Ala. 108, 10 So. 224.

Where the claim is based on a judgment it is not necessary that a certified copy of the judgment should be presented as part of the claim unless the statute so provides; although it may be the duty of the representative to

expressly require that where the claim is founded upon a written instrument or an account, either the original or a copy must accompany the claim,[84] but such statutes do not apply to cases where the instrument has been lost and no copy can be obtained,[85] or where the instrument is only collaterally involved and is not the basis of the claim;[86] and it has been held that presentation of a copy may be waived by the personal representative.[87]

(c) *Necessity For Producing Vouchers.*[88] Unless the statute expressly so requires, the creditor need not present vouchers in support of his claim,[89] and if the statute provides that the representative may require satisfactory vouchers, they need not be presented unless the representative makes a request for them.[90]

(d) *Special Requirements as to Secured Claims.* Provision is made by some statutes whereby a statement of a claim which is secured by a mortgage or other lien which has been recorded shall describe the same and refer to the date, volume, and page of the record.[91] Under such a statute merely presenting a copy of a note which states that it is secured by mortgage is not a sufficient presentation of the mortgage,[92] and has been held to operate as a waiver of the mortgage lien.[93] But a statute providing that if the claim be secured by mortgage or other evidence of lien, the mortgage, etc., or a certified copy from the record shall be attached to the claim and filed therewith, has been held to be merely directory, it being sufficient if the claim is otherwise sufficiently described in the statement;[94] and the creditor's failure to assert his lien in the affidavit authenticating his claim has been held not to constitute a waiver of the lien.[95]

require evidence or vouchers sufficient to establish to his satisfaction the justice of the claim. *In re* Crosby, 55 Cal. 574 (holding that prior to Hittel Gen. Laws, pp. 881–884, a claim based on a judgment might properly consist, so far as presentation was concerned, only of a statement of the material parts of the judgment); Gaston *v.* McKnight, 43 Tex. 619 (holding that an abstract which properly describes the judgment, its date, amount, parties, etc., and which is accompanied by the affidavit of the holder, is sufficient). See also Ransom *v.* Quarles, 16 Ala. 437, holding that the certificate of the clerk of the court in which judgment was rendered is sufficient if it substantially describes the judgment, and that the omission to specify the costs is immaterial.

84. Sonoma County Bank *v.* Charles, 86 Cal. 322, 24 Pac. 1019; Blasingame *v.* Blasingame, 24 Ind. 86; McCullough *v.* Smith, 24 Ind. App. 536, 57 N. E. 143, 79 Am. St. Rep. 281; Baker *v.* Chittuck, 4 Greene (Iowa) 480; Waltemar *v.* Schnick, 102 Mo. App. 133, 76 S. W. 1053; Roethlisberger *v.* Caspari, 12 Mo. App. 514.

Mutilated note.— Where the claim is founded on a promissory note which has been mutilated since execution by having the signature torn away and the torn portion lost, the statement of the claim must account for the mutilation and show that the holder is innocent thereof. McCullough *v.* Smith, 24 Ind. App. 536, 57 N. E. 143, 79 Am. St. Rep. 281.

85. Blasingame *v.* Blasingame, 24 Ind. 86.

86. Bryson *v.* Kelley, 53 Ind. 486.

87. Grimes *v.* Booth, 19 Ark. 224; Grimes *v.* Bush, 16 Ark. 647; Borden *v.* Fowler, 14 Ark. 471.

The question of waiver is one of fact to be determined by the jury or by the court sitting as a jury. Grimes *v.* Booth, 19 Ark. 224; Grimes *v.* Bush, 16 Ark. 647.

88. **The word "voucher"** used in the Oreg. Code, § 1131, means the affidavit of the claimant to the effect that the amount claimed is justly due, etc. Willis *v.* Marks, 29 Oreg. 493, 45 Pac. 293.

89. Gansevoort *v.* Nelson, 6 Hill (N. Y.) 389.

90. Willcox *v.* Smith, 26 Barb. (N. Y.) 316; Russell *v.* Lane, 1 Barb. (N. Y.) 519; Townsend *v.* New York L. Ins. Co., 4 N. Y. Civ. Proc. 398; Gansevoort *v.* Nelson, 6 Hill (N. Y.) 389; Morgan *v.* Bartlette, 3 Ohio Cir. Ct. 431, 2 Ohio Cir. Dec. 244; Olympia First Nat. Bank *v.* Root, 19 Wash. 111, 52 Pac. 521.

91. Moore *v.* Russell, 133 Cal. 297, 65 Pac. 624, 85 Am. St. Rep. 166; Worley *v.* Hineman, (Ind. App. 1892) 29 N. E. 570. See also Culver *v.* Yundt, 112 Ind. 401, 13 N. E. 91.

Description held sufficient see Moore *v.* Russell, 133 Cal. 297, 65 Pac. 624, 85 Am. St. Rep. 166; San Diego Consol. Nat. Bank *v.* Hayes, 112 Cal. 75, 44 Pac. 469.

Description held insufficient see Worley *v.* Hineman, (Ind. App. 1892) 29 N. E. 570.

92. *In re* Turner, 128 Cal. 328, 60 Pac. 967; Sonoma County Bank *v.* Charles, 86 Cal. 322, 24 Pac. 1019.

93. *In re* Turner, 128 Cal. 328, 60 Pac. 967. *Compare* Sonoma County Bank *v.* Charles, 86 Cal. 322, 24 Pac. 1019.

94. Kirman *v.* Powning, 25 Nev. 378, 60 Pac. 834, 61 Pac. 1090.

95. Ball *v.* Hill, 48 Tex. 634; Sutherland *v.* Elmendorf, 24 Tex. Civ. App. 137, 57 S. W. 890.

(E) *Amendment.* Statements of claims against decedents' estates are generally subject to amendment, provided that substantial justice will be promoted thereby, that the cause of action embraced in the original statement be not changed, that new items be not added, and of course that the original statement contain allegations upon which an amendment may be predicated; such amendments being allowed either under the general statutes relating to amendments of pleadings or under special statutes applicable to claims of creditors in administration proceedings.[96] It seems that the courts can permit a claim to be amended to the same extent as pleadings, and in certain contingencies amendments may be made by the parties without leave of court.[97] In New York the personal representative to whom a claim is presented may require the creditor to make the statement of the claim more definite and certain.[98] If a creditor makes an invalid presentation of his claim, he is not thereby estopped from presenting it in due form within the statutory period;[99] and it has been held that a second presentation of a claim may be treated as an amendment.[1] After the time for presenting or filing claims has expired amendments will not ordinarily be allowed.[2]

(II) *VERIFICATION*[3]—(A) *Necessity*—(1) IN GENERAL. It is very generally provided by statute that claims presented or filed against a decedent's estate shall be verified by an affidavit as to their correctness and justness, and such requirements are usually held to be imperative.[4] It has even been held that the

96. *Illinois.*— McCall *v.* Lee, 120 Ill. 261, 11 N. E. 522 [*affirming* 24 Ill. App. 585]; Belleville Sav. Bank *v.* Bornman, (1886) 7 N. E. 686, (1887) 10 N. E. 552.

Indiana.— Peden *v.* King, 30 Ind. 181.

Iowa.— Baker *v.* Chittuck, 4 Greene 480.

Missouri.— Corson *v.* Waller, 104 Mo. App. 621, 78 S. W. 656.

Nevada.— Kirman *v.* Powning, 25 Nev. 378, 60 Pac. 834, 61 Pac. 1090, amendment by attaching note and mortgage to claim.

Vermont.— Maughan *v.* Burns, 64 Vt. 316, 23 Atl. 583.

See 22 Cent. Dig. tit. "Executors and Administrators," § 817; and, generally, PLEADING.

The amount of the claim may be increased by amendment where the claim is based upon a *quantum meruit* and its nature and identity are not changed. Maughan *v.* Burns, 64 Vt. 316, 23 Atl. 583. See also Bogue *v.* Corwine, 80 Mo. App. 616.

Amendment allowable on appeal.—Corson *v.* Waller, 104 Mo. App. 621, 78 S. W. 656; Maughan *v.* Burns, 64 Vt. 316, 23 Atl. 583.

Amendment must not change ground of action. Donahue's Appeal, 62 Conn. 370, 26 Atl. 399. *Compare* Merwin's Appeal, 72 Conn. 167, 43 Atl. 1055.

97. Wolfe *v.* Wilsey, 2 Ind. App. 549, 28 N. E. 1004. See also Kirman *v.* Powning, 25 Nev. 378, 60 Pac. 834, 61 Pac. 1090.

98. Weller *v.* Weller, 4 Hun 195; Townsend *v.* New York L. Ins. Co., 4 N. Y. Civ. Proc. 398.

99. Westbay *v.* Gray, 116 Cal. 660, 48 Pac. 800. See also Warren *v.* McGill, 103 Cal. 153, 37 Pac. 144.

1. Wolfe *v.* Wilsey, 2 Ind. App. 549, 28 N. E. 1004. See also Simmons *v.* Tongue, 3 Bland (Md.) 341.

2. *In re* Turner, 128 Cal. 388, 60 Pac. 967; Sullenberger's Estate, 72 Cal. 549, 14 Pac. 513; Dickey *v.* Dickey, 8 Colo. App. 141, 45 Pac. 228. See also Wernse *v.* McPike, 100 Mo. 476, 13 S. W. 809 [*overruling* Wernse *v.* McPike, 86 Mo. 565].

3. **For a general discussion of affidavits** see AFFIDAVITS, 2 Cyc. 1.

4. *Arkansas.*— McIlroy Banking Co. *v.* Dickson, 66 Ark. 327, 50 S. W. 868; Cox *v.* Phelps, 65 Ark. 1, 45 S. W. 990; Wilkerson *v.* Gordon, 48 Ark. 360, 3 S. W. 183; Ross *v.* Hine, 48 Ark. 304, 3 S. W. 190; Alter *v.* Kinsworthy, 30 Ark. 756; Rogers *v.* Wilson, 13 Ark. 507.

Illinois.— See Smith *v.* Goodrich, 167 Ill. 46, 47 N. E. 316 [*reversing* 67 Ill. App. 418].

Indiana.— Worley *v.* Hineman, (App. 1892) 29 N. E. 570. As to the earlier Indiana statutes see Smith *v.* Denman, 48 Ind. 65.

Kansas.— Clawson *v.* McCune, 20 Kan. 337.

Kentucky.— Leach *v.* Kendall, 13 Bush 424; Trabue *v.* Harris, 1 Metc. 597; Hayden *v.* Kale, 7 Ky. L. Rep. 375. See also Curry *v.* Bryant, 7 Bush 301.

Maryland.— Dyson *v.* West, 1 Harr. & J. 567. See also Kent *v.* O'Hara, 7 Gill & J. 212.

Mississippi.— The code of 1892 requires the affidavit as an indispensable jurisdictional prerequisite to the allowance and registration of the claim. Cheairs *v.* Cheairs, 81 Miss. 662, 33 So. 414, 60 L. R. A. 549. But under the former statutes the rule was not so strict. See Cheairs *v.* Cheairs, *supra*; Sims *v.* Sims, 30 Miss. 333; Smith *v.* Smith, 3 How. 216.

New Mexico.— Clancey *v.* Clancey, 7 N. M. 405, 37 Pac. 1105, 38 Pac. 168, holding that the verification of the claim is essential to the jurisdiction of the probate court and cannot be supplied on appeal.

Oregon.—Zachary *v.* Chambers, 1 Oreg. 321.

Texas.— Converse *v.* Sorley, 39 Tex. 515; Gillmore *v.* Dunson, 35 Tex. 435; Walters *v.* Prestidge, 30 Tex. 65.

affidavit cannot be waived by the personal representative or dispensed with by the probate court,[5] although where the statute provides merely that such an affidavit may be required by the representative[6] the creditor need not make the affidavit unless the representative requests him to do so.[7] It has also been held that, while the creditor cannot enforce payment unless his claim is properly verified, if objection is taken on that ground, the representative may pay an unverified claim and be allowed credit for the payment, provided that he knows and can prove that the claim is valid, subsisting, and just,[8] especially if the claim has been passed by the probate court;[9] and, where an executor who is also residuary legatee gives bond to pay debts and legacies, he may settle and pay claims at his discretion, subject to objections from no one except the sureties in his bond.[10] In the absence of any statute so providing, a claim against a decedent's estate need not as a rule be verified or authenticated by the oath or affidavit of the claimant,[11] although in a few states local practice, independent of

See 22 Cent. Dig. tit. "Executors and Administrators," § 814.

In Iowa the statutory provisions requiring an oath in support of the claim are held to be merely directory and an oath may be administered after the claim is filed. Wile *v.* Wright, 32 Iowa 451; Goodrich *v.* Conrad, 24 Iowa 254. See also Moore *v.* McKinley, 60 Iowa 367, 4 N. W. 768.

In Missouri the statutory requirement for an affidavit in support of the creditor's claim applies only where the creditor presents his demand to the probate court for allowance and has no application to an action in another court. Stiles *v.* Smith, 55 Mo. 363.

The affidavit entitles the claim to be allowed without further proof if no exception is taken. Flinn *v.* Shackleford, 42 Ala. 202; Cook *v.* Davis, 12 Ala. 551.

5. *Arkansas.*— Cox *v.* Phelps, 65 Ark. 1, 45 S. W. 990; Alter *v.* Kinsworthy, 30 Ark. 750; Rogers *v.* Wilson, 13 Ark. 507. See also Green *v.* Brooks, 25 Ark. 318. *Compare* Leake *v.* Sutherland, 25 Ark. 219.

Kansas.— See Clawson *v.* McCune, 20 Kan. 337.

New Mexico.— Clancey *v.* Clancey, 7 N. M. 405, 37 Pac. 1105, 38 Pac. 168.

Texas.— Converse *v.* Sorley, 39 Tex. 515; Gillmore *v.* Dunson, 35 Tex. 435.

West Virginia.— See Crotty *v.* Eagle, 35 W. Va. 143, 13 S. E. 59.

See 22 Cent. Dig. tit. "Executors and Administrators," § 814.

6. See Matter of Morton, 7 Misc. (N. Y.) 343, 28 N. Y. Suppl. 82; King *v.* Todd, 15 N. Y. Suppl. 156, 21 N. Y. Civ. Proc. 114, 27 Abb. N. Cas. (N. Y.) 149.

7. Willcox *v.* Smith, 26 Barb. (N. Y.) 316; Russell *v.* Lane, 1 Barb. (N. Y.) 519; Townsend *v.* New York L. Ins. Co., 4 N. Y. Civ. Proc. 398; Gansevoort *v.* Nelson, 6 Hill (N. Y.) 389.

8. Terrell *v.* Roland, 86 Ky. 67, 4 S. W. 825, 9 Ky. L. Rep. 258. See also Overly *v.* Overly, 1 Metc. (Ky.) 117, holding that where the personal representative, acting in good faith, has paid an unverified claim, his failure to require an affidavit being a mere oversight, he may subsequently require an affidavit to be made and may thus be entitled to credit for the payment even after an order settling his accounts has been reversed on appeal.

In Mississippi under the earlier statutes the law was as stated in the text (see Cheairs *v.* Cheairs, 81 Miss. 662, 33 So. 414, 60 L. R. A. 549; Sims *v.* Sims, 30 Miss. 333; Smith *v.* Smith, 3 How. 216); but the later statutes expressly forbid the representative to pay unverified claims (Cheairs *v.* Cheairs, *supra*).

In New Jersey it was formerly stated that no recognition of a claim by the personal representative or by the probate court could dispense with the requirement that claims be presented under oath and within the statutory period (Lewis *v.* Champion, 40 N. J. Eq. 959; Gould *v.* Tingley, 16 N. J. Eq. 501), although it had been decided that where the estate was solvent the representative could pay debts which he was satisfied were just even though the claims were not verified (Kinnan *v.* Wight, 39 N. J. Eq. 501); but it has been provided by statute (Gen. St. p. 2408; Pub. Laws (1898), p. 739, § 68), that if the personal representative in good faith pays a claim not presented under oath, and the claim is proved to have been a just one, he shall have allowance for the payment if there be sufficient assets to pay the debts of equal degree in full, and that if the assets are not sufficient the representative shall be allowed for the *pro rata* amount which the creditor would have been entitled to receive if the claim had been presented duly verified (see Freehold First Nat. Bank *v.* Thompson, 61 N. J. Eq. 188, 48 Atl. 333).

9. Owens *v.* Collinson, 3 Gill & J. (Md.) 25, holding also that this rule applies where the representative seeks to retain for the amount of his own claim. See also Semmes *v.* Magruder, 10 Md. 242.

10. Durfee *v.* Abbott, 50 Mich. 278, 15 N. W. 454. See also Wheeler *v.* Hatheway, 58 Mich. 77, 24 N. W. 780.

11. Marsh *v.* Dooley, 52 Cal. 232; Probate Judge *v.* Hairston, 4 How. (Miss.) 242.

Under the Alabama statutes verification of a claim is required only when presentation is made by filing the claim or a state-

any express legislative enactment, requires that such claims be supported by affidavit.[12]

(2) What Claims Must Be Verified — (a) In General.[13] The statutes requiring the verification of claims against a decedent's estate do not apply to demands for which the estate is not directly or properly liable, such as claims arising after the decedent's death and on obligations contracted by the personal representative.[14] It has been held that the claim of a bank seeking to enforce its statutory lien on the stock of a deceased debtor need not be accompanied by the statutory affidavit,[15] but an affidavit has been held necessary to authenticate a claim arising out of an alleged breach of trust by the decedent.[16]

(b) Claims Reduced to Judgment. It has been held that unless the statute expressly so provides, a claim based on a judgment need not be verified,[17] and that, where a judgment has been rendered against an executor or administrator in his representative capacity, the judgment[18] or duly certified copy thereof[19] constitutes a sufficient proof or authentication of the claim on which the judgment is founded. But in some jurisdictions a judgment rendered against the decedent in his lifetime must be verified in the same manner as other claims.[20] Whatever may be the rule as to a domestic judgment, a judgment allowing a claim against the estate in a foreign administration must, when exhibited against the estate in the domestic administration, be accompanied by the affidavit required by the law of the forum.[21]

(c) Claims of State or Municipality. It has been held that a statute requiring verification of claims against the estates of deceased persons does not, in the absence of an expressed intention, include claims of the state or its agents;[22] but on the other hand it has been held that claims of a municipality for unpaid taxes must be verified by the statutory affidavit,[23] except where the taxes have accrued after the decedent's death.[24]

(d) Claims of Personal Representative. In a number of jurisdictions the statutes require that a claim asserted by the personal representative as a creditor shall be supported by his affidavit to the effect that the claim is justly due and unpaid and that there are no offsets, etc.,[25] and the affidavit required of the repre-

ment thereof in the office of the probate judge; a valid presentation may be made to the representative personally without verification by affidavit or otherwise. Peevey *v.* Farmers', etc., Bank, 132 Ala. 82, 31 So. 466 [*followed* in Nicholas *v.* Sands, 136 Ala. 267, 33 So. 815]; Rayburn *v.* Rayburn, 130 Ala. 217, 30 So. 365. See also Jones *v.* Pharr, 3 Ala. 283.

12. Brown *v.* Brown, 45 S. C. 408, 23 S. E. 127; Westfield *v.* Westfield, 13 S. C. 482; *Ex p.* Hanks, Dudley Eq. 231. See also Hahnlin's Appeal, 45 Pa. St. 343.

13. Mortgage — Texas statute.— A mortgage is not a "claim for money" within the Texas act of 1848 (Paschal Dig. art. 1095), specifying the manner in which "claims for money," etc., against a decedent's estate shall be verified before presentation to the executor or administrator. Simpson *v.* Reily, 31 Tex. 298. But see Robertson *v.* Paul, 16 Tex. 472.

14. Crenshaw *v.* Duff, 113 Ky. 912, 69 S. W. 962, 24 Ky. L. Rep. 718; Berry *v.* Graddy, 1 Metc. (Ky.) 553. See also Lucking *v.* Gegg, 12 Bush (Ky.) 298; Eggen *v.* Huston, 11 Ky. L. Rep. 235; Polly *v.* Covington, 10 Ky. L. Rep. 361.

15. McIlroy Banking Co. *v.* Dixon, 66 Ark. 327, 50 S. W. 868.

16. McIlroy Banking Co. *v.* Dixon, 66 Ark. 327, 50 S. W. 868 (defalcation by bank cashier); Green *v.* Brooks, 25 Ark. 318.

17. Marsh *v.* Dooley, 52 Cal. 232.

18. Smith *v.* Smith, 3 How. (Miss.) 216. See also Crane *v.* Moses, 13 S. C. 561.

19. Bradwell *v.* Wilson, 158 Ill. 346, 42 N. E. 145 [*reversing* 57 Ill. App. 162]; Darling *v.* McDonald, 101 Ill. 370.

20. Bayless *v.* Powers, 62 Iowa 601, 17 N. W. 907; Scroggs *v.* Tutt, 20 Kan. 271; Curry *v.* Bryant, 7 Bush (Ky.) 301.

21. Smith *v.* Goodrich, 167 Ill. 46, 47 N. E. 316 [*reversing* 67 Ill. App. 418].

22. Arnold *v.* Com., 80 Ky. 135, motion to recover against the representative of a surety on a bail-bond.

23. Gay *v.* Louisville, 93 Ky. 349, 20 S. W. 266, 14 Ky. L. Rep. 327. See also Leach *v.* Kendall, 13 Bush (Ky.) 424.

24. Polly *v.* Covington, 10 Ky. L. Rep. 361.

25. Hildebrandt's Estate, 92 Cal. 433, 28 Pac. 486; Hood *v.* Maxwell, 66 S. W. 276, 23 Ky. L. Rep. 1791; Terry *v.* Dayton, 31 Barb. (N. Y.) 519; Matter of Clapsaddle, 4 Misc. (N. Y.) 355, 24 N. Y. Suppl. 313, Pow. Surr. (N. Y.) 111; Clark *v.* Clark, 8 Paige (N. Y.) 152, 35 Am. Dec. 676; Williams *v.* Purdy, 6 Paige (N. Y.) 166; Puckett *v.*

sentative must, like the affidavit of any other creditor, substantially conform to the statute.[26]

(e) Amended Claims. Where an original statement of a claim is accompanied by the proper affidavit, an amended or additional statement thereafter filed by leave of court need not be supported by another affidavit.[27]

(B) *Who May Make Affidavit.* Ordinarily the affidavit should be made by the creditor himself,[28] or at least by someone having a legal or equitable interest in the claim asserted;[29] and an affidavit by a third person, such as the creditor's agent or attorney[30] or husband,[31] is not sufficient even when based upon his own knowledge.[32] Likewise where a third person has paid a debt of the decedent and, without showing by independent proof that the payment was made at the decedent's request, seeks reimbursement from the estate, his own affidavit in support of his claim is not sufficient but he must obtain the affidavit of the original creditor.[33] The statutes in some states, however, provide that the affidavit may be made by a third person who is acquainted with the facts to be sworn to and who is otherwise competent to testify,[34] or by the agent or attorney of the claimant.[35] It has been held that a joint claim may be sufficiently verified by the affidavit of one of the joint claimants;[36] but the rule is otherwise where the claim is due to several persons not jointly but severally.[37] It has been held in Delaware that where the claim is in favor of a partnership, all the acting or managing partners must join in making probate of the claim, and therefore a probate by only one of the members of the firm is insufficient unless it appears that the other members are not active partners.[38] Where the claimant is a corporation and the statute does not expressly require a particular officer or agent to make the affidavit, it is properly made by that officer or agent who is most familiar with the facts relating to the debt;[39] but if the statute requires that the

McCall, 30 Tex. 457. See also Wood *v.* Rusco, 4 Redf. Surr. (N. Y.) 380.

Funds of estate not an "offset."— The fact that the representative holds in his official capacity more money than the amount of his claim against the estate does not preclude his making the affidavit alleging "that there are no offsets" to his claim. Hildebrandt's Estate, 92 Cal. 433, 28 Pac. 486.

26. Matter of Clapsaddle, 4 Misc. (N. Y.) 335, 24 N. Y. Suppl. 313, Pow. Surr. (N. Y.) 111.

27. Pence *v.* Young, 22 Ind. App. 427, 53 N. E. 1060; Taggart *v.* Tevanny, 1 Ind. App. 339, 27 N. E. 511. See also Gibbs *v.* Ely, 13 Ind. App. 130, 41 N. E. 351. Where a creditor who presented to the executor a properly authenticated account for services performed had rendered to the testator in his lifetime an account for the same services but for a smaller amount, it was held that upon rejection of the verified account presented to the executor, the smaller account might be allowed without further verification, and that even if verification were necessary the objection came too late after final judgment. Clark *v.* Bomford, 20 Ark. 440.

28. *Arkansas.*—Beirne *v.* Imboden, 14 Ark. 237.

California.— See Macoleta *v.* Packard, 14 Cal. 178.

Mississippi.— McWhorter *v.* Donald, 39 Miss. 779, 80 Am. Dec. 97.

Oregon.— Zachary *v.* Chambers, 1 Oreg. 321.

South Carolina.— Westfield *v.* Westfield, 13 S. C. 482.

See 22 Cent. Dig. tit. "Executors and Administrators," §816.

29. Cook *v.* Davis, 12 Ala. 551.

The personal representative of a deceased creditor is of course the proper person to make the affidavit in support of a claim in favor of the deceased creditor's estate. Davis *v.* Browning, 91 Cal. 603, 27 Pac. 937; Deringer *v.* Deringer, 6 Houst. (Del.) 64. Where the creditor's administrator is a corporation an affidavit by the proper officer thereof is as valid as an affidavit made by any other administrator. Deringer *v.* Deringer, *supra.*

30. Beirne *v.* Imboden, 14 Ark. 237; Zachary *v.* Chambers, 1 Oreg. 321; Westfield *v.* Westfield, 13 S. C. 482. See also Macoleta *v.* Packard, 14 Cal. 178. *Contra,* McIntosh *v.* Greenwood, 15 Tex. 116; Hansell *v.* Gregg, 7 Tex. 223.

31. McWhorter *v.* Donald, 39 Miss. 779, 80 Am. Dec. 97.

32. Beirne *v.* Imboden, 14 Ark. 237.

33. McWhorter *v.* Donald, 39 Miss. 779, 80 Am. Dec. 97. *Compare* Winningham *v.* Halloway, 51 Ark. 385, 11 S. W. 579.

34. Mason *v.* Bull, 26 Ark. 164.

35. Mason *v.* Bull, 26 Ark. 164. See also Peter *v.* King, 13 Mo. 143; Dawson *v.* Wombles, 104 Mo. App. 272, 78 S. W. 823.

36. Ashley *v.* Gunton, 15 Ark. 415.

37. Cecil *v.* Negro Rose, 17 Md. 92.

38. Gregory *v.* Bailey, 4 Harr. (Del.) 256.

39. Cox *v.* Higginbotham, 76 S. W. 1079, 25 Ky. L. Rep. 1057.

affidavit shall be made by a designated officer, an affidavit by another officer is insufficient.[40]

(c) *Who May Take Affidavit* — (1) In General.[41] Under a general statutory authority to take affidavits a clerk of court may take the affidavit required by statute to accompany claims against decedents' estates,[42] and commissioners of deeds appointed by the governor to act in other states have authority to take the affidavits necessary to support claims against decedent's estates.[43]

(2) Necessity For Showing Officer's Authority.[44] An affidavit made before a magistrate or other officer of another state must be accompanied by the proper authentication of his official character and authority,[45] but it is otherwise as to commissioners of deeds appointed by the governor to act in other states, as they are officers of the state by whose authority they are appointed, and their official character and authority are matters of which the courts of that state will take judicial notice.[46]

(d) *Form and Sufficiency of Affidavit* — (1) In General. The statutes usually either expressly require or clearly contemplate that the oath supporting a claim against the decedent's estate shall be in the form of an affidavit in writing;[47] but it has been held that the want of the statutory affidavit may be supplied by the claimant's oath as a witness in open court.[48] Unless the statute or a rule of court requires the affidavit to be signed by the affiant, an affidavit otherwise sufficient is not rendered invalid by the omission of the affiant's signature;[49] but where the statute requires the affidavit to be signed by the party making it, the signature of the affiant is essential to the validity of the presentation.[50] The affidavit must substantially comply with all the material requirements of the statute.[51] Thus where the statute requires the affidavit to be made

40. Lanigan *v.* North, 69 Ark. 62, 63 S. W. 62.

41. See, generally, Affidavits, 2 Cyc. 9.

42. Lafferty *v.* Lafferty, 10 Ark. 268 (holding that a statute authorizing judges, justices of the peace, and notaries public to take such affidavits does not exclude the authority of the clerk of court); Etter *v.* Dugan, 1 Tex. Unrep. Cas. 175.

43. Smith *v.* Van Gilder, 26 Ark. 527; Kaufman *v.* Stone, 25 Ark. 336; Hailey *v.* McGee, 19 Tex. 107; Greenwood *v.* Woodward, 18 Tex. 1.

44. See, generally, Affidavits, 2 Cyc. 31 *et seq.*

45. Alter *v.* Kinsworthy, 30 Ark. 756. See, generally, Affidavits, 2 Cyc. 14 *et seq.*

46. Smith *v.* Van Gilder, 26 Ark. 527. See also Kaufman *v.* Stone, 25 Ark. 336, holding that the certificate and official seal of the commissioner are sufficient evidence of his official character. See Affidavits, 2 Cyc. 32.

47. See Anderson *v.* Cochran, 93 Tex. 583, 57 S. W. 29; Shelton *v.* Berry, 19 Tex. 154, 70 Am. Dec. 326.

48. Overly *v.* Overly, 1 Metc. (Ky.) 117; Kincheloe *v.* Gorman, 29 Mo. 421. See also Terrell *v.* Rowland, 86 Ky. 67, 4 S. W. 825, 9 Ky. L. Rep. 258.

49. Mahan *v.* Owen, 23 Ark. 347 [*citing* Gill *v.* Ward, 23 Ark. 16]; Shelton *v.* Berry, 19 Tex. 154, 70 Am. Dec. 326; Alford *v.* Cochrane, 7 Tex. 485. See, generally, Affidavits, 2 Cyc. 26.

50. Anderson *v.* Cochran, 93 Tex. 583, 57 S. W. 29; Lanier *v.* Taylor, (Tex. Civ. App. 1897) 41 S. W. 516.

51. *Alabama.*— Dennis *v.* Coker, 34 Ala. 611; Pickle *v.* Ezzel, 27 Ala. 623; Cook *v.* Davis, 12 Ala. 551, holding that the affidavit should show something for which the estate is responsible as a money demand or as ascertained damages.

California.— Perkins *v.* Onyett, 86 Cal. 348, 24 Pac. 1024.

Delaware.— Lolley *v.* Needham, 1 Harr. 86, holding that the affidavit must disclose all the credits and that it is not sufficient to refer generally to the books of the decedent.

Kentucky.— Dewhurst *v.* Shepherd, 102 Ky. 239, 43 S. W. 253, 19 Ky. L. Rep. 1260; Leach *v.* Kendall, 13 Bush 424; Trabue *v.* Harris, 1 Metc. 597 (holding that "offset" does not include "discount"); Smithson *v.* Baker, 9 Ky. L. Rep. 494; Hayden *v.* Kale, 7 Ky. L. Rep. 375; Hansford *v.* Parrish, 7 Ky. L. Rep. 94.

Maryland.— Cecil *v.* Negro Rose, 17 Md. 92; Dyson *v.* West, 1 Harr. & J. 567; Smoot *v.* Bunbury, 1 Harr. & J. 136, omission to state that creditor had not received any security.

Mississippi.— Cheairs *v.* Cheairs, 81 Miss. 662, 33 So. 414, 60 L. R. A. 549; McWhorter *v.* Donald, 39 Miss. 779, 80 Am. Dec. 97.

Texas.— Walters *v.* Prestidge, 30 Tex. 65; Strickland *v.* Sandmeyer, 21 Tex. Civ. App. 351, 52 S. W. 87.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 814, 815, 842.

An affidavit made in the debtor's lifetime is clearly insufficient. Wilkerson *v.* Gordon, 48 Ark. 360, 3 S. W. 183.

by the claimant or some other person who knows that the claim is correct and that it is due, the affidavit must be made upon the affiant's knowledge, and if made "to the best of his knowledge, information, and belief" it is not sufficient.[52] But a substantial compliance with the statute is ordinarily held sufficient and immaterial errors and omissions or slight departures from the strict statutory form will be disregarded.[53] Thus, although the statute requires that the verified

A copy of the affidavit is insufficient, the original is required. Ash *v.* Clark, 32 Wash. 390, 73 Pac. 351.

Compliance with the statute must appear on the face of the affidavit; a mere statement in the affidavit that the affiant appeared and made oath "according to law" is not sufficient. Evans *v.* Bonner, 2 Harr. & M. (Md.) 377.

Where there are two affidavits made on different dates, an omission of a substantial averment in the later one is not supplied by the earlier one. Dyson *v.* West, 1 Harr. & J. (Md.) 567.

Additional affidavit of third person required in Kentucky see Ky. St. § 3870; Dewhurst *v.* Shepherd, 102 Ky. 239, 43 S. W. 253, 19 Ky. L. Rep. 1260; Nutall *v.* Brannin, 5 Bush (Ky.) 11; Trabue *v.* Harris, 1 Metc. (Ky.) 597; Hansford *v.* Parrish, 7 Ky. L. Rep. 94. If the executor or administrator is the only competent witness, his refusal to make the affidavit dispenses with further proof, except the claimant's own oath. Trabue *v.* Harris, *supra.*

A statement that the claim is not usurious is required by the Mississippi statute to be incorporated in the affidavit. Cheairs *v.* Cheairs, 81 Miss. 662, 33 So. 414, 60 L. R. A. 549.

52. Pickle *v.* Ezzell, 27 Ala. 623 [*followed* in Dennis *v.* Coker, 34 Ala. 611]. See also Lanigan *v.* North, 69 Ark. 62, 63 S. W. 62; Trabue *v.* Harris, 1 Metc. (Ky.) 597. *Compare* Prestridge *v.* Irwin, 46 Ala. 653.

53. *Arkansas.*— Smith *v.* Van Gilder, 26 Ark. 527; State *v.* Collins, 16 Ark. 32. See also Beirne *v.* Imboden, 14 Ark. 237.

California.— Guerian *v.* Joyce, 133 Cal. 405, 65 Pac. 972; Griffith *v.* Lewin, 129 Cal. 596, 62 Pac. 172; Davis *v.* Browning, 91 Cal. 603, 27 Pac. 937. See also Hall *v.* San Francisco Super. Ct., 69 Cal. 79, 10 Pac. 257.

Indiana.— Story *v.* Story, 32 Ind. 137.

Kentucky.— See Cochran *v.* Germania Nat. Bank, 8 Ky. L. Rep. 790 (erroneous statement of fact not required to be stated by the statute); Thompson *v.* Bailey, 1 Ky. L. Rep. 321 (holding that where the amount of the claim is left blank in the affidavit, the defect is not fatal if the amount can be ascertained from the record, as from the commissioner's report on file in the case). See also Sherley *v.* Sherley, 17 S. W. 628, 13 Ky. L. Rep. 565.

Missouri.— Merchants' Bank *v.* Ward, 45 Mo. 310 [*distinguishing* Peter *v.* King, 13 Mo. 143]; Waltemar *v.* Schnick, 102 Mo. App. 133, 76 S. W. 1053; Lenk Wine Co. *v.* Caspari, 11 Mo. App. 382.

Montana.— Empire State Min. Co. *v.* Mitchell, 29 Mont. 55, 74 Pac. 81.

Texas.— Crosby *v.* McWillie, 11 Tex. 94.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 814, 815.

The use of the word "claimant" instead of "affiant" in the affidavit is immaterial where it appears from the affidavit that the same person is both claimant and affiant. Warren *v.* McGill, 103 Cal. 153, 37 Pac. 144; Davis *v.* Browning, 91 Cal. 603, 27 Pac. 937. *Aliter* where the affidavit is made by the claimant's agent. Perkins *v.* Onyett, 86 Cal. 348, 24 Pac. 1024, where the affidavit stated that there were no offsets "to the knowledge of the claimant" instead of "to the knowledge of the affiant."

Affidavits held sufficient see Guerian *v.* Joyce, 133 Cal. 405, 65 Pac. 972; Taggart *v.* Tevanny, 1 Ind. App. 339, 27 N. E. 511.

Affidavit by officer of corporation held sufficient.— State *v.* Collins, 16 Ark. 32.

The object of requiring the affidavit of the creditor is not to prove the existence of the debt, as it is not evidence for that purpose, but it is to prevent the exhibition against the estate of claims which are fictitious or which were discharged by the debtor in his lifetime; and also to prevent the allowance of claims against which there exist legal offsets which are known only to the claimant, and which those who are interested in the estate may be unable to establish by legal proof. Williams *v.* Purdy, 6 Paige (N. Y.) 166. Therefore a claimant is not required to specify in his affidavit an independent demand which is known to the personal representative and which is conceded to be due from the claimant to the estate, but which the administrator may or may not plead as a counter-claim at his option. Osborne *v.* Parker, 66 N. Y. App. Div. 277, 72 N. Y. Suppl. 894.

The fact that the claimant is a relative of the decedent does not necessitate a stronger verification of his claim than is required of any other creditor. Valentine *v.* Valentine, 4 Redf. Surr. (N. Y.) 265.

Irregularities in the affidavit may be waived by the representative's failure to make seasonable and specific objection thereto. Morgan *v.* Bartlette, 3 Ohio Cir. Ct. 431, 2 Ohio Cir. Dec. 244; Cannon *v.* McDaniel, 46 Tex. 303 (holding that after allowance and approval the affidavit cannot be impeached except in a direct proceeding); Heath *v.* Garrett, 46 Tex. 23; Shelton *v.* Berry, 19 Tex. 154, 70 Am. Dec. 326. See also Etter *v.* Dugan, 1 Tex. Unrep. Cas. 175. *Contra,* Alter *v.* Kinsworthy, 30 Ark. 756. And see Gillmore *v.* Dunson, 35 Tex. 435; Walters *v.*

statement filed shall set forth the credits and deductions, if it does not expressly require succinctness and definiteness in stating them, a simple statement of them is sufficient,[54] and may be contained either in the statement of the claim or in the affidavit supporting it.[55] The statutory affidavit reciting that the claim is "justly due" may properly be used to support a claim which is payable at a future day or which while absolute in its obligation is payable upon the happening of some contingency; the word "due" in the affidavit being given the meaning of "owing."[56] Where the affidavit is made by the creditor's agent or attorney it must be shown in some way that the affiant is the agent or attorney, and that he has knowledge or means of knowledge of the facts contained in the affidavit;[57] but unless the statute otherwise provides, the fact of the agency need not appear on the face of the affidavit if it is known to the personal representative,[58] and the fact of the affiant's knowledge or means of knowledge need not be recited in the affidavit but may be shown by evidence *aliunde*.[59] Some of the statutes, however, allowing the affidavit to be made by a person other than the claimant, require that if this is done the affidavit shall set forth the reason why it is not made by the claimant himself,[60] shall recite that the affiant is the claimant's agent or attorney if such is the case,[61] and shall state that the affiant is cognizant of the facts contained therein.[62] Where the claimant is a partnership, an affidavit which does not show that the affiant is a member of the firm or is acquainted with the facts sworn to is insufficient.[63]

(2) AMENDMENT. In some jurisdictions a defective affidavit supporting a claim against a decedent's estate may be cured by amendment,[64] but a defective affidavit cannot be amended under a statute not enacted until the period for filing or presenting claims has expired.[65]

10. EVIDENCE AS TO PRESENTATION — a. Presumptions. In the absence of proof of the time when a claim was presented against an estate, and of any objection in the probate court that it was not presented within the time limited, it must be presumed that it was presented in due time.[66]

b. Admissions and Part Payment by Representative.[67] Where the personal representative admits or acknowledges that a claim has been duly presented, his admission or acknowledgment is competent evidence of the fact,[68] whether he

Prestige, 30 Tex. 65; Lanier *v.* Taylor, (Tex. Civ. App. 1897) 41 S. W. 516.

54. Miller *v.* Eldridge, 126 Ind. 461, 27 N. E. 132.

55. Wolfe *v.* Wilsey, 2 Ind. App. 549, 28 N. E. 1004.

56. Crocker-Woolworth Nat. Bank *v.* Carle, 133 Cal. 409, 65 Pac. 951. See also Cassatt *v.* Vogle, 12 Mo. App. 323; Barto *v.* Stewart, 21 Wash. 605, 59 Pac. 480.

57. Peter *v.* King, 13 Mo. 143.

58. Heath *v.* Garrett, 46 Tex. 23. See also Hanna *v.* Fisher, 95 Ind. 383.

59. Dawson *v.* Wombles, 104 Mo. App. 272, 78 S. W. 823.

60. Perkins *v.* Onyett, 86 Cal. 348, 24 Pac. 1024. The requirements of such a statute are satisfied by an affidavit made by one of the claimant's attorneys, stating that the claimant is a corporation and that none of its officers except its attorneys reside in the county. Empire State Min. Co. *v.* Mitchell, 29 Mont. 55, 74 Pac. 81.

61. Dawson *v.* Wombles, 104 Mo. App. 272, 78 S. W. 823.

62. Strickland *v.* Sandmeyer, 21 Tex. Civ. App. 351, 52 S. W. 87. See also Perkins *v.* Onyett, 86 Cal. 348, 24 Pac. 1024.

63. Lanigan *v.* North, 69 Ark. 62, 63 S. W. 62.

64. Walker *v.* Wigginton, 50 Ala. 579; Chadwell *v.* Chadwell, 98 Ky. 643, 33 S. W. 1118; Dawson *v.* Wombles, 104 Mo. App. 272, 78 S. W. 823; Lonkey *v.* Powning, 25 Nev. 428, 62 Pac. 235. See also Fox *v.* Lawson, 44 Ala. 319. *Contra*, Alter *v.* Kinsworthy, 30 Ark. 756.

65. Dennis *v.* Coker, 34 Ala. 611.

66. Oakes *v.* Buckley, 49 Wis. 592, 6 N. W. 321. See also Francis *v.* Williams, 14 Tex. 158.

67. See, generally, EVIDENCE, 16 Cyc. 1036, 1037.

68. Grimball *v.* Mastin, 77 Ala. 553; Pharis *v.* Leachman, 20 Ala. 662; Starke *v.* Keenan, 5 Ala. 590. See also Brown *v.* Brown, 56 Conn. 249, 14 Atl. 718, 7 Am. St. Rep. 307.

An admission that a demand is a subsisting debt against the estate is equivalent to an admission that it is an enforceable liability of the estate; i. e. one not barred by the statute of non-claim. Grimball *v.* Mastin, 77 Ala. 553; Pharis *v.* Leachman, 20 Ala. 662. See also Frazier *v.* Praytor, 36 Ala. 691; Mathes *v.* Jackson, 7 N. H. 259, admission that claim was due, and promise to pay.

made it before or after the expiration of the statutory period for presentation, if he was then the acting personal representative,[69] and the competency of this evidence is not impaired by his subsequent resignation.[70] But it has been held that where an administrator makes a report of insolvency, founded on his knowledge of claims, the report does not indicate that a claim included therein has been duly presented, although on the basis of this report the estate is declared insolvent.[71] A part payment made by the representative after the expiration of the period limited for presenting claims is a fact tending to show that the claim was duly presented.[72]

c. Best and Secondary Evidence. Where the fact of due presentation or filing of a claim is a matter properly appearing of record in the probate court, the record is the appropriate medium of proof under the best evidence rule, and unless the record evidence is produced or its absence explained, parol evidence is not admissible.[73]

d. Weight and Sufficiency of Evidence. In cases tried before a jury the sufficiency of the evidence to establish the due presentation of a claim against a decedent's estate is a matter solely for the jury's determination.[74] An indorsement on an instrument on which the claim is founded to the effect that the claim was presented to the personal representative at a certain date which was within the statutory period, it being shown that the claimant was the sole owner of the instrument, has been held sufficient evidence of presentation.[75] Where defendants claim the benefit of the statute of non-claim by way of plea, but do not positively deny in their answer the presentation of complainant's demand, proof of presentation by one witness is sufficient.[76]

11. Withdrawal of Claim. Where the statute provides that a claim may be presented by filing it or a statement thereof in the office of the judge of probate, the claim or statement filed must remain on file during the rest of the statutory period, and if the creditor after filing the claim withdraws it, and does not leave in its place a proper statement or restore the claim to the files, his act operates as an abandonment of the presentation, as otherwise the personal representative might be misled or deceived;[77] but the withdrawal of the statement of a claim for a mere temporary purpose and under such circumstances that no inference

Admissions or acknowledgments by one of several representatives are equally competent. Starke *v.* Keenan, 5 Ala. 590.

Against whom admission is competent.— Where the suit is in chancery, for the purpose of subjecting to the payment of the intestate's debts property which is standing in the name of a trustee for the benefit of his wife and children, and which is alleged to have been purchased by the intestate with his individual means, and fraudulently added to the trust estate, the admission by the administrator of the presentation of the complainant's demand is evidence not only against the administrator, but also against the *cestuis que trustent*. Pharis *v.* Leachman, 20 Ala. 662.

69. Grimball *v.* Mastin, 77 Ala. 553; Pharis *v.* Leachman, 20 Ala. 662.

70. Starke *v.* Keenan, 5 Ala. 590. See also Grimball *v.* Mastin, 77 Ala. 553.

71. McDowell *v.* Jones, 58 Ala. 25. *Contra*, Pharis *v.* Leachman, 20 Ala. 662.

72. Pharis *v.* Leachman, 20 Ala. 662. See also Francis *v.* Williams, 14 Tex. 158.

Payment of interest by representative who is sole legatee and devisee.— Where a personal representative, who was also sole legatee and devisee, paid interest on a mortgage note after the expiration of the period for presentation, some of the payments being made after the settlement of the estate, and the mortgage was afterward discovered to be void for want of title in the deceased mortgagor, it was held that the payments constituted no evidence of due presentation of the claim, but were more in consonance with an intention of the parties to continue the loan and not have it paid out of the estate in settlement. Dime Sav. Bank *v.* McAlenney, 76 Conn. 141, 55 Atl. 1019.

73. Kornegay *v.* Mayer, 135 Ala. 141, 33 So. 36 (docket entry); Franklin *v.* Brownson, 2 Tyler (Vt.) 103 (commissioners' report containing list of claims presented). See Evidence, 17 Cyc. 466, 471, 497, 500.

Even the testimony of the probate judge is inadmissible. Kornegay *v.* Mayer, 135 Ala. 141, 33 So. 36.

74. Frazier *v.* Praytor, 36 Ala. 691.

Evidence held sufficient to show due filing see Carhart *v.* Clark, 31 Ala. 396.

75. Rayburn *v.* Rayburn, 130 Ala. 217, 30 So. 365.

76. Pharis *v.* Leachman, 20 Ala. 662.

77. Floyd *v.* Clayton, 67 Ala. 265. See also Wernse *v.* McPike, 100 Mo. 476, 13 S. W. 809.

of an intention to abandon the claim can arise does not affect the rights acquired by the creditor through the presentation or filing,[78] and where the claim presented is the result of a compromise agreement with the representative, which is afterward repudiated by him, the creditor may withdraw the claim and substitute another for the amount justly due, although the latter claim is for a greater amount than the former.[79]

12. Effect of Failure to Make Due Presentation[80] — a. In General. Under the statutes of many states a claim not presented within the statutory period is, as between the creditor and the estate, forever barred and extinguished both as to the remedy and as to the right;[81] but in other states the failure to present a claim within the statutory period does not of itself absolutely bar the claim, but precludes the creditor from participating in the inventoried assets of the estate and confines him to uninventoried assets afterward discovered,[82] while in still others the creditor who has not duly presented his claim is merely postponed to creditors whose claims have been duly presented, and if assets have been paid out he can obtain payment only out of the residue, if any,[83] or if the estate has been distributed he loses his remedy against the personal representative and can look only to the property in the hands of the distributees.[84] Where a claim has not been presented within the statutory period, it cannot thereafter be allowed either in a court of original jurisdiction[85] or on appeal,[86] unless a special statute grants relief from the consequences of the delay and the remedy provided has been duly taken.[87] The creditor's failure to present his demand within the time prescribed by the statute has been held to prevent him from compelling legatees to refund if sufficient assets to pay the claim were retained by the executor, and this although the assets retained have subsequently been wasted or have become unavailable and the executor is insolvent.[88] Where the delay of a creditor in presenting his

78. Clough *v.* Ide, 107 Iowa 669, 78 N. W. 697 (claim withdrawn for purpose of preparing petition for its allowance and returned); Braught *v.* Griffith, 16 Iowa 26 (note withdrawn from files for purpose of suing other parties).

79. Bogue *v.* Corwine, 80 Mo. App. 616.

80. See also Descent and Distribution, 14 Cyc. 210 note 46; and, generally, Wills.

As to secured claims see *supra*, X, B, 2, g.

Failure to present as affecting right of action against representative see *infra*, XIV, B, 1, b.

Questions of suretyship.—For the creditor's failure to present his claim as affecting the rights of a surety and the creditor's right of subrogation to securities held by the surety for indemnity see Principal and Surety.

81. *Alabama.*— Allen *v.* Elliott, 67 Ala. 432; Yniestra *v.* Tarleton, 67 Ala. 126; McDowell *v.* Jones, 58 Ala. 25; Halfman *v.* Ellison, 51 Ala. 543; Decatur Branch Bank *v.* Hawkins, 12 Ala. 755; Thrash *v.* Sumwalt, 5 Ala. 13. See also Badger *v.* Kelly, 10 Ala. 944. *Compare* Walker *v.* Crews, 73 Ala. 412.

Connecticut.— Cone *v.* Dunham, 59 Conn. 145, 20 Atl. 311, 8 L. R. A. 647; Brown *v.* Reed, 2 Root 189; Painter *v.* Smith, 2 Root 142; Fanning *v.* Coit, Kirby 423.

Missouri.—Beekman *v.* Richardson, 150 Mo. 430, 51 S. W. 689; Richardson *v.* Harrison, 36 Mo. 96; State *v.* Browning, 102 Mo. App. 455, 76 S. W. 719; Price *v.* McCause, 30 Mo. App. 627. See also Waltemar *v.* Schnick, 102 Mo. App. 133, 76 S. W. 1053; Wilks *v.* Murphy, 19 Mo. App. 221.

Nebraska.— Fitzgerald *v.* Chariton First Nat. Bank, 64 Nebr. 260, 89 N. W. 813; Stichter *v.* Cox, 52 Nebr. 532, 72 N. W. 848; Huebner *v.* Sesseman, 38 Nebr. 78, 56 N. W. 697.

New Hampshire.— Chapman *v.* Gale, 32 N. H. 141; Gookin *v.* Sanborn, 3 N. H. 491.

Tennessee.— Hooper *v.* Bryant, 3 Yerg. 1.

Vermont.— Probate Ct. *v.* Gale, 47 Vt. 473; Soule *v.* Benton, 44 Vt. 309; Briggs *v.* Thomas, 32 Vt. 176.

Wisconsin.— Pereles *v.* Leiser, 119 Wis. 347, 96 N. W. 799; Fields *v.* Mundy, 106 Wis. 383, 82 N. W. 343, 80 Am. St. Rep. 39; Austin *v.* Saveland, 77 Wis. 108, 45 N. W. 955; Carpenter *v.* Murphey, 57 Wis. 541, 15 N. W. 798. See also Winter *v.* Winter, 101 Wis. 494, 77 N. W. 883.

See 22 Cent. Dig. tit. "Executors and Administrators," § 829.

82. See *infra*, X, B, 12, c.

83. See *infra*, X, B, 12, c.

84. Hood *v.* Hood, 80 Ky. 39; Stull *v.* Davidson, 12 Bush (Ky.) 167; Brown *v.* Forsche, 43 Mich. 492, 5 N. W. 1011; Smith's Estate, 1 Ashm. (Pa.) 352; Bledsoe *v.* Beiler, 66 Tex. 437, 1 S. W. 164.

85. McGee *v.* McDonald, 66 Mich. 628, 33 N. W. 737; Fitzgerald *v.* Chariton First Nat. Bank, 64 Nebr. 260, 89 N. W. 813; Farrow *v.* Nevin, 44 Oreg. 496, 75 Pac. 711. See also Wilks *v.* Murphy, 19 Mo. App. 221.

86. McGee *v.* McDonald, 66 Mich. 628, 33 N. W. 737; Fitzgerald *v.* Chariton First Nat. Bank, 64 Nebr. 260, 89 N. W. 813.

87. See *infra*, X, B, 12, b, (II).

88. Miller *v.* Mitchell, Bailey Eq. (S. C.) 437.

claim does not defeat but merely defers his right to payment, he is still entitled to require of the personal representative a proper administration of the estate,[89] and to contest the settlement of the representative's accounts.[90] The fact that a claim based upon a bond was not presented within the required time has been held to be no evidence that the execution of the bond was procured through fraud or mistake.[91]

b. Excuses and Relief — (i) *In General.* It may be stated broadly that, according to the weight of authority, a creditor cannot be excused for failure to present his claim, and cannot be relieved of the consequences of his neglect, unless granted indulgence by virtue of some statutory provision.[92]

(ii) *Statutory Provisions.* In a number of states there are statutes providing either expressly[93] or by implication[94] that in proper cases the court or a judge thereof may extend the time for the presentation of claims of creditors against a decedent's estate.[95] Such a statute does not affect the operation of the general statute of limitations but merely gives the claimant an opportunity to present

89. Harpending *v.* Daniels, 11 Ky. L. Rep. 858.

90. Martine's Estate, 11 Abb. N. Cas. (N. Y.) 50.

91. Johnston *v.* Derr, 110 N. C. 1, 14 S. E. 641.

92. See Burckhartt *v.* Helfrich, 77 Mo. 376; and see *supra*, X, B, 4, c.

Relief in equity.— In the absence of statutory authority a court of equity will not interpose to grant relief to a creditor whose claim is barred by his neglect to comply with the statute of non-claim. Beekman *v.* Richardson, 150 Mo. 430, 51 S. W. 689; Bauer *v.* Gray, 18 Mo. App. 173. See also Smith *v.* Smith, 174 Ill. 52, 50 N. E. 1083, 43 L. R. A. 403 [*affirming* 63 Ill. App. 534]; Blanchard *v.* Williamson, 70 Ill. 647. *Compare* Sugar River Bank *v.* Fairbank, 49 N. H. 131.

The fact that a creditor expects to receive as a legacy under the decedent's will a greater sum than the amount of his claim does not relieve him from the necessity of duly presenting his claim, and does not remove the statutory bar when it has once attached. Gordon *v.* Ballentine, 50 Ala. 99.

A previous professional engagement of the creditor's attorneys does not constitute an excuse for failure to present or file his claim within the statutory period. Roberts *v.* Spencer, 112 Ind. 85, 13 N. E. 129.

An unauthorized discharge of the personal representative before settlement of the estate, the order being a nullity, does not excuse a creditor's failure to exhibit his claim. Blanchard *v.* Williamson, 70 Ill. 647.

The creditor's ignorance of the debtor's death does not afford a sufficient excuse. Beekman *v.* Richardson, 150 Mo. 430, 51 S. W. 689.

93. *Michigan.*— Heavenrich *v.* Nichols, 113 Mich. 508, 71 N. W. 852; McGee *v.* McDonald, 66 Mich. 628, 33 N. W. 737; Hart *v.* Shiawassee Cir. Judge, 56 Mich. 592, 23 N. W. 326; People *v.* Monroe County Probate Judge, 16 Mich. 204.

Minnesota.— Hunt *v.* Burns, 90 Minn. 172, 95 N. W. 1110; St. Croix Boom Corp. *v.* Brown, 47 Minn. 281, 50 N. W. 197; Gibson *v.* Brennan, 46 Minn. 92, 48 N. W. 460; Massachusetts Mut. L. Ins. Co. *v.* Elliot, 24 Minn. 134.

Nebraska.— Ribble *v.* Furmin, (1904) 98 N. W. 420; Fitzgerald *v.* Chariton First Nat. Bank, 64 Nebr. 260, 89 N. W. 813.

New Hampshire.— Parker *v.* Gregg, 23 N. H. 416.

New Jersey.— Freehold First Nat. Bank *v.* Thompson, 61 N. J. Eq. 188, 48 Atl. 333.

Vermont.— Sleeper *v.* Gould, 53 Vt. 111.

Wisconsin.— Brill *v.* Ide, 75 Wis. 113, 43 N. W. 559; Tredway *v.* Allen, 20 Wis. 475; Boyce *v.* Foote, 19 Wis. 199.

See 22 Cent. Dig. tit. "Executors and Administrators," § 800.

94. **In California** where the period for presenting claims begins to run from the publication of a notice to creditors, the notice being published by order of the court or a judge thereof, if, upon proof of the publication, the judge determines that the publication has not given proper notice to creditors he may, within the period limited, direct a new notice to be given as though there had been no previous attempt to do so, and in such a case the time for the presentation of claims begins to run only from the giving of the new notice. But where the court recognizes that a publication already made gives notice, although in the opinion of the judge not the best notice, the judge cannot, after the expiration of the time for presentation, extend that time by ordering additional notice, but will be compelled to sign an order or decree showing that due notice to creditors has been given. Johnston *v.* Napa County Super. Ct., 105 Cal. 666, 39 Pac. 36.

95. **Unauthorized presentation.**— A creditor whose claim has been presented without his authority and has been disallowed is nevertheless "a creditor who has failed to present his claim," within the meaning of a statute authorizing an extension of time for such creditors. Whitcomb *v.* Davenport, 63 Vt. 656, 22 Atl. 723.

An extension to enable an heir to contest a creditor's claim is not authorized by a statute allowing an extension of time for creditors to prove claims. Graves *v.* Graves, 58 N. H. 24.

and litigate his claim, subject to all legal defenses which may have attached thereto.[96] Whether these statutes are mandatory or vest a purely discretionary power in the court or judge appears not to be very definitely settled.[97] Good cause must be shown for the extension of time, and the court should consider all the attendant circumstances, including the conduct of the creditor and the condition of the estate,[98] and the diligence of the creditor not only in endeavoring to present his claim within the statutory period but also in applying for the extension.[99] Some of the statutes moreover provide that extensions shall not be granted after a certain period from the expiration of the time originally limited for presenting claims.[1] The special proceedings pointed out by the statute for extending

96. Briggs *v.* Thomas, 32 Vt. 176.

97. **In Michigan** the granting of an extension of time under Howell St. § 5893, is within the discretion of the probate judge, and when the period for presentation has expired he cannot be compelled by mandamus to extend it. People *v.* Monroe County Probate Judge, 16 Mich. 204. But the revival of the commission under Howell St. § 5894, before the estate is closed, is a matter of right, not of discretion, and can be enforced by mandamus. Heavenrich *v.* Nichols, 113 Mich. 508, 71 N. W. 852; Hart *v.* Shiawassee County Cir. Judge, 56 Mich. 592, 23 N. W. 326.

In Minnesota it has been held that the statute is mandatory where good cause is shown for the exercise of the power. Massachusetts Mut. L. Ins. Co. *v.* Elliot, 24 Minn. 134. See also State *v.* Polk County Probate Ct., 79 Minn. 257, 82 N. W. 580. *Compare* St. Croix Boom Corp *v.* Brown, 47 Minn. 281, 50 N. W. 197; Gibson *v.* Brennan, 46 Minn. 92, 48 N. W. 460.

In Nebraska the discretion of the county court with respect to belated claims is the same kind of discretion that a court of equity has in actions for the specific performance of contracts; it is not to be arbitrarily exercised, but when proper and timely application is made and good cause is shown, the court must extend the time as the circumstances of the case may require. Ribble *v.* Furmin, (Nebr. 1904) 98 N. W. 420.

98. See State *v.* Polk County Probate Ct., 79 Minn. 257, 82 N. W. 580; State *v.* Rock County Probate Ct., 67 Minn. 51, 69 N. W. 609, 908; St. Croix Boom Corp. *v.* Brown, 47 Minn. 281, 50 N. W. 197; Gibson *v.* Brennan, 46 Minn. 92, 48 N. W. 460; State *v.* Ramsey County Probate Ct., 42 Minn. 54, 43 N. W. 692; *In re* Mills, 34 Minn. 296, 25 N. W. 631; Fitzgerald *v.* Chariton First Nat. Bank, 64 Nebr. 260, 89 N. W. 813.

When extension proper.— The probate court should extend the time for presentation of claims, so as to allow a claimant who has used due diligence to file his claim, where such extension will not delay the settlement of the estate, even though the claim has already been presented and allowed in the state of decedent's residence. State *v.* Rock County Probate Ct., 67 Minn. 51, 69 N. W. 609, 908. Where a claim founded on a foreign judgment had been presented, but had been disallowed on the ground that the judgment was void for want of jurisdiction, and an application was made in due time thereafter to obtain an extension of time within which to present a claim based upon the original demand upon which the judgment was founded, it was held that the application ought to have been granted. Smith *v.* Grady, 68 Wis. 215, 31 N. W. 477.

Judicial discretion.—Whether good cause is shown is to a certain extent within the sound discretion of the court. Gibson *v.* Brennan, 46 Minn. 92, 48 N. W. 460; *In re* Mills, 34 Minn. 296, 25 N. W. 631; Ribble *v.* Furmin, (Nebr. 1904) 98 N. W. 420. See also State *v.* Polk County Probate Ct., 79 Minn. 257, 82 N. W. 580. And the decision of the court will not be disturbed on review by a higher court unless there has been an abuse of discretion. Gibson *v.* Brennan, 46 Minn. 92, 48 N. W. 460. But where the court in refusing an application for extension exceeds the limits of a sound and just discretion, its judgment will be reversed. Smith *v.* Grady, 68 Wis. 215, 31 N. W. 477. See also State *v.* Polk County Probate Ct., 79 Minn. 257, 82 N. W. 580; Ribble *v.* Furmin, (Nebr. 1904) 98 N. W. 420.

99. St. Croix Boom Corp. *v.* Brown, 47 Minn. 281, 50 N. W. 197; Gibson *v.* Brennan, 46 Minn. 92, 48 N. W. 460; State *v.* Ramsay County Probate Ct., 42 Minn. 54, 43 N. W. 692 (refusal of application for second extension of time); Massachusetts Mut. L. Ins. Co. *v.* Elliot, 24 Minn. 134.

The same strictness of proof is not required as where an application is made to obtain relief from a default in a civil action. State *v.* Rock County Probate Ct., 67 Minn. 51, 69 N. W. 609, 908; *In re* Mills, 34 Minn. 296, 25 N. W. 631.

1. Fitzgerald *v.* Chariton First Nat. Bank, 64 Nebr. 260, 89 N. W. 813 [*criticizing* Tredway *v.* Allen, 20 Wis. 475]; Gardner *v.* Callaghan, 61 Wis. 91, 20 N. W. 685, holding, however, that where the county court has failed to comply with Rev. St. § 3829, in giving notice of the time for presentation of claims it may remedy this error by extending the time, even though more than the prescribed period has elapsed from the time originally limited, inasmuch as Rev. St. § 3840, which prohibits extensions after the expiration of a certain period does not apply if the original order is invalid. *Compare* Tredway *v.* Allen, 20 Wis. 475, decided under an earlier statute.

Under the Vermont statutes the application to the probate court to renew the com-

the time must be duly taken or a claim not presented within the regular period cannot be allowed.[2] Under some of the statutes the personal representative and other persons interested have the right to appear and contest the application for the reopening or revivor of the commission and for the extension of the time of presentation,[3] but unless otherwise provided by statute it is not necessary to give notice to the personal representative before granting an order of extension.[4] Upon an application to the probate court for the revivor of a commission or upon an application for mandamus to compel such revivor, the merits of the claim for which the revivor is sought are not open for investigation.[5] Where a commission on claims has been revived the failure of the commissioners to meet, take final action, and make their report within the time fixed by the order does not defeat the claims of creditors.[6] Where an order extending the time for exhibiting claims to the commissioner has been granted after an order accepting the commissioner's first report, the probate court can vacate the order of acceptance.[7] The Iowa statutes permit claims to be filed and proved after the expiration of the statutory period where peculiar circumstances entitle the claimant to equitable relief.[8] There appears to have been no rule adopted as to the facts necessary to arrest the operation of the statute, and each case must be considered largely upon its own merits;[9] but a claimant seeking this exemption from the statutory bar must show

mission and extend the time for presenting claims must, where there is no question as to notice to the creditor, be made within six months after the expiration of the time previously limited, and cannot be made at any time during the settlement of the estate. Sleeper *v.* Gould, 53 Vt. 111. See also Whitcomb *v.* Davenport, 63 Vt. 656, 22 Atl. 723.

Averment in petition.— Ordinarily it is not necessary that the petition for the extension should aver that it was filed within the required time. Where there is nothing in the record before a reviewing court to preclude the possibility that the fact of due filing appeared and was acted upon in the court of original jurisdiction, the reviewing court will not deprive the petitioner of his remedy because of his omission to allege the fact. Whitcomb *v.* Davenport, 63 Vt. 656, 22 Atl. 723.

For the proper procedure on appeal where the record does not show that the petition for extension was presented within the required time see Whitcomb *v.* Davenport, 63 Vt. 656, 22 Atl. 723.

2. McGee *v.* McDonald, 66 Mich. 628, 33 N. W. 737; Fitzgerald *v.* Chariton First Nat. Bank, 64 Nebr. 260, 89 N. W. 813, holding that this is true whether the allowance is sought in the county court or on appeal to the district court. See also Hunt *v.* Burns, 90 Minn. 172, 95 N. W. 1110.

3. McGee *v.* McDonald, 66 Mich. 628, 33 N. W. 737.

4. Parker *v.* Gregg, 23 N. H. 416. See also Heavenrich *v.* Nichols, 113 Mich. 508, 71 N. W. 852.

5. Hart *v.* Shiawassee County Cir. Judge, 56 Mich. 592, 23 N. W. 326.

6. Heavenrich *v.* Nichols, 113 Mich. 508, 71 N. W. 852.

7. Parker *v.* Gregg, 23 N. H. 416.

8. See Schlutter *v.* Dahling, 100 Iowa 515, 69 N. W. 884; Ury *v.* Bush, 85 Iowa 698, 52 N. W. 666; Brewster *v.* Kendrick, 17 Iowa 479.

Whether the remedy would be equitable rather than legal is not material, and it makes but little difference whether the claim in its origin was legal or equitable; but the court must determine from the circumstances, rather than from the character of the remedy, whether the facts are such as to excuse the delay and whether consistently with the interest of the estate the claim should be audited and paid. In considering this question, however, equitable principles, rather than strict rules of law, are regarded as controlling. Brewster *v.* Kendrick, 17 Iowa 479.

The representative need not prove the date of his appointment where the claimant pleads excuse for not filing a claim in time. Manning *v.* Stout, 93 Iowa 233, 61 N. W. 963.

Mode of trial.— Where a claimant seeks to prove his claim after the expiration of the statutory period the court should first determine whether the circumstances are such as in equity should remove the bar of the statute, and if this question is determined in favor of the claimant the case should be disposed of in the same manner as cases arising on other claims; and issues of fact must be tried by a jury unless a jury is waived. Lamm *v.* Sooy, 79 Iowa 593, 44 N. W. 893. See also Ingham *v.* Dudley, 60 Iowa 16, 4 N. W. 82.

9. Hawkeye Ins. Co. *v.* Lisker, 122 Iowa 341, 98 N. W. 127; Ury *v.* Bush, 85 Iowa 698, 52 N. W. 666; Lamm *v.* Sooy, 79 Iowa 593, 44 N. W. 893; Roaf *v.* Knight, 77 Iowa 506, 42 N. W. 433; Johnston *v.* Johnston, 36 Iowa 608; Brewster *v.* Kendrick, 17 Iowa 479.

The fact that a creditor permitted a sale of property on which he held a chattel mortgage, believing that there was plenty of property to pay the debts of the estate, is immaterial. Colby *v.* King, 67 Iowa 458, 25 N. W. 704.

the exercise of proper diligence.[10] The fact that the estate is solvent and unsettled when the claim is filed is an important consideration in determining whether the delay should be excused;[11] but this fact alone is not sufficient,[12] and after final settlement of the estate a belated claimant should be held to very strict proof of equitable circumstances to warrant the allowance of his claim, especially where he knew all the time of the circumstances on which he relies and of the debtor's death.[13] That negotiations have been had with the personal representative or his attorney for the purpose of effecting a settlement of the claim is also an important consideration, and where the delay has been caused by statements or requests of the personal representative and by his promise to pay the claim a sufficient excuse is shown.[14]

(III) *REVIEW.* An order of a court of probate jurisdiction, denying to a creditor who has not duly presented or filed his claim the relief afforded by the

Where the owner of a note relied upon a false statement of a bank cashier that the note, which had been deposited in the bank, had been duly filed against the estate of the maker, the delay should have been excused. Manatt *v.* Reynolds, 114 Iowa 688, 87 N. W. 683.

Relying on traveling collector not sufficient diligence.— Hawkeye Ins. Co. *v.* Lisker, 122 Iowa 341, 98 N. W. 127.

For facts held sufficient to excuse delay and to entitle the claimant to equitable relief against the bar of the statute see Ury *v.* Bush, 85 Iowa 698, 52 N. W. 666; Sankey *v.* Cook, 82 Iowa 125, 47 N. W. 1077; Lamm *v.* Sooy, 79 Iowa 593, 44 N. W. 893; Orcutt *v.* Hanson, 70 Iowa 604, 31 N. W. 950 [*distinguishing* Clark *v.* Tallman, 68 Iowa 372, 27 N. W. 261]; Pettus *v.* Ferrell, 59 Iowa 296, 13 N. W. 319; Wilcox *v.* Jackson, 57 Iowa 278, 10 N. W. 661; Senat *v.* Findley, 51 Iowa 20, 50 N. W. 575; Johnston *v.* Johnston, 36 Iowa 608; Wile *v.* Wright, 32 Iowa 451; McCormack *v.* Cook, 11 Iowa 267.

For facts held insufficient to excuse delay and entitle the claimant to equitable relief against the bar of the statute see *In re* Jacob, 119 Iowa 176, 93 N. W. 94 (failure of representative to file inventory); Schlutter *v.* Dahling, 100 Iowa 515, 69 N. W. 884; Corey *v.* Gillespie, 94 Iowa 347, 62 N. W. 837; Pearson *v.* Christman, 93 Iowa 703, 61 N. W. 1085; Roaf *v.* Knight, 77 Iowa 506, 42 N. W. 433 (relying on erroneous statement of non-resident attorney); Colby *v.* King, 67 Iowa 458, 25 N. W. 704; Lacey *v.* Loughridge, 51 Iowa 629, 2 N. W. 515; Phelps *v.* Thompson, 48 Iowa 641; Davis *v.* Shawhan, 34 Iowa 91; Shomo *v.* Bissell, 20 Iowa 68; Preston *v.* Day, 19 Iowa 127.

Want of actual notice of the representative's appointment is insufficient ground where the required statutory notice has been given. Hawkeye Ins. Co. *v.* Lisker, 122 Iowa 341, 98 N. W. 127.

10. Porter *v.* Brentlinger, 117 Iowa 536, 91 N. W. 809; Schlutter *v.* Dahling, 100 Iowa 515, 69 N. W. 884; Cory *v.* Gillespie, 94 Iowa 347, 62 N. W. 837; Roaf *v.* Knight, 77 Iowa 506, 42 N. W. 433; Lacey *v.* Loughridge, 51 Iowa 629, 2 N. W. 515; Phelps *v.* Thompson, 48 Iowa 641; Davis *v.* Shawhan, 34 Iowa 91; Ferrall *v.* Irvine, 12 Iowa 52.

The unexplained forgetfulness of the creditor as to the existence of the claim is no ground for relief. Porter *v.* Brentlinger, 117 Iowa 536, 91 N. W. 809.

11. Ury *v.* Bush, 85 Iowa 698, 52 N. W. 666; Sankey *v.* Cook, 82 Iowa 125, 47 N. W. 1077; Lamm *v.* Sooy, 79 Iowa 593, 44 N. W. 893; Pettus *v.* Farrell, 59 Iowa 296, 13 N. W. 319; Senat *v.* Findley, 51 Iowa 20, 50 N. W. 525; Baldwin *v.* Dougherty, 39 Iowa 50; Johnston *v.* Johnston, 36 Iowa 608; Bragley *v.* Ross, 33 Iowa 505; Brewster *v.* Kendrick, 17 Iowa 479; McCormack *v.* Cook, 11 Iowa 267.

The fact that the personal representative has made a final report will not preclude the filing and allowance of a delayed claim, if the delay has been sufficiently excused, where the report has not been acted upon by the court and notice of it has not been given or waived. Ury *v.* Bush, 85 Iowa 698, 52 N. W. 666.

12. *In re* Jacob, 119 Iowa 176, 93 N. W. 94; Brownell *v.* Williams, 54 Iowa 353, 6 N. W. 530. See also Davis *v.* Shawhan, 34 Iowa 91.

13. Shomo *v.* Bissell, 20 Iowa 68. See also Potter *v.* Brentlinger, 117 Iowa 536, 91 N. W. 809.

When allowance proper.— Although the estate has been settled and the personal property distributed, the claim may be allowed where there is sufficient real estate to pay it and the delay has been satisfactorily explained. Manatt *v.* Reynolds, 114 Iowa 688, 87 N. W. 683.

14. Henry *v.* Day, 114 Iowa 454, 87 N. W. 416 (false representations by executor); Pettus *v.* Farrell, 59 Iowa 296, 13 N. W. 319; Baldwin *v.* Dougherty, 39 Iowa 50; Burroughs *v.* McLain, 37 Iowa 189; Brayley *v.* Ross, 33 Iowa 505. See also Brewster *v.* Kendrick, 17 Iowa 479. *Compare* Colby *v.* King, 67 Iowa 458, 25 N. W. 704; Davis *v.* Shawhan, 34 Iowa 91; Preston *v.* Day, 19 Iowa 127.

Failure to file another claim.— A delay caused by the representative's request not to file a certain claim, and his promise to pay it, will not excuse the failure to file another claim of which the representative had no notice. Manning *v.* Stout, 93 Iowa 233, 61 N. W. 963.

A continuance by consent of the parties

local statutes allowing extensions of time, is generally held to be a final order from which an appeal may be taken.[15]

c. Rights as to Assets Remaining or Subsequently Discovered. In some states a creditor who has not presented his claim within the regular statutory period, although precluded from sharing in the inventoried assets of the estate, is entitled to participate in subsequently discovered assets not inventoried or accounted for by the personal representative,[16] provided, however, that his claim is proved and

constitutes a sufficient excuse for not proving a claim within the statutory period. Ingham *v.* Dudley, 60 Iowa 16, 14 N. W. 82. See also Wile *v.* Wright, 32 Iowa 451.

15. Hart *v.* Shiawassee County Cir. Judge, 56 Mich. 592, 23 N. W. 326 (refusal to revive commission); Ribble *v.* Furmin, (Nebr. 1904) 98 N. W. 420; Whitcomb *v.* Davenport, 63 Vt. 656, 22 Atl. 723 (refusal to revive commission).

The personal representatives of a deceased creditor may appeal. Hart *v.* Shiawassee County Cir. Judge, 56 Mich. 592, 23 N. W. 326.

A decision on appeal in an intermediate court affirming an order which extends a commission on claims and directs the commissioners to hear and adjudicate upon a specified claim is not a judgment or final order according to the course of the common law and therefore cannot be reviewed on writ of error. Churchill *v.* Burt, 32 Mich. 490, decision of circuit court affirming order of probate court.

Judgment on appeal.— A judgment of the district court upon such an appeal, remanding the cause to the county court, with direction to "permit the filing of the claim, and to set a day for hearing, and to proceed and hear and pass upon the same," is not the proper judgment, but a hearing in the district court on such claim should be had in the same manner as though the appeal had been from an order disallowing the claim upon hearing before the county court. Ribble *v.* Furmin, (Nebr. 1904) 98 N. W. 420.

In Minnesota it has been held that the statutes do not authorize the review of such an order of refusal by an appeal and hence that a writ of certiorari is available (Massachusetts Mut. L. Ins. Co. *v.* Elliot, 24 Minn. 134), but where the probate court grants to a creditor an extension of time for presentation and also allows his claim against the estate, the adjudication as to the extension of time may be reviewed upon appeal from the order allowing the claim, and hence a writ of certiorari will not lie (State *v.* Hennepin County Probate Ct., 28 Minn. 381, 10 N. W. 209 [*distinguishing* Massachusetts Mut. L. Ins. Co. *v.* Elliot, *supra*]).

16. *Colorado.*— Thompson *v.* White, 25 Colo. 226, 54 Pac. 718; Townsend *v.* Thompson, 24 Colo. 411, 51 Pac. 433; McClure *v.* La Plata County, 23 Colo. 130, 46 Pac. 677.

Illinois.— Morse *v.* Pacific R. Co., 191 Ill. 356, 61 N. E. 104; Waughop *v.* Bartlett, 165 Ill. 124, 46 N. E. 197 [*affirming* 61 Ill. App. 252]; Snydacker *v.* Swan Land, etc., Co., 154 Ill. 220, 40 N. E. 466; Darling *v.* McDonald, 101 Ill. 370; Mulvey *v.* Johnson, 90 Ill. 457; Blanchard *v.* Williamson, 70 Ill. 647; Shepard *v.* Lawrence County Nat. Bank, 67 Ill. 292; Russell *v.* Hubbard, 59 Ill. 335; Stone *v.* Clarke, 40 Ill. 411; Wingate *v.* Pool, 25 Ill. 118; Peacock *v.* Haven, 22 Ill. 23; Bradford *v.* Jones, 17 Ill. 93; Stillman *v.* Young, 16 Ill. 318; Sloo *v.* Pool, 15 Ill. 47; Ryan *v.* Jones, 15 Ill. 1; Rowan *v.* Kirkpatrick, 14 Ill. 1; People *v.* White, 11 Ill. 341; Judy *v.* Kelley, 11 Ill. 211, 50 Am. Dec. 455; Thorn *v.* Watson, 10 Ill. 26; Tinker *v.* Babcock, 107 Ill. App. 78 [*affirmed* in 204 Ill. 571, 68 N. E. 445]; Morse *v.* Gillette, 93 Ill. App. 23 [*affirmed* in 191 Ill. 371, 61 N. E. 1136]; Smith *v.* Preston, 82 Ill. App. 285; Tillson *v.* Ward, 46 Ill. App. 179; People *v.* Brooks, 22 Ill. App. 594 [*affirmed* in 123 Ill. 246, 14 N. E. 39].

Maine.— Littlefield *v.* Eaton, 74 Me. 516.

Massachusetts.— Aiken *v.* Morse, 104 Mass. 277; Holland *v.* Cruft, 20 Pick. 321.

New Jersey.— Cunningham *v.* Stanford, 69 N. J. L. 9, 54 Atl. 245; Ryder *v.* Wilson, 41 N. J. L. 9; Vandyke *v.* Chandler, 10 N. J. L. 49; Terhune *v.* White, 34 N. J. Eq. 98.

See 22 Cent. Dig. tit. "Executors and Administrators," § 829.

Debts due to the United States are payable out of subsequently discovered assets according to the rule of the text. Holland *v.* Cruft, 20 Pick. (Mass.) 321.

The property liable is that which has not been inventoried or accounted for by the personal representative, regardless of the time when, or the person by whom, it is discovered. It makes no difference with the creditor's rights whether the property not inventoried is discovered before or after he obtains his judgment or brings his suit, or whether it is first discovered by him or by the personal representative. Shepard *v.* Lawrence County Nat. Bank, 67 Ill. 292; Stone *v.* Clark, 40 Ill. 411; Bradford *v.* Jones, 17 Ill. 93. See also Townsend *v.* Thompson, 24 Colo. 411, 51 Pac. 433; Durston *v.* Pollock, 91 Iowa 668, 60 N. W. 221, construing the Illinois statute.

What are subsequently discovered assets. As a general rule no property can be considered new assets which has been in the hands and under the control of the personal representative, or has been inventoried, or which is the product, profits, or proceeds of such property, although it may have assumed, or have been converted into, a new and different form. Littlefield *v.* Eaton, 74 Me. 516; Alden *v.* Stebbins, 99 Mass. 616; Chenery *v.* Webster, 8 Allen (Mass.) 76; Sturtevant *v.* Stur-

allowed for this purpose.[17] The subsequent presentation and allowance of the claim may be had at any time before the debt is barred by the general statute of limitations,[18] although it will be at the expense of the claimant.[19] The creditor, if successful in establishing his claim, is entitled to a special judgment, to be satisfied out of the uninventoried assets subsequently discovered.[20] Under the statutes of other states a creditor who has failed to present or file his claim within the required time is postponed to other creditors and not entitled to share with them in the *pro rata* distribution, but may obtain payment out of the assets remaining unadministered, if there are any;[21] but it has been held that the sole

tevant, 4 Allen (Mass.) 122. The following have been held not to be new assets subject to the claims of belated creditors: Money accruing from patent rights that were inventoried (Robinson *v.* Hodge, 117 Mass. 222); the proceeds of inventoried real estate which has been sold for the payment of debts (Alden *v.* Stebbins, *supra*; Chenery *v.* Webster, *supra* [*followed* in Aiken *v.* Morse, 104 Mass. 277]), the proceeds of a judgment rendered in a suit begun in the decedent's lifetime (Bradford *v.* Forbes, 9 Allen (Mass.) 365), property received by an administrator *de bonis non* in satisfaction of the liability by a surety of a former administrator who had failed to account for property inventoried (Veazie *v.* Marrett, 6 Allen (Mass.) 372), the proceeds of notes received in payment for an inventoried interest in a partnership (Sturtevant *v.* Sturtevant, *supra*), the rents of inventoried real estate (Littlefield *v.* Eaton, *supra*; Alden *v.* Stebbins, *supra*), the proceeds of logs and lumber sold from inventoried land (Littlefield *v.* Eaton, *supra*), the earnings of an inventoried schooner (Littlefield *v.* Eaton, *supra*), money received by the heirs on a mortgage of the decedent's real estate and turned over to the representative to pay debts of the estate; where the representative with the assent of the probate judge has entered the sum on his account (Littlefield *v.* Eaton, *supra*). Land is subsequently discovered estate within the Illinois statutes, where under an erroneous construction of the will it was treated for over two years by all the parties as not belonging to the estate. Sutton *v.* Read, 176 Ill. 69, 51 N. E. 801.

What constitutes accounting for property. — Where executors fixed an appraised value to an insufficient description which they intended to represent certain land which testator had owned, and subsequently conveyed the land to the persons entitled to take under the will, and reported to the court, it was held that they had " accounted for " the land within a statute permitting a creditor not presenting his claim within two years to subject property not accounted for to the payment thereof. Auburn State Bank *v.* Brown, 172 Ill. 284, 50 N. E. 144 [*affirming* 72 Ill. App. 584].

Property recovered by setting aside a fraudulent assignment made by the intestate in his lifetime is assets which the belated creditor can subject to his claim. Holland *v.* Cruft, 20 Pick. (Mass.) 321.

Legacy in executor's hands. — Under the New Jersey statutes a creditor who has not presented his claim in due time, and who is bound by a decree of the orphans' court barring claims of creditors against the executors, may nevertheless maintain an action against the executors to obtain payment of a ratable portion of his debt from any legacy which has not been paid over by the executors or has been attached in their hands (Dodson *v.* Sevars, 52 N. J. Eq. 611, 30 Atl. 477); but these statutes give the right of action only after final settlement has been made in the court where the executor's account must be passed (Cunningham *v.* Stanford, (N. J. Sup. 1902) 52 Atl. 374; Emson *v.* Allen, 62 N. J. L. 491, 41 Atl. 703; O'Neill *v.* Freeman, 45 N. J. L. 208).

17. Wingate *v.* Poole, 25 Ill. 118.

18. Blanchard *v.* Williamson, 70 Ill. 647. *Compare* Tillson *v.* Ward, 46 Ill. App. 179.

19. Blanchard *v.* Williamson, 70 Ill. 647.

20. McClure *v.* La Plata County, 23 Colo. 130, 46 Pac. 677; Mulvey *v.* Johnson, 90 Ill. 457; Shepard *v.* Lawrence County Nat. Bank, 67 Ill. 292; Stone *v.* Clarke, 40 Ill. 411; Peacock *v.* Haven, 22 Ill. 23; Bradford *v.* Jones, 17 Ill. 93; Judy *v.* Kelley, 11 Ill. 211, 50 Am. Dec. 455; Smith *v.* Preston, 82 Ill. App. 285.

The judgment must be special, not general, and should direct that execution be levied out of property which has not been inventoried or accounted for by the personal representative; but should not be limited by reason of the time when, or the person by whom, the property is first discovered. Mulvey *v.* Johnson, 90 Ill. 457; Russell *v.* Hubbard, 59 Ill. 335; Stone *v.* Clarke, 40 Ill. 411; Bradford *v.* Jones, 17 Ill. 93. See also Townsend *v.* Thompson, 24 Colo. 411, 51 Pac. 433; Darling *v.* McDonald, 101 Ill. 370.

21. *Georgia.*— Goodwin *v.* Hightower, 30 Ga. 249; Yerby *v.* Matthews, 26 Ga. 549; Mahone *v.* Georgia Cent. Bank, 17 Ga. 111.

Kentucky.— Grey *v.* Lewis, 79 Ky. 453.

Mississippi.— Ales *v.* Plant, 61 Miss. 259.

New York.— Baggott *v.* Boulger, 2 Duer 160; Matter of Morton, 7 Misc. 343, 28 N. Y. Suppl. 82; Lesser *v.* Keller, 29 N. Y. Suppl. 829; Martine's Estate, 11 Abb. N. Cas. 50; Matter of Phyfe, 5 N. Y. Leg. Obs. 331. See also New York *v.* Gorman, 26 N. Y. App. Div. 191, 49 N. Y. Suppl. 1026, holding that Code Civ. Proc. § 2718, does not mean that a debt against the estate not presented within the time limited shall not be liquidated by a formal judgment.

Pennsylvania.— Stœver's Appeal, 3 Watts

object of such a provision is to permit the belated creditor to reach the personal estate while subject to the control of the administrator, and that it does not give him the right to compel a sale of the land when the personal estate is exhausted.[22]

13. Waiver of Due Presentation.[23] The personal representative being in a sense a trustee for all the parties interested in the estate, it is his duty to protect them against every demand which is not legally enforceable against the estate.[24] As a general rule therefore the personal representative cannot waive the requirements of the statutes of non-claim,[25] and if he pays a claim which has not been duly presented he is not entitled to credit for the payment.[26] In conformity to

& S. 154; Matter of Smith, 1 Ashm. 352. See also *In re* Mitchell, 2 Watts 87; McClintock's Estate, 32 Pittsb. Leg. J. 287; *In re* Cowan, 28 Pittsb. Leg. N. 119.

South Carolina.— Ford *v.* Rouse, Rice 219. See also Sebring *v.* Keith, 2 Hill 340; *Ex p.* Hanks, Dudley Eq. 231.

Texas.— Buchanan *v.* Wagnon, 62 Tex. 375; Ryan *v.* Flint, 30 Tex. 382; Hall *v.* McCormick, 7 Tex. 269. But under the act of 1840 the claim was barred if not presented in the required time. Buchanan *v.* Wagnon, *supra*; Graham *v.* Vining, 1 Tex. 639, 2 Tex. 433; McDougald *v.* Hadley, 1 Tex. 490.

See 22 Cent. Dig. tit. "Executors and Administrators," § 829.

The claims of non-resident creditors are included in Kentucky, subject, however, to a deduction for sums received or receivable from the foreign assets (if any) of the estate. Grey *v.* Lewis, 79 Ky. 453.

Mortgage creditor foreclosing after first distribution.— Where a mortgage creditor, without presenting his claim prior to an intermediate acounting, foreclosed his mortgage and obtained a deficiency judgment after distribution under the intermediate accounting, it was held that in view of a statute providing that no preference should be given in the payment of any debt over other debts of the same class, he was entitled upon the final accounting to be allowed out of the assets then on hand the same share or dividend that he would have received had he presented his claim in time for the first distribution. Home Ins. Co. *v.* Lyon, 3 Dem. Surr. (N. Y.) 69.

22. Nagle *v.* Ball, 71 Miss. 330, 13 So. 929; Ales *v.* Plant, 61 Miss. 259.

23. See also *supra*, X, B, 4, d.

24. Rogers *v.* Wilson, 13 Ark. 507; Winchell *v.* Sanger, 73 Conn. 399, 47 Atl. 706, 66 L. R. A. 935. See *infra*, X, C, 1, b.

25. *Alabama.*—Grimball *v.* Mastin, 77 Ala. 553. See also Pipkin *v.* Hewlett, 17 Ala. 291.

Arkansas.— Nichols *v.* Shearon, 49 Ark. 75, 4 S. W. 167; Rogers *v.* Wilson, 13 Ark. 507.

California.— Harp *v.* Calahan, 46 Cal. 222.

Connecticut.— See Winchell *v.* Sanger, 73 Conn. 399, 47 Atl. 706, 66 L. R. A. 935; Pike *v.* Thorp, 44 Conn. 450.

Illinois.— Hapke *v.* People, 29 Ill. App. 546.

Kansas.— See Collamore *v.* Wilder, 19 Kan. 67.

Michigan.— Clark *v.* Davis, 32 Mich. 154, 157 [*citing* Fish *v.* Morse, 8 Mich. 34], per Cooley, J.

Minnesota.— Gilman *v.* Maxwell, 79 Minn. 377, 82 N. W. 669; Bunnell *v.* Post, 25 Minn. 376.

Mississippi.—Cockrell *v.* Seasongood, (1902) 33 So. 77; Nagle *v.* Ball, 71 Miss. 330, 13 So. 929.

Missouri.— The notice of demand required to place a claim in the fifth class cannot be waived by the personal representative (Hicks *v.* Jamison, 10 Mo. App. 35; Spaulding *v.* Suss, 4 Mo. App. 541); and even though he has misled the creditor by false and fraudulent statements as to the terms of the law requiring notice, he is not estopped thereby (Spaulding *v.* Suss, *supra*). The personal representative may, however, enter his appearance and waive notice of demand for the purpose of allowance (Madison County Bank *v.* Suman, 79 Mo. 527; Waltemar *v.* Schnick, 102 Mo. App. 133, 76 S. W. 1053), and by appearing and contesting the claim on its merits he waives his right to object that he did not receive such notice (Kincheloe *v.* Gorman, 29 Mo. 421; Wencker *v.* Thompson, 96 Mo. App. 59, 69 S. W. 743); but the date of the waiver is to be taken as the date of the exhibition or presentation of the demand (Madison County Bank *v.* Suman, *supra*; Wencker *v.* Thompson, *supra*). The representative's parol promise to pay, made before his qualification, is inoperative to bind the estate or to waive notice of the claim. Bambrick *v.* Bambrick, 157 Mo. 423, 58 S. W. 8.

Nebraska.— Fitzgerald *v.* Chariton First Nat. Bank, 64 Nebr. 260, 89 N. W. 813; Huebner *v.* Sesseman, 38 Nebr. 78, 56 N. W. 697.

Nevada.— Adams *v.* Smith, 19 Nev. 259, 9 Pac. 337, 10 Pac. 553.

Tennessee.— Brown *v.* Porter, 7 Humphr. 372. See also Apperson *v.* Harris, 7 Lea 323.

Texas.— Converse *v.* Sorley, 39 Tex. 515.

Utah.— Fullerton *v.* Bailey, 17 Utah 85, 53 Pac. 1020.

Wyoming.— O'Keefe *v.* Foster, 5 Wyo. 343, 40 Pac. 525.

United States.— Pulliam *v.* Pulliam, 10 Fed. 23, construing the Tennessee statute.

Neither the personal representative nor the probate court has the power to dispense with the requirements of the statute. Converse *v.* Sorley, 39 Tex. 515. See also Wilks *v.* Murphy, 19 Mo. App. 221.

26. Nichols *v.* Shearon, 49 Ark. 75, 4 S. W. 167; Bunnell *v.* Post, 25 Minn. 376; Hueb-

this principle it is generally held that he is bound to plead the statute, and that his failure to do so cannot avail the claimant[27] or preclude the heirs and legatees from pleading the statute on settlement of the representative's account.[28] In some jurisdictions, moreover, the representative's failure to plead the statute renders him liable for a devastavit in case payment is enforced against the estate.[29] Although by misleading statements and assurances he induces a creditor to omit compliance with the statute, the claim will nevertheless become barred and the representative will not be estopped to contest it,[30] unless some statutory provision intervenes whereby the creditor may be afforded relief.[31] A part payment of a claim on condition that the creditor holds the representative harmless in case of a deficiency does not affect the operation of the statute of non-claim, or prevent the representative from objecting that the claim has not been duly presented;[32]

ner *v.* Sesseman, 38 Nebr. 78, 56 N. W. 697. *Contra,* Pennock's Estate, 122 Iowa 622, 98 N. W. 480.

Waiver of right to object.— The heirs or other persons entitled to object may, however, waive their right by entering into a *bona fide* settlement with the representative. Hanlon *v.* Wheeler, (Tex. Civ. App. 1898) 45 S. W. 821.

In New Jersey it was formerly stated that no recognition of a claim by the personal representative or by the probate court could dispense with the requirement that claims be presented under oath and within the statutory period (Lewis *v.* Champion, 40 N. J. Eq. 59; Gould *v.* Tingley, 16 N. J. Eq. 501), although it had been decided that where the estate was solvent the representative could pay debts which he was satisfied were just even though the claims were not verified (Kinnan *v.* Wight, 39 N. J. Eq. 501). But it has been provided by statute (Gen. St. p. 2408; Pub. Laws (1898), p. 739, § 68), that if the personal representative in good faith pays a claim not presented under oath, and the claim is proved to have been a just one, the representative shall have allowance for the payment if there be sufficient assets to pay the debts of equal degree in full, and that if the assets are not sufficient the representative shall be allowed for the *pro rata* amount which the creditor would have been entitled to receive if the claim had been presented duly verified. See Freehold First Nat. Bank *v.* Thompson, 61 N. J. Eq. 188, 48 Atl. 333.

Recovery back of payment.— In Nevada it has been held that if, in the absence of any fraud or deceit, the representative, with full knowledge of all the facts, voluntarily pays a claim which has not been presented, he cannot recover from the claimant the amount paid. Adams *v.* Smith, 19 Nev. 259, 9 Pac. 337, 10 Pac. 553. But in Michigan a contrary view has been asserted. Miner *v.* Raymond, 113 Mich. 28, 71 N. W. 501.

27. *Arkansas.*— Rogers *v.* Wilson, 13 Ark. 507.

Georgia.— Hoskins *v.* Sheddon, 70 Ga. 528, construing the Tennessee statute.

Illinois.— Hapke *v.* People, 29 Ill. App. 546.

Nebraska.— Fitzgerald *v.* Chariton First Nat. Bank, 64 Nebr. 260, 89 N. W. 813.

Tennessee.— Brown *v.* Porter, 7 Humphr. 373. See also Apperson *v.* Harris, 7 Lea 323.

Utah.— Fullerton *v.* Bailey, 17 Utah 85, 53 Pac. 1020.

United States.— Pulliam *v.* Pulliam, 10 Fed. 23, construing the Tennessee statute.

In North Carolina it has been held that where the claim is a just one the personal representative is not bound to plead the statute. Williams *v.* Maitland, 36 N. C. 92.

In Iowa the decisions are apparently inconsistent. In Brownell *v.* Williams, 54 Iowa 353, 6 N. W. 530, it was held that the personal representative is not bound to plead the statute but that whenever it appears to the court from an inspection of the claim or otherwise that the claim has not been filed or proved as required it is the duty of the court to reject it. But in *In re* Pennock, 122 Iowa 622, 98 N. W. 480, it was held that the representative might pay claims and have credit for the payment, although the claims had not been properly filed against the estate. See also *In re* Wonn, 80 Iowa 750, 45 N. W. 1063.

28. Stillman *v.* Young, 16 Ill. 318; Bunnell *v.* Post, 25 Minn. 376. See also Pulliam *v.* Pulliam, 10 Fed. 23, construing the Tennessee statute. *Compare* Hanlon *v.* Wheeler, (Tex. Civ. App. 1898) 45 S. W. 821.

Estoppel.— Where a testator gave a certain fund to his children, and the latter gave to the testator's creditors orders on the executors for payment out of the fund, thereby leading the creditors to believe that no demand need be made of the executors, the children were estopped to object that such a demand was not made. Drye *v.* Cunningham, 74 S. W. 272, 24 Ky. L. Rep. 2500.

29. Hoskins *v.* Sheddon, 70 Ga. 528 (construing the Tennessee statute); Byrn *v.* Fleming, 3 Head (Tenn.) 658; Brown *v.* Porter, 7 Humphr. (Tenn.) 373. See also Apperson *v.* Harris, 7 Lea (Tenn.) 323.

30. Cockrell *v.* Seasongood, (Miss. 1902) 33 So. 77; Nagle *v.* Ball, 71 Miss. 330, 13 So. 929; Spaulding *v.* Suss, 4 Mo. App. 541. See also Bambrick *v.* Bambrick, 157 Mo. 423, 58 S. W. 8; Lewis *v.* Champion, 40 N. J. Eq. 59. *Compare* Sugar River Bank *v.* Fairbank, 49 N. H. 131.

31. See *supra,* X, B, 12, b, (II).

32. Gorman *v.* Nairne, 12 Ala. 338.

and the representative cannot by a promise to pay revive against the estate a debt barred by the statute.[33] In a few jurisdictions it is held that formal requirements as to presentation may be waived by the personal representative, and will be held to be waived where he fails to make seasonable objection,[34] and even in jurisdictions where the representative cannot dispense with presentation there are cases holding that if he appears in court and, without raising any objection to the creditor's failure to comply with the statute, contests the claim on its merits, he waives his right of objection.[35]

14. Allowance — a. By Personal Representative — (i) *In General.* In many jurisdictions the personal representative is authorized to pass upon the justice of claims presented against the decedent's estate, and to allow or reject the same in his discretion, in lieu of any formal action by the probate court;[36] approval, however, by the probate court, after the admission of the claim by the personal representative, being made by some statutes essential to its due allowance and payment.[37]

(ii) *Form and Sufficiency* — (a) *General Rule.* As a general rule it may be laid down that any acts or statements of the representative which evince an intention to pay a claim against the estate or amount to an admission of its validity and justice will be sufficient to constitute an allowance thereof;[38] but it is necessary that the acts or statements should be of this character, and equivocal

33. Decatur Branch Bank *v.* Hawkins, 12 Ala. 755. See also Halfman *v.* Ellison, 51 Ala. 543; Colby *v.* King, 67 Iowa 458, 25 N. W. 704.

34. Rawson *v.* Knight, 71 Me. 99; Ross *v.* Knox, 71 N. H. 249, 51 Atl. 910.

Where an administrator has seen and examined a claim against the estate, and is subsequently requested to allow it, which he refuses to do, the claim being present in the pocket of its owner, and the administrator being so told, a formal presentation of the claim is not necessary, but may be presumed to be waived. Cheeseman *v.* Kyle, 15 Ohio St. 15. See also Howard *v.* Leavell, 10 Bush (Ky.) 481. *Compare* Pike *v.* Thorp, 44 Conn. 450.

35. Leake *v.* Sutherland, 25 Ark. 219; Guerian *v.* Joyce, 133 Cal. 405, 65 Pac. 972; Hentsch *v.* Porter, 10 Cal. 555; Pepper *v.* Sidwell, 36 Ohio St. 454; Daykin *v.* Emery, 10 Ohio Cir. Ct. 652, 5 Ohio Cir. Dec. 121. See *infra*, XIV, B, 1, b, (iv).

36. *Indiana.*— Lasure *v.* Carter, 5 Ind. 498.

Louisiana.— Beeman's Succession, 47 La. Ann. 1355, 17 So. 820; Richmond's Succession, 35 La. Ann. 858; Prudhomme's Succession, 23 La. Ann. 228.

New York.— Matter of Le Baron, 67 How. Pr. 346; Wright *v.* Beirne, 2 Dem. Surr. 539.

Ohio.— Thomas *v.* Chamberlain, 39 Ohio St. 112; Jackson *v.* Jackson, 8 Ohio Dec. (Reprint) 105, 5 Cinc. L. Bul. 647, holding that the district court has no jurisdiction to instruct an administrator as to whether he shall reject or allow a claim filed against the estate.

Texas.— See Oldham *v.* Smith, 26 Tex. 530.

See 22 Cent. Dig. tit. "Executors and Administrators," § 832.

37. *Arkansas.*— Gist *v.* Gans, 30 Ark. 285; Meyer *v.* Quartermous, 28 Ark. 45; Walker *v.* Byers, 14 Ark. 246; Hudson *v.* Breeding, 7 Ark. 445.

California.— Nally *v.* McDonald, 66 Cal. 530, 6 Pac. 390.

Iowa.— Byer *v.* Healy, 84 Iowa 1, 50 N. W. 70; *In re* Seavey, 82 Iowa 440, 48 N. W. 924; Schriver *v.* Holderbaum, 75 Iowa 33, 39 N. W. 125; Bayless *v.* Powers, 62 Iowa 601, 17 N. W. 907; Karr *v.* Stivers, 34 Iowa 123. See also Marlow *v.* Marlow, 48 Iowa 639, holding that an order by the court to an administrator to pay a claim duly sworn to and filed is sufficient to indicate that the claim is approved by the court, even where it has not been formally proved up.

Maryland.—Coburn *v.* Harris, 58 Md. 87.

Texas.— Wygel *v.* Woodlief, 76 Tex. 604, 13 S. W. 569; Price *v.* McIver, 25 Tex. 769, 78 Am. Dec. 558 (holding, however, that the probate court cannot enforce payment of the claim until the same has been allowed by the administrator); Danzey *v.* Swanney, 7 Tex. 617; Neill *v.* Hodge, 5 Tex. 487.

See 22 Cent. Dig. tit. "Executors and Administrators," § 831.

In Kansas a personal representative is not allowed to pay any demand against the estate over the sum of fifty dollars, until the same has been allowed or approved by the probate court, and the statute cannot be evaded by splitting up a single and entire demand into demands of less than fifty dollars each. Clawson *v.* McCune, 20 Kan. 337.

38. See Maraist *v.* Guilbeau, 31 La. Ann. 713 (placing debt on account and asking authority to pay it); Western Reserve Bank *v.* McIntire, 40 Ohio St. 528 (agreement to pay decree); Thomas *v.* Chamberlain, 39 Ohio St. 112 (holding a part payment without dispute, to be an allowance of the whole claim); Smock *v.* Bouse, 12 Ohio Cir. Ct. 46, 5 Ohio Cir. Dec. 293 (filing a petition for the sale of land, and including therein a claim of a cred-

acts or statements not evincing such an intention or amounting to such an admission are not sufficient.[39] A disallowance of a claim by the personal representative and notice thereof to the creditor should be in terms so unequivocal that the latter may know with certainty when his claim, if not sued upon, will be barred by the statute of limitations;[40] and where the personal representative does or says anything from which the creditor may reasonably infer that the determination to reject the claim is not final, but that it will be further examined and considered, such claim is not rejected within the meaning of the statutes.[41] Where the representative directs his attorney to reject a particular claim, the rejection by the attorney is as effectual as though the representative had personally notified the claimant of the rejection.[42] A claim indorsed as rejected is not reinstated by an erasure of the representative's signature thereto more than three months afterward.[43]

(B) *Effect of Failure to Act on Claim.* In some jurisdictions claims not acted on by the personal representative within a specified time after their presentation are deemed rejected,[44] but it has also been held that the failure of the representative to indorse on a claim his rejection thereof within the specified time operates as an allowance.[45]

(III) *Time For Allowance.* Executors and administrators are entitled to a reasonable time for the examination of claims and accounts against the estate before indorsing thereon their allowance or rejection.[46]

(IV) *Conflict of Interests.* Where the executor or administrator is interested in a claim against his decedent's estate, he is disqualified from passing upon

itor whom the administrator had frequently assured would be paid the same as other creditors); Heath *v.* Garrett, 46 Tex. 23 (withdrawing answer in suit on rejected claim and consenting to judgment).

39. *Iowa.*— Lamm *v.* Sooy, 79 Iowa 593, 44 N. W. 893.

Louisiana.— Figuras *v.* Benoist, 11 La. Ann. 683.

Rhode Island.— Providence Municipal Ct. *v.* Wilbour, 23 R. I. 95, 49 Atl. 488.

South Carolina.— McKinlay *v.* Gaddy, 26 S. C. 573, 2 S. E. 479.

Wisconsin.— Hepp *v.* Huefner, 61 Wis. 148, 20 N. W. 923.

See 22 Cent. Dig. tit. "Executors and Administrators," § 834.

A bare acknowledgment that an account is just, made by the representative, is not sufficient to charge the estate with the debt. Ciples *v.* Alexander, 2 Treadw. (S. C.) 767.

The execution and delivery of a note for services to be rendered to the estate is not an allowance of the claim. Price *v.* McIver, 25 Tex. 769, 78 Am. Dec. 558.

40. Bradley *v.* Vail, 48 Conn. 375.

A distinct refusal to allow a claim is a rejection, although no formal demand is made at the time that the executors should indorse their allowance upon the claim. Harter *v.* Taggart, 14 Ohio St. 122.

Waiver of notice.— In Arkansas, when a claim is presented to the administrator within the required time, and a waiver of notice indorsed thereon, it is tantamount to a rejection and reference of it to the probate court. Randolph *v.* Ward, 29 Ark. 238.

If the representative relies on a defect in form alone he should say so, or he will be deemed to have waived it. Aiken *v.* Coolidge, 12 Oreg. 244, 6 Pac. 712.

41. Hoyt *v.* Bonnett, 50 N. Y. 538; Reynolds *v.* Collins, 3 Hill (N. Y.) 36; Kidd *v.* Chapman, 2 Barb. Ch. (N. Y.) 414; Barsalou *v.* Wright, 4 Bradf. Surr. (N. Y.) 164. See also Elliot *v.* Cronk, 13 Wend. (N. Y.) 35.

42. Selover *v.* Coe, 63 N. Y. 438; Wintermeyer *v.* Sherwood, 77 Hun (N. Y.) 193, 28 N. Y. Suppl. 449.

43. Burks *v.* Bennett, 62 Tex. 277.

44. Bellows *v.* Chief, 20 Ark. 424; *In re* Callahan, 152 N. Y. 320, 46 N. E. 486; Schutz *v.* Morette, 146 N. Y. 137, 40 N. E. 780 [*reversing* 81 Hun 518, 31 N. Y. Suppl. 39]; Matter of Whitehead, 38 N. Y. App. Div. 319, 56 N. Y. Suppl. 989; Matter of Doran, 2 N. Y. Annot. Cas. 40, 38 N. Y. Suppl. 544; Farwell *v.* Richardson, 10 N. D. 34, 84 N. W. 558. See also Providence Municipal Ct. *v.* Wilbour, 23 R. I. 95, 49 Atl. 488, holding that the executor's failure to file a statement in the probate court denying the validity of a duly presented claim is not equivalent to the allowance of the claim. But *compare* Lambert *v.* Craft, 98 N. Y. 342; Matter of Miller, 9 N. Y. Suppl. 60, 2 Connoly Surr. (N. Y.) 134; Matter of Cowgrey, 5 Dem. Surr. (N. Y.) 453; Underhill *v.* Newburger, 4 Redf. Surr. (N. Y.) 499; Matter of Phyfe, 5 N. Y. Leg. Obs. 331.

45. Kirman *v.* Powning, 25 Nev. 378, 60 Pac. 834, 61 Pac. 1090; Dickey *v.* Corliss, 41 Vt. 127.

46. Dredla *v.* Baache, 60 Nebr. 655, 83 N. W. 916; Keenan *v.* Saxton, 13 Ohio 41. And see Large *v.* Large, 29 Wis. 60.

such claim,[47] the statute usually providing for the probate or other designated court to pass upon the claim in such case.[48]

(v) *Action by One of Several Representatives.* Since the act of one personal representative is the act of all of the representatives of the estate, the better rule seems to be that the allowance or rejection of a claim against the estate by one of two or more personal representatives is binding upon the estate.[49]

b. By Commissioners — (i) *In General.* Some of the statutes provide for the appointment of commissioners, for the purpose of passing upon and adjusting claims against decedents' estates.[50]

(ii) *Appointment and Qualifications.* The power and duty to appoint commissioners is usually vested in the probate court, which is accorded a liberal interpretation as to its exercise.[51] The appointment of commissioners may be

47. Hildebrandt's Estate, 92 Cal. 433, 28 Pac. 486; Hill's Estate, 67 Cal. 238, 7 Pac. 664; Henderson *v.* Ayres, 23 Tex. 96 (where the administrator served as attorney of a creditor of the estate); Johnson *v.* Brown, 25 Tex. Suppl. 120. See also *In re* Crosby, 55 Cal. 574.

Where the same person is administrator of two estates whose interests conflict, as where there is a demand in behalf of one to be presented for allowance against the other, he cannot legally act as administrator of both estates in the matter of obtaining an allowance of the demand, but should resign the administration of one of the estates. If he fails to resign, and attempts to act in the same capacity for both estates, and the demand is allowed, the proceeding will be regarded as a nullity. State *v.* Reinhardt, 31 Mo. 95; State *v.* Bidlingmaier, 26 Mo. 483. See also Clark *v.* Crosswhite, 28 Mo. App. 34.

An administrator who authorizes a person to purchase claims against the estate is not thereby precluded from passing upon them. Johnson *v.* Brown, 25 Tex. Suppl. 120.

48. Hubbard *v.* Hubbard, 16 Ind. 25; Ludlow *v.* Ludlow, 4 N. J. L. 189 (holding that if one of several joint executors has a claim against the estate he cannot compel his co-executors to allow and credit it before the ordinary, but must resort to a court of equity); *In re* Marcelle, 165 N. Y. 70, 58 N. E. 796; Snyder *v.* Snyder, 96 N. Y. 88 [*reversing* 30 Hun 186, 4 N. Y. Civ. Proc. 370].

Where the representative has assigned his claim against the estate his assignee is not confined to the remedy provided by statute to enable the executor himself to enforce his claim. Snyder *v.* Snyder, 96 N. Y. 88 [*reversing* 30 Hun 186, 4 N. Y. Civ. Proc. 370].

49. Willis *v.* Farley, 24 Cal. 490; Cross *v.* Long, 66 Kan. 293, 71 Pac. 524; Coburn *v.* Harris, 53 Md. 367; Dean *v.* Duffield, 8 Tex. 235, 58 Am. Dec. 108. But see *In re* Whitmore, Myr. Prob. (Cal.) 103; McLane *v.* Belvin, 47 Tex. 493, holding that where by will three executors were appointed with authority to administer without control of a court of probate, and all qualified as such, two of such executors could not allow a claim against the estate.

Claim of one executor.— The orphans' court cannot allow one executor the amount of the debt claimed by him from testator's estate, if his co-executor disputes its payment. Middleton *v.* Middleton, 35 N. J. Eq. 115.

50. *Connecticut.*— Mills *v.* Wildman, 18 Conn. 124.

Kentucky.— Story *v.* Story, 35 S. W. 540, 18 Ky. L. Rep. 97, report by commissioners and confirmation by court.

Maine.— See Rogers *v.* Rogers, 67 Me. 456, commissioners of exorbitant claims.

Massachusetts.— Ripley *v.* Collins, 162 Mass. 450, 38 N. E. 1133.

Michigan.—Crosby *v.* Montcalm Cir. Judge, 125 Mich. 24, 83 N. W. 1040; *In re* Vedder, 122 Mich. 439, 81 N. W. 356 (holding that the right to have claims against the estate presented to and passed upon by commissioners exists, even where the executor is also residuary legatee and gives a bond to pay all debts and legacies); Heavenrich *v.* Nichols, 113 Mich. 508, 71 N. W. 852; Campau *v.* Miller, 46 Mich. 148, 9 N. W. 140; Buchoz *v.* Pray, 36 Mich. 429. See also Osmun *v.* Oakland Cir. Judge, 107 Mich. 27, 64 N. W. 949.

Minnesota.— State *v.* Ramsey County Probate Ct., 25 Minn. 22.

Nebraska.— Dredla *v.* Baache, 60 Nebr. 655, 83 N. W. 916; Schaberg *v.* McDonald, 60 Nebr. 493, 83 N. W. 737. See also Craig *v.* Anderson, 3 Nebr. (Unoff.) 638, 92 N. W. 640.

Rhode Island.— Mason *v.* Taft, 23 R. I. 388, 50 Atl. 648.

South Carolina.— Rouse *v.* Raynal, Riley Eq. 210.

Virginia.— Marshal *v.* Cheatham, 88 Va. 31, 13 S. E. 308.

See 22 Cent. Dig. tit. "Executors and Administrators," § 837.

Auditor.— In Pennsylvania an officer appointed by the court to pass upon and allow such claims is called an auditor. Axtell's Appeal, 3 Pa. Cas. 488, 6 Atl. 560; Fehl's Estate, 13 Pa. Super. Ct. 601.

51. Smith *v.* Lloyd, 76 Mich. 619, 39 N. W. 756; State *v.* Ramsey County Probate Ct., 25 Minn. 28; Bryant *v.* Livermore, 20 Minn.

made at any time during the progress of the administration.[52] Such commissioners should be disinterested persons, and should be duly appointed and sworn before entering upon the duties of office.[53]

(III) *POWER AND DUTIES.* In respect to claims accruing in the lifetime of the decedent, which by law survive, and where the facts necessary to give jurisdiction and authority exist, the commissioners act judicially,[54] and their judgment, rendered upon due investigation of the claim, should be respected in the probate court and elsewhere.[55] They are usually, however, not authorized to pass upon debts and expenses incurred subsequent to decedent's death,[56] or claims which are contingent,[57] or purely equitable in their nature.[58]

(IV) *REPORT.* The report of the commissioners should be filed within the time specified in the order appointing them or designated by statute,[59] but claims against the estate cannot be defeated by the failure of the commissioners to take final action and make their report within the time fixed by the order.[60] Neither does the fact that the report was returned before the expiration of the time for the presentment of claims render the same void.[61] The probate court has power to accept or reject the report of the commissioners, and in passing upon it is not confined to matters appearing on the face thereof, but may exercise its discretion in inquiring into the genuineness and identity of the claims and the regularity of the report generally.[62] The report of the commissioners allowing or dis-

313; Wilkinson *v.* Winne, 15 Minn. 159. See also Axtell's Appeal, 3 Pa. Cas. 488, 6 Atl. 560.

Where the court neglects to appoint commissioners, the creditor has the right to call for them. Powers *v.* Powers, 57 Vt. 49.

A third commissioner should not be appointed without notice, and on *ex parte* application, where the two already appointed disagree as to a claim. Smith *v.* Lloyd, 76 Mich. 619, 39 N. W. 756.

52. Wilkinson *v.* Winne, 15 Minn. 159.

Commissioners may be appointed before inventory filed.— Bryant *v.* Livermore, 20 Minn. 313.

53. Cummings *v.* Halsted, 26 Minn. 151, 1 N. W. 1052; Bryant *v.* Livermore, 20 Minn. 313; Ashley *v.* Eggers, 59 Wis. 563, 18 N. W. 471.

The judge of probate is not barred from acting as commissioner. Cummings *v.* Halsted, 26 Minn. 151, 1 N. W. 1052.

Where a creditor presents his claim to commissioners whom he deems disqualified by reason of interest, he thereby waives such objection. Bryant *v.* Livermore, 20 Minn. 313.

54. Finley *v.* Dubay, 112 Mich. 334, 70 N. W. 885; Clark *v.* Davis, 32 Mich. 154; Mason *v.* Taft, 23 R. I. 388, 50 Atl. 648.

55. Finley *v.* Dubay, 112 Mich. 334, 70 N. W. 885; Wilkinson *v.* Conaty, 65 Mich. 614, 32 N. W. 841; Lothrop *v.* Conely, 39 Mich. 757; Axdell's Appeal, 43 Leg. Int. (Pa.) 476.

56. Greenleaf *v.* Sabin, 1 Root (Conn.) 468; Mason *v.* Taft, 23 R. I. 388, 50 Atl. 648; Hatch *v.* Hatch, 60 Vt. 160, 13 Atl. 791. See, however, Booth *v.* Radford, 57 Mich. 357, 24 N. W. 102, holding that funeral expenses and the expenses of decedent's last sickness may properly be allowed as preferred claims by the commissioners.

57. Campau *v.* Miller, 46 Mich. 148, 9 N. W. 140; Shurbun *v.* Hooper, 40 Mich. 503; Buchoz *v.* Pray, 36 Mich. 429.

The commissioners can only receive and report the evidence relating to such claims, the claims are not definitely adjudicated until they are supposed to have become absolute. Campau *v.* Miller, 46 Mich. 148, 9 N. W. 140; Buchoz *v.* Pray, 36 Mich. 429.

58. Brown *v.* Sumner, 31 Vt. 671. See also McKinney *v.* Hamilton, 53 Mich. 497, 19 N. W. 263. But see Spaulding *v.* Warner, 52 Vt. 29, holding that they have jurisdiction of claims originating in equitable principles, where the right and extent of recovery are readily ascertainable. See also Moore *v.* Bachelder, 51 Vt. 50.

59. Hansell's Estate, 11 Phila. (Pa.) 47.

60. Heavenrich *v.* Nichols, 113 Mich. 508, 71 N. W. 852.

61. Johnson *v.* Johnson, 66 Mich. 525, 23 N. W. 413 (holding that, on an appeal by heirs from the allowance of a claim against the estate, they cannot object to a premature return by the commissioners on claims which could damnify no one but a creditor who had no opportunity to present his claim); Sowles *v.* Quinn, 61 Vt. 354, 17 Atl. 493.

62. Peck *v.* Sturges, 11 Conn. 420; Palmer *v.* Palmer, 61 Me. 236; Hodges *v.* Thacher, 23 Vt. 455; Newel *v.* Keith, 11 Vt. 214 (holding likewise that it is no objection to the report that other and prior items to the account presented were considered, where those items were not included in the settlement); Armentrout *v.* Shafer, 89 Va. 566, 16 S. E. 726. See also Whitcomb *v.* Hutchinson, 48 Vt. 310.

Reconsideration of acceptance.— Although the court has caused to be entered on the report "filed, accepted, and ordered to be recorded," it may, before the report is actually recorded, reject the same for errors found therein, and send it back to the commissioners for correction. Adarene *v.* Marlow, 33 Vt. 558.

allowing a claim, when filed and approved by the probate court, is final, and has the effect of a judgment, unless duly appealed from.[63]

c. By the Court — (i) *In General.* In many jurisdictions the statutes require all claims to be presented to the probate court for allowance in the first instance, and, upon due notice and opportunity given to the personal representative to appear, and upon proof of claim presented the court will allow or disallow the claim;[64] and, under these statutes, the personal representative cannot pay any claims out of the assets of the estate until allowed by the probate court.[65]

(ii) *Notice of Filing.* In some jurisdictions notice of the filing of a claim in court is required to be given to the personal representative, in order to obtain jurisdiction of his person, as a condition precedent to the adjudication of the claim by the court.[66]

(iii) *Order or Decree.* The order or decree entered by the court on passing upon a claim against a decedent's estate should be against the executor or administrator[67] for the allowance of the claim at an amount certain to be paid out of the assets of the estate,[68] or for the disallowance of

63. *Maine.*— Palmer *v.* Palmer, 61 Me. 236.
Michigan.—Finley *v.* Dubay, 112 Mich. 334, 70 N. W. 885.
Minnesota.— State *v.* Ramsey County Probate Ct., 25 Minn. 22.
Ohio.— Cromwell *v.* Herron, 11 Ohio Cir. Ct. 448, 5 Ohio Cir. Dec. 196.
Vermont.— Tute *v.* Janes, 50 Vt. 124; Whitcomb *v.* Hutchinson, 48 Vt. 310, holding that objection to a report on the ground of irregularity comes too late where the correction of the report might have been seasonably sought on appeal.
See 22 Cent. Dig. tit. "Executors and Administrators," § 840.

64. *Alabama.*— Lapsley *v.* Goldsby, 14 Ala. 73; Parks *v.* Stonum, 8 Ala. 752.
Illinois.— Hales *v.* Holland, 92 Ill. 494; Kingan *v.* Burn, 104 Ill. App. 661. See also Miller *v.* Simons, 71 Ill. App. 369.
Kansas.— Scroggs *v.* Tutt, 20 Kan. 271.
Mississippi.— See Mobile Branch Bank *v.* Rhew, 37 Miss. 110.
Missouri.— Church *v.* Church, 73 Mo. App. 421; State *v.* Walsh, 67 Mo. App. 348 (holding that the probate court has jurisdiction to allow a demand for legal services rendered the administrator in the course of his administration on the estate); Dingle *v.* Pollick, 49 Mo. App. 479. See also Cassatt *v.* Vogel, 94 Mo. 646, 8 S. W. 169.
New Mexico.— Chaves *v.* Perea, 3 N. M. 71, 2 Pac. 73.
See 22 Cent. Dig. tit. "Executors and Administrators," § 841.
Claims cannot be allowed by probate judge in vacation. Dingle *v.* Pollick, 49 Mo. App. 479; Chaves *v.* Perea, 3 N. M. 71, 2 Pac. 73.

65. Reitzell *v.* Miller, 25 Ill. 67; Wallace *v.* Monroe, 22 Ill. App. 602; Wilks *v.* Murphy, 19 Mo. App. 221.

66. Wallace *v.* Gatchell, 106 Ill. 315; Hales *v.* Holland, 92 Ill. 494; Propst *v.* Meadows, 13 Ill. 157; Phœnix Ins. Co. *v.* Guderyahn, 20 Ill. App. 161; Foley *v.* Wallace, 2 Ind. 174; Scroggs *v.* Tutt, 20 Kan. 271; Chaves *v.* Perea, 3 N. M. 71, 2 Pac. 73. See *supra*, X, B, 8.
Service upon one of two administrators only.— A claim against an estate can be allowed, although the summons was served on one of two administrators only and was void for want of a seal, where such administrator was the active one and he and the attorney for both administrators appeared. Tewalt *v.* Irwin, 164 Ill. 592, 46 N. E. 13.
Waiver.— Where the administrator, who was not served with a notice, was actually present at the hearing, and entered exceptions to the allowance of the claim, he thereby waived the irregularity of want of service. McLeary *v.* Doran, 79 Iowa 210, 44 N. W. 360.

67. West *v.* Krebaum, 88 Ill. 263 (holding, however, that an order allowing a claim against an estate is not bad because entitled against the estate, instead of against the administrator, where the administrator appeared in the case); Maddox *v.* Maddox, 97 Ind. 537; Martin *v.* Shannon, 101 Iowa 620, 70 N. W. 720; Roberts *v.* Weadock, 98 Wis. 400, 74 N. W. 93.
Order should be for costs also in proper cases. Maddox *v.* Maddox, 97 Ind. 537.
Attorney's fees.— The probate court may allow attorney's fees for services rendered to the administrator directly in favor of the attorney instead of in favor of the administrator, and order payment out of the assets of the estate. State *v.* Walsh, 67 Mo. App. 348.

68. La Roe *v.* Freeland, 8 Mich. 531. See also State *v.* James, 82 Mo. 509.
The order of entry and allowance is sufficient, although not signed by the county judge, where the claim appears on the schedule of claims, showing its allowance on the day fixed for hearing claims, and also on the entry book, in the handwriting of the county judge, showing the name of the claimant, the amount of the claim, and the amount allowed on said day. McCormack *v.* McCormack, 53 Nebr. 255, 73 N. W. 693.
What will be determined.— On an application for a decree for the payment of a judgment against a deceased person, the surrogate

the claim.[69] The court has inherent power to correct or amend its own order or decree,[70] or its records.[71] A claim shown to have been filed after it was barred by limitations will not be presumed to have been allowed by the court unless that fact affirmatively appears upon the record.[72]

d. Set-Off. The statutes usually provide that where a creditor of the deceased presents a claim to the commissioners, or to the court of probate, the personal representative may exhibit claims of the deceased as a set-off to the claim of the creditor, and the commissioners or the court shall ascertain and allow the balance against or in favor of the estate, as they shall find the same to be;[73] and it has been held that a claim not so asserted cannot subsequently be enforced against the creditor, or set off by the personal representative in an action to enforce an allowance against the estate.[74]

e. Setting Aside Allowance — (i) *In General.* The probate court has as a general rule power to set aside the allowance or disallowance of a claim against a decedent's estate,[75] especially where such allowance or disallowance was obtained

will determine the amount remaining due on the judgment, and who is the owner, but not whether there has been an accord and satisfaction, or whether the estate is entitled in equity to a release or discharge in whole or in part. McNulty *v.* Hurd, 72 N. Y. 518.

69. La Roe *v.* Freeland, 8 Mich. 531.

Order held sufficient.— An order of the county court in respect to a claim presented against the estate that "after having taken the matter under advisement, the court this day, after due deliberation, rejects the claim" is a sufficiently formal judgment. Johnson *v.* Gillett, 52 Ill. 358.

70. Page *v.* Ralph, 55 Ark. 52, 17 S. W. 365. See also Schwartz's Estate, 2 Woodw. (Pa.) 393. And see, generally, JUDGMENTS.

71. Ritchey *v.* Withers, 72 Mo. 556, holding that where the probate judge allowed a claim against the estate of the deceased, and placed it in a certain class, and the clerk in making the indorsement on the demand, and in the book of abstracts of demands, made a mistake and put the claim in another class this might be corrected by a *nunc pro tunc* entry.

72. Janes *v.* Brunswick, 8 N. M. 345, 45 Pac. 878.

73. People *v.* McCutcheon, 40 Mich. 244 (holding likewise that a set-off when once asserted cannot be withdrawn); Willard *v.* Fralick, 31 Mich. 431 (holding, however, that such set-off must be confined to claims of the deceased, and cannot include demands which never belonged to the deceased); Robinson *v.* Walker, 50 Mo. 19; Bliss *v.* Little, 63 Vt. 86, 22 Atl. 13; Hatch *v.* Hatch, 60 Vt. 160, 13 Atl. 791. See also Cassatt *v.* Vogel, 94 Mo. 646, 8 S. W. 169.

74. Olmstead *v.* Bailey, 35 Conn. 584; Jamison *v.* Wickham, 67 Mo. App. 575; Bliss *v.* Little, 63 Vt. 86, 22 Atl. 13; Hatch *v.* Hatch, 60 Vt. 160, 13 Atl. 791. See also McMorrin *v.* Overholt, 14 Ark. 244.

75. *Alabama.*— Wills *v.* Rand, 41 Ala. 198.

Arkansas.— Scott *v.* Penn, 68 Ark. 492, 60 S. W. 235.

Colorado.— Clemes *v.* Fox, 25 Colo. 39, 53 Pac. 225, holding likewise that the county court in vacating an order allowing a claim against decedent's estate is presumed to have had jurisdiction over the person of the claimant, unless the contrary affirmatively appears by the record.

Illinois.— Schlink *v.* Maxton, 153 Ill. 447, 38 N. E. 1063 [*affirming* 48 Ill. App. 471], holding that where fraud or mistake has intervened in the allowance of a claim the county court has jurisdiction to set it aside after the close of the term at which it was allowed, if the facts are such that a court of equity would entertain jurisdiction of a bill to set aside a judgment.

Indiana.— Beard *v.* Peru First Presb. Church, 15 Ind. 490, holding likewise that the pendency of an appeal from the allowance of a claim will not prevent claimant from instituting proceedings before the court making the allowance to set the same aside.

Iowa.— *In re* Davenport, 85 Iowa 293, 52 N. W. 197.

Kansas.— Wolfley *v.* McPherson, 61 Kan. 492, 59 Pac. 1054 [*reversing* (App. 1899) 57 Pac. 257]; Lutz *v.* Balcom, (Sup. 1898) 53 Pac. 523.

Michigan.—See Lyle *v.* Anderson, 122 Mich. 601, 82 N. W. 246.

Missouri.— See Casey *v.* Murphy, 7 Mo. App. 247.

Nebraska.— McGrew *v.* Humboldt State Bank, 60 Nebr. 716, 84 N. W. 99; McKenna *v.* McCormick, 60 Nebr. 595, 83 N. W. 844.

See 22 Cent. Dig. tit. "Executors and Administrators," § 844.

In Texas an allowance and approval of a claim by the administrator and the chief justice of the county court can only be set aside or nullified by an original proceeding commenced in the district court for that purpose; it cannot be done by the county court. Cone *v.* Crum, 52 Tex. 348; Swan *v.* House, 50 Tex. 650; Hoffner *v.* Brander, 23 Tex. 631; Eccles *v.* Daniels, 16 Tex. 136; Moore *v.* Hillebrant, 14 Tex. 312, 65 Am. Dec. 118.

Claim payable in Confederate money.— An administrator's allowance of a claim payable in Confederate money and approval thereof by the probate court are absolute nullities, and proof that the allowance and approval were made or obtained by fraud is not necessary. McGar *v.* Nixon, 36 Tex. 289.

ex parte.[76] A suit in equity may also be maintained to set aside for fraud an order or decree of the probate court allowing a claim against a decedent's estate.[77] An administrator who has disallowed a claim may afterward, it has been held, revoke his action, and allow the same;[78] but it has been held that where the administrator has allowed a claim in full he cannot withdraw such allowance by protesting against an approval thereof by the court.[79]

(II) *WHO MAY ATTACK ALLOWANCE*. Heirs and devisees[80] and distributees and legatees as well as personal representatives may move to have an allowance set aside on proper grounds, when injuriously affected thereby, no matter how small their interests in the estate may be.[81] A receiver of the decedent's estate represents the interests of the creditors as well as of the estate, and if a motion by the receiver to set aside an order of the surrogate granting allowances out of the estate is denied, the motion cannot be renewed by the creditors or any one of them without leave of court.[82]

(III) *TIME FOR APPLICATION*. Proceedings to vacate an order of allowance or classification of claims must be brought within the time limited by statute if there be any statute applicable thereto,[83] and otherwise they must be brought within a reasonable time.[84]

(IV) *GROUNDS*. The discretionary power of the probate court to amend or vacate its own orders or judgments continues only until the expiration of the term at which such orders or judgments were rendered,[85] and after that time the court can act in respect to the matter only according to fixed principles of law,[86] and unless a motion to vacate made at a subsequent term presents some of the grounds enumerated in the statute it cannot be granted.[87] The usual grounds for vacating or setting aside an order or decree of the probate court allowing or disallowing a claim against an estate are that such order or judgment was procured by fraud or misrepresentation, or through mistake, surprise, or excusable inadvertence or neglect,[88] or that proper notice was not given to the personal

76. *California*.— Sullenberger's Estate, 72 Cal. 549, 14 Pac. 513.

Missouri.— Martin *v.* La Master, 63 Mo. App. 342. See also State *v.* James, 82 Mo. 509.

New Hampshire.— Parker *v.* Gregg, 23 N. H. 416.

New York.— Matter of Warrin, 28 Misc. 695, 60 N. Y. Suppl. 191.

South Carolina.— Fraser *v.* Charleston, 23 S. C. 373.

See 22 Cent. Dig. tit. "Executors and Administrators," § 844.

77. Jones *v.* Brinker, 20 Mo. 87; Purdy *v.* Gault, 19 Mo. App. 191; Central Nat. Bank *v.* Fitzgerald, 94 Fed. 16. See also *In re* Lindsay, 184 Pa. St. 262, 39 Atl. 82.

78. Husted *v.* Hoyt, 12 Conn. 160.

79. Hensel *v.* International Bldg., etc., Assoc., 85 Tex. 215, 20 S. W. 116.

80. Schlink *v.* Maxton, 153 Ill. 447, 38 N. E. 1063 [*affirming* 48 Ill. App. 471]; Lancaster *v.* Gould, 46 Ind. 397; Martin *v.* La Master, 63 Mo. App. 342; Link *v.* Link, 48 Mo. App. 345; Giddings *v.* Steele, 28 Tex. 732, 91 Am. Dec. 336; Claiborne *v.* Tanner, 18 Tex. 68.

81. Sherman *v.* Whiteside, 190 Ill. 576, 60 N. E. 838; Lancaster *v.* Gould, 46 Ind. 397; Bell *v.* Ayres, 24 Ind. 92; *In re* Davenport, 85 Iowa 293, 52 N. W. 197; Cone *v.* Crum, 52 Tex. 348.

82. Irving Nat. Bank *v.* Kernan, 3 Redf. Surr. (N. Y.) 1.

83. Wolfley *v.* McPherson, 61 Kan. 492, 59 Pac. 1054 [*reversing* (App. 1899) 57 Pac. 257]. See also McKenna *v.* McCormick, 60 Nebr. 595, 83 N. W. 844.

84. Eccles *v.* Daniels, 16 Tex. 136; Weadock *v.* Ray, 111 Wis. 489, 87 N. W. 477. See also Snow *v.* Mather, 52 Tex. 650.

85. McGrew *v.* Humboldt State Bank, 60 Nebr. 716, 84 N. W. 99.

86. McGrew *v.* Humboldt State Bank, 60 Nebr. 716, 84 N. W. 99.

87. McGrew *v.* Humboldt State Bank, 60 Nebr. 716, 84 N. W. 99. See also Hendron *v.* Kinner, 110 Iowa 544, 80 N. W. 419, 81 N. W. 783; McKenna *v.* McCormick, 60 Nebr. 595, 83 N. W. 844.

88. *Arkansas*.— Scott *v.* Penn, 68 Ark. 492, 60 S. W. 235.

Colorado.— Clemes *v.* Fox, 25 Colo. 39, 53 Pac. 225, holding that where the grounds on which a county court at a subsequent term vacated orders allowing claims and approving the widow's allowance do not appear, the vacation is presumed to have been for fraud or mistake.

Illinois.— Sherman *v.* Whiteside, 190 Ill. 576, 60 N. E. 838 [*affirming* 93 Ill. App. 572], holding that it must be shown that the claim was allowed through fraud and collusion with the executor, and not through negligence. Schlink *v.* Maxton, 153 Ill. 447, 38 N. E. 1063 [*affirming* 48 Ill. App. 471].

Indiana.— Statelar *v.* Sample, 29 Ind. 315, holding, however, that the complaint did

representative or the creditors of the estate.[89] The mere fact that a claim was barred by the general statute of limitations when allowed has been held to be no ground for setting aside an allowance thereof,[90] particularly where the personal representative had not availed himself of such plea.[91] Where the allowance or disallowance of a claim is sought to be set aside on the ground of newly discovered evidence, it should be shown why such evidence could not with due diligence have been furnished earlier, and to be available as a ground for reopening the case such evidence should be controlling and not cumulative only.[92]

(v) *Proceedings.* Since an order or judgment of the probate court allowing or disallowing a claim against the decedent's estate has largely the effect of a judgment,[93] where proceedings are instituted to vacate such order or decree, the presumption is that the allowance was made upon satisfactory vouchers and proofs, or that the claim was disallowed for want of sufficient evidence or some fatal irregularity, and the burden of proving otherwise is upon the party seeking to vacate the order or decree.[94] But it has been held that the court may set aside or modify the allowance of a claim against the estate approved by the administrator and allowed by the clerk in vacation without any evidence except what may be shown by the papers.[95] If an order is made out of court and without notice allowing a claim against an estate, no notice of a motion to set it aside is necessary.[96]

f. Effect of Allowance[97] — (i) *By Probate Court* — (a) *Upon Claimant and Personal Representative.* In many jurisdictions, while the allowance or disallowance of a claim against an estate by the probate court, either directly or by way of approval of the act of commissioners or the personal representative in

not present a case justifying the intervention of a court of equity on the ground of fraud.

Iowa.— Snelling *v.* Kroger, 89 Iowa 247, 56 N. W. 446.

Minnesota.— *In re* Gragg, 32 Minn. 142, 19 N. W. 651.

Texas.— Cone *v.* Crum, 52 Tex. 348; Lott *v.* Ballaud, 21 Tex. 167; Eccles *v.* Daniels, 16 Tex. 136. See also Hicks *v.* Oliver, 78 Tex. 233, 14 S. W. 575; Jones *v.* Underwood, 11 Tex. 116.

Wisconsin.— McLachlan *v.* Staples, 13 Wis. 448.

See 22 Cent. Dig. tit. "Executors and Administrators," § 847.

89. *Illinois.*— Propst *v.* Meadows, 13 Ill. 157.

Iowa.— McLeary *v.* Doran, 79 Iowa 210, 44 N. W. 360.

Missouri.— Martin *v.* Nichols, 63 Mo. App. 342.

Oregon.—Knight *v.* Hamaker, 40 Oreg. 424, 67 Pac. 107.

Pennsylvania.—Carroll's Estate, 4 Pa. Dist. 680, 17 Pa. Co. Ct. 273.

Vermont.— Wells *v.* Morse, 11 Vt. 9.

See 22 Cent. Dig. tit. "Executors and Administrators," § 847.

Excuse for non-appearance held insufficient. — Where a claim against an estate filed by an administrator was allowed a subsequent vacation of the allowance on the application of one who knew of the time for hearing, but failed to appear and oppose the claim, and whose only excuse for not appearing was that he felt confident that the administrator would administer the estate honestly and not permit unjust claims to be allowed, was an abuse of discretion. *In re* Kidder, 53 Minn. 529, 55 N. W. 738.

90. Dyer *v.* Jacoway, 50 Ark. 217, 6 S. W. 902; Cone *v.* Crum, 52 Tex. 348; Campbell *v.* Shotwell, 51 Tex. 27; Mosely *v.* Gray, 23 Tex. 496; Hillebrant *v.* Burton, 17 Tex. 138.

91. Marshall *v.* Coleman, 187 Ill. 556, 58 N. E. 628 [*modifying* 89 Ill. App. 41]; Lott *v.* Cloud, 23 Tex. 254.

92. Williams *v.* Price, 11 Cal. 212; McDaniels *v.* Van Fosen, 11 Iowa 195; Bowen *v.* Steere, 6 R. I. 251.

93. Wright *v.* Campbell, 27 Ark. 637; Jones *v.* Brinker, 20 Mo. 87. See *infra*, X, B, 14, f, (I), (A).

94. *California.*— Swain's Estate, 67 Cal. 637, 8 Pac. 497.

Colorado.— Jones *v.* Bradley, 8 Colo. App. 178, 45 Pac. 229.

Indiana.— Stout *v.* Morgan, 6 Ind. 369.

Missouri.— See Jones *v.* Brinker, 20 Mo. 87, holding that a statement that the administrator illegally procured an allowance in his favor does not make out a case for equitable relief.

New York.— Matter of Warrin, 56 N. Y. App. Div. 414, 67 N. Y. Suppl. 763.

Texas.— Henderson *v.* Ayres, 23 Tex. 96; Hillebrant *v.* Burton, 17 Tex. 138.

See 22 Cent. Dig. tit. "Executors and Administrators," § 848.

95. Ordway *v.* Phelps, 45 Iowa 279.

96. Sullenberger's Estate, 72 Cal. 549, 14 Pac. 513.

97. **Effect of disallowance by commissioners.**— It has been held in an early Connecticut case that a creditor is barred of his claim by a disallowance by the commissioners. Penderson *v.* Avery, 1 Root (Conn.) 103. But

reference to such claim, may not be regarded as a judgment in the strict sense of the term, yet it operates as an adjudication between the claimant and the personal representative, and binds the latter and the estate equally with the former.[98] It follows that such allowance or disallowance is not subject to collateral attack.[99]

(B) *Upon Heirs, Distributees, Etc.* While the allowance of a claim against the estate by the court has been held to be *prima facie* binding on the heirs where they had due notice of the hearing and an opportunity to oppose the claim,[1] the general rule is that the allowance of a claim by the probate or county court is not conclusive as against the heir or distributee, and that he may contest such allowance when the representative's final account is presented for approval.[2] Neither does the allowance of a claim against the personal representative have the effect of creating a technical lien on the land as against the heir or devisee.[3]

(II) *By Personal Representative.* In some jurisdictions claims presented to the personal representatives and admitted and allowed by them acquire the character of liquidated and undisputed debts against the estate;[4] and the repre-

in Vermont the mere fact that a creditor's claim was disallowed by the commissioner raises no presumption that it was not presented in good faith or that he was not a "creditor" within the meaning of the statute. Bliss *v.* Little, 63 Vt. 86, 22 Atl. 13.

98. *California.*— Holt Mfg. Co. *v.* Ewing, 109 Cal. 353, 42 Pac. 435; Walkerly *v.* Bacon, 85 Cal. 137, 24 Pac. 638; *In re* McKinley, 49 Cal. 152.

Illinois.— Mason *v.* Bair, 33 Ill. 194.

Indiana.— La Porte *v.* Organ, 5 Ind. App. 369, 32 N. E. 342.

Iowa.— *In re* Pennock, 122 Iowa 622, 98 N. W. 480; Hendron *v.* Kinner, 110 Iowa 544, 80 N. W. 419, 81 N. W. 783; Ashton *v.* Miles, 49 Iowa 564; Little *v.* Sinnett, 7 Iowa 324.

Massachusetts.— See Mitchell *v.* Pease, 7 Cush. 350.

Minnesota.—McCord *v.* Knowlton, 79 Minn. 299, 82 N. W. 589; Barber *v.* Bowen, 47 Minn. 118, 49 N. W. 684.

Missouri.— Clark *v.* Bettelheim, 144 Mo. 258, 46 S. W. 135; Munday *v.* Leeper, 120 Mo. 417, 25 S. W. 381; Funk *v.* Seehorn, 99 Mo. App. 587, 74 S. W. 445.

Nebraska.— Yeatman *v.* Yeatman, 35 Nebr. 422, 53 N. W. 385.

Oregon.—Johnston *v.* Shofner, 23 Oreg. 111, 31 Pac. 254.

Texas.— Howard *v.* Battle, 18 Tex. 673. See also Swan *v.* House, 50 Tex. 650.

West Virginia.— Hurxthal *v.* St. Lawrence Boom, etc., Co., 53 W. Va. 87, 44 S. E. 520, 97 Am. St. Rep. 954.

Wisconsin.— Roberts *v.* Weadock, 98 Wis. 400, 74 N. W. 93.

United States.— Tate *v.* Norton, 94 U. S. 746, 24 L. ed. 222.

See 22 Cent. Dig. tit. "Executors and Administrators," § 849.

Mortgage.— Upon a claim against an estate being presented, contested, and disallowed, a mortgage given to secure it falls with it, and cannot afterward be enforced as a separate claim. Sanger *v.* Palmer, 36 Ill. App. 485.

Allowance of portion of claim.— The allowance by the personal representative of a portion of a claim against a decedent's estate and its approval by the probate court is not an adjudication as to the balance of the claim, which may be considered and disposed of just as if no such allowance had been made. Smith *v.* McFadden, 56 Iowa 482, 9 N. W. 350.

99. Stokes *v.* Pillow, 64 Ark. 1, 40 S. W. 580; Palm's Appeal, 44 Mich. 637, 7 N. W. 200; Clark *v.* Thias, 173 Mo. 628, 73 S. W. 616; Clark *v.* Bettelheim, 144 Mo. 258, 46 S. W. 135; Sutherland *v.* St. Lawrence County, 42 Misc. (N. Y.) 38, 85 N. Y. Suppl. 696.

1. Mason *v.* Bair, 33 Ill. 194, even though they did not avail themselves of such opportunity.

2. *California.*— Wise *v.* Williams, 88 Cal. 30, 25 Pac. 1064.

Florida.— Sanderson *v.* Sanderson, 17 Fla. 820.

Illinois.— Marshall *v.* Coleman, 187 Ill. 556, 58 N. E. 628 [*modifying* 89 Ill. App. 41]; Schlink *v.* Maxton, 153 Ill. 447, 38 N. E. 1063; Shepard *v.* Speer, 140 Ill. 238, 29 N. E. 718; Ward *v.* Derham, 134 Ill. 195, 25 N. E. 745; *In re* Corrington, 124 Ill. 363, 16 N. E. 252. See also Goeppner *v.* Leitzelmann, 98 Ill. 409.

Louisiana.— Minor *v.* Harding, 4 La. 378, if approval *ex parte*.

Montana.— *In re* Barker, 26 Mont. 279, 67 Pac. 941.

Vermont.— Wells *v.* Morse, 11 Vt. 9.

See 22 Cent. Dig. tit. "Executors and Administrators," § 531.

3. Noe *v.* Moutray, 170 Ill. 169, 48 N. E. 709; Hight *v.* Taylor, 97 Ind. 392; Hunt *v.* Rabitoay, 125 Mich. 137, 84 N. W. 59, 84 Am. St. Rep. 563; Mott *v.* Newark German Hospital, 55 N. J. Eq. 722, 37 Atl. 757, holding this to be true, even though the executor is the devisee.

4. Prudhomme's Succession, 23 La. Ann. 228; Schutz *v.* Morette, 146 N. Y. 137, 40 N. E. 780; Lambert *v.* Craft, 98 N. Y. 342; Magee *v.* Vedder, 6 Barb. (N. Y.) 352; Matter of Miner, 39 Misc. (N. Y.) 605, 80 N. Y. Suppl. 643; Matter of Von der Lieth, 25 Misc. (N. Y.) 255, 55 N. Y. Suppl. 428; Stonestreet *v.* Frost, 123 N. C. 640, 31 S. E. 836. See

sentatives cannot thereafter question the propriety of their approval of a claim, unless there is manifest error.[5] But the heir is not bound by the extrajudicial statement of the personal representative that he believes the debt to be due.[6] The rejection of a claim by an executor or administrator is of no judicial force whatever, and cannot affect the creditor's right of action, but it merely remits him to his remedy by an action at law or the special proceeding allowed by statute to establish and enforce his claim.[7]

g. Appeal and Review — (i) *In General.* The statutes usually provide for an appeal from a final order, judgment, or decree of the probate court or commissioners, allowing a claim against a decedent's estate,[8] and the disallowance of

also Baillio *v.* Wilson, 6 Mart. N. S. (La.) 334; Matter of Warrin, 56 N. Y. App. Div. 414, 67 N. Y. Suppl. 763.

Compromise agreement.— An executor who for a sufficient consideration has entered into a compromise agreement with a claimant against the estate is estopped to repudiate anything conceded thereby. Todd *v.* Terry, 26 Mo. App. 598.

Contingent claim.— An executor's approval of a claim, upon its face merely contingent, whether in conjunction with the *ex parte* act of the probate judge or not, cannot give it the validity of a judgment. Pico *v.* De la Guerra, 18 Cal. 422. See also Blanchard *v.* Conger, 61 Iowa 153, 16 N. W. 59, to the same effect.

Where there is no legal foundation for a claim the representative's recognition of it as proper to be paid is not binding upon him or the estate. Webster *v.* Le Compte, 74 Md. 249, 22 Atl. 232.

5. Beeman's Succession, 47 La. Ann. 1355, 17 So. 820; Winn's Succession, 33 La. Ann. 1392; Lilley's Succession, 6 Rob. (La.) 24.

In Ohio where a claim has been duly presented to and allowed by the administrator, no further allowance by a succeeding administrator *de bonis non* is required, but the allowance of the claim is not conclusive of its validity against the estate, and it may be contested by either the administrator who allowed it or the administrator *de bonis non*. Thomas *v.* Chamberlain, 39 Ohio St. 112.

6. Minor *v.* Harding, 4 La. 378.

7. *Maryland.*— See State *v.* Reigart, 1 Gill 1, 30 Am. Dec. 628.

New York.— Matter of Phyfe, 5 N. Y. Leg. Obs. 331.

Ohio.— Morgan *v.* Bartlette, 3 Ohio Cir. Ct. 431, 2 Ohio Cir. Dec. 244.

Pennsylvania.— Cowen *v.* Gonder, 5 Phila. 15.

United States.— U. S. *v.* Fidelity Trust Co., 121 Fed. 766, 58 C. C. A. 42.

See 22 Cent. Dig. tit. "Executors and Administrators," § 849.

8. *Arkansas.*— Page *v.* Ralph, 55 Ark. 52, 17 S. W. 365, holding likewise that since the remedy at law of the party aggrieved is ample a bill in chancery for correction will not lie.

California.— See *In re* Williams, (1893) 32 Pac. 241.

Colorado.— Clemes *v.* Fox, 6 Colo. App. 377, 40 Pac. 843.

Connecticut.— Peck *v.* Sturges, 11 Conn. 420.

Illinois.— Ramsley *v.* Whitbeck, 183 Ill. 550, 56 N. E. 322 [*reversing* 81 Ill. App. 210].

Indiana.— Taggart *v.* Tevanny, 1 Ind. App. 339, 27 N. E. 511.

Maryland.— Stevenson *v.* Schriver, 9 Gill & J. 324.

Michigan.— Smith *v.* Lloyd, 76 Mich. 619, 39 N. W. 756 (holding, however, that by appealing from the rejection of a claim by the commissioners, the claimant waives his right to ask for the appointment of a third commissioner); Patton *v.* Bostwick, 39 Mich. 218 (holding that an appeal is the only remedy, and that a bill in chancery will not lie); La Roe *v.* Freeland, 8 Mich. 531.

Minnesota.—State *v.* Hennepin County Probate Ct., 28 Minn. 381, 10 N. W. 209.

Nebraska.— Herman *v.* Beck, (Sup. 1903) 94 N. W. 512.

New Hampshire.— Cossar *v.* Truesdale, 69 N. H. 490, 45 Atl. 252.

Rhode Island.— Donnelly *v.* McNally, 19 R. I. 665, 37 Atl. 810, holding, however, that the statute [Gen. Laws, c. 215, § 6] providing for an appeal from a decree of the probate court, confirming the report of the commissioners, repeals that section of the statute [Pub. Laws, c. 186, § 13] providing for an appeal from the judgment of the commissioners.

Texas.— Glenn *v.* Kimbrough, 70 Tex. 147, 8 S. W. 81.

Vermont.— Robinson *v.* Robinson, 32 Vt. 738; Adams *v.* Adams, 22 Vt. 50, holding that where there are claims existing between the personal representative and the estate, the allowance of the claim by the commissioners may be reviewed and adjusted by the court of chancery.

Wisconsin.— Parry *v.* Wright, 20 Wis. 483.

See 22 Cent. Dig. tit. "Executors and Administrators," § 850.

But *compare* Treece *v.* Carr, (Tenn. Ch. App. 1900) 58 S. W. 1078, holding that where a master has reported a claim against an estate as just, and a chancellor has concurred therein, it is conclusive on appeal.

Order vacating order allowing claim appealable.— McKenna *v.* McCormick, 60 Nebr. 595, 83 N. W. 844.

Review of allowance of claim by certiorari see CERTIORARI, 6 Cyc. 730.

When appeal unnecessary.— No appeal is necessary from a decree of the probate court

a claim by the court is also usually regarded as a final order which may be reviewed by appeal or writ of error;[9] but in several jurisdictions no appeal will lie from the disallowance of a claim by the personal representative or the probate court, the remedy of the party aggrieved being an action at law to enforce his claim.[10] Merely interlocutory orders or decrees with reference to the allowance of claims are not appealable,[11] nor will any appeal lie from a merely ministerial act of the judge.[12]

(II) *OBJECTIONS AND EXCEPTIONS.* Objections in the nature of exceptions to irregularities in the proceedings, on the hearing on a claim against a decedent's estate, previous to the final decree, must be taken at the time of the hearing, in order to be available on appeal.[13]

(III) *WHO MAY APPEAL.* As a general rule any person affected by a judgment or decree of the probate court may appeal therefrom, whether a party to the record or not.[14] The appellant must, however, show an interest in the matter litigated; a grievance, in the legal sense, existing only when the judgment, order, or decree complained of bears upon his interest;[15] and in several jurisdictions, creditors, devisees, legatees, or heirs can only appeal from the decision of the commissioners or the probate court, where the personal representative fails or declines to take such appeal.[16]

which is wholly unauthorized and a mere nullity. Bond *v.* Dunbar, 2 N. H. 216.

Submission by mutual agreement.— Where by mutual agreement a contested claim is submitted to the decision of the probate court, such decision is final and no appeal lies. Piper *v.* Clark, 18 N. H. 415.

9. *Alabama.*— McNiel *v.* Macon, 20 Ala. 772.

California.— See *In re* Williams, (1893) 32 Pac. 241.

Colorado.— Clemes *v.* Fox, 6 Colo. App. 377, 40 Pac. 843.

Minnesota.— Capehart *v.* Logan, 20 Minn. 442, holding, however, that a creditor, in case of disallowance of a part of his claim, must appeal from the decision on the claim as presented, and not from that part of the decision disallowing a portion of his claim.

New Hampshire.— Chapman *v.* Gale, 32 N. H. 141.

See 22 Cent. Dig. tit. "Executors and Administrators," § 851.

10. *In re* Barker, 26 Mont. 279, 67 Pac. 941; *In re* Powning, 25 Nev. 428, 62 Pac. 235; Campbell *v.* Tackaberry, 51 Tex. 37; Wilkins *v.* Wilkins, 1 Wash. 87, 23 Pac. 411. See also Glenn *v.* Kimbrough, 70 Tex. 147, 8 S. W. 81.

11. *In re* Turner, 128 Cal. 388, 60 Pac. 967 (refusal to permit amendment of claim); Churchill *v.* Burt, 32 Mich. 490.

12. Kennedy *v.* Cress, 19 Iowa 42.

13. *Alabama.*— Watson *v.* McClanahan, 13 Ala. 57; Cook *v.* Davis, 12 Ala. 551. But see Street *v.* Street, 113 Ala. 333, 21 So. 138.

Indiana.— Brown *v.* Sullivan, 3 Ind. App. 211, 29 N. E. 453.

Kentucky.— McCarty *v.* McCarty, 11 Ky. L. Rep. 366.

Louisiana.— Gollain's Succession, 31 La. Ann. 173.

Missouri.— Chidsey *v.* Howell, 91 Mo. 622, 4 S. W. 446, 60 Am. Rep. 267.

Vermont.— Thorp *v.* Thorp, 75 Vt. 34, 52 Atl. 105.

See 22 Cent. Dig. tit. "Executors and Administrators," § 852.

14. *Arkansas.*— Jamison *v.* Adler-Goldman Commission Co., 59 Ark. 548, 28 S. W. 35.

Connecticut.— Fairweather *v.* Curtiss, 2 Root 32; Staniford *v.* Hide, 1 Root 263.

Maryland.— Stevenson *v.* Schriver, 9 Gill & J. 324.

Minnesota.— Lake *v.* Albert, 37 Minn. 453, 35 N. W. 177. See also Schultz *v.* Brown, 47 Minn. 255, 257, 49 N. W. 982.

New Hampshire.— Chapman *v.* Haley, 43 N. H. 300.

Texas.— Glenn *v.* Kimbrough, 70 Tex. 147, 8 S. W. 81; Harper *v.* Stroud, 41 Tex. 367.

Vermont.— Arnold *v.* Brook, 36 Vt. 204.

See 22 Cent. Dig. tit. "Executors and Administrators," § 853.

15. *Alabama.*— Anderson *v.* Anderson, 37 Ala. 683.

Connecticut.— Banks *v.* Basset, 2 Root 297, holding that an appeal from a judgment in probate does not lie in favor of a creditor, because another creditor is allowed too much by the commissioners, but the appeal must be taken by the personal representative.

Louisiana.— Pettis's Succession, 11 La. Ann. 177.

Montana.— See *In re* Barker, 26 Mont. 279, 67 Pac. 941, holding that a person in his capacity as administrator cannot appeal from an order disallowing his individual claim against the estate, and on such an appeal his individual rights will not be considered.

Pennsylvania.—Kern's Estate, 18 Pa. Super. Ct. 506.

Texas.— Stark *v.* Seale, 59 Tex. 1.

See 22 Cent. Dig. tit. "Executors and Administrators," § 853.

16. Downing *v.* Porter, 9 Mass. 386; Crouch *v.* Wayne Cir. Judges, 52 Mich. 596, 18 N. W. 374; Herman *v.* Beck, (Nebr. 1903) 94 N. W. 512; Gilbert *v.* Howe, 47 Vt. 402.

(iv) *TIME FOR APPEALING.* Statutes giving the right of appeal from an order or decree of the probate court usually fix the time within which such appeal must be taken, and the time runs from the date of entry of such order or decree.[17]

(v) *APPLICATION, BOND, AND NOTICE.* An application for appeal need not set forth upon oath a formal statement of the facts, but records of the probate court, or if need be evidence *aliunde* may supply the appellate court with the requisite proof.[18] Under the statutes of several states, the giving of a bond with sureties approved by the court is a condition precedent to the right to appeal,[19] and it is also ordinarily required that a notice of appeal should be given by the appellant to the other parties in interest.[20]

(vi) *EFFECT OF APPEAL.* The general rule is that an appeal from an order or decree of the probate court allowing or disallowing a claim has the effect of vacating such order or decree.[21]

(vii) *PROCEEDINGS IN APPELLATE COURT.* In several jurisdictions, on appeal from the order or decree of the probate court, there is a trial *de novo*, each party being entitled to a trial by jury at his election.[22] On the trial of an

17. *In re* Charles, 35 Minn. 438, 29 N. W. 170; Auerbach *v.* Gloyd, 34 Minn. 500, 27 N. W. 193; Schooley's Estate, 7 Kulp (Pa.) 226; Robinson *v.* Robinson, 32 Vt. 738. See also Cilley *v.* Flander, 62 Vt. 82, 19 Atl. 116.

Extension of time.— In Vermont, where the administrator failed to appeal from an order of allowance, a petition by the decedent's widow for leave to appeal after the time to appeal had expired, on the ground of "fraud, accident, or mistake," setting forth the facts of the case, was sufficient to call for the exercise of the discretion of the court and not demurrable. Congden *v.* Congden, 59 Vt. 597, 10 Atl. 732.

18. *Connecticut.*— Comstock's Appeal, 55 Conn. 214, 10 Atl. 559.

Illinois.— Thorp *v.* Goewey, 85 Ill. 611.

Michigan.— Winter *v.* Winter, 90 Mich. 197, 51 N. W. 363.

New Hampshire.— Cossar *v.* Truesdale, 69 N. H. 490, 45 Atl. 252.

Vermont.— Thorp *v.* Thorp, 75 Vt. 34, 52 Atl. 1051; Whitcomb *v.* Davenport, 63 Vt. 656, 22 Atl. 723; Woodbury *v.* Woodbury, 48 Vt. 94.

See 22 Cent. Dig. tit. "Executors and Administrators," § 858.

On appeal from the rejection of a claim by commissioners, the declaration must conform to the claim and the bill of particulars. Hilebrands *v.* Nibbelink, 40 Mich. 646.

Report of commissioners as declaration.— Where on appeal no new issue is formed in the circuit court and no declaration is filed, the report of the commissioners setting forth the nature of the claim will stand as a declaration in the case, and any judgment beyond the claim presented to the commissioners is erroneous. White *v.* Allen, 18 Mich. 194.

19. Sullivan *v.* Breen, 93 Ill. App. 526; Home Sav. Bank *v.* Lillibridge, 113 Mich. 385, 71 N. W. 638; King *v.* Gridley, 69 Mich. 84, 37 N. W. 50; Dickinson's Appeal, 2 Mich. 337; Arnold *v.* Brook, 36 Vt. 204.

The power to approve such bond cannot be delegated to the clerk of the court. Sullivan *v.* Breen, 93 Ill. App. 526.

The personal representative is specially exempted from giving bond on appeal from an order granting an allowance, under the Texas statute. Adoue *v.* Gonzales, 22 Tex. Civ. App. 73, 54 S. W. 367.

20. McIntosh *v.* Wheeler, 58 Kan. 324, 49 Pac. 77; Home Sav. Bank *v.* Lillibridge, 113 Mich. 385, 71 N. W. 638 (holding, however, that under Howell Annot. St. § 5910, providing that on appeal from the decision of the commissioners on a claim against a decedent's estate appellant shall give notice in such manner as the judge of probate shall direct, notice need not be given to other creditors of the estate by a claimant appealing from the disallowance of his claim, where the probate judge does not direct it to be given them); Schultz *v.* Brown, 47 Minn. 255, 257, 49 N. W. 982; Lake *v.* Albert, 37 Minn. 453, 35 N. W. 117; Field *v.* Smith, 62 N. H. 698 (holding that an appeal from the decision of a commissioner disallowing a claim will be dismissed where it appears that no service of the petition and declaration has been made upon the administrator). But see Glenn *v.* Kimbrough, 70 Tex. 147, 8 S. W. 81, holding that under the Texas statutes the heirs may appeal from the allowance of a claim against the estate, without giving notice of such appeal, although they did not appear and contest the claim in the probate court.

21. Smith *v.* Lloyd, 76 Mich. 619, 39 N. W. 756; Callaghan *v.* Grenet, 66 Tex. 236, 17 S. W. 507; Manchester Dist. Probate Ct. *v.* Kent, 49 Vt. 380; Woodbury *v.* Woodbury, 48 Vt. 94; Stearns *v.* Stearns, 30 Vt. 213.

An appeal from the decision of commissioners whether taken within twenty days, or allowed by the supreme or county court after twenty days have expired, is but a continuance of the same proceeding, and simply transfers the case from one tribunal to another. Calderwood *v.* Calderwood, 38 Vt. 171.

22. *Connecticut.*— Comstock's Appeal, 55 Conn. 214, 10 Atl. 559; Middletown Fourth Ecclesiastical Soc. *v.* Mather, 15 Conn. 587.

appeal the case cannot be enlarged and no claim can be heard which was not passed upon in the first instance;[23] but upon motion of the appellant the court may require the claimant to make his claim more specific and definite.[24] The presumption is in favor of the regularity of the presentment and proof in the lower tribunal,[25] but upon a review of matters wholly within the discretion of the probate court, all of the facts which may have actuated the court should be presented.[26] As a general rule, the order, judgment, or decree of the lower tribunal will not be reversed where the error complained of is harmless, nor for causes not apparent of record.[27]

h. Costs. In some jurisdictions, where a formal presentment and establishment of claims against the estate is requisite, costs are allowed the successful claimant where his claim is contested.[28] But an estate is not liable for the costs on claims filed after the term of court designated by the statutes for the adjustment thereof.[29] The allowance of costs to the party prevailing and against the unsuccessful party is usually within the discretion of the court.[30]

C. Disputed Claims — 1. Contest of Claims in General — a. Who May Contest or Object to Claims. The representative may contest any claim which in his opinion ought not be allowed against the estate,[1] and any person having an inter-

Illinois.— Thorp *v.* Goewey, 85 Ill. 611.

Michigan.— Patrick *v.* Howard, 47 Mich. 40, 10 N. W. 71.

Missouri.— Watkins *v.* Donnelly, 88 Mo. 322.

New Hampshire.— See Elwell *v.* Roper, 72 N. H. 254, 56 Atl. 242.

Oregon.— Johnston *v.* Shofner, 23 Oreg. 111, 31 Pac. 254.

Vermont.— Lynde *v.* Davenport, 57 Vt. 597; Woodbury *v.* Woodbury, 48 Vt. 94. But see Hurlburt *v.* Miller, 72 Vt. 110, 47 Atl. 393, holding that the allowance of the trial of an issue of fact by a jury is discretionery with the county court.

Wisconsin.— York *v.* Orton, 65 Wis. 6, 26 N. W. 166. But see Moerchen *v.* Stoll, 48 Wis. 307, 4 N. W. 352.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 860–861.

23. Patrick *v.* Howard, 47 Mich. 40, 10 N. W. 71.

24. Watkins *v.* Donnelly, 88 Mo. 322.

25. Boggs *v.* Mobile Branch Bank, 12 Ala. 494; Cox *v.* Higginbotham, 76 S. W. 1079, 25 Ky. L. Rep. 1057; Wright *v.* Pate, (Tex. Sup. 1886) 1 S. W. 661. See also *In re* Osburn, 36 Oreg. 8, 58 Pac. 521.

Where the action of the lower tribunal was dependent upon questions of fact, such action will not be disturbed unless manifest error be made to appear. Gilliland's Estate, 6 Pa. Dist. 138, 19 Pa. Co. Ct. 285.

26. Gibson *v.* Brennan, 46 Minn. 92, 48 N. W. 460.

27. Baskins *v.* Wylds, 39 Ark. 347 (where, however, the judgment was reversed for want of due notice to the personal representative which fact appeared of record); Anderson *v.* Greensburgh, etc., Turnpike Co., 48 Ind. 467; Harman *v.* McMullin, 85 Va. 187, 7 S. E. 349; Tredway *v.* Allen, 20 Wis. 475.

28. Crane *v.* Hopkins, 6 Ind. 44; Gibbs *v.* Mann, 4 Mo. 55; Carter *v.* Barnum, 24 Misc. (N. Y.) 220, 53 N. Y. Suppl. 539, 28 N. Y. Civ. Proc. 161; Browning *v.* Vanderhoven, 4 Abb. N. Cas. (N. Y.) 166; Mason *v.* Codwise, 6 Johns. Ch. (N. Y.) 297; Sutton *v.* Sutton, 21 Vt. 74. See also O'Hear *v.* Skeeles, 22 Vt. 152.

29. Russell *v.* Hubbard, 59 Ill. 335; Floyd *v.* Miller, 61 Ind. 224, holding, however, that the costs cannot be taxed against a claimant against decedent's estate, unless such claim was filed more than a year after the issuance of letters of administration and due notice thereof. And see Walters *v.* Hutchins, 29 Ind. 136.

30. Gillett *v.* McFarlan, 106 Iowa 746, 76 N. W. 663; Munn *v.* Munn, 20 N. J. Eq. 472; Resser's Appeal, 39 Leg. Int. (Pa.) 421; Bartolet's Appeal, 1 Walk. (Pa.) 77 (holding that where an executor presents an unfounded claim against the estate, the court may charge him with the costs of witnesses called in support of the claim); Danner's Estate, 2 Lehigh Val. L. Rep. (Pa.) 442 (holding that the fees of witnesses produced before the auditor in support of a claim which the auditor rejected as unfounded were properly disallowed as against the estate); Sharp's Estate, 1 Lehigh Val. L. Rep. (Pa.) 228. See also Metzger's Estate, 18 Lanc. L. Rev. (Pa.) 43; Burbaker's Estate, 4 Lanc. L. Rev. (Pa.) 90 (holding that where moneys wrongfully paid under mistake of fact to an administrator are directed by the court to be paid by the administrator to the party rightfully entitled, the costs of audit will be directed to be paid from the two funds, each bearing its proportionate part); Miers *v.* Betterton, 18 Tex. Civ. App. 430, 45 S. W. 430. See, however, McCullough's Estate, 5 Pa. Co. Ct. 87, 20 Wkly. Notes Cas. (Pa.) 471, holding that if a claimant is unsuccessful in the prosecution of his claim against the estate he becomes personally liable for the costs.

1. Bell *v.* Faison, 53 Miss. 354; Overstreet *v.* Trainer, 24 Miss. 484; Matter of Parker, 1 Barb. Ch. (N. Y.) 154. See also Richard *v.* Ouviere, 10 La. Ann. 723.

est in the estate adverse to the allowance of the claim may contest it.[2] Heirs and distributees may contest the allowance of the claims of creditors,[3] or of the representative;[4] and one creditor may contest the claims of other creditors,[5] provided the assets are insufficient to pay the claims of all;[6] but an objection cannot be made by a person who, although interested in the estate, could not be benefited by a disallowance of the claim.[7]

b. Duty of Representative to Contest Claims.[8] It is the duty of the representative to contest all claims presented against the estate which he believes, or has reason to believe, are unfounded or unjust,[9] or which are not presented and authenticated according to the requirements of the statute.[10] But the propriety of contesting particular claims must frequently be left largely to the representative's discretion and no presumption of bad faith or misconduct will be made against him.[11]

c. Grounds of Objection. Objections to a claim may be based on a denial of its justice or validity,[12] or may rest on the ground that the claim is barred,[13] or that the claimant has not complied with the statutory requirements as to its presentation and authentication.[14] But it is not a valid objection to the claim of a creditor that a similar demand has been presented against another estate,[15] or to the claim of a representative that he has not filed his administration bond.[16]

A special administrator may contest claims against the estate but his authority ceases upon the appointment and qualification of a general administrator. Cadman *v.* Richards, 13 Nebr. 383, 14 N. W. 159.

2. Mackey *v.* Ballou, 112 Ind. 198, 13 N. E. 715; King *v.* Rockhill, 41 N. J. Eq. 273, 7 Atl. 437; Mason *v.* Taft, 23 R. I. 388, 50 Atl. 648. See also Matter of Parker, 1 Barb. Ch. (N. Y.) 154.

One who has purchased real estate, which, there being no personal property, is liable to be sold by the administrator to make assets to pay an allowance, if it is a legal charge against the estate, has such an interest as gives him a right to contest its validity. Mackey *v.* Ballou, 112 Ind. 198, 13 N. E. 715.

A judgment in favor of a representative upon a claim presented by him and rejected by the judge may be contested by any person interested in the estate in the same manner as other allowed claims; but in such cases the burden is upon the person contesting to show that the claim was not properly allowed. *In re* More, 121 Cal. 635, 54 Pac. 148.

3. Romero's Succession, 28 La. Ann. 607.

Under the Ohio statute an heir may file a requisition on the representative to disallow and reject a claim, but this provision does not apply to the payment of legacies, nor can a legatee or devisee file such a requisition. Hunt *v.* Hayes, 19 Ohio Cir. Ct. 151, 10 Ohio Cir. Dec. 388.

4. Cover *v.* Stockdale, 16 Md. 1; Willcox *v.* Smith, 26 Barb. (N. Y.) 316; Hoch's Appeal, 21 Pa. St. 280.

5. Cavaroc *v.* Fournet, 28 La. Ann. 587; Oates *v.* Lilly, 84 N. C. 643; Mason *v.* Taft, 23 R. I. 388, 50 Atl. 648.

One not shown to be a creditor of the succession cannot oppose the allowance of claims set up by others. Floyd's Succession, 12 Rob. (La.) 197.

6. See Cavaroc *v.* Fournet, 28 La. Ann. 587; Mason *v.* Taft, 23 R. I. 388, 50 Atl. 648.

7. Hoopes' Estate, 2 Chest. Co. Rep. (Pa.) 67.

8. **Duty to interpose statute of limitations** see *supra*, X, A, 18, b.

Duty to interpose statute of non-claim see *supra*, X, B, 13.

9. *Alabama.*— Teague *v.* Corbitt, 57 Ala. 529; Green *v.* Fagan, 15 Ala. 335.

Arkansas.— Rogers *v.* Wilson, 13 Ark. 507.

Connecticut.—Winchell *v.* Sanger, 73 Conn. 399, 47 Atl. 706, 66 L. R. A. 935.

Illinois.— Marshall *v.* Coleman, 187 Ill. 556, 58 N. E. 628 [*modifying* 89 Ill. App. 41].

Indiana.— Ray *v.* Moore, 24 Ind. App. 480, 56 N. E. 937.

Maryland.— Strasbaugh *v.* Dallam, 93 Md. 712, 50 Atl. 417.

New York.— *In re* Lydicker, 1 N. Y. Suppl. 895.

West Virginia.—Crotty *v.* Eagle, 35 W. Va. 143, 13 S. E. 59.

England.— *In re* Rownson, 29 Ch. D. 358, 49 J. P. 759, 54 L. J. Ch. 950, 52 L. T. Rep. N. S. 825, 35 Wkly. Rep. 605.

See 22 Cent. Dig. tit. "Executors and Administrators," § 866.

The same degree of diligence must be exercised as in the prosecution of actions accruing to him in his representative capacity. Teague *v.* Corbitt, 57 Ala. 529.

10. Walker *v.* Byers, 14 Ark. 246.

11. Pearson *v.* Darrington, 32 Ala. 227.

12. Koch *v.* Alker, 3 Dem. Surr. (N. Y.) 148. See also *In re* Depuy, 9 N. Y. Suppl. 121.

13. Bowling *v.* Lamar, 1 Gill (Md.) 358; Oates *v.* Lilly, 84 N. C. 643. See also Yingling *v.* Hesson, 16 Md. 112.

14. Beirne *v.* Imboden, 14 Ark. 237, holding further that an objection for want of proper authentication may be taken by either plea, motion, or objection to the admissibility of evidence.

15. Montgomery's Estate, 3 Brewst. (Pa.) 306.

16. *In re* Houck, 23 Oreg. 10, 17 Pac. 461.

d. Time For Making Objection. Where the time for making objections is limited by statute no objection can be made after the time limited on any ground existing prior to the expiration of this period,[17] but objections founded on matters subsequently occurring may be interposed at any time prior to the rendition of a final decree in favor of the creditor,[18] and the court may also in its discretion extend the time originally limited.[19] An objection for want of proper authentication of a claim may be made at any time before final judgment,[20] but not thereafter.[21] Distributees may contest a claim of the representative without waiting for him to exhibit an administration account including the same.[22]

e. Waiver of Objections and Estoppel. Mere silence on the part of a representative after presentation of a claim, accompanied by lapse of time, will not preclude him from thereafter contesting its validity,[23] but by filing at the instance of an alleged creditor an account including the latter's claim he will be estopped to dispute its validity,[24] and if by verbally admitting the validity of a claim and stating that it will be paid he induces a third person to take the claim he cannot thereafter contest it in the hands of such third person.[25] The heirs may also be estopped by their conduct from contesting a claim,[26] and where the heirs are estopped the representative is also estopped in a proceeding where he represents only their interests.[27] Refusal to pay a claim on the sole ground that it was not presented in time is a waiver of objections as to the manner in which it was presented,[28] and objections based on irregularities in filing and docketing a claim are waived by a general appearance of the representative.[29]

2. Arbitration, Reference, and Hearing Before Commissioners — a. Arbitration[30] — (i) *Right to Submit Disputed Claims.* An executor or administrator has the right, both at common law and under express statutes in some jurisdictions, to submit to arbitration claims against the estate which he represents.[31] No special authority from the probate court is required for the exercise of this right,[32] nor is the right affected by statutory provisions authorizing a reference of disputed claims.[33] The heirs or other persons beneficially interested have

17. Chandler *v.* Wynne, 85 Ala. 301, 4 So. 653; Moore *v.* Winston, 66 Ala. 296; Thornton *v.* Moore, 61 Ala. 347.

18. Thames *v.* Herbert, 61 Ala. 340. See also in this connection Thornton *v.* Moore, 61 Ala. 347.

19. King *v.* Rockhill, 41 N. J. Eq. 273, 7 Atl. 437.

20. Beirne *v.* Imboden, 14 Ark. 237.

21. Clark *v.* Bomford, 20 Ark. 440.

22. Cover *v.* Stockdale, 16 Md. 1.

23. *In re* Callahan, 152 N. Y. 320, 46 N. E. 486 [*reversing* 87 Hun 210, 33 N. Y. Suppl. 1016]; Matter of Brown, 76 N. Y. App. Div. 185, 78 N. Y. Suppl. 297, 12 N. Y. Annot. Cas. 37; Matter of Clauss, 16 N. Y. App. Div. 34, 44 N. Y. Suppl. 805. *Compare* Wright *v.* Beirne, 2 Dem. Surr. (N. Y.) 539.

24. Wright *v.* Beirne, 2 Dem. Surr. (N. Y.) 539.

25. Swenson *v.* Walker, 3 Tex. 93.

26. Jenks *v.* Black, 96 Mich. 122, 55 N. W. 563.

27. Jenks *v.* Black, 96 Mich. 122, 55 N. W. 563.

28. Kentucky Title Co. *v.* English, 50 S. W. 968, 20 Ky. L. Rep. 2024.

29. Sanders *v.* Hartge, 17 Ind. App. 243, 46 N. E. 604.

30. See *supra*, V, I.

31. *New York.*— Wood *v.* Tunnicliff, 74 N. Y. 38.

Ohio.— Childs *v.* Updyke, 9 Ohio St. 333. See also Bradstreet *v.* Pross, 9 Ohio Dec. (Reprint) 154, 11 Cinc. L. Bul. 117.

Pennsylvania.— Grace *v.* Sutton, 5 Watts 540.

South Dakota.— Unterrainer *v.* Seelig, 13 S. D. 148, 82 N. W. 394.

Texas.— Yarborough *v.* Leggett, 14 Tex. 677. *Compare* Callaghan *v.* Grenet, 66 Tex. 236, 18 S. W. 507.

Vermont.— Dickinson *v.* Dutcher, Brayt. 104.

Virginia.— Nelson *v.* Cornwell, 11 Gratt. 724; Wheatley *v.* Martin, 6 Leigh 62.

United States.— Strodes *v.* Patton, 23 Fed. Cas. No. 13,538, 1 Brock. 228.

See 22 Cent. Dig. tit. "Executors and Administrators," § 873.

Contra.— Clark *v.* Hogle, 52 Ill. 427.

One of two administrators may submit a matter in dispute between himself in right of his intestate and another to arbitration and the award will bind the estate. Grace *v.* Sutton, 5 Watts (Pa.) 540.

Claims not referable under the statute may be submitted to arbitration. Wood *v.* Tunnicliff, 74 N. Y. 38.

32. Unterrainer *v.* Seelig, 13 S. D. 148, 82 N. W. 394; Dickinson *v.* Dutcher, Brayt. (Vt.) 104.

33. Wood *v.* Tunnicliff, 74 N. Y. 38; Childs *v.* Updyke, 9 Ohio St. 333; Unterrainer *v.* Seelig, 13 S. D. 148, 82 N. W. 394; Powers *v.* Douglass, 53 Vt. 471, 38 Am. Rep. 699.

no right to submit a claim against the estate to arbitration while the estate is subject to administration.[34]

(II) *Submission*— (A) *Form.* A valid submission to arbitration may be made by parol,[35] and there need not be any express agreement to abide by the award, as this will be implied from the fact of submission.[36]

(B) *Effect.* An agreement to submit to arbitration is not an admission of assets,[37] unless the representative covenants to abide by and pay the amount of the award,[38] and not even then if from the articles of submission a contrary intention appears.[39]

(III) *Powers of Arbitrators.* The powers of arbitrators and the extent of their authority depend upon the terms of the agreement between the parties,[40] which will be strictly construed.[41]

(IV) *Operation and Effect of Award.*[42] At common law a representative who submitted disputed claims to arbitration acted at his peril, and if the award was less favorable to the estate than an action at law would have been he might be held liable to account for the deficiency to the heirs or other persons interested in the estate;[43] but the award was binding and the injury could be redressed only by charging the representative with a devastavit.[44] This rule has, however, been changed by statute in some jurisdictions.[45] The award is binding upon the representative,[46] and upon the creditors of the estate,[47] and also upon the heirs and devisees, although they may in some cases hold the representative individually liable.[48] As against the representative it has been held that if he covenants to abide by and pay the amount of the award he will be personally bound for the full amount awarded,[49] although in form he covenanted as representative,[50] unless from a fair construction of the articles of submission a contrary intention appears;[51] but in the absence of such an agreement he is bound only in his representative capacity and according to the amount of assets.[52] The submis-

34. Stahl *v.* Brown, 72 Iowa 720, 32 N. W. 105.

35. Whitney *v.* Phœnix, 4 Redf. Surr. (N. Y.) 180; Valentine *v.* Valentine, 2 Barb. Ch. (N. Y.) 430.

36. Valentine *v.* Valentine, 2 Barb. Ch. (N. Y.) 430.

37. Grace *v.* Sutton, 5 Watts (Pa.) 540; Pearson *v.* Henry, 5 T. R. 6, 2 Rev. Rep. 523 [*disapproving* Barry *v.* Rush, 1 T. R. 691, 1 Rev. Rep. 360]. See *infra*, X, C, 2, b, (IV), (B). *Contra*, Riddell *v.* Sutton, 5 Bing. 200, 7 L. J. C. P. O. S. 60, 2 M. & P. 345, 30 Rev. Rep. 569, 15 E. C. L. 541.

38. Barry *v.* Rush, 1 T. R. 691, 1 Rev. Rep. 360. See also Wood *v.* Tunnicliff, 74 N. Y. 38.

39. McKeen *v.* Oliphant, 18 N. J. L. 442.

40. Alexander *v.* Burton, 21 N. C. 469. See also Montgomery's Appeal, 3 Pa. Cas. 514, 7 Atl. 231.

41. Alexander *v.* Burton, 21 N. C. 469.

42. See *supra*, V, I.

43. *Kentucky.*— Overly *v.* Overly, 1 Metc. 117.

Massachusetts.— Bean *v.* Farnam, 6 Pick. 269.

New Jersey.— Crum *v.* Moore, 14 N. J. Eq. 436, 82 Am. Dec. 262.

New York.— Wood *v.* Tunnicliff, 74 N. Y. 38.

Texas.— Yarborough *v.* Leggett, 14 Tex. 677.

Virginia.— Nelson *v.* Cornwell, 11 Gratt. 724; Wheatley *v.* Martin, 6 Leigh 62.

See 22 Cent. Dig. tit. "Executors and Administrators," § 887.

44. Wheatley *v.* Martin, 6 Leigh (Va.) 62.

45. Overly *v.* Overly, 1 Metc. (Ky.) 117; Chadbourn *v.* Chadbourn, 9 Allen (Mass.) 173; Yarborough *v.* Leggett, 14 Tex. 677.

46. *Massachusetts.*— Bean *v.* Farnam, 6 Pick. 269.

New Jersey.— Crum *v.* Moore, 14 N. J. Eq. 436, 82 Am. Dec. 262.

New York.— Wood *v.* Tunnicliff, 74 N. Y. 38.

Virginia.— Wheatley *v.* Martin, 6 Leigh 62.

United States.— Strodes *v.* Patton, 23 Fed. Cas. No. 13,538, 1 Brock. 228.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 885, 887.

47. Strodes *v.* Patton, 23 Fed. Cas. No. 13,538, 1 Brock. 228.

48. Wheatley *v.* Martin, 6 Leigh (Va.) 62.

49. Powers *v.* Douglass, 53 Vt. 471, 38 Am. Rep. 699; Barry *v.* Rush, 1 T. R. 691, 1 Rev. Rep. 360. See also Wood *v.* Tunnicliff, 74 N. Y. 38.

50. Barry *v.* Rush, 1 T. R. 691, 1 Rev. Rep. 360. See also Wood *v.* Tunnicliff, 74 N. Y. 38.

51. McKeen *v.* Oliphant, 18 N. J. L. 442. See also Wood *v.* Tunnicliff, 74 N. Y. 38.

52. Grace *v.* Sutton, 5 Watts (Pa.) 540; Powers *v.* Douglass, 53 Vt. 471, 38 Am. Rep. 699; Wheatley *v.* Martin, 6 Leigh (Va.) 62; Pearson *v.* Henry, 5 T. R. 6, 2 Rev. Rep. 523 [*distinguishing* Barry *v.* Rush, 1 T. R. 691, 1 Rev. Rep. 360].

sion is an implied promise to pay from the assets in his hands and no further promise is necessary to sustain an action on this award.[53] As between different creditors, an award in favor of one does not entitle him to any priority of payment over other creditors but merely establishes and liquidates the claim.[54]

b. Reference[55] — (I) *STATUTORY PROVISIONS.* There are in many jurisdictions statutory provisions expressly authorizing a submission of disputed claims to referees.[56] These statutes are designed merely to afford an expeditious and inexpensive method of determining such claims,[57] and do not preclude the right of the parties to resort to arbitration[58] or to an ordinary action at law,[59] nor do they make it the duty of either party to offer to refer.[60] The statutory reference has been said to be not an action but a special proceeding,[61] but it is a judicial proceeding terminating in a judgment,[62] and is substantially a suit.[63]

(II) *WHAT CLAIMS MAY BE REFERRED.* Only such claims may be referred as the statutes permitting the reference authorize.[64] Statutes providing generally for a reference of all claims against the estate cover all claims of whatever nature which the representative is competent to settle and adjust,[65] which have been rejected or disputed by him;[66] and so include claims of an equitable as well as of

53. Swicard *v.* Wilson, 2 Mill (S. C.) 218.

54. Wood *v.* Tunnicliff, 74 N. Y. 38.

55. See *supra*, V, I.

56. *Maryland.*—Browne *v.* Preston, 38 Md. 373.

Michigan.— Shepherd *v.* Shepherd, 108 Mich. 82, 65 N. W. 580.

Mississippi.— Bell *v.* Faison, 53 Miss. 354; Boyd *v.* Lowry, 53 Miss. 352; Allen *v.* Miles, 36 Miss. 640.

New Hampshire.— McLaughlin *v.* Newton, 53 N. H. 531; Kingman *v.* Probate Judge, 31 N. H. 171.

New York.— Hustis *v.* Aldridge, 144 N. Y. 508, 39 N. E. 649; Wood *v.* Tunnicliff, 74 N. Y. 38; Eighmie *v.* Strong, 49 Hun 16, 1 N. Y. Suppl. 502, 15 N. Y. Civ. Proc. 119; Francisco *v.* Fitch, 25 Barb. 130; Russell *v.* Lane, 1 Barb. 519; Brockett *v.* Bush, 18 Abb. Pr. 337.

North Carolina.— McLeod *v.* Graham, 132 N. C. 473, 43 S. E. 935; Dunn *v.* Beaman, 126 N. C. 766, 36 S. E. 172; Lassiter *v.* Upchurch, 107 N. C. 411, 12 S. E. 63.

Ohio.— Anderson *v.* Baker, 15 Ohio St. 173; Childs *v.* Updyke, 9 Ohio St. 333; Bradstreet *v.* Pross, 9 Ohio Dec. (Reprint) 154, 11 Cinc. L. Bul. 117.

South Dakota.— Unterrainer *v.* Seelig, 13 S. D. 148, 82 N. W. 394.

Vermont.— Noyes *v.* Phillips, 57 Vt. 229.

See 22 Cent. Dig. tit. "Executors and Administrators," § 870 *et seq.*

Under the New York statute, as amended in 1893 on entry of the order of reference, the proceeding becomes an action in the supreme court and the reference is given the same standing as a reference in an action. Lee *v.* Lee, 85 Hun 588, 33 N. Y. Suppl. 115; Rutherford *v.* Soop, 85 Hun 119, 32 N. Y. Suppl. 636; Jenkinson *v.* Harris, 27 Misc. 714, 59 N. Y. Suppl. 548.

In Pennsylvania the statute provides for the reference of disputed claims to an auditor for determination. See Coulston's Estate, 161 Pa. St. 151, 28 Atl. 1020 [*affirming* 3 Pa. Dist. 99, 14 Pa. Co. Ct. 243]; Curley's Estate, 9 Pa. Dist. 276, 23 Pa. Co. Ct. 659; Burton's Estate, 3 Pa. Dist. 755, 15 Pa. Co. Ct. 367; Seybert's Estate, 5 Pa. Co. Ct. 35.

57. Roulston *v.* Roulston, 5 Misc. (N. Y.) 569, 26 N. Y. Suppl. 667; Lassiter *v.* Upchurch, 107 N. C. 411, 12 S. E. 63.

58. Wood *v.* Tunnicliff, 74 N. Y. 38; Childs *v.* Updyke, 9 Ohio St. 333; Unterrainer *v.* Seelig, 13 S. D. 148, 82 N. W. 394; Powers *v.* Douglass, 53 Vt. 471, 38 Am. Rep. 699.

59. Mowell *v.* Van Buren, 77 Hun (N. Y.) 569, 28 N. Y. Suppl. 1035.

60. Proude *v.* Whiton, 15 How. Pr. (N. Y.) 304.

Privilege of reference may be waived by representative. Terry *v.* Cape Fear Bank, 20 Fed. 773.

61. Eldred *v.* Eames, 115 N. Y. 401, 22 N. E. 216; Mowry *v.* Peet, 88 N. Y. 453; Mowell *v.* Van Buren, 77 Hun (N. Y.) 569, 28 N. Y. Suppl. 1035; Denise *v.* Denise, 41 Hun (N. Y.) 9; Coe *v.* Coe, 37 Barb. (N. Y.) 232, 14 Abb. Pr. (N. Y.) 86; Robert *v.* Ditmas, 7 Wend. (N. Y.) 522.

62. Coe *v.* Coe, 37 Barb. (N. Y.) 232, 14 Abb. Pr. (N. Y.) 86.

63. Coe *v.* Coe, 37 Barb. (N. Y.) 232, 14 Abb. Pr. (N. Y.) 86; Robert *v.* Ditmas, 7 Wend. (N. Y.) 522.

64. Dana *v.* Prescott, 1 Mass. 200.

65. Skidmore *v.* Post, 32 Hun (N. Y.) 54; Francisco *v.* Fitch, 25 Barb. (N. Y.) 130; Russell *v.* Lane, 1 Barb. (N. Y.) 519; Brockett *v.* Bush, 18 Abb. Pr. (N. Y.) 337; Noyes *v.* Phillips, 57 Vt. 229.

Individual claim of representative may be referred. Dana *v.* Prescott, 1 Mass. 200; McLaughlin *v.* Newton, 53 N. H. 531.

A claim of a ward of the deceased accruing in his lifetime for a balance of a trust fund is a claim "against deceased" for which his estate is liable, and may be referred. Fowler *v.* Hebbard, 40 N. Y. App. Div. 108, 57 N. Y. Suppl. 531.

66. Buckhout *v.* Hunt, 16 How. Pr. (N. Y.) 407. holding that until a claim has been rejected or disputed by the representative the

a legal nature,[67] and claims arising out of tort as well as out of contract;[68] but claims against the estate within the meaning of the statutes comprise only such as accrued during the life of the decedent or would have accrued against him if he had lived,[69] and a statute providing only for a reference of claims against the estate does not authorize a reference of claims in favor of the estate.[70]

(III) *Refusal to Refer.* Either the representative or the claimant may refuse to refer a disputed claim upon an offer to refer made by the other party,[71] but the probate court has no discretion to refuse a reference where the representative and claimant mutually agree thereto.[72] Neither party can be said to have refused to refer until the other has in some way manifested his willingness to do so,[73] but a neglect to answer an offer or proposition to refer might be deemed a refusal.[74]

(IV) *Agreement to Refer*—(A) *Form.* In the case of a statutory reference, although the offer to refer may be by parol,[75] the agreement itself must be in writing,[76] and must be submitted to the surrogate or probate judge for approval,[77] and filed in the office of the county clerk.[78] The agreement to refer should substantially present the issues between the parties,[79] but matters of defense need not be set up therein.[80]

(B) *Effect.* An agreement to refer and the filing of such agreement in the office of the clerk operates as a voluntary appearance by the parties,[81] and is also a waiver of the right to have the matter in dispute tried by a jury.[82] The agree-

claimant is not in a position to propose a reference.

A judgment docketed against the decedent in his lifetime is not a claim which may be rejected and referred, but is a debt, the validity of which has been established by a court of competent jurisdiction. Matter of Browne, 35 Misc. (N. Y.) 362, 71 N. Y. Suppl. 1034.

67. Skidmore *v.* Post, 32 Hun (N. Y.) 54; White *v.* Story, 43 Barb. (N. Y.) 124; Francisco *v.* Fitch, 25 Barb. (N. Y.) 130; Brockett *v.* Bush, 18 Abb. Pr. (N. Y.) 337. *Compare* Sands *v.* Craft, 10 Abb. Pr. (N. Y.) 216, 18 How. Pr. (N. Y.) 438.

68. Brockett *v.* Bush, 18 Abb. Pr. (N. Y.) 337 [*disapproving* Akely *v.* Akely, 17 How. Pr. 21].

69. Van Slooten *v.* Dodge, 145 N. Y. 327, 39 N. E. 950; Shorter *v.* Mackey, 13 N. Y. App. Div. 20, 43 N. Y. Suppl. 112; Godding *v.* Porter, 17 Abb. Pr. (N. Y.) 374; Joyce *v.* McGuire, 2 N. Y. City Ct. 422. See also Skidmore *v.* Post, 32 Hun (N. Y.) 54.

A claim of the representative as such against the estate cannot be referred. Dana *v.* Prescott, 1 Mass. 200.

A claim for a legacy is not a claim against the estate which an executor may refer under the statute. Godding *v.* Porter, 17 Abb. Pr. (N. Y.) 374.

The claim of an executor against the estate of his deceased co-executor for property, the use of which was given to the co-executor for life by the will, is not a claim against the testator's estate which may be referred if disputed but is a claim against the estate of the co-executor. Shorter *v.* Mackey, 13 N. Y. App. Div. 20, 43 N. Y. Suppl. 112.

The fact that an item of the claim accrued after decedent's death does not deprive the referees of authority to allow it. McDaniels *v.* McDaniels, 40 Vt. 340, 94 Am. Dec. 408.

70. Wood *v.* Tunnicliff, 74 N. Y. 38.

71. Wood *v.* Tunnicliff, 74 N. Y. 38; Proude *v.* Whiton, 15 How. Pr. (N. Y.) 304.

72. Kingman *v.* Probate Judge, 31 N. H. 171.

73. Buckhout *v.* Hunt, 16 How. Pr. (N. Y.) 407; Proude *v.* Whiton, 15 How. Pr. (N. Y.) 304.

An unqualified rejection of a claim by a representative, unaccompanied by an offer to refer, is not equivalent to a refusal to do so. Buckhout *v.* Hunt, 16 How. Pr. (N. Y.) 407; Proude *v.* Whiton, 15 How. Pr. (N. Y.) 304 [*overruling* Fort *v.* Gooding, 9 Barb. 388].

74. See Proude *v.* Whiton, 15 How. Pr. (N. Y.) 304.

75. Roberts *v.* Pike, 13 N. Y. Suppl. 559, 19 N. Y. Civ. Proc. 422 [*affirmed* in 14 N. Y. Suppl. 957].

76. Bucklin *v.* Chapin, 53 Barb. (N. Y.) 488, 35 How. Pr. (N. Y.) 155. See also Roberts *v.* Pike, 13 N. Y. Suppl. 559, 19 N. Y. Civ. Proc. 422; Noyes *v.* Phillips, 57 Vt. 229.

77. Burnett *v.* Gould, 27 Hun (N. Y.) 366. See also Anderson *v.* Baker, 15 Ohio St. 173.

78. Burnett *v.* Gould, 27 Hun (N. Y.) 366. See also Anderson *v.* Baker, 15 Ohio St. 173.

79. Woodin *v.* Bagley, 13 Wend. (N. Y.) 453.

80. Tracy *v.* Suydam, 30 Barb. (N. Y.) 110.

81. Tracy *v.* Suydam, 30 Barb. (N. Y.) 110.

82. Adams *v.* Brady, 67 Hun (N. Y.) 521, 22 N. Y. Suppl. 466 [*affirmed* in 139 N. Y. 608, 35 N. E. 203]; Masten *v.* Budington, 18 Hun (N. Y.) 105.

The waiver is not restricted to the first reference to which the parties consented, and if the report is rejected the court may against the consent of one of the parties appoint a new referee and resubmit the claim. Adams

ment to refer is not an admission on the part of the representative of sufficient assets to pay the claim,[83] nor is an offer to refer made by a representative after a refusal to pay a claim a waiver of the statute of limitations, unless the offer is accepted before the claim is barred and there is an actual submission as proposed.[84]

(v) *Waiver of Defects.* Statutory provisions which are not jurisdictional but relate merely to matters of procedure may be waived by the parties,[85] and where the court has jurisdiction of the subject-matter the voluntary appearance of the parties confers jurisdiction of their persons and is a waiver of all irregularities in the prior proceedings,[86] but the representative by consenting to refer does not waive the objection that the claim was not referable under the statute.[87]

(vi) *Selection and Appointment of Referees.* Under some of the statutes the selection of the referees is made by the parties agreeing to the reference as a part of their agreement and then submitted to the probate court for approval,[88] and the probate judge cannot make the selection unless the parties have failed to agree and consent to accept such persons as he may select,[89] or one of the referees selected refuses to serve,[90] or the report of the first referees is rejected and the claim is referred to new referees.[91] Under other statutes the selection is made by the probate judge[92] upon notice to all persons who may be affected by the proceedings.[93] The number of referees is ordinarily specified by statute,[94] but the parties may agree to the appointment of a different number,[95] or that the probate judge shall himself act as referee.[96]

(vii) *Powers of Referees.* The referees possess only such powers as are expressly conferred or may be fairly inferred from the provisions of the statute authorizing the reference.[97]

v. Brady, 67 Hun (N. Y.) 521, 22 N. Y. Suppl. 466.

83. Sinclair *v.* Wilson, 3 Penr. & W. (Pa.) 167; Hoare *v.* Muloy, 2 Yeates (Pa.) 161. See *supra*, X, C, 2, a, (II), (B).

84. Cornes *v.* Wilkin, 79 N. Y. 129 [*affirming* 14 Hun 428].

85. Shepherd *v.* Shepherd, 108 Mich. 82, 65 N. W. 580; Bradstreet *v.* Pross, 9 Ohio Dec. (Reprint) 154, 11 Cinc. L. Bul. 117.

86. Montgomery *v.* Burgess, 92 Hun (N. Y.) 289, 36 N. Y. Suppl. 711; Bucklin *v.* Chapin, 53 Barb. (N. Y.) 488, 35 How. Pr. (N. Y.) 155. See also Regan *v.* Stone, 7 Sm. & M. (Miss.) 104; *In re* Ludlam, 13 Pa. St. 188; Benedict's Estate, 4 Lanc. L. Rev. (Pa.) 99.

87. Van Slooten *v.* Dodge, 145 N. Y. 327, 29 N. E. 950; Shorter *v.* Mackey, 13 N. Y. App. Div. 20, 43 N. Y. Suppl. 112.

88. Tilney *v.* Clendenning, 1 Dem. Surr. (N. Y.) 212.

89. Tilney *v.* Clendenning, 1 Dem. Surr. (N. Y.) 212.

90. Hustis *v.* Aldridge, 144 N. Y. 508, 39 N. E. 649, holding that in such case, under the New York statute, the court cannot vacate the reference but must appoint another referee unless the stipulation expressly provides otherwise.

91. Adams *v.* Brady, 67 Hun (N. Y.) 521, 22 N. Y. Suppl. 466 [*affirmed* in 139 N. Y. 608, 35 N. E. 203]; Masten *v.* Budington, 18 Hun (N. Y.) 105.

92. Kingman *v.* Probate Judge, 31 N. H. 171; Noyes *v.* Phillips, 57 Vt. 229.

93. Kingman *v.* Probate Judge, 31 N. H. 171.

94. Shepherd *v.* Shepherd, 108 Mich. 82, 65 N. W. 580; Tilney *v.* Clendenning, 1 Dem. Surr. (N. Y.) 212.

95. Shepherd *v.* Shepherd, 108 Mich. 82, 65 N. W. 580.

96. McLaughlin *v.* Newton, 53 N. H. 531.

97. Eldred *v.* Eames, 115 N. Y. 401, 22 N. E. 216 [*reversing* 48 Hun 253]. See also Bell *v.* Faison, 53 Miss. 354; Roulston *v.* Roulston, 5 Misc. (N. Y.) 569, 26 N. Y. Suppl. 667.

They do not possess the same powers as referees in ordinary actions (Eldred *v.* Eames, 115 N. Y. 401, 22 N. E. 216 [*reversing* 48 Hun, 253]) unless such powers are expressly conferred by statute (Jenkinson *v.* Harris, 27 Misc. (N. Y.) 714, 59 N. Y. Suppl. 548; Lassiter *v.* Upchurch, 107 N. C. 411 12 S. E. 63).

Under the New York statute, prior to the amendment of 1893, it was held in accordance with the rule stated in the text that the referee could not require a bill of particulars (Townsend *v.* New York L. Ins. Co., 4 N. Y. Civ. Proc. 398) or permit the claimant to amend his claim (Eldred *v.* Eames, 115 N. Y. 401, 22 N. E. 216 [*reversing* 48 Hun 253]; Mowell *v.* Van Buren, 77 Hun 569, 28 N. Y. Suppl. 1035) or in any way vary or enlarge the matter referred (Townsend *v.* New York L. Ins. Co., *supra*; Rowlston *v.* Rowlston, 5 Misc. 569, 26 N. Y. Suppl. 667); but under the amendment of 1893 giving the referee the same powers as referees in ordinary actions (see Lee *v.* Lee, 85 Hun 588, 33 N. Y. Suppl. 115; Rutherford *v.* Soop, 85 Hun 119, 32 N. Y. Suppl. 636; Jenkinson *v.* Harris, 27 Misc. 714, 59 N. Y. Suppl. 548) the referee may allow an amendment of the claim (Louns-

(VIII) *REVOCATION OF ORDER OF REFERENCE.* The court may revoke an order of reference while the reference is pending upon proof of facts which might render further proceedings before the referees fraudulent or injurious to the rights of persons interested in the claim referred or in the estate, and may do so on the application of one who is not a party to the reference and against the consent of those who are parties thereto.[98]

(IX) *HEARING.* The hearing on a statutory reference is conducted without filing any pleadings,[99] the agreement to refer supplying the place of both pleadings and process;[1] but notice of the time of the hearing should be given.[2] The hearing must be confined strictly to the particular claim referred,[3] and the claimant must satisfy the referees of its justice and validity.[4] Any defense may be urged which is available to defeat the claim,[5] including the statute of limitations,[6] and every species of legal proof adapted to show the injustice or invalidity of the claim in whole or in part is admissible.[7] If while the reference is pending it appears that the presence of other persons is necessary to a complete determination of the controversy the court may on motion order them to be brought in and made parties.[8] It is not necessary that the testimony taken on the hearing before the referees should be signed and filed.[9] In Pennsylvania, on a hearing before an auditor, an issue may be demanded to try a disputed question of fact before a jury.[10]

(X) *FINDINGS.* The only finding that the referees are authorized to make is that the claim in question be allowed or disallowed,[11] and they cannot after rejecting the claim make an affirmative finding in favor of the estate against the claimant.[12] The award is a nullity as to any finding by the referees which is in

bury *v.* Sherwood, 53 N. Y. App. Div. 318, 65 N. Y. Suppl. 676; Lee *v.* Lee, *supra*), and adjudicate upon the question of costs (Jenkinson *v.* Harris, *supra*), but that he cannot require a bill of particulars (Rutherford *v.* Soop, *supra*).

98. Lathrop *v.* Hitchcock, 38 Vt. 496.

99. Rutherford *v.* Soop, 85 Hun (N. Y.) 119, 32 N. Y. Suppl. 636; Tracy *v.* Suydam, 30 Barb. (N. Y.) 110; Woodin *v.* Bagley, 13 Wend. (N. Y.) 453.

1. Robert *v.* Ditmas, 7 Wend. (N. Y.) 522.

2. Wasserman's Estate, 6 Pa. Dist. 343; Carroll's Estate, 4 Pa. Dist. 680.

The representative need not give notice to his cestuis que trustent of the hearing, although such notice would be prudent and proper. Mayer *v.* Gilligan, 2 N. Y. St. 702.

3. Mowell *v.* Van Buren, 77 Hun (N. Y.) 569, 28 N. Y. Suppl. 1035; Rowlston *v.* Rowlston, 5 Misc. (N. Y.) 569, 26 N. Y. Suppl. 667.

4. Tracy *v.* Suydam, 30 Barb. (N. Y.) 110. See also Street *v.* Ranson, 62 N. Y. App. Div. 519, 71 N. Y. Suppl. 93; Yates *v.* Root, 4 N. Y. App. Div. 439, 38 N. Y. Suppl. 663.

Claims should be carefully scrutinized and should be established only upon clear and satisfactory proof. Barrett *v.* Bailey, 59 N. Y. App. Div. 300, 69 N. Y. Suppl. 246.

5. Simons *v.* Steele, 82 N. Y. App. Div. 202, 81 N. Y. Suppl. 737.

Any defense which the decedent could have made alive may be set up. Tracy *v.* Suydam, 30 Barb. (N. Y.) 110.

Non-residence of the representative is no ground for rejecting his individual claim against the estate. Newton's Estate, 11 Phila. (Pa.) 100.

6. Simons *v.* Steele, 82 N. Y. App. Div. 202, 81 N. Y. Suppl. 737; Rutherford *v.* Soop, 85 Hun (N. Y.) 119, 32 N. Y. Suppl. 636; Tracy *v.* Suydam, 30 Barb. (N. Y.) 110; Woodin *v.* Bagley, 13 Wend. (N. Y.) 453.

The referee may of his own motion give effect to the statute of limitations where the defense is not raised by the representative. Simons *v.* Steele, 82 N. Y. App. Div. 202, 81 N. Y. Suppl. 737 [*affirmed* in 177 N. Y. 542, 69 N. E. 1131].

7. Tracy *v.* Suydam, 30 Barb. (N. Y.) 110, holding that within this rule a set-off or part payment may be proved in reduction of the amount of the claim.

8. Mowry *v.* Peet, 7 Abb. N. Cas. (N. Y.) 195.

9. Kellogg *v.* Werner, 6 Hun (N. Y.) 452.

10. Hansell's Estate, 11 Phila. (Pa.) 47.

An issue is not a matter of right on every disputed claim but it must be shown that some disputed fact exists for the determination of which a jury is necessary. Hansell's Estate, 11 Phila. (Pa.) 47; Beehler's Estate, 3 Phila. (Pa.) 254.

An application for an issue is too late after the audit is closed and notice given that the report is prepared for filing (White's Estate, 11 Phila. (Pa.) 100), or after all the evidence on both sides has been given on a rehearing (Tassey's Appeal, 1 Pa. Cas. 341, 3 Atl. 101).

Mere delay in presenting a sealed note for payment is not sufficient of itself to authorize the granting of an issue by an auditor to determine whether the debt has been paid, or has lost its value by the delay. Hummel's Estate, 3 Phila. (Pa.) 442.

11. Bell *v.* Faison, 53 Miss. 354.

12. Gilmore *v.* Hubbard, 12 Cush. (Mass.) 220; Mowry *v.* Peet, 88 N. Y. 453. But see

excess of their authority,[13] but if that part of their award which is within the scope of their authority is independent of and clearly distinguishable from the rest it may be affirmed as to that part and rejected as to the balance.[14] The findings of a referee upon questions of fact will be sustained unless clearly contrary to the evidence.[15]

(xi) *Return and Approval of Report.* In the absence of a statute giving the reference the same standing as a reference in an action and authorizing judgment to be entered upon the report,[16] the report of the referees must be returned to and approved by the court before judgment can be entered thereon,[17] the return being made not to the surrogate or probate judge who approved the selection of the referees but to the court of general jurisdiction in which the rule for their appointment was entered.[18] On presentation of the report the court may either set it aside or accept it and render judgment thereon.[19] If the report is rejected, the court may appoint new referees and resubmit the claim to them,[20] or if the report is merely defective in form it may be sent back to the same referee for correction;[21] but if the report is not accepted the court cannot substitute its own finding for that which the referee should have made and render judgment thereon.[22] The statutes as to the time within which referees appointed in ordinary actions must make and deliver their report do not apply to a statutory reference of a disputed claim.[23]

(xii) *Effect of Award.* Under the North Carolina statute the award is equivalent to a judgment and can be attacked only for fraud or collusion,[24] and is binding upon the heirs, although they were not parties to the proceeding.[25]

c. Hearing Before Commissioners. In some jurisdictions provision is made

Hendrickson *v.* Dickson, 19 Hun (N. Y.) 290, holding that where a referee reports that the claim is unfounded the court may on application of the representative direct the referee to report on any claim in favor of the estate against the claimant.

13. Gilmore *v.* Hubbard, 12 Cush. (Mass.) 220.

14. Gilmore *v.* Hubbard, 12 Cush. (Mass.) 220; Unterrainer *v.* Seelig, 13 S. D. 148, 82 N. W. 394.

15. Hart *v.* Tuite, 75 N. Y. App. Div. 323, 78 N. Y. Suppl. 154; Coale *v.* Coale, 63 N. Y. App. Div. 32, 71 N. Y. Suppl. 214; O'Neill *v.* Barry, 20 N. Y. App. Div. 121, 46 N. Y. Suppl. 752. See also Hendron *v.* Kinner, 110 Iowa 544, 80 N. W. 419, 81 N. W. 783.

The findings of an auditor, under the Pennsylvania statute, upon questions of fact will not be disturbed unless clearly contrary to the evidence. *In re* Coulston, 161 Pa. St. 151, 28 Atl. 1020 [*affirming* 3 Pa. Dist. 99, 14 Pa. Co. Ct. 243]; Curley's Estate, 9 Pa. Dist. 276, 23 Pa. Co. Ct. 659; Burton's Estate, 3 Pa. Dist. 755, 15 Pa. Co. Ct. 367; Seybert's Estate, 5 Pa. Co. Ct. 35; Bromley's Estate, 18 Phila. (Pa.) 7; White's Estate, 11 Phila. (Pa.) 100; Wedekind's Estate, 11 Phila. (Pa.) 68; Sheetz's Estate, 2 Woodw. (Pa.) 407; Scott's Estate, 14 York Leg. Rec. (Pa.) 77); but such findings will not be sustained on appeal where the appellate court is of the opinion that there was not sufficient evidence in law to sustain them (Fiscus' Estate, 13 Pa. Super. Ct. 615; Fehl's Estate, 13 Pa. Super. Ct. 601).

16. See Jenkinson *v.* Harris, 27 Misc. (N. Y.) 714, 59 N. Y. Suppl. 548, holding that under the New York statute as amended in 1893 a confirmation of the report by the court is no longer necessary.

17. Harmon *v.* Haines, 68 N. H. 28, 38 Atl. 734; Burnett *v.* Gould, 27 Hun (N. Y.) 366.

18. Anderson *v.* Baker, 15 Ohio St. 173. See also Burnett *v.* Gould, 27 Hun (N. Y.) 366.

19. Coe *v.* Coe, 37 Barb. (N. Y.) 232, 14 Abb. Pr. (N. Y.) 86; Boyd *v.* Bigelow, 14 How. Pr. (N. Y.) 511. See also Harmon *v.* Haines, 68 N. H. 28, 38 Atl. 734.

A motion for a new trial upon case and exceptions may be made after the referee's report is confirmed. Eighmie *v.* Strong, 49 Hun (N. Y.) 16, 1 N. Y. Suppl. 502, 15 N. Y. Civ. Proc. 119.

The court may vacate the judgment rendered upon confirmation of the report, the power to do so being an incident of the power to set aside the report. Young *v.* Cuddy, 23 Hun (N. Y.) 249.

20. Adams *v.* Brady, 67 Hun (N. Y.) 521, 22 N. Y. Suppl. 466 [*affirmed* in 139 N. Y. 608, 35 N. E. 203]; Masten *v.* Budington, 18 Hun (N. Y.) 105.

21. Shea *v.* Cornish, 22 N. Y. Suppl. 168, 29 Abb. N. Cas. (N. Y.) 289.

22. Coe *v.* Coe, 37 Barb. (N. Y.) 232, 14 Abb. Pr. (N. Y.) 86.

23. Godding *v.* Porter, 17 Abb. Pr. (N. Y.) 374.

24. Lassiter *v.* Upchurch, 107 N. C. 411, 12 S. E. 63. See also Speer *v.* James, 94 N. C. 417.

25. Lassiter *v.* Upchurch, 107 N. C. 411, 12 S. E. 63.

by statute for the appointment of commissioners to pass upon disputed claims,[26] and a court of chancery may in a suit against the representative appoint commissioners to ascertain and report upon claims against the estate.[27] The commissioners, although in a sense they act judicially, are not strictly speaking a court,[28] but are appointed to act in a particular case only, after which their authority ceases;[29] but the court may on the application of a creditor revive a commission after its report is filed at any time before the estate is settled.[30] The hearing should be had on notice to the parties interested,[31] but is conducted without formal pleadings,[32] and any objections and defenses may be interposed which would be available in an action on the claim.[33] The evidence taken before the commissioners should be returned to the probate court.[34] The commissioners have no jurisdiction of claims in behalf of the estate except as offsets to adversary claims.[35] An appeal will lie from the decision of commissioners,[36] but their adjudication as to matters within their authority is final and conclusive unless appealed from,[37] and unless the appeal is prosecuted according to the requirements of the statute.[38] Under the Maine statute if a claim is not paid within thirty days after the report of the commissioners is accepted, the claimant may file a copy of the report in the office of the clerk of the court and execution may be issued thereon.[39]

3. Proceedings in Probate Court — a. Probate Jurisdiction as to Disputed Claims — (i) *In General.* In the absence of statute probate courts have no jurisdiction to try and determine disputed claims against an estate,[40] even with

26. *Maine.*— Palmer *v.* Palmer, 61 Me. 236; Bates *v.* Ward, 49 Me. 87.

Michigan.— Heavenrich *v.* Nichols, 113 Mich. 508, 71 N. W. 852.

Rhode Island.— Mason *v.* Taft, 23 R. I. 388, 50 Atl. 648.

Vermont.— Martin *v.* White, 58 Vt. 389, 3 Atl. 498. See also Davis *v.* Flint, 67 Vt. 485, 32 Atl. 473.

Wisconsin.— Price *v.* Dietrich, 12 Wis. 626.

See 22 Cent. Dig. tit. "Executors and Administrators," § 890.

Where an executor is residuary legatee and has given bond to pay the debts and legacies no commission need be issued to consider claims against the estate. Durfee *v.* Abbott, 50 Mich. 278, 15 N. W. 454.

27. Gayle *v.* Singleton, 1 Stew. (Ala.) 566; Wilson *v.* Wilson, 4 Ky. L. Rep. 450; Davis *v.* Roberts, Sm. & M. Ch. (Miss.) 543.

The regular practice in a suit to settle a decedent's estate is for creditors to file their claims before the commissioners; and where so filed, either party may at once take proof on the same, or they can wait until the report is filed and then except to the report, and the court will allow time to take proof on the exceptions. Exceptions may allege any fact showing that the claim ought not to be paid, including a plea of limitations. Wilson *v.* Wilson, 4 Ky. L. Rep. 450.

28. Shurbun *v.* Hooper, 40 Mich. 503; Mason *v.* Taft, 23 R. I. 388, 50 Atl. 648.

29. Shurbun *v.* Hooper, 40 Mich. 503.

30. Havenrich *v.* Nichols, 113 Mich. 508, 71 N. W. 852. See also Martin *v.* White, 58 Vt. 398, 3 Atl. 498.

31. Gayle *v.* Singleton, 1 Stew. (Ala.) 566.

If the representative appears and is present at the hearing he cannot object to want of notice. Heavenrich *v.* Nichols, 113 Mich. 508, 71 N. W. 852.

32. See Mason *v.* Taft, 23 R. I. 388, 50 Atl. 648.

33. Mason *v.* Taft, 23 R. I. 388, 50 Atl. 648, holding that the statute of limitations is available without being specially pleaded.

34. Buchoz *v.* Pray, 37 Mich. 512, holding further that mandamus will lie to compel the commissioners to return evidence to the probate court.

35. Allen *v.* Rice, 22 Vt. 333.

36. Palmer *v.* Palmer, 61 Me. 236; Price *v.* Dietrich, 12 Wis. 626.

37. Palmer *v.* Palmer, 61 Me. 236; Shurbun *v.* Hooper, 40 Mich. 503; Price *v.* Dietrich, 12 Wis. 626.

38. Palmer *v.* Palmer, 61 Me. 236; Bates *v.* Ward, 49 Me. 87.

39. Palmer *v.* Palmer, 61 Me. 236.

40. *Connecticut.*— Isaacs *v.* Stevens, 13 Conn. 499.

District of Columbia.— Keyser *v.* Breitbarth, 3 Mackey 19. See also Mercer *v.* Hogan, 4 Mackey 520.

Maryland.—Bowie *v.* Ghiselin, 30 Md. 553; Miller *v.* Dorsey, 9 Md. 317. See also Levering *v.* Levering, 64 Md. 399, 2 Atl. 1.

Mississippi.— Arnold *v.* Hamer, Freem. 509.

New Jersey.— Miller *v.* Pettit, 16 N. J. L. 421; Partridge *v.* Partridge, 46 N. J. Eq. 434, 19 Atl. 662, 47 N. J. Eq. 601, 22 Atl. 1075; Middleton *v.* Middleton, 35 N. J. Eq. 115; Vreeland *v.* Vreeland, 16 N. J. Eq. 512.

New York.— Glacius *v.* Fogel, 88 N. Y. 434 [*affirming* 25 Hun 227]; McNulty *v.* Hurd, 72 N. Y. 518; Tucker *v.* Tucker, 4 Abb. Dec. 428, 4 Keyes 136; Matter of Hammond, 92 Hun 478, 36 N. Y. Suppl. 1074; Barker *v.* Laney, 90 Hun 108, 35 N. Y. Suppl. 626;

the consent of the parties;[41] and where the same court is both a court of probate and a court of general jurisdiction, it cannot while sitting as a court of probate try disputed claims, but a suit must be brought on the civil side of the docket.[42] As soon as a claim is disputed the jurisdiction of the probate court over it is suspended until its validity is established in another forum,[43] and any proceedings then pending in the probate court to enforce its payment should be dismissed.[44] By a disputed claim, however, is meant one which is disputed by the representative and not a claim which an heir, legatee, or other person interested in the estate may deem unfounded or unjust;[45] and where the claim has been allowed by the representative its validity may be passed upon by the probate court if on the settlement of the representative's accounts it is disputed by some person interested in the estate.[46] The probate court may also determine whether the claim was ever presented to the representative,[47] and whether it was allowed or rejected by him.[48]

Ashley *v.* Lamb, 50 Hun 568, 3 N. Y. Suppl. 715; Cooper *v.* Felter, 6 Lans. 485; Montross *v.* Wheeler, 4 Lans. 99; Curtis *v.* Stilwell, 32 Barb. 354; Andrews *v.* Wallace, 29 Barb. 350; Disoway *v.* Washington Bank, 24 Barb. 60; Wilson *v.* Baptist Education Soc., 10 Barb. 308; Magee *v.* Vedder, 6 Barb. 352 [*distinguishing* Fitzpatrick *v.* Brady, 6 Hill 581; Kidd *v.* Chapman, 2 Barb. Ch. 414]; Forman *v.* Lawrence, 6 Thomps. & C. 640; Matter of Von der Lieth, 25 Misc. 255, 55 N. Y. Suppl. 428; Matter of Strickland, 5 N. Y. Suppl. 851, 1 Connoly Surr. 435; Wellenberger's Estate, 15 N. Y. St. 719, 6 Dem. Surr. 364 [*disapproving* Dakin *v.* Demming, 6 Paige 95]; Matter of Dunn, 8 N. Y. St. 766; *In re* Brown, 3 N. Y. Civ. Proc. 39, 1 Dem. Surr. 136; Adams *v.* Glidden, 6 Dem. Surr. 197 [*distinguishing* Lambert *v.* Craft, 98 N. Y. 342]; Stevens *v.* Stevens, 2 Redf. Surr. 265; *In re* Jones, 1 Redf. Surr. 263; Jennings *v.* Phelps, 1 Bradf. Surr. 485; Shaw's Estate, Tuck. Surr. 352 [*disapproving* Campbell *v.* Bruen, 1 Bradf. Surr. 224]; Matter of Phyfe, 5 N. Y. Leg. Obs. 331. *Compare* Sellis' Case, 4 Abb. Pr. 272; Babcock *v.* Lillis, 4 Bradf. Surr. 218.

Pennsylvania.— *In re* Warner, 2 Whart. 295; Metts' Appeal, 1 Whart. 7; Matter of Latimer, 2 Ashm. 520; Frantz's Estate, 6 Lanc. Bar 1.

South Carolina.— Brown *v.* McWhite, 30 S. C. 356, 9 S. E. 277.

Texas.— Neill *v.* Hodge, 5 Tex. 487; Marx *v.* Freeman, 21 Tex. Civ. App. 429, 52 S. W. 647.

Wisconsin.— Hooe *v.* Lockwood, 3 Pinn. 42, 3 Chandl. 41.

United States.— Davis *v.* Weed, 7 Fed. Cas. No. 3,658, 44 Conn. 569. See also Nicholls *v.* Hodge, 18 Fed. Cas. No. 10,231, 2 Cranch C. C. 582.

See 22 Cent. Dig. tit. "Executors and Administrators," § 893.

The jurisdiction of probate courts is special and limited and defined by statute (Bowie *v.* Ghiselin, 30 Md. 553; S. Albert Grocer Co. *v.* Painter, 66 Mo. App. 480; Wilson *v.* Baptist Education Soc., 10 Barb. (N. Y.) 308), and they have only such powers as are expressly or impliedly conferred by such statutes (Bowie *v.* Ghiselin, *supra*; Case *v.* Spencer, 86 N. Y. App. Div. 454, 83 N. Y. Suppl. 697; Matter of Wait, 39 Misc. (N. Y.) 74, 78 N. Y. Suppl. 869, 12 N. Y. Annot. Cas. 141).

Where the validity of a judgment debt is disputed, the surrogate's court has no jurisdiction to determine questions as to its validity, although it may pass upon any payments made and determine the balance due and may also determine who is the owner of the judgment and entitled to the money. McNulty *v.* Hurd, 72 N. Y. 518; Matter of Wait, 39 Misc. (N. Y.) 74, 78 N. Y. Suppl. 869, 12 N. Y. Annot. Cas. 141; Matter of Browne, 35 Misc. (N. Y.) 366, 71 N. Y. Suppl. 1037.

41. *In re* Walker, 136 N. Y. 20, 32 N. E. 633.

42. Marx *v.* Freeman, 21 Tex. Civ. App. 429, 52 S. W. 647.

43. Wilson *v.* Baptist Education Soc., 10 Barb. (N. Y.) 308; Bauer *v.* Kastner, 3 N. Y. Civ. Proc. 39, 1 Dem. Surr. (N. Y.) 136.

44. Matter of Hammond, 92 Hun (N. Y.) 478, 36 N. Y. Suppl. 1074; Matter of Corbett, 90 Hun (N. Y.) 182, 35 N. Y. Suppl. 945; *In re* Lyman, 11 N. Y. Suppl. 530.

The objection under the New York statute, when made in opposition to a petition for a decree for payment of a claim, should be in writing (Kiernan's Estate, 4 N. Y. Civ. Proc. 218) and verified, but the defect will be considered waived if not objected to by the other party (Matter of Corbett, 90 Hun 182, 35 N. Y. Suppl. 945).

The dismissal may be made without allowing the claimant to reply to the representative's objection to the claim. Matter of Hammond, 92 Hun (N. Y.) 478, 36 N. Y. Suppl. 1074.

45. Vreeland *v.* Vreeland, 16 N. J. Eq. 512; Matter of Strickland, 5 N. Y. Suppl. 851, 1 Connoly Surr. (N. Y.) 436.

46. *In re* Strickland, 5 N. Y. Suppl. 851, 1 Connoly Surr. (N. Y.) 436.

47. Matter of Reinach, 41 Misc. (N. Y.) 78, 83 N. Y. Suppl. 651.

48. *In re* Miles, 170 N. Y. 75, 62 N. E. 1084 [*reversing* 61 N. Y. App. Div. 562, 71 N. Y. Suppl. 71]; Matter of Reinach, 41 Misc. (N. Y.) 78, 83 N. Y. Suppl. 651; Matter of Von der Lieth, 25 Misc. (N. Y.) 255, 55 N. Y. Suppl. 428; Bowne *v.* Lange, 4 Dem.

(II) *EQUITABLE JURISDICTION.* Probate courts do not possess the general powers of courts of equity,[49] their equitable jurisdiction being limited to such as is expressly conferred by statute or is necessarily incident to the proper exercise of duties directly imposed.[50] Under statutes conferring jurisdiction on probate courts to pass upon disputed claims they may determine simple demands whether of a legal or equitable nature,[51] but as to matters of purely equitable cognizance they have no jurisdiction,[52] and such cases must be decided either by an amicable reference or by a bill in equity.[53]

(III) *STATUTORY PROVISIONS.* In some of the states jurisdiction to try disputed claims has been conferred upon probate courts by statute.[54] In some cases this jurisdiction is limited and can be exercised only under certain circumstances or as to particular classes of claims,[55] and in such cases the statute will be

Surr. (N. Y.) 350. See also *In re* Lydecker, 1 N. Y. Suppl. 895.

49. Moore *v.* Winston, 66 Ala. 296; Butler *v.* Lawson, 72 Mo. 227; McNulty *v.* Hurd, 72 N. Y. 518; Matter of Wait, 39 Misc. (N. Y.) 74, 78 N. Y. Suppl. 869, 12 N. Y. Annot. Cas. 141; Hall *v.* Bruen, 1 Bradf. Surr. (N. Y.) 435; Leonard *v.* Leonard, 67 Vt. 318, 31 Atl. 783. See also Castlio *v.* Martin, 11 Mo. App. 251. *Compare* McCall *v.* Lee, 120 Ill. 261, 11 N. E. 522 [*affirming* 24 Ill. App. 585]; Hurd *v.* Slaten, 43 Ill. 348; Esterly *v.* Rua, 122 Fed. 609, 58 C. C. A. 548.

50. Mt. Olive, etc., Coal Co. *v.* Slevin, 56 Mo. App. 107. See also Maginn *v.* Green, 67 Mo. App. 616.

51. Dixon *v.* Buell, 21 Ill. 203; Hoffmann *v.* Hoffmann, 126 Mo. 486, 29 S. W. 603; Hammons *v.* Renfrow, 84 Mo. 332; Maginn *v.* Green, 67 Mo. App. 616; Mt. Olive, etc., Coal Co. *v.* Slevin, 56 Mo. App. 107. See also Clark *v.* Carr, 45 Ill. App. 469; State *v.* Reigart, 1 Gill (Md.) 1, 39 Am. Dec. 628.

52. Bellows *v.* Cheek, 20 Ark. 424; Butler *v.* Lawson, 72 Mo. 227; Holliday *v.* Nolan, 93 Mo. App. 403, 67 S. W. 663; Miller *v.* Fulton, 206 Pa. St. 595, 56 Atl. 74; *In re* Fulton, 200 Pa. St. 545, 50 Atl. 187. See also Mt. Olive, etc., Coal Co. *v.* Slevin, 56 Mo. App. 107.

The probate court has no jurisdiction where the claim involves an accounting (Miller *v.* Fulton, 206 Pa. St. 595, 56 Atl. 74), the rescission of a contract (Bellows *v.* Cheek, 20 Ark. 424), or the following of a trust fund through various transmutations (Butler *v.* Lawson, 72 Mo. 227).

53. *In re* Fulton, 200 Pa. St. 545, 50 Atl. 187.

54. *Alaska.*—*In re* Gladough, 1 Alaska 649.

Arkansas.— Bellows *v.* Cheek, 20 Ark. 424; Pennington *v.* Gibson, 6 Ark. 447.

Illinois.— Thomson *v.* Black, 200 Ill. 465, 65 N. E. 1092 [*affirming* 102 Ill. App. 304]; Deiterman *v.* Ruppel, 200 Ill. 199, 65 N. E. 707; Ward *v.* Durham, 134 Ill. 195, 25 N. E. 745.

Louisiana.—Irwin's Succession, 33 La. Ann. 63; Smith *v.* Wilson, 2 La. 257. See also Kerley's Succession, 18 La. Ann. 583.

Missouri.— Wabash R. Co. *v.* Ordelheide, 172 Mo. 436, 72 S. W. 684; Hoffmann *v.* Hoffmann, 126 Mo. 486, 29 S. W. 603; Mitchell *v.* Martin, 63 Mo. App. 560; Mt. Olive, etc., Coal Co. *v.* Slevin, 56 Mo. App. 107.

Pennsylvania.— Phillips *v.* Allegheny Valley R. Co., 107 Pa. St. 465; McMurray's Appeal, 101 Pa. St. 421; Hammett's Appeal, 83 Pa. St. 392; Bull's Appeal, 24 Pa. St. 286; *In re* Gochenaur, 23 Pa. St. 460; Guth's Appeal, (1886) 5 Atl. 728; *In re* Kittera, 17 Pa. St. 416; Boy's Estate, 1 Pa. Co. Ct. 66. See also Kalbfell's Estate, 30 Pittsb. Leg. J. 325.

Vermont.— Sherman *v.* Abell, 46 Vt. 547.

See 22 Cent. Dig. tit. "Executors and Administrators," § 893.

In Indiana the circuit courts are by statute also courts of probate and have jurisdiction to try disputed claims (Noble *v.* McGinnis, 55 Ind. 528) this jurisdiction having been transferred from the courts of common pleas by the act of 1873 (Alexander *v.* Alexander, 48 Ind. 559). Claims are first placed upon the appearance docket and if not allowed are transferred to the issue docket for trial. Stanford *v.* Stanford, 42 Ind. 485.

Equity will not control the probate court in its province of determining and adjudicating questions of the allowance or disallowance of claims against estates of decedents. Sherman *v.* Abell, 46 Vt. 547.

Cross demands against claimant.— Under the present Missouri statute where there is a cross demand against the claimant larger than his claim against the estate the probate court may adjust the claim and give judgment against the claimant for the excess. Mitchell *v.* Martin, 63 Mo. App. 560 [*distinguishing* Thomas *v.* Dunninca, 15 Mo. 385, which was decided under the administration law of 1845 prior to the revision of 1855].

Claims against the representative in favor of the estate cannot be tried by the probate court. Winton's Appeal, 111 Pa. St. 387, 5 Atl. 240. See also McManus *v.* McDowell, 11 Mo. App. 436.

55. **In Maryland** the act of 1798 provides that the orphans' court may with the consent of both the parties arbitrate between a claimant and the representative, but the statute does not apply to claims against the representative in his individual capacity. Browne *v.* Preston, 38 Md. 373.

In New York the act of 1895, amending Code Civ. Proc. §§ 1822, 2743, provides that the surrogate may try disputed claims upon the written consent of the parties (Clark *v.* Hyland, 88 N. Y. App. Div. 392, 84 N. Y.

strictly construed and held to confer no new jurisdiction other than that clearly provided.[56]

(iv) *Claims of Representative.* In some states jurisdiction is conferred by statute upon probate courts to pass upon claims of the representative against the estate which he represents,[57] and under such statutes the court may pass upon claims of an equitable as well as a legal nature.[58] The probate court may also pass upon a claim of the representative under statutes giving it jurisdiction to determine claims of creditors presented on an application to sell real estate.[59] But in the absence of statute the general rule as to lack of jurisdiction to determine disputed claims applies to claims of the representative.[60]

b. Nature of Proceeding. Proceedings in the probate court for the trial and determination of disputed claims are usually summary.[61] The proceeding is neither a suit at law or in equity but is distinctively statutory and *sui generis*,[62] and is not governed by the technical rules of pleading, procedure, evidence, and the like which apply to formal suits at law.[63] In the absence of statute the pro-

Suppl. 640; Matter of Edmonds, 47 N. Y. App. Div. 229, 62 N. Y. Suppl. 652) but the act is strictly construed (Clark *v.* Hyland, *supra*) and confers no jurisdiction except where the parties consent in writing (Clark *v.* Hyland, *supra*; Matter of Edmonds, *supra*; Matter of Warner, 39 Misc. 432, 79 N. Y. Suppl. 363; Matter of Kirby, 36 Misc. 312, 75 N. Y. Suppl. 509) and even then only upon a judicial settlement of the representative's accounts (Clark *v.* Hyland, *supra*).

In Wisconsin the probate court may hear and determine "contingent claims" which cannot be presented as debts before the commissioners and allowed by them. Hall *v.* Wilson, 6 Wis. 433.

Insolvent estates.— In some jurisdictions the probate court has jurisdiction only in the case of insolvent estates. See Miller *v.* Pettit, 16 N. J. L. 421; Middleton *v.* Middleton, 35 N. J. Eq. 115; Davis *v.* Weed, 7 Fed. Cas. No. 3,658, 44 Conn. 569.

In proceedings for the sale of real estate for the payment of debts the surrogate may, under the New York statutes, try the validity of claims rejected by the representative. *In re* Haxtun, 102 N. Y. 157, 6 N. E. 111 [*reversing* 33 Hun 364]; Hopkins *v.* Van Valkenburgh, 16 Hun (N. Y.) 3; Matter of Williams, 1 Misc. (N. Y.) 35, 22 N. Y. Suppl. 906; People *v.* Westbrook, 61 How. Pr. (N. Y.) 138. See *infra*, XII, G, 10.

56. Clark *v.* Hyland, 88 N. Y. App. Div. 392, 84 N. Y. Suppl. 640.

57. Mercer *v.* Hogan, 4 Mackey (D. C.) 520; Neilley *v.* Neilley, 89 N. Y. 352 [*reversing* 23 Hun 651]; Boughton *v.* Flint, 74 N. Y. 476 [*reversing* 13 Hun 206]; Shakespeare *v.* Markham, 72 N. Y. 400 [*reversing* on this point 10 Hun 311]; Kyle *v.* Kyle, 67 N. Y. 400 [*affirming* 3 Hun 458]; Sexton *v.* Sexton, 64 N. Y. App. Div. 385, 72 N. Y. Suppl. 213 [*affirmed* in 174 N. Y. 510, 66 N. E. 1116].

In New York the statute formerly provided that such claims might be proved either on the service and return of a citation for that purpose or upon final accounting (Matter of Flood, 16 Abb. Pr. N. S. 407; Barras *v.* Barras, 4 Redf. Surr. 263); but these provisions are superseded by the code of civil procedure which restricts the jurisdiction to the "judicial settlement" of the representative's accounts and the surrogate cannot now entertain an independent proceeding to determine such claims (Matter of Ryder, 129 N. Y. 640, 29 N. E. 309 [*reversing* 13 N. Y. Suppl. 542, 2 Connoly Surr. 224]; Starbuck *v.* Farmers' L. & T. Co., 28 N. Y. App. Div. 308, 51 N. Y. Suppl. 8). This restriction does not, however, affect the surrogate's jurisdiction to determine such claims on an application for the sale of real estate. Matter of Williams, 1 Misc. 35, 22 N. Y. Suppl. 906.

Only claims of which the representative is sole owner can be determined by the surrogate's court. Matter of Jones, 2 Misc. (N. Y.) 221, 23 N. Y. Suppl. 767 [*criticizing* Shakespeare *v.* Markham, 72 N. Y. 400].

58. Boughton *v.* Flint, 74 N. Y. 476 [*reversing* 13 Hun 206]; Sexton *v.* Sexton, 64 N. Y. App. Div. 385, 72 N. Y. Suppl. 213 [*affirmed* in 174 N. Y. 510, 66 N. E. 1116].

59. Matter of Williams, 1 Misc. (N. Y.) 35, 22 N. Y. Suppl. 906. See *infra*, XII, G, 10.

60. Middleton *v.* Middleton, 35 N. J. Eq. 115, holding that the probate court cannot try the validity of a claim of a representative disputed by his co-representative.

The fact that a claim is presented and proved in a proceeding where the surrogate has no jurisdiction to try the claim and order it paid will not prevent the claimant from setting up the claim in another action. Thornton *v.* Moore, 26 Misc. (N. Y.) 120, 56 N. Y. Suppl. 1100.

61. Hayner *v.* Trott, 46 Kan. 70, 26 Pac. 415; Sublett *v.* Nelson, 38 Mo. 487; Phillips *v.* Russell, 24 Mo. 527; Pruitt *v.* Muldrick, 39 Oreg. 353, 65 Pac. 20.

62. Grier *v.* Cable, 159 Ill. 29, 42 N. E. 395 [*affirming* 53 Ill. App. 350].

63. Thompson *v.* Black, 200 Ill. 465 [*affirming* 102 Ill. App. 304]; Scheel *v.* Eidman, 68 Ill. 193; Stanley *v.* Pence, 160 Ind. 636, 66 N. E. 51, 67 N. E. 441]; Strasbaugh *v.* Dullam, 93 Md. 712, 50 Atl. 417; Wilkes *v.* Cornelius, 21 Oreg. 348, 28 Pac. 135.

ceeding need not be formally entitled but any entitling or description which will identify it is sufficient.[64]

c. Citation, Notice, and Appearance. Where proceedings are instituted in the probate court to establish a disputed claim notice must be given to the representative,[65] but this requirement will be deemed to be waived if he appears and contests the claim upon its merits[66] or consents to a continuance.[67] In the case of a claim of the representative against the estate notice should be given to the heirs who are of age.[68]

d. Pleadings. Proceedings in the probate court for the trial and determination of disputed claims are ordinarily conducted without formal pleadings,[69] it being sufficient for the claimant to merely file a succinct statement of his claim.[70] The claim should be presented in writing,[71] but need not conform to the technical requirements of a complaint,[72] or contain a formal demand for judgment of any kind,[73] and is sufficient if it apprises defendant of the nature and amount of the claim and shows enough to bar another action for the same demand.[74] If the

64. *In re* Jefferson, 35 Minn. 215, 28 N. W. 256.

65. Bellows *v.* Cheek, 20 Ark. 424; Pennington *v.* Gibson, 6 Ark. 447; Durfee *v.* Abbott, 50 Mich. 278, 15 N. W. 454; McFaul *v.* Haley, 166 Mo. 56, 65 S. W. 995.

Where an executor has given bond as residuary legatee he and his sureties are entitled to personal service, and notice by publication as in ordinary proceedings to adjust claims against the estate is not sufficient. Durfee *v.* Abbott, 50 Mich. 278, 15 N. W. 454.

66. Bellows *v.* Cheek, 20 Ark. 424.

Failure to present the claim on the day named in the notice is immaterial where the statute only requires the term to be stated and the representative is present on the day the claim is presented. Phillips *v.* Russell, 24 Mo. 527.

67. Sullivan *v.* Deadman, 19 Ark. 484 [*distinguishing* Pennington *v.* Gibson, 6 Ark. 447]; State *v.* Walker, 14 Ark. 234; Voorhies *v.* Eubank, 6 Iowa 274.

Failure to furnish a copy of the claim to the representative is also waived by appearance and consent to a continuance. Borden *v.* Fowler, 14 Ark. 471.

68. Patterson *v.* Phillips, 18 Fed. Cas. No. 10,829*a*, Hempst. 69.

69. *Arkansas.*— Bellows *v.* Cheek, 20 Ark. 424; Pennington *v.* Gibson, 6 Ark. 447.

Illinois.— Thomson *v.* Black, 200 Ill. 465, 65 N. E. 1092 [*affirming* 102 Ill. App. 304]; Thorp *v.* Goewey, 85 Ill. 611.

Indiana.— Stanley *v.* Pence, 160 Ind. 636, 66 N. E. 51, 67 N. E. 441; Stricker *v.* Barnes, 122 Ind. 348, 23 N. E. 263; Hanna *v.* Fisher, 95 Ind. 383; Stapp *v.* Messeke, 94 Ind. 423; Hileman *v.* Hileman, 85 Ind. 1.

Iowa.— Scovil *v.* Fisher, 77 Iowa 97, 41 N. W. 583.

Kansas.— Hayner *v.* Trott, 46 Kan. 70, 26 Pac. 415.

Michigan.— Patrick *v.* Howard, 47 Mich. 40, 10 N. W. 71.

Missouri.— Sublett *v.* Nelson, 38 Mo. 487; Phillips *v.* Russell, 24 Mo. 527; Monumental Bronze Co. *v.* Doty, 99 Mo. App. 195, 73 S. W. 234, 78 S. W. 850.

Nebraska.— Fitzgerald *v.* Union Sav. Bank, 65 Nebr. 97, 90 N. W. 994.

Ohio.— Matter of Gerke, Ohio Prob. 289.

Oregon.— Wilkes *v.* Cornelius, 21 Oreg. 348, 28 Pac. 135.

See 22 Cent. Dig. tit. "Executors and Administrators," § 899.

70. Stanley *v.* Pence, 160 Ind. 636, 66 N. E. 51, 67 N. E. 441; Stricker *v.* Barnes, 122 Ind. 348, 23 N. E. 263; Davis *v.* Huston, 84 Ind. 272; Post *v.* Pedrick, 52 Ind. 490.

The statement must contain sufficient facts to show, *prima facie* at least, that the estate is indebted to the claimant. Walker *v.* Heller, 104 Ind. 327, 3 N. E. 114.

71. Thomson *v.* Black, 200 Ill. 465, 65 N. E. 1092 [*affirming* 102 Ill. App. 304]; Hayner *v.* Trott, 46 Kan. 70, 26 Pac. 415. See also Van Vleck *v.* Burroughs, 6 Barb. (N. Y.) 341.

72. Thomson *v.* Black, 200 Ill. 465, 65 N. E. 1092 [*affirming* 102 Ill. App. 304]; Davis *v.* Huston, 84 Ind. 272; Ginn *v.* Collins, 43 Ind. 271; Hannum *v.* Curtis, 13 Ind. 206; Sublett *v.* Nelson, 38 Mo. 487; Wilkes *v.* Cornelius, 21 Oreg. 348, 28 Pac. 135. *Compare* Johnson *v.* Kent, 9 Ind. 252.

73. Hanna *v.* Fisher, 95 Ind. 383.

74. Stapp *v.* Messeke, 94 Ind. 423; Davis *v.* Huston, 84 Ind. 272; Post *v.* Pedrick, 52 Ind. 490; Ginn *v.* Collins, 43 Ind. 271; Hannum *v.* Curtis, 13 Ind. 206; Phillips *v.* Russell, 24 Mo. 527; Fitzgerald *v.* Union Sav. Bank, 65 Nebr. 97, 90 N. W. 994. See also Hayner *v.* Trott, 46 Kan. 70, 26 Pac. 415.

The claim is sufficient if filed in such form as to unmistakably disclose the nature of the transaction that gave rise to it. Monumental Bronze Co. *v.* Doty, 99 Mo. App. 195, 73 S. W. 234, 78 S. W. 850.

Demurrer is not ordinarily a proper mode of questioning the sufficiency of a statement of a claim (Hayner *v.* Trott, 46 Kan. 70, 26 Pac. 415), but in Indiana it is provided by the statute that the sufficiency of the statement or of any subsequent pleading may be so tested (Pence *v.* Young, 22 Ind. App. 427, 53 N. E. 1060. See also Stapp *v.* Messeke, 94 Ind. 423).

statement is insufficient the claimant should be allowed to amend by filing a more full and particular statement.[75] The resistance of defendant, without a written answer, puts in issue all matters upon which a defense to the claim could be based, usually set up by a general denial,[76] and no matters need be specially pleaded unless required by statute.[77] It has been held that if a party elects to file a formal written plea in a proceeding of this kind he must conform to the rules of pleading.[78]

e. Defenses. Whatever would be a good defense in an ordinary suit on a claim is equally good in a proceeding to establish the claim in the probate court,[79] but where the claim presented is based upon a judgment, it cannot be defeated by matters which might have been interposed as a defense to the action in which the judgment was rendered.[80] The statute of limitations is a good defense,[81] and is available without being specially pleaded.[82]

f. Evidence[83] — (i) *Presumptions and Burden of Proof.* There is no legal presumption that a decedent was indebted at the time of his death and the burden of proving the existence of such indebtedness is upon the party asserting it,[84] but where an indebtedness is evidenced by a bond and note, the creditor need not prove that it has not been paid, but the burden of proving payment or other matter in discharge is upon the opposite party,[85] and an opposition based solely on the ground that the debt has been extinguished impliedly admits that it was once due, and like the plea of payment imposes the burden of proof upon the party urging it.[86] A claim which has been allowed or admitted by the representative is *prima facie* valid and the burden of proving its invalidity is upon the party opposing it,[87] but if the admission of the claim is denied by the representative, the burden is upon the claimant to show that it was admitted.[88] Long delay in presenting or prosecuting a claim creates a strong presumption against its

75. *In re* Hidden, 23 Cal. 362. See also Wolfe *v.* Wilsey, 2 Ind. App. 549, 28 N. E. 1004.

If the claim is not enlarged by the amendment it may be allowed. Dayton *v.* Dakin, 103 Mich. 65, 61 N. W. 349.

An amendment may be denied if the effect would be to cause a continuance and it relates to a distinct claim which need not be determined in the same proceeding. Guion *v.* Giller, 101 Iowa 333, 70 N. W. 201.

76. Scovil *v.* Fisher, 77 Iowa 97, 41 N. W. 583.

77. Dick *v.* Dumbauld, 10 Ind. App. 508, 38 N. E. 78, holding that under the Indiana statute nothing need be specially pleaded except a set-off or counter-claim. See also Pence *v.* Young, 22 Ind. App. 427, 53 N. E. 1060.

The defense of payment in whole or in part is available without a special plea. Simons *v.* Beaver, 15 Ind. App. 510, 43 N. E. 478.

78. Bellows *v.* Cheek, 20 Ark. 424; Pennington *v.* Gibson, 6 Ark. 447. See also Holman *v.* Mayhew, 15 Ind. 263; Norman *v.* Norman, 11 Ind. 288; Jackson *v.* Butts, 5 Ind. App. 384, 32 N. E. 96.

Verification of answer.— Where a promissory note purporting to have been made by a decedent is filed as a claim against his estate the answer of the administrator denying the execution of the instrument need not be sworn to in order to put plaintiff to proof of its execution. Barnett *v.* Cabinet Makers' Union, 28 Ind. 254.

79. Lucas *v.* Cassaday, 2 Greene (Iowa) 208; Turner *v.* Ellis, 24 Miss. 173; McFaul *v.* Haley, 166 Mo. 56, 65 S. W. 995; Burnett *v.* Noble, 5 Redf. Surr. (N. Y.) 69.

Equitable defenses as well as legal may be interposed. Wilcox *v.* Powers, 6 Mo. 145.

80. McClain's Estate, 5 Pa. Dist. 155, 17 Pa. Co. Ct. 432.

81. Pennington *v.* Gibson, 6 Ark. 447.

82. Bromwell *v.* Bromwell, 139 Ill. 424, 28 N. E. 1057; Bromwell *v.* Schubert, 40 Ill. App. 330; Brownell *v.* Williams, 54 Iowa 353, 6 N. W. 530.

83. See, generally, EVIDENCE.

84. Markwell *v.* Thorn, 28 Wis. 548.

If it is doubtful whether the deceased debtor was principal or surety on a claim set up, the burden is upon the creditor to show that he was principal, or that the principal was insolvent. Simmons *v.* Tongue, 3 Bland (Md.) 341.

85. Matter of Macomber, 11 N. Y. Suppl. 198, 2 Connoly Surr. (N. Y.) 279; Moore *v.* Brown, 51 N. C. 106.

86. Rhodes' Succession, 39 La. Ann. 473, 2 So. 36.

87. *In re* Loshe, 62 Cal. 413; Matter of Le Baron, 67 How. Pr. (N. Y.) 346; Valentine *v.* Valentine, 4 Redf. Surr. (N. Y.) 265. See also Montgomery *v.* Nash, 23 Tex. 157. *Compare* Matter of Warrin, 28 Misc. (N. Y.) 695, 60 N. Y. Suppl. 191; *In re* Chambers, 38 Oreg. 131, 62 Pac. 1013.

88. Matter of Phyfe, 5 N. Y. Leg. Obs. 331. See also Romero's Succession, 43 La. Ann. 975, 9 So. 919.

validity,[89] particularly where the claim was not asserted in the lifetime of the alleged debtor.[90] Where a claim is based on a receipt for money paid for the decedent during his lifetime, it will be presumed that it was paid by the claimant as the agent of the decedent and not with funds advanced by him, where the form of the receipt is consistent with such payment,[91] and, where the representative pays outstanding debts against the estate, it will be presumed that he did so as representative, and if he claims to have advanced money therefor, the burden is upon him to show this fact, and also the amount actually paid.[92] Ordinarily the fact that services were rendered a decedent at his request or with his approval raises a presumption that they were to be paid for,[93] but where the claimant was a member of the decedent's immediate family, or a relative living with him as such, or a person not a relative but living as a member of the family, it will be presumed that the services were gratuitous and the burden is upon the claimant to show the contrary.[94] In the case of claims for domestic services, it will be presumed that wages were regularly paid when due, or that it was understood that no compensation was to be made.[95]

(II) *Admissibility.* In an action to establish a disputed claim it is competent to inquire into all the facts and circumstances having a tendency to prove or disprove the existence or validity of the claim.[96] So where the claim is based upon an alleged loan to the decedent, evidence is admissible of the financial condition of the parties,[97] or of the fact that at the time of the alleged loan the claimant was indebted to the decedent.[98] Evidence of declarations of the decedent is admissible on an issue as to whether services were understood as being gratuitous or for compensation,[99] and evidence that the claim was previously presented for a smaller amount is admissible as an admission on the part of the claimant as to the amount rightfully due.[1] The claimant's books of account are admissible in evidence where the claim is based upon an open account,[2] or for services rendered,[3] or, where the claim is based upon a note against the estate which is contested, as a circumstance to show that the note was for the same amount as the books showed to be due.[4] A memorandum against his interest found among the papers of the deceased showing a debt due by him is admissible in favor of a party seeking to establish the fact stated,[5] and conversely papers found among the effects of the decedent, the genuineness of which is sufficiently proved, and which tend to show a payment by him of the claim presented are admissible in evi-

89. Bodenheimer *v.* Bodenheimer, 35 La. Ann. 1005; Seybert's Estate, 5 Pa. Co. Ct. 35; McQuinn's Estate, 18 Phila. (Pa.) 78; Rogers *v.* Law, 1 Black (U. S.) 253, 17 L. ed. 58. See also *In re* Fosbinders, 2 Lehigh Val. L. Rep. (Pa.) 270.

90. Seacord *v.* Matteson, 56 Ill. App. 439; McQuinn's Estate, 18 Phila. (Pa.) 78.

91. Pursel *v.* Pursel, 14 N. J. Eq. 514.

92. Gillett *v.* Gillett, 9 Wis. 194.

93. Bugh's Estate, 9 Pa. Dist. 276, 23 Pa. Co. Ct. 660; Michael's Estate, 5 Pa. Co. Ct. 321. See also Ginders *v.* Ginders, 21 Ill. App. 522; Hess' Estate, 13 Phila. (Pa.) 285. And see *supra*, X, A, 3, a.

94. See *supra*, X, A, 3, b.

95. Koecker's Estate, 9 Pa. Co. Ct. 238; Kelly's Estate, 16 Phila. (Pa.) 285; Walker's Estate, 14 Lanc. Bar (Pa.) 64; *In re* Fosbinders, 2 Lehigh Val. L. Rep. (Pa.) 270.

96. Wilson *v.* Hotchkiss, 81 Mich. 172, 45 N. W. 838. See also Mark *v.* Miles, 59 Ill. App. 102.

Offer to sell claim.— Where the claim is based on a note the rightful possession of which is disputed evidence is admissible on the part of the claimant that prior to the decedent's death he made repeated and public offers to sell the same, such evidence tending to show that he was asserting it as a claim against decedent in his lifetime. Passmore *v.* Passmore, 50 Mich. 626, 16 N. W. 170, 45 Am. Rep. 62.

97. Wilson *v.* Hotchkiss, 81 Mich. 172, 45 N. W. 838.

98. Graham *v.* Graham, 111 N. Y. 502, 19 N. E. 53.

99. Knight *v.* Knight, 6 Ind. App. 268, 33 N. E. 456. See also Ginders *v.* Ginders, 21 Ill. App. 522.

1. Ludlow *v.* Pearl, 55 Mich. 312, 21 N. W. 315.

2. Kilbourn *v.* Anderson, 77 Iowa 501, 42 N. W. 431.

3. Yearsley's Appeal, 48 Pa. St. 531.

4. Baker *v.* Halleck, 128 Mich. 180, 87 N. W. 100.

5. Gallagher *v.* Brewster, 153 N. Y. 364, 47 N. E. 450 [*reversing* 1 N. Y. App. Div. 65, 36 N. Y. Suppl. 1081].

dence.[6] Tax lists are admissible as evidence of the value of personal property.[7] Evidence which is not relevant or material to the particular facts in issue,[8] or which tends to raise a new or collateral issue[9] is not admissible. A paper executed by the decedent which is testamentary in its nature is not admissible unless it has been admitted to probate.[10]

(III) *WEIGHT AND SUFFICIENCY*—(A) *In General.* While the uncontradicted testimony of a single witness whose competency or credibility is not impeached is sufficient, if believed, to establish a claim against a decedent's estate,[11] unless corroboration is required by statute,[12] the general rule is that claims against estates of deceased persons should be established by very satisfactory evidence, and that such claims and the evidence adduced to support them should be carefully scrutinized, so as to prevent as far as possible the allowance of unjust or fictitious demands.[13] This rule is very strictly applied where the proof con-

6. Taylor *v.* Greene, 129 Mich. 564, 89 N. W. 343.

7. Daniels *v.* Fowler, 123 N. C. 35, 31 S. E. 598.

8. *Illinois.*— Seacord *v.* Matteson, 56 Ill. App. 439.

Indiana.— Sullivan *v.* Sullivan, 6 Ind. App. 65, 32 N. E. 1132.

Iowa.— Smith *v.* McFadden, 56 Iowa 482, 9 N. W. 350.

Michigan.— Laird *v.* Laird, 127 Mich. 24, 86 N. W. 436.

New York.— Vaughn *v.* Strong, 12 N. Y. Suppl. 251.

Wisconsin.— Fitzpatrick *v.* Phelan, 58 Wis. 250, 16 N. W. 606.

See 22 Cent. Dig. tit. "Executors and Administrators," § 902.

On an issue as to payment of the claim the fact that the decedent had money on deposit to the claimant's knowledge is no evidence of payment and is properly excluded. McDowell *v.* McDowell, 75 Vt. 401, 56 Atl. 98, 98 Am. St. Rep. 831.

Evidence as to the mental and physical condition of decedent in the latter part of his life is properly excluded where defendant does not offer to show in what manner if any plaintiff took an undue advantage of such condition. Sullivan *v.* Sullivan, 6 Ind. App. 65, 32 N. E. 1132.

Letters written by the decedent are not admissible unless they relate to matters embraced in plaintiff's claim. Shirts *v.* Rooker, 21 Ind. App. 420, 52 N. E. 629.

Evidence of declarations of the deceased as to unpleasant relations with his other children is not admissible in support of a claim by one child for boarding the deceased parent. Laird *v.* Laird, 127 Mich. 24, 86 N. W. 436.

Where a claim is based on a specific contract for a certain amount for services rendered, evidence of the actual value of the service is immaterial and inadmissible. Matter of Johnson, 32 N. Y. App. Div. 634, 52 N. Y. Suppl. 1081.

In an action on a claim to recover the purchase-price of land bought at a sheriff's sale under an execution against the decedent, the deed to which has been set aside, it is error to admit evidence of the amount expended by the purchaser in improvements on the property, since there can be no recovery for improvements, except on a proceeding taken under the occupying claimant law. Westerfield *v.* Williams, 59 Ind. 221.

Evidence of the relations of the parties which is merely preliminary and will aid in the better appreciation of the other evidence as it is adduced may be admitted, although having no direct bearing upon the particular fact in issue. Kinney *v.* McFaul, 122 Iowa 452, 98 N. W. 276.

9. Curd *v.* Wisser, 120 Iowa 743, 95 N. W. 266.

10. Wilson *v.* Van Leer, 103 Pa. St. 600.

11. Banes' Estate, 4 Pa. Co. Ct. 495.

12. Moise's Succession, 107 La. 717, 31 So. 990, holding that under the Louisiana statute the testimony of one witness is not alone sufficient, where the amount of the claim is over five hundred dollars, but that it may be sufficient when supported by corroborative circumstances. See also Piffet's Succession, 37 La. Ann. 871.

13. *Iowa.*— Holmes *v.* Connable, 111 Iowa 298, 82 N. W. 780.

Louisiana.— Gates *v.* Walker, 8 La. Ann. 277.

Mississippi.— North *v.* Lowe, 63 Miss. 31; McWhorter *v.* Donald, 39 Miss. 779, 80 Am. Dec. 97.

New York.— *In re* Marcellus, 165 N. Y. 70, 58 N. E. 796; Van Slooten *v.* Wheeler, 140 N. Y. 624, 35 N. E. 583; Robinson *v.* Carpenter, 77 N. Y. App. Div. 520, 79 N. Y. Suppl. 283; Matter of Arkenburgh, 58 N. Y. App. Div. 583, 69 N. Y. Suppl. 125; Porter *v.* Rhoades, 48 N. Y. App. Div. 635, 63 N. Y. Suppl. 112; Rix *v.* Hunt, 16 N. Y. App. Div. 540, 44 N. Y. Suppl. 988; Wheeler *v.* Eastwood, 88 Hun 160, 34 N. Y. Suppl. 513.

Pennsylvania.— *In re* Mueller, 159 Pa. St. 590, 28 Atl. 491; Graham *v.* Graham, 34 Pa. St. 475; Atkinson's Estate, 9 Pa. Dist. 404.

See 22 Cent. Dig. tit. "Executors and Administrators," § 903.

Evidence sufficient to establish claim see the following cases:

Alabama.— Linch *v.* McLemore, 15 Ala. 632.

Illinois.— Grant *v.* Odiorne, 43 Ill. App. 402.

Indiana.— Cunningham *v.* Packard, 6 Ind.

sists of parol evidence as to admissions or declarations of the decedent;[14] and in cases where the claim is made by the personal representative,[15] and where the

App. 34, 32 N. E. 333; Wolfe *v.* Wilsey, 2 Ind. App. 549, 28 N. E. 1004.

Iowa.—*In re* Reeve, 111 Iowa 260, 82 N. W. 912.

Louisiana.— Moise's Succession, 107 La. 717, 31 So. 990.

Maryland.— Steele *v.* Steele, 75 Md. 477, 23 Atl. 959.

Michigan.— Crampton *v.* Newton, 132 Mich. 149, 93 N. W. 250; Van Buskirk *v.* Hoy, 114 Mich. 425, 72 N. W. 246.

New Jersey.— Middleton *v.* Middleton, 35 N. J. Eq. 141.

New York.— Matter of Hamilton, 70 N. Y. App. Div. 73, 75 N. Y. Suppl. 66 [*reversing* 34 Misc. 607, 70 N. Y. Suppl. 426]; Coale *v.* Coale, 63 N. Y. App. Div. 32, 71 N. Y. Suppl. 214; Breed *v.* Breed, 55 N. Y. App. Div. 121, 67 N. Y. Suppl. 162; Fisher *v.* Filon, 90 Hun 605, 35 N. Y. Suppl. 283; Kingston Nat. Bank *v.* Van Buren, 88 Hun 564, 34 N. Y. Suppl. 772; Heyne *v.* Dorflier, 57 Hun 591, 10 N. Y. Suppl. 908; Matter of Neil, 35 Misc. 254, 71 N. Y. Suppl. 840; *In re* Powers, 11 N. Y. Suppl. 396.

Pennsylvania.— Kuhlman's Estate, 178 Pa. St. 43, 35 Atl. 918; Shirk's Appeal, 10 Pa. Cas. 631, 14 Atl. 413; Patterson's Estate, 9 Pa. Dist. 259, 23 Pa. Co. Ct. 567; Hess' Estate, 9 Pa. Dist. 19; Walton's Estate, 4 Kulp 487; Bradley's Estate, 16 Phila. 219; Arnold's Estate, 5 Phila. 215.

Tennessee.— Treece *v.* Carr, (Ch. App. 1900) 58 S. W. 1078.

West Virginia.— Faulkner *v.* Thomas, 48 W. Va. 148, 35 S. E. 915.

Wisconsin.— Gudden *v.* Gudden, 113 Wis. 297, 89 N. W. 111.

See 22 Cent. Dig. tit. "Executors and Administrators," § 903.

Evidence insufficient to establish claim see the following cases:

Arkansas.— Leigh *v.* Williams, 64 Ark. 165, 41 S. W. 323; Mahan *v.* Owen, 23 Ark. 347.

Colorado.— Dickey *v.* Dickey, 8 Colo. App. 141, 45 Pac. 228.

Illinois.— Mark *v.* Miles, 59 Ill. App. 102.

Iowa.— Murphy *v.* McCarthy, 108 Iowa 38, 78 N. W. 819.

Kentucky.— Dewhurst *v.* Shepherd, 102 Ky. 239, 43 S. W. 253, 19 Ky. L. Rep. 1260; Webb *v.* Webb, 6 T. B. Mon. 163; Allsop *v.* Owensboro Deposit Bank, 69 S. W. 1102, 24 Ky. L. Rep. 762.

Louisiana.— Floyd's Succession, 12 Rob. 197.

Maryland.— Justis *v.* Justis, 99 Md. 69, 57 Atl. 23; Young *v.* Mackall, 4 Md. 362.

Minnesota.— *In re* Mintzer, 33 Minn. 470, 23 N. W. 845.

Nebraska.— Gillett *v.* Sweeney, (1903) 97 N. W. 795; *In re* Devries, (1903) 97 N. W. 590.

New York.— Van Slooten *v.* Wheeler, 140 N. Y. 624, 35 N. E. 583 [*reversing* 21 N. Y. Suppl. 329, 15 N. Y. Suppl. 591]; Matter of Clarke, 57 N. Y. App. Div. 430, 68 N. Y. Suppl. 243; Crippen *v.* Crippen, 53 Hun 232, 6 N. Y. Suppl. 378; Matter of Kirkpatrick, 9 Misc. 228, 30 N. Y. Suppl. 283; De Mets *v.* Moss, 17 N. Y. Suppl. 902 [appeal *dismissed* in 136 N. Y. 620, 32 N. E. 1014]; Van Horne *v.* Fonda, 5 Johns. Ch. 388.

Pennsylvania.— *In re* Clymer, 202 Pa. St. 580, 52 Atl. 52; *In re* McKown, 198 Pa. St. 102, 47 Atl. 1113; Hunter's Estate, 147 Pa. St. 549, 23 Atl. 973; Loftis' Estate, 3 Pa. Co. Ct. 195; McFarland's Estate, 12 Phila. 122.

Virginia.— Nottingham *v.* Lynchburg Trust, etc., Bank, (1898) 29 S. E. 684.

See 22 Cent. Dig. tit. "Executors and Administrators," § 903.

A due-bill signed by a decedent, and found among his private papers after his death, is not alone sufficient evidence of a debt, but may be so when coupled with confidential instructions, oral and written, to his executor to pay the same. O'Neill *v.* O'Neill, 18 S. C. 360, 44 Am. Rep. 579.

A book-account of sums of money lent to a person since deceased is not sufficient, in the absence of other evidence, to support a claim therefor against the decedent's estate. Matter of Linn, 2 Pearson (Pa.) 487.

14. *Iowa.*— Holmes *v.* Connable, 111 Iowa 298, 82 N. W. 780.

Kentucky.— Brewer *v.* Hieronymus, 41 S. W. 310, 19 Ky. L. Rep. 645.

Louisiana.— Wilder *v.* Franklin, 10 La. Ann. 279; Gates *v.* Walker, 8 La. Ann. 277.

Michigan.— Clancy *v.* Leach, 125 Mich. 630, 84 N. W. 1105.

Missouri.— Benne *v.* Benne, 56 Mo. App. 504.

Pennsylvania.— Heffner's Estate, 134 Pa. St. 436, 19 Atl. 693; McMahon's Estate, 132 Pa. St. 175, 19 Atl. 68; Graham *v.* Graham, 34 Pa. St. 475; Thompson's Appeal, 10 Pa. Cas. 574, 13 Atl. 952; Rhoades' Estate, 18 Phila. 18.

See 22 Cent. Dig. tit. "Executors and Administrators," § 903.

Where such evidence is clear, positive, and specific it may be sufficient to establish the validity of the claim. McCann's Appeal, 6 Pa. Cas. 15, 9 Atl. 48.

15. Matter of Humfreville, 6 N. Y. App. Div. 535, 39 N. Y. Suppl. 550; Wright's Accounting, 16 Abb. Pr. N. S. (N. Y.) 429. See also Matter of Arkenburgh, 58 N. Y. App. Div. 583, 69 N. Y. Suppl. 125; Adams' Estate, Tuck. Surr. (N. Y.) 109; *In re* Hoffer, 156 Pa. St. 473, 27 Atl. 11.

Where the statute requires the representative's claim to be proved, it contemplates the same proof which is required to prove any other claim against the estate which is objected to, and the affidavit of the representative verifying his claim is insufficient. Underhill *v.* Newburger, 4 Redf. Surr. (N. Y.) 499.

only evidence in support of the claim is the testimony of the claimant himself.[16] In the absence of statute the uncorroborated testimony of the claimant may be sufficient to establish his claim, if the court is entirely satisfied as to its truthfulness,[17] there being no absolute rule of law that corroboration is necessary;[18] but in some jurisdictions it is provided by statute that a disputed claim cannot be established by the testimony of the claimant alone.[19] Stale claims are regarded with special disfavor, and require very strong and conclusive testimony to establish them,[20] particularly where the claim was never asserted in the decedent's lifetime.[21]

(B) *Claims For Services.* To establish a claim for services, proof of an express contract is not in all cases essential,[22] but the claimant must show either

See also Williams *v.* Purdy, 6 Paige (N. Y.) 166.

Evidence sufficient to establish claim of representative see Matter of Van Buren, 19 Misc. (N. Y.) 373, 44 N. Y. Suppl. 357.

16. *In re* Marcellus, 165 N. Y. 70, 58 N. E. 796; Matter of Arkenburgh, 58 N. Y. App. Div. 583, 69 N. Y. Suppl. 125; Rawlinson *v.* Scholes, 79 L. T. Rep. N. S. 350.

The affidavit of the claimant is not sufficient to establish a claim for paying a decedent's debt in his lifetime, without showing by independent proof that the payment was made at the request of decedent, or that he recognized the validity of the debt, or the propriety of its payment for him by the claimant. McWhorter *v.* Donald, 39 Miss. 779, 80 Am. Dec. 97.

The sole testimony of a son is not sufficient to establish a contract with his deceased father to support the latter for a certain consideration as the basis of a claim against the estate of the father, where, at the time he claimed to be supporting his father he was living on the latter's farm. Bratcher *v.* Bratcher, (Tenn. Ch. App. 1900) 62 S. W. 1108.

17. *Re* Griffin, 79 L. T. Rep. N. S. 442; Rawlinson *v.* Scholes, 79 L. T. Rep. N. S. 350.

18. *In re* Hodgson, 31 Ch. D. 177, 55 L. J. Ch. 241, 54 L. T. Rep. N. S. 222, 34 Wkly. Rep. 127; *Re* Griffin, 79 L. T. Rep. N. S. 442; Rawlinson *v.* Scholes, 79 L. T. Rep. N. S. 350 [*disapproving In re* Finch, 23 Ch. D. 267, 48 L. T. Rep. N. S. 129, 31 Wkly. Rep. 526].

19. Kingan *v.* Burns, 104 Ill. App. 661; Harding *v.* Grim, 25 Oreg. 506, 36 Pac. 634.

20. *Louisiana.*— Rogge *v.* Nouvet, 50 La. Ann. 1220, 23 So. 933; Bodenheimer *v.* Bodenheimer, 35 La. Ann. 1005; Woods' Succession, 30 La. Ann. 1002; Wilder *v.* Franklin, 10 La. Ann. 279. See also Wood *v.* Egan, 39 La. Ann. 684, 2 So. 191; Simpson *v.* Powell, 7 La. Ann. 555.

New York.— Matter of Humfreville, 6 N. Y. App. Div. 535, 39 N. Y. Suppl. 550.

Pennsylvania.— *In re* Miller, 188 Pa. St. 214, 41 Atl. 532; Heffner's Estate, 134 Pa. St. 436, 19 Atl. 693; Irwin's Estate, 133 Pa. St. 1, 19 Atl. 284; Geiger's Appeal, (1889) 16 Atl. 851, 1 Mona. 547; Geiger's Estate, 14 Pa. Super. Ct. 523; Seybert's Estate, 5 Pa. Co. Ct. 35. See also Williamson's Estate, 12 Phila. 144.

South Carolina.— Chalmers *v.* Kinard, 38 S. C. 126, 16 S. E. 778, 895. See also Hanks *v.* Williams, Cheves Eq. 203.

Virginia.— Perkins *v.* Lane, 82 Va. 59.

United States.— Rogers *v.* Law, 1 Black 253, 17 L. ed. 58.

See 22 Cent. Dig. tit. "Executors and Administrators," § 903; and *infra*, note 32.

Delay in presenting a check of the decedent until after his death, which was eighteen months after the date of the check, does not make it a stale demand, and in the absence of evidence of payment by the decedent, after the date of the check, the claim should be allowed. Barnes *v.* Dunn, 19 N. Y. App. Div. 326, 46 N. Y. Suppl. 115.

21. *Illinois.*— Brock *v.* Slaten, 82 Ill. 282; Seacord *v.* Matteson, 56 Ill. App. 439.

Louisiana.— Woods' Succession, 30 La. Ann. 1002.

Mississippi.— Carter *v.* Judge Adams County Probate Ct., 2 Sm. & M. 42.

New York.— Kearney *v.* McKeon, 85 N. Y. 136; Porter *v.* Rhoades, 48 N. Y. App. Div. 635, 63 N. Y. Suppl. 112; Matter of De Freest, 41 Misc. 535, 85 N. Y. Suppl. 74; Matter of Wilmot, 39 Misc. 686, 80 N. Y. Suppl. 651; Wright *v.* Wright, 4 Redf. Surr. 345.

Pennsylvania.— Flood's Estate, 8 Pa. Dist. 634, 23 Pa. Co. Ct. 304.

United States.— Rogers *v.* Law, 1 Black 253, 17 L. ed. 58.

See 22 Cent. Dig. tit. "Executors and Administrators," § 903; and *infra*, note 33.

When it appears that there were subsequent dealings in which the claimant was to some extent a debtor of the decedent, but that he never presented his claim in reduction of his debt, the weight of suspicion becomes very great, and justifies a demand for distinct and definite proof, and the clearest indication of honesty and fairness. Kearney *v.* McKeon, 85 N. Y. 136; Porter *v.* Rhoades, 48 N. Y. App. Div. 635, 63 N. Y. Suppl. 112. See also Seacord *v.* Matteson, 56 Ill. App. 439.

22. Neish *v.* Gannon, 198 Ill. 219, 64 N. E. 1000 [*affirming* 98 Ill. App. 248]; Sherman *v.* Whiteside, 190 Ill. 576, 60 N. E. 838 [*affirming* 93 Ill. App. 572]; Chapman *v.* Barnes, 29 Ill. App. 184; Killpatrick *v.* Helston, 25 Ill. App. 127; Ginders *v.* Ginders, 21 Ill. App. 522; Decker *v.* Kanous, 129 Mich. 146, 88 N. W. 398; De Camp *v.* Wilson, 31 N. J. Eq.

an express contract or an implied agreement or mutual understanding that the services were to be paid for,[23] and in the latter case the facts showing such agreement or understanding must be clearly established.[24] The existence or non-existence of such an implied agreement or mutual understanding may be established from the circumstances of the particular case,[25] as by proof of the character of the services rendered,[26] particular relations between the parties, as of friendship,[27] or obligation,[28] the financial condition of the parties,[29] or proof of whether similar services previously performed were gratuitous or for compensation;[30] but no general rule can be laid down applicable to all cases as to what facts and circumstances are sufficient to show the existence or non-existence of such agreement or understanding.[31] Particularly strong and convincing proof is required where the claim is stale,[32] or where the services extended over a considerable period and no demand for compensation was ever made during the decedent's lifetime,[33] or where there are any circumstances connected with the claim tending to render it

656. *Compare* Wright *v.* Senn, 85 Mich. 191, 48 N. W. 545; Leitgabel *v.* Belt, 108 Wis. 107, 83 N. W. 1111. See *supra*, X, A, 3, a.

23. *Illinois.*— Ginders *v.* Ginders, 21 Ill. App. 522.

Indiana.— Ellis *v.* Baird, 31 Ind. App. 295, 67 N. E. 960.

Oregon.—Wilkes *v.* Cornelius, 21 Oreg. 348, 28 Pac. 135.

Pennsylvania.— Hess' Estate, 13 Phila. 285.

Wisconsin.— Tyler *v.* Burrington, 39 Wis. 376; Hall *v.* Finch, 29 Wis. 278, 9 Am. Rep. 559.

See 22 Cent. Dig. tit. "Executors and Administrators," § 903½; and *supra*, X, A, 3, a.

24. *Michigan.*— Decker *v.* Kanous, 129 Mich. 146, 88 N. W. 398.

New York.— Matter of Stevenson, 86 Hun 325, 33 N. Y. Suppl. 493; Matter of Warner, 39 Misc. 432, 79 N. Y. Suppl. 363.

Oregon.— Wilkes *v.* Cornelius, 21 Oreg. 348, 28 Pac. 135.

South Carolina.— Sullivan *v.* Latimer, 38 S. C. 158, 17 S. E. 701.

Wisconsin.— Tyler *v.* Burrington, 39 Wis. 376; Hall *v.* Finch, 29 Wis. 278, 9 Am. Rep. 559.

See 22 Cent. Dig. tit. "Executors and Administrators," § 903½.

25. Chapman *v.* Barnes, 29 Ill. App. 184.

The claimant need not have kept an account with the deceased and charged him with each item of service at the time it was rendered in order to establish an understanding that the services were to be paid for. McCleery *v.* McLean, 11 Ill. App. 344.

26. Chapman *v.* Barnes, 29 Ill. App. 184; De Camp *v.* Wilson, 31 N. J. Eq. 656.

27. Clark *v.* Todd, 16 N. Y. Suppl. 491; Graham *v.* Gulliver, 4 N. Y. Suppl. 33; West's Estate, 2 Pa. Dist. 268; 13 Pa. Co. Ct. 93; Voldemar's Estate, 4 Pa. Co. Ct. 577.

Where services were first rendered through motives of friendship and neighborly kindness it will be presumed that the original relation continued in the absence of proof to the contrary. Conaughton's Estate, 2 Pa. Dist. 189, 12 Pa. Co. Ct. 590.

28. Graham *v.* Gulliver, 4 N. Y. Suppl. 33; Sullivan *v.* Latimer, 38 S. C. 158, 17 S. E. 701.

29. Matter of Childs, 5 Misc. (N. Y.) 560, 26 N. Y. Suppl. 721; Sullivan *v.* Latimer, 38 S. C. 158, 17 S. E. 701.

30. O'Brien's Estate, 17 Phila. (Pa.) 456.

The fact that gratuitous services were rendered raises no presumption that subsequent services of a different character and rendered under different conditions were also gratuitous. Hayden *v.* Henderson, 21 Ill. App. 299.

31. *In re* Young, 39 Mich. 429.

Evidence held sufficient see Galloway *v.* Galloway, 70 S. W. 48, 24 Ky. L. Rep. 857; Robinson *v.* Raynor, 28 N. Y. 494 [*reversing* 36 Barb. 128]; Matter of Hamilton, 70 N. Y. App. Div. 73, 75 N. Y. Suppl. 66 [*affirmed* in 172 N. Y. 652, 65 N. E. 1117]; *In re* Harper, 196 Pa. St. 137, 46 Atl. 302; Lindsey's Appeal, (Pa. 1888) 15 Atl. 434.

Evidence held insufficient see Clawson *v.* Moore, 29 Ill. App. 296; Kibby *v.* Kibby, 8 Ind. App. 698, 35 N. E. 840; Gaunce *v.* Barlow, 70 S. W. 284, 24 Ky. L. Rep. 929; *In re* O'Neill, 49 N. Y. App. Div. 414, 63 N. Y. Suppl. 291; *In re* Hewlett, 19 N. Y. Suppl. 193.

32. Malone *v.* Malone, 106 Ala. 567, 17 So. 676; Gaines' Succession, 45 La. Ann. 1424, 14 So. 251; Rice's Succession, 14 La. Ann. 317; Matter of Childs, 5 Misc. (N. Y.) 560, 26 N. Y. Suppl. 721; Wait's Appeal, 4 Pa. Cas. 511, 9 Atl. 943; McQuinn's Estate, 18 Phila. (Pa.) 78; Kelly's Estate, 16 Phila. (Pa.) 285. See also *supra*, note 20.

33. *Alabama.*—Malone *v.* Malone, 106 Ala. 567, 17 So. 676.

Louisiana.— Rice's Succession, 14 La. Ann. 317.

Michigan.—Wright *v.* Senn, 85 Mich. 191, 48 N. W. 545.

Mississippi.— Carter *v.* Judge Adams County Probate Ct., 2 Sm. & M. 42.

New York.— Hart *v.* Tuite, 75 N. Y. App. Div. 323, 78 N. Y. Suppl. 154; Hughes *v.* Davenport, 1 N. Y. App. Div. 182, 37 N. Y. Suppl. 243; Rowland *v.* Howard, 75 Hun 1, 26 N. Y. Suppl. 1018; Matter of Pray, 40 Misc. 516, 82 N. Y. Suppl. 807; Matter of Wilmot, 39 Misc. 686, 80 N. Y. Suppl. 651; Matter of Childs, 5 Misc. 560, 26 N. Y. Suppl. 721; Clark *v.* Todd, 16 N. Y. Suppl. 491.

improbable or suspicious.[34] Since services rendered a decedent by a member of his immediate family, or a person living with him as such, are presumed to be gratuitous,[35] the proof in such cases must be sufficient to overcome this presumption.[36]

g. Hearing. The probate court cannot, against the consent of the representative, proceed with the hearing of a disputed claim unless the statutory requirements as to filing and docketing the same have been complied with.[37] On the hearing the person seeking to establish a claim against the estate has the affirmative of the issue and is entitled to open and close the case.[38] The submission of disputed questions of fact to a jury is discretionary with the probate court,[39] and it may do so of its own motion.[40]

h. Judgment. The judgment rendered in a probate court on the trial of a disputed claim is not a judgment in the technical sense, on which execution may issue,[41] but it simply ascertains whether the claim should be allowed and if allowed it is ordered to be paid from the assets of the estate.[42] It is, however, a final adjudication as to the validity and amount of the claim and is to that extent a judgment,[43] and has the same conclusive force as the judgments of other tribunals,[44] is entitled to the same presumptions as to regularity and validity,[45] and cannot be questioned in a collateral proceeding.[46] It is binding upon the repre-

Pennsylvania.— Miller's Estate, 136 Pa. St. 239, 20 Atl. 796; Conaughton's Estate, 2 Pa. Dist. 189, 12 Pa. Co. Ct. 590; Koecker's Estate, 9 Pa. Co. Ct. 238; Keith's Estate, 5 Pa. Co. Ct. 581; Voldemar's Estate, 4 Pa. Co. Ct. 577; Kelly's Estate, 16 Phila. 285; Shaffer's Estate, 6 Lack. Leg. N. 137.

Rhode Island.— Gorton *v.* Johnson, 23 R. I. 138, 49 Atl. 499.

See 22 Cent. Dig. tit. "Executors and Administrators," § 903½; and *supra*, note 21.

34. Moore *v.* Smith, 103 Mich. 387, 61 N. W. 538; Hughes *v.* Davenport, 1 N. Y. App. Div. 182, 37 N. Y. Suppl. 182; Wood *v.* Rusco, 4 Redf. Surr. (N. Y.) 380.

35. See *supra*, X, A, 3, b.

36. Decker *v.* Kanous, 129 Mich. 146, 88 N. W. 398; Wilkes *v.* Cornelius, 21 Oreg. 348, 28 Pac. 135. See also Bostwick *v.* Bostwick, 71 Wis. 273, 37 N. W. 405.

37. Scott *v.* Dailey, 89 Ind. 477.

38. Yingling *v.* Hesson, 16 Md. 112.

39. Kates' Estate, 148 Pa. St. 471, 24 Atl. 77; Ike's Estate, 8 Pa. Dist. 501, 23 Pa. Co. Ct. 7.

A trial by jury cannot be demanded by the parties as a matter of right, but both issues of law and of fact are to be tried by the court unless referred. Esterly *v.* Rua, 122 Fed. 609, 58 C. C. A. 548.

An issue will not be granted on a mere naked allegation where the evidence is not sufficient to show any real matter in dispute. Ike's Estate, 8 Pa. Dist. 501, 23 Pa. Co. Ct. 7.

40. *In re* Dutton, 205 Pa. St. 244, 54 Atl. 903.

41. Bentley *v.* Brown, 123 Ind. 552, 24 N. E. 507; Voorhies *v.* Eubank, 6 Iowa 274. See also Russell *v.* Hubbard, 59 Ill. 335.

The judgment only establishes the claim in the same manner as if allowed by the representative and approved by the court. Hall *v.* Cayot, 141 Cal. 13, 74 Pac. 299.

42. Voorhies *v.* Eubank, 6 Iowa 274.

A formal order of allowance is not necessary but if the judgment as rendered is such in effect it is sufficient. Boyl *v.* Simpson, 23 Ind. 393.

Upon proof of a claim payable in instalments some of which are not yet due judgment may be rendered for its payment at different times as the instalments fall due. Wolfe *v.* Wilsey, 2 Ind. App. 549, 28 N. E. 1004.

Where the claim was not filed within the proper time and can be paid only out of subsequently discovered assets the judgment should in this regard be special and not general. Russell *v.* Hubbard, 59 Ill. 335.

Counter-claim.— The surrogate has no authority to render an affirmative judgment against the claimant on a counter-claim in favor of the estate. Matter of Wilmot, 39 Misc. (N. Y.) 686, 80 N. Y. Suppl. 651.

43. Bentley *v.* Brown, 123 Ind. 552, 24 N. E. 507.

44. Moody *v.* Peyton, 135 Mo. 482, 36 S. W. 621, 58 Am. St. Rep. 604.

In the absence of fraud or collusion the judgment is final and conclusive.

Arkansas.— Jackson *v.* Gorman, 70 Ark. 88, 66 S. W. 346.

Illinois.— Ford *v.* Stuart First Nat. Bank, 201 Ill. 120, 66 N. E. 316 [*reversing* 100 Ill. App. 70]; Ward *v.* Durham, 134 Ill. 195, 25 N. E. 745.

Louisiana.— Sturges *v.* Sheriff, 14 La. Ann. 231.

Missouri.— Moody *v.* Peyton, 135 Mo. 482, 36 S. W. 621, 58 Am. St. Rep. 604.

Vermont.— Sherman *v.* Abell, 46 Vt. 547.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 907, 908.

45. People *v.* Gray, 72 Ill. 343; Little *v.* Sinnett, 7 Iowa 324. See also Million *v.* Ohnsorg, 10 Mo. App. 432.

46. Jackson *v.* Gorman, 70 Ark. 88, 66 S. W. 346; *In re* Cook, 14 Cal. 129; Tenk *v.* Lock, 26 Ill. App. 216.

sentative,[47] the claimant,[48] the heirs[49] and legatees,[50] and other creditors.[51] Judgment cannot be rendered for more than the amount of the claim.[52]

i. **Vacating or Setting Aside Judgment.** Probate courts have no jurisdiction to set aside their own adjudications and grant rehearings;[53] nor will a court of chancery grant such relief in the absence of a clear showing of fraud or mistake.[54]

4. Appeal[55] — a. Right to Appeal. Appeals from judgments or orders of probate courts allowing or rejecting disputed claims are in most jurisdictions expressly permitted by statute.[56] Where there is a remedy by appeal a suit in equity cannot be maintained to enjoin the enforcement of the probate decree,[57] nor will mandamus lie to compel a probate judge to allow a rejected claim.[58] The decision of a referee under a statutory reference may be reviewed either by a motion for a new trial by way of opposing the motion to confirm the report or by a direct appeal from the judgment entered on the report.[59]

47. Bentley *v.* Brown, 123 Ind. 552, 24 N. E. 507; Knecht *v.* U. S. Savings Inst., 2 Mo. App. 563.

A judgment on a claim in favor of the representative is equally binding upon the estate and upon subsequent representatives as would be the allowance of a claim in favor of any other creditor. Bentley *v.* Brown, 123 Ind. 552, 24 N. E. 507.

48. Shepherd *v.* Bevans, 4 Md. Ch. 408.

49. Sturges *v.* Sheriff, 14 La. Ann. 231; Moody *v.* Peyton, 135 Mo. 482, 36 S. W. 621, 58 Am. St. Rep. 604.

50. Ward *v.* Durham, 134 Ill. 195, 25 N. E. 745.

51. Ford *v.* Stuart First Nat. Bank, 201 Ill. 120, 66 N. E. 316 [*reversing* 100 Ill. App. 70].

52. Russell *v.* Hubbard, 59 Ill. 335.

Where the representative pleads a set-off judgment cannot be rendered in his favor and against the claimant for a larger amount than the set-off claimed. Jones *v.* Jones, 21 Ark. 409.

53. Hitchcock *v.* Genesee Probate Judge, 99 Mich. 128, 57 N. W. 1097. See also *In re* Cook, 14 Cal. 129; Ford *v.* Stuart First Nat. Bank, 201 Ill. 120, 66 N. E. 316; Moore *v.* Hillebrant, 14 Tex. 312, 65 Am. Dec. 118.

Under the Pennsylvania statute it is the duty of the orphans' court to grant a review of the auditing of claims where a proper case is set forth on the face of the petition for review and the facts are verified by affidavit. Meckel's Appeal, 112 Pa. St. 554, 4 Atl. 447.

54. Ward *v.* Durham, 134 Ill. 195, 25 N. E. 745; Hendron *v.* Kinner, 110 Iowa 544, 80 N. W. 419, 81 N. W. 783.

To authorize relief against a judgment on the ground of fraud, accident, or mistake there must have been a valid defense thereto on the merits which has been lost, which loss was occasioned by the fraud or act of the prevailing party or by mistake on the part of the losing party unmixed with any negligence or default on his part. Ward *v.* Durham, 134 Ill. 195, 25 N. E. 745.

55. See, generally, Appeal and Error.

56. *Arkansas.*— *Ex p.* Cheatham, 6 Ark. 437.

Colorado.— Corning *v.* Ryan, 3 Colo. 525.

Illinois.— Ford *v.* Stuart First Nat. Bank, 201 Ill. 120, 66 N. E. 316 [*reversing* 100 Ill. App. 70]; Grier *v.* Cable, 159 Ill. 29, 42 N. E. 395 [*affirming* 53 Ill. App. 350]; Bassett *v.* Noble, 15 Ill. App. 360.

Indiana.— Walker *v.* Heller, 104 Ind. 327, 3 N. E. 114.

Kansas.— Morgan *v.* Saline Valley Bank, 4 Kan. App. 668, 46 Pac. 61.

Michigan.— Bartlett *v.* Wayne Cir. Judge, 133 Mich. 604, 95 N. W. 721.

Minnesota.— See Smith *v.* Pence, 62 Minn. 321, 64 N. W. 822.

Nebraska.— Ribble *v.* Furmin, (1904) 98 N. W. 420.

New Hampshire.— Harmon *v.* Haines, 68 N. H. 28, 38 Atl. 734; Sawyer *v.* Copp, 6 N. H. 42.

Texas.— Glenn *v.* Kimbrough, 70 Tex. 147, 8 S. W. 81.

Vermont.— Lathrop *v.* Hitchcock, 38 Vt. 496.

Wisconsin.— Groner *v.* Hield, 22 Wis. 200.

See 22 Cent. Dig. tit. "Executors and Administrators," § 910.

Appeal to circuit court see *Ex p.* Cheatham, 6 Ark. 437; Ford *v.* Stuart First Nat. Bank, 201 Ill. 120, 66 N. E. 316 [*reversing* 100 Ill. App. 70]; Grier *v.* Cable, 159 Ill. 29, 42 N. E. 395 [*affirming* 53 Ill. App. 350]; Bartlett *v.* Wayne Cir. Judge, 133 Mich. 604, 95 N. W. 721; Groner *v.* Hield, 22 Wis. 200.

Appeal to district court see Corning *v.* Ryan, 3 Colo. 525; Morgan *v.* Saline Valley Bank, 4 Kan. App. 668, 46 Pac. 61.

Appeal to county court see Lathrop *v.* Hitchcock, 38 Vt. 496.

A formal entry of judgment is not necessary to authorize an appeal, but any entry which plainly indicates the determination of the probate court to allow or disallow the claim is sufficient. Corning *v.* Ryan, 3 Colo. 525.

57. Reily *v.* Porcher, 46 N. Y. App. Div. 290, 61 N. Y. Suppl. 662.

58. *Ex p.* Cheatham, 6 Ark. 437.

59. Coe *v.* Coe, 37 Barb. (N. Y.) 232. See also Foote *v.* Valentine, 48 Hun (N. Y.) 475, 1 N. Y. Suppl. 410; Boyd *v.* Bigelow, 14 How. Pr. (N. Y.) 511.

Motion for new trial not necessary.— Where a party appears and unsuccessfully opposes a motion for confirmation of the report he may appeal from the judgment entered

b. Who May Appeal. The statutes in some of the states provide that any person who may consider himself aggrieved may appeal,[60] in which case it is not necessary that the appellant should be a party of record to the proceedings in the probate court but merely that he should be aggrieved thereby.[61] Heirs or distributees are parties interested in the allowance of claims against the estate and are entitled to appeal[62] in their own names,[63] although not parties to the record.[64] Under the statutes in some states, however, the heirs can maintain an appeal on their own account only where the representative refuses to do so,[65] but in such cases they are entitled to control the proceedings without interference from the representative.[66] Where, in the case of claims presented by the representative the court appoints some person to defend the action in the probate court, the estate may appeal, through the person appointed, from an allowance of the claim;[67] and a co-representative who is also a legatee may in either capacity appeal from the allowance of a claim in favor of the other representative.[68] The representative is a proper party to appeal in behalf of those whose interests he represents from the allowance of the claims of creditors against the estate,[69] but creditors whose claims have been rejected must appeal on their own account,[70] since as to them the representative is a party adversely interested.[71]

c. Time For Taking Appeal. The time within which appeals may be taken is ordinarily prescribed by statute,[72] and if the appeal is not taken within the

thereon without first moving at a special term for a new trial on a case and exceptions. Kellogg *v.* Clark, 23 Hun (N. Y.) 393.

Costs in proceedings on a statutory reference of a claim against a decedent's estate are within the discretion of the court and its decision will not be reviewed. Hauxhurst *v.* Ritch, 119 N. Y. 621, 23 N. E. 176.

60. Weer *v.* Gand, 88 Ill. 490; Pfirshing *v.* Falsh, 87 Ill. 260; Darwin *v.* Jones, 82 Ill. 107; Glenn *v.* Kimbrough, 70 Tex. 147, 8 S. W. 81; Lathrop *v.* Hitchcock, 38 Vt. 496. See also Daboll *v.* Field, 9 R. I. 266.

The appellant must be a person aggrieved, although the statute literally provides that any person "who may consider" himself aggrieved may appeal, and so before one as a creditor can appeal from an order of the probate court he must have filed a claim as a creditor. Wallace *v.* Chicago, etc., Stove Co., 46 Ill. App. 571.

61. Weer *v.* Gand, 88 Ill. 490; Glenn *v.* Kimbrough, 70 Tex. 147, 8 S. W. 81; Lathrop *v.* Hitchcock, 38 Vt. 496.

62. Murphy *v.* Murphy, 2 Mo. App. 156.

63. Pfirshing *v.* Falsh, 87 Ill. 260; Burns *v.* Keas, 20 Iowa 16.

64. Murphy *v.* Murphy, 2 Mo. App. 156. *Contra,* Johnson *v.* Williams, 28 Ark. 478.

65. King *v.* Ingham Cir. Judge, 69 Mich. 84, 37 N. W. 50; Daniels *v.* Stevens, 60 Mich. 219, 27 N. W. 1; Groner *v.* Hield, 22 Wis. 200.

A neglect to appeal within the time limited for taking an appeal is equivalent to "declining" to do so within the meaning of the statute and gives the heirs the right to appeal. Groner *v.* Hield, 22 Wis. 200.

In Nebraska the statute providing that parties in interest cannot appeal except where the representative refuses to do so is impliedly repealed by the act of 1881. Ribble *v.* Furmin, (1904) 98 N. W. 420; Drexel *v.* Rochester Loan, etc., Co., 65 Nebr. 231, 91 N. W. 254.

66. King *v.* Ingham Cir. Judge, 69 Mich. 84, 37 N. W. 50.

67. Bassett *v.* Noble, 15 Ill. App. 360.

68. Hesson *v.* Hesson, 14 Md. 8.

69. Daboll *v.* Field, 9 R. I. 266. See also Overstreet *v.* Trainer, 24 Miss. 484.

Where appeals are not taken as a matter of right but must be allowed by the court a representative will not be allowed to appeal, as he is not personally interested, unless it is shown that he does so in the interest of heirs or others affected by the allowance of the claims. *In re* Gladough, 1 Alaska 649.

If the representative declines to appear and a judgment is rendered in the probate court, upon his default, allowing a claim he cannot appeal. *In re* Carver, 10 S. D. 609, 74 N. W. 1056.

70. Pearson *v.* Darrington, 32 Ala. 227; Trouilly's Succession, 52 La. Ann. 276, 26 So. 851.

71. Pearson *v.* Darrington, 32 Ala. 227.

72. *Illinois.*— Darwin *v.* Jones, 82 Ill. 107.

Indiana.— Miller *v.* Carmichael, 98 Ind. 236; Yearley *v.* Sharp, 96 Ind. 469; Bell *v.* Mousset, 71 Ind. 347.

Maryland.—Porter *v.* Timanus, 12 Md. 283; Mayhew *v.* Soper, 10 Gill & J. 366.

Missouri.— Stephens *v.* Bernays, 119 Mo. 143, 24 S. W. 46.

Nebraska.— Drexel *v.* Rochester Loan, etc., Co., 65 Nebr. 231, 91 N. W. 254; Baacke *v.* Dredla, 57 Nebr. 92, 77 N. W. 341.

Wisconsin.— Groner *v.* Hield, 22 Wis. 200.

United States.— Mauro *v.* Ritchie, 16 Fed. Cas. No. 9,312, 3 Cranch C. C. 147.

See 22 Cent. Dig. tit. "Executors and Administrators," § 915.

The order allowing the appeal may be made after the time limited by the statute if the

time limited it may be dismissed on motion;[73] but under the statutes of some states the court may under certain circumstances allow an appeal after the regular time has expired.[74]

d. Record and Proceedings. The proceedings for taking an appeal from judgments of the probate court are regulated by statute.[75] In some cases it is provided that the appeal shall be taken in the same manner as appeals from a justice of the peace;[76] in others in the same manner as actions are commenced in the court where the appeal is heard;[77] and in still others on a case made and settled by the surrogate as upon an appeal in an ordinary action.[78] The transcript of the record must show all the proceedings in the probate court and contain all the evidence.[79] On an appeal by a claimant from a rejection of his claim process need only be issued to and served upon the representative who is the nominal party to the record, and other persons interested in the estate must take notice of such service.[80]

e. Bond. On appeal from judgments of the probate court the appellant is ordinarily required by statute to give a bond,[81] which must be approved,[82] and filed within the time prescribed by the statute.[83] If the bond is defective the appeal should not be dismissed absolutely in the first instance, but conditionally, in case a new or amended bond is not filed within a reasonable time to be fixed by the court.[84]

f. Objections and Exceptions. Objections to the allowance of a claim not made in the probate court cannot be urged for the first time on appeal,[85] but will be considered as waived,[86] unless the objection is one which the representative has no right to waive.[87] In the case of an heir appealing from the allowance of a

application for the order was made before the expiration of this period and the appellant was without fault in making and prosecuting the same. Burns *v.* Keas, 20 Iowa 16.

73. Miller *v.* Carmichael, 98 Ind. 236; Yearley *v.* Sharp, 96 Ind. 469; Baacke *v.* Dredla, 57 Nebr. 92, 77 N. W. 341.

74. See Yearley *v.* Sharp, 96 Ind. 469; Rutherford *v.* Allen, 62 Vt. 260, 19 Atl. 714; Groner *v.* Hield, 22 Wis. 200.

Where the right to appeal is contingent on the refusal of the representative to do so and he does not expressly decline to appeal during the time limited the heirs should be allowed to appeal after its expiration. Groner *v.* Hield, 22 Wis. 200.

75. See the statutes of the different states, and cases cited *supra*, X, C, 4, a.

76. Ford *v.* Stuart First Nat. Bank, 201 Ill. 120, 66 N. E. 316 [*reversing* 100 Ill. App. 70]; Beardsley *v.* Hill, 61 Ill. 354; Fitzgerald *v.* Union Sav. Bank, 65 Nebr. 97, 90 N. W. 994.

77. Voorhies *v.* Eubank, 6 Iowa 274.

78. Matter of Sunderlin, 69 Hun (N. Y.) 403, 23 N. Y. Suppl. 648. See also Matter of Sherwood, 75 N. Y. App. Div. 342, 78 N. Y. Suppl. 186.

79. Baker *v.* Hentig, 22 Kan. 323. See also Matter of Sunderlin, 69 Hun (N. Y.) 403, 23 N. Y. Suppl. 648; *In re* Carpenter, 4 Pa. St. 222.

Where there is a conflict of testimony touching a claim against an estate and the record does not afford sufficient information to enable the court to estimate it the judgment of the lower court thereon will not be disturbed. *In re* Labauve, 39 La. Ann. 388, 1 So. 830.

A writ of certiorari will be allowed to supply papers necessary to the record which have been accidentally omitted. Woods' Succession, 30 La. Ann. 1002.

80. Motsinger *v.* Coleman, 16 Ill. 71.

81. Darwin *v.* Jones, 82 Ill. 107; Bell *v.* Mousset, 71 Ind. 347; King *v.* Ingham Cir. Judge, 69 Mich. 84, 37 N. W. 50; Daniels *v.* Stevens, 60 Mich. 219, 27 N. W. 1.

On an appeal by a creditor from a disallowance of his claim the bond properly runs to the representative. Daniels *v.* Stevens, 60 Mich. 219, 27 N. W. 1.

Representative may appeal without filing bond. Walker *v.* Heller, 104 Ind. 327, 3 N. E. 114; Miller *v.* Carmichael, 98 Ind. 236; Winter *v.* Winter, 90 Mich. 197, 51 N. W. 363.

82. Bartlett *v.* Wayne Cir. Judge, 133 Mich. 604, 95 N. W. 721.

83. Darwin *v.* Jones, 82 Ill. 107; Bartlett *v.* Wayne Cir. Judge, 133 Mich. 604, 95 N. W. 721.

84. King *v.* Ingham Cir. Judge, 69 Mich. 84, 37 N. W. 50.

85. Cummins *v.* Peed, 109 Ind. 71, 9 N. E. 603; Clough *v.* Ide, 107 Iowa 669, 78 N. W. 697 (objection that the claim was not properly entitled); Stevens *v.* Witter, 88 Iowa 636, 55 N. W. 535.

An objection that a claim was not referable if not made on the reference cannot be urged for the first time on appeal from the decision of the referee. Weller *v.* Weller, 4 Hun (N. Y.) 195.

86. Boggs *v.* Mobile Branch Bank, 12 Ala. 494; Weller *v.* Weller, 4 Hun (N. Y.) 195.

87. Reay *v.* Heazelton, 128 Cal. 335, 60 Pac. 977.

claim where the representative refuses to appeal, it is not necessary, to sustain his right of appeal, that the act of the probate court in allowing the claim should have been objected to.[88]

g. Parties. On an appeal by a creditor from a disallowance of his claim the representative is the only necessary defendant in error and other creditors need not be made parties.[89] Under the Indiana statute if it appears that another person is jointly liable by contract with the decedent on the claim presented such person may be made a party.[90] Where after disallowance in the probate court the claim is assigned, the court may permit the assignee to be substituted as claimant on the appeal.[91]

h. Hearing on Appeal. On appeal from a judgment of a probate court the case is tried *de novo*.[92] The trial is usually conducted without filing any formal pleadings,[93] unless required by the court;[94] and no technical form for framing the issues is necessary, the only requirement being that the nature of the controversy shall clearly appear.[95] The issues on appeal must be the same as in the probate court,[96] and the claimant cannot base his right to recover on a theory different from and inconsistent with that asserted in the court below,[97] nor can he present a new and different claim;[98] but if his previous statement did not correctly set forth his claim it may be amended.[99] If the appellant does not prosecute his

88. Groner *v.* Hield, 22 Wis. 200.

89. Huntsville Branch Bank *v.* Steele, 10 Ala. 915.

90. See Claypool *v.* Gish, 108 Ind. 424, 9 N. E. 382.

91. Harman *v.* Harman, 62 Nebr. 452, 87 N. W. 177.

92. *Arkansas.*— Grimes *v.* Bush, 16 Ark. 647.

Iowa.— Voorhies *v.* Eubank, 6 Iowa 274.

Kansas.— Neil *v.* Case, 25 Kan. 510, 37 Am. Rep. 259; Morgan *v.* Saline Valley Bank, 4 Kan. App. 668, 46 Pac. 61.

Missouri.— Berry *v.* Henslee, 38 Mo. 392; Elstroth *v.* Young, 78 Mo. App. 651.

Texas.— Glenn *v.* Kimbrough, 70 Tex. 147, 8 S. W. 81.

Wisconsin.— Central Bank *v.* St. John, 17 Wis. 157.

See 22 Cent. Dig. tit. "Executors and Administrators," § 818.

The jurisdiction of the district court on appeal is no greater than that of the probate court, and where the statute requires the claim to be established by competent testimony in the probate court it must be established in the same manner on appeal (Phillips *v.* Faherty, 9 Kan. App. 380, 58 Pac. 861; Morgan *v.* Saline Valley Bank, 4 Kan. App. 668, 46 Pac. 61) and the administrator cannot confess judgment (Phillips *v.* Faherty, *supra*).

On appeal from an allowance by commissioners where no formal issue is made in the circuit court the case is tried in the same manner as if it were before the commissioners. Westra *v.* Westra, 101 Mich. 526, 60 N. W. 55.

93. Haffamier *v.* Hund, 10 Kan. App. 579, 63 Pac. 659; Hoffman *v.* Pope, 74 Mich. 235, 41 N. W. 907; Wencker *v.* Thompson, 96 Mo. App. 59, 69 S. W. 743; Fitzgerald *v.* Union Sav. Bank, 65 Nebr. 97, 90 N. W. 994.

A set-off cannot be given in evidence in a court of record unless specially pleaded, and where proceedings are conducted summarily without formal pleadings the record cannot be amended to include such a defense where it was not presented in the probate court, but to be admissible it must be filed in the probate court. Berry *v.* Henslee, 38 Mo. 392.

The statute of limitations may be invoked without a written plea. Wencker *v.* Thompson, 96 Mo. App. 59, 69 S. W. 743.

Even where the statutes provide for formal written pleadings on appeal (Stuart *v.* Stuart, 70 Minn. 46, 72 N. W. 819; Lake *v.* Albert, 37 Minn. 453, 35 N. W. 177) the fact that a trial is had without such pleadings is a mere irregularity not affecting the jurisdiction of the court (Lake *v.* Albert, 37 Minn. 453, 35 N. W. 177).

94. See Fitzgerald *v.* Union Sav. Bank, 65 Nebr. 97, 90 N. W. 994.

95. Comstock *v.* Smith, 26 Mich. 306. See also King *v.* Brewer, 121 Mich. 339, 80 N. W. 238.

96. Raub *v.* Nisbett, 111 Mich. 38, 69 N. W. 77; Fitzgerald *v.* Union Sav. Bank, 65 Nebr. 97, 90 N. W. 994. See also Graham *v.* Townsend, 62 Nebr. 364, 87 N. W. 169.

In a case where no pleadings are filed, if either party tries to introduce new issues objection may be taken by objecting to evidence introduced in support of such issues. Fitzgerald *v.* Union Sav. Bank, 64 Nebr. 97, 90 N. W. 994.

97. Raub *v.* Nisbett, 111 Mich. 38, 69 N. W. 77.

98. Patrick *v.* Howard, 47 Mich. 40, 10 N. W. 71. See also Stuart *v.* Stuart, 70 Minn. 46, 72 N. W. 819.

In Vermont the statute provides that the claimant may recover on claims not previously presented where the failure to do so was due to fraud, accident, or mistake. Cutting *v.* Ellis, 67 Vt. 70, 30 Atl. 688.

99. Cutting *v.* Ellis, 67 Vt. 70, 30 Atl. 688.

The claimant may increase the amount of his claim where the amount is a matter of

appeal it may be dismissed and the judgment of the lower court allowed to stand.[1]

i. Judgment. The judgment rendered in the appellate court is not an ordinary judgment against the representative on which execution may be issued, but is merely an allowance or disallowance of the claim which is certified to the probate court.[2]

5. Costs[3] — a. On Trial in Probate Court. Costs on the trial of disputed claims in probate courts are usually regulated by statute.[4] In the absence of a statute providing expressly for the allowance of costs in such cases it has been held that the equity powers of a probate court were broad enough to authorize an allowance against the estate of costs necessarily incurred in sustaining a valid claim.[5]

b. On Reference. The costs to be awarded on a statutory reference are also regulated by statute.[6] The New York statutes have been several times altered and amended,[7] but by a recent amendment[8] it is provided that upon the entry of the order of reference the proceeding shall become an action in the supreme court,[9] and the costs are awarded according to the provisions relating to actions against executors and administrators,[10] and by the referee instead of by the court.[11]

opinion and not of express contract and he thinks the claim as at first presented was too small. Killpatrick *v.* Helston, 25 Ill. App. 127.

1. Voorhies *v.* Eubank, 6 Iowa 274.

2. Voorhies *v.* Eubank, 6 Iowa 274; Tyler *v.* Gallop, 68 Mich. 185, 35 N. W. 902, 13 Am. St. Rep. 336; Wood *v.* Flanery, 89 Mo. App. 632; Ambs *v.* Caspari, 13 Mo. App. 587; Bennett *v.* Taylor, (Nebr. 1903) 96 N. W. 669.

The judgment may classify the claim against the estate (Ambs *v.* Caspare, 13 Mo. App. 587), but it is not essential to its validity that it should do so (McCall *v.* Lee, 120 Ill. 261, 11 N. E. 522 [*affirming* 24 Ill. App. 585]).

3. See, generally, Costs.

4. Richardson *v.* Allman, 40 Ill. App. 90; Matter of Ingraham, 35 Misc. (N. Y.) 577, 72 N. Y. Suppl. 62.

In Illinois the statute provides that the estate shall be answerable for costs on claims filed at or before the time selected for the adjustment of claims, and as to claims subsequently filed where a defense is made the court may in its discretion order the whole or some part of the costs occasioned by such defense to be paid by the estate. Richardson *v.* Allman, 40 Ill. App. 90. See also Robnett *v.* Robnett, 43 Ill. App. 191. Prior to the act of 1872, the estate was answerable for the costs on claims filed at or before the term selected for adjustment but not on those filed thereafter. Russell *v.* Hubbard, 59 Ill. 335. See also Beardsley *v.* Hill, 61 Ill. 354; Richardson *v.* Allman, 40 Ill. App. 90.

In New York, on the hearing of a disputed claim before the surrogate on the judicial settlement of the representative's accounts, costs are within the discretion of the surrogate. Matter of Coonley, 38 Misc. 219, 77 N. Y. Suppl. 269; Matter of Ingraham, 35 Misc. 577, 72 N. Y. Suppl. 62.

5. Decker's Estate, 22 Pa. Co. Ct. 46.

6. Robert *v.* Ditmas, 7 Wend. (N. Y.) 552.

7. **For decisions prior to the act of 1893** amending N. Y. Code Civ. Proc. § 2718 see Denise *v.* Denise, 110 N. Y. 562, 18 N. E. 368 [*affirming* 41 Hun 9]; Kearney *v.* McKeon, 85 N. Y. 136; Babbage *v.* Webster, 72 Hun (N. Y.) 456, 25 N. Y. Suppl. 300; Matter of McQueen, 58 Hun (N. Y.) 172, 11 N. Y. Suppl. 509, 19 N. Y. Civ. Proc. 290, 11 N. Y. Suppl. 510; Agar *v.* Tibbets, 56 Hun (N. Y.) 272, 9 N. Y. Suppl. 591, 18 N. Y. Civ. Proc. 338; Dryer *v.* Brown, 55 Hun (N. Y.) 612, 10 N. Y. Suppl. 53, 24 Abb. N. Cas. (N. Y.) 59, 144; Walker *v.* Gardener, 8 Misc. (N. Y.) 468, 29 N. Y. Suppl. 669; Hallock *v.* Bacon, 16 N. Y. Suppl. 725, 21 N. Y. Civ. Proc. 255; Hearn *v.* Sullivan, 13 Abb. N. Cas. (N. Y.) 371; Munson *v.* Howell, 12 Abb. Pr. (N. Y.) 77, 20 How. Pr. (N. Y.) 59; Radley *v.* Fisher, 24 How. Pr. (N. Y.) 404; Avery *v.* Smith, 9 How. Pr. (N. Y.) 349; Van Sickler *v.* Graham, 7 How. Pr. (N. Y.) 208; Newton *v.* Sweet, 4 How. Pr. (N. Y.) 134, 2 Code Rep. (N. Y.) 61; Lansing *v.* Cole, 3 Code Rep. (N. Y.) 246.

8. N. Y. Laws (1893), c. 686, amending Code Civ. Proc. § 2718.

9. Outhouse *v.* Odell, 84 Hun (N. Y.) 494, 32 N. Y. Suppl. 388, 24 N. Y. Civ. Proc. 289; Henning *v.* Miller, 83 Hun (N. Y.) 403, 31 N. Y. Suppl. 878; Adams *v.* Olin, 78 Hun (N. Y.) 309, 29 N. Y. Suppl. 131.

10. Whitcomb *v.* Whitcomb, 92 Hun (N. Y.) 443, 36 N. Y. Suppl. 607; Outhouse *v.* Odell, 84 Hun (N. Y.) 494, 32 N. Y. Suppl. 388, 24 N. Y. Civ. Proc. 289; Henning *v.* Miller, 83 Hun (N. Y.) 403, 31 N. Y. Suppl. 878; Adams *v.* Olin, 78 Hun (N. Y.) 309, 29 N. Y. Suppl. 131.

If the representative is successful in resisting the claim, he is entitled to costs as a matter of right. Winne *v.* Hills, 91 Hun (N. Y.) 89, 36 N. Y. Suppl. 683.

11. Jenkinson *v.* Harris, 27 Misc. (N. Y.) 714, 59 N. Y. Suppl. 548; Fisher *v.* Bennett, 21 Misc. (N. Y.) 178, 47 N. Y. Suppl. 114.

This amendment does not, however, repeal the previous law relating to disbursements,[12] and a claimant may be allowed his disbursements, although under the present statute he would not be entitled to costs.[13]

c. Effect of Refusal to Refer. Under the New York statutes costs may be awarded against the representative in favor of a successful claimant where the representative refused to submit the claim to reference.[14] But to entitle the claimant to costs he must bring himself strictly within the statute,[15] and it must affirmatively appear that he made an offer to refer,[16] and that the offer was refused.[17] Under the statute allowing the surrogate to pass upon disputed claims by consent of the parties on a judicial settlement of the representative's accounts, costs may be awarded against a representative who does not consent to have the claim so determined,[18] but if the claimant commences his action before the expiration of the time within which the representative may file such consent he thereby waives his right to costs.[19]

d. Effect of Unreasonable Resistance of Claim. Under the New York statute costs cannot be taxed against a representative where it does not appear that his resistance of the claim was unreasonable.[20] But if the claim was unreasonably resisted the representative is chargeable with costs,[21] provided the demand was presented within the time limited by a notice published as prescribed by law;[22] and in such cases the costs may be taxed either against the representative personally or be paid out of the estate as the court, under the circumstances of the particular case, may direct.[23] These provisions apply to references as well as

12. Niles *v.* Crocker, 88 Hun (N. Y.) 312, 34 N. Y. Suppl. 761; Outhouse *v.* Odell, 84 Hun (N. Y.) 494, 32 N. Y. Suppl. 388, 24 N. Y. Civ. Proc. 289.

Rule as to disbursements.— Under the old code of procedure the prevailing party was entitled to recover the fees of witnesses and of referees and other necessary disbursements (Larkins *v.* Maxon, 103 N. Y. 680, 9 N. E. 56; Krill *v.* Brownell, 40 Hun (N. Y.) 72, 10 N. Y. Civ. Proc. 8; Hallock *v.* Bacon, 16 N. Y. Suppl. 725, 21 N. Y. Civ. Proc. 255); and this provision was retained by the laws of 1880 repealing the code of procedure (Larkins *v.* Maxon, *supra*; Niles *v.* Crocker, 88 Hun (N. Y.) 312, 34 N. Y. Suppl. 761; Hallock *v.* Bacon, *supra*; Hatch *v.* Stewart, 42 Hun (N. Y.) 164; Krill *v.* Brownell, *supra* [*overruling* Miller *v.* Miller, 32 Hun 481, 67 How. Pr. 135; Daggett *v.* Mead, 11 Abb. N. Cas. 116]; Hallock *v.* Bacon, *supra*; Hall *v.* Edmunds, 67 How. Pr. (N. Y.) 202); and was not repealed by the amendment of 1893 which makes provision only as to costs (Outhouse *v.* Odell, 84 Hun (N. Y.) 494, 32 N. Y. Suppl. 388, 24 N. Y. Civ. Proc. 289).

13. Osborne *v.* Parker, 66 N. Y. App. Div. 277, 72 N. Y. Suppl. 894; Whitcomb *v.* Whitcomb, 92 Hun (N. Y.) 443, 36 N. Y. Suppl. 607; Outhouse *v.* Odell, 84 Hun (N. Y.) 494, 32 N. Y. Suppl. 388, 24 N. Y. Civ. Proc. 289.

14. Davis *v.* Gallagher, 37 N. Y. App. Div. 626, 55 N. Y. Suppl. 1066; Snyder *v.* Snyder, 26 Hun (N. Y.) 324; Effray *v.* Masson, 18 N. Y. Suppl. 350, 22 N. Y. Civ. Proc. 59; Nellis *v.* Duesler, 18 N. Y. Suppl. 315; Roberts *v.* Pike, 13 N. Y. Suppl. 559, 19 N. Y. Civ. Proc. 422; Wilkinson *v.* Littlewood, 67 How. Pr. (N. Y.) 474; Robertson *v.* Sheill, 3 Den. (N. Y.) 161.

Where a claim was not presented within the time fixed by statute plaintiff cannot recover costs against the executor or administrator. Bradley *v.* Burwell, 3 Den. (N. Y.) 261.

15. Cruikshank *v.* Cruikshank, 9 How. Pr. (N. Y.) 350; Swift *v.* Blair, 12 Wend. (N. Y.) 278.

16. Buckhout *v.* Hunt, 16 How. Pr. (N. Y.) 407.

17. Buckhout *v.* Hunt, 16 How. Pr. (N. Y.) 407; Stephenson *v.* Clark, 12 How. Pr. (N. Y.) 282; Cruikshank *v.* Cruikshank, 9 How. Pr. (N. Y.) 350.

It is insufficient to show a refusal to submit to arbitration. Cruikshank *v.* Cruikshank, 9 How. Pr. (N. Y.) 350; Swift *v.* Blair, 12 Wend. (N. Y.) 278.

18. Carter *v.* Barnum, 24 Misc. (N. Y.) 220, 53 N. Y. Suppl. 539, 28 N. Y. Civ. Proc. 161.

19. Hart *v.* Hart, 45 N. Y. App. Div. 280, 61 N. Y. Suppl. 131.

20. Johnson *v.* Myers, 103 N. Y. 666, 9 N. E. 55; Matter of Raab, 47 N. Y. App. Div. 33, 62 N. Y. Suppl. 332; Vaughn *v.* Strong, 66 Hun (N. Y.) 278, 21 N. Y. Suppl. 154; Harrison *v.* Ayers, 18 Hun (N. Y.) 336; Ehrenreich *v.* Lichtenberg, 59 N. Y. Suppl. 383; Buckhout *v.* Hunt, 16 How. Pr. (N. Y.) 407; Stephenson *v.* Clark, 12 How. Pr. (N. Y.) 282.

21. Matter of Post, 30 Misc. (N. Y.) 551, 64 N. Y. Suppl. 369; Brainerd *v.* De Graef, 29 Misc. (N. Y.) 560, 61 N. Y. Suppl. 953; Dukelow *v.* Searles, 20 N. Y. Suppl. 348; Darling *v.* Halsey, 2 Abb. N. Cas. (N. Y.) 105; Linn *v.* Clow, 14 How. Pr. (N. Y.) 508.

22. Niles *v.* Crocker, 88 Hun (N. Y.) 312, 34 N. Y. Suppl. 761.

23. Osborne *v.* Parker, 66 N. Y. App. Div. 277, 72 N. Y. Suppl. 894. See also Matter of

to actions.[24] Where the action is in the supreme court the facts showing such unreasonable resistance must be certified by the judge or referee before whom the trial took place,[25] but this requirement does not affect the right of the prevailing party to recover his disbursements.[26] What will amount to an unreasonable resistance depends upon the circumstances of the particular case.[27]

e. Costs on Appeal.[28] In some jurisdictions the statutes provide that the costs on appeal from a judgment of the probate court shall be within the discretion of the appellate court;[29] and in others that the prevailing party shall recover his costs against the other party.[30]

D. Priorities and Payment — 1. Authority and Duty to Pay. One of the most important duties of the personal representative is the payment of debts which have been legally established against the estate.[31] Where there is no lien

Post, 30 Misc. (N. Y.) 551, 64 N. Y. Suppl. 369.

24. Brainerd *v.* De Graef, 29 Misc. (N. Y.) 560, 61 N. Y. Suppl. 953; Fisher *v.* Bennett, 21 Misc. (N. Y.) 178, 47 N. Y. Suppl. 114.

25. Lounsbury *v.* Sherwood, 53 N. Y. App. Div. 318, 65 N. Y. Suppl. 676; Whitcomb *v.* Whitcomb, 92 Hun (N. Y.) 443, 36 N. Y. Suppl. 607; Brainerd *v.* De Graef, 29 Misc. (N. Y.) 560, 61 N. Y. Suppl. 953.

Certificate necessary where costs taxed by referee.— Whitcomb *v.* Whitcomb, 92 Hun (N. Y.) 443, 36 N. Y. Suppl. 607.

The certificate need not be incorporated in the report of the referee but may be made separately and after the report is filed. Brainerd *v.* De Graef, 29 Misc. (N. Y.) 560, 61 N. Y. Suppl. 953.

26. Osborne *v.* Parker, 66 N. Y. App. Div. 277, 72 N. Y. Suppl. 894; Lounsbury *v.* Sherwood, 53 N. Y. App. Div. 318, 65 N. Y. Suppl. 676; Whitcomb *v.* Whitcomb, 92 Hun (N. Y.) 443, 36 N. Y. Suppl. 607.

27. Robert *v.* Ditmas, 7 Wend. (N. Y.) 522.

The fact that the resistance of the representative is ineffectual does not necessarily show that it was improper to make it. Nicholson *v.* Showerman, 6 Wend. (N. Y.) 554.

If the amount of the claim as presented is materially reduced the resistance will be held not to be unreasonable. Johnson *v.* Myers, 103 N. Y. 666, 9 N. E. 55; Rauth *v.* Davenport, 18 N. Y. Suppl. 721, 22 N. Y. Civ. Proc. 121; Daggett *v.* Mead, 11 Abb. N. Cas. (N. Y.) 116; Pinkernelli *v.* Bischoff, 2 Abb. N. Cas. (N. Y.) 107; Buckhout *v.* Hunt, 16 How. Pr. (N. Y.) 407; Robert *v.* Ditmas, 7 Wend. (N. Y.) 522. It has been held that the resistance was not unreasonable where the amount of the claim was reduced from three thousand dollars to three hundred dollars (Rauth *v.* Davenport, 18 N. Y. Suppl. 721, 22 N. Y. Civ. Proc. 121), from thirteen hundred dollars to nine hundred and ninety-two dollars and fifty cents (Matter of Raab, 47 N. Y. App. Div. 33, 62 N. Y. Suppl. 332), from forty-five hundred and seventy-two dollars and eighty-eight cents to eleven hundred and seventy-nine dollars and twenty cents (Matter of Ingraham, 35 Misc. (N. Y.) 577, 72 N. Y. Suppl. 62), from one thousand dollars to three hundred and fifty dollars (Cruikshank *v.* Cruikshank, 9 How. Pr. (N. Y.) 350), and from one hundred and fifty-seven dollars to one hundred and ten dollars (Comstock *v.* Olmstead, 6 How. Pr. (N. Y.) 77); but where a claim was reduced from one hundred and ninety-six dollars to one hundred and seventy-eight dollars and fifty cents, the representative denying any liability, this was held not to be such a material reduction as to relieve the representative from liability for costs (Dukelow *v.* Searles, 20 N. Y. Suppl. 348).

28. See, generally, Costs, 11 Cyc. 204.

29. Donaldson *v.* Raborg, 28 Md. 34; Shepherd *v.* Shepherd, 108 Mich. 82, 65 N. W. 580; Dodge *v.* Stanton, 12 Mich. 408. See also Richardson *v.* Allman, 40 Ill. App. 90.

Where the representative appeals without reasonable ground for resisting the allowance and taking the appeal it is proper that the claimant should recover the costs of the appeal. Dodge *v.* Stanton, 12 Mich. 408.

Where the representative is claimant and the court appoints a special representative to defend the claim, to entitle the special representative to recover the costs of an appeal from an allowance it must appear that he acted in good faith and with reasonable prudence in appealing. Switzer *v.* Kee, 69 Ill. App. 499.

On appeal from the decision of commissioners where their allowance is greatly decreased it is proper to apportion the costs. Hatch *v.* Hatch, 60 Vt. 160, 13 Atl. 791.

30. Harrington *v.* Evans, 49 Mo. App. 372, holding that where an heir appeals in the name of the representative from the allowance of a claim and the allowance is sustained the costs should be taxed against the estate and not against the heir. See also Martin *v.* Nichols, 54 Mo. App. 594.

31. *Georgia.*— Churchill *v.* Bee, 66 Ga. 621; Windsor *v.* Bell, 61 Ga. 671; McIntosh *v.* Hambleton, 35 Ga. 94, 89 Am. Dec. 276.

Louisiana.— Willis' Succession, 109 La. 281, 33 So. 314; Hoss' Succession, 42 La. Ann. 1022, 8 So. 833; Meissonier *v.* Laurent, 14 La. Ann. 14.

Maryland.— Baldwin *v.* Mitchell, 86 Md. 379, 38 Atl. 775; Emery *v.* Owings, 6 Gill 191.

New York.— Schmitz *v.* Langhaar, 88 N. Y. 503; Matter of Miner, 39 Misc. 605, 80 N. Y. Suppl. 643.

North Carolina.— Holden *v.* Strickland, 116

the assets of the estate, real or personal, can as a rule be applied to the payment of the debts only by or through the personal representative unless a contrary provision is made in the decedent's will;[32] but it has been held in England that a personal representative may assign the assets to trustees for the benefit of the decedent's creditors and that the assignment is valid as against a judgment obtained by a creditor against the representative.[33]

2. Classification and Priorities of Debts[34] — **a. What Law Governs.**[35] In the administration of a decedent's estate the priorities of debts are governed wholly by the law of the jurisdiction in which the representative acts and from which he derives his authority.[36]

b. At Common Law — (I) *Classification.*[37] At common law the proper expenses of the funeral and of proving the will, if one existed, had priority over all debts of the decedent, and this priority has not been taken away by modern statutes.[38] Apart from these expenses the debts of the decedent were, under the common-law system, divided into three main classes: (1) Debts of record; (2) debts by specialty; and (3) debts by simple contract.[39] These were payable in the

N. C. 185, 21 S. E. 684; Wadsworth *v.* Davis, 63 N. C. 251.

Pennsylvania.— Duval's Appeal, 38 Pa. St. 112.

South Carolina.— Farys *v.* Farys, Harp. Eq. 261.

Wisconsin.— Gillett *v.* Gillett, 9 Wis. 194.

England.— See Nicholls *v.* Judson, 2 Atk. 300, 26 Eng. Reprint 583.

Canada.— McPhadden *v.* Bacon, 13 Grant Ch. (U. C.) 591.

See *supra*, VIII, I, 8, d; X, A, 1.

Liability for failure to make payment see *infra*, X, D, 11.

Failure to pay debts as breach of administration bond see *infra*, XVII, E, 5.

Liability for paying legatees and distributees before creditors see *infra*, XI, L, 5.

Upon removal by the court the representative has of course no further authority to pay debts. Rutenic *v.* Hamaker, 40 Oreg. 444, 67 Pac. 196.

32. Holden *v.* Strickland, 116 N. C. 185, 21 S. E. 684; Tuck *v.* Walker, 106 N. C. 285, 11 S. E. 183; Mauney *v.* Holmes, 87 N. C. 428; Murchison *v.* Williams, 71 N. C. 135; Duval's Appeal, 38 Pa. St. 112. See also Emery *v.* Owings, 6 Gill (Md.) 191, per Dorsey, J.

Effect of testamentary trust.— Where a testator names an executor in his will, and devises land to others in trust with a direction to sell, the proceeds to be applied to the payment of debts, he does not thereby confer upon the testamentary trustees the powers and duties of the executor as to paying the debts, unless the will contains a clear expression of an intention to that effect. Duval's Appeal, 38 Pa. St. 112. See, generally, Wills.

33. Wolverhampton, etc., Banking Co. *v.* Marston, 7 H. & N. 148, 7 Jur. N. S. 1040, 30 L. J. Exch. 402, 4 L. T. Rep. N. S. 524, 9 Wkly. Rep. 790.

34. Power of testator to prefer creditors by will see, generally, Wills.

35. In administration generally, see *supra*, I, K.

36. *Louisiana.*— Mary's Succession, 2 Rob. 438.

New Hampshire.— Goodall *v.* Marshall, 11 N. H. 88, 35 Am. Dec. 472.

North Carolina.— Moye *v.* May, 43 N. C. 131, 54 N. C. 84.

Pennsylvania.— *In re* Miller, 3 Rawle 312, 24 Am. Dec. 345.

Virginia.— Tunstall *v.* Pollard, 11 Leigh 1.

United States.— Smith *v.* Union Bank, 5 Pet. 518, 8 L. ed. 212 [*affirming* 24 Fed. Cas. No. 14,362, 4 Cranch C. C. 21].

England.— *In re* Klœbe, 28 Ch. D. 175, 54 L. J. Ch. 297, 52 L. T. Rep. N. S. 19, 33 Wkly. Rep. 391 [*explaining* Cook *v.* Gregson, 2 Drew 286, 23 L. J. Ch. 734, 2 Wkly. Rep. 401, and *disapproving* Wilson *v.* Dunsany, 18 Beav. 293, 18 Jur. 762, 23 L. J. Ch. 492, 2 Wkly. Rep. 288, 52 Eng. Reprint 115]. See also Pardo *v.* Bingham, L. R. 6 Eq. 485.

Canada.— Milne *v.* Moore, 24 Ont. 456.

See 22 Cent. Dig. tit. "Executors and Administrators," § 927; and *infra*, XVI, D, 1.

Compare Caruthers *v.* Corbin, 38 Ga. 75.

37. A declaration by a debtor on his deathbed that a specified debt is sacred, and a request that it shall be paid, will not affect the order of payment. Mason *v.* Man, 3 Desauss. (S. C.) 116.

Where the assets were sufficient to pay all the debts it seems that the order of priority was considered immaterial and was not strictly followed. Turner *v.* Turner, 1 Jac. & W. 39, 37 Eng. Reprint 290.

38. See *infra*, X, D, 2, c, (II), (B), (1).

39. 4 Bacon Abr. 105. See also Com. *v.* Logan, 1 Bibb (Ky.) 529.

A debt or obligation of record is a writing obligatory, acknowledged before a judge or other officer having authority for that purpose, and enrolled in a court of record. Public Accounts *v.* Greenwood, 1 Desauss. (S. C.) 450. See also 13 Cyc. 425. The mere fact that a bond is recorded does not make it a debt of record in the legal sense of the term. Public Accounts *v.* Greenwood, 1 Desauss. (S. C.) 450.

Debt by specialty see 13 Cyc. 424.

Debt by simple contract see 13 Cyc. 424.

following order: (1) Debts of record or by specialty due to the crown;[40] (2) other debts of record, such as final judgments rendered against the decedent in his lifetime,[41] final decrees of a court of equity being upon the same footing;[42] (3) specialty debts, such as debts due on bonds, covenants, and other sealed instruments, when founded on a consideration,[43] and rent in arrear in the decedent's lifetime;[44] (4) debts due by simple contract, that is, contracts not under seal, such as bills and notes, and promises resting in parol or implied in law;[45] and (5) specialty debts

40. See Com. *v.* Logan, 1 Bibb (Ky.) 529. But debts due the crown did not have priority over debts which were otherwise of superior dignity; the preference extended only to debts of equal or inferior degree. Com. *v.* Logan, 1 Bibb (Ky.) 529; Public Accounts *v.* Greenwood, 1 Desauss. (S. C.) 450.

Debts to state see *infra*, X, D, 2, c, (II), (B), (2), (b), aa.

41. *Illinois.*— Woodworth *v.* Paine, 1 Ill. 374.

Kentucky.— Place *v.* Oldham, 10 B. Mon. 400; Com. *v.* Barstow, 3 B. Mon. 290.

New Jersey.— Newark Second Nat. Bank *v.* Blauvelt, 44 N. J. Eq. 173, 14 Atl. 618.

New York.— Hamed's Case, 4 Abb. Pr. 270; Ainslie *v.* Radcliff, 7 Paige 439; Trust *v.* Harned, 4 Bradf. Surr. 213.

Pennsylvania.— See Ramsay's Appeal, 4 Watts 71.

England.— See Berrington *v.* Evans, 3 Y. & C. Exch. 384.

Canada.— Frontenac Loan Co. *v.* Morice, 3 Manitoba 462.

The priority was not founded on any supposed lien on the decedent's land. Ainslie *v.* Radcliff, 7 Paige (N. Y.) 439.

A judgment of a justice of the peace, not being a matter of record, did not rank with judgments of courts of record, but when the representative had notice of the judgment he was bound to pay it before specialties. Garrett *v.* Johnson, 29 N. C. 231.

The dormancy of a judgment did not affect its dignity in administration. Garrett *v.* Johnson, 29 N. C. 231.

Among several judgments or decrees no priority was recognized by reason of prior date of recovery. Newark Second Nat. Bank *v.* Blauvelt, 44 N. J. Eq. 173, 14 Atl. 618 [*distinguishing* Thompson *v.* Brown, 4 Johns. Ch. (N. Y.) 619]; Ainslie *v.* Radcliff, 7 Paige (N. Y.) 439 [*distinguishing* Thompson *v.* Brown, 4 Johns. Ch. (N. Y.) 619].

42. Newark Second Nat. Bank *v.* Blauvelt, 44 N. J. Eq. 173, 14 Atl. 618; Ainslie *v.* Radcliff, 7 Paige (N. Y.) 439; Woddrop *v.* Ward, 3 Desauss. (S. C.) 203; Searle *v.* Lane, 2 Vern. Ch. 88, 23 Eng. Reprint 667. See also Garner *v.* Briggs, 4 Jur. N. S. 230, 27 L. J. Ch. 483, 6 Wkly. Rep. 378; Perry *v.* Phelips, 10 Ves. Jr. 33, 7 Rev. Rep. 31, 32 Eng. Reprint 756.

Judgment or decree must be final.— *Ex p.* Farrars, 13 S. C. 254; McIntosh *v.* Brooks, 3 Strobh. (S. C.) 133 note; McIntosh *v.* Wright, Rich. Eq. Cas. (S. C.) 385.

A judgment in the lord mayor's court against a garnishee did not entitle plaintiff to rank as a judgment creditor in the administration of the garnishee's assets. Holt *v.* Murray, 1 Sim. 485, 2 Eng. Ch. 485. See also Redhead *v.* Welton, 30 L. J. Ch. 577, 4 L. T. Rep. N. S. 230, 9 Wkly. Rep. 473.

Thus a debt due by recognizance of special bail had priority over a debt by specialty. Moon *v.* Pasteur, 4 Leigh (Va.) 35.

Until enrolment a recognizance had no preference over specialty debts. Bernes *v.* Weisser, 2 Bradf. Surr. (N. Y.) 212; Bothomly *v.* Fairfax, 1 P. Wms. 334, 24 Eng. Reprint 413, 2 Vern. Ch. 750, 23 Eng. Reprint 1090. See also Glynn *v.* Thorpe, 1 B. & Ald. 153.

43. *Kentucky.*—Com. *v.* Barstow, 3 B. Mon. 290; Com. *v.* Logan, 1 Bibb 529.

North Carolina.— Roundtree *v.* Sawyer, 15 N. C. 44.

South Carolina.— Rippon *v.* Townsend, 1 Bay 445; Harbison *v.* Giles, 1 Bay 275.

Texas.— Dunn *v.* Sublett, 14 Tex. 521.

England.— Pinchon's Case, 9 Coke 86*b*; Atkinson *v.* Grey, 18 Jur. 282, 1 Sm. & G. 577.

Canada.—Hutchinson *v.* Edmison, 11 Grant Ch. (U. C.) 477.

Effect of naming heir in bond.—In applying the proceeds of the real estate a creditor by bond in which the heirs were named took priority over a specialty creditor under a security in which the heirs were not expressly named. Richardson *v.* Jenkins, 1 Drew. 477, 1 Eq. Rep. 123, 17 Jur. 446, 22 L. J. Ch. 874, 1 Wkly. Rep. 298.

Separate property of deceased married woman.— In distributing the separate property of a deceased married woman, a bond was not entitled to any priority over debts by simple contract since the bond, considered merely as a bond, was void. Anonymous, 18 Ves. Jr. 258, 11 Rev. Rep. 194, 34 Eng. Reprint 315.

44. Kidd *v.* Boone, L. R. 12 Eq. 89, 40 L. J. Ch. 531, 24 L. T. Rep. N. S. 356; *In re* Hastings, 6 Ch. D. 610, 612, 47 L. J. Ch. 137, 25 Wkly. Rep. 842 (per Manlins, V. C.); Clough *v.* French, 2 Coll. 277, 9 Jur. 1029, 15 L. J. Ch. 24, 33 Eng. Ch. 277; Thompson *v.* Thompson, 9 Price 464. *Compare* Talbot *v.* Shrewsbury, L. R. 16 Eq. 26, 42 L. J. Ch. 877, 21 Wkly. Rep. 473; Vincent *v.* Godson, 4 De G. M. & G. 546, 24 L. J. Ch. 121, 2 Wkly. Rep. 408, 53 Eng. Ch. 438, 43 Eng. Reprint 620 [*affirming* 17 Jur. 295], holding that the rule whereby rent was classed as a specialty debt did not apply to rents of lands outside of England.

Relation of landlord and tenant essential.— Vincent *v.* Godson, 4 De G. M. & G. 546, 24 L. J. Ch. 121, 2 Wkly. Rep. 408 [*affirming* 17 Jur. 295].

45. Com. *v.* Barstow, 3 B. Mon. (Ky.) 290; Com. *v.* Logan, 1 Bibb (Ky.) 529; Rip-

not founded on a valuable consideration.[46] At the present time, however, this order of classification is but little observed, if at all.

(II) *Preference Among Debts of Same Class* — (A) *Right of Representative to Give Preference.* At common law an executor or administrator has the right to pay one creditor of a given class in full, although the assets are insufficient to satisfy the claims of other creditors of the same class.[47] But if a creditor obtains a judgment or decree against the executor or administrator, such creditor must be satisfied before any others of the same class;[48] and after the representative has notice of the commencement of an action at law against him by a creditor he cannot make a voluntary payment to any other creditor of equal degree,[49] although he may give preference to another creditor of equal degree by confessing judgment in his favor.[50] Notice of the commencement of a suit in equity does not, however, have the effect of destroying the representative's right of preference,[51] and he can make a voluntary payment to another creditor of the same class at any time before final decree.[52] If a creditor files a bill in equity

pon *v.* Townsend, 1 Bay (S. C.) 445; Harbison *v.* Giles, 1 Bay (S. C.) 275.

46. Stephens *v.* Harris, 41 N. C. 57; Jones *v.* Powell, 1 Eq. Cas. Abr. 84, 21 Eng. Reprint 896; Dawson *v.* Kearton, 2 Jur. N. S. 113, 25 L. J. Ch. 166, 3 Sm. & G. 186, 4 Wkly. Rep. 222; Lomas *v.* Wright, 3 L. J. Ch. 68, 2 Myl. & K. 769, 7 Eng. Ch. 769, 39 Eng. Reprint 1138; Lechmere *v.* Carlisle, 3 P. Wms. 211, 24 Eng. Reprint 1033; 2 Williams Ex. 217. See also Isenhart *v.* Brown, 2 Edw. (N. Y.) 341; Garrard *v.* Dinorben, 5 Hare 213, 10 Jur. 772, 15 L. J. Ch. 439, 26 Eng. Ch. 213; Clough *v.* Lambert, 3 Jur. 672, 10 Sim. 174, 16 Eng. Ch. 174; Fairbeard *v.* Bowers, Prec. Ch. 17, 24 Eng. Reprint 9, 2 Vern. Ch. 202, 23 Eng. Reprint 731.

47. *Georgia.*— Green *v.* Allen, 45 Ga. 205; Bomgaux *v.* Bevan, Dudley 110.

New York.— Schmitz *v.* Langhaar, 88 N. Y. 503; McKay *v.* Green, 3 Johns. Ch. 56.

North Carolina.—McLean *v.* Leach, 68 N. C. 95; Brandon *v.* Allison, 66 N. C. 532; Wadsworth *v.* Davis, 63 N. C. 251; Anonymous, 2 N. C. 295.

United States.— Wilson *v.* Wilson, 30 Fed. Cas. No. 17,848, 1 Cranch C. C. 255.

England.—Lyttleton *v.* Cross, 3 B. & C. 317, 10 E. C. L. 150; *In re* Hankey, [1899] 1 Ch. 541, 68 L. J. Ch. 242, 80 L. T. Rep. N. S. 47, 47 Wkly. Rep. 444; *In re* Harris, 56 L. J. Ch. 754, 56 L. T. Rep. N. S. 507, 35 Wkly. Rep. 710; Waring *v.* Danvers, 1 P. Wms. 295, 24 Eng. Reprint 396.

Contra, under modern statutes.— See *infra*, X, D, 10, b, (II).

48. See *infra*, X, D, 2, b, (II), (B).

49. *Georgia.*— Bomgaux *v.* Bevan, Dudley 110.

Kentucky.— Gregg *v.* Com., 9 Dana 343.

New York.— See Schmitz *v.* Langhaar, 88 N. Y. 503.

North Carolina.—Wadsworth *v.* Davis, 63 N. C. 251; Hall *v.* Gully, 26 N. C. 345; White *v.* Arrington, 25 N. C. 166 (holding that under Rev. St. c. 46, § 23, allowing executors and administrators nine months before they are required to plead, an executor or administrator can no more avail himself under the plea of *plene administravit* of voluntary payment of a debt after notice of a writ sued out than he could at common law); Anonymous, 2 N. C. 295.

England.— Waring *v.* Danvers, 1 P. Wms. 295, 24 Eng. Reprint 396; Parker *v.* Dee, 3 Swanst. 529 note, 36 Eng. Reprint 968. But since the Judicature Act of 1873, which provides that when the rules of equity and those of common law conflict the former shall prevail, the rule in equity must be followed; and an administrator is entitled after notice of an action brought against him by one creditor to apply the assets in payment of the debt of another creditor. Vibart *v.* Coles, 24 Q. B. D. 364, 59 L. J. Q. B. 152, 62 L. T. Rep. N. S. 551, 38 Wkly. Rep. 359 [*following In re* Radcliffe, 7 Ch. D. 733].

50. Gregg *v.* Com., 9 Dana (Ky.) 343; Allison *v.* Davidson, 21 N. C. 46; Anonymous, 2 N. C. 295; Wilson *v.* Wilson, 30 Fed. Cas. No. 17,848, 1 Cranch C. C. 255; Lyttleton *v.* Cross, 3 B. & C. 317, 10 E. C. L. 150; Waring *v.* Danvers, 1 P. Wms. 295, 24 Eng. Reprint 396; Parker *v.* Dee, 3 Swanst. 529 note, 36 Eng. Reprint 968.

A court of equity will not interfere by injunction to restrain the representative from confessing judgment. Wilson *v.* Wilson, 30 Fed. Cas. No. 17,848, 1 Cranch C. C. 255.

51. Sandridge *v.* Spurgen, 37 N. C. 269; Allison *v.* Davidson, 21 N. C. 46; Vibart *v.* Coles, 24 Q. B. D. 364, 59 L. J. Q. B. 152, 62 L. T. Rep. N. S. 551, 38 Wkly. Rep. 359; Oxford *v.* Daston, Colles 229, 1 Eng. Reprint 262; Maltby *v.* Russell, 3 L. J. Ch. O. S. 85, 25 Rev. Rep. 191, 2 Sim. & St. 227, 1 Eng. Ch. 227; Mason *v.* Williams, 2 Salk. 507. See also Schmitz *v.* Langhaar, 88 N. Y. 503.

52. Wadsworth *v.* Davis, 63 N. C. 251; Sandridge *v.* Spurgen, 37 N. C. 269; Allison *v.* Davidson, 21 N. C. 46; Mason *v.* Williams, 2 Salk. 507.

A decree quod computet on a bill filed by a creditor against an executor for the purpose of collecting his own debt does not prevent the executor from paying other claims of equal dignity before final decree. Sandridge *v.* Spurgen, 37 N. C. 269; Allison *v.* Davidson, 21 N. C. 46; Smith *v.* Eyles, 2 Atk. 385, 26 Eng. Reprint 633; Mason *v.* Williams, 2

against an executor or administrator for the benefit of himself and all other creditors, and a decree is had for an account and distribution, this is in the nature of a decree in favor of all the creditors,[53] and, although the legal priorities of creditors are not affected by the decree,[54] the right of a preference among creditors of equal degree is gone.[55]

(B) *Right of Creditor to Obtain Preference.* At common law, among creditors of the same class, the one who first reduces his claim to judgment against the personal representative has priority over the others as a reward for his superior diligence;[56] and the same rule applies to decrees in equity against the personal representative;[57] but in order to entitle the creditor to preference his judgment or decree must be final.[58] Judgments or decrees obtained by a creditor against the personal representative do not, however, belong to the same class as judgments recovered against the decedent in his lifetime,[59] and a creditor who obtains judgment against the personal representative does not thereby acquire priority over creditors whose claims are of superior dignity to that upon which the judgment is founded.[60] The mere bringing of an action against a personal representative, while it may prevent him from making voluntary payments to other creditors of the same class,[61] does not entitle the creditor bringing the action to any priority over other creditors who may institute actions,[62] but the priority of the claims of the several creditors who institute actions is determined according to the dates of their respective judgments.[63] A decree made for the administration of the estate on a bill in equity filed on behalf of all the creditors operates as a decree in favor of all the creditors, and a subsequent judg-

Salk. 507. But it is otherwise where the bill is filed on behalf of all the creditors. Sandridge *v.* Spurgen, *supra*; Allison *v.* Davidson, *supra*; Jones *v.* Jukes, 2 Ves. Jr. 518, 2 Rev. Rep. 308, 30 Eng. Reprint 753.

53. Perry *v.* Phelips, 10 Ves. Jr. 34, 7 Rev. Rep. 31, 32 Eng. Reprint 756; Paxton *v.* Douglas, 8 Ves. Jr. 520, 32 Eng. Reprint 456.

54. Nunn *v.* ——, 2 L. J. Ch. O. S. 123, 1 Sim. & St. 588, 24 Rev. Rep. 242, 1 Eng. Ch. 588.

55. Sandridge *v.* Spurgen, 37 N. C. 269; Allison *v.* Davidson, 21 N. C. 46; *In re* Harris, 56 L. J. Ch. 754, 56 L. T. Rep. N. S. 507, 35 Wkly. Rep. 710; Mitchelson *v.* Piper, 5 L. J. Ch. 294, 8 Sim. 64, 8 Eng. Ch. 64.

56. Henderson *v.* Burton, 38 N. C. 259; Lidderdale *v.* Robinson, 15 Fed. Cas. No. 8,337, 2 Brock. 159 [*affirmed* in 12 Wheat. 594, 6 L. ed. 740]; *In re* Williams, L. R. 15 Eq. 270, 42 L. J. Ch. 158, 28 L. T. Rep. N. S. 17, 21 Wkly. Rep. 160; Ashley *v.* Pocock, 3 Atk. 208, 26 Eng. Reprint 921; *In re* Bentinck [1897], 1 Ch. 673, 66 L. J. Ch. 359, 76 L. T. Rep. N. S. 284, 45 Wkly. Rep. 397 (per Sterling, J.); *In re* Stubbs, 8 Ch. D. 154, 47 L. J. Ch. 671, 26 Wkly. Rep. 736; Vincent *v.* Godson, 3 De G. & Sm. 717; Fowler *v.* Roberts, 2 Giff. 226, 6 Jur. N. S. 1189, 8 Wkly. Rep. 492. See also Mapes *v.* Coffin, 5 Paige (N. Y.) 296; Jennings *v.* Rigby, 33 Beav. 198, 33 L. J. Ch. 149, 9 L. T. Rep. N. S. 308, 12 Wkly. Rep. 32.

57. Bank of England *v.* Morice, 2 Bro. P. C. 465, 1 Eng. Reprint 1068. See also Perry *v.* Phelips, 10 Ves. Jr. 34, 7 Rev. Rep. 31, 32 Eng. Reprint 756.

58. Perry *v.* Phelips, 10 Ves. Jr. 34, 7 Rev. Rep. 31, 32 Eng. Reprint 756. See also Garner *v.* Briggs, 4 Jur. N. S. 230, 27 L. J. Ch. 483, 6 Wkly. Rep. 378.

Decree quod computet.— A mere decree against the executor for an accounting with a direction for payment according to the result of the account does not entitle the creditor obtaining the decree to any priority over a judgment subsequently obtained. Smith *v.* Eyles, 2 Atk. 385, 26 Eng. Reprint 633; Perry *v.* Phelips, 10 Ves. Jr. 34, 7 Rev. Rep. 31, 32 Eng. Reprint 756.

Judgment quod recuperet.— Where in an action of covenant an interlocutory judgment *quod recuperet* was signed, but before final judgment defendant died, and his executor confessed judgment to a bond creditor, it was held that the executor could plead the judgment confessed in bar to a scire facias in the action of covenant. Smith *v.* Eyles, 2 Atk. 385, 26 Eng. Reprint 633.

59. 2 Williams Ex. 201.

60. Henderson *v.* Burton, 38 N. C. 259; Roundtree *v.* Sawyer, 15 N. C. 44; Lidderdale *v.* Robinson, 15 Fed. Cas. No. 8,337, 2 Brock. 159 [*affirmed* in 12 Wheat. 594, 6 L. ed. 740].

61. See *supra*, X, D, 2, b, (II), (A).

62. Anonymous, 2 N. C. 296.

63. Lidderdale *v.* Robinson, 15 Fed. Cas. No. 8,337, 2 Brock. 159 [*affirmed* in 12 Wheat. 594, 6 L. ed. 740]; Ashley *v.* Pocock, 3 Atk. 208, 26 Eng. Reprint 921; Dollond *v.* Johnson, 2 Eq. Rep. 621, 18 Jur. 767, 23 L. J. Ch. 637, 2 Sm. & G. 301, 2 Wkly. Rep. 505. See also Perry *v.* Phelips, 10 Ves. Jr. 34, 7 Rev. Rep. 31, 32 Eng. Reprint 756. But see Dancy *v.* Pope, 68 N. C. 147; McLean *v.* Leach, 68 N. C. 95, holding that the creditor who first proceeds upon his judgment *quando* and fixes the administrator with assets, must first be paid without any regard to the priority of the judgments.

ment in favor of a single creditor entitles him to no preference with regard to the payment of his claim.[64]

c. Under Modern Statutes — (I) *In General.* The common-law order of priority still exists in so far as it has not been expressly abrogated or superseded by the local administration laws;[65] but the power of state legislatures to regulate the priorities of claims against decedents' estates is well settled,[66] and the common-law rules have been very generally superseded by statutes, differing widely in the various jurisdictions, classifying the debts of decedents and specifying the order in which they shall be paid.[67] The provisions of the local statutes fixing the order of payment are mandatory; they cannot be changed or disregarded by the court,[68] or by the representative.[69] The representative's right to prefer one

64. Parker *v.* Ringham, 33 Beav. 535. See also *In re* Stubbs, 8 Ch. D. 154, 47 L. J. Ch. 671, 26 Wkly. Rep. 736; Shepherd *v.* Kent, Prec. Ch. 190, 24 Eng. Reprint 92, 2 Vern. Ch. 435, 23 Eng. Reprint 879.

65. Woodworth *v.* Paine, 1 Ill. 374; Newark Second Nat. Bank *v.* Blauvelt, 44 N. J. Eq. 173, 14 Atl. 618; Sullivan *v.* Horner, 41 N. J. Eq. 299, 7 Atl. 411; Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384.

In New Mexico, if the statutes are silent as to the priority of a particular class of debts, the courts are compelled to resort to the civil law of Spain and Mexico. Crenshaw *v.* Delgado, 1 N. M. 376.

66. Chicago Title, etc., Co. *v.* McGlew, 193 Ill. 457, 61 N. E. 1018 [*affirming* 90 Ill. App. 58]. See also Central Bank *v.* Little, 11 Ga. 346.

67. See Rains *v.* Rainey, 11 Humphr. (Tenn.) 261; Mosier *v.* Zimmerman, 5 Humphr. (Tenn.) 61.

In England the priority of specialty debts over debts by simple contract has been abolished by 32 & 33 Vict. c. 46, under which all creditors of the decedent, whether by specialty or simple contract, are treated as standing in equal degree and entitled to be paid accordingly out of the assets whether legal or equitable. Crowder *v.* Stewart, 16 Ch. D. 368, 50 L. J. Ch. 136, 29 Wkly. Rep. 331; *Re* Orsmond, 58 L. T. Rep. N. S. 24. Under this statute the manner of applying assets to pay a simple contract debt due to the crown is to apportion the assets ratably between the specialty and simple contract debts, and to pay the crown debt out of the amount apportioned to the latter class. *In re* Bentinck, [1897] 1 Ch. 673, 66 L. J. Ch. 359, 76 L. T. Rep. N. S. 284, 45 Wkly. Rep. 397. This statute abolished the priority of a debt for rent, which formerly ranked as a specialty debt. *In re* Hastings, 6 Ch. D. 610, 47 L. J. Ch. 137, 25 Wkly. Rep. 842.

In Canada the statute of 29 Vict. c. 28, § 28, in express terms makes all debts of the decedent, including those due to the crown, payable *pari passu*; all priorities being abolished except as to liens existing in the debtor's lifetime, on his real or personal estate. Parsons *v.* Gooding, 33 U. C. Q. B. 499; Taylor *v.* Brodie, 21 Grant Ch. (U. C.) 607.

In the United States some of the early statutes retained the common-law priority of debts by specialty over debts by simple contract (Frazer *v.* Tunis, 1 Binn. (Pa.) 254; Heath *v.* Belk, 12 S. C. 582; Rippon *v.* Townsend, 1 Bay (S. C.) 445; Harrison *v.* Giles, 1 Bay (S. C.) 275; Rice *v.* Cannon, Bailey Eq. (S. C.) 172. See also Evans *v.* Norris, 2 N. C. 411. *Compare* Hargroves *v.* Cooke, 15 Ga. 321; Smith *v.* Ellington, 14 Ga. 379, both construing certain peculiar provisions of the early Georgia statutes), and of recognizances over both specialties and simple contracts (Dorsey *v.* Tunis, 4 Yeates (Pa.) 93, recognizance of bail). But with very few exceptions the law at the present day is that debts by specialty and debts by simple contract stand on a footing of equality. See Scott *v.* Ware, 64 Ala. 174; Heath *v.* Belk, 12 S. C. 582. Such an exception is found in Delaware where the common-law order of payment has with a few modifications been retained and adopted by Rev. St. (1893) c. 89, § 25, debts of record, specialties, and simple contracts being payable in the order named as at common law. Under this statute a distributive balance under an administrator's account falls within the seventh class as a debt due by obligation. Robinson *v.* Robinson, 3 Harr. (Del.) 433.

68. *California.*— Tompkins *v.* Weeks, 26 Cal. 50.

Illinois.— Colton *v.* Field, 131 Ill. 398, 22 N. E. 545.

Indiana.— Jenkins *v.* Jenkins, 63 Ind. 120.

Iowa.— Hart *v.* Jewett, 11 Iowa 276.

New York.— Thomson *v.* Taylor, 71 N. Y. 217, holding that if the decree of a surrogate authorized by 2 Rev. St. c. 116, § 18, for an executor's payment of a debt before the final accounting, remains unexecuted when the general decree for the distribution of the estate among the creditors is made, it must, in case of insufficiency of assets to pay the debts in full, give way to the paramount authority of the statute providing for equality between the creditors; and the creditor obtaining the decree cannot claim a preference under it.

Oregon.— *In re* Osburn, 36 Oreg. 8, 58 Pac. 521.

Virginia.— Deering *v.* Kerfoot, 89 Va. 491, 16 S. E. 671.

West Virginia.— Gardner *v.* Gardner, 47 W. Va. 368, 34 S. E. 792.

69. Tompkins *v.* Weeks, 26 Cal. 50 (holding the representative not entitled to credit for payment in disregard of the statutory

creditor over another is generally abolished and all debts of the same class are made payable *pro rata* in case of deficiency of assets.[70] Neither is it any longer possible for a creditor, by the exercise of superior diligence, to obtain any preference over other creditors; but a judgment recovered by him against the personal representative has no higher rank than the claim on which it is founded and gives the claim no preference.[71] Even the fact that a creditor by his diligence has

order, although made under order of the probate court); *In re* Dennis, 67 Iowa 110, 24 N. W. 746; Mason's Appeal, 89 Pa. St. 402. See *infra*, X, D, 10, b.

An executor de son tort is as much bound by such statutes as a rightful executor. Bennett *v.* Ives, 30 Conn. 329.

70. *Alabama.*— Scott *v.* Ware, 64 Ala. 174.

Arkansas.— Payne *v.* Flournoy, 29 Ark. 500.

Connecticut.— Bennett *v.* Ives, 30 Conn. 329.

Georgia.— Carter *v.* Penn, 79 Ga. 747, 4 S. E. 896; Green *v.* Allen, 45 Ga. 205; Bomgaux *v.* Bevan, Dudley 110; Wylly *v.* King, Ga. Dec. 7, Pt. II.

Illinois.— Colton *v.* Field, 131 Ill. 398, 22 N. E. 545; Dunlap *v.* McGehee, 98 Ill. 287; People *v.* Phelps, 78 Ill. 147. See also Armstrong *v.* Cooper, 11 Ill. 560; Ramsay *v.* Ramsay, 97 Ill. App. 270.

Iowa.— Hart *v.* Jewett, 11 Iowa 276.

Kentucky.— See Com. *v.* Richardson, 8 B. Mon. 81.

Louisiana.— Boyce *v.* Escoffie, 2 La. Ann. 872. See also Harkin's Succession, 2 La. Ann. 923.

Massachusetts.— See Harriman *v.* Tyndale, 184 Mass. 534, 69 N. E. 353.

New York.— Thomson *v.* Taylor, 71 N. Y. 217; Mount *v.* Mitchell, 31 N. Y. 356; Little Falls Nat. Bank *v.* King, 53 N. Y. App. Div. 541, 65 N. Y. Suppl. 1010; Matter of Phipp, 29 Misc. 263, 61 N. Y. Suppl. 241; Allen *v.* Bishop, 25 Wend. 414 (per Nelson, C. J.); *In re* St. John, Tuck. Surr. 126.

North Carolina.— Moore *v.* Byers, 65 N. C. 240.

Ohio.— McDonald *v.* Aten, 1 Ohio St. 293.

Oregon.— See *In re* Osburn, 36 Oreg. 8, 58 Pac. 521.

Pennsylvania.— Stephens *v.* Cotterell, 99 Pa. St. 188; Prevost *v.* Nicholls, 4 Yeates 479; Cairn's Estate, 13 Phila. 350; Ritter's Estate, 11 Phila. 12. See also *In re* Hofelt, 28 Pittsb. Leg. J. 402.

South Carolina.— Lenoir *v.* Winn, 4 Desauss. 65, 6 Am. Dec. 597. See also Wulbern *v.* Timmons, 55 S. C. 456, 33 S. E. 568.

Tennessee.— Rains *v.* Rainey, 11 Humphr. 261.

Virginia.— Scott *v.* Cheatham, 78 Va. 82.

England.— St. 32 & 33 Vict. c. 46, which placed specialty and simple contract debts on the same footing in the distribution of decedents' estates, did not have the effect of enlarging the representative's right of preference among creditors of the same class, and under this act a simple contract debt cannot be paid in preference to the specialty debts when the estate is insolvent. *In re* Hankey, [1899] 1 Ch. 541, 68 L. J. Ch. 242, 80 L. T. Rep. N. S. 470, 47 Wkly. Rep. 444 [*refusing* to follow *Re* Orsmond, 58 L. T. Rep. N. S. 24, which holds to the contrary]. See also *In re* Jones, 55 L. J. Ch. 350.

Canada.— Parsons *v.* Gooding, 33 U. C. Q. B. 499; Douer *v.* Ross, 19 Grant Ch. (U. C.) 229.

A parol contract between the representative and a creditor cannot operate to give the creditor a lien on the decedent's land so as to entitle him to any preference. Moyer *v.* Moyer, 17 Misc. (N. Y.) 648, 40 N. Y. Suppl. 772.

A personal collateral security given by the representative to a creditor cannot give the latter any greater rights as to the real estate than he has without the security. Wyse *v.* Smith, 4 Gill & J. (Md.) 295.

Liens existing on land at debtor's death see *infra*, X, D, 2, c, (III), (A), (3); X, D, 2, c, (III), (B), (3).

71. *Alabama.*— Scott *v.* Ware, 64 Ala. 174, per Breckell, C. J.

Arkansas.— Yonley *v.* Lavender, 27 Ark. 252 [*affirmed* in 21 Wall. (U. S.) 276, 22 L. ed. 536].

California.—Vance *v.* Smith, 124 Cal. 219, 56 Pac. 1031, construing Code Civ. Proc. § 1504. See also McLean *v.* Crow, 88 Cal. 644, 26 Pac. 596.

Georgia.— Herrington *v.* Tolbert, 110 Ga. 528, 35 S. E. 687; Carter *v.* Penn, 79 Ga. 747, 4 S. E. 896; Turk *v.* Ross, 59 Ga. 378; Green *v.* Allen, 45 Ga. 205; Dupree *v.* Adkins, 43 Ga. 475; Davis *v.* Smith, 5 Ga. 274, 47 Am. Dec. 279; Bomgaux *v.* Bevan, Dudley 110.

Illinois.— Armstrong *v.* Cooper, 11 Ill. 560. See also Clingman *v.* Hopkie, 78 Ill. 152.

New York.— *In re* Fox, 92 N. Y. 93; Schmitz *v.* Langhaar, 88 N. Y. 503 (reviewing earlier decisions); Matter of Miner, 39 Misc. 605, 80 N. Y. Suppl. 643; Allen *v.* Bishop, 25 Wend. 414 (per Nelson, C. J.); Parker *v.* Gaines, 17 Wend. 559; St. John's Estate, Tuck. Surr. 126.

Ohio.— McDonald *v.* Aten, 1 Ohio St. 293.

Pennsylvania.— Strouse *v.* Lawrence, 160 Pa. St. 421, 28 Atl. 930 (attachment execution on judgment against representative); Patterson's Appeal, 96 Pa. St. 93; Prevost *v.* Nicholls, 4 Yeates 479; Wootering *v.* Stewart, 2 Yeates 483. See also Matter of Patterson, 1 Ashm. 336.

South Carolina.— Fraser *v.* Charleston, 23 S. C. 373; Hutchison *v.* Bates, 1 Bailey 111; Summers *v.* Tidmore, 1 McCord 270; Tucker *v.* Condy, 7 Rich. Eq. 281.

increased the assets by the discovery of a fund applicable to the claims of creditors does not entitle him to any preference over other creditors of the same class; but the newly discovered fund will be distributed among all the creditors according to the local statute.[72] Where an unpreferred creditor has received a dividend on the first annual distribution, and afterward, but within the time limited for the exhibition and allowance of claims, other demands of the same class are allowed, the latter must be paid an equal percentage with the first before the first can share in a second distribution.[73] The rights of creditors and the relative priorities of their claims become fixed at the time of the debtor's death,[74] and the law then in force controls,[75] and it is immaterial that the debt was contracted[76] or the claim reduced to judgment before the enactment of that law.[77]

(II) *PREFERRED CLAIMS*—(A) *In General.* Where preferred claims are enumerated in the same class the order in which they are enumerated is immaterial, and if the statute does not expressly prefer any one of them over another all are payable *pro rata* if the assets are insufficient to pay them in full,[78] and if, by the common law, one of the claims enumerated in the statute as preferred was entitled to priority over the others, this priority is not displaced by reason of the

Tennessee.— Mosier *v.* Zimmerman, 5 Humphr. 62. See also Rains *v.* Rainey, 11 Humphr. 261.

Texas.— Buchanan *v.* Wagnon, 62 Tex. 375.

Canada.— Bank of British North America *v.* Mallory, 17 Grant Ch. (U. C.) 102, holding that creditors who had recovered judgments against the representative and obtained payment in full were bound to refund the excess over their *pro rata* shares. See also Taylor *v.* Brodie, 21 Grant Ch. (U. C.) 607. *Compare* Henry *v.* Sharp, 18 Grant Ch. (U. C.) 16.

Contra.— *In re* Williams, L. R. 15 Eq. 270, 42 L. J. Ch. 158, 28 L. T. Rep. N. S. 17, 21 Wkly. Rep. 160; *In re* Stubbs, 8 Ch. D. 154, 47 L. J. Ch. 671, 26 Wkly. Rep. 736.

A statute giving priority to judgments and executions applies only to such judgments and executions as existed in the lifetime of the decedent. Bomgaux *v.* Bevan, Dudley (Ga.) 110.

As between several judgments obtained against the representative at different times and on claims of equal degree, their dates are immaterial; all the judgments share *pro rata.* Carter *v.* Penn, 79 Ga. 747, 4 S. E. 896. *Compare* Dupree *v.* Adkins, 43 Ga. 475, holding the judgments payable in the order of their seniority.

72. Colton *v.* Field, 131 Ill. 398, 22 N. E. 545; McDonald *v.* Aten, 1 Ohio St. 293; Wulbern *v.* Timmons, 55 S. C. 456, 33 S. E. 568 (ascertainment of an overpayment by the representative); Rains *v.* Rainey, 11 Humphr. (Tenn.) 261 (setting aside fraudulent assignment by debtor in his lifetime).

73. Dunlap *v.* McGhee, 98 Ill. 287. *Compare* Home Ins. Co. *v.* Lyon, 3 Dem. Surr. (N. Y.) 69.

74. *Georgia.*— Green *v.* Allen, 45 Ga. 205; Williams *v.* Price, 21 Ga. 507, 510; Bomgaux *v.* Bevan, Dudley 110.

Illinois.— Chicago Title, etc., Co. *v.* McGlew, 193 Ill. 457, 61 N. E. 1018 [*affirming* 90 Ill. 58]; Clingman *v.* Hopkie, 78 Ill. 152.

Louisiana.— Gragard's Succession, 106 La. 298, 30 So. 885; Boyce *v.* Escoffie, 2 La. Ann. 872.

New York.— Little Falls Nat. Bank *v.* King, 53 N. Y. App. Div. 541, 65 N. Y. Suppl. 1010; Ainslie *v.* Radcliff, 7 Paige 439.

North Carolina.— Mauney *v.* Holmes, 87 N. C. 428.

Pennsylvania.— Strouse *v.* Lawrence, 160 Pa. St. 421, 28 Atl. 930; Patterson's Appeal, 96 Pa. St. 93; Deichman's Appeal, 2 Whart. 395, 30 Am. Dec. 271; Scott *v.* Ramsey, 1 Binn. 221; Matter of Patterson, 1 Ashm. 336.

South Carolina.— Thomas *v.* McElwee, 3 Strobh. 131; Hutchison *v.* Bates, 1 Bailey 111; Tucker *v.* Condy, 7 Rich. Eq. 281.

75. Chicago Title, etc., Co. *v.* McGlew, 193 Ill. 457, 61 N. E. 1018 [*affirming* 90 Ill. 58]; Paschall *v.* Hailman, 9 Ill. 285; Deichman's Appeal, 2 Whart. (Pa.) 395, 30 Am. Dec. 271.

Statutes not retroactive.— Statutes regulating the priorities of debts do not apply to the estates of persons who died before such statutes were enacted. Woodworth *v.* Paine, 1 Ill. 374; Betts *v.* Bond, 1 Ill. 287; Price *v.* Harrison, 31 Gratt. (Va.) 114. But see Place *v.* Oldham, 10 B. Mon. (Ky.) 400.

76. Chicago Title, etc., Co. *v.* McGlew, 193 Ill. 457, 61 N. E. 1018 [*affirming* 90 Ill. App. 58]; Deichman's Appeal, 2 Whart. (Pa.) 395, 30 Am. Dec. 271. See also State *v.* Dickson, 38 Ga. 171.

77. Paschal *v* Hailman, 9 Ill. 285 [*distinguishing* Woodworth *v.* Paine, 1 Ill. 374; Betts *v.* Bond, 1 Ill. 287]; Deichman's Appeal, 2 Whart. (Pa.) 395, 30 Am. Dec. 271. See also State *v.* Dickson, 38 Ga. 171.

Constitutionality of statute.— A statute which abolishes the priority of judgments with respect to payment out of the personal estate is not unconstitutional as impairing the obligations of contracts because it applies to judgments in existence at the date of its enactment. Deichman's Appeal, 2 Whart. (Pa.) 395, 30 Am. Dec. 271. See also State *v.* Dickson, 38 Ga. 171.

78. Ritter's Estate, 11 Phila. (Pa.) 12.

fact that the statute mentions this claim after the others which it places in the same class.[79]

(B) *As to General Assets* — (1) EXPENSES OF FUNERAL AND ADMINISTRATION. Both by the common law and the modern statutes the proper expenses of the decedent's funeral are given preference, in payment out of the assets, over all debts of the decedent;[80] and a like priority is accorded to the legitimate expenses incident to and necessarily incurred in the administration of the estate.[81]

79. Sullivan *v.* Horner, 41 N. J. Eq. 299, 7 Atl. 411.

80. *Georgia.*— White *v.* Stephens, R. M. Charlt. 56.

Iowa.— Hart *v.* Jewett, 11 Iowa 276.

Kentucky.— Best *v.* Spooner, 4 Ky. L. Rep. 602.

Louisiana.— Alter *v.* O'Brien, 31 La. Ann. 452; Halbert's Succession, 3 La. Ann. 436.

Michigan.— Booth *v.* Radford, 57 Mich. 357, 24 N. W. 102.

Minnesota.— Dampier *v.* St. Paul Trust Co., 46 Minn. 526, 49 N. W. 286.

New Jersey.— Sullivan *v.* Horner, 41 N. J. Eq. 299, 7 Atl. 411.

New York.— Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384.

North Carolina.— Ray *v.* Honeycutt, 119 N. C. 510, 26 S. E. 127; Parker *v.* Lewis, 13 N. C. 21, holding that this is true independently of any promise by the representative.

Pennsylvania.— Luton's Estate, 10 Kulp 161 (bill for tombstone included); Saving Fund *v.* Cartwright, 1 Leg. Rec. 171.

South Carolina.— *Ex p.* Worley, 49 S. C. 41, 26 S. E. 949; Salvo *v.* Schmidt, 2 Speers 512.

Tennessee.— Steger *v.* Frizzell, 2 Tenn. Ch. 369.

Texas.— McLane *v.* Paschal, 47 Tex. 365. See also Robertson *v.* Paul, 16 Tex. 472.

Vermont.— Sawyer *v.* Hebard, 58 Vt. 375, 3 Atl. 529; Shaw *v.* Hallihan, 46 Vt. 389, 14 Am. Rep. 628.

England.— Sharp *v.* Lush, 10 Ch. D. 468, 48 L. J. Ch. 231, 27 Wkly. Rep. 528. See also Rex *v.* Wade, 5 Price 621, 19 Rev. Rep. 664.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 945, 976.

Funeral expenses are preferred to debts due the United States (U. S. *v.* Eggleston, 25 Fed. Cas. No. 15,027, 4 Sawy. 199), debts of record, such as judgments (Holbert's Succession, 3 La. Ann. 436; Sullivan *v.* Horner, 41 N. J. Eq. 299, 7 Atl. 411; Parker *v.* Lewis, 13 N. C. 21), claims secured by trust deeds (McLane *v.* Paschal, 47 Tex. 365), and rents in arrear in the decedent's lifetime (Ritter's Estate, 11 Phila. (Pa.) 12; Salvo *v.* Schmidt, 2 Speers (S. C.) 512).

Advance by representative.— Where an administrator has paid for funeral expenses an amount in excess of the personal assets, such amount should be refunded to him out of the proceeds of the realty in preference to all debts not specific liens thereon. Clayton *v.* Somers, 27 N. J. Eq. 230; Loftis *v.* Loftis, 94 Tenn. 232, 28 S. W. 1091.

Funeral expenses of decedent's family.— In some jurisdictions the statutes giving preference to funeral expenses include expressly or by implication the funeral expenses of the decedent's wife and children. Alter *v.* O'Brien, 31 La. Ann. 452; Sullivan *v.* Horner, 41 N. J. Eq. 299, 7 Atl. 441, where all were killed in a common disaster.

81. *Georgia.*— Mapp *v.* Long, 62 Ga. 568.

Indiana.— See Taylor *v.* Wright, 93 Ind. 121.

Iowa.— Hart *v.* Jewett, 11 Iowa 276.

Kentucky.— Best *v.* Spooner, 4 Ky. L. Rep. 602.

Louisiana.— Moise's Succession, 107 La. 717, 31 So. 990 (attorney's fee); Well's Succession, 24 La. Ann. 162 (attorney's fee); Lauve's Succession, 18 La. Ann. 721 [*following* Friend *v.* Graham, 10 La. 438]; Holbert's Succession, 3 La. Ann. 436. See also Hautau's Succession, 32 La. Ann. 54.

Minnesota.— Dampier *v.* St. Paul Trust Co., 46 Minn. 526, 49 N. W. 286.

Missouri.— Elstroth *v.* Young, 88 Mo. App. 418.

New York.— *In re* Thompson, 41 Barb. 237 [*affirming* 1 Redf. Surr. 490] (judgment against representative for value of attorney's services); *In re* Mahoney, 37 Misc. 472, 75 N. Y. Suppl. 1056 (judgment for costs recovered against the representative in an action by him to recover a claim alleged to be due the decedent in his lifetime). See also Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384.

Pennsylvania.— France's Estate, 16 Wkly. Notes Cas. 350.

Rhode Island.— Hazard *v.* Engs, 14 R. I. 5.

South Carolina.— *Ex p.* Worley, 49 S. C. 41, 26 S. E. 949.

Texas.— Manning *v.* Mayes, 79 Tex. 653, 15 S. W. 638; Callaghan *v.* Grenet, 66 Tex. 236, 18 S. W. 507 (attorney's fees); Williams *v.* Robinson, 56 Tex. 347 (attorney's fees); McLane *v.* Paschal, 47 Tex. 365 (prior to claim secured by trust deed). See also Robertson *v.* Paul, 16 Tex. 472.

See 22 Cent. Dig. tit. "Executors and Administrators," § 950.

The costs of administration have priority over debts due the United States (U. S. *v.* Eggleston, 25 Fed. Cas. No. 15,027, 4 Sawy. 199, holding, however, that these costs do not include the costs and expenses of defending an action brought by the United States to enforce a claim that was *prima facie* just and ought to have been allowed and paid. See also U. S. *v.* Hahn, 37 Mo. App. 580; U. S. *v.* Hunter, 26 Fed. Cas. No. 15,427, 5 Mason 229) and also over a judgment in favor of a creditor against the personal representative (Williams *v.* Robinson, 56 Tex. 347).

(2) Debts Due to the Public or Sovereignty — (a) To United States. By virtue of acts of congress[82] debts due to the United States must be paid before all other debts of the decedent.[83] The statutes giving this priority supersede and control all state laws so far as priorities of claims are concerned,[84] so that the absence of a similar provision in a state statute is immaterial;[85] but the state statutes usually recognize the priority of debts due the United States by including them among the preferred claims.[86]

(b) To State or County — aa. *In General.* The common law of England giving preference to debts due the crown[87] has in some states been declared to be in force so as to give priority to debts due the state, it being held that such debts have priority over the claims of citizens except as against antecedent liens.[88] In many states the statutes expressly give a preference to debts due the state or "the public,"[89] but such statutes apply only where the debt of the state and that of the

Costs in suits by creditors.— In England costs in creditors' suits have priority. Loomes *v.* Stotherd, 1 L. J. Ch. O. S. 220, 1 Sim. & St. 458, 1 Eng. Ch. 458; Barker *v.* Wardle, 2 Myl. & K. 818, 7 Eng. Ch. 818, 39 Eng. Reprint 1157; Larkins *v.* Paxton, 2 Myl. & K. 320, 7 Eng. Ch. 320, 39 Eng. Reprint 965. See also Sanderson *v.* Stoddart, 32 Beav. 155, 9 Jur. N. S. 1216, 7 L. T. Rep. N. S. 662, 11 Wkly. Rep. 275; Newbegin *v.* Bell, 23 Beav. 386, 53 Eng. Reprint 152; Gaunt *v.* Taylor, 2 Hare 413, 24 Eng. Ch. 413. In the United States there are several cases holding that costs thus recovered are preferred claims (Matter of Randell, 8 N. Y. Suppl. 652, 2 Connoly Surr. (N. Y.) 29; Shields *v.* Sullivan, 3 Dem. Surr. (N. Y.) 296. See also Hautau's Succession, 32 La. Ann. 54; *In re* Casey, 2 Silv. Supreme (N. Y.) 585, 6 N. Y. Suppl. 608); but the contrary has been asserted on the ground that the costs are part of the judgment (Shute *v.* Shute, 5 Dem. Surr. (N. Y.) 1), and it has been held that such costs are not proper expenses of administration (Taylor *v.* Wright, 93 Ind. 121. See also U. S. *v.* Eggleston, 25 Fed. Cas. No. 15,027, 4 Sawy. 199), and do not even rank with the debt on which the creditor's judgment is founded but are postponed to debts of every degree incurred by the decedent in his lifetime (Hutchison *v.* Bates, 1 Bailey (S. C.) 111).

Expenses incurred by decedent as administrator.— The expenses of administration which are preferred do not include the costs and expenses of settling an estate of which the decedent was the administrator. Hullett *v.* Hood, 109 Ala. 345, 19 So. 419.

82. U. S. Rev. St. §§ 3466, 3467 [U. S. Comp. St. (1901) p. 2314].

83. U. S. *v.* Hahn, 37 Mo. App. 580; Com. *v.* Lewis, 6 Binn. (Pa.) 266; Gregory's Estate, 11 Phila. (Pa.) 126; Brent *v.* Washington Bank, 10 Pet. (U. S.) 596, 9 L. ed. 547; U. S. *v.* North Carolina Bank, 6 Pet. (U. S.) 29, 8 L. ed. 308; U. S. *v.* Duncan, 25 Fed. Cas. No. 15,003, 4 McLean 607, 12 Ill. 523.

Debts payable at a future day included.— U. S. *v.* North Carolina Bank, 6 Pet. (U. S.) 29, 8 L. ed. 308.

Priority not affected by rule of marshaling assets.— U. S. *v.* Duncan, 25 Fed. Cas. No. 15,003, 4 McLean 607, 12 Ill. 523.

Statute liberally construed.— U. S. *v.* Duncan, 25 Fed Cas. No. 15,003, 4 McLean 607, 12 Ill. 523.

A debt to the United States is not a lien upon the property of the decedent but has only a priority of payment. Postmaster Gen. *v.* Robbins, 19 Fed. Cas. No. 11,314, 1 Ware 163; U. S. *v.* Eggleston, 25 Fed. Cas. No. 15,027, 4 Sawy. 199 [*citing* U. S. *v.* Fisher, 2 Cranch (U. S.) 358, 2 L. ed. 304].

The expenses of the decedent's last illness are a debt due from the deceased and claims due the United States have priority over them. Postmaster Gen. *v.* Robbins, 19 Fed. Cas. No. 11,314, 1 Ware 163; U. S. *v.* Eggleston, 25 Fed. Cas. No. 15,027, 4 Sawy. 199.

Priority over widow's allowance see *supra*, IX, G, 1.

Allowance and classification by the probate court are not essential to justify the representative in paying a debt due the United States. U. S. *v.* Hahn, 37 Mo. App. 580.

84. U. S. *v.* Duncan, 25 Fed. Cas. No. 15,003, 4 McLean 607, 12 Ill. 523.

85. U. S. *v.* Hahn, 37 Mo. App. 580.

86. See Hart *v.* Jewett, 11 Iowa 276.

87. See *supra*, X, D, 2, b, (I).

88. Robinson *v.* Darien Bank, 18 Ga. 65; Orem *v.* Wrightson, 51 Md. 34, 34 Am. Rep. 286; Smith *v.* State, 5 Gill (Md.) 45; State *v.* State Bank, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561; Murray *v.* Ridley, 3 Harr. & M. (Md.) 171. See also Com. *v.* Logan, 1 Bibb (Ky.) 529.

A judgment belonging to the state has priority over a judgment in favor of an individual. Contee *v.* Chew, 1 Harr. & J. (Md.) 417.

A specialty debt due to a citizen has been preferred to a simple contract debt due the commonwealth. Com. *v.* Logan, 1 Bibb (Ky.) 529.

In South Carolina it has been held that the common law on this point is not in force, and that the only priority to which the state is entitled is that afforded by the statute. State *v.* Harris, 2 Bailey (S. C.) 598; Klinck *v.* Keckley, 2 Hill Eq. (S. C.) 250.

89. See Baxter *v.* Baxter, 23 S. C. 114.

In Pennsylvania debts due to the commonwealth are payable after all other debts. 1 Brightly Purdon Dig. p. 591. But a judgment in favor of the commonwealth ranks

individual are otherwise of equal degree and equally entitled to payment.[90] In the absence of a statute giving a preference to debts due to a county, such debts have no priority over the general debts of the decedent.[91]

bb. *What Debts Included*—(aa) *In General.* In determining what debts are within the meaning of a statute giving priority to debts due the state or the public, the wording of the particular statute is of course controlling, and the settled rules of statutory construction must be followed.[92] The preference given by statute to a claim due the state is not affected by the fact that the state holds a mortgage as security.[93]

(bb) *Debts to Corporation Owned by State*—aaa. *Under General Statutes.* A debt due to a bank owned and controlled entirely by the state is not a debt due to the state or "the public" within the meaning of a general statute giving such debts a preference.[94]

bbb. *Under Special Statutes.* It is, however, competent for the legislature, by a special enactment, to give debts due to such corporations priority.[95]

(c) Taxes. The statutes usually include taxes among the preferred debts of decedents,[96] but, where the assessment is made after the death of the decedent, the taxes are not preferred claims.[97]

with other judgments. Ramsey's Appeal, 4 Watts (Pa.) 71.

90. Klinck *v.* Keckley, 2 Hill Eq. (S. C.) 250; Dunlap *v.* Bynum, 4 Desauss. (S. C.) 646; Public Accounts *v.* Greenwood, 1 Desauss. (S. C.) 450.

91. Hargrove *v.* Lilly, 69 Ga. 326.

Construction of statutes.— A statute giving priority to debts due the state does not include debts due a county (Hargrove *v.* Lilly, 69 Ga. 326), but it seems that such debts are included in a statute giving priority to "debts due to the public" (Baxter *v.* Baxter, 23 S. C. 114).

92. Baxter *v.* Baxter, 23 S. C. 114. See, generally, Statutes.

General terms used will not be limited. Baxter *v.* Baxter, 23 S. C. 114.

Liability as surety on county treasurer's bond.— The liability of the decedent as surety on the bond of a county treasurer who defaulted is a "debt due to the public" within the meaning of a statute preferring such debts. Baxter *v.* Baxter, 23 S. C. 114.

Taxes collected and retained by decedent.— A statute which gives priority to taxes and levies assessed on a decedent prior to his death gives no lien or priority in favor of the state on the estate of a deceased defaulting sheriff for taxes collected and unaccounted for by him. Spillman *v.* Payne, 84 Va. 435, 4 S. E. 749. See also Hargrove *v.* Lilly, 69 Ga. 326.

93. Lenoir *v.* Winn, 4 Desauss. (S. C.) 65, 6 Am. Dec. 597.

94. Georgia Cent. Bank *v.* Little, 11 Ga. 346; State Bank *v.* Gibbs, 3 McCord (S. C.) 377 [*citing* U. S. Bank *v.* Planters Bank, 9 Wheat. (U. S.) 904, 6 L. ed. 244]; Fields *v.* Wheatley, 1 Sneed (Tenn.) 351. *Compare* Robinson *v.* Darien Bank, 18 Ga. 65.

95. Central Bank *v.* Little, 11 Ga. 346. See also State *v.* Dickson, 38 Ga. 171.

96. See Hart *v.* Jewett, 11 Iowa 276; Bonaparte *v.* State, 63 Md. 465; Fulton *v.* Nicholson, 7 Md. 104; State *v.* Donaldson, 28 Mo. App. 190; *In re* Babcock, 115 N. Y. 450, 22 N. E. 263 [*affirming* 52 Hun 142, 4 N. Y. Suppl. 903]; Mitchell *v.* Bowne, 63 How. Pr. (N. Y.) 1; Coleman *v.* Coleman, 5 Redf. Surr. (N. Y.) 524. See also Naftel *v.* Osborn, 96 Ala. 623, 12 So. 182.

Taxes prior to debts due United States.— U. S. *v.* Eggleston, 25 Fed. Cas. No. 15,027, 4 Sawy. 199.

Assessment on life-estate.— Under a statute giving a preference to "taxes assessed on the estate of the deceased previous to his death," where an assessment was made during the decedent's lifetime on realty in which he had a life-estate and the taxes remained unpaid at the time of his death, they were entitled to preferential payment out of his personal estate. Coleman *v.* Coleman, 5 Redf. Surr. (N. Y.) 524.

Street assessment.— Under a statute which directs that the representative shall pay "the debts" of the decedent in a certain order and provides that "taxes assessed upon the estate of the deceased previous to his death" shall be preferred, a street assessment is not entitled to preference unless it was a personal debt of the decedent and not merely a charge on land. Matter of Hun, 7 Misc. (N. Y.) 409, 28 N. Y. Suppl. 253. See also Seabury *v.* Bowen, 3 Bradf. Surr. (N. Y.) 207.

97. Pryor *v.* Davis, 109 Ala. 117, 19 So. 440. See also *In re* Selleck, 111 N. Y. 284, 19 N. E. 66. *Compare* U. S. *v.* Eggleston, 25 Fed. Cas. No. 15,027, 4 Sawy. 199, applying the law of Oregon.

What taxes within statute.— Under a statute giving a preference to "taxes assessed upon the estate of the deceased previous to his death" an assessment so far completed before decedent's death that the name of the person described as owner cannot be changed or altered by the assessment officers is payable from his estate as a preferred claim in due course of administration. *In re* Babcock, 115 N. Y. 450, 22 N. E. 263 [*affirming* 52 Hun 142, 4 N. Y. Suppl. 903].

(3) Expenses of Last Illness. The expenses of the decedent's last illness, including the charges of physicians, bills for medicines, etc., are entitled to preference under some statutes.[98]

(4) Wages of Servants, Etc. Wages due to servants, employees, or laborers for a certain period prior to the decedent's death are in some states given a preference.[99]

98. *Iowa.*— Hart *v.* Jewett, 11 Iowa 276.

Louisiana.— Schmidt's Succession, 108 La. 293, 32 So. 413; Holbert's Succession, 3 La. Ann. 436. But under the civil code the claim must be recorded or it cannot rank as privileged. Elliott *v.* Elliott, 31 La. Ann. 31.

Maine.— Huse *v.* Brown, 8 Me. 167.

Michigan.— Booth *v.* Radford, 57 Mich. 357, 24 N. W. 102.

Pennsylvania.— Staggers' Estate, 8 Pa. Super. Ct. 260, 43 Wkly. Notes Cas. 79; Wasson's Estate, 8 Pa. Dist. 480, 22 Pa. Co. Ct. 111, 15 Montg. Co. Rep. 26; Jones' Estate, 2 Chest. Co. Rep. 302; *In re* Silvius, 3 Lack. Leg. N. 84; Pottsville Union Sav. Fund Assoc. *v.* Cartwright, 1 Leg. Rec. 171.

South Carolina.— *Ex p.* Worley, 49 S. C. 41, 26 S. E. 949; McVoy *v.* Percival, Dudley 337.

See 22 Cent. Dig. tit. "Executors and Administrators," § 946.

Validity of claim.— It must be shown that the physician's services, for which a preference is claimed, were actually rendered. Spiro *v.* Leibenguth, 51 La. Ann. 152, 24 So. 785.

Services of a nurse are included. *In re* Silvius, 3 Lack. Leg. N. (Pa.) 84; McVoy *v.* Percival, Dudley (S. C.) 337.

What constitutes last sickness.— The "last sickness," the expenses of which are preferred by statute, is the sickness which terminated in the patient's death, and the right to preference is limited to services performed and expense incurred during that sickness (Whitaker's Succession, 7 Rob. (La.) 91; Huse *v.* Brown, 8 Me. 167; Wasson's Estate, 8 Pa. Dist. 480, 22 Pa. Co. Ct. 111, 15 Montg. Co. Rep. (Pa.) 26; Duckett's Estate, 1 Chest. Co. Rep. (Pa.) 78, the illness after the patient is prostrated and when services are constantly necessary), but in the absence of statute no particular period preceding the death can be fixed as constituting the last illness of which the expenses are preferred, as the duration of the last illness must vary considerably according to the nature of the disease and the condition of the patient (Huse *v.* Brown, 8 Me. 167; Stagger's Estate, 8 Pa. Super. Ct. 260, 43 Wkly. Notes Cas. (Pa.) 79; Wasson's Estate, 8 Pa. Dist. 480, 22 Pa. Co. Ct. 111, 15 Montg. Co. Rep. (Pa.) 26; McVoy *v.* Percival, Dudley (S. C.) 337).

Services to others than decedent.— A statute placing among preferred debts of an estate a debt for "medical services within the twelve months preceding the decease" means services to the decedent only and not to his wife, child, or tenant. Baker *v.* Dawson, 131 N. C. 227, 32 S. E. 588.

Expenses of administration preferred to expenses of last illness.— France's Estate, 16 Wkly. Notes Cas. (Pa.) 350.

99. Hullett *v.* Hood, 109 Ala. 345, 19 So. 419 (holding, however, that the evidence in support of the claim was insufficient to show how much had been earned and was due in the year of the decedent's death); Chicago Title, etc., Co. *v.* McGlew, 193 Ill. 457, 61 N. E. 1018 [*affirming* 90 Ill. App. 58]; Cawood *v.* Wolfley, 56 Kan. 281, 43 Pac. 236, 54 Am. St. Rep. 590, 31 L. R. A. 538; Martin's Appeal, 33 Pa. St. 395; Boniface *v.* Scott, 3 Serg. & R. (Pa.) 351; *Ex p.* Meason, 5 Binn. (Pa.) 167; Miller's Estate, 1 Ashm. (Pa.) 323; Hotz's Estate, 16 Wkly. Notes Cas. (Pa.) 351; McKim's Estate, 2 Pa. L. J. Rep. 224, 3 Pa. L. J. 502; Pottsville Union Sav. Fund Assoc. *v.* Cartwright, 1 Leg. Rec. (Pa.) 171. See also Naftel *v.* Osborn, 96 Ala. 623.

Who are servants.— The term "servant" as used in these statutes has been held to include a clerk in a store (Cawood *v.* Wolfley, 56 Kan. 281, 43 Pac. 236, 54 Am. St. Rep. 590, 31 L. R. A. 538), a bar-keeper (Boniface *v.* Scott, 3 Serg. & R. (Pa.) 351), and a person hired at a monthly salary, who resided in the house of his employer and whenever required assisted in the domestic labor of the family, although principally employed in aiding the decedent in his market and slaughter-house (Miller's Estate, 1 Ashm. (Pa.) 323); but the term has been held to mean household servants and not to include persons employed in iron works (*Ex p.* Meason, 5 Binn. (Pa.) 167).

A farm laborer is not a servant within the meaning of the Pennsylvania act of 1834, preferring servants' wages for a period of one year, but under the act of 1891 the wages of such a laborer for six months preceding the decedent's death are preferred. Sollenberger's Estate, 8 Pa. Dist. 626, 15 Montg. Co. Rep. (Pa.) 145.

Effect of leaving service.—If a year's wages are due from a decedent's estate to a servant, she is entitled to that amount as a preferred claim, although she left his service several months before his death. Martin's Appeal, 33 Pa. St. 395.

Inclusion of unpreferred claim.— The fact that a servant lent money to her employer and included it in her claim for wages did not affect her statutory right of preference if the sums lent could be easily separated from the sums due for wages. Chicago Title, etc., Co. *v.* McGlew, 193 Ill. 457, 61 N. E. 1018 [*affirming* 90 Ill. App. 58].

Claims of illegitimate children and of their mother.— Where the mother of illegitimate children allowed the father to have their

(5) RENT. Among the claims preferred by the local statutes rent is frequently included.[1]

(6) CLAIMS FOUNDED ON FIDUCIARY RELATIONS — (a) IN GENERAL. Property held in trust does not on the trustee's death become assets of his estate, but, although mingled with the trustee's own funds or used by him in the purchase of property for his own benefit, may, if it can be traced, be followed and reclaimed by the *cestui que trust* in the hands of the decedent's personal representative, regardless of the claims of the decedent's creditors; but where the trust funds were wasted by the trustee or can no longer be traced, the *cestui que trust* can claim only as a general creditor of the estate unless some statute entitles him to a preference.[2] Before the enactment of statutes abolishing the distinction between

services until they reached majority, in consideration of his agreement to bring them up and to provide a home for her at his death, neither her claim under the contract nor the claims of the children under an agreement by which they worked for the father after arriving at age and permitted him to hold their wages for them are preferred claims against his estate after his death. Story *v.* Story, 61 S. W. 279, 62 S. W. 865, 22 Ky. L. Rep. 1731, 1869.

1. Longwell *v.* Ridinger, 1 Gill (Md.) 57; Greenough's Appeal, 9 Pa. St. 18; Morgan's Estate, 11 Pa. Co. Ct. 536; Walker's Estate, 6 Pa. Co. Ct. 515; McEwen *v.* Joy, 7 Rich. (S. C.) 33. See also Naftel *v.* Osborn, 96 Ala. 623, 12 So. 182. Under N. Y. Code Civ. Proc. § 2719, the surrogate may give to rents due or accruing on leases held by the decedent at the time of his death a preference over claims of the fourth class, if it appears to the satisfaction of the surrogate that such a preference will benefit the estate. Hovey *v.* Smith, 1 Barb. 372.

Liability of cotenant under mining lease. —A claim for money payable as rent by a cotenant, for the privilege of taking coal out of a mine at a certain sum per cubic yard, is a preferred debt under the Pennsylvania statute. Greenough's Appeal, 9 Pa. St. 18.

Rent due for a pew in a church is not a preferred debt under the New York statute unless due on a lease of the pew for a term of years which is assets in the hands of the administrator, or unless giving the rent a preference would in some way benefit the personal estate of the decedent. Johnson *v.* Corbett, 11 Paige (N. Y.) 265.

Taxes included in rent.— Where the terms of the lease include taxes to be paid by the lessee as a part of the rent, such taxes may be allowed as a preferred claim. Morgan's Estate, 11 Pa. Co. Ct. 536.

The preference is not confined to the last year's rent, under the Pennsylvania statute, but no more than one year's rent can be included. Morgan's Estate, 11 Pa. Co. Ct. 536.

Rent accruing after tenant's death.—Under the South Carolina statute which simply uses the word "rent" without any limitation, rent accruing after the tenant's death is preferred as well as rent which accrued in his lifetime. McEwen *v.* Joy, 7 Rich. (S. C.) 33. But under the Pennsylvania statute rent accruing after the tenant's death is not preferred; but whether the rent can be apportioned so that what was due at the death may be preferred appears to be unsettled. See Walker's Estate, 6 Pa. Co. Ct. 515; McKim's Estate, 2 Pa. L. J. Rep. 224, 3 Pa. L. J. 502; Kemp's Estate, 34 Pittsb. Leg. J. 82.

The relation of landlord and tenant must have existed; the relation of innkeeper and guest is not sufficient. Ferris' Estate, 7 Pa. Dist. 425.

2. *California.*— Pierce *v.* Robinson, 13 Cal. 116.

Kansas.— Hubbard *v.* Alamo Irrigating, etc., Co., 53 Kan. 637, 36 Pac. 1053, 37 Pac. 625.

Louisiana.— See Stone's Succession, 31 La. Ann. 311; Longbottom *v.* Babcock, 9 La. 44.

Massachusetts.—Johnson *v.* Ames, 11 Pick. 173.

New Hampshire.— Rockwood *v.* Brookline School Dist., 70 N. H. 388, 47 Atl. 704.

New Jersey.— Smith *v.* Combs, 49 N. J. Eq. 420, 24 Atl. 9.

New York.— *In re* Fox, 92 N. Y. 93 (conversion of assets by executor); Barlow *v.* Yeomans, 50 Barb. 187 (conversion of assets by executor); Matter of Van Duzer, 51 How. Pr. 410; Moses *v.* Murgatroyd, 1 Johns. Ch. 119, 7 Am. Dec. 478; Graham *v.* Van Duzer, 2 Redf. Surr. 322.

Ohio.— Deering Harvester Co. *v.* Keifer, 20 Ohio Cir. Ct. 311, 11 Ohio Cir. Dec. 270.

Pennsylvania.— Rado's Estate, 30 Pittsb. Leg. J. 410.

South Carolina.— See Phælon *v.* Perman, 2 McCord Eq. 423.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 960, 961–983; *supra*, III, H, 3; X, A, 7; and, generally, TRUSTS.

Breach of duty by guardian.— The claim of a ward against the estate of his deceased guardian, based on the guardian's failure to collect money belonging to the ward, is a mere claim for damages and an accounting, and in the absence of a statute giving it a preference it is payable ratably with the claims of other general creditors of the estate. But it would be otherwise if the money had been collected and retained. Dodson *v.* McKelvey, 93 Mich. 263, 53 N. W. 517.

specialty and simple contract debts in administration,[3] a claim against a decedent's estate for a breach of trust committed by the decedent in his lifetime ranked merely as a simple contract debt,[4] unless the breach of trust was also a breach of a bond or covenant executed by the trustee or fiduciary, in which case the claim ranked as a debt by specialty.[5] Local statutes in the United States, however, frequently give a preference to claims against the decedent as executor or administrator,[6] guardian,[7] or trustee.[8]

(b) Estate of Foreign Fiduciary. In Georgia a statute of this character has been held to apply solely to the estates of fiduciaries appointed under the laws of that state, the debts of foreign fiduciaries being payable according to their ordinary dignity,[9] but in Virginia such a statute has been held applicable to the

3. See *supra*, X, D, 2, c, (I).

4. Bateman *v.* Latham, 56 N. C. 35; Benbury *v.* Benbury, 22 N. C. 235; Rolain *v.* Darby, 1 McCord Eq. (S. C.) 472; Burton *v.* Smith, 4 Fed. Cas. No. 2,219, 4 Wash. 522; Vernon *v.* Vawdry, 2 Atk. 119, 26 Eng. Reprint 474. See also Cox *v.* Bateman, 2 Ves. 19, 28 Eng. Reprint 13. But see Smith *v.* Ellington, 14 Ga. 379; Gardsden *v.* Lord, 1 Desauss. (S. C.) 208.

5. Benbury *v.* Benbury, 22 N. C. 235; Rice *v.* Cannon, Bailey Eq. (S. C.) 172 (breach of trust by administrator who had given bond); McDowell *v.* Caldwell, 2 McCord Eq. (S. C.) 43, 16 Am. Dec. 635 (breach of guardian's bond); Burton *v.* Smith, 4 Fed. Cas. No. 2,219, 4 Wash. 522; Primrose *v.* Bromley, 1 Atk. 89, 26 Eng. Reprint 58 (covenant by assignee of bankrupt); Benson *v.* Benson, 1 P. Wms. 130, 24 Eng. Reprint 324. But see Stock *v.* Parker, 2 McCord Eq. (S. C.) 376; Rolain *v.* Darby, 1 McCord Eq. (S. C.) 472.

6. Johnson *v.* Brady, 24 Ga. 131; Fitzsimmons *v.* Cassell, 98 Ill. 332 [*affirming* 6 Ill. App. 525]; Tunstall *v.* Pollard, 11 Leigh (Va.) 1. See also Godbold *v.* Godbold, 13 S. C. 601; Shearman *v.* Christian, 6 Rand. (Va.) 49.

Where one of two executors receives money due the estate, which is not accounted for either by him in his lifetime or by his legal representative, the surviving executor may have the amount so received by his co-executor allowed against the latter's estate as a sixth-class claim. Fitzsimmons *v.* Cassell, 98 Ill. 332 [*affirming* 6 Ill. App. 525].

Waste by husband of executrix.— Where a man marries an executrix, administers the estate which she represents, and dies leaving her surviving, no judgment having been rendered against him in his lifetime for the waste committed, a claim founded on the waste committed by the husband does not constitute a debt due from him to the original estate, and in the administration of his own estate it is not entitled to a preference over his own debts. Henrico Justices *v.* Turner, 6 Leigh (Va.) 116.

Where a legatee takes the individual note of the executor secured by a mortgage on his individual property in discharge of the legacy, and gives a receipt to the representative as executor, the claim for the legacy becomes the individual debt of the executor and on his death has no fiduciary character entitling it to a preference. Lawton *v.* Fish, 51 Ga. 647. *Compare* Smith *v.* Blackwell, 31 Gratt. (Va.) 291.

7. *Georgia.*— Ragland *v.* Justices Inferior Ct., 10 Ga. 65; Watson *v.* Watson, 1 Ga. 266.

Illinois.— Cruce *v.* Cruce, 21 Ill. 46. See also Perry *v.* Carmichael, 95 Ill. 519.

Kentucky.— White *v.* Carrico, 2 Metc. 232; Curle *v.* Curle, 9 B. Mon. 309; Com. *v.* Barstow, 3 B. Mon. 290.

Virginia.— Smith *v.* Blackwell, 31 Gratt. 291.

United States.— Black *v.* Scott, 3 Fed. Cas. No. 1,464, 2 Brock. 325, construing the Virginia statute.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 961, 984.

Claim not preferred to widow's allowance. —Cruce *v.* Cruce, 21 Ill. 46. See *supra*, IX, G, 1.

Creditors of ward may be substituted to his rights. White *v.* Carrico, 2 Metc. (Ky.) 232.

Giving bonds for amount due ward.—Where a guardian on settlement with his ward executes bonds to the ward for the amount due him, the original indebtedness does not become merged or extinguished unless there is full and satisfactory evidence that this result was intended; therefore the bonds being for a fiduciary debt, the debt retains that character and is entitled to preference. Smith *v.* Blackwell, 31 Gratt. (Va.) 291. *Compare* Lawton *v.* Fish, 51 Ga. 647.

8. Latimer *v.* Sayre, 45 Ga. 468; Svanoe *v.* Jurgens, 144 Ill. 507, 33 N. E. 955 [*reversing* 44 Ill. App. 277]; Perry *v.* Carmichael, 95 Ill. 519; Wilson *v.* Kirby, 88 Ill. 566. *Compare* Lathrop *v.* Brown, 65 Ga. 312.

The relation of trustee and cestui que trust must have existed between the decedent and the claimant; there must have been a trust in the technical sense of the term. Southern Star Copper Lightning Rod Co. *v.* Cleghorn, 59 Ga. 782; Shipherd *v.* Furness, 153 Ill. 590, 39 N. E. 1096 [*affirming* 46 Ill. App. 319]; Svanoe *v.* Jurgens, 144 Ill. 507, 33 N. E. 955 [*reversing* 44 Ill. App. 277]; Wilson *v.* Kirby, 88 Ill. 566; Weer *v.* Gand, 88 Ill. 490; Ford *v.* Stuart First Nat. Bank, 100 Ill. App. 70. See also Latimer *v.* Sayre, 45 Ga. 468; Chappell *v.* Craig, 96 Iowa 273, 65 N. W. 146.

9. Caruthers *v.* Corbin, 38 Ga. 75.

estate of a foreign executor who had never qualified in that state but died holding assets of his testator there.[10]

(7) Claims For Provisions Furnished. In Louisiana supplies of provisions furnished to the debtor or his family "during the last six months" are privileged claims against his succession.[11]

(8) Liquidated Demands. Under the statutes in a few states liquidated demands have preference over debts on open account,[12] a demand being liquidated whenever the amount due was agreed upon by the parties or fixed by operation of law.[13]

(9) Debts Incurred by Representative[14]—(a) In Performing Decedent's Contracts.[15] Debts incurred by the decedent in his lifetime have priority over debts contracted by the personal representative in performing the decedent's executory contracts.[16]

(b) In Carrying on Decedent's Business.[17] Debts created by the decedent in his lifetime have also priority of payment out of his general estate over debts incurred by the representative in carrying on the decedent's business pursuant to testamentary directions.[18]

(10) Priority Between Matured and Unmatured Claims. Between debts of the same class no distinction in dignity or priority exists by reason of the fact that one is due presently and another not due until a future day,[19] but a debt owing presently, although not yet due, retains its priority over debts of lower degree, and without providing for its payment the representative cannot lawfully pay debts of inferior dignity.[20] The existence of merely contingent debts does not, however, in the absence of express statute, prevent the representative from applying the assets to debts of inferior degree.[21]

10. Tunstall *v.* Pollard, 11 Leigh (Va.) 1.

11. See Moise's Succession, 107 La. 717, 31 So. 990; Duke's Succession, 41 La. Ann. 209, 6 So. 502.

12. See Kelley *v.* Terhune, 113 Ga. 365, 38 S. E. 839; Boyd *v.* Flournoy, 67 Ga. 575.

13. Hargroves *v.* Cooke, 15 Ga. 321. See also Furman *v.* Moore, 64 N. C. 358.

Assent to account rendered.—Where the debtor in his lifetime assented to the correctness of an account rendered to him, the account is a liquidated demand within the meaning of the statute. Kelley *v.* Terhune, 113 Ga. 365, 38 S. E. 839.

Claim for money collected and retained.—A claim against the estate of a deceased attorney for a certain sum of money collected and retained by him is a liquidated demand. Smith *v.* Ellington, 14 Ga. 379.

14. Expenses of funeral and of administration see *supra*, X, D, 2, c, (II), (B), (1).

15. See also *supra*, VIII, B.

16. *In re* Allaim, 199 Pa. St. 573, 49 Atl. 252, building contracts.

17. See also *supra*, VIII, C, 3, b.

18. Morrow *v.* Morrow, 2 Tenn. Ch. 549, holding that this is true, although the will directs that all the testator's property shall be chargeable with the debts thus contracted by the representative. See also Willis *v.* Sharp, 115 N. Y. 396, 22 N. E. 149, 5 L. R. A. 636 [*reversing* 46 Hun 540]; *In re* Allam, 199 Pa. St. 573, 49 Atl. 252; Cutbush *v.* Cutbush, 1 Beav. 184, 3 Jur. 142, 8 L. J. Ch. 175, 17 Eng. Ch. 185, 48 Eng. Reprint 912; Lucas *v.* Williams, 4 De G. F. & J. 436, 10 Wkly. Rep. 677, 65 Eng. Ch. 339, 45 Eng. Reprint 1253.

Debts contracted in making crops.—All debts contracted by an administrator, who is lawfully carrying on a farm and completing a crop growing at the time of the death of the intestate, are privileged claims on the income of the place, although not on other property; and a subsequent administrator is bound to pay such debts. But if the proceeds of the crop have been appropriated to the payment of debts due from the deceased in his lifetime, or have been declared assets, then such creditor is entitled to payment out of any other fund of the estate. Emanuel *v.* Norcum, 7 How. (Miss.) 150. Under Ala. Code, 1886, § 2098, which provides that "any crop commenced by a decedent may be completed and gathered by the executor or administrator, and, the expenses of the plantation being deducted therefrom, is assets in his hands," the rent of land, taxes, the cost of completing, harvesting, and selling the crop, hauling, and the charge for preserving the property, are proper allowances to an administratrix before any creditor can claim payment out of the proceeds of the crop. Naftel *v.* Osborn, 96 Ala. 623, 12 So. 182.

19. Hutchinson *v.* Bates, 1 Bailey (S. C.) 111. See also Cook *v.* Woodard, 5 Dem. Surr. (N. Y.) 97; Dunn *v.* Sublett, 14 Tex. 521. But *compare* Evans *v.* Norris, 2 N. C. 411.

20. U. S. *v.* North Carolina Bank, 6 Pet. (U. S.) 29, 8 L. ed. 308 (debt due the United States); Atkinson *v.* Grey, 18 Jur. 282, 1 Sm. & G. 577; Lemun *v.* Fooke, 3 Lev. 57. See also Dunn *v.* Sublett, 14 Tex. 521.

21. Delamothe *v.* Lanier, 4 N. C. 296; Dunlap *v.* Bynum, 4 Desauss. (S. C.) 646;

(11) Priority Between Resident and Non-Resident Creditors. In the absence of a statute so providing, resident creditors as such have no priority over non-residents but both stand on a footing of equality according to the ordinary rank and dignity of their claims,[22] notwithstanding the fact that the assets in the domestic state are insufficient to pay all the creditors in full and that in the state where the foreign creditors reside there are other assets upon which they can administer.[23]

(12) Priority Dependent on Time of Filing or Proving Claim. Under the statutory system prevailing in some states debts not in the preferred classes have priority according to the time when they are exhibited or filed, those exhibited or filed within a certain period being placed in a class by themselves to be paid in priority to debts exhibited or filed thereafter.[24] This mode of obtaining priority does not, however, exist except where expressly provided for by statute; but in the absence of such a provision all unpreferred claims exhibited

Henderson *v.* Gilchist, 17 Jur. 570, 22 L. J. Ch. 970, 1 Wkly. Rep. 426. See also Dunn *v.* Sublett, 14 Tex. 521.

22. *Arkansas.*— Yonley *v.* Lavender, 27 Ark. 252 [*affirmed* in 21 Wall. (U. S.) 276, 22 L. ed. 536].

Kentucky.—Grey *v.* Lewis, 79 Ky. 453.

Maryland.—See Murray *v.* Ridley, 3 Harr. & M. 171.

Massachusetts.—See Dawes *v.* Head, 3 Pick. 128.

New Hampshire.—See Goodall *v.* Marshall, 11 N. H. 88, 35 Am. Dec. 472.

North Carolina.— Findley *v.* Gidney, 75 N. C. 395.

Pennsylvania.— See *In re* Miller, 3 Rawle 312, 24 Am. Dec. 345.

Texas.— Tyler *v.* Thompson, 44 Tex. 497, 23 Am. Rep. 600.

England.— *In re* Klœbe, 28 Ch. D. 175, 54 L. J. Ch. 297, 52 L. T. Rep. N. S. 19, 33 Wkly. Rep. 391.

Canada.— Milne *v.* Moore, 24 Ont. 456.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1000; and *infra*, XVI, D, 2.

Construction of statute.— The object of the South Carolina act of 1788, providing that, where an alien died indebted to citizens of that state, the claims of such citizens, although founded on simple contracts, were payable in the same manner as if liquidated by bond or other specialty, was to give citizens of the state a preference over foreigners in the administration of the estate of a deceased alien; but it was not intended that the debts of South Carolina citizens should be paid first to the total exclusion of foreign creditors. Mitchell *v.* Fayolle, 4 McCord (S. C.) 28.

23. Findley *v.* Gidney, 75 N. C. 395. See also Tyler *v.* Thompson, 44 Tex. 497, 23 Am. Rep. 600.

24. See Keith *v.* Parks, 31 Ark. 664; Phelps *v.* Greenbaum, 87 Iowa 347, 54 N. W. 76; *In re* Wonn, 80 Iowa 750, 45 N. W. 1063; Chandler *v.* Hockett, 12 Iowa 269; Hart *v.* Jewett, 11 Iowa 276; Madison County Bank *v.* Suman, 79 Mo. 527; Buckhartt *v.* Helfrich, 77 Mo. 376; State Bank *v.* Tutt, 44 Mo. 366; Miller *v.* Janney, 15 Mo. 265; Jones *v.* Davis, 37 Mo. App. 69; Williams *v.* Penn, 12 Mo. App. 393 (claims not accruing until after death of debtor); Converse *v.* Sorley, 39 Tex. 515.

The mere filing within the time limited is sufficient to give a claim its statutory rank; proving or establishing the claim within such time is not necessary, provided that it be finally established within the time allowed for the proof of claims. Smith *v.* McFadden, 56 Iowa 482, 9 N. W. 350; Goodrich *v.* Conrad, 24 Iowa 254; Noble *v.* Morrey, 19 Iowa 509; Chandler *v.* Hackett, 12 Iowa 269.

Claims presented and approved but not formally filed.— Under the Iowa statute providing that claims filed within a certain period after notice of representative's appointment are entitled to be paid in a certain order, valid claims presented and approved by the representative within the statutory period are entitled to rank accordingly, although not formally filed if, under the circumstances, other parties in interest are not prejudiced. *In re* Wonn, 80 Iowa 750, 45 N. W. 1063.

Contingent claims.— Where a claim has been filed against an estate as a contingent claim, and it appears by the register of claims in probate that the claim has been allowed and established by the court as a claim of the third class, it must be presumed, in the absence of any other evidence, that it was allowed and established only as a contingent claim; and upon such showing alone it is proper for the court to overrule a motion for unconditional payment by the administrator. Blanchard *v.* Conger, 61 Iowa 153, 16 N. W. 59.

As to judgments see Keith *v.* Parks, 31 Ark. 664; Cooley *v.* Smith, 17 Iowa 99; Madison County Bank *v.* Suman, 79 Mo. 527; State Bank *v.* Tutt, 44 Mo. 366; Converse *v.* Sorley, 39 Tex. 515; Simpson *v.* Knox, 1 Tex. Unrep. Cas. 569.

Excuse for delay.— Under Iowa Rev. St. § 2405, a claim, although not filed within the statutory period of eighteen months, may nevertheless be given priority as a claim of the third class (i. e. those filed within six months) if "peculiar circumstances entitle the claimant to equitable relief." Brewster *v.* Kendrick, 17 Iowa 479. See also Kells *v.* Lewis, 91 Iowa 128, 58 N. W. 1074, refusing relief under the circumstances of the case.

and allowed within the general period limited for that purpose are payable *pro rata*.[25]

(c) *As to Encumbered Property.* Property which is subject to a lien or encumbrance can in a strict sense be considered assets of the estate only so far as its value exceeds the amount of the encumbrance,[26] and hence it follows that the rules of priority applicable in the case of general assets of the estate must be subject to considerable modification when applied to encumbered property.[27]

(III) *Liens* — (A) *Judgments and Decrees* — (1) Priority as to General Assets — (a) In General. Under the statutes of some states judgments rendered against the decedent in his lifetime are preferred claims as against the general assets of the estate.[28] In some states the statutes preferring judgments contemplate that the judgments shall be subsisting liens at the debtor's death or at least be capable of being liens;[29] but in the absence of any such provision a judgment is entitled to preference, although it did not constitute a lien on the debtor's land at the time of his death or would not have constituted such a lien if the debtor had owned any land.[30] As a general rule in order for a judgment to be preferred it must have been rendered against the decedent in his lifetime;[31] and it is also sometimes required that the judgment shall have been docketed prior to

25. Dunlap *v.* McGhee, 98 Ill. 287; Ramsay *v.* Ramsay, 97 Ill. App. 270.

26. See *supra*, X, B, 2, g.

The residue of the proceeds of the encumbered realty after paying off judgments may, together with the proceeds of the unencumbered land, be applied to the preferred claims. Wade's Appeal, 29 Pa. St. 328; Ramsey's Appeal, 4 Watts (Pa.) 71.

27. See *infra*, X, D, 2, c, (III).

28. *Arkansas.*— Eddins *v.* Graddy, 28 Ark. 500 (delivery bond judgment); Tucker *v.* Yell, 25 Ark. 420.

California.— *In re* Smith, 122 Cal. 462, 55 Pac. 249.

Kansas.— See Wolfe *v.* Robbins, 10 Kan. App. 222, 63 Pac. 278.

Missouri.— Tonnies *v.* McIntyre, 82 Mo. App. 268.

New Jersey.— Newark Second Nat. Bank *v.* Blauvelt, 44 N. J. Eq. 173, 14 Atl. 618.

New York.— McNulty *v.* Hurd, 72 N. Y. 518 [*modifying* 11 Hun 339]; Matter of Blackford, 35 N. Y. App. Div. 330, 54 N. Y. Suppl. 972; Matter of Foster, 8 Misc. 344, 29 N. Y. Suppl. 316; Hamed's Case, 4 Abb. Pr. 270; Trust *v.* Harned, 4 Bradf. Surr. 213.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 957, 981.

The preference thus given is absolute and cannot be defeated by any inquiry into the cause of action on which the judgment was recovered. Matter of Blackford, 35 N. Y. App. Div. 330, 54 N. Y. Suppl. 972.

Final decrees in equity stand on the same footing with judgments and are entitled to the same priority, although not mentioned in the statute giving priority to judgments. Newark Second Nat. Bank *v.* Blauvelt, 44 N. J. Eq. 173, 14 Atl. 618.

Judgment of justice of the peace.— Whether a judgment rendered by a justice of the peace ranks with judgments rendered by courts of record depends upon whether under the local statutes the judgment is or can be made a judgment of record. See Garrett *v.* Johnson, 29 N. C. 231; Scott *v.* Ramsay, 1 Binn. (Pa.) 221; Bettinger *v.* Ridgway, 3 Fed. Cas. No. 1,369, 4 Cranch C. C. 340 (construing Md. Act (1798), c. 101, in its application to the District of Columbia). See also, generally, Judgments; Justices of the Peace.

29. Tucker *v.* Yell, 25 Ark. 420. See also Eddins *v.* Graddy, 28 Ark. 500; Wolfe *v.* Robbins, 10 Kan. App. 222, 63 Pac. 278, construing Gen. St. (1897) c. 107, § 80, subd. 4, to mean that judgments which are liens upon real estate of the deceased, where the estate is insolvent, shall, to the extent of the lien, be paid, without reference to classification, with the exception therein stated, but the deficiency shall only be paid as other judgments rendered against the deceased in his lifetime are paid.

A dormant judgment did not rank with other judgments under the Georgia statute of 1792, but was classed with "bonds and other obligations"; and its revival after the debtor's death did not alter its rank. Williams *v.* Price, 21 Ga. 507. But judgments which were liens at the debtor's death but became dormant thereafter and are revived before the assets are distributed operate by relation as of the date of the decedent's death, and take rank as preferred claims accordingly. King *v.* Morris, 40 Ga. 63.

30. Matter of Foster, 8 Misc. (N. Y.) 344, 29 N. Y. Suppl. 316; Hamed's Case, 4 Abb. Pr. (N. Y.) 270; Ainslie *v.* Radcliff, 7 Paige (N. Y.) 439; Trust *v.* Harned, 4 Bradf. Surr. (N. Y.) 213. The fact that a judgment lost its lien on the land and has not been revived does not affect its classification for payment out of the general assets. Tonnies *v.* McIntyre, 82 Mo. App. 268.

31. Rutledge *v.* Simpson, 141 Mo. 290, 42 S. W. 820; James *v.* Beesly, 4 Redf. Surr. (N. Y.) 236; Bernes *v.* Weisser, 2 Bradf. Surr. (N. Y.) 212; Reinig *v.* Hartman, 69 Wis. 28, 32 N. W. 639. See also Patterson's Appeal, 96 Pa. St. 93.

the debtor's death.[32] The judgment or decree must be final;[33] and must not only ascertain that a certain sum of money is due but also order payment.[34] In a number of states the statutes have abolished the common-law priority of judgments over specialty and simple contract debts and made them all payable *pro rata* out of the general assets.[35]

(b) Foreign Judgments. It is generally held that foreign judgments, including the judgments of sister states, do not have the priority accorded by statute to domestic judgments but rank merely as simple contract debts.[36]

(2) Priority as to Property Subject to Lien. Where the personal estate is insufficient, judgments existing in the debtor's lifetime are payable out of the proceeds of the land covered by them in priority to all unsecured debts,[37] but in

Where the death occurs after the rendition of a verdict or the assessment of damages, and under the provisions of the statutes final judgment is entered against decedent after his death, the judgment so rendered is entitled to preference in the class with judgments rendered in the debtor's lifetime. Matter of Dunn, 5 Redf. Surr. (N. Y.) 27; Mills *v.* Jones, 2 Rich. (S. C.) 393.

A deficiency judgment in foreclosure rendered against the personal representative is not a preferred claim against the estate of the deceased mortgagor (James *v.* Beesly, 4 Redf. Surr. (N. Y.) 236; Reinig *v.* Hartman, 69 Wis. 28, 32 N. W. 639. See, generally, Mortgages), even though the action was pending at the time of the mortgagor's death (Reinig *v.* Hartman, 69 Wis. 28, 32 N. W. 639. See also Cook *v.* Jennings, 40 S. C. 204, 18 S. E. 640, deficiency judgment rendered in defendant's lifetime but deficiency not ascertained until after his death), but the judgment is nevertheless payable out of the personal estate (Mitchell *v.* Bowne, 63 How. Pr. (N. Y.) 1).

32. Mitchell *v.* Mount, 19 Abb. Pr. (N. Y.) 1; Clark's Case, 15 Abb. Pr. (N. Y.) 227; Stevenson *v.* Weisser, 1 Bradf. Surr. (N. Y.) 343.

The New York statute refers only to docketing in the court in which the judgment was rendered. Hamed's Case, 4 Abb. Pr. 270; Trust *v.* Harned, 4 Bradf. Surr. 213.

33. Rutledge *v.* Simpson, 141 Mo. 290, 42 S. W. 820; *Ex p.* Farrars, 13 S. C. 254; McIntosh *v.* Brooks, 3 Strobh. (S. C.) 133 note; Thomas *v.* McElwee, 3 Strobh. (S. C.) 131, holding that, where the death of a defendant occurs between interlocutory and final judgment, the final judgment being entered up against his representative, the right to a preference does not exist. McIntosh *v.* Wright, Rich. Eq. Cas. (S. C.) 385.

An allowance of alimony pendente lite in an action against a husband for permanent support of his wife is in the nature of a final judgment, and the claim for unpaid alimony is a preferred claim against his estate. *In re* Smith, 122 Cal. 462, 55 Pac. 249.

34. *Ex p.* Farrars, 13 S. C. 254. See also Cook *v.* Jennings, 40 S. C. 204, 18 S. E. 640.

A decree settling the accounts of an executor or administrator and showing a balance in his hands is not a judgment and is not entitled to preference as a judgment. *In re* Kehoe, Myr. Prob. (Cal.) 127. See also Rutledge *v.* Simpson, 141 Mo. 290, 42 S. W. 820; Ramsey's Appeal, 4 Watts (Pa.) 71.

35. *Illinois.*— Clingman *v.* Hopkie, 78 Ill. 152; Paschall *v.* Hailman, 9 Ill. 285.

Kentucky.— Place *v.* Oldham, 10 B. Mon. 400.

Mississippi.—Robertson *v.* Demoss, 23 Miss. 298.

North Carolina.— Jenkins *v.* Carter, 70 N. C. 500.

Pennsylvania.— Mason's Appeal, 89 Pa. St. 402 (priority out of proceeds of realty but not out of proceeds of personalty); Deichman's Appeal, 2 Whart. 395, 30 Am. Dec. 271; Ramsey's Estate, 1 Lack. Leg. Rec. 367.

Tennessee.— Prewett *v.* Goodlett, 98 Tenn. 82, 38 S. W. 434.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 957, 981.

In New Mexico, there being no express statute on this point, a creditor who recovered judgment against his debtor in the latter's lifetime, but has not sued out execution, is not entitled to any priority over general creditors and gains no priority by reviving the judgment by scire facias; and he may be enjoined from enforcing his judgment beyond his *pro rata* share. Crenshaw *v.* Delgado, 1 N. M. 376.

36. *Maryland.*— Brengle *v.* McClellan, 7 Gill & J. 434.

Missouri.— Gainey *v.* Sexton, 29 Mo. 449; Harness *v.* Green, 20 Mo. 316.

New York.— Brown *v.* Public Administrator, 2 Bradf. Surr. 103.

South Carolina.— Cameron *v.* Wurtz, 4 McCord 278.

United States.— McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. ed. 177 (construing the Georgia statute); Norton *v.* Stevens, 18 Fed. Cas. No. 10,353*a*, 1 Hayw. & H. 94 (construing the Maryland act of 1798).

England.— Wilson *v.* Dunsany, 18 Beav. 293, 18 Jur. 762, 23 L. J. Ch. 492, 2 Wkly. Rep. 288, 52 Eng. Reprint 115. See also Walker *v.* Witter, Dougl. (3d ed.) 1; Dupleix *v.* De Roven, 2 Vern. Ch. 540, 23 Eng. Reprint 950.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 958, 981.

Aliter as to judgments of sister states. *In re* Colt, 4 Watts & S. (Pa.) 314.

37. *Georgia.*— See Hargrove *v.* Lilly, 69

order that a judgment may have this priority it must have been a lien on the land at the time of the debtor's death,[38] and proceedings thereafter to make it a lien are ineffectual to give it priority.[39]

(3) Priority Inter Sese.[40] By statute in many states judgments and decrees are payable according to their priority in point of time, the oldest being paid first; the priority, however, being generally determined by the date of docketing or enrolment.[41] But, in the absence of such a statute, judgments and decrees, regardless of their relative priorities in point of time, are payable *pro rata* on deficiency of assets.[42]

(B) *Specific Liens* — (1) Priority as to General Assets. A mortgage is entitled to no preference out of the general assets merely by reason of the fact that it is a mortgage, but ranks as against the general assets according to the nature of the instrument which it was given to secure;[43] and in some states a similar rule is embodied in the statutes, the mortgagee being placed, so far as property not covered by his mortgage is concerned, on a footing of equality with unsecured creditors.[44] In a number of states, however, the statutes give to mortgages a preference in payment out of the general assets.[45]

Ga. 326. But *compare* State *v.* Dickson, 38 Ga. 171; Ragland *v.* Justices Inferior Ct., 10 Ga. 65.

Kansas.— Wolfe *v.* Robbins, 10 Kan. App. 222, 63 Pac. 278.

Mississippi.— See Robertson *v.* Demoss, 23 Miss. 298.

Missouri.— Bassett *v.* Slater, 81 Mo. 75; Finley *v.* Caldwell, 1 Mo. 512.

North Carolina.— Jerkins *v.* Carter, 70 N. C. 500.

Pennsylvania. — Mason's Appeal, 89 Pa. St. 402; Wade's Appeal, 29 Pa. St. 328; Ramsey's Appeal, 4 Watts 71; Matter of Hocker, 2 Pearson 493, 14 Phila. 659; O'Brien's Estate, 19 Pa. Co. Ct. 467; *In re* Bryan, 4 Phila. 228; Ramsey's Estate, 1 Lack. Leg. Rec. 367.

South Carolina.— Baxter *v.* Baxter, 23 S. C. 114; Public Account Com'rs *v.* Greenwood, 1 Desauss. 450.

Rule applies to judgments by confession. Finley *v.* Caldwell, 1 Mo. 512.

To what claims preferred.— A judgment is entitled to payment out of the proceeds of the encumbered land, where the personal estate is insufficient, in priority to such preferred claims as the funeral expenses and the expense of the decedent's last illness (Wade's Appeal, 29 Pa. St. 328; Matter of Hocker, 2 Pearson (Pa.) 493, 14 Phila. (Pa.) 659; *In re* Bryan, 4 Phila. (Pa.) 228; Pottsville Union Sav. Fund *v.* Cartwright, 11 Lanc. Bar (Pa.) 136, 1 Leg. Rec. (Pa.) 171), claims arising out of fiduciary relations with the decedent (Alderson *v.* Henderson, 5 W. Va. 182), debts due the state (Finley *v.* Caldwell, 1 Mo. 512; Baxter *v.* Baxter, 23 S. C. 114; Dunlap *v.* Bynum, 4 Desauss. (S. C.) 646; Public Account Com'rs *v.* Greenwood, 1 Desauss. (S. C.) 450), and the wages of miners, laborers, and mechanics (Wade's Appeal, 29 Pa. St. 328).

Priority defeated by sale under trust deed see Pahlman *v.* Shumway, 24 Ill. 127.

38. Clingman *v.* Hopkie, 78 Ill. 152; Turney *v.* Gates, 12 Ill. 141; Patterson's Appeal, 96 Pa. St. 93; Matter of Patterson, 1 Ashm. (Pa.) 336. See also Williams *v.* Price, 21 Ga. 507; Robertson *v.* Demoss, 23 Miss. 298.

Judgment entered on day of death.— Where the death of the debtor and the entry of judgment occur on the same day, but the judgment is entered after the death, the judgment is not entitled to priority of payment out of the proceeds of the land. Patterson's Appeal, 96 Pa. St. 93.

39. Clingman *v.* Hopkie, 78 Ill. 152; Patterson's Appeal, 96 Pa. St. 93; Matter of Patterson, 1 Ashm. (Pa.) 336. See also Williams *v.* Price, 21 Ga. 507; Robertson *v.* Demoss, 23 Miss. 298.

40. See, generally, Judgments.

41. See King *v.* Morris, 40 Ga. 63; Moore *v.* Dortic, Ga. Dec. Pt. II, 84; Matter of Townsend, 83 Hun (N. Y.) 200, 31 N. Y. Suppl. 409; Matter of Foster, 8 Misc. (N. Y.) 344, 29 N. Y. Suppl. 316; Ainslie *v.* Radcliff, 7 Paige (N. Y.) 439; Trust *v.* Harned, 4 Bradf. Surr. (N. Y.) 213; Mauney *v.* Holmes, 87 N. C. 428; Galloway *v.* Bradfield, 86 N. C. 163; Klinck *v.* Keckley, 2 Hill Eq. (S. C.) 250.

Judgment in favor of state.— Where a statute makes judgments payable in the order of their seniority, a senior judgment in favor of a citizen is prior to a junior judgment in favor of the state, although debts due the state are preferred by statute. Klinck *v.* Keckley, 2 Hill Eq. (S. C.) 250. *Aliter* in Georgia. State *v.* Dickson, 38 Ga. 171.

42. Newark Second Nat. Bank *v.* Blauvelt, 44 N. J. Eq. 173, 14 Atl. 618.

43. Piester *v.* Piester, 22 S. C. 139, 53 Am. Rep. 711 [*overruling* Edwards *v.* Sanders, 6 S. C. 316]; Tunno *v.* Happoldt, 2 McCord (S. C.) 188; Kinard *v.* Young, 2 Rich. Eq. (S. C.) 247.

44. See Woolley *v.* Johnson, 102 Ky. 155, 43 S. W. 678, 19 Ky. L. Rep. 159; Baldwin *v.* Criswell, 14 La. 166; Piester *v.* Piester, 22 S. C. 139, 53 Am. Rep. 711; Chandler *v.* Burdett, 20 Tex. 42.

45. Moore *v.* Dortic, Ga. Dec. Pt. II, 84; State *v.* Mason, 21 Ind. 171; Swift *v.* Har-

(2) Priority as to Encumbered Property. When the personal estate is insufficient, a specific lien binding decedent's land at the time of his death has priority as to the land bound thereby over all unsecured debts of the decedent or claims against the estate and in distributing the proceeds of the land among creditors the holder of the lien is entitled to be first paid.[46] The most frequent application of this rule is in the case of land subject to a mortgage or deed of trust,[47]

ley, 20 Ind. App. 614, 49 N. E. 1069. *Contra*, Rogers *v.* State, 6 Ind. 31.

A vendor's lien is not entitled to a preference under a statute giving a preference to mortgages. Kimmell *v.* Burns, 84 Ind. 370.

46. *California.*— *In re* Murray, 18 Cal. 686.

Indiana.— Ryker *v.* Vawter, 117 Ind. 425, 20 N. E. 294.

Kentucky.— Day *v.* Davis, 47 S. W. 769, 20 Ky. L. Rep. 869; Milward *v.* Shields, 43 S. W. 184, 19 Ky. L. Rep. 1076, 39 L. R. A. 506.

Louisiana.— Rogers' Succession, 41 La. Ann. 400, 7 So. 692 (priority over all other privileges, except expenses of sale, affixing seals, costs of inventory, etc.); Markey's Succession, 22 La. Ann. 265. But *compare* Alter *v.* O'Brien, 31 La. Ann. 452; Patrick's Succession, 30 La. Ann. 1071, holding that a special mortgage creditor of a succession is entitled to be paid out of the proceeds of the property on which his mortgage rests in preference to the expenses and charges of the administration only when there are other funds of the succession out of which such expenses may be paid.

Missouri.— Finley *v.* Caldwell, 1 Mo. 512.

Oregon.— Shepard *v.* Saltzman, 34 Oreg. 40, 54 Pac. 882.

Pennsylvania.— Wade's Appeal, 29 Pa. St. 328; Boud's Appeal, 2 Pennyp. 241; Saving Fund *v.* Cartwright, 1 Leg. Rec. 171.

South Carolina.— Shell *v.* Young, 32 S. C. 462, 11 S. E. 299; Baxter *v.* Baxter, 23 S. C. 114.

Tennessee.— Fields *v.* Wheatley, 1 Sneed 351.

Virginia.— McCandlish *v.* Keen, 13 Gratt. 615.

United States.— Brent *v.* Washington Bank, 10 Pet. 596, 9 L. ed. 547; U. S. *v.* Duncan, 25 Fed. Cas. No. 15,003, 4 McLean 607.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1002 *et seq.*

But *compare* State *v.* Dickson, 38 Ga. 171; Ragland *v.* Justices Inferior Ct., 10 Ga. 65; Watson *v.* Watson, 1 Ga. 266; Moore *v.* Dortic, Ga. Dec. Pt. II, 84.

The same rule applies to personal property subject to a mortgage given by the decedent in his lifetime. Horsfall *v.* Roylcs, 20 Mont. 495, 52 Pac. 199.

A laborer's lien on logs constitutes a primary claim on the property covered by it and takes precedence to the extent of such property. Casey *v.* Ault, 4 Wash. 167, 29 Pac. 1048.

Attorney's lien see Blankenbaker *v.* Bank of Commerce, 85 Ind. 459 [*distinguishing* Jenkins *v.* Jenkins, 63 Ind. 120]; and, generally, Attorney and Client, 4 Cyc. 1017, 1021.

Where the personal representative has paid preferred claims he cannot obtain an allowance out of the proceeds of the encumbered land in priority to the encumbrance. Boud's Appeal, 2 Pennyp. (Pa.) 241. See also Felton's Estate, 7 Pa. Dist. 262.

In Texas the general rule obtains as to the lien of an unpaid vendor (Robertson *v.* Paul, 16 Tex. 472; Toullerton *v.* Manchke, 11 Tex. Civ. App. 148, 32 S. W. 238. See also Stell *v.* Lewis, 2 Tex. Unrep. Cas. 533), but not as to other specific liens (McLane *v.* Paschal, 47 Tex. 365; Robertson *v.* Paul, 16 Tex. 472; Barnes *v.* Scottish-American Mortg. Co., 29 Tex. Civ. App. 443, 68 S. W. 529); and mortgaged land and mortgaged chattels contribute ratably to pay the preferred debts (Barnes *v.* Scottish-American Mortg. Co., 29 Tex. Civ. App. 443, 68 S. W. 529).

47. *In re* Murray, 18 Cal. 686; Baxter *v.* Baxter, 23 S. C. 114; Fields *v.* Wheatley, 1 Sneed (Tenn.) 351; McCandlish *v.* Keen, 13 Gratt. (Va.) 615.

New mortgages given by the heirs in substitution of old mortgages, securing and continuing an indebtedness incurred by decedent, will be treated in the settlement of the estate as though given by decedent. Jacobs *v.* Jacobs, 7 Ohio S. & C. Pl. Dec. 486.

Mortgage and judgment.— A mortgagee may exhaust his security in payment of the mortgage notwithstanding that a judgment has been filed and classified against the estate, especially where the local statute provides that the mortgaged property is the primary fund for the satisfaction of the mortgage. Tucker *v.* Wells, 111 Mo. 399, 20 S. W. 114. See also Kiolbassa *v.* Raley, 1 Tex. Civ. App. 165, 23 S. W. 253.

Where an executor mortgages the decedent's real estate under a valid provision of the will directing that the property be mortgaged and the debts paid with the proceeds, the mortgage so far as concerns the property covered thereby is a lien superior to other debts established against the estate. Iowa L. & T. Co. *v.* Holderbaum, 86 Iowa 1, 52 N. W. 550.

Necessity for recording.— Whether a mortgage or deed of trust must have been recorded in the debtor's lifetime in order to constitute a preferred lien on the land after his death depends upon the effect of the local statutes requiring such instruments to be recorded. See Sorrels *v.* Stamper, 27 La. Ann. 630; Gayle's Succession, 27 La. Ann. 547 (both holding that reinscription of a perempted mortgage after a mortgagor's death is inoperative); Nice's Appeal, 54 Pa.

but it applies also in the case of a vendor's lien.[48] The proceeds of the encumbered property must be applied to the payment of the lien in priority to the expenses of the decedent's funeral[49] or last sickness,[50] and of administering the estate,[51] debts due the United States[52] or the state,[53] and taxes not constituting a prior lien on the land.[54] The rule is not affected by a statute providing that a decedent's real estate not subjected by his will to the payment of his debts shall be assets for the payment of debts in the order in which personal estate is to be applied,[55] or directing a ratable division of the assets among creditors, the encumbered land not being general assets;[56] neither is the operation of the rule affected by a general testamentary charge of debts upon the decedent's lands.[57] Statutes changing the common-law classification of debts and placing unsecured debts on a footing of equality do not affect a lien acquired under an execution before the debtor's death,[58] but it has been held in Louisiana that the privilege acquired by the creditor by the seizure of real property of the debtor under a fieri facias

St. 200 (holding that a debt secured by an unrecorded mortgage, without possession having been taken under it in the lifetime of the mortgagor, cannot upon his death take precedence over his general debts, but is payable only *pro rata* with them); Adams' Appeal, 1 Penr. & W. (Pa.) 447 (holding recording necessary to give mortgage a lien); McCandlish *v.* Keen, 13 Gratt. (Va.) 615 (holding recording not necessary). See, generally, MORTGAGES.

Chattel mortgages.— Where possession by the mortgagee is necessary to the validity of a chattel mortgage as against other creditors (see CHATTEL MORTGAGES, 6 Cyc. 1053), property covered by such a mortgage, but of which the decedent has retained possession until his death, passes into the custody of the law for administration, and the mortgagee is entitled to no preference over other creditors of the decedent. Kater *v.* Steinruck, 40 Pa. St. 501; Heft's Appeal, 5 Pa. Cas. 573, 9 Atl. 87.

48. Rogers' Succession, 41 La. Ann. 400, 7 So. 692; Markey's Succession, 22 La. Ann. 265; Robertson *v.* Paul, 16 Tex. 472; Toullerton *v.* Manchke, 11 Tex. Civ. App. 148, 32 S. W. 238. See also Hargrove *v.* Lilly, 69 Ga. 326, decree in favor of an unpaid vendor, fixing a lien on the land.

Recognizance to secure purchase-money.— Where the decedent in his lifetime entered into a recognizance in the orphans' court to secure the purchase-money of land purchased by him, the recognizance constituted a specific lien which on sale of the land to pay debts was entitled to priority of payment out of the proceeds. Ramsey's Appeal, 4 Watts (Pa.) 71.

Where vendor's liens have been abolished by statute the vendor of land is entitled to no priority in the distribution of any of the assets of the decedent's estate, but the debt takes rank not by its consideration but by the form in which the decedent left it. Jones *v.* James, 56 Ga. 325.

49. Ryker *v.* Vawter, 117 Ind. 425, 20 N. E. 294; Milward *v.* Shields, 43 S. W. 184, 19 Ky. L. Rep. 1076, 39 L. R. A. 506 [*overruling* Best *v.* Spooner, 4 Ky. L. Rep. 602]; Boud's Appeal, 2 Pennyp. (Pa.) 241. See also Wade's Appeal, 29 Pa. St. 328. *Contra*, Alter *v.* O'Brien, 31 La. Ann. 452.

50. Ryker *v.* Vawter, 117 Ind. 425, 20 N. E. 294; Boud's Appeal, 2 Pennyp. (Pa.) 241; Saving Fund *v.* Cartwright, 1 Leg. Rec. (Pa.) 171.

51. *California.*— *In re* Murray, 18 Cal. 686.

Indiana.— Ryker *v.* Vawter, 117 Ind. 425, 20 N. E. 294.

Kentucky.— Day *v.* Davis, 47 S. W. 769, 20 Ky. L. Rep. 869, attorney's fee in action by representative to settle the estate.

Oregon.— Shepard *v.* Saltzman, 34 Oreg. 40, 54 Pac. 882.

South Carolina.— See Shell *v.* Young, 32 S. C. 462, 11 S. E. 299.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1008.

52. Brent *v.* Washington Bank, 10 Pet. (U. S.) 596, 9 L. ed. 547; U. S. *v.* Duncan, 25 Fed. Cas. No. 15,003, 4 McLean 607.

53. Baxter *v.* Baxter, 23 S. C. 114. See also Finley *v.* Caldwell, 1 Mo. 512; Dunlap *v.* Bynum, 4 Desauss. (S. C.) 646; Public Account Com'rs *v.* Greenwood, 1 Desauss. (S. C.) 450.

54. Boud's Appeal, 2 Pennyp. (Pa.) 241. **Under the Maryland statutes** (Act (1843), c. 208; Act (1797), c. 90) taxes are a lien on the land and are entitled to priority of payment out of the proceeds of the mortgaged property, notwithstanding that there is personalty in the hands of the representative; but when the taxes have been thus paid the mortgagee will be subrogated to the rights of the state and county and be entitled to a preference in the personal estate according to his proper priority in the course of administration. Fulton *v.* Nicholson, 7 Md. 104.

55. McCandlish *v.* Keen, 13 Gratt. (Va.) 615.

56. Fields *v.* Wheatley, 1 Sneed (Tenn.) 351.

57. McCandlish *v.* Keen, 13 Gratt. (Va.) 615.

58. Black *v.* Planters' Bank, 4 Humphr. (Tenn.) 367. See also Hullett *v.* Hood, 109 Ala. 345, 19 So. 419; Meyers *v.* Meyers, 19 Grant Ch. (U. C.) 185.

must be postponed in case of the subsequent death of the debtor to funeral and law charges, and expenses of the debtor's last illness.[59]

(3) Priority Inter Sese.[60] The statutes frequently provide that mortgages and other specific liens shall be paid according to their priority in point of time, the oldest being payable first.[61]

(iv) *Proceedings For Classification.*[62] The classification of claims against a decedent's estate is a matter over which the probate court is often given original jurisdiction by statute,[63] and the original jurisdiction thus conferred is held to be exclusive.[64] *A fortiori* any classification of debts by the personal representative is subject to revision by the probate court.[65] A creditor with a claim acknowledged by the executor cannot have it classed as privileged without making him a party.[66] The classification of a claim has been considered as a proceeding *in rem*, requiring a general notice as a jurisdictional fact.[67] Probate courts in passing upon and classifying claims against a decedent's estate exercise equitable powers and regard substance rather than form.[68] If the statute does not require that the classification of a demand should be entered on the record at large, an indorsement of its class on the claim itself, and an entry on the abstract book, is sufficient to give the classification validity.[69] And it has been held that, since the statute fixes the class to which a claim belongs, a judgment allowing a claim need not specify the class in which the claim is to be placed, but a direction that the claim be paid in the due course of administration is sufficient.[70] In some states the classification of a claim by the probate court is not such a final judgment as to be conclusive,[71] and, although it may be appealed from when erroneous,[72] yet it is within the jurisdiction of the court to correct the erroneous classification, and to do this at a subsequent term,[73] and if fraud or mistake be shown to have affected the original classification the court may reëxamine the claim and place it in its proper class.[74] But in other states the classification of a claim by the probate court is a judicial act having the same force and effect as a judgment of any court of general jurisdiction,[75] and it is held that as to change the classification made by the probate court is to change the force of the judgment as to all creditors in the prior classes, this should be done only where such facts exist as would authorize the court to modify or set aside its judgments in other respects.[76]

59. Holbert's Succession, 3 La. Ann. 436.

60. See, generally, Mortgages.

61. See Moore *v.* Dortic, Ga. Dec. Pt. II, 84.

62. Allowance see *supra*, X, B, 14.

63. See Tucker *v.* Yell, 25 Ark. 420; McLean *v.* Crow, 88 Cal. 644, 26 Pac. 596; Porter *v.* Sweeney, 61 Tex. 213; Williams *v.* liams *v.* Robinson, 56 Tex. 347.

In Illinois the county court has jurisdiction to classify a judgment rendered by the circuit court on appeal from the county court, and left unclassified by the circuit court. McCall *v.* Lee, 24 Ill. App. 585 [*affirmed* in 120 Ill. 261, 11 N. E. 522].

64. McLean *v.* Crow, 88 Cal. 644, 26 Pac. 596; Porter *v.* Sweeney, 61 Tex. 213; Williams *v.* Robinson, 56 Tex. 347.

65. Tucker *v.* Yell, 25 Ark. 420. See also McLean *v.* Crow, 88 Cal. 644, 26 Pac. 596.

66. Lilley's Succession, 6 Rob. (La.) 24.

67. *In re* Smith, 122 Cal. 462, 55 Pac. 249, holding that, in the absence of an express statutory provision, an adjudication as to an alleged preference of a claim can be made only at the same time and under the same notice as is required upon settlement of the representative's accounts.

68. Chicago Title, etc., Co. *v.* McGlew, 193 Ill. 457, 61 N. E. 1018 [*affirming* 90 Ill. App. 58]. See also McCall *v.* Lee, 120 Ill. 261, 11 N. E. 522 [*affirming* 24 Ill. App. 585].

69. Nelson *v.* Russell, 15 Mo. 356.

70. McCall *v.* Lee, 120 Ill. 261, 11 N. E. 522 [*affirming* 24 Ill. App. 585].

71. McPherson *v.* Wolfley, 9 Kan. App. 67, 57 Pac. 257.

72. McPherson *v.* Wolfley, 9 Kan. App. 67, 57 Pac. 257.

73. Ford *v.* Stuart First Nat. Bank, 100 Ill. App. 70.

74. Ford *v.* Stuart First Nat. Bank, 100 Ill. App. 70.

75. Tucker *v.* Yell, 25 Ark. 420; Cossitt *v.* Biscoe, 12 Ark. 95; Miller *v.* Janney, 15 Mo. 265; Cooper *v.* Duncan, 20 Mo. App. 355.

The adjudication cannot be set aside in equity on the ground that it was made under a mistake of law, but the party aggrieved is confined to his remedy by appeal or writ of error. Cooper *v.* Duncan, 20 Mo. App. 355.

76. Miller *v.* Janney, 15 Mo. 265. See also Cossitt *v.* Biscoe, 12 Ark. 95; Nelson *v.* Russell, 15 Mo. 356.

(v) *Waiver or Loss of Priority.* A creditor may by his laches lose his right to priority of payment.[77] But, under a statute classifying claims according to the time of their exhibition to the representative[78] and providing that actions commenced against the representative shall be considered demands legally exhibited from the time of serving the original process, a creditor who has begun an action against the representative does not lose his priority by taking a nonsuit.[79] It has been held in Pennsylvania that the statutory right of preference given to the wages of servants does not exist where the servants received from the debtor in his lifetime single bills payable at a future day with interest,[80] but this decision has been disapproved in Illinois on the ground that the taking of a note bearing interest is not a discharge or waiver of the creditor's lien.[81] In Louisiana it has been held that an administrator who claims a privilege on personal property sold to the succession, and who sells the real estate and personal property in bulk, without separate appraisement, loses his privilege.[82]

3. Claims of Executor or Administrator — a. Right to Retain Assets in Payment — (i) *At Common Law* — (a) *In General.* It is a well-settled rule of the common law that if a creditor becomes executor or administrator of his debtor's estate he may retain so much of the assets in his hands as is sufficient to pay his debt, in preference to all other creditors of equal degree.[83]

(b) *Who May Exercise Right.* The right of retainer extends to a temporary or special administrator,[84] to each of several joint executors or adminis-

If an improper classification is the result of a clerical error of the judge, the proper remedy is by motion in the probate court for an order correcting the error *nunc pro tunc*; and in such a case equity will not interfere by injunction. Jillett *v.* Union Nat. Bank, 56 Mo. 304.

77. Reakirt *v.* Flanagan, 6 Pa. Dist. 402, 40 Wkly. Notes Cas. (Pa.) 375.

78. See *supra*, X, D, 2, c, (II), (B), (12).

79. Tevis *v.* Tevis, 23 Mo. 256.

80. Silver *v.* Williams, 17 Serg. & R. (Pa.) 292.

81. Chicago Title, etc., Co. *v.* McGlew, 193 Ill. 457, 61 N. E. 1018 [*affirming* 90 Ill. App. 58].

82. Rogers' Succession, 41 La. Ann. 400, 7 So. 692.

83. *Alabama.*— Trimble *v.* Farris, 78 Ala. 260; Miller *v.* Irby, 63 Ala. 477; Kirksey *v.* Kirksey, 41 Ala. 626.

Connecticut.— Pitkin *v.* Pitkin, 8 Conn. 325.

Florida.— Sanderson *v.* Sanderson, 17 Fla. 820; Sealey *v.* Thomas, 6 Fla. 25.

Kentucky.— Payne *v.* Pusey, 8 Bush 564; Berry *v.* Graddy, 1 Metc. 553; Buckner *v.* Morris, 2 J. J. Marsh. 121; Saunders *v.* Saunders, 2 Litt. 314.

Maryland.— State *v.* Reigart, 1 Gill 1, 39 Am. Dec. 628.

Missouri.— Nelson *v.* Russell, 15 Mo. 356.

New Jersey.— Personette *v.* Personette, 35 N. J. Eq. 472; Dolman *v.* Cook, 14 N. J. Eq. 56.

New York.— Rogers *v.* Hosack, 18 Wend. 319 [*reversing* 6 Paige 415]; Rogers *v.* Rogers, 3 Wend. 503, 20 Am. Dec. 716; Decker *v.* Miller, 2 Paige 149.

North Carolina.— Hassell *v.* Griffin, 55 N. C. 117; White *v.* Griffin, 47 N. C. 3.

Ohio.— Hall *v.* Pratt, 5 Ohio 72.

Pennsylvania.— *Ex p.* Meason, 5 Binn. 167.

Rhode Island.— Perkins *v.* Perkins, 11 R. I. 270.

South Carolina.— Sebring *v.* Keith, 2 Hill 340.

Tennessee.— Shields *v.* Alsup, 5 Lea 508; Harrison *v.* Henderson, 7 Heisk. 315; Smith *v.* Watkins, 8 Humphr. 331.

Virginia.— Shores *v.* Wares, 1 Rob. 1.

United States.— Page *v.* Lloyd, 5 Pet. 304, 8 L. ed. 134.

England.— *In re* Compton, 30 Ch. D. 15, 54 L. J. Ch. 904, 53 L. T. Rep. N. S. 410; Robinson *v.* Cumming, 2 Atk. 409, 26 Eng. Reprint 646; Middleton *v.* Poole, 2 Coll. Ch. 246, 33 Eng. Ch. 246; Potter *v.* Fowler, 6 L. J. Ch. 273; Woodward *v.* Darcy, Plowd. 184.

Canada.— Kline *v.* Kline, 3 Ch. Chamb. (U. C.) 161.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1012.

The right of retainer is a remedy by mere operation of law, and is founded upon the fact that the personal representative cannot maintain a suit against himself, as the representative of the decedent, to recover a debt due him in his private capacity; and as the creditor who first sues and obtains judgment against the personal representative must be first paid, the representative must lose his debt if the estate is insolvent, unless he has the right of retainer. Wynch *v.* Grant, 2 Drew. 312, 3 Eq. Rep. 60, 18 Jur. 1010, 24 L. J. Ch. 6, 3 Wkly. Rep. 6; *In re* Dunning, 54 L. J. Ch. 900, 53 L. T. Rep. N. S. 413, 33 Wkly. Rep. 760; *Re* Faithful, 57 L. T. Rep. N. S. 14; Wankford *v.* Wankford, 1 Salk. 299. And see cases cited above.

84. Rattoon *v.* Overacker, 8 Johns. (N. Y.) 126; Kinard *v.* Young, 2 Rich. Eq. (S. C.) 247; Whitehead *v.* Sampson, Freem. 265;

trators,[85] and to the representative of a deceased executor, where such representative represents the estate of the original testator.[86] But the right may be exercised only by the legal personal representative of the estate under administration,[87] and not by an executor named in the will who has renounced probate,[88] or a representative who has resigned,[89] or has been removed.[90] An executor *de son tort* cannot retain for his own debt,[91] even against a debt of inferior degree,[92] or although the rightful representative consents to the retainer.[93]

(c) *As to What Claims Right Exists.* A personal representative is entitled to retain for any valid claim held by him against the estate,[94] although his claim can

Vaughan *v.* Browne, 2 Str. 1106; Williamson *v.* Norwitch, Styles 337; Franks *v.* Cooper, 4 Ves. Jr. 763, 31 Eng. Reprint 394. An administrator *durante minoritate* may retain for a debt due to himself (Briers *v.* Goddard, Hob. 351; Roskelley *v.* Godolphin, T. Raym. 483) or to the infant in whose stead he was appointed (Franks *v.* Cooper, 4 Ves. Jr. 763, 31 Eng. Reprint 394).

85. Decker *v.* Miller, 2 Paige (N. Y.) 149; Crowder *v.* Stewart, 16 Ch. D. 368, 50 L. J. Ch. 136, 29 Wkly. Rep. 331; Sharman *v.* Rudd, 4 Jur. N. S. 527, 27 L. J. Ch. 844; Kent *v.* Pickering, 2 Keen 1, 6 L. J. Ch. 375, 15 Eng. Ch. 1, 48 Eng. Reprint 528; Jacomb *v.* Harwood, 2 Ves. 265, 28 Eng. Reprint 172.

86. *In re* Rhoades, [1899] 2 Q. B. 347, 68 L. J. Q. B. 804, 80 L. T. Rep. N. S. 742, 6 Manson 277, 47 Wkly. Rep. 561; *In re* Compton, 30 Ch. D. 15, 54 L. J. Ch. 904, 53 L. T. Rep. N. S. 410. See *infra*, XXII.

An executor of a sole executor may retain for a debt due to himself in his individual capacity (*In re* Compton, 30 Ch. D. 15, 54 L. J. Ch. 904, 53 L. T. Rep. N. S. 410; Hopton *v.* Dryden, Prec. Ch. 179, 24 Eng. Reprint 87; Thomson *v.* Grant, 1 Russ. 540 note, 46 Eng. Ch. 481, 38 Eng. Reprint 209); or as executor of the deceased executor (Lay *v.* Lay, 10 S. C. 208; Thomson *v.* Grant, *supra*).

An executor of one of several executors cannot retain for a debt due from the original testator; because the surviving executors become the representatives of the original testator. *In re* Compton, 30 Ch. D. 15, 54 L. J. Ch. 904, 53 L. T. Rep. N. S. 410; Hopton *v.* Dryden, Prec. Ch. 179, 24 Eng. Reprint 87.

87. *In re* Rhoades, [1899] 2 Q. B. 347, 68 L. J. Q. B. 804, 80 L. T. Rep. N. S. 742, 6 Manson 277, 47 Wkly. Rep. 561; *In re* Compton, 30 Ch. D. 15, 54 L. J. Ch. 904, 53 L. T. Rep. N. S. 410.

88. Smith *v.* North, 13 Jur. 998.

89. Fort *v.* Battle, 13 Sm. & M. (Miss.) 133.

90. See Rutenie *v.* Hamaker, 40 Oreg. 444, 67 Pac. 196.

91. *Kentucky.*—McMeekin *v.* Hynes, 4 Ky. L. Rep. 177.

Louisiana.— See McGinnis' Succession, 18 La. Ann. 268.

Maryland.— Baumgartner *v.* Haas, 68 Md. 32, 11 Atl. 588; Glenn *v.* Smith, 2 Gill & J. 493, 20 Am. Dec. 452.

Massachusetts.— Carey *v.* Guillow, 105 Mass. 18, 7 Am. Rep. 494.

Mississippi.— Hardy *v.* Thomas, 23 Miss. 544, 57 Am. Dec. 152.

New Hampshire.— Brown *v.* Leavitt, 26 N. H. 493.

North Carolina.— Turner *v.* Child, 12 N. C. 331, 17 Am. Dec. 555.

South Carolina.—Cook *v.* Sanders, 15 Rich. 63, 94 Am. Dec. 139; Leach *v.* House, 1 Bailey 42; Kinard *v.* Young, 2 Rich. Eq. 247.

Tennessee.— Winn *v.* Slaughter, 5 Heisk. 191; Hutchinson *v.* Fulghum, 4 Heisk. 550; Sharp *v.* Caldwell, 7 Humphr. 415; Partee *v.* Caughran, 9 Yerg. 460.

Virginia.— Shields *v.* Anderson, 3 Leigh 729.

England.— Ayre *v.* Ayre, 1 Ch. Cas. 33, 22 Eng. Reprint 680; Coulter's Case, 5 Coke 30*a*; Vernon *v.* Curtis, 2 H. Bl. 18; Prince *v.* Rowson, 1 Mod. 208; Alexander *v.* Lane, Yelv. 137.

Grant of letters pendente lite.— If a person who is sued as executor *de son tort* takes out administration pending the suit, the subsequent grant of administration will justify a retainer. Rattoon *v.* Overacker, 8 Johns. (N. Y.) 126; Kinard *v.* Young, 2 Rich. Eq. (S. C.) 247; Whitehead *v.* Sampson, Freem. 265; Vaughan *v.* Browne, 2 Str. 1106; Williamson *v.* Norwitch, Styles 337.

92. Brown *v.* Leavitt, 26 N. H. 493; Leach *v.* House, 1 Bailey (S. C.) 42; Vernon *v.* Curtis, 2 H. Bl. 18.

93. Brown *v.* Leavitt, 26 N. H. 493; Vernon *v.* Curtis, 2 H. Bl. 18.

If the distributees consent to an irregular administration, the persons so administering may, as against the distributees, retain an amount sufficient to discharge a debt due them by the decedent in his lifetime. Josey *v.* Rogers, 13 Ga. 478.

94. Kline *v.* Kline, 3 Ch. Chamb. (U. C.) 161.

Damages arising from the breach of a pecuniary contract for which there is a certain measure may be retained. *In re* Compton, 30 Ch. D. 15, 54 L. J. Ch. 904, 53 L. T. Rep. N. S. 410 [*following* Loane *v.* Casey, 2 W. Bl. 965].

Claim for indemnity or reimbursement.— Where an executor is surety for his testator and is compelled to pay the debt, he has a right of retainer in respect to his claim for reimbursement. Milam *v.* Ragland, 19 Ala. 85; Boyd *v.* Brooks, 34 Beav. 7 [*affirmed* in 34 L. J. Ch. 605, 12 L. T. Rep. N. S. 38, 13 Wkly. Rep. 419]; Bathurst *v.* De la Zouch,

only be ascertained by taking accounts in a court of equity.[95] A personal representative who is one of several joint creditors of the decedent is entitled to retain for the whole debt;[96] and the administrator of a deceased partner has been allowed to retain a debt due to him by the firm out of the individual assets of his intestate, even as against an individual creditor of the intestate.[97] If the right to receive payment and the liability to pay are centered in the same personal representative, he has a right to retain for the debt,[98] although it be due to him as the representative of another estate,[99] or as trustee for another,[1] or be due to another in trust for him.[2] The representative cannot retain for a claim due to other

Dick. 460, 21 Eng. Reprint 348. See also Wildes *v.* Dudlaw, L. R. 19 Eq. 198, 44 L. J. Ch. 341, 23 Wkly. Rep. 435. And it has been held that an executor who is surety for his testator has a right of retainer by way of indemnity, although he has not paid, or been called upon to pay, the debt. Ferguson *v.* Gibson, L. R. 14 Eq. 379, 41 L. J. Ch. 640; *In re* Giles, [1896] 1 Ch. 956, 65 L. J. Ch. 419, 74 L. T. Rep. N. S. 21, 44 Wkly. Rep. 283. See also *In re* Allen, [1896] 2 Ch. 345, 65 L. J. Ch. 760, 75 L. T. Rep. N. S. 136, 44 Wkly. Rep. 644; *Re* Orme, 50 L. T. Rep. N. S. 51.

Claim not due.— Although a debt due from the intestate to the administrator may not have fallen due, the administrator may retain funds for the payment of it in preference to debts of an inferior grade. Relph *v.* Gist, 4 McCord (S. C.) 267.

Claim acquired after decedent's death.—An administrator may retain assets to satisfy a debt due to him on a note of his intestate, indorsed to him after the death of his intestate, but prior to the grant of administration. Reynolds *v.* Putney, 8 N. C. 318. But an executor has no right to retain for a debt proved by a creditor under a decree in an administration suit, and subsequently bequeathed by him to the executor. Jones *v.* Evans, 2 Ch. D. 420, 45 L. J. Ch. 751, 24 Wkly. Rep. 778.

Claim unenforceable by reason of statute of frauds.— In England it has been held that an administrator cannot retain for a claim held by him against his intestate, which is not in writing as required by the statute of frauds (*In re* Rownson, 29 Ch. D. 358, 49 J. P. 759, 54 L. J. Ch. 950, 52 L. T. Rep. N. S. 825, 35 Wkly. Rep. 604); but the contrary has been held in Kentucky (Berry *v.* Graddy, 1 Metc. (Ky.) 553).

Expenses of administration.— Under the plea of *plene administravit* an administrator may prove the expenses of administration and show that he has retained money to that amount. Gillies *v.* Smither, 2 Stark. 528, 3 E. C. L. 517.

Debt due wife as part of separate estate.— An administratrix may retain out of her husband's estate what was due her for money lent to him and deposited with him from her separate estate. Personette *v.* Personette, 35 N. J. Eq. 472.

95. Morris *v.* Morris, 4 Gratt. (Va.) 293; *In re* Morris, L. R. 10 Ch. 68, 44 L. J. Ch. 178, 31 L. T. Rep. N. S. 491, 23 Wkly. Rep. 120; Kline *v.* Kline, 3 Ch. Chamb. (U. C.) 161. But see De Tastet *v.* Shaw, 1 B. & Ald. 664.

96. Hosack *v.* Rogers, 6 Paige (N. Y.) 415 [*reversed* in 18 Wend. 319]; *In re* Hubback, 29 Ch. D. 934, 54 L. J. Ch. 923, 52 L. T. Rep. N. S. 908, 33 Wkly. Rep. 666; Crowder *v.* Stewart, 16 Ch. D. 368, 50 L. J. Ch. 136, 29 Wkly. Rep. 331.

97. See Hassell *v.* Griffin, 55 N. C. 117; White *v.* Griffin, 47 N. C. 3.

98. *In re* Dunning, 54 L. J. Ch. 900, 53 L. T. Rep. N. S. 413, 33 Wkly. Rep. 760; *Re* Faithfull, 57 L. T. Rep. N. S. 14; Thompson *v.* Thompson, 9 Price 464.

99. *Alabama.*—Miller *v.* Irby, 63 Ala. 477; Kimball *v.* Moody, 27 Ala. 130.

North Carolina.— Chaffin *v.* Chaffin, 22 N. C. 255; Muse *v.* Sawyer, 4 N. C. 637.

Virginia.— See Green *v.* Thompson, 84 Va. 376, 5 S. E. 507.

England.— Fox *v.* Garrett, 28 Beav. 16; Thompson *v.* Cooper, 1 Coll. Ch. 81, 8 Jur. 164, 13 L. J. Ch. 416, 28 Eng. Ch. 81; Wynch *v.* Grant, 2 Drew. 312, 3 Eq. Rep. 60, 18 Jur. 1010, 24 L. J. Ch. 6, 2 Wkly. Rep. 6; Fryer *v.* Gildridge, Hob. 14.

Canada.— Kline *v.* Kline, 3 Ch. Chamb. (U. C.) 161.

1. Hosack *v.* Rogers, 6 Paige (N. Y.) 415 [*reversed* in 18 Wend. 319]; Sander *v.* Heathfield, L. R. 19 Eq. 21, 44 L. J. Ch. 113, 31 L. T. Rep. N. S. 400, 23 Wkly. Rep. 331; Davies *v.* Parry, [1899] 1 Ch. 602, 68 L. J. Ch. 346, 47 Wkly. Rep. 429; *In re* Barrett, 43 Ch. D. 70, 59 L. J. Ch. 218, 38 Wkly. Rep. 59; Crowder *v.* Stewart, 16 Ch. D. 368, 50 L. J. Ch. 136, 29 Wkly. Rep. 331.

The administrator of a sole trustee who has died insolvent is entitled, in respect of the trusteeship, which has devolved upon him as such administrator, to exercise the legal right of retainer in respect of any debts due to the trust estate. Sander *v.* Heathfield, L. R. 19 Eq. 21, 44 L. J. Ch. 113, 31 L. T. Rep. N. S. 400, 23 Wkly. Rep. 331; *Re* Faithfull, 57 L. T. Rep. N. S. 14.

2. Loomes *v.* Stotherd, 1 L. J. Ch. O. S. 220, 1 Sim. & St. 458, 1 Eng. Ch. 458; Cockroft *v.* Black, 2 P. Wms. 298, 24 Eng. Reprint 738; Franks *v.* Cooper, 4 Ves. Jr. 763, 31 Eng. Reprint 394; Loane *v.* Casey, 2 W. Bl. 965. But see *In re* Dunning, 54 L. J. Ch. 900, 53 L. T. Rep. N. S. 413, 33 Wkly. Rep. 760; Thompson *v.* Thompson, 9 Price 464.

persons,[3] or exercise the right of retainer as to his own claim for arbitrary damages, such as damages founded on tort.[4]

(D) *What Assets May Be Retained.* An executor or administrator may retain for his own debt out of any legal assets that come into his possession or control,[5] or into the hands of his co-executor or administrator.[6] The doctrine of retainer, however, has no application to equitable assets.[7]

(E) *Priority Over Other Claims.* While the representative is entitled to retain for his debt in preference to all other debts of equal or inferior dignity,[8] he

3. *In re* Richards, [1901] 2 Ch. 399, 70 L. J. Ch. 699, 85 L. T. Rep. N. S. 273, 50 Wkly. Rep. 57, holding that a person to whom a grant of administration has been made as nominee of a creditor of an intestate cannot retain for a debt due to his principal, where the grant is not expressed to be for the use of his principal.

Claim assigned by executor.— An executor cannot retain the amount of a debt due to him from the estate of his testator, where such debt has been duly assigned by him to a third person. Pitkin *v.* Pitkin, 8 Conn. 325.

4. Lane *v.* Casey, 2 W. Bl. 965.

5. *In re* Rhoades, [1899] 2 Q. B. 347, 68 L. J. Q. B. 804, 80 L. T. Rep. N. S. 742, 6 Manson 277, 47 Wkly. Rep. 561; *In re* Compton, 30 Ch. D. 15, 54 L. J. Ch. 904, 53 L. T. Rep. N. S. 410; Walters *v.* Walters, 18 Ch. D. 182, 50 L. J. Ch. 819, 44 L. T. Rep. N. S. 769, 29 Wkly. Rep. 888.

Possession necessary.— *In re* Jones, 31 Ch. D. 440, 55 L. J. Ch. 350, 53 L. T. Rep. N. S. 855, 34 Wkly. Rep. 249.

Assets coming in after death of representative.— The assertion by an executor in his lifetime of his right of retainer as against future assets of his testator will not bind assets which after his death fall into the testator's estate. *In re* Compton, 30 Ch. D. 15, 54 L. J. Ch. 904, 53 L. T. Rep. N. S. 410 [*modifying* Wilson *v.* Coxwell, 23 Ch. D. 764, 52 L. J. Ch. 975].

Retaining assets in specie.— At common law an executor is not required to sell the assets and pay himself out of the money, but he may retain the assets in specie. Muse *v.* Sawyer, 4 N. C. 637; Yost *v.* Crombie, 8 U. C. C. P. 159. See also Miller *v.* Irby, 63 Ala. 477; Kimball *v.* Moody, 27 Ala. 130; Woodward *v.* Darcy, Plowd. 184. But see *In re* Gilbert, [1898] 1 Q. B. 282, 67 L. J. Q. B. 229, 77 L. T. Rep. N. S. 775, 4 Manson 337, 46 Wkly. Rep. 351 (where the court, although holding that an executor whose debt largely exceeded the value of his testator's estate might retain the entire assets in specie, without first realizing them, said that if the assets had been of greater value than the debt the executor might not have been entitled to retain before he had realized, or at least had clearly appropriated some specific assets in payment of the debt); Chapman *v.* Turner, 9 Mod. 268.

6. Decker *v.* Miller, 2 Paige (N. Y.) 149, holding, however, that an executor who is indebted to the estate may refuse to pay, out of such debt, a demand held against the estate by his co-executor, until he is satisfied that the other assets are insufficient to discharge the claim of his co-executor.

7. Harrison *v.* Henderson, 7 Heisk. (Tenn.) 315; Bain *v.* Sadler, L. R. 12 Eq. 570, 40 L. J. Ch. 791, 25 L. T. Rep. N. S. 202, 19 Wkly. Rep. 1077; *In re* Baker, 44 Ch. D. 262, 59 L. J. Ch. 661, 62 L. T. Rep. N. S. 817, 38 Wkly. Rep. 417; Walters *v.* Walters, 18 Ch. D. 182, 50 L. J. Ch. 819, 44 L. T. Rep. N. S. 769, 29 Wkly. Rep. 888; *In re* Poole, 6 Ch. D. 739, 46 L. J. Ch. 803, 37 L. T. Rep. N. S. 119, 25 Wkly. Rep. 862; Duignan *v.* Croome, 41 L. T. Rep. N. S. 672; Hopton *v.* Dryden, Prec. Ch. 179, 24 Eng. Reprint 87. But see Kline *v.* Kline, 3 Ch. Chamb. (U. C.) 161.

Proceeds of realty.— Land devised to be sold for the payment of debts constitutes equitable assets, and the personal representative has no right to retain from the proceeds of the sale a debt due to him from the testator. Harrison *v.* Henderson, 7 Heisk. (Tenn.) 315; Bain *v.* Sadler, L. R. 12 Eq. 570, 40 L. J. Ch. 791, 25 L. T. Rep. N. S. 202, 19 Wkly. Rep. 1077; Anonymous, 2 Ch. Cas. 54, 22 Eng. Reprint 843. But see Hall *v.* Macdonald, 14 Sim. 1, 37 Eng. Ch. 1. And the same rule applies to the proceeds of land made liable in equity by statute for the debts of the decedent. Walters *v.* Walters, 18 Ch. D. 182, 50 L. J. Ch. 819, 44 L. T. Rep. N. S. 769, 29 Wkly. Rep. 888. See also *In re* Williams, [1904] 1 Ch. 52, 73 L. J. Ch. 82, 89 L. T. Rep. N. S. 580, 20 T. L. R. 54, 52 Wkly. Rep. 318.

On a bill in equity to foreclose a mortgage, it is doubtful whether the right of an executor to retain out of the funds of the estate in his hands, or from the amount due by him to the estate, sufficient to satisfy his claim against the estate, will be recognized where it would operate merely as a set-off. Dolman *v.* Cook, 14 N. J. Eq. 56.

8. *Alabama.*— Trimble *v.* Farris, 78 Ala. 260; Miller *v.* Irby, 63 Ala. 477.

Kentucky.— Buckner *v.* Morris, 2 J. J. Marsh. 121. See also Young *v.* Wickliffe, 7 Dana 447.

New Jersey.— Dolman *v.* Cook, 14 N. J. Eq. 56.

New York.— Rogers *v.* Hosack, 18 Wend. 319; Decker *v.* Miller, 2 Paige 149.

Pennsylvania.— *Ex p.* Meason, 5 Binn. 167.

Virginia.— Morris *v.* Morris, 4 Gratt. 293; Cookus *v.* Peyton, 1 Gratt. 431; Shores *v.* Wares, 1 Rob. 1; Shearman *v.* Christian, 9 Leigh 571.

cannot exercise the right so as to obtain a preference over debts of superior dignity.[9]

(F) *Loss of Right.* A personal representative may lose his right to retain by acts on his part inconsistent with the existence of the right.[10] But a decree of administration, made in a creditor's suit, does not deprive the personal representative of his right of retainer,[11] although the assets out of which he seeks to retain come into his hands after the decree;[12] nor does the payment into court of money recovered on account of the estate prevent him from exercising his right of retainer.[13] The executor or administrator has no right of retainer out of

United States.— Page *v.* Lloyd, 5 Pet. 304, 8 L. ed. 134.

England.— Ferguson *v.* Gibson, L. R. 14 Eq. 379, 41 L. J. Ch. 640; *In re* Allen, [1896] 2 Ch. 345, 65 L. J. Ch. 760, 75 L. T. Rep. N. S. 136, 44 Wkly. Rep. 644; Horne *v.* Shepherd, 3 Jur. N. S. 806, 26 L. J. Ch. 817.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1013.

Claims in individual and in fiduciary capacity.— Where a personal representative has claims against the estate both in his individual capacity and as representative of another estate, he cannot retain for the debt due to him in his individual capacity in preference to the claim held by him as representative. Chaffin *v.* Chaffin, 22 N. C. 255.

9. *New Jersey.*— Dolman *v.* Cook, 14 N. J. Eq. 56.

North Carolina.—Chaffin *v.* Chaffin, 22 N. C. 55.

Pennsylvania.— *Ex p.* Meason, 5 Binn. 167.

United States.— Page *v.* Lloyd, 5 Pet. 304, 8 L. ed. 134.

England.— Talbot *v.* Frere, 9 Ch. D. 568, 27 Wkly. Rep. 148; Ferguson *v.* Gibson, L. R. 14 Eq. 379, 41 L. J. Ch. 640.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1013.

Retainer without notice of claim of higher dignity.— It has been held that if an executor has fully administered the estate, and has retained a portion of the assets in payment of a debt due himself, without notice of a claim of higher dignity, such claim cannot be enforced against the portion of the assets retained by him. *In re* Fludyer, [1898] 2 Ch. 562, 67 L. J. Ch. 620, 79 L. T. Rep. N. S. 298, 47 Wkly. Rep. 5. *Contra*, Cookus *v.* Peyton, 1 Gratt. (Va.) 431.

Retainer must be for debt of highest dignity.— Where a foreign administrator was a creditor of the intestate by specialty and also by simple contract, and received assets insufficient to discharge both debts, it was held that he must retain in satisfaction of the specialty debt, and that he would be allowed to rank only as a simple contract creditor in respect to the assets in the hands of the domestic administrator. Johnson *v.* Ward, 2 L. J. Ch. O. S. 137.

10. Fort *v.* Bottle, 13 Sm. & M. (Miss.) 133; Redman *v.* Turner, 65 N. C. 445, holding that an administrator will not be allowed to retain out of assets of his intestate the amount of a note payable to him as guardian, and on which his intestate was surety, where he has paid over to the maker of the note, who is insolvent, a claim against his intestate for a sum more than sufficient to have discharged the note.

11. Davies *v.* Parry, [1899] 1 Ch. 602, 68 L. J. Ch. 346, 47 Wkly. Rep. 429; Sharman *v.* Rudd, 4 Jur. N. S. 527, 27 L. J. Ch. 844; Nunn *v.* ——, 2 L. J. Ch. O. S. 123, 1 Sim. & St. 588, 24 Rev. Rep. 242, 1 Eng. Ch. 588; *Re* Orme, 50 L. T. Rep. N. S. 51. See also *In re* Hubback, 29 Ch. D. 934, 54 L. J. Ch. 923, 52 L. T. Rep. N. S. 908, 33 Wkly. Rep. 666.

Executor suing on behalf of himself and all other creditors.— In the administration of a testator's estate, the right of an executor to retain for his debt is not affected by the circumstances that he is himself plaintiff, suing on behalf of himself and all other creditors, and that he has submitted to account in the ordinary form. *Ex p.* Campbell, 16 Ch. D. 198, 43 L. T. Rep. N. S. 727, 29 Wkly. Rep. 233.

12. Davies *v.* Parry, [1899] 1 Ch. 602, 68 L. J. Ch. 346, 47 Wkly. Rep. 429; Nunn *v.* ——, 2 L. J. Ch. O. S. 123, 1 Sim. & St. 588, 24 Rev. Rep. 242, 1 Eng. Ch. 588.

13. Hosack *v.* Rogers, 6 Paige (N. Y.) 415 [*reversed* on other grounds in 18 Wend. 319]; *In re* Compton, 30 Ch. D. 15, 54 L. J. Ch. 904, 53 L. T. Rep. N. S. 410; Richmond *v.* White, 12 Ch. D. 361, 48 L. J. Ch. 798, 41 L. T. Rep. N. S. 570, 27 Wkly. Rep. 878; Tipping *v.* Power, 1 Hare 405, 6 Jur. 434, 11 L. J. Ch. 257, 23 Eng. Ch. 405; *In re* Langley, 68 L. J. Ch. 361; Langton *v.* Higgs, 1 L. J. Ch. 150, 5 Sim. 228, 9 Eng. Ch. 228; Chissum *v.* Dewes, 5 Russ. 29, 29 Rev. Rep. 10, 5 Eng. Ch. 29, 38 Eng. Reprint 938; Hall *v.* Macdonald, 14 Sim. 1, 37 Eng. Ch. 1; Stahlschmidt *v.* Lett, 1 Sm. & G. 415.

Payment by person other than representative.— Where, in pursuance of an order made on motion of the residuary legatee, and in the presence of the executor, an insurance company pays into court money which forms a part of the assets of the estate, the executor is not thereby deprived of his right of retainer in priority to the costs of the suit and the debts of other creditors, since the payment into court by the insurance company is in substance a payment by the executor. Richmond *v.* White, 12 Ch. D. 34, 48 L. J. Ch. 798, 41 L. T. Rep. N. S. 570, 27 Wkly. Rep. 878.

Priority over costs of suit.— If the fund paid into court is insufficient to discharge the administrator's debt, his right of retainer will prevail against plaintiff's right to have

assets collected by a receiver appointed in a creditor's suit,[14] although he may retain out of assets previously collected by him and paid over to the receiver.[15]

(II) *Under Modern Statutes.* In England the right of retainer still exists as at common law,[16] but in the United States and Canada the statutes have greatly modified the right of retainer and confined its full operation to solvent estates,[17]

the cost of the suit satisfied. Richmond *v.* White, 12 Ch. D. 361, 48 L. J. Ch. 798, 41 L. T. Rep. N. S. 570, 27 Wkly. Rep. 878; Chissum *v.* Dewes, 5 Russ. 29, 29 Rev. Rep. 10, 5 Eng. Ch. 29, 38 Eng. Reprint 938. See also Tipping *v.* Power, 1 Hare 405, 6 Jur. 434, 11 L. J. Ch. 257, 23 Eng. Ch. 405.

14. *In re* Harrison, 32 Ch. D. 395, 55 L. J. Ch. 687, 55 L. T. Rep. N. S. 150, 34 Wkly. Rep. 736; *In re* Jones, 31 Ch. D. 440, 55 L. J. Ch. 350, 53 L. T. Rep. N. S. 855, 34 Wkly. Rep. 249 [*following In re* Birt, 22 Ch. D. 604, 52 L. J. Ch. 397, 48 L. T. Rep. N. S. 67, 31 Wkly. Rep. 334; Richmond *v.* White, 12 Ch. D. 361, 48 L. J. Ch. 798, 41 L. T. Rep. N. S. 570, 27 Wkly. Rep. 878]; Davenport *v.* Moss, 14 L. T. Rep. N. S. 133, 14 Wkly. Rep. 453.

15. Hosack *v.* Rogers, 6 Paige (N. Y.) 415 [*reversed* on other grounds in 18 Wend. 319]; *In re* Harrison, 32 Ch. D. 395, 55 L. J. Ch. 687, 55 L. T. Rep. N. S. 150, 34 Wkly. Rep. 736; *In re* Jones, 31 Ch. D. 440, 55 L. J. Ch. 350, 53 L. T. Rep. N. S. 855, 34 Wkly. Rep. 249.

16. **Hinde Palmer's Act** (32 & 33 Vict. c. 46), which abolished the distinction between specialty and simple contract debts in the administration of the estate of a deceased person, did not abolish the representative's right of retainer (Crowder *v.* Stewart, 16 Ch. D. 368, 50 L. J. Ch. 136, 29 Wkly. Rep. 331), nor did it enlarge his right so as to enable him to retain in full for a simple contract debt as against a specialty debt (*In re* Jones, 31 Ch. D. 440, 55 L. J. Ch. 350, 53 L. T. Rep. N. S. 855, 34 Wkly. Rep. 249; Wilson *v.* Coxwell, 23 Ch. D. 764, 52 L. J. Ch. 975).

Judicature Act of 1875.— An executor's right to retain a debt due to himself does not make him a secured creditor within the meaning of the Judicature Act (1875), § 10, and his right to retain is not affected by that section. Lee *v.* Nuttall, 12 Ch. D. 61, 48 L. J. Ch. 616, 41 L. T. Rep. N. S. 363, 27 Wkly. Rep. 805. See also *In re* May, 45 Ch. D. 499, 60 L. J. Ch. 34, 63 L. T. Rep. N. S. 375, 38 Wkly. Rep. 765.

17. *Alabama.*— If the estate is insolvent the administrator has, since the act of 1843, no right of retainer, but the debts are to be paid *pro rata.* Miller *v.* Irby, 63 Ala. 477; Smith *v.* Bryant, 60 Ala. 235; Kimball *v.* Moody, 27 Ala. 130; Shortridge *v.* Easley, 10 Ala. 520. See also Trimble *v.* Fariss, 78 Ala. 260.

Florida.— The right of retainer exists except where the estate is insolvent. Sanderson *v.* Sanderson, 17 Fla. 820; Sealey *v.* Thomas, 6 Fla. 25.

Illinois.— See Paschall *v.* Hailman, 9 Ill. 285.

Kentucky.— The right of retainer is not taken away, but it is modified by St. § 3868, which makes all debts of equal dignity and requires them to be paid ratably. Payne *v.* Pusey, 8 Bush 564; Berry *v.* Graddy, 1 Metc. 553.

Louisiana.— See Bujac *v.* Loste, 12 La. Ann. 96.

Maryland.— The claims of executors or administrators stand on an equal footing with other claims of the same nature. Pub. Gen. Laws (1904), art. 93, § 95; Semmes *v.* Magruder, 10 Md. 242.

Missouri.— The common-law doctrine of retainer is abolished. Nelson *v.* Russell, 15 Mo. 356.

New Jersey.— See Dolman *v.* Cook, 14 N. J. Eq. 56.

New York.— Under the New York statutes (2 Rev. St. (3d ed.) p. 642, § 35; Code Civ. Proc. § 2719) the claim of an executor or administrator has no priority over others of the same class. Matter of Gardner, 5 Redf. Surr. 14; Treat *v.* Fortune, 2 Bradf. Surr. 116. Previous to the passage of the Revised Statutes the common law prevailed and an executor or administrator had a right to pay his own claim in preference to all other claims of equal degree (Neilly *v.* Neilly, 89 N. Y. 352; Starbuck *v.* Farmers' L. & T. Co., 28 N. Y. App. Div. 308, 51 N. Y. Suppl. 8; Rogers *v.* Rogers, 3 Wend. 503, 20 Am. Dec. 716; Hosack *v.* Rogers, 6 Paige 415 [*reversed* on other grounds in 18 Wend. 319]; *In re* Rogers, 1 Redf. Surr. 231; Treat *v.* Fortune, 2 Bradf. Surr. 16); and the Revised Statutes did not apply where a testator died previous to the date of their passage, although assets came into the hands of his personal representative after that date (Rogers *v.* Hosack, 18 Wend. 319 [*reversing* on other grounds 6 Paige 415]).

Pennsylvania.— Under Pa. Act, Sept. 19, 1794, § 14, giving preference to certain debts against decedent's estate, not including debts due to an administrator or executor, and placing all other debts on the same footing, an administrator cannot on a deficiency of assets retain his whole debt, as against creditors in an equal degree. *Ex p.* Meason, 5 Binn. 167.

South Carolina.— An administrator cannot retain more than his proportion of the debts due to himself where the estate is insolvent (Leonir *v.* Winn, 4 Desauss. 65, 6 Am. Dec. 597); but an administrator, as against a creditor who has not rendered a statement of his debt within the time prescribed by law is entitled to retain for his whole debt, although the assets are not enough to pay all (Sebring *v.* Keith, 2 Hill 340).

Tennessee.— The right of retainer still ex-

and in some jurisdictions the personal representative can apply no part of the assets of the estate in payment of a claim held by him, until his claim has been allowed by the probate court.[18]

b. Presumption of Payment From Receipt of Assets. At common law, as a consequence of the right of retainer, if a personal representative receives assets sufficient to pay a claim held by him against the decedent, and which he may lawfully retain for that purpose, his retainer for his debt and its consequent extinguishment are conclusively presumed.[19] The mere fact that a creditor becomes the personal representative of his debtor does not raise any presumption of the extinguishment of the debt;[20] but in order to have that effect there must be a receipt of assets by the personal representative sufficient to pay his debt, and which he may lawfully retain for that purpose.[21] No act on the part of the repre-

ists, except in the case of insolvent estates, which are required to be distributed *pro rata* among all the creditors (Smith *v.* Watkins, 8 Humphr. 331); but the personal representative, if he has funds in his hands, must manifest his intention to retain by settlement with the county court, or some other equivalent act of appropriation, within the period limiting suits against him by other creditors, or his claim will be barred (Williams *v.* Williams, 15 Lea 438; Shields *v.* Alsup, 5 Lea 508; Byrn *v.* Fleming, 3 Head 658; Hamner *v.* Hamner, 3 Head 398).

Canada.— If the estate of a deceased person is insolvent, the provisions of the Property and Trusts Act apply so as to displace any right on the part of the executor to retain in full for his claim. *Re* Ross, 29 Grant Ch. (U. C.) 385. See also Kline *v.* Kline, 3 Ch. Chamb. (U. C.) 161.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1012 *et seq.*

Presumption that common law prevails in foreign state.— In the absence of proof of the laws of a foreign state, the presumption is that the common law, giving preference to the claims of an executor over those of equal degree, prevails. Dix *v.* Hozier, 6 N. Y. St. 745.

18. Semmes *v.* Magruder, 10 Md. 242; Owens *v.* Collinson, 3 Gill & J. (Md.) 25; Neilley *v.* Neilley, 89 N. Y. 352; Kyle *v.* Kyle, 67 N. Y. 400; Matter of Arkenburgh, 58 N. Y. App. Div. 583, 69 N. Y. Suppl. 125; Starbuck *v.* Farmers' L. & T. Co., 28 N. Y. App. Div. 308, 51 N. Y. Suppl. 8; Wilcox *v.* Smith, 26 Barb. (N. Y.) 316. See also Broome *v.* Van Hook, 1 Redf. Surr. (N. Y.) 444; *In re* Rogers, 1 Redf. Surr. (N. Y.) 251; Treat *v.* Fortune, 2 Bradf. Surr. (N. Y.) 116. But see State *v.* Reigart, 1 Gill (Md.) 1, 39 Am. Dec. 628.

Interest on amount retained.— An executor who retains any part of the assets in satisfaction of his disputed claim against the estate is chargeable with interest on the amount retained. Matter of Gardner, 5 Redf. Surr. (N. Y.) 14.

19. *Alabama.*— Beadle *v.* Steele, 86 Ala. 413, 5 So. 169; Trimble *v.* Fariss, 78 Ala. 260; Miller *v.* Irby, 63 Ala. 477.

Delaware.— Miller *v.* Miller, 5 Harr. 333.

Florida.— Sealey *v.* Thomas, 6 Fla. 25.

Ohio.— Hall *v.* Pratt, 5 Ohio 72.

South Carolina.— See Johnson *v.* Brockelbank, 2 Hill 353; Evans *v.* Evans, 1 Desauss. 515.

United States.— See Page *v.* Lloyd, 5 Pet. 304, 8 L. ed. 134.

England.— Woodward *v.* Darcy, Plowd. 184.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1020.

Debts due to representative in fiduciary capacity.— The presumption of extinguishment extends to debts due to the representative as trustee (Miller *v.* Irby, 63 Ala. 477) or as the representative of another estate (Miller *v.* Irby, *supra*; Muse *v.* Sawyer, 4 N. C. 637; Thomas *v.* Chamberlain, 39 Ohio St. 112; Fryer *v.* Gildridge, Hob. 14; Wangford *v.* Wangford, 11 Mod. 38, 1 Salk. 299. See also Dorchester *v.* Webb, Cro. Car. 372).

20. Muse *v.* Sawyer, 4 N. C. 637; Hall *v.* Pratt, 5 Ohio 72; Wangford *v.* Wangford, 11 Mod. 38, 1 Salk. 299.

21. *Alabama.*— Dickie *v.* Dickie, 80 Ala. 57; Trimble *v.* Fariss, 78 Ala. 260; Miller *v.* Irby, 63 Ala. 477; Kimball *v.* Moody, 27 Ala. 130.

Florida.— Sealey *v.* Thomas, 6 Fla. 25.

Massachusetts.— Bemis *v.* Call, 10 Allen 512.

New York.— See Thompson *v.* Thompson, 2 Johns. 471.

North Carolina.— Chaffin *v.* Hanes, 15 N. C. 103; Muse *v.* Sawyer, 4 N. C. 637.

Ohio.— Hall *v.* Pratt, 5 Ohio 72.

South Carolina.— Porter *v.* Cheesborough, 1 Strobh. Eq. 275.

England.— Lowe *v.* Peskett, 16 C. B. 500, 1 Jur. N. S. 1049, 24 L. J. C. P. 196, 3 Wkly. Rep. 481, 81 E. C. L. 500; Dorchester *v.* Webb, 1 Cro. Car. 372; Wangford *v.* Wangford, 11 Mod. 38, 1 Salk. 299.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1020.

Receipt of assets insufficient to pay debt.— If an executor, who is also a creditor, receives and disposes of property of the estate and dies before accounting therefor, the presumption of payment of his debt by retainer does not arise, unless the value of the property so received equaled the amount of the debt. Jordan *v.* Hardie, 131 Ala. 72, 31 So. 504. See also Woodward *v.* Darcy, Plowd. 184.

sentative in applying the assets in payment of his debt is necessary in order to work an extinguishment thereof;[22] but by operation of law the property in the assets, to an amount sufficient to extinguish his debt, is vested in him, and his debt is paid,[23] and it is not in his discretion to keep alive or continue the debt or by any subsequent act to revive it.[24] This doctrine, being a consequence of the right of retainer, does not apply where the right of retainer has been abolished or materially modified by statute;[25] and under statutes which prevent the personal representative from disposing of tangible personal property except by sale under order of the probate court, the debt of the personal representative is not extinguished unless he receives money,[26] or has possession of other personal assets for a sufficient length of time to enable him to convert them into money.[27] It has been held that the failure of the representative to apply for an order to sell the real estate of the decedent to pay debts for such a length of time as to render him chargeable at the suit of other creditors will raise a presumption of the extinguishment of his own debt.[28]

c. Secured Claims. A personal representative whose claim against the decedent's estate is secured is entitled to the benefit of his security.[29]

d. Set-Off and Counter-Claim. An executor or administrator indebted to the estate of his decedent will not be allowed to pay in full a claim that he holds against that estate, but will be required to offset the debt against his claim.[30]

4. Advances to Pay Claims — a. Advances by Executor or Administrator — (i) *In General.* Although the duty of a personal representative to serve the best interests of the estate he represents does not impose any obligation on him to use his own funds for that purpose, it authorizes him to do so; and if, in good faith and for the benefit of the estate, he advances his own funds to pay debts or discharge contracts which are just charges against the estate he is entitled to reimbursement.[31] And if with good reason the representative pays the just debts

Death of representative before receiving assets.— If an administrator dies without receiving assets, his debt is not presumed to have been extinguished. Hall *v.* Pratt, 5 Ohio 72.

22. Beadle *v.* Steele, 86 Ala. 413, 5 So. 169; Miller *v.* Irby, 63 Ala. 477; Muse *v.* Sawyer, 4 N. C. 637; Woodward *v.* Darcy, Plowd. 184. But see Shields *v.* Alsup, 5 Lea (Tenn.) 508.

23. Beadle *v.* Steele, 86 Ala. 413, 5 So. 169; Trimble *v.* Fariss, 78 Ala. 260; Muse *v.* Sawyer, 4 N. C. 637; Woodward *v.* Darcy, Plowd. 184.

24. Beadle *v.* Steele, 86 Ala. 413, 5 So. 169; Dickie *v.* Dickie, 80 Ala. 57; Miller *v.* Irby, 63 Ala. 477; Chaffin *v.* Hanes, 15 N. C. 103. See also Harkins *v.* Hughes, 60 Ala. 316; Prentice *v.* Dehon, 10 Allen (Mass.) 353. But see Page *v.* Lloyd, 5 Pet. (U. S.) 304, 8 L. ed. 134.

25. Miller *v.* Irby, 63 Ala. 477; Sealey *v.* Thomas, 6 Fla. 25; Matter of Saunders, 4 Misc. (N. Y.) 28, 23 N. Y. Suppl. 829, Pow. Surr. (N. Y.) 336; Smith *v.* Watkins, 8 Humphr. (Tenn.) 331.

26. Miller *v.* Irby, 63 Ala. 477; Kimball *v.* Moody, 27 Ala. 130; Harrison *v.* Henderson, 7 Heisk. (Tenn.) 315 [*overruling* Smith *v.* Watkins, 8 Humphr. (Tenn.) 331]. See also Ross *v.* Wharton, 10 Yerg. (Tenn.) 190.

Receipt of depreciated currency.— A personal representative who is a creditor of the decedent will not be permitted to receive depreciated currency in payment of debts due the estate, suffer it to become worthless in his hands, and then devolve the whole loss on the distributees; but he must retain in payment of his own claim the same kind of money which he receives in payment of debts due the estate. Dickie *v.* Dickie, 80 Ala. 57.

27. Miller *v.* Irby, 63 Ala. 477; Glenn *v.* Glenn, 41 Ala. 571 (holding that an administrator's retention in specie for six or seven years of sufficient personalty to pay a debt due to him raised a presumption that the debt was paid, and he was entitled to credit in his accounts for the amount of the debt); Kimball *v.* Moody, 27 Ala. 130 (failure for twelve years to convert assets into money).

28. Miller *v.* Irby, 63 Ala. 477. See also Trimble *v.* Fariss, 78 Ala. 260; Kimball *v.* Moody, 27 Ala. 130.

29. Dexter *v.* Arnold, 7 Fed. Cas. No. 3,855, 3 Mason 284. See also Kern *v.* Noble, 57 Ill. App. 27 [*affirmed* in 159 Ill. 311, 42 N. E. 844].

30. Terhune *v.* Oldis, 44 N. J. Eq. 146, 14 Atl. 638. See also Whipple *v.* Crocker, 6 Ill. App. 133. And see *infra*, X, D, 4, a, (v).

The liability of an administrator for assets wasted should be applied in payment of a debt due to him to the intestate. Pool *v.* Ellis, 64 Miss. 555, 1 So. 725.

31. *Alabama.*— Martin *v.* Foster, 38 Ala. 688.

Arkansas.— Trimble *v.* James, 40 Ark. 393.

California.— Burnett *v.* Lyford, 93 Cal. 114, 28 Pac. 855, holding that Code Civ. Proc. § 1617, forbidding the purchase by an

of the decedent from his own means after the personalty is exhausted, he is entitled to repayment from the proceeds of the decedent's lands which were originally liable for such debts,[32] although where he seeks to subject the real estate

administrator of a claim against the estate which he represents, is inapplicable to a case where an administrator, for the purpose of protecting the estate against a sacrifice under the foreclosure of a mortgage, advances his own funds and takes an assignment of the mortgage to himself or a third person.

Connecticut.— Lawrence *v.* Kitteridge, 21 Conn. 577, 56 Am. Dec. 385.

Kentucky.— Mitcherson *v.* Mercer, 6 J. J. Marsh. 381; Haddix *v.* Haddix, 5 Litt. 201.

Maryland.— Dennis *v.* Dennis, 15 Md. 73; Edelen *v.* Edelen, 11 Md. 415.

Mississippi.— Slaton *v.* Alcorn, 51 Miss. 72; Short *v.* Porter, 44 Miss. 533; Woods *v.* Ridley, 27 Miss. 119.

Missouri.— Hill *v.* Buford, 9 Mo. 869.

New Jersey.— Freehold First Nat. Bank *v.* Thompson, 61 N. J. Eq. 188, 48 Atl. 333. See also Ver Duin *v.* Ver Duin, 42 N. J. Eq. 325, 5 Atl. 647.

New York.— Stilwell *v.* Melrose, 15 Hun 378; *In re* Randell, 8 N. Y. Suppl. 652, 2 Connoly Surr. 29; Livingston *v.* Newkirk, 3 Johns. Ch. 312.

North Carolina.— Chesson *v.* Chesson, 43 N. C. 141; Williams *v.* Williams, 17 N. C. 69, 22 Am. Dec. 729.

Pennsylvania.— *In re* Connolly, 198 Pa. St. 146, 48 Atl. 489; *In re* Bentley, 196 Pa. St. 497, 46 Atl. 898; *In re* Mustin, 188 Pa. St. 544, 41 Atl. 618; Blank's Appeal, 3 Grant 192; McCurdy's Appeal, 5 Watts & S. 397.

South Carolina.— Brooks *v.* Brooks, 12 S. C. 422; Watts *v.* Watts, 2 McCord Eq. 77.

Texas.— Dunson *v.* Payne, 44 Tex. 539.

Wisconsin.— Gundry *v.* Henry, 65 Wis. 559, 27 N. W. 401.

United States.— Manson *v.* Duncanson, 166 U. S. 533, 17 S. Ct. 647, 41 L. ed. 1105.

England.—See Woodward *v.* Darcy, Plowd. 184.

See 22 Cent. Dig. tit. "Executors and Administrators, § 1023; and *supra*, X, A, 19, g.

Payment of claims not presented or allowed.— Where commissioners appointed to receive and adjust all claims against an estate regularly complete and file their report, the administrator is not entitled to an allowance in his account for payments made out of his own funds on claims which were never presented to the commissioners and allowed by them, although the claims so paid were valid against the estate, and would have been properly allowed by the commissioners had they been presented. Bunnell *v.* Post, 25 Minn. 376.

Necessity for accounting.— In Pennsylvania an executor who claims for advances to the estate must establish his standing by settling an account. *In re* Bently, 196 Pa. St. 497, 46 Atl. 898; Blank's Appeal, 3 Grant 192.

Repayment by successor in the trust.— Where an administrator *de bonis non* pays to his predecessor a sum of money which the latter advanced to satisfy a just demand against the estate, he is entitled to an allowance in his accounts for the sum so paid. Hearrin *v.* Savage, 16 Ala. 286.

Advances out of property of third person. — The representative is also entitled to reimbursement for advances made out of property belonging to a third person where he is liable to account therefor to the owner. Birkholm *v.* Wardell, 42 N. J. Eq. 337, 7 Atl. 569, where an administrator was allowed reimbursement for advances made from funds held by him as guardian. See also Cordell *v.* McCullough, 20 La. Ann. 174.

32. *Alabama.*— McCullough *v.* Wise, 57 Ala. 623.

Kentucky.— Doty *v.* Cox, 22 S. W. 321, 15 Ky. L. Rep. 68; Taylor *v.* Taylor, 8 B. Mon. 419, 48 Am. Dec. 400.

Missouri.— Roberts *v.* Bartlett, 26 Mo. App. 611.

New Jersey.— Liddel *v.* McVicar, 11 N. J. L. 44, 19 Am. Dec. 369; Clayton *v.* Somers, 27 N. J. Eq. 230.

New York.— Livingston *v.* Newkirk, 3 Johns. Ch. 312. See also Bolton *v.* Myers, 146 N. Y. 257, 40 N. E. 737.

North Carolina.— Denton *v.* Tyson, 118 N. C. 542, 24 S. E. 116; Turner *v.* Shuffler, 108 N. C. 642, 13 S. E. 243; Sanders *v.* Sanders, 17 N. C. 262; Williams *v.* Williams, 17 N. C. 69, 22 Am. Dec. 729.

Pennsylvania.— McKerrahan *v.* Crawford, 59 Pa. St. 390.

Tennessee.— Loftis *v.* Loftis, 94 Tenn. 232, 28 S. W. 1091.

Virginia.— Gaw *v.* Huffman, 12 Gratt. 628.

West Virginia.— Surber *v.* Kent, 5 W. Va. 96, advance of Confederate currency.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1023; and DESCENT AND DISTRIBUTION, 14 Cyc. 198.

Right to subject property charged by will with payment of debts.— Where the executors pay a debt, or the creditor accepts their note in place of the note of the testator, so that the executors become the debtors and personally responsible to the creditor, the only effect is that the executors become the creditors of the estate instead of the original creditors, and they may resort to the fund set apart by the will for the payment of debts. Peter *v.* Beverly, 10 Pet. (U. S.) 532, 9 L. ed. 522 [*reaffirmed* in 1 How. 134, 11 L. ed. 75]. See also *In re* Lefevre, 200 Pa. St. 531, 50 Atl. 185.

Representative acting in bad faith.—Where an administrator, with knowledge that the personal estate is insolvent, pays debts of the intestate to a larger amount than the

to reimburse him for his advances he must show that the fund or property primarily chargeable with the debts has been faithfully administered and has proved inadequate.[33] The personal representative occupies, however, as to debts paid by him from his own funds, merely the position of the original creditors, and is entitled to no greater preference;[34] and in no case will he be allowed to make a profit for himself from the transaction.[35]

(II) *RETAINER OF ASSETS IN SATISFACTION.*[36] At common law, if an executor or administrator makes advances out of his own funds to the value of the personal assets of the estate, he may elect to apply those assets to reimburse himself, and by such election the assets become his own property;[37] but the statutes which in many states prevent the personal representative from disposing of personal property except by sale under order of the probate court,[38] have abrogated the right of the personal representative to appropriate specific personal property in satisfaction of his advances.[39]

(III) *INTEREST ON ADVANCES.* A change of interest by a personal representative on advances made by him is not favored, and the circumstances offered to

personal assets, for the purpose of making the heir his debtor and withdrawing the question of debt or no debt from the proper forum, he is entitled to no relief. Williams *v.* Williams, 17 N. C. 69, 22 Am. Dec. 729. See also Sanders *v.* Sanders, 17 N. C. 262.

33. Frary *v.* Booth, 37 Vt. 78. See *infra*, XII, B, 2, c.

Ex parte settlement not evidence against heirs.— Street *v.* Street, 11 Leigh (Va.) 498.

34. Hearrin *v.* Savage, 16 Ala. 286; *In re* Randell, 8 N. Y. Suppl. 652, 2 Connoly Surr. (N. Y.) 29; *In re* Greiner, 2 Watts (Pa.) 414; Cooper's Estate, 4 Pa. Super. Ct. 615; Smith's Estate, 8 Pa. Co. Ct. 159; Willis *v.* Willis, 20 Grant Ch. (U. C.) 396. But see Spackman *v.* Holbrook, 2 Giff. 198, 6 Jur. N. S. 881, 2 L. T. Rep. N. S. 367.

Payment of the funeral expenses of the decedent by an administrator out of his own money gives him a preferred claim against the estate chargeable on the land, and payable therefrom after such debts as are specific liens on the land. Loftis *v.* Loftis, 94 Tenn. 232, 28 S. W. 1091.

35. Amos *v.* Heatherby, 7 Dana (Ky.) 45 (where an administrator paid a debt of the estate with his own property estimated above its actual value, and was allowed credit for its actual value only); Desha *v.* Desha, 11 Ky. L. Rep. 405. See *supra*, VIII, J, 1; X, A, 21.

Payment for representative's own benefit. — Where an administratrix, for her own benefit, pays a mortgage lien to relieve personal property which had been valued and set apart to her as exempt, and there is no other personal property belonging to the estate, she cannot charge the estate with the amount so paid. Patapsco Guano Co. *v.* Ballard, 107 Ala. 710, 19 So. 777, 54 Am. St. Rep. 131.

36. **Right of retainer generally** see *supra*, X, D, 3, a.

37. *Kentucky.*— Mitcherson *v.* Mercer, 6 J. J. Marsh. 381; Haddix *v.* Haddix, 5 Litt. 201.

New York.— Livingston *v.* Newkirk, 3 Johns. Ch. 312.

North Carolina.— Chesson *v.* Chesson, 43 N. C. 141.

England.— Merchant *v.* Driver, 1 Saund. 307; Dyer 2*a*, 187*b*.

Canada.— Yost *v.* Crombie, 8 U. C. C. P. 159.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1023.

Land directed by the will to be sold cannot be retained by the personal representative in satisfaction of his advances. See Livingston *v.* Newkirk, 3 Johns. Ch. (N. Y.) 312. But he can apply the proceeds of the realty for this purpose. Livingston *v.* Newkirk, *supra*. See also Miller *v.* Irby, 63 Ala. 477; Bolton *v.* Myers, 146 N. Y. 257, 40 N. E. 737.

Election to take chattel no evidence of payment of debts.— Although an executor who has paid debts of the estate with his own money may sometimes elect to take a specific chattel in satisfaction, the mere election to take a chattel is not evidence that the executor has paid debts to the value thereof. Mitcherson *v.* Mercer, 6 J. J. Marsh. (Ky.) 381.

38. See *supra*, VIII, P, 2, a, (I), (B).

39. Lindsay *v.* Lindsay, 1 Desauss. (S. C.) 150, holding that the executors cannot, on paying debts of the estate, take the estate to themselves without a regular sale. A personal representative cannot, by paying debts and legacies beyond the amount of cash received from sales, transfer to himself in his own right the title to any portion of the property of the decedent at its appraised value (Gavin *v.* Carling, 55 Md. 530; Dennis *v.* Dennis, 15 Md. 73; Haslett *v.* Glenn, 7 Harr. & J. (Md.) 17; Hall *v.* Griffith, 2 Harr. & J. (Md.) 483); nor can the orphans' court authorize such a transaction (Gavin *v.* Carling, *supra*); but where a court of equity is called upon to pass a decree recognizing the correctness of this proposition, it will provide for the reimbursement of the representative out of the decedent's property for all proper disbursements on account of the estate appearing to have been legally made by him (Dennis *v.* Dennis, *supra*).

sustain it will be examined with scrupulous care,[40] and interest will not be allowed where funds amply sufficient to meet all claims against the estate were in the possession of the personal representative, or where the failure to obtain sufficient funds was due to his negligence in converting the assets of the estate into money.[41] On the other hand interest will be allowed where the advances were meritorious and beneficial, and the personal representative has been guilty of no neglect or delay in settling the estate.[42]

(iv) *Effect of Limitations.* The statute of limitations does not begin to run against the claim of an administrator or executor for advances made to pay debts of the estate until he has stated his account.[43] But the payment by the representative out of his own funds of debts against the estate will not prolong the lien of such debts upon the real estate of the decedent, beyond the statutory period, in favor of the representative.[44]

(v) *Set-Off of Advances Against Debts.* On a settlement of the accounts of an executor or administrator, advances made by him for the estate should be set off against amounts found to be due from him to the estate.[45]

40. Pettingill *v.* Pettingill, 60 Me. 411; Liddell *v.* McVicar, 11 N. J. L. 44, 19 Am. Dec. 369; Evarts *v.* Mason, 11 Vt. 122.

41. *Maryland.*— Billingslea *v.* Henry, 20 Md. 282.

Massachusetts.— Storer *v.* Storer, 9 Mass. 37.

Missouri.— McPike *v.* McPike, 111 Mo. 216, 20 S. W. 12; Booker *v.* Armstrong, 93 Mo. 49, 4 S. W. 727.

New Jersey.— Liddel *v.* McVickar, 11 N. J. L. 44, 19 Am. Dec. 369.

South Carolina.— McGougan *v.* Hall, 21 S. C. 600, where the executor permitted all the assets of the estate to go to the hands of the legatees without providing for outstanding debts.

Vermont.— Evarts *v.* Nason, 11 Vt. 122; Rix *v.* Smith, 8 Vt. 365.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1029.

Where the executor has a life-estate in the residuum of the estate, he is not entitled to interest on money advanced by him to pay debts of the testator, as under his life-tenancy he has had the use of the property of the estate, which was subject to the discharge of the debts. Brooks *v.* Brooks, 12 S. C. 422.

42. *Arkansas.*— Trimble *v.* James, 40 Ark. 393.

Georgia.— See Crawford *v.* Tibble, 69 Ga. 519.

Maine.— Pettingill *v.* Pettingill, 60 Me. 411.

Maryland.— Billingslea *v.* Henry, 20 Md. 282.

Massachusetts.— Jennison *v.* Hapgood, 10 Pick. 77, where an executor, having no assets from the estate, advanced his own money to redeem land of the testator mortgaged for less than its value, and to prevent a foreclosure.

New Jersey.— Liddel *v.* McVickar, 11 N. J. L. 44, 19 Am. Dec. 369.

New York.— Stilwell *v.* Melrose, 15 Hun 378 (advances to pay interest-bearing debts); Mann *v.* Lawrence, 3 Bradf. Surr. 424 (holding that an executor should be allowed interest on his advances where the money advanced was expended for taxes, necessary expenses, and repairs, and debts which carried interest).

Pennsylvania.— Callaghan *v.* Hall, 1 Serg. & R. 241; *In re* Hobson, 25 Pittsb. Leg. J. 456.

Vermont.— Rix *v.* Smith, 8 Vt. 365.

Virginia.— See Jones *v.* Williams, 2 Call 102.

England.— Finch *v.* Pescott, L. R. 17 Eq. 554, 43 L. J. Ch. 728, 30 L. T. Rep. N. S. 156, 22 Wkly. Rep. 437; Small *v.* Wing, 5 Bro. P. C. 66, 2 Eng. Reprint 537; Biggar *v.* Eastwood, 15 L. R. Ir. 219.

Canada.— Menzies *v.* Ridley, 2 Grant Ch. 544.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1029.

Compound interest will not be allowed on advances made by a personal representative. Trimble *v.* James, 40 Ark. 393. See also Walker's Estate, 3 Rawle (Pa.) 243.

Interest on costs paid by an executor pending a suit regarding the estate will not be allowed. Lewis *v.* Lewis, 13 Beav. 82, 51 Eng. Reprint 32; Gordon *v.* Trail, 8 Price 416.

43. *In re* Bentley, 196 Pa. St. 497, 46 Atl. 898. See also Nowell *v.* Bragdon, 14 Me. 320.

44. Battersby *v.* Castor, 181 Pa. St. 555, 37 Atl. 572; Merkel's Estate, 154 Pa. St. 285, 26 Atl. 428; Demmy's Appeal, 43 Pa. St. 155; Loomis' Appeal, 29 Pa. St. 237; McCurdy's Appeal, 5 Watts & S. (Pa.) 397; Villee's Estate, 2 Pa. Dist. 74.

An agreement by the heirs that the representative shall receive reimbursement out of the proceeds of the real estate for his advances may prevent the running of the statute of limitations against such advances, so far as the heirs and persons claiming under them are concerned. Wallace's Appeal, 5 Pa. St. 103.

45. Hall *v.* Griffith, 2 Harr. & J. (Md.) 482. See also Dreisbach's Appeal, 17 Pa. St. 120; Falconer *v.* Powe, Bailey Eq. (S. C.) 150. And see *supra*, X, D, 3, d.

b. Advances by Third Persons. Advances by third persons to the representative for the purpose of paying the debts of an estate ordinarily create only a personal liability on the part of the representative;[46] but, in cases where the representative is entitled to reimbursement from the estate for the debts paid by him, equity will subrogate the person advancing the money to the rights of the representative and allow him to be repaid directly from the estate,[47] but only to the extent that the money advanced has been actually used in the payment of debts for which the estate was legally bound.[48] Payments by third persons directly to the creditors of an estate are not favored, but reimbursement will generally be allowed where the payments are made in good faith and for the benefit of the estate, especially where they are made by the widow, or an heir or distributee, intending thereby to avoid the expense of administration.[49]

5. Interest on Claims — a. When Allowed — (I) *In General.* Interest is not allowable from a decedent's estate, where from the nature of the claim no interest is due; and the claims of creditors with whom settlement is made in the ordinary course of administration are usually dealt with on the footing they occupied in this respect at the date of decedent's death.[50] Claims bearing interest by their terms should be paid with interest accruing before and after the decedent's death, according to their tenor;[51] but interest is not usually allowed on unliquidated claims,[52] although it has been held that such claims bear interest from the time they are due and payable.[53]

(II) *Necessity and Effect of Demand.* In some jurisdictions claims not otherwise bearing interest begin to draw interest from the date that demand is made upon the personal representative for their payment.[54] By statute in Ken-

46. See *supra*, VIII, D, 5.

47. Short *v.* Porter, 44 Miss. 533; Woods *v.* Ridley, 27 Miss. 119; Freehold First Nat. Bank *v.* Thompson, 61 N. J. Eq. 188, 48 Atl. 333; De Concillio *v.* Brownrigg, 51 N. J. Eq. 532, 25 Atl. 383; Hamlin *v.* Smith, 72 N. Y. App. Div. 601, 76 N. Y. Suppl. 258; Johnson *v.* Kellog, 8 N. Y. St. 413. See *supra*, VIII, D, 5.

A surety on a note given by an executor in renewal of a note of the decedent, after being compelled to pay the note, is entitled to be substituted to the claim of the executor and the creditor against the assets of the estate, and there being a balance due the executor from the estate by reason of the payment of the debt by the surety, the surety is entitled to such balance in preference to a subsequent assignee of the executor. Heart *v.* Bryan, 17 N. C. 147.

48. Woods *v.* Ridley, 27 Miss. 119; Freehold First Nat. Bank *v.* Thompson, 61 N. J. Eq. 188, 48 Atl. 333; De Concillio *v.* Brownrigg, 51 N. J. Eq. 532, 25 Atl. 383.

Money used to pay representative's own debts.— Where a creditor of an estate advanced money to the administrator to pay off certain claims, the creditor cannot claim to be reimbursed from the estate as to a portion of the sum advanced which the administrator used for individual purposes, although the agreement was that it was all to be used for the estate. But where the money advanced was mixed with other funds from which the administrator paid some individual claims, it should be treated as a trust fund in determining the rights of the creditor as against the estate for the money advanced, and payments of individual claims should be assumed to have been made from individual funds. Freehold First Nat. Bank *v.* Thompson, 61 N. J. Eq. 188, 48 Atl. 333.

49. Jenks *v.* Terrell, 73 Ala. 238; Brearley *v.* Norris, 23 Ark. 166. See also Chase *v.* Barratt, 4 Paige (N. Y.) 148.

Purchase of claims against estate see *supra*, X, A, 21.

50. *In re* Selby, Myr. Prob. (Cal.) 125; Durnford's Succession, 1 La. Ann. 92. See also *Re* Kirkpatrick, 10 Ont. Pr. 4. And see Schouler Ex. § 440.

Interest is never allowed on expenses of administration. Wilson's Appeal, 3 Walk. (Pa.) 216.

Advances by representative see *supra*, X, D, 4, a, (III).

51. See Brownson *v.* Baker, 11 La. 409; Reber's Estate, 143 Pa. St. 308, 22 Atl. 880.

52. Pursell *v.* Fry, 19 Hun (N. Y.) 595; *In re* Merchant, 6 N. Y. Suppl. 875; Greenawalt's Estate, 9 Lanc. Bar (Pa.) 50.

Claim liquidated by agreement with representative see Elder's Appeal, 94 Pa. St. 461.

53. Anderson *v.* Birdsall, 19 La. 441. See also Parker *v.* Parker, 33 Ala. 459; Newel *v.* Keith, 11 Vt. 214.

54. Pico *v.* Stevens, 18 Cal. 376; Yarborough's Succession, 16 La. Ann. 258; Shepherd *v.* Shepherd, 108 Mich. 82, 65 N. W. 580. But see Pursell *v.* Fry, 19 Hun (N. Y.) 595.

Demand of administrator pendente lite.— Under Mo. Rev. St. § 3705, providing that creditors shall be allowed interest at the rate of six per cent per annum on accounts after they become due and demand of payment is made, a creditor of a decedent whose claim is allowed against the estate is entitled to

tucky it is a condition precedent to the recovery of interest accruing on a claim after the death of the debtor that the claim be duly verified and demanded of the personal representative within one year after his appointment.[55]

(III) *Effect of Allowance.* In some jurisdictions all claims bear interest from the date of their allowance, at the rate prescribed for judgments, although the original demand did not bear interest.[56]

(IV) *Representative's Agreement to Pay Interest.* An executor or

interest thereon from the date of the demand of payment of the administrator *pendente lite*. Ryans *v.* Hospes, 167 Mo. 342, 67 S. W. 285.

Interest may be recovered, although not called for in the statement of the claim presented to the administrator. Harwood *v.* Larramore, 50 Mo. 414. See also Wilson *v.* Van Winkle, 7 Ill. 684. *Contra*, Aguirre *v.* Packard, 14 Cal. 171, 73 Am. Dec. 645.

55. Ky. St. § 3884. See McCann *v.* Bell, 79 Ky. 112 (holding that where a note executed for the purchase-price of land is not to bear interest until after maturity, the interest stipulated for is no part of the price of the land, but is the consideration for the forbearance, and unless such note is duly verified and demanded of the representative within a year after his appointment, no interest accruing after the maker's death can be recovered); Guill *v.* Corinth Deposit Bank, 68 S. W. 870, 24 Ky. L. Rep. 482.

The statute authorizes the same proceedings against a curator for the collection of a debt due from the decedent as are authorized to be had against an executor or administrator. Moran *v.* Hammer, 58 S. W. 988, 22 Ky. L. Rep. 831.

Claims not due.— The demand required by Ky. St. § 3884, applies to claims due and bearing interest at the death of the decedent or at the time of the appointment of his personal representative, and as to claims that are not due at these dates the statute has no application until they mature. Kentucky Title Co. *v.* English, 50 S. W. 968, 20 Ky. L. Rep. 2024; Pepper *v.* Harper, 47 S. W. 620, 20 Ky. L. Rep. 837. See also Jones *v.* Louisville Sav., etc., Co., 58 S. W. 534, 22 Ky. L. Rep. 570.

Where there is no representative upon whom demand may be made, demand is excused. Tatum *v.* Gibbs, 41 S. W. 565, 19 Ky. L. Rep. 695.

Waiver of demand.— Demand may be waived by the representative where other persons interested in the estate are not prejudiced thereby. Cox *v.* Higgenbotham, 79 S. W. 1079, 25 Ky. L. Rep. 1057; Botts *v.* Utley, 12 Ky. L. Rep. 555; Croninger *v.* Marthen, 7 Ky. L. Rep. 599, holding that a request by an executor that creditors should postpone collection of their demands to enable him to pay without a sale of the real estate, accompanied by an assurance that their claims should be paid in full, amounted to a waiver of the demand necessary to the allowance of interest where the executor was the only other creditor of the estate, which was insolvent.

Partial payment before demand.— A personal representative by merely making a payment upon a claim before it is verified does not waive his right to require, as a condition precedent to a recovery of interest accruing after the debtor's death, that the claim be verified and the payment of the balance due thereon be demanded within a year from the time of his qualification. Jett *v.* Cockrill, 85 Ky. 348, 3 S. W. 422, 9 Ky. L. Rep. 16. Nor does a part payment of interest operate as a waiver of demand. Davis *v.* Banta, 4 Ky. L. Rep. 368.

Reference to commissioner.— Where a representative within one year from his appointment files a petition in equity for a settlement of the estate of his decedent, and the case is referred to a commissioner to audit claims against the estate, a demand by a creditor is not necessary in order to entitle him to interest. Richardson *v.* Banta, 23 S. W. 350, 15 Ky. L. Rep. 348; Hamilton *v.* Tarlton, 3 Ky. L. Rep. 471. See also Jones *v.* Louisville Sav., etc., Co., 58 S. W. 534, 22 Ky. L. Rep. 570.

56. Glenn's Estate, 74 Cal. 567, 16 Pac. 396; Wheeler *v.* Dawson, 63 Ill. 54; Finley *v.* Carothers, 9 Tex. 517, 60 Am. Dec. 179. See also Wainwright's Estate, 13 Phila. (Pa.) 336. But see *In re* Selby, Myr. Prob. (Cal.) 125, holding that the allowance of a claim by the executor and the probate judge is not a judgment of a court, so as to bear interest until the claim has passed the final accounting and been ordered paid.

The report of commissioners upon the estate of a deceased insolvent is in the nature of a judgment ascertaining the sums which were due from the deceased at the time of his death, and from and after that time interest is allowable on such claims as upon a judgment. Mowry *v.* Peck, 2 R. I. 260. But see Bowers *v.* Hammond, 139 Mass. 360, 31 N. E. 729.

Recovery of judgment on rejected claim.— If an administrator rejects a legal claim against the estate and the claimant afterward sues and recovers a judgment thereon, he is entitled to interest on his claim from the time of its presentation to the administrator. Kennedy's Estate, 94 Cal. 22, 29 Pac. 412; Pico *v.* Stevens, 18 Cal. 376. But the probate court cannot, in ordering the judgment to be paid, allow such interest, where the same is not included in the judgment recovered, since the probate court can base its order only on the transcript of the judgment. Kennedy's Estate, 94 Cal. 22, 29 Pac. 412.

administrator may agree to pay interest on a claim so as to bind himself personally, but the estate will not be bound by the agreement.[57]

b. Computation of Interest — (I) *Period of Computation.* Where claims are paid in the ordinary course of administration, interest is computed up to the time of payment.[58] On a sale of land under order of court for the payment of debts, interest on the debts payable out of the proceeds of the sale should be computed only up to the day of sale[59] or confirmation of the sale.[60] But creditors are entitled to their proportionate shares of the interest earned by the fund arising from the sale.[61]

(II) *Rate.* Interest on claims against estates under administration is usually allowed at the contract rate,[62] or in the absence of contract at the legal

57. Fairfield *v.* Bonner, 2 Hill (S. C.) 468; Pinckney *v.* Singleton, 2 Hill (S. C.) 343. See also Staples *v.* Staples, 85 Va. 76, 7 S. E. 199, holding that where a note made by an executor for the amount of the principal and accrued interest of a debt due by the estate was allowed to run two years, when the interest then due was added and the whole embraced in a judgment confessed by the executor, the estate should be charged only with the principal sum originally due and simple interest at legal rate, the executor having no authority to bind the estate to pay compound interest. See *supra*, VIII, D, 1.

58. Andrews *v.* Withers, 6 La. 360; Wissel's Appeal, 4 Pennyp. (Pa.) 236. See also Green *v.* Abbott, 2 Root (Conn.) 242; Brownson *v.* Baker, 11 La. 409.

Where the estate is insolvent interest can be computed only to decedent's death. Keebler's Estate, 4 Pa. Dist. 346.

Debt due representative.— Whenever an administrator is in funds, a debt due to himself must be regarded as paid, and can no longer draw interest. Sebring *v.* Keith, 2 Hill (S. C.) 340. But a personal representative cannot be prevented from charging interest up to the time of final settlement, where he has no right to retain any part of the assets in payment of his claim until it has been allowed by the surrogate on final accounting. Matter of Sanders, 4 Misc. (N. Y.) 28, 23 N. Y. Suppl. 829, Pow Surr. (N. Y.) 336. The personal representative cannot, however, prolong the running of interest on his claim by delaying the settlement of the estate, and he will be allowed interest only for the period within which by the exercise of due diligence he might have settled the estate. *In re* Richmond, 2 Pick. (Mass.) 567. See also Sutton's Estate, 13 Pa. Super. Ct. 492.

Secured claims.— Where a debt due to the personal representative is secured and he realizes from his security a sum sufficient to pay his debt, he is not entitled to interest thereafter. Matter of Babcock, 9 N. Y. Suppl. 554, 2 Connoly Surr. (N. Y.) 82; Rainow's Estate, 4 Kulp (Pa.) 153.

59. Ellicott *v.* Ellicott, 6 Gill & J. (Md.) 35.

60. Stultzfoos' Appeal, 3 Penr. & W. (Pa.) 265; O'Hara's Estate, 4 Leg. Gaz. (Pa.) 130.

Interest on liens.— On a sale of land of an insolvent estate for the payment of debts, interest on liens on the property sold ceases on the day of the confirmation of the sale. Yeatman's Appeal, 102 Pa. St. 297 [*reversing* 1 Chest. Co. Rep. 508]; Ramsey's Appeal, 4 Watts (Pa.) 71; Stultzfoos' Appeal, 3 Penr. & W. (Pa.) 265; Sollenberger's Estate, 8 Pa. Dist. 626; Smith's Estate, 2 Chest. Co. Rep. (Pa.) 212; Lang's Estate, 1 Chest. Co. Rep. (Pa.) 287; Dutton *v.* Horne, 1 Del. Co. (Pa.) 33; *In re* O'Hara, 4 Leg. Gaz. (Pa.) 130. Nor will interest accruing after the confirmation of the sale be allowed to the lien creditor as a claim payable from the personal estate. *In re* Wilson, 1 Chest. Co. Rep. (Pa.) 60. But where the estate is solvent and the sale is made on motion of the personal representative for the purpose of paying debts and legacies, interest should be allowed for the time elapsing between the day of confirmation and the day of payment. Yeatman's Appeal, 102 Pa. St. 297 [*reversing* 1 Chest. Co. Rep. 508, and *distinguishing* Ramsey's Appeal, 4 Watts 71].

In Louisiana interest is computed up to the time of payment. Zeigler *v.* Creditors, 49 La. Ann. 144, 21 So. 606 (holding that the sale in a succession of property on which there are mortgages, and the payment of the proceeds of the sale into the hands of the administrator, will not stop the running of interest on the claims): Brownson *v.* Baker, 11 La. 409.

61. Ellicott *v.* Ellicott, 6 Gill & J. (Md.) 35; Campbell's Estate, 22 Pa. Super. Ct. 430; Lang's Estate, 1 Chest. Co. Rep. (Pa.) 287.

62. Richardson *v.* Diss, 127 Cal. 58, 59 Pac. 197 (holding that Code Civ. Proc. § 1494, which limits the rate of interest on claims after allowance to that allowed on judgments, applies only to claims against insolvent estates); Desorme's Succession, 10 Rob. (La.) 474; Bowers *v.* Hammond, 139 Mass. 360, 31 N. E. 729 (holding that the allowance of a claim against an estate represented to be insolvent but which subsequently proves to be solvent, by the commissioners appointed under Pub. St. c. 137, to audit and allow claims against insolvent estates, is not a judgment, and the claim thus allowed continues to bear interest at the rate specified in the original contract and not at the rate allowed by statute on judg-

rate.[63] In some jurisdictions, however, statutes prescribe a different rule as to insolvent estates.[64]

(III) *COMPOUND INTEREST.* Compound interest is not allowed in the absence of a special agreement to pay the same.[65]

c. Preference of Interest on Preferred Claims. The interest accruing on a preferred claim, being a mere incident of the claim, is also preferred.[66]

6. TIME OF PAYMENT. It is the duty of a personal representative to pay off claims against an estate as speedily as possible, consistent with the rights and interests of all the parties interested;[67] and he should not retain amounts that he has collected for the estate and allow interest to accumulate on claims.[68] As a general rule, however, a claim against the estate of a decedent is not payable by his personal representative until after the expiration of the period allowed creditors for presenting their claims has expired,[69] and until such claim has been established by a court of competent jurisdiction or its payment duly authorized by the probate court.[70] It is sometimes provided by statute that the estate must be settled and claims paid before the expiration of a certain time;[71] and in any event the personal representative should pay claims during the period within which creditors may sue him. The statute limiting the time for creditors to bring suit is binding upon him as well as upon them, and if he pays a claim barred by this statute he pays it in his own wrong and cannot have reimbursement from the estate.[72] Under the general authority conferred upon a personal representa-

ments). But see Dillman *v.* Hastings, 144 U. S. 136, 12 S. Ct. 662, 36 L. ed. 378.

Directions in the will for the payment of interest on a debt of the testator at a rate in excess of the legal rate entitle the creditor to interest at that rate as against the legatees. Watson *v.* McClanahan, 13 Ala. 57.

63. Desorme's Succession, 10 Rob. (La.) 474; Gillet *v.* Rachal, 9 Rob. (La.) 276.

64. Ellis *v.* Polhemus, 27 Cal. 350. See also Richardson *v.* Diss, 127 Cal. 58, 59 Pac. 197.

A mortgage debt is within the provisions of Cal. Prob. Act, § 131, which allows only ten per cent interest on claims against an insolvent estate after the date of issuance of letters of administration, although the rate of interest specified in the mortgage is more than ten per cent. Ellis *v.* Polhemus, 27 Cal. 350.

65. Anderson *v.* Northrop, 44 Fla. 472, 33 So. 419; Desorme's Succession, 10 Rob. (La.) 474; Hosack *v.* Rogers, 9 Paige (N. Y.) 461, holding that under the right of retainer an executor had no authority to make a rest in a debt due to himself on the day he took out letters testamentary, so as to charge interest upon the interest then due.

66. Eddy *v.* People, 187 Ill. 304, 58 N. E. 297 [*reversing* 88 Ill. App. 265]; Shultz's Appeal, 11 Serg. & R. (Pa.) 182, holding that where the estate was insufficient to pay both specialty and simple contract debts, the specialty creditors were entitled to interest up to the time of the apportionment of the assets. But see Vandegriff's Estate, 3 Pa. Dist. 421.

67. *Iowa.*— Hart *v.* Jewett, 17 Iowa 234.

New York.— Matter of Miner, 39 Misc. 605, 80 N. Y. Suppl. 643.

South Carolina.— Farys *v.* Farys, Harp. Eq. 261.

England.— See Nicholls *v.* Judson, 2 Atk. 300, 26 Eng. Reprint 583.

Canada.— McPhadden *v.* Bacon, 13 Grant Ch. (U. C.) 591.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1075.

68. Hoss' Succession, 42 La. Ann. 1022, 8 So. 833.

69. Nicols *v.* Chapman, 9 Wend. (N. Y.) 452. See also Lewis *v.* Houston, 7 Blackf. (Ind.) 335; Dullard *v.* Hardy, 47 Mo. 403. But see Dunlap *v.* McGhee, 98 Ill. 287; Pope *v.* Wickliffe, 7 T. B. Mon. (Ky.) 412.

70. See *In re* Spanier, 120 Cal. 698, 53 Pac. 357; Lobit *v.* Castille, 14 La. Ann. 779. *Compare* Union Bank *v.* McDonough, 7 La. Ann. 231. Under Cal. Code Civ. Proc. § 1513, providing that a personal representative may at any time under order of the court pay all interest-bearing debts of his decedent, the court cannot on the application of a creditor compel the personal representative to pay any claim in advance of the filing of an inventory and account of administration and has authority to make only a permissive order for the advance payment of a claim against the estate. *In re* Hope, 106 Cal. 153, 39 Pac. 523.

71. Pratt *v.* Houghtaling, 45 Mich. 457, 8 N. W. 72, holding that where a widow, after being made executrix, remarries and an administrator *de bonis non* is appointed, the interim between her disqualification and the new appointment may be added to the four years and six months allowed by law for the payment of claims against the estate. And see *supra*, II, N, 1.

72. Ames *v.* Jackson, 115 Mass. 508. See also Dickinson *v.* Arms, 8 Pick. (Mass.) 394.

Where no injury has resulted to the legatees or others interested in the estate, the representative may be allowed credit for the

tive to preserve the estate, he has the power to make a valid contract with a creditor extending the time of payment of a claim owing by the estate, provided that the claim is not already barred by the statute of non-claim and that the contract is for the benefit of the estate.[73]

7. Mode and Sufficiency of Payment[74] — **a. Medium of Payment.** The court may require a personal representative to pay a debt of his decedent's estate in the kind of money which he has received as property of the estate.[75] Although a personal representative's settlement in depreciated currency is set aside as null and void, yet such creditors as received depreciated currency willingly in discharge of their debts will not be allowed to revive their claims against the estate, and, the estate being insolvent, the *pro rata* dividends to which such creditors would, if paid in legal currency, be entitled are to be allowed to the personal representative as credits.[76] Where a personal representative, out of depreciated currency collected by him in the course of his administration, pays specie debts of his decedent, in the settlement of his account he should be credited with the debts so paid at their nominal amount;[77] but when he advances his own depreciated currency in payment of debts of the estate he must account to the estate for the difference between the nominal and real value of such currency.[78] It is no objection that certain payments and allowances were not met and discharged as they accrued, in depreciated money, but were allowed against the estate on a basis of money current at the time of the settlement, when it is shown that the estate benefited thereby.[79] The rule of law that a creditor is paid his debt when he becomes executor of his debtor's estate and as such receives assets applicable to such debt does not apply when the assets so received are depreciated currency, unless the creditor is willing to receive it in payment.[80]

b. Giving of Note by Personal Representative. A promissory note given by a personal representative for a debt of his decedent is neither a payment nor an extinguishment of such debt,[81] unless it is shown that the parties intended that it should operate as such.[82]

c. Assignment of Note Due Decedent. A personal representative has authority to assign bills and notes due to the decedent in satisfaction of debts due by him,[83] but he has no power by assignment or otherwise to appropriate them to

payment, but the amount of the allowance should be reduced in so far as such persons have been prejudiced. Forward *v.* Forward, 6 Allen (Mass.) 494.

73. North *v.* Walker, 66 Mo. 453 [*affirming* 2 Mo. App. 174]; Smarr *v.* McMaster, 35 Mo. 349.

74. An award by the probate court to a creditor of a decedent of the amount of his claim out of funds adjudged to be in the hands of a personal representative is not the equivalent in law of the actual payment of the claim, and if such creditor, by reason of the personal representative's insolvency, fails to receive payment of the sum awarded him, he is entitled to come in and share in a subsequently raised fund of the estate. Pomeroy's Appeal, 127 Pa. St. 492, 18 Atl. 4, 4 L. R. A. 367.

Conveyance of property by heir not payment.— Where an heir of the decedent makes a conveyance of certain property coming to him from the estate of the decedent to one having a claim against the estate, which conveyance is not intended or accepted as a payment of such claim, the estate is not discharged. Waddell *v.* Waddell, (Tenn. Ch. App. 1897) 42 S. W. 46.

75. Magraw *v.* McGlynn, 26 Cal. 420. See also *In re* Dem, 39 Cal. 70, holding that where executors selling property of the estate for the payment of debts made the sale for and received payment in legal tender notes, it was error for the probate court to order payment in gold coin.

76. Trammel *v.* Philleo, 33 Tex. 395.

77. Moss *v.* Morrman, 24 Gratt. (Va.) 97.

78. Caruthers *v.* Corbin, 38 Ga. 75.

79. Cummings *v.* Bradley, 57 Ala. 224.

80. Crawford *v.* Crawford, 17 S. C. 521.

81. Taylor *v.* Perry, 48 Ala. 240; Woods *v.* Ridley, 27 Miss. 119 (holding that the creditor may at his election hold the executor primarily liable or proceed by bill against the estate); Douglas *v.* Fraser, 2 McCord Eq. (S. C.) 105; Crim *v.* England, 46 W. Va. 480, 33 S. E. 310, 76 Am. St. Rep. 826 (note signed in representative capacity).

82. Glenn *v.* Smith, 2 Gill & J. (Md.) 493, 20 Am. Dec. 452; Yerger *v.* Foote, 48 Miss. 62; Glenn *v.* Burrows, 37 Hun (N. Y.) 602; McLure *v.* Askew, 5 Rich. Eq. (S. C.) 162. See also James *v.* Hackley, 16 Johns. (N. Y.) 273.

83. Marshall County *v.* Hana, 57 Iowa 372, 10 N. W. 745.

the payment of the debt of one creditor to the exclusion of others of equal or higher rank.[84] If a creditor of an estate accepts notes and obligations in favor of an estate as collateral security to collect and apply to his debt and fails to collect or to show good reason for his failure, he will be charged with the amount of such notes and obligations, and if this amount is equal to his claim against the estate such claim is extinguished.[85]

d. Transfer of Assets — (I) *In General.* An agreement under which a creditor of the deceased who has purchased certain of his property pays for it by giving credit upon an account which he claims against the estate has been held binding upon both the representative and the creditor.[86] But it has also been held that, until the rendition of an account and the classification of the debts of the estate, the personal representative cannot, even under an order of the court, transfer an asset of the estate to a creditor in payment of his debt.[87]

(II) *Rights of Creditors When Assets Improperly Transferred.* Creditors may follow and recover assets of the estate which have been improperly transferred by the personal representative,[88] where they are acquired from him by persons with knowledge of his trust and of his disregard of its obligation.[89] Where assets have been transferred to a creditor of the personal representative, other creditors may elect to avoid such transaction, and hold the creditor liable for assets thus received, or may let the transaction stand and charge the personal representative for a devastavit.[90]

e. Set-Off.[91] Any debt or demand which constitutes a legal set-off for or against a party in his lifetime, if still subsisting at the time of his death, will constitute a good set-off for or against his personal representative,[92] and a personal representative has no right to pay a debt due by the estate which he represents to a person who is himself indebted to the estate, without first having set off the debt due to the estate against that due by the estate.[93] In determining what are proper set-offs between personal representatives and claimants against the estate, the rule requiring mutuality of debts or demands has been applied;[94] but it has also been held that a personal representative may accept claims against the estate in dis-

Assignment of notes not belonging to decedent.— Where negotiable notes were received by a *feme covert* for certain property which she had previously purchased of her husband, on whose death said notes were not claimed by his administrators, nor included in their account, but were given by the widow in part payment to a creditor of herself and husband, with a stipulation that the claim was to be paid out of future funds *pro rata*, it was held that the auditors could not add the amount of such notes to the account and then deduct it from the aforesaid creditor's dividend, but it must be deducted from said creditor's claim, and the residue paid *pro rata*. *In re* Leech, 27 Pa. St. 318.

84. Payne *v.* Flournoy, 29 Ark. 500. See also Wittaker *v.* Wright, 35 Ark. 515.

85. Lile's Succession, 24 La. Ann. 550.

86. Neely *v.* Blair, 157 Pa. St. 417, 27 Atl. 777.

87. Snider *v.* Cutliff, 30 La. Ann. 1195.

88. Russell *v.* Walker, Rich. Eq. Cas. (S. C.) 229.

89. Smith *v.* Ayer, 101 U. S. 320, 25 L. ed. 955.

90. Frank *v.* Thompson, 105 Ala. 211, 16 So. 634.

91. See, generally, Recoupment, Set-Off, and Counter-Claim.

92. Ely *v.* Com., 5 Dana (Ky.) 398.

Cancellation of creditors' notes.— A claim against an estate may be paid by the cancellation of notes due by the creditor to the estate. Severson *v.* Langland, (Iowa 1899) 78 N. W. 206.

93. Tell City Furniture Co. *v.* Stiles, 60 Miss. 849. See also Green *v.* Fagan, 15 Ala. 335; Hyman *v.* Rollans, 70 Miss. 412, 12 So. 339; Moorhead's Appeal, 32 Pa. St. 297.

Demand of estate not barred by failure to set off.— Where there is no statutory provision requiring a personal representative, upon the exhibition by a creditor of his claim against the estate, in the probate court, to set off any debt or demand such estate may have against such creditor, the representative's neglect to do so will not bar such demand. Morton *v.* Bailey, 2 Ill. 213, 27 Am. Dec. 767.

94. Bishop *v.* Dillard, 49 Ark. 285, 5 S. W. 341; Bizzell *v.* Stone, 12 Ark. 378; Dudley *v.* Griswold, 2 Bradf. Surr. (N. Y.) 24 (holding that an executor cannot set off a debt due him individually against a demand upon him as executor); Carter's Appeal, 10 Pa. St. 114; Cotton's Estate, 6 Pa. Dist. 205 (holding that an executor sued in his official capacity may set off only those claims which his testator might have pleaded and which are due to his estate). See also Mathewson *v.* Stafford Bank, 45 N. H. 104.

charge of claims accruing after the decedent's death, and is entitled to set off the one against the other,[95] and that an administrator who has sold property of the decedent to a creditor of the estate may set off the price against the *pro rata* dividend of such creditor upon the distribution of the funds of the estate.[96]

f. Compromise. A personal representative may effect the settlement of claims against the estate by compromising them, and should be allowed any sums paid out by him in so doing if he has acted in good faith and with the care and judgment of a man of ordinary prudence and sagacity.[97] But a compromise by the personal representative of a claim due by the estate will not be enforced in equity unless it is shown to be to the interest of the estate and a proper one for such representative to make.[98]

8. Application of Payments. The doctrine that where a debtor makes a payment he may, if he chooses, direct its application, that if he does not direct, the creditor may elect as to the application, and that if a payment has been made and neither party has elected as to the application, the court will direct the application to those debts which have the poorest security, applies when a payment is made by a personal representative to a creditor of his decedent.[99]

9. Payment Before Allowance or Order. The personal representative is not authorized to pay a claim against the estate until it has been allowed,[1] and in some jurisdictions he should not pay a claim until its payment is expressly ordered by the court.[2] If he pays any claim whatever without due authority, he acts at his

95. Dickenson *v.* McDermott, 13 Tex. 248.

96. Grier's Appeal, 25 Pa. St. 352.

97. *Massachusetts.*— Cook *v.* Richardson, 178 Mass. 125, 59 N. E. 675; Newell *v.* West, 149 Mass. 520, 21 N. E. 954.

New Jersey.— Meeker *v.* Vanderveer, 15 N. J. L. 392; Rogers *v.* Hand, 39 N. J. Eq. 270. See also Heisler *v.* Sharp, 44 N. J. Eq. 167, 14 Atl. 624 [*affirmed* in 45 N. J. Eq. 367, 19 Atl. 621].

New York.— Under Laws (1893), c. 100, a surrogate has power to authorize the compromise of a debt or claim against the estate of the decedent (Matter of Bronson, 69 N. Y. App. Div. 487, 74 N. Y. Suppl. 1052); but before the enactment of this statute, it had been decided that while the surrogate had power to authorize the compromise of a claim due the estate, he had no power to authorize the compromise of a claim against the estate (Matter of Farley, 15 N. Y. St. 727).

Ohio.— See *In re* Worthington, 5 Ohio S. & C. Pl. Dec. 524.

Pennsylvania.— Bruner's Appeal, 57 Pa. St. 46.

Canada.—*Re* Robbins, 23 Grant Ch. (U. C.) 162.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1092.

The consent of the probate court is necessary to enable a personal representative to pay money to compromise a suit against the estate. Lucich *v.* Medin, 3 Nev. 93, 93 Am. Dec. 376.

Estoppel.— An executor who, for a sufficient consideration, has entered into a compromise agreement with a claimant against the estate, is estopped to repudiate anything conceded thereby. Todd *v.* Terry, 26 Mo. App. 598.

A transfer of assets of the estate by an administrator in his official capacity by way of compromise of a pending suit against him in his representative capacity is a violation of a statute prohibiting a private sale by executors or administrators. Bogan *v.* Camp, 30 Ala. 276.

Right to complete compromise made by decedent.— If a debtor has compromised with his creditors, payments to be made at a future day, and the debtor dies before all the payments are made, his personal representatives have the right to complete the payments contemplated by the compromise and release his estate from the payment of the debts in full, in conformity with the terms of the compromise. Matter of Leslie, 10 Daly (N. Y.) 76.

Compromise of claims in favor of estate see *supra*, VII, K.

98. Pullin *v.* Smith, 106 Ky. 418, 50 S. W. 833, 20 Ky. L. Rep. 1993.

99. Cresson's Estate, 3 Pa. Co. Ct. 419; Putnam *v.* Russell, 17 Vt. 54, 42 Am. Dec. 478; Backhouse *v.* Patten, 5 Pet. (U. S.) 160, 8 L. ed. 82. See, generally, Payment.

1. Walker *v.* Diehl, 79 Ill. 473; Wysong *v.* Nealis, 13 Ind. App. 165, 41 N. E. 388; Lockhart *v.* White, 18 Tex. 102. See also Clark *v.* Clark, 21 Vt. 490.

Allowance.— See *supra*, X, B, 14.

2. Whittaker *v.* Wright, 35 Ark. 511; Payne *v.* Flournoy, 29 Ark. 500; *In re* Fernandez, 119 Cal. 579, 51 Pac. 851; *In re* Titcomb, Myr. Prob. (Cal.) 55; Young *v.* Scott, 59 Kan. 621, 54 Pac. 670; Price's Succession, 35 La. Ann. 905; Beatty *v.* McCleod, 11 La. Ann. 76; Kenner *v.* Duncan, 3 Mart. N. S. (La.) 563.

Duty of court to order payment.— Where a tableau of distribution, filed by the executor, has been advertised and published in the manner required by law, after the ex-

peril,[3] but he will generally be credited on his accounting with any claim paid by him, even without authority, upon his showing that it was a proper claim against the estate.[4]

10. Improper Payments — a. In General. A personal representative will not of course as a general rule be allowed credit for the payment of a claim which is not a proper charge upon the estate, and if he pays such a claim out of assets of the estate he commits a devastavit.[5] So also if a personal representative pays

piration of the delay given by such notice, if no opposition be made the law makes it the duty of the judge to grant an order authorizing the executor to pay the creditors according to his tableau. Minvielle's Succession, 12 La. Ann. 72.

3. Whittaker *v.* Wright, 35 Ark. 511; Payne *v.* Flournoy, 29 Ark. 500; McPaxton *v.* Dickson, 15 Ark. 41; *In re* Fernandez, 119 Cal. 579, 51 Pac. 851; Walker *v.* Diehl, 79 Ill. 473; Lynch *v.* Hickey, 13 Ill. App. 139; Price's Succession, 35 La. Ann. 905. See also Robson's Succession, 19 La. Ann. 97.

Personal representative must prove claim. —Where a personal representative pays a claim before it is authorized by the court he takes the risk of proving it and getting it allowed the same as any other creditor. See also Millard *v.* Harris, 119 Ill. 185, 10 N. E. 387 [*affirming* 17 Ill. App. 512]; Walker *v.* Diehl, 79 Ill. 473; Roberts *v.* Rogers, 28 Miss. 152, 61 Am. Dec. 542.

Where a succession is insolvent, an administrator, on being removed, cannot claim credit for debts of the succession which he has paid without judicial order or authority. Chaffe *v.* Farmer, 36 La. Ann. 813.

The enforcement of penalties for the failure of a representative to obtain a proper order to pay a claim against an estate is a matter within the sound discretion of the court. Mt. Carmel Church *v.* Farrelly, 34 La. Ann. 533.

4. *California.*— *In re* Fernandez, 119 Cal. 579, 51 Pac. 851; *In re* Galland, 92 Cal. 293, 28 Pac. 287.

Illinois.— Hapke *v.* People, 29 Ill. App. 546, holding that where a personal representative makes payments on claims not presented and allowed he will be allowed credit for payments made before the expiration of the statutory period for filing claims but not for those made thereafter.

Indiana.— Wysong *v.* Nealis, 13 Ind. App. 165, 41 N. E. 388.

Kansas.— Young *v.* Scott, 59 Kan. 621, 54 Pac. 670.

Louisiana.— Depas *v.* Riez, 2 La. Ann. 30; Rouly *v.* Berard, 11 Rob. 478; Williams' Succession, 7 Rob. 46. See also McCombs *v.* Dunbar, 3 La. 517.

Texas.— Lockhart *v.* White, 18 Tex. 102.

Virginia.— See Kee *v.* Kee, 2 Gratt. 116.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1099, 1100.

But see Bunnell *v.* Post, 25 Minn. 376; Langston *v.* Canterbury, 173 Mo. 122, 73 S. W. 151 [*distinguishing* McPike *v.* McPike, 111 Mo. 216, 20 S. W. 12; Jacobs *v.* Jacobs, 99 Mo. 427, 12 S. W. 457]; Springfield Grocer Co. *v.* Walton, 95 Mo. App. 526, 69 S. W. 477; Huebner *v.* Sesseman, 38 Nebr. 78, 56 N. W. 697; Johnson *v.* Pulver, 1 Nebr. (Unoff.) 290, 95 N. W. 697.

Ratification equivalent to prior order. Geiger's Estate, 12 Wkly. Notes Cas. (Pa.) 439. See also King *v.* Whiton, 15 Wis. 684.

Enforceable claim allowed.— An administrator is entitled to an allowance in his account for any claim paid by him which could have been enforced against him either in law or at equity. Richardson *v.* Merrill, 32 Vt. 27.

Not necessary to await suit.—When a debt is not barred by statute an administrator may pay it if confessedly just and due, without waiting to be sued, and ordinarily when he has funds of the decedent it is his duty to do so and to credit himself with such payment in his settlement. Van Winkle *v.* Blackford, 33 W. Va. 573, 11 S. E. 26.

Not necessary to sue for settlement before paying.— Where an estate is solvent, an administrator is not compelled, under penalty of being charged with a devastavit, to sue for the settlement of the estate before paying debts. Rothschild *v.* Wald, 12 Ky. L. Rep. 685.

5. *Alabama.*— Teague *v.* Corbitt, 57 Ala. 529; Harris *v.* Parker, 41 Ala. 604.

California.— See *In re* Kennedy, 120 Cal. 458, 52 Pac. 820; Moore's Estate, 96 Cal. 522, 31 Pac. 584.

Illinois.— Marshall *v.* Coleman, 187 Ill. 556, 58 N. E. 628 [*modifying* 89 Ill. App. 41]; Leon *v.* Leon, 56 Ill. App. 153.

Indiana.— See State *v.* Lemonds, 29 Ind. 437.

Iowa.— Kintz *v.* Schoentgen, (1900) 84 N. W. 679.

Massachusetts.—Phillips *v.* Frye, 14 Allen 36; Ripley *v.* Sampson, 10 Pick. 371.

New Jersey.—Stark *v.* Hunton, 3 N. J. Eq. 300.

New York.— Poughkeepsie Bank *v.* Hazbrouck, 6 N. Y. 216; Matter of Peyser, 5 Dem. Surr. 244.

Pennsylvania.— Hottenstein's Appeal, 2 Grant 301; Bolick's Estate, 2 Leg. Rec. 187.

Tennessee.— Jones *v.* Ward, 10 Yerg. 160.

Vermont.— French *v.* Winsor, 24 Vt. 402.

Canada.— *Re* Williams, 27 Ont. 405.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1102.

Gaming debts.— A personal representative should not be allowed for a payment of a debt of his decedent which appears on its face to have been for money lost at gaming (Carter *v.* Cutting, 5 Munf. (Va.) 223); but notes given by the decedent for gaming debts

funds of the estate to persons who are not entitled to receive them he will not be protected.[6]

b. Payment Out of Order of Priority — (i) *In General.* Where a personal representative having notice of claims of superior degree[7] pays claims of an inferior degree and there are not funds remaining sufficient to pay such superior claims he commits a devastavit[8] and is personally liable to the preferred creditor

and paid by a personal representative, without knowledge on his part at the time of payment of the illegal consideration, will be allowed him on the settlement of the estate (Coffee *v.* Ruffin, 4 Coldw. (Tenn.) 487).

Usurious debts.— A personal representative should be denied credit in his account for usurious debts of his decedent paid by him, if he has notice of their usurious character. Smith *v.* Britton, 2 Patt. & H. (Va.) 124.

Liability for payment of excess of interest see *In re* Dunne, 58 Cal. 543; Ellicott *v.* Ellicott, 6 Gill & J. (Md.) 35; Cole *v.* Leake, 27 Miss. 767.

Liability for interest on sums paid on improper claims see Clement's Appeal, 49 Conn. 519; Jones *v.* Ward, 10 Yerg. (Tenn.) 160.

Allowance of debts fairly due.— A personal representative will be allowed credit for debts of the estate paid by him if they appear to have been fairly due. It is not a sufficient ground for a disallowance that their payment might possibly have been successfully resisted. *In re* Frazer, 92 N. Y. 239.

Payment in excess of direction in will.— Where on the settlement of an executor it appeared that certain creditors whose claims the testator had, in his will, directed to be paid had received more than the amount specified in the will but no more than was justly due, it was held that the executor was justified in making such payments. Beecher *v.* Barber, 20 N. Y. St. 136, 6 Dem. Surr. (N. Y.) 129.

Illegal taxes.— A personal representative is not chargeable for the payment of taxes levied under an ordinance which is afterward held void, if in making such payment he exercised the decree of care which cautious persons employ in their own business. Scudder *v.* Ames, 142 Mo. 187, 43 S. W. 659.

Judgment confessed by decedent.— An administrator cannot question the validity of a judgment confessed by his intestate, upon any ground for which the intestate himself could not have questioned it; as for instance mere inadequacy of consideration, or that it was intended as a fraud upon creditors; nor, it seems, can his creditors question it if the estate is sufficient for the payment of debts. Wise *v.* Hardin, 5 S. C. 325.

A judgment confessed by a personal representative is *prima facie* fair and just, and, in the absence of any proof that it is otherwise, if he pays it such payment should be allowed him on his settlement. Powell *v.* Myers, 21 N. C. 502.

Relief against overpayment.— In a proper case equity may afford relief to a personal representative who through some inadvertence has overpaid a claim. Richardson *v.* Ransom, 99 Ill. App. 258.

6. Davis *v.* Bagley, 40 Ga. 181, 2 Am. Rep. 570; Matter of Van Buren, 19 Misc. (N. Y.) 373, 44 N. Y. Suppl. 357. See also Von Voorhis' Appeal, 8 Pa. Cas. 374, 11 Atl. 233.

Protection of judgment in favor of person not entitled thereto.— If a judgment for a debt properly due from the estate is recovered by a person not entitled thereto, the personal representative will be protected in paying it out of the personal estate; but such judgment forms no ground for a claim of the personal representative against the heirs, as for money disbursed by him for the benefit of the estate, beyond the personal assets he has received. Newsom *v.* Newsom, 38 N. C. 411.

7. Place *v.* Oldham, 10 B. Mon. (Ky.) 400; Hutchcraft *v.* Tilford, 5 Dana (Ky.) 353; Logan *v.* Troutman, 2 A. K. Marsh. (Ky.) 66; Webster *v.* Hammond, 3 Harr. & M. (Md.) 131.

Judgment as notice see Com. *v.* Barstow, 3 B. Mon. (Ky.) 290; Stephens *v.* Barnett, 7 Dana (Ky.) 257; Garrett *v.* Johnson, 29 N. C. 231 (judgment of justice of the peace); Nimmo *v.* Com., 4 Hen. & M. (Va.) 57, 4 Am. Dec. 488; Mayo *v.* Bentley, 4 Call (Va.) 528; Hall *v.* Tapper, 3 B. & Ad. 655, 23 E. C. L. 289; Fuller *v.* Redmon, 26 Beav. 600, 5 Jur. N. S. 1045, 29 L. J. Ch. 324, 7 Wkly. Rep. 430, 53 Eng. Reprint 1030; Waller *v.* Turner, 10 Jur. N. S. 147, 33 L. J. Ch. 232, 9 L. T. Rep. N. S. 758, 3 New. Rep. 413, 12 Wkly. Rep. 337; Landon *v.* Ferguson, 3 Russ. 349, 3 Eng. Ch. 349, 38 Eng. Reprint 607; Searle *v.* Lane, 2 Vern. Ch. 37, 88, 23 Eng. Reprint 634, 667 (decree in equity).

Notice need not be by institution of a suit. Webster *v.* Hammond, 3 Harr. & M. (Md.) 131; Brown *v.* Lone, 3 N. C. 159.

Exhibition of a bond to the administrator before letters of administration are taken out is sufficient notice. Brown *v.* Lone, 3 N. C. 159.

8. *Georgia.*— Bomgaux *v.* Bevan, Dudley 110.

Indiana.— State *v.* Mason, 21 Ind. 171.

Kentucky.— Place *v.* Oldham, 10 B. Mon. 400; Stephens *v.* Barnett, 7 Dana 257; Cochran *v.* Davis, 5 Litt. 118; Logan *v.* Trautman, 3 A. K. Marsh. 66.

North Carolina.— Howell *v.* Reams, 73 N. C. 391; Laws *v.* Thompson, 49 N. C. 104; Moye *v.* Albritton, 42 N. C. 62 (a devastavit committed even though the improper payment made because of an honest mistake); Garrett *v.* Johnson, 29 N. C. 231.

South Carolina.— Swift *v.* Miles, 2 Rich. Eq. 147.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1109.

for the deficiency;[9] but if he had no notice actual or constructive of the claims entitled to preference he incurs no personal liability by reason of paying debts of inferior dignity.[10] If the claim of higher degree is merely contingent, the common-law rule is that even if the representative has notice of such a claim he may exhaust the assets in paying debts of inferior degree without incurring any liability to the holder of the contingent claim, although the claim subsequently becomes due by the happening of the contingency,[11] but it is otherwise where the claim of higher degree is not contingent but merely payable at a future day.[12]

(II) *PREFERRING ONE CREDITOR OF A CLASS.* Under the modern statutes

If the representative reserves assets to pay the superior claims the payment of debts of inferior dignity is not a devastavit (Braxton *v.* Winslow, 4 Call (Va.) 308), although the assets reserved are lost, if no blame for such loss can be imputed to the personal representative (Hinton *v.* Kennedy, 3 S. C. 459).

No devastavit when right to priority accrued after payment.— Coltraine *v.* Spurgin, 31 N. C. 52.

9. *Alabama.*— Hullett *v.* Hood, 109 Ala. 345, 19 So. 419; Pryor *v.* Davis, 109 Ala. 117, 19 So. 440. See also Byrd *v.* Jones, 84 Ala. 336, 4 So. 375; McNeill *v.* McNeill, 36 Ala. 109, 76 Am. Dec. 320.

Indiana.— Cunningham *v.* Cunningham, 94 Ind. 557.

Missouri.— See Bassett *v.* Slater, 81 Mo. 75.

New York.— *In re* Mahoney, 37 Misc. 472, 75 N. Y. Suppl. 1056.

North Carolina.— Roundtree *v.* Sawyer, 15 N. C. 44; Brown *v.* Lone, 3 N. C. 159.

South Carolina.— Huger *v.* Dawson, 3 Rich. 328; Lenoir *v.* Winn, 4 Desauss. 65, 6 Am. Dec. 597.

Texas.— Clifford *v.* Campbell, 65 Tex. 243.

Virginia.— Mimmo *v.* Com., 4 Hen. & M. 57, 4 Am. Dec. 488.

England.— Searle *v.* Lane, 2 Vern. Ch. 37, 23 Eng. Reprint 634.

Canada.— Hutchinson *v.* Edmison, 11 Grant Ch. (U. C.) 477.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1109.

Payment out of order without order of court.— An administrator pays at his own risk demands of one class in advance of their proper order, and without an order of court. Dullard *v.* Hardy, 47 Mo. 403; Schoeneich *v.* Reed, 8 Mo. App. 356.

A judgment quando does not alter the dignity of the debt or charge the representative with assets. Hence, where a creditor obtains a judgment *quando* on an open account the representative is not protected in paying the judgment after notice of an outstanding debt of higher degree. Roundtree *v.* Sawyer, 15 N. C. 44.

Setting aside assignment of assets to creditors of lower degree see Frontenac Loan Co. *v.* Morice, 3 Manitoba 462.

Subrogation to rights of creditors paid.— The representative is entitled to be subrogated to the rights of the creditors whose claims he has paid and to receive the shares to which they would have been entitled had they not been paid in full. Hullett *v.* Hood, 109 Ala. 345, 19 So. 419.

10. *Kentucky.*—Com. *v.* Barstow, 3 B. Mon. 290; Hutchcraft *v.* Tilford, 5 Dana 353; Pope *v.* Wickliffe, 7 T. B. Mon. 412.

Missouri.— See Simonds *v.* Pettibone, 3 Mo. 330.

New Jersey.— See Miller *v.* Harrison, 34 N. J. Eq. 374.

North Carolina.— Delamothe *v.* Lanier, 4 N. C. 296.

Virginia.— Mayo *v.* Bentley, 4 Call 528.

United States.— U. S. *v.* Fisher, 2 Cranch 358, 390 note, 2 L. ed. 304; U. S. *v.* Eggleston, 25 Fed. Cas. No. 15,027, 4 Sawy. 199; U. S. *v.* Ricketts, 27 Fed. Cas. No. 16,159, 2 Cranch C. C. 553.

England.— Hawkins *v.* Day, Ambl. 160, 27 Eng. Reprint 107, Dick. 155, 21 Eng. Reprint 228; Clough *v.* French, 2 Coll. 277, 9 Jur. 1029, 15 L. J. Ch. 24, 33 Eng. Ch. 277; Bettenson *v.* Winder, Dick. 468, 21 Eng. Reprint 351. *Compare* Searle *v.* Lane, 2 Vern. 37, 88, 23 Eng. Reprint 634, 637.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1110.

A reasonable time must have elapsed since the decedent's death or the representative will not be protected in his payment, although he had no notice of the debt entitled to priority, for a precipitate payment is evidence of fraud. Hutchinson *v.* Edmison, 11 Grant Ch. (U. C.) 477. *Compare* Nosotti *v.* Jefferson, 3 De G. J. & S. 570, 9 Jur. N. S. 656, 8 L. T. Rep. N. S. 589, 11 Wkly. Rep. 841, 68 Eng. Ch. 570, 46 Eng. Reprint 757.

Avoidance of means of knowledge.— The representative will not be protected where his asserted ignorance of a debt of higher degree is the result of his voluntary avoidance of the means of knowledge. Hutchinson *v.* Edmison, 11 Grant Ch. (U. C.) 477.

11. Delamothe *v.* Lanier, 4 N. C. 296; Hawkins *v.* Day, Ambl. 160, 27 Eng. Reprint 107, Dick. 155, 21 Eng. Reprint 228; Henderson *v.* Gilchrist, 17 Jur. 570, 22 L. J. Ch. 970, 1 Wkly. Rep. 426; Wildridge *v.* McKane, 1 Molloy 122; Norman *v.* Baldry, 6 Sim. 621, 9 Eng. Ch. 621.

Reservation of assets under statute see *infra*, X, D, 13.

12. Atkinson *v.* Grey, 1 Smale & G. 577, 18 Jur. 282.

in the United States and Canada if the personal representative pays one debt of a class to the exclusion of others of the same class he commits a devastavit or renders himself personally liable for the deficiency, if any, resulting therefrom.[13]

c. Payment Out of Funds Not Belonging to Estate.[14] Funds which have been trust funds in the hands of a decedent remain the property of the *cestui que trust* and cannot be held liable for the decedent's debts,[15] and where an executor wrongfully makes payment of debts of the estate out of trust funds not primarily liable therefor, the beneficiary can be reimbursed to the extent of such misappropriation out of the property primarily liable, if it or its proceeds still exist.[16] If money is collected by a personal representative and improperly appropriated to the payment of the debts of his decedent under a mistaken belief as to his right to do so, and without collusion with the heirs, he becomes individually liable therefor, and land descending to the heirs cannot be subjected to its repayment.[17] Where a personal representative under a misconception that certain moneys coming to his hands are assets of the estate pays a portion of the creditors of a certain class a dividend on the amount of their claims, and it afterward turns out that such moneys are not assets, and there is nothing left to pay any of the claims of this class, a court of equity will not require the personal representative to pay the same *pro rata* share on the claims of other creditors of this class.[18]

d. Payment Under Authority of Court. A personal representative will be protected in the payment of a claim which has been duly allowed or ordered paid by the court, although such claim was not a proper one for payment,[19] or although it should not have been paid in full,[20] unless it be made to appear that

13. *Alabama.*— Jackson *v.* Wood, 108 Ala. 209, 19 So. 312, holding that the representative can have credit only for the share to which the overpaid creditor was entitled.

Georgia.— Bomgaux *v.* Bevan, Dudley 110.

Mississippi.— Gay *v.* Lemle, 32 Miss. 309.

Ohio.— See *In re* Wakefield, 5 Ohio S. & C. Pl. Dec. 395, 7 Ohio N. P. 562.

West Virginia.— An administrator cannot, within twelve months after his qualification, pay one debt in full, or in excess of its ratable share of assets over another of the same class, either with or without notice of such other debt; and if he does he is personally liable to the omitted creditor for his share of money applied in such payment. If such payment be made after twelve months he is not liable unless he had notice of the other debt. McCoy *v.* Jack, 47 W. Va. 201, 34 S. E. 991.

Canada.— Parsons *v.* Gooding, 33 U. C. Q. B. 499; Taylor *v.* Brodie, 21 Grant Ch. (U. C.) 607; Doner *v.* Ross, 19 Grant Ch. (U. C.) 229.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1109.

Contra, at common law. See *supra*, X, D, 2, b, (II), (A).

Representative entitled to credit for share properly payable.— Where a personal representative pays the entire claim of a creditor who is entitled to a *pro rata* payment only, he is entitled to a credit to the extent of such creditor's *pro rata* share. Jackson *v.* Wood, 108 Ala. 209, 19 So. 312; Walker *v.* Kerr, 7 Tex. Civ. App. 498, 27 S. W. 299. See also Hullett *v.* Hood, 109 Ala. 345, 19 So. 419; Taylor's Estate, 4 Pa. Dist. 691, 17 Pa. Co. Ct. 166.

14. **Property available for payment** generally see *infra*, X, D, 16.

15. *In re* Belt, 29 Wash. 535, 70 Pac. 74, 92 Am. St. Rep. 916, holding further that where an administrator as such recovers a judgment in an action commenced by his decedent as a trustee he is not estopped as against a creditor of the estate to set up that the funds are not the property of the estate.

16. Milly *v.* Harrison, 7 Coldw. (Tenn.) 191.

17. Story *v.* Harrison, 4 Ky. L. Rep. 54.

18. Pinneo *v.* Goodspeed, 120 Ill. 524, 12 N. E. 196 [*affirming* 22 Ill. App. 50].

19. *Iowa.*— See Buttschaw *v.* Miller, 72 Iowa 225, 33 N. W. 642.

Kentucky.— See Story *v.* Story, 62 S. W. 865, 22 Ky. L. Rep. 1869.

Louisiana.— Baldwin *v.* Carleton, 2 Rob. 54.

Maryland.—Owens *v.* Collinson, 3 Gill & J. 25. See also Garrison *v.* Hill, 81 Md. 206, 31 Atl. 794; Conner *v.* Ogle, 4 Md. Ch. 425.

Nevada.— *In re* Millenovich, 5 Nev. 161.

Texas.— See Cameron *v.* Morris, 83 Tex. 14, 18 S. W. 422.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1103.

Compare Hunt *v.* Russ, 18 D. C. 527, holding that the fact that a claim is duly verified and passed by the court does not relieve the personal representative from the duty of defending against it if he knows of any defense; but if he knows of none he may safely pay it and it will be allowed as a credit in his account.

If the court is without authority to make the order it affords no protection. *In re* Kennedy, 120 Cal. 458, 52 Pac. 820.

20. Thomson *v.* Taylor, 71 N. Y. 217.

such allowance of the claim or order for the payment thereof was obtained through his collusion or bad faith.[21]

11. Failure to Make Payment — a. Individual Liability of Personal Representative. A personal representative by failure to pay a claim which it is his duty to pay may become personally liable therefor.[22]

b. Liability For Interest or Costs. A personal representative having assets of the estate in his hands is chargeable individually with interest[23] or costs[24] accruing because of his failure to pay at the proper time claims against the estate which it was his duty to pay.

c. Penalty For Failure to Pay. A personal representative who fails to pay a claim when so ordered is, by statute in some jurisdictions, subject to a penalty.[25]

12. Proceedings to Enforce Payment — a. In General. Probate courts generally have jurisdiction to order the payment of the duly allowed or established claims of creditors;[26] but a claim against a decedent cannot be enforced in a

21. Turner *v.* Turner, 21 Ill. App. 427; Garr *v.* Harding, 37 Mo. App. 24. See also Garrison *v.* Hill, 81 Md. 206, 31 Atl. 794; Dodd *v.* Ghilselin, 27 Fed. 405.

22. *Kentucky.*— Jeeter *v.* Durham, 6 J. J. Marsh. 228.

Louisiana.— Lobit *v.* Castille, 14 La. Ann. 779; Waters *v.* Wilson, 3 Mart. N. S. 135.

Michigan.— Palm's Appeal, 44 Mich. 637, 7 N. W. 200.

Minnesota.—Dampier *v.* St. Paul Trust Co., 46 Minn. 526, 49 N. W. 286.

Missouri.— Schwecke *v.* Mathias, 8 Mo. App. 569.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1116; and *infra*, XVII, E, 5.

Where a personal representative is indebted to the estate, and instead of applying the amount of the debt to the payment of claims permits the land to be sold to satisfy creditors, he commits a devastavit and is liable to the heirs and devisees for the full amount of the injury they sustain by the sale. Farys *v.* Farys, Harp. Eq. (S. C.) 261. See also McPhadden *v.* Bacon, 13 Grant Ch. (U. C.) 591.

Failure to subject realty to payment of debts.— An administrator is guilty of waste where he fails to cause the real estate of his decedent to be applied to the payment of his debts, when the personal property is insufficient. New Hampshire Strafford Bank *v.* Mellen, Smith (N. H.) 385.

Liability for tax.—The individual property of a personal representative may be taken for a tax imposed on him in his representative capacity, when no property of the estate can be found. *In re* McMahon, 66 How. Pr. (N. Y.) 190.

In Vermont under the statute regulating the settlement of estates, personal representatives are not personally liable to the creditors for their debts against the estate until after a decree has been made by the probate court for the distribution of the assets among the creditors, and the expiration of the time limited for payment. Orange County Bank *v.* Kidder, 20 Vt. 519.

23. *Maryland.*— Scott *v.* Dorsey, 1 Harr. & J. 227.

Massachusetts.— Forward *v.* Forward, 6 Allen 494.

Missouri.— *In re* Motier, 7 Mo. App. 514.

New York.— Willcox *v.* Smith, 26 Barb. 316; *In re* Goetschius, 2 Misc. 278, 23 N. Y. Suppl. 970.

Pennsylvania.— Callaghan *v.* Hall, 1 Serg. & R. 241. *Compare* Coggin's Appeal, 3 Walk. 426.

Texas.— Finley *v.* Carothers, 9 Tex. 517, 60 Am. Dec. 179.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1117.

24. Callaghan *v.* Hall, 1 Serg. & R. (Pa.) 241; Davis *v.* Davis, 2 Hill Eq. (S. C.) 377.

25. See Minvielle's Succession, 12 La. Ann. 72; Van Hook *v.* Letchford, 35 Tex. 598.

26. See Erwin *v.* Lowry, 1 La. Ann. 276; Bull's Appeal, 24 Pa. St. 286; *In re* Kittera, 17 Pa. St. 416; Porter *v.* Sweeney, 61 Tex. 213. But *compare* Miller *v.* Pettit, 16 N. J. L. 421.

Notice.— In the absence of statutory requirement, no notice need be given to authorize a probate court to decree payment of debts, and distribution of assets among creditors. Lanier *v.* Irvine, 24 Minn. 116.

Where a final settlement has been set aside, the probate court becomes repossessed of the administration of the estate, and is the proper tribunal in which to enforce a demand allowed against the estate. Ferguson *v.* Carson, 9 Mo. App. 497.

Implied condition of order.— If a representative's account on a settlement before the county court shows that he has no cash, but only property in his hands, and the court makes an order that all demands of a particular class be paid, it is upon the implied condition that funds sufficient for that purpose first come into his hands; and a creditor of that class who sues out a scire facias to compel payment of his demand must show that the property has been converted into cash. Polk *v.* Farar, 12 Mo. 356.

Requisites of decree.—N. Y. Code Civ. Proc. § 2743, provides that, where the validity of a debt or claim is admitted or has been established, the surrogate's decree must determine to whom it is payable, the sum to be paid,

summary proceeding by rule to show cause,[27] unless such a proceeding is authorized by statute.[28] It has been held that where a claimant against an estate neglects to take advantage of the means provided by statute for satisfying his claim, he has no remedy at law or in equity.[29]

b. Statutory Proceedings. Special proceedings for enforcing the payment of claims against the estates of decedents are sometimes provided by statute.[30]

c. Creditors' Suits.[31] The creditor of a deceased debtor, like any other creditor, may resort to equity for the purpose of reaching assets for the payment of his claim,[32] but, contrary to the general rule, it has been held in a number of

and all other questions concerning the same. See Oser's Estate, 4 N. Y. Civ. Proc. 129.

Enforcement of decree.— Where imprisonment for debt has been abolished, a final decree against a personal representative for the payment of a debt due from his decedent cannot be enforced by attachment and sequestration. The remedy, where there are no funds in the hands of the representative belonging to the estate of the decedent which can be reached, is by execution against the individual property of the personal representative, if he has wasted the estate which came into his hands. Hosack *v.* Rogers, 11 Paige (N. Y.) 603.

27. Thurman *v.* Morgan, 79 Va. 367.

28. **In Louisiana** a creditor in whose favor a judgment has been rendered against the personal representative for a sum of money may proceed summarily by rule to enforce its payment. Maraist *v.* Guilbeau, 30 La. Ann. 1089; Dubuch *v.* Wildermuth, 3 La. Ann. 407. See also Jamison's Succession, 108 La. 279, 32 So. 381.

29. Winegar *v.* Newland, 44 Mich. 367, 6 N. W. 841.

30. **In Iowa** summary proceedings to compel a personal representative to pay money in accordance with an order of the court is provided for by Rev. (1860) §§ 2419, 2420. See Hart *v.* Jewett, 17 Iowa 234.

In New York it is provided by statute (Code Civ. Proc. § 2722) that a petition may be presented to the surrogate by a creditor at any time after six months have expired since letters were granted, praying for a decree directing the personal representative to pay the petitioner's claim, and that he be cited to show cause why such a decree should not be made, and it is further provided that on the presentation of such a petition the surrogate must issue a citation accordingly, and on the return thereof must make such a decree in the premises as justice requires; but such petition must be dismissed where the personal representative files a written answer duly verified setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, and denying its validity or legality, or where it is not proved to the satisfaction of the surrogate that there is money or other personal property of the estate which can be applied to the payment of such claim without injuriously affecting the rights of others. See Willis *v.* Sharp, 115 N. Y. 396, 22 N. E. 149, 5 L. R. A. 636 [*reversing* 46 Hun 540]; Matter of Walker, 70 N. Y. App. Div. 263, 74 N. Y. Suppl. 971; Matter of Stevenson, 77 Hun 203, 28 N. Y. Suppl. 362; Matter of Miller, 70 Hun 61, 23 N. Y. Suppl. 1104; Matter of Miner, 39 Misc. 605, 80 N. Y. Suppl. 643; Matter of Hitchler, 21 Misc. 417, 47 N. Y. Suppl. 1069; Kenny *v.* Geoghegan, 9 N. Y. Civ. Proc. 378; Mitchell *v.* Mount, 19 Abb. Pr. 1; Sellis' Case, 4 Abb. Pr. 272; Matter of Mills, 11 How. Pr. 126; Kidd *v.* Chapman, 2 Barb. Ch. 414; *In re* Coit, 3 Dem. Surr. 58; Babcock *v.* Lillis, 4 Bradf. Surr. 218; Campbell *v.* Bruen, 1 Bradf. Surr. 224. A creditor, within the meaning of this statute, is a person to whom the deceased was indebted during his lifetime (Hall *v.* Dusenbury, 38 Hun 125, 4 Dem. Surr. 181) or an assignee of such a person (Matter of Moderno, 63 Hun 261, 17 N. Y. Suppl. 781, 28 Abb. N. Cas. 57, 22 N. Y. Civ. Proc. 72). This statute prohibits the surrogate from adjudicating upon a disputed claim, but does not either expressly or by implication deprive him of the right to decide whether or not a claim has been rejected or allowed, and where, upon competent and sufficient evidence, he decides it was admitted and allowed, he may properly direct its payment. *In re* Miles, 170 N. Y. 75, 62 N. E. 1084 [*reversing* 61 N. Y. App. Div. 562, 71 N. Y. Suppl. 71]. See also Ruthven *v.* Patten, 1 Rob. 416, 2 Abb. Pr. N. S. 121. There is also a statute in this state which makes special provision for the collection of funeral expenses. Laws (1901), c. 293, amending Code Civ. Proc. § 2729. See Matter of Kalbfleisch, 78 N. Y. App. Div. 464, 79 N. Y. Suppl. 651; Matter of Kipp, 70 N. Y. App. Div. 567, 75 N. Y. Suppl. 589.

Suit on judgment unnecessary to authorize decree for payment.— McNulty *v.* Hurd, 72 N. Y. 518 [*modifying* 11 Hun 339]. See also Matter of Lyman, 60 Hun (N. Y.) 82, 14 N. Y. Suppl. 198, 20 N. Y. Civ. Proc. 421 [*affirmed* in 128 N. Y. 614, 28 N. E. 252].

31. See, generally, CREDITORS' SUITS, 12 Cyc. 1.

32. Kennedy *v.* Creswell, 101 U. S. 641, 25 L. ed. 1075; Johnson *v.* Powers, 13 Fed. 315.

In Wisconsin creditors are expressly authorized by statute to bring an action to reach real estate or other assets of the decedent which are not included in the inventory of his personal representative and which ought to be subjected to the payment of his debts. See Allen *v.* McRae, 91 Wis. 226, 64

cases that the creditor is not obliged to obtain a judgment at law before he can avail himself of this remedy.[33]

d. Execution. Where a judgment has been obtained against a personal representative, who without paying the judgment proceeds to distribute all the decedent's property among his legal distributees, the judgment creditor may levy his execution on any of the property distributed.[34] In Illinois when a claim is filed and allowed against an estate it becomes a judgment, and the creditor may have execution thereon, but the execution must follow the judgment and two separate and distinct claims should not be included in one execution.[35] In Michigan, where in the prosecution of a claim a lien has been acquired by attachment against a defendant who dies pending the suit, plaintiff may, on obtaining judgment against the personal representative of the decedent, have execution against the property so attached, whether or not commissioners have been appointed to hear claims against the estate of the decedent.[36]

e. Review. Orders directing the payment of claims against the estate of decedents are generally appealable,[37] and an order of the probate court dismissing

N. W. 889; German Bank *v.* Leyser, 50 Wis. 258, 6 N. W. 809, holding that real estate conveyed by a decedent in his lifetime in fraud of his creditors may be reached in such an action.

Personal representative a necessary party. — Abraham *v.* Hall, 59 Ala. 386.

Necessity for showing representative and sureties irresponsible. — A creditor of a decedent has no right to follow the personal estate of the decedent into the hands of a third person to whom it is alleged that the representative has paid it in his own wrong, without showing that the representative and his sureties are irresponsible. Jackson *v.* Forrest, 2 Barb. Ch. (N. Y.) 576.

Suit to prevent misapplication. — A creditor has the right to pursue the assets of an estate whenever he has reason to apprehend their misapplication by the personal representative, either voluntarily or by coercion of execution in satisfaction of his own debts. Williamson *v.* Mobile Branch Bank, 7 Ala. 906, 42 Am. Dec. 617.

Property fraudulently disposed of by debtor. — Where a debtor in his lifetime made a fraudulent disposition of his property equity will entertain a bill filed by a creditor and subject such property to the payment of the debts of the decedent. White *v.* Russell, 79 Ill. 155. See also Stephens *v.* Harris, 41 N. C. 57; Spoon *v.* Smith, 36 S. C. 558, 15 S. E. 800. But see Caswell *v.* Caswell, 28 Me. 232, holding that a creditor of an insolvent estate cannot maintain an action to recover property conveyed by a decedent to defraud his creditors, although such an action might be maintained by the personal representative of the estate. In Alabama the court will entertain a bill filed by a simple contract creditor of a deceased debtor averring a deficiency of legal assets to satisfy his demand and asking that property fraudulently conveyed by the debtor while in life be subjected to the payment thereof (Houston *v.* Blackman, 66 Ala. 559, 41 Am. Rep. 756; Jenkins *v.* Lockard, 66 Ala. 377; Pharis *v.* Leachman, 20 Ala. 662), but such a bill will not be entertained unless a deficiency of legal assets is alleged (Sharp *v.* Sharp, 76 Ala. 312; State Bank *v.* Ellis, 30 Ala. 478). In California, if a decedent in his lifetime conveyed any part of his real estate with intent to defraud his creditors, his personal representative, on their application and their paying or securing to be paid certain costs, is bound to bring an action for the recovery of the property so conveyed. Mesmer *v.* Jenkins, 61 Cal. 151. See *supra*, III, H, 7.

A creditor may follow the assets in the hands of legatees and other persons claiming as volunteers or fraudulent alienees of an unfaithful and insolvent representative; and such a volunteer is not protected by the fact that the representative had sufficient assets to pay all the debts, if he has not wasted them. Barnawell *v.* Threadgill, 56 N. C. 50. See also Everingham *v.* Vanderbilt, 51 How. Pr. (N. Y.) 177.

In North Carolina jurisdiction of creditors' bills is in the superior and not in the probate court. Wadsworth *v.* Davis, 63 N. C. 251.

33. Jenkins *v.* Lockard, 66 Ala. 377; Halfman *v.* Ellison, 51 Ala. 543; Watts *v.* Gayle, 20 Ala. 817; Everingham *v.* Vanderbilt, 51 How. Pr. (N. Y.) 177; Kennedy *v.* Creswell, 101 U. S. 641, 25 L. ed. 1075; Johnson *v.* Powers, 13 Fed. 315. And see CREDITORS' SUITS, 12 Cyc. 10. But see Caswell *v.* Caswell, 28 Me. 232.

34. Van Houten *v.* Reily, 6 Sm. & M. (Miss.) 440.

35. Cohen *v.* Menard, 31 Ill. App. 503 [*affirmed* in 136 Ill. 130, 24 N. E. 604].

36. Smith *v.* Jones, 15 Mich. 281.

37. Stuttmeister *v.* San Francisco Super. Ct., 72 Cal. 487, 14 Pac. 35; Weadock *v.* Ray, 111 Wis. 489, 87 N. W. 477, holding that where a personal representative, with full knowledge of the facts, has neglected to prosecute an appeal directly from an order for the payment of claims, as authorized by the statute, he cannot be relieved from the order on an application for its vacation. See also Bennett *v.* Bennett, 102 Ind. 86, 1 N. E. 199. But *compare* Webb *v.* Stillman, 26 Kan. 371, holding that an order directing the pay-

a petition to have the personal representative show cause why a claim that has been allowed shall not be paid has been held to be appealable.[38]

13. Reservation of Assets. In some jurisdictions personal representatives are required by statute to reserve a portion of the assets of the estate for the payment of claims which are contingent, or as to which suits are pending, or which are not yet due.[39] And a court of equity has power, in cases where there is a clear debt to be paid or duty to be performed at a future day, to order that sufficient assets for the discharge of it be retained and secured by the personal representative, before the distribution of the estate.[40]

14. Liability of Creditor to Refund. At common law a creditor who had received his just debt in good faith from a personal representative could not be compelled to refund any part of it,[41] even though preferred debts of the estate remained unpaid;[42] but according to the rule which now generally obtains, when a personal representative under an honest belief that the estate is solvent pays a creditor in excess of his *pro rata* distributive share, he may upon its being ascertained that the estate is really insolvent recover the overpayment from the creditor.[43] Where, owing to an erroneous computation as to the amount of the claim of a creditor, a personal representative has made an overpayment, he may

ment of a claim already allowed is not a final order and is not appealable.

38. *In re* McKinley, 49 Cal. 152.

39. *California.*— *In re* Sigourney, 61 Cal. 71.

Maine.— Greene *v.* Dyer, 32 Me. 460.

Maryland.— Pole *v.* Simmons, 49 Md. 14; Ing *v.* Baltimore Assoc., etc., 21 Md. 426.

Massachusetts.— Cobb *v.* Kempton, 154 Mass. 266, 28 N. E. 264; Hammond *v.* Granger, 131 Mass. 351.

New Hampshire.— Wheeler *v.* Joslin, 63 N. H. 164.

New York.— *In re* Henshaw, 37 Misc. 536, 75 N. Y. Suppl. 1047; Hallett *v.* Hare, 5 Paige 315; Field *v.* Field, 2 Redf. Surr. 106. See also *In re* Truslow, 37 Misc. 189, 74 N. Y. Suppl. 944.

Pennsylvania.— Upon the distribution of the estate of a decedent in the orphans' court, it is within the sound discretion of the court to direct a portion of the funds to be withheld to meet a claim against the estate as to which there is a suit pending in a common-law court. Bennett's Estate, 132 Pa. St. 201, 19 Atl. 58. See also Fitzpatrick's Estate, 14 Wkly. Notes Cas. 472.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1133; and *infra*, XI, Q.

Retaining a sum to pay tax.— Where the validity of a tax against a decedent's estate is in question upon a final accounting the decree should provide for the retention of the amount of tax. Matter of Kenworthy, 63 Hun (N. Y.) 165, 17 N. Y. Suppl. 655.

Reservation of money to apply on canceled contract.— An administrator cannot retain money remaining in his hands unadministered to apply on a contract made for the sale of land to the decedent, where the contract has been annulled and canceled by the vendors; he would thus benefit the heirs seeking enforcement of the contract, at the expense of the creditors of the estate. Harmon *v.* Durham, 3 Wend. (N. Y.) 367.

40. Petrie *v.* Voorhees, 18 N. J. Eq. 285.

41. *Indiana.*— See Tarplee *v.* Capp, 25 Ind. App. 56, 56 N. E. 270.

Massachusetts.— Walker *v.* Hill, 17 Mass. 380.

Pennsylvania.— Carson *v.* McFarland, 2 Rawle 118, 19 Am. Dec. 627. See also Yocum *v.* Commercial Nat. Bank, 8 Pa. Dist. 631.

Tennessee.— Johnson *v.* Molsbee, 5 Lea 444.

England.— See Dillon *v.* Burton, 3 Ridg. 101.

Canada.— Doner *v.* Ross, 19 Grant Ch. (U. C.) 229.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1134.

42. Staples *v.* Staples, 85 Va. 76, 7 S. E. 199; Findlay *v.* Trigg, 83 Va. 539, 3 S. E. 142; Hodges *v.* Waddington, 2 Vent. 360. See also Whitted *v.* Nash, 66 N. C. 590.

43. *Arkansas.*— See Boles *v.* Jessup, 57 Ark. 469, 21 S. W. 880.

Connecticut.— See Mansfield *v.* Lynch, 59 Conn. 320, 22 Atl. 313, 12 L. R. A. 285.

Illinois.— Wolf *v.* Beaird, 123 Ill. 585, 15 N. E. 161, 5 Am. St. Rep. 565 [*reversing* on other grounds 23 Ill. App. 482].

Indiana.— Tarplee *v.* Capp, 25 Ind. App. 56, 56 N. E. 270. See also East *v.* Ferguson, 59 Ind. 169. But *compare* Beardsley *v.* Marsteller, 120 Ind. 319, 22 N. E. 315.

Kentucky.— Moore *v.* Moore, 88 Ky. 683, 11 S. W. 780, 11 Ky. L. Rep. 210; Masonic's Sav. Bank *v.* Bang, 10 S. W. 633, 10 Ky. L. Rep. 743.

Maine.— Morris *v.* Porter, 87 Me. 510, 33 Atl. 15.

Massachusetts.— Heard *v.* Drake, 4 Gray 514; Bliss *v.* Lee, 17 Pick. 83; Walker *v.* Bradley, 3 Pick. 261; Walker *v.* Hill, 17 Mass. 380.

Ohio.— Rogers *v.* Weaver, 5 Ohio 536, Wright 174.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1134.

Form of action.— The personal representative may recover the overpayment in an action for money had and received for the use

maintain an action in his representative capacity to recover the amount overpaid,[44] and where plaintiffs in a creditor's suit turn out to have been overpaid, the court has jurisdiction to order them to refund such overpayment.[45] A personal representative who on competent advice pays a claim *bona fide* made against the estate of his decedent, cannot afterward, upon further advice taken, recover the amount of the claim so paid upon the suggestion that the payment was made under a mistake of law.[46] Money paid out of the assets of an intestate's estate that is solvent, by one who afterward becomes administrator, in discharge of a *bona fide* indebtedness of the estate which the administrator would have been bound to pay in due course of administration, cannot be recovered by him.[47]

15. Release by Creditors. A person having a claim against an estate may by express agreement release it,[48] and if the agreement is in writing, in construing it the primary consideration is to arrive at the intention of the parties thereto.[49] A receipt given to a personal representative for the payment of a claim against an

of the estate (Wolf *v.* Beaird, 123 Ill. 585, 15 N. E. 161, 5 Am. St. Rep. 565 [*reversing* 23 Ill. App. 486 (*following* Beaird *v.* Wolf, 19 Ill. App. 36; Foskett *v.* Wolf, 19 Ill. App. 33)]), and after his final settlement, for his own use (Wolf *v.* Beaird, *supra*; Rogers *v.* Weaver, 5 Ohio 536, Wright (Ohio) 174).

Agreement to refund.— An agreement entered into by a creditor with the personal representative that he will refund the amount received less the dividend, to which he is entitled, in the event the estate is found to be insolvent, is based upon a sufficient consideration, and if the estate proves to be insolvent, the personal representative may enforce repayment. Beardsley *v.* Marsteller, 120 Ind. 319, 22 N. E. 315. See also Gorman *v.* Nairne, 12 Ala. 338.

Setting off improper payment.— Where through a mistake of fact, a personal representative makes a payment on a claim of a class to which there are no funds of the estate applicable, the claimant should be charged with such payment when a claim for which there are assets applicable is paid him. Pinneo *v.* Goodspeed, 120 Ill. 524, 12 N. E. 196 [*affirming* 22 Ill. App. 50].

If the creditor has been prejudiced by the failure of the personal representative to comply with the law governing the settlement of estates, or by his bad faith or negligence in any respect, the personal representative cannot recover back the overpayment. Brooking *v.* Farmers' Bank, 83 Ky. 431 [*explaining* and *distinguishing* Lawson *v.* Hansborough, 10 B. Mon. (Ky.) 147].

Insufficiency resulting from representative's fault.— Money paid by a personal representative to a creditor out of the proceeds of property subject to a mortgage in favor of another creditor cannot be recovered by the personal representative when at the time of payment there were funds in his hands proceeding from the sale of the mortgaged property sufficient to extinguish it, although by his laches in suffering the mortgage claim to remain unpaid and from the accumulation of interest the fund has become insufficient to extinguish it. Foster's Succession, 4 La. Ann. 497.

In Canada, under Ont. Rev. St. c. 110, § 36, where it appears that one creditor has received more than his *pro rata* share, he will be ordered to refund at the instance of other creditors (Chamberlen *v.* Clark, 9 Ont. App. 273 [*affirming* 1 Ont. 135], but it seems that a personal representative cannot maintain an action to recover the excess so paid (see Leitch *v.* Molson's Bank, 27 Ont. 621).

44. Grimes *v.* Blake, 16 Ind. 160.

45. Graves *v.* Wright, 1 C. & L. 267, 2 Dr. & War. 77.

46. Mayhew *v.* Stone, 26 Can. Supreme Ct. 58.

47. Rainwater *v.* Harris, 51 Ark. 401, 11 S. W. 583, 3 L. R. A. 845.

48. Winslow *v.* Leland, 128 Ill. 304, 24 N. E. 588; Freeland First Nat. Bank *v.* Thompson, 61 N. J. Eq. 188, 48 Atl. 333, holding that where one having a claim against an estate entered into an agreement with the heirs, one of whom was also administrator, whereby the claimant agreed to accept a stipulated consideration in full settlement of all claims "against the estate, heirs or administrators," the release was valid as to any claim against the administrator, although he was not an express party in his official capacity. See also Horne *v.* McRae, 53 S. C. 51, 30 S. E. 701. *Compare* Glenn *v.* Froman, 13 Ky. L. Rep. 540.

Covenant in favor of one of two representatives.— Where there is a joint decree against the executors of two persons and a creditor receives a moiety of the debt from the representatives of one of them, a covenant not to levy the residue of the decree upon the estate of that one does not discharge the representatives of the other, although a release would have operated to discharge both executors. Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185, 6 Call (Va.) 308.

49. Colton *v.* Field, 131 Ill. 398, 22 N. E. 545 [*reversing* 28 Ill. App. 354].

Waiver of all claim in excess of a certain amount.— A stipulation in writing indorsed on a claim by which a claimant waives any claim against the estate beyond a certain sum constitutes a waiver of interest on that sum. *In re* Bleakley, Myr. Prob. (Cal.) 235.

estate is not conclusive evidence of payment, and where payment has not in fact been made the estate is still liable, notwithstanding the receipt;[50] but it has been held that where a personal representative makes a settlement with a creditor by a payment *pro rata* upon his claim, taking a receipt in full, such receipt is conclusive unless it is shown that it was obtained by fraud, or through mistake, or upon some condition.[51]

16. Property Available For Payment — a. In General. As a general rule it may be laid down that all of the property of a decedent of whatever character is liable for the payment of his debts.[52] The debts of a decedent are charges upon the *corpus* of his estate and not merely upon the income,[53] although it may in certain cases be proper to apply the income to the payment of debts and expenses in preference to the *corpus*.[54] Where a community is unliquidated and owes debts, the administration of the estate of the husband involves that of the community, and hence community property may be validly sold by the administrator of the husband's succession for the payment of community debts.[55] Where the expenses of administration are of a general nature, they should be charged *pro rata* on the community property and separate estate; but expenses which

50. Shropshire *v.* Long, 68 Iowa 537, 27 N. W. 737. *Compare* Taylor *v.* McCall, 71 Ala. 52, holding that, where attorneys gave an administrator their receipt for money which they had not in fact received, and he obtained credit on such receipt in his account, they thereby discharged the estate and must look to the administrator personally.

Receipt prima facie evidence of payment.— McCreeliss *v.* Hinkle, 17 Ala. 459.

51. Adriance *v.* Crews, 38 Tex. 148. See also Miller *v.* Harrison, 34 N. J. Eq. 374.

52. See Thompson *v.* Bailey, 1 Ky. L. Rep. 321; U. S. *v.* Drennen, 25 Fed. Cas. No. 14,992, Hempst. 320.

Balance of insurance policy assigned as security.— Where the balance of a sum paid on a policy of insurance on the life of a decedent which had been assigned as security has been paid over by the pledgee to the administrator, the money must be used by the administrator to pay the debts of the decedent, and should not be paid to his minor children at the direction of the creditor. Harrisburg Nat. Bank *v.* Hiester, 2 Pearson (Pa.) 253.

Legal assets primarily liable.— Before a creditor having a judgment against an intestate can seek satisfaction out of purely equitable assets in the hands of a stranger, he must make it appear that the estate is otherwise insufficient. Jones *v.* McCleod, 61 Ga. 602.

Debts are not a lien upon the property, unless expressly charged thereon. Hines *v.* Spruill, 22 N. C. 93.

Stock held by an administrator of surety. — An administrator of a surety, having bank-stock certificates in his hands as such administrator when the principal debtor becomes insolvent, may and should apply on the debt for which the decedent is bound as surety the value of the stock and any dividends thereon remaining in his hands. Van Winkle *v.* Blackford, (W. Va. 1904) 46 S. E. 589.

53. Smith *v.* Barham, 17 N. C. 420, 25 Am. Dec. 721, holding that in case of a residuary bequest to one for life, with remainder over, the whole is subject to the immediate payment of debts, and the executor should sell immediately, instead of waiting for the debts to be paid out of the profits.

Where the testator has not appropriated any particular fund for the payment of debts and has disposed of both the fee and the income, the fee is primarily liable for the payment of the debts. Duncan *v.* Tobin, Dudley Eq. (S. C.) 161.

As between a life-tenant and a remainderman, where a testator does not direct the fund out of which his debts are to be paid, they are chargeable, not on the income, but on the *corpus* of the estate as it existed at the testator's demise. Gillam *v.* Caldwell, 11 Rich. Eq. (S. C.) 73.

Counsel fees as against annuitant.— The court has a right to refuse to charge, against the income of the estate in which a widow appears to be interested as an annuitant, the counsel fees paid by its executor on a successful suit brought by him against the widow to recover assets of the estate, but may allow a counsel fee payable out of the *corpus* in the matter of exceptions. Bonney *v.* Haydock, 40 N. J. Eq. 513, 4 Atl. 766.

54. See De Peyster *v.* Clarkson, 2 Wend. (N. Y.) 77; Hawley *v.* James, 5 Paige (N. Y.) 318 [*reversed* on other grounds in 16 Wend. 61]. *Compare* Vanderford's Appeal, (Pa. 1888) 12 Atl. 491.

Current expenses.— The income of property in the hands of an executor is the primary fund for payment of current expenses; and a person seeking to charge the capital for a debt contracted by the executor must show that the debt was necessary, that the executor has no funds of the estate, and that the executor is insolvent. Manigault *v.* Holmes, Bailey Eq. (S. C.) 283.

55. Oriol *v.* Herndon, 38 La. Ann. 759. As to administration of community property generally see Husband and Wife.

attach specifically to particular pieces of estate are to be charged against such pieces.[56]

b. Real and Personal Property.[57] Under the modern law of administration the whole estate of a decedent, real as well as personal, is subject to the payment of debts.[58] The general rule as to the order in which a decedent's property is liable for the payment of his debts is that the personal estate must be first applied.

56. *In re* Patton, Myr. Prob. (Cal.) 241.

57. The equitable doctrine as to marshaling of assets for payment of debts of a decedent has no application in Missouri since the enactment of the statute of administration. Titterington *v.* Hooker, 58 Mo. 593; Elstroth *v.* Dickmeyer, 88 Mo. App. 418; McAllister *v.* Williams, 23 Mo. App. 286.

58. *Alabama.*— Scott *v.* Ware, 64 Ala. 174.

Illinois.— Vansyckle *v.* Richardson, 13 Ill. 171.

Indiana.— Moncrief *v.* Moncrief, 73 Ind. 587.

Missouri.— See Titterington *v.* Hooker, 58 Mo. 593; Elstroth *v.* Dickmeyer, 88 Mo. App. 418.

New Jersey.— Hattersley *v.* Bissett, 52 N. J. Eq. 693, 30 Atl. 86.

New York.— Glacius *v.* Fogel, 88 N. Y. 434 [*affirming* 25 Hun 227]; Platt *v.* Platt, 4 N. Y. St. 651.

North Carolina.— Hines *v.* Spruill, 22 N. C. 93.

Ohio.— Piatt *v.* St. Clair, 6 Ohio 227, Wright 261.

Pennsylvania.— Chilcott's Appeal, 134 Pa. St. 240, 19 Atl. 850; Steel *v.* Henry, 9 Watts 523; Quigley *v.* Beatty, 4 Watts 13; Penn *v.* Hamilton, 2 Watts 53; Trevor *v.* Ellenberger, 2 Penr. & W. 94; Morris *v.* Griffith, 1 Yeates 189; Morris *v.* McConnaughy, 2 Dall. 189, 1 L. ed. 343; Klein's Estate, 2 Pa. Dist. 813, 14 Pa. Co. Ct. 94. See also Blank's Appeal, 3 Grant 192; Bailey *v.* Bowman, 6 Watts & S. 118; Shorman *v.* Farmers' Bank, 5 Watts & S. 373; Benner's Estate, 2 Chest. Co. Rep. 233.

South Carolina.— Galphin *v.* McKinney, 1 McCord Eq. 280.

Tennessee.— Morrow *v.* Morrow, 2 Tenn. Ch. 549.

Virginia.— McCandlish *v.* Keen, 13 Gratt. 615. See also Murphy *v.* Carter, 23 Gratt. 477.

United States.— Davis *v.* Weed, 7 Fed. Cas. No. 3,658, 44 Conn. 569; U. S. *v.* Drennen, 25 Fed. Cas. No. 14,992, Hempst. 320.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1052.

Real estate is legal "assets" for the payment of a decedent's debts after the personalty is exhausted. Best *v.* Spooner, 4 Ky. L. Rep. 602.

Land cannot be applied until widow's dower assigned.— Hill *v.* Mitchell, 5 Ark. 608.

Sale of realty necessary.— Real estate is not assets for the payment of the debts of a decedent before it has been sold and the proceeds received by the administrator. Vaughn *v.* Deloatch, 65 N. C. 378. See *infra*, XII.

Promise to pay out of personalty.— Where for a valuable consideration one promises to pay a debt out of his personal estate at his death, without a specific limitation to that estate alone, if the personal estate proves insufficient, the real estate may be resorted to. Judy *v.* Louderman, 48 Ohio St. 562, 29 N. E. 181.

Lien of debts on realty see Cooper's Estate, 206 Pa. St. 628, 56 Atl. 67, 98 Am. St. Rep. 759; *In re* Emerick, 172 Pa. St. 191, 33 Atl. 550; Bailey *v.* Bowman, 6 Watts & S. (Pa.) 118; Shorman *v.* Farmers' Bank, 5 Watts & S. (Pa.) 373; Steel *v.* Henry, 9 Watts (Pa.) 523; Quigley *v.* Beatty, 4 Watts (Pa.) 13; Penn *v.* Hamilton, 2 Watts (Pa.) 53; Trevor *v.* Ellenberger, 2 Penr. & W. (Pa.) 94; Schreck's Estate, 2 Kulp (Pa.) 166; Benner's Estate, 2 Chest. Co. Rep. (Pa.) 233.

Consent of representative to sale by heir.— An administrator cannot, by consenting to the sale of land by the heir, divest the creditor of his right to have his debt made out of such land, although it might create an estoppel against him, if the right of creditors were not affected. Moncrief *v.* Moncrief, 73 Ind. 587. See also Pell *v.* Farquar, 3 Blackf. (Ind.) 331.

Selection of particular tract.— A general creditor of a decedent, asserting no lien upon any portion of decedent's land, cannot select a particular tract, and subject it to the payment of his debt. Hundley *v.* Taylor, 25 S. W. 887, 15 Ky. L. Rep. 808.

Although the time has expired within which creditors can apply for a sale of real estate to pay debts, yet, if there is a deficiency in the personal estate, debts and funeral expenses are payable out of the surplus proceeds of real estate previously sold on foreclosure. Matter of Callaghan, 69 Hun (N. Y.) 161, 23 N. Y. Suppl. 378. See also Powell *v.* Harrison, 88 N. Y. App. Div. 228, 85 N. Y. Suppl. 452.

Where funds used for benefit of realty.— Where an executor who is also a trustee under the will has used funds in his hands to keep down the interest upon encumbrances upon a portion of the trust property and for repairs of the same instead of applying such funds in payment of the debts of the deceased, equity will charge such premises in favor of the creditors of the deceased, to the extent of the amount so laid out upon them. Ferris *v.* Van Vechten, 9 Hun (N. Y.) 12.

Remedy of heir.— If, by the fault of the executor or administrator in not collecting personal estate, or in not applying it to the payment of debts, lands are taken from the heir or devisee, the representative is liable

and then the realty,[59] and even though a debt is secured by a mortgage or other lien on land, if it is a personal debt of the decedent it is to be paid primarily out

to the person injured in an action of waste. Mitchel *v.* Lunt, 4 Mass. 654.

59. *Alabama.*— Scott *v.* Ware, 64 Ala. 174. See also Quarles *v.* Grigsby, 31 Ala. 172.

Colorado.— Whitsett *v.* Kershow, 4 Colo. 419.

Delaware.— See Grose *v.* McMullen, 2 Del. Ch. 227.

Illinois.— People *v.* Phelps, 78 Ill. 147.

Indiana.— Clarke *v.* Henshaw, 30 Ind. 144; Scott *v.* Morrison, 5 Ind. 551; Swift *v.* Harley, 20 Ind. App. 614, 49 N. E. 1069.

Kentucky.— Broadwell *v.* Broadwell, 4 Metc. 290. See also Alexander *v.* Waller, 6 Bush 330; Best *v.* Spooner, 4 Ky. L. Rep. 602.

Maine.— Hanson *v.* Hanson, 70 Me. 508.

Maryland.— Wyse *v.* Smith, 4 Gill & J. 295; Hoye *v.* Brewer, 3 Gill & J. 153; Hammond *v.* Hammond, 2 Bland 306.

Massachusetts.— See Hays *v.* Jackson, 6 Mass. 149.

Mississippi.— Anderson *v.* Newman, 60 Miss. 532.

Missouri.— Stokes *v.* O'Fallon, 2 Mo. 32.

New Jersey.— Whitehead *v.* Gibbons, 10 N. J. Eq. 230. See also Ford *v.* Westervelt, 55 N. J. Eq. 485, 40 Atl. 26; Hattersley *v.* Bissett, 52 N. J. Eq. 693, 30 Atl. 86.

New York.— Russell *v.* Russell, 36 N. Y. 581, 93 Am. Dec. 540; Matter of Barker, 27 Misc. 395, 58 N. Y. Suppl. 868; Matter of Oosterhoudt, 15 Misc. 566, 38 N. Y. Suppl. 179; Hoes *v.* Van Hoesen, 1 Barb. Ch. 379 [*affirmed* in 1 N. Y. 120]; Livingston *v.* Newkirk, 3 Johns. Ch. 312; Matter of Noyes, 3 Dem. Surr. 369; Griswold *v.* Griswold, 4 Bradf. Surr. 216; Seabury *v.* Bowen, 3 Bradf. Surr. 207.

North Carolina.— North Carolina Baptist Female University *v.* Borden, 132 N. C. 476, 44 S. E. 47; Graham *v.* Little, 40 N. C. 407.

Ohio.— Pittsburg, etc., R. Co. *v.* Schmidt, 8 Ohio Cir. Ct. 355, 4 Ohio Cir. Dec. 535. See also Piatt *v.* St. Clair, 6 Ohio 227, Wright 261.

Pennsylvania.— Sunday's Appeal, 131 Pa. St. 584, 18 Atl. 931; Risk's Appeal, 110 Pa. St. 171, 1 Atl. 85; Mason's Appeal, 89 Pa. St. 402; Eavenson's Appeal, 84 Pa. St. 172; Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553; Kinter's Appeal, 62 Pa. St. 318; Ramsey's Appeal, 4 Watts 71; *In re* Walker, 3 Rawle 229; Todd *v.* Todd, 1 Serg. & R. 453; Crowley's Estate, 7 Pa. Dist. 322; Alter's Estate, 4 Pa. Co. Ct. 558; Mansell's Estate, 1 Pars. Eq. Cas. 367; Lane's Estate, 1 Del. Co. 334 (whether the estate be solvent or insolvent); Ramsey's Estate, 1 Lack. Leg. Rec. 367; McKeown's Estate, 8 Wkly. Notes Cas. 343.

South Carolina.— North *v.* Valk, Dudley Eq. 212; Hall *v.* Hall, 2 McCord Eq. 269.

Tennessee.— Nashville Trust Co. *v.* Carr, (Ch. App. 1900) 62 S. W. 204; Morrow *v.* Morrow, 2 Tenn. Ch. 549.

Virginia.— Elliott *v.* George, 23 Gratt. 780. See Cary *v.* Macon, 4 Call 605. But see Suckley *v.* Rotchford, 12 Gratt. 60, 65 Am. Dec. 240.

England.— Lanoy *v.* Athol, 2 Atk. 446, 26 Eng. Reprint 668; Ancaster *v.* Mayer, 1 Bro. Ch. 454, 28 Eng. Reprint 1237; Barry *v.* Harding, 7 Ir. Eq. 313, 1 J. & L. 475; Cope *v.* Cope, 2 Salk. 449; Brummel *v.* Prothero, 3 Ves. Jr. 111, 30 Eng. Reprint 921. See also Powis *v.* Corbet, 3 Atk. 556, 26 Eng. Reprint 1120; Palmer *v.* Mason, 1 Atk. 505, 26 Eng. Reprint 319; Reeves *v.* Newenharn, 2 Ridg. 11; Chaplin *v.* Chaplin, 3 P. Wms. 365, 24 Eng. Reprint 1103.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1061–1073.

The cost of improvements to the real estate of a decedent which are necessary and proper to adapt the premises to the requirements of business, and which result in an increased income to the widow, is properly charged and allowed out of the personal estate. Culp's Estate, 5 Phila. (Pa.) 97.

When income of realty properly applicable. — Where personal estate of decedent is insufficient, and during the contest over the probate of the will the income of the realty has accumulated as a fund in the executors' hands, and there are controversies between legatees and devisees, the debts may be paid from the fund, and the legatees and devisees be left to settle their disputes before a competent tribunal. Skidmore *v.* Romaine, 2 Bradf. Surr. (N. Y.) 122.

Foreign assets.— An action in one state by a judgment creditor of an insolvent corporation organized in that state against the widow and the sole heir of a deceased stockholder to enforce his personal liability to the extent of the value of land in such state inherited by the widow cannot be defeated by showing that there are personal assets of decedent's estate in another state sufficient to pay plaintiff's claim. Cooper *v.* Ives, 62 Kan. 395, 63 Pac. 434.

The legislature has power to subject the lands of a person to the payment of his debts, to the exclusion of the personal property. Watkins *v.* Holmon, 16 Pet. (U. S.) 25, 10 L. ed. 873. See also Shehan *v.* Barnett, 6 T. B. Mon. (Ky.) 592.

Obligation of support charged on land.— Where a deed made by a father to his son in pursuance to a previous agreement recited that "for, and in consideration of two hundred dollars, and the faithful maintenance" of the grantor's wife, the grantor "hath given and granted unto the said" grantee "a certain tract of land, to have and to hold," etc., the maintenance of the grantor's wife was not a charge upon the personalty of the estate of the grantee, deceased, in the hands of his administrator, but a charge upon the land sold in the hands of the grantee's heirs. Laxton *v.* Tilly, 66 N. C. 327.

of the personalty.[60] Where the decedent has left a will disposing of his property, the provisions thereof may give rise to a different order of marshaling, which will be discussed in its appropriate place,[61] but to change the natural order of applying the assets of a testator for the payment of debts, an intention to that effect must be clearly expressed in the will.[62] With regard to what constitutes

Agreements between administrator and creditors.— An administrator cannot make a valid agreement with a creditor of the estate that part of the claim shall be charged against the land. *In re* Jenkins, 3 Dem. Surr. (N. Y.) 551.

Where a will disposing of both realty and personalty was contested the expenses of the contest and those of administration were chargeable against the personal estate, although, under a failure of the will to have disposed of it, one half of the personal estate would have passed to the next of kin. Matter of Ogden, 41 Misc. (N. Y.) 158, 83 N. Y. Suppl. 977.

When contribution pro rata proper see Farnum *v.* Bascom, 122 Mass. 282; Wootering *v.* Stewart, 2 Yeates (Pa.) 483; McLearn *v.* Wallace, 10 Pet. (U. S.) 625, 9 L. ed. 558.

60. *Illinois.*—People *v.* Phelps, 78 Ill. 147.

Indiana.— Swift *v.* Harley, 20 Ind. App. 614, 49 N. E. 1069. But *compare* Kirkpatrick *v.* Caldwell, 32 Ind. 299.

Maryland.— Lansdale *v.* Ghequiere, 4 Harr. & J. 257.

Massachusetts.—Creesy *v.* Willis, 159 Mass. 249, 34 N. E. 265; Plimpton *v.* Fuller, 11 Allen 139.

North Carolina.— Mahoney *v.* Stewart, 123 N. C. 106, 31 S. E. 384 [*following* Pate *v.* Oliver, 104 N. C. 458, 10 S. E. 709, and *distinguishing* Moore *v.* Dunn, 92 N. C. 63].

Pennsylvania.— Sunday's Appeal, 131 Pa. St. 584, 18 Atl. 931 (interest on mortgage); Lennig's Appeal, 52 Pa. St. 135; Peters' Estate, 16 Pa. Super. Ct. 462; Burton's Estate, 3 Pa. Dist. 755, 15 Pa. Co. Ct. 367; Mansel's Estate, 1 Pars. Eq. Cas. 367; Matter of Mason, 1 Pars. Eq. Cas. 129; Lane's Estate, 1 Del. Co. 334.

South Carolina.— Henagan *v.* Harllee, 10 Rich. Eq. 285.

Virginia.—Dandridge *v.* Minge, 4 Rand. 397.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1068–1069; *supra*, X, A, 1; and DESCENT AND DISTRIBUTION, 14 Cyc. 199.

Contra.— Johnson *v.* Corbett, 11 Paige (N. Y.) 265. And see Hawley *v.* James, 16 Wend. (N. Y.) 61 [*reversing* 5 Paige 318]; *In re* Treharne, 3 Dem. Surr. (N. Y.) 152; Cornwell *v.* Deck, 2 Redf. Surr. (N. Y.) 87; *In re* Williams, 1 Redf. Surr. (N. Y.) 208. And see Haggerty's Succession, 27 La. Ann. 667; *In re* Swan, 54 Mo. App. 17.

Taxes or assessments on realty, if assessed or becoming due before the decedent's death, are payable primarily from the personalty (Matter of Noyes, 3 Dem. Surr (N. Y.) 369; Griswold *v.* Griswold, 4 Bradf. Surr. (N. Y.) 216; Seabury *v.* Bowen, 3 Bradf. Surr. (N. Y.) 207; Alter's Estate, 4 Pa. Co. Ct. 558. See also Pugh *v.* Russell, 27 Gratt. (Va.) 789. But *compare* Boring *v.* Jobe, (Tenn. Ch. App. 1899) 53 S. W. 763, holding that where taxes have become a lien on realty, which has descended to the heirs, by reason of an administrator's failure to pay them, they may be enforced against such realty, although sufficient personal assets have come into the hands of the administrator, and there has been devastavit by him), but those accruing subsequently are a charge on the land (Griswold *v.* Griswold, 4 Bradf. Surr. (N. Y.) 216. See also Piatt *v.* St. Clair, Wright (Ohio) 526. See *supra*, X, A, 15).

Contract by subsequent purchaser to pay mortgage.— Where one purchases land, giving a mortgage for part of the price, and thereafter sells the land, and the purchaser assumes the mortgage, and the original purchaser dies, and the mortgagee obtains judgment against decedent's estate, proceedings may be suspended for enforcing such judgment, and the mortgagee ordered to sell the mortgaged premises before coming in on the personalty. Gould's Estate, 6 Wkly. Notes Cas. (Pa.) 562.

Vendor's lien on homestead.— An administrator has no right without an order of court to apply the general assets of the estate to the discharge of a debt secured by a vendor's lien upon the homestead set apart to the family of the deceased. Mullins *v.* Yarborough, 44 Tex. 14.

Where a married woman gives a mortgage or a judgment to secure the purchase-money of real estate conveyed to her, it may be enforced against the land on the equitable principle that she cannot hold the price and retain the land; but it is not such a personal obligation as will entitle the holder to participate in the distribution of the assets of her estate in the hands of her administrator. Sawtelle's Appeal, 84 Pa. St. 306.

61. See, generally, WILLS.

The general rule of marshaling in the case of testate estates is that the assets are to be applied to the payment of debts in the following order: (1) The general or residuary personalty not specifically bequeathed, exonerated, or exempted; (2) real estate appropriated to, and not merely charged with, the payment of debts; (3) real estate descended, whether acquired before or after the making of the will; (4) real estate devised charged with the payment of debts; (5) general pecuniary legacies *pro rata*; (6) specific and residuary devises and specific legacies *pro rata*. 3 Williams Ex. (7th Am. ed.) 214, 215.

62. *Delaware.*— Grose *v.* McMullen, 2 Del. Ch. 227.

Indiana.— Scott *v.* Morrison, 5 Ind. 551.

New Jersey.— Bird *v.* Hawkins, 58 N. J. Eq. 229, 42 Atl. 588.

realty and what personalty, it may be laid down as a general rule that no part of an estate is personal property which was not such at the death of the owner,[63] although of course this rule may be affected by testamentary provisions by which realty is converted into personalty.[64]

c. Rents of Realty. Rents of real estate accruing subsequent to the death of a decedent are, for the purpose of marshaling assets, regarded as realty rather than as personalty,[65] and hence are not primarily liable for the payment of debts;[66] but they may, like the realty itself, be made subject to the decedent's debts where the personalty is insufficient,[67] and under appropriate circumstances it may be proper to apply the rents to the payment of debts instead of selling the realty itself for this purpose.[68]

d. Proceedings to Marshal Assets. Proceedings to marshal assets of a decedent's estate are, with certain modifications necessarily resulting from the nature of the case, governed by practically the same rules as apply in the case of the ordinary proceedings for marshaling assets.[69]

XI. DISTRIBUTION OF ESTATE.

A. Authority and Duty to Make — 1. In General. It is the right and duty of a personal representative, upon the settlement of his decedent's estate, and after payment of debts to make distribution of the decedent's property, in the manner

North Carolina.— Robards *v.* Wortham, 17 N. C. 173, 22 Am. Dec. 738. See also Graham *v.* Little, 40 N. C. 407.

Ohio.— See Pittsburg, etc., R. Co. *v.* Schmidt, 8 Ohio Cir. Ct. 355, 4 Ohio Cir. Dec. 535.

South Carolina.— See North *v.* Valk, Dudley Eq. 212.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1065; and, generally, WILLS.

63. Winants *v.* Terhune, 15 N. J. Eq. 185. See also Cloudas *v.* Adams, 4 Dana (Ky.) 603, holding money arising from a sale of realty to be equitable assets.

Direction to sell to pay specified debts.— Where an executor was ordered by a will to sell real estate to pay debts for which the testator was surety, and after such payment the balance was to be given to a daughter-in-law, the proceeds of the sale after payment of such debts was not personal property applicable to the payment of debts of the estate before a resort could be had to the realty. Winants *v.* Terhune, 15 N. J. Eq. 185.

Direction to sell lands and invest proceeds. — Where a will authorized the executor to sell testator's lands and invest the proceeds in securities, or purchase other lands therewith, and provided that such proceeds should always be considered as real estate, creditors of the deceased could not subject the proceeds to payment of their claims as personal property, but could follow them only in equity. Mayer *v.* McCune, 59 How. Pr. (N. Y.) 78.

A judicial sale of decedent's realty will not convert it into personalty, and an application to the supreme court by a creditor for payment of the surplus must be founded on an order of the surrogate for the sale of such realty, and payment of the applicant's demand. Hoey *v.* Kinney, 10 Abb. Pr. (N. Y.) 400. See also Young's Estate, 6 Pa. Co. Ct. 454.

Where real estate is appropriated under the right of eminent domain, the damages assessed thereafter are personal property, and hence liable in the first instance for debts. Hay's Estate, 29 Pittsb. Leg. J. (Pa.) 311.

64. See, generally, WILLS.

65. *In re* Woodworth, 31 Cal. 595; Indianapolis First Nat. Bank No. 2,556 *v.* Hanna, 12 Ind. App. 240, 39 N. E. 1054; Robb's Appeal, 41 Pa. St. 45. See also Draper *v.* Barnes, 12 R. I. 156.

66. Richardson *v.* Richardson, 87 Ill. App. 354 (in the absence of a specific provision in the will); Robb's Appeal, 41 Pa. St. 45. See also Zoellner *v.* Zoellner, 53 Mich. 620, 19 N. W. 566.

Heirs may authorize the administrator to collect rents and apply them on the debts of the decedent; yet such payment will not inure to the benefit of any creditors not paid, unless it be proven that the payment was to be a pure gift to all the creditors, or that those who are not so paid have suffered some loss by the arrangement. Giblin's Estate, 2 Kulp (Pa.) 292.

67. Indianapolis First Nat. Bank No. 2,556 *v.* Hanna, 12 Ind. App. 240, 39 N. E. 1054, special order of court in renting property. See also Pharis *v.* Leachman, 20 Ala. 662; Thompson *v.* Bailey, 1 Ky. L. Rep. 321; Glacius *v.* Fogel, 88 N. Y. 434 [*affirming* 25 Hun 227]; McCandlish *v.* Edloe, 3 Gratt. (Va.) 330.

68. See *infra*, XII, B, 2, d.

69. See Stephens *v.* James, 77 Ga. 139, 3 S. E. 160; Jordan *v.* Brown, 72 Ga. 495; Coleman *v.* Franklin, 26 Ga. 368; Macon, etc., R. Co. *v.* Parker, 9 Ga. 377; Matoon *v.* Clapp, 8 Ohio 248; Brubaker's Estate, 17 Lanc. L. Rev. (Pa.) 390; Pugh *v.* Russell, 27 Gratt. (Va.) 789. And see, generally, MARSHALING ASSETS.

directed by the will,[1] as in the payment of legacies;[2] or in case of intestacy, or as to property not disposed of by the will, in the manner prescribed by statute,[3] upon an order of the court.[4] But it is no part of his duty to partition or convey among heirs or devisees the real estate of his decedent[5] or to pay legacies charged upon the land,[6] unless empowered by the will to do so.[7] The power of making distribution cannot be delegated by the personal representatives to another, and it has been held not even to the probate court.[8] A surviving executor has

1. *Alabama.*— Colbert *v.* Daniel, 32 Ala. 314.

California.— *In re* Levinson, 98 Cal. 654, 33 Pac. 726 (holding that upon the failure of a trust provided for in the will distribution may be decreed in accordance with the testator's intention as expressed in the will); Cronin's Estate, Myr. Prob. 252.

North Carolina.— Johnson *v.* Johnson, 108 N. C. 619, 13 S. E. 183.

Ohio.— Ratliff *v.* Warner, 32 Ohio St. 334.

Pennsylvania.— Beck's Appeal, 116 Pa. St. 547, 9 Atl. 942; Callahan's Estate, 5 Lack. Leg. N. 105.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1136.

2. *Maryland.*— Hindman *v.* State, 61 Md. 471, also holding that the probate court has no power to relieve an executor of a duty imposed upon him by the will in respect to the legacy.

New Hampshire.— Parker *v.* Cowell, 16 N. H. 149.

New York.— Prattsville Reformed Dutch Church *v.* Brandow, 52 Barb. 228; Frost *v.* Frost, 4 Edw. 733.

North Carolina.— Johnson *v.* Johnson, 108 N. C. 619, 13 S. E. 183.

Pennsylvania.— McDowell's Estate, 8 Del. Co. 172, 17 Montg. Co. Rep. 43.

Tennessee.— Lockart *v.* Northington, 1 Sneed 318.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1136.

The investment of a fund for the benefit of minor legatees must be made by the executor where the will so directs. Hindman *v.* State, 61 Md. 471.

An improper bequest imposes no duty or obligation on the executor. Wickham *v.* Bath, 35 Beav. 59.

3. Harrison *v.* Harrison, 9 Ala. 470; Hampton's Case, 17 Serg. & R. (Pa.) 144 (holding that a personal representative cannot take the property at an appraised value and divide it arbitrarily among the heirs); *In re* Rendell, [1901] 1 Ch. 230, 70 L. J. Ch. 265, 83 L. T. Rep. N. S. 625, 49 Wkly. Rep. 131.

Personal property bequeathed to executors for a purpose which fails must be distributed by them among the next of kin. McDonald's Estate, 2 Nova Scotia 123.

The power of distribution is not barred by the filing by the distributees of a bill to prevent the execution of an order of sale (Harrison *v.* Harrison, 9 Ala. 470), or by failure of the administrator to make a sale of personal estate (Harrison *v.* Harrison, *supra*); nor does an outstanding and undetermined claim of the widow to her share of the real estate prevent the administrator from paying to the children and distributees the sums respectively due them (Quarles *v.* Garrett, 4 Desauss. (S. C.) 145).

4. Wood *v.* Stone, 39 N. H. 572; Rankin's Estate, 5 Pa. Co. Ct. 603.

After an order for distribution it is the duty of the personal representative to hold the funds in his hands subject to the order of the court, and to pay them to such parties as the court may direct; and further than this he has no standing in court or before an auditor respecting the distribution of the funds in his hands. Michael's Estate, 5 Pa. Co. Ct. 321. See also Leland *v.* Kingsbury, 24 Pick. (Mass.) 315.

A distribution by both of two administrators may be ordered where on an accounting by one of them the parties stipulated that the other should also account in the same proceeding, and thereupon the proceedings were consolidated. Matter of Smith, 40 Misc. (N. Y.) 331, 81 N. Y. Suppl. 1035.

A public administrator may be ordered by the probate court to distribute the balance of an estate among the next of kin of the intestate under Mass. Gen. St. c. 95. Parker *v.* Kückens, 7 Allen (Mass.) 509.

Distributers may be appointed by the probate court in Connecticut to complete a selection of part of the estate which the widow was allowed to make under the will, where she died before completing the selection, but such selection cannot be made by the executor. Walker *v.* Upson, 74 Conn. 128, 49 Atl. 904.

A second husband acting as administrator of his deceased wife's estate is entitled only to one third of her share in property which she held as administratrix of her former husband, and may be compelled to make distribution accordingly. Sturgineger *v.* Hannah, 2 Nott & M. (S. C.) 147.

5. Gay *v.* Gay, 29 Ga. 549; Smith *v.* McCormick, 46 Ind. 135; Geddes' Succession, 36 La. Ann. 963; Miller's Succession, 28 La. Ann. 316; Kachlein's Appeal, 5 Pa. St. 95.

6. Conard's Appeal, 33 Pa. St. 47.

7. Johnson *v.* Johnson, 108 N. C. 619, 13 S. E. 183; Conrad's Appeal, 33 Pa. St. 47.

8. Matter of Te Culver, 22 Misc. (N. Y.) 217, 49 N. Y. Suppl. 820, holding that where an administrator paid to the surrogate upon the judicial settlement of his accounts the sum found remaining in his hands, to be distributed to the heirs, the surrogate received the money for the purpose of distribution in his individual capacity as agent of the ad-

the duty of completing the distribution of the estate upon the death of his co-executor.[9]

2. Authority After Discharge. The termination of a representative's authority deprives him of all power of further distribution,[10] and it is his duty thereafter to turn over the funds to his successor.[11] He cannot surrender the estate to a person claiming it as heir without proof of the heirship.[12]

3. Administrator Pendente Lite. An administrator *pendente lite* is an officer of the court and holds the property only until the suit terminates, and he is therefore under no obligation to distribute the assets of the estate;[13] but he will not be compelled to refund, where he has made distribution according to law.[14]

4. Distribution of Money Recovered on Representative's Bond. Money recovered by way of penalty on the bond of the executor or administrator must in some states be distributed by the judge of probate.[15] It must go to the heirs on whose share it has accrued.[16]

5. Security For Future Payment of Legacy, or Payment Into Court. A court of equity may intervene at the instance of a pecuniary legatee to require security for the payment of a legacy in the future, whether vested or contingent,[17] where there is danger that the principal of the legacy will be wasted or lost;[18] or else to order the fund to be paid by the representative into court.[19]

6. Request For Directions. The personal representative has the right to maintain a petition or bill at any time after his qualification[20] for directions from the court as to the application or distribution of funds of the estate which are in his hands, where he is in doubt as to how they should properly be distributed,[21]

ministrator, and that the latter was accordingly responsible for such money.

9. *In re* Steencken, 51 N. Y. App. Div. 417, 64 N. Y. Suppl. 660, 30 N. Y. Civ. Proc. 329.

10. Connelly's Appeal, 1 Grant (Pa.) 366; Babin *v.* D'Astugue, 7 Mart. N. S. (La.) 615.

11. Connelly's Appeal, 1 Grant (Pa.) 366.

12. Babin *v.* D'Astugue, 7 Mart. N. S. (La.) 615. But see Geddes' Succession, 36 La. Ann. 963, holding that, after an executor has paid debts and legacies and homologated his account, he is bound on demand of the widow or heirs to surrender the property to them.

13. Lilly *v.* Menke, 126 Mo. 190, 28 S. W. 643, 994; Winpenny's Estate, 11 Phila. (Pa.) 20.

14. Bradford's Case, 1 Browne (Pa.) 87.

15. See Ordinary *v.* Barcalow, 36 N. J. L. 15.

16. *In re* Dimmick, 111 La. 655, 35 So. 801.

17. Randle *v.* Carter, 62 Ala. 95; Lupton *v.* Lupton, 2 Johns. Ch. (N. Y.) 614; Love *v.* Love, 3 Hayw. (Tenn.) 13. The legatee's right to relief in such cases depends on the existence of assets liable for the satisfaction of the legacy, which it is the executor's duty to hold for its payment, when due. Randle *v.* Carter, 62 Ala. 95.

18. Howard *v.* Howard, 16 N. J. Eq. 486; Lindsay's Estate, 10 Wkly. Notes Cas. (Pa.) 36; Higginson *v.* Fabre, 3 Desauss. (S. C.) 89 (contingent legacy); Hopkins *v.* Wainwright, 1 Desauss. (S. C.) 302.

19. Lupton *v.* Lupton, 2 Johns. Ch. (N. Y.) 614.

20. Gordon *v.* Groesbeck, 1 Ohio Cir. Ct. 320, 1 Ohio Cir. Dec. 176.

21. *Georgia.*— Hamberger *v.* Easter, 57 Ga. 71.

Kentucky.— Fraser *v.* Page, 82 Ky. 73.

Massachusetts.— Hills *v.* Putnam, 152 Mass. 123, 25 N. E. 40; Putnam *v.* Collamore, 109 Mass. 509; Stevens *v.* Warren, 101 Mass. 564.

New Hampshire.— Gafney *v.* Kenison, 64 N. H. 354, 10 Atl. 706.

New Jersey.— Dunn *v.* Campbell, 47 N. J. Eq. 4, 9 Atl. 1099.

Ohio.— Noble *r.* Martin, 4 Ohio Cir. Ct. 365, 2 Ohio Cir. Dec. 598.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1148.

Want of parties defendant does not render such a bill defective if the numerous claimants of the fund, representing every possible interest, are fully represented before the court by those having similar interests. Hills *v.* Putnam, 152 Mass. 123, 25 N. E. 40.

An appeal from the judgment in such a case need not be taken by the representative (Fraser *v.* Page, 82 Ky. 73; Bryant *r.* Thompson, 128 N. Y. 426, 28 N. E. 522, 13 L. R. A. 745 [*reversing* 14 N. Y. Suppl. 386]); but the legatees, devisees, or other defendants, if not satisfied with the decision, may take an appeal (Fraser *r.* Page, 82 Ky. 73; Noble *r.* Martin, 4 Ohio Cir. Ct. 365, 2 Ohio Cir. Dec. 598).

Where division of the fund is not to be made until the expiration of a given term, the court will not undertake to instruct as to such division until such term has expired. Gafney *r.* Kenison, 64 N. H. 354, 10 Atl. 706.

Where the executor has an adequate remedy by way of defense, he cannot maintain such a bill. Dodge *r.* Morse, 129 Mass. 423,

as where there is a dispute as to who is entitled to the same,[22] or there is reason to believe that a legacy made by the testator is invalid.[23]

7. Admission of or Charging With Assets. Where one receives money in his capacity as personal representative, he cannot withhold it from distribution on the ground that it is not a part of the estate;[24] and if he admits that he has sufficient assets in his hands to satisfy legatees or distributees, a judgment or decree may be rendered against him accordingly.[25] After the entry of a decree charging the representative with sufficient assets to pay all legacies, the legatees are remitted entirely to the personal responsibility of the representative, and unless they seasonably assert their rights they stand in no better position than other creditors.[26]

B. Priority of Debts to Legacies and Distributive Shares. The right of a legatee or distributee to his legacy or distributive share is suspended until all debts and liabilities of the decedent's estate have been satisfied,[27] although every

holding that where there is no doubt as to the person entitled to the fund, but there is some question as to the right of a trustee to receive it without giving bond, the executor cannot maintain such a bill, as he has an adequate remedy by way of defense to any suit that might be brought against him by the trustee without having given bond.

22. Bryant *v.* Thompson, 128 N. Y. 426, 28 N. E. 522, 13 L. R. A. 745.

23. Gordon *v.* Groesbeck, 1 Ohio Cir. Ct. 320, 1 Ohio Cir. Dec. 176.

24. Sain *v.* Bailey, 90 N. C. 566.

25. Smith *v.* Smith, 4 Paige (N. Y.) 271; Buchanan *v.* Buchanan, 4 Strobh. (S. C.) 63; Sharpe *v.* Lockwood, 78 Va. 24.

A bond to pay debts and legacies given by an executor is a conclusive admission of sufficent assets. Stebbins *v.* Smith, 4 Pick. (Mass.) 97.

Overpayment under a mistake as to the value of the assets is not such an admission of assets as should bind the executor or administrator to make a like overpayment to the other legatees or distributees. Anderson *v.* Piercy, 20 W. Va. 282.

Representative's charge to himself or admission controlled by other evidence.— Hills *v.* Putman, 152 Mass. 123, 25 N. E. 40.

26. Bellows *v.* Sowles, 53 Fed. 325.

Where an executor serves without giving bond with sureties, under a request in the will, and becomes insolvent after a decree of distribution, the heirs or distributees who have not seasonably guarded against this condition of things stand in no better position than his other creditors for enforcing their claims. Bellows *v.* Sowles, 53 Fed. 325.

Where the executors pay a judgment fixing them with assets they cannot afterward recover the amount thus paid out of the estate of their testator, the judgment against them being personal. Perkins *v.* Berry, 103 N. C. 131, 9 S. E. 621.

27. *Alabama.*— Leavens *v.* Butler, 8 Port. 380.

Colorado.— Hanna *v.* Palmer, 6 Colo. 156, 45 Am. Rep. 524, rights of widow.

Georgia.— Ferguson *v.* Ferguson, 51 Ga. 340.

Illinois.— Sherman *v.* Saylor, 36 Ill. App. 356.

Kentucky.— Smith *v.* Vertrees, 2 Bush 63; Hammon *v.* Pearl, 6 T. B. Mon. 410.

Louisiana.— Wilson *v.* Wilson, 107 La. 139, 31 So. 643; Bachemin's Succession, 19 La. Ann. 488.

Maine.— Hamlin *v.* Mansfield, 88 Me. 131, 33 Atl. 788.

Michigan.— Miller *v.* Stepper, 32 Mich. 194.

Missouri.— Lewis *v.* Carson, 93 Mo. 587, 3 S. W. 483, 6 S. W. 365.

New Jersey.— Coddington *v.* Bispham, 36 N. J. Eq. 574; Blauvelt *v.* Winkle, 29 N. J. Eq. 111.

New York.— Wilkes *v.* Harper, 1 N. Y. 586 [*affirming* 2 Barb. Ch. 338]; Hallock *v.* Hallock, 79 N. Y. App. Div. 508, 80 N. Y. Suppl. 61; *In re* Keef, 43 Hun 98; Harrison *v.* Peck, 56 Barb. 251.

North Carolina.— Pullen *v.* Hutchins, 67 N. C. 428.

Pennsylvania.— *In re* McCracken, 29 Pa. St. 426; Hoover *v.* Hoover, 5 Pa. St. 351; Hulse's Estate, 12 Phila. 130.

South Carolina.— Swift *v.* Miles, 2 Rich. Eq. 147; Porter *v.* Cheeseborough, Speers Eq. 496; Carnes *v.* Smith, 2 Desauss. 299.

Texas.— Wade *v.* Freese, (Civ. App. 1902) 71 S. W. 69.

Utah.— *In re* Thorn, 24 Utah 209, 67 Pac. 22.

United States.— Sibley *v.* Simonton, 20 Fed. 784.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1150. See also Descent and Distribution, 14 Cyc. 184 *et seq.*; and, generally, Wills.

Debts, within the meaning of this rule, include expenses of last illness and funeral, charges of administration, widow's allowance, costs, and interest (Dean's Succession, 33 La. Ann. 867; *In re* Casey, 2 Silv. Supreme (N. Y.) 585, 6 N. Y. Suppl. 608; *In re* Thorn, 24 Utah 209, 67 Pac. 22); and even a voluntary bond executed by the testator during his life in consideration of love and affection (Gordon *v.* Small, 53 Md. 550); but not claims not admitted to be due, nor sued for,

legacy and devise may be thereby defeated,[28] or until the suspension is removed by the assent of the personal representative, where he is satisfied that the estate is solvent,[29] or by lapse of time for settlement of the estate.[30] Although a legatee or distributee may compel satisfaction or distribution after the lapse of the statutory period for paying debts, it has been held that the rights of legal creditors must be fully protected before such satisfaction or distribution will be ordered.[31]

C. Assent to Legacy or Devise — 1. In General. At law a legacy, whether specific or general, does not vest in the legatee, so as to be subject to his debts[32] or to be enforceable by him, until it is assented to by the personal representative,[33]

under section 16 of the Louisiana statute of March 25, 1828 (Graves *v.* Routh, 4 La. Ann. 126).

A subsequent judgment creditor's rights are inferior to those of a distributee where the distribution is made without fraud. Justices Baker County Inferior Ct. *v.* Moreland, 20 Ga. 145.

The residuary fund of an estate must bear the burden of all debts, not otherwise provided for, before it can be distributed to the residuary legatees. *In re* McCracken, 29 Pa. St. 426; McGlaughlin *v.* McGlaughlin, 24 Pa. St. 20. And see, generally, Wills.

Mortgaged real estate may be distributed among the heirs or devisees subject to the mortgage, where the mortgagee waives all recourse against any other portion of the estate to satisfy his claim. *In re* Hinckley, Myr. Prob. (Cal.) 189.

28. Leavens *v.* Butler, 8 Port. (Ala.) 380; Gresham *v.* Baugh, 66 Ga. 189; Hamlin *v.* Mansfield, 88 Me. 131, 33 Atl. 788.

29. Jackson *v.* Rowell, 87 Ala. 685, 6 So. 95, 4 L. R. A. 637; Refeld *v.* Bellette, 14 Ark. 148; Anderson *v.* Irvine, 6 B. Mon. (Ky.) 231.

Presumption of consent.— Munsell *v.* Bartlett, 6 J. J. Marsh. (Ky.) 20.

That the time to present claims has not expired does not justify a refusal by executors having sufficient funds in their possession to make a payment on account of a legacy more than one year after their appointment, where they have been dilatory in publishing notice to creditors, unless they can point out with certainty the existence of claims which may be made against the estate, and which may impair the legatee's right. *In re* Cain, 17 N. Y. Suppl. 11.

30. *Alabama.*— Jackson *v.* Rowell, 87 Ala. 685, 6 So. 95, 4 L. R. A. 637.

Arkansas.— Refeld *v.* Bellette, 14 Ark. 148.

Maryland.— Coward *v.* State, 7 Gill & J. 475. And see Mitchell *v.* Mitchell, 1 Gill 66.

Massachusetts.— Sturtevant *v.* Sturtevant, 4 Allen 122, holding that the receipt of notes by an administrator after the expiration of two years from the time of giving bond and notice of his appointment does not authorize a delay in the distribution of the estate for the purpose of allowing him to retain assets sufficient to satisfy the claim of a non-resident creditor who has given notice of his demand, and who commenced a bill in equity in another state against the intestate in his lifetime to establish it.

Mississippi.— Grant *v.* Spawn, 33 Miss. 134; Murdock *v.* Washburn, 1 Sm. & M. 546.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1150.

31. Grant *v.* Spann, 33 Miss. 134. See also *infra*, XI, Q.

32. Suggs *v.* Sapp, 20 Ga. 100.

33. *Alabama.*— Bonner *v.* Young, 68 Ala. 35; Upchurch *v.* Norsworthy, 12 Ala. 532.

Arkansas.— Ross *v.* Davis, 17 Ark. 113 (previous to the time allowed for the settlement of the estate); Carter *v.* Cantwell, 16 Ark. 154; Refeld *v.* Billette, 14 Ark. 148.

Connecticut.—Johnson *v.* Connecticut Bank, 21 Conn. 148.

Florida.— Lott *v.* Meacham, 4 Fla. 144.

Georgia.— Phillips *v.* Smith, 119 Ga. 556, 46 S. E. 640; Suggs *v.* Sapp, 20 Ga. 100.

Indiana.— Jennings *v.* Sturdevant, 140 Ind. 641, 40 N. E. 61; Highnote *v.* White, 67 Ind. 596; Crist *v.* Crist, 1 Ind. 570, 50 Am. Dec. 481.

Kentucky.— Nancy *v.* Snell, 6 Dana 148.

Maryland.— Wilson *v.* Rine, 1 Harr. & J. 138; Lark *v.* Linstead, 2 Md. Ch. 162.

Michigan.— Wheeler *v.* Hatheway, 54 Mich. 547, 20 N. W. 579.

New York.— Tole *v.* Hardy, 6 Cow. 333.

North Carolina.— Wooten *v.* Jarman, 52 N. C. 238; James *v.* Masters, 7 N. C. 110.

South Carolina.— Adams *v.* Rees, 9 Rich. 116; Lenoir *v.* Sylvester, 1 Bailey 632; Moore *v.* Barry, Bailey 504; Cannon *v.* Ulmer, Bailey Eq. 204.

Tennessee.— Finch *v.* Rogers, 11 Humphr. 559.

Virginia.— Nelson *v.* Cornwell, 11 Gratt. 724; Hairston *v.* Hall, 3 Call 218.

England.— Northey *v.* Northey, 2 Atk. 77, 9 Mod. 270, 26 Eng. Reprint 447.

Canada.— Archer *v.* Severn, 12 Ont. 615.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1153.

Forgiving a debt by will is in the nature of a legacy, and must be assented to by the executor before the debt is extinguished. Cheshire *v.* Cheshire, 19 N. C. 254.

Trover will not lie against an executor for the conversion of a legacy to which he has never assented. Adams *v.* Rees, 9 Rich. (S. C.) 116.

Trespass or trover may be maintained by the executor, against a legatee, who takes

or at least until it may be seen with reasonable certainty that it will not be needed to pay claims of a higher rank,[34] unless the legacy is charged on the land.[35] In equity, however, the executor is considered as a trustee and may be compelled to give his assent if he refuses it without just cause,[36] unless a condition precedent required of the legatee has not been complied with or non-compliance excused.[37]

2. Acts of Assent and Presumptions — a. In General. The representative's assent need not be in writing.[38] It may be express or implied, and may be either shown by direct proof or inferred from circumstances consistent with the intent to surrender to the legatee or devisee the legal title and control,[39] as where a con-

possession of the legacy without the executor's assent. Crist *v.* Crist, 1 Ind. 570, 50 Am. Dec. 481; Wilson *v.* Rine, 1 Harr. & J. (Md.) 138.

In Mississippi by statute (Howard & Hutch. 412) a legatee may maintain an action at law for his legacy without the assent of the executor, and the executor's only defense is that the property is necessary for the payment of debts or that a final settlement has been made. Magee *v.* Gregg, 11 Sm. & M. 70; Worten *v.* Howard, 2 Sm. & M. 527, 41 Am. Dec. 607.

34. Suggs *v.* Sapp, 20 Ga. 100. See also Finch *v.* Rogers, 11 Humphr. (Tenn.) 559.

35. Jennings *v.* Sturdevant, 140 Ind. 641, 40 N. E. 61; Tole *v.* Hardy, 6 Cow. (N. Y.) 333.

36. *Alabama.*— Millsap *v.* Stanley, 50 Ala. 319; Vaughan *v.* Vaughan, 30 Ala. 329. And see Bonner *v.* Young, 68 Ala. 35.

Georgia.— Lester *v.* Stephens, 113 Ga. 495, 39 S. E. 109.

Indiana.— Crist *v.* Crist, 1 Ind. 570, 50 Am. Dec. 481.

Maryland.— Lark *v.* Linstead, 2 Md. Ch. 162.

South Carolina.— Price *v.* Nesbit, 1 Hill Eq. 445; Stuart *v.* Carson, 1 Desauss. 500.

United States.— Fenwick *v.* Chapman, 9 Pet. 461, 9 L. ed. 193 [*affirming* 5 Fed. Cas. No. 2,604, 4 Cranch C. C. 431].

England.— Northey *v.* Northey, 2 Atk. 77, 9 Mod. 270, 26 Eng. Reprint 447.

Canada.— Archer *v.* Severn, 12 Ont. 615.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1153, 1161.

37. Vaughan *v.* Vaughan, 30 Ala. 329, holding that where a selection by a legatee is annexed as a condition precedent to his right to the legacy, it must be made, and the notice thereof given, before filing the bill, unless it is prevented by the executor.

38. Griffith *v.* Roseborough, 52 N. C. 520.

39. *Alabama.*— Whorton *v.* Moragne, 62 Ala. 201; Cox *v.* McKinney, 32 Ala. 461; George *v.* Goldsby, 23 Ala. 326.

Georgia.— Phillips *v.* Smith, 119 Ga. 556, 46 S. E. 640; King *v.* Skellie, 79 Ga. 147, 3 S. E. 614.

Indiana.— Crist *v.* Crist, 1 Ind. 570, 1 Am. Rep. 481.

Kentucky.— Nancy *v.* Snell, 6 Dana 148; Pirtle *v.* Cowan, 4 Dana 302; Simrall *v.* Graham, 1 Dana 574.

New York.— Wheeler *v.* Lester, 1 Bradf. Surr. 293.

North Carolina.— Edney *v.* Bryson, 47 N. C. 365; Rea *v.* Rhodes, 40 N. C. 148; Buffaloe *v.* Baugh, 34 N. C. 201; Merritt *v.* Windley, 14 N. C. 399.

South Carolina.— Green *v.* Iredell, 31 S. C. 588, 10 S. E. 545; Thompson *v.* Schmidt, 3 Hill 156; Harley *v.* Bates, 2 Brev. 419.

Tennessee.— Chester *v.* Greer, 5 Humphr. 26.

Virginia.— Lynch *v.* Thomas, 3 Leigh 682; Royall *v.* Eppes, 2 Munf. 479.

United States.— McClanahan *v.* Davis, 8 How. 170, 12 L. ed. 1033.

England.— Doe *v.* Mabberley, 6 C. & P. 126, 25 E. C. L. 354; Tudor *v.* Guest, 27 L. J. Exch. 395; Barnard *v.* Pumfrett, 5 Myl. & C. 63, 46 Eng. Ch. 63, 41 Eng. Reprint 295; Austin *v.* Beddoe, 3 Reports 580, 41 Wkly. Rep. 619; Hawkins *v.* Williams, 10 Wkly. Rep. 692.

Canada.— Honsberger *v.* Honsberger, 5 U. C. Q. B. O. S. 479.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1154.

Slight expressions or equivocal acts of the representative will not amount to an assent. George *v.* Goldsby, 23 Ala. 326; Burkhead *v.* Colson, 22 N. C. 77; Martin *v.* Peck, 2 Yerg. (Tenn.) 298; Thorne *v.* Thorne, [1893] 3 Ch. 196, 63 L. J. Ch. 38, 69 L. T. Rep. N. S. 378, 8 Reports 282, 42 Wkly. Rep. 282; Doe *v.* Sturges, 2 Marsh. 505, 7 Taunt. 217, 17 Rev. Rep. 491, 2 E. C. L. 333.

Mere setting apart of certain property by the executor amounts to nothing more than a mental determination and does not bind the estate. Sherman *v.* Jerome, 120 U. S. 319, 7 S. Ct. 577, 30 L. ed. 680. But see Page's Appeal, 71 Pa. St. 402, holding that where executors are put in charge of a special fund for a legatee, to manage for his benefit, the legatee's right to the product of such fund may be inferred from setting it apart for him.

Where there is a deficiency of assets an executor's assent should not be implied, but in such case there ought to be an express assent, because of the great prejudice which otherwise might come to him. Wheeler *v.* Lester, 1 Bradf. Surr. (N. Y.) 293; Southward *v.* Milward, 8 Vin. Abr. 176.

It is a question of fact for the jury whether or not assent has been given. Merritt *v.* Windley, 14 N. C. 399; Mason *v.* Farnell, 1

siderable length of time has elapsed,[40] or where the legatee or devisee has been in possession for some time with the consent, express or implied, of the representative,[41] and the same rule applies where the representative is legatee or devisee.[42]

b. Legacy or Devise in Remainder. An executor's assent to a legacy or devise of an estate for life or other particular estate amounts to an assent to the legacy or devise in remainder,[43] although the personal representative himself is

D. & L. 576, 13 L. J. Exch. 142, 12 M. & W. 674; Elliott *v.* Elliott, 11 L. J. Exch. 3, 9 M. & W. 23; Barnard *v.* Pumfrett, 5 Myl. & C. 63, 46 Eng. Ch. 63, 41 Eng. Reprint 295; Richardson *v.* Gifford, 3 N. & M. 325.

The burden of overcoming the presumption of assent is on the party denying it. Phillips *v.* Smith, 119 Ga. 556, 46 S. E. 640.

To repel the presumption of assent, the record of the orphans' court in another state may be used as *prima facie* evidence, but only *prima facie,* of outstanding debts against the estate. Nancy *v.* Snell, 6 Dana (Ky.) 148.

Possession of a legacy by an executor is not necessary to his assent to it. Spruill *v.* Spruill, 6 N. C. 175.

40. Phillips *v.* Smith, 119 Ga. 556, 46 S. E. 640; Coleman *v.* Lane, 26 Ga. 515; Wheeler *v.* Hatheway, 54 Mich. 547, 20 N. W. 579, one year from the granting of letters testamentary.

41. *Alabama.*— Whorton *v.* Moragne, 62 Ala. 201.

Arkansas.— Refeld *v.* Bellette, 14 Ark. 148.

Connecticut.—Johnson *v.* Connecticut Bank, 21 Conn. 148.

Georgia.— Thaggard *v.* Crawford, 112 Ga. 326, 37 S. E. 367; Vaughn *v.* Howard, 75 Ga. 285; Parker *v.* Chambers, 24 Ga. 518; Jordan *v.* Thornton, 7 Ga. 517.

Massachusetts.— Andrews *v.* Hunneman, 6 Pick. 126.

Mississippi.— Hall *v.* Hall, 27 Miss. 458.

New Hampshire.— Haven *v.* Haven, 69 N. H. 204, 39 Atl. 972.

North Carolina.— Gums *v.* Capehart, 58 N. C. 242; Propst *v.* Roseman, 49 N. C. 130; Lillard *v.* Reynolds, 25 N. C. 366; Lewis *v.* Smith, 23 N. C. 145; White *v.* White, 29 N. C. 536.

South Carolina.— Green *v.* Iredell, 31 S. C. 588, 10 S. E. 545.

Tennessee.— Squires *v.* Old, 7 Humphr. 454.

United States.— McClanahan *v.* Davis, 8 How. (U. S.) 170, 10 L. ed. 1033; Schley *v.* Collis, 47 Fed. 250, 13 L. R. A. 567.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1154.

The assent of the executor need not be proved, where the legatee had possession during the lifetime of the executor. Lowry *v.* Mountjoy, 6 Call (Va.) 55. But see Bothwell *v.* Dobbs, 59 Ga. 787, holding that where the testator, after making his will containing a specific bequest to the legatee, placed her in possession of the property, the title did not vest absolutely so as to prevent the property from being assets, and to render the assent of the executor unnecessary.

42. *Alabama.*— Murphree *v.* Singleton, 37 Ala. 412; Walker *v.* Walker, 26 Ala. 262; Gantt *v.* Phillips, 23 Ala. 275. And see Whorton *v.* Moragne, 62 Ala. 201, where the assent was given by a co-executor.

Georgia.— Shipp *v.* Gibbs, 88 Ga. 184, 14 S. E. 196; Vanzant *v.* Bigham, 76 Ga. 759; Thursby *v.* Myers, 57 Ga. 155; Parker *v.* Chambers, 24 Ga. 518.

Kentucky.— Adie *v.* Cornwell, 3 T. B. Mon. 276.

Maryland.— Kopp *v.* Herrman, 82 Md. 339, 33 Atl. 646.

New York.— Hudson *v.* Reeve, 1 Barb. 89.

North Carolina.— Hearne *v.* Kevan, 37 N. C. 34; Lewis *v.* Smith, 20 N. C. 471; Jones *v.* Zollicoffer, 4 N. C. 645, 7 Am. Dec. 708.

Tennessee.— Chester *v.* Greer, 5 Humphr. 26.

Virginia.— Frazer *v.* Bebill, 11 Gratt. 9.

England.— Fenton *v.* Clegg, 2 C. L. R. 1014, 9 Exch. 680, 23 L. J. Exch. 197; Doe *v.* Sturges, 2 Marsh. 505, 7 Taunt. 217, 17 Rev. Rep. 491, 2 E. C. L. 333.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1156.

Assent by a representative to a legacy or devise to himself will be presumed where he uses the property as his own for a considerable time (Camp *v.* Coleman, 36 Ala. 163; Hearne *v.* Kevan, 37 N. C. 34), where he makes a sale or transfer thereof (Murphree *v.* Singleton, 37 Ala. 412), where he is in possession of the personal estate of the testator (Stuart *v.* Carson, 1 Desauss. (S. C.) 500), or where he divides the fund with another legatee (Frazer *v.* Bevill, 11 Gratt. (Va.) 9); but the assent of the representative will not be presumed where his acts are equivocal (Doe *v.* Sturges, 2 Marsh. 505, 7 Taunt. 217, 17 Rev. Rep. 491, 2 E. C. L. 333).

A widow qualifying as executrix and taking possession of the estate thereby vests in herself legal title to a legacy bequeathed to her unless she expressly dissents from the will. Gantt *v.* Phillips, 23 Ala. 275.

43. *Alabama.*— Hemphill *v.* Moody, 64 Ala. 468; Harkins *v.* Hughes, 60 Ala. 316; Thrasher *v.* Ingram, 32 Ala. 645; Gibson *v.* Land, 27 Ala. 117.

Florida.— Lott *v.* Meacham, 4 Fla. 144.

Georgia.— Akin *v.* Akin, 78 Ga. 24, 1 S. E. 267; Vanzant *v.* Bigham, 76 Ga. 759; McGlawn *v.* Lowe, 74 Ga. 34; Gay *v.* Gay, 29 Ga. 549; Perkins *v.* Brown, 29 Ga. 412; Coleman *v.* Lane, 26 Ga. 515; Parker *v.* Chambers, 24 Ga. 518; Jordan *v.* Thornton, 7 Ga. 517. And see Harris *v.* Cole, 114 Ga. 295, 40 S. E. 271.

Mississippi.— Hall *v.* Hall, 27 Miss. 458.

North Carolina.— McKoy *v.* Guirkin, 102 N. C. 21, 8 S. E. 776; Windley *v.* Gaylord,

the legatee or devisee of the particular estate,[44] unless the assent is restricted to one estate alone,[45] or unless the executor has some trust or duty to perform after the expiration of the particular estate.[46]

3. Time For Assent. An executor may lawfully assent to a specific legacy before the debts of the estate are paid;[47] and in those jurisdictions in which the common-law rule that an executor acquires his authority from the will prevails he may assent even before probate or before he qualifies,[48] except where he is a non-resident,[49] or refuses or neglects to accept office.[50] But in those jurisdictions in which he is held to acquire his authority from the probate court he cannot assent until he has qualified according to law.[51]

4. Operation and Effect. Assent to a legacy or devise, properly given, is usually irrevocable,[52] even though it may leave insufficient assets to pay

52 N. C. 55; Hotchkiss *v.* Thomas, 51 N. C. 537; Rea *v.* Rhodes, 40 N. C. 148; Robertson *v.* Houlder, 37 N. C. 341; Hearne *v.* Kevan, 37 N. C. 34; Lewis *v.* Smith, 20 N. C. 471; Conner *v.* Satchwell, 20 N. C. 202; Smith *v.* Barham, 17 N. C. 420, 25 Am. Dec. 721; Alston *v.* Foster, 16 N. C. 337; Burnett *v.* Roberts, 15 N. C. 81; Ingrams *v.* Terry, 9 N. C. 122.

South Carolina.— Finley *v.* Hunter, 2 Strobh. Eq. 208.

Tennessee.— Finch *v.* Rogers, 11 Humphr. 559.

Virginia.— Lynch *v.* Thomas, 3 Leigh 682; Bishop *v.* Bishop, 2 Leigh 484.

United States.— McClanahan *v.* Davis, 8 How. 170, 12 L. ed. 1033.

England.— Stevenson *v.* Liverpool, L. R. 10 Q. B. 81, 44 L. J. Q. B. 34, 31 L. T. Rep. N. S. 673, 23 Wkly. Rep. 246; Foley *v.* Burnell, 4 Bro. P. C. 34, 2 Eng. Reprint 23; Adams *v.* Peirce, 3 P. Wms. 11, 24 Eng. Reprint 948. And see Webster *v.* Johnson, 3 Wkly. Rep. 60.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1155.

The assent of one of several executors is sufficient to vest both the particular estate and the remainder over. Boone *v.* Dyks, 3 T. B. Mon. (Ky.) 529; Adie *v.* Cornwell, 3 T. B. Mon. (Ky.) 276.

An administrator de bonis non cannot recover from a remainder-man a legacy which has vested in him by the assent of the executor to the original bequest. Windley *v.* Gaylord, 52 N. C. 55; Etheridge *v.* Bell, 27 N. C. 87.

If the remainder over is a contingent one, the assent to the particular estate is qualified as to the remainder, and becomes absolute upon the happening of the contingency (Gay *v.* Gay, 29 Ga. 549; Acheson *v.* McCombs, 38 N. C. 554; Conner *v.* Satchwell, 20 N. C. 202), unless the interest in the property during the interval between the termination of the particular estate and the happening of the contingency is not disposed of by the will (Nixon *v.* Robbins, 24 Ala. 663).

Adjustment of claims in remainder.— The successive beneficiaries in interest in such case must adjust their several claims among themselves without the further intervention of the personal representative. McKoy *v.* Guirkin, 102 N. C. 21, 8 S. E. 776.

44. *Alabama.*— Camp *v.* Coleman, 36 Ala. 163; Gantt *v.* Phillips, 23 Ala. 275.

Georgia.— Shipp *v.* Gibbs, 88 Ga. 184, 14 S. E. 196.

Kentucky.— Adie *v.* Cornwall, 3 T. B. Mon. 276.

Maryland.— Kopp *v.* Herrman, 82 Md. 339, 33 Atl. 646.

North Carolina.—Hearne *v.* Kevan, 37 N. C. 34; Jones *v.* Zollicoffer, 4 N. C. 645, 7 Am. Dec. 708.

But see Richards *v.* Browne, 3 Bing. N. Cas. 493, 3 Hodges 27, 6 L. J. C. P. 95, 4 Scott 262, 32 E. C. L. 230, holding that where an executrix has a life-estate in a chattel under a bequest, her taking possession of the chattel is no assent to a further bequest thereof in remainder.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1155, 1156.

45. Hotchkiss *v.* Thomas, 51 N. C. 537; Robertson *v.* Houlder, 37 N. C. 341.

46. Nixon *v.* Robbins, 24 Ala. 663; McGlawn *v.* Lowe, 74 Ga. 34; Gay *v.* Gay, 29 Ga. 549; McKoy *v.* Guirkin, 102 N. C. 21, 8 S. E. 776; Acheson *v.* McCombs, 38 N. C. 554; Lewis *v.* Smith, 20 N. C. 471; Allen *v.* Watson, 5 N. C. 189; Lenoir *v.* Sylvester, 1 Bailey (S. C.) 632.

47. Edney *v.* Bryson, 47 N. C. 365; Thompson *v.* Schmidt, 3 Hill (S. C.) 156. But see Pullen *v.* Hutchins, 67 N. C. 428.

48. Aleck *v.* Tevis, 4 Dana (Ky.) 242; Gordon *v.* Woods, 4 Bibb (Ky.) 476; Gums *v.* Capehart, 58 N. C. 242. And see Thompson *v.* Schmidt, 3 Hill (S. C.) 156.

An assent by an executor who dies without proving the will becomes operative on administration afterward being taken out with the will annexed. Johnson *v.* Warwick, 17 C. B. 516, 25 L. J. C. P. 102, 84 E. C. L. 516.

49. Gums *v.* Capehart, 58 N. C. 242; Hairston *v.* Hairston, 55 N. C. 123; Stamps *v.* Moore, 47 N. C. 80.

50. White *v.* White, 20 N. C. 536.

51. Gardner *v.* Gantt, 19 Ala. 666; Martin *v.* Peck, 2 Yerg. (Tenn.) 298. But see Finch *v.* Rogers, 11 Humphr. (Tenn.) 559, holding that where the legatee was put in possession by the testator, and there are other assets sufficient for the payment of debts, the executor may assent to such legacy even before he proves the will.

52. *Arkansas.*— Ross *v.* Davis, 17 Ark. 113.

debts,[53] and operates to divest the representative of all title in or control over the property embraced in the legacy or devise assented to,[54] and to vest a complete legal title in the legatee or devisee,[55] free from an execution subsequently obtained against the executor,[56] but subject to rights acquired by third persons in the bequeathed property before the executor assented.[57]

Kentucky.— Nancy *v.* Snell, 6 Dana 148.
Michigan.—Eberstein *v.* Camp, 37 Mich. 176.
United States.— Fenwick *v.* Chapman, 9 Pet. 461, 9 L. ed. 193 [*affirming* 5 Fed. Cas. No. 2,604, 4 Cranch C. C. 431].
England.—Foley *v.* Burnell, 4 Bro. P. C. 34, 2 Eng. Reprint 23.
See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1159, 1163.

53. Ross *v.* Davis, 17 Ark. 113; Nancy *v.* Snell, 6 Dana. (Ky.) 148. But see Pullen *v.* Hutchins, 67 N. C. 428 (holding that the assent of an executor to a legacy before the debts of his testator are paid is void as to creditors, and if the executor commits a devastavit and is insolvent, the loss must fall upon the legatee rather than the creditor); Rea *v.* Rhodes, 40 N. C. 148 (also holding that the creditor can only follow the property in a court of equity).

An executor may retract his assent, if given upon a reasonable ground for considering the assets sufficient for all demands, where they prove deficient in consequence of unknown debts unexpectedly claimed (Nelson *v.* Cornwell, 11 Gratt. (Va.) 724), if the assent has not been completed by possession (Wheeler *v.* Lester, 1 Bradf. Surr. (N. Y.) 293; Chamberlain *v.* Chamberlain, 1 Ch. Cas. 256, 22 Eng. Reprint 788).

Where an executor is also legatee, he cannot, by his assent, transfer the title to the legacy to himself as an individual to the detriment of the rights of creditors. Matter of Pye, 18 N. Y. App. Div. 306, 46 N. Y. Suppl. 350.

54. *Alabama.*— Harkins *v.* Hughes, 60 Ala. 316.
Arkansas.— Ross *v.* Davis, 17 Ark. 113.
Georgia.— People's Nat. Bank *v.* Cleveland, 117 Ga. 908, 44 S. E. 20; Jourdan *v.* Miller, 41 Ga. 51.
South Carolina.—Nunn *v.* Owens, 2 Strobh. 101; Alexander *v.* Williams, 2 Hill 522; Fronty *v.* Godard, Bailey Eq. 517.
England.— Foley *v.* Burnell, 4 Bro. P. C. 34, 2 Eng. Reprint 23; Byrchall *v.* Bradford, 6 Madd. 235, 23 Rev. Rep. 204.
See 22 Cent. Dig. tit. "Executors and Administrators," § 1159.

55. *Arkansas.*— Ross *v.* Davis, 17 Ark. 113.
Georgia.—People's Nat. Bank *v.* Cleveland, 117 Ga. 908, 44 S. E. 20, holding that an action for the recovery of the legacy may be maintained by the legatee after the executor's assent. And see Harris *v.* Cole, 114 Ga. 295, 40 S. E. 271, in which it may be inferred from the holding of the court that an assent to a devise in remainder may prevent a due administration of the estate for the payment of debts, or force creditors to collect their claims by seeking an abatement of such devise.
Kentucky.— Anderson *v.* Irvine, 6 B. Mon. 231; Nancy *v.* Snell, 6 Dana 148; Pirtle *v.* Cowan, 4 Dana 302.
New York.— Onondaga Trust, etc., Co. *v.* Price, 87 N. Y. 542; Hudson *v.* Reeve, 1 Barb. 89, executor as legatee.
North Carolina.— Gums *v.* Capehart, 58 N. C. 242; Rea *v.* Rhodes, 40 N. C. 148; Alston *v.* Foster, 16 N. C. 337; Burnett *v.* Roberts, 15 N. C. 81.
Pennsylvania.—Hanbest's Estate, 12 Phila. 72, executor as legatee.
South Carolina.—Nunn *v.* Owens, 2 Strobh. 101; Alexander *v.* Williams, 2 Hill 522; McMullin *v.* Brown, 2 Hill Eq. 457.
Tennessee.— Martin *v.* Peck, 2 Yerg. 298.
See 22 Cent. Dig. tit. "Executors and Administrators," § 1159.

An assent to a specific pecuniary legacy is a contract to pay it, enforceable by a proper proceeding. Hendrick *v.* Mayfield, 74 N. C. 626; Dunham *v.* Elford, 13 Rich. Eq. (S. C.) 190, 94 Am. Dec. 162.

Replevin lies against an executor who arbitrarily revokes his assent to a legatee's possession of specific legacies and resumes control thereof. Eberstein *v.* Camp, 37 Mich. 176.

An assent to a specific legacy is unexceptionable where the executor retains enough from the estate to pay the testator's debts. Nunn *v.* Owens, 2 Strobh. (S. C.) 101.

An assent to the bequest of an equitable interest does not vest the legal title in the legatee. Merritt *v.* Windley, 14 N. C. 399.

Title against creditors.— The possession of a legacy by a legatee for four years after assent of the executor will confer title against the creditors of the testator. Alexander *v.* Williams, 2 Hill (S. C.) 522.

56. *Alabama.*— Whorton *v.* Moragne, 62 Ala. 201, executor as legatee.
North Carolina.— Alston *v.* Foster, 16 N. C. 337.
South Carolina.—Nunn *v.* Owens, 2 Strobh. 101; Alexander *v.* Williams, 2 Hill 522; McMullin *v.* Brown, 2 Hill Eq. 457; Fronty *v.* Godard, Bailey Eq. 517.
Tennessee.— Lyon *v.* Vick, 6 Yerg. 42.
Virginia.— Randolph *v.* Randolph, 6 Rand. 194; Sampson *v.* Bryce, 5 Munf. 175; Burnley *v.* Lambert, 1 Wash. 308.

A bona fide assent, without collusion with the legatee to defraud creditors, vests the legacy in the legatee beyond the control of the executor or any creditor who has to reach the property through an execution against the executor; and after assent a sale under such an execution is void. Alexander *v.* Williams, 2 Hill (S. C.) 522.

57. Brock *v.* Sims, 1 Speers (S. C.) 49; Moore *v.* Barry, 1 Bailey (S. C.) 504, although the legatee be an infant.

D. Executor or Administrator as Legatee or Distributee — 1. Title, Rights, and Liabilities in General. When an executor is also legatee or distributee no formal act is necessary to vest title to the legacy or distributive share in him as an individual;[58] any act on his part showing an intention to retain assets in payment being sufficient.[59] But he cannot, without an order of court,[60] or a settlement or agreement with his co-legatee or co-distributee,[61] retain his legacy or share from the assets of the estate to the exclusion or in preference of other legatees, distributees, or creditors,[62] as by applying it to debts due by him to the estate.[63] Nor can he transfer to himself, as legatee or distributee, property belonging to the estate before he has settled his administration account and paid the debts and prior legacies due from the estate.[64]

2. Residuary or Sole Legatee Acting as Executor. An executor who is also residuary legatee acquires full title to the residuary assets only when all debts, charges, and legacies are paid[65] and he is judicially determined to be the sole or residuary legatee.[66] It has been held that this is true notwithstanding he has given the bond permitted by statute in such cases for the payment of debts and

58. *In re* Mullon, 145 N. Y. 98, 39 N. E. 821 [*affirming* 74 Hun 358, 26 N. Y. Suppl. 683]; Blood *v.* Kane, 130 N. Y. 514, 29 N. E. 294, 15 L. R. A. 490; Stuart *v.* Carson, 1 Desauss. (S. C.) 500.

Possession by a co-executor of personal chattels bequeathed to the widow, who is also one of the executors, immediately vests in her as legatee, that of the executors, as such, being divested. Golder *v.* Littlejohn, 30 Wis. 344.

Allowance of bequest by court.—The allowance of a credit by the probate court in the account of the executors, of whom the widow is one, of a certain amount for "personal property bequeathed to the widow," does not operate to vest that amount absolutely in the widow, so that it cannot be reclaimed by the surviving executor after her death, where it does not appear that the construction of the will was in question. Vreeland *v.* Westervelt, 45 N. J. Eq. 572, 17 Atl. 695.

59. Boone *v.* Dyke, 3 T. B. Mon. (Ky.) 529; *In re* Richardson, [1896] 1 Ch. 512, 65 L. J. Ch. 512, 74 L. T. Rep. N. S. 12, 44 Wkly. Rep. 279.

A deposit in his individual name by an executor, who is also legatee, of rents which he had collected is legitimate proof of an intention to retain them in part payment of his legacy. Hanbest's Estate, 12 Phila. (Pa.) 72.

60. Cutliff *v.* Boyd, 72 Ga. 302.

61. Cutliff *v.* Boyd, 72 Ga. 302.

An assignment of assets by co-executors to an executor who is also residuary legatee gives him a good title thereto under the will and assignment together. Hitchcock *v.* Merritt, 15 Wis. 522.

62. *Georgia.*— McMillan *v.* Toombs, 79 Ga. 143, 4 S. E. 16.

Kentucky.— Beauchamp *v.* Handley, 1 B. Mon. 135, holding that where an executor, who is also co-devisee with another of land held by title bond, recovers judgment on such bond, he holds the judgment as trustee for his co-devisee, and if he afterward acquires the land, with the proceeds of the judgment, the co-devisee or his assignee will be entitled to the same interest in the land as the executor.

Louisiana.— Cordeviolle's Succession, 24 La. Ann. 319, holding that an executrix who is also an heir cannot as heir retain the purchase-money of certain property in her possession until distribution.

New York.— Matter of Van Houten, 18 N. Y. App. Div. 301, 46 N. Y. Suppl. 190.

North Carolina.— Little *v.* Hager, 67 N. C. 135.

Pennsylvania.— Com. *v.* Cochran, 146 Pa. St. 223, 23 Atl. 203.

South Carolina.— Gardsden *v.* Lord, 1 Desauss. 208; Atcheson *v.* Robertson, 4 Rich. Eq. 39. And see Turnipseed *v.* Sirrine, 60 S. C. 272, 38 S. E. 423.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1164.

63. Breitling *v.* Clarke, 49 Ala. 450; Cutliff *v.* Boyd, 72 Ga. 302, notes given by him to the deceased.

64. Matter of Van Houten, 18 N. Y. App. Div. 301, 46 N. Y. Suppl. 190; Lewis *v.* Ewing, 18 Pa. St. 313, although he is sole residuary legatee or distributee.

An executor may retain as his own any specific chattel of his own held by his testator which came into his hands as executor, and which he might have recovered in an action at law, were he not executor. Saunders *v.* Saunders, 2 Litt. (Ky.) 314.

65. *In re* Mullon, 145 N. Y. 98, 39 N. E. 821 [*affirming* 74 Hun 358, 26 N. Y. Suppl. 683]; Blood *v.* Kane, 130 N. Y. 514, 29 N. E. 994, 15 L. R. A. 490; Drake *v.* Paige, 127 N. Y. 562, 28 N. E. 407 [*affirming* 52 Hun 292, 5 N. Y. Suppl. 466]; Harding *v.* Harding, 16 L. J. Ch. 179.

A devastavit committed by one of several residuary legatees who is also an executor prevents him from taking any of the residue until such loss is made good. Buerhaus *v.* De Saussure, 41 S. C. 457, 19 S. E. 926, 20 S. E. 64.

66. Jones *v.* Roberts, 84 Wis. 465, 54 N. W. 917.

legacies,[67] but in some jurisdictions he is held to acquire title as an individual to the personal estate on his filing such bond.[68]

E. Time For Distribution[69] — **1. In General.** Although the distribution of a decedent's estate should be made at the earliest possible moment consistent with the rights of creditors and the safety of the representative,[70] as a general rule it cannot be made or ordered[71] until after administration has been granted,[72] and the payment of all debts and final settlement of the representative's account,[73] or until after the expiration of the statutory period for the filing of claims and settling the estate.[74] A distributee or surviving spouse may waive objections

67. Collins *v.* Collins, 140 Mass. 502, 5 N. E. 632; Jenkins *v.* Wood, 140 Mass. 66, 2 N. E. 780; Jones *v.* Richardson, 5 Metc. (Mass.) 247; Gore *v.* Brazier, 3 Mass. 523, 3 Am. Dec. 182; Evans *v.* Foster, 80 Wis. 509, 50 N. W. 410, 14 L. R. A. 117. But see Cole's Will, 52 Wis. 591, 9 N. W. 664, holding that, where an executrix and sole legatee named in the will gives such bond, title to the whole estate passes to her and the administration is ended; but she is liable upon said bond for the costs awarded out of the estate to contestants.

The acceptance of a devise by a residuary legatee and executrix, subject to the lien of a legacy to another person, renders her personally liable to pay such legacy, although the will exempts her from giving bond. Evans *v.* Foster, 80 Wis. 509, 50 N. W. 410, 14 L. R. A. 117.

68. Richardson *v.* Bailey, 69 N. H. 384, 41 Atl. 263, 76 Am. St. Rep. 176; Mercer *v.* Pike, 58 N. H. 286; Batchelder *v.* Russell, 10 N. H. 39.

Where no bond was given for the payment of debts and legacies the estate of the deceased executor, who was also residuary legatee, is not liable for an unpaid legacy. Seavey *v.* Roberts, 63 N. H. 621, 3 Atl. 634.

69. Time for payment of legacies see, generally, WILLS.

70. Sinnott *v.* Kenaday, 12 App. Cas. (D. C.) 115; Sterrett *v.* National Safe Deposit, etc., Co., 10 App. Cas. (D. C.) 131; Hasley's Succession, 27 La. Ann. 586; Alexander *v.* Stewart, 8 Gill & J. (Md.) 226.

71. Exceptional cases.— McDearman *v.* Martin, 38 Ark. 261; Reynolds *v.* People, 55 Ill. 328.

72. Cargile *v.* Harrison, 9 B. Mon. (Ky.) 518. But see Ross *v.* Ross, 4 Ch. Chamb. (U. C.) 27, where, the amount of the legacy being small, an order for its payment without letters of administration was made.

Where the probate of a will is set aside, the probate court cannot at the same time order distribution; but new and suitable letters should first be taken out. Garner *v.* Lansford, 12 Sm. & M. (Miss.) 558.

73. *Alabama.*— Horton *v.* Averett, 20 Ala. 719; Thrash *v.* Sumwalt, 5 Ala. 13.

California.— *In re* Coursen, (1901) 65 Pac. 965; *In re* Sheid, 122 Cal. 528, 55 Pac. 328, 129 Cal. 172, 61 Pac. 920; Smith *v.* Westerfield, 88 Cal. 374, 26 Pac. 206; *In re* Pritchett, 51 Cal. 568, 52 Cal. 94.

Iowa.— Linton *v.* Crosby, 61 Iowa 401, 16 N. W. 342.

Massachusetts.— Browne *v.* Doolittle, 151 Mass. 595, 25 N. E. 23.

Mississippi.— Thornton *v.* Glover, 25 Miss. 132.

Missouri.— Clarke *v.* Sinks, 144 Mo. 448, 46 S. W. 199.

New Jersey.— Wade *v.* Potter, 14 N. J. L. 278, holding that the widow of an intestate cannot come into court for her distributive share before the settlement of her husband's estate.

New York.— Robinson *v.* Adams, 30 Misc. 537, 63 N. Y. Suppl. 816.

Pennsylvania.— Mazurie's Estate, 33 Leg. Int. 256.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1185; and *supra*, XI, B.

An executor's account must be filed, audited, and confirmed before the distribution of any part of the estate can be ordered. Hanbest's Estate, 12 Phila. (Pa.) 31; *In re* Reinheimer, 11 Phila. (Pa.) 160.

Pending the judicial settlement of an account, payment of legacies or other claims will not be ordered without some very good reason. *In re* Harris, 1 N. Y. Civ. Proc. 162; *In re* Harding, 24 Pa. St. 189, holding that exceptions to probate accounts should be disposed of before the fund is referred to an auditor for distribution.

Refusal to file account.— Where an estate has been settled, excepting a claim by the executors, which cannot be adjusted until they file their final account, which they refuse to do in obedience to an order of the probate court, and the persons entitled to the estate have adjusted matters between themselves, they are entitled to an order assigning the property to them and discharging the executors. *In re* Lambie, 112 Mich. 118, 70 N. W. 442.

74. *Alabama.*— Jackson *v.* Rowell, 87 Ala. 685, 6 So. 95, 4 L. R. A. 637; Ward *v.* Oates, 42 Ala. 225; Harrison *v.* Harrison, 9 Ala. 470, eighteen months.

Arkansas.— McDearman *v.* Martin, 38 Ark. 261, two years.

California.— *In re* Sheid, 122 Cal. 528, 55 Pac. 328, 129 Cal. 172, 61 Pac. 920; Smith *v.* Westerfield. 88 Cal. 374, 26 Pac. 206; Letellier's Estate, 74 Cal. 311, 15 Pac. 847.

District of Columbia.— Sinnott *v.* Kenady, 12 App. Cas. 115.

Georgia.— Williams *v.* Lancaster, 113 Ga. 1020, 39 S. E. 471; Selman *v.* Milliken, 28 Ga. 366, holding that an executor is not subject to garnishment for the distributive

to a distribution on the ground that it was premature,[75] or may be estopped to object.[76]

2. Partial Distribution.[77] The personal representative may, however, be allowed or ordered to make a partial distribution before final settlement of his accounts or the expiration of the statutory period, where it can be made without prejudice to the rights of creditors and other persons interested;[78] and in some jurisdictions this is expressly provided for by statute.[79] But where proceedings

share of an heir until the expiration of twelve months after his appointment.

Illinois.— Haskins *v.* Martin, 103 Ill. App. 115, holding that it is the representative's duty to apply for an order of distribution, after the time for presenting claims has expired and he has filed a report showing a cash balance in his hands belonging to the heirs.

Indiana.— Fleece *v.* Jones, 71 Ind. 340, one year.

Kentucky.— Com. *v.* Hammond, 10 B. Mon. 62, nine months.

Louisiana.— Toy's Succession, 14 La. Ann. 536.

Maryland.— Yakel *v.* Yakel, 96 Md. 240.

Mississippi.— Packwood *v.* Elliott, 43 Miss. 504 (twelve months); Young *v.* Ross, 31 Miss. 556; Fort *v.* Battle, 13 Sm. & M. 133.

Missouri.— Clarke *v.* Sinks, 144 Mo. 448, 46 S. W. 199.

Montana.— *In re* McFarland, 10 Mont. 586, 27 Pac. 389.

Pennsylvania.— Edgar *v.* Shields, 1 Grant 361.

Rhode Island.— Steere *v.* Wood, 15 R. I. 199, 2 Atl. 551, three years.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1185 *et seq.*

In New York, under Code Civ. Proc. § 2728, as amended by Laws (1895), c. 426, and § 2743, as amended by Laws (1898), c. 565, in case of administration in intestacy, payment and distribution may be decreed before the expiration of one year, where the administrator has voluntarily petitioned for judicial settlement of his accounts; but in case of an executor under the will, his accounts cannot be judicially settled and a distribution decreed before the expiration of one year from the issuance of letters testamentary, although all the beneficiaries under the will and the next of kin and heirs of the decedent consent thereto. *In re* Lansing, 37 Misc. 177, 74 N. Y. Suppl. 945; Matter of Lawson, 36 Misc. 96, 72 N. Y. Suppl. 645; Matter of Bronner, 30 Misc. 31, 62 N. Y. Suppl. 1003.

The dismissal of a petition for distribution filed prior to the expiration of the time allowed for filing claims should be without prejudice to the right to renew it at the proper time. Sinnott *v.* Kenaday, 12 App. Cas. (D. C.) 115.

Where an executor refuses to pay a legacy upon demand after the expiration of the statutory period, an action to recover the same may be maintained at once without waiting for the judicial settlement of his account. Bernardston Cong. Unitarian Soc. *v.* Hale, 29 N. Y. App. Div. 396, 51 N. Y. Suppl. 704. And see *infra*, XI, M.

75. McReynolds *v.* Jones, 30 Ala. 101, holding that where a widow after dissenting from her husband's will makes application for a division of slaves belonging to the estate she cannot afterward have the division set aside because it was made before the lapse of eighteen months from the grant of administration.

76. McReynolds *v.* Jones, 30 Ala. 101; *In re* Levinson, 98 Cal. 654, 33 Pac. 726.

77. **Requirement of refunding bond or other indemnity** on partial distribution see *infra*, XI, G.

78. *Alabama.*— Sankey *v.* Elsberry, 10 Ala. 455.

California.— *In re* Levinson, 98 Cal. 654, 33 Pac. 726; Roberts' Estate, (1885) 7 Pac. 758.

Illinois.— Curts *v.* Brooks, 71 Ill. 125; Reynolds *v.* People, 55 Ill. 328.

Kentucky.— Fletcher *v.* Sanders, 7 Dana 345, 32 Am. Dec. 96.

Montana.— *In re* Phillips, 18 Mont. 311, 45 Pac. 222.

Ohio.— Disney *v.* Hawes, 9 Ohio Dec. (Reprint) 406, 12 Cinc. L. Bul. 322; *In re* Isherwood, 5 Ohio S. & C. Pl. Dec. 143, 7 Ohio N. P. 332.

Pennsylvania.— Gable's Appeal, 40 Pa. St. 231; Flintham *v.* Forsythe, 9 Serg. & R. 133; Neal's Estate, 14 Wkly. Notes Cas. 258. But see Seitzinger's Estate, 2 Woodw. 348.

England.— *In re* Richardson, [1896] 1 Ch. 512, 65 L. J. Ch. 512, 74 L. T. Rep. N. S. 12, 44 Wkly. Rep. 279.

Partial distribution in favor of a dowress out of the personal estate of her deceased husband should not be ordered until the accounts of the executor are made up and the commissioners proceed to make division. Chaires *v.* Shepard, 7 Fla. 77.

The pendency of a suit by an executrix in her personal capacity against herself in her representative capacity for money paid for funeral expenses is not a proper ground of objection to an order for partial distribution where it has already been decided that such action cannot be maintained. *In re* Phillips, 18 Mont. 311, 45 Pac. 222.

79. *California.*— *In re* Hale, 121 Cal. 125, 53 Pac. 429; *In re* Painter, 115 Cal. 635, 47 Pac. 700; *In re* Crocker, 105 Cal. 368, 38 Pac. 954.

District of Columbia.—Sterrett *v.* National Safe Deposit, etc., Co., 10 App. Cas. 131; Cropper *v.* McLane, 6 App. Cas. 119, holding that partial distribution may be ordered dur-

are pending which suspend the functions of the representative, or where his right to distribute does not exist, partial distribution should not be decreed or enforced.[80]

3. Before Probate of Will. Although an executor cannot be compelled to pay legacies before probate of the will or his qualification as executor,[81] his subsequent qualification relates back by construction to the death of his testator and validates a payment so made.[82]

4. Before Decree of Distribution. Ordinarily a representative cannot be compelled to pay a distributive share before an order or decree of distribution;[83] but where all debts that have been allowed have been paid and the time for presenting others has expired, it is his duty to turn over the residue to heirs

ing the pendency of a non-suspensive appeal from an order admitting the will to probate.

Indiana.— Chapell *v.* Shuee, 117 Ind. 481, 20 N. E. 417; Lilly *v.* Stahl, 5 Ind. 447.

Mississippi.— Anderson *v.* Gregg, 44 Miss. 170.

New York.— Gilman *v.* Gilman, 63 N. Y. 41 [*affirming* 4 Hun 69, 6 Thomps. & C. 211]; Matter of Ockerhausen, 57 Hun 590, 10 N. Y. Suppl. 928; Barnes *v.* Barnes, 13 Hun 233; Keteltas *v.* Green, 9 Hun 599. And see Hoyt *v.* Jackson, 1 Dem. Surr. 553; Seymour *v.* Butler, 3 Bradf. Surr. 193, holding that where a testator bequeathed a legacy to his wife in lieu of dower, and there was delay in probating the will, the surrogate was authorized to order payment of such portion of the legacy as was necessary for the widow's maintenance, provided the assets were more than sufficient to pay the debts, and a satisfactory indemnity bond was given. Residuary legatees are not within the application of the New York statute on this point. Lockwood *v.* Lockwood, 3 Redf. Surr. (N. Y.) 330.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1186.

The surplus of "one third" required by N. Y. Code, § 2719, to allow the surrogate to decree payment to a legatee or distributee within a year, etc., is to be estimated by excluding the amount of the petitioner's claim and payments already made. Tuttle *v.* Heidermann, 5 Redf. Surr. 199.

Pending an appeal as to part of an estate, the other part may, on order of the court, be distributed by the administrator. Sterrett *v.* National Safe Deposit, etc., Co., 10 App. Cas. (D. C.) 131.

"Necessary" in a statute providing for an advancement by executors of part of legacies, when adjudged by the court to be "necessary for support," is used in a relative sense, having reference to the station in society of the beneficiary, her former mode of life, and the estate to which she has been accustomed and will ultimately be entitled. Lockwood *v.* Lockwood, 3 Redf. Surr. (N. Y.) 330.

That "the estate is but little indebted," within the meaning of a statute, is used relatively and as referring to a condition of things in which the debts are small as compared with the value of the estate, and not absolutely, so as to require the estate to be but little indebted regardless of its value. *In re* Crocker, 105 Cal. 368, 38 Pac. 954.

80. *In re* Welch, 106 Cal. 427, 39 Pac. 805, holding that a partial distribution cannot be decreed, while the estate is in the hands of a special administrator appointed pending proceedings to remove the general administrator.

Where the audit of a representative's account is continued pending a new trial involving a contest of the will, a petition by certain legatees for partial distribution should be dismissed. Neal's Estate, 14 Wkly. Notes Cas. (Pa.) 258.

A decree of partial distribution of real property is improper, where the court has ordered such property to be sold to pay debts and the expenses of administration; and the fact that such order is suspended by an appeal does not justify a distribution which would defeat the order of sale if it should be affirmed. *In re* Freud, 134 Cal. 333, 66 Pac. 476.

Under N. Y. Code Civ. Proc. § 2650, providing that, after service on an executor or administrator with the will annexed of a citation to show cause why probate of the will should not be revoked, he must suspend acts that he has been expressly allowed to perform by order of the surrogate, the surrogate cannot order, after service of such citation, a portion of the estate to be divided among the legatees. *In re* McGowan, 28 Hun 246.

81. State *v.* Judge New Orleans Probate Ct., 4 Rob. (La.) 42; Ward *v.* Bowen, 2 Sneed (Tenn.) 58, holding that no suit by attachment or otherwise can be brought against an executor before the probate of the will or his qualification as executor to reach a legacy bequeathed by the will.

82. Pinkham *v.* Grant, 78 Me. 158, 3 Atl. 179.

83. *Illinois.*— Neubrecht *v.* Santmeyer, 50 Ill. 74.

Maine.— Hawes *v.* Williams, 92 Me. 483, 43 Atl. 101.

Massachusetts.— Cathaway *v.* Bowles, 136 Mass. 54.

Mississippi.— Thornton *v.* Glover, 25 Miss. 132.

New Jersey.— Ordinary *v.* Smith, 15 N. J. L. 92; Sayre *v.* Sayre, 16 N. J. Eq. 505.

England —Canterbury *v.* Tappen, 8 B. & C. 151, 15 E. C. L. 82; Canterbury *v.* Robertson, 1 Cromp. & M. 690.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1190.

and distributees,[84] and he may do so without waiting for an order of the probate court.[85]

5. Suspending or Withholding Distribution. Distribution may be suspended or withheld pending the determination of disputes affecting the distribution,[86] as the determination of the right to and amount of uncollected assets,[87] or where distribution cannot be immediately had without prejudice to the estate,[88] or pending the determination of a suit in which garnishment or other suitable process has been issued against the representative for a claim against the distributee,[89] even though a decree for payment has been rendered[90] or the money has been paid into court.[91]

6. Presumptions. After the lapse of a considerable period from the time within which a representative is required to settle his accounts, it will be presumed that they have been settled and the balance distributed,[92] and the repre-

84. Brown *v.* Forsche, 43 Mich. 492, 5 N. W. 1011.

85. *Connecticut.*— State *v.* Whitehouse, 75 Conn. 410, 53 Atl. 897.

Massachusetts.— Palmer *v.* Whitney, 166 Mass. 306, 44 N. E. 229.

Michigan.— Brown *v.* Forsche, 43 Mich. 492, 5 N. W. 1011.

Minnesota.— Krause *v.* Krause, 81 Minn. 484, 84 N. W. 332.

Missouri.— Clarke *v.* Sinks, 144 Mo. 448, 46 S. W. 199; State *v.* Morton, 18 Mo. 53; State *v.* Rankin, 4 Mo. 426.

Vermont.— *In re* Scott, 36 Vt. 297.

Washington.— Griffin *v.* Warburton, 23 Wash. 231, 62 Pac. 765.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1190.

86. *In re* Kittson, 45 Minn. 197, 48 N. W. 419; Gibbons *v.* Shepard, 2 Dem. Surr. (N. Y.) 247 (dispute as to person entitled); *In re* Fulton, 200 Pa. St. 545, 50 Atl. 187 (holding that where one comes into an orphans' court with a claim against a decedent's estate which he should have prosecuted in a court of general equity jurisdiction, settlement and distribution of the estate should be suspended for only such time as is sufficient to permit him to file a bill and prosecute it with diligence to final hearing); Wistar's Estate, 13 Phila. (Pa.) 242; Hulse's Estate, 12 Phila. (Pa.) 130. *Compare* Gallagher's Estate, 5 Pa. Co. Ct. 214.

Indebtedness to estate.— In Delaware it has been held that a legacy presently payable cannot be set off in equity against a debt of the legatee to the estate, not yet due. Hayes *v.* Hayes, (Del. Ch. 1901) 73 Am. Dec. 709. But in Pennsylvania the court seems to have taken a different view. See Sproul's Appeal, 105 Pa. St. 442, holding that where a testator was a surety on an administration bond given by a legatee, the fact that the said legatee was in default as administrator was a reason for withholding payment of the legacy until the contingent liability of the testator's estate for the legatee's default was discharged although it was no reason for a refusal to allow interest to accrue upon such legacy.

Distribution will not be stayed because one of the next of kin testified on the trial of the caveat that he was informed and believed that the intestate left a valid will, although the same cannot be found. Sterrett *v.* National Safe Deposit, etc., Co., 10 App. Cas. (D. C.) 131.

Pending the contest of a will the surrogate has no jurisdiction to order the payment of a portion of a legacy or distributive share. Riegelman *v.* Riegelman, 4 Redf. Surr. (N. Y.) 492.

87. *In re* Ricaud, 57 Cal. 421; *In re* Ockershausen, 15 N. Y. Suppl. 510.

When the assets consist of choses in action uncollected, a final settlement and distribution cannot be made unless the distributees will consent to receive the notes or other evidences of debt, or unless the administrator has by negligence made himself liable for them. Anderson *v.* Gregg, 44 Miss. 170.

Where collection is improbable, and there is a large amount of money on hand after paying all of decedent's debts, a final settlement and distribution should be made; and where there are infant distributees the unpaid claims should pass to their guardian, who can assert their rights thereto. Bellinger *v.* Ingalls, 21 Oreg. 191, 27 Pac. 1038.

88. Christian's Estate, 13 Pa. Co. Ct. 283, holding that where an executor has in his hands securities of fluctuating value and they cannot be sold without prejudice to the estate distribution will not be immediately ordered.

89. Miller *v.* Simpson, (Ky. 1886) 2 S. W. 171; *In re* Davis, 27 Mont. 490, 71 Pac. 757; Sherwood *v.* Judd, 3 Bradf. Surr. (N. Y.) 419; Cotton's Estate, 6 Pa. Dist. 268; Boy's Estate, 1 Pa. Co. Ct. 66; Millard's Estate, 26 Pittsb. Leg. J. (Pa.) 189.

False process or false notice of process will not avail against the executor or administrator who notwithstanding makes payment to the distributee as he was ordinarily bound to make it. Bolton *v.* Stretch, 30 N. J. Eq. 536.

90. Sherwood *v.* Judd, 3 Bradf. Surr. (N. Y.) 419.

91. Millard's Estate, 26 Pittsb. Leg. J. (Pa.) 189.

92. *Alabama.*— Worley *v.* High, 40 Ala. 171; Austin *v.* Jordan, 35 Ala. 642; Blackwell *v.* Blackwell, 33 Ala. 57, 70 Am. Dec.

sentative cannot thereafter be compelled to make a distribution, unless he has made some admission or done some act to remove the bar created by the presumption,[93] or the presumption is overcome by other evidence.[94]

7. Effect of Representative's Death Before Distribution. Where an executor or administrator dies after settling his accounts, showing funds in his hands belonging to legatees or distributees, the latter may commence proceedings to recover the amount to which they are entitled without waiting until the personal representative of such deceased executor or administrator has settled his account in the probate court,[95] although it is otherwise if he dies without settling such an account.[96]

8. Limitations. By analogy to the statute of limitations a petition in the probate court for the payment of a legacy or distributive share should be instituted within the time in which suits of the same character are required to be commenced in courts of common law or of equity.[97]

556; Barnett *v.* Tarrence, 23 Ala. 463; Gantt *v.* Phillips, 23 Ala. 275; Rhodes *v.* Turner, 21 Ala. 210.

New Jersey.— White River Village Cong. Church *v.* Benedict, 59 N. J. Eq. 136, 44 Atl. 878 [*affirmed* in 62 N. J. Eq. 812, 48 Atl. 1117].

New York.— *In re* Bedell, 1 N. Y. Suppl. 287.

North Carolina.— Cox *v.* Brower, 114 N. C. 422, 19 S. E. 365.

Pennsylvania.—Wilkinson's Estate, 1 Pars. Eq. Cas. 170; Ingraham *v.* Cox, 1 Pa. L. J. Rep. 464.

South Carolina.—Sager *v.* Warley, Rice Eq. 26.

Texas.— Marks *v.* Hill, 46 Tex. 345.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1198.

An administrator of a deceased distributee or legatee is subject to this presumption (Sager *v.* Warley, Rice Eq. (S. C.) 26), although there may have been an interval of several years between the death of the legatee or distributee and the appointment of his administrator (Cox *v.* Brower, 114 N. C. 422, 19 S. E. 365).

The usual period of prescription is twenty years (See cases cited *supra*, this note) and a lapse of seven years (Strohm's Appeal, 23 Pa. St. 351) or even of twelve or fifteen years (Bird *v.* Graham, 21 N. C. 168) has been held insufficient to raise the presumption.

Ignorance of a legacy by the legatee does not preclude the presumption of payment arising from the lapse of twenty years, as against a purchaser of land under the will, where the executor had ample personal assets to pay the legacy, and the purchaser did not know that the assets were not so applied. White River Village Cong. Church *v.* Benedict, 59 N. J. Eq. 136, 44 Atl. 878 [*affirmed* in 62 N. J. Eq. 812, 48 Atl. 1117].

93. McCartney *v.* Bone, 40 Ala. 533.

94. Blackwell *v.* Blackwell, 33 Ala. 57, 70 Am. Dec. 556; Hubley's Appeal, 19 Pa. St. 138.

The pendency of a suit against the representative within twenty years excludes such presumption. Winston *v.* Street, 2 Patt. & H. (Va.) 169.

Filing of an account for a final settlement within twenty years, upon which a decree has been rendered, does not rebut the presumption. McCartney *v.* Bone, 40 Ala. 533.

Where the distributee was an infant for twenty years after the date of the administration bond, and instituted proceedings against the administrator within seven years after coming of age, the presumption will not arise. Brown *v.* McCall, 3 Hill (S. C.) 335. But see McCartney *v.* Bone, 40 Ala. 533.

95. Richardson *v.* Richardson, 9 Pa. St. 428; Doebler *v.* Snavely, 5 Watts (Pa.) 225 (holding that, upon the settlement of a joint administration account by two executors and the subsequent death of one of them, an action may be maintained against the personal representative of the deceased executor to recover a legacy under the will of his testator, upon the allegation and proof that funds came into the hands of such deceased executor separately); Moore *v.* George, 10 Leigh (Va.) 228.

Distributees who are guilty of great delay and laches in asserting their claim against a solvent administrator in his lifetime must produce clear and undoubted proof of their claim when it is presented against his estate. Kernell *v.* Crutcher, (Tenn. Ch. App. 1901) 61 S. W. 1045.

96. Whiteside *v.* Whiteside, 20 Pa. St. 473.

Where an executrix who is also a legatee dies without making any report, her accounts must be adjusted by a court of equity before distribution can be ordered. Curtiss *v.* Curtiss, 65 Cal. 572, 4 Pac. 578.

97. Davis *v.* Townsend, 45 Minn. 523, 48 N. W. 405; Clock *v.* Chadeagne, 10 Hun (N. Y.) 97; Matter of Miller, 15 Misc. (N. Y.) 556, 37 N. Y. Suppl. 1129 (holding that a proceeding to obtain a distributive share will not be taken out of the statute by reason of the fact that within six years the administrator furnished to each of the next of kin an account showing an indebtedness to him in which he credited himself with disbursements incurred within the six years); McCartee *v.* Camel, 1 Barb. Ch. (N. Y.) 455; Duhme *v.* Mehner, 5 Ohio S. & C. Pl. Dec. 107, 3 Ohio N. P. 266 (six years); *In re* Rowe, 58 L. J.

F. Requirement of Receipt or Release — 1. Right to Require. The personal representative may require a receipt or release as a condition precedent to the payment of the amount due on a legacy or distributive share;[98] but he cannot require the legatee or distributee to pay the costs of such release.[99]

2. Requisites to Validity — a. In General. In order that such acquittances may be valid as against the legatee or distributee, the latter must have had full knowledge of all the circumstances with respect to his rights in the distribution.[1] In case of an allotment to a devisee or legatee, the receipt should be in substance and form as referred to in the will.[2]

b. By Married Woman. In the absence of statute a receipt or release given by a married woman should also be executed by her husband,[3] except where it is for a legacy bequeathed to her separate use.[4]

3. Construction, Operation, and Effect. Unless the legatee or distributee is estopped,[5] a receipt or release is open to explanation or impeachment,[6] as by

Ch. 703, 61 L. T. Rep. N. S. 581. See also Descent and Distribution, 14 Cyc. 149, 160; and, generally, Wills.

Running of the statute of limitations in such cases begins at the time of final settlement of the representative's account (Bernardston Cong. Unitarian Soc. *v.* Hale, 29 N. Y. App. Div. 396, 51 N. Y. Suppl. 704), or at the time of the order of court directing distribution (Smith *v.* Moore, 102 Va. 260, 46 S. E. 326. See also Matter of Gall, 42 N. Y. App. Div. 255, 59 N. Y. Suppl. 254). But as against a proceeding by subsequently discovered heirs to obtain an order for the payment to them of moneys paid into the state treasury by the administrator under an order of the probate court because there were no known heirs, limitation begins to run only from the date of publication by the administrator of the special notice required by statute to be given the unknown heirs. *In re* Bomino, 83 Mo. 433.

Burden of proving new promise.— Where a distributee sues the personal representative of the administrator to recover his distributive share and defendant pleads the statute of limitation, the burden of proof is on plaintiff to prove a new promise by the administrator within the limit of the statute. Edwards *v.* Harness, 87 Ill. App. 471.

98. Sterrett *v.* National Safe Deposit, etc., Co., 10 App. Cas. (D. C.) 131; Smyley's Estate, 18 N. Y. Suppl. 266 (holding that the payment to attorneys of the distributees with instructions to procure releases before paying over does not justify the distributees in proceeding against such attorneys, in disregard of the condition precedent of payment); Johnson *v.* Johnson, 108 N. C. 619, 13 S. E. 183; *In re* Fortune, Ir. R. 4 Eq. 351.

A legatee for life may be required, as a condition precedent to the executor's assenting to or delivering the legacy to him, to sign an inventory of the chattels admitting their reception, and that he is entitled to have them only for life, after which they belong to the remainder-man. Howell *v.* Howell, 38 N. C. 522.

A receipt for a monthly allowance, as in lieu of dower, cannot be required of a widow by the executor as a condition precedent to the paying of such allowance, where the order therefor contains no provision that it shall be so received, although she agreed for a valuable consideration prior to the obtaining of the order that it should be in lieu of dower. *In re* Dekum, 28 Oreg. 97, 41 Pac. 159.

99. *In re* Fortune, Ir. R. 4 Eq. 351.

1. Welch *v.* Lewis, 104 Ky. 531, 47 S. W. 454, 20 Ky. L. Rep. 716 (holding that a release given by heirs without consideration will be set aside where it was given under a mistaken belief that the estate was insolvent and was induced by a misunderstanding of representations made to them by the widow); Arthur *v.* Nelson, 1 Dem. Surr. (N. Y.) 337; Michoud *v.* Girod, 4 How. (U. S.) 503, 11 L. ed. 1076 (holding acquittances not binding where information had been withheld by the executor).

2. Johnson *v.* Johnson, 108 N. C. 619, 13 S. E. 183.

3. Barrett's Estate, 31 Pittsb. Leg. J. (Pa.) 53, holding that where a *feme covert*, as authorized by the act of April 11, 1856, executes a full release to an executor without her husband joining with her, such release does not discharge the executor from his position as such. And see Lawson's Appeal, 23 Pa. St. 85.

4. Guild *v.* Peck, 11 Paige (N. Y.) 475, holding that the receipt of a *feme covert* for a legacy bequeathed to her separate use is a good discharge to the executor.

5. Tunnell *v.* Burton, 4 Del. Ch. 382; *In re* Koehnken, 25 Ohio Cir. Ct. 245; Risher's Estate, 40 Pittsb. Leg. J. (Pa.) 131, holding that one may be hindered in setting aside the effect of a release by his own laches, as in permitting without objection a *bona fide* distribution in accordance with the release. And see English's Estate, 16 Wkly. Notes Cas. (Pa.) 511.

6. *Illinois.*— Ross *v.* Smith, 47 Ill. App. 197, 198, holding that a receipt given by a widow for a certain sum, "Amount due me in full in the estate of . . . deceased, under the will annexed, and in lieu of widow's award," did not estop her to claim that she received the money, not as a bequest under the will, but in lieu of the articles enumerated by statute as the widow's award.

showing that it was obtained through fraud and misrepresentations,[7] or for an inadequate consideration;[8] and is binding only for the amount actually received[9] or mentioned therein.[10] But in the absence of such impeachment or explanation a receipt or release in full discharges the representative from further liability as representative to the legatee or distributee.[11] A receipt is evidence that an account was rendered by the executor or administrator and settled and its charges

Missouri.— Aull *v.* St. Louis Trust Co., 149 Mo. 1, 50 S. W. 289.

New York.— Colburn *v.* Lansing, 46 Barb. 37 (holding that it is competent for parties to a receipt to show for what purpose it was given, to what fund it referred, and to inquire into the consideration, so far at least it may be explained by parol); Arthur *v.* Nelson, 1 Dem. Surr. 337; Wilcox *v.* McCarthy, 3 Bradf. Surr. 284.

Pennsylvania.—Horton's Appeal, 38 Pa. St. 294.

Texas.— Hanlon *v.* Wheeler, (Civ. App. 1898) 45 S. W. 821.

United States.— Cowen *v.* Adams, 78 Fed. 536, 24 C. C. A. 198 [*affirmed* in 174 U. S. 800, 19 S. Ct. 873, 43 L. ed. 1188], holding that the receipt by a legatee from the administrators of collateral given by him for a debt due the testator does not estop him to dispute a receipt taken by such administrators for his share of the estate as having been paid by its application to such debts.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1201. And see, generally, RELEASE.

Pleading and proof.— On a bill to set aside a release the administrator cannot plead the release in bar of a discovery of the amount of the estate at the time of such release; but he should by proper negative averments in his plea deny the allegations of fraud, etc., and must support his plea by a full answer and discovery as to every equitable circumstance charged in the bill, in avoidance of such release. Bolton *v.* Gardner, 3 Paige (N. Y.) 273.

Under Ohio Rev. St. § 6190, a receipt delivered by a distributee to an administrator, and by him filed with his final account, although conclusive upon the parties in so far as the giving of the receipt is concerned, is not conclusive as to payment to such distributee. *In re* Koehnken, 25 Ohio Cir. Ct. 235.

7. Pennington *v.* L'Hommedieu, 7 N. J. Eq. 343; Berryhill's Appeal, 35 Pa. St. 245.

8. Pennington *v.* L'Hommedieu, 7 N. J. Eq. 343; Harris *v.* Dinkins, 4 Desauss. (S. C.) 60, holding that a release from all claims for one's "share in the estate," given for an inadequate consideration, applies to one's share in personal estate only, and not to the land besides, which he shared in inheritance.

9. *Arkansas.*— Ambleton *v.* Dyer, 53 Ark. 224, 13 S. W. 926.

Ohio.— *In re* Koehnken, 25 Ohio Cir. Ct. 245.

Pennsylvania.— *In re* Watson, 189 Pa. St. 150, 42 Atl. 5; Horton's Appeal, 38 Pa. St. 294, holding that a receipt given by a distributee for a sum "on compromise in full of all claims and demands against the estate" will not prevent the recovery of whatever balance may be actually due.

Tennessee.— McHaney *v.* McNeilly, 10 Heisk. 535.

Texas.— Hanlon *v.* Wheeler, (Civ. App. 1898) 45 S. W. 821.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1201.

A receipt as "in full" is not demandable by the executor if the receipt given covers the amount actually received. Godfrey *v.* Getchell, 46 Me. 537.

As evidence of payment.— A voucher showing a receipt of payment of a certain balance is *prima facie* evidence that no more was unpaid at that time, and throws upon the contestant the burden of showing the contrary. *In re* Sarment, 123 Cal. 331, 55 Pac. 1015; Dakin *v.* Demming, 6 Paige (N. Y.) 95.

The administrator will continue liable for any balance due until barred by the statute of limitations. *In re* Koehnken, 25 Ohio Cir. Ct. 245.

A release given by a guardian on the payment of a less sum than is due the minor, on a settlement of the estate, is inoperative except for the money actually paid to the guardian. Witman's Appeal, 28 Pa. St. 376. See Dakin *v.* Demming, 6 Paige (N. Y.) 95.

10. Lyman *v.* Clark, 9 Mass. 235.

11. *Alabama.*— Pearson *v.* Darrington, 32 Ala. 227.

Iowa.— Kinney *v.* Newbold, 115 Iowa 145, 88 N. W. 328.

New Hampshire.— Lovett *v.* Morey, 66 N. H. 273, 20 Atl. 283.

New Jersey.— Dodson *v.* Sevars, 52 N. J. Eq. 611, 30 Atl. 477.

New York.— Matter of Murphy, 80 N. Y. App. Div. 238, 80 N. Y. Suppl. 530.

Virginia.— Mason *v.* Jones, 26 Gratt. 271.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1201.

An interest held by an executor as testamentary trustee for the releasor is not released by a release to him as executor of every interest the releasor possesses in the estate. Dority *v.* Dority, 40 N. Y. App. Div. 236, 57 N. Y. Suppl. 1073.

A receipt "in full for the legacy" will be presumed to be intended by the legatee to discharge land devised subject to the payment of the legacy. Schanck *v.* Arrowsmith, 9 N. J. Eq. 314.

A release acquiesced in for more than fifteen years may be sustained as an accord and satisfaction where given by a residuary legatee for a valuable consideration when the estate was unsettled and its value uncertain. Matter of Hodgman, 11 N. Y. App. Div. 344, 42 N. Y. Suppl. 1004.

allowed,[12] and that the legatee or distributee had notice of the settlement and might have appealed.[13]

4. Representative as Legatee or Distributee. Where the representative is also a legatee or distributee, he should execute and file a receipt in all respects like those required from other legatees or distributees.[14]

G. Security and Refunding Bond — 1. Necessity of Refunding Bond or Other Indemnity — a. In General. A legatee or distributee is in some jurisdictions required by statute, as a condition precedent to his being paid his legacy or distributive share or a portion thereof, to give to the personal representative a refunding bond or other indemnity for the return of money paid to him, whenever necessary for the payment of debts or legacies,[15] or to equalize distributive

12. De Coux *v.* Plantevignes, 10 La. 503, holding this to be true in case of a receipt by heirs for a balance.

An auditor, to whom an executor's account has been referred to audit and resettle, is not bound by a release given to the executor by a residuary legatee, expressing satisfaction with the account. Bloom's Appeal, 15 Pa. St. 403.

13. Camper *v.* Hayeth, 10 Ind. 528.

14. Johnson *v.* Johnson, 108 N. C. 619, 13 S. E. 183.

15. *Connecticut.*—Gen. St. 374 (Rev. St. § 400), providing for such bond, has fallen into disuse since the legal authority given to the court of probate to limit the exhibition of demands. Davis *v.* Vansands, 45 Conn. 600, 7 Fed. Cas. No. 3,655; Griswold *v.* Bigelow, 6 Conn. 258.

Delaware.— State *v.* Rodney, 1 Houst. 442.

Indiana.— Chapell *v.* Shuee, 117 Ind. 481, 20 N. E. 417; Tapley *v.* McGee, 6 Ind. 56.

Kentucky.—Fleming *v.* Jones, 12 Bush 503. See under a former statute Mountjoy *v.* Pearce, 4 Metc. 97; Roberts *v.* Dale, 7 B. Mon. 199; Fletcher *v.* Sanders, 7 Dana 345, 32 Am. Dec. 96; Overstreet *v.* Potts, 4 Dana 138; Duncan *v.* Mizner, 4 J. J. Marsh. 443; Shirley *v.* Mitchell, 3 J. J. Marsh. 684; Neely *v.* Neely, 1 Litt. 292; Prewett *v.* Prewett, 4 Bibb 266.

Louisiana.— The only condition which an executor can impose on an heir before delivering possession of the estate to him is that the latter shall advance a sum sufficient to pay movable or particular legacies (Fisk's Succession, 3 La. Ann. 705; Carraby's Succession, 3 Rob. 349; Milne's Succession, 2 Rob. 382), the right of demanding security from such heirs before taking possession being in creditors of the estate only (Fisk's Succession, 3 La. Ann. 705). And see George's Succession, 4 La. Ann. 223, holding that the curator of a vacant succession cannot require security from the heirs and legatees for amounts due to creditors other than the state before delivering possession to the succession, where the heirs and legatees are not residents of Louisiana or citizens of any other state.

Mississippi.— Packwood *v.* Elliott, 43 Miss. 504; Maxwell *v.* Craft, 32 Miss. 307; Cannon *v.* Benson, 26 Miss. 395; Keith *v.* Jolly, 26 Miss. 131. And see Gammage *v.* Noble, 24 Miss. 150. A petitioner for distribution before final settlement is not required, under the statute of this state, to file a refunding bond with his petition. It is sufficient if the petition contains an offer to execute one, although the executor is not bound to make distribution until such bond be executed. Richmond *v.* Delay, 34 Miss. 83; Keith *v.* Jolly, 26 Miss. 131.

Montana.— *In re* Phillips, 18 Mont. 311, 45 Pac. 222.

New Hampshire.— Chandler *v.* Batchelder, 61 N. H. 370.

New Jersey.— Coddington *v.* Bispham, 36 N. J. Eq. 224; Vanderpool *v.* Vanderpool, 3 N. J. Eq. 120.

New York.—Barnes *v.* Barnes, 13 Hun 233; Haebler *v.* John Eichler Brewing Co., 25 Misc. 576, 55 N. Y. Suppl. 1071.

North Carolina.— Ingrams *v.* Terry, 9 N. C. 122.

Pennsylvania.— Robins' Estate, 180 Pa. St. 630, 37 Atl. 121; Schaeffer's Appeal, 119 Pa. St. 640, 13 Atl. 507; Simpson's Appeal, 109 Pa. St. 383; Jones' Appeal, 99 Pa. St. 124; Musser *v.* Oliver, 21 Pa. St. 362; Edgar *v.* Shields, 1 Grant 361; Dougherty *v.* Snyder, 15 Serg. & R. 84, 16 Am. Dec. 520; Rastaetter's Estate, 15 Pa. Super. Ct. 549; Sterling's Estate, 15 Pittsb. Leg. J. 505. A refunding bond which an executor is entitled to demand from the heirs can be demanded where the executor makes distribution, but not where distribution is made by an auditor and confirmed by the court. Barlet's Estate, 3 Kulp 241. There are but two methods by which distribution of decedent's estates will protect administrators: (1) Distribution by the court or by an auditor appointed for that purpose; and (2) distribution of the residue, after deducting known claims, under the direction of the court, and taking refunding bonds approved by the court from the distributees. Jones' Estate, 28 Pittsb. Leg. J. 375.

Tennessee.— Willeford *v.* Watson, 12 Heisk. 476; Morris *v.* Morris, 9 Heisk. 814; Molloy *v.* Elam, Meigs 590.

Texas.— Stephenson *v.* McFaddin, 42 Tex. 322.

Virginia.—Sheppard *v.* Starke, 3 Munf. 29.

West Virginia.—McGlaughlin *v.* McGlaughlin, 43 W. Va. 226, 27 S. E. 378.

England.— An executor of a lessee of a leasehold interest is entitled to be indemnified against the eventual breaches of the covenants, either by a retainer in court of a part of the assets, or by security of the legatees or distributees to refund. Brewer *v.* Pocock, 23 Beav. 310, 53 Eng. Reprint 122; Dean *v.*

shares,[16] notwithstanding in some jurisdictions there has been a decree of distribution,[17] and the court in ordering payment or distribution should direct the representative to require such bond or other indemnity,[18] unless there are circumstances within the knowledge of the court sufficient to justify it in dispensing

Allen, 20 Beav. 1, 52 Eng. Reprint 502; Dobson *v.* Carpenter, 12 Beav. 370, 50 Eng. Reprint 1103; Vernon *v.* Egmont, 1 Bligh N. S. 554, 4 Eng. Reprint 979; Fletcher *v.* Stevenson, 3 Hare 360, 8 Jur. 307, 13 L. J. Ch. 202, 25 Eng. Ch. 360; Cochrane *v.* Robinson, 5 Jur. 4, 10 L. J. Ch. 109, 11 Sim. 378, 34 Eng. Ch. 378; Hickling *v.* Boyer, 21 L. J. Ch. 388, 3 Macn. & G. 635, 42 Eng. Reprint 404. By the former rule, when legacies were paid, the legatee was required to give security to refund, in case any other debts should be discovered; but this practice has been discontinued, although the legatee's liability to refund remains. March *v.* Russell, 1 Jur. 588, 6 L. J. Ch. 303, 3 Myl. & C. 31, 14 Eng. Ch. 31, 40 Eng. Reprint 836. And see Noel *v.* Robinson, 2 Ch. Cas. 145, 22 Eng. Reprint 887, 2 Ch. Rep. 248, 21 Eng. Reprint 670, 2 Vent. 358, 1 Vern. 90, 23 Eng. Reprint 334.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1205.

Upon the presumption of death of some of the distributees by reason of their absence, it is proper to require security for the refunding of such amount as the absentees will be entitled to in case of their afterward appearing. Meaher's Estate, 10 Pa. Co. Ct. 221.

Indemnity against liability for an inheritance tax may be required by an executor from heirs whose distributive shares are subject to such tax. Fitzpatrick's Estate, 8 Pa. Dist. 726.

An administrator improperly appointed cannot claim a refunding bond before he will be compelled to pay over to the rightful parties assets of the intestate that may have come into his hands. McChord *v.* Fisher, 13 B. Mon. (Ky.) 193.

Actions.— A statute providing that no suit at law for a legacy or distributive share shall be instituted against a representative until security be given or tendered to refund in case of a deficiency of assets (Killen *v.* Adams, 1 Del. Ch. 184; Cowell *v.* Oxford, 6 N. J. L. 432) does not control a suit in equity (Killen *v.* Adams, 1 Del. Ch. 184; Wilson *v.* Fisher, 5 N. J. Eq. 493). And see Betts *v.* Van Dyke, 40 N. J. Eq. 149, holding that where a representative holds money as a trustee, a legatee entitled thereto may maintain an action therefor without giving a refunding bond.

16. Tapley *v.* McGee, 6 Ind. 56.

17. Murdock *v.* Washburn, 1 Sm. & M. (Miss.) 546; Walden *v.* Payne, 2 Wash. (Va.) 1. And see the cases cited in the following note.

In Pennsylvania it is held that a final decree of a court of competent jurisdiction, awarding distribution, will protect a representative, whether he has or has not taken refunding bonds from the distributees (Ferguson *v.* Yard, 164 Pa. St. 586, 30 Atl. 517; Charlton's Appeal, 88 Pa. St. 476; Stewart's Appeal, 86 Pa. St. 149; Stecher *v.* Com., 6 Whart. 60; McAvoy's Estate, 8 Pa. Dist. 233; Woodward's Estate, 2 Chest. Co. Rep. 9; Clark's Estate, 1 Kulp 32; Gunkel's Estate, 6 Lanc. L. Rev. 217; Altinger's Estate, 42 Leg. Int. 56); and if an account has been filed by the representative a year from the grant of letters testamentary, an adjudication awarding distribution is after confirmation mandatory, and the representative cannot refuse compliance on the ground that no bond has been given (Pierson's Estate, 5 Pa. Dist. 424; Moorehead's Estate, 29 Pittsb. Leg. J. 291. And see Lejee's Estate, 5 Pa. Dist. 311). Nor is the giving of such a bond a prerequisite to the bringing of an action against the representative to recover a distributive share of the balance shown by such account. Baughman *v.* Kunkle, 8 Watts 483. But see Simpson's Appeal, 109 Pa. St. 383, where it was held that a distributee to whom a balance in the hands of an administrator was awarded by the orphans' court, on the adjudication of an account filed within one year from the grant of letters of administration, is not entitled to payment of such award without giving a refunding bond.

18. *Alabama.*— Johnston *v.* Fort, 30 Ala. 78.

Indiana.— Hayes *v.* Matlock, 27 Ind. 49; Tapley *v.* McGee, 6 Ind. 56; Mazelin *v.* Rouyer, 8 Ind. App. 27, 35 N. E. 303.

Kentucky.— Mountjoy *v.* Pearce, 4 Metc. 97; Overstreet *v.* Potts, 4 Dana 138; Duncan *v.* Mizner, 4 J. J. Marsh. 443; Shirley *v.* Mitchell, 3 J. J. Marsh. 684; Neely *v.* Neely, 1 Litt. 292; Prewett *v.* Prewett, 4 Bibb 266.

Massachusetts.— Browne *v.* Doolittle, 151 Mass. 595, 25 N. E. 23; Atherton *v.* Corliss, 101 Mass. 40.

Minnesota.— See Olson *v.* Fish, 75 Minn. 228, 77 N. W. 818.

New York.—Barnes *v.* Barnes, 13 Hun 233; *In re* Austin, 2 N. Y. Suppl. 875; Jones' Estate, 1 N. Y. Suppl. 751, 15 N. Y. Civ. Proc. 45.

Ohio.— Disney *v.* Hawes, 9 Ohio Dec. (Reprint) 406, 12 Cinc. L. Bul. 322; *In re* Isherwood, 5 Ohio S. & C. Pl. Dec. 143, 7 Ohio N. P. 332.

South Carolina.— Brown *v.* Cattell, 1 Desauss. 112.

Virginia.— McRae *v.* Brooks, 6 Munf. 157; Rootes *v.* Webb, 4 Munf. 77; Stovall *v.* Woodson, 2 Munf. 303. But see Handly *v.* Snodgrass, 9 Leigh 484, where it was held that the mere omission of a decree in favor of legatees against the executor to require of them a refunding bond was not ground for reversing the decree.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1205.

In Mississippi, however, it is held not neces-

therewith,[19] as the lapse of time sufficient to raise the presumption that there are no outstanding debts.[20] Under some statutes the requirement of such bond or indemnity applies only in the case of distribution before the expiration of the period for filing claims against the estate.[21] Such bond is necessary even where there are sufficient assets to satisfy all demands against the estate.[22]

b. By Assignee of Legacy or Distributive Share. The assignee of a legacy or distributive share must in general give the same bond or indemnity as would be required of his assignor.[23]

c. By Creditor of Legatee or Distributee. A creditor of a legatee or distributee seeking to subject the latter's legacy or distributive share in the hands of the representative may also be required to give a refunding bond to meet outstanding claims.[24]

2. Waiver of Right to Require Bond. A representative may waive his right

sary that a decree directing distribution before final settlement should require a refunding bond, as the law directs that a party shall not have the benefit of such decree until he has executed and delivered such bond. Mundy *v.* Calvert, 40 Miss. 181; French *v.* Davis, 38 Miss. 167. And see Crowder *v.* Shackelford, 35 Miss. 321.

Laches of the representative may estop him from objecting to a decree on the ground that the execution of a refunding bond is not therein required. Harman *v.* Davis, 30 Gratt. (Va.) 461.

19. Chambers *v.* Wright, 52 Ala. 444 (holding that it is not erroneous to decree an heir his share of a particular fund in the hands of an administrator without exacting a refunding bond, when the administrator shows by his answer no reason why it is improper, and it appears that the estate is solvent and that all the other heirs have received their share, and there is no allegation of outstanding indebtedness); Christian's Estate, 13 Pa. Co. Ct. 415 (holding that a refunding bond for the value of assets transferred by an executor under direction of court will not be required where a bond conditioned for the return of the assets in specie has already been given); Palmer's Estate, 2 Chest. Co. Rep. (Pa.) 453; Irwin's Estate, 2 Chest. Co. Rep. (Pa.) 452; Woodward's Estate, 2 Chest. Co. Rep. (Pa.) 9; Murgitroyde *v.* Cleary, 16 Lea (Tenn.) 539 (holding that, in a proper case and on satisfactory proof that there are unpaid debts owing the estate, chancery has jurisdiction to distribute the assets among those entitled without requiring refunding bonds).

20. Roberts *v.* Dale, 7 B. Mon. (Ky.) 199; Baughman *v.* Kunkle, 8 Watts (Pa.) 483; Thompson's Estate, 2 Chest. Co. Rep. (Pa.) 452.

21. *California.*— *In re* Mitchell, 121 Cal. 391, 53 Pac. 810; *In re* Hale, 121 Cal. 125, 53 Pac. 429; *In re* Crocker, 105 Cal. 368, 38 Pac. 954. And see *In re* Levinson, 98 Cal. 654, 33 Pac. 726.

Florida.— Sanderson *v.* Sanderson, 17 Fla. 820.

Illinois.— Klicka *v.* Klicka, 105 Ill. App. 369; Sherman *v.* Saylor, 36 Ill. App. 356; Graffenreid *v.* Kundert, 34 Ill. App. 483; Grafenreid *v.* Kundert, 23 Ill. App. 440.

Missouri.— *In re* Pound, 166 Mo. 419, 66 S. W. 273.

Rhode Island.— Steere *v.* Wood, 15 R. I. 199, 2 Atl. 551.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1205.

After the lapse of the statutory period, a representative may be compelled to make distribution by an order of court without a refunding bond (State *v.* Stephenson, 12 Mo. 178), if it appears that debts which have been allowed have been paid or secured (*In re* Mitchell, 121 Cal. 391, 53 Pac. 810; *In re* Hale, 121 Cal. 125, 53 Pac. 429), or if the decree of the court reserves from distribution sufficient other property to pay all contested claims (*In re* Crocker, 105 Cal. 368, 38 Pac. 954).

Estoppel.— Where an executor, within two years after the date of his letters, without an order of the court, and without requiring any refunding bond, distributes sums to the legatees, he cannot refuse to comply with a subsequent order of distribution because no refunding bond had been given, it appearing that the debts are paid. *In re* Pound, 166 Mo. 419, 66 S. W. 273.

A creditor of an estate is not a "distributee" within the meaning of a statute requiring distributees to give a refunding bond before they can compel the personal representative to pay their distributive shares; and such creditor cannot be required to give a refunding bond before he can compel the representative to pay his claim. Wolf *v.* Griffin, 13 Ill. App. 559.

22. Sherman *v.* Saylor, 36 Ill. App. 356.

23. Blackerby *v.* Holton, 5 Dana (Ky.) 520. But the purchaser of a distributee's interest need not execute a refunding bond in order to maintain a bill in his own name to compel distribution, although the court should require a bond before payment is made. Kavanaugh *v.* Thacker, 2 Dana (Ky.) 137.

24. Sparks *v.* De la Guerra, 14 Cal. 108 (holding that neither a legatee nor his creditors can maintain a bill against executors to recover a legacy, without an averment and proof that the estate has been settled, or that there will remain a balance after settlement, or an offer to give a refunding bond to abide the settlement); Fitchett *v.* Dolbee, 3 Harr. (Del.) 267.

to require a refunding bond,[25] but his intention to waive his rights in this respect must be very clear.[26]

3. Amount of Bond. The penal amount of the refunding bond is usually within the discretion of the court[27] or representative.[28]

4. Approval of Bond. In order that such bonds may protect the representative they must be approved by the probate court[29] at the time or after the final order to deliver the property is made.[30]

5. Effect of Giving Bond. Refunding bonds stand as to creditors in place of the assets distributed, and of the representative's responsibility, and operate to exonerate the representative from all liability for such assets and to protect him against the claims of creditors.[31] Recitals therein are subject to the ordinary rules of construction.[32]

6. Failure to Give Bond. The failure of the legatee or distributee to give or tender a refunding bond may be pleaded as a defense in an action for his legacy or distributive share[33] or it may constitute a ground for recovering the legacy or distributive share if already delivered.[34] It is the duty of the representative upon such failure to invest the fund in the manner prescribed by statute[35] and not to pay it into court.[36]

7. Security From Legatee of Particular Estate. A legatee or devisee or tenant of a particular estate, with remainder over, is usually not required to give a refunding or forthcoming bond upon the delivery of the legacy or devise to him, for its delivery at the end of his particular estate,[37] unless there is an express

25. Harrison *v.* Mundy, Dudley Eq. (S. C.) 34 (holding that the voluntary payment of a legacy to one who is by will required to give a bond and return it on the happening of a certain event waives the right to require such bond or to compel repayment of the money); Nelson *v.* Cornwell, 11 Gratt. (Va.) 724.

26. Howell *v.* Johnston, 49 N. C. 502 (holding that assent to the possession of a legacy on condition that a refunding bond be given is not a waiver of such bond); Nelson *v.* Cornwell, 11 Gratt. (Va.) 724 (holding that an assent by an executor to a legacy is not a waiver of his right to a refunding bond).

27. Kirkpatrick *v.* Gibson, 14 Fed. Cas. No. 7,848, 2 Brock. 388.

28. Badger *v.* Daniel, 79 N. C. 372, holding that an executor has fulfilled the requirements of the statute if the aggregate penalties of such bonds are in his just discretion sufficient to meet the outstanding debts of the estate.

29. Jones' Estate, 1 N. Y. Suppl. 751, 15 N. Y. Civ. Proc. 45; Robins' Estate, 180 Pa. St. 630, 37 Atl. 121; Edgar *v.* Shields, 1 Grant (Pa.) 361; Woodward's Estate, 2 Chest. Co. Rep. (Pa.) 9.

A bond filed by the committee of the property of an incompetent person, where it has been fixed and approved by the court, is sufficient to protect the executors in paying over a share of the estate to the committee. Wright *v.* Hayden, 31 Misc. (N. Y.) 116, 63 N. Y. Suppl. 796.

30. Harrison *v.* Harrison, 9 Ala. 470.

31. *Massachusetts.*— Browne *v.* Doolittle, 151 Mass. 595, 25 N. E. 23.

Mississippi.— Fonte *v.* Horton, 36 Miss. 350.

North Carolina.—Badger *v.* Daniel, 79 N. C. 372.

Pennsylvania.— Schaeffer's Appeal, 119 Pa. St. 640, 13 Atl. 507.

Tennessee.— Maxwell *v.* Smith, 86 Tenn. 539, 8 S. W. 340.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1213.

A plea of plene administravit is a good defense to the representative in an action against him by a creditor of the estate after the taking of such bond. Maxwell *v.* Smith, 86 Tenn. 539, 8 S. W. 340.

32. See Fonte *v.* Horton, 36 Miss. 350, holding that a recital in a bond, given upon the receipt of a specific legacy, that the executor was discharged from all claim and liability on account of the legacy does not discharge him from accounting for hire received by him before the legacy was delivered, but not paid over.

33. Cowell *v.* Oxford, 6 N. J. L. 432 (also holding that such objection must be by plea in abatement); Logan *v.* Richardson, 1 Pa. St. 372 [*overruling* Chandler *v.* Lamborne, 2 Pa. L. J. Rep. 124, 3 Pa. L. J. 367].

34. Howell *v.* Johnston, 49 N. C. 502, holding this to be true where the failure to give bond constituted a breach of the condition upon which the property was delivered.

35. *In re* Koch, 5 Rawle (Pa.) 338 (holding that the fund should be put at interest on security approved by the orphans' court); Bahnert's Estate, 12 Phila. (Pa.) 27, 4 Wkly. Notes Cas. (Pa.) 360.

36. Bahnert's Estate, 12 Phila. (Pa.) 27, 4 Wkly. Notes Cas. (Pa.) 360.

37. Taggard *v.* Piper, 118 Mass. 315; Fiske *v.* Cobb, 6 Gray (Mass.) 144; Homer *v.* Shelton, 2 Metc. (Mass.) 194; Hodge *v.* Hodge, 72 N. C. 616; Williams *v.* Cotton, 56 N. C. 395; Apple *v.* Allen, 56 N. C. 120; Pelham *v.* Taylor, 54 N. C. 121, 59 Am. Dec. 605;

statutory provision requiring it,[38] or unless there is danger of his wasting, secreting, or removing the property,[39] as where the legacy is one of money or stocks.[40]

H. Advances and Disbursements by Representative — 1. In General. Advances and disbursements made by the representative for the benefit of legatees or distributees of the estate are to be reimbursed from their respective portions of the estate;[41] and they should be specially adjusted by the representative, aside from his ordinary administration accounts, by way of an offset to the amount

Bullock *v.* Bullock, 17 N. C. 307; Hawthorne *v.* Beckwith, 89 Va. 786, 17 S. E. 241; Raney *v.* Heath, 2 Patt. & H. (Va.) 206.

In New York it has been held that security should be required where the will shows a clear intention that the *corpus* of the estate should remain entire, and that the legatee of the particular estate should have merely a usufructuary interest therein (Livingston *v.* Murray, 68 N. Y. 485; Tyson *v.* Blake, 22 N. Y. 558; Montfort *v.* Montfort, 24 Hun 120; Matter of Fernbacher, 17 Abb. N. Cas. 339, 4 Dem. Surr. 227); but where the will indicates an intention to intrust to the life beneficiary the full possession and control of the estate, the executor, in surrendering possession, need not require security unless there are special circumstances rendering such a course hazardous (Matter of Fernbacher, 17 Abb. N. Cas. 339, 4 Dem. Surr. 227). But see Covenhoven *v.* Shuler, 2 Paige 122, 21 Am. Dec. 73; Westcott *v.* Cady, 5 Johns. Ch. 334, 9 Am. Dec. 306, both holding that an inventory specifying that the articles belong to the first taker for the allotted time and afterward to the remainder-man is generally sufficient.

Discretion.— Under some statutes whether security shall be required from a legatee for life or years lies within the discretion of the executor (*In re* Ryerson, 26 N. J. Eq. 43) or the probate court (Fisher *v.* Kreebel, 1 Leg. Chron. (Pa.) 113).

A widow is not bound to give security upon the delivery to her of property bequeathed to her by her husband for life (Straub's Appeal, 1 Pa. St. 86; *In re* Brinton, 7 Watts (Pa.) 203) unless she holds as testamentary trustee (Kelsey *v.* Van Camp, 3 Dem. Surr. (N. Y.) 530).

An inventory of chattels specifically bequeathed, and not necessarily consumed in the use, is usually required from the first taker, and is generally sufficient. Dodson *v.* Sevars, 52 N. J. Eq. 611, 30 Atl. 477; Covenhoven *v.* Shuler, 2 Paige (N. Y.) 122, 21 Am. Dec. 73; Westcott *v.* Cady, 5 Johns. Ch. (N. Y.) 334, 9 Am. Dec. 306.

Upon the presumption of the death of the legatee of a particular estate from his absence for a considerable length of time, the legatee over may recover without giving security. Miller *v.* Beates, 3 Serg. & R. (Pa.) 490, 8 Am. Dec. 658.

38. Security Co. *v.* Pratt, 65 Conn. 161, 32 Atl. 396; Cardona's Succession, 14 La. Ann. 356.

In Pennsylvania, under the act of Feb. 24, 1834, sections 46, 49, a person entitled to a life-interest in personal property or in money substituted for real estate is not entitled to receive such property until such security has been given, under the direction of the orphans' court, as shall sufficiently provide for the interest of the persons entitled in remainder (Culbertson's Appeal, 76 Pa. St. 145; Duval's Appeal, 38 Pa. St. 112; Clevenstine's Appeal, 15 Pa. St. 495; Wale's Estate, 11 Phila. 156; *In re* Feiser, 1 Walk. 256. And see Green's Appeal, 42 Pa. St. 25; Kinnard *v.* Kinnard, 5 Watts 108), unless those entitled in remainder waive such security by a writing filed of record (Culbertson's Appeal, 76 Pa. St. 145).

39. *Connecticut.*—Clarke *v.* Terry, 34 Conn. 176 (non-resident legatee); Langworthy *v.* Chadwick, 13 Conn. 42. And see Hudson *v.* Wadsworth, 8 Conn. 348.

Illinois.— Burnett *v.* Lester, 53 Ill. 325.

Massachusetts.— Taggard *v.* Piper, 118 Mass. 315; Fiske *v.* Cobb, 6 Gray 144; Homer *v.* Shelton, 2 Metc. 194.

New Jersey.— *In re* Ryerson, 26 N. J. Eq. 43; Howard *v.* Howard, 16 N. J. Eq. 486.

North Carolina.— Cheshire *v.* Cheshire, 37 N. C. 569.

South Carolina.— Swan *v.* Ligan, 1 McCord Eq. 227.

Virginia.— Hawthorne *v.* Beckwith, 89 Va. 786, 17 S. E. 241; Mortimer *v.* Moffatt, 4 Hen. & M. 503; Raney *v.* Heath, 2 Patt. & H. 206.

England.— Foley *v.* Burnell, 1 Bro. Ch. 274, 28 Eng. Reprint 1125; Conduitt *v.* Soane, 1 Coll. 285, 13 L. J. Ch. 390, 28 Eng. Ch. 285.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1217.

Income of a legacy only should be paid by the executor to the legatee upon failure of the latter to give the security required. Mason *v.* Pate, 34 Ala. 379; Clarke *v.* Terry, 34 Conn. 176.

40. *Alabama.*— Mason *v.* Pate, 34 Ala. 379.

Mississippi.— Hardin *v.* Osborne, 43 Miss. 532.

Pennsylvania.— Kinnard *v.* Kinnard, 5 Watts 108; Eichelberger *v.* Barnetz, 17 Serg. & R. 293.

South Carolina.— Shackleford *v.* Buchanan, 1 Desauss. 570.

Virginia.— Hawthorne *v.* Beckwith, 89 Va. 786, 17 S. E. 241.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1217.

41. *Alabama.*— Dickie *v.* Dickie, 80 Ala. 57; Watson *v.* McClanahan, 13 Ala. 57; Parker *v.* McGaha, 11 Ala. 521; Willis *v.* Willis, 9 Ala. 330.

California.— Moore's Estate, 96 Cal. 522, 31 Pac. 584; Rose's Estate, 80 Cal. 166, 22 Pac. 86.

due from the estate in his hands to the legatee or distributee,[42] or to the assignee of the legatee or distributee.[43] If the legacy or distributive share lapses in interest after the advances have been made, the representative may recover them by an action in his own right as for money had and received.[44]

Illinois.— Blake *v.* People, 161 Ill. 74, 43 N. E. 590.

Indiana.— Greene *v.* Brown, (1894) 38 N. E. 519.

Kentucky.— Churchill *v.* Akin, 5 Dana 475; Triggs *v.* Daniel, 2 Bibb 301.

Louisiana.— Sparrow's Succession, 42 La. Ann. 500, 7 So. 611, 44 La. Ann. 475, 10 So. 882; Broadway's Succession, 3 La. Ann. 591. And see Beatty *v.* Dufief, 11 La. Ann. 74.

Mississippi.— Kelly *v.* Davis, 37 Miss. 76.

New York.— King *v.* Talbot, 40 N. Y. 76, 92; Matter of Rogers, 10 N. Y. App. Div. 593, 42 N. Y. Suppl. 133; Matter of McKay, 33 Misc. 520, 68 N. Y. Suppl. 925.

Pennsylvania.— Good's Estate, 150 Pa. St. 301, 24 Atl. 624; Brennan's Estate, 65 Pa. St. 16; Hart's Estate, 9 Pa. Dist. 274; Hosfield's Estate, 4 Pa. Co. Ct. 257; McGeary's Estate, 33 Pittsb. Leg. J. 405.

South Carolina.— Johnson *v.* Henagan, 11 S. C. 93.

Virginia.—Jackson *v.* Jackson, 1 Gratt. 143.

United States.— McIntire *v.* McIntire, 192 U. S. 116, 24 S. Ct. 196, 48 L. ed. 369 [*affirming* 20 App. Cas. (D. C.) 134].

England.— See *Re* Moore, 45 L. T. Rep. N. S. 466.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1219.

Credit on representative's account cannot be allowed for advancements made to legatee or distributee. See *supra*, VIII, I, 8, c.

Advances to minors may be charged against their legacies or distributive shares, when made to their guardian (Black's Estate, Tuck. Surr. (N. Y.) 145); but not as a general rule where made to the minor while he was without a guardian (Standley *v.* Langley, 25 Miss. 252; Jones *v.* Coon, 5 Sm. & M. (Miss.) 751. And see Lee *v.* Brown, 4 Ves. Jr. 362, 4 Rev. Rep. 208, 31 Eng. Reprint 184), unless such payments are ratified by the infant after attaining his majority (Lee *v.* Brown, 4 Ves. Jr. 362, 4 Rev. Rep. 208, 31 Eng. Reprint 184) or authorized by an order of court (Matter of Spencer, 1 De G. M. & G. 311, 16 Jur. 233, 21 L. J. Ch. 313; 50 Eng. Ch. 239, 42 Eng. Reprint 572; Lee *v.* Brown, *supra*), nor where the advances consist of maintenance furnished to the minor children by their mother, who is also administratrix, and who has also received the benefit of their services (*In re* Gossner, 6 Whart. (Pa.) 401; Francis' Estate, 5 Kulp (Pa.) 17), although they may be allowed in equity if made in good faith and are such disbursements as would have been approved had they been made by a guardian (Munden *v.* Bailey, 70 Ala. 63; Montgomery *v.* Givhan, 24 Ala. 568; Martin *v.* Campbell, 35 Ark. 137; Rogers *v.* Traphagen, 42 N. J. Eq. 421, 11 Atl. 336).

Where portions of a decedent's estate are sold by order of court to provide support for certain heirs such heirs are chargeable with proceeds of the sale and interest. Lee *v.* Smith, 18 Tex. 141.

The statutory exemption selected and allowed to a widow and minor children is in the nature of an advancement when the estate is solvent and should be accounted for by them on final settlement as part of their legacies or distributive shares. Hunter *v.* Law, 68 Ala. 365.

Legacies paid to persons who were also distributees pending a contest of the will will be considered as advancements on the distributive shares of such persons. Kelly *v.* Davis, 37 Miss. 76.

42. *Alabama.*— Cawlfield *v.* Brown, 45 Ala. 552; Parker *v.* McGaha, 11 Ala. 521 (advance to widow); Willis *v.* Willis, 9 Ala. 330 (board and clothing furnished to distributees).

Michigan.— Greene *v.* Mallary, (1901) 86 N. W. 541.

North Carolina.— Young *v.* Kennedy, 95 N. C. 265, 100 N. C. 393, 6 S. E. 392.

Pennsylvania.— Hambright's Estate, 169 Pa. St. 57, 32 Atl. 60, holding that, where, pending the settlement of an estate, money is advanced by the executor, with the consent of the legatees, to the committee of the testator's lunatic widow for her support, it is proper, in settling the account, to charge the advancement against the widow's interest.

Virginia.— Boyd *v.* Townes, 79 Va. 118, holding that an executor who has paid a valid judgment against one of the distributees is entitled to charge the amount of such judgment against the share of such distributee.

Wisconsin.— Lyle *v.* Williams, 65 Wis. 231, 26 N. W. 448.

But see Sparrow's Succession, 42 La. Ann. 500, 7 So. 611, 44 La. Ann. 475, 10 So. 882.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1219.

Advancements made in the lifetime of a testator cannot be included in such set-off. Cawlfield *v.* Brown, 45 Ala. 552.

An advance to a widow not directed by the probate court cannot be set off against her distributive share on an accounting in equity, although the failure to direct the allowance was caused by mutual mistake as to the law. Lyon *v.* Lyon, 43 N. C. 201.

Advances of money cannot be set off against the distributive share of one who having released the administrator from all pecuniary demands is entitled only to a distributive share of the personalty remaining in specie. Pearson *v.* Darrington, 32 Ala. 227.

43. Wallston *v.* Braswell, 54 N. C. 137.

44. Lawrence *v.* Carter, 16 Pick. (Mass.) 12.

2. Amount of Advances. The amount of advances to be made should be limited to the actual interest of the beneficiary of the estate at the time the advances are made.[45]

3. Interest on Advances. Where the circumstances indicate that advances were made as a partial distribution, as where the representative had income in hand not bearing interest, no interest should be charged thereon against the legatee or distributee,[46] but where the representative is charged with interest on the funds in his hands, the advances should be treated as loans, and interest charged thereon, for the double purpose of reimbursing the representative for the interest which has been charged against him and of equalizing distributive shares.[47] If a note or other evidence of indebtedness is taken for the advance, it is merely a loan and should bear interest.[48]

4. Advances by Executor or Administrator Individually. Where the representative makes advances or disbursements from his own funds for the benefit of legatees or distributees, he becomes subrogated to their rights,[49] and is entitled to credit therefor, as a charge against their legacies or distributive shares, upon final settlement of the estate;[50] or after the legacy or distributive share is due he may reimburse himself from funds in his hands subject to its payment.[51]

45. Chester County Hospital *v.* Hayden, 83 Md. 104, 34 Atl. 877 (holding that advances made to one entitled to a life-interest in a fund should not exceed the amount of income earned by that fund during the period of advancement); Hoyt *v.* Jackson, 1 Dem. Surr. (N. Y.) 553; Lockwood *v.* Lockwood, 3 Redf. Surr. (N. Y.) 330.

Advances for maintenance and education of a minor child should not exceed the interest on such child's distributive share. Tanner *v.* Davidson, 3 Bibb (Ky.) 456. And see Henning *v.* Conner, 2 Bibb (Ky.) 188.

The legal rate of interest on a trust fund is not a test of its income, for the purpose of computing the proportion of the legacy which may be advanced, since the actual income from such fund may be greater or less than the legal rate. Hoyt *v.* Jackson, 1 Dem. Surr. (N. Y.) 553.

46. Thorn *v.* Garner, 113 N. Y. 198, 21 N. E. 149 [*modifying* 42 Hun 507]; King *v.* Talbot, 40 N. Y. 76; Brooks *v.* Hanna, 19 Ohio Cir. Ct. 216, 10 Ohio Cir. Dec. 480.

47. King *v.* Talbot, 40 N. Y. 76; Jenkins' Estate, 4 Kulp (Pa.) 46; Cunningham *v.* Cauthen, 37 S. C. 123, 15 S. E. 917, 44 S. C. 95, 21 S. E. 800. And see Brooks *v.* Hanna, 19 Ohio Cir. Ct. 216, 10 Ohio Cir. Dec. 480. Interest on advances should be allowed the representative where he makes them before the legacy or distributive share is due. Black *v.* Keenan, 5 Dana (Ky.) 570.

48. Brooks *v.* Hanna, 19 Ohio Cir. Ct. 216, 10 Ohio Cir. Dec. 480.

49. Tickel *v.* Quinn, 1 Dem. Surr. (N. Y.) 425; Gaw *v.* Huffman, 12 Gratt. (Va.) 628.

50. *Kentucky.*— Black *v.* Keenan, 5 Dana 570.

Missouri.— Scott *v.* Crews, 72 Mo. 261.

New Jersey.— Rogers *v.* Traphagen, 42 N. J. Eq. 421, 11 Atl. 336.

New York.— Tickel *v.* Quinn, 1 Dem. Surr. 425; Broome *v.* Van Hook, 1 Redf. Surr. 444.

Pennsylvania.— Pettit's Appeal, 39 Pa. St. 324.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1223.

Payments made by an ancillary administrator for a distributee cannot be set off by the domiciliary administrator against the distributee's claim to a share of the fund in course of domiciliary administration, where it does not appear that the ancillary administration has ever been settled, or whether there are any outstanding debts, or that the ancillary administrator has filed a cross bill for that purpose. Chambers *v.* Wright, 52 Ala. 444.

Where the assets are insufficient to pay legacies in full, and the executor by advances to the legatees from his own fund becomes subrogated to their right, he is entitled to be credited only with their *pro rata* share from the assets available for distribution at the time of the accounting. Tickel *v.* Quinn, 1 Dem. Surr. (N. Y.) 425.

The purchase of a ward's interest by the executor from the guardian will be deemed a payment on account of the ward's claim for which the executor will be entitled to credit. Black *v.* Keenan, 5 Dana (Ky.) 570.

An executor is not bound to pay out of his individual means after nearly exhausting the funds applicable from the estate for advancement. Fonda *v.* Penfield, 56 Barb (N. Y.) 503.

51. Rogers *v.* Traphagen, 42 N. J. Eq. 421, 11 Atl. 336; Snyder *v.* Warbasse, 11 N. J. Eq. 463; Smith *v.* Huger, 1 Desauss. (S. C.) 247, holding that where an executor has made advances and has become surety in considerable sums for a legatee, and the legatee dies insolvent, the executor may retain such sums from the amount of the legacy, although there was no express understanding to that effect at the time of making the advances.

Upon the death of a representative before reimbursing himself for such advances, like relief may be claimed by his personal representative for the benefit of his estate (Lay

5. Lien For Advances. The representative's advances or disbursements on behalf of a legatee or distributee constitute a lien upon his share or interest in the estate,[52] but it cannot be enforced until the estate is ready for distribution.[53]

6. Expenses Incurred by Representative. Expenses *bona fide* and prudently incurred by the representative may be duly set off against the legacy or distributive share concerned therein,[54] or an action for contribution may be maintained against the legatee or distributee therefor after final distribution.[55] But expenditures made for the benefit of the estate should be paid out of the property of the estate before it is distributed, and cannot be charged in a distribution of the estate as a lien on the heirs' interests therein.[56]

I. Mode and Sufficiency of Payment or Distribution[57] **— 1. In General.** Unless a particular mode of paying a legatee or distributee is expressly prescribed by the will[58] or by statute[59] payment may in general be made to him in any manner which gives him his due proportion of the estate,[60] and which shows an

v. Lay, 10 S. C. 208) or by his co-executor (Smith *v.* Huger, 1 Desauss. (S. C.) 247).

The rents and profits of a testamentary trust estate are not chargeable with cash advances made by the executor after his final account has been allowed and an order of distribution of the trust estate has been made, even though the account as allowed shows that the trust estate is indebted to him for such advances, and the court has transferred the property subject to the charge. Black *v.* Herring, (Md. 1894) 30 Atl. 917.

52. Greene *v.* Brown, (Ind. Sup. 1894) 38 N. E. 519; Haskell *v.* Hill, 169 Mass. 124, 47 N. E. 586; Hammond *v.* Cronkright, 47 N. J. Eq. 447, 20 Atl. 847; Blair *v.* Blair, 42 Misc. (N. Y.) 79, 85 N. Y. Suppl. 722; *Ex p.* Makins, 6 Jur. 468, 2 Mont. D. & De G. 508.

53. Greene *v.* Brown, (Ind. Sup. 1894) 38 N. E. 519 (holding that where the undivided interests of some of the heirs in decedent's land was subject to liens for money advanced by the administrator to redeem from mortgage foreclosures, the liens attached to the several interests of such heirs after partition of the land); Haskell *v.* Hill, 169 Mass. 124, 47 N. E. 586 (holding that executors loaning money to a legatee, with the understanding that they may deduct the sums lent from his share of the estate, acquire a lien on his interest in such estate, although he cannot set off against the loan when due the share coming to him, if suit is brought before the estate is ready for distribution).

54. Farquharson *v.* Nugent, 6 Dem. Surr. (N. Y.) 296 (payment of tax); Ammon's Appeal, 63 Pa. St. 284 (holding that costs and expenses of defending a suit against the representative by a legatee may be deducted from the latter's legacy); Mackey's Appeal, 10 Pa. Cas. 107, 13 Atl. 464; *In re* Murphy, 30 Wash. 9, 70 Pac. 109. And see *In re* Anning, 34 N. Brunsw. 308.

Counsel fees and expenses of suit, incurred by the representative in contesting or defending a will, may be deducted from the shares of persons interested therein (Miller *v.* Simpson, (Ky. 1886) 2 S. W. 171; Kelly *v.* Davis, 37 Miss. 76; Blair *v.* Blair, 42 Misc. (N. Y.) 79, 85 N. Y. Suppl. 722); but he is not entitled to set off against the distributive share of a legatee expenses incurred in the successful defense of a suit in another state, brought against the executor individually by such legatee, to recover his legacy (*In re* Roberts, 163 Pa. St. 408, 30 Atl. 213).

Taxes paid by the representative and charged to his account may be deducted from the income when he pays it to the life-tenant. Williams *v.* Herrick, 18 R. I. 120, 25 Atl. 1099. But where he fails to invest a pecuniary legacy until the legatee becomes of age he should have no allowance for taxes paid on such legacy. Eliott *v.* Sparrell, 114 Mass. 404.

55. Blair *v.* Blair, 42 Misc. (N. Y.) 79, 85 N. Y. Suppl. 722. And see *infra*, XI, R.

56. Huston *v.* Becker, 15 Wash. 586, 47 Pac. 10, holding that a court exercising probate jurisdiction has no power to direct the distribution of a decedent's estate to the heirs charged with a lien in favor of the administrator on account of money expended by him for the benefit of the estate.

57. **Payment to a representative as legatee or distributee** see *supra*, XI, D.

58. Russell *v.* Kearney, 27 Ga. 96, holding that, where the will requires the executor to divide the property into shares before distributing it to the legatees, he will be guilty of a devastavit to other legatees, if he delivers property to a legatee without making such division, unless they acquiesce therein.

59. See McKee *v.* McKee, 48 Ga. 332.

60. See Johnson *v.* Bell, 71 Ala. 258; *In re* Tobin, 16 N. Y. Suppl. 462, Pow. Surr. (N. Y.) 5; Banks *v.* Taylor, 10 Abb. Pr. (N. Y.) 199; *In re* Fisher, 189 Pa. St. 179, 42 Atl. 8; *In re* Watson, 189 Pa. St. 150, 42 Atl. 5.

Payment of taxes and expenses of repairs on the real property made by administrators on the order of the heir, who was one of the next of kin, is a payment to such person as one of the next of kin. Banks *v.* Taylor, 10 Abb. Pr. (N. Y.) 199.

A conveyance by an executor of his private property to a devisee as part payment of the latter's share in the estate is a valid pay-

absolute payment.[61] Usually the payment should be made in money,[62] although with the consent of parties interested it may be made in other kinds of personalty.[63] Payment may sometimes be made by instalments.[64] A deposit in bank to a distributee's credit without notification thereof does not constitute a good payment.[65]

2. Distribution in Kind — a. In General. A distribution in kind is authorized where a conversion of the property into money is not necessary to the administration of the estate,[66] nor demanded by the parties interested.[67]

b. Stocks, Bonds, Notes, and Other Securities. A payment or distribution in kind of stocks, bonds, notes, or other securities may be made where the parties

ment binding on the devisee. *In re* Fisher, 189 Pa. St. 179, 42 Atl. 8.

When a representative keeps an estate together without authority, distributees may elect to take the profits or to charge him with rent. Hinson *v.* Williamson, 74 Ala. 180; Harrison *v.* Harrison, 39 Ala. 489.

An agreement by one authorized to receive a legacy for his principal with the executor to account to his principal for an indebtedness due by him (the agent) to the executor as so much of the legacy, without the principal's assent, is not a payment of the legacy by the executor. Benoist *v.* Poirer, 1 Hill Eq. (S. C.) 217.

61. Bryant *v.* Householder, 71 Ind. 349.

Estoppel.— A representative may be estopped to deny that a payment is absolute where by his acts he has led others to believe that it was absolute, and they would otherwise be prejudiced. Garrett *v.* Hamburg Bank, 1 Strobh. Eq. (S. C.) 66.

62. Ward *v.* Oates, 42 Ala. 225.

A bequest of money is payable in coin, and not in paper currency (Graveley *v.* Graveley, 25 S. C. 1, 60 Am. Rep. 478) unless the latter payment is authorized by statute (Yates *v.* Salle, Wythe (Va.) 163).

Where the assets consist partly of gold and partly of currency, each distributee should be decreed his share of each kind of money, distinguishing between them. Lowry *v.* Newsom, 51 Ala. 570.

A husband's share in the personal property of his deceased wife remaining after the payment of debts and expenses of administration is in the absence of agreement or order of the court payable in money. Bartlett *v.* Hill, 69 N. H. 197, 45 Atl. 144.

A payment in depreciated currency (Confederate money) has been held void (Thompson *v.* Perryman, 45 Ala. 619; Purdie *v.* Jones, 32 Gratt. (Va.) 827) where the legacy was payable in good money (Stark *v.* Lipscomb, 29 Gratt. (Va.) 322), although the representative has been allowed credit for the value of such currency paid by him at a time when it passed as lawful money (Williams *v.* Williams, 79 N. C. 411. And see Depriest *v.* Patterson, 94 N. C. 519) and he was required by the legatee to make payment (Evans *v.* Smith, 84 N. C. 146).

A bank draft purchased by the representative and paid to a distributee is not a good payment, where the bank fails before the distributee can with due diligence collect it. State *v.* Wagers, 47 Mo. App. 431.

63. Ward *v.* Oates, 42 Ala. 225; State *v.* Conrad, 1 Marv. (Del.) 417, 41 Atl. 77; Kennedy *v.* Williams, 7 Humphr. (Tenn.) 50; *In re* Nickels, [1898] 1 Ch. 630, 67 L. J. Ch. 406, 78 L. T. Rep. N. S. 379, 46 Wkly. Rep. 422.

A debt to the succession not yet due is capable of partition among distributees. Le Blanc *v.* Bertant, 16 La. Ann. 294.

64. Bowles *v.* Drayton, 1 Desauss. (S. C.) 489, 1 Am. Dec. 689.

A legatee is not bound to accept a partial payment of his legacy in the absence of an order of court directing such payment. Welch *v.* Adams, 152 Mass. 74, 25 N. E. 34, 9 L. R. A. 244.

65. Rainwater *v.* Hummell, 79 Iowa 571, 44 N. W. 814.

66. *Alabama.*— Ward *v.* Oates, 42 Ala. 225.

Illinois.— Waterman *v.* Alden, 115 Ill. 83, 3 N. E. 505.

Maine.— Rose *v.* O'Brien, 50 Me. 188.

Maryland.— Evans *v.* Iglehart, 6 Gill & J. 171.

Pennsylvania.—Maffet's Estate, 8 Kulp 184.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1232.

The shares of specific property need not be exactly equal, but the balances may be made up in money. Mercer *v.* Glass, 25 S. W. 114, 15 Ky. L. Rep. 710; Williams *v.* Holmes, 9 Md. 281; Jillett *v.* Powell, Speers Eq. (S. C.) 142.

The records of the probate court ordering such distribution are sufficient muniments of title without any formal transfer of the several parts distributed. Rose *v.* O'Brien, 50 Me. 188.

A conveyance of real estate to the legatee or distributee may constitute a good payment (French *v.* Baker, 95 Ga. 715, 22 S. E. 652. And see Casto *v.* Kintzel, 27 W. Va. 750), although a third person is in possession holding adversely (French *v.* Baker, 95 Ga. 715, 22 S. E. 652); but the right to take the land instead of the proceeds cannot be claimed after a sale by the executor under a power (Osgood *v.* Franklin, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513).

Money for which the representative has become liable by his negligence or misconduct cannot be decreed to a distributee as his distributive share, under a statute allowing the court to decree distribution of chattels in specie or of money. Ward *v.* Oates, 42 Ala. 225.

67. Maffett's Estate, 8 Kulp (Pa.) 184.

interested consent thereto,[68] or where it appears that a conversion of the securities into money would cause a loss,[69] or that the equities in the case justify such a distribution.[70] The effect of such a distribution is to discharge the representative from liability for such assets and to give to the legatee or distributee who receives the securities the right to maintain or defend suits with respect thereto.[71] Payment of a bequest to a legatee, partly in cash and partly by note, is a sufficient payment, if received as such by the legatee, to give rise to a right of action on a bond of indemnity given to the executor.[72]

c. Specific Legacy.[73] A specific legacy should be delivered in kind to the legatee entitled thereto,[74] unless in cases where such legacy is needed to satisfy

68. *Georgia.*— Dillard *v.* Ellington, 57 Ga. 567.

Illinois.— Waterman *v.* Alden, 15 Ill. 83, 3 N. E. 505, holding, however, that the court will not order the distribution of such assets, the parties not agreeing, where there are notes, accounts, and other choses, some of which are good, some doubtful, and others desperate.

Kentucky.— Wood *v.* Wood, 1 Metc. 512; Smith *v.* Broyles, 15 B. Mon. 461.

Louisiana.— Mandeville *v.* Arnoudt, 9 Rob. 447.

Maine.— Hurley *v.* Hewett, 89 Me. 100, 35 Atl. 1026.

Mississippi.— Murff *v.* Frazier, 41 Miss. 408.

New Jersey.— Wilson *v.* Fisher, 5 N. J. Eq. 493.

New York.— Lane *v.* Albertson, 78 N. Y. App. Div. 607, 79 N. Y. Suppl. 947; King *v.* Talbot, 50 Barb. 453.

North Carolina.— Baptist Female University *v.* Borden, 132 N. C. 476, 44 S. E. 47, 1007 (holding this to be true where the exigencies of the estate and its administration do not require the sale of securities representing advantageous investments); Hester *v.* Hester, 38 N. C. 9.

Pennsylvania.— Reed's Estate, 82 Pa. St. 428; Brown's Estate, 8 Phila. 197; Park's Estate, 4 Pa. Co. Ct. 560.

England.— See *In re* Richardson, [1896] 1 Ch. 512, 65 L. J. Ch. 512, 74 L. T. Rep. N. S. 12, 44 Wkly. Rep. 279; *In re* Lepine, [1892] 1 Ch. 210, 61 L. J. Ch. 153, 66 L. T. Rep. N. S. 360; *Re* Brooks, 76 L. T. Rep. N. S. 771; *Re* Tredwell, 65 L. T. Rep. N. S. 742; Barclay *v.* Owen, 60 L. T. Rep. N. S. 220.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1233.

A transfer of such securities in payment of the legacy or distributive share should be by proper indorsement or assignment (Hester *v.* Hester, 38 N. C. 9; Davidson *v.* Moore, 14 S. C. 251), although it has been held that a parol transfer is sufficient (Mitchell *v.* Mitchell, 1 Gill (Md.) 66).

If investments made by the executor are disallowed, the legatee or distributee who has received the securities should return them upon receiving payment in money. *In re* Niles, 113 N. Y. 547, 21 N. E. 687.

Where some of the heirs are minors, a distribution in kind of securities should not be ordered, although the minors are represented by guardians. Reynolds *v.* Reynolds, 11 Ala. 1023.

69. Lane *v.* Albertson, 78 N. Y. App. Div. 607, 79 N. Y. Suppl. 947; Matter of Thompson, 41 Misc. (N. Y.) 420, 84 N. Y. Suppl. 1111.

70. Johnson *v.* Beauchamp, 5 Dana (Ky.) 70 (holding that where an executor has loaned the funds as required by the will, and has done so honestly and with due discretion, the legatees should be required to take the securities or their proceeds); Guerrant *v.* Johnson, 4 Munf. (Va.) 360.

If the estate consisted of stocks which are not collectable, and which can only be realized upon by a sale, or of government securities that would not become due in many years, or notes or bonds amply secured on real estate, and which are of equal value, the sale of which is not necessary for the administration of the estate, the court no doubt in the exercise of a sound discretion with which it is clothed by the statute in such matters might order such stocks or securities to be preserved and distributed in kind. Waterman *v.* Alden, 115 Ill. 83, 3 N. E. 505.

71. *Alabama.*—Clark *v.* Moses, 50 Ala. 326.

Georgia.— Dillard *v.* Ellington, 57 Ga. 567.

Kentucky.— Smith *v.* Broyles, 15 B. Mon. 461.

Michigan.— Van Middlesworth *v.* Van Middlesworth, 32 Mich. 183.

Pennsylvania.— Reed's Estate, 82 Pa. St. 428.

South Carolina.—Darrel *v.* Eden, 3 Desauss. 241, 4 Am. Dec. 613.

Personal liability may rest upon the representative, however, upon his own individual guarantee or assurance of the safety of the security. Graffenreid *v.* Kundert, 23 Ill. App. 440, 31 Ill. App. 394.

72. Van Middlesworth *v.* Van Middlesworth, 32 Mich. 183.

73. See, generally, WILLS.

74. *Alabama.*—Nelson *v.* Beck, 54 Ala. 329.

Louisiana.— D'Aunoy's Succession, 3 La. Ann. 36.

Maryland.— Woods *v.* Fuller, 61 Md. 457.

Missouri.— Landis *v.* Eppstein, 82 Mo. 99.

New Jersey.— Hayes *v.* Berdan, 47 N. J. Eq. 567, 21 Atl. 339; Hayes *v.* Hayes, 45 N. J. Eq. 461, 17 Atl. 634.

Pennsylvania.— Robinson's Estate, 24 Pa. Co. Ct. 588.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1246.

debts,[75] or unless the will provides for its investment and the delivery of the proceeds by way of income to the legatee.[76]

3. Note or Bond of Executor. The acceptance by a legatee or distributee of the note or bond of the executor for the amount of his legacy or distributive share extinguishes his claim to the latter.[77]

4. Retaining Indebtedness Due by Legatee or Distributee — a. In General. As a general rule an executor or administrator has the right to and should retain from a legacy or distributive share the amount of any indebtedness which may be due to the estate of the decedent by the legatee or distributee,[78] or by his

A refusal to deliver a specific legacy is not justified by the remote contingency of a contest against the validity of the will. Robinson's Estate, 24 Pa. Co. Ct. 588.

A specific legacy of a certain sum in depreciated currency (Confederate notes or bonds), after ascertaining its pecuniary value at the time it becomes due and payable, should be paid out of the general assets of the estate, liable to be applied to the payment of general legacies, either in whole or *pro rata* in proportion to the sufficiency of such assets. Harper *v.* Bibb, 47 Ala. 547.

Distribution by the court of specific articles may be required by the executor under Md. Code, art. 93, § 138. Hoffman *v.* Hoffman, 88 Md. 60, 40 Atl. 712.

75. Hayes *v.* Berdan, 47 N. J. Eq. 567, 21 Atl. 339; Hayes *v.* Hayes, 45 N. J. Eq. 461, 17 Atl. 634; Robinson's Estate, 24 Pa. Co. Ct. 588.

76. Watrous *v.* Smith, 7 Hun (N. Y.) 544.

77. Stewart's Appeal, 3 Watts & S. (Pa.) 476; Hall *v.* Hurford, 2 Pa. L. J. Rep. 291; McTeer *v.* Ferguson, 1 Bay (S. C.) 112.

Accepting the note of one of two executors as security for the payment of a legacy, thereby extending the time of payment, discharges the other executor. Mosley *v.* Floyd, 31 Ga. 564.

Although a settlement between the representative and a distributee is *prima facie* conclusive as to the amount due, a note given thereon is not payment or satisfaction, in the absence of any definite agreement or understanding to that effect between the parties. Fraser *v.* Hext, 2 Strobh. Eq. (S. C.) 250. See, generally, Payment.

Where the widow agrees to accept the note of an administrator upon her husband's estate for her distributive share and to forbear the collection thereof for one year, she thereby suspends her remedy in the orphans' court for distribution, but may maintain a common-law action in the common pleas on the administrator's promise to give such note. Ament *v.* Sarver, 2 Grant (Pa.) 34.

78. *Alabama.*— Nelson *v.* Murfee, 69 Ala. 598.

Indiana.— New *v.* New, 127 Ind. 576, 27 N. E. 154; Fiscus *v.* Fiscus, 127 Ind. 283, 26 N. E. 831.

Maine.— Webb *v.* Fuller, 85 Me. 443, 27 Atl. 346, 22 L. R. A. 177.

Maryland.— Hoffman *v.* Hoffman, 88 Md. 60, 40 Atl. 712, 90 Md. 123, 44 Atl. 1012.

Massachusetts.— Nickerson *v.* Chase, 122 Mass. 296; Blackler *v.* Boott, 114 Mass. 24.

Mississippi.— See Fonte *v.* Horton, 36 Miss. 350.

New York.— Matter of Braunsdorf, 2 N. Y. App. Div. 73, 37 N. Y. Suppl. 229 [*affirming* 13 Misc. 666, 35 N. Y. Suppl. 298]; Close *v.* Van Husen, 19 Barb. 1505; Bogert's Estate, 41 Misc. 598, 85 N. Y. Suppl. 291.

Ohio.— *In re* Ellis, 5 Ohio S. & C. Pl. Dec. 330. And see Woodruff *v.* Snowden, 10 Ohio S. & C. Pl. Dec. 123, 7 Ohio N. P. 520.

Pennsylvania.— Duel's Estate, 137 Pa. St. 116, 20 Atl. 419; Strong *v.* Bass, 35 Pa. St. 333. See Dreisbach's Appeal, 17 Pa. St. 120; Dunn *v.* American Philosophical Soc., 2 Pa. St. 75.

Vermont.— Tinkham *v.* Smith, 56 Vt. 187.

England.— *In re* Watson, [1896] 1 Ch. 925, 65 L. J. Ch. 553, 74 L. T. Rep. N. S. 453, 44 Wkly. Rep. 571; *In re* Taylor, [1894] 1 Ch. 671; Jeffs *v.* Wood, 2 P. Wms. 128, 24 Eng. Reprint 668. See also Currie *v.* Goold, 2 Madd. 163.

Deduction from distributive share see Descent and Distribution, 14 Cyc. 121 *et seq.*

Deduction from legacy or devise see, generally, Wills.

Deduction of debts barred by statute see Descent and Distribution, 14 Cyc. 122; and, generally, Wills.

The term "set-off," as used in this class of cases, is used inaccurately. It is not in fact a set-off, but it is the mere exercise of the right of the administrator to apply the funds in his hands to the payment of a debt due from the distributee to the estate. Fiscus *v.* Fiscus, 127 Ind. 283, 26 N. E. 831; Cherry *v.* Boultbee, 3 Jur. 1116, 9 L. J. Ch. 118, 4 Myl. & C. 442, 18 Eng. Ch. 442, 41 Eng. Reprint 171. And see Webb *v.* Fuller, 85 Me. 443, 445, 27 Atl. 346, 22 L. R. A. 177, in which Emery, J., said: "It is not the technical right of set-off in actions at law. It is rather called in the old cases the right of retainer. It is an equitable right of its own nature, and not at all dependent upon any statute."

Devastavit cannot be charged against an administrator for refusing to pay a distributive share, where he holds claims against the distributee to an amount greater than his share. Sayre *v.* Lewis, 5 B. Mon. (Ky.) 90.

An executor, as trustee under the will, cannot retain the income of a trust created for the debtor's benefit. Voorhees *v.* Voorhees, 18 N. J. Eq. 223; Matter of Bogert, 41 Misc. (N. Y.) 598, 85 N. Y. Suppl. 291.

Foreign attachment cannot be maintained against an administrator, as trustee, by a dis-

assignee,[79] although the fund to be distributed arises out of the sale of real estate of the decedent;[80] and this rule applies as well to a representative as legatee or distributee as to others.[81] Interest on a debt due by a distributee to the estate should be charged against such distributee in a settlement with the representative only where the administrator is charged with interest in his final settlement.[82]

b. Debt Due to Executor or Administrator Individually. In some jurisdictions a debt due to the personal representative individually by a legatee or distributee may be set off against his legacy or distributive share on a distribution of the estate to the beneficiaries,[83] but in other jurisdictions it is held otherwise,[84]

tributee who owes him debts exceeding the amount of his distributive share, even if before contracting such debts he executed to the administrator an assignment of such share in fraud of creditors. Nickerson *v.* Chase, 122 Mass. 296; Henshaw *v.* Whitney, 11 Gray (Mass.) 223.

A surety on a bond given by a distributee to the estate may in equity compel the administrator to apply the distributee's share toward the satisfaction of the bond. Allen *v.* Smitherton, 41 N. C. 341.

A debt due from the husband of a legatee or distributee cannot be deducted from her legacy or distributive share (Thibodaux's Succession, 10 La. Ann. 653. See Haage's Appeal, 17 Pa. St. 181; Tiernan's Estate, 31 Pittsb. Leg. J. (Pa.) 185), although it has been held that it may be set up by cross bill, before final distribution, that the distributive share should not be paid on the ground that the husband's marital rights had attached and that he was indebted to the estate in a greater sum than such share (Crutchfield *v.* Patten, 44 Ga. 65).

79. Goodman *v.* Benham, 16 Ala. 625; Dull's Estate, 137 Pa. St. 116, 20 Atl. 119; Strong *v.* Bass, 35 Pa. St. 333; Romig *v.* Erdman, 5 Whart. (Pa.) 112, 34 Am. Dec. 533; Ranking *v.* Barnard, 5 Madd. 32. See also DESCENT AND DISTRIBUTION, 14 Cyc. 136; and, generally, WILLS.

80. Nelson *v.* Murfee, 69 Ala. 598; Close *v.* Van Husen, 19 Barb. (N. Y.) 305.

Priority of right.— The personal representative is entitled to retain the share of an heir or distributee in such moneys in payment of a debt which the latter owes to the decedent's estate as against the claim of a judgment creditor of such heir or distributee (Nelson *v.* Murfee, 69 Ala. 598), and he has a right to subject lands of his intestate to the payment of a debt due by the heir to the estate in preference to the claims of a purchaser from the heir and also to the lien of a creditor of the heir attaching to the land on the death of the ancestor (Streety *v.* McCurdy, 104 Ala. 493, 16 So. 686).

81. Sanchez *v.* Forster, 133 Cal. 614, 65 Pac. 1077 (holding that where an administrator who is also an heir owes the estate more than the value of his distributive share, he should account for such share as a payment on the debt, and if he fails to do so the amount may be collected of his bondsmen); Hoffman *v.* Armstrong, 90 Md. 123, 44 Atl. 1012; Gosnell *v.* Flack, 76 Md. 423, 25 Atl. 411, 18 L. R. A. 158; Henry *v.* Fiske, 11 R. I. 318; Sims *v.* Doughty, 5 Ves. Jr. 243, 31 Eng. Reprint 567 (holding that one executor may retain from the legacy of his co-executor the amount due by the latter for a devastavit).

The amount in which an executor who is also a legatee misapplies the funds of the estate may be deducted from his legacy. Young *v.* Schelly, (N. J. Ch. 1891) 21 Atl. 1049; Grant *v.* Edwards, 92 N. C. 447.

82. Munden *v.* Bailey, 70 Ala. 63; Haskin *v.* Teller, 3 Redf. Surr. (N. Y.) 316; Smith *v.* Smith, 101 N. C. 461, 8 S. E. 128, 131, 133; McClendon *v.* Gomillon, Dudley (S. C.) 48.

83. Dubois *v.* Dubois, 6 Cow. (N. Y.) 494 (holding that a decree for distribution against the executor changes the character of the claim for the legacy or distributive share into one against the representative personally, and that, in an action of debt on the decree, the representative may set off a demand due to him in his own right); Fay *v.* Reager, 2 Sneed (Tenn.) 200 (holding this rule to apply even against an attaching creditor of the legatee); Preston *v.* Davis, 102 Va. 178, 45 S. E. 865 (holding that a debt due an administrator individually from a distributee may in equity be allowed as a payment on that distributee's share of the estate); Hooper *v.* Hooper, 32 W. Va. 526, 9 S. E. 937. See also DESCENT AND DISTRIBUTION, 14 Cyc. 122 note 4.

Advances by representative see *supra*, XI, H.

A debt due by a guardian in his individual capacity to the representative cannot be set off against the ward's distributive share, decreed to be paid to the guardian. Shriver *v.* Garrison, 30 W. Va. 456, 4 S. E. 660.

On an accounting between an administrator and a distributee, the amount found to be due the distributee by a commissioner to whom the accounting has been referred is properly credited on a judgment owing to the administrator by the distributee, as of the date when the commissioner closed his account, and not as of the date of the decree. Kent *v.* Kent, (Va. 1899) 34 S. E. 32.

84. Kidd *v.* Porter, 13 Ala. 91; Bradshaw's Appeal, 3 Grant (Pa.) 109; Richbourg *v.* Richbourg, Harp. Eq. (S. C.) 168; McLaughlin *v.* Barnes, 12 Wash. 373, 41 Pac. 62.

An assignment of the representative's claim after a decree of distribution does not prevent the court from compelling him to pay to the distributee her share on the ground that the representative has been garnished in a suit by the assignee against the distributee

unless the distributee consents,[85] or unless the debt is one for advances or disbursements by the representative.[86]

c. Retainer From Specific Personal Property. Specific personal property awarded to a distributee[87] or a specific legacy[88] is not subject to the representative's right of retainer so long as there are general assets.[89]

5. Application of Payments.[90] In accordance with the rule that debts must be paid before legacies or distributive shares, payments to a legatee or distributee should be applied to debts due from the estate to the legatee or distributee before being applied to the legacy or distributive share,[91] and to accrued interest on such debts[92] or distributive shares[93] before application to the principal.

6. Notice and Tender. The representative should notify legatees or distributees of his readiness to pay over,[94] and if from any cause he is uncertain who such legatees or distributees are he should institute proceedings to ascertain them.[95] After such notice the representative need not make a tender of the amount of the legacy or distributive share to one who is capable of asserting his rights,[96] especially where acceptance of a previous tender has been refused.[97]

7. To Whom Payment Should Be Made — a. In General. Payment should be made to the party entitled to receive the legacy or distributive share,[98] or to his

on the claim assigned. McLaughlin *v.* Barnes, 12 Wash. 373, 41 Pac. 62.

85. Kidd *v.* Porter, 13 Ala. 91.

86. Smith *v.* Huger, 1 Desauss. (S. C.) 247, holding that where an executor advances money and becomes bound for a legatee for sundry debts, and the latter dies insolvent, the executor may retain out of his legacy sufficient to indemnify him. And see *supra*, XI, H.

87. Rose *v.* O'Brien, 50 Me. 188.

88. Fonte *v.* Horton, 36 Miss. 350 (holding that the probate court will order the delivery of a specific legacy and will leave the executor to avail himself of his set-off by getting an injunction to stay the delivery); Clarke *v.* Cotton, 17 N. C. 51; Woodruff *v.* Snowden, 10 Ohio S. & C. Pl. Dec. 123, 7 Ohio N. P. 520 (holding that the indebtedness to the estate of a devisee of specific realty is not, without judgment and levy by the executor, a charge upon or set-off against the realty so specifically devised).

89. Clarke *v.* Cotton, 17 N. C. 51.

90. See, generally, Payment.

91. Coco's Succession, 32 La. Ann. 325.

Restitution of dowry is a debt of the estate to which payment must be applied before application to the widow's distributive share. Coco's Succession, 32 La. Ann. 325.

Voluntary payments to a guardian received by him on account of debts due to his ward as distributee of both real and personal estate may be applied *pro rata* to both debts. Ordinary *v.* McCullom, 3 Strobh. (S. C.) 494.

Where the testator's life insurance collected by his representatives is decreed to be paid by them to the beneficiary in the policy, who is also a legatee under the will, general payments made by the representative to such beneficiary and legatee should be first applied to extinguish the indebtedness for the amount collected on the policy. Atkins *v.* Atkins, 71 Vt. 422, 45 Atl. 1037.

Where the decedent was also guardian of a distributee, any sum paid to the latter by the representative will be presumed to be on account of his distributive share, particularly where the personal representative denies the fact of the guardianship, or that anything was due on that account. Latham *v.* Wilcox, 99 N. C. 367, 6 S. E. 711.

92. Coco's Succession, 32 La. Ann. 325; Geddis *v.* Irvine, 5 Pa. St. 508.

A specific legacy is a "debt" from the time it is due within the meaning of Ky. St. § 2219, which provides that partial payments on interest-bearing "debts" shall be first applied to the deduction of accrued interest. Morton *v.* Church Home for Females, etc., 70 S. W. 841, 24 Ky. L. Rep. 1122.

93. Schnell *v.* Schroder, Bailey Eq. (S. C.) 334. But see Cary *v.* Macon, 4 Call (Va.) 605, holding that where a husband gives a receipt for two hundred pounds in part of a bequest to his wife the payment should be applied to the principal and not to the interest.

94. Tilton *v.* American Bible Soc., 60 N. H. 377, 49 Am. Rep. 321; Walthour *v.* Walthour, 2 Grant (Pa.) 102.

95. Tilton *v.* American Bible Soc., 60 N. H. 377, 49 Am. Rep. 321.

96. Burtis *v.* Dodge, 1 Barb. Ch. (N. Y.) 77.

97. Burtis *v.* Dodge, 1 Barb. Ch. (N. Y.) 77. See, generally, Tender.

98. State *v.* Taggart, 88 Ind. 269; Banks *v.* McCarty, 5 Mo. 1; Elliott *v.* Lewis, 3 Edw. (N. Y.) 40, holding that the distributive share of two sons of a first husband should be paid to the second husband to whom they are indebted.

Persons entitled see Descent and Distribution, 14 Cyc. 34 *et seq.*; and, generally, Wills.

A legacy to "A., to be divided between himself and his family," may be paid to A. Cooper *v.* Thornton, 3 Bro. Ch. 186, 29 Eng. Reprint 479. And see Robinson *v.* Tickell, 3 Ves. Jr. 142, 7 Rev. Rep. 5, 32 Eng. Reprint 307.

Payment to the clerk of the county court is no defense in an action by the distributee

properly authorized representative[99] or assignee,[1] unless payment to a third person is directed by the legatee or distributee.[2] But if the persons entitled refuse to accept the amount found due them, the representative may be ordered to pay the amount into court and receive his discharge.[3]

b. Shares of Deceased Legatees or Distributees. The share of a deceased legatee or distributee is generally payable to his duly qualified representative;[4] although if no administration is had upon his estate, or creditors are in nowise prejudiced, it may be paid directly to his heirs or distributees.[5]

c. Shares of Absent or Unknown Legatees or Distributees. In cases where there are unknown or absent and unheard-from legatees or distributees it becomes the duty of the personal representative to invest the fund[6] or pay it into

under a Tennessee statute requiring that an administrator pay a distributive share to the parties entitled immediately after his settlement. Stewart *v.* Glenn, 3 Heisk. (Tenn.) 581.

99. Jacks *v.* Adair, 31 Ark. 616; Williams *v.* Cushing, 34 Me. 370.

Counsel appearing before an auditing judge for a distributee has authority to receive the amount awarded. Payment direct to the client is irregular and improper. Whiteside's Estate, 8 Pa. Dist. 274.

1. Webre's Succession, 35 La. Ann. 266; Sayles *v.* Best, 140 N. Y. 368, 35 N. E. 636 [*affirming* 20 N. Y. Suppl. 951]; Matter of Hodgman, 11 N. Y. App. Div. 344, 42 N. Y. Suppl. 1004.

Payment to a pretended assignee, in bad faith or without due heed, will not protect the representative. Dorsheimer *v.* Rorback, 23 N. J. Eq. 46.

The grantee of an heir apparent cannot be paid the interest of such heir which was conveyed to him before the decedent's death. *In re* Ryder, 141 Cal. 366, 74 Pac. 993.

2. Watson *v.* McClanahan, 13 Ala. 57; Cartmel *v.* Rench, 2 J. J. Marsh. (Ky.) 118.

3. Gready's Estate, 14 Phila. (Pa.) 259.

4. *Alabama.*— McConico *v.* Cannon, 25 Ala. 462.

Connecticut.— Kingsbury *v.* Scovill, 26 Conn. 349.

Iowa.— Moore *v.* Gordon, 24 Iowa 158.

Maine.— Grant *v.* Bodwell, 78 Me. 460, 7 Atl. 12.

Massachusetts.— Newcomb *v.* Williams, 9 Metc. 525; Foster *v.* Fifield, 20 Pick. 67.

Missouri.— Hanenkamp *v.* Borgmier, 32 Mo. 569.

New York.— Matter of Hodgman, 11 N. Y. App. Div. 344, 42 N. Y. Suppl. 1004.

Ohio.— Banning *v.* Gotshall, 62 Ohio St. 210, 56 N. E. 1030.

Pennsylvania.— Sweed's Estate, 10 Pa. Co. Ct. 463; Stokes' Estate, 3 Pa. Co. Ct. 193.

Tennessee.— Puckett *v.* James, 2 Humphr. 565.

England.— Bailey *v.* Hammond, 7 Ves. Jr. 590, 32 Eng. Reprint 237.

See 22 Cent. Dig. tit. "Executors and Administrators." § 1241. See also DESCENT AND DISTRIBUTION, 14 Cyc. 109; and, generally, WILLS.

A distribution on the presumption of death may be decreed where a person who if living would have been entitled to a distributive share has been absent and unheard of for a long period of years previous to the death of the decedent. Morrison's Estate, 12 Montg. Co. Rep. (Pa.) 121; Burns *v.* Ford, 1 Bailey (S. C.) 507.

5. Maxwell *v.* Craft, 32 Miss. 307 (holding that where a distributee dies before receiving his distributive share, leaving the same heirs as the intestate, owing no debts, and owning no property but his distributive share of the intestate's estate, distribution of his estate should be made directly to the heirs and not to the administrator); Rouggley *v.* Tiechmann, 10 Mo. App. 257; Sweed's Estate, 10 Pa. Co. Ct. 463; Beck's Estate, 16 Lanc. L. Rev. (Pa.) 215; Robertson *v.* Gillenwaters, 85 Va. 116, 7 S. E. 371. But see *In re* Lane, 20 N. Y. Suppl. 78, 2 Connoly Surr. (N. Y.) 266, holding that where there is a sum to be distributed to an estate, of which no administrator has been appointed, there is no person to whom the share can be decreed to be paid, and in such case the administrator must hold it until someone entitled to receive it shall appear, when it will be the subject of further accounting.

Where a widow dies pending the distribution of her husband's estate consisting only of community property, the decree distributing his estate may direct a payment of the widow's interest to her heirs, none of her creditors objecting. McClellan *v.* Downey, 63 Cal. 520.

Upon the presumption of death of an heir from absence, his share may be divided among the other heirs, upon their executing a refunding bond to indemnify the executor against the claim of the absent heir. Norman *v.* Cunningham, 5 Gratt. (Va.) 63. And see McCartee *v.* Camel, 1 Barb. Ch. (N. Y.) 455.

6. Walthour *v.* Walthour, 2 Grant (Pa.) 102; Miles' Estate, 2 Pa. Dist. 103, 12 Pa. Co. Ct. 383; Vogdes' Estate, 6 Pa. Co. Ct. 441, 23 Wkly. Notes Cas. (Pa.) 471; Lyon *v.* Magagno, 7 Gratt. (Va.) 377. But see Waggener *v.* Hardin, 2 B. Mon. (Ky.) 153, holding that administrators might make a valid allotment of the slaves of their intestate in the absence of a part of the distributees, and an allotment thus made could not be canceled, so as to reinvest the administrator with the legal title, after the slaves had passed into the *bona fide* possession of a third person.

court[7] or into the county or state treasury,[8] according to the statute, for the benefit of whoever may subsequently establish a legal right to it.[9]

d. Legatees or Distributees Under Disability — (i) *INFANTS.* As a general rule a bequest to or the distributive share of a minor, when due, can be legally paid only to his properly accredited and qualified guardian,[10] but if there is no properly

7. Moore *v.* Eure, 101 N. C. 11, 7 S. E. 471, 9 Am. St. Rep. 17; Gable's Appeal, 40 Pa. St. 231; Eroch's Estate, 1 Kulp (Pa.) 81; Vogdes' Estate, 6 Pa. Co. Ct. 441, 23 Wkly. Notes Cas. (Pa.) 471; Lyon *v.* Magagno, 7 Gratt. (Va.) 377.

8. State *v.* Taggart, 88 Ind. 269; Fuhrer *v.* State, 55 Ind. 150; Dorr *v.* Com., 1 Mass. 293; *In re* Bomino, 83 Mo. 433; Matter of Sackett, 38 Misc. (N. Y.) 463, 77 N. Y. Suppl. 1030 (also holding that payment to the surrogate in such cases does not discharge the representative); Matter of Culver, 22 Misc. (N. Y.) 217, 49 N. Y. Suppl. 820; Matter of Lane, 20 N. Y. Suppl. 78, 2 Connoly Surr. (N. Y.) 266.

A distributee is not "unknown" within the meaning of a statute providing for the payment to the state treasurer of a distributive share, where the person entitled thereto is unknown, where the distributee is an estate of which no administrator has been appointed. Matter of Lane, 20 N. Y. Suppl. 78, 2 Connoly Surr. (N. Y.) 266.

In England under the present practice, where it is doubtful to whom a legacy is payable, the better course is not by payment into court under the Trustee Relief Act, but by an administrative summons, waiving accounts, simply for the purpose of obtaining the decision of the judge, or, after taking out such summons, where both parties agree, by submitting a statement of facts in the nature of a special case for the opinion of the judge. *In re* Birkett, 9 Ch. D. 576, 47 L. J. Ch. 846, 39 L. T. Rep. N. S. 418, 27 Wkly. Rep. 164.

A legacy to an infant who dies before it is payable, and for whom no administrator has been appointed, will be ordered to be paid into court for the benefit of whoever may establish a legal right to it. Matter of Morgan, 1 Misc. (N. Y.) 71, 22 N. Y. Suppl. 1064.

9. Matter of Morgan, 1 Misc. (N. Y.) 71, 22 N. Y. Suppl. 1064; Matter of Conway, 5 Dem. Surr. (N. Y.) 290, holding that money paid into the city treasury by a public administrator may be obtained by any person entitled thereto, whether in his own right or as assignee, by means of a special proceeding instituted by petition in the surrogate's court, under Code, § 2717.

Where the evidence is insufficient to determine whether a legatee is alive or dead, or whether he left issue entitled to his share, the remainder of the estate may be distributed and the share of such legatee deposited with the controller, until proper proof can be made. Dunn *v.* Travis, 56 N. Y. App. Div. 317, 67 N. Y. Suppl. 743.

10. *Delaware.*— Spruance *v.* Darlington, 7 Del. Ch. 111, 30 Atl. 663.

Florida.— Moore *v.* Hamilton, 4 Fla. 112.

Kentucky.— Edmonds *v.* Morrison, 5 Dana 223 (holding that payment to an illegally appointed guardian will not exonerate the executor unless the ward adopts his act); Thrasher *v.* Lewis, 13 Ky. L. Rep. 926.

Missouri.— Landis *v.* Eppstein, 82 Mo. 99; Henry *v.* State, 9 Mo. 778.

New Jersey.— Rogers *v.* Traphagen, 42 N. J. Eq. 421, 11 Atl. 336.

New York.— Davis *v.* Crandall, 101 N. Y. 311, 4 N. E. 721; Genet *v.* Tallmadge, 1 Johns. Ch. 3; Hoyt *v.* Hilton, 2 Edw. 202; Matter of Moody, 2 Dem. Surr. 624.

North Carolina.— Walker *v.* Kelly, 7 N. C. 265.

Ohio.— Campbell *v.* English, Wright 119, holding that under the Ohio statutes a guardian for a minor under twelve years has no authority to receive her distributive share after she attains that age.

Pennsylvania.— *In re* Gitt, 203 Pa. St. 263, 52 Atl. 251; Senseman's Appeal, 21 Pa. St. 331; Beishlag's Estate, 7 Pa. Dist. 127, 20 Pa. Co. Ct. 583.

South Carolina.— Crenshaw *v.* Crenshaw, 4 Rich. Eq. 14; Johnson *v.* Johnson, 2 Hill Eq. 277, 29 Am. Dec. 72.

Vermont.— Sparhawk *v.* Buell, 9 Vt. 41.

Virginia.— See Hannah *v.* Boyd, 25 Gratt. 692.

Canada.— Huggins *v.* Law, 14 Ont. App. 383 [*reversing* 11 Ont. 565].

See 22 Cent. Dig. tit. "Executors and Administrators," § 1243.

Payment to a guardian individually is improper; it should be to him in his fiduciary capacity. Edwards *v.* Williams, 39 S. C. 86, 17 S. E. 457.

An illegal arrangement between guardian and administrator in reference to the payment of the minor's distributive share, although consummated, does not relieve the administrator from personal liability to the administrator of the minor for the latter's share. Asberry *v.* Asberry, 33 Gratt. (Va.) 463.

Payment to a third person as agent or attorney of the minor is erroneous, even though made under the probate court's decree. Tapley *v.* McGee, 6 Ind. 56; Decrow *v.* Moody, 73 Me. 100.

A guardian ad litem may be directed to receive the minor's legacy where the amount thereof is too small to pay the expense of having a guardian appointed. Cook *v.* First Universalist Church, 23 R. I. 62, 49 Atl. 389.

An order of the probate court is a necessary prerequisite, under some statutes, to the payment of an infant's distributive share to his general guardian. Lowman *v.* Elmira, etc., R. Co., 85 Hun (N. Y.) 188, 32 N. Y. Suppl.

qualified general guardian it may be paid into court[11] or to the county treasurer,[12] as provided by statute. It should not be paid to the minor's parents as such,[13] nor to the minor individually.[14]

(II) *MARRIED WOMEN.* At common law the husband might generally receive the legacy or distributive share of his wife by virtue of his marital rights in her personalty;[15] but under the modern statutes the rule is otherwise; the wife is entitled to receive payment in her own right,[16] and a payment of her legacy or

579; Willcox *v.* Smith, 26 Barb. (N. Y.) 316. But the probate court cannot direct the legacy to be applied to the support or education of the infant legatee. Matter of Patton, 7 Misc. (N. Y.) 377, 28 N. Y. Suppl. 160.

The acceptance of a claim due the estate as part of the minor's legacy or distributive share cannot be made by the guardian under a statute permitting an adult legatee or distributee to accept such claim. Bescher *v.* State, 63 Ind. 302.

A foreign guardian may receive his ward's legacy or distributive share in a domestic jurisdiction, without securing a domestic appointment, where it appears that he has properly qualified in the foreign jurisdiction and that there are no domestic debts chargeable against the funds. State *v.* Whitehouse, 75 Conn. 410, 53 Atl. 897; Gardiner *v.* Thorndike, 183 Mass. 81, 66 N. E. 633. But see Morrell *v.* Dickey, 1 Johns. Ch. (N. Y.) 153. Pub. St. (Mass.) c. 139, §§ 39, 40, providing that when an infant is a nonresident and has no guardian within the commonwealth, and has personal estate in the hands of an administrator within the commonwealth, such administrator may pay over the estate to a guardian appointed in the state where the ward resides, upon such terms as the probate court may impose, do not make a voluntary payment to the guardian illegal, but are intended merely to enable the administrator to obtain a domestic decree which will protect him. Gardiner *v.* Thorndike, *supra*.

Until a legacy is payable the executor cannot relieve himself of responsibility as executor by paying it over to the guardian of the legatee (Branch *v.* Holcraft, 14 Ind. 237; Hinkley *v.* Probate Judge, 45 Mich. 343, 7 N. W. 907; Swope *v.* Chambers, 2 Gratt. (Va.) 319); and if the executor be also guardian, he cannot, before the legacy is payable, elect to hold it as guardian so as to relieve his sureties as executor and charge his sureties as guardian (Swope *v.* Chambers, *supra*).

11. Toler *v.* Landon, 3 Dem. Surr. (N. Y.) 337; McCloskey *v.* Reid, 4 Bradf. Surr. (N. Y.) 334. And see *Re* Parr, 11 Ont. Pr. 301.

A New York statute making this provision contemplates such payment into court only when the subject-matter of the legacy is capable of investment for the infant's benefit. Toler *v.* Landon, 3 Dem. Surr. 337.

A testamentary guardian cannot receive a minor's legacy or distributive share under some statutes; but in default of a general guardian the money must be paid into court. Sackett's Estate, Tuck Surr. (N. Y.) 84.

12. Lowman *v.* Elmira, etc., R. Co., 85 Hun (N. Y.) 188, 32 N. Y. Suppl. 579.

13. *Alabama.*—Nelson *v.* Beck, 54 Ala. 329; Lang *v.* Pettus, 11 Ala. 37.

Delaware.— Slaughter *v.* Slaughter, 7 Houst. 482, 32 Atl. 857; Spruance *v.* Darlington, 7 Del. Ch. 111, 30 Atl. 663.

Georgia.— Williams *v.* Adams, 94 Ga. 270, 21 S. E. 526.

Illinois.— Perry *v.* Carmichael, 95 Ill. 519.

Massachusetts.— Miles *v.* Boyden, 3 Pick. 213.

New Jersey.— McKnight *v.* Walsh, 23 N. J. Eq. 136.

New York.— *In re* Hobson, 131 N. Y. 575, 30 N. E. 63; Furman *v.* Coe, 1 Cai. Cas. 96; Whitlock *v.* Whitlock, 1 Dem. Surr. 160.

South Carolina.— Johnson *v.* Johnson, 2 Hill Eq. 277, 29 Am. Dec. 72; Cannon *v.* Ulmer, Bailey Eq. 204.

Vermont.— Sparhawk *v.* Buell, 9 Vt. 41.

England.— Rotheram *v.* Fanshaw, 3 Atk. 628, 26 Eng. Reprint 1161; Dagley *v.* Tolferry, 1 P. Wms. 285, 24 Eng. Reprint 391. But see Ker *v.* Ruxton, 16 Jur. 491, holding that a legacy to an infant for mourning may be ordered to be paid to his father, he undertaking to apply it for the benefit of the infant.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1243.

Where the widow is co-legatee with her only child, who lives with her, it is not devastavit for the executor to deliver the legacy (a slave) to her. Villard *v.* Robert, 1 Strobh. Eq. (S. C.) 393.

14. Quinn *v.* Moss, 12 Sm. & M. (Miss.) 365; Sparhawk *v.* Buell, 9 Vt. 41. And see Philips *v.* Paget, 2 Atk. 80, 26 Eng. Reprint 449; Davies *v.* Austen, 3 Bro. Ch. 178, 29 Eng. Reprint 475, 1 Ves. Jr. 247, 30 Eng. Reprint 325.

15. *Alabama.*— Montgomery *v.* Givhan, 24 Ala. 568.

Mississippi.— McGee *v.* Ford, 5 Sm. & M. 769; Wade *v.* Grimes, 7 How. 425; Lowry *v.* Houston, 3 How. 394.

Missouri.— Banks *v.* McCarty, 5 Mo. 1.

South Carolina.— *Ex p.* Stephens, 1 McCord 87; Heath *v.* Heath, 2 Hill Eq. 100; Cannon *v.* Ulmer, Bailey Eq. 204.

England.— Stephens *v.* Totty, 1 Cro. Eliz. 908; Palmer *v.* Trevor, 1 Vern. 261, 23 Eng. Reprint 456.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1244.

16. Bunger *v.* Petty, (Ky. 1893) 23 S. W. 961; Anderson *v.* Gregg, 44 Miss. 170. See, generally, HUSBAND AND WIFE.

A legacy for a wife's "sole and separate use" cannot be paid to the husband, but the

distributive share to her husband will not bind her unless she has authorized or ratified it.[17]

J. Payment of Annuities[18] — **1. Duties of Executors in General.** An executor not expressly charged under the will has no concern with bequests of annuities charged upon the land,[19] but as to annuities charged upon personal estate in his hands, or upon property under his control generally, the executor may be ordered to make periodical payments,[20] or settle arrears,[21] or to give security for the payment of future instalments,[22] or for restoring the principal to the general legatees on the annuitant's death.[23] An executor is also charged with the duty of setting apart and investing a fund with which to raise an annuity provided for by the will, where the will fails to designate such fund or to specify who shall invest it.[24]

2. Increase or Reduction of Annuity. The executor may have power under the provisions of the will to increase the annuity at his discretion;[25] but the annuity cannot be reduced thereafter under such power.[26] A release executed by an annuitant to part of the executors does not operate to reduce the annuity, but only to discharge the released executors from liability.[27]

K. Effect of Payment or Distribution in General — 1. Conclusiveness and Effect in General. A payment or distribution properly made and receipted for is binding on the representative,[28] unless it can be successfully impeached for

wife should appear in court and elect whether to be paid or to have the fund secured for her sole use and benefit. Gest *v.* Williams, 4 Del. Ch. 55. And see West *v.* Cauthen, 9 S. C. 45, holding that the *corpus* of a legacy given to a married woman "for her sole and separate use" could not be paid to her during coverture, but could only be paid to a trustee legally appointed.

17. Nevius *v.* Gourley, 95 Ill. 206; Crawford *v.* Redus, 54 Miss. 700; Anderson *v.* Gregg, 44 Miss. 170. See, generally, Husband and Wife.

18. **Annuities generally** see Annuities, 2 Cyc. 458.

19. Robinson *v.* McIver, 63 N. C. 645; Stewart's Appeal, 110 Pa. St. 410, 6 Atl. 321; Hocker's Estate, 13 Phila. (Pa.) 292.

20. Eichelberger's Estate, 170 Pa. St. 242, 32 Atl. 605.

The present value of an annuity in money cannot be ordered to be paid to the devisee of an annuity for life in making equality of distribution among heirs and devisees of an estate left undevised. Bowles *v.* Winchester, 13 Bush (Ky.) 1.

21. Colwell's Estate, 4 Pa. Co. Ct. 381. And see Annuities, 2 Cyc. 464.

22. Colwell's Estate, 4 Pa. Co. Ct. 381.

23. Love *v.* Love, 3 Hayw. (Tenn.) 13.

24. Leslie *v.* Moser, 163 Ill. 502, 45 N. E. 417 [*reversing* 62 Ill. App. 555]; Claggett *v.* Hardy, 3 N. H. 147; *Ex p.* McComb, 4 Bradf. Surr. (N. Y.) 151; Love *v.* Love, 3 Hayw. (Tenn.) 13; Harbin *v.* Masterman, [1896] 1 Ch. 351, 65 L. T. Ch. 195, 73 L. T. Rep. N. S. 591, 44 Wkly. Rep. 421. And see Hindman *v.* State, 61 Md. 471.

Estoppel to object to the sufficiency of an appropriation for an annuity does not result from the annuitant's petitioning the probate court to compel the executors to account for arrears and to reinvest a portion of the fund, and by his receiving checks for interest, where at the time of such acts the appropriation did not appear to be insufficient. Merritt *v.* Merritt, 48 N. J. Eq. 1, 21 Atl. 128.

Where no decree or award has been made in favor of the annuitant, an executor cannot be peremptorily ordered to pay an annuity; but where he fails to comply with a previous order directing the investment of a fund for the annuitant as directed by the will, he will be again ordered to set apart and invest the fund. Vautier's Estate, 14 Phila. (Pa.) 259.

The amount to be set apart to secure an annuity must be such as in the judgment of the court is not only sufficient at the time to meet the annuity together with the charges and expenses, but also as is likely to continue to be sufficient for these purposes. Hanbest's Estate, 5 Pa. Dist. 691, 18 Pa. Co. Ct. 534.

25. Mason *v.* Mason, 4 Sandf. Ch. (N. Y.) 623; Case *v.* Towle, 2 Sandf. Ch. (N. Y.) 426, also holding that, where the executor has exercised his discretion and fixed the limit of the annuity, neither a subsequent administrator nor the court acting on the fund could increase it beyond that limit.

26. Mason *v.* Mason, 4 Sandf. Ch. (N. Y.) 623, holding this to be true, although the increase was made in the belief that it was revocable.

27. Cocks *v.* Haviland, 7 N. Y. Suppl. 870, 871.

28. Larue *v.* White, 8 Dana (Ky.) 45 (holding also that the report of an auditor without the vouchers to sustain it is not sufficient to outweigh the admission of the executor against his interest and show that the settlement was not made understandingly, or is not conclusive); Tintle *v.* Fulmer, 4 Lanc. L. Rev. (Pa.) 361; Rosborough *v.* Rutland, 2 S. C. 378.

Release from executor's debt. — In the absence of special circumstances rebutting the presumption of negligence, an executor who

fraud,[29] mistake,[30] or improper means used in procuring it.[31] It is also binding on the legatee or distributee who accepts the payment or distribution,[32] unless made through fraud[33] or mutual mistake;[34] and estops him from claiming as his own property included in the distribution;[35] or from assailing the intervening rights of third persons;[36] or from objecting to the representative's course of distribution, however irregular,[37] at least unless he first restores to the representative what he has received.[38]

2. Rights and Liabilities of Representative After Payment or Distribution — a. In General. After full payment or distribution the representative is released from further liability, for acts done in his representative capacity, to the legatees or distributees,[39] or to their creditors;[40] and he is precluded from thereafter exer-

voluntarily distributes property charged with his own debt thereby releases the property from the charge. Harkins *v.* Hughes, 60 Ala. 316.

29. Larue *v.* White, 8 Dana (Ky.) 45.

30. Larue *v.* White, 8 Dana (Ky.) 45; Hammond *v.* Hammond, 169 Mass. 82, 47 N. E. 535, holding that where executors have by mistake made payments to a legatee from the income of the estate, which should have been made from the principal, they are entitled to retain money from the proper fund to make such payments good.

31. Larue *v.* White, 8 Dana (Ky.) 45.

32. Little *v.* Little, 161 Mass. 188, 36 N. E. 795; Fort *v.* Battle, 13 Sm. & M. (Miss.) 133; *In re* Markle, 187 Pa. St. 639, 41 Atl. 304; Sager *v.* Warley, Rice Eq. (S. C.) 26. And see Slack *r.* Wiggin, 1 Dem. Surr. (N. Y.) 568.

The acceptance of a partial payment does not preclude a suit for the balance. Marshall *r.* Moseley, 21 N. Y. 280.

33. Potter's Appeal, 56 Conn. 1, 12 Atl. 513, 7 Am. St. Rep. 272.

34. Speight *v.* Gatling, 17 N. C. 5; Maldaner *r.* Beurhaus, 108 Wis. 25, 84 N. W. 25, holding that in such a case the legatees may maintain a bill for redistribution. But see Hopson *v.* Com., 7 Bush (Ky.) 644.

35. Patterson *v.* Dushane, 137 Pa. St. 23, 20 Atl. 538.

36. McLeod *r.* Johnson, 28 Miss. 374.

37. McLeod *r.* Johnson, 28 Miss. 374; Fort *r.* Battle, 13 Sm. & M. (Miss.) 133; Sager *v.* Warley, Rice Eq. (S. C.) 26.

A sale of decedent's business interests made by the representative in good faith and for which the purchaser's bond is taken cannot be impeached by a distributee after he has participated in the distribution of the sums collected on such bond. Wilson's Appeal, 4 Pennyp. (Pa.) 432.

Long lapse of time strengthens the situation as against reopening a division of the estate, notwithstanding irregularities. Smith *r.* Jarnagin, 1 Tenn. Cas. 79, Thomps. Cas. (Tenn.) 135.

38. McLeod *r.* Johnson, 28 Miss. 374.

39. *Indiana.*— Ray *r.* Doughty, 4 Blackf. 115.

Kentucky.— Mitchell *r.* Miller, 6 Dana 79; Mountjoy *r.* Hinkston, Litt. Sel. Cas. 214.

New York.— *In re* Quinn, 9 N. Y. Suppl. 550, holding that an executor who has turned over testator's business to the legatees cannot be called on by a devisee to account for the legatees' failure to comply with a provision of the will which directed them to apply one third of the net profits annually to the payment of a mortgage on the land devised to her.

South Carolina.— Sager *v.* Warley, Rice Eq. 26.

Vermont.— Beardsley *v.* Knight, 10 Vt. 185, 33 Am. Dec. 193.

England.— Knatchbull *v.* Fearnhead, 1 Jur. 687, 3 Myl. & C. 122, 14 Eng. Ch. 122, 40 Eng. Reprint 871.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1254.

Where a will is subsequently discovered and proved, the executor cannot compel the administrator, who has *bona fide* and duly distributed, to account for such property, but proceedings should rather be against the distributees themselves. Barkaloo *r.* Emerick, 18 Ohio 268.

Where the heirs refuse to accept a certain note and mortgage as part of their shares and money is given to them instead, the representative becomes absolute owner of such note and mortgage, and the heirs to whom it is delivered, without assignment or intent to transfer, cannot sue upon it. Blakely *v.* Carter, 70 Wis. 540, 36 N. W. 329.

Future income of the estate need no longer be accounted for by the representative (Johnson *r.* Johnson, 2 Hill Eq. (S. C.) 277, 29 Am. Dec. 72), nor should he be permitted to retain possession for the purpose of gathering an ungathered crop (Murdock *r.* Washburn, 1 Sm. & M. (Miss.) 546).

On proof of distribution the representative is entitled to have satisfaction entered. Carroll *r.* Moore, 7 Ala. 615.

A decree directing payment of a balance in the executor's hands in execution of trusts in the will is not a payment so as to discharge him or so as to exonerate the fund distributable and charge the person to whom it is payable; nothing short of actual payment or some act of the distributee to its prejudice will exonerate the fund. Clapp *r.* Meserole, 1 Abb. Dec. (N. Y.) 362, 1 Keyes (N. Y.) 281, 27 How. Pr. (N. Y.) 600 note [*affirming* 38 Barb. 661].

40. Mosely *r.* McGough, 69 Ga. 748 (holding that garnishment served afterward on the executor or administrator by a creditor of the

cising control, as representative, over the property distributed.[41] And if assets fully set apart remain in his possession, he holds them as agent or bailee of the legatee or distributee and not as representative.[42] Where a distributee is entitled to recover his share either from the personal representative or from a third person who has received the same and recovers it by action against the personal representative, the latter is subrogated to the distributee's rights against such third person.[43]

b. Delivery to Legatee For Life. Delivery to a legatee or tenant for life amounts also to a delivery to the remainder-man and in general discharges the representative from any further duty or liability with respect to the legacy,[44] except where it was his duty to invest the fund and pay over the income only to the legatee for life,[45] and in such case the remainder man is not guilty of laches in not claiming the fund until after the death of the life-tenant, although he is aware that the representative has failed to invest the fund as directed by the will and has paid over the principal to the life-tenant.[46]

L. Improper, Erroneous, or Premature Payment or Distribution — 1. In General. A representative is personally responsible to the aggrieved person for an improper or erroneous payment or distribution,[47] unless the latter is

distributee comes too late); Evans *v.* Robinson, 5 B. Mon. (Ky.) 589.

41. Murdock *v.* Washburn, 1 Sm. & M. (Miss.) 546; Hunter *v.* Lawrence, 11 Gratt. (Va.) 111, 62 Am. Dec. 640.

The representative cannot sell assets after finally delivering them to the residuary legatee or distributee. McCants *v.* Bee, 1 McCord Eq. (S. C.) 383, 16 Am. Dec. 610.

A purchase back with funds of the estate of property distributed is made at the representative's own risk; and he must be held personally liable for any loss thereon. *In re* Herrick, 12 N. Y. Suppl. 105.

42. Harkins *v.* Hughes, 60 Ala. 316; Woodruff *v.* Young, 31 Hun (N. Y.) 420; Soley's Estate, 11 Phila. (Pa.) 144, holding that property returned to one of two co-executors to hold cannot be recovered from the other.

43. Stayner *v.* Bower, 42 Ohio St. 314, holding that, where a husband had received property from his wife's father as advancements on her share of her father's estate, she was entitled on the latter's death, when her distributive share was ascertained, to compel her husband to account, or to collect her share in full from the administrator; and where the administrator paid in full, he was subrogated to her rights against her husband.

44. *Alabama.*— Hunter *v.* Green, 22 Ala. 329.

Louisiana.—Piffet's Succession, 39 La. Ann. 466, 1 So. 889; Samuels *v.* Brownlee, 36 La. Ann. 228.

Massachusetts.— Lynde *v.* Estabrook, 7 Allen 68.

Mississippi.— Lusk *v.* Swayze, 35 Miss. 155; Andrews *v.* Brumfield, 32 Miss. 107; Probate Judge *v.* Alexander, 31 Miss. 297.

New Hampshire.— Weeks *v.* Jewett, 45 N. H. 540.

New Jersey.— Dodson *v.* Sevars, 52 N. J. Eq. 611, 30 Atl. 477.

Texas.— Blackwell *v.* Blackwell, (Civ. App. 1893) 23 S. W. 31.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1255.

After the death of the tenant for life, the executor, who has delivered over to him property given by the will, cannot maintain an action against a third person to recover the property for the parties entitled to it under the will. Weeks *v.* Jewett, 45 N. H. 540.

Surrender to remainder-man.— Where an executrix who is also tenant for life surrenders her estate to the remainder-men, and a division is made among them by their consent, they cannot afterward complain of the surrender of the life-estate as a devastavit. Garrett *v.* Garrett, 1 Strobh. Eq. (S. C.) 96.

45. Mercer *v.* Glass, 25 S. W. 114, 15 Ky. L. Rep. 710; Wooten *v.* Burch, 2 Md. Ch. 190; Jones *v.* Simmons, 42 N. C. 178.

46. Montgomery's Appeal, 77 Pa. St. 370.

47. *Alabama.*—Hemphill *v.* Moody, 62 Ala. 510, where credit on account therefor was denied.

Maryland.—Hindman *v.* State, 61 Md. 471; Hanson *v.* Worthington, 12 Md. 418.

New Jersey.— Thiefes *v.* Mason, 55 N. J. Eq. 456, 37 Atl. 455 (holding that, where an executor does not prove the will but disposes of the personal estate otherwise than as directed by the will, he is responsible to the legatee for conversion, as is also his executor or administrator, but the latter is not responsible to the administrator with the will annexed of the first testator); Ashhurst *v.* Field, 26 N. J. Eq. 1 (where credit on account was denied).

New York.— Matter of Baker, 57 N. Y. App. Div. 44, 68 N. Y. Suppl. 44, holding an executor responsible for a loss to a trust fund caused by his distributing so as to benefit the residuary estate at the expense of such fund.

South Carolina.— Boone *v.* Durand, 1 Desauss. 588.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1257.

Poverty of a legatee does not exonerate the executor from making him a payment unauthorized by the will to the injury of other

estopped from objecting thereto.[48] If he distributes to the wrong person or omits one entitled to share he may be compelled to pay again to the right person;[49] or if he pays to one legatee or distributee more than is due him, in legal contemplation the sum overpaid is in his hands as assets which he must pay over to the persons entitled thereto.[50] But if the error or inequality has occurred on partial distribution, it may be rectified on a subsequent or final distribu-

legatees interested. Wallis *v.* Cowell, 25 N. C. 323.

Yielding negligently to a process of court and turning over a distributive share without appearing and contesting the proceedings may render the representative personally liable. Fisher *v.* Ritchey, 64 N. C. 172.

48. *Alabama.*— Colbert *v.* Daniel, 32 Ala. 314, legatee present and assenting to an allotment under an erroneous construction of the will.

Kentucky.— Hopson *v.* Com., 7 Bush 644.

New York.— Matter of Turfler, 1 Misc. 58, 23 N. Y. Suppl. 135, Pow. Surr. 389.

North Carolina.—Wallis *v.* Cowell, 25 N. C. 323.

Ohio.— Brent *v.* First, 41 Ohio St. 436.

Pennsylvania.—Rankin's Estate, 27 Pittsb. Leg. J. 45.

South Carolina.— Garrett *v.* Garrett, 1 Strobh. Eq. 96.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1257 *et seq.*

Payment of a contingent legacy to the guardian of a minor does not estop a surviving residuary legatee thereafter entitled to the legacy from maintaining an action against the executor to enforce his interest, although he had notice and was present at the settlement of the executor's account. Cowdin *v.* Perry, 11 Pick. (Mass.) 503.

49. *Kentucky.*— Keiningham *v.* Keiningham, 71 S. W. 497, 24 Ky. L. Rep. 1330.

Massachusetts.— Cowdin *v.* Perry, 11 Pick. 503.

Michigan.— Richardson *v.* Richardson, 100 Mich. 364, 59 N. W. 178, representative of an heir distributing among the latter's legatees funds which such heir had received as attorney in fact of his coheirs.

Mississippi.— Garner *v.* Lansford, 12 Sm. & M. 558.

New York.—Matter of Robertson, 51 N. Y. App. Div. 117, 64 N. Y. Suppl. 385 [*affirmed* in 165 N. Y. 675, 59 N. E. 1129]; Lawrence *v.* Brinkerhoff, 2 N. Y. Leg. Obs. 122.

North Carolina.— Wade *v.* Dick, 33 N. C. 313, holding this to be true, although he makes such distribution in good faith upon his own judgment or upon the judgment of his counsel.

Ohio.— Negley *v.* Gard, 20 Ohio 310; *In re* Koehnken, 25 Ohio Cir. Ct. 245; Rote *v.* Warner, 17 Ohio Cir. Ct. 350, 9 Ohio Cir. Dec. 540.

Pennsylvania.—Bear's Estate, 9 Pa. Super. Ct. 492, 43 Wkly. Notes Cas. 469, distribution to unauthorized representative of a deceased distributee. But see Sutter's Estate, 5 Pa. Co. Ct. 591.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1261.

Ignorance of the existence of the ones omitted does not relieve the administrator from liability to them for their shares (Campbell *v.* Reed, 24 Pa. St. 498; Laurason *v.* Davenport, 2 Call (Va.) 95), as he is bound to make diligent inquiry after such persons, especially where he has knowledge of their having removed to a distant part of the state years before (Campbell *v.* Reed, 24 Pa. St. 498).

A decree in favor of a distributee who has been erroneously excluded from distribution should be first against the distributees respectively for the share of each, and then against the administrators for what they do not pay, and should be estimated upon the value of the property at the time of division, when he was excluded. Powell *v.* Powell, 9 Dana (Ky.) 12.

50. *Alabama.*— Sellers *v.* Smith, 11 Ala. 264.

Maine.— Smith *v.* Lambert, 30 Me. 137.

New Hampshire.— Griswold *v.* Chandler, 5 N. H. 492.

New Jersey.— See McKnight *v.* Walsh, 24 N. J. Eq. 498 [*affirming* 23 N. J. Eq. 136].

New York.— *In re* Underhill, 117 N. Y. 471, 22 N. E. 1120 [*affirming* 6 N. Y. Suppl. 133]; Adair *v.* Brimmer, 74 N. Y. 539; Matter of Saltus, 3 Abb. Dec. 243, 3 Keyes 500; Matter of Robertson, 51 N. Y. App. Div. 117, 64 N. Y. Suppl. 385 [*affirmed* in 165 N. Y. 675, 59 N. E. 1129]; Johnson *v.* Weir, 34 Misc. 683, 70 N. Y. Suppl. 1020. See *In re* Tobin, 16 N. Y. Suppl. 462, Pow. Surr. 5, holding that where testator gave his wife one thousand dollars and the remainder of his estate to his brother, and testator and his wife had an account in a bank in their joint names, in which each deposited, having independent sources of revenue, and after his death she drew out the balance, there being no proof as to how much belonged to each, the presumption was that each owned half, and, the executors having paid the legacy of one thousand dollars without retaining the brother's half interest therefrom, a decree should be made providing that the executors should execute an assignment to the brother of such interest, to be held by him to his own use, but that the executor would not be charged personally therewith.

North Carolina.— Sanders *v.* Jones, 43 N. C. 246.

Pennsylvania.— Mayberry's Appeal, 33 Pa. St. 258; Ihmsen's Estate, 29 Pittsb. Leg. J. 218.

South Carolina.—Whitlock *v.* Whitlock, 13 Rich. Eq. 165; Stephenson *v.* Axson, Bailey Eq. 274.

Vermont.— Spaulding *v.* Wakefield, 53 Vt. 660, 38 Am. Rep. 709, holding that it is

tion;[51] and the excess may be retained from the future income or shares of the ones so overpaid.[52] The fact that the representative has accounted to one legatee or distributee for less than his legacy or distributive share does not give to another a greater interest in the residue than he was previously entitled to.[53] Nor does the fact that he has made overpayment to one legatee or distributee bind him to make like payments to others.[54]

2. Payment Under Will Subsequently Declared Invalid. An executor who comes into possession of property under a will duly authenticated and proved, and parts with it to one having a right to demand it, cannot be held liable to other heirs therefor, if the will be afterward proved invalid or void,[55] unless he had notice of a contest of the will at the time of the payment.[56] But the one receiving such property may be sued by other distributees for the difference between the amount to which he is entitled and the amount so received;[57] or if he is also a creditor of the estate the representative is entitled to credit for the amount so received in a settlement with him.[58]

3. Payment Before Order or Decree. Voluntary payments to distributees without an order or decree of court authorizing the same are made by the representative at his own peril,[59] although a subsequent decree in his favor will protect

waste and culpable negligence for an executor to deliver to legatees, in payment of one thousand dollars each, three bonds of the estate of that face value, but actually worth twelve hundred dollars each in the market, and he is liable to the estate for the loss, even though they were appraised at par.

Virginia.— Gallego *v.* Atty. Gen., 3 Leigh 450, 24 Am. Dec. 650.

United States.—Falls Bridge Turnpike Co. *v.* Adams, 8 Fed. Cas. No. 4,630, 1 Hayw. & H. 95; Moffit *v.* Varden, 17 Fed. Cas. No. 9,689, 5 Cranch C. C. 658.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1264.

Collection of excess.— An order directing executors who had overpaid certain legatees to pay the balance due to other legatees when they had collected the amounts overpaid creates an absolute obligation on the part of the executors to collect the sums overpaid within a reasonable time. Adams *v.* Turner, 12 S. C. 594.

An order for immediate payment to an unpaid legatee may be made without waiting until the executor has recovered from other legatees the excess paid them. Matter of Robertson, 51 N. Y. App. Div. 117, 64 N. Y. Suppl. 385 [*affirmed* in 165 N. Y. 675, 59 N. E. 1129].

The representative of a deceased executor cannot recover from the latter's successor in the administration the amount of overpayments made by the executor where the circumstances do not permit of a fair readjustment. Laird *v.* Moore, 27 Pa. St. 67.

A decree allowing an executor's account, in which he has credited himself with money paid to a legatee beyond his just proportion, furnishes no protection to the executor for making such payment. Smith *v.* Lambert, 30 Me. 137.

51. Leavens' Estate, 65 Wis. 440, 27 N. W. 324.

52. Grim's Appeal, 109 Pa. St. 391, 1 Atl. 212 [*affirming* 9 Pa. Co. Ct. 523]: Vanderford's Appeal, (Pa. 1888) 12 Atl. 491; Richardson's Estate, 12 Phila. (Pa.) 32.

53. Montgomery *v.* Givhan, 24 Ala. 568.

54. Anderson *v.* Piercy, 20 W. Va. 282.

55. Le Baron *v.* Fauntleroy, 2 Fla. 276; Poag *v.* Carroll, Dudley (S. C.) 1.

But payments without order of court to special legatees under a will subsequently annulled will not be recognized. Heffner's Succession, 49 La. Ann. 407, 21 So. 905.

56. Kelly *v.* Davis, 37 Miss. 76. And see Smith *v.* Stockbridge, 39 Md. 640, holding that, where a will which has been admitted to probate has been declared void by the court of appeals, a partial distribution made under an administration with the will annexed is void.

Liability for insurance and use of property. — Where an executor anticipates the law and turns over property in payment of a specific legacy, which is afterward declared void, he must answer for the insurance collected for an injury to the property by fire; but he should not be charged for the use of the property when it has not been damaged thereby. Turnipseed *v.* Sirrine, 60 S. C. 272, 38 S. E. 423.

57. Le Baron *v.* Fauntleroy, 2 Fla. 276.

58. Wood *v.* Nelson, 10 B. Mon. (Ky.) 229.

59. *Arkansas.*— McPaxton *v.* Dickson, 15 Ark. 41.

Louisiana.— Beatty *v.* Dufief, 11 La. Ann. 74, holding that payments without an order of court are irregular and not binding, unless shown to have liberated the estate from a legal charge.

Maryland.— Biays *v.* Roberts, 68 Md. 510, 13 Atl. 366.

Massachusetts.— Palmer *v.* Whitney, 166 Mass. 306, 44 N. E. 229; Defriez *v.* Coffin, 155 Mass. 203, 29 N. E. 516. And see Welch *v.* Adams, 152 Mass. 74, 25 N. E. 34, 9 L. R. A. 244.

Mississippi.— Lowry *v.* McMillan, 35 Miss. 147, 72 Am. Dec. 119.

him.[60] He may be entitled to credit, however, for the payments made, if they are correct and not more than the distributive share.[61]

4. Payment Under Order of Court. A payment or distribution in good faith in accordance with an order or decree of court will generally protect a representative and release him from further liability,[62] although the order or decree is subsequently reversed,[63] unless it merely orders distribution without determining the persons entitled or their shares,[64] or does not dispose of the whole estate.[65] But he is not protected if he makes payment or distribution in bad faith under an order which is void,[66] or which orders distribution before the payment of debts,[67] or which has been obtained by him in bad faith,[68] or where such payment or distribution is made before the time for appealing from the order has expired.[69]

5. Payment or Distribution Before Debts Are Paid. If a representative makes distribution to legatees or distributees without taking a refunding bond[70] before

Nebraska.— Boales *v.* Ferguson, 55 Nebr. 565, 76 N. W. 18.

See 22 Cent. Dig. tit. "Executors and Administrators." § 1259.

The mere fact that the payment was made in good faith will not protect the representative. McKnight *v.* Walsh, 23 N. J. Eq. 136, voluntary payment of part of an infant's legacy to the father, for the latter's expense in supporting the child.

A mere formal division of property without a legal warrant therefor and without delivery confers no title upon the distributees and the representative may successfully defend an action brought for its recovery by one to whom he has assigned a share. Dearman *v.* Radcliffe, 5 Ala. 192.

A representative may at his own risk assign a mortgage belonging to the estate to one of the heirs by way of advance before a decree of distribution, and in the absence of fraud or collusion or insufficiency of assets the assignee may maintain a suit to foreclose the mortgage. Williams *v.* Ely, 13 Wis. 1.

Payment to the surrogate before a decree settling the representative's accounts of an amount due a distributee is not a good payment to the latter, and the representative may be compelled to pay again upon the failure of the surrogate to account for the amount paid him. Matter of Te Culver, 22 Misc. (N. Y.) 217, 49 N. Y. Suppl. 820.

60. Charlton's Appeal, 88 Pa. St. 476. And see *infra*, XI, P, 3, a.

61. Donaldson *v.* Raborg, 28 Md. 34; Young *v.* Thresher, 48 Mo. App. 327. See also Palmer *v.* Whitney, 166 Mass. 306, 44 N. E. 229.

62. See *infra*, XI, P, 3, a.

63. Frazer *v.* Page, 5 Ky. L. Rep. 790; Charlton's Appeal, 88 Pa. St. 476; Stewart's Appeal, 86 Pa. St. 149.

64. Garner *v.* Lansford, 12 Sm. & M. (Miss.) 558; Boales *v.* Ferguson, 55 Nebr. 565, 76 N. W. 18. See Wade *v.* Dick, 36 N. C. 313.

65. Schooler *v.* Stark, 73 Mo. App. 301, holding that, where an order of distribution made by the circuit court on appeal did not include or refer to a special fund, the distribution of which by the probate court was not included, payment to the distributees in accordance with the judgment of the circuit court will not release the executor from liability to account for such special fund.

66. Pearson *v.* Darrington, 32 Ala. 227.

67. McMahon *v.* Jones, 14 Abb. N. Cas. (N. Y.) 406, 67 How. Pr. (N. Y.) 113; McNair *v.* Ragland, 16 N. C. 516; Lewis *v.* Richardson, 6 Rich. (S. C.) 382, holding this to be true where the decree provides for a forthcoming bond on which the representative has his remedy.

68. O'Neil's Appeal, 55 Conn. 409, 11 Atl. 857, holding that where an administratrix procured an order of distribution and knowingly omitted a distributee therefrom, a payment thereunder was not made in good faith, and that the administratrix was liable for such distributee's share on reversal of the order.

69. Coulter *v.* Lyda, 102 Mo. App. 401, 76 S. W. 720. But see Ernst *v.* Freeman, 129 Mich. 271, 88 N. W. 636.

70. *Kentucky.*— Dye *v.* Claunch, 5 J. J. Marsh. 659 (holding that a creditor telling an executor to settle with a distributee "without regard to my account" does not exonerate the executor from taking bonds from the distributes and holding assets until all the debts of which he had notice are satisfied); Hooser *v.* Hooser, 3 Ky. L. Rep. 796.

North Carolina.— Reeves *v.* Bell, 47 N. C. 254.

Pennsylvania.— Robins' Estate, 180 Pa. St. 630, 37 Atl. 121 [*modifying* 4 Pa. Dist. 277]; Jones' Appeal, 99 Pa. St. 124; Musser *v.* Oliver, 21 Pa. St. 362; Dougherty *v.* Snyder, 15 Serg. & R. 84, 16 Am. Dec. 520; Rastaetter's Estate, 15 Pa. Super. Ct. 549. And see Transue's Estate, 141 Pa. St. 170, 21 Atl. 502; Sidle *v.* Anderson, 45 Pa. St. 464.

Tennessee.— Rice *v.* Hunt, 7 Lea 33; Boring *v.* Jobe, (Ch. App. 1899) 53 S. W. 763.

Virginia.— Beverly *v.* Rhodes, 86 Va. 415, 10 S. E. 572; Morrison *v.* Lavell, 81 Va. 519; Edmounds *v.* Scott, 78 Va. 720; Lewis *v.* Overby, 31 Gratt. 601.

West Virginia.— McGlaughlin *v.* McGlaughlin, 43 W. Va. 226, 27 S. E. 378.

But see Davis *v.* Van Sands, 7 Fed. Cas. No. 3,655, 45 Conn. 600, holding that failure to take a refunding bond is not of itself sufficient ground for holding the administrator guilty of a devastavit, especially where

the payment of debts he is guilty of a devastavit, and personally liable to unpaid creditors prejudiced thereby, who present or give notice of their claims within the time prescribed by statute,[71] although he was ignorant of their existence at

the statute requiring such bond has practically fallen into disuse.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1263½.

Laches of the creditor will not bar his right against a representative who has made distribution without taking a refunding bond. Robins' Estate, 180 Pa. St. 630, 37 Atl. 121 [*modifying* 4 Pa. Dist. 277]; Jones' Appeal, 99 Pa. St. 124; Montgomery's Appeal, 92 Pa. St. 202, 37 Am. Rep. 670; Musser *v.* Oliver, 21 Pa. St. 362; Rastaetter's Estate, 15 Pa. Super. Ct. 549.

An erroneous belief that a debt was satisfied, which belief was not authorized by the conduct of the creditor, does not relieve the representative from liability to such creditor, where he distributed the estate without taking a refunding bond. Hooser *v.* Hooser, 3 Ky. L. Rep. 796.

A creditor's refusal to accept certain funds in payment of his claim relieves the representative from liability for turning over such funds to the legatees without taking a refunding bond. Ramsay *v.* Hanner, 64 N. C. 668.

One acting as trustee and not in the capacity of an administrator is not guilty of devastavit for making distribution without taking refunding bonds. Transue's Estate, 143 Pa. St. 170, 21 Atl. 502, so holding as to administrators appointed by the court in partition proceedings to sell realty and pay the debts of the estate, as they act as trustees and not as administrators.

Subsequent confirmation of the representative's account of his voluntary payment to legatees or distributees does not protect him against creditors where he has taken no refunding bond. Robins' Estate, 180 Pa. St. 630, 37 Atl. 121 [*modifying* 4 Pa. Dist. 277].

71. *Alabama.*— Handley *v.* Heflin, 84 Ala. 600, 4 So. 725; Whitfield *v.* Woolf, 51 Ala. 202; Feagan *v.* Kendall, 43 Ala. 628.

Connecticut.— Phelps *v.* Swan, Kirby 428.

Georgia.— Lanier *v.* Huguley, 91 Ga. 791, 18 S. E. 39; McIntosh *v.* Hambleton, 35 Ga. 94, 89 Am. Dec. 276.

Indiana.— Fleece *v.* Jones, 71 Ind. 340; Ray *v.* Doughty, 4 Blackf. 115.

Kentucky.— Johnson *v.* Fuquay, 1 Dana 514.

Maryland.— Rawlings *v.* Adams, 7 Md. 26; Steuart *v.* Carr, 6 Gill 430; Cornish *v.* Willson, 6 Gill 299.

Missouri.— Lewis *v.* Carson, 93 Mo. 587, 3 S. W. 483, 6 S. W. 365 (although legacies were directed by the will to be paid "as soon as practicable"); North *v.* Priest, 81 Mo. 561 [*affirming* 9 Mo. App. 586].

New York.— Carter *v.* Board of Education, 68 Hun 435, 23 N. Y. Suppl. 95 [*affirmed* in 144 N. Y. 621, 39 N. E. 628]; Matter of Swart, 2 Silv. Supreme 585, 6 N. Y. Suppl. 608; Matter of Oosterhoudt, 15 Misc. 566, 38 N. Y. Suppl. 179; McMahon *v.* Jones, 14 Abb. N. Cas. 406, 67 How. Pr. 113; McMahon *v.* Sullivan, 14 Abb. N. Cas. 405, 67 How. Pr. 152; Glacius *v.* Fogel, 4 Redf. Surr. 516; Clayton *v.* Wardell, 2 Bradf. Surr. 1.

North Carolina.— McNair *v.* Ragland, 16 N. C. 516, even though there was a premature order of the court, where he did not oppose such order.

Ohio.— James *v.* West, 67 Ohio St. 28, 65 N. E. 156, distribution on the advice of counsel and a probate judge before the debts of the estate are paid.

Pennsylvania.— Thomas *v.* Riegel, 5 Rawle 266; Swearinger *v.* Pendleton, 4 Serg. & R. 389; Rastaetter's Estate, 15 Pa. Super. Ct. 549. *Compare* Mustin's Estate, 8 Pa. Dist. 180.

South Carolina.— Graves *v.* Spoon, 18 S. C. 386; Crane *v.* Moses, 13 S. C. 561; Cochran *v.* Cochran, 2 Desauss. 521; Trescot *v.* Trescot, 1 McCord Eq. 417.

Tennessee.— Davis *v.* Jackson, (Ch. App. 1897) 39 S. W. 1067.

Virginia.— Lewis *v.* Mason, 84 Va. 731, 10 S. E. 529; Davis *v.* Newman, 2 Rob. 664, 40 Am. Dec. 764; Cookus *v.* Peyton, 1 Gratt. 431; Kippen *v.* Carr, 4 Munf. 119.

England.— Hawkins *v.* Day, Ambl. 160, 27 Eng. Reprint 107, Dick. 155, 21 Eng. Reprint 228; Newcastle, etc., Banking Co. *v.* Hymers, 22 Beav. 367, 52 Eng. Reprint 1149; Davis *v.* Blackwell, 9 Bing. 5, 1 L. J. C. P. 140, 2 Moore & S. 7, 23 E. C. L. 461; Knatchbull *v.* Fearnhead, 1 Jur. 687, 3 Myl. & C. 122, 14 Eng. Ch. 122, 40 Eng. Reprint 871; Scottish Equitable L. Assur. Soc. *v.* Beatty, 29 L. R. Ir. 290. And see *In re* Lindsey, Ir. R. 8 Eq. 61.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1263.

A distribution by agreement among the persons entitled does not relieve the representative from liability for debts left unpaid. Long *v.* Mitchell, 63 Ga. 769; Drayton *v.* Drayton, 1 Desauss. (S. C.) 557.

That a debt is secured by a mortgage on real estate does not justify the payment of legacies before ascertaining the existence of assets sufficient to pay all debts; and in case of a judgment for a deficiency on a foreclosure and a sale of the mortgaged premises the judgment creditor may compel the executor to account. Glacius *v.* Fogel, 4 Redf. Surr. (N. Y.) 516.

Liability for interest.— In some cases it has been held that the representative is liable for interest on the amount prematurely distributed (Cookus *v.* Peyton, 1 Gratt. (Va.) 431) from the time of distribution (Cochran *v.* Cochran, 2 Desauss. (S. C.) 521), or from a date one year later than the date of the testamentary letters (Rote *v.* Warner, 17 Ohio Cir. Ct. 350, 9 Ohio Cir. Dec. 540); but on the other hand it has been held that

the time of such distribution,[72] or has subsequently settled his accounts and been discharged;[73] and he cannot relieve himself from liability by proof that his co-executor had received assets sufficient to pay all debts.[74] This rule does not apply, however, where the representative makes distribution in ignorance of outstanding claims after he has given due notice to creditors and they have failed to present their claims within the prescribed time,[75] or where he makes merely a partial distribution reserving sufficient assets to meet unpaid claims.[76]

6. Liability of Legatee or Distributee to Refund — a. In General. Repayment of the amount wrongfully paid a legatee or distributee under a mistake of fact may be enforced against him as a personal obligation in a suit by the personal representative,[77] notwithstanding the fact that he has made a final settlement of his

he is only liable for the amount distributed without interest (McKinzie *v.* Smith, 3 N. C. 372) where by reason of such distribution he has been compelled to borrow money to pay debts and is not allowed credit for interest paid on the money so borrowed (Matter of Oosterhoudt, 15 Misc. (N. Y.) 566, 38 N. Y. Suppl. 179).

Property improperly distributed is to be estimated, in an action by a creditor against the executor, as assets in his hands, at its increased value and not as it was when received or distributed. Mason County Justices *v.* Lee, 1 T. B. Mon. (Ky.) 247.

Distribution by an executor to himself as devisee or heir at law with notice of an outstanding debt against his testator does not give him a title free from the ordinary legal lien of a judgment *de bonis testatoris* subsequently rendered against him in favor of the creditor. McMillan *v.* Toombs, 79 Ga. 143, 4 S. E. 16.

72. *Alabama.*— Whetstone *v.* McQueen, 137 Ala. 301, 34 So. 229; Whitfield *v.* Woolf, 51 Ala. 202.

Kentucky.— Johnson *v.* Fuquay, 1 Dana 514.

Pennsylvania.— Swearinger *v.* Pendleton, 4 Serg. & R. 389.

Virginia.— Lewis *v.* Overby, 31 Gratt. 601; Cookus *v.* Peyton, 1 Gratt. 431.

West Virginia.—McGlaughlin *v.* McGlaughlin, 43 W. Va. 226, 27 S. E. 378.

England.— Hawkins *v.* Day, Ambl. 160, 27 Eng. Reprint 107, Dick. 155, 21 Eng. Reprint 228; Newcastle, etc., Banking Co. *v.* Hymers, 22 Beav. 367, 52 Eng. Reprint 1149; Hill *v.* Gomme, 1 Beav. 540, 3 Jur. 744, 8 L. J. Ch. 350, 17 Eng. Ch. 540, 48 Eng. Reprint 1050; Knatchbull *v.* Fearnhead, 1 Jur. 687, 3 Myl. & C. 122, 14 Eng. Ch. 122, 40 Eng. Reprint 871; Smith *v.* Day, 6 L. J. Exch. 219, M. & H. 185, 2 M. & W. 684; Norman *v.* Baldry, 6 Sim. 621, 9 Eng. Ch. 621.

But *compare* Graves *v.* Spoon, 18 S. C. 386, holding that payments to distributees to the prejudice of creditors are justifiable where the administrator after a close observance of his prescribed duty makes such payments in ignorance of outstanding claims and with assets then of sufficient value to pay all debts.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1263.

73. Long *v.* Mitchell, 63 Ga. 769; Thomas *v.* Riegel, 5 Rawle (Pa.) 266.

A final decree allowing an administrator's account is no defense to an action against the administrator on a judgment rendered in an action pending at the time of such decree, where he held in his hands funds sufficient to pay any judgment that might be rendered against him in such action, and his petition for the decree failed to disclose the pending action. Whitney *v.* Pinney, 51 Minn. 146, 53 N. W. 198.

74. Whitfield *v.* Woolf, 51 Ala. 202.

75. *Maryland.*— Glenn *v.* Smith, 17 Md. 260; Rawlings *v.* Adams, 7 Md. 26.

New York.— O'Connor *v.* Gifford, 117 N. Y. 275, 22 N. E. 1036 [*affirming* 3 N. Y. Suppl. 337 (*reversing* 3 N. Y. Suppl. 207, 6 Dem. Surr. 71)] (although the legacy for which the money was paid was void); Erwin *v.* Loper, 43 N. Y. 521.

North Carolina.— Mallard *v.* Patterson, 108 N. C. 255, 13 S. E. 93.

South Carolina.— Crane *v.* Moses, 13 S. C. 561.

England.— Clegg *v.* Rowland, L. R. 3 Eq. 368, 36 L. J. Ch. 137, 15 L. T. Rep. N. S. 385, 15 Wkly. Rep. 251. And see Davis *v.* Blackwell, 9 Bing. 5, 1 L. J. C. P. 140, 2 Moore & S. 7, 23 E. C. L. 461; *Re* Land Credit Co., 21 Wkly. Rep. 135, holding that if the representative has actual notice of the claim he is liable therefor, although the creditor failed to send in particulars of it in answer to an advertisement of creditors.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1262.

76. Anderson *v.* Irvine, 7 B. Mon. (Ky.) 209; Rothschild *v.* Wald, 12 Ky. L. Rep. 685. And see Graves *v.* Spoon, 18 S. C. 386.

77. *Alabama.*— Sellers *v.* Smith, 11 Ala. 264.

Connecticut.—Northrop *v.* Graves, 19 Conn. 548, 50 Am. Dec. 264.

Georgia.— Echols *v.* Almon, 77 Ga. 330, 1 S. E. 269.

Indiana.— Stokes *v.* Goodykoontz, 126 Ind. 535, 26 N. E. 391.

Kentucky.— McCampbell *v.* McCampbell, 5 Litt. 92, 15 Am. Dec. 48, holding that an executor who pays a legacy supposing it a charge on land, which he erroneously supposed to belong to himself, may recover it from the owner. And see Whitney *v.* Whitney, 5 Dana 327.

Louisiana.— Beatty *v.* Dufief, 11 La. Ann. 74.

accounts;[78] but not where such payment is made under a mistake of law,[79] unless necessary for the payment of debts of the estate.[80] If the representative refuses or fails to apply the remedy[81] or is insolvent, the other legatees or distributees may sue in equity to compel a repayment.[82] This remedy, however, may be

Maryland.— Buchanan *v.* Pue, 6 Gill 112.

Massachusetts.— Stevens *v.* Goodell, 3 Metc. 34, holding that an administrator *de bonis non* could recover the amount improperly distributed.

New York.— Matter of Robertson, 51 N. Y. App. Div. 117, 64 N. Y. Suppl. 385 [*affirmed* in 165 N. Y. 675, 59 N. E. 1129]; Lawyers' Surety Co. *v.* Reinach, 25 Misc. 150, 54 N. Y. Suppl. 205 [*affirming* 23 Misc. 242, 51 N. Y. Suppl. 162] (distribution under an erroneous decree); Williamson *v.* Williamson, 6 Paige 298.

North Carolina.— Wilcoxon *v.* Donelly, 90 N. C. 245, holding also that the liability to repay does not constitute a charge upon such party's share in the decedent's land.

Pennsylvania.— Grim's Estate, 147 Pa. St. 190, 23 Atl. 802, 803; Sutter's Estate, 5 Pa. Co. Ct. 591.

South Carolina.— Buerhaus *v.* De Saussure, 41 S. C. 457, 19 S. E. 926, 20 S. E. 64.

Vermont.— French *v.* Winsor, 36 Vt. 412.

Virginia.— Gallego *v.* Atty.-Gen., 3 Leigh 450, 24 Am. Dec. 650.

United States.— Moffit *v.* Varden, 17 Fed. Cas. No. 9,689, 5 Cranch C. C. 658; Washington *v.* Washington, 29 Fed. Cas. No. 17,236, 3 Cranch C. C. 77.

Canada.— See Uffner *v.* Lewis, 27 Ont. App. 242.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1265.

A note given by the representative in payment in lieu of cash or property may be sealed to the true amount of the legacy or distributive share where it appears that it had been made for more than the amount due. Barnes *v.* Stephenson, 22 Ga. 209.

The assignment of a mortgage in payment of a legacy less in amount than the nominal amount of the mortgage does not make the legatee responsible for the nominal excess, where he has with proper diligence and in good faith sold the property under a decree of foreclosure for less than the amount of his legacy. Hammond *v.* Lewis, 1 How. (U. S.) 14, 11 L. ed. 30.

Moneys paid under an erroneous decree of distribution, being assets of the estate, are properly recoverable in an action at law. Lawyers' Surety Co. *v.* Reinach, 25 Misc. (N. Y.) 150, 54 N. Y. Suppl. 205 [*affirming* 23 Misc. 242, 51 N. Y. Suppl. 162].

Interest on the excess may be charged against the one overpaid (Buerhaus *v.* De Saussure, 41 S. C. 457, 19 S. E. 926, 20 S. E. 64; Davidson *v.* Boomer, 17 Grant Ch. (U. C.) 509. But see Boys' Home *v.* Lewis, 3 Ont. L. Rep. 208) from the time the demand for restitution is made (Grim's Estate, 147 Pa. St. 190, 23 Atl. 802, 803).

Priority.— Upon the death of an overpaid distributee, the claim for repayment of the excess will not take precedence over the claims of creditors of such distributee. Williams *v.* McCardell, 14 S. C. 219.

Defenses based on the representative's wrong-doing in distributing such excess cannot be set up in an action therefor. Lawyers' Surety Co. *v.* Reinach, 23 Misc. (N. Y.) 242, 51 N. Y. Suppl. 162.

Set-off.— As a representative's right of action for restitution in such case is in his representative capacity, a claim against him individually cannot be set off against the claim for restitution. Lawyers' Surety Co. *v.* Reinach, 25 Misc. (N. Y.) 150, 54 N. Y. Suppl. 205 [*affirming* 23 Misc. 242, 51 N. Y. Suppl. 162]. See also Stevens *v.* Goodell, 3 Metc. (Mass.) 34.

The burden of proving that the amount received was excessive is upon the person requiring the money to be refunded. Peterson *v.* Peterson, L. R. 3 Eq. 111, 36 L. J. Ch. 101, 15 Wkly. Rep. 164.

Liability of life legatee to refund.— Moss *v.* Cohen, 158 N. Y. 240, 53 N. E. 8 [*reversing* 15 Misc. 108, 36 N. Y. Suppl. 265].

78. Sellers *v.* Smith, 11 Ala. 264.

But after the executor's discharge he cannot procure a direction, in an action by a devisee for partition, that enough of the proceeds to pay his claim against the devisee who has been overpaid be paid into the surrogate's court, the time having elapsed within which a distribution of the proceeds would be stayed in the interest of creditors, and the surrogate's decree not having been opened. Johnson *v.* Weir, 34 Misc. (N. Y.) 683, 70 N. Y. Suppl. 1020, 36 Misc. (N. Y.) 737, 74 N. Y. Suppl. 358.

79. Phillips *v.* McConica, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. Rep. 753; Shriver *v.* Garrison, 30 W. Va. 456, 4 S. E. 660. And see Rogers *v.* Ingham, 3 Ch. D. 351, 35 L. T. Rep. N. S. 677, 25 Wkly. Rep. 338.

80. Shriver *v.* Garrison, 30 W. Va. 456, 4 S. E. 660. And see *infra*, XI, R.

81. Miller *v.* Stark, 29 S. C. 325, 7 S. E. 501.

82. Wallace *v.* Latham, 52 Miss. 291; Buffalo Loan, etc., Safe Deposit Co. *v.* Leonard, 154 N. Y. 141, 47 N. E. 966 [*affirming* 9 N. Y. App. Div. 384, 41 N. Y. Suppl. 294]; Miller *v.* Stark, 29 S. C. 325, 7 S. E. 501; Lyles *v.* Lyles, 1 Hill Eq. (S. C.) 76; Orr *v.* Kaines, 2 Ves. 194, 28 Eng. Reprint 125. And see Gallego *v.* Atty.-Gen., 3 Leigh (Va.) 450, 24 Am. Dec. 650.

But *compare* Gaines *v.* Smiley, 7 Sm. & M. (Miss.) 53, 45 Am. Dec. 295, holding that the superior court of chancery has not jurisdiction of a bill by a person alleging himself to be a distributee, whose claims have been overlooked or disregarded in the distribution in the probate court, against one of the distributees to recover from him a ratable pro-

barred by the statute of limitations,[83] which begins to run from the time the overpayments were made,[84] and not from the time they were discovered.[85]

b. Restitution on Reversal of Decree. Upon the reversal of a decree of distribution the parties are in the same position as if no decree had been rendered, and the personal representative is entitled to restitution of all the property distributed under such decree, or its value,[86] including any part thereof which has been assigned or transferred by the distributee.[87]

M. Delay in or Failure to Make Payment or Distribution — 1. Liability of Representative in General. Since a representative renders himself liable under his bond for culpable negligence as well as for active misconduct,[88] he may be held chargeable for a loss occurring through his unreasonable delay or failure to distribute, or to apply for an order of distribution,[89] or to make payment to those entitled,[90] unless the latter have also been guilty of negligence to

portion of the estate, as the proper remedy is in the probate court.

A deficiency of assets is shown in an action by legatees to recover of another legatee an overpayment of a legacy, where it appears from the complaint, as well as from a settlement in the probate court exhibited therewith, that the executor held assets amounting to fourteen thousand three hundred and forty-one dollars to be equally divided among ten legatees, and that defendant received two thousand one hundred and seventy-eight dollars. Miller *v.* Stark, 29 S. C. 325, 7 S. E. 501.

The husband of a distributee is not estopped to recover from the other distributees his interest in his wife's distributive share, by the fact that he administers on the original estate. Gray *v.* Cockrell, 20 Tex. Civ. App. 324, 49 S. W. 247.

83. Shelburne *v.* Robinson, 8 Ill. 597; Reading *v.* Reading, 6 N. J. L. 186; Montgomery's Appeal, 92 Pa. St. 202, 37 Am. Rep. 670; Schriver *v.* Garrison, 30 W. Va. 456, 4 S. E. 660.

84. Reading *v.* Reading, 6 N. J. L. 186; Ferguson *v.* Yard, 164 Pa. St. 586, 30 Atl. 517; Montgomery's Appeal, 92 Pa. St. 202, 37 Am. Rep. 670.

85. Montgomery's Appeal, 92 Pa. St. 202, 37 Am. Rep. 670; Shriver *v.* Garrison, 30 W. Va. 456, 4 S. E. 660, holding that an administrator suing in a court of equity to recover money alleged to have been paid in ignorance of a material fact, to a distributee in excess of what he was entitled to, cannot avoid the bar of the statute of limitations on the ground that the mistake was not discovered until after the statutory limitation for the commencement of the action had expired, if it appears that he was informed of such other facts as would be sufficient to put him upon such inquiry as would have led to the discovery of such material fact before such cause of action was barred.

86. Ashton *v.* Heggerty, 130 Cal. 516, 62 Pac. 934; Ashton *v.* Heydenfeldt, 127 Cal. 442, 59 Pac. 759 (holding that the representative may maintain an action for such restitution against a legatee, although the property was not "actually delivered" but was used by the representative with the consent and under the direction of the legatee, to discharge her debts); Ashton *v.* Heydenfeldt, 124 Cal. 14, 56 Pac. 624.

Where the estate consists of corporate stock which is delivered and transferred on the books of the corporation to distributees pending an appeal from the decree of distribution, which is subsequently reversed, the representative is upon such reversal entitled to the stock (Ashton *v.* Zeila Min. Co., 134 Cal. 408, 60 Pac. 494; Ashton *v.* Heggerty, 130 Cal. 516, 62 Pac. 934; Ashton *v.* Heydenfeldt, 124 Cal. 14, 56 Pac. 624), and may sue to recover the dividends thereon, notwithstanding others appear as owners on the books of the corporation (Ashton *v.* Zeila Min. Co., *supra*).

Defenses.— It is no defense that the property sought to be recovered was not subject to an outstanding mortgage, owing to the existence of which the decree of distribution was reversed (Ashton *v.* Heggerty, 130 Cal. 516, 62 Pac. 934) or that the distributee is the owner of the property involved in the proceeding (Heydenfeldt *v.* San Francisco Super Ct., 117 Cal. 348, 49 Pac. 210).

Jurisdiction.— The superior court in California has power to compel the delivery of property received by defendant under a decree of distribution, which is reversed, even though the property be of such a character that it cannot be seized under a writ of replevin. Ashton *v.* Heydenfeldt, 124 Cal. 14, 56 Pac. 624. And see Heydenfeldt *v.* San Francisco Super. Ct., 117 Cal. 348, 49 Pac. 210.

87. Ashton *v.* Zeila Min. Co., 134 Cal. 408, 66 Pac. 494; Ashton *v.* Heggerty, 130 Cal. 516, 62 Pac. 934, holding also that it is immaterial whether or not a consideration was given for the assignment.

88. See *infra*, XVII, E.

89. Sanford *v.* Thorp, 45 Conn. 241.

90. Myers *v.* Myers, 33 Ala. 85; Moorhead *v.* Thompson, 1 La. 281; Clarke *v.* Sinks, 144 Mo. 448, 46 S. W. 199; State *v.* Grigsby, 92 Mo. 419, 5 S. W. 39; State *v.* Thornton, 56 Mo. 325; State *v.* Matson, 44 Mo. 305; Remington *v.* Walker, 99 N. Y. 626, 1 N. E. 305; Matter of Te Culver, 22 Misc. (N. Y.) 217, 49 N. Y. Suppl. 829 (holding that where on judicial settlement with administrators a

which the loss may be attributed,[91] as where they have delayed to demand payment until after the loss occurred,[92] or unless he is otherwise excused from such delay or failure.[93] If there has been an order of distribution the distributees may sue the representative for a devastavit[94] or they may apply for an order of court compelling distribution.[95]

2. Effect of Representative's Death. Upon the death of a representative who has neglected or failed to pay a legacy or distributive share, his representative is liable to the legatee or distributee, provided sufficient assets come to his hands from the original estate, or from the estate of such deceased representative.[96] The person entitled may elect either to present the sum due him as a claim against the deceased representative's estate[97] or to proceed upon the deceased representative's bond.[98]

N. Liability of Representative For Interest on Legacies or Distributive Shares — 1. For Failure or Delay to Pay Over. Where a representative unreasonably retains in his hands without sufficient cause the amount of a legacy or distributive share, he is usually held liable to the person entitled for interest thereon from the time when payment should have been made.[99] But where the

certain sum was found due, and the administrators gave their check to the surrogate, who gave a receipt therefor, but no final decree was made, nor the money ever distributed to the heirs, the administrators were liable to the heirs for said sum); Pulliam *v.* Pulliam, 10 Fed. 23 (holding that an executor neglecting to execute the trusts of a will is not absolutely liable for the legacy, but only to the extent of what he actually receives, unless there has been supine negligence on his part).

Mere neglect to pay the balance of a legacy does not render the executor personally liable, unless he claims to be himself entitled thereto, or is proved guilty of some illegal conduct in the premises. Hurlbut *v.* Durant, 21 Hun (N. Y.) 481.

Damages.— A legatee is entitled to recover damages equal to the legacy against an executor who has violated his covenant to pay the legacy. Com. *v.* Heaveren, 2 B. Mon. (Ky.) 126.

91. Fitzsimons *v.* Fitzsimons, 1 S. C. 400, holding that, although a representative detained a legacy until some time after the debts were or should have been paid, and until a portion of the legacy was lost by an inevitable accident, as the loss occurred after a bill for an account by the legatee against the representative had reached a stage that enabled the legatee to obtain such orders of court as would have prevented the loss, the representative was not liable to account therefor.

92. Roberts *v.* Summers, 47 Ga. 434; Thompson *v.* Youngblood, 1 Bay (S. C.) 248, holding that an executor is not bound to search out a legatee, and that the latter must bear the loss occasioned by the depreciation of money in the hands of the executor which he has always been ready to pay over.

93. Haltiwanger *v.* Windhorn, 44 S. C. 413, 22 S. E. 446, holding an administrator excused from the payment of the balance of the widow's homestead exemption, where the balance of the estate was consumed in the care of the estate and in the payment of debts.

A representative is not excused for failing to make distribution, by the distributees' obtaining an injunction preventing a sale advertised by him for the purpose of dividing the estate, where the sale would have been void if made (Harrison *v.* Harrison, 39 Ala. 489), by the fact that one of the distributees is a minor, where he had a guardian (Henry *v.* State, 9 Mo. 778); by the fact that persons claiming to be assignees of a distributee have made demand on the representative for the distributive share, although payment to an actual assignee may excuse him (Marshall *v.* Hitchcock, 3 Redf. Surr. (N. Y.) 461), or by the fact that the funds of the estate were mingled with the assets of a firm of which he was a member (*In re* Taylor, Myr. Prob. (Cal.) 160).

The burden of showing an excuse for not making a distribution within the legal time is on the administrator. Haskins *v.* Martin, 103 Ill. App. 115.

Attachment as garnishee no excuse.— Lex's Appeal, 97 Pa. St. 289.

94. Neubrecht *v.* Santmeyer, 50 Ill. 74.

95. Neubrecht *v.* Santmeyer, 50 Ill. 74; Brown's Estate, 13 Pa. Co. Ct. 413, holding that where it appears, five months after the confirmation of the adjudication on an executor's account showing a sum due the guardian of minors, that he has made no effort to pay even a part thereof he will, on demand of the guardian, be ordered to pay at once.

96. Windsor *v.* Bell, 61 Ga. 671; Moore *v.* Smith, 5 N. J. Eq. 649 [*affirming* 4 N. J. Eq. 485].

97. Tracey *v.* Hadden, 78 Ill. 30.

98. Tracey *v.* Hadden, 78 Ill. 30. And see *infra*, XVII.

99. *Arkansas.*— Atkins *v.* Guice, 21 Ark. 164.

California.— Clary's Estate, 112 Cal. 292, 44 Pac. 569.

Connecticut.— Colt *v.* Colt, 33 Conn. 270 (holding that executors are not chargeable with interest on unpaid legacies after one year as of course; but only where interest is

delay is a reasonable one, under the circumstances,[1] as where he is doubtful as to the proper disposition of the fund and brings it into court and asks the court's directions;[2] or the delay is caused by the fault of the person entitled to receive

made by use of the fund or they have been guilty of misconduct); Rowland *v.* Isaacs, 15 Conn. 115.

Florida.— Amos *v.* Campbell, 9 Fla. 187, holding that only simple interest will be allowed a distributee who has been dilatory in calling the representative to account.

Georgia.— In this state, where the representative's conduct in failing to make returns of the condition of the estate in his hands amounts to mere neglect, he is liable only for simple interest on the balance in his hands (Binion *v.* Miller, 27 Ga. 78); but if his conduct is wrongful and not mere negligence he is liable for compound interest thereon for six years from the time it fell due, to be compounded at the end of that term, and at the end of every subsequent term of six years (Hamilton *v.* Reese, 18 Ga. 8; Kenan *v.* Hall, 8 Ga. 417; Fall *v.* Simmons, 6 Ga. 265).

Illinois.— Cox *v.* Cox, 53 Ill. App. 84.

Kentucky.—Moore *v.* Beauchamp, 4 B. Mon. 71; Dicken *v.* Dicken, Ky. Dec. 173.

Louisiana.— Mann's Succession, 4 La. Ann. 28.

Maine.— Decrow *v.* Moody, 73 Me. 100.

Maryland.— Mickle *v.* Cross, 10 Md. 352; Thomas *v.* Frederick County School, 9 Gill & J. 115.

Massachusetts.— Eliott *v.* Sparrell, 114 Mass. 404.

Mississippi.— Banks *v.* Machen, 40 Miss. 256; Cole *v.* Leake, 27 Miss. 767.

Missouri.— Henry *v.* State, 9 Mo. 778.

New Jersey.— Craig *v.* Manning, 8 N. J. Eq. 806.

New York.— Hallett *v.* Hare, 5 Paige 315.

North Carolina.— Johnson *v.* Person, 16 N. C. 368.

Pennsylvania.— Witman's Appeal, 28 Pa. St. 376; Bitzer *v.* Hahn, 14 Serg. & R. 232; Fow's Estate, 14 Pa. Co. Ct. 648; Bear's Estate, 9 Pa. Super. Ct. 492, 43 Wkly. Notes Cas. 469; Vogdes' Estate, 6 Pa. Co. Ct. 441, 23 Wkly. Notes Cas. 471. And see Laua *v.* Kech, 11 Leg. Int. 31.

Rhode Island.— Almy *v.* Newport Probate Ct., 18 R. I. 612, 30 Atl. 458.

South Carolina.— Lowman *v.* Lowman, 69 S. C. 543, 48 S. E. 536; Nettles *v.* McCown, 5 S. C. 43; McCaw *v.* Blewitt, Bailey Eq. 98.

Texas.— Simpson *v.* Knox, 1 Tex. Unrep. Cas. 569.

Virginia.— Preston *v.* Davis, 102 Va. 178, 45 S. E. 865; Bourne *v.* Mechan, 1 Gratt. 292.

Wisconsin.— Evans *v.* Foster, 80 Wis. 509, 50 N. W. 410, 14 L. R. A. 117.

United States.— Stewart *v.* Barcroft, 23 Fed. Cas. No. 13,422, 1 Hayw. & H. 41.

England.— Williams *v.* Powell, 15 Beav. 461, 16 Jur. 393, 51 Eng. Reprint 616; *Re* Jones, 49 L. T. Rep. N. S. 91; Ashburnham *v.* Thompson, 13 Ves. Jr. 402, 33 Eng. Reprint 345; Longmore *v.* Broom, 7 Ves. Jr. 124, 32 Eng. Reprint 51. See also Blogg *v.* Johnson, L. R. 2 Ch. 225, 36 L. J. Ch. 859, 16 L. T. Rep. N. S. 306, 15 Wkly. Rep. 626; Donovan *v.* Needham, 9 Beav. 164, 10 Jur. 150, 15 L. J. Ch. 193, 50 Eng. Reprint 306.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1271. And see, generally, WILLS.

Misappropriation of the fund to the representative's own use renders him personally liable for interest until paid. Clary's Estate, 112 Cal. 292, 44 Pac. 569 (compound interest); Connell *v.* Furgason, 5 Coldw. (Tenn.) 401.

Unreasonably appealing from a decree in favor of a distributee.— Hallett *v.* Hare, 5 Paige (N. Y.) 315.

Interest pending a controversy in relation to the title to a sum due a distributee, but retained in the representative's hands, may be charged against the latter, where he does not apply to the court for permission to deposit, or dispose of the sum, so as to prevent the further accumulation of interest. Thomas *v.* Frederick County School, 9 Gill & J. (Md.) 115.

1. Allen *v.* Hardee, 30 Ga. 463; Springer *v.* Oliver, 21 Ga. 517; Phelps *v.* Fitch, 178 Mass. 442, 59 N. E. 1031 (holding that parties entitled to shares of a residuary estate under an agreement compromising a will contest are not entitled to interest on their shares after the expiration of one year from the death of the testator, where there is no claim that the money was wrongfully detained by the executor); Cary *v.* Macon, 4 Call (Va.) 605; Johnson *v.* Mitchell, 1 Rand. (Va.) 209 (holding that where a legacy is left to one in trust, and the trustee refuses to act, the executor is not bound to pay the legacy until a new trustee has been appointed by the chancery court, and is not chargeable with interest therefor until after the decree).

Awaiting the appointment of an administrator of a deceased legatee or distributee is a reasonable delay within the meaning of the above rule. Bear's Estate, 9 Pa. Super. Ct. 492, 43 Wkly. Notes Cas. (Pa.) 469; Frierson *v.* Graham, 7 Rich. Eq. (S. C.) 95.

Interest during war.— Drumgoole *v.* Smith, 78 Va. 665.

Absence of person entitled.—*In re* Doremus, 33 N. J. Eq. 234; Clarke *v.* Canfield, 15 N. J. Eq. 119.

2. *Georgia.*— Rogers *v.* Bottsford, 44 Ga. 652.

Kentucky.— Moore *v.* Beauchamp, 4 B. Mon. 71.

Maryland.— Thomas *v.* Frederick County School, 9 Gill & J. 115.

Tennessee.— Turney *v.* Williams, 7 Yerg. 172.

Texas.— Simpson *v.* Knox, 1 Tex. Unrep. Cas. 569.

Virginia.— Sharpe *v.* Rockwood, 78 Va. 24.

the funds, as by failing to make a demand or to receive it after notice of readiness to pay over,[3] or by failure to tender a refunding bond,[4] the representative is not liable for interest on the fund unless he received interest on it,[5] or derived a benefit from its use.[6] An order or decree for distribution generally draws interest from its date notwithstanding the person entitled to the award makes no demand therefor.[7]

2. Liability After Tender of Payment. Where the representative makes tender of what he may rightly pay or distribute at the time, interest on the sum tendered cannot be claimed by the legatee or distributee refusing or unreasonably delaying to receive the same,[8] unless after such tender and refusal the representative misappropriates the fund.[9]

3. Failure to Invest Legacy or Distributive Share. Where by the terms of the will, by order of court, or otherwise, it becomes the duty of the representative to invest the funds of a legatee or distributee in his hands, he will be chargeable with interest thereon if he negligently delays or fails to do so.[10]

3. Vance *v.* Vance, 5 T. B. Mon. (Ky.) 521; Phelps *v.* Fitch, 178 Mass. 442, 59 N. E. 1031; Holley *v.* S. G., 4 Edw. (N. Y.) 284; Riddle *v.* Riddle, 5 Rich. Eq. (S. C.) 31; Payne *v.* Harris, 3 Strobh. Eq. (S. C.) 39 (holding that interest will not be allowed, previous to the filing of their bill, on the shares of the distributees who are admitted after the settlement of the estate by the administrator); McAlister *v.* Brice, McMull. Eq. (S. C.) 275. See also *In re* Blake, 137 Cal. 429, 70 Pac. 303. But *compare* Bourne *v.* Mechan, 1 Gratt. (Va.) 292.

4. Vance *v.* Vance, 5 T. B. Mon. (Ky.) 521; Webb *v.* Conn, Litt. Sel. Cas. (Ky.) 475. But see Patterson *v.* Nichol, 6 Watts (Pa.) 379, 31 Am. Dec. 473, holding that in an action to recover the distributive share of an intestate plaintiff is entitled to recover interest, although no refunding bond was tendered until long after the death of the intestate.

5. Rogers *v.* Bottsford, 44 Ga. 652; Webb *v.* Conn, Litt. Sel. Cas. (Ky.) 475; *In re* Doremus, 33 N. J. Eq. 234; McAlister *v.* Brice, McMull. Eq. (S. C.) 275; Sparhawk *v.* Buell, 9 Vt. 41.

Where an infant is the legatee or distributee the representative is not chargeable with interest while awaiting the appointment of a guardian, and notice thereof (Matter of Schweibert, 25 Misc. (N. Y.) 464, 55 N. Y. Suppl. 649; Spruill *v.* Cannon, 22 N. C. 400; Lieber's Estate, 5 Pa. Dist. 187, 17 Pa. Co. Ct. 557; Sparhawk *v.* Buell, 9 Vt. 41; Cavendish *v.* Fleming, 3 Munf. (Va.) 198) unless he has received interest on the money (Matter of Schweibert, 25 Misc. (N. Y.) 464, 55 N. Y. Suppl. 649; Sparhawk *v.* Buell, 9 Vt. 41), or unless the money was so invested that he might have received interest without incurring an unreasonable hazard (Matter of Schweibert, 25 Misc. (N. Y.) 464, 55 N. Y. Suppl. 649; Sparhawk *v.* Buell, 9 Vt. 41).

6. Vance *v.* Vance, 5 T. B. Mon. (Ky.) 521; *In re* Doremus, 33 N. J. Eq. 234; Clarke *v.* Canfield, 15 N. J. Eq. 119.

7. Randolph *v.* People, 40 Ill. App. 174; State *v.* Babb, 77 Mo. App. 277; McRae *v.* Malloy, 87 N. C. 196.

8. Mickle *v.* Cross, 10 Md. 352; Burtis *v.* Dodge, 1 Barb. Ch. (N. Y.) 77; McAlister *v.* Brice, McMull. Eq. (S. C.) 275; Cary *v.* Macon, 4 Call (Va.) 605.

Where a demand for a legacy is made after its tender and refusal and the executor then refuses to pay, he is chargeable with interest from that time. Chestnut *v.* Strong, 2 Hill Eq. (S. C.) 146.

A deposit of the amount of a legacy in bank, to the knowledge of one of the trustees subsequently appointed, and to whom it is to be transferred upon their executing a certain agreement and giving a receipt, does not constitute a conditional tender of the money to the trustees, so as to relieve the executor from paying interest on the legacy from that time. *In re* Blake, 137 Cal. 429, 70 Pac. 303.

9. Goodwin's Estate, 22 Pa. Super. Ct. 469, holding that where an executor, having in his hands the requisite amount, makes an offer of payment, which offer is refused, but does not subsequently keep the tender good by retaining in his hands an amount sufficient to make the payment, but uses the money for other purposes, he will be liable for interest when he finally makes payment.

10. *California.*— Moore's Estate, 95 Cal. 34, 30 Pac. 106.

Kentucky.— Smith *v.* Lampton, 8 Dana 69.

Maryland.— Darne *v.* Catlett, 6 Harr. & J. 475.

Massachusetts.— Eliott *v.* Sparrell, 114 Mass. 404.

New Jersey.— Fowler *v.* Colt, 25 N. J. Eq. 202 (holding that the fact that the delay was for the interest of the residuary legatee does not excuse him from separating a specific legatee's interest and investing it); Halstead *v.* Mecker, 18 N. J. Eq. 136; Frey *v.* Demarest, 17 N. J. Eq. 71; King *v.* Berry, 3 N. J. Eq. 261.

New York.— Remington *v.* Walker, 99 N. Y. 626, 1 N. E. 305.

Pennsylvania.— Huston's Appeal, 9 Watts 472.

Virginia.— Sharpe *v.* Rockwood, 78 Va. 24.

England.— Williams *v.* Powell, 15 Beav. 461, 16 Jur. 393, 51 Eng. Reprint 616; Atty.-Gen. *v.* Alford, 4 De G. M. & G. 843, 1 Jur. N. S. 361, 3 Wkly. Rep. 200, 53 Eng. Ch. 659.

4. Effect of Erroneous or Improper Payments. Where a representative makes erroneous or improper payments, he is liable for interest thereon from the time of such payments,[11] unless such payment has been made in good faith under a mistake of fact, and the representative has acquired no benefit therefrom.[12]

O. Proceedings For Payment or Distribution[13] — 1. Jurisdiction and Powers of Court. Jurisdiction of proceedings for the distribution of an estate or for the payment of a legacy or distributive share is usually conferred by statute upon the probate court,[14] within such limits as may be imposed by the statute

43 Eng. Reprint 737; *Re* Jones, 49 L. T. Rep. N. S. 91.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1272.

Compound interest may be charged against the representative where his delay or negligence amounts to a violation of his trust (Darne *v.* Catlett, 6 Harr. & J. (Md.) 475; Salisbury *v.* Colt, 27 N. J. Eq. 492; Atty.-Gen. *v.* Alford, 4 De G. M. & G. 843, 1 Jur. N. S. 361, 3 Wkly. Rep. 200, 53 Eng. Ch. 659, 43 Eng. Reprint 737; Gilroy *v.* Stephen, 51 L. J. Ch. 834, 46 L. T. Rep. N. S. 761, 30 Wkly. Rep. 745), as where without authority he loans the fund to his co-executor on inadequate security (Perrine *v.* Petty, 34 N. J. Eq. 193) or where he appropriates the fund to his own use or in some way derives a profit therefrom (Darne *v.* Catlett, 6 Harr. & J. (Md.) 475).

Liability to residuary legatees.— An order directing an investment for specific legatees imposes no duty upon the representative to make such investment for the benefit of the residuary estate, and consequently he will not be liable to residuary legatees for interest on the fund, although it has never been invested. Miller's Appeal, 127 Pa. St. 95, 17 Atl. 866.

Ignorance of the persons entitled or their places of residence does not relieve the representative from liability for interest, where he lets the fund lie idle in his hands. Almy *v.* Newport Prob. Ct., 18 R. I. 612, 30 Atl. 458.

An administrator is not entitled to a diminution in the legal rate of interest upon funds retained in his hands uninvested, on the ground that it would have been difficult to invest in his neighborhood small sums except at less than the legal rate. Frey *v.* Demarest, 17 N. J. Eq. 71.

Interest on funds of estates for failure to invest see *supra*, VIII, F, 2.

Where the representative is liable to be called upon at any time for payment of the legacy or distributive share, and there are no directions under the will or statute, nor by order of court, to put the fund out at interest, he will not be required to pay interest thereon; unless it is made to appear that he has mingled the trust fund with his own moneys, or that he has used it in such a way as to make it produce interest. Lake *v.* Park, 19 N. J. L. 103; Frey *v.* Demarest, 17 N. J. Eq. 71; Burtis *v.* Dodge, 1 Barb. Ch. (N. Y.) 77.

11. *Alabama.*—Moody *v.* Hemphill, 71 Ala. 169, payment of legacy barred by lapse of time.

California.— Moore's Estate, 95 Cal. 34, 30 Pac. 106.

Iowa.— McClure *v.* Brown, 56 Iowa 768, 9 N. W. 906.

New Jersey.— Van Houten *v.* Post, 32 N. J. Eq. 709.

New York.— McLoskey *v.* Reid, 4 Bradf. Surr. 334; Lawrence *v.* Brinckerhoff, 2 N. Y. Leg. Obs. 122.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1273½.

12. McKnight *v.* Walsh, 24 N. J. Eq. 498 [*affirming* 23 N. J. Eq. 136], holding the executor not liable for interest on the excess of an annual allowance paid to a beneficiary under the will, where he paid such excess in good faith by mistake as to his discretionary power under the will and had no use or benefit of such excess.

13. **Time for proceedings for distribution** see *supra*, XI, E.

14. *California.*— *In re* Sheid, 129 Cal. 172, 61 Pac. 920.

Connecticut.— Eliot's Appeal, 74 Conn. 586, 51 Atl. 558; Mack's Appeal, 71 Conn. 122, 41 Atl. 242; State *v.* Blake, 69 Conn. 64, 36 Atl. 1019; Clement *v.* Brainard, 46 Conn. 174.

Illinois.— Reynolds *v.* People, 55 Ill. 328.

Indiana.— Chapell *v.* Shuee, 117 Ind. 481, 20 N. E. 417, holding that, although a complaint by the administrator and distributees of an intestate for a distribution of assets does not aver that the latter was domiciled or died possessed of property in or was an inhabitant of the state, or that administration was granted in the state, judgment for plaintiffs will not be arrested for that reason, as the circuit court has general jurisdiction of the subject-matter, and facts depriving it of that jurisdiction not appearing, will be presumed not to exist. A claim for the allowance of a legacy may be presented in the court having probate jurisdiction as a claim against the estate, but if the payment of all debts against the estate is not alleged, some reason for appealing to the court for the establishment of the legacy must be shown, and also some wrong on the part of the administrator. Fickle *v.* Snepp, 97 Ind. 289, 49 Am. Rep. 449.

Iowa.— Duffy *v.* Duffy, 114 Iowa 581, 87 N. W. 500; Leacox *v.* Griffith, 76 Iowa 89, 40 N. W. 109.

Kansas.— Holden *v.* Spier, 65 Kan. 412, 70 Pac. 348; Keith *v.* Guthrie, 59 Kan. 200, 52 Pac. 435; Proctor *v.* Dicklow, 57 Kan. 119, 45 Pac. 86.

Louisiana.— Flournoy *v.* Flournoy, 29 La. Ann. 737. But money received by the repre-

conferring jurisdiction.[15] In some states the probate court has exclusive primary

sentative from the estate of a deceased brother of the testator and to which the heirs are entitled is not within the jurisdiction of the probate court and can be recovered by the heirs from the representative only by a suit in a court of ordinary jurisdiction. Kemp *v.* Kemp, 11 La. 19.

Maine.— Healey *v.* Cole, 95 Me. 272, 49 Atl. 1065.

Maryland.— Blackburn *v.* Craufurd, 22 Md. 447; Williams *v.* Holmes, 9 Md. 281, holding that the probate court may exercise such jurisdiction even though the parties interested are infants, for whom such court has no authority to appoint a guardian *ad litem.*

Massachusetts.— Pierce *v.* Prescott, 128 Mass. 140.

Michigan.— Byrne *v.* Hume, 84 Mich. 185, 47 N. W. 679, 86 Mich. 546, 49 N. W. 576; Langrick *v.* Gospel, 48 Mich. 185, 12 N. W. 38. See also Canfield *v.* Canfield, 118 Fed 1, 55 C. C. A. 169.

Minnesota.— Schmidt *v.* Stark, 61 Minn. 91, 63 N. W. 255.

Mississippi.— Hoover *v.* Brem, 43 Miss. 603; Wells *v.* Mitchell, 39 Miss. 800.

Missouri.— Aull *v.* St. Louis Trust Co., 149 Mo. 1, 50 S. W. 289; Darneal *v.* Reeves, 25 Mo. 295.

New York.— Matter of Underhill, 35 N. Y. App. Div. 434, 54 N. Y. Suppl. 967; Lyon's Estate, 1 Misc. 447, 23 N. Y. Suppl. 146; Stagg *v.* Jackson, 2 Barb. Ch. 86 [*affirmed* in 1 N. Y. 206]; Bloodgood *v.* Bruen, 2 Bradf. Surr. 8. The surrogate who grants administration of an estate, and no other, has jurisdiction to decree distribution. Dakin *v.* Hudson, 6 Cow. 221; Foster *v.* Wilber, 1 Paige 537; Seymour *v.* Seymour, 4 Johns. Ch. 409; Wright *v.* New York M. E. Church Corp., Hoffm. 202.

North Carolina.— Hendrick *v.* Mayfield, 74 N. C. 626; Johnston *v.* Davis, 70 N. C. 581; Bell *v.* Davis, 70 N. C. 330. See also Kennon *v.* Blanson, 16 N. C. 64. In this state the clerk of the superior court has by statute probate jurisdiction of such matters, and the superior court has no jurisdiction on petition, motion, or summary order to direct the disposition of money paid into the office of such clerk by executors or administrators. *Ex p.* Cassidey, 95 N. C. 225. Where, however, a specific pecuniary legacy has been assented to by the executor, it becomes a debt, and an action to recover the same must be brought to a regular term of the superior court. Hendrick *v.* Mayfield, 74 N. C. 626; McFarland *v.* McKay, 74 N. C. 258; Miller *v.* Burnest, 65 N. C. 67.

Ohio.— McLaughlin *v.* McLaughlin, 4 Ohio St. 508, 64 Am. Dec. 603; Disney *v.* Hawes, 9 Ohio Dec. (Reprint) 406, 12 Cinc. L. Bul. 322; Smith *v.* Harker, 6 Ohio Dec. (Reprint) 1014, 9 Am. L. Rec. 488; Guiou *v.* Guiou, 5 Ohio Dec. (Reprint) 205, 3 Am. L. Rec. 475; *In re* Isherwood, 5 Ohio S. & C. Pl. Dec. 143, 7 Ohio N. P. 332.

Pennsylvania.— Kelly's Appeal, 77 Pa. St. 232; Mussleman's Appeal, 65 Pa. St. 480; Ashford *v.* Ewing, 25 Pa. St. 213; Rittenhouse *v.* Levering, 6 Watts & S. 190; Dewald *v.* Berkheiser, 19 Pa. Super. Ct. 570; Ingersoll's Estate, 11 Phila. 69.

Tennessee.— Stewart *v.* Glenn, 3 Heisk. 581.

Texas.— Shiner *v.* Shiner, 90 Tex. 414, 38 S. W. 1126.

Utah.— Snyder *v.* Murdock, 26 Utah 233, 73 Pac. 22.

Vermont.— Keeler *v.* Keeler, 39 Vt. 550.

Washington.— Reformed Presb. Church of North America *v.* McMillan, 31 Wash. 643, 72 Pac. 502.

Wisconsin.— Where one dies leaving real and personal estate disposed of by will, the county court of the county where testator resided has jurisdiction, on conclusion of the settlement, to make a final order distributing the remaining personalty, if any, and assigning the real estate in accordance with the provisions of the will. Rev. St. §§ 3940–3955; *In re* Hess, 97 Wis. 244, 72 N. W. 638.

Canada.— McDonald's Estate, 2 Nova Scotia 123, holding that distribution of personal property, upon failure of the purpose for which it was devised to the executors, is within the jurisdiction of the probate court.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1274.

Conflict of authority.— The distribution of personal property must be made under the authority of the court where the deceased was domiciled, in the state or country where the principal administration was granted. Healey *v.* Cole, 95 Me. 272, 49 Atl. 1065; Jennison *v.* Hapgood, 10 Pick. (Mass.) 77; Dawes *v.* Boylston, 9 Mass. 337, 6 Am. Dec. 72; Hutton *v.* Hutton, 40 N. J. Eq. 461, 2 Atl. 280. On application to a court of equity in this country for a decree of distribution according to the *lex domicilii* of the estate of a deceased person domiciled abroad, the court has authority to decree distribution; and it is incumbent on those opposed thereto to show that such a decree will work injustice or public mischief. Harvey *v.* Richards, 11 Fed. Cas. No. 6,184, 1 Mason 381.

Proceedings by after-discovered heirs.—The probate court has jurisdiction to order payment from the state treasury to subsequently discovered heirs of money paid in under its order because there were no known heirs, notwithstanding the statute of escheats, giving the circuit court jurisdiction where there are no known heirs. *In re* Bomino, 83 Mo. 433.

The pendency of a controversy as to the ownership of the property does not affect the jurisdiction of the probate court to enter an order of distribution subject to the pending suit. *In re* Richards, 133 Cal. 524, 65 Pac. 1034.

15. See Pearson *v.* Darrington, 32 Ala. 227; Harrison *v.* Harrison, 9 Ala. 470; Reynolds *v.* People, 55 Ill. 328; Piggott *v.* Ramey, 2 Ill. 145; Swain *v.* Smith, 61 N. J. Eq. 590, 47 Atl. 509; *In re* Eakin, 20 N. J. Eq. 481; Dundas' Appeal, 73 Pa. St. 474

jurisdiction in such proceedings,[16] and an action cannot be maintained against the representative for the recovery of a distributive share, although his account exhibiting a specific balance against him has been settled and confirmed in the probate court.[17] In others courts of equity exercise a concurrent jurisdiction therein, although such courts will not usually take jurisdiction unless the probate court cannot afford adequate relief.[18] In still others courts of equity have jurisdiction ancillary to that of the probate court, the former taking jurisdiction usually where there are special circumstances in respect to which the probate court cannot take jurisdiction, or cannot give adequate relief.[19]

2. Nature of Proceedings. The proceeding to obtain a decree of distribution is not in the nature of a suit between party and party in which one seeks to recover a right withheld by the other; but is analogous in its character to a proceeding in admiralty or other proceeding *in rem*, in which a decision between the parties before the court settles the rights of all parties to the property in question.[20]

[*reversing* 8 Phila. 598]; Shore's Estate, 14 Phila. (Pa.) 321; Hopkins' Estate, 11 Phila. (Pa.) 42.

16. *Connecticut.*— State *v.* Blake, 69 Conn. 64, 36 Atl. 1019; Clement *v.* Brainard, 46 Conn. 174.

Kansas.— Keith *v.* Guthrie, 59 Kan. 200, 52 Pac. 435, holding that in matters pertaining to the distribution of a decedent's estate the probate court has exclusive jurisdiction subject to appeal to the district court.

Montana.— Ryan *v.* Kinney, 2 Mont. 454.

North Carolina.— Hendrick *v.* Mayfield, 74 N. C. 626; Heilig *v.* Foard, 64 N. C. 710; Hunt *v.* Sneed, 64 N. C. 176.

Pennsylvania.— Kelly's Appeal, 77 Pa. St. 232; Mussleman's Appeal, 65 Pa. St. 480; Black *v.* Black, 34 Pa. St. 354; Ashford *v.* Ewing, 25 Pa. St. 213; Whitside *v.* Whitside, 20 Pa. St. 473; Dewald *v.* Berkheiser, 19 Pa. Super. Ct. 570; Barber *v.* Ross, 2 Pa. Dist. 263.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1274. And see Equity, 16 Cyc. 94.

17. Ashford *v.* Ewing, 25 Pa. St. 213.

18. Harland *v.* Person, 93 Ala. 273, 9 So. 379; Harrison *v.* Harrison, 9 Ala. 470; Calhoun *v.* King, 5 Ala. 523. A bill in equity may be filed by a legatee for the recovery of his legacy whether the executor has assented thereto or not, although he might also enforce his claim, after the executor has assented by proceedings in the probate court. Millsap *v.* Stanley, 50 Ala. 319. And see Equity, 16 Cyc. 92.

Where the estate consists of corporate stock, which has been allotted to the widow as administratrix, and a suit in equity is brought by certain of the heirs to set aside as fraudulent a transfer of other corporate stock by the corporation to a third person and to determine complainants' rights in the stock and for other relief, all the parties being before the court, it can enter a decree requiring the widow to convey to each of the heirs his proper share in the stock allotted to her as administratrix. Jones *v.* Green, 129 Mich. 203, 88 N. W. 1047, 95 Am. St. Rep. 433.

19. *California.*— Toland *v.* Earl, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100, holding that where there is no embarrassment as to the proper mode of administering the estate the fact that the parties differ as to the distribution which shall be made of the residue does not authorize a suit in equity by the administrator to have the probate court instructed as to what distribution should be made.

Maryland.— Woods *v.* Fuller, 61 Md. 457 (holding that in order to give courts of equity jurisdiction to superintend the settlement of an estate of a deceased person, or to distribute the legacies at the instance and request of the executor, he must show some special circumstance, such as a trust devolved upon him by the will, and about which he is doubtful, or at least something more than the mere payment over of a legacy after the debts of the deceased are paid); Lee *v.* Price, 12 Md. 253.

Missouri.— Aull *v.* St. Louis Trust Co., 149 Mo. 1, 50 S. W. 289.

Ohio.— McLaughlin *v.* McLaughlin, 4 Ohio St. 508, 64 Am. Dec. 603, holding that the powers of the probate court are exhausted when the order of distribution is made; and it has no jurisdiction to entertain a petition brought to enforce the collection of the amount awarded to the distributee as a debt against the administrator. The superior court in this state by virtue of its chancery powers has jurisdiction of an action by one or more heirs to compel distribution (Cadwallader *v.* Longley, 1 Disn. (Ohio) 497, 12 Ohio Dec. (Reprint) 756), or to compel the payment of legacies by the executor (Guiou *v.* Guiou, 5 Ohio Dec. (Reprint) 205, 3 Am. L. Rec. 475).

Texas.— Hill *v.* Townsend, 24 Tex. 575, holding that the district court has jurisdiction of a suit by the distributees against the administrator, in which it appears that administration has been pending during twelve years, that during the last three years the administrator has claimed the property as his own and has sold part, that the debts are all paid, and that the administrator's bond is worthless, although it does not appear that the estate has been settled in the probate court.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1274. And see Equity, 16 Cyc. 96.

20. Crew *v.* Pratt, 119 Cal. 139, 51 Pac. 38; Hill *v.* Lawler, 116 Cal. 359, 48 Pac.

3. Mode or Form of Proceeding. The mode or form of proceeding for the recovery of a legacy or distributive share is generally regulated by statute,[21] the usual form being an application or petition for an order of distribution,[22] or for an order directing payment of a particular legacy.[23]

4. Who May File Petition — a. In General. It is generally provided by statute that a petition for distribution or payment may be filed by a devisee, legatee, or distributee.[24] A widow is entitled to compel distribution of her deceased husband's estate in all respects like a distributee.[25]

b. Personal Representative. The personal representative of the decedent should apply for a final distribution when the time for presenting claims has expired and he has filed his report showing a balance in his hands for distribution;[26]

323; Loring *v.* Steineman, 1 Metc. (Mass.) 204; Exton *v.* Zule, 14 N. J. Eq. 501; Sparhawk *v.* Buell, 9 Vt. 41.

In Pennsylvania proceedings for distribution in the orphans' court are conducted upon the principles and practice which regulate an administration suit in the chancery courts of England. Bicking's Appeal, 2 Brewst. 202; Woodward's Estate, 2 Chest. Co. Rep. 9.

21. See Mack's Appeal, 71 Conn. 122, 41 Atl. 242, holding that under Gen. St. § 628, requiring the probate court to ascertain the heirs and distributees of estates, the proper practice to ascertain heirs and distributees is to apply for an order of distribution, or an order to hand over the estate without distribution, of which orders the ascertainment of heirs and distributees is an incident. And see, generally, Wills.

22. Mack's Appeal, 71 Conn. 122, 41 Atl. 242; Crowder *v.* Shackelford, 35 Miss. 321. And see the cases hereafter cited.

23. Matter of Underhill, 35 N. Y. App. Div. 434, 54 N. Y. Suppl. 967 [*affirmed* in 158 N. Y. 721, 53 N. E. 1133]. And see, generally, Wills.

24. *California.*— Alcorn *v.* Buschke, 133 Cal. 655, 66 Pac. 15; *In re* Crocker, 105 Cal. 368, 38 Pac. 954 (holding that a petition for partial distribution may be presented by several legatees and devisees); *In re* Letellier, 74 Cal. 311, 15 Pac. 847.

Indiana.— Conner *v.* Hawkins, 8 Blackf. 236.

Mississippi.— Temple *v.* Hammock, 52 Miss. 360; Crowder *v.* Shackelford, 35 Miss. 321; Benoit *v.* Brill, 7 Sm. & M. 32.

Nevada.— *In re* Foley, 24 Nev. 197, 51 Pac. 834, 52 Pac. 649.

New Jersey.— Sayre *v.* Sayre, 16 N. J. Eq. 505; Exton *v.* Zule, 14 N. J. Eq. 501.

New York.— Matter of Underhill, 35 N. Y. App. Div. 434, 54 N. Y. Suppl. 967.

Pennsylvania.— Baker's Appeal, 59 Pa. St. 313, holding that all the legatees may join in the petition.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1280.

An incompetent distributee for whom no guardian has been appointed cannot petition by attorney for partial distribution. *In re* Davis, 27 Mont. 490, 71 Pac. 757.

Where the contest of a will is settled by agreement of the parties, which agreement is subsequently confirmed by a decree fixing their shares, such parties and their assigns, although not heirs or legatees named in the will, have a right to petition for a partial distribution under a statute authorizing such distribution on petition of an heir, devisee, or legatee. *In re* Davis, 27 Mont. 490, 71 Pac. 757.

The next of kin of a deceased legatee cannot maintain a petition for such legatee's share. Matter of Hodgman, 11 N. Y. App. Div. 344, 42 N. Y. Suppl. 1004.

Heirs or next of kin who have conveyed to other persons all their interest in the real and personal estate of the intestate are not entitled against the wish of their grantee to a decree for the assignment and distribution of real estate held by the administrator under his foreclosure of a mortgage thereof to the intestate. Stevens *v.* Palmer, 15 Gray (Mass.) 505.

Testamentary trusts.— Ky. Gen. St. c. 35, § 19, giving a right of action to a distributee against the administrator for his share does not apply to a trust fund created by the sale of land by an administrator with the will annexed, the proceeds of which he is directed by a will to distribute; the only right of action which he has in such case being to compel execution of the trust and an accounting for a reasonable part of the money collected. McRoberts *v.* Carneal, (Ky. 1898) 44 S. W. 442.

A petition filed in the names of the widow and other distributees of the deceased cannot be dismissed on the motion of the widow alone. Green *v.* Fagan, 15 Ala. 335.

25. Grant *v.* Spann, 33 Miss. 134.

A widow who has dissented from her husband's will cannot petition the probate court, after the expiration of eighteen months from the probate of the will, for her distributive share; nor can her administrator. Johnston *v.* Fort, 30 Ala. 78.

26. *Connecticut.*— Sanford *v.* Thorp, 45 Conn. 241; Davenport *v.* Richards, 16 Conn. 310.

Illinois.— Haskins *v.* Martin, 103 Ill. App. 115.

Kansas.— See Holden *v.* Spier, 65 Kan. 412, 70 Pac. 348.

Maryland.— Jones *v.* Jones, 36 Md. 459.

Mississippi.— Nabors *v.* McKay, 27 Miss. 799.

New Jersey.— Sayre *v.* Sayre, 16 N. J. Eq. 505; Exton *v.* Zule, 14 N. J. Eq. 501.

but he is not entitled to petition for a partial distribution under a statute allowing a legatee or distributee to do so,[27] nor to apply for a division of lands devised,[28] unless directed by the will to do so.[29]

c. Assignees. An assignee or purchaser of a legacy or distributive share may come in by petition on final distribution and claim the assignor's legacy or share,[30] but he cannot file an original petition for the distribution of such legacy or distributive share.[31]

5. Process or Notice. An order for distribution is unauthorized and invalid, unless notice of proceedings therefor is given in the manner prescribed by statute,[32] or by the court,[33] to the personal representative,[34] and to all distribu-

Rhode Island.— West Greenwich Probate Ct. *v.* Carr, 20 R. I. 592, 40 Atl. 844.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1280.

27. Alcorn *v.* Buschke, 133 Cal. 655, 66 Pac. 15; Letellier's Estate, 74 Cal. 311, 15 Pac. 847.

28. Temple *v.* Hammock, 52 Miss. 360.

29. Shiner *v.* Shiner, 90 Tex. 414, 38 S. W. 1126.

30. *In re* Burton, 93 Cal. 459, 29 Pac. 36; Balch *v.* Zentmeyer, 11 Gill & J. (Md.) 267.

31. Matter of Wood, 38 Misc. (N. Y.) 64, 76 N. Y. Suppl. 967; *In re* Brewster, 3 N. Y. Suppl. 556, 1 Connoly Surr. (N. Y.) 172; Tilden *v.* Dows, 3 Dem. Surr. (N. Y.) 240; Peyser *v.* Wendt, 2 Dem. Surr. (N. Y.) 221.

A purchaser at a sheriff's sale of a devisee's undivided interest in land cannot petition a probate court for a distribution of the proceeds of sale under a statute which allows devisees, legatees, and distributees to have a distribution. Smith *v.* Hall, 20 Ala. 777. And see Graham *v.* Abercrombie, 8 Ala. 552.

32. *California.*— *In re* Mitchell, 126 Cal. 248, 58 Pac. 549; Asher *v.* Yorba, 125 Cal. 513, 58 Pac. 137; Daly *v.* Pennie, 86 Cal. 552, 25 Pac. 67, 21 Am. St. Rep. 61 (personal notice is not required); *In re* Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594.

Indiana.— Glessner *v.* Clark, 140 Ind. 427, 39 N. E. 544.

Louisiana.— Harkins' Succession, 2 La. Ann. 923. See Millaudon *v.* Cajus, 6 La. 222.

Maryland.— Wilson *v.* McCarty, 55 Md. 277.

Minnesota.— Greenwood *v.* Murray, 28 Minn. 120, 9 N. W. 629.

Mississippi.— Mundy *v.* Calvert, 40 Miss. 181.

Missouri.— State *v.* Henderson, 164 Mo. 347, 64 S. W. 138, 86 Am. St. Rep. 618; Lilly *v.* Menke, 126 Mo. 190, 28 S. W. 643, 994; Baker *v.* Lumpee, 91 Mo. App. 560.

New Jersey.— Adams *v.* Adams, 46 N. J. Eq. 298, 19 Atl. 14, holding that the usual notice that the executor or administrator with the will annexed will state and settle his accounts will not be sufficient to render the decree conclusive as to a legatee having no other notice.

Ohio.— Matter of Cloud, 7 Ohio Cir. Ct. 67, 3 Ohio Cir. Dec. 666.

Texas.— Porter *v.* Sweeney, 61 Tex. 213, holding that probate courts may, upon the mere general notices required by statute, make needful orders for settlement and distribution, without actual intervention of all the parties in interest.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1281.

Proof of notice.— Where a decree recites due service of notice by publication, or by posting, such recital is sufficient to prove such service as against a collateral attack. Crew *v.* Pratt, 119 Cal. 139, 51 Pac. 38.

Presumption of notice.— If the complaint does not allege that the notice required by law was not given it will be presumed that it was given (Daly *v.* Pennie, 86 Cal. 552, 25 Pac. 67, 21 Am. St. Rep. 61); and the fact that the affidavit of the posting of the notice was made on the day of the posting is no objection to the jurisdiction of the court to order distribution; the presumption being that the notice remained posted during the statutory period (Crew *v.* Pratt, 119 Cal. 139, 51 Pac. 38).

33. Lamson *v.* Knowles, 170 Mass. 295, 49 N. E. 440; Schæffner's Appeal, 41 Wis. 260, holding that where the statute does not prescribe what notice shall be given the court may prescribe the notice.

34. *Alabama.*— Brazeale *v.* Brazeale, 9 Ala. 491; Welch *v.* Walker, 4 Port. 120, holding that a citation to an administrator to show cause why judgment and execution should not be awarded against him for the distributive share of one in an estate must set out the previous proceedings had in the settlement of the estate.

California.— Letellier's Estate, 74 Cal. 311, 15 Pac. 847.

Illinois.— Reynolds *v.* People, 55 Ill. 328, holding that the citation issued by a county court at the instance of one of the heirs of the estate to an administrator to show cause why an order should not be made requiring him to make partial distribution to the heirs should run in the name of the people.

Iowa.— Huey *v.* Huey, 26 Iowa 525, holding that where an executor is a resident of another state, notice to him of an application to pay over a distributive share, and an order by the court to that effect, are binding upon him in such other state.

Missouri.— See State *v.* Henderson, 164 Mo. 347, 64 S. W. 138, 86 Am. St. Rep. 618, holding that a statute requiring written notice of an application for distribution ap-

tees, legatees, or other persons interested in the distribution,[35] or unless the persons

plies only to notice to persons entitled to share in the distribution, and not to an executor.

New York.— Kerrigan *v.* Kerrigan, 2 Redf. Surr. 517.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1281.

Notice to the representative's attorney was sufficient on proceedings to set aside an order denying a petition for partial distribution, where at the hearing of such petition the executors appeared and it was admitted that due notice was given to them and all parties interested. *In re* Mitchell, 121 Cal. 391, 53 Pac. 810.

Where the essential requisites have been complied with by the distributees on an application for partial distribution, there is no necessity for a notice to the administrator before a final decree can be rendered. Harrison *v.* Meadors, 41 Ala. 274.

Service of citation upon an administrator to render an account gives the court jurisdiction over his person, and any action of the court thereafter in ordering distribution of money in his hands is within the jurisdiction of the court and not void. *Ex p.* Pearce, 44 Ark. 509.

Service of citation upon the husband of an administratrix is sufficient to support a final settlement of the administration. Kavanaugh *v.* Thompson, 16 Ala. 817.

35. *Alabama.*—Gardner *v.* Gardner, 42 Ala. 161; Hollis *v.* Caughman, 22 Ala. 478; Harrison *v.* Harrison, 9 Ala. 470; Watson *v.* May, 8 Ala. 177, holding that only a general citation to parties having an adverse interest is necessary.

Arkansas.— Neal *v.* Robertson, 55 Ark. 79, 17 S. W. 582, holding that notice must be given to an infant daughter of the decedent.

California.— *In re* Grider, (1889) 21 Pac. 532 (holding a decree of distribution a nullity as to distributees not served with process or appearing, even though it falsely recites notice); Abila *v.* Burnett, 33 Cal. 658.

Illinois.— Long *v.* Thompson, 60 Ill. 27.

Indiana.— Glessner *v.* Clark, 140 Ind. 427, 39 N. E. 544.

Louisiana.— Couder's Succession, 47 La. Ann. 810, 17 So. 317; Broussard *v.* Robin, 8 La. Ann. 478.

Maryland.— Shriver *v.* State, 65 Md. 278, 4 Atl. 679; Wilson *v.* McCarty, 55 Md. 277.

Massachusetts.— Lamson *v.* Knowles, 170 Mass. 295, 49 N. E. 440; Browne *v.* Doolittle, 151 Mass. 595, 25 N. E. 23; Smith *v.* Rice, 11 Mass. 507.

Minnesota.— Greenwood *v.* Murray, 28 Minn. 120, 9 N. W. 629; Wood *v.* Myrick, 16 Minn. 494.

Mississippi.— Mundy *v.* Calvert, 40 Miss. 181; Pringle *v.* Hunt, 31 Miss. 351.

Missouri.— State *v.* Henderson, 164 Mo. 347, 64 S. W. 138, 86 Am. St. Rep. 618; Lilly *v.* Menke, 126 Mo. 190, 28 S. W. 643, 994; State *v.* St. Gemme, 31 Mo. 230; Baker *v.* Lumpee, 91 Mo. App. 560 (holding that an order of distribution made after final settlement is *coram non judice*, unless the distributees have been served with notice of the intended order of distribution ten days prior thereto as required by Rev. St. (1899) § 243).

Montana.—*In re* McFarland, 10 Mont. 586, 27 Pac. 389.

New Jersey.— Adams *v.* Adams, 46 N. J. Eq. 298, 19 Atl. 14; Exton *v.* Zule, 14 N. J. Eq. 501.

New York.— See *In re* Rainforth, 37 Misc. 660, 76 N. Y. Suppl. 314, holding that, where the executor's account shows that there is a surplus distributable to persons interested who have not been cited, it is discretionary with the surrogate to cite them.

Oregon.— State *v.* O'Day, 41 Oreg. 495, 69 Pac. 542.

Pennsylvania.— Purviance *v.* Com., 17 Serg. & R. 31; Woodward's Estate, 2 Chest. Co. Rep. 9; Cochran's Estate, 31 Pittsb. Leg. J. 338.

Texas.— Porter *v.* Sweeney, 61 Tex. 213 (holding that general notices to parties in interest is sufficient); Johns *v.* Northcutt, 49 Tex. 444.

Vermont.— Lenehan *v.* Spaulding, 57 Vt. 115; *Ex p.* Robinson, 1 D. Chipm. 357.

Washington.—McGowan *v.* Smith, 22 Wash. 625, 61 Pac. 713.

Wisconsin.— Leavens' Estate, 65 Wis. 440, 27 N. W. 324; Schæffner's Appeal, 41 Wis. 260; Ruth *v.* Oberbrunner, 40 Wis. 238; Bresee *v.* Stiles, 22 Wis. 120.

Canada.— Uffner *v.* Lewis, 27 Ont. App. 242.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1281.

Removal of the representative after notice has been given and the appointment of another in his place does not destroy the efficacy of the notice. State *v.* O'Day, 41 Oreg. 495, 69 Pac. 542.

Intervention of all parties not necessary.— If the proceedings on distribution have been regularly conducted, and the notices required by law have been given, these notices amount in law to service upon all the parties in interest, and the court may proceed to make needful orders for distribution without actual intervention of all the parties in interest. Woodward's Estate, 2 Chest. Co. Rep. (Pa.) 9; Porter *v.* Sweeney, 61 Tex. 213.

Passing account without notice.— Passing an administrator's account cannot be regarded as a final distribution of the estate by the orphans' court, where it does not appear that any meeting of the distributees was appointed, or any notice of an intended meeting given, or that a distributee whose share had been placed in bank and for which credit is claimed by the administrator had ever received it or assented to the distribution thus made. Scott *v.* Fox, 14 Md. 388.

who are entitled to notice appear in the proceedings for distribution and waive notice.[36]

6. Parties.[37] Necessary parties to a proceeding for distribution are in general the personal representatives of the decedent,[38] the distributees,[39] or their personal representatives,[40] and all other persons interested in the distribution and as to whom the representative will not be protected, if a decree is rendered without their being made parties.[41] If any of the distributees are infants they may be

36. Gardner *v.* Gardner, 42 Ala. 161; Hollis *v.* Caughman, 22 Ala. 478; Smith *v.* Smith, 21 Ala. 761; Crew *v.* Pratt, 119 Cal. 139, 51 Pac. 38; *In re* Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; *In re* Grider, (Cal. 1889) 21 Pac. 532; Exton *v.* Zule, 14 N. J. Eq. 501; Kerrigan *v.* Kerrigan, 2 Redf. Surr. (N. Y.) 517.

37. **Parties to proceedings for recovery of legacies** see, generally, Wills.

38. *Alabama.*—Ward *v.* Oates, 42 Ala. 225.

Arkansas.— Norwood *v.* Holliman, 27 Ark. 445.

Illinois.— Hopper *v.* Ferguson, 23 Ill. 438.

Kentucky.— Cargile *v.* Harrison, 9 B. Mon. 518; Haden *v.* Haden, 7 J. J. Marsh. 168.

Mississippi.— Shattuck *v.* Young, 2 Sm. & M. 30; Porter *v.* Porter, 7 How. 106, 40 Am. Dec. 55.

New York.— Cocks *v.* Haviland, 5 Dem. Surr. 11, holding that the fact that one of several co-executors is insolvent and has no assets in his hands makes it none the less necessary to make him a party to a special proceeding to enforce payment of arrears of an annuity.

Pennsylvania.— Baker's Appeal, 59 Pa. St. 313.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1283.

An executor or administrator is not a necessary party to a proceeding by legatees after final settlement to procure a division of property remaining in his hands for distribution. Pringle *v.* Hunt, 31 Miss. 351.

39. *Alabama.*— Boyett *v.* Kerr, 7 Ala. 9.

Arkansas.— Morris *v.* Virden, 57 Ark. 232, 21 S. W. 223; Neal *v.* Robertson, 55 Ark. 79, 17 S. W. 587; Norwood *v.* Holliman, 27 Ark. 445.

Kentucky.—Johnson *v.* Beauchamp, 5 Dana 70; Cargile *v.* Harrison, 9 B. Mon. 518.

Louisiana.— Bothick's Succession, 109 La. 1, 33 So. 47.

Mississippi.— Murff *v.* Frazier, 41 Miss. 408; Porter *v.* Porter, 7 How. 106, 40 Am. Dec. 55.

Nevada.— Royce *v.* Hampton, 16 Nev. 25.

New York.— Clock *v.* Chadeagne, 10 Hun 97.

North Carolina.—Williams *v.* Williams, 74 N. C. 1, holding that where one only of ten distributees sued the administrators without making the others parties, the court could not render a decree of distribution, and could do no more than adjudicate the rights of plaintiff and the administrators.

Tennessee.—Stewart *v.* Glenn, 3 Heisk. 581.

Virginia.—Sheppard *v.* Starke, 3 Munf. 29.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1283.

A petition by one of several distributees without making the co-distributees parties is not sufficient to give the court power to order distribution. Murff *v.* Frazier, 41 Miss. 408. *Compare* Benoit *v.* Brill, 7 Sm & M. (Miss.) 32 (holding that, at the expiration of the time fixed by statute, any one of several distributees may petition the probate court for his share, without joining his co-distributees; and the court will compel the distribution upon the petitioner's filing a sufficient bond); Ward *v.* Oates, 42 Ala. 225 (holding that in a proceeding for partial distribution by one of several distributees, instituted under Rev. Code, § 2105, others besides the administrator are not indispensable parties).

A petition for the division of the personal property of the deceased need not make all the distributees parties to it. Pringle *v.* Hunt, 31 Miss. 351.

A petition for the distributive share of a married woman must be presented in the joint names of such married woman and her husband, and not in the name of the husband alone. Westervelt *v.* Gregg, 1 Barb. Ch. (N. Y.) 469; Smith *v.* Hopper, 20 Ala. 245. But see King *v.* Brown, 108 Ala. 68, 18 So. 935.

Where the petitioner claims to be the sole heir of the estate and regularly pursues the course required by statute in giving notice, etc., he is not guilty of fraud upon the court because he does not state the names of other parties who claim to be heirs of the estate. Royce *v.* Hampton, 16 Nev. 25.

Where the decree of distribution is not made upon the petition of the administrator, he is not bound to notify the court that there are other parties besides the petitioner who claim to be heirs of the estate. Royce *v.* Hampton, 16 Nev. 25.

40. McMullen *v.* Brazelton, 81 Ala. 442, 1 So. 778; Thomas *v.* Dumas, 30 Ala. 83; McConico *v.* Cannon, 25 Ala. 462; Hall *v.* Andrews, 17 Ala. 40; Boyett *v.* Kerr, 7 Ala. 9; Morris *v.* Virden, 57 Ark. 232, 21 S. W. 223; Sheppard *v.* Starke, 3 Munf. (Va.) 29.

41. Riggs *v.* Cragg, 89 N. Y. 479 [*reversing* 26 Hun 89]; Neaves *v.* Neaves, 2 Dem. Surr. (N. Y.) 230; Triplett *v.* Woodward, 98 Va. 187, 35 S. E. 455; Sheppard *v.* Starke, 3 Munf. (Va.) 29.

Creditors are necessary parties to a proceeding for distribution. Beekman *v.* Vanderveer, 3 Dem. Surr. (N. Y.) 221; Woodward's Estate, 2 Chest. Co. Rep. (Pa.) 9: Triplett *v.* Woodward, 98 Va. 187, 35 S. E. 455.

The husband of a legatee is not a proper party to a bill by an administrator with the

represented by their general guardian;[42] but in case there is no competent general guardian, or he fails to attend after notice, a guardian *ad litem* should be appointed to represent them.[43] Persons claiming through the decedent, as creditor, legatee, or distributee, may be permitted to intervene in the hearing of a petition for distribution,[44] by filing some pleading or statement as to the grounds upon which they claim a right to be heard.[45]

7. Pleadings. Formal and technical pleadings are not usually required in proceedings for distribution,[46] but the application or petition should substantially comply with the statute, if any,[47] or rules of court;[48] should state the essential facts required to be established for the relief prayed for;[49] and should conclude

will annexed for distribution of the estate. Triplett *v.* Woodward, 98 Va. 187, 35 S. E. 455.

The appointment of an attorney for absent heirs is essential under the Louisiana statute only in case a necessity therefor is shown during a pending administration of a succession. Kellogg's Succession, 51 La. Ann. 1304, 26 So. 262; Burnside's Succession, 35 La. Ann. 708.

A widow who was in community with her deceased husband is not a proper party to an action by the heirs against the executors to compel them to pay over funds in their possession; since, not being one of the heirs, she has nothing to claim of the executors and no account to settle with them. Kemp *v.* Kemp, 11 La. 19.

42. Smith *v.* Smith, 21 Ala. 761; Sankey *v.* Sankey, 6 Ala. 607; Gammage *v.* Noble, 24 Miss. 150.

43. Thompson *v.* Perryman, 45 Ala. 619; Morgan *v.* Morgan, 35 Ala. 303; King *v.* Collins, 21 Ala. 363 [*overruling* Parks *v.* Stonum, 8 Ala. 752]; Sankey *v.* Sankey, 6 Ala. 607; Conwill *v.* Conwill, 61 Miss. 202; Mundy *v.* Calvert, 40 Miss. 181; Cason *v.* Cason, 31 Miss. 578.

44. *In re* Crook, 125 Cal. 459, 58 Pac. 89 (mortgagee); Braman's Appeal, 89 Pa. St. 78; McBride's Appeal, 72 Pa. St. 480; Fry's Estate, 4 Dauph. Co. Rep. (Pa.) 72.

One claiming adversely, and not as a distributee or creditor, has no standing to be heard in a proceeding for distribution. Hamor's Estate, 1 Chest. Co. Rep. (Pa.) 319.

A surviving husband who claims certain property in the possession of the executors of the will of his deceased wife as community property to which he is entitled cannot have his claim of ownership determined upon a proceeding for the distribution of his wife's estate. Rowland's Estate, 74 Cal. 523, 16 Pac. 315, 5 Am. St. Rep. 464.

An order denying the application of one having no direct or contingent interest in the fund, to intervene in proceedings to compel an executor to pay over a legacy is in the court's discretion; it involves no substantial right and so is not reviewable. *In re* Halsey, 93 N. Y. 48.

45. *In re* Crook, 125 Cal. 459, 58 Pac. 89. And see *supra*, XI, O, 4, c.

46. Calhoun *v.* McKnight, 39 La. Ann. 325, 1 So. 612; Walker *v.* Bradbury, 15 Me. 207 (written petition not essential); Anderson *v.* Gregg, 44 Miss. 170; Mundy *v.* Calvert, 40 Miss. 181; French *v.* Davis, 38 Miss. 167; Clock *v.* Chadeagne, 10 Hun (N. Y.) 97.

Misnumbering petition.— The fact that the clerk filed a petition for distribution under a different number from the other papers in the estate is immaterial, there being but one estate. *In re* Sheid, 129 Cal. 172, 61 Pac. 920.

A cross bill is unnecessary on a petition for the distribution of the estate of an intestate, as it is competent for an administrator, without formality, to show cause in any intelligible manner why a decree for distribution should not be made. French *v.* Davis, 38 Miss. 167.

Joining claims.— Where estates are connected, as where one of the decedent's was a distributee of another and the same person is administrator of both, distributees entitled to a portion of each of the estates may unite both claims in the same bill against the administrator. Breckinridge *v.* Floyd, 7 Dana (Ky.) 456.

47. Ford *v.* Garner, 49 Ala. 601, holding that a petition for distribution which described a minor heir as "Matilda Gravitt's child, whose name is unknown" did not comply with Rev. Code, § 2222, requiring that the petition either state the name or show that the distributee has no name.

An affidavit which fully states the facts, filed with a notice of a motion to require the administrator to pay a legacy, is a sufficient "petition" to authorize a citation, as prescribed by Code Civ. Proc. §§ 2717, 2718, prescribing the procedure to compel payment of legacies. *In re* Dunscomb, 10 N. Y. Suppl. 247.

A verification to a petition to the surrogate court to compel an executor to pay a legacy to petitioner, stating that petitioner "knows the contents thereof, and that the same are true," is a compliance with the provision of the code requiring the affidavit to state that the contents are true to the knowledge of deponent. *In re* Macauley, 94 N. Y. 574.

48. McClelland's Estate, 3 Pa. Dist. 759, 15 Pa. Co. Ct. 375.

49. *Alabama.*— McRae *v.* Pegues, 4 Ala. 158.

Arkansas.— Norwood *v.* Holliman, 27 Ark. 445.

California.— *In re* Levinson, 98 Cal. 654, 33 Pac. 726.

Georgia.—Bellerby *v.* Thomas, 105 Ga. 477, 30 S. E. 425.

with a prayer for the relief sought.[50] An answer or plea may be filed to the petition setting up a denial or substantial defense to the facts stated therein[51] and a reply may be filed to the answer or plea.[52]

Indiana.— Chapell *v.* Shuee, 117 Ind. 481, 20 N. E. 417; Roberts *v.* Huddleston, 93 Ind. 173.

Kentucky.— See Wilson *v.* Hunt, 6 B. Mon. 379.

Minnesota.— *In re* Kittson, 45 Minn. 197, 48 N. W. 419.

Mississippi.— French *v.* Davis, 38 Miss. 167; Cole *v.* Leake, 27 Miss. 767; Crosby *v.* Covington, 24 Miss. 619.

New York.— *In re* Macaulay, 94 N. Y. 574; Baylis *v.* Swartwout, 4 Redf. Surr. 395.

Texas.—Turner *v.* Clark, 18 Tex. Civ. App. 606, 46 S. W. 381.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1284.

A demurrer to the petition will be sustained where the petition states facts insufficient for the relief sought for (Norwood *v.* Holliman, 27 Ark. 445) or where it shows that it was filed in less than a year after the grant of letters of administration (Young *v.* Ross, 31 Miss. 556); but a demurrer to the whole petition will not be sustained if it be good as to any part of the relief prayed for (Wells *v.* Mitchell, 39 Miss. 800; Cole *v.* Leake, 27 Miss. 767).

Allegation of grant of administration.— It is unnecessary to allege that administration of the estate was granted by the same court in which the petition is filed. Hargroves *v.* Thompson, 31 Miss. 211.

Petition upon presumption of death.— *In re* Morrison, 183 Pa. St. 155, 38 Atl. 895.

An application for the ascertainment of persons entitled to participate in the distribution of funds of the testator's estate is unnecessary in a petition for distribution, as such ascertainment is a mere incident to a decree for distribution. Chase *v.* Benedict, 72 Conn. 322, 44 Atl. 507.

Misdescription.—A petition by devisees and legatees for partial distribution is not defective because it describes petitioners as "heirs at law." *In re* Crocker, 105 Cal. 368, 38 Pac. 954.

Description of defendant representative.— A petition for a legacy, against the administrator of the testator, need not describe him as administrator with the will annexed; or show in what manner he became administrator; it is sufficient if it describes him as administrator. Quinn *v.* Moss, 12 Sm. & M. (Miss.) 365.

A refunding bond need not be filed with the petition for distribution, when presented before final settlement; it is sufficient if the petition contains an offer to execute one. Richmond *v.* Delay, 34 Miss. 83; Keith *v.* Jolly, 26 Miss. 131. See also Norwood *v.* Holliman, 27 Ark. 445; Crosby *v.* Covington, 24 Miss. 619.

50. Cook's Estate, 77 Cal. 220, 17 Pac. 923, 19 Pac. 431, 11 Am. St. Rep. 267, 1 L. R. A. 567 (holding, however, that it is improper to include, in a petition for final distribution of a decedent's estate, a prayer for an accounting against one who is alleged to have come into possession of property of the estate, and not to have accounted for it); Hurley *v.* Hewett, 89 Me. 100, 35 Atl. 1026 (holding that a distribution in kind could be ordered, although the prayer of the petition called for such a distribution only by implication); Garner *v.* Lansford, 12 Sm. & M. (Miss.) 558. See also *In re* Morrison, 183 Pa. St. 155, 38 Atl. 895.

51. *In re* Halleck, Myr. Prob. (Cal.) 46 (holding that opposition to distribution must state that there is a liability unsatisfied of a certain and definite amount or nature); Packwood *v.* Elliott, 43 Miss. 504; Matter of Feeks, 6 N. Y. St. 60 (holding that where, upon a verified petition being filed by a legatee, a citation is issued by the surrogate to the executors to show cause why they should not be decreed to pay a certain sum to the legatee, it is error to refuse to allow the executors to file a verified answer).

That the representative does not know who the heirs are is no answer or plea to a petition by heirs for distribution. Conner *v.* Hawkins, 8 Blackf. (Ind.) 236.

Facts showing want of jurisdiction in the court to act upon the petition must be alleged in the answer, if relied upon by defendant. Chapell *v.* Shuee, 117 Ind. 481, 20 N. E. 417.

Under N. Y. Code Civ. Proc. §§ 2717, 2718, 2722, an answer sufficient to justify the dismissal of a petition in the surrogate's court for a legacy or distributive share must be duly verified, must set forth facts which cast a doubt on the petitioner's claim, and must deny the validity and legality of the claim. *In re* Macaulay, 94 N. Y. 574; Hurlburt *v.* Durant, 88 N. Y. 121, 2 N. Y. Civ. Proc. 115; Matter of Dunn, 39 N. Y. App. Div. 510, 57 N. Y. Suppl. 444; Matter of Muller, 25 N. Y. App. Div. 269, 50 N. Y. Suppl. 786; Matter of Waterford Y. M. C. A., 22 N. Y. App. Div. 325, 47 N. Y. Suppl. 354; Matter of Alexander, 83 Hun 147, 31 N. Y. Suppl. 411; Brown *v.* Phelps, 48 Hun 219 [*affirmed* in 113 N. Y. 658, 21 N. E. 415]; Matter of McClouth, 9 Misc. 385, 30 N. Y. Suppl. 274; *In re* Phalen, 5 N. Y. Suppl. 43. But the representative's answer is not sufficient for this purpose where it merely denies the validity or legality of the petitioner's claim (*In re* Macaulay, 94 N. Y. 574), or that there is money in his hands with which to pay the claim (Brown *v.* Phelps, 48 Hun 219 [*affirmed* in 113 N. Y. 658, 21 N. E. 415]), or where it merely avers that "the petitioner's legacy is not yet payable by the terms of the will" (Steinele *v.* Oechsler, 5 Redf. Surr. 312).

52. Conner *v.* Hawkins, 8 Blackf. (Ind.) 236 (holding that a suit for distribution should not be dismissed upon objections to the answer or plea being overruled, but the petitioners should be permitted to reply); Quinn *v.* Moss, 12 Sm. & M. (Miss.) 365.

8. Evidence. In a proceeding by a legatee or distributee for his legacy or distributive share the burden is on him to prove his title and all other facts necessary to entitle him to recover,[53] unless such proof is waived;[54] and upon the representative to prove payment, settlement, or any other matter of defense relied upon by him.[55] The representative may introduce evidence only as to such matters as he has set up as a defense.[56]

9. Proceedings of Auditor or Commissioner. In some states auditors or commissioners may be appointed to examine the representative's accounts and make an allotment of the estate of a deceased person in the hands of the representative among the persons entitled to the same, creditors included.[57] The duty or power of such auditors or commissioners is to ascertain and report the shares of distributees,[58] in doing which a majority of them may act.[59] They may consider evidence in reference to claims against the decedent,[60] construe instruments,[61] and make allowances and give credit to the representative for disbursements made after settlement in the probate court;[62] but they have no title whatever to or right to possession of the estate either before or after division made;[63] nor have they power to review proceedings of the probate court, or to alter or restate an account which has been settled in that court,[64] or to make distribution, that duty being upon the administrator according to their report.[65] Their report is subject

53. Hall *v.* Wilson, 14 Ala. 295.

A petitioner for partial distribution, whether there be opposition or not, must show that the estate is but little indebted, that the applicant is entitled to the share asked for, and what, when the expenses are paid, such share will amount to. *In re* Painter, 115 Cal. 635, 47 Pac. 700.

54. Hall *v.* Wilson, 14 Ala. 295. And see Descent and Distribution, 14 Cyc. 155.

55. Young *v.* Cook, 30 Miss. 320.

The verified return of the testator's executor approved and ordered to record by the court of ordinary having jurisdiction over the estate, and duly recorded, which shows a payment to all the legatees, including a money bequest to the husband of the life-tenant, is admissible as *prima facie* evidence of such latter payment in a suit by an executory legatee, upon the death of the life-tenant without leaving children, to recover said money from the administrator of the husband, he being a party in interest and connected with the testator's estate, and the approval and recording of such return under the order of the court of ordinary being a judgment *de bene esse* which affects him. Crawford *v.* Clark, 110 Ga. 729, 36 S. E. 404.

56. Bradley *v.* Byrd, 12 Sm. & M. (Miss.) 269, holding that where the administrator in his answer resisted the distributee's claim solely on the ground that the commissioners had possession of the property and should make distribution, he cannot on the hearing show a delivery of his share to the distributees.

57. *Alabama.*— Chambers *v.* Perry, 17 Ala. 726.

Kentucky.— Williams *v.* Williams, 3 Litt. 40, holding that the order appointing such commissioners to divide the land described to heirs ought to state that it was made on the application of the heirs or of some of them. If an examination of accounts and calculation is necessary to ascertain the amount of each share a master should be appointed; and in the case of complicated accounts the omission to refer it would, it seems, be ground of reversal. Roberts *v.* Dale, 7 B. Mon. 199.

Mississippi.— Bradley *v.* Byrd, 12 Sm. & M. 269.

New Jersey.— Meeker *v.* Vanderveer, 15 N. J. L. 392.

Pennsylvania.— *In re* Kittera, 17 Pa. St. 416; Heitler's Estate, 3 Am. L. Reg. 487 note.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1286.

58. Bradley *v.* Byrd, 12 Sm. & M. (Miss.) 269.

Separate accounts of co-executors cannot be combined by the auditor appointed to report distribution, as the executors, by filing separate accounts, have no joint duty of distribution. Heyer's Appeal, 34 Pa. St. 183.

59. Chambers *v.* Perry, 17 Ala. 726.

60. Dobbins *v.* McGonigal, 20 Wkly. Notes Cas. (Pa.) 21.

61. McGettrick's Appeal, 98 Pa. St. 9, holding that an auditor appointed by the orphans' court to distribute the proceeds of a sale of realty belonging to an intestate, among his heirs, has power to inquire into and to pass upon the validity of a deed whereby the share of one of the heirs in the realty is assigned to a stranger.

62. Meeker *v.* Vandeveer, 15 N. J. L. 392.

63. Bradley *v.* Byrd, 12 Sm. & M. (Miss.) 269.

64. Meeker *v.* Vandeveer, 15 N. J. L. 392. An auditor to whom the account of an administrator, as confirmed by the orphans' court, has been referred for a distribution of the balance, is confined to the decree of the orphans' court, and cannot go behind it for the purpose of increasing the sum there ascertained by the addition of interest. Wither's Appeal, 16 Pa. St. 151.

65. Bradley *v.* Byrd, 12 Sm. & M. (Miss.) 269.

to exception,[66] and it is only after its confirmation by the probate court that a final order to deliver up the property can be made.[67]

10. Examination and Settlement of Accounts. On a petition for distribution of all the assets, a settlement of the representative's entire accounts may be ordered and needful corrections made.[68]

11. Appraisal of Estate. Where it is necessary to a just and equitable distribution,[69] distributers appointed by the probate court may revalue the property to be distributed;[70] or appraisers may be appointed for that purpose on petition of the representative.[71]

12. Hearing and Determination — a. In General. Before issuing an order of distribution the court should hear and determine all questions relating to the rights of the parties;[72] and as incidental thereto may in general exercise all

66. Harrison *v.* Harrison, 9 Ala. 470; Aull *v.* St. Louis Trust Co., 149 Mo. 1, 50 S. W. 289; Bracken's Estate, 138 Pa. St. 104, 22 Atl. 20 (holding that any one to whom an equal share in a decedent's estate has been awarded on a distribution thereof by an auditor in the orphans' court has a right, being interested in the amount of the fund, to except to the findings of the auditor and to have his exceptions considered by the court); Frymeyer's Estate, 17 Lanc. L. Rev. (Pa.) 401 (holding that an executor, who is an active trustee of an estate created under a will, is authorized to file exceptions to the report of the auditor distributing the estate).

A mistake in the commissioners' report may be corrected by the court and relief be granted accordingly. Smith *v.* Sweringen, 26 Mo. 551.

67. Harrison *v.* Harrison, 9 Ala. 470; Smith *v.* Sweringen, 26 Mo. 551; Whelen's Appeal, 70 Pa. St. 410.

Where an auditor appointed to audit and settle an administration account also reported a distribution of the fund, and such part of his report is set aside, the court may decree distribution, on the facts reported by him. Drysdale's Appeal, 14 Pa. St. 531.

A decree of confirmation may be opened and corrected even for a mistake of law where it appears that one of the legatees or distributees has not had proper knowledge of his rights, although vigilant in his search, that necessary information has been refused or withheld, or that undue advantage has been taken of circumstances whereby his will was coerced. Whelen's Appeal, 70 Pa. St. 410.

68. *In re* Willey, 140 Cal. 238, 73 Pac. 998; Mundy *v.* Calvert, 40 Miss. 181 (holding that a decree for distribution, without ordering an account of the amount, character, and condition of the estate in the representative's hands, is erroneous); Crowder *v.* Shackelford, 35 Miss. 321; Billingslea *v.* Young, 33 Miss. 95. And see Heyer's Appeal, 34 Pa. St. 183, holding that it is irregular in a distribution proceeding to surcharge the executor or administrator with interest, thereby increasing the balance against him beyond that indicated by the account as confirmed.

Failure of the representative to make an inventory is no bar to a petition for a distribution of the estate, and for this purpose the court may compel the representative to make an inventory and settle his accounts. McWillie *v.* Van Vacter, 35 Miss. 428, 72 Am. Dec. 127; Billingslea *v.* Young, 33 Miss. 95. And see Humphrey *v.* Conger, 7 App. Cas. (D. C.) 23.

69. Platt *v.* Platt, 42 Conn. 330.

70. Platt *v.* Platt, 42 Conn. 330; Davenport *v.* Richards, 16 Conn. 310.

71. Rogers *v.* Cruger, 7 Johns. (N. Y.) 557. But see Peterson's Estate, 13 Phila. (Pa.) 265, holding that the orphans' court having merely limited jurisdiction, and no statute authorizing it to appoint appraisers to set apart a claimant's interest in a testator's realty, jurisdiction to make the appointment cannot be conferred even by an express provision in the will concurred in by the parties claiming thereunder. And see DESCENT AND DISTRIBUTION, 14 Cyc. 128 *et seq.*

The mode of such appraisement must strictly pursue the terms of the statute giving the probate court power to order it. Messinger *v.* Kintner, 4 Binn. (Pa.) 97.

Appraisers need not be appointed under Me. Rev. St. c. 65, § 28, where the distribution can be executed with mathematical certainty without the aid of appraisers. Hurley *v.* Hewett, 89 Me. 100, 34 Atl. 1026.

The appraisal may be set aside for gross mistake by the appraisers in calculating the value of certain parts of the estate, although no actual misconduct or fraud is imputed to them. Rogers *v.* Cruger, 7 Johns. (N. Y.) 557.

72. *In re* Painter, 115 Cal. 635, 47 Pac. 700 (although the petitioner's claims is unopposed); Exton *v.* Zule, 14 N. J. Eq. 501; *In re* Gray, 111 N. Y. 404, 18 N. E. 719 [*affirming* 42 Hun 411] (holding that the surrogate in ordering distribution cannot disregard the report of a referee confirmed by the supreme court); Orser's Estate, 4 N. Y. Civ. Proc. 129.

An issue upon questions arising on distribution in the orphans' court is not of right, but is a matter of discretion. Alexander's Estate, 8 Kulp (Pa.) 402.

Property embraced in an agreement for distribution.— In a proceeding for a partial distribution of a decedent's estate, the question whether all the property, or only the separate property of decedent, was embraced in an agreement between the widow and the heirs for a distribution of the estate is

powers and decide all questions necessary to a correct distribution of the estate.[73] It should in general ascertain and declare what is to be distributed,[74] who are

not properly before the court. *In re* Foley, 24 Nev. 197, 51 Pac. 834, 52 Pac. 649.

An issue as to the incompetency of an heir to make an assignment of his interest in the estate by reason of the drinking habit will be refused on distribution unless there is evidence of his actual incompetency at the time the assignment was made because of existing drunkenness or insanity. Alexander's Estate, 8 Kulp (Pa.) 402.

Questions not to be considered.— The question of title to the property (Cone's Appeal, 68 Conn. 84, 35 Atl. 781; Homer's Appeal, 35 Conn. 113; McBride's Appeal, 72 Pa. St. 480), or the validity of claims in the representative's hands as assets of the estate (Cone's Appeal, *supra*), are not proper questions to be considered in proceedings for distribution.

73. *California.*— Crew *v.* Pratt, 119 Cal. 139, 51 Pac. 38.

Kansas.— Proctor *v.* Dicklow, 57 Kan. 119, 45 Pac. 86.

Mississippi.— McWillie *v.* Van Vacter, 35 Miss. 428, 72 Am. Dec. 127.

New York.— Riggs *v.* Cragg, 89 N. Y. 479, 11 Abb. N. Cas. 401 [*reversing* 26 Hun 89]; Kager *v.* Brenneman, 47 N. Y. App. Div. 63, 62 N. Y. Suppl. 339 (holding that the surrogate has jurisdiction to determine whether money belonging to the estate has been used by the executor to purchase real property); Matter of Halsted, 41 Misc. 606, 85 N. Y. Suppl. 301; Matter of George, 3 N. Y. Suppl. 426, 1 Connoly Surr. 241 (holding that under Code Civ. Proc. § 2743, the surrogate has jurisdiction to decide as to the validity of a trust, where without such a determination a distribution of the estate cannot be had); Matter of Kick, 11 N. Y. St. 688; Matter of Collyer, 4 Dem. Surr. 24. But the power of a surrogate to decree distribution according to the respective rights of the claimants under the statute does not include the power to pass upon disputed rights. Giles' Estate, 11 Abb. N. Cas. 57; Greene *v.* Day, 1 Dem. Surr. 45. And see Du Bois *v.* Brown, 1 Dem. Surr. 317. Under Code Civ. Proc. §§ 2717, 2818, the surrogate has jurisdiction of a petition for a decree directing the payment of a legacy only where the identity of the legatee and the amount or validity of the legacy are not denied in the answer. Fiester *v.* Shepard, 92 N. Y. 251 [*affirming* 26 Hun 183]; Hurlburt *v.* Durant, 88 N. Y. 121; *In re* Hedding M. E. Church, 35 Hun 315; *In re* Cutchogue Cong. Church, 13 N. Y. Suppl. 140; Cuthbert *v.* Jacobson, 2 Dem. Surr. 134 (holding that the denial need not be formal, but it is sufficient if the answer alleges facts inconsistent with the right claimed); Mumford *v.* Coddington, 1 Dem. Surr. 27 (holding that where to an application for the payment of a legacy the executor answers that he has paid it to an assignee of the legatee, the validity of the applicant's claim is sufficiently denied to justify the surrogate in dismissing the petition for want of jurisdiction). In proceedings, under Code Civ. Proc. § 2722, for a special accounting of an executor and to enforce payment of a legacy, the surrogate has jurisdiction only where the right to the legacy is undisputed. Riggs *v.* Cragg, 89 N. Y. 479, 11 Abb. N. Cas. 401 [*reversing* 26 Hun 89].

Ohio.— Armstrong *v.* Grandin, 39 Ohio St. 368.

Pennsylvania.— Williamson's Appeal, 94 Pa. St. 231; Otterson *v.* Gallagher, 88 Pa. St. 355; Dundas' Appeal, 73 Pa. St. 474 [*reversing* 8 Phila. 598]; Souder's Appeal, 57 Pa. St. 498; Moore's Estate, 8 Pa. Dist. 399, 22 Pa. Co. Ct. 591.

Compare Cook *v.* Weaver, 77 Ga. 9 (holding that the ordinary is not authorized to decide difficult legal questions); Hanscom *v.* Marston, 82 Me. 288, 19 Atl. 460 (holding that the probate court has no power to determine whether an alleged settlement between an executor and residuary legatee is valid); Bowers *v.* Lester, 2 Heisk. (Tenn.) 456 (holding that under Tenn. Code, §§ 2295, 2311–2315, the county court has only power to order the payment of a distributive share or legacy readily ascertained by simple calculation, without complication or plausible dispute, and without issue or litigation).

See 22 Cent. Dig. tit. "Executors and Administrators," § 1275.

Dismissal.— A petition for a legacy or distributive share should be dismissed without prejudice to a subsequent action for an accounting (Matter of Storm, 7 Misc. (N. Y.) 383, 28 N. Y. Suppl. 394); where it appears that there is no money or other personal property of the estate applicable to the payment of the petitioner's claim which may be so applied without injuriously affecting the rights of others entitled to priority or equality of payment or satisfaction out of the estate (Matter of Alexander, 83 Hun (N. Y.) 147, 31 N. Y. Suppl. 411; Matter of Storms, *supra*).

74. *California.*—Burdick's Estate, 112 Cal. 387, 44 Pac. 734.

Kentucky.— Breckinridge *v.* Floyd, 7 Dana 456.

Maryland.— Pole *v.* Simmons, 45 Md. 246.

Texas.— Hartwell *v.* Jackson, 7 Tex. 576.

Vermont.— *Ex p.* Robinson, 1 D. Chipm. 357. See Davis *v.* Flint, 67 Vt. 485, 32 Atl. 473; Adams *v.* Adams, 16 Vt. 228.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1290, 1291.

Mistake as to amount.— An order for the distribution of a certain amount as the balance left on the settlement of an administration account, and an acceptance of a distribution made under the order, where by mistake the amount was not large enough, are not necessarily erroneous, but the distribution may be good so far as it goes, and a further order of distribution made for

entitled to share in the distribution,[75] and what they are each entitled to receive;[76] and in doing so the court may hear evidence,[77] and, where this is necessary,

what remains. Dickinson's Appeal, 54 Conn. 224, 6 Atl. 422.

75. *California.*— Crew *v.* Pratt, 119 Cal. 139, 51 Pac. 38; William Hill Co. *v.* Lawler, 116 Cal. 359, 48 Pac. 323; *In re* Painter, 115 Cal. 635, 47 Pac. 700; *In re* Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; Oxarart's Estate, 78 Cal. 109, 20 Pac. 367, holding that the mere pendency of a proceeding for an adjudication of heirship is not ground for compelling a continuance of a petition for distribution, as the question of heirship may be determined on the hearing of the latter petition.

Connecticut.—Mack's Appeal, 71 Conn. 122, 41 Atl. 242; Davenport *v.* Richards, 16 Conn. 310.

Kansas.— Proctor *v.* Dicklow, 57 Kan. 119, 45 Pac. 86.

Maryland.— Alexander *v.* Leakin, 72 Md. 199, 19 Atl. 532; Pole *v.* Simmons, 45 Md. 246; Blackburn *v.* Craufurd, 22 Md. 447.

Massachusetts.— Pierce *v.* Prescott, 128 Mass. 140; Loring *v.* Steineman, 1 Metc. 204.

Mississippi.— Lowry *v.* McMillan, 35 Miss. 147, 72 Am. Dec. 119.

New York.— Matter of Sudds, 75 N. Y. App. Div. 612, 77 N. Y. Suppl. 413; Matter of Halsted, 41 Misc. 606, 85 N. Y. Suppl. 301; York's Estate, 6 N. Y. Civ. Proc. 245, 1 How. Pr. N. S. 16, 3 Dem. Surr. 187; Orser's Estate, 4 N. Y. Civ. Proc. 129.

Pennsylvania.— *In re* Clement, 160 Pa. St. 391, 28 Atl. 932; Purviance *v.* Com., 17 Serg. & R. 31, holding, however, that, although the orphans' court might decree distribution of a balance on hand and designate the distributees, the usual and better course was to confirm the account, stating the balance subject to distribution, and ascertain the distributees, if a matter of doubt, by a proceeding at law.

Texas.— Hudgins *v.* Leggett, 84 Tex. 207, 19 S. W. 387.

Vermont.— Keeler *v.* Keeler, 39 Vt. 550; *Ex p.* Robinson, 1 D. Chipm. 357. See Davis *v.* Flint, 67 Vt. 485, 32 Atl. 473; Adams *v.* Adams, 16 Vt. 228.

Washington.—Reformed Presbyterian Church of North America *v.* McMillan, 31 Wash. 643, 72 Pac. 502.

But see Hanscom *v.* Marston, 82 Me. 288, 19 Atl. 460 (holding that the probate court has no power to determine who takes the residuum of an estate under a will); Cadiz First Nat. Bank *v.* Beebe, 62 Ohio St. 41, 56 N. E. 485.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1275, 1290, 1291.

Contest of right.— The personal representative is entitled on proceedings for distribution to contest the title of any one who claims an interest in the final distribution of the estate (Watson *v.* May, 8 Ala. 177; Babin *v.* D'Astugue, 7 Mart. N. S. (La.) 615, holding that, although the executor's term has expired, he has the right to contest the claims of persons pretending to be the legal heirs); but he cannot contest the claim of one heir against another in a contest between the heirs to determine to whom distribution should be made, to which proceeding he is made a formal party (Roach *v.* Coffey, 73 Cal. 281, 14 Pac. 840); nor can he contest the rights of legatees under the will upon a rule upon the commissioner to show cause why he has not turned over money to one of them (Key *v.* Griffin, 1 Rich. Eq. (S. C.) 67). See also DESCENT AND DISTRIBUTION, 14 Cyc. 95.

The right of a grantee of an heir, devisee, or legatee cannot be determined upon a proceeding for partial distribution, but the distribution should be suspended until his rights are determined on final distribution or in some other appropriate proceeding. *In re* Foley, 24 Nev. 197, 291, 51 Pac. 834, 52 Pac. 649, 1134, 53 Pac. 8.

Legatee of first testator.— The power conferred upon the surrogate's court by N. Y. Code Civ. Proc. § 2606, in connection with section 2603, to compel an executor of a deceased executor to account for unadministered assets of the first estate in his hands and to pay and deliver the same to the surrogate's court, or to his successor in office, or to "such other person as is authorized by law to receive the same" does not require the surrogate to direct payment or delivery to a legatee under the will of the first testator. *In re* Moehring, 154 N. Y. 423, 48 N. E. 818.

76. *California.*— Crew *v.* Pratt, 119 Cal. 139, 51 Pac. 38; William Hill Co. *v.* Lawler, 116 Cal. 359, 48 Pac. 323; *In re* Painter, 115 Cal. 635, 47 Pac. 700 (holding also that the court may elect to defer the distribution, and direct suit to be brought under Code Civ. Proc. § 1664, to determine the extent of the applicant's interest); *In re* Hinckley, 58 Cal. 457 (also holding that the court may determine whether interests under a will are in present enjoyment or merely contingent, and whether legal or equitable).

Georgia.— Cook *v.* Weaver, 77 Ga. 9.

Kansas.— Holden *v.* Spier, 65 Kan. 412, 70 Pac. 348.

Maryland.— Pole *v.* Simmons, 45 Md. 246.

Montana.— *In re* Davis, 27 Mont. 490, 71 Pac. 757.

New York.— Matter of Halsted, 41 Misc. 606, 85 N. Y. Suppl. 301; Orser's Estate, 4 N. Y. Civ. Proc. 129.

Tennessee.—Bowers *v.* Lester, 2 Heisk. 456.

Vermont.— Keeler *v.* Keeler, 39 Vt. 550; *Ex p.* Robinson, 1 D. Chipm. 357. See also Davis *v.* Flint, 67 Vt. 485, 32 Atl. 473; Adams *v.* Adams, 16 Vt. 228.

But see Cadiz First Nat. Bank *v.* Beebe, 62 Ohio St. 41, 56 N. E. 485.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1275.

77. *In re* Painter, 115 Cal. 635, 47 Pac. 700; Cook *v.* Weaver, 77 Ga. 9; Pole *v.* Sim-

construe the will[78] or, with some qualification, other instruments bearing on such questions.[79] The parties opposing the granting of a decree of distribution may make a motion for a new trial where the decree directs the distribution.[80]

b. Advancements and Indebtedness of Legatee or Distributee. In determining the amount of a distributive share the probate court may settle all questions of advancements,[81] and in some jurisdictions may inquire into and determine the indebtedness of the distributee to the estate and order a deduction of the same

mons, 45 Md. 246; Exton *v.* Zule, 14 N. J. Eq. 501.

78. *California.*— *In re* Willey, (1899) 56 Pac. 550; Goad *v.* Montgomery, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145; Crew *v.* Pratt, 119 Cal. 139, 51 Pac. 38.

Connecticut.—Mack's Appeal, 71 Conn. 122, 41 Atl. 242, holding that the probate court may determine the validity of a bequest only so far as necessary on a controversy clearly within its statutory jurisdiction; and that it may grant distribution on the ground of intestacy resulting from an invalid bequest only when the invalidity is plainly apparent on the face of the bequest.

Iowa.— Covert *v.* Sebern, 73 Iowa 564, 35 N. W. 636.

Maryland.— Pole *v.* Simmons, 45 Md. 246. But see State *v.* Warren, 28 Md. 338.

Michigan.— Byrne *v.* Hume, 84 Mich. 185, 47 N. W. 679, 86 Mich. 546, 49 N. W. 576; Glover *v.* Reid, 80 Mich. 228, 45 N. W. 91.

Minnesota.— Eddy *v.* Kelly, 72 Minn. 32, 74 N. W. 1020.

New Jersey.— Hill *v.* Bloom, 41 N. J. Eq. 276, 7 Atl. 438, holding that the orphans' court, in fixing the decree of distribution by executors, has power to construe the will so far as necessary to determine to whom the distribution or payment is to be made. And see Stevens *v.* Dewey, 55 N. J. Eq. 232, 36 Atl. 825 (holding that under Gen. St. p. 2391, the orphans' court has authority to construe a will only on special proceedings instituted on the application of some party in interest, bringing every person interested into court; and that a decree directing an administrator with the will annexed to distribute money according to the terms of a will is not a decree construing the will); Adams *v.* Adams, 46 N. J. Eq. 298, 19 Atl. 14.

New York.— Garlock *v.* Vandevort, 128 N. Y. 374, 28 N. E. 599 [*affirming* 12 N. Y. Suppl. 955 (*affirming* 5 N. Y. Suppl. 737)]; Purdy *v.* Hayt, 92 N. Y. 446; *In re* Verplanck, 91 N. Y. 439 [*affirming* 27 Hun 609]; Riggs *v.* Cragg, 89 N. Y. 479, 11 Abb. N. Cas. 401 [*reversing* 26 Hun 89, and *distinguishing* Bevan *v.* Cooper, 72 N. Y. 317 (*reversing* 7 Hun 117)]; Matter of Hamilton, 76 Hun 200, 27 N. Y. Suppl. 813; Matter of Vandevort, 62 Hun 612, 17 N. Y. Suppl. 316; Matter of French, 52 Hun 303, 5 N. Y. Suppl. 249; Matter of McCahill, 29 Misc. 450, 61 N. Y. Suppl. 1071; Matter of Havens, 8 Misc. 574, 29 N. Y. Suppl. 1085; Matter of Kick, 11 N. Y. St. 688.

Oregon.— *In re* John, 30 Oreg. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242.

Vermont.—Ward *v.* Underhill Cong. Church, 66 Vt. 490, 29 Atl. 770 (holding that the probate court may determine what kind of an interest, whether absolute or for life, a particular legatee takes); Keeler *v.* Keeler, 39 Vt. 550.

Washington.—Webster *v.* Seattle Trust Co., 7 Wash. 642, 33 Pac. 970, 35 Pac. 1082.

Wisconsin.— Schaeffner's Appeal, 41 Wis. 260; Brook *v.* Chappell, 34 Wis. 405.

But see Cook *v.* Weaver, 77 Ga. 9 (holding that the ordinary is not authorized to construe intricate bequests); Bowers *v.* Lester, 2 Heisk. (Tenn.) 456 (holding that the county court has no jurisdiction to construe wills).

See 22 Cent. Dig. tit. "Executors and Administrators," § 1275.

Res adjudicata.— The construction placed upon the will in such proceeding is *res adjudicata* unless appealed from. Byrne *v.* Hume, 84 Mich. 185, 47 N. W. 679, 86 Mich. 546, 49 N. W. 576.

79. Pole *v.* Simmons, 45 Md. 246.

The validity of an antenuptial contract may be passed upon by the probate court, in determining the distributive rights of the parties thereunder. Matter of Jones, 3 Misc. (N. Y.) 586, 24 N. Y. Suppl. 706; Winkle *v.* Winkle, 8 Oreg. 193.

A deed on which a claim to land by part of the heirs is based cannot be construed by the probate court, as questions arising on deeds are determinable only in courts of common law. *In re* Willey, (Cal. 1899) 56 Pac. 550; Proctor *v.* Atkyns, 1 Mass. 321.

An instrument disposing of or releasing a legacy or distributive share cannot be passed upon by the probate court upon the final settlement of the accounts of the representative. *In re* U. S. Trust Co., 175 N. Y. 304, 67 N. E. 614 [*affirming* 80 N. Y. App. Div. 77, 80 N. Y. Suppl. 475; *In re* Randall, 152 N. Y. 508, 46 N. E. 945 [*reversing* 80 Hun 229, 29 N. Y. Suppl. 1019]; Sanders *v.* Soutter, 126 N. Y. 193, 27 N. E. 263; *In re* Wagner, 119 N. Y. 28, 23 N. E. 200.

80. *In re* Davis, 27 Mont. 236, 70 Pac. 721.

81. Lamotte *v.* Martin, 52 La. Ann. 864, 27 So. 291; Springer's Appeal, 29 Pa. St. 208; *Ex p.* Robinson, 1 D. Chipm. (Vt.) 357. See also Labauve's Estate, 39 La. Ann. 388, 1 So. 830. And see DESCENT AND DISTRIBUTION, 14 Cyc. 162 *et seq.* *Compare* Floyd *v.* Floyd, 7 B. Mon. (Ky.) 290, holding that, where a testator leaves undevised estate, the court cannot of its own motion direct an account of advancements with a view to equalizing the distribution of the estate.

from his share;[82] but it cannot consider questions as to the validity or extent of the indebtedness of a legatee or distributee to the representative personally,[83] or to third persons.[84]

c. Power to Decree Distribution to Assignee. In some jurisdictions the probate court has power, in ordering distribution, to decree the share of a legatee or distributee to his assignee;[85] but in other jurisdictions this power is denied,[86] except where the assignment is undisputed,[87] and the legatee or distributee consents to payment to the assignee.[88]

13. Appeal — a. In General. An appeal from an order or decree of distribution is regulated entirely by statute,[89] under which it is usually provided that an appeal may be taken from a final order or a decree of distribution or payment, and

82. Holden *v.* Spier, 65 Kan. 412, 70 Pac. 348; Jones *v.* Treadwell, 169 Mass. 430, 48 N. E. 339; Lietman *v.* Lietman, 149 Mo. 112, 50 S. W. 307, 73 Am. St. Rep. 374 [*overruling* Ford *v.* Talmage, 36 Mo. App. 65]; Springer's Appeal, 29 Pa. St. 208, but holding that the orphans' court cannot decide that a distributee is in debt beyond his share of the estate. *Contra,* Bondurant *v.* Thompson, 15 Ala. 202; Kidd *v.* Porter, 13 Ala. 91; Hayes *v.* Hayes, 11 Ky. L. Rep. 441; Matter of Colwell, 15 N. Y. St. 742; Rudd *v.* Rudd, 4 Dem. Surr. (N. Y.) 335. *Compare* Hancock *v.* Hubbard, 19 Pick. (Mass.) 167; Procter *v.* Newhall, 17 Mass. 81.

83. Matter of Peaslee, 81 Hun (N. Y.) 597, 30 N. Y. Suppl. 1028; Carter's Appeal, 10 Pa. St. 144; Bradshaw's Appeal, 3 Grant (Pa.) 109; Siegfried's Estate, 1 Woodw. (Pa.) 77.

84. Martinovich *v.* Marsicano, 137 Cal. 354, 70 Pac. 459 (holding that, under Code Civ. Proc. §§ 1665, 1666, 1678, the probate court cannot award a distributee's share to his judgment creditor); Matter of Redfield, 71 Hun (N. Y.) 344, 25 N. Y. Suppl. 3 (holding that the claim of a creditor of a distributee to his distributive share cannot be considered by the surrogate upon proceedings for distribution under Code Civ. Proc. § 2743).

The process of distribution cannot be interrupted by the interposition of claims against the shares of distributees unless those shares have passed by assignment, or have been attached in the hands of the executor or other legal custodian. Carter's Appeal, 10 Pa. St. 144; Ottinger's Estate, 4 Pa. Dist. 711, 17 Pa. Co. Ct. 244; Ditsche's Estate, 13 Phila. (Pa.) 288; Robinson's Estate, 12 Phila. (Pa.) 170; Matter of Landis, 2 Phila. (Pa.) 217.

85. Shephard *v.* Clark, 38 Ill. App. 66; Selleck *v.* Mathews, 7 Rich. (S. C.) 26.

In Pennsylvania, the orphans' court being clothed with power of distribution, has jurisdiction to determine the validity of assignments by legatees or distributees and the priority of attachment liens on their interests. Lex's Appeal, 97 Pa. St. 289; Otterson *v.* Gallagher, 88 Pa. St. 355; Dundas' Appeal, 73 Pa. St. 474.

86. *Maine.*— *In re* Cote, 98 Me. 415, 57 Atl. 584; Knowlton *v.* Johnson, 46 Me. 489.

Mississippi.— Portevant *v.* Neylaus, 38 Miss. 104; Locke *v.* Williams, 36 Miss. 187; Dixon *v.* Houston, 35 Miss. 636; Hill *v.* Hardy, 34 Miss. 289.

Montana.— *In re* Davis, 27 Mont. 490, 71 Pac. 757.

New Hampshire.—Wood *v.* Stone, 39 N. H. 572.

Oregon.—Harington *v.* La Rocque, 13 Oreg. 344, 10 Pac. 498.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1276.

87. Johnson *v.* Jones, 47 Mo. App. 237; *In re* Davis, 27 Mont. 490, 71 Pac. 757 (holding that where the assignment has been recognized by the court and is not disputed by the assignor, neither the administrator nor another distributee is interested or has a right to object to payment to the assignee); Wood *v.* Stone, 39 N. H. 572.

Under the New York statutes the surrogate court has power only upon a final accounting to decree payment of a legacy or distributive share to an assignee of the legatee or distributee, where the rights of the parties are undisputed (Matter of Redfield, 71 Hun 344, 25 N. Y. Suppl. 3; *In re* Brewster, 3 N. Y. Suppl. 556, 1 Connoly Surr. 172; Tilden *v.* Dows, 3 Dem. Surr. 240; Peyser *v.* Wendt, 2 Dem. Surr. 221); and where the validity of the assignment is disputed, and the legacy or distributive share is claimed by different persons, resort must be had to a court of equity to settle the dispute (*In re* Randall, 152 N. Y. 508, 46 N. E. 945 [*reversing* 80 Hun 229, 29 N. Y. Suppl. 1019]; Matter of Cook, 68 Hun 280, 22 N. Y. Suppl. 969; *In re* Brown, 3 N. Y. Civ. Proc. 39, 1 Dem. Surr. 136; Hitchcock *v.* Marshall, 2 Redf. Surr. 174; Decker *v.* Morton, 1 Redf. Surr. 477. But see Matter of McCabe, 18 N. Y. Suppl. 715, 28 Abb. N. Cas. 59); and the surrogate should hold in abeyance his decree of distribution, so far at least as concerns the interest to which the assignment refers, until the party's rights can be determined in equity (*In re* Brown, 3 N. Y. Civ. Proc. 39, 1 Dem. Surr. 136).

88. Johnson *v.* Jones, 47 Mo. App. 237.

89. See Keith *v.* Guthrie, 59 Kan. 200, 52 Pac. 435; Proctor *v.* Dicklow, 57 Kan. 119, 45 Pac. 86. And see cases cited in the following notes.

Provision relating to appeals in civil actions are expressly applied to probate proceedings under some statutes. See *In re* Davis, 27 Mont. 235, 70 Pac. 721.

in some states other orders or decrees,[90] by any party aggrieved thereby,[91] includ-

90. *Alabama.*— Sherard *v.* Sherard, 33 Ala. 488; May *v.* May, 28 Ala. 141; McConico *v.* Cannon, 25 Ala. 462; Crothers *v.* Ross, 17 Ala. 816; Andrews *v.* Hall, 15 Ala. 85; *Ex p.* Harrison, 7 Ala. 736.

California.— *In re* Delaney, 110 Cal. 563, 42 Pac. 981; Daly *v.* Pennie, 86 Cal. 552, 25 Pac. 67, 21 Am. St. Rep. 61 (holding that where a decree of final distribution is erroneous as to the law or the facts it is appealable; and that such error is not ground for relief in equity against the decree); Bates *v.* Ryberg, 40 Cal. 463.

Indiana.— Wood *v.* Wood, 51 Ind. 141.

Minnesota.— Mintzer *v.* St. Paul Trust Co., 45 Minn. 323, 47 N. W. 973.

Missouri.— Branson *v.* Branson, 102 Mo. 613, 15 S. W. 74, holding that an appeal will lie from the probate court from "all orders making distribution," without regard to when they are made.

Montana.— *In re* McFarland, 10 Mont. 445, 26 Pac. 185.

Nebraska.— Merrick *v.* Kennedy, 46 Nebr. 264, 64 N. W. 989.

Rhode Island.— Jeter *v.* Moore, 17 R. I. 85, 20 Atl. 230.

South Carolina.— Verdier *v.* Verdier, 12 Rich. Eq. 138.

Vermont.— Essex Dist. Probate Ct. *v.* May, 52 Vt. 182.

United States.— Stovall *v.* Banks, 10 Wall. 583, 19 L. ed. 1036.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1293.

Orders appealable.—Under the various statutes an appeal lies from the final decree of the probate court confirming and accepting the report of persons appointed to make a division or distribution of the estate (May *v.* May, 28 Ala. 141; Wordin's Appeal, 64 Conn. 40, 29 Atl. 238; Webster *v.* Merriam, 9 Conn. 225. But see Strong *v.* Strong, 8 Conn. 408), from an order denying and dismissing a petition for distribution on the ground that the petitioner is not an heir or devisee (Morton *v.* Morton, 62 Nebr. 420, 87 N. W. 182), from an order of partial distribution (*In re* Mitchell, 121 Cal. 391, 53 Pac. 810; Fisher's Estate, 75 Cal. 523, 17 Pac. 640), or from an order denying a motion for a new trial in such proceedings (*In re* Davis, 27 Mont. 235, 70 Pac. 721).

Orders not appealable.— On the other hand it has been held that an appeal does not lie from an order refusing to set aside or postpone a decree of final distribution (Burdick's Estate, 112 Cal. 387, 44 Pac. 734; Wiard's Estate, 83 Cal. 619, 24 Pac. 45; Lutz's Estate, 67 Cal. 457, 8 Pac. 39; *In re* Dean, 62 Cal. 613; *In re* Calahan, 60 Cal. 232; Wood *v.* Wood, 51 Ind. 141) or from an order or rule directing the residue of the estate to be paid into the treasury or court to be distributed under the court's direction (Gosslins *v.* Her Heirs, 2 La. 141; Young *v.* Smith, 15 Pet. (U. S.) 287, 10 L. ed. 741).

An opinion of the probate court as to the rights of the distributees is not appealable, unless there is an order of distribution. Dyer *v.* Carr, 18 Mo. 246.

Uniting an order settling an account and a decree of distribution at the same time and in the same paper under one signature of the judge does not affect the right of appeal from either of these orders. *In re* Delaney, 110 Cal. 563, 42 Pac. 981.

Effect of appeal.— A probate decree appealed from remains in full force until the appellate court reverses it. The probate court ought properly to be advised as to the action of that court, although a judgment affirming the decree is not necessary. Dickinson's Appeal, 54 Conn. 224, 6 Atl. 422.

Effect of payment before appeal.— In Pennsylvania under the act of Oct. 13, 1840, no bill of review of a decree directing distribution will be allowed to creditors, legatees, or distributees, where payment has actually been made by the executor or administrator in pursuance of such decree before the application for the bill of review is granted. Woodward's Estate, 2 Chest. Co. Rep. 9. But a distribution which has not changed the actual custody of the fund, so that it remains intact and under the control of the court, is not a distribution which prevents a review. Collins' Estate, 10 Pa. Dist. 249.

91. *Alabama.*— *Ex p.* Jones, 1 Ala. 15.

California.— *In re* Coursen, (1901) 65 Pac. 965; *In re* Crooks, 125 Cal. 459, 58 Pac. 89. But a judgment of distribution will not be disturbed on appeal at the instance of a person not interested in the estate. *In re* Blythe, 110 Cal. 231, 42 Pac. 643.

Maine.— Tillson *v.* Small, 80 Me. 90, 13 Atl. 402.

Mississippi.— Porter *v.* Porter, 7 How. 106, 40 Am. Dec. 55.

Montana.— *In re* Davis, 27 Mont. 235, 70 Pac. 721.

Nebraska.— Merrick *v.* Kennedy, 46 Nebr. 264, 64 N. W. 989, holding that, in order to enable a party to appeal from a final order of distribution, he must have been injuriously affected by such order.

New York.— Bryant *v.* Thompson, 128 N. Y. 426, 28 N. E. 522, 13 L. R. A. 745; Matter of Coe, 55 N. Y. App. Div. 270, 66 N. Y. Suppl. 784.

Pennsylvania.— Shiffer's Appeal, 4 Pennyp. 512; Woodward's Estate, 2 Chest. Co. Rep. 9.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1293.

Whether or not the parties are "aggrieved" within the meaning of the statute is a question to be determined after a hearing upon the merits and not on a motion to dismiss the appeal. *In re* Davis, 27 Mont. 235, 70 Pac. 721.

One claiming under a gift causa mortis is not affected by decrees of the probate court charging the administrator with the property, and ordering it to be distributed among the

ing any aggrieved legatee, devisee, or distributee.[92] As a general rule a personal representative cannot appeal from an order of final distribution, unless he is a party in interest,[93] or acts as representative of all the parties.[94] But where the order is of such a nature that his obedience to it might subject him to a personal liability, he is held to be a party interested and may appeal;[95] and upon this ground it is generally held that the representative is such a party in interest as to enable him to appeal from an order of partial distribution.[96] Where the probate

next of kin, and therefore cannot appeal from such decrees, although he appeared and produced witnesses in that court. Lewis *v.* Bolitho, 6 Gray (Mass.) 137.

An objection that the appellant has not sufficient interest in the subject-matter to entitle him to appeal from a decree of distribution in the probate court must be made in the county court before issue joined and trial begun, otherwise it will be too late. See Stevens *v.* Joyal, 48 Vt. 291.

92. *In re* Williams, 122 Cal. 76, 54 Pac. 386; Bates *v.* Ryberg, 40 Cal. 463; Lake's Appeal, 32 Conn. 331; Allen's Succession, 48 La. Ann. 1036, 20 So. 193, 55 Am. St. Rep. 295; Bullard's Estate, 4 N. Y. Civ. Proc. 284.

A widow may appeal from a probate decree giving her an alleged inadequate portion of the proceeds of land sold in lieu of her dower on the final settlement of her deceased husband's estate. Sherard *v.* Sherard, 33 Ala. 488. But a widow, as executrix of her deceased husband's estate, is not prejudiced by an order of partial distribution, where the sum left in her hands, after payment to the legatees, is sufficient to cover the expenses of administration, the amount devised to her as widow, and an amount for a reasonable family allowance. *In re* Phillips, 18 Mont. 311, 45 Pac. 222.

A husband may appeal from the decree of distribution upon his wife's estate. Tilson *v.* Small, 80 Me. 90, 13 Atl. 402.

A legatee is not prejudiced because property in which he has no interest is improperly distributed by the final decree. *In re* Coursen, (Cal. 1901) 65 Pac. 965.

93. *California.*— *In re* Coursen, (1901) 65 Pac. 965; *In re* Williams, 122 Cal. 76, 54 Pac. 386; *In re* Welch, 106 Cal. 427, 39 Pac. 805; Merrifield *v.* Longmire, 66 Cal. 180, 4 Pac. 1176; Marrey's Estate, 65 Cal. 287, 3 Pac. 896; *In re* Wright, 49 Cal. 550; Bates *v.* Ryberg, 40 Cal. 463.

Louisiana.— Marks' Succession, 108 La. 685, 32 So. 958, holding that where a final account of executors shows an amount ready for distribution, and pending oppositions cannot reduce the same, and time has passed for filing further oppositions, the executors have no interest sufficient to maintain an appeal from an order directing distribution.

Montana.— *In re* Dewar, 10 Mont. 422, 25 Pac. 1025.

Nebraska.— Merrick *v.* Kennedy, 46 Nebr. 264, 64 N. W. 989.

New Hampshire.— Hills *v.* Baker, 59 N. H. 514.

New York.— Matter of Coe, 55 N. Y. App. Div. 270 66 N. Y. Suppl. 784.

Pennsylvania.— Stineman's Appeal, 34 Pa. St. 394; Sharp's Appeal, 3 Grant 260; Godwin's Estate, 22 Pa. Super. Ct. 469; Fuhrman's Estate, 21 Pa. Super. Ct. 27; Bradley's Estate, 5 Pa. Co. Ct. 572; Gallagher's Appeal, 6 Wkly. Notes Cas. 457.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1293.

A testamentary executor has the legal right to take and promote an appeal, in his official capacity, from a judgment placing the heirs in possession of the property of the succession, for which said executor has been appointed and qualified. Baumgarden's Succession, 35 La. Ann. 127.

Where the representative is made a party to the decree for the purpose of taking an appeal he may appeal from a decree for final distribution. McConico *v.* Cannon, 25 Ala. 462.

Where the administrator's account has been confirmed, he has no such interest in the estate as will enable him to appeal from an order to pay over the balance in his hands. Gallagher's Appeal, 89 Pa. St. 29.

94. Ruch *v.* Biery, 110 Ind. 444, 11 N. E. 312; Allen's Succession, 48 La. Ann. 1036, 20 So. 193, 55 Am. St. Rep. 295; *In re* Koch, 4 Rawle (Pa.) 268.

95. *Arkansas.*— Morris *v.* Virden, 57 Ark. 232, 21 S. W. 223.

California.— *In re* Welch, 106 Cal. 427, 39 Pac. 805.

Connecticut.— Hewitt's Appeal, 58 Conn. 223, 20 Atl. 453.

Louisiana.— Allen's Succession, 48 La. Ann. 1036, 20 So. 193, 55 Am. St. Rep. 295.

Pennsylvania.— Godwin's Estate, 22 Pa. Super. Ct. 469, holding that where there is a contention respecting the amount which the executor should pay to the parties entitled, and the decree requires a payment beyond his liability, he is aggrieved thereby and has a right to appeal.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1293.

Where the decree of distribution excludes the decedent's widow from participating therein, it is held under the Alabama statute that the administrator is injured thereby and is therefore entitled to appeal from such decree notwithstanding he has omitted to file a statement containing a list of the distributees of the estate as required by statute, where such facts otherwise appear on the record. Crothers *v.* Ross, 17 Ala. 816.

96. Harrison *v.* Meadors, 41 Ala. 274, holding this to be true under the acts of 1857–1858, page 244, although it was otherwise previous to the passage of that act. See Mc-

court refuses to entertain a petition for a share in the distribution, the remedy is not by writ of error but by certiorari[97] or mandamus.[98]

b. Proceedings to Transfer Cause. The appeal should be taken within the prescribed time,[99] and in the prescribed manner,[1] and all persons interested should be made parties thereto.[2] Under some statutes a bond must be executed by the appellant,[3] the effect of which is to stay proceedings on the judgment or decree appealed from,[4] so far as may be necessary for the protection of the interests of the appealing parties.[5]

c. Review and Disposition of Cause. The appellate court will review and adjudicate only such questions as were properly raised in the lower court and which appear on the record,[6] and in the absence of proper pleading and

Allister *v.* Thompson, 32 Ala. 497; Johnson *v.* Fort, 30 Ala. 78; *In re* Mitchell, 121 Cal. 391, 53 Pac. 810; *In re* Welch, 106 Cal. 427, 39 Pac. 805; *In re* Kelley, 63 Cal. 106; *In re* Phillips, 18 Mont. 311, 45 Pac. 222; *In re* McFarland, 10 Mont. 445, 26 Pac. 185; Jeter *v.* Moore, 17 R. I. 85, 20 Atl. 230.

97. Fowler *v.* Trewhit, 10 Ala. 622.

98. *Ex p.* Jones, 1 Ala. 15.

99. Cawlfield *v.* Brown, 45 Ala. 552; Thomas *v.* Dumas, 30 Ala. 83; Westerfield's Estate, 96 Cal. 113, 30 Pac. 1104; Wiard's Estate, 83 Cal. 619, 24 Pac. 45; *In re* Grider, 81 Cal. 571, 22 Pac. 908; Fisher's Estate, 75 Cal. 523, 17 Pac. 640; Burton's Estate, 64 Cal. 428, 1 Pac. 702; Harland's Estate, 64 Cal. 379, 1 Pac. 159; State *v.* Blake, 69 Conn. 64, 36 Atl. 1019; Merriwether *v.* Sebree, 2 Bush (Ky.) 232; *In re* McFarland, 10 Mont. 445, 26 Pac. 185.

Extension of time.— Some statutes authorize the allowance of an appeal to a person who without fault or error has failed to take his appeal within the time required by law, if justice requires a revision of the decree. Chase *v.* Bates, 81 Me. 182, 16 Atl. 542, holding, however, that the appellant's petition should be dismissed for insufficiency where no reasons are alleged for his laches, nor any diligence shown when the fact became known to him, nor any particular shown in which the decree required revision.

Premature appeal.— An appeal from an order for distribution before the entry at large in the minutes of a decree describing the property distributed is premature and must be dismissed. *In re* Sheid, 122 Cal. 528, 55 Pac. 328.

1. **Service of notice of appeal.**— Where an order settling the executor's account and a decree of distribution are rendered at the same time, an appeal from an order settling the account will not be dismissed because the notice of appeal therefrom was not served upon any other party than the executor; and, where the order settling the account is reversed, it necessarily vacates the decree of distribution, and in such case the appeal from the decree will not be dismissed for failure to serve the notice of appeal upon one of the distributees named in the decree of distribution. *In re* Delaney, 110 Cal. 563, 42 Pac. 981.

Joinder of proceedings.— The general rule that two or more separate judgments, decrees, or orders cannot be brought up for appellate review by one writ of error or appeal applies to decrees of distribution. Sampson's Estate, 22 Pa. Super. Ct. 93, holding that, where a decree of the orphans' court directs distribution in five equal parts among the testator's children, three of the children cannot take a joint appeal and procure a review of the decree below on their distinct individual claims. And see, generally, APPEAL AND ERROR, 2 Cyc. 531. But it is no objection to an appeal taken by an administrator, both from an order of the district court sustaining objection to a final account and also from an order entering a decree of distribution, that thereby two separate actions have been united in one appeal, as such orders are not actions in a legal sense. *In re* Dewar, 10 Mont. 422, 25 Pac. 1025.

Writ of error necessary to a review of errors in the trial of the proceeding for distribution, see Shiffer's Appeal, 4 Pennyp. (Pa.) 512.

2. Billinslea *v.* Abercrombie, 2 Stew. & P. (Ala.) 24, holding that all the parties interested in the distribution must be made parties, where one party appeals from the order of distribution. But where the appeal is from an order denying a new trial to one who had petitioned as heir for his distributive share of the estate, beneficiaries under the will who did not appear and resist the petition are not necessary parties to the appeal. *In re* Ryer, 110 Cal. 556, 42 Pac. 1082.

3. *In re* Schedel, 69 Cal. 241, 10 Pac. 334; *In re* Kavanagh, 9 N. Y. Suppl. 443; Matter of Espie, 3 Redf. Surr. (N. Y.) 270.

The quantum of security to be taken by the orphans' court upon an appeal from a decree of distribution is a matter within its discretion and is not necessarily to be measured by the *quantum* of the estate. *In re* Koch, 4 Rawle (Pa.) 268.

In Indiana on an appeal by an administrator or executor no bond is necessary, and a motion to dismiss such appeal for want of a bond, because there are other appellants unnecessarily joined, will not be entertained. Ruch *v.* Biery, 110 Ind. 444, 11 N. E. 312.

4. *In re* Schedel, 69 Cal. 241, 10 Pac. 334; Matter of Espie, 3 Redf. Surr. (N. Y.) 270.

5. *In re* Kavanagh, 9 N. Y. Suppl. 443. And see Bullard's Estate, 4 N. Y. Civ. Proc. 284.

6. Petty *v.* Wafford, 11 Ala. 143 (holding that, where the administrator fails to require

proof may dismiss the appeal.[7] A judgment or decree of distribution will not be disturbed on appeal for errors not seriously affecting the justice and equality of the distribution;[8] nor for insufficiency of evidence where it warrants the findings on which the decree appealed from was predicated.[9]

14. Costs and Attorney's Fees. The allowance of reasonable costs and attorney's fees incurred either by the representative or the claimants in ascertaining the fund for distribution, bringing it into court, determining the rights of parties thereto, and making distribution, is largely within the discretion of the court;[10] and although as a general rule they should be allowed out of the general fund before distribution is decreed,[11] yet where they are unnecessarily caused or

those claiming distribution to propound their interest, he will not be heard, on error, to complain that their interest is not shown by the record); Sankey *v.* Elsberry, 10 Ala. 455; Scarboro's Estate, 70 Cal. 147, 11 Pac. 563; Hargroves *v.* Thompson, 31 Miss. 211. See also *In re* Moyer, 141 Pa. St. 125, 21 Atl. 504.

Error apparent by decree.— Where it appears by the decree of final settlement that the widow has been excluded from all participation of her deceased husband's estate, the error will not be considered as waived, but may be revised at the instance of the administrator, although no exception was at the time taken to the action of the court below. Crothers *v.* Ross, 17 Ala. 816.

An appeal by one in his representative capacity does not bring up for review matters affecting his personal share of the estate as distributee or legatee. *In re* Phillips, 18 Mont. 311, 45 Pac. 222.

Evidence.— On appeal from a decree accepting the return of distributers it is competent for the appellants to show that the distribution is unequal and unjust. Webster *v.* Merriam, 9 Conn. 225.

7. *In re* Crooks, 125 Cal. 459, 58 Pac. 89, holding that an appeal by a mortgagee from the decree of distribution, the record upon which merely shows an offer of the mortgage in evidence, unaccompanied by a pleading or statement of facts, or by any showing that the mortgage debt was not paid, and does not show that the mortgagee is an aggrieved party, must be dismissed. But a contention that a motion for a new trial does not lie in proceedings for the distribution, because all the facts alleged in the petition were admitted by defendants, is a sufficient reason for affirming an order denying a new trial on the hearing but no reason for dismissal of the appeal. *In re* Davis, 27 Mont. 235, 70 Pac. 721.

8. Hearne *v.* Harbison, 9 Ala. 731; McClelland *v.* Lowry, 21 Ark. 452; Williamson *v.* Williamson, 6 B. Mon. (Ky.) 307.

9. *In re* Kelley, 63 Cal. 106; Patterson's Estate, 166 Pa. St. 119, 30 Atl. 1020; Hosfield's Estate, 4 Pa. Co. Ct. 257.

10. *Colorado.*—Church *v.* Eggleston, 3 Colo. App. 239, 32 Pac. 984.

New Mexico.— Perea *v.* Harrison, 7 N. M. 666, 41 Pac. 529, holding that, where the costs are chargeable against the fund, the court has the power to fix the allowance for solicitors' fees without taking proof as to the value of the services rendered.

Pennsylvania.— Lusk's Estate, 150 Pa. St. 517, 24 Atl. 595; Neill's Estate, 3 Pa. Co. Ct. 197, 19 Wkly. Notes Cas. 380.

Wisconsin.— McMahon *v.* Snyder, 117 Wis. 463, 94 N. W. 351, holding, however, that on determining an appeal from a judgment of the county court making a final distribution it was error for the circuit court to award any other than the statutory costs.

Canada.— McDonald's Estate, 2 Nova Scotia 123.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1296.

11. *Alabama.*— Mitchell *v.* Mitchell, 8 Ala. 414.

Colorado.— Church *v.* Eggleston, 3 Colo. App. 239, 32 Pac. 984, holding that, in proceedings to obtain a share in the estate of a decedent, it is error to tax costs against the administrators personally, where there is nothing to show that they precipitated the contest, or were responsible for it, or exceeded their official duties; and the fact that they were nephews of the decedent should be disregarded.

Massachusetts.— Abbott *v.* Bradstreet, 3 Allen 587.

Pennsylvania.— Lusk's Estate, 150 Pa. St. 517, 24 Atl. 595; Geissinger's Appeal, (1889) 17 Atl. 222; Neill's Estate, 3 Pa. Co. Ct. 197, 19 Wkly. Notes Cas. 380; Wilson's Appeal, 3 Walk. 216; Walter's Estate, 2 Chest. Co. Rep. 159.

England.— Hilliard *v.* Fulford, 4 Ch. D. 389, 46 L. J. Ch. 43, 35 L. T. Rep. N. S. 750, 25 Wkly. Rep. 161.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1296.

Classes of costs.— A fund in the hands of an intestate's administrator upon which a decree of the court acts for the purpose of distribution is liable to three classes of charges: (1) The necessary expense of ascertaining it and reducing it into possession; (2) a reasonable compensation for its safekeeping and supervision; and (3) the expenses of ascertaining the proper distributees and making distribution among them. *Ex p.* Plitt, 19 Fed. Cas. No. 11,228, 2 Wall. Jr. 453. And see Lane's Estate, 3 Pa. Dist. 162, holding that "legal costs" within the meaning of a Pennsylvania statute (Act June 10, 1881, § 1) relating to the distribution of estates must be construed to cover all the legal charges or expenses which prior to the passage of that act were payable out of the trust fund for distribution.

increased by the acts of the representative or claimants they may be charged against the representative individually,[12] or against the claimant causing them,[13] as the case may be.

P. Order or Decree For Distribution — 1. Form and Requisites. Distribution of an estate to heirs on final settlement may be made by a single decree assigning to each heir separately the amount adjudged to be due him.[14] The

An attorney's fees, although employed by a particular legatee or distributee, may be charged against the general fund where the services rendered by him inure to the benefit of all interested in the production and protection of such fund (Foster *v.* Foster, 126 Ala. 257, 28 So. 624; Thirlwell *v.* Campbell, 11 Bush (Ky.) 163; Neill's Estate, 3 Pa. Co. Ct. 197, 19 Wkly. Notes Cas. (Pa.) 380; McIntire *v.* McIntire, 192 U. S. 116, 24 S. Ct. 196, 48 L. ed. 369 [*affirming* 20 App. Cas. (D. C.) 134]; *Ex p.* Plitt, 19 Fed. Cas. No. 11,228, 2 Wall. Jr. 453); but not where his services are merely for the benefit or protection of his client, the others interested being represented by counsel of their own (Foster *v.* Foster, 126 Ala. 257, 28 So. 624; Bailey *v.* Barclay, 109 Ky. 636, 60 S. W. 377, 22 Ky. L. Rep. 1244; Thirlwell *v.* Campbell, 11 Bush (Ky.) 163; Sims *v.* Birdsong, 59 S. W. 749, 22 Ky. L. Rep. 1049; McIntire *v.* McIntire, 192 U. S. 116, 24 S. Ct. 196, 48 L. ed. 369 [*affirming* 20 App. Cas. (D. C.) 134]), or where an allowance of the attorney's fee is not requested (Cook *v.* Jennings, 40 S. C. 204, 18 S. E. 640). Counsel fees will be awarded out of the estate only to the successful party, and not to both of the contesting parties. Lee *v.* Lee, 39 Barb. (N. Y.) 172.

The compensation of an attorney appointed to represent non-resident heirs under Cal. Code Civ. Proc. § 1718, may be allowed out of the estate, to be charged on distribution to the heir represented by him, but the court cannot fix the compensation of the attorney in advance, he must wait until final distribution. *In re* Lux, 134 Cal. 3, 66 Pac. 30.

Costs ex parte.— On a petition for a distributive share of an estate, when some of the heirs were not responsible for the resulting contest, costs should not be taxed against the estate as a whole; and claimants if successful should not be assessed with costs. Church *v.* Eggleston, 3 Colo. App. 239, 32 Pac. 984.

12. Church *v.* Eggleston, 3 Colo. App. 239, 32 Pac. 984; *In re* McFarland, 10 Mont. 586, 27 Pac. 389; Osborn's Appeal, 130 Pa. St. 359, 18 Atl. 897 (holding that, where the executors have failed to make a division of an estate as directed by the supreme court, they should be charged with the costs of the proceedings to compel them to make such division); Witman's Appeal, 28 Pa. St. 376 (holding that, where an executor unjustly and for his own advantage resists the payment of a legacy, he is liable for the costs of a citation to render an account and subsequent proceedings to compel payment of the legacy); *In re* Brinton, 10 Pa. St. 408 (holding that executors are liable for costs incurred by litigating matters before auditors for distribution which have been adjudicated); Axtell's Appeal, 3 Pa. Cas. 488, 6 Atl. 560; Walter's Estate, 2 Chest. Co. Rep. (Pa.) 159.

An executor will not be charged with costs of litigating a demand of the devisees for interest on a trust fund, where the demand included more than the devisees were entitled to receive, although the general rule is that an executor must pay costs when he pays interest. Dunscomb *v.* Dunscomb, 1 Johns. Ch. (N. Y.) 508, 7 Am. Dec. 504.

Questions for court.— Where in an action against an executor for a legacy he pleads want of assets, and an accounting is had before auditors, the question whether the executor was negligent in not paying the legacy or any part of it, so as to render him personally liable for the costs of the suit, is a question for the court upon the facts of the case as reported by the auditors. Meeker *v.* Arrowsmith, 16 N. J. L. 227.

13. *Mississippi.*— See French *v.* Davis, 38 Miss. 167.

Pennsylvania.— Evans' Estate, 155 Pa. St. 646, 26 Atl. 739 (holding that on the distribution of testator's estate among the various persons entitled after the death of the life-tenant, if an audit is rendered necessary by attachments or assignments of certain distributive shares, it is proper that the costs of such audit be imposed on the shares so attached or assigned, rather than on the whole fund); Lusk's Estate, 150 Pa. St. 517, 24 Atl. 595; Eckes' Estate, 8 Pa. Dist. 252, 22 Pa. Co. Ct. 287; McCloskey's Estate, 12 Phila. 74; Johns' Estate, 2 Chest. Co. Rep. 281.

Texas.— See Fowler *v.* Evans, 26 Tex. 636.

Wisconsin.— *In re* Kirkendall, 43 Wis. 167.

England.— Hilliard *v.* Fulford, 4 Ch. D. 389, 46 L. J. Ch. 43, 35 L. T. Rep. N. S. 750, 25 Wkly. Rep. 161.

Canada.— McDonald's Estate, 2 Nova Scotia 123.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1296.

Where legatees voluntarily appear in an *ex parte* proceeding instituted by an executor for an order appointing commissioners to divide his testator's estate among the legatees and oppose the confirmation of the report of the commissioners, no steps being taken to bring in the legatees as parties, the court cannot award costs against them. Darden *v.* Maget, 18 N. C. 498.

14. King *v.* Brown, 108 Ala. 68, 18 So. 935.

That the decree was made in favor of parties who were not applicants therefor (Caldwell *v.* Kinkead, 1 B. Mon. (Ky.) 228; Sayre

decree should generally specify the several distributees by name and relationship;[15] should specify the property and amount to be paid to each distributee;[16] should specify the land to be divided sufficiently for identification;[17] and should make a positive and conclusive disposition[18] of all the property or assets among

v. Sayre, 16 N. J. Eq. 505) or whose shares have been satisfied or released (Sayre *v.* Sayre, *supra*) is no valid objection to the decree.

A joint distribution is improper in Pennsylvania where the executors file separate accounts. Evangelical Assoc.'s Appeal, 35 Pa. St. 316.

An interlocutory decree awarding a distributive share to a trustee, until proceedings shall be taken to determine the mental capacity of the distributee, may be made under some circumstances. See Harker's Estate, 176 Pa. St. 19, 34 Atl. 927.

A separate decree cannot be made at the instance of each of the claimants. Sayre *v.* Sayre, 16 N. J. Eq. 505.

15. *In re* Crooks, 125 Cal. 459, 58 Pac. 89; Goad *v.* Montgomery, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145; Grant *v.* Bodwell, 78 Me. 460, 7 Atl. 12; Loring *v.* Steineman, 1 Metc. (Mass.) 204; Purviance *v.* Com., 17 Serg. & R. (Pa.) 31. *Compare* Jewell *v.* Pierce, 120 Cal. 79, 52 Pac. 132.

Distributive share of married woman.—Under the present Alabama statute the distributive share of a married woman should be decreed in favor of herself alone (King *v.* Brown, 108 Ala. 68, 18 So. 935), although under prior statutes a decree for the wife's distributive share was required to be rendered in favor of the husband and wife for the use of the wife (Moody *v.* Hemphill, 75 Ala. 268; Harrison *v.* Meadors, 41 Ala. 274; Roberson *v.* Roberson, 21 Ala. 273; Green *v.* Fagan, 15 Ala. 335; Petty *v.* Wafford, 11 Ala. 143; Blackwell *v.* Vastbinder, 6 Ala. 218). In Maryland an allotment by the orphans' court to the husband of a distributee passes the title to her; her husband taking only such interest as is provided for by statute. Davis *v.* Patton, 19 Md. 120.

A decree in favor of an infant distributee should be in his name by his guardian if he has one; but if it is in his name alone without the intervention of a guardian it is not reversible on error. Thompson *v.* Perryman, 45 Ala. 619; Morgan *v.* Morgan, 35 Ala. 303; Green *v.* Fagan, 15 Ala. 335; Sankey *v.* Sankey, 6 Ala. 607.

Under the Ohio statute (Rev. St. § 524) the only order of distribution authorized is a general order to the representative to distribute the funds remaining in his hands according to law (Cadiz First Nat. Bank *v.* Beebe, 62 Ohio St. 41, 56 N. E. 465; Armstrong *v.* Grandin, 39 Ohio St. 368; Cox *v.* John, 32 Ohio St. 532; Swearingen *v.* Morris, 14 Ohio St. 424); and an order therefore designating or naming the distributees is not authorized and will not debar any one interested in the distribution from asserting his or her interest therein (Armstrong *v.* Grandin, 39 Ohio St. 368).

16. *Alabama.*— Sankey *v.* Sankey, 8 Ala. 601; Davis *v.* Davis, 6 Ala. 611.

California.— *In re* Coursen, (1901) 65 Pac. 965 (where a provision as to the distribution of property was held erroneous for being indefinite); Goad *v.* Montgomery, 119 Cal. 552, 51 Pac. 581, 63 Am. St. Rep. 145. *Compare* Jewell *v.* Pierce, 120 Cal. 79, 52 Pac. 132.

Iowa.— Foteaux *v.* Lepage, 6 Iowa 123.

Kentucky.— Roberts *v.* Dale, 7 B. Mon. 199; White *v.* White, 3 Dana 374; Banton *v.* Campbell, 2 Dana 421; Neely *v.* Neely, 1 Litt. 292. Where an administrator who is also husband of one of the distributees is sued by the distributees for the estate left in his hands, his wife's share should be deducted from the aggregate, and the decree in favor of the others should be for the balance only. Singleton *v.* Singleton, 5 Dana 87.

Louisiana.— Varion *v.* Rousant, 12 Mart. 112.

Maine.— Grant *v.* Bodwell, 78 Me. 460, 7 Atl. 12.

Minnesota.— See Fraser *v.* Farmers', etc., Sav. Bank, 89 Minn. 482, 483, 95 N. W. 307, holding that a final decree finding certain heirs owners in fee "of all the real property hereinbefore described, and of all the real property of which the said testator died seised, whether the same is described in the inventory herein or not," was not intended to cover the homestead, but only the property described, and such property as might perhaps have been unintentionally omitted from the inventory.

Vermont.— *Ex p.* Robinson, 1 D. Chipm. 357.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1299.

Where an equal division cannot be made, a decree cannot be rendered and execution awarded against those receiving more than their share, in favor of the others, for the balance. Teat *v.* Lee, 8 Port. (Ala.) 507.

17. Jones *v.* Minogue, 29 Ark. 637; Bates *v.* Howard, 105 Cal. 173, 38 Pac. 715; Smith *v.* Biscailuz, 83 Cal. 344, 21 Pac. 15, 23 Pac. 314, holding that a general description of the land is sufficient, upon a collateral attack, to include omitted lands which may be shown by evidence to have in fact belonged to the decedent at the time of his death. See also Green *v.* Hardy, 24 Me. 453. The description is not required to be so specific that the land can be identified without the aid of extrinsic evidence; nor is it material that the description is false in part, if what remains is sufficient for the purpose of identification. Wheeler *v.* Bolton, 66 Cal. 83, 4 Pac. 981.

18. *In re* Garrity, 108 Cal. 463, 38 Pac. 628, 41 Pac. 485, holding that a decree of distribution should not be made contingent upon the future establishment of conditions inserted in a proviso.

all the parties entitled thereto.[19] It should be entered on the record in the prescribed manner.[20] A decree for distribution upon the presumption of the death of an ancestor arising from his absence should include an adjudication on the effect of such absence and should rest the order of distribution thereon.[21]

2. Setting Aside, Correcting, and Modifying. Ordinarily the probate court has entire control of its decrees until the end of the term at which they are entered, and during that term may for sufficient cause set aside, amend, or modify a decree of distribution,[22] although property has been distributed in pursuance of it,[23] and the distributees have given receipts reciting that the property has been delivered in compliance with the order and is received in satisfaction thereof.[24] After the end of the term, however, the only remedy is usually by appeal,[25] except where the decree was rendered through mistake, inadvertence, surprise, or fraud, in which case, according to the weight of authority, upon a proper application or motion by some person interested,[26] and upon due notice to all interested

19. Hollis *v.* Caughman, 22 Ala. 478 (holding that a decree is not final, unless it makes distribution of all the assets found to be in the hands of the executor or administrator among all the parties who appear by the record to be interested in the estate); Bothick's Succession, 109 La. 1, 33 So. 47 (holding that, where a rule for distribution is made absolute by a judgment which does not distribute the fund among all the heirs, it will be annulled).

20. Blackwell *v.* Meneese, 5 Stew. & P. (Ala.) 397, holding that a decree ascertaining the amount of a distributive share and giving judgment thereon cannot be entered *nunc pro tunc* upon proceedings had upon the final settlement of an estate.

Delay in entering the decree does not render it invalid, where when entered it appears in its proper place on the record, and as of the day of rendition. State *v.* Henderson, 164 Mo. 347, 64 S. W. 138, 86 Am. St. Rep. 618.

A statement of distribution of certain property, approved by the judge of the county court and entered on the records of the court, but not entered as a decree, is evidence of a partition of the property, but is not conclusive upon creditors of a distributee. Debrell *v.* Ponton, 22 Tex. 686, 27 Tex. 623.

21. *In re* Morrison, 183 Pa. St. 155, 38 Atl. 895.

22. Aull *v.* St. Louis Trust Co., 149 Mo. 1, 50 S. W. 289.

23. Aull *v.* St. Louis Trust Co., 149 Mo. 1, 50 S. W. 289.

24. Aull *v.* St. Louis Trust Co., 149 Mo. 1, 50 S. W. 289.

25. Emerson *v.* Heard, 81 Ala. 443, 1 So. 197; Key *v.* Vaughn, 15 Ala. 497; State *v.* Blake, 69 Conn. 64, 36 Atl. 1019 (holding that under the Connecticut statute a decree of the probate court in the settlement of estates can be attacked only by appeal taken within the time limited); Bissell *v.* Bissell, 24 Conn. 241 (holding that a bill in equity is not the proper proceeding to set aside such a decree, and that distribution being entirely within the jurisdiction of the probate court, the decree could be set aside only upon an appeal to the superior court). See also Parker *v.* Townsend Nat. Bank, 121 Mass. 565. *Compare* Thomas *v.* Dumas, 30 Ala. 83.

A motion to amend nunc pro tunc cannot be maintained after the close of the term at which the decree was rendered to correct or modify such decree. Browder *v.* Faulkner, 82 Ala. 257, 3 So. 30; Emerson *v.* Heard, 81 Ala. 443, 1 So. 197. And see Crothers *v.* Ross, 15 Ala. 800.

It is no ground for setting aside a decree of distribution on appeal that an additional inventory exhibited in the course of administration was not signed by the appraisers and that the appraisers had placed no valuation upon the property contained in it, the only items therein complained of being property which sold for two dollars, the avails of which were duly applied. Canfield *v.* Bostwick, 21 Conn. 550.

26. *California.*— *In re* Ingram, 78 Cal. 586, 21 Pac. 435, 12 Am. St. Rep. 80.

Indiana.— Glessner *v.* Clark, 140 Ind. 427, 39 N. E. 544, holding that an order, made on the hearing of a partial account, for distribution, may be set aside on the application of one appointed administrator as successor to the administrator, on the hearing of whose account the order was granted.

Maine.— *In re* Cote, 98 Me. 415, 57 Atl. 584.

Missouri.— Aull *v.* St. Louis Trust Co., 149 Mo. 1, 50 S. W. 289.

New York.— See Smith *v.* Baylis, 3 Dem. Surr. 567, holding that a petitioner who is neither a creditor, nor one of the next of kin, nor an assignee, has no standing in court for the opening of a decree and for payment to him.

Texas.— Wade *v.* Freese, (Civ. App. 1902) 71 S. W. 69, holding that a holder of a lien on land of the decedent which was erroneously awarded to the widow by the county court is entitled to have such order set aside in the court where the administration proceedings are pending.

Washington.— State *v.* Walla Walla County Super. Ct., 13 Wash. 25, 42 Pac. 630.

Wisconsin.— Leavens' Estate, 65 Wis. 440, 27 N. W. 324, holding that a person claiming to be entitled to a share of the estate may

parties,[27] the probate court by reason of its equity powers or by express statutory enactment may in its discretion set aside, amend, or modify the decree,[28] provided

proceed by petition in the county court to have an order set aside, although being a minor when the original probate proceedings were had he was not represented therein by guardian or otherwise.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1304, 1305.

A party aggrieved by the alleged fraudulent acts of an administrator, whereby an order of court was made distributing an estate among parties not entitled thereto, should seek his redress by first petitioning the court to vacate such order of distribution; and in such a proceeding it is proper to make the beneficiaries under the fraudulent administration defendants. Leavens' Estate, 65 Wis. 440, 27 N. W. 324.

Sufficiency of application.— A new petition by an administrator for an order of distribution in which he sets forth the undisputed facts in regard to the persons entitled to distributive shares and the amount to be distributed, and which differs entirely from the former petition and decree, must be regarded as containing by necessary implication so clear a prayer for the revocation of the previous decree as to have the effect of such an application. *In re* Cote, 98 Me. 415, 57 Atl. 584.

Parties.— The persons to whom the estate has been distributed under such order are proper parties to the proceedings to set the same aside, although the county court may have no power to compel them to refund the property. Leavens' Estate, 65 Wis. 440, 27 N. W. 324.

27. *California.*— *In re* Ingram, 78 Cal. 586, 21 Pac. 435, 12 Am. St. Rep. 80.

Maine.— *In re* Cote, 98 Me. 415, 57 Atl. 584.

Missouri.— Aull *v.* St. Louis Trust Co., 149 Mo. 1, 50 S. W. 289.

New York.— Lawyers' Surety Co. *v.* Reinach, 25 Misc. 150, 54 N. Y. Suppl. 205 [*affirming* 23 Misc. 242, 51 N. Y. Suppl. 162].

Pennsylvania.— See Cochran's Estate, 31 Pittsb. Leg. J. 338, holding that the act of March 29, 1832, section 19, requiring notice to be given of claims against a decedent within a year, did not apply to a proceeding to open a decree of distribution and let in a claimant.

Vermont.— Stone *v.* Peasley, 28 Vt. 716.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1304, 1305.

Sufficiency of notice.— The notice of the hearing of a motion to vacate an order denying a petition for partial distribution, and of an application for an order granting such petition, which is served upon the executors only, without any posting of notice to acquire jurisdiction of all legatees and creditors, is insufficient to give jurisdiction to make either order. *In re* Mitchell, 126 Cal. 248, 58 Pac. 549.

Recital of notice.— A recital in the order vacating the decree that all persons interested "were duly served with due notice" of the motion to vacate is conclusive of that fact in a proceeding to review the order on certiorari. De Pedrorena *v.* San Diego County Super. Ct., 80 Cal. 144, 22 Pac. 71.

28. *California.*— *In re* Ross, 140 Cal. 282, 73 Pac. 976.

Massachusetts.— See Parker *v.* Townsend Nat. Bank, 121 Mass. 565.

New York.— Engelson *v.* Mitchell, 88 N. Y. App. Div. 504, 85 N. Y. Suppl. 103; Lawyers' Surety Co. *v.* Reinack, 25 Misc. 150, 54 N. Y. Suppl. 205 [*affirming* 23 Misc. 242, 51 N. Y. Suppl. 162] (holding that the surrogate has power to amend or modify a decree of distribution for the benefit of newly discovered distributees who were not parties to the original proceedings); Matter of Gilman, 7 N. Y. St. 321; Smith *v.* Baylis, 4 Dem. Surr. 30.

Pennsylvania.— White's Estate, 1 Pa. Dist. 508; Wells' Estate, 14 Phila. 318 (holding that an order upon an executor to pay over will be vacated where it appears to have been improvidently issued, and it is shown that, instead of anything being due from the executor, the estate owes him); Cochran's Estate, 31 Pittsb. Leg. J. 338 (holding that a decree of distribution will be opened to let in a creditor of decedent who had no actual notice of the audit and exercised due diligence, where the executor and distributee are the same person). In this state the orphans' court may set aside, amend, or modify such a decree upon a simple petition, or it may treat such petition as in effect and substance a bill of review (Keyser's Estate, 6 Pa. Dist. 181, 19 Pa. Co. Ct. 364), but such petition must allege fraud, and that money sought to be recovered had not been paid out to the distributees mentioned in the decree (*In re* Bear, 162 Pa. St. 547, 29 Atl. 856; Miller's Estate, 4 Pa. Dist. 407; White's Estate, 1 Pa. Dist. 508); and it is too late if brought after an actual payment in accordance with the decree has been made (Keim's Appeal, 125 Pa. St. 480, 17 Atl. 463; Miller's Estate, 4 Pa. Dist. 407; White's Estate, 1 Pa. Dist. 508). See Christian's Estate, 2 Pa. Dist. 579, holding that, where an adjudication directing distribution of securities in the hands of an executor is confirmed without exception, the matter passes beyond the power of the court, and can be modified only by a proceeding for review, with citation to all parties to be affected.

Wisconsin.— Creamer *v.* Ingalls, 89 Wis. 112, 61 N. W. 82; Been *v.* Kimberly, 72 Wis. 343, 39 N. W. 542; Leavens' Estate, 65 Wis. 440, 27 N. W. 324.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1304, 1305.

An order denying a petition for partial distribution is not vacated merely by a subsequent order granting the petition, since it is final so far as the hearing on the petition is

in some jurisdictions the decree has not been acted upon;[29] or it may be modified or set aside by a bill in equity.[30] A decree in equity determining the rights of the distributees and ordering the appointment of commissioners to make partition cannot be amended, except upon rehearing or bill of review.[31] An application or petition to set aside or amend a decree of distribution may be barred by lapse of the time, if any, prescribed by statute,[32] or in equity by laches.[33]

3. Operation and Effect — a. In General. A decree of distribution, if properly made after due notice, is in its nature final, and unless set aside for fraud,

concerned, and is appealable. *In re* Mitchell, 126 Cal. 248, 58 Pac. 549.

A schedule of distribution inconsistent with the will will be corrected on exception where it appears that it was made unwittingly by the auditing judge, his attention not being called to the provisions of an obscure will, and where the exceptants did not appear before him. Trickett's Estate, 8 Pa. Dist. 398, 22 Pa. Co. Ct. 558.

Where a guaranty of collection and distribution is given by the executor to legatees upon distribution of assets in kind to them, and a final accounting is had and decree entered, resort must be had, if the assets be insufficient, to the guaranty and not to opening the decree. Redmond *v.* Ely, 2 Bradf. Surr. (N. Y.) 175.

29. Long *v.* Thompson, 60 Ill. 27 (holding that where a probate court improperly made an order for the distribution of money in the hands of an administrator, without notice to those entitled thereto, there having been no final settlement of the administration, and nothing done under the order of distribution, the whole matter was *in fieri* and it was competent for the probate court on notice to the administrator, to set aside such order at a subsequent term); Kinne *v.* Schumacher, 65 Ill. App. 342; *In re* Cote, 98 Me. 415, 57 Atl. 584; *In re* Bear, 162 Pa. St. 547, 29 Atl. 856; Keim's Appeal, 125 Pa. St. 480, 17 Atl. 463; Miller's Estate, 4 Pa. Dist. 407; White's Estate, 1 Pa. Dist. 508; State *v.* Walla Walla County Super. Ct., 13 Wash. 25, 42 Pac. 630. See also Randolph *v.* School Trustees, 26 Ill. App. 241. *Contra*, Harris *v.* Starkey, 176 Mass. 445, 57 N. E. 698, 79 Am. St. Rep. 322, holding that a decree of distribution can be revised after the executor has distributed the estate as ordered, so as to enable one entitled who was omitted to recover his share from those to whom the estate has been distributed.

In Louisiana under Rev. Civ. Code, arts. 1067, 1068, providing for the payment of new or straggling creditors who present themselves and who have not made themselves known before, when the funds in the hands of the administrator are insufficient, and which give them a right of action against legatees and creditors who have been paid for return and contribution, with a view to a new distribution, it is held that these articles apply only to successions under actual administration and were not intended to apply to successions already administered upon, where the assets have been distributed, the heirs put in possession, and the administrator discharged; and the proceedings cannot be reopened and a new administration inaugurated. Atkinson *v.* Rodney, 35 La. Ann. 313.

30. Maldaner *v.* Beurhaus, 108 Wis. 25, 84 N. W. 25.

Alien distributees may maintain a bill in equity in the federal court to set aside a decree of distribution of the probate court procured by fraud in this country. Sullivan *v.* Andoe, 6 Fed. 641, 4 Hughes 290.

Misjoinder of parties.— Where executors distributed the residuum of decedent's estate among the legatees, and thereafter it was discovered that securities assigned certain legatees were forgeries, and such legatees filed a bill in equity for a reapportionment, it was held that there was no misjoinder of parties complainant, since the distribution was a single transaction affecting all parties. Maldaner *v.* Beurhaus, 108 Wis. 25, 84 N. W. 25.

31. Ansley *v.* Robinson, 16 Ala. 793.

32. De Pedrorena *v.* San Diego County Super. Ct., 80 Cal. 144, 22 Pac. 71; *In re* Hudson, 63 Cal. 454 (holding that probate courts have no jurisdiction to entertain a petition by a legatee to set aside a decree of distribution after the time prescribed by statute (Cal. Code Civ. Proc. § 473) for fraud or imposition by false representation; nor has the jurisdiction of the superior courts as succeeding to the powers of the probate courts been enlarged in this regard; and that courts of equity alone can grant the proper relief); Exton *v.* Zule, 14 N. J. Eq. 501.

Want of diligence in ascertaining the rights of a minor in an ancestor's estate is not to be imputed to a child of tender years when moving to set aside a decree. *In re* Ross, 140 Cal. 282, 73 Pac. 976.

33. *Alabama.*— Slatter *v.* Glover, 14 Ala. 648, 48 Am. Dec. 118.

Illinois.— Starrett *v.* Keating, 61 Ill. App. 189.

Nevada.— Royce *v.* Hampton, 16 Nev. 25.

Pennsylvania.— Hoban's Appeal, 102 Pa. St. 404.

Wisconsin.— Maldaner *v.* Beurhaus, 108 Wis. 25, 84 N. W. 25; Beem *v.* Kimberly, 72 Wis. 343, 39 N. W. 542, holding, however, that a claimant will not be held guilty of laches in moving to set aside the decree of distribution, where she at once took legal advice, and pressed her counsel to commence proceedings, and nothing has been done with the estate since the order of distribution to alter the relations of the parties or prejudice the executor.

United States.— Sullivan *v.* Andoe, 6 Fed. 641, 4 Hughes 290.

etc.,[34] or appealed from within the time limited by law, it concludes the rights of all parties interested in the estate,[35] and generally cannot be impeached in a col-

34. Blackburn *v.* Craufurd, 22 Md. 447. And see *supra*, XI, P, 2.

35. *Alabama.*— Cousins *v.* Jackson, 49 Ala. 236; Watson *v.* Hutto, 27 Ala. 513; Sankey *v.* Sankey, 18 Ala. 713; Harrison *v.* Pool, 16 Ala. 167. See Landreth *v.* Landreth, 12 Ala. 640.

Arkansas.— Wilson *v.* Harris, 13 Ark. 559.

California.— Under the statutes in this state it is held that the action of the probate court in making distribution binds the whole world, and is equally conclusive upon every claimant whether his claim is presented, or whether he fails to appear, subject only to be reversed, set aside, or modified upon appeal. Kauffman *v.* Gries, 141 Cal. 295, 74 Pac. 846; Martinovich *v.* Marsicano, 137 Cal. 354, 70 Pac. 459; Cunha *v.* Hughes, 122 Cal. 111, 54 Pac. 535, 68 Am. St. Rep. 27; Jewell *v.* Pierce, 120 Cal. 79, 52 Pac. 132; *In re* Trescony, 119 Cal. 568, 51 Pac. 951; Good *v.* Montgomery, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145; Crew *v.* Pratt, 119 Cal. 139, 51 Pac. 38; William Hill Co. *v.* Lawler, 116 Cal. 359, 48 Pac. 323; Hinckley *v.* Stebbins, (1892) 29 Pac. 52; Chever *v.* Ching Hong Poy, 82 Cal. 68, 22 Pac. 1081; Freeman *v.* Rahm, 58 Cal. 111; Irwin *v.* Backus, 25 Cal. 214, 85 Am. Dec. 125.

Connecticut.— State *v.* Blake, 69 Conn. 64, 36 Atl. 1019; Kellogg *v.* Johnson, 38 Conn. 269; Gates *v.* Treat, 17 Conn. 388.

Georgia.— Atkinson *v.* McDonald, 74 Ga. 350.

Illinois.— Tinker *v.* Babcock, 204 Ill. 571, 68 N. E. 445 [*affirming* 107 Ill. App. 78] (holding that the judgment of the probate court awarding distribution is a judgment *in rem* and is binding on all creditors and others who had an opportunity to be heard); Paullissen *v.* Loock, 38 Ill. App. 510; People *v.* Brooks, 22 Ill. App. 594.

Kansas.— Keith *v.* Guthrie, 59 Kan. 200, 52 Pac. 435; Proctor *v.* Dicklow, 57 Kan. 119, 45 Pac. 86.

Kentucky.— Benton *v.* Campbell, 2 Dana 421.

Minnesota.— Eddy *v.* Kelly, 72 Minn. 32, 74 N. W. 1020 (holding that a decree of distribution under a will concludes all parties interested as to everything necessarily involved in it); Ladd *v.* Weiskopf, 62 Minn. 29, 64 N. W. 99 (holding the decree binding on all persons interested, whether then in being or not); Greenwood *v.* Murray, 26 Minn. 259, 2 N. W. 945.

Missouri.— Tapley *v.* McPike, 50 Mo. 589, holding that a decree of distribution while unreversed will protect an innocent purchaser or a stranger buying property under it.

Montana.— Ryan *v.* Kinney, 2 Mont. 454.

Nevada.— McNabb *v.* Wixom, 7 Nev. 163.

New Jersey.— Sayre *v.* Sayre, 16 N. J. Eq. 505; Exton *v.* Zule, 14 N. J. Eq. 501.

New York.— *In re* Underhill, 117 N. Y. 471, 22 N. E. 1120; Kager *v.* Brenneman, 47 N. Y. App. Div. 63, 62 N. Y. Suppl. 339; Foulks *v.* Foulks, 57 Hun 591, 10 N. Y. Suppl. 785; *In re* Halsted, 41 Misc. 606, 85 N. Y. Suppl. 301 (holding that a judgment directing distribution, in the absence of irregularity or fraud, is, under Code Civ. Proc. § 2743, conclusive as a judgment on each party to the special proceeding, who was duly cited). See also Baggott *v.* Boulger, 2 Duer 160.

Pennsylvania.— Ferguson *v.* Yard, 164 Pa. St. 586, 30 Atl. 517; Otterson *v.* Gallagher, 88 Pa. St. 355; Bradshaw's Appeal, 3 Grant 109; Clark's Estate, 1 Kulp 32; Woodward's Estate, 2 Chest. Co. Rep. 9.

South Carolina.— Hurt *v.* Hurt, 6 Rich. Eq. 114 (holding that a distributee residing out of the state, but within the United States, properly made a party to the proceedings for distribution and duly notified in the manner prescribed by statute of the pendency and object of the proceedings, is concluded by the decree for distribution, unless he petitions for a rehearing within two years, although the decree excludes him altogether from a share of the estate to which he was entitled and although he had no actual notice of the pendency of the suit); McClure *v.* Miller, Bailey Eq. 107, 21 Am. Dec. 522.

Texas.— Stewart *v.* Morrison, 81 Tex. 396, 17 S. W. 15, 26 Am. St. Rep. 821.

Utah.— Snyder *v.* Murdock, 26 Utah 233, 73 Pac. 22.

Vermont.— Lenihan *v.* Spaulding, 57 Vt. 115 (decree held conclusive on the finding of the court as to the absence of an heir); Tryon *v.* Tryon, 16 Vt. 313; Georgia Dist. Probate Ct. *v.* Vanduzer, 13 Vt. 135; Sparhawk *v.* Buell, 9 Vt. 41.

Wisconsin.— Schæffner's Appeal, 41 Wis. 260.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1306, 1309.

Thus a decree of distribution is conclusive, unless appealed from or set aside, as to the amount of assets in the hands of the representative for distribution (Judge Limestone County Ct. *v.* Coulter, 3 Stew. & P. (Ala.) 348; *In re* Snyder, 34 Hun (N. Y.) 302; Matter of Monell, 28 Misc. (N. Y.) 308, 59 N. Y. Suppl. 981; McFarland's Estate, 1 Phila. (Pa.) 378); as to the amount of each share (Cousins *v.* Jackson, 49 Ala. 236; Probate Judge *v.* Robins, 5 N. H. 246; Sayre *v.* Sayre, 16 N. J. Eq. 505; Burd *v.* McGregor, 2 Grant (Pa.) 353), and the party entitled to receive it (Sayre *v.* Sayre, 16 N. J. Eq. 505); but is not conclusive as to the fact of payment of debts or shares (Sayre *v.* Sayre, 16 N. J. Eq. 505, holding also that the question whether an administrator has actually paid a claim under the order of distribution or not can only be properly tried by a suit; Sparhawk *v.* Buell, 9 Vt. 41).

That all the distributees are living is incidentally but not conclusively determined by the decree of distribution; and the con-

lateral proceeding.[36] It is not conclusive, however, in some jurisdictions, upon persons interested who received no notice of the proceedings and had no opportunity to be heard therein,[37] or upon one who claims adversely to the estate,[38] or where it makes a distribution unauthorized by law.[39] Unless reversed or modified it operates to vest an absolute right and title in each distributee to the prop-

trary may be set up elsewhere. Eans *v.* Sawyer, 27 Tex. 448 [*following* Sawyer *v.* Boyle, 21 Tex. 28].

Construction.— Where an order of distribution is susceptible of two constructions, one of which would render it legal and operative, while the other would render it illegal and void, the former must be adopted. Armstrong *v.* Grandin, 39 Ohio St. 368.

A decree annulling a will, made after the distribution of the estate, upon the application of one of several heirs, does not render the decree of distribution void. It is valid and binding as to subsequent *bona fide* purchasers from the distributee. Thompson *v.* Samson, 64 Cal. 330, 30 Pac. 980.

Notice of account or decree.— An allegation of want of actual notice of the settlement of the account of an executor or administrator, or of the decree of distribution, is unavailing where it appears that the notice provided by the act of assembly has been given. Ferguson *v.* Yard, 164 Pa. St. 586, 30 Atl. 517.

36. *Alabama.*—Calhoun *v.* Whittle, 56 Ala. 138 (holding that, although a decree against an administrator, directing payment of a bequest to a legatee who is only a tenant for life, without requiring a suitable bond for the protection of the interests of the remaindermen, is erroneous, yet, if the administrator takes no steps to correct or reverse it, he cannot collaterally impeach it, nor claim any advantage from the error when sued on the decree); Thompson *v.* Perryman, 45 Ala. 619.

California.—Williams *v.* Marx, 124 Cal. 22, 56 Pac. 603; Jewell *v.* Pierce, 120 Cal. 79, 52 Pac. 132 (holding that the failure of the decree to name the heirs of the testator and the proportions in which they should take did not render it void or subject to collateral attack); *In re* Trescony, 119 Cal. 568, 51 Pac. 951; Crew *v.* Pratt, 119 Cal. 139, 51 Pac. 38; William Hill Co. *v.* Lawler, 116 Cal. 359, 48 Pac. 353. And see Burdick's Estate, 112 Cal. 387, 44 Pac. 734.

Connecticut.—Gates *v.* Treat, 17 Conn. 388.

Kansas.— Keith *v.* Guthrie, 59 Kan. 200, 52 Pac. 435, holding that it cannot be collaterally attacked by injunction proceedings to restrain its enforcement.

Louisiana.— Fendler *v.* Daigre, 19 La. Ann. 190.

Maryland.—Blackburn *v.* Craufurd, 22 Md. 447.

Massachusetts.— Pierce *v.* Prescott, 128 Mass. 140.

Minnesota.— Wood *v.* Myrick, 16 Minn. 494.

Montana.— Ryan *v.* Kinney, 2 Mont. 454.

New Hampshire.— Probate Judge *v.* Robins, 5 N. H. 246.

Pennsylvania.—Woodward's Estate, 2 Chest. Co. Rep. 9.

Vermont.— Georgia Dist. Probate Ct. *v.* Vanduzer, 13 Vt. 135, not even for fraud.

United States.— Stovall *v.* Banks, 10 Wall. 583, 19 L. ed. 1036; Hiller *v.* Ladd, 85 Fed. 703, 29 C. C. A. 394.

England.— Spencer *v.* Williams, L. R. 2 P. 230, 40 L. J. P. & Adm. 45, 24 L. T. Rep. N. S. 513, 19 Wkly. Rep. 703; Barrs *v.* Jackson, 9 Jur. 609, 14 L. J. Ch. 433, 1 Phil. 582, 19 Eng. Ch. 582; Allen *v.* Dundas, 3 T. R. 125.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1306, 1309.

37. *Alabama.*— Wright *v.* Phillips, 56 Ala. 69, holding that a decree in chancery against an administrator in favor of one of the distributees for his share of a specific fund does not conclude other distributees not parties to the suit from relief against the decree on the ground that he has received more than his proper share of the estate, including assets in a foreign jurisdiction, and is insolvent.

Idaho.— Coats *v.* Harris, (1904) 75 Pac. 243.

Maryland.—Blackburn *v.* Craufurd, 22 Md. 447.

Minnesota.— Backdahl *v.* Grand Lodge A. O. U. W., 46 Minn. 61, 48 N. W. 454, holding that a decree of distribution is not evidence as against strangers that the persons to whom the estate is assigned are heirs of the decedent.

Mississippi.— Conwill *v.* Conwill, 61 Miss. 202 (holding that a decree of distribution on final settlement is not conclusive on a minor for whom no guardian was appointed); Porter *v.* Porter, 7 How. 106, 40 Am. Dec. 55.

Wisconsin.— Ruth *v.* Oberbrunner, 40 Wis. 238.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1306, 1309.

38. Finnerty *v.* Pennie, 100 Cal. 404, 34 Pac. 869; Rowland's Estate, 74 Cal. 523, 16 Pac. 315, 5 Am. St. Rep. 464 (holding that a legatee under a will who claims certain property in the hands of the executor in his own right and adversely to the estate is not concluded by a decree attempting to distribute such property or afterward asserting his adverse claim against his distributee); Barnard *v.* Wilson, 74 Cal. 512, 16 Pac. 307. See also *In re* Willey, (1899) 56 Pac. 550; Chever *v.* Ching Hong Poy, 82 Cal. 68, 22 Pac. 1081; Bath *v.* Valdez, 70 Cal. 350, 11 Pac. 724.

39. Martinovich *v.* Marsicano, 137 Cal. 354, 70 Pac. 459 (holding that the probate court has no authority to award a distributee's share to his judgment creditor, and hence the decree awarding the share to one to whom it was conveyed is not *res adjudicata* of the judgment creditor's right to enforce the lien of his judgment against such share); Hind-

erty respectively assigned to him,[40] subject to any outstanding title in the hands of a third person;[41] and a subsequent order directing a different disposition is without authority and void.[42] It also operates to render the representative personally liable for the balance adjudged to be in his hands,[43] and to protect him if he makes distribution in accordance therewith.[44]

man *v.* State, 61 Md. 471; Armstrong *v.* Grandin, 39 Ohio St. 368.

40. *Alabama.*— Bean *v.* Welsh, 17 Ala. 770.

California.— *In re* Garraud, 36 Cal. 277.

Minnesota.— State *v.* Ramsey County Probate Ct., 84 Minn. 289, 87 N. W. 783; Schmidt *v.* Stark, 61 Minn. 91, 63 N. W. 255; Greenwood *v.* Murray, 26 Minn. 259, 2 N. W. 945.

Vermont.— Tryon *v.* Tryon, 16 Vt. 313.

Washington.—Prefontaine *v.* McMicken, 16 Wash. 16, 47 Pac. 231.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1306, 1309.

An assignment of real property in a decree of distribution to a party named, "to have and to hold the same unto her, her heirs and assigns, forever," is an assignment of an estate in fee, although the will under which the decree is made gives the distributee the residue of testator's estate to be used "during her natural life" the same as testator might do if empowered to dispose of the same absolutely. Tidd *v.* Rines, 26 Minn. 201, 2 N. W. 497.

41. *In re* Richards, 133 Cal. 524, 65 Pac. 1034.

42. *In re* Garraud, 36 Cal. 277; Prefontaine *v.* McMicken, 16 Wash. 16, 47 Pac. 231.

Conditional decree.— Even though a decree of distribution of a decedent's real estate may have been conditional and the condition may not have been performed, such real estate cannot be subjected to the lien of a judgment when the petition therefor fails to state facts showing that there is not sufficient personal property in the hands of the executor to satisfy the claim, and that a sale of the real estate is necessary for the purpose of paying debts of the estate. Prefontaine *v.* McMicken, 16 Wash. 16, 47 Pac. 231.

43. Matter of Monell, 28 Misc. (N. Y.) 308, 59 N. Y. Suppl. 981, holding that a decree of distribution upon the accounting of an administration should direct payment by him individually, and not as administrator. A provision in a surrogate's decree that the executor pay over the balance in his hands in execution of the trusts in the will is not a payment, so as to discharge him or to exonerate the fund distributable, and charge the person to whom it is made payable. Such a decree gives to the distributee a remedy against the executor personally for his proportion of the fund found to be in the executor's hands; but this remedy is cumulative, not impairing at all his remedy against the fund itself, which can be exonerated by nothing short of actual payment or some act of the distributee to its prejudice. Clapp *v.* Meserole, 1 Abb. Dec. (N. Y.) 362, 1 Keyes (N. Y.) 281, 27 How. Pr. (N. Y.) 600 note [*affirming* 38 Barb. 661]. And see *infra*, XV, F, 5.

44. *California.*— Freeman *v.* Rahm, 58 Cal. 111.

Connecticut.— Merwin's Appeal, 75 Conn. 33, 52 Atl. 484; Kellogg *v.* Johnson, 38 Conn. 269.

Kentucky.— Fraser *v.* Page, 82 Ky. 73 (distribution in accordance with the court's construction of a will, which turned out erroneous); Vandergrift *v.* Cone, 37 S. W. 60, 18 Ky. L. Rep. 454.

Louisiana.— Baron *v.* Baum, 46 La. Ann. 1101, 15 So. 364; Girod *v.* Crossman, 11 La. Ann. 497.

Massachusetts.— Lamson *v.* Knowles, 170 Mass. 295, 49 N. E. 440; Palmer *v.* Whitney, 166 Mass. 306, 44 N. E. 229; Loring *v.* Steineman, 1 Metc. 204.

Michigan.— Ernst *v.* Freeman, 129 Mich. 271, 88 N. W. 636, holding that where no order for a stay of the decree is had on appeal taken, the administrator will be protected if he makes distribution in good faith in accordance with the decree, although the time for appealing has not expired.

Mississippi.— Lowry *v.* McMillan, 35 Miss. 147, 72 Am. Dec. 119.

Missouri.—Young *v.* Thrasher, 48 Mo. App. 327.

New Jersey.— Sayre *v.* Sayre, 16 N. J. Eq. 505.

Pennsylvania.— Ferguson *v.* Yard, 164 Pa. St. 586, 30 Atl. 517; Charlton's Appeal, 88 Pa. St. 476; Stewart's Appeal, 86 Pa. St. 149 (holding that where an administrator in pursuance of a decree has paid over money to a distributee without notice of a bill of review he will be protected against loss should the court subsequently open and change the decree); *In re* Koch, 4 Rawle 268; Sutter's Estate, 23 Wkly. Notes Cas. 68; Woodward's Estate, 2 Chest. Co. Rep. 9.

Texas.— Johnson *v.* Wilcox, 53 Tex. 413.

United States.— Alexander *v.* Bryan, 110 U. S. 414, 4 Sup. Ct. 107, 28 L. ed. 195.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1306, 1309. And see *supra*, XI, L, 4.

When the representative has received his share as distributee under a decree of the probate court, such property is no longer liable to a judgment rendered against him as representative. Ferguson *v.* Yard, 164 Pa. St. 586, 30 Atl. 517.

The remedy of a party deprived of his rights by the decree is not against the administrator, but against the distributees who have wrongfully received the estate. In their favor, as against the rightful claimant, the decree does not operate. Sayre *v.* Sayre, 16 N. J. Eq. 505; Exton *v.* Zule, 14 N. J. Eq. 501.

b. Lien. A decree making distribution subject to a certain claim against the estate, as may be done in some jurisdictions, creates a lien on the estate in the hands of the distributee to the amount of such claim.[45]

4. Enforcement of Decree. A decree of distribution may be enforced by an execution against the property of the representative, in the same manner as a judgment at law,[46] by a suit on his administration bond,[47] or, if necessary by reason of the representative's refusal or failure to comply with the decree after a demand, by proceedings for contempt.[48]

45. Finnerty *v.* Pennie, 100 Cal. 404, 34 Pac. 869, where a lien in favor of the administrator was thus created upon the estate.

An allotment to one distributee subject to a payment to another distributee to equalize the division creates a lien on the property allotted the first distributee to the amount of such payment. Gregory *v.* Hooker, 8 N. C. 394, 9 Am. Dec. 646.

In Washington, however, the court has no authority to decree a distribution of the estate subject to a lien for the compensation of the representative (*In re* Sour, 17 Wash. 675, 50 Pac. 587), or for money expended by him for the benefit of the estate (Huston *v.* Becker, 15 Wash. 586, 47 Pac. 10) as such payments should be made out of the estate before distribution is made.

A decree upon a bill for directions not fixing the amount due by the executor but directing him to pay off an estate when collected to certain general legatees after retaining a certain sum in his hands to pay counsel fees and allowances to himself under the will and another sum for a specific legatee is not such a final decree in money as to constitute a lien upon the property from the date of its rendition in favor of such general legatees. Hamberger *v.* Easter, 57 Ga. 71.

46. *Alabama.*— Browder *v.* Faulkner, 82 Ala. 257, 3 So. 30 (holding, however, that a decree in favor of several distributees jointly does not authorize the issuance of execution); Thompson *v.* Perryman, 45 Ala. 619.

Mississippi.— Isom *v.* McGehee, 45 Miss. 712; Torrence *v.* Kerr, 27 Miss. 786.

New York.—Peyser *v.* Wendt, 2 Dem. Surr. 221 (holding that such execution may run against the representative personally without notice to him or application to the surrogate); Joel *v.* Ritterman, 5 Redf. Surr. 136; Sherwood *v.* Judd, 3 Bradf. Surr. 419.

North Carolina.— Ellison *v.* Andrews, 34 N. C. 188.

Ohio.— McLaughlin *v.* McLaughlin, 4 Ohio St. 508, 64 Am. Dec. 603.

Oregon.— Rostel *v.* Morat, 19 Oreg. 181, 23 Pac. 900, holding that execution, and not contempt, is the proper proceeding to enforce a decree for money in probate proceedings.

Pennsylvania.— *In re* McIntosh, 158 Pa. St. 525, 27 Atl. 1042 (holding also that a rule to show cause must issue before execution can be issued); Philadelphia *v.* Brennan, 18 Pa. Co. Ct. 59.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1311.

Separate executions.— Where several legatees or distributees obtain a decree against the representative, the decree is several and each is entitled to a separate execution for each share. Ellison *v.* Andrews, 34 N. C. 188.

An order for execution issuing in favor of an infant distributee without the intervention of a guardian is erroneous. Green *v.* Fagan, 15 Ala. 335.

Execution by an administrator de bonis non.— Where a decree is made in a probate court in favor of several plaintiffs on a petition for a legacy, one of whom is the executor of a deceased legatee, and his executor dies before satisfaction or execution sued out, the right to the legacy of the deceased legatee vests in the administrator *de bonis non*, but he is not entitled to have execution until he has made himself a party either by scire facias or according to the course of the courts of equity. Ellison *v.* Andrews, 34 N. C. 188.

Form of citation.— A citation to an administrator calling upon him to show cause why judgment and execution should not be awarded against him for the distributive share of one in the estate must set out the previous proceedings had in the settlement of the estate. Welch *v.* Walker, 4 Port. (Ala.) 120.

47. See *infra*, XVII, E, 10.

48. *California.*— Clary's Estate, 112 Cal. 292, 44 Pac. 569; Melone *v.* Davis, 67 Cal. 279, 7 Pac. 703; *Ex p.* Cohn, 55 Cal. 193; *Ex p.* Smith, 53 Cal. 204.

Georgia.— See Everett *v.* Sparks, 107 Ga. 48, 32 S. E. 878, 73 Am. St. Rep. 107.

Illinois.— Under Rev. St. c. 3, § 115, the personal representative may be attached and imprisoned for failure or refusal to comply with an order of the court as to the payment of distributive shares after a demand therefor, as required by statute. Randolph *v.* People, 130 Ill. 533, 22 N. E. 615 [*reversing* 26 Ill. App. 241]; Piggott *v.* Ramey, 2 Ill. 145. The demand provided for can neither be dispensed with nor waived (Blake *v.* People, 161 Ill. 74, 43 N. E. 590; Haines *v.* People, 97 Ill. 161; Von Kettler *v.* Johnson, 57 Ill. 109) but it need not definitely state the amount due (Randolph *v.* People, 40 Ill. App. 174).

Mississippi.— Torrence *v.* Kerr, 27 Miss. 786; Vertner *v.* Martin, 10 Sm. & M. 103; Moore *v.* Adams County Probate Judge, Walk. 310.

New York.— Under Code of Civ. Proc. § 2555, failure of the representative to pay over a balance in his hands, in accordance with the decree of the surrogate's court and after demand therefor has been duly made, is a contempt of the court and is punishable as such by the imposition of a fine equal in

5. Restraining Enforcement. Upon a showing of fraud in procuring the decree or other grounds of equitable relief, an injunction may be granted restraining proceedings to enforce the decree;[49] but as the distribution of estates is greatly favored an injunction will not be granted where adequate relief can otherwise be obtained by the petitioner.[50]

6. Order For Partial Distribution.[51] A decree for partial distribution can be rendered only upon an application therefor,[52] and can only be made in favor of those who join in such application,[53] except where the application is made by the administrator himself;[54] and a separate decree should be rendered in favor of

amount to the sum adjudged to be in his hands and by a commitment to jail until the same shall be paid. *In re* Snyder, 103 N. Y. 178, 8 N. E. 479 [*affirming* 34 Hun 302]; Matter of Holmes, 79 N. Y. App. Div. 267, 79 N. Y. Suppl. 687 [*affirmed* in 176 N. Y. 604, 68 N. E. 1118]; Matter of Waring, 1 N. Y. App. Div. 29, 36 N. Y. Suppl. 529; Saltus *v.* Saltus, 2 Lans. 9 (holding also that on return of the attachment the executor may show cause against his commitment); Matter of Kurtzman, 2 N. Y. St. 655; People *v.* Marshall, 7 Abb. N. Cas. 380; Sherwood *v.* Judd, 3 Bradf. Surr. 419 (holding this to be only an additional remedy to that of execution); Doran *v.* Dempsey, 1 Bradf. Surr. 490. See also Matter of Monell, 28 Misc. 1308, 59 N. Y. Suppl. 981; Rugg *v.* Jenks, 4 Dem. Surr. 105.

Oregon.—See Rostel *v.* Morat, 19 Oreg. 181, 23 Pac. 900, holding that under the statute (Hill Code, § 406) the probate court may enforce an order or decree other than one for the payment of money by punishing the party for contempt.

Washington.— McLaughlin *v.* Barnes, 12 Wash. 373, 41 Pac. 62.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1311. See also Contempt, 9 Cyc. 24.

A plea of insolvency and want of property of his own or belonging to the estate is no defense to an executor on an attachment against him for failure to pay a sum decreed on his final settlement. *In re* Snyder, 103 N. Y. 178, 8 N. E. 479 [*affirming* 34 Hun 302]; Joel *v.* Ritterman, 5 Redf. Surr. (N. Y.) 136.

An appeal lies to the circuit court from an order of the county court directing an administrator to pay over a specified sum of money on a claim allowed against an estate, within a given time, and the costs of the proceeding, and providing for his imprisonment in case of his failure to make such payment. Such order is a final judgment, as much as if an execution had been awarded. The manner of enforcing payment, whether by execution or attachment, does not affect the character of the order or decree. Randolph *v.* People, 130 Ill. 533, 22 N. E. 615.

Effect of appeal.— An attachment will not be granted against the personal representative for failure to obey the decree of distribution, where he has appealed from the decree and filed a bond as required by statute. Matter of Espie, 3 Redf. Surr. (N. Y.) 270. *Compare* Matter of Holmes, 79 N. Y. App. Div. 267, 79 N. Y. Suppl. 687 [*affirmed* in 176 N. Y. 604, 68 N. E. 1118], holding that where an executor, on appealing from a final decree directing him to pay certain legacies, gave the undertaking for costs required by Code Civ. Proc. § 2577, but not the undertaking required by section 2578 for staying execution, the respondents could enforce the decree, as if it had not been appealed from, and were not limited to enforcing it by execution.

Credit should be allowed the representative in such proceedings for moneys paid by him to a distributee on account of his legacy prior to the making of the decree and for which through his inadvertence he was not credited in his final account. Matter of Schweibert, 25 Misc. (N. Y.) 464, 55 N. Y. Suppl. 649.

49. Blackburn *v.* Craufurd, 22 Md. 447; Fairly *v.* Thompson, 34 Miss. 101, holding that where residuary legatees take advantage of a mistake in the executor's inventory, by joining in their petition for distribution other parties without their consent and imposing a fraud upon the court, the executor may obtain an injunction to stay proceedings under the decree.

Pleading.— But an administrator cannot enjoin the execution of a decree for distribution, on the ground that before his final settlement he had paid off and discharged the amounts due defendants as distributees, in the absence of any averment in his bill that such payments were not examined and allowed or rejected on his formal accounting. Gaillard *v.* Thomas, 61 Miss. 166.

50. Bates' Estate, 5 Ohio S. & C. Pl. Dec. 545, 7 Ohio N. P. 625, holding that the probate court will not enjoin the distribution of a decedent's estate at the suit of his successor in title to the property on the ground that he holds a bond by which title is guaranteed, and therefore has a claim which will arise if title proves defective, as he has an adequate remedy at law.

51. When partial distribution may be made see *supra*, XI, E, 2.

52. Bludworth *v.* White, 42 Ala. 662, holding that where a probate court, upon application, appointed a day for an administrator to make final settlement, but turned it into a partial distribution, without any application for that purpose, either by the administrator or the distributees, and a decree was rendered in favor of the latter for their distributive shares the proceeding was without authority of law, and the decree void.

53. Harrison *v.* Meadors, 41 Ala. 274.

54. Harrison *v.* Meadors, 41 Ala. 274.

each distributee who applies for it.[55] This decree is conclusive only as to the funds then distributed,[56] and does not estop the distributee to assert that the representative had then other funds in his hands.[57]

Q. Reservation of Assets. Before making distribution of the whole or part of an estate, the personal representative is entitled or may be ordered to retain in his hands sufficient assets to meet contingent or disputed legacies,[58] or to meet claims against the estate which are disputed or not yet due,[59] or which are likely to arise in the future.[60] The amount to be reserved is fixed by law, or the court's just discretion, considering the circumstances.[61] If it becomes

55. Harrison *v.* Meadors, 41 Ala. 274.

If a joint decree is rendered against the administrator, in favor of the several distributees, for the sums ascertained to be due to them respectively and a decree for the wife's distributive share is rendered in favor of the husband, "in right of the wife, and for her use," these are mere irregularities, which will be considered on error as amended. Harrison *v.* Meadors, 41 Ala. 274.

Decree of partial distribution to legatees.— It is better practice, in making an order for partial distribution to legatees, to specify in the order the sum of money to be paid to each legatee, and the amount of the collateral inheritance tax to be deducted therefrom; and it is erroneous not to deduct therefrom payments made previously thereon by the executors, and which were admitted to have been received by the legatees. *In re* Mitchell, 121 Cal. 391, 53 Pac. 810.

56. Kline's Appeal, 86 Pa. St. 363; Pepper's Estate, 13 Pa. Co. Ct. 407; Guenther's Appeal, 4 Wkly. Notes Cas. (Pa.) 41.

57. State *v.* Berning, 6 Mo. App. 105.

58. Ing *v.* Baltimore Assoc., 21 Md. 426; Petrie *v.* Voorhees, 18 N. J. Eq. 285; *In re* Denike, 3 Silv. Supreme (N. Y.) 291, 6 N. Y. Suppl. 450; Auburn Theological Seminary *v.* Cole, 20 Barb. (N. Y.) 321; *In re* Hall, [1903] 2 Ch. 226, 72 L. J. Ch. 554, 88 L. T. Rep. N. S. 619, 51 Wkly. Rep. 529.

Partial distribution.— In permitting a partial distribution of an estate, a share in which is claimed by one whose right as a legatee under the will has not been determined, if, in the opinion of the court enough of the estate would not remain after the proposed distribution to satisfy the claim, it should order a sufficient sum to be set apart and invested under the direction of the court to abide the event. Gable's Appeal, 40 Pa. St. 231.

In Pennsylvania the personal representative is allowed to retain a fund in his hands, if exposed to a suit for a devastavit in those entitled under a will on the principle of *quia timet*. Sims *v.* Chew, 15 Serg. & R. 197.

59. Linton *v.* Crosby, 61 Iowa 401, 16 N. W. 342; Pehan's Succession, 5 La. Ann. 304; George's Succession, 4 La. Ann. 223; Hoyt *v.* Bonnett, 50 N. Y. 538; Field *v.* Field, 2 Redf. Surr. (N. Y.) 160 (holding that the reservation can be only for claims against the estate and not for those against the representative personally); Johnson *v.* Mills, 1 Ves. 282, 27 Eng. Reprint 1033.

The retention of assets to meet an unliquidated demand against the estate is not the right of the executor, but rests in the discretion of the probate court. Ing *v.* Baltimore Assoc., 21 Md. 426.

Taxes.— A representative who pays legacies, when he should reserve the money for taxes, cannot have relief from the courts. McMahon *v.* Sullivan, 14 Abb. N. Cas. (N. Y.) 405.

Where a claimant makes no effort to enforce his claim which is disputed, the probate court, on entering a final decree on an administrator's accounting, will not direct him to retain the amount of the disputed claim (Matter of Rasch, 26 Misc. (N. Y.) 459, 55 N. Y. Suppl. 434, 28 N. Y. Civ. Proc. 98), but it is otherwise if the claimant makes an effort and his failure to sue was because of the non-residence of the administrator, and his refusal to make a voluntary appearance (Matter of Rasch, *supra*).

Alternative order pending appeal.— When the decision of the commissioner of internal revenue imposing a tax on a legacy is in dispute, and the accountant wishes to make distribution without payment of the legacy tax, the auditing judge may make an alternative order that the legatees secure the accountant in case the decision of the commissioner be sustained, or, failing that, that the accountant retain a fund sufficient to defray the tax, if it shall be finally held to be demandable. Fitzpatrick's Estate, 9 Pa. Dist. 88.

Nature of claim.—Executors are not bound, in distributing their testator's estate, to retain assets in their hands to meet a liability of which they have notice unless the liability amounts to a debt. Whittaker *v.* Kershaw, 45 Ch. D. 320, 60 L. J. Ch. 9, 63 L. T. Rep. N. S. 203, 39 Wkly. Rep. 23.

60. Field *v.* Field, 2 Redf. Surr. (N. Y.) 160.

An order of distribution on an annual not a final settlement should leave a margin in the representative's hands for later expenses. Peters *v.* Clendenin, 12 Mo. App. 521.

Anticipated costs of litigation on a claim against the estate cannot be reserved for under 3 N. Y. Rev. St. [6th ed.] p. 104, § 89, providing for the reservation of assets to meet claims against the estate. Field *v.* Field, 2 Redf. Surr. 160.

61. Linton's Succession, 31 La. Ann. 130 (holding that an executor in filing his account has no right to reserve an amount in blank for discharging the necessary remaining expenses of closing the succession as the

unnecessary to dispose of such assets for the purpose for which they were reserved, the representative must account for them as assets of the estate to the person entitled to receive them.[62]

R. Liability to Refund on Deficiency of Assets[63]— **1. In General.** As a general rule, in the absence of a statute, where a personal representative makes voluntary distribution of a balance or settles legacies in full, he cannot maintain an action at law against the distributees or legatees to compel a refunding upon an insufficiency of assets in his hands for debts or claims,[64] except where a special promise to refund has been made,[65] or a refunding bond has been given.[66] Nor in the absence of a statute has the probate court jurisdiction to compel a legatee or distributee to refund.[67] Equity, however, will usually give relief and compel the legatee or distributee to refund his *pro rata* share of the deficiency, in proportion to the amount he has received from the estate,[68] although no refunding

law fixes the amount); Grigg's Estate, 11 Phila. (Pa.) 23.

62. Wells *v.* Mitchell, 39 Miss. 800 (holding that if, in a partial voluntary settlement between an executor and the heir, funds are left in the hands of the former to pay certain legacies in the will which are illegal, the funds so retained continue to be assets in his hands, and, on his failure to pay the illegal legacies, he will be liable to account for them to the heir); Thompson *v.* Thompson, 70 N. Y. App. Div. 242, 75 N. Y. Suppl. 401 (holding him liable to account as representative only).

63. Liability of heirs or distributees for debts of intestate see DESCENT AND DISTRIBUTION, 14 Cyc. 184 *et seq.*

Liability of legatees and devisees for debts of testator see, generally, WILLS.

64. *Indiana.*— Egbert *v.* Rush, 7 Ind. 706.

Maryland.— Somervell *v.* Somervell, 3 Gill 276, 43 Am. Dec. 340; Turner *v.* Egerton, 1 Gill & J. 430, 19 Am. Dec. 235.

Mississippi.— Turner *v.* Chambers, 10 Sm. & M. 308, 48 Am. Dec. 751.

New York.— *In re* Hodgman, 140 N. Y. 421, 35 N. E. 660 [*affirming* 69 Hun 484, 23 N. Y. Suppl. 725]. See also Underhill *v.* Rodwell, 18 N. Y. App. Div. 361, 46 N. Y. Suppl. 22.

Pennsylvania.—Weiser's Appeal, 18 Pa. St. 423. See also Miller *v.* Hulme, 126 Pa. St. 277, 17 Atl. 587.

England.— Johnson *v.* Johnson, 3 B. & P. 162, 6 Rev. Rep. 736; Coppin *v.* Coppin, 2 P. Wms. 291, 24 Eng. Reprint 735.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1319.

Void legacies.— The rule that an executor who pays a legacy must bear the loss when it subsequently appears that the assets are not sufficient to justify payment and that he cannot compel the legatee to refund does not apply to payment of legacies which are subsequently declared void by the courts, and in such cases the legatees will be compelled to refund, and will not be relieved by the fact that the executor would be protected from personal liability for such payment. Carter *v.* Board of Education, 68 Hun (N. Y.) 435, 23 N. Y. Suppl. 95 [*affirmed* in 144 N. Y. 621, 39 N. E. 628].

In Michigan under Howell St. § 5820, providing for proceedings at law or in equity for a contribution, as supplementary to the probate decree therein provided for, such proceeding if at law must be against the parties liable to contribution severally, but if in equity may be against them jointly. Frost *v.* Atwood, 73 Mich. 67, 41 N. W. 96, 16 Am. St. Rep. 560. A decree for contribution by devisees and legatees in payment of debts and other liabilities of the estate, under this statute, is no more than a personal judgment, enforceable by execution. Frost *v.* Atwood, *supra.*

65. Gibbs *v.* Clagett, 2 Gill & J. (Md.) 14; Norwood *v.* O'Neal, 112 N. C. 127, 16 S. E. 759.

66. See *infra*, XI, R, 2.

67. Clinton's Estate, 9 Pa. Dist. 455, 24 Pa. Co. Ct. 218; Wheeler's Estate, 4 Pa. Dist. 265, 36 Wkly. Notes Cas. (Pa.) 296; Leavens' Estate, 65 Wis. 440, 27 N. W. 324. See also Frost *v.* Atwood, 73 Mich. 67, 41 N. W. 96, 16 Am. St. Rep. 560.

In New York the surrogate has no jurisdiction upon the final accounting of a representative to compel a legatee or distributee to restore the amount of an overpayment, although it may determine the fact and extent of such overpayment in ascertaining the amount of the distributive shares. Lang *v.* Stringer, 144 N. Y. 275, 39 N. E. 363 [*reversing* 67 Hun 107, 22 N. Y. Suppl. 44]; *In re* Underhill, 117 N. Y. 471, 22 N. E. 1120; Lang *v.* Housell, 21 N. Y. Suppl. 102, 29 Abb. N. Cas. 117, 1 Pow. Surr. 243.

68. Cutright *v.* Stanford, 81 Ill. 240; Zollickoffer *v.* Seth, 44 Md. 359; McClung *v.* Sieg, 54 W. Va. 467, 46 S. E. 210, 66 L. R. A. 884; Johnson *v.* Johnson, 3 B. & P. 162, 6 Rev. Rep. 736; Doe *v.* Guy, 3 East 120, 4 Esp. 154, 6 Rev. Rep. 563. And see the cases cited in the following notes.

Liability for interest or income.— A legatee or distributee, when called upon to refund, will not be charged with interest prior to the demand (Fripp *v.* Talbird, 1 Hill Eq. (S. C.) 142) unless he is entitled to other funds, making interest in the hands of the court (Gittins *v.* Steele, 1 Swanst. 199, 18 Rev. Rep. 57, 36 Eng. Reprint 356), nor is he liable for any intermediate income (Jervis *v.* Wolferstan, L. R. 18 Eq. 18, 43 L. J. Ch. 809, 30 L. T. Rep. N. S. 452). But a re-

bond has been given,[69] where the representative acted in good faith and with due care and diligence in making the payments or distribution, honestly believing the assets sufficient, and the deficiency was caused by no fault on his part,[70] as where

siduary legatee, receiving the estate or any part of it from the executor, with a knowledge that the other legacies have not been paid or provided for, may be required to refund, with interest, to the same extent to which the executor is liable to the other legatees. Stephenson *v.* Axson, Bailey Eq. (S. C.) 269.

A decree against several distributees for a refunding should not be several, but should be joint, requiring each to pay *pro rata*. Cutright *v.* Stanford, 81 Ill. 240.

Lien upon devised land for contribution.— Equity will not decree a lien upon devised land, for the purchase-price paid on its sale by an executor to enforce a decree of the probate court for contribution by the devisee toward the payment of the testator's debts, even though the money was used by the executor for that purpose, such sale being void. Frost *v.* Atwood, 73 Mich. 67, 41 N. W. 96, 16 Am. St. Rep. 560.

69. *Alabama.*—Alexander *v.* Fisher, 18 Ala. 374.

Illinois.— Cutright *v.* Stanford, 81 Ill. 240.

Indiana.— Smith *v.* Smith, 76 Ind. 236.

Kentucky.— Hooser *v.* Hooser, 3 Ky. L. Rep. 796.

New Jersey.— See Harris *v.* White, 5 N. J. L. 422.

North Carolina.— Pullen *v.* Hutchins, 67 N. C. 428; Stack *v.* Williams, 56 N. C. 13; Marsh *v.* Scarboro, 17 N. C. 551, 27 Am. Dec. 248.

Pennsylvania.— Saegar *v.* Wilson, 4 Watts & S. 501.

70. *Alabama.*— Moore *v.* Lesueur, 33 Ala. 237; Alexander *v.* Fisher, 18 Ala. 374.

Arkansas.— See Ross *v.* Davis, 17 Ark. 113.

Illinois.— Cutright *v.* Stanford, 81 Ill. 240.

Indiana.— Smith *v.* Smith, 76 Ind. 236.

Kentucky.—Caldwell *v.* Kinkead, 1 B. Mon. 228.

Maryland.— Zollickoffer *v.* Seth, 44 Md. 359; Buchanan *v.* Pue, 6 Gill 112; Somervell *v.* Somervell, 3 Gill 276, 43 Am. Dec. 340; Turner *v.* Egerton, 1 Gill & J. 430, 19 Am. Dec. 235.

Massachusetts.— Sheldon *v.* Kirkland, 8 Gray 531.

Michigan.— See Frost *v.* Atwood, 73 Mich. 67, 41 N. W. 96, 16 Am. St. Rep. 560.

New Jersey.— See Harris *v.* White, 5 N. J. L. 422.

New York.— *In re* Hodgman, 140 N. Y. 421, 35 N. E. 660 [*affirming* 69 Hun 484, 23 N. Y. Suppl. 725]. And see Harvard College *v.* Quinn, 3 Redf. Surr. 514.

North Carolina.— The representative to compel a refunding in such cases must allege and prove special circumstances showing that he was in no default in not completing the settlement before making the payment or distribution. Lowery *v.* Perry, 85 N. C. 131; Bumpass *v.* Chambers, 77 N. C. 357; Donnell *v.* Cooke, 63 N. C. 227; Lambert *v.* Hobson, 56 N. C. 424; Alexander *v.* Fox, 55 N. C. 106, 62 Am. Dec. 211; Marsh *v.* Scarboro, 17 N. C. 551, 27 Am. Dec. 248. An administrator, against whom a judgment was recovered after he had delivered over the property of his intestate to the distributees, may recover from them each the ratable part of such debt, when it appears that the intestate was only surety for the debt recovered, and that at the time of such delivery the principal was solvent; but the solvent distributees will not be required to pay the ratable parts of the insolvent ones. Clark *v.* Williams, 70 N. C. 679.

Tennessee.— See Robinson *v.* Rutherford County Ct., 8 Humphr. 374.

Virginia.— Davis *v.* Newman, 2 Rob. 664, 40 Am. Dec. 764; Gallego *v.* Atty.-Gen., 3 Leigh 450; Miller *v.* Rice, 1 Rand. 438; Burnley *v.* Lambert, 1 Wash. 308. See also Lewis *v.* Overby, 31 Gratt. 601. Where, without fraud or collusion, a decree is rendered by a court of competent jurisdiction against an executor, he may bring his suit in equity against the legatees for contribution to satisfy such decree, without first paying the money himself, or appealing from the decree against him, although requested and advised to do so. Bower *v.* Glendening, 4 Munf. 219.

West Virginia.—McClung *v.* Sieg, 54 W. Va. 467, 46 S. E. 210, 66 L. R. A. 884; McEndree *v.* Morgan, 31 W. Va. 521, 8 S. E. 285; Shriver *v.* Garrison, 30 W. Va. 456, 4 S. E. 660; Anderson *v.* Piercy, 20 W. Va. 282.

England.—Whittaker *v.* Kershaw, 45 Ch. D. 320, 60 L. J. Ch. 9, 63 L. T. Rep. N. S. 203, 39 Wkly. Rep. 23; Jervis *v.* Wolferstan, L. R. 18 Eq. 18, 43 L. J. Ch. 809, 30 L. T. Rep. N. S. 452; Rowe *v.* Thorpe, 1 Jur. 771; Edwards *v.* Freeman, 2 P. Wms. 435, 24 Eng. Reprint 803; Anonymous, 1 P. Wms. 495, 24 Eng. Reprint 487. See also Davis *v.* Davis, Dick. 32, 21 Eng. Reprint 178.

Basis of suit.— The claim which can furnish a basis for an action to compel a legatee or distributee to refund must be allowed in the probate court or established by proper proceedings elsewhere, as a liability of the estate involved. White *v.* Hepp, 6 Mart. (La.) 704; Brinkworth *v.* Hazlett, 64 Nebr. 592, 90 N. W. 537; Whittaker *v.* Kershaw, 45 Ch. D. 320, 60 L. J. Ch. 9, 63 L. T. Rep. N. S. 203, 39 Wkly. Rep. 23.

Parties.— In a suit in equity against a distributee for contribution, all distributees within the jurisdiction of the court should be made parties (McClung *v.* Sieg, 54 W. Va. 467, 46 S. E. 210, 66 L. R. A. 884), except those who have refunded their respective proportions of the deficiency (Alexander *v.* Fisher, 18 Ala. 374). Unsatisfied creditors may be made parties in a bill for restitution against a residuary legatee, who is also a devisee of land charged with the payment of debts (Caldwell *v.* Kinkead, 1 B. Mon. (Ky.)

he was compelled to make payment or distribution under an order of court,[71] or where the legatees or distributees were guilty of fraud or misrepresentation in procuring the payment or distribution.[72] But even equity will not grant relief if the assets were originally sufficient, and the deficiency is caused by the representative's neglect, waste, or bad faith.[73]

2. Liabilities and Actions on Refunding Bond or Other Indemnity — a. In General. The liability of a legatee or distributee upon a refunding bond or other written indemnity depends of course upon the conditions of the instrument and varies accordingly,[74] his usual liability being only for his *pro rata* share of

228), but not where the devise of a residuary legatee and the residuary bequest are not charged with the payment of the testator's debts (Caldwell *v.* Kinkead, *supra*). Where all the distributees are not within the jurisdiction of the court the representative may sue such of them as are within the reach of the court's process, and if all of them are non-residents he can attach such property in the state as is subject to an attachment in equity. McClung *v.* Sieg, *supra*.

Laches or lapse of time may bar the representative's suit in equity for a refunding. Drayton *v.* Drayton, 1 Desauss. (S. C.) 557; Robertson *v.* Archer, 5 Rand. (Va.) 319.

An executor who receives money as residuary legatee cannot maintain a bill in equity against a specific legatee to compel him to refund *pro rata* money paid to him in satisfaction of his legacy, on account of expenses incurred subsequently to the payment of such legacy, where it appears that he has received as residuary legatee more than the entire amount of the expenses so incurred. White *v.* Easters, 38 Ala. 154.

71. Davis *v.* Vansands, 7 Fed. Cas. No. 3,655, 45 Conn. 600; Lang *v.* Stringer, 144 N. Y. 275, 39 N. E. 363 [*reversing* 67 Hun 107, 22 N. Y. Suppl. 447]; Stack *v.* Williams, 56 N. C. 13; Newman *v.* Barton, 2 Vern. 205, 23 Eng. Reprint 733; Noel *v.* Robinson, 2 Ch. Cas. 145, 22 Eng. Reprint 887, 2 Ch. Rep. 248, 21 Eng. Reprint 670, 1 Vern. 90, 23 Eng. Reprint 334, 2 Vent. 358.

72. White's Estate, 1 Pa. Dist. 508; Gallen's Estate, 8 Pa. Co. Ct. 37; Stephenson *v.* Axson, Bailey Eq. (S. C.) 274.

73. *Alabama.*— Moore *v.* Lesueur, 33 Ala. 237.

Georgia.— Demere *v.* Scranton, 8 Ga. 43.

Michigan.— Breining *v.* Schneider, 46 Mich. 385, 9 N. W. 441.

New York.—*In re* Hodgman, 140 N. Y. 421, 35 N. E. 660 [*affirming* 69 Hun 484, 23 N. Y. Suppl. 725]; Lupton *v.* Lupton, 2 Johns. Ch. 614.

South Carolina.— *Ex p.* Boyd, 8 Rich. Eq. 166; McLure *v.* Askew, 5 Rich. Eq. 162.

West Virginia.— McEndree *v.* Morgan, 31 W. Va. 521, 8 S. E. 285.

England.—Whittaker *r.* Kershaw, 45 Ch. D. 320, 60 L. J. Ch. 9, 63 L. T. Rep. N. S. 203, 39 Wkly. Rep. 23; Jervis *v.* Wolferstan, L. R. 18 Eq. 18, 43 L. J. Ch. 809, 30 L. T. Rep. N. S. 452 (holding that notice of a remote contingent liability on the part of a testator is not sufficient to prevent his executor from distributing his residuary estate; and if the executor distributes with such notice and the liability afterward ripens into a debt, he will be entitled to call on the residuary legatees to refund); Peterson *v.* Peterson, L. R. 3 Eq. 111, 36 L. J. Ch. 101, 15 Wkly. Rep. 204; Anonymous, 1 P. Wms. 495, 24 Eng. Reprint 487.

Waste of co-executor.— If a legacy to an executor be of equal grade with those of other legatees, and because of the waste of a co-executor who has died the assets are insufficient to pay all the legacies, the executor can only retain his due proportion of his legacy. Atcheson *v.* Robertson, 4 Rich. Eq. (S. C.) 39.

Where the debt due is that of the representative himself, his own knowledge of the debt or claim when he paid the legatee or distributee hinders his remedy to obtain a refund. Lang *v.* Howell, 21 N. Y. Suppl. 102, 29 Abb. N. Cas. (N. Y.) 117, Pow. Surr. (N. Y.) 243.

74. See Springsteen *v.* Samson, 32 N. Y. 703.

Legal costs and charges against the estate afterward incurred in the settlement of the same is within the terms of a bond reciting that the distributees would save the administrator harmless from all "debts, dues, demands and claims now due, or to grow due hereafter." Springsteen *v.* Samson, 32 N. Y. 703.

Claims of legatees are demands against the estate covered by the condition of a refunding bond, to secure the repayment of a sum paid in distribution, "to discharge any debt or demand against the estate where executors shall not have other assets to pay." Allwein *v.* Werntz, 7 Pa. Cas. 44, 9 Atl. 925.

A writing of indemnity other than a bond may be duly enforced, whether under seal or not, the benefit conferred by the early receipt of money furnishing a sufficient consideration for the promise. Lowery *v.* Perry, 85 N. C. 131. But an action upon a promise by a distributee to indemnify an administrator for any advance made in excess of his share is not maintainable where the administrator has resigned without an allowance for the sum advanced in his final account, and his successor has paid to the distributee such an amount that the distributive share exceeds that sum. Stone *v.* Bancroft, 108 Mass. 98.

Liability of purchaser from distributee, upon latter's promise and failure to give bond. — Johnston *v.* Howell, 57 N. C. 87.

A promise to refund given to an administrator by one to whom he paid his distributive

the deficiency of assets to pay subsequently discovered debts of the estate,[75] not exceeding the value of property which the legatee or distributee has received from the estate without interest.[76] Whether there is a deficiency of assets and the extent thereof can only be determined by a settlement in the probate court,[77] and therefore until such settlement has been made the obligor in the bond cannot be held liable thereon.[78]

b. Actions — (i) *In General.* The right to maintain an action on a refunding bond depends upon the terms of the statute providing therefor. It has been held that such action may be maintained by the creditors themselves,[79] or by the representative for their benefit.[80] The statute of limitations begins to run against an action on such a bond from the discovery of the deficiency of the assets and not from the date of the bond.[81] Scire facias, after a decree on a probate petition, issues on the refunding bond as a summary remedy at the instance of a creditor, under some statutes.[82]

(ii) *Pleading and Proof.*[83] In an action of debt by the representative on a refunding bond, he should aver and prove facts showing a breach of the condi-

share gives no cause of action to those who are rightly entitled to the money so paid, and the money can be recovered only by the administrator to whom the promise was made. Norwood *v.* O'Neal, 112 N. C. 127, 16 S. E. 759.

The value of the estate is no defense to a residuary legatee who has given the usual bond to pay all debts and legacies and has taken the estate and enjoyed it, when called upon to pay the outstanding legacies or debts, on the ground that the estate is less valuable than he had supposed; and he cannot claim his release on a surrender of the assets. Hatheway *v.* Weeks, 34 Mich. 237.

75. Lloyd *v.* Rowe, 20 N. J. L. 680, holding that a refunding bond conditioned for repayment by a legatee of so much as should be necessary to pay debts which the executor had no assets to meet entitled the executor to recover only for payment of subsequently discovered debts of decedent, and not for a balance due to the executor for commissions and expenses of administration, which were not named in the condition of the bond. See Johnston *v.* Howell, 57 N. C. 87.

A debt due by a legatee to outside parties is not covered by such bond, and if paid by the representative under an attachment of the legatee's interest cannot be recovered by the representative in an action against the legatee on the bond. Desmond *v.* Fisher, 152 Mass. 521, 25 N. E. 968.

76. McKinzie *v.* Smith, 3 N. C. 372. But see Ross *v.* Davis, 17 Ark. 113, holding that the extent of recovery from a specific legatee is the value of the specific legacy, where it consists of property, at the time of delivery, with interest therein, and not the increased value.

Right to discovery of amount received from the estate.— In an action on a refunding bond given by distributees, the sureties, if any, are entitled to discovery as to the amount that each of such distributees received from the estate. Fletcher *v.* Faust, 22 Ga. 559.

77. Neal *v.* Maxwell, 40 Miss. 726; Ratliff *v.* Davis, 38 Miss. 107.

78. Neal *v.* Maxwell, 40 Miss. 726; Ratliff *v.* Davis, 38 Miss. 107, holding that a court of equity will not, where a refunding bond has been given, set off against a claim of the obligor in the bond his *pro rata* share of a debt established against the estate, until a deficiency of assets and his consequent liability to refund has been established by the probate court.

79. Schaeffer's Appeal, 119 Pa. St. 640, 13 Atl. 507, holding that creditors have no remedy in case of a deficiency of assets except upon such bond.

80. Ross *v.* Davis, 17 Ark. 113; Chandler *v.* Morrison, 123 Ind. 254, 23 N. E. 160 (holding also that an action on the bond is not premature if brought after suit begun against the obligee and after proceeds of the estate in his hands, including the bond, are ordered to be turned over to the administrator and after the money has been demanded and refused); Lloyd *v.* Rowe, 20 N. J. L. 680; Henderson *v.* McAleer, 27 N. C. 632 (holding that the representative cannot for his own use recover the amount paid a legatee or distributee by an action on the refunding bond). See Robinson *v.* Rutherford County Ct., 8 Humphr. (Tenn.) 374, holding that no action lies at law for the benefit of the administrator under Code, § 2316 *et seq.*, the bond being by the express terms of the act for the benefit of creditors of the estate, and the remedy of the administrator, upon recovery of judgment against him, being in equity.

81. Salisbury *v.* Black, 6 Harr. & J. (Md.) 293, 14 Am. Dec. 279.

82. Jenkins *v.* Wood, 144 Mass. 238, 10 N. E. 818; Chatham *v.* Boykin, 6 N. C. 301; Maxwell *v.* Smith, 86 Tenn. 539, 8 S. W. 340, holding that, where a plea of fully administered is found in favor of the representative, a summary remedy by scire facias is provided for by Code, § 2318, which may be resorted to by the creditor.

83. **Where to a scire facias upon a refunding bond** defendant pleaded that the debt recovered against the administrator was not justly due, and that the administrator fraudulently and collusively with plaintiff confessed the judgment, the burden of proof lies

tions of the bond, as that he has given notice of debts to the legatee or distributee, that he had not or has not assets to pay such debts, that he has made a request for a return of so much of the legacy or distributive share as is necessary to discharge those debts in due proportion, and that the amount requested is unpaid;[84] and should demand judgment for the exact amount of the claim upon such legatee or distributee and no more.[85]

XII. SALES UNDER ORDER OF COURT.[86]

A. In General — Statutory Provisions. While at common law the real estate of a decedent was not subject to his debts,[87] nor was the personal representative authorized to sell the same in the absence of some testamentary provision authorizing him to do so,[88] statutes have been universally enacted providing for a sale of the realty of a decedent by his executor or administrator by the license of and under the supervision of the courts when the circumstances of the case render such a course necessary.[89] In order for a sale to be authorized under

on defendant to verify his plea by proof of the fraud, otherwise judgment must be rendered against him on the scire facias. Chatham *v.* Boykin, 6 N. C. 301.

84. Chandler *v.* Morrison, 123 Ind. 254, 23 N. E. 160; Lloyd *v.* Rowe, 20 N. J. L. 680; Moss *v.* Moss, 4 Hen. & M. (Va.) 293.

The general averment "that the executor had not and hath not other assets to pay" is sufficient; and it is not necessary to aver that there were no other legacies to abate. Lloyd *v.* Rowe, 20 N. J. L. 680.

85. Lowery *v.* Perry, 85 N. C. 131.

86. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d.

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2.

Judicial sales generally see JUDICIAL SALES.

A mortgage is in effect a sale. Wallace *v.* Grant, 27 Wash. 130, 67 Pac. 578. And throughout this section no distinction is made between proceedings for sale and proceedings to mortgage the realty unless some special matter makes such distinction necessary.

87. See *supra*, III, C, 1; and Schouler Ex. § 509.

88. See *supra*, VIII, O, 9, a.

89. *Alabama.*— Woods *v.* Legg, 91 Ala. 511, 8 So. 342; Hall *v.* Hall, 47 Ala. 290. See also Wyman *v.* Campbell, 6 Port. 219, 31 Am. Dec. 677.

Georgia.— Harwell *v.* Foster, 102 Ga. 38, 28 S. E. 967. See also Wellborn *v.* Rogers, 24 Ga. 558.

Louisiana.— See Davis *v.* Gaines, 104 U. S. 386, 26 L. ed. 757.

Maine.— Nowell *v.* Nowell, 8 Me. 220.

Maryland.— Waring *v.* Waring, 2 Bland 673.

Massachusetts.— Crouch *v.* Eveleth, 12 Mass. 503; Drinkwater *v.* Drinkwater, 4 Mass. 354.

Mississippi.— Hargrove *v.* Baskin, 50 Miss. 194; Adams *v.* Harris, 47 Miss. 144.

Montana.— State *v.* Second Judicial Dist. Ct., 24 Mont. 1, 60 Pac. 489, lease.

New Mexico.— Albuquerque First Nat. Bank *v.* Lee, 8 N. M. 589, 45 Pac. 1114.

New York.— Bridgewater *v.* Brookfield, 3 Cow. 299.

North Carolina.— Waugh *v.* Blevins, 68 N. C. 167.

Pennsylvania.— Freker *v.* Berg, 193 Pa. St. 442, 44 Atl. 580.

South Carolina.— Perry *v.* Brown, 1 Bailey 45.

Tennessee.— See Dulles *v.* Read, 6 Yerg. 53.

Texas.— Bartley *v.* Harris, 70 Tex. 181, 7 S. W. 797; Williams *v.* San Saba County, 59 Tex. 442.

Washington.— Wallace *v.* Grant, 27 Wash. 130, 67 Pac. 578.

England.— See Tulloch *v.* Tulloch, L. R. 3 Eq. 574; Curtis *v.* Price, 12 Ves. Jr. 89, 8 Rev. Rep. 303, 33 Eng. Reprint 35; Holme *v.* Stanley, 8 Ves. Jr. 2, 32 Eng. Reprint 249.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 558, 1332½; and Schouler Ex. § 511.

Power of courts discretionary.— Nowell *v.* Nowell, 8 Me. 220; *In re* Allen, 15 Mass. 58.

A statute providing that the representative shall not be required to sell any property other than that of a perishable nature belonging to the estate of any decedent does not prohibit the probate court from ordering a sale of the property of an estate on the petition or application of the administrator. Alexander *v.* Maverick, 18 Tex. 179, 67 Am. Dec. 693.

Statute not applicable to decree of sale passed before it went into effect. Johnson *v.* Futrell, 86 N. C. 122.

What statute governs.— The Pennsylvania act of April 18, 1853, relating to the sale of estates of decedents, does not apply where a petition is filed in the orphans' court by an executor or administrator for an order of sale for the payment of debts. Kiskaddon *v.* Dodds, 21 Pa. Super. Ct. 351.

Under the Alabama act of 1818 the authority to make a sale was not restricted to cases of intestate estates, but applied to the estate of any deceased person. King *v.* Kent, 29 Ala. 542.

Assent of secretary of war.— The Texas acts of May 18, 1838, and Dec. 24, 1838, requiring the assent of the secretary of war

such a statute it must be shown that the circumstances are such as are contemplated by the statute,[90] and in obtaining an order for sale and making the sale, the statutory method of procedure must be complied with.[91] With regard to personalty, modern statutes, as has been seen, sometimes curtail the representative's common-law power of sale, and require him to obtain an order of court authorizing a sale.[92]

B. When Authorized — 1. In General. The court may usually direct the sale of personal property which is of a perishable nature, or a sale which is necessary for its preservation,[93] and in some jurisdictions a sale of either realty or personalty may be authorized or directed where this is necessary for the general purposes of administration or where it is apparent that such course is for the best interest of the estate,[94] but in order to justify an order for the sale of realty it

to the sale of land belonging to the estate of a deceased soldier and sixty days' notice thereof had no application to the estates of citizen soldiers. Templeton *v.* Ferguson, 89 Tex. 47, 33 S. W. 329.

Lien created by proceedings for sale.— Proceedings by the representative to sell decedent's realty to pay his debts create a lien superior to any that may thereafter attach against the estate at the instance of creditors of an heir. Carter *v.* Carter, 4 Ky. L. Rep. 718.

Statute not retroactive.— The California act of March 23, 1893, providing that an order to sell realty might be granted to an administrator when it appeared to be for the best interest of the estate, although there were no debts or liens, did not apply to the real estate of a decedent who died in 1891 leaving no debts or liens. Packer's Estate, 125 Cal. 396, 58 Pac. 59, 73 Am. St. Rep. 58.

In the absence of statute chancery has not jurisdiction to decree their sale at suit of a creditor, unless he has some specific lien thereon or right therein. It is only by virtue of the statute making such real estate assets that it may be sold for creditors. McPike *v.* Wells, 54 Miss. 136.

90. Gardner *v.* Craddock, 4 Bush (Ky.) 370; Powell *v.* Felton, 33 N. C. 469; Krug's Estate, 13 York Leg. Rec. (Pa.) 95.

A power to authorize an exchange should be exercised with extreme caution, and where all the parties in interest except the petitioner are adverse to such exchange and show good reasons for their opposition it should not be ordered. Miller's Estate, 16 Pa. Co. Ct. 449.

Statutory conditions the same whether representative or creditor applies for sale.—Matter of Meagley, 39 N. Y. App. Div. 83, 56 N. Y. Suppl. 503.

Delay in applying for letters of administration may under statute preclude a sale of realty, the title to which has passed to a *bona fide* purchaser. See Fonda *v.* Chapman, 23 Hun (N. Y.) 119.

91. Wills *v.* Pauly, 116 Cal. 575, 48 Pac. 709 (holding that Cal. Code Civ. Proc. § 1469, which provides that, when the estate of a decedent who left a widow and children does not exceed fifteen hundred dollars, the court shall set apart the whole estate to the widow and children, subject only to certain expenses, does not validate an administrator's sale of land by order of the court to pay such expenses, without following the proceedings prescribed by tit. 11, c. 7, art. 4, § 1536 *et seq.*, although the whole estate of which the land is a part has been set aside to the widow and children); Long *v.* Long, 142 N. Y. 545, 37 N. E. 486; Hogan *v.* Kavanaugh, 138 N. Y. 417, 34 N. E. 292; Kingsland *v.* Murray, 133 N. Y. 170, 30 N. E. 845; Moser *v.* Cochrane, 107 N. Y. 35, 13 N. E. 442; Matter of Meagley, 39 N. Y. App. Div. 83, 56 N. Y. Suppl. 503. See *infra*, XII, G.

92. See *supra*, VIII, P, 2, a, (I), (B).

93. Adkinson *v.* Wright, 46 Ala. 598. See also Joslin *v.* Caughlin, 26 Miss. 134, holding that the probate court has no right to direct the sale of property bequeathed unless necessary for the preservation of it.

94. *California.*— *In re* Leonis, 138 Cal. 194, 71 Pac. 171.

Maine.— See *In re* Snow, 96 Me. 570, 53 Atl. 116.

Maryland.—Crawford *v.* Blackburn, 19 Md. 40.

Minnesota.— Deppe *v.* Ford, 89 Minn. 253, 94 N. W. 679.

Mississippi.— Joslin *v.* Caughlin, 26 Miss. 134.

New York.— *In re* Rich, 2 N. Y. Suppl. 176; Matter of Cogswell, 4 Redf. Surr. 241.

North Carolina.— McMillan *v.* Reeves, 102 N. C. 550, 9 S. E. 449; Hinton *v.* Powell, 54 N. C. 230.

Pennsylvania.— McAlpin's Estate, 1 Phila. 440; Rhoades' Estate, 4 Wkly. Notes Cas. 527.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1333.

But *compare* Bompart *v.* Lucas, 21 Mo. 598.

Sale of notes and accounts.— Where notes and accounts due the succession are numerous and small in amount, and constitute, as it were, a mass of bad debts, the discretion of the judge of probate in ordering their sale at public auction will be considered as legally and properly exercised. Pool's Succession, 14 La. Ann. 677.

Where one of the joint purchasers of real estate dies, a proceeding to sell the lands to equalize the payments does not fall within the rules applicable to cases of sale for partition and for the payment of debts, in relation to the necessary proof, account, etc. Rankin *v.* Black, 1 Head (Tenn.) 650.

Pending a contest over the probate of a

must be shown that the sale is necessary for some authorized purpose.[95] It has been held that a sale of realty may be ordered to provide the support to which the widow and children are entitled under statute in case the personalty is insufficient.[96]

2. For Payment of Debts — a. In General. The most usual object for which the statutes authorize the court to order a sale of decedent's realty is for the payment of his debts,[97] but the sale should be ordered to be made for the payment of

will or the grant of letters of administration, the person in whose charge the personalty of the deceased has been placed will be generally allowed to sell that portion of the assets which may be necessary for the preservation and benefit of the estate. Public Administrator *v.* Burdell, 4 Bradf. Surr. (N. Y.) 252.

When sale of judgment not proper.—Where several persons, as heirs and legal representatives of a succession under administration, are the owners in indivision of a judgment from which a devolutive appeal is pending, the sale of the judgment will not be ordered to effect a partition, on the application of one of the coöwners, opposed by the others, when it does not appear that the administrator of the succession has made any effort to execute the judgment, especially in a case where the sale would inure to the benefit of one only of the co-proprietors, and to the detriment of the others. Rochereau *v.* Maignan, 32 La. Ann. 45.

Estates of deceased soldiers — Consent of heirs see Harris *v.* Graves, 26 Tex. 577.

Unreasonable withholding of consent.— Where the price offered for real estate of decedent is advantageous, and the rights of the only objecting party in interest, if he has any, will not be affected by the sale, the withholding of his consent is unreasonable and a sale will be ordered, since an unreasonable withholding of consent is one of the grounds upon which a sale may be decreed under section 5 of the Pennsylvania act of April 27, 1855. Goddard's Estate, 9 Pa. Dist. 703.

When order of sale properly refused.— It is the duty of the administrator to ascertain the nature and extent of the assets of the succession before he attempts to sell them by an indefinite description of the rights and interests of the succession in lands and debts, and an order of sale under such description will be refused, although the sale has been advised by a family meeting, for if the decedent had no rights the sale would be a fraud upon the purchasers, while if he had rights the vagueness of their description would necessarily operate to the injury of the minor heirs. Boudreaux's Succession, 6 La. Ann. 78.

95. *In re* Snow, 96 Me. 570, 53 Atl. 116; Gross *v.* Howard, 52 Me. 192; Newcomb *v.* Smith, 5 Ohio 447 (holding that a sale of an intestate's real estate, made by an administrator upon a joint application with guardians, not to pay debts, but to maintain children and improve the property, is not valid); Flanagan *v.* Pierce, 27 Tex. 78 (holding that the court is not authorized to decree a sale, except to pay debts or for the purpose of partition, when, by report of the commissioners in partition, it is shown that the land cannot be equitably divided). See also Brookfield *v.* Bradley, Jac. 632, 4 Eng. Ch. 632. And see *infra*, XII, B, 2–4.

Law in force at time of decedent's death.— The court has no power to order the sale of real property after the title has vested in the heirs, except for the purposes provided by the law in force at the time of the death of the ancestor. *In re* Roach, 139 Cal. 17, 72 Pac. 393; Packer's Estate, 125 Cal. 396, 58 Pac. 59, 73 Am. St. Rep. 58.

A license to accept an advantageous offer for the purchase of a decedent's real estate can be granted to the executor only where the court could under the statute grant a license to sell at auction to pay debts or legacies. *In re* Snow, 96 Me. 570, 53 Atl. 116.

The court may properly defer the sale of realty for the payment of debts where the life-tenant objects to the sale and the creditors express a willingness to wait pending arrangements for a mortgage, and it is alleged that a present sale would result in the sacrifice of the property. Woolman's Estate, 6 Pa. Dist. 205.

96. Newans *v.* Newans, 79 Iowa 32, 44 N. W. 213. See also Reinhardt *v.* Seaman, 208 Ill. 448, 69 N. E. 847, widow's award. *Compare* Newcomb *v.* Smith, 5 Ohio 447.

In Pennsylvania it has been held that the court may order a sale of the decedent's real estate to pay debts, maintain and educate children, etc., but not for the purpose of giving to the widow her statutory allowance. Lyman *v.* Byam, 38 Pa. St. 475. But see Heyer's Estate, 8 Kulp 107.

Where a widow elects to take her statutory allowance in real estate, such allowance becomes, after the confirmation of the report of the appraisers that the land cannot be divided without injury, a charge on it, and the orphans' court has power to enforce payment of the charge by a decree that it be made out of the lands by sale. Greenawalt's Estate, 16 Pa. Super. Ct. 263.

97. *Alabama.*—See Rainey *v.* McQueen, 121 Ala. 191, 25 So. 920; Price *v.* Wilkinson, 10 Ala. 172; Leavens *v.* Butler, 8 Port. 380.

Arkansas.— Mays *v.* Rogers, 52 Ark. 320, 12 S. W. 579.

California.— *In re* Freud, 131 Cal. 667, 63 Pac. 1080, 82 Am. St. Rep. 407; *In re* Brannan, (1897) 51 Pac. 320.

Connecticut.—Griswold *v.* Bigelow, 6 Conn. 258.

District of Columbia.— See Richardson *v.* Penicks, 1 App. Cas. 261.

Georgia.—Williams *v.* O'Neal, 119 Ga. 175,

the debts of the decedent generally and not merely for the payment of a single

45 S. E. 978; Knapp *v.* Harris, 60 Ga. 398. See also Phillips *v.* James, 115 Ga. 425, 41 S. E. 663.

Illinois.— Sutton *v.* Read, 176 Ill. 69, 51 N. E. 801; Moline Water Power, etc., Co. *v.* Webster, 26 Ill. 233; Virgin *v.* Virgin, 91 Ill. App. 188 [*affirmed* in 189 Ill. 144, 59 N. E. 586].

Indiana.— Jarrell *v.* Brubaker, 150 Ind. 260, 49 N. E. 1050.

Louisiana.— Wilson *v.* Wilson, 109 La. 1075, 34 So. 94; McLean's Succession, 12 La. Ann. 222; Union Bank *v.* McDonogh, 7 La. Ann. 231.

Maine.— *In re* Snow, 96 Me. 570, 53 Atl. 116.

Maryland.—Cornish *v.* Willson, 6 Gill 299; Carnan *v.* Turner, 6 Harr. & J. 65.

Massachusetts.— Tyndale *v.* Stanwood, 182 Mass. 534, 66 N. E. 23; Palmer *v.* Palmer, 13 Gray 326 (holding that the occupation of an intestate's real estate by one of his two administrators, who is also one of the heirs, without paying or charging himself with debts, is not of itself a bar to granting a petition to sell real estate for the payment of debts); *In re* Allen, 15 Mass. 58; Dean *v.* Dean, 3 Mass. 258.

Minnesota.— State *v.* Ramsey County Probate Ct., 25 Minn. 22.

Mississippi.—Williams *v.* Ratcliff, 42 Miss. 145.

Missouri.— St. Francis Mill Co. *v.* Sugg, 169 Mo. 130, 69 S. W. 359; Keene *v.* Wyatt, 160 Mo. 1, 60 S. W. 1037, 63 S. W. 116; Howell *v.* Jump, 140 Mo. 441, 41 S. W. 976; Blair *v.* Marks, 27 Mo. 579; Bompart *v.* Lucas, 21 Mo. 598; Derge *v.* Hill, 103 Mo. App. 281, 77 S. W. 105.

Nebraska.— W. J. Perry Live Stock Commission Co. *v.* Biggs, (1903) 94 N. W. 712.

New Jersey.— Skillman *v.* Van Peld, 1 N. J. Eq. 511.

New Mexico.— Albuquerque First Nat. Bank *v.* Lee, 8 N. M. 589, 45 Pac. 1114.

New York.— Hogan *v.* Kavanaugh, 138 N. Y. 417, 34 N. E. 292; Richmond *v.* Freeman's Nat. Bank, 86 N. Y. App. Div. 152, 83 N. Y. Suppl. 632; Matter of Foley, 39 N. Y. App. Div. 248, 57 N. Y. Suppl. 131; Matter of Meagley, 39 N. Y. App. Div. 83, 56 N. Y. Suppl. 503; Matter of Williams, 1 Misc. 35, 22 N. Y. Suppl. 906; Ferguson *v.* Broome, 1 Bradf. Surr. 10.

North Carolina.— Glover *v.* Flowers, 101 N. C. 134, 7 S. E. 579, 95 N. C. 57.

Ohio.— Bateman *v.* Morris, 7 Ohio S. & C. Pl. Dec. 287, 4 Ohio N. P. 397.

Oregon.— *In re* Houck, 23 Oreg. 10, 17 Pac. 461.

Pennsylvania.— Lyman *v.* Byam, 38 Pa. St. 475; Walker's Estate, 23 Pa. Co. Ct. 657; Johnson's Estate, 30 Pittsb. Leg. J. 365. See also Green's Estate, 1 Del. Co. 521.

Tennessee.— Erck *v.* Erck, 107 Tenn. 77, 63 S. W. 1122; Allen *v.* Shanks, 90 Tenn. 359, 16 S. W. 715.

Utah.— Cain *v.* Young, 1 Utah 361.

West Virginia.— Shahan *v.* Shahan, 48 W. Va. 477, 37 S. E. 552, 86 Am. St. Rep. 68.

United States.— Florentine *v.* Barton, 2 Wall. 210, 17 S. E. 783; Davis *v.* Vansands, 7 Fed. Cas. No. 3,655, 45 Conn. 600, debt not presented within time limited, but subsequently presented as provided by statute.

England.— Price *v.* Price, 16 L. J. Ch. 232, 15 Sim. 484, 38 Eng. Ch. 484.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1334.

A debt due to the representative may be sufficient to authorize a sale of realty for payment thereof (*In re* Reynolds, 195 Pa. St. 225, 45 Atl. 726), and if the personal property is insufficient to pay the debts, and the administrator *bona fide* and under proper circumstances advances money to pay them, the court may order a sale of real estate to reimburse him (Liddel *v.* McVickar, 11 N. J. L. 44, 19 Am. Dec. 369. See also Collinson *v.* Owens, 6 Gill & J. (Md.) 4).

Claim of sureties on administration bond.— Where application is made by an administrator for an order to sell real estate to pay a claim held by the sureties on his official bond, the court may, if it appears from his accounts that he is indebted to the estate, refuse to make the order, if such sale will injure other creditors, or, where the estate is solvent, if it will injure the heirs. Deans *v.* Wilcoxon, 25 Fla. 980, 7 So. 163.

Sale to obtain money for payment of taxes allowed.— Sales *v.* Cosgrove, 25 S. W. 594, 15 Ky. L. Rep. 791; Welsh *v.* Perkins, 8 Ohio 52. But see Walker *v.* Diehl, 79 Ill. 473.

Realty may be sold for payment of liens thereon. *In re* Frend, 131 Cal. 667, 63 Pac. 1080, 82 Am. St. Rep. 407.

Equitable demands may be proved on the application to sell the real estate of an intestate to pay his debts, and if the claim is an equitable lien on a portion of the real estate, and not secured by judgment or mortgage, or expressly charged on the lot, the court may order it to be paid out of the proceeds of the real estate. Renwick *v.* Renwick, 1 Bradf. Surr. (N. Y.) 234.

The fact that a person's claim as heir is barred does not affect the right of the representative to sell the land to pay a debt of the claimant regularly established against the estate. Sutton *v.* Read, 176 Ill. 69, 51 N. E. 801.

Debts of married woman.— The probate court has no jurisdiction to order the sale of lands in which a married woman had a separate estate, to pay debts contracted during her coverture. Boston *v.* Murray, 94 Mo. 175, 7 S. W. 273 [*following* Davis *v.* Smith, 75 Mo. 219].

Although debts are directed to be paid out of rents and profits by the will, the court will decree a sale if it is necessary. Berry *v.* Askham, 2 Vern. Ch. 26, 23 Eng. Reprint 627.

The advice of a family meeting is not necessary to authorize a sale of a decedent's real estate to pay debts. Irwin *v.* Flynn, 110 La.

debt.[98] In a great many jurisdictions a sale of realty can be authorized only for the payment of debts which were in existence at the time of decedent's death.[99] Thus the right to order a sale for the payment of the expenses of administration is very generally denied,[1] although in a few jurisdictions a sale for this purpose is

829, 34 So. 794; Childs *v.* Lockett, 107 La. 270, 31 So. 751; Fluker's Succession, 32 La. Ann. 292; Davidson *v.* Davidson, 28 La. Ann. 269; Kiser's Succession, 22 La. Ann. 175; Carter *v.* McManus, 15 La. Ann. 676.

False claims.— Where a proceeding instituted in behalf of decedent's widow for the sale of his real estate for the payment of debts is founded upon false claims fraudulently made for the purpose of procuring the sale of such lands, a sale made thereunder to the widow is void. Lawson *v.* Acton, 57 N. J. Eq. 107, 40 Atl. 584.

The costs of an action against decedent's surviving partner are not a debt of the decedent for which his real estate may be sold. Matter of Stowell, 15 Misc. (N. Y.) 533, 37 N. Y. Suppl. 1127, 25 N. Y. Civ. Proc. 316.

Effect of partition.— A mere order for partition does not withdraw the property designated in it from the jurisdiction of the probate court so as to prevent a sale of the land in further administration for the purpose of paying debts. But it is otherwise if such partition is made and approved. The making of a partial partition does not, however, deprive the probate court of the right to order a sale in due course of administration of land not included in the actual partition. Lee *v.* Henderson, 75 Tex. 190, 12 S. W. 981.

The fact that the administrator's bond has been reduced by order of the probate court upon the assumption that all the lands belonging to the estate have been partitioned and delivered to the heirs does not affect the status of lands not in fact partitioned or deprive the court of power to order a sale of such lands. Lee *v.* Henderson, 75 Tex. 190, 12 S. W. 981.

Effect of suit against representative alone. — The creditor of a decedent who sues the representative alone without joining or making the heirs parties to the suit does not thereby release the real estate of the decedent from the lien of his debt or claim, if any there was, so as to deprive the court of power to order a sale for payment of such debt. Murphy's Appeal, 8 Watts & S. (Pa.) 165 [*followed* in Weaver's Appeal, 19 Pa. St. 416].

Under the Washington statute (Ballinger Annot. Code & St. § 6333) funeral expenses are a debt of the decedent, and not merely a part of the expenses of the administration; and hence, under Laws (1895), p. 197, § 3, providing that no real estate of a deceased person shall be liable for his debts unless letters of administration are granted within six years from the date of his death, the court has no power to order a sale of such realty to pay funeral expenses, letters not having been so issued. *In re* Smith, 25 Wash. 539, 66 Pac. 93.

A final decree discharging the administrator discharges the lien of creditors on real estate which might have been previously sold to pay debts. State *v.* Ramsey County Probate Ct., 40 Minn. 296, 41 N. W. 1033.

Sale cannot be made to effect compromise of disputed claim. Bompart *v.* Lucas, 21 Mo. 598.

A bond for title is *prima facie* a claim for land, and its approval by the probate judge and the administrator does not convert it into a money claim against the estate for the amount of the penalty, and hence an order to sell property for the payment of such claim is properly refused. Gregory *v.* Hughes, 20 Tex. 345.

Advances of representative to pay for public land.— Where the head of a family made entry upon public land and died before final proof, and after her death her administrator advanced the money and paid the government for the land, and obtained a patent to it for her heirs, and subsequently obtained an order from the probate court to sell the land to repay him, it was held that the money so advanced was not a lien upon the land, and that no title thereto passed by a sale under such order. Coulson *v.* Wing, 42 Kan. 507, 22 Pac. 570, 16 Am. St. Rep. 503; Black *v.* Dressell, 20 Kan. 153.

Advances to infant distributees.— An administrator who has made advances to the infant distributees in excess of their share of the personal assets is not entitled to have the land sold for his reimbursement. Munden *v.* Bailey, 70 Ala. 63.

98. Taylor *v.* Hanford, 11 N. J. L. 341. See also Spears' Succession, 28 La. Ann. 804.

99. *Alabama.*— Beadle *v.* Steele, 86 Ala. 413, 5 So. 169.

Illinois.— Walker *v.* Diehl, 79 Ill. 473; Fitzgerald *v.* Glancy, 49 Ill. 465.

Maryland.— Carey *v.* Dennis, 13 Md. 1.

Massachusetts.— Dean *v.* Dean, 3 Mass. 258.

Mississippi.— Moore *v.* Ware, 51 Miss. 206.

Missouri.— U. S. Presbyterian Church *v.* McElhinney, 61 Mo. 540.

New York.—Matter of Quatlander, 29 Misc. 566, 61 N. Y. Suppl. 1064; Ball *v.* Miller, 17 How. Pr. 300; Wood *v.* Byington, 2 Barb. Ch. 387.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1335.

Contra.— Long *v.* Landman, 118 Mich. 174, 76 N. W. 374, construing a statute authorizing the giving of a mortgage for the purpose of paying "the debts against the estate of any deceased person."

Realty may be sold to pay funeral expenses. Matter of Quatlander, 29 Misc. (N. Y.) 566, 61 N. Y. Suppl. 1064; Matter of Corwin, 10 Misc. (N. Y.) 196, 31 N. Y. Suppl. 426; King's Estate, 10 N. Y. Civ. Proc. 175.

1. *Alabama.*— Owens *v.* Childs, 58 Ala. 113 (holding that an administrator's sale of lands to pay expenses of litigation undertaken at

allowed.[2] The fact that a debt is secured by mortgage is no reason why the representative may not be authorized to sell realty for the purpose of paying the same.[3]

his own instance only, to dispossess an occupant of lands and purchase them himself, is properly enjoined); McMekin *v.* Bobo, 12 Ala. 268 (cost of probate of nuncupative will). See also Garrett *v.* Garrett, 64 Ala. 263.

Arkansas.— Mays *v.* Rogers, 52 Ark. 320, 12 S. W. 579.

Illinois.— Walker *v.* Diehl, 79 Ill. 473; Fitzgerald *v.* Glancy, 49 Ill. 465.

Massachusetts.—Drinkwater *v.* Drinkwater, 4 Mass. 354; Dean *v.* Dean, 3 Mass. 258.

Missouri.— Howell *v.* Jump, 140 Mo. 441, 41 S. W. 976; Farrar *v.* Dean, 24 Mo. 16.

New York.— Matter of Quatlander, 29 Misc. 566, 61 N. Y. Suppl. 1064; Fitch *v.* Witbeck, 2 Barb. Ch. 161; Cornwall's Estate, Tuck. Surr. 250.

Ohio.— Carr *v.* Hull, 65 Ohio St. 394, 62 N. E. 439, 87 Am. St. Rep. 623, 58 L. R. A. 641.

England.— See Lees *v.* Lees, L. R. 15 Eq. 151, 42 L. J. Ch. 319, 27 L. T. Rep. N. S. 743, 21 Wkly. Rep. 215.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1335.

Realty cannot be sold to pay compensation of representative. Beadle *v.* Steele, 86 Ala. 413, 5 So. 169; Moore *v.* Ware, 51 Miss. 206; Hollman *v.* Bennett, 44 Miss. 322.

Costs.—Realty of a decedent cannot be sold for the payment of the costs of a suit in which judgment was obtained against the representative, even though the suit was originally commenced against the decedent. Matter of Foley, 39 N. Y. App. Div. 248, 57 N. Y. Suppl. 131; Matter of Stowell, 15 Misc. (N. Y.) 533, 37 N. Y. Suppl. 1127, 25 N. Y. Civ. Proc. 316; Wood *v.* Byington, 2 Barb. Ch. (N. Y.) 387; Burnham *v.* Harrison, 3 Redf. Surr. (N. Y.) 345. See also Kavanagh *v.* Wilson, 5 Redf. Surr. (N. Y.) 43; Lees *v.* Lees, L. R. 15 Eq. 151, 42 L. J. Ch. 319, 27 L. T. Rep. N. S. 743, 21 Wkly. Rep. 215.

Where only enough to pay the costs of administration is realized at the sale, it is nevertheless valid if it was made for the purpose of paying the debts. Howell *v.* Jump, 140 Mo. 441, 41 S. W. 976.

2. *California.*— *In re* Roach, 139 Cal. 17, 72 Pac. 393; *In re* Freud, 131 Cal. 667, 63 Pac. 1080, 82 Am. St. Rep. 407 (holding that a sale may be decreed for the payment of expenses of administration still to accrue); *In re* Bentz, 36 Cal. 687.

Indiana.— Falley *v.* Gribling, 128 Ind. 110, 26 N. E. 794; Dunning *v.* Driver, 25 Ind. 269.

New Hampshire.— See Tilton *v.* Tilton, 41 N. H. 479, where the court, although refusing a license to sell to pay the expenses of administration, did so upon the ground that the expenses had been settled and adjusted by mutual agreement of the parties and there was nothing to show that the agreement was not a valid and binding one, fairly and understandingly made, and the opinion leaves room for an inference that under proper circumstances a sale for such purpose might be allowed.

New Jersey.— Personette *v.* Johnson, 40 N. J. Eq. 173.

Oregon.— *In re* Houck, 23 Oreg. 10, 17 Pac. 461.

Pennsylvania.— *In re* Reynold, 195 Pa. St. 225, 45 Atl. 726; Demmy's Appeal, 43 Pa. St. 155; Cobaugh's Appeal, 24 Pa. St. 143; Honeywell's Estate, 9 Kulp 340.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1335.

Realty may be sold to pay representative's compensation. Personette *v.* Johnson, 40 N. J. Eq. 173; *In re* Reynold, 195 Pa. St. 225, 45 Atl. 726. And see Conger *v.* Cook, 56 Iowa 117, 8 N. W. 782.

Sale after expiration of lien of debts.— As such expenses are not debts of the decedent and hence the law limiting the lien of his debts does not apply to them, a sale for their payment may be decreed after the expiration of the lien of the debts of the decedent. *In re* Reynold, 195 Pa. St. 225, 45 Atl. 726; Demmy's Appeal, 43 Pa. St. 155; Cobaugh's Appeal, 24 Pa. St. 143.

Sale cannot be ordered until account filed. Honeywell's Estate, 9 Kulp (Pa.) 340; Grice's Estate, 11 Phila. (Pa.) 107.

3. *California.*— *In re* Marden, Myr. Prob. 184.

Iowa.— Mead *v.* Mead, 39 Iowa 28.

Maryland.— Gibson *v.* McCormick, 10 Gill & J. 65.

Missouri.— Day *v.* Graham, 97 Mo. 398, 11 S. W. 55.

New York.— Mooers *v.* White, 6 Johns. Ch. 360.

Texas.— Hurley *v.* Barnard, 48 Tex. 83.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1336.

Mortgage not made by decedent.— A mortgage upon land belonging to the estate of a deceased person, although not given by the decedent, and not therefore a personal debt, is a debt against the estate within the meaning of 3 Howell St. Mich. § 6105, which authorizes the probate court to license an executor or administrator to borrow money by way of mortgage on the estate of the decedent "for the purpose of paying the debts against the estate." *In re* Lambie, 94 Mich. 489, 54 N. W. 173.

When sale improper.— A license to sell has been refused where it appeared that the only debt due was secured by a mortgage, that the mortgagee was in possession, that four years had elapsed, that there was no judgment for the debt, and that the heirs offered to save the administrators harmless. Etheridge *v.* Bell, 27 N. C. 87. And it has been held that the probate court has no power to order a sale of land where the only debts are secured by mortgage on the land, even though the mortgagees consent that their liens may be discharged by such sale. Kautz's Estate, 11 Pa. Co. Ct. 322. See also

The death of the owner of lands does not give his personal representatives or his creditors such an interest in the real estate as precludes the legislature from repealing the laws authorizing sales to be made by executors or administrators for the payment of debts.[4]

b. Existence and Validity of Debts. In order to authorize a sale of land to pay debts, the existence of valid and legally enforceable debts of the estate must be shown,[5] but it has been held not necessary that the debt should be due when the order of sale is asked or the sale made.[6] A sale should not be ordered where the alleged debts are fraudulent,[7] or in anticipation of an indebtedness which is not valid and subsisting at the time and may never exist,[8] or for raising a fund to meet claims which are contested and doubtful;[9] nor should a license be granted to sell lands for the payment of debts already barred by the statutes of limitations or non-claim,[10] although where the proceedings for such sale are instituted before

Grice's Estate, 11 Phila. (Pa.) 107, 2 Wkly. Notes Cas. (Pa.) 211; Grice *v.* Kinsey, 4 Wkly. Notes Cas. (Pa.) 208.

Interest payable on a mortgage on decedent's estate, and falling due five years after his death, is not a debt of decedent, to pay which realty belonging to his estate will be ordered sold. Matter of Pfohl, 20 Misc. (N. Y.) 627, 46 N. Y. Suppl. 1086.

4. Ludlow *v.* Johnston, 3 Ohio 553, 17 Am. Dec. 609.

Sale after repeal.— Where proceedings for a sale of real estate of an intestate to pay debts were commenced before the repeal of the act authorizing such sale, and the administrators, notwithstanding the repeal, sold the land and appropriated the proceeds to pay the debts, the sale was void. Hamilton Bank *v.* Dudley, 2 Pet. (U. S.) 492, 7 L. ed. 496. See also Perry *v.* Clarkson, 16 Ohio 571, where the order of sale was passed after the repeal.

An order to sell is not a "suit or prosecution pending," within the exception of a general repealing act providing that any depending suit or prosecution may be carried on to final judgment, and executed agreeably to the repealed laws under which it may have been begun. Davis *v.* Livingston, 6 Ohio 225; Ludlow *v.* Wade, 5 Ohio 494.

5. *Georgia.*— McGowan *v.* Lufburrow, 82 Ga. 523, 9 S. E. 427, 14 Am. St. Rep. 178.

Illinois.— Dorman *v.* Tost, 13 Ill. 127.

Louisiana.— Leverich's Succession, 47 La. Ann. 1665, 18 So. 700.

Maine.— Lebroke *v.* Damon, 89 Me. 113, 35 Atl. 1028; Gross *v.* Howard, 52 Me. 192.

Massachusetts.— Lamson *v.* Schutt, 4 Allen 359.

Mississippi.— Hargrove *v.* Baskin, 50 Miss. 194.

Pennsylvania.— See Kurtz's Estate, 16 Lanc. L. Rev. 205.

Texas.— Hamblin *v.* Warnecke, 31 Tex. 91.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1337.

If any part of the indebtedness alleged is found to be due the chancellor has jurisdiction to order a sale of part of the property to pay it. McGowan *v.* Lufburrow, 82 Ga. 523, 9 S. E. 427, 14 Am. St. Rep. 178.

Where certain accounts were transferred to the administrator by the creditors this was not a release which prevented them from looking to the land for the balance due them after the personalty was exhausted. Wheeler *v.* Floyd, 24 S. C. 413.

If demands against an estate have been adjusted by mutual agreement to the satisfaction of the persons interested a sale of real estate should not be ordered to pay them. Tilton *v.* Tilton, 41 N. H. 479.

The allowance of claims in a court without jurisdiction over the claims or the land is not a basis for a sale. Hughes *v.* Griswold, 6 Mo. 245.

6. Carey *v.* Dennis, 13 Md. 1; Mooers *v.* White, 6 Johns. Ch. (N. Y.) 360; Hurley *v.* Barnard, 48 Tex. 83. *Contra,* Holburn *v.* Pfanmiller, 114 Ky. 831, 71 S. W. 940, 24 Ky. L. Rep. 1613 (taxes assessed but not yet due); Wilcox's Estate, 11 N. Y. Civ. Proc. 115.

7. Hunter *v.* French, 86 Ind. 320. See also Lynn's Estate, 2 Lehigh Val. L. Rep. (Pa.) 231.

Illegal arrangement as to payment.—Where an arrangement was made between an administrator and others by which the land belonging to the estate was to be bought in at the administrator's sale by a certain person, and taken by the administrator's children in payment of a claim held by them against the estate, it was held that, although the arrangement was illegal, and the children could claim no right to the land thereunder, yet their claim was not extinguished, and a new sale to pay it should be ordered. Matthews *v.* Matthews, (Miss. 1887) 1 So. 741.

8. Kremer *v.* Bull, 26 S. W. 1099, 16 Ky. L. Rep. 183; Fasig's Estate, 1 Woodw. (Pa.) 213.

9. Fasig's Estate, 1 Woodw. (Pa.) 213.

10. *Maine.*— Nowell *v.* Nowell, 8 Me. 220.

Massachusetts.— Heath *v.* Wells, 5 Pick. 140, 16 Am. Dec. 383; Thompson *v.* Brown, 16 Mass. 172; *In re* Allen, 15 Mass. 58.

Minnesota.— See *In re* Ackerman, 33 Minn. 54, 21 N. W. 852.

Mississippi.— Ales *v.* Plant, 61 Miss. 259; Ferguson *v.* Scott, 49 Miss. 500; Moody *v.* Harper, 38 Miss. 599.

New Hampshire.— Hodgdon *v.* White, 11 N. H. 208.

New York.— Gilchrist *v.* Rea, 9 Paige 66, holding that an administrator who has

the claim has become barred, and the effect thereof is to interrupt the period of prescription, a sale may be ordered.[11]

c. Insufficiency of Personalty. Insufficiency of the personalty for the payment of the debts should be shown in order to justify the grant of a license to sell real estate,[12] but when it is ascertained that the personalty of the decedent is

paid a debt of the intestate which was barred by the statute, having no assets at the time, cannot be reimbursed by a sale of the real estate for that purpose.

Pennsylvania.— Oliver's Appeal, 101 Pa. St. 299; Pry's Appeal, 8 Watts 253 (omission to revive a judgment); McCormick's Estate, 4 Kulp 15; Meskill's Estate, 8 Pa. Dist. 52; Moyer's Estate, 11 Pa. Co. Ct. 528; Pray *v.* Brock, 1 Pa. L. J. Rep. 354. See also *In re* Cake, 157 Pa. St. 457, 27 Atl. 773; Demmy's Appeal, 43 Pa. St. 155; Shorman *v.* Farmer's Bank, 5 Watts & S. 373; Seitzinger *v.* Fisher, 1 Watts & S. 293; Schreck's Estate, 2 Kulp 166.

Tennessee.— Batson *v.* Murrell, 10 Humphr. 301, 51 Am. Dec. 707.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1338.

Compare Mead *v.* Mead, 39 Iowa 28, holding that where land of an intestate was sold by an administrator under order of the court to pay a mortgage thereon the objection that the sale was without authority because the notes and mortgage had never been filed as a claim against the estate was without merit, since such failure was excused by the application of the administrator for authority to sell.

A judgment is not barred by the statute because recovered some two years prior to the filing of the petition for license to sell. Lebroke *v.* Damon, 89 Me. 113, 35 Atl. 1028.

Payment of interest on mortgage.— Where on a bill in equity to subject real estate in the hands of heirs to the payment of the decedent's debts it appeared that the debt was secured by mortgage, that the interest on the mortgage had been regularly paid by the mortgagor during his lifetime, and by his administrator after his death until the estate was settled and turned over to the heirs, that the mortgage was thereupon foreclosed and the property sold, and that the claim was for a deficiency upon such sale, the failure of the mortgagee to prove her claim before the commissioners did not constitute laches sufficient to bar the claim, since the payment of interest by the administrator led the mortgagee to believe that the mortgage would be assumed by the administrator and the heirs of the estate. Chewitt *v.* Moran, 17 Fed. 820.

11. Deans *v.* Wilcoxon, 25 Fla. 980, 7 So. 163; Porter *v.* Hornsby, 32 La. Ann. 337.

12. *Alabama.*— Banks *v.* Speers, 97 Ala. 560, 11 So. 841.

Arkansas.— Ambleton *v.* Dyer, 53 Ark. 224, 13 S. W. 926.

California.— See *In re* Roach, 139 Cal. 17, 72 Pac. 393.

Connecticut.— Griswold *v.* Bigelow, 6 Conn. 258.

District of Columbia.— See Richardson *v.* Penicks, 1 App. Cas. 261.

Florida.— Anderson *v.* Northrop, 30 Fla. 612, 12 So. 318.

Illinois.— Vansyckle *v.* Richardson, 13 Ill. 171; Rowland *v.* Swope, 39 Ill. App. 514.

Indiana.— Moore *v.* Moore, 155 Ind. 261, 57 N. E. 242; Fiscus *v.* Moore, 121 Ind. 547, 23 N. E. 362, 7 L. R. A. 235; Hunsucker *v.* Smith, 49 Ind. 114; Swift *v.* Harley, 20 Ind. App. 614, 49 N. E. 1069.

Iowa.— See Conger *v.* Cook, 56 Iowa 117, 8 N. W. 782.

Kentucky.— Chambers *v.* Davis, 15 B. Mon. 522; Courts *v.* Courts, 6 Ky. L. Rep. 512.

Louisiana.— Phelan's Succession *v.* Bird, 20 La. Ann. 355. See also Leverich's Succession, 47 La. Ann. 1665, 18 So. 700.

Maine.—Stevens *v.* Burgess, 61 Me. 89.

Maryland.— Macgill *v.* Hyatt, 80 Md. 253, 30 Atl. 710; Griffith *v.* Frederick County Bank, 6 Gill & J. 424; Collinson *v.* Owens, 6 Gill & J. 4; Carnan *v.* Turner, 6 Harr. & J. 65.

Michigan.— Ireland *v.* Miller, 71 Mich. 119, 39 N. W. 16.

Minnesota.— State *v.* Ramsey County Probate Ct., 25 Minn. 22.

Mississippi.— Anderson *v.* Newman, 60 Miss. 532; Hargrove *v.* Baskin, 50 Miss. 194; McCoy *v.* Nichols, 4 How. 31.

Missouri.— Merritt *v.* Merritt, 62 Mo. 150.

New Hampshire.— Tilton *v.* Tilton, 41 N. H. 479.

New Jersey.— Taylor *v.* Hanford, 11 N. J. L. 341; Liddel *v.* McVickar, 11 N. J. L. 44, 19 Am. Dec. 369.

New York.— Hogan *v.* Kavanaugh, 138 N. Y. 417, 34 N. E. 292; Kingsland *v.* Murray, 133 N. Y. 170, 30 N. E. 845; Russell *v.* Russell, 36 N. Y. 581, 93 Am. Dec. 540; Corwin *v.* Merritt, 3 Barb. 341; Matter of Georgi, 21 Misc. 419, 47 N. Y. Suppl. 1061; Moyer *v.* Moyer, 17 Misc. 648, 40 N. Y. Suppl. 772; Matter of Hemiup, 3 Paige 305; Thompson *v.* Brown, 4 Johns. Ch. 619. See also Matter of Plopper, 15 Misc. 202, 37 N. Y. Suppl. 33; Wambaugh *v.* Gates, 11 Paige 505.

North Carolina.— State Baptist Female University *v.* Borden, 132 N. C. 476, 44 S. E. 47, 1007 (unless it clearly appears from the will that the testator meant to charge the debts upon his real estate); Lilly *v.* Wooley, 94 N. C. 412; Bland *v.* Hartsoe, 65 N. C. 204; Wiley *v.* Wiley, 63 N. C. 182.

Ohio.— Welsh *v.* Perkins, 8 Ohio 52. See also Carr *v.* Hull, 65 Ohio St. 394, 62 N. E. 439, 87 Am. St. Rep. 623, 58 L. R. A. 641.

Oregon.— See *In re* Houck, 23 Oreg. 10, 17 Pac. 461.

Pennsylvania.— Pry's Appeal, 8 Watts 253; Berluchy's Estate, 1 Leg. Rec. 225; Kitchenman's Estate, 15 Phila. 519; Eddy's Estate,

insufficient to pay his debts, and there are lands to which he had title, it is the clear duty of the representative to proceed for the sale of such lands.[13] It is not permissible to transfer personal effects and moneys by distribution to the heirs and then resort to the land to pay debts on the allegation that there is no personal estate.[14] In some states no order for a sale of realty can properly be made until so much of the personal estate as has come into the representative's hands has been actually applied to the payment of the debts,[15] but in others mere proof of an insufficiency of personalty is enough.[16] Where the assets were originally suffi-

12 Phila. 118; Kelly's Estate, 11 Phila. 100; Fasig's Estate, 1 Woodw. 213. See also Grice's Estate, 11 Phila. 107.

Rhode Island.— Wood *v.* Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198.

South Carolina.— McNamee *v.* Waterbury, 4 S. C. 156; Bird *v.* Houze, Speers Eq. 250.

Tennessee.— Woodfin *v.* Anderson, 2 Tenn. Ch. 331; Callender *v.* Turpin, (Ch. App. 1901) 61 S. W. 1057.

Utah.— Needham *v.* Salt Lake City, 7 Utah 319, 26 Pac. 920.

Washington.— Wallace *v.* Grant, 27 Wash. 130, 67 Pac. 578.

West Virginia.— Sommerville *v.* Sommerville, 26 W. Va. 479; Bierne *v.* Brown, 10 W. Va. 748; Laidley *v.* Kline, 8 W. Va. 218; Martin *v.* Rellehan, 3 W. Va. 480.

United States.—See Corbet *v.* Johnson, 6 Fed. Cas. No. 3,218, 1 Brock. 77; Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185, 6 Call 308.

England.— Birch *v.* Glover, 4 Madd. 376; Curtis *v.* Price, 12 Ves. Jr. 105, 8 Rev. Rep. 303, 33 Eng. Reprint 35.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1339.

Disputed claim.— It is no ground of opposition to the granting of an order of sale of real estate that there is a litigated claim held by the estate against the grantee of a devisee, who claims that there is nothing due. *In re* Schroeder, Myr. Prob. (Cal.) 7.

Uncollected and doubtful demands should not be reckoned in estimating the sufficiency of the personalty, but only personal property actually in the hands of the representative. Bridge *v.* Swain, 3 Redf. Surr. (N. Y.) 487.

Leasehold premises containing the tomb of the decedent need not be disposed of before resorting to the realty to pay debts. Skidmore *v.* Romaine, 2 Bradf. Surr. (N. Y.) 122.

Insufficiency to pay the uncontested claims is a sufficient showing, although other claims are contested. Rose's Estate, 17 Pa. Co. Ct. 514.

Deficiency of immediately available personalty.— A charge upon real estate in aid of the personal will be made available for the satisfaction of creditors by a sale, although there be personal estate outstanding, if it be not immediately applicable. Clanmorris *v.* Bingham, 1 Molloy 514.

Deterioration of assets.— Where the personal assets in the hands of an administrator were originally sufficient to pay decedent's debts, but before being realized upon have deteriorated in value, without negligence of the administrator, until insufficient for that purpose, the real estate becomes liable for the deficiency. Pearson *v.* Gillenwaters, 99 Tenn. 446, 42 S. W. 9, 63 Am. St. Rep. 844.

Averment of sufficiency in answer.— Where an answer avers that on the disposal of exceptions to the account of one of the petitioners, who was the administrator of decedent and whose letters have been vacated, there will be sufficient personal property to pay all of decedent's just debts, an order to sell real estate in payment of debts will not be granted at the instance of judgment creditors. Miller's Estate, 18 Lanc. L. Rev. (Pa.) 53.

Admission of insufficiency.— Where real estate is charged with the payment of debts if the personalty is insufficient a sale will not be decreed until the master reports that the personalty is insufficient, even though insufficiency be admitted by the executors (Owen *v.* Pugh, 3 L. J. Ch. O. S. 194) or infant devisees (Birch *v.* Glover, 4 Madd. 376. See also Curtis *v.* Price, 12 Ves. Jr. 105, 8 Rev. Rep. 303, 33 Eng. Reprint 35).

It is not necessary that the representative should have pleaded plene administravit in suits against him by creditors of the estate in order to enable him to maintain a bill to reach realty descended and sell the same for the satisfaction of judgments recovered against him. See Henry *v.* Mills, 1 Lea (Tenn.) 144, 150, where the court said: "It is not necessary, however, to lay down a positive rule on this subject."

13. Pitkin *v.* Pitkin, 7 Conn. 315; Virgin *v.* Virgin, 91 Ill. App. 188 [*affirmed* in 189 Ill. 144, 59 N. E. 586]. See *infra*, XII, C, I.

14. Foley *v.* McDonald, 46 Miss. 238.

15. *Florida.*— Hays *v.* McNealy, 16 Fla. 409.

New Jersey.— Stiers *v.* Stiers, 20 N. J. L. 52; State *v.* Conover, 9 N. J. L. 338; Bray *v.* Neill, 21 N. J. Eq. 343.

North Carolina.— Lilly *v.* Wooley, 94 N. C. 412. But see Blount *v.* Pritchard, 88 N. C. 445 [*distinguishing* and *approving* Bland *v.* Hartsoe, 65 N. C. 204; Finger *v.* Finger, 64 N. C. 183; Wiley *v.* Wiley, 63 N. C. 182; Graham *v.* Little, 40 N. C. 407]; Shields *v.* McDowell, 82 N. C. 137.

Washington.— Wallace *v.* Grant, 27 Wash. 130, 67 Pac. 578.

West Virginia.—Sommerville *v.* Sommerville, 26 W. Va. 479; Bierne *v.* Brown, 10 W. Va. 748; Martin *v.* Rellehan, 3 W. Va. 480.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1339.

16. Richardson *v.* Musser, 54 Cal. 196; Richmond *v.* Foote, 3 Lans. (N. Y.) 244; *In re* Very, 24 Misc. (N. Y.) 139, 53 N. Y.

cient to pay the debts, but they have been lost, wasted, or distributed by the representative in violation of his duty, the resulting insufficiency of assets does not of itself warrant a sale of the realty,[17] but the remedy is primarily upon the bond of the executor or administrator.[18] The real estate is not, however, according to the better opinion, relieved from ultimate liability, and if the creditors have not been at fault and remedies upon the representative's bond or in pursuit or recovery of the personal assets fail to furnish full redress, a sale of the real estate may be ordered at the instance of creditors for payment of the debts.[19]

d. Sufficiency of Rents and Profits. Aside from express statute or testamentary direction, it is usually considered that the court ought not to order the sale of lands which have descended to heirs or devisees, where the rents and

Suppl. 389, 28 N. Y. Civ. Proc. 163; Matter of Georgi, 21 Misc. (N. Y.) 419, 47 N. Y. Suppl. 1061; Walker's Appeal, 1 Grant (Pa.) 431; Pearson *v.* Gillenwaters, 99 Tenn. 446, 42 S. W. 9, 63 Am. St. Rep. 844; Maxwell *v.* Smith, 86 Tenn. 539, 8 S. W. 340. But see Corwin *v.* Merritt, 3 Barb. (N. Y.) 341; Kendell *v.* Titus, 9 Heisk. (Tenn.) 727; Dulles *v.* Read, 6 Yerg. (Tenn.) 53.

17. *Alabama.*— Speer *v.* Banks, 114 Ala. 323, 21 So. 834; Banks *v.* Speers, 103 Ala. 436, 16 So. 25.

Florida.— Anderson *v.* Northrop, 30 Fla. 612, 12 So. 318.

Illinois.— Rowland *v.* Swope, 39 Ill. App. 514.

Michigan.— Ireland *v.* Miller, 71 Mich. 119, 39 N. W. 16.

Mississippi.— Hargrove *v.* Baskin, 50 Miss. 194.

Missouri.— Merritt *v.* Merritt, 62 Mo. 150.

New York.— Kingsland *v.* Murray, 133 N. Y. 170, 30 N. E. 845; *In re* Very, 24 Misc. 139, 53 N. Y. Suppl. 389, 28 N. Y. Civ. Proc. 163 [*distinguishing In re* Bingham, 127 N. Y. 296, 27 N. E. 1055].

Pennsylvania.— Pry's Appeal, 8 Watts 253; Berluchy's Estate, 1 Leg. Rec. 225; Kelly's Estate, 11 Phila. 100.

South Carolina.— Bird *v.* Houze, Speers Eq. 250.

Tennessee.— Allen *v.* Shanks, 90 Tenn. 359, 16 S. W. 715.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1340; and *infra*, XII, R, 1.

But *compare* Corbet *v.* Johnson, 6 Fed. Cas. No. 3,218, 1 Brock. 77, holding that if the personalty has passed out of the representative's hands and into the hands of another, the creditor is not bound to pursue it further, but the court will proceed to decree directly against the land.

18. *Alabama.*— Banks *v.* Speers, 103 Ala. 436, 16 So. 25.

Maryland.— Wyse *v.* Smith, 4 Gill & J. 295.

Mississippi.— Turner *v.* Ellis, 24 Miss. 173.

Missouri.— Merritt *v.* Merritt, 62 Mo. 150.

North Carolina.— Lilly *v.* Wooley, 94 N. C. 412; Carlton *v.* Byers, 70 N. C. 691; Latham *v.* Bell, 69 N. C. 135.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1340.

19. *Alabama.*— Banks *v.* Speers, 103 Ala. 436, 16 So. 25.

California.— Haynes *v.* Meeks, 20 Cal. 288.

Florida.— Anderson *v.* Northrop, 30 Fla. 612, 12 So. 318.

Illinois.— Young *v.* Wittenmyre, 123 Ill. 303, 14 N. E. 869 [*reversing* 22 Ill. App. 496]; Rowland *v.* Swope, 39 Ill. App. 514.

Indiana.— Nettleton *v.* Dixon, 2 Ind. 446.

Michigan.— Roscoe *v.* McDonald, 91 Mich. 270, 51 N. W. 939; Ireland *v.* Miller, 71 Mich. 119, 39 N. W. 16.

Mississippi.— Hargrove *v.* Baskin, 50 Miss. 194; Hollman *v.* Bennett, 44 Miss. 322; Evans *v.* Fisher, 40 Miss. 643.

Missouri.— Merritt *v.* Merritt, 62 Mo. 150.

New York.—Kingsland *v.* Murray, 133 N. Y. 170, 30 N. E. 845; *In re* Bingham, 127 N. Y. 296, 27 N. E. 1055.

North Carolina.— Wiley *v.* Wiley, 61 N. C. 131.

South Carolina.— Bird *v.* Houze, Speers Eq. 250.

Tennessee.— Jones *v.* Douglass, 1 Tenn. Ch. 631.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1340.

Lands should not be sold until all other remedies have been exhausted. Stigler *v.* Porter, 42 Miss. 449; Paine *v.* Pendleton, 32 Miss. 320. But where it appears that a former administrator died insolvent, and that his estate has ever since been insolvent, and his bond as administrator has been lost, and his sureties are unknown, the administrator *de bonis non* need not sue the former administrator's administrator for funds misappropriated by him before applying for a license to sell land to pay debts. Brittain *v.* Dickson, 104 N. C. 547, 10 S. E. 701.

An estate for years, being a chattel interest descending to the personal representatives of the decedent, and not to his heirs, may be sold to pay debts, upon an insufficiency of personalty resulting from waste, before exhausting remedies against the personal representatives and sureties. Webster *v.* Parker, 42 Miss. 465.

Loss of equity against land by delay.— Where a creditor delayed prosecuting his remedy against the executor until the personal property passed into the hands of the devisee's husband who wasted it, and released the executor, such creditor forfeited his equity against the land. Buford *v.* McKee, 3 B. Mon. (Ky.) 224.

profits thereof will satisfy within a reasonable time the debts which the personalty is insufficient to pay.[20]

e. Account of Administration. It is not usually considered necessary that an account of the administration should be rendered and a final adjudication be had upon it before the court can make an order for a sale of real estate to pay debts, or expenses of administration where this is permissible.[21]

3. For Paymemt of Legacies. The court has no inherent authority to order a sale of the decedent's real estate for the payment of a legacy, even though the personal fund has been exhausted;[22] but where legacies are charged on land by the will, the land may be ordered sold for their payment.[23]

20. *Louisiana.*— Savage *v.* Williams, 15 La. Ann. 250.

New Jersey.— Trimmer *v.* Todd, (Ch. 1894) 28 Atl. 581.

Ohio.— See White *v.* Turpin, 16 Ohio St. 270.

Pennsylvania.— Pennock's Estate, 2 Phila. 143. But *compare* Klein's Estate, 2 Pa. Dist. 813, 14 Pa. Co. Ct. 94.

Virginia.— Tennent *v.* Pattons, 6 Leigh 196; Wilder *v.* Chambliss, 6 Munf. 432, where there is no specific lien or encumbrance upon the land for such debts.

England.— See Rowe *v.* Beavis, Dick. 178, 21 Eng. Reprint 237.

See *supra*, X, D, 16, c.

Where the debts cannot be satisfied within a reasonable time out of the rents and profits a sale should be ordered. Lawton *v.* Hunt, 4 Strobh. Eq. (S. C.) 1.

21. *California.*— Abila *v.* Burnett, 33 Cal. 658.

Florida.— See Deans *v.* Wilcoxon, 25 Fla. 980, 7 So. 163.

Louisiana.—Tabor's Succession, 33 La. Ann. 343, application of creditor need not be preceded by or predicated upon account of administration or tableau of distribution.

Massachusetts.— Palmer *v.* Palmer, 13 Gray 326.

New York.— Matter of Plopper, 15 Misc. 202, 37 N. Y. Suppl. 33; Matter of Howard, 11 Misc. 224, 32 N. Y. Suppl. 1098; *In re* Merchant, 6 N. Y. Suppl. 875. The earlier cases holding that a judicial settlement should precede the commencement of proceedings for disposition of real estate to pay debts (Mead *v.* Jenkins, 95 N. Y. 31 [*affirming* 29 Hun 253, 27 Hun 570]; Schneider *v.* McFarland, 4 Barb. 139 [*affirmed* in 2 N. Y. 459]; Skidmore *v.* Romaine, 2 Bradf. Surr. 122) were decided before the change in the statute regulating such proceedings (Matter of Howard, 11 Misc. 224, 32 N. Y. Suppl. 1098).

Pennsylvania.— The personal representative can obtain an order for the sale of realty to pay debts before the account is settled (Weaver's Appeal, 19 Pa. St. 416; Huckle *v.* Phillips, 2 Serg. & R. 4. *Contra*, under the act of 1811. Fox *v.* Winters, 4 Rawle 174. See also Rhoad's Estate, 3 Rawle 420), but no other person interested can apply until the administration account has been finally settled showing a deficiency of personal assets (Freno's Estate, 11 Phila. 42) and the orphans' court will not order a sale of the decedent's land before the administrator's final account has been settled, merely to meet the expense of getting out letters of administration (Grice's Estate, 11 Phila. 107).

Vermont.— Maeck *v.* Sinclear, 10 Vt. 103.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1438.

Contra.— Beckham *v.* Duncan, (Va. 1889) 9 S. E. 1002; Simmons *v.* Lyles, 27 Gratt. (Va.) 922; Hart *v.* Hart, 31 W. Va. 688, 8 S. E. 562; Laidly *v.* Kline, 8 W. Va. 218; Martin *v.* Rellehan, 3 W. Va. 480. And see Crippen *v.* Crippen, 1 Head (Tenn.) 128.

Where an accounting is pending, an order of sale may properly be delayed until an adjudication upon the account, for such adjudication furnishes the best method of ascertaining that there is a necessity for the sale. Rosenfield's Estate, 10 N. Y. Civ. Proc. 201. See also Palmer *v.* Palmer, 13 Gray (Mass.) 326.

22. *Alabama.*— Scott *v.* Ware, 64 Ala. 174; Price *v.* Wilkinson, 10 Ala. 172, holding that the orphans' court has no power to marshal assets to secure the payment of pecuniary legacies by directing a sale of lands to pay debts.

Connecticut.— Wattles *v.* Hyde, 9 Conn. 10; Goodwin *v.* Chaffee, 4 Conn. 163.

Delaware.— Rambo *v.* Rumer, 4 Del. Ch. 9.

New Jersey.— Skillman *v.* Van Pelt, 1 N. J. Eq. 511.

North Carolina.— State Baptist Female University *v.* Borden, 132 N. C. 476, 44 S. E. 47, 1007.

Pennsylvania.— Torrance *v.* Torrance, 53 Pa. St. 505; Dunn's Estate, 8 Pa. Dist. 289.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1343.

But *compare* Probate Judge *v.* Kimball, 12 N. H. 165.

23. Kremer *v.* Fidelity Trust, etc., Co., 29 S. W. 634, 16 Ky. L. Rep. 559 (sale to repay advances by trustees to pay annuity to widow for which will made estate liable); *In re* Douty, 196 Pa. St. 432, 46 Atl. 483 (holding a sale of realty proper where annuities and legacies were charged thereon and the personalty was exhausted); *In re* Marcy, 22 Pa. St. 140; Cresson's Estate, 3 Phila. (Pa.) 270; Walters *v.* Jackson, 10 L. J. Ch. 383, 12 Sim. 278, 35 Eng. Ch. 236. See also Wattles *v.* Hyde, 9 Conn. 10.

Where money is given to be raised out of profits and the profits will not raise it in a

4. For Distribution. In many jurisdictions the court has power to authorize a sale of the real property of a decedent for the purpose of partition and distribution, where it is not susceptible of a division in kind, or the parties in interest will not consent to an adjustment;[24] but it has been held that a right to subject the land to sale for the purpose of equalizing a previous distribution of the personal estate among the legatees cannot arise either from the fact of the unequal distribution or from a verbal agreement between the parties.[25]

5. Effect of Testamentary Provisions. The court cannot in general order a sale of property when there is a power of sale in the will under which the representative may act,[26] but circumstances may arise under which a sale by order of court may be proper notwithstanding the fact that the will confers such a

convenient time the court will decree a sale. Heycock *v.* Heycock, 1 Vern. Ch. 256, 23 Eng. Reprint 452. *Contra,* Ridout *v.* Plymouth, 2 Atk. 105, 26 Eng. Reprint 465.

Personalty must be applied before land sold.— Devereux *v.* Devereux, 81 N. C. 12.

24. *Alabama.*— Rice *v.* Drennen, 75 Ala. 335; Teat *v.* Lee, 8 Port. 507. But see Bishop *v.* Hampton, 15 Ala. 761; McCain *v.* McCain, 12 Ala. 510.

Florida.— Wilson *v.* Matheson, 17 Fla. 630.

Kentucky.— Cromwell *v.* Mason, 2 Bush 439, where the land is incapable of division without injury and one of the heirs a minor.

Louisiana.— Wilson *v.* Wilson, 109 La. 1075, 34 So. 94.

Maryland.— Woelfel *v.* Evans, 74 Md. 346, 22 Atl. 71.

Pennsylvania.— Gregg's Appeal, 20 Pa. St. 148, only when all heirs refuse to take real estate at appraisal.

Tennessee.— Fulton *v.* Davidson, 3 Heisk. 614.

Texas.— Littlefield *v.* Tinsley, 26 Tex. 353. But see Flanagan *v.* Pierce, 27 Tex. 78.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1343.

Jurisdiction continues until complete distribution made.— Woelfel *v.* Evans, 24 Md. 346, 22 Atl. 71.

The fact that the heirs have agreed to dispense with administration and to deal with the land as their own is no answer to an application by an administrator to sell the land for division and distribution. Rice *v.* Drennen, 75 Ala. 335.

Sale for partition not proper until after expiration of period of administration.— Anderson *v.* Lockhart, 2 Tex. Unrep. Cas. 63.

When petition denied.— A petition of an administratrix for an order to sell land of a decedent for distribution will be denied when there are minor distributees and no one interested in the distribution desires it to be made. Avery *v.* Avery, 47 Ala. 505.

Where the estate can be divided in kind as well as by making a sale, and the ordinary fails to take the proper steps to bring this about, the executor will be enjoined from selling for the purpose of distribution. McCook *v.* Pond, 72 Ga. 150.

Decree ordering sale before all devisees entitled to take ascertained erroneous.— Williams *v.* Hassell, 73 N. C. 174.

Where land is devised and the executors assent to the devise the probate court is without jurisdiction to order a sale for the purpose of division on the application of an executor or to hold the executor responsible for the money received from the sale made under such order. Whorton *v.* Moragne, 62 Ala. 201.

Opposition of parties in interest.— With only one heir out of four praying for distribution and the other three protesting, a sale cannot be directed for the purpose of distribution under the Pennsylvania act of June 12, 1893 (Pub. Laws 461), which requires a request for an order of sale by all parties in interest. Krug's Estate, 9 Pa. Dist. 239.

In the case of an implied conversion by the testator commingling real estate and personalty and bequeathing the shares the court has no power to order a sale by the executor. Krug's Estate, 9 Pa. Dist. 239.

25. Hudson *v.* Gray, 58 Miss. 882.

26. Wilson *v.* Holt, 83 Ala. 528, 3 So. 321, 3 Am. St. Rep. 768; Whorton *v.* Moragne, 62 Ala. 201; Arnett *v.* Bailey, 60 Ala. 435; Wilson *v.* Armstrong, 42 Ala. 168, 94 Am. Dec. 635; McCollum *v.* McCollum, 33 Ala. 711; Matter of Rowley, 38 Misc. (N. Y.) 622, 78 N. Y. Suppl. 215; Hesdra's Estate, 20 N. Y. Suppl. 79, 2 Connoly Surr. (N. Y.) 514; Rosenfield's Estate, 10 N. Y. Civ. Proc. 201, 5 Dem. Surr. (N. Y.) 251; Matter of Davids, 5 Dem. Surr. (N. Y.) 14; Dennis *v.* Jones, 1 Dem. Surr. (N. Y.) 80; Clark *v.* Clark, 3 Bradf. Surr. (N. Y.) 32; Wiley *v.* Wiley, 61 N. C. 131; Selfridge's Appeal, 9 Watts & S. (Pa.) 55. *Contra,* Robinson *v.* Redman, 2 Duv. (Ky.) 82.

Implied power.— Under a statute providing that before the surrogate can make a decree of sale he must find that the property "is not subject to a valid power of sale for the payment of" the debts the surrogate cannot make a decree of sale if there is an actual and valid power, although it is implied and not express. Coogan *v.* Ockershausen, 55 N. Y. Super. Ct. 286, 18 N. Y. St. 366 [*affirming* 11 N. Y. Civ. Proc. 315].

Referring sale to power.— Where a trust deed with power of sale was probated as part of a will, and the trustee who was also sole executor obtained an order of sale which was invalid and sold the land five years thereafter, executing a deed as executor but not report-

power.[27] A testamentary provision for the raising of a fund to pay debts by the hire of certain property has been held not to preclude a sale of such property under order of court where this was necessary for the payment of debts;[28] but in an English case where a testator directed money to be raised for the purposes of his will by mortgage of part of his real estate, the court declined to direct a sale, although the master found that the money could be more advantageously raised in that way.[29] Where a testator directs that his debts be paid from the sales of his unproductive property, an order directing the executor to sell property, a part of which is productive, will not be reversed on appeal, where the sale is not for the payment of debts alone, but also for payment of taxes and large expenses of administration.[30] The New York statute authorizes a sale of decedent's realty for the payment of debts unless it is devised expressly charged with such payment,[31] but the exception does not enable an insolvent debtor, by devising real property charged with the payment of a specified debt, to deprive general creditors of their right to have it sold and distributed among them after the personal estate has been exhausted.[32]

C. Who May Apply For Sale — 1. Executor or Administrator — a. In General. The executor or administrator has usually the right and in a proper case, such as a deficiency of personalty, it is his duty to apply for an order or license for the sale of the real property of his decedent.[33]

ing the sale to the probate court, the sale should be referred to the power in the deed, and not to the order of the court. Matthews *v.* McDade, 72 Ala. 377. See also Purser *v.* Short, 58 Ill. 477.

27. *In re* Karge, 18 N. Y. Suppl. 724 (holding that where, by the terms of a will, the executors have no power to sell until after the debts are paid, a sale under order of court for the payment of debts is proper); McFarland's Appeal, 37 Pa. St. 300 (holding that where a will gives a general authority to sell, without expressly naming the executors, and there is a controversy as to their right to sell, and they are trustees for legatees interested in the sale, it is a proper case for a sale under order of court); Schaffer's Estate, 1 Woodw. (Pa.) 387 (holding that under the Pennsylvania act of 1853, authorizing the orphans' court to make a sale of land belonging to minors, when manifestly for their interest, such a sale may be made of land devised to minors in anticipation of the period assigned for its sale in the will).

Where the power of sale is discretionary and not enforceable by creditors, they are entitled, under the New York statute, to petition the surrogate for an order of sale for the payment of debts. Parker *v.* Beer, 173 N. Y. 332, 66 N. E. 3 [*affirming* 65 N. Y. App. Div. 598, 72 N. Y. Suppl. 955]; Matter of Johnson, 18 N. Y. App. Div. 371, 46 N. Y. Suppl. 53; Matter of Heroy, 67 Hun (N. Y.) 13, 21 N. Y. Suppl. 685, 23 N. Y. Civ. Proc. 128. But the court is not authorized to interfere with the discretion of the executor as to making a sale at the instance of heirs or legatees (Greer *v.* McBeth, 12 Rich. Eq. (S. C.) 254. See also Bullock's Estate, 9 Pa. Dist. 690) save in exceptional instances (Bullock's Estate, *supra*).

If the power of sale is void or payment of the debts as directed in the will is impracticable, resort may still be had to proceedings before the surrogate under the statute for the sale of the land. *In re* Richmond, 168 N. Y. 385, 61 N. E. 647 [*affirming* 62 N. Y. App. Div. 624, 71 N. Y. Suppl. 1147].

Where compliance with testamentary directions would cause sacrifice of property.— Where executors filed a bill, alleging that under the will it was their duty to sell certain town lots to pay the debts and that no such sale could be effected without a great sacrifice of the property and that there were other salable lands and asking advice as to the manner in which the trust could be performed, a court of chancery could afford relief and a sale of such lands under its decree was valid. Bridges *v.* Rice, 99 Ill. 414.

Unproductive real estate may be ordered to be sold even when the executors have been given power to sell when they think it best for the interest of the estate. *In re* Rogers, 185 Pa. St. 428, 39 Atl. 1109; Marvine *v.* Drexel, 68 Pa. St. 362; Carey's Estate, 9 Kulp (Pa.) 336.

28. Shaw *v.* McBride, 56 N. C. 173.

29. Drake *v.* Whitmore, 5 De G. & Sm. 619.

30. *In re* Heydenfeldt, 127 Cal. 456, 59 Pac. 839.

31. N. Y. Code Civ. Proc. § 2749.

Exception does not include devise impliedly charging land. Coogan *v.* Ockershausen, 55 N. Y. Super. Ct. 286, 18 N. Y. St. 366 [*affirming* 11 N. Y. Civ. Proc. 315].

32. Matter of Richmond, 168 N. Y. 385, 61 N. E. 647 [*affirming* 62 N. Y. App. Div. 624, 71 N. Y. Suppl. 1147].

33. *Alabama.*—Matheson *v.* Hearin, 29 Ala. 210. See also Henley *v.* Johnson, 134 Ala. 646, 32 So. 1009, 92 Am. St. Rep. 48, holding that under Code, § 155, providing that land may be sold by the personal representative for the payment of debts it necessary, the right belongs solely to the personal representative.

b. Compelling Application.[34] If the representative fails to apply without undue delay for authority to convert the real estate of his decedent into assets to pay debts, he may be compelled to discharge this duty at the instance of any creditor.[35]

California.— Couts' Estate, 87 Cal. 480, 25 Pac. 685.

Illinois.— Majorowicz *v.* Payson, 153 Ill. 484, 39 N. E. 127; Virgin *v.* Virgin, 91 Ill. App. 188 [*affirmed* in 189 Ill. 144, 59 N. E. 586].

Indiana.— Jarrell *v.* Brubaker, 150 Ind. 260, 49 N. E. 1050.

Kentucky.— Huser *v.* Smith, 1 Ky. L. Rep. 56.

Louisiana.— Savage *v.* Williams, 15 La. Ann. 250.

Massachusetts.— Tyndale *v.* Stanwood, 182 Mass. 534, 66 N. E. 23.

Mississippi.— Nabors *v.* McKay, 27 Miss. 799. *Contra,* as to sale of realty for more equal distribution among heirs. Washington *v.* McCaughan, 34 Miss. 304.

Missouri.— Grayson *v.* Weddle, 63 Mo. 523.

New York.— Matter of O'Brien, 39 N. Y. App. Div. 321, 56 N. Y. Suppl. 925.

North Carolina.— Clement *v.* Cozart, 109 N. C. 173, 13 S. E. 862; Wilson *v.* Pearson, 102 N. C. 290, 9 S. E. 707; Wilson *v.* Bynum, 92 N. C. 717; Ballard *v.* Kilpatrick, 71 N. C. 281; Pelletier *v.* Saunders, 67 N. C. 261. See also Sinclair *v.* McBryde, 88 N. C. 438.

Oregon.— Under the statute no one is authorized to make the application for a sale of realty except the executor or administrator. Levy *v.* Riley, 4 Oreg. 392.

Pennsylvania.—Heyer's Estate, 8 Kulp 107; Walker's Estate, 23 Pa. Co. Ct. 657; Kitchenman's Estate, 15 Phila. 519. *Contra,* as to proceedings against lands charged with legacies. Littleton's Appeal, 93 Pa. St. 177; Field's Appeal, 36 Pa. St. 11.

Rhode Island.— West Greenwich Probate Ct. *v.* Carr, 20 R. I. 592, 40 Atl. 844, representative should proceed within a reasonable time.

South Carolina.— Shaw *v.* Barksdale, 25 S. C. 204; Scruggs *v.* Foot, 19 S. C. 274; McNamee *v.* Waterbury, 4 S. C. 156.

Texas.— Lee *v.* King, 21 Tex. 577; Allen *v.* Clark, 21 Tex. 404; Alexander *v.* Maverick, 18 Tex. 179, 67 Am. Dec. 693.

West Virginia.— Shahan *v.* Shahan, 48 W. Va. 447, 37 S. E. 552, 86 Am. St. Rep. 68; Reinhardt *v.* Reinhardt, 21 W. Va. 76.

United States.— Pratt *v.* McCullough, 19 Fed. Cas. No. 11,113, 1 McLean 69, holding that the court has no power to order a sale except on the application of the executor or administrator.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1345½.

Contra, as to executor having no power as to realty under will. Peirce *v.* Graham, 85 Va. 227, 7 S. E. 189.

Application by attorney of executor sufficient.— Piatt *v.* McCullough, 19 Fed. Cas. No. 11,113, 1 McLean 69.

A demand upon the administrator to sell is not a prerequisite to his right to petition for or the power of the court to order a sale. *In re* Roach, 139 Cal. 17, 72 Pac. 393.

The Texas act of 1843, providing that the representative should not be required to sell property of the estate except upon application of a creditor or some one of the persons mentioned in the act, did not inhibit the administrator from applying for an order for the sale of the real property of an estate when necessary for the payment of debts, etc., nor did it inhibit the court from granting such order on the application of an administrator (Allen *v.* Clark, 21 Tex. 404; Alexander *v.* Maverick, 18 Tex. 179, 67 Am. Dec. 693 [*explaining* Miller *v.* Miller, 10 Tex. 319]), although he might have been exempted from liability for failure to procure an order of sale (Allen *v.* Clark, 21 Tex. 404).

Bill to remove cloud on title see McCaa *v.* Russom, 52 Miss. 639.

Person acting as administrator without authority.— A sale of the real estate of a decedent under an order of the probate court granted upon the application of a person assuming to act as administrator *de bonis non,* but whose appointment was void because there was no vacancy, has been held void. Sitzman *v.* Pacquette, 13 Wis. 291; Humes *v.* Cox, 1 Pinn. (Wis.) 551.

Estoppel.— Where the administrator joins the heirs in a petition to sell land for partition, admitting that he has personal assets sufficient to pay the debts, he cannot afterward subject the land itself to the payment of the debts. Livingston *v.* Noe, 1 Lea (Tenn.) 55.

The administrator's consent to a sale of the land by the heirs does not divest the creditor of his right to have his debt made out of the land, nor estop the administrator from procuring an order of sale to pay such creditor. Moore *v.* Moore, 155 Ind. 261, 57 N. E. 242; Baker *v.* Griffitt, 83 Ind. 411; Moncrief *v.* Moncrief, 73 Ind. 587.

34. **Compelling exercise of power of sale under will** see *supra,* VIII, O, 9, d, (I), (1).

35. Clement *v.* Cozart, 109 N. C. 173, 13 S. E. 862; Kitchenman's Estate, 15 Phila. (Pa.) 519. See also Sinclair *v.* McBryde, 88 N. C. 438. *Compare* Hutchinson's Estate, 10 Pa. Co. Ct. 592.

Time for proceeding.— No definite rule can be laid down as to the time within which a creditor must initiate proceedings to compel a personal representative to proceed to subject realty to the payment of debts of his decedent. Ferguson *v.* Scott, 49 Miss. 500. In New York a creditor may at any time institute such proceedings and require the personal representative to show cause why he should not be ordered to sell the real estate, and the statute expressly prohibits him from assigning as cause "that the time within

2. Creditors. In most jurisdictions creditors of the decedent have the right to apply for an order directing the sale of the decedent's realty for the payment of debts, especially when the representative neglects or refuses to do so,[36] although

which he is allowed to sell the same has expired." Ferguson *v.* Broome, 1 Bradf. Surr. 10.

If there is not enough money in the estate to pay the costs, the representative will not be required to advance them, but if a creditor is willing to advance the costs or indemnify the representative, he will be ordered to proceed. Kitchenman's Estate, 15 Phila. (Pa.) 519.

Property fraudulently conveyed by decedent. — An administrator cannot be compelled to proceed to sell property fraudulently conveyed by his intestate. Bottorff *v.* Covert, 90 Ind. 508; Harrington *v.* Hatton, 129 N. C. 146, 39 S. E. 780.

Jurisdiction to compel co-representative to join in application. — A court of equity has no jurisdiction to compel a co-representative to join in a petition to the probate court for leave to sell real estate. The petitioner, if aggrieved, must seek his remedy in the probate court. Southwick *v.* Morrell, 121 Mass. 520.

36. *Alabama.*— Banks *v.* Speers, 103 Ala. 436, 16 So. 25; Fitzpatrick *v.* Edgar, 5 Ala. 499.

Arkansas.—Brown *v.* Hanauer, 48 Ark. 277, 3 S. W. 27.

California.— Roach's Estate, 139 Cal. 17, 72 Pac. 393; Cout's Estate, 87 Cal. 480, 25 Pac. 685 (holding that one whose claim against the executor for services to the estate has been allowed by the court may make application for the sale of land); Haynes *v.* Meeks, 20 Cal. 288.

Florida.— Anderson *v.* Northrup, 30 Fla. 612, 12 So. 318.

Illinois.— Young *v.* Wittenmyre, 122 Ill. 303, 14 N. E. 869 [*reversing* 22 Ill. App. 496]; Rowland *v.* Swope, 39 Ill. App. 514.

Indiana.—Whisnand *v.* Small, 65 Ind. 120; Nettleton *v.* Dixon, 2 Ind. 446.

Kansas.— Stratton *v.* McCandliss, 32 Kan. 512, 4 Pac. 1018.

Louisiana.—Winn's Succession, 30 La. Ann. 702 (only a creditor whose debt has been acknowledged); Dubuch *v.* Wildermuth, 3 La. Ann. 407; Porter's Succession, 5 Rob. 96. See also Jones *v.* Morgan, 6 La. Ann. 630. But see Mason *v.* Fuller, 12 La. Ann. 68.

Maryland.—McGaw *v.* Gortner, 96 Md. 489, 54 Atl. 133.

Michigan.— Roscoe *v.* McDonald, 91 Mich. 270, 51 N. W. 939; Ireland *v.* Miller, 71 Mich. 119 39 N. W. 16.

Mississippi.— Cheairs *v.* Cheairs, 81 Miss. 662, 33 So. 414, 60 L. R. A. 549, only when the claim is properly registered after being probated and allowed. See also Allen *v.* Hillman, 69 Miss. 225, 13 So. 871; Hargrove *v.* Baskin, 50 Miss. 194; Hollman *v.* Bennett, 44 Miss. 322; Evans *v.* Fisher, 40 Miss. 643.

Missouri.— Merritt *v.* Merritt, 62 Mo. 150.

New Mexico.— Albuquerque First Nat. Bank *v.* Lee, 8 N. M. 589, 45 Pac. 1114.

New York.— Kingsland *v.* Murray, 133 N. Y. 170, 30 N. E. 845; *In re* Bingham, 127 N. Y. 296, 27 N. E. 1055; Van Orden *v.* Krouse, 89 Hun 1, 34 N. Y. Suppl. 1004; Corwin's Estate, 10 Misc. 196, 31 N. Y. Suppl. 426.

North Carolina.— Clement *v.* Cozart, 109 N. C. 173, 13 S. E. 862; Wilson *v.* Pearson, 102 N. C. 290, 9 S. E. 707; Wilson *v.* Bynum, 92 N. C. 717; Ballard *v.* Kilpatrick, 71 N. C. 281; Pelletier *v.* Saunders, 67 N. C. 261; Wiley *v.* Wiley, 61 N. C. 131.

Pennsylvania.— Lukens' Estate, 10 Pa. Dist. 118; Martin's Estate, 6 Pa. Dist. 58 (application by widow to whom money due from estate); Johnson's Estate, 30 Pittsb. Leg. J. 365. But see *In re* Hutchinson, 9 Lanc. L. Rev. 24.

South Carolina.— Shaw *v.* Barksdale, 25 S. C. 204; Scruggs *v.* Foot, 19 S. C. 274; Bird *v.* Houze, Speers Eq. 250.

Tennessee.— Bird *v.* Key, 8 Baxt. 366; Dulles *v.* Read, 6 Yerg. 53; Jones *v.* Douglass, 1 Tenn. Ch. 631.

Texas.— Danzey *v.* Swinney, 7 Tex. 617.

Virginia.— Peirce *v.* Graham, 85 Va. 227, 7 S. E. 189.

Washington.—Prefontaine *v.* McMicken, 16 Wash. 16, 47 Pac. 231.

West Virginia.— A creditor may institute a suit for the sale of decedent's realty if the personal representative fails to institute such a suit within six months after his qualification. Reinhardt *v.* Reinhardt, 21 W. Va. 76.

Wisconsin.—Richter *v.* Leiby, 99 Wis. 512, 75 N. W. 82.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1346.

Creditors living in another state may proceed in Tennessee to have lands situated in the latter state sold to satisfy their debt notwithstanding there is property of the decedent in the state where the creditors live. Bird *v.* Key, 8 Baxt. (Tenn.) 366.

Mortgage creditors of a succession, although insolvent, are not bound to wait. They may require a sale of the mortgaged property for cash, provided its appraised value be obtained, and their wish must always prevail over that of the other creditors. Ogden's Succession, 10 Rob. (La.) 457; Porter's Succession, 5 Rob. (La.) 96.

Protection of unsecured creditors. — A petition for the sale of realty will be granted to protect the rights of the unsecured creditors, although the petitioners represent but a small proportion of the total indebtedness, and the executors will be directed to sell sufficient of the real estate to pay the balance due them, notwithstanding the executors have made every effort to sell at private sale, unless an agreement be filed, signed by all parties, that the lien of all the unsecured debts may be continued. Lukens' Estate, 10 Pa. Dist. 118.

Allowance of claim. — A creditor who has

they may lose their rights in this respect by a lack of diligence in enforcing them or by waiving them and trying to secure payment in other ways.[37]

3. Other Persons Interested in Estate. In some jurisdictions any person who is interested in the estate may apply for an order of sale in case the executor or administrator fails to make application therefor;[38] accordingly it has been held that in a proper case application may be made by the heirs,[39] the legatees,[40] or the

not obtained both an allowance of his claim by the administrator and an approval by the probate judge cannot maintain a proceeding in the probate court for the sale of land; and it seems that a proceeding commenced before such approval cannot be cured by a subsequent approval. Danzey *v.* Swinney, 7 Tex. 617.

Appeal from allowance.— A creditor whose claim has been allowed may bring an action, under the Wisconsin statute, to subject real estate or other assets not inventoried to sale, although an appeal has been taken from the allowance of his claim. Richter *v.* Leiby, 99 Wis. 512, 75 N. W. 82.

Legacy in payment for services.—An agreement by decedent to compensate a certain person for services to be rendered by a legacy does not constitute such person a creditor entitled to ask for the sale of lands for payment where such legacy has been made. Markley's Estate, 20 Phila. (Pa.) 175.

A creditor who has assigned his interest in a debt against decedent cannot institute proceedings in his own name for the sale of land, but the assignee, who is the real creditor, must institute the proceedings in his own name. Butler *v.* Emmett, 8 Paige (N. Y.) 12.

A judgment creditor, whose judgment is a subsisting lien upon the real estate of a deceased debtor as against the heirs at law, cannot institute proceedings before the surrogate to compel a sale of the real estate for the satisfaction of the judgment. Butler *v.* Emmett, 8 Paige (N. Y.) 12.

The petitioning creditor obtains no preference over other creditors whose claims are of equal dignity. Sinclair *v.* McBryde, 88 N. C. 438.

One whose claim is for funeral expenses is not a "creditor of the decedent," and therefore cannot maintain a proceeding for the sale of decedent's land to pay debts. Van Orden *v.* Krouse, 89 Hun (N. Y.) 1, 34 N. Y. Suppl. 1004; Matter of Corwin, 10 Misc. (N. Y.) 196, 31 N. Y. Suppl. 426.

Demand on representative not a prerequisite.— Roach's Estate, 139 Cal. 17, 72 Pac. 393.

Chancery has no inherent jurisdiction to decree a sale of land at the suit of a creditor unless he has some specific lien thereon, or it is specifically burdened by the testator with the debts. McPike *v.* Wells, 54 Miss. 136.

Claim not constituting debt.—Where a husband and wife contracted to give plaintiffs an option for six months on a certain tract of land lying outside the state, and within six months, but after the death of the husband, plaintiff elected to buy, but the wife and heirs of the husband refused to convey, it was held that as plaintiffs had not elected to buy during the husband's life, their claim for damages for refusal to convey was not a debt due from the husband, entitling them to sue for a sale of realty to pay debts under the Maryland statute. McGaw *v.* Gortner, 96 Md. 489, 54 Atl. 133.

37. Phelps *v.* Harris, 61 Miss. 705; Honeywell's Estate, 9 Kulp (Pa.) 340.

Loss of right to enforce claim against part of land.— Where the creditor who petitions for leave to sell or mortgage his deceased debtor's land omits certain land of the decedent from his notice of *lis pendens*, and thus, under the statute, loses his right to enforce his claim against such land, the remaining land should be released from liability in proportion to the value of the omitted land. *In re* Bingham, 127 N. Y. 296, 27 N. E. 1055.

When right not lost.— A decedent owed a certain amount for which a creditor held collateral. The account of the administrator recognized the claim as valid but stated that the creditor had agreed to compromise for half the amount of the claim if the collateral could be made available, otherwise his claim to be for the full amount. Pursuant to a decree, stating the creditor's claim at the amount agreed on for compromise, and directing a *pro rata* distribution of the assets, the creditor received payment on account of his claim and gave a receipt for his "distributive share" of his "claim against said estate." The collateral failed to realize enough to pay the amount due the creditor. It was held that neither the decree of distribution nor the receipt given by the creditor estopped him from resorting to the real estate for the collection of the whole amount remaining due him upon the full amount of his claim. Mead *v.* Jenkins, 38 Hun (N. Y.) 340.

38. Couts' Estate, 87 Cal. 480, 25 Pac. 685; Prefontaine *v.* McMicken, 16 Wash. 16, 47 Pac. 231.

39. Price *v.* Price, 16 L. J. Ch. 232, 15 Sim. 484, 38 Eng. Ch. 484. See also Johnson's Estate, 30 Pittsb. Leg. J. N. S. 365.

Whether all must concur.— Under a statute requiring a request by all parties in interest for an order to sell estate property for purposes of distribution, a sale cannot be directed when one heir asks therefor and the three remaining heirs object thereto. Krug's Estate, 9 Pa. Dist. 239. But under the Maryland statute of 1785 the chancellor could decree a sale of land upon the application of only a part of the heirs interested. Shriver *v.* Lynn, 2 How. (U. S.) 43, 11 L. ed. 172.

40. McKenzie *v.* L'Amoureux, 11 Barb. (N. Y.) 516; Cassady's Estate, 13 Phila.

widow.[41] It has been held that a suit to sell realty for the purpose of paying debts and saving the personalty from the demands of creditors for the benefit of the estate can be instituted only by one who as heir, devisee, or purchaser has an interest in the real estate proposed to be sold, and also an interest in the personal estate which it is proposed to save by the sale.[42] While the guardian of a minor may duly apply for a license to sell land in a suitable case, this standing is not so readily accorded to a mere guardian *ad litem*.[43]

D. Property or Interests Subject to Sale[44] — **1. In General.** As a general rule under the statutes all a decedent's real estate may be sold for the payment of his debts,[45] but the court should not order a sale of property held by the decedent merely in trust and not in his own right.[46] An estate in reversion or remainder may be decreed to be sold for the payment of debts.[47] A crop upon the decedent's estate may be decreed to be sold in such manner as may seem reasonable and the interest of the estate may require.[48] The right to order a sale of property of a decedent is not affected by the fact that his interest therein was

(Pa.) 383. See also Rodney *v.* Rodney, 12 Jur. 665, 16 Sim. 307, 39 Eng. Ch. 307.

Proceedings against lands charged with legacies must be by legatees themselves. Littleton's Appeal, 93 Pa. St. 177; Fields' Appeal, 36 Pa. St. 11.

41. King *v.* Kent, 29 Ala. 542; Reinhardt *v.* Seaman, 208 Ill. 448, 69 N. E. 847 (holding that the widow of a decedent is entitled to ask that his real estate other than the homestead be sold to pay the widow's award); Matter of O'Brien, 39 N. Y. App. Div. 321, 56 N. Y. Suppl. 925 (holding that where an executrix, who was also the widow of testator, and to whom all his property had been devised for her own use, and ultimately for that of her children, paid the debts and funeral expenses of testator, she had the right to enforce a lien for such debts against the realty of testator where the personalty was insufficient to pay the same, although she failed to procure the assignment of such debts to her); Martin's Estate, 6 Pa. Dist. 58 (widow with a claim as creditor); Heyer's Estate, 8 Kulp (Pa.) 107 (widow's claim for exemption). But *compare* Hull *v.* Hull, 26 W. Va. 1.

A widow whose dower has been assigned her cannot demand a sale of the lands for payment of the debts of others. Lawrence *v.* Brown, 5 N. Y. 394.

Estoppel.— A widow, by procuring the estate of her deceased husband to be settled as insolvent, accepting all the assets in lieu of her widow's award, and later conveying the real estate to one and assigning her allowance as an award to another, estops herself, and also her assignee, from having the real estate sold to pay the award. Brown *v.* Morgan, 84 Ill. App. 233.

42. Waring *v.* Waring, 2 Bland (Md.) 673.

43. Darby *v.* Anglin, 4 Hayw. (Tenn.) 244.

44. Sale of realty under testamentary authority see *supra*, VIII, O, 9, d, (I), (H).

45. Spence *v.* Parker, 57 Ala. 196. See also Stillman *v.* Young, 16 Ill. 318; Edmiston *v.* Young, 17 Tex. 135.

Interests of minors.— The right of a court of probate or equity to order a sale of a decedent's real estate, where the statute gives due authority, is not affected by the fact that a minor is interested in the property as heir or devisee. Lange's Succession, 46 La. Ann. 1017, 15 So. 404; Leverett *v.* Harris, 7 Mass. 292. But see Whitman *v.* Fisher, 74 Ill. 147.

Escheated lands.— The orphans' court has no authority to order a sale of lands which have escheated to the state. Van Kleek *v.* O'Hanlon, 21 N. J. L. 582 [*affirming* 20 N. J. L. 31]. But *compare* Evans *v.* Brown, 5 Beav. 114, 6 Jur. 380, 11 L. J. Ch. 349, 49 Eng. Reprint 520. See Escheat, 16 Cyc. 557.

Where a valid sale has been made under order of court so as to divest both heirs and creditors of any further claim any order made afterward to sell the same land would not have the support of a rightful jurisdiction. Lindsay *v.* Jaffray, 55 Tex. 626. See also Brockenborough *v.* Melton, 55 Tex. 493.

Where part of land has been aliened by heirs.— Where lands descended are divided among the intestate's heirs, and some of the shares are aliened to *bona fide* purchasers before application is made to sell lands to pay debts of the estate, the unsold shares are liable not merely for their ratable proportion but for the entire indebtedness of the estate. The proper adjustment among the heirs is matter for separate suit. Maxwell *v.* Smith, 86 Tenn. 539, 8 S. W. 340.

46. Newell *v.* Montgomery, 129 Ill. 58, 21 N. E. 508 [*affirming* 30 Ill. App. 48].

Administration for payment of mortgage. — In order to enable A to raise the purchase-price of land which he had agreed to buy of several cotenants, they conveyed to B, one of their number, under a parol trust to procure a loan of the required amount, and then to convey to A subject to the mortgage. B procured the loan, but died before executing a deed to A. It was held that the land was subject to administration and sale as B's estate for the purpose of paying the mortgage debt, although all the other tenants, who were her heirs, had conveyed to A, also an heir, in accordance with the original agreement. Cooper *v.* Loughlin, 75 Tex. 524, 13 S. W. 37.

47. Williams *v.* Ratcliff, 42 Miss. 145.

48. Horn *v.* Grayson, 7 Port. (Ala.) 270.

only that of a cotenant,[49] although no more than the interest of the decedent can pass by such a sale;[50] and where the rule of survivorship deprives the decedent of all interest at his death, nothing remains which can be sold as part of his estate.[51] The fact that realty has been devised by the decedent does not deprive the court of jurisdiction to order a sale thereof,[52] nor does the fact that realty is leased for a certain period preclude its sale.[53] A bond held by a decedent at his death, although not yet due, is liable to be sold under a decree in equity to raise funds for the payment of his debts.[54] A vendor's lien is not an asset which is the subject of sale to pay debts.[55] The orphans' court has no power to decree a separation of fixtures from the realty and a sale of the fixtures as personalty.[56]

2. Property Not Owned by Decedent at His Death.[57] The probate court has ordinarily no jurisdiction to order a sale of land to which the decedent had no title whatever at the date of his death and whether such sale be through fraud or mistake it is void and must be set aside,[58] but where personalty not owned by decedent but found among his chattels at the time of his death is sold the sale

49. Roulston *v.* Washington, 79 Ala. 529; Spence *v.* Parker, 57 Ala. 196; Brennan *v.* Hill, 2 Rich. (S. C.) 599 note; Gates *v.* Irick, 2 Rich. (S. C.) 593.

A sale of a deceased partner's interest in partnership lands cannot be ordered before the partnership debts have been paid, and the accounts between the partners adjusted, although the surviving partner makes the application as administrator of the deceased partner. Roulston *v.* Washington, 79 Ala. 529. But see McCormick's Estate, 57 Pa. St. 54, 98 Am. Dec. 191.

The personal property of a deceased partner which is in the possession of the surviving partner, and constitutes a part of the firm property, cannot be sold by the decedent's executors under order of court. Auerbach's Estate, 23 Utah 529, 65 Pac. 488, 90 Am. St. Rep. 685.

50. McCormick's Appeal, 57 Pa. St. 54, 98 Am. Dec. 191.

51. See Walker's Estate, 1 Del. Co. (Pa.) 384.

52. Scales *v.* Curfman, (Tenn. Ch. App. 1898) 53 S. W. 755.

Improvements of devisee.— Where a devisee of a mill has added thereto machines and appliances with the intent and purpose of making them permanently a part thereof, and they have been made and used as a permanent part thereof, and are adapted to the purpose thereof, they may be sold as part thereof for the benefit of decedent's creditors. Richmond *v.* Freeman's Nat. Bank, 86 N. Y. App. Div. 152, 83 N. Y. Suppl. 632.

53. *In re* Brannan, (Cal. 1897) 51 Pac. 320.

Where the lease gives the lessee an option to purchase at the end of the term, the property cannot be sold during the term to pay debts of the deceased landlord. Magruder *v.* Hornot, 110 La. 585, 34 So. 696.

54. Grose *v.* McMullen, 2 Del. Ch. 227.

Indemnity bond.— The probate court has no jurisdiction to make an order authorizing an administrator to assign a bond of indemnity, given to his decedent as sheriff to indemnify him against claims of a third person to property levied on. McDermott *v.* Mitchell, 53 Cal. 616.

55. O'Connor *v.* Vineyard, 91 Tex. 488, 44 S. W. 485.

56. Walter's Estate, 10 Kulp (Pa.) 221.

57. As to property held or claimed adversely see *infra*, XII, D, 5.

58. *Alabama.*— Bishop *v.* Blair, 36 Ala. 80.

Indiana.— Edwards *v.* Beall, 75 Ind. 401.

Louisiana.— Beckham *v.* Henderson, 23 La. Ann. 446; Cresse *v.* Marigny, 4 Mart. 50.

Mississippi.— Ives *v.* Pierson, Freem. 220.

Pennsylvania.— Paul *v.* Squibb, 12 Pa. St. 292, although the widow, who was the true owner, supposed the property belonged to her husband's estate and instigated the sale.

Texas.— Miller *v.* Rogers, 49 Tex. 398.

United States.— Elliott *v.* Shuler, 50 Fed. 454.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1351.

Although the petition prays the sale of an entire tract if it is found by the court that the decedent owned part only of the tract it should have that part only appraised and sold. Ewing *v.* Higby, 7 Ohio 198, 28 Am. Dec. 633, holding that where the prayer was for the sale of an entire tract, but subsequently one fourth thereof was decreed to another person, and thereafter the court received the appraisement of an undivided three quarters of the tract only, and, reciting it, ordered all to be sold, this showed that the court meant all appraised, all belonging to the heirs after deducting the fourth interest of the other person.

Conveyance not recorded until after grantor's death.— Although a conveyance of land made in trust to secure an existing debt and future advances is not recorded till after the grantor's death, the title vests in the grantee as against creditors of decedent who did not attach the property during his life; and the executors have no power to sell the same for the payment of decedent's debts, under Mass. Pub. St. c. 134, § 2, as land "liable to attachment or execution by a creditor of the deceased in his lifetime." Edwards *v.* Barnes, 167 Mass. 205, 45 N. E. 351.

Property as to which decedent had power of appointment.— Where real estate was placed in the hands of a trustee to be con-

will usually be upheld and the right of the true owner limited to the recovery of the proceeds of sale or at most of such damages as will indemnify him.[59] Land which a decedent has in his lifetime conveyed in fraud of creditors may be reached and made available by sale for the payment of creditors, the proceeding usually involving a judicial inquiry into the question of fraud as well as the necessity of resorting to the land.[60]

3. Lands Conveyed by Heir or Devisee. In some states a *bona fide* sale and conveyance of land belonging to a decedent by the heir or devisee gives the purchaser a title thereto superior to the rights of creditors of the decedent, whose sole remedy thereafter is an action against the heir or devisee for payment of the debt;[61] but under the general policy of modern legislation the land of a decedent

veyed to A's appointee or in failure of an appointment to her heirs at law, and she died without making an appointment, it was held that as she had no legal title to the property it could not be sold in the ordinary course of administration, under a license, for the payment of her debts. Coverdale *v.* Aldrich, 19 Pick. (Mass.) 391.

Proof sufficient to show ownership.— On an application for the sale of lands to pay debts, proof of decedent's continuous occupancy, with open acts of ownership for more than twenty years, is sufficient proof of ownership in the absence of evidence that he did not enter or hold of his own right. Meadows *v.* Meadows, 78 Ala. 240.

Land belonging to representative.— In order to set aside a sale of lands belonging to the administrator on the ground that they were included in the conveyance by mistake, it must be shown that the parties did not intend the deed to operate as a conveyance in the personal as well as representative capacity of the administrator. Donaho *v.* Smith, 50 Iowa 218.

59. Waterhouse *v.* Bourke, 14 La. Ann. 358. See also Donaldson *v.* Rust, 6 Mart. (La.) 260, holding that the owner can claim the proceeds as he could have claimed the chattel had it not been sold, and need not claim as a creditor.

60. *Indiana.*— Bushnell *v.* Bushnell, 88 Ind. 403, land bought with decedent's money and deeded to another to defraud creditors.

Maine.— Brown *v.* Whitmore, 71 Me. 65; Wescott *v.* McDonald, 22 Me. 402, license to sell permitted under statute, whether such conveyance was merely fraudulent as to creditors or made with actual premeditated fraud.

Massachusetts.— Tyndale *v.* Stanwood, 182 Mass. 534, 66 N. E. 23. See also Willard *v.* Nason, 5 Mass. 240; Drinkwater *v.* Drinkwater, 4 Mass. 354.

New Hampshire.— Kingsbury *v.* Wild, 3 N. H. 30.

North Carolina.— Harrington *v.* Hatton, 129 N. C. 146, 39 S. E. 780 (except when sale would interfere with rights of innocent purchasers); Mannix *v.* Ihrie, 76 N. C. 299; Waugh *v.* Blevins, 68 N. C. 167.

Ohio.— Spoors *v.* Coen, 44 Ohio St. 497, 9 N. E. 132; Webster *v.* Ballard, 4 Ohio Dec. (Reprint) 419, 2 Clev. L. Rep. 137.

Vermont.— McLane *v.* Johnson, 43 Vt. 48, resort must be had to a court of chancery to perfect and clear the title.

Wisconsin.— See Allen *v.* McRae, 91 Wis. 226, 64 N. W. 889, land purchased and paid for by decedent, but title taken in name of third person.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1352.

Where creditors procure the setting aside of a deed of the decedent on the ground that it is fraudulent as against them, the administrator may treat the property thus uncovered as assets of the estate and sell the same under order of court. St. Francis Mill Co. *v.* Sugg, 169 Mo. 130, 69 S. W. 359 [*distinguishing* Zoll *v.* Soper, 75 Mo. 460; Hall *v.* Callahan, 66 Mo. 316; George *v.* Williamson, 26 Mo. 190, 72 Am. Dec. 203]. But see Schultz's Succession, 39 La. Ann. 505, 2 So. 47.

Where the personal estate is sufficient to pay all debts and charges, except for certain debts secured by a mortgage on the decedent's lands, there is no occasion for and no right in the administrator to subject to the payment of such mortgage debts other lands conveyed by his intestate during his lifetime, on the allegation of fraud as against creditors. McCall *v.* Pixley, 48 Ohio St. 379, 27 N. E. 887.

Where the widow and administratrix had joined her deceased husband in a simulated transfer of property subject to a certain mortgage to a nominal buyer, who formally recognized the mortgage in the transfer, she could not afterward have the property sold as a part of her husband's succession, to the prejudice of the mortgage creditor. Tabary's Succession, 31 La. Ann. 409.

Sale for full value.— Where the decedent, against whom docketed judgments existed, sold land at its value, the probate court has no power to order a sale of such land by the personal representative to pay the claims of the judgment creditors. Heck *v.* Williams, 79 N. C. 437.

61. *Alabama.*— Beadle *v.* Steele, 86 Ala. 413, 5 So. 169; Bell *v.* Craig, 52 Ala. 215.

Georgia.— Shipp *v.* Gibbs, 88 Ga. 184, 14 S. E. 196.

Illinois.— Ryan *v.* Jones, 15 Ill. 1.

Mississippi.— Westbrook *v.* Munger, 64 Miss. 575, 1 So. 750.

South Carolina.— Stackhouse *v.* Wheeler, 17 S. C. 91.

Tennessee.— Smith *v.* Thomas, 14 Lea 324.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1353.

remains subject to a lien or a cloud upon the title pending the full administration of his estate or for a fixed period, and it remains during such time liable to be sold for the payment of the decedent's debts or such claims as the statute may have included notwithstanding any sale by the heir or devisee.[62]

4. Inchoate and Equitable Titles. An inchoate and equitable title in the decedent passing to his heirs or devisees may be sold under a decree of the probate court,[63] but where there is at most a slight or merely an apparent equity and no really valuable interest in the decedent or his heirs the court should refuse to order a sale.[64] As a rule the right to perfect a decedent's inchoate title to or interest in public land goes to his heirs, and the executor or administrator cannot sell under order of court the patent or the lands which have been patented to the heirs.[65]

62. *Connecticut.*— Griswold *v.* Bigelow, 6 Conn. 258.

Indiana.— Smith *v.* Gorham, 119 Ind. 436, 21 N. E. 1096; Baker *v.* Griffitt, 83 Ind. 411; Weakley *v.* Conradt, 56 Ind. 430.

Michigan.—Ireland *v.* Miller, 71 Mich. 119, 39 N. W. 16.

New Jersey.—Warwick *v.* Hunt, 11 N. J. L. 1; Cooper *v.* Cooper, 5 N. J. Eq. 498.

New York.— Dodge *v.* Stevens, 105 N. Y. 585, 12 N. E. 759 [*reversing* 40 Hun 443].

North Carolina.— Donoho *v.* Patterson, 70 N. C. 649.

Ohio.— Sidener *v.* Hawes, 37 Ohio St. 532; Faran *v.* Robinson, 17 Ohio St. 242, 93 Am. Dec. 617.

Pennsylvania.— Mohler's Appeal, 8 Pa. St. 26.

Texas.— Edmiston *v.* Long, 17 Tex. 135.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1353.

A previous partition sale does not divest the surrogate of power to order a sale to pay debts of the deceased within three years after the granting of letters of administration. Hall *v.* Partridge, 10 How. Pr. (N. Y.) 188.

63. *Alabama.*— Jones *v.* Woodstock Iron Co., 95 Ala. 551, 10 So. 635; Roulston *v.* Washington, 79 Ala. 529; Spence *v.* Parker, 57 Ala. 196; Inman *v.* Gibbs, 47 Ala. 305; Vaughan *v.* Holmes, 22 Ala. 593; Jennings *v.* Jenkins, 9 Ala. 285; Evans *v.* Mathews, 8 Ala. 99.

Kentucky.— Peebles *v.* Watts, 9 Dana 102, 33 Am. Dec. 531.

Missouri.— Howell *v.* Jump, 140 Mo. 441, 41 S. W. 976; Jackson *v.* Magruder, 51 Mo. 55; Valle *v.* Bryan, 19 Mo. 423.

Ohio.— Biggs *v.* Bickel, 12 Ohio St. 49.

Pennsylvania.— Horner's Appeal, 56 Pa. St. 405.

Wisconsin.— See Allen *v.* McRae, 91 Wis. 226, 64 N. W. 889.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1354.

Contra, under a statute authorizing the sale of real estate of which the decedent "died seized." Livingston *v.* Livingston, 3 Johns. Ch. (N. Y.) 148.

Redemption from execution sale by third person.— The failure of an administrator to redeem property sold under execution sale and the redemption thereof by one who had no power to redeem does not preclude the administrator from obtaining an order to sell such property to pay the debts of his decedent. Jarrell *v.* Brubaker, 150 Ind. 260, 49 N. E. 1050.

Where the administrator pays the balance of the purchase-price of property and takes a conveyance in the name of the heirs, the court has no jurisdiction to subsequently order a sale of the land. Jones *v.* Woodstock Iron Co., 95 Ala. 551, 10 So. 635.

64. *Alabama.*—Vaughan *v.* Holmes, 22 Ala. 593; Mounger *v.* Barks, 17 Ala. 48; Brown *v.* Chambers, 12 Ala. 697.

Kansas.—Amos *v.* Livingston, 26 Kan. 106.

Massachusetts.— Caverly *v.* Eastman, 142 Mass. 4, 7 N. E. 33.

New York.— Goodwin *v.* Nelin, 2 Abb. Dec. 258, 4 Transcr. App. 369, 35 How. Pr. 402.

Ohio.— Tiernan *v.* Beam, 2 Ohio 383, 15 Am. Dec. 557.

Tennessee.—Milligan *v.* Humbard, 11 Heisk. 137, holding that the seizin of a person in possession of land under a title bond which chancery has refused to specifically execute is not such as to entitle his executor or administrator to sell it for payment of debts.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1354.

A sale of the "right to redeem" from a mortgage conveys nothing to the purchaser, since it is a sale of a mere personal privilege, and not of an interest in land subject to sale for the payment of decedent's debts. Rainey *v.* McQueen, 121 Ala. 121, 25 So. 920.

65. *Alabama.*— Burns *v.* Hamilton, 33 Ala. 210, 70 Am. Dec. 570; Cothran *v.* McCoy, 33 Ala. 65.

California.— Hartley *v.* Brown, 46 Cal. 201.

Kansas.— Coulson *v.* Wing, 42 Kan. 507, 22 Pac. 570, 16 Am. St. Rep. 503; Rogers *v.* Clemmans, 26 Kan. 522.

Louisiana.— Stanbrough *v.* Wilson, 13 La. Ann. 494.

Texas.— East *v.* Dugan, 79 Tex. 329, 15 S. W. 273; Harwood *v.* Wylie, 70 Tex. 538, 7 S. W. 789 (holding that where it appears after the sale of land by order of court that no certificate severing the land from the public domain was located or filed thereon until eight months after the sale the purchaser acquires no title); Turner *v.* Hart, 10 Tex. 438 (conditional head-right certificate not susceptible of sale under order of court for grantee's debts). But see Soye *v.* Maverick, 18 Tex. 100.

5. Property Held or Claimed Adversely. The court should not order a sale of property which is held by a person claiming a title adverse to the decedent,[66] but the representative must first recover possession.[67] If there be a clear, outstanding legal title adverse to the estate, the court may refuse an order of sale,[68] although if there be reasonable cause for doubt, the proper course is to permit the sale and let the question be tested by the court having jurisdiction of the subject-matter.[69] When at the time of his death the legal title to real estate was in the decedent, his personal representative may rightfully treat it as his property, and if necessary for the payment of debts petition for its sale, and whoever challenges his right to sell may fairly be charged with the burden of proof;[70] but on the other hand, when the legal title was not in the decedent, and the representative seeks to subject to the payment of decedent's debts property which apparently belongs to another, the burden of proving that the decedent had an interest in such property is upon the representative.[71]

6. Homestead. The court cannot decree a sale of the homestead for the payment of a decedent's debts,[72] unless it is made to appear that the debt for which the sale is ordered accrued before the homestead right was acquired by the decedent,[73]

Washington.—Towner *v.* Rodegeb, 33 Wash. 153, 74 Pac. 50, 99 Am. St. Rep. 936.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1355.

Contra.— Hawkins *v.* Hulburd, 10 Ohio 178; Moore *v.* Moore, 11 Humphr. (Tenn.) 512; Jackson *v.* Astor, 1 Pinn. (Wis.) 137, 39 Am. Dec. 281. And see Prevo *v.* Walters, 5 Ill. 35.

66. Harris *v.* Cole, 114 Ga. 295, 40 S. E. 271; Lowe *v.* Bivins, 112 Ga. 341, 37 S. E. 374; Hall *v.* Armor, 68 Ga. 449; Weitman *v.* Thiot, 64 Ga. 11; Tongue *v.* Morton, 6 Harr. & J. (Md.) 21; Libby *v.* Christy, 1 Redf. Surr. (N. Y.) 465. *Contra,* Barney *v.* Cuttler, 1 Root (Conn.) 489; Mercier *v.* Sterlin, 5 La. 472 (where possession of third person illegal); Knowles *v.* Blodgett, 15 R. I. 463, 8 Atl. 691, 2 Am. St. Rep. 913 (where decedent died seized of the land in question).

Possession of heirs.— Where the heirs of an intestate, on his death, enter into possession of land which he owned, such possession is in their own right, and is adverse to that of an administrator subsequently appointed, within Ga. Civ. Code, § 3547, providing that an administrator must first recover possession before he can sell the property of his intestate held adversely by a third person. Davitte *v.* Southern R. Co., 108 Ga. 665, 34 S. E. 327.

Court will rather direct bringing of suit to test title. Libby *v.* Christy, 1 Redf. Surr. (N. Y.) 465.

67. Lowe *v.* Bivins, 112 Ga. 341, 37 S. E. 374; Davith *v.* Southern R. Co., 108 Ga. 665, 34 S. E. 327.

68. Public Administrator *v.* Burdell, 4 Bradf. Surr. (N. Y.) 252.

69. Martin *v.* Bond, 64 Nebr. 868, 90 N. W. 910; Public Administrator *v.* Burdell, 4 Bradf. Surr. (N. Y.) 252; Walker's Estate, 23 Pa. Co. Ct. 657; Bloodheart's Estate, 2 Pa. Co. Ct. 476.

If the sale would be made at a disadvantage by reason of a controversy over the title, it is proper to stay further proceedings until the parties have had an opportunity of determining the title in a court of competent jurisdiction; but if the creditors insist upon selling all of the interest of the decedent after proper time has been allowed for instituting a suit to determine the title in another court, the sale will be ordered. Hewitt *v.* Hewitt, 3 Bradf. Surr. (N. Y.) 265.

70. Amos *v.* Livingston, 26 Kan. 106.

71. Amos *v.* Livingston, 26 Kan. 106.

72. *Illinois.*— Oettinger *v.* Specht, 162 Ill. 179, 44 N. E. 399; Hartman *v.* Schultz, 101 Ill. 437. But see Virgin *v.* Virgin, 91 Ill. App. 188 [*affirmed* in 189 Ill. 144, 59 N. E. 586], sale with assent of widow.

Mississippi.— Smith *v.* Wells, 46 Miss. 64.

Nebraska.—Tindall *v.* Peterson, (1904) 98 N. W. 688, 99 N. W. 659.

North Carolina.— Hinsdale *v.* Williams, 75 N. C. 430.

Ohio.— See Bliss *v.* Fuhrman, 6 Ohio Cir. Ct. 203, 3 Ohio Cir. Dec. 416.

Texas.— Yarboro *v.* Brewster, 38 Tex. 397; Cummins *v.* Denton, 1 Tex. Unrep. Cas. 181; Trammell *v.* Neal, 1 Tex. Unrep. Cas. 51.

Utah.— Cain *v.* Young, 1 Utah 361.

Wisconsin.— Howe *v.* McGivern, 25 Wis. 525.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1361.

Setting off homestead — Allowance in lieu of.— On a proceeding by an administrator to sell land of the decedent to pay debts under Ohio Rev. St. § 5437, the widow, if the owner of a homestead, is entitled to have it set off by metes and bounds, as provided by section 5438, but is not entitled in lieu thereof to an allowance of five hundred dollars under section 5441; that section authorizing such an allowance only where the widow is not the owner of a homestead. Bliss *v.* Fuhrman, 6 Ohio Cir. Ct. 203, 3 Ohio Cir. Dec. 416.

An order for a sale of the homestead is not void, although it is erroneous, and it cannot be attacked even by direct proceedings, the remedy being by appeal. Sigmond *v.* Bebber, 104 Iowa 431, 73 N. W. 1027.

73. See Kelsay *v.* Frazier, 78 Mo. 111; Daudt *v.* Harmon, 16 Mo. App. 203; Gamble

and in some cases even the power to sell subject to the homestead right has been denied.[74]

7. Encumbered Property. As a general rule the court has power to order a sale of property which is mortgaged or otherwise encumbered, subject to the encumbrance,[75] and in some jurisdictions a sale may be ordered free of the lien of such encumbrances, provision being made for their payment out of the proceeds.[76]

8. Lands Subject to Interest of Surviving Spouse. As a general rule the reversionary interest in land subject to the widow's dower may be sold for pay-

v. Watterson, 83 N. C. 573; Howe *v.* McGivern, 25 Wis. 525.

The burden of proof is on one claiming under an administrator's deed of a homestead to show that the debt for payment of which it was sold was contracted before the homestead right was acquired. Kelsay *v.* Frazier, 78 Mo. 111.

When unconditional sale proper.— Where the debts contracted by decedent before the adoption of the homestead exemption law exceed the value of the personalty an unconditional sale should be ordered, and it is error to discriminate in the order of sale between debts incurred before and after the passage of the homestead law, as such discrimination if exercised at all must be exercised when the proceeds of the land sold are brought into court for distribution. Gamble *v.* Watterson, 83 N. C. 573.

It must appear from the records of the probate court that the order was to sell for a debt that accrued before the homestead was acquired in order to divest heirs of their homestead rights by an administrator's sale. Daudt *v.* Harmon, 16 Mo. App. 203; Howe *v.* McGivern, 25 Wis. 525.

Presumption in favor of order of sale see Phillips *v.* James, 115 Ga. 425, 41 S. E. 663.

Jurisdiction of probate court in case of mortgage.— The probate court cannot make an order of sale of the homestead of a deceased husband to satisfy a valid mortgage executed before the declaration of homestead. His remedy is in the district court. *In re* Orr, 29 Cal. 101.

74. Oettinger *v.* Specht, 162 Ill. 179, 44 N. E. 399; Hartman *v.* Schultz, 101 Ill. 437; Hinsdale *v.* Williams, 75 N. C. 430. *Contra*, Williams *v.* O'Neal, 119 Ga. 175, 45 S. E. 978; Keene *v.* Wyatt, 160 Mo. 1, 60 S. W. 1037, 63 S. W. 116; Derge *v.* Hill, 103 Mo. App. 281, 77 S. W. 105.

The value of the homestead above the exemption is liable for the satisfaction of claims allowed against the estate where title was in the decedent at the time of his death. W. J. Perry Live Stock Commission Co. *v.* Biggs, (Nebr. 1903) 94 N. W. 712.

75. Bolling *v.* Jones, 67 Ala. 508; Perkins *v.* Winter, 7 Ala. 855; *In re* Braman, (Cal. 1897) 51 Pac. 320 (sale subject to lease); Kenley *v.* Bryan, 110 Ill. 652; Phelps *v.* Funkhouser, 39 Ill. 401; Fudge *v.* Fudge, 23 Kan. 416.

The bringing of an action to foreclose on a decedent's real estate in the court of common pleas does not prevent an action by his administrator in the probate court to sell the same property to pay debts unless the administrator is made a party to the former action. Bateman *v.* Morris, 7 Ohio S. & C. Pl. Dec. 287, 4 Ohio N. P. 397.

Such a decree can only be made in a creditor's suit, and an implied power of sale in the executor, arising from a direction in the will to pay debts, will not enable the court to direct the sale of the mortgaged estate, if it cannot make a decree for foreclosure. Bolton *v.* Stannard, 4 Jur. N. S. 576, 27 L. J. Ch. 845, 6 Wkly. Rep. 570.

Payment of encumbrances with funds raised on new mortgage.— Where an executor and devisee paid off mortgages on the real estate devised to him with funds raised by new mortgages and the assets proved insufficient to pay the debts of the estate the surrogate had no power to direct the sale of the real estate for the payment of the debts subject to the amounts which would have been due on the original mortgages if not paid. Jackson *v.* Holladay, 3 Redf. Surr. (N. Y.) 379.

Pledged property.— A sale of a savings-bank book delivered to a third person by a deceased creditor as security for a debt will not be decreed. Boynton *v.* Payrow, 67 Me. 587.

76. Virgin *v.* Virgin, 91 Ill. App. 188 [*affirmed* in 189 Ill. 144, 59 N. E. 586]; Ihmsen's Estate, 29 Pittsb. Leg. J. (Pa.) 218; Shahan *v.* Shahan, 48 W. Va. 447, 37 S. E. 552, 86 Am. St. Rep. 68.

Sale discharged of homestead and dower.— The probate court has power with the assent in writing of the widow to direct that the lands be sold free and discharged from homestead estate and right of dower, and after such sale to ascertain the value of such estate and right, and order the same paid out of the proceeds. Virgin *v.* Virgin, 91 Ill. App. 188 [*affirmed* in 189 Ill. 144, 59 N. E. 586].

Consent of mortgagee to sale free of mortgage.— In a creditors' suit for the administration of real estate subject to a mortgage having priority to the claims of creditors a sale of the estate free from the mortgage cannot be directed without the consent of the mortgagee whether he is a party to the suit or not. If, however, the mortgagee is a party to the suit the direction will not be made in the common alternative form that the property shall be sold free from his security if he concurs in the sale and subject to it if he does not concur, but the court will require him to elect at once whether he will concur or not. Wickenden *v.* Rayson, 6 De G. M.

ment of the decedent's debts before the dower interest has expired, although the dower itself cannot be defeated ;[77] but in some states the rule is somewhat different as to the statutory interest which the widow takes in her deceased husband's estate.[78] The curtesy estate has been considered to be subject to be defeated by the necessity for a sale of the land to pay the debts of the decedent.[79]

9. Marshaling. In determining what land shall be sold, where a sale of all is not necessary, or in fixing the order in which the various parcels shall be sold, where it is doubtful whether or not a sale of all is necessary, the doctrine of marshaling assets, with certain modifications and extensions rendered necessary by the circumstances of the case, is usually held applicable.[80]

& G. 210, 25 L. J. Ch. 162, 4 Wkly. Rep. 39, 55 Eng. Ch. 165, 43 Eng. Reprint 1212.

77. *Delaware.*—Doe *v.* Wright, 2 Houst. 49.

Illinois.— Oettinger *v.* Specht, 162 Ill. 179, 44 N. E. 399; Kenley *v.* Bryan, 110 Ill. 652.

Indiana.— See Hutchinson *v.* Lemcke, 107 Ind. 121, 8 N. E. 71, recognizing this rule as existing prior to the statute of 1852. For present rule in this state see *infra*, note 78.

Massachusetts.—Leverett *v.* Armstrong, 15 Mass. 26, construing the provincial act of 1696 (8 Wm. III), chapter 37.

New York.— Maples *v.* Howe, 3 Barb. Ch. 611.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1363; and *infra*, XII, T, 2, b.

Dower interest cannot be sold for payment of husband's debts see 14 Cyc. 925 note 99.

Assignment of dower before sale.— When the widow is a defendant in a suit brought to subject the realty of a decedent to the payment of his debts, and she has not elected to take the value of her dower in money, her dower should be assigned before an out-and-out sale of the realty is decreed. McKittrick *v.* McKittrick, 43 W. Va. 117, 27 S. E. 303.

Payment to widow to release dower.— An administrator cannot, as a matter of law, recover from an estate the sum he has paid the widow to release her right of dower in lands sold by him under a probate license; the statute does not empower him to make any such arrangement, and under the license the purchaser can buy only the interest of the estate. Needham *v.* Belote, 39 Mich. 487.

78. Under the Indiana statute the court cannot order a sale of the portion of the real estate which the widow owns by reason of her marital rights for the purpose of paying the debts of the decedent (Lewis *v.* Watkins, 150 Ind. 108, 49 N. E. 944; Bumb *v.* Gard, 107 Ind. 575, 8 N. E. 713; Hutchinson *v.* Lemcke, 107 Ind. 121, 8 N. E. 71; Compton *v.* Pruitt, 88 Ind. 171; Armstrong *v.* Cavitt, 78 Ind. 476), and if her interest is sold for the purpose of paying a debt secured by mortgage on the land, she is entitled as against creditors to be reimbursed for the full value of her share out of the personal assets of the estate (Lewis *v.* Watkins, *supra*).

Under the Minnesota statute the undivided third of the real estate that goes to the widow is a part of the decedent's estate subject to the payment of his debts and a license to sell for that purpose "the interest of said estate" in certain lands will cover the widow's third. Scott *v.* Wells, 55 Minn. 274, 56 N. W. 828.

79. Bennett *v.* Camp, 54 Vt. 36. See also Berluchy's Estate, 1 Leg. Rec. (Pa.) 225. But *compare* Casler *v.* Gray, 159 Mo. 588, 60 S. W. 1032.

In Ohio it has been said that there is no power in the probate court to sell the property free of the husband's curtesy against his will. Pirmann *v.* Gerhold, Ohio Prob. 142. But see Clark *v.* Harlan, Ohio Prob. 106.

80. See the following cases:

Alabama.— Matheson *v.* Hearin, 29 Ala. 210; Couch *v.* Campbell, 6 Port. 262.

Arkansas.— Howell *v.* Duke, 40 Ark. 102, holding that the purchaser of land from the heir of a deceased intestate is entitled, on a petition by the administrator to sell lands to pay debts, to have the unsold land first applied thereto.

Maryland.— Spencer *v.* Pearce, 10 Gill & J. 294, holding that where the land of a deceased debtor is decreed to be sold for the payment of his debts upon the application of a creditor whose claim is for the purchase-money of certain land bought by such debtor, the land so purchased should be first sold.

Massachusetts.— Hays *v.* Jackson, 6 Mass. 149, holding that where a testator directed his debts to be paid, made a specific devise of certain lands, and gave over the residuum, and died seized of real estate acquired after making the will and which did not pass thereby, upon the application of executors for license to sell real estate for the payment of debts the lands not included in the specific devise and which would otherwise fall into the residuum should be sold first and the after-acquired lands next.

New York.— Pelletreau *v.* Smith, 30 Barb. 494 (holding that undevised lands should be ordered sold for the payment of debts before those specifically devised; but the surrogate has no power to order the money to be raised out of an undevised remainder, although the clear intent of the statute is that the devised life-estate shall be exonerated); Eddy *v.* Traver, 6 Paige 521, 31 Am. Dec. 261 (holding that where an heir has conveyed a part of the real estate of a decedent which descended to him, before the debts of the decedent are paid, the surrogate may direct the land still belonging to the heir to be first sold for the payment of such debts so as to protect the equitable rights of the purchaser).

North Carolina.— Camp Mfg. Co. *v.* Liver-

E. Amount to Be Sold — 1. In General. Where a decedent's lands are in separate lots or parcels, or are otherwise easily capable of separation, a probate decree for a sale to pay debts should as a general rule be limited to so much as will satisfy the valid debts.[81] But the court is usually allowed an ample discretion as to decreeing the sale of the whole or any part of a decedent's realty as may be deemed suitable or as the best interest of the estate may require; the scope and expression of its license to sell, determining the rights of all concerned in the premises.[82] If the representative sells more than he was authorized to sell by the order or license of the court the sale is void.[83]

2. Entire Interest of Decedent. Upon a sale of land by an executor or admin-

man, 123 N. C. 7, 31 S. E. 346, holding that where a testator devised only a part of his estate, and as to this gave a life-estate to his wife with remainder over, in selling property to pay debts the undevised property should be sold first, then, in case more was needed, the devised property subject to the life-estate, and last the life-estate.

Pennsylvania.— *In re* Cowden, 1 Pa. St. 267, holding that where lands are sold to satisfy the debts of the devisee, such lands being subject to the charge of certain legacies not yet due, the purchasers thereof are substituted to the right of the lien creditors making the sale and entitled to demand that such charge be made upon those parcels upon which the liens of the selling creditors attached last and so on in inverse order of their creation.

Tennessee.— Erck *v.* Erck, 107 Tenn. 77, 63 S. W. 1122, holding that where, in a proceeding to sell land of a decedent, consisting of vacant lots and an undivided interest in a storehouse, to pay debts it appeared that the vacant lots were insufficient to pay the debts and that it was to the interest of the estate to sell the undivided interest instead of the vacant lots it was not error to so order.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1364.

81. *Connecticut.*— Lockwood *v.* Sturdevant, 6 Conn. 373.

Illinois.— Harris *v.* Hogle, 37 Ill. 150, 87 Am. Dec. 243, holding that it is error to license an executor to sell so much real estate as he may deem for the best interest of the estate.

Indiana.— Black *v.* Meek, Smith 131.

Kentucky.— Gill *v.* Givin, 4 Metc. 197.

Louisiana.— Dumestre's Succession, 40 La. Ann. 571, 4 So. 328.

Maine.— Wakefield *v.* Campbell, 20 Me. 393, 37 Am. Dec. 60.

Massachusetts.—Litchfield *v.* Cudworth, 15 Pick. 23.

Mississippi.— Champion *v.* Cayce, 54 Miss. 695.

New Hampshire.— Adams *v.* Morrison, 4 N. H. 166, 17 Am. Dec. 406.

New York.— Matter of Georgi, 21 Misc. 419, 47 N. Y. Suppl. 1061.

Ohio.— Ewing *v.* Higby, 7 Ohio 198, 28 Am. Dec. 633.

Pennsylvania.— Bailey's Appeal, 2 Grant 225.

Tennessee.— Crippen *v.* Crippen, 1 Head 128.

Texas.— Wells *v.* Mills, 22 Tex. 302

Virginia.— Peirce *v.* Graham, 85 Va. 227, 7 S. E. 189.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1365.

A sale of enough to pay incidental charges attending the sale may be authorized. Dean *v.* Dean, 3 Mass. 258.

The title of a purchaser for value is not affected by the fact that the proceeds of sale exceed the decedent's debts. Comstock *v.* Crawford, 3 Wall. (U. S.) 396, 18 L. ed. 34. But *compare* Louisville Banking Co. *v.* Pranger, 68 S. W. 632, 24 Ky. L. Rep. 408, holding that a judicial sale of the lands of a deceased person to pay his debts is void, as to infant heirs, where more land is sold than is necessary to pay the debts of the ancestor, unless the property is indivisible.

82. *Connecticut.*— Buel's Appeal, 60 Conn. 63, 22 Atl. 488.

Georgia.— Wellborn *v.* Rogers, 24 Ga. 558.

Illinois.— Bowles *v.* Rouse, 8 Ill. 409.

Indiana.— Black *v.* Meek, Smith 131.

Kentucky.— Turner *v.* Turner, 33 S. W. 1102, 17 Ky. L. Rep. 1203.

Massachusetts.— Tenney *v.* Poor, 14 Gray 500, 77 Am. Dec. 340; Sewall *v.* Raymond, 7 Metc. 454.

Michigan.—Norman *v.* Olney, 64 Mich. 553, 31 N. W. 555.

New Jersey.— State *v.* Conover, 9 N. J. L. 338.

New York.— *In re* Dolan, 88 N. Y. 309, holding that a sale of more land than is necessary to pay debts may be ordered if the judge deems that a sale of less will be prejudicial to heirs or devisees.

North Carolina.— Tillett *v.* Aydlett, 90 N. C. 551.

Pennsylvania.— Stiver's Appeal, 56 Pa. St. 9.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1365.

Abuse of discretion not available to purchasers.— *In re* Dolan, 88 N. Y. 309.

83. Lockwood *v.* Sturdevant, 6 Conn. 373; Wakefield *v.* Campbell, 20 Me. 393, 37 Am. Dec. 60; Gregson *v.* Tuson, 153 Mass. 325, 26 N. E. 874; Litchfield *v.* Cudworth, 15 Pick. (Mass.) 23; Adams *v.* Morrison, 4 N. H. 166, 17 Am. Dec. 406.

Adjoining strip properly sold with farm.— An executor, having had his petition to sell the "M farm" of deceased granted, properly included in his sale thereof, by the acre, a small strip, outside the old surveys to the

istrator for the payment of the debts, all the decedent's interest therein should be sold, subject only to encumbrances existing at the time of his death.[84]

F. Payment or Security to Prevent Sale. The heirs or legatees, or those interested in the estate, have ordinarily a right to furnish the necessary money for the payment of the decedent's debts and thus remove the cloud upon their title to the land arising out of its liability to be sold for the debts,[85] and as a general rule no decree of sale should be made for the payment of debts without giving them a reasonable opportunity to pay the debts and thus avoid a sale.[86] The heirs or legatees may also under the statutes of some states prevent a sale of the realty by giving a bond for the payment of debts.[87] An offer in a pleading to

M farm, but title to which was acquired by the owner of that farm, by adverse possession, by including it with and occupying it as part of that farm. *In re* Smith, 188 Pa. St. 222, 41 Atl. 542.

84. *Louisiana.*— Le Boeuf *v.* Webre, 40 La. Ann. 380, 4 So. 223, sale of undivided half improper where decedent owned the entire tract.

Maine.— Hasty *v.* Johnson, 3 Me. 282.

Michigan.— Hewitt *v.* Durant, 78 Mich. 186, 44 N. W. 318 (holding that a sale subject to mortgages created after decedent's death or interests created by his will is void); Daly's Appeal, 47 Mich. 443, 11 N. W. 262; Eberstein *v.* Oswalt, 47 Mich. 254, 10 N. W. 360.

New Hampshire.— Braley *v.* Simonds, 61 N. H. 369, holding that nothing passes by a sale pursuant to a license of court, as of the decedent's equity of redemption in lands, where he died seized of the unencumbered fee.

Texas.— Kalteyer *v.* Wipff, (Civ. App. 1899) 49 S. W. 1055.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1366.

85. *Indiana.*— Davis *v.* Kendall, 161 Ind. 412, 68 N. E. 894.

Louisiana.— Hearsey *v.* Bates, 36 La. Ann. 300, where claims are not urgent.

New Hampshire.— See Prescott *v.* Walker, 16 N. H. 340.

Ohio.— Corey *v.* Hayes, 13 Ohio Cir. Ct. 185, 7 Ohio Cir. Dec. 272.

Pennsylvania.— Sager *v.* Mead, 171 Pa. St. 349, 33 Atl. 355.

Virginia.— Menefee *v.* Marge, (1888) 4 S. E. 726.

West Virginia.— Hart *v.* Hart, 31 W. Va. 688, 8 S. E. 562.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1367.

The mere payment to an executor by a devisee of the amount of the decedent's debts will not discharge the land of deceased from the lien of creditors' claims. Hunt *v.* Moore, 2 Pa. St. 105.

Payment by heir or devisee of his share of debts.— In a New Hampshire case, where a testator devised all his real estate to his two sons in severalty, and upon the executor's obtaining leave to sell real estate to pay debts, one of the sons paid his half of the debts, the executor's action in selling only such real estate as had been devised to the other son was held proper. Prescott *v.* Walker, 16 N. H. 340. But in a North Carolina case, where partition had been made of land between the heirs, and a part of the heirs had sold their shares, and the creditors of the ancestor instituted proceedings to subject the land to the payment of debts, it was held that the heirs who had not sold their land were not entitled to pay their ratable portions of the debt and retain the land discharged therefrom, nor was an heir who had sold his land for more than his ratable share of the debt entitled to be discharged from liability on payment of such ratable share. Hinton *v.* Whitehurst, 73 N. C. 157.

A mere license to enter land and cut and remove the trees as purchaser thereof gives no such interest in the land as entitles one to pay the deceased seller's debts, so as to prevent the sale of the land for paying debts of the estate. Fletcher *v.* Livingston, 153 Mass. 388, 26 N. E. 1001.

86. Menefee *v.* Marge, (Va. 1888) 4 S. E. 726; Hart *v.* Hart, 31 W. Va. 688, 8 S. E. 562.

87. *Indiana.*— Davis *v.* Kendall, 161 Ind. 412, 68 N. E. 894.

Iowa.— Seery *v.* Murray, 107 Iowa 384, 77 N. W. 1058.

Massachusetts.— Studley *v.* Josselyn, 5 Allen 118.

New Hampshire.— Jenness *v.* Robinson, 10 N. H. 215.

New Jersey.— *In re* Pitcher, 61 N. J. Eq. 614, 47 Atl. 277.

Ohio.— Davisson *v.* Burgess, 31 Ohio St. 78.

Pennsylvania.— Single's Appeal, 3 Brewst. 160, holding that, where the heirs give security to pay the debts, it is a proper exercise of the discretion of the court to rescind an order of sale of the real estate for the payment of such debts.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1368.

A widow, having a dower interest in the real estate of her deceased husband, is sufficiently interested in the estate to entitle her, in connection with one or more of the heirs of such estate, to give the bond provided for by Ohio Rev. St. § 6145, to obviate a sale of such real estate to pay debts, etc., by the administrator; and, having in good faith given such bond, and, as required by the conditions thereof, paid to the administrator the aggregate amount of the valid debts of the decedent and the charges of administration, is not to be regarded as a mere volunteer, but

pay the debts, or of judgment that the pleader give bond for their payment, is not equivalent to actual payment of the debts or giving bond, and is insufficient to prevent a sale.[88]

G. Proceedings For Sale — 1. In General. A sale can ordinarily be ordered only in an appropriate proceeding for that purpose in which the statutory requirements are complied with and such an order is asked.[89] In some jurisdictions an application to the probate court by the executor or administrator of a decedent

is entitled to be subrogated to the rights of the administrator, and fully reimbursed from a fund arising from the sale of such real estate in a proceeding in partition by the heirs. Corey *v.* Hayes, 13 Ohio Cir. Ct. 185, 7 Ohio Cir. Dec. 272.

All need not give bond.— It is not essential that all the heirs or devisees should give bond for payment in order to justify the judge in dismissing an application for sale. If some of them give bond with sufficient sureties, the statutory requirement is fulfilled. Jenness *v.* Robinson, 10 N. H. 215.

Bond of executor who is also residuary legatee.— It has been held that where an executor who is also residuary legatee gives bond for the payment of debts and legacies, a sale of realty for payment of debts cannot properly be ordered. Thayer *v.* Winchester, 133 Mass. 447. *Contra*, Lafferty *v.* People's Sav. Bank, 76 Mich. 35, 43 N. W. 34.

The bond need not strictly conform to the statute, provided it supplies in good season the needful security for dispensing with the sale. Davisson *v.* Burgess, 31 Ohio St. 78.

When condition broken.— The condition of such a bond is broken when it is ascertained by an account settled in the probate court that debts have been found due from the estate, and that the goods, chattels, and personal assets of the deceased are insufficient for their payment, but not earlier. Studley *v.* Josselyn, 5 Allen (Mass.) 118.

Offer not in conformity to statute.— Where the personal estate of a decedent amounted to two hundred and sixty dollars and the claims filed were about one hundred and twenty-seven dollars and over eleven hundred dollars in notes made by the decedent directly to his widow who was the administratrix, and on application by the administratrix for leave to sell land the heirs offered to give bond to pay all the debts except the notes, an order for sale was proper since the orphans' court could not determine the validity of the claims on an application for leave to sell the land, and the offer of the heirs was not in conformity with the statute. *In re* Pitcher, 61 N. J. Eq. 614, 47 Atl. 277.

When statute not applicable.— The Iowa statute providing that any person interested in a decedent's estate may prevent a sale of it by giving a bond to pay all demands against the estate to the extent of the value of the property does not apply to an action by an administrator with the will annexed to recover assets alleged to have been unlawfully seized by a devisee. Seery *v.* Murray, 107 Iowa 384, 77 N. W. 1058.

88. Davis *v.* Kendall, 161 Ind. 412, 68 N. E. 894.

89. *Colorado.*— Filmore *v.* Reithman, 6 Colo. 120.

Florida.— Price *v.* Winter, 15 Fla. 66, holding it essential to the validity of the sale that the court should so far conform to the statute regulating the proceedings as to acquire jurisdiction of the subject-matter and the parties.

Illinois.— Majorowicz *v.* Payson, 153 Ill. 484, 39 N. E. 127, holding that a bill by an administrator, in the interest of two of the creditors, which did not make the widow and heirs parties, and which was not signed by the administrator, nor verified by him, and did not show the condition of the estate or amount of claims, but sought to set aside as fraudulent a conveyance made by his intestate, could not be treated as a petition for the sale of the intestate's land, but was merely a possessory action, and therefore could not be maintained by the administrator.

Louisiana.—Spears' Succession, 28 La. Ann. 804.

Massachusetts.—See Knox *v.* Jenks, 7 Mass. 488.

Mississippi.— Weeks *v.* Thrasher, 52 Miss. 142.

New Hampshire.— Lebanon Sav. Bank *v.* Waterman, 65 N. H. 68, 17 Atl. 577.

Washington.— Wallace *v.* Grant, 27 Wash. 130, 67 Pac. 578.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1369.

On accounting by an executor or administrator the probate court has no incidental power of ordering a sale of realty for the payment of debts and will not consider the alleged invalidity of a conveyance by the residuary legatee. O'Connor *v.* Gifford, 3 N. Y. Suppl. 207, 6 Dem. Surr. (N. Y.) 71. See also Picard *v.* Montross, (Miss. 1895) 17 So. 375. But statutes sometimes confer authority upon the court to make an order of sale in connection with the representative's accounts, making it appear that the personal estate is insufficient to pay the debts. Day *v.* Graham, 97 Mo. 398, 11 S. W. 55.

Proceeding to sell realty fraudulently conveyed by decedent see Longley *v.* Sewell, 4 Ohio S. & C. Pl. Dec. 1, 2 Ohio N. P. 376.

In a suit to ascertain the construction of a will of real estate, and to carry the trusts thereof into execution, the court has power, if necessary, to direct a sale or mortgage of a sufficient part of the property, for the purpose of raising the taxed costs of the suit, although some of the plaintiffs are infants. St. 15 & 16 Vict. c. 86, § 55, gives power to direct a sale before the hearing in those cases only in which the court could under the old

for leave to sell the lands of the estate is regarded as a proceeding *in rem*,[90] but in others it is considered that the proceeding is not *in rem* but in its nature adversary.[91] It has been held that a proceeding by an executor or administrator to sell land for the payment of debts is not a chancery proceeding,[92] although it must be in all respects according to the practice of a court of chancery,[93] and the facts necessary to authorize the sale must appear of record, or the decree of sale will be void and confer no title upon a purchaser.[94] A proceeding to sell real estate for the payment of debts may be joined with a statutory proceeding to sell so that the widow's interest can be set apart, but before making such sale the interest of the widow should be ascertained so that her rights at the sale can be protected without putting her under the burden of protecting incidentally the rights of the creditors.[95]

2. Jurisdiction. The probate court has no inherent authority to order a sale of the decedent's real estate, but such authority is a special and limited one derived from statutes which designate the special cases for its exercise and the provisions of which must be strictly complied with throughout the entire proceeding.[96] As a general rule the statutes confer jurisdiction with regard to

practice have given such direction at the hearing. Mandeno *v.* Mandeno, Kay appendix ii.

Authority from heir to sell.— An instrument executed by an heir of the decedent, authorizing the executor or administrator to sell certain land "under the direction of the court," does not dispense with the necessity of observing all the statutory requirements. Hartley *v.* Croze, 38 Minn. 325, 37 N. W. 449.

Strict compliance with the statutory requirements is necessary so far as such requirements relate to the absolute prerequisites of the sale, although errors or defects that go to the form and not to the substance may be disregarded. *In re* Mahoney, 34 Hun (N. Y.) 501.

Filing of title papers.— Ky. Civ. Code, § 492, requiring title papers to be filed in certain actions, is not applicable to an action to procure a sale of an intestate's interest in lands, to pay his debts and for distribution to the heirs. Rodgers *v.* Rodgers, 31 S. W. 139, 17 Ky. L. Rep. 358.

Proceedings to sell an equitable title in fee should be the same as if the title were a legal one. Woods *v.* Monroe, 17 Mich. 238.

90. *Alabama.*— Neville *v.* Kenney, 125 Ala. 149, 28 So. 452, 82 Am. St. Rep. 230; Friedman *v.* Shamblin, 117 Ala. 454, 23 So. 821; Davis *v.* Tarver, 65 Ala. 98; Garrett *v.* Bruner, 59 Ala. 513 (regarded as a proceeding *in rem* when collaterally assailed); Pettus *v.* McClannahan, 52 Ala. 55; De Bardelaben *v.* Stoudenmire, 48 Ala. 643; Spragins *v.* Taylor, 48 Ala. 520.

Arkansas.—Adams *v.* Thomas, 44 Ark. 267; Sturdy *v.* Jacoway, 19 Ark. 499; Rogers *v.* Wilson, 13 Ark. 507; *Ex p.* Marr, 12 Ark. 84; Adamson *v.* Cummins, 10 Ark. 541.

New Jersey.— Lawson *r.* Acton, 57 N. J. Eq. 107, 40 Atl. 584.

South Carolina.— McLaurin *v.* Rion, 24 S. C. 407.

Texas.—Crawford *r.* McDonald, 88 Tex. 626, 33 S. W. 325; Heath *r.* Layne, 62 Tex. 686; Murchison *r.* White, 54 Tex. 78; George *v.* Watson, 19 Tex. 354. But see Finch *v.* Edmonson, 9 Tex. 504.

Washington.— Ryan *r.* Fergusson, 3 Wash. 356, 28 Pac. 910.

United States.— Florentine *v.* Barton, 2 Wall. 210, 17 L. ed. 783; Grignon *v.* Astor, 2 How. 319, 11 L. ed. 283; Hastings *v.* Granberry, 11 Fed. Cas. No. 6,200, 3 Cranch C. C. 319.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1369.

Jurisdiction over persons of heirs not necessary.— Hastings *v.* Granberry, 11 Fed. Cas. No. 6,200, 3 Cranch C. C. 319, holding, however, that under Md. Acts (1786), c. 45, § 8, a sale could not be made of the interest of a non-resident infant in lands. But *compare* Sheldon *v.* Tucker, 3 R. I. 98.

If the heirs or devisees contest the application it then assumes the further character of a suit *in personam*. Davis *r.* Tarver, 65 Ala. 98; Garrett *r.* Bruner, 59 Ala. 513, if the regularity of the proceeding is presented on error or by appeal.

91. *Iowa.*— Good *v.* Norley, 28 Iowa 188.

Missouri.— Shields *v.* Ashley, 16 Mo. 471.

New York.— Schneider *v.* McFarland, 2 N. Y. 459 [*affirming* 4 Barb. 139].

Ohio.—Holloway *v.* Stuart, 19 Ohio St. 472, under the Ohio act of 1840 and amendment of 1858. But see Sheldon *v.* Newton, 3 Ohio St. 494.

Oregon.— Fiske *r.* Kellogg, 3 Oreg. 503.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1369.

92. Moffitt *r.* Moffitt, 69 Ill. 641; Moline Water Power, etc., Co. *v.* Webster, 26 Ill. 233; Benson *v.* Cilley, 8 Ohio St. 604.

93. Whitmore *r.* Johnson, 10 Humphr. (Tenn.) 610. *Contra*, Benson *v.* Cilley, 8 Ohio St. 604.

94. Whitmore *r.* Johnson, 10 Humphr. (Tenn.) 610. See *infra*, X, G, 14.

95. Albuquerque First Nat. Bank *v.* Lee, 8 N. M. 589, 45 Pac. 1114.

96. *Alabama.*— Robertson *v.* Bradford, 70 Ala. 385; Wyman *r.* Campbell, 6 Port. 219,

ordering a sale of decedent's realty upon the probate court or the court vested with jurisdiction of the administration of estates,[97] and this jurisdiction is

31 Am. Dec. 677. See also Hall *v.* Chapman, 35 Ala. 553, sale of personalty.

California.— Haynes *v.* Meeks, 20 Cal. 288; Gregory *v.* McPherson, 13 Cal. 562.

Florida.— Sloan *v.* Sloan, 25 Fla. 53, 5 So. 603; Hays *v.* McNealy, 16 Fla. 409.

Illinois.— Whitman *v.* Fisher, 74 Ill. 147 (court of equity); Bennett *v.* Whitman, 22 Ill. 448.

Indiana.— Seward *v.* Clark, 67 Ind. 289.

Louisiana.—Spears' Succession, 28 La. Ann. 804; Richard *v.* Deuel, 11 Rob. 508; Ogden's Succession, 10 Rob. 457; Poultney *v.* Cecil, 8 La. 321.

Minnesota.— Hartley *v.* Croze, 38 Minn. 325, 37 N. W. 449.

Mississippi.— Washington *v.* McCaughan, 34 Miss. 304.

Ohio.— Ludlow *v.* Johnston, 3 Ohio 553, 17 Am. Dec. 609.

Tennessee.— Linnville *v.* Darby, 1 Baxt. 306; Bond *v.* Clay, 2 Head 379, holding that the jurisdiction of the county court, under the law authorizing the sale by that tribunal of the property of decedents for partition, etc., is limited alone to the making and completion of the sale, and after such sale has been completed by the confirmation of the report, if any matters of equity exist, or should arise, entitling the purchaser to be relieved against the payment of the purchase-money, resort must be had to a court of equity. See also Cross *v.* Bloomer, 6 Baxt. 74.

Texas.— Groesbeck *v.* Bodman, 73 Tex. 287, 11 S. W. 322.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1369.

97. *Arkansas.*— Apel *v.* Kelsey, 47 Ark. 413, 2 S. W. 102.

Delaware.— Rambo *v.* Rumer, 4 Del. Ch. 9.

Florida.— Hays *v.* McNealy, 16 Fla. 409.

Georgia.— Knapp *v.* Harris, 60 Ga. 398. See also McGowan *v.* Lufburrow, 82 Ga. 523, 9 S. E. 427, 14 Am. St. Rep. 178.

Illinois.— Smith *v.* Hileman, 2 Ill. 323.

Indiana.— May *v.* Logan County, 30 Fed. 250, civil circuit court as court of probate.

Kansas.— Stratton *v.* McCandliss, 32 Kan. 512, 4 Pac. 1018.

Louisiana.— Pr. Code, art. 990, provides that it shall be the duty of the several judges of probate upon application of a creditor or any creditor of a vacant estate to cause so much of the property as may be necessary to pay the debts of the estate to be offered for sale, but this article does not contemplate sales of succession property made at the instance of succession representatives, which must under Acts (1855), No. 56, be ordered by clerks of the district courts, and clerks of the district courts have also power to order the sale of succession property at the instance of creditors. Davie *v.* Scriber, 38 La. Ann. 651.

Maine.— Lebroke *v.* Damon, 89 Me. 113, 35 Atl. 1028.

Maryland.— Woelfel *v.* Evans, 74 Md. 346, 22 Atl. 71; Williams *v.* Holmes, 9 Md. 281. See also Young *v.* Twigg, 27 Md. 620.

Missouri.— Priest *v.* Spier, 96 Mo. 111, 9 S. W. 12. See also Medis *v.* Kenney, 176 Mo. 200, 75 S. W. 633, 98 Am. St. Rep. 496.

New Hampshire.— Lebanon Sav. Bank *v.* Waterman, 65 N. H. 88, 17 Atl. 577.

New York.— See Kingsland *v.* Murray, 133 N. Y. 170, 30 N. E. 845 [*affirming* 60 Hun 116, 14 N. Y. Suppl. 495].

North Carolina.— Wood *v.* Skinner, 79 N. C. 92; Pelletier *v.* Saunders, 67 N. C. 261, clerk of superior court as probate judge.

Ohio.— Dalton *v.* Davis, 18 Ohio Cir. Ct. 878, 6 Ohio Cir. Dec. 133, court of common pleas.

Oregon.— Russell *v.* Lewis, 3 Oreg. 280.

Pennsylvania.— Miskimins' Appeal, 114 Pa. St. 530, 6 Atl. 743; Norris *v.* Farrell, 11 Phila. 271; Cresson's Estate, 3 Phila. 270.

South Carolina.— Shaw *v.* Barksdale, 25 S. C. 204; Scruggs *v.* Foot, 19 S. C. 274; McNamee *v.* Waterbury, 4 S. C. 156. See also Whitesides *v.* Barber, 24 S. C. 373.

Tennessee.— Erck *v.* Erck, 107 Tenn. 77, 63 S. W. 1122; Davis *v.* Davis, 87 Tenn. 200, 10 S. W. 363, county court.

Texas.— See Rogers *v.* Kennard, 54 Tex. 30.

Wisconsin.— See Reynolds *v.* Schmidt, 20 Wis. 374.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1375.

The jurisdiction of the court of a particular county as to a particular estate is a question of fact to be determined by that court, and its determination is conclusive and cannot be questioned in a collateral proceeding. Bostwick *v.* Skinner, 80 Ill. 147.

Sale for excess over jurisdictional amount. —A sale of land by order of the probate court is not void, although the price for which it was sold exceeds the amount to which its jurisdiction extends, if the valuation made before the sale was within its jurisdiction. Chambers *v.* Watson, 1 Bailey (S. C.) 511.

Constitutionality of statutes.— A constitutional provision conferring on the probate court jurisdiction in all matters testamentary and of administration is not contravened by a statute authorizing that court to order a sale of decedent's land where the sale will benefit the heirs and creditors (Tucker *v.* Harris, 13 Ga. 1, 58 Am. Dec. 488), or a statute authorizing the sale of lands belonging to heirs, some of whom are minors, and a division of the proceeds among those entitled (Harrington *v.* Wofford, 46 Miss. 31).

Jurisdiction of clerk — When question immaterial.— Whether the clerk of the superior court, in the exercise of his probate jurisdiction, has jurisdiction to entertain an action by administrators to sell lands of their intestate, is immaterial after the action is removed into the superior court before the judge; for, the parties all being represented,

ordinarily exclusive in the first instance,[98] although in a few states it is concurrent with that of courts of equity or other courts of law.[99] In the absence of

and as the superior court would have had jurisdiction of such an action originally brought before it, the proceedings become *coram judice*, and a sale thereunder is valid. McMillan *v.* Reeves, 102 N. C. 550, 9 S. E. 449.

Sale of lease.— A lease of real estate for twenty-five years is personal property which passes, on the death of the lessee, to his administrator; and under the Nebraska statutes the administrator may sell the lease as personalty under a proper order from the county court, without obtaining a license from the district court, as in case of the sale of real estate for the payment of debts. Mulloy *v.* Kyle, 26 Nebr. 313, 41 N. W. 1117.

Where debts are charged on the real estate of the testator by his will, the surrogate court has no jurisdiction to order a sale for their payment, since that duty devolves on another court. Smith *v.* Coup, 6 Dem. Surr. (N. Y.) 45, 19 N. Y. St. 898.

Land fraudulently conveyed by decedent.— Under the Ohio statutes an administrator desiring to sell real estate which his intestate conveyed away in his lifetime in fraud of creditors may either bring ejectment in the court of common pleas for the recovery of the land at the time of filing a suit in the probate court to sell the land, or, in one action in the court of common pleas, seek to avoid the conveyance and pray for a sale of the land; and by an election to pursue his remedy in the common pleas, he ousts the probate court of its jurisdiction. Longley *v.* Sewell, 4 Ohio S. & C. Pl. Dec. 1, 2 Ohio N. P. 376. But where, in an action by an administrator to set aside conveyances made by his intestate as fraudulent, in a court of competent jurisdiction, such court decides that such conveyances were fraudulent, and should be set aside, but does not proceed further to order a sale of such property to pay debts of the estate, the administrator may then apply to the probate court to have such property sold to pay debts, since, a nullity of the conveyance having been judicially decreed, the proceeding is not one to set aside the conveyance, and to subject the land to the payment of decedent's debts, which, when coupled in one action, must be by Ohio Rev. St. §§ 6139, 6140, brought only in the common pleas. Lowman *v.* Sewall, 16 Ohio Cir. Ct. 466, 9 Ohio Cir. Dec. 177.

98. *Delaware.*— Rambo *v.* Rumer, 4 Del. Ch. 9, so holding as to sales for payment of debts.

Louisiana.— Sevier *v.* Gordon, 23 La. Ann. 212, district courts no jurisdiction.

Missouri.— Priest *v.* Spier, 96 Mo. 111, 9 S. W. 12.

New Hampshire.— Lebanon Sav. Bank *v.* Waterman, 65 N. H. 88, 17 Atl. 577.

New York.— See Hogan *v.* Kavanaugh, 138 N. Y. 417, 34 N. E. 292.

Oregon.— Russell *v.* Lewis, 3 Oreg. 380.

Pennsylvania.— Miskimins' Appeal, 114 Pa. St. 530, 6 Atl. 743; Norris *v.* Farrell, 11 Phila. 271.

Texas.— Rogers *v.* Kennard, 54 Tex. 30.

Wisconsin.— See Morgan *v.* Hammett, 23 Wis. 30, holding that the circuit court has no jurisdiction to license an administrator to sell real estate to pay debts unless the county judge is disqualified to act.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1375.

Sale or mortgage.— It is also within the exclusive jurisdiction of the orphans' court having jurisdiction of the accounts of an executor or administrator to determine whether money should be raised by sale or mortgage of the real estate. Spencer *v.* Jennings, 114 Pa. St. 618, 8 Atl. 2.

Sale for payment of legacies.— The court of chancery can decree the legacies to be a charge on the land and order its sale for their payment if the devisees do not pay them, but in such case the order of sale would be only in execution of an authority which the court on a construction of the will finds to be given thereby, and such sale cannot be ordered upon a bill filed by the executor unless all of the devisees are made parties and submit themselves to the decree of the court. Rambo *v.* Rumer, 4 Del. Ch. 9.

Disqualification of judge of court of probate jurisdiction.— Where on an application to the court of common pleas in which the administration of testator's estate was pending for the sale of land to pay debts, the judge was disqualified, and thereupon certified the cause to the circuit court as authorized by Mo. Rev. St. (1899) § 1760, such court had jurisdiction to order a sale. Meddis *v.* Kenney, 176 Mo. 200, 75 S. W. 633, 98 Am. St. Rep. 496. But, under the Wisconsin statute, where, from a supposed but not actual disqualification of the county judge, a license for an administrator's sale of real estate was issued by the circuit judge, such order of sale was *coram non judice*, and the sale made thereunder absolutely void. Morgan *v.* Hammett, 23 Wis. 30.

Foreclosure of mortgage.— A district court which has regularly acquired jurisdiction of a suit against an administrator to foreclose a mortgage can decree a sale of the mortgaged premises; but where the claim has been presented to the administrator and probate court, and been allowed, the mortgagee cannot go into the district court for an order of sale. Belloc *v.* Rogers, 9 Cal. 123.

99. *Florida.*— Hays *v.* McNealy, 16 Fla. 409, holding that a statute vesting jurisdiction in the circuit court to sell lands belonging to intestate estates to pay debts did not repeal a prior statute vesting a like authority in the judge of probate.

Georgia.— Equity has concurrent jurisdiction (McGowan *v.* Lufburrow, 82 Ga. 523, 9 S. E. 427, 14 Am. St. Rep. 178), but leave to

statute vesting jurisdiction to order sales in the courts of probate, or in a case where such statutes do not apply, the jurisdiction for this purpose rests in the courts of equity.[1] As a general rule the court of the county where the letters testamentary or of administration were granted and where the administration is pending has the exclusive power to order a sale of decedent's realty regardless of whether or not the land is situated within such county, if it is within the state;[2] but in a few states a different view has been asserted and it has been held that the application must be made to the court of the county in which the land is

sell is usually to be obtained from the court of ordinary and not from a court of equity (Knapp *v.* Harris, 60 Ga. 398. See also Jones *v.* Lamar, 34 Fed. 454).

Iowa.— The district court has general jurisdiction, and its powers are of such a nature as to give it cognizance of proceedings by creditors to compel an administratrix to sell real estate for the payment of debts; and it is not ousted of this jurisdiction by the granting of letters of administration by the county court. Waples *v.* Marsh. 19 Iowa 381.

North Carolina.— Johnson *v.* Futrell, 86 N. C. 122 (jurisdiction to order sale not exclusively in clerk of superior court but may be exercised by the judge); Smythe *v.* Henry, 41 Fed. 705.

South Carolina.— Shaw *v.* Barksdale, 25 S. C. 204, court of common pleas as well as court of probate has jurisdiction.

Tennessee.— Allen *v.* Shanks, 90 Tenn. 359, 16 S. W. 715; Waddell *v.* Waddell, (Ch. App. 1897) 42 S. W. 46; Connell *v.* Walker, 6 Lea 709; Kindell *v.* Titus, 9 Heisk. 727; Fleming *v.* Talliafer, 4 Heisk. 352.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1375.

1. *Alabama.*— See Jordan *v.* Hardie, 131 Ala. 72, 31 So. 504; Wilson *v.* Crooks, 17 Ala. 59.

District of Columbia.— Richardson *v.* Penicks, 1 App. Cas. 261. See also Creswell *v.* Kennedy, 3 MacArthur 78.

Maryland.— Young *v.* Twigg, 27 Md. 620; Wyse *v.* Smith, 4 Gill & J. 295; Tyson *v.* Hollingsworth, 1 Harr. & J. 469.

North Carolina.— See Williams *v.* Williams, 17 N. C. 69, 22 Am. Dec. 729.

Ohio.— See Piatt *v.* St. Clair, 6 Ohio 227, Wright 261.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1464.

Jurisdiction of equity inherent and not dependent upon statute.— Allen *v.* Shanks, 90 Tenn. 259, 16 S. W. 715; Waddell *v.* Waddell, (Tenn. Ch. App. 1897) 42 S. W. 46; Britain *v.* Cowen, 5 Humphr. (Tenn.) 315 (holding that the jurisdiction of the chancery court to decree a sale of a decedent's real estate for payment of his debts will not be defeated on the ground that the bill is not filed in the district where the land lies, if the court have jurisdiction on general chancery principles, independent of the special jurisdiction conferred by statute); Smythe *v.* Henry, 41 Fed. 705.

Breach of condition attached to devise.— The orphans' court cannot decree a sale by executors of land devised on breach of a condition attached to the devise that the devisees pay a certain sum to the executors within a stated time, as the only remedy in such case is by a bill in the chancery court. Skillman *v.* Van Pelt, 1 N. J. Eq. 511.

When the sale could be effected by proceedings in the probate court under the statute, a court of equity will not entertain a bill by an executor to sell for payment of debts. Leslie *v.* Willey, Wright (Ohio) 147.

2. *Alabama.*— Calloway *v.* Kirkland, 50 Ala. 401, entire tract lying in two counties.

Arkansas.— Apel *v.* Kelsey, 47 Ark. 413, 2 S. W. 102; Gordon *v.* Howell, 35 Ark. 381.

California.— See *In re* Scott, 15 Cal. 220.

Illinois.— Rev. St. (1899) c. 3, § 98. The act of 1829 required that application should be made to the circuit court of the county "in which administration shall have been granted," but under the act of 1827 an application to the circuit court of the county in which the real estate was situated was sufficient. Doe *v.* Hileman, 2 Ill. 323.

Indiana.— Vail *v.* Rinehart, 105 Ind. 6, 4 N. E. 218; *Ex p.* Shockley, 14 Ind. 413. *Contra*, Williamson *v.* Miles, 25 Ind. 55 [*followed* in Jones *v.* Levi, 72 Ind. 586], holding that the courts of the county where letters were granted and of that where the land is situated have concurrent jurisdiction.

Iowa.— Van Horn *v.* Ford, 16 Iowa 578.

Kentucky.— Walker *v.* Yowell, 94 Ky. 205, 21 S. W. 873, 14 S. W. 829; Girty *v.* Logan, 6 Bush 8.

Louisiana.— Alexander *v.* Bourdier, 43 La. Ann. 321, 8 So. 876; Wisdom *v.* Parker, 31 La. Ann. 52; Chaney *v.* Gray, 7 Rob. 144; State *v.* Probate Judge St. Jean Baptiste Parish, 17 La. 500.

Nebraska.— Stack *v.* Royce, 34 Nebr. 833, 52 N. W. 675. See also Dietrichs *v.* Lincoln, etc., R. Co., 14 Nebr. 355, 15 N. W. 728.

New York.— Long *v.* Olmsted, 3 Dem. Surr. 581.

Ohio.— Avery *v.* Dufrees, 9 Ohio 145; Avery *v.* Pugh, 9 Ohio 67. *Contra*, under statute of 1795. Davis *v.* Livingston, 6 Ohio 225; Ludlow *v.* McBride, 3 Ohio 240.

Pennsylvania.— Under the act of March 29, 1832, the orphan's court of the county in which the administration is pending has full power to order the sale or mortgage of so much of the land situated in such county as it deems necessary. If, however, the real estate is situated in another county, the court of the county where the administration is pending has power merely to authorize the executor or administrator to raise,

situated.[3] Where the court which has ordered a sale of a decedent's realty is one which under the statute could properly have taken jurisdiction for that purpose the presumption is always in favor of the court actually having had jurisdiction.[4] Where the court has acquired jurisdiction it is not ousted of such jurisdiction by a cross bill of the widow for dower and the proceedings had thereunder.[5] Where jurisdiction is conferred only upon the probate court of the county where the will has been proved or administration granted it follows that no court can take jurisdiction of a proceeding to sell lands until a will has been proved or administration granted,[6] and it has also been held that the probate court has no authority to order a sale of a decedent's realty until there has been the grant of regular administration upon the estate and an order directing a sale by a special administrator is void.[7]

3. Time For Application — a. In General. It has been held premature to decree a sale of the realty before adjudicating the claims of creditors and their respective priorities in order to ascertain the precise amount chargeable upon such realty,[8] or to decree a sale of the whole of the land of a decedent in satisfaction of claims of his creditors before dower has been assigned to the widow in kind or it is ascertained that it cannot be so assigned and a money compensation to the widow in lieu of dower has been ascertained.[9] Where the personal property has been appraised and is known to be insufficient to pay the debts of the decedent the representative may at once apply for an order to sell the realty and need not wait until the debts are allowed,[10] and so also where personal assets, although good, are not immediately available the court need not delay a sale of land to pay the debts in excess of such assets until they can be actually applied.[11] A probate court does not lose jurisdiction to order the sale of a decedent's land for the payment of debts, if the order is made within the period to which the time for the payment of claims may properly be extended, although the extension may not have been actually made.[12] The court cannot as a rule order or license a sale after the succession has been actually closed and the executor or administrator been discharged,[13] but a probate license to sell or mortgage real estate is not necessarily void because granted after the expiration of the statutory time allowed

from the real estate so situated, such sum of money as is necessary, designating the amount; and the orphans' court of the county where the real estate is situated, upon presentation of such decree and proper application, has the power to make the order of sale or mortgage of so much and such parts of the land as will in its opinion be necessary to raise the sum specified. Under this form of procedure the orphans' court of the county having jurisdiction of the accounts has the exclusive power to pass upon the propriety of a sale or mortgage of the decedent's land, and the orphans' court of the county where the land is situated, being presumed to know what part and how much of the land it is necessary and expedient to sell to raise the sum specified, has jurisdiction to actually order the sale, but such jurisdiction is wholly dependent upon the decree of the court having jurisdiction of the account. Spencer *v.* Jennings, 114 Pa. St. 618, 8 Atl. 2, 123 Pa. St. 184, 16 Atl. 426; Lane *v.* Nelson, 79 Pa. St. 407. See also Burkhardt's Estate, 6 Pa. Co. Ct. 374 [*affirmed* in 1 Mona. 474].

Wisconsin.— See Reynolds *v.* Schmidt, 20 Wis. 374.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1374.

3. Hopkins *v.* Meir, (N. J. Ch. 1890) 19 Atl. 264; Pittenger *v.* Pittenger, 3 N. J. Eq. 156; Ellis *v.* Adderton, 88 N. C. 472. Proceedings for the sale of a decedent's land to pay debts may be taken in any of the counties in which the decedent had lands. Nanthala Marble, etc., Co. *v.* Thomas, 76 Fed. 59.

4. Cassell *v.* Joseph, 184 Ill. 378, 56 N. E. 413; Robb *v.* Howell, 180 Ill. 177, 54 N. E. 324; Swearengen *v.* Gulick, 67 Ill. 208; Nantahala Marble, etc., Co. *v.* Thomas, 76 Fed. 59.

5. Swearengen *v.* Gulick, 67 Ill. 208.

6. Whitesides *v.* Barber, 24 S. C. 373.

7. Long *v.* Burnett, 13 Iowa 28, 81 Am. Dec. 420.

8. Simmons *v.* Lyles, 27 Gratt. (Va.) 922; Buchanan *v.* Clark, 10 Gratt. (Va.) 164; Cralle *v.* Meem, 8 Gratt. (Va.) 496.

9. Simmons *v.* Lyles, 27 Gratt. (Va.) 922. See also White *v.* White, 16 Gratt. (Va.) 264, 80 Am. Dec. 706.

10. Randel *v.* Randel, 64 Kan. 254, 67 Pac. 837.

11. Doherty *v.* Choate, 16 Lea (Tenn.) 192.

12. Pratt *v.* Houghtaling, 45 Mich. 457, 8 N. W. 72.

13. Servier *v.* Gordon, 25 La. Ann. 231; Hoffman *v.* Beard, 32 Mich. 218.

Where the heirs have been put in possession after partition among themselves an or-

for closing up the estate if it has not been closed up in fact and if the will contemplates that it shall remain in the hands of the executor for a longer period.[14]

b. Statutes of Limitation.[15] The general statutes of limitation do not as a rule apply to an application for the sale of a decedent's real estate,[16] although a contrary view has been asserted,[17] and it has also been held the court should not license a sale of land to pay debts against an estate after the legal remedy for their recovery has been barred by lapse of time.[18] In some jurisdictions there

der to sell succession property cannot be granted. Servier *v.* Gordon, 25 La. Ann. 231.

Expiration of time before sale can be made. — Where a license to sell was granted within four years and six months from the appointment of the original administrator the fact that more than that period would elapse before the sale could be made thereunder did not deprive the court of jurisdiction. *In re* Beniteau, 88 Mich. 152, 50 N. W. 110, where the court said that Hoffman *v.* Beard, 32 Mich. 218, has been substantially overruled and is not good law.

14. Church *v.* Holcomb, 45 Mich. 29, 7 N. W. 167; Larzelere *v.* Starkweather, 38 Mich. 96 [*distinguishing* Hoffman *v.* Beard, 32 Mich. 218].

15. See, generally, LIMITATIONS OF ACTIONS.

16. *California.*— Arguello's Estate, 85 Cal. 151, 24 Pac. 641, while the administration is pending.

Illinois.— People *v.* Lanham, 189 Ill. 326, 59 N. E. 610 [*reversing* 91 Ill. App. 101], doctrine of laches rather than of legal limitation applies. See also McCollister *v.* King, 10 Ill. App. 243.

Iowa.— See McCrary *v.* Tasker, 41 Iowa 255.

New York.—Skidmore *v.* Romaine, 2 Bradf. Surr. 122.

Ohio.— The right of an executor or administrator to obtain an order of sale for the payment of debts as against the heirs is wholly unaffected by the statute of limitations (Lafferty *v.* Shinn, 38 Ohio St. 46 [*following* Taylor *v.* Thorn, 29 Ohio St. 569]), but it has been held that the lapse of six years from the time the right to payment of a legacy accrues and the deficiency of personal assets is ascertained constitutes a bar to an action by an administrator *de bonis non* with the will annexed to sell the real estate for the payment of the legacy (Longley *v.* Stump, 9 Ohio Dec. (Reprint) 234, 11 Cinc. L. Bul. 247).

Tennessee.— Henry *v.* Mills, 1 Lea 144.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1377.

Continuation of original proceedings.— Where an administrator obtained leave to sell land to pay debts, but for good reasons no sale was made for four years, and the administrator then again petitioned for leave to sell, it was held that the second petition could be considered a continuation of the proceedings had under the first petition, and that statutes of limitation were in no way applicable. *In re* Montgomery, 60 Cal. 645, where the court refused to decide whether the statute would have been applicable in any event.

17. Thus in Indiana the fifteen years' statute has been held applicable. Scherer *v.* Ingerman, 100 Ind. 428, 11 N. E. 8, 12 N. E. 304; Cole *v.* Lafontaine, 84 Ind. 446. And an action by an executor or administrator to sell lands fraudulently conveyed by his testator or intestate in his lifetime must be commenced within five years after the death of the decedent. Bushnell *v.* Bushnell, 88 Ind. 403.

18. Tarbell *v.* Parker, 106 Mass. 347; Hoffman *v.* Beard, 32 Mich. 218; *In re* Godfrey, 4 Mich. 308; Carman *v.* Brown, 4 Dem. Surr. (N. Y.) 96. But *compare* Cooper *v.* Robinson, 2 Cush. (Mass.) 184.

When debts have been proved within the time limited a sale for their payment may be ordered after the expiration of such time. Edmunds *v.* Rockwell, 125 Mass. 363.

Where an administrator neglected to give notice of his appointment a license to him to sell real estate for the payment of debts was valid, although granted more than four years after his appointment, that being the time limited for the bringing of actions against him. Hudson *v.* Hulbert, 15 Pick. (Mass.) 423.

Effect of statute limiting suits against heirs.— A petitioner to the surrogate's court for the sale of a decedent's land to satisfy a judgment is not, upon the objection of the statute of limitations against his claims, entitled to the benefit of 2 N. Y. Rev. St. p. 109, § 53, prohibiting the bringing of suits against heirs or devisees to charge them with a decedent's debts within the three years from the grant of letters, as this section of the statute applies to actions in the supreme court only. Mead *v.* Jenkins, 4 Redf. Surr. (N. Y.) 369.

Statutory limitation of time to institute proceedings for sale.— N. Y. Code Civ. Proc. § 2750, which provides that a creditor may institute a proceeding to sell realty within three years after the issue of letters of administration, does not extend the statute of limitations indefinitely, so that such proceedings may be instituted within that time, regardless of the period that has elapsed before administration was granted. Church *v.* Olendorf, 49 Hun (N. Y.) 439, 3 N. Y. Suppl. 557.

The time within which action cannot be brought against the heirs is not to be included in computing the elapsed period. Mead *v.* Jenkins, 95 N. Y. 31 [*affirming* 27 Hun 570, 29 Hun 253].

have, however, been enacted particular statutes of limitation with reference to the time within which application must be made for an order or license to sell,[19] which

A statute limiting the lien of unsecured debts of a decedent is not like a statute of limitation which may or may not be pleaded, but it raises an absolute bar to any right to collect out of the real estate unless action was brought or the claim filed, except by the consent of the heirs. Hoover's Estate, 9 Kulp (Pa.) 126.

Where the lien of debts upon real estate has expired by reason of the five-year limitation prescribed by the Pennsylvania act of Feb. 24, 1834, the orphans' court has no jurisdiction to direct the executor or administrator to sell the real estate for the payment of such debts (Smith *v.* Wildman, 178 Pa. St. 245, 35 Atl. 1047, 56 Am. St. Rep. 760, 36 L. R. A. 834), and an adjudication confirming the account of an executor does not create a lien on the real estate if the lien of the debt was lost by lapse of time before the account was filed (Battersby *v.* Castor, 181 Pa. St. 555, 37 Atl. 572). The limitation under the statute referred to does not, however, apply to the sale of real estate of a decedent where any one of the debts for which it is ordered as a payment is "secured by mortgage or judgment"; but in such case the orphans' court has jurisdiction to order a sale more than five years after the decease, and the purchaser thereat takes a valid title. Bindley's Appeal, 69 Pa. St. 295.

Application within time limited for presentation of claims.— Where the owner of a mortgage on lands of a decedent applies to the probate court, under Wash. Code, § 1523, to have the mortgage redeemed out of the personal assets of the estate, or, in the alternative provided by section 1524, to have the land sold and the proceeds applied on the debt, and any deficiency remaining, after exhausting the land, satisfied out of decedent's other estate, he must apply within the year allowed by section 1467 for presentation of claims against the estate of a decedent. Scammon *v.* Ward, 1 Wash. 179, 23 Pac. 439.

19. Slocum *v.* English, 62 N. Y. 494 [*affirming* 4 Thomps. & C. 266]; Matter of Van Vleck, 32 Misc. (N. Y.) 419, 66 N. Y. Suppl. 727; *In re* Topping, 9 N. Y. Suppl. 447, 18 N. Y. Civ. Proc. 115, 2 Connoly Surr. (N. Y.) 187; Fitch *v.* Whitbeck, 2 Barb. Ch. (N. Y.) 161; U. S. Life Ins. Co. *v.* Jordan, 5 Redf. Surr. (N. Y.) 207 (holding that the three-year limitation in Code Civ. Proc. § 2750, to proceedings to sell real estate to pay the decedent's debts, applies where the letters issued more than three years before Sept. 1, 1880, and the personal representatives had not before that date accounted to the surrogate, and that in such case no right having accrued under section 3352, nor under Laws (1880), c. 245, § 3, Code Civ. Proc. c. 4, does not apply); Mead *v.* Jenkins, 4 Redf. Surr. (N. Y.) 369; Ferguson *v.* Broome, 1 Bradf. Surr. (N. Y.) 10; Cornwall's Estate, Tuck. Surr. (N. Y.) 250. See also Church *v.* Olendorf, 49 Hun (N. Y.) 439, 3 N. Y. Suppl. 557.

The filing of a petition within the time limited gives the court jurisdiction, although the citation is not returnable until after the expiration of that period (*In re* Topping, 9 N. Y. Suppl. 447, 18 N. Y. Civ. Proc. 115, 2 Connoly Surr. (N. Y.) 187), or even though the citation is not issued until after the expiration of such time (Matter of Van Vleck, 32 Misc. (N. Y.) 419, 66 N. Y. Suppl. 727).

Effect of order in another state enjoining proceedings against estate.— An order by a court in one state enjoining creditors of a decedent from proceeding against the estate otherwise than by proving their demands before certain commissioners did not restrain a creditor from legally enforcing his claim against the estate out of real property belonging to it and situated in another state so as to prevent the running of limitations against a proceeding for that purpose during the period in which the order was in force. Mowry *v.* McQueen, 80 Minn. 385, 83 N. W. 348.

Revesting of title in heir.— A statute requiring an application for sale to be made within three years after the grant of letters if the heir or devisee has aliened the land applies even though the title has meanwhile revested in the heir. Dodge *v.* Stevens, 105 N. Y. 585, 12 N. W. 759 [*reversing* 40 Hun 443].

Limitation applicable only in favor of bona fide purchasers for value.— Mead *v.* Jenkins, 95 N. Y. 31 [*affirming* 27 Hun 570, 29 Hun 253]; Mead *v.* Jenkins, 4 Redf. Surr. (N. Y.) 369.

Under the West Virginia statute which confers upon the personal representative the right to institute a suit to sell the real estate, and provides that if he does not bring such suit within six months after his qualification, any creditor of the decedent may institute and prosecute such suit, the right of the representative to institute a suit is not lost upon the expiration of six months after his qualification, but is only lost when suit is brought by a creditor. Reinhardt *v.* Reinhardt, 21 W. Va. 76.

A debt in judgment at the time of decedent's death is not within a statute requiring action within two years after the decedent's death to sell realty, but realty may be ordered sold for the payment of such a debt, even though a number of years (in the case at bar nineteen) have elapsed since the death of the decedent. Hoover's Estate, 9 Kulp (Pa.) 126.

Repealed statute.— Minn. Laws (1879), c. 18 (St. (1894), § 4598), authorizing a sale to be made within one year after the making of the order or within such further time, not exceeding two years, as might be allowed by the judge of probate, operated to

statutes as a rule begin to run from the time of the appointment or qualification of the executor or administrator.[20]

c. Reasonable Time and Laches. Apart from statute an application for an order or license to sell must be made within a reasonable time,[21] and the right to obtain an order or license to sell may be lost by laches or delaying without excuse for an unreasonable time to make the proper application to the court.[22] But even

repeal Laws (1876), c. 37, § 3, so far as the latter limited the time within which the real estate of a deceased person might be sold for payment of debts to three years from the date of death. Culver *v.* Hardenbergh, 37 Minn. 225, 33 N. W. 792.

20. Slocum *v.* English, 62 N. Y. 494 [*affirming* 4 Thomps. & C. 266]; Cornwall's Estate, Tuck. Surr. (N. Y.) 250.

Statute runs from original grant.— The statute begins to run from the time of the original granting of letters of administration, and not, in case of a change of administrators, from the time of granting letters to the one who made the sale. Slocum *v.* English, 62 N. Y. 494 [*affirming* 4 Thomps. & C. 266].

21. *Illinois.*— See Myer *v.* McDougal, 47 Ill. 278.

Iowa.— It has been laid down as a general rule that an application of an executor to sell real estate of the decedent for the payment of debts will not be sustained unless made within eighteen months from the time he gives notice of his appointment unless the peculiar circumstances of the case are such as to make it the duty of a court of equity to depart from this general rule, and that under such circumstances the application must be made within a reasonable time. McCrary *v.* Tasker, 41 Iowa 255 [*followed* in Waters *v.* Tasker, 41 Iowa 263; Waters *v.* Crossen, 41 Iowa 261].

Minnesota.— State *v.* Ramsey County Probate Ct., 40 Minn. 296, 41 N. W. 1033.

Missouri.— Gunby *v.* Brown, 86 Mo. 253 (sale under order procured after twelve years enjoined); Barlow *v.* Clark, 67 Mo. App. 340.

New York.— Mooers *v.* White, 6 Johns. Ch. 360, holding that ordinarily a reasonable time is one year.

Rhode Island.— See West Greenwich Probate Ct. *v.* Carr, 20 R. I. 592, 40 Atl. 844.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1378.

Reasonable time may be fixed by analogy to statute of limitations. Rickard *v.* Williamson, 7 Wheat. (U. S.) 59, 5 L. ed. 398. See also Myer *v.* McDougal, 47 Ill. 278; McCoy *v.* Morrow, 18 Ill. 519, 68 Am. Dec. 578.

Year after final settlement of accounts.— After the expiration of one year from the final settlement of the accounts of an intestate in the court of probate by the administrator, no application on the part of such administrator to sell the real estate of the intestate to satisfy debts still due will be sustained, except the circumstances of the particular case are of such a peculiar character as to make it the duty of a court of equity to depart from this general rule. Dorman *v.* Lane, 6 Ill. 143.

Seven years.— In the absence of a statute, seven years has been adopted by the courts of Illinois as the period within which an action must be brought to have the estate of an intestate sold for payment of his debts after letters of administration have been granted. McKean *v.* Vick, 108 Ill. 373; Furlong *v.* Riley, 103 Ill. 628; Bishop *v.* O'Conner, 69 Ill. 431; Moore *v.* Ellsworth, 51 Ill. 308; Rosenthal *v.* Renick, 44 Ill. 202; Brown *v.* Morgan, 84 Ill. App. 233.

While realty in hands of heirs.— In Rhode Island it has been laid down that courts of equity may authorize the sale of a decedent's realty for his debts at any time while such realty remains in the hands of his heirs. Mowry *v.* Robinson, 12 R. I. 152.

22. *Alabama.*— Bozeman *v.* Bozeman, 83 Ala. 416, 3 So. 784, 82 Ala. 389, 2 So. 732.

Arkansas.— Black *v.* Robinson, 70 Ark. 185, 68 S. W. 489 (holding that delay for more than seven years after the grant of letters of administration before attempting to subject the lands of an intestate to the payment of his debts, without other excuse than that the lands were subject to overflow, is such laches as will bar an application to sell the interest of an infant heir; but it is otherwise as to the interest of an heir who was an administrator during six years, and was chiefly responsible for the delay); Brogan *v.* Brogan, 63 Ark. 405, 39 S. W. 58, 58 Am. St. Rep. 124; Mays *v.* Rogers, 37 Ark. 155.

California.— Wingerter *v.* Wingerter, 71 Cal. 105, 11 Pac. 853; *In re* Crosby, 55 Cal. 574.

Illinois.— McKean *v.* Vick, 108 Ill. 373; Furlong *v.* Riley, 103 Ill. 628; Reed *v.* Colby, 89 Ill. 104; Wolf *v.* Ogden, 66 Ill. 224; Langworthy *v.* Baker, 23 Ill. 484; McCollister *v.* King, 10 Ill. App. 243.

Iowa.— Cresswell *v.* Slack, 68 Iowa 110, 26 N. W. 42; McCrary *v.* Tasker, 41 Iowa 255 [*followed* in Waters *v.* Tasker, 41 Iowa 263; Waters *v.* Crossen, 41 Iowa 261].

Maine.— Smith *v.* Dutton, 16 Me. 308; Nowell *v.* Nowell, 8 Me. 220.

Michigan.— *In re* Godfrey, 4 Mich. 308.

Minnesota.— State *v.* Ramsey County Probate Ct., 40 Minn. 296, 41 N. W. 1033.

Mississippi.— Ferguson *v.* Scott, 49 Miss. 500.

New Hampshire.—Hatch *v.* Kelly, 63 N. H. 29; Hall *v.* Woodman, 49 N. H. 295.

New York.— Jackson *v.* Robinson, 4 Wend. 436; Ferguson *v.* Broome, 1 Bradf. Surr. 10. See also Olyphant *v.* Phyfe, 27 Misc. 64, 58 N. Y. Suppl. 217.

a delay for a considerable length of time will not result in a loss of the right where such delay is excused or a good reason therefor is shown.[23]

4. Parties — a. In General. A proceeding for the sale of a decedent's property should ordinarily be adversary and not *ex parte*,[24] although it may be *ex parte* when the representative and the heirs join in a petition to sell land for assets.[25] Where there are two or more executors or administrators all should join in a petition for an order to sell lands to pay debts.[26] If the application for a sale be made by a person other than the personal representative, the personal representative must at all events be made a party to the proceedings.[27] The

Pennsylvania.— Hunt's Appeal, 4 Pa. Cas. 514, 7 Atl. 594.

South Carolina.— Gregory *v.* Rhoden, 24 S. C. 90.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1378.

The decision of the probate court that the delay in applying for an administrator's sale was not unreasonable is conclusive when collaterally assailed. Howell *v.* Jump, 140 Mo. 441, 41 S. W. 976.

Circumstances amounting to laches see Battersby *v.* Castor, 6 Pa. Dist. 73, 19 Pa. Co. Ct. 108.

Circumstances not showing laches see Abbott *v.* Downs, 168 Mass. 481, 47 N. E. 94.

An unreasonable delay in urging relief after filing the petition may warrant a dismissal of the proceedings on the ground of laches. Matter of Braker, 48 N. Y. App. Div. 443, 62 N. Y. Suppl. 859; Allen *v.* Sanford, 55 Hun (N. Y.) 607, 8 N. Y. Suppl. 182.

Where a testator's realty is impliedly converted into personalty by his will, lapse of time will not exempt it from liability for debts in default of sufficient personal assets. Mustin's Estate, 8 Pa. Dist. 180.

23. *Arkansas.*—.Brogan *v.* Brogan, 63 Ark. 405, 39 S. W. 405, 58 Am. St. Rep. 124; Killough *v.* Hinton, 54 Ark. 65, 14 S. W. 1092, 26 Am. St. Rep. 19.

California.— Arguello's Estate, 85 Cal. 151, 64 Pac. 641.

Illinois.— Judd *v.* Ross, 146 Ill. 40, 34 N. E. 531; Bursen *v.* Goodspeed, 60 Ill. 277; Moore *v.* Ellsworth, 51 Ill. 308.

Indiana.— Nettleton *v.* Dixon, 2 Ind. 446.

Iowa.— Reed *v.* Reed, 94 Iowa 569, 63 N. W. 329; Schlab *v.* Holderbaum, 80 Iowa 394, 45 N. W. 1051; Conger *v.* Cook, 56 Iowa 117, 8 N. W. 782.

Kentucky.— Boyd *v.* Emmons, 103 Ky. 393, 45 S. W. 364, 20 Ky. L. Rep. 107.

Massachusetts.— Palmer *v.* Palmer, 13 Gray 326; Cooper *v.* Robinson, 2 Cush. 184. See also *In re* Richmond, 2 Pick. 567.

Michigan.— Flood *v.* Strong, 108 Mich. 561, 56 N. W. 473.

Mississippi.— Yandell *v.* Pugh, 53 Miss. 295.

Missouri.— Macey *v.* Stark, 116 Mo. 481, 21 S. W. 1088 [*followed* in Macey *v.* Pitillo, (1893) 21 S. W. 1094]; Barlow *v.* Clark, 67 Mo. App. 340.

New York.— Matter of Howard, 11 Misc. 224, 32 N. Y. Suppl. 1098; Mooers *v.* White, 6 Johns. Ch. 360.

Oregon.— *In re* Smith, 43 Oreg. 595, 73 Pac. 336, 75 Pac. 133.

Pennsylvania.— Paschall's Estate, 14 Phila. 242.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1378.

A promise by heirs to pay debts after the termination of a life-estate may afford an excuse for delay in applying for leave to sell real estate. McCollister *v.* King, 10 Ill. App. 243.

Circumstances not excusing delay see Brogan *v.* Brogan, 63 Ark. 405, 39 S. W. 58, 58 Am. St. Rep. 124.

24. See Gladson *v.* Whitney, 9 Iowa 267; Wright *v.* Steed, 10 La. Ann. 238.

25. See Harris *v.* Brown, 123 N. C. 419, 31 S. E. 877.

26. Hannum *v.* Day, 105 Mass. 33; Personette *v.* Johnson, 40 N. J. Eq. 173 (or, if both or all do not join, the record should show why the executor or executors who do not apply do not join in the application); Fitch *v.* Witbeck, 2 Barb. Ch. (N. Y.) 161. *Contra,* Jackson *v.* Robinson, 4 Wend. (N. Y.) 436.

27. *District of Columbia.*— Plumb *v.* Bateman, 2 App. Cas. 156.

Illinois.— McDowell *v.* Cochran, 11 Ill. 31.

Iowa.— Postlewait *v.* Howes, 3 Iowa 365.

Kentucky.— Perry *v.* Seitz, 2 Duv. 122; Robertson *v.* McDaniel, 5 J. J. Marsh. 11.

Louisiana.— See Wright *v.* Steed, 10 La. Ann. 238.

Maryland.— Lynn *v.* Gephart, 27 Md. 547; Piper *v.* Tuck, 26 Md. 208; Carey *v.* Dennis, 13 Md. 1; Baltimore *v.* Chase, 2 Gill & J. 376; David *v.* Grahame, 2 Harr. & G. 94; Tyler *v.* Bowie, 4 Harr. & J. 333; Hammond *v.* Hammond, 2 Bland 306.

Pennsylvania.— Raessler's Estate, 5 Pa. Dist. 776, 19 Pa. Co. Ct. 161.

Tennessee.— See Wright *v.* Thornton, 87 Tenn. 74, 9 S. W. 429.

United States.— U. S. Bank *v.* Ritchie, 8 Pet. 128, 8 L. ed. 890; Allen *v.* Simons, 1 Fed. Cas. No. 237, 1 Curt. 122.

England.— Knight *v.* Knight, 3 P. Wms. 331, 24 Eng. Reprint 1088.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1381.

Resignation of representative.— A decree for a sale of a decedent's land to pay debts rendered on the application of creditors is void where the administrator, by reason of his previous resignation, which has been

heirs or devisees are as a general rule considered necessary parties to a proceeding to sell land whether for the payment of debts or for distribution,[28] for the reason that the title of an heir or devisee cannot be divested by the proceedings

accepted, is not before the court in his representative capacity at the time of its rendition. Wright *v.* Thornton, 87 Tenn. 74, 9 S. W. 429.

Where there are no personal assets, and hence there is no qualified executor or administrator, a creditor's bill to subject realty to the payment of debts may be maintained without the presence of an executor or administrator. Plumb *v.* Bateman, 2 App. Cas. (D. C.) 156. See also Birely *v.* Staley, 5 Gill & J. (Md.) 432, 25 Am. Dec. 303.

Foreign administrators.— Although there are administrators who have been duly qualified and entered upon the performance of their duties and taken possession of the personal assets in the state of their qualification, there is no administration of which a court of another state can take judicial cognizance on a creditor's bill for the sale of realty, but it will be assumed for the purpose of such suit that there are no executors or administrators. The rule that a court of equity cannot proceed with a creditor's bill against the real estate of a decedent until the executor or administrator of the personalty is made a party to the suit means an executor qualified or an administrator appointed within the jurisdiction who can be reached by the process of the court. Plumb *v.* Bateman, 2 App. Cas. (D. C.) 156.

28. *Alabama.*— See Davis *v.* Tarver, 65 Ala. 98. But *compare* Neville *v.* Kenney, 125 Ala. 149, 28 So. 452, 82 Am. St. Rep. 230, holding that the failure to make one of the heirs a party does not render the sale void or open to collateral attack by him.

Florida.— Wilson *v.* Fridenburg, 19 Fla. 461, 21 Fla. 386; Young *v.* McKinnie, 5 Fla. 542, decree not binding upon an infant heir not made a party as to the extent of his interest.

Illinois.— Burr *v.* Bloemer, 174 Ill. 638, 51 N. E. 821; Robertson *v.* Wheeler, (1896) 44 N. E. 870; Hopkins *v.* McCann, 19 Ill. 113; Eaton *v.* Bryan, 18 Ill. 525; Stone *v.* Wood, 16 Ill. 177. But *compare* Swearengen *v.* Gulick, 67 Ill. 208; Gibson *v.* Roll, 27 Ill. 88, 81 Am. Dec. 219 [*overruling In re* Sturms, 25 Ill. 390], as to infant heirs. And see Goudy *v.* Hall, 36 Ill. 313, 87 Am. Dec. 217.

Indiana.— Wood *v.* Wood, 150 Ind. 600, 50 N. E. 573; Sherry *v.* Denn, 8 Blackf. 542.

Iowa.— Gladson *v.* Whitney, 9 Iowa 267.

Maryland.— Bowen *v.* Gent, 54 Md. 555; Hammond *v.* Hammond, 2 Bland 306.

Mississippi.— Hargrove *v.* Baskin, 50 Miss. 194; Winston *v.* McLendon, 43 Miss. 254.

Nebraska.— Holmes *v.* Columbia Nat. Bank, (1903) 97 N. W. 26.

New York.— Holly *v.* Gibbons, 176 N. Y. 520, 68 N. E. 889, 98 Am. St. Rep. 694, 177 N. Y. 401, 69 N. E. 731; Jenkins *v.* Young, 35 Hun 569.

North Carolina.— McNeill *v.* Fuller, 121 N. C. 209, 28 S. E. 299; Dickens *v.* Long, 109 N. C. 165, 13 S. E. 841; Thompson *v.* Cox, 53 N. C. 311; Davis *v.* Howcott, 21 N. C. 460.

Ohio.— Adams *v.* Jeffries, 12 Ohio 253, 40 Am. Dec. 477.

Oregon.— Fiske *v.* Kellogg, 3 Oreg. 503.

South Carolina.— McLaurin *v.* Rion, 24 S. C. 407; Moore *v.* Smith, 24 S. C. 316; Leroy *v.* Charleston, 20 S. C. 71, heirs of a trustee under a special trust by the will.

Tennessee.— Jordan *v.* Maney, 10 Lea 135; Shields *v.* Alsup, 5 Lea 508; Bennett *v.* Kennedy, 3 Head 674; Elliott *v.* Cochran, 2 Sneed 468; Hinkle *v.* Shadden, 2 Swan 46; Frazier *v.* Pankey, 1 Swan 75; Estes *v.* Johnson, 10 Humphr. 223; Green *v.* Shaver, 3 Humphr. 139.

Virginia.— Hudgin *v.* Hudgin, 6 Gratt. 320, 52 Am. Dec. 124.

West Virginia.— Kilbreth *v.* Roots, 33 W. Va. 600, 11 S. E. 21, devisees should be made parties by name.

United States.— Sprague *v.* Litherberry, 22 Fed. Cas. No. 13,251, 4 McLean 442, stating Ohio law.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1381.

Contra.— Irwin *v.* Flynn, 110 La. 829, 34 So. 749; Tertron *v.* Comeau, 28 La. Ann. 633; Weaver's Appeal, 19 Pa. St. 416; Murphy's Appeal, 8 Watts & S. (Pa.) 165; Telfair *v.* Stead, 2 Cranch (U. S.) 407, 2 L. ed. 320, by the practice and law of Georgia. See also Wherry *v.* Bell, 2 Rob. (La.) 225, holding that where, by legal proceedings, fairly conducted, for a debt of the common ancestor of the parties, property has been judicially sold, the purchaser acquires a good title against an heir who subsequently makes himself known. But see Misner *v.* Fulshire, 21 La. Ann. 282, holding, however, that the omission to make the heirs parties was cured by their failure to make objections before the sale.

Existence of heirs presumed.— Gladson *v.* Whitney, 9 Iowa 267.

Infant heirs are necessary parties. Fiske *v.* Kellogg, 3 Oreg. 503. But an infant heir who has conveyed away his interest in the land is not a necessary party, for, although his deed is voidable at his election after attaining his majority, it is not void. Scruggs *v.* Foot, 19 S. C. 274.

Where a will has worked an equitable conversion by directing land to be sold by the trustee, and the proceeds invested, a sale is valid, although infant distributees are not made parties to the suit therefor, and although the petition sought a sale on an incorrect theory, sufficient cause for sale having been alleged, and general relief prayed for. Sloan *v.* Baltimore Safe-Deposit, etc., Co., 73 Md. 239, 20 Atl. 922.

Heirs of deceased heir.— On an application by an administrator to the probate court for

unless he is made a party.[29] The widow of the decedent is also a necessary party in some jurisdictions.[30] A mortgagee of the land is not a necessary party,[31] nor is a creditor or a person supposed to have a claim against the estate,[32] or a

the sale of his intestate's lands for the payment of his debts, the fact that one of the heirs of the intestate had died does not authorize the appointment of an administrator *ad litem* to represent the estate of such heir; but the heirs of said deceased heir, as successors in title to the real estate, are the proper representatives of the interest which resided in their predecessor, and they should be made parties to the proceeding. Poole *v.* Daughdrill, 129 Ala. 208, 30 So. 579.

Contingent remainder-men *in esse* and within the jurisdiction of the court are necessary parties. Farr *v.* Gilreath, 23 S. C. 502. But see Markle's Estate, 5 Pa. Dist. 47, 17 Pa. Co. Ct. 337.

If the lands have been devised the devisees are the only necessary parties defendant, and an heir of the testator, having no interest in the lands, is not a necessary party. Williams *v.* Williams, 49 Ala. 439. See also Pennsylvania L., etc., Ins. Co. *v.* Bauerle, 143 Ill. 459, 33 N. E. 166.

Where lands are specifically charged with the payment of debts by the will of the decedent, the heirs are not necessary parties to proceedings by creditors for the purpose of making their debts out of the real estate. Smith *v.* Wyckoff, 11 Paige (N. Y.) 49.

The interest devised is too remote to make a devisee a necessary party to a suit for subjecting the property to the payment of testator's debts where it is contingent on both testator's children dying without issue and a failure of the executrix to sell the property as she is authorized by the will to do. New *v.* Bass, 92 Va. 383, 23 S. E. 747.

Entry of appearance by administrator for heirs.— The written consent of the heirs, neither attested nor acknowledged, to a sale of decedent's property, does not authorize the administrator to enter an appearance for them in an action by him to sell the property, especially when he is interested in a lien debt against the estate. Jenkins *v.* Crofton, 9 S. W. 406, 10 Ky. L. Rep. 456.

Death of heir who was a party.—Where the administrator and the heirs have joined in a petition to sell land for assets the death of one of the petitioners will not vitiate the title of the purchasers, although he left minor heirs who were not made parties. Harris *v.* Brown, 123 N. C. 419, 31 S. E. 877.

A purchaser from the heirs prior to the commencement of a proceeding by the administrator for the sale of a decedent's land to pay debts must be made a party to the proceeding in order that his rights may be cut off. Robertson *v.* Wheeler, (Ill. 1896) 44 N. E. 870.

Presumption of authority of counsel to act for heirs not served.—Where the record shows that all the heirs were represented by counsel, and the authority of the counsel to act for those not served with process is not disputed, such power will be assumed for the purpose of sustaining the jurisdiction of the court to order a sale. McMillen *v.* Reeves, 102 N. C. 550, 9 S. E. 449.

Attorney for heirs absent or not represented.— In a proceeding for the sale of a decedent's real estate, the probate court should appoint an attorney for heirs not represented. *In re* Simmons, 43 Cal. 543. But a judgment ordering a sale at the suit of the curator, without the appointment of an attorney to represent the absent heirs, is not a nullity. Gibson *v.* Foster, 2 La. Ann. 503. Neither, where an attorney for absent heirs was regularly appointed, does the fact that such attorney absented himself from the state during the entire conclusion of the proceedings for the settlement of the estate render a sale of the lands under order of the probate court invalid. Porter *v.* Hornsby, 32 La. Ann. 337. So also the failure of an administrator to obtain an order of court for the sale of succession property, contradictorily with an attorney of absent heirs, is a mere irregularity and will not render the sale null and void, or affect the purchaser. Herriman *v.* Janney, 31 La. Ann. 276.

29. Burr *v.* Bloemer, 174 Ill. 638, 51 N. E. 821; Dickens *v.* Long, 109 N. C. 165, 13 S. E. 841.

Remedy of heir not made party.— If one of the heirs is not named in the petition or is not made a party to the proceedings, he may apply to be made a party in order that he may sue out an appeal, and having this remedy it cannot be said that he is deprived of his property without due process of law. Lyons *v.* Hamner, 84 Ala. 197, 4 So. 26, 5 Am. St. Rep. 363.

30. Wood *v.* Wood, 150 Ind. 600, 50 N. E. 573; Kent *v.* Taggart, 68 Ind. 163 (holding that the sale of a whole tract of land to pay debts, made under proceedings to which the widow was not a party, passes to the purchaser no interest in her dower rights therein); Simonton *v.* Brown, 72 N. C. 46. *Contra*, *In re* Smith, 43 Oreg. 595, 73 Pac. 336, 75 Pac. 133; Weaver's Appeal, 19 Pa. St. 416; Murphy's Appeal, 8 Watts & S. (Pa.) 165.

31. Matter of Haig, 6 Dem. Surr. (N. Y.) 454, 3 N. Y. Suppl. 285; Holloway *v.* Stuart, 19 Ohio St. 472; Defrees *v.* Greenbaum, 11 Ohio St. 486. But *compare* Hart *v.* Hart, 31 W. Va. 688, 8 S. E. 562.

32. Lewis *v.* De Graw, 19 Ill. App. 313; Thompson *v.* Cox, 53 N. C. 311.

Where land specifically charged with payment of debts.— In a bill by a creditor of a testator's estate to obtain payment out of land specifically charged by the testator with debts, all the creditors whose debts are charged upon the land and are still due should be made parties, if they are named in the will; but, if the names of other creditors cannot be ascertained by the complainant, he may in the first instance allege that fact in

creditor of an heir.[33] Where, in a proceeding to sell land of an intestate to pay debts, the widow of a deceased son and heir is made a party as such, it is not necessary to the validity of the sale that she should also be made a party as administratrix of her husband's estate.[34] When the administrator of a devisee brings an action to sell the real estate acquired by the devise to pay his debts, a creditor of the original testator is neither a necessary nor a proper party defendant.[35] A person claiming land under a deed from a former administrator is not interested in the estate so as to entitle him to interfere in proceedings by a subsequent administrator to sell the land for the payment of debts.[36] A mortgagor who has parted with his title to the land mortgaged, and is not in possession thereof, is not a necessary party to a proceeding brought by the executor of the purchaser to obtain an order to sell the land for the payment of debts.[37] Any person interested in the property whose sale is sought may become a party to the proceedings on proper showing of his interest,[38] but a creditor of the estate cannot become a party plaintiff in proceedings by the representative to sell real estate to pay debts.[39] Proceedings in the orphans' court against lands charged with legacies should be by the legatees themselves and the executor is not a proper party,[40] but the fact that the executor is made a party does not avoid the proceedings for want of jurisdiction if the legatees are in fact parties.[41]

b. Guardian of Infant. It is usually required, and considered essential to the validity of the proceedings, that an infant heir or devisee of the land whose sale is sought shall have a regular guardian, or else a guardian *ad litem*, to represent his interest,[42] but in some states, if such infant be duly cited, the non-appointment

excuse. Smith *v.* Wyckoff, 11 Paige (N. Y.) 49.

33. Nichols *v.* Lee, 16 Colo. 147, 26 Pac. 157.

Creditors of an heir may intervene in such proceedings if they so desire. Nichols *v.* Lee, 16 Colo. 147, 26 Pac. 157.

34. Wood *v.* Wood, 150 Ind. 600, 50 N. E. 573.

35. Smith *v.* Hayward, 5 Ohio S. & C. Pl. Dec. 462, 4 Ohio N. P. 501.

36. Shields *v.* Ashley, 16 Mo. 471.

37. Denison University *v.* Manning, 65 Ohio St. 138, 61 N. E. 706.

38. *Arkansas.*— *Ex p.* Marr, 12 Ark. 84.

Georgia.— McGowan *v.* Lufburrow, 82 Ga. 523, 9 S. E. 427, 14 Am. St. Rep. 178, minors as contingent remainder-men.

Illinois.— Newell *v.* Montgomery, 129 Ill. 58, 21 N. E. 508.

Mississippi.— Moody *v.* Harper, 38 Miss. 599.

North Carolina.— Battle *v.* Duncan, 90 N. C. 546; Gibson *v.* Pitts, 69 N. C. 155.

Ohio.— Doan *v.* Biteley, 49 Ohio St. 588, 32 N. E. 600 (persons claiming adverse title to the land); Clark *v.* Harlin, Ohio Prob. 106 (husband in proceedings for sale of his deceased wife's estate, where his curtesy is at issue).

See 22 Cent. Dig. tit. "Executors and Administrators," § 1382.

But *compare* Shields *v.* Ashley, 16 Mo. 471, holding that under a statute declaring that the deed given in pursuance to such a sale should convey to the purchaser only the right, title, and interest which the deceased had in the real estate at the time of his death, a person claiming a title superior to the decedent was not a proper party and had not even the right to interfere and resist the order of sale.

Purchasers of real estate from the owner's widow are not proper parties in such proceedings. Nix *v.* Mayer, (Tex. 1886) 2 S. W. 819.

39. Strickland *v.* Strickland, 129 N. C. 84, 39 S. E. 735; Rawls *v.* Carter, 119 N. C. 596, 26 S. E. 154; Dickey *v.* Dickey, 118 N. C. 956, 24 S. E. 715.

40. Littleton's Appeal, 93 Pa. St. 177; Field's Appeal, 36 Pa. St. 11.

41. Littleton's Appeal, 93 Pa. St. 177.

42. *Alabama.*— Craig *v.* McGehee, 16 Ala. 41.

Florida.— Price *v.* Winter, 15 Fla. 66.

Georgia.— McGowan *v.* Lufburrow, 82 Ga. 523, 9 S. E. 427, 14 Am. St. Rep. 178.

Kentucky.— Vowles *v.* Buckman, 6 Dana 466.

Mississippi.— Billups *v.* Brander, 56 Miss. 495; Winston *v.* McLendon, 43 Miss. 254.

New York.— Sheldon *v.* Wright, 5 N. Y. 497 [*affirming* 7 Barb. 39]; Schneider *v.* McFarland, 2 N. Y. 459 [*affirming* 4 Barb. 139]; *In re* Mahoney, 34 Hun 501; Richmond *v.* Foote, 3 Lans. 244; Havens *v.* Sherman, 42 Barb. 636; Ackley *v.* Dygert, 33 Barb. 176 (whether or not the petition shows that an heir interested is a minor); Corwin *v.* Merritt, 3 Barb. 341; Bloom *v.* Burdick, 1 Hill 130, 37 Am. Dec. 299.

North Carolina.— Hyman *v.* Jarnigan, 65 N. C. 96.

Ohio.— Biggs *v.* Bickel, 12 Ohio St. 49.

Oregon.— Fiske *v.* Kellogg, 3 Oreg. 503.

South Carolina.— Tinley *v.* Robertson, 17 S. C. 435.

West Virginia.— Hart *v.* Hart, 31 W. Va. 688, 8 S. E. 562.

of a guardian to represent his interests, although possibly an irregularity of which immediate advantage may be taken, is not of itself to be deemed a defect sufficient to invalidate the sale and prevent title from vesting in the purchaser.[43]

c. Effect of Failure to Join Necessary Parties. As a general rule a failure to join a necessary party to the proceedings to sell land renders the proceeding and the sale void, at least as to the interest of such party,[44] although where the pro-

See 22 Cent. Dig. tit. "Executors and Administrators," § 1383.

Appointment and appearance of guardian sufficient.— An order of sale is not void, although the name of a minor child does not appear in the record, if the record shows the appointment and appearance of a guardian *ad litem* for all the minor heirs. Snevely *v.* Lowe, 18 Ohio 368. And infants are bound where represented by guardian *ad litem*, although they are not served with summons, notice, or other paper. Rollins *v.* Brown, 37 S. C. 345, 16 S. E. 44, so holding where the proceedings were instituted and completed before the adoption of the code of procedure.

An order appointing a special guardian nunc pro tunc will not cure an omission to appoint one in the first instance. *In re* Mahoney, 34 Hun (N. Y.) 501.

Failure to serve notice of application for guardian.— Failure to serve notice on certain infants of an application for the appointment of a special guardian for them, as required by N. Y. Code Civ. Proc. § 2531, where a petition for a sale of decedent's real property for the payment of his debts was duly presented, and all parties interested, including such infants, were regularly cited, and the decree directing the sale, and the order confirming it and directing its execution, were properly made, does not affect the title of a purchaser at such sale, since section 2784 provides that his title is not affected by such omissions, errors, or irregularities. Fenn's Estate, 8 N. Y. Civ. Proc. 206.

Sufficiency of affidavit to authorize appointment see Robinson *v.* Clark, 34 S. W. 1083, 17 Ky. L. Rep. 1401.

Appearance by administrator.—Where land was sold to pay debts under a decree of court on the petition of the administrator, and two heirs who were minors appeared by the administrator as their next friend, the sale was void, as against the minors, their interest being antagonistic to that of the administrator. O'Conner *v.* Carver, 12 Heisk. (Tenn.) 436. But *compare* Harris *v.* Brown, 123 N. C. 419, 31 S. E. 877, holding that, while it is irregular for the administrator to represent a minor heir as guardian in a proceeding to sell land for assets, yet where there is no suggestion of any unfair advantage having been taken in the sale, confirmation, or elsewhere in the proceeding such irregularity will not vitiate the title of the purchaser.

Where statutory guardian not a party but guardian ad litem appointed.— Where in a proceeding by an administrator to sell real estate a guardian *ad litem* was appointed for an infant defendant, although no affidavit was filed showing that such infant had no statutory guardian residing in the state, as required by statute, and at the sale the statutory guardian became the purchaser, it was held that the sale should be set aside as the statutory guardian was not a party to the proceeding and it was reasonable to believe that the irregularity would materially affect the salable value of the property. Catlett *v.* Catlett, 72 S. W. 781, 24 Ky. L. Rep. 1986.

Appearance of guardian without answer.— Where on application by an administratrix for permission to sell land notice was properly served upon the infant heir and upon her guardian, and the guardian appeared, the court thereupon acquired jurisdiction to order the sale, although no answer was filed by the guardian, notwithstanding a statutory provision that "no judgment can be rendered against an infant until after a defense by a guardian." Bickel *v.* Erskine, 43 Iowa 213.

43. *California.*—Thomas *v.* Parker, 97 Cal. 456, 32 Pac. 562.

Illinois.— Gage *v.* Schroder, 73 Ill. 44 (citation of infant heirs sufficient); Barnett *v.* Wolf, 70 Ill. 76. *Contra*, Whitney *v.* Porter, 23 Ill. 445. And see Herdman *v.* Short, 18 Ill. 59.

Indiana.— See Clark *v.* Hillis, 134 Ind. 421, 34 N. E. 13. But *compare* Comparet *v.* Randall, 4 Ind. 55; Timmons *v.* Timmons, 3 Ind. 251, 6 Ind. 8.

Iowa.— Myers *v.* Davis, 47 Iowa 325.

Massachusetts.— Holmes *v.* Beal, 9 Cush. 223.

Nebraska.— McClay *v.* Foxworthy, 18 Nebr. 295, 25 N. W. 86.

New Hampshire.— Boody *v.* Emerson, 17 N. H. 577.

Wisconsin.— Sitzman *v.* Pacquette, 13 Wis. 291.

United States.— Parker *v.* Kane, 22 How. 1, 16 L. ed. 286, a Wisconsin case.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1383.

44. *Illinois.*—Burr *v.* Bloemer, 107 Ill. 638, 51 N. E. 821.

Maryland.— Bowen *v.* Gent, 54 Md. 555.

New York.—Jenkins *v.* Young, 35 Hun 569.

North Carolina.— McNeill *v.* Fuller, 121 N. C. 209, 28 S. E. 299; Harrison *v.* Harrison, 106 N. C. 282, 11 S. E. 356; Perry *v.* Adams, 98 N. C. 167, 3 S. E. 729, 2 Am. St. Rep. 326; Stancill *v.* Gay, 92 N. C. 462. See also Dickens *v.* Long, 109 N. C. 165, 13 S. E. 841; Shields *v.* Allen, 77 N. C. 375.

Oregon.— Fiske *v.* Kellogg, 3 Oreg. 503.

South Carolina.— Whitesides *v.* Barber, 24 S. C. 373; Moore *v.* Smith, 24 S. C. 316.

Tennessee.— Shields *v.* Alsup, 5 Lea 508; Bennett *v.* Kennerly, 3 Head 674; Estes *v.* Johnson, 10 Humphr. 223.

Virginia.— Hudgin *v.* Hudgin, 6 Gratt. 320, 52 Am. Dec. 124.

ceeding is regarded as strictly *in rem* it has been held that such an omission goes only to the regularity of the proceeding and not to the jurisdiction of the court, and while it may cause the decree to be reversed on appeal or error, or set aside on direct attack, does not render the decree or the sale thereunder void or open to collateral attack.[45]

5. Petition or Other Application — a. Necessity. In respect to the subject-matter the jurisdiction of the probate court to order a sale of a decedent's real estate attaches upon the filing of a petition or application containing the jurisdictional allegations,[46] and as a general rule the filing of a petition or formal application of this complete character is a necessary prerequisite to the exercise of the power of the court to order or license a sale.[47]

There can arise no presumption of jurisdiction of the persons of the heirs having been obtained where the record does not show that they were made parties and the proceeding does not purport to be anything more than an *ex parte* proceeding by the administrator. Moore *v.* Smith, 24 S. C. 316.

Making widow party by amendment.— Where land which had been assigned to a widow as dower was sold under order of court for payment of the husband's debts in a proceeding to which the widow was not made a party, the sale was void as to her, and a subsequent amendment of the original proceedings by which she was made a party could not give validity to a deed executed thereunder. Simonton *v.* Brown, 72 N. C. 46.

45. Neville *v.* Kinney, 125 Ala. 149, 28 So. 452, 82 Am. St. Rep. 230; Lyons *v.* Hamner, 84 Ala. 197, 4 So. 26, 5 Am. St. Rep. 363.

Collateral attack generally see *infra*, XII, S, 3.

46. *Alabama.*— Moore *v.* Cottingham, 113 Ala. 148, 30 So. 994, 59 Am. St. Rep. 100; Doe *v.* Hardy, 52 Ala. 291; Pettus *v.* McClannahan, 52 Ala. 55; De Bardeleben *v.* Stoudenmire, 48 Ala. 643; Spragins *v.* Taylor, 48 Ala. 520; Warnock *v.* Thomas, 48 Ala. 463; Satcher *v.* Satcher, 41 Ala. 26, 91 Am. Dec. 498; Duval *v.* McLoskey, 1 Ala. 708; Wyman *v.* Campbell, 6 Port. 219, 31 Am. Dec. 677.

Illinois.— Bostwick *v.* Skinner, 80 Ill. 147; Duffin *v.* Abbott, 48 Ill. 17; Wight *v.* Wallbaum, 39 Ill. 554; Schnell *v.* Chicago, 38 Ill. 382, 87 Am. Dec. 304; Goudy *v.* Hall, 36 Ill. 313, 87 Am. Dec. 217; Gibson *v.* Roll, 30 Ill. 172, 83 Am. Dec. 181, 27 Ill. 88, 81 Am. St. Rep. 219; Fitzgibbon *v.* Lake, 29 Ill. 165, 81 Am. Dec. 302; Young *v.* Lorain, 11 Ill. 624, 52 Am. Dec. 463.

Iowa.— Long *v.* Burnett, 13 Iowa 28, 81 Am. Dec. 420.

New York.— Jackson *v.* Irwin, 10 Wend. 441; Farrington *v.* King, 1 Bradf. Surr. 182.

Virginia.— Cox *v.* Thomas, 9 Gratt. 323.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1386.

Prayers for sale of different properties in same application.— In the same application there may be a prayer to sell cultivated land, wild land, and personalty, and at the proper time an order may be passed granting leave to sell each. Coggins *v.* Griswold, 64 Ga. 323.

Truth of statements immaterial.— The jurisdiction rests upon the averments of the petition and not upon their proof, and so far as the question of jurisdiction is concerned it is immaterial whether the statements of the petition be true or not. Stuart *v.* Allen, 16 Cal. 473, 76 Am. Dec. 551.

47. *Alabama.*— Robertson *v.* Bradford, 73 Ala. 116, 70 Ala. 385; Landford *v.* Dunklin, 71 Ala. 594; Tyson *v.* Brown, 64 Ala. 244; Jay *v.* Stein, 49 Ala. 514; Hine *v.* Hussey, 45 Ala. 496.

California.— Pryor *v.* Downey, 50 Cal. 388, 19 Am. Rep. 656.

Idaho.— Ethell *v.* Nichols, 1 Ida. 741.

Illinois.— Monahon *v.* Vandyke, 27 Ill. 154.

Iowa.— Long *v.* Burnett, 13 Iowa 28, 81 Am. Dec. 420.

Mississippi.— Picard *v.* Montross, (1895) 17 So. 375.

Missouri.— A petition is necessary (Teverbaugh *v.* Hawkins, 82 Mo. 180) except where on a settlement of the accounts of the representative it appears that the personal estate is insufficient to pay the debts, in which case the court is authorized to make an order of sale of its own motion (Day *v.* Graham, 97 Mo. 398, 11 S. W. 55; Teverbaugh *v.* Hawkins, 82 Mo. 180).

Montana.— State *v.* Second Judicial Dist. Ct., 24 Mont. 1, 60 Pac. 489, lease.

New Jersey.— Lawson *v.* Acton, 57 N. J. Eq. 107, 40 Atl. 584.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1386.

Contra.— Emerson *v.* Ross, 17 Fla. 122. And see Whitley *v.* Davis, 1 Swan (Tenn.) 333 (holding that, although a sale of land be not the primary purpose of a bill filed by an administrator against the heirs of his intestate, and although there be no specific prayer of the bill for the sale of the land, yet, if the attainment of the justice of the case makes a sale necessary, the court may order it); Saul *v.* Frame, 3 Tex. Civ. App. 596, 22 S. W. 984 [*following* Robertson *v.* Johnson, 57 Tex. 62; Alexander *v.* Maverick, 18 Tex. 179, 67 Am. Dec. 693].

Verified petition instead of affidavit.— An administrator's application to be allowed to mortgage realty, although in the form of a verified petition stating the requisite facts, pursuant to Hill Annot. Laws Oreg. § 1078, subd. 2, and not on affidavit, as required by Oreg. Laws (1898), p. 34, was sufficient to confer jurisdiction on the county court, and

b. Requirements — (i) *In General.* The petition or other application for a sale must be in writing,[48] and should aver all the facts requisite for giving jurisdiction in the case, or required by statute to be set forth.[49] If there is a will this must be alleged, and it has also been held necessary to show whether the widow elected to take thereunder or dissented therefrom,[50] what were the provisions of the will as to real estate,[51] and that such will does not contain a power to sell for the payment of debts.[52] When the proceeding to sell real estate is instituted by

therefore the order authorizing the mortgage of the property was not subject to collateral attack. Lawrey *v.* Sterling, 41 Oreg. 518, 69 Pac. 460.

Cross petition in action for partition.— Where, in an action for partition of real estate brought by heirs, the administrator by answer and cross petition sets forth the necessity of selling the real estate to pay debts, he is entitled to an order of sale. Lafferty *v.* Shinn, 38 Ohio St. 46.

The final report of an administrator after legal summons to the heirs to appear and contest his account is not such a bill or petition as to justify a court to decree the sale of land to pay expenses and charges against decedent's estate. Picard *v.* Montross, (Miss. 1895) 17 So. 375.

Creditor may proceed summarily by rule. Dubuch *v.* Wildermuth, 3 La. Ann. 407.

Land purchased but not paid for by the decedent in his lifetime may be sold by the representative for the payment of the purchase-price without a petition or appraisement. Garrett *v.* Bicknell, 64 Mo. 404.

48. Townsend *v.* Steel, 85 Ala. 580, 5 So. 351; Reynolds *v.* Kirkland, 44 Ala. 312. See also Alabama Conference M. E. Church South *v.* Price, 42 Ala. 39.

An order to sell perishable property may be made on an oral application; but it is the better practice to require the application to be made in writing and verified by oath. Adkinson *v.* Wright, 46 Ala. 598.

49. *Alabama.*— Wilson *v.* Holt, 83 Ala. 528, 3 So. 321, 3 Am. St. Rep. 768; Meadows *v.* Meadows, 73 Ala. 356; Arnett *v.* Bailey, 60 Ala. 435; Hall *v.* Hall, 47 Ala. 290; Harris *v.* Parker, 41 Ala. 604.

California.— Byrne's Estate, 112 Cal. 176, 44 Pac. 467.

Illinois.— Bree *v.* Bree, 51 Ill. 367; Lynch *v.* Hickey, 13 Ill. App. 139.

Indiana.— Renner *v.* Ross, 111 Ind. 269, 12 N. E. 508.

New York.— Ackley *v.* Dygert, 33 Barb. 176.

Pennsylvania.— Heffner's Appeal, 119 Pa. St. 462, 13 Atl. 314; Torrance *v.* Torrance, 53 Pa. St. 505.

Texas.— See Danzey *v.* Swinney, 7 Tex. 617, holding that, although merely because a petition or application in the probate court for an order to sell decedent's land fails to set out all the facts necessary to entitle the party to relief, exceptions to it ought not to be sustained, yet, if the facts and exhibits set out in the petition or application show *prima facie* that the party is not entitled to relief, the probate court may properly dismiss the proceeding at once.

Washington.— Prefontaine *v.* McMicken, 16 Wash. 16, 47 Pac. 231.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1385.

A petition by a creditor must set out the facts required by statute to be shown in a petition by an executor or administrator. Allen *v.* Sanford, 5 Silv. Supreme (N. Y.) 208, 8 N. Y. Suppl. 182; Mead *v.* Sherwood, 4 Redf. Surr. (N. Y.) 352; Prefontaine *v.* McMicken, 16 Wash. 16, 47 Pac. 231.

The amount due or to become due upon the family allowance should, under Cal. Code Civ. Proc. § 1537, be stated; but where the sale was not ordered to pay a family allowance, the failure of the petition to make such statement did not render it objectionable on appeal, since it would be presumed that there was nothing due on such allowance. *In re* Levy, 141 Cal. 639, 75 Pac. 317.

Reference to former petition.—Where a petition for the sale of land is insufficient, but refers to a former petition, which was sufficient to confer jurisdiction, the court can regard the two as constituting one petition. Friedman *v.* Shamblin, 117 Ala. 454, 23 So. 821.

Stating the statutory grounds disjunctively does not invalidate the petition. Inman *v.* Gibbs, 47 Ala. 305.

Mines or mining interests.— A tract of land for which a mineral patent had been issued and of which the deceased was the owner in fee simple and upon which no mining had been done for a series of years cannot be summarily sold as a mine or mining interest under Cal. Code Civ. Proc. §§ 1529–1533, and can only be sold under a petition stating the facts required for the sale of real estate under section 1537 of the code. Byrne's Estate, 112 Cal. 176, 44 Pac. 467.

Petitions held sufficient see Moore *v.* Cottingham, 113 Ala. 148, 20 So. 994, 59 Am. St. Rep. 100; *In re* Roach, 139 Cal. 17, 72 Pac. 393; Cahill *v.* Bassett, 66 Mich. 407, 33 N. W. 722.

Petitions held insufficient see Ackley *v.* Dygert, 33 Barb. (N. Y.) 176; Heffner's Appeal, 119 Pa. St. 462, 13 Atl. 314; Torrance *v.* Torrance, 53 Pa. St. 505.

50. Meadows *v.* Meadows, 73 Ala. 356; Archibald *v.* Long, 144 Ind. 451, 43 N. E. 439; Renner *v.* Ross, 111 Ind. 269, 12 N. E. 508, where it appears that the only claim against the estate is that of the widow for the statutory allowance.

51. Allen *v.* Sanford, 5 Silv. Supreme (N. Y.) 208, 8 N. Y. Suppl. 182.

52. Wilson *v.* Holt, 83 Ala. 528, 3 So. 321, 3 Am. St. Rep. 768; Arnett *v.* Bailey, 60 Ala. 435; Hall *v.* Hall, 47 Ala. 290. *Contra,*

a creditor his standing as such must be averred and shown.[53] But facts not essential or not required by statute to be set out need not be averred.[54] Thus there is no need of averring that decedent died intestate[55] or that the estate is insolvent.[56] Neither is it necessary that an administrator's petition for leave to sell realty should state how he was appointed,[57] the date of the issuance of letters,[58] or that he was appointed by a court having power,[59] but it is sufficient to state generally that he is the administrator.[60] An allegation that the premises were fraudulently conveyed is also unnecessary.[61] A creditor's petition for a sale of realty to pay debts need not allege that the executor or administrator refused to act in the matter.[62] It is not an objection to the petition that it only asks for a sale instead of for permission to mortgage, lease, or sell where it appears from the petition itself that a mortgage or lease would fail to accomplish the purpose intended.[63] An application by executors for the sale of land embracing both wild and cultivated land, one to be sold at public and the other at private sale, has been held not invalid, where the citation used in each case was published.[64] A substantial compliance with the statutory requirements as to what a petition for the sale of property shall contain is sufficient,[65] and defects, irregularities, or omissions not amounting to a failure to show jurisdictional facts do not deprive the court of jurisdiction or render the judgment subject to collateral attack, although they may be cause for reversal,[66] but the failure of an application for an order of the probate court for the sale of a decedent's land to allege facts giving the court jurisdiction renders void an order issued thereon or a sale made

In re Haig, 3 N. Y. Suppl. 285, 6 Dem. Surr. (N. Y.) 454, where the will showed such fact.

Where the petition refers to the will, which is of record, and makes the will a part of the petition, and the will contains no such power, this supplies an averment, omitted from the petition as to the lack of power. Arnett *v.* Bailey, 60 Ala. 435.

53. Albuquerque First Nat. Bank *v.* Lee, 8 N. M. 589, 45 Pac. 1114.

54. *Florida.*— Deans *v.* Wilcoxon, 18 Fla. 531.

Illinois.— Moffitt *v.* Moffitt, 69 Ill. 641.

Indiana.— Whisnand *v.* Small, 65 Ind. 120.

New York.— *In re* Bingham, 127 N. Y. 296, 27 N. E. 1055 [*affirming* 10 N. Y. Suppl. 325], holding that a petition by a creditor for leave to sell or mortgage the land of his deceased debtor filed more than three years after the issue of letters testamentary need not aver that it is founded on a debt which was in controversy in an action brought by such creditor against the executors during said three years, although, under Code Civ. Proc. § 2752, such fact must be proved in order to give the surrogate jurisdiction of the proceeding.

North Carolina.— Monger *v.* Kelly, 115 N. C. 294, 20 S. E. 374, holding that a petition by an administrator *de bonis non* for the sale of land for the payment of debts need not allege that petitioner has exhausted his remedy on the bond of the former administrator.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1385.

55. Deans *v.* Wilcoxon, 18 Fla. 531.

56. Deans *v.* Wilcoxon, 18 Fla. 531.

57. Moffitt *v.* Moffitt, 69 Ill. 641.

58. *In re* Haig, 3 N. Y. Suppl. 285, 6 Dem. Surr. (N. Y.) 454, where it shows that the proceeding was commenced within three years thereafter.

59. Moffitt *v.* Moffitt, 69 Ill. 641.

60. Moffitt *v.* Moffitt, 69 Ill. 641; *In re* Haig, 3 N. Y. Suppl. 285, 6 Dem. Surr. (N. Y.) 454.

61. Tyndale *v.* Stanwood, 182 Mass. 534, 66 N. E. 23.

62. Whisnand *v.* Small, 65 Ind. 120.

63. *In re* Dolan, 88 N. Y. 309 [*reversing* 26 Hun 46].

64. Coggins *v.* Griswold, 64 Ga. 323.

65. De Bardelaben *v.* Stoudenmire, 48 Ala. 643; Harris *v.* Parker, 41 Ala. 604; *In re* Heydenfeldt, 127 Cal. 456, 59 Pac. 839; Burris *v.* Kennedy, 108 Cal. 331, 41 Pac. 458; Burris *v.* Adams, 96 Cal. 664, 31 Pac. 565; Richardson *v.* Butler, 82 Cal. 174, 23 Pac. 9, 16 Am. St. Rep. 116; Stuart *v.* Allen, 16 Cal. 473, 76 Am. Dec. 551; Hobson *v.* Ewan, 62 Ill. 146 (no form being prescribed); Lynch *v.* Hickey, 13 Ill. App. 139 (but substantial compliance is necessary).

66. *Alabama.*— Poole *v.* Daughdrill, 129 Ala. 208, 30 So. 579; Satcher *v.* Satcher, 41 Ala. 26, 91 Am. Dec. 498.

Arkansas.— Adams *v.* Thomas, 44 Ark. 267.

California.— Burris *v.* Kennedy, 108 Cal. 331, 41 Pac. 458; Townsend *v.* Gordon, 19 Cal. 188.

Texas.— Lyne *v.* Sanford, 82 Tex. 58, 19 S. W. 847, 27 Am. St. Rep. 852, holding that where a sworn appraisement and inventory showing the condition of the estate was made before sale, a failure to attach to the application for sale an exhibit showing the condition of the estate, and what debts had been allowed, would not invalidate the sale.

Washington.— Ackerson *v.* Orchard, 7 Wash. 377, 34 Pac. 1106, 35 Pac. 605.

Wisconsin.— Reynolds *v.* Schmidt, 20 Wis. 374.

in pursuance of such order.[67] It has been held no objection to an administrator's petition for leave to sell real estate that it was in the form of a bill in chancery.[68]

(11) *AVERMENTS AS TO HEIRS OR DEVISEES.* It is commonly required that the petition shall name and describe the heirs or devisees,[69] and show whether any of them, and if so which, are infants, married women, lunatics, or otherwise under any disability.[70] A petition giving the degree of the relationship of the

See 22 Cent. Dig. tit. "Executors and Administrators," § 1385.

67. Robertson *v.* Bradford, 73 Ala. 116; De Bardelaben *v.* Stoudenmire, 48 Ala. 643; Wright *v.* Edwards, 10 Oreg. 298.

68. Bowles *v.* Rouse, 8 Ill. 409.

69. *Alabama.*— Poole *v.* Daughdrill, 129 Ala. 208, 30 So. 579; Townsend *v.* Steel, 85 Ala. 580, 5 So. 351; Bingham *v.* Jones, 84 Ala. 202, 4 So. 409; Bozeman *v.* Bozeman, 82 Ala. 389, 2 So. 732; McCorkle *v.* Rhea, 75 Ala. 213 (holding that an order for sale of land on a petition by the administrator of a tenant in common which fails to state the names of all the persons interested is absolutely void, and a sale thereunder does not divest the title of the heirs); Hall *v.* Hall, 47 Ala. 290; Hoard *v.* Hoard, 41 Ala. 590 (holding that a petition for the sale of decedent's lands for the purpose of making an equitable division among the heirs which does not allege the christian names and the ages of the infant heirs, although the name of their guardian is set forth, is fatally defective, and will not support an order of sale); Noles *v.* Noles, 40 Ala. 576 (holding that a statutory provision that in an application to the probate court for leave to sell land for distribution among heirs of an intestate the names of heirs and their places of residence shall be given is not complied with by an averment that the names of heirs are unknown, while their place of residence is given); Blann *v.* Grant, 6 Ala. 110.

California.— *In re* Levy, 141 Cal. 639, 75 Pac. 317. See also *In re* Roach, 139 Cal. 17, 72 Pac. 393.

Illinois.— See Stow *v.* Kimball, 28 Ill. 93, 107 [*explaining* Turney *v.* Turney, 24 Ill. 625], where the court said: "Sound and judicious practice no doubt requires that the names of the heirs and devisees, and their grantees, if known, should be inserted in the petition, but the statute has not prescribed it, and we must not hold the proceeding void for the want of it."

Indiana.— Rapp *v.* Matthias, 35 Ind. 332.

New York.— Jenkins *v.* Young, 35 Hun 569; Ackley *v.* Dygert, 33 Barb. 176; Allen *v.* Sanford, 5 Silv. Supreme 208, 8 N. Y. Suppl. 182; *In re* Johns, 18 N. Y. Suppl. 172, 21 N. Y. Civ. Proc. 326; Mead *v.* Sherwood, 4 Redf. Surr. 352.

West Virginia.— Underwood *v.* Underwood, 22 W. Va. 303, widow, heirs, devisees, and all known creditors.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1388.

Failure to name heirs a jurisdictional defect.— Matter of Slater, 17 Misc. (N. Y.) 474, 41 N. Y. Suppl. 534; *In re* Johns, 18 N. Y. Suppl. 172, 21 N. Y. Civ. Proc. 326.

Omission to name heirs in petition does not invalidate decree. Hobson *v.* Ewan, 62 Ill. 146; Morris *v.* Hogle, 37 Ill. 150, 87 Am. Dec. 243; Stow *v.* Kimball, 28 Ill. 93; Gibson *v.* Roll, 27 Ill. 88, 81 Am. Dec. 219 [*overruling In re* Sturms, 25 Ill. 390]. See also Turney *v.* Turney, 24 Ill. 625.

Error in name.— The fact that a minor heir was wrongly named in the petition and order did not affect the jurisdiction of the court, it appearing that she was rightly named in the summons. McCormack *v.* Kimmel, 4 Ill. App. 121.

A petition showing that there are heirs whose names are not given is fatally defective upon demurrer, although it states that the names of such heirs are unknown to the petitioner, and shows that he has used all reasonable diligence to ascertain them. Bingham *v.* Jones, 84 Ala. 202, 4 So. 409.

Submission to court as to which of persons named are heirs.— On an application by an administrator for an order to sell lands, on the ground that they cannot be equitably divided without a sale, a petition stating that there are children of two marriages, giving their names, ages, etc., and submitting to the court the question whether all of them are entitled to share in the lands, or only the children of the last marriage, is sufficient to give the court jurisdiction, and the court may decree a sale, without deciding who are heirs. Eatman *v.* Eatman, 83 Ala. 478, 3 So. 850.

Statement on information and belief.— An application by an administrator to sell lands of his decedent which avers that certain persons named are the heirs to the best of the petitioner's knowledge, information, and belief is sufficient. Townsend *v.* Steel, 85 Ala. 580, 5 So. 351; Greenblatt *v.* Hermann, 144 N. Y. 13, 38 N. E. 966 [*reversing* 69 Hun 298, 23 N. Y. Suppl. 565].

Failure to state that persons named the only heirs.— The failure of a petition for the sale of testator's real estate to allege that the persons named as devisees and legatees therein were the only heirs, as required by Cal. Code Civ. Proc. § 1537, which statement, however, appeared from the order of sale, did not render the order fatally defective. *In re* Levy, 141 Cal. 639, 75 Pac. 317.

Where a person is mentioned as a deceased heir it should be stated who succeeded as heirs to her title. Poole *v.* Daughdrill, 129 Ala. 208, 30 So. 579.

70. Poole *v.* Daughdrill, 129 Ala. 208, 30 So. 579; Bozeman *v.* Bozeman, 82 Ala. 389, 2 So. 732; Page *v.* Matthews, 41 Ala. 719 (holding that on an application by an administrator for an order to sell real estate of his intestate, a petition averring that two of the distributees of the estate are married

heirs and not setting forth the proportionate interest of each has been held to be sufficient.[71]

(III) *Averments as to Necessity and Purpose of Sale.* The petition or application must set forth the necessity for[72] and the object or purpose of the sale.[73] When a sale for the payment of debts is sought the petition must aver the existence and amount of debts,[74] and, it has been asserted, the allowance of

women, but not stating the ages, severally, of the husbands and wives, and averring that four others of the distributees are minors, and in no way showing whether the wives and husbands are minors, is fatally defective); Griffin *v.* Griffin, 3 Ala. 623. See also Cloud *v.* Barton, 14 Ala. 347; Mead *v.* Sherwood, 4 Redf. Surr. (N. Y.) 352.

Failure to state which heirs of full age not jurisdictional.— Field *v.* Goldsby, 28 Ala. 218, 65 Am. Dec. 341.

71. Rodgers *v.* Rodgers, 31 S. W. 139, 17 Ky. L. Rep. 358.

72. *Alabama.*— Sermon *v.* Black, 79 Ala. 507; Robertson *v.* Bradford, 70 Ala. 385 (holding that Code (1852), § 1755, providing for the sale of decedent's land to pay his debts when it was "more beneficial for the estate to sell land than slaves" was not complied with by a petition alleging that it was "more to the interest of all parties to sell the house and lots than the personal estate"); Hall *v.* Hall, 47 Ala. 290; Hall *v.* Chapman, 35 Ala. 553 (personalty); Wyatt *v.* Rambo, 29 Ala. 510, 68 Am. Dec. 89.

California.— *In re* Rose, 63 Cal. 346; Haynes *v.* Meeks, 20 Cal. 288. See also Kertchem *v.* George, 78 Cal. 597, 21 Pac. 372, where the decree was not in such form as to cure the omision under Code Civ. Proc. § 1537.

Maine.— *In re* Snow, 96 Me. 570, 53 Atl. 116.

New York.— Ackley *v.* Dygert, 33 Barb. 176.

Texas.—Gillenwaters *v.* Scott, 62 Tex. 670, holding that a petition for a sale of a decedent's lands, which merely shows that the sale will be advantageous to the estate, without showing any of the statutory reasons therefor, as that it is necessary to pay debts, is defective.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1389.

Liability to waste or perishable nature.— Under the statute authorizing the sale of personal property of a decedent's estate, when liable to waste or when it is of a perishable nature, an averment in a petition in such case that the property is "of a character liable to waste or be consumed by fire" is sufficient to sustain the jurisdiction of the court. Harris *v.* Parker, 41 Ala. 604.

Necessity for payment of debts.— An application which shows on its face that a sale is necessary for the purpose of paying the debts of the estate is sufficient. Hatcher *v.* Clifton, 33 Ala. 301.

"Opinion and belief."— An application showing that in the "opinion and belief" of the representative it is necessary to sell for the payment of debts is sufficient when the order of sale is questioned collaterally. Reynolds *v.* Kirkland, 44 Ala. 312. See also King *v.* Kent, 29 Ala. 542; *In re* Merchant, 6 N. Y. Suppl. 875. But *compare* Sharp *v.* Sharp, 76 Ala. 312; Hall *v.* Hall, 47 Ala. 290.

73. Ikelheimer *v.* Chapman, 32 Ala. 676.

A joinder of different grounds of sale, as for partition and payment of debts, in the same bill or petition will not affect the validity of the sale, although the practice is irregular. Kindell *v.* Titus, 9 Heisk. (Tenn.) 727.

Statement not invalidating petition.—Where the petition for a sale of land to pay debts shows on its face that there is not enough personal property to pay the alleged debts and the prayer is confined to leave to sell to pay debts and charges of administration, the petition is not rendered void because of a statement therein that "in petitioning to sell all the real estate of said deceased, he [the petitioner] does it with a view to the distribution of the balance over and above the amount necessary to pay the debts." Norman *v.* Olney, 64 Mich. 553, 31 N. W. 555.

74. *Alabama.*— The existence of debts should be alleged but it is not necessary to state the amount. Cotton *v.* Holloway, 96 Ala. 544, 12 So. 172 [*modifying* Quarles *v.* Campbell, 72 Ala. 64, and *overruling* Abernathy *v.* O'Reilly, 90 Ala. 495, 7 So. 919]. See also Smith *v.* Brannon, 99 Ala. 445, 12 So. 422.

California.— See *In re* Roach, 139 Cal. 17, 72 Pac. 393.

Colorado.— Bateman *v.* Reitler, 19 Colo. 547, 36 Pac. 548.

Illinois.— Moffitt *v.* Moffitt, 69 Ill. 641 (holding that an allegation in an administrator's petition for leave to sell realty to pay debts "that there are debts now standing against said estate, which have been allowed, to the amount of —— dollars, and that there are no assets in petitioner's hands, the personal property being all exhausted, wherewith to pay said debts, without selling real estate," is a sufficient statement of indebtedness to authorize a decree for the sale of lands); Lynch *v.* Hickey, 13 Ill. App. 139 (amount of claims allowed).

Indiana.— Jackson *v.* Weaver, 98 Ind. 307 (holding that a petition to sell lands which shows a claim allowed against the estate, without specifying whether the debt was incurred as surety or principal, is sufficient in that respect after verdict); Rapp *v.* Matthias, 35 Ind. 332 (amount of debts must be shown).

Iowa.— Gladson *v.* Whitney, 9 Iowa 267. See also Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122.

Kentucky.— Rodgers *v.* Rodgers, 31 S. W. 139, 17 Ky. L. Rep. 358, amount of debts.

claims against the estate;[75] and it must also be shown that a sale is necessary for their payment.[76] If land is to be sold the insufficiency of the personalty and the necessity of resorting to the realty for payment of the debts must also be made to appear,[77] although it has been held that if these facts are necessarily to be

New York.— Ackley *v.* Dygert, 33 Barb. 176; Gilchrist *v.* Rea, 9 Paige 66, holding that on an application by an administrator for an order of the surrogate for a sale of real estate to pay debts, after a lapse of several years from the death of the debtor, the petition must show that such debts have been recently discovered, and, if six years have elapsed, that they are not barred by the statute.

North Carolina.— Blount *v,* Pritchard, 88 N. C. 445.

Tennessee.— Linnville *v.* Darby, 1 Baxt. 306, petition must specify debts or the names of creditors.

Utah.— Needham *v.* Salt Lake City, 7 Utah 319, 26 Pac. 920.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1390.

Names of all known creditors should be stated. Underwood *v.* Underwood, 22 W. Va. 303.

These requirements are directory only (Jackson *v.* Houston, 84 Tex. 622, 19 S. W. 799; Kleinecke *v.* Woodward, 42 Tex. 311), and a failure to conform to them is not sufficient to invalidate a sale made under the authority of the probate court having jurisdiction of the estate (Jackson *v.* Houston, 84 Tex. 622, 19 S. W. 799).

Failure of the petition to state all the claims does not render the judgment subject to collateral attack. Myers *v.* Davis, 47 Iowa 325.

A particular description of each debt is not necessary, but a statement of the aggregate amount of the debts is sufficient. Collins *v.* Farnworth, 8 Blackf. (Ind.) 575; State *v.* Ramsey County Probate Ct., 19 Minn. 117 [*followed* in Spencer *v.* Sheehan, 19 Minn. 338]; Cooley *v.* Cooley, (Tenn. Ch. App. 1896) 37 S. W. 1028. See also Doherty *v.* Choate, 16 Lea (Tenn.) 192.

Failure to show mortgage.— A petition for the sale of a decedent's property to pay his debts, which sets out all the facts showing the indebtedness to the petitioner, is sufficient to confer jurisdiction on the surrogate, although it does not show a mortgage against the property, and does not name the mortgagees as parties. Matter of Ibert, 48 N. Y. App. Div. 510, 62 N. Y. Suppl. 1051.

Overstatement of debts.— A sale of property of a succession is not vitiated by the fact that the application therefor set forth a larger amount of debts as being due than really existed, where the sale was necessary to pay the actual debts. Simonin *v.* Czarnowski, 47 La. Ann. 1334, 17 So. 847.

Petition by creditor.— Under a statute requiring the petition of a creditor for the sale of the real estate of one deceased to set forth, as nearly as the petitioner can on diligent inquiry ascertain them, the debts and names of creditors, the amount of funeral expenses, and to whom due, jurisdiction is acquired by the statement of a debt due the petitioner, and if he has no knowledge on the subject of the funeral expenses he need make no allusion to them. *In re* German Bank, 39 Hun (N. Y.) 181.

In a petition to sell for the family allowance and future expenses of administration, where the prior accounts of the administrator have been settled, an averment that there are no debts or expenses accrued and unpaid is a sufficient statement of the debts, expenses, and charges of administration within Cal. Code Civ. Proc. § 1537. Richardson *v.* Butler, 82 Cal. 174, 23 Pac. 9, 16 Am. St. Rep. 101.

75. Lynch *v.* Hickey, 13 Ill. App. 139. See also Nenninger *v.* Tietsam, 29 Ill. App. 648.

Notes secured by trust deed.— An application for an order of sale which states that the notes evidencing petitioner's claim are secured by a trust deed, describing such deed and notes, and that the claim had been allowed by the administrator, is sufficient, without setting forth the instruments *verbatim,* and need not allege that the trust deed was allowed by the administrator and approved by the court. Henry *v.* Drought, 10 Tex. Civ. App. 379, 30 S. W. 584.

76. *In re* Snow, 96 Me. 570, 53 Atl. 116.

77. *Alabama.*— Moore *v.* Cottingham, 113 Ala. 148, 20 So. 994, 59 Am. St. Rep. 100; Quarles *v.* Campbell, 72 Ala. 64; May *v.* Parham, 68 Ala. 253.

California.— Haynes *v.* Meeks, 20 Cal. 288; Stuart *v.* Allen, 16 Cal. 473, 76 Am. Dec. 551.

Colorado.— Bateman *v.* Reitler, 19 Colo. 547, 36 Pac. 548.

Illinois.— Moffitt *v.* Moffitt, 69 Ill. 641.

Indiana.— Renner *v.* Ross, 111 Ind. 269, 12 N. E. 508; Rapp *v.* Matthias, 35 Ind. 332.

Iowa.— See Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122.

Maine.— *In re* Snow, 96 Me. 570, 53 Atl. 116.

Maryland.— Gibson *v.* McCormick, 10 Gill & J. 65; Griffith *v.* Frederick County Bank, 6 Gill & J. 424; Hammond *v.* Hammond, 2 Bland 306. *Compare* Tessier *v.* Wyse, 3 Bland 28.

New York.— Ackley *v.* Dygert, 33 Barb. 176.

North Carolina.— Clement *v.* Cozart, 107 N. C. 695, 705, 12 S. E. 254, 257; Blount *v.* Pritchard, 88 N. C. 445.

Pennsylvania.— O'Brian *v.* Wiggins, 10 Kulp 125.

Utah.— Needham *v.* Salt Lake City, 7 Utah 319, 26 Pac. 920.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1390.

inferred from the averments in the petition the failure of the petition to affirmatively state them does not impair its validity.[78] It is also usually required that the amount and value of the personal estate shall be made to appear,[79] and it is

If there be no personalty, its existence should be clearly negatived, and an averment simply that there are no tangible assets wherefrom payment can be made is not sufficient. Gladson *v.* Whitney, 9 Iowa 267.

Necessity for sale of whole.— To authorize a sale of the real estate of a decedent, where the debts amount to less than the value of the whole, it must be alleged in the petition that the residue would be greatly depreciated by a sale of less than the whole. *In re* Snow, 96 Me. 570, 53 Atl. 116.

Failure to show validity of payments reducing personalty.— An administrator's petition to sell real estate to pay decedent's debts which shows that there are unpaid claims established against the estate which the personalty is insufficient to pay is not subject to demurrer because it fails to show that certain payments for which he claims credit were legal and valid, although, if such payments were stricken out, the personalty would be sufficient to pay all established claims against the estate. Conger *v.* Cook, 56 Iowa 117, 8 N. W. 782.

Statement of facts showing necessity.— The necessity for the sale is not a matter for the executor or administrator to determine, but is a conclusion which the court itself must draw from the facts stated, and the petition must furnish the materials for its judgment. The insufficiency of the personalty must be shown by a statement of the facts as to its amount and disposition and as to the outstanding debts and charges, and the necessity for the sale of the whole or some portion of the real property by a description of all the real property of which the decedent died seized and a statement of its condition and value as required by statute. Haynes *v.* Meeks, 20 Cal. 288.

A petition by an administrator de bonis non which alleges that there are just debts and charges against the estate, and that no personalty came into his hands is sufficient without also alleging that there is an insufficiency of personal assets in the original administrator's hands. Beniteau *v.* Dodsley, 88 Mich. 152, 50 N. W. 110.

Petition in former proceeding showing insufficiency.—Where a petition to the orphans' court to sell decedent's real estate at private sale was defective in not alleging that the personal estate was not sufficient to pay decedent's debts, a prior petition by an administrator to sell the real estate at public sale, on which no order of sale was effected, was not admissible in evidence, since the fact that the court in some prior proceeding had jurisdiction to sell the property, which it did not exercise, in no way tended to show that it had jurisdiction in a subsequent proceeding. O'Brian *v.* Wiggins, 10 Kulp (Pa.) 125.

Petitions held sufficient see *In re* Bentz, 36 Cal. 687; Stanley *v.* Noble, 59 Iowa 666, 13 N. W. 839; Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122; Gibson *v.* McCormick, 10 Gill & J. (Md.) 65.

78. Meadows *v.* Meadows, 73 Ala. 356 (holding that where the application by an administrator to sell the decedent's lands to pay debts avers the amount of the debts, and that there is no personalty, the omission to aver the inference that a sale of the land is necessary is not fatal); *In re* Bentz, 36 Cal. 687 (holding that where the petition alleged that the value of the personal estate was not more than fifty dollars and that the debts and expenses of administration to be paid would amount to four hundred and forty dollars this was sufficient); Bateman *v.* Reitler, 19 Colo. 547, 36 Pac. 548; Little *v.* Sinnett, 7 Iowa 324 (holding that a petition for leave to sell real estate, describing certain lands, and averring that said lands were all the property of the deccased (a nonresident) in said county, so far as known, and that the debts and charges amounted at least to a sum certain, sufficiently averred that the personalty was insufficient.

79. *California.*— Gregory *v.* Taber, 19 Cal. 397, 79 Am. Dec. 219 (holding that the filing of an account of personal property, at or about the date of the filing of the petition, does not supply the place of a statement of such property in the petition, unless the account is especially referred to therein); Gregory *v.* McPherson, 13 Cal. 562.

Indiana.— Rapp *v.* Matthias, 35 Ind. 332, if a sale of land is sought.

Kentucky.— Rodgers *v.* Rodgers, 31 S. W. 139, 17 Ky. L. Rep. 358.

New York.— Richmond *v.* Foote, 3 Lans. 244 (holding that a petition of an administrator to sell decedent's real estate for the payment of debts, stating that "the amount of personal property which has come to his hands as appraised by the inventory is," etc., sufficiently states the amount of personal property which actually came into his hands, as required by statute); Ackley *v.* Dygert, 33 Barb. 176.

North Carolina.— McNeill *v.* McBryde, 112 N. C. 408, 16 S. E. 841, holding a petition merely alleging that the personal estate "is wholly insufficient to pay his (intestate's) debts and the costs and charges of administration" demurrable, as not complying with Code, § 1437, requiring the petition to set forth "the value of the personal estate of the intestate and the application thereof."

See 22 Cent. Dig. tit. "Executors and Administrators," § 1390.

Contra.— Cotton *v.* Holloway, 96 Ala. 544, 12 So. 172.

Petition must show an inventory. Ackley *v.* Dygert, 33 Barb. (N. Y.) 176.

Reference to inventory.— A petition which states that the inventory on file contains a full description of the personal estate and

sometimes required that the application of the personalty shall be shown.[80] If the statute requires the actual exhaustion of the personalty in the payment of debts before a sale of realty is authorized such exhaustion must be made to appear by the petition,[81] but otherwise it is sufficient if the petition shows merely that the personalty is insufficient.[82] Where a sale of land for partition is asked for the petition must show that it cannot be fairly divided.[83]

(IV) *AVERMENTS AS TO REALTY.* As a general rule the statutes require that a petition for the sale of land of a decedent to pay debts shall contain a description of the land, which must be accurate and specific, or at least describe the land

refers to such inventory and makes it a part of the petition is sufficient. *In re* Bentz, 36 Cal. 687. See also Stuart *v.* Allen, 16 Cal. 473, 76 Am. Dec. 551.

Inaccuracies and omissions.— Although a petition sets forth inaccurately the personal property, or omits valuable portions thereof, yet if it purports on its face to set forth the whole of it, and the amount, if any, undisposed of, the order of sale made thereon cannot be attacked. Haynes *v.* Meeks, 20 Cal. 288.

The fact that there has been a previous administrator does not relieve the second administrator from the necessity of a compliance to the extent of his ability with the statutory requirements as to a statement of the personal property in a petition for a sale of the realty. He must show not merely the personal property which has come into his possession since his appointment but also to the extent of his ability that which came into the hands of his predecessor. Haynes *v.* Meeks, 20 Cal. 288.

When omission not fatal.— In an action to sell a decedent's interest in land to pay his debts, on the ground of deficiency of personalty, an omission to state in the petition the amount of personalty is not fatal where the petition also prays for the sale, on the ground of indivisibility, for apportionment among the heirs. Rodgers *v.* Rodgers, 31 S. W. 139, 17 Ky. L. Rep. 358.

Where the records of the surrogate's court show the amount of personalty which came into the hands of the administrator such amount need not be set forth in a petition by the administrator for leave to sell realty for the payment of debts. Forbes *v.* Halsey, 26 N. Y. 53. See also Jackson *v.* Crawfords, 12 Wend. (N. Y.) 533.

A true and correct inventory and appraisement of all the personal property must be exhibited to the court. O'Brien *v.* Wiggins, 10 Kulp (Pa.) 125.

80. Gladson *v.* Whitney, 9 Iowa 267; Ackley *v.* Dygert, 33 Barb. (N. Y.) 176.

Sufficiency of petition.— Under N. Y. Code Civ. Proc. § 2752, subd. 4, which requires a petition by an administrator for a sale of decedent's realty to pay debts to state the amount of personalty that has come into petitioner's hands, the application thereof, and the amount which may yet be realized, a petition stating that the amount of personalty was insufficient to pay debts, that the amount which had come into petitioner's hands was ten dollars, that he had proceeded with reasonable diligence in converting the personalty into money and applying it to the debts, and that the only indebtedness of decedent was petitioner's claim, amounting to one thousand five hundred and fifty-nine dollars, was sufficient, although it did not state specifically what application had been made of the personalty, or the amount which might yet be realized. Matter of Williams, 1 Misc. 35, 22 N. Y. Suppl. 906. An administrator's petition to sell decedent's real estate to pay debts, stating the amount of the personal assets received, and "that it is still in my hands unpaid and unapplied," sufficiently shows the application of the personal estate as required by statute. Richmond *v.* Foote, 3 Lans. (N. Y.) 244.

81. Kindell *v.* Titus, 9 Heisk. (Tenn.) 727. See also Wallace *v.* Grant, 27 Wash. 130, 67 Pac. 578, holding a petition stating merely that petitioner had sold "all the personal property of said estates that in his judgment is advisable to sell at the present time" was insufficient to authorize a mortgage of decedent's property because showing affirmatively that the personal estate had not been exhausted.

82. See Richardson *v.* Musser, 54 Cal. 196.

83. Flanagan *v.* Pierce, 27 Tex. 78, holding that an allegation in a petition that the sale is sought "to enable the administrator to settle up said estate and satisfy all the heirs" is not sufficient.

An allegation that land cannot be divided "fairly" is sufficient under a statute providing for a sale when the land cannot be divided equitably. Warnock *v.* Thomas, 48 Ala. 463. See also Satcher *v.* Satcher, 41 Ala. 26, 9 Am. Dec. 498, holding an allegation that the land could not be "fairly, beneficially, and equitably divided" sufficient.

Averment held sufficient.— An averment in the petition of an executor that "the said real estate cannot be advantageously divided among the numerous devisees of said testator" is a sufficient averment within Ky. Civ. Code Pr. § 490, subs. 2, which provides for a sale of property jointly owned if "the property cannot be divided without materially impairing its value or the value of the plaintiff's interest therein," when taken with other averments in the petition which show that, as a matter of fact, the property cannot be divided without materially impairing its value. Zehnder *v.* Schoenbachler, 70 S. W. 278, 24 Ky. L. Rep. 947.

with sufficient certainty to identify it,[84] and it is also required in some states that the petition shall show the condition [85] and value of the land,[86] and whether or not

84. *Alabama.*— Kornegay *v.* Mayer, 135 Ala. 141, 33 So. 36; Henley *v.* Johnston, 134 Ala. 646, 32 So. 1009, 92 Am. St. Rep. 48; Austin *v.* Willis, 90 Ala. 421, 8 So. 94; Gilchrist *v.* Shackelford, 72 Ala. 7; De Bardelaben *v.* Stoudenmire, 48 Ala. 643; Smith *v.* Flournoy, 47 Ala. 345.

California.— *In re* Cook, 137 Cal. 184, 69 Pac. 968; Haynes *v.* Meeks, 20 Cal. 288; Townsend *v.* Gordon, 19 Cal. 188.

Indiana.— Rapp *v.* Matthias, 35 Ind. 332.

Missouri.— Roberts *v.* Thomason, 174 Mo. 378, 74 S. W. 624, holding that a deed based on a sale by an administrator on a petition to the probate court that does not describe the land, and on an order in response to such petition, also failing to describe the land is void.

New York.— Ackley *v.* Dygert, 33 Barb. 176.

Washington.— Hazelton *v.* Bogardus, 8 Wash. 102, 35 Pac. 602.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1391.

Sale of equity of redemption.— An administrator's sale of a deceased mortgagor's equity of redemption is invalid if the petition to the probate court for leave to sell does not correctly describe the land. Rainey *v.* McQueen, 121 Ala. 191, 25 So. 920.

Where power of sale given by will.— The fact that the bill did not set out and describe the property of the testator is not fatal to the jurisdiction to decree a sale where the will vested the executors with the widest discretion as to selling the property and the application was by them to the chancellor for aid in the execution of their trust. Allen *v.* Shanks, 90 Tenn. 359, 16 S. W. 715.

An imperfect description in the petition, which is true so far as it goes, and which may have been amended in the probate court, or perfected by the aid of facts judicially known to the courts, is not fatal to the validity of the proceedings. Smith *v.* Flournoy, 47 Ala. 345.

The petition may refer to the inventory for a description of the real estate and the condition and value thereof and both may be considered together. Wilson *v.* Hastings, 66 Cal. 243, 5 Pac. 217; Stuart *v.* Allen, 16 Cal. 473, 76 Am. Dec. 551. But where a petition contains no description of the real estate or its condition, or the value and the reference to the inventory is for greater certainty, this is insufficient to incorporate the inventory with the petition and cure the omission to describe the realty. Wilson *v.* Hastings, 66 Cal. 243, 5 Pac. 217.

Description held sufficient see Richardson *v.* Butler, 82 Cal. 174, 23 Pac. 9, 16 Am. St. Rep. 101.

Descriptions held insufficient see Kornegay *v.* Mayer, 135 Ala. 141, 33 So. 36; Henley *v.* Johnston, 134 Ala. 646, 32 So. 1009, 92 Am. St. Rep. 48 (failure to indicate with accuracy the section, township, and range in which lands located); Gilchrist *v.* Shackelford, 72 Ala. 7; Wilson *v.* Hastings, 66 Cal. 243, 5 Pac. 217; Hazelton *v.* Bogardus, 8 Wash. 102, 35 Pac. 602 (holding that a sale of land by an administrator is void where the petition for and order of sale describe the land as located in a certain township and county, when there is no such township in that county, and there is nothing, aside from such description, to indicate any certain piece of land).

85. *In re* Levy, 141 Cal. 639, 75 Pac. 317; *In re* Cook, 137 Cal. 184, 69 Pac. 968; *In re* Devincenzi, 119 Cal. 498, 51 Pac. 845; Richardson *v.* Butler, 82 Cal. 174, 23 Pac. 9, 16 Am. St. Rep. 101; *In re* Boland, 55 Cal. 310; Gregory *v.* Taber, 19 Cal. 397, 79 Am. Dec. 219; Spencer *v.* Sheehan, 19 Minn. 338.

Negative averments.— A petition for leave to sell real estate need not show that it is not cultivated, improved, or built upon, or that it has no water power or other natural advantages. Spencer *v.* Sheehan, 19 Minn. 338.

Objection cannot be first raised on appeal. — Where no objection was urged at the trial to the petition for the sale of the real estate of a deceased person that it did not contain a proper statement of the condition of the property such objection cannot be considered upon appeal, but the petition must be treated as properly describing such condition. Baum *v.* Roper, 132 Cal. 42, 64 Pac. 128.

Statements held sufficient see *In re* Levy, 141 Cal. 639, 75 Pac. 317; *In re* Devincinzi, 119 Cal. 498, 51 Pac. 845 ("fair"); Richardson *v.* Butler, 82 Cal. 174, 23 Pac. 9, 16 Am. St. Rep. 101, "unimproved."

86. *In re* Levy, 141 Cal. 639, 75 Pac. 317; *In re* Cook, 137 Cal. 184, 69 Pac. 968 (holding that a petition alleging merely that the land "is unimproved desert land," and "is chiefly valuable for the possibility that it may contain petroleum," without either stating its value or that its value could not be ascertained, and which is unaided by any direct finding of value, is substantially defective as against a direct attack upon appeal from the order of sale); Silverman *v.* Gundelfinger, 82 Cal. 548, 23 Pac. 12; Gregory *v.* Taber, 19 Cal. 397, 79 Am. Dec. 219; Rapp *v.* Matthias, 35 Ind. 332; Matter of McGee, 5 N. Y. App. Div. 527, 38 N. Y. Suppl. 1062. See also *In re* Devincinzi, 119 Cal. 498, 51 Pac. 845.

Where several parcels lie together the petition need not state the value of each parcel separately. Matter of McGee, 5 N. Y. App. Div. 527, 38 N. Y. Suppl. 1062; Matter of Georgi, 35 Misc. (N. Y.) 685, 72 N. Y. Suppl. 431.

Reference to schedule annexed to petition sufficient.— Silverman *v.* Gundelfinger, 82 Cal. 548, 23 Pac. 12. See also Richardson *v.* Butler, 82 Cal. 174, 23 Pac. 9, 16 Am. St. Rep. 101.

it is occupied, and if occupied, the names of the occupants.[87] It has also been required that the petition shall show whether the decedent has any other real estate than that described therein,[88] and even that it shall describe all the lands of the decedent.[89] It should be alleged that the land sought to be sold lies within the jurisdiction of the court.[90] The petition must show decedent had some title to or interest in the land sought to be sold,[91] and it is sometimes required that it shall show what this title or interest is.[92] But on the other hand it has been held that the representative's petition for leave to sell includes any interest which the decedent had in the lands described,[93] and hence the petition need not set out the precise character of decedent's interest,[94] or the encumbrances to which the premises are subject.[95] In some jurisdictions a failure of the petition to describe

Statement of appraised value.— Where a petition for the sale of testator's real estate stated that the value thereof was set forth in a schedule attached to the petition, an objection that the values so set forth were the appraised values and not the present values was not available on general demurrer. *In re* Levy, 141 Cal. 639, 75 Pac. 317.

A creditor's petition must state the value of the premises sought to be ordered applied to his debt. Mead *v.* Sherwood, 4 Redf. Surr. (N. Y.) 352.

87. Ackley *v.* Dygert, 33 Barb. (N. Y.) 176; Matter of Slater, 17 Misc. (N. Y.) 474, 41 N. Y. Suppl. 534.

A creditor's petition must state who are the occupants of the premises sought to be ordered applied to his debt. Mead *v.* Sherwood, 4 Redf. Surr. (N. Y.) 352.

88. Allen *v.* Sanford, 5 Silv. Supreme (N. Y.) 208, 8 N. Y. Suppl. 182.

89. Levy's Estate, 141 Cal. 639, 75 Pac. 317; Wilson *v.* Hastings, 66 Cal. 243, 5 Pac. 217 (holding that where an inventory, referred to as part of the petition, does not contain a sufficient description of all decedent's real property to identify it, it will be insufficient as a basis for such an order of sale, although it correctly describes the parcel to be sold); Eddy's Estate, 12 Phila. (Pa.) 118.

An omission to describe one tract of land owned by testator, of which the petitioners neither knew nor could have known by diligent inquiry, does not render a creditor's petition fatally defective. *In re* Faulkner, 57 Hun (N. Y.) 586, 10 N. Y. Suppl. 325.

A statement of the real estate which the decedent died "leaving" is a sufficient compliance with a statute requiring the petition to state what real estate the decedent "may have died seized of." McNitt *v.* Turner, 16 Wall. (U. S.) 352, 21 L. ed. 341.

Where the answer states that certain real estate is omitted from the schedule attached to the petition, and there is no replication, the petition to sell must be dismissed under a statute requiring that on an application for a sale the representative shall exhibit to the court "a full and correct statement of all the real estate of such decedent." *In re* Eddy, 12 Phila. (Pa.) 55.

90. Williams *v.* Williams, 49 Ala. 439.

Judicial knowledge aiding petition.— In proceedings before the probate court for the sale of a decedent's lands for the payment of debts, if the lands are so described in the petition that the court, aided by its judicial knowledge of the surveys of the public lands, must know that they are situated in the county, this is sufficient to support the jurisdiction of the court. Money *v.* Turnipseed, 50 Ala. 499.

Description leaving no difficulty in identification.— Where a petition to the probate court by an executor or administrator to sell the lands of the decedent for distribution omits to state that the lands are in the county or within the jurisdiction of the court in which the application is made, yet, if such a description is given as will leave no real difficulty in identifying the lands intended, it will be sufficient, especially if no objection is interposed before the final order of sale has been made. De Bardelaben *v.* Stoudenmire, 48 Ala. 643.

91. Williams *v.* Williams, 49 Ala. 439 (that decedent died seized of the land); Pettit *v.* Pettit, 32 Ala. 288; Heffner's Appeal, 119 Pa. St. 462, 13 Atl. 314. See also Henley *v.* Johnston, 134 Ala. 646, 32 So. 1009, 92 Am. St. Rep. 48, holding that a petition by an administrator for sale of lands which averred that decedent "died seized and possessed of the following described real estate, to wit: Certain interest and rights, not definitely known to your petitioner in and to about forty-eight tracts of land," etc., sufficiently showed that decedent had a legal or equitable interest in the lands sought to be sold.

Descendible estate.— An allegation, in a proceeding to sell land, that intestate at the time of his death was entitled to a vested remainder in fee of the residence place in which his widow, defendant, has a life-estate, is sufficient as an allegation of an estate in the intestate "which by law would descend to his heirs," with N. C. Code, § 1446, making the same liable for the payment of his debts. Elliott *v.* Shuler, 50 Fed. 454.

92. Rapp *v.* Matthias, 35 Ind. 332.

An averment that decedent was the owner in fee simple is sufficient, it is not necessary to set out his title any more specifically. Jackson *v.* Weaver, 98 Ind. 307.

93. Tyndale *v.* Stanwood, 182 Mass. 534, 66 N. E. 23.

94. Tyndale *v.* Stanwood, 182 Mass. 534, 66 N. E. 23.

95. Tyndale *v.* Stanwood, 182 Mass. 534, 66 N. E. 23. See also Spencer *v.* Sheehan, 19

or to sufficiently describe the land is not fatal to the petition.[96] Statements as to the real estate need not be made positively and unqualifiedly to give jurisdiction.[97]

(v) *Signing and Verification.* The petition or application should ordinarily be signed by the executor or administrator[98] and verified by his oath or affidavit.[99]

c. Filing. The petition must be filed in the court having jurisdiction to order a sale.[1] The time for filing is regulated by statute or local practice varying somewhat in the different jurisdictions.[2]

d. Amendment. The court may allow an amendment of the petition,[3] but

Minn. 338, holding that the petition need not show that there are no encumbrances.

96. *California.*— Burris *v.* Kennedy, 108 Cal. 331, 41 Pac. 458.

Georgia.— Coggins *v.* Griswold, 64 Ga. 323, petition need not describe land.

Kansas.— Bryan *v.* Bander, 23 Kan. 95, petition alleging only that property situated in county where petition filed and containing no other description not fatally defective.

Kentucky.— McNew *v.* Martin, 60 S. W. 412, 22 Ky. L. Rep. 1275, judgment for sale valid, although land not described in petition.

Massachusetts.—Yeomans *v.* Brown, 8 Metc. 51, statute providing that petition "may" set forth the value, description, and condition of the land not imperative.

Michigan.— Woods *v.* Monroe, 17 Mich. 238, holding that a license to an administrator to sell lands of the intestate is not void because the petition therefor did not describe one of the lots to be sold; the other lots being fully described, and, as to the one lot, a supplemental order being afterward made and appended to the original license directing the administrator to sell it.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1391.

97. *In re* German Bank, 39 Hun (N. Y.) 181.

98. See Spragins *v.* Taylor, 48 Ala. 520, holding, however, that it was sufficient where the application was signed by the executor "by his attorney."

99. Reynolds *v.* Kirkland, 44 Ala. 312; *In re* Boland, 55 Cal. 310 (if brought under Code Civ. Proc. § 1537); Weed *v.* Edmonds, 4 Ind. 468; Crippen *v.* Crippen, 1 Head (Tenn.) 128. See also Alabama Conference M. E. Church South *v.* Price, 42 Ala. 39. *Contra*, Myers *v.* Davis, 47 Iowa 325.

Verification may be made before any officer authorized to administer oaths. Richmond *v.* Foote, 3 Lans. (N. Y.) 244.

Want of verification would not affect jurisdiction. Myers *v.* Davis, 47 Iowa 325, where the court said that this would be true if the statute required verification, which it did not.

A failure to strictly comply with the statutory requirements as to the affidavit will not render the sale void. Wilkerson *v.* Allen, 67 Mo. 502.

Where certain schedules were annexed to and made part of the petition of an administrator to sell land, a verification placed before the schedules was not improper. Richardson *v.* Butler, 82 Cal. 174, 23 Pac. 9, 16 Am. St. Rep. 101.

Waiver.— The verification by an administrator of a petition to sell land for the payment of debts as required by statute will be presumed to be waived by a party who appears and contests the petition. Weed *v.* Edmonds, 4 Ind. 468.

1. Stack *v.* Royce, 34 Nebr. 833, 52 N. W. 675 (petition must be filed in the office of the clerk of the district court of the county in which administration was granted); Wood *v.* Skinner, 79 N. C. 92.

2. **Georgia.**— It is not necessary to file the petition for a sale of real estate any number of days before the term at which the decree is granted; Code, § 4221, providing for the filing of *ex parte* petitions in chancery, not prescribing any time wherein such a petition shall be filed. McGowan *v.* Lufburrow, 82 Ga. 523, 9 S. E. 427, 14 Am. St. Rep. 178.

Illinois.— An administrator may file his petition for an order to sell real estate to pay debts on a day subsequent to the particular day specified in his notice thereof. Shoemate *v.* Lockridge, 53 Ill. 503. But see Gibson *v.* Roll, 30 Ill. 172, 83 Am. Dec. 181. But where he gives notice that he will, at a certain term of the court, apply for an order to sell lands of the estate to pay debts, the petition must be filed at the term designated in the notice, or all proceedings under it will be void. Schnell *v.* Chicago, 38 Ill. 382, 87 Am. Dec. 304; Morris *v.* Hogle, 37 Ill. 150, 87 Am. Dec. 243; Turney *v.* Turney, 24 Ill. 625.

Indiana.— Under Rev. St. (1843) p. 527, requiring that an administrator's petition for leave to sell real estate shall be presented to the court, and that the court shall make the order of sale while in session, a petition may be filed in vacation. Shepherd *v.* Fisher, 17 Ind. 229.

Petition filed before appointment.— Under Ind. Rev. St. (1843) p. 458, §§ 27, 28, providing that an administrator's sale shall not be avoided on account of irregularity, where it appeared that a sale was directed by a court of competent jurisdiction, that the administrator took the oath and gave bond, that notice was given, and that the premises were sold, and held by the purchaser in good faith, the sale should not be avoided because the petition for the sale of the land was filed by the administrator before his appointment. Rice *v.* Cleghorn, 21 Ind. 80.

3. Brown *v.* Powell, 45 Ala. 149; Matter of Ibert, 48 N. Y. App. Div. 510, 62 N. Y. Suppl. 1051; Matter of Miller, 2 N. Y. App.

omissions constituting a jurisdictional defect cannot be supplied by amendment.[4] Where the petition fails to give the names of the heirs, an amendment of this defect should not be allowed without notice to the heirs.[5] If by reason of an amendment a contestant is embarrassed in his defense or the condition of the case is so changed as to render new pleas or further evidence necessary, the court on his application should postpone a further hearing of the case, and give him time to file new pleas and take further evidence.[6]

e. Curing of Defects. Defects, omissions, or other irregularities in the petition may be cured by the order, the finding, or by the other papers on the record;[7] but where the petition is insufficient to give the court jurisdiction or authorize a decree of sale the defects cannot be cured by inserting the necessary statements in the order.[8]

f. Collateral Attack on Sufficiency. Where the law gives jurisdiction and there is a petition and notice, the objection that the petition was not sufficient cannot be made collaterally.[9]

6. Citation or Notice — a. Necessity. It is usually required that a citation or notice of the application to sell shall be issued or given to the heirs and devisees of the decedent and others interested in the estate,[10] and it is by service or publi-

Div. 615, 37 N. Y. Suppl. 447 (holding under Code Civ. Proc. § 2474, providing that the surrogate's court may in its discretion permit an omitted recital or allegation to be supplied by amendment, a motion to dismiss a proceeding for the sale of real estate for the payment of debts on the ground of insufficient showing of facts in the petition was properly denied, it appearing that no final order directing such sale had been made); *In re* Faulkner, 10 N. Y. Suppl. 325 (holding that the names of creditors of the estate, not known at the time of filing the petition, may be subsequently added).

Setting up mortgage.— A surrogate has power to allow the amendment of a petition by setting up a mortgage executed by the heirs of the decedent, and to issue a supplemental citation bringing in the mortgagees as parties, although the statute of limitations has run against the institution of a new proceeding. Matter of Ibert, 48 N. Y. App. Div. 510, 62 N. Y. Suppl. 1051.

Amendment after death of representative. — Where, after the order confirming an administrator's sale to pay debts and the order to make title, the administrator dies, the probate court has no authority to entertain a motion by the purchaser to make an amendment of the pleadings, so as to include another tract alleged to have been omitted by mistake. Stafford *v.* Harris, 72 N. C. 198.

Amendment as to property included on parol evidence.— Where the petition, order of sale, confirmation of sale, and order to make title is for a single tract of land identified and made certain by boundaries and description, the pleadings cannot be amended at the instance of the purchaser and on parol evidence so as to include another distinct tract of land claimed to have been omitted by mistake. Stafford *v.* Harris, 72 N. C. 198.

Under the Alabama statute, where a mistake has been made in the description of a decedent's lands sold under a probate decree, whether in the petition, order, or other proceedings, the court ordering the sale has authority to correct it on the application of the purchaser or any one claiming under him. Brown *v.* Williams, 87 Ala. 353, 6 So. 111; Lee *v.* Williams, 85 Ala. 189, 3 So. 718. But the personal representative of the decedent is not authorized to file such an application, he being only a party defendant to it. Lee *v.* Williams, 85 Ala. 189, 3 So. 718.

4. Dennis *v.* Jones, 1 Dem. Surr. (N. Y.) 80. See also Crabtree *v.* Niblett, 11 Humphr. (Tenn.) 488, omission to make heirs parties.

5. Turney *v.* Turney, 24 Ill. 625.

6. Brown *v.* Powell, 45 Ala. 149. See also Gharky *v.* Werner, 66 Cal. 388, 5 Pac. 676, holding that where a petition for a sale of realty is amended at the hearing by adding another parcel to the lands described, it must be treated as a new petition, and proceedings had *de novo*.

7. Arguello's Estate, 85 Cal. 151, 24 Pac. 641; Jackson *v.* Weaver, 98 Ind. 307; West *v.* Cochran, 104 Pa. St. 482; Reynolds *v.* Schmidt, 20 Wis. 374.

On a direct attack on the sufficiency of a petition for a sale of decedent's real estate for payment of debts, by appeal from the order of sale, the order will not supply deficiencies of the petition under Cal. Code Civ. Proc. § 1537, providing that a failure to set forth facts in the petition will not invalidate the subsequent proceedings if the defect be supplied by proofs, and the facts be stated in the petition, this availing only on collateral attack. *In re* Cook, 137 Cal. 184, 69 Pac. 968.

8. Cloud *v.* Barton, 14 Ala. 347; Gregory *v.* Taber, 19 Cal. 397, 79 Am. Dec. 219.

9. Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122.

10. *Alabama.*— Summersett *v.* Summersett, 40 Ala. 596, 91 Am. Dec. 494; Field *v.* Goldsby, 28 Ala. 218, 65 Am. Dec. 341; Doe *v.* Riley, 28 Ala. 164, 65 Am. Dec. 334; Wiley *v.* White, 3 Stew. & P. 355.

Arkansas.— Gregg *v.* Gregg, 33 Ark. 89; Rogers *v.* Wilson, 13 Ark. 507.

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California.— Campbell *v.* Drais, 125 Cal. 253, 57 Pac. 994; Beckett *v.* Selover, 7 Cal. 215, 68 Am. Dec. 237.

Connecticut.— Dorrance *v.* Raynsford, 67 Conn. 1, 34 Atl. 706, 52 Am. St. Rep. 266.

Florida.— Emerson *v.* Ross, 17 Fla. 122.

Georgia.— Fussell *v.* Dennard, 118 Ga. 270, 45 S. E. 247; Davis *v.* Howard, 56 Ga. 430.

Illinois.— Marshall *v.* Rose, 86 Ill. 374; Fell *v.* Young, 63 Ill. 106; Gibson *v.* Roll, 27 Ill. 88, 81 Am. Dec. 219; Herdman *v.* Short, 18 Ill. 59.

Indiana.— Martin *v.* Neal, 125 Ind. 547, 25 N. E. 813; Helms *v.* Love, 41 Ind. 210; Hawkins *v.* Hawkins, 28 Ind. 66.

Massachusetts.— Walker *v.* Fuller, 147 Mass. 489, 18 N. E. 400. See also Nazro *v.* Long, 179 Mass. 451, 61 N. E. 43. *Contra, In re* Rulluff, 1 Mass. 240, construing St. (1783) c. 32, § 1.

Mississippi.— Picard *v.* Montross, (1895) 17 So. 375; McPike *v.* Wells, 54 Miss. 136; Root *v.* McFerrin, 37 Miss. 17, 75 Am. Dec. 49; Gwin *v.* McCarroll, 1 Sm. & M. 351; Campbell *v.* Brown, 6 How. 106, 230.

Missouri.— Hill *v.* Taylor, 99 Mo. App. 524, 74 S. W. 9.

Nebraska.— Holmes *v.* Columbia Nat. Bank, (Sup. 1903) 97 N. W. 26.

New Hampshire.— Flanders *v.* George, 55 N. H. 486; French *v.* Hoyt, 6 N. H. 370, 25 Am. Dec. 464, holding that an order of notice is necessary, although the application is made by the mother of minor heirs for whom no guardians have been appointed, and although the estate is supposed to be insolvent.

New York.— Corwin *v.* Merritt, 3 Barb. 341; Matter of Slater, 17 Misc. 474, 41 N. Y. Suppl. 534; *In re* John, 18 N. Y. Suppl. 172, 21 N. Y. Civ. Proc. 326. See also Fenn's Estate, 8 N. Y. Civ. Proc. 206.

Vermont.— Under the general act relating to sales of realty for the payment of debts, it was necessary that heirs and devisees should be first notified. But it was useless and unnecessary to notify the heirs where the proceeding was, under the act of 1831, for the recovery and sale, for the payment of debts, of land fraudulently conveyed by the decedent in his lifetime. Harrington *v.* Gage, 6 Vt. 532.

Virginia.— Menefee *v.* Marge, (1888) 4 S. E. 726.

Wisconsin.— Humes *v.* Cox, 1 Pinn. 551.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1398 *et seq.*

Contra.— *Louisiana.*— The heirs are not entitled to notice in proceedings to sell property to pay debts (Irwin *v.* Flynn, 110 La. 829, 34 So. 794; Tertrou *v.* Comeau, 28 La. Ann. 633; Carter *v.* McManus, 15 La. Ann. 676; Leonard *v.* Fluker, 4 Rob. 148. See also Lehmann's Succession, 41 La. Ann. 987, 7 So. 33; Hood's Succession, 33 La. Ann. 466. But *compare* Bowles' Succession, 3 Rob. 35), but mortgage creditors have been held entitled to notice of any application by the executor to sell the mortgaged property (French *v.* Prieur, 6 Rob. 299).

Pennsylvania.— The widow and heirs are not entitled to specific notice of an application for an order of sale for the payment of debts (Irwin *v.* Guthrie, 198 Pa. St. 267, 47 Atl. 992; *In re* Smith, 188 Pa. St. 222, 41 Atl. 542; West Hickory Min. Assoc. *v.* Reed, 80 Pa. St. 38; Stiver's Appeal, 56 Pa. St. 9; Wall's Appeal, 31 Pa. St. 62; Weaver's Appeal, 19 Pa. St. 416; Murphy's Appeal, 8 Watts & S. 165. See also *In re* Simmonds, 19 Pa. St. 439. But *compare* Mustin's Estate, 8 Pa. Dist. 180), but the public notice of the sale is sufficient, as those interested can then be heard at any time before confirmation (Wall's Appeal, *supra*; Weaver's Appeal, *supra*).

Rhode Island.— Butler *v.* Butler, 10 R. I. 501 [*following* Luther *v.* Martin, 10 R. I. 503 note.]

Texas.— George *v.* Watson, 19 Tex. 354.

Washington.— Ryan *v.* Fergusson, 3 Wash. 356, 28 Pac. 910, notice not necessary except as required by statute.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1401.

An application to mortgage or lease the land must be upon notice, the same as an application to sell. Martin *v.* Neal, 125 Ind. 547, 25 N. E. 813.

Constructive notice.— Conceding that Cal. Code Civ. Proc. § 473, providing that a party may be released from a judgment or order taken against him through his mistake, inadvertence, surprise, or excusable neglect, applies to an order for sale of real estate of a decedent, such order is not to be set aside on the ground that the heirs had no knowledge of the filing of the petition for sale, where the estate had been long pending in court and the heirs had the constructive notice provided by statute. *In re* Leonis, 138 Cal. 194, 71 Pac. 171.

Time of issuing citation.— A statute requiring the citation, when issued upon the petition, to be served within sixty days thereafter, does not render the proceeding null for failure to issue the citation promptly on the filing of the petition. Matter of Van Vleck, 32 Misc. (N. Y.) 419, 66 N. Y. Suppl. 727.

Notice for second hearing.— After a reversal of an order granting a nonsuit and dismissing a petition for an order requiring the executrix to sell real estate, it is not necessary, upon a second hearing, to again give the statutory notice required by Cal. Code Civ. Proc. § 1539, but the court is at liberty to hear and dispose of the petition upon such notice as may be provided by its general rules or as it may deem reasonable in the particular case. *In re* Couts, 100 Cal. 400, 34 Pac. 865. See also Cahill *v.* Bassett, 66 Mich. 407, 33 N. W. 722.

Agreement for sale upon reasonable notice.—Where an agreement provided that a sale,

interested is acquired.[11] The court cannot, at the hearing, abandon the case presented by the petition and order the sale for another object, as such sale would be without notice;[12] and so also, where after the rendition of a judgment of sale an amended petition was filed, reciting that the land had been incorrectly described in the petition and judgment, and setting out a correct description, and the descriptions were materially different, land embraced in the first being omitted from the second, and land not embraced in the first being included in the second, the making of an order amending the judgment of sale, and ordering a sale of the newly described land in accordance with the terms of the original judgment, without any summons ever issuing on the amended petition, or any report from the guardian or guardian *ad litem* of infant defendants ever being made thereon till after the sale was confirmed, was error.[13] But a notice by an administrator of an intention to apply for an order to sell his decedent's lands for the payment of debts may be used by his successor as administrator of the same estate, in case the first administrator fails to effect a sale;[14] and it has been held that where an executor files a petition in the proper court for license to sell real property, and the heirs and devisees sign a waiver of notice and enter an appearance, or are duly served with notice, such notice will continue until the debts mentioned in the petition are paid by the sale of the real property described therein, and a purchaser under a renewed license issued on such petition, who has paid the purchase-price, the same being applied to the payment of the debts against the estate of the testator, and the sale having been confirmed and a deed made to such purchaser, may rely upon the title so acquired as against a collateral attack by the heirs and devisees of such testator.[15] In most jurisdictions a failure to give notice or to give proper notice is held to be jurisdictional and to render the order of sale and the sale thereunder nullities, at least as to the interest of the persons not notified;[16] but in a few jurisdictions, where the proceeding to sell is

which must be made in the course of administration, should be made upon reasonable notice, no legal requisites were dispensed with, and whatever was ordinarily essential to such a sale continued to be so. Halleck *v.* Moss, 17 Cal. 339.

Notice to distributees.— In Mississippi an application for a sale of personalty (slaves) for the payment of debts need not be upon notice to the distributees (Smith *v.* Chew, 35 Miss. 153; Hutchins *v.* Brooks, 31 Miss. 430), but when a sale is to be made for distribution, notice to the distributees is necessary and must be affirmatively shown by the record (Hutchins *v.* Brooks, 31 Miss. 430; Joslin *v.* Caughlin, 26 Miss. 134).

Order on annual settlement.— In Missouri an order for a sale of land may be made by the court without notice to the heirs on an annual settlement of the accounts of the executor or administrator, where it appears that the personal property is insufficient to pay the debts. Hutchinson *v.* Shelley, 133 Mo. 400, 34 S. W. 838; Day *v.* Graham, 97 Mo. 398, 11 S. W. 55; Teverbaugh *v.* Hawkins, 82 Mo. 180; Patee *v.* Mowry, 59 Mo. 161. But otherwise notice is necessary. Hutchinson *v.* Shelley, *supra*; Teverbaugh *v.* Hawkins, *supra*.

11. Goudy *v.* Hall, 36 Ill. 313, 87 Am. Dec. 217; Gibson *v.* Roll, 30 Ill. 172, 83 Am. Dec. 181.

12. Williams *v.* Childress, 25 Miss. 78.

13. Robinson *v.* Clark, 34 S. W. 1083, 17 Ky. L. Rep. 1401.

14. Rogers *v.* Johnson, 125 Mo. 202, 28 S. W. 635.

15. Seymour *v.* Ricketts, 21 Nebr. 240, 31 N. W. 781.

16. *California.*— Burris *v.* Kennedy, 108 Cal. 331, 41 Pac. 458. See also Halleck *v.* Moss, 17 Cal. 339, sale upon insufficient notice "at least voidable if not absolutely void."

Connecticut.— Dorrance *v.* Raynsford, 67 Conn. 1, 34 Atl. 706, 52 Am. St. Rep. 266.

Illinois.— Burr *v.* Bloemer, 174 Ill. 638, 51 N. E. 821; Donlin *v.* Hettinger, 57 Ill. 348; Botsford *v.* O'Conner, 57 Ill. 72; Goudy *v.* Hall, 30 Ill. 109; Whitney *v.* Porter, 23 Ill. 445 (service of notice upon infant heirs only, while statute required service on guardians or persons having control); Herdman *v.* Short, 18 Ill. 59.

Indiana.— Martin *v.* Neal, 125 Ind. 547, 25 N. E. 813 (holding an order for the mortgaging and leasing of land void because made without notice, although notice was given of a previous application to sell); Wetherill *v.* Harris, 67 Ind. 452; Hawkins *v.* Hawkins, 28 Ind. 66; Guy *v.* Pierson, 21 Ind. 18; Gerrard *v.* Johnson, 12 Ind. 636; Piatt *v.* Dawes, 10 Ind. 60 (lease); Doe *v.* Bowen, 8 Ind. 197, 65 Am. Dec. 758; Doe *v.* Anderson, 5 Ind. 33; Babbitt *v.* Doe, 4 Ind. 355; Wort *v.* Finley, 8 Blackf. 335; Bliss *v.* Wilson, 4 Blackf. 169.

Kansas.— Chicago, etc., R. Co. *v.* Cook, 43 Kan. 83, 22 Pac. 988; Rogers *v.* Clemmans,

regarded as being strictly *in rem*, the failure to give notice is regarded as a mere irregularity and does not render the judgment void.[17]

26 Kan. 522; Mickel *v.* Hicks, 19 Kan. 578, 21 Am. Rep. 161.

Mississippi.— Hendricks *v.* Pugh, 57 Miss. 157; Winston *v.* McLendon, 43 Miss. 254; Martin *v.* Williams, 42 Miss. 210, 97 Am. Dec. 456; Hamilton *v.* Lockhart, 41 Miss. 460; Root *v.* McFerrin, 37 Miss. 17, 75 Am. Dec. 49; Commercial Bank *v.* Doe, 9 Sm. & M. 613; Planters' Bank *v.* Johnson, 7 Sm. & M. 449; Laughman *v.* Thompson, 6 Sm. & M. 259; Gwin *v.* McCarroll, 1 Sm. & M. 351; Puckett *v.* McDonald, 6 How. 269; Campbell *v.* Brown, 6 How. 106, 230; Vick *v.* Vicksburg, 1 How. 379, 31 Am. Dec. 167.

Missouri.— Young *v.* Downey, 145 Mo. 250, 46 S. W. 1086, 68 Am. St. Rep. 568, 150 Mo. 317, 51 S. W. 751; Hutchinson *v.* Shelley, 133 Mo. 400, 34 S. W. 838; Cunningham *v.* Anderson, 107 Mo. 371, 17 S. W. 972, 28 Am. St. Rep. 417; Teverbaugh *v.* Hawkins, 82 Mo. 180; Valle *v.* Fleming, 19 Mo. 454, 61 Am. Dec. 566.

New Hampshire.— French *v.* Hoyt, 6 N. H. 370, 25 Am. Dec. 464.

New Jersey.— Bray *v.* Neill, 21 N. J. Eq. 343.

New York.— Sheldon *v.* Wright, 5 N. Y. 497; Schneider *v.* McFarland, 2 N. Y. 459 [*affirming* 4 Barb. 139]; Jenkins *v.* Young, 35 Hun 569; Corwin *v.* Merritt, 3 Barb. 341; Matter of Slater, 17 Misc. 474, 41 N. Y. Suppl. 534; *In re* John, 18 N. Y. Suppl. 172, 21 N. Y. Civ. Proc. 326; Bloom *v.* Burdick, 1 Hill 130, 37 Am. Dec. 299. See also Matter of Georgi, 44 N. Y. App. Div. 180, 60 N. Y. Suppl. 772 [*affirmed* in 162 N. Y. 660, 57 N. E. 1110].

North Carolina.— McNeill *v.* Fuller, 121 N. C. 209, 28 S. E. 299; Harrison *v.* Harrison, 106 N. C. 282, 11 S. E. 356, decree void as against heirs not served in some sufficient way.

Ohio.— At the present time the rule appears to be as stated in the text. Benson *v.* Cilley, 8 Ohio St. 604. And see Holloway *v.* Stuart, 19 Ohio St. 472. But prior to the statute of 1840 the prevailing view seems to have been that the proceeding was strictly *in rem* and a failure to serve or notify the heirs was a mere irregularity. Biggs *v.* Bickel, 12 Ohio St. 49; Benson *v.* Cilley, 8 Ohio St. 604; Sheldon *v.* Newton, 3 Ohio St. 494; Lewis *v.* Lewis, 15 Ohio 715; Robb *v.* Irwin, 15 Ohio 689; Ewing *v.* Hollister, 7 Ohio, Pt. II, 138; Ewing *v.* Higby, 7 Ohio 198, 28 Am. Dec. 633. See also Snevely *v.* Lowe, 18 Ohio 368. *Contra*, Adams *v.* Jeffries, 12 Ohio 253, 40 Am. Dec. 477. And see Sprague *v.* Litherberry, 22 Fed. Cas. No. 13,251, 4 McLean 442.

Oregon.— Fiske *v.* Kellogg, 3 Oreg. 503.

South Carolina.— Whitesides *v.* Barber, 24 S. C. 373. See also Turner *v.* Malone, 24 S. C. 398. But see McLaurin *v.* Rion, 24 S. C. 407.

Tennessee.— Linnville *v.* Darby, 1 Baxt. 306; Taylor *v.* Walker, 1 Heisk. 734.

Virginia.— Menefee *v.* Marge, (1888) 4 S. E. 726.

Wisconsin.— Blodgett *v.* Hitt, 29 Wis. 169; Gibbs *v.* Shaw, 17 Wis. 197, 84 Am. Dec. 737.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1397 *et seq.*

Title of purchaser valid except as against heir not notified.— Menefee *v.* Marge, (Va. 1888) 4 S. E. 726.

Omission to give statutory notice cannot be cured. Hutchinson *v.* Shelley, 133 Mo. 400, 34 S. W. 838 (by a subsequent notice); *In re* Mahoney, 34 Hun (N. Y.) 501.

An omission to serve the notice on a tenant who occupied a portion of the premises did not affect the validity of the purchaser's title except as to the tenant, and as to him only during the continuance of his lease. Rigney *v.* Coles, 6 Bosw. (N. Y.) 479.

Statute under which sale made must govern.— Where a sale appearing upon the record to have been made under the section of the statute providing for the payment of debts was void for want of the notice required by that section, it could not be sustained as having been made under other sections, which provided for a sale for other ends, and which required no notice. Valle *v.* Fleming, 19 Mo. 454, 61 Am. Dec. 566.

17. *Alabama.*— Neville *v.* Kenney, 125 Ala. 149, 28 So. 452, 82 Am. St. Rep. 230; Friedman *v.* Shamblin, 117 Ala. 454, 23 So. 821; Lyons *v.* Hamner, 84 Ala. 197, 4 So. 26, 5 Am. St. Rep. 363; Field *v.* Goldsby, 28 Ala. 218, 65 Am. Dec. 341; Doe *v.* Riley, 28 Ala. 164, 65 Am. Dec. 334; Wyman *v.* Campbell, 6 Port. 219, 31 Am. Dec. 677. *Compare* Summersett *v.* Summersett, 40 Ala. 596, 91 Am. Dec. 494, holding that, to sustain an order for the sale of a decedent's lands for equitable division, the record must affirmatively show that the resident heirs, of full age, had the statutory notice, or that they appeared.

Arkansas.— Apel *v.* Kelsey, 47 Ark. 413, 2 S. W. 102; Montgomery *v.* Johnson, 31 Ark. 74; Rogers *v.* Wilson, 13 Ark. 507.

Iowa.— Spurgin *v.* Bowers, 82 Iowa 187, 47 N. W. 1029 (failure to serve notice on person claiming under an heir); Morrow *v.* Weed, 4 Iowa 77, 66 N. W. 122. *Contra*, Good *v.* Norley, 28 Iowa 188 [*followed* in Boyles *v.* Boyles, 37 Iowa 592]. See also Myers *v.* Davis, 47 Iowa 325.

Texas.— Heath *v.* Layne, 62 Tex. 686; George *v.* Watson, 19 Tex. 354, so holding upon the ground that the act of 1848 did not require or seem to contemplate the service of a citation or notice upon the heirs. *Contra*, under the act of 1846. Littlefield *v.* Tinsley, 26 Tex. 353; Finch *v.* Edmonson, 9 Tex. 504.

United States.— See Grignon *v.* Astor, 2 How. 319, 11 L. ed. 283.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1397 *et seq.*

b. Who Entitled to Notice. The heirs[18] and devisees[19] of the decedent are the persons primarily entitled to notice. In some jurisdictions it is required that a notice, citation, summons, or order to show cause shall be served on infant heirs as well as adult, in order to obtain jurisdiction of their persons.[20] The widow has also been held entitled to notice.[21] Under some statutes, persons in occupation of the premises of which a sale is desired are entitled to notice.[22] The executor or administrator must be cited on an application by a creditor for a sale of decedent's realty to pay debts.[23] Land charged with legacies may be sold for the payment of debts without service of the order to show cause upon the lega-

18. Martin *v.* Neal, 125 Ind. 547, 25 N. E. 813; Campbell *v.* Brown, 6 How. (Miss.) 106; Holmes *v.* Columbia Nat. Bank, (Nebr. Sup. 1903) 97 N. W. 26; *In re* Dolan, 88 N. Y. 309. And see *supra*, note 10.

If any of the heirs are married women, the citation must be served on their husbands as well as on them. Page *v.* Matthews, 41 Ala. 719.

If an heir of the decedent dies after notice given him of the commencement by the administrator of proceedings to sell real estate to pay debts of the estate, and a sale thereafter takes place without any further notice (or any suggestion of the death of such heir), and is affirmed, such sale is valid, and the heirs of such heir cannot attack its validity. Palmerton *v.* Hoop, 131 Ind. 23, 30 N. E. 874.

A purchaser from the heir has been held not entitled to be served with notice of the petition to sell, where an examination of the record would have shown him that the property was subject to be sold for the decedent's debts, that there were debts unpaid, and that an administrator had been appointed for the very purpose of subjecting the land to their payment. Dolton *v.* Nelson, 7 Fed. Cas. No. 3,976, 3 Dill. 469. But see Kammerrer *v.* Ziegler, 1 Dem. Surr. (N. Y.) 177, holding that, in a proceeding by a creditor under the statute to dispose of a decedent's real estate for the payment of debts, citation must issue to one who has purchased the property at a sale had in partition proceedings among the heirs.

19. *In re* Dolan, 88 N. Y. 309. And see *supra*, note 10.

Remainder-men under the will are entitled to notice. Flanders *v.* George, 55 N. H. 486.

Executors and devisees in trust who have not qualified.— Persons nominated as executors and to whom certain devises were made in trust are not entitled to notice where they have not qualified and letters testamentary have issued to the other executors, especially where the will itself directed that only such directors as qualified should be deemed executors. *In re* Dolan, 88 N. Y. 309.

The wife of a devisee is not entitled to notice of a petition for license to sell the land devised for the payment of debts, legacies, and charges of administration. Harrington *v.* Harrington, 13 Gray (Mass.) 513, 74 Am. Dec. 648.

20. *Indiana.*— Guy *v.* Pierson, 21 Ind. 18; Martin *v.* Starr, 7 Ind. 224; Doe *v.* Anderson, 5 Ind. 33.

Mississippi.— Winston *v.* McLendon, 43 Miss. 254.

New York.— Pinckney *v.* Smith, 26 Hun 524, holding that an infant defendant must be served with the order to show cause before a special guardian can be appointed for him.

North Carolina.— Harrison *v.* Harrison, 106 N. C. 282, 11 S. E. 356; Perry *v.* Adams, 98 N. C. 167, 3 S. E. 729, 2 Am. St. Rep. 326; Shields *v.* Allen, 77 N. C. 375. But *compare* Chambers *v.* Penland, 78 N. C. 53.

Tennessee.—Linville *v.* Darby, 1 Baxt. 306; Taylor *v.* Walker, 1 Heisk. 734; Wheatley *v.* Harvey, 1 Swan 484.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1402.

Contra.— Price *v.* Winter, 15 Fla. 66.

Appointment of guardian ad litem before service on minors a nullity.— Linnville *v.* Darby, 1 Baxt. (Tenn.) 306; Taylor *v.* Walker, 1 Heisk. (Tenn.) 734; Wheatley *v.* Harvey, 1 Swan (Tenn.) 484.

Merely citing the guardian ad litem appointed to represent the infant is not sufficient (Guy *v.* Pierson, 21 Ind. 18; Doe *v.* Anderson, 5 Ind. 33. But see Doe *v.* Harvey, 5 Blackf. (Ind.) 487, holding service of notice on the general guardian of infant heirs sufficient), and a decree of sale rendered merely upon the answer or appearance of a guardian *ad litem*, without jurisdiction of the persons of the minor heirs being acquired by summons or notice, has been held void (Clark *v.* Thompson, 47 Ill. 25, 95 Am. Dec. 457. *Contra*, Stuart *v.* Allen, 16 Cal. 473, 76 Am. Dec. 551; Rollins *v.* Brown, 37 S. C. 345, 16 S. E. 44 [*following* Walker *v.* Veno, 6 S. C. 459; Bulow *v.* Witte, 3 S. C. 308]; Sprague *v.* Litherberry, 22 Fed. Cas. No. 13,251, 4 McLean 442. But *compare* Johnson *v.* Cobb, 29 S. C. 372, 7 S. E. 601).

21. Martin *v.* Neal, 125 Ind. 547, 25 N. E. 813; Helms *v.* Love, 41 Ind. 210; *In re* Dolan, 88 N. Y. 309.

Devisees of the widow are not, as such, concluded by an order of sale where they were made parties and notified only as the children and heirs at law of the original decedent; but the sale is void as to the widow's interest. Elliott *v.* Frakes, 71 Ind. 412.

22. *In re* Dolan, 88 N. Y. 309.

23. Kammerrer *v.* Ziegler, 1 Dem. Surr. (N. Y.) 177; Mustin's Estate, 8 Pa. Dist. 180.

tees.[24] Creditors of the decedent are not usually entitled to notice,[25] nor are persons claiming adversely to or under a title derived independently of the decedent.[26]

c. Form and Requisites. Where the statute does not declare what the notice shall contain, it is for the court to determine whether the statements thereof are sufficient,[27] but where the statute provides that notice shall be given in such form and manner as the court shall prescribe, no mere constructive notice will be sufficient, unless it is given in the form and manner prescribed by the court.[28] As a general rule where the notice gives information that at a specified time and place the executor or administrator will apply for authority to sell the whole of the real estate of the decedent, or so much as is necessary for the purpose stated, this is sufficient for all practical purposes,[29] and in determining the sufficiency of a notice the courts should consider whether a reasonable person in the exercise of his ordinary faculties would on reading the notice be apprised by it in what court and at what time the petition would be presented.[30] It has been held not to be necessary that the citation or order to show cause should specifically name the heirs, devisees, or persons interested,[31] specifically describe the

24. *In re* Dolan, 88 N. Y. 309 [*reversing* 26 Hun 46].

25. Thompson *v.* Cox, 53 N. C. 311.

In New York, in a proceeding to sell realty for the payment of debts, the citation must be directed generally to all other creditors of the decedent as well as to the creditors named, unless the executor or administrator has caused to be published a notice requiring creditors to present their claims, and the time for the presentation thereof has elapsed. Matter of Slater, 17 Misc. 474, 41 N. Y. Suppl. 534; Kammerrer *v.* Ziegler, 1 Dem. Surr. 177. And where no administrator's notice to creditors has been published, and no order for publication of notice to unknown creditors has been made, a purchaser of land sold under the surrogate's decree to pay debts cannot be compelled to complete the purchase. Matter of Georgi, 44 N. Y. App. Div. 180, 60 N. Y. Suppl. 772 [*affirmed* in 162 N. Y. 660, 57 N. E. 1110].

26. Walker *v.* Fuller, 147 Mass. 489, 18 N. E. 400; Yoemans *v.* Brown, 8 Metc. (Mass.) 51 (disseizor in possession); Shields *v.* Ashley, 16 Mo. 471.

27. Gibson *v.* Roll, 27 Ill. 88, 81 Am. Dec. 219.

28. Mickel *v.* Hicks, 19 Kan. 578, 21 Am. Rep. 161.

29. Hobson *v.* Ewan, 62 Ill. 146; Gibson *v.* Roll, 27 Ill. 88, 81 Am. Dec. 219.

Form of notices held sufficient see Hobson *v.* Ewan, 62 Ill. 146; Gibson *v.* Roll, 27 Ill. 88, 81 Am. Dec. 219.

Form of order to show cause held sufficient see Rigney *v.* Coles, 6 Bosw. (N. Y.) 479.

Failure to state that assignment of dower and homestead will be asked.— Under Ill. Dower Act, § 44, providing that whenever application is made to a county court for leave to sell real estate of a decedent for payment of debts, and it appears that there is a dower or homestead interest in lands sought to be sold, such court may, in the same proceeding, on the petition of the executor or administrator, or the person entitled to dower and homestead, cause the same to be assigned, there is no error in proceeding to judgment, although the summons simply states that defendants are required to answer a petition "that prays that the court will order and direct a sale of real estate of said deceased for payment of debts," while the administrator's petition asks that homestead and dower be assigned and set off. Oettinger *v.* Specht, 162 Ill. 179, 44 N. E. 399.

Slight discrepancy in stating name of decedent.— The sale of a decedent's land for the payment of debts is not void because the order to show cause and the notice given by publication pursuant thereto are entitled, "In the matter of the estate of W. M. Macey, deceased," instead of "William M. Macey," where it appears that the estate was as well known by the one designation as the other, and that no interested party was misled thereby. Macey *v.* Stark, 116 Mo. 481, 21 S. W. 1088 [*followed* in Macey *v.* Pitillo, (1893) 21 S. W. 1094].

30. Finch *v.* Sink, 46 Ill. 169, 92 Am. Dec. 246.

Notices held sufficient see Finch *v.* Sink, 46 Ill. 169, 92 Am. Dec. 246; Jeffries *v.* Decker, 42 Ill. 519; Moore *v.* Neil, 39 Ill. 256, 89 Am. Dec. 303; Goudy *v.* Hall, 36 Ill. 313, 87 Am. Dec. 217; Johnson *v.* Clark, 18 Kan. 157; Rigney *v.* Coles, 6 Bosw. (N. Y.) 479.

31. It is sufficient if it be directed to "all persons interested." Taylor *v.* Hosick, 13 Kan. 518; Spencer *v.* Sheehan, 19 Minn. 338; Stack *v.* Royce, 34 Nebr. 833, 52 N. W. 675; Furth *v.* U. S. Mortgage, etc., Co., 13 Wash. 73, 42 Pac. 523. See also Foley *v.* McDonald, 46 Miss. 238, "to the non-resident heirs." *Contra*, Matter of Georgi, 35 Misc. (N. Y.) 685, 72 N. Y. Suppl. 431.

In Illinois it was formerly not necessary to insert the names of the persons interested (Gibson *v.* Roll, 27 Ill. 88, 81 Am. Dec. 219; Bowles *v.* Rouse, 8 Ill. 409), but this has been changed by statute (see Cothran St. Ill. (1885) p. 73; Ill. Rev. St. (1889) c. 3, § 103).

Where the widow is the petitioner and the

property,[32] or specify the day in the term of court specified when the application will be made.[33]

d. Personal Service. It is usually required that the summons, citation, notice, or order to show cause shall be personally served on those interested within the jurisdiction [34] a designated time before the hearing of the application,[35] but the legislature has power by statute to dispense with personal notice to heirs within the county and allow notice by publication merely.[36] Under some statutes it has been held optional with the representative whether notice shall be given by personal service or by publication, either mode sufficing,[37] and personal service has also been held to dispense with a statutory requirement of publication.[38] Where the service of a notice has been adjudged sufficient by the court to which it was returnable, the court will be presumed to have acquired jurisdiction thereby.[39] An admission of service may be sufficient.[40]

whole proceeding is at her instance, it is not necessary that her name should appear in the citation. Matter of McGee, 5 N. Y. App. Div. 527, 38 N. Y. Suppl. 1062.

32. *In re* Roach, 139 Cal. 17, 72 Pac. 393, holding that it is sufficient if reference is made in the order to show cause to the petition on file in which the description fully appears.

33. Madden *v.* Cooper, 47 Ill. 359; Finch *v.* Sink, 46 Ill. 169, 92 Am. Dec. 246; Goudy *v.* Hall, 36 Ill. 313, 87 Am. Dec. 217.

If the heirs wish to resist the application, they can take a rule on the administrator to file his petition by a certain day, if they are inconvenienced by his delay. Finch *v.* Sink, 46 Ill. 169, 92 Am. Dec. 246.

34. Summersett *v.* Summersett, 40 Ala. 596, 91 Am. Dec. 494.

Service of guardian.— An order for the sale of an intestate's land to pay his debts is not binding on a minor having a guardian in the state unless the guardian is served with process. Wells *v.* Smith, 44 Miss. 296.

The parties served are sufficiently identified where the notice names specifically the persons to whom it is addressed and the return states that the petition and notice were served upon the widow and minor heirs therein named. Myers *v.* Davis, 47 Iowa 325.

Efforts to serve writ.— Under Colo. Rev. St. p. 671, § 104, requiring an administrator's sale to conform to a chancery sale, and Chancery Act, p. 94, § 8, declaring that notice by publication shall not dispense with the usual exertion of the sheriff to serve the writ, a return of *non est inventus*, made before the return-day, would not support such notice of sale. Vance *v.* Maroney, 4 Colo. 47.

Mode of serving summons.— By the express provisions of Ill. Rev. St. c. 3, § 103, in a proceeding to sell lands to pay debts of a decedent, service of summons by reading the same to defendant is sufficient, and Ill. Dower Act, § 26, providing that where a surviving wife sues by petition in chancery for recovery of dower, defendants shall be summoned as in suits in chancery, has no application, although dower is assigned in the proceeding pursuant to section 44 of such act. Oettinger *v.* Specht, 162 Ill. 179, 44 N. E. 399.

35. Summersett *v.* Summersett, 40 Ala. 596, 91 Am. Dec. 494.

Adjourned hearing.— An order to show cause was issued, returnable on April 26, but was not served on an infant heir. On the return-day of the order a special guardian was appointed for the infant, who admitted service of the citation for the infant. The proof was then taken and the proceedings adjourned to May 10. On April 26 a copy of the order, returnable on that day, was taken, the return-day was erased, and the new adjourned day inserted, and the order was then served upon the infant, but no new order to show cause was entered or made. It was held that the sale was invalid because the infant, when the proof was taken, had not been served with process and had no legal guardian, and the order served upon him was not in fact an order and was too late to be of service. Pinckney *v.* Smith, 26 Hun (N. Y.) 524.

36. Fudge *v.* Fudge, 23 Kan. 416 (where the statute provided that "the court shall require notice of the petition, and of the time and place of hearing the same, to be given for such length of time and in such manner as the court may see proper," and it was held that where notice was given by publication pursuant to the order of the court, this was sufficient, although the heirs were all residents of the county in which the proceedings were had and the land situated); Fleming *v.* Bale, 23 Kan. 88.

37. Hobson *v.* Ewan, 62 Ill. 146 (statute in force in 1853); Gibson *v.* Roll, 27 Ill. 88, 81 Am. Dec. 219.

38. Harris *v.* Ransom, 24 Miss. 504. But *compare* Matlock *v.* Livingston, 9 Sm. & M. (Miss.) 489; Planters' Bank *v.* Johnson, 7 Sm. & M. (Miss.) 449.

39. Tharp *v.* Brenneman, 41 Iowa 251.

40. Robison *v.* Furman, 47 N. J. Eq. 307, 20 Atl. 898, holding that if, on the return of a rule to show cause in the orphans' court why land of a decedent should not be sold, proctors appear on behalf of all the parties interested and admit due and legal service of the rule that is sufficient evidence of proper service.

Rule as to infants.— In South Carolina the summons must be actually served upon an infant defendant, as under the decisions of that state an infant is incapable of making himself a party to an action by accepting

e. Publication. Publication of the notice of an application for a sale, or of the citation or summons thereon, or the order to show cause against the sale, is often provided for[41] in lieu of personal service,[42] and this is the usual mode of giving notice in the case of non-resident heirs or devisees.[43] An order of publication is usually necessary,[44] and such order is commonly based upon an affidavit showing the facts necessary to warrant the giving of notice in this manner.[45] The requirements of the statute or order of court under which publication is made must be complied with[46] as to the length of time during which the publication shall be continued,[47] the time when publication shall begin and end,[48] the paper or papers in which the publication is to be made,[49] and the number of

service of summons so as to be bound by a judgment therein. Whitesides *v.* Barber, 24 S. C. 373; Finley *v.* Robertson, 17 S. C. 435.

41. See Spencer *v.* Sheehan, 19 Minn. 338; Cunningham *v.* Anderson, 107 Mo. 371, 17 S. W. 972, 28 Am. St. Rep. 417.

Under a statute providing for such notice as the court may prescribe, a notice by publication may be prescribed and is lawful. Casey *v.* Stewart, 60 Iowa 160, 14 N. W. 225; Lees *v.* Wetmore, 58 Iowa 170, 12 N. W. 238.

42. Thomas *v.* Parker, 97 Cal. 456, 32 Pac. 562 (holding that under Code Civ. Proc. § 1578, publication properly made is sufficient, and it is not an objection that personal service was not required to be made upon minor heirs under the age of fourteen years); Davis *v.* Howard, 56 Ga. 430 (holding that under Code, § 2559, an order granting leave to an administrator to sell land, obtained on the published notice required by the code, is valid, and cannot be set aside because there was no personal notice).

43. Field *v.* Goldsby, 28 Ala. 218, 65 Am. Dec. 341; Sellers *v.* Talby, 33 Miss. 582.

44. Foley *v.* McDonald, 46 Miss. 238. See also Cunningham *v.* Anderson, 107 Mo. 371, 17 S. W. 972, 28 Am. St. Rep. 417.

45. See Rowland *v.* Carroll, 81 Ill. 224.

Affidavit of non-residence may be on information and belief. Rowland *v.* Carroll, 81 Ill. 224.

Caption.— An affidavit filed in a proceeding by an executor or administrator for an order to sell lands to pay debts, to authorize the publication of notice, need not be entitled in the case. If it states the necessary facts and is filed in the case, even if not entitled at all, and without any caption, it may be sustained. Harris *v.* Lester, 80 Ill. 307.

Where the statute is silent as to who shall make the affidavit to authorize publication there is no force in an objection that it is made by a person other than the administrator. Rowland *v.* Carroll, 81 Ill. 224.

46. Sheldon *v.* Wright, 7 Barb. (N. Y.) 39.

47. Sibley *v.* Waffle, 16 N. Y. 180; Sheldon *v.* Wright, 7 Barb. (N. Y.) 39.

Publication for the time fixed by law is sufficient, although an interlocutory decree of the probate court required publication for a greater length of time. Sellers *v.* Talby, 33 Miss. 582.

48. See Sheldon *v.* Wright, 5 N. Y. 497. holding the publication had a sufficient compliance with the statute.

Lapse of time between last publication and return-day.— Proceedings for the sale of decedent's land to pay debts will not be dismissed on the ground that eight full days did not elapse between the date of the last publication and the date when the citation was made returnable; N. Y. Code Civ. Proc. § 441, governing the service of summons, and providing that it is not complete until the day of the last publication, not being applicable to a citation. Matter of Denton, 40 Misc. (N. Y.) 326, 81 N. Y. Suppl. 1031 [*affirmed* in 86 N. Y. App. Div. 359, 83 N. Y. Suppl. 778].

Six weeks before return-day.— Under a statute requiring the rule to show cause to be published "for six weeks successively once in each week before the return-day," it has been held not necessary that the publication should be made in the six weeks next preceding the return-day. Robinson *v.* Furman, 47 N. J. Eq. 307, 20 Atl. 898.

49. *In re* O'Sullivan, 84 Cal. 444, 24 Pac. 281 (holding that the publication of an order to show cause why an administrator's petition for the sale of the real estate of a decedent should not be granted, and of the notice of the sale of such real estate, may be made in such newspaper in the county as the court or judge shall direct, for the number of successive weeks required by the statute, although such paper be published weekly only, and other papers are published daily in the same county); Townsend *v.* Tallant, 33 Cal. 45, 91 Am. Dec. 617 (holding that under the California Probate Act of 1851, requiring notice of an order of the probate court requiring all persons interested to show cause why the real estate of the intestate should not be sold to pay debts, to be published for four successive weeks before the day to show cause, in a paper designated by the court, if such notice was published three weeks in the paper designated by the court, and then the fourth week in another paper designated by the administrator, the court did not acquire jurisdiction).

Nearest newspaper.—Any newspaper printed at the county-seat answers the intention of a statute requiring a notice of the sale of estate and property to be published in the nearest newspaper. Stow *v.* Kimball, 28 Ill. 93.

Petition to sell land outside of county where administration pending.— Where an estate was being administered in D county and a petition of the administrator asked for

insertions.[50] A requirement that publication shall be made a certain number of weeks consecutively is satisfied by the publication the prescribed number of times at weekly intervals before the hearing;[51] but the full notice prescribed must be given, that is to say, the first publication must be made the prescribed number of weeks prior to the hearing.[52] After the completion of the publication of the order to show cause for the time prescribed by statute, the court can proceed at once at the time named in the order.[53] It has been held that compliance with the statutory requirements must be shown affirmatively by the representative or the person claiming title under the order of the court.[54]

f. Return.[55] The full notice required by statute must be given, and if the citation or summons is made returnable in a less time than that required by statute, there is want of jurisdiction which is fatal to the validity of the proceedings;[56]

leave to sell lands situated in R county, together with lands situated in D county, it was unnecessary that the notice of the petition to sell should be given in a newspaper published in R county. Gavin *v.* Grayvon, 41 Ind. 559.

50. See Townsend *v.* Tallant, 33 Cal. 45, 91 Am. Dec. 617.

The discontinuance of the paper at the end of three weeks does not dispense with the necessity of further publication where notice of an administrator's petition to sell land has been ordered to be published "four successive weeks" in a certain paper, except in the event of personal service or written assent to the sale by all persons interested in the estate. Townsend *v.* Tallant, 33 Cal. 45, 91 Am. Dec. 617.

51. Madden *v.* Cooper, 47 Ill. 359; Dayton *v.* Mintzer, 22 Minn. 393.

Publication once a week in daily paper.— A statute requiring that notice of an order to show cause why leave to sell shall not be granted to an administrator shall be published for four weeks in a newspaper printed in the county is complied with by a publication once a week for four successive weeks, although the newspaper in which publication is made is published daily. Rigney *v.* Coles, 6 Bosw. (N. Y.) 479.

52. Gibson *v.* Roll, 30 Ill. 172, 83 Am. Dec. 181; Monahon *v.* Vandyke, 27 Ill. 154; Young *v.* Downey, 145 Mo. 250, 46 S. W. 1086, 150 Mo. 317, 51 S. W. 751 [*overruling* Cruzer *v.* Stephens, 123 Mo. 337, 27 S. W. 557, 45 Am. St. Rep. 549]. See also Madden *v.* Cooper, 47 Ill. 359. *Contra*, Fleming *v.* Bale, 23 Kan. 88, holding that an order of notice of the hearing by the probate court of an administrator's petition to sell land requiring the notice to be published in a designated weekly paper "two consecutive weeks," although the hearing was to be had eleven days after the order was made, should be construed to mean "two consecutive times," that is to say, in the next two issues, the court laying stress upon the fact that the order did not require the notice to be published "for" two consecutive weeks. See also Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122.

Lapse of prescribed time before hearing sufficient.— Under a statute requiring the first publication to be six weeks before the day the petition should be presented, it is not necessary that six weeks should intervene between the first day of publication of notice and the first day of the term in which the application is made, but only that six weeks should intervene between the first day of publication and the day upon which an application is made for an order to sell. Madden *v.* Cooper, 47 Ill. 359.

Delay in presenting petition.— If notice of an application to sell lands is not published for six full weeks before the day therein specified as the time when the petition will be presented, parties are not bound to take notice of such application; and although the petition be not in fact presented until a later day than the one fixed by the notice, nor till after the six weeks required by the statute has expired, yet that fact will not cure the defect. Gibson *v.* Roll, 30 Ill. 172, 83 Am. Dec. 181.

53. *In re* Roach, 139 Cal. 17, 72 Pac. 393, holding that it is not necessary that thirty days should elapse after the completed publication before the court has jurisdiction of the persons interested in the estate, even though some of such persons reside in Ireland.

54. Sheldon *v.* Wright, 7 Barb. (N. Y.) 39.

Evidence independent of record.— It is proper, as against a collateral attack, to show by competent evidence, independently of the record, that the publication was in fact made in strict accordance with the requirements of the order of the court. Schroeder *v.* Wilcox, 39 Nebr. 136, 57 N. W. 1031.

Objection to printer's certificate of publication cannot be raised in collateral proceeding. Finch *v.* Sink, 46 Ill. 169, 92 Am. Dec. 246.

An affidavit of publication made by the "proprietor" of the paper in which the order was published has been held sufficient. Reynolds *v.* Schmidt, 20 Wis. 374.

Proof of posting.— Where there was no affidavit of posting in due form legally made and in evidence, but the administrator in his report of sale stated, under oath, that he posted notices, and the report was duly confirmed, the evidence of posting was sufficient. Woods *v.* Monroe, 17 Mich. 238.

55. To what term summons returnable see Sloan *v.* Strickler, 12 Colo. 179, 20 Pac. 611.

56. Monahon *v.* Vandyke, 27 Ill. 154; Bray *v.* Neill, 21 N. J. Eq. 343; Stilwell *v.* Swarthout, 81 N. Y. 109 (holding further that the

but the fact that the order to show cause was made returnable one day later than the time prescribed by statute has been held to be a mere irregularity which would not avoid the sale.[57] A summons to heirs, directing them to appear on a past day and show cause why realty of a decedent should not be sold for the payment of debts, confers no jurisdiction.[58] The application to sell real estate must be made at the term or date specified in the notice published or the order to show cause; otherwise the order will not be binding for want of notice.[59]

g. Waiver and Curing of Errors. Errors or irregularities in the notice may be cured by the appearance of those interested,[60] or by the confirmation of the sale,[61] and even an omission to issue summons or give notice may be waived.[62] Where an order to show cause is properly published, a failure, in issuing the order, to designate the paper in which the publication shall be made, as required by statute, is cured by the order of court confirming the sale.[63] Under some statutes adults may waive the notice by filing their assent to the sale in writing,[64] and guardians may assent in like manner for their wards,[65] but it has been held that infant heirs cannot personally come into court and waive citation and consent to the decree.[66]

h. Presumptions — Collateral Attack. According to the weight of authority it is to be presumed that there was such service or appearance as conferred upon the court in which the proceedings were brought jurisdiction of the persons of those

right of an infant defendant to set up the error on appeal could not be waived by failure to take an objection before the surrogate); Havens *v.* Sherman, 42 Barb. (N. Y.) 636.

Expiration of time before hearing sufficient.— Under Colo. Rev. St. (1868) c. 90, § 103, providing that if, in proceedings for the sale of land to pay debts, a notice to non-residents be not first published at least sixty days before the return-day of the summons, the cause shall stand continued until the next term, a decree can be rendered after the lapse of sixty days from the first publication of the notice, although that time had not expired when the term at which the decree is rendered began. Sloan *v.* Strickler, 12 Colo. 179, 20 Pac. 611.

57. O'Connor *v.* Huggins, 1 N. Y. Suppl. 377 [*affirmed* in 113 N. Y. 511, 21 N. E. 184, and *distinguishing* Stilwell *v.* Swarthout, 81 N. Y. 109].

58. Hendricks *v.* Pugh, 57 Miss. 157.

59. Morris *v.* Hogle, 37 Ill. 150, 87 Am. Dec. 243; Turney *v.* Turney, 24 Ill. 625. But *compare* Rigney *v.* Coles, 6 Bosw. (N. Y.) 479, holding that, although the order to show cause required the parties to appear on August 30, and the order to sell was made September 2, and did not recite that the proceedings were formally adjourned during the intermediate time, the order of sale was not for that cause presumptively invalid, and that even though it was shown that no adjournments were entered in the surrogate's book of minutes, the proceedings would not be impaired if it were proved that they were in fact continued by adjournments.

Nunc pro tunc order.— Where, in a proceeding for the sale of a decedent's land, the order to show cause was returnable on April 4, and the proofs were made and a decree for a sale entered on that day, but on April 11 another decree for a sale was made, reciting that the decree theretofore made had been vacated for error, a sale under the second decree was valid. Burris *v.* Kennedy, 108 Cal. 331, 41 Pac. 458, 38 Pac. 971.

60. Butler *v.* Emmett, 8 Paige (N. Y.) 12, holding that an irregularity in giving notice to the heir at law is cured by a subsequent petition of such heir, to the surrogate, for an order to confirm the sales made under the former order, and to authorize the administrator to give deeds to the purchasers and to receive the purchase-money bid upon such sales. See also Bowles *v.* Rouse, 8 Ill. 409.

61. Dayton *v.* Mintzer, 22 Minn. 393, no appeal being taken therefrom.

62. Greer *v.* Greer, 12 S. W. 152, 11 Ky. L. Rep. 380, holding that where, after a sale under order of court of a decedent's land to pay his debts, an heir makes a claim of ownership to one of the lots, and on an application to set aside the order of sale the issue of ownership is made and tried, the objection that no summons was issued on the amended petition, which asked for the sale of that lot, is waived.

63. Furth *v.* U. S. Mortgage, etc., Co., 13 Wash. 73, 42 Pac. 523.

64. See Smock *v.* Reichwine, 117 Ind. 194, 19 N. E. 776.

Waiver as guardian merely.— Where a writing containing a waiver of notice and consent to the sale is signed by the widow as guardian of the minor heirs, but not in her own right, a sale made without notice of the application does not pass the widow's interest in the real estate to a purchaser. Helms *v.* Love, 41 Ind. 210.

65. Smock *v.* Reichwine, 117 Ind. 194, 19 N. E. 776. See also Jones *v.* Levi, 72 Ind. 586. *Contra*, Campbell *v.* Drais, 125 Cal. 253, 57 Pac. 994. And see Guy *v.* Pierson, 21 Ind. 18; Doe *v.* Anderson, 5 Ind. 33.

66. Winston *v.* McLendon, 43 Miss. 254.

interested,[67] where the record is silent on the subject of notice[68] or does not affirmatively state facts negativing the conclusion that notice was given,[69] and the regularity of the notice cannot be collaterally questioned.[70] But in some jurisdictions it is held that the giving of the notice required must affirmatively appear by the record in order to sustain the jurisdiction of the court.[71] Recitals in a decree for the sale of land as to service of process and proof of publication are *prima facie* true,[72] although in a proceeding to vacate the decree they are not conclusive, but may be contradicted.[73] In a collateral proceeding, however, it is sufficient that the decree recites that due notice was given; such a finding is conclusive and can only be rebutted by evidence in the record and not by extraneous proof,[74]

67. *Florida.*— Wilson *v.* Matheson, 17 Fla. 630.

Georgia.— Coggins *v.* Griswold, 64 Ga. 323.

Illinois.— Donlin *v.* Hettinger, 57 Ill. 348.

Indiana.— Clark *v.* Hillis, 134 Ind. 421, 34 N. E. 13 (holding that where it appears expressly that notice was given by publication and posting of the pendency of the proceeding, the absence from the files of the notice will not defeat the presumption that it was the proper notice); Hawkins *v.* Hawkins, 28 Ind. 66; Hawkins *v.* Ragan, 20 Ind. 193; Doe *v.* Harvey, 3 Ind. 104.

Kansas.— Mickel *v.* Hicks, 19 Kan. 578, 27 Am. Rep. 161, holding that where notice can only be given in a form and manner to be prescribed by the court, and the record contains an order prescribing such form and manner, but the notice itself is lost or destroyed, it will be presumed that the notice in fact given was one following the form and manner prescribed.

Kentucky.— See Jones *v.* Edwards, 78 Ky. 6.

Oregon.— Russell *v.* Lewis, 3 Oreg. 380.

Where the original judgment-roll is lost or destroyed, but the rough minute docket of the court shows that a petition to sell land for assets was filed, and the other dockets show memoranda of an order for publication for non-resident defendants, that an order of sale was made, a report of sale filed, and a judgment of confirmation rendered, there is a presumption of law, independent of the statute (N. C. Code, §§ 69, 70), that the publication was made as ordered, and proper proof of it filed before the judgment of sale was entered. Everett *v.* Newton, 118 N. C. 919, 23 S. E. 961.

68. Clark *v.* Hillis, 134 Ind. 421, 43 N. E. 13; Martin *v.* Starr, 7 Ind. 224.

On error the reviewing court cannot indulge a presumption that the requisite steps were taken to bring the parties within the jurisdiction of the court, but the record must show affirmatively either the service of notice or the presence of defendants in court. Martin *v.* Starr, 7 Ind. 224.

69. Gerrard *v.* Johnson, 12 Ind. 636.

70. Berrian *v.* Rogers, 43 Fed. 467, in ejectment against the purchaser.

71. Root *v.* McFerrin, 37 Miss. 17, 75 Am. Dec. 49 (holding that parol evidence is inadmissible to supply an omission of the record in this respect); Kempe *v.* Pintard, 32 Miss. 324; Commercial Bank *v.* Doe, 9 Sm. & M. (Miss.) 613; Planters' Bank *v.* Johnson, 7 Sm. & M. (Miss.) 449; Laughman *v.* Thompson, 6 Sm. & M. (Miss.) 209; Gwin *v.* McCarroll, 1 Sm. & M. (Miss.) 351; Puckett *v.* McDonald, 6 How. (Miss.) 269; Campbell *v.* Brown, 6 How. (Miss.) 106, 230.

Distinction between sales of realty and of personalty.— In case of a sale of real estate the record must show that all the proceedings were regular, and that the citations were published according to law; but a sale of a chattel will be valid even though the record does not show that citations were published according to law; and this is true, although it be a lease for ninety-nine years which is sold. Dillingham *v.* Jenkins, 7 Sm. & M. (Miss.) 479.

72. Sivley *v.* Summers, 57 Miss. 712; Commercial Bank *v.* Doe, 9 Sm. & M. (Miss.) 613; Comstock *v.* Crawford, 3 Wall. (U. S.) 397, 18 L. ed. 34.

73. Sivley *v.* Summers, 57 Miss. 712.

74. *Alabama.*— Goodwin *v.* Sims, 86 Ala. 102, 5 So. 587, 11 Am. St. Rep. 21.

Illinois.— Andrews *v.* Bernhardi, 87 Ill. 365; Barnett *v.* Wolf, 70 Ill. 76. See also Hobson *v.* Ewan, 62 Ill. 146. But *compare* Goudy *v.* Hall, 30 Ill. 109.

Iowa.— Myers *v.* Davis, 47 Iowa 325, holding that when there is a service insufficient only in the manner of making it, a question of jurisdiction is raised which the court must decide, and if it does so erroneously the judgment, although voidable, is binding until reversed and corrected on appeal, and is not void or subject to collateral attack. See also Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122.

Mississippi.— Sivley *v.* Summers, 57 Miss. 712.

New York.— Sheldon *v.* Wright, 5 N. Y. 497.

North Carolina.— Sledge *v.* Elliott, 116 N. C. 712, 21 S. E. 797; Edwards *v.* Moore, 99 N. C. 1, 5 S. E. 13, holding that where defendant in an action to recover land set up title under a decree of the court in which the premises had been sold to make assets, and the record showed that plaintiffs had accepted service of the summons in the proceeding in which the decree was made, the record could not be collaterally attacked by evidence that the acceptance of service was made by one who had no authority. See also Morrison *v.* Craven, 120 N. C. 327, 26 S. E. 940.

South Carolina.— Turner *v.* Malone, 24

and the judgment of the court that the notice was sufficient is binding on all parties interested unless an appeal is taken.[75] But if the record shows service which is insufficient and fails to show that the court found that it had jurisdiction, the presumption is rebutted and it must be held that the court acted upon insufficient notice.[76]

7. Objections and Exceptions.[77] An application for a sale of real property of a decedent may be opposed by the persons who are interested in the land, such as the heirs and devisees,[78] or by the personal representative where a sale to pay debts is sought by a creditor,[79] but not by persons who have no interest such as will be affected by a sale;[80] and either the heirs or devisees[81] or the personal

S. C. 398 [*explaining* and *distinguishing* Bragg *v.* Thompson, 19 S. C. 572; Finley *v.* Robertson, 17 S. C. 435; Lyles *v.* Bolles, 8 S. C. 258; Gregg *v.* Bigham, 1 Hill 299, 26 Am. Dec. 181].

75. Stanley *v.* Noble, 59 Iowa 666, 13 N. W. 839 [*following* Shawhan *v.* Loffer, 24 Iowa 217]; Lees *v.* Wetmore, 58 Iowa 170, 12 N. W. 238; Thomas *v.* Le Baron, 8 Metc. (Mass.) 355. See also Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122.

Record showing finding that notice sufficient.— Where the record of a proceeding in the court of common pleas to subject lands of a decedent to the payment of debts upon the petition of the administrator sets out that it was "shown to the court that due notice had been given to the defendants," this language imports a finding that the notice which the law requires under the circumstances has been regularly given. Richards *v.* Skiff, 8 Ohio St. 586.

76. Donlin *v.* Hettinger, 57 Ill. 348; Clark *v.* Thompson, 47 Ill. 25, 95 Am. Dec. 457.

77. Practice on overruling demurrer.— Where, in a special proceeding to make real estate assets instituted before a superior court clerk in North Carolina, there was a demurrer filed to the complaint, it was error for the judge, after overruling the demurrer, to direct that an order issue to plaintiff to sell the land, but the decision of the judge should be transmitted to the clerk with leave for defendant to answer before the clerk if so advised. Jones *v.* Hemphill, 77 N. C. 42.

78. Grant *v.* Noel, 118 Ga. 258, 45 S. E. 279 (any heir may object); Matter of Campbell, 66 N. Y. App. Div. 478, 73 N. Y. Suppl. 290 [*affirmed* in 170 N. Y. 84, 62 N. E. 1070] (husband, wife, heirs, devisees, and persons claiming under them); Richardson *v.* Judah, 2 Bradf. Surr. (N. Y.) 157 (heirs or persons claiming under them); Person *v.* Montgomery, 120 N. C. 111, 26 S. E. 645.

Persons showing a prima facie interest in the lands may contest an application to sell on the ground of an insufficiency of personalty. Paine *v.* Pendleton, 32 Miss. 320.

A purchaser from the widow and heirs is a person interested in the estate who may, under the Alabama statute, contest the application. Speer *v.* Banks, 114 Ala. 323, 21 So. 834.

Purchaser of homestead.— Where a homestead occupied by the decedent at the time of his death did not exceed in area and value the limit allowed by law as exempt, and he left no minor children, a purchaser of said homestead from the widow was a person interested in the estate who might, under the Alabama statute, contest an application for the sale of decedent's lands to pay debts, although at the time of the purchase said property had not been set apart to the widow as a homestead. Newell *v.* Johns, 128 Ala. 584, 29 So. 609.

The attorney for absent heirs need not formally oppose the curator's application for a sale. It is sufficient if, when notified of the petition, he indorses on it his approval. Michel *v.* Michel, 11 La. 149.

Notice to other heirs.— Where an heir of a decedent objects to an application of the administrator to sell land, he need not give notice to any of the other heirs. Grant *v.* Noel, 118 Ga. 258, 45 S. E. 279.

79. Harrison *v.* Taylor, 43 S. W. 723, 19 Ky. L. Rep. 1191, holding that where in an action by an executor a defendant puts in an answer and counter-claim seeking a sale of the testator's land to pay his debts, the executor should be allowed a reasonable time to file a reply.

80. Richardson *v.* Judah, 2 Bradf. Surr. (N. Y.) 157.

Creditors.— Although creditors may be made parties, it is only for the purpose of presenting and proving their debts and contesting other claims, and they cannot be allowed to interpose an answer or file objections for the purpose of contesting the necessity of the proceedings or of making a defense to them. Matter of Campbell, 66 N. Y. App. Div. 478, 73 N. Y. Suppl. 290 [*affirmed* in 170 N. Y. 84, 62 N. E. 1070]. *Compare* Jackson *v.* Warthen, 111 Ga. 834, 36 S. E. 214.

A person claiming paramount title to a decedent's real estate has no right to appear in proceedings brought by the administrator and resist an order for sale of the property to pay decedent's debts, since such proceeding cannot affect claimant's interest. Shields *v.* Ashley, 16 Mo. 471.

81. Black *v.* Robinson, 70 Ark. 185, 68 S. W. 489 (holding that an heir who was administrator of the estate for several years and was responsible to a considerable extent for the failure to sell lands to pay debts cannot object to an application to sell for that purpose by the administrator *de bonis non* on the ground that there has been unreasonable delay); Van Bibber *v.* Julian, 81

representative[82] may become estopped to oppose or object to a sale of the land. The mode of objection, whether more or less formal, depends upon local statute or procedure.[83] Any objections or exceptions which legitimately tend to oppose the conclusion that a sale should be made may be raised and considered.[84] Thus it may be set up in opposition that the sale has not been asked within the time limited by statute for the procurement of a sale,[85] or the heirs may contest the exhaustion of the personalty,[86] or seek a proper application of personalty which the administrator wrongfully refuses to inventory.[87] A denial of the existence, justness, or validity

Mo. 618. See also Buntyn *v.* Holmes, 9 Lea (Tenn.) 319.

Contract of infant heir.— A contract between an infant heir at law and a creditor of the decedent's estate, by which the former conveys by deed of trust a tract of land in payment of the debt, taking the creditor's receipt, and specifying therein that the contract is subject to ratification by the infant on attaining his majority, being disaffirmed by him after attaining his majority, does not estop him from setting up the statute of limitations in defense to an application by the creditor, as administrator of the estate, for an order to sell the lands for the payment of the debt. Warren *v.* Hearne, 82 Ala. 554, 2 So. 491.

Objection by devisees who signed petition. — Where the devisees who signed the petition for an order to mortgage the real estate of the decedent present, promptly after the order is granted, a petition asking for a revocation of the order, setting forth that they signed the first petition under a misapprehension and misunderstanding of their rights, they will not be precluded from obtaining redress if they have any *bona fide* rights in the premises. Kurtz's Estate, 16 Lanc. L. Rev. (Pa.) 205.

82. Wood *v.* McChesney, 40 Barb. (N. Y.) 417. See also Buntyn *v.* Holmes, 9 Lea (Tenn.) 319.

83. See Paine *v.* Pendleton, 32 Miss. 320 (holding that no formal answer is requisite, but objections and exceptions are sufficient if made in such form that the court is enabled to inquire into their sufficiency or correctness); Steffy's Appeal, 76 Pa. St. 94 (holding that a rule to show cause should not issue on a mere answer *ore tenus* to a petition by executors for authority to sell real estate to pay debts, since the proceedings of the orphans' court should have the substance of equitable form, by petition, answer, and replication, in which the requisites making the case should appear).

If a needless or illegal purpose for sale is added to a proper one, objection should be, not by demurrer, but by motion to strike out the objectionable portion. Conger *v.* Cook, 56 Iowa 117, 8 N. W. 782.

An objection as to the right of creditors to bring an action to determine whether there had been a devastavit, and to subject the real estate to the payment of their debts, can be taken advantage of only by demurrer, as the alleged want of authority appears on the face of the proceedings. Wilson *v.* Pearson, 102 N. C. 290, 9 S. E. 707.

84. See Finch *v.* Du Bignon, 117 Ga. 113, 43 S. E. 423, holding that where an administrator applies for leave to sell the lands of the decedent for the necessary purpose of paying debts and for distribution, it is error to strike on demurrer a ground of caveat filed by the heirs at law, denying that any necessity for the sale exists, although it appears that there are debts due by the estate.

Postponement of sale.—A sale of decedent's real estate may be postponed by the court when the life-tenant objects to the sale, and where creditors express a willingness to wait, pending arrangements looking toward a mortgage of the same, it being alleged that a present sale would result in a probable sacrifice of the property. Woolman's Estate, 6 Pa. Dist. 205, 19 Pa. Co. Ct. 281..

85. Cole *v.* Lafontaine, 84 Ind. 446, holding that an answer pleading that "no cause of action to have the lands sold had accrued within the period of fifteen years next preceding the filing of the petition," was good under Ind. Code (1852), § 212, requiring such petition to be filed within fifteen years, but that an answer that "the cause of action mentioned in the petition did not occur within six years" was bad, as not showing whether the cause of action was one to which the six-year limitation applied.

New trial for failure to consider plea.— Where heirs, in their answer to a proceeding by an administrator to obtain a license to sell land for the payment of his intestate's debts, plead that the action was not brought within the time prescribed by law, and the court below fails to consider the merits of the plea, and there is some evidence to sustain it, a new trial will be granted. Proctor *v.* Proctor, 105 N. C. 222, 10 S. E. 1036.

86. Shields *v.* Alsup, 5 Lea (Tenn.) 508. See *infra*, XII, G, 11.

A grantee of the heir may show that personal property other than that contained in the inventory of the estate is available for that purpose, although the inventory was made by the heir. Topping's Estate, 9 N. Y. Suppl. 447, 18 N. Y. Civ. Proc. 115, 2 Connoly Surr. (N. Y.) 187.

How settlement of accounts contested.— Where after settlement of his accounts the administrator files a bill to sell land for the payment of debts, the heirs may contest the settlement by answer as well as by cross bill or original bill. Shields *v.* Alsup, 5 Lea (Tenn.) 508.

87. Duffield *v.* Walden, 102 Iowa 676, 72 N. W. 278.

of the debts for the payment of which a sale is asked is also a good ground of objection.[88] But only such objections or exceptions are admissible by way of opposing the sale as meet fairly the issue whether a sale should be ordered, without interposing collateral issues which are immaterial to the question whether a sale should be ordered or should be determined in different proceedings.[89]

8. Interference of Other Proceedings Involving Land. A suspension of proceedings for a sale by the probate court while other litigation is in progress may be proper sometimes;[90] but ordinarily a sale may be ordered and made for the payment of debts notwithstanding the pendency of proceedings for partition[91] or to foreclose a mortgage,[92] the proceedings of a family meeting,[93] or a previous levy of execution on the land.[94]

9. Hearing of Application. On the hearing of a petition for the sale of a decedent's lands to pay debts, the court should hear proof of the allegations of the petition and make inquiry as to the necessity of the sale,[95] and also, it has

88. Matter of Knapp, 25 Misc. (N. Y.) 133, 54 N. Y. Suppl. 927; Person *v.* Montgomery, 120 N. C. 111, 26 S. E. 645; Shields *v.* Alsup, 5 Lea (Tenn.) 508. See *infra*, X, G, 10, c.

The heir must prove that the debts do not exist in order to prevent a sale for the payment of debts. A mere allegation to that effect is insufficient. Lehman *v.* Worley, 40 La. Ann. 620, 4 So. 573.

89. *Alabama.*— Brown *v.* Powell, 45 Ala. 149, holding that in an application by an administrator to sell the lands of his intestate for distribution among the heirs, because the same could not be equitably divided, etc., a plea that certain of the heirs had received advancements to the amount of their distributive shares or interests in the estate, and that by excluding the heirs so advanced the lands could be equitably divided among the remaining heirs, was bad on demurrer.

California.— *In re* Brannan, (1897) 51 Pac. 320 (holding that an objection that, on account of the depreciated value of testator's property, a sale thereof would be to the damage of the residuary legatees, cannot be interposed against a petition for an order directing the executrix to sell, as the objection can be considered under Code Civ. Proc. § 1552 *et seq.*, only when the sale comes up for confirmation); Dorsey's Estate, 75 Cal. 258, 17 Pac. 209.

Illinois.— Dauel *v.* Arnold, 201 Ill. 570, 66 N. E. 846 [*affirming* 103 Ill. App. 298].

Missouri.— Trent *v.* Trent, 24 Mo. 307.

New Jersey.— When a sale for the payment of debts is asked no person can intervene and contest the title of the decedent. *In re* Devine, 62 N. J. Eq. 703, 49 Atl. 138; Swackhamer *v.* Kline, 25 N. J. Eq. 503.

North Carolina.— Stainback *v.* Harris, 115 N. C. 100, 20 S. E. 277 (holding that in an action by an administrator to subject lands in possession of the heirs to the payment of a judgment on a claim against decedent, the fact that the administrator made no defense to the action on the claim is no defense); Proctor *v.* Proctor, 105 N. C. 222, 10 S. E. 1036.

Oregon.— *In re* Houck, (1888) 17 Pac. 461.

Tennessee.— Pea *v.* Waggoner, 5 Hayw. 242.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1410.

Depression of market.— It is not a good ground of objection to an application by an administrator for leave to sell lands or stock in an incorporated company for the purpose of paying debts that the market is depressed, and that for this reason the property will not sell for its full value. Jackson *v.* Warthen, 111 Ga. 834, 36 S. E. 214.

The invalidity or irregularity of the representative's appointment does not furnish a ground of resistance to an application by him to sell real estate. Riser *v.* Snoddy, 7 Ind. 442, 65 Am. Dec. 740; Waldow *v.* Beemer, 45 Nebr. 626, 63 N. W. 918.

90. Grider *v.* Apperson, 38 Ark. 388; Himelspark's Estate, 8 Pa. Dist. 327.

91. Brown's Succession, 23 La. Ann. 308; Rice *v.* Dickerman, 47 Minn. 527, 50 N. W. 698. But *compare Re* Kennedy's Estate, 17 Phila. (Pa.) 507.

92. Fitzimmons' Appeal, 40 Pa. St. 422; Shaw *v.* Barksdale, 25 S. C. 204, proceeding to foreclose mortgage given by devisee. But *compare* Breevort *v.* McJimsey, 1 Edw. (N. Y.) 551.

Where the land has been sold in foreclosure proceedings in another court a proceeding instituted in the surrogate's court to procure a sale thereof for a debt should be kept alive until the validity of the foreclosure can be attacked elsewhere. Knickerbocker *v.* Decker, 4 Dem. Surr. (N. Y.) 128.

93. Munday *v.* Kaufman, 48 La. Ann. 591, 19 So. 619.

94. Clarkson *v.* Beardsley, 45 Conn. 196; Patrick's Succession, 25 La. Ann. 154; Bossier *v.* Kennedy, 19 La. Ann. 107.

95. *Nebraska.*— Trumble *v.* Williams, 18 Nebr. 144, 24 N. W. 716.

New Hampshire.— See Hodgdon *v.* White, 11 N. H. 208.

New Jersey.— Smith *v.* Smith, 27 N. J. Eq. 445.

New Mexico.— See Albuquerque First Nat. Bank *v.* Lee, 8 N. M. 589, 45 Pac. 1114.

New York.— Barnett *v.* Kincaid, 2 Lans. 320.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1417, 1439.

been held, as to the proper manner, terms, and conditions of sale;[96] but matters purely collateral to the petition for sale should not be heard or passed upon,[97] nor need the court, on application by an administrator to sell real estate to pay debts, inquire whether the land to be sold is a homestead before issuing the order for the sale.[98] The court has jurisdiction to settle an account between the devisees and the legatees before ordering a sale for the payment of an unpaid legacy,[99] and it has been held error to decree the renting or selling of land before taking an account of the liens thereon and settling the priorities of creditors.[1] The court has jurisdiction to try any question of fact properly arising in a proceeding to sell realty,[2] and while it may in some jurisdictions afford the parties a trial by jury when the nature of the issues entitles them to a jury trial or renders it appropriate,[3] issues of law are to be decided by the court.[4] It is usually a matter of discretion with the court either to investigate the facts or to order a reference,[5] but a reference should not be had where it would be a mere form and involve useless expense.[6] The hearing may be had and an order of sale made at a special term appointed for that purpose when such special terms are authorized by statute,[7] and under some statutes the chancellor may decree a sale at chambers where the necessity of the sale is not denied.[8] After the presenta-

All the jurisdictional facts must be proved as alleged unless they are admitted. Williams *v.* Williams, 49 Ala. 439.

Depositions.— Under Ala. Code (1886), §§ 2113, 2114, providing that, on application to sell a decedent's real estate, depositions shall be filed as to the facts stated in the application and the necessity of the sale, no affidavit is required setting forth the cause for taking the depositions. Bozeman *v.* Bozeman, 83 Ala. 416, 3 So. 784.

Agreed statement of facts.— When a petition to the orphans' court for the sale of land for the payment of legacies alleges matters of fact as to which the court should have been informed and the matters are in the knowledge of the parties, the court, to avoid expense, may permit the parties to embody them in an agreement and file it; otherwise the court will appoint an auditor. Harris' Estate, 2 C. Pl. (Pa.) 17.

Trial in superior court.— Where, on petition to sell real estate in the probate court, issues of fact are raised, the trial thereof should be transferred to the superior court in term-time. Wood *v.* Skinner, 79 N. C. 92.

Where the allegations of the petition are not denied, the petitioners need not prove the same before an order of sale can be issued. *In re* Brannan, (Cal. 1897) 51 Pac. 220. But *compare* Martin *v.* Starr, 7 Ind. 224.

Consideration of cross complaint.— The circuit court may, in connection with application of an administrator to sell intestate's property to pay debts, consider a cross complaint showing reason why the interest of one heir should be sold first, and may mold its order accordingly. Galvin *v.* Britton, 151 Ind. 1, 49 N. E. 1064.

96. Haywood *v.* Haywood, 80 N. C. 42.

97. *California.*— Theller *v.* Such, 57 Cal. 447, dispute of heirs or representatives with third persons not to be determined.

Illinois.— Bennett *v.* Whitman, 22 Ill. 448, general power of executor not to be determined.

New Jersey.— Smith *v.* Smith, 27 N. J. Eq. 445, necessity for sale the only question which can be examined.

North Carolina.— Clement *v.* Foster, 71 N. C. 36, questions of trespass, boundary, etc., not affecting the parties to the application should not be considered.

Pennsylvania.— Smith's Estate, 177 Pa. St. 17, 35 Atl. 339, error to determine validity of codicil.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1422.

98. Randel *v.* Randel, 64 Kan. 254, 67 Pac. 837.

99. Jenkins *v.* Jenkins, 7 Pa. St. 246.

1. Daingerfield *v.* Smith, 83 Va. 81, 1 S. E. 599; Kendrick *v.* Whitney, 28 Gratt. (Va.) 646; Simmons *v.* Lyles, 27 Gratt. (Va.) 922; Hart *v.* Hart, 31 W. Va. 688, 8 S. E. 562.

2. Doan *v.* Biteley, 49 Ohio St. 588, 32 N. E. 600.

3. Doan *v.* Biteley, 49 Ohio St. 588, 32 N. E. 600. See also Jones *v.* Hemphill, 77 N. C. 42.

Where no issue of fact is raised it is improper to transfer the cause to the trial docket. Brandon *v.* Phelps, 77 N. C. 44.

4. Jones *v.* Hemphill, 77 N. C. 42.

5. Matter of Lichtenstein, 16 Misc. (N. Y.) 667, 39 N. Y. Suppl. 174, 25 N. Y. Civ. Proc. 301; Sanderson *v.* Overman, 98 N. C. 235, 3 S. E. 502; Thompson *v.* Joyner, 71 N. C. 369; Lucas' Appeal, 53 Pa. St. 404; Fitzsimmons' Appeal, 40 Pa. St. 422. See also Harlammert *v.* Moody, 26 S. W. 2, 15 Ky. L. Rep. 839.

A sale should not be ordered pending a reference to a commissioner to state an account of the personal assets in the hands of an administrator and before a confirmation of the report of such commissioner. Thompson *v.* Joyner, 71 N. C. 369.

It is the administrator's duty to apply for an auditor. Lucas' Appeal, 53 Pa. St. 404.

6. Bloom *v.* Cate, 7 Lea (Tenn.) 471.

7. Roach *v.* Gunter, 42 Ala. 239.

8. Blake *v.* Black, 84 Ga. 392, 11 S. E. 494.

tion of the petition the court may fix a subsequent date for the hearing of proofs or other action in the case,[9] and it has been held that where the cause is not disposed of at one term it stands continued as of course to the next term, and it is not necessary that an order of continuance should be entered.[10] An application for an order to sell or to mortgage real estate to pay debts, after jurisdiction of the parties is acquired, can be dismissed only by an order to that effect,[11] and after a hearing has been had, the debts proved, and an order of sale made, the administrator cannot at his option discontinue the proceeding;[12] but the creditors may insist upon its further prosecution, and apply as may be necessary for reviving or speeding the proceedings.[13] Where an administrator presented a petition to the orphans' court, asking authority to sell land alleged to be the property of his intestate, it was proper for the court to dismiss such petition when it was made to appear by those interested that the intestate had but a life-estate in the premises,[14] but the fact that an executor or administrator has been removed after a petition to sell lands to pay debts has been filed is no reason why the proceedings should be dismissed. It is sufficient that the same be delayed until a properly qualified executor or administrator shall be found to proceed.[15] The burden of proof as to the necessity for a sale rests upon the personal representative when the application is made by him,[16] and he must show such necessity regardless of whether or not there is a contest over the application.[17] Where the application is made by a creditor the burden of proof rests upon him.[18] When debts are charged on settled real estate, the court, in determining whether the debts are to be raised by sale or mortgage, will give greater weight to the wishes of the persons whose interests in the estate are immediate than to those whose interests are more remote.[19] It has been held that where the representative has petitioned for an order to sell real estate to pay debts, an order directing him to mortgage such real estate is invalid.[20]

10. Proof and Contest of Claims[21] — a. In General. Where a sale is asked for the payment of debts, it must be shown that there are existing debts against the estate for the payment of which the sale is necessary,[22] especially where the

Filing order granted at chambers.— An order or license to an administrator to sell real estate of an intestate, granted by a judge sitting at chambers, must be filed in the office of the clerk of the district court of the county in which letters of administration are issued, before the administrator is empowered and authorized to sell such real estate. Veeder *v.* McKinley-Lanning L. & T. Co., 61 Nebr. 892, 86 N. W. 982.

9. Gibson *v.* Roll, 30 Ill. 172, 83 Am. Dec. 181.

10. Duval *v.* McLoskey, 1 Ala. 708.

11. Raven *v.* Norton, 2 Dem. Surr. (N. Y.) 110.

12. Farrington *v.* King, 1 Bradf. Surr. (N. Y.) 182.

13. Raven *v.* Norton, 2 Dem. Surr. (N. Y.) 110; Farrington *v.* King, 1 Bradf. Surr. (N. Y.) 182.

14. Grim's Appeal, 1 Grant (Pa.) 209.

15. Steele *v.* Steele, 89 Ill. 51.

16. Garrett *v.* Bruner, 59 Ala. 513.

17. Garrett *v.* Bruner, 59 Ala. 513.

18. See May *v.* Parham, 68 Ala. 253, holding that on an allegation by the creditor in a bill to subject realty to the payment of his claim, that the personalty had been wasted and that the administrators and his sureties were insolvent, the burden of showing the insolvency is upon him, and the admission by the administrator in his answer would not be evidence against the devisees.

19. Metcalfe *v.* Hutchinson, 1 Ch. D. 591, 45 L. J. Ch. 210.

20. Edwards *v.* Baker, 145 Ind. 281, 44 N. E. 467. See also Martin *v.* Neal, 125 Ind. 547, 25 N. E. 813. And see Cahill *v.* Bassett, 66 Mich. 407, 33 N. W. 722, equal division of the court.

21. **Appeal from determination on claims** see *infra*, XII, G, 16, a.

22. *Alabama.*— See Kornegay *v.* Mayer, 135 Ala. 141, 33 So. 36.

Illinois.— Walker *v.* Diehl, 79 Ill. 473.

New York.— Raynor *v.* Gordon, 23 Hun 264; Corwin *v.* Merritt, 3 Barb. 341.

Pennsylvania.— *In re* Vogel, 3 Lanc. L. Rev. 218.

Virginia.— Menefee *v.* Marge, (1888) 4 S. E. 726 (holding that the interest of an heir in real estate cannot be sold until the liability has been adjudicated and the amount judicially determined and an option given to the heir to pay without sale); Daingerfield *v.* Smith, 83 Va. 81, 1 S. E. 599; Kendrick *v.* Whitney, 28 Gratt. 646; Simmons *v.* Lyles, 27 Gratt. 922.

West Virginia.— Hart *v.* Hart, 31 W. Va. 688, 8 S. E. 562.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1425.

insufficiency of the personalty is denied.[23] Under the statutes of some states the surrogate or probate court has jurisdiction, in a proceeding to sell land, instituted by the representative, to adjudicate upon the validity of claims against the estate,[24] and disputes and controversies in regard to claims ought generally to be settled before a license to sell is granted.[25]

b. Who May Contest Claims. The heirs or devisees, being the persons whose interests would immediately be affected by a sale of a decedent's realty to pay debts, are entitled to dispute the claims against the estate for the payment of which a sale is asked,[26] and judgment creditors of a devisee have been held

But *compare* Tenney *v.* Poor, 14 Gray (Mass.) 500, 77 Am. Dec. 340, holding that it is not necessary to the validity of a license granted to an executor by the probate court to sell real estate for the payment of debts that the amount of debts should have been previously ascertained by judgment against the executor or by commission of insolvency.

The New Mexico statute does not require the ascertainment of who are creditors of the estate and what may be the amount of each claim, but it is sufficient to show that a sale of the real estate is necessary to pay debts. Albuquerque First Nat. Bank *v.* Lee, 8 N. M. 589, 45 Pac. 1114.

Allowance of claims.— It has been held that a sale cannot properly be ordered for the payment of debts unless they have been presented to the court and proved and allowed. Walker *v.* Diehl, 79 Ill. 473. But *compare* Grayson *v.* Weddle, 63 Mo. 523, holding that where, by inadvertence, the debt shown by a mortgage note had not, at the date of an order made by the probate court for the sale of the mortgaged property, been allowed, but it was allowed before the sale, the want of allowance before making the order was a mere irregularity which would not affect the title of a purchaser at the sale.

Effect of failure to answer.— Where, in a case of sale of real estate of a decedent to pay debts, the court ordered the petition of a claimant to be set down for hearing on a future day fixed, a copy having been first served on the parties in interest, and no answer to the petition was filed, and it was sent to an auditor to state the claim, the statements in the petition were not therefore to be taken *pro confesso*, but a trial on the merits might be had. Kent *v.* Waters, 18 Md. 53.

Discretion of court in refusing issue see *In re* Ike, 200 Pa. St. 202, 49 Atl. 791.

A demand by a creditor of payment from the representative is not indispensable where the representative has not in his hands sufficient assets to pay the debts of the estate and institutes an action for a settlement, which has been referred to a commissioner to audit and report upon claims filed and proved by creditors as provided by statute. Orr *v.* Orr, 10 S. W. 640, 10 Ky. L. Rep. 755.

23. Hammond *v.* Hammond, 2 Bland (Md.) 306, holding that in such case an account of the personalty must be taken and the creditors required to file vouchers of their claims.

Even if insufficiency of the personalty be to some extent admitted or established still the creditors may be required to bring in their claims in order that it may be ascertained what proportion of the realty must be sold. Hammond *v.* Hammond, 2 Bland (Md.) 306.

24. *In re* Haxtun, 102 N. Y. 157, 6 N. E. 111 [*reversing* 33 Hun 364]; Hopkins *v.* Van Valkenburgh, 16 Hun (N. Y.) 3; Turner *v.* Amsdell, 3 Dem. Surr. (N. Y.) 19; Borntraeger *v.* Borntraeger, 7 Ohio Dec. (Reprint) 551, 32 Cinc. L. Bul. 891, holding that the probate court has jurisdiction to determine the equities between parties and the priorities of liens. See also *In re* Bingham, 127 N. Y. 296, 27 N. E. 1055. *Contra*, Pirmann *v.* Gerhold, 5 Ohio S. & C. Pl. Dec. 414, Ohio Prob. 142, holding that the remedy of the heir or other person interested is by filing his requisition to disallow the claims, and when that is done the proceedings for sale must stop until such claims have been adjudicated by the proper tribunal. And see Barnett *v.* Kincaid, 2 Lans. (N. Y.) 320.

Claims disputed by representative may be decided upon. People *v.* Westbrook, 61 How. Pr. (N. Y.) 138. *Contra*, Matter of Glann, 2 Redf. Surr. (N. Y.) 75, holding that the authority of the surrogate is limited to claims resisted by the heirs or devisees.

In New Jersey the orphans' court has no power, except in the case of insolvent estates, to determine as to the validity of the claims of creditors of the estate upon an application for an order for the sale of decedent's lands for the payment of debts. Smith *v.* Smith, 27 N. J. Eq. 445 [*followed*, although doubtingly, in Doll *v.* Cash, 61 N. J. Eq. 108, 47 Atl. 1059].

25. Person *v.* Montgomery, 120 N. C. 111, 26 S. E. 645; Brittain *v.* Dickson, 104 N. C. 547, 10 S. E. 701; Smith *v.* Brown, 99 N. C. 377, 6 S. E. 667; New *v.* Bass, 92 Va. 383, 23 S. E. 747.

Proof and allowance of claims after decree but before sale sufficient.— Little *v.* Sinnett, 7 Iowa 324.

26. *Alabama.*— Kornegay *v.* Mayer, 135 Ala. 141, 33 So. 36; Warren *v.* Hearne, 82 Ala. 554, 2 So. 491; Trimble *v.* Fariss, 78 Ala. 260; Gayle *v.* Johnston, 72 Ala. 254, 47 Am. Rep. 405; Davis *v.* Tarver, 65 Ala. 98; Steele *v.* Steele, 64 Ala. 438, 38 Am. Rep. 15; Garrett *v.* Bruner, 59 Ala. 513; Bond *v.* Smith, 2 Ala. 660.

entitled to set up the statute of limitations, although the devisee himself did not appear.[27] It has also been held that the representative may in such proceedings contest claims,[28] and even a person to whom the decedent conveyed land in fraud of creditors has been allowed to plead the statute of limitations in proceedings by the administrator to sell the land conveyed to pay outlawed debts.[29] But such claims cannot be contested by a person who would in no instance be affected by a determination as to their validity.[30]

c. Defenses. The heirs or devisees may contest the validity and legality of any debts,[31] and may make any defense against the supposed debts which the decedent could have made if living, or which the personal representative could make if the creditors were suing him at law.[32] Any fact which will show the non-existence or extinguishment of debts is available as a defense;[33] thus the heirs, devisees, or other persons entitled to contest claims may plead the statutes of non-claim[34] or limitations[35] to any of the debts set up.

d. Effect of Allowance or Rejection of Claim. As the real parties to the con-

California.— *In re* Schroeder, 45 Cal. 304; Beckett *v.* Selover, 7 Cal. 215, 68 Am. Dec. 237.

Illinois.— Marshall *v.* Rose, 86 Ill. 374; Moline Water Power, etc., Co. *v.* Webster, 26 Ill. 233; Stone *v.* Wood, 16 Ill. 177.

Indiana.— O'Haleran *v.* O'Haleran, 115 Ind. 493, 17 N. E. 917; Scherer *v.* Ingerman, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304; Cole *v.* Lafontaine, 84 Ind. 446; Riser *v.* Snoddy, 7 Ind. 442, 65 Am. Dec. 740.

Mississippi.— Champion *v.* Cayce, 54 Miss. 695.

Missouri.— Callahan *v.* Griswold, 9 Mo. 784.

New Hampshire.—Nichols *v.* Day, 32 N. H. 133, 64 Am. Dec. 358.

New York.— Hopkins *v.* Van Valkenburgh, 16 Hun 3; Matter of Knapp, 25 Misc. 133, 54 N. Y. Suppl. 927, 28 N. Y. Civ. Proc. 220; *In re* Hearman, 11 N. Y. Suppl. 905, 20 N. Y. Civ. Proc. 8; Mooers *v.* White, 6 Johns. Ch. 360; Colson *v.* Brainard, 1 Redf. Surr. 324; Skidmore *v.* Romaine, 2 Bradf. Surr. 122.

North Carolina.— Person *v.* Montgomery, 120 N. C. 111, 26 S. E. 645; Speer *v.* James, 94 N. C. 417.

Pennsylvania.— Dean's Appeal, 87 Pa. St. 24; Murphy's Appeal, 8 Watts & S. 165; Luton's Estate, 10 Kulp 161; Clark's Estate, 19 Phila. 218.

United States.— Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185, 6 Call (Va.) 308.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1427.

Reopening case.— Where, in a proceeding to sell real estate of a decedent for payment of his debts, the evidence in support of a claim litigated by the devisees has been closed and the case submitted for decision, the surrogate has no power to reopen the case and receive new testimony without notice to the devisees or their attorney, as they would be thereby deprived of their right to contest given by N. Y. Code Civ. Proc. § 2755. *In re* Hearman, 11 N. Y. Suppl. 905, 20 N. Y. Civ. Proc. 8.

27. Raynor *v.* Gordon, 23 Hun (N. Y.) 264.

28. Bolt *v.* Dawkins, 16 S. C. 198.

The representative, when a creditor, may object to the validity or dispute the present existence of a claim presented by another person. Winsmith *v.* Winsmith, 15 S. C. 611.

29. Syme *v.* Riddle, 88 N. C. 463.

30. See Pirmann *v.* Gerhold, 5 Ohio S. & C. Pl. Dec. 414, Ohio Prob. 142, holding that this would be true if the probate court had jurisdiction to determine the validity of claims against the estate, but denying such jurisdiction.

31. Beckett *v.* Selover, 7 Cal. 215, 68 Am. Dec. 237; Hopkins *v.* Van Valkenburgh, 16 Hun (N. Y.) 3; Dean's Appeal, 87 Pa. St. 24; Murphy's Appeal, 8 Watts & S. (Pa.) 165; Clark's Estate, 19 Phila. (Pa.) 218.

32. Warren *v.* Hearne, 82 Ala. 554, 2 So. 491; Gayle *v.* Johnston, 72 Ala. 254, 47 Am. Rep. 405; Davis *v.* Tarver, 65 Ala. 98; Garrett *v.* Garrett, 64 Ala. 263; Bond *v.* Smith, 2 Ala. 660; Dorman *v.* Lane, 6 Ill. 143.

Equitable as well as legal defenses may be set up. Matter of Renwick, 2 Bradf. Surr. (N. Y.) 80.

33. Kornegay *v.* Mayer, 135 Ala. 141, 33 So. 36; Warren *v.* Hearne, 82 Ala. 554, 2 So. 491; Trimble *v.* Fariss, 78 Ala. 260; Steele *v.* Steele, 64 Ala. 438, 38 Am. Rep. 15; Matter of Knapp, 25 Misc. (N. Y.) 133, 54 N. Y. Suppl. 927.

Demand of estate against judgment creditor.— An unliquidated demand held among the assets of an estate against a judgment creditor of the estate cannot be set up to defeat his application for an order to sell property for the payment of his judgment. Brown *v.* Roberts, 21 La. Ann. 508.

34. Kornegay *v.* Mayer, 135 Ala. 141, 33 So. 36.

35. *Alabama.*—Warren *v.* Hearne, 82 Ala. 554, 2 So. 491; Gayle *v.* Johnston, 72 Ala. 254, 47 Am. Rep. 405; Bond *v.* Smith, 2 Ala. 660.

Indiana.— Riser *v.* Snoddy, 7 Ind. 442, 65 Am. Dec. 740.

Mississippi.— Champion *v.* Cayce, 54 Miss. 695.

New York.— Raynor *v.* Gordon, 23 Hun 264; Hopkins *v.* Van Valkenburgh, 16 Hun 3; Matter of Knapp, 25 Misc. 133, 54 N. Y.

troversy in a proceeding to sell land for the payment of debts, whether instituted by the representative or by creditors, are the creditors on the one hand and the heirs or devisees on the other,[36] the representative's admission of a claim against the estate does not bind the heirs or devisees,[37] nor does the fact that a claim against the estate has been presented and allowed preclude the heir from contesting the same.[38] Neither does the fact that a claim has been rejected by the representative deprive the surrogate of jurisdiction to determine its validity.[39]

e. Effect of Judgment Against Representative.[40] A judgment against the representative rendered in a proceeding to which the heir or devisee was not a party or a privy does not preclude the heir or devisee from contesting the claim on which it is based;[41] but if the heir or devisee in any way became a party to the

Suppl. 927; Mead *v.* Jenkins, 4 Redf. Surr. 369; Skidmore *v.* Romaine, 2 Bradf. Surr. 122; Renwick *v.* Renwick, 1 Bradf. Surr. 234.

North Carolina.— Person *v.* Montgomery, 120 N. C. 111, 26 S. E. 645; Speer *v.* James, 94 N. C. 417; Bevers *v.* Park, 88 N. C. 456.

South Carolina. — Bolt *v.* Dawkins, 16 S. C. 198.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1429.

Effect of objection.— If some of the heirs set up the statute of limitations against a particular debt, and the objection is sustained, the court will not confine its operation to such part only of the debt as would fall on the heirs setting it up, but it reaches the whole debt. Renwick *v.* Renwick, 1 Bradf. Surr. (N. Y.) 234.

Averment as to character of debts.— One who contests a proceeding in the probate court to sell decedent's lands for the payment of debts, on the ground that such debts are barred by the three years' statute of limitations provided for open accounts, need not aver that the debts are open accounts. Gayle *v.* Johnston, 72 Ala. 254, 47 Am. Dec. 405.

When defense not admissible.— Where an heir took a fraudulent conveyance from his ancestor and thereby prevented the creditors from proceeding to cause the land to be sold as the decedent's until after the statute of limitations had run, he could not avail himself of the bar of the statute to defeat such proceedings, taken after they had procured the conveyance to be adjudged void. Jennings *v.* Jones, 2 Redf. Surr. (N. Y.) 95.

General statute of limitations applicable to real actions no defense. Henry *v.* Mills, 1 Lea (Tenn.) 144.

36. Hopkins *v.* Van Valkenburgh, 16 Hun (N. Y.) 3.

37. Hopkins *v.* Van Valkenburgh, 16 Hun (N. Y.) 3; Mead *v.* Jenkins, 4 Redf. Surr. (N. Y.) 369.

38. Becket *v.* Selover, 7 Cal. 215, 68 Am. Dec. 237; Moline Water Power, etc., Co. *v.* Webster, 26 Ill. 233; O'Haleran *v.* O'Haleran, 115 Ind. 493, 17 N. E. 917; Scherer *v.* Ingerman, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304; Cole *v.* Lafontaine, 84 Ind. 446. See also Woodfin *v.* Anderson, 2 Tenn. Ch. 331.

Prima facie right established by allowance. — Jackson *v.* Weaver, 98 Ind. 307.

39. *In re* Haxtun, 102 N. Y. 157, 6 N. E. 111 [*reversing* 33 Hun 364]; Hopkins *v.* Van Valkenburgh, 16 Hun (N. Y.) 3; *In re* Merchant, 6 N. Y. Suppl. 875.

40. **Judgment against representative as evidence** see *infra*, XII, G, 10, e.

41. *California.*— *In re* Schroeder, 46 Cal. 304.

Illinois.— Stone *v.* Wood, 16 Ill. 177.

Indiana.— Scherer *v.* Ingerman, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304.

New Hampshire.—Nichols *v.* Day, 32 N. H. 133, 64 Am. Dec. 358.

New York.— Colson *v.* Brainard, 1 Redf. Surr. 324. See also Wood *v.* Byington, 2 Barb. Ch. 387; Kavanagh *v.* Wilson, 5 Redf. Surr. 43.

Pennsylvania.— Luton's Estate, 10 Kulp 161. See also Dean's Appeal, 87 Pa. St. 24.

Tennessee.— Woodfin *v.* Anderson, 2 Tenn. Ch. 331.

United States.— Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185, 6 Call (Va.) 308.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1430.

In North Carolina the heir cannot contest the debts on which judgment has been recovered against the representative (Long *v.* Oxford, 108 N. C. 280, 13 S. E. 112; Proctor *v.* Proctor, 105 N. C. 222, 10 S. E. 1036; Speer *v.* James, 94 N. C. 417), except on the ground of fraud or collusion between the representative and the creditor (Person *v.* Montgomery, 120 N. C. 111, 26 S. E. 645; Tilley *v.* Bivins, 112 N. C. 348, 16 S. E. 759; Long *v.* Oxford, *supra*; Proctor *v.* Proctor, *supra*), and where the findings of the court negative the allegations that the judgment was thus obtained the heir is bound by the judgment (Long *v.* Oxford, *supra*; Proctor *v.* Proctor, *supra*).

Questioning widow's award.—On a petition by an administrator for the sale of real estate, the heirs and devisees may question the justice of the order approving the appraiser's award to the widow, as they may any other claim allowed against the estate; and thereupon the county court may refer the estimate back to the same or other appraisers, but it has no power otherwise to fix another value of her award. Marshall *v.* Rose, 86 Ill. 374.

Heirs may show fraud on part of representative in suffering judgment. Callahan *v.* Griswold, 9 Mo. 784; Nichols *v.* Day, 32 N. H. 133, 64 Am. Dec. 358.

proceedings in which the judgment against the representative was rendered, he is bound thereby and cannot contest the validity thereof.[42]

f. Evidence. In an application to sell land for the payment of debts, the burden of proving the insufficiency of personal assets and the existence of debts chargeable upon the lands rests upon the personal representative,[43] and the heirs, by setting up the statute of non-claim, do not assume the burden of proving that defense, but the representative is regarded as holding the affirmative of the issue, and to maintain it is bound to prove the due filing or presentment of the claim.[44] The fact of the allowance by an executor of claims against the decedent's estate is no proof of their validity,[45] but whether or not a claim has been allowed by the representative, it is treated the same and must be proved and established before the surrogate by common-law proof.[46] A judgment rendered against the decedent in his lifetime is conclusive evidence of the existence of a liability at the time, not only against the personal representative, but also against the heirs,[47] and a judgment against the representative is *prima facie* evidence of the validity and amount of the claim, even as against those who were not parties or privies.[48] Admissions cannot be evidence of indebtedness where the persons by whom they

Where the executor was also residuary devisee and a creditor recovered a verdict in an action at law against him as executor, fixing the amount of the debt, but no judgment was entered thereon for the reason that there were no personal assets in the hands of the executor, and the creditor then filed a bill against the same person as residuary devisee to subject the real estate to the satisfaction of his claim, defendant in the latter bill was not concluded by the verdict rendered in the action against him as executor, nor was it evidence against him. Keefe *v.* Malone, 3 MacArthur (D. C.) 236.

Judgment conclusive evidence of indebtedness as against representative.— Wood *v.* Byington, 2 Barb. Ch. (N. Y.) 387.

42. Stone *v.* Wood, 16 Ill. 177; Nichols *v.* Day, 32 N. H. 133, 64 Am. Dec. 358. See also Smith *v.* Gorham, 119 Ind. 436, 21 N. E. 1096.

43. Kornegay *v.* Mayer, 135 Ala. 141, 33 So. 36; Davis *v.* Tarver, 65 Ala. 98; Garrett *v.* Garrett, 64 Ala. 263; Garrett *v.* Bruner, 59 Ala. 513, whether there is a contest of the application or not. But *compare In re* Le Baron, 3 Dem. Surr. (N. Y.) 37, holding that where, in a special proceeding under Code Civ. Proc. § 2750 *et seq.*, to procure a decree directing the disposition of a decedent's real property for the payment of his debts, the administrator admits the validity of a claim, the burden of disproving it is on the one attacking it.

Creditors are sometimes required to prove their claims. See Gibson *v.* McCormick, 10 Gill § J. (Md.) 65; Hammond *v.* Hammond, 2 Bland (Md.) 306.

Evidence of disinterested witnesses not necessary to prove debts.— Miller *v.* Mayer, 124 Ala. 434, 26 So. 892. Thus creditors may testify as to the existence of debts. Alford *v.* Alford, 96 Ala. 385, 11 So. 316; Chamberlin *v.* Chamberlin, 4 Allen (Mass.) 184.

A finding of indebtedness by commissioners is not necessary before a petition for the sale of land to pay debts and expenses of administration is filed, as proof of the indebtedness may be made by other evidence. Cahill *v.* Bassett, 66 Mich. 407, 33 N. W. 722.

It is not necessary that depositions be used to prove debts under the Alabama statute, but they may be proved by evidence adduced in the ordinary mode. Poole *v.* Daughdrill, 129 Ala. 208, 30 So. 579 [*overruling* Quarles *v.* Campbell, 72 Ala. 64].

Evidence held admissible to prove indebtedness see Lassiter *v.* Upchurch, 107 N. C. 411, 12 S. E. 63; Erck *v.* Erck, 107 Tenn. 77, 63 S. W. 1122; Henry *v.* Drought, 10 Tex. Civ. App. 379, 30 S. W. 584.

Evidence sufficient to show indebtedness see Blanton *v.* Mayes, 72 Tex. 417, 10 S. W. 452.

44. Kornegay *v.* Mayer, 135 Ala. 141, 33 So. 36.

45. Matter of Pfohl, 20 Misc. (N. Y.) 627, 46 N. Y. Suppl. 1086. See also *supra*, XII, G, 10, d.

46. Turner *v.* Amsdell, 3 Dem. Surr. (N. Y.) 19.

47. Wood *v.* Byington, 2 Barb. Ch. (N. Y.) 387, holding that a decretal order made in a chancery suit during the life of defendant, establishing a partnership between him and complainant, and directing an account, is conclusive evidence that the right of complainant to call defendant to account was not barred by the lapse of time or otherwise at the time that the order was made, against the heirs of such defendant as well as against his personal representatives, in a proceeding before the surrogate for the sale of deceased's real estate for the payment of his debts; and this, notwithstanding the fact that such suit abated after such order by the death of defendant.

48. *California.*— *In re* Schroeder, 46 Cal. 304.

Illinois.— Stone *v.* Wood, 16 Ill. 177.

Indiana.— Smith *v.* Gorham, 119 Ind. 436, 21 N. E. 1096; Scherer *v.* Ingerman, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304.

were made had no power to bind those against whom they are sought to be used.[49]

11. Determination as to Sufficiency of Personalty — a. In General. Leave to sell land for the payment of a decedent's debts ought not to be granted without proof that the personalty is insufficient to meet the lawful claims upon the estate,[50] and this is true even though the application for a sale is not resisted by the heirs or devisees.[51] It should also appear upon an application by the executor or administrator that he has proceeded with due and reasonable diligence in pursuing the personal assets and converting and applying them to the purposes of administration.[52]

b. Inventory, Appraisal, or Account. The filing of an inventory, appraisal, schedule, or account is not usually essential to the jurisdiction of the court to

New Hampshire.— Nichols *v.* Day, 32 N. H. 133, 64 Am. Dec. 358.

New York.— Colson *v.* Brainard, 1 Redf. Surr. 324.

Pennsylvania.— Schmidt's Estate, 5 Pa. Dist. 17, 17 Pa. Co. Ct. 314.

United States.— Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185, 6 Call (Va.) 308.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1430, 1432.

But *compare* Keefe *v.* Malone, 3 MacArthur (D. C.) 236.

49. See Kornegay *v.* Mayer, 135 Ala. 141, 33 So. 36 (holding that the heirs of a decedent are not, in a proceeding to subject lands to debts, his representative in such sense as to make their admissions evidence of his indebtedness); Hooper *v.* Hardie, 80 Ala. 114 (holding that, when a bill seeks to sell decedent's lands for the payment of debts, the existence of debts and the deficiency of personal assets cannot be proved against infant defendants by admission of their guardian *ad litem*); Chamberlain *v.* Chamberlain, 4 Allen (Mass.) 184 (holding that the averment by an administrator, in a petition for leave to sell real estate for the payment of debts, that a certain debt is due, and his oral admission of that fact, cannot be considered as evidence to establish the same in a hearing on the petition).

50. *New Jersey.*— Taylor *v.* Hanford, 11 N. J. L. 341; Bray *v.* Neill, 21 N. J. Eq. 343, extent of deficiency of personalty must be ascertained.

New York.— *In re* Lichtenstein, 16 Misc. 667, 39 N. Y. Suppl. 174, 25 N. Y. Civ. Proc. 301.

North Carolina.— Person *v.* Montgomery, 120 N. C. 111, 26 S. E. 645.

Pennsylvania.— Stiver's Appeal, 56 Pa. St. 9. See also Spencer *v.* Jennings, 123 Pa. St. 184, 16 Atl. 426.

Tennessee.— See Wade *v.* Fisher, 10 Heisk. 490.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1434.

Where it is admitted by objections to an administrator's petition for license to sell realty to pay a claim against the testator's estate that the only property of the estate in the state is the realty, the objectors cannot on appeal complain that it was not proven that the personal property had been exhausted. *In re* Smith, 43 Oreg. 595, 73 Pac. 336, 75 Pac. 133.

Insufficiency of personalty must be determined by referee. Matter of Van Vleck, 32 Misc. (N. Y.) 419, 66 N. Y. Suppl. 727.

A report of the clerk or master that the personalty is insufficient is necessary in Tennessee (Reid *v.* Huff, 9 Humphr. (Tenn.) 345; Frazier *v.* Pankey, 1 Swan (Tenn.) 75) and such report must be confirmed before the sale is ordered (Frazier *v.* Pankey, *supra*, holding that a report made and confirmed after the sale will not validate it). A settlement made by the representative with the clerk of the county court is *prima facie* evidence in his favor, and when accurate and not excepted to may constitute the basis of a master's report so as to authorize the chancellor to direct the sale of slaves to pay the debts of the estate (Curd *v.* Bonner, 4 Coldw. (Tenn.) 632); but a report of the assets of the estate drawn by the clerk without the submission of testimony, but by adopting an exhibit to an unsworn bill, purporting to lump the amount of the assets and the debts, and containing no particulars as to the value of the assets or as to the names of the creditors and the value of their respective claims, is not such a report as will authorize a decree for the sale of the property of the estate to pay the debts (Wade *v.* Fisher, 10 Heisk. (Tenn.) 490).

Application of personalty.— It is necessary that the court should ascertain and decide whether the personal estate which came to the hands of the applicant has been applied to the payment of debts. Bray *v.* Neill, 21 N. J. Eq. 343.

51. *In re* Lichtenstein, 16 Misc. (N. Y.) 667, 39 N. Y. Suppl. 174, 25 N. Y. Civ. Proc. 301.

52. Matter of Kingsland, 60 Hun (N. Y.) 116, 14 N. Y. Suppl. 495, 20 N. Y. Civ. Proc. 357 [*reversing* 9 N. Y. Suppl. 447, 18 N. Y. Civ. Proc. 115, 2 Connoly Surr. 187]; Farrington *v.* King, 1 Bradf. Surr. (N. Y.) 182.

On an application by an administrator de bonis non for leave to sell land for the payment of decedent's debts, he must show that his predecessor showed the same diligence as would have been required of him had he been appointed administrator in the first instance. Matter of Kingsland, 60 Hun (N. Y.) 116,

order a sale of realty for the payment of debts where it otherwise appears that the personal assets are insufficient.[53]

c. Evidence. The burden of proof rests upon the representative, when the application for a sale of realty to pay debts is made by him, to show that the personalty is actually insufficient to pay the debts.[54] Proof that the administrator had received profits from the estate more than sufficient to pay the debts of the estate is admissible.[55] The fact that the administrator's account as allowed showed a balance in his hands does not raise a presumption that the subsequent sale of land belonging to the estate was not necessary to pay the deceased's debts.[56] Where an administrator *de bonis non* neglects to cite his predecessor for the purpose of showing administration of personal assets and that they were not sufficient to pay debts, such previous administrator may be cited on petition of any creditor having an interest in such sale.[57]

12. Trial of Title of Decedent and Adverse Claims to Property. As a general rule the court cannot, in a proceeding to sell lands of a decedent for the payment of debts, decide upon the validity of the title of the decedent or adjudicate on

14 N. Y. Suppl. 495, 20 N. Y. Civ. Proc. 357 [*reversing* 9 N. Y. Suppl. 447, 18 N. Y. Civ. Proc. 115, 2 Connoly Surr. 187].

53. Nichols *v.* Lee, 16 Colo. 147, 26 Pac. 157; Shoemate *v.* Lockridge, 53 Ill. 503; Eldridge *v.* McMackin, 37 Miss. 72; Grayson *v.* Weddle, 63 Mo. 523; Mount *v.* Valle, 19 Mo. 621; Overton *v.* Johnson, 17 Mo. 442; Brown *v.* Woody, 22 Mo. App. 253. See also Learned *v.* Matthews, 40 Miss. 210, holding that, although an administrator's account of the personal estate and debts is required by statute to be exhibited on oath before a citation to show cause why an administrator's sale of land to pay debts shall not be made, its omission does not render a decree of sale void. But *compare* Ford *v.* Walsworth, 15 Wend. (N. Y.) 449.

A creditor desiring a sale under order of a probate court of real estate of decedent is not obliged to exhibit a list of debts and inventory of the effects of the estate. That duty devolves on the administrator. Grayson *v.* Weddle, 63 Mo. 523.

In Pennsylvania the law requires an inventory and appraisement of all the personal estate to be exhibited to the orphans' court at the time of the petition for an order to sell realty for the payment of debts (Walker's Appeal, 1 Grant 431), and although the filing of such inventory and appraisement is the better practice, yet all that is required under the statute is the exhibition thereof to the court (Stiver's Appeal, 56 Pa. St. 9; Thomas' Estate, 3 Wkly. Notes Cas. 96). Where the schedule and appraisement is imperfect and insufficient it may be amended (Walker's Appeal, 1 Grant 431) even after the sale (Kennedy *v.* Wachsmuth, 12 Serg. & R. 171, 14 Am. Dec. 676).

In West Virginia it has been held error to decree a sale of the land of a decedent for the payment of his debts until the administration accounts of all his personal representatives had been settled and the amount and priorities of all debts and liabilities against the estate ascertained and decreed. Hart *v.* Hart, 31 W. Va. 688, 8 S. E. 562.

54. Garrett *v.* Garrett, 64 Ala. 263.

Under the Alabama code the insufficiency of the personalty must be shown by depositions (Garrett *v.* Bruner, 59 Ala. 513; Hill *v.* Hill, 9 Ala. 793) of disinterested witnesses (Quarles *v.* Campbell, 72 Ala. 64) who must testify to facts within their own knowledge, it not being sufficient that they testify that, in their opinion, there is no other way of paying decedent's debts than by a sale (Quarles *v.* Campbell, *supra*). It need not be shown affirmatively that the witnesses are disinterested, since that will be presumed in the absence of proof to the contrary. Quarles *v.* Campbell, *supra*. Although the statute requires the deposition of "witnesses" the fact that the necessity was shown by the deposition of one witness only does not render the sale void. Thompson *v.* Boswell, 97 Ala. 570, 12 So. 809 [*overruling* Stevenson *v.* Murray, 87 Ala. 442, 6 So. 301]. The contestant may controvert by oral evidence the statements in the application (Garrett *v.* Bruner, *supra*) or the depositions (Garner *v.* Toney, 107 Ala. 352, 18 So. 161).

Evidence showing insufficiency see Garner *v.* Toney, 107 Ala. 352, 18 So. 161; Matter of Plopper, 15 Misc. (N. Y.) 202, 37 N. Y. Suppl. 33.

Evidence not showing insufficiency see White River Village Cong. Church *v.* Benedict, 62 N. J. Eq. 812, 48 Atl. 1117 [*affirming* 59 N. J. Eq. 136, 44 Atl. 878]; Sanford *v.* Granger, 12 Barb. (N. Y.) 392; Matter of Meagley, 39 N. Y. App. Div. 83, 56 N. Y. Suppl. 503.

A decree of insolvency of a decedent's estate by a court of competent jurisdiction makes, under the Alabama statute, a *prima facie* case of necessity for a sale of the lands, dispensing with the necessity of taking depositions as in chancery cases, and substituting the decree for proof of the existence of debts and of the insufficiency of personal assets. Henley *v.* Johnston, 134 Ala. 646, 32 So. 1009, 92 Am. St. Rep. 48.

55. Dorman *v.* Lane, 6 Ill. 143.

56. Jacocks *v.* Paterson, 18 R. I. 751, 30 Atl. 795.

57. Woodfin *v.* Anderson, 2 Tenn. Ch. 331.

adverse claims to the property held or asserted by other persons;[58] but it is held in New York that, without trying the absolute title, the surrogate may determine the probable ownership.[59]

13. Order or Decree of Sale[60] — a. Necessity. Where there is no power of sale given by will, or where in the case of personalty the representative is without power to sell without the sanction of the court, it is absolutely necessary to the making of a valid sale of a decedent's property by his personal representative that there should be an order or decree of the proper court directing or authorizing such sale.[61]

b. Requisites — (i) *In General.* The order of sale should be based upon the petition presented,[62] and must be made by the court and evidenced by the

58. *Kansas.*— Cooper *v.* Armstrong, 3 Kan. 78, holding further that the district court on appeal from the probate court has no greater power.

Massachusetts.— Tyndale *v.* Stanwood, 182 Mass. 534, 66 N. E. 23; Walker *v.* Fuller, 147 Mass. 489, 18 N. E. 400, except so far as any doubt as to the title may affect the expediency of the sale.

Mississippi.— Gill *v.* Shirley, 55 Miss. 814.

Missouri.— Shields *v.* Ashley, 16 Mo. 471.

New Jersey.— Liddel *v.* McVickar, 11 N. J. L. 44, 19 Am. Dec. 369.

New York.— Libby *v.* Christy, 1 Redf. Surr. 465; Hewitt *v.* Hewitt, 3 Bradf. Surr. 265.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1443.

Contra.— Gavin *v.* Graydon, 41 Ind. 559; Perry *v.* Peterson, 98 N. C. 63, 3 S. E. 834 (holding that an order of sale ought not to be made until an issue as to the title to the land had been tried and disposed of); Gates *v.* Irick, 2 Rich. (S. C.) 593. And see Straughan *v.* Tysor, 124 N. C. 229, 32 S. E. 557, where title was passed on, no question of the power of the court being raised.

In Georgia provision is made by statute for the trial of claims interposed to property which has been advertised for sale by an executor or administrator. See Evans *v.* Brown, 80 Ga. 656, 6 S. E. 280; Martin *v.* McConnell, 29 Ga. 204; Falls *v.* Griffith, 25 Ga. 72.

In Illinois the rule stated in the text formerly prevailed (Newell *v.* Montgomery, 129 Ill. 58, 21 N. E. 508 [*affirming* 30 Ill. App. 48]; Beebe *v.* Saulter, 87 Ill. 518; Le Moyne *v.* Quimby, 70 Ill. 399; Shoemate *v.* Lockridge, 53 Ill. 503; Gridley *v.* Watson, 53 Ill. 186; Cutter *v.* Thompson, 51 Ill. 390; Phelps *v.* Funkhouser, 39 Ill. 401; Smith *v.* McConnell, 17 Ill. 135, 63 Am. Dec. 340), but the act of June 15, 1887, gives to the county and probate courts the power, in proceedings to sell land for the payment of debts, to determine all questions of conflicting or controverted titles arising between the parties and to remove clouds from the title of any real estate sought to be sold (Newell *v.* Montgomery, *supra*).

59. Libby *v.* Christy, 1 Redf. Surr. (N. Y.) 465.

60. **Decree of sale in favor of mortgagee.** — On an executor's petition to sell land there can be no order of sale in favor of a mortgagee on his mortgage in the nature of a foreclosure. Harlan *v.* Roberts, 2 Ohio Dec. (Reprint) 473, 3 West. L. Month. 202.

61. *Alabama.*—Gilchrist *v.* Shackelford, 72 Ala. 7.

Georgia.— Waller *v.* Hogan, 114 Ga. 383, 40 S. E. 254; Groover *v.* King, 46 Ga. 101.

Louisiana.— See Robert *v.* Brown, 14 La. Ann. 597.

Missouri.— Evans *v.* Snyder, 64 Mo. 516 [*followed* in Melton *v.* Fitch, 125 Mo. 281, 28 S. W. 612; Greene *v.* Holt, 76 Mo. 677].

North Carolina.— McNeill *v.* Fuller, 121 N. C. 209, 28 S. E. 299.

Ohio.— Goforth *v.* Longworth, 4 Ohio 129, 19 Am. Dec. 588; Newcomb *v.* Smith, Wright 208.

South Carolina.— Hunter *v.* Hunter, 58 S. C. 382, 36 S. E. 734, 79 Am. St. Rep. 845.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1444.

A commission to sell property issued by the clerk will not supply the place of the necessary order for sale; nor will it be inferred from such commission that a decree of sale existed, although it recites that it was issued in pursuance of the order of the district court. Robert *v.* Brown, 14 La. Ann. 597.

When order of sale presumed.— After possession and use of a Texas land certificate for sixty years from its unimpeached transfer by an administrator, and twenty-five years' continued use and possession of the lands patented thereunder, improving the same and paying taxes thereon, an order of court for the sale of the land, referred to in the transfer, will be presumed. Massenberg *v.* Denison, 107 Fed. 18, 46 C. C. A. 120.

Where the record shows only that certain preliminary steps were taken leading up to a judgment or order of sale, it cannot be inferred that such a judgment or order was rendered. Hunter *v.* Hunter, 58 S. C. 382, 36 S. E. 734, 79 Am. St. Rep. 845.

Conveyance under defective order cannot be aided in equity. Tiernan *v.* Deam, 2 Ohio 383, 15 Am. Dec. 557.

62. Mays *v.* Rogers, 37 Ark. 155 (holding that an order of the probate court directing the sale of more land for the payment of debts than is prayed for in the petition is erroneous); Verry *v.* McClellan, 6 Gray (Mass.) 535, 66 Am. Dec. 423 (holding that

records.[63] It should show the existence of the necessary jurisdictional facts,[64] and the necessity for the sale,[65] but it is not necessary that it should set out the proceedings upon which it is founded.[66] In some jurisdictions the statutes require that the order or decree shall fix the terms and conditions,[67] time,[68] and place of sale.[69] A decree for the sale of land to pay debts should state whether a sale of the whole or only a part is necessary,[70] and when the debts of an estate are small in comparison with the assets, which consist of specific articles, the order of sale should designate with as much certainty as possible what articles are to be sold.[71] The order should ordinarily specify the sum which the court has adjudged to be necessary to be raised by a sale of land,[72] although this has been held unnecessary where the property, although represented to be more than sufficient to pay the demands against the estate, is so situated that a part cannot be sold without injury to those interested.[73] It is the better practice for the court, in all cases where

where the petition prayed for a license to sell a specific portion of the real estate of the decedent, and after publication of a notice to show cause why license should not be granted to sell "the whole of the real estate of said deceased," a license to sell "the whole of the real estate of said deceased" was granted, such license was irregular and void). But see Baum *v.* Roper, 132 Cal. 42, 64 Pac. 128, holding that where the statute does not control the court as to its order of sale by the desire or prayer of the representative, and the petition states the jurisdictional facts, the court has jurisdiction to order the sale of a lot described in the petition, but the sale of which was not petitioned for, and the sale under such order cannot be collaterally attacked on the ground that the petition was to sell other real estate.

63. Newcomb *v.* Smith, Wright (Ohio) 208, holding that a petition to sell with "allowed" written upon it by an associate judge is not an order of sale. See also Evans *v.* Snyder, 64 Mo. 516.

The making and loss of an order will not be presumed if the minutes show no order. Newcomb *v.* Smith, Wright (Ohio) 208.

64. Wyatt *v.* Rambo, 29 Ala. 510, 68 Am. Dec. 89; Needham *v.* Salt Lake City, 7 Utah 319, 26 Pac. 920. See also Sloan *v.* Sloan, 25 Fla. 53, 5 So. 603; Gardner *v.* Cheatham, 37 S. C. 73, 16 S. E. 368.

The order must set forth that notice was given to the persons interested. Summersett *v.* Summersett, 40 Ala. 596, 91 Am. Dec. 494; Puckett *v.* McDonald, 6 How. (Miss.) 269.

Form of order sufficiently showing service of notice see Bowen *v.* Bond, 80 Ill. 351.

Recital held insufficient.— A recital in an order for the sale of realty for the payment of debts that it was made upon proof of due publication of the order to show cause was nothing more than a statement by the surrogate that he had acquired jurisdiction of the parties; and his adjudging that he had jurisdiction, without stating that he found from evidence that the facts existed which conferred it, was not sufficient. Sibley *v.* Waffle, 16 N. Y. 180.

Order not showing compliance with statutory requirement of posting see Planters' Bank *v.* Johnson, 7 Sm. & M. (Miss.) 449.

65. Wilson *v.* Armstrong, 42 Ala. 168, 94 Am. Dec. 635.

Order for sale of realty for payment of debts must show insufficiency of personalty. Wattles *v.* Hyde, 9 Conn. 10.

Order must show liabilities of estate, names of creditors, and amount of assets. Starkey *v.* Hammer, 1 Baxt. (Tenn.) 438. See also Young *v.* Young, 12 Lea (Tenn.) 335.

The debts or expenses of administration need not be particularized in the order for sale. *In re* Roach, 139 Cal. 17, 72 Pac. 393.

66. Williams *v.* O'Neal, 119 Ga. 175, 45 S. E. 978.

67. Moline Water Power, etc., Co. *v.* Webster, 26 Ill. 233; Underwood *v.* Cartwright, 47 S. W. 580, 20 Ky. L. Rep. 809.

Terms prescribed in former order as governing.— Where an order for the sale of several tracts prescribed the terms of sale, a subsequent order for the sale of other property was held to have intended the sale to be upon the terms prescribed in the former order. Sledge *v.* Elliott, 116 N. C. 712, 21 S. E. 797. But a former judgment of sale fixing the terms and conditions, which was ignored by the court and the parties, did not dispense with such provisions in the judgment under which the sale was made. Underwood *v.* Cartwright, 47 S. W. 580, 20 Ky. L. Rep. 809.

68. See Title Guaranty, etc., Co. *v.* Holverson, 95 Ga. 707, 22 S. E. 533, holding, however, that a sale actually made within thirty days from the date of the order, as required by statute, was not void because the order did not require the sale to be made within such time. But *compare* Yerger *v.* Ferguson, 55 Miss. 190, holding that under Miss. Code (1857), p. 449, art. 98, empowering the probate court merely to decree the sale of the estate of a decedent, it had no discretion as to when the sale should be made or reported.

69. Bozeman *v.* Bozeman, 82 Ala. 389, 2 So. 732; Brown *v.* Brown, 41 Ala. 215.

70. Griffith *v.* Philips, 9 Lea (Tenn.) 417, holding, however, that a failure to do so is a mere irregularity which does not invalidate the decree or render the sale void.

71. Lowe *v.* Lowe, 6 Md. 347.

72. Furman *v.* Furman, 45 N. J. Eq. 744, 18 Atl. 194.

73. Merrill *v.* Harris, 26 N. H. 142, 57 Am. Dec. 359.

there are several distinct parcels of property, to insert in its order a direction that the sale cease when the amount required has been obtained;[74] but the omission of such a direction does not invalidate the order or the sales made in pursuance of it.[75] In West Virginia it has been held that the order of sale should make application of the assets in the hands of the personal representatives and decree to the several creditors of the decedent the sums ascertained to be due to them respectively and fix the order in which they are to be paid.[76] Where the statute simply requires the court to order the sale, it is not necessary to state in the order by whom the sale is to be made.[77] Statutory restrictions as to price to be obtained from the sale need not be specified in the order, if the court does not intend to impose any other restrictions.[78] It is not necessary for the order to state what interest the decedent had in the land to be sold,[79] and the fact that the order directs a sale and conveyance of the right, title, and interest which the decedent had at the time of his death furnishes no reason for a purchaser refusing to take a deed in the absence of proof of any defect of title or of a failure to show that good title.[80] It is not essential to the validity of a decree in a proceeding to sell land for assets, under the North Carolina statute, that it should be signed.[81] Where, after a final judgment for the sale of land, the court, at a subsequent term, and without any supplemental proceedings, entered another and apparently original judgment ordering a sale of the land on different terms, it was held that the second judgment was void,[82] but where the first order of sale was not a final judgment, but an interlocutory order subject to be vacated, set aside, modified, or changed on petition or motion until the real estate was sold under such order, the sale confirmed, and until the end of the term of court at which such sale was confirmed, a second order procured on an amended petition was held valid and binding.[83] Under a statute giving the court power to grant an administrator "license" to sell real estate to procure assets, an order granting one license to sell if, in the settlement of the estate, it should be found necessary, is not void as being a conditional judgment, or as attempting to vest the administrator with judicial power,[84] and it has been held that an order of the orphans' court requiring an executor to sell so much of the personalty of the testator as would satisfy all debts, claims, and commissions against the estate, should not be reversed on the ground that it was too general and vested too much discretion in the executor.[85] Under the Montana statute the court has authority to enter an order directing an executor to make a lease of his decedent's lands for a term and rental specified in

74. *In re* Spriggs, 20 Cal. 121. And see Richardson *v.* Butler, 82 Cal. 174, 23 Pac. 9, 16 Am. St. Rep. 101, holding that where it appeared from the petition of an administrator to sell land that the amount necessary to be raised was between ten thousand and eleven thousand dollars, and the property consisted of several lots and parcels, a provision that the sale should cease when an amount not less than ten thousand dollars, and not more than eleven thousand dollars, should be obtained, did not invalidate the order of sale.

75. *In re* Spriggs, 20 Cal. 121.

76. Hart *v.* Hart, 31 W. Va. 688, 8 S. E. 562 [*following* Kanawha Valley Bank *v.* Wilson, 25 W. Va. 242].

77. Crawford *v.* McDonald, 88 Tex. 626, 33 S. W. 325, holding that therefore, where a sale was asked by a creditor, the sale was not rendered void by a direction in the order that the sale be made by "petitioner" instead of by the executor, where this appeared to have been a clerical mistake and the sale was in fact made by the executor.

78. Lappin *v.* Mumford, 14 Kan. 9.

An order for the sale of mortgaged property for cash need not embody a condition of law that its appraised value be obtained. Porter's Succession, 5 Rob. (La.) 96.

79. Bowles *v.* Rouse, 8 Ill. 409.

80. *In re* Dolan, 88 N. Y. 309 [*reversing* 26 Hun 46].

81. Sledge *v.* Elliott, 116 N. C. 712, 21 S. E. 797.

82. Bethel *v.* Bethel, 6 Bush (Ky.) 65, 99 Am. Dec. 655.

83. Hall *v.* Price, 141 Ind. 576, 40 N. E. 1084.

84. Sledge *v.* Elliott, 116 N. C. 712, 21 S. E. 797.

85. Lowe *v.* Lowe, 6 Md. 347, where the court said that if, under such authority, the executrix should attempt to sell property much beyond the necessity of the case or should act in any manner oppressively to the legatees, they might obtain relief by making application to the orphans' court to stop the sale altogether or to limit the extent of it, or relief might be obtained by injunction from a court of equity.

the order and is not limited to a statement of the minimum sum which the executor may receive, leaving it discretionary with him as to whether he will carry out an agreement entered into prior to the making of the petition.[86]

(II) *Description of Property.* An order or decree of sale should contain a description of the property to be sold, which should be sufficiently definite and complete to certainly identify the same,[87] and if it does not contain such a description a purchaser at the sale is justified in refusing to comply with his bid.[88] But it has been held that the order of sale and the sale thereunder are not void because the description of the property in the order is imperfect[89] or even because the order contains no description whatever of the property,[90] where it is apparent that the property sold is that of which a sale was asked and intended.[91] The description of the property in the order of sale may be aided by other portions of the probate record.[92] Where the description in the order is indefinite but is made certain by the recitals therein the sale is valid,[93] but where the description is definite and certain and clearly identifies land which the decedent never owned, and no other, the sale is void.[94] The rule that when a deed of conveyance contains a general description which is definite and certain in itself and is followed by a particular description, the latter description will not limit or restrict the grant, which is clear and unambiguous by the general description, has been applied to an order of a probate court directing the sale of real property.[95]

c. Operation and Effect. An order of sale by a probate court is an adjudica-

86. State *v.* Second Judicial Dist. Ct., 24 Mont. 1, 60 Pac. 489.

87. *Alabama.*—Gayle *v.* Singleton, 1 Stew. 566.

Georgia.— Davie *v.* McDaniel, 47 Ga. 195.

Illinois.— Tilton *v.* Pearson, 67 Ill. App. 372.

Kentucky.— Bartlett *v.* Gray, 4 Ky. L. Rep. 615.

North Carolina.— Blythe *v.* Hoots, 72 N. C. 575.

Texas.— Davis *v.* Touchstone, 45 Tex. 490.

Wisconsin.— Humes *v.* Cox, 1 Pinn. 551, holding that a license to sell real estate of a decedent, as well as the order of court granting the same, should describe the lands to be sold.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1445.

But *compare* Norton *v.* Norton, 5 Cush. (Mass.) 524; Yeomans *v.* Brown, 8 Metc. (Mass.) 51; Kingsbury *v.* Wild, 3 N. H. 30.

Descriptions held sufficient see Macmanus *v.* Orkney, 91 Tex. 27, 40 S. W. 715 [*reversing* (Civ. App. 1897) 39 S. W. 614]; Davis *v.* Touchstone, 45 Tex. 490; Grant *v.* Hill, (Tex. Civ. App. 1898) 44 S. W. 1027.

Descriptions held insufficient see Tilton *v.* Pearson, 67 Ill. App. 372; Blythe *v.* Hoots, 72 N. C. 575.

88. Tilton *v.* Pearson, 67 Ill. App. 372.

89. Davie *v.* McDaniel, 47 Ga. 195; Schnell *v.* Chicago, 38 Ill. 382, 87 Am. Dec. 304; Norwood *v.* Snell, (Tex. Civ. App. 1902) 69 S. W. 642. *Compare* Graham *v.* Hawkins, 38 Tex. 328.

90. Allen *v.* Shanks, 90 Tenn. 359, 16 S. W. 715 (holding that the fact that the decree does not define the particular property to be sold does not invalidate it where the will vested the executors with the widest discretion as to selling his property and the application was by them to the chancellor for aid in the execution of their trust); Wells *v.* Polk, 36 Tex. 120; Norwood *v.* Snell, (Tex. Civ. App. 1902) 68 S. W. 642. See also Davis *v.* Touchstone, 45 Tex. 490; Wells *v.* Mills, 22 Tex. 302. *Contra*, Melton *v.* Fitch, 125 Mo. 281, 28 S. W. 612 [*following* Greene *v.* Holt, 76 Mo. 677; Evans *v.* Snyder, 64 Mo. 516], holding that a sale of land not described in the order of sale is void.

91. Schnell *v.* Chicago, 38 Ill. 382, 87 Am. Dec. 304.

92. Crawford *v.* McDonald, 88 Tex. 626, 33 S. W. 325; Davis *v.* Touchstone, 45 Tex. 490; Ferguson *v.* Templeton, (Tex. Civ. App. 1895) 32 S. W. 148.

Where an order omitted to describe the land, but referred to the petition, in which the quantity, interest, and title of the decedent, and the former ownership of the land, with the fact that it was the only land owned by him, were set out, it was held that the order identified the land with sufficient certainty. Montgomery *v.* Johnson, 31 Ark. 74.

93. Buntin *v.* Root, 66 Minn. 454, 69 N. W. 330.

94. Hanson *v.* Ingwaldson, 77 Minn. 533, 80 N. W. 702, 77 Am. St. Rep. 692 [*distinguishing* Buntin *v.* Root, 66 Minn. 454, 69 N. W. 330].

Subsequent correction.— Where an administrator's sale was void because of a misdescription of the land sold, a subsequent order purporting to correct the order of license and the other records, so as to describe the land intended to be sold, was also void. Hanson *v.* Ingwaldson, 77 Minn. 533, 80 N. W. 702, 77 Am. St. Rep. 692.

95. Middleton *v.* Wharton, 41 Minn. 266, 43 N. W. 4.

tion that all the facts existed which were necessary to give the court jurisdiction,[96] and is conclusive as to the necessity of the sale.[97] The order or decree of sale is binding on all of the parties to the proceeding[98] and their privies,[99] but is not binding on or conclusive against other persons.[1] The order or decree is conclusive as to the existence and validity of debts or claims against the estate;[2] but as such adjudication is only between the personal representative and the heirs or devisees, it establishes the existence of valid debts only as an element of necessity for the sale, and is not a conclusive adjudication as to the existence or validity of particular debts either in favor of or against creditors, they not being parties to the proceeding for the sale,[3] nor is it evidence for the representative, on settlement, of the validity of any claims.[4] An order for the sale of realty is conclusive as to the insufficiency of the personalty and the necessity of resorting to the realty.[5] The usual presumption in favor of an order of court exists in the case

96. Davis *v.* Gaines, 104 U. S. 386, 26 L. ed. 757.

97. Irwin *v.* Flynn, 110 La. 829, 34 So. 794.

98. *California.*—See *In re* Leonis, 138 Cal. 194, 71 Pac. 171.

Illinois.— Judd *v.* Ross, 146 Ill. 40, 34 N. E. 631.

Indiana.— See Bumb *v.* Gard, 107 Ind. 575, 8 N. E. 713.

North Carolina.— Ward *v.* Lowndes, 96 N. C. 367, 2 S. E. 591.

South Carolina.— Dyson *v.* Jones, 65 S. C. 308, 43 S. E. 667 (in the absence of fraud); Culler *v.* Crim, 52 S. C. 574, 30 S. E. 635.

Tennessee.— Thomson *v.* Blanchard, 2 Lea 528.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1446.

Infant parties.— A decree of the probate court ordering sale of intestate's land for the payment of debts is as conclusive on infants properly represented by a guardian *ad litem* as on adults. Chardavoyne *v.* Lynch, 82 Ala. 376, 3 So. 98.

Same person in different capacities.—Where the vendor of land is the heir of the vendee, and as heir is made a party to an administrator's petition to sell for the payment of debts, the adjudication will not preclude him from proceeding to enforce his vendor's lien. Lord *v.* Wilcox, 99 Ind. 491. So also heirs inheriting two thirds of their land from their mother and one third from their father are not estopped to bring an action against their father's administrator to restrain him from selling said land by the fact that they have been made parties to the petition to sell, as the court had no jurisdiction over that inherited from their mother. Goldsberry *v.* Gentry, 92 Ind. 193.

Joinder of widow as petitioner.— Where a petition for the sale of land belonging to a decedent's estate names both the administrator and the widow as petitioners, the latter, although not named in the summons or in the order of sale, is bound by the decree in the case as a party thereto, whether she actually joined in the petition or not, except in a direct proceeding to vacate the same. Brittain *v.* Mull, 99 N. C. 483, 6 S. E. 382.

99. Boulden *v.* Lanahan, 29 Md. 200; Richmond *v.* Freeman's Nat. Bank, 86 N. Y. App. Div. 152, 83 N. Y. Suppl. 632; Thomson *v.* Blanchard, 2 Lea (Tenn.) 528.

1. Hughes *v.* Treadaway, 116 Ga. 663, 42 S. E. 1035; Collinson *v.* Owens, 6 Gill & J. (Md.) 4; Everitt *v.* Williams, 45 N. J. L. 140. See also Holmes *v.* Columbia Nat. Bank, (Nebr. 1903) 97 N. W. 26.

2. Daughdrill *v.* Daughdrill, 108 Ala. 321, 19 So. 185; Chardavoyne *v.* Lynch, 82 Ala. 376, 3 So. 98; Judd *v.* Ross, 146 Ill. 40, 34 N. E. 631; Simpson *v.* Norton, 45 Me. 281; Grubb *v.* Galloway, 203 Pa. St. 236, 52 Atl. 176, 93 Am. St. Rep. 764; Stewart *v.* Madden, 153 Pa. St. 445, 25 Atl. 803, 34 Am. St. Rep. 713.

An order validating an executor's claim against the estate, made in a proceeding to sell real estate of the decedent, is conclusive upon the estate, either in a proceeding specially instituted for proof of such claim or on a final accounting. Matter of Gardner, 5 Redf. Surr. (N. Y.) 14.

Effect of dismissal of petition.— On an application by an administrator to sell land for the payment of debts, it being admitted that there are no personal assets, a judgment of dismissal on the merits is conclusive against the validity of the claims asserted as debts, and is a bar to another petition by the administrator for the same purpose, there being no evidence of change in the status of the estate. McCalley *v.* Robinson, 70 Ala. 432.

3. Everitt *v.* Williams, 45 N. J. L. 140; Latta *v.* Russ, 53 N. C. 111. But *compare* Lyne *v.* Sanford, 82 Tex. 58, 19 S. W. 847, 27 Am. St. Rep. 852, holding that where the application for order of sale set out a claim, and asked that a land certificate be sold for the purpose of paying the debt, and the court granted the order of sale, it was tantamount to an allowance of the claim by the administrator, and an approval by the court.

4. Daughdrill *v.* Daughdrill, 108 Ala. 321, 19 So. 185.

5. *Alabama.*— Chardavoyne *v.* Lynch, 82 Ala. 376, 3 So. 98.

California.— *In re* Spriggs, 20 Cal. 121. See also *In re* Leonis, 138 Cal. 194, 71 Pac. 171.

Maryland.— Mackubin *v.* Brown, 1 Bland 410.

of an order for the sale of a decedent's property,[6] and it will be presumed that the order or decree was made upon a proper showing.[7] When the court has jurisdiction an order granting leave to sell real estate is valid whether passed on good reason or without reason, and the sale under such order passes the title of the decedent.[8] Where it is necessary the application for a sale may be looked to for the proper interpretation and understanding of the order made by the court upon such application.[9] An order or decree of sale authorizes the sale of all the property properly embraced within its scope,[10] but cannot be extended so as to authorize the sale of other property.[11] A license to "sell" realty imports that the whole title to any estate disposed of is to be parted with for an equivalent in money and not that such estate is to be encumbered for money,[12] and an order authorizing an administrator to borrow money on the real estate is an authority to mortgage it, but not to confess judgment.[13] An order authorizing the administrator to lease property to pay debts is not a revocation of a previous order authorizing a sale for the same purpose, as both powers may stand together.[14] An order for the sale of realty invests the personal representative with the legal title thereto so far as to enable him to remove encumbrances thereon by bill in equity and have the title perfected, so that the order of sale may be carried out for the best interests of the estate and of the creditors.[15] The mere fact that an order has

New Jersey.— Everitt *v.* Williams, 45 N. J. L. 140.

Tennessee.— Thomson *v.* Blanchard, 2 Lea 528.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1446.

If the decree is that the petition for sale be not granted, this is conclusive that the personal assets are then sufficient for the payment of debts. But the decree has relation solely to the status of the estate in this respect at the time of its rendition and not to its status at some subsequent time when new facts may have occurred changing it. Ford *v.* Ford, 68 Ala. 141.

6. Lowe *v.* Lowe, 6 Md. 347; Hutchins *v.* Brooke, 31 Miss. 430; Laughman *v.* Thompson, 6 Sm. & M. (Miss.) 259.

7. *Arkansas.*—Jackson *v.* Gorman, 70 Ark. 88, 66 S. W. 346, after the time for appeal has passed.

Connecticut.— See Shelton *v.* Hadlock, 62 Conn. 143, 25 Atl. 483.

Florida.— Deans *v.* Wilcoxon, 25 Fla. 980, 7 So. 163.

Georgia.— Williams *v.* O'Neal, 119 Ga. 175, 45 S. E. 978.

Louisiana.— Irwin *v.* Flynn, 110 La. 829, 34 So. 794.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1446.

8. Doe *v.* Roe, 30 Ga. 961; Perkins *v.* Fairfield, 11 Mass. 227.

9. Farris *v.* Gilbert, 50 Tex. 350.

10. See the following cases:

Connecticut.— Rockwell *v.* Sheldon, 2 Day 305, holding that a general order of sale by the court of probate extends to all the property of the deceased known to the court at the time of making such order, although not contained in the inventory or record.

Georgia.— Oliver *v.* Powell, 114 Ga. 592, 40 S. E. 826 (holding that an order of court granting to an administrator leave to sell all the real estate belonging to decedent in a certain county covers every interest in land in that county, whether in possession or expectancy); Adams *v.* Adams, 113 Ga. 824, 39 S. E. 291 (holding that where an order for the sale of land, granted by an ordinary, was for the sale of a reversion in realty after the expiration of a widow's dower, and before the sale took place the widow died, the order constituted authority to sell the fee).

Illinois.— Stow *v.* Kimball, 28 Ill. 93, holding that a decree or order for the sale of "real estate described in the petition" justifies the sale of all the real estate so described.

Mississippi.— Monk *v.* Horne, 38 Miss. 100, 75 Am. Dec. 94, holding that a decree of the probate court directing the sale of the lands and mills belonging to the estate of the deceased authorizes the sale of any real estate and mills belonging to the deceased within the jurisdiction of the court.

United States.— Santana Live-Stock, etc., Co. *v.* Pendleton, 81 Fed. 784, 26 C. C. A. 608, holding that an order made, on application by an administrator, to sell six hundred acres of land, or so much as is necessary to pay debts, to be taken from one-half league and labor owned by the estate, authorizes the sale of so much of the half league and labor as may be required, although more than six hundred acres.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1446.

11. See Janes *v.* Throckmorton, 57 Cal. 368, holding that a decedent's interest in land under covenant by which the covenantor, after paying debts of the decedent from the sales of the land, is to convey a proportion of the balance to the decedent, cannot be sold under an order directing the sale of the personalty of the decedent.

12. Brown *v.* Van Duzee, 44 Vt. 529.

13. Barger *v.* Cassidy, 4 Phila. (Pa.) 324.

14. Jackson *v.* Irwin, 10 Wend. (N. Y.) 441.

15. Williams *v.* Stratton, 10 Sm. & M. (Miss.) 418.

been made by the probate court for the sale of the real estate of the intestate does not prevent the court from setting the same aside as a homestead for the widow.[16] A recital in the order of sale that "it is more advantageous to sell the land" does not show that the sale was ordered for the reason that it would be advantageous to the estate.[17] Under a statute providing that the court may prescribe the maximum period of a loan ordered to be negotiated by an administrator, an order to execute a mortgage therefor payable on or before two years from the date must be regarded as fixing the maximum period only.[18] An order for the sale of land of a decedent to discharge it of liens, providing that, if the proceeds are insufficient to discharge the mortgage debt, the deficiency shall, upon the order of court, be paid out of the assets applicable thereto in the hands of the administrator, does not adjudicate the priorities of different creditors in the fund.[19] An order for the sale of the intestate's real estate by the administrator cannot have a retrospective effect, so as to legalize a sale made prior to the order.[20] Where, after the granting of a license to sell realty, but before a sale thereunder, the law giving the court jurisdiction to grant such license was repealed, this revoked the license, and a subsequent sale thereunder was void.[21]

d. Amendment or Vacation. An order of a court of probate jurisdiction granting to the representative leave to sell cannot be vacated, rescinded, or revoked by that court, except in the same manner as other judgments, upon notice to the administrator, and for good cause shown.[22] Where the order or decree of sale is void, as where the court acted without jurisdiction in making the same, it may be vacated or set aside, even at a subsequent term;[23] but where the court had jurisdiction the order of sale will not be set aside at a subsequent term merely because errors or irregularities have intervened in the proceedings, or the order itself is erroneous.[24] It seems, however, that the order or decree of sale is open to amendment or correction at all times until it has been acted upon and a sale made thereunder and confirmed.[25] Under the Iowa statute it has been held that a defendant who was served by publication only had the legal right to have an order of sale made upon default set aside upon his mere motion therefor

16. *In re* Smith, 51 Cal. 563.

17. Louder *v.* Schluter, 78 Tex. 103, 14 S. W. 205, 207.

18. Fast *v.* Steele, 127 Cal. 202, 59 Pac. 585.

19. Ryker *v.* Vawter, 117 Ind. 425, 20 N. E. 294.

20. Ludlow *v.* Park, 4 Ohio 5.

21. Campau *v.* Gillett, 1 Mich. 416, 53 Am. Dec. 73.

22. Whitaker *v.* Smith, 33 Ga. 237.

23. De Bardelaben *v.* Stoudenmire, 48 Ala. 643; Summersett *v.* Summersett, 40 Ala. 596, 91 Am. Dec. 494; Wall *v.* Clark, 19 Tex. 321, holding that where the county court makes an order to sell property, and at a subsequent term, while the proceeding is still *in fieri*, it is shown that the property does not belong to the estate, the order of sale should be revoked. See also Hull *v.* Hamilton, 8 W. Va. 43.

A claim that the property was in custodia legis at the time an order of sale was made at the instance of the administrator of the succession of a deceased husband, set up as a ground for revoking the order, is not sustained where it appears merely that an order of seizure and sale was previously issued and executed against the widow in her individual capacity as owner of the property. Morere *v.* Preston, 34 La. Ann. 873.

24. Carter *v.* Waugh, 42 Ala. 452 [*following* Satcher *v.* Satcher, 41 Ala. 26, 91 Am. Dec. 498]; Wall *v.* Clark, 19 Tex. 321.

After a decree of sale has been executed, the orphans' court has no power to set aside the decree. Crombie *v.* Engle, 19 N. J. L. 82.

Where the court of ordinary is a court of inferior jurisdiction, the ordinary has authority to revoke his permission to an executor to sell real estate, where such permission was given under a mistake of facts, as it is essential to a court of inferior jurisdiction that it have power to revise and correct its proceedings before they are finally completed and decided on by the superior courts. Radford *v.* Westcott, 1 Desauss. (S. C.) 596.

Under the Montana statute the court has no power to revoke an order directing the executor to lease land to a certain person at a fixed sum against the objection of the person designated as the lessee, where he has complied with the conditions of the order, even though the executor has subsequently had a more favorable offer. State *v.* Second Judicial Dist. Ct., 24 Mont. 1, 60 Pac. 489.

25. See Sheldon *v.* Wright, 7 Barb. (N. Y.) 39 [*affirmed* in 5 N. Y. 497]; Maxwell *v.* Blair, 95 N. C. 317.

Under the Montana statute the court has power to modify an order previously made

at any time before the sale and within two years after the order was made.[26] In Louisiana the validity of an *ex parte* order of sale in a succession proceeding by an executrix to pay debts may be assailed by rule.[27] A person who is not interested in the estate so as to entitle him to become a party to the proceedings for sale has no standing in court to apply to have the order of sale set aside.[28]

14. Essentials to Be Shown of Record. It is necessary to the validity of a sale that the order of sale should appear of record,[29] and the record should show affirmatively a compliance with all the requirements of the statute under which the sale is decreed,[30] such as that an application showing a statutory ground for the sale has been preferred by a proper person,[31] that a citation was published or notice given as required by statute,[32] that there was a necessity for the sale,[33] and that the court heard satisfactory proof on the subject.[34] It has been held that inasmuch as probate jurisdiction to order the sale of a decedent's land for purposes of administration is derived wholly from statute, jurisdiction in any case should appear of record.[35] In Nebraska it has been held that where a district judge at chambers grants a license to an executor or administrator to sell real estate, the record of the proceedings must be made in the district court having jurisdiction to hear and determine the application; that is, in the court of the county in which the administration was granted.[36]

15. Appraisal of Property to Be Sold. It is provided by statute in many jurisdictions that realty of a decedent shall be appraised before it is sold.[37] The

as to the amount of rental of property authorized to be leased, where the executor and lessee have agreed thereto. State *v.* Second Judicial Dist. Ct., 24 Mont. 1, 60 Pac. 489.

26. Huston *v.* Huston, 29 Iowa 347.

27. Thompson's Succession, 42 La. Ann. 118, 7 So. 477.

28. Shields *v.* Ashley, 16 Mo. 471.

29. Evans *v.* Snyder, 64 Mo. 516; Goforth *v.* Longworth, 4 Ohio 129, 19 Am. Dec. 588. See also Groover *v.* King, 46 Ga. 101. *Contra,* Egan *v.* Grece, 79 Mich. 629, 45 N. W. 74. And see Baeder *v.* Jennings, 40 Fed. 199, holding that a recital in an administrator's deed of an order of sale is sufficient presumptive proof, forty or fifty years after the date of the deed, of such an order, the possession being conformable to the deed.

30. Martin *v.* Williams, 42 Miss. 210, 97 Am. Dec. 456; Gelstrop *v.* Moore, 26 Miss. 206, 59 Am. Dec. 254; Planters' Bank *v.* Johnson, 7 Sm. & M. (Miss.) 449; Lowry *v.* McDonald, Sm. & M. Ch. (Miss.) 620; Crisman *v.* Beasley, Sm. & M. Ch. (Miss.) 561.

31. Landford *v.* Dunklin, 71 Ala. 594, personal representative.

32. Root *v.* McFerrin, 37 Miss. 17, 75 Am. Dec. 49; Kempe *v.* Pintard, 32 Miss. 324; Planters' Bank *v.* Johnson, 7 Sm. & M. (Miss.) 449; Laughman *v.* Thompson, 6 Sm. & M. (Miss.) 259. See also Gibbs *v.* Shaw, 17 Wis. 197, 84 Am. Dec. 737, holding that a statement in the license, that it appeared to the judge "that the notice had been published" in a certain newspaper is not sufficient evidence of due publication.

33. Wyatt *v.* Rambo, 29 Ala. 510, 68 Am. Dec. 89; McMekin *v.* Bobo, 12 Ala. 268; Clapp *v.* Beardsley, 1 Aik. (Vt.) 168, holding that a naked license to an administrator to sell real estate of the intestate will not support a title derived from the administrator's sale, but it must appear, either from the license or from the probate records, that such facts existed as would warrant the granting of the license.

34. Fridley *v.* Murphy, 25 Ill. 146. But *compare* Sidener *v.* Hawes, 37 Ohio St. 532, holding that an order for the sale of real estate to pay debts will not be reversed for want of a journal entry showing that the statements of the petition were found to be true.

35. Goodwyn *v.* Sims, 86 Ala. 102, 5 So. 587, 11 Am. St. Rep. 21; Tyson *v.* Brown, 64 Ala. 244 (jurisdiction cannot be presumed from the fact of sale); Pettit *v.* Pettit, 32 Ala. 288; Wyatt *v.* Rambo, 29 Ala. 510, 68 Am. Dec. 89 (jurisdiction will not be supplied by intendment); Wright *v.* Edwards, 10 Oreg. 298; Hilton's Appeal, (Pa. 1887) 9 Atl. 434. See also McCartney *v.* Calhoun, 11 Ala. 110. But see Wood *v.* Crawford, 18 Ga. 526 [*following* Perkins *v.* Attaway, 14 Ga. 27; Tucker *v.* Harris, 13 Ga. 1, 58 Am. Dec. 488].

Failure to name heirs.—In a proceeding by an administrator for an order to sell lands, if the record fails to name the heirs otherwise than by the general designation "heirs," the proceeding will be void as to them, and there can arise no presumption that the court acquired jurisdiction over any persons other than those named. Guy *v.* Pierson, 21 Ind. 18.

36. Stack *v.* Royce, 34 Nebr. 833, 52 N. W. 675.

37. See the following cases:

Arkansas.— Bell *v.* Green, 38 Ark. 78.

Indiana.— Rice *v.* Cleghorn, 21 Ind. 80; Maple *v.* Shoyer, 1 Blackf. 561.

Kentucky.— Vivion *v.* Vivion, 50 S. W. 984, 21 Ky. L. Rep. 103.

Louisiana.— Curley's Succession, 18 La. Ann. 728.

purpose of such a provision is to advise the court of the value of the estate and to assist it in exercising its judicial discretion in approving or disapproving the sale, and also to furnish *prima facie* evidence of value and of the good faith of the personal representative and the purchaser.[38]

16. Review[39]— a. What Orders Reviewable. An order directing or refusing to direct a sale of a decedent's realty is subject to appeal,[40] and it has also been

Missouri.— McVey *v.* McVey, 51 Mo. 406. Under the Spanish law an appraisement was not necessary to the validity of a representative's sale. McNair *v.* Hunt, 5 Mo. 300.

Texas.— Jemison *v.* Gaston, 21 Tex. 266.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1459.

Effect of failure to have appraisal made.— The fact that a personal representative fails to have land appraised before selling it, as required by statute, does not render the sale void if it is confirmed by the court. It can be set aside only by appeal from the order of confirmation or by a direct proceeding for that purpose, and cannot be impeached in a collateral proceeding. Bell *v.* Green, 38 Ark. 78; Noland *v.* Barrett, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572. But see Curley's Succession, 18 La. Ann. 728.

Irregularities in the appraisement will not invalidate the sale. Noland *v.* Barrett, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572; Johnson *v.* Beazley, 65 Mo. 250, 27 Am. Rep. 276; Moore *v.* Wingate, 53 Mo. 398; McVey *v.* McVey, 51 Mo. 406. See also Rice *v.* Cleghorn, 21 Ind. 80; Lalanne *v.* Moreau, 13 La. 431.

All appraisers need not swear to appraisement. An appraisement of land of a decedent, sworn to by two out of three appraisers, is valid. Moore *v.* Wingate, 53 Mo. 398.

Correction of description in appraisement. — The probate court may correct an error in the description of land appraised for sale under a personal representative's petition. Lasure *v.* Carter, 5 Ind. 498.

Reappraisement.— The probate judge may in his discretion order real estate which is to be sold to pay the debts of an estate, to be reëxamined and reappraised. This reappraisement may be made at any time before the sale. Hood's Succession, 33 La. Ann. 466. See also Webb *v.* Keller, 39 La. Ann. 55, 1 So. 423.

Necessity for proof of appraisement.— The records of the court need not show that an appraisement has been made in order for the sale to be valid, nor is it incumbent on a party claiming under the sale to prove that fact. Jemison *v.* Gaston, 21 Tex. 266.

38. Noland *v.* Barrett, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572.

39. See, generally, Appeal and Error, 2 Cyc. 474.

Effect upon bona fide purchaser of reversal of order of sale see *infra*, XII, T, 3, c, (III).

40. *Alabama.*— Spence *v.* Parker, 57 Ala. 196 (*aliter* under earlier statute); Devany *v.* Devany, 25 Ala. 722.

California.— *In re* Leonis, 138 Cal. 194, 71 Pac. 171; *In re* Corwin, 61 Cal. 160. See also *In re* Levy, 141 Cal. 639, 75 Pac. 317.

Illinois.— Steele *v.* Steele, 89 Ill. 51 (appeal from county to circuit court); Lewis *v.* Flowree, 32 Ill. App. 314 (time for taking appeal from county to circuit court).

Indiana.— Simpson *v.* Pearson, 31 Ind. 1, 99 Am. Dec. 577 [*distinguishing* Love *v.* Mikals, 12 Ind. 439].

Louisiana.— State *v.* Lazarus, 37 La. Ann. 830. But where parties have been recognized by formal decree of court as legatees of a succession, no appeal will lie from a subsequent judgment on a rule taken by them or on application of the personal representative ordering him to sell property enough to pay the legacies. State *v.* Judge New Orleans Second Dist. Ct., 22 La. Ann. 200.

Minnesota.— *In re* Wilson, (1903) 97 N. W. 647, order reviewable by appeal only and not upon certiorari.

Missouri.— See Ferguson *v.* Carson, 86 Mo. 673 [*affirming* 9 Mo. App. 497].

Texas.—See Harrison *v.* Oberthier, 40 Tex. 385.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1469.

Contra.—Steinbarger *v.* Steinbarger, 19 Ohio 106; Webster *v.* Ballard, 4 Ohio Dec. (Reprint) 419, 2 Clev. L. Rep. 137; Snodgrass' Appeal, 96 Pa. St. 420 [*overruling* Hess' Appeal, 1 Watts 255]; Robinson *v.* Glancy, 69 Pa. St. 89 [*distinguishing* Robinson's Appeal, 62 Pa. St. 213], holding that an appeal lies only from the decree confirming the sale.

In Indiana a proceeding to sell land of a decedent to make assets is a proceeding under the decedent's act, and appeals from orders made in such proceedings are governed by that act and not by the general practice act. Bollenbacher *v.* Whisnand, 148 Ind. 377, 47 N. E. 706; Beaty *v.* Voris, 138 Ind. 265, 37 N. E. 785; Galentine *v.* Wood, 137 Ind. 532, 35 N. E. 901; Rinehart *v.* Vail, 103 Ind. 159, 2 N. E. 330; Seward *v.* Clark, 67 Ind. 289 [*overruling* Hamlyn *v.* Nesbit, 37 Ind. 284].

In Michigan it has been held that where the probate court denies a personal representative leave to sell and on appeal the circuit court reverses this order and grants leave, it should enter the proper judgment itself instead of directing the probate court to enter it. Daley's Appeal, 47 Mich. 443, 11 N. W. 262.

In New Jersey, by constitutional provision, an appeal from an order for a sale of land of a decedent may be taken from the orphans' court to the prerogative court, but a certiorari will not lie in the supreme court to review such an order. Carroll *v.* Baxter, 65 N. J. L. 478, 47 Atl. 507. See also *In re* Devine, 62 N. J. Eq. 703, 49 Atl. 138.

held that such an order may be reviewed by writ of error,[41] and a bill of review has been sustained.[42] An appeal lies from a judgment of the probate court, rendered on a rule against a personal representative to show cause why the sale of certain property should not be stopped,[43] and an heir at law may appeal from a decision of the surrogate, made in proceedings for the sale of real estate for debts, adjudging certain claims to be valid against the deceased and his estate.[44] An appeal does not lie from an order of the probate court directing a personal representative to proceed with the sale of real estate under a previous order directing such sale,[45] an order refusing to set aside a previous order for the sale of a decedent's property,[46] or an order directing a personal representative to file a petition to sell real estate.[47] An order to a personal representative to execute a lease of certain realty belonging to his decedent's estate is not a final judgment in a special proceeding from which an appeal will lie under the Montana statute.[48]

b. Persons Entitled to Review and Parties. The general rules that to entitle a person to a review he must have an interest in the subject-matter of the suit or proceedings,[49] must be aggrieved by the judgment or order complained of,[50] and, unless it is otherwise provided by statutory or constitutional provisions,[51] must have been a party to the proceeding below or be a legal representative of or a person in privity with a party,[52] are applicable in proceedings to sell property of decedents. Personal representatives must be made parties to appeals taken in such a proceeding,[53] and so must heirs who appeared below and contested the claims of creditors when such creditors appeal;[54] and legatees who appeared below as adverse parties are proper parties to an appeal by a representative from an order refusing leave to sell.[55] A person who is not a necessary or even a proper party to a proceeding to sell realty to pay debts is not a necessary party to an appeal taken in such a proceeding.[56]

41. Vance *v.* Rockwell, 3 Colo. 240; Fitzgerald *v.* Glancy, 49 Ill. 465. See also Oettinger *v.* Specht, 162 Ill. 179, 44 N. E. 399; Lynn *v.* Lynn, 160 Ill. 307, 43 N. E. 482.

In Nebraska a final order made in a proceeding by a representative for leave to sell real estate is reviewable only by petition in error and not by appeal. Poessnecker *v.* Entenmann, 64 Nebr. 409, 89 N. W. 1033.

42. Peirce *v.* Graham, 85 Va. 227, 7 S. E. 189; U. S. Bank *v.* Ritchie, 8 Pet. (U. S.) 128, 8 L. ed. 890. *Contra*, Indianapolis First Nat. Bank No. 2,556 *v.* Hanna, 12 Ind. App. 240, 39 N. E. 1054.

43. State *v.* Judge New Orleans Second Dist. Ct., 22 La. Ann. 200.

44. Owens *v.* Bloomer, 14 Hun (N. Y.) 296.

45. *In re* Martin, 56 Cal. 208.

46. *In re* Smith, 51 Cal. 563.

47. Lane *v.* Thorn, 103 Ill. App. 215.

48 *In re* Tuohy, 23 Mont. 305, 58 Pac. 722.

49. *Arkansas.*— *Ex p.* Marr, 12 Ark. 84.

Maine.— Allen *v.* Smith, 80 Me. 486, 15 Atl. 62.

Missouri.— Redman *v.* Adams, 88 Mo. App. 534.

North Carolina.— Watkins *v.* Pemberton, 47 N. C. 174.

Pennsylvania.— Everman's Appeal, 67 Pa. St. 335.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1473; and Appeal and Error, 2 Cyc. 628.

An administrator has an appealable interest in an order dismissing a petition for license to sell realty. *In re* Smith, 43 Oreg. 595, 73 Pac. 336, 75 Pac. 133.

The representative of a representative has not an appealable interest. The appeal must be prosecuted by the successor of the original representative. Nason *v.* Smith, 13 Vt. 170.

A purchaser of realty from the heir of a decedent may appeal from a decree authorizing the sale of such realty. Mowry *v.* Robinson, 12 R. I. 152.

A creditor may appeal from an order for the sale of land. Redman *v.* Adams, 88 Mo. App. 534. *Contra*, Henry *v.* Estey, 13 Gray (Mass.) 336.

50. Johns *v.* Caldwell, 60 Md. 259 (an administrator *pendente lite* not a person aggrieved); Moore *v.* Brady, (Miss. 1892) 11 So. 723; *In re* Divine, (N. J. Prerog. 1900) 46 Atl. 649; Parker *v.* Reynolds, 32 N. J. Eq. 290; Swackhamer *v.* Kline, 25 N. J. Eq. 503 (a devisee of the decedent a party aggrieved); *In re* Everman, 67 Pa. St. 335. See also Patterson's Appeal, (Pa. 1888) 16 Atl. 38. And see Appeal and Error, 2 Cyc. 631.

51. See Allen *v.* Smith, 80 Me. 486, 15 Atl. 62. And see Appeal and Error, 2 Cyc. 627.

52. Arnett *v.* McCain, 47 Ark. 411, 1 S. W. 873. See also Guy *v.* Pierson, 21 Ind. 18. And see Appeal and Error, 2 Cyc. 626.

53. Beaty *v.* Voris, 138 Ind. 265, 37 N. E. 785.

54. Patterson *v.* Hamilton, 26 Hun (N. Y.) 665.

55. Findlay *v.* Whitmire, 15 Ga. 534.

56. *In re* Smith, 43 Oreg. 595, 73 Pac. 336, 75 Pac. 133.

c. Reservation and Presentation of Grounds of Review. The general rules as to raising questions which it is desired to have reviewed, as to making objections and reserving exceptions in the court below, and as to presenting matters for review in the record on appeal are applicable on appeals from the action of the court with reference to ordering or refusing to order a sale.[57]

d. Presumptions. The usual presumption that an order or decree is correct till the contrary is made affirmatively to appear will be indulged by the appellate court in favor of an order made in proceedings to sell property of a decedent.[58]

e. Scope of Review. Where an order by a probate court for the sale of land of a decedent recites that certain claims against his estate have been allowed and approved, an appellate court called on to determine the validity of the sale will not go back of such order to determine whether any claims had been authenticated, allowed, and approved;[59] and, when an order of a lower court as to the sale of a decedent's property involves the exercise of a lawful discretion, its action will not be interfered with on appeal, unless there has been an abuse of discretion.[60]

f. Effect of Appeal. In some jurisdictions an appeal taken from a decree authorizing the sale of realty of a decedent suspends the operation of such decree from the time when it is taken, and no action can be legally had under such decree during the pendency of the appeal;[61] and it has been held that pending an appeal from a decree for a sale of land of a decedent, the personal representative has no right to an order authorizing him to rent the land.[62]

g. Effect of Sale on Decision of Appellate Court. If land has been sold under a license which was illegally obtained and an appeal has been taken from the decree granting such license, the fact of sale will not affect the decision of the appellate court.[63]

H. Enjoining Sale.[64] Persons who can obtain adequate relief in the probate court by a contest of the application for the sale of the decedent's realty must pursue that remedy and cannot maintain a bill in equity to enjoin the proposed sale.[65] Neither will an injunction against such a sale be granted in favor of one

57. See Knerr *v.* McDonald, 30 Ind. App. 660, 66 N. E. 773; Gay *v.* Louisville, 93 Ky. 349, 20 S. W. 266, 14 Ky. L. Rep. 327 [*reversing* on other grounds 13 Ky. L. Rep. 366]; Hill *v.* Taylor, 99 Mo. App. 524, 74 S. W. 9; Henry *v.* Drought, 10 Tex. Civ. App. 379, 30 S. W. 584. And see APPEAL AND ERROR, 2 Cyc. 660, 677, 714.

Waiver of objections see *In re* Levy, 141 Cal. 639, 75 Pac. 317; Saxon *v.* Cain, 19 Nebr. 488, 26 N. W. 385; Brooks *v.* Brooks, 97 N. C. 136, 1 S. E. 487.

58. *Alabama.*— Poole *v.* Daughdrill, 129 Ala. 208, 30 So. 579 [*overruling* Quarles *v.* Campbell, 72 Ala. 64].

California.— *In re* Roach, 139 Cal. 17, 72 Pac. 393.

Florida.— Deans *v.* Wilcoxson, 25 Fla. 980, 7 So. 163.

Illinois.— Dauel *v.* Arnold, 201 Ill. 570, 66 N. E. 846.

Indiana.— See Jackson *v.* Weaver, 98 Ind. 307.

Maryland.— Lowe *v.* Lowe, 6 Md. 347.

Nebraska.— Saxon *v.* Cain, 19 Nebr. 488, 26 N. W. 385.

Rhode Island.— Jacocks *v.* Patterson, 18 R. I. 751, 30 Atl. 795.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1477.

But *compare In re* Snow, 96 Me. 570, 53 Atl. 116.

59. McKee *v.* Simpson, 36 Fed. 248.

60. Black *v.* Meek, Smith (Ind.) 131; Crawford *v.* Blackman, 19 Md. 40; Moore *v.* Moore, 14 Barb. (N. Y.) 27; Barnett *v.* Kincaid, 2 Lans. (N. Y.) 320; Lovinier *v.* Pearce, 70 N. C. 167.

61. Francis *v.* Daley, 150 Mass. 381, 23 N. E. 218, if a sale is made the purchaser gets no title. See also Burgett *v.* Apperson, 52 Ark. 213, 12 S. W. 559; Smelser *v.* Blanchard, 15 La. Ann. 254 (effect of suspensive appeal); Daley *v.* Francis, 153 Mass. 8, 26 N. E. 132; Lictie *v.* Chappell, 111 N. C. 347, 16 S. E. 171 (holding that when a sale is made pending an appeal, the probate court cannot make an order confirming the sale and directing title to be made to the purchaser).

62. Herring *v.* Harris, 45 Miss. 62, 65, where the court said: "The application for an order to rent the lands is of itself tantamount to the averment that the execution of the decree of sale is suspended, if not by supersedeas, at least by the voluntary action of the administrator, as a matter of prudence, to await the adjudication of this court upon the questions presented by the appeal."

63. Gross *v.* Howard, 52 Me. 192. See also Nowell *v.* Nowell, 8 Me. 220.

64. See, generally, INJUNCTIONS.

65. Speers *v.* Banks, 114 Ala. 323, 21 So. 834 [*overruling* Banks *v.* Speers, 103 Ala.

who alleges that he is in possession of realty as the owner thereof, and that the decedent had no title thereto, since, if the decedent had no title, the purchaser can acquire none, and the legal rights and remedies of the complainant will not be affected in any way by the sale.[66] An injunction against an administration sale will be granted, however, where the proper grounds appear.[67] A person who has no interest in an estate cannot enjoin a sale of the property thereof.[68]

I. Authority to Sell[69] — **1. In General.** In many states the representative is the proper person to make the sale and the court cannot, so long as he is willing and competent to act,[70] appoint a stranger to make the sale;[71] and a sale made by a person so appointed is void and conveys no title.[72] In some states, however, the sale is made by commissioners appointed by the court.[73] If two or more executors have qualified they should execute the duties of their office relative to the sale in their joint capacity, and if one alone acts in the sale and in the execution of a deed of the land in question no title passes.[74] An administrator

436, 16 So. 25]; Bailey *v.* Ross, 68 Ga. 735; Johnson *v.* Holliday, 68 Ga. 81; Sprague *v.* West, 127 Mass. 471. *Compare* Penn *v.* Penn, 39 Mo. App. 282.

Person not a proper party may enjoin. A party in possession of land, and claiming it by a purchase at a sheriff's sale, made under a judgment rendered against a decedent, is not a proper party defendant to a proceeding in the probate court to sell the land for the payment of debts; and hence has no opportunity to contest it in that court; but, if a sale of the land is ordered by the probate court to pay a debt barred by the statute of limitations he may enjoin it in equity. Moody *v.* Harper, 38 Miss. 599.

Persons without notice of proceedings may enjoin. Swan *v.* Thompson, 36 Mo. App. 155. But a mortgage creditor has no right to enjoin the sale of his debtor's property for want of notice of the application for the order, when the sale was ordered to pay creditors having a preference over him. Wells *v.* Wells, 25 La. Ann. 194.

66. Seymour *v.* Bourgeat, 12 La. 123 [*followed* in Rapides Lumber Co. *v.* Hartiens, 111 La. 793, 35 So. 910]. *Compare* Bevill *v.* Smith, 25 Fla. 209, 6 So. 62, holding that an averment of possession in the complainant is essential to a bill brought by one claiming the legal title to land to enjoin a sale by a commissioner under order of the court upon the ground that the sale will cast a cloud upon his title, and that the personal representative is a necessary party to such a bill.

67. See Simmons *v.* Crumbley, 84 Ga. 495, 10 S. E. 1090; Thayer *v.* Lane, Harr. (Mich.) 247. *Compare* Ducote *v.* Bordelon, 24 La. Ann. 145.

Such relief will be granted where the conduct of the personal representative in forcing the sale is so far oppressive and unwarranted as to be inequitable, and the claimant, being an infant, is unable to protect himself (Doll *v.* Cash, 61 N. J. Eq. 108, 47 Atl. 1059), or where the sale is for the purpose of satisfying a void judgment (Bienvenu *v.* Parker, 30 La. Ann. 160) or improper claims which have been allowed by reason of fraud and collusion on the part of the personal representative (Penn *v.* Penn, 39 Mo. App. 282).

68. Field *v.* Mathison, 3 Rob. (La.) 38.

69. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d, (I), (G).

70. Taylor's Appeal, 119 Pa. St. 297, 12 Atl. 222; Boughman's Estate, 4 Lanc. Bar (Pa.) Oct. 5, 1892.

71. Swan *v.* Wheeler, 4 Day (Conn.) 137; Crouch *v.* Eveleth, 12 Mass. 503.

72. State *v.* Younts, 89 Ind. 313; Crouch *v.* Eveleth, 12 Mass. 503.

A deed of commissioners who are heirs conveys all their interest to the purchaser, although the court exceeded its jurisdiction in appointing commissioners to sell. Berger *v.* Arnold, (Tex. Civ. App. 1893) 24 S. W. 527.

73. See Stone *v.* Latham, 68 N. C. 421, holding that the court may not only appoint commissioners, but may also remove them.

In Louisiana sale is made by an auctioneer appointed by the court. He must be authorized in writing to make the sale or title to the land will not pass by his adjudication. Cronan *v.* McDonogh, 12 La. Ann. 269.

Death of executor before sale by auctioneer does not invalidate sale. Massey's Succession, 46 La. Ann. 126, 15 So. 6.

Administrator may act as commissioner. Harris *v.* Brown, 123 N. C. 419, 31 S. E. 877. See also Lafiton *v.* Doiron, 12 La. Ann. 164, holding that the representative may act as auctioneer.

74. Gregory *v.* McPherson, 13 Cal. 562; Kreider's Estate, 17 Lanc. L. Rev. (Pa.) 201. See also Blythe *v.* Coots, 72 N. C. 575, holding that if the order directs a sale to be made by the executor and executrix, a sale by the executor alone, who received all the purchase-money and had his report of sale confirmed, may be set aside. *Contra*, Melms *v.* Pfister, 59 Wis. 186, 18 N. W. 255, holding that the heirs could not avoid a sale of land because the license to sell was granted to part only of the executors, especially as one of the appointees under the will, the widow, had refused to take under the will and joined in making the report of sale and in giving the deed.

A sale under an order directing it to be made by one of several administrators is valid when made according to the order. Bickle *v.* Young, 3 Serg. & R. (Pa.) 234.

or other person appointed to sell can sell only as he is authorized,[75] and, if he has exceeded the scope of his authority in making the sale, the fact that he acted in good faith and on the advice of counsel is immaterial.[76]

2. Administrator De Bonis Non or Special Administrator. A sale by an administrator *de bonis non* who has obtained an order of court authorizing the sale passes a good title to the purchaser,[77] and an administrator *de bonis non* may execute an order granted to his predecessor to sell land and thus pass a good title.[78] But it has been held that the probate court cannot authorize a special administrator to sell land.[79]

3. Agent, Sheriff, or Other Officer. It has been held that, as the order of court which directs the sale of lands usually prescribes particularly as to how the sale should be conducted, there is no special personal confidence reposed in the judgment and discretion of the personal representative, and therefore he may have the sale conducted by his agent and the title will pass,[80] but other authorities maintain that the authority given to sell lands is a personal trust which cannot be delegated to another and that, although the administrator may employ an auctioneer to make the sale, he must be present and superintend and control the sale.[81] Where the personal representative is charged by law with the duty of selling the real estate of his decedent, this power cannot be conferred upon the sheriff[82] or a commissioner appointed by the probate court.[83]

4. Oath. A personal representative who is authorized to sell real estate of his decedent is usually required to take an oath prescribed by statute,[84] and it has been held that if he neglects to take such oath prior to the sale, the sale is invalid, and no title passes to the purchaser by a deed executed pursuant thereto, and no estoppel is created thereby.[85]

75. Braley *v.* Simonds, 61 N. H. 369; *In re* Lawrence, 1 Redf. Surr. (N. Y.) 310. See also Hawkins *v.* Brown, 7 La. 417; Elliott *v.* Labarre, 2 La. 326.

The court is the vendor, not the representative, and the representative's only agency is that of an officer or special agent designated by the law for special purposes and clothed with a special trust. Pryor *v.* Davis, 109 Ala. 117, 19 So. 440; Cruikshank *v.* Luttrell, 67 Ala. 318.

Sale of less land than designated in order not void see Seymour *v.* Seymour, 22 Conn. 272.

76. Pryor *v.* Davis, 109 Ala. 117, 19 So. 440.

77. Harris *v.* Cole, 114 Ga. 295, 40 S. E. 271. See also Willis *v.* Ferguson, 59 Tex. 172.

78. Gress Lumber Co. *v.* Leitner, 91 Ga. 810, 18 S. E. 62; Baker *v.* Bradsby, 23 Ill. 632. See also Deans *v.* Wilcoxon, 25 Fla. 980, 7 So. 152, holding that the administrator *de bonis non* might, under the laws existing before Feb. 16, 1870, consummate an incomplete sale made by his predecessor.

79. Long *v.* Burnett, 13 Iowa 28, 81 Am. Dec. 420.

80. Sturdy *v.* Jacoway, 19 Ark. 499; Cheever *v.* Hora, 22 Ga. 600; Lewis *v.* Reed, 11 Ind. 239, holding that if the administrator be authorized to sell at a public sale he may employ an auctioneer, and if he sell at a private sale he can appoint an agent to negotiate the sale within the limit fixed by the court, which sale he may approve and report for ratification.

81. Kellogg *v.* Wilson, 89 Ill. 357; Sebastian *v.* Johnson, 72 Ill. 282, 22 Am. Rep. 144. See also Noland *v.* Noland, 12 Bush (Ky.) 426, holding that a sale by an auctioneer in the absence of the commissioner appointed to execute the order of sale is invalid.

82. Jarvis *v.* Russick, 12 Mo. 63. See also Heath *v.* Garrett, 46 Tex. 23.

In Louisiana a statute authorizing a succession sale to be made by an auctioneer has been held not to prevent the court from directing a sale by court officers such as the sheriff. Nora's Succession, 2 La. Ann. 229.

83. Rose *v.* Newman, 26 Tex. 131, 80 Am. Dec. 646.

84. See Campbell *v.* Knights, 26 Me. 224, 45 Am. Dec. 107; Parker *v.* Nichols, 7 Pick. (Mass.) 111; Norman *v.* Olney, 64 Mich. 553, 31 N. W. 555; Buntin *v.* Root, 66 Minn. 454, 69 N. W. 330.

Substantial compliance with statutory requirements as to form of oath necessary.— Hugo *v.* Miller, 50 Minn. 105, 52 N. W. 381.

Time of taking oath.— In Massachusetts, under the act of 1817, a personal representative was required to take the oath before fixing on the time and place of sale. Parker *v.* Nichols, 7 Pick. 111. Prior to this statute he could take the oath at any time before the sale was actually made. Blood *v.* Hayman, 13 Metc. 231. In Maine it has been held that where the oath is taken before the sale is advertised it is sufficient, although it is not recorded until after an action involving the purchaser's title is begun. Fowle *v.* Coe, 63 Me. 245.

85. Campbell *v.* Knights, 26 Me. 224, 45 Am. Dec. 107. See also Parker *v.* Nichols, 7 Pick. (Mass.) 111.

5. Special Bond For Sale — a. In General. Statutes regulating the sale of the real estate of decedents usually provide that a personal representative who makes such a sale must give a special bond for the faithful application of the proceeds of such sale,[86] especially where he is authorized to sell more real estate than is required for the payment of debts,[87] and it has been held that a sale made without such a bond having been given is invalid,[88] although the weight of authority supports a contrary view, especially where no one is injured by the omission.[89]

86. *Alabama.*— Wyman *v.* Campbell, 6 Port. 219, 31 Am. Dec. 677.

California.— Burris *v.* Kennedy, 108 Cal. 331, 41 Pac. 458.

Illinois.— See People *v.* Huffman, 182 Ill. 390, 55 N. E. 981 [*reversing* on other grounds 78 Ill. App. 345], holding that when it is necessary to sell land of the decedent under the provisions of a will, such bond must be given regardless of whether the land lies within or without the state where the estate is being administered.

Indiana.— Clark *v.* Hillis, 134 Ind. 421, 34 N. E. 13; Salyer *v.* State, 5 Ind. 202.

Maine.— Snow *v.* Russell, 93 Me. 362, 45 Atl. 305, 74 Am. St. Rep. 350; Hasty *v.* Johnson, 3 Me. 282.

Mississippi.— Sharpley *v.* Plant, 79 Miss. 175, 28 So. 799, 89 Am. St. Rep. 588.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1457.

Amount of penalty of bond see *In re* Winona Bridge R. Co., 51 Minn. 97, 52 N. W. 1079; Jackson *v.* Holladay, 3 Redf. Surr. (N. Y.) 379; Fitzimmons' Appeal, 40 Pa. St. 422; Tarr's Estate, 1 Pa. Co. Ct. 229.

Obligee.— A bond is valid which is payable to the county judge who granted the license to sell, although the land sold is situated in another county. Sitzman *v.* Pacquette, 13 Wis. 291. The bond should not be made payable to the heirs of the decedent. Bushnell *v.* Krum, 32 Fla. 62, 13 So. 591. See also Robinson's Appeal, 62 Pa. St. 213.

Approval.—Where the statute requires that such bond shall be approved in writing by the judge, it will be presumed, where the contrary does not appear and the case discloses that all other steps were taken with strictness and accuracy, that the statute was complied with in this respect. Austin *v.* Austin, 50 Me. 74, 79 Am. Dec. 597.

The absence of a seal opposite the signatures of the obligors in the bond will not invalidate the sale. Buntin *v.* Root, 66 Minn. 454, 69 N. W. 330.

A variance between the order of sale and the bond as to the amount to be produced by the sale will not invalidate the sale. Purrington *v.* Dunning, 11 Me. 174.

Conditions prescribed by statute must be inserted in bond. Williamson *v.* Williamson, 3 Sm. & M. (Miss.) 715, 41 Am. Dec. 636.

Provision as to time of giving bond merely directory.— It has been held that under a statute requiring that such a bond shall be given before the sale is "ordered or made," a bond given after the order has been made but before it has issued and before the sale has taken place, is valid (Grenawalt's Appeal, 37 Pa. St. 95) and that a sale is not void if a bond is given before the confirmation of the sale (Thorn's Appeal, 35 Pa. St. 47), as such a provision is merely directory.

Where the court making the order to sell had no jurisdiction such a bond is void. Pettit *v.* Pettit, 32 Ala. 288.

Proof that bond not given.—In an action to recover real estate so sold, and to remove the cloud created by the sale, the fact that no bond was given may be proved by showing that the record is silent as to such bond, and by testimony of the administrator that none was executed. Babcock *v.* Cobb, 11 Minn. 347.

Bond when realty mortgaged by representative see Griffin *v.* Johnson, 37 Mich. 87; Fox *v.* Lipe, 24 Wend. (N. Y.) 164.

87. In some states the rule is that the representative must give a special bond whenever he is authorized to sell more real estate than is necessary for the payment of debts, and may be required to give a bond in all cases where the judge ordering the sale deems it necessary. See Norman *v.* Olney, 64 Mich. 553, 31 N. W. 555; Drake *v.* Kiddell, 38 Mich. 232; McClay *v.* Foxworthy, 18 Nebr. 295, 25 N. W. 86.

In Massachusetts the representative is not required to give such a bond unless he is authorized to sell more real estate than is necessary for the payment of debts. Tenney *v.* Poor, 14 Gray (Mass.) 500, 77 Am. Dec. 340.

88. Snow *v.* Russell, 93 Me. 362, 45 Atl. 305, 74 Am. St. Rep. 350; Babcock *v.* Cobb, 11 Minn. 347; Sharpley *v.* Plant, 79 Miss. 175, 28 So. 799, 89 Am. St. Rep. 588; Heth *v.* Wilson, 55 Miss. 587; Rucker *v.* Dyer, 44 Miss. 591; Washington *v.* McCaughan, 34 Miss. 304; Currie *v.* Stewart, 26 Miss. 646, 27 Miss. 52, 61 Am. Dec. 500; Williamson *v.* Williamson, 3 Sm. & M. (Miss.) 715, 41 Am. Dec. 636; Bright *v.* Boyd, 4 Fed. Cas. No. 1,875, 1 Story 478. See also Cohea *v.* State, 34 Miss. 179; Stevenson *v.* McReary, 12 Sm. & M. (Miss.) 9, 51 Am. Dec. 102.

89. *Alabama.*— Wyman *v.* Campbell, 6 Port. 219, 31 Am. Dec. 677 [*overruling* Wiley *v.* White, 3 Stew. & P. (Ala.) 355].

Illinois.— Frothingham *v.* Petty, 197 Ill. 418, 64 N. E. 270.

Indiana.— Clark *v.* Hillis, 134 Ind. 421, 34 N. E. 13; Foster *v.* Birch, 14 Ind. 445.

Massachusetts.— See Perkins *v.* Fairfield, 11 Mass. 227.

Michigan.—Norman *v.* Olney, 64 Mich. 553, 31 N. W. 555.

Pennsylvania.— Lockhart *v.* John, 7 Pa. St. 137. See also Dixey *v.* Laning, 49 Pa. St. 143.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1457.

b. Liability on Bond. The special bond given for the sale is in the nature of an additional security,[90] and creates a liability, not for the general administration of the estate, but only with reference to the sale.[91] The nature and extent of such liability depends of course upon the terms of the bond and of the statute under which it is given.[92]

J. Notice of Sale — 1. In General. Notice of the proposed sale is commonly required to be given to interested persons,[93] and in some jurisdictions a sale of real property without the required notice is held void.[94] But, if the administrator gives the notice required by law, the fact that the court directed the sale to be made without notice will not affect the validity of the sale.[95] Where the period of notice is prescribed by statute,[96] it has been held that if the notice falls short of the requirements of the statute the sale is absolutely void;[97] but it has also been held that if the order of sale is a general one and does not prescribe the length of notice, the fact that the sale was had under a notice short of the statu-

90. Durfee *v.* Joslyn, 92 Mich. 211, 52 N. W. 626.

91. Burtch *v.* State, 17 Ind. 506; Durfee *v.* Joslyn, 92 Mich. 211, 52 N. W. 626; Com. *v.* Winters, 4 Wkly. Notes Cas. (Pa.) 346.

The bond does not cover counsel fees incurred in a proceeding to compel the administrator to account for the proceeds. Mann *v.* Everts, 64 Wis. 372, 25 N. W. 209.

92. **The bond creates a continuing liability** and is not exhausted by the first sale under the order. Sawyers *v.* Hicks, 6 Watts (Pa.) 76.

A bond conditioned for the faithful payment and application of the purchase-money according to the final decree creates no liability until there is a decree directing payment and application. Pettit *v.* Pettit, 32 Ala. 288.

A bond given voluntarily without a statute requiring it imposes no liability. Hughlett *v.* Hughlett, 5 Humphr. (Tenn.) 453.

Bond given after sale.— Where a sale was made without order and a bond given under a subsequent order taking cognizance of the sale the sureties are liable. Fleece *v.* Jones, 71 Ind. 340.

The sureties are liable for interest upon the proceeds of the sale from the time the administrator received them. Durfee *v.* Joslyn, 101 Mich. 551, 60 N. W. 39.

In Massachusetts the bond covers the surplus alone, after paying debts. See Bennett *v.* Overing, 16 Gray 267. *Compare* Fay *v.* Valentine, 8 Pick. 526, construing the former statute.

Exhausting general bond.— In Indiana the general administration bond must be first exhausted before an action can be maintained on the special bond. Salyers *v.* Ross, 15 Ind. 130; Salyer *v.* State, 5 Ind. 202. But in Michigan the general bond need not first be sued upon. White *v.* Schaberg, 131 Mich. 319, 91 N. W. 168.

Relief of sureties.— The commissioner appointed to make the sale, being also the administrator, will not be held constructively to have paid the money as commissioner to himself as administrator, in order to relieve the sureties. Brandon *v.* Mason, 1 Lea (Tenn.) 615. In New York the statute (Code Civ. Proc. § 2600) providing for the release of sureties on their own application, although general in its terms, does not apply to the special bond given on a sale of real estate. Matter of Lawyers' Surety Co., 25 Misc. 136, 54 N. Y. Suppl. 926.

93. See Field *v.* Goldsby, 28 Ala. 218, 65 Am. Dec. 341, holding, however, that the provisions of the act of 1806 requiring a personal representative to give notice of the time and place of sale do not apply to sales made by commissioners appointed by the court to sell land for distribution.

Court cannot authorize private sale without notice. Fussell *v.* Dennard, 118 Ga. 270, 45 S. E. 247.

When realty is sold upon an annual settlement of accounts, where personalty is insufficient to pay debts, the settlement itself appears as a notice and renders other notice unnecessary. Patee *v.* Mowry, 59 Mo. 161.

94. Wyman *v.* Campbell, 6 Port. (Ala.) 219, 31 Am. Dec. 677; Curley's Succession, 18 La. Ann. 728. See also Matlock *v.* Livingston, 9 Sm. & M. (Miss.) 489.

The administrator's failure to readvertise property for an adjourned sale does not render the sale void. Botsford *v.* O'Conner, 57 Ill. 72.

Sale of personalty.— The bare omission to give the required notice for the sale of personalty has been held not to impair the title of the purchaser. James *v.* Dixon, 21 Mo. 538. But see Halleck *v.* Moss, 17 Cal. 339, holding that a sale of personalty upon insufficient notice is at least voidable if not actually void.

Jurisdiction to determine the sufficiency of the advertisement of sale and the power to compel the administrator to make a complete advertisement is possessed by the orphans' court. Parker *v.* Allen, (N. J. Ch. 1886) 4 Atl. 300.

95. Clark *v.* Hillis, 134 Ind. 421, 34 N. E. 13. See also Lawrence's Appeal, 49 Conn. 411. *Compare* Matlock *v.* Livingston, 9 Sm. & M. (Miss.) 489.

96. **Length of notice by publication** see *infra*, XII, J, 2.

97. Curley's Succession, 18 La. Ann. 728; Zech's Estate, 15 Pa. Co. Ct. 622.

tory period does not affect the title of the purchaser,[98] although if the order fixes the length of notice to be given it must be strictly complied with or the sale will be invalidated.[99] Under the old chancery practice a reasonable notice of sale was all that was necessary.[1] It has been held that proof of advertisement according to law and the order of the court will not be required after the lapse of a long period, such as forty or fifty years.[2]

2. **Publication.** The length of the period of publication and the number of insertions during the period depend upon the different statutes and their construction by the courts,[3] as also does the length of time which may or must elapse between the last publication and the day of sale,[4] and the number of newspapers in which publication must be made.[5] The court has usually the power to designate the paper or papers in which the notice shall be published.[6] A statutory provision that the notice must be published a certain number of weeks successively is satisfied if the publication appears at weekly intervals for the number of weeks prescribed.[7] If there is an actual compliance with the law with regard to publication, the sale is valid, notwithstanding the order of the court as to the publication did not conform to the statute in its requirements.[8] Under a statute

98. Sowards *v.* Pritchett, 37 Ill. 517, holding, however, that short notice coupled with other irregularities or inadequacy of price may be sufficient grounds for setting aside the sale.

99. Reynolds *v.* Wilson, 15 Ill. 394, 60 Am. Dec. 753. See also Bryan *v.* Hinman, 5 Day (Conn.) 211.

1. Darrington *v.* Borland, 3 Port. (Ala.) 9.

2. Blair *v.* Marks, 27 Mo. 579. See also Vasquez *v.* Richardson, 19 Mo. 96.

3. **In California,** Code Civ. Proc. § 1705, requires publication of the notice of a private sale to be "for two weeks successively next before the day on or after which the sale is to be made" and the publication must be "as often during the prescribed period as the paper is regularly issued," but the court may order a less number of insertions than each issue of the paper during the period. See *In re* O'Sullivan, 84 Cal. 444, 448, 24 Pac. 281. For a public sale the publication must be for three weeks successively and if the notice is published in a daily newspaper once a week for three successive weeks pursuant to an order of the court the publication is sufficient. Cunningham's Estate, 73 Cal. 558, 15 Pac. 136. See further Dorsey's Estate, 75 Cal. 258, 17 Pac. 209; *In re* Osgood, Myr. Prob. (Cal.) 153.

In Georgia a publication of forty days after a general leave to sell is sufficient for the validity of the sale, although the special order to sell in that county was granted pending the publication and less than twenty days before the sale. King *v.* Cabaniss, 81 Ga. 661, 7 S. E. 620.

4. **In California,** under Code Civ. Proc. § 1549, providing that a notice of a private sale of real property must be published in a newspaper for two weeks successively next before the day of sale and that the notice must state the day on or after which the sale may be made, a publication in a daily newspaper from the fifth to the nineteenth day of the month naming the twenty-first day of that month as the day on or after which sale will be made has been held to be insufficient. Hellman *v.* Merz, 112 Cal. 661, 44 Pac. 1079.

In Minnesota, under Gen. St. (1866) c. 57, § 35, requiring notice to be published for three successive weeks "next before such sale," it is held that the sale must take place within the week following the completion of the publication, publication being complete one week after the last insertion. Hartley *v.* Croze, 38 Minn. 325, 37 N. W. 449; Wilson *v.* Thompson, 26 Minn. 299, 3 N. W. 699.

In New Jersey, under the act of March 17, 1887 (Pub. Laws 28), requiring publication once a week for four weeks successively next preceding the time appointed for a sale, it has been held that where the last publication was on the second day of the month and the time appointed for the sale was the tenth, the sale was illegal. Tappan *v.* Dayton, 51 N. J. Eq. 260, 28 Atl. 1.

5. Hautau's Succession, 32 La. Ann. 54, holding that if an administrator publish in more newspapers than the statute allows he cannot be credited with the disbursements caused by the extra publication.

6. See Adolph's Estate, 11 Phila. (Pa.) 157, holding that the clerk of the orphans' court may make a selection, under the act of March 18, 1875, which provides that the judges of the court may establish rules in their discretion and where one of the rules provided that the clerk might select the newspaper.

A weekly newspaper of general circulation is proper medium for publication of notice see *In re* O'Sullivan, 84 Cal. 444, 24 Pac. 281.

7. Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122; Dayton *v.* Mintzer, 22 Minn. 393; *In re* Harris, 14 R. I. 637. See also Etie *v.* Cade, 4 La. 383, holding further that if the newspaper in which the notice was published is not issued in one of the weeks during the thirty-day period required, the sale is not vitiated.

8. Lawrence's Appeal, 49 Conn. 411.

requiring that the affidavit of publication of an order of the probate court for the sale of land be made by the "printer" of the paper in which the insertion was made, an affidavit by the "proprietor" has been held sufficient.[9] If the affidavit of the publication of the notice of sale was insufficient, a bidder at a private sale may refuse to comply with his bid and may recover his deposit, and an amended affidavit filed after the hearing of the action to recover the deposit cannot obviate the defect or defeat the action.[10]

3. POSTING. It is sometimes required either in lieu of or in addition to the publication of notice, that notices shall be posted up[11] in public places, by which is meant such places as are likely to give notice to the public.[12] The requirements of the statute as to posting should be followed,[13] and it must be shown that the notices were duly posted.[14]

4. FORM AND CONTENTS OF NOTICE. The notice must be published in the English language.[15] It has been held that the notice need not state the conditions of the sale,[16] or at least an omission to state the condition is a mere irregularity.[17] Whether a mistake in or an insufficiency of the designation of the date of sale will avoid the sale appears to depend upon whether it makes the date of the sale doubtful.[18] Merely naming the town in which the sale was to be made has been held not a sufficient compliance with a requirement that the notice designate the place of sale.[19] A purchaser may avoid the sale if there has been a misleading mistake in the description of the property in the advertisement or notice,[20] but it is otherwise where, although there were mistakes or omissions in the description of the property, it was such that there would be no difficulty in ascertaining what

9. Reynolds *v.* Schmidt, 20 Wis. 374.

10. Hellman *v.* Merz, 112 Cal. 661, 44 Pac. 1079.

11. Halleck *v.* Moss, 17 Cal. 339, holding that under a statute requiring notice of sale of personalty to be given by posting in three public places or by publication if the judge so order, the notice must be given by posting in the absence of an order of the judge to publish.

12. Sowards *v.* Pritchett, 37 Ill. 517, where the notice was held not sufficient.

Affixing notice to church or court-house door sufficient.— Etie *v.* Cade, 4 La. 383.

13. Matter of McFeeley, 2 Redf. Surr. (N. Y.) 541, holding that where a notice of sale is not posted in the ward of the city where the property is situated as required by law the sale is void. But see Averill *v.* Jackson City Bank, 114 Mich. 20, 72 N. W. 15, holding that the requirements of 2 Howell Annot. St. § 6040, that notice shall be posted in three of the most public places in the ward in which the land is situated are sufficiently followed if the notices are not posted in the ward but are posted in three of the most public places in the city, where notice was also given by newspaper publication and the sale was open and notorious and full value realized.

14. See Woods *v.* Monroe, 17 Mich. 238.

Sufficiency of proof.— A report of sale made at the time and duly confirmed is sufficient evidence of posting, but an affidavit of posting made and filed in the probate court ten years after the sale, without the consent of that court, is not legal evidence. Woods *v.* Monroe, 17 Mich. 238. A recital in a decree of confirmation that it appears to the court that due notice of sale had been given is sufficient proof, in the absence of anything contradicting it, of posting the notices of sale. Yerger *v.* Ferguson, 55 Miss. 190.

15. Tappan *v.* Dayton, 51 N. J. Eq. 260, 28 Atl. 1, although the general reading matter of the newspaper in which it appears is in a foreign language.

16. Paine *v.* Fox, 16 Mass. 129.

17. Brubaker *v.* Jones, 23 Kan. 411.

18. See Little *v.* Sinnett, 7 Iowa 324 (holding that a notice which was dated June 4, 1847, which fixed the time of the sale as "on the 26th of June next" was sufficient notice of the sale on the 26th day of June, 1847). Wellman *v.* Lawrence, 15 Mass. 326 (holding that where a sale was advertised for Friday the seventeenth whereas Friday was the sixteenth and the mistake was not corrected until the last publication made on the date of the sale, the sale could be avoided).

19. Hartley *v.* Croze, 38 Minn. 325, 37 N. W. 494, holding the sale void because of the insufficiency of the notice. But *compare* Little *v.* Sinnett, 7 Iowa 324, holding that where the notice named the town where the sale would be made, the failure to designate any particular place in the town did not render the notice void or invalidate the sale where it did not appear that any mistake occurred or that an unusual or improper place was adopted. In the case last cited the court said (at page 335): "We might doubt whether the same rule, in this respect, is to be applied to a small village, which might be to a large city, whose population equalled a county, or even a state."

20. Doyle *v.* Whitridge, 97 Md. 711, 55 Atl. 459.

land was meant.[21] The fact that the notice did not contain the signature of the commissioner who was directed to sell the land does not affect the validity of the sale.[22] If an heir be not sufficiently named in the notice the sale is not binding on him and he may attack the proceedings collaterally.[23]

K. Manner and Conduct of Sale — 1. In General.[24] In making a sale the executor or administrator must comply with every essential requirement of the statute which authorized the sale or no title will pass,[25] and where the manner of selling is directed by the court the directions must also be strictly followed.[26] The representative is bound to show sound discretion in conducting the sale and the responsibility of preventing a sacrifice of the property is on him and he can therefore refuse to consummate the sale if the property does not bring its fair market value,[27] or if the sale might be set aside by the court on the ground of unfairness.[28] The representative must give all persons who desire to bid at the sale ample opportunity to do so.[29] The mere substitution of one bidder for another who fails to comply with the terms of sale cannot affect the validity of the sale.[30] A purchaser may avoid the sale for a material misrepresentation made thereat.[31]

2. Time of Sale.[32] A sale under a license after the expiration of the time

21. New England Hospital *v.* Sohrer, 115 Mass. 50; *In re* Winona Bridge R. Co., 51 Minn. 97, 52 N. W. 1079. See also Wylly *v.* Gazan, 69 Ga. 506.

22. Allsop *v.* Owensboro Deposit Bank, 69 S. W. 1102, 24 Ky. L. Rep. 762.

23. Clark *v.* Hillis, 134 Ind. 421, 34 N. E. 13.

24. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d, (III).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, c.

The possession of a land certificate by the administrator at the time of the sale where the certificate had become identified with a location and would therefore naturally be in the surveyor's office is not necessary to the validity of the sale. Corley *v.* Anderson, 5 Tex. Civ. App. 213, 23 S. W. 839.

25. Wyman *v.* Campbell, 6 Port. (Ala.) 219, 31 Am. Dec. 677; Worthy *v.* Johnson, 8 Ga. 236, 52 Am. Dec. 399; Elliott *v.* Labarre, 2 La. 326.

As to mere matters of form, a substantial compliance with the statute is all that is necessary to make the sale valid. Tutt *v.* Zenir, 51 Mo. 431.

Preliminary offering of rents and profits.— Under some statutes the fee simple of the real estate cannot be sold until the rents and profits for a term of years defined in the statute have been first offered for sale, the fee simple being allowed to be sold only in case the rents and profits of the term of years are insufficient. Martin *v.* Densford, 3 Blackf. (Ind.) 295. See also *supra*, XII, B, 2, d.

26. Reynolds *v.* Wilson, 15 Ill. 394, 60 Am. Dec. 753; Glenn *v.* Wootten, 3 Md. Ch. 514 (holding, however, that after the trustee has once offered the property in the market in the mode prescribed by the decree and has been unable to sell it he may dispose of it in a different mode and then it is for the court to say whether it will ratify the sale or not); Broadwater *v.* Richards, 4 Mont. 52, 80, 2 Pac. 544, 546; Tennent *v.* Pattons, 6 Leigh (Va.) 196.

27. Rogers *v.* Dickey, 117 Ga. 819, 45 S. E. 71.

Crier cannot complete sale over protest of administrator. Scales *v.* Chambers, 113 Ga. 920, 39 S. E. 396.

28. *In re* Lawrence, 1 Redf. Surr. (N. Y.) 310.

29. Scales *v.* Chambers, 113 Ga. 920, 39 S. E. 396 (holding that under an issue whether the crier had knocked off property without giving the persons at the sale a fair opportunity to bid, it was competent to show by one person that but for the premature termination of the sale he would have run the property up higher); Pearson *v.* Moreland, 7 Sm. & M. (Miss.) 609, 45 Am. Dec. 319.

That a limitation of time for further bidding was proclaimed, which limitation was afterward repeatedly done away with and the sale kept open, is not a ground for setting aside the sale, as the only effect must have been to quicken and excite the bidders. Fairfax *v.* Muse, 4 Munf. (Va.) 124.

That the day of the sale was cloudy and occasionally rainy is not ground for setting aside the sale where a considerable number of persons were present and bid on the land, and it does not appear with certainty that any person who would have bid for the land was prevented from attending. Fairfax *v.* Muse, 4 Munf. (Va.) 124.

30. Halleck *v.* Guy, 9 Cal. 181, 70 Am. Dec. 643, holding that the order directing the sale and the order confirming it gave vitality to the purchase.

31. Doyle *v.* Whitridge, 97 Md. 711, 55 Atl. 459, holding that a misrepresentation by the auctioneer at a sale of a ground-rent that a certain responsible firm was the tenant, whereas the leasehold had been sold by them, released the purchaser, although the misrepresentation was innocently made.

32. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d, (II).

prescribed by statute within which such sale shall be made is void.[33] The court can, however, usually extend the time within which the sale may be made,[34] and a statute which limits the life of a license to sell realty to a certain period does not limit the power of the probate court to grant a second license.[35] In some jurisdictions a sale made when the court is not in session at the time is void.[36] Where the order gives a general power to sell, without restriction as to time, a clause requiring a report at the next term does not limit the exercise of the power to that term.[37] Where a statute limits the time within which actions may be brought against the representative, after the grant of letters, the time in which a license to sell may be exercised is not necessarily limited to the same period.[38] An administrator must sell perishable property promptly after receiving the order, or in case of deterioration he will be chargeable with its value at the time it should have been sold.[39]

3. PLACE OF SALE. The sale is usually required to be made in the county in which the land is situated,[40] and the place of sale is sometimes prescribed by statute, either absolutely or by fixing a place at which the sale shall be made unless the court orders some other place,[41] but it is also sometimes left entirely to

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, b.

Hour of sale.— That a sale of real estate in the country was advertised to begin at eleven A. M. is no ground for setting aside the sale. Metz's Estate, 14 York Leg. Rec. (Pa.) 136.

33. Chadbourne *v.* Rackliff, 30 Me. 354; Campau *v.* Gillett, 1 Mich. 416, 53 Am. Dec. 73. See also Mason *v.* Ham, 36 Me. 573. *Compare* Klingensmith *v.* Bean, 2 Watts (Pa.) 486, 27 Am. Dec. 328.

Under the Pennsylvania act of April 13, 1854, the orphans' court has power to confirm an executor's sale of land to pay debts made more than five years after the date of the order of sale. Bowker's Estate, 12 Phila. (Pa.) 161.

Computation of time.— Where, on appeal from an order of license to an administrator to sell real estate, the order was directed to be modified, which was done, the two years within which a sale must be made under Wis. Rev. St. (1898) § 3889, should be computed from the modification. Mackin *v.* Hobbs, 116 Wis. 528, 93 N. W. 462.

34. See Mackin *v.* Hobbs, 116 Wis. 528, 93 N. W. 462, holding that an extension of time within which to sell realty may be granted by the county court, although the year within which the original license was to be exercised had expired, for the discretion of the court may, under Wis. Rev. St. (1898) § 3889, be exercised any time within the two-year limit therein fixed; but an application by the administrator for an extension of time to sell the realty to pay the expenses of administration after all debts and legacies have been paid is too late under section 3850, when made eight years after the grant of letters, if there is no excuse for the delay except during two and one-half years of the time.

Before the return of the order, there is no need of an application for an extension. Snider's Estate, 1 Del. Co. (Pa.) 163.

35. Harrison *v.* Harrison, 67 Minn. 520, 70 N. W. 802.

36. Mobley *v.* Nave, 67 Mo. 546.

Session of probate and common pleas court. — The "probate and common pleas court" of Jackson county is none the less a probate court because it has common-pleas business added to its probate business; and an administrator's sale of land in Jackson county, made while such court was in session for the transaction of probate business, is valid, under the statute requiring such sale to be made during the session of the circuit, probate, or county court, although the order under which the sale was made directed a sale during the session of the "court of common pleas of Jackson county." Macey *v.* Pitillo, (Mo. Sup. 1893) 21 S. W. 1094; Macey *v.* Stark, 116 Mo. 481, 21 S. W. 1088.

37. Bowen *v.* Bond, 80 Ill. 351.

38. Cooper *v.* Robinson, 2 Cush. (Mass.) 184. But see Wellman *v.* Lawrence, 15 Mass. 326.

39. Steele *v.* Knox, 10 Ala. 608.

40. Calloway *v.* Kirkland, 50 Ala. 401.

If land consisting of an entire tract lies in two counties, the sale may be in either county, and the probate court administering the estate must designate which. Calloway *v.* Kirkland, 50 Ala. 401.

In Georgia, the place of sale may be either in the county having jurisdiction of the administration or in the county where the land lies, according to the discretion of the court in each case; and if land is sold in either county without the special direction of the court the sale is voidable only. Patterson *v.* Lemon, 50 Ga. 231.

In the absence of statute the sale need not be in the county where the land is situated; the place of sale being discretionary with the court and the administrator. Van Horn *v.* Ford, 16 Iowa 578.

41. See Neill *v.* Keese, 5 Tex. 23, 51 Am. Dec. 746, sale at county court-house unless court directs sale to be made elsewhere.

If the court designates no place for the sale it must be at the place designated by the statute or it will be void. Peters *v.* Caton, 6 Tex. 554.

the discretion of the representative and the court by which the sale has been ordered.[42]

4. Sale in Parcels. Under the old chancery practice land consisting of several tracts should be sold, each parcel separately,[43] and under some statutes, where a piece of real property which is to be sold is susceptible of division, it is required to be divided and sold in parcels.[44] Where the petition is for the sale of mortgaged land to pay debts, the court may order a sale as a whole or in parts.[45] Although the order of court for the sale describes the land as one parcel, yet the representative may sell it in several lots if in his judgment it will be for the interest of the estate.[46] Under a statute providing that the court may order the representative to sell so much of decedent's lands as is necessary to pay his debts, the court may order the sale of such lands in lots with streets laid out thereon, if a sale in that manner appears advantageous;[47] but a statute providing that the owner of land may plat the same and lay out streets thereon has been held not to authorize an administrator to make the plat for the purposes of selling in parcels where he is licensed by the court to sell the land.[48]

5. Public or Private Sale.[49] As a general rule a sale under order of court should be at public auction, and in some jurisdictions a private sale is absolutely void;[50] but in others, although a public sale is the proper mode, a private sale is not void.[51] In other jurisdictions the sale may be public or private as the court in its discretion may direct.[52] Where under a statute which does not prescribe

What a sufficient designation by court.— Where, upon a petition for leave to sell land, "at the late residence of the deceased," the court granted leave to sell "according to law," a sale at said residence was valid, as the order considered with reference to the petition must be understood as granting the prayer of the petition. Jemison *v.* Gaston, 21 Tex. 266.

A sale of a land certificate need not be made at the court-house door of the county in which the land on which the certificate was issued is situate, since before the issuance of a patent the interest of the owner is but a chattel interest, and may be sold as other personal property. Melton *v.* Turner, 38 Tex. 81.

42. See Van Horn *v.* Ford, 16 Iowa 578.

43. See Kenley *v.* Bryan, 110 Ill. 652.

Time for objection.— The objection that two distinct tracts were sold as one without first having been offered separately is a good ground for impeaching the report of sale, but not for impeaching the sale years afterward by a bill in equity. Kenley *v.* Bryan, 110 Ill. 652.

44. See Truxillo's Succession, 24 La. Ann. 453.

Statute directory merely.— McCampbell *v.* Durst, 73 Tex. 410, 11 S. W. 380.

Where lots are sufficiently designated by the map of the United States survey and the sale was made in portions easily ascertainable, the objection that there was no division and sale by lots will be disregarded. Walker *v.* Kimbrough, 27 La. Ann. 558.

45. Jenkins' Estate, 3 Pa. Co. Ct. 620, holding that if the land is sold in parts the court may order that each part shall be subject to such portion of the mortgage as the mortgagee and the administrator shall agree on.

46. Delaplaine *v.* Lawrence, 3 N. Y. 301. See also Jackson *v.* Irwin, 10 Wend. (N. Y.) 441.

47. Hohokus Tp. *v.* Erie R. Co., 65 N. J. L. 353, 47 Atl. 566.

48. People *v.* Board of Public Works, 41 Mich. 724, 725, 49 N. W. 924.

49. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d, (III).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, c.

50. Worten *v.* Howard, 2 Sm. & M. (Miss.) 527, 41 Am. Dec. 607; Herrick *v.* Grow, 5 Wend. (N. Y.) 579. See also Burney *v.* Ludeling, 47 La. Ann. 73, 16 So. 507; Jackson *v.* Irwin, 10 Wend. (N. Y.) 441.

Statute not retroactive.— A private sale made by virtue of an order obtained under a statute which did not require a public sale is valid, although the property was not sold until after the enactment of a statute which required a public sale. Jackson *v.* Irwin, 10 Wend. (N. Y.) 441.

51. Apel *v.* Kelsey, 52 Ark. 341, 12 S. W. 703, 30 Am. St. Rep. 183; Burris *v.* Kennedy, 108 Cal. 331, 41 Pac. 458. See also Harris *v.* Parker, 41 Ala. 604, sale of personalty.

52. *In re* Smith, 188 Pa. St. 222, 41 Atl. 542. See also O'Brian *v.* Wiggins, 14 Pa. Super. Ct. 37. But see Jacoby *v.* McMahon, 42 Pittsb. Leg. J. (Pa.) 446, holding that the orphans' court has no jurisdiction to order a private sale of a decedent's real estate to pay his debts.

Prior to the Pennsylvania act of May 9, 1889 (Pamphl. Laws 182), proceedings on the petition of the representative for an order of sale for the payment of debts were governed by the act of March 29, 1832, which act merely contemplated a public and not a private sale. Kiskaddon *v.* Dodds, 21 Pa. Super. Ct. 351.

the mode of sale an administrator applies for leave to sell at a private sale and the order is silent as to the mode of sale, directing only that it be according to law, a private sale passes the title.[53]

6. Adjournment. Under an order of court empowering the representative to sell property on a day specified, he may adjourn the sale in the exercise of a sound discretion,[54] and without statutory authority,[55] and he will not be liable for a loss caused thereby.[56] A confirmation of a report stating the adjournment and the reasons therefor is a judgment by the court that in its opinion the representative exercised a wise discretion in adjourning the sale, and this judgment is final and conclusive until impeached and set aside in a direct proceeding.[57] A statute requiring a certain number of days' notice of the time and place of the sale of real estate does not prevent the representative from adjourning the sale to a day less remote from the day originally fixed than the period of notice prescribed in the statute.[58] An adjournment from the court-house door where the sale was advertised to be held to another place in the county, near the land in question, is a mere irregularity cured by confirmation of the sale.[59]

L. Terms and Conditions[60] — **1. In General.** The representative can make no terms for the sale which are not warranted by statute or order of court,[61] and

A sale of a stock of goods may be ordered to be private under Hill Annot. Laws, § 1144, and the stock may be closed out in the regular course of business. See *In re* Osburn, 36 Oreg. 8, 58 Pac. 521, holding that for this purpose the administrator may incur the necessary expense of lighting, clerk-hire, etc.

Wild land may be sold at private sale on leave therefor from the ordinary. Coggins *v.* Griswold, 64 Ga. 323.

The court may issue an order in the alternative form that land be sold either at a public or a private sale. See Lawrence's Appeal, 49 Conn. 411; *In re* Smith, 188 Pa. St. 222, 41 Atl. 542.

Sale not according to decree.— Where a decree authorized a public sale of decedent's land for payment of debts, and a private sale was made at which the property was sold at a sacrifice, the sale was annulled, especially as it appeared that the purchaser, who was the executor, had full knowledge of all the circumstances. Peirce *v.* Graham, 85 Va. 227, 7 S. E. 189.

53. Hand *v.* Motter, 73 Mo. 457.

54. Lamb *v.* Lamb, Speers Eq. (S. C.) 289, 40 Am. Dec. 618 (sale of personalty); Sitzman *v.* Pacquette, 13 Wis. 291. See also *In re* Lawrence, 1 Redf. Surr. (N. Y.) 310.

Circumstances warranting adjournment.— A storm, the absence of bidders, or other like circumstances would not only warrant but require a postponement. Lamb *v.* Lamb, Speers Eq. (S. C.) 289, 40 Am. Dec. 618. See also Beaubien *v.* Poupard, Harr. (Mich.) 206. And a combination of bidders to affect the sale is good ground for postponement. *In re* Lawrence, 1 Redf. Surr. (N. Y.) 310. But the fact that the widow of a testator has spread false reports as to the title being subject to her dower and thus embarrassed the sale of the realty attempted by the administrator or that it is probable that she will do so again have been held not to furnish good cause to suspend the sale. *In re* Lawrence, 1 Redf. Surr. (N. Y.) 310.

An adjournment by an attorney or agent of the executor in his absence is sufficient, the act being ministerial and therefore not beyond his power as executor or trustee to delegate. Hicks *v.* Willis, 41 N. J. Eq. 515, 7 Atl. 507.

55. Norris *v.* Howe, 15 Mass. 175.

56. Lamb *v.* Lamb, Speers Eq. (S. C.) 289, 40 Am. Dec. 618.

57. Noland *v.* Barrett, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572.

58. *In re* Gillespie, 10 Watts (Pa.) 300.

59. Thompson *v.* Burge, 60 Kan. 549, 57 Pac. 110, 72 Am. St. Rep. 369. See *infra*, XII, Q, 8.

60. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d, (IV).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, e.

61. Cruikshank *v.* Luttrell, 67 Ala. 318; Foote *v.* Overman, 22 Ill. App. 181; Randolph's Appeal, 5 Pa. St. 242; Bailey's Appeal, 2 Grant (Pa.) 225. See also Selb *v.* Montague, 102 Ill. 446 (holding that the representative cannot add a condition that the purchaser shall discharge the widow's dower and right of homestead); Hamilton *v.* Pleasants, 31 Tex. 638, 98 Am. Dec. 551 (holding that as the law did not warrant a sale for Confederate money, a declaration of the representative at the time of sale that it was made for such money did not operate as a fraud upon the purchaser).

As to taxes.— The administrator cannot bind the personal estate by a statement at the sale of the realty that taxes due and constituting a lien thereon at the time of the sale will be paid by the estate, for the taxes accruing after the death of the taxpayer are a liability of the heir and not of the estate. Sexton *v.* Sikking, 90 Ill. App. 667.

Requiring the purchaser to buy other property than that of the decedent is to encumber the sale in a way in which the administrator

if he attaches an unauthorized condition the purchaser is not bound to pay the bid.[62] But the representative has the right under a decree to sell land for cash to demand a deposit as a guaranty that the bidder will consummate the purchase if the court approves the sale.[63]

2. Cash or Credit.[64] The court may order the property to be sold for cash or on credit[65] or partly for cash and partly on credit.[66] If, however, the sale is not made in accordance with the directions of the order, it may not be absolutely void,[67] but its validity may depend on the subsequent ratification of the heirs or devisees, or in a proper case on its confirmation by the court.[68] In some jurisdictions it is held that it is the representative's duty to sell for cash unless the order directs him to sell on credit,[69] or unless all the creditors consent to a sale on credit,[70] and that if loss follows his breach of duty he will be held liable;[71] but in other jurisdictions a sale on credit is the rule,[72] while in still others, whether the sale shall be for cash or on credit is considered to be a matter within the discretion of the representative who, however, must exercise his discretion wisely for the best interests of the estate.[73] In some jurisdictions the period of credit

has no right. Savage *v.* Williams, 15 La. Ann. 250.

A restriction of the quantity of land to less than that advertised to be sold, the restriction having been publicly proclaimed, binds the purchasers so that they cannot compel a conveyance of the whole amount advertised, whether they heard the proclamation or not. Lee *v.* Hester, 20 Ga. 588.

Agreement to allow purchaser credit for individual debt.— A sale of realty under an agreement with the purchaser to allow him credit for an individual debt which agreement is not disclosed at the sale or to the court which confirms it has been held void. Sharpley *v.* Plant, 79 Miss. 175, 28 So. 799, 89 Am. St. Rep. 588. But *compare* Heath *v.* Layne, 62 Tex. 686, holding the sale merely voidable in such case.

62. McMaster *v.* Arthur, 33 S. C. 512, 12 S. E. 308 (where the master announced at the sale when notice was given of the claim of a homestead that the land was to be sold subject to the claim, which was not stated in the order of sale); Witherspoon *v.* Witherspoon, 33 S. C. 223, 11 S. E. 704 (holding that a purchaser who was not present at the sale and did not hear the announcement of the conditions attached and who was kept out of possession over a year by reason of misunderstanding as to the terms could not be subjected to an enforcement of an original condition). But see Layton *v.* Hennen, 3 La. Ann. 1.

63. Mueller *v.* Conrad, 178 Ill. 276, 52 N. E. 1031; Allen *v.* Shepard, 87 Ill. 314.

64. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d, (IV).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, e.

65. Darrington *v.* Borland, 3 Port. (Ala.) 9; Reynolds *v.* Wilson, 15 Ill. 394, 60 Am. Dec. 753; Fitzimmons' Appeal, 40 Pa. St. 422; Baily's Appeal, 32 Pa. St. 40.

66. Griffin *v.* Griffin, 3 Ala. 623. See also Lacroix's Succession, 30 La. Ann. 924; Fitzimmons' Appeal, 40 Pa. St. 422.

On the adjudicatee's failure to pay the first instalment, a personal judgment for the whole price ordered in the supreme court should be for cash. McCleland *v.* Bideman, 5 La. Ann. 563.

67. Harris *v.* Parker, 41 Ala. 604. *Contra*, Smelser *v.* Blanchard, 15 La. Ann. 254.

68. McCully *v.* Chapman, 58 Ala. 325.

69. Foster *v.* Thomas, 21 Conn. 285; Richards *v.* Adamson, 43 Iowa 248. See Maples *v.* Howe, 3 Barb. Ch. (N. Y.) 611.

70. Maples *v.* Howe, 3 Barb. Ch. (N. Y.) 611.

71. Foster *v.* Thomas, 21 Conn. 285; Richards *v.* Adamson, 43 Iowa 248, holding that if he accepts a note and mortgage in part payment he cannot recover from the estate the expenses of foreclosure.

72. See Wood *v.* Wheeler, 11 Tex. 122, twelve months' credit.

Sale of homestead.— When realty in which there is a homestead exemption is ordered to be sold, the terms of the sale not being prescribed, the sale should be for cash to the amount of the exemption and the balance on the same credit as is usual on sales of lands for the satisfaction of creditors. Wood *v.* Wheeler, 11 Tex. 122.

73. Spence *v.* Dasher, 63 Ga. 430, holding that whether the representative has abused his discretion is a question for the jury.

In Louisiana the law contemplates an offering first for cash and then on twelve months' credit if the property fails to bring its appraised value (Lacroix's Succession, 30 La. Ann. 924); but it is not imperatively required that the first offering be for cash (Wright *v.* Cumming, 19 La. Ann. 353). The sale need be made for cash only where creditors so demand (Hood's Succession, 33 La. Ann. 466), and the fact that the property has been sold for one-half cash and the balance on a credit of twelve months does not vitiate the title (Lacroix's Succession, *supra*). The administrator in making a sale should not encumber the sale by requiring a greater proportion of the price to be paid in cash than the needs of the estate require. Savage *v.* Williams, 15 La. Ann. 250.

is fixed by statute,[74] while in others it is left to the sound discretion of the probate court.[75] The failure of the representative to take security for deferred payments as required by statute or order of court does not render his deed a nullity where the facts have been reported to the court and the sale has been approved notwithstanding.[76]

3. When Property Mortgaged.[77] In some jurisdictions, where the property is mortgaged, all that can be sold is the fee subject to the mortgage,[78] and the representative cannot require as a condition of the sale that the purchaser shall discharge the mortgage,[79] nor can he himself remove the encumbrance with a view to a better price when he shall offer the property for sale under an order of court.[80] In other jurisdictions, however, a sale may be directed free of the encumbrance, provision being made for payment thereof from the proceeds of sale,[81] or the representative may make an agreement with the purchaser that the latter shall discharge the mortgage debt.[82] A general order to sell encumbered lands is not sufficient to authorize a sale free from encumbrances, even although a statute authorizes such a sale under certain circumstances.[83]

M. Who May Purchase — 1. In General.[84] If a person making a bid in the names of others complies with the bid and takes title in their names, it is of no concern of the heirs whether the person who actually made the bid was authorized to use the names in which the bid was made.[85] The creditors of the estate cannot object to the substitution by a court of equity of one person in place of another as purchaser of the property sold, if the person so substituted in place

74. See Citizens' St. R. Co. *v.* Robbins, 128 Ind. 449, 26 N. E. 116, 25 Am. St. Rep. 445, 12 L. R. A. 498.

The statutory period is applicable only where decree gives no directions as to the sale; and it is not error for the decree of sale to order a longer or different credit to be given. Moffitt *v.* Moffitt, 69 Ill. 641.

75. Grider *v.* Apperson, 38 Ark. 388.

Credit of one year.— In Pennsylvania it has been held that one year is the proper period of credit, not only because of the analogy of that period to the time allowed for the settlement of estates, but because such has been the practice which has been found to work well in some parts of the state. Baily's Appeal, 32 Pa. St. 40, 2 Grant (Pa.) 225.

76. Wilkerson *v.* Allen, 67 Mo. 502; Miller *v.* Anders, 21 Tex. Civ. App. 72, 51 S. W. 897. But see Citizens' St. R. Co. *v.* Robbins, 128 Ind. 449, 26 N. E. 116, 25 Am. St. Rep. 445, 12 L. R. A. 498.

Statutory requirement of mortgage.— An agreement for judgment for the price of land sold and for the foreclosure of a lien has the same effect as a mortgage to secure the purchase-price which the statute requires, and the action of the administrator in waiving a mortgage to secure deferred payments on sale and of electing to enforce the contract of sale on foreclosure is binding on the estate and heirs. Miller *v.* Anders, 21 Tex. Civ. App. 72, 51 S. W. 897.

77. **In Louisiana** a probate court which has not acquired jurisdiction over mortgaged property of a succession by an omission or commission or laches of the mortgage creditor, whose contract contains the pact *de non alienando*, has no authority to order the sale of the property affected to him on the terms of part cash and part credit, after appraisement, as he is entitled to demand a sale for cash, and without appraisement. Thompson's Succession, 42 La. Ann. 118, 7 So. 477. But a creditor of an estate, whose debt operates as a judicial mortgage, and is in a twelve months' bond executed by the deceased, cannot cause the property of the succession to be sold for cash, without the benefit of appraisement, to satisfy his claim. Boyd's Succession, 13 La. Ann. 439.

78. Selb *v.* Montague, 102 Ill. 446; Phelps *v.* Funkhouser, 39 Ill. 401.

79. Selb *v.* Montague, 102 Ill. 446.

80. Phelps *v.* Funkhouser, 39 Ill. 401.

81. McLaughlin *v.* Barnum, 31 Md. 425; Culver *v.* Hardenbergh, 37 Minn. 225, 33 N. W. 792; Voorhees' Appeal, 57 N. J. Eq. 291, 42 Atl. 567.

82. See Culver *v.* Hardenbergh, 37 Minn. 225, 33 N. W. 792; Matter of Georgi, 35 Misc. (N. Y.) 685, 72 N. Y. Suppl. 431.

Security for discharge.— Where an administrator sells land encumbered by a mortgage it is his duty to take security from the purchaser that the latter will discharge the mortgage. Duncan *v.* Fish, 1 Aik. (Vt.) 231.

If the mortgagee be the purchaser the representative should exact of him a discharge of the debt constituting the encumbrance. Duncan *v.* Fish, 1 Aik. (Vt.) 231.

83. Voorhees' Appeal, 57 N. J. Eq. 291, 42 Atl. 567.

The order of sale may be amended nunc pro tunc in a proper case so as to authorize a sale already made as free from encumbrances. Voorhees' Appeal, 57 N. J. Eq. 291, 42 Atl. 567.

84. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d, (VI), (A).

85. Deans *v.* Wilcoxon, 25 Fla. 980, 7 So. 163.

of the original purchaser is responsible and ready to comply in all respects with the terms of sale.[86]

2. Widow or Heirs of Decedent. Property of a decedent sold under order of court may be purchased by either the widow[87] or an heir.[88]

3. Guardian of Decedent's Children. A guardian of the decedent's children has no right to purchase the property of the decedent at a sale by the executor or administrator under order of court,[89] but it is usually considered that if such guardian does purchase the sale is voidable only and not absolutely void.[90]

4. Executor or Administrator — a. General Rule.[91] It is well established as a general rule that where property of a decedent is sold under order of the court the executor or administrator cannot lawfully become the purchaser;[92] and in the

86. Farmers' Bank *v.* Clarke, 28 Md. 145.

87. Reinhardt *v.* Seaman, 208 Ill. 448, 69 N. E. 847; Wood *v.* Bott, 56 Miss. 128.

88. See Aubuchon *v.* Aubuchon, 133 Mo. 260, 34 S. W. 569; Baker *v.* Mancill, 2 Lanc. L. Rev. (Pa.) 373.

Purchase by one of several heirs.— The equitable principle that a cotenant will not be permitted to purchase an outstanding title or encumbrance for his exclusive benefit and to set it up against the cotenant, but that such purchase inures to the benefit of all who are willing to contribute their just proportion of the expense, does not apply to the purchase of land by one of the heirs at a sale under order of court. Aubuchon *v.* Aubuchon, 133 Mo. 260, 34 S. W. 569.

89. Culberhouse *v.* Shirey, 42 Ark. 25; Mann *v.* McDonald, 10 Humphr. (Tenn.) 275.

Authority from judge to purchase.— The natural tutrix of minor heirs, if authorized by the judge, may purchase at the sale of the property of the deceased insolvent whose succession is being administered by syndics. McCarty *v.* Steam Cotton Press Co., 5 La. 16.

90. Egan *v.* Grece, 79 Mich. 629, 45 N. W. 74; Taylor *v.* Brown, 55 Mich. 482, 21 N. W. 901; Bostwick *v.* Atkins, 3 N. Y. 53. But *compare* Forbes *v.* Halsey, 26 N. Y. 53.

Waiver of objections.— Where a sale was beneficial to the ward, and he was present at the sale, and instead of repudiating it he suffered eighteen years to elapse after he became of age without impeaching the conveyance, during which time the title passed to innocent third persons, it was held that he must be deemed to have waived any objection to the sale and to have affirmed it. Bostwick *v.* Atkins, 3 N. Y. 53.

91. Sale of realty under testamentary authority see *supra*, VIII, O, 9, d, (VI), (B), (1).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, f, (I).

92. *Alabama.*— Daniel *v.* Stough, 73 Ala. 379; James *v.* James, 55 Ala. 525; Frazer *v.* Lee, 42 Ala. 25; Payne *v.* Turner, 36 Ala. 623; Charles *v.* Dubose, 29 Ala. 367. See also Montgomery *v.* Givham, 24 Ala. 568.

Arkansas.— Bland *v.* Fleeman, 58 Ark. 84, 23 S. W. 4; McLeod *v.* Griffis, 45 Ark. 505; Culberhouse *v.* Shirey, 42 Ark. 25; Mock *v.* Pleasants, 34 Ark. 63.

California.— O'Connor *v.* Flynn, 57 Cal. 293.

Georgia.— Houston *v.* Bryan, 78 Ga. 181, 1 S. E. 252, 6 Am. St. Rep. 252; Grubbs *v.* McGlawn, 39 Ga. 672; Bond *v.* Watson, 22 Ga. 637.

Illinois.— O'Connor *v.* Mahoney, 159 Ill. 69, 42 N. E. 378; Lagger *v.* Mutual Union Loan, etc., Assoc., 146 Ill. 283, 33 N. E. 946; Nelson *v.* Hayner, 66 Ill. 487; Coat *v.* Coat, 63 Ill. 73; Williams *v.* Walker, 62 Ill. 517; Kruse *v.* Steffens, 47 Ill. 112; Lockwood *v.* Mills, 39 Ill. 602. See also Williams *v.* Rhodes, 81 Ill. 571, interest in purchase.

Indiana.— Fisher *v.* Bush, 133 Ind. 315, 32 N. E. 924; Morgan *v.* Wattles, 69 Ind. 260; Shaw *v.* Swift, 1 Ind. 565, Smith 398.

Kentucky.— Handlin *v.* Davis, 81 Ky. 34.

Louisiana.— Porter *v.* Depeyster, 18 La. 351; Scott *v.* Gorton, 14 La. 115, 33 Am. Dec. 578; Macarty *v.* Bond, 9 La. 351.

Michigan.— Dwight *v.* Blackmar, 2 Mich. 330, 57 Am. Dec. 130; Beaubien *v.* Poupard, Harr. 206.

Mississippi.— McGowan *v.* McGowan, 48 Miss. 553; Bland *v.* Muncaster, 24 Miss. 62, 57 Am. Dec. 162.

Missouri.— Clark *v.* Drake, 63 Mo. 354.

New Hampshire.— Hoitt *v.* Webb, 36 N. H. 158; Remick *v.* Butterfield, 31 N. H. 70, 64 Am. Dec. 316.

New Jersey.— Smith *v.* Drake, 23 N. J. Eq. 302; Huston *v.* Cassedy, 13 N. J. Eq. 228; Culver *v.* Culver, 11 N. J. Eq. 215; Mulford *v.* Minch, 11 N. J. Eq. 16, 64 Am. Dec. 472; Obert *v.* Obert, 10 N. J. Eq. 98; Mulford *v.* Bowen, 9 N. J. Eq. 797; Scott *v.* Gamble, 9 N. J. Eq. 218; Williamson *v.* Johnson, 5 N. J. Eq. 537.

New York.—Terwilliger *v.* Brown, 44 N. Y. 237.

North Carolina.— Tayloe *v.* Tayloe, 108 N. C. 69, 12 S. E. 836; Shearin *v.* Hunter, 72 N. C. 493; Roberts *v.* Roberts, 65 N. C. 27.

Ohio.— Caldwell *v.* Caldwell, 45 Ohio St. 512, 15 N. E. 297; Piatt *v.* Longworth, 27 Ohio St. 159; Barrington *v.* Alexander, 6 Ohio St. 189; Sheldon *v.* Newton, 3 Ohio St. 494.

Pennsylvania.— Chronister *v.* Bushey, 7 Watts & S. 152; Matter of Wallington, 1 Ashm. 307.

South Carolina.— Emonds *v.* Crenshaw, 1 McCord Eq. 252; Perry *v.* Dixon, 4 Desauss. 504 note. See also Teague *v.* Dunlap, 1 Harp. Eq. 97.

Texas.— Fisher *v.* Wood, 65 Tex. 199; Hamblin *v.* Warnecke, 31 Tex. 91; Wipff *v.* Heder, 6 Tex. Civ. App. 685, 26 S. W. 118.

application of this rule it is immaterial whether he purchase directly or indirectly through the medium of an agent or third person who purchases ostensibly for himself but really for the executor or administrator.[93] There is all the more reason for the application of this rule where the sale is tainted with fraud or unfairness;[94] but it is not necessary that this should be the case, for the sale may as a rule be avoided merely because the executor or administrator purchased, even although it was fairly made and the price realized was an adequate one.[95] The rule also applies where the representative purchases as agent of another with a view to making a profit out of the transaction.[96]

b. Limitations of the Rule.[97] The representative may, it has been held, purchase at his own sale if he bids fairly with the knowledge and consent of the next of kin who have at the time full knowledge of the condition of the estate and the value of the property;[98] and if the sale is made not by a representative but by a commissioner appointed to sell, or some other person not acting under the orders of the representative, the representative may properly become a purchaser.[99]

Virginia.— Hudson *v.* Hudson, 5 Munf. 180.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1500.

A purchase by a co-executor may be avoided by the heirs or devisees, although the purchaser had nothing to do with procuring the order of sale, but the petition was presented, the bond given, and the sale made by another executor. Beeson *v.* Beeson, 9 Pa. St. 279.

A purchase by an executor in the right of his wife may be set aside. Calloway *v.* Gilmer, 36 Ala. 354.

A purchase by a firm of which the representative is a member may be avoided. See Griffith *v.* Maxfield, 63 Ark. 548, 39 S. W. 852; Harrod *v.* Norris, 11 Mart. (La.) 297, 13 Am. Dec. 350. But *compare* Leeper's Appeal, (Pa. 1888) 14 Atl. 331.

If another person is interested in the bid of the executor, a court of equity will not set aside the sale as to the other person in a case where the sale was by commissioners for full value and there was no fraud in fact. Price *v.* Winter, 15 Fla. 66.

The fact that the sale has been confirmed by the court does not prevent its being afterward set aside by reason of the representative's being the purchaser. McMillan *v.* Rushing, 80 Ala. 402. But see Baldwin *v.* Dalton, 168 Mo. 20, 67 S. W. 599.

Where a creditor procures the appointment of one of his employees as administrator and pays the expenses of administration, such creditor is not the administrator of the estate within the provision of the statute prohibiting an administrator from purchasing the estate he represents. Gray *v.* Quicksilver Min. Co., 68 Fed. 677.

93. *Arkansas.*— Woodard *v.* Jaggers, 48 Ark. 248, 2 S. W. 851; McGauhey *v.* Brown, 46 Ark. 25.

California.— Scott *v.* Umbarger, 41 Cal. 410.

Georgia.— Reed *v.* Aubrey, 91 Ga. 435, 17 S. E. 1022, 44 Am. St. Rep. 49; Ridgeway *v.* Ridgeway, 84 Ga. 25, 10 S. E. 495; Bond *v.* Watson, 22 Ga. 637.

Illinois.— Miller *v.* Rich, 204 Ill. 444, 68 N. E. 488; Kruse *v.* Steffens, 47 Ill. 112; Lockwood *v.* Mills, 39 Ill. 602.

Iowa.— Read *v.* Howe, 39 Iowa 553.

Mississippi.— Matthews *v.* Matthews, (1887) 1 So. 741.

New York.— Terwilliger *v.* Brown, 59 Barb (N. Y.) 9 [*affirmed* in 44 N. Y. 237]; Woodruff *v.* Cook, 2 Edw. 259.

North Carolina.— McNeill *v.* Fuller, 121 N. C. 209, 28 S. E. 299. See also Joyner *v.* Conyers, 59 N. C. 78.

Ohio.— Riddle *v.* Roll, 24 Ohio St. 572 [*affirming* 5 Ohio Dec. (Reprint) 232, 3 Am. L. Rec. 648].

Texas.— Fisher *v.* Wood, 65 Tex. 199.

Wisconsin.— Gibson *v.* Gibson, 102 Wis. 501, 78 N. W. 917.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1500.

94. Chaffe *v.* Farmer, 34 La. Ann. 1017. See Hudson *v.* Hudson, 5 Munf. (Va.) 180.

95. Daniel *v.* Stough, 73 Ala. 379; Charles *v.* Dubose, 29 Ala. 367; Le Comte's Estate, 8 N. Y. St. 784; Shute *v.* Austin, 120 N. C. 440, 27 S. E. 90; Wipff *v.* Heder, 6 Tex. Civ. App. 685, 26 S. W. 118. See also McCartney *v.* Calhoun, 17 Ala. 301. But *compare* Lockwood *v.* Mills, 39 Ill. 602; Huger *v.* Huger, 9 Rich. Eq. (S. C.) 217; Stallings *v.* Foreman, 2 Hill Eq. (S. C.) 401. And see Baldwin *v.* Dalton, 168 Mo. 20, 67 S. W. 599; Clark *v.* Clark, 65 N. C. 655.

96. Wingate *v.* Herschauer, 42 Iowa 506; Willis *v.* Berry, 104 La. 114, 28 So. 888; Neda *v.* Fontenot, 2 La. Ann. 782; Clarke *v.* Drake, 63 Mo. 354; Piatt *v.* Longworth, 27 Ohio St. 159.

97. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d, (VI), (B), (2).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, f, (I).

98. Lyon *v.* Lyon, 43 N. C. 201. See also Hannum's Appeal, 1 Chest. Co. Rep. (Pa.) 362.

99. See Charleville *v.* Chouteau, 18 Mo. 492; Tomlinson *v.* Detestatius, 3 N. C. 284; Cooley *v.* Cooley, (Tenn. Ch. App. 1896) 37 S. W. 1028; Dexter *v.* Harris, 7 Fed. Cas. No. 3,862, 2 Mason 531.

Again, if the representative has an interest in the estate, it may be necessary for him to purchase at the sale for his own protection, and consequently it is held that in such case he may purchase and the purchase will be upheld if the sale be fairly conducted.[1] The representative may also subsequently purchase from the vendee at the sale under order of court and acquire a good title by such purchase if the sale was fairly conducted and there was no understanding at the time of the sale that the representative should share in, or receive the benefit of, the purchase.[2]

c. Whether Sale Void or Voidable.[3] A purchase of property of the estate by an executor or administrator at a sale under order of court, while universally considered to be highly improper, is usually held to be merely voidable at the election of the persons interested, and not void;[4] and even statutes providing that such sales are void have been construed to mean simply that they are voidable.[5]

Purchase at undervalue.— In such case a purchase by the representative has been allowed to stand, even though he purchased for a price less than the property was actually worth. Tomlinson *v.* Detestatius, 3 N. C. 284.

1. Cottingham *v.* Moore, 128 Ala. 209, 30 So. 784 (holding that a representative who is a judgment creditor of the decedent and who holds an execution lien has such an interest in the land that he may become a purchaser, if the sale be fair and properly conducted and for an adequate price); Penny *v.* Jackson, 85 Ala. 67, 4 So. 720; Frazer *v.* Lee, 42 Ala. 25; Brannan *v.* Oliver, 2 Stew. (Ala.) 47, 19 Am. Dec. 39; Linman *v.* Riggins, 40 La. Ann. 761, 5 So. 49, 8 Am. St. Rep. 549; Davidson *v.* Davidson, 28 La. Ann. 269; Kellar *v.* Blanchard, 21 La. Ann. 38; Vanwickle *v.* Matta, 16 La. Ann. 325; Pagett *v.* Curtis, 15 La. Ann. 451; Aicard *v.* Daly, 7 La. Ann. 612; Fristoe *v.* Burke, 5 La. Ann. 657; Porter *v.* Depeyster, 18 La. 351. See also Payne *v.* Turner, 36 Ala. 623; McCartney *v.* Calhoun, 17 Ala. 301; McLane *v.* Spence, 6 Ala. 894; Froneberger *v.* Lewis, 79 N. C. 426.

Fraud.— Where an executor who is also a legatee appoints one agent to sell and another to buy the purchase will be set aside for fraud. Britton *v.* Johnson, 2 Hill Eq. (S. C.) 430.

2. *Alabama.*— Foxworth *v.* White, 72 Ala. 224.

Arkansas.— West *v.* Waddill, 33 Ark. 575.

Michigan.— See Louden *v.* Martindale, 109 Mich. 235, 67 N. W. 133.

New Jersey.—Wortman *v.* Skinner, 12 N. J. Eq. 358.

Pennsylvania.— Armor *v.* Cochrane, 66 Pa. St. 308; Painter *v.* Henderson, 7 Pa. St. 48.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1500.

A presumption of fraud is not warranted because of the representative's subsequent purchase. Vasquez *v.* Richardson, 19 Mo. 96. See also Sumner *v.* Sessoms, 94 N. C. 371.

3. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d, (VI), (B), (3).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, f, (I).

4. *Alabama.*— Fielder *v.* Childs, 73 Ala. 567; Harris *v.* Parker, 41 Ala. 604; Charles *v.* Dubose, 29 Ala. 367. But if the representative becomes the purchaser of his decedent's land under an order of court granted by the probate court on his petition, the heirs are entitled to notice of the proceedings after the sale, and if this notice is not shown to have been given a deed executed under the proceedings will be held void on collateral attack. Allison *v.* Allison, 114 Ala. 393, 21 So. 1008 [*reaffirming* Bolling *v.* Smith, 108 Ala. 411, 19 So. 370].

Arkansas.— Gibson *v.* Herriott, 55 Ark. 85, 17 S. W. 589, 29 Am. St. Rep. 17.

California.— Burris *v.* Kennedy, 108 Cal. 331, 41 Pac. 458; Boyd *v.* Blankman, 29 Cal. 19, 87 Am. Dec. 146.

Georgia.— Smith *v.* Granberry, 39 Ga. 381, 99 Am. Dec. 464; Shine *v.* Redwine, 30 Ga. 780; Mercer *v.* Newsom, 23 Ga. 151.

Illinois.— Sloan *v.* Graham, 85 Ill. 26. See also Williams *v.* Rhodes, 81 Ill. 571.

Indiana.— Comegys *v.* Emerick, 134 Ind. 148, 33 N. E. 899, 39 Am. St. Rep. 245.

Louisiana.— Hicks *v.* Weems, 14 La. Ann. 629; Ross *v.* Ross, 3 La. Ann. 533. But see Scott *v.* Gorton, 15 La. 115, 33 Am. Dec. 578.

Massachusetts.— Ives *v.* Ashley, 97 Mass. 198; Harrington *v.* Brown, 5 Pick. 519.

Missouri.— Mitchell *v.* McMullen, 59 Mo. 252.

New York.— See Ward *v.* Smith, 3 Sandf. Ch. 592, decided before the enactment of 2 Rev. St. 104, § 27, which is preserved in Code Civ. Proc. § 2774.

North Carolina.— Froneberger *v.* Lewis, 70 N. C. 456.

Pennsylvania.— Pennock's Appeal, 14 Pa. St. 446, 53 Am. Dec. 561 (holding that one of several administrators may bid at a sale of realty made by them under order of court subject in the event of a sale to him to disaffirmance by the heirs or creditors); Beeson *v.* Beeson, 9 Pa. St. 279.

Wisconsin.— Melms *v.* Pabst Brewing Co., 93 Wis. 153, 66 N. W. 518, 57 Am. St. Rep. 899.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1500.

5. *California.*— See Boyd *v.* Blankman, 29 Cal. 19, 87 Am. Dec. 146.

Michigan.— See Hoffman *v.* Harrington, 28 Mich. 90, where the court was equally divided

It follows that until the sale is actually set aside the legal title remains in the representative.[6]

d. Ratification.[7] It follows that interested persons are not confined to the remedy of avoiding the sale but have the right to elect whether they will have the sale set aside or ratify it and hold the representative as trustee for the value or price.[8] The right to have the sale set aside must be exercised within a reasonable time after the irregular purchase has become known to the person seeking its avoidance, as acquiescence in the sale for a long time will create a presumption of ratification.[9]

e. Leave of Court to Bid. Where it is proper for the representative to become the purchaser he should for his own protection procure permission from the court to bid.[10]

f. Refunding of Purchase-Money. The representative is entitled to have the purchase-money which he has paid refunded to him where the sale to him is set aside or he is held as a trustee for the persons interested in the property.[11]

5. Relative of Representative.[12] A sale to a near relative, or the husband or wife, of the personal representative, is obviously improper, and may usually be

as to whether the word "void" in such a statutory provision should be construed as void or as voidable.

Minnesota.— White *v.* Iselin, 26 Minn. 487, 5 N. W. 359.

Nebraska.— Veeder *v.* McKinley-Lanning L. & T. Co., 61 Nebr. 892, 86 N. W. 982.

Ohio.— See Terrill *v.* Auchauer, 14 Ohio St. 80.

Wisconsin.— Melms *v.* Pabst Brewing Co., 93 Wis. 153, 66 N. W. 518, 57 Am. St. Rep. 899. See also McCrubb *v.* Bray, 36 Wis. 333.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1500.

Contra.— Terwilliger *v.* Brown, 44 N. Y. 237; Forbes *v.* Halsey, 26 N. Y. 53. But see *In re* Bach, 12 N. Y. Suppl. 712, 2 Connoly Surr. (N. Y.) 490, where the court instead of holding the purchase absolutely void surcharged the executor for the difference between the amount realized at the sale and the value shown by the inventory.

6. Fielder *v.* Childs, 73 Ala. 567; McLane *v.* Spence, 6 Ala. 894; Highsmith *v.* Whitehurst, 120 N. C. 123, 26 S. E. 917. See also Montgomery *v.* Givhan, 24 Ala. 568; Boyd *v.* Blankman, 29 Cal. 19, 87 Am. Dec. 146.

7. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d, (VI), (B), (4).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, f, (I).

8. *Arkansas.*—Woodard *v.* Jaggers, 48 Ark. 248, 2 S. W. 851.

California.— See Boyd *v.* Blankman, 29 Cal. 19, 87 Am. Dec. 146.

Illinois.— Elting *v.* Biggsville First Nat. Bank, 173 Ill. 368, 50 N. E. 1095 [*affirming* 68 Ill. App. 204].

Indiana.— Comegys *v.* Emerick, 134 Ind. 148, 33 N. E. 899, 39 Am. St. Rep. 245. See also Doe *v.* Harvey, 3 Ind. 104.

Louisiana.— Longbottom *v.* Babcock, 9 La. 44.

Maryland.— Williams *v.* Marshall, 4 Gill & J. 376.

New York.— See Ford *v.* Smith, 3 Sandf. Ch. 592.

North Carolina.— Froneberger *v.* Lewis, 79 N. C. 426.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1500.

If the purchasing representative be insolvent, a court of chancery will set aside the sale not only as against him but as against purchasers under him with notice. McHartney *v.* Calhoon, 17 Ala. 301. And see Joyner *v.* Conyers, 59 N. C. 78.

9. *Georgia.*— Word *v.* Davis, 107 Ga. 780, 33 S. E. 691.

Illinois.— Williams *v.* Rhodes, 81 Ill. 571.

Kentucky.— Johnson *v.* Poff, 59 S. W. 325, 22 Ky. L. Rep. 950.

Maryland.— Williams *v.* Marshall, 4 Gill & J. 376.

Pennsylvania.— Taggot *v.* Reilly, 3 Phila. 196.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1500.

After the lapse of three years a sale by the administrator indirectly to himself may be set aside on the application of any creditor of the estate. Hannum's Appeal, 1 Chest. Co. Rep. (Pa.) 362; Worth's Estate, 1 Chest. Co. Rep. (Pa.) 297.

10. Froneberger *v.* Lewis, 79 N. C. 426; Armor *v.* Cochrane, 66 Pa. St. 308. See also Hannum's Appeal, 1 Chest. Co. Rep. (Pa.) 362.

The proper method to obtain the necessary leave of court is not by petition, but by a bill to which all persons interested should be made parties. *In re* Patterson, (N. J. Ch. 1890) 20 Atl. 486. And the application should show that the representative's sureties are willing that the request should be granted. Lewis' Estate, 1 Chest. Co. Rep. (Pa.) 313.

11. Highsmith *v.* Whitehurst, 120 N. C. 123, 23 S. E. 917; Howe *v.* Riddle, 5 Ohio Dec. (Reprint) 232, 3 Am. L. Rec. 648, with interest.

12. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d, (VI), (C).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, f, (II).

avoided.[13] But it has been said that the fact that the purchaser is a son of the administrator does not compel an inference of fraud, but is merely a circumstance to be carefully considered with others in the case.[14]

6. Attorney of Representative.[15] A sale of realty to the attorney of the representative who obtained the order of sale may be set aside as against public policy.[16]

7. Judge, Appraiser, or Commissioner. A purchase by the judge who ordered the sale,[17] by the person who appraised the lands,[18] or by one of several commissioners appointed to make the sale,[19] is objectionable. But the fact that one tract of land was purchased by the probate judge does not invalidate a deed for another and different tract sold to another person at the same sale, although both purchases were included in the same report to the probate court.[20]

N. Bids and Offers — 1. In General. An agreement made by the representative before obtaining an order of sale to accept a certain price for land of the estate is not necessarily fraudulent if the sale is subsequently made in pursuance of the forms and requirements of law.[21] The representative offering land for sale at public outcry has the right to withdraw the offer of the land at any time before the hammer falls.[22] If land is advertised as containing about a certain number of acres but is described by metes and bounds and a purchaser bids a round sum for the land, he cannot be held for a greater amount than the price bid, although it be subsequently discovered that the tract contains a considerable number of acres more than advertised.[23] Where land was knocked down at a certain bid and two persons claimed the bid and the land was immediately reoffered by order of the executors and was knocked down to one of the said bidders at a higher price than his previous bid, he became liable to complete his contract

13. Lowery *v.* Idleson, 117 Ga. 778, 45 S. E. 51; Scott *v.* Gorton, 14 La. 111, 33 Am. Dec. 576; Dundas' Appeal, 64 Pa. St. 325. But *compare* Crawford *v.* Gray, 131 Ind. 53, 30 N. E. 885.

14. Cain *v.* McGeenty, 41 Minn. 194, 42 N. W. 933.

15. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d, (VI), (E).

16. West *v.* Waddill, 33 Ark. 575.

A purchase by the law partner of the representative's attorney will not be set aside, unless bad faith or fraud be clearly shown, where the separate business of each lawyer was unaffected by the partnership and the purchaser had nothing to do with the affairs of the estate for the administrator of which his partner was the attorney, and held himself aloof from all dealings with the administrator. Gibson *v.* Gossom, 65 Ark. 631, 47 S. W. 237.

17. Livingston *v.* Cochran, 33 Ark. 294. See also Scott *v.* Calvit, 2 La. 69; Woods *v.* Munroe, 17 Mich. 238.

Sale voidable only. — A purchase by the probate judge is not absolutely void but merely voidable at the instance of those interested in the estate. Scott *v.* Calvit, 2 La. 69. And the fact that the land sold at an administrator's sale was deeded by the purchaser to a judge of probate is not such notice of fraud or wrong as would preclude any other person from becoming a *bona fide* purchaser, although the deed was by mistake made to bear date before the confirmation of the sale. Woods *v.* Munroe, 17 Mich. 238. But see Livingston *v.* Cochran, 33 Ark. 294, holding that the purchaser of a bid of a probate judge with knowledge that he was judge and had made the order of sale is not an innocent purchaser.

18. Armstrong *v.* Huston, 8 Ohio 552.

19. Saltmarsh *v.* Veene, 4 Port. (Ala.) 283, 30 Am. Dec. 525.

20. Bacon *v.* Morrison, 57 Mo. 68.

21. *California.* — Stuart *v.* Allen, 16 Cal. 473, 76 Am. Dec. 551.

Illinois. — Goodbody *v.* Goodbody, 95 Ill. 456.

Louisiana. — Brown *v.* Jacobs, 24 La. Ann. 526.

Michigan. — Norman *v.* Olney, 64 Mich. 553, 31 N. W. 555.

North Carolina. — Coffin *v.* Cook, 106 N. C. 376, 11 S. E. 371.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1504.

22. Tillman *v.* Dunman, 114 Ga. 406, 40 S. E. 244, 88 Am. St. Rep. 28, 57 L. R. A. 784; Bean *v.* Kirkpatrick, 105 Ga. 476, 30 S. E. 426.

Collusive withdrawal of property from sale. — Although the withdrawal be the result of collusion between the representative and another for the purpose of transferring the property by private sale, the person who made the last and highest bid before the withdrawal cannot insist upon the right to take the land as a purchaser. Tillman *v.* Dunman, 114 Ga. 406, 40 S. E. 244, 88 Am. St. Rep. 28, 57 L. R. A. 784, holding that, although the fraud of the representative would be open to inquiry by legatees and creditors, it was not open to inquiry at the instance of a stranger.

23. Dalton *v.* Rust, 22 Tex. 133.

at his last bid.[24] If a purchaser files a written bid for land sold under an order of court and the sale be confirmed according to the bid, he cannot have the confirmation vacated and be released on the ground that the terms of the bid vary from the order and notice of sale.[25]

2. Chilling Bidding. An agreement or combination whereby the bidding for the property is restricted or prevented is fraudulent and is ground for setting aside the sale.[26]

3. Puffing. The employment of a puffer by a person interested in the estate, merely to raise the price at the sale, is usually held a fraud on the purchaser, which entitles him to be relieved from his purchase;[27] but the mere fact that the representative bid at the sale is not a ground for objection by the other bidders if his bid was made in good faith and for the purpose of obtaining the property for himself.[28]

O. Payment — 1. In General.[29] If property is sold to several jointly, each purchaser is liable individually for the entire amount of the consideration.[30] If an administrator purchases property of the succession and gives his note therefor payable to his agent for the use of the succession, a valid obligation is created, the real obligees being the heirs and creditors of the succession.[31] If a person buys property with the understanding that he is to discharge claims against the estate, his obligation, if inchoate, is made perfect against him the moment he proceeds to avail himself of his rights.[32] Ordinarily a purchaser is not entitled to deduct from the price the value of improvements put on the land

24. Warehime *v.* Graf, 83 Md. 98, 34 Atl. 364.

25. *In re* Otis, Myr. Prob. (Cal.) 222.

26. Chaffe *v.* Meyer, 34 La. Ann. 1031; Grant *v.* Lloyd, 12 Sm. & M. (Miss.) 191.

Contract not fraudulent.— Where two attorneys representing allowed claims against the estate of a decedent in excess of the value of certain land, constituting the whole estate, agreed that as between themselves all the allowances should be of equal rank, and that upon a sale of the land one of them should buy it for the use of all creditors "*pro rata*," unless some other person should bid enough to pay the debts, the contract was not fraudulent, as preventing competition, and a purchase pursuant to its terms was valid. Murphy *v.* De France, 105 Mo. 53, 15 S. W. 949, 16 S. W. 861.

Laches.— The right to have the sale set aside on the ground of fraud on the part of the purchaser in preventing persons from bidding against him may of course be lost by laches. Kellogg *v.* Wilson, 89 Ill. 357, holding that after a delay of eight years the sale would not be set aside except upon clear proof.

27. Backenstoss *v.* Stahler, 33 Pa. St. 251, 75 Am. Dec. 592; Pennock's Appeal, 14 Pa. St. 446, 53 Am. Dec. 561; Dively's Estate, 1 Lanc. L. Rev. (Pa.) 359, holding that the sale may be set aside, although the officer in charge of the sale has no knowledge of the arrangement for puffing. But see East *v.* Wood, 62 Ala. 313 (holding that the purchaser could not rescind because the person interested in the estate had employed a person obnoxious to the bidders to compete for the purchase, where the administrator was not inculpated in the transaction); McMillan *v.* Harris, 110 Ga. 72, 35 S. E. 334, 78 Am. St. Rep. 93, 48 L. R. A. 345 (holding that the fact that persons entitled to the proceeds of land sold by an executor under order of court engaged a third person to buy at the sale and run the price up to a specified amount, with the understanding that if knocked down to him they would take it off his hands is not a ground for setting the sale aside).

Time for objection.— The purchaser should make his objection before the sale is confirmed; for after confirmation and the delivery of the deed and possession thereunder the objection comes too late. Backenstoss *v.* Stahler, 33 Pa. St. 251, 75 Am. Dec. 592.

Waiver of right to avoid purchase.— A purchaser who has full knowledge that a puffer has been employed and nevertheless gives his notes for the purchase-money waives his right to have his purchase annulled. Robinson *v.* Robinson, 11 Bush (Ky.) 174.

28. Riggs *v.* Schweitzer, 170 Pa. St. 549, 33 Atl. 116; Pennock's Appeal, 14 Pa. St. 446, 53 Am. Dec. 561.

29. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d, (VIII), (A).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, h.

30. Markle's Estate, 5 Pa. Dist. 348, holding that his remedy, if he is forced to pay more than his share, is contribution from his copurchasers.

31. Mouton *v.* Beauchamp, 10 La. Ann. 666, holding also that he cannot disavow the sale and resist payment of the note without tendering back the property. Purchase by representative generally see *supra*, XII, M, 4.

32. Decuir *v.* Ferrior, McGloin (La.) 205.

by third persons whom he may possibly be compelled to remunerate.[33] If a purchaser deposits the price with a notary, he takes the risk of loss unless the executor is formally put in default or expressly or impliedly consents to the deposit.[34] If, on a sale by licitation, the wife's share of the proceeds is retained by the husband, the purchaser, she cannot avoid the sale on the ground of non-payment of her portion of the proceeds.[35] Where the proceeds of a sale are directed to be divided among testator's children, the administrator is entitled to receive the money in preference to a judgment creditor of one of the children.[36] The rights of a *bona fide* purchaser of a note given to heirs for the price of land sold at partition sale are paramount to the rights of an administrator seeking to subject the note to the payment of the ancestor's debts as assets of the estate.[37]

2. Payment Before Due. Although the terms of sale of a decedent's land contemplate a period of credit in whole or in part, actual payment before such period matures may fairly be accepted by the representative.[38]

3. Medium of Payment.[39] As a general rule the representative can receive nothing but money upon the sale of his decedent's property,[40] and if he accepts depreciated currency he is accountable for the full value in standard money, although he acted in good faith.[41] Notes taken by an executor for property sold to pay debts are not assets until they are due and collected.[42]

4. When Property Sold Is Encumbered.[43] As a rule the purchaser takes the property subject to fixed encumbrances thereon, and his bid is therefore considered without reference to the encumbrances.[44]

33. Rutherford *v.* Martin, 3 Mart. N. S. (La.) 63.

34. O'Keefe's Succession, 12 La. Ann. 246, where the notary absconded with the price.

35. Huguet *v.* Bates, 32 La. 454.

36. Allison *v.* Wilson, 13 Serg. & R. (Pa.) 330.

37. Rowecamp *v.* Meyer, 6 Ohio Dec. (Reprint) 1128, 10 Am. L. Rec. 566.

38. Halleck *v.* Guy, 9 Cal. 181, 70 Am. Dec. 643; Brown *v.* Jacobs, 24 La. Ann. 526; Gwynn *v.* Dorsey, 4 Gill & J. (Md.) 453.

Discount to purchaser see Halleck *v.* Guy, 9 Cal. 181, 70 Am. Dec. 643; Canonge's Succession, 1 La. Ann. 212.

39. Sale of realty under testamentary authority see *supra*, VIII, O, 9, d, (VIII), (B).

40. Chandler *v.* Schoonover, 14 Ind. 324.

The court has no authority to direct a sale to be made for anything but legal currency. Doe *v.* Hileman, 2 Ill. 323, holding that the court had no authority to direct payment in notes of a state bank, but that a sale under such an order was not void but merely voidable.

41. Brewer *v.* Vanarsdale, 6 Dana (Ky.) 204.

Receipt of Confederate currency see the following cases:

Alabama.— Stewart *v.* Lee, 56 Ala. 53; Hudgens *v.* Cameron, 50 Ala. 379; Clark *v.* Bernstein, 49 Ala. 596; Kitchell *v.* Jackson, 44 Ala. 302.

Louisiana.— Brown *v.* Jacobs, 24 La. Ann. 526; Martin *v.* Singleton, 23 La. Ann. 551.

South Carolina.— De Saussure *v.* McClenaghan, 6 S. C. 83.

Texas.— Trammel *v.* Philleo, 33 Tex. 395.

Virginia.— Poague *v.* Greenlee, 22 Gratt. 724.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1509.

Waiver of objection.— If currency is received by distributees at its nominal value with full knowledge of the transaction, they will not be permitted to disavow their deliberate act after a period of several years. Brewer *v.* Vanarsdale, 6 Dana (Ky.) 204.

42. McKay *v.* Flowers, 44 N. C. 211. Where, however, a person buys land at an administrator's sale, pays a part of the price in cash, and delivers to the administrator a note for the balance, under an agreement that the note will be paid upon demand if it becomes necessary for the administrator to have the cash for the purpose of distribution, such note, in a proceeding to marshal the assets of the estate, may be regarded as cash in the administrator's hands, so far, at least, as to warrant a judgment against the maker for such portion of the amount of the note as may be requisite for the administration of the estate. Bellerby *v.* Thomas, 105 Ga. 477, 30 S. E. 425.

43. Purchase by encumbrancer see *infra*, XII, O, 6.

Terms and conditions of sale when property encumbered see *supra*, XII, L, 3.

44. Crosson's Estate, 6 Pa. Co. Ct. 414, 22 Wkly. Notes Cas. (Pa.) 226 [*affirmed* in 125 Pa. St. 380, 17 Atl. 423], holding, however, that where the auctioneer announced that the property was subject to a mortgage, that the amount due thereon was unascertained, and that to enable buyers to bid intelligently and know exactly what they were paying for the property, he would cry the sale as if there were no such mortgage, the purchaser might deduct the balance due on the mortgage from the amount of his bid.

Payment in discharge of dower.— Where lands are sold to pay debts of the estate, and the purchaser, pursuant to an agreement

5. Purchase by Heir, Distributee, Etc. If a purchaser at the sale is a beneficiary of the estate, deduction or offset as to the price may sometimes be conveniently made;[45] but retention of the price is not permissible as against the immediate right of creditors to be paid from the net proceeds of the sale.[46] Subject to some exceptions, a distributee purchasing at the administrator's sale cannot enjoin the collection of his bonds for the purchase-money until his distributive share is determined and set off against the bond.[47]

6. Purchase by Person Holding Claim Against Estate or Representative. A simple contract creditor of an estate cannot as a general rule deduct the amount of his claim from the amount of the price due from him,[48] and the representative cannot ordinarily make a binding agreement with the creditor to allow a credit on his claim in payment of the price.[49] A set-off in such case is said to be open to the objection of lack of mutuality,[50] and to the further and more serious objection that in this way the person to whom the set-off was allowed would obtain an

with the widow, pays her a sum in discharge of dower, he is not entitled to abate his bid to the extent of the payment. Weakley *v.* Gurley, 60 Ala. 399.

In Louisiana the purchaser is entitled to retain in his hands out of the price the amount required to satisfy privileged debts in special hypothecation to which the property was sold subject. See Leverich's Succession, 47 La. Ann. 1665, 18 So. 700; Triche's Succession, 29 La. Ann. 384; Bradford *v.* Dortch, 13 La. 79. Deduction of the amount of a tax lien from the amount of the purchase-money is also allowable. Moore *v.* Moore, 22 La. 226.

45. Kenley *v.* Bryan, 110 Ill. 652; Mason *v.* Bemiss, 38 La. Ann. 935; Markle's Estate, 5 Pa. Dist. 47, 17 Pa. Co. Ct. 337.

The father of minor legatees cannot, on purchasing, retain the price because entitled to receive the legacy for them and to enjoy the usufruct thereof during marriage. His debt to the estate is personal, and his claim to the legacy *in autre droit*. Gorton *v.* Gorton, 12 La. 476.

The husband of decedent's daughter, not being an heir of decedent, must, when he has contracted with the administrator for purchases, pay the debt he contracted for whether or not there are sufficient funds in the administrator's hands to pay the debts of the deceased. Fluker *v.* Kent, 27 La. Ann. 37.

46. Harris *v.* Harris, 12 La. Ann. 10; Patrick *v.* Bryan, 6 La. Ann. 699, holding that, if heirs purchase so large a portion of an estate that there is not enough due from other persons to pay the debts, they can be forced by the administrator to pay such portions as are over their estimated shares of the succession. See also Mason *v.* Bemiss, 38 La. Ann. 935, 938.

47. Hickerson *v.* Helm, 2 Rob. (Va.) 628.

In Louisiana, under Civ. Code, § 2625, heirs may purchase property of the succession to the amount of their proportion, and are not obliged to pay the purchase-money until a liquidation is had, by which it is ascertained what balance there is in their favor or against them. See Fulker *v.* Kent, 27 La. Ann. 37; Mavor *v.* Armant, 14 La. Ann. 181. Although the purchasing heir be not obliged to pay the surplus of the price above the portion coming to him until the estate is partitioned, he must, even from a period anterior to the partition, pay interest when stipulated as part of the price; otherwise his position would be more favorable than that of the rest. Marionneaux *v.* Marionneaux, 12 Rob. (La.) 666. See also Aguillard's Succession, 13 La. Ann. 97, holding that heirs are chargeable with the interest stipulated in their notes from maturity until the day of the formation of the mass of the estate for partition.

48. *Alabama.*— Walker *v.* Tyson, 52 Ala. 593.

Arkansas.—Bishop *v.* Dillard, 49 Ark. 285, 5 S. W. 341.

Illinois.— See Harding *v.* Shepard, 107 Ill. 264.

Louisiana.— Pendarvis *v.* Wall, 14 La. Ann. 449; Green *v.* Davis, 7 Mart. N. S. 238. *Contra,* Johns *v.* Race, 48 La. Ann. 1170, 20 So. 660.

Maryland.— Schwallenberg *v.* Jennings, 43 Md. 554.

Mississippi.— Cotton *v.* Parker, Sm. & M. Ch. 191, holding that the purchaser cannot buy up claims against the estate after it is declared insolvent and offset them against the demand of the representative for the purchase-money. See also Mellen *v.* Boarman, 13 Sm. & M. 100.

New Mexico.— Albuquerque First Nat. Bank *v.* Lee, 8 N. M. 589, 45 Pac. 1114, holding that a provision in the decree of sale giving the creditor a right to bid upon the property and pay that bid in the amount of the claim which the estate owes him is error.

New York.— Thompson *v.* Whitmarsh, 100 N. Y. 35, 2 N. E. 273.

Texas.— Hall *v.* Hall, 11 Tex. 526.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1512.

49. Bishop *v.* Dillard, 49 Ark. 285, 5 S. W. 341; Rindge *v.* Oliphint, 62 Tex. 682. But see May *v.* Taylor, 27 Tex. 125.

50. See Moody *v.* Shaw, 85 Ind. 88; Dayhuff *v.* Dayhuff, 27 Ind. 158; Mellen *v.* Boarman, 13 Sm. & M. (Miss.) 100. But see Blanchard *v.* Lockett, 4 Rob. (La.) 370.

advantage over other creditors of the estate.[51] But under circumstances where the purchasing creditor would obtain no preference a set-off is sometimes allowed[52] and an agreement therefor enforced.[53] A mortgagee or other lienor who becomes purchaser at the sale and is entitled as lienor to receive part of the proceeds of the sale may set off the amount of his lien against the amount of his bid.[54] A purchaser cannot set off an amount paid by him for taxes which have accrued subsequent to the death of decedent and prior to the sale, for the representative is not obliged to pay taxes on land accruing after decedent's death, and the purchaser takes the land subject to any lien thereon for taxes due.[55] The right of set-off or of retaining out of the purchase-price, where it exists, is subject to the duty of paying expenses, commissions, or "legal costs."[56] A discharge of the personal debt of the representative to the purchaser in consideration for the property is unauthorized,[57] and the sale may be set aside or the purchaser held liable for the purchase-money,[58] but if with full knowledge of the facts the persons interested in the estate elect to charge the administrator with the amount in his account, they cannot afterward revoke their election and proceed in equity against the purchaser.[59]

7. Security For Purchase-Money — a. In General. The requisites as to the

51. *Maryland.*—Schwallenberg *v.* Jennings, 43 Md. 554.

New Mexico.— Albuquerque First Nat. Bank *v.* Lee, 8 N. M. 589, 45 Pac. 1114.

North Carolina.— Pate *v.* Oliver, 104 N. C. 458, 10 S. E. 709. See also Brandon *v.* Allison, 66 N. C. 532.

Pennsylvania.— Singerly *v.* Swain, 33 Pa. St. 102, 75 Am. Dec. 581.

Texas.— Hall *v.* Hall, 11 Tex. 526.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1512.

52. Dickinson *v.* Chism, 2 T. B. Mon. (Ky.) 144. See also Ellett *v.* Reid, 25 W. Va. 550.

If the purchaser is the sole creditor of the estate a set-off may be allowed. *In re* Albert, 80 Mo. App. 557; Hall *v.* Hall, 11 Tex. 526. See also Brandon *v.* Allison, 66 N. C. 532.

If there be no debt of superior or equal dignity to that offered in set-off, a set-off is proper. Ransom *v.* McClees, 64 N. C. 17. See also Dickinson *v.* Chism, 2 T. B. Mon (Ky.) 144.

53. Norton *v.* Edwards, 66 N. C. 367 [*distinguishing* Brandon *v.* Allison, 66 N. C. 532].

54. Bellow's Succession, 108 La. 477, 32 So. 618; Tertrou *v.* Durand, 30 La. Ann. 1108; Irwin *v.* Guthrie, 198 Pa. St. 267, 47 Atl. 992; Claridge *v.* Lavenburg, 7 Tex. Civ. App. 155, 26 S. W. 324. And see *In re* Turner, 128 Cal. 388, 392, 60 Pac. 967; McDaniel *v.* Hooks, 30 Ga. 981 (agreement to allow such set-off); Singerly *v.* Swain, 33 Pa. St. 102, 75 Am. Dec. 581.

The holder of a lien claim for whose benefit the land is sold may of course retain. Bacon *v.* McNutt, 3 Mart. N. S. (La.) 129; Huddleston *v.* Kempner, (Tex. Civ. App. 1894) 28 S. W. 236.

Where this right is given to the lienor by statute it is necessary for him to pursue his right according to the terms of the statute. *In re* Turner, 128 Cal. 388, 60 Pac. 967; Singerly *v.* Swain, 33 Pa. St. 102, 75 Am. Dec. 581.

In Louisiana the mortgage creditor who purchases at a succession sale of property on which a mortgage is a lien may retain the amount of his mortgage out of the price on executing a bond with security in favor of the representative for a sum to be fixed by court, conditioned that he will pay such sums as may be ascertained on the settlement of the succession to be payable in preference to him out of the proceeds of the property so purchased by him up to the amount of his bid. Bellow's Succession, 108 La. 477, 32 So. 618; Tertrou *v.* Durand, 30 La. Ann. 1108.

Vendor's lien.— Under a statute by which the purchaser of land of a decedent which has not been paid for takes subject to the vendor's lien for the purchase-money, the vendor himself, upon becoming a purchaser, stands upon the same footing as a stranger, and must pay the amount of his bid without deducting his claim; for, as he purchased at sale only the right, title, and interest of the decedent, his bid for the land was in effect the amount of his lien as well as the amount of his bid. Ross *v.* Julian, 70 Mo. 209.

55. Henderson *v.* Whitinger, 56 Ind. 131.

The mere promise by the representative to allow the purchaser a set-off for taxes paid by him at the request of the representative is not sufficient to bind the estate, in the absence of facts which show a right to charge the estate or that a consideration for the promise arose prior to decedent's death. Moody *v.* Shaw, 85 Ind. 88.

56. Becker *v.* Espenshade, 8 Pa. Dist. 525 (holding that where land is sold to a lien creditor for less than the amount of his lien, the "legal costs" which he must pay in cash include the administrator's commission on the purchase-money, and that two and one-half per cent is the proper rate for the commission); Claridge *v.* Lavenburg, 7 Tex. Civ. App. 155, 26 S. W. 324.

57. Nunn *v.* Norris, 58 Ala. 202; Chandler *v.* Schoonover, 14 Ind. 324.

58. Chandler *v.* Schoonover, 14 Ind. 324.

59. Nunn *v.* Norris, 58 Ala. 202.

security which should be given by the purchaser who does not pay cash vary in different jurisdictions.[60] The court cannot authorize, nor can the representative demand, security of a different character than that provided for by statute.[61] If the sureties on notes offered have all the qualifications required by statute, the representative cannot arbitrarily reject the notes, but if his decision as to the sufficiency of the sureties was made in good faith and with due caution it should stand.[62] An insertion of a condition in the bond that no other property than that purchased shall be levied on for the payment of the bond is beyond the power of an administrator who has been directed to sell real estate and to secure the purchase-money by a bond and mortgage.[63] The interest of the heirs in a recognizance given for the price is several and not joint, and the liability of the recognizors is to each of the heirs severally and not jointly.[64] A surety is not discharged for irregularities in the sale if they did not render the same an absolute nullity and have to all appearances been cured;[65] nor will it avail him as a defense to an action on a note given for the price that he became surety in the expectation that the administrator would perform his duty to the estate by also taking mortgage security required by law and by the order of sale.[66] Where a bond and mortgage given for the price are assigned to a creditor of the estate in satisfaction of his claim, they are not extinguished by operation of law, but the assignee may enforce the mortgage.[67]

b. Vendor's Lien. Both by the equitable doctrine[68] and by statute in some states[69] land sold under a valid[70] order of court passes to the purchaser subject to a vendor's lien. The taking of security for the purchase-price does not, in the absence of agreement to that end, affect the right to enforce the lien against the land.[71] The representative has no authority to release the vendor's lien.[72] A person not the purchaser who pays the purchase-price may be subrogated to the lien.[73]

60. See State *v.* Baskin, 1 Strobh. (S. C.) 35 (holding that the bond contemplated by the South Carolina act of 1839 to be given to the ordinary by an executor who purchases at his own sale is not a money bond but a bond conditioned to account to the parties interested for the purchase-money and interest when the property sold for its value or, if it is sold for less, to account for its actual value); Hall *v.* Hall, 11 Tex. 526 (holding that the taking of mortgage security for the price is not authorized by Hartley Dig. Tex. arts. 1016, 1023, 1039).

The giving of separate purchase bonds by two purchasers when the land was sold as a whole and the fact that the commissioner making the sale allowed the purchasers to divide the land does not invalidate the sale if each bond was proportioned to the value of the obligor's share of the land. Rodgers *v.* Rodgers, 31 S. W. 139, 17 Ky. L. Rep. 358.

61. Howison *v.* Oakley, 118 Ala. 215, 23 So. 810.

62. Hamilton *v.* Bonham, 20 Ohio Cir. Ct. 252.

63. Sage *v.* Nock, 4 Pa. L. J. Rep. 518.

64. Phillips *v.* Cannon, 4 Del. Ch. 58.

65. Quinn's Succession, 34 La. Ann. 878.

66. Wornell *v.* Williams, 19 Tex. 180.

67. Clowney *v.* Cathcart, 2 S. C. 395.

68. *Alabama.*— Strange *v.* Keenan, 8 Ala. 816.

Georgia.— See Cook *v.* Cook, 67 Ga. 381; McClure *v.* Williams, 58 Ga. 494, sale before vendor's lien abolished.

Louisiana.— Scott *v.* Scott, 42 La. Ann. 766, 7 So. 716; Jones *v.* Read, 1 La. Ann. 200.

Missouri.— Thomas *v.* Bridges, 73 Mo. 530.

North Carolina.— Mast *v.* Raper, 81 N. C. 330.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1514.

Retaining title as security.— Where it is agreed that the title of personalty shall remain in the administrator as security for what might be due to him from the purchaser, the administrator may enforce his right as against an execution of a creditor of the purchaser. Napier *v.* Wightman, Speers Eq. (S. C.) 357.

69. Gardner *v.* Kelso, 80 Ala. 497, 2 So. 680; Hise *v.* Geiger, 7 Watts & S. (Pa.) 273. See also Elliott *v.* Connell, 5 Sm. & M. (Miss.) 91.

70. **A sale under a void order can give rise to no lien** for the purchase-money. Hamilton *v.* Lockhart, 41 Miss. 460.

71. Strange *v.* Keenan, 8 Ala. 816; Hoggatt *v.* Wade, 10 Sm. & M. (Miss.) 143; Hise *v.* Geiger, 7 Watts & S. (Pa.) 273. See also Bogart *v.* Bell, 112 Ala. 412, 20 So. 511, holding that the fact that the heirs charged the administrator who was the purchaser with the price did not constitute an election to rely on the liability of his sureties on the bond for the price, so as to prevent them from enforcing payment out of the land.

72. Wood *v.* Sullens, 44 Ala. 686. See also Elliott *v.* Connell, 5 Sm. & M. (Miss.) 91.

73. Rather *v.* Young, 56 Ala. 94 (where the administrator charged himself with the

The lien may be enforced against a voluntary transferee[74] or against a purchaser with notice.[75] Where, under the statute, a conveyance cannot be ordered until the whole of the purchase-money has been paid, a decree confirming the sale and directing a conveyance extinguishes the lien or at least casts upon the heirs seeking to enforce a vendor's lien the burden of showing non-payment.[76] If the lien be once extinguished, it cannot be revived by a subsequent transaction between the parties.[77] The purchaser's vendee who buys a part of the property sold to the purchaser under order of court is entitled to have his land exonerated to the extent of the value of the land yet remaining in his vendor,[78] and if the heirs release the first purchaser they waive the lien to that extent against the land of the purchaser's vendee.[79] A bill to enforce a vendor's lien filed after a lapse of nine years cannot be maintained.[80]

8. Rights and Liabilities on Failure or Refusal of Bidder to Complete Purchase. As an incident to its right to order the sale of real property, the court may enforce the remedies provided by law against a bidder who refuses to comply with his bid,[81] and may compel the purchaser to perform his contract.[82] The purchaser, however, cannot be compelled to carry out his contract if the decree[83] or proceedings thereon[84] are insufficient to transfer a good title or if

unpaid purchase-money and was allowed to enforce the vendor's lien on the land sold); Thomas *v.* Bridges, 73 Mo. 530 (where the administrator was held liable for a credit allowed to the purchaser and enforced the lien to the amount of the credit against the land); Mast *v.* Raper, 81 N. C. 330 (holding a surety on the purchaser's note subrogated to the right of enforcement of the lien against the land). See also Stabler *v.* Spencer, 64 Ala. 496, where the administrator who was one of the heirs took the purchaser's unpaid note as a part of his distributive share and was subrogated to the lien.

74. Thomas *v.* Bridges, 73 Mo. 530.

75. Strange *v.* Keenan, 8 Ala. 816.

What is sufficient notice.— A deed of the land by the administrator which shows that the land belonged to the estate, that he sold under order of court, and that part of the purchase-money had not become due is sufficient to charge the grantee of the purchaser with notice of the lien for the purchase-money. Hoggatt *v.* Wade, 10 Sm. & M. (Miss.) 143. A mortgage thus created by statute is itself constructive notice of its existence. Miller *v.* Helm, 2 Sm. & M. (Miss.) 687.

76. Wood *v.* Stanley, 78 Ala. 348; Sims *v.* Sampey, 64 Ala. 230.

77. Sims *v.* Sampey, 64 Ala. 230.

78. Dugger *v.* Tayloe, 60 Ala. 504.

79. Dugger *v.* Tayloe, 60 Ala. 504.

80. Wood *v.* Stanley, 78 Ala. 348.

81. Bobb's Succession, 27 La. Ann. 344. See also Lewis *v.* Casenave, 6 La. 437.

82. Mannessier's Succession, 44 La. Ann. 803, 11 So. 139; Raguet *v.* Barron, 6 Mart. N. S. (La.) 659; Mount *v.* Brown, 33 Miss. 566, 69 Am. Dec. 362; McLaurin *v.* Parker, 24 Miss. 509; Maul *v.* Hellman, 39 Nebr. 322, 58 N. W. 112. See also Stebbins *v.* Field, 43 Mich. 333, 5 N. W. 394.

Rule to show cause is a proper mode of proceeding to compel the purchaser to complete his purchase. Haggerty's Succession, 28 La. Ann. 37.

If another bidder is substituted upon the refusal of the first bidder to comply with his bid, the second bidder can be compelled to comply with his contract. Halleck *v.* Guy, 9 Cal. 181, 70 Am. Dec. 643.

83. Tilton *v.* Pearson, 67 Ill. App. 372. See also Michel's Succession, 20 La. Ann. 233, holding that a sale of property of a succession made after the order authorizing the sale was suspended by a new order is a nullity and therefore the purchaser is not obliged to carry out the contract.

The rightfulness of the recusation of a judge of the court from which the order of sale issued cannot be put at issue in a rule to compel the purchaser at a succession sale to comply with his bid. Lacroix's Succession, 30 La. Ann. 924.

84. Weber's Succession, 16 La. Ann. 420, where, however, the court said that it was a different thing if the purchaser complied voluntarily with the terms of the sale and went into possession. See, however, Halleck *v.* Guy, 9 Cal. 181, 70 Am. Dec. 643, holding that the purchaser cannot refuse to pay on the ground that the notice of sale stated a good title and that the title was not good, for the sale was stated in the notice as a probate sale and the purchaser was bound to examine the title himself.

Mere irregularities in the sale do not create a cloud upon the title and will not relieve the purchaser from his bid, for he is protected by the decree under which the sale was made and by his right to restitution in case of loss or injury. Byrne's Succession, 38 La. Ann. 518.

The purchaser cannot object to the title because the widow does not sign the act of sale or because the auctioneer and notary refuse to furnish the title for examination. Merrick *v.* North, 28 La. Ann. 878.

Proof showing non-existence of alleged cloud on title.— Where a purchaser of real property at a succession sale refused to accept the title on the ground that one A had an undivided interest in the land by in-

there have been misrepresentations as to the terms of sale.[85] Where the purchaser fails to comply with the terms of his contract, the representative may treat the property bid off by such purchaser as unsold,[86] or if the highest bidder refuses to comply with his bid, it is not wrong to allow the sale to be returned as made to the next highest bidder.[87] Whether a loss by destruction of the property occurring between the date of sale and the confirmation thereof is to be borne by the purchaser or the estate depends upon the view taken by the courts of the particular jurisdiction as to the time when the purchase is complete.[88] If the purchaser refuses to comply with his bid on the ground that the property is subject to an encumbrance he cannot, after the encumbrance has been discharged, compel a conveyance upon a tender of the amount of his bid.[89]

9. Actions to Recover Purchase-Money[90] — a. Right of Action. The fact that a statute provides for a resale in case the successful bidder defaults does not preclude a right of action for the amount of the bid, for the statutory remedy is merely cumulative.[91] The action may be brought before the expiration of the time of credit allowed by the terms of the sale if the purchaser has failed to comply with the terms.[92] Under statutes permitting the assertion by cross petition of any claim against persons not parties arising out of the same subject-matter, it appears that a defendant in an action by the administrator for the purchase-money may litigate a cause of action between himself and the administrator in his individual capacity.[93]

heritance from a minor who had owned the land in common with deceased, but the proof showed that the alleged undivided interest was transferred to the deceased by the minor's parent during her lifetime, and that consequently no title by inheritance passed at her death, it was held that the purchaser was properly required to accept the title. Mannessier's Succession, 44 La. Ann. 803, 11 So. 139.

85. Kingsbery *v.* Love, 95 Ga. 543, 22 S. E. 617, holding that, if the purchaser has been misled by the administrator to believe that his bid would be for the land free from encumbrances, he cannot be forced to complete his purchase and pay for the land subject to encumbrances.

Failure of the administrator to comply with an agreement made with the purchaser to apply the purchase-money to the payment of encumbrances does not justify the purchaser in refusing to comply with his bid, where the order of sale provided that the land should be sold subject to encumbrances. Maul *v.* Hellman, 39 Nebr. 322, 58 N. W. 112.

If the advertised terms of the sale are varied by an announcement made on the day of the sale, it must be shown by clear and convincing evidence that the purchaser had actual knowledge of the altered terms before he made his bid, if he is to be held liable for the deficiency on resale. Daniel *v.* Jackson, 53 Ga. 87.

86. Meek *v.* Beaver, 25 Ind. App. 576, 58 N. E. 730.

87. Stiver's Appeal, 56 Pa. St. 9.

88. See Thomas *v.* Caldwell, 136 Ala. 518, 34 So. 949 (holding that since the purchaser is to be regarded as the owner of the land from the date of purchase, he must bear the loss, if any occurs, during the time necessarily intervening between the sale and the confirmation); Demmy's Appeal, 43 Pa. St. 155 [*following Ex p.* Minor, 11 Ves. Jr. 559, 9 Rev. Rep. 247, 32 Eng. Reprint 1205], (holding that, where confirmation of the sale was delayed until a fire had occurred, the widow and heirs, through whose agency and at whose instance the delay had taken place, could not thereafter insist that the sale be confirmed and the purchaser compelled to take the property).

89. Sebastian *v.* Johnson, 72 Ill. 282, 22 Am. Rep. 144.

90. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d, (VIII), (C).
Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, h.

91. Dawson *v.* Miller, 20 Tex. 171, 70 Am. Dec. 380.

92. Mount *v.* Brown, 33 Miss. 566, 69 Am. Dec. 362 (the court saying that the action was not one to recover upon the contract of purchase, but for a failure of duty to comply with the terms of the contract and therefore the right of action became complete as soon as defendant refused to do his duty); Peebles *v.* Overton, 6 N. C. 384 (holding that where the terms of the sale were twelve months' credit by giving bond with approved security and the purchaser refused to pay the money or give a bond a right of action arose immediately). But *compare* Kibby *v.* Chitwood, 2 T. B. Mon. (Ky.) 104, holding that assumpsit will not lie in case the purchaser fails to pay cash or put up his bond, although action for tort might.

93. Phillips *v.* Keifer, 2 Metc. (Ky.) 478, holding that under such statute the purchaser may proceed by cross petition against one of the administrators who claims part of the property as his own and denies that the purchaser has acquired any right to it at his purchase in order to recover of the

b. Jurisdiction. If a stranger to the succession withholds the price of property purchased at the sale, an action for the price can be brought only before a court of ordinary jurisdiction;[94] but if a legatee and universal heir retains the price of property adjudicated to him until his share shall be fixed by the partition, his rights must be settled contradictorily with the other heirs under the direction of the probate court whose decree must fix the portion coming to each.[95] When the representative is before the court to which he has reported a sale and by which the sale has been confirmed, and the homologation of his accounts is pending, the parish court has no jurisdiction at the suit of creditors of the succession to compel the purchaser of the property sold to pay the adjudicated price or to decree the property as still belonging to the succession.[96] If the purchaser attempts to set off a judgment which was originally entered in another county and which was transferred to the county where the sale was made, the issue, whether the consideration for the judgment has failed or not, can be tried only in the court having jurisdiction of the sale.[97]

c. Defenses.[98] That the sale was void for want of authority and that consequently the consideration for the purchase had failed is a good defense to an action for the purchase-money,[99] but the purchaser is estopped from showing the illegality of a sale so long as he retains the property purchased.[1] The purchaser cannot repudiate his bid because of a defective title or no title at all in the decedent when there is no fraud or misrepresentation by the administrator;[2] and it is even held that fraudulent misrepresentations by an administrator as to the title or the encumbrances upon the land sold are no defense to his suit for the purchase-money.[3] To an action for the purchase-price of property purchased at an administrator's sale the plea of *ne unques administrator* is bad, for the making of the contract of sale admitted the representative capacity of plaintiff.[4] It is no defense to an action for the purchase-money that the representative was interested in the purchase and the sale is therefore voidable at the instance of the heirs and creditors who may have been injured thereby.[5] An agreement by

administrator in his individual character for an illegal conversion of the property.

94. See Carraby's Succession, 3 Rob. (La.) 349.

95. Carraby's Succession, 3 Rob. (La.) 349.

96. Swan *v.* Gayle, 29 La. Ann. 574.

97. Gordon's Appeal, 93 Pa. St. 361.

98. Sale of realty under testamentary authority see *supra*, VIII, O, 9, d, (VIII), (C), (2).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, h.

99. Beene *v.* Collenberger, 38 Ala. 647; Laughman *v.* Thompson, 6 Sm. & M. (Miss.) 259; Campbell *v.* Brown, 6 How. (Miss.) 230; Vance *v.* Davenport, 11 Rich. (S. C.) 517. See also Gwin *v.* McCaroll, 1 Sm. & M. (Miss.) 151. *Compare* Blanchard *v.* Maureau, 3 La. Ann. 128, holding that the invalidity of a probate sale of the property of a succession, resulting from the non-existence of any order therefor in the records of the parish where it was made, is one of which the heirs alone can avail themselves and is no defense to an action against the purchaser for the purchase-money.

If the sale has been validated through ratification, the purchaser when sued for the price cannot urge the danger of eviction because of informality. Stephenson *v.* Addison, 17 La. 454.

1. Harbin *v.* Levy, 6 Ala. 399.

2. Halleck *v.* Guy, 9 Cal. 181, 70 Am. Dec. 643; Keen *v.* McAfee, 116 Ga. 728, 42 S. E. 1022; Colbert *v.* Moore, 64 Ga. 502. And see *infra*, XII, T, 3, b.

The existence of an encumbrance does not constitute a defense to a suit for purchase-money. The purchaser can demand nothing more than a bond of indemnity against future disturbance. Jones *v.* Read, 1 La. Ann. 200.

3. Riley *v.* Kepler, 94 Ind. 308. See also Culli *v.* House, 133 Ala. 304, 33 So. 354, holding that misrepresentations by the administrator as to the quantity of land to be sold are no defense to an action against the bidder for damages for failure to keep his bid good.

The making of false representations is the representative's individual tort for which he is individually liable. Riley *v.* Kepler, 94 Ind. 308.

If the purchaser was not misled by any false or fraudulent representations they constitute no defense in his behalf. McLaurin *v.* Parker, 24 Miss. 509.

4. Harbin *v.* Levi, 6 Ala. 399.

5. McAnulty *v.* Hodges, 33 Miss. 579. See also Bagby *v.* Hudson, 11 Ky. L. Rep. 581, holding that, where property was purchased by a third person for one of the executors to whom it was delivered, the purchaser is liable on his note for the purchase-price, the other creditor not knowing of or consenting

the commissioners authorized to sell the land or by the representative, by which only an individual obligation is incurred, cannot be urged in defense of an action for the purchase-money.[6] If the purchaser objects to a deed because not in the proper form he should make the objection at the time the deed is tendered. It cannot be raised in defense to an action for deficiency on resale for failure to pay purchase-money.[7] It has been held that legatees who purchase, but do not comply with the terms of sale, cannot afterward plead the statute of limitations when called upon for payment, although they may have had four years' peaceable possession, because the decree for sale is substantially a judgment against the purchaser for the purchase-money.[8]

d. Parties. An action for damages for default of a bidder for land sold under order of court for partition among heirs may be properly brought in the name of the heirs, inasmuch as the legal title is in them and they are entitled to the proceeds of the sale and also to anything recovered for breach of the contract.[9] But an unpaid legatee who is not the administrator or legal representative of decedent cannot collect notes given for real property of the estate sold under order of court by foreclosing the lien for the purchase-money.[10] The administrator *de bonis non* has the right to enforce the payment of the purchase-money for property sold by his predecessor,[11] unless there has been a rescission or resale by the order of court,[12] for his predecessor cannot maintain such an action after removal.[13] In a suit to obtain the unpaid purchase-price out of the land sold, the heirs have been held necessary parties in order that the court may convey a good title to the purchaser under its decree.[14] If to an action for the price of land sold the defense is that the sale was invalid and the title remained in the heirs the heirs must be made parties.[15] A mortgagee entitled to share in the proceeds of property sold at probate sale and not paid for may by an hypothecary action enforce his claim against the purchaser, when the administrator, although notified of the proceeding, does not object and no creditor claims a preference on the price.[16] To a suit for the purchase-price against the successful bidder at a resale, the defaulting bidder at the first sale is not a necessary party, although he may be a proper party.[17]

e. Pleadings. In some jurisdictions it is held that in a suit to recover the purchase-money on an administrator's sale the complaint must allege that the sale was confirmed, for until confirmed it is not complete or binding and confers no right on the purchaser.[18] In an action for damages against the defaulting bidder

to the arrangement. That a purchase by the representative is only voidable see *supra*, XII, M, 4, c.

6. Jennings *v.* Jenkins, 9 Ala. 285 (holding that if commissioners authorized by the court to sell land make sale of it in that capacity and execute their individual bonds, with condition to make title when the purchase-money is paid, the execution of such a bond is a collateral matter, which is binding, if at all, upon them individually; and it is therefore no defense in an action upon the notes for the purchase-money that upon a tender of the money they refused to make a title); Dees *v.* Tildon, 2 La. Ann. 412 (holding that if the purchaser at a sale *per aversionem* is sued for the price, there being minor heirs, he cannot prove an agreement with the representative and the heirs of age, deducting from the price a certain sum for an alleged deficiency in the quantity; for such an agreement would be an obligation personal to the representative and the adult heirs).

7. Stryker *v.* Vanderbilt, 27 N. J. L. 68.

8. Coburn *v.* Magwood, Riley Eq. (S. C.) 187.

9. Howison *v.* Oakley, 118 Ala. 215, 23 So. 810.

10. Crane *v.* Warfield, (Ark. 1891) 15 S. W. 609.

11. Cruikshank *v.* Luttrell, 67 Ala. 318; Harbin *v.* Levi, 6 Ala. 399; Chandler *v.* Schoonover, 14 Ind. 324.

12. Cruikshank *v.* Luttrell, 67 Ala. 318.

13. Harbin *v.* Levi, 6 Ala. 399.

14. McDonald *v.* McMahon, 66 Ala. 115; Wallace *v.* Nichols, 56 Ala. 321. *Contra*, Cozzens *v.* Farnan, 30 Ohio St. 491, 27 Am. Rep. 470.

15. Claiborne *v.* Yoeman, 15 Tex. 44.

16. King *v.* Hicky, 2 La. Ann. 367.

17. Taylor *v.* Hosick, 13 Kan. 518.

18. Bell *v.* Green, 38 Ark. 78. See also Howison *v.* Oakley, 118 Ala. 215, 242, 23 So. 810, where the court said: "The court was the real vendor, and the administrator was its mere agent to conduct the negotiations, whose acts were subject to confirmation by

it is not necessary to aver that there was a resale.[19] In an action for loss due to a default of the bidder and the necessary resale it is not necessary to allege that the first sale was fairly conducted; for fraud, collusion, or unfairness in the sale is a matter of defense to be specially pleaded.[20] A plea of fraudulent representations by the representative is defective if it does not aver that the representations, however false and fraudulent, were relied on in the purchase by defendant and actually deceived him.[21] If the defense is offered that the sale was without authority, the plea should allege that the sale by the executors was not authorized by either an order of court or the provisions of the will.[22] A plea in avoidance of liability for the purchase-money which alleges that the administrator has refused to let the purchaser into possession or to execute a deed has been held defective in not setting out the contract under which defendant purchased and how that has been violated by plaintiff.[23] The damages against a defaulting bidder being composed of two distinct items, namely, (1) the difference between the bid at the first sale and the amount paid at the resale, and (2) the necessary expenses incurred by reason of the resale, a complaint claiming both items is not demurrable because it fails to show that plaintiff is entitled to recover one of them if it contains sufficient allegations to justify a recovery of the other.[24]

f. Presumptions and Proof. It has been held that there is no presumption in an action for the purchase-price that the sale has been confirmed.[25] As against the heirs at law seeking to enforce the vendor's lien against the administrator who purchased, a court of equity will not presume payment of the debt by the administrator to himself, although he reported the sale to the court and it was confirmed and he afterward charged himself with the amount in an annual settlement but in fact never paid it.[26]

g. Execution and Enforcement of Judgment. If an administrator relies on the bond and personal security of a distributee for purchases at a sale of his intestate's personalty and takes no assignment of or lien upon her share of the land, he is not entitled to any higher rights as to that interest than any other creditor; and if suit has been prosecuted, and a judgment obtained on the bond, a prior judgment against the distributee will be entitled to be first satisfied out of such interest.[27]

10. Resale and Recovery of Difference in Price.[28] The probate court has authority to order a new sale if the purchaser at the first sale fails to comply with his bid.[29] If a resale be necessary on account of the wrongful default of the successful bidder, it will be at the defaulting bidder's risk and he will be liable for any loss resulting from the difference of the prices in the two sales,[30]

the court. Until the bid was accepted by the court, the purchase was incomplete, the bid was a mere proposition to purchase, and did not, therefore, amount to a contract on which any liability could be incurred." And see also Cruikshank *v.* Luttrell, 67 Ala. 318; Stout *v.* Phillippi Mfg., etc., Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843.

19. Howison *v.* Oakley, 118 Ala. 215, 23 So. 810.

20. Howison *v.* Oakley, 118 Ala. 215, 23 So. 810.

21. Wooldridge *v.* Womack, 1 Tex. App. Civ. Cas. § 338.

22. Keen *v.* McAfee, 116 Ga. 728, 42 S. E. 1022.

23. Matthews *v.* Evans, 9 Ala. 643.

24. Howison *v.* Oakley, 118 Ala. 215, 23 So. 810.

How defect taken advantage of.— The defect should be taken advantage of by motion to strike out, by objection to the evidence by which it is sought to prove such damages, or by request for appropriate instructions to the jury. Howison *v.* Oakley, 118 Ala. 215, 23 So. 810.

25. Walker *v.* Jessup, 43 Ark. 163; Bell *v.* Green, 38 Ark. 78.

26. Knight *v.* Blanton, 51 Ala. 333.

27. Pendergrass *v.* Pendergrass, 26 S. C. 19, 1 S. E. 45.

28. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d, (VIII), (D).

29. Landry *v.* Connely, 4 Rob. (La.) 127 (holding that the court could either compel the bidder to comply with his bid, or order a resale *à la folle enchère*); Greffet *v.* Willman, 114 Mo. 106, 21 S. W. 459. But see Bray *v.* Bray, 16 La. 352.

30. *Alabama.*— Hutton *v.* Williams, 35 Ala. 503, 76 Am. Dec. 297; Lamkin *v.* Crawford, 8 Ala. 153.

Georgia.— Sproull *v.* Seay, 76 Ga. 27; Alexander *v.* Herring, 54 Ga. 200.

even although the statute which provides for a resale in case of such default omits to prescribe that the resale shall be at the defaulting bidder's risk.[31] He is also liable for the expenses of the second sale.[32] It is not necessary that the first sale should have been confirmed in order to charge the defaulting purchaser with the loss due to his default,[33] and in some jurisdictions no new order for the resale is necessary.[34] But the successful bidder at the first sale must be put in default before any liability for deficiency on the resale can arise.[35] To hold the defaulting bidder liable for the deficiency, it is necessary that the second sale should be made as soon as practicable,[36] or at least within a reasonable time.[37] If the court orders a resale on account of fraud, the order may be without notice to the fraudulent purchaser;[38] but under a statute which provides that, when it is made to appear to the court that the sureties of the purchaser are insufficient the sale must not be confirmed until the purchaser gives security to the satisfaction of the court, and if such security is not given the sale must be vacated as to the purchaser thus failing, it is a condition precedent to the first purchaser's liability for his default that he should have notice of the finding of the court that his

Louisiana.— Smith *v.* Kinney, 30 La. Ann. 332.

Massachusetts.— Cobb *v.* Wood, 8 Cush. 228.

Mississippi.— Mount *v.* Brown, 33 Miss. 566, 69 Am. Dec. 362.

Pennsylvania.— Banes *v.* Gordon, 9 Pa. St. 426, holding that an order annulling a confirmation of a sale, because of the refusal of the purchaser to complete the purchase, and directing a resale does not rescind the contract so as to preclude a recovery for any deficiency on the resale. But see Morgan's Estate, 11 Pa. Co. Ct. 152.

Texas.— A defaulting bidder is liable for the loss arising from the difference in the two prices with ten per cent damages. Akin *v.* Horn, 2 Tex. App. Civ. Cas. § 8.

United States.— Shaw *v.* Shaw, 21 Fed. Cas. No. 12,724, 4 Cranch C. C. 715.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1518.

Jurisdiction.— The orphan's court has no jurisdiction to compel the defaulting bidder at a sale not authorized by it to make good the deficiency on resale, where, although some of the parties are minors, the others are *sui juris*. Claypoole's Estate, 3 Pa. Dist. 455, where the court said: "Clearly we have no jurisdiction over those of full age, and as the remedy is a joint one, which cannot well be severed, the proceedings should be in a court that can take jurisdiction of all concerned."

If property is resold for a higher price than at the original sale the defaulting bidder has been held entitled to whatever balance remains of the proceeds of the resale after deducting the proper costs, expenses, and interest. Mealey *v.* Page, 41 Md. 172.

31. Thomas *v.* Caldwell, 136 Ala. 518, 34 So. 949; Howison *v.* Oakley, 118 Ala. 215, 23 So. 810. *Contra*, McGuinness *v.* Whalen, 16 R. I. 558, 18 Atl. 158, 27 Am. St. Rep. 763, holding that an administrator's sale is not a judicial sale; that a defaulting bidder is not liable on an implied contract for a deficiency arising from a resale, there being no statutes creating such liability; that the defaulting bidder is liable in an action for his breach of contract; and that the measure of damages is the loss due to his default, and the jury may or may not find that the difference in the two prices is the proper measure of damages.

Commissioner may annex to the terms of sale a condition of resale at the purchaser's risk in case of a failure to comply with his bid, although the court did not so order. Shaw *v.* Shaw, 21 Fed. Cas. No. 12,724, 4 Cranch C. C. 715.

32. Thomas *v.* Caldwell, 136 Ala. 518, 34 So. 949; Howison *v.* Oakley, 118 Ala. 215, 23 So. 810.

33. Culli *v.* House, 133 Ala. 304, 32 So. 254; Shaw *v.* Shaw, 21 Fed. Cas. No. 12,724, 4 Cranch C. C. 715. *Contra*, see Bradbury *v.* Reed, 23 Tex. 258, under Hartley Dig. art. 1176.

34. Jones *v.* Hoss, 29 La. Ann. 564; Harris *v.* Harris, 12 La. Ann. 10; Duncan *v.* Armant, 3 La. Ann. 84; Short *v.* Ramsey, 18 Tex. 397. *Contra*, Greenwalt *v.* McClure, 7 Ill. App. 152.

35. See Skolfield *v.* Rhodes, 10 Rob. (La.) 128; Perkins *v.* Dixon, 1 Rob. (La.) 413.

Tender of a transfer by the representative to the purchaser of stock is not necessary to put the latter in default. Harris *v.* Harris, 12 La. Ann. 10.

36. Saunders *v.* Bell, 56 Ga. 442.

The second sale need not be advertised for more than ten days, providing the customary notice be given within that time. Duncan *v.* Armant, 3 La. Ann. 84.

A delay at the bidder's request does not discharge his liability. Sproull *v.* Seay, 74 Ga. 676.

37. Short *v.* Ramsey, 18 Tex. 397.

What is a reasonable time depends upon the circumstances of each case. Short *v.* Ramsey, 18 Tex. 397, holding that a delay from January to the following October, if unexplained, is such a delay as will discharge the first bidder from all liability to make good any difference in price.

38. Pearson *v.* Moreland, 7 Sm. & M. (Miss.) 609, 45 Am. Dec. 319.

security is insufficient and that he be given an opportunity to furnish security satisfactory to the court.[39] The representative must not clog the second sale with any conditions different from those of the first which are likely to lower the price, if the purchaser at the first sale is to be held liable for the loss accruing from the second sale;[40] but a defaulting bidder is not discharged from liability by a mere alteration of the terms of the sale prescribed by the court.[41] That the bidder at the second attempt to sell defaulted does not relieve the first defaulter from his liability, which continues up to the time the final sale is completed, when the measure of damages for which he is liable is determined.[42] If the administrator releases the bidder the latter cannot afterward be charged with the deficiency upon the resale,[43] and if the representative puts the purchaser in possession and receives a part of the purchase-money, he loses the right given him by statute to resell the land at the purchaser's risk.[44] A private sale under leave of court does not operate as a waiver of the original contract with the first purchaser.[45] A defaulting bidder who privately agrees to buy or lease from the second purchaser acquiesces in the judgment divesting his title,[46] and an heir in default on his bid ratifies a second sale and renounces all rights under the first adjudication where he accepts his portion of the estate, including notes given for the purchase-price by the second purchaser.[47]

11. Equitable Relief Against Collection of Purchase-Money. Equity will give relief by injunction and rescission against a judgment for purchase-money if the decree of sale was invalid.[48] If part of the land mentioned in the decree of sale was not decedent's property, but a sale was effected upon the administrator's promise that he would not enforce payment for that part of the land until the purchaser had possession under a good title, the promise may be enforced by a court of equity.[49] A bill brought years after the sale to enjoin the collection of the purchase-money of property which became valueless in the purchaser's hands will not lie because the sale was not confirmed.[50] If an injunction be asked on the ground that the purchaser has a valid set-off[51] mutuality must be shown.[52] A purchaser, as a simple debtor, cannot enjoin the execution of a judgment for the purchase-money on the ground that the administration bond is insufficient, for it is immaterial to him whether the bond is good or not.[53] Where a surety in an administrator's bond becomes purchaser he will not be relieved in equity

39. Howison *v.* Oakley, 118 Ala. 215, 23 So. 810.

40. Banes *v.* Gordon, 9 Pa. St. 426 [*following* Paul *v.* Shallcross, 2 Rawle (Pa.) 326].

41. Singerly *v.* Swain, 33 Pa. St. 102, 75 Am. Dec. 581, where the court directed that the purchaser at the subsequent sale should be required to pay down one thousand dollars, instead of fifty dollars as before.

42. Sproull *v.* Seay, 76 Ga. 27.

43. Reynolds *v.* Dismuke, 48 Ala. 209.

44. Penn *v.* Willingham, 84 Ga. 360, 10 S. E. 1085, holding that his remedy then is a suit for the unpaid balance.

45. Meek *v.* Spencer, 8 Ind. 118.

46. Landry *v.* Connely, 4 Rob. (La.) 127.

47. Skolfield *v.* Rhodes, 10 Rob. (La.) 128.

48. Dickinson *v.* Chism, 2 T. B. Mon. (Ky.) 144 (where only injunction was prayed); Miller *v.* Palmer, 55 Miss. 323 (although the application for relief was made several years afterward and judgment was recovered *nil dicit* and the purchaser might have pleaded failure of consideration, if he had investigated the state of his title, for he will not be regarded as negligent if he in good faith relied upon the validity of the proceedings and had no notice of the defects in his title); Lowry *v.* McDonald, Sm. & M. Ch. (Miss.) 620. See also Wagener *v.* Lyles, 29 Ark. 47; Bartee *v.* Tompkins, 4 Sneed (Tenn.) 623.

Plaintiff will be compelled to do equity by restoring possession to the heirs and accounting for the rents and profits. Miller *v.* Palmer, 55 Miss. 323.

49. Wright *v.* Underwood, 6 S. W. 437, 9 Ky. L. Rep. 712.

50. Queener *v.* Trew, 6 Heisk. (Tenn.) 59.

51. **Pleading.**— If injunction be prayed on the ground of a set-off, a bill which does not allege that there are no other demands against the estate entitled to precedence over the set-off claimed is not demurrable, but the defense must be made by answer. Dickinson *v.* Chism, 2 T. B. Mon. (Ky.) 144.

52. Wharton *v.* Jones, 49 Ala. 102, holding that the purchaser of land could not enjoin a judgment at law on notes for the purchase-money upon the ground that he held powers of attorney from the widow and guardian of some of the infant distributees authorizing him to receive and receipt for their distributive shares of the estate.

53. Wharton *v.* Jones, 49 Ala. 102.

from the payment of the purchase-money on the ground that the administrator is insolvent, there being no charge of a misapplication of assets.[54]

P. Report or Return. Where, under the statutes, the order or decree of sale is final, it appears that no report is necessary to validate the title acquired by the purchaser;[55] but where the order or decree is merely interlocutory, title depends upon a report and confirmation.[56] Where the deed is required to be made in strict conformity with the order of confirmation the report must state the name of the true purchaser;[57] but in those jurisdictions where it is held a deed may be made to the actual purchaser, although not named in the order, the report is not conclusive as to his identity.[58] The report should show that the sale was conducted in compliance with the statute.[59] The same particularity of description is not required in a report of sale of land by the representative as is necessary in a deed,[60] so if the land can be identified and it appears that it was actually sold and paid for, the sale is not subject to collateral attack;[61] and the administrator may make a sufficient deed as against the heirs or a court of equity on his failure to do so may vest the title in a *bona fide* purchaser.[62] Where the sale has been of property subject to encumbrances the return should show either that the administrator has sold merely the equity of redemption and taken security from the purchaser to pay the encumbrances and hold the estate harmless, or else that the sale has been free from encumbrances and that they have been paid off with the proceeds.[63] The report should correctly show the consideration or purchase-price.[64] That the report was made by only one of two administrators does not affect the validity of the sale.[65] In the absence of a statutory requirement, the report of sale of real property need not be verified,[66] and, although a statute requires a verification, the omission thereof is a mere irregularity which

54. Marsh *v.* Bennett, 6 How. (Miss.) 215.

55. Wyman *v.* Campbell, 6 Port. (Ala.) 219, 31 Am. Dec. 677; Bryan *v.* Hinman, 5 Day (Conn.) 211; Moore *v.* Neil, 39 Ill. 256, 89 Am. Dec. 303; Stow *v.* Kimball, 28 Ill. 93. See also Hazlewood *v.* Chrisman, (Tenn. Ch. App. 1901) 62 S. W. 39, where the clerk had not reported a sale.

56. Perkins *v.* Winter, 7 Ala. 855; Cummings *v.* McCullough, 5 Ala. 324; Lightfoot *v.* Doe, 1 Ala. 475. And see *infra*, XII, Q, 1.

Recital of the return in the order of confirmation is sufficient proof that there was a report of sale. See Day Land, etc., Co. *v.* New York, etc., Land Co., (Tex. Civ. App. 1894) 25 S. W. 1089.

57. Larason *v.* Lambert, 13 N. J. L. 182.

58. Dodd *v.* Templeman, 76 Tex. 57, 15 S. W. 187, where it was shown that the real purchaser was the administrator.

59. Thus where the rents and profits for a certain period must be first offered for sale before the fee can be sold, the report of sale of the fee must show that the rents and profits were first offered for sale. Martin *v.* Densford, 3 Blackf. (Ind.) 295.

60. Gilbert *v.* Cooksey, 69 Mo. 42. See also Pendleton *v.* Shaw, 18 Tex. Civ. App. 439, 44 S. W. 1002.

A full description by metes and bounds of the land sold need not be set forth in the report. Calvert *v.* Alexander, 8 S. W. 696, 10 Ky. L. Rep. 119.

A mistake in the description by government subdivisions will not control other descriptive particulars which identify the land with certainty. Montgomery *v.* Johnson, 31 Ark. 74.

61. Harris *v.* Dunn, (Tex. Civ. App. 1898) 45 S. W. 731.

62. Gilbert *v.* Cooksey, 69 Mo. 42.

63. Duncan *v.* Fish, 1 Aik. (Vt.) 231.

64. Martin *v.* Densford, 3 Blackf. (Ind.) 295.

A recital of payment of the price is not necessary to the validity of the title transferred. Wood *v.* Montgomery, 60 Ala. 500.

A report stating that the property was sold for cash is not fraudulent by reason of the fact that instead of cash the administrator received from the widow a receipt for the amount of her adjudged award against the estate, which amount she had in good faith bid at the sale. Reinhardt *v.* Seaman, 208 Ill. 448, 69 N. E. 847.

The return is not conclusive in the settlement of the administration account as to the amount of the proceeds of the sale. Diehl's Appeal, 33 Pa. St. 406.

If the price for which the land sold can be ascertained with certainty from the report an objection that a definite price does appear by the report cannot be sustained. Sizemore *v.* Wedge, 20 La. Ann. 124, holding that where two tracts of land were sold under the same order on the same day and at the same time, and the *procès verbal* specified that the whole property brought the sum of four thousand dollars and one piece thereof brought the sum of one thousand five hundred dollars, the amount which the other piece of land brought was thus fixed with certainty.

65. Doe *v.* Harvey, 5 Blackf. (Ind.) 487.

66. Hargus *v.* Bowen, 46 Miss. 72; Sheldon *v.* Wright, 5 N. Y. 497 [*affirming* 7 Barb. 39].

does not render the sale void.[67] An amendment of the return will not be made at the instance of a stranger to the proceedings,[68] nor after confirmation of the sale and execution of a deed to the purchaser,[69] nor without notice to the purchaser;[70] but if an executor has knowledge before confirmation of the sale that the property has brought an inadequate price, it is his duty to have his return amended and to have the sale set aside and a new one made for the benefit of the estate.[71] Under a statute providing that deeds shall take effect as to all subsequent purchasers without notice, only after recording, a decree for the sale of land and the administrator's report does not amount to constructive notice of an unrecorded administrator's deed, as against a subsequent *bona fide* purchaser from the heir.[72] In an action of ejectment the report of sale made by an administrator is competent evidence to show what land has been sold, its price, and the name of the purchaser, although the report may be insufficient to authorize the granting of an order to make title.[73] A report of sale made after the representative has made final settlement of the estate and been discharged is an absolute nullity.[74]

Q. Confirmation[75] **— 1. Necessity.** Sales of the realty of a decedent are in most jurisdictions subject to the approval of the court, as in the case of judicial sales generally,[76] and therefore in the absence of confirmation the title of the

67. Higgins *v.* Reed, 48 Kan. 272, 29 Pac. 389.

68. Diehl's Appeal, 33 Pa. St. 406.

69. Diehl's Appeal, 33 Pa. St. 406.

70. Fritz's Estate, 14 Phila. (Pa.) 260.

71. Sheridan's Estate, 10 Kulp (Pa.) 157.

72. Anthony *v.* Wheeler, 130 Ill. 128, 22 N. E. 494, 17 Am. St. Rep. 281.

73. Webb *v.* Ballard, 97 Ala. 584, 12 So. 106.

74. Melton *v.* Fitch, 125 Mo. 281, 28 S. W. 612; Garner *v.* Tucker, 61 Mo. 427.

75. Sale of realty under testamentary authority see *supra*, VIII, O, 9, d, (v).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, k.

Who entitled to notice of confirmation see Patterson *v.* Eakim, 87 Va. 49, 12 S. E. 144.

76. *Alabama.*— Comer *v.* Hart, 79 Ala. 389; Bland *v.* Bowie, 53 Ala. 152; Wallace *v.* Hall, 19 Ala. 367; Bonner *v.* Greenlee, 6 Ala. 411; Lightfoot *v.* Doe, 1 Ala. 475.

Arkansas.— Apel *v.* Kelsey, 47 Ark. 413, 2 S. W. 102; Bell *v.* Green, 38 Ark. 78; Halliburton *v.* Sumner, 27 Ark. 460, holding, however, that on a subsequent confirmation of the sale the title of the purchaser related back to the date thereof.

California.— Horton *v.* Jack, 115 Cal. 29, 46 Pac. 920; Dennis *v.* Winter, 63 Cal. 16.

Florida.— Knox *v.* Spratt, 19 Fla. 817.

Idaho.— People *v.* Cunningham, 6 Ida. 113, 53 Pac. 451.

Indiana.— Williams *v.* Perrin, 73 Ind. 57, so holding with relation to both realty and personalty.

Mississippi.— Maynard *v.* Cocke, (1895) 18 So. 374; Learned *v.* Matthews, 40 Miss. 210; Smith *v.* Denson, 2 Sm. & M. 326.

Missouri.— Henry *v.* McKerlie, 78 Mo. 416.

New York.— Stilwell *v.* Swarthout, 81 N. Y. 109. And see Rea *v.* McEachron, 13 Wend. 460, 28 Am. Dec. 471.

North Carolina.— Mason *v.* Osgood, 64 N. C. 467.

Pennsylvania.— Greenough *v.* Small, 137 Pa. St. 132, 20 Atl. 553, 21 Am. St. Rep. 859; Demmy's Appeal, 43 Pa. St. 155; Bickley *v.* Biddle, 33 Pa. St. 276.

Tennessee.— Wheatley *v.* Harvey, 1 Swan 484.

Texas.— Hirshfield *v.* Davis, 43 Tex. 155; Littlefield *v.* Tinsley, 26 Tex. 353; Neill *v.* Cody, 26 Tex. 286; Yerby *v.* Hill, 16 Tex. 377; Davis *v.* Stewart, 4 Tex. 223.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1530.

Mortgage.— Confirmation of the act of the representative in mortgaging the property of decedent for his debts is necessary and a mortgage founded on the decree of confirmation cannot be impeached in collateral proceedings. Morgan's Appeal, 11 Pa. St. 271, 4 Atl. 506. *Contra*, People *v.* Cunningham, 6 Ida. 113, 53 Pac. 451.

Confirmation by estoppel see Johnson *v.* Cooper, 56 Miss. 608.

Statute not retroactive.— A statute requiring confirmation of an executor's sale does not apply to sales made before it went into effect (Harlan *v.* Brown, 2 Gill (Md.) 475, 41 Am. Dec. 436), and a sale after the enactment of such a statute has been held valid without any confirmation if the order of sale was made previous to the enactment (Fox *v.* Lipe, 24 Wend. (N. Y.) 164).

When confirmation unnecessary.— Where the statute reserves in the court no further supervision after the order of sale is made and the conveyance may be executed by the representative or commissioner for sale without report to the court, confirmation is not necessary. Moffitt *v.* Moffitt, 69 Ill. 641, holding that the statute of 1857 does not require an approval of an administrator's sale of land in order to vest title thereto in the purchaser, as is required in the case of a guardian's sale.

heirs is not divested,[77] the title of the vendee before confirmation being a mere equity.[78] A bidder at a sale is not a purchaser and is not entitled to possession until confirmation,[79] and he is under no legal obligation to pay the amount bid until the sale has been confirmed.[80] Confirmation must be shown, it will not be presumed.[81]

2. General Rules Governing Action of Court. When the question of the confirmation or setting aside of a sale of land comes before the probate court, much is left to its discretion.[82] Mere lapse of time without any intervention of the rights of third persons will not prevent a confirmation of the sale under order of court.[83] After the sale to one purchaser has been confirmed, the court may with the purchaser's consent order the sale confirmed in the name of a different purchaser;[84] but where a sale of land has been confirmed and final settlement has been made and approved and remains in force, the court cannot, years afterward, approve another report of sale presented to it; and therefore a deed given pursuant to such approval conveys no title.[85] If it be discovered after the sale that the estate did not own full title to the land as had been represented, the court may approve an adjustment made by the administrator with the purchaser whereby the estate received more than the appraisal value of the land, and the order of approval is conclusive unless appealed from.[86] The death of the purchaser will not prevent confirmation of the sale and the vesting of title in his heirs,[87] but if the administrator, being sole plaintiff in the proceeding, dies before confirmation, the suit abates and a subsequent confirmation without a revival is void.[88] If an

77. Wallace *v.* Hall, 19 Ala. 367; Rea *v.* McEachron, 13 Wend. (N. Y.) 465, 28 Am. Dec. 471; Greenough *v.* Small, 137 Pa. St. 132, 20 Atl. 553, 21 Am. St. Rep. 859; Demmy's Appeal, 43 Pa. St. 155. See also Harris *v.* Brower, 3 Tex. Civ. App. 649, 22 S. W. 758, holding that under the act of 1840 (Hartley Dig. art. 1018) title does not pass to the purchaser unless it is shown that he is entitled to confirmation by virtue of his compliance with the statute in all essential particulars.

The heir may recover possession, although the purchase-money has been paid and possession given. Greenough *v.* Small, 137 Pa. St. 132, 20 Atl. 553, 21 Am. St. Rep. 859.

78. People *v.* Cunningham, 6 Ida. 113, 53 Pac. 451; Littlefield *v.* Tinsley, 26 Tex. 353; Neill *v.* Cody, 26 Tex. 286.

79. Maynard *v.* Cocke, (Miss. 1895) 18 So. 374; Crotwell *v.* Boozer, 1 S. C. 271. See also Brooks *v.* Kelly, 63 Miss. 616.

If the order of sale of personalty requires a report and confirmation the contract of purchase cannot operate to confer a vested right upon the purchaser until the confirmation is had. Williams *v.* Perrin, 73 Ind. 57. *Contra*, Moffitt *v.* Moffitt, 69 Ill. 641; Watt *v.* Scott, 3 Watts (Pa.) 79.

The remedy of the purchaser is by application to chancery for confirmation. Rea *v.* McEachron, 13 Wend. (N. Y.) 465, 28 Am. Dec. 471; Matter of Hemiup, 3 Paige (N. Y.) 305.

Purchaser in possession before confirmation a mere intruder.— Pool *v.* Ellis, 64 Miss. 555, 1 So. 725.

80. Pool *v.* Ellis, 64 Miss. 555, 1 So. 725; Bickley *v.* Biddle, 33 Pa. St. 276. See also State *v.* Cox, 62 Miss. 786; Neill *v.* Cody, 26 Tex. 286 [*approving* Bradbury *v.* Reed, 23 Tex. 258]; Dowling *v.* Duke, 20 Tex. 181.

81. Apel *v.* Kelsey, 47 Ark. 413, 2 S. W. 102; Crotwell *v.* Boozer, 1 S. C. 271. See also Learned *v.* Matthews, 40 Miss. 210. *Contra*, Agan *v.* Shannon, 103 Mo. 661, 15 S. W. 757, where the administrator had accounted for the precise sum for which the land had been sold.

82. Davis *v.* Stewart, 4 Tex. 223.

If no terms of sale have been prescribed in the order it is in the discretion of the court either to confirm the terms on which the sale was made or to rescind it altogether. Briel's Appeal, 24 Pa. St. 511.

When proper to refuse confirmation.— If the court does not believe a sale to have been fair or made in conformity to law it is its duty to set it aside and order a new sale. Davis *v.* Stewart, 4 Tex. 223.

When an indispensable necessity for the sale appears and no objection on account of irregularity or illegality in the order of sale was made at or previous to the sale, the purchaser is entitled to have the sale homologated. Hebrard's Succession, 18 La. Ann. 485.

83. Hazlewood *v.* Chrisman, (Tenn. Ch. App. 1901) 62 S. W. 39.

The statute of limitations relative to claims against an estate does not apply to the confirmation of a sale for the payment of decedent's debts. Hazlewood *v.* Chrisman, (Tenn. Ch. App. 1901) 62 S. W. 39.

84. Davis *v.* Touchstone, 45 Tex. 490.

85. Garner *v.* Tucker, 61 Mo. 427.

86. *In re* Hesche, 73 Mo. App. 612.

87. Hazlewood *v.* Chrisman, (Tenn. Ch. App. 1901) 62 S. W. 39.

88. Wheatley *v.* Harvey, 1 Swan (Tenn.) 484.

heir dies after notice of proceedings to sell and a sale thereafter takes place without further notice or any suggestion of the death of the heir and is confirmed, the sale is valid and not subject to attack by the heirs of the deceased heir.[89] When land is purchased by the representative,[90] his application for an order of conveyance of the title is regarded as made in his capacity of purchaser instead of in his representative character, and notice to the heirs is essential to the validity of the order, and when the notice has not been given the probate court acquires no jurisdiction to adjudicate the question of the payment of the purchase-money or to order a conveyance to the purchaser.[91]

3. Time For Confirmation. That the sale is confirmed at a term or time different from that prescribed by law does not render the sale void but merely voidable,[92] whether the confirmation be premature[93] or delayed.[94]

4. Notice of Application. Notice of an application to confirm the sale and for a conveyance may be essential to the validity of the purchaser's title.[95]

5. Objections to Confirmation — a. In General. On some grounds at least the order of sale may by the more general rule be impeached by the heirs or other interested persons upon the return of the report of sale for confirmation.[96] An objection to confirmation may be based upon the ground that the petition on which the sale was ordered[97] or the proceeding in which the order of sale was made[98] was defective in some matter going to the jurisdiction, or that the person

89. Palmer *v.* Hoop, 131 Ind. 23, 30 N. E. 874.

90. See *supra*, XII, M, 4.

91. Bolling *v.* Smith, 108 Ala. 411, 19 So. 370. See also Allison *v.* Allison, 114 Ala. 393, 21 So. 1008.

That the heirs were before the court on a final settlement of the accounts of the administrator, immediately after which, but in a separate proceeding, the court confirmed a sale of land by the administrator to himself, cannot be construed as a notice to the heirs of the latter proceeding. Washington *v.* Bogart, 119 Ala. 377, 24 So. 245.

92. Murray *v.* Purdy, 66 Mo. 606. But see Learned *v.* Matthews, 40 Miss. 210, holding that unless the sale be reported at the first term after the sale no valid confirmation can be decreed without previous notice to parties whose interests are to be affected by the sale.

93. Custer *v.* Holler, 160 Ind. 505, 67 N. E. 228; Henry *v.* McKerlie, 78 Mo. 416; Sims *v.* Gray, 66 Mo. 613; Johnson *v.* Beazley, 65 Mo. 250, 27 Am. Rep. 276. *Contra*, Mitchell *v.* Bliss, 47 Mo. 353.

94. Doe *v.* McLoskey, 1 Ala. 708; Wilcoxon *v.* Osborn, 77 Mo. 621. See also Brown *v.* Hobbs, 19 Tex. 167. *Contra*, Learned *v.* Matthews, 40 Miss. 210.

Confirmation at an adjourned term instead of at a regular term will not vitiate the sale. Wilkerson *v.* Allen, 67 Mo. 502; Sankey's Appeal, 55 Pa. St. 491 [*following* Klingensmith *v.* Bean, 2 Watts (Pa.) 486, 27 Am. Dec. 328], holding that confirmation after a term had intervened is tantamount to a continuance of the order of sale and should be held good even upon appeal. *Contra*, Castleman *v.* Relfo, 50 Mo. 583; State *v.* Towl, 48 Mo. 148; Speck *v.* Wohlien, 22 Mo. 310.

95. Anderson *v.* Bradley, 66 Ala. 263 (holding that notice to the heirs is necessary after the functions of the administrator have ceased); Dugger *v.* Tayloe, 60 Ala. 504 [*overruling* 46 Ala. 320] (holding that where the purchaser makes the application, notice to the administrator, but not to the heirs, is essential).

In North Carolina a notice of the application for confirmation is desirable (Stradley *v.* King, 84 N. C. 635) but not essential (Blue *v.* Blue, 79 N. C. 69).

Application by representative.— Notice to the heirs is not necessary when the application is made by the administrator (Moore *v.* Cottingham, 113 Ala. 148, 20 So. 994, 59 Am. St. Rep. 100; May *v.* Marks, 74 Ala. 249) unless the administrator is himself the purchaser, when such notice is essential (Smith *v.* Lusk, 119 Ala. 394, 24 So. 256; Bolling *v.* Smith, 108 Ala. 411, 19 So. 370; Ligon *v.* Ligon, 84 Ala. 555, 4 So. 405).

96. Fenix *v.* Fenix, 80 Mo. 27 (where the objection to confirmation was that there were no debts which the personalty of the estate could not satisfy); Weaver's Appeal, 19 Pa. St. 416 (holding that the heirs will be permitted to show either that the debts had been paid, that their lien had been lost, or that there was no necessity to raise the money to pay debts; but that it could not be objected by them that the representative had not settled the administration account prior to the order of sale). See also *In re* Gibbs, 4 Utah 97, 6 Pac. 525.

97. Kelley's Estate, 1 Abb. N. Cas. (N. Y.) 102, holding that the act of 1850 and its amendment curing defects in titles under such sales apply only where the sale is collaterally questioned, not to a direct proceeding.

98. Marcom *v.* Wyatt, 117 N. C. 129, 23 S. E. 169. But *compare* Allen *v.* Shepard, 87 Ill. 314, holding that the court cannot go behind the order of sale or even revise it on motion to confirm, the matters before the court on that motion relating solely to the

making objection had no prior opportunity to be heard.[99] Under some modern statutes the court is obliged to confirm a sale in spite of irregularities in the conduct thereof, if compliance with certain essential conditions appear.[1] The court will of course refuse to confirm a sale by an administrator where fraud is made to appear.[2] A person interested in the estate may object to the confirmation on the ground that the sureties on the bond of the purchaser are insolvent.[3] The object of a hearing upon confirmation not being to settle title to the land in question but to transmit title unencumbered, the court cannot and ought not to confirm a sale if the title in the decedent be doubtful and the sale be opposed by an adverse claimant.[4]

b. Inadequacy of Price.[5] Inadequacy of price is an element proper for consideration when a sale is attacked on other grounds, and will aid in preventing confirmation.[6] Even standing alone, inadequacy of price may be sufficient to prevent confirmation,[7] although when only inadequacy of price is relied on there

transactions which took place in the attempt to execute the order and make the sale. And see Bostwick *v.* Atkins, 3 N. Y. 53 [*disapproving* Matter of Hemiup, 3 Paige (N. Y.) 305].

Presumption that the order of sale was regularly issued see Wadsworth's Succession, 2 La. Ann. 966.

Formal defects or irregularities.— That matters which are formal have been disregarded in the proceedings to sell land will not prevent the confirmation if there has been no fraud and it appears to be plainly to the interest of all concerned that the sale be confirmed. Howerton *v.* Sexton, 90 N. C. 581.

99. *In re* Gibbs, 4 Utah 97, 6 Pac. 525.

Duty to make timely objections.— Persons summoned to answer a petition to sell land of the estate should then present their defense, for they will not be permitted to remain silent and, after a sale is made and reported, come in and show cause against a decree for a sale. Norris *v.* Callahan, 59 Miss. 140. See also Marcom *v.* Wyatt, 117 N. C. 129, 23 S. E. 169.

That personal notice was not given minor heirs of the application to sell the land is not a valid objection, for public notice of the sale is sufficient and those interested can be heard at any time before confirmation. Weaver's Appeal, 19 Pa. St. 416. But if the infant heirs are without a guardian, the court should not confirm the sale until a guardian has been appointed. Albright's Estate, 6 Lack. Leg. N. (Pa.) 108.

A minor may have a remedy against a decree prejudicial to his interest by an original bill brought within a year after attaining majority. Norris *v.* Callahan, 59 Miss. 140; Mayo *v.* Clancy, 57 Miss. 674; Sledge *v.* Boon, 57 Miss. 222.

1. Meadows *v.* Meadows, 81 Ala. 451, 1 So. 29, holding that under Code (1876), §§ 2463, 2467, as amended by the acts of 1878–1879, page 77, the probate court in passing upon the question of confirming or vacating a sale for the payment of decedent's debts is limited to the consideration of three issues: (1) Fairness of the sale; (2) adequacy of price; and (3) sufficiency of solvency of the sureties — and if the court is satisfied on these three points it must confirm the sale, and therefore failure to advertise according to the order and to sell in subdivisions is not sufficient ground for refusing to confirm a sale, with the fairness of which the court is satisfied.

2. Pearson *v.* Moreland, 7 Sm. & M. (Miss.) 609, 45 Am. Dec. 319.

3. *In re* Arguello, 50 Cal. 308.

4. Hower's Appeal, 55 Pa. St. 337. See also Swafford *v.* Howard, 50 S. W. 43, 20 Ky. L. Rep. 1793; Renneberg's Succession, 15 La. Ann. 661.

Where the widow claims a resulting trust in the land as bought with her money, it is not error to confirm the sale against her remonstrance, for the court has no power to order a sale of any more than the decedent's interest in the land which alone passes to the purchaser. Kline's Appeal, 39 Pa. St. 463.

5. **In connection with advance bid** see *infra*, XII, Q, 6.

As ground for attack after confirmation see *infra*, XII, S, 4, e.

6. *Arkansas.*— Burgett *v.* Apperson, 52 Ark. 213, 12 S. W. 559.

Kentucky.— Underwood *v.* Cartwright, 47 S. W. 580, 20 Ky. L. Rep. 809.

Mississippi.— Pearson *v.* Moreland, 7 Sm. & M. 609, 45 Am. Dec. 319.

New York.—Campbell's Estate, Tuck. Surr. 240.

Ohio.— Woodward *v.* Curtis, 19 Ohio Cir. Ct. 15, 10 Ohio Cir. Dec. 400.

Tennessee.— Click *v.* Burris, 6 Heisk. 539.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1534.

If irregularities or fraud in the proceedings have caused the inadequacy of price the sale will not be confirmed (Planters' Bank *v.* Neely, 7 How. (Miss.) 80, 40 Am. Dec. 51; State *v.* Burnside, 33 S. C. 276, 11 S. E. 787); but the personal representatives may be chargeable with the loss in such cases (Brown *v.* Reed, 56 Ohio St. 264, 46 N. E. 982; Meyer's Estate, 177 Pa. St. 450, 35 Atl. 669), and then one who will thereby be protected cannot object to the sale (Hazlett's Estate, 137 Pa. St. 587, 21 Atl. 804).

7. *Alabama.*— Rev. Code, §§ 2092, 2094 (Civ. Code (1896), §§ 173, 174, 176), requires a resale if the court finds that the

must be clear and satisfactory proof of the inadequacy claimed,[8] and it has been held that the inadequacy must be so gross as to raise a presumption of fraud in order to prevent confirmation.[9]

c. Hearing Upon Objections. The hearing is governed by the usual rules as to the burden of proof[10] and the admissibility of evidence.[11]

6. Reopening Sale on Advance Bid.[12] The practice of English chancery courts formerly allowed as of course the opening of the biddings before the report of sale was confirmed upon an offer of at least ten per cent advance, payment of costs, and bringing the money into court;[13] but this practice has been strongly disapproved,[14] and is now abolished by express statute.[15] In the United States the practice of opening the sale on an advance bid before confirmation has been adopted in a few states,[16] but it is usually considered that no advance bid, how-

amount for which the land or any portion thereof sold was greatly disproportionate to its real value. The court cannot accept a new bid. Field *v.* Gamble, 47 Ala. 443.

Indiana.— See Williams *v.* Perrin, 73 Ind. 57.

Kentucky.— Durrett *v.* Bradford, 58 S. W. 540, 22 Ky. L. Rep. 623, where the right to set aside was reserved in the decree.

New Jersey.— Ryan *v.* Wilson, 64 N. J. Eq. 797, 53 Atl. 1039 [*affirming* (Prerog. 1902) 52 Atl. 993].

Texas.— Hardin *v.* Smith, 49 Tex. 420; Hirshfield *v.* Davis, 43 Tex. 155, holding that Paschal Dig. art. 5713, providing for confirmation of the sale if "fairly" made, authorizes the court to refuse confirmation for inadequacy of price. The decision of the county judge may be reviewed. James *v.* Nease, (Civ. App. 1902) 69 S. W. 110.

Virginia.— Terry *v.* Cole, 80 Va. 695, sale to pay legacies.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1534.

The Louisiana statute requiring an appraisal within twelve months before a sale of a minor's lands renders the sale invalid, if on its first offering it brings less than the appraised value (Tabary's Succession, 31 La. Ann. 409); and where it is sold in three parcels the purchaser of one cannot be compelled to comply with his bid until sales of the others demonstrate that the aggregate price makes up the appraised value (Landreaux *v.* Bel, 5 La. 434). A sale may be made at less than the appraised value when it is for the purpose of paying debts (Fontelieu's Succession, 28 La. Ann. 638; Norton *v.* Citizens' Bank, 28 La. Ann. 354; Carter *v.* McManus, 15 La. Ann. 641; Haner's Succession, 5 La. Ann. 437; Valderes *v.* Bird, 10 Rob. 396; Hutchiss *v.* Dodd, 13 La. 84), or on a second offer on twelve months' credit (Campbell *v.* Owens, 32 La. Ann. 265; Lewis *v.* Labauve, 13 La. Ann. 382; Fritz's Succession, 12 La. Ann. 368), or where the terms of sale are fixed by creditors and a family meeting (Towles *v.* Weeks, 7 La. 312). The adjudication may be made at two thirds of the appraisement, unless the sale has been demanded by creditors. Hood's Succession, 33 La. Ann. 466. Sales at less than the appraisal are not necessarily void. Herrmann *v.* Fontelieu, 29 La. Ann. 502; Davidson *v.* Davidson, 28 La. Ann. 269; Stoltz's Succession, 28 La. Ann. 175.

8. Reinhardt *v.* Seaman, 208 Ill. 448, 69 N. E. 847; Allen *v.* Shepard, 87 Ill. 314, holding that it is not sufficient to show that the sale was for less than half the value fixed by real-estate dealers.

9. Calvert *v.* Alexander, 8 S. W. 696, 10 Ky. L. Rep. 119. See also Farmers' Bank *v.* Clarke, 28 Md. 145.

10. See Montgomery *v.* All the World, 23 La. Ann. 239, holding that a party opposing a monition asking to have the title obtained at a succession sale confirmed is for all legal purposes plaintiff in the action and must establish his averments by proof.

11. See Jacks *v.* Adamson, 56 Ohio St. 397, 47 N. E. 48, 60 Am. St. Rep. 749, holding that on the hearing of a motion for an order confirming *nunc pro tunc* a sale made several years before the court may resort to all sources of information which are competent under the general rules of evidence, including the testimony of the administrator and the probate judge.

12. See, generally, Judicial Sales.

13. See Ringler's Estate, 1 Woodw. (Pa.) 214; Mann *v.* McDonald, 10 Humphr. (Tenn.) 275.

14. Andrews *v.* Emerson, 7 Ves. Jr. 420, 32 Eng. Reprint 170.

15. St. 30 & 31 Vict. c. 48, § 6.

16. Brown's Appeal, 68 Pa. St. 53; McBride's Estate, 9 Pa. Dist. 216, 23 Pa. Co. Ct. 544; Herr's Estate, 2 Pa. Dist. 737; Hepting's Estate, 1 Lanc. L. Rev. (Pa.) 45; McRee's Estate, 6 Phila. (Pa.) 75; Sharpe's Estate, 4 Pa. L. J. Rep. 162; Metz's Estate, 14 York Leg. Rec. (Pa.) 136; Click *v.* Burris, 6 Heisk. (Tenn.) 539; Geisler *v.* Mauk, (Tenn. Ch. App. 1898) 48 S. W. 344 (holding that biddings may be reopened for no other reason than an offer of more than ten per cent advance). But see Ringler's Estate, 1 Woodw. (Pa.) 214.

An offer must be made of at least ten per cent over the first sale (Murphy's Estate, 11 Wkly. Notes Cas. (Pa.) 419) in writing (Breese's Estate, 2 Kulp (Pa.) 62) and including costs (Dimock's Estate, 33 Pa. L. J. Rep. 317, 5 Pa. L. J. 262).

Until confirmation there is no complete sale. Geisler *v.* Mauk, (Tenn. Ch. App. 1898) 48 S. W. 344.

ever large, will suffice to open the sale after confirmation.[17] A reopening of the sale is sometimes especially provided for by statute when it can be shown not only that a higher offer has been made but also that the first sale was at a price disproportionate to the value of the property.[18] Under such a provision both the disproportion between the true value and the price and the fact that an increased bid can be had must appear.[19] It is necessary that the additional value should have inhered in the property at the time of the sale,[20] and if the full market value at the time of sale was realized the reason why the market value was low at that time is immaterial.[21] It is within the discretion of the court to either order a new sale or accept the advance bid.[22]

7. Form and Requisites of Confirmation. No formal order[23] or precise form of words[24] confirming the sale of land is necessary. The court's approval is a sufficient confirmation,[25] and anything which expresses the approbation of the court is sufficient.[26] The order of confirmation is not void because it refers to a day subsequent to its own date as the day on which the land was ordered sold,[27] or fails to properly describe the land if the description appears in other parts of the proceedings.[28] Neither will it be held void for failing to show that proof was heard upon the question of the sufficiency of the price given for the land sold.[29] Failure to confirm the commissioners' report and ordering a resale are equivalent to setting aside the sale.[30]

8. Effect of Confirmation or Refusal to Confirm. The order of confirma-

17. Click *v.* Burris, 6 Heisk. (Tenn.) 539; Houston *v.* Aycock, 5 Sneed (Tenn.) 406, 73 Am. Dec. 131. But *compare* Mann *v.* McDonald, 10 Humphr. (Tenn.) 275, where an advance of fifty per cent was offered after confirmation but at the same term, and the supreme court said that it was not prepared to hold that the chancellor erred in the exercise of his discretion in opening the biddings.

18. Cal. Code Civ. Proc. § 1552; 2 N. Y. Rev. St. 106, §§ 29, 30.

19. *In re* Leonis, 138 Cal. 194, 71 Pac. 171 (holding that the order of sale will not be vacated merely because the bid was disproportionate to the value of the property); Kain *v.* Masterton, 16 N. Y. 174; Horton *v.* Horton, 2 Bradf. Surr. (N. Y.) 200.

The determination of these facts rests in the discretion of the surrogate. Delaplaine *v.* Lawrence, 3 N. Y. 301. And see as to discretion of trial court Frey's Appeal, 5 Pa. Cas. 265, 8 Atl. 585.

20. *In re* Leonis, 138 Cal. 194, 71 Pac. 171; Kain *v.* Masterton, 16 N. Y. 174; McRee's Estate, 6 Phila. (Pa.) 75.

21. *In re* Burton, 105 Cal. 353, 38 Pac. 952. See also Boyd *v.* Wyle, 124 U. S. 98, 8 S. Ct. 364, 31 L. ed. 369 [*affirming* 18 Fed. 355].

22. Griffin *v.* Warner, 48 Cal. 383. See also *In re* Griffith, 127 Cal. 543, 59 Pac. 988.

The court may receive as many bids as may be made and upon a consideration of the whole determine whether to accept the highest bid or order a new sale. It is not limited to the alternative of accepting the first offer that may be made or ordering a new sale. *In re* Griffith, 127 Cal. 543, 59 Pac. 988.

23. Carey *v.* West, 139 Mo. 146, 40 S. W. 661.

Entry of confirmation nisi is intended to indicate that the sale is confirmed, unless exceptions shall be filed thereto within such time as the court in the exercise of a proper discretion may permit. Lang's Estate, 1 Chest. Co. Rep. (Pa.) 287.

24. Worthington *v.* McRoberts, 9 Ala. 297.

25. Pendleton *v.* Shaw, 18 Tex. Civ. App. 439, 44 S. W. 1002.

Decision and the findings of court need not be in writing. See *In re* Gibbs, 4 Utah 97, 6 Pac. 525.

26. Worthington *v.* McRoberts, 9 Ala. 297; Livingston *v.* Cochran, 33 Ark. 294 (holding that an order of court directing an administrator to give a deed of land sold under a previous order is a virtual confirmation of the sale); Corley *v.* Anderson, 5 Tex. Civ. App. 213, 23 S. W. 839 (holding that an entry in the minutes of the court may suffice as a confirmation where no further sale was ordered and no objection raised, and the purchase-price was paid, and possession taken by the purchaser).

Approval of the final account of an administrator and his discharge is substantially a confirmation of the sale by him. Ferguson *v.* Templeton, (Tex. Civ. App. 1895) 32 S. W. 148. *Contra, In re* Delaney, 49 Cal. 76.

A clause in a decree of distribution confirming and approving all acts of the executor is not a confirmation of the sale by him. *In re* Delaney, 49 Cal. 76.

Approval can be gathered from whole record. Carey *v.* West, 139 Mo. 146, 40 S. W. 661.

27. Barton *v.* Davidson, (Tex. Civ. App. 1898) 45 S. W. 400.

28. Crawford *v.* McDonald, 88 Tex. 626, 33 S. W. 325.

29. Captain *v.* Stubbs, 68 Tex. 222, 224, 4 S. W. 467.

30. Duval *v.* Planters', etc., Bank, 10 Ala. 636.

tion cures irregularities in the previous proceedings,[31] but it cannot impart validity to a void sale.[32] Failure to have the land viewed by disinterested householders of the county wherein it lies,[33] or failure to make any attempt to advertise the sale,[34] or the insufficiency of the publication of a notice of the hearing upon the petition for the sale,[35] have been held irregularities which are cured by confirmation. But an order of publication has been held essential to give the probate court jurisdiction to order a sale of decedent's land and the lack of the order is an omission not curable by the order of confirmation.[36] A confirmation of a sale on the administrator's false report that the purchaser has made the required cash payment does not divest the title of the heirs, and the land remains bound for the payment of the purchase-money even in the hands of *bona fide* purchasers.[37] A recital in the decree of confirmation that the purchase-money has been paid is conclusive upon the administrator in any proceeding against him by the creditors or distributees of the estate, but not as between the administrator and purchaser,[38] or as against a subsequent administrator, when seeking to enforce a vendor's lien on the land.[39] After confirmation, the purchaser cannot contest the proceedings in the orphans' court when sued in a common-law court for the purchase-money.[40] After confirmation of the sale of land, the executors cannot be surcharged with any alleged deficiency of price while the confirmation remains

31. *Alabama.*— Jennings *v.* Jenkins, 9 Ala. 285.

Arkansas.— Apel *v.* Kelsey, 47 Ark. 413, 2 S. W. 102.

Louisiana.— See Lafon *v.* Phillips, 2 Mart. N. S. 225.

Minnesota.— Dayton *v.* Mintzer, 22 Minn. 393.

Missouri.— Tutt *v.* Boyer, 51 Mo. 425.

Pennsylvania.— Jacob's Appeal, 23 Pa. St. 477.

Rhode Island.— See Andrews *v.* Goff, 17 R. I. 205, 21 Atl. 347.

Tennessee.— Ridgely *v.* Bennett, 13 Lea 206.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1535.

Confirmation of sale made without order.— Although the representative has no power to sell land except under order of court, a sale made without an order but approved and confirmed by the court is as valid and efficacious as if it had been made under the required order. Hamilton *v.* Hamilton, 51 S. W. 170, 21 Ky. L. Rep. 260.

Order passes only on acts of representative in making sale. Culver *v.* Hardenbergh, 37 Minn. 225, 33 N. W. 792; Dawson *v.* Holmes, 30 Minn. 107, 14 N. W. 462.

Consent to confirmation by defendants after notice of sale in an action to sell land for assets cures all irregularities in the preliminary proceedings. Chambers *v.* Penland, 78 N. C. 53. But see Strickland *v.* Strickland, 129 N. C. 84, 39 S. E. 735.

32. *Alabama.*— Cruikshank *v.* Littrell, 67 Ala. 318.

Kentucky.— Bethel *v.* Bethel, 6 Bush 65, 99 Am. Dec. 655.

Louisiana.— Robert *v.* Brown, 14 La. Ann. 597.

Minnesota.— Culver *v.* Hardenbergh, 37 Minn. 225, 33 N. W. 792.

Missouri.— Cunningham *v.* Anderson, 107 Mo. 371, 17 S. W. 792, 28 Am. St. Rep. 417.

Texas.— Fishback *v.* Page, 17 Tex. Civ. App. 183, 186, 43 S. W. 317.

Wisconsin.— Chase *v.* Ross, 36 Wis. 267.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1535.

Lack of jurisdiction.—An order of confirmation cannot render valid an order of sale which it was not within the jurisdiction of the court to make. Culver *v.* Hardenbergh, 37 Minn. 225, 33 N. W. 792. But if a decree of confirmation be made in the court of the county in which the letters were issued, want of jurisdiction is not to be presumed from the mere omission to set forth in the claim or in the appraisement that the decedent died or was domiciled at the time of his death within the commonwealth. Greenawalt's Estate, 16 Pa. Super. Ct. 263.

33. Apel *v.* Kelsey, 47 Ark. 413, 2 S. W. 102.

34. Apel *v.* Kelsey, 47 Ark. 413, 2 S. W. 102.

It will be presumed from the confirmation of the sale, in the absence of anything in the record, that the representative complied with the order of the court as to notice and time of sale. Ferguson *v.* Templeton, (Tex. Civ. App. 1895) 32 S. W. 148.

35. Dayton *v.* Mintzer, 22 Minn. 393. See also Thompson *v.* Burge, 60 Kan. 549, 57 Pac. 110, 72 Am. St. Rep. 369.

36. Cunningham *v.* Anderson, 107 Mo. 371, 17 S. W. 972, 28 Am. St. Rep. 417.

37. Wallace *v.* Nichols, 56 Ala. 321. See also Wipff *v.* Heder, 6 Tex. Civ. App. 680, 26 S. W. 118, holding that the fact that a sale made by an administrator was on credit and was falsely reported to the court as made for cash will avoid the sale in a direct proceeding.

38. Wiley *v.* Lashlee, 8 Humphr. (Tenn.) 717.

39. Hudgens *v.* Cameron, 50 Ala. 379.

40. Richter *v.* Fitzsimmons, 4 Watts (Pa.) 251.

unreversed.[41] If a state court having general jurisdiction of the estate confirms a sale of any of the assets, the order of confirmation is conclusive upon a federal court upon the questions of the legality of the sale under the state statutes and of the right to sell the property in question under the order of sale granted.[42]

9. Entry Upon Record or Registration of Confirmation. The approval of the court should be shown by the record;[43] but it is sufficient if the approval can be gathered from the record,[44] and a formal entry of approval is not necessary.[45] In a few jurisdictions the order of confirmation must be registered or recorded, to be notice to third persons without actual or other constructive notice.[46]

10. Review of Order of Confirmation. The approval[47] or disapproval[48] of the sale of land is a final judgment from which an appeal can be taken. But inasmuch as the confirmation of an administrator's sale of lands rests in the sound discretion of the court, a decree refusing confirmation will not be reversed, unless an abuse of discretion is shown.[49] Nor will an order of confirmation be reversed for mere irregularities in the proceedings.[50] It has been held that on appeal from the order of confirmation of a sale of land, no question can be raised as to the legality of the appointment of the administrator,[51] or the propriety and legality of the order directing the sale to be made,[52] or the justice and legality of the debts allowed against the estate.[53] The objection that the property sold for less than its appraised value must be specially pleaded, in order to be considered on appeal from the judgment homologating the sale.[54] Persons who have appeared in the proceedings and whose rights have been affected by the order of confirmation or refusal to confirm may appeal therefrom,[55] and are entitled to notice on appeal by others.[56] And persons interested may appear by leave of court and appeal, even although not originally parties.[57] Where there has been a failure on

41. Dundas' Estate, 18 Phila. (Pa.) 79.

42. May *v.* Mercer County, 30 Fed. 246, sale of right of action for infringement of patent.

43. Valle *v.* Fleming, 19 Mo. 454, 61 Am. Dec. 566.

Entry of reasons for confirming or rejecting unnecessary.— Davis *v.* Stewart, 4 Tex. 223.

44. Camden *v.* Plane, 91 Mo. 117, 4 S. W. 86; Grayson *v.* Weddle, 63 Mo. 523; Jones *v.* Manly, 58 Mo. 559; Loyd *v.* Waller, 74 Fed. 601, 20 C. C. A. 548. But see Crotwell *v.* Boozer, 1 S. C. 271.

45. Grayson *v.* Weddle, 63 Mo. 523.

46. Lyons *v.* Cenas, 22 La. Ann. 113. See also Allen *v.* Atchison, 26 Tex. 616.

The recording of a procès verbal of sale in the parish where the property lies is notice to third persons. Wright *v.* Cummings, 19 La. Ann. 353.

The omission to record a procès verbal in the parish where the succession lies will not render the sale void. Wright *v.* Cummings, 19 La. Ann. 353.

47. Tutt *v.* Boyer, 51 Mo. 425; Wolff *v.* Wohlien, 32 Mo. 124; *In re* Hesche, 73 Mo. App. 612. See also Wilson *v.* Brown, 21 Mo. 410

48. *In re* Leonis, 138 Cal. 194, 71 Pac. 171; Hirshfield *v.* Davis, 43 Tex. 155. But see Wolff *v.* Wohlien, 32 Mo. 124, holding that an order of the circuit court in a trial *de novo* of an order of the probate court disapproving a report of sale is not a final order from which an appeal will lie.

49. Eatman *v.* Eatman, 83 Ala. 478, 3 So. 850; Heard *v.* Whitehead, 41 Miss. 404. See Wells *v.* Mills, 22 Tex. 302.

50. Ridgely *v.* Bennett, 13 Lea (Tenn.) 206. See also McDonald *v.* Hutton, 8 N. J. Eq. 473, failure to give notice of application for order of sale.

51. Allen *v.* Shepard, 87 Ill. 314.

52. Allen *v.* Shepard, 87 Ill. 314; Norris *v.* Callahan, 59 Miss. 140.

53. Allen *v.* Shepard, 87 Ill. 314.

54. Michel *v.* Michel, 11 La. 149.

55. Kitchell *v.* Irby, 42 Ala. 447 (holding that an administrator *de bonis non* appointed after the sale who contests the order of confirmation has an interest in the lands of the estate, in so far that he might rent them out or apply for an order of sale, and is therefore entitled to appeal); Warehime *v.* Graf, 83 Md. 98, 24 Atl. 364 (holding that executors empowered by will to sell land and directed to hold part of the proceeds as a trust fund and to distribute the residue may appeal from an order refusing to confirm the sale and directing a resale).

Parties to the decree are necessary parties to the appeal therefrom. England *v.* McLaughlin, 35 Ala. 590. See also Kitchell *v.* Irby, 42 Ala. 447.

Waiver of right to appeal.— An administrator who procures a sale and the confirmation thereof waives his right to have the order confirming the sale reviewed by proceedings in error. Saxon *v.* Cain, 19 Nebr. 488, 26 N. W. 385. A purchaser who did not appeal from an order setting aside a sale of land to him cannot appeal from the order of resale. *In re* Boland, 55 Cal. 310.

56. *In re* Bell, 125 Cal. 539, 58 Pac. 153.

57. Warehime *v.* Graf, 83 Md. 98, 34 Atl. 364.

the part of the probate court to set apart for the use of minor children the property exempt from forced sale and the property has been sold by order of court, it is not error, upon certiorari, to revise and correct the proceedings in the probate court, to join the administrator and the purchaser of the property at the probate sale.[58]

R. Second Sale — 1. In General. Where the proceeds of realty ordered to be sold for the payment of claims against an estate are insufficient for that purpose, the court may make another order directing the sale of more realty.[59] But this cannot be done until the proceeds obtained from the first sale have been exhausted,[60] and it has been held that, where a sum sufficient to pay claims was realized at the sale but such sum has been lost or misapplied by the representative, a sale of other realty to pay the claims cannot be ordered.[61] Where a sale of realty has failed for lack of bidders or because of the insufficiency of the amount bid such realty may be again offered for sale.[62]

2. New Proceedings. Where a sale of additional realty becomes necessary, new proceedings should be instituted, new notice given to the parties interested, and another order of sale obtained;[63] but where for any reason an attempted sale has failed, entirely new proceedings are not necessary to enable the personal representative to again offer the same property for sale.[64]

58. Connell *v.* Chandler, 11 Tex. 249.

59. Liddel *v.* McVickar, 11 N. J. L. 44, 19 Am. Dec. 369; Huckle *v.* Phillips, 2 Serg. & R. (Pa.) 4. See also Learned *v.* Matthews, 40 Miss. 210. *Compare* Ludlow *v.* Johnston, 3 Ohio 553, 17 Am. Dec. 609.

60. Brown *v.* Rose, 6 Blackf. (Ind.) 69.

61. Stifler's Estate, 8 Pa. Dist. 400, 23 Pa. Co. Ct. 24 [*following* Hanna's Appeal, 31 Pa. St. 53; Pry's Appeal, 8 Watts (Pa.) 253] (loss through failure of bank in which proceeds deposited); Clyburn *v.* Reynolds, 31 S. C. 91, 9 S. E. 973 (holding that claimants who were parties to the proceeding in which the sale was ordered could not, where proceeds amply sufficient to pay their claims had been realized but had been misapplied, ask that other portions of the real estate be subjected to the payment of their claims). And see *supra*, XII, B, 2, c.

62. See Campbell *v.* Owens, 32 La. Ann. 265; Farrington *v.* King, 1 Bradf. Surr. (N. Y.) 182. *Compare* Gamble *v.* Woods, 53 Pa. St. 158, holding that where an executor failed to sell the land of his testator for want of a sufficient bid in consequence of an easement on it, the court was right in refusing to direct him to apply for another order of sale.

63. Cromine *v.* Tharp, 42 Ill. 120 [*distinguishing* Stow *v.* Kimball, 28 Ill. 93]; Cunningham *v.* Anderson, 107 Mo. 371, 17 S. W. 972, 28 Am. St. Rep. 417 (new notice necessary for sale of land excluded from sale by first order); Ackley *v.* Dygert, 33 Barb. (N. Y.) 176; Gilchrist *v.* Rea, 9 Paige (N. Y.) 66; Butler *v.* Emmett, 8 Paige (N. Y.) 12. See also Robinson *v.* Clark, 34 S. W. 1083, 17 Ky. L. Rep. 1401.

Second sale for subsequently discovered debts.— Where a surrogate has made an order for a sale of a part of the real estate of the decedent for the payment of debts that were then ascertained he is not authorized to make another order for the sale of another portion of the estate to pay debts alleged to have been subsequently discovered until the executor making the application has made out and filed an account of such new debts and has complied with the provisions of the statute as on an original application. Gilchrist *v.* Rea, 9 Paige (N. Y.) 66.

License to mortgage.— If, after an order for a sale of realty has been obtained, it is desired to obtain a license to mortgage such realty, a new notice must be given, or the order granting the license to mortgage will be void. Martin *v.* Neal, 125 Ind. 547, 25 N. E. 813.

64. See Trumbel *v.* Williams, 18 Nebr. 144, 24 N. W. 716, holding that where a license to sell realty granted to the original representative has been of no avail by reason of want of bidders, there is no necessity for a second petition filed by his successor, but the first petition is sufficient to authorize the court to issue him a license to sell. See also Seymour *v.* Ricketts, 21 Nebr. 240, 31 N. W. 781, holding that service of notice of the application sustains proceedings until the debts are paid or the land described is all sold, and the license may be renewed without repeating the service.

Where realty fails to bring the required price at the first offering no additional order of court is required to authorize the personal representative to resell it. Burgett *v.* Apperson, 52 Ark. 213, 12 S. W. 559 (holding that under the Arkansas statute it is only necessary for the court to provide for the execution of the judgment previously entered by directing that the land shall be offered for sale to the highest bidder at the end of twelve months after the first offering, and on a day fixed for that purpose); Campbell *v.* Owens, 32 La. Ann. 265.

Land repurchased by personal representative.— Where land sold to pay debts is repurchased by the personal representative for the estate, a second order to sell it need not

S. Annulling Sales After Confirmation — 1. By Whom Sales May Be Attacked — a. In General.[65] As a general rule only those interested in the estate can complain of informalities in the sale.[66] The regularity of a sale or of the proceedings whereon it is founded may be called in question by heirs or devisees,[67] legatees or distributees,[68] or by creditors of the decedent whose rights have been prejudiced;[69] but not by persons claiming adversely to the heirs or devisees.[70] Purchasers cannot complain of matters not injurious to their rights.[71] Where administration is revoked upon discovery and probate of a will, after the administrator has sold property, the executor is bound by the sale, although the legatees may attack it.[72]

be founded on a new order to show cause why the land should not be sold. Stowe *v.* Banks, 123 Mo. 672, 27 S. W. 347.

65. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d, (XII), (C).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, m.

66. Ardis *v.* Smith, 52 Ga. 102; Mouser *v.* Bogwell, 76 S. W. 826, 25 Ky. L. Rep. 1032. See also Webster *v.* Calden, 53 Me. 203.

Persons desiring to make an advanced bid have no such interest as to entitle them to have a sale set aside on the ground of fraud. Terry *v.* Clothier, 1 Wash. 475, 25 Pac. 673.

67. Worthy *v.* Johnson, 8 Ga. 236, 52 Am. Dec. 399 (heirs may file a bill to set aside a sale when the administrator on application has refused to do so); Randall *v.* State Bank, 17 La. 273; Jones *v.* Carter, 56 Mo. 403; Remick *v.* Butterfield, 31 N. H. 70, 64 Am. Dec. 316 (each may sue at law for his own share when the sale is void). But *compare* Seward *v.* Clark, 67 Ind. 289, holding that in the absence of fraud or mistake infant heirs are bound by the proceedings and cannot by appealing after attaining their majority annul the sale.

In New Hampshire it has been held that heirs may not, pending the administration, maintain a writ of entry against one holding under a void sale, because under the statute the administrator's right of possession continues throughout the administration. Bergin *v.* McFarland, 26 N. H. 533.

Forced heirs having only a residuary interest may not attack a sale for irregularities not affecting them. Brown *v.* Jacobs, 24 La. Ann. 526.

Heirs taking subject to an estate by curtesy are not prejudiced by and cannot complain of a mortgage authorized by the court to secure a debt of the ancestor and made payable on the death of the husband. Corbett's Estate, 10 Pa. Dist. 59.

Insufficiency of assets.— Heirs cannot complain of a sale for full value when the assets, including proceeds of the sale, are insufficient to pay the debts. Highsmith *v.* Whitehurst, 120 N. C. 123, 26 N. E. 917. And see Trahan *v.* Simon, 51 La. Ann. 809, 25 So. 374; Matter of Wood, 70 N. Y. App. Div. 321, 75 N. Y. Suppl. 272. But a report of insolvency will not alone constitute a defense to an action by heirs, as it is not conclusive of the final insolvency of the estate. Grant *v.* Lloyd, 12 Sm. & M. (Miss.) 191.

68. Stanbrough *v.* McClellan, 36 La. Ann. 234; Bland *v.* Muncaster, 24 Miss. 62, 57 Am. Dec. 162; Price *v.* Nesbit, 1 Hill Eq. (S. C.) 445.

69. Grubbs *v.* McGlawn, 39 Ga. 672 [*overruling* Mercer *v.* Newsom, 23 Ga. 151]; Elting *v.* Biggsville First Nat. Bank, 173 Ill. 368, 50 N. E. 1095 [*affirming* 68 Ill. App. 204]; Thompson's Succession, 42 La. Ann. 118, 7 So. 477, mortgage creditor. *Contra*, Thompson *v.* Cox, 53 N. C. 311.

Except where the proceeds are insufficient to pay the debts a creditor may not avoid a sale. Bland *v.* Muncaster, 24 Miss. 62, 57 Am. Dec. 162. See also Patterson *v.* Eakin, 87 Va. 49, 12 S. E. 144.

If a sale is absolutely void the creditor may attack it without showing any injury to himself. Macarty *v.* Bond, 9 La. 351.

The fact that a creditor has a remedy on the administrator's bond does not preclude him from vacating a sale to the administrator himself. *In re* Devincenzi, 119 Cal. 498, 51 Pac. 845; Prestidge *v.* Pendleton, 24 Miss. 80; Murphy *v.* Clark, 1 Sm. & M. (Miss.) 221; Hannum's Appeal, 1 Chest. Co. Rep. (Pa.) 362.

A bailor of property sold as that of a bailee may not attack the sale if he has sustained no injury. Waterhouse *v.* Bourke, 14 La. Ann. 358.

70. *Illinois.*— Wimberly *v.* Hurst, 33 Ill. 166, 83 Am. Dec. 295.

Louisiana.— Tabarry's Succession, 30 La. Ann. 187.

Maine.— Purrington *v.* Dunning, 11 Me. 174.

Massachusetts.— Knox *v.* Jenks, 7 Mass. 488.

Pennsylvania.— Bean's Appeal, 2 Walk. 512.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1539.

71. Cralle *v.* Meem, 8 Gratt. (Va.) 496, holding that purchasers cannot have a sale set aside, although prematurely made, if it was beneficial to infant heirs and consented to by the adult heirs.

Where there have been two sales, one claiming as purchaser under the first cannot complain of irregularities in the proceedings on the second sale. Sullivan *v.* Berry, 83 Ky. 198, 4 Am. St. Rep. 147; *In re* Gillespie, 10 Watts (Pa.) 300.

72. Price *v.* Nesbit, 1 Hill Eq. (S. C.) 445.

b. Estoppel[73] — (i) *In General.* One who might otherwise successfully attack a sale may be estopped from so doing, the principles governing such estoppel being practically the same as those applying to estoppel generally. Thus one may be estopped by being present at the sale and by his conduct inducing another to purchase,[74] or he may estop himself from attacking the proceedings or particular features thereof by himself asserting title thereunder.[75] So too one will not be heard to object to the regularity of proceedings had on his own application,[76] instigation, or consent,[77] or which he has aided in carrying into effect.[78] Neither will one be heard to complain of defects for the existence of which he is himself responsible.[79] The ordinary principles of *res judicata* apply to proceedings for the sale of a decedent's property and proceedings attacking such sale, and parties thereto are concluded by determinations made in such proceedings,[80] even with regard to questions not litigated but which there was an opportunity to litigate.[81] And it has been held that a party to the proceeding who fails to set up an adverse claim to the property is estopped *in pais*, although the court could not in that proceeding adjudicate his claim.[82] Where one is inter-

73. Sale of realty under testamentary authority see *supra*, VIII, O, 9, d, (XII), (C).

74. McCaa *v.* Woolf, 42 Ala. 389 (a husband stating at the sale that the title is good estops both himself and his wife from asserting her undisclosed interest); Williamson *v.* Ross, 33 Ala. 509 (stating that a purchaser would get a good title); Favill *v.* Roberts, 50 N. Y. 222 [*affirming* 3 Lans. 14].

Mere presence at the sale without affirmative acts inducing the purchase will not usually work an estoppel (Allen *v.* Kallam, 69 Ala. 442; Owen *v.* Slatter, 26 Ala. 547, 62 Am. Dec. 745); but a widow cannot object to a sale because made without her consent when she was present and purchased part of the property (Davidson *v.* Silliman, 24 La. Ann. 225), nor can one object for want of notice of a sale if he was there present (Adams *v.* Howard, 110 N. C. 15, 14 S. E. 648).

75. Doe *v.* Wright, 2 Houst. (Del.) 49; McChesney *v.* Daly, 7 La. Ann. 613; Aicard *v.* Daly, 7 La. Ann. 612; Allen *v.* Atchison, 26 Tex. 616. An heir cannot take advantage of the acts of one claiming to be administrator in establishing a land certificate, which was supposed to have been lost to the estate, and then contest its sale on the ground that the administrator was not lawfully appointed. Giddings *v.* Steele, 28 Tex. 732, 91 Am. Dec. 336.

76. Evans *v.* Mathews, 8 Ala. 99; Ions *v.* Harbison, 112 Cal. 260, 44 Pac. 572; Linman *v.* Riggins, 40 La. Ann. 761, 5 So. 49, 8 Am. St. Rep. 549; Mardis *v.* Mardis, 13 La. Ann. 236; Saulet *v.* Ogilvie, 11 La. 282.

77. Jennings *v.* Jenkins, 9 Ala. 285; Pepper *v.* Zahrsinger, 94 Ind. 88; *In re* Simmonds, 19 Pa. St. 439; James *v.* Corker, 30 Tex. 617; Grande *v.* Chaves, 15 Tex. 550. An heir cannot attack a sale on the ground that he was a minor not represented, when he had, in a petition to be recognized as heir, averred that he was of full age. Chandler *v.* Hough, 7 La. Ann. 440.

78. Jennison *v.* Hapgood, 10 Pick. (Mass.) 77; Butler *v.* Emmett, 8 Paige (N. Y.) 12. See also Pool *v.* Ellis, 64 Miss. 555, 1 So. 725, holding that where the parties thought a sale was illegal and the purchaser purchased again at a second sale he could not assert that the first sale was legal.

Irregularities are cured by defendants coming in after the sale and consenting to confirmation. Chambers *v.* Penland, 78 N. C. 53.

79. Bennallack *v.* Richards, 125 Cal. 427, 58 Pac. 65, holding that an executor cannot claim title for want of confirmation which he himself should have procured.

80. Seymour *v.* Seymour, 22 Conn. 272; Linman *v.* Riggins, 40 La. Ann. 761, 5 So. 49, 8 Am. St. Rep. 549; Ward *v.* Lowndes, 96 N. C. 367, 2 S. E. 591; Wilson *v.* Leigh, 39 N. C. 97; Dooly *v.* Russell, 10 Wash. 195, 38 Pac. 1000.

Remainder-men represented by trustees are bound by the record. Rhodes *v.* Caswell, 41 N. Y. App. Div. 229, 58 N. Y. Suppl. 470.

The parties entitled to distribution of the purchase-money are concluded by the settlement of the administrator's account and estopped thereby from attacking the sale on the ground that the purchase-money was not paid. Long *v.* Joplin Min., etc., Co., 68 Mo. 422.

81. *Indiana.*— Gavin *v.* Graydon, 41 Ind. 559.

North Carolina.— Morrisett *v.* Ferebee, 120 N. C. 6, 26 S. E. 628.

Pennsylvania.— Jacoby *v.* McMahon, 174 Pa. St. 133, 34 Atl. 286, 189 Pa. St. 1, 41 Atl. 1119.

South Carolina.— Culler *v.* Crim, 52 S. C. 574, 30 S. E. 635; Hodge *v.* Fabian, 31 S. C. 212, 9 S. E. 820, 17 Am. St. Rep. 25.

Tennessee.— Posey *v.* Eaton, 9 Lea 500.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1540; and, generally, JUDGMENTS.

A vendee who neglects to set up his sale of the property to a third person in a suit to set aside the sale will not be permitted to set it up in a subsequent suit to recover the property or its value. Putnam *v.* Davidson, 3 La. Ann. 266.

82. Harding *v.* Le Moyne, 114 Ill. 65, 29 N. E. 188.

ested in two capacities he is usually held to be estopped in one by his acts in the other.[83]

(II) *Retaining Benefits.*[84] One who has knowingly accepted and retained the purchase-money or a part thereof is thereby estopped from afterward attacking the sale or asserting title to the land,[85] but it is necessary in order to work the estoppel that the person receiving the money should have known at the time of the facts rendering the sale invalid,[86] and that what was received was proceeds of

83. Beniteau *v.* Dodsley, 88 Mich. 152, 50 N. W. 110; Beeson *v.* Beeson, 9 Pa. St. 279; Dubose *v.* James, McMull. Eq. (S. C.) 55. But *compare* Owen *v.* Slatter, 26 Ala. 547, 62 Am. Dec. 745, where a widow who was also administratrix was held not estopped from claiming dower by failing to announce at the sale that the land was to be sold subject to her dower.

84. **Reimbursement of purchaser for purchase-money and improvements when sale avoided** see *infra*, XII, S, 6, a, b.

85. *Georgia.*— Carey *v.* Moore, 119 Ga. 92, 45 S. E. 998; Moore *v.* Carey, 116 Ga. 28, 42 S. E. 376.

Indiana.— Axton *v.* Carter, 141 Ind. 672, 39 N. E. 546; Wilmore *v.* Stetler, 137 Ind. 127, 34 N. E. 357, 36 N. E. 856, 45 Am. St. Rep. 169; Palmerton *v.* Hoop, 131 Ind. 23, 30 N. E. 874; Bumb *v.* Gard, 107 Ind. 575, 8 N. E. 713.

Kansas.— Crane *v.* Lowe, 59 Kan. 606, 54 Pac. 666.

Louisiana.— Beard *v.* Cash, 32 La. Ann. 121; Tilsen *v.* Haine, 27 La. Ann. 228; McCulloch *v.* Weaver, 14 La. Ann. 33; *In re* Dickson, 6 La. Ann. 754.

Mississippi.— Willie *v.* Brooks, 45 Miss. 542; Lee *v.* Gardiner, 26 Miss. 521.

Missouri.— Meddis *v.* Kenney, 176 Mo. 200, 75 S. W. 633, 98 Am. St. Rep. 496.

New York.— *In re* Place, 1 Redf. Surr. 276.

Pennsylvania.— Cameron *v.* Coy, 165 Pa. St. 290, 30 Atl. 843; Fink *v.* Miller, 19 Pa. Super. Ct. 556.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1541.

In Alabama, if the sale was void, the estoppel will not be recognized at law but will be enforced in equity. Oden *v.* Dupuy, 99 Ala. 36, 11 So. 419, 12 So. 605; Wilson *v.* Holt, 83 Ala. 528, 3 So. 321, 3 Am. St. Rep. 768; Robertson *v.* Bradford, 73 Ala. 116; Casey *v.* Morgan, 67 Ala. 441; Bell *v.* Craig, 52 Ala. 215; Williamson *v.* Ross, 33 Ala. 509; Price *v.* Wilkinson, 10 Ala. 172.

In Georgia it seems that a purchaser does not get title by estoppel, but is merely entitled to reimbursement to the extent that he has added to the trust estate. Nosworthy *v.* Blizzard, 53 Ga. 668.

In Indiana it is held that the court is without authority to sell the widow's share, that an order for such sale is void, and that the widow is not estopped from asserting her title by accepting a part of the proceeds of the sale as a portion of her distributive share of the estate. Compton *v.* Pruitt, 88 Ind. 171; Hanlon *v.* Waterbury, 31 Ind. 168. So too children who have accepted the proceeds of the sale of their own interest are not estopped from asserting their title to the widow's interest after her death. Elliott *v.* Frakes, 71 Ind. 412; Fry *v.* Lawson, 32 Ind. App. 364, 69 N. E. 1038. If, however, the widow actively instigates the sale of her interest and accepts the proceeds she will be estopped (Pepper *v.* Zahnsinger, 94 Ind. 88. See also Myers *v.* Boyd, 144 Ind. 496, 43 N. E. 567), but merely requesting the administrator to sell without accepting the proceeds will not work an estoppel (Roberts *v.* Lindley, 121 Ind. 56, 22 N. E. 967).

Participation in the proceeds of a bond given for the purchase-money estops distributees from charging the administrator with liability for improperly selling. Wilson's Appeal, 4 Pennyp. (Pa.) 432.

The death of one of the heirs before payment of the price does not affect the estoppel, where the remaining heirs receive their own interest and that of the decedent. Wilmore *v.* Stetler, 137 Ind. 127, 34 N. E. 357, 36 N. E. 856, 45 Am. St. Rep. 169.

Receipt by trustee ratifies voidable sale. Rhodes *v.* Caswell, 41 N. Y. App. Div. 229, 58 N. Y. Suppl. 470.

A receipt of the purchase-money by the administrator and its use to pay debts creates an equitable estoppel against the heir. Robertson *v.* Bradford, 73 Ala. 116.

The purchaser may by a bill in equity divest the title of heirs who have knowingly retained the purchase-money. Smith *v.* Lusk, 119 Ala. 394, 24 So. 256.

A creditor receiving the purchase-money forfeits no rights as to priority of payment. The receipt of the money merely prevents the following of the land. New Orleans Gaslight, etc., Co. *v.* Webb, 2 La. Ann. 526.

Merely charging the purchase-money against the purchaser's claim as a distributee of the estate does not estop the heirs. Sweeney *v.* Warren, 127 N. Y. 426, 28 N. E. 413, 24 Am. St. Rep. 468.

If the money was received for the purpose of tendering it back and not for retention, the estoppel does not arise. Moore *v.* Carey, 116 Ga. 28, 42 S. E. 376.

Void sale.— The executrix cannot ratify a sale void for want of a valid order by accepting the purchase-money. Smelser *v.* Blanchard, 15 La. Ann. 254.

Estoppel does not operate in favor of purchaser taking with notice of defect. Campbell *v.* Drais, 125 Cal. 253, 57 Pac. 994.

86. Schnell *v.* Chicago, 38 Ill. 382, 87 Am. Dec. 304; Harmon *v.* Smith, 38 Fed. 482, the heirs in these cases were minors.

the sale.[87] Distribution of the purchase-money to persons under disability does not estop them unless such distribution is ratified upon removal of the disability,[88] and it has been held that even the receipt of money and expression of satisfaction at the sale after reaching majority will not estop one who was an infant when the sale was made.[89] Estoppel has also been held to arise from bringing suit for the purchase-money[90] and recovering judgment therefor.[91] A like estoppel prevails against a purchaser, forbidding him, while he retains possession of the property, to resist payment of the purchase-money or otherwise repudiate the burdens arising from the purchase because of defects in the sale or proceedings leading up thereto.[92]

(III) *RATIFICATION.* Heirs of full age may bind themselves by an express ratification of an irregular sale, and will not be thereafter heard to question its validity,[93] but persons under disability cannot ratify.[94] If in a bill to avoid a voidable sale and for other purposes plaintiff amends by striking out the prayer to set aside the sale he thereby affirms the sale.[95]

2. TIME WITHIN WHICH SALE MAY BE ANNULLED — a. Statutes of Limitations.[96] Where a proceeding attacking a sale by an executor or administrator falls within

87. McArthur *v.* Carrie, 32 Ala. 75, 70 Am. Dec. 529; Spencer *v.* Jennings, 139 Pa. St. 198, 21 Atl. 73.

88. Willie *v.* Brooks, 45 Miss. 542; Valle *v.* Fleming, 19 Mo. 454, 61 Am. Dec. 566. But see Milner *v.* Vandivere, 86 Ga. 540, 12 S. E. 879.

They must refund money or have it charged upon land. Willie *v.* Brooks, 45 Miss. 542.

A married woman is estopped by receiving the proceeds of the sale, but she is not estopped by her husband's receipt of them without her consent. Kempe *v.* Pintard, 32 Miss. 324.

89. Ackley *v.* Dygert, 33 Barb. (N. Y.) 176, where no one has been influenced by the declaration of the heir to buy the land or to do any other act by which he would be prejudiced were the heir allowed to assert title to the property.

90. Lathrop *v.* Doty, 82 Iowa 272, 47 N. W. 1089; Ogden *v.* Ogden, 1 S. W. 665, 8 Ky. L. Rep. 416.

91. Johnson *v.* Perkins, 1 Baxt. (Tenn.) 367; Miller *v.* Anders, 21 Tex. Civ. App. 72, 51 S. W. 897.

92. *Alabama.*— Martin *v.* Truss, 50 Ala. 95; Hickson *v.* Lingold, 47 Ala. 449; Duncan *v.* Stewart, 25 Ala. 408, 60 Am. Dec. 527; Worthington *v.* McRoberts, 7 Ala. 814, 9 Ala. 297; Lamkin *v.* Reese, 7 Ala. 170; Harbin *v.* Levi, 6 Ala. 399. In early cases it was held that there was no estoppel, although the purchaser had not suffered eviction, if the sale was absolutely void. Wiley *v.* White, 3 Stew. & P. 355, 2 Stew. 331. But although no title passed payment cannot be resisted if the purchaser is about to receive title from another source. Lee *v.* White, 4 Stew. & P. 178.

Louisiana.— Dupleix *v.* Deblieux, 26 La. Ann. 218; Collins *v.* Hollier, 13 La. Ann. 585; Aicard *v.* Daly, 7 La. Ann. 612.

Mississippi.— Martin *v.* Tarver, 43 Miss. 517; Whitworth *v.* Carver, 43 Miss. 61; Bohannon *v.* Madison, 31 Miss. 348; Joslin *v.* Caughlin, 27 Miss. 852. The reason given for the rule is that if the sale is void the property is unadministered assets and the administrator is therefore chargeable therewith, and the purchaser cannot retain the property without indemnifying him. Therefore the rule does not apply to real estate for which the administrator is not responsible. Washington *v.* McCaughan, 34 Miss. 304.

Missouri.— Adair *v.* Adair, 78 Mo. 630.

Texas.— Byars *v.* Thompson, 80 Tex. 468, 15 S. W. 1087; Claiborne *v.* Yoeman, 15 Tex. 44; Perry *v.* Booth, 7 Tex. 493.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1542.

Where a firm buys property, one who afterward enters it as a partner is bound by the conditions of the sale and must carry them out. Allen *v.* Atchison, 26 Tex. 616.

Compelling election.— If the sale was in excess of the administrator's authority the purchaser may compel creditors and heirs to elect its ratification or rescission. McCully *v.* Chapman, 58 Ala. 325.

93. Dunlap *v.* Mitchell, 10 Ohio 117; O'Dell *v.* Rogers, 44 Wis. 136; Mills *v.* Mills, 57 Fed. 873.

Void sale.— Under La. Code, arts. 1139, 1663, making sales by executors to themselves absolute nullities, such sales cannot be ratified by relation or so as to bind any one not a party to the ratification. Scott *v.* Gorton, 14 La. 115, 33 Am. Dec. 578.

Facts not amounting to ratification.— Where, pending a suit to set a sale aside, an amendment is made praying for an accounting and a money judgment, and an agreement made with other claimants that the land be sold subject to a determination of their respective rights, such amendment is not a ratification of the sale and the rights of plaintiff should be transferred to the fund realized. Carmichael *v.* Foster, 69 Ga. 372.

94. Mitchell *v.* Dunlap, 10 Ohio 117 (married women); Longworth *v.* Goforth, Wright (Ohio) 192 (infants).

95. Smith *v.* Worthington, 53 Fed. 977, 4 C. C. A. 130.

96. Sale of realty under testamentary authority see *supra*, VIII, O, 9, d, (XII), (D).

the provisions of a general statute of limitations, the ordinary rules of construction of such statutes of course apply,[97] and a purchaser may be protected by his adverse possession for the statutory period.[98] There are, however, in many jurisdictions, special statutes expressly limiting the time within which executor's or administrator's sales may be attacked,[99] and these statutes are usually held to apply to sales which are void[1] as well as to those which are merely irregular and void-

97. See, generally, LIMITATIONS OF ACTIONS.

A purchase by the administrator is not voidable on the ground of actual fraud but on the ground of public policy, and a suit to set aside such a sale is not within a statute limiting actions for relief or against fraud, nor is it an action for the recovery of real property. Potter *v.* Smith, 36 Ind. 231.

In Texas a suit to set aside a sale on the ground of fraud is in substance a bill of review and is barred by a two years' statute relating to bills of review and writs of error. Murchison *v.* White, 54 Tex. 78. But such an action may be brought within a year after plaintiff becomes of age, although eighteen years after the order attacked. Kalteyer *v.* Wipff, 92 Tex. 673, 52 S. W. 63.

98. Davidson *v.* Koehler, 76 Ind. 398; McCullough *v.* Minor, 2 La. Ann. 466; Jones *v.* Billstein, 28 Wis. 221.

Even though the proceedings were void, he may be so protected. McMichael *v.* Craig, 105 Ala. 382, 16 So. 883.

99. *California.*— Code Civ. Proc. § 190, providing that no action for the recovery of any estate sold by an executor or administrator shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within three years next after the sale, bars an action after that time by grantees of heirs who were minors, because the administrator had the right to bring the suit and might have done so within the statutory time. Meeks *v.* Olpherts, 100 U. S. 564, 25 L. ed. 735. But the statute does not run, where the administrator was himself the purchaser, until the right accrues to the heirs to sue. Gray *v.* Quicksilver Min. Co., 68 Fed. 677.

Indiana.— See Palmerton *v.* Hoop, 131 Ind. 23, 30 N. E. 874.

Louisiana.— By Rev. Civ. Code, art. 3543, informalities are cured in five years. This relates to all irregularities prior to the sale (Webb *v.* Keller, 39 La. Ann. 55, 1 So. 423. See also Valderes *v.* Bird, 10 Rob. 396) and bars persons under disabilities (Linman *v.* Riggins, 40 La. Ann. 761, 5 So. 49, 8 Am. St. Rep. 549).

Michigan.— Howell St. § 6074, applies to attacks on the ground of fraud (Egan *v.* Grece, 79 Mich. 629, 45 N. W. 74) and bars a grantee of an heir in five years after the heir attains his majority (Watson *v.* Lion Brewing Co., 61 Mich. 595, 28 N. W. 726).

Mississippi.— Code (1871), § 2173, bars an action in one year if the sale is made in good faith to one who pays the purchase-money (Summers *v.* Brady, 56 Miss. 10; Morgan *v.* Hazlehurst Lodge, 53 Miss. 665), but it will not bar an action where the purchaser was merely credited for the amount of his bid on a debt (Clay *v.* Field, 115 U. S. 260, 6 S. Ct. 36, 29 L. ed. 375) or where the purchase was in bad faith (Sharpley *v.* Plant, 79 Miss. 175, 28 So. 799, 89 Am. St. Rep. 588). But a purchaser in good faith from the purchaser at the sale is protected. Summers *v.* Brady, 56 Miss. 10.

Wisconsin.— Rev. St. c. 94, § 60, limiting to five years actions by heirs or others claiming under a deceased person, has the effect of preventing the court itself from revising its former proceedings so as to divest title acquired through the sale. Betts *v.* Shotton, 27 Wis. 667.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1553.

The Spanish laws formerly prevailing within the Louisiana Purchase prevented an attack after four years. McNair *v.* Hunt, 5 Mo. 300.

1. Hawley *v.* Zigerly, 135 Ind. 248, 34 N. E. 219; Davidson *v.* Bates, 111 Ind. 391, 12 N. E. 687; White *v.* Clawson, 79 Ind. 188; Vail *v.* Halton, 14 Ind. 344; Vancleave *v.* Milliken, 13 Ind. 105; Holmes *v.* Beal, 9 Cush. (Mass.) 223; Rice *v.* Dickerman, 47 Minn. 527, 50 N. W. 698; Spencer *v.* Sheehan, 19 Minn. 338. *Contra,* Boyles *v.* Boyles, 37 Iowa 592; Chadbourne *v.* Rackliff, 30 Me. 354.

The California statute has been construed by both the state and federal courts as applying to void sales (Ganahl *v.* Soher, 68 Cal. 95, 8 Pac. 650; Harlan *v.* Peck, 33 Cal. 515, 91 Am. Dec. 653; Meeks *v.* Olpherts, 100 U. S. 564, 25 L. ed. 735 [*affirming* 16 Fed. Cas. No. 9,393, 3 Sawy. 206]), but it is not applicable where the sale is void and the purchaser has never been in possession (Gage *v.* Downey, 94 Cal. 241, 29 Pac. 635). And where the sale was made by one appointed as public administrator, who, without taking oath or giving bond, assumed the administration, it was held that he did not represent the heirs and that the sale was not within the statute. Staples *v.* Connor, 79 Cal. 14, 21 Pac. 380.

In Michigan void sales are within Howell St. § 6074, relating to actions for the recovery of any estate sold by an executor or administrator, by any heir or other person claiming under the deceased testator or intestate (Kammerer *v.* Morlock, 125 Mich. 320, 84 N. W. 319; Toll *v.* Wright, 37 Mich. 93), but not within Howell St. § 8698, relating to sales under an order, judgment, decree, or process of a court or legal tribunal of competent jurisdiction (Toll *v.* Wright, *supra*; Millar *v.* Babcock, 29 Mich. 526).

able.[2] A statute barring attacks on sales already made in two years from the passage of the act has been held good,[3] and it has even been held that a statute in general terms applies to sales already made, at least where time remains after the passage of the act to commence the action.[4] As to the time when the statutes of limitation begin to run the rules in the different states vary.[5] The running of the statute is not usually prevented by the fact that the administration has not been closed,[6] or that dower has not been assigned to the widow, when she is not in possession;[7] neither will ignorance of the facts suspend the statute when there was no concealment and the facts were readily ascertainable.[8]

b. Laches. Irrespective of a statute of limitations one may by his own laches lose the right to attack a sale, as by remaining silent until the rights of third persons have intervened,[9] until the rights of creditors have been lost by lapse of time,[10] or until the purchaser has made valuable improvements on the land.[11] So also one may be estopped by remaining silent for a long time and receiving benefits from the sale,[12] and in general courts of equity will apply the rule requiring diligence on the part of suitors, and deny relief when there has been unreasonable delay.[13]

2. See Pearson *v.* Burditt, 26 Tex. 157, 80 Am. Dec. 649.

Sales to the representative himself are within the statutes. Axton *v.* Carter, 141 Ind. 672, 39 N. E. 546; Fisher *v.* Bush, 133 Ind. 315, 32 N. E. 924.

3. Rice *v.* Dickerman, 47 Minn. 527, 50 N. W. 698; Streeter *v.* Wilkinson, 24 Minn. 288.

4. Beal *v.* Nason, 14 Me. 344. But see Holyoke *v.* Haskins, 5 Pick. (Mass.) 20, 16 Am. Dec. 372.

5. In California, Code Civ. Proc. § 1573, provides that an action for the recovery of real estate sold by the administrator must be commenced within three years after the settlement of his final account, and it is held that the statute commences to run at the expiration of a reasonable time for obtaining a settlement after the estate is in condition to be closed. Dennis *v.* Bint, 122 Cal. 39, 54 Pac. 378, 68 Am. St. Rep. 17.

In Indiana the special statute does not begin to run until the sale is confirmed, but the general statute relating to actions to recover possession of real estate begins to run, when the sale is void, from the time the purchaser takes possession under his certificate. L'Hommedieu *v.* Cincinnati, etc., R. Co., 120 Ind. 435, 22 N. E. 125.

In Wisconsin the right of action of the heirs accrues as soon as the grantee in the representative's deed goes into possession, and the commencement of the running of the statute is not postponed until the settlement of the estate. Jones *v.* Billstein, 28 Wis. 221 [*followed* in Jones *v.* Lathrop, 28 Wis. 339].

6. Bland *v.* Fleeman, 58 Ark. 84, 23 S. W. 4; Burney *v.* Ludeling, 41 La. Ann. 627, 6 So. 248.

7. Agan *v.* Shannon, 103 Mo. 661, 15 S. W. 757.

8. Bland *v.* Fleeman, 58 Ark. 84, 25 S. W. 4; Dennis *v.* Bint, 122 Cal. 39, 54 Pac. 378, 68 Am. St. Rep. 17, at least without accounting for the failure to discover the facts. See also McGauhey *v.* Brown, 46 Ark. 25.

9. Jones *v.* Rountree, 96 Ga. 230, 23 S. E. 311; Fuller *v.* Little, 59 Ga. 338; Massey's Succession, 46 La. Ann. 126, 15 So. 6; Benedict *v.* Bonnot, 39 La. Ann. 972, 3 So. 223; Hawkins *v.* Simmons, 41 N. C. 16; Halbert *v.* Carroll, (Tex. Civ. App. 1894) 25 S. W. 1102.

10. Murphy *v.* De France, 105 Mo. 53, 15 S. W. 949, 16 S. W. 861.

11. Jones *v.* Woodstock Iron Co., 95 Ala. 551, 10 So. 635; Evans *v.* Snyder, 64 Mo. 516; *In re* Gillespie, 10 Watts (Pa.) 300.

Person under disability.—A married woman who received no purchase-money is not estopped by permitting the purchaser to make improvements (Throckmorton *v.* Pence, 121 Mo. 50, 25 S. W. 843); nor is an infant (Jones *v.* Woodstock Iron Co., 95 Ala. 551, 10 So. 635).

Where the representative becomes the purchaser an heir is not estopped by permitting him to make improvements (Potter *v.* Smith, 36 Ind. 231. See also Caldwell *v.* Caldwell, 45 Ohio St. 512, 15 N. E. 297), but in such case the representative is to be compensated for his improvements (Smith *v.* Drake, 23 N. J. Eq. 302).

12. Davis *v.* Evans, 62 Ala. 401; Garrett *v.* Lynch, 45 Ala. 204; Jacoby *v.* McMahon, 174 Pa. St. 133, 34 Atl. 286; Sager *v.* Mead, 171 Pa. St. 349, 33 Atl. 355; Hudson *v.* Jurnigan, 39 Tex. 579. See also *supra*, XII, S, 1, b, (II).

13. *Georgia.*— Word *v.* Davis, 107 Ga. 780, 33 S. E. 691; Etheredge *v.* Slayton, 94 Ga. 496, 19 S. E. 818, 99 Ga. 138, 25 S. E. 24; Flanders *v.* Flanders, 23 Ga. 249, 68 Am. Dec. 523; Beckham *v.* Newton, 21 Ga. 187.

Illinois.— Kellogg *v.* Wilson, 89 Ill. 357.

Michigan.— Egan *v.* Grece, 79 Mich. 629, 45 N. W. 74.

North Carolina.— Harris *v.* Brown, 123 N. C. 419, 31 S. E. 877.

Pennsylvania.— Irwin *v.* Guthrie, 198 Pa. St. 267, 47 Atl. 992; Grindrod's Estate, 140 Pa. St. 161, 21 Atl. 259.

United States.— Balkham *v.* Woodstock Iron Co., 154 U. S. 177, 14 S. Ct. 1010, 38 L. ed. 953 [*affirming* 43 Fed. 648, 11 L. R. A.

3. Collateral Attack — a. Proper Only When Sale Void. A void order of sale is open to collateral attack.[14] If, however, the jurisdiction of the court has properly attached, the order of sale is not void, whatever may be the errors and irregularities in the proceedings,[15] and the general rule is that there can be no collateral attack on such an order except for want of jurisdiction.[16]

230]; Eames *v.* Manly, 117 Fed. 387, 54 C. C. A. 561.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1553.

The analogy of the statute of limitations will be followed. Candler *v.* Clarke, 90 Ga. 550, 16 S. E. 645; Musselman *v.* Eshleman, 10 Pa. St. 394, 51 Am. Dec. 493. And in Indiana it is held that where lapse of time is relied upon it must be pleaded and based on some statute of limitations. Morgan *v.* Wattles, 69 Ind. 260.

Ignorance of the law will not excuse delay. Word *v.* Davis, 107 Ga. 780, 33 S. E. 691.

Infants notified of proceedings are not estopped by acquiescence for several years where they have taken no benefits. Harrison *v.* Harrison, 106 N. C. 282, 11 S. E. 356.

Delay not sufficient to defeat right.— A delay of six years is not unreasonable where some of the heirs were non-residents, some were invalids, and the others minors, and the facts were not discovered until a few days before the suit was commenced (Ingalls *v.* Rowell, 149 Ill. 163, 36 N. E. 1016); nor is nineteen years' delay fatal where a life-estate existed for sixteen years, and a remainder-man was under disability and knew nothing as to the nature of the sale for several years after his estate fell in. Kiskaddon *v.* Dodds, 21 Pa. Super. Ct. 351.

When lapse of time will not mature title. — Mere lapse of time will not mature title in a purchaser of a land certificate where he did not pay the price or give security therefor, where there has been no confirmation and the certificate has not been located. Harris *v.* Brower, 3 Tex. Civ. App. 649, 22 S. W. 758.

14. Long *v.* Burnett, 13 Iowa 28, 81 Am. Dec. 420, special administrator licensed to sell when there was no authority to grant such power to a special administrator.

A defect of jurisdiction apparent on the face of the record will sustain an action to vacate the proceedings. Guy *v.* Pierson, 21 Ind. 18. And see McPherson *v.* Cunliff, 11 Serg. & R. (Pa.) 422, 14 Am. Dec. 642.

15. *Alabama.*— De Bardelaben *v.* Stoudenmire, 48 Ala. 643; Spragins *v.* Taylor, 48 Ala. 520; Satcher *v.* Satcher, 41 Ala. 26, 91 Am. Dec. 498; Wyman *v.* Campbell, 6 Port. 219, 31 Am. Dec. 677. See also Perkins *v.* Winter, 7 Ala. 855.

Arkansas.— Apel *v.* Kelsey, 47 Ark. 413, 2 S. W. 102.

California.— Stuart *v.* Allen, 16 Cal. 473, 76 Am. Dec. 551.

Florida.— Price *v.* Winter, 15 Fla. 66.

Georgia.— Coggins *v.* Griswold, 64 Ga. 323.

Illinois.— Harris *v.* Lester, 80 Ill. 307.

Iowa.— Cheney *v.* McColloch, 104 Iowa 183, 73 N. W. 580; Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122.

Kansas.— Fleming *v.* Bale, 23 Kan. 88.

North Carolina.— McIver *v.* Stephens, 101 N. C. 255, 7 S. E. 695.

Tennessee.— Ridgely *v.* Bennett, 13 Lea 210; Norville *v.* Coble, 1 Lea 465.

Washington.— Furth *v.* U. S. Mortgage, etc., Co., 13 Wash. 73, 42 Pac. 523.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1449.

Requisites to jurisdiction.—In Alabama the sole requisite to establish jurisdiction and protect an order of sale from collateral attack is the presenting of a petition setting forth a statutory ground for the sale (Friedman *v.* Shamblin, 117 Ala. 454, 23 So. 821; De Bardelaben *v.* Stoudenmire, 48 Ala. 643; Watson *v.* Collins, 37 Ala. 587; Doe *v.* Riley, 28 Ala. 164, 65 Am. Dec. 334; Perkins *v.* Winter, 7 Ala. 855), except where minors are interested, and then there must be proof of the necessity of the sale by deposition, as in chancery proceedings (Thompson *v.* Boswell, 97 Ala. 570, 12 So. 809). But the want of such proof was in an earlier case held to be a mere irregularity (Field *v.* Goldsby, 28 Ala. 218, 65 Am. Dec. 341), and incompetency of the witnesses so examined cannot be proved to defeat the sale if the order of sale contains a recital of proper proof (Kent *v.* Mansel, 101 Ala. 334, 14 So. 489).

16. *Alabama.*— Moore *v.* Cottingham, 113 Ala. 148, 20 So. 994, 59 Am. St. Rep. 100; Hatcher *v.* Clifton, 33 Ala. 301; King *v.* Kent, 29 Ala. 542; Cox *v.* Davis, 17 Ala. 714, 52 Am. Dec. 199.

Arkansas.— George *v.* Norris, 23 Ark. 121; Sturdy *v.* Jacoway, 19 Ark. 499.

California.— Burris *v.* Kennedy, 108 Cal. 331, 41 Pac. 458; Halleck *v.* Moss, 22 Cal. 266; Haynes *v.* Meeks, 20 Cal. 288; *In re* Spriggs, 20 Cal. 121.

Connecticut.— Richardson *v.* Frink, 2 Root 270.

Delaware.— Roach *v.* Martin, 1 Harr. 548, 28 Am. Dec. 546; Martin *v.* Roach, 1 Harr. 477; Van Dyke *v.* Johns, 1 Del. Ch. 93, 12 Am. Dec. 76.

Georgia.— McDade *v.* Burch, 7 Ga. 559, 50 Am. Dec. 407.

Illinois.— Frothingham *v.* Petty, 197 Ill. 418, 64 N. E. 270; Bradley *v.* Droue, 187 Ill. 175, 58 N. E. 304, 79 Am. St. Rep. 214; Bostwick *v.* Skinner, 80 Ill. 147; Moffitt *v.* Moffitt, 69 Ill. 641; Wimberly *v.* Hurst, 33 Ill. 166, 83 Am. Dec. 295; Stow *v.* Kimball, 28 Ill. 93; Iverson *v.* Loberg, 26 Ill. 179, 79 Am. Dec. 364.

Indiana.— Watkins *v.* Lewis, 153 Ind. 648, 55 N. E. 83; Denton *v.* Arnold, 151 Ind. 188, 51 N. E. 240; Pepper *v.* Zahnsinger, 94 Ind.

A stranger to the title may raise no objection not going to the jurisdiction,[17] as the title of the purchaser can be affected by no other defect.[18] The sale itself is likewise protected from collateral attack unless the proceedings are void, either for want of jurisdiction or from a failure to comply with some statutory provision expressly made essential to the validity of the sale.[19] Thus it seems that a sale

88; Gavin *v.* Graydon, 41 Ind. 559; Williams *v.* Sharp, 2 Ind. 101.

Iowa.— Cheney *v.* McColloch, 104 Iowa 183, 73 N. W. 580.

Kentucky.— Muldrow *v.* Fox, 2 Dana 74.

Louisiana.—Anger's Succession, 38 La. Ann. 492; Barbee *v.* Perkins, 23 La. Ann. 331.

Massachusetts.— Thayer *v.* Winchester, 133 Mass. 447; Perkins *v.* Fairfield, 11 Mass. 227.

Michigan.— Howard *v.* Moore, 2 Mich. 226. See also Long *v.* Landman, 118 Mich. 174, 76 N. W. 374.

Nebraska.— Schroeder *v.* Wilcox, 39 Nebr. 136, 57 N. W. 1031.

New Hampshire.— Merrill *v.* Harris, 26 N. H. 142, 57 Am. Dec. 359.

New York.— Forbes *v.* Halsey, 26 N. Y. 53; Jackson *v.* Crawfords, 12 Wend. 533; Jackson *v.* Robinson, 4 Wend. 436.

North Carolina.— Ward *v.* Lowndes, 96 N. C. 367, 2 S. E. 591.

Ohio.— Calkins *v.* Johnston, 20 Ohio St. 539; Benson *v.* Cilley, 8 Ohio St. 604; Richards *v.* Skiff, 8 Ohio St. 586; Cadwallader *v.* Evans, 1 Disn. 385, 12 Ohio Dec. (Reprint) 811.

Pennsylvania.— Dixcy *v.* Laning, 49 Pa. St. 143; Unangst *v.* Kraemer, 8 Watts & S. 391; Fox *v.* Winters, 4 Rawle 174.

South Carolina.— Gates *v.* Irick, 2 Rich. 593.

Texas.— Lyne *v.* Sanford, 82 Tex. 58, 19 S. W. 847, 27 Am. St. Rep. 852; George *v.* Watson, 19 Tex. 354.

Virginia.— Peirce *v.* Graham, 85 Va. 227, 7 S. E. 189.

Wisconsin.— Jackson *v.* Astor, 1 Pinn. 137, 39 Am. Dec. 281.

United States.— Comstock *v.* Crawford, 3 Wall. 396, 18 L. ed. 34; McCants *v.* Peninsular Land Co., 68 Fed. 66, 15 C. C. A. 225; Garrett *v.* Boeing, 68 Fed. 51, 15 C. C. A. 209; May *v.* Logan County, 30 Fed. 250.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1449.

17. *Alabama.*— Doe *v.* Riley, 28 Ala. 164, 65 Am. Dec. 334.

Arkansas.— Montgomery *v.* Johnson, 31 Ark. 74; Thorn *v.* Ingram, 25 Ark. 52.

California.— Zilmer *v.* Gerichten, 111 Cal. 73, 43 Pac. 408; Dennis *v.* Winter, 63 Cal. 16; Halleck *v.* Moss, 22 Cal. 266.

Nebraska.— Trumble *v.* Williams, 18 Nebr. 144, 24 N. W. 716.

New York.— Rigney *v.* Coles, 6 Bosw. 479.

North Carolina.— Overton *v.* Crawford, 52 N. C. 415, 78 Am. Dec. 244.

Texas.— Baker *v.* De Zavalla, 1 Tex. Unrep. Cas. 621.

United States.— Ballance *v.* Forsyth, 13 How. 18, 14 L. ed. 32 [*affirming* 9 Fed. Cas. No. 4,951, 6 McLean 562].

See 22 Cent. Dig. tit. "Executors and Administrators," § 1449.

18. *Alabama.*— Clark *v.* Bernstein, 49 Ala. 596; Spragins *v.* Taylor, 48 Ala. 520; Warnock *v.* Thomas, 48 Ala. 463.

Arkansas.— Bennett *v.* Owen, 13 Ark. 177.

Florida.— Price *v.* Winter, 15 Fla. 66.

Illinois.— Moore *v.* Neil, 39 Ill. 256, 89 Am. Dec. 303; Goudy *v.* Hall, 36 Ill. 313, 87 Am. Dec. 217; Stow *v.* Kimball, 28 Ill. 93.

Louisiana.— Gurney's Succession, 14 La. Ann. 622.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1545; and *infra*, XII, T, 3, c, (III).

19. *Alabama.*— Collins *v.* Johnson, 45 Ala. 548, if the court had jurisdiction and ordered the sale, and the purchase-money has been paid and a deed made.

Arkansas.— Sturdy *v.* Jacoway, 19 Ark. 499, the sale itself vests title and no advantage can be taken collaterally of any defect in the deed.

Mississippi.— Johnson *v.* Cooper, 56 Miss. 608, where the sale has been confirmed and the purchaser has paid the price, gone into possession, and made improvements.

Missouri.— Rugle *v.* Webster, 55 Mo. 246; Tutt *v.* Boyer, 51 Mo. 425.

New Jersey.— Hohokus Tp. *v.* Erie R. Co., 65 N. J. L. 353, 47 Atl. 566; Den *v.* Newark India-Rubber Co., 24 N. J. L. 467.

Pennsylvania.— Iddings *v.* Cairns, 2 Grant 88, strangers cannot collaterally attack sale.

Texas.— Moody *v.* Butler, 63 Tex. 210 (holding that a failure to enter the confirmation on the minutes will not open the sale to collateral attack when an indorsement of confirmation appears on the return); Peterson *v.* Lowry, 48 Tex. 408; Baker *v.* De Zavalla, 1 Tex. Unrep. Cas. 621.

United States.—Nash *v.* Williams, 20 Wall. 226, 22 L. ed. 254; Burnham *v.* Hewey, 4 Fed. Cas. No. 2,175, 1 Hask. 372, holding that under Me. St. (1857) c. 71, § 30, a stranger to the title cannot avoid the sale if the court had jurisdiction and the deed was duly executed and recorded.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1554.

A recital in the record of payment of the purchase-price cannot be contradicted. May *v.* Marks, 74 Ala. 249.

The using of different baptismal names in different parts of the record will not avoid the sale when it is plain that the same person was intended. Webb *v.* Sellers, 27 Tex. 423.

Sale of property not belonging to estate.— An order directing the administration of the estate of one person does not authorize the sale of property of another decedent, and such a sale is void. Woodyard *v.* Threlkeld, 1 A. K. Marsh. (Ky.) 10.

cannot be collaterally attacked because not made by the person licensed to make it, the confirmation curing the defect, at least where the sale was under color of authority.[20]

b. What Attacks Are Collateral. All attacks of an indirect nature are collateral.[21] And even bills in equity to set aside a sale have been said to be collateral attacks,[22] or to amount to collateral attacks so far as the purchaser is concerned.[23]

4. Grounds For Annulling Sales[24]— a. Want of Authority of Executor or Administrator — (i) *Defective Appointment.* Where one is recognized as executor or administrator by the court and licensed to make a sale, the general rule is that the regularity of his appointment cannot be questioned in another proceeding, this rule being based to a certain extent upon the ground that the granting of the license to sell includes an adjudication of the authority of the person applying as representative for the license.[25] But in some states this doctrine is repudiated and it is held that if the representative was not lawfully appointed the sale is void.[26] It has also been held that if the record of the pro-

20. Osman *v.* Traphagen, 23 Mich. 80 (sale by one of two administrators, the other refusing to act in the matter); Harris *v.* Shafer, (Tex. Civ. App. 1893) 21 S. W. 110 (sale by administrator's agent).

21. See Price *v.* Wilkinson, 10 Ala. 172; Bruning *v.* Golden, 159 Ind. 199, 64 N. E. 657; Markle's Estate, 11 Pa. Co. Ct. 13; Wright *v.* McNatt, 49 Tex. 425.

22. Clark *v.* Bernstein, 49 Ala. 596; Spragins *v.* Taylor, 48 Ala. 520; Price *v.* Winter, 15 Fla. 66; Moore *v.* Neil, 39 Ill. 256, 89 Am. Dec. 303; Gurney's Succession, 14 La. Ann. 622. Equity will not set aside an administrator's deed where there was jurisdiction and no fraud. Covington *v.* Chamblin, 156 Mo. 574, 57 S. W. 728. But see *infra*, XII, S, 5, a.

23. Bradley *v.* Droue, 187 Ill. 175, 58 N. E. 304, 79 Am. St. Rep. 214; Moore *v.* Neil, 39 Ill. 256, 89 Am. Dec. 303.

A cross bill attacking the sale in a suit to quiet title to the land is a collateral attack. Friedman *v.* Shamblin, 117 Ala. 454, 23 So. 821.

A bill to impress the land with a trust involves a collateral attack which cannot be sustained where jurisdiction existed. Garrett *v.* Boeing, 68 Fed. 51, 15 C. C. A. 209.

24. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d, (XII), (B).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, m.

A statute specifying on what grounds the sale may be avoided restricts the right of attack to the grounds named. Coon *v.* Fry, 6 Mich. 506; Howard *v.* Moore, 2 Mich. 226; Palmer *v.* Oakley, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41.

25. *Alabama.*— Clancy *v.* Stephens, 92 Ala. 577, 9 So. 522, 524; May *v.* Marks, 74 Ala. 249; Landford *v.* Dunklin, 71 Ala. 594. *Contra*, where there is evidence of the existence of another lawful administrator. Allen *v.* Kellam, 69 Ala. 442.

Illinois.— Hobson *v.* Ewan, 62 Ill. 146; Schnell *v.* Chicago, 38 Ill. 382, 87 Am. Dec. 304.

Iowa.— Little *v.* Sinnett, 7 Iowa 324.

Louisiana.— Ford *v.* Mills, 46 La. Ann. 331, 14 So. 845; Lehmann's Succession, 41 La. Ann. 987, 7 So. 33; Webb *v.* Keller, 39 La. Ann. 55, 1 So. 423; Michael *v.* Michael, 11 La. 149.

Mississippi.— Ragland *v.* Green, 14 Sm. & M. 194.

Missouri.— Macey *v.* Stark, 116 Mo. 481, 21 S. W. 1088; Valle *v.* Fleming, 19 Mo. 454, 61 Am. Dec. 566.

Pennsylvania.— Grove's Estate, 2 Woodw. 182.

Texas.— Rindge *v.* Oliphint, 62 Tex. 682; Dancy *v.* Stricklinge, 15 Tex. 557, 65 Am. Dec. 179; Poor *v.* Boyce, 12 Tex. 440; Halbert *v.* Martin, (Civ. App. 1895) 30 S. W. 388; Evans *v.* Martin, 6 Tex. Civ. App. 331, 25 S. W. 688; Saul *v.* Frame, 3 Tex. Civ. App. 596, 22 S. W. 984.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1547.

Subsequent revocation of appointment.— A sale is not open to attack if made by one while acting as administrator under an appointment by the court, although the court afterward revokes the appointment for error in making it. Benson *v.* Rice, 2 Nott & M. (S. C.) 577.

In a suit to quiet title based upon an administrator's sale, the heirs cannot question the regularity of the appointment of one who was administrator *de facto* and was licensed to sell by a probate court having jurisdiction, if he gave a bond, took the oath, gave notice of the sale, and the sale was confirmed. Woods *v.* Monroe, 17 Mich. 238.

Appointment by another court in same state.— The sale cannot be defeated on collateral attack because another court in the same state had appointed another administrator, the appointment of the one making the sale being regular on its face. Posey *v.* Eaton, 9 Lea (Tenn.) 500. See also Grande *v.* Herrera, 15 Tex. 533.

26. Pryor *v.* Downey, 50 Cal. 388, 19 Am. Rep. 656; Chase *v.* Ross, 36 Wis. 267; Frederick *v.* Pacquette, 19 Wis. 591; Sitz-

bate proceedings does not on its face show facts authorizing a grant of administration, the letters are absolutely void, and so is a sale made in the course of such void administration.[27] The same result follows when the court has granted administration to a person incompetent to be appointed,[28] and also where the sale is made by one who has not qualified, although appointed.[29] Heirs may collaterally attack a sale made by an administrator fraudulently appointed when the purchaser was a party to or had notice of the fraud.[30]

(II) *TERMINATION OF AUTHORITY.* While a sale made after an estate has been actually closed is void,[31] and the termination of the authority of the executor or administrator would seem on the same principle to render invalid any subsequent sale made by him,[32] yet it has been held that a sale made while he is still acting and recognized as representative cannot be impeached, at least collaterally.[33]

b. Defects in Proceedings Prior to Order — (I) *PARTIES.* It has been held that the failure to name the heirs or others interested as parties in the proceedings for the sale, while it may constitute an irregularity, does not render the order void.[34] And so also while infant heirs should be represented by a guardian *ad*

man *v.* Pacquette, 13 Wis. 291. See also Piatt *v.* McCullough, 19 Fed. Cas. No. 11,113, 1 McLean 69.

27. Daniel *v.* Sapp, 20 Ga. 514; Haug *v.* Primeau, 98 Mich. 91, 57 N. W. 25; Templeton *v.* Falls Land, etc., Co., 77 Tex. 55, 13 S. W. 964; Paul *v.* Willis, 69 Tex. 261, 7 S. W. 357; Withers *v.* Patterson, 27 Tex. 491, 86 Am. Dec. 643; Wardrup *v.* Jones, 23 Tex. 489; Hurt *v.* Horton, 12 Tex. 285; Roy *v.* Whitaker, (Tex. Civ. App. 1898) 50 S. W. 491. See also Seaverns *v.* Gerke, 21 Fed. Cas. No. 12,595, 3 Savy. 353, holding that where there was no record of the appointment and it was made by a judge having no authority a sale was void.

Heirs who answer in the proceedings for the sale, without objection to the authority of the administrator, are bound by the order, but those served constructively and who do not appear are not bound. Hartley *v.* Glover, 56 S. C. 69, 33 S. E. 796.

Failure to show residence of decedent or presentation of claims.— Where the record failed to show whether the decedent was a resident of the county or had property there, or whether any claim against the estate was presented, the sale was held good against collateral attack. Flenner *v.* Walker, 5 Tex. Civ. App. 145, 23 S. W. 1029. See also Burdett *v.* Silsbee, 15 Tex. 604.

28. Where the court appointed an infant as executrix the appointment and sale thereunder were held void. Knox *v.* Nobel, 77 Hun (N. Y.) 230, 28 N. Y. Suppl. 355; Continental Trust Co. *v.* Nobel, 10 Misc. (N. Y.) 325, 30 N. Y. Suppl. 994.

29. Casanave *v.* Spear, 23 La. Ann. 519 (appointment and order to sell made at the same time and sale made without qualifying as administrator); McLean *v.* Houston, 2 Heisk. (Tenn.) 37 (executor selling without probating the will).

The mere silence of the record as to the giving of a bond does not impeach the power of the administrator. Moody *v.* Butler, 63 Tex. 210.

30. Daniel *v.* Sapp, 20 Ga. 514; McMahan *v.* Rice, 16 Tex. 335.

31. Hoffman *v.* Beard, 32 Mich. 218.

There can be no collateral attack if the estate be actually still open, notwithstanding the fact that it ought to have been closed. Church *v.* Holcomb, 45 Mich. 29, 7 N. W. 167.

32. See Rumph *v.* Truelove, 66 Ga. 480 (holding that a sale made by an administratrix after her letters had abated by her marriage was void); Levy *v.* Riley, 4 Oreg. 392 (holding that a sale made by the administrator after he had been removed by the operation of a statute was void).

33. Alexander *v.* Maverick, 18 Tex. 179, 67 Am. Dec. 693; Soye *v.* McCallister, 18 Tex. 80, 67 Am. Dec. 689.

The order is an adjudication that the administrator's authority continued and all parties are estopped from showing the contrary. Farley *v.* Dunklin, 76 Ala. 530; May *v.* Marks, 74 Ala. 249.

An order to a public administrator to turn over the estate to a successor does not avoid a sale thereafter made where there has been no discharge of record. Warren *v.* Carter, 92 Mo. 288, 5 S. W. 42.

The fact that no inventory was filed for more than seven years does not sustain a finding that the administration had lapsed where the court afterward exercised jurisdiction over the estate by approving the inventory, making an order of sale, and confirming the sale. Harris *v.* Shafer, (Tex. Civ. App. 1893) 21 S. W. 110.

The birth of a child which has the effect of revoking a will does not render void a sale thereafter made by the executor while he was still acting as such. Green *v.* Shreveport Baptist Church, 27 La. Ann. 563.

34. Lyons *v.* Hamner, 84 Ala. 197, 4 So. 26, 5 Am. St. Rep. 363; Duval *v.* McLoskey, 1 Ala. 708; Harris *v.* Lester, 80 Ill. 307. But see Matter of Slater, 17 Misc. (N. Y.) 474, 41 N. Y. Suppl. 534, holding that the naming of heirs in the petition is jurisdictional, and a purchaser may apply to the surrogate to be relieved from his purchase, when the heirs are not named.

Unborn devisee.— The executor represents

litem, a defect in the proceedings in this respect has been held not to defeat the jurisdiction.[35]

(II) *NOTICE OF APPLICATION.* The necessity of the service of citation, summons, or other form of notice on heirs and others interested in the estate in order to confer jurisdiction depends upon the legislation of the state in which the proceedings are had, and the rulings vary, it being held in some states that a failure to comply with a statute requiring and regulating notice renders the sale void and open to collateral attack,[36] while in others it is held that in a collateral proceeding there can be no inquiry as to whether any notice or sufficient notice was given.[37] A recital in the record of due service cannot be impeached in another proceeding,[38] and if the record is silent as to notice regularity will generally be presumed.[39]

a devisee, unborn at the time of the proceeding, and such devisee cannot afterward collaterally attack the sale as a stranger to the proceedings. Dean *v.* Central Cotton Press Co., 64 Ga. 670.

A mistake in the name of a minor heir in the petition is of no effect where she was rightly named in the summons and a guardian *ad litem* appointed. McCormack *v.* Kimmel, 4 Ill. App. 121.

Fraud.— Those who were not parties, who never had a day in court, and whose rights were injured, may collaterally assail a decree of sale for fraud. Sager *v.* Mead, 164 Pa. St. 125, 30 Atl. 284. See also Dickens *v.* Long, 109 N. C. 165, 13 S. E. 841.

35. Jenkins *v.* Young, 43 Hun (N. Y.) 194. See also Killough *v.* Warren, (Tenn. Ch. App. 1899) 58 S. W. 898, holding that a sale is not void because no guardian *ad litem* was appointed until after proof as to debts and assets, where one was appointed and answered before decree. *Contra*, Johnson *v.* Johnson, 40 Ala. 247, holding that a sale is void as to an infant where a guardian *ad litem* was appointed, but never accepted or acted, the clerk of the court signing in his name without his knowledge an acceptance of service of the citation. And see O'Dell *v.* Rogers, 44 Wis. 136.

Failure to appoint guardian in proceedings for probate of will.—A sale cannot be avoided because there was no guardian *ad litem* appointed on the probate of the will, where the infant took title by descent and not under the will. Melms *v.* Pfister, 59 Wis. 186, 18 N. W. 255.

36. Campbell *v.* Drais, 125 Cal. 253, 57 Pac. 994; Townsend *v.* Tallant, 33 Cal. 45, 91 Am. Dec. 617; Clements *v.* Henderson, 4 Ga. 148, 48 Am. Dec. 216; Doe *v.* Anderson, 5 Ind. 33. But see Thompson *v.* Doe, 8 Blackf. (Ind.) 336; Doe *v.* Harney, 5 Blackf. (Ind.) 487.

In Kansas notice to the heirs is jurisdictional, and where no notice is given the order of sale and the proceedings based thereon are void. Rogers *v.* Clemmans, 26 Kan. 522; Mickel *v.* Hicks, 19 Kan. 578, 21 Am. Rep. 161. But personal notice is not inherently essential and the legislature may provide for service by publication. Fudge *v.* Fudge, 23 Kan. 416.

Where the administrator was also guardian of the sole heir his written assent to the order without notice to the heir was sufficient. Jones *v.* Levi, 72 Ind. 586.

37. *Alabama.*— Friedman *v.* Shamblin, 117 Ala. 454, 23 So. 821; Field *v.* Goldsby, 28 Ala. 218, 65 Am. Dec. 341.

Montana.— See Kirk *v.* Baker, 26 Mont. 190, 66 Pac. 942.

Pennsylvania.— McPherson *v.* Cunliff, 11 Serg. & R. (Pa.) 422, 14 Am. Dec. 642.

Texas.— Lyne *v.* Sanford, 82 Tex. 58, 19 S. W. 847, 27 Am. St. Rep. 852; Hurley *v.* Barnard, 48 Tex. 83; Heath *v.* Layne, 62 Tex. 686; George *v.* Watson, 19 Tex. 354.

United States.— Grignon *v.* Astor, 2 How. 319, 11 L. ed. 283; Garrett *v.* Boeing, 68 Fed. 51, 15 C. C. A. 209; Berrian *v.* Rogers, 43 Fed. 467.

One served with notice cannot attack the sale on the ground that others interested were not served. Farris *v.* Hoskins, 63 S. W. 577, 23 Ky. L. Rep. 596.

It is for the court granting the license to determine the sufficiency of the notice and there can be no collateral attack based on a defective notice or defective service. Stanley *v.* Noble, 59 Iowa 666, 13 N. W. 839; Myers *v.* Davis, 47 Iowa 325; Haight *v.* Haves, 3 Nebr. (Unoff.) 587, 92 N. W. 297; McGlawhorn *v.* Worthington, 98 N. C. 199, 3 S. E. 633.

38. Goodwin *v.* Sims, 86 Ala. 102, 5 So. 587, 11 Am. St. Rep. 21 (unless falsified by the record itself); Bradley *v.* Droue, 187 Ill. 175, 58 N. E. 304, 79 Am. St. Rep. 214; Andrews *v.* Bernhardi, 87 Ill. 365; Harris *v.* Lester, 80 Ill. 307; Barnett *v.* Wolf, 70 Ill. 76 (insufficient publisher's certificate appearing in record does not overcome finding of due notice); Lees *v.* Wetmore, 58 Iowa 170, 12 N. W. 238; Morrison *v.* Craven, 120 N. C. 327, 26 S. E. 940; Edwards *v.* Moore, 99 N. C. 1, 5 S. E. 13 (recital of acknowledgment of service).

If the record discloses that there was no citation the sale is void. Stevens *v.* Durrett, 49 Miss. 411. And a recital of jurisdictional facts in the order will not prevail as against affirmative evidence of want of jurisdiction in other parts of the record. Gilmore *v.* Taylor, 5 Oreg. 89.

39. Jones *v.* Edwards, 78 Ky. 6; Farris *v.* Hoskins, 63 S. W. 577, 23 Ky. L. Rep. 596; Smith *v.* Denson, 2 Sm. & M. (Miss.) 326; Coffin *v.* Cook, 106 N. C. 376, 11 S. E. 371. But *compare* Gibbs *v.* Shaw, 17 Wis.

(III) *PETITION.* A petition invoking the action of the court is generally held requisite to confer jurisdiction and protect a sale against even collateral attack,[40] but the sufficiency of the petition is a matter to be determined by the court to which it is presented, and, while it may be investigated there and on appeal, it cannot be questioned collaterally.[41] It is, however, sometimes held that the sale is void if the petition does not state all facts essential to the jurisdiction.[42] When the court has acted on the petition and ordered the sale, the petition will be liberally construed in an attack on the sale itself, and sustained in spite of informalities or statements merely defective.[43]

c. Improper Order — (I) *WANT OF SUFFICIENT CAUSE.* A purchaser is not bound to inquire as to the truth of the allegations upon which the order to sell was granted.[44] The order is a judgment that the circumstances existed rendering a sale necessary,[45] and no collateral attack can be based on the ground that there was in fact no such necessity.[46] The rule excludes collateral inquiry as to the

197, 84 Am. Dec. 737, holding that the sale is void unless the record affirmatively discloses notice as required by statute.

Presumption on appeal.— If the report of sale shows due notice and the record is otherwise silent regularity will be presumed even on appeal in the original case. Allsop *v.* Owensboro Deposit Bank, 69 S. W. 1102, 24 Ky. L. Rep. 762.

40. *Illinois.*— Harding *v.* Le Moyne, 114 Ill. 65, 29 N. E. 188.

Iowa.— Myers *v.* Davis, 47 Iowa 325; Hilton *v.* Budgett, 43 Iowa 684; Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122.

New Jersey.— Lawson *v.* Acton, 57 N. J. Eq. 107, 40 Atl. 584.

Oregon.— Wright *v.* Edwards, 10 Oreg. 298.

Texas.— Finch *v.* Edmonson, 9 Tex. 504.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1451; and *supra*, XII, G, 5, a.

41. *Illinois.*— Bradley *v.* Droue, 187 Ill. 175, 58 N. E. 304, 78 Am. St. Rep. 214.

Iowa.— Myers *v.* Davis, 47 Iowa 325; Hilton *v.* Budgett, 43 Iowa 684; Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122.

Minnesota.— Rumrill *v.* St. Albans First Nat. Bank, 28 Minn. 202, 9 N. W. 731; Montour *v.* Purdy, 11 Minn. 384, 88 Am. Dec. 88. And see Smith *v.* Barr, 83 Minn. 354, 86 N. W. 342.

Nebraska.— Trumble *v.* Williams, 18 Nebr. 144, 24 N. W. 716.

Texas.— Gillenwaters *v.* Scott, 62 Tex. 670; Poor *v.* Boyce, 12 Tex. 440.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1451; and *infra*, XII, G, 5, f.

42. Wright *v.* Edwards, 10 Oreg. 298.

43. *Alabama.*— Bolling *v.* Smith, 79 Ala. 535; Pollard *v.* Hanrick, 74 Ala. 334; Bibb *v.* Bishop Cobbs Orphan Home, 61 Ala. 326.

Colorado.— Bateman *v.* Reitler, 19 Colo. 547, 36 Pac. 548.

Illinois.— Frothingham *v.* Petty, 197 Ill. 418, 64 N. E. 270.

Indiana.— Denton *v.* Arnold, 151 Ind. 188, 51 N. E. 240.

Maryland.— Simpson *v.* Bailey, 80 Md. 421, 30 Atl. 622.

Missouri.— Stowe *v.* Banks, 123 Mo. 672, 27 S. W. 347; Bray *v.* Adams, 114 Mo. 486, 21 S. W. 853; Garner *v.* Tucker, 61 Mo. 427; Overton *v.* Johnson, 17 Mo. 442.

New York.— Schneider *v.* McFarland, 2 N. Y. 459 [*affirming* 4 Barb. 139].

South Carolina.— Clyburn *v.* Reynolds, 31 S. C. 91, 9 S. E. 973.

Texas.— Gillenwaters *v.* Scott, 62 Tex. 670; Howard *v.* Bennett, 13 Tex. 309; Poor *v.* Boyce, 12 Tex. 440.

Wisconsin.— Melms *v.* Pfister, 59 Wis. 186, 18 N. W. 255.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1451.

Averments which would be bad on demurrer as not being direct and positive may protect the petition from collateral attack. Wright *v.* Ware, 50 Ala. 549; King *v.* Kent, 29 Ala. 542; Doe *v.* Riley, 28 Ala. 164, 65 Am. Dec. 334.

An insufficient verification would be a good objection before the surrogate or on appeal but not on collateral attack. Sheldon *v.* Wright, 5 N. Y. 497 [*affirming* 7 Barb. 39]. See also Friedman *v.* Shamblin, 117 Ala. 454, 23 So. 821; Coon *v.* Fry, 6 Mich. 506; Stradley *v.* King, 84 N. C. 635.

An objection to the confirmation of the sale is a collateral attack within the meaning of this rule. Matter of Devincenzi, 119 Cal. 498, 51 Pac. 845.

Where the petition specifies no debt and names no creditor the sale is void. Linnville *v.* Darby, 1 Baxt. (Tenn.) 306.

44. Long *v.* Landman, 118 Mich. 174, 76 N. W. 374; Wolf *v.* Robinson, 20 Mo. 459.

45. Macey *v.* Stark, 116 Mo. 481, 21 S. W. 1088; Macey *v.* Pitillo, (Mo. 1893) 21 S. W. 1094.

46. *Alabama.*— Wyatt *v.* Steele, 26 Ala. 639.

Michigan.— Long *v.* Landman, 118 Mich. 174, 76 N. W. 374; Griffin *v.* Johnson, 37 Mich. 87.

Missouri.— Macey *v.* Pitillo, (1893) 21 S. W. 1094; Macey *v.* Stark, 116 Mo. 481, 21 S. W. 1088.

Texas.— Johnson *v.* Weatherford, 31 Tex. Civ. App. 180, 71 S. W. 789.

Vermont.— Doolittle *v.* Holton, 28 Vt. 819, 67 Am. Dec. 745.

existence of debts,[47] the exhaustion of personalty,[48] or the necessity of selling as much land as was ordered sold.[49] It is even held that, where the court might under some circumstances exercise jurisdiction over particular land, a sale cannot be collaterally attacked because the land ordered sold was not subject to sale to satisfy the debts.[50] Where the order purports to have been made on a statutory ground it may not be attacked as being in fact based upon some other ground not authorized by statute.[51]

See 22 Cent. Dig. tit. "Executors and Administrators," § 1450.

Proof by depositions.— The recitals in the decree are conclusive of the fact that proof was taken by depositions in the manner required by law. Goodwin *v.* Sims, 86 Ala. 102, 5 So. 587, 11 Am. St. Rep. 21; Bibb *v.* Bishop Cobbs Orphan Home, 61 Ala. 326.

47. *California.*— McCauley *v.* Harvey, 49 Cal. 497.

Connecticut.— Shelton *v.* Hadlock, 62 Conn. 143, 25 Atl. 483; Brewster *v.* Denison, 1 Root 231.

Georgia.— Adams *v.* Adams, 113 Ga. 824, 39 S. E. 291.

Illinois.— Hobson *v.* Ewan, 62 Ill. 146; Stow *v.* Kimball, 28 Ill. 93.

Iowa.— Little *v.* Sinnett, 7 Iowa 324.

Louisiana.— Linman *v.* Riggins, 40 La. Ann. 761, 5 So. 49, 8 Am. St. Rep. 539.

Minnesota.— Curran *v.* Kuby, 37 Minn. 330, 33 N. W. 907.

Missouri.— Murphy *v.* De France, 105 Mo. 53, 15 S. W. 949, 16 S. W. 861.

Nebraska.— Haight *v.* Hayes, 3 Nebr. (Unoff.) 587, 92 N. W. 297.

Oregon.— Lawrey *v.* Sterling, 41 Oreg. 518, 69 Pac. 460.

Pennsylvania.— Grubb *v.* Galloway, 203 Pa. St. 236, 52 Atl. 176, 93 Am. St. Rep. 764. *Contra,* Smith *v.* Wildman, 194 Pa. St. 294, 45 Atl. 136 [*reaffirming* 178 Pa. St. 245, 35 Atl. 1047, 56 Am. St. Rep. 760, 36 L. R. A. 834].

Texas.— Looney *v.* Linney, (Civ. App. 1892) 21 S. W. 409.

Virginia.— Lawson *v.* Moorman, 85 Va. 880, 9 S. E. 150.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1450.

Statute of limitations.— There can be no collateral attack on the ground that the sale was for a debt barred by the statute of limitations, although fraud and collusion are generally alleged. Cobb *v.* Garner, 105 Ala. 467, 17 So. 47, 53 Am. St. Rep. 136.

Dispensing with supervision of court.— Where a special mode of procedure is provided where the testator wishes to dispense with the supervision of the county court, such method must be pursued strictly, and a sale cannot be made except on claims established in the manner provided. Carroll *v.* Carroll, 20 Tex. 731.

When sale void.— A sale to satisfy an allowance to a widow is absolutely void, where the widow had already been assigned a homestead, as beyond the power of the court. Newcomb *v.* Newcomb, 38 Tex. 561.

48. *Alabama.*—Foxworth *v.* White, 72 Ala. 224.

Connecticut.— Brown *v.* Lanman, 1 Conn. 467.

Indiana.— Jones *v.* French, 92 Ind. 138.

Massachusetts.— Leverett *v.* Harris, 7 Mass. 292.

Michigan.— Long *v.* Landman, 118 Mich. 174, 76 N. W. 374.

New York.— Wood *v.* McChesney, 40 Barb. 417.

Pennsylvania.— See Snyder *v.* Markel, 8 Watts (Pa.) 416, holding that an order to sell realty before the settlement of the account of personal property, although improvident, is not void.

Tennessee.— Kindell *v.* Titus, 9 Heisk. 727.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1450.

Exhaustion of personal assets must appear somewhere in the proceedings or the sale will be void. Sloan *v.* Sloan, 25 Fla. 53, 5 So. 603.

49. Boyd *v.* Blankman, 29 Cal. 19, 87 Am. Dec. 146; Allen *v.* Ashley School Fund, 102 Mass. 262; Hodges *v.* Fabian, 31 S. C. 212, 9 S. E. 820, 17 Am. St. Rep. 25.

A purchaser cannot object to taking title on the ground that the property sold for more than the debts (Lehmann's Succession, 41 La. Ann. 987, 7 So. 33), at least where the disproportion is not great (*In re* Haaf, 52 La. Ann. 249, 26 So. 834).

50. Ions *v.* Harbison, 112 Cal. 260, 44 Pac. 572; Showers *v.* Robinson, 43 Mich. 502, 5 N. W. 988; Drake *v.* Kinsell, 38 Mich. 232. Although a will directs the debts to be paid out of the personal estate, the court having jurisdiction to reserve personalty can order the sale of real estate. Such an order, although erroneous in view of the will, is not open to collateral attack. Overton *v.* Johnson, 17 Mo. 442.

Where the evidence leaves it doubtful whether a decedent whose land was sold belonged to a class of persons exempt from administration by creditors, a sale to satisfy debts will be sustained against collateral attack. Flenner *v.* Walker, 5 Tex. Civ. App. 145, 23 S. W. 1029.

A sale of land not authorized by the decree is of course void. Nichols *v.* Little, 115 Ga. 600, 41 S. E. 991. But a sale is not void because the land sold comprises a greater number of acres than is recited in the proceedings. McIver *v.* Stephens, 101 N. C. 255, 7 S. E. 695.

An order for the sale of property which the petitioner asks not to be sold, but which is described in the petition, is not void. Baum *v.* Roper, 132 Cal. 42, 64 Pac. 128.

51. Casseday *v.* Norris, 49 Tex. 613; Woodhouse *v.* Fillbates, 77 Va. 317.

(II) *Errors or Irregularities.* Errors or irregularities in the order or decree of sale do not render the sale void or open to collateral attack.[52]

d. Defects in Proceedings After Order — (I) *Representative's Oath and Bond.* Statutes are generally mandatory, and a failure to comply with them fatal on collateral attack, in so far as they require an executor or administrator about to make a sale to take a special oath[53] or give bond to account for the proceeds.[54]

(II) *Notice of Sale.* The failure to give proper notice of the time and place of sale is generally a mere irregularity which is not cognizable collaterally,[55] the adjudication of the probate court being conclusive.[56]

(III) *Sale and Report.* Irregularities in conducting the sale itself or in subsequent proceedings do not generally render the sale void. Thus the sale is not void because several parcels are sold in bulk under one bid[57] or because the purchase-money is not paid.[58] Nor can a collateral attack be made because of a

52. Peyroux *v.* Peyroux, 24 La. Ann. 175; Farris *v.* Gilbert, 50 Tex. 350.

A sale is not void because the order directs the administrator to take payment in state bank-notes instead of legal currency (Doe *v.* Hileman, 2 Ill. 323), because it is in the alternative to sell for cash or on deferred payments (Fleming *v.* Bale, 23 Kan. 88), because it improperly describes the land, the defect being cured by the order of confirmation and acquiescence (Corley *v.* Goll, 8 Tex. Civ. App. 184, 27 S. W. 819), or because it does not describe the property at all (Wells *v.* Polk, 36 Tex. 120). Neither is the order of sale void because it fails to set off a homestead right. Reinhardt *v.* Seaman, 208 Ill. 448, 69 N. E. 847; Bradley *v.* Drone, 187 Ill. 175, 58 N. E. 304. Title passes, although the order directed one of two executors to sell, if the court confirms the sale (Corley *v.* Anderson, 5 Tex. Civ. App. 213, 23 S. W. 839), and although the order directs the administrator to sell instead of a trustee, where the administrator might be appointed trustee (Simpson *v.* Bailey, 80 Md. 421, 30 Atl. 622). An order to mortgage land is not void because it fails to direct the administrator as required by statute to execute a note. Fast *v.* Steele, 127 Cal. 202, 59 Pac. 585. A mortgage is not void because the order therefor directs it to be given for the payment of specified claims instead of payment of all claims ratably. Stambach *v.* Emerson, 139 Cal. 282, 72 Pac. 991, (1902) 69 Pac. 856.

53. Campbell *v.* Knights, 26 Me. 224, 45 Am. Dec. 107; Parker *v.* Nichols, 7 Pick. (Mass.) 111 (sale void if oath not taken until after fixing time and place of sale); Howard *v.* Moore, 2 Mich. 226.

Parol evidence may be received to show that an oath which appears by the record to have been taken after sale was in fact taken in due time. Norman *v.* Olney, 64 Mich. 553, 31 N. W. 555. And see Fowle *v.* Coe, 63 Me. 245.

54. Snow *v.* Russell, 93 Me. 362, 45 Atl. 305, 74 Am. St. Rep. 350; Howard *v.* Moore, 2 Mich. 226. *Contra*, where the proceeds have been actually and properly distributed. Jones *v.* French, 92 Ind. 138; Dequindre *v.* Williams, 31 Ind. 444; Foster *v.* Birch, 14 Ind. 445.

Amount of penalty.— Where a bond was given, objection to the sale cannot be made collaterally on the ground that the penalty was too small. Richmond *v.* Foote, 3 Lans. (N. Y.) 244.

Order dispensing with bond.— In Maine a sale has been held void for want of a bond, although the order excused the executor from giving a bond. Snow *v.* Russell, 93 Me. 362, 45 Atl. 305, 74 Am. St. Rep. 350. But in Michigan under a statute permitting a collateral attack where the administrator did not give a bond "in case a bond was required upon granting the license," it has been held that the requirement referred to was that of the license and not of the law, and that the sale was valid without a bond, where the license required none, although it should have required one. Norman *v.* Olney, 64 Mich. 553, 31 N. W. 555.

55. Matheson *v.* Hearin, 29 Ala. 210; Doe *v.* Riley, 28 Ala. 164, 65 Am. Dec. 334; Moffitt *v.* Moffitt, 69 Ill. 641; Melton *v.* Fitch, 125 Mo. 281, 28 S. W. 612; McNair *v.* Hunt, 5 Mo. 300.

Irregularities in the notice will not invalidate the sale. Apel *v.* Kelsey, 47 Ark. 413, 2 S. W. 102; Carroll's Estate, 1 Lack. Leg. Rec. (Pa.) 142.

Statute may make notice essential to validity of sale. See Doe *v.* Roe, 4 Ga. 148, 48 Am. Dec. 216; Howard *v.* Moore, 2 Mich. 226.

56. Richardson *v.* Butler, 82 Cal. 174, 23 Pac. 9, 16 Am. St. Rep. 101; Hugo *v.* Miller, 50 Minn. 105, 52 N. W. 381.

57. Cowins *v.* Tool, 36 Iowa 82; Osman *v.* Traphagen, 23 Mich. 80.

58. Giddings *v.* Steele, 28 Tex. 732, 91 Am. Dec. 336, holding that the remedy is against the administrator for the unpaid amount. In Evans *v.* Singletary, 63 N. C. 205, it was intimated that relief might be had in equity.

Credit of claim of purchaser.— A sale is not void where the purchaser receives a credit of his own claim upon the purchase-price, because he was not a creditor to as great an amount as he asserted. Simonin *v.* Czarnowski, 47 La. Ann. 1334, 17 So. 847.

failure in other respects to comply with the terms of the law or of the order in making the sale.[59] Errors in the report of sale which work no injury will not justify setting it aside.[60] The administrator is, however, absolutely without authority to sell any land not included within the terms of the order, and such a sale will be set aside.[61]

e. Inadequacy of Price.[62] After confirmation a sale cannot be attacked for inadequacy of price alone by a bill in equity[63] or collaterally;[64] but inadequacy of price is a circumstance to be considered when other grounds are alleged as bearing upon the fairness of the sale.[65]

f. Fraud.[66] Fraud in the sale renders it voidable but not absolutely void,[67] and it is usually held that in a collateral proceeding, such as ejectment by the heirs, such fraud cannot be shown, but that a bill in equity or other proceeding having the direct object of setting aside the sale must be resorted to.[68] Where

Motion before confirmation.— A sale may be set aside on motion if the purchase-price is not paid and the sale has not been confirmed. McSwean *v.* Faulks, 46 Ala. 610.

59. Halleck *v.* Moss, 22 Cal. 266; James *v.* Kelley, 107 Ga. 446, 33 S. E. 425, 73 Am. St. Rep. 135 (holding that a sale will not be set aside, because the auctioneer cried a bid for the purchaser); Perry *v.* Blakey, 5 Tex. Civ. App. 331, 23 S. W. 804 (conveying to a creditor in satisfaction of his claim); Cassels *v.* Gibson, (Tex. Civ. App. 1894) 27 S. W. 725 (sale for cash where the law required a sale on credit).

Prior contract of sale.— If there was an actual public sale it cannot be avoided, because of a prior unauthorized contract to sell to the purchaser at the price he afterward bid. Stuart *v.* Allen, 16 Cal. 473, 76 Am. Dec. 551.

Oral directions given by the judge who ordered the mortgage of property cannot prejudice the mortgagee at least where it is not shown that he knew of them. Fast *v.* Steele, 127 Cal. 202, 59 Pac. 585.

Affidavit that administrator not the purchaser.— An administration sale under the act of 1807 is not void because the affidavit of the administrator that he was not the purchaser was not made within the time required by law. Vasquez *v.* Richardson, 19 Mo. 96.

60. Doe *v.* Riley, 28 Ala. 164, 65 Am. Dec. 334 (indefiniteness in description of land, it appearing nevertheless that the proper land was sold); Macey *v.* Pitillo, (Mo. Sup. 1893) 21 S. W. 1094 (misrecital of date of a reviving order); Macey *v.* Stark, 116 Mo. 481, 21 S. W. 1088.

61. Ludlow *v.* Park, 4 Ohio 5. When the order directs the sale of two tracts separately, the smaller one first, and it turns out that the sale of the smaller one was void, the subsequent sale of the larger must be set aside as unauthorized. Hewitt *v.* Durant, 78 Mich. 186, 44 N. W. 318.

Differences in descriptions.— A sale will not be set aside because of a slight difference between the description of the land in the petition and judgment and in the deed, where it is admitted that the deed covers the land in controversy. Kalteyer *v.* Wipff, (Tex. Civ. App. 1899) 49 S. W. 1055.

62. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d, (XII), (B).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, m.

Judicial sales generally see JUDICIAL SALES.

63. Lowe *v.* Guice, 69 Ala. 80 (where there was an opportunity to contest the question on confirmation); Kimball *v.* Lincoln, 99 Ill. 578 [*affirming* 7 Ill. App. 470]; Williams *v.* Johnson, 112 N. C. 424, 17 S. E. 496, 34 Am. St. Rep. 513, 21 L. R. A. 848.

Where the court fixes a minimum price a sale for more than that price will not be deemed inadequate. Fennell *v.* League, 107 Tenn. 239, 63 S. W. 1121.

Gross inadequacy.— Where one item of property was worth one hundred and fifty dollars and sold for one dollar, the inadequacy amounts to a fraud for which the sale may be set aside after title has passed. Maxwell *v.* Burns, (Tenn. Ch. App. 1900) 59 S. W. 1067.

64. Fowle *v.* Coe, 63 Me. 245; Webster *v.* Calden, 53 Me. 203; Sumner *v.* Sessoms, 94 N. C. 371; Capt *v.* Stubbs, 68 Tex. 222, 4 S. W. 467.

65. Payne *v.* Turner, 36 Ala. 623 (bill to set aside sale requiring no confirmation); McLane *v.* Spence, 6 Ala. 894; Neel *v.* Carson, 47 Ark. 421, 2 S. W. 107; Myer's Estate, 9 Pa. Co. Ct. 439. See also Gray *v.* Quicksilver Min. Co., 68 Fed. 677, where the court refused to interfere because the fraud charged had not been proved.

Sale will not be set aside for irregularities unless price inadequate. Grove's Estate, 2 Woodw. (Pa.) 182.

The sale of the land of infant heirs to their mother is null if for less than the appraised value, and open to collateral attack. Pipkin *v.* Doiron, 14 La. 294.

66. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d, (XII), (B).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, m.

67. Palmerton *v.* Hoop, 131 Ind. 23, 30 N. E. 874; McCampbell *v.* Durst, 15 Tex. Civ. App. 522, 40 S. W. 315.

68. Myer *v.* McDougal, 47 Ill. 278; Blanchard *v.* Webster, 62 N. H. 467; Atkins *v.* Kinnan, 20 Wend. (N. Y.) 241, 32 Am. Dec. 534;

the facts were known and appeared in the confirmation proceedings the judgment of confirmation estops one there represented from making a subsequent attack,[69] but a confirmed sale will be set aside where the parties injured by fraud proceed promptly after obtaining information of the facts.[70] Charges of fraud must be clear and distinct.[71] Fraud in the sale will not be presumed[72] or inferred from slight or indecisive circumstances.[73] The courts will, however, interfere where the sale, although nominally to pay debts, was designed merely to divest the title of the heirs,[74] or where there was a scheme to buy in the land at an inadequate price.[75] It is a constructive fraud, warranting the setting aside of the sale, for the representative to obtain an order to sell land to pay debts on the ground of insufficiency of personalty while he holds notes which he claims as his own but which belong to the estate.[76] One cannot complain unless his interests are injuriously affected.[77]

Shirley *v.* Warfield, 12 Tex. Civ. App. 449, 34 S. W. 390. *Contra*, Rhoades *v.* Selin, 20 Fed. Cas. No. 11,740, 4 Wash. 715. And see Decuir *v.* Lejeune, 15 La. Ann. 569.

A sale to the representative himself, either directly or indirectly, is governed by similar principles and cannot be collaterally attacked. Hoover *v.* Malen, 83 Ind. 195; Temples *v.* Cain, 60 Miss. 478; Sumner *v.* Sessoms, 94 N. C. 371; Beeson *r.* Beeson, 9 Pa. St. 279; Dodd *v.* Templeman, 76 Tex. 57, 13 S. W. 187; Rutherford *v.* Stamper, 60 Tex. 447. And see *supra*, XII, M, 4, c.

69. Murphy *v.* De France, 105 Mo. 53, 15 S. W. 949, 16 S. W. 861. A bill to impeach a sale for fraud will not lie when the facts constituting the fraud were directly in issue in the probate proceedings and must have been there determined. Gordon *r.* Gordon, 55 N. H. 399.

70. McAdow *v.* Boten, 67 Kan. 136, 72 Pac. 529; Corbett's Estate, 10 Pa. Dist. 59; Armington's Estate, 1 Phila. (Pa.) 444; Albright's Estate, 6 Lack. Leg. N. (Pa.) 108; Johnson *v.* Waters, 111 U. S. 640, 4 S. Ct. 619, 28 L. ed. 547.

Where a mere volunteer instituted probate proceedings, ostensibly to pay debts, but in reality to get title to land through the sale, and effected his purpose, a purchaser from the heirs was permitted to have the deed and sale set aside. Bergin *r.* Haight, 99 Cal. 52, 33 Pac. 760.

71. McDermott's Succession, 51 La. Ann. 173, 24 So. 787.

72. Friedman *v.* Shamblin, 117 Ala. 454, 23 So. 821; Price *v.* Nesbit, 1 Hill Eq. (S. C.) 445; Coulson *v.* Coulson, 5 Wis. 79. But see Barnawell *v.* Threadgill, 56 N. C. 50, holding that one standing in a confidential relation to an intemperate executor must show good faith in acquiring property of the estate.

73. Morrow *v.* Cile, 132 N. C. 678, 44 S. E. 370; Loomis *v.* Rosenthal, 34 Oreg. 585, 57 Pac. 55.

The evidence must be substantial. Keene *v.* Wyatt, 160 Mo. 1, 60 S. W. 1037, 63 S. W. 116; Kellum *v.* Smith, 18 Tex. 835.

Circumstances not sufficient to establish fraud see Trimble *v.* Marshall, 66 Iowa 233, 23 N. W. 645; Scott *v.* Burch, 6 Harr. & J. (Md.) 67; Kammerer *v.* Morlock, 125 Mich. 320, 84 N. W. 319; Egan *v.* Grece, 79 Mich. 629, 45 N. W. 74; Overton *v.* Webster, 26 Mo. 332; Comstock *v.* Crawford, 3 Wall. (U. S.) 396, 18 L. ed. 34.

Allowance of fraudulent claims.— Where there were just debts a sale will not be set aside because some of the claims allowed were fraudulent. Myer *v.* McDougal, 47 Ill. 278. And see Fudge *v.* Fudge, 23 Kan. 416.

The presumption of fraud is raised where the administrator was the sole creditor and the proceeds of the sale were just equal to the debt and expenses. Humes *v.* Cox, 1 Pinn. (Wis.) 551.

74. *Georgia.*— Dees *v.* Freeman, 87 Ga. 588, 13 S. E. 747.

Missouri.— Hull *v.* Voorhis, 45 Mo. 555.

Pennsylvania.— Kinzer *v.* Mitchell, 8 Pa. St. 64.

South Carolina.— McGuire *r.* McGowan, 4 Desauss. 486.

Tennessee.— Bennett *v.* Kennerly, 3 Head 674.

Texas.— McCampbell *r.* Durst, 15 Tex. Civ. App. 522, 40 S. W. 315.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1546.

Where the real purpose was to divest the property of its dotal character and enable the husband purchasing more readily to deal with it, the sale was held void. Decuir *r.* Lejeune, 15 La. Ann. 569.

75. McQueen *r.* McDaniel, 38 S. W. 880, 18 Ky. L. Rep. 954; Kreider's Estate, 17 Lanc. L. Rev. (Pa.) 201.

Devices to keep bidders away are frequently parts of such schemes and justify the setting aside of the sale. Jones *r.* French, 92 Ind. 138; Grant *r.* Lloyd, 12 Sm. & M. (Miss.) 191; Kreider's Estate, 17 Lanc. L. Rev. (Pa.) 201.

76. *In re* McBride, 7 N. J. L. J. 73.

77. Lander *v.* Abrahamson, 34 Nebr. 553, 52 N. W. 571, holding that a good defense to the proceedings must be shown in order to justify the setting aside of a fraudulent confirmation.

Heirs of an insolvent estate have such an interest as entitles them to the setting aside of a sale made for the purpose of defrauding creditors. McCampbell *v.* Durst, 15 Tex. Civ. App. 522, 40 S. W. 315.

Where an administrator was proceeding for his own personal ends and not for the ad-

g. Mistake.[78] The ordinary principles of equity apply where it is sought to set aside a sale for mistake.[79] A sale will not be set aside for mistake except at the instance of one injuriously affected.[80]

5. Procedure[81] **— a. Forum and Form of Remedy.** The jurisdiction to order a sale of decedent's property is special and ceases with the order of confirmation, so that thereafter the court granting a license has no power, by virtue of its jurisdiction previously existing, to revise its proceedings, and set the sale aside.[82] After the jurisdiction of the probate court ceases, a bill in equity, or in the code states an action in the nature thereof, will lie, and is necessary in order to vacate a voidable sale.[83] The necessity of bringing in new parties may also require

vantage of the estate in seeking to annul a sale, relief was refused. Cushing *v.* Harmonson, 26 La. Ann. 214.

78. **Sale of property not belonging to decedent** see *supra*, XII, D, 2.

79. See Equity, 16 Cyc. 72 note 31.

Where the purchaser bought separately two parcels, the purchase of one being the inducement to the purchase of the other, and confirmation was refused as to one parcel, it was held that the confirmation as to the other would be set aside. Davis *v.* Cureton, 70 N. C. 667.

80. Lamkin *v.* Reese, 7 Ala. 170; *In re* Behring, 31 Pittsb. Leg. J. (Pa.) 156.

81. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d, (xii), (a), (d).

82. *Alabama.*— Duval *v.* McLoskey, 1 Ala. 708.

California.— See *In re* Leonis, 138 Cal. 194, 71 Pac. 171, holding that Code Civ. Proc. § 1552, authorizing the probate court to order a resale if, on the application to confirm, it finds that the sale was unfair or disproportionate to the value of the property and a new bid is offered, is exclusive, and the probate court cannot set aside a sale for errors antecedent to the sale itself.

Illinois.— Stettauer *v.* Chicago Title, etc., Co., 62 Ill. App. 31.

Minnesota.— State *v.* Sibley County Probate Ct., 33 Minn. 94, 22 N. W. 10; State *v.* Ramsey County Probate Ct., 19 Minn. 117.

Mississippi.— Grant *v.* Lloyd, 12 Sm. & M. 191.

North Carolina.— Rawls *v.* Carter, 119 N. C. 596, 26 S. E. 154; McLaurin *v.* McLaurin, 106 N. C. 331, 10 S. E. 1056; Peterson *v.* Vann, 83 N. C. 118; Thompson *v.* Cox, 53 N. C. 311. *Contra*, Lovinier *v.* Pearce, 70 N. C. 167, where there was an order retaining the cause for distribution of the proceeds. And see Hyman *v.* Jarnigan, 65 N. C. 96.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1555.

Continuing jurisdiction.— Jurisdiction continues during the term at which the order of confirmation is made but does not extend thereafter. Duval *v.* McLoskey, 1 Ala. 708; Stettauer *v.* Chicago Title, etc., Co., 62 Ill. App. 31; Turnbull *v.* Endicott, 3 Sm. & M. (Miss.) 302; Planters Bank *v.* Neely, 7 How. (Miss.) 80, 40 Am. Dec. 51. The jurisdiction of the court of probate continues and is exclusive until confirmation, even after twenty years. Hart *v.* Hart, 39 Miss. 221, 77 Am. Dec. 668.

Where an order of confirmation was invalid because entered pending an appeal from the order of sale, a motion to set aside the sale in the probate court was proper. Lictie *v.* Chappell, 111 N. C. 347, 16 S. E. 171.

Motion to set aside, followed by appearance and answer, may be treated as independent action. Stradley *v.* King, 84 N. C. 635.

83. *Alabama.*— Mosely *v.* Tuthill, 45 Ala. 621, 6 Am. Rep. 710.

Georgia.— Worthy *v.* Johnson, 8 Ga. 236, 52 Am. Dec. 399.

Massachusetts.— Yeackel *v.* Litchfield, 13 Allen 417, 90 Am. Dec. 207.

Mississippi.— Smith *v.* Chew, 35 Miss. 153.

New Jersey.— Runyon *v.* Newark India-Rubber Co., 24 N. J. L. 467; Howell *v.* Sebring, 14 N. J. Eq. 84.

North Carolina.— McLaurin *v.* McLaurin, 106 N. C. 331, 10 S. E. 1056; Peterson *v.* Vann, 83 N. C. 118.

Texas.— Dobbin *v.* Bryan, 5 Tex. 276.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1555.

In Louisiana it seems that a direct action in a court of ordinary jurisdiction is always necessary. Anger's Succession, 38 La. Ann. 492; Fields *v.* Gagne, 31 La. Ann. 182; Violett *v.* Fairchild, 6 La. Ann. 193. But such a court cannot set aside a sale because of the invalidity of the administrator's appointment. The court of probate must first remove the administrator. McCombs *v.* Dunbar, 3 La. 517. The order of sale and proceedings leading thereto must be attacked in the court ordering the sale, but subsequent proceedings may be brought in the court of the administrator's domicile. Woods *v.* Woods, 13 La. Ann. 189.

In Nebraska, where the license to sell is obtained in a court of general jurisdiction at law and in equity, it has been said that the proper remedy after confirmation is by petition in the original proceedings, and the petition must be positively verified. Lander *v.* Abrahamson, 34 Nebr. 553, 52 N. W. 571.

No equity jurisdiction except in case of fraud.— A court of equity has no jurisdiction to set aside a sale made and confirmed by order of the probate court except for fraud in procuring the judgment. Baker *v.* Lamkin, 11 Ohio Cir. Ct. 103, 5 Ohio Cir. Dec. 54.

Equity will not enjoin the enforcement of a judgment at law based on the title made

resort to such an independent proceeding.[84] Equity will also take jurisdiction under proper allegations to impress a trust on the property in the hands of the purchaser, without directly attacking his legal title,[85] or when, because of there being no law requiring confirmation, no opportunity was afforded to test the validity of the sale at law.[86] Where equity has taken over the administration of an estate on a bill filed for that purpose it will on supplemental bill set aside a sale made under order of the orphans' court after such transfer of the administration.[87] If the sale is absolutely void persons interested may so treat it, and courts of law will disregard it, so that generally no equitable relief is required and none will be given against void sales.[88] A defective sale may sometimes be in effect avoided by defending proceedings brought by the purchaser to confirm his title.[89] The purchaser at a voidable sale may maintain a bill to compel the heir to elect whether he will ratify or disaffirm.[90]

b. Parties. In a suit to set aside an executor's or administrator's sale the principles of equity control as to the parties.[91] All the heirs or devisees must be made parties,[92] as must also the administrator[93] and all other parties to the sale.[94] The vendee must be brought in as a party[95] and all who have since acquired interests in the property should also be made parties.[96] Those also must be brought in whose rights would be affected by a determination of the matters involved.[97]

c. Pleadings. The pleadings in a proceeding to set aside a sale must have the substantial requisites of equity pleadings.[98] The allegations of the bill, complaint, or petition must be positive and direct,[99] and they must be of specific

through the sale where there was no obstacle to contesting the validity of the sale in the action at law. Lieby *v.* Ludlow, 4 Ohio 469.

84. Herrmann *v.* Fontelieu, 29 La. Ann. 502; Everett *v.* McKinney, 7 La. 375; Casanova *v.* Acosta, 1 La. 179; Saunders *v.* Howard, 51 Tex. 23.

85. Caldwell *v.* Caldwell, 45 Ohio St. 512, 15 N. E. 297; Fisher *v.* Wood, 65 Tex. 199.

Equity will enforce the claims of distributees against the purchaser, the power of the probate court not being adequate. Baines *v.* McGee, 1 Sm. & M. (Miss.) 208.

86. Payne *v.* Turner, 36 Ala. 623.

87. Pearson *v.* Darrington, 32 Ala. 227.

88. State Bank *v.* White, 23 Mo. 342, 66 Am. Dec. 671; Mawhorter *v.* Armstrong, 16 Ohio 188.

89. Quick *v.* Goodwin, 19 Ind. 438 (holding that heirs were estopped from maintaining an action to set aside a sale by having failed to appeal from a decree which the purchasers had obtained confirming their title); Casanave *v.* Spear, 23 La. Ann. 519 (refusing relief to a purchaser because of informalities in the sale); Baumann *v.* Chambers, 17 Tex. Civ. App. 242, 42 S. W. 564 (defects set up as equitable defense to an action of ejectment brought by the purchaser).

Demurring to a bill by the purchasers to restrain an action at law and reform their deed is not an election to disaffirm a sale to the administrators and does not present for adjudication the right of the heirs to vacate such sale. Thorp *v.* McCullum, 6 Ill. 614.

90. Bland *v.* Bowie, 53 Ala. 152.

91. Hooey *v.* Wilson, 9 Wall. (U. S.) 501, 19 L. ed. 762. See, generally, EQUITY, 16 Cyc. 181.

92. Daniel *v.* Stough, 73 Ala. 379; Benson *v.* Benson, 97 Mo. App. 460, 71 S. W. 360; Estill *v.* Deckerd, 4 Baxt. (Tenn.) 497 (holding that equitable owners attacking the sale as void and seeking to establish a trust must bring in heirs in whom, on the theory that the sale was void, the legal title remains); Hooey *v.* Wilson, 9 Wall. (U. S.) 501, 19 L. ed. 762.

93. Herrmann *v.* Fontelieu, 29 La. Ann. 502.

94. Burney *v.* Ludeling, 41 La. Ann. 627, 6 So. 248.

Creditors are not generally necessary parties (Vincent *v.* Phillips, 47 La. Ann. 1216, 17 So. 786), but a creditor who instituted the proceedings leading to the sale must be made a party to a bill to set it aside (Hooey *v.* Wilson, 9 Wall. (U. S.) 501, 19 L. ed. 762. And see Benson *v.* Benson, 97 Mo. App. 460, 71 S. W. 360).

Where the administrator indirectly purchased, neither his creditors nor his assignee for creditors are proper parties. Hannum's Appeal, 1 Chest. Co. Rep. (Pa.) 362.

95. Herrmann *v.* Fontelieu, 29 La. Ann. 502; Everett *v.* McKinney, 7 La. 375; McCombs *v.* Dunbar, 3 La. 517; Casanova *v.* Acosta, 1 La. 179; Saunders *v.* Howard, 51 Tex. 23.

96. Sterlin *v.* Gros, 5 La. 100; Saunders *v.* Howard, 51 Tex. 23.

97. Murphy *v.* De France, 105 Mo. 53, 15 S. W. 949, 16 S. W. 861, holding that an heir attacking a sale and asserting a homestead right must bring in the widow and other heirs interested in the assignment of the homestead.

98. See EQUITY, 16 Cyc. 227.

99. Garrett *v.* Lynch, 45 Ala. 204 (holding that an allegation that plaintiff caused

facts, not general conclusions.[1] The extent of plaintiff's interest must be stated with certainty,[2] and plaintiff must, when necessary in order to disclose an unquestionable right, plead exceptions and negative facts.[3] A bill to set aside a sale for fraud must charge the purchaser with notice of the fraud.[4] There should in general be an offer in pleading to restore the purchase-money.[5]

d. Evidence — (I) *Presumptions* — (A) *As to Jurisdiction, Etc.* The presumptions are strongly in favor of the validity of sales. It is often held that jurisdiction will be presumed from the fact that the court made the order,[6] but in some states it is held that on a collateral attack one claiming under the sale must show affirmatively the jurisdictional facts.[7] A finding or recital in the record is sufficient to raise a presumption of jurisdiction,[8] but no presumption of

search to be made in the office of the probate court and no record or any evidence could be found that the administrator had ever applied to said court for the sale of the lands is not an averment that no order of sale had been made); Deans *v.* Wilcoxson, 25 Fla. 980, 7 So. 163 (holding that in a suit brought before confirmation an allegation that the purchasers intended to make no payment other than a credit on the claim to satisfy which the sale was made is insufficient to show that the sale was not for cash, as the court will not presume that the administrator will violate the law or the probate court confirm an illegal purchase); George *v.* Watson, 19 Tex. 354 (where under a statute requiring the administration to be "in the county where the deceased resided if he had a fixed domicile or residence in the republic," a bill attacking a sale on the ground that the administration in R county was without jurisdiction and alleging that the last place of residence of the deceased was in L county, where he resided at the time of his death, was held bad for not alleging that L county was his permanent or fixed residence or that he had a fixed domicile or residence in the republic).

1. Burris *v.* Adams, 96 Cal. 664, 31 Pac. 565 [*distinguishing* Jones *v.* Hanna, 81 Cal. 507, 22 Pac. 883]; Denton *v.* Arnold, 151 Ind. 188, 51 N. E. 240 [*following* Bailey *v.* Rinker, 146 Ind. 129, 45 N. E. 38], holding that where the recitals of the record as to service of process are conclusive, a complaint seeking to set aside a sale for want of service must allege not merely that there was no service, but what the record discloses as to service.

The defects relied upon must be specified. Deans *v.* Wilcoxson, 25 Fla. 980, 7 So. 163; Gormley *v.* Palmes, 13 La. Ann. 213; Leonard *v.* Cameron, 39 Miss. 419.

2. Fisher *v.* Bush, 133 Ind. 315, 32 N. E. 924.

3. Oliver *v.* Park, 101 Ky. 1, 39 S. W. 423, 19 Ky. L. Rep. 179 (holding that plaintiff must, in seeking to avoid a sale for want of notice, where the record discloses an appearance by attorney, deny the attorney's authority); Back *v.* Combs, 96 Ky. 522, 29 S. W. 352, 16 Ky. L. Rep. 613 (holding that plaintiff must show that he is within an exception to a statute of limitations which the bill would show to be otherwise applicable); Dickens *v.* Long, 109 N. C. 165, 13 S. E. 841 (holding that a plaintiff claiming the land as an exempt homestead must negative the exceptions in the statute creating the exemption).

4. Duffy *v.* Mellick, 42 N. J. Eq. 117, 7 Atl. 341; Cascaden *v.* Cascaden, 140 Pa. St. 140, 21 Atl. 259.

A subsequent purchaser must be charged in the bill with notice of the fraud. George *v.* Watson, 19 Tex. 354.

5. Gormley *v.* Palmes, 13 La. Ann. 213. See *infra*, XII, S, 6, a, (I).

6. *Arkansas.*— Blevins *v.* Case, 66 Ark. 416, 51 S. W. 65.

Indiana.— Denton *v.* Arnold, 151 Ind. 188, 51 N. E. 240; Sims *v.* Gay, 109 Ind. 501, 9 N. E. 120; Doe *v.* Harvey, 3 Ind. 104; Horner *v.* Doe, 1 Ind. 130, 48 Am. Dec. 355.

Missouri.— Murphy *v.* De France, 105 Mo. 53, 15 S. W. 949, 16 S. W. 861 [*overruling* Daudt *v.* Harmon, 16 Mo. App. 203].

New York.— Wood *v.* McChesney, 40 Barb. 417.

Ohio.— Sheldon *v.* Newton, 3 Ohio St. 494.

Texas.— Lyne *v.* Sanford, 82 Tex. 58, 19 S. W. 847, 27 Am. St. Rep. 852; Mills *v.* Herndon, 77 Tex. 89, 13 S. W. 854; Tom *v.* Sayers, 64 Tex. 339.

United States.— Moore *v.* Greene, 19 How. 69, 15 L. ed. 533 [*affirming* 17 Fed. Cas. No. 9,763, 2 Curt. 202], after many years' possession. The statutory power of the court being sufficient to authorize it to order the sale, the order cannot be impeached collaterally for lack of jurisdiction. Grignon *v.* Astor, 2 How. 319, 11 L. ed. 283. And see Allen *v.* Lyons, 1 Fed. Cas. No. 227, 2 Wash. 475.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1562.

Where the jurisdictional facts appear on the record the same presumption arises in favor of the judgment as arises in favor of courts of general jurisdiction. Root *v.* McFerrin, 37 Miss. 17, 75 Am. Dec. 49.

7. Reddick *v.* Long, 124 Ala. 260, 27 So. 402; Shelton *v.* Hadlock, 62 Conn. 143, 25 Atl. 483; Doe *v.* Roe, 4 Ga. 148, 48 Am. Dec. 216; Fell *v.* Young, 63 Ill. 106.

8. Kilgour *v.* Gockley, 83 Ill. 109; Moore *v.* Neil, 39 Ill. 256, 89 Am. Dec. 303; Little *v.* Sinnett, 7 Iowa 324; Grevemberg *v.* Bradford, 44 La. Ann. 400, 10 So. 786; Perry *v.* Blakey, 5 Tex. Civ. App. 331, 23 S. W. 804.

It is sufficient if the record recites notice,

jurisdiction can be indulged if the record affirmatively discloses facts contrary thereto.[9] Not only jurisdiction but the fact that proceedings were had and a license granted will be presumed if the deed so recites and there has been long possession thereunder.[10] Indeed long and undisturbed possession alone creates a presumption of the validity of the sale.[11] No presumption will be indulged contrary to the record in order to sustain a sale, as by presuming that it was in fact made under an execution or a power in the will when the record discloses that it was made under an order of court and was void thereunder.[12]

(B) *As to Regularity of Proceedings.* The existence and regularity of steps in the proceedings, not jurisdictional, but sometimes essential to perfect title in the purchaser, will almost uniformly be presumed where the record is merely silent,[13]

but if it does not, none will be presumed from the fact that no order was made until thirty years had elapsed. Thomas *v.* Le Baron, 8 Metc. (Mass.) 355.

9. Where the administration record did not disclose the existence of any heirs and the order of sale was made the day the application was filed, notice to the heirs could not be presumed. Doe *v.* Bowen, 8 Ind. 197, 65 Am. Dec. 758. And see Guy *v.* Pierson, 21 Ind. 18; Doe *v.* Anderson, 5 Ind. 33; Babbitt *v.* Doe, 4 Ind. 355; Moore *v.* Smith, 24 S. C. 316. But *compare* Gerrard *v.* Johnson, 12 Ind. 636, where, although the record showed that there had been no service, it was nevertheless presumed that there had been a voluntary appearance.

Service of notice.— Where the recital of service showed that the service was defective, and the order was set aside and a new order made without any new adjudication as to service, and no other service appeared, it was presumed that the second order was based on the service mentioned in the first, and that the court failed to acquire jurisdiction. Donlin *v.* Hettinger, 57 Ill. 348. If, however, the record discloses that there was notice by publication and posting, the absence of the notice from the files will not defeat the presumption that it was a proper one. Clark *v.* Hillis, 134 Ind. 421, 34 N. E. 13.

10. Starr *v.* Brewer, 58 Vt. 24, 3 Atl. 479 (lapse of fifty years and probate proceedings lost); Massenburg *v.* Denison, 71 Fed. 618, 18 C. C. A. 280 (fifty-five years' possession). See also Baker *v.* Prewitt, 64 Ala. 551; Stevenson *v.* McReary, 12 Sm. & M. (Miss.) 9, 51 Am. Dec. 102 (where there was incomplete evidence of the probate proceedings); Doolittle *v.* Holton, 28 Vt. 819, 67 Am. Dec. 745.

11. *Alabama.*— Lay *v.* Lawson, 23 Ala. 377. Where the purchase-money was paid and an informal deed made by the administrator and the probate records destroyed, the report and confirmation of sale were presumed after nineteen years. Smith *v.* Wert, 64 Ala. 34.

Georgia.— Newton *v.* Roe, 33 Ga. 163.

Massachusetts.— Gray *v.* Gardner, 3 Mass. 399.

Mississippi.— Stevenson *v.* McReary, 12 Sm. & M. 9, 51 Am. Dec. 102.

North Carolina.— Morris *v.* House, 125 N. C. 550, 34 S. E. 712.

Texas.— Sypert *v.* McCowen, 28 Tex. 635.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1562.

12. Jay *v.* Stein, 49 Ala. 514; Wilson *v.* Armstrong, 42 Ala. 168, 94 Am. Dec. 635; Alabama Conference M. E. Church South *v.* Price, 42 Ala. 39; Rice *v.* Bamberg, 59 S. C. 498, 38 S. E. 209. If, however, the property was personalty and might have been sold without an order, the sale is not invalidated because an order was obtained. Horner's Appeal, 56 Pa. St. 405.

13. *Georgia.*— Coggins *v.* Griswold, 64 Ga. 323.

Iowa.— When there is a petition presented by an administrator all further proceedings have the same presumptions of regularity which attach to judgments of courts of general jurisdiction. Long *v.* Burnett, 13 Iowa 28, 81 Am. Dec. 420. And see Lees *v.* Wetmore, 58 Iowa 170, 12 N. W. 238.

Michigan.— Wheelock *v.* Lake, 117 Mich. 11, 75 N. W. 140.

Mississippi.— Hutchins *v.* Brooks, 31 Miss. 430.

Missouri.— McNair *v.* Hunt, 5 Mo. 300.

New York.— Rigney *v.* Coles, 6 Bosw. 479. After ten years an order of confirmation will be presumed in collateral proceedings, although none is found of record. Mott *v.* Ft. Edward Waterworks Co., 79 N. Y. App. Div. 179, 79 N. Y. Suppl. 1100.

Tennessee.— Sanders *v.* Guille, (Ch. App. 1896) 37 S. W. 999.

Texas.— Templeton *v.* Ferguson, 89 Tex. 47, 33 S. W. 329 [*affirming* (Civ. App. 1895) 32 S. W. 148]; Harris *v.* Shafer, (Civ. App. 1893) 21 S. W. 110. Where the order of confirmation did not identify the land sold to each purchaser, it was presumed that the confirmation related to the lands conveyed by the deeds which had been previously executed. Perry *v.* Blakey, 5 Tex. Civ. App. 331, 23 S. W. 804.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1562.

Where the record discloses an insufficient order of confirmation, the existence of another and sufficient order will not be presumed. Pace *v.* Fishback, 10 Tex. Civ. App. 450, 31 S. W. 424. See also Blakey *v.* Perry, 15 Tex. Civ. App. 26, 38 S. W. 374.

Inventory.— A decree of sale and subsequent proceedings afford no evidence that an inventory had been previously made. Goodwin *v.* Sheldon, 1 Day (Conn.) 312.

and especially is this true where the records are in whole or in part lost.[14] So a record defective in some particular may be aided by a finding, recital, or allegation in another part from which the court will presume the existence of the missing element.[15] The general rule that persons acting in an official capacity are presumed to have properly performed their duties[16] has often been applied, especially after a considerable lapse of time.[17] A *prima facie* case is made by the purchaser by production of an order of sale, order of confirmation, and deed; all other steps will be presumed.[18]

(II) *ADMISSIBILITY.* The construction of the order of sale must be determined by the court from an inspection of the record itself,[19] but parol evidence, based on data in the deed, may be received to identify the land conveyed.[20] Where the statute protects a sale from attack if certain conditions are complied with, and the price "duly accounted for," the account can be shown only by the probate records.[21] Where fraud is charged parol evidence may be received to contradict the official appraisement as to the value of the property,[22] and parties to the deed may testify to facts in support of the charge of fraud, although they contradict recitals in the deed.[23]

(III) *SUFFICIENCY.* Evidence in support of allegations invalidating the sale must be clear and strong;[24] but slight evidence, especially after a long lapse of

14. Wyatt *v.* Scott, 33 Ala. 313 (where regularity was presumed after twenty years, the records having been loosely kept at the time of the sale); Johnson *v.* McDyer, 9 S. W. 778, 11 Ky. L. Rep. 29; Bray *v.* Adams, 114 Mo. 486, 21 S. W. 853; Rowdon *v.* Brown, 91 Mo. 429, 4 S. W. 129; Morris *v.* House, 125 N. C. 550, 34 S. E. 712.

15. Burris *v.* Kennedy, (Cal. 1895) 38 Pac. 971 (holding that where a petition does not aver the value of the property, it will be presumed on collateral attack that its value was stated in an inventory referred to in the petition as on file); McCamant *v.* Roberts, 80 Tex. 316, 15 S. W. 580, 1054 (holding that where the petition alleged the existence of debts, this will be presumed, although the record does not elsewhere affirmatively show it).

16. See EVIDENCE, 16 Cyc. 1076.

17. *Iowa.*— Brown *v.* Butters, 40 Iowa 544, presumption that sale was for not less than required proportion of appraised value.

Maine.— Austin *v.* Austin, 50 Me. 74, 79 Am. Dec. 597, approval of bond presumed from its filing.

Missouri.— Price *v.* Springfield Real-Estate Assoc., 101 Mo. 107, 14 S. W. 57, 20 Am. St. Rep. 595, presumption that an administrator had paid the necessary proportion of the appraised value to render his purchase legal, and that an administrator who was a judge of the court did not participate in the proceedings. So the making of the deed was presumed when the order of confirmation showed that a sale bill had been filed, because a deed should have been made in the course of the administrator's duty. Long *v.* Joplin Min., etc., Co., 68 Mo. 422.

New York.— Demarest *v.* Wynkoop, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467, where a sale was regular but the deed was dated nineteen years after the sale, and it was presumed that a deed was made at the time and lost, and the one produced executed to take its place.

Oregon.— Russell *v.* Lewis, 3 Oreg. 380, where on the face of the record the order was made a day before the time fixed in the order to show cause, and it was presumed that there was a mistake in making up the record, rather than that the order was made before the return-day.

Pennsylvania.— Fink *v.* Miller, 19 Pa. Super. Ct. 556.

Tennessee.— Griffith *v.* Philips, 9 Lea 417, payment of purchase-money presumed from confirmation.

Texas.— Saul *v.* Frame, 3 Tex. Civ. App. 596, 22 S. W. 984, presumption that a bond was executed before making sale.

United States.— Santana Live-Stock, etc., Co. *v.* Pendleton, 81 Fed. 784, 26 C. C. A. 608.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1562.

18. Harris *v.* Ransom, 24 Miss. 504 (holding that the burden is then on the party impeaching the sale to show that it was not made legally); Young *v.* Downey, 145 Mo. 250, 46 S. W. 1086; Agan *v.* Shannon, 103 Mo. 661, 15 S. W. 757; Price *v.* Springfield Real-Estate Assoc., 101 Mo. 107, 14 S. W. 57, 20 Am. St. Rep. 595. And see Hawkins *v.* Ragan, 20 Ind. 193.

19. Wyatt *v.* Steele, 26 Ala. 639.

20. Doe *v.* Riley, 28 Ala. 164, 65 Am. Dec. 334.

21. Jewett *v.* Jewett, 10 Gray (Mass.) 31.

22. Herrimann *v.* Janney, 31 La. Ann. 276.

23. Kifer *v.* Brenneman, 1 Pa. St. 452; McCampbell *v.* Durst, 73 Tex. 410, 11 S. W. 380.

24. *Illinois.*— Wilson *v.* Kellogg, 77 Ill. 47, fraud.

Louisiana.— St. Ament *v.* Tessier, 47 La. Ann. 177, 16 So. 737 (non-payment of price); Calhoun *v.* McKnight, 44 La. Ann. 575, 10 So. 783 (fraud).

time accompanied by possession of the purchaser or those claiming under him, may be sufficient to sustain the sale.[25]

e. Decree. If another court has exclusive jurisdiction to license sales, a court of equity may on avoiding a sale decree possession and remove all obstacles to a resale, but it cannot itself order one.[26] A new license may be obtained if necessary,[27] but if the defect was in the sale alone the license should not be vacated and a new license is unnecessary.[28] Under some circumstances the defect can be cured only by a resale.[29] In the case of sales by administrators to themselves the proper course has sometimes been declared to be to order a resale, and if on such resale more is not bid than was paid by the administrator on the first sale, then to confirm the first.[30] The defect of a decree annulling an administrator's sale is to revest title in the heirs or devisees, subject as before to administration.[31]

Maryland.— Goldsborough *v.* Ringgold, 1 Md. Ch. 239, inaccuracy of survey on which sale made.

Mississippi.— Sanders *v.* Sorrell, 65 Miss. 288, 3 So. 661, purchaser's knowledge of fraud.

Pennsylvania.— Sager *v.* Mead, 171 Pa. St. 349, 33 Atl. 355 (inadequacy of price); Potts *v.* Wright, 82 Pa. St. 498 (fraud).

See 22 Cent. Dig. tit. "Executors and Administrators," § 1561.

Absence of citation and bond.— Testimony of a judge that he had examined the records of the court without finding a citation essential to the jurisdiction has been held not sufficient to defeat the sale. Gibson *v.* Foster, 2 La. Ann. 503. But such testimony as to failing to find a bond, together with the testimony of the administrator that none was given, has been held sufficient to defeat the sale. Babcock *v.* Cobb, 11 Minn. 347.

25. Thomas *v.* Le Baron, 8 Metc. (Mass.) 355 (holding that after twenty-four years a certificate of the judge recorded with the grant of the license that the administrator had taken the oath is sufficient evidence of the fact); Baker *v.* Henry, 63 Mo. 517 (where the report of sale was found among the papers of a deceased clerk, but not with other probate papers, and the court-house had been destroyed by fire, and the records moved from place to place, and it was held that the filing was sufficiently proved); Turner *v.* Suffler, 108 N. C. 642, 13 S. E. 243 (holding that a finding of a referee in a suit to set aside a sale that it was made in good faith will not be reversed if there is any evidence to warrant it); Huckle *v.* Phillips, 2 Serg. & R. (Pa.) 4 (holding that, where records were loosely kept and many years had elapsed, letters of administration need not be produced if there was secondary evidence that they were granted).

Recitals in deed.— After the lapse of years recitals of jurisdictional facts in the deed are *prima facie* evidence thereof (Doe *v.* Henderson, 4 Ga. 148, 48 Am. Dec. 216; Davis *v.* Gaines, 104 U. S. 386, 26 L. ed. 757), but recitals giving reasons why the property sold for so little create suspicion as to the fairness of the sale (Grant *v.* Lloyd, 12 Sm. & M. (Miss.) 191).

26. Forniquet *v.* Forstall, 34 Miss. 87.

27. Moody *v.* Moody, 11 Me. 247.

28. McMillan *v.* Rushing, 80 Ala. 402; Robbins *v.* Wolcott, 27 Conn. 234.

29. Greer *v.* Greer, 12 S. W. 152, 11 Ky. L. Rep. 380 (holding that where land is sold in which there was an undivided interest not subject to sale, the court must order a resale; it cannot cure the error by compelling the owner of such interest to accept a portion of the purchase-money); Sharpley *v.* Plant, 79 Miss. 175, 28 So. 799, 89 Am. St. Rep. 588 (holding that the court cannot impart validity to a sale which was ineffectual to divest the heirs' title by imposing conditions upon compliance with which it will be confirmed, but a new sale must be ordered); Camp Mfg. Co. *v.* Liverman, 123 N. C. 7, 31 S. E. 346 (holding that where a sale was made on an agreement which made it in effect a mortgage to pay decedent's debts, those not bound by the agreement are entitled to a resale according to law).

30. Burnett *v.* Eaton, 29 N. J. Eq. 466; Davoue *v.* Fanning, 2 Johns. Ch. (N. Y.) 252, where a resale was ordered on condition that if the property should not bring the amount of the original purchase, together with the value of the improvements, the first sale should be confirmed.

The sale should not be set aside but the purchaser should be declared a trustee for the devisees. Chapman *v.* Sims, 53 Miss. 154.

The fact that the debts of the estate have been fully paid is no objection to a resale, as the administrator, not being able to recover back the money so paid, will be subrogated to the rights of the creditors. Wheeler *v.* Wheeler, 1 Conn. 51; Wilson *v.* Bergin, 28 N. H. 96.

31. Fisher *v.* Wood, 65 Tex. 199. Where property has been sold by an administrator, and for want of proper parties the sale is rescinded, it cannot be taken from the administrator, but must be left in his hands to be administered according to law. Savage *v.* Williams, 15 La. Ann. 250.

Judgment in ejectment obtained by purchaser.— Where, pending an appeal from a decree setting aside a sale, the purchaser recovered in ejectment against an adverse claimant, the benefits of the purchaser's judgment inured to the heirs on affirmance

6. Accounting With Purchaser When Sale Avoided[32] **— a. Reimbursement For Purchase-Money** — (i) *Necessity of Offer by Plaintiff.* Equity imposes an obligation on the heir seeking to set aside a sale to tender back the purchase-money as a condition of obtaining relief, where it has been applied in payment of the liabilities of the estate.[33] It is sometimes held that no equity for repayment arises in favor of one who purchases *mala fides*,[34] but this distinction is elsewhere denied.[35]

(ii) *Method and Extent of Reimbursement.* The equity of the purchaser arises from the employment of the money for the benefit of the estate, and accordingly it is sometimes held that his right is one of subrogation to those of the creditors who have been paid,[36] or to have his payment charged as a lien on the land,[37] but actual repayment to the extent at least of benefits received by the estate is the usual requirement.[38]

of their decree. Mabary *v.* Dollarhide, 98 Mo. 198, 11 S. W. 611, 14 Am. St. Rep. 639.

Charging with penalty.— Where a sale is set aside as fraudulent and the administrator charged under a penal statute with the appraised value of the goods, he is not thereby vested with title in his own right. Smith *v.* Billing, 22 Fed. Cas. No. 13,014, 3 Cranch C. C. 355.

Necessity of further administration.— Where the bill by the heirs prayed a recovery of the rents and the value of personalty also sold the administrator cannot complain of a decree in accordance with such prayers if he made no showing of necessity for further administration. Lowery *v.* Idelson, 117 Ga. 778, 45 S. E. 51.

32. Sale of realty under testamentary authority see *supra*, VIII, O, 9, d, (xiii).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, l.

33. *Indiana.*— Shepherd *v.* Fisher, 17 Ind. 229.

Louisiana.— Beard *v.* Cash, 32 La. Ann. 121; Sharkey *v.* Bankston, 30 La. Ann. 891.

Mississippi.— Cole *v.* Johnson, 53 Miss. 94; Short *v.* Porter, 44 Miss. 533.

Nebraska.—Holmes *v.* Columbia Nat. Bank, (Sup. 1903) 97 N. W. 26.

Pennsylvania.— *In re* Smith, 188 Pa. St. 222, 41 Atl. 542.

United States.— Davis *v.* Gaines, 104 U. S. 386, 26 L. ed. 757.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1550½.

When repayment or tender unnecessary.— Where the sale is an absolute nullity, a previous tender is not a condition precedent to an action to set it aside. Wood *v.* Nicholls, 33 La. Ann. 744. And see Milner *v.* Vandivere, 86 Ga. 540, 12 S. E. 879; Burney *v.* Ludeling, 41 La. Ann. 627, 6 So. 248. Nor is repayment or tender a condition precedent where it does not appear that the purchase-money has been paid or applied for the benefit of the estate. Fishback *v.* Paige, 17 Tex. Civ. App. 183, 43 S. W. 317. And there need be no offer to refund where the rents and profits received by the purchaser exceed the amount of his disbursements (Cole *v.* Boyd, (Nebr. Sup. 1903) 93 N. W. 1003), or where it appears that the purchaser paid nothing out of his own funds (Shaw *v.* Swift, Smith (Ind.) 398).

34. Meyer *v.* Farmer, 36 La. Ann. 785; Forniquet *v.* Forstall, 34 Miss. 87.

35. Neel *v.* Carson, 47 Ark. 421, 2 S. W. 107; Fisher *v.* Bush, 133 Ind. 315, 32 N. E. 924; Obert *v.* Obert, 12 N. J. Eq. 423.

36. Gaines *v.* Kennedy, 53 Miss. 103; Short *v.* Porter, 44 Miss. 533; Lee *v.* Gardiner, 26 Miss. 521; Caldwell *v.* Palmer, 6 Lea (Tenn.) 652; Bennett *v.* Coldwell, 8 Baxt. (Tenn.) 483; Starkey *v.* Hammer, 1 Baxt. (Tenn.) 438; Martin *v.* Turner, 2 Heisk. (Tenn.) 384; Campbell *v.* Bryant, 2 Tenn. Cas. 146; Hudgin *v.* Hudgin, 6 Gratt. (Va.) 320, 52 Am. Dec. 124.

37. Baker *v.* Martin, 156 Ind. 53, 59 N. E. 174; Stults *v.* Brown, 112 Ind. 370, 14 N. E. 230, 2 Am. St. Rep. 190; Jones *v.* French, 92 Ind. 138; Grant *v.* Lloyd, 12 Sm. & M. (Miss.) 191; Martin *v.* Turner, 2 Heisk. (Tenn.) 384.

Estate or funds chargeable.— The amount due the purchaser will be charged against the land and must be paid before the heir is entitled to possession. Gaines *v.* Kennedy, 53 Miss. 103; Blodgett *v.* Hitt, 29 Wis. 169, holding that the purchaser may set up the claim as an equitable defense in ejectment by the heir. The purchaser is entitled to reimbursement out of the first moneys arising from a resale. Potter *v.* Smith, 36 Ind. 231.

Necessity of filing claim of lien.— The claim on account of purchase-money paid, although a lien, is a claim against the estate which must be filed as provided by statute. Stults *v.* Forst, 135 Ind. 297, 34 N. E. 1125.

38. *Arkansas.*— Neel *v.* Carson, 47 Ark. 421, 2 S. W. 107.

Indiana.— Fisher *v.* Bush, 133 Ind. 315, 32 N. E. 924.

Mississippi.— See Gaines *v.* Kennedy, 53 Miss. 103; Jayne *v.* Boisgerard, 39 Miss. 796.

New Jersey.— Merselis *v.* Vreeland, 8 N. J. Eq. 575.

Ohio.— Roll *v.* Riddle, 5 Ohio Dec. (Reprint) 232, 3 Am. L. Rec. 648 [*affirmed* in 24 Ohio St. 572].

Tennessee.— Caldwell *v.* Palmer, 6 Lea 652.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1550½.

(III) *Reimbursement When Sale Void.* Although the sale was absolutely void, the general rule is that the land cannot be recovered by the heir without repayment of the purchase-money paid to the estate.[39] Where, however, distinctions between law and equity are observed, no notice can be paid to such equities in an action of ejectment to recover the land,[40] but where the heir is required to go into equity to establish his title or possession repayment will be enforced.[41] As to whether the probate court may on vacating a sale adjust the rights of the purchaser the cases are not in accord.[42] Where the land has been recovered without repayment an action will lie to recover back the purchase-money from the estate.[43]

b. Reimbursement For Improvements.[44] A purchaser in good faith is entitled, when the sale is avoided, to credit or reimbursement for improvements made by him,[45] not at their cost or separate value, but to the extent to which they have

The entire purchase-money should be repaid. *Mississippi.*— Ragland *v.* Green, 14 Sm. & M. 194.

Missouri.— Schafer *v.* Causey, 76 Mo. 365; Mobley *v.* Nave, 67 Mo. 546.

New Jersey.— Obert *v.* Obert, 12 N. J. Eq. 423.

Texas.— Halsey *v.* Jones, 86 Tex. 488, 25 S. W. 696; Stephenson *v.* Marsalis, 11 Tex. Civ. App. 162, 33 S. W. 383.

Wisconsin.— Blodgett *v.* Hitt, 29 Wis. 169.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1550½.

A payment before confirmation is voluntary and the purchaser must bear the loss if the administrator misappropriates the money. He will not be subrogated to the rights of the administrator as an individual creditor until the debts due from the intestate to the administrator have been first applied to the claims of the estate against the administrator for the funds misappropriated. Pool *v.* Ellis, 64 Miss. 555, 1 So. 725.

Money applied to debts.— Where the purchase-money pays all the debts and leaves a surplus for the heirs it must all be repaid. Smith *v.* Knoebel, 82 Ill. 392. So the purchaser is entitled to repayment of moneys applied to the satisfaction of debts of the devisee seeking to avoid the sale. Beeson *v.* Beeson, 9 Pa. St. 279.

Items of credit and debit.— The purchaser is entitled to a lien for the balance found after crediting him with the amount of the purchase-money applied to the payment of debts, with interest, repairs, and reasonable improvements, and charging him with rents and profits. Ebelmesser *v.* Ebelmesser, 99 Ill. 541. Interest should also be allowed (Smith *v.* Knoebel, 82 Ill. 392; Schafer *v.* Causey, 76 Mo. 365; Mobley *v.* Nave, 67 Mo. 546; Obert *v.* Obert, 12 N. J. Eq. 423), and taxes paid by the purchaser (Smith *v.* Knoebel, *supra*; Schafer *v.* Causey, *supra*). In addition to repayment of the purchase-money the purchaser has been allowed auctioneer's fees paid by him, and the costs of examining the title (John's Estate, 18 N. Y. Suppl. 172, 21 N. Y. Civ. Proc. 326), but the last item has also been denied (Campbell's Estate, Tuck. Surr. (N. Y.) 240). Costs allowed the executor should not be deducted from the amount to be repaid. Thomas' Estate, 4 Kulp (Pa.) 445.

39. Hill *v.* Billingsly, 53 Miss. 111; Gaines *v.* Kennedy, 53 Miss. 103; Schafer *v.* Causey, 76 Mo. 365; Mobley *v.* Nave, 67 Mo. 546; Martin *v.* Turner, 2 Heisk. (Tenn.) 384; Halsey *v.* Jones, 86 Tex. 488, 25 S. W. 696; Stephenson *v.* Marsalis, 11 Tex. Civ. App. 162, 33 S. W. 383. *Contra*, Beene *v.* Collenberger, 38 Ala. 647; Nowler *v.* Coit, 1 Ohio 519, 13 Am. Dec. 640.

Court cannot create lien in favor of purchaser at void sale. Frost *v.* Atwood, 73 Mich. 67, 41 N. W. 96, 16 Am. St. Rep. 560. And see Beall *v.* Price, 13 Ohio 368, 42 Am. Dec. 204.

40. Stevens *v.* Durrett, 49 Miss. 411.

41. Obert *v.* Obert, 12 N. J. Eq. 423.

42. See Eichelberger *v.* Hawthorne, 33 Md. 588 (holding that the orphans' court has no authority, on vacating a sale, to adjust the rights of the purchaser; but he must be remitted to equity); Matter of Lynch, 67 How. Pr. (N. Y.) 436 (holding that a surrogate may order the executor to refund).

43. Dorman *v.* Laine, 6 Ill. 143; Stevens *v.* Durrett, 49 Miss. 411; Hudgin *v.* Hudgin, 6 Gratt. (Va.) 320, 52 Am. Dec. 124.

One buying personal property with notice of facts rendering the sale void cannot recover back the price after the property has been recovered from him, because his payment was voluntary. Beene *v.* Collenberger, 38 Ala. 647.

Persons liable.— Where the executors have turned over the money to the residuary legatee and have no assets in their hands, although there has been no judicial settlement, the action should be brought against the legatee. Mertens *v.* Roche, 39 N. Y. App. Div. 398, 57 N. Y. Suppl. 349. And as an unauthorized sale confers no right on the administrator to receive the money as administrator, he is not liable to the purchaser therefor in his representative capacity unless it be shown that he has actually accounted to the estate for such money. Schlicker *v.* Hemenway, 110 Cal. 579, 42 Pac. 1063, 52 Am. St. Rep. 116.

44. See, generally, Improvements.

45. *Illinois.*— Ebelmesser *v.* Ebelmesser, 99 Ill. 541; Smith *v.* Knoebel, 82 Ill. 392.

enhanced the value of the property.[46] It is sometimes held that the value of improvements is allowed only as a set-off against rents and profits, and that the allowance cannot exceed the amount of such rents and profits.[47]

c. Liability For Rents and Profits. The purchaser should be charged with the rents and profits of the land during the period of his possession.[48]

T. Operation and Effect of Sale[49] — **1. Sale Is Judicial.** A sale of land by an executor or administrator under order of court is in the nature of a judicial sale, and has in general the same force and effect.[50]

2. Effect in Divesting Titles and Liens — a. Title of Heirs or Devisees. A sale by an executor or administrator to pay debts divests the title of the heirs or devisees,[51] but does not prevent them from setting up an after-acquired

Maryland.— Gavin *v.* Carling, 55 Md. 530.

Mississippi.— Grant *v.* Lloyd, 12 Sm. & M. 191.

New Jersey.— Smith *v.* Drake, 23 N. J. Eq. 302.

Ohio.— Barrington *v.* Alexander, 6 Ohio St. 189; Longworth *v.* Wolfington, 6 Ohio 9.

Tennessee.— Starkey *v.* Hammer, 1 Baxt. 438.

Texas.— Burdett *v.* Silsbee, 15 Tex. 604; Anderson *v.* Lockhart, 2 Tex. Unrep. Cas. 63.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1584, 1585.

Credit for improvements has been allowed where the sale was void (Burdett *v.* Silsbee, 15 Tex. 604; Anderson *v.* Lockhart, 2 Tex. Unrep. Cas. 63), where the administrator purchased at his own sale (Miller *v.* Rich, 204 Ill. 444, 68 N. E. 488; Ebelmesser *v.* Ebelmesser, 99 Ill. 541; Smith *v.* Drake, 23 N. J. Eq. 302; Mulford *v.* Minch, 11 N. J. Eq. 16, 64 Am. Dec. 472; Barrington *v.* Alexander, 6 Ohio St. 189; Wipff *v.* Heder, 6 Tex. Civ. App. 685, 26 S. W. 118), and where the sale was set aside for fraud (Grant *v.* Lloyd, 12 Sm. & M. (Miss.) 191).

No allowance can be made for improvements not paid for by the purchaser and for which he is not liable. Burks *v.* Vaughan, (Ark. 1892) 19 S. W. 754.

If the property is sold as litigious property, the purchaser cannot claim the increased value in case of eviction. Gravier *v.* Gravier, 3 Mart. N. S. (La.) 206.

A mortgagee from one holding under a void decree transferring the property of a decedent is entitled to the benefit of improvements made by the mortgagor, deducting therefrom their proportion of taxes, insurance, and other burdens. Gavin *v.* Carling, 55 Md. 530.

46. Lagger *v.* Mutual Union Loan, etc., Assoc., 146 Ill. 283, 33 N. E. 946; Ebelmesser *v.* Ebelmesser, 99 Ill. 541 (holding that the credit should be for proper and lasting improvements which have enhanced the value of the land, but not for unreasonable, expensive, or unsuitable improvements); Smith *v.* Drake, 23 N. J. Eq. 302; Starkey *v.* Hammer, 1 Baxt. (Tenn.) 438.

47. Huse *v.* Den, 85 Cal. 390, 24 Pac. 790, 20 Am. St. Rep. 232 (void sales); Grant *v.* Lloyd, 12 Sm. & M. (Miss.) 191; Williamson *v.* Williamson, 3 Sm. & M. (Miss.) 715, 41 Am. Dec. 636; Starkey *v.* Hammer, 1 Baxt. (Tenn.) 438.

48. Burks *v.* Vaughan, (Ark. 1892) 19 S. W. 754; Smith *v.* Knoebel, 82 Ill. 392; Kruse *v.* Steffens, 47 Ill. 112; Shaw *v.* Swift, Smith (Ind.) 398; Hudgin *v.* Hudgin, 6 Gratt. (Va.) 320, 52 Am. Dec. 124.

Direction for payment to heir.— A purchaser cannot complain that he is directed to pay the rents and profits to the heir instead of the executor, where under the will it was the duty of the executor to pay them to the heir. Borders *v.* Murphy, 125 Ill. 577, 18 N. E. 739.

If an heir purchases at an invalid sale and collects rents, and the sale is afterward set aside at the suit of another heir who is adjudged entitled to a share of the rents so collected, the amount thus due the latter should be charged as a lien on the interest of the purchasing heir in the land. Kalteyer *v.* Wipff, (Tex. Civ. App. 1899) 49 S. W. 1055.

49. Sale of realty under testamentary authority see *supra*, VIII, O, 9, d, (x).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, j.

50. *Alabama.*— Pryor *v.* Davis, 109 Ala. 117, 19 So. 440.

Florida.— Price *v.* Winter, 15 Fla. 66.

Georgia.— Harwell *v.* Foster, 102 Ga. 38, 28 S. E. 967.

Louisiana.— Howard *v.* Zeyer, 18 La. Ann. 407; Lalanne *v.* Morceau, 13 La. 431.

Pennsylvania.— Moore *v.* Shultz, 13 Pa. St. 98, 53 Am. Dec. 446.

United States.— Davis *v.* Gaines, 104 U. S. 386, 26 L. ed. 757; Grignon *v.* Astor, 2 How. 319, 11 L. ed. 283.

A decree ordering a sale is in rem and analogous to a decree of foreclosure of a mortgage, so that it may be enforced after seven years instead of being governed by analogy to the limitation of judgments at law. Kipping *v.* Demint, 184 Ill. 165, 56 N. E. 330, 75 Am. St. Rep. 164.

A sale to pay debts resulting in a purchase by heirs cannot be construed as a partition sale. Nesom *v.* Weis, 34 La. Ann. 1004. And see Kinzer *v.* Mitchell, 8 Pa. St. 64.

51. King *v.* Cabaniss, 81 Ga. 661, 7 S. E. 620 (so holding, although the deed purports to convey more than the heirs own); Miami Exporting Co. *v.* Holly, Wright (Ohio) 226;

title.[52] Such a sale also divests the land of the lien of a legacy charged thereon.[53] The relationship of mortgagor and mortgagee may, however, be created between the heir and a creditor purchasing, by an agreement at the time of sale or prior thereto that the property shall be held as security for the debt and to convey upon its payment,[54] and a purchaser may also charge himself as trustee for heirs by a prior agreement to hold as such in case he purchases.[55]

b. Dower Rights.[56] As a widow's dower is not usually subject to the general debts of the husband,[57] her right to dower, or to a statutory estate in the nature thereof, is usually not divested by an administration sale.[58] Sometimes, however, the sale may be made free from dower, and the widow compensated from the

Stringfellow *v.* Cain, 99 U. S. 610, 25 L. ed. 421 (holding that a sale and delivery of possession, rightful or wrongful, will divest a right of the heirs depending entirely on continued adverse possession).

A lease by the administrator under statutory authority passes the term, and a devisee cannot maintain ejectment against the lessee. Eoff *v.* Thompkins, 66 Mo. 225. And see *Ex p.* Barker, 127 Ala. 203, 28 So. 574.

If a widow takes under the will her interest is divested by a sale for debts. Meddis *v.* Kenney, 176 Mo. 200, 75 S. W. 633, 98 Am. St. Rep. 496.

There is no redemption from a sale to pay debts. Maxwell *v.* Smith, 86 Tenn. 539, 8 S. W. 340; Love *v.* Williams, 2 Lea (Tenn.) 226.

52. Flenner *v.* Travellers' Ins. Co., 89 Ind. 164; Flenner *v.* Benson, 89 Ind. 108.

53. Lombaert's Appeal, 99 Pa. St. 580; McLanahan *v.* McLanahan, 1 Penr. & W. (Pa.) 96, 21 Am. Dec. 363; Barnet *v.* Washebaugh, 16 Serg. & R. (Pa.) 410.

Conditional sale.— The lien of the legacy will be divested in spite of a written condition of sale, not in the order, by which the legacies were to remain charges, the purchaser having no actual notice of the condition. Randolph's Appeal, 5 Pa. St. 242.

54. Nickson *v.* Toney, 3 Head (Tenn.) 655.

Right to enforce agreement.— Where, after a sale which was voidable by the heirs, an agreement was made with the adult heirs to convey to all upon payment of their proportionate shares of the debt, it was held that the consideration inured to the benefit of the minor heirs and they were entitled specifically to enforce the agreement. Williams *v.* Williams, 85 N. C. 313.

55. Christy *v.* Christy, 176 Pa. St. 421, 35 Atl. 245, holding, however, that the trust attached only to the interest which passed by the sale and not to an interest which the purchaser already held in the lands.

56. See also *supra*, XII, D, 8.

57. See DOWER, 14 Cyc. 925.

58. *Alabama.*— Clancy *v.* Stephens, 92 Ala. 577, 9 So. 522, 524.

Arkansas.— Webb *v.* Smith, 40 Ark. 17; Livingston *v.* Cochran, 33 Ark. 294.

Indiana.— Clark *v.* Deutsch, 101 Ind. 491; Pepper *v.* Zahnsinger, 94 Ind. 88; Matthews *v.* Pate, 93 Ind. 443; Nutter *v.* Hawkins, 93 Ind. 260; Flenner *v.* Travellers' Ins. Co., 89 Ind. 164; Flenner *v.* Benson, 89 Ind. 108; Compton *v.* Pruitt, 88 Ind. 171; Hendrix *v.* McBeth, 87 Ind. 287; Armstrong *v.* Cavitt, 78 Ind. 476; Elliott *v.* Frakes, 71 Ind. 412. See also Bell *v.* Shaffer, 154 Ind. 413, 56 N. E. 217 (holding that the widow's dower cannot be included in the sale by an amendment of the petition after the order and the sale); Elliott *v.* Frakes, 90 Ind. 389 (holding that where the same person is administrator of the estate of a husband and of his widow, a sale of the husband's land to make assets does not pass title to the widow's share).

Maryland.— Waring *v.* Waring, 2 Bland 673.

Massachusetts.— Hale *v.* Munn, 4 Gray 132.

Nebraska.— Motley *v.* Motley, 53 Nebr. 375, 73 N. W. 738, 68 Am. St. Rep. 608.

New Jersey.— Pittenger *v.* Pittenger, 3 N. J. Eq. 156.

Oregon.— *In re* Smith, 43 Oreg. 595, 73 Pac. 336, 75 Pac. 133; Whiteaker *v.* Belt, 25 Oreg. 490, 36 Pac. 534; House *v.* Fowle, 22 Oreg. 303, 29 Pac. 890.

Pennsylvania.— Bauer *v.* Karstein, 16 Phila. 120; Allen's Estate, 1 Leg. Chron. 102. See also Zooks' Appeal, 54 Pa. St. 486 (where a sale having been made to pay debts, subject to the payment of the widow's dower yearly during her life, and the purchaser having retained one third of the purchase-price, secured by mortgage, it was held that the proceeds of the sale represented the entire interest of the decedent in the land, the purchaser being merely accountable to the widow for her dower); Vandever *v.* Baker, 13 Pa. St. 121.

See 22 Cent. Dig. tit. "Executors and Administrators." § 1572.

Contra.— Scott *v.* Wells, 55 Minn. 274, 56 N. W. 828; Mount *v.* Valle, 19 Mo. 621.

Notice of dower right.— Where the record discloses that the decedent left a widow, it is notice to the purchaser of her dower right. Motley *v.* Motley, 53 Nebr. 375, 73 N. W. 738, 68 Am. St. Rep. 608.

Where the widow purchases, her dower becomes merged in the fee, and her right to dispose of the property is absolute. Reinhardt *v.* Seaman, 208 Ill. 448, 69 N. E. 847.

The statute of limitations runs against a widow's claim for dower from the time that the purchaser enters into possession in hostility thereto. Livingston *v.* Cochran, 33 Ark. 294.

proceeds of the sale.[59] It is generally held that if the widow is a party to the proceedings leading to the sale, the decree is an adjudication against her unless it assigns dower or reserves her rights.[60] A sale to satisfy a debt to which the dower estate is subject discharges dower.[61] Questions sometimes arising between the purchaser and the heirs after the death of the widow as to the right to land assigned as dower must be determined from the description in the record and in the deed.[62]

c. Encumbrances.[63] The effect of an administrator's sale on existing encumbrances varies. In some states such sales pass merely such interest as descended from testator, subject to all encumbrances, which remain charges on the land.[64]

59. Virgin *v.* Virgin, 189 Ill. 144, 59 N. E. 586 [*affirming* 91 Ill. App. 188]; Williams' Case, 3 Bland (Md.) 186 (with the consent of the widow); Schmitt *v.* Willis, 40 N. J. Eq. 515, 4 Atl. 767.

Rights of widow as to proceeds.— A conveyance having been made by an administrator in pursuance of a decree in fulfilment of a contract made by the decedent, the widow releasing dower is entitled to one third of the price of the land. *In re* Drenkle, 3 Pa. St. 377.

A subsequent purchaser is not personally liable for the proportion of purchase-money representing the dower interest unless he assumes its payment. Unangst *v.* Kraemer, 8 Watts & S. (Pa.) 391.

60. *In re* Pennock, 122 Iowa 622, 98 N. W. 480; Olmsted *v.* Blair, 45 Iowa 42; Garvin *v.* Hatcher, 39 Iowa 685; Gardiner *v.* Miles, 5 Gill (Md.) 94.

Election.— Under the Pennsylvania act of April 26, 1850, providing that the widow of an insolvent decedent might retain either real or personal property to the value of three hundred dollars, the widow cannot claim real estate sold under order of court, where no election to retain either real or personal estate was made before the sale. Neff's Appeal, 21 Pa. St. 243.

If the widow fails to interpose her right of quarantine she cannot set it up against the purchaser. Doane *v.* Walker, 101 Ill. 628.

The widow's estate is not divested if the petition did not expressly ask that it be sold and if she in consenting to the sale did not expressly designate such interest. Irey *v.* Mater, 134 Ind. 238, 33 N. E. 1018.

Widow not bound by default judgment.— Compton *v.* Pruitt, 88 Ind. 171.

61. Mead *v.* Mead, 39 Iowa 28; St. Clair *v.* Morris, 9 Ohio 15, 34 Am. Dec. 415.

62. See Costly *v.* Tarver, 38 Ala. 107 (holding that if the sale was of the entire real estate of decedent the purchaser takes the reversion after the dower estate); Flenner *v.* Travellers' Ins. Co., 89 Ind. 164 (holding that where deceased left children by a former wife, who by statute took the land upon her death, a sale subject to her life-estate did not pass their interest); Kempton *v.* Swift, 2 Metc. (Mass.) 70 (holding that a sale by bounds of the real estate not assigned as dower does not pass the reversion of that assigned).

A sale of land "except the dower" passes the reversion (Moody *v.* West, 12 Ind. 399), as does a sale of a described tract "less or except the widow's dower described as follows," and describing the land set apart (Austin *v.* Willis, 90 Ala. 421, 8 So. 94).

63. See also *supra*, XII, D, 7.

64. *Alabama.*— Perkins *v.* Winter, 7 Ala. 855; Doe *v.* McLoskey, 1 Ala. 708.

Illinois.— Sebastian *v.* Johnson, 72 Ill. 282, 22 Am. Rep. 144; Shoemate *v.* Lockridge, 53 Ill. 503; Cutter *v.* Thompson, 51 Ill. 390; Phelps *v.* Funkhouser, 39 Ill. 401; McConnel *v.* Smith, 39 Ill. 279; Smith *v.* McConnell, 17 Ill. 135, 63 Am. Dec. 340.

Indiana.— Moody *v.* Shaw, 85 Ind. 88; McCallam *v.* Pleasants, 67 Ind. 542; Henderson *v.* Whitinger, 56 Ind. 131; Martin *v.* Beasley, 49 Ind. 280. Under the statute authorizing the court to order the sale either subject to liens or for their payment, the sale will be subject to liens unless otherwise ordered (Martin *v.* Beasley, 49 Ind. 280) and so appearing by the record (Crum *v.* Meeks, 128 Ind. 360, 27 N. E. 722).

Maryland.— See Ellicott *v.* Ellicott, 6 Gill & J. 35, holding that a mortgagee cannot be required to come into chancery under proceedings for the sale of a decedent's real estate and seek payment of his claim out of the proceeds of sale, but may rely on his mortgage.

New Jersey.— Cool *v.* Higgins, 23 N. J. Eq. 308.

Pennsylvania.— Under the act of March 23, 1867, the lien of a mortgage is not destroyed by a judicial sale, and the purchaser takes subject to the mortgage, although the debt is improperly included in the schedule of debts for the payment of which the sale was ordered (Penn Square Bldg. Assoc.'s Appeal, 81* Pa. St. 330; Metz's Estate, 1 Leg. Rec. 274) and in spite of agreements between administrator and purchaser (Fish's Estate, 16 Phila. 373). The purchaser takes subject to all arrears of interest and to arrears of a ground-rent. Lewis' Estate, 16 Phila. 367; Terry's Estate, 13 Phila 298. Prior to the statute the sale divested the mortgage lien. Cadmus *v.* Jackson, 52 Pa. St. 295. As to judgments see *infra*, note 65.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1569½.

Where a portion of mortgaged premises is sold, the residue remaining to the heirs must be first resorted to to satisfy the mortgage

In others the policy is to give the purchaser so far as possible a clear title by divesting encumbrances and transferring from the land to the fund realized by its sale the lien of judgments,[65] and mortgages.[66] Sometimes the purchaser takes free from a tax lien which is transferred by the sale to the fund.[67] Exceptions to the rule whereby the land is divested of encumbrances are made in the case of vendor's liens, with which the land came charged into the hands of decedent,[68] and mortgages which were made before he purchased, securing debts which were not and have not become his.[69] It has also been held that the sale is subject to liens when made for purposes of distribution and not to pay debts.[70] It is some-

before proceeding against that sold. Moore *v.* Chandler, 59 Ill. 466.

A sale to pay liens discharges all, although the proceeds are insufficient to pay the debts secured. Foltz *v.* Peters, 16 Ind. 244; West *v.* Townsend, 12 Ind. 434.

Failure of purchaser to give bond to pay liens.— On a sale subject to liens the purchaser takes subject thereto, although he fails to give a bond, as required by statute, conditioned that he will pay them. Massey *v.* Jerauld, 101 Ind. 270.

If the administrator pays a mortgage after the sale he is subrogated to the rights of the mortgagee against the land. Greenwell *v.* Heritage, 71 Mo. 459; Welton *v.* Hull, 50 Mo. 296.

65. McDaniel *v.* Edwards, 56 Ga. 444; Carhart *v.* Vann, 46 Ga. 389; Defrees *v.* Greenham, 11 Ohio St. 486; Miami Exporting Co. *v.* Holly, Wright (Ohio) 226; Crawford *v.* Crawford, 2 Watts (Pa.) 339; McPherson *v.* Cunliff, 11 Serg. & R. (Pa.) 422, 14 Am. Dec. 642; O'Brian *v.* Wiggins, 14 Pa. Super. Ct. 37; Bentzel *v.* Wambaugh, 14 York Leg. Rec. (Pa.) 141; Cromer *v.* Boinest, 27 S. C. 436, 3 S. E. 849.

66. *Georgia.*— Newson *v.* Carlton, 59 Ga. 516.

Kentucky.— Underwood *v.* Cartwright, 47 S. W. 580, 20 Ky. L. Rep. 809.

Louisiana.— Condon's Succession, 28 La. Ann. 755; Harper *v.* Linman, 26 La. Ann. 690; Wooley *v.* Russ, 24 La. Ann. 482; Michel *v.* Delaporte, 14 La. Ann. 91; Ynogoso's Succession, 13 La. Ann. 559; Lewis *v.* Labauve, 13 La. Ann. 382; Aicard *v.* Daly, 7 La. Ann. 612; Leverich *v.* Prieur, 8 Rob. 97; French *v.* Prieur, 6 Rob. 299; Williams *v.* State Bank, 17 La. 378; Taylor *v.* Crain, 16 La. 290; Hoey *v.* Cunningham, 14 La. 86; Lalanne *v.* Moreau, 13 La. 431; Zacharie *v.* Prieur, 9 La. 197; Joyce *v.* Poydras de la Lande, 6 La. 277; De Ende *v.* Moore, 2 Mart. N. S. 336; Lafon *v.* Phillips, 2 Mart. N. S. 225.

Massachusetts.— See Abby *v.* Fuller, 8 Metc. 36, where it was held a proper method of reaching the equity of redemption, in order to make assets, to sell the land with notice that the mortgage would be first paid out of the proceeds of the sale, and to so apply the proceeds.

Ohio.— Defrees *v.* Greenham, 11 Ohio St. 486; Whiteley *v.* Weber, 2 Ohio Cir. Ct. 336.

United States.— Davis *v.* Martin, 113 Fed. 6, 51 C. C. A. 27, construing law of Louisiana.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1569½.

Sale may be made expressly subject to mortgages. Hebert *v.* Doussan, 8 La. Ann. 267; Grayson *v.* Mayo, 2 La. Ann. 927.

67. Herrington *v.* Tolbert, 110 Ga. 528, 35 S. E. 687. See also Smith *v.* Cornell, 111 N. Y. 554, 19 N. E. 271 [*reversing* 51 N. Y. Super. Ct. 354] (holding that where an heir purchased at a sale made by a trustee to satisfy dower, and afterward it was adjudged that trusts created by the will were void, and that he took as heir, the executor was not relieved from the statutory duty of paying taxes assessed previous to testator's death, although the dower sale was nominally subject to unpaid taxes); Henry *v.* Horstick, 9 Watts (Pa.) 412 (holding that taxes which are not charges upon the land but which the purchaser has been compelled to pay to avoid distress of personal property upon the land may, it seems, be recovered back from the heirs, but the administrator is not liable therefor). But *compare* Sexton *v.* Sikking, 90 Ill. App. 667 (holding that the purchaser takes subject to unpaid taxes which are liens); Merrick *v.* North, 28 La. Ann. 878 (holding that a purchaser is chargeable with taxes from the time rents accrue).

68. Bradford *v.* Dortch, 13 La. 79. See also Delassus *v.* Poston, 19 Mo. 425; Mountcastle *v.* Moore, 11 Heisk. (Tenn.) 481. See, however, Rhett *v.* Georgia Land, etc., Co., 64 Ga. 521.

69. Field's Succession, 3 Rob. (La.) 5; Offutt *v.* Hendsley, 9 La. 1; Swindler *v.* Peyroux, 5 La. 468; Johnston *v.* Bell, 6 Mart. N. S. (La.) 384; Stallman's Estate, 6 Phila. (Pa.) 389. But see Cadmus *v.* Jackson, 52 Pa. St. 295.

A mortgage by a prior owner is discharged where it has been assumed by decedent and is included in the schedule of debts, for the payment of which the sale is made. Moore *v.* Shultz, 13 Pa. St. 98, 53 Am. Dec. 446. But see Metz's Estate, 1 Leg. Rec. (Pa.) 274.

70. Moore *v.* Wright, 14 Rich. Eq. (S. C.) 132. And see Carhart *v.* Vann, 46 Ga. 389. *Contra*, Bentzel *v.* Wambaugh, 14 York Leg. Rec. (Pa.) 141, construing the Pennsylvania statute of June 12, 1893.

Charge by will.— On a sale for distribution the purchaser takes subject to a charge by will to support an heir, but on a sale to pay debts the rule is otherwise. Bell *v.* Watkins, 104 Ga. 345, 30 S. E. 756.

General debts.— A partition sale within two years from the time administration was

times held that the lien can be divested only when its holder is a party to the proceedings leading to the sale.[71] A purchaser or mortgagee under license of the court cannot be subjected to a claim against the estate interposed after the sale or mortgage.[72]

d. Rights of Purchasers From and Creditors of Heirs and Devisees. Not only is the estate of the heir or devisee divested, but as he takes subject to the necessities of administration, a sale by the administrator will divest the title of one who has purchased from him,[73] or a lien created by him or arising out of his debts.[74] Title acquired under condemnation proceedings against the heirs is, however, superior to that acquired by a purchaser under a subsequent sale by an administrator.[75]

3. Title of Purchaser — a. What Title Passes in General.[76] The purchaser at a sale by an executor or administrator under order of court takes only such title as decedent had at the time of his death,[77] and is subject to the obligations

granted does not discharge the land from the general debts of the estate. Wilson's Appeal, 45 Pa. St. 435; Miller's Estate, 9 Pa. Dist. 510.

71. Crum *v.* Meeks, 128 Ind. 360, 27 N. E. 722; Underwood *v.* Cartwright, 47 S. W. 580, 20 Ky. L. Rep. 809; Holloway *v.* Stuart, 19 Ohio St. 472; Cromer *v.* Boinest, 27 S. C. 436, 3 S. E. 849.

72. Ury *v.* Bush, 85 Iowa 698, 52 N. W. 666.

73. Nelson *v.* Murfee, 69 Ala. 598; Nichols *v.* Lee, 16 Colo. 147, 26 Pac. 157. See also Warwick *v.* Hunt, 11 N. J. L. 1.

Estate of purchaser at sale.— One who purchases at an administration sale acquires an equitable estate in the land which constitutes a defense in ejectment by the grantee of heirs with notice. Long *v.* Joplin Min., etc., Co., 68 Mo. 422.

Improvements.— A purchaser from the heir or devisee is not entitled to a lien for improvements made by him when his estate is divested by a sale to pay the debts of decedent. Moore *v.* Moore, 155 Ind. 261, 57 N. E. 242; Simpson *v.* Gibbes, 1 Desauss. (S. C.) 145. One who buys pending proceedings looking to the sale of land and makes improvements thereon under the belief that it will not be necessary to sell the land does so at his own risk and is not entitled to compensation for the improvements in case the land is afterward sold under the order. Hurn *v.* Keller, 79 Va. 415.

If the sale does not take place within the period fixed by statute the estate of purchasers from the heir will not be divested. Warwick *v.* Hunt, 11 N. J. L. 1; Bockover *v.* Ayres, 22 N. J. Eq. 13; Hyde *v.* Tanner, 1 Barb. (N. Y.) 75.

74. Judgment liens see McDaniel *v.* Edwards, 56 Ga. 444; Keckeley *v.* Moore, 2 Strobh. Eq. (S. C.) 21. But see Loudon *v.* Robertson, 5 Blackf. (Ind.) 276.

Mortgages see Myers *v.* Pierce, 86 Ga. 786, 12 S. E. 978; Escarraguell's Succession, 36 La. Ann. 155; Pigneguy's Succession, 12 Rob. (La.) 450; Steel's Appeal, 86 Pa. St. 222.

The title of a purchaser at an execution sale on a judgment against the heir will be divested of title by a subsequent sale to pay the ancestor's debts. Horner *v.* Hasbrouck, 41 Pa. St. 169. But a sale for the benefit of the heirs and not to pay debts will not affect the title acquired by a purchaser at execution sale on a judgment against the heir. Swift *v.* Kenison, 39 Vt. 473. But see McDaniel *v.* Edwards, 56 Ga. 444.

Enforcement of judgment against debtor's share of proceeds.— The lien of a judgment against the heir may be enforced against any share of the proceeds of the sale to which the heir would be entitled. Sears *v.* Mack, 2 Bradf. Surr. (N. Y.) 394.

75. Kane *v.* Kansas City, etc., R. Co., 112 Mo. 34, 20 S. W. 532.

76. Sale of realty under testamentary authority see *supra*, VIII, O, 9, d, (xi).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, l.

77. *Indiana.*— Weyer *v.* Franklin Second Nat. Bank, 57 Ind. 198.

Louisiana.— Howard *v.* Zeyer, 18 La. Ann. 407.

Missouri.— Shields *v.* Ashley, 16 Mo. 471.

New York.— Van Vleck *v.* Enos, 88 Hun 348, 34 N. Y. Suppl. 754.

Pennsylvania.—Walker's Estate, 23 Pa. Co. Ct. 657; Bloodhart's Estate, 2 Pa. Co. Ct. 476; Bean's Appeal, 2 Walk. 512; Rush's Estate, 1 Phila. 404; Vogel's Estate, 3 Lanc. L. Rev. 218.

South Carolina.— McLaurin *v.* Rion, 24 S. C. 407.

Texas.— Hanrick *v.* Gurley, 93 Tex. 458, 54 S. W. 347, 56 S. W. 330.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1574.

A conveyance of land which decedent was forbidden to transfer may create an equity entitling the purchaser to hold against the heirs until it is satisfied. Maxson *v.* Jennings, 19 Tex. Civ. App. 700, 48 S. W. 781.

If decedent had no title the purchaser takes none, although the real owner was a party to the proceedings. Gjerstadengen *v.* Van Duzen, 7 N. D. 612, 76 N. W. 233, 66 Am. St. Rep. 679; McLaurin *v.* Rion, 24 S. C. 407.

If decedent was estopped to claim title so is the purchaser. Cooper *v.* Lindsay, 109 Ala. 338, 19 So. 379; Hill *v.* Blackwelder, 113 Ill. 283.

under which decedent held the property.[78] The title cannot be given effect by relation to the date of a lien which was discharged from the proceeds of the sale.[79] No land or interest will pass except that stated in the petition[80] and included in the order,[81] and none except that actually sold.[82] Easements and necessary incidents to the enjoyment of property will, however, pass with it;[83] and it seems that the order of sale of an inchoate title will carry the title so far as it is perfected at the time of the sale.[84]

The possession of one under a bond for title given by the decedent is adverse to a purchaser at an administrator's sale, and the sale is therefore void. Heard *v.* Phillips, 101 Ga. 691, 31 S. E. 216, 44 L. R. A. 369.

78. Stanbrough *v.* Evans, 2 La. Ann. 474 (holding that one buying mortgaged chattels must comply with a promise of the decedent to produce them whenever required under the mortgagee); Van Vleck *v.* Enos, 88 Hun (N. Y.) 348, 34 N. Y. Suppl. 754 (holding that one purchasing with notice where the decedent had a deed absolute, but intended as security, holds only as security).

Where decedent in his lifetime had granted timber to another, the purchaser at an administrator's sale took the land charged with the right of the third person to the timber. Howell *v.* James Lumber Co., 102 Ga. 595, 27 S. E. 699.

79. Meyers *v.* Farquharson, 46 Cal. 190; Cadmus *v.* Jackson, 52 Pa. St. 295.

80. Austin *v.* Willis, 90 Ala. 421, 8 So. 94; Fielder *v.* Childs, 73 Ala. 567.

81. Hanson *v.* Ingwaldson, 77 Minn. 533, 80 N. W. 702, 77 Am. St. Rep. 692; Greene *v.* Holt, 76 Mo. 677; Page *v.* Fishback, 10 Tex. Civ. App. 450, 31 S. W. 424. Thus where it was supposed that a decedent held only an equity of redemption, and this only was ordered sold and was sold, and it turned out that decedent had an absolute unencumbered title, nothing passed by the sale. Crane *v.* Guthrie, 47 Iowa 542. Where, however, an order merely authorized a sale of patent rights, and with them there were sold certain accrued claims arising therefrom, it was held that the confirmation of the sale, as made, was equivalent to a previous order directing it. May *v.* Logan County, 30 Fed. 250.

82. Messick *v.* Mayer, 52 La. Ann. 1161, 27 So. 815; Hege *v.* Hege, 1 Penr. & W. (Pa.) 83. See also Johnson *v.* Oldham, 126 Ala. 309, 28 So. 487, 85 Am. St. Rep. 30; Hamilton *v.* Hamilton, 6 Mart. N. S. (La.) 143.

Easement.— Where an order directed the sale of a lot but made no mention of an easement for an alley to which it was subject, but the sale was made subject to the easement, the vendee took subject to such easement. Overdeer *v.* Updegraff, 69 Pa. St. 110.

Tract larger than was supposed.— Where a tract supposed to contain one hundred acres was sold at a certain price per acre, it was held that the purchaser took only one hundred acres, although it was subsequently ascertained that the tract contained more. Williams *v.* Bradley, 7 Heisk. (Tenn.) 54.

Contemporaneous interpretation of statute. — The estate sold is to be determined by the interpretation given to the statute creating it at the time of the sale and not by a different interpretation thereafter given it by the courts. Myers *v.* Boyd, 144 Ind. 496, 43 N. E. 567.

The deed is to be construed in connection with the will, the decree, and the report of sale. Francisco *v.* Billingsley, (Tenn. Ch. App. 1898) 48 S. W. 323. And see Poutalba *v.* Copland, 3 La. Ann. 86.

Conclusiveness of terms of deed or decree. — The terms of the deed, it seems, are not even at law always conclusive as to what was sold. Thus, where all of a certain tract of land which the decedent owned at his death was ordered sold and was sold and the description in the deed by courses and distances did not include all, the purchasers nevertheless took the entire tract sold. McGhee *v.* Hoyt, 106 Pa. St. 516. And in Tennessee where the court by decree may vest title in the purchaser, the confirmation of a report passes title to the entire property sold, although the decree vesting title does so only as to part. Killough *v.* Warren, (Tenn. Ch. App. 1900) 58 S. W. 898; Williams *v.* Clark, (Tenn. Ch. App. 1899) 51 S. W. 130. See also Messick *v.* Mayer, 52 La. Ann. 1161, 27 So. 815. But where property was put up as of an unknown quantity and was afterward, and before adjudication, described as having a known quantity, the positive description in the deed will control. Macarty *v.* Foucher, 12 Mart. (La.) 114.

Idem sonans.— Where a land certificate issued to Willis A Forris and was sold as that of Willis A. Farris, which was the name of the decedent, the title passed, it being evident that the same person was intended. Lyne *v.* Sanford, 82 Tex. 58, 19 S. W. 847, 27 Am. St. Rep. 852.

Where two tracts are sold with overlapping descriptions, the purchaser first in point of time takes the portion sold twice. Cherry *v.* Stein, 11 Md. 1.

83. Maguire *v.* Baker, 57 Ga. 109 (the right to use a dam to its full capacity); Palmer *v.* Petty, 21 La. Ann. 176 (the right to occupy land for the purpose of finishing the tanning of hides thereon which were sold, together with bark and tools necessary for the process); Brakely *v.* Sharp, 10 N. J. Eq. 206 (the right to the unimpeded flow of an artificial watercourse extending through the land).

84. Peevy *v.* Hurt, 32 Tex. 146; Lubbock *v.* Binns, 20 Tex. Civ. App. 407, 50 S. W. 584; Moody *v.* Looscan, (Tex. Civ. App. 1898) 44 S. W. 621, all so holding with re-

b. Rule of Caveat Emptor[85]— (i) *Rule Generally Applicable.* The rule of *caveat emptor* applies to sales of decedent's property under order of court,[86] and the purchaser cannot complain because of defects in quantity,[87] quality,[88] or title.[89]

gard to land certificates, located or patented after the order. See also Halbert *v.* De Bode, 15 Tex. Civ. App. 615, 40 S. W. 1011, holding that a conveyance by an administrator of a portion of the land in consideration of the location of the certificate passes the interest of the heirs.

85. Sale of realty under testamentary authority see *supra*, VIII, O, 9, d, (xi), (b).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, l.

86. *Alabama.*— Bolling *v.* Jones, 67 Ala. 508; Corbitt *v.* Dawkins, 54 Ala. 282; Watson *v.* Collins, 37 Ala. 587; Burns *v.* Hamilton, 33 Ala. 210, 70 Am. Dec. 570; Worthington *v.* McRoberts, 9 Ala. 297; Perkins *v.* Winter, 7 Ala. 855.

Arkansas.— Bennett *v.* Owen, 13 Ark. 177.

Georgia.— Keen *v.* McAfee, 116 Ga. 728, 42 S. E. 1022; Jones *v.* Warnock, 67 Ga. 484; Colbert *v.* Moore, 64 Ga. 502.

Illinois.— Robertson *v.* Wheeler, 162 Ill. 566, 44 N. E. 870; Tilley *v.* Bridges, 105 Ill. 336 [*affirming* 11 Ill. App. 353]; Bishop *v.* O'Conner, 69 Ill. 431; Fell *v.* Young, 63 Ill. 106; Donlin *v.* Hettinger, 57 Ill. 348; Walden *v.* Gridley, 36 Ill. 523; Bingham *v.* Maxcy, 15 Ill. 295.

Indiana.— Loudon *v.* Robertson, 5 Blackf. 276.

Kansas.— Headrick *v.* Yount, 22 Kan. 344.

Louisiana.— Pintard *v.* Deyris, 3 Mart. N. S. 32.

Massachusetts.— Tyndale *v.* Stanwood, 182 Mass. 534, 66 N. E. 23.

Mississippi.— Cogan *v.* Frisby, 36 Miss. 178; Cabaniss *v.* Clark, 31 Miss. 423.

Missouri.— Foley *v.* Boulware, 86 Mo. App. 674.

North Carolina.— Ellis *v.* Adderton, 88 N. C. 472; Parker *v.* Leathers, 55 N. C. 249.

Ohio.— Arnold *v.* Donaldson, 46 Ohio St. 73, 18 N. E. 540; Holloway *v.* Stuart, 19 Ohio St. 472.

Pennsylvania.— Bickley *v.* Biddle, 33 Pa. St. 276; Sackett *v.* Twining, 18 Pa. St. 199, 57 Am. Dec. 599; Vandever *v.* Baker, 13 Pa. St. 121; King *v.* Gunnison, 4 Pa. St. 171; Kennedy's Appeal, 4 Pa. St. 149; Fox *v.* Mensch, 3 Watts & S. 444; Bashore *v.* Whisler, 3 Watts 490.

Texas.— Ward *v.* Williams, 45 Tex. 617; Hawpe *v.* Smith, 25 Tex. Suppl. 448; Thompson *v.* Munger, 15 Tex. 523, 65 Am. Dec. 176; Williams *v.* McDonald, 13 Tex. 322; Edmondson *v.* Hart, 9 Tex. 554; Lynch *v.* Baxter, 4 Tex. 431, 51 Am. Dec. 735. See also Walton *v.* Reager, 20 Tex. 103.

Virginia.— Brock *v.* Philips, 2 Wash. 68.

Washington.—Towner *v.* Rodegeb, 33 Wash. 153, 74 Pac. 50, 99 Am. St. Rep. 936; Wallace *v.* Grant, 27 Wash. 130, 67 Pac. 578.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1577.

87. Perkins *v.* Winter, 7 Ala. 855; Sackett *v.* Twining, 18 Pa. St. 199, 57 Am. Dec. 599. See, however, Davenport *v.* Fortier, 3 Mart. N. S. (La.) 695, holding that a purchaser may claim a diminution in the price for deficiency in the quantity.

Mistake.— Where the executor and bidder both believed that a building was entirely on the lot sold, and it turned out to be in part on other land, the sale was rescinded as being based on a mutual mistake as to the condition of the property. McKay *v.* Coleman, 85 Mich. 60, 48 N. W. 203.

88. Bingham *v.* Maxcy, 15 Ill. 295; Parker *v.* Leathers, 55 N. C. 249; Edmondson *v.* Hart, 9 Tex. 554.

89. *Alabama.*— Bolling *v.* Jones, 67 Ala. 508; Corbitt *v.* Dawkins, 54 Ala. 282.

Arkansas.— Bennett *v.* Owen, 13 Ark. 177.

Georgia.— Keen *v.* McAfee, 116 Ga. 728, 42 S. E. 1022; Jones *v.* Warnock, 67 Ga. 484; Colbert *v.* Moore, 64 Ga. 502.

Illinois.— Shup *v.* Calvert, 174 Ill. 500, 51 N. E. 828; Tilley *v.* Bridges, 105 Ill. 336 [*affirming* 11 Ill. App. 353]; Walden *v.* Gridley, 36 Ill. 523.

Indiana.— Loudon *v.* Robertson, 5 Blackf. 276.

Kansas.— Headrick *v.* Yount, 22 Kan. 344.

Mississippi.— Cummings *v.* Johnson, 65 Miss. 342, 4 So. 541; Cogan *v.* Frisby, 36 Miss. 178; Cabaniss *v.* Clark, 31 Miss. 423; Joslin *v.* Caughlin, 26 Miss. 134.

North Carolina.— It has been held that where a purchaser had notice of defects in the title to the land sold, he bought at his own risk. Ellis *v.* Addleton, 88 N. C. 472. But on the other hand it has been held that the purchaser will not be compelled to pay his money and take a title substantially defective unless the sale was made of an estate or interest short of the entire title, and so mentioned in the decree or clearly to be implied from the nature of the sale. Edney *v.* Edney, 80 N. C. 81. A distinction has been made that where a particular piece of land is sold under an order of court a good title is deemed to be offered and a purchaser will not be compelled to complete his purchase by the payment of the price if it appears that a good title cannot be made; but it is otherwise where the sale is ordered merely of the estate of a person named in the land. Shields *v.* Allen, 77 N. C. 375.

Ohio.— Arnold *v.* Donaldson, 46 Ohio St. 73, 18 N. E. 540.

Pennsylvania.— Bickley *v.* Biddle, 33 Pa. St. 276; King *v.* Gunnison, 4 Pa. St. 171; Fox *v.* Mensch, 3 Watts & S. 444; Bashore *v.* Whisler, 3 Watts 490. But the doctrine has not been very consistently applied. Thus the purchaser has been relieved from his bid on discovery of a defect in title before confirmation (King's Estate, 2 Lehigh Val. L.

(II) *No Warranty as Against Estate.* No warranty is implied either of title or quality,[90] and it is generally held that the representative is without authority to make an express warranty which will bind the estate.[91]

(III) *Representative Bound Personally If He Warrants.*[92] A covenant actually made by the representative will bind him personally,[93] but no per-

Rep. 229) and the sale has been set aside for such defect (Tubbs' Estate, 4 Pa. Dist. 325, 7 Kulp 483; Walker's Estate, 1 Del. Co. 384). In one case the sale was set aside on the ground that the petition stated seizin in fee, when the decedent in fact only owned an undivided half. Lerch's Estate, 2 Lehigh Val. L. Rep. 348. And it is said that the purchaser will take the property free from all defects not known to him and which do not appear on the face of the land records. Banks *v.* Ammon, 27 Pa. St. 172.

Texas.— Ward *v.* Williams, 45 Tex. 617; Hawpe *v.* Smith, 25 Tex. Suppl. 448; Thompson *v.* Munger, 15 Tex. 523, 65 Am. Dec. 176; Lynch *v.* Baxter, 4 Tex. 431, 51 Am. Dec. 735.

Virginia.— Brock *v.* Philips, 2 Wash. 68.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1577.

Contra.— There are cases holding that the purchaser cannot be compelled to accept a defective title. Nash's Succession, 48 La. Ann. 1573, 21 So. 254; White's Succession, 9 La. Ann. 232; Monaghan *v.* Small, 6 S. C. 177.

Recovering back price.— A purchaser evicted under a superior title cannot maintain assumpsit for the purchase-money; his only resort is to such covenants as may be in his deed. Joyce *v.* Ryan, 4 Me. 101.

Reimbursement from estate.— One who buys land subject to a lien under which it is afterward sold has no right to receive from the proceeds what he had paid the administrator. Delassus *v.* Poston, 21 Mo. 543.

The purchaser cannot complain in a collateral proceeding that he did not acquire the entire interest of decedent. Watson *v.* Collins, 37 Ala. 587; Worthington *v.* McRoberts, 9 Ala. 297; Arnold *v.* Donaldson, 46 Ohio St. 73, 18 N. E. 540; Brock *v.* Philips, 2 Wash. (Va.) 68.

Where the purchase was induced by misrepresentations and unauthorized promises concerning the title the sale will be set aside on application made before confirmation. De Haven's Appeal, 106 Pa. St. 612, 2 Del. Co. (Pa.) 209.

90. Halleck *v.* Guy, 9 Cal. 181, 70 Am. Dec. 643; Ware *v.* Houghton, 41 Miss. 370, 93 Am. Dec. 258; Joslin *v.* Caughlin, 26 Miss. 134; Prescott *v.* Holmes, 7 Rich. Eq. (S. C.) 9; Williams *v.* McDonald, 13 Tex. 322. *Contra*, in Louisiana, where the sale imports full legal warranty. Gautreaux *v.* Boote, 10 La. Ann. 137.

There may be an implied warranty of title but none of quality. George *v.* Bean, 30 Miss. 147.

No implied warranty of genuineness of securities sold.— Oldfield *v.* Vassar College, 68 N. Y. App. Div. 272, 73 N. Y. Suppl. 1112.

Representations made at the sale by an administrator may constitute a fraud on the purchaser but not a warranty. Mellen *v.* Boarman, 13 Sm. & M. (Miss.) 100.

91. *Alabama.*— Pryor *v.* Davis, 109 Ala. 117, 19 So. 440.

Georgia.— Colbert *v.* Moore, 64 Ga. 502.

Illinois.— Tilley *v.* Bridges, 105 Ill. 336 [*affirming* 11 Ill. App. 353]; McManus *v.* Keith, 49 Ill. 388; Sexton *v.* Sikking, 90 Ill. App. 667.

Massachusetts.— Sumner *v.* Williams, 8 Mass. 162, 5 Am. Dec. 83.

Mississippi.— Mellen *v.* Boarman, 13 Sm. & M. 100.

Ohio.— Arnold *v.* Donaldson, 46 Ohio St. 73, 18 N. E. 540; Lockwood *v.* Gilson, 12 Ohio St. 526.

Texas.— Lynch *v.* Baxter, 4 Tex. 431, 51 Am. Dec. 735; Dallas County *v.* Club Land, etc., Co., 95 Tex. 200, 66 S. W. 294 [*modifying* 26 Tex. Civ. App. 449, 64 S. W. 872].

See 22 Cent. Dig. tit. "Executors and Administrators," § 1577; and *infra*, XII, U, 5.

Contra, as to quality of personal property. Craddock *v.* Stewart, 6 Ala. 77; O'Neall *v.* Abney, 2 Bailey (S. C.) 317. And see Magoffin *v.* Stringer, 13 La. 370.

The administrator cannot bind the estate by an agreement to hold the purchaser liable only for what he should realize on a resale. Fahrig *v.* Schimpff, 199 Pa. St. 423, 49 Atl. 237, 85 Am. St. Rep. 796.

92. Sale of realty under testamentary authority see *supra*, VIII, O, 9, d, (XIV).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, l.

93. Vincent *v.* Morrison, 1 Ill. 227; Kauffelt *v.* Leber, 9 Watts & S. (Pa.) 93. See also Lockwood *v.* Gilson, 12 Ohio St. 526. In Georgia an administrator has been held personally liable on a warranty that property was sound, so far as the office of administrator authorized him to warrant. Aven *v.* Beckom, 11 Ga. 1. But in Ohio an executor has been held not bound in any way by a covenant to warrant "as executors are bound by law to do" because they were not bound by law to do so at all. Day *v.* Brown, 2 Ohio 345. See *infra*, XII, U, 5.

Covenant as representative.— A covenant made expressly by the grantor in his capacity as administrator has been held to bind him personally. Sumner *v.* Williams, 8 Mass. 162, 5 Am. Dec. 83. But where the administrator recited that he did not bind himself personally but made covenants in his representative capacity, he was held not bound in either. Dallas County *v.* Club Land, etc., Co., 95 Tex. 200, 66 S. W. 294 [*modifying* 26 Tex. Civ. App. 449, 64 S. W. 872].

An administrator de bonis non cannot be charged on a warranty made by the first administrator. O'Neall *v.* Abney, 2 Bailey (S. C.) 317.

sonal covenant of any nature whatsoever on the part of the executor or administrator will be implied.[94]

c. Protection of Bona Fide Purchasers[95]—(i) *Against Fraud Upon Purchaser.* The rule that fraud vitiates everything generally prevails as against the rule of *caveat emptor* to the extent that a sale induced by the fraudulent misrepresentations of the administrator will be set aside,[96] but it is well settled that such misrepresentations do not render the estate liable in damages, but only the administrator individually,[97] and it is generally held that they cannot be urged as a defense in an action for the price.[98] The mere silence of the administrator as to a known defect of title is not a fraud which will vitiate the sale,[99] nor is the expression of an opinion as to the effect of facts known to the purchaser.[1] A sale will bind the purchaser notwithstanding it was induced by the fraud of a legatee or distributee, the purchaser's remedy being personal against the person guilty of the fraud;[2] and the same is true where misrepresentations are made by a third person without collusion of the administrator.[3]

(ii) *Against Fraud Upon Others.* Although a sale be fraudulent as against the heirs or others interested in the property, the title of a purchaser in good faith and without notice of the fraud will not be affected;[4] nor will that of a subsequent purchaser in good faith from the vendee, although the latter may have been a party to the fraud.[5] A subsequent purchaser with notice will take

A covenant in a deed by an administratrix, who is also the widow, against her own acts, refers to her acts in her representative capacity and does not estop her from claiming dower. Wright *v.* De Groff, 14 Mich. 164.

94. Mockbee *v.* Gardiner, 2 Harr. & G. (Md.) 176; Mathews *v.* Allen, 6 Tex. 330. Thus the usual implications in the words "grant, bargain, and sell" do not apply to an administrator's deed. Shontz *v.* Brown, 27 Pa. St. 123.

95. Sale of realty under testamentary authority see *supra*, VIII, O, 9, d, (xi), (c).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, l.

96. Mellen *v.* Boarman, 13 Sm. & M. (Miss.) 100; Coombs *v.* Lane, 17 Tex. 280; Able *v.* Chandler, 12 Tex. 88, 62 Am. Dec. 518; Crayton *v.* Munger, 9 Tex. 285. *Contra*, Fore *v.* McKenzie, 58 Ala. 115, holding that a purchaser has no right to rely on the administrator's representations as to title.

Statements of the administrator and his attorney misleading the purchaser may be a ground of relief. De Haven's Appeal, 106 Pa. St. 612, 2 Del. Co. Rep. 209.

A misrepresentation as to the value of woodland, made to one who had not seen the property is a defense to an action for not making good the bid. Stewart *v.* Dougherty, 1 Pittsb. (Pa.) 233.

A sale will be set aside before confirmation, but not after, where the administrator stated that decedent owned the whole tract when he only owned one half. Porter's Estate, 3 Luz. Leg. Reg. (Pa.) 47.

A misrepresentation made after the sale and at the time of the delivery of the deed will not avoid the sale. Kirkland *v.* Wade, 61 Ga. 478.

A statement made in good faith by the executor as to the title is no ground for relief. Wells *v.* Harper, 81 Ga. 194, 6 S. E. 913, 12 Am. St. Rep. 310.

97. *Indiana.*—West *v.* Wright, 98 Ind. 335.

Minnesota.— Fritz *v.* McGill, 31 Minn. 536, 18 N. W. 753.

Missouri.— Richardson *v.* Palmer, 24 Mo. App. 480.

Ohio.— Dunlap *v.* Robinson, 12 Ohio St. 530.

Texas.— Able *v.* Chandler, 12 Tex. 88, 62 Am. Dec. 518.

98. Brown *v.* Evans, 15 Kan. 88; Westfall *v.* Dungan, 14 Ohio St. 276; Vandever *v.* Baker, 13 Pa. St. 121. *Contra*, Atwood *v.* Wright, 29 Ala. 346; Rice *v.* Richardson, 3 Ala. 428; Rice *v.* Burnet, 39 Tex. 177.

99. Hutchins *v.* Brooks, 31 Miss. 430; Ward *v.* Williams, 45 Tex. 617; Thompson *v.* Munger, 15 Tex. 523, 65 Am. Dec. 176.

1. Walton *v.* Reager, 20 Tex. 103.

2. Robinson *v.* Bright, 3 Metc. (Ky.) 30; Williams *v.* McCormack, 7 Humphr. (Tenn.) 308.

3. Pool *v.* Hodnett, 18 Ala. 752, statement made by the holder of a superior title.

Declarations of the crier, misleading the purchaser, may be a ground of relief. Atwood *v.* Wright, 29 Ala. 346; Vandever *v.* Baker, 13 Pa. St. 121.

4. Adams *v.* Thomas, 44 Ark. 267; Pipkin *v.* Casey, 13 Mo. 347; McCown *v.* Foster, 33 Tex. 241; Dexter *v.* Harris, 7 Fed. Cas. No. 3,862, 2 Mason 531.

5. *Indiana.*— Hawkins *v.* Ragan, 20 Ind. 193.

Iowa.— Read *v.* Howe, 39 Iowa 553.

Louisiana.— Morrill *v.* Carr, 2 La. Ann. 807.

Massachusetts.— Robbins *v.* Bates, 4 Cush. 104; Blood *v.* Hayman, 13 Metc. 231.

Michigan.— King *v.* Nunn, 99 Mich. 590, 58 N. W. 636.

North Carolina.— Morrow *v.* Cole, 132 N. C. 678, 44 S. E. 370; Fowler *v.* Poor, 93 N. C. 466.

a good title if the original purchaser was without notice.[6] Even if the sale is set aside the rights of a *bona fide* purchaser will be protected.[7]

(III) *AGAINST DEFECTIVE PROCEEDINGS.* A purchaser will be protected against a divestiture of his title by reason of a defect in the proceedings under which he buys, provided the court had jurisdiction,[8] and the order or decree in terms authorized the sale.[9] Neither will a *bona fide* purchaser's title be defeated by a subsequent reversal of the order or decree of sale.[10] He is not bound to go behind the order to ascertain if it was regularly granted,[11] or to investigate as to whether the directions of the law as to the manner of the sale were in all respects complied with.[12] So also a sale by an executor acting under a will duly

Texas.— Halbert *v.* Young, (Sup. 1887) 6 S. W. 747; Martin *v.* Robinson, 67 Tex. 368, 3 S. W. 550.

A mortgagee of the purchaser is not charged with notice of the fraud, although the fraud is disclosed on the face of the proceedings leading to the sale. Lawson *v.* Acton, 57 N. J. Eq. 107, 40 Atl. 584. See Van Horn *v.* Ford, 16 Iowa 578, where a demurrer presenting a similar question was overruled reserving the question for determination on final hearing.

One who purchases at an execution sale on a judgment against the vendee at the administrator's sale is not a *bona fide* purchaser without notice. See Worthy *v.* Johnson, 8 Ga. 236, 52 Am. Dec. 399.

A conveyance to the executor by the purchaser is not alone notice that the executor was interested at the time of the sale. Otis *v.* Kennedy, 107 Mich. 312, 65 N. W. 219. But see Veeder *v.* McKinley-Lanning Loan, etc., Co., 61 Nebr. 892, 86 N. W. 982, where there were other circumstances tending to impart notice.

A purchaser from the vendee is chargeable with notice where he knew that the sale was to satisfy a personal debt of the administratrix to the purchaser. Tillman *v.* Thomas, 87 Ala. 321, 6 So. 151, 13 Am. St. Rep. 42.

Erroneous issue.— It was error to submit to the jury an issue as to whether the purchaser took title "with knowledge of the rights of the plaintiff in said land," because that might mean merely knowledge of his past interest and not knowledge of the fraud. Morrow *v.* Cole, 132 N. C. 678, 44 S. E. 370.

6. Perry *v.* Peterson, 98 N. C. 63, 3 S. E. 834; Pullian *v.* Byrd, 2 Strobh. Eq. (S. C.) 134.

7. Wylie's Estate, 7 Pa. Dist. 748, where a sale subject to a mortgage was set aside because improvidently made, and the court ordered a resale without prejudice to the right of the purchaser to subrogation to the rights of the mortgagee in so far as he had made payments on the mortgage.

8. Chancey *v.* Henry, 89 Ga. 123, 14 S. E. 885; Bowen *v.* Bond, 80 Ill. 351; Ackerson *v.* Orchard, 7 Wash. 377, 34 Pac. 1106, 35 Pac. 605.

Erroneous exercise of jurisdiction.— As a court of chancery has power under some circumstances to authorize the sale of a decedent's land, a purchaser at a sale under its decree will take title, although it should not have assumed jurisdiction to order the sale in the particular case. Shoemate *v.* Lockridge, 53 Ill. 503.

9. Irwin *v.* Flynn, 110 La. 829, 34 So. 794; Belard *v.* Gebelin, 47 La. Ann. 162, 16 So. 739; Linman *v.* Riggins, 40 La. Ann. 761, 5 So. 49, 8 Am. St. Rep. 549; Webb *v.* Keller, 39 La. Ann. 55, 1 So. 423; Macias' Succession, 36 La. Ann. 444; Duckworth *v.* Vaughan, 27 La. Ann. 599; Green *v.* Shreveport Baptist Church, 27 La. Ann. 563; Mitchell *v.* Lee. 23 La. Ann. 630; Woods *v.* Lee, 21 La. Ann. 505; Sizemore *v.* Wedge, 20 La. Ann. 124; Wright *v.* Cummings, 19 La. Ann. 353; Beale *v.* Walden, 11 Rob. (La.) 67; Valderes *v.* Bird, 10 Rob. (La.) 396; Rhodes *v.* Union Bank, 7 Rob. (La.) 63; Ball *v.* Ball, 15 La. 173; Graham *v.* Gibson, 14 La. 146; Lalanne *v.* Moreau, 13 La. 431; Poultney *v.* Cecil, 8 La. 321; Pintard *v.* Deyris, 3 Mart. N. S. (La.) 32; Fowler *v.* Poor, 93 N. C. 466; Rindge *v.* Oliphint, 62 Tex. 682; Alexander *v.* Maverick, 18 Tex. 179; Dancy *v.* Stricklinge, 15 Tex. 557, 65 Am. Dec. 179; Bartlett *v.* Cocke, 15 Tex. 471; Poor *v.* Boyce, 12 Tex. 440; Thompson *v.* Tolmie, 2 Pet. (U. S.) 157, 7 L. ed. 381 [*reversing* 24 Fed. Cas. No. 14,080, 3 Cranch C. C. 123].

10. Goudy *v.* Hall, 36 Ill. 313, 87 Am. Dec. 217; Irwin *v.* Jeffers, 3 Ohio St. 389; Davis *v.* Gaines, 104 U. S. 386, 26 L. ed. 757. See also Holly *v.* Gibbons, 177 N. Y. 401, 69 N. E. 731 [*amending* remittitur in 176 N. Y. 520, 68 N. E. 889, 98 Am. St. Rep. 694], construing N. Y. Code Civ. Proc. § 1323, by which it is expressly provided that, when a final judgment or order is reversed upon appeal, restitution cannot be compelled "so as to affect the title of a purchaser in good faith for value." But *compare* Wheeler *v.* Wheeler, 1 Conn. 51.

11. Stow *v.* Kimball, 28 Ill. 93; McCormack *v.* Kimmel, 4 Ill. App. 121; Griffin *v.* Johnson, 37 Mich. 87; Sheldon *v.* Newton, 3 Ohio St. 494; Florentine *v.* Bartmon, 2 Wall. (U. S.) 210, 17 L. ed. 783; Grignon *v.* Astor, 2 How. (U. S.) 219. But see Piatt *v.* McCullough, 19 Fed. Cas. No. 11,113, 1 McLean 69.

The only inquiry a purchaser is bound to make as to the authority of an executor or administrator to sell is as to the orders of the court and the statutes of the state. Hamilton *v.* Pleasants, 31 Tex. 638, 98 Am. Dec. 551.

12. Gress Lumber Co. *v.* Leitner, 91 Ga. 810, 18 S. E. 62; Patterson *v.* Lemon, 50 Ga. 231; Goodbody *v.* Goodbody, 95 Ill. 456; Pleasants *v.* Dunkin, 47 Tex. 343.

probated passes title to a *bona fide* purchaser, although the will is subsequently set aside,[13] and a purchaser from the purchaser at the sale takes good title, although the administration is afterward revoked.[14]

(iv) *Against Defects in Decedent's Title.* The purchaser does not act entirely at his peril even as regards the title of decedent. Acting upon the doctrine that the rule of *caveat emptor* charges a purchaser only with those things which he might discover with reasonable diligence,[15] it is held that he will take the property free from latent equities and secret trusts.[16] It has also been held that purchasers at administration sales are within the protection of the recording acts as against unrecorded deeds.[17]

d. Curative Statutes. Statutes very generally exist for the protection of the title of purchasers in good faith against defects in the proceedings. These generally cure merely those defects which do not concern jurisdictional steps,[18] and it is usually held that they cannot constitutionally operate to give effect to a sale void for want of jurisdiction.[19] But in this respect the rule must be borne in mind

Duty to search record.— There are a few cases holding that purchasers are chargeable with notice of defects in the proceedings which appear in any part of the record of the proceedings in which the sale is had. Fisher *v.* Bush, 133 Ind. 315, 32 N. E. 924 (holding that an identity of name between the administrator's attorney appearing of record and the purchaser at the sale was sufficient to put subsequent purchasers on inquiry as to whether the attorney was the purchaser); McNally *v.* Haynes, 59 Tex. 583 (holding that the purchaser is chargeable with notice from the record of the proceedings ordering the sale but not from the general administration record); Perry *v.* Peterson, 98 N. C. 63, 3 S. E. 834.

Notice from deed.— A recital in a deed dated December 3 that leave to sell was granted in November is notice that there was not the required forty days' advertisement of the sale. Groover *v.* King, 46 Ga. 101.

The purchaser is bound to know the law, and he takes no title to personalty sold at private sale without an order which the law requires to authorize such sale. Weyer *v.* Franklin Second Nat. Bank, 57 Ind. 198.

13. Mathis *v.* Gerantz, 11 La. Ann. 3; Davis *v.* Gaines, 104 U. S. 386, 26 L. ed. 757, discovery and probate of later will. See also Lehmann's Succession, 41 La. Ann. 987, 7 So. 33.

A purchaser in bad faith is not protected. Mathis *v.* Gerantz, 11 La. Ann. 3.

14. Halbert *v.* Young, (Tex. Sup. 1887) 6 S. W. 747.

15. Love *v.* Berry, 22 Tex. 371; Cheveral *v.* Bowman, 2 Tex. App. Civ. Cas. § 114.

16. Blankenship *v.* Whaley, 124 Cal. 300, 57 Pac. 79; Rupp's Appeal, 100 Pa. St. 531; Lumpkin *v.* Adams, 74 Tex. 96, 11 S. W. 1070; Keen *v.* Case, 22 Tex. 412; Love *v.* Berry, 22 Tex. 371; Dalton *v.* Rust, 22 Tex. 133; Cheveral *v.* Bowman, 2 Tex. App. Civ. Cas. § 114. See Prescott *v.* Hawkins, 16 N. H. 122, where this was questioned without decision. And see Lahey *v.* Broderick, 72 N. H. 180, 55 Atl. 354.

17. Barto *v.* Tompkins County Nat. Bank, 15 Hun (N. Y.) 11; Taylor *v.* Harrison, 47 Tex. 454, 26 Am. Rep. 304. And see Deeds; Vendor and Purchaser.

Purchaser takes free from defects not apparent on face of land records. Banks *v.* Ammon, 27 Pa. St. 172.

Bona fide purchasers.— One who takes under an administrator's deed "all the right, title and interest" of the estate is a *bona fide* purchaser within the meaning of the recording acts. White *v.* Dupree, 91 Tex. 66, 40 S. W. 962 [*reversing* (Civ. App. 1897) 39 S. W. 988].

Where the purchaser was the clerk of the court in which proceedings were pending to determine an adverse claim to the land he was charged with notice of such claim. Dickerson *v.* Campbell, 32 Mo. 544.

18. *Alabama.*— Brown *v.* Williams, 87 Ala. 353, 6 So. 111.

Indiana.— Lucas *v.* Tucker, 17 Ind. 41.

Kansas.— Rogers *v.* Clemmens, 26 Kan. 522.

Louisiana.— Morton *v.* Reynolds, 4 Rob. 26.

New York.— Wilson *v.* White, 109 N. Y. 59, 15 N. E. 749, 4 Am. St. Rep. 420; Stilwell *v.* Swarthout, 81 N. Y. 109.

North Carolina.— Perry *v.* Adams, 98 N. C. 167, 3 S. E. 729, 2 Am. St. Rep. 326 note; Gulley *v.* Macy, 86 N. C. 721.

United States.— Seaverns *v.* Gerke, 21 Fed. Cas. No. 12,595, 3 Sawy. 353.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1544.

19. Robertson *v.* Bradford, 70 Ala. 385. But see Wilkinson *v.* Leland, 2 Pet. (U. S.) 627, 7 L. ed. 542, where the court sustained the power of the legislature of Rhode Island by special act to validate a sale made of land in Rhode Island under an order of a probate court in New Hampshire.

If the proceedings are regular on their face the title will be protected, although they were conducted and the sale made by one having no authority from the executors. Allen *v.* Cutliff, 23 La. Ann. 614.

An act curing defects in proceedings against infants, idiots, and lunatics will not be construed as giving effect as against such persons to proceedings which would be void against a defendant *sui juris*. Gulley *v.* Macy, 86 N. C. 721.

that the proceeding is generally held to be one *in rem*, and that the authority of the legislature is very broad in declaring what shall be necessary to invoke the power of the court; therefore it is said that whatever the legislature need not in the first instance have required it may waive by a curative act.[20] Within these limits statutes may be made retroactive, so as to perfect titles under sales made before their passage.[21]

4. WHEN TITLE PASSES — a. In General. For some purposes the title is held to pass at the time of the sale,[22] or on compliance by the purchaser with the terms of the sale;[23] but generally title does not vest until confirmation,[24] although in some jurisdictions it then relates back to the date of sale.[25] The title cannot relate back so as to charge the purchaser with taxes accruing between decedent's death and the sale.[26]

b. As to Rents and Profits. The purchaser is generally entitled to the rents and profits from the time of confirmation and not from the time of sale.[27] It is

20. Mitchell *v.* Campbell, 19 Oreg. 198, 24 Pac. 455; Ackerson *v.* Orchard, 7 Wash. 377, 34 Pac. 1106, 35 Pac. 605; Reynolds *v.* Schmidt, 20 Wis. 374. Thus a statute is valid which protects sales where the proceeding was begun before the clerk as judge of probate instead of in the superior court. Ward *v.* Lowndes, 96 N. C. 367, 2 S. E. 591; Herring *v.* Outlaw, 70 N. C. 334; Bell *v.* King, 70 N. C. 330.

21. Brown *v.* Williams, 87 Ala. 353, 6 So. 111; Mitchell *v.* Campbell, 19 Oreg. 198, 24 Pac. 455. See also Kiskaddon *v.* Dodds, 21 Pa. Super. Ct. 351, holding that a statute passed to validate private sales of real estate which were invalid under a former statute cures a defect in the title of the purchaser, although suit was begun by a person claiming an interest in the real estate before the validating act was passed.

Sales not within curative act.— An act curing defects in sales will not be construed as applying to estates which never fell within the operation of the probate acts of the state, the estate having been administered under another system of law. Coppenger *v.* Rice, 33 Cal. 408.

22. Holmes' Appeal, 108 Pa. St. 23 (holding that judgments entered against the purchaser after the sale but before confirmation are liens on his interest); Polk *v.* Pledge, 5 Coldw. (Tenn.) 384 (where a purchaser of slaves was held liable, although slavery was abolished between the time of the sale and of the confirmation thereof); Edwards *v.* Gill, 5 Tex. Civ. App. 203, 23 S. W. 742 (holding that where a land certificate was sold before location, a confirmation after location and patent carried the title to the land, as title to the certificate passed upon the sale).

23. Citizens' St. R. Co. *v.* Robbins, 128 Ind. 449, 26 N. E. 116, 25 Am. St. Rep. 445, 12 L. R. A. 498, where the law requires no confirmation.

A purchaser entering before paying the price, without permission of the executor, is an intruder. Bagley *v.* Stephens, 78 Ga. 304, 2 S. E. 545.

A mortgage made after the sale was confirmed, but before the purchase-money was paid, was held valid where the purchaser allowed a third person thereafter to pay the purchase-money and take the deed. Harris *v.* Bryant, 83 N. C. 568. See also Gaiennie *v.* Gaiennie, 24 La. Ann. 79.

24. *Arkansas.*— Halliburton *v.* Sumner, 27 Ark. 460.

California.— Horton *v.* Jack, 115 Cal. 29, 46 Pac. 920.

Illinois.— Foote *v.* Overman, 22 Ill. App. 181.

Indiana.— Bellows *v.* McGinnis, 17 Ind. 64.

Kentucky.— Ball *v.* Covington First Nat. Bank, 80 Ky. 501; Norris *v.* Williams, 65 S. W. 439, 23 Ky. L. Rep. 1497.

Pennsylvania.— Law's Estate, 7 Pa. Co. Ct. 605.

Tennessee.— Pearson *v.* Gillenwaters, 99 Tenn. 446, 42 S. W. 9, 63 Am. St. Rep. 844; Hyder *v.* O'Brien, (Ch. App. 1898) 48 S. W. 262.

In Alabama title does not vest until the purchase-money has been paid and a conveyance has been executed under a decree directing it. Dugger *v.* Tayloe, 60 Ala. 504; Doe *v.* Hardy, 52 Ala. 291.

25. Halliburton *v.* Sumner, 27 Ark. 460 (holding that a lease made by the administrator after a sale was divested by the confirmation); Bellows *v.* McGinnis, 17 Ind. 64 (holding that after confirmation the purchaser might recover for a trespass committed between sale and confirmation).

26. Le Moyne *v.* Harding, 132 Ill. 23, 23 N. E. 414 [*affirming* 31 Ill. App. 624].

27. Foote *v.* Overman, 22 Ill. App. 181; Ball *v.* Covington First Nat. Bank, 80 Ky. 501; Norris *v.* Williams, 65 S. W. 439, 23 Ky. L. Rep. 1497; Page *v.* Culver, 55 Mo. App. 606; Pearson *v.* Gillenwaters, 99 Tenn. 446, 42 S. W. 9, 63 Am. St. Rep. 844.

In Delaware a purchaser is not liable for rents and profits between sale and confirmation. Caulk *v.* Caulk, 3 Houst. (Del.) 81.

A purchaser is not entitled to rents pending an appeal from an order of confirmation, as his right accrues only on final confirmation. Pearson *v.* Gillenwaters, 99 Tenn. 446, 42 S. W. 9, 63 Am. St. Rep. 844.

Widow and heirs entitled to rents until delivery of deed. Law's Estate, 7 Pa. Co. Ct. 605; Engle *v.* Conrad, 12 Montg. Co. Rep. (Pa.) 76.

sometimes held that the purchaser takes all payments falling due after confirmation,[28] and sometimes that there should be an apportionment between the heirs and purchaser of rent inuring before and after confirmation.[29]

5. Proceedings to Perfect Rights of Purchaser — a. To Obtain Deed. The probate court has sometimes power to compel the administrator to make a proper conveyance to the purchaser,[30] and where this power exists equity cannot interfere except when, because of accident, mistake, or similar cause, there can be no relief in the probate court.[31] Elsewhere it seems that the remedy is a suit for specific performance of the contract,[32] but a defective sale cannot be helped out through the medium of a suit in equity to compel performance.[33]

b. To Obtain Possession. Where the sale was made in pursuance of a decree in equity the court will by writ of assistance place the purchaser in possession, if possession is withheld by parties to the suit,[34] but not where the land is held adversely to the title of the heirs or devisees.[35] One not a party may be dispossessed through a rule against him to show cause.[36] The purchaser may also maintain ejectment.[37]

U. Conveyance[38] **— 1. Necessity.** It is usual for statutes as to administration sales of the realty of decedents to provide for the execution of conveyance to the purchasers, when certain conditions have been complied with,[39] and in some

Purchaser not entitled to rents and profits until payment of price.— Lapene *v.* Badeaux, 36 La. Ann. 194.

Purchaser entitled to crops growing at time of sale.—Jewett *v.* Keenholts, 16 Barb. (N. Y.) 193. *Contra*, Barrett *v.* Choen, 119 Ind. 56, 20 N. E. 145, 21 N. E. 322, 12 Am. St. Rep. 363.

Rents and profits to accrue will not pass unless expressly ordered sold. Guyer *v.* Maynard, 6 Gill & J. (Md.) 420.

An express reservation from the sale of rents or crops to mature is enforced in some jurisdictions. Broadwell *v.* Sammons, 69 S. W. 1084, 24 Ky. L. Rep. 814; Backenstoss *v.* Stahler, 33 Pa. St. 251, 75 Am. Dec. 592; Marys *v.* Anderson, 24 Pa. St. 272.

28. Foote *v.* Overman, 22 Ill. App. 181; Page *v.* Culver, 55 Mo. App. 606.

29. Norris *v.* Williams, 65 S. W. 439, 23 Ky. L. Rep. 1497.

30. *In re* Lewis, 39 Cal. 306; Long *v.* Jarratt, 94 N. C. 443; Mason *v.* Osgood, 64 N. C. 467. *Contra*, Wolf *v.* Lynch, 2 Dem. Surr. (N. Y.) 610.

31. Garrett *v.* Lynch, 45 Ala. 204 (holding that equity would direct a conveyance where the records of the probate court had been lost and could not be replaced); Lamkin *v.* Reese, 7 Ala. 170 (holding that equity will not interfere unless those having power to rectify the mistake refuse to do so); Piatt *v.* McCullough, 19 Fed. Cas. No. 11,113, 1 McLean 69 (holding that equity will aid where, because of accident or mistake, the executor's deed has failed to convey a good legal title).

32. Sebastian *v.* Johnson, 72 Ill. 282, 22 Am. Rep. 144; Pittenger *v.* Pittenger, 3 N. J. Eq. 156; Wolfe *v.* Lynch, 2 Dem. Surr. (N. Y.) 610.

Heirs canot be compelled to convey by such a suit. Speck *v.* Wohlien, 22 Mo. 310.

33. Sebastian *v.* Johnson, 72 Ill. 282, 22 Am. Rep. 144; Young *v.* Rathbone, 16 N. J. Eq. 224, 84 Am. Dec. 151 (holding that an irregular sale will not be enforced while it is still open to review by appeal, although the judgment, if unappealed from, would be conclusive); Matter of Hemiup, 2 Paige (N. Y.) 316 (holding that where a statute provides for the rectifying of certain irregularities, no power exists except with regard to those specified); Bright *v.* Boyd, 4 Fed. Cas. No. 1,875, 1 Story 478.

34. Nutwell *v.* Nutwell, 47 Md. 35; Jones *v.* Hooper, 50 Miss. 510. And see, generally, Assistance, Writ of, 4 Cyc. 289 *et seq.*

35. Harding *v.* Le Moyne, 114 Ill. 65, 29 N. E. 188 (holding that, although one claiming adversely and in possession was a party to the suit, he may not be dispossessed in that proceeding, because the court was there without jurisdiction to determine adverse claims); Marcom *v.* Wyatt, 117 N. C. 129, 23 S. E. 169.

Parties obtaining title subsequent to the decree may set it up in answer to the application. Nutwell *v.* Nutwell, 47 Md. 35.

36. Paxton *v.* Rucker, 15 W. Va. 547.

37. Knox *v.* Jenks, 7 Mass. 488; Willard *v.* Nason, 5 Mass. 240; Jackson *v.* Robinson, 4 Wend. (N. Y.) 436.

Parties.— Where there are several purchasers of different tracts, and a mistake in describing the tracts affecting all, all the purchasers must be parties to an action by one for the purpose of establishing his right to possession of the tract purchased. Gauthier *v.* Desbony, 5 La. Ann. 139; Sigler *v.* Gauthier, 5 La. Ann. 138.

38. See, generally, Deeds, 13 Cyc. 505.

Sale of realty under testamentary authority see *supra*, VIII, O, 9, d, (vii).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, g.

39. See Landford *v.* Dunklin, 71 Ala. 594; State *v.* Cunningham, 6 Ida. 113, 53 Pac. 451 (holding that a mandamus will issue to

jurisdictions the purchasers do not become invested with title until proper conveyances have been executed,[40] but in other jurisdictions title passes to the purchasers when the sale is confirmed.[41]

2. **Authority to Convey and Right to Conveyance — a. In General.** When the authority to execute such a conveyance is regulated by statute, as it generally is,

compel the execution of a conveyance); Hughes *v.* McDivitt, 102 Mo. 77, 14 S. W. 660, 15 S. W. 756; El Paso *v.* Fort Dearborn Nat. Bank, 96 Tex. 496, 74 S. W. 21 [*reversing* (Civ. App. 1903) 71 S. W. 799]; Burgess *v.* Millican, 50 Tex. 397.

In Pennsylvania a deed from the personal representative is contemplated, although not expressly provided for by statute. Shontz *v.* Brown, 27 Pa. St. 123.

Sale by a referee in aid of power in a will. — Where the decree under which property is sold by a referee is made in aid of a power of sale contained in a will, and to carry out its provisions the referee's deed to the purchaser conveys a marketable title, a deed from the executor is unnecessary. Strauss *v.* Benheim, 28 Misc. (N. Y.) 660, 59 N. Y. Suppl. 1054.

Conveyance of land certificate. — An administrator who has under license from the probate court sold for the payment of the intestate's debts a part-paid land certificate left by him and his interest in the lands therein described may after confirmation of such sale properly assign such certificate to the purchaser thereof, such assignment being necessary to meet the requirements of the land-office. Louden *v.* Martindale, 109 Mich. 235, 67 N. W. 133. In Texas it has been held that since a land certificate is regarded as personalty and the title of personalty vests in the purchaser upon the making of an order confirming an administrator's sale, a written conveyance of such certificate is not necessary, but that, it being a fixed custom to make a written conveyance thereof, the title, under the circumstances, would vest in the grantee in the administrator's conveyance. McKee *v.* Simpson, 36 Fed. 248.

40. Gridley *v.* Phillips, 5 Kan. 349 (holding that it is necessary that a deed should have been executed or some equitable proceeding had in order to vest the title to the land in the purchaser); Strange *v.* Austin, 134 Pa. St. 96; Overdeer *v.* Opdergraff, 69 Pa. St. 110; Leshey *v.* Gardner, 3 Watts & S. (Pa.) 314, 38 Am. Dec. 764; *In re* McRee, 6 Phila. (Pa.) 75; *In re* Hepting, 1 Lanc. L. Rev. (Pa.) 45.

In Alabama a sale of land by a personal representative under an order of the probate court does not pass the title to the purchaser as against the heirs and devisees until the sale is reported and confirmed, the purchase-money paid, and a conveyance executed under the order of the court. Comer *v.* Hart, 79 Ala. 389; Watson *v.* Martin, 75 Ala. 506; Landford *v.* Dunklin, 71 Ala. 594; Cruikshank *v.* Luttrell, 67 Ala. 318; Van Hoose *v.* Bush, 54 Ala. 342; Doe *v.* Hardy, 52 Ala. 291; Wallace *v.* Hall, 19 Ala. 367; Perkins *v.* Winter, 7 Ala. 854; Bonner *v.* Greenlee, 6 Ala. 411; Cummings *v.* McCullough, 5 Ala. 324; Lightfoot *v.* Doe, 1 Ala. 475. The title to land sold on credit under order of the probate court for distribution is not divested out of the heir until a conveyance is executed under order of the court, after ascertaining that the entire purchase-money has been paid. The purchaser at such a sale takes but an inchoate equity which on full payment of the purchase-money ripens into a perfect equity, entitling him to a conveyance under order of the court or a resort to equity to divest the title of the heirs. Ketchum *v.* Creagh, 53 Ala. 224. See also Bibb *v.* Bishop Cobbs Orphan Home, 61 Ala. 326.

In Missouri the rule is that "when the sale by an administrator or curator under an order of the court has been regularly approved by the court, this fact of itself passes to the purchaser an equity for the legal title, which equity, notwithstanding an irregular deed or the want of any deed, the court will enforce in his favor by denying recovery in ejectment, by the heirs, or by vesting him with the perfect title; provided, always, that he has on his part complied with the terms of the sale. Henry *v.* McKerlie, 78 Mo. 416, 428 [*distinguishing* Wohlien *v.* Speck, 18 Mo. 561, and *quoted* with approval in Sherwood *v.* Baker, 105 Mo. 472, 10 S. W. 938, 24 Am. St. Rep. 399].

In Texas to pass a perfect legal title to land of an estate sold by a personal representative under the order of court, a conveyance by the personal representative executed according to the statute is necessary (Sypert *v.* McCowen, 28 Tex. 635); but the order of sale, the sale, the confirmation thereof, and the compliance by the purchaser with the terms of sale constitute an equitable title sufficient to protect the purchaser without a deed (McVee *v.* Johnson, 45 Tex. 634. See also Sypert *v.* McCowen, 28 Tex. 635; Rock *v.* Heald, 27 Tex. 523; Bartlett *v.* Cocke, 15 Tex. 471).

Nothing but an equity vests in the purchaser as to land sold but not included in the deed. Nantahala Marble, etc., Co. *v.* Thomas, 76 Fed. 59.

41. Sturdy *v.* Jacoway, 19 Ark. 499; Miami Exporting Co. *v.* Holly, Wright (Ohio) 227. See also McNew *v.* Williams, 36 S. W. 687, 18 Ky. L. Rep. 364. And see *supra*, XII, T, 4, a.

In Louisiana by statute the adjudication made and recorded by the judge of probate or the clerk of court is a complete title to the purchaser and no deed is necessary. Jones *v.* Read, 1 La. Ann. 200; Rousseau *v.* Tête, 6 Rob. 471; Faulk *v.* Pinnell, 6 Rob. 26; Gorton *v.* Gorton, 12 La. 476; Berthoud *v.* Uhruh, 9 La. 180; Babin *v.* Winchester, 7

the personal representative has no right to execute it or the purchaser to demand its execution until the statutory requirements are complied with.[42] Usually such statutes require that the sale shall be confirmed by the court[43] and the purchase-money paid,[44] and an order of court directing the execution of the conveyance is sometimes necessary.[45]

b. Who Has Authority. The personal representative is generally the person authorized to execute the conveyance,[46] but other persons are sometimes authorized to execute it.[47] An administrator *de bonis non* may execute a conveyance of land sold by his predecessor.[48]

c. Duration of Authority. As a general rule there is no prescribed period within which such a conveyance must be executed, but it may be executed at any time so long as the order authorizing its execution continues in force.[49] So

La. 460; Marigny *v.* Nivet, 2 La. 498; Hopkins *v.* Peretz, 3 Mart. 590.

42. Akin *v.* Horn, 2 Tex. App. Civ. Cas. § 8. *Compare* Miller *v.* Anders, 21 Tex. Civ. App. 72, 51 S. W. 897.

43. See Strange *v.* Austin, 134 Pa. St. 96, 19 Atl. 492; Leshey *v.* Gardner, 3 Watts & S. (Pa.) 314, 38 Am. Dec. 764; Burgess *v.* Millican, 50 Tex. 397.

A deed executed prior to confirmation of the sale, although unauthorized, will take effect on confirmation. El Paso *v.* Fort Dearborn Nat. Bank, 96 Tex. 496, 74 S. W. 21 [*reversing* (Civ. App. 1903) 71 S. W. 799].

44. *Alabama.*— Bogart *v.* Bell, 112 Ala. 412, 20 So. 511; Landford *v.* Dunklin, 71 Ala. 594; Corbitt *v.* Chenny, 52 Ala. 480.

Kansas.—Cockins *v.* McCurdy, 40 Kan. 758, 20 Pac. 470.

Missouri.— Hughes *v.* McDivitt, 102 Mo. 77, 14 S. W. 660, 15 S. W. 756.

North Carolina.— Hyman *v.* Jarnigan, 65 N. C. 96.

Pennsylvania.— Strange *v.* Austin, 134 Pa. St. 96, 19 Atl. 492.

Texas.— Sypert *v.* McCowen, 28 Tex. 635. See 22 Cent. Dig. tit. "Executors and Administrators," § 1596.

Representative's failure to account for proceeds no objection to deed.—Decker *v.* Decker, 74 Me. 465.

45. Landford *v.* Dunklin, 71 Ala. 594; Cruikshank *v.* Luttrell, 67 Ala. 318; Doe *v.* Hardy, 52 Ala. 291; Perkins *v.* Winter, 7 Ala. 855. But *compare* Wood *v.* Montgomery, 60 Ala. 500.

Either personal representative or purchaser may apply for order for conveyance. Anderson *v.* Bradley, 66 Ala. 263; Dugger *v.* Tayloe, 60 Ala. 504; Van Hoose *v.* Bush, 54 Ala. 342.

Notice of application.— If the application for the order of conveyance is made by the purchaser notice must be given to the personal representative (Dugger *v.* Tayloe, 60 Ala. 504 [*overruling* Dugger *v.* Tayloe, 46 Ala. 320], and to the heirs (Anderson *v.* Bradly, 66 Ala. 263). When the personal representative as such makes the application, notice to the heirs is not necessary (Ligon *v.* Ligon, 84 Ala. 555, 4 So. 405), but when land is bought by the personal representative himself the application is to be regarded as made by him individually as purchaser and notice to the heirs is necessary (Bogart *v.* Bell, 112 Ala. 412, 20 So. 511; Bolling *v.* Smith, 108 Ala. 411, 19 So. 370; Ligon *v.* Ligon, 84 Ala. 555, 4 So. 405).

46. See Osman *v.* Traphagen, 23 Mich. 80; Blair *v.* Marks, 27 Mo. 579; Burgess *v.* Millican, 50 Tex. 397; Chase *v.* Ross, 36 Wis. 267.

Agent of personal representative cannot execute deed. Gridley *v.* Phillips, 5 Kan. 349.

Where the personal representative is a married woman she may convey land in her fiduciary character without her husband joining in the conveyance. Huls *v.* Bunlin, 47 Ill. 396.

When a sale is made by several personal representatives all must join in the conveyance in order to pass title. Greene *v.* Holt, 76 Mo. 677. *Compare* Wortman *v.* Skinner, 12 N. J. Eq. 358.

47. See Pollard *v.* Hanrick, 74 Ala. 334; Landford *v.* Dunklin, 71 Ala. 594; Hutton *v.* Williams, 35 Ala. 503, 76 Am. Dec. 297.

In case of a purchase by a personal representative, the Missouri statute requires the clerk of the court to execute the necessary deed (Greene *v.* Holt, 76 Mo. 677), while in Alabama a commissioner is appointed by the court to execute the deed (see Bolling *v.* Smith, 108 Ala. 411, 19 So. 370).

48. Goodwynne *v.* Bellerby, 116 Ga. 901, 43 S. E. 275 [*distinguishing* Oglesby *v.* Gilmore, 5 Ga. 56; Thomas *v.* Harwick, 1 Ga. 80]; Peterman *v.* Watkins, 19 Ga. 153 (special order to administrator *de bonis non* is unnecessary); Baker *v.* Bradsby, 23 Ill. 632. See also Greene *v.* Scarborough, 49 Ala. 137; Gridley *v.* Phillips, 5 Kan. 349. But see Davis *v.* Brandon, 1 How. (Miss.) 154.

49. Moody *v.* Hamilton, 22 Fla. 309; Osman *v.* Traphagen, 23 Mich. 80; Howard *v.* Moore, 2 Mich. 226.

The postponement of the delivery of the deed beyond the time specified in the conditions of sale, in consequence of objections being made to the confirmation of the sale, does not release the purchaser. Robb *v.* Mann, 11 Pa. St. 300, 51 Am. Dec. 551.

Limitation of time.— In Maine a deed made after more than one year has elapsed since the license to sell was granted by the probate court is void. Mason *v.* Ham, 36 Me. 573; Marr *v.* Hobson, 22 Me. 321; Marr *v.* Boothby, 19 Me. 150), but a deed executed and delivered within one year from the date

long as a personal representative has not resigned or been discharged or removed he may execute a valid conveyance, even though he has made his final settlement;[50] but after his resignation, removal, or discharge, his authority ceases and he cannot execute a valid conveyance, even though the land was sold before he ceased to act as personal representative.[51] If, however, before the expiration of his office he executes an imperfect deed he may make the proper corrections in it at any time.[52]

d. Extent of Authority. Unless it is otherwise provided in the order of sale the grantor is authorized to convey only an estate in fee.[53] Necessarily, however, only such title as the decedent had can be conveyed,[54] and no title passes to land not described in the order of sale.[55]

e. To Whom Conveyance Made. The conveyance is generally made to the purchaser, and it has been held that when the decree confirming the sale orders a conveyance to be made to the purchaser it must be made to the person who really purchased the land at the sale and to him only.[56] It has, however, been expressly decided in a number of cases that the conveyance may be made to the assignee of the purchaser,[57] or to such person as the purchaser may indicate.[58] Where the property of a decedent is reported as sold to one "as administrator," a subsequent deed vesting him personally with the title is not a pursuance of the master's report of sale, and such purchaser will be held as trustee of the estate.[59]

3. Form, Contents, and Execution[60]**— a. In General.** The conveyance must be adapted to conveying the estate which is the subject-matter of the power of sale.[61] Authority to sell and convey must appear on the face of the instrument[62] and it

of the license to sell, although not acknowledged within the year, passes title (Poor *v.* Larrabee, 58 Me. 543). In Massachusetts the same rule as to the time for executing such a deed formerly prevailed (Macy *v.* Raymond, 9 Pick. 285), but this rule has been modified by a statute providing that a sale of realty by a personal representative under a license shall be valid as against any person claiming under the deceased, although the deed is not delivered within a year, if certain conditions are complied with and the price duly accounted for (see Jewett *v.* Jewett, 10 Gray 31; Cooper *v.* Robinson, 2 Cush. 184).

50. Wilkerson *v.* Allen, 67 Mo. 502; Garner *v.* Tucker, 61 Mo. 427; Rugle *v.* Webster, 55 Mo. 246; McVey *v.* McVey, 51 Mo. 406.

51. Owens *v.* Cowan, 7 B. Mon. (Ky.) 152; Elstner *v.* Fife, 32 Ohio St. 358. But *compare* Bartlett *v.* Cocke, 15 Tex. 471.

52. Rugle *v.* Webster, 55 Mo. 246.

53. Iseman *v.* McMillan, 36 S. C. 27, 15 S. E. 336.

54. Nesbitt *v.* Richards, 14 Tex. 656.

55. Greene *v.* Holt, 76 Mo. 677. See also *supra*, p. 751 note 11.

56. Larason *v.* Lambert, 13 N. J. L. 182; Thompson *v.* Rogers, 67 Pa. St. 39.

57. Hobson *v.* Ewan, 62 Ill. 146; Ewing *v.* Higby, 7 Ohio 198, 28 Am. Dec. 633. See also White *v.* Jones, 88 N. C. 166.

In Alabama it is provided by statute (Code (1886), § 2124) that the court shall upon application order a conveyance made to the purchaser or his heirs or any other person holding under him directly or derivatively who has paid the purchase-money. See Webb *v.* Ballard, 90 Ala. 357, 7 So. 443 (holding that one who holds possession under the vendee by an exchange void under the statute of frauds did not hold under the purchaser within the meaning of this statute and the court could not properly order a conveyance made to him); Anderson *v.* Bradly, 66 Ala. 263. Under the statute formerly in force a conveyance could be made only to the original purchaser at the sale. Puritt *v.* Holly, 73 Ala. 369; Anderson *v.* Bradly, *supra*.

58. Ward *v.* Lounds, 96 N. C. 367, 2 S. E. 591. See also Coffin *v.* Cook, 106 N. C. 376, 11 S. E. 371.

59. Taylor *v.* Walker, 1 Heisk. (Tenn.) 734.

60. Sale of realty under testamentary authority see *supra*, VIII, O, 9, d, (VII), (A).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, g.

61. Griswold *v.* Bigelow, 6 Conn. 258, holding that a deed of release is not adapted for this purpose. See also Mitchell *v.* Hazen, 4 Conn. 495, 10 Am. Dec. 169; Wood *v.* Mistetta, 20 Tex. Civ. App. 236, 49 S. W. 236, 50 S. W. 135.

62. Watson *v.* Watson, 10 Conn. 77; Lockwood *v.* Sturdevant, 6 Conn. 373; Coffin *v.* Cook, 106 N. C. 376, 11 S. E. 371, formal recital not necessary if authority appears. But see Odell *v.* Kennedy, 26 Tex. Civ. App. 439, 64 S. W. 802.

Order of sale need not be set out at length. Jones *v.* Tailor, 7 Tex. 240, 56 Am. Dec. 48. See also Brown *v.* Redwyne, 16 Ga. 67; Langdon *v.* Strong, 2 Vt. 234. But *compare* Sheldon *v.* Wright, 5 N. Y. 497 [*affirming* 7 Barb. 39]; Atkins *v.* Kinnan, 20 Wend. (N. Y.) 241, 32 Am. Dec. 534.

Amendment.— An administrator will be allowed and compelled in a court of equity to

must contain any recitals required by statute.[63] The conveyance need not recite that the sale was by auction,[64] or that the grantee was the highest bidder;[65] neither need it recite confirmation of the sale,[66] or be signed as executor, administrator, or commissioner, if the capacity in which the grantor conveys appears in any other part of the instrument.[67] The fact that the conveyance is to some extent irregular and informal does not necessarily render it void.[68] Thus the conveyance is not invalidated by a mistake in the technical designation of the grantor, as where an administrator is described as executor[69] or *vice versa*,[70] or because the grantor, who should sign as commissioner, signs as administrator.[71] Neither is the validity of the deed affected by a mistake therein as to the date of the sale,[72] or a misrecital as to the date of the license to sell if it contains a recital of other facts which show that the sale was made under the true license.[73]

b. Description of Property. The property sold must be so described that it may be certainly identified and its boundaries ascertained,[74] as otherwise the conveyance will be void for uncertainty.[75] The description of the property in the

amend a deed made by him on a sale made by order of court, by inserting a recital of such order, as required by statute. Thorp *v.* McCullum, 6 Ill. 614.

63. Hughes *v.* McDivitt, 102 Mo. 77, 14 S. W. 660, 15 S. W. 756. See also Bray *v.* Adams, 114 Mo. 486, 21 S. W. 853. *Compare* Stryker *v.* Vanderbilt, 27 N. J. L. 68 (holding that provisions prescribing what should be recited in a deed are merely directory); El Paso *v.* Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 S. W. 21 [*reversing* (Civ. App. 1903) 71 S. W. 799].

64. Kingsbury *v.* Wild, 3 N. H. 30.

65. Kingsbury *v.* Wild, 3 N. H. 30.

66. Knowlton *v.* Smith, 36 Mo. 507, 88 Am. Dec. 152.

Even where the statute requires a recital of confirmation, a failure to comply with this requirement does not affect the validity of the deed, but merely controls its effect as evidence. El Paso *v.* Ft. Dearborn Nat. Bank, 99 Tex. 496, 74 S. W. 21 [*reversing* (Civ. App. 1903) 71 S. W. 799].

67. Kingsbury *v.* Wild, 3 N. H. 30; McLean *v.* Patterson, 84 N. C. 427; Chase *v.* Whiting, 30 Wis. 544.

68. Young *v.* Walker, 26 Kan. 242. See also Brubaker *v.* Jones, 23 Kan. 411; Connoughton *v.* Bernard, 84 Md. 577, 36 Atl. 265; Johnson *v.* Beazley, 65 Mo. 250, 27 Am. Rep. 276; Wortman *v.* Skinner, 12 N. J. Eq. 358.

Lack of seal or proper acknowledgment.— An administrator's deed which is informal for the want of a seal or because not properly acknowledged is sufficient to vest an equitable title in the grantee, which will constitute a good defense to an action of ejectment brought by the heirs of the deceased against one claiming under it. Snider *v.* Coleman, 72 Mo. 568.

69. Mobberly *v.* Johnson, 78 Ky. 273.

70. Copper *v.* Robinson, 2 Cush. (Mass.) 184.

71. McLean *v.* Patterson, 84 N. C. 427.

72. Garner *v.* Tucker, 61 Mo. 427.

73. Thomas *v.* Le Baron, 8 Metc. (Mass.) 355.

74. Laub *v.* Buckmiller, 17 N. Y. 620. See also Jameson *v.* Balmer, 20 Me. 425; El Paso *v.* Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 S. W. 21 [*reversing* (Civ. App. 1903) 71 S. W. 799].

Resorting to the other conveyances or documents for description see Foster *v.* Bowman, 55 Iowa 237, 7 N. W. 513 (petition for sale); Pitts *v.* Farnum, 8 Cush. (Mass.) 41 (mortgage expressly referred to for a further description); Kempton *v.* Swift, 2 Metc. (Mass.) 70 (reference to proceedings for assignment of dower); Orrick *v.* Bower, 29 Mo. 210 (reference to report of sales made by the administrator to the court and to a plot of lots sold, accompanying it); Kerlicks *v.* Keystone Land, etc., Co., (Tex. Civ. App. 1893) 21 S. W. 623 (reference to maps, land certificates, etc.).

Where a deed contains two descriptions, one applicable to land to which the decedent had title and the other to land which he did not own, the former will be taken as the true description and the latter rejected as false. Bray *v.* Adams, 114 Mo. 486, 21 S. W. 853.

The quantity of land is stated by way of description and is not a matter of covenant. Carter *v.* Beck, 40 Ala. 599.

Construction of descriptive clause see Wells *v.* Dillard, 93 Ga. 682, 20 S. E. 263; Bay *v.* Posner, (Md. 1894) 29 Atl. 11; Starr *v.* Brewer, 58 Vt. 24, 3 Atl. 479.

The words "more or less" should be construed with reference to the particular circumstances under and in relation to which they are used. Bromberg *v.* Yukers, 108 Ala. 577, 19 So. 49.

Correction of error in description.— Where a purchaser of land at an administrator's sale pays the purchase-money, and the same is applied in the discharge of the debts of the decedent, but the land is not correctly described in the deed executed by the administrator, an assignee of the purchaser will be entitled to a decree in equity correcting the error and divesting the legal title to the land out of the heirs of the decedent and vesting it in him. Grayson *v.* Weddle, 80 Mo. 39, 63 Mo. 523.

75. Borders *v.* Hodges, 154 Ill. 498, 39

conveyance should follow that which appears in the petition by which a sale is asked and the order by which it is authorized or directed.[76]

4. ACKNOWLEDGMENT AND RECORDING. The conveyance must be acknowledged in the manner prescribed by statute in order to pass title.[77] An acknowledgment may be valid notwithstanding a misrecital therein,[78] and defective acknowledgments may be cured by statute.[79] The conveyance should also be recorded.[80]

5. EFFECT OF COVENANTS.[81] The estate is not bound by any covenant contained in such a conveyance,[82] but the executor or administrator will be held to respond personally to the full scope of such a covenant, although he describes himself as executor or administrator.[83]

N. E. 597; Jones *v.* Carter, 56 Mo. 403; Harris *v.* Shafer, 86 Tex. 314, 23 S. W. 979, 24 S. W. 263.

76. Blackwell *v.* Townsend, 91 Ky. 609, 16 S. W. 587, 13 Ky. L. Rep. 291. See also Bromberg *v.* Yukers, 108 Ala. 577, 19 So. 49.

Description in petition and order controls. — Where an administrator's deed refers to the petition and order of sale and also contains a description of the land, which varies from that contained in the petition and order, the former description will yield to the latter as against the heirs of the decedent. Agan *v.* Shannon, 103 Mo. 661, 15 S. W. 757.

Variance in descriptions. — In proceedings to sell land of a decedent, the description of the land in the petition and administrator's deed gave the field-notes, but the order of sale did not. The petition described the land as being covered by patent No. 249, which was the proper number, but the order of sale and administrator's deed described it as No. 248. The field-notes showed that the property was the same as that covered by patent No. 249. It was held error, in trespass to try title, to exclude the deed and order because of the variance, it being for the court to determine whether the land in controversy was that intended to be sold. Minor *v.* Lumpkin, (Tex. Civ. App. 1895) 29 S. W. 800.

Presumption in case of variance. — It will be presumed that the administrator committed a clerical error in inserting a wrong description of land in his report of sale and deed, where the description differs from that contained in the order of sale. Agan *v.* Shannon, 103 Mo. 661, 15 S. W. 757.

77. Campbell *v.* Laclede Gas Light Co., 84 Mo. 352. *Compare* Harrington *v.* Gage, 6 Vt. 532.

The acknowledgment must conform to the general law on the subject where the statute making it the duty of the administrator to execute, acknowledge, and deliver the deed does not state what the certificate of acknowledgment shall set forth. Hughes *v.* McDivitt, 102 Mo. 77, 14 S. W. 660, 15 S. W. 756.

78. Agan *v.* Shannon, 103 Mo. 661, 15 S. W. 757 [*overruling* Lincoln *v.* Thompson, 75 Mo. 613].

79. Cupp *v.* Welch, 50 Ark. 294, 7 S. W. 139.

80. Harrington *v.* Gage, 6 Vt. 532, holding that it is necessary to have the proceedings and order of sale as well as the conveyance recorded.

Not necessary to record a deed referred to. — Where one deed makes reference to another the two are to be considered as one and the deed so referred to need not be recorded. Agan *v.* Shannon, 103 Mo. 661, 15 S. W. 757.

When record becomes effective. — In Louisiana a conveyance of land sold by a personal representative, like other conveyances, becomes effective as against third parties from the time of its filing with the proper officer, and not from the time when it is actually recorded. Davis *v.* Martin, 113 Fed. 6, 51 C. C. A. 27.

A failure to record the deed does not affect the title as between the purchaser and the succession (Gaiennie *v.* Gaiennie, 24 La. Ann. 79) or the heirs of the decedent (Harrington *v.* Gage, 6 Vt. 532); nor does the failure of a purchaser at an administrator's sale to record his deed within twelve months from its date postpone his rights to those of a judgment creditor who obtains judgment before record (Davie *v.* McDaniel, 47 Ga. 195).

81. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d, (VII), (B).

82. Hale *v.* Marquette, 69 Iowa 376, 28 N. W. 647. See *supra*, XII, T, 3, b, (II).

Covenant of quiet enjoyment is not binding. Osborne *v.* McMillan, 50 N. C. 109. See also Mabie *v.* Matteson, 17 Wis. 1.

Covenant of warranty is not binding. Belden *v.* Seymour, 8 Conn. 19; Worthy *v.* Johnson, 8 Ga. 236, 52 Am. Dec. 399; Dallas County *v.* Club Land, etc., Co., 95 Tex. 200, 66 S. W. 294 [*modifying* 26 Tex. Civ. App. 449, 64 S. W. 872]; Nesbitt *v.* Richardson, 14 Tex. 656; Lynch *v.* Baxter, 4 Tex. 431, 51 Am. Dec. 735; Prouty *v.* Mather, 49 Vt. 415.

83. *Connecticut.* — Belden *v.* Seymour, 8 Conn. 19; Mitchell *v.* Hazen, 4 Conn. 495, 10 Am. Dec. 169.

Georgia. — See Worthy *v.* Johnson, 8 Ga. 236, 52 Am. Dec. 399.

Illinois. — Vincent *v.* Morrison, 1 Ill. 227.

Massachusetts. — Sumner *v.* Williams, 8 Mass. 162, 5 Am. Dec. 83.

Mississippi. — Magee *v.* Mellon, 23 Miss. 585.

Vermont. — Prouty *v.* Mather, 49 Vt. 415.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1602; *supra*, XII, T, 3, b, (III); and COVENANTS, 11 Cyc. 1055.

But *compare* Dallas County *v.* Club Land, etc., Co., 95 Tex. 200, 66 S. W. 294. And see Hale *v.* Marquette, 69 Iowa 376, 28 N. W.

6. Conveyance as Evidence. A personal representative's conveyance of his decedent's land made without authority is a nullity and no evidence of title in the grantee.[84] To support his title under a deed from the representative it is necessary for the grantee to show that the grantor had a valid power to sell and that such power was exercised in the manner required by law,[85] and proof of authority other than a recital thereof in the conveyance is necessary.[86] Due authority having, however, been shown, the recitals in the conveyance of the acts required by law to be done in making the sale will be considered as *prima facie* evidence of their having been done as therein recited.[87] In some states, by statute, recitals in such a conveyance are themselves evidence of the facts recited.[88] A deed of conveyance executed by commissioners under an order of the orphans' court to the purchaser at their sale is admissible as evidence of the conveyance.[89]

7. Mortgage. A mortgage given by the personal representative should in its provisions accord with the order or license under which it is executed,[90] and should not contain unauthorized provisions.[91] Such a mortgage is not void

647; Shontz *v.* Brown, 27 Pa. St. 123; Nesbitt *v.* Richardson, 14 Tex. 656; Lynch *v.* Baxter, 4 Tex. 431, 51 Am. Dec. 735.

84. Dawson *v.* Parham, 47 Ark. 215, 1 S. W. 72.

85. *California.*— See White *v.* Moses, 21 Cal. 43.

Connecticut.— Dorrence *v.* Raynsford, 67 Conn. 1, 34 Atl. 706, 52 Am. St. Rep. 266.

Georgia.— Dowdy *v.* McArthur, 94 Ga. 577, 21 S. E. 148.

Iowa.— Thornton *v.* Mulquinne, 12 Iowa 549, 79 Am. Dec. 548.

Louisiana.— Lanfear *v.* Harper, 13 La. Ann. 548.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1604.

86. Waller *v.* Hogan, 114 Ga. 383, 40 S. E. 254; Roberts *v.* Martin, 70 Ga. 196; Davie *v.* McDaniel, 47 Ga. 195; Doe *v.* Henderson, 4 Ga. 148, 48 Am. Dec. 216. See also Taylor *v.* Lawrence, 148 Ill. 388, 36 N. E. 74.

Recitals a circumstance tending to show order of sale.— The recitals in a deed made by the administrator conveying land by him as such are relevant only as tending to show that in making the sale he did not undertake to act independently of leave from the court of ordinary, but that the court had passed an order granting leave to sell. While the recitals afford no direct evidence of the truth of the facts recited, the making of them is a circumstance which the jury may take into consideration in connection with the other facts as tending to establish this fact. Attaway *v.* Carswell, 89 Ga. 343, 14 S. E. 472.

87. Roberts *v.* Martin, 70 Ga. 196; Davie *v.* McDaniel, 47 Ga. 195; Doe *v.* Henderson, 4 Ga. 148, 48 Am. Dec. 216.

88. Cupp *v.* Welch, 50 Ark. 294, 7 S. W. 139; Bray *v.* Adams, 114 Mo. 486, 21 S. W. 853; Campbell *v.* Laclede Gas Light Co., 84 Mo. 352; Camden *v.* Plain, 91 Mo. 117, 4 S. W. 86; Johnson *v.* Beazley, 65 Mo. 250, 27 Am. Rep. 276 (recital as evidence of appointment of administrator); Knowlton *v.* Smith, 36 Mo. 507, 88 Am. Dec. 152; Chase *v.* Ross, 36 Wis. 267 (administrator's deed only presumptive evidence of the regularity of proceedings prior to sale); Chase *v.* Whiting, 30 Wis. 544 (recital presumptive evidence that grantor was administrator).

In Texas the statute provides that the deed "shall recite the decree of confirmation; and the recitation of the order of confirmation shall be *prima facie* evidence that there was an order of sale, and that all provisions of the law were complied with in making and executing such order." See El Paso *v.* Ft. Dearborn Nat. Bank, 96 Tex. 496, 502, 74 S. W. 21 [*reversing* (Civ. App. 1903) 71 S. W. 799]. Under an earlier statute the recitals in a deed were not sufficient to show an order of sale, but they were *prima facie* evidence that all the requisites of the law were complied with in making the sale. See White *v.* Jones, 67 Tex. 638, 4 S. W. 161; Tucker *v.* Murphy, 66 Tex. 355, 1 S. W. 76; Terrell *v.* Martin, 64 Tex. 121; Jones *v.* Taylor, 7 Tex. 240, 56 Am. Dec. 48.

89. Doe *v.* Riley, 28 Ala. 164, 65 Am. Dec. 334, holding that the deed is admissible in behalf of a remote purchaser when sued by the intestate's heir, and that, although the description in it does not correspond with the description of the land sued for and described in the petition and order of sale, yet if it embraces any portion of the land sold a general objection to it may be overruled.

90. *In re* Vedder, 122 Mich. 439, 81 N. W. 356.

91. Stipulation as to attorney's fees.— An order of court authorizing a personal representative to execute a trust deed does not authorize a stipulation therein for the payment of attorney's fees in case of foreclosure. Pershing *v.* Wolf, 6 Colo. App. 410, 40 Pac. 856. But see Griffin *v.* Johnson, 37 Mich. 87; and *supra*, VIII, O, 11, b.

Clause waiving valuation and appraisement laws.— Under the Indiana statute providing that a mortgage executed by the personal representative under the authority of the court shall be as valid as if executed by the deceased in his lifetime, a mortgage executed under order of court and approved by the court has been held valid, although it contained a clause waiving the valuation

because of mere irregularities.[92] A reference to the order of the court and a recital of the execution of the mortgage pursuant to such order, with other similar recitals, is sufficient to show that the mortgage was executed by the mortgagor as personal representative in pursuance of law and the court's order, and not in a personal capacity.[93]

V. Disposition of Proceeds[94]— **1. Payment of Debts.** The proceeds of land sold for the payment of debts of a decedent are assets for that purpose and are as a general rule to be applied in the same manner as the proceeds of personalty.[95]

and appraisement laws. Smith *v.* Eels, 27 Ind. App. 321, 61 N. E. 200.

92. Griffin *v.* Johnson, 37 Mich. 87.

93. Thomas *v.* Parker, 97 Cal. 456, 32 Pac. 562.

94. **Sale of realty under testamentary authority** see *supra*, VIII, O, 9, d, (IX), (C).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, i.

95. *Alabama.*— Pearson *v.* Darrington, 32 Ala. 227.

Illinois.— Cruce *v.* Cruce, 21 Ill. 46; Vansyckle *v.* Richardson, 13 Ill. 171.

Indiana.— See McNaughtin *v.* Lamb, 2 Ind. 642.

Maryland.— Dent *v.* Maddox, 4 Md. 522. See also Cornish *v.* Willson, 6 Gill 299.

Mississippi.— Lee *v.* Gardiner, 26 Miss. 521.

New Jersey.— Haines *v.* Price, 20 N. J. L. 480; Freehold First Nat. Bank *v.* Thompson, 61 N. J. Eq. 188, 48 Atl. 333.

New York.— See Bloodgood *v.* Bruen, 2 Bradf. Surr. 8 [*reversed* on other grounds in 8 N. Y. 362].

North Carolina.— Thompson *v.* Cox, 53 N. C. 311.

Pennsylvania.— Ramsay's Appeal, 4 Watts 71; Pennsylvania Agricultural, etc., Bank *v.* Stambaugh, 13 Serg. & R. 299. See also *In re* Fisher, 29 Pittsb. L. J. 168.

Texas.— See Peevy *v.* Hurt, 32 Tex. 146.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1606, 1609.

Proceeds used exclusively for paying debts.— Where the county court has ordered the sale of lands of the deceased to pay debts, it has no power to appropriate the proceeds to make good a deficiency in the widow's allowance, to reimburse the administrator for improvements put upon the land, or for any other purpose than to pay debts. Ritchey *v.* Withers, 72 Mo. 556.

Charges of administration payable out of proceeds.— Brazer *v.* Dean, 15 Mass. 183. See also Youenes' Succession, 28 La. Ann. 499. *Compare In re* Kennedy, 1 Lack. Leg. N. (Pa.) 135; Stell *v.* Lewis, 2 Tex. Unrep. Cas. 533.

Costs of judgment on debt due by decedent payable out of proceeds.— Long *v.* Oxford, 108 N. C. 280, 13 S. E. 112.

Payment of unliquidated damages for breach of agreement.— In the distribution of the proceeds arising from the sale of the real estate of a deceased debtor, a specialty creditor, whose claim is for unliquidated damages on articles of agreement, for a breach before the distribution, is entitled to be paid, although the covenants were not broken at the time of the death of decedent. Stultzfoos' Appeal, 3 Penr. & W. (Pa.) 265.

Payment of debt due personal representative see Williams *v.* Williams, 11 Gratt. (Va.) 95.

Payment of debts of personal representative.— An administrator cannot apply the proceeds of a sale of his intestate's property in payment of his own debts. Chandler *v.* Schoonover, 14 Ind. 324.

Ratable payment.— The administrator can only pay out the proceeds ratably among all the creditors, and if he pays one creditor more than his share such creditor holds the excess in trust for other creditors. Ewing *v.* Maury, 3 Lea (Tenn.) 381.

Payment in order of priority.— Where a judicial sale converts land into money for the payment of debts the money belongs to the creditors in the order of their liens. Campbell's Estate, 22 Pa. Super. Ct. 430. Under N. Y. Code, § 2793, directing the order of distribution of the proceeds of a sale of land for the payment of debts, debts established and recited in the first decree have a priority over those established by supplementary decree, when there is not enough to pay all. Kenyon *v.* Talbot, 2 Dem. Surr. (N. Y.) 548.

Proceeds of realty fraudulently conveyed by decedent.— The proceeds of a sale by an administrator of real estate conveyed by his intestate with intent to defraud creditors are applicable to the payment of all creditors alike, although such conveyance was void only as against persons who were creditors at the time it was made. Norton *v.* Norton, 5 Cush. (Mass.) 524.

Proceeds of land subject to a resulting trust.— Where land of a decedent which was subject to a resulting trust in favor of another for a part of the money provided by the latter for its purchase was sold under order of court to a *bona fide* purchaser ignorant of the trust, the purchaser took a good title to the property as against the *cestui que trust*, but such *cestui que trust* as against decedent's creditors was entitled to such a proportionate part of the proceeds as the amount contributed by him bore to the whole purchase-price paid by the decedent. Rupp's Appeal, 100 Pa. St. 531.

Surplus after paying debts for which sale made.— Where land is sold to pay certain debts of a decedent and there is a surplus realized, it may be impounded and applied

Special provision for the disposition of such proceeds is, however, sometimes made by statute.[96] Where land is not sold for the payment of debts but for partition the proceeds thereof are not assets for the payment of debts,[97] without an order making them applicable for that purpose.[98]

2. SATISFACTION OF MORTGAGES AND OTHER LIENS. Where mortgages or other liens on property of a decedent are divested by a sale thereof, the proceeds of such sale should be first applied to the satisfaction of such liens in the order of their priority and the residue to the payment of the other debts of the decedent in due course of administration,[99] but when such liens are not divested by a sale

to the payment of the claim of a judgment creditor who was not a party to the proceedings for the sale of the land. Rhinehart *v.* Murray, 83 Tenn. 469.

Limitation as to time of payment of debts out of proceeds.— In Pennsylvania, for a certain statutory period after a decedent's death, his debts are a lien on his realty, and when such lien is discharged by an order of court for a sale for the payment of debts the rights of creditors are transferred from the land to the proceeds of the sale. McKeown's Estate, 8 Wkly. Notes Cas. 343. See also Kittera's Estate, 17 Pa. St. 416. The debt must be one which is susceptible of enforcement; not a debt barred by the statute of limitations, or it cannot be paid out of the proceeds. Chapman's Appeal, 122 Pa. St. 331, 15 Atl. 460 [*reversing* 3 Pa. Co. Ct. 534]; *In re* Yorks, 110 Pa. St. 69, 1 Atl. 162, 2 Atl. 65 [*overruling* McClintic's Appeal, 1 Pa. Cas. 251, 1 Atl. 573]. If the lien of a debt has expired at the time of the sale it cannot participate in the proceeds. Emerick's Estate, 172 Pa. St. 191, 33 Atl. 550; *In re* Cake, 157 Pa. St. 457, 27 Atl. 773; Williamson's Estate, (Sup. 1889) 17 Atl. 8. See also *In re* Shoop, 1 Leg. Gaz. 71. When a debt of a decedent is a lien on his real estate and not barred by the statute of limitations at the confirmation of the sale thereof by order of the court for the payment of debts, the lien of the debt is turned upon the fund, and the creditor's right to participate is not affected by a subsequent delay in distribution. Arndt's Appeal, 117 Pa. St. 120, 11 Atl. 633 [*distinguishing* Crosson's Estate, 6 Pa. Co. Ct. 14, 22 Wkly. Notes Cas. 226]; Sheridan's Estate, 10 Kulp 225.

Where land is sold to pay a fraudulent claim the proceeds belong to the heirs. Whitlock *v.* McClusky, 91 Ill. 582.

96. See Houston *v.* Houston, 2 Marv. (Del.) 270, 43 Atl. 95; Shute *v.* Shute, 5 Dem. Surr. (N. Y.) 1; Ambrose *v.* Byrne, 61 Ohio St. 146, 65 N. E. 408; Stone *v.* Strong, 42 Ohio St. 53; Jones *v.* Allen, 8 Ohio S. & C. Pl. Dec. 338, 6 Ohio N. P. 518.

In New York only debts owing by the decedent at the time of his death, his necessary funeral expenses, and the actual expenses of the proceeding for the sale can be paid from such proceeds. *In re* Summers, 37 Misc. 575, 75 N. Y. Suppl. 1050; Matter of Woodard, 13 N. Y. St. 161; Wilcox's Estate, 11 N. Y. Civ. Proc. 115; Cook *v.* Woodard, 5 Dem. Surr. 97; Long *v.* Olmsted, 3 Dem. Surr. 581; Smith *v.* Meakin, 2 Dem. Surr. 129. See also Matter of Renwick, 2 Bradf. Surr. 80.

97. Hunter *v.* Law, 68 Ala. 365; Johnston *v.* Union Bank, 37 Miss. 526. See also Kerr's Estate, 4 Phila. (Pa.) 182. *Compare* Dees *v.* Tildon, 2 La. Ann. 412. But see Dickerson *v.* Wilcoxon, 99 N. C. 535, 6 S. E. 774, holding that where land has been sold at the instance of devisees and the proceeds turned over to the personal representative they may be subjected to the payment of a judgment debt of the decedent without a special proceeding brought for that purpose. As to the disposition of proceeds of a partition sale see, generally, PARTITION.

98. Johnston *v.* Union Bank, 37 Miss. 526. See also Langham *v.* Darby, 13 Mo. 553.

99. *California.*— *In re* Murray, 18 Cal. 686.

Georgia.— Stallings *v.* Ivey, 49 Ga. 274 (vendor's lien); Carhart *v.* Vann, 46 Ga. 389; Sims *v.* Ferrill, 45 Ga. 585. See also McClure *v.* Williams, 58 Ga. 494; Atkinson *v.* Keith, 50 Ga. 577.

Illinois.— Bayless *v.* People, 56 Ill. App. 55.

Indiana.— Ryker *v.* Vawter, 117 Ind. 425, 20 N. E. 294; Perry *v.* Borton, 25 Ind. 274.

Louisiana.— Rhea's Estate, 33 La. Ann. 369; Robinson's Succession, 23 La. Ann. 17; Tureaud *v.* Gex, 21 La. Ann. 253; Ynogoso's Succession, 13 La. Ann. 559; Dejean's Succession, 8 La. Ann. 505; Zacharie *v.* Prieur, 9 La. 197.

Massachusetts.— See Church *v.* Savage, 7 Cush. 440.

Missouri.— Peters *v.* Holliday, 40 Mo. 544.

Ohio.— Defrees *v.* Greenham, 11 Ohio St. 486; Miami Exporting Co. *v.* Holly, Wright 226.

Pennsylvania.— See *In re* Ross, 9 Pa. St. 17; Girard *v.* McDermott, 5 Serg. & R. 128; Marsh *v.* Haldeman, 2 Pa. L. J. Rep. 234, 3 Pa. L. J. 512. See also Matter of Hocker, 2 Pearson 493, 14 Phila. 659.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1608.

The holder of an unrecorded mortgage is entitled to payment in preference to general creditors. Kirkpatrick *v.* Caldwell, 32 Ind. 299.

The costs of foreclosing a mortgage upon the realty of a decedent are payable out of the proceeds of such land when it is sold by the personal representative. Connecticut Mut. L. Ins. Co. *v.* Hobbs, 14 Ind. App. 681, 43 N. E. 452.

A judgment which has lost its lien when the land is sold cannot participate in the

they are not to be satisfied out of the proceeds.[1] Taxes which are a lien on land of a decedent should be paid out of the proceeds of a sale thereof.[2]

3. Payment of Costs and Expenses of Sale. The costs and expenses of a sale of the realty of a decedent are generally to be paid out of the proceeds of the sale[3] before any other charge or debt of any kind whatever is paid.[4]

4. Disposition of Surplus. The surplus of the proceeds of a sale of real estate of a decedent, remaining after the payment of his debts, is to be considered and disposed of as real estate.[5]

distribution of the fund raised by the sale. Williamson's Appeal, (Pa. 1889) 17 Atl. 8. See also Matter of McGee, 65 N. Y. App. Div. 460, 73 N. Y. Suppl. 64.

Proof of satisfaction of judgment.— An auditor appointed to distribute the proceeds of a sale of a decedent's property may receive testimony to show that a judgment against the decedent was paid or satisfied before such sale. McCormick *v.* McGonigar, 4 Pa. Super. Ct. 408.

Distribution not subject to collateral attack.— Where the proceeds of an orphans' court sale of mortgaged premises were applied to the payment of the mortgage, the distribution cannot be collaterally questioned, and the money paid cannot be recovered back. Jackson *v.* Dickerson, 5 Phila. (Pa.) 356.

In Kentucky, under the act of 1839, subjecting the land of a decedent as well as his personalty to the payment of his debts, the liens which are to be discharged before the debts of general creditors are to be paid are such liens as existed at the death of the intestate and not such as were afterward acquired by judgment or execution. Slaughter *v.* Slaughter, 8 B. Mon. 482.

1. Cools *v.* Higgins, 23 N. J. Eq. 308; Tubb's Estate, 161 Pa. St. 252, 28 Atl. 1109; Penn Square Bldg. Assoc. Appeal, 81* Pa. St. 330. See also Bockover *v.* Ayres, 22 N. J. Eq. 13; Steger's Estate, 11 Phila. (Pa.) 158; Swift *v.* Kennison, 39 Vt. 473.

2. Trowbridge *v.* Sypher, 55 Iowa 352, 7 N. W. 567; Brown *v.* Evans, 15 Kan. 88, by statute. See also Nesbit *v.* Wood, 56 S. W. 714, 22 Ky. L. Rep. 127. *Compare* Fessenden's Appeal, 77 Me. 98, holding that taxes assessed upon real estate prior to its sale by an executor of an insolvent estate for the production of assets for the payment of debts are chargeable to the rents of the land accruing after the testator's decease, rather than to the proceeds of sale received by the executor.

3. *Connecticut.*— Canfield *v.* Bostwick, 21 Conn. 550.

Kentucky.— See Mason County *v.* Lee, 1 T. B. Mon. 247.

Louisiana.— Haile's Succession, 52 La. Ann. 1529, 27 So. 967. See also Ruthenberg *v.* Helberg, 43 La. 410, 9 So. 99.

New York.— Cook *v.* Woodard, 5 Dem. Surr. 97. See also Wilcox *v.* Quinby, 20 N. Y. Suppl. 5; Matter of Mathewson, 3 N. Y. Suppl. 660, 1 Connoly Surr. 157, 9 N. Y. Suppl. 290, 1 Connoly Surr. 254.

Pennsylvania.— Kitchenman's Estate, 15 Phila. 519.

South Carolina.— Glenn *v.* Gerald, 64 S. C. 236, 42 S. E. 155.

Texas.— See Stell *v.* Lewis, 2 Tex. Unrep. Cas. 533.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1607.

Counsel fees paid out of proceeds.— Dundas' Appeal, 7 Pa. Cas. 629, 12 Atl. 485; Glenn *v.* Gerald, 64 S. C. 236, 42 S. E. 155. But *compare* Miller *v.* Swan, 10 Ky. L. Rep. 1015; Markey's Succession, 22 La. Ann. 265.

Unnecessary expenses not allowed out of proceeds.— Rudolph *v.* Underwood, 88 Ga. 664, 16 S. E. 55. See also Matter of McGee, 65 N. Y. App. Div. 460, 73 N. Y. Suppl. 64.

A percentage on the proceeds of sale may be allowed to the personal representative as compensation for his services as to the sale. Chatfield *v.* Swing, 6 Ohio Dec. (Reprint) 666, 7 Am. L. Rec. 326.

4. Negueloua's Succession, 52 La. Ann. 1495, 27 So. 962; Markey's Succession, 22 La. Ann. 265; Stone *v.* Strong, 42 Ohio St. 53; Greer *v.* Riley, 92 Tex. 699, 53 S. W. 578.

5. *Alabama.*— Williamson *v.* Mason, 23 Ala. 488.

Indiana.— Ball *v.* Green, 90 Ind. 75, holding that where an heir mortgages the realty inherited by him and it is afterward sold by the administrator to pay debts of his decedent, the mortgagee is entitled to any surplus.

Maryland.— See Dent *v.* Maddox, 4 Md. 522, right of widow to dower in surplus.

Missouri.— See Warfield *v.* Hume, 91 Mo. App. 541.

New Jersey.— Oberly *v.* Lerch, 18 N. J. Eq. 346.

New York.— Sears *v.* Mack, 2 Bradf. Surr. 394. See also Davis *v.* Davis, 4 Redf. Surr. 355.

North Carolina.— Denton *v.* Tyson, 118 N. C. 542, 24 S. E. 116, holding that such surplus cannot be applied to the payment of a judgment against the personal representative in favor of the widow for the balance of her year's allowance. See also Sloan *v.* Mendenhall, 60 N. C. 553; Latta *v.* Russ, 53 N. C. 111.

Ohio.— Griswold *v.* Frink, 22 Ohio St. 79, holding that the widow of the decedent is not entitled to any part of the surplus in her capacity as one of the distributees of his personal estate.

5. By Whom Proceeds Received and Distributed. It is sometimes provided by statute that the proceeds of a sale shall be received by the personal representative and applied like other assets,[6] or again it is provided that they shall be paid into court.[7] Where a trustee appointed to sell real estate on a creditor's bill for a settlement of a decedent's estate died after the sale and before the purchase-money had been paid, it was held that it was proper to direct the purchaser to pay the purchase-money to the creditors entitled to it under the bill.[8] Such proceeds are usually distributed by the court or under its order.[9]

Pennsylvania.— Wale's Estate, 11 Phila. 156. See also Grenawalt's Appeal, 37 Pa. St. 95; Pennell's Appeal, 20 Pa. St. 515.

Tennessee.— Read *v.* Bostick, 6 Humphr. 321.

Wisconsin.— See Tyron *v.* Farnsworth, 30 Wis. 577.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1611; and Conversion, 9 Cyc. 844.

Proper procedure to recover surplus from representative.— While money acquired by the personal representative from the sale of lands, for the payment of debts, and remaining in his hands for distribution after paying the debts, will be treated as having the qualities of land for certain purposes of administration and succession, for all other purposes it is only money in the hands of the administrator; and any process or procedure to get it out of his hands must necessarily be that which is adapted to the recovery of money as money. Nelson *v.* Murfee, 69 Ala. 598.

Surplus of land fraudulently conveyed by decedent.— If an administrator sells land by license of court to pay debts of his intestate, after recovering it from one to whom the intestate conveyed it in fraud of his creditors but for a valuable consideration, a surplus of the proceeds, remaining after paying the debts, belongs to the fraudulent grantee as against the heirs of the intestate. Allen *v.* Ashley School Fund, 102 Mass. 262.

Payment of lien against portion of heir.— If, at the time of the sale, there are liens by mortgage, judgment, or decree, against the portions of any of the heirs, it is equitable that on a claim filed such liens should be admitted as a valid charge against the shares of the heirs in the surplus. Sears *v.* Mack, 2 Bradf. Surr. (N. Y.) 394.

In New York Code Civ. Proc. §§ 2798, 2799, especially provide for the disposition and distribution of the surplus of proceeds of realty of a decedent sold to satisfy a mortgage or other liens thereupon, which accrued during the decedent's lifetime. See Powell *v.* Harrison, 88 N. Y. App. Div. 228, 85 N. Y. Suppl. 452; Washington L. Ins. Co. *v.* Clark, 79 N. Y. App. Div. 160, 79 N. Y. Suppl. 610; Matter of Callaghan, 69 Hun 161, 23 N. Y. Suppl. 378; Matter of Stilwell, 68 Hun 406, 23 N. Y. Suppl. 65; Di Lorenzo *v.* Dragone, 25 Misc. 26, 54 N. Y. Suppl. 420, 28 N. Y. Civ. Proc. 102; Matter of Coutant, 24 Misc. 350, 53 N. Y. Suppl. 713; Matter of Solomon, 4 Redf. Surr. 509.

6. See Cruce *v.* Cruce, 21 Ill. 46; Thompson *v.* Cox, 53 N. C. 311.

Payment to agent of representative.— In Louisiana, where a succession is not in debt, the tutor of the minor heirs may administer and may receive the proceeds of a probate sale of personalty of the succession or authorize any other person to receive them for him; and a payment made by a purchaser to a person so authorized will release him. Martin *v.* Dupre, 1 La. Ann. 239.

7. See Matter of McGee, 65 N. Y. App. Div. 460, 73 N. Y. Suppl. 64; Matter of Bradley, 25 Misc. (N. Y.) 261, 54 N. Y. Suppl. 555.

An auctioneer is not the person to retain and pay out succession funds under order of court. He is to return his sale and its proceeds to the court, and the representative of the succession is to make a distribution in court according to law and the rights of all creditors settled contradictorily. Minor *v.* Barker, 26 La. Ann. 160. The creditor of a succession cannot demand that the auctioneer, who has sold property of the succession, shall pay over the proceeds of the property. Only the one charged with the administration of the succession is empowered to make such demand. Dowler's Succession, 29 La. Ann. 437.

8. Coombs *v.* Jordan, 3 Bland (Md.) 284, 22 Am. Dec. 236.

9. See Dent *v.* Maddox, 4 Md. 522; Matter of Lesourd, 27 Misc. (N. Y.) 414, 59 N. Y. Suppl. 371; Kennedy's Estate, 1 Lack. Leg. N. (Pa.) 135.

Rights of claimants determined by court.— In the distribution of a fund produced by sale of a decedent's property for the payment of debts, the orphans' court has jurisdiction to determine the rights of all claimants thereto. Grove's Appeal, 103 Pa. St. 562.

Appealability of order of court.— A decree of the court of common pleas which does not distribute the whole fund raised upon the sheriff's or coroner's sale of real estate is not final; and in case a creditor is not satisfied with the partial appropriation of the fund, he must wait until a decree is made distributing the entire fund, when he may appeal, and have redress for any error committed in such partial appropriation. Stultzfoos' Appeal, 3 Penr. & W. (Pa.) 265.

Proceeds of a sale under order of court in aid of a will must be distributed under the order of the court. Brandon *v.* Mason, 1 Lea (Tenn.) 615. See also Beeks *v.* Rye, 77 Miss. 358, 27 So. 635.

In North Carolina the jurisdiction to direct the application of the proceeds of a sale of realty of a decedent is exclusively in the clerk of the superior court, and an order made by a judge of such court in term-time

6. Duty of Purchaser or Mortgagee as to Application of Proceeds.[10] Where land of a decedent is sold or mortgaged, under an order of court, the purchaser or mortgagee is under no duty to see to the application of the proceeds, and his rights are not affected by a misapplication thereof.[11]

W. Liability of Representative[12] **— 1. In General.** Any liability of an executor or administrator on account of sales made by him must arise either from receipt of the purchase-money, a failure to execute his duties in the manner required by law, or negligence or misconduct in their performance. There is no liability beyond this, although the representative may have erred in judgment.[13]

2. For Purchase-Money — a. When Collected. The executor or administrator exercising good faith is responsible in general for moneys actually received by him as proceeds of the sale, and for no more.[14] He is not liable for the deficiency

as to such proceeds is extrajudicial. Moore *v.* Ingram, 91 N. C. 376.

10. Sale of realty under testamentary authority see *supra*, VIII, O, 9, d, (IX), (D).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, i.

11. *Iowa.*— Lees *v.* Whetmore, 58 Iowa 170, 12 N. W. 238.

Maryland.— Coombs *v.* Jordan, 3 Bland 284, 28 Am. Dec. 236.

Missouri.— Howell *v.* Jump, 140 Mo. 441, 41 S. W. 976.

Ohio.— Defrees *v.* Greenham, 11 Ohio St. 486. See also Muskingum Bank *v.* Carpenter, 7 Ohio 21, 28 Am. Dec. 616.

Pennsylvania.— Dixcy *v.* Laning, 49 Pa. St. 143.

South Carolina.— Spencer *v.* Godfrey, Bailey Eq. 468.

Texas.— See Blanton *v.* Mayes, 72 Tex. 417, 10 S. W. 452.

Washington.— See Wallace *v.* Grant, 27 Wash. 130, 67 Pac. 578, holding that while it is true that a mortgagee of property of a decedent under order of court is under no duty to see that the money is properly expended by the administrator, if he has seen to it that the loan has been made under the provisions of law, it is incumbent upon him, in order to ask that the estate be estopped from pleading the illegality of the mortgage, to show that the estate was actually the recipient of the money by the administrator.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1613; and, generally, Judicial Sales.

12. Sale of realty under testamentary authority see *supra*, VIII, O, 9, d, (XIV).

Sale of personalty under testamentary authority or common-law power see *supra*, VIII, P, 2, n.

Liability of representative on warranty see *supra*, XII, T, 3, b, (III).

13. Gale *v.* O'Connor, 43 La. Ann. 717, 9 So. 557 (holding that a public administrator cannot be proceeded against as a wrong-doer because of his making a sale brought about by a conspiracy in which he did not participate); *In re* Conser, 40 Oreg. 138, 66 Pac. 607 (holding that an executor acting in good faith is not responsible for selling a note and mortgage at less than its appraised value, the testimony as to its actual value being conflicting); *In re* Worcester, 60 Vt. 420, 15 Atl. 336.

14. Herron's Succession, 32 La. Ann. 835 (holding the administrator liable only in Confederate money, when he had received such money at a time when it was the only currency of the state); Coussy *v.* Vivant, 12 La. Ann. 44 (holding that where an agent of the executrix had received the purchase-money and had been appointed to succeed her upon her death, the presumption was the money was still in his possession, and her estate was not liable therefor); *In re* Vandervoort, 1 Redf. Surr. (N. Y.) 270 (holding that where by order of court the proceeds had been paid to the heirs the executor was not liable); Dray *v.* Bloch, 27 Oreg. 549, 41 Pac. 660 (holding that an administrator *de bonis non* was liable for only what came into his hands); Mason *v.* Rodgers, 83 Tex. 389, 18 S. W. 811 (holding the administrator not chargeable with proceeds of a sale on credit to a claimant in satisfaction of his claim).

The administrator is bound by his report showing a sale for cash and cannot excuse himself by proving a sale on credit. Davis' Appeal, 14 Pa. St. 371.

Presumption of receipt of payment.—After twelve years it will be conclusively presumed that a trustee selling land received payment and he will be accountable therefor. Maddox *v.* Dent, 4 Md. Ch. 543.

Receipt by co-executor.— Where one of two executors obtained the order and sold, he was held liable for the proceeds, although his co-executor received part. Johnson *v.* Johnson, 2 Hill Eq. (S. C.) 277, 29 Am. Dec. 72.

The statute of limitations begins to run against the heirs only from the time the administrator actually receives the money. Boswell *v.* Underwood, 84 Ga. 79, 10 S. E. 595.

Sale of encumbered land.— Where land was sold subject to a mortgage, but the amount of the mortgage could not be ascertained, and bids were taken without considering the mortgage, with an agreement that the amount due thereon should be deducted from the price, and this was done, the administrator was not chargeable with the amount allowed to the purchaser on account of the mortgage; but he was chargeable with accrued interest and state taxes which he deducted from the bid (Crosson's Estate, 6 Pa. Co. Ct.

or failure of securities taken by him if they were taken in good faith and without negligence.[15] He is liable in his representative capacity only for what he receives in that capacity.[16] He is liable for an improper disbursement of the proceeds.[17]

b. For Not Collecting. The personal representative making the sale is liable for any loss resulting from a failure to realize the purchase-price, if he has disregarded the requirements of law or of the order of sale, as by extending credit without authority,[18] or, where authorized to sell on credit, if he has omitted to take security as required by law or the order of sale.[19] Independent of express directions, it is negligence charging the representative for any resulting loss if he extends credit without requiring security by mortgage or by some means other than the personal obligation of the purchaser.[20] The representative may also render himself liable by negligence in not proceeding to collect the purchase-money.[21] Persons interested in the land or proceeds may be estopped from

14, 22 Wkly. Notes Cas. (Pa.) 226 [*affirmed* in 125 Pa. St. 380, 17 Atl. 423].

Until there has been an accounting in the probate court the right of action for the proceeds is in the administrator *de bonis non* and not in the heirs. Neagle *v.* Hall, 115 N. C. 415, 20 S. E. 516.

An action by heirs for the proceeds is personal and not in the nature of a revendication. Bennett *v.* Alexander, 15 La. Ann. 469.

15. Gordon *v.* Gibbs, 3 Sm. & M. (Miss.) 473; Davis *v.* Yerby, Sm. & M. Ch. (Miss.) 508; Shields *v.* Jones, 68 N. C. 488; Davis *v.* Marcum, 57 N. C. 189.

Loss through failure of bank.— A commissioner to sell land who deposited the purchase-money in a solvent bank was held not liable therefor when the bank became insolvent at the close of the Civil war. Thomson *v.* Brooke, 76 Va. 160.

16. Abby *v.* Fuller, 8 Metc. (Mass.) 36 (holding that where the land was sold with notice that the proceeds would be first applied to discharge the mortgage, and this was done, only the value of the equity came into the administrator's hands as assets, and he was not answerable to the estate for the amount of the mortgage which he paid); Diehl's Appeal, 33 Pa. St. 406 (holding that the administrator is chargeable only with the proceeds of the equitable interest belonging to the estate). But see *In re* Moyer, 1 Pearson (Pa.) 407, where the administrator was charged with the whole purchase-price, where by mistake the sale had been made discharged of encumbrances, in violation of the order, and the administrator had paid the mortgage out of the purchase-money.

The proceeds of a void sale do not become assets with which the representative is charged in his representative capacity. Pettit *v.* Pettit, 32 Ala. 288; Brandon *v.* Brown, 106 Ill. 519, holding that an executor need not account for proceeds of a sale where the legatees recovered the land in ejectment and the executor returned the money to the purchaser. But the administrator is chargeable with the rents and profits as long as the occupant retains the land. Anderson *v.* McGowan, 42 Ala. 280.

17. Clark's Appeal, 93 Pa. St. 369 (holding the administrator liable for attorney's fees chargeable upon the fund, where he disbursed the fund without waiting for the approval of his account); Cramp's Appeal, 81 Pa. St. 90 [*reversing* 8 Phila. 204] (holding an administrator liable for a lien, to meet which he should have withheld sufficient funds).

An accounting may be compelled under N. Y. Code Civ. Proc. § 2726, where the administrator does not pay the proceeds into court, as required by Code Civ. Proc. § 2786. Matter of Bradley, 25 Misc. 261, 54 N. Y. Suppl. 555.

18. Kelley *v.* Helmkamp, 40 Ill. App. 35; Richards *v.* Adamson, 43 Iowa 248; *In re* Dillebaugh, 4 Watts (Pa.) 1835.

Administrator chargeable with depreciation of currency received without authority.— Brewer *v.* Vanarsdale, 6 Dana (Ky.) 204; Williams *v.* Campbell, 46 Miss. 57.

19. James *v.* Faulk, 54 Ala. 184; Payne *v.* Pippey, 49 Ala. 599; Betts *v.* Blackwell, 2 Stew. & P. (Ala.) 373; Roberts *v.* Adams, 2 S. C. 337; Lamb *v.* Lamb, Speers Eq. (S. C.) 289, 40 Am. Dec. 618; Massey *v.* Cureton, Cheves Eq. (S. C.) 181; Peay *v.* Fleming, 2 Hill Eq. (S. C.) 97; Stukes *v.* Collins, 4 Desauss. (S. C.) 207.

The representative cannot discharge himself by showing that his disregard was disclosed by his report of sale, and that the sale was confirmed (James *v.* Faulk, 54 Ala. 184), or that stay-laws and military orders prevented the collection (Roberts *v.* Adams, 2 S. C. 337).

On an order requiring sureties to be taken, an administrator becomes responsible if he takes sureties who are non-residents of the state. Roberts *v.* Adams, 2 S. C. 337. But see Shields *v.* Jones, 68 N. C. 488.

20. Bowen *v.* Shay, 105 Ill. 132; King *v.* King, 3 Johns. Ch. (N. Y.) 552; Roseman *v.* Pless, 65 N. C. 374.

Waiver of vendor's lien.—The administrator is liable for a resulting loss if he waives the vendor's lien for purchase-money by taking indorsed notes, although the indorsers were in good credit and reputed to be responsible, and although a higher price was obtained than if there had been a sale for cash. *In re* Palmer, 1 Dougl. (Mich.) 422.

21. Beeman's Succession, 47 La. Ann. 1355,

asserting a liability against the administrator where they agreed that the sale should be made in the manner in which the administrator proceeded.[22]

3. For Negligence or Misconduct in Selling. The representative will be chargeable with the loss which results from his failure in any substantial respect to follow the requirements of the law as to the manner of making the sale,[23] and he must also bear the loss occasioned by unreasonably delaying the sale.[24] He may render himself liable by knowingly selling for a grossly inadequate price.[25] An administrator who knowingly and fraudulently obtains an order and sells land when no necessity therefor exists will be charged with the value of the land at the time that suit is brought for an accounting,[26] while if the sale is set aside the administrator will be charged personally with the costs of such proceedings.[27]

17 So. 820; Dent *v.* Maddox, 4 Md. 522 [*affirming* as to this point 4 Md. Ch. 543]; Kennedy's Appeal, 4 Pa. St. 149 (holding that where the purchaser refused to take a life-estate sold, without a conveyance from the remainder-man, whom the administrator agreed to compensate out of the purchase-money, the administrator was liable for the whole purchase-price, as he could have compelled the purchaser to perform his bid); Carpenter *v.* Stowe, 75 Vt. 114, 53 Atl. 360 (holding that where the administrator took a bag represented by the purchaser to contain the full amount, and he counted it one or two days later, found it short, and said nothing to the purchaser, he held liable for the full price).

On a sale free from encumbrances the purchaser refused to comply with his bid because of encumbrances, some of which were not paid until after the time for completing the sale, and it was held that the administrator was not liable for the purchase-price, as it was his duty merely to resell. Wanzer *v.* Eldridge, 33 N. J. Eq. 511.

Where a master made the sale and there was a loss through the neglect of the master to seek payment the executor is not responsible. Thompson *v.* Wagner, 3 Desauss. (S. C.) 94.

Slight delay in suing.— An administrator does not render himself liable by allowing one term of court to pass before suing. Gwynn *v.* Dorsey, 4 Gill & J. (Md.) 453. See also Davis *v.* Marcum, 57 N. C. 189.

22. Schroeder's Estate, 2 Woodw. (Pa.) 290.

23. Morton *v.* Johnston, 124 Mich. 561, 83 N. W. 369 (holding that one who sells without giving the required notice, at less than the appraised value, will be charged with such value); *In re* Glover, 127 Mo. 153, 29 S. W. 982 (holding that an administrator authorized to sell notes for their face value with accrued interest, who sells them for less, should be charged with the full amount); Schwartz's Estate, 12 Phila. (Pa.) 71 (holding an administrator selling without giving notice of a mortgage liable for the expense of reselling).

A failure to take bond to indemnify against liens subject to which the sale was made renders the representative liable (Sparrow *v.* Kelso, 92 Ind. 514), but not where the purchaser is solvent, because he is liable without a bond and there is no loss (State *v.* Kelso, 94 Ind. 587).

Failure to resell, where the purchaser fails to comply with the terms, renders the representative liable. Fontenet *v.* Debaillon, 8 La. Ann. 509.

Sale irrespective of appraisal.— The administrator is liable for the difference between the appraised value of movables and the sum for which they were sold, if the sale was improperly made irrespective of the appraisal (Richmond's Succession, 35 La. Ann. 858), but not where the sale was for their full value (Lee's Succession, 4 La. Ann. 578).

24. Goodbear *v.* Gary, 1 La. Ann. 240; *In re* Gorman, 50 Mo. 179; Bland *v.* Hartsoe, 65 N. C. 204.

Delay in good faith.— The administrators are not chargeable with loss occasioned by refusing an offer and selling later for a less price, where they acted on competent advice and the property depreciated in consequence of a general financial depression which intervened. Sunday's Appeal, 131 Pa. St. 584, 18 Atl. 931.

Injunction as excuse for delaying sale.— A personal representative is not guilty of laches for delay in selling land, where it appears that the delay was caused by injunction proceedings and by frequent disapprovals of attempted sales by the probate court. Rogers *v.* Johnson, 125 Mo. 202, 28 S. W. 635.

25. Matter of Johnston, 74 Hun (N. Y.) 618, 26 N. Y. Suppl. 966, holding an administrator liable for the value of a half interest which he sold for one hundred and ten dollars, having bought the other half for himself at about the same time for fifteen hundred dollars. See also Succession of Hautau, 32 La. Ann. 54.

26. Bell *v.* Bell, 20 Ga. 250; Hart *v.* Ten Eyck, 2 Johns. Ch. (N. Y.) 62. See also Farys *v.* Farys, Harp. Eq. (S. C.) 261.

An executor who concurs with his co-executor in obtaining a sale without necessity and in obtaining its confirmation is liable for a loss occasioned by the failure of his co-executor to record a mortgage for the purchase-money. Bailey *v.* Boyce, 5 Rich. Eq. (S. C.) 187.

Administrator not charged with value of property unless gross negligence or fraud shown.— Richardson *v.* Sage, 57 Cal. 212.

27. Loomis' Appeal, 29 Pa. St. 237; Hurt *v.* Horton, 12 Tex. 285.

4. For Buying at His Own Sale. An executor or administrator who purchases property of the decedent at a sale under order of the court is, unless the heirs or devisees recover the land itself,[28] as they are entitled to do in case they elect to have the sale set aside,[29] chargeable with the full value of the land[30] at the time of the sale,[31] or perhaps at the time of the suit.[32] If he has resold he is chargeable with all the profits realized on the resale.[33] It must, however, be shown in order to so charge the representative that he was interested at the time of the sale.[34] As to such interest the report of the representative showing himself to be the purchaser is conclusive against him,[35] but the record is not conclusive in his favor.[36]

28. Miller *v.* Binion, 33 Ga. 33; Chapman *v.* Sims, 53 Miss. 154.

29. See *supra*, XII, M, 4, a.

30. Lord *v.* Blount, 25 N. C. 516; Britton *v.* Browne, 4 N. C. 332; Wallington's Estate, 1 Ashm. (Pa.) 307; Gee *v.* Hicks, Rich. Eq. Cas. (S. C.) 5. But see Armstrong's Appeal, 68 Pa. St. 409, where the purchase was by the administrator's wife and there was no actual fraud.

How value ascertained.— The value must be ascertained, not by conjecture of witnesses, but by reselling the land with a proper upset price. Bailey *v.* Robinson, 1 Gratt. (Va.) 4, 42 Am. Dec. 540.

A doubt as to value should be resolved in favor of the heirs. Huston *v.* Cassidy, 14 N. J. Eq. 320.

An administrator purchasing jointly with another is responsible for the entire price, and a distributee may sue for his share. Ward *v.* Oates, 42 Ala. 225.

Where an agent made the sale and became interested in the purchase, it was held that the administratrix would be chargeable with the full value of the land unless she called the agent to account. Currier *v.* Green, 2 N. H. 225.

Where two administrators bought, and one received the money as guardian for minor heirs, the fact that he wasted it was no defense in an action against the other for the value. Chandler *v.* Clarke, 90 Ga. 550, 16 S. E. 645.

Interest.— Where wild lands of the testator were sold by the executor and bought in by himself, and the heirs elected to consider him as the purchaser, but no profit had accrued to him from the lands, and frequent taxes had been paid by him, and the lands were unsalable, and the title to some of the parcels doubtful, it was held that he should be charged with only simple interest. Jennison *v.* Hapgood, 10 Pick. (Mass.) 77.

31. Huston *v.* Cassedy, 13 N. J. Eq. 228; Glass *v.* Greathouse, 20 Ohio 503.

32. Shine *v.* Redwine, 30 Ga. 780.

33. *Alabama.*— Pearson *v.* Darrington, 32 Ala. 227.

Arkansas.— Ambleton *v.* Dyer, 53 Ark. 224, 13 S. W. 926.

Indiana.— Brackenridge *v.* Holland, 2 Blackf. 377, 20 Am. Dec. 123.

Kentucky.— Goodridge *v.* Fitch, 9 B. Mon. 562, purchase by administrator and guardian for heirs.

Massachusetts.— Jennison *v.* Hapgood, 10 Pick. 77.

North Carolina.— Grant *v.* Hughes, 99 N. C. 375, 6 S. E. 572 [*modifying* on rehearing 96 N. C. 177, 2 S. E. 339]; Ford *v.* Blount, 25 N. C. 516.

Pennsylvania.— Hacker's Estate, 7 Pa. Co. Ct. 202, 24 Wkly. Notes Cas. 318; Deal's Estate, 3 Pa. Co. Ct. 383.

Virginia.— See Cross *v.* Cross, 4 Gratt. 257, holding that an administratrix who sets up slaves of the estate to be hired publicly, then hires them herself at a much reduced price, and then hires them out to other persons at an advanced price, will be held to account for the advanced price, or, if that cannot be ascertained, for reasonable hire.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1590.

Resale for more than actual value.— Where an administrator, through the agency of another, became the purchaser of lands of the decedent sold by himself under a license from the court, for the sum of five hundred dollars, and afterward sold the land upon a long credit for one thousand dollars, which was well secured, it was held that he should be charged with the price for which he resold the land, although it had been found that the actual value of the land was seven hundred and fifty dollars. Grant *v.* Hughes, 99 N. C. 375, 6 S. E. 572 [*modifying* on rehearing 96 N. C. 177, 2 S. E. 339].

Uncertainty as to amount of profits.— If owing to the conduct of the executor or administrator who has purchased real property of the decedent at a sale under order of the court, any uncertainty exists as to the amount of the profits made by him on such purchase and a subsequent resale, he will be chargeable with the largest amount which from the circumstances he can be presumed to have realized. Brackenridge *v.* Holland, 2 Blackf. (Ind.) 377, 20 Am. Dec. 123.

Adjustment where several lots purchased.— An administrator cannot be compelled to account for profits on lots resold without allowing him for the remaining lots which were worth less than he paid for them. Hapgood *v.* Jennison, 2 Vt. 294.

34. Baldwin *v.* Dalton, 168 Mo. 20, 67 S. W. 599; Smith *v.* Worthington, 53 Fed. 977, 4 C. C. A. 130.

35. James *v.* James, 55 Ala. 525.

36. Grant *v.* Hughes, 96 N. C. 177, 2 S. E. 339.

XIII. INSOLVENT ESTATES.

A. In General. The executor or administrator of an insolvent estate represents the general creditors and holds the property of the estate in trust for them.[1] It is his duty to represent the estate as insolvent and to invoke the action of the probate court accordingly, that the assets may be administered for the general benefit of creditors,[2] and where the estate is actually insolvent, he cannot take it out of the insolvent course by his mere agreement.[3]

B. What Law Governs. The administration of an insolvent estate is governed by the law of the place where the estate is situated.[4]

C. Insolvency Proceedings — 1. Jurisdiction — a. Probate Court. Ordinarily the administration and settlement of an estate declared insolvent should be carried out and concluded in the probate court.[5] The power of that court in such cases is governed wholly by statute,[6] but is usually sufficiently large to enable it to adjudicate on all matters in reference to the insolvency; and therefore proceedings in the probate court by the administrator will not be enjoined unless it is clear that the facts relied on for the injunction cannot be adjudicated in that court.[7] The probate jurisdiction attaches upon receiving the executor's or administrator's report or representation of insolvency, and thenceforward the executor or administrator is considered the actor and is held to notice of subsequent proceedings.[8]

b. Courts of Equity. A court of equity may have jurisdiction where there are conflicting interests, or some question of special equitable cognizance is involved.[9]

2. Grounds For Declaration of Insolvency. It has been held that a declaration of insolvency should be based on the insufficiency of the personal estate to pay the debts,[10] but it has also been asserted that the insolvency should be estimated upon the probable value of the whole estate both real and personal.[11]

1. Hughes *v.* Menefee, 29 Mo. App. 192.

2. McGehee *v.* Lomax, 49 Ala. 131; Yandell *v.* Pugh, 53 Miss. 295; McMahon *v.* Weart, (N. J. Ch. 1896) 35 Atl. 444.

An administrator de bonis non has the duty of declaring and administering the estate as insolvent upon the failure of the administrator in chief to do so. Lambeth *v.* Garber, 6 Ala. 870; Yandell *v.* Pugh, 63 Miss. 295.

3. Janes' Appeal, 89 Pa. St. 54.

4. Moorehead *v.* Diemer, 2 Baxt. (Tenn.) 153; Gilchrist *v.* Cannon, 1 Coldw. (Tenn.) 581. See *supra*, I, K.

Suit in federal court.— This rule does not deprive a citizen of another state of a right to bring his suit against the administrator in the federal court. Hunt *v.* Danforth, 12 Fed. Cas. No. 6,887, 2 Curt. 592.

5. Shackelford *v.* Bankhead, 72 Ala. 476; Clark *v.* Eubank, 65 Ala. 245; McBroom *v.* McBroom, 19 Ala. 173.

6. Weaver *v.* Weaver, 23 Ala. 789; Steele *v.* Weaver, 20 Ala. 540; Boggs *v.* Mobile Branch Bank, 12 Ala. 494; Martin *v.* Baldwin, 7 Ala. 923; Ives' Appeal, 28 Conn. 416; Bacon *v.* Thorp, 27 Conn. 251; Miller *v.* Pettit, 16 N. J. L. 421; McMahon *v.* Weart, (N. J. Ch. 1896) 35 Atl. 444; Flemming *v.* Talliafer, 4 Heisk. (Tenn.) 352; Smith *v.* Brady, 7 Yerg. (Tenn.) 447.

7. McMahon *v.* Weart, (N. J. Ch. 1896) 35 Atl. 444.

8. Hayes *v.* Collier, 47 Ala. 726; Watts *v.* Gayle, 20 Ala. 817; Crothers *v.* Ross, 17 Ala. 816; Clarke *v.* West, 5 Ala. 117.

Want of actual notice to creditors is not fatal. Hine *v.* Hussey, 45 Ala. 496.

9. Clark *v.* Head, 75 Ala. 373; Shackelford *v.* Bankhead, 72 Ala. 476; Corr *v.* Shackelford, 68 Ala. 241 (homestead controversy involving questions of fraud); Gayle *v.* Singleton, 1 Stew. (Ala.) 566; Jeter *v.* Barnard, 42 Ga. 43; Williams *v.* Starkweather, 22 R. I. 501, 48 Atl. 669.

Where the mortgagee of property belonging to an insolvent estate files his bill to foreclose and the lien on the mortgage has been lost by lapse of time, chancery will take jurisdiction to call in all the creditors of the estate and make distribution among them. Gayle *v.* Singleton, 1 Stew. (Ala.) 566.

Where the creditors are numerous a court of equity may take jurisdiction. Thomson *v.* Palmer, 3 Rich. Eq. (S. C.) 139, bill to enjoin creditors from suing at law.

10. See also Byrne *v.* McDowell, 23 Ala. 404; Woods *v.* McCann, 3 Ala. 61; Flemming *v.* Talliafer, 4 Heisk. (Tenn.) 352; Blount County Bank *v.* Smith, (Tenn. Ch. App. 1898) 48 S. W. 296.

11. Saunders *v.* Planters' Bank, 2 Sm. & M. (Miss.) 287, also holding that an order to sell the realty need not be obtained before the estate is declared insolvent.

The assets need not have been reduced to money; it is sufficient that the representa-

The executor or administrator should not represent the estate insolvent unless he has good reason to believe it so; nor ought the probate judge to allow such a representation and proceed with the estate as insolvent unless he also on examination has good reason to believe it to be so.[12] Where an estate solvent in fact is declared and administered as insolvent, the proceedings, if not fraudulent, are nevertheless valid and binding, and there is no remedy against the executor or administrator personally.[13]

3. Representation of Insolvency — a. In General. The representation of insolvency should show to the court that the estate appears to the executor or administrator to be insolvent,[14] should be in the name of all the executors or administrators, where there are more than one,[15] although it may be sufficient when signed and verified by one alone,[16] and should be filed in the office or court prescribed by statute.[17] It is in general immaterial whether the representation be made by the original executor or administrator or by his successor in trust.[18]

b. Time of Making. The estate should be represented insolvent within the time prescribed by statute, if any there be.[19] In the absence of statute there is no particular limitation of time;[20] but the representative is on the one hand entitled to a reasonable time in which to determine whether or not the estate is insolvent,[21] while on the other hand he must make his representation of insolvency within a reasonable time.[22]

4. Hearing. In determining insolvency all valid claims presented against the estate should be considered,[23] and also the assets or resources of the estate,[24] and the representative's prudence or conduct in administering.[25] The court has power

tive believes the estate insolvent from a fair estimate. Neibert *v.* Withers, Sm. & M. Ch. (Miss.) 599.

12. Walker *v.* Hill, 17 Mass. 380.

Who may oppose representation.— Next of kin entitled to the estate, if claims against it are barred, may question the administrator's application to have the estate declared insolvent. McMahon *v.* Weart, (N. J. Ch. 1896) 35 Atl. 444.

13. Ticknor *v.* Harris, 14 N. H. 272, 40 Am. Dec. 186; Probate Judge *v.* Brooks, 5 N. H. 82.

14. Shackleford *v.* King, 24 Ala. 158; Barker *v.* Wendell, 17 N. H. 159, holding that a representation that "the estate being greatly involved makes it necessary to represent the same insolvent" and begging "leave so to represent the same" is representing it insolvent.

If the decedent was a member of a partnership the extent of his interest therein and the liabilities of the firm should be shown. Raines *v.* Raines, 30 Ala. 425.

Filing a full statement of such claims "as come to his knowledge" is sometimes required of the representative. McDowell *v.* Jones, 58 Ala. 25.

15. Steele *v.* Weaver, 20 Ala. 540; Hutchinson *v.* Newbold, 45 N. J. Eq. 698, 17 Atl. 691.

16. Steele *v.* Weaver, 20 Ala. 540.

17. Holliday *v.* McKinne, 22 Fla. 153 (stating that under the Florida statute a written suggestion of insolvency must be filed in the office of the judge of the county court in which letters testamentary or administration have been granted); Graves *v.* Cook, 12 B. Mon. (Ky.) 122 (holding that it is competent for an administrator to file his petition in the county court, and that he is not required to file in the quarterly court of the presiding justice).

18. Quackenbush *v.* Campbell, Walk. (Mich.) 525.

19. Parker *v.* Whiting, 6 How. (Miss.) 352; Williams *v.* Starkweather, 22 R. I. 501, 38 Atl. 669; McGowan *v.* Peabody, 20 R. I. 582, 40 Atl. 758; Strong *v.* Luther, 20 R. I. 317, 38 Atl. 1054.

20. Quackenbush *v.* Campbell, Walk. (Mich.) 525; Von Arx *v.* Wemple, 43 N. J. L. 154.

Representative may report insolvency immediately after appointment. Hullett *v.* Hood, 109 Ala. 345, 19 So. 419.

21. Barber *v.* Collins, 18 R. I. 760, 30 Atl. 796; Pierce *v.* Allen, 12 R. I. 510.

22. Daniel *v.* Lowe, 7 Heisk. (Tenn.) 361.

23. Saunders *v.* Planters' Bank, 2 Sm. & M. (Miss.) 287. And see *In re* McMahon, [1900] 1 Ch. 173, 69 L. J. Ch. 142, 81 L. T. Rep. N. S. 715, 7 Manson 38.

Costs accruing in the ordinary course of administration are proper to be proved. Nicholas *v.* Sands, 136 Ala. 267, 33 So. 815; Hatchett *v.* Corbow, 59 Ala. 516.

Claims barred by limitations will not be considered. Haby *v.* Fuos, (Tex. Civ. App. 1894) 25 S. W. 1121.

24. Feagan *v.* Kendall, 43 Ala. 628, holding that the amount chargeable to the executor or administrator for his own failure to use proper diligence to collect debts due the estate is an asset in his hands, and must be reckoned as such in considering the question of the solvency or insolvency of the estate.

25. Furlow *v.* Tillman, 21 Ga. 150; Williams *v.* Starkweather, 22 R. I. 501, 38 Atl. 669.

Depreciation due to representative's fault. — Depreciation in the value of the estate,

to adjudicate on all questions raised in reference to the insolvency,[26] but it is not proper to finally adjudicate upon the correctness or validity of claims or payments that may be incidentally involved; nor should the same strictness and fulness of proof as to their validity be required as when they are up for final adjudication on their merits in an appropriate proceeding for that purpose.[27]

5. DECREE. A decree of insolvency merely ascertains, as between the personal representative and the creditors, the existing status of the estate, and is binding both on the administrator or executor and the creditors,[28] and not subject to collateral attack,[29] except for fraud[30] or want of jurisdiction;[31] or unless the attaching creditor's right of action did not accrue until after final settlement.[32] In the absence of statute such decree does not affect the rights of heirs, next of kin, legatees, or devisees, nor is it evidence against them of any fact ascertained by it,[33] nor is its validity affected by their not being made parties to the proceedings.[34]

6. REVIEW. An appeal from a decree of a probate judge decreeing or refusing to decree insolvency should be taken in the time prescribed by statute,[35] and upon objections urged in the lower court.[36] The appellate court may order the cause to be remitted with directions for a further hearing.[37] A mere inaccurate instruction constitutes no ground for reversal, when the inaccuracy is not such as would unduly influence the jury.[38]

7. EFFECT OF REPRESENTATION OR DECLARATION OF INSOLVENCY — a. In General. The effect of filing and advertising a report or representation of insolvency is to preclude the bringing of any suit against the executor or administrator upon claims due from the estate, to preclude any creditor from thereafter acquiring or perfecting a lien, and to require all persons to present their claims in the insolvency proceedings.[39] But until the executor or administrator has taken such steps common-law courts have no notice of the insolvency, and executions against the estate cannot be restrained.[40] The institution of insolvent proceedings does not suspend in favor of creditors the special statute of limitations with

which is due to the representative's fault, should hinder him in procuring an award of insolvency from the court on his representation. Weakley *v.* Gurley, 60 Ala. 399; Bramblet *v.* Webb, 11 Sm. & M. (Miss.) 438.

26. McMahon *v.* Weart, (N. J. Ch. 1896) 35 Atl. 444. And see Allein *v.* Sharp, 7 Gill & J. (Md.) 96.

A suit by agreement between an administrator and creditor to have the estate settled as insolvent should be rejected at the creditor's cost on his failure to prove his claim. McClure *v.* Enoch, 7 Ky. L. Rep. 830.

27. Willis *v.* Rand, 41 Ala. 198; Raines *v.* Raines, 30 Ala. 425; Greenwood *v.* McGilvray, 120 Mass. 516.

28. McMillan *v.* Rushing, 80 Ala. 402; Randle *v.* Carter, 62 Ala. 95; McGehee *v.* Lomax, 49 Ala. 131; Moody *v.* Davis, 67 N. H. 300, 38 Atl. 464.

The omission of creditors to file their claims against an estate duly declared insolvent cannot annul the decree of insolvency. McCuan *v.* Turrentine, 48 Ala. 68.

An administrator cannot object to the regularity of an order declaring an estate insolvent, made upon his own report. McLaughlin *v.* Nelms, 9 Ala. 925.

29. Friedman *v.* Shamblin, 117 Ala. 454, 23 So. 821.

30. Friedman *v.* Shamblin, 117 Ala. 454, 23 So. 821; Byrne *v.* McDow, 23 Ala. 404.

31. Friedman *v.* Shamblin, 117 Ala. 454, 23 So. 821.

A decree rendered upon a compromise between creditors without notice to the executor is absolutely void. Greenlaw *v.* Pettit, 87 Tenn. 467, 11 S. W. 357.

32. Bacon *v.* Thorp, 27 Conn. 251.

33. McMillan *v.* Rushing, 80 Ala. 402 (holding this to have been the rule prior to Ala. Act, Dec. 4, 1878); Randle *v.* Carter, 62 Ala. 95.

34. Randle *v.* Carter, 62 Ala. 95.

35. Banks *v.* McDougald, 29 Ala. 75; Black *v.* Black, 20 Ala. 401.

36. Bristow *v.* McClelland, 122 Ind. 64, 22 N. E. 299.

37. Bucknam *v.* Phelps, 6 Mass. 448.

38. Nicholas *v.* Sands, 136 Ala. 267, 33 So. 815.

39. Spencer *v.* Goodlett, 104 Tenn. 648, 58 S. W. 322; Woods *v.* Woods, 99 Tenn. 50, 41 S. W. 345; Bates *v.* Elrod, 13 Lea (Tenn.) 156; Henderson *v.* McGhee, 6 Heisk. (Tenn.) 55; Wessell *v.* Gross, (Tenn. Ch. App. 1900) 57 S. W. 372; Sellars *v.* Brown, (Tenn. Ch. App. 1897) 46 S. W. 335. And see *infra*, XIII, H, 2, a.

40. Dibble *v.* Woodhull, 24 N. J. L. 618; Bonner *v.* Bonner, 7 Humphr. (Tenn.) 436.

Execution on a judgment against the administrator may be levied on real estate fraudulently conveyed where the administrator, in defending the action against his intestate, neglects to suggest insolvency on the record. Wyman *v.* Fox, 55 Me. 523.

reference to actions against executors or administrators nor relieve them from their obligation to commence proceedings either at law or before commissioners within the time limited,[41] nor does it prolong the representative's lien on the real estate of his decedent for the payment of debts.[42] The effect of a decree adjudging a decedent's estate to be insolvent is to transfer to the probate court the jurisdiction of all claims against the estate, so that the administration may proceed in conformity with the insolvent legislation.[43]

b. On Actions Pending. In general the declaration of insolvency abates or discontinues all suits against the executor or administrator for the collection of claims against the estate, the creditors proceeding next to prove their claims before the judge or commissioners in insolvency.[44] In some jurisdictions, however, a pending suit may proceed to judgment so as to ascertain the amount due,[45] or in order to better preserve the litigant's rights in case the estate does not prove eventually insolvent,[46] or the insolvency proceedings become defeated by the fault of the executor or administrator himself,[47] or the claim in question is disallowed by the commissioners;[48] and the same is true where the action is not one merely against the estate.[49]

c. On Judgments and Executions. If before or at the time of entering judgment the personal representative declares the estate to be insolvent, the judgment can only be allowed as a *pro rata* claim against the estate, and no execution can issue thereon,[50] nor can a suit on the judgment be maintained against the

41. Aiken *v.* Morse, 104 Mass. 277.

42. Aiken *v.* Morse, 104 Mass. 277.

43. McEachin *v.* Reid, 40 Ala. 410; Powe *v.* Sterrett, 16 Ala. 339; Edwards *v.* Gibbs, 11 Ala. 292; Hill *v.* Treat, 67 Me. 501; Brown *v.* Staples, 28 Me. 497, 48 Am. Dec. 504; Moody *v.* Davis, 67 N. H. 300, 38 Atl. 464.

The property of the decedent passes into the custody of the law for administration on the basis of insolvency, notwithstanding prior and premature dispositions of the same, unless the proceeds of such transactions may serve fairly as a substitute (Hill *v.* Treat, 67 Me. 501; Heft's Appeal, 19 Wkly. Notes Cas. (Pa.) 302), and notwithstanding a prior attachment of the property (Belfast Sav. Bank *v.* Lancey, 93 Me. 422, 45 Atl. 523, 74 Am. St. Rep. 361).

A decree of insolvency pending appeal to ascertain to whom a note secured by a mortgage on the insolvent estate should be paid does not suspend the action of the court in granting a decree, or the right of the successful litigant to the sale of the mortgaged premises to pay the debt. Cannon *v.* Kinney, Sm. & M. Ch. (Miss.) 555.

Decree as evidence see Byrne *v.* McDow, 23 Ala. 404.

44. Weaver *v.* Weaver, 20 Ala. 557; Woods *v.* McCann, 3 Ala. 61; Fennell *v.* Patrick, 3 Stew. & P. (Ala.) 244 (unless the suit be to recover the preferred expenses of last illness and funeral); Melone *v.* Gaines, Minor (Ala.) 317; Colbert *v.* Chandler, Minor (Ala.) 254; Clindenin *v.* Allen, 4 N. H. 385; Patterson *v.* Smith, 66 Vt. 633, 30 Atl. 2; Georgia Probate Ct. *v.* Vanduzer, 13 Vt. 135. But see Waller *v.* Nelson, 48 Ala. 531; Ashley *v.* Harrington, 1 D. Chipm. (Vt.) 348.

Plaintiff must discontinue if he wishes to prove claim before commissioners. Continental L. Ins. Co. *v.* Smith, 11 R. I. 433.

45. Greenleaf *v.* Allen, 127 Mass. 248; Greenwood *v.* McGilvray, 120 Mass. 516; Trezevant *v.* McQueen, 12 Sm. & M. (Miss.) 575 (also holding that the creditor is bound nevertheless to take due heed of the commissioners' proceedings so as not to come in too late for their report); Campbell *v.* Hancock, 7 Humphr. (Tenn.) 75; Sellars *v.* Brown, (Tenn. Ch. App. 1897) 46 S. W. 335.

A suit begun before the appointment of commissioners may be prosecuted to judgment. Strong *v.* Luther, 20 R. I. 317, 38 Atl. 1054 (holding that, where the administrator does not procure the appointment of commissioners within the prescribed time, their subsequent appointment by the court does not bar plaintiff's suit already begun); Gardner *v.* Gardner, 17 R. I. 751, 24 Atl. 785.

46. Hunt *v.* Whitney, 4 Mass. 620; Smith *v.* Smith, 18 R. I. 722, 29 Atl. 584, 30 Atl. 602. And see Moore *v.* Eames, 15 Mass. 312.

47. Sturgis *v.* Reed, 2 Me. 109; Hunt *v.* Whitney, 4 Mass. 620.

48. Hunt *v.* Whitney, 4 Mass. 620.

49. Bacon *v.* Bacon, 51 Conn. 19. See also Cunningham *v.* Munroe, 15 Gray (Mass.) 471.

A bill for winding up a partnership of which the deceased was a member, if not an immediate suit for prosecuting a claim against the estate, is not discontinued by a declaration of insolvency. Goldthwait *v.* Day, 149 Mass. 185, 21 N. E. 359; Smith *v.* Smith, 18 R. I. 722, 29 Atl. 584, 30 Atl. 602.

50. *Alabama.*— Gamble *v.* Dunklin, 48 Ala. 425; Burk *v.* Jones, 13 Ala. 167.

Indiana.— Joyce *v.* Hufford, 7 Blackf. 382.

Maine.— Walker *v.* Newton, 85 Me. 458, 27 Atl. 347; Duly *v.* Hogan, 60 Me. 351; Ring *v.* Burton, 5 Me. 45.

Massachusetts.— Greenwood *v.* McGilvray, 120 Mass. 516; Hunt *v.* Whitney, 4 Mass. 620.

personal representative.[51] Even where execution has issued a declaration of insolvency will destroy the lien of the judgment and cause the execution to be set aside.[52]

d. On Prior Payment of Claims.[53] An executor or administrator who without authority, although in good faith, distributes or pays out moneys of the estate voluntarily in the belief that it is solvent must generally bear the consequences of his mistake if it afterward proves insolvent,[54] although in his final accounting he may be allowed so much as would have been received under the insolvency proceedings by the person to whom the payment was made.[55] Neither can he recover back any part of the sums so paid,[56] except by virtue of some statutory provision,[57] or under an agreement to refund.[58] The amount previously paid by the executor or administrator to a creditor toward his *pro rata* dividend upon a debt actually due from the decedent should be allowed upon the final settlement of the accounts, although such creditor neglects to come in and prove his debt and claim a dividend thereon.[59]

D. Appointment and Powers of Commissioners — 1. Appointment. The statutes usually provide, in the case of an insolvent decedent's estate, that upon the petition of the personal representative[60] or creditors,[61] the probate court may appoint suitable and disinterested commissioners or auditors who shall audit and examine the claims of all creditors submitted within a certain period and report for allowance accordingly.[62] Persons having an interest in the proceedings,

New Jersey.— Union Nat. Bank *v.* Poulson, 40 N. J. L. 284; Taylor *v.* Volk, 38 N. J. L. 204; Howell *v.* Potts, 20 N. J. L. 1.

New York.— Willis *v.* Sharp, 124 N. Y. 406, 26 N. E. 974 [*affirming* 12 N. Y. Suppl. 120].

See 22 Cent. Dig. tit. "Executors and Administrators," § 1622.

A judgment against a garnishee after the estate has been declared insolvent is invalid. Seals *v.* Holloway, 77 Ala. 344.

If an administrator suffers judgment to be rendered against him before he represents the estate insolvent, he must pay the full amount of such judgment without regard to the assets of the deceased. Newcome *v.* Goss, 1 Metc. (Mass.) 333.

51. Seals *v.* Holloway, 77 Ala. 344; Shiver *v.* Rousseau, 68 Ala. 564; Sharp *v.* Herrin, 32 Ala. 502; Willis *v.* Sharp, 124 N. Y. 406, 26 N. E. 974 [*affirming* 12 N. Y. Suppl. 120]; Barber *v.* Collins, 18 R. I. 760, 30 Atl. 796.

52. *Alabama.*— Powe *v.* Sterrett, 16 Ala. 339.

Indiana.— Joyce *v.* Hufford, 7 Blackf. 382.

Michigan.— Quackenbush *v.* Campbell, Walk. 525.

Mississippi.— Parker *v.* Whiting, 6 How. 352. But see Bass *v.* Heard, 33 Miss. 131.

New Jersey.— Ryan *v.* Van Arx, 46 N. J. L. 531; Von Arx *v.* Wemple, 45 N. J. L. 87.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1622.

Where judgment has been obtained and execution issued before decedent's death a report of insolvency does not cut off the lien of the judgment creditor. Dye *v.* Bartlett, 7 How. (Miss.) 224.

53. Overpayment of claims after representation of insolvency see XIII, I, 5.

54. Cairn's Estate, 13 Phila. (Pa.) 350.

Insolvency caused by depreciation.— It is not a sufficient defense that the estate has become insolvent since the payment by depreciation in the value. Woodward *v.* Fisher, 11 Sm. & M. (Miss.) 303.

55. Pierce *v.* Allen, 12 R. I. 510.

56. Parker *v.* Daughtry, 111 Ala. 529, 20 So. 362; Shelton *v.* Carpenter, 60 Ala. 201; Brooking *v.* Farmers' Bank, 7 Ky. L. Rep. 492. But see Shaw *v.* Gookin, 7 N. H. 16.

57. Brooking *v.* Farmers' Bank, 7 Ky. L. Rep. 492; Bowking *v.* Farmers' Bank, 5 Ky. L. Rep. 933; Flint *v.* Valpey, 130 Mass. 385; Richards *v.* Nightingale, 9 Allen (Mass.) 149; Heard *v.* Drake, 4 Gray (Mass.) 514; Bascom *v.* Butterfield, 1 Metc. (Mass.) 536; Bliss *v.* Lee, 17 Pick. (Mass.) 83; Walker *v.* Bradley, 3 Pick. (Mass.) 261; Walker *v.* Hill, 17 Mass. 380. And see Colegrove *v.* Robinson, 11 Metc. (Mass.) 238; Austin *v.* Henshaw, 7 Pick. (Mass.) 46.

Interest on the amount overpaid can be recovered only after demand. Walker *v.* Bradley, 3 Pick. (Mass.) 261.

58. Hatcher *v.* Royster, 14 Lea (Tenn.) 222.

59. Johnson *v.* Corbett, 11 Paige (N. Y.) 265.

60. Hall *v.* Merrill, 67 Me. 112.

A claimant may acknowledge notice of the petition for the appointment of commissioners, and of the time and place of hearing before the commissioners. Hall *v.* Merrill, 67 Me. 112.

61. McMillan's Estate, 21 Pa. Co. Ct. 17, holding, however, that the Pennsylvania act of April 13, 1840, providing for the appointment of an auditor to settle with the creditors, does not authorize his appointment over the protest of the executor where the estate is largely solvent and the claim of the creditor asking such appointment is disputed.

62. Ludwig *v.* Blackinton, 24 Me. 25. See also McGowan *v.* Peabody, 20 R. I. 582, 40

either direct or indirect, are disqualified thereby and should not be appointed as commissioners.[63]

2. Powers. After appointment and assignment of the estate to the commissioners all claims and causes of action should be presented for allowance to them,[64] and where the commissioners become vested with the legal interest in decedent's choses in action all suits thereon should be brought by them.[65]

E. Collection and Management of Estate — 1. In General. In the collection and management of an insolvent estate the usual rule as to the diligence and good faith required of executors and administrators applies, and their liability is governed accordingly;[66] and where the collection and management of the estate is committed to commissioners or syndics they are governed by the same rule.[67]

2. Actions — a. In General. As the representative of the estate and of creditors generally the executor or administrator may maintain various actions for the protection of the insolvent estate,[68] or, where necessary, may bring a bill in equity,[69] in which he may set up fraud and avoid acts of the decedent.[70] He

Atl. 758; Strong *v.* Luther, 20 R. I. 317, 38 Atl. 1054.

When appointment unnecessary.— The appointment of commissioners is not necessary where the funds in the hands of an administrator are not "sufficient to extend beyond the payment of the expenses of the funeral and administrators and the allowance to the widow and children." Ludwig *v.* Blackinton, 24 Me. 25.

Appeal will lie from appointment. Sturges *v.* Peck, 12 Conn. 139; Pierce *v.* Allen, 12 R. I. 510. *Contra,* Putney *v.* Fletcher, 140 Mass. 596, 5 N. E. 640.

Nomination by creditors.— Under a statute providing that the court may appoint as commissioner the person nominated "by majority of the creditors whose claims have been reported and filed" a nomination by the majority of such creditors present and voting is not sufficient to authorize the appointment unless they are also a majority of all the creditors whose claims are filed. Com. *v.* Anthony, 4 Watts & S. (Pa.) 511.

Under some codes commissioners are dispensed with and the procedure is before the probate court. See McNeil *v.* Macon, 20 Ala. 772.

63. English *v.* Smith, 13 Conn. 221; Sturges *v.* Peck, 12 Conn. 139; Stoddard *v.* Moulthrop, 9 Conn. 502; Fairbank's Appeal, 2 Root (Conn.) 386; Lyon *v.* Lyon, 2 Root (Conn.) 203; Barker *v.* Wales, 1 Root (Conn.) 265.

64. Sugar River Bank *v.* Fairbank, 49 N. H. 131, holding suits in equity to be within the spirit of a statute so providing.

65. Johns *v.* Johns, 6 Ohio 271.

66. *Alabama.*— Clark *v.* Eubank, 80 Ala. 584, 3 So. 49; Eubank *v.* Clark, 78 Ala. 73.

Louisiana.— Triche's Succession, 39 La. Ann. 289, 2 So. 52; Connolly's Succession, 6 La. Ann. 795.

New Hampshire.— Lane *v.* Thompson, 43 N. H. 320; Moulton *v.* Wendell, 37 N. H. 406.

United States.— Peyatte *v.* English, 25 Fed. Cas. No. 15,054*a*, Hempst. 24.

Canada.— Higgins *v.* Ontario Trusts Corp., 27 Ont. App. 432 [*affirming* 30 Ont. 684].

See 22 Cent. Dig. tit. "Executors and Administrators," § 1625; and *supra,* VIII, A, 1; VIII, L, 1.

Representative of insolvent estate cannot redeem for benefit of widow. Whitehead *v.* Cummins, 2 Ind. 58; Gibson *v.* Crehore, 5 Pick. (Mass.) 146; Rossiter *v.* Cossit, 15 N. H. 38.

Rights of heirs.— Negligence in the management of an insolvent estate cannot be charged against the administrator at the instance of the heirs of the decedent, where such negligence does not affect their interest. *In re* Armstrong, 125 Cal. 603, 68 Pac. 183. An heir of an insolvent intestate cannot maintain assumpsit for money had and received against the administrator for his share of the proceeds of land sold by the administrator. Henry *v.* Arms, Smith (N. H.) 39.

Liability to heir for rents.— The administrator of an insolvent estate is not liable to an heir of the estate of the intestate for rents received for land rented by him at public auction and held as assets. Boynton *v.* McEwen, 36 Ala. 348.

67. Desorme's Succession, 10 Rob. (La.) 474; Meilleur *v.* His Creditors, 3 La. 532.

The syndic of an insolvent succession is authorized to issue execution on a twelve-months' bond, in order to preserve the assets under his charge from loss by prescription. Cloutier *v.* Lemée, 33 La. Ann. 305.

68. Judson *v.* Connolly, 4 La. Ann. 169; McLean *v.* Weeks, 61 Me. 277; Hoyt *v.* Wilkinson, 10 Pick. (Mass.) 31.

69. Sims *v.* Shelton, 2 Strobh. Eq. (S. C.) 221.

Parties.— Judgment creditors and those whose claims are undisputed should not be made parties to a bill by the administrator to avoid a multiplicity of suits by compelling the creditors to prove their claims. Green *v.* Allen, 45 Ga. 205.

70. Sullice *v.* Gradenigo, 15 La. Ann. 582; Holland *v.* Cruft, 20 Pick. (Mass.) 321; Matthews *v.* Hutchins, 68 N. H. 412, 40 Atl. 1063; Bouslough *v.* Bouslough, 68 Pa. St. 495.

Suit to set aside fraudulent conveyance of decedent see *supra,* III, H, 7.

Evidence.— In an action by an administrator to set aside a fraudulent conveyance

may also interpose or defend in actions by others concerning the estate.[71] A bill in equity may be maintained against an executor or administrator of an insolvent estate for property held in trust by his intestate, which has come into his hands, if the trust property can be identified.[72] In contesting claims the representative should specially plead the insolvency in the manner required by statute.[73]

b. Respecting Realty. In some jurisdictions it is held that a decree or declaration of insolvency entitles the personal representative to possession and control of the realty, and that he may thereafter maintain actions respecting the same;[74] but there is also authority for the view that, notwithstanding the declaration of insolvency, the right to maintain such actions is in the heir, until he is actually divested.[75]

F. Sales and Conveyances Under Order of Court.[76] Where an estate is insolvent, the creditors are entitled to have both the real and personal property of the decedent within the jurisdiction appropriated in satisfaction of their demands;[77] and sales under order or sanction of the court may be procured accordingly.[78] It is usually the duty of the representative to proceed within a

made by his intestate the commissioners' report allowing claims is admissible in evidence for the purpose of showing that the property so conveyed is needed to pay debts (Bassett *v.* McKenna, 52 Conn. 437; Matthews *v.* Hutchins, 68 N. H. 412, 40 Atl. 1063), and the commissioner may testify as to the items allowed by him where the record of allowance fails to show such items (Matthews *v.* Hutchins, 68 N. H. 412, 40 Atl. 1063).

71. Lembeck, etc., Brewing Co. *v.* Kelly, 63 N. J. Eq. 401, 51 Atl. 794.

72. Goodell *v.* Buck, 67 Me. 514; McLarren *v.* Brewer, 51 Me. 402; Thompson *v.* White, 45 Me. 445; Taylor *v.* Plumer, 3 M. & S. 562, 2 Rose 457, 16 Rev. Rep. 361.

The burden is on plaintiff to identify the property claimed as held by the decedent in trust for him. Goodell *v.* Buck, 67 Me. 514.

73. Cameron *v.* Clarke, 11 Ala. 259; Humphreys *v.* Morrow, 9 Port. (Ala.) 283.

74. Parkman *v.* Aicardi, 34 Ala. 393, 73 Am. Dec. 457; Norcum *v.* Lum, 33 Miss. 299; Moulton *v.* Wendell, 37 N. H. 406; Wessell *v.* Gross, (Tenn. Ch. App. 1900) 57 S. W. 372; Trafford *v.* Austin, 3 Tenn. Ch. 496. But see Long *v.* McDougald, 23 Ala. 413.

Acts done before the estate was decreed insolvent, although after the decedent's death, do not give the personal representative a right to maintain trespass *quare clausum fregit*. Lane *v.* Thompson, 43 N. H. 326.

75. Boynton *v.* Peterborough, etc., R. Co., 4 Cush. (Mass.) 467. See also Nason *v.* Willard, 2 Mass. 478.

76. See *supra*, XII.

77. Goodall *v.* Marshall, 11 N. H. 88, 35 Am. Dec. 472; Trafford *v.* Austin, 3 Tenn. Ch. 496.

Proof of insolvency.— In case of an application for the sale of real estate to pay debts of a deceased insolvent, primary proof of the insolvency stands in place of full proof until full proof is demanded, but such demand dispenses with the primary proof prescribed by the testamentary system. Kent *v.* Waters, 18 Md. 53. Under Ala. Sess. Acts (1878–1879), p. 164, the decree of insolvency is substituted for proof of the existence of debts and the insufficiency of the personal assets. Meadows *v.* Meadows, 78 Ala. 240.

78. Friedman *v.* Shamblin, 117 Ala. 454, 23 So. 821; White *v.* Drew, 42 Mo. 561; Ingram *v.* Ingram, 5 Heisk. (Tenn.) 541. And see Goodwin *v.* Sheldon, 1 Day (Conn.) 312.

Jurisdiction.— Under the Tennessee statutes when it becomes necessary in the settlement of an insolvent estate to sell real or personal property, the county court has jurisdiction to make such sale whenever the amount of the assets received by the personal representative, exclusive of real estate, does not exceed three thousand dollars. Up to that point the county and chancery courts have concurrent jurisdiction; but above that amount of assets, exclusive of real estate, the jurisdiction of the chancery court is exclusive. Fleming *v.* Talliafer, 4 Heisk. 352.

Meeting of creditors not a necessary prerequisite.— Lacroix's Succession, 30 La. Ann. 924. But see Tucker *v.* Beatty, 12 Rob. (La.) 545.

Proceedings.— A decree for a sale of an insolvent estate, under proceedings allowed only in the matter of solvent estates, is erroneous. Maynard *v.* Cocke, (Miss. 1895) 18 So. 374.

The syndic's consent to the sale of mortgaged property on credit and without appraisement is binding on the heirs unless they show that they were injured by it. Poultney *v.* Cecil, 8 La. 321.

On a bill by a ward to enforce her claim against the estate of a deceased surety of her guardian, who died insolvent without making a settlement, she is not entitled to a sale of lands until her debt has been established by a decree concluding the heirs, nor to exclusive payment out of the assets over preferred claims or equal creditors. Sharp *v.* Sharp, 76 Ala. 312.

A former petition for an order to sell lands, filed before the estate was declared insolvent and still pending, cannot be pleaded in abatement of a subsequent application under a statute authorizing a sale without taking tes-

reasonable time to procure such sale,[79] but a creditor may also file a bill on behalf of himself and all other creditors for the purpose of having the land sold to pay their claims,[80] provided he does so within the time prescribed by statute in such cases.[81] As in other cases of needful sales of real estate, the heirs or devisees should be made parties before an order or license can properly issue.[82] To establish the insolvency of the estate under proceedings for a sale of the land there need not be a judgment of insolvency in the probate court,[83] but it has been held that it must appear that the estate was duly represented insolvent, that commissioners were duly appointed, and that their report showing the estate to be insolvent was duly made and accepted.[84]

G. Presentation, Proof, and Allowance of Claims — 1. Presentation — a. Necessity of Presentation.[85] It is usually required that claims against the insolvent estate of a decedent must in order that they may be lawfully allowed or paid be presented, duly verified, to the commissioners or the probate court within a specific time limited by statute, failing in which the creditor loses his right,[86]

timony when an estate has been declared insolvent. Meadows *v.* Meadows, 78 Ala. 240.

A reversion of land assigned as the widow's dower cannot be sold under a general license to sell real estate under Mass. St. (1784) c. 2, although it seems to be otherwise since the Revised Statutes. Bancroft *v.* Andrews, 6 Cush. (Mass.) 493.

79. West Greenwich Probate Ct. *v.* Carr, 20 R. I. 592, 40 Atl. 844.

80. Slatter *v.* Carroll, 2 Sandf. Ch. (N. Y.) 573; Jordan *v.* Moses, 10 S. C. 431, holding that under such a bill the court may direct a sale of land lying in another county.

81. Apperson *v.* Harris, 7 Lea (Tenn.) 323.

82. Lamar *v.* Gunter, 39 Ala. 324; French *v.* Hoyt, 6 N. H. 370, 25 Am. Dec. 464; Parchman *v.* Charlton, 1 Coldw. (Tenn.) 381; Frazier *v.* Pankey, 1 Swan (Tenn.) 75; Reid *v.* Huff, 9 Humphr. (Tenn.) 345. But see Benedict *v.* Bonnot, 39 La. Ann. 972, 3 So. 223.

If there are no heirs or devisees the state should be made a party. Trafford *v.* Young, 3 Tenn. Ch. 496.

Creditors by filing their claims become quasi-parties, and are bound by the proceedings. Ewing *v.* Maury, 3 Lea (Tenn.) 381.

83. Friedman *v.* Shamblin, 117 Ala. 454, 23 So. 821; Hudson *v.* Stewart, 48 Ala. 204.

84. Griffin *v.* Pratt, 3 Conn. 513. And see Gilchrist *v.* Cannon, 1 Coldw. (Tenn.) 581.

85. See, generally, *supra*, X, B, 1.

86. *Alabama.*— Christopher *v.* Stewart, 133 Ala. 348, 32 So. 11; Parker *v.* Daughtry, 111 Ala. 529, 20 So. 362; Hatchett *v.* Curlow, 59 Ala. 516; Watson *v.* Rose, 51 Ala. 292; Gamble *v.* Dunklin, 48 Ala. 425; Erwin *v.* McGuire, 44 Ala. 499; Ray *v.* Thompson, 43 Ala. 434, 94 Am. Dec. 696; Sharp *v.* Sharp, 35 Ala. 574; Bell *v.* Andrews, 34 Ala. 538; Murdock *v.* Rousseau, 32 Ala. 611; Sharp *v.* Herrin, 32 Ala. 502; Carhart *v.* Clark, 31 Ala. 396; Steele *v.* Weaver, 20 Ala. 540; Shortridge *v.* Easley, 10 Ala. 520; Hollinger *v.* Holly, 8 Ala. 454.

California.— Visalia Sav. Bank *v.* Curtis, 135 Cal. 350, 67 Pac. 329.

Connecticut.— Nelson *v.* Hubbel, 2 Root 421.

Illinois.— Tipton *v.* Carrigan, 10 Ill. App. 318.

Maine.— Todd *v.* Darling, 11 Me. 34.

Massachusetts.—Freeman *v.* Ward, 16 Pick. 201.

Mississippi.— Greener *v.* Neal, 61 Miss. 204; Herring *v.* Wellons, 5 Sm. & M. 354.

New Jersey.— *In re* Fogg, 37 N. J. Eq. 238; Stelle *v.* Conover, 30 N. J. Eq. 640; Gould *v.* Tingley, 16 N. J. Eq. 501.

Tennessee.— Hearn *v.* Roberts, 9 Lea 365; Lunsford *v.* Jarrett, 2 Lea 579; Martin *v.* Blakemore, 5 Heisk. 50; Stone *v.* Sanders, 1 Head 248; Marley *v.* Cummings, 5 Sneed 479; Smith *v.* Sprout, (Tenn. Ch. App. 1900) 58 S. W. 376; Grimmett *v.* Midgett, (Tenn. Ch. App. 1899) 57 S. W. 399; Hurley *v.* Murrell, 2 Tenn. Ch. 620.

Vermont.— Freeman *v.* Holt, 51 Vt. 538; McCollum *v.* Hinckley, 9 Vt. 143.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1632, 1633.

An agreement by the representative of an insolvent estate, allowing a claim against the estate which had not been presented to and allowed by the commissioners, is unwarranted and void. Freeman *v.* Holt, 51 Vt. 538.

A claim on which an action is pending when insolvency is declared need not be presented. Waller *v.* Nelson, 48 Ala. 531; Erwin *v.* McGuire, 44 Ala. 499; McDougald *v.* Dawson, 30 Ala. 553; Trezevant *v.* McQueen, 13 Sm. & M. (Miss.) 311. But see Sharp *v.* Herrin, 32 Ala. 502. See *infra*, X, B, 1, c.

One against whom the representative has brought suit may file in offset a claim larger than that on which he is sued, although the debt to him is not yet due, and in such case the creditor is entitled to judgment for the balance and need not present his claim to the commissioners of insolvency, but the judgment, when rendered, is to be presented to the judge of probate and by him added to the claims allowed by the commissioners. Bigelow *v.* Folger, 2 Metc. (Mass.) 255.

A representative's statement of claims which have come to his knowledge, filed with a report of insolvency pursuant to statute, does not indicate that there has been a presentment of claims included therein nor avoid

although under some statutes a lien creditor may have a lien declared in his favor without first proving his debt, and certain preferred claims need not be presented.[87] A creditor whose claim has not been filed before the commissioners cannot sue the executor or administrator, although the estate should finally prove to be actually solvent,[88] unless the claim is one which is privileged or preferred by statute and need not be proved or presented to the commissioners.[89] But where the claim is one which could not be presented to the commissioners it may be enforced against any estate remaining after the payment of claims allowed by the commissioners,[90] and a creditor whose claim was not presented in time may sometimes enforce the same against assets subsequently discovered;[91] nor does a failure to present the claim bar its being offset against a claim afterward made upon the creditor by the executor or administrator.[92]

b. Right to Present. Any one having a valid claim against the estate may present and prove the same,[93] and the creditors may pursue their claims and have

the bar of the statute of non-claim as to a claim included in such statement but not properly presented. McDowell *v.* Jones, 58 Ala. 25. But see Pharis *v.* Leachman, 20 Ala. 662.

When new presentation and allowance dispensed with.— In the practice of some states, where a claim against an estate has been allowed by the executor or administrator in the usual way, and the account is left with him, and the estate is afterward declared probably insolvent, but no commissioners of insolvency are appointed, the claim should be reported to the court as a valid one, without a new presentation and allowance thereof, unless the holder is notified by the executor or administrator that he has rejected the claim. Haley *v.* Krug, 1 Ohio Cir. Ct. 44, 1 Ohio Cir. Dec. 27.

Opening commission.— Under Mass. Rev. St. c. 68, § 20, allowing a commission of insolvency to be opened by the probate court, the claim of the creditor in whose favor the commission is opened is not barred by any of the statutes of limitation in consequence of a lapse of time subsequent to the close of the first commission. Ostrom *v.* Curtis, 1 Cush. 461.

87. Hood *v.* Hammond, 128 Ala. 569, 30 So. 540, 86 Am. St. Rep. 159 (vendor's lien); Bulfinch *v.* Benner, 64 Me. 404; Massachusetts Iron Co. *v.* Hooper, 7 Cush. (Mass.) 183; Greenough's Appeal, 9 Pa. St. 18. But see *In re* Mitchell, 2 Watts (Pa.) 87.

The claim of an executor having the right to retain assets sufficient to pay a debt due him is not subject to or barred by Mass. Pub. St. c. 136, § 9, providing that no executor shall be held to answer any suit by a creditor of deceased unless commenced within two years from the giving of the executor's bond, although the estate is insolvent, and the executor has failed to present his claim to the court, or although he has not filed a statement of his claim as required by section 6 in case his claim is disputed. Brown *v.* Greene, 181 Mass. 109, 63 N. E. 2, 92 Am. St. Rep. 404.

88. *Connecticut.*— Williams *v.* Lathrop, 2 Root 364.

Maine.— Dillingham *v.* Weston, 21 Me. 263.

Massachusetts.— Freeman *v.* Ward, 16 Pick. 201; Johnson *v.* Ames, 6 Pick. 330; Paine *v.* Nichols, 15 Mass. 264.

Tennessee.— Martin *v.* Blakemore, 5 Heisk. 50.

Vermont.— See Burgess *v.* Gates, 20 Vt. 326.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1632.

89. Bulfinch *v.* Benner, 64 Me. 404 (claim for taxes); Dillingham *v.* Weston, 21 Me. 263; Greenough's Appeal, 9 Pa. St. 18.

90. Bacon *v.* Thorp, 27 Conn. 251; Hawley *v.* Botsford, 27 Conn. 80; Ticknor *v.* Harris, 14 N. H. 272, 40 Am. Dec. 186; Lowry *v.* Stevens, 6 Vt. 113. And see *In re* McMurdo, [1902] 71 L. J. Ch. 691, 2 Ch. 684, 50 Wkly. Rep. 644.

Where property remains unaccounted for by the administrator the provision of the statute in relation to insolvent estates that if a claim is not presented to the commissioners within a year it shall be forever barred does not apply. Allen *v.* Keith, 26 Miss. 232.

91. Sacket *v.* Mead, 1 Conn. 13.

92. Berrigan *v.* Pearsall, 46 Conn. 274. But see Bell *v.* Andrews, 34 Ala. 538.

93. Henry *v.* Black, 24 Ala. 417 (indorser); Powe *v.* Tyson, 15 Ala. 221 (surety); Rollins *v.* Robinson, 35 N. H. 381; Fenner *v.* Manchester, 6 R. I. 140 (representative).

A secured creditor may prove his debt before the commissioners of insolvency without first surrendering a mortgage on the separate estate of the debtor's wife which he holds as security. Whitman *v.* Winchester, 15 Gray (Mass.) 453.

One having merely an equitable title to a demand against an insolvent estate may file it as a claim against the estate. Hogan *v.* Calvert, 21 Ala. 194. And see Blankenship *v.* Nimmo, 50 Ala. 506.

A debt created by a declaration in the will to the prejudice of other creditors cannot be presented as where the testator recites that he had repeatedly promised to pay to the legatee the amount of his legacy as compensation for services rendered; the services having been rendered under a contract fixing as compensation therefor a smaller sum which has been paid. Klein's Estate, 6 Pa. Dist. 370.

Under the Tennessee statute an order by

them allowed, in every jurisdiction where administration is taken, until they have obtained full payment.[94]

c. Claims Presentable.[95] As a general rule such claims, and only such claims, may be presented to the commissioners for allowance as are present and positive debts or fixed liabilities susceptible of a present valuation,[96] and not claims which depend on such contingencies that they may never become due.[97] A claim which is not provable before the commissioners cannot be ascertained in equity and added by decree to their report.[98]

d. Time For Presentation.[99] The time for presentation is either fixed by statutes varying somewhat in the different jurisdictions, or left to be fixed by the probate court within certain limits,[1] and as a rule the time begins to run from the declaration of insolvency.[2] An extension of the time for presentation, at the

the clerk of the county court on the administrator to give notice to file claims is necessary to authorize the filing of claims. Grimmett *v.* Midgett, (Ch. App. 1899) 57 S. W. 399.

94. Ramsay *v.* Ramsay, 196 Ill. 179, 63 N. E. 618 [*affirming* 97 Ill. App. 270] (but in such case what the creditor has received in another jurisdiction must be taken into account); Loomis *v.* Farnum, 14 N. H. 119; Goodall *v.* Marshall, 11 N. H. 88, 35 Am. Dec. 472.

95. See, generally, *supra*, X, A.

96. *Connecticut.*—Bacon *v.* Thorp, 27 Conn. 251.

New Hampshire.— Simpson *v.* Gafney, 66 N. H. 261, 20 Atl. 931.

New York.— Matter of Rooney, 3 Redf. Surr. 15.

Rhode Island.— Moies *v.* Sprague, 9 R. I. 541.

England.— *In re* McMahon, [1900] 1 Ch. 173, 69 L. J. Ch. 142, 81 L. T. (N. S.) 715, 7 Manson 38.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1630.

Unmatured claims payable absolutely may be proved. Haverhill Loan, etc., Assoc. *v.* Cronin, 4 Allen (Mass.) 141; Alexander *v.* Follet, 5 N. H. 499, statute.

A debt evidenced by a mortgage, unacknowledged and unrecorded, and without the affidavit required by statute, although insufficient to create a lien on the mortgaged premises, may be proved against the estate of the deceased insolvent mortgagor. Nelson *v.* Hagerstown Bank, 27 Md. 51.

A note given as collateral security for an indorsement on another note may be proved against the insolvent estate of the deceased maker, although the indorsed note was proved by the holder in full against such estate. Emerson *v.* Paine, 176 Mass. 391, 57 N. E. 667.

A fiduciary bond is not a valid claim against an insolvent decedent's estate without proof of actual damages. Green *v.* Creighton, 7 Sm. & M. (Miss.) 197.

A claim for family expenses incurred under a will between the death and the distribution is not such a "debt against the estate" as should be filed or allowed in insolvency. Prince *v.* Prince, 47 Ala. 283.

Rent.— A lessor is entitled to prove against the insolvent estate of his lessee for rent payable under the terms of the lease, before or after the lessee's death, up to the time that the claim is presented to the commissioner, but no claim for rent payable beyond that time is thus presentable. Deane *v.* Caldwell, 127 Mass. 242.

A claim which cannot be prosecuted at common law cannot be proven, under some statutes, as a "claim" or "debt," where the estate is insolvent. Moies *v.* Sprague, 9 R. I. 541.

97. Bacon *v.* Thorp, 27 Conn. 251; Harding *v.* Smith, 11 Pick. (Mass.) 478; Ticknor *v.* Harris, 14 N. H. 272, 40 Am. Dec. 186; Fields *v.* Wheatley, 1 Sneed (Tenn.) 351.

A claim which may be proved at any time is not "contingent" within the meaning of the statute, although the holder of it erroneously believes that he has a valid lien as security therefor, which must first be relinquished. Sears *v.* Wills, 7 Allen (Mass.) 430.

98. Moies *v.* Sprague, 9 R. I. 541.

99. See, generally, *supra*, X, B, 4.

1. See the following cases:

Alabama.— Watson *v.* Rose, 51 Ala. 292; Waller *v.* Nelson, 48 Ala. 531; Phelan *v.* Phelan, 13 Ala. 679; Lattimore *v.* Williams, 8 Ala. 428.

Connecticut.— Berrigan *v.* Pearsall, 46 Conn. 274.

Maine.— Todd *v.* Darling, 11 Me. 34.

Mississippi.—Greener *v.* Neal, 61 Miss. 204.

New Jersey.— *In re* Togg, 37 N. J. Eq. 238.

Wisconsin.— Cole *v.* Lightfoot, 4 Wis. 295.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1633.

A creditor is entitled to the full statutory time for presenting his claim, and this right cannot be defeated by an earlier report or other hindrance on the part of the commissioners. Cole *v.* Lightfoot, 4 Wis. 295.

A creditor who has recovered judgment against an administrator on a liability of the intestate, before the administrator has suggested the insolvency of the estate, may, under the Tennessee statute, file his claim in an insolvent suit at any time before the funds of the estate are paid out. Hurley *v.* Murrell, 2 Tenn. Ch. 620.

2. Shelton *v.* Poulson, 60 Ala. 578; Shortridge *v.* Easley, 10 Ala. 520; Lattimore *v.* Williams, 8 Ala. 428; Coppuck *v.* Wilson, 15 N. J. L. 75.

court's discretion, for a limited period, is allowed under the statutes of some jurisdictions, when a proper case arises.[3]

e. Statement and Verification.[4] In the absence of a specific statutory requirement any statement of a claim against an insolvent estate is sufficient which, when taken in connection with the affidavit accompanying it, if any, fairly discloses an existing liability, and enables the commissioners or court to understand it and to act intelligently.[5] Under some statutes the claim must be verified by the affidavit of the claimant,[6] or his agent[7] or attorney,[8] made before the proper officer.[9] Unless the statute provides otherwise this affidavit may be made at any time before, or at the time of, the final settlement of the estate.[10]

f. Sufficiency of Presentation or Filing.[11] Claims must be presented and filed in the place and manner prescribed by statute therefor.[12] Where properly presented the claim does not lose its status as to presentation, because the judge has allowed it to be taken from the office for a special purpose and it has become mislaid or not returned through inadvertence,[13] or because he fails to docket it,[14]

3. *Alabama.*— Lapsley *v.* Goldsby, 14 Ala. 73.

Connecticut.— Deming's Appeal, 34 Conn. 201; Lockwood *v.* Reynolds, 16 Conn. 303; Webb *v.* Fitch, 1 Root 177.

Maine.— Griffin *v.* Parcher, 48 Me. 406; Todd *v.* Darling, 11 Me. 34.

Massachusetts.— Walker *v.* Lyman, 6 Pick. 458.

New Hampshire.— *In re* Peabody, 40 N. H. 342; Bufford *v.* Johnson, 34 N. H. 489.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1633.

Notice to the administrator is not necessary to render valid an order by the probate court extending the time for exhibiting claims. Parker *v.* Gregg, 23 N. H. 416.

4. See, generally, *supra*, X, B, 9, b.

5. Woodruff *v.* Winston, 68 Ala. 412; Thornton *v.* Moore, 61 Ala. 347; Hogan *v.* Calvert, 21 Ala. 194; American Bd. Foreign Missions Com'rs Appeal, 27 Conn. 344.

Copy of evidence of debt or substantial statement will suffice. Erwin *v.* McGuire, 44 Ala. 499; Rutherford *v.* Mobile Branch Bank, 14 Ala. 92; Rowdon *v.* Young, 12 Ala. 234.

Delivering the evidence of indebtedness to the commissioners with a verbal claim for its allowance may suffice. Mills *v.* Wildman, 18 Conn. 124.

A creditor coming in under a decree to prove a claim not mentioned in the pleadings must present the particulars of his claim to the master, accompanied by his affidavit that the sum claimed is justly due, and that neither he, nor any person by his order or on his account, has received satisfaction or security for any part of the claim. Morris *v.* Mowatt, 4 Paige (N. Y.) 142.

6. Thornton *v.* Moore, 61 Ala. 347; Erwin *v.* McGuire, 44 Ala. 499; Fox *v.* Lawson, 44 Ala. 319; Trowbridge *v.* Pinckard, 31 Ala. 424; Lay *v.* Clark, 31 Ala. 409; Cook *v.* Davis, 12 Ala. 551; Campbell *v.* Campbell, 11 Ala. 730; Huffman *v.* Moore, 101 Ky. 288, 41 S. W. 292, 19 Ky. L. Rep. 461; Morgan *v.* McCausland, 96 Me. 449, 52 Atl. 931; Smith *v.* Abbott, 17 N. J. L. 358. See also Gay *v.* Louisville, 93 Ky. 349, 20 S. W. 266, 14 Ky. L. Rep. 327.

A promissory note, upon which a suit is pending, is not such a claim as is required to be verified by affidavit. Waller *v.* Nelson, 48 Ala. 531.

7. Planters', etc., Bank *v.* Smith, 14 Ala. 416.

8. Erwin *v.* McGuire, 44 Ala. 499.

9. Smith *v.* Abbott, 17 N. J. L. 358.

Where an affidavit is taken in another state the commissioners' certificate is presumptive evidence that the oath was taken before a lawful officer (Carhart *v.* Clark, 31 Ala. 396), and the affidavit is a sufficient basis to support an amended affidavit in support of the claim upon settlement of the insolvent estate in the domestic court (Fox *v.* Lawson, 44 Ala. 319).

10. Norvill *v.* Williams, 35 Ala. 551 (holding that an affidavit made after the intestate's death is sufficient to verify the claim, although it was made before the estate was declared to be insolvent); Gaffney *v.* Williamson, 21 Ala. 112; Bloodgood *v.* Smith, 14 Ala. 423; Rutherford *v.* Mobile Branch Bank, 14 Ala. 92; Gilbert *v.* Brashear, 12 Ala. 191; Brown *v.* Easly, 10 Ala. 564; Shortridge *v.* Easley, 10 Ala. 520.

11. See, generally, *supra*, X, B, 9.

12. Woods *v.* Woods, 99 Tenn. 50, 41 S. W. 345; Prewett *v.* Goodlett, 98 Tenn. 82, 38 S. W. 434. But see Middleton *v.* Maull, 16 Ala. 479, holding that claims presented to the administrator within the required time, but not filed with the clerk as required by statute within the time prescribed, are nevertheless entitled to be paid if the estate should ultimately prove solvent.

Filing before the declaration of insolvency has been held sufficient, although the claim was not again filed after such declaration. Henderson *v.* Henderson, 67 Ala. 519 (also holding that in such case the creditor must show verification and docketing, so as to afford opportunity to file objections); Levert *v.* Read, 54 Ala. 529.

Where a claim is withdrawn upon the administrator's false representation of solvency this is not an abandonment of the claim, and the claim should be allowed if refiled before the assets are distributed. Stamps *v.* Bell, 2 Baxt. (Tenn.) 170.

13. Ross *v.* Ross, 20 Ala. 105.

14. Henderson *v.* Henderson, 67 Ala. 519.

or the clerk fails to file it, as it would be unjust for the claimant to suffer for the negligence of another person.[15]

2. **Proof of Claims.**[16] Where the claim is properly filed and its validity is not disputed by the executor or administrator, the affidavit of the claimant, if regular, is sufficient to establish it and no other proof should be called for;[17] but if the claim or affidavit is duly objected to, the creditor must prove his claim by competent evidence.[18]

3. **Objections and Proceedings Thereon.**[19] In proceedings before the court or commissioners with reference to a claim filed against the insolvent estate, so far as the statutes sanction, objections to the claim may be filed by the executor or administrator,[20] or by the distributees,[21] or creditors.[22] Such objections, however, must be made and filed within the time prescribed by statute therefor,[23] or, in the

15. Rutherford *v.* Mobile Branch Bank, 14 Ala. 92; Gaffney *v.* Williamson, 12 Ala. 628.

16. See, generally, *supra*, X, C.

17. McNeil *v.* Macon, 20 Ala. 772.

18. Woodruff *v.* Winston, 68 Ala. 412; Brasher *v.* Lyle, 13 Ala. 524; Askew *v.* Weissinger, 6 Ala. 907.

Admissions.— In an action against a deceased attorney's estate, founded upon the attorney's negligence in collecting a note, proof of the attorney's admission that he had collected the money on the note and of his promise to pay it is not competent evidence for the creditor. Stubbs *v.* Beene, 37 Ala. 627.

Notes and obligations of the deceased insolvent are not conclusive proof of the debts of which they are evidence, but such additional proof by affidavit or otherwise should be furnished as will satisfy the commissioners or other tribunal of the fairness and validity of the claim. Warren's Succession, 4 La. Ann. 451. It is not always deemed necessary to produce the original note or instrument on which the debt is founded, and if a claim be disallowed and then sued at common law plaintiff is not confined to the proof he produced before the commissioners. Cole *v.* Lightfoot, 4 Wis. 295.

Judgment.— Where a defendant dies pending a suit, and the administrator comes in to defend, the judgment rendered against the decedent's estate is to be laid before the commissioners of insolvency and by them received as conclusive evidence of the debt and reported by them accordingly. Bullard *v.* Dame, 7 Pick. (Mass.) 239.

Evidence properly excluded.— Where it is shown and not denied that part of plaintiff's bill "as per contract with deceased" was copied from certain other bills, the exclusion of such other bills as further evidence of the fact was not error, since it could not have injured defendants. Huntington's Appeal, 73 Conn. 582, 48 Atl. 766.

Presumption that necessary proof made.— A presumption that the necessary proof of the ownership of the claim was made will arise where the record does not show that plaintiff, to whom a claim against the insolvent estate was decreed, was not the proprietor. Boggs *v.* Mobile Branch Bank, 12 Ala. 494.

19. See, generally, *supra*, X, C.

20. Christopher *v.* Stewart, 133 Ala. 348, 32 So. 11; Gaffney *v.* Williamson, 21 Ala. 112; Trezevant *v.* McQueen, 13 Sm. & M. (Miss.) 311; Allen *v.* Rice, 22 Vt. 333.

The defense that a claim was not filed within the statutory period may be raised by exceptions to the report of the master, or by a motion to dismiss the claimant's petition. Smith *v.* Sprout, (Tenn. Ch. App. 1900) 58 S. W. 376.

21. Christopher *v.* Stewart, 133 Ala. 248, 32 So. 11; Eubank *v.* Clark, 78 Ala. 73.

22. Christopher *v.* Stewart, 133 Ala. 348, 32 So. 11; Orr *v.* Thomas, 3 La. Ann. 682; Smith *v.* Sprout, (Tenn. Ch. App. 1900) 58 S. W. 376.

23. Christopher *v.* Stewart, 133 Ala. 348, 32 So. 11; Eubank *v.* Clark, 78 Ala. 73; Cunningham *v.* Lindsay, 77 Ala. 510; Clark *v.* Knox, 70 Ala. 607, 45 Am. Rep. 93; Thames *v.* Herbert, 61 Ala. 340.

This rule has been applied to an objection denying the justice, correctness, and validity of the claim (Handy *v.* Meachem, 33 Ala. 457; Hogan *v.* Calvert, 21 Ala. 194; Bartol *v.* Calvert, 21 Ala. 42), and an objection going to the form or sufficiency of the verification or affidavit (Hogan *v.* Calvert, 21 Ala. 194; Gaffney *v.* Williamson, 21 Ala. 112; Bartol *v.* Calvert, 21 Ala. 42).

The time prescribed by statute cannot be enlarged by agreement between the probate judge and the administrator of the estate. Hardy *v.* Meachem, 33 Ala. 457.

An objection that the claim was not filed within the prescribed time may be made at any time before the hearing or at the hearing (Hogan *v.* Calvert, 21 Ala. 194; Bartol *v.* Calvert, 21 Ala. 42), and the same rule has been applied to an objection that the claim was not verified within the time prescribed by statute (Carhart *v.* Clark, 31 Ala. 396. But see Gaffney *v.* Williamson, 21 Ala. 112).

Matters occurring after the declaration in insolvency, which are a valid bar to the demand, or which deprive the creditor of all right in equity and good conscience to share in the distribution, may be shown at any time before a final decree declaring the amount of the claim and the ratable proportion of the assets to which the claimant is entitled. Thornton *v.* Moore, 61 Ala. 347; Thames *v.* Herbert, 61 Ala. 340.

absence of a statutory provision limiting the time, within a reasonable time.[24] Unless objections are filed the allowance of a claim duly filed is usually a matter of right and no objection thereto can be heard in the proceedings before the court or commissioners,[25] except where defenses have arisen after the time for filing objections has expired.[26] If there is a conflict of evidence upon the facts of the claim, an issue may be submitted to the jury for determination ;[27] but if a jury is not demanded it is the duty of the judge to decide the issue under the rules prevailing in courts of law.[28] Where a claim has been transferred before objection is filed to its allowance, the transferee may intervene and become the actor, where issues are formed against its allowance.[29]

4. ALLOWANCE OR REJECTION.[30] Claims against an insolvent estate are to be decided upon as they existed on the date of the insolvent's death.[31] In some jurisdictions the power of allowing or disallowing claims belongs exclusively to the commissioners, and their action in this respect is binding upon the estate and its creditors unless seasonable objection is made thereto,[32] or there is fraud in the proceedings before the commissioners.[33] The commissioners in such proceedings must give due notice of their meetings to all creditors,[34] and they combine so far the powers of law and equity that they ought to allow a claim which a court of equity would enforce.[35] In other jurisdictions, however, the probate court is invested with power in such matters.[36] The allowance of a claim against an

24. Steele *v.* Weaver, 20 Ala. 540.

25. Christopher *v.* Stewart, 133 Ala. 348, 32 So. 11; Chandler *v.* Wynne, 85 Ala. 301, 4 So. 653; Cunningham *v.* Lindsay, 77 Ala. 510; Clark *v.* Knox, 70 Ala. 607, 45 Am. Rep. 93; Guard *v.* Hale, 64 Ala. 479; Thames *v.* Herbert, 61 Ala. 340; Gaffney *v.* Williamson, 21 Ala. 112; Crater *v.* Smith, 42 N. J. Eq. 348, 7 Atl. 575.

26. Christopher *v.* Stewart, 133 Ala. 348, 32 So. 11.

27. Reed *v.* Wiley, 5 Sm. & M. (Miss.) 394.

The Alabama act of 1843 did not impose upon the judge of the county court the duty of causing an issue to be made, on his own volition, between the creditor and the administrator of an insolvent estate. Cook *v.* Davis, 12 Ala. 551.

28. Nooe *v.* Garner, 70 Ala. 443.

29. Thornton *v.* Moore, 61 Ala. 347.

30. See, generally, *supra*, X, B, 14.

31. Blackmer *v.* Blackmer, 5 Vt. 355.

32. Bartram *v.* Hopkins, 71 Conn. 505, 42 Atl. 645; Shelton *v.* Hadlock, 62 Conn. 143, 25 Atl. 483; Hotchkiss *v.* Beach, 10 Conn. 232; Findlay *v.* Hosmer, 2 Conn. 350; Williams *v.* Perkins, 2 Root (Conn.) 470; Parsons *v.* Mills, 2 Mass. 80; Gold *v.* McMechan, 1 Mass. 23; Allen *v.* Fletcher, 14 Vt. 274. See also Tuttle *v.* Robinson, 33 N. H. 104.

Claim allowed to administrator may be disproved in action on probate bond. Sherman *v.* Talman, 2 Root (Conn.) 140.

Where decedent was a married woman, the allowance by commissioners is conclusive that the claims bound her estate. Shelton *v.* Hadlock, 62 Conn. 143, 25 Atl. 483.

Where commissioners of insolvency allow part of a claim and reject part, and the executor or administrator brings a suit against the creditor on a demand in favor of the estate which was not laid before the commissioners, the creditor may file in set-off that part of his claim which the commissioners rejected. Wright *v.* Dunham, 9 Pick. (Mass.) 37.

The rejection of a claim secured by a pledge, mortgage, or other lien only bars the right of such claim to any portion of the general fund in the hands of the administrator for payment, but does not discharge the lien. Tuttle *v.* Robinson, 33 N. H. 104.

The disallowance of interest on a mortgage note on the ground of usury is not conclusive on the mortgagee on the question of usury in a subsequent action to foreclose the mortgage. Loomis *v.* Eaton, 32 Conn. 550.

An executor or administrator who has a disputed claim of his own must present it to the probate court to determine its validity, and not to the commissioners in insolvency. Green *v.* Russell, 132 Mass. 536.

33. See Hall *v.* Merrill, 67 Me. 112.

34. Davis' Appeal, 39 Conn. 395; Saunders *v.* Planters' Bank, 2 Sm. & M. (Miss.) 287.

35. Shelton *v.* Hadlock, 62 Conn. 143, 25 Atl. 483; Collins *v.* Tillou, 26 Conn. 368, 68 Am. Dec. 398; Brown *v.* Slater, 16 Conn. 192, 41 Am. Dec. 136.

36. See Steger *v.* Frizzell, 2 Tenn. Ch. 369.

When a claim against an insolvent estate has been rejected by the probate judge, the claim cannot be investigated by the succeeding judge of probate, if any of the creditors object. Saltmarsh *v.* Bird, 19 Ala. 665.

Effect of action upon claims.— The action of the orphans' court or probate court in ascertaining the amount of the decedent's indebtedness binds the real estate equally with personalty, and if not conclusive is at least *prima facie* evidence against all parties interested in the estate and against a fraudulent grantee of the decedent. Heydenfeldt *v.* Towns, 27 Ala. 423. The ascertainment of the validity and amount of the demand of a creditor in the probate court has the force and effect of a judgment *in personam* against the representative and may be assailed by the

insolvent estate is not a judgment which becomes dormant by lapse of time as against newly discovered assets of such estate.[37] The allowance should be positive and intelligible in expression as to the amount allowed.[38] In general the commissioners should reckon the total allowance of claims upon fair principles which do justice to all the creditors alike,[39] and should offset mutual debts or claims between each creditor and the decedent, and report only the balance which they find due.[40]

5. Report of Commissioners. After receiving and adjudicating claims against the insolvent estate, the commissioners should make their report to the court of probate, within the prescribed time.[41] It need not appear of record that the

legatee for fraud, or when the administrator claims credit for it the legatee may show that defenses existed, and that by proper diligence he could have prevented it from being obtained. Randle *v.* Carter, 62 Ala. 95.

Surrogate may classify claims and allow equitable as well as legal demands. Payne *v.* Matthews, 6 Paige (N. Y.) 19, 29 Am. Dec. 738.

The county court has power to determine the validity of claims filed against an insolvent estate, under the Tennessee statute, the claimant becoming a party to the proceedings by filing his claim; and a claim so allowed cannot be afterward adjudicated by the clerk on objection by the administrator. Barksdale *v.* Ward, (Tenn. Ch. App. 1898) 46 S. W. 771.

37. Sharp *v.* Citizens' Bank, (Nebr. 1904) 98 N. W. 50.

38. Lowry *v.* Stevens, 6 Vt. 113.

39. Ramsay *v.* Ramsay, 196 Ill. 179, 63 N. E. 618 [*affirming* 97 Ill. App. 270], holding that where resident creditors who have received part payment of their claims in ancillary administration proceedings in another state ask to participate in the assets in the hands of the principal administrator, they should be required to account for what they have received under the ancillary administration. And see Loomis *v.* Farnum, 14 N. H. 119.

Judgment and costs of suit against the decedent's estate may be added to the list of claims against the estate (Healy *v.* Root, 11 Pick. (Mass.) 389), or if the judgment is against the claimant they may be deducted from his claim (Ellis *v.* Smith, 38 Me. 114).

Interest may be allowed on the claim in a proper case. Hamilton *v.* Tarlton, 3 Ky. L. Rep. 471; Hagan *v.* Sompeyrac, 3 La. 154; Bowers *v.* Hammond, 139 Mass. 360, 31 N. E. 729; Dodge *v.* Breed, 13 Mass. 537; Mowry *v.* Peck, 2 R. I. 60. And a mortgagee proceeding under a statute permitting foreclosure, provided all recourse against other property of the estate is expressly waived, is entitled to interest at the rate expressed in the mortgage notes, and not merely that allowed on judgments in the supreme court. Visalia Sav. Bank *v.* Curtis, 135 Cal. 350, 67 Pac. 329 [*distinguishing* Ellis *v.* Polhemus, 27 Cal. 350]. But see Keebler's Estate, 4 Pa. Dist. 346, holding that interest should not be allowed after decedent's death on a balance due on a mortgage.

Interest on amount allowed.— It has been held in Rhode Island that as a report of commissioners upon the estate of a deceased insolvent is in the nature of a judgment ascertaining the sums due from the deceased at his death, interest will be allowed upon said sums as upon a judgment. Mowry *v.* Peck, 2 R. I. 60. But in Massachusetts it has been held that the allowance of a claim against an estate represented to be insolvent by the commissioners is not a judgment which merges the debt and starts the running of a new rate of interest, but the claim thus allowed continues to bear interest at the rate specified in the original contract. Bowers *v.* Hammond, 139 Mass. 360, 31 N. E. 729.

A creditor whose claim is barred by the general statute of non-claim is not entitled to share in the distribution of the estate when it has been declared insolvent. Gordon *v.* Ballentine, 50 Ala. 99.

The allowance of a claim may be impeached for fraud by one sought to be affected by such allowance, who was not a party or privy to the proceeding. Matthews *v.* Hutchins, 68 N. H. 412, 40 Atl. 1063.

40. Gregory *v.* Benedict, 39 Conn. 22; Staniford *v.* Hide, 1 Root (Conn.) 397; Williams *v.* Darling, 1 Root (Conn.) 356; Hosmer *v.* Brattle, 1 Root (Conn.) 347; Helms *v.* Harclerode, 65 Kan. 736, 70 Pac. 866; Medomak Bank *v.* Curtis, 24 Me. 36.

What a creditor has received as administrator cannot be offset against his claim upon the estate. Staniford *v.* Hide, 1 Root (Conn.) 397.

Counter-claim need not be considered if interested parties consent to such course. Bailey *v.* Bussing, 41 Conn. 73.

An administrator is not bound to set off a judgment in favor of his decedent against a claim upon his estate, but having done so he cannot complain that it makes an unequal distribution. Denny *v.* Moore, 13 Ind. 418.

Claims for which the intestate was the surety of a third person are not to be considered in determining the amount of the claim by such third person against the estate under the commission. White Mountains R. Co. *v.* Eastman, 34 N. H. 124.

41. Nelson *v.* Woodbury, 1 Me. 251; Saunders *v.* Planters' Bank, 2 Sm. & M. (Miss.) 287. But see Providence Steam Carpet Beating Co. *v.* Hazard, 20 R. I. 131, 37 Atl. 635, holding that the report of a commission to examine claims is not rendered void by failure to make it within the time limited in the order of appointment.

report of the commissioners was made under oath,[42] or that the advertisement of their meeting was made according to the directions of the court.[43] This report is in the nature of a judgment and is conclusive upon all interested therein who fail to properly object thereto,[44] especially where it has been accepted and approved by the probate court,[45] and the court should not thereafter reopen the report unless the former orders were null and void,[46] or except to correct a mistake[47] or supply an omission.[48] It is not conclusive, however, upon one who was not a party to the proceedings, and had no right to appeal therefrom.[49] It is the duty of the representative to give notice of a pending suit against the estate to the commissioners and to insist that a reservation be made to meet the judgment in such suit, and if he does not, and the report of the commissioners is accepted, it seems he will be liable to the creditor for his *pro rata* share of the assets.[50]

6. Reference of Disputed Claims.[51] A submission of disputed claims to referees is sometimes permitted where the claims submitted to the commissioners have been rejected by them in whole or in part.[52] The referees' report in such cases should include the evidence upon which they found their report;[53] and if erroneous may be set aside by the probate court upon exceptions taken,[54] and may be

Sufficiency of report.— The commissioners' report is sufficient if it states simply that they allowed the claimant a sum named, even where he makes several distinct claims. Littlefield *v.* Clark, 3 R. I. 265.

Report should not embrace preferred claims. Flitner *v.* Hanley, 19 Me. 261.

Where a claim was filed merely by way of notice and was considered as withdrawn at the time of the report, it was held that such claim had not been adjudicated on. Ostrom *v.* Curtis, 1 Cush. (Mass.) 461.

Effect of delay.— The fact that the report of commissioners is not returned until long after the time limited in the commission does not change the method of settling the estate. Jones *v.* Martin, 67 N. H. 334, 39 Atl. 971.

42. Herring *v.* Wellons, 5 Sm. & M. (Miss.) 354.

43. Herring *v.* Wellons, 5 Sm. & M. (Miss.) 354.

44. Findlay *v.* Hosmer, 2 Conn. 350; Bordman *v.* Smith, 4 Pick. (Mass.) 212; Gold *v.* McMechan, 1 Mass. 23; Mowry *v.* Steere, 2 R. I. 420; Mowry *v.* Peck, 2 R. I. 60.

The report constitutes a lien upon the real estate of the deceased in favor of the creditors proving their claims, which will be paramount to the title acquired by the purchaser under an execution in favor of a creditor. Mowry *v.* Steere, 2 R. I. 420.

A creditor who failed to present his claim within the statutory period is bound by the report of the commissioners. Canon *v.* Abbot, 1 Root (Conn.) 251.

Objection to the report must be taken by way of exceptions thereto. Crutcher *v.* Cavanaugh, 12 Ky. L. Rep. 292; Hemphill *v.* Fortner, 11 Sm. & M. (Miss.) 344.

45. Bates *v.* Ward, 49 Me. 87; Hemphill *v.* Fortner, 11 Sm. & M. (Miss.) 344, report that no claims were presented.

A suggestion that the representative corruptly neglected to oppose illegal claims against the estate will not cause the probate court to reject the report of commissioners, the remedy being against the personal representative by an action on his administration bond or a special action on the case for waste. Parsons *v.* Mills, 2 Mass. 80.

46. Hemphill *v.* Fortner, 11 Sm. & M. (Miss.) 344; Dahlgren *v.* Duncan, 7 Sm. & M. (Miss.) 280; Herring *v.* Wellons, 5 Sm. & M. (Miss.) 354; Powell *v.* Carbry, 4 Sm. & M. (Miss.) 86; Addison *v.* Eldridge, 1 Sm. & M. (Miss.) 510; Smith *v.* Berry, 1 Sm. & M. (Miss.) 321.

47. Towle *v.* Bannister, 16 Pick. (Mass.) 255.

48. Hemphill *v.* Fortner, 11 Sm. & M. (Miss.) 344.

49. Matthews *v.* Hutchins, 68 N. H. 412, 40 Atl. 1063.

50. Trezevant *v.* McQueen, 12 Sm. & M. (Miss.) 575.

51. See, generally, *supra*, X, C, 2, b.

52. Green *v.* Creighton, 7 Sm. & M. (Miss.) 197; Smith *v.* Berry, 1 Sm. & M. (Miss.) 321; Bond *v.* Dunbar, 2 N. H. 216; Woman's College *v.* Horne, (Tenn. Ch. App. 1900) 60 S. W. 609. And see Robins *v.* Norcum, 4 Sm. & M. (Miss.) 332.

53. Green *v.* Creighton, 7 Sm. & M. (Miss.) 197.

54. Green *v.* Creighton, 7 Sm. & M. (Miss.) 197.

Failure to agree on new referees is no ground for setting aside the report of the old referees, where, after referees had been appointed, it was agreed between parties that two new referees should be agreed upon, but they are unable to agree upon them. Sweet *v.* Mathewson, 1 R. I. 420.

A variance between the petition for an appointment of referees to hear and report a petition "according to law" and the writ directing the referees to decide as should seem "just and equitable" is not a ground for setting aside the report if the referees have decided according to law and have not followed the words of the writ. Sweet *v.* Mathewson, 1 R. I. 420.

recommitted to them if it appears to the court that the ends of justice will thus be best subserved.[55]

7. Review or Appeal — a. In General.[56] The personal representative,[57] a creditor,[58] an heir or distributee,[59] or any person interested or aggrieved[60] may appeal from the report of the commissioners allowing or rejecting claims,[61] or from the action of the probate court in accepting or rejecting such report,[62] or allowing or disallowing claims.[63]

b. Proceedings For Transfer of Cause.[64] An appeal must be in the manner prescribed by statute.[65] The appellant should aver in the reasons assigned for

55. Reed *v.* Wiley, 5 Sm. & M. (Miss.) 394.

56. See, generally, *supra*, X, B, 14, g.

57. *In re* McCune, 76 Mo. 200; Clough *v.* Clark, 63 N. H. 403, 1 Atl. 201.

58. Saunders *v.* Denison, 20 Conn. 521; Edwards *v.* Botsford, 1 Root (Conn.) 244; Foster *v.* Clark, 61 N. H. 29 (holding that a creditor's refusal to testify in support of his claim does not affect his right of appeal); Chapman *v.* Haley, 43 N. H. 300; Cromwell *v.* Herron, 11 Ohio Cir. Ct. 448, 5 Ohio Cir. Dec. 196; Hobart *v.* Herrick, 28 Vt. 627.

Supersedeas as to claims of other creditors. — Under the Alabama statute a creditor of an insolvent estate whose claim has been disallowed cannot on appeal have a supersedeas of decrees in favor of other creditors but the administrator should be allowed to reserve a ratable proportion of the moneys in his hands for the payment of such claim. Clark *v.* Guard, 73 Ala. 456.

59. Harris *v.* Angell, 16 R. I. 347, 16 Atl. 142, 17 Atl. 909. *Contra*, Burrows *v.* Bourne, 67 Me. 225.

60. Findlay *v.* Hosmer, 2 Conn. 350; Sawyer *v.* Copp, 6 N. H. 42; Yeaw *v.* Searle, 2 R. I. 168.

61. Bennett's Appeal, 33 Conn. 214; Clough *v.* Clark, 63 N. H. 403, 1 Atl. 201; Foster *v.* Clark, 61 N. H. 29; Chapman *v.* Haley, 43 N. H. 300; Harris *v.* Angell, 16 R. I. 347, 16 Atl. 142, 17 Atl. 909; Barnes *v.* Mowry, 11 R. I. 420. But see Hooe *v.* American Fur Co., 1 Wis. 334.

The commissioners' report of a contingent claim cannot be appealed from, but only their allowance of a claim. Hobart *v.* Herrick, 28 Vt. 627.

The commissioners' decision can be considered only on appeal directly therefrom, not on appeal from the probate court. Bennett's Appeal, 33 Conn. 214; Barnes *v.* Mowry, 11 R. I. 420.

Excess of jurisdiction. — Commissioners of insolvency having no jurisdiction to determine that a preferred claim is a non-preferred one, an appeal by a creditor from such a judgment by them cannot be sustained. State *v.* Hichborn, 67 Me. 504.

Venue. — An appeal from the decision of commissioners may be brought in the county where the administrator resides, although administration was granted in another county. Gould *v.* Carlton, 55 Me. 511.

Where a party has neglected to prosecute his appeal from the judgment of commissioners, a trial may be granted by the supreme court under R. I. Pub. St. c. 221, § 8. Baker *v.* Hoxie, 20 R. I. 331, 38 Atl. 1000; Harris *v.* Earle, (R. I. 1889) 39 Atl. 192.

62. Bennett's Appeal, 33 Conn. 214; Saunders *v.* Denison, 20 Conn. 521; Peck *v.* Sturges, 11 Conn. 420; Edwards *v.* Botsford, 1 Root 244; *In re* McCune, 76 Mo. 200.

Conclusiveness of decision not appealed from. — The decision of the probate judge upon the question whether further assets have come to the hands of an executor or administrator, so as to entitle a creditor to have the commission of insolvency opened for the purpose of letting in his claim, is conclusive upon the parties unless appealed from, and is not open to inquiry upon an appeal from the decision of the commissioners allowing or disallowing the claim. Ostrom *v.* Curtis, 1 Cush. (Mass.) 461.

A review is not allowed in a county court in a case appealed from a decision of the probate court in accepting a report of commissioners upon an insolvent estate. Foster *v.* Caldwell, 18 Vt. 176.

A confirmation of the report of referees is final as to the action of the probate court but is subject to reëxamination in the supreme court upon the law and facts. Reed *v.* Wiley, 5 Sm. & M. (Miss.) 394.

63. McNeil *v.* Macon, 20 Ala. 772; Sawyer *v.* Copp, 6 N. H. 42; England *v.* Pearson, 16 Lea (Tenn.) 443, 1 S. W. 42 (holding that an appeal from an adjudication of claims by the probate clerk lies directly to the circuit court, and the probate judge has no jurisdiction to review the acts of such clerk); Barksdale *v.* Ward, (Tenn. Ch. App. 1898) 46 S. W. 771.

An order striking out objections to claims against an insolvent estate, on the ground that the objections had not been filed within the prescribed time, is not within a statute providing for an appeal "upon any issue as to the allowance of any claim against insolvent estates." Christopher *v.* Stewart, 133 Ala. 348, 32 So. 11.

64. See, generally, *supra*, X, B, 14, g.

65. Morgan *v.* McCausland, 96 Me. 449, 52 Atl. 931; Bates *v.* Ward, 49 Me. 87.

Petition where appeal prevented by mistake, etc. — The law allowing a petition for appeal from the decree of a judge of probate, where such appeal has been prevented by mistake, accident, or misfortune, does not extend to the decision of commissioners upon insolvent estates; neither can the supreme court grant or refuse new trials on such decisions. Jones *v.* Martin, 67 N. H. 334, 39 Atl. 971;

appeal the extent of his interest and how it is affected by the decision appealed from,[66] and the grounds of objection must be stated with reasonable certainty, although minuteness and precision are not requisite.[67] The appeal should be taken by the appellant within the time prescribed by statute,[68] and due notice given to parties adversely interested,[69] who should, if claimants, bring their claims before the appellate court in the prescribed time and manner.[70] Even if the appellee is entitled to require a bond he may waive such privilege.[71]

c. Hearing and Determination.[72] On appeal such questions or matters only will be heard and determined as were considered below and are properly brought before the appellate court.[73] In the hearing and determination of a claim upon appeal, issues for a jury trial are sometimes framed.[74] Where the single issue is whether the claim itself ought to be allowed against the estate, formal pleadings are not necessary.[75] Under some statutes the claimant may on appeal from the commissioners amend any defect, mistake, or informality in the statement of his claim which does not change the ground of the action.[76] The statutes sometimes permit the court to require the creditor to submit to examination under oath,[77] but such a statute does not authorize the claimant to testify on his own motion.[78] A statute requiring on an appeal from a commissioner a production of "attested copies of the petition, declaration, and order of notice" does not make his report competent evidence upon the trial in the appellate court.[79] Proceedings on appeal by a creditor of an insolvent estate from the allowance of the claim of another

Hilton *v.* Wiggin, 46 N. H. 120. And see Swain *v.* Kemp, 71 N. H. 620, 51 Atl. 905.

Ineffectual appeal.— An appeal from a decree of a judge of probate and not from the decision of the commissioners is ineffectual to confer jurisdiction, where it appears that there is no decree of the judge of probate to appeal from, and no appeal is taken from the decision of the commissioners. Morgan *v.* McCausland, 96 Me. 449, 52 Atl. 931.

66. Saunders *v.* Denison, 20 Conn. 521.

67. Barnard *v.* Barnard, 16 Vt. 223.

68. *Connecticut.*— Bailey *v.* Whitman, 49 Conn. 79.

Maine.—Robbins Cordage Co. *v.* Brewer, 48 Me. 481.

Massachusetts.— Merriam *v.* Leonard, 6 Cush. 151.

New Jersey.— Young *v.* Young, 32 N. J. Eq. 275.

Rhode Island.— Barnes *v.* Mowry, 11 R. I. 420; Burlingame *v.* Saunders, 4 R. I. 41.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1644.

Leave to appeal after the expiration of the time limited for appeal will be granted, under N. H. Gen. St. c. 188, § 9, only when it appears that the petitioner has not unreasonably neglected to appeal, and that injustice has been done by the decision of the judge; and the petitioner will be required to furnish some evidence that the appeal is taken in good faith and that he actually intends to try the issues presented thereby. *In re* Moulton, 50 N. H. 532.

69. Donovan's Appeal, 40 Conn. 154; Pattee *v.* Lowe, 35 Me. 121; Jacobs *v.* Jacobs, 110 Mass. 229; Shaw *v.* Newell, 9 R. I. 111; Sheldon *v.* Johnston Probate Ct., 5 R. I. 436.

The fact that giving notice of appeal will be inconvenient cannot dispense with the positive requirement of the statute with regard thereto. Sheldon *v.* Johnston Probate Ct., 5 R. I. 436.

Affidavits in explanation or contradiction of the testimony on which the petition is founded, as set forth in the petition itself, must be taken with notice, or filed a sufficient length of time to enable the party to examine them. Wing *v.* Bates, 16 Vt. 148.

70. Sumner *v.* Fisk, 45 N. H. 588.

71. Rich *v.* Eldredge, 42 N. H. 246.

72. See, generally, *supra*, X, B, 14, g, (VII).

73. Hart's Appeal, 32 Conn. 520; Morgan *v.* McCausland, 96 Me. 449, 52 Atl. 931; Barksdale *v.* Ward, (Tenn. Ch. App. 1898) 46 S. W. 771.

An appeal from the disallowance of one of two distinct claims does not carry up for appeal the allowance of the other. Scutt's Appeal, 46 Conn. 38.

Account different from that used below.— Where upon the trial of an appeal plaintiff relied upon and used before the jury, against defendant's objection, an account against the deceased, which varied in amount and items charged, and was different in other respects from the original account filed in the probate court and used before the commissioners and auditor, the proceeding was irregular and the verdict should be set aside. Rich *v.* Eldredge, 42 N. H. 246.

74. Tolles' Appeal, 54 Conn. 521, 9 Atl. 402.

75. Tolles' Appeal, 54 Conn. 521, 9 Atl. 402.

76. Huntington's Appeal, 73 Conn. 582, 48 Atl. 766; Donahue's Appeal, 62 Conn. 370, 26 Atl. 399; Starkey's Appeal, 61 Conn. 199, 23 Atl. 1081 (stating claim in alternate forms); Bluehill Academy *v.* Ellis, 32 Me. 260; Abbott *v.* Keith, 11 Vt. 525.

77. Dyer *v.* Stanwood, 7 N. H. 261.

78. Morse *v.* Page, 25 Me. 496.

79. Cook *v.* Bennett, 51 N. H. 85.

creditor whose demand is much larger than the appellant's will be stayed to await the determination of an appeal taken by the administrator from the allowance of the claim of the appealing creditor.[80]

H. Rights and Remedies of Creditors — 1. In General. Under some statutes the creditors of an insolvent estate have the right to nominate a person as administrator of the property, rights, and credits of such estate unadministered.[81] Each creditor is entitled to a ratable proportion of his claim, with other creditors, and no more,[82] and he also has the right to contest the claims of other creditors or claimants,[83] provided his claims or objections are presented in the prescribed time and manner.[84]

2. Actions[85] — a. In General. After the representation or declaration of insolvency a creditor cannot bring an action on his full claim against the executor or administrator,[86] unless it is a preferred one, not affected by the insol-

80. Farr *v.* Williams, 47 N. H. 560.

81. Weaver *v.* Weaver, 23 Ala. 789; Long *v.* Easly, 13 Ala. 239, holding that it is the duty of the court to appoint an administrator so nominated by the creditors and that if the creditors fail to make such nomination the court may appoint such person as it shall deem fit.

Where a meeting of creditors fails to appoint a syndic to an insolvent succession for whose administration neither the beneficiary, heir, or any other person has applied, the court may appoint the sheriff. Morris *v.* Williams, 6 La. Ann. 391.

82. Happoldt *v.* Jones, Harp. (S. C.) 109; Hays *v.* Cecil, 16 Lea (Tenn.) 160, holding that where a creditor has received from the assets in another state a larger percentage on his claim than the creditors in the state where administration is had, he is entitled to nothing under the administration in the latter state.

Time for examination of claims. — The rights of claimants as to demands which form items of an account which the syndic of an insolvent succession is ordered to render cannot be examined until such account be rendered. Percy *v.* Percy, 7 Mart. N. S. (La.) 348.

83. *In re* Mouillerat, 14 Mont. 245, 36 Pac. 185 [*distinguishing* Ryan *v.* Kinney, 2 Mont. 454].

General creditors may require that their debts shall take precedence of voluntary and incomplete transfers of the decedent's property (Stewart *v.* Newton, 12 La. Ann. 622), or dispute liens claimed upon assets and contest the validity of chattel mortgages or pledges claimed as security (Farnum *v.* Boutelle, 13 Metc. (Mass.) 159; Currie *v.* Knight, 34 N. J. Eq. 485).

A creditor may plead the statute of limitations in bar of another creditor's debt (Wordsworth *v.* Davis, 75 N. C. 159; *In re* Claghorn, 181 Pa. St. 600, 37 Atl. 918, 59 Am. St. Rep. 680 [*distinguishing* McWilliam's Appeal, 117 Pa. St. 111, 11 Atl. 383]), even though the representatives have waived or are estopped to plead the statute (*In re* Claghorn, 181 Pa. St. 600, 37 Atl. 918, 59 Am. St. Rep. 680 [*distinguishing* McWilliam's Appeal, 117 Pa. St. 111, 11 Atl. 383]).

Upon proceedings for distribution before an auditor creditors may question each other's claims and the auditor may reject such as do not appear to be fair and just. Hahnlin's Appeal, 45 Pa. St. 343. And see *In re* Kittera, 17 Pa. St. 416 [*overruling* Matter of Smith, 1 Ashm. (Pa.) 352].

Effect of opposition. — An opposition by a creditor to an administrator's tableau of distribution puts in issue the validity as well as the rank of debts. Kerley's Succession, 18 La. Ann. 583.

84. Dahlgren *v.* Duncan, 7 Sm. & M. (Miss.) 280; Koons *v.* Koons, 148 Pa. St. 585, 24 Atl. 95.

85. **Actions pending at time of declaration of insolvency** see *supra*, XIII, C, 7, b.

Actions generally see *infra*, XIV.

86. *Indiana.* — Hardesty *v.* Kinworthy, 8 Blackf. 304; Remy *v.* Butler, 7 Blackf. 5.

Maine. — Pattee *v.* Lowe, 36 Me. 138.

Massachusetts. — Johnson *v.* Ames, 6 Pick. 330; Paine *v.* Nichols, 15 Mass. 264; Wildridge *v.* Patterson, 15 Mass. 148.

New Jersey. — Reeves *v.* Townsend, 22 N. J. L. 396.

Tennessee. — Spencer *v.* Goodlett, 104 Tenn. 648, 58 S. W. 322; Sellars *v.* Brown, (Ch. App. 1897) 46 S. W. 335.

Texas. — Farmers', etc., Nat. Bank *v.* Bell, 31 Tex. Civ. App. 124, 71 S. W. 570.

Canada. — Wilson *v.* Marvin, 3 Brit. Col. 327.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1647, 1648; and *supra*, XIII, C, 7, a.

But *compare* Blodget *v.* Brinsmaid, 7 Vt. 9, holding that creditors of an estate represented insolvent have the right to sue the executor or administrator before the appointment of commissioners.

Action in federal courts. — A decree of insolvency by a state court is no bar to the rendition of a judgment in an action at law in the federal courts, but when the estate is actually insolvent such judgment will be enjoined in equity and the creditor compelled to come in and take his place with other creditors of the estate. Byrne *v.* McDow, 23 Ala. 404.

Appeal lies from decree granting leave to institute suit. Leighton *v.* Chapman, 30 Me. 538.

vency,[87] or the estate proves solvent,[88] or unless the estate has been wasted and not accounted for by the representative,[89] although under some statutes a suit may be prosecuted for the purpose of establishing the claim, the judgment thereon to be enforced and collected in the manner provided for the collection of other claims against the estate.[90] The creditor may also sue the representative where his claim is rejected[91] and the representative gives him notice to sue.[92] After the proceedings in insolvency a creditor's right is generally to maintain an action against the representative only for the balance allowed him by the commissioners,[93] or for his *pro rata* share of the dividend decreed by the probate court;[94] his usual remedy in such cases being either by a suit on the representative's administration bond[95] or by debt on the decree of distribution.[96] If the creditor is paid his *pro rata* share he cannot sue for the balance of his claim,[97] unless it is a preferred one, which has been paid only a *pro rata* share with general creditors.[98]

b. Suits in Equity. Unless barred by lapse of time or laches,[99] a creditor of an insolvent estate may maintain a bill in equity to wind up such estate and to subject it to the payment of debts generally;[1] or he may maintain a bill to subject certain assets to the payment of his judgment,[2] to set aside a fraudulent conveyance or sale by the intestate,[3] to annul a fraudulent judgment against the decedent,[4] or to restrain proceedings under a judgment at law obtained by another

87. Pattee *v.* Lowe, 36 Me. 138.

88. Bacon *v.* Thorp, 27 Conn. 251; Pattee *v.* Lowe, 36 Me. 138. But see Johnson *v.* Ames, 6 Pick. (Mass.) 330; Paine *v.* Nichols, 15 Mass. 264.

89. McNeill *v.* Elkins, 10 La. 587; State *v.* Bowen, 45 Miss. 347; Burruss *v.* Fisher, 23 Miss. 228. But see Pattee *v.* Lowe, 36 Me. 138; Longfellow *v.* Patrick, 25 Me. 18.

90. Wilson *v.* Broward, 15 Fla. 587; Crisp *v.* Dunn, 56 N. J. L. 355, 29 Atl. 166.

91. Eaton *v.* Whitaker, 6 Pick. (Mass.) 465; Smith *v.* Crater, 43 N. J. Eq. 636, 12 Atl. 530; James *v.* James, 14 R. I. 564, holding that such suit may be brought without notice.

Premature suit.— A suit at law on a claim against an insolvent estate which is commenced after the claim has been rejected by the insolvency commissioners, but before they have made their report and procured its acceptance by the judge of probate, is premature. Goff *v.* Kellogg, 18 Pick. (Mass.) 256.

92. Smith *v.* Crater, 43 N. J. Eq. 636, 12 Atl. 530.

93. Doolittle *v.* Hunsden, Brayt. (Vt.) 41.

94. Melone *v.* Gaines, Minor (Ala.) 317; Nelson *v.* Woodbury, 1 Me. 251; Mansfield *v.* Patterson, 15 Mass. 491; State *v.* Bowen, 45 Miss. 347; Burruss *v.* Fisher, 23 Miss. 228.

95. Wass *v.* Bucknam, 40 Me. 289; Dickinson *v.* Bean, 11 Me. 50; Nelson *v.* Woodbury, 1 Me. 251; State *v.* Bowen, 45 Miss. 347. And see *infra*, XVII.

Necessity for decree and demand.— Before a creditor may maintain an action on the administration bond there must be a decree of distribution by the probate judge and a demand made upon the administrator for the amount decreed the creditor. Nelson *v.* Woodbury, 1 Me. 251.

Where new assets are discovered pending proceedings of an insolvent estate, a creditor who has his claims allowed by the commissioners cannot sustain a suit for the recovery of such new assets, but should sue upon the administration bond for the benefit of all creditors in case the administrator refuse to inventory it. Tyler *v.* Cook, Kirby (Conn.) 391. And see Mansfield *v.* Patterson, 15 Mass. 491.

96. Wass *v.* Bucknam, 40 Me. 289.

97. Siebert *v.* Zinkand, 26 Pittsb. Leg. J. (Pa.) 137.

98. Flitner *v.* Hanley, 19 Me. 261.

99. See Brown *v.* Morgan, 84 Ill. App. 233; Stone *v.* Sanders, 1 Head (Tenn.) 248.

1. Lunsford *v.* Jarrett, 2 Lea (Tenn.) 579; Treece *v.* Carr, (Tenn. Ch. App. 1900) 58 S. W. 1078; Timmons *v.* Rainey, (Tenn. Ch. App. 1899) 55 S. W. 21.

2. Bay *v.* Cook, 31 Ill. 336; Simpson *v.* Simpson, 7 Humphr. (Tenn.) 275.

Bill in alternative.— A creditor's bill may be maintained after the death of a judgment debtor to reach equitable assets where the prayer is in the alternative that plaintiff be given a prior lien on the fund, or, if this cannot be granted, that there be a settlement and distribution of the debtor's assets. Riddle *v.* Motley, 1 Lea (Tenn.) 468.

3. State *v.* Parsons, 147 Ind. 579, 47 N. E. 17, 62 Am. St. Rep. 430; Morris *v.* Williams, 6 La. Ann. 391; Spicer *v.* Ayers, 2 Thomps. & C. (N. Y.) 626 (holding that where a defendant is both the administrator of the decedent and the party holding the fraudulent title, the estate being insolvent, a creditor at large may maintain his action in equity for relief); Lilienthal *v.* Drucklieb, 92 Fed. 753, 34 C. C. A. 657. And see *supra*, III, H, 7.

4. Morris *v.* Williams, 6 La. Ann. 391, holding that, to enable creditors to annul a judgment obtained by a wife against her husband, they must allege and prove they were creditors at the time the judgment was rendered, and that it was obtained by collusion in order to defraud them of their recourse upon the husband's property.

creditor after the estate was declared insolvent.[5] But he cannot by any such suits acquire a preference over other creditors.[6]

c. Time For Suing.[7] Creditors are usually forbidden to bring suit within a prescribed period after the granting of administration, except as to preferred claims not affected by the decedent's insolvency.[8] It is also generally provided that suits by creditors to enforce their claims are barred unless brought within a certain time prescribed by statute,[9] unless new assets come into the representative's hands;[10] but it has been held that the balance of a claim against the estate of a deceased insolvent person, on which a dividend has been paid, is not within the statute of limitations.[11]

d. Parties.[12] The executor or administrator is generally a necessary party to proceedings against an insolvent estate in equity,[13] as are also the heirs where the bill has for its object the sale of land to pay debts.[14]

e. Pleading.[15] A declaration by a creditor on a claim which has been rejected by the commissioners should set forth the demand truly and state that it was laid before the commissioners and was rejected.[16] It is no objection to a declaration by a creditor that he declares against himself as administrator.[17] In an action by a creditor, suing in behalf of all, against an administratrix and the county judge for an accounting, a petition which alleges collusion between defendants and a fraudulent payment and retention of illegal fees to the prejudice of the creditors is sufficient as against demurrer.[18]

f. Evidence.[19] The insolvency of the estate may be shown in a collateral proceeding by a creditor to enforce his claim,[20] although the proof required to establish insolvency in such proceeding need not be as positive as when the insolvency is directly in issue.[21] The opinion of the commissioners as to the facts

5. Byrne *v.* McDow, 23 Ala. 404; Scarlett *v.* Hicks, 13 Fla. 314.

6. Bouchaud *v.* Dias, 1 N. Y. 201 [*reversing* 10 Paige 445]; People's Nat. Bank *v.* Kern, 8 Pa. Dist. 72; Gleaves *v.* Wilson, 4 Baxt. (Tenn.) 54.

7. See *infra*, XIV, F.

8. Smith *v.* Rhodes, 29 Me. 360; Severance *v.* Hammatt, 28 Me. 511.

9. Leighton *v.* Chapman, 30 Me. 538; Gleaves *v.* Wilson, 4 Baxt. (Tenn.) 54.

Where a claim has been rejected by the commissioners for want of proof, and such rejection is confirmed by the probate court's allowance of the report of the commissioners, the claimant is concluded thereby, unless his suit is brought with all the diligence required by the statute. Burlingame *v.* Brown, 5 R. I. 410.

The time elapsing while proceedings are pending in the probate court between the creditor's filing of his claim and the bringing of a suit thereon cannot be deducted to prevent the bar of the statute of limitations. Lea *v.* Leachman, 22 Ala. 452.

Relief from failure to sue within time limited.— N. H. Pub. St. c. 191, § 27, providing that one who has a claim against the estate of a deceased person which has not been prosecuted in time may apply to the supreme court by petition stating the facts, and, if the court deem that justice and equity require it and that the claimant has not been culpably negligent, they may give him judgment for the amount due him, does not apply to insolvent estates. Parsons *v.* Parsons, 67 N. H. 419, 29 Atl. 999.

10. Dexter *v.* Arnold, 7 Fed. Cas. No. 3,855, 3 Mason 284.

11. Bancroft *v.* Andrews, 6 Cush. (Mass.) 493.

12. See *infra*, XIV, G.

13. McDowell *v.* Cochran, 11 Ill. 31; White *v.* Follin, 1 Hill Eq. (S. C.) 187.

A creditor's bill to recover assets fraudulently conveyed by the decedent does not depend on the existence of a legal representative of the decedent or on his refusal to act and may be brought independent of such representative. Lilienthal *v.* Drucklieb, 92 Fed. 753, 24 C. C. A. 657.

14. Timmons *v.* Rainey, (Tenn. Ch. App. 1899) 55 S. W. 21. See *supra*, XII, G, 4, a.

15. See, generally, *infra*, XIV, K.

16. Eaton *v.* Whitaker, 6 Pick. (Mass.) 465.

17. Ross *v.* Ross, 20 Ala. 105, holding that, in a contest between creditors, it is the proper practice, where written objections are filed to a creditor's claim, for him to declare upon it as in a suit at common law, against the representative, and that such declaration is not demurrable because the creditor as plaintiff declares against himself as administrator *de bonis non* as defendant.

18. McGlave *v.* Fitzgerald, (Nebr. 1903) 93 N. W. 692, holding further that it was not necessary in order to entitle the creditor to bring an action that he should show a technical refusal by the administratrix to sue.

19. See, generally, *infra*, XIV, L.

20. Byrd *v.* Jones, 84 Ala. 336, 4 So. 375.

21. Byrd *v.* Jones, 84 Ala. 336, 4 So. 375.

in reference to a claim, as they appeared before them, is inadmissible to establish such claim in an action against the representative thereon.[22]

g. Defenses.[23] The personal representative of an insolvent estate can defend a suit brought against him for a debt due from his decedent only by showing an account of administration properly settled in the probate court, or by regular proceedings in insolvency under statute.[24] An administrator who distributes the entire fund in his hands pending an appeal by a creditor whose claim is disallowed cannot set up such payment in bar of an action by the creditor against him on a settlement made after a reversal of the disallowance;[25] nor can the representative set up the allowance of a claim by the commissioners to the wrong person as a defense to an action by the proper person on the same claim.[26]

h. Judgment and Relief.[27] Where a creditor's claim has been allowed by the commissioners, judgment may be rendered in an action by the creditor, for the amount of the dividend awarded him by the court;[28] but if notice of dissatisfaction with the commissioners' report is given by the representative as required by statute, and the creditor in consequence brings an action at law, he may have judgment for a larger or smaller sum than that allowed by the commissioners,[29] together with his costs in the action.[30] But the writ, in an action of this kind, should contain no order to attach the goods of the intestate, and if it does it may be abated by plea or motion, though unless so avoided the objection is waived.[31] A general decree may be rendered for the benefit of all creditors, although the bill is on behalf of one of them only, if it appears by the answer that the estate is insolvent, and that there are other creditors to be paid ratably with plaintiff.[32] A surety who brings an action on a note of the deceased insolvent, which he did not pay until after administration had ended, and to which the representative pleads *plene administravit*, may be entitled to a judgment *quando acciderint*.[33]

I. Distribution and Settlement — **1. In General.** As a general rule all the property of a deceased insolvent debtor not set apart for the widow and minor children becomes assets in the hands of his representative, for the payment *pro rata* of all his debts according to classification, no matter where the assets may be found or the creditors reside.[34] Claims of a higher class are to be paid before

22. Fitch *v.* Hyde, Kirby (Conn.) 258.
23. See, generally, *infra*, XIV, C.
24. Cushing *v.* Field, 9 Metc. (Mass.) 180.
25. Clark *v.* Guard, 73 Ala. 456.
26. Salem First Nat. Bank *v.* Grant, 71 Me. 374, 36 Am. Rep. 334.
27. See, generally, *infra*, XIV, O.
28. Peirce *v.* Whittemore, 8 Mass. 282.
29. Blake *v.* Dennie, 15 Pick. (Mass.) 385; Pierce *v.* Saxton, 14 Pick. (Mass.) 274; Burns *v.* Fay, 14 Pick. (Mass.) 8.
30. Blake *v.* Dennie, 15 Pick. (Mass.) 385; Pierce *v.* Saxton, 14 Pick. (Mass.) 274. And see Mathewson *v.* Sheldon, 6 R. I. 223.
31. Thayer *v.* Comstock, 39 Me. 140.
32. Dias *v.* Bouchaud, 10 Paige (N. Y.) 445 [*reversed* on other grounds in 1 N. Y. 201].
33. Rosborough *v.* Mills, 35 S. C. 578, 15 S. E. 281.
34. *Arkansas.*— Jamison *v.* Adler-Goldman Commission Co., 59 Ark. 548, 28 S. W. 35.

Illinois.— Ramsay *v.* Ramsay, 196 Ill. 179, 63 N. E. 618 [*affirming* 97 Ill. App. 270].

Massachusetts.— Jennison *v.* Hapgood, 14 Pick. 345.

Mississippi.— Dahlgren *v.* Duncan, 7 Sm. & M. 280; Stamps *v.* Brown, Walk. 526, holding that where a creditor has two claims, a judgment and a note, the dividend allowed him should be credited on each claim *pro rata*.

Pennsylvania.— Smith's Estate, 17 Lanc. L. Rev. 380.

United States.— Tennessee Union Bank *v.* Vaiden, 18 How. 503, 15 L. ed. 472; Williams *v.* Benedict, 8 How. 107, 12 L. ed. 1003.

England.— *In re* Bentinck, [1897] 1 Ch. 673, 66 L. J. Ch. 359, 76 L. T. Rep. N. S. 284, 45 Wkly. Rep. 397; *In re* Jones, 31 Ch. D. 440, 55 L. J. Ch. 350, 53 L. T. Rep. N. S. 855, 34 Wkly. Rep. 249; Wilson *v.* Coxwell, 23 Ch. D. 764, 52 L. J. Ch. 975.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1652.

A non-resident creditor is entitled to participate with resident creditors in the assets according to the rank and classification of his claim, where it does not appear that he has received payment on such claim in any other state. Tyler *v.* Thompson, 44 Tex. 497, 23 Am. Rep. 600.

A creditor entitled to a preference as to legal assets, who has been partially paid out of such assets, cannot receive any share of the equitable assets until the payments to all

distribution to those of a lower class, taking the whole fund if necessary,[35] and any surplus remaining after paying verified claims goes in the absence of statute to the distributees in preference to creditors whose claims were rejected because not properly filed and verified.[36] No priority or preference of payment can be acquired by one creditor over other creditors of the same class.[37] A claim of the personal representative against the insolvent estate can only be paid *pro rata* with other creditors of the same class,[38] but where he has paid preferred claims out of his own funds he may become entitled to a preference by subrogation.[39]

2. New or Increased Assets. Newly discovered assets also become a trust fund for ratable distribution among creditors,[40] and the fact that certain creditors have, by their special discovery and exertion, made such assets available to the estate for distribution, gives them no preference in the distribution,[41] although it would seem that their special and reasonable outlay in procuring such assets should be deducted with other costs from the fund thus made available.[42]

3. Preferred Claims.[43] The statutes usually provide what claims shall be entitled to a preference in the distribution of the assets of an insolvent estate[44]

creditors are equalized, when he will be paid ratably out of the residue; and it makes no difference whether he has received payment of one of several distinct claims or a part of one entire claim. Wilder *v.* Keeler, 3 Paige (N. Y.) 167, 23 Am. Dec. 781.

The rule of distribution in a trust deed for the benefit of creditors will be the rule of distribution of the estate if not repugnant to the laws of the state where it is to be applied. Slatter *v.* Carroll, 2 Sandf. Ch. (N. Y.) 573.

Delayed creditor.— A creditor whose debt was not due when the first account of the executor was audited, and who did not participate in the distribution then made, is entitled, on a further distribution, to receive an amount sufficient to give him a share of the entire estate proportionate to that received by other creditors of the same class. Cairn's Estate, 37 Leg. Int. (Pa.) 183.

Judgment given for support of wife.— A judgment given by a deceased husband to a trustee to secure his wife's support must be postponed to claims of creditors in the distribution. Jaeger Estate, 1 Del. Co. (Pa.) 525.

Notes executed to a married woman by her husband in consideration of her conveyance of land and slaves cannot be allowed out of his insolvent estate in preference to other creditors. Maraman *v.* Maraman, 4 Metc. (Ky.) 84.

35. Gish's Appeal, 31 Pa. St. 277; *In re* Williams, L. R. 15 Eq. 270, 42 L. J. Ch. 158, holding that a simple contract creditor of a deceased insolvent who obtains but does not register a judgment for his debt against a legal personal representative is entitled to priority over the intestate's specialty and simple contract creditors. See *infra*, XIII, I, 3.

36. Puryear *v.* Puryear, 34 Ala. 555; Murdock *v.* Rousseau, 32 Ala. 611. But see Bartol *v.* Calvert, 21 Ala. 42.

37. Leiper *v.* Lavis, 15 Serg. & R. (Pa.) 108.

Judgment creditors share ratably in the assets of an insolvent estate notwithstanding the dates of the judgments (Newark Second Nat. Bank *v.* Blauvelt, 44 N. J. Eq. 173, 14 Atl. 618; Leiper *v.* Levis, 15 Serg. & R. (Pa.) 118; Williams *v.* Benedict, 8 How. (U. S.) 107, 12 L. ed. 1007), but if the personal estate is insufficient the judgments should be paid from the realty in the order of their priority (Bassett *v.* Elliott, 78 Mo. 525).

38. Baker *v.* Wood, 51 Ala. 345; Shortridge *v.* Easley, 16 Ala. 520; Sealey *v.* Thomas, 6 Fla. 25; Tell City Furniture Co. *v.* Stiles, 60 Miss. 849; Rutenic *v.* Hamakar, 40 Oreg. 444, 67 Pac. 196.

39. Trumbo *v.* Tiernan, 7 Ky. L. Rep. 41; Chamberlin *v.* McDowell, 42 N. J. Eq. 628, 9 Atl. 577. And see *In re* Torr, 2 Rawle (Pa.) 250.

40. Sharp *v.* Citizens' Bank, (Nebr. 1904) 98 N. W. 50; Gunter *v.* Gunter, 2 S. C. 11; Dexter *v.* Arnold, 7 Fed. Cas. No. 3,855, 3 Mason 284.

41. Colton *v.* Field, 131 Ill. 398, 22 N. E. 545; Jenkins *v.* Edens, 12 B. Mon. (Ky.) 239; Rains *v.* Rainey, 11 Humphr. (Tenn.) 261.

42. *In re* Weed, 163 Pa. St. 595, 30 Atl. 272.

43. As to priorities generally see *supra*, X, D, 2.

44. See Smith *v.* Mallory, 24 Ala. 628; Crutcher *v.* Cavanaugh, 12 Ky. L. Rep. 292; Field *v.* Wheatley, 1 Sneed (Tenn.) 351; Hartley *v.* Gains, 4 Hayw. (Tenn.) 159.

Mortgages.— Under 2 Ind. Rev. St. (1876) p. 534, §§ 108, 109, a mortgage on realty of a deceased insolvent is a preferred debt as to the personalty. Evans *v.* Pence, 78 Ind. 439. But in Massachusetts it has been held that a mortgagee of a decedent who died insolvent cannot demand that the administrator be required to pay a balance due on the price of the chattels mortgaged as this would give a preference to the mortgagee over the other creditors. Wentworth *v.* S. A. Woods Mach. Co., 163 Mass. 28, 39 N. E. 414.

A decree in equity ranks with a judgment at law in the distribution of the assets of an insolvent estate. Second Nat. Bank *v.* Blauvelt, 44 N. J. Eq. 173, 14 Atl. 618.

and for the classification of such claims.[45] Expenses of last illness and funeral,[46] necessary expenses of administration,[47] and debts due the government,[48] are generally recognized as privileged claims. Some of the statutes rank judgment creditors and creditors by specialty or simple contract on an equal footing of *pro rata* distribution.[49] A claim for a trust fund cannot be treated as a preferred claim[50] unless the fund can be specifically identified.[51]

4. Secured Claims — a. Preference Out of Security. A lien or secured creditor is entitled to a preference of payment out of the specific property on which his lien exists[52] to the extent of such lien,[53] but he cannot apply the excess of the security over the amount of the secured claim to an unsecured claim which he holds and thereby obtain a preference over other creditors.[54]

b. Rights as to General Assets. In some jurisdictions it is held that a secured creditor can prove only for the difference between the amount of his claim and the value of his security unless he surrenders the security to go into the common fund,[55] or unless the security was furnished by a third person not primarily responsible for the debt.[56] But by the weight of authority a secured creditor may prove and collect dividends on his entire claim allowed by the commissioners, without giving up or affecting his security.[57] If he thus obtains payment in full

45. See Smith *v.* Mallory, 24 Ala. 628.

46. Flitner *v.* Hanly, 18 Me. 270; Huse *v.* Brown, 8 Me. 167. And see *supra*, X, D, 2, c, (II), (B), (1).

47. Friend *v.* Graham, 10 La. 438; Morel *v.* Misotiere, 3 Mart. (La.) 363; Fuller *v.* Connelly, 142 Mass. 227, 7 N. E. 853. And see *supra*, X, D, 2, c, (II), (B), (1).

Unauthorized compromise.— Where the administrator compromises a claim against a debtor without an order of court, costs paid by him in such case are not a preferred claim against the estate. Patapsco Guano Co. *v.* Ballard, 107 Ala. 710, 19 So. 777, 54 Am. St. Rep. 131.

48. Huse *v.* Brown, 8 Me. 167; Fields *v.* Wheatley, 1 Sneed (Tenn.) 351. And see *supra*, X, D, 2, c, (II), (B), (2).

A debt due a state bank is not a debt due to the government within the meaning of this rule, for the statute refers only to debts and arrearages due to the government or state in its sovereign character, as revenues, fines, forfeitures, penalties, etc. Fields *v.* Wheatley, 1 Sneed (Tenn.) 351.

49. Smith *v.* Mallory, 24 Ala. 628; Paschall *v.* Hailman, 9 Ill. 285.

50. Stephens *v.* Stephens, 89 Ky. 185, 12 S. W. 192, 11 Ky. L. Rep. 496; Crutcher *v.* Cavanaugh, 12 Ky. L. Rep. 292; Benbury *v.* Benbury, 22 N. C. 235; Schneider's Estate, 11 Phila. (Pa.) 71. And see Cooley *v.* Vansyckle, 14 N. J. Eq. 496.

51. Schneider's Estate, 11 Phila. (Pa.) 71; Vandever *v.* Freeman, 20 Tex. 333, 70 Am. Dec. 391, holding that where a trust is established against an insolvent estate, in property which has been sold as the property of said estate since the death of the trustee, the *cestui que trust* will not be remitted to his *pro rata* with the general creditors, but is entitled to recover the proceeds of the trust property.

52. Jewett *v.* Hurrle, 121 Ind. 404, 23 N. E. 262; Durand *v.* Delahoussaye, 28 La. Ann. 622; Brown *v.* Trottner, 11 Ohio Cir. Ct. 498, 1 Ohio Cir. Dec. 222. But see Severance *v.* Hammatt, 28 Me. 511.

Lien must have been perfected see Weed *v.* Standley, 12 Fla. 166; Rhoton's Succession, 34 La. Ann. 893.

Equitable relief.— Where one had arranged with his debtor, before the latter died, to take certain security on property, and the writing given is inadequate for that purpose, equity will relieve such creditor where the estate is insolvent, and enforce against the decedent's personal representative the original undertaking. Hunt *v.* Ennis, 12 Fed. Cas. No. 6,889, 2 Mason 244.

Where lien has expired.— Heirs paying off judgments against their ancestor, the lien of which had expired, are not entitled thereby to any priority over general creditors of the estate. Belcher *v.* Wickersham, 9 Baxt. (Tenn.) 111.

53. Smith *v.* Bryant, 60 Ala. 235.

54. Smith *v.* Bryant, 60 Ala. 235; Masonic Sav. Bank *v.* Bangs, 84 Ky. 135, 4 Am. St. Rep. 197; Spratt *v.* Richmond First Nat. Bank, 84 Ky. 85, 7 Ky. L. Rep. 791; Peters *v.* Nashville Sav. Bank, 86 Tenn. 224, 6 S. W. 133.

55. Bristol County Sav. Bank *v.* Woodward, 137 Mass. 412; Haverhill Loan, etc., Assoc. *v.* Cronin, 4 Allen (Mass.) 141; Savage *v.* Winchester, 15 Gray (Mass.) 453; Farnum *v.* Boutelle, 13 Metc. (Mass.) 159; Middlesex Bank *v.* Minot, 4 Metc. (Mass.) 325; Hooker *v.* Olmstead, 6 Pick. (Mass.) 481; Gibson *v.* Crehore, 5 Pick. (Mass.) 146; Amory *v.* Francis, 16 Mass. 308; Johnson *v.* Corbett, 11 Paige (N. Y.) 265; Moore *v.* Dunn, 92 N. C. 63; Creecy *v.* Pearce, 69 N. C. 67. *Compare* Church *v.* Savage, 7 Cush. (Mass.) 440. And see Bartholomew *v.* May, 1 Atk. 487, 26 Eng. Reprint 309.

56. Bristol County Sav. Bank *v.* Woodward, 137 Mass. 412; Savage *v.* Winchester, 15 Gray (Mass.) 453.

57. *Colorado.*— Erle *v.* Lane, 22 Colo. 273, 24 Pac. 591.

the security inures to the benefit of the unsecured creditors,[58] while if the dividend, although insufficient to pay his claim in full, reduces it to less than the value of the security, the representative must redeem for the benefit of the estate.[59] Where, however, the creditor disposes of the security the sum realized operates as a partial payment to reduce his claim *pro tanto*, and thereafter he is entitled to dividends only on the balance.[60]

5. Improper Payments and Liability to Refund. If the representative makes overpayments, or pays some creditors in full while others are left unpaid, he will be personally liable to the latter to make up their respective proportions,[61] and where a claim is paid by the representative to the wrong person under a mistake, he may be compelled as administrator to pay it again to the right person.[62] The creditors receiving an overpayment may be compelled to refund in an action by the representative or his successor,[63] but not in an action directly by other

Connecticut.— Findlay *v.* Hosmer, 2 Conn. 350.

Illinois.— Peoria First Nat. Bank *v.* Commercial Nat. Bank, 151 Ill. 308, 37 N. E. 1019; Furness *v.* Union Nat. Bank, 147 Ill. 570, 35 N. E. 624; Matter of Bates, 118 Ill. 524, 9 N. E. 257, 59 Am. Rep. 383.

Indiana.— Clarke *v.* Henshaw, 30 Ind. 144. See also Hight *v.* Taylor, 97 Ind. 392.

Louisiana.— Day's Succession, 2 La. Ann. 895.

Maryland.— See Watkins *v.* Worthington, 2 Bland 509.

Missouri.— Day *v.* Graham, 97 Mo. 398, 11 S. W. 55; *In re* McCune, 76 Mo. 200; Welton *v.* Hull, 50 Mo. 296.

New Hampshire.— Moses *v.* Ranlet, 2 N. H. 488.

Ohio.— Cromwell *v.* Herron, 11 Ohio Cir. Ct. 448, 5 Ohio Cir. Dec. 196.

Pennsylvania.— Mason's Appeal, 89 Pa. St. 402; *In re* Kittera, 17 Pa. St. 416; Daus' Estate, 8 Pa. Dist. 326.

Texas.— Sutherland *v.* Elmendorf, 24 Tex. Civ. App. 137, 57 S. W. 890.

Vermont.— Walker *v.* Baxter, 26 Vt. 710; West *v.* Rutland Bank, 19 Vt. 403.

United States.— Schuelenburg *v.* Martin, 2 Fed. 747, 1 McCrary 348.

England.— Mason *v.* Bogg, 1 Jur. 330, 2 Myl. & C. 443, 14 Eng. Ch. 443 [*questioning* Greenwood *v.* Taylor, 1 Russ. & M. 185, 5 Eng. Ch. 185].

See 22 Cent. Dig. tit. "Executors and Administrators," § 1655.

A mortgage creditor is entitled to payment out of the general assets, although a court of equity may compel him to first resort to the land. Tubb's Estate, 161 Pa. St. 252, 28 Atl. 1109; Fish's Estate, 16 Phila. (Pa.) 373.

The purchase of the equity of redemption by a mortgagee does not extinguish his debt so as to preclude him from an average. Findlay *v.* Hosmer, 2 Conn. 350.

Application of dividend.— Where the claim allowed consisted wholly of principal the dividend should be applied solely to the principal leaving the interest unpaid. Loomis *v.* Eaton, 32 Conn. 550.

Secured creditor must account for amount received in excess of debt and interest. Daus' Estate, 8 Pa. Dist. 326.

58. Erle *v.* Lane, 22 Colo. 273, 44 Pac. 591.

59. Erle *v.* Lane, 22 Colo. 273, 24 Pac. 591; Matter of Bates, 118 Ill. 524, 9 N. E. 257, 59 Am. Rep. 383.

60. *Arkansas.*— Jamison *v.* Adler-Goldman Commission Co., 59 Ark. 548, 28 S. W. 35.

Colorado.— Erle *v.* Lane, 22 Colo. 273, 44 Pac. 591; Sullivan *v.* Erle, 8 Colo. App. 1, 44 Pac. 948.

Illinois.— Peoria First Nat. Bank *v.* Commercial Nat. Bank, 151 Ill. 308, 37 N. E. 1019; Furness *v.* Union Nat. Bank, 147 Ill. 570, 35 N. E. 624.

Indiana.— La Plante *v.* Convery, 98 Ind. 499.

Missouri.— *In re* McCune, 76 Mo. 200.

South Carolina.— Wheat *v.* Dingle, 32 S. C. 473, 11 S. E. 394, 8 L. R. A. 375.

Tennessee.— Winton *v.* Eldridge, 3 Head 361; Fields *v.* Wheatley, 1 Sneed 351.

Vermont.— West *v.* Rutland Bank, 19 Vt. 403.

West Virginia.— Van Winkle *v.* Blackford, 54 W. Va. 621, 46 S. E. 589.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1655.

In Pennsylvania it is held that in case of insolvency a creditor is entitled to have his dividend computed upon his total claim at the death of decedent, irrespective of the amount realized from sale of collateral security, but cannot receive more than the sum actually due. *In re* Miller, 82 Pa. St. 113, 22 Am. Rep. 754; Carr's Estate, 3 Pa. Dist. 740, 15 Pa. Co. Ct. 354; Morgan's Estate, 1 Pa. Dist. 402, 11 Pa. Co. Ct. 536.

61. Harris *v.* Fisher, 5 Sm. & M. (Miss.) 74; Rice *v.* Hunt, 7 Lea (Tenn.) 33; Johnson *v.* Molsbee, 5 Lea (Tenn.) 444; Redding *v.* Boyd, 64 Tex. 498.

Payment pending appeal.— If the representative pays out the entire funds in his hands pending an appeal by a creditor from a disallowance of his claim, he will be personally liable to such creditor upon a reversal of the disallowance, and cannot require him to proceed against a creditor who has been paid. Clark *v.* Guard, 73 Ala. 456.

62. Bird *v.* Bohannon, 25 Ala. 279.

63. Walker *v.* Mock, 39 Ala. 568; McFarlin *v.* Ringer, 51 Ga. 363; Tarplee *v.* Capp, 25 Ind. App. 56, 56 N. E. 270; Coughlin's Succession, 35 La. Ann. 343; Debreuil's Succession, 12 Rob. (La.) 507.

creditors, the remedy of the latter being upon the administration bond of the representative.[64]

6. Proceedings and Decree For Distribution — a. In General. Upon proceedings for distribution after the lapse of the prescribed time from the grant of administration,[65] and upon due notice to the parties interested or entitled to participate,[66] a decree for the distribution of the assets to the creditors in the mode prescribed by statute should be rendered,[67] the effect of which is to render the executor or administrator personally liable to and subject to execution in favor of each creditor,[68] and to release him from liability in his fiduciary capacity unless other assets are discovered.[69] A decree of distribution when properly rendered is generally conclusive upon all of the persons interested,[70] except those who were not made parties to the proceedings,[71] unless it has been appealed from[72]

As between mortgage creditors the burden of contribution is upon the junior mortgagee. Hautau's Succession, 32 La. Ann. 54; Marc's Succession, 29 La. Ann. 412; Rousseau's Succession, 23 La. Ann. 1; O'Laughlin's Succession, 18 La. Ann. 142.

Payment in another jurisdiction.— A curator of an insolvent estate cannot recover from a creditor of the decedent, who has collected his claim from the representative of the estate in another jurisdiction, the amount so collected, for the purpose of enabling equal distribution among all creditors. Schneller *v.* Vance, 8 La. 506, 28 Am. Dec. 140.

When proof of insolvency at time of payment unnecessary.— It is not necessary to aver or prove, in an action to recover the excess paid an unpreferred creditor long before a final settlement of the estate, that the estate was insolvent when the debt was paid. Tarplee *v.* Capp, 25 Ind. App. 56, 56 N. E. 270.

Defenses.— It is no defense to an action to recover the excess paid an unpreferred creditor that the claims which reduced the estate to insolvency were not filed until more than fifteen months after the payment of his claim, although before final settlement of the estate; or that there was no finding that the estate had been finally settled as insolvent and that the final dividend had not been ascertained and decreed, where the evidence showed that the estate had been left open for the purpose of prosecuting actions to recover excess payments and the court's findings showed the aggregate indebtedness and assets, and the per cent that could ratably be paid. Tarplee *v.* Capp, 25 Ind. App. 56, 56 N. E. 270.

64. Johnson *v.* Molsbee, 5 Lea (Tenn.) 444. But *compare* Ewing *v.* Maury, 3 Lea (Tenn.) 381.

65. See Williamson *v.* Mason, 18 Ala. 87; Browne *v.* Doolittle, 151 Mass. 595, 25 N. E. 23.

66. See Chaffe *v.* Farmer, 36 La. Ann. 813; Eakin *v.* Brick, 16 N. J. L. 98; *In re* Kittera, 17 Pa. St. 416.

67. Stanwood *v.* Owen, 5 Allen (Mass.) 439; Jewett *v.* Phillips, 5 Allen (Mass.) 150.

That the judge of probate is himself a creditor is no valid objection to his decree ordering claims of creditors of an estate which has been administered in insolvent course to be paid in full. Probate Judge *v.* Tillotson, 6 N. H. 292.

Form of decree.— Sometimes the decree is made in the form of a certain per cent upon the whole claim of a creditor, and sometimes so as to ascertain the aliquot part of a claim and direct its payment (State *v.* Bowen, 45 Miss. 347) or in the form of a percentage on the balance due on the claim (Cromwell *v.* Herron, 11 Ohio Cir. Ct. 448, 5 Ohio Cir. Dec. 196).

Reservation of assets.— A statutory provision that a probate judge in ordering a dividend among creditors shall leave in the hands of the administrator a sum sufficient to pay a creditor who has a contingent claim, which could not be proved as a debt in the commission, in proportion to what has been paid to the other creditors, does not apply to a surety on a promissory note which has been proved by the holder and been allowed to him by the commissioners. Cummings *v.* Thompson, 7 Metc. (Mass.) 132. And see Lamberton *v.* Freeman, 16 N. H. 547.

68. Lehman *v.* Robertson, 84 Ala. 489, 4 So. 728; Boggs *v.* Mobile Branch Bank, 12 Ala. 494; State *v.* Bowen, 45 Miss. 347; Powell *v.* Cooper, 42 Miss. 221; Anderson *v.* Tindall, 26 Miss. 332.

An administrator is chargeable as trustee of a creditor under a decree of the probate court ordering him to pay a certain sum to the creditor where the estate is insolvent. Adams *v.* Barrett, 2 N. H. 374.

When formal insolvency proceedings are waived, and by agreement of all parties a decree is entered directing the administrator to make distribution among creditors, he becomes personally liable for the amounts decreed to them respectively. Allen *v.* Smith, 72 Miss. 689, 18 So. 579.

69. Anderson *v.* Tindall, 26 Miss. 332.

70. Coffin *v.* McCullough, 30 Ala. 107; State *v.* Bowen, 45 Miss. 347; Georgia Probate Ct. *v.* Vanduzer, 13 Vt. 135.

71. Rice *v.* Cannon, Bailey Eq. (S. C.) 172.

72. Lehman *v.* Robertson, 84 Ala. 489, 4 So. 728.

The absence of creditors is not ground for reversing a decree confirming the auditor's report, for they might have verified their claims when sent to the administrator, but it would have been ground for adjourning a meeting

or opened,[73] and, like other judgments or decrees properly rendered, cannot be impeached collaterally.[74]

b. Computation of Dividends. The indebtedness on which the apportionment of assets is reckoned has been held to be the debt at the time of the insolvent's death,[75] although in other jurisdictions it is held to be only on the balance due at the time of apportionment.[76] To ascertain the amount due the creditors, interest is sometimes reckoned on their allowances,[77] but after a dividend is decreed no future interest will accrue on such dividend relative to the estate;[78] and if the representative so uses the proceeds of the estate as to render himself personally liable for interest, an action to charge him therewith must be brought against him in his personal capacity.[79] Under some statutes the judge of probate may correct the list of claims allowed by commissioners conformably to special facts arising after their report, such as a change in the condition of claimants or the assets, and compute dividends on the corrected list.[80]

7. Accounting and Settlement — a. In General.[81] It is the duty of the personal representative of an insolvent estate to settle his accounts of administration after the commissioners' report,[82] within the time prescribed by statute,[83] in the prescribed manner,[84] and upon a proper citation and notice.[85] He should also settle with a successor in the trust if one be appointed.[86] Upon final settlement it is the province of the probate judge to determine the proper charges against[87] and credits in favor of the representative,[88] and to pass upon objections properly

of creditors before the auditor. Hahnlin's Appeal, 45 Pa. St. 343.

73. *In re* Cowan, 184 Pa. St. 339, 39 Atl. 59 [*affirming* 28 Pittsb. Leg. J. 119].

74. Georgia Probate Ct. *v.* Vanduzer, 13 Vt. 135.

75. Carr's Estate, 3 Pa. Dist. 740, 15 Pa. Co. Ct. 354; Morgan's Estate, 1 Pa. Dist. 402, 11 Pa. Co. Ct. 536; Ihmsen's Estate, 29 Pittsb. Leg. J. (Pa.) 218; Morton *v.* Caldwell, 3 Strobh. Eq. (S. C.) 161.

Payments which have been subsequently made by a third person upon any of the demands thus taken into consideration do not release the portion of the decedent's assets originally liable to the creditor, if there still remains due on the demand a balance requiring that proportion to satisfy it. Morton *v.* Caldwell, 3 Strobh. Eq. (S. C.) 161.

76. Peck *v.* Harrison, 23 Conn. 118; *In re* McCune, 76 Mo. 200; Lowell *v.* French, 54 Vt. 193.

Payment in another state.— Non-resident creditors who have received part of their claims from the assets under ancillary administration in another state must deduct such amount before sharing in the assets under the domiciliary administration. Ramsay *v.* Ramsay, 196 Ill. 179, 63 N. E. 618 [*affirming* 97 Ill. App. 270].

77. Williams *v.* American Bank, 4 Metc. (Mass.) 317; *In re* McCune, 76 Mo. 200. But *compare* Camp *v.* Grant, 21 Conn. 41, 54 Am. Dec. 321; Kier's Estate, 29 Pittsb. Leg. J. (Pa.) 372.

78. Camp *v.* Grant, 21 Conn. 41, 54 Am. Dec. 321; Fitch *v.* Huntington, Kirby (Conn.) 38.

79. Fitch *v.* Huntington, Kirby (Conn.) 38.

80. Williams *v.* American Bank, 4 Metc. (Mass.) 317. And see Ames *v.* Slater, 27 Minn. 70, 6 N. W. 418.

81. **Accounting and settlement** generally see *infra*, XV.

82. Shackleford *v.* King, 24 Ala. 158.

83. Eaton *v.* Brown, 8 Me. 22, holding that under a statute penalizing an administrator of an insolvent estate for failure to settle his account of administration within six months after the commissioners have reported a list of claims, the administrator is only bound to exhibit his account within that time and present himself to verify or support it; and the penalty does not attach where the administrator files a supplemental account consisting of items coming to his knowledge after the allowance of his former account, or arising from a realization of assets previously deemed worthless.

An account of personal estate only required. — Butler *v.* Ricker, 6 Me. 268.

84. McKeown *v.* Fagan, 4 Redf. Surr. (N. Y.) 320.

A partial settlement is permitted under some statutes. See Boggs *v.* Mobile Branch Bank, 12 Ala. 494.

85. Tuttle *v.* Robinson, 33 N. H. 104, holding that the private claim of an administrator cannot be allowed on a settlement of the account of administration unless the citation for such settlement contains a notice of the nature and amount of such private claim.

86. Cobb *v.* Muzzey, 13 Gray (Mass.) 57, holding that an administrator of an insolvent estate must account to an administrator *de bonis non* for money prematurely paid to creditors in the belief that the estate was solvent.

87. Whitlock *v.* Whitlock, 25 Ala. 543; Clarke *v.* West, 5 Ala. 117.

88. *Alabama.*— Lehman *v.* Robertson, 84 Ala. 489, 4 So. 728; Clarke *v.* West, 5 Ala. 117.

Kentucky.— Clark *v.* Newman, 1 S. W. 880, 8 Ky. L. Rep. 515.

raised to his administration of the estate.[89] If, after final settlement of the estate as insolvent, there appears a balance, the persons entitled thereto may compel a settlement and distribution in their favor upon due notice to the representative.[90]

b. Proceedings — (i) *In General.* A bill for the final settlement of an insolvent estate must be brought within the time prescribed by statute,[91] unless a delay beyond that period is justified by peculiar circumstances.[92] The persons made parties to such a bill or coming in by petition must describe and set forth with certainty the origin and amounts of their claims,[93] and prove the same unless they are admitted by the representative to be just and due.[94]

(ii) *Parties.* The only necessary parties to proceedings for the settlement of an insolvent estate are usually the personal representative, on the one side, and the creditors whose claims have been allowed, or their assignees, on the other;[95] but legatees, distributees, or other persons interested may also appear or be joined as defendants.[96]

(iii) *Judgment.* The judgment of the probate court upon such settlement is final and conclusive,[97] unless appealed from[98] or opened,[99] and cannot be attacked collaterally.[1]

(iv) *Appeal.* An appeal from a final judgment or decree rendered in a final settlement of an insolvent estate may be taken[2] by the personal representative,[3] a distributee,[4] or a creditor,[5] but upon appeal the appellate court may not hear

Maine.— Burrows *v.* Bourne, 67 Me. 225.

New Hampshire.— Rossiter *v.* Cossit, 15 N. H. 38.

Pennsylvania.— Schroeder's Estate, 2 Woodw. 290.

Rhode Island.— Rafferty *v.* Potter, 21 R. I. 517, 45 Atl. 152.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1658.

A claim allowed by commissioners and not appealed from must be allowed in the administrator's accounts, even though fictitious. Reynolds *v.* McGregor, 16 Vt. 101.

Payment of debts other than preferred debts cannot be allowed as a credit in an administration account of an insolvent estate. Shedden *v.* Sterling, 23 Ala. 518; Overfield's Estate, 37 Leg. Int. (Pa.) 62.

Reasonable attorney's fees are proper allowances in the administrator's favor, and being part of the expenses incident to the administration cannot be abated, although the estate be declared insolvent. Hearrin *v.* Savage, 16 Ala. 286.

Costs in an action against an estate cannot be allowed an administrator if, pending such action, the estate becomes absolutely insolvent and the whole estate legally appropriated furnishes no dividend to the creditors. Hunt *v.* Whitney, 4 Mass. 620.

89. Edwards *v.* Gibbs, 11 Ala. 292.

90. McMillan *v.* Rushing, 80 Ala. 402; Purdom *v.* McBroom, 19 Ala. 110.

91. Cash *v.* Dickens, 2 Lea (Tenn.) 254.

92. Cash *v.* Dickens, 2 Lea (Tenn.) 254.

93. Reid *v.* Huff, 9 Humphr. (Tenn.) 345.

94. Reid *v.* Huff, 9 Humphr. (Tenn.) 345.

95. Eubanks *v.* Clark, 78 Ala. 73; Baker *v.* Wood, 51 Ala. 345.

Personal representative of fraudulent grantor a proper party.— Handley *v.* Heflin, 84 Ala. 600, 4 So. 725.

96. Handley *v.* Heflin, 84 Ala. 600, 4 So. 725 (holding that the fraudulent grantees or donees of a deceased debtor may be joined as defendants, although they claim different parts of the property under separate gifts or conveyances); Eubanks *v.* Clark, 78 Ala. 73 (holding that distributees, although not necessary parties to subsequent proceedings in insolvency, may appear on final settlement for the purpose of establishing a surplus, and are not precluded by any former proceedings to which they were not parties from surcharging the administrator's accounts); Meadows *v.* Edwards, 46 Ala. 354.

A legatee who has prematurely received his legacy and participated with the executor in concealing assets is a proper party defendant in a bill by creditors for settlement of the estate. Handley *v.* Hufflin, 84 Ala. 600, 4 So. 725.

97. McDonald *v.* McDonald, 50 Ala. 26.

98. Heydenfeldt *v.* Towns, 27 Ala. 423.

99. Gist *v.* Cattell, 1 Bailey Eq. (S. C.) 343, holding that where a debt which increases the shares of certain distributees who assume it is subsequently released as being invalid, a court of equity will open the settlement, notwithstanding the creditors had received their shares and executed mutual releases.

1. Heydenfeldt *v.* Towns, 27 Ala. 423; Clarke *v.* Eureka County Bank, 116 Fed. 534.

2. Lehman *v.* Robertson, 84 Ala. 489, 4 So. 728; Watt *v.* Watt, 37 Ala. 543; Heydenfeldt *v.* Towns, 27 Ala. 423; Coughlin's Succession, 35 La. Ann. 343.

3. See McCune's Estate, 76 Mo. 200.

4. *In re* Swan, 54 Mo. App. 17.

5. Nicholls *v.* Hodge, 18 Fed. Cas. No. 10,231, 2 Cranch C. C. 582, holding that the creditors of an insolvent estate have a right to appeal from the decision of the orphans' court of Washington county, D. C., on the final settlement of the executor's account, to the circuit court of the District of Columbia.

such objections as have been waived below.[6] The appellate court may on reversal remand the cause for further proceedings.[7] The costs may be taxed against one of the parties[8] or apportioned among both.[9]

XIV. ACTIONS.

A. In What Capacity Suits By or Against Personal Representatives Brought — 1. Actions by Personal Representatives — a. General Rules Applicable to All Classes of Actions. On all causes of action, whether on contract or in tort, accruing during the lifetime of the testator or intestate, the executor or administrator must sue in his representative capacity and not otherwise,[10] except in the case of a note made payable to bearer of which the decedent was payee or transferee, or where a negotiable note of which the decedent was payee or indorsee, was indorsed by him in blank.[11] As regards causes of action arising subsequent to the death of the testator or intestate, it is well settled that the executor or administrator may sue in his individual capacity.[12] Only such causes of action as accrued during the lifetime of the decedent or upon contract made by him are of necessity to be prosecuted by the executors or administrators in their representative capacity.[13] So while there are some decisions (practically all of which have been overruled either expressly or by implication) holding that the representative can sue on such causes of action only in his individual capacity,[14] the rule seems to

A creditor whose claim is rejected at the final settlement of an insolvent estate of a deceased person cannot sue out a writ of error. Stout *v.* Ward, 10 Ala. 628.

6. Crothers *v.* Ross, 17 Ala. 816.

7. Weaver *v.* Weaver, 23 Ala. 789.

8. Timmons *v.* Rainey, (Tenn. Ch. App.) 55 S. W. 21.

9. Colton *v.* Field, 131 Ill. 398, 22 N. E. 545 [*reversing* 28 Ill. App. 354].

10. *Arkansas.*— Yarborough *v.* Ward, 34 Ark. 204.

Massachusetts.— Kent *v.* Bothwell, 152 Mass. 341, 25 N. E. 721, 9 L. R. A. 258.

New Jersey.—Stewart *v.* Richey, 17 N. J. L. 164.

New York.— Buckland *v.* Gallup, 105 N. Y. 453, 11 N. E. 843; Patchen *v.* Wilson, 4 Hill 57.

North Carolina.— Beaty *v.* Gingles, 53 N. C. 302.

Pennsylvania.— Kline *v.* Guthart, 2 Penr. & W. 490.

South Carolina.— Forrest *v.* Trommell, 1 Bailey 77.

Vermont.— Haskell *v.* Bowen, 44 Vt. 579.

Virginia.— Lawson *v.* Lawson, 16 Gratt. 230, 80 Am. Dec. 702.

Wisconsin.— Lawrence *v.* Vilas, 20 Wis. 401.

United States.— Kane *v.* Paul, 14 Pet. 33, 10 L. ed. 341.

England.—Gallant *v.* Bouteflower, 4 Dougl. 34, 26 E. C. L. 34; 1 Saunders 112; 3 Williams Ex. 1779.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1666.

In an action brought by an administrator for the wrongful death of his decedent plaintiff must sue in his representative character. Denver, etc., R. Co. *v.* Woodward, 4 Colo. 1.

11. See *infra*, XIV, A, 1, b, (I).

12. *Arkansas.*— Hemphill *v.* Hamilton, 11 Ark. 425.

District of Columbia.—Campbell *v.* Wilson, 2 Mackey 497.

Georgia.—Wylly *v.* King, Ga. Dec. Pt. II, 7.

Kentucky.— Pringle *v.* Samuels, 1 Bibb 167.

Maine.— Carlisle *v.* Burley, 3 Me. 250.

New York.—Buckland *v.* Vallup, 105 N. Y. 453, 11 N. E. 843; Murray *v.* Church, 1 Hun 49 [*affirmed* in 58 N. Y. 621]; Holdridge *v.* Scott, 1 Lans. 303; Cheney *v.* Beale, 47 Barb. 523; Brown *v.* Motteler, 2 N. Y. City Ct. 439.

Oregon.— Sears *v.* Dailey, 43 Oreg. 346, 73 Pac. 5; Burrell *v.* Kern, 34 Oreg. 501, 56 Pac. 809.

Vermont.— Bates *v.* Sabin, 64 Vt. 511, 24 Atl. 1013.

Virginia.— Lawson *v.* Lawson, 16 Gratt. 230, 80 Am. Dec. 702.

Wisconsin.— Lawrence *v.* Vilas, 20 Wis. 380.

England.—Gallant *v.* Bouteflower, 3 Dougl. 34, 26 E. C. L. 34; Jenkins *v.* Plombe, 6 Mod. 181.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1668 *et seq.*

13. Buckland *v.* Gallant, 105 N. Y. 453, 11 N. E. 843.

The rule is not changed by a statute providing that an action by an executor or administrator upon a cause of action belonging to him in his representative capacity must be brought in his representative capacity. Buckland *v.* Gallup, 105 N. Y. 453, 11 N. E. 843; Bingham *v.* Marine Nat. Bank, 41 Hun (N. Y.) 377; Brown *v.* Motteler, 2 N. Y. City Ct. 439.

14. Helm *v.* Van Fleet, 1 Blackf. (Ind.) 342, 12 Am. Dec. 248; Stewart *v.* Richey, 17 N. J. L. 164 [*overruled* in Myers *v.* Weger, 62 N. J. L. 432, 42 Atl. 280]; Kline *v.* Guthart, 2 Penr. & W. (Pa.) 490 [*criticized* in Peries *v.* Aycinena, 3 Watts & S. (Pa.) 64]; Hosier *v.* Arundel, 3 B. & P. 7; Nicolas *v.* Killigrew, 1 Ld. Raym. 436; Betts *v.*

be well settled that if the fruits of the recovery will be assets the representative may declare either in his representative capacity or in his own name.[15] This rule applies equally whether the action is on tort[16] or contract[17] and whether the consideration flows from the decedent or the representative.[18] It has been held, however, under a code provision requiring suit to be brought in the name of the real party in interest that the personal representative must declare in his representative capacity, although the cause of action arose subsequent to decedent's death.[19]

b. Application of Rules to Particular Actions — (i) *ACTIONS ON NOTES.* Where a note is given to an executor or administrator in his representative capacity, he may sue on it in that capacity,[20] or in his individual capacity at his option without naming himself as executor or administrator.[21] For purposes of suits of representatives in their individual character, when a note is made pay-

Mitchell, 10 Mod. 316. And see Burhans *v.* Blanchard, 1 Den. (N. Y.) 626.

15. *Arkansas.*— Yarborough *v.* Ward, 34 Ark. 204.

Georgia.— Wylly *v.* King, Ga. Dec. Pt. II, 7.

Kentucky.—Brent *v.* Tivebaugh, 12 B. Mon. 87.

Massachusetts.— Mowry *v.* Adams, 14 Mass. 327.

New Jersey.— Myers *v.* Weger, 62 N. J. L. 432, 42 Atl. 280.

Oregon.— Burrell *v.* Kern, 34 Oreg. 501, 56 Pac. 809.

Vermont.— Hutchinson *v.* Ford, 62 Vt. 97, 18 Atl. 1044; Haskell *v.* Bowen, 44 Vt. 579.

Virginia.— Lawson *v.* Lawson, 16 Gratt. 230, 80 Am. Dec. 702.

United States.— Kane *v.* Paul, 14 Pet. 33, 10 L. ed. 341.

England.—Gallant *v.* Bouteflower, 3 Dougl. 34, 26 E. C. L. 34; Cowell *v.* Watts, 6 East 405.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1608 *et seq.*

Transfer of interest by surviving partner to executrix.— Where the survivor of two partners, as a part division of the assets of the firm, transferred his interest in an account of the firm to the executrix of the deceased partner, a suit upon the account was properly brought by her as such executrix. Lawrence *v.* Vilas, 20 Wis. 381; Roys *v.* Vilas, 18 Wis. 169.

Where money recovered not assets.—Where an executrix elected to take certain negroes as legatee under the will, and thereafter the negroes were hired out, plaintiff could not maintain an action for such hire as executrix, the hire belonging to her in her own right, since her recovery as executrix would prejudice the rights of her creditors. David *v.* Bell, Peck (Tenn.) 135.

16. *Massachusetts.*— Kent *v.* Bothwell, 152 Mass. 341, 25 N. E. 721, 9 L. R. A. 258.

Oregon.— Burrell *v.* Kern, 34 Oreg. 501, 56 Pac. 809.

Tennessee.— Lashlee *v.* Wily, 8 Humphr. 659.

Vermont.— Manwell *v.* Briggs, 17 Vt. 176.

Wisconsin.— Knox *v.* Bigelow, 15 Wis. 415.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1672.

17. *Alabama.*— James *v.* Johnson, 44 Ala. 629; Harbin *v.* Levi, 6 Ala. 399.

Arkansas.— Hemphill *v.* Hamilton, 11 Ark. 425.

Georgia.— Daniel *v.* Hollingshead, 16 Ga. 190.

Indiana.— Sheets *v.* Pabody, 6 Blackf. 120, 38 Am. Dec. 132.

Missouri.— Mosman *v.* Bender, 80 Mo. 579. And see Holman *v.* Nance, 84 Mo. 674.

Pennsylvania.— Boggs *v.* Bard, 2 Rawle 102.

England.— Bull *v.* Palmer, 2 Lev. 165; Partridge *v.* Court, 5 Price 412; Powley *v.* Newton, 6 Taunt. 453, 1 E. C. L. 701; Thompson *v.* Stent, 1 Taunt. 322; King *v.* Thom, 1 T. R. 487.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1669.

18. Williams Ex. 763.

19. Hamilton *v.* McIndoo, 81 Minn. 324, 84 N. W. 118 (action on judgment recovered by representation); Rogers *v.* Gooch, 87 N. C. 442 (action on bond given to representative).

20. *Alabama.*— James *v.* Johnson, 44 Ala. 629; Goodman *v.* Walker, 30 Ala. 482, 68 Am. Dec. 134.

Indiana.— Sheets *v.* Pabody, 6 Blackf. 120, 38 Am. Dec. 132.

Iowa.— Carleton *v.* Byington, 17 Iowa 579.

Missouri.— Rector *v.* Langham, 1 Mo. 568.

New York.— Merritt *v.* Seaman, 6 N. Y. 168.

Texas.— Groce *v.* Herndon, 2 Tex. 410.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1669.

21. *Alabama.*— McGehee *v.* Slater, 50 Ala. 431; James *v.* Johnson, 44 Ala. 629; Waldrop *v.* Pearson, 42 Ala. 636; Goodman *v.* Walker, 30 Ala. 482, 68 Am. Dec. 134.

Georgia.— Oglesby *v.* Gilmore, 5 Ga. 56.

Indiana.— Ratcliff *v.* Everman, 87 Ind. 446; Sheets *v.* Pabody, 6 Blackf. 120, 38 Am. Dec. 132; Barnes *v.* Modisett, 3 Blackf. 253; Savage *v.* Merian, 1 Blackf. 176.

Iowa.— Carleton *v.* Byington, 17 Iowa 579.

Mississippi.— Rucks *v.* Taylor, 49 Miss. 552; Eckford *v.* Hogan, 44 Miss. 398; Falls *v.* Wilson, 24 Miss. 168; Trotter *v.* White, 10 Sm. & M. 607; Laughman *v.* Thompson, 6 Sm. & M. 259; Carter *v.* Saunders, 2 How. 851.

Missouri.— Smith *v.* Monks, 55 Mo. 106;

able to one as executor or administrator, the words "executor or administrator" may be regarded as merely descriptive of the person and may be rejected as surplusage.[22] So where notes or bills are indorsed or assigned to executors or administrators as such they may sue either in their representative[23] or individual capacity.[24] So an administrator or executor may sue in his own name upon a note payable to bearer where the decedent was payee,[25] or the note was transferred to him,[26] and it is immaterial that the time for payment had not arrived at the time of his death.[27] It is also immaterial whether the administrator is domestic or foreign.[28] He may also sue in his representative capacity on such note.[29] An executor or administrator may sue in his own right upon a negotiable note payable to decedent and indorsed by him in blank as if it were indorsed to

Thomas *v.* Relfe, 9 Mo. 377; Lacompte *v.* Seargent, 7 Mo. 351.

New York.— Litchfield *v.* Flint, 104 N. Y. 543, 11 N. E. 58; Merritt *v.* Seaman, 6 N. Y. 168; Reznor *v.* Webb, 36 How. Pr. 353.

Oregon.— Burrell *v.* Kern, 34 Oreg. 501, 56 Pac. 809.

Texas.— Moss *v.* Whitaker, 35 Tex. 388; Claiborne *v.* Yoeman, 15 Tex. 44; Butler *v.* Robertson, 11 Tex. 142; Groce *v.* Herndon, 2 Tex. 410; Gayle *v.* Ennis, 1 Tex. 184.

England.— Betts *v.* Mitchell, 10 Mod. 316.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1669.

But see Perkins *v.* Crabtree, 5 Ark. 475, holding that if the note or bond be executed to him as administrator or by the use of any other terms, clearly indicating the debt to be due the estate of the testator, then the administrator should sue on it in his representative capacity and the money when collected will be assets; but if the note be executed to him "administrator'" or "being administrator" then the law will hold it to be a note executed to him in his private right, such words operating as mere matter of description; and consequently suit can only be maintained on it in his own name.

Note given for purchase-price of goods.— An executor may sue in his own name without declaring in his representative character on a note given to him for the purchase-price of goods sold by him belonging to the estate of his testator (Evans *v.* Gordon, 8 Port. (Ala.) 346), so a note given by the resident of one state to the executor of another state for property purchased at a sale of his intestate's estate and accounted for in his final settlement becomes his property, and he may maintain an action thereon whether the sale was or was not made by authority of law (Dunlap *v.* Newman, 47 Ala. 429).

Where an instrument made payable to the estate of a deceased person and not to any person or persons by name is regarded as a promise to pay the executors of the deceased, there is no necessity for their suing in a representative capacity. Lyon *v.* Marshall, 11 Barb. (N. Y.) 241.

22. James *v.* Johnson, 44 Ala. 629; Laycock *v.* Oleson, 60 Ill. 30. And see *infra*, XIV, K, 1, a, (I), (A), (1), (a), bb.

Unauthorized acceptance of note.— Where an administrator obtained a note of third persons before its maturity, in payment of a note secured by a vendor's lien on land, payable to his intestate, which be surrendered, it was held that, although he may not have been authorized to accept the note in payment, he paid a consideration for it, and it is immaterial whether he sues such third persons on the note in his character as administrator or otherwise. Brainerd *v.* Butte, (Tex. Civ. App. 1898) 44 S. W. 575.

23. King *v.* Thom, 1 T. R. 487.

24. Evans *v.* Gordon, 8 Port. (Ala.) 142; Rucks *v.* Taylor, 49 Miss. 552.

Suit prior to appointment of administrator.—Although the action be brought prior to the appointment of an administrator the taking upon himself of that trust by the person bringing the suit legalizes all his acts relative to the goods and credits committed to him from the decease of the intestate and he may proceed with the suit. Gage *v.* Johnson, 20 Me. 437.

25. Robinson *v.* Crandall, 9 Wend. (N. Y.) 425.

26. Gage *v.* Johnson, 20 Me. 437; Bright *v.* Currie, 5 Sandf. (N. Y.) 433; Packer *v.* Willson, 15 Wend. (N. Y.) 343; Floyd *v.* Brooks, 2 McCord (S. C.) 264; Sanford *v.* McCreedy, 28 Wis. 103. And see Patchen *v.* Wilson, 4 Hill (N. Y.) 57.

27. Patchen *v.* Wilson, 4 Hill (N. Y.) 57.

Reason for rule.— The property in as well as all the rights incident to a note, payable to bearer, is transferable by delivery, and amongst these, the right to sue is the most indisputable; and whether the natural import of the term itself or its legal consequence is considered the same result follows. It is in direct terms a promise to pay to the bearer and when once it passes out of the hands of the original payee it enters into the circulating medium of the country, becomes identified with it as a representative of coin, and like it is the property of him who has the legal possession and as an incident the right to sue is indispensable. Floyd *v.* Brooks, 2 McCord (S. C.) 364.

28. Bright *v.* Currie, 5 Sandf. (N. Y.) 433; Sanford *v.* McCreedy, 28 Wis. 103.

29. Floyd *v.* Brooks, 2 McCord (S. C.) 364.

Note not delivered until after intestate's death.— An administrator in his representative capacity may, it seems, maintain an action as bearer on a note payable to the intestate or bearer, although such note was not

him individually.[30] If, however, the note has not been indorsed by the decedent or by the personal representative in his official capacity, he cannot recover upon it in his own name. He can sue on it only in his representative capacity.[31]

(II) *Actions on Bonds.* An executor or administrator may sue individually or in his representative character on a bond made payable to him individually,[32] and when a bond is executed to him in his representative capacity he may sue on it individually,[33] except in cases where by statute suit is required to be brought by the real party in interest.[34] So on a bond assigned to him in his representative capacity he may sue either in his individual[35] or representative capacity,[36] and he may sue in his representative capacity upon a bond running to the decedent.[37]

(III) *Actions on Judgments.* Administrators in their representative capacity may have an action on a judgment recovered by the intestate in his lifetime,[38] and where a judgment is recovered by an executor or administrator it is a debt due to him in his personal character and he may sue on it in his own name.[39] The rule is not affected by the fact that the judgment was recovered in a foreign state.[40] It has been held, however, that where a statute requires all actions to be prosecuted in the name of the real party in interest, an action by an administrator upon a judgment rendered in his favor as such must be brought by him in his representative capacity.[41]

(IV) *Actions For Purchase-Price of Property Sold by Personal Representative.* An action for the price of personal property belonging to the estate sold by the executor or administrator may be brought either in his individual[42] or representative capacity.[43]

delivered until after the death of the intestate. But whether he could declare on such note as one given and payable to the intestate *quære*. Baxter *v.* Buck, 10 Vt. 548.

30. Barrett *v.* Barrett, 8 Me. 353 (holding further that if defendant has any matter of set-off against the estate of the decedent he may avail himself of it in defense of the action); Barlow *v.* Myers, 24 Hun (N. Y.) 286; Cooper *v.* Kerr, 3 Johns. Cas. (N. Y.) 606.

31. Woodbury *v.* Woodbury, 47 N. H. 11, 90 Am. Dec. 555.

32. Oliver *v.* Townsend, 16 Iowa 430.

33. Hemphill *v.* Hamilton, 11 Ark. 425; Ayres *v.* Toland, 7 Harr. & J. (Md.) 3; Waddell *v.* Moore, 24 N. C. 261.

Suit on an appeal-bond may be brought by executors in their individual capacity, although it was given upon a judgment recovered by them as executors. Morris *v.* Hunken, 40 N. Y. App. Div. 129, 57 N. Y. Suppl. 712, which is decided on the ground that the undertaking is a contract. It has also been held that the action may be brought in a representative capacity. Sasscer *v.* Walker, 5 Gill & J. (Md.) 102, 25 Am. Dec. 272.

34. Rogers *v.* Gooch, 87 N. C. 442.

35. Rucks *v.* Taylor, 49 Miss. 552.

36. McDonald *v.* Williams, 16 Ark. 36.

37. Webster *v.* Tibbits, 19 Wis. 438.

38. Wooster *v.* Bishop, 2 Root (Conn.) 230. And see Ireland *v.* Litchfield, 8 Bosw. (N. Y.) 634, 22 How. Pr. (N. Y.) 178, holding that on the death of a plaintiff after final judgment in his favor his personal representatives may bring an action on the judgment to obtain the same relief as was obtainable by a writ of scire facias prior to the code.

39. *Georgia.*— Oglesby *v.* Gilmore, 5 Ga. 56.

Indiana.— Campbell *v.* Baldwin, 6 Blatchf. 364.

Massachusetts.— Talmadge *v.* Chapel, 16 Mass. 71.

Vermont.— Adams *v.* Campbell, 4 Vt. 447.

United States.— Biddle *v.* Wilkins, 1 Pet. 686, 7 L. ed. 315.

England.— Crawford *v.* Whittal, Dougl. (3d ed.) 4 note; Large *v.* Attwood, 1 D. & R. 551, 16 E. C. L. 55; Bonafous *v.* Walker, 2 T. R. 126.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1667.

40. Tittman *v.* Thornton, 107 Mo. 500, 17 S. W. 979, 16 L. R. A. 410; Hall *v.* Harrison, 21 Mo. 277, 64 Am. Dec. 225; Nichols *v.* Smith, 7 Hun (N. Y.) 580; Bright *v.* Currie, 5 Sandf. (N. Y.) 433; Lawrence *v.* Lawrence, 3 Barb. Ch. (N. Y.) 71.

41. Hamilton *v.* McIndoo, 81 Minn. 324, 84 N. W. 118.

42. Laycock *v.* Oleson, 60 Ill. 30; Thompson *v.* Whitmarsh, 100 N. Y. 35, 2 N. E. 273; Gross *v.* Gross, 26 Misc. (N. Y.) 385, 56 N. Y. Suppl. 219 [*affirming* 25 Misc. 297, 54 N. Y. Suppl. 572]; Aiken *v.* Bridgeman, 37 Vt. 249; Brassington *v.* Ault, 2 Bing. 177, 9 E. C. L. 534, 1 C. & P. 302, 12 E. C. L. 181, 3 L. J. C. P. O. S. 243, 9 Moore C. P. 340, 27 Rev. Rep. 581; Heath *v.* Chilton, 13 L. J. Exch. 225, 12 M. & W. 632.

43. Eagle *v.* Fox, 28 Barb. (N. Y.) 473, 8 Abb. Pr. (N. Y.) 40. But see Kline *v.* Guthart, 2 Penr. & W. (Pa.) 490.

(v) *Actions on Contracts With Respect to Real Estate.* A personal representative may sue in his individual capacity on his contract in regard to the real estate of the decedent.[44] Thus, where a person holding lands as administrator has leased them, he can recover the rents in his own name.[45]

(vi) *Actions to Recover Money Paid by Mistake.* Where a personal representative has paid out money of the estate he may recover it back in a suit brought in his individual capacity,[46] and it has also been held that such action may be properly brought in a representative capacity.[47]

(vii) *Actions For Money Paid by Decedent as Surety.* Where a personal representative pays a debt for which the decedent was surety, he may recover in an action either in his own name[48] or in his representative capacity.[49]

(viii) *Actions to Recover Land or For Injuries Thereto.* Whenever an executor or administrator is entitled to possession of land, he may maintain an action in his individual capacity for a trespass committed thereon since the decedent's death;[50] but for a trespass committed during the decedent's lifetime he must sue in his representative capacity.[51] If the complaint shows that he is by inheritance the sole owner of the land, the action must be brought in his individual and not in his representative capacity.[52] To recover possession of the land, he may bring an action of unlawful detainer either in his representative or individual capacity,[53] so to recover possession he may bring in his representative capacity ejectment,[54] trespass to try title,[55] or a writ or entry.[56] For an interference with an incorporeal hereditament (such as a right to use a pew) he may declare in his representative capacity, or it seems in his own name, without setting up his representative character.[57]

(ix) *Actions For Injury to or Conversion of Property After Decedent's Death.* Where personal property of the testator or intestate is injured or converted after his death, the executor or administrator may sue on the cause of action arising therefrom in his individual capacity.[58] After the death of the testator or intestate, the executor or administrator acquires a special right in the personal property and may declare as any other person upon his own

44. Loew *v.* Christ, 13 N. Y. App. Div. 624, 42 N. Y. Suppl. 963.

45. Yarborough *v.* Ward, 34 Ark. 204; Kingsland *v.* Ryckman, 5 Daly (N. Y.) 13.

Construction of complaint.— Where executors in their representative capacity brought assumpsit for the use and occupation of a farm described as "land and appurtenances of the plaintiffs, held by the defendant at the special instance and request, and by the sufferance and permission, of the plaintiffs" and no count in the declaration disclosed any contract made with the testator in his lifetime, and there was no allegation that the rent was not paid to him in his lifetime, it was held that the action must be deemed to be brought by the executors in their individual capacity. Fesmire *v.* Brock, 25 Ark. 20.

46. Rogers *v.* Weaver, Wright (Ohio) 174, in which it was said that he is personally responsible for the money and has a corresponding personal right to recover it back.

47. Phillips *v.* McConica, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. Rep. 753, in which it was said that an executor is always a proper party to maintain an action to recover money belonging to the estate.

48. Mowry *v.* Adams, 14 Mass. 327; Williams *v.* Moore, 9 Pick. (Mass.) 432; O'Brian *v.* Coskrey, 4 Yeates (Pa.) 105.

49. Williams *v.* Moore, 9 Pick. (Mass.) 432; Mowry *v.* Adams, 14 Mass. 327.

50. Smith *v.* Smith, 11 N. H. 459.

51. Kennerly *v.* Wilson, 1 Md. 102.

52. Taylor *v.* Fickas, 64 Ind. 167, 31 Am. Rep. 114.

53. Spear *v.* Lomax, 42 Ala. 576.

54. Chauncy *v.* Brown, 99 Ga. 766, 26 S. E. 763.

55. Thompson *v.* Duncan, 1 Tex. 485.

56. Pierce *v.* Strickland, 26 Me. 277.

57. Perrin *v.* Granger, 33 Vt. 101.

58. *New Jersey.*— Stewart *v.* Richey, 17 N. J. L. 164.

New York.— Patchen *v.* Wilson, 4 Hill 57; Valentine *v.* Jackson, 9 Wend. 302.

South Carolina.— Carter *v.* Estes, 11 Rich. 363; Guphill *v.* Isbell, 8 Rich. 463; Kerby *v.* Quinn, Rice 264.

Tennessee.— Lashlee *v.* Wily, 8 Humphr. 659.

Vermont.— Manwell *v.* Briggs, 17 Vt. 176; Trask *v.* Donoghue, 1 Aik. 370.

Wisconsin.— Knox *v.* Bigelow, 15 Wis. 415.

United States.— White *v.* Pulley, 27 Fed. 436.

England.— Fraser *v.* Swansea Canal Nav. Co., 1 A. & E. 354, 3 L. J. K. B. 153, 3 N. & M. 391, 28 E. C. L. 177.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1672.

property, when injured or converted by another.[59] It has accordingly been held that he may maintain in his individual capacity, trover,[60] replevin,[61] detinue,[62] and trespass.[63] Nevertheless it does not follow from what has been said that the executor or administrator is bound to sue in his individual capacity; on the contrary, the weight of authority is that he may sue in his representative capacity, it being optional with him in which capacity the action shall be instituted.[64] To entitle a personal representative to maintain an action for injury to or conversion of personal property whether in his individual or representative capacity, it is not necessary that he should have had actual possession thereof at the time the cause of action arose,[65] but such action may be maintained, although the injury or conversion occurred between the time of decedent's death and the granting of letters of administration.[66] The legal effect of granting such letters is to vest in the administrator the legal estate in the personal property and this relates back to the time of the death of the decedent.[67] So an administrator may sue in his own right for the conversion of goods acquired after the death of the intestate.[68]

c. Actions on Contracts Involving Unauthorized Use of Assets by Personal Representative. Where a personal representative by contract makes an unauthor-

59. Anderson *v.* Wilson, 13 Ark. 409; Valentine *v.* Jackson, 9 Wend. (N. Y.) 302, 303, in which it was further said: "This is an inevitable deduction from the fact of the existence of the right of property and possession consequent upon the executorship. It is the individual possession, actual or constructive, of the executor that is violated by the injury to the property, and the redress may be in the same capacity."

60. *California.*—Ham *v.* Henderson, 50 Cal. 367.

Maine.— Carlisle *v.* Burley, 3 Me. 250.

Massachusetts.— Foster *v.* Gorton, 5 Pick. 185; Towle *v.* Lovet, 6 Mass. 394.

New York.— Valentine *v.* Jackson, 9 Wend. 302; Barker *v.* Baker, 5 Cow. 267.

North Carolina.—Satterwhite *v.* Carson, 25 N. C. 549.

South Carolina.— Carter *v.* Estes, 11 Rich. 363; Guphill *v.* Isbell, 8 Rich. 463; Kerby *v.* Quinn, Rice 264.

Tennessee.— Lashlee *v.* Wily, 8 Humphr. 659.

Vermont.— Manwell *v.* Briggs, 17 Vt. 176.

England.— Fraser *v.* Swansea Canal Nav. Co., 1 A. & E. 354, 3 L. J. K. B. 153, 3 N. & M. 391, 28 E. C. L. 177; Hollis *v.* Smith, 10 East 293.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1672.

61. Branch *v.* Branch, 6 Fla. 314; Kent *v.* Bothwell, 152 Mass. 341, 25 N. E. 721, 9 L. R. A. 258; People *v.* Judges Albany Mayor's Ct., 9 Wend. (N. Y.) 486.

62. Sims *v.* Boynton, 32 Ala. 353, 70 Am. Dec. 540.

63. Knox *v.* Bigelow, 15 Wis. 415.

64. *Arkansas.*— Anderson *v.* Wilson, 13 Ark. 409.

Florida.— Branch *v.* Branch, 6 Fla. 314.

Massachusetts.— Kent *v.* Bothwell, 152 Mass. 341, 25 N. E. 721, 9 L. R. A. 258.

Michigan.— Gilkey *v.* Hamilton, 22 Mich. 283.

New York.—Singleton *v.* Smith, 2 N. Y. St. 173.

North Carolina.— Berry *v.* Pulliam, 2 N. C. 16.

Tennessee.— Lashlee *v.* Wily, 8 Humphr. 659.

Vermont.— Manwell *v.* Briggs, 17 Vt. 176.

Wisconsin.— Knox *v.* Bigelow, 15 Wis. 415.

England.—Agnes *v.* Cheverel, Cro. Jac. 113.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1672.

But see Stewart *v.* Richey, 17 N. J. L. 164, holding that the executor or administrator should not sue in his representative capacity. This decision, however, seems to be overruled in Myers *v.* Weger, 62 N. J. L. 432, 42 Atl. 280.

65. Kent *v.* Bothwell, 152 Mass. 341, 25 N. E. 721, 9 L. R. A. 258; Agnes *v.* Cheverel, Cro. Jac. 113; Hollis *v.* Smith, 10 East 293; Grimstead *v.* Shirley, 2 Taunt. 116; Williams Ex. & Adm. 762. *Contra*, Cockerill *v.* Kynaston, 4 T. R. 277, holding that if the goods which were the subject of the action were never in the actual possession of the executor or administrator it is absolutely necessary for him to declare in that character.

66. *California.*—Ham *v.* Henderson, 50 Cal. 367; Jahns *v.* Nolting, 29 Cal. 507.

New York.— Valentine *v.* Jackson, 9 Wend. 302.

North Carolina.—Satterwhite *v.* Carson, 25 N. C. 549.

South Carolina.— Kerby *v.* Quinn, Rice 264.

Vermont.— Manwell *v.* Briggs, 17 Vt. 176.

Wisconsin.— Knox *v.* Bigelow, 15 Wis. 415.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1672.

67. Valentine *v.* Jackson, 9 Wend. (N. Y.) 302; Satterwhite *v.* Carson, 25 N. C. 549; Kerby *v.* Quinn, Rice (S. C.) 264. The action is made to rest on the representative's right of property which draws after it the right of possession. Kent *v.* Bothwell, 152 Mass. 341, 25 N. E. 721, 9 L. R. A. 258. And see Hollis *v.* Smith, 10 East 293; Bollard *v.* Spencer, 7 T. R. 358.

68. White *v.* Pulley, 27 Fed. 436.

ized use of the money or choses in action of the estate this amounts to a conversion for which he is personally liable, and he may sue on the contract in his own name,[69] and it has been held that the action can only be brought in his individual capacity.[70] If, however, the administrator has settled the estate and has been discharged without having been charged with the proceeds of such a contract then he can maintain no action on such contracts or claims, and the right to sue passes to the succeeding administrator.[71]

d. Where Representative Has Been Charged With or Has Accounted For Proceeds of Contract. Where an administrator has been charged with or has accounted for the proceeds of contracts made with the decedent,[72] or with him in his representative character,[73] he may sue individually thereon.

e. Where Representative Is Sole Beneficiary. Where there are no outstanding debts against the estate and the executrix is the sole devisee and legatee, she may consider herself as holding the property not as executrix but in her own right and may sue for it on that theory.[74]

2. Actions Against Personal Representatives — a. General Rules Applicable to All Classes of Action. The general rule is that no action will lie against an executor or administrator in his representative character except upon some claim or demand which existed against the testator or intestate in his lifetime, and that if a claim or demand wholly accrued in the time of the executor or administrator, he is liable therefor only in his personal character.[75] Nevertheless it has been frequently held that, whatever property or money is lawfully recovered or received by an executor or administrator after the death of the testator or intestate in virtue of his representative character, he holds as assets of the estate and that he is liable therefor in such representative character to the party who has a good title thereto,[76] or may be charged *de bonis propriis* with the money or property so received.[77] The fact that an action is brought against administrators as indi-

69. Dickson *v.* McLarney, 97 Ala. 383, 12 So. 398; Collins *v.* Greene, 67 Ala. 211. And see Bates *v.* Sabin, 64 Vt. 511, 24 Atl. 1013.

70. Thornton *v.* Smiley, 1 Ill. 34 (unauthorized loan); Ketchum *v.* Morrell, 2 N. Y. Leg. Obs. 58 (unauthorized loan). *Compare* Bond *v.* Corbett, 2 Minn. 248 (in which it was held (nothing being said as to the right of the administrator to make a loan) that an administrator who loans money belonging to the estate may sue for it either in his representative or private capacity), and Parks *v.* Mockenhaupt, 133 Cal. 424, 65 Pac. 875 (apparently holding that where an administrator borrowed money in his individual capacity pledging certificates of stock belonging to the estate, he may maintain replevin therefor in his official capacity, although the money was used in part to pay debts of the estate).

Effect of resignation or removal.— A personal representative who has loaned money or choses in action of the estate without authority to do so may sue on the contract in his own name, notwithstanding he has resigned or been removed from the administration, unless it be shown that he has in some way been discharged from the liability thus incurred. Tomkies *v.* Reynolds, 17 Ala. 109.

71. Collins *v.* Greene, 67 Ala. 211.

72. Lyons *v.* Doherty, 50 Mo. 38.

73. Dickson *v.* McLarney, 97 Ala. 383, 12 So. 398.

74. Ewers *v.* White, 114 Mich. 266, 72 N. W. 184.

75. Malone *v.* Davis, 67 Cal. 279, 7 Pac. 703; Myer *v.* Cole, 12 Johns. (N. Y.) 349. "Nothing is better settled than that an executor or administrator, is answerable in his official character, for no cause of action that was not created by the act of the decedent himself. In actions against the personal representative on his own contract and engagements, though made for the benefit of the estate, the judgment is *de bonis propriis*; and he is, by every principle of legal analogy, to answer it with his personal property." Seip *v.* Drach, 14 Pa. St. 352, 356. And see *infra*, XIV, A, 2, b, (II), (B), (C).

76. Thurston *v.* Doane, 47 Me. 79; De Valengin *v.* Duffy, 14 Pet. (U. S.) 282, 10 L. ed. 457; Duffy *v.* Neale, 7 Fed. Cas. No. 4,119, Taney 271. And see Conger *v.* Atwood, 28 Ohio St. 134, 22 Am. Rep. 462.

77. Call *v.* Houdlette, 70 Me. 308; *In re* Galloway, 21 Wend. (N. Y.) 32, 34 Am. Dec. 209; De Valengin *v.* Duffy, 14 Pet. (U. S.) 282, 10 L. ed. 457; Duffy *v.* Neale, 7 Fed. Cas. No. 4,119, Taney 271.

Where a factor sells goods of his principal in his own name upon a credit and dies before the money is received, if it is afterward paid to the administrator in his representative character, the creditor is entitled to consider it as assets in his hands and to charge him in the same character in which he received it. De Valengin *v.* Duffy, 14 Pet. (U. S.) 282, 10 L. ed. 457.

viduals does not prevent them from claiming to have acted in their representative character.[78]

b. Actions on Contracts — (I) *Of Decedent.* In actions against administrators and executors founded upon contracts made by the testator or intestate defendant must be sued in his representative character, and the judgment will not be against him personally but *de bonis testatoris.*[79]

(II) *Of Personal Representative* — (A) *On Consideration Arising During Decedent's Lifetime.* Where the consideration for the promise of the personal representative arises during the lifetime of the decedent, he may be sued thereon in his representative capacity.[80]

(B) *On New and Independent Consideration.* Contracts of executors and administrators, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration moving between their promisee and themselves, are their personal contracts, which do not bind the estate, and they must be sued on these contracts in their individual and not in their representative capacity.[81] The fact that they are described in the

An executor or administrator who enters upon leasehold property held by the testator or intestate in his lifetime, or who receives the rents and profits thereof, is chargeable in the *debet* and *detinet* directly on the covenant of the lessee as an assignee, and need not be named executor, etc. *In re* Galloway, 21 Wend. (N. Y.) 32, 34 Am. Dec. 209.

Effect of laches enforcing claim.— An administrator who collects money upon a judgment founded on a suit in the name of his intestate is not individually liable to another for a share thereof belonging to such other person, unless before he appropriates the same to the use of the estate he has notice not to pay it over or unless in paying it over he has acted in bad faith. Call *v.* Houdlette, 70 Me. 308.

78. Bryant *v.* Bryant, 2 Rob. (N. Y.) 612.

79. Melone *v.* Davis, 67 Cal. 279, 7 Pac. 703; Ferrin *v.* Myrick, 41 N. Y. 315; Compton *v.* Whitehouse, 48 N. Y. Super. Ct. 208; Waldsmith *v.* Waldsmith, 2 Ohio 156; Sedam *v.* Shaffer, 5 Watts & S. (Pa.) 529; Masterson *v.* Masterson, 5 Rawle (Pa.) 137.

In order to bind the estate of a deceased person by judgment, the representative thereof must be sued in his representative capacity. Lewis *v.* Nichols, 38 Tex. 54.

Taxes due from deceased.— An action cannot be maintained against an executrix in her personal capacity for taxes due from the deceased during his lifetime, and, if the executrix is liable in any event, it is only in her representative capacity. Eno *v.* Cornish, Kirby (Conn.) 296.

80. Vaughn *v.* Gardner, 7 B. Mon. (Ky.) 326; Gillet *v.* Hutchinson, 24 Wend. (N. Y.) 184; Howard *v.* Powers, 6 Ohio 92; Wilkings *v.* Murphey, 29 Fed. Cas. No. 17,663, 3 N. C. 282.

81. *Alabama.*— Spotswood *v.* Bently, 132 Ala. 266, 31 So. 445; Daily *v.* Daily, 66 Ala. 266; Humes *v.* Farris, 48 Ala. 615; Godbold *v.* Roberts, 20 Ala. 354; McEldery *v.* McKenzie, 2 Port. 33, 27 Am. Dec. 643; Greening *v.* Sheffield, Minor 276.

Arkansas.— Tucker *v.* Grace, 61 Ark. 410, 33 S. W. 530.

California.— Schlicker *v.* Hemenway, 110 Cal. 579, 42 Pac. 1063, 52 Am. St. Rep. 116; Melone *v.* Davis, 67 Cal. 279, 7 Pac. 703; *In re* Page, 57 Cal. 238; Gurnee *v.* Maloney, 38 Cal. 85, 99 Am. Dec. 352; Dwinelle *v.* Henriquez, 1 Cal. 387.

Georgia.— Clarke *v.* Alexander, 71 Ga. 500.

Kansas.— Getty *v.* Larkin, 59 Kan. 548, 53 Pac. 755.

Kentucky.— Moody *v.* Ewing, 8 B. Mon. 521; Heasley *v.* Dunn, 5 B. Mon. 145.

Maine.— Walker *v.* Patterson, 36 Me. 273; Davis *v.* French, 20 Me. 21, 37 Am. Dec. 36.

Massachusetts.— Sumner *v.* Williams, 8 Mass. 162, 5 Am. Dec. 83.

New Jersey.— Sibbit *v.* Lloyd, 11 N. J. L. 163.

New York.— O'Brien *v.* Jackson, 167 N. Y. 31, 60 N. E. 238; Parker *v.* Day, 155 N. Y. 383, 49 N. E. 1046; Van Slooten *v.* Dodge, 145 N. Y. 327, 39 N. E. 950; Austin *v.* Munroe, 47 N. Y. 360; Ferrin *v.* Myrick, 41 N. Y. 315; Saperstein *v.* Ullman, 49 N. Y. App. Div. 446, 63 N. Y. Suppl. 626 [*affirmed* in 168 N. Y. 636, 61 N. E. 553]; Ross *v.* Harden, 44 N. Y. Super. Ct. 26; Ross *v.* Harden, 42 N. Y. Super Ct. 427; Cary *v.* Gregory, 38 N. Y. Super. Ct. 127; Reynolds *v.* Reynolds, 3 Wend. 244; Demont *v.* Field, 7 Cow. 58; Myer *v.* Cole, 12 Johns. 349.

North Carolina.— Beaty *v.* Gingles, 53 N. C. 302.

Ohio.— Waldsmith *v.* Waldsmith, 2 Ohio 156. And see Connell *v.* Brumback, 18 Ohio Cir. Ct. 502, 10 Ohio Cir. Dec. 149.

Pennsylvania.— Seip *v.* Drach, 14 Pa. St. 352; Beeson *v.* McNabb, 2 Pa. St. 422; Fritz *v.* Thomas, 1 Whart. 66, 29 Am. Dec. 39; Masterson *v.* Masterson, 5 Rawle 137; Grier *v.* Huston, 8 Serg. & R. 402, 11 Am. Dec. 627; Geyer *v.* Smith, 1 Dall. 347, 1 L. ed. 169.

South Carolina.— Pearce *v.* Smith, 2 Brev. 360, 4 Am. Dec. 588.

Tennessee.— Bedford *v.* Ingram, 5 Hayw. 155.

England.— Brigden *v.* Parkes, 2 B. & P. 424; Wheeler *v.* Collier, Cro. Eliz. 406; Rose *v.* Bowler, 1 H. Bl. 108; Jennings *v.* Newman,

contract as personal representatives does not affect the rule,[82] and although they are named in the declaration or complaint as personal representatives, this will be considered merely *descriptio personæ*, which will be treated as surplusage or as intended to show the nature and origin of their liability. It cannot affect the form of the judgment.[83] Accordingly personal representatives must be sued in their individual capacity on notes[84] or bonds[85] executed by them, or on bills of exchange drawn by them,[86] or on drafts accepted by them,[87] or on contracts made by them for the payment for services of an attorney.[88] So a personal representative cannot be sued as such, either for money had and received by him,[89] money lent to him,[90] or on an account stated of money due from him as executor.[91] A personal representative must be sued in his individual capacity for work and labor performed at his request in his representative capacity,[92] and he is liable indi-

4 T. R. 347; Barry *v.* Rush, 1 T. R. 691, 1 Rev. Rep. 360.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1683, 1684.

Reason for rule.— He has the title to the personal estate. He has no principal behind him for whom he can contract as agent. This is the policy of the law. The estate in the personalty is given, by the law, directly to the administrator. For the purpose of use and sale the title vests in him and he is held responsible as owner. As owner, he must account to the persons ultimately entitled to distribution and as owner he sells, disposes, and contracts as his judgment dictates. These considerations fix the liability for the debt in question upon the administrators personally, and not upon the estate. Ferrin *v.* Myrick, 41 N. Y. 315.

82. Melone *v.* Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127; Winthrop *v.* Jarvis, 8 La. Ann. 434; Walker *v.* Patterson, 36 Me. 273; Patterson *v.* Craig, 1 Baxt. (Tenn.) 291.

83. Melone *v.* Davis, 67 Cal. 279, 7 Pac. 703; Waldsmith *v.* Waldsmith, 2 Ohio 156.

84. Christian *v.* Morris, 50 Ala. 585; Orne *v.* Ritchie, 12 Phila. (Pa.) 231; Waldsmith *v.* Waldsmith, 2 Ohio 156; Childs *v.* Monins, 2 B. & B. 460, 5 Moore C. P. 282, 23 Rev. Rep. 513, 6 E. C. L. 228.

85. Patterson *v.* Craig, 1 Baxt. (Tenn.) 291; Barry *v.* Rush, 1 T. R. 691, 1 Rev. Rep. 360.

86. Kirkman *v.* Benham, 28 Ala. 501.

87. Wisdom *v.* Becker, 52 Ill. 342.

88. Pike *v.* Thomas, 62 Ark. 223, 35 S. W. 212, 54 Am. St. Rep. 292; Tucker *v.* Grace, 61 Ark. 410, 33 S. W. 530; Austin *v.* Munro, 47 N. Y. 360; Genet *v.* De Graaf, 27 N. Y. App. Div. 238, 50 N. Y. Suppl. 442; Hurd *v.* Wheeling, etc., R. Co., 6 Ohio S. & C. Pl. Dec. 545, 4 Ohio N. P. 404. But see Williams *v.* Walker, 31 Ga. 195 (in which it was held that where one of two executors named in a will qualified and employed the services of an attorney in behalf of the estate, and he died, and the other executor subsequently qualified, the attorney should recover his fees in an action at law against the second executor in his representative capacity. It was said that while there was no individual liability attaching to defendant, the estate he represents is responsible, there being no dispute as to the value of the services); Jackson *v.* Leech, 113 Mich. 391, 71 N. W. 846 (holding that, under a statute providing that an executor shall be allowed all the necessary expenses in the care, management, and settlement of the estate, and for his services such fees as the law provides together with all extra expenses, an executor may bind the estate for the payment of a reasonable compensation for the services of an attorney. Two judges dissenting).

89. *Delaware.*— Wilson *v.* Harvey, 3 Harr. 500.

Kentucky.— Moody *v.* Ewing, 8 B. Mon. 521; Montgomery *v.* Armstrong, 5 J. J. Marsh. 175.

Massachusetts.— Cronan *v.* Cotting, 99 Mass. 334; Farrelly *v.* Ladd, 10 Allen 127.

North Carolina.— Hailey *v.* Wheeler, 49 N. C. 159.

England.— Ashby *v.* Ashby, 7 B. & C. 444, 6 L. J. K. B. O. S. 41, 1 M. & R. 180, 31 Rev. Rep. 242, 14 E. C. L. 202; Rose *v.* Bowler, 1 H. Bl. 108.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1683.

A person who has paid money on an erroneous judgment may, after it is reversed, bring an action to recover it back against the parties who received it, personally, although they received the money as executors. Scholey *v.* Halsey, 72 N. Y. 578.

Where money is paid an administrator by mistake, and he gives a receipt in his representative character, the action to recover it back must be brought against him personally. Grier *v.* Huston, 8 Serg. & R. (Pa.) 402, 11 Am. Dec. 627.

Where an administrator knowingly receives and enacts usury on debts due his intestate he is personally liable to refund in an action of assumpsit, although he may have settled his accounts and accounted for it to those entitled to the estate. Heasley *v.* Dunn, 5 B. Mon. (Ky.) 145. But in order to charge him personally it must be shown that he accepted the money with knowledge of the usury. Ossiper *v.* Gafney, 56 N. H. 352.

90. Ashby *v.* Ashby, 7 B. & C. 444, 6 L. J. K. B. O. S. 41, 1 M. & R. 180, 31 Rev. Rep. 242, 14 E. C. L. 202; Rose *v.* Bowler, 1 H. Bl. 108.

91. Rose *v.* Bowler, 1 H. Bl. 108.

92. Myer *v.* Cole, 12 Johns. (N. Y.) 349.

vidually for goods furnished at his request.[93] So according to many decisions, notwithstanding it is his duty to pay such expenses from the estate, an administrator or executor should be sued in his individual capacity on contracts made by him for funeral or burial expenses of the decedent,[94] although there are decisions which seem to maintain the contrary view.[95]

(c) *On Promise in Consideration of Assets.* And where a personal representative promises that in consideration of having assets he will pay a claim against the decedent, he may be sued in his individual capacity and a judgment rendered *de bonis propriis*,[96] or he may be sued in his representative capacity and a judgment rendered *de bonis testatoris*.[97] Nevertheless, when sued in his personal capacity, he is not bound to pay the debts of the decedent beyond the assets which he received, nor will his written promise to do so make him liable unless founded on other sufficient consideration.[98]

(d) *Where Will Gives Representative Authority to Make Contracts.* Where an executor is empowered by will to make contracts in respect to the management and control of the estate he may be sued in his representative capacity thereon.[99]

e. Actions Based on Tort — (i) *In General.* For torts committed by a personal representative while acting in his representative capacity he must in general be sued in his individual and not in his representative capacity.[1] No action can

93. Daily *v.* Daily, 66 Ala. 266.

94. Ferrin *v.* Myrick, 41 N. Y. 315; Murphy *v.* Naughton, 68 Hun (N. Y.) 424, 23 N. Y. Suppl. 52; Demott *v.* Field, 7 Cow. (N. Y.) 58; Myer *v.* Cole, 12 Johns. (N. Y.) 349; Smith *v.* Teacle, 8 Pa. Co. Ct. 150.

95. Hapgood *v.* Houghton, 10 Pick. (Mass.) 154; Patterson *v.* Buchanan, 40 N. Y. App. Div. 493, 58 N. Y. Suppl. 179, 29 N. Y. Civ. Proc. 238; Riley *v.* Waller, 22 Misc. (N. Y.) 63, 48 N. Y. Suppl. 535; Lucy *v.* Walrond, 3 Bing. N. Cas. 841, 3 Hodges 215, 6 L. J. C. P. 290, 5 Scott 46, 32 E. C. L. 386; Rogers *v.* Price, 3 Y. & J. 28.

Under special statutory provisions.— Under a statute placing funeral expenses among debts to be first paid out of the estate and providing that an action for them may be brought against an executor, even within the six months which is generally allowed him to examine into the condition of the estate, an action will lie for such expenses against the executor in his representative capacity. Campfield *v.* Ely, 13 N. J. L. 150.

96. Carter *v.* Thomas, 3 Ind. 213; Sleighter *v.* Harrington, 4 N. C. 679, 7 Am. Dec. 715; Malin *v.* Bull, 13 Serg. & R. (Pa.) 441; Hawkes *v.* Saunders, 1 Cowp. 289; Atkins *v.* Hill, 1 Cowp. 284; Trewinian *v.* Howell, Cro. Eliz. 91.

97. Forbes *v.* Perrie, 1 Harr. & J. (Md.) 109; Dixon *v.* Ramsay, 7 Fed. Cas. No. 3,932, 1 Cranch C. C. 472; Faxon *v.* Dyson, 8 Fed. Cas. No. 4,705, 1 Cranch C. C. 441. See also Pole *v.* Simmons, 49 Md. 14.

Promise to pay legacy.— An action may be brought against a personal representative individually on his promise and consideration of assets to pay a legacy (Clark *v.* Herring, 5 Binn. (Pa.) 33; Kayser *v.* Disher, 9 Leigh (Va.) 357; Hawkes *v.* Saunders, 1 Cowp. 289), or it may be brought against him in his representative capacity (Foulk *v.* Brown, 2 Watts (Pa.) 209; Hawkes *v.* Saunders, *supra*). *Contra*, Kayser *v.* Disher, 9 Leigh (Va.) 357.

Where a promise is merely implied, the action, it has been held, must be brought against the personal representative in his capacity as such. Courtney *v.* Hunter, 6 Fed. Cas. No. 3,285, 1 Cranch C. C. 265.

98. Byrd *v.* Holloway, 6 Sm. & M. (Miss.) 199.

99. Wade *v.* Pope, 44 Ala. 690 (holding that if the will gives a trustee and executor authority to contract debts for expenses incidental to the management of the estate he represents he is liable at law for such debts in his representative capacity); Ingham *v.* Ryan, 18 Colo. App. 347, 71 Pac. 899 (holding that where a will gave an executor power to sell land and he entered into a contract authorizing an agent to sell a portion thereof, promising him a commission therefor, and the agent secured a purchaser to whom a conveyance was executed, he might maintain an action against the executor as such for his services). And see Bostwick *v.* Beach, 103 N. Y. 414, 9 N. E. 41, in which it was held that where a will authorizes a sale of the real estate the executor might be sued in his representative capacity for specific performance. But see O'Brien *v.* Jackson, 167 N. Y. 31, 60 N. E. 238 [*reversing* 42 N. Y. App. Div. 171, 58 N. Y. Suppl. 1044], in which it was held that notwithstanding such testamentary powers, an action would not lie against the executor in his representative capacity, but in which it was further said that if the complaint stated a good cause of action in equity, the judgment might be suffered to stand for whatever it was worth in any subsequent proceeding taken to reach the trust estate.

1. Burdine *v.* Roper, 7 Ala. 466; Warren *v.* Banning, 21 N. Y. Suppl. 883; Wengert *v.* Beashore, 1 Penr. & W. (Pa.) 232; Gordon

be maintained against a personal representative as such for malfeasance or misfeasance or for a tort.[2]

(II) *ACTIONS FOR CONVERSION OR DETENTION OF PROPERTY.* If a personal representative takes property not belonging to the estate, he has no right to it in his representative capacity. His refusal to restore it to the rightful owner renders him individually liable, and he cannot be sued in his representative capacity for his individual tort.[3] A personal representative is liable in his individual capacity even though the property has passed from the possession of the decedent into his possession,[4] and according to a number of decisions he may under these circumstances be sued also in his representative capacity.[5]

v. Robinson, 1 Browne (Pa.) 325; Boston Beef Packing Co. *v.* Stevens, 12 Fed. 279, 20 Blatchf. 443.

Application of rule.— Thus an action must be brought against a personal representative in his individual capacity for injuries caused by his neglect to repair a street (Eustace *v.* Jahns, 38 Cal. 3), by his failure to keep in repair a building leased by him, as executor (Boston Beef Packing Co. *v.* Stevens, 12 Fed. 279, 20 Blatchf. 443), or managed and controlled by him as executor (Deschler *v.* Franklin, 20 Ohio Cir. Ct. 56, 11 Ohio Cir. Dec. 188), for a trespass committed by him on another's land (Gordon *v.* Robinson, 1 Browne (Pa.) 325), for injuries resulting to a purchaser of land of an estate from concealment and misrepresentations of a personal representative (Warren *v.* Banning, 21 N. Y. Suppl. 883), for a malicious prosecution (Wengert *v.* Beashore, 1 Penr. & W. (Pa.) 232), or for neglect or refusal to pay over as ordered by a decree of distribution a distributive share of the estate (Melone *v.* Davis, 67 Cal. 279, 7 Pac. 703; Morrow *v.* Brenizer, 2 Rawle (Pa.) 185; Williams *v.* Davis, 18 Wis. 115). An executrix, however, in a suit to recover a legacy is only liable to the extent of the property which came into her hands and which had been appropriated wrongfully to her own use. Hawkins *v.* Forrest, 1 Tex. Unrep. Cas. 167.

2. Eustace *v.* Jahns, 38 Cal. 3.

3. *Alabama.*— Hunnicutt *v.* Higginbotham, 138 Ala. 472, 35 So. 469, 100 Am. St. Rep. 45; Daily *v.* Daily, 66 Ala. 266; Prater *v.* Stinson, 26 Ala. 456; Sims *v.* Canfield, 2 Ala. 555.

Indiana.— Davis *v.* Schmidt, (App. 1892) 31 N. E. 840.

Maryland.— Smith *v.* Wood, 31 Md. 293.

New York.— Van Slooten *v.* Dodge, 145 N. Y. 327, 39 N. E. 950 [*reversing* 76 Hun 55, 27 N. Y. Suppl. 666]; Anderson *v.* Thomson, 38 Hun 394.

Tennessee.— Cocke *v.* Trotter, 10 Yerg. 213.

Virginia.— Royall *v.* Eppes, 2 Munf. 479.

United States.— De Valengin *v.* Duffy, 14 Pet. 282, 10 L. ed. 457. And see Harrison *v.* Perea, 168 U. S. 311, 18 S. Ct. 129, 42 L. ed. 478 [*affirming* 7 N. M. 666, 41 Pac. 529].

See 22 Cent. Dig. tit. "Executors and Administrators," § 1687.

But see Schmitt *v.* Jacques, 26 Tex. Civ. App. 125, 62 S. W. 956.

4. *Alabama.*— Brewer *v.* Strong, 10 Ala. 961, 44 Am. Dec. 514.

Delaware.— Walter *v.* Miller, 1 Harr. 7.

Georgia.— Yeldell *v.* Shinholster, 15 Ga. 189.

Louisiana.— Warren *v.* Saltenberer, 6 La. Ann. 351.

South Carolina.— Elmore *v.* Elmore, 58 S. C. 289, 36 S. E. 656, 51 L. R. A. 261.

Tennessee.— Norment *v.* Smith, 1 Humphr. 46.

Texas.— Clapp *v.* Walters, 2 Tex. 130.

Virginia.— Catlett *v.* Russell, 6 Leigh 344; Newsum *v.* Newsum, 1 Leigh 86, 19 Am. Dec. 739.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1687.

And see Pryor *v.* Morgan, 170 Pa. St. 568, 33 Atl. 98; Michener *v.* Dale, 23 Pa. St. 59, holding that where property given plaintiff by intestate was surrendered to the administrator by her on demand without her disclaiming or making a gift or sale to the administrator she may waive the tort and bring suit in assumpsit for the value of the property against the administrator either in his individual or representative capacity. But see Scott *v.* Key, 9 La. Ann. 213, holding that an action to recover property from an administrator on the ground that his intestate never had title thereto should be against the administrator in his official capacity and against the heirs of the intestate.

5. *Alabama.*— Brewer *v.* Strong, 10 Ala. 961, 44 Am. Dec. 514; Nations *v.* Hawkins, 11 Ala. 859, holding that under a statute declaring that the action of trover shall survive for or against an executor or administrator they are subjected to that form of action in their representative capacity where a conversion had taken place in the lifetime of the decedent.

Kentucky.— Gentry *v.* McKehen, 5 Dana 34.

Minnesota.— Pabst Brewing Co. *v.* Small, 83 Minn. 445, 86 N. W. 450, holding that where an executor takes possession of real property held by testator, which he is authorized by statute to do, ejectment may be brought against him in his representative capacity.

New York.— Moran *v.* Morrill, 78 N. Y. App. Div. 440, 80 N. Y. Suppl. 120 [*affirmed* in 177 N. Y. 563, 69 N. E. 1127].

Pennsylvania.— Schott *v.* Sage, 4 Phila. 87, under a statute providing that an administrator shall be liable to be sued in any action which might have been maintained against defendant if he had lived.

d. Action For Accounting of Income From Property Held in Trust by Decedent. Where real estate came into the hands of an executor which was not properly assets but which was held by his testatrix as a constructive trustee for the executor as an individual and others and the executor received all the rents and profits after the death of his testatrix he is liable to a personal judgment in a suit for accounting for the rents and profits.[6]

B. Conditions Precedent to Suit — 1. For Debts of Decedent — a. Leave of Probate Court to Sue. Where leave of the probate court to sue the personal representative is made a condition precedent by statute the action cannot be maintained without procuring such permission.[7] It is not essential to the validity of the order granting permission that it should be made on petition and notice to the personal representative.[8] The application is addressed to the sound discretion of the court and will not be granted when it would be inequitable to do so.[9]

b. Presentation of Claim[10] — (i) *Necessity For Presentation*[11] — (a) *The Rule and Reasons on Which It Is Based.* Presentation of a claim to the probate court for allowance is not a condition precedent to the commencement of an action on the claim unless such presentation is required by statute.[12] In many jurisdictions, however, presentation of a claim to the personal representative is by statute made a condition precedent to a suit thereon.[13] The object of statutes

Texas.— Clapp *v.* Walters, 2 Tex. 130.

Virginia.— Ferrill *v.* Brewis, 25 Gratt. 765 (holding that, under a statute providing that trespass or case may be maintained against a personal representative for carrying away goods by decedent, trover may be sustained against a personal representative as such, although the goods never came into his hands); Catlett *v.* Russell, 6 Leigh 344.

United States.— De Valengin *v.* Duffy, 14 Pet. 282, 10 L. ed. 457.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1687.

Contra.— Elmore *v.* Elmore, 58 S. C. 289, 36 S. E. 656, 51 L. R. A. 261 (by divided court); Jones *v.* Littlefield, 3 Yerg. (Tenn.) 133; Norment *v.* Smith, 1 Humphr. (Tenn.) 46.

6. Anderson *v.* Northrop, 44 Fla. 472, 33 So. 419.

7. Crane *v.* Malony, 39 Iowa 39.

8. Sterritt *v.* Robinson, 17 Iowa 61.

9. *In re* Collins, 17 Hun (N. Y.) 289; Matter of Fleming, 5 Dem. Surr. (N. Y.) 336.

10. See, generally, on this subject *supra*, X, B.

11. For presentation of claim as condition precedent to right to set off claim see *infra*, XIV, D, 1, n.

12. Jones *v.* Perot, 19 Colo. 141, 34 Pac. 728; Vance *v.* Maroney, 3 Colo. 293; Rosenthal *v.* Magee, 41 Ill. 370. Under statutes providing that a claim allowed by the personal representative and approved by the judge must be filed in the county court within a certain time and that when a claim is rejected suit must be brought within a designated time after rejection, it is not essential to an action on a rejected claim that it should be filed in the county court. Saxton *v.* Musselman, (S. D. 1903) 95 N. W. 291.

13. *California.*—Barthe *v.* Rogers, 127 Cal. 52, 59 Pac. 310; Morrow *v.* Barker, 119 Cal. 65, 51 Pac. 12; Lichtenberg *v.* McGlynn, 105 Cal. 45, 38 Pac. 541; Gillespie *v.* Winn, 65 Cal. 429, 4 Pac. 411; Eustace *v.* Jahns, 38 Cal. 3.

Connecticut.—Grant *v.* Grant, 63 Conn. 530 (provided the estate is solvent); Pike *v.* Thorp, 44 Conn. 450.

Kentucky.— Perry *v.* Seitz, 2 Duv. 122; Rogers *v.* Mitchell, 1 Mete. 22; Smith *v.* Clark, 7 Ky. L. Rep. 746.

Louisiana.— Vavasseur *v.* Mouton, 34 La. Ann. 1044; Yarborough's Succession, 16 La. Ann. 258; Lobit *v.* Castille, 14 La. Ann. 779.

Mississippi.— The rule laid down in Rawlins *v.* Poindexter, 26 Miss. 654, 27 Miss. 61; Campbell *v.* Young, 3 How. 301; Smith *v.* Smith, 3 How. 216, that failure to authenticate the claim by affidavit to probate and record did not affect the creditor's right to sue on it, is changed by statute. Code Annot. §§ 1932, 1933, provides that no suit shall be maintained in any court on a claim not registered, probated, and allowed, and that probate, registration, and allowance shall be sufficient presentation to the personal representative.

Missouri.— See Evans *v.* King, 16 Mo. 525.

New Hampshire.— Amoskeag Mfg. Co. *v.* Barnes, 48 N. H. 25; Quigg *v.* Kittredge, 18 N. H. 137.

North Carolina.— Ward *v.* Jones, 44 N. C. 127.

Ohio.— Pepper *v.* Sidwell, 36 Ohio St. 454; Yager *v.* Greiss, 1 Ohio Cir. Ct. 531, 1 Ohio Cir. Dec. 296.

Oregon.— Zachary *v.* Chambers, 1 Oreg. 321.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1679, 1681.

In Arkansas the presentation of a claim to the administrator for allowance is not a prerequisite to a right of action. Saunders

requiring presentation of claims to the personal representative is to bring them to his knowledge so that he may be enabled to judge in what manner the estate should be settled,[14] and to afford him additional means for protecting the estate against spurious claims,[15] and an opportunity to allow all valid claims against the estate and thereby avoid the cost of unnecessary litigation.[16] The personal representative is not presumed to know what the claims are, and in a great majority of cases he cannot know until they are presented to him by the creditors.[17]

(B) *Extent and Limits of Rule.* The rule requiring presentation has been held the same in chancery as at law.[18] So it has been held that knowledge of the existence of a claim on the part of the personal representative, no matter how full, does not dispense with the necessity of complying with the statutes.[19] The statutory requirement has been held to apply to claims evidenced by judgment as well as other demands,[20] and to joint actions against personal representatives and

v. Rudd, 21 Ark. 519; Maddin *v.* State Bank, 13 Ark. 276. *Compare* Ryan *v.* Lemon, 7 Ark. 78.

In Indiana the filing of a claim against the decedent's estate constitutes a sufficient demand against the administrator to authorize suit on it. Armacost *v.* Lindley, 116 Ind. 295, 19 N. E. 138; Walker *v.* Heller, 104 Ind. 227, 3 N. E. 114; Wright *v.* Jordon, 71 Ind. 1; Woods *v.* Matlock, 19 Ind. App. 364, 48 N. E. 384. To confer jurisdiction over the subject of the action a claim against the estate of a decedent must be filed, placed upon the appearance docket, and, if not allowed, must be transferred to the issue docket; and, upon demurrer for want of jurisdiction, the record must show that such steps have been taken. Stanford *v.* Stanford, 42 Ind. 485.

In Louisiana failure to make demand may prevent recovery of costs but not the debt itself. Fisk *v.* Friend, 3 Rob. 264; St. Helena Police Jury *v.* Fluker, 1 Rob. 389.

In Maine under Rev. St. c. 87, § 12, one who has a claim against a decedent may maintain an action thereon against the administrator or executor, if commenced within two years and six months after notice of the appointment of the administrator is given, without a presentation of the claim in writing to the administrator and demand of payment within two years after such notice. The statute treats the commencement of the action as a presentation of plaintiff's claim and a sufficient demand of payment. Gould *v.* Whitmore, 79 Me. 383, 10 Atl. 60. Under a previous statute presentment of the claim in writing and demand for payment was necessary. Maine Cent. Institute *v.* Haskell, 71 Me. 487; Eaton *v.* Buswell, 69 Me. 552.

Rule in Texas.— Under the statutes of this state presentation of a claim on a money demand properly authenticated is a condition precedent to the right to sue thereon in an ordinary action against the estate, but the statutes apply only to claims for money. Thompson *v.* Branch, 35 Tex. 21; Walters *v.* Prestidge, 30 Tex. 66; Wiley *v.* Pinson, 23 Tex. 486; Fulton *v.* Black, 21 Tex. 424; Millican *v.* Millican, 15 Tex. 460; Danzey *v.* Swiney, 7 Tex. 617; Hall *v.* McCormick, 7 Tex. 269; National Guarantee Loan, etc., Co. *v.* Fly, 29 Tex. Civ. App. 533, 69 S. W. 231 (note); Roddy *v.* Harell, (Civ. App. 1897) 40 S. W. 1064 (rents); Cummings *v.* Jones, Dall. 531. In replevin against an administrator the assertion of a money demand for failure to deliver the property is secondary and does not constitute a claim for money within the meaning of the statutes (Barlow *v.* Anglin, (Civ. App. 1898) 45 S. W. 857); and the statute has no application to cases where the demand is for uncertain or unliquidated damages or for land (Bullion *v.* Campbell, 27 Tex. 653; Evans *v.* Hardeman, 15 Tex. 480; Robinson *v.* McDonald, 11 Tex. 385, 62 Am. Dec. 480; Merle *v.* Andrews, 4 Tex. 200; Curran *v.* Texas Land, etc., Co., 24 Tex. Civ. App. 499, 60 S. W. 466); so, where the testator as authorized by statute provides by his will that the probate court shall have no control of the estate and the executor administers upon the estate independently of that court, a creditor may institute and maintain a suit on his claim without verifying and presenting it for allowance (Smyth *v.* Caswell, 65 Tex. 379; Pleasant *v.* Davidson, 34 Tex. 459), the policy of the probate law requiring verification and presentment of the claim to the personal representative has no application when the probate court is debarred by will from the management of the estate (Smyth *v.* Caswell, *supra*). For decisions under a former statute relating to administration independently of the probate court see Shaw *v.* Ellison, 24 Tex. 197; Hogue *v.* Sims, 9 Tex. 546.

14. Probate Judge *v.* Lane, 51 N. H. 342.

15. Marshall *v.* Perkin, 72 Me. 343.

16. Quigg *v.* Kittredge, 18 N. H. 137; Pepper *v.* Sidwell, 36 Ohio St. 454; Wanz *v.* Park Hotel Co., 1 Ohio Cir. Ct. 105, 1 Ohio Cir. Dec. 63.

17. Grant *v.* Grant, 63 Conn. 530, 29 Atl. 15, 38 Am. St. Rep. 379; Pike *v.* Thorp, 44 Conn. 450.

18. Owens *v.* Corbitt, 57 Ala. 92; Jones *v.* Lightfoot, 10 Ala. 17.

19. Owens *v.* Corbitt, 57 Ala. 92.

20. Ready *v.* Thompson, 4 Stew. & P. (Ala.) 52; Curry *v.* Bryant, 7 Bush (Ky.) 301 (in which it was said that as such a claim like any other demand may be unjust or have been paid or be subject to set-offs or discounts, there is no reason for exempting it from the operation of the statute); Lobit *v.* Castille,

devisees on claims due from the estate.[21] The requirements have been held not to apply to demands against a personal representative arising after the grant of administration,[22] nor where the executor sells property in suit which by the terms of the will is reserved to the widow and children and by statute expressly declared not to be assets in the personal representative's hands,[23] nor to proceedings by a judgment creditor to subject to the payment of his judgment property fraudulently conveyed by decedent,[24] nor to actions brought against the debtor in his lifetime and revived against the representative,[25] nor to actions brought to correct errors made in a settlement with decedent,[26] nor to claims in which the amount of the liability could not have been determined by the representative.[27] So failure to make demand does not deprive the claimant of the right to interest where there was no administrator of whom demand could be made,[28] and it is very generally held that these statutes have no application where the claim is in relation to real estate and no presentation or demand is necessary in actions to foreclose mortgages, and the only effect of failure to present the claim for allowance would be to prevent a recovery of any deficiency that might remain after exhaustion of the mortgaged property, out of the testator's other estate.[29]

(II) *Sufficiency of Presentation.* Claims must be presented, as required by statute,[30] and they should be presented to the executor or administrator personally.[31] The claim presented need not be signed by the party making it and the demand of payment need not be in writing, although the claim must be.[32] Any presentment which gives the personal representative to understand the

14 La. Ann. 779. *Compare* Eddins *v.* Graddy, 28 Ark. 500, holding that after revival of a judgment by scire facias no presentation to the administrator is necessary; that the service of the scire facias is a presentation and the judgment of revival an allowance against the estate.

21. Ryan *v.* Jones, 15 Ill. 1, but devisees can only insist upon the general statutes of limitations.

22. Duggan *v.* Oglesby, 99 Ill. 405; Ryan *v.* Spieth, 18 Mont. 45, 44 Pac. 403; Probate Judge *v.* Lane, 51 N. H. 342.

A suit by a sheriff for money advanced to pay taxes for an estate is not within the requirements of the statute. Brown *v.* Porter, 7 Humphr. (Tenn.) 373.

23. Graves *v.* Graves, 10 B. Mon. (Ky.) 31. See also Curd *v.* Curd, 9 Humphr. (Tenn.) 171.

24. O'Doherty *v.* Toole, 2 Ariz. 288, 15 Pac. 28.

25. *Florida.*— Ellison *v.* Allen, 8 Fla. 206.

Indiana.— Clodfelter *v.* Hulett, 92 Ind. 426.

Kentucky.— Tipton *v.* Richardson, 54 S. W. 738, 21 Ky. L. Rep. 1194; Cochran *v.* Whittaker, 10 Ky. L. Rep. 495.

Ohio.— Musser *v.* Chase, 29 Ohio St. 577.

Washington.— Strong *v.* Eldridge, 8 Wash. 595, 36 Pac. 696.

26. Linn County *v.* Day, 16 Iowa 158. And see Fox *v.* Apperson, 6 Bush (Ky.) 653, holding that affidavit as to claim and demand are not necessary before filing a petition in equity against the executor of the agent of plaintiff for a discovery and settlement of his account as such.

27. Wanz *v.* Park Hotel Co., 1 Ohio Cir. Ct. 105, 1 Ohio Cir. Dec. 63, a suit to enforce a statutory liability of a deceased stockholder in an insolvent corporation.

Where foreign executors are sued, not for any liability by testator or his estate, but on their own liability, for the misapplication of the trust funds which have come to their hands no previous proceedings before the surrogate are necessary. Montalvan *v.* Clover, 32 Barb. (N. Y.) 190.

28. Tatum *v.* Gibbs, 41 S. W. 565, 19 Ky. L. Rep. 695

29. *California.*— Dreyfus *v.* Giles, 79 Cal. 409, 2 Pac. 840; Security Sav. Bank *v.* Connell, 65 Cal. 574, 4 Pac. 580.

Iowa.— Allen *v.* Moer, 16 Iowa 307.

Montana.— Lamme *v.* Dodson, 4 Mont. 560, 2 Pac. 298.

Nebraska.— National L. Ins. Co. *v.* Fitzgerald, 61 Nebr. 692, 85 N. W. 948.

Oregon.— Teel *v.* Winston, 22 Oreg. 489, 29 Pac. 142; Verdier *v.* Bigne, 16 Oreg. 208, 19 Pac. 64.

Washington.— Scammon *v.* Ward, 1 Wash. 179, 23 Pac. 439.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1679, 1681. See also *supra*, X, B, 2, f.

Proceedings to foreclose a vendor's lien against the administrators and heirs is not an action against the personal representative to obtain satisfaction out of the personal assets and in such proceedings it is not necessary to probate the claim before suit. Allen *v.* Smith, 29 Ark. 74.

30. Marshall *v.* Perkins, 72 Me. 343.

31. Rawson *v.* Knight, 71 Me. 99, in which it was said that the reception of the notice and demand required by an agent or attorney of an administrator is not incident to a general appointment or employment to assist in settling an estate; nor will such an appointment relieve claimants from any duty incumbent upon them by force of the statute.

32. Millett *v.* Millett, 72 Me. 117.

nature and amount of the claim will be sufficient.[33] The demand must be such, however, that the personal representative if he wishes to pay may do so at once and a demand for payment by letter is insufficient.[34] While the claimant can only recover on the claim which was presented to the personal representative,[35] and not on a cause of action not included in the claim,[36] he may sue for an amount less than his rejected claim, if it be shown to be part of the claim presented,[37] and the presentation of a claim for a designated amount will not necessarily prevent a recovery for a greater amount.[38] So an erasure of the names of indorsers on a note after presentment does not make an action thereon one for a different claim than the one presented.[39]

(III) *BY WHOM CLAIM PRESENTED.* It has been held that the claim may be presented either by plaintiff, his agent or attorney.[40]

(IV) *HOW NON-PRESENTATION CURED OR WAIVED.* Presentment and allowance of a demand after suit brought does not cure the failure to present before bringing suit.[41] It has been held, however, that presentment may be waived and that it is waived where the administrator joins issue and goes to trial on the validity of the claim without objection,[42] or files a demurrer.[43]

c. Verification of Claim — (I) *NECESSITY AND SUFFICIENCY.* The statutes in some jurisdictions make it a condition precedent to a suit against an executor or administrator on a claim against the estate that the claim be authenticated by affidavit,[44] or that an affidavit of the justice of the demand be made,[45] and an

33. Ross *v.* Knox, 71 N. H. 249, 51 Atl. 910; Little *v.* Little, 36 N. H. 224. And see Tebbetts *v.* Tilton, 31 N. H. 273.

Presenting a copy of a note or other written instrument will be sufficient unless the representative requires the original to be produced. Marshall *v.* Perkins, 72 Me. 343; Tebbetts *v.* Tilton, 31 N. H. 273; Mathes *v.* Jackson, 7 N. H. 259.

The presentment of an account, including articles furnished for decedent's burial and articles sold and delivered to him in his lifetime, without showing the amount due for the funeral, is not sufficient as a demand for payment of the funeral expenses. Ward *v.* Jones, 44 N. C. 127.

34. Probate Judge *v.* Runnells, 66 N. H. 271, 21 Atl. 1020.

35. Brooks *v.* Lawson, 136 Cal. 10, 68 Pac. 97; Lichtenberg *v.* McGlynn, 105 Cal. 45, 38 Pac. 541.

36. Barthe *v.* Rogers, 127 Cal. 52, 59 Pac. 310.

37. Cochran *v.* Germania Nat. Bank, 8 Ky. L. Rep. 790; Carter *v.* Beckwith, 104 N. Y. 236, 10 N. E. 350; Wilcox *v.* Alexander, (Tex. Civ. App. 1895) 32 S. W. 561.

38. Russell *v.* Pratt, 7 Pa. Co. Ct. 662. See also Morgan *v.* Bartlette, 3 Ohio Cir. Ct. 431, 2 Ohio Cir. Dec. 244; McCormick *v.* Blum, 4 Tex. Civ. App. 9, 22 S. W. 1054, 1120.

39. Morris *v.* Cude, 57 Tex. 337.

40. Marshall *v.* Perkins, 72 Me. 343. But see Zachary *v.* Chambers, 1 Oreg. 321, 322, in which it was held that the claim must be presented by the claimant himself. In this case it was said: "There are many transactions of life, from want of a wise precaution, or arising from that confidence which, too often perhaps, men repose in each other, of which there are no witnesses but the parties to the transactions; or if there is any evidence of it *aliunde,* it is known only to them. The decease of one party leaves all such knowledge in the breast of a single individual, and that one the claimant. The law can provide but one avenue to that knowledge,— an appeal to the conscience of the creditor under the solemn injunction of an oath."

41. Thompson *v.* Branch, 35 Tex. 21; Millican *v.* Millican, 15 Tex. 460; Danzey *v.* Swinney, 7 Tex. 617. See also Rogers *v.* Mitchell, 1 Metc. (Ky.) 22.

42. Lyon *v.* Logan County Bank, 78 S. W. 454, 25 Ky. L. Rep. 1668; Rigney *v.* Pelley, 13 Ky. L. Rep. 93; Pepper *v.* Sidwell, 36 Ohio St. 454; Daykin *v.* Emery, 10 Ohio Cir. Ct. 652, 5 Ohio Cir. Dec. 121. And see Thomas *v.* Thomas, 15 B. Mon. (Ky.) 178.

43. Lyttle *v.* Davidson, 67 S. W. 34, 23 Ky. L. Rep. 2262.

44. Ross *v.* Hyne, 48 Ark. 304, 3 S. W. 190; Saunders *v.* Rudd, 21 Ark. 519.

In Mississippi it has been held that a statute requiring a creditor to authenticate his claim by affidavit is designed for the protection of the personal representative in case he shall wrongfully pay a claim but the want of it in no way affects the creditor's right to sue. Campbell *v.* Young, 3 How. 301.

45. Smith *v.* Clark, 7 Ky. L. Rep. 747. See also Swift Iron, etc., Works *v.* Schulte, 8 Ky. L. Rep. 787.

To what claims applicable.— The statute has been held to apply to a complainant who has commenced his action but has not recovered judgment before the death of his debtor (Matthews *v.* Jones, 2 Metc. (Ky.) 254), or to a claim against an estate pleaded as a set-off or counter-claim (Warfield *v.* Gardner, 3 Ky. L. Rep. 423); but an affidavit is not necessary in an action against an executor on a compromise made with plaintiff, as where recovery is sought on a demand against the estate (Newton *v.* Cecil, 43 S. W. 734,

affidavit made before an officer not having authority to take affidavits will be inoperative.[46]

(II) *Waiver of Verification or Defects in Verification.* In one jurisdiction it has been held that the statutory requirement cannot be waived, and if the affidavit made is defective, advantage may be taken of it at any time before final judgment.[47] In another, failure to verify the demand is waived by appearance and answer to the merits.[48] Want of verification can only be taken advantage of before or at the time of filing the answer.[49] It has been held, however, that defendant does not waive his right to object to the sufficiency of the affidavit by answering without objection.[50] Where, in an action brought in the lifetime of the decedent and after his death revived against his administrator, plaintiff, without having verified his demand, recovers a verdict and the court renders a judgment thereon against the administrator, such judgment will be reversed with directions to the court below to set it aside, but to render it again upon the necessary affidavit being made subject to any credits, offsets, or discounts disclosed in the affidavit; and if no such affidavit shall be filed within a reasonable time then to set aside the verdict and dismiss the action.[51]

d. Rejection or Disallowance of Claim. Under some statutes it is essential to the right to bring suit on a claim against the estate that it should have been rejected or disallowed when presented.[52]

19 Ky. L. Rep. 1430). And the statute has no application to claims against an executor or administrator. Therefore, where the only payment of usury sought to be recovered consisted of payments to defendant as administrator, it was no defense that no affidavit had been made before suit brought. Crenshaw *v.* Duff, 69 S. W. 962, 24 Ky. L. Rep. 718.

What affidavit shall state.—The statute requiring the verification of demands against the estates of decedents does not require that the affidavit shall state either the date or amount of the note or other demand; therefore, where the affidavit describes the demand as bearing a certain date, which does not correspond with the real date, the variance is not fatal. Cochran *v.* Germania Nat. Bank, 8 Ky. L. Rep. 790.

Affidavit held sufficient.—An affidavit in an action on a count for services rendered which follows substantially the language of the statute, states sufficient facts to constitute a cause of action, shows an employment, rendition of services, their value, and decedent's agreement to pay, is a sufficient verification of the demand. Peak *v.* Grover, 12 Ky. L. Rep. 189.

Affidavit of a third person to prove an account against the estate of a decedent which states that the account "is just and true as he verily believes" is insufficient. Trabue *v.* Harris, 1 Metc. (Ky.) 597.

Dismissal without prejudice.— For failure to make affidavit to the justice of a demand against a decedent's estate as required by statute before suing an heir thereon, the petition should not be dismissed absolutely but without prejudice. Teeter *v.* Anderson, 8 Ky. L. Rep. 108.

46. Winder *v.* Hendricks, 56 Cal. 464. And see Alter *v.* Kinsworthy, 30 Ark. 756, holding that making affidavit before a justice of the peace of another state is not a sufficient compliance with the statutory requirement.

47. Alter *v.* Kinsworth, 30 Ark. 756; Ryan *v.* Lemon, 7 Ark. 78.

48. Thomas *v.* Thomas, 15 B. Mon. (Ky.) 178; Lyons *v.* Logan County Bank, 78 S. W. 454, 25 Ky. L. Rep. 1668; Rigney *v.* Pelley, 13 Ky. L. Rep. 93.

The proper practice is for the personal representative to file an affidavit showing that no demand has been made on him before suit brought accompanied by an affidavit required by the statute and thereupon a rule should be awarded against plaintiff to show cause why his petition should not be dismissed. Tichenor *v.* Wood, 70 S. W. 637, 24 Ky. L. Rep. 1109.

49. Gough *v.* Alvey, 10 Ky. L. Rep. 590.

50. Hansford *v.* Parrish, 7 Ky. L. Rep. 94.

51. Worthley *v.* Hammond, 13 Bush (Ky.) 510.

52. Lichtenberg *v.* McGlynn, 105 Cal. 45, 38 Pac. 541; Eustace *v.* Jahns, 38 Cal. 3; Yarborough's Succession, 16 La. Ann. 258; Erie County *v.* Walker, 10 Ohio Dec. (Reprint) 558, 22 Cinc. L. Bul. 106; Cummings *v.* Butler, Dall. (Tex.) 531.

A formal indorsement of rejection on a claim by the administrator is not a prerequisite to the right to bring suit. It is sufficient if the claim has been unequivocally rejected. Erie County *v.* Walker, 10 Ohio Dec. (Reprint) 558, 22 Cinc. L. Bul. 106.

Insolvent estate.— An action cannot be brought at common law on a rejected claim until the commissioners on an estate reported insolvent have reported their report being the proper evidence of the rejection of the claim. Ellsworth *v.* Thayer, 4 Pick. (Mass.) 122.

The neglect of defendant to make answer to a demand upon her as administratrix to pay a sum due to certain persons as their share of the income of an estate owned jointly

2. To Recover Legacies and Distributive Shares. No action at law can be maintained for the recovery of a legacy unless the will has been regularly admitted to probate,[53] and in some jurisdictions it is essential that the legatee should before bringing action give a refunding bond.[54] It is also a condition to the right of recovery at law that sufficient assets have come into defendant's hands,[55] and that there are no debts for which the legacy could be made liable.[56] So the general rule is that to authorize a recovery of a legacy in an action at law a demand therefor must be made[57] by someone having authority to receive and to discharge the legacy,[58] unless such demand is waived as may be done.[59] No decree of the probate court in favor of the legatee is necessary to enable him to maintain an action for his legacy,[60] nor is it necessary that there should be an order that the legacy be paid to plaintiff or into court.[61] To authorize a bill in equity to recover a legacy it is not necessary that there should have been a settlement of the estate,[62] nor that the claim should have first been established against the executor, at law,[63] nor that there should have been an order in the probate court for its payment;[64] and if the purpose of the bill is merely to establish the validity of the bequest and not to obtain possession of a particular thing bequeathed a demand for the particular legacy is not a condition precedent to the bringing of a suit.[65] To entitle a distributee to maintain an action at law for his share as ordered to be paid by a decree of distribution, demand and refusal to pay are not conditions precedent to the right to sue, the action itself being sufficient demand;[66] but neither an action at law[67] nor a bill in equity[68] can under any circumstances be maintained for the

by them and decedent is such a demand and refusal to account as to warrant the bringing of an action on the claim. Cutler *v.* Currier, 54 Me. 81.

53. Sheperd *v.* Nabors, 6 Ala. 631; Armstrong *v.* Lear, 12 Wheat. (U. S.) 169, 6 L. ed. 589; Rex *v.* Netherseal, 4 T. R. 258.

54. Nelson *v.* Cornwell, 11 Gratt. (Va.) 724.

55. Farwell *v.* Jacobs, 4 Mass. 634.

56. Magee *v.* Gregg, 11 Sm. & M. (Miss.) 70.

57. Miles *v.* Boyden, 3 Pick. (Mass.) 213; Prescott *v.* Parker, 14 Mass. 429; Tappan *v.* Tappan, 30 N. H. 50; Payne *v.* Smith, 12 N. H. 34; Pickering *v.* Pickering, 6 N. H. 120.

The reason assigned is that it is not the executor's duty to seek the legatee but it is sufficient if he pays when the legatee comes and demands payment. Miles *v.* Boyden, 3 Pick. (Mass.) 213; Tappan *v.* Tappan, 30 N. H. 50.

The fact that the legacies are made payable at a fixed time does not obviate the necessity of making a demand. Miles *v.* Boyden, 3 Pick. (Mass.) 213.

Limitation of rule.— If an express promise is made on a sufficient consideration to pay a legacy, it is not necessary to give a right of action that a demand should have been subsequently made for payment. Gause *v.* Hughes, 9 Port. (Ala.) 552.

Under special statutory provisions.— Under a statute which provides that an executor shall after the expiration of a year from the grant of letters testamentary pay general legacies, it has been held that no demand is necessary to make complete the right in the legatee to proceed by petition in the surrogate's court to compel payment of the legacy. Matter of Underhill, 9 N. Y. Suppl. 455, 1 Connoly Surr. (N. Y.) 541; House *v.* Agate, 3 Redf. Surr. (N. Y.) 307.

58. Miles *v.* Boyden, 3 Pick. (Mass.) 213.

59. Miles *v.* Boyden, 3 Pick. (Mass.) 213.

What amounts to waiver.— While a father as natural guardian is not entitled to demand or receive payment of a legacy to his child, yet if a demand by him is resisted solely on the ground that the child had no claim to the legacy, the executor thereby waives the necessity of the demand, and the action by the legatee by his father as *prochein ami* will be sustained. Miles *v.* Boyden, 3 Pick. (Mass.) 213.

Where a demand is made by attorney, the party has the right at the time to require reasonable evidence of the authority of the individual to make it; but if no exception is taken at the time then a subsequent commencement of a suit by the party in whose behalf it was made claiming under such demand is a ratification of the demand and is *prima facie* evidence that it was made by his authority. Payne *v.* Smith, 12 N. H. 34.

60. Magee *v.* Gregg, 11 Sm. & M. (Miss.) 70.

61. Wall *v.* Bulger, 46 Hun (N. Y.) 346.

62. Frey *v.* Demarest, 16 N. J. Eq. 236.

63. Taliaferro *v.* Thornton, 6 Call (Va.) 21.

64. Mahar *v.* O'Hara, 9 Ill. 424.

65. Haines *v.* Carpenter, 10 Fed. Cas. No. 5,905, 1 Woods 262 [*affirmed* in 91 U. S. 254, 23 L. ed. 345].

66. Melone *v.* Davis, 67 Cal. 279, 7 Pac. 703. To the same effect see Henry *v.* State, 9 Mo. 778.

67. Cathaway *v.* Bowles, 136 Mass. 54.

68. Cummings *v.* Cummings, 143 Mass. 340, 9 N. E. 730.

recovery of a distributive share of the decedent's estate except after a decree of distribution has been rendered.[69]

C. Defenses — 1. In Actions by Personal Representatives — a. In General. Defendant in an action by an administrator *de bonis non* may take advantage of fraud in the contract made by the original administrator,[70] and an equity growing out of a debt sought to be enforced by a special administrator may be set up against him.[71] In an action by an administrator to recover a debt due the estate it is no defense that the co-administrator directed defendant not to pay it to plaintiff.[72] In an action to set aside conveyances of deceased in fraud of creditors, it is no defense that the creditor's claims have been assigned to the administrator who brings the action.[73] In an action for the recovery of property belonging to the estate defendant cannot set up as a defense for withholding it that the estate owes him money.[74] In an action on a note due decedent it is not a defense that the note was deposited with a trust company by order of court and was produced therefrom only for the purpose of the action.[75] The fact that an administrator as an attorney at law has received from defendant a note for collection, the proceeds of which are to be applied to the payment of a debt due the intestate's estate, is no defense to a bill filed by the administrator to enforce a vendor's lien reserved as security for such debt.[76] When sued on a note payable to decedent the surety of the maker who was insolvent may insist on the application of a distributive share of the payee's estate, coming to the maker in discharge of the note.[77] An administrator is not estopped from bringing suit for an accounting because of delay occasioned by misapprehension of the validity of the contract between decedent and defendant where such delay was not prejudicial to defendant.[78] A recovery by heirs of a deceased person is a good defense to a suit by an administrator for their benefit where there are no debts due or owing by the decedent.[79] Where an administrator of a tenant sues for an irregularity committed by the landlord in carrying out a lawful distress levied after the tenant's death, the mere insolvency of the tenant's estate where there has been no decree of insolvency is immaterial.[80] If one who assigns property to another for sale subsequently sues for the proceeds as administrator of one deceased, defendant cannot set up that he may be required to pay again to plaintiff personally, since plaintiff is bound by his judicial admissions as to the ownership of the proceeds.[81]

b. Want of Representative Capacity.[82] Want of administrative capacity cannot be pleaded in an action by a person on a contract made with him as administrator

69. **The obligation to a distributee assumed by the administrator** is to pay to such persons as the court may direct any balance remaining in his hands upon the settlement of his accounts. This contemplates that an administrator is entitled to be protected by a decree of distribution, passed by the probate court, before he can be called upon to divide the balance remaining in his hands among those claiming it as distributees under the statutes. Cathaway *v.* Bowles, 136 Mass. 54.

70. Rice *v.* Richardson, 3 Ala. 428.

71. Nashville, etc., Turnpike Co. *v.* Harris, 8 Humphr. (Tenn.) 158, assigning as the reason for this holding that a special administrator for the collection of a debt does not represent the intestate so as to be liable for an action for non-performance of the intestate's contracts.

72. Strever *v.* Feltman, 1 Thomps. & C. (N. Y.) 277, because the co-administrator was acting in violation of his duty.

73. Howd *v.* Brackenridge, 97 Mich. 65, 56 N. W. 221, in which it was said that while it is ordinarily true that a distinct right of action for fraud is not assignable, yet if the right to enforce a claim which is itself assignable depends on showing fraud incidentally the rule has no application.

74. Roumfort *v.* McAlarney, 82 Pa. St. 193.

75. Cornwell *v.* McElrath, (Cal. 1895) 39 Pac. 617.

76. Mulloy *v.* Putnam, 1 Tenn. Ch. 473.

77. Wright *v.* Austin, 56 Barb. (N. Y.) 13.

78. Stennett *v.* Red Oak Invest. Co., 112 Iowa 273, 83 N. W. 1069.

79. Hardaway *v.* Drummond, 27 Ga. 221, 73 Am. Dec. 730.

80. Brown *v.* Howell, 68 N. J. L. 292, 53 Atl. 459, in which it was said if insolvency without proceedings for a decree thereof would not be sufficient to prevent the collection of a debt it would *a fortiori* be insufficient to require the return of a debt that had been collected.

81. Whetstone *v.* Rawlins, 26 La. Ann. 474.

82. **Appointment, qualification, and tenure** see *supra*, II.

since he may sue thereon in his individual capacity.[83] And one who has received the benefit of a contract made by him with an executor is estopped to set up that the contract is of such a character that the executor had no authority to make it.[84] It may be pleaded as a defense in an action by an executor that his letters testamentary have been revoked.[85] And it is a good defense to a bill in equity where a person is administrator that he had not taken out letters of administration in the state before filing the bill.[86] The objection that a plaintiff has no right to sue in a representative capacity may be waived by defendant's admissions.[87]

2. In Actions Against Personal Representative — a. Want of Representative Capacity. One who is not a personal representative may set up this fact as a defense to an action against him as such,[88] unless he has done some act which will estop him to deny his representative capacity.[89] He may also plead a revocation of letters of administration in bar of the further maintenance of an action against him in his representative capacity,[90] or that he has been removed from office.[91] It is not, however, a good plea in bar that the representative has resigned his trust, unless it is further alleged either that he has administered the assets that come into his hands or that he delivered them to his successor;[92] and even a discharge on final settlement cannot be pleaded in bar to an action for a debt not barred by the statute of limitations at the time of final settlement.[93] If an administrator is sued by a stranger for the recovery of land, proof of title in decedent is a good defense to the action, although the administration is void.[94]

b. Disability of Decedent. The existence of a disability such as the infancy[95]

83. Claiborne *v.* Yoeman, 15 Tex. 44.

84. Shawhan *v.* Long, 26 Iowa 488, 96 Am. Dec. 164; Scott *v.* Meadow, 16 Lea (Tenn.) 290.

Unauthorized purchase of claim.— Where a defendant in an action by an administrator on a claim sold and assigned to the latter for a valuable consideration has no interest in the estate he cannot set up as a defense that the administrator had no right to purchase the claim. The general rule that the administrator will not be permitted to speculate with the funds of the estate has no application. Brossard *v.* Williams, 114 Wis. 89, 89 N. W. 832.

85. Leach *v.* Lewis, 38 Ind. 160. It has been held, however, that where letters of administration granted in another state where the intestate was domiciled are revoked such revocation does not affect ancillary letters which have been in the mean time taken out in this territory by the same person, nor is a suit previously brought by such administrator in this territory on behalf of the estate abated by such revocation. Huntington *v.* Moore, 1 N. M. 489.

86. Carter *v.* Treadwell, 5 Fed. Cas. No. 2,480, 3 Story 25.

87. Martin *v.* Fowler, 51 S. C. 164, 28 S. E. 312; Reynolds *v.* Torrance, 2 Brev. (S. C.) 59. And see Barton *v.* Davidson, (Tex. Civ. App. 1898) 45 S. W. 400.

In a suit to foreclose a mortgage by persons claiming to be administrators, the objection that they were not will not be sustained if they had obtained the grant of administration before the objection was passed on. A grant of letters relates back to decedent's death and legalizes previous acts of an administrator. Martin *v.* Fowler, 51 S. C. 164, 28 S. E. 312.

88. Wise *v.* Brocker, 1 Colo. 550; Borden *v.* Thorpe, 35 N. C. 298.

89. Du Val *v.* Marshall, 30 Ark. 230, as for instance executing an instrument as administrator of an estate.

90. Morrison *v.* Cones, 7 Blackf. (Ind.) 593.

91. Jewett *v.* Jewett, 5 Mass. 275, holding further that it is not necessary for him to plead that he has fully administered since he cannot retain any assets for payment of the judgment. And see Parkhill *v.* Union Bank, 1 Fla. 110, holding that where an administratrix was removed pending a suit against her in that capacity, on being reappointed with others as administrators *de bonis non* a plea to the action that since the last continuance she had been removed by public authority, and that the assets had been taken out of her hands as administratrix, being in the nature of a plea of *ne unques administratrix* was properly pleaded in bar, although it might have been pleaded in abatement.

92. Gayle *v.* Elliott, 10 Ala. 264, in which it was further said that it is not sufficient to show that the property remained during the interval between his resignation and the appointment of his successor where the testator required that it should or that it has been clandestinely removed by some other person unless he shows that he took such care of it as a man of prudence would have taken of his own estate; nor that his successor went into possession of the testator's lands under the provisions of the will, and that they were of value sufficient to pay plaintiff's demand.

93. Pollock *v.* Buie, 43 Miss. 140.

94. Victory *v.* Stroud, 15 Tex. 373.

95. Hussey *v.* Jewett, 9 Mass. 100; Counts *v.* Bates, Harp. (S. C.) 464; Baker *v.* Huddleston, 3 Baxt. (Tenn.) 1.

or coverture of decedent[96] is a good defense by the personal representative in an action against him on contracts made by his testator or intestate, and this is true, although the representative may have sold as part of the estate the property so acquired by decedent,[97] and the rule applies where plaintiff elects to waive a conversion by decedent and sue in contract.[98]

c. Fraudulent Gifts or Conveyances by Decedent. A personal representative cannot set up as a defense to a claim against the estate that the claim arises out of a gift[99] or conveyance by the decedent which is in fraud of creditors.[1] Although such gift or conveyance may be void as to creditors, it is nevertheless good as between the parties, and the personal representative cannot set up a defense which would not have been available to decedent.[2] One cannot complain of a wrong done by himself, or of another's wrong in which he participated.[3] So an administrator sued on a judgment against decedent cannot set up as a defense that the judgment was obtained by collusion between plaintiff and decedent.[4]

d. Insolvency of Estate. While it is a good plea *puis darrein continuance* that an estate has been represented insolvent pending an action against it,[5] a plea that the estate is insolvent is not good in bar, since the estate may be able to pay a portion of the debts.[6]

e. In Actions For Legacies and Distributive Shares. Where the assets are sufficient, it is no defense to a suit for a legacy that the estate has been partitioned among the heirs or other legatees,[7] or that debts have not been paid.[8] *Plene administravit* is not a good defense if several judgments are pleaded by the administrator and plaintiff falsifies any of them,[9] nor where a legislative enactment was necessary to enable the legatee to receive a bequest and the legislature was not in session between the time of decedent's death and the time of final settlement.[10] So a plea by an administrator on a judgment recovered against him as such that he had fully administered except as to goods and chattels to a certain amount not sufficient to satisfy such judgment does not bar a recovery.[11] That the estate has been fully settled and the lands apportioned is no defense to an action against the administrator by the decedent's covenantee for a breach of a covenant of warranty against encumbrances.[12] *Plene administravit* and want of assets is a good defense in an action on a claim brought several years after settlement of the administration account after having had previous notice of the claim.[13] It is not a defense that creditors enjoined an agent to receive legacies from a foreign executor under an appointment by the legatees from paying so much of the money as would be sufficient to satisfy their claims.[14] It is no defense to an action for a distributive share that subsequent to a settlement of his account in the probate court charging himself with assets a portion of the assets were subsequently recovered from the administrator in an adverse suit of which the distributees had notice.[15] The

96. Baker *v.* Garris, 108 N. C. 218, 13 S. E. 2.

97. Counts *v.* Bates, Harp. (S. C.) 464.

98. Baker *v.* Huddleston, 3 Baxt. (Tenn.) 1.

99. Chappell *v.* Brown, 1 Bailey (S. C.) 528.

1. Roden *v.* Murphy, 10 Ala. 804; Drinkwater *v.* Drinkwater, 4 Mass. 354; Williams *v.* Williams, 34 Pa. St. 312; Tomlinson *v.* Tomlinson, 10 Rich. (S. C.) 404.

2. See cases cited in preceding notes.

All the powers of executors and administrators are derivative, and if the donor could not dispute his own voluntary gift, on the ground that it operated a fraud on his creditors, his executor or administrator could not. Chappel *v.* Brown, 1 Bailey (S. C.) 528.

3. Dow *v.* Blake, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156.

4. Dow *v.* Blake, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156.

5. Fennell *v.* Patrick, 3 Stew. & P. (Ala.) 244.

6. Peyatte *v.* English, 2 Fed. Cas. No. 11,054*a*, Hempst. 24.

7. Stephenson *v.* McFaddin, 42 Tex. 322.

8. Kent *v.* Dunham, 106 Mass. 586.

9. Bell *v.* Davidson, 13 N. C. 397.

10. England *v.* Prince George's Parish, 53 Md. 466.

11. Parker *v.* Gainer, 17 Wend. (N. Y.) 559.

12. Taylor *v.* Priest, 21 Mo. App. 685.

13. U. S. *v.* Primrose, 27 Fed. Cas. No. 16,091, Gilp. 58.

14. Scotts *v.* Lindsay, 2 Dana (Ky.) 241.

15. Clark *v.* Callaghan, 2 Watts (Pa.) 259, in which it was said that the adminis-

personal representative cannot after final accounting set up as a defense to an action for a distributive share that a mistake had occurred in the course of the settlement.[16] Nor is a judgment for a distributive share, void for want of jurisdiction, a defense to such action.[17] In an action for a distributive share it may be set up as a defense that part of the funds had been lost without the administrator's negligence,[18] or that a part of the estate is claimed by one of defendants as individual property and that another part is subject to a trust,[19] or that it had been paid to a regularly appointed guardian of the claimant.[20]

f. Miscellaneous. An administrator may maintain a plea in abatement seasonably pleaded as well as a plea in bar.[21] The administrator cannot set up an estoppel in his favor in his individual capacity against a claim against the estate,[22] nor is it a defense to a suit against him in his representative capacity that there is an action pending on the same claim against him in his individual capacity.[23] To a suit on a note made by decedent defendant may plead a usurious consideration,[24] or *non est factum*.[25] A void judgment in favor of a creditor against a personal representative is no defense to a subsequent suit by the creditor to recover the amount of his claim against the estate.[26] If a reason for rejecting the claim is indorsed thereon, the representative cannot plead in abatement of a suit thereon any other reason which goes merely to the sufficiency of the presentation for allowance.[27] The personal representative cannot allege his own illegal acts in bar of the action of creditors against him.[28] A receipt given decedent may be set up in defense of an award on the claim for which the receipt was given.[29] Where decedent representing himself as agent of another sold his property and converted the proceeds the personal representative is estopped to set up title in a third person.[30] The settlement of an executor's account in the probate court is no bar it seems to a suit for malfeasance and waste.[31]

D. Set-Off or Counter-Claim — 1. In Actions by Personal Representatives — a. Necessity For Mutuality of Demands. In order to warrant the allowance of set-off in actions by personal representatives, the debts must be mutual and the principle of mutuality requires that the debts should not only be due to and from the same person but in the same capacity.[32]

trator's remedy is by petition to the probate court for a review. See also Thompson *v.* McGaw, 2 Watts (Pa.) 161, holding that in an action against an executor for a legacy defendant cannot show that the balance of an administration account in his hands, settled by the orphans' court, was composed of bonds not due at the time of the settlement, and which afterward could not be collected because of the insolvency of the obligors.

16. Singleton *v.* Garrett, 23 Miss. 195, in which it was said that if this could be done there would be no use in a final decree. *Compare* Cherry *v.* Belcher, 5 Stew. & P. (Ala.) 133, holding that, where administrators are sued in chancery by a distributee to compel the payment of a distributive share, they are not precluded by the fact that the orphans' court had previously by settlement ascertained the amount to which such distributee was entitled from showing mistakes, payments by them subsequent to the settlement, or any other matter which in equity may be relied on.

17. Basom *v.* Taylor, 39 Mich. 682.

18. Westervelt *v.* Ackerson, 35 N. J. Eq. 43.

19. Westervelt *v.* Ackerson, 35 N. J. Eq. 43.

20. Young *v.* Suggs, Sm. & M. Ch. (Miss.) 393.

21. Guild *v.* Richardson, 6 Pick. (Mass.) 364, in which it was said that such a plea may be decisive of the action, but if it is not it may involve a question of costs on which the administrator may be appointed to relieve the estate.

22. Lee *v.* Carter, 52 Ind. 342.

23. Hall *v.* Richardson, 22 Hun (N. Y.) 444.

24. Fox *v.* Whitney, 16 Mass. 118.

25. Stanton *v.* Burge, 34 Ga. 435.

26. Gorman *v.* Swaggerty, 4 Sneed (Tenn.) 560.

27. Hansell *v.* Gregg, 7 Tex. 223.

28. Collins *v.* Hollier, 13 La. Ann. 585. Thus, in an action by a creditor of a decedent's estate to compel the administrator to pay his claim which had been duly presented and allowed, the administrator's answer that he had paid over the funds to the distributees and for that reason had no funds in hand with which to pay the claim presents no defense. North *v.* Priest, 81 Mo. 561.

29. Parsons *v.* Hall, 3 Me. 60.

30. McNair *v.* McKay, 33 N. C. 602.

31. Young *v.* Chaney, 3 La. 462.

32. *Alabama.*— Mauldin *v.* Armistead, 14 Ala. 702; Rapier *v.* Holland, Minor 176.

Arkansas.— Bizzell *v.* Stone, 12 Ark. 378.

Connecticut.— Nichols *v.* Dayton, 34 Conn. 65.

b. Debts Due in Decedent's Lifetime Against Causes of Action Accruing After His Death. The rule is well settled that in an action brought upon a cause of action accruing after decedent's death defendant cannot set off a debt due from the intestate in his lifetime.[33] The rule is the same whether brought by the personal representative in his individual or representative character,[34] and it applies with equal force whether the contract sued on was made with the personal representatives,[35] or with the decedent if no cause of action arose thereon

Indiana.— Dayhuff *v.* Dayhuff, 27 Ind. 158.

Kentucky.— Cummins *v.* Williams, 5 J. J. Marsh. 384; Bibb *v.* Saunders, 2 Bibb 87; Hancock *v.* Hancock, 69 S. W. 757, 24 Ky. L. Rep. 664; Lee *v.* Russell, 38 S. W. 874, 18 Ky. L. Rep. 951.

Louisiana.— Guibert *v.* Herpin, 3 Mart. N. S. 395.

Maine.— Adams *v.* Ware, 33 Me. 228.

New Hampshire.— Woodman *v.* Barker, 2 N. H. 479.

New York.— Matter of Hill, 17 Abb. N. Cas. 273; Dale *v.* Cooke, 4 Johns. Ch. 11; Dudley *v.* Griswold, 2 Bradf. Surr. 24.

Pennsylvania.— Tenant *v.* Tenant, 110 Pa. St. 478, 1 Atl. 532; Stuart *v.* Com., 8 Watts 74.

South Carolina.— Porter *v.* Cheesborough, 1 Strobh. Eq. 275.

Texas.— Gresham *v.* Harcourt, 93 Tex. 149, 53 S. W. 1010.

Virginia.— James *v.* Johnston, 22 Gratt. 461.

United States.— McKown *v.* Manhattan L. Ins. Co., 91 Fed. 352.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1699. And see *infra*, XIV, D, 1, b, c, f.

33. *Alabama.*— Tate *v.* Chandler, 4 Stew. & P. 417; Rapier *v.* Holland, Minor 176.

Arkansas.— Bishop *v.* Dillard, 49 Ark. 285, 5 S. W. 341; Bizzell *v.* Stone, 12 Ark. 378.

Georgia.— Mills *v.* Lumpkin, 1 Ga. 511, 44 Am. Dec. 677.

Illinois.— Harding *v.* Shepard, 107 Ill. 264; Newhall *v.* Turney, 14 Ill. 338.

Indiana.— Dayhuff *v.* Dayhuff, 27 Ind. 158.

Iowa.— Toerring *v.* Lamp, 77 Iowa 488, 42 N. W. 378.

Kentucky.— Cummins *v.* Williams, 5 J. J. Marsh. 384; Crews *v.* Williams, 2 Bibb 262, 4 Am. Dec. 701; Burton *v.* Chinn, Hard. 252; Hancock *v.* Hancock, 69 S. W. 757, 24 Ky. L. Rep. 664; Lee *v.* Russell, 38 S. W. 874, 18 Ky. L. Rep. 951; Dunn *v.* Carpenter, 10 Ky. L. Rep. 494.

Louisiana.— Mercer *v.* Lobit, 10 La. Ann. 47.

Missouri.— Woodward *v.* McGaugh, 8 Mo. 161.

New Hampshire.— Shaw *v.* Gookin, 7 N. H. 16, Woodman *v.* Barker, 2 N. H. 479; Colby *v.* Colby, 2 N. H. 419.

New York.— Thompson *v.* Whitmarsh, 100 N. Y. 35, 2 N. E. 273; Jordan *v.* National Shoe, etc., Bank, 74 N. Y. 467, 30 Am. Rep. 319; Merritt *v.* Seaman, 6 N. Y. 168; Foley *v.* Scharmann, 58 N. Y. App. Div. 250, 68 N. Y. Suppl. 771; Wakeman *v.* Everett, 41 Hun 278; Fry *v.* Evans, 8 Wend. 530; Root *v.* Taylor, 20 Johns. 137; Irving *v.* De Kay, 10 Paige 319; Dale *v.* Cooke, 4 Johns. Ch. 11.

Ohio.— McDonald *v.* Black, 20 Ohio 185, 55 Am. Dec. 448.

Texas.— Robb *v.* Smith, 40 Tex. 89; Atchison *v.* Smith, 25 Tex. 228.

Wisconsin.— McLaughlin *v.* Winner, 63 Wis. 120, 23 N. W. 402, 53 Am. Rep. 273; Armstrong *v.* Pratt, 2 Wis. 299.

England.— Schofield *v.* Corbett, 11 Q. B. 779, 6 N. & M. 527, 63 E. C. L. 779; Mardall *v.* Thellusson, 6 E. & B. 976, 3 Jur. N. S. 314, 5 Wkly. Rep. 25, 88 E. C. L. 976 [*reversing* 21 L. J. Q. B. 410]; Rees *v.* Watts, 11 Exch. 410, 1 Jur. N. S. 1023, 25 L. J. Exch. 30, 3 Wkly. Rep. 575; Tegetmeyer *v.* Lumley, Willes 264 note; Shipman *v.* Thompson, Willes 103.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1698 *et seq.*

Effect of special agreement by representative.— It is not within the power of an administrator to bind the assets in his hands by an agreement that a debt contracted by his intestate may be set off against one contracted to himself in favor of the estate and an answer setting up such agreement presents no defense available either at law or in equity. Bishop *v.* Dillard, 49 Ark. 285, 5 S. W. 341.

Limitations of rule.— In Pennsylvania it has been held that, in an action by executors of a solvent testator to recover dividends from defendant's corporations which became due after testator's death, defendant may set off a debt due to it by the testator when the suit was brought. Steinmeyer *v.* Ewalt St. Bridge Co., 189 Pa. St. 145, 42 Atl. 132.

34. Aiken *v.* Bridgman, 37 Vt. 249.

35. *Alabama.*— Rapier *v.* Holland, Minor 176.

Indiana.— Welborn *v.* Coon, 57 Ind. 270.

Kentucky.— Burton *v.* Chinn, Hard. 252; Hancock *v.* Hancock, 69 S. W. 757, 24 Ky. L. Rep. 664; Dunn *v.* Carpenter, 10 Ky. L. Rep. 494.

New York.— Thompson *v.* Whitmarsh, 100 N. Y. 35, 2 N. E. 273; Dale *v.* Cooke, 4 Johns. Ch. 11.

Texas.— Atchison *v.* Smith, 25 Tex. 228.

Virginia.— Brown *v.* Garland, 1 Wash. 221.

United States.— McKown *v.* Manhattan L. Ins. Co., 91 Fed. 352.

In an action for the price of goods belonging to the estate and sold by the administrator defendant cannot set off a debt due him from decedent in his lifetime. Thompson *v.* Whitmarsh, 100 N. Y. 35, 2 N. E. 273; Ste-

until after his death.[36] In order to authorize such set-off the suit must be upon a cause of action in favor of the estate which had accrued at the time of decedent's death.[37] The reason for the rule is that the allowance of the set-off or counter-claim would necessarily destroy the equal and just distribution of the assets belonging to the estate among creditors in every case where the assets were insufficient to pay all the debts of the deceased.[38] Again, to allow the administrator to bind the estate by the appropriation of the debts due to the estate, not due from defendant to the intestate in his lifetime, to be applied to the satisfaction of a debt due defendant upon a contract made with the intestate would open the door for avoiding statutes which require that all such claims against the estate must be presented to and allowed by commissioners appointed by the proper court, and for the allowance of claims against the estate which had been barred by the statutes of non-claim because not presented and allowed as required by law.[39]

c. Claims Accruing After Decedent's Death Against Causes of Action Arising in His Lifetime. Demands on which causes of action arise subsequent to decedent's death are not proper subjects of set-off against demands on causes of action arising in decedent's lifetime because there is no mutuality of indebtedness between the parties.[40]

phens *v.* Cotterell, 99 Pa. St. 188; Steel *v.* Steel, 12 Pa. St. 64; Wolfersberger *v.* Bucher, 10 Serg. & R. (Pa.) 10; Aiken *v.* Bridgman, 37 Vt. 249; Lambarde *v.* Older, 17 Beav. 542, 17 Jur. 1110, 23 L. J. Ch. 18, 2 Wkly. Rep. 32, 51 Eng. Reprint 1144.

An obligor on a note executed to a married woman during her coverture cannot in an action by her on the note set off against the same an indebtedness against the estate of her deceased husband of which estate she was administratrix. Hurst *v.* Hamilton, 44 S. W. 432, 19 Ky. L. Rep. 1753.

Limitation of rule.— Although one who is sued by an administrator cannot set up a demand in his favor against plaintiff in his individual capacity, yet, if the administrator is insolvent, and a portion of the recovery will belong to him in his individual capacity, such claim may be set up as a retainer in the nature of a set-off. Carr *v.* Askew, 94 N. C. 194.

36. Nichols *v.* Dayton, 34 Conn. 65; Patterson *v.* Patterson, 1 Hun (N. Y.) 323; Ketchum *v.* Miln, Seld. Notes (N. Y.) 152; Hallett *v.* Hallett, 13 Ch. D. 232, 49 L. J. Ch. 61, 41 L. T. Rep. N. S. 723, 28 Wkly. Rep. 321.

In an action by an executrix to foreclose a mortgage for money which became due after testator's death, defendant cannot offset any debt due from the testator to him, although the offset existed at the time of his death. Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384 [*affirming* 1 Hun 323].

In an action by an executrix on a life-insurance policy, defendant cannot offset a claim for money due from decedent to him in his lifetime. Hallet *v.* Hallet, 13 Ch. D. 232, 49 L. J. Ch. 61, 41 L. T. Rep. N. S. 723, 28 Wkly. Rep. 321.

37. Patterson *v.* Patterson, 1 Hun (N. Y.) 323.

38. *Illinois.*— Newhall *v.* Turney, 14 Ill. 338.

Massachusetts.— Aldrich *v.* Campbell, 4 Gray 284.

Missouri.— Woodward *v.* McGaugh, 8 Mo. 161.

New York.— Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384; Fry *v.* Evans, 8 Wend. 530; Root *v.* Taylor, 20 Johns. 137.

Pennsylvania.— Steel *v.* Steel, 12 Pa. St. 64; Smith *v.* Boyer, 2 Watts 173.

Vermont.— Aiken *v.* Bridgman, 37 Vt. 249.

Wisconsin.— Lawrence *v.* Vilas, 20 Wis. 381.

England.— Wrout *v.* Dawes, 25 Beav. 369, 53 Eng. Reprint 678; Lambarde *v.* Older, 17 Beav. 542, 17 Jur. 1110, 23 L. J. Ch. 18, 2 Wkly. Rep. 32, 51 Eng. Reprint 1144; Shipman *v.* Thompson, Willes 103.

39. McLaughlin *v.* Winner, 63 Wis. 120, 23 N. W. 402, 53 Am. Rep. 273.

40. *Arkansas.*— Lawson *v.* Fischer, 5 Ark. 52.

Delaware.— Robinson *v.* Robinson, 4 Harr. 418.

Georgia.— Carter *v.* Tippins, 113 Ga. 636, 38 S. E. 946.

Illinois.— Wisdom *v.* Becker, 52 Ill. 342.

Kentucky.— Lee *v.* Russell, 38 S. W. 874, 18 Ky. L. Rep. 951.

Texas.— Houston *v.* Evans, (Sup. 1891) 17 S. W. 925; Guthrie *v.* Guthrie, 17 Tex. 541.

England.— Newell *v.* National Provincial Bank of England, 1 C. P. D. 496, 45 L. J. C. P. 285, 34 L. T. Rep. N. S. 533, 24 Wkly. Rep. 458.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1701.

Contra.— Ferris *v.* Mullan, 56 Ind. 164, holding that in an action by the administrator for money collected for decedent by defendant, an attorney at law, defendant may set off a claim for professional services rendered by him for the administrator in the settlement of the estate. This is a memorandum decision and no reason is given for this holding. And see Turner *v.* Tapscott, 30 Ark. 312.

d. Debts Due in Decedent's Lifetime Against Causes of Action Accruing in His Lifetime. Where suit is brought on a cause of action accruing before decedent's death, defendant is entitled to set off a debt due him from decedent before his death.[41]

Illustrations of rule.— A note given defendant by decedent which matured after decedent's death cannot be set off in an action for a deposit made by decedent with defendant (Jaeger *v.* Bowery Bank, 8 Misc. (N. Y.) 150, 29 N. Y. Suppl. 303); nor in an action to recover a balance due from defendant to plaintiff's intestate at the time of his death (Jordan *v.* National Shoe, etc., Bank, 12 Hun (N. Y.) 512 [*affirmed* in 74 N. Y. 467, 39 Am. Rep. 319]; and services rendered to an executor after testator's death cannot be set off in an action by the executor for money due the estate (Dodson *v.* Nevitt, 5 Mont. 518, 6 Pac. 358), so a defendant cannot counter-claim a demand arising out of a tort committed by the executor in a suit on a cause of action belonging to decedent (Wakeman *v.* Everett, 41 Hun (N. Y.) 278 [*affirmed* in 110 N. Y. 675, 18 N. E. 481]).

Money paid as surety for decedent since his death cannot according to the weight of authority be set off against a debt due decedent in his lifetime. White *v.* Henly, 54 Mo. 592; Mercein *v.* Smith, 2 Hill (N. Y.) 210; Granger *v.* Granger, 6 Ohio 35 [*overruling* by implication Bentley *v.* Hollingsback, Wright (Ohio) 168]; Minor *v.* Minor, 8 Gratt. (Va.) 1. This rule has been held to apply in Pennsylvania, when the estate is insolvent. Poorman *v.* Goswiler, 2 Watts (Pa.) 69. And see Dorsheimer *v.* Bucher, 7 Serg. & R. (Pa.) 8.

The institution of unwarranted litigation or other wrongful conduct of the executors constitutes no ground of set-off or recoupment against a demand due to the testator. Cumberland Island Co. *v.* Bunkley, 108 Ga. 756, 33 S. E. 183.

Limitations and exceptions to rule.—Where by statute attorney's fees are part of the expenses of administration entitled to priority of payment over all charges except funeral expenses, and the party rendering them has his option to hold the administrator or the estate liable therefor, an attorney who is sued to compel payment of money collected for the estate may set off a claim for services rendered in the settlement of the estate. Gammage *v.* Rather, 46 Tex. 105. So in some jurisdictions claims for funeral expenses may be set off in a suit brought by the personal representative to collect a debt due decedent. Adams *v.* Butts, 16 Pick. (Mass.) 343; Barbee *v.* Greene, 86 N. C. 158. It is necessary, however, that such claim should be pleaded as a set-off. Defendant cannot avail himself thereof as a payment of his debt. Adams *v.* Butts, 16 Pick. (Mass.) 343. In Pennsylvania a limitation is recognized which does not elsewhere obtain. It is there held that where an administrator sues on a cause of action arising before decedent's death, defendant, if the estate is solvent, may set off a debt due by decedent when the suit was brought but becoming due after his death. Hicks *v.* Liberties Nat. Bank, 168 Pa. St. 638, 32 Atl. 63. And see Bosher *v.* Exchange Bank, 4 Pa. St. 32, 45 Am. Dec. 665. The rule is otherwise if the estate is insolvent. Farmers, etc., Bank's Appeal, 48 Pa. St. 57. The rule that a demand against the decedent which accrued after his death cannot be set off in an action by the personal representative does not apply where the action is for the proceeds of decedent's note discounted by defendant, and defendant was induced to discount the note by decedent's fraudulent representations as to his solvency since the fraud relates back and vitiates the entire transaction, although the note matured and the fraud was discovered after decedent's death. Peyman *v.* Bowery Bank, 14 N. Y. App. Div. 432, 43 N. Y. Suppl. 826. Debts of decedent not due at the time of his death may be set off in an action on a claim due before decedent's death under a statute providing that, in an action by a personal representative, a demand against decedent which at the time of the death belonged to defendant may be set off in the same manner as if the action had been brought by decedent (Boyden *v.* Massachusetts Mut. L. Ins. Co., 153 Mass. 544, 27 N. E. 669); or under a statute providing that when cross demands have existed between persons under such circumstances that one could be pleaded as a counter-claim or set-off to an action brought upon the other, neither can be deprived of the benefit thereof by the assignment or death of the other and that the demands must be deemed compensated so far as they equal each other (Convery *v.* Langdon, 66 Ind. 311; Ainsworth *v.* State Bank, 119 Cal. 470, 51 Pac. 952, 63 Am. St. Rep. 135, 39 L. R. A. 689). And see Sorin *v.* Olinger, 12 Ind. 29, holding that where the intestate held the note of defendant and agreed that it should be paid by boarding, etc., his children, and afterward the administrator sanctioned the agreement, defendant was allowed to set it up in a suit on the note by the administrator *de bonis non* as to board both before and after the death of the intestate.

41. *Connecticut.*— Dickerson *v.* Whittlesey, 2 Root 121.

Delaware.— State *v.* Connoway, 2 Houst. 206.

Illinois.— Peacock *v.* Haven, 22 Ill. 23; Camp *v.* Elliott, 38 Ill. App. 337.

Indiana.— Schoonover *v.* Quick, 17 Ind. 196.

Kansas.— Helms *v.* Harclerode, 65 Kan. 736, 70 Pac. 866.

Kentucky.— Barnes *v.* Greene, 12 S. W. 277, 11 Ky. L. Rep. 422.

New York.— Conway *v.* Conway, 3 Sandf. 650; Furman *v.* Hinz, 4 N. Y. St. 674.

North Carolina.— Austin *v.* Holmes, 23 N. C. 399.

e. Claims Accruing After Decedent's Death Against Causes of Action Accruing After His Death. A demand against the personal representative may be set off against a demand of the personal representative arising after testator's death;[42] under these circumstances, the demands are mutual and due in the same right.[43]

f. Claims in Favor of One Party Against Another Party and Others Jointly. Debts and demands between parties to a suit are not mutual when that in favor of one party is against the other party jointly with others as parties.[44] Consequently in an action by a personal representative on a demand due by defendant alone defendant cannot set off a demand against decedent due to himself and another jointly,[45] nor can he set off a demand due him from decedent and others jointly.[46]

g. Claims Growing Out of Partnership Dealings Between Defendant and Decedent. In an action by a personal representative to recover on a claim due the decedent, claims growing out of partnership dealings between the decedent and defendant are not a proper subject of set-off or counter-claim where there has been no accounting or final settlement of the partnership affairs.[47]

h. Legacies or Distributive Shares. Where suit is brought by a personal representative against a legatee he cannot in general plead as a set-off the amount of his legacy, at least where it is not shown that the estate is solvent and is in a condition to be distributed,[48] and some decisions seem to deny the right of set-off

Ohio.— Granger *v.* Granger, 6 Ohio 35.

South Carolina.— Mayhew *v.* Flake, 2 Nott & M. 398. But see Happoldt *v.* Jones, Harp. 109, holding that in an action by the administrator against a creditor the latter cannot set off the full amount of a note, made by the intestate and transferred to the creditor after the intestate's death, but is entitled only to a reduction ratably with other creditors.

Tennessee.— Richardson *v.* Parker, 2 Swan 529. See Gregory *v.* Hasbrook, 1 Tenn. Ch. 218.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1698.

And see Rix *v.* Newton, 26 Vt. 384.

Illustrations of rule.— A bank when sued by the administrator of a deceased debtor for the amount of his deposit may set off the amount of the note of the intestate held by it which was due at the time of his death (Traders Nat. Bank *v.* Cresson, 75 Tex. 298, 12 S. W. 819); and in an action by an administrator a demand for the value of the goods delivered to testator may be pleaded as a set-off where the price thereon had not been agreed on (Smith *v.* Huie, 14 Ala. 201); so in an action on a note given to plaintiff's testator defendant may set off a claim for legal services rendered the testator in the settlement of an estate of which he was administrator, as the attorney has under the statute an option to demand his compensation either of the administrator individually or of the estate (Andrus *v.* Pettus, 36 Tex. 108).

A note due from the day of its date is an existing demand in favor of the payee at the time of the maker's death, so as to be a proper counter-claim to a subsequent action by the administrator of the maker to foreclose a mortgage owned by intestate. Thornton *v.* Moore, 26 Misc. (N. Y.) 120, 56 N. Y. Suppl. 1100.

42. Tate *v.* Chandler, 4 Stew. & P. (Ala.) 417 (in which it was held that in an action by an administrator on a note made to him as such against the maker an order drawn by a stranger upon the administrator and accepted by him as such in favor of the maker may be filed and set off by defendant); Lacompte *v.* Seargent, 7 Mo. 351; Brooks *v.* Canon, 9 N. Y. St. 506. But see L'Engle *v.* L'Engle, 19 Fla. 714, holding that in a suit by administrators in their representative capacity to recover assets of the estate loaned by them, defendant cannot set off the value of his services rendered the estate at the request of the administrators, since the administrators can make no new contract binding the estate, unless specially authorized by law, and defendant's remedy is personal against them.

43. See cases cited *supra*, note 42.

44. Adams *v.* Ware, 33 Me. 228.

45. Lee *v.* Russell, 38 S. W. 874, 18 Ky. L. Rep. 951.

Waiver of objection.— If the objection that a debt due to defendant and another jointly cannot be set off against a demand due by defendant alone is not availed of by demurrer, it is waived where a statute so provides. Lee *v.* Russell, 38 S. W. 874, 18 Ky. L. Rep. 951.

46. Adams *v.* Ware, 33 Me. 228.

47. Tomlinson *v.* Nelson, 49 Wis. 679, 6 N. W. 366 [*approving* Linderman *v.* Disbrow, 31 Wis. 465], in which it was said that one partner has no claim against his copartner individually on account of partnership transactions, although a final settlement of the affairs would show a balance in favor of the former; that until such final settlement the general rule is that the firm and not the individual partner is the debtor and that in such case it cannot be said correctly that there is a debt due from one partner to the other.

48. Dobbs *v.* Prothro, 55 Ga. 73; Brewer *v.* Brewer, 7 Ga. 584; Woessner *v.* Wells,

altogether on the ground that it would interfere with the regular course of distribution,[49] and enable defendant to obtain his share of the estate before the others would obtain theirs.[50] So in an action by the personal representative, it is generally held that defendant cannot set off the amount of a distributive share.[51]

i. Claims Against Estate Purchased After Decedent's Death. Claims against an estate purchased after decedent's death cannot be set off in an action against the purchaser thereof for a debt due the decedent,[52] nor even on a debt created after the death of decedent.[53] The view is taken that it is contrary to public policy to allow a person indebted to an insolvent estate to purchase a claim against such estate after the death of the intestate and make it available as a set-off in order to escape payment of his own debt.[54]

j. In Actions by Representative For Commissions. In an action by a personal representative for his commissions, the heirs upon showing that the personal representative could have recovered assets belonging to the estate amounting to

(Tex. Civ. App. 1894) 28 S. W. 247. See also Powell *v.* Palmer, 45 Mo. App. 236. In this case an executor sought to enforce against the residuary legatee a vendor's lien in favor of the testator. The legatee by way of defense pleaded that all bequests and charges payable out of the estate, other than the residuary bequest to himself, had been satisfied; but it also appeared that the time allowed by the statute for the presentation of claims against the estate had not elapsed. It was held that a demurrer to such defense was properly sustained, notwithstanding the action was in equity, since the allegation that there were no provable demands against the estate was not susceptible of absolute proof, and no refunding bond was tendered.

49. Robinson *v.* Robinson, 4 Harr. (Del.) 418; Dunn *v.* Carpenter, 10 Ky. L. Rep. 494.

50. Dunn *v.* Carpenter, 10 Ky. L. Rep. 494.

One who wrongfully obtains possession of the funds of an estate cannot defend an action brought by the executor to recover them by claiming them in payment of a legacy due to himself. Morel *v.* Surgi, 21 La. Ann. 184.

51. Brents *v.* Vittatoe, 8 Ky. L. Rep. 427; Guthrie *v.* Guthrie, 17 Tex. 541. And see Vreeland *v.* Westervelt, 45 N. J. Eq. 572, 17 Atl. 695; Morgan *v* Morgan, (Pa. 1889) 16 Atl. 489. *Compare* Whedbee *v.* Reddick, 79 N. C. 521, in which it was held that the legatee who borrows from the executors the money of their testator and gives his note for its repayment may set up as a counterclaim against the note the amount due him from the estate.

Under special statutory provisions.— A statute which provides that a coheir on purchasing property from the succession can retain the price until his share is definitely fixed does not authorize the maker of a note in the hands of the administrator of a succession to resist payment on the ground that his wife was an heir when sued by the administrator. Landry *v.* Le Blanc, 4 Rob. (La.) 37.

52. *Indiana.*— Haugh *v.* Seabold, 15 Ind. 343.

Iowa.— Woodward *v.* Laverty, 14 Iowa 381; Cook *v.* Lovell, 11 Iowa 81.

Kentucky.— Thompson *v.* Thompson, 78 S. W. 418, 25 Ky. L. Rep. 1626.

Louisiana.— Naquin *v.* Durac, 22 La. Ann. 249.

New York.— Root *v.* Taylor, 20 Johns. 137.

Rhode Island.— Irons *v.* Irons, 5 R. I. 264.

South Carolina.— Schmidt *v.* Crafts, 2 Brev. 266.

Texas.— Mitchell *v.* Rucker, 22 Tex. 66.

Wisconsin.— Union Nat. Bank *v.* Hicks, 67 Wis. 189, 30 N. W. 234.

But see McGinnis *v.* Allen, 2 Swan (Tenn.) 645, in which it was said that the argument against the admissibility of the set-off relied upon in this case deduced from the policy of the statute regulating the administration of insolvent estates, however well founded as applicable to cases conducted under the provisions of those statutes, has no application to the present case. So far as appears from this record no suggestion of the insolvency of the intestate's estate has been or could be made. If the estate be in fact insolvent, it is the business of the administrators to resort to the proper proceedings under the statutes.

An administrator cannot authorize a person to purchase claims against the estate to be used as a set-off against debts due the estate. Johnson *v.* Brown, 25 Tex. Suppl. 120.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1703.

53. Biscoe *v.* Moore, 12 Ark. 77; Whitehead *v.* Cade, 1 How. (Miss.) 95, in which it was said that the fact that the debt was contracted with the administrator does not make the case any better, especially when the estate has been reported insolvent.

54. Union Nat. Bank *v.* Hicks, 67 Wis. 189, 30 N. W. 234. See also Irons *v.* Irons, 5 R. I. 264, in which it was said that it would enable them to take out of such an estate by way of set-off the full amount of the claims thus purchased, in general, too, at a large discount, to the lessening of the dividends of the other creditors of the estate, whilst the other debtors of the estate not able or not fortunate enough thus to purchase in claims against the estate to set off against their debts would be obliged to pay them in full.

more than the commissions claimed, but which have been lost to the estate by lapse of time, could plead these facts as a set-off to his claim for commissions.[55]

k. In Actions Between Representatives of Different Estates. Where a suit is brought by the administrator of one intestate against the administrator of another intestate for a debt due from the intestate of one to the intestate of another in their lifetime defendant may set off a debt due from plaintiff's intestate to his intestate.[56]

l. In Actions by Administrator Brought Within the Time He Is Exempt From Suit. Where an administrator commences an action within the time during which he is by statute exempt from suit, defendant may plead a set-off.[57]

m. Effect of Insolvency of Estate on Right to Set-Off.[58] In the absence of some special statutory provision to the contrary,[59] insolvency of an estate does not furnish grounds for denying a set-off in an action brought by the personal representative of the estate.[60] Where an estate is insolvent the right of set-off is not limited to cases provided for by statutes of set-off,[61] but is based on the equitable principles which govern the settlement and distribution of the insolvent and bankrupt estates of living persons.[62] It would be inequitable that the administrator should recover the whole sum against the creditor and the creditor take only the average upon his debt.[63] All mutual demands of every nature and kind are to be set off.[64] Claims may be set off which were not due and payable when the action was brought, providing they became due pending the action.[65] Claims not liquidated as well as those the amounts of which are ascertained may be set off;[66]

55. Burbank *v.* Duncan, 53 S. W. 19, 21 Ky. L. Rep. 826.

56. Barnard *v.* Jordan, 25 N. C. 268.

57. Cunningham *v.* Baker, 2 Nott & M. (S. C.) 399.

58. For necessity of demand in case of insolvent estates see *infra*, XIV, D, 1, n, (III).

59. Whitehead *v.* Cade, 1 How. (Miss.) 95, holding that where a statute forbids any action against an estate after it has been reported insolvent the debtor of an insolvent estate will not be allowed a set-off.

60. *Alabama.*— Godbold *v.* Roberts, 7 Ala. 662.

Arkansas.—Higgs *v.* Warner, 14 Ark. 192.

Connecticut.— Hosmer *v.* Merriam, 1 Root 427.

Indiana.— Carley *v.* Lewis, 24 Ind. 23.

Massachusetts.—Bigelow *v.* Folger, 2 Metc. 255.

Ohio.— Creager *v.* Minard, Wright 519.

Pennsylvania.— Light *v.* Leininger, 8 Pa. St. 403; Mohn *v.* Myers, 16 Lanc. L. Rev. 213, 13 York Leg. Rec. 7.

Tennessee.— Richardson *v.* Parker, 2 Swan 529.

Vermont.— Olcott *v.* Morey, 1 Tyler 198.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1707.

And see Ray *v.* Dennis, 5 Ga. 357.

Extinguishment of claim of estate.— If the intestate was indebted to defendant in his lifetime in an equal or greater amount than the debt due from defendant to the intestate then the intestate's demand as against defendant was paid and extinguished by such indebtedness and the note of defendant in the hands of the intestate's administrator cannot be considered as assets, for the reason it has been paid off and extinguished by the intestate's mutual indebtedness to defendant at the time of his death. The intestate if in life could not have recovered the amount of the note from defendant nor can his legal representative. Ray *v.* Dennis, 5 Ga. 357. See also Richardson *v.* Parker, 2 Swan (Tenn.) 529.

Bank deposits.— A bank holds a note against a depositor, the deposit exceeding the amount of the note. The depositor dies insolvent. It is held that in equity the bank has a right to retain the amount of the note out of the deposit; equity regarding the bank as debtor to the depositor's estate only for the excess of the deposit over the note, and the deposit as being general assets of the estate only to the extent of the surplus. Therefore it was held immaterial that these are debts of superior dignity. Ford *v.* Thornton, 3 Leigh (Va.) 695.

61. Phelps *v.* Rice, 10 Metc. (Mass.) 128; Troup *v.* Mechanics' Nat. Bank, 24 R. I. 377, 53 Atl. 122.

62. Troup *v.* Mechanics' Nat. Bank, 24 R. I. 377, 53 Atl. 122.

Statutes relative to the settlement of insolvent estates contemplate a fair adjustment of all demands subsisting between the deceased and his creditors at the time of his death, so that the balance justly due to the estate may be collected and then fairly distributed among the creditors. Lyman *v.* Estes, 1 Me. 182.

63. Hosmer *v.* Merriam, 1 Root (Conn.) 427.

64. Bigelow *v.* Folger, 2 Metc. (Mass.) 255; Knapp *v.* Lee, 3 Pick. (Mass.) 452; McDonald *v.* Webster, 2 Mass. 498.

65. Bigelow *v.* Folger, 2 Metc. (Mass.) 255. And see Boyden *v.* Massachusetts Mut. L. Ins. Co., 153 Mass. 544, 27 N. E. 669.

66. Phelps *v.* Rice, 10 Metc. (Mass.) 128.

nor is the claimant estopped from a plea of set-off because he has exhibited his demand before commissioners in insolvency, whether it has been allowed[67] or disallowed.[68]

n. Presentment or Demand as Condition Precedent of Right of Set-Off — (i) *In General.* There is some diversity of opinion as regards the necessity of making demand for settlement of a claim against an estate as a condition precedent of the right to set it off in an action by the personal representative of the estate against the holder of the claim. It has been held that failure to present a claim to the commissioners and procure its allowance will not bar the right of set-off in an action by the personal representative where his own fraudulent acts prevented its presentation.[69] Some cases in which no special statutory provision is mentioned hold that no presentment of the claim is necessary to entitle the holder to plead it as a set-off.[70] So in construing a statute providing that no "action" shall be brought against a personal representative until after demand is made of him for payment, accompanied by affidavit and proof, it has been held that demand is unnecessary to authorize a set-off in a suit by the administrator against the holder thereof;[71] but that the claim must be verified and proved in the manner required by law in the case of claims sued upon in a direct action.[72] So it has been held that notwithstanding a statute providing that no claimant shall maintain any action on his claim unless it is first presented to the personal representative, such presentation is not essential to the right of set-off where another statute provides that if two parties have cross demands which one may plead as a set-off in an action by the other, neither can be deprived of the benefit thereof by the death of the other and that the two demands must be deemed compensated so far as they equal each other.[73] On the other hand it has been held that demand is necessary under a statute providing that no other claims than those presented within the required time can be enforced against the estate, the view being taken that set-off is the equivalent of an action and if no presentation of the demand has been made is prematurely brought.[74] It has also been held that the bar created by a decree made upon proceedings to limit creditors of deceased persons applies to debts and demands alleged by way of set-off.[75]

67. Olcott *v.* Morey, 1 Tyler (Vt.) 198.

68. Phelps *v.* Rice, 10 Metc. (Mass.) 128; Olcott *v.* Morey, 1 Tyler (Vt.) 198.

69. Rose *v.* Clark, 1 Root (Conn.) 229.

70. Mitchell *v.* Rucker, 22 Tex. 66; Smalley *v.* Trammel, 11 Tex. 10; Mortin *v.* Gordon, Dall. (Tex.) 396.

The ground on which the set-off is admitted is to the extent of the discount thereof a mutual extinguishment of the demands of the representative parties. See cases cited *supra*, note 70.

71. Warfield *v.* Gardner, 79 Ky. 583, 587, 3 Ky. L. Rep. 423 (in which it was said: "The reason for requiring a claimant, before bringing an original action against a personal representative, to make demand of him for payment, is, that if the claim is just and properly proved, it may be paid without subjecting the estate to the costs of litigation. But the reason for requiring the demand to be made ceases when the personal representative begins litigation himself"); Millett *v.* Watkins, 4 Bush (Ky.) 642; Ward *v.* Rhorer, 54 S. W. 6, 21 Ky. L. Rep. 1086. But see Reed *v.* Johnson, 127 Cal. 538, 59 Pac. 986, where it was held (under a statute (Code Civ. Proc. § 1500) providing that no holder of any claim shall maintain an action thereon unless the claim was presented to the personal representative) that a set-off cannot be pleaded in an action by a personal representative where the claim was not presented for allowance. Nevertheless under the statutes of this state, relating to the powers and duties of the surviving partner (Code Civ. Proc. § 1585) a surviving partner is entitled to an allowance for sums drawn by the deceased from the partnership during his lifetime in an action against him by the administratrix notwithstanding the claim had not been presented to her for allowance. Manuel *v.* Escolle, 65 Cal. 110, 3 Pac. 411.

72. Warfield *v.* Gardner, 79 Ky. 583, 3 Ky. L. Rep. 423.

73. Murphy *v.* Colton, 4 Okla. 181, 44 Pac. 208, in which it was further held to be immaterial that the set-off exceeds the claim of the estate but that it will only be allowed to an extent not to exceed the claim of the estate.

74. Hall *v.* Greene, 24 R. I. 286, 52 Atl. 1087.

Waiver of non-presentation. — By joining issue upon the plea in set-off plaintiff waives his right to object that it was not presented for allowance. Hall *v.* Greene, 24 R. I. 286, 52 Atl. 1087.

75. Emson *v.* Allen, 62 N. J. L. 491, 41 Atl. 703.

(II) *Demands Not Presented Within Time Prescribed by Statute of Non-Claim.* No demand which has not been presented within the time prescribed can be pleaded by way of set-off, where the statute of non-claim expressly declares that such claim shall be barred and cannot be pleaded as a set-off;[76] and the same has been held to be the case under a statute to the effect that no demand shall be pleaded by way of set-off which was not justly due and accruing to the party pleading it at the time of the commencement of the suit.[77] There is some conflict of authority as to the effect of statutes merely providing that all demands not presented against the estate within a designated time shall be barred. Some of the decisions under these statutes hold that the defense of non-claim as a bar to an independent demand pleaded as a set-off in an action by the personal representative is as complete as if it were interposed to a separate action brought for the recovery of such demand.[78] On the other hand there are decisions holding that statutes of this character only apply where the creditor in the first instance sues the estate; that it has no application to claims presented by way of set-off, and that claims so presented can only be barred by the general statutes of limitations.[79] So under a statute providing that, if an administrator commences an

76. Lovell *v.* Nelson, 11 Allen (Mass.) 101, 87 Am. Dec. 706; Parker *v.* Wells, (Nebr. 1903) 94 N. W. 717; Ewing *v.* Griswold, 43 Vt. 400; Carpenter *v.* Murphey, 57 Wis. 541, 15 N. W. 798. See also Quinn *v.* McGovern, 97 Mich. 114, 56 N. W. 226, construing the following statutes: Howell Annot. St. Mich. § 5901, provides that any person failing to present his claim in the time limited shall be barred from recovering on it, or setting it off in any action. Section 5894 provides that at any time before the estate is closed, further time may be allowed for presenting a claim. Section 5904 provides that nothing in the chapter including those sections shall prevent an executor or administrator from commencing an action against another person, or prosecuting an action commenced by deceased. Section 5905 provides in such case that defendant may set off any claim against deceased without presenting it to the commissioners. It was held that where after the expiration of the time for presenting claims to the commissioners an administrator begins an action defendant cannot set off a claim which he had not presented to them.

Estoppel.— Where a creditor of an insolvent estate, relying on an agreement with the administrator to allow the creditor's claim in offset to demands against him in favor of the estate, has neglected to present his claim to the commissioners, it has been held that he is entitled to have it set off in equity against the claim of the estate. Nims *v.* Rood, 11 Vt. 96, 34 Am. Dec. 669.

Misleading statement of court.— The fact that the probate judge told a claimant that it was not necessary to file his claim and that it could be used as a set-off against a note given by the claimant to decedent does not alter the rule that a claim must be presented to authorize its allowance by way of set-off. Benjamin *v.* Early, 123 Mich. 93, 81 N. W. 973.

Effect of failure to appoint commissioners. — The rule stated in the text does not apply where no commissioners to whom the claim might be presented were ever appointed. Boltwood *v.* Miller, 112 Mich. 657, 71 N. W. 506.

Rule under Vermont statutes.— The Vermont statutes contain some peculiar provisions. Gen. St. p. 401, § 14, provides that if a claimant does not exhibit his claim to the commissioners within the time limited by the court for that purpose he shall be forever barred from pleading it as a set-off in any action whatever. Section 17 of the same chapter provides that in an action by the personal representative on a claim due the estate, defendant may plead in offset any claim he has against deceased instead of presenting it to the commissioners. In construing these provisions, it is held that the latter only gives the right of set-off in cases where the administrator brings his suit before the commissioners have acted, where the institution of the suit prevents the offset before the commissioners. Probate Ct. *v.* Gale, 47 Vt. 473; Soule *v.* Benton, 44 Vt. 309; Ewing *v.* Griswold, 43 Vt. 400.

77. Jones *v.* Jones, 21 N. H. 219.

78. Patrick *v.* Petty, 83 Ala. 420, 3 So. 779; Bell *v.* Andrews, 34 Ala. 538; Murdock *v.* Rousseau, 32 Ala. 611; Emson *v.* Allen, 62 N. J. L. 491, 41 Atl. 703. See also Shelton *v.* St. Clair, 64 Ala. 565; Lyon *v.* Petty, 65 Cal. 322, 4 Pac. 103.

79. Lay *v.* Mechanics' Bank, 61 Mo. 72; Stiles *v.* Smith, 55 Mo. 363, 367, where the court said: "A person may well have a demand against an estate, and knowing that he is also indebted to the estate, neglect to prove up the same, supposing that the amounts are about equal, and that when he is proceeded against, he can plead his demand as a set-off and thus determine the whole matter in one suit. If in such a case the administrator should wait till after two years had expired before instituting such an action, it was certainly never designed or intended that the creditor should be deprived of a just or lawful claim."

action to recover in the interest of the estate, defendant may set off any claim he has against the deceased instead of presenting it to the probate court, such offset is permissible even though the time for filing claims has expired.[80]

(III) *WHERE ESTATE IS INSOLVENT.* Where an estate is insolvent, to authorize a set-off in a suit brought by the personal representative, no presentation of the demand is necessary. The statutes of non-claim are very generally held not to apply under these circumstances.[81] In the case of mutual claims between an insolvent estate and a creditor or a debtor, set-off takes place by operation of law upon principles of equity and independently of the statutes relating to set-off.[82] Nevertheless if the amount claimed by way of set-off is greater than the amount due the estate, the claimant cannot recover the balance without due presentation of the demand.[83] A set-off can be used as matter of defense only, and not as the foundation of a recovery of any balance.[84]

o. Necessity of Pleading Set-Offs. In a suit by a personal representative defendant is not bound to plead a set-off,[85] unless he wishes to recover thereon.[86]

2. IN ACTIONS AGAINST PERSONAL REPRESENTATIVES. In actions against personal representatives on claims against decedent, they are entitled to set off claims in decedent's favor against plaintiff.[87] They cannot, however, set off claims due

80. Talty *v.* Torling, 79 Minn. 386, 82 N. W. 632; Gerdtzen *v.* Cockrell, 52 Minn. 501, 55 N. W. 58.

81. *Maine.*— Morrison *v.* Jewell, 34 Me. 146; Lyman *v.* Estes, 1 Me. 182.

Massachusetts.— McDonald *v.* Webster, 2 Mass. 498.

New Hampshire.— Mathewson *v.* Strafford Bank, 45 N. H. 104.

Rhode Island.— Hall *v.* Greene, 24 R. I. 286, 52 Atl. 1087.

Vermont.— Olcott *v.* Morey, 1 Tyler 198.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1707, 1708.

Bar only pleaded in actions by creditor.— The general bar in cases where the creditor fails to exhibit his claim to the commissioners in insolvency can only be pleaded in an action instituted by the creditor and cannot be taken advantage of by the administrator under the general issue in offset in exclusion of defendant's defense. Olcott *v.* Morey, 1 Tyler (Vt.) 198.

Rule under Alabama statute.— Under a statute which provides that every person having any claim on an estate declared insolvent must file it in the office of the judge of probate within nine months after declaration of insolvency or it is forever barred, a claim against an insolvent estate not filed within the time required is not available as a set-off. Shelton *v.* St. Clair, 64 Ala. 565; Bell *v.* Andrews, 34 Ala. 538; Murdock *v.* Rousseau, 32 Ala. 611.

82. Hall *v.* Greene, 24 R. I. 286, 52 Atl. 1087.

83. McDonald *v.* Webster, 2 Mass. 498, holding that if the balance be against the estate it must be laid before the commissioners and be by them reported to the judge that the creditor may receive his dividend.

84. Mathewson *v.* Strafford Bank, 45 N. H. 104; Troup *v.* Mechanics' Nat. Bank, 24 R. I. 377, 53 Atl. 122.

85. Gregory *v.* Hasbrook, 1 Tenn. Ch. 218, holding that he may decline to do so and afterward sue on his demand at law or set it off in equity against the judgment recovered against him, provided that he can make out a sufficient case to give the latter court jurisdiction.

86. Patterson *v.* Steele, 36 Ill. 272.

87. Percy *v.* Clary, 32 Md. 245; Bealey *v.* Smith, 158 Mo. 515, 59 S. W. 984, 81 Am. St. Rep. 317; Shimer *v.* Kinder, 12 N. Y. St. 728; Johnson *v.* Corbett, 11 Paige (N. Y.) 265; Nehbe *v.* Price, 2 Nott & M. (S. C.) 328; Stuart *v.* Peyton, 97 Va. 796, 34 S. E. 696. And see Headley *v.* Jenkins, 13 Ky. L. Rep. 463. But *compare* Blakely *v.* Frazier, 11 S. C. 122, 139, in which it was held that in an action against executors on a claim accruing against decedent in his lifetime, the unpaid costs of a suit on the same cause of action against testator brought and discontinued during his lifetime will not be set off. In this case, the court said: "The defendants, as defendants, have no right to demand such costs, but merely as the personal representatives of the deceased former defendant." This, however, seems to be a sufficient reason why a set-off should be permitted in this case.

Illustrations of rule.— In an action on a claim against an estate for services rendered to the deceased there may be set off sums of money and the value of articles furnished to the claimant by the deceased during his lifetime. Shimer *v.* Kinder, 12 N. Y. St. 728. So in an action on a claim due from decedent the personal representative may set off the claim of decedent against plaintiff on an instrument acknowledging the receipt of a sum of money in trust to be accounted for to decedent which is liquidated and payable on demand and that too whether it is considered as in trust or a mere debt. Gannon *v.* Ruffin, 151 Mass. 204, 24 N. E. 37.

In an action against an executor in his representative capacity on accounts stated by him as executor, a set-off of debts due from plaintiff to the testator is permissible, because an account stated by an executor as such shows a debt due from testator to plaintiff. Blakesley *v.* Smallwood, 8 Q. B.

them in their individual capacity.[88] The general rule is that a personal representative when sued in his official capacity may set off only those claims which decedent himself might have pleaded and which are due by his estate.[89] So in actions against personal representatives, in their individual capacity, it is not permissible to set off claims due the estate, as the claims are not between the same parties nor in the same right.[90] He may, however, set off a claim due to himself

538, 10 Jur. 470, 15 L. J. Q. B. 185, 55 E. C. L. 538.

Where a suit is brought by the administrator of one intestate against the administrator of another intestate for a debt due from the intestate of one to the intestate of the other in their lifetime, defendant may set off a debt that was due from plaintiff's intestate to his intestate. Barnard *v.* Jordan, 25 N. C. 268.

Claims due decedent and executor jointly. — In one jurisdiction it has been held that in an action against the personal representative on a claim due from decedent defendant may set off a claim due to himself and deceased as partner. Burke *v.* Stillwell, 23 Ark. 294. And see for a similar holding Eyrich *v.* Capital State Bank, 67 Miss. 60, 6 So. 615, which cites the above decision. See also Hale *v.* Brown, 11 Ala. 87.

Where estate insolvent.— In a suit on a note given by decedent if the estate is declared insolvent, claims between plaintiff and the estate are subject to be set off, and the balance on it should be allowed to be recovered, although there could have been no set-off if both parties had lived. Medomak Bank *v.* Curtis, 24 Me. 36.

Invalid claims of decedent.— In an action by a child against his mother's administrator for money received by her as his guardian, the administrator cannot set up a claim for the support and education of her child by the intestate unless it appears that she intended to charge him therefor. Guion *v.* Guion, 16 Mo. 48, 57 Am. Dec. 223.

Necessity of pleading set-off.— An administrator of an estate is not bound to set off any debt or demand which the estate may have against a suing creditor, and his failure to do so will not bar such debt or demand. Ward *v.* People, 77 Ill. App. 522.

Time of filing set-off.— Under a statute providing that an executor or administrator shall not be obliged to make a defense for one year after his appointment, he may file an account in set-off on the first day of the term next after the close of the year from the date of his appointment, although the action may have been begun at a previous term. Cooley *v.* Patterson, 49 Me. 570.

88. *Alabama.*— Phillips *v.* Thompson, 9 Port. 664.

Massachusetts.— Stickney *v.* Clement, 7 Gray 170.

New Hampshire.— Lamberton *v.* Freeman, 16 N. H. 547.

New York.— Mead *v.* Merritt, 2 Paige 402.

North Carolina.— Barnard *v.* Jordan, 25 N. C. 268.

Pennsylvania.—Bradshaw's Appeal, 3 Grant 109; Cotton's Estate, 6 Pa. Dist. 205; Dale *v.* Medway, Wilcox 155.

Texas.— House *v.* Collins, 42 Tex. 486.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1712 *et seq.*

Contra.— Mardall *v.* Thelluson, 21 L. J. Q. B. 410 [practically *overruled* in Rees *v.* Watts, 11 Exch. 410, 1 Jur. N. S. 1023, 25 L. J. Exch. 30, 3 Wkly. Rep. 575].

Claims purchased after decedent's death.— A personal representative cannot either at law or in equity set off a demand purchased by him after the death of the testator or intestate against a debt due by the estate to the person against whom he held the demand so purchased. Weeks *v.* O'Brien, 25 N. Y. App. Div. 206, 49 N. Y. Suppl. 344, 27 N. Y. Civ. Proc. 86 [*reversing* 20 Misc. 48, 45 N. Y. Suppl. 740]; Mead *v.* Peck, 2 Paige (N. Y.) 402; Lamberton *v.* Freeman, 16 N. H. 547; McClenahan *v.* Cotten, 83 N. C. 332. Where there is no set-off at law, there must be special circumstances of equity to authorize a set-off in chancery, and it is against the principles of sound policy to permit executors to purchase claims against the creditors of the estate in order to obtain a set-off in equity. Mead *v.* Peck, 2 Paige (N. Y.) 402.

Price of goods sold by personal representative.— In an action against a personal representative for a debt due from decedent, defendant cannot set off a sum due on a note given by plaintiff to him as administrator for goods of his intestate which he had sold as administrator. Smith *v.* Edwards, 1 Houst. (Del.) 427; Barnard *v.* Jordan, 25 N. C. 268. But see Eldredge *v.* Bell, 64 Iowa 125, 19 N. W. 879, holding that the purchase-money from the sale of the personal property of an estate belongs to the executors, regardless of any claim which the purchaser may have against the estate; but if, in an action by the purchaser against the estate to enforce his claim the executors set up the purchase-money due as a counter-claim against the purchaser, a court is justified in treating the purchase-money claim precisely as the executors pleaded it.

89. Cotton's Estate, 6 Pa. Dist. 205. Where one of the parties must sue or be sued in his representative character, and the other may sue or be sued without naming him executor, then, the debts being due in different rights, cannot be set off against each other. Barnard *v.* Jordan, 25 N. C. 268.

90. Collins *v.* Greene, 67 Ala. 211; Prouty *v.* Hudson, 5 Pa. L. J. Rep. 311; Lanier *v.* Brunson, 21 S. C. 41. But *compare* Blood *v.* Kane, 130 N. Y. 514, 29 N. E. 994, 15 L. R. A. 490 [*reversing* 52 Hun 225, 6 N. Y. Suppl.

individually,[91] or due to himself and another individually, provided the other consents, but not otherwise.[92] So where an executor voluntarily pays a legacy without a refunding bond and afterward the estate is found to be insolvent, the executor may, in an action against him for a debt due from testator, set off what he has paid upon the legacy beyond the proportion which he should have paid.[93] After the administration is wound up the commissions are due the administrator and ascertainable and may be counter-claimed in any action by the heirs without being reduced to judgment.[94]

E. Jurisdiction and Venue — 1. Jurisdiction — a. Action on Claims in Favor of or Against Estate. Actions on claims in favor of an estate should be brought in courts of ordinary jurisdiction and not in the probate court.[95] Actions on claims against estates are usually brought in courts of law of ordinary jurisdiction,[96] but under the statutes of some jurisdictions actions of this character may be brought in the probate court.[97] Where a creditor has exhausted legal remedies without avail, he may sue in equity to subject to his claim an interest in the estate of an administrator.[98] So a court of equity has jurisdiction of a bill by a creditor to enforce his demand against the executors and legatees, to whom assets have been delivered upon the undertaking to pay all demands.[99] And it has been held that inasmuch as a personal representative is a trustee for creditors and others interested, this court has jurisdiction of an action against the administrator for a debt due from decedent.[1] Its jurisdiction cannot be invoked, however, to enforce such a claim, where by statute the relief sought may be obtained in an ordinary legal proceeding in the probate court, and where no special circumstances requiring the aid of a court of equity are disclosed.[2] Where suit is brought on a claim secured by a mortgage or trust deed, the court may determine the validity of the trust deed,[3] and the mortgage being

353], in which it was held that an executrix and sole devisee and legatee who has paid all the debts of testator may in an action against her individually for services rendered her personally set off a debt due by plaintiff to the estate, although there was never any publication of notice to creditors to present their claims.

In an action for payment of a personal debt, defendant cannot plead by way of set-off or counter-claim, a debt due to him as executor of the decedent's estate. He cannot discharge his own liability by setting off the debt due the estate. Gourley *v.* Walker, 69 Iowa 80, 28 N. W. 444.

91. Barlow *v.* Myers, 24 Hun (N. Y.) 286, in which defendant was permitted to set off a note to his testator indorsed in blank and in which it was said that any person in possession of such a note may sue upon it and may in court if necessary fill out the blank and make it payable to himself.

Claim due to decedent and administrator jointly.— When one joint maker of a note is the administrator of his co-maker, he is entitled when sued to set off against the payee any debt which the latter owes the estate. Mitchell *v.* Burt, 9 Ala. 226.

92. Solliday *v.* Bissey, 12 Pa. St. 347.

93. Harris *v.* White, 5 N. J. L. 422, holding that the money refunded would belong to the executors in their representative capacity. The whole doctrine of refunding goes upon the principle that the money refunded is assets in the hands of the executors for the payment of debts. And see Smith *v.* Smith, 79 N. C. 455, holding that in an action against an executor on a note of testator they may insist on a refund of a legacy paid plaintiff in order to pay the note out of the legacy.

94. Barlow *v.* Norfleet, 72 N. C. 535.

95. Bernard *v.* Thayer, 19 La. Ann. 257; Barrett *v.* Halpin, 19 La. Ann. 166.

96. Sanders *v.* Douglas, 3 Sm. & M. (Miss.) 454; Vaughn *v.* Stephenson, 69 N. C. 212.

97. Cole County *v.* Dallmey, 101 Mo. 57, 13 S. W. 687; Jones' Appeal, 11 Wkly. Notes Cas. (Pa.) 554.

98. Bennick *v.* Bennick, 62 N. C. 45.

99. Moore *v.* Coldwell, 8 Rich. Eq. (S. C.) 22, in which it was said that the remedy at law is neither so plain nor adequate as to exclude the creditor from a court of equity.

1. Judal *v.* Brandon, 5 Blackf. (Ind.) 506.

2. Kothman *v.* Markson, 34 Kan. 542, 9 Pac. 218.

A general creditor cannot sustain a bill in equity on a purely legal demand unless he shows that he has exhausted his legal remedy or that that remedy for some good cause would be inadequate or unavailable. Hale *v.* White, 47 W. Va. 700, 35 S. E. 884, holding that where the bill shows that the estate is solvent and the assets superabundant, the mere pretext of the want of discovery will not give equitable jurisdiction against a personal representative who is not shown to have neglected any of the statutory requirements relating to his duties as such representative to the injury of plaintiff.

3. Albright *v.* Allday, (Tex. Civ. App. 1896) 37 S. W. 646.

an incident of the debt, the court has jurisdiction to settle and determine conflicting claims and interests thereunder.[4] Where a claim against a decedent's estate is transferred from the orphans' court to the chancery court, the latter will take it in the plight and condition it is then in, and proceed with it like other chancery causes, applying the law regulating such estates in the orphans' court.[5]

b. Actions on Joint or Joint and Several Obligations of Deceased and Others. A court of probate has jurisdiction of a claim on which a decedent is jointly and severally liable and may adjudicate upon it as an equitable money claim.[6] Otherwise, however, as to a claim on which decedent is jointly liable with another which must be enforced in a court of ordinary jurisdiction.[7] The living joint obligor is not amenable to the jurisdiction of a probate court.[8]

c. Actions at Law and Suits in Equity For Recovery of Legacies and Distributive Shares — (i) *Actions and Suits For Legacies.* At first it was held in England that an action might be maintained at law against an executor upon his promise to pay a general legacy in consideration of assets.[9] These cases, however, were subsequently overruled and the doctrine established that an action at law did not lie for the recovery of a legacy,[10] except in case of specific legacies assented to by the executor, and in the latter instance the action was allowed on the ground that the interest in any specific thing bequeathed vests at law in the legatee upon the assent of the executor.[11] In many American states the right to bring actions at law to recover legacies is given by statute,[12] while in others the right is upheld independently of any statutory provision,[13] and that too whether

4. Dyer *v.* George, 32 Tex. Civ. App. 504, 75 S. W. 48.

5. Taliaferro *v.* Brown, 11 Ala. 702.

6. Moore *v.* Rogers, 19 Ill. 347.

7. Noble *v.* McGinnis, 55 Ind. 528; Gallier *v.* Walsh, 1 Rob. (La.) 226.

8. Gallier *v.* Walsh, 1 Rob. (La.) 226.

Effect of special statutory provisions.— Under a statute giving the probate court exclusive jurisdiction over "all suits and other proceedings instituted against executors and administrators upon any demand against the estate of their testator or intestate," the probate court has exclusive jurisdiction of demands arising out of joint obligations of deceased as well as those arising out of his sole obligations. Wernse *v.* McPike, 76 Mo. 249; Julian *v.* Wood, 69 Mo. 153.

9. Hawkes *v.* Saunder, 1 Cowp. 289; Atkins *v.* Hill, 1 Cowp. 284.

10. Deeks *v.* Strutt, 5 T. R. 690.

The reason assigned is that if an action will lie for a legacy no terms can be imposed on the party who is entitled to recover; and therefore when the legacy is given to a wife, the husband would recover at law and no provision could be made for the wife or family; whereas a court of equity will take care to make some provision for the wife in such a case. Deeks *v.* Strutt, 5 T. R. 690.

11. Williams *v.* Lee, 3 Atk. 223, 26 Eng. Reprint 930; Doe *v.* Guy, 3 East 120, 4 Esp. 154, 6 Rev. Rep. 563; Young *v.* Holmes, 1 Str. 70; 3 Williams Ex. 518.

12. *Alabama.*— Pettigrew *v.* Pettigrew, 1 Stew. 580; Gause *v.* Hughes, 9 Port. 556.

Maine.— Holt *v.* Libby, 80 Me. 329, 14 Atl. 201.

Massachusetts.— Gale *v.* Nickerson, 151 Mass. 428, 24 N. E. 400, 9 L. R. A. 200; Colwell *v.* Alger, 5 Gray 67; Miles *v.* Boyden, 3 Pick. 213.

Mississippi.— Magee *v.* Gregg, 11 Sm. & M. 70; Worten *v.* Howard, 2 Sm. & M. 527, 41 Am. Dec. 607. And see Packwood *v.* Elliot, 43 Miss. 504.

New Jersey.— Woodruff *v.* Woodruff, 3 N. J. L. 552.

New York.— Ducasse *v.* Caze, Anth. N. P. 190.

Pennsylvania.— Solliday *v.* Bissey, 12 Pa. St. 347; Clark *v.* Herring, 5 Binn. 33; Holloback *v.* Van Buskirk, 4 Dall. 147, 1 L. ed. 777.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1678.

Discharge of one joint executor.— If one of several joint executors who have rendered an account showing a balance is discharged and ordered to pay over any funds in his hands to the other executors and he does so the legatee cannot sustain an action against him for a legacy as it would be in direct conflict with the decree. McNeal *v.* Holbrook, 25 Pa. St. 189.

In North Carolina the probate court has exclusive original jurisdiction of special proceedings for legacies and distributive shares; in such cases, if the construction of a will comes in question or, should exceptions be filed to the account as stated by the probate judge, such questions and exceptions and all other questions of law will be sent up to the judge from whose decision an appeal may be taken. Heilig *v.* Foard, 64 N. C. 710.

13. Colt *v.* Colt, 32 Conn. 422; Knapp *v.* Hanford, 6 Conn. 170; Goodwin *v.* Chaffee, 4 Conn. 163; Spalding *v.* Spalding, 2 Root 271; Warren *v.* Rogers, 2 Root 159; Lamb *v.* Smith, 1 Root 419; Tappen *v.* Tappen, 30 N. H. 50; Weeks *v.* Sowles, 58 Vt. 696, 6

the promise to pay is express or merely implied,[14] the reason assigned being that the basis for the rule in England does not exist here; that the rights of all legatees, whether married women or infants, are as fully protected by legislation as they could be by any administration of the trust in equity.[15] Other decisions have recognized the English rule as to specific legacies and allow actions at law to recover such legacies when they are assented to by the executor,[16] and some decisions hold that an action at law will lie on an express promise to pay a general legacy either in consideration of assets or forbearance;[17] but that an express promise of the executor is necessary to authorize the action.[18] Legacies are recoverable on a bill in equity,[19] and assent by the executor is unnecessary. A court of equity which regards the executor as a trustee will compel him to assent and pay the legacy.[20] Notwithstanding the fact that the action may be maintained at law for recovery of a legacy, this does not take away the jurisdiction of a court of equity.[21]

(II) *Actions and Suits For Distributive Shares.* An action at law does not lie to recover a distributive share of an intestate's property,[22] without statutory authorization.[23] And this is so, although the personal representative may have expressly promised to pay.[24] A bill in equity is the appropriate remedy for the recovery of a distributive share,[25] an administrator being considered a trustee

Atl. 603. And see Webster *v.* American Bible Soc., 50 Ohio St. 1, 33 N. E. 297.

14. See Connecticut cases *supra*, note 13.

15. Knapp *v.* Hanford, 6 Conn. 170.

16. Lark *v.* Linstead, 2 Md. Ch. 162; Hodge *v.* Hodgem, 72 N. C. 616; Miller *v.* Burnest, 65 N. C. 67. See also Nelson *v.* Cornwell, 11 Gratt. (Va.) 724, which holds that where an executor has assented to a specific legacy the legatee may sue for his legacy at law, provided the executor has waived a refunding bond. It was held, however, in this case that the intention to waive the refunding bond must be very clear and will not be presumed from mere assent to the legatee. The assent will be presumed to be given on condition that the refunding bond be furnished.

A legacy uncertain in amount is not recoverable by action at law, even where the executor has assented to it, or has made a part payment; but it is enforceable in the court of probate. Hendrick *v.* Mayfield, 74 N. C. 626.

17. McNeil *v.* Quince, 3 N. C. 153.

18. Coates *v.* Mackie, 43 Md. 127; Lark *v.* Linstead, 2 Md. Ch. 162; Vanlaar *v.* Haslet, Wright (Ohio) 458. See also Kent *v.* Summervell, 7 Gill & J. (Md.) 265.

19. *Connecticut.*— Colt *v.* Colt, 32 Conn. 422.

Maryland.— Lark *v.* Linstead, 2 Md. Ch. 162.

New Jersey.— Frey *v.* Demorest, 16 N. J. Eq. 236.

North Carolina.— McNeil *v.* Quince, 3 N. C. 153.

Vermont.— Bellows *v.* Sowles, 57 Vt. 411; Sparhawk *v.* Buell, 9 Vt. 41.

Virginia.— Taliaferro *v.* Thornton, 6 Call 21.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1678.

Where the executor refuses to pay a legacy claimed by him to be void under the state law, a bill to recover it lies, as the remedy at law is inadequate. Domestic, etc., Missionary Soc. Protestant Episcopal Church *v.* Gaither, 62 Fed. 422.

20. Lark *v.* Linstead, 2 Md. Ch. 162.

21. Webster *v.* American Bible Soc., 50 Ohio St. 1, 33 N. E. 297; Nelson *v.* Cornwell, 11 Gratt. (Va.) 724; Pettigrew *v.* Pettigrew, 1 Stew. (Ala.) 580. But see Gale *v.* Nickerson, 151 Mass. 428, 24 N. E. 400, 9 L. R. A. 200, holding that the action must be brought at law where a statute authorizes this mode of procedure because there is an adequate remedy at law, and further holding that a statute providing that a bill in equity may be maintained to reach and apply in payment of a debt any property of the debtor or which cannot be come at by attachment or execution is not applicable to a suit by heirs of a legatee to recover his share of an estate.

22. Jones *v.* Tanner, 7 B. & C. 542, 6 L. J. K. B. O. S. 71, 1 M. & R. 420, 14 E. C. L. 245.

23. Holmes *v.* Howell, 14 N. C. 98. Statutory authority, however, is found for bringing actions of this character at law in some jurisdictions. See Wheeler *v.* Bolton, 54 Cal. 302; Schmidt *v.* Stark, 61 Minn. 91, 63 N. W. 255; Dorsheimer *v.* Rorback, 23 N. J. Eq. 46; Frey *v.* Demarest, 16 N. J. Eq. 236.

24. Amos *v.* Campbell, 9 Fla. 187; Fischer *v.* Fischer, 50 N. Y. Super. Ct. 74; Jones *v.* Tanner, 7 B. & C. 542, 6 L. J. K. B. O. S. 71, 1 M. & R. 420, 14 E. C. L. 245. And see Johnson *v.* Johnson, 3 B. & P. 162, 6 Rev. Rep. 736; Holland *v.* Clark, 1 Y. & Coll. 151, 20 Eng. Ch. 151; 3 Williams Ex. 519.

A distributive share due a feme covert cannot be recovered in an action at law except on the administrator's bond, the only remedy in chancery where the court will see that a suitable provision is made. At law a husband might obtain possession of a wife's property without being compellable to make a suitable settlement upon her. Howard *v.* Brown, 11 Vt. 361.

25. Cherry *v.* Belcher, 5 Stew. & P. (Ala.) 133; Parsons *v.* Parsons, 9 N. H. 309, 32

for the benefit of those entitled to distributive shares in an estate.[26] Notwithstanding a statutory remedy by action at law is given for the recovery of a distributive share of an estate, this remedy is merely cumulative and does not qualify or limit the jurisdiction of equity over the subject.[27]

d. Actions Based on Malfeasance or Misfeasance of Personal Representative. In some states the jurisdiction of the probate court is adequate to afford a complete remedy against an administrator for failure to return an inventory and for conversion of assets of the estate to his own use.[28] Neither a court of common law of ordinary jurisdiction,[29] nor the chancery court,[30] will assume jurisdiction. Where, however, the estate has been finally settled and the representative discharged the jurisdiction of the probate court is exhausted, and actions based on improper administration cannot be brought therein, but must be brought in another tribunal.[31] The administrator of an executor cannot be sued at law for a devastavit of the latter; resort must be had to a court of equity, where the liabilities of the succeeding representatives and their sureties can be adjusted;[32] and a court of equity is the proper tribunal to investigate and grant relief against the fraudulent combination by the personal representative and others confederating to injure those interested in the faithful administration of the estate. In no other court can appropriate relief be afforded.[33]

e. Suits For Specific Performance. Specific performance is strictly a subject of equity jurisdiction;[34] and suits to enforce specific performance of a contract entered into by a person deceased must be brought in a court of chancery in the absence of special statutes conferring jurisdiction on some other court.[35] To authorize any other court to exercise jurisdiction, it must be clearly conferred and cannot be given by implication merely.[36] Nevertheless the statutes of many states have conferred jurisdiction on probate courts of suits of the character under consideration.[37] The jurisdiction so conferred is held to be concurrent

Am. Dec. 362; Pinkerton *v.* Walker, 3 Hayw. (Tenn.) 221.

Where an executor refuses to pay over the money in his hands to a person claiming the same as distributee until the right of such person to receive it is established, equity has jurisdiction to grant relief upon a bill by the distributee against the executor. Garrison *v.* Hill, 81 Md. 206, 31 Atl. 794.

26. Parsons *v.* Parsons, 9 N. H. 309, 32 Am. Dec. 362; Pinkerton *v.* Walker, 3 Hayw. (Tenn.) 321.

27. Dorsheimer *v.* Rorback, 23 N. J. Eq. 46; Frey *v.* Demarest, 16 N. J. Eq. 236.

28. Edmundson *v.* Roberts, 2 How. (Miss.) 822.

In Montana the probate court can make necessary orders for settlement of estates of deceased persons, but cannot render judgments against administrators for receiving money of estates and failing to account therefor. Deer Lodge County *v.* Kohrs, 2 Mont. 66.

29. Graffam *v.* Ray, 91 Me. 234, 39 Atl. 569.

30. Edmundson *v.* Roberts, 2 How. (Miss.) 822. But see Dobbs *v.* Cockerham, 2 Port. (Ala.) 328.

31 Davis *v.* Harwood, 70 Tex. 71, 8 S. W. 58; Long *v.* Wooters, 18 Tex. Civ. App. 35, 45 S. W. 165.

32. Taliferro *v.* Bassett, 3 Ala. 670.

33. Crain *v.* Cram, 17 Tex. 80; Dobbin *v.* Bryan, 5 Tex. 276.

34. Pomeroy Sp. Pert. § 1.

35. Coil *v.* Pitman, 46 Mo. 51.

36. Coil *v.* Pitman, 46 Mo. 51.

37. *California.*— See Corwin's Estate, 61 Cal. 160.

Indiana.— Boyle *v.* Moss, 4 Blackf. (Ind.) 535.

Maine.— May *v.* Boyd, 97 Me. 398, 54 Atl. 938, 94 Am. St. Rep. 509.

Massachusetts.— Lyons *v.* Hayden, 119 Mass. 482.

Mississippi.— Servis *v.* Beatty, 32 Miss. 52. And see White *v.* Gilbert, 39 Miss. 802.

Pennsylvania.— Fitzimmons *v.* Lindsay, 205 Pa. St. 79, 54 Atl. 488; Myers *v.* Black, 17 Pa. St. 193; McFardon's Appeal, 11 Pa. St. 503; Chess' Appeal, 4 Pa. St. 52, 45 Am. Dec. 668; Logan's Estate, 21 Pa. Co. Ct. 455.

Texas.— Walker *v.* Myers, 36 Tex. 203; Todd *v.* Caldwell, 10 Tex. 236; Buchanan *v.* Park, (Civ. App. 1899) 36 S. W. 807.

Washington.— See Christ Church *v.* Beach, 7 Wash. 65, 39 Pac. 1053.

United States.— Aspley *v.* Murphy, 52 Fed. 570, 3 C. C. A. 205.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1721, 1722.

To what suits statutes not applicable.— Statutes vesting in the orphans' court exclusive jurisdiction to specifically enforce a contract where a vendee, under articles of agreement for the sale of land, leaves and the vendor retakes possession and then dies, does not apply when the vendor conveys the legal title to a third person, who subsequently dies, devising it to another. Merrell *v.* Merrell, 5 Pa. Co. Ct. 531. So under the Texas statutes the jurisdiction of a probate

with and not exclusive of jurisdiction of courts of equity,[38] where there is nothing in the act conferring jurisdiction which indicates an intention to restrict the bringing of such suits to the probate court.[39]

f. Suits to Enforce Liens. The enforcement of vendor's liens belongs to the jurisdiction of chancery courts.[40] A probate court has no jurisdiction to enforce a vendor's lien against land belonging to a decedent's estate unless conferred by statute, and a statute giving a probate court jurisdiction in "proceedings instituted against executors and administrators upon any demand against the estate of a decedent" does not confer such jurisdiction.[41] Even though such jurisdiction were conferred upon a probate court the jurisdiction of a chancery court would not thereby be ousted unless the intent to vest exclusive jurisdiction in the probate court appears very clearly.[42] Statutes merely conferring on probate courts jurisdiction to foreclose a mortgage given by a decedent do not take away the jurisdiction of a court of equitable jurisdiction over such suits.[43] A court of chancery and not a court of probate has jurisdiction to enforce a lien of an heir against land purchased by an administrator out of funds of the estate.[44]

g. Actions or Suits to Set Aside Fraudulent Conveyances. Where a personal representative in behalf of creditors of the estate seeks to set aside a conveyance of realty by decedent made in fraud of creditors suit must be brought in a court of equity.[45] If, however, the property sought to be reached is personalty, an action may be brought in a court of law for its recovery,[46] and it has been held

court to enforce the specific performance by an administrator of a contract of the deceased to convey real estate can be exercised only when there is a bond or written agreement in writing to make title. Peters *v.* Phillips, 19 Tex. 70, 70 Am. Dec. 319.

38. Lyons *v.* Hayden, 119 Mass. 482; Mousseau *v.* Mousseau, 40 Minn. 236, 41 N. W. 977; Christ Church *r.* Beach, 7 Wash. 65, 39 Pac. 1053.

Rule in Pennsylvania.— In Pennsylvania it is held that the jurisdiction of the probate court of proceedings to enforce specific performance of decedent's contracts is exclusive. Fitzsimmons *v.* Lindsay, 205 Pa. St. 79, 54 Atl. 488; Wiley's Appeal, 84 Pa. St. 270; Cobbs *v.* Burns, 61 Pa. St. 278; Porter *v.* Dougherty, 25 Pa. St. 405; Weller *v.* Weyand, 2 Grant 102 (in which it was said that where a remedy is provided by statute, it supersedes common-law remedies, especially where the statutory remedy is substituted for the inconvenient practice introduced by the courts of administering equity in common-law forms to prevent a failure of justice); Woopel *v.* Calder, 8 Lanc. Bar 205.

39. Christ Church *r.* Beach, 7 Wash. 65, 39 Pac. 1053.

40. Edmonson *v.* Phillips, 73 Mo. 57. And see Burger *v.* Potter, 32 Ill. 66.

41. Ross *v.* Julian, 70 Mo. 209.

42. Edmonson *v.* Phillips, 73 Mo. 57.

Under the Texas statutes the probate court in a pending administration has exclusive original jurisdiction over vendor's liens against the estate. The remedy upon rejection of a lien by the administrator is in the probate court (Moore *v.* Glass, 6 Tex. Civ. App. 368, 25 S. W. 128); and the same is the case with respect to a lien which has been approved by the probate court (Cunningham *v.* Taylor, 20 Tex. 126).

43. Shoemaker *v.* Brown, 10 Kan. 383.

Under the statutes of Nevada in an action to foreclose a mortgage given by decedent where the mortgagee and the representative of the deceased are the only necessary parties, the probate court and equitable courts have concurrent jurisdiction; but if other persons whose rights could not be adjudicated in a probate court are necessary parties the court of equity must of necessity hear the case. Corbett *v.* Rice, 2 Nev. 330.

Under Tex. Rev. St. art. 2067, which provide that "any creditor of a deceased person holding a claim secured by a mortgage . . . which claim has been allowed and approved . . . may obtain at a regular term of the court, from the county court . . . an order for the sale of the property upon which he has such mortgage," where an administrator has allowed a claim but rejected in part the lien of the mortgage securing it, he can only enforce his lien in the county court, and no jurisdiction for that purpose is conferred on the district court by a statute providing that "when a claim for money against an estate has been rejected by [an] . . . administrator either in whole or in part, the owner of such claim may, . . . bring a suit against the executor or administrator for the establishment thereof in any court having jurisdiction." Western Mortg., etc., Co. *v.* Jackman, 77 Tex. 622, 14 S. W. 305.

44. Culver *v.* Pierson, (N. J. Ch. 1888) 15 Atl. 269.

45. See *infra*, XIV, G, 3, f; and, generally, FRAUDULENT CONVEYANCES.

46. Doe *r.* Clark, 42 Iowa 123; Cooley *v.* Brown, 30 Iowa 490, 35 Iowa 475; Bresnaham *v.* Nugent, 106 Mich. 459, 64 N. W. 458. But see Benjamin *r.* Le Baron, 15 Ohio 517, holding that an administrator cannot maintain an action at law to recover goods transferred by decedent to defraud his creditor; that the remedy if any is in chancery.

that such action must be brought in a court of law and a bill in equity cannot be maintained.[47]

h. Actions on Contracts of Personal Representatives. Common-law tribunals and not probate courts have jurisdiction of actions against personal representatives on contracts made by them which bind them and not the estate in the absence of some statute conferring jurisdiction on probate courts.[48] If by statute the contract binds the estate and not the representative personally the probate court has exclusive original jurisdiction to enforce it,[49] and, under a statute giving probate courts jurisdiction in all suits against administrators arising from any duty omitted in the discharge of their trusts, an action may be brought in the probate court to compel specific performance of a contract of sale of land against an administrator who had individually executed a bond to convey to his intestate prior to his death and who in selling his intestate's interest in the land executed a bond to convey in his individual capacity instead of signing as administrator the bond that had been executed in favor of his intestate.[50] The circuit court has jurisdiction of an action by an attorney to establish a claim for services rendered a decedent's estate, under a statute providing that any person having a claim against an estate may establish it by judgment or decree of some court of record.[51]

i. Actions on Claims of Personal Representative Against Estate. Where an administrator has a claim to any portion of the property alleged by the creditors to belong to the estate and his claim is adverse to that of the creditors, they may resort to a court of equity to have the controversy settled.[52] A statute providing that any person having a demand against an estate may establish the same by the judgment of some court of record in the ordinary course of proceedings confers on circuit courts jurisdiction to establish demands against estates of deceased persons, but does not give them jurisdiction to adjust the claims of a personal representative for his services and expenses against the estate in his hands.[53]

j. Actions to Charge Personal Representative Individually. Actions of this character are usually brought in courts of ordinary jurisdiction.[54] But under the statutes of some states the probate court has jurisdiction of proceedings to charge a personal representative individually for a debt of the decedent.[55]

k. Suits Between Personal Representatives. As is shown in another section, courts of law subject to some few exceptions have no jurisdiction of suits by one personal representative against another. Suits of this character are of equitable cognizance.[56]

l. Set-Off or Counter-Claim. The set-off of one judgment against another is a matter of equitable cognizance and the probate court has no power to try the validity of the judgments of other tribunals nor the right of personal representatives to set off one judgment against another.[57] A court of equity has not jurisdiction to set off a claim against the estate not reduced to judgment against a judgment in favor of the estate.[58] Courts in which suit is brought by a personal representative to enforce a demand in favor of the estate are very

47. Bresnaham *v.* Nugent, 106 Mich. 459, 64 N. W. 458.

48. Flower *v.* Swift, 5 Mart. N. S. (La.) 529. And see Holmes *v.* Foster, 78 N. C. 35.

49. Gurnee *v.* Maloney, 38 Cal. 85, 99 Am. Dec. 352.

50. Boyle *v.* Moss, 4 Blackf. (Ind.) 535.

51. Nichols *v.* Reyburn, 55 Mo. App. 1.

52. Morse *v.* Slason, 13 Vt. 296.

53. Stephens *v.* Cassity, 104 Mo. App. 210, 77 S. W. 1089.

54. Prater *v.* Stinson, 26 Ala. 456; Burnett *v.* Strong, 26 Miss. 116.

55. Jones' Appeal, 11 Wkly. Notes Cas. (Pa.) 554.

56. See *infra*, XIV, T.

Claim of administrator against estate.— Equity has jurisdiction of a suit by administrators against their co-administrator to ascertain and settle the amount due on a claim made by the co-administrator against the estate. Petty *v.* Young, 43 N. J. Eq. 654, 9 Atl. 377, 12 Atl. 392.

57. Stilwell *v.* Carpenter, 2 Abb. N. Cas. (N. Y.) 238.

58. Reno *v.* Robertson, 41 Ind. 567, in which it was said that it is only after the claims have passed into judgment that one can be used on motion to compel satisfaction of the other.

generally held to have jurisdiction to entertain a claim against the estate and allow it by way of set-off and counter-claim, provided it is of such a character that it will admit of being set off or counter-claimed.[59] The view is taken that statutes vesting the probate court with exclusive jurisdiction of suits or proceedings on demands against an estate only contemplate a voluntary proceeding against an estate and do not deny the right to make any defense on being involuntarily brought into another court.[60] Nevertheless the court in which the set-off is pleaded has jurisdiction only so far as the claims extinguish each other. No judgment can be rendered for a balance in favor of defendant;[61] and its jurisdiction is further restricted by the character of the claims which are sought to be set off against each other.[62]

m. Miscellaneous. If property of a person is inventoried by an administrator as belonging to an estate, the owner may sue at law for its recovery and a bill in equity will not lie, where the remedy at law is adequate.[63] To recover money paid to the distributee in case new debts appear against the intestate the remedy of the administrator is in equity.[64] So it has been held that he may file a bill in chancery against one who intermeddles and embezzles goods of the estate, instead of proceeding at law, where statutes expressly authorize a suit in equity under these circumstances.[65] Statutes giving a court jurisdiction over all suits of executors and administrators on any "demand" against the estate confer on such court jurisdiction of an action of trespass for acts committed by decedent.[66] While a county court in the exercise of its probate jurisdiction may entertain proceedings in the nature of a discovery against persons charged with secreting or refusing to account for property belonging to an estate, yet its power ends with the discovery, so that the right or title of the decedent to property claimed by or from his administrator must if an adjudication becomes necessary be litigated in courts of ordinary jurisdiction.[67] The right to object to the jurisdiction may be lost by estoppel.[68]

2. Venue — a. In Actions Against Personal Representative. Statutes requiring suits for money demands against estates to be brought in the county where the estate is being administered have been held to apply to independent executors as well as to other executors.[69] They also apply to suits against executors, although sued with other defendants not executors.[70] They do not apply to suits for construction of a will,[71] nor to an action against an independent executor for property belonging to minor children which is alleged to have been wasted,[72] nor to a suit for a community debt against the administratrix of community property;[73] nor to suits by distributees against the administrator and the sureties on

59. Thomson *v.* Mylne, 11 Rob. (La.) 349; Stiles *v.* Smith, 55 Mo. 363. And see *supra*, XIV, D.

60. Stiles *v.* Smith, 55 Mo. 363.

61. Thomson *v.* Mylne, 11 Rob. (La.) 349.

62. See, generally, on this subject *supra*, XIV, D.

63. Beekman *v.* Cottrell, 51 N. J. Eq. 337, 31 Atl. 29.

64. Turner *v.* Egerton, 1 Gill & J. (Md.) 430, 19 Am. Dec. 235.

65. Thorn *v.* Tyler, 3 Blackf. (Ind.) 504.

66. Mayberry *v.* McClurg, 51 Mo. 256.

67. Gardner *v.* Gillihan, 20 Oreg. 598, 27 Pac. 220.

68. Erwin *v.* Lowry, 7 How. (U. S.) 172, 12 L. ed. 655, holding that where a petition for the seizure and sale of the mortgaged property of a deceased person was filed in the United States courts against the executor, alleging plaintiff to be a citizen of Tennessee and defendant of Louisiana, and the proceedings went on to a sale without any objection to the jurisdiction of the court by the executor on the ground of residence of the parties, it is too late for a curator, appointed in the place of the executor, to raise the objection in the state court against a purchaser at the sale.

69. Bondies *v.* Buford, 58 Tex. 266; Morton *v.* Morris, (Tex. Civ. App. 1900) 56 S. W. 559.

70. Wilson *v.* Kyle, 35 Tex. 559.

71. Crosson *v.* Dwyer, 9 Tex. Civ. App. 482, 30 S. W. 929, holding that suit may be brought in any county where the executors reside.

72. Morton *v.* Morris, (Tex. Civ. App. 1900) 56 S. W. 559.

73. Jones *v.* McRae, 16 Tex. Civ. App. 308, 41 S. W. 403 (Rev. St. (1895) art. 2227), providing that an administratrix of community property may be sued in respect to such property the same as the deceased might have been in his lifetime. It was further

his bond;[74] nor to a suit to recover a legacy payable at a specific time.[75] A statute providing that all actions on official bonds "or against" personal representatives in their official capacity shall be instituted in the county where the bond shall have been given, if the principal or any of the sureties is in the county, applies to all actions against personal representatives in their capacity as such, whether sued on the bond or merely as executor or administrator.[76] A personal representative is entitled to be sued in the county in which he resides,[77] unless the estate is being administered in another county.[78] The statute does not apply, however, to actions in which the personal representative is not sued in his character as such.[79] By the express provisions of the statutes of one state, actions against personal representatives may be brought either in the county where they reside or were appointed, or where they can be served personally.[80] Where a statute requires suits against an executor for distribution to be brought in the county where he qualifies a plea of set-off equivalent to such suit to an action which the executors bring in a different county cannot be sustained.[81] Executors are not public officers within the meaning of statutes relating to place of trial of actions against public officers.[82] Where an administrator wrongfully inventories property of another's estate, the administrator thereof may sue for its recovery in the county where he took out administration, although the court of another county has jurisdiction of the estate of defendant's intestate.[83] When an administrator is a necessary party to an action, he may be sued in any county where any of his co-defendants reside.[84] A nominal party cannot be constituted an administrator and thus by uniting him with the real party in interest withdraw the jurisdiction from the county of the residence of the latter.[85]

b. In Actions by Personal Representative. Actions which are transitory and not local in their nature need not be brought by a personal representative in the county where the estate is being administered,[86] and he may bring suit on a note executed to decedent by a non-resident and payable at the maker's residence in the state in which his letters issued.[87]

c. Change of Venue. Claims filed against a decedent's estate are civil suits

held in this case that where such administratrix qualified in one county and moved to another suit must be brought against her in the county of her residence.

74. Stewart *v.* Morrison, 81 Tex. 396, 17 S. W. 15, 26 Am. St. Rep. 821.

75. Worthington *v.* Ware, 68 S. W. 627, 24 Ky. L. Rep. 429, holding that as such a suit does not involve a settlement of testator's estate the fact that it is not brought in the county in which the will was probated does not constitute a valid objection to the jurisdiction of the court.

76. Farmers' State Alliance *v.* Murrell, 119 N. C. 124, 25 S. E. 785; Wood *v.* Morgan, 118 N. C. 749, 24 S. E. 522; Bidwell *v.* King, 71 N. C. 287; Foy *v.* Morehead, 69 N. C. 512; Stanley *v.* Mason, 69 N. C. 1.

77. Bidwell *v.* King, 71 N. C. 287.

78. Rogers *v.* Harrison, 1 Tex. App. Civ. Cas. § 494, holding, however, that a petition in a suit against an executor, instituted in one county, which alleges that defendant resided in another county, and which fails to allege that the estate was being administered in the former county, is insufficient to support a judgment by default against the executor.

79. Roberts *v.* Connor, 125 N. C. 45, 34 S. E. 107, holding that where defendant was sued as surviving executor of B, doing business as B. & Co., bankers, and was sought to be held for wrongful acts of the bank committed after B's death he was not sued as executor but as the bank.

Action for legacy.— An action against an executor, although it alleged the executor's promise to pay the interest on a legacy of one hundred and fifty dollars, and failure to do so must be brought in the probate court of the county in which the will was proved. Bidwell *v.* King, 71 N. C. 287.

80. Osborn *v.* Lidy, 51 Ohio St. 90, 37 N. E. 434.

81. Bennett *v.* McCrocklin, 3 Metc. (Ky.) 322.

82. Thompson *v.* Wood, 115 Cal. 301, 47 Pac. 50.

83. Abbott *v.* People, 10 Ill. App. 62 [*affirmed* in 105 Ill. 588].

84. Owen *v.* State, 25 Ind. 107.

85. Lawson *v.* Cunningham, 34 Ga. 523, in which it was said that such a proceeding would be a fraud upon the provision of the constitution which guarantees to a defendant the right to be sued in the county of his residence.

86. Trimble *v.* Lebus, 94 Ky. 304, 22 S. W. 329, 15 Ky. L. Rep. 85.

87. Amsden *v.* Danielson, 18 R. I. 787, 31 Atl. 4. And see Perkins *v.* Stone, 18 Conn. 270.

within statutes relating to change of venue,[88] and a statute authorizing change of venue on application of any freeholder sued in any action not local out of the county of his residence applies to actions against personal representatives.[89] Change of venue to a county in which the personal representative is by statute required to be sued is proper when the action is brought in another county.[90]

F. Time to Sue and Limitations — 1. Premature Commencement of Action — a. Statutory Prohibition of Suit Within Designated Period. In the absence of some statute exempting personal representatives from suit for a certain period there is no reason why suit should not be brought on a rejected claim at any time after the issuing of letters of administration.[91] But in many jurisdictions the statutes contain provisions which protect the personal representatives from suit for a designated period after letters testamentary or of administration are granted.[92]

b. Actions or Suits to Which Statutes Applicable. In a number of jurisdictions these statutes are held to apply to suits in equity as well as actions at law;[93] while in others they are held to apply only to actions at law.[94] The statutes include an executor who is also a residuary legatee and who has given bond to pay debts and legacies,[95] and to an ordinary, on whom is cast the duties and rights of an executor by statute.[96] While the statutes are applicable where the personal representative as such is a necessary defendant,[97] the suit must be against the personal representative as such. If brought against him in his personal capacity the exemption does not apply.[98] The statutes do not apply to actions of detinue;[99] to actions arising out of a breach of duty on the representative's part;[1] to actions to set aside fraudulent conveyances by decedent;[2] to an action to recover lands from a personal representative by one claiming them adversely;[3] to bills to remove the administration into equity;[4] to actions to cancel a deed to decedent;[5] to a bill to enjoin an administrator from interference with a legacy to which decedent had no title;[6] to a bill to foreclose a mortgage;[7] or to an action to recover

88. Lester *v.* Lester, 70 Ind. 201.

89. McLeod *v.* Shelton, 42 Miss. 517.

90. Wood *v.* Morgan, 118 N. C. 749, 24 S. E. 522.

91. Matson *v.* Abbey, 70 Hun (N. Y.) 475, 24 N. Y. Suppl. 284 [*affirmed* in 141 N. Y. 179, 36 N. E. 11].

92. Espy *v.* Comer, 76 Ala. 501; Reedy *v.* Armistead, 31 Miss. 353; Jones *v.* Whitworth, 94 Tenn. 602, 30 S. W. 736; Stratton *v.* Dines, 126 Fed. 968.

Statutes protecting personal representatives from compulsory payment within a certain time after taking out letters of administration do not prohibit suits within that time. Matter of Phyfe, 5 N. Y. Leg. Obs. 331; Parsons *v.* Keystone Nat. Bank, 34 Leg. Int. (Pa.) 297.

Effect of garnishment.— Under a statute which provides that an administrator may be garnished, but shall not be compelled to answer till the estate in his hands is sufficiently administered to enable him safely to answer the writ, the only effect of the garnishment is to keep in his hands, by way of injunction, the property finally to be ascertained and disposed of by the court on a view of all the priorities and equities of existing creditors, and hence is not in violation of a statute which prohibits a suit to recover a debt owed by a decedent till twelve months from the qualification of the administrator. Sapp *v.* McArdle, 41 Ga. 628.

93. Alabama State Bank *v.* Glass, 82 Ala. 278, 2 So. 641; Cleveland *v.* Mills, 9 S. C. 430. And see Rosenthal *v.* Enevoldsen, 61 Miss. 532; Anderson *v.* Newman, 60 Miss. 532; Reedy *v.* Armistead, 31 Miss. 353.

94. Sandridge *v.* Spurgen, 37 N. C. 269; Stone *v.* Corcoran, 17 R. I. 759, 24 Atl. 781.

95. Troy Nat. Bank *v.* Stanton, 116 Mass. 435.

96. O'Daniel *v.* Lehre, 2 Strobh. Eq. (S. C.) 83.

97. Anderson *v.* Newman, 60 Miss. 532; Reedy *v.* Armistead, 31 Miss. 353.

98. Baker *v.* Mitchell, 109 Ala. 490, 20 So. 40; Torrey *v.* Bishop, 104 Ala. 548, 16 So. 422; Alabama State Bank *v.* Glass, 82 Ala. 278, 2 So. 641; Sims *v.* Canfield, 2 Ala. 555.

99. Sims *v.* Canfield, 2 Ala. 555, since such action cannot be instituted against the personal representative in his representative capacity.

1. Probate Judge *v.* Lane, 51 N. H. 342.

2. Freeman *v.* Pullen, 119 Ala. 235, 24 So. 57; Alabama State Bank *v.* Glass, 82 Ala. 278, 2 So. 641; Manning *v.* Drake, 1 Mich. 34.

3. Torrey *v.* Bishop, 104 Ala. 548, 16 So. 422.

4. Baker *v.* Mitchell, 109 Ala. 490, 20 So. 40.

5. Lanfair *v.* Thompson, 112 Ga. 487, 37 S. E. 717, under a statute in which the exemption only applies to a suit to recover a debt due by decedent.

6. Womack *v.* Greenwood, 6 Ga. 299.

7. Teel *v.* Winston, 29 Oreg. 489, 29 Pac. 142. And see Hathaway *v.* Lewis, 2 Disn.

funeral expenses where expressly excepted from the operation of the statute.[8] The statutes have been held to apply to a bill to enforce a vendor's lien for purchase-money;[9] to an action to recover counsel fees;[10] to a bill by a creditor of the administrator to be subrogated to the administrator's rights as creditor of the estate, the latter having paid a debt of the estate with his own money, in fraud of complainant's rights;[11] and to a bill against one both personally and as administrator charging him with a fraudulent transfer to decedent.[12] Ordinarily a distributee cannot maintain an action against an administrator until there has been a decree for distribution.[13]

c. Effect of Removal, Resignation, Etc. Where an administrator resigns or is removed, it is held that his successor is not entitled to the statutory exemption from suit; that the time from which the exemption commences is the date of the qualification of the original administrator.[14] And such has been held to be the rule where letters of administration are afterward revoked on presentation and approval of the will, and where the administrator is the same person who is appointed executor in the will;[15] there is some conflict of authority as to whether an administrator who becomes such on the death of the original administrator is entitled to the statutory period of exemption from the time of the qualification.[16]

(Ohio) 260, holding that an action to foreclose a mortgage may be maintained before the expiration of the period fixed by the act to provide for the settlement of the estate of deceased persons, as the act merely suspends the remedy for the debt but not the remedy upon any security which may have been given.

A foreclosure suit in which no relief is sought against the administrator of the estate which he represents is not within the meaning of the statutes. United Security L. Ins., etc., Co. *v.* Vandegrift, 51 N. J. Eq. 400, 27 Atl. 985. Scire facias to foreclose a mortgage is a proceeding *in rem* and not an action within the provision exempting a personal representative from suit within a year after letters of administration are taken out. Menard *v.* Marks, 2 Ill. 25.

A prohibition against suit for any debt or legacy until the expiration of the time limited for payment has no application to a bill to foreclose the equity of redemption of mortgaged premises. Austin *v.* Jackson, 10 Vt. 267; Bradley *v.* Norris, 3 Vt. 369.

8. Studley *v.* Willis, 134 Mass. 155.

9. Reedy *v.* Armistead, 31 Miss. 253.

10. Fry *v.* Lofton, 45 Ga. 171.

11. Anderson *v.* Newman, 60 Miss. 532.

12. Rosenthal *v.* Enevoldsen, 61 Miss. 532.

13. Flynn *v.* Flynn, 183 Mass. 365, 67 N. E. 314 (holding that since a decedent's estate must be settled under the direction of the probate court by an executor or administrator, decedent's widow was not entitled to maintain a bill against the executors and the transferee of certain of decedent's personal property, alleged to have been transferred in fraud of her marital rights, to set aside such transfer prior to the final settlement of the estate in the probate court); Tallon *v.* Tallon, 156 Mass. 313, 31 N. E. 287; Browne *v.* Doolittle, 151 Mass. 595, 25 N. E. 23; Cummings *v.* Cummings, 143 Mass. 340, 9 N. E. 730; Cathaway *v.* Bowles, 136 Mass. 54. *Compare* Peck *v.* Vandemark, 99 N. Y. 29, 1 N. E. 41, holding that a suit by a widow against the executor of her deceased husband's estate to enforce an antenuptial agreement for a settlement upon her of one half of his property absolutely and the other half for life cannot be held as prematurely brought, although the estate be not yet settled up, if the debts of the estate and the expenses of administration can be approximately estimated by the court.

14. Todd *v.* Wright, 12 Heisk. (Tenn.) 442; Coleman *v.* Raynor, 3 Coldw. (Tenn.) 25. These cases assign as a reason that the resigning administrator is required to settle and pay over to the new administrator the balance of money, property, and effects in his hands and is therefore furnished with information with regard to the situation of the estate, merely on taking upon himself the administration thereof, and that in consequence the reason for the rule exempting personal representatives from suit for a designated period does not apply.

In case of removal of an executor, a suit brought against the administrator *de bonis non* within a year from the qualification of the executor is of course premature. Troy Nat. Bank *v.* Stanton, 116 Mass. 435.

15. Kittredge *v.* Folsom, 8 N. H. 98, holding that such administration is an original administration within the terms of the statute exempting personal representatives from suit commenced within a year after the original grant of administration. *Compare* Callahan *v.* Smith, T. U. P. Charlt. (Ga.) 149, in which it was held that where letters of administration had been revoked because the administrators had not complied with the requisites of the will in giving sufficient bond, administration had never been granted, and that the full time allowed by law for the settlement of the estate by the administrator subsequently appointed must lapse before there is any liability to suit.

16. **That he is.**—Minor *v.* Webb, 1 Heisk. (Tenn.) 395.

d. Effect of Revival of Action. A proceeding to revive an action brought against decedent and pending at his death is not an action within the meaning of the statutes.[17]

e. Waiver of Objection That Suit Is Prematurely Brought. It is perfectly competent for a personal representative to waive the defense that the suit is prematurely brought,[18] and a judgment rendered in such suit will protect him when pleaded in suits brought after that time.[19] The objection, it has been held, must be taken by plea in abatement,[20] and is waived by answering to the merits and consenting to have it placed on the trial calendar.[21]

2. Statutes of Limitations — a. In Actions by Personal Representatives — (I) *Right to Sue as Affected by General Statute of Limitations*[22] — (A) *In Actions Generally* — (1) Causes of Action Arising in Decedent's Lifetime. Where a cause of action accruing to testator or intestate is barred by the general statute of limitations in his lifetime, his personal representative cannot recover thereon, although decedent died on the last day of the statutory period and the representative sued shortly after his death.[23] As respects causes of action arising in decedent's lifetime, but not barred by the general statute of limitations at the time of his death, it is well settled that his death does not interrupt the running of the statute in the absence of some statutory provision to the contrary;[24] and it has been held that the fact that the administrator is ignorant of the cause of action does not affect the rule.[25]

(2) Causes of Action Arising After Decedent's Death. A cause of action

That he is not.—Cooley *v.* Patterson, 49 Me. 570.

17. Breckenridge *v.* Mellon, 1 How. (Miss.) 273; Parker *v.* Willard, Smith (N. H.) 212; Quick *v.* Campbell, 44 S. C. 386, 22 S. E. 479.

The object of the exemption is to afford a personal representative an opportunity to see whether the estate committed to his administration is sufficient to pay the debts in full or not, and if not that he may then institute such proceedings as shall secure an equal distribution of the estate among his creditors and prevent the securing of unjust preferences. United Security L. Ins., etc., Co. *v.* Vandegrift, 51 N. J. Eq. 400, 26 Atl. 985. And see Sandridge *v.* Spurgen, 37 N. C. 269.

18. Kittredge *v.* Folsom, 8 N. H. 98; Clements *v.* Rogers, 91 N. C. 63; Boynton *v.* Sandford, 28 N. J. Eq. 184 [*affirmed* in 28 N. J. Eq. 592].

19. Terry *v.* Vest, 33 N. C. 65; Bryan *v.* Miller, 32 N. C. 129.

20. Kittredge *v.* Folsom, 8 N. H. 98; Clements *v.* Swain, 2 N. H. 475.

21. Clements *v.* Rogers, 91 N. C. 63.

Presumption as to waiver.— Where an executor permits a proceeding prematurely brought to proceed to a final decree, it will be presumed, on his application to set aside the decree on the ground that it was prematurely brought, that he intended to waive the defense unless there is proof of accident or inadvertence. Boynton *v.* Sandford, 28 N. J. Eq. 184 [*affirmed* in 28 N. J. Eq. 592].

22. Right to sue as further affected by statutes specially applicable to executors and administrators see *infra*, XIV, F, 2, b, (I), (B). For time within which action brought by decedent may be continued or revived by executors and administrators see Abatement and Revival, 1 Cyc. p. 103 *et seq.*

23. Penny *v.* Brice, 18 C. B. N. S. 393, 11 L. T. Rep. N. S. 632, 13 Wkly. Rep. 342, 114 E. C. L. 393.

24. *Alabama.*— McNeill *v.* McNeill, 35 Ala. 30; Johnson *v.* Wren, 3 Stew. 172.

Arkansas.— Brown *v.* Merrick, 16 Ark. 612.

District of Columbia.— Campbell *v.* Wilson, 2 Mackey 497.

Iowa.— Sherman *v.* Western Stage Co., 24 Iowa 515.

Kansas.— Green *v.* Goble, 7 Kan. 297.

Kentucky.— Hull *v.* Deatly, 7 Bush 687; Baker *v.* Baker, 13 B. Mon. 406; Beauchamp *v.* Mudd, 2 Bibb 537.

Maryland.— Ruff *v.* Bull, 7 Harr. & J. 14, 16 Am. Dec. 290.

Mississippi.— Metcalf *v.* Grover, 55 Miss. 145; Byrd *v.* Byrd, 28 Miss. 144.

North Carolina.— Hall *v.* Gibbs, 87 N. C. 4.

Ohio.— Granger *v.* Granger, 6 Ohio 35; Irwin *v.* Garretson, 1 Cinc. Super. Ct. 533.

Pennsylvania.— Light's Estate, 136 Pa. St. 211, 20 Atl. 536, 537; Amole's Appeal, 115 Pa. St. 356, 8 Atl. 614.

South Carolina.— Boyd *v.* Monro, 32 S. C. 249, 10 S. E. 963; Bolt *v.* Dawkins, 16 S. C. 198; Lott *v.* De Graffenreid, 10 Rich. Eq. 346.

Tennessee.— Fowlkes *v.* Nashville, etc., R. Co., 9 Heisk. 829.

Vermont.— Conant *v.* Hitt, 12 Vt. 285.

Washington.— McAuliff *v.* Parker, 10 Wash. 141, 83 Pac. 744.

England.— Hickman *v.* Walker, Willes 27; 2 Wood Lim. § 194.

See 33 Cent. Dig. tit. "Limitation of Actions," § 424 *et seq.*

25. Boyd *v.* Monro, 33 S. C. 249, 10 S. E. 963.

which accrues to an administrator after the death of an intestate is not complete and does not arise and exist so that the statute of limitations can begin to run upon it until an administrator is appointed who can bring suit.[26] The reason assigned is that no cause of action can arise and exist in favor of an administrator until he comes into existence as such.[27] So according to the weight of authority the statute of limitations does not commence to run against the right of an executor to bring suit on a cause of action arising after testator's death until probate of the will and his qualification as executor.[28] It has been held, however, that the

26. *Alabama.*— Johnson *v.* Wren, 3 Stew. 172.

Arkansas.— Word *v.* West, 38 Ark. 243; McCustian *v.* Ramey, 33 Ark. 141.

Connecticut.— Hobart *v.* Connecticut Turnpike Co., 15 Conn. 145.

Delaware.— Carey *v.* Morris, 5 Harr. 299.

District of Columbia.— Tucker *v.* Nebeker, 2 App. Cas. 326.

Georgia.— Doe *v.* Kennon, 1 Ga. 379; Spann *v.* Fox, Ga. Dec. 1.

Iowa.— Sherman *v.* Western Stage Co., 24 Iowa 515.

Kansas.— Carney *v.* Havens, 23 Kan. 82.

Kentucky.— Hull *v.* Deatly, 7 Bush 687; Pendleton *v.* Pendleton, 6 Bush 469; Baker *v.* Baker, 13 B. Mon. 406; Beauchamp *v.* Mudd, 2 Bibb 537.

Maryland.— Rockwell *v.* Young, 60 Md. 563; Smith *v.* Doe, 33 Md. 442; Fishwick *v.* Sewell, 4 Harr. & J. 393. See also Haslett *v.* Glenn, 7 Harr. & J. 17; Ruff *v.* Bull, 7 Harr. & J. 14, 16 Am. Dec. 290.

Michigan.— Parks *v.* Norris, 101 Mich. 71, 59 N. W. 428.

Mississippi.— Wood *v.* Ford, 29 Miss. 57.

Missouri.— Polk *v.* Allen, 19 Mo. 467; McDonald *v.* Walton, 2 Mo. 48.

New Hampshire.— Clark *v.* Amoskeag Mfg. Co., 62 N. H. 612; Brewster *v.* Brewster, 52 N. H. 52.

New York.— Bucklin *v.* Ford, 5 Barb. 393; Wenman *v.* Mohawk Ins. Co., 13 Wend. 267, 28 Am. Dec. 464.

Pennsylvania.— Riner *v.* Riner, 166 Pa. St. 617, 31 Atl. 347, 45 Am. St. Rep. 693; Amole's Appeal, 115 Pa. St. 356, 8 Atl. 614; Marsteller *v.* Marsteller, 93 Pa. St. 350.

South Carolina.— Witt *v.* Elmore, 2 Bailey 595; Geiger *v.* Brown, 4 McCord 418.

Virginia.— Hansford *v.* Elliott, 9 Leigh 79; Clark *v.* Hardeman, 2 Leigh 347.

United States.— Fullenwider's Case, 9 Ct. Cl. 403.

England.— Burdick *v.* Garrick, L. R. 5 Ch. 233, 39 L. J. Ch. 369, 18 Wkly. Rep. 387; Murray *v.* East India Co., 5 B. & Ald. 204, 24 Rev. Rep. 325, 7 E. C. L. 118; Pratt *v.* Swaine, 8 B. & C. 285, 6 L. J. K. B. O. S. 353, 2 M. & R. 350, 15 E. C. L. 146; Fergusson *v.* Fyffe, 8 Cl. & F. 121, 8 Eng. Reprint 49; Curry *v.* Stephenson, 4 Mod. 372, 2 Falk. 421.

See 33 Cent. Dig. tit. "Limitation of Actions," § 424 *et seq.*

Contra.— Tynan *v.* Walker, 35 Cal. 634, 95 Am. Dec. 152.

Conversion of property.— In case of a wrongful conversion after decedent's death the statute does not begin to run until after the appointment of the administrator. The statute begins to operate only from the time the right to demand the property vests in someone. Johnson *v.* Wren, 3 Stew. (Ala.) 172; Parks *v.* Norris, 101 Mich. 71, 59 N. W. 428; Haslett *v.* Glenn, 7 Harr. & J. (Md.) 17; Fishwick *v.* Sewall, 4 Harr. & J. (Md.) 393; Witt *v.* Elmore, 2 Bailey (S. C.) 595; Pratt *v.* Swaine, 8 B. & C. 285, 6 L. J. K. B. O. S. 353, 2 M. & R. 350, 15 E. C. L. 146.

A cause of action for wrongful death accrues not to the deceased but to his administrator, and the statute does not commence to run until the appointment of an administrator. Andrews *v.* Hartford, etc., R. Co., 34 Conn. 57; Sherman *v.* Western Stage R. Co., 24 Iowa 515.

In a suit to vacate a judgment taken against decedent after his death the statute of limitations begins to run against the administrator from the time of his appointment. Lynn *v.* Lowe, 88 N. C. 478.

Where a will is revoked, the statute of limitations against the executor of such will does not commence to run in favor of the executor properly appointed until letters of administration were granted to him. Spruance *v.* Darlington, 7 Del. Ch. 111, 30 Atl. 663.

Where an infant dies leaving a cause of action which passes to his personal representatives, the statute which had not begun to run in his lifetime does not begin to run after his death until the qualification of the personal representative. Sorrels *v.* Trantham, 48 Ark. 386, 4 S. W. 281.

Limitation of rule.— Where there is no administrator and no debts are shown to be due, the distributees have the right to sue for and recover the property belonging to their ancestors, and in such a case, where a suit by them would be barred by the statute of limitations a recovery by the administrator will also be barred, although there was no administrator when the cause of action accrued and none was appointed until within the period prescribed by the statute of limitations. Manly *v.* Kidd, 33 Miss. 141.

27. Johnson *v.* Wren, 3 Stew. (Ala.) 172; Andrews *v.* Hartford, etc., R. Co., 34 Conn. 57; Bucklin *v.* Ford, 5 Barb. (N. Y.) 393.

28. Hobart *v.* Connecticut Turnpike Co., 15 Conn. 115; Garland *v.* Milling, 6 Ga. 310; Donaldson *v.* Reboug, 26 Md. 312. But see Arnold *v.* Arnold, 35 N. C. 174, 55 Am. Dec. 434, which seems to maintain a contrary doctrine.

statute commences to run on the appointment and qualification of the administrator, although the decree appointing him is reversed on appeal.[29]

(B) *In Actions by Administrator De Bonis Non.* If the right to maintain an action depends on plaintiff's appointment as administrator *de bonis non* the action must fail if the appointment was made after the action was commenced.[30] Where a statute has commenced to run against an administrator it continues to run against the administrator *de bonis non*,[31] and is not suspended during the period that elapses between the death of the administrator and the appointment of the administrator *de bonis non*.[32] So where a transfer of property of an estate by an administrator has become effectual under the statutes of limitation an administrator *de bonis non* cannot recover such property as a part of the estate.[33] Until a disputed will is finally adjudged to be invalid no cause of action accrues to an administrator *de bonis non* to recover goods remaining unadministered by the executor, and the statute of limitation does not begin to run against him until that time.[34]

(C) *In Actions to Recover Overpayments to Creditors or Legatees.* Where a personal representative makes overpayments to a creditor through mistake superinduced by the fraud of the latter, the statute does not commence to run against a right to recover the overpayment until the date the payment was made.[35] If a creditor has paid a claim in full, under an honest belief that the estate is solvent and the estate is subsequently declared insolvent and dividends ordered to be paid from all the assets then available, the statute of limitations commences to run in an action to recover the excess from the date when the dividend was ordered.[36] The statute runs against a cause of action for money paid a legatee in excess of his legacy by mistake from the date of payment and not from the date of settling the executor's final account.[37] Where a legatee dies before the executor's claim for overpayments is barred and the executor becomes the administrator of the legatee the statute does not run against him while he remains administrator because he cannot sue himself and because he is not obliged to exercise the right of retainer on pain of forfeiting it within any specific time after taking out administration.[38]

(D) *Claims of Personal Representatives Against Estates.* Statutes of limitations do not apply to claims of the personal representative against the estate of the decedent for the very obvious reason that he cannot bring an action against

Effect of issue to try validity of will.— Where a chattel is placed by a father in his daughter's possession and remains in her possession until his death, after which an issue is made up to try the validity of the will which pended for eight years, when the will was established, it was held that a demand made by an administrator *pendente lite* and a refusal did not make the daughter's possession adverse to the rights of the executor so as to set the statutes of limitations to running against him. Wooten *v.* Jarman, 51 N. C. 111.

29. Mowry *v.* Harris, 18 R. I. 519, 28 Atl. 657, under a statute which declares that in case of an appeal from a decree of any court of probate its operation shall be suspended until it is affirmed by the supreme court, provided that, if the decree grants letters of administration, the administrator on giving bond may collect credits of intestate as though no appeal had been taken.

30. Gatfield *v.* Hanson, 57 How. Pr. (N. Y.) 331.

31. Campbell *v.* Wilson, 2 Mackey (D. C.) 497, in which it was said that when the statute begins to run no subsequent transfer of title arrests its operation.

Termination of an administration and its continued vacancy by reason of the administrator's death does not arrest or impede the operation of the statute. Underhill *v.* Mobile F. Dept. Ins. Co., 67 Ala. 45.

32. Bugg *v.* Sumner, 1 McMull. (S. C.) 333.

33. Collins *v.* Bankhead, 1 Strobh. (S. C.) 25. *Compare* Lawson *v.* Lay, 24 Ala. 184, holding that if an administrator makes a gratuitous bailment of property belonging to the estate both he and his bailee are guilty of a conversion. The administrator himself cannot avoid the bailment nor sue for the recovery of the property, and the statute of limitations commences to run in favor of the bailee from the time of the appointment of an administrator *de bonis non*.

34. Finn *v.* Hempstead, 24 Ark. 111.

35. Gamble *v.* Hicks, 27 Miss. 781.

36. Richards *v.* Nightingale, 9 Allen (Mass.) 149.

37. Ely *v.* Norton, 6 N. J. L. 187.

38. Dillard *v.* Ellington, 57 Ga. 567.

himself.[39] This is an exception to the rule that when a statute commences to run against a claim nothing interrupts its operation.[40]

(E) *Effect of Failure to Prosecute Suit.* The failure of an administrator to prosecute with reasonable diligence a suit pending at decedent's death may be treated as an abandonment thereof so as to exclude him from bringing an action on the same cause of action barred by the statute of limitations subsequent to decedent's death,[41] and where, as authorized by statute, a person sues on a claim due the estate as administrator without appointment, and subsequently thereto an administrator who has been appointed refuses to prosecute, the suit will abate.[42]

(F) *Exceptional Circumstances Operating to Suspend Running of Statute.* In computing the time within which a personal representative must bring action the time during which the courts are by statute closed should be excluded,[43] and where an executor who has been ousted by means of a fraudulent will is subsequently reinstated, the time during which his functions were suspended must be excluded in estimating the period within which an action to recover property of the estate against those who perpetrated the fraud must be brought.[44] So where persons who have fraudulently secreted property of an estate for a number of years on discovery admit possession and promise to account therefor they cannot set up that the executor's claim to the property has become stale and barred by lapse of time.[45] An action by a personal representative instituted after the statutory period has elapsed has been sustained in one jurisdiction where no plea to the jurisdiction was filed and no showing was made that the estate had been closed or that the personal representative had been discharged,[46] and the statute does not commence to run against a bill by the personal representative to recover property fraudulently conveyed by decedent until a reasonable time has elapsed after evidence of the fraud is discovered.[47] If a right of action exists in favor of the personal representative the statute of limitations is not prevented from running against a claim in favor of the decedent's estate by the disabilities of the heirs.[48]

39. Semmes *v.* Magruder, 10 Md. 242; Spencer *v.* Spencer, 4 Md. Ch. 456; Brown *v.* Stewart, 4 Md. Ch. 368; State *v.* Reigart, 1 Gill (Md.) 1, 39 Am. Dec. 628. And see Moore *v.* Bryant, 10 Tex. Civ. App. 131, 31 S. W. 222, holding that where an independent executor claims the property in his hands for the satisfaction of a debt due him from the estate, limitations cannot be invoked against such claim in an action by the heirs to recover the property so held. But *compare In re* Ward, 21 Ohio Cir Ct. 753, 12 Ohio Cir. Dec. 44.

40. Semmes *v.* Magruder, 10 Md. 242.

41. Richards *v.* Maryland Ins. Co., 8 Cranch (U. S.) 84, 3 L. ed. 496.

Where an administrator qualifies immediately after decedent's death but declines to prosecute, the limitation legally attaches and a statute providing that for purposes of limitations letters are deemed to have been issued within six years after the death of the testator has no application to such a case and does not revive the lost cause of action or transfer it to the next of kin or the legatees. Hunt *v.* Peake, 2 N. Y. City Ct. 26.

42. Merrill *v.* Woodbury, 61 N. H. 504.

43. Quierry *v.* Faussier, 4 Mart. (La.) 609.

44. Marsden's Appeal, 102 Pa. St. 199.

45. Croom *v.* Cone, 13 Ga. 21.

Notice of fraud relied on to take a case out of the statute of limitation, to the heirs, is not necessarily notice to the administrator, as there may be debts due from the estate, the holders of which should not suffer from the negligence of the heirs, and the heirs may be disabled to sue and therefore not within the statute. Barfield *v.* King, 29 Ga. 288.

46. Card *v.* Fowler, 120 Mich. 646, 79 N. W. 925. And see Swift *v.* Williams, 1 La. 165, holding that an executor whose functions have been continued after the year may sue during such continuance. *Compare* Lamothe *v.* Dufour, 4 Mart. (La.) 338.

47. Preston *v.* Cutter, 64 N. H. 461, 13 Atl. 874.

In California, an action by an administrator to recover back real estate conveyed by the decedent in his lifetime for the purpose of defrauding his creditors may be commenced within three years after the creditors recover judgment against the estate. Forde *v.* Exempt F. Co., 50 Cal. 299.

48. Darnall *v.* Adams, 13 B. Mon. (Ky.) 273; Rosson *v.* Anderson, 9 B. Mon. (Ky.) 423; Rindge *v.* Oliphint, 62 Tex. 682. *Compare* Fleming *v.* Collins, 27 Ga. 494, holding that a court of equity will not enjoin an administrator in suing to recover a tract of land for the benefit of the heirs notwithstanding the seven years' bar has attached where both the heirs were before and at the time

(II) *Right to Sue as Affected by Statutes Specially Applicable to Personal Representatives.* If it is provided by statute that the time which elapses between the death of a person and the grant of letters testamentary, or of administration on his estate, is not to be taken as any part of the time limited for the commencement of actions by executors or administrators, this period must be excluded in computing the time within which suit must be brought, although the statute commenced to run in the decedent's lifetime.[49] Statutes of this character contemplate the grant of permanent letters of administration. The suspension provided for does not cease upon the grant of temporary letters of administration.[50] So a statute which provides that if any right of action existed in favor of a decedent at the time of his death and survives, action may be brought thereon within a designated period after the grant of administration extends the time within which suits may be brought which would be otherwise barred by the general statute of limitations and does not limit the time of bringing actions against which the statute had not run;[51] and the same is the rule under a statute providing that if a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof and the cause of action survives, an action may be commenced by his representatives after the expiration of the time and within a designated period from his death.[52] So under statutes of this character suit need not be brought within the designated period after grant of administration, provided it is brought within the period fixed by the general statute of limitations.[53] If, however, at the time the special statute commences to run, there remains an unexpired portion of the general statute of greater length than the period fixed by the special statute the general statute controls and the special statute does not operate to extend the time within which suit may be commenced.[54] It has been held, however, that an action by the executor of the

of intestate's death and have been ever since *non compos mentis*.

49. McNeill *v.* McNeill, 35 Ala. 30; Grice *v.* Jones, 1 Stew. (Ala.) 254. And see Manly *v.* Turnipseed, 37 Ala. 522; Hutchinson *v.* Tolls, 2 Port (Ala.) 44.

In New York it has been held that the provision of the Revised Statutes that "the time which shall have elapsed between the death of any person and the granting of letters testamentary on his estate, not exceeding," etc., "shall not be deemed any part of the time limited by law for the commencement of actions by executors" is superseded by the provisions of the code of civil procedure, and that the rule of limitation in that regard is furnished by section 402 of the code which provides that "if a person entitled to maintain an action, dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representative, after the expiration of that time, and within one year after his death." Greene *v.* New York Cent., etc., R. Co., 48 N. Y. Super. Ct. 333.

50. Scott *v.* Atwell, 63 Ga. 764.

51. Morse *v.* Whitcher, 64 N. H. 591, 15 Atl. 207. To the same effect see Winslow *v.* Benton, 130 N. C. 58, 40 S. E. 840.

52. Pinkney *v.* Pinkney, 61 Ill. App. 525; Harris *v.* Rice, 66 Ind. 267; McNear *v.* Robeson, 12 Ind. App. 87, 39 N. E. 896.

Effect of failure to appoint administrator. — Where a statute provides that if a person dies before the expiration of the period in which he is entitled to commence an action and the cause of action survives, action may be commenced by his representatives after the expiration of that time and within a year after his death; the action may become barred without reference to the appointment of an administrator or executor for his estate. Hughston *v.* Nail, 73 Miss. 284, 18 So. 920 [*distinguishing* Boyce *v.* Frances, 56 Miss. 573; Cook *v.* Reynolds, 58 Miss. 243; Clayton *v.* Merrett, 52 Miss. 353, decided under a statute since repealed]. Under a provision of this character an action must be brought within a year after decedent's death without regard to when an administrator is appointed. It is counted from the death of decedent in respect to claims in favor of the estate because the law does not encourage laches in those entitled to administration. Coppersmith *v.* Wilson, 107 N. C. 31, 12 S. E. 77.

53. Converse *v.* Johnson, 146 Mass. 20, 14 N. E. 925, in which it was said by Field, J., delivering the opinion of the court, that it is not intended by such statute that the executor or administrator should not collect debts due the estate by suits brought more than two years after his appointment when the debts were not barred by other provisions of the statute.

54. *Florida.*— Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526.

Illinois.— Pinkney *v.* Pinkney, 61 Ill. App. 525.

estate of the creditor against the executor of the estate of the debtor brought more than two years (the statutory period) after defendant's appointment, although within two years after plaintiff's appointment, cannot be maintained.[55] Statutes requiring an administrator to sue within a designated time contemplate administration in the state of their enactment, and therefore one who qualifies as administrator and sues in that state within the statutory period is not barred, although he qualified as administrator in another state more than the statutory period before suit brought.[56]

(III) *MISCELLANEOUS.* Where leave to sue is necessary and is asked within the period fixed by statute for bringing suit, the motion cannot be denied on the ground of laches, for this would in effect establish a time for bringing suit different from that fixed by the statute.[57] If a surviving executor files a bill against the administratrix of his co-executor to recover certain property inventoried as part of the co-executor's estate, delay in filing the bill is no defense thereto if the delay was due to the action of both parties.[58] A widow who has wrongfully taken possession of a note payable to decedent and procured the debtor to give a note payable to herself in its place acquires no right to the debt evidenced by the original note and no lapse of time bars the right of the representative to sue for the amount due thereon. As to money actually collected by her on the note the statute runs from the time of its collection and she may invoke the bar of six years, no facts being shown to make her a trustee *ex maleficio*.[59] Where an administrator appointed seventeen years after decedent's death takes possession of land as belonging to intestate and is evicted therefrom by an intruder without title whose possession commences shortly after the grant of letters he should not be permitted to allege that the claim of plaintiff was stale as to him.[60] The granting of an order allowing the administrator a certain time within which to move for a new trial, in a case in which a claim against a decedent is allowed, does not suspend the right of the administrator during such time to annul a conveyance by his decedent as in fraud of the creditor in whose favor the claim is allowed.[61]

b. In Actions Against Personal Representatives — (I) *ACTIONS ON CLAIMS AGAINST ESTATE* — (A) *Operation and Effect of General Statutes of Limitations.* The general statutes of limitations apply with the same effect to the cases of the estates of deceased persons as to cases where the debtor was living,[62] and this is true whether the debt matured before or after decedent's death.[63] As between the executors and creditors of an estate no trust exists of that peculiar kind which is within the exclusive control of a court of equity, and to which the statute of limitations cannot be pleaded; the relation between them is simply that of debtor and creditor and the statute of limitations may be set up in any forum that has jurisdiction of the case, whether legal or equitable.[64]

Minnesota.— Wood *v.* Bragg, 75 Minn. 527, 78 N. W. 93.

New York.— Tompkins *v.* Austin, 10 N. Y. St. 339.

North Carolina.— Hughes *v.* Boone, 114 N. C. 54, 19 S. E. 63.

55. Hill *v.* Mixter, 5 Allen (Mass.) 27. *Compare* Lawrence *v.* Norfleat, 90 N. C. 533, holding that, under a statute providing that suits against an administrator will be barred within seven years after the qualification of the administrator, a suit by one administrator against another must be commenced within seven years after plaintiff is entitled under his appointment to maintain the actions.

56. Holmes *v.* Brooks, 68 Me. 416.

57. Matter of Howe, 61 Hun (N. Y.) 608, 16 N. Y. Suppl. 465.

58. Vreeland *v.* Westervelt, 45 N. J. Eq. 572, 17 Atl. 695.

59. Buie *v.* Buie, 67 Miss. 456, 7 So. 344.

60. Healy *v.* Buchanan, 34 Cal. 567.

61. Walker *v.* Cady, 106 Mich. 21, 63 N. W. 1005.

62. Campbell *v.* Fleming, 63 Pa. St. 242; Mitcheltree *v.* Veach, 31 Pa. St. 455; Man *v.* Warner, 4 Whart. (Pa.) 455. And see Cotter *v.* Quinlan, 2 Dem. Surr. (N. Y.) 29.

63. Man *v.* Warner, 4 Whart. (Pa.) 455.

If a cause of action against decedent is barred before his death, the statute may be pleaded in an action against his personal representative. Sullivan *v.* Latimer, 38 S. C. 158, 17 S. E. 701.

64. York's Appeal, 110 Pa. St. 69, 1 Atl. 162, 2 Atl. 65 [expressly *overruling* McCandless' Estate, 61 Pa. St. 9; McClintock's Ap-

(B) *Operation and Effect of Special Statutes of Limitations* — (1) IN GENERAL. No delay short of the time fixed by some special statute of limitations will bar a creditor seeking the enforcement of a claim against the estate of a decedent which is not barred by a general statute of limitations; so long as he pursues the remedies pointed out by law within the time it prescribes he is entitled to the aid of the courts in the enforcement of his demand.[65]

(2) STATUTES REQUIRING SUIT WITHIN PRESCRIBED TIME AFTER DEATH, APPOINTMENT, QUALIFICATION, ETC.— (a) SUMMARY OF PROVISIONS. The statutes of the various states fixing special periods of limitation for suits against executors or administrators vary considerably in detail both in respect to the time when the statutory period shall commence to run and the duration thereof. These statutes respectively fix the period at which the statute commences to run as of the death of the testator or intestate; the granting of letters testamentary or of administration, qualification, qualification and notice of appointment, etc.[66]

(b) STATUTES REQUIRING SUIT WITHIN PRESCRIBED TIME AFTER DEATH OF DECEDENT. Statutes requiring creditors of a deceased person to sue within a designated time after his death apply to actions against personal representatives as well as to the heirs.[67] All persons are considered creditors within the meaning of the statute who have demands originating from contracts or agreements.[68] Statutes of this character have been held to apply to a debt, although part of it did not become due until more than the statutory period after decedent's death, if no notice of the debt was given to the personal representative within the statutory period.[69] They do not apply to actions not based on an indebtedness of decedent, such as an action by a surviving partner for an accounting of debts paid by him which should have been paid by decedent,[70] nor to the foreclosure of a trust deed given by him,[71] nor to causes of action accruing after his death,[72] nor will these statutes operate as a bar to creditors not suing within the period thereby fixed where there is no executor or administrator on the estate of decedent during that time.[73]

(c) STATUTES REQUIRING SUIT WITHIN DESIGNATED TIME AFTER GRANT OF LETTERS. Statutes requiring suit against executors or administrators to be brought within a designated time after grant of letters testamentary or of administration apply to actions against executors who are residuary legatees and give bonds for the payment of debts and of legacies;[74] but they do not apply to claims maturing after

peal, 29 Pa. St. 360. In McCandless' Estate, *supra*, it was held that the administrator may in an action against him plead the general statute of limitations, but that the statute cannot be pleaded when the creditor's proceeding in a court having equity jurisdiction is for a distributive portion of the debtor's estate. In McClintock's Appeal, *supra*, it was held in a court of equitable jurisdiction that a debt against the estate of a decedent is not barred by the statute of limitations, where less than six years from the time it accrued had elapsed at the death of the debtor but the six years expired before settlement and distribution of the estate was made.

65. Westbrook *v.* Munger, 61 Miss. 329.

66. See the statutes of various states.

67. Lewis *v.* Hickman, 2 Overt. (Tenn.) 317.

68. Williams *v.* Conrad, 11 Humphr. (Tenn.) 412, holding that a person claiming a life-interest in shares to be conveyed on certain trusts by a person who afterward dies is barred on failure to assert the claim within the time limited.

A state is a creditor within the meaning of these statutes (State *v.* Crutcher, 2 Swan (Tenn.) 504), unless the statute expressly excepts states from their operation (O'Neal *v.* State, 10 Lea (Tenn.) 727).

Until payment by a surety on a judgment rendered against him he is not a creditor within the meaning of the statutes. Marshall *v.* Hudson, 9 Yerg. (Tenn.) 57.

Purchaser of property by decedent not owned by him.— Where one in possession of slaves sold them and died, and the slaves were recovered from the purchaser on the vendor's title being adjudged invalid, it was held that the purchaser was not a creditor of the estate within the meaning of the statute. Caplinger *v.* Vaden, 5 Humphr. (Tenn.) 629.

69. Neil *v.* Hosmer, 5 N. C. 202; McLellan *v.* Hill, 1 N. C. 532.

70. Clanton *v.* Price, 90 N. C. 96.

71. Smith *v.* Goodlett, 92 Tenn. 230, 21 S. W. 106, since the foreclosure does not take away any right which the decedent had from the representative, but leaves him to redeem the same as the decedent might have done.

72. Armistead *v.* Bozman, 36 N. C. 117.

73. McKinder *v.* Littlejohn, 23 N. C. 66.

74. Holden *v.* Fletcher, 6 Cush. (Mass.) 235; Walker *v.* Cheever, 39 N. H. 420.

the decedent's death, their operation being confined to causes of action matured and existing against the decedent at the time of his death.[75]

(d) Statutes Requiring Suit Within Designated Period After Qualification of Representative. By the provisions of some statutes, suit must be brought against a personal representative within a designated period after he has qualified,[76] and if brought after the expiration of that period they are of course barred.[77] These statutes run without regard to the publication of notice for creditors to file their claims.[78] They commence to run on the qualification of the administrator and are not stopped by his subsequent resignation.[79] They include suits on judgments obtained against the decedent during his lifetime;[80] but have no application to claims accruing after death of the decedent,[81] nor to notes given by decedent which are referred to in the schedule of debts attached to a petition to sell real estate filed before the bar of the statute has operated.[82]

(e) Statutes Requiring Suit Within Designated Time After Qualification or Giving Bond and Notice of Appointment. Where statutes provide that a personal representative after giving notice of his appointment is not liable to suit by a creditor unless it is commenced within a designated period after his giving bond the statute does not commence to run from the date that an insufficient bond is given.[83] While the limitation provided for by this statute commences to run from the date of giving bond and not from notice,[84] notice is necessary to render the statute operative,[85] and it must be in strict compliance with the terms of the statute.[86] Failure to give the notice required by this statute does not, however,

75. Wilkinson *v.* Winne, 15 Minn. 159.

76. Union Bank *v.* Powell, 3 Fla. 175, 52 Am. Dec. 367; Champion *v.* Cayce, 54 Miss. 695.

Effect of removal of creditor to or from state.— Under a statute which gives residents of the state two years and non-residents three years within which to commence suits against personal representatives, the residence of a creditor at the time of administration granted determines the bar and his subsequent removal to or from the state will not change the bar. Humbard *v.* Smith, 10 Yerg. (Tenn.) 249.

77. Kesterson *v.* Hill, 101 Va. 739, 45 S. E. 288.

78. Sivley *v.* Summers, 57 Miss. 712; Todd *v.* Wright, 12 Heisk. (Tenn.) 442; Atkinson *v.* Settle, 5 Yerg. (Tenn.) 299; Crabaugh *v.* Hart, 3 Yerg. (Tenn.) 431; Hooper *v.* Bryant, 3 Yerg. (Tenn.) 1.

79. Champion *v.* Cayce, 54 Miss. 695.

80. State Bank *v.* Vance, 9 Yerg. (Tenn.) 471; Peyton *v.* Carr, 1 Rand. (Va.) 436.

81. Sivley *v.* Summers, 57 Miss. 712; Buckingham *v.* Walker, 48 Miss. 609; McLean *v.* Ragsdale, 31 Miss. 701.

Contracts made by a personal representative, although in fulfilment of an executory contract made by decedent, are not within the meaning of the statute. Cummins *v.* Kennedy, 3 Litt. (Ky.) 118, 14 Am. Dec. 45.

Judgments against executor.— A statute providing that no action shall be brought against an executor or administrator upon a judgment obtained against the testator or intestate, and that scire facias shall be issued to revive the same after the expiration of six years from the qualification of the executor or administrator, applies only to judgments against the testator or intestate and not to judgments against executors and administrators. Bingaman *v.* Robertson, 25 Miss. 501. See also Pope *v.* Bowman, 27 Miss. 194.

82. Allen *v.* Shanks, 90 Tenn. 359, 16 S. W. 715.

83. Abercrombie *v.* Sheldon, 8 Allen (Mass.) 532.

Effect of shortening period of limitation.— If the period prescribed by the statute is shortened by an amended statute, the original and not the amended statute applies to actions against personal representatives who gave bond before it took effect (Hildreth *v.* Marshall, 7 Gray (Mass.) 167; King *v.* Tirrell, 2 Gray (Mass.) 331); but a subsequent statute excepting from the operation of the amended statute any right which had accrued or existed against any deceased person or his executor or administrator prior to its passage does not revive a right of action barred by such amended statute before the passage of the subsequent statute (Page *v.* Melvin, 10 Gray (Mass.) 208. See also Thompson *v.* Burnham, 13 Gray (Mass.) 211).

84. Sewall *v.* Valentine, 6 Pick. (Mass.) 276 [*explaining dictum* in *In re* Allen, 15 Mass. 58; Lawrence *v.* Norfleet, 90 N. C. 533].

85. Corliss Steam Engine Co. *v.* Schumacher, 109 Mass. 416; Love *v.* Ingram, 104 N. C. 600, 10 S. E. 77; Lawrence *v.* Norfleet, 90 N. C. 533. And see Gilbert *v.* Little, 2 Ohio St. 156.

86. Slattery *v.* Doyle, 180 Mass. 27, 61 N. E. 264, holding that where defendant in accordance with the statute was ordered to give notice by publication in a certain newspaper once a week for three weeks but published the notice three times in one week and once in the week following the notice was insufficient.

affect the running of the general statutes of limitations.[87] By further statutory provisions in one jurisdiction where the administrator had assets and sets up the statute he must show that he has properly administered the same.[88] If it is ascertained that he has no assets the statute is a complete bar.[89] The allowance of further time to settle the estate does not take the case out of the operation of the statutes.[90] Where no bond is required or given, the right of the creditor to bring an action is barred on the expiration of the statutory period after time of appointment, notice having been duly given.[91] Where the right of action accrued subsequent to qualification, the statute commences to run from the date of the accrual.[92] The statute applies to suits in equity as well as to suits at law,[93] to claims on judgments against the decedent,[94] to a claim by a widow for a year's support allowed her by statute,[95] to actions by a collector of taxes against the administrator,[96] and to claims in favor of the administrator himself.[97] The statute has no application to claims for specific property held in trust by deceased,[98] nor to actions on demands against the executor himself,[99] nor to a bill against an administrator who has converted complainant's property to the use of decedent's estate.[1] So the statutes have no application to actions which do not accrue within the period fixed thereby.[2] In computing the time within which action may be brought the day on which the bond was given must be excluded.[3]

(f) Statutes Requiring Suit Within Designated Time After Probate and Notice of Appointment. Where a statute provides that no action shall be brought against any executor or administrator in his representative capacity after three years from probate of the will or grant of administration, provided notice of his appointment be given, the statutory period to be reckoned from the time of giving notice, it is of course obvious that the time commences to run from the day of notice of appointment.[4] To put this statute in operation notice is necessary,[5]

Publication of an administrator's qualification in a newspaper printed in the county is not a sufficient compliance with the statutory requirement that qualification be advertised at the court-house door, and does not entitle the administrator to the benefit of the statute. McLin *v.* McNamara, 22 N. C. 82. And see Cooper *v.* Cherry, 53 N. C. 323; Salter *v.* Blount, 22 N. C. 218; Bond *v.* Allen, 3 Fed. Cas. No. 1,619, Brunn. Col. Cas. 3, 1 N. C. 83.

87. Toby *v.* Allen, 3 Kan. 399; Corliss Steam Engine Co. *v.* Schumacher, 109 Mass. 416.

88. Little *v.* Duncan, 89 N. C. 416; McKeithan *v.* McGill, 83 N. C. 517; Cooper *v.* Cherry, 53 N. C. 323; Reeves *v.* Bell, 47 N. C. 254; Godley *v.* Taylor, 14 N. C. 178.

89. Little *v.* Duncan, 89 N. C. 416.

90. Gilbert *v.* Little, 2 Ohio St. 156.

91. Delaplane *v.* Smith, 38 Ohio St. 413. And see Jones *v.* Jones, 41 Ohio St. 417, holding that if because of the provisions in the will the executor is not required to give bond the statute commences to run from the time of this qualification.

92. Miller *v.* Shoaf, 110 N. C. 319, 14 S. E. 800; Godley *v.* Taylor, 14 N. C. 178; Trott *v.* West, 9 Yerg. (Tenn.) 433; Bradford *v.* McLemore, 3 Yerg. (Tenn.) 318.

93. Burditt *v.* Grew, 8 Pick. (Mass.) 108.

94. Scroggs *v.* Tutt, 23 Kan. 181; McLellan *v.* Lunt, 11 Me. 150.

95. *In re* Glenn, 23 Ohio Cir. Ct. 397.

96. Rich *v.* Tuckerman, 121 Mass. 222, 223, where it is said: "The collector has the rights of a creditor, and may pursue the same remedy, and it follows that, in so doing, he must be subject to the provisions of law that apply to other creditors."

97. *In re* Ward, 21 Ohio Cir. Ct. 753, 12 Ohio Cir. Dec. 44.

98. Johnson *v.* Ames, 11 Pick. (Mass.) 173.

Actions to recover property.— Where the parties were descendants of a common ancestor and plaintiff brought an action for the sale of certain family portraits, claiming an interest under a will, while defendant claimed that they passed to him with the mansion-house and also by adverse possession, the suit being to determine the rights of the parties to property, the special statute limiting time of action for "claims against the estate" did not apply. Haven *v.* Haven, 181 Mass. 573, 64 N. E. 410.

99. Dallinger *v.* Davis, 149 Mass. 62, 20 N. E. 696.

1. Nashua Sav. Bank *v.* Abbott, 181 Mass. 531, 63 N. E. 1058, 92 Am. St. Rep. 430.

2. McClaskey *v.* Barr, 79 Fed. 408.

3. Paul *v.* Stone, 112 Mass. 27.

4. Lynch *v.* Farnell, 24 R. I. 496, 53 Atl. 869; Bosworth *v.* Smith, 9 R. I. 67; Miner *v.* Aylesworth, 18 Fed. 199. And see Thompson *v.* Hoxsie, 24 R. I. 493, 53 Atl. 873.

5. **If no notice is given** the special statute relating to actions against personal representatives has no application. The time within which suit must be brought is under

and the notice must be published in accordance with the provisions of the statute.[6] This statute applies to suits in equity as well as to actions at law,[7] and to contributions decreed to be due from the stock-holders of a bank under a section of their charter making them personally liable for "all losses, deficiencies, or failure of the capital stock of said bank."[8] It does not apply to a bill against an administrator not in his capacity as such but as trustee.[9]

(3) Statutes Permitting Suit Within Designated Period After Death of Grant of Administration. In many jurisdictions statutes are in force which provide in effect that if a person liable to action dies before the expiration of the time limited for action and the cause of action survives it may be commenced against his personal representative after the expiration of that time and within a specified period after administration granted. So in other jurisdictions statutes have been enacted which are in all respects the same except that the period prescribed runs from the death of the decedent instead of the time when administration is granted.[10] Their object is to extend the time in certain cases within which actions may be commenced and they are not intended under any circumstances to limit the time given by other statutes of limitations.[11] Consequently an action accruing against decedent in his lifetime is not barred merely because it was not commenced within the period after grant of administration fixed by the special statute under consideration, but it will be seasonably commenced if

these circumstances governed by the general statute of limitations. Knowles *v.* Whaley, 15 R. I. 97, 23 Atl. 144.

Notice by an administrator de bonis non.— Where an executor publishes no notice of his appointment and an administrator *de bonis non* with the will annexed is subsequently appointed and publishes notice the statute only commences to run from the date of the publication. Lynch *v.* Farnell, 24 R. I. 496, 53 Atl. 869.

Where an administrator dies after qualifying and without fully administering the estate and an administrator *de bonis non* is appointed, the statutory period commences to run from the qualification of the original administrator and notice of appointment as by express provision of the statute, the new administration is under these circumstances considered a continuance of the original administration. Thompson *v.* Hoxsie, 25 R. I. 377, 55 Atl. 930.

Change of statute pending settlement of estate.— Where, pending settlement of an estate, a statute requiring suit to be brought within three years from the time of giving notice of appointment is amended so as to make the limitation two years, the earlier statute governs actions brought against the administrator, and an action commenced within three years after notice is seasonably brought. Gunn *v.* Kelliher, 20 R. I. 180, 38 Atl. 8.

6. Lynch *v.* Farnell, 24 R. I. 496, 53 Atl. 869, holding that the fact that the executor made a payment on account of the creditor's claim, and that the creditor had actual knowledge that he was acting as executor of the estate did not satisfy the terms of the statute, for without the notice no time is fixed for the statute to run at all.

7. Warren *v.* Providence Tool Co., 19 R. I. 656, 35 Atl. 1041.

A suit in equity cannot be maintained against the executor of a deceased stock-holder of a corporation, the members of which are liable for the corporate debts or the payment of the debt out of the personal assets of the testator, after the lapse of three years from publication of notice. New England Commercial Bank *v.* Newport Steam Factory, 6 R. I. 154, 75 Am. Dec. 688.

8. Atwood *v.* Rhode Island Agricultural Bank, 2 R. I. 191, holding that this is so, even though the three years have elapsed before the deficiency in the capital stock is discovered, and, although the administrator may have received dividends on the shares on which contributions are decreed more than three years after administration is granted.

9. Randall *v.* Peckham, 10 R. I. 545, in which the statute was held not to apply to a bill in equity against an administrator to obtain surrender of mortgage notes given his intestate and cancellation of the mortgage and to enjoin a sale thereunder on the ground of a release by intestate.

10. See statutes of various states and cases cited in subsequent notes in this section.

11. *California.*— Lowell *v.* Kier, 50 Cal. 646; Smith *v.* Hall, 19 Cal. 85.

Florida.— Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526.

Nevada.— Rickards *v.* Hutchinson, 18 Nev. 215, 2 Pac. 52, 4 Pac. 702; Wick *v.* O'Neale, 2 Nev. 303.

New York.— Scovil *v.* Scovil, 45 Barb. 517.

Oregon.— Blaslower *v.* Speel, 23 Oreg. 106, 31 Pac. 253.

"To avoid the harshness and injustice of this rule, which often barred a cause of action without any fault or laches on the part of the creditor, the statute in question was enacted, which preserves to the creditor the right to bring an action within six months after the appointment of an executor or administrator, when the time limited would otherwise expire subsequent to the death of the debtor, and before the appointment of his personal repre-

brought within the period prescribed by the general statute of limitations;[12] and on the other hand by the express provision of the statutes an action not barred at decedent's death if brought within the period fixed by the special statute will be seasonably commenced, although the period fixed by the general statute for bringing suit has expired.[13] It has also been held that a suit brought within the period fixed by the special statute will be seasonably brought no matter how long the appointment had been delayed.[14] Nevertheless, if at the time the special statute commences to run, a portion of the time fixed by the general statute longer than that fixed by the special statute remains unexpired, the period fixed by the general statute controls and the special statute cannot operate to extend the time for bringing suit.[15] So if the suit is brought after the expiration both of the general statutes of limitations and of the period fixed by statutes of the character under consideration it is barred.[16] And of course these special statutes do not have the effect of reviving a cause of action barred at the time of decedent's death.[17] As is obvious from their language they apply only to cases where the general statute of limitations has commenced to run.[18] Nor have they any application to executors *de son tort* who may be sued immediately after intermedling.[19] They have been held to apply to suits to foreclose mortgages given to secure notes not barred by limitation when the maker died, although the personal representative is not a party thereto.[20] These statutes are applicable whether the administrator has given notice of his appointment or not.[21]

(4) Statutes Requiring Suit Within Designated Time After Rejection of Claim — (a) Nature and Effect of Statutes. In some states, by virtue of express statutory provisions, suit must be brought on claims presented by the holder and rejected by the personal representative within a designated time after rejection, in default of which the claim shall be forever barred,[22] and when the

sentative." Blaskower *v.* Steel, 23 Oreg. 106, 108, 31 Pac. 253.

12. Lowell *v.* Kier, 50 Cal. 646; Hall *v.* Brennan, 140 N. Y. 409, 35 N. E. 663.

13. *California.*— Hibernia Sav., etc., Soc. *v.* Hebert, 53 Cal. 375.

Florida.— Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526.

Illinois.— Roberts *v.* Tunnell, 165 Ill. 631, 46 N. E. 713 [*affirming* 65 Ill. App. 191]; Higgins *v.* Spring, 36 Ill. App. 310.

Indiana.— Roeder *v.* Keller, 135 Ind. 692, 35 N. E. 1014; Epperson *v.* Hostetter, 95 Ind. 583; Knippenberg *v.* Morris, 80 Ind. 540; Harris *v.* Rice, 66 Ind. 267.

Michigan.— Sword *v.* Keith, 31 Mich. 247.

Mississippi.— Klaus *v.* Moore, 77 Miss. 701, 27 So. 612; Clayton *v.* Merrett, 52 Miss. 353. And see Weir *v.* Monahan, 67 Miss. 434, 7 So. 291; Sledge *v.* Jacobs, 58 Miss. 194; Adams *v.* Williams, 57 Miss. 38; Bissinger *v.* Lawson, 57 Miss. 36.

Nevada.— Wick *v.* O'Neale, 2 Nev. 303.

New Hampshire.— Brown *v.* Leavitt, 26 N. H. 493.

New York.— Sanford *v.* Sanford, 62 N. Y. 553; Scovil *v.* Scovil, 45 Barb. 517.

North Carolina.— Winslow *v.* Benton, 130 N. C. 58, 40 S. E. 840; Benson *v.* Bennett, 112 N. C. 505, 17 S. E. 432.

Vermont.— Briggs *v.* Thomas, 32 Vt. 176; Hapgood *v.* Southgate, 21 Vt. 384.

Wisconsin.— Boyce *v.* Foote, 19 Wis. 199.

Compare Louisville, etc., R. Co. *v.* Brantley, 106 Ky. 849, 51 S. W. 585, 21 Ky. L. Rep. 473, in which it was held that under St. § 2516, providing that an action for an injury to the person of plaintiff shall be commenced within one year next after the cause of action accrued, "and not thereafter," and section 2526, providing that if a person entitled to bring such an action "dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, the action thereon may be brought by his representative after the expiration of that time, if commenced within one year after his qualification," the death of the person injured does not stop the running of the statute; and if one year elapses after the injury before the qualification of a personal representative the bar is complete, section 2526 having no application except where the personal representative qualifies before the expiration of the period of limitation.

14. Danglada *v.* De la Guerra, 10 Cal. 386.

15. Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526; Jones *v.* Mitchell, 9 Ky. L. Rep. 858; Hambrick *v.* Jones, 64 Miss. 240, 8 So. 176. And see Blaskower *v.* Steel, 23 Oreg. 106, 31 Pac. 253; Briggs *v.* Thomas, 32 Vt. 176.

16. McNeill *v.* Gallagher, 24 R. I. 490, 53 Atl. 630. And see Schwartz *v.* Stock, 26 Nev. 155, 65 Pac. 357.

17. Hibernia Sav., etc., Assoc. *v.* Herbert, 53 Cal. 375.

18. Smith *v.* Hall, 19 Cal. 85.

19. Chambers *v.* David, 1 Hill (S. C.) 50.

20. Roberts *v.* Tunnell, 165 Ill. 631, 46 N. E. 713 [*affirming* 65 Ill. App. 191].

21. Lancey *v.* White, 68 Me. 28.

22. *Arizona.*—Underwood *v.* Brown, (1900) 60 Pac. 700.

bar of the statute has attached no act or omission of the personal representative can revive it.[23] These statutes are independent of and collateral to the general statutes of limitation,[24] and are manifestly designed to put all claims upon an equal footing. Their practical effect is to bar some claims in a much less time than the general statute does and in other cases the time may be somewhat extended.[25] It has been held that they are not statutes of limitation in the sense that the operation thereof will be suspended by constitutional provisions suspending all statutes of limitation in civil suits.[26] They are considered highly penal in their nature, must be construed with great strictness, and in order to bring a case within their provisions and to make them available to the personal representative, all the requisites of the statute must have been strictly complied with and their terms implicitly obeyed.[27]

(b) Claims to Which Statutes Are Applicable. The statutes apply to claims arising after decedent's death as well as to claims arising in his lifetime,[28] and their operation is not suspended as to a rejected claim secured by mortgage by the filing of a bill within the statutory period for a foreclosure of the mortgage.[29] So a claim which becomes due on presentation is a claim "then due" within the meaning of the statutes.[30] They have no application, however, in respect of claims which need not be presented for allowance.[31] They do not authorize suits

California.— Benedict *v.* Hoggin, 2 Cal. 385.

Nevada.— Wick *v.* O'Neale, 2 Nev. 303.

New York.— Cramer *v.* Bedell, 10 N. Y. St. 817.

Ohio.— McKent *v.* Kent, 2 Ohio Dec. (Reprint) 370, 2 West. L. Month. 540; Pollock *v.* Pollock, 2 Ohio Cir. Ct. 140, 1 Ohio Cir. Dec. 408. And see Crouse *v.* Frybarger, 22 Ohio Cir. Ct. 315, 12 Ohio Cir. Dec. 254.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1758.

A statute requiring action to be brought as speedily as the same can be done after disallowance of a claim against an estate represented as insolvent does not require such action to be commenced at the next succeeding term of court in all cases. The intent of the legislature is that this should be done as speedily as possible having regard to the place of residence and of the circumstances of the parties. Guild *v.* Hale, 15 Mass. 455.

Effect of partial rejection.— Where a claim consists of independent items and the executor admits some and rejects others, the statute commences to run against the rejected items from the date of the rejection. Wintermeyer *v.* Sherwood, 77 Hun (N. Y.) 193, 28 N. Y. Suppl. 449, 23 N. Y. Civ. Proc. 422.

23. Selover *v.* Coe, 63 N. Y. 438; Miller *v.* Ewing, 68 Ohio St. 176, 67 N. E. 292 (holding that the representative cannot waive the statute by estoppel); Pollock *v.* Pollock, 2 Ohio Cir. Ct. 140, 1 Ohio Cir. Dec. 408; Flynn *v.* Diefendorf, 51 Hun (N. Y.) 194, 4 N. Y. Suppl. 934 (holding that after the statutory period has elapsed an agreement between the creditor and executrix to refer the claim does not waive the bar of the statute); Willis *v.* Talbert, (Tex. Sup. 1889) 11 S. W. 535.

24. Barclay *v.* Blackington, 127 Cal. 189, 59 Pac. 834.

25. Continental L. Ins. Co. *v.* Barber, 50 Conn. 567, holding that where decedent's note had been presented to the executors within the six months limited by the probate court therefor, and within the period fixed by the general statute (six years), an action brought within the four months prescribed by statute from rejection of the claim was not barred, although more than six years had elapsed since the right of action first accrued. *Compare* Barclay *v.* Blackington, 127 Cal. 189, 59 Pac. 834, in which it was said that while these statutes may shorten they cannot lengthen the operation of the general statute.

26. Stanfield *v.* Neill, 36 Tex. 688; Walker *v.* Taul, 1 Tex. App. Civ. Cas. § 28.

27. Robeson *v.* Niles, 7 Mackey (D. C.) 182; Coburn *v.* Harris, 53 Md. 367; Peterson *v.* Ellicott, 9 Md. 52; Potts *v.* Baldwin, 67 N. Y. App. Div. 434, 74 N. Y. Suppl. 655; Broderick *v.* Smith, 3 Lans. (N. Y.) 26; Calanan *v.* McClure, 47 Barb. (N. Y.) 206; Geer *v.* Archer, 2 Barb. (N. Y.) 420; Van Saun *v.* Farley, 4 Daly (N. Y.) 165; Adler *v.* Davis, 31 Misc. (N. Y.) 47, 63 N. Y. Suppl. 241; Reynolds *v.* Collins, 3 Hill (N. Y.) 36; Elliott *v.* Cronk, 13 Wend. (N. Y.) 35. But see Miller *v.* Ewing, 68 Ohio St. 176, 67 N. E. 292, in which it was said that the statutes should receive a liberal construction.

28. Cornes *v.* Wilkin, 14 Hun (N. Y.) 428.

Funeral expenses.— A statute providing that where an administrator rejects a claim against decedent's estate, either before or after publication of notice to present claims, claimant must commence action thereon within six months, applies to claims for funeral expenses as well as those arising before the death. Koons *v.* Wilkin, 2 N. Y. App. Div. 13, 37 N. Y. Suppl. 640.

29. Ware *v.* Weatherby, (N. J. Sup. 1900) 45 Atl. 914.

30. Maurer *v.* King, 127 Cal. 114, 59 Pac. 290.

31. National Guarantee Loan, etc., Co. *v.* Fly, 29 Tex. Civ. App. 533, 69 S. W. 231.

on claims not due.[32] Nor have they any application to claims arising on dealings with the personal representative.[33]

(c) Steps Necessary to Make Statute Available — aa. *Presentation and Rejection of Claim.* To make the statute available therefore the claim must have been presented by the claimant or by someone duly authorized by him to make presentation,[34] and the claim so presented must be properly authenticated, for otherwise it stands on the same footing as if it had never been exhibited.[35] The claim must be presented to and rejected by the personal representative,[36] or by someone whom he has directed to reject the claim.[37] The rejection must be express, unequivocal, and final.[38] Whatever may be the language or declaration of the

32. Brooks *v.* Lawson, 136 Cal. 10, 68 Pac. 97; Radue *v.* Pauwelyn, 27 Mont. 68, 69 Pac. 557. A statute requiring a plaintiff to sue on a bond, or on claims for breaches thereof, within nine months after their rejection by the administrator, has no reference to a possible or contingent claim that might arise from further breaches of a bond. Orendorff *v.* Utz, 48 Md. 298.

Contingent claims are claims not due within a statute requiring rejected claims not due to be sued on within a designated time after they become due. Morse *v.* Steele, 132 Cal. 456, 64 Pac. 690.

33. Coburn *v.* Harris, 58 Md. 87, the reason for requiring presentation of claims is that the administrator is supposed to be ignorant of the character of such claims and in direct dealings with the administrator himself the reason of the rule ceases.

34. Coburn *v.* Harris, 53 Md. 367; Peterson *v.* Ellicott, 9 Md. 52, holding that the statute is not available to the personal representative where it does not affirmatively appear that the person presenting the claim was plaintiff's agent.

35. Washington Loan, etc., Co. *v.* Darling, 21 App. Cas. (D. C.) 132; Coburn *v.* Harris, 53 Md. 367; Crosby *v.* McWillie, 11 Tex. 94.

When claim considered sufficiently authenticated.— After a claim against an estate had been presented and rejected by the executrix, plaintiff's attorney, deeming the claim not sufficiently formal, again presented it to the executrix's attorney, who simply took the claim and said it would be again rejected and it was so rejected by the executrix. There was nothing said at the second presentation by defendant's attorney as to the informality of the first presentation or that it would be considered as not having been before rejected. It was held that the statute limiting the time of action on rejected claims began to run from the first rejection. Gillespie *v.* Wright, 93 Cal. 169, 28 Pac. 862.

36. Ulster County Sav. Inst. *v.* Young, 161 N. Y. 23, 55 N. E. 483 [*affirming* 15 N. Y. App. Div. 181, 44 N. Y. Suppl. 493]; Hardy *v.* Ames, 47 Barb. (N. Y.) 413; Whitmore *v.* Foose, 1 Den. (N. Y.) 159. And see Morgan *v.* Barthelte, 3 Ohio Cir. Ct. 431, 2 Ohio Cir. Dec. 244.

Limitation of rule.— When a claim against a decedent's estate has been passed by the orphans' court and payment of the same demanded by the creditor and refused by the administrator, or one of two administrators, then an action to recover it must be begun within nine months thereafter. In such case it is not necessary that there should be a physical exhibition of the claim to the administrator in order that the statutory limitation should begin to run. But when the claim has not been passed by the orphans' court there must be a physical presentation of it properly authenticated to the administrator in order that his refusal to pay may be such as to require suit to be brought by the claimant within nine months. Bradford *v.* Street, 84 Md. 273, 35 Atl. 886.

37. Selover *v.* Coe, 63 N. Y. 438; Wintermeyer *v.* Sherwood, 77 Hun (N. Y.) 193, 28 N. Y. Suppl. 449; Miller *v.* Ewing, 68 Ohio St. 176, 67 N. E. 292, in all of which cases it was held that a rejection by an attorney directed so to do is sufficient, because when the representative gives to the attorney instructions how to act, it is not a delegation of the trust but a performance of it by the representative acting through another. If, however, the claim was merely presented to and rejected by the attorney of the personal representative who had no directions to reject it, such rejection would not make the statute available. See cases cited in preceding note.

Rejection by court after rejection by representative.— Where a claim is presented to the representative and rejected, and subsequently presented to the county court and rejected, the statutory period runs from the date of rejection by the representative, and not from the date of rejection by the county court. The statute providing that when a claim is rejected either by the executor or administrator of a county judge suit must be brought within three months from same rejection, not contemplating the presentation of the rejected claims to the county court. Farwell *v.* Richardson, 10 N. D. 34, 84 N. W. 558.

38. Ukiah Bank *v.* Shoemake, 67 Cal. 147, 4 Pac. 420; Caulfield *v.* Green, 73 Conn. 321, 47 Atl. 334; Ulster County Sav. Inst. *v.* Young, 161 N. Y. 23, 55 N. E. 483 [*affirming* 15 N. Y. App. Div. 181, 44 N. Y. Suppl. 493]; Adler *v.* Davis, 31 Misc. (N. Y.) 47, 63 N. Y. Suppl. 241; Barsalou's Case, 4 Abb. Pr. (N. Y.) 135; Barsalou *v.* Wright, 4 Bradf. Surr. (N. Y.) 164; Woodlief *v.* Bragg, 108 N. C. 571, 13 S. E. 211.

Limitations of rule.— By the express provisions of some statutes a claim which is not acted on by the personal representative within ten days after presentation will be

representative to the claimant if in the same notice or declaration or at the same time he does or says anything from which the claimant may reasonably infer that the determination to dispute or reject the claim is not final, but that it will be further examined or considered either upon the vouchers already exhibited or such as may be thereafter presented, the claim is not "disputed or rejected" within the meaning of the statute.[39] The claim rejected must also be the same as that sued on or the statute will not apply,[40] but this does not mean that a party whose claim is rejected can evade the statute by successive presentation of claims founded on the same transaction but varying in form or detail.[41]

bb. *Notice of Rejection of Claim.* So knowledge of the rejection of a claim must be brought home to the claimant,[42] and the rejection is operative only from the

deemed rejected. This does away with the requirement of express rejection; the statute commences to run from the expiration of the ten-day period when no action is taken on the claim and if the action is not brought within the statutory period thereafter the claim is effectually barred. Underwood *v.* Brown, (Ariz. 1900) 60 Pac. 700; Farwell *v.* Richardson, 10 N. D. 34, 84 N. W. 558; Boyd *v.* Van Neida, 9 N. D. 337, 83 N. W. 329. By the provisions of the statutes of another state if a claim is not acted on within ten days it is optional with the claimant to deem the neglect equivalent to a rejection. He need not consider it so unless he chooses. Cowgill *v.* Dinwiddie, 98 Cal. 481, 33 Pac. 439; Stewart *v.* Hinkel, 72 Cal. 187, 13 Pac. 494; Ukiah Bank *v.* Shoemake, 67 Cal. 147, 7 Pac. 420. The claimant can treat the proceedings as nugatory and file a new claim and thus avoid the running of the statute. Stewart *v.* Hinkel, 72 Cal. 187, 13 Pac. 494.

39. Hoyt *v.* Bonnett, 50 N. Y. 538; Reynolds *v.* Collins, 3 Hill (N. Y.) 36; Elliott *v.* Cronk, 13 Wend. (N. Y.) 35; Kidd *v.* Chapman, 2 Barb. Ch. (N. Y.) 414.

Rejections held insufficient to set statute in motion.— A mere statement by an executor that he doubted the justice of plaintiff's claim and an offer to refer it to disinterested persons. Matter of Eichman, 33 Misc. (N. Y.) 322, 68 N. Y. Suppl. 636. A letter by the executor in which he stated that he would not be ready to settle the estate and that the claim presented would not be considered until he had seen claimant. Caulfield *v.* Green, 73 Conn. 321, 47 Atl. 334. A rejection upon any other ground than that the debt claimed or some part thereof is not legally or equitably due. Kidd *v.* Chapman, 2 Barb. Ch. (N. Y.) 414. A statement by the representative that he felt obliged to reject the claim followed by conduct which would create an impression that the claim had not been finally rejected. Calanan *v.* McClure, 47 Barb. (N. Y.) 206.

Rejections held sufficient to set statutes in motion.— A statement by the administrator within a reasonable time after exhibition of the claim that the claim is rejected and that all claimant will get on it will be at the end of a lawsuit. Miller *v.* Ewing, 68 Ohio St. 176, 67 N. E. 292. A verbal statement that the claim is disputed and rejected, there being no statutory requirement of written notice or that it should be in any particular form. Peters *v.* Stewart, 2 Misc. (N. Y.) 357, 21 N. Y. Suppl. 993.

40. Robeson *v.* Niles, 7 Mackey (D. C.) 182, so holding where the claim was originally presented and rejected and was for services rendered as attorney and trustee, while that sued on was for services as attorney only. *Compare* Willis *v.* Talbert, (Tex. Sup. 1889) 11 S. W. 535, holding that under a statute providing that where a claim for money against an estate has been rejected in whole or in part, the owner must sue within ninety days thereafter, the statute is set in motion on rejection of the claim because proper credits had not been entered thereon, and cannot be revived by a second presentation ninety days thereafter and indorsement thereon by the administrator of a portion of the claim.

41. Titus *v.* Poole, 145 N. Y. 414, 40 N. E. 228 [*affirming* 73 Hun 383, 26 N. Y. Suppl. 451].

42. Potts *v.* Baldwin, 67 N. Y. App. Div. 434, 74 N. Y. Suppl. 655; Steward *v.* Hinkle, 72 Cal. 187, 13 Pac. 494; Van Saun *v.* Farley, 4 Daly (N. Y.) 165.

Sufficient and insufficient notice illustrated. — Notice to an attorney employed by the claimant to make out in legal shape and present the claim has been held not notice to the creditor (Van Saun *v.* Farley, 4 Daly (N. Y.) 165); and the filing of a notice on rejection in a proceeding in a surrogate's court to which the claimant was an involuntary party does not obviate the necessity of bringing knowledge of the rejection home to her (Potts *v.* Baldwin, 67 N. Y. App. Div. 434, 74 N. Y. Suppl. 655); so the mere fact that an attorney who had a claim against a decedent's estate for collection appeared in the proceedings in the surrogate's court in which such claim was rejected has been held insufficient to charge the claimant with notice of such rejection (Potts *v.* Baldwin, *supra*); but it has been held that a written notice by an administrator rejecting a claim left at claimant's house with a person of suitable age to inform the bearer that claimant was not home is equivalent to personal notice and sufficient to set the statute in motion (Peters *v.* Stewart, 2 Misc. (N. Y.) 357, 21 N. Y. Suppl. 993 [*reversing* 1 Misc. 8, 20 N. Y. Suppl. 661]).

Where the actual date of rejection is concealed from the claimant the statute only

time of actual notice to him.[43] Under former New York statutes,[44] the statute could be set up only in cases where the presentation and rejection of a claim occurred after publication of notice requiring creditors to present their claims against the estate,[45] but under the present provision[46] notice to present claims prior to presentation and rejection thereof is not necessary to set the statute in motion,[47] and according to a number of decisions no notice at all is necessary to set the statute in motion, the view being taken that where a claim has been presented and rejected there is no object in giving notice to the creditor whose claim has been so presented and rejected.[48]

(d) Miscellaneous. In computing the time within which a rejected claim must be sued on, the day of rejection must be excluded.[49] If a claim which has been allowed is subsequently rejected the statute runs from the date of the rejection.[50] The statutes do not run in favor of a representative who at the time the action accrues and continuously thereafter resides out of the state.[51] And where the personal representative rejects a claim presented by the administrator of a creditor residing in another state an action on such claim is not barred by the statute of limitations.[52]

(c) *Suspension of Operation of Statutes of Limitations* — (1) Death of Testator or Intestate. Where a cause of action has not accrued against a person at the time of his death the general statute of limitations does not commence to run until there is administration upon decedent's estate; because until that time a cause of action has never accrued, there being no one who could be

commences to run from the date on which the claimant was actually notified of the rejection of his claim. Cowgill *v.* Dinwiddie, 98 Cal. 481, 33 Pac. 439.

Withdrawal of notice.— Where an administrator after disallowing a claim and giving notice requested the creditor not to sue, expressing his belief that the claim would be compromised, and the creditor at the special instance and request of the administrator delayed the commencement of his suit accordingly, it was held that this conduct of the administrator was equivalent to an express declaration that he would not insist upon the disallowance and notice and justified the jury in finding a waiver. Husted *v.* Hoyt, 12 Conn. 160.

43. Cowgill *v.* Dinwiddie, 98 Cal. 481, 33 Pac. 439; Robbins *v.* Coffing, 52 Conn. 118.

As he cannot maintain a suit on his claim until it is rejected he has an absolute right to be informed of its rejection by the representative, who alone knows what form of action has been taken with respect to it. Steward *v.* Hinkle, 72 Cal. 187, 13 Pac. 494.

44. 2 Rev. St. 88, 89, §§ 34–38, 39.

45. Tucker *v.* Tucker, 4 Abb. Dec. (N. Y.) 428, 4 Keyes (N. Y.) 136; Hardy *v.* Ames, 47 Barb. (N. Y.) 413; Dolbeer *v.* Casey, 19 Barb. (N. Y.) 149; Whitmore *v.* Foose, 1 Den. (N. Y.) 159; Clark *v.* Sexton, 23 Wend. (N. Y.) 477; Flagg *v.* Ruden, 1 Bradf. Surr. (N. Y.) 193.

46. N. Y. Code Civ. Proc. § 1822, providing that "where an executor or administrator disputes or rejects a claim against the estate of the decedent, exhibited to him, either before or after the commencement of the publication of a notice requiring the presentation of claims, as prescribed by law, . . . the claimant must commence an action . . . within six months after the dispute or rejection, . . . in default whereof," etc.

47. Snell *v.* Dale, 17 N. Y. Suppl. 575.

Claims presented and rejected before the enactment of the statute are not within its provisions. *In re* Haxtun, 102 N. Y. 157, 6 N. E. 111 [*reversing* 33 Hun 364].

Sufficiency of notice.— Under a statute requiring administrators to publish notice to creditors that they would be required to present their claims against the estate, notice that creditors were requested to present their claims is sufficient. Prentice *v.* Whitney, 8 Hun (N. Y.) 300.

48. Field *v.* Field, 77 N. Y. 294 (in which it was said that claims against the estate may be presented at any time after the personal representative qualifies and enters on the discharge of his duty and that when he examines and decides on the justice of the claim presented, although no notice to creditors has been published, the effect of his decision is the same as though the claim was presented after publication of such notice); Wintermeyer *v.* Sherwood, 77 Hun (N. Y.) 193, 28 N. Y. Suppl. 449. *Contra*, Salomon *v.* Heickel, 4 Dem. Surr. (N. Y.) 176.

49. Hunter *v.* Lanius, 82 Tex. 677, 18 S. W. 201.

50. Stewart *v.* McLaughlin, 47 Ohio St. 555, 28 N. E. 175; Kyle *v.* House, 38 Tex. 155.

51. Hayden *v.* Pierce, 71 Hun (N. Y.) 593, 25 N. Y. Suppl. 55 [*affirmed* in 144 N. Y. 512, 39 N. E. 638, 1 N. Y. Annot. Cas. 205].

52. Cobb *v.* Norwood, 11 Tex. 556, holding further that an administrator of a creditor being appointed in the state where decedent dies he might commence suit within three months after presenting the claim.

sued.[53] On the other hand the rule is well settled that if the cause of action accrues in decedent's lifetime his death does not, in the absence of legislation to the contrary, suspend the running of the statute until administration is taken out,[54] even though the debtor may die within the period fixed by statute and by reason of litigation as to the right to probate an executor or administrator may be appointed until after expiration of the time limited.[55] The harshness of this rule has, however, led to the enactment of special legislation in many jurisdictions, the effect of which is to materially modify it.[56]

(2) Presentation and Allowance of Claim. Because of a difference in the provisions of the statutes of the various states, there is lack of uniformity in the decisions as to whether or not presentation alone, or presentation and allow-

53. Abbott *v.* McElroy, 10 Sm. & M. (Miss.) 100; Jolliffe *v.* Pitt, 2 Vern. Ch. 694. See also Elwell *v.* Roper, 72 N. H. 254, 56 Atl. 342. But see Hibernia Sav., etc., Soc. *v.* Conlin, 67 Cal. 178, 7 Pac. 477.

Where a parent agrees to compensate his daughter by his will for her services and no compensation is made, an action by her will lie against his administrator to recover for such services; and the claim will not be barred by limitations until after the lapse of the statutory period after administration granted. Tuohy *v.* Trail, 19 App. Cas. (D. C.) 79. And see Sword *v.* Keith, 31 Mich. 247.

54. *Alabama.*— Johnson *v.* Wren, 3 Stew. 172.

Arkansas.— Whipple *v.* Johnson, 66 Ark. 204, 49 S. W. 827; Biscoe *v.* Madden, 17 Ark. 533; Brown *v.* Merrick, 16 Ark. 612; Etter *v.* Finn, 12 Ark. 632.

California.— Quivey *v.* Hall, 19 Cal. 97.

Florida.— Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526.

Illinois.— Bonney *v.* Stoughton, 122 Ill. 536, 13 N. E. 833; Baker *v.* Brown, 18 Ill. 91.

Louisiana.— Linderman's Succession, 3 La. Ann. 714; Dubreuil's Succession, 12 Rob. 507.

Mississippi.— Abbott *v.* McElroy, 10 Sm. & M. 100.

New Jersey.— Dekay *v.* Darrah, 14 N. J. L. 288. *Compare* Burnet *v.* Bryan, 6 N. J. L. 377.

New York.— Sanford *v.* Sanford, 62 N. Y. 553; Church *v.* Alendorf, 49 Hun 439, 3 N. Y. Suppl. 557; Matter of Howard, 11 Misc. 224, 32 N. Y. Suppl. 1098 [*affirmed* in 36 N. Y. Suppl. 1126].

North Carolina.— Copeland *v.* Collins, 122 N. C. 619, 30 S. E. 315 [*distinguishing* Long *v.* Clegg, 94 N. C. 763]; Daniel *v.* Laughlin, 87 N. C. 433; Armistead *v.* Bozman, 36 N. C. 117; Godley *v.* Taylor, 14 N. C. 178; Jones *v.* Brodie, 7 N. C. 594. *Compare* Baird *v.* Reynolds, 99 N. C. 469, 6 S. E. 377.

Pennsylvania.— Mitcheltree *v.* Veach, 31 Pa. St. 455.

South Carolina.— Bolt *v.* Dawkins, 16 S. C. 198; Bugg *v.* Summer, 1 McMull. 333; Nicks *v.* Martindale, Harp. 135, 18 Am. Dec. 647; McCollough *v.* Speed, 3 McCord 255.

Tennessee.— Anderson *v.* Bedford, 4 Coldw. 464.

Virginia.— Harshberger *v.* Alger, 31 Gratt. 52.

West Virginia.— Handy *v.* Smith, 30 W. Va. 195, 3 S. E. 604.

United States.—Hayman *v.* Keally, 11 Fed. Cas. No. 6,265, 3 Cranch C. C. 325. *Compare* Lewis *v.* Broadwell, 15 Fed. Cas. No. 8,319, 3 McLean 568.

England.— Rhodes *v.* Smethurst, 1 H. & H. 237, 2 Jur. 893, 7 L. J. Exch. 273, 4 M. & W. 42; Freake *v.* Cranefeldt, 8 L. J. Ch. 61, 3 Myl. & C. 499, 14 Eng. Ch. 499.

See 33 Cent. Dig. tit. "Limitation of Actions," § 431 *et seq.*

But see Nelson *v.* Herkel, 30 Kan. 456, 2 Pac. 110; Toby *v.* Allen, 3 Kan. 399, in which cases it was held without mentioning any statutory provision that the death of the debtor operates to suspend the statute of limitations until an administrator is appointed; that there must be a person to sue and that the cause of action cannot accrue or exist unless there is a person *in esse* against whom an action can be brought; but it is further held in this state that while the death of a debtor operates to suspend the running of a statute until appointment of an administrator, the creditor cannot indefinitely prolong the time of limitations by his own omission or refusal to act (Bauserman *v.* Charlott, 46 Kan. 480, 26 Pac. 1051), and that inasmuch as a creditor is himself authorized by statute to take out letters of administration in case of delay by persons entitled to do so the statute of limitations will run against his claim after a reasonable time has elapsed subsequent to the death of decedent, although no personal representative had been appointed (Black *v.* Elliott, 63 Kan. 211, 65 Pac. 215, 88 Am. St. Rep. 239; Bauserman *v.* Charlott, 46 Kan. 480, 26 Pac. 1051 [*affirmed* in 147 U. S. 647, 13 S. Ct. 466, 37 L. ed. 316]. See also Kulp *v.* Kulp, 51 Kan. 341, 32 Pac. 118, 21 L. R. A. 550).

Under the Georgia statute, providing that the time between the death of a person and representation taken upon his estate shall not be counted against creditors, provided the time does not exceed five years, and that at the expiration of that time the limitation shall commence, failure to take out administration within five years does not prevent the statute from running after the expiration of that time. Langmade *v.* Tuggle, 78 Ga. 707, 3 S. E. 666.

55. Rhodes *v.* Smethurst, 1 H. & H. 237, 2 Jur. 893, 7 L. J. Exch. 273, 4 M. & W. 42.

56. See *infra*, XIV, F, 2, b, (I), (B), (2), (e).

ance, will operate to suspend the running of the statutes of limitations in actions against executors and administrators; thus in some states it is held that the mere filing or exhibition of a claim against an estate does not have this effect,[57] while in other jurisdictions it is held that it does.[58] So under the statutes of a number of the states no claim which has been presented and duly allowed can be affected by the statutes of limitations pending proceedings for the settlement of the estate.[59] But presentation of a claim within the required time will not validate the claim if before presentation it was barred by the general statute of limitations.[60] Where a statute requires suit to be brought within a year after allowance and an appeal is taken from the allowance of a claim, the statute commences to run from the time of the entry of the certification of the allowance by the court to which the appeal is taken, in the court where the claim was originally presented.[61]

57. Hanson *v.* Towle, 19 Kan. 273; Reber's Appeal, 125 Pa. St. 20, 17 Atl. 189; Keyser's Appeal, 124 Pa. St. 80, 16 Atl. 577, 2 L. R. A. 159 [*explaining* York's Appeal, 110 Pa. St. 69, 1 Atl. 162, 2 Atl. 65]; Thompson *v.* Hoxsie, 25 R. I. 377, 55 Atl. 930; Woods *v.* Woods, 99 Tenn. 50, 41 S. W. 345; Prewett *v.* Goodlett, 98 Tenn. 82, 38 S. W. 434. *Compare* Hillborn's Estate, 5 Pa. Dist. 265.

Filing and withdrawal of a claim does not constitute the commencement of an action to prevent the statute of limitations from running. Morse *v.* Clark, 10 Colo. 216, 14 Pac. 327.

58. Deans *v.* Wilcoxson, 25 Fla. 980, 7 So. 163; Warden *v.* McKinnon, 94 N. C. 378.

"Filing" defined.— The term "filing" signifies that the claim is to be exhibited to the personal representative for inspection in order that he may reject or allow it. It is not required of the creditor that he should part with the possession of the evidence of his claim. Hinton *v.* Pritchard, 126 N. C. 8, 35 S. E. 127.

What is a sufficient filing.— Before the death of a judgment debtor of a county an execution was issued, and after his death it was presented by the sheriff to the debtor's administrator who recognized it as a valid debt against the debtor's estate. It was held that the claim of the county was filed with the administrator within N. C. Code, § 164, providing that such a filing will preclude the running of limitations. Stonestreet *v.* Frost, 123 N. C. 640, 31 S. E. 836. So it has been held that an action brought against an administrator is a sufficient filing of a claim against the estate. McLeod *v.* Graham, 132 N. C. 473, 43 S. E. 935. See also Bush *v.* Adams, 22 Fla. 177.

A formal petition by a mortgage creditor asking recognition as such and demanding that the executor give security for his claim is such a judicial demand as will interrupt prescription. Berens *v.* Boutté, 31 La. Ann. 112.

Under the Missouri practice where notice of the exhibition of a demand has properly been made, and the cause has been docketed in the probate court and continued, the cause is not barred by the two years' statute of limitations, although continued for three years. Nichols-Shephard Co. *v.* Donavon, 67 Mo. App. 286.

59. *Arkansas.*—Fort *v.* Blagg, 38 Ark. 471.

California.— Wise *v.* Williams, 72 Cal. 544, 14 Pac. 204; German Sav., etc., Soc. *v.* Hutchinson, 68 Cal. 52, 8 Pac. 627; Dohs *v.* Dohs, 60 Cal. 255; Schroeder's Estate, 46 Cal. 304. And see Beckett *v.* Selover, 7 Cal. 215, 68 Am. Dec. 237.

Louisiana.—Willis' Succession, 109 La. 281, 33 So. 314.

North Carolina.— Turner *v.* Shuffler, 108 N. C. 642, 13 S. E. 243.

Pennsylvania.— Reber's Appeal, 125 Pa. St. 20, 17 Atl. 189.

Texas.— Wygal *v.* Myers, 76 Tex. 598, 13 S. W. 567; Howard *v.* Battle, 18 Tex. 673; Herbert *v.* Herbert, (Civ. App. 1900) 59 S. W. 594. *Compare* Danzey *v.* Swieney, 7 Tex. 617.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1757.

What is not a sufficient allowance.— Under a statute requiring the clerk upon the receipt of the prescribed affidavit and the claim and its approval by him to indorse thereon the words, "Probated, allowed for $—— and registered and to sign his name officially thereto, an indorsement that the claim is 'allowed and registered,'" is insufficient to stop the running of the statute. Cheairs *v.* Cheairs, 81 Miss. 662, 33 So. 414, 60 L. R. A. 549.

Application of the rule.— Under a statute providing that no claim which has been presented and allowed shall be affected by the statute of limitations, the statute does not run against a claim founded on a note and mortgage after allowance by the counsel of a deceased mortgagor. German Sav., etc., Soc. *v.* Hutchinson, 68 Cal. 52, 8 Pac. 627.

An allowed claim has the force of a judgment.— It stands pending the final close of the administration waiting payment in due course under orders of the court. Fort *v.* Blagg, 38 Ark. 471.

60. McKinzie *v.* Hill, 51 Mo. 303, 11 Am. Dec. 450, in which it was said that statutes of this character are not intended to be grafted on the general statute as an extension of time.

61. Horst *v.* McCormick Harvester Mach. Co., 30 Nebr. 558, 46 N. W. 717.

(3) Commencement of Action. The commencement of an action within the period fixed by statute therefor stops the running of a statute of limitations [62] and it is immaterial that a judgment thereon is not rendered within the statutory period.[63] The filing of claims with the proper officer and his indorsement thereof has in some jurisdictions been held to be the commencement of an action within statutes of limitations specially applicable to administrators or executors,[64] but the pleading of a lien on land by a judgment creditor in an action by the executor to sell the land for the payment of debts is not.[65] Where a reference by statute stands in the place of an action, the entry of an order to refer is the commencement of an action sufficient to stop the running of the general statutes of limitations.[66] If through mistake of plaintiff's attorney an action is not entered, another action for the same cause commenced after the expiration of the special statutes of limitations will be barred,[67] and if plaintiff suffers a nonsuit in an action commenced within the statutory period, a subsequent action brought by him after the expiration of the statutory period will be barred.[68] So if an action against one administrator is discontinued because there are several who should be sued, a second action against all the administrators commenced after the expiration of the statute will be barred.[69] And if a suit is dismissed for champerty a new suit for the same cause of action brought after the expiration of the statute is barred thereby.[70] Where an action is commenced within the statutory period, amendments to cure defects of form made after the expiration of that period do not set up a new cause of action nor entitle defendant to avail himself of the statute.[71] Where a demurrer is sustained, because the remedy is in equity,[72] or a suit is dismissed for want of jurisdiction because defendant, an administrator appointed in one state, was sued by plaintiff for the same cause in the federal court of another state,[73] the action is one defeated by defect in form within a statute permitting a new suit within a year thereafter, in case a suit is defeated on this ground. Amendments after expiration of the statutory period will not be permitted if they set up a new cause of action.[74] Where a party defendant

62. See Limitations of Actions; and cases cited in notes 62 *et seq.*

Where suit by legatee inures to benefit of other legatees.— Where on a bill by legatees against an executor and other legatees for setttlement and distribution a decree is made ordering payment to complainants of the amounts due them and allowing legatees who were defendants to propound their claims by petition, which they do, the running of the statute as to them is suspended by the filing of the original bill. Lockhart *v.* Horn, 15 Fed. Cas. No. 8,446, 3 Woods 542.

63. Lee *v.* McKoy, 118 N. C. 518, 24 S. E. 210; Phillips *v.* Allegheny Valley R. Co., 107 Pa. St. 472.

64. Robinson *v.* Robinson, 173 Mass. 233, 53 N. E. 854; Treece *v.* Carr, (Tenn. Ch. App. 1900) 58 S. W. 1078. And see *supra*, XIV, F, 2, b, (I), (C), (2).

Filing of a claim with the commissioners of an insolvent estate is equivalent to the commencement of an action wherein the meaning of the statute limiting actions in certain cases to two years after letters testamentary or of administration are granted. Guild *v.* Hale, 15 Mass. 455.

65. Ambrose *v.* Byrne, 61 Ohio St. 146, 55 N. E. 408.

66. Bucklin *v.* Chapin, 1 Lans. (N. Y.) 443.

67. Packard *v.* Swallow, 29 Me. 458.

68. Peyton *v.* Carr, 1 Rand. (Va.) 436.

69. Hopkins *v.* McPherson, 2 Bay (S. C.) 194. And see Gray *v.* Trapnall, 23 Ark. 510, holding that where a suit for land is brought against the administrator only within the period of limitation and dismissed, a new suit for the same land against the administrator and an heir after the period of limitation is barred by the statute. The second suit is not such a continuance as to avoid the bar of the statute.

70. Anderson *v.* Bedford, 4 Coldw. (Tenn.) 464.

71. Tolbert *v.* McBride, 75 Tex. 95, 12 S. W. 752 (so holding where the petition in an action against an administrator on a note of his intestate did not allege that the note was for a valuable consideration nor state the precise date of the transfer to plaintiff); Coles *v.* Portis, 18 Tex. 155.

An amendment of a writ so as to charge defendant as administrator is not objectionable, although made more than two years after due notice of his appointment and after final accounting. Hutchinson *v.* Tucker, 124 Mass. 240.

72. Taft *v.* Stow, 174 Mass. 171, 54 N. E. 506.

73. Caldwell *v.* Harding, 1 Lowell 326, 4 Fed. Cas. No. 2,302.

74. See Miller *v.* Taylor, 6 Heisk. (Tenn.) 465. An action of account against the administrator of a guardian to recover a balance found to be due on adjustment of his

dies during the pendency of an action no change in the form of the proceedings will cause plaintiff to lose the benefit of his *lis pendens* and authorize defendant's representatives to set up the bar of the statute where decedent could not have done so.[75]

(4) Statutes Prohibiting Suit For Designated Period After Death or Decedent or Qualification of Representative. Where a statute exempts personal representatives from suit for a designated time after decedent's death or their qualification such period must be excluded in estimating the time within which suit must be brought.[76] When a temporary incapacity to sue grows out of a particular provision of a statute, such disability interrupts the running of the statute of limitations,[77] and constitutes an exception to the general rule that the running of a statute when it has once commenced to run is not stopped by an intervening disability.[78] These statutes do not apply where a suit does not seek to fix or establish a liability against the estate. To fall within the provisions of the statute, the suit must be against the personal representative as such,[79] and must

account, made on application of his administrator, is not a continuation of an action of debt on a record of the county court showing such adjustment and finding such balance to be due, and the second action if brought after the expiration of the statutory period is not saved from the bar of such statute by the fact that the first action was brought within the statutory period. Spalding *v.* Butts, 6 Conn. 28.

75. Glenn *v.* Smith, 17 Md. 260.

The substitution of the administrator of a defendant in an action pending at his decease is a sufficient commencement of an action to continue the lien on the real estate of defendant; and such an action in the county where administration was granted duly prosecuted to judgment more than five years after the death of the intestate continues the lien of the debts on his real estate, throughout the commonwealth. Bredin *v.* Agnew, 8 Pa. St. 233.

76. *Alabama.*— Hood *v.* League, 102 Ala. 228, 14 So. 572; Allen *v.* Elliott, 67 Ala. 432; Posey *v.* Decatur Bank, 12 Ala. 802; Houpt *v.* Shields, 3 Port. 247; Hutchinson *v.* Tolls, 2 Port. 44.

California.— Quivey *v.* Hall, 19 Cal. 97.

Georgia.— Coney *v.* Horne, 93 Ga. 723, 20 S. E. 213; Pendleton *v.* Andrews, 70 Ga. 306; Tarver *v.* Cowart, 5 Ga. 66; Jordan *v.* Jordan, Dudley 182.

Illinois.— Tilton *v.* Yount, 28 Ill. App. 580.

Kentucky.— Caldwell *v.* Irvine, 4 J. J. Marsh. 107; Field *v.* Wallace, 6 T. B. Mon. 333.

Michigan.— Sword *v.* Keith, 31 Mich. 247.

Mississippi.— Allen *v.* Hillman, 69 Miss. 225, 3 So. 871; Adams *v.* Williams, 57 Miss. 38; Wilkinson *v.* Moore, 27 Miss. 365; Jennings *v.* Love, 24 Miss. 249; West Feliciana R. Co. *v.* Stockett, 13 Sm. & M. 395; Henderson *v.* Ilsley, 11 Sm. & M. 9, 49 Am. Dec. 41; Abbott *v.* McElroy, 10 Sm. & M. 100; Dowell *v.* Webber, 2 Sm. & M. 452.

New York.— Riley *v.* Riley, 141 N. Y. 409, 36 N. E. 398; Hall *v.* Brennan, 140 N. Y. 409, 35 N. E. 663 [*affirming* 64 Hun 394, 19 N. Y. Suppl. 623]; Sanford *v.* Sanford, 62 N. Y. 553; O'Flyn *v.* Powers, 21 N. Y. Suppl. 905; Scovil *v.* Scovil, 30 How. Pr. 246; Wenman *v.* Mohawk Ins. Co., 13 Wend. 267, 28 Am. Dec. 464.

Oregon.— Blaskower *v.* Steel, 23 Oreg. 106, 31 Pac. 253.

South Carolina.— Moore *v.* Smith, 29 S. C. 254, 7 S. E. 458; Lawton *v.* Bowman, 2 Strobh. 190; Moses *v.* Jones, 2 Nott & M. 259; Wightman *v.* Chanler, 2 Brev. 251.

Tennessee.— Woods *v.* Woods, 99 Tenn. 50, 41 S. W. 345; Jones *v.* Whitworth, 94 Tenn. 602, 30 S. W. 736; Bright *v.* Moore, 87 Tenn. 186, 10 S. W. 356; Todd *v.* Wright, 12 Heisk. 442; Maynard *v.* May, 2 Coldw. 44.

Wisconsin.— Boyce *v.* Foote, 19 Wis. 199; Lightfoot *v.* Cole, 1 Wis. 26.

United States.— Marsh *v.* Burroughs, 16 Fed. Cas. No. 9,111.

England.— Douglas *v.* Forrest, 4 Bing. 686, 6 L. J. C. P. O. S. 157, 1 M. & P. 663, 29 Rev. Rep. 695, 13 E. C. L. 693.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1748; and 33 Cent. Dig. tit. "Limitations of Actions" § 433.

But see Dekay *v.* Darrah, 14 N. J. L. 288, which seems to lay down a contrary rule.

Suspension by order for account.— Where within five years from the date of a judgment rendered against a deceased person an account of debts against his estate was ordered which operated to suspend the statute of limitations as against such judgment a subsequent action to enforce such judgment against his estate was not barred. Robinett *v.* Mitchell, 101 Va. 762, 45 S. E. 287, 99 Am. St. Rep. 928.

77. Tilton *v.* Yount, 28 Ill. App. 580; Dowell *v.* Webber, 2 Sm. & M. (Miss.) 452.

78. Allen *v.* Hillman, 69 Miss. 225, 13 So. 871; Moore *v.* Smith, 29 S. C. 254, 7 S. E. 485.

79. Alabama State Bank *v.* Glass, 82 Ala. 278, 6 So. 641; Lester *v.* Stevens, 113 Ga. 495, 39 S. E. 109.

Illustrations.— The time allowed by statute in which executors and administrators are exempt from suit does not apply to suits by legatees and devisees to restrain the executor and others coöperating with him from

seek to fasten or establish a liability upon or against property of decedent.[80] They do not apply to a bill by a creditor against the administrator of the deceased debtor and others to set aside a fraudulent conveyance by decedent, the land not being assets in the hands of the administrator.[81] These statutes have been held to apply to claims which had been duly presented and were existing at the time of the adoption of the statutes,[82] and to actions for the recovery of land.[83]

(5) Acknowledgment, Promise to Pay, or Part Payment Within Statutory Period. The acknowledgment by an executor or administrator of a debt or promise to pay the same within the statutory period of limitations operates to suspend the running of the statute which begins to run from the date of such acknowledgment or promise.[84] And part payment by an executor or administrator of a claim against the estate made before the expiration of the statutory period of limitations arrests the running of the statute so that time will begin to run only from the period of such payment,[85] and the claim will not be barred until the expiration of the limited period thereafter.[86] This is true, although no promise is made to pay the balance.[87] To be effective, however, the acknowledgment, promise of payment, or part payment must be made by the personal representative himself,[88] and to the creditor or someone lawfully acting in his behalf.[89] The acknowledgment to be within the rule must also be clear and unequivocal.[90]

wasting the estate. Lester *v.* Stephens, 113 Ga. 495, 39 S. E. 109. So where an executor is by will vested with a trust entirely disconnected from executorial duties, such for instance as the power to sell and take charge of the real estate until such sale a suit against the executor to foreclose a mortgage thereon is not within the statutes. Ayres *v.* Shepherd, 64 N. J. Eq. 166, 53 Atl. 690.

80. Alabama State Bank *v.* Glass, 82 Ala. 278, 6 So. 641.

81. Manning *v.* Drake, 1 Mich. 34.

82. Rayburn *v.* Rayburn, 130 Ala. 217, 30 So. 365.

83. Wynne *v.* Parke, (Tex. Civ. App. 1895) 32 S. W. 726.

84. *Georgia.*— Griffin *v.* Justices Baker County Inferior Ct., 17 Ga. 96.

Louisiana.— Sevier *v.* Gordon, 21 La. Ann. 373.

Mississippi.— Waul *v.* Kirkman, 25 Miss. 606.

New York.— Carroll *v.* Carroll, 11 Barb. 293.

Tennessee.— McWhirter *v.* Jackson, 10 Humphr. 209.

Texas.— Daniel *v.* Harvin, 10 Tex. Civ. App. 439, 31 S. W. 421; Park *v.* Pendergast, 4 Tex. Civ. App. 566, 23 S. W. 535. But see Danzey *v.* Swinney, 7 Tex. 617. *Compare* Whitehurst *v.* Dey, 90 N. C. 542, in which it was held that an executor's simple admission of the correctness of a claim against the estate and a verbal promise to pay it from the assets will not arrest the running of the statute of limitations, there being no proof that the creditor refrained from suing at the executor's request, or that there was any agreement for indulgence.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1752.

Right of administrator to sue on acknowledged claims.— An administrator who has admitted claims made against the estate of his intestate before they were barred by the special statute of limitations and has agreed with such creditors to bring a suit for their benefit to recover back a gift *causa mortis* of the intestate may bring such suit after the expiration of such period of limitation. Chase *v.* Redding, 13 Gray (Mass.) 418.

85. Foster *v.* Starkey, 12 Cush. (Mass.) 324; Denise *v.* Denise, 110 N. Y. 562, 18 N. E. 368 [*affirming* 41 Hun 9]; Hamlin *v.* Smith, 72 N. Y. App. Div. 601, 76 N. Y. Suppl. 258; Heath *v.* Grenell, 61 Barb. (N. Y.) 190; Niemcewicz *v.* Bartlett, 13 Ohio 271.

86. Niemcewicz *v.* Bartlett, 13 Ohio 271.

87. Foster *v.* Starkey, 12 Cush. (Mass.) 324.

88. Larason *v.* Lambert, 12 N. J. L. 247 (holding that an acknowledgment of a person sued as administrator to be available to take a note out of the statute must have been made by the administrator when he was administrator); Blake *v.* Quash, 3 McCord (S. C.) 340 (holding that an acknowledgment and part payment by an heir at law will not overthrow presumption of payment in a suit against the executor).

The promise of an executor de son tort to pay a debt of the deceased will not prevent the bar of the statute of limitations to a suit for the debt, brought against him afterward when he is rightful administrator. Haselden *v.* Whitesides, 2 Strobh. (S. C.) 353.

89. Kisler *v.* Sanders, 40 Ind. 78.

A written acknowledgment by the administrator of a debt, not made to the creditor or his agent, does not suspend the running of the statute. Clawson *v.* McCune, 20 Kan. 337.

90. Hanson *v.* Towle, 19 Kan. 273; Goldsmith *v.* Kilbourn, 46 Md. 289; Forbes *v.* Perrie, 1 Harr. & J. (Md.) 109 (holding that the filing by an administrator as an exhibit in a suit in chancery of an account against his intestate is insufficient acknowledgment of the account); Matter of Kendrick, 6 N. Y. St. 521 (holding that the statement in the

There is some conflict of authority as to whether a promise to pay or part payment by one of two or more personal representatives will arrest the running of the statute. In one jurisdiction it has been held that it will,[91] while in another the contrary view is maintained,[92] except where the one promising afterward becomes sole representative of the estate.[93]

(6) Absence of Representative From State. Where special provision is made for bringing actions against personal representatives absent from the state their absence does not interrupt the running of the statute of limitations;[94] and independently of any statutory provision on the subject it has been held that absence of the executor from the state after rejection of a claim does not excuse the creditor's failure to sue him within the time limited by law.[95] A statute excluding a period of non-residence and absence of defendant from the state from the time within which actions must be commenced has been held to apply to actions against administrators on rejected claims.[96] And a statute providing that, after any cause of action shall accrue, if the person against whom it has accrued shall be absent from and reside out of the state, the period of his absence or residence out of the state shall be excluded in computing the statutory period of limitations has been held to apply to an action against an administrator who removes from the state before expiration of the limited time, although the action accrued against decedent in his lifetime.[97]

(7) Death of Testator or Intestate During Absence From State. It is usually provided by statute that limitation ceases to run in favor of a debtor during his absence from the state,[98] but the statute of limitations commences to run again upon his decease.[99]

account of an administrator that certain claims had been presented and that he had disputed it and that it remained unpaid is not a sufficient acknowledgment of indebtedness).

Acknowledgment held sufficient.— An indorsement on a note that it has been presented and allowed and will be paid on settlement of the estate is sufficient (Sevier *v.* Gordon, 21 La. Ann. 373); and so is an indorsement of an account as follows: "The within account is accepted and will be paid when means sufficient come to my hands" (McWhirter *v.* Jackson, 10 Humphr. (Tenn.) 209).

Part payment on a claim after the period fixed by the statute of non-claims has elapsed raises the presumption that the claim was presented before the statutory period had elapsed. Pharis *v.* Leachman, 20 Ala. 662.

91. Heath *v.* Grenell, 61 Barb. (N. Y.) 190. See also Hamlin *v.* Smith, 72 N. Y. App. Div. 601, 76 N. Y. Suppl. 258.

92. Caruthers *v.* Mardis, 3 Ala. 599, in which it was assigned as a reason that one administrator has no power to bind those connected in the administration so as to make them responsible for a devastavit.

93. Hall *v.* Darrington, 9 Ala. 502.

94. French *v.* Davis, 38 Miss. 218.

95. Cotten *v.* Jones, 37 Tex. 34, in which it was said, however, that if the claim had not been presented to the administrator the rule would be otherwise. See also Wilkinson *v.* Winne, 15 Minn. 159. But see Jennings *v.* Browder, 24 Tex. 192.

96. Hayden *v.* Pierce, 144 N. Y. 512, 39 N. E. 638 [*affirming* 71 Hun 593, 25 N. Y. Suppl. 55].

97. Smith *v.* Arnold, 1 Lea (Tenn.) 378. *Compare* Taylor *v.* McGill, 6 Lea (Tenn.) 294, holding that the absence of an administrator from the state will not arrest the operation of the statute of limitations if the suit may be prosecuted against heirs within the state and the administrator be made a party by publication.

98. See, generally, Limitations of Actions.

Absence sufficient to arrest running of statute.— Where decedent left the state with his family on a sea voyage, expecting to be absent for three years, leaving property in the state in the care of his father-in-law but never returned and died before the expiration of the three years, his absence was such as to prevent the statute from running. Ward *v.* Cole, 32 N. H. 452, 64 Am. Dec. 378.

99. Hibernian Banking Assoc. *v.* Commercial Nat. Bank, 157 Ill. 524, 31 N. E. 919; Savage *v.* Scott, 45 Iowa 130; Whitney *v.* Webb, 10 Ohio 513; Teal *v.* Ayres, 9 Tex. 588. *Compare* Lee *v.* Gause, 24 N. C. 440, holding that, in case of one dying intestate in another state, the statute of limitations does not commence to run until administration in this state. And see Grubb *v.* Clayton, 11 Fed. Cas. No. 5,849*a*, Brunn. Col. Cas. 30, 3 N. C. 378.

The decedent's estate stands precisely on the same footing as it would have stood had he died within the limits of the state, and the fact of his dying abroad does not impede the grant of administration or the facility of subjecting the property to the payment of claims. Whether the debtor is a resident or non-resident, the vigilant creditor can with like facility force administration, and if he

(8) Disability of Claimant to Sue. If the statutes of limitations for bringing actions against personal representatives contain no exception in favor of persons under disability, a claim by a person under disability not sued on within the statutory period will be barred.[1] If a statute contains a saving clause in favor of persons living out of the state, the disability is removed by coming into the state even for temporary purposes, provided the debtor at that time be within the state.[2] Failure of a non-resident of the state to sue on a claim within the statutory period cannot operate as a bar where he received no notice of intestate's death or appointment of an administrator until immediately before bringing suit, and it appears that the administrator had not settled the estate and had assets to pay all claims against it. These facts constitute "peculiar circumstances entitling the claimant to equitable relief" within the exception made by the statute.[3]

(9) Vacancy in Office of Representative. The general rule is that a vacancy in the office of executor or administrator does not affect the running of the statute of limitations[4] unless the first grant of letters is void.[5] Nevertheless the statutes in some jurisdictions make provision for an extension of time for bringing suit where a vacancy in the administration occurs.[6]

(10) Miscellaneous. The running of the statutes is suspended by an appeal from the decree appointing the personal representative,[7] or by an order of injunction issued in a suit by the administrator for a settlement of the estate preventing creditors from suing,[8] or where plaintiff puts in his claim immediately and keeps

does not and his claim as against one be barred, there is no sound reason why it should not be precluded as against the other. Teal *v.* Ayres, 9 Tex. 588.

Under the New York statutes, a distinction is made between cases where the debtor leaves the state after the statute begins to run and when he is out of the state at the time the statute commences to run. In the last case the statute commences to run only from the time of granting letters testamentary or of administration, in this state. Davis *v.* Garr, 6 N. Y. 125, 55 Am. Dec. 387; Benjamin *v.* De Groot, 1 Den. 151. In the first case the statute runs from the time the cause accrued, but from that period the time during which he was out of the state is to be deducted and also eighteen months following the death of decedent which another statute provides, shall be excluded in estimating the time within which such suit must be brought. Christophers *v.* Garr, 6 N. Y. 61.

1. Williams *v.* Conrad, 11 Humphr. (Tenn.) 412.

2. Faw *v.* Roberdeau, 3 Cranch (U. S.) 174, 2 L. ed. 402.

3. McCormack *v.* Cook, 11 Iowa 267.

4. *Alabama.*— Reed *v.* Minell, 30 Ala. 61; Pipkin *v.* Hewlett, 17 Ala. 291; Lowe *v.* Jones, 15 Ala. 545 (death of administrator); Richardson *v.* Williams, 5 Port. 515.

California.— McMillan *v.* Hayward, 94 Cal. 357, 29 Pac. 774.

Georgia.— Pendleton *v.* Andrews, 70 Ga. 306.

Maine.— Heard *v.* Meader, 1 Me. 156.

Mississippi.— Boyd *v.* Lowry, 53 Miss. 352.

Rhode Island.— Thompson *v.* Hoxsie, 24 R. I. 493, 53 Atl. 873 (death of administrator); Mowry *v.* Harris, 18 R. I. 519, 28 Atl. 657 (removal of administrator).

See 22 Cent. Dig. tit. "Executors and Administrators," § 1756.

Appointment of an administrator de bonis non is not a grant of letters *de novo.* Thompson *v.* Hoxsie, 24 R. I. 493, 53 Atl. 673.

The marriage of an executrix does not *ipso facto* terminate her authority nor interrupt the running of the statute of limitations, and an action brought against an administrator subsequently appointed after the statutory bar had attached cannot be sustained. McMillan *v.* Hayward, 94 Cal. 357, 29 Pac. 774.

5. Brown *v.* Hill, 27 Miss. 44.

6. Eddy *v.* Adams, 145 Mass. 489, 14 N. E. 509; Fisher *v.* Metcalf, 7 Allen (Mass.) 209; Hemenway *v.* Gates, 5 Pick. (Mass.) 321; Smith *v.* Brown, 101 N. C. 347, 7 S. E. 890; Atkinson *v.* Brooks, 10 Yerg. (Tenn.) 484. And see Pratt *v.* Northam, 19 Fed. Cas. No. 11,376, 5 Mason 95. A statute providing that if a person against whom an action may be brought dies before the expiration of the limitation, if the action survives it may be commenced in one year after the qualification of the personal representative extends to a case where an executor is removed and an administrator *de bonis non* appointed. Smith *v.* Brown, 99 N. C. 377, 6 S. E. 667. And see Brittain *v.* Dickson, 104 N. C. 547, 10 S. E. 701.

Where an administrator dies after judgment quando acciderint recovered against him, the time between his death and the appointment of an administrator *de bonis non* must be excluded in determining whether action on the judgment is barred. Dickson *v.* Crowley, 112 N. C. 629, 17 S. E. 158.

7. McPhetres *v.* Halley, 32 Me. 72.

8. Smith *v.* Morgan, 4 Ky. L. Rep. 829. *Compare* Barnes *v.* Green, 3 Ky. L. Rep. 253,

it up by a regular correspondence and demand of payment, although the statutory period elapses before suit is brought.[9] The statute is not suspended by institution of proceedings in insolvency,[10] nor by the pendency of an action to settle the estate if creditors are not restrained from suit by injunction,[11] nor by an unreasonable delay on the part of the personal representative to make objection to the claim presented to him,[12] nor by the fact that the administrator made distribution after he had notice of plaintiff's claim,[13] nor by failure of the creditors to institute proceedings to compel sale of real estate until after the administrator had rendered an account.[14] So a clause in a will directing all of testator's debts to be paid and appropriating therefor the rents of his real estate does not take the case at law out of the statutes of limitations where plaintiff does not seek his remedy under the will.[15] Ignorance of the fact that a conveyance made by decedent was in fraud of creditors does not avoid the bar of the statute.[16] The fact that a creditor lives outside of the county in which the will is proved and notice of appointment of executors published does not excuse failure to sue the executors within the statutory period.[17]

(D) *Waiver of Bar Created by Statutes of Limitations* — (1) General Statutes of Limitations. The question whether an executor or administrator has power to waive the general statute of limitations has been considered in another part of this treatise.[18]

(2) Special Statutes of Limitations — (a) The General Rule. With respect to statutes of non-claim and statutes limiting the time within which actions shall be brought against executors and administrators, it is very generally held that the bar created by these statutes cannot be waived by the personal representative either by failure to plead the bar or by agreement with the creditor.[19] The statutes absolutely extinguish the right of the claimant instead of affecting the remedy merely.[20] A personal representative cannot abrogate a positive rule of law applying to probate of claims within a designated period by any conduct of his own, however misleading or designing. The creditor is bound to obey the plain requirements of the statutes,[21] and the fact that he fails to present a claim in reliance on an agreement which the administrator had not the power to make

holding that an order of court enjoining creditors from proceeding at law to compel the payment of their claims, made in a proceeding by an administrator for the settlement of an estate as an insolvent estate, does not prevent limitations from running against claims filed in the action and not properly verified.

9. Littlejohn *v.* Gilchrist, 3 N. C. 393, this decision does not seem to be based on any valid reason.

10. Reed *v.* Minnell, 30 Ala. 61; Aiken *v.* Morse, 104 Mass. 277.

11. Dugan *v.* Mitchell, 5 Ky. L. Rep. 150.

12. Bucklin *v.* Chapin, 1 Lans. (N. Y.) 443.

13. Woodward *v.* Perry, 85 Me. 440, 27 Atl. 345.

14. Butler *v.* Johnson, 111 N. Y. 204, 18 N. E. 643 [*affirming* 41 Hun 206].

15. Wilson *v.* Turberville, 30 Fed. Cas. No. 17,843, 1 Cranch C. C. 512.

16. Reed *v.* Minell, 30 Ala. 61.

17. Richards *v.* Child, 98 Mass. 284.

18. See *supra*, X, A, 18, b.

19. *Illinois.*— Stillman *v.* Young, 16 Ill. 318.

Kansas.— Collamore *v.* Wilder, 19 Kan. 67.

Maine.— Littlefield *v.* Eaton, 74 Me. 516.

Massachusetts.— Ames *v.* Jackson, 115 Mass. 508; Waltham Bank *v.* Wright, 8 Allen 121; Heath *v.* Wells, 5 Pick. 140, 16 Am. Dec. 383; Emerson *v.* Thompson, 16 Mass. 429; Thompson *v.* Brown, 16 Mass. 172; *In re* Allen, 15 Mass. 58; Dawes *v.* Sheadd, 15 Mass. 6, 8 Am. Dec. 80; Brown *v.* Anderson, 13 Mass. 201.

Mississippi.— Nagle *v.* Ball, 71 Miss. 330, 13 So. 929.

Missouri. — Wiggins *v.* Lovering, 9 Mo. 262.

Nebraska.— Fitzgerald *v.* Chariton First Nat. Bank, 64 Nebr. 260, 89 N. W. 813.

New Hampshire.— Preston *v.* Cutter, 64 N. H. 461, 13 Atl. 874; Probate Judge *v.* Ellis, 63 N. H. 366; Hodgdon *v.* White, 11 N. H. 208.

Ohio.— Pollock *v.* Pollock, 2 Ohio Cir. Ct. 140, 1 Ohio Cir. Dec. 408. *Contra*, Joyce *v.* Hart, 11 Ohio Dec. (Reprint) 487, 27 Cinc. L. Bul. 144.

Rhode Island.— Thompson *v.* Hoxsie, 25 R. I. 377, 55 Atl. 930.

Tennessee.— Langham *v.* Baker, 5 Baxt. 701; Brown *v.* Porter, 7 Humphr. 373.

Wyoming.— O'Keefe *v.* Foster, 5 Wyo. 343, 40 Pac. 525.

20. Thomson *v.* Hoxsie, 25 R. I. 377, 55 Atl. 930.

21. Nagle *v.* Ball, 71 Miss. 330, 13 So. 929.

is a mistake of law on his part for which the courts furnish no relief.[22] If the executor or administrator neglects to plead the statute and thereby judgment is recovered in an action brought after the debt is legally barred, or if he voluntarily pays the debt, it is held to be in his own wrong and he cannot claim to be reimbursed from the estate.[23]

(b) STATUTORY EXCEPTIONS TO RULE. In some jurisdictions the statutes fixing the period within which suit must be brought on claims against the estate contain provisos excepting the claimant from the operation of the statute where he delays commencement of his action at the special request of the personal representative. In order that the claimant may have the benefit of this exception the request must be made by the personal representative himself,[24] within the statutory period,[25] and it must stipulate for a definite time of indulgence, or until the happening of a designated event which may occur and thereby render the period certain.[26] If on request suit is delayed for a specified time the creditor must sue within the statutory period after the expiration of that time.[27] So the request only stops the running of the special statute of limitations and has no effect on the general statute.[28] Under the statutes of another jurisdiction, an offer by the personal representative to refer a disputed claim to arbitration which is accepted within the period limited for bringing suit thereon and followed by a submission operates as a waiver of the statute,[29] but a mere offer by an executor to refer a claim after an unqualified refusal to pay it will not waive the statute.[30]

(E) *Statutes Saving Claims Barred by Limitations* — (1) IN GENERAL. The statutes of some states provide in effect that judgment may be rendered

22. Collamore *v.* Wilder, 19 Kan. 67.

23. Ames *v.* Jackson, 115 Mass. 508.

24. Hubbard *v.* Marsh, 29 N. C. 204, a request by a coöbligor of decedent is insufficient.

25. Allen *v.* Shanks, 90 Tenn. 359, 16 S. W. 715.

26. Prewett *v.* Goodlett, 98 Tenn. 82, 88 S. W. 434; State *v.* Murray, 9 Baxt. (Tenn.) 209; Langham *v.* Baker, 5 Baxt. (Tenn.) 701; Cook *v.* Cook, 10 Heisk. (Tenn.) 464; Birdsong *v.* Birdsong, 2 Head (Tenn.) 289; Farmers, etc., Bank *v.* Leach, 11 Humphr. (Tenn.) 515; Puckett *v.* James, 2 Humphr. (Tenn.) 565; Trott *v.* West, 9 Yerg. (Tenn.) 433. The definite time may as well be the time which might elapse until the personal representative could accomplish a certain event as for a particular length of time named. Puckett *v.* James, *supra*.

Illustrations of sufficient and insufficient request.— The following requests have been held sufficiently definite: A request for delay until the personal representative shall collect the debts of the estate (McKizzack *v.* Smith, 1 Sneed (Tenn.) 470); or until the land bought by the testator should be paid for (Puckett *v.* James, 2 Humphr. (Tenn.) 565); or until the administrator shall have settled with another creditor (State *v.* Murray, 9 Baxt. (Tenn.) 209); on the other hand a general request to creditors of the estate for delay from time to time (Langham *v.* Baker, 5 Baxt. (Tenn.) 701); or a statement on presentation of the claim "hold on, your claim is good" (Chestnutt *v.* McBride, 1 Heisk. (Tenn.) 389); or payment of part of the debt and a promise "to pay the balance soon" (Trott *v.* West, Meigs (Tenn.) 163, 9 Yerg. (Tenn.) 433) are insufficient to arrest the running of the statute. And where creditors were persuaded to postpone selling real estate for more than five years after decedent's death but nothing was said to creditors to induce them to forbear filing a lien, or any promise made that the lien of debts should remain, the lien should not be extended beyond the statutory period. Welsh's Appeal, 5 Pa. Cas. 494, 10 Atl. 34. So where a claimant against an estate had a settlement with the administrator who agreed on the correctness of the claim and he subsequently moved out of the county and was notified by the administrator that he had lost the claim and that it would have to be proven and filed with the clerk and the claimant then wrote the administrator to send him a memorandum, it was held that these circumstances were not sufficient to excuse the failure to file the claim within two years and six months after the appointment of the administrator as required by statute. Smith *v.* Sprout, (Tenn. Ch. App. 1900) 58 S. W. 376.

27. Cook *v.* Cook, 10 Heisk. (Tenn.) 464; Puckett *v.* James, 2 Humphr. (Tenn.) 565, holding that where an executor's request for an extension of time in which to pay a debt due the estate was for indulgence until certain land should be paid for, the statute of limitations will commence running from the time the land is paid for.

28. Bates *v.* Elrod, 13 Lea (Tenn.) 156; Loyd *v.* Loyd, 9 Baxt. (Tenn.) 406.

29. Cornes *v.* Wilkin, 79 N. Y. 129. And see Fishkill Nat. Bank *v.* Speight, 47 N. Y. 668.

30. Cornes *v.* Wilkins, 79 N. Y. 129; Fishkill Nat. Bank *v.* Speith, 47 N. Y. 668; Snell *v.* Dale, 17 N. Y. Suppl. 575.

against a personal representative notwithstanding the statutory limitation, if the court thinks justice and equity require it and that the creditor is not chargeable with culpable neglect in not prosecuting his claim within the time limited therefor. In construing the statutes it has been held that their operation is not limited to cases where the failure to sue seasonably was due to such fraud, accident, or mistake as would be a ground for equitable relief if there were no statute,[31] and that delay caused by the creditor's ignorance of a fact which he did not know existed and which he had reasonable ground to believe did not exist is not culpable neglect within the meaning of the statute.[32] Such also is the rule with respect to delay agreed to by all parties interested in the estate, including heirs and creditors;[33] but a creditor who has refrained from bringing suit within the time limited at the suggestion of the administrator and in reliance on statements made in good faith by him[34] or whose delay in bringing suit is merely the result of his ignorance of the limitation of actions against personal representatives,[35] or is not caused by accident or mistake or by the practice of fraud or imposition is not entitled to relief under the statutes.[36] These statutes have been held to apply not only to claims which might have been sued on within the time limited by statute, but also to contingent claims which could not have been sued on but which might have been presented and to claims which come into existence after the expiration of the statutory period.[37] They do not apply to claims barred by the statute of limitations at the time of their passage.[38] The question of culpable neglect is one of fact to be determined by the trial court,[39] and is not subject to review.[40]

(2) Receipt of New Assets by Personal Representative. In some jurisdictions statutes which provide the period of limitations for suit against personal representatives make an exception in the case of discovery and receipt of new assets by the representative after the expiration of the statutory period. The bar of the statute is removed and the estate reopened so that any creditor,[41] even though he has not proved his claim within the statutory period,[42] may come in and assert his claim to such new assets.[43] The limitation commences to run from the time of the receipt of the new assets, and if the suit is not brought within the time limited thereafter the claim is conclusively barred.[44]

31. Ewing *v.* King, 169 Mass. 97, 47 N. E. 597

32. Ewing *v.* King, 169 Mass. 97, 47 N. E. 597.

33. Knight *v.* Cunningham, 160 Mass. 580, 36 N. E. 466.

34. Powow River Nat. Bank *v.* Abbott, 179 Mass. 336, 60 N. E. 973. See also Wells *v.* Child, 12 Allen (Mass.) 333.

35. Jenney *v.* Wilcox, 9 Allen (Mass.) 245.

36. Waltham Bank *v.* Wright, 8 Allen (Mass.) 121.

37. Libby *v.* Hutchinson, 72 N. H. 190, 55 Atl. 547.

38. Garfield *v.* Bemis, 2 Allen (Mass.) 445.

39. Powers *v.* Holt, 62 N. H. 625.

40. Libby *v.* Hutchinson, 72 N. H. 190, 55 Atl. 547.

41. Thurston *v.* Lowder, 47 Me. 72.

42. Holland *v.* Cruft, 20 Pick. (Mass.) 321.

43. **What are new assets within the rule.** — Property recovered by an administrator after the expiration of the statutory period, by setting aside a fraudulent conveyance of the decedent, is new assets within the rule (Holland *v.* Cruft, 20 Pick. (Mass.) 321); on the other hand the following have been held not new assets: Property received by an administrator *de bonis non* in settlement of a suit against the surety on the bond of his predecessor for failure to account for inventoried property (Veazie *v.* Marrett, 6 Allen (Mass.) 272); money arising from the sale of land possessed by the decedent at the time of his death and sold for the payment of debts, and money received by the administrator from the guardian of the heirs of the intestate under an arrangement made to save their lands from sale (Favorite *v.* Booher, 17 Ohio St. 548); proceeds of a mortgage given by the heirs at law without leave of court on lands of which their intestate ancestor died seized (Shute *v.* Wilkins, 163 Mass. 491, 40 N. E. 848); money accruing from inventoried patent rights, either as royalties or as proceeds of sales of such rights (Robinson *v.* Hodge, 117 Mass. 222); so the fact that a note fraudulently given in settlement of certain other notes is set out in the inventory while the other notes are omitted does not make the proceeds of such notes afterward coming into the executor's hands new assets (Gould *v.* Camp, 157 Mass. 358, 32 N. E. 225).

44. Thurston *v.* Lowder, 47 Me. 72.

(II) *ACTIONS OR SUITS FOR LEGACIES AND DISTRIBUTIVE SHARES* — (A) *In General.* The general rule is well settled that statutes of limitations whether general or special do not run in favor of an executor or administrator in respect of claims to recover legacies or distributive shares.[45] The reason is that the relation of the personal representative and the legatee or distributee is that of trustee and *cestui que trust*, in a direct and continuing trust and therefore the personal representative's possession cannot be adverse so long as this relation exists.[46] To put the statute in operation, there must be a final settlement or at least a dis-

45. *Alabama.*— Bonner *v.* Young, 68 Ala. 35; High *v.* Worley, 32 Ala. 709.

Arkansas.— Harriet *v.* Swan, 18 Ark. 495.

Connecticut.— Wilmerding *v.* Russ, 33 Conn. 67.

Florida.— Amos *v.* Campbell, 9 Fla. 187.

Indiana.— Smith *v.* Calloway, 7 Blackf. 86.

Maryland.— Ogle *v.* Tayloe, 49 Md. 158; Smith *v.* Smith, 7 Md. 55; Ward *v.* Reeder, 2 Harr. & M. 145.

Massachusetts.— Kent *v.* Dunham, 106 Mass. 586.

Michigan.— Moores' Appeal, 84 Mich. 474, 48 N. W. 39.

Mississippi.— Peebles *v.* Acker, 70 Miss. 356, 12 So. 248; Cooper *v.* Cooper, 61 Miss. 676; Roberts *v.* Roberts, 34 Miss. 322; Wren *v.* Gayden, 1 How. 365.

Missouri.— Picot *v.* Bates, 39 Mo. 292.

New Jersey.— Hedges *v.* Norris, 32 N. J. Eq. 192.

New York.— Wood *v.* Riker, 1 Paige 616; Decouche *v.* Savetier, 3 Johns. Ch. 190; Arden *v.* Arden, 1 Johns. Ch. 313.

North Carolina.— Bushee *v.* Surles, 77 N. C. 62; Davis *v.* Cotten, 55 N. C. 430; McCraw *v.* Fleming, 40 N. C. 348; Salter *v.* Blount, 22 N. C. 218; Bailey *v.* Shannonhouse, 16 N. C. 416.

Pennsylvania.— Logan *v.* Richardson, 1 Pa. St. 372; Thompson *v.* McGaw, 2 Watts 161; Durdon *v.* Gaskill, 2 Yeates 268; Pennepacker *v.* Pennepacker, 2 Pa. L. J. Rep. 114, 3 Pa. L. J. 357.

South Carolina.— Edwards *v.* Williams, 39 S. C. 86, 17 S. E. 457; Montgomery *v.* McCloud, 27 S. C. 188, 3 S. E. 196; Beard *v.* Stanton, 15 S. C. 164.

Tennessee.— Carr *v.* Lowe, 7 Heisk. 84; Lafferty *v.* Turley, 3 Sneed 157; Haynie *v.* Hall, 5 Humphr. 290, 42 Am. Dec. 427; Guthrie *v.* Owen, 10 Yerg. 339; Smart *v.* Waterhouse, 10 Yerg. 94; McDonald *v.* McDonald, 8 Yerg. 145; Pinkerton *v.* Walker, 3 Hayw. 221.

Vermont.— Sparhawk *v.* Buell, 9 Vt. 41.

Virginia.— Jones *v.* Jones, 92 Va. 590, 24 S. E. 255; Leake *v.* Leake, 75 Va. 792; Nelson *v.* Cornwell, 11 Gratt. 724.

England.— Parker *v.* Ash, 1 Vern. Ch. 256, 23 Eng. Reprint 452; Higgins *v.* Crawfurd, 2 Ves. Jr. 571, 30 Eng. Reprint 781.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1761.

View that statute available.— In some jurisdictions where a remedy at law is given by statutes to recover legacies and distributive shares, the view is taken that the statute of limitations is a bar to suit for a legacy and that this is so whether the proceeding to recover the same is an action at law or a suit in equity. American Bible Soc. *v.* Hebard, 51 Barb. (N. Y.) 552; Smith *v.* Remington, 42 Barb. (N. Y.) 75; Kane *v.* Bloodgood, 7 Johns. Ch. (N. Y.) 90, 11 Am. Dec. 417; Souzer *v.* De Meyer, 2 Paige (N. Y.) 574; Pratt *v.* Northam, 19 Fed. Cas. No. 11,376, 5 Mason 95. And see House *v.* Agate, 3 Redf. Surr. (N. Y.) 307. This doctrine has not, however, been generally adopted and has been very severely criticized on the ground that a claim to a legacy is essentially an equitable and not a legal claim, and that the character of the right is not altered by making it cognizable in courts of common law. Hedges *v.* Norris, 32 N. J. Eq. 192; King *v.* Berry, 3 N. J. Eq. 44. And see Thompson *v.* McGaw, 2 Watts (Pa.) 161. In Louisiana, where the civil law practice obtains, an action for a legacy is barred in ten years. Nolasco *v.* Lurty, 13 La. Ann. 100.

The present English rule.— By 3 & 4 Wm. 4, c. 27, legacies are barred after twenty years (Piggott *v.* Jeffreson, 5 Jur. 796, 12 Sim. 26, 35 Eng. Ch. 26); unless there has been some payment or signed acknowledgment (Proud *v.* Proud, 32 Beav. 234).

Where the characters of administrator and distributee unite in the same person, who holds possession of personal property in the former character for more than five years, his rights as distributee will not be barred by the statute of limitations. Vaiden *v.* Bell, 3 Rand. (Va.) 448.

46. *Arkansas.*— Harriet *v.* Swan, 18 Ark. 495.

Massachusetts.— Kent *v.* Dunham, 106 Mass. 586.

Mississippi.— Cooper *v.* Cooper, 61 Miss. 676; Jordan *v.* McKenzie, 30 Miss. 32.

Missouri.— Picot *v.* Bates, 39 Mo. 292.

New York.— Decouche *v.* Savetier, 3 Johns. Ch. 190, 8 Am. Dec. 478.

South Carolina.— Montgomery *v.* Cloud, 27 S. C. 188, 3 S. E. 196; Beard *v.* Stanton, 15 S. C. 164.

Tennessee.— Carr *v.* Lowe, 7 Heisk. 84.

Virginia.— Jones *v.* Jones, 92 Va. 590, 24 S. E. 255; Leake *v.* Leake, 75 Va. 792.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1761.

And see, generally, on the subject of adverse holding between trustee and *cestui que trust* ADVERSE POSSESSION, 1 Cyc. 1062, where the question is considered at some length.

The doctrine is clearly explained in a well considered case as follows: "Until the trust is ended and the executor discharged from

avowal of the trust.[47] But inasmuch as the rule is based on the relation of trustee and *cestui que trust*, the reason therefor ceases when the relation determines, and the statute of limitations then becomes operative. Consequently the statute is available to an executor or administrator against the claim of a legatee or distributee, when he does some act purporting to be an execution of the trust, for he thereby divests himself of his character as trustee and thenceforth stands in an adverse relation to the *cestui que trust*.[48] On final settlement by an administrator or executor the statute of limitations commences to run in his favor against claims of legatees and distributees.[49] So it may happen that without any final settlement or any act purporting to be in execution of the trust, he may set up a claim adverse to that of the legatee or distributee. In this case the statute is operative from the time the adverse claim is made known to the latter,[50] but notice to him is necessary.[51] This notice must be actual or the acts or declarations of the personal representative must be so notorious and unequivocal as to raise a presumption of notice.[52] So where an administrator who acknowledges a balance due is

any further accounting, the beneficiaries have the right to consider the trust an active one, and mere delay on the part of the trustee in settling with the court, and through it with the beneficiaries, and obtaining his discharge, cannot be considered such a breach of the trust as to set the statute in motion in his favor. To so hold would be to offer a reward to executors and administrators to be dilatory instead of diligent in the performance of their duties. Nevertheless, we are not to be understood as saying that there may not be cases in which, after an actual suspension of the trust, there has been such long acquiescence or delay on the part of the *cestui que trust* as to require the court to deny him relief upon the ground of laches." Cooper *v.* Cooper, 61 Miss. 676, 694.

47. Matter of Moore, 84 Mich. 474, 48 N. W. 39; Peebles *v.* Acker, 70 Miss. 356, 12 So. 248; Roberts *v.* Roberts, 34 Miss. 322; Wood *v.* Riker, 1 Paige (N. Y.) 616; Edwards *v.* Williams, 39 S. C. 86, 17 S. E. 457. And see Flynn *v.* Flynn, 183 Mass. 365, 67 N. E. 314; Bechtold *v.* Read, 49 N. J. Eq. 111, 22 Atl. 1085.

48. Montgomery *v.* Cloud, 27 S. C. 188, 3 S. E. 196; Beard *v.* Stanton, 15 S. C. 164; Glover *v.* Lott, 1 Strobh. Eq. (S. C.) 79; Moore *v.* Porcher, Bailey Eq. (S. C.) 195.

Application of rule.— Defendant as executor in discharge of his trust paid over to an unmarried infant, seventeen years of age, who was a residuary legatee of his testator, her distributive share of the estate and took the joint receipt of herself and her father for the same. The court held that twelve years after making his final return he was entitled to the protection of the statute of limitations against a suit for the amount brought by the legatee and her husband. Glover *v.* Lott, 1 Strobh. Eq. (S. C.) 79. So where distributees of an estate give to the administrator receipts in full for the amount due them on payment of a less amount, the statute begins to run against their right of action for the balance from the giving of such receipts. Coppersmith *v.* Wilson, 104 N. C. 28, 10 S. E. 134.

Duty to assert right.— If the legatee or distributee supposes that the trust has not been faithfully and fully performed, it is his duty to assert his right. Beard *v.* Stanton, 15 S. C. 164; Moore *v.* Porcher, Bailey Eq. (S. C.) 195.

49. *Connecticut.*— Wilmerding *v.* Russ, 33 Conn. 67.

Delaware.— Buckmaster *v.* Reed, 7 Houst. 207, 30 Atl. 971.

Georgia.— Jacobs *v.* Pou, 18 Ga. 346; Walker *v.* Wootten, 18 Ga. 119.

Mississippi.— Young *v.* Cook, 30 Miss. 320.

Missouri.— State *v.* Blackwell, 20 Mo. 97. And see State *v.* Shires, 39 Mo. App. 560.

North Carolina.— Wilkerson *v.* Dunn, 52 N. C. 125.

Ohio.— Lease *v.* Downy, 5 Ohio Cir. Ct. 480, 3 Ohio Cir. Dec. 235.

South Carolina.— Buchanan *v.* Buchanan, 4 Strobh. 63.

Texas.— See Timnen *v.* Mebane, 10 Tex. 246, 69 Am. Dec. 205.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1761.

Contra.— Amos *v.* Campbell, 9 Fla. 187.

Notwithstanding the fact that a final settlement sets the statute of limitations in motion, the running thereof may be interrupted by admissions of the executor made subsequent to the settlement. Buchanan *v.* Buchanan, 4 Strobh. (S. C.) 63.

Effect of making return subsequent to settlement.— Where the statute is set in motion by final settlement, the fact that the administrator makes a return subsequent to the settlement in which he states matters occurring before the settlement, the payments made at that settlement, but nothing which happened afterward does not amount to an admission sufficient to take an action against him, by the heirs out of the statute of limitation. Walker *v.* Wootten, 18 Ga. 119.

50. Patton *v.* Overton, 8 Humphr. (Tenn.) 192.

51. Bonner *v.* Young, 68 Ala. 35.

52. See ADVERSE POSSESSION, 1 Cyc. 1067.

Married distributee becoming discovert.— Where an administrator held property to which one of the distributees was entitled, but which had been assigned to the administrator by the distributee's husband, it was

removed, and an administrator *de bonis non* appointed, the statute commences to run against their claims against the administrator from the time of the removal, in the absence of any concealment or disability on the part of the heirs.[53]

(B) *Presumption of Payment From Lapse of Time.* While, as stated in the preceding section, the statute of limitations is ordinarily inoperative to bar a claim for a legacy or distributive share, lapse of time may raise a presumption of payment or satisfaction.[54] Stale demands are unwillingly countenanced in courts. Interference in behalf of those who sleep on their rights, or who procrastinate them until evidence has passed away is reluctantly awarded, even where there is no statutory bar.[55] A lapse of twenty years or over from the time the legacy or distributive share becomes payable raises a presumption of payment or satisfaction and unless rebutted bars the claim.[56] Nevertheless the presumption may be rebutted and the liability to account will then remain in full force.[57] If the delay is satisfactorily explained and the presumption of satisfaction sufficiently removed the equity of the claimant remains unaffected,[58] and where there is any evidence to rebut the presumption of payment the sufficiency of the evidence is a question of fact to be determined by the jury.[59] On the other hand if no evidence is given to repel the presumption the court should instruct the jury that they are bound by it.[60]

(III) *ACTIONS BASED ON WRONGFUL ACTS OF REPRESENTATIVE.* While limitations do not run against an executor for trust funds in his hands until demand, the claim for damages based on his mismanagement of the estate is subject to the operation of the statute of limitations.[61] If the claim is based on the negligence

held proper to charge that if made with her consent, and the administrator claimed and held the property afterward as his own, with the knowledge of the distributee who had meanwhile become discovert, the statute commenced to run against her from the time she became a *feme sole*. Smith *v.* Atwood, 14 Ga. 402.

53. Mott *v.* Ruenbuhl, 1 Tex. App. Civ. Cas. § 599.

54. *Indiana.*—Smith *v.* Calloway, 7 Blackf. 86.

New York.— Arden *v.* Arden, 1 Johns. Ch. 313.

Pennsylvania.— Summerville *v.* Holliday, 1 Watts 507; Durdon *v.* Gaskill, 2 Yeates 268.

South Carolina.— Sims *v.* Aughtery, 4 Strobh. Eq. 103.

Virginia.— Leake *v.* Leake, 75 Va. 792; Anderson *v.* Burwell, 6 Gratt. 405.

England.— Stuart *v.* Mellish, 2 Atk. 610, 26 Eng. Reprint 765; Parker *v.* Ash, 1 Vern. Ch. 256, 23 Eng. Reprint 452; Higgins *v.* Crawfurd, 2 Ves. Jr. 571, 30 Eng. Reprint 781.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1761.

55. Glen *v.* Kimbrough, 58 N. C. 173.

56. *Alabama.*— Bonner *v.* Young, 68 Ala. 35.

Massachusetts.— Andrews *v.* Sparhawk, 13 Pick. 393.

North Carolina. — Shearin *v.* Eaton, 37 N. C. 282; Ivy *v.* Rogers, 16 N. C. 58. And see Hamlin *v.* Mebone, 54 N. C. 18.

Pennsylvania.— Norris' Appeal, 71 Pa. St. 106; Okeson's Appeal, 2 Grant 303; Foulk *v.* Brown, 2 Watts 209; Brown's Estate, 8 Phila. 197.

South Carolina.— *Ex p.* Epting, 22 S. C. 399.

Nothing short of twenty years raises a presumption of payment unless corroborated by proof of other circumstances. Sparhawk *v.* Buell, 9 Vt. 41. And see Richardson *v.* Richardson, 9 Pa. St. 428.

Within the twenty-year period burden of proof lies on defendant; after that time it lies on plaintiff to show the contrary. Norris' Appeal, 71 Pa. St. 106.

57. Arden *v.* Arden, 1 Johns. Ch. (N. Y.) 313; Glen *v.* Kimbrough, 58 N. C. 173; Shearin *v.* Eaton, 37 N. C. 282; Bird *v.* Graham, 36 N. C. 196; Falls *v.* Torrance, 11 N. C. 412; Norris' Appeal, 71 Pa. St. 106; Foulk *v.* Brown, 2 Watts (Pa.) 209; Durdon *v.* Gaskill, 2 Yeates (Pa.) 268.

Facts held sufficient to rebut presumption. — Declarations by an administrator inducing a belief that he would not contest a claim for a legacy or distributive share was sufficient to repel the presumption of satisfaction or abandonment. Falls *v.* Torrance, 11 N. C. 412.

58. Falls *v.* Torrance, 11 N. C. 412.

59. Kingman *v.* Kingman, 121 Mass. 249; Andrews *v.* Sparhawk, 13 Pick. (Mass.) 393; Summerville *v.* Holliday, 1 Watts (Pa.) 507.

60. Summerville *v.* Holliday, 1 Watts (Pa.) 507.

61. Taylor *v.* Benham, 5 How. (U. S.) 233, 12 L. ed. 130.

Limitation fixed by special statute.— In Florida an action against an administrator for personal liability incurred by mismanagement of the estates must be brought within five years from the time of his discharge. Gadsden *v.* Jones, 1 Fla. 332. The

of the representative in collecting a debt, the statute does not commence to run from probate of the will but only from the time of the loss.[62] If the administrator buys in personal property of the estate at a sale thereof, and thenceforth openly and notoriously asserts title in himself the statute of limitations will bar a bill brought by the heirs for relief after the action was barred at law.[63] If an administrator buys land of decedent's estate at a judicial sale, the statute commences to run in his favor from the time of his discharge by the probate court, there being no concealment of the circumstances of the sale.[64] Where an administrator rents land improperly allotted to intestate's widow and occupies it while administrator, he cannot, in a suit against him by a succeeding representative to recover possession, set up adverse possession during the time he was administrator.[65] If he assumes as agent for the heirs to collect rents and apply them in payment of decedent's debts in exoneration of the land and fails to so apply the rents, he cannot set up the statute of limitations unless there is a demand and refusal and then only from the time thereof.[66] If he has purchased land for the estate taking title as administrator and after discharge on final settlement continues in possession under claim of title the statute commences to run from the date of his discharge.[67] A plea of a statute providing that actions of assumpsit or debt grounded upon any lending or contract without specialty shall be commenced within five years is not good in bar of an action against the personal representative of a personal representative for a devastavit committed by the latter.[68] Mere delay of a creditor in presenting his demand for payment does not preclude him from suing the representative for a devastavit, and the fact that the personal representative has distributed the estate does not relieve him of liability to a creditor who sues within the period fixed by the statute.[69] When an action is brought against an executor or administrator for a devastavit, and a judgment is obtained against him the cause of action accrues at the time of the qualification and the limitation in force at the time governs; but when the action is brought after the death of the executor the cause of action accrues as against his real and personal representative, when such representative qualifies and gives notice to creditors, and is governed by the limitation then in force.[70] Where a judgment is rendered for plaintiff in an action against a representative for a devastavit a further action by plaintiff to subject real estate to the payment of the judgment cannot be treated as an equitable continuation, or writ of execution on the judgment so as to avoid the bar of the statute of limitations.[71]

limitation of a statute providing that an action against an administrator for malfeasance must be brought within a year from the time of final settlement does not apply to an action by an administrator *de bonis non* against an original administrator to recover an amount alleged to have been charged to defendant in his final account, since the final accounting intended by the statute is not the last accounting of successive representatives before the final settlement of the estate. Bartels *v.* Gove, 4 Wash. 632, 30 Pac. 675.

Actions by judgment creditors.— An action by a judgment creditor of decedent to reach assets misapplied by the administrator in order that they may be applied in due course of administration must be brought during the time limited by statute for bringing actions on judgments. Malloy *v.* Vanderbilt, 4 Abb. N. Cas. (N. Y.) 127.

62. Harrington *v.* Keteltas, 92 N. Y. 40.

63. Keeton *v.* Keeton, 20 Mo. 530.

64. McGaughey *v.* Brown, 46 Ark. 25.

65. Baker *v.* Barclift, 76 Ala. 414, he cannot as an individual hold adversely to himself as the legal representative of the estate.

66. Shuffler *v.* Turner, 111 N. C. 297, 16 S. E. 417.

67. Harney *v.* Donohoe, 97 Mo. 141, 10 S. W. 191.

68. Brockenbrough *v.* Campbell, 5 Fla. 83. And see Williams *v.* Freeman, 7 Watts & S. (Pa.) 359, holding that a statute providing that "all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent, except the proprietaries' quit-rents, shall be commenced and sued within six years next after the cause of such actions or suits, and not after," has no application to an action against an administrator founded upon a devastavit.

69. Harpending *v.* Daniels, 11 Ky. L. Rep. 858.

70. Syme *v.* Badger, 96 N. C. 197, 2 S. E. 61.

71. Syme *v.* Badger, 96 N. C. 197, 2 S. E. 61.

(iv) *Actions to Set Aside Settlement For Mistake or Fraud.* Under a statute authorizing any person interested in the estate to have a settlement thereof set aside for mistake or fraud within three years after settlement, if a settlement should be made without in some manner finally disposing of debts against the estate within the knowledge of the administrator the creditors will be barred from any further action against the administrator after three years.[72]

(v) *Actions Against Representative and Coöbligor of Decedent.* Where suit is brought against an obligor and the representative of a deceased obligor the fact that the suit is barred as to the latter by some statute specially applicable to suits against executors and administrators does not prevent the recovery of a judgment against the former.[73] Where an administrator is sued on a joint and several obligation with the surviving obligor, they are in respect of the application of the statute of limitations to be regarded as if they had been sued separately, and the time during which suits cannot be brought against an administrator must be added to the period fixed by the general statute before the statute can be made a bar as to his liability.[74]

G. Parties — 1. Actions or Suits to Recover or Protect Personal Estate, or to Establish or Foreclose Liens Thereon. The personal representative in all cases represents the personal estate, the legal title to which vests in him absolutely, and both in law and equity he is considered as fully representing the rights and interests of all other persons who have ultimate rights in such estate. He is therefore the proper party to bring suit in relation to the personal estate both at law and in equity,[75] and it is in general improper to join as parties other persons having ultimate rights in the estate.[76] Thus it has been held that the personal representative is the proper party to bring a suit for the collection of debts due the estate and it is improper to join heirs, devisees, or legatees as parties to the suit.[77] So he is the proper party to bring an action for injuries to personal property of the estate,[78] or to protect it from sale on execution issued on a judgment against himself personally,[79] or to recover property exempt from execution belonging to intestate and wrongfully withheld.[80] So in a suit by an administrator *de bonis non* against the former administrator to recover personal property of the estate the heirs or distributees need not be made parties.[81] The

72. Beard *v.* Peru First Presb. Church, 15 Ind. 490.

73. Buie *v.* Buie, 24 N. C. 87; Nashville Bank *v.* Campbell, 7 Yerg. (Tenn.) 353.

74. Parker *v.* Jackson, 16 Barb. (N. Y.) 33.

75. *Georgia.*— Jones *v.* McCleod, 61 Ga. 602.

Kentucky.— Boyd *v.* Jones, 2 S. W. 552, 8 Ky. L. Rep. 602.

Nebraska.— Cox *v.* Yeazel, 49 Nebr. 343, 68 N. W. 483.

South Carolina.— Gregory *v.* Forrester, 1 McCord Eq. 318; Galphin *v.* McKinney, 1 McCord Eq. 280.

Vermont.— Robinson *v.* Swift, 3 Vt. 377.

England.— Smith *v.* Bolden, 33 Beav. 262; Jones *v.* Goodchild, 2 Eq. Cas. Abr. 168, 22 Eng. Reprint 144, 3 P. Wms. 33, 24 Eng. Reprint 958; 1 Daniel Ch. Pr. 220; Pomeroy Rem. & Rem. Rights, § 261. *Compare* Phillips *v.* Threadgill, 37 Ala. 93, holding that the administrator is a necessary party to a bill filed by distributees against a person in adverse possession of personal property alleged to belong to the estate. There is nothing in this case to show why the court thought the distributees entitled to sue at all.

The right of action to recover a legacy or other chose in action due an intestate is in his administrator and cannot be maintained by the distributees of the estate or their assignee. Whelan *v.* Edwards, 31 Ark. 723.

Where both a foreign and a resident administrator assert by petition in the same action the same demand, the latter is the proper party to represent the estate. Crumlish *v.* Shenandoah Valley R. Co., 40 W. Va. 627, 22 S. E. 90.

In Louisiana, where an executor sues for personal property of the estate, the heirs, if interested and present, or their representatives, if absent, should be made parties. Hart *v.* Boni, 6 La. 97.

76. See cases cited in the preceding and following notes.

77. O'Bannon *v.* Roberts, 2 Dana (Ky.) 54 (rents accruing during decedent's lifetime); Graveley *v.* Graveley, 84 Va. 145, 4 S. E. 218. And see Burge *v.* Burge, 76 S. W. 873, 25 Ky. L. Rep. 979.

78. Coleman *v.* Bailey, 4 Bibb (Ky.) 297, holding that the heirs should not be joined.

79. Labitut *v.* Prewett, 14 Fed. Cas. No. 7,962, 1 Woods 144.

80. Staggs *v.* Ferguson, 4 Heisk. (Tenn.) 690.

81. Long *v.* Easly, 13 Ala. 239.

general rule as stated is subject to some exceptions. Thus a creditor of deceased may under peculiar circumstances, such as fraud or collusion on the part of the personal representative, bring suit against a debtor to the estate,[82] and it has been held that a creditor may maintain a bill when the personal representative refuses to sue.[83] So where an administrator makes a fraudulent transfer of property belonging to the estate and refuses to bring suit for its recovery, it has been held that the heirs may do so.[84] If an administrator sues to recover on a note given to a former administrator of the same estate, the court can order him to be made a party if necessary to a proper determination of the case.[85] The executor *eo nomine* is a necessary party defendant in a bill praying a decree that will deprive him of title to the personal estate,[86] and also in a bill to establish an equitable lien on funds of the estate.[87] The heirs are not necessary parties to foreclose a mortgage of personal property belonging to the estate.[88] Where a decree of distribution of the estate of a decedent was reversed, a company which had transferred shares of stock belonging to the estate to a distributee is a proper party defendant to an action by the executors to recover such shares and to cancel the transfer thereof.[89]

2. Actions or Suits by Creditors of Estate — a. In General. In actions or suits by creditors to enforce claims against the estate the general rule is that the personal representative is the only necessary or even proper party defendant.[90] Accordingly the plaintiff should not join as defendants the widow or heirs,[91] or legatees[92] or residuary legatees, unless the interests of the executor are adverse

82. 1 Daniel Ch. Pr. 200. And see Fisher *v.* Hubbell, 65 Barb. (N. Y.) 74, 7 Lans. (N. Y.) 481; Gregory *v.* Forrester, 1 McCord Eq. (S. C.) 318; Atty.-Gen. *v.* Wynne, Mosely 126; Wilson *v.* Smith, 1 Myl. & K. 126, 7 Eng. Ch. 126, 39 Eng. Reprint 629; Alsager *v.* Rowley, 6 Ves. Jr. 748, 31 Eng. Reprint 1289. And see Nance *v.* Powell, 39 N. C. 297, holding that, where an administrator fails to sue, a debtor of the deceased creditors can only file a bill against the debtor on charging collusion between him and the administrator.

Collusive settlement of matter in litigation. — Where an administrator settles a matter in litigation which is prejudical to the substantial rights of the heir at law and not such as properly protects his interest or is entered into collusively and in fraud of his rights and without his consent, the court may properly permit the heir at law to be substituted to prosecute the action in her own name. Tecumseh Nat. Bank *v.* McGee, 61 Nebr. 709, 85 N. W. 949.

83. Burroughs *v.* Elton, 11 Ves. Jr. 29, 8 Rev. Rep. 79, 32 Eng. Reprint 998. See also Ravenscraft *v.* Pratt, 22 Kan. 20.

Under the West Virginia statutes if an executor has failed to institute suit to ascertain outstanding claims any creditor may prosecute that action after the expiration of six months from the executor's qualification, whether he has obtained judgment on his claim or not. Broderick *v.* Broderick, 28 W. Va. 378.

84. Randel *v.* Dyett, 38 Hun (N. Y.) 347, this is on the principle that when a person whose duty it is to act refuses the person injured by the refusal may act in behalf of the injured estate.

85. Dancy *v.* Smith, 68 N. C. 179.

86. Kempton *v.* Bartine, 60 N. J. Eq. 411, 45 Atl. 966 [*affirming* 59 N. J. Eq. 149, 44 Atl. 461].

87. Guyer *v.* Wilson, 139 Ill. 392, 28 N. E. 738 [*reversing* 36 Ill. App. 539].

88. Scott *v.* Jenkins, (Fla. 1902) 35 So. 101.

89. Ashton *v.* Heggerty, 130 Cal. 516, 62 Pac. 934.

90. Melick *v.* Melick, 17 N. J. Eq. 156; Frazer *v.* Charleston, 19 S. C. 384; Fripp *v.* Talbird, 1 Hill Eq. (S. C.) 142; Newland *v.* Champion, 1 Ves. 105, 27 Eng. Reprint 920. See also cases cited in subsequent notes in this section. But see McMullin *v.* Day, 1 Miles (Pa.) 136, holding that where an administrator is sued the heirs may come in and defend on terms.

Where suit is brought for a breach of covenant of warranty after the covenantor's death and the only relief sought is establishment of the claim, the devisees and heirs should not be joined as parties defendant. McConaughey *v.* Bennett, 50 W. Va. 172, 40 S. E. 540.

In a suit against executors to recover funds bequeathed by the deceased, but claimed to be in fact the property of plaintiff, the legatees thereof are not necessary parties defendant. King *v.* Lawrence, 14 Wis. 238.

In Louisiana a father acting in the capacity of tutor to his minor children is the representative of the succession of the mother and as such the proper party to be sued for a debt of his deceased wife. Monget *v.* Penny, 7 La. Ann. 135.

91. Nelson *v.* Hart, 8 Ind. 293 (holding that the general rule is not altered by the code); Miner *v.* Aylesworth, 18 Fed. 199.

92. Frazer *v.* Charleston, 19 S. C. 384; Glover *v.* Patten, 165 U. S. 394, 17 S. Ct. 411,

to them and their rights may be prejudiced,[93] or distributees,[94] or devisees[95] or persons to whom decedent conveyed property in trust to convert into money and pay his creditors and to account for any surplus to decedent or his legal representatives[96] or debtors to the estate.[97] The general rule, however, is not without some exceptions. Thus a debtor to the estate may be joined as a defendant in case of collusion between the personal representative and the debtor, or insolvency of the personal representative, or unwillingness to proceed to collect the assets.[98] In no event, however, can a creditor sue a debtor of the estate without making the personal representative a party.[99] So by statute in some jurisdictions the heirs may come in and defend if the personal representative refuses or neglects to do so,[1] and this will perhaps be permissible in the absence of any statutory authority. So where a bond has been given by an heir under a statute authorizing the administrator on written requisition by an heir to disallow a claim on the giving of a bond approved by the court for the payment of all expenses in the collection of such claim, the party giving the bond must be made a party to the suit on a rejected claim and permitted to defend if he desires or he cannot be held liable for the cost and expenses of the suit.[2]

b. Creditor's Bills. To a creditor's bill against the estate, legatees are ordinarily not necessary parties because their interests are sufficiently protected by the personal representative;[3] but where the executor is removed, the reason for the rule ceases, and they are necessary parties to such bill in accordance with the general doctrine that all persons having an interest in the object of the suit should be made parties.[4] In a creditor's bill against the administrator and heir of a decedent to enforce the collection of the joint obligation of decedent and another obligor such obligor is a necessary party, although a non-resident in order that he may be made primarily liable for whatever portion of the debt may in equity be due from him.[5] Where heirs and devisees are seeking to hold the executor liable for mismanagement of the estate they may be joined as plaintiffs in a creditor's bill.[6]

c. Suits to Establish Rejected Claims. In a suit to establish a rejected claim against a decedent's estate and to determine the validity of a trust deed given to secure it, the trustee is not a necessary party.[7]

3. Actions or Suits in Relation to Land — a. Actions or Suits For Recovery of Land. Notwithstanding the fact that the personal representative is by statute

41 L. ed. 760. And see Douglas *v.* Fraser, 2 McCord Eq. (S. C.) 105, holding that to a bill against an executor to charge the estate with a debt legatees need not be made parties unless their legacies have been paid and there is a deficiency of assets.

93. Melick *v.* Melick, 17 N. J. Eq. 156.

94. Fripp *v.* Talbird, 1 Hill Eq. (S. C.) 142.

95. Greene *v.* Martine, 27 Hun (N. Y.) 246.

96. Miner *v.* Aylesworth, 18 Fed. 199.

97. Gilbert *v.* Thomas, 3 Ga. 575; Lancaster *v.* Evors, 4 Beav. 158, 5 Jur. 525, 49 Eng. Reprint 299; Alsager *v.* Rowley, 6 Ves. Jr. 748, 31 Eng. Reprint 1289; Utterson *v.* Mair, 2 Ves. Jr. 95, 30 Eng. Reprint 540.

98. Gilbert *v.* Thomas, 3 Ga. 575; Lancaster *v.* Evors, 4 Beav. 158, 5 Jur. 525, 49 Eng. Reprint 299; Gedge *v.* Traill, 2 L. J. Ch. O. S. 1, 1 Russ. & M. 281 note; Newland *v.* Champion, 1 Ves. 105, 27 Eng. Reprint 920; Story Eq. Pl. §§ 178–227. And see Burroughs *v.* Elton, 11 Ves. Jr. 29, 8 Rev. Rep. 79, 32 Eng. Reprint 998; Doran *v.* Simpson, 4 Ves. Jr. 651, 31 Eng. Reprint 336.

Instance.— A creditor may join as defendant a person claiming a fund in court on which the estate has an equitable demand for the purpose of obtaining payment out of it where the executor refuses to take steps to establish the demand. Lancaster *v.* Evors, 4 Beav. 158, 5 Jur. 525, 49 Eng. Reprint 299.

99. Isaacs *v.* Clark, 13 Vt. 657.

"Estate" as party.— In a suit against an executor, the executor and not the "estate" should be made the party defendant. Voorhies *v.* Eubank, 6 Iowa 274.

1. Gibson *v.* Higdon, 15 B. Mon. (Ky.) 205; Baxter *v.* Knox, 31 S. W. 284, 17 Ky. L. Rep. 489.

2. Fullerton *v.* Davis, 1 Ohio Cir. Ct. 572, 1 Ohio Cir. Dec. 320.

3. Frazer *v.* Charleston, 13 S. C. 533. And see Jones *v.* Lackland, 2 Gratt. (Va.) 81.

4. Frazer *v.* Charleston, 13 S. C. 533, holding further that assignees of the legatees have the right to be made parties to the bill.

5. White *v.* Kennedy, 23 W. Va. 221.

6. Spencer *v.* Goodlett, 104 Tenn. 648, 58 S. W. 322.

7. Ryon *v.* George, 32 Tex. Civ. App. 504, 75 S. W. 48.

given the right to possession of land as assets for the purpose of administration the heirs are indispensable parties in ejectment or any similar action where the title is in question,[8] and a statute providing that when a mortgagee dies before payment of the debt all his rights and powers pass to the personal representative do not empower the personal representative of a deceased mortgagee to maintain ejectment with making the mortgagee's heirs at law parties.[9] If sole and exclusive right to prosecute and defend all suits concerning decedent's land is given by will to the executor and the legal title vested in him, the devisees are not necessary parties to a suit against the executor for part of the land.[10] And where the title to real estate vests in the executors in fee by the terms of the will they may maintain an action against one wrongfully in possession of the land for its recovery without joining the heirs as parties.[11] Where an administrator purchases land at a sale under execution in his favor as such, it may be treated as personalty until his duty in respect to it is performed and he may proceed for its recovery without joining the heirs; nevertheless, it is not improper to substitute the heirs as plaintiffs in his stead.[12] So where the purchaser at sheriff's sale on execution dies, and a conveyance is made to his personal representative, he may bring an action to recover possession, without joining any of the heirs with him.[13] An administrator cannot maintain a bill in equity to recover land of his intestate to which the heirs are not parties on the ground that the assets of the estate are insufficient to pay its debts, in the absence of a showing that it has been declared insolvent.[14] Where suit is brought by an executor of one succession to recover property seized by the executor of another succession he must join as defendants the heirs of the seizing creditor.[15]

b. Foreclosure of Mortgages — (i) *On Death of Mortgagee.* Where a mortgagee dies, his personal representative is the proper party to maintain a bill to foreclose the mortgage,[16] and the reason is that the money secured belongs to

8. Chowning *v.* Stanfield, 49 Ark. 87, 4 S. W. 476; Sisk *v.* Almon, 34 Ark. 391.

In Louisiana it has been held that the administrator of a succession cannot maintain an action for the recovery of real estate alleged to be the property of the succession, when the heirs of the succession are present and all of them are not made parties to the suit. Ledoux *v.* Burton, 30 La. Ann. 576. So in an action by a dative testamentary executrix to recover realty held under tax title, an issue as to whether or not the property belongs to a community alleged to have existed between deceased and plaintiff cannot be determined, where the heirs are not parties. Benton *v.* Benton, 106 La. 99, 30 So. 137.

In Texas the statute authorizes the personal representative to maintain an action of trespass to try title without joining the heirs. Boggess *v.* Brownson, 59 Tex. 417; Zacharie *v.* Waldrom, 56 Tex. 116; Gunter *v.* Fox, 51 Tex. 383 [*overruling* Barrett *v.* Barrett, 31 Tex. 344]; Guilford *v.* Love, 49 Tex. 715. Where, however, a defendant in such a suit asks affirmative relief in his answer, he becomes a plaintiff to the extent of such relief, and, if he fails to comply with the requirements of Tex. Rev. St. art. 1202 (Act Aug. 15, 1870, p. 141), by making the heirs of the estate parties, a judgment in his favor will not operate to divest the title of the estate. East *v.* Dugan, 79 Tex. 329, 15 S. W. 273.

Under statutes authorizing heirs or devisees to join with the personal representative in suits to recover real property belonging to the estate, the heirs cannot compel the bringing of such action by an executor. Crosby *v.* Dowd, 61 Cal. 557.

9. Hughes *v.* Gay, 132 N. C. 50, 43 S. E. 539.

10. Lee *v.* Colston, 5 T. B. Mon. (Ky.) 238.

11. Martin *v.* Spurrier, 23 Ohio Cir. Ct. 110.

12. Jackson *v.* Roberts, 95 Ky. 410, 25 S. W. 879, 15 Ky. L. Rep. 831.

13. Reynolds *v.* Darling, 42 Barb. (N. Y.) 418.

14. Campbell *v.* Doyle, 57 Miss. 292.

15. Bird *v.* Générès, 34 La. Ann. 321.

16. *California.*— Grattan *v.* Wiggins, 23 Cal. 16.

Connecticut.— Roath *v.* Smith, 5 Conn. 133.

Illinois.— Citizens' Nat. Bank *v.* Dayton, 116 Ill. 257, 4 N. E. 492.

Maine.— Plummer *v.* Doughty, 78 Me. 341, 5 Atl. 526; Webster *v.* Calden, 56 Me. 204; Felch *v.* Hooper, 20 Me. 159.

Massachusetts.— Marsh *v.* Austin, 1 Allen 235; Fay *v.* Cheney, 14 Pick. 399.

Mississippi.— Griffin *v.* Lovell, 42 Miss. 402.

England.— Freake *v.* Horseley, 2 Freem. Ch. 180, 22 Eng. Reprint 1145, Nelson 93, 21 Eng. Reprint 798; Story Eq. Pl. § 200.

the personal estate and draws after it the mortgaged estate as an incident.[17] According to some of the text writers and some decisions the heir of the mortgagee is a necessary party,[18] as being a trustee of the legal estate for the executor,[19] and because if the mortgage should be redeemed there would be no one before the court by whom an effectual conveyance of the legal estate could be made.[20] So some decisions have held that the heir of the mortgagee should be made a party either as plaintiff or defendant when in possession of the premises.[21] By virtue of legislation in a number of jurisdictions, it is no longer necessary to join the heir as a party; it has so been held under a statute providing that payment of the mortgage debt to the mortgagee or his representative revests title in the mortgagor without reconveyance,[22] or that a mortgage may be released by the personal representative of a deceased mortgagee,[23] or giving the administrator the sole right to maintain actions for debts due deceased.[24] Under statutes of this character it has been held that the heir is not even a proper party.[25] Where an executor accepts payment of a bond secured by mortgage in confederate currency and delivers up the bond and enters the mortgage satisfied and cancels it, he is a necessary party to a suit by the legatees against the obligor in the bond to compel him to deliver it up and to obtain control of the property mortgaged for distribution.[26]

(II) *On Death of Mortgagor* — (A) *Whether Personal Representative Necessary Party* — (1) Introductory Statement. As will be shown in another title of this work, the heirs of a deceased mortgagor are indispensable parties to a bill to foreclose the mortgage unless there is some special provision affecting the practice.[27] As respects the necessity of making the personal representative of the deceased mortgagor a party there is considerable diversity of holding, which may be accounted for to some extent at least by statutory provisions affecting the question.[28]

(2) View That Personal Representative Is a Necessary Party. In a number of jurisdictions it is held that the personal representative is a necessary party. In some of them no special statutory provision is relied on.[29] In others statutes expressly provide that the personal representative shall be joined as a party,[30] and in others his joinder is considered to be necessary because of statutes vest-

See 22 Cent. Dig. tit. "Executors and Administrators," § 1779.

An administrator de bonis non with the will annexed may bring suit to foreclose a mortgage making other mortgagees as well as the mortgagor parties. Miller *v.* Donaldson, 17 Ohio 264.

Limitation of rule. — Where the widow of decedent mortgagee had made an amicable settlement with other heirs, and was the sole owner of the mortgage which had been assigned to her, and the administrator of the estate had fully settled it and been discharged, and the settlement had been approved by the court, it was held that the administrator was neither a necessary nor a proper party to an action for foreclosure brought by the widow. Westerfield *v.* Spencer, 61 Ind. 339.

17. Griffin *v.* Lovell, 42 Miss. 402; Citizens' Nat. Bank *v.* Dayton, 116 Ill. 257, 4 N. E. 492; Story Eq. Pl. § 200.

18. Worthington *v.* Lee, 2 Bland (Md.) 678; Hughes *v.* Gay, 132 N. C. 50, 43 S. E. 539; Hughes *v.* Hodges, 94 N. C. 56; McIver *v.* Cherry, 8 Humphr. (Tenn.) 713; Scott *v.* Nicoll, 3 Russ. 476, 3 Eng. Ch. 476, 38 Eng. Reprint 654; Powell Mortg. 970; Story Eq. Pl. § 200.

19. Scott *v.* Nicoll, 3 Russ. 476, 3 Eng. Ch. 476, 38 Eng. Reprint 654.

20. Worthington *v.* Lee, 2 Bland (Md.) 678; Powell Mortg. 970; Story Eq. Pl. § 200.

21. Huggins *v.* Hall, 10 Ala. 283; Osborne *v.* Tunis, 25 N. J. L. 633.

22. Griffin *v.* Lovell, 42 Miss. 402.

23. Citizens' Nat. Bank *v.* Dayton, 116 Ill. 257, 4 N. E. 492; Dayton *v.* Dayton, 7 Ill. App. 136.

24. Grattan *v.* Wiggins, 23 Cal. 16.

25. Citizens' Nat. Bank *v.* Dayton, 116 Ill. 257, 4 N. E. 492.

26. Howland *v.* Kelly, 12 Fed. Cas. No. 6,796, Chase 427.

27. See, generally, Mortgages.

28. See *infra*, XIV, G, 3, b, (II), (A), (2), (3), (4).

29. Hall *v.* Musler, 1 Disn. (Ohio) 36, 12 Ohio Dec. (Reprint) 471; Sargent *v.* Baldwin, 60 Vt. 17, 13 Atl. 854.

In Georgia it was held that the administrator of a deceased mortgagor was the proper party to be sued for a foreclosure of the mortgage and that the mortgagor's heirs were not necessary parties. Dixon *v.* Cuyler, 27 Ga. 248.

30. Hall *v.* Klepzig, 99 Mo. 83, 12 S. W. 372; Tierney *v.* Spiva, 97 Mo. 98, 10 S. W.

ing in him possession of real as well as personal property for purposes of administration.[31]

(3) View That Personal Representative Is Not a Necessary Party. Decisions having an opposite tendency will now be considered. The undoubted weight of authority where the question is not affected by statute is to the effect that in suits of the character under consideration the personal representative is not a necessary party;[32] that if the heir desires the benefit of having the personal estate applied in exoneration of the real, he must enforce the right by filing a bill against the representative for such relief.[33] There are, however, a few well recognized exceptions. Thus it has been held that the personal representative is a necessary party where the bill seeks to charge the personal estate with any deficiency in the mortgaged premises to pay the debt.[34] Another exception is where the mortgage is for a term of years only, for then the equity is said to belong to the personal representative,[35] and if the mortgage comprises both freehold and leasehold estates the heir and the personal representative are both necessary parties.[36]

433; Miles *v.* Smith, 22 Mo. 502; Riley *v.* McCord, 21 Mo. 285.

31. Harwood *v.* Marye, 8 Cal. 580; Kelsey *v.* Welch, 8 S. D. 255, 66 N. W. 390.

Limitations of rule.— Where a mortgagor conveys the mortgaged premises his personal representative is not a necessary party to a suit for foreclosure (Gutzeit *v.* Pennie, 98 Cal. 327, 33 Pac. 199; Hibernia Sav., etc., Soc. *v.* Herbert, 53 Cal. 375), and where the mortgaged premises after the mortgagor's death are set apart to the widow, the administrator is not a necessary party to the foreclosure (Schadt *v.* Heppe, 45 Cal. 433).

In Alabama where the realty as well as the personalty may and generally is brought under the personal representative, he is a necessary party to a bill to foreclose a mortgage executed by his testator or intestate unless it is shown that the assets in his hands to be administered are discharged from all liability for the mortgage debt (Boyle *v.* Williams, 72 Ala. 351; Dooley *v.* Villalonga, 61 Ala. 129 [*disapproving* Inge *v.* Boardman, 2 Ala. 331]. And see Wilkins *v.* Wilkins, 4 Port. 245); and it was held that in an action to foreclose a mortgage after the death of the mortgagor, the appointment of an administrator *ad litem* is insufficient to cure the defect in not making the heirs and legal representatives of the mortgagor parties (Bell *v.* Hall, 76 Ala. 546).

32. *Illinois.*— Bissell *v.* Chicago Mar. Co., 55 Ill. 165; Roberts *v.* Flatt, 42 Ill. App. 608.

Indiana.— Lovering *v.* King, 97 Ind. 130; Cole *v.* McMickle, 30 Ind. 94; Slaughter *v.* Foust, 4 Blackf. 379.

Iowa.— Darlington *v.* Effey, 13 Iowa 177.

Maryland.— David *v.* Grahame, 2 Harr. & G. 94; Worthington *v.* Lee, 2 Bland 678.

Michigan.— Abbott *v.* Godfrey, 1 Mich. 178.

Minnesota.— Hill *v.* Townley, 45 Minn. 167, 47 N. W. 653.

Nevada.— Ricketts *v.* Hutchinson, 18 Nev. 215, 2 Pac. 52, 4 Pac. 702.

New Jersey.— Harlem Co-operative Bldg., etc., Assoc. *v.* Freeburn, 54 N. J. Eq. 37, 33 Atl. 514; United Security L. Ins., etc., Co. *v.* Vandegrift, 51 N. J. Eq. 400, 26 Atl. 985.

North Carolina.— Fraser *v.* Bean, 96 N. C. 227, 2 S. E. 159; Averett *v.* Ward, 45 N. C. 192.

South Carolina.— Butler *v.* Williams, 27 S. C. 221, 3 S. E. 211; Trapier *v.* Waldo, 16 S. C. 276. And see Bryce *v.* Bowers, 11 Rich. Eq. 41; Wright *v.* Eaves, 10 Rich. Eq. 582, holding that where the mortgagor has conveyed mortgaged premises his personal representative is not a necessary party to a bill for foreclosure.

Virginia.— Graham *v.* Carter, 2 Hen. & M. 6.

Wisconsin.— Walker *v.* Jarvis, 16 Wis. 28.

England.— Duncombe *v.* Hansley, 3 P. Wms. 333 note.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1779; 35 Cent. Dig. "Mortgages," § 1282.

33. Harlem Co-operative Bldg., etc., Assoc *v.* Freeburn, 54 N. J. Eq. 37, 33 Atl. 514; Duncombe *v.* Hansley, 3 P. Wms. 333 note; Story Eq. Pl. § 196.

The mortgagee need not intermeddle with the personal estate or run into an account thereof, and if the heir would have the benefit of any payment made by the mortgagor or his executor he must prove it. Duncombe *v.* Hansley, 3 P. Wms. 333 note.

34. Lovering *v.* King, 97 Ind. 130; Darlington *v.* Effey, 13 Iowa 177; Leonard *v.* Morris, 9 Paige (N. Y.) 90; Drayton *v.* Marshall, 1 Rice Eq. (S. C.) 373, 33 Am. Dec. 84. See also the following cases in which this doctrine is recognized: Roberts *v.* Flatt, 42 Ill. App. 608; Slaughter *v.* Foust, 4 Blackf. (Ind.) 379; Abbott *v.* Godfroy, 1 Mich. 178. But see Butler *v.* Williams, 27 S. C. 221, 3 S. E. 211, in which it was held that the personal representative is not a necessary party even though a deficiency judgment is asked since the prayer for relief is no part of the complaint.

35. Bradshaw *v.* Outram, 13 Ves. Jr. 234, 9 Rev. Rep. 183, 33 Eng. Reprint 282.

36. Story Eq. Pl. 196.

(4) Whether Personal Representative a Proper Party. It is usually held that the personal representative of a deceased mortgagor, although not a necessary party, is nevertheless a proper party to a bill to foreclose a mortgage,[37] and if not made a defendant, he may upon his own motion be joined as such.[38]

(B) *Whether Heirs Necessary Parties.* Heirs are necessary parties to a suit to foreclose a mortgage of realty belonging to the estate.[39]

c. Redemption From Mortgage. If the mortgage be for a term of years only, the personal representative of the mortgagor is the proper party to file a bill to redeem.[40] If the mortgage be of the fee, the heir, or if the property be devised, the devisee is the proper party to file a bill to redeem,[41] and it is not necessary to make the personal representative a party where all payments on the debt were made by the heir and no effort is made to charge the personal assets of the estate;[42] but if the bill alleges that part of the mortgage was paid by the mortgagor in his lifetime, his personal representative as well as his heir or devisee is a necessary party to take an account of what is due on the mortgage,[43] and it has been said that as the personal assets are usually first to be applied in exoneration of the real estate mortgaged it would seem that on a bill to redeem by the heir or devisee the personal representative of the mortgagor might properly be made a party defendant in order to have the assets so applied.[44] If the mortgagee dies his heirs or devisees are necessary parties to a bill to redeem as having the legal title.[45] His personal representative is also a necessary party as being the person entitled to receive the money on payment of the mortgage.[46] This doctrine is

37. Hodgdon *v.* Heidman, 66 Iowa 645, 24 N. W. 257; Huston *v.* Stringham, 21 Iowa 36; Darlington *v.* Effey, 13 Iowa 177; Hill *v.* Townley, 45 Minn. 167, 47 N. W. 653; United Security L. Ins., etc., Co. *v.* Vandegrift, 51 N. J. Eq. 400, 26 Atl. 985; Averett *v.* Ward, 45 N. C. 192.

Reason for rule.— It had been assigned as a reason that the estate is liable for any deficit after exhausting the mortgage, although no judgment can be rendered against the personal representative for the deficiency (Hodgdon *v.* Heidman, 66 Iowa 645, 24 N. W. 257; Hill *v.* Townley, 45 Minn. 167, 47 N. W. 653); and it has also been said that the interest which the personal representative has in being present when an account is taken of the amount remaining due in order that he may see that all proper credits are given and that the sum remaining due is fairly and correctly ascertained is sufficient to make him a proper party. The complainant also has this advantage in making him a party that, while no direct or active relief can be awarded against him, he will nevertheless be concluded by the decree as to the amount due, and if a suit at law or other proceeding should afterward be necessary to recover the whole amount due on the bond, the amount so recovered will be considered, after the proceeds of sale of the mortgaged premises have been credited, as having been unalterably determined by the decree in the foreclosure suit (United Security L. Ins., etc., Co. *v.* Vandegrift, 51 N. J. Eq. 400, 26 Atl. 985).

38. Huston *v.* Stringham, 21 Iowa 36; Darlington *v.* Effey, 13 Iowa 177.

39. Scott *v.* Jenkins, (Fla. 1902) 35 So. 101.

40. Story Eq. Pl. § 182.

41. Sutherland *v.* Rose, 47 Barb. (N. Y.) 144, in which it was said that an administrator has no interest in the controversy and can bring no action. Story Eq. Pl. § 182.

Statutory change of rule.— In Massachusetts it is provided by statute (Gen. St. c. 140, § 32) that the personal representative as well as the heirs or devisees of the deceased mortgagor may bring suit to redeem (Long *v.* Richards, 170 Mass. 120, 48 N. E. 1083, 64 Am. St. Rep. 281; Aiken *v.* Morse, 104 Mass. 277); and in Michigan, where the administrator under the statute is entitled to possession of decedent's lands, it is held that he has such an interest in the real estate as entitles him to redeem, and that a bill for that purpose might be brought by him without joining the heirs where complete justice could be done to the parties in the case (Enos *v.* Sutherland, 11 Mich. 538).

42. Jones *v.* Richardson, 85 Ala. 463, 5 So. 194.

43. Cholmondeley *v.* Clinton, 2 Jac. & W. 1, 37 Eng. Reprint 527, 2 Meriv. 171, 35 Eng. Reprint 905, 22 Rev. Rep. 99 [*affirmed* in 4 Bligh 1, 22 Rev. Rep. 83, 4 Eng. Reprint 721]; Story Eq. Pl. § 182.

44. Story Eq. Pl. § 182.

45. See, generally, Mortgages; and Story Eq. Pl. § 188.

46. *Arkansas.*— Wood *v.* Holland, 57 Ark. 198, 21 S. W. 223.

Maine.— Hilton *v.* Lothrop, 46 Me. 297.

Massachusetts.— Haskins *v.* Hawkes, 108 Mass. 379.

North Carolina.— Guthrie *v.* Sorrell, 41 N. C. 13.

England.— Anonymous, 2 Freem. Ch. 52, 22 Eng. Reprint 1053; Hobart *v.* Abbot, 2 P. Wms. 643, 24 Eng. Reprint 897.

Statutory change of rule.— Where a statute provides that debts due by mortgage shall be considered personal property and

based upon the principle that the money should return to the fund from which it came.[47]

d. Enforcement of Vendor's Lien. The personal representative of a deceased vendor is the proper party to file a bill to enforce a lien for unpaid purchase-money.[48] If the legal title has not been conveyed by decedent, his heirs, or devisees, if the land has been devised, are necessary parties,[49] and it has been held that their presence cannot be dispensed with by tendering either in the pleadings or at the trial a deed from the heirs to the purchasers unless the latter accepts the deed.[50] So one who has purchased at an administrator's sale part of the land previously sold by decedent, and on which the administrator is seeking to foreclose a vendor's lien, has such an interest as warrants the court to permit him to become a party defendant.[51] Neither decedent's widow nor after her death her next of kin are proper parties to a suit by an administrator to recover the balance of unpaid purchase-money of real estate sold by intestate.[52] Where the purchaser of land dies, his heirs or devisees are ordinarily necessary parties defendant to a bill to enforce a vendor's lien on the land.[53] So his personal representative is a proper[54] and ordinarily a necessary party,[55] because the per-

that if the mortgagee dies after taking possession the debt is personal assets and the mortgage under the same control of the personal representative as if it had been a pledge of personal estate the heirs are not necessary parties to a bill to redeem but the bill may be maintained against the personal representative alone. Dexter *v.* Arnold, 7 Fed. Cas. No. 3,857, 1 Sumn. 109. For the same result under similar statutes see Copeland *v.* Yoakum, 38 Mo. 349.

47. Anonymous, 2 Freem. Ch. 52, 22 Eng. Reprint 1053.

48. McCoy *v.* Broderick, 3 Sneed (Tenn.) 203. And see Adams *v.* Green, 34 Barb. (N. Y.) 176.

49. *Arkansas.*— Anderson *v.* Levy, 33 Ark. 665.

Kentucky.— Phillips *v.* Breck, 79 Ky. 465; Smith *v.* West, 5 Litt. 48.

Mississippi.— Kimbrough *v.* Curtis, 50 Miss. 117.

Missouri.— Leeper *v.* Lyon, 68 Mo. 216.

Tennessee.— McCoy *v.* Broderick, 3 Sneed 203.

Texas.— See Loller *v.* Frost, 38 Tex. 208.

Virginia.— Mott *v.* Carter, 26 Gratt. 127.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1778; 48 Cent. Dig. tit. "Vendor and Purchaser," § 779.

Reason for rule.— The personal representative has no right to the purchase-money until he can show that he is in a condition to make a good title to the purchaser and this can only be done by bringing the heirs who are vested with the legal title before the court. McCoy *v.* Broderick, 3 Sneed (Tenn.) 203.

Amendment adding parties.— Where, notwithstanding an objection that the heirs of the vendors should be made parties, the trial court, without requiring this to be done, makes a decree for the sale of the land, the appellate court may amend the decree by directing that the heirs be made parties before the land is sold and affirmed as amended. Mott *v.* Carter, 26 Gratt. (Va.) 127.

50. Leeper *v.* Lyon, 68 Mo. 216. *Compare* Wollenberg *v.* Rose, 41 Oreg. 314, 68 Pac. 804, holding that a bill by an administrator to foreclose defendant's equitable interest in lands sold him by plaintiff's intestate does not make the heirs of the intestate parties is not an objection after answer, the administrator alleging his readiness to furnish a good and sufficient deed.

51. Chapman *v.* Callahan, 66 Mo. 299.

52. Hubbard *v.* Clark, (N. J. Ch. 1886) 7 Atl. 26.

53. See, generally, VENDOR AND PURCHASER.

54. Lord *v.* Wilcox, 99 Ind. 491.

55. Overly *v.* Tipton, 68 Ind. 410; Teetor *v.* Abden, 2 Ind. 183; Bryer *v.* Chase, 8 Blackf. (Ind.) 508; Sommerville *v.* Sommerville, 26 W. Va. 484; Morris *v.* Payton, 10 W. Va. 1; Lewis *v.* Hawkins, 23 Wall. (U. S.) 119, 23 L. ed. 113.

Personal representative of subpurchaser.— Where a purchaser of land resells it and the person purchasing from him dies, the personal representative of the latter is a necessary party to a bill to enforce a vendor's lien on the land. Mullins *v.* Sparks, 43 Miss. 129.

Administrator ad litem.— When the bill alleges that the estate is largely insolvent and has been declared insolvent and that all the assets have been administered and distributed, the estate should be represented by an administrator with full powers and an administrator *ad litem* is not sufficient. Moore *v.* Alexander, 81 Ala. 509, 8 So. 199.

Limitations of rule.— The personal representative of the deceased purchaser is not a necessary party defendant if decedent left no personal estate to be administered and this is alleged in the bill (Overly *v.* Tipton, 68 Ind. 410); and where the purchaser was a non-resident and died without personal estate or a personal representative in the state, a bill might be brought against the heirs alone (Reed *v.* Gregory, 46 Miss. 740). So when the complainant sues as assignee of a promissory note given for the purchase-money of land claiming as residuary legatee

sonal estate is primarily liable for the debt and the heir or devisee is entitled to have the personal estate first applied to the payment thereof.[56] When an executor acting in good faith and in the exercise of sound discretion has purchased lands at a judicial sale in order to save a debt due to the estate, the lands are regarded simply as personalty in his hands, and the devisees or heirs are not necessary parties to a bill filed by him against a subsequent purchaser to subject the lands to payment of the purchase-money.[57]

e. Specific Enforcement or Rescission of Decedent's Contracts. Where one who has contracted to convey real estate dies and a bill is brought by his personal representatives to enforce specific performance all his heirs should be made parties either as plaintiffs or as defendants.[58] If the vendor has devised the estate contracted to be sold and his representatives bring a bill for specific performance the devisee is a necessary party.[59] If a bill is brought by the purchaser to enforce specific performance of the contract of sale made by the deceased vendor all his heirs are necessary parties,[60] and if the land has been devised the devisees should be made parties.[61] So it has been held that the administrator is a proper party defendant as he represents the creditors, and as the property might be needed to pay decedent's debts.[62] It has been held, however, that an executor who is also a devisee and made a party in that character is not a necessary party in his character of executor.[63] Where the purchaser dies, and his heirs seek to enforce specific performance against the vendor the representative of the purchaser is a necessary party defendant as the heirs to whom the contract descends in equity are entitled to have the contract primarily paid out of the personal assets.[64] So it seems he

under the will of the deceased vendor, and it is shown that the executors have made a final settlement of the estate and delivered the note to the complainant, they are neither necessary nor proper parties to the suit. Bogan *v.* Hamilton, 90 Ala. 454, 8 So. 186.

56. Reed *v.* Gregory, 46 Miss. 740; Sommerville *v.* Sommerville, 26 W. Va. 484.

57. Hughes *v.* Hatchett, 55 Ala. 539.

58. Burger *v.* Potter, 32 Ill. 66; Morgan *v.* Morgan, 2 Wheat. (U. S.) 290, 4 L. ed. 242; Roberts *v.* Marchant, 1 Hare 547, 13 L. J. Ch. 56, 23 Eng. Ch. 547, 1 Phil. Ch. 370, 19 Eng. Ch. 370, 41 Eng. Reprint 672; Story Eq. Pl. § 160. See also Perry *v.* Roberts, 23 Mo. 221.

The administrator of a deceased vendor of land ought to be a party to a suit for the recovery of the purchase-money. Barbour *v.* Craig, Litt. Sel. Cas. (Ky.) 213.

Effect of conveyance by heirs to personal representative.— Where the heirs consent to have a contract of sale executed and voluntarily convey the title to the administratrix to enable her to transfer it to the purchaser, it is not necessary to make them parties in a suit for specific performance of the contract brought by the administratrix. Schroeppel *v.* Hopper, 40 Barb. (N. Y.) 425.

59. Roberts *v.* Marchant, 1 Hare 547, 13 L. J. Ch. 56, 23 Eng. Ch. 547, 1 Phil. Ch. 370, 19 Eng. Ch. 370, 41 Eng. Reprint 672; Calvert Parties 293.

60. Duncan *v.* Wickliffe, 5 Ill. 452. This is necessary in order to afford them an opportunity of contesting the fact whether their ancestor had done an act by which their interest in the property alleged to be conveyed should be divested. Carr *v.* Callaghan, 3 Litt. (Ky.) 365.

Rule in Texas.— Under the statutes of this state which authorize the bringing of suit for specific performance against executors and administrators, it is not necessary to make the heirs parties in an action for the specific performance of a contract made by a decedent for the conveyance of land (Shannon *v.* Taylor, 16 Tex. 413; Ottenhouse *v.* Burleson, 11 Tex. 87; Holt *v.* Clemmons, 3 Tex. 423; Thompson *v.* Duncan, 1 Tex. 485); they may, however, be joined as parties (Ottenhouse *v.* Burleson, *supra*).

Bill for accounting and specific performance.— To a bill for an account of the profits of a mill and for a specific performance of a bond to convey the mill, the obligor being dead, his personal representative must be made a party defendant as well as his heirs at law. Castel *v.* Strange, 54 N. C. 324.

61. Carr *v.* Callaghan, 3 Litt. (Ky.) 365.

62. Judd *v.* Mosely, 30 Iowa 423; Colfax *v.* Colfax, 32 N. J. Eq. 206. And see *In re* Healy, (Cal. 1901) 66 Pac. 175.

Notwithstanding a statute permits suit to be brought against the personal representative of a deceased vendor alone to enforce specific performance, the heirs may be sued without joining the personal representative. He is a proper but not a necessary party. Judd *v.* Mosely, 30 Iowa 423.

63. Watson *v.* Mahan, 20 Ind. 223.

64. Champion *v.* Brown, 6 Johns. Ch. (N. Y.) 398, 10 Am. Dec. 343; Story Eq. Pl. § 177. And see Downing *v.* Risley, 15 N. J. Eq. 93, in which it was held that where the estate has not been settled or decedent's debts paid the administrator should be a party because he has an interest in disputing the contract, and is the party liable to pay the purchase-money.

may join as complainant to a bill which seeks to compel specific performance of the contract by the vendor when the purchase-money is unpaid or the fact of payment was controverted; otherwise, however, where the purchase-money has been paid in full and the bill affirmatively shows that there can be no necessity for the exercise by the administrator of his statutory powers over the real estate.[65] The widow of the purchaser is a necessary party complainant because she was entitled to dower in her husband's equitable estate in the land at the time of his death.[66] If the purchaser dies his heirs or devisees as well as his personal representatives are necessary parties to a bill to enforce specific performance against his estate.[67] One claiming property as remainder-man under a marriage agreement between his parents in a bill for specific performance of such agreement should not make the legatees in his father's will parties defendant, as the executor represents the adverse interest under the will.[68] The personal representative of a vendor against whom a rescission of contract for the sale of land is asked is a necessary party to the suit,[69] and if he is empowered to sell lands and make and acknowledge titles, he takes the fee simple title, and in an action against him to rescind a contract of sale made by decedent he represents all the beneficiaries and they are not necessary parties.[70] So where an obligee of a bond for the conveyance of land dies, before the time fixed for the conveyance, his executors must be made parties to a bill to rescind the contract on the ground of fraud on the part of the obligor.[71] If a covenant to convey real estate is not broken in the vendee's lifetime, his heirs, being entitled to all the advantages resulting from the covenant, are necessary parties in an action by the executors of the deceased vendee to cancel the contract.[72] An administrator's bill to cancel a deed by his intestate, being an attack on it for the benefit of all persons interested in the estate, a decree setting it aside cannot be disturbed, on appeal of defendants, as affecting the interest of a person not a party.[73]

f. Suits to Set Aside Fraudulent Conveyance of Decedent. The question whether or not a personal representative is a proper party to bring suit to set aside a fraudulent conveyance executed by his decedent is considered in another chapter in this treatise.[74] There is a considerable conflict of authority as respects the propriety or necessity of joining the personal representative of a decedent as a party defendant in a suit by a creditor to set aside as fraudulent a conveyance made by decedent, and the decisions are not always harmonious even in the same jurisdiction. A considerable number of decisions hold that the personal representative is a necessary party,[75] and that if there is no administrator the com-

65. McKay *v.* Broad, 70 Ala. 377. And see Hill *v.* Smith, 32 N. J. Eq. 473.

Amendment striking out name of administrator.— When a bill is improperly filed in the name of an administrator as sole plaintiff and the heirs are brought in by amendment, the name of the administrator cannot be struck out by a second amendment, since this would work an entire change of parties. McKay *v.* Broad, 70 Ala. 377.

66. Hill *v.* Smith, 32 N. J. Eq. 473.

67. Townsend *v.* Champernowne, 9 Price 130, while the personal property is primarily chargeable the land purchased belongs in equity to the heirs or devisees and is chargeable with any deficit.

68. Harrington *v.* McLean, 62 N. C. 258.

69. Cravens *v.* Dyer, 1 Litt. (Ky.) 153.

70. Alger *v.* Anderson, 78 Fed. 729.

71. Rice *v.* Spotswood, 6 T. B. Mon. (Ky.) 40, 17 Am. Dec. 115, the right of decedent to be restored the purchase-money paid by him has none of the attributes of land but partakes of the nature of a chattel and goes to his personal representative. And see Gatewood *v.* Rucker, 1 T. B. Mon. (Ky.) 21.

72. Cox *v.* Grant, 6 J. J. Marsh. (Ky.) 201.

73. Travis *v.* Parks, 130 Mich. 15, 89 N. W. 569.

74. See *supra*, III, H, 7.

Refusal of administrator to bring suit.— Where an administrator empowered by statute to bring suit to set aside a fraudulent conveyance by defendant refuses to do so, a general creditor of decedent (the latter's property having been all applied to the payment of debts except such as was fraudulently transferred) cannot bring such action making the administrators defendants without first obtaining a judgment at law. Harvey *v.* McDonnell, 48 Hun (N. Y.) 409, 1 N. Y. Suppl. 83.

75. *Illinois.*—McDowell *v.* Cochran, 11 Ill. 31.

Indiana.— Hays *v.* Montgomery, 118 Ind. 91, 20 N. E. 646; Willis *v.* Thompson, 93

plainant must procure one to be appointed and join him as a defendant before the suit can proceed.[76] Other decisions, however, take the contrary view and hold that the personal representative is not a necessary party,[77] and this rule is held to be not affected by legislation authorizing the personal representative himself to bring suit to set aside a fraudulent conveyance of decedent and recover the property.[78] Some of these decisions while holding that the personal representative is not a necessary party hold that he is, nevertheless, a proper party,[79]

Ind. 52; Baugh *v.* Boles, 66 Ind. 376; Allen *v.* Vestal, 60 Ind. 245.

Iowa.— Postlewait *v.* Howes, 3 Iowa 365.

Missouri.— Coates *v.* Day, 9 Mo. 304. But see Missouri decisions cited in note 79.

North Carolina.— Dozier *v.* Dozier, 21 N. C. 96.

South Carolina.— Brockman *v.* Bowman, 1 Hill Eq. 338.

Vermont.— Peaslee *v.* Barney, 1 D. Chipm. 331, 6 Am. Dec. 743.

West Virginia.—Boggs *v.* McCoy, 15 W. Va. 344.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1782; 24 Cent. Dig. tit. "Fraudulent Conveyances," § 794.

And see Bachman *v.* Sepulveda, 39 Cal. 688.

Various reasons are assigned in support of this view. Thus it has been said that the personal representative must be given an opportunity to show that the judgment (in case the claim is reduced to judgment) has been paid or that if it be unpaid the estate is solvent and the proceeding unnecessary. McDowell *v.* Cochran, 11 Ill. 31. And see Coates *v.* Day, 9 Mo. 304. So in other cases it is assigned as a reason that the personal estate is the primary and actual fund which must be resorted to for the payment of his debt to plaintiff before any real estate can be subjected to his payment (Postlewait *v.* Howes, 3 Iowa 365; Boggs *v.* McCoy, 15 W. Va. 344); and that the claim can only be collected through the administrator (Hays *v.* Montgomery, 118 Ind. 91, 20 N. E. 646). It has also been said that the personal representative must be made a party defendant that he may by the decree be compelled to proceed with the estate recovered in the payment of the debts in due course of administration. Peaslee *v.* Barney, 1 D. Chipm. (Vt.) 331, 6 Am. Dec. 743.

Where a life-tenant joins with the remainder-man in conveying the property to defraud a creditor, his personal representative is a necessary party to a bill by the creditor to set it aside. Johnson *v.* Huber, 134 Ill. 511, 25 N. E. 790.

In Texas it has been held that the creditor and vendee are the only necessary parties to a suit to set aside as fraudulent as to creditors the deed of one who died without property and on whose estate no administration has been taken out (Heard *v.* McKinney, 1 Tex. Unrep. Cas. 83); but that where a claim against an estate has been allowed and approved or rejected and a creditor brings suit against third persons, to set aside a conveyance made by the decedent, which is alleged to be in fraud of creditors, the administrator is a necessary party defendant to the suit (Hall *v.* McCormick, 7 Tex 269).

76. Hays *v.* Montgomery, 118 Ind. 91, 20 N. E. 646; Baugh *v.* Boles, 66 Ind. 376; Allen *v.* Vestal, 60 Ind. 245; Postlewait *v.* Howes, 3 Iowa 365.

77. *Alabama.*— McClarin *v.* Anderson, 109 Ala. 571, 19 So. 982; Merchants' Nat. Bank *v.* McGee, 108 Ala. 304, 19 So. 356; Staton *v.* Rising, 103 Ala. 454, 15 So. 848; Coffey *v.* Norwood, 81 Ala. 512, 8 So. 199; Houston *v.* Blackman, 66 Ala. 559, 41 Am. Rep. 756.

Arizona.— O'Doherty *v.* Toole, 2 Ariz. 288, 15 Pac. 28.

Maine.— Dockray *v.* Mason, 48 Me. 178.

Mississippi.— Taylor *v.* Webb, 54 Miss. 36

Missouri.— Zoll *v.* Soper, 75 Mo. 460; Jackman *v.* Robinson, 64 Mo. 289; Merry *v.* Fremon, 44 Mo. 518; George *v.* Williamson, 26 Mo. 190, 72 Am. Dec. 203.

New Jersey.— Munn *v.* Marsh, 38 N. J. Eq. 410 [*affirmed* in 40 N. J. Eq. 343].

New York.— Jackson *v.* Forrest, 2 Barb. Ch. 576.

North Carolina.— Wall *v.* Fairley, 73 N. C. 464.

Tennessee.— McCutchen *v.* Pigue, 4 Heisk. 565.

Wisconsin.— Cornell *v.* Radway, 22 Wis. 260.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1782; 24 Cent. Dig. tit. "Fraudulent Conveyances," § 744.

These reasons have been assigned for the rule stated.— Neither the debtor if living nor, if he be dead, the personal representative can enjoy any of the fruits of a successful prosecution of the suit to set aside a fraudulent conveyance. Coffey *v.* Norwood, 81 Ala. 512, 8 So. 199. The administrator has no interest in the suit (Jackman *v.* Robinson, 64 Mo. 289; McCutchen *v.* Pigue, 4 Heisk. (Tenn.) 565); and a decree establishing the debt which must form the basis of the release complainant seeks cannot affect him or the personal assets of the estate in his hands (Staton *v.* Rising, 103 Ala. 454, 15 So. 848). After complainant's judgment is satisfied, the remainder belongs to the purchaser and is not assets of the estate. Coffey *v.* Norwood, 81 Ala. 512, 8 So. 199; Dockray *v.* Mason, 48 Me. 178; Zoll *v.* Soper, 75 Mo. 460.

78. O'Doherty *v.* Toole, 2 Ariz. 288, 15 Pac. 28.

79. See Alabama cases cited in note 77. and Pharis *v.* Leachman, 20 Ala. 662.

A joint action may be maintained against the administrator of the decedent and one

while other decisions go to the extent of denying that the personal representative is even a proper party.[80]

g. Suits to Quiet Title. On the death of an intestate his lands descend immediately to his heirs and they are the proper persons to bring an action to quiet title thereto.[81]

h. Suits to Subject Decedent's Land to Payment of Debts. Questions relating to parties in this class of suits are considered elsewhere in this work.[82]

i. Miscellaneous. In an action to establish a right of way across the land of a decedent, the heirs or devisees are necessary parties defendant,[83] and the heirs are necessary parties defendant in a suit against an administrator to obtain a conveyance of real estate alleged to have been held in trust for the complainant by defendant's intestate.[84] The heir of a deceased mortgagee is not a necessary party to a proceeding to correct a misdescription in the mortgage.[85] All the devisees must be made parties to a bill to enjoin executors from selling land belonging to testator's estate.[86]

4. Actions at Law or Suits in Equity For Legacies or Distributive Share — a. Actions at Law. Where the interests of legatees or distributees have been ascertained and fixed by decree and the share of each determined, each may maintain a separate suit for his share without joining the others.[87] However, judgment cannot be rendered against executors, on proceedings instituted in the name of the husband alone, for his wife's distributive share in an estate.[88]

b. Suits in Equity — (i) *By Legatee or Distributee.* Where a legatee brings suit to recover a legacy, the executor is a necessary party defendant.[89] But it is not in general necessary that residuary legatees or other legatees be made parties; it will be sufficient to make the executor a party.[90] Especially is

to whom he had conveyed property in fraud of creditors. De Graffenreid *v.* Rawson, 23 Ga. 11.

80. See Missouri, New Jersey, and New York decisions cited in note 77.

81. Marsh *v.* Waupaca County, 38 Wis. 250.

The administrators having improperly joined with the heirs in bringing an action to quiet title, the misjoinder cannot be reached by demurrer, but the averments of the complaint concerning the administration of the estate would probably be stricken out as irrelevant and redundant. Marsh *v.* Waupaca County, 38 Wis. 250.

Under Tex. Rev. St. art. 1202, providing that in every suit against the estate of a decedent involving title to real estate, the executor and administrator, if any, and the heirs shall be made parties defendant, the heirs are necessary parties to a suit against the estate to acquire title (Russell *v.* Texas, etc., R. Co., 68 Tex. 646, 5 S. W. 686), unless the land has been devised, in which case the devisee and not the heir should be made a party (Lufkin *v.* Galveston, 73 Tex. 340, 11 S. W. 340).

82. See Descent and Distribution, 14 Cyc. 1; and, generally, Wills.

83. Dwyer *v.* Olivari, (Tex. Sup. 1891) 16 S. W. 800.

84. Wiley *v.* Davis, (Me. 1887) 10 Atl. 493.

85. Dayton *v.* Dayton, 7 Ill. App. 136.

A suit to correct a mistake in a sale of land certificate by an executor is not a suit to contest the title of the estate to land, within a statute requiring the executor and heirs and devisees to be made parties to suits contesting the estate's title to land. Wood *v.* Mistretta, 20 Tex. Civ. App. 236, 49 S. W. 236, 50 S. W. 135.

86. Lee *v.* Marshall, 2 T. B. Mon. (Ky.) 30.

87. Hauenstein *v.* Kull, 59 How. Pr. (N. Y.) 24.

88. Blackwell *v.* Meneese, 5 Stew. & P. (Ala.) 397.

89. Cooper Eq. Pl. p. 34; Story Eq. Pl. § 171.

If legacies are made a charge on the real estate by will, the executor is a necessary party defendant to a bill to enforce the charge, if the personal assets are not exonerated from the charge as the primary fund. Story Eq. Pl. § 205.

90. *Georgia.*— Beall *v.* Blake, 16 Ga. 119.

Kentucky.— Todd *v.* Sterrett, 6 J. J. Marsh. 425.

New Jersey.— Davison *v.* Rake, 45 N. J. Eq. 767, 18 Atl. 752; Read *v.* Patterson, 44 N. J. Eq. 211, 14 Atl. 490, 6 Am. St. Rep. 877; Melick *v.* Melick, 17 N. J. Eq. 156; Vanderpool *v.* Davenport, 3 N. J. Eq. 120.

New York.— Cromer *v.* Pinckney, 3 Barb. Ch. 466; Pritchard *v.* Hicks, 1 Paige 270; Davoue *v.* Fanning, 4 Johns. Ch. 199; Brown *v.* Ricketts, 3 Johns. Ch. 553; Wiser *v.* Blachly, 1 Johns. Ch. 437.

Virginia.— Sharpe *v.* Rockwood, 78 Va. 24.

United States.— West *v.* Randall, 29 Fed. Cas. No. 17,424, 2 Mason 181; Dandridge *v.* Washington, 2 Pet. 370, 7 L. ed. 454.

this the case where sufficient assets are admitted by the executor.[91] So far as the residuary legatees are concerned, the executor is their legal representative and it is his duty to see that they are properly defended.[92] Where, however, the suit involves the construction and effect of the residuary clause in the will, the residuary legatees being directly interested are necessary parties.[93] And to a bill brought by a legatee where legacy is charged on real estate, all other legatees whose legacies are charged on real estate are necessary parties.[94] So where several general legatees bring separate suits against the executors to recover the amount of their legacies and the estate is insufficient to pay them all, the court will direct an account of the estate to be taken in one cause only and in the meantime direct the proceedings in all the other suits to be stayed.[95] A stranger to whom it is alleged that the legacy has been paid for the benefit of the legatees is not a necessary party defendant in a suit against the executor for the recovery of the legacy.[96] So it has been held that an administrator *de bonis non* with the will annexed is not a necessary party to a bill for a legacy filed by a legatee against the personal representative of the deceased executor of the testator, the executor having received assets to pay the legacy.[97] Nor is an executor's debtor a proper party to a suit against the executor for a legacy, as the court has no jurisdiction over such debtor.[98] So ordinarily debtors to the estate should not be joined,[99] except in cases where there is collusion between the executor and the debtor or where the executor is insolvent, in which case the debtor may be made a party and a recovery be had against him.[1] Where legacies are by will made a charge on the real estate in the hands of the heir or devisee, the heir or devisee entitled to the real estate must be a party to any bill to enforce the charge.[2] In a suit by a part of the distributees and heirs at law of an intestate against his adminis-

England.— Lawson *v.* Barker, 1 Bro. Ch. 303, 28 Eng. Reprint 1147; Atty.-Gen. *v.* Ryder, 2 Ch. Cas. 178, 22 Eng. Reprint 901; Haycock *v.* Haycock, 2 Ch. Cas. 124, 22 Eng. Reprint 877; Brown *v.* Dowthwaite, 1 Madd. 446; Dunstall *v.* Rabett, Rep. t. Finch. 243, 23 Eng. Reprint 133; Atwood *v.* Hawkins, Rep. t. Finch. 113, 23 Eng. Reprint 62; Wainwright *v.* Waterman, 1 Ves. Jr. 311, 30 Eng. Reprint 360.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1784.

In a suit by the assignee of a legatee under a will against the administrators with the will annexed to set aside a receipt given by such legatee for his share and to establish his right to an interest in the estate, the other legatees are not necessary parties. Adams *v.* Cowan, 174 U. S. 800, 19 S. Ct. 873, 43 L. ed. 1188 [*affirming* 38 Fed. 536, 24 C. C. A. 198].

Where the interests of the executor are adverse to the residuary legatee and the rights and interests of the residuary legatee may be prejudiced, it seems that he should be made a party. Melick *v.* Melick, 17 N. J. Eq. 156.

91. Marsh *v.* Hague, 1 Edw. (N. Y.) 174.

92. Pritchard *v.* Hicks, 1 Paige (N. Y.) 270; Wiser *v.* Blachly, 1 Johns. Ch. (N. Y.) 437; Marsh *v.* Hague, 1 Edw. (N. Y.) 174; Davison *v.* Rake, 45 N. J. Eq. 767, 18 Atl. 752; Dandridge *v.* Washington, 2 Pet. (U. S.) 370, 7 L. ed. 454.

93. Read *v.* Patterson, 44 N. J. Eq. 211, 14 Atl. 490, 6 Am. St. Rep. 877.

94. *Kentucky.*— Todd *v.* Sterrett, 6 J. J. Marsh. 425.

New York.— Hallett *v.* Hallett, 2 Paige 15. See also Fish *v.* Howland, 1 Paige 20.

North Carolina.— Parker *v.* Cobb, 131 N. C. 25, 42 S. E. 531.

Virginia.— Findlay *v.* Sheffey, 1 Rand. 73.

West Virginia.— Snider *v.* Brown, 3 W. Va. 143.

England.— Mose *v.* Sadler, 1 Cox C. C. 352, 29 Eng. Reprint 1199.

Annuity charged on land.— The personal representatives of a deceased devisee are necessary parties to a bill by the widow of the testator against his executors and devisees for an annuity devised to her and charged on the real estate. Jones *v.* McGinty, 3 Dana (Ky.) 425.

95. Ross *v.* Crary, 1 Paige (N. Y.) 416.

96. Gleason *v.* Thayer, 24 Barb. (N. Y.) 82.

97. Kirkwood *v.* Mitchell, 1 Del. Ch. 130.

98. Hunt *v.* Mayberry, 29 N. J. L. 403, holding that in such a case the only proper defendants are those against whom the decree of distribution was made.

99. Evans *v.* Evans, 23 N. J. Eq. 71; Dorsheimer *v.* Rorback, 23 N. J. Eq. 46; Beaty *v.* Downing, 96 Va. 451, 31 S. E. 612.

1. Dorsheimer *v.* Rorback, 23 N. J. Eq. 46.

Special cause for making debtor party necessary.— A debtor of the deceased is a proper party only when a special cause is made showing in a particular case a propriety in departing from the general rule in order to afford the complainant adequate relief. Harrison *v.* Righter, 11 N. J. Eq. 389.

2. Story Eq. Pl. § 205.

trator, the court has power, after determining the fund due from the administrator, to decree the separate sums due from such fund to the several distributees of the estate, although many of such distributees are not named as complainants in the bill.[3]

(II) *By Residuary Legatee or Distributee.* Bills to recover residuary legacies or distributive shares cannot ordinarily be maintained without making the executor or a duly appointed administrator a party defendant,[4] because the law casts title to all the personal estate of the decedent upon his personal representative.[5] So the general rule is well settled that where a suit is brought by one of several residuary legatees or next of kin for final settlement and distribution of the estate all the other residuary legatees or distributees should be made parties in order that the rights and claims of all may be conveniently established at the same time and in the same suit,[6] and non-joinder is fatal on

3. Thornton *v.* Tison, 95 Ala. 589, 10 So. 639.

4. Blackwell *v.* Blackwell, 33 Ala. 57, 70 Am. Dec. 556; Gardner *v.* Gantt, 19 Ala. 666; Farley *v.* Farley, 1 McCord Eq. (S. C.) 506; Robertson *v.* Gillenwaters, 85 Va. 116, 7 S. E. 371; Hansford *v.* Elliott, 9 Leigh (Va.) 79; Samuel *v.* Marshall, 3 Leigh (Va.) 567; Cooper Eq. Pl. 34; Story Eq. Pl. § 171. And see Alexander *v.* Stewart, 8 Gill & J. (Md.) 226; Logan *v.* Fairlie, 3 L. J. Ch. O. S. 152, 2 Sim. & St. 284, 25 Rev. Rep. 208, 1 Eng. Ch. 284.

Making one who has not taken out letters of administration a party is not sufficient even though he is entitled to administration. Farley *v.* Farley, 1 McCord Eq. (S. C.) 506.

A bill cannot be maintained by distributees against an executor of his own wrong, who has sold property of the deceased, to have an account and obtain a decree against the former for the proceeds of the sale, unless the rightful personal representative be a party plaintiff or defendant. Nease *v.* Capehart, 8 W. Va. 95.

Where the bill does not allege that the estate does not owe any debts, the administrator is a necessary party to a bill to enforce a distributee's claim to decedent's estate. Willard *v.* Goddard, (Tenn. Ch. App. 1898) 48 S. W. 397.

Limitation of rule.— Where, by misrepresentation of the residuary legatee, the legatee receives only a part of his legacy, and the executor has paid over all the remaining assets to the residuary legatee, the legatee may bring a bill against the residuary legatee and the representative of the executor for what remains due him without making the representative of the testator a party (Beasley *v.* Kenyon, 3 Beav. 544; Story Eq. Pl. § 214); so it has been held that where an infant dies when only eleven years old a bill to distribute her estate brought twenty years afterward may proceed without making the administrator of the infant a party (Markly *v.* Singletary, 11 Rich. Eq. (S. C.) 393).

5. Gardner *v.* Gantt, 19 Ala. 666.

6. *Alabama.*— High *v.* Worley, 32 Ala. 709; Boyett *v.* Kerr, 7 Ala. 2. *Contra, dictum* in Cherry *v.* Belcher, 5 Stew. & P. 133.

Arkansas.— Morris *v.* Virden, 57 Ark. 232, 21 S. W. 223; Neal *v.* Robertson, 55 Ark. 79, 17 S. W. 587.

Kentucky.— Cargile *v.* Harrison, 9 B. Mon. 518; Hawkins *v.* Craig, 1 B. Mon. 27; Kavanaugh *v.* Thacker, 2 Dana 137; Noland *v.* Turner, 5 J. J. Marsh. 179; Turley *v.* Young, 5 J. J. Marsh. 133; Kellar *v.* Bellor, 5 T. B. Mon. 573; Slaughter *v.* Froman, 5 T. B. Mon. 19, 17 Am. Dec. 33; Chinn *v.* Caldwell, 4 Bibb 543; Prewett *v.* Prewett, 4 Bibb 266.

New Jersey.— Deegan *v.* Capner, 44 N. J. Eq. 339, 15 Atl. 819; Dehart *v.* Dehart, 3 N. J. Eq. 471.

New York.— Davoue *v.* Fanning, 4 Johns. Ch. 199; Brown *v.* Ricketts, 3 Johns. Ch. 553.

North Carolina.— Huson *v.* McKenzie, 16 N. C. 463.

Texas.— Newland *v.* Holland, 45 Tex. 588.

Vermont.— Sillings *v.* Bumgardener, 9 Gratt. 273; Purcell *v.* Maddox, 3 Munf. 79; Sheppard *v.* Starke, 3 Munf. 29.

United States.— McArthur *v.* Scott, 113 U. S. 340, 5 S. Ct. 652, 28 L. ed. 1015; Dandridge *v.* Washington, 2 Pet. 320, 7 L. ed. 454; West *v.* Randall, 29 Fed. Cas. No. 17,424, 2 Mason 181. *Compare* Alston *v.* Cohen, 1 Woods 487, 1 Fed. Cas. No. 265.

England.— Parsons *v.* Neville, 3 Bro. Ch. 365, 29 Eng. Reprint 586; Sherrit *v.* Birch, 3 Bro. Ch. 229, 29 Eng. Reprint 505; Haycock *v.* Haycock, 2 Ch. Cas. 124, 22 Eng. Reprint 877; Morse *v.* Sadler, 1 Cox Ch. 352, 29 Eng. Reprint 1199; Hawkins *v.* Hawkins, 1 Hare 543, 6 Jur. 638, 11 L. J. Ch. 428, 23 Eng. Ch. 543; Dunstall *v.* Rabett, Rep. t. Finch. 243, 23 Eng. Reprint 133; Atwood *v.* Hawkins, Rep. t. Finch. 113, 23 Eng. Reprint 62; Cockburn *v.* Thompson, 16 Ves. Jr. 321, 33 Eng. Reprint 1005; Story Eq. Pl. § 89.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1784.

Contra.— In Ohio it is held that the distributees of the personal estate of an intestate cannot join in an action against the administrators for their distributive share. It was said that such claims cannot be joined without violating the rules relating to joinder of action that each distributee has a separate, distinct, and independent claim to his distributive share. Waldsmith *v.* Waldsmith, 2 Ohio 156.

Reason for rule.— "The general rule of this Court is, that all persons interested in the

demurrer.[7] Where one of the residuary legatees or distributees dies before distribution his personal representative is a necessary party to the suit,[8] and that too, although he died insolvent and no administrator had been appointed.[9] The rule that in suits by residuary legatees or distributees all other residuary legatees or distributees should be made parties is, however, subject to some limitations. The rule may be dispensed with when it is impracticable or very inconvenient to enforce it,[10] if the court can do subtantial justice to the parties before it without injury to absent parties equally interested.[11] Thus, when they are very numerous and some of them are out of the jurisdiction of the court, the court on being satisfied that there is a sufficient number to ensure a fair trial of the question at issue may hear the cause and distribute the shares of the parties before it.[12] The decree, however, should be without prejudice to the rights of those who are not made parties and who do not come in before the decree.[13] It is not conclusive upon persons not made parties.[14] So one of several next of kin of an intestate entitled to distribution may sue for his distributive share without making the other distributees parties, if the latter are unknown and cannot be found and this fact is stated in the bill.[15] It has also been said that the necessity for the relaxation of the rule is more especially apparent in the courts of the United States, where oftentimes the enforcement of the rule would oust them of their jurisdiction and deprive parties entitled to the interposition of a court of equity of any remedy whatever,[16] and a distributee who has sold out his interest need not be made a party to the bill for distribution.[17] Creditors, legatees, or prior encumbrancers, it has been held, need not be made parties to a bill of the character under consideration,[18] and that this is so, although some of the legacies to be paid before the residuum are not to be paid

subject of a suit must be parties, except where their numbers are so great as to render the application of the rule highly inconvenient or impracticable. And therefore, where the interests of a class, as of the children or next of kin of a particular person, is concerned, the whole of those who constitute the class must be parties, and the Court must be satisfied, by evidence of some kind, that they are so." Hawkins *v.* Hawkins, 1 Hare 543, 546, 6 Jur. 638, 11 L. J. Ch. 428, 23 Eng. Ch. 543.

7. Davoue *v.* Fanning, 4 Johns. Ch. (N. Y.) 199.

8. *Alabama.*— McMullen *v.* Brazelton, 81 Ala. 442, 1 So. 778; Hall *v.* Andrews, 17 Ala. 40; Boyett *v.* Kerr, 7 Ala. 9.

Arkansas.— Morris *v.* Virden, 57 Ark. 232, 21 S. W. 223.

Kentucky.— Wilkinson *v.* Perry, 7 T. B. Mon. 214.

New Jersey.— Dehart *v.* Dehart, 3 N. J. Eq. 471.

Virginia.— Purcell *v.* Maddox, 3 Munf. 79; Sheppard *v.* Starke, 3 Munf. 29.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1784.

The personal representative of the deceased distributee should be made a party to the suit for distribution and not the heirs. Wilkinson *v.* Perrin, 7 T. B. Mon. (Ky.) 214.

Executor appointed in another state.— Where a residuary legatee sues the executor and other residuary legatees for a distribution of the estate, the executor of a deceased non-resident legatee may be made a defendant, although appointed as executor in another state. Stone *v.* Demarest, 67 N. Y. App. Div. 549, 73 N. Y. Suppl. 903.

9. Dehart *v.* Dehart, 3 N. J. Eq. 471.

10. Dehart *v.* Dehart, 3 N. J. Eq. 471; Wiser *v.* Blachly, 1 Johns. Ch. (N. Y.) 437; Cockburn *v.* Thompson, 16 Ves. Jr. 321, 33 Eng. Reprint 1005.

11. Payne *v.* Hook, 7 Wall. (U. S.) 425, 19 L. ed. 260.

12. McArthur *v.* Scott, 113 U. S. 340, 5 S. Ct. 652, 28 L. ed. 1015; Bradwin *v.* Harpur, Ambl. 374, 27 Eng. Reprint 249; Harvey *v.* Harvey, 4 Beav. 215, 49 Eng. Reprint 321.

13. Hallett *v.* Hallett, 2 Paige (N. Y.) 15; McArthur *v.* Scott, 113 U. S. 340, 5 S. Ct. 652, 28 L. ed. 1015; Harvey *v.* Harvey, 5 Beav. 134, 49 Eng. Reprint 528.

14. Dehart *v.* Dehart, 3 N. J. Eq. 471; Story Eq. Pl. § 89. See also Harrison *v.* Harrison, 9 Ala. 470.

15. Cooper Eq. Pl. 39, 40; Story Eq. Pl. § 90.

16. Payne *v.* Hook, 7 Wall. (U. S.) 425, 19 L. ed. 260.

17. Fellar *v.* Beelor, 5 T. B. Mon. (Ky.) 573. See also King *v.* Berry, 3 N. J. Eq. 44, holding that a legatee who has assigned all his interest is neither a necessary nor a proper party to a bill filed by the assignee for its recovery.

18. Vanderpool *v.* Davenport, 3 N. J. Eq. 120 (in which it is said the reason is obvious. Their claims and priorities are admitted and therefore they are not interested in the account to be taken. There can be no residuum until they are satisfied); Mitwood Eq. Pl. 233. But see Nelson *v.* Page, 7 Gratt. (Va.)

immediately and may depend on such residuum to make up any deficiency.[19] If the administrator has wrongfully paid over money belonging to a distributee to a third person he may be properly joined as a defendant in a suit against the administrator for its recovery.[20] Where a specific legatee is dead at the time of the execution of the will and the next of kin sues the executor to recover the amount of the legacy as undisposed of property, the trustee of the residuary legatee is not a necessary party, although the sum sued for may have been paid to him by the executor.[21] Where a testator devised his residuary estate to his daughter subject to a legacy contingent on her death without issue and the amount of such legacy was held by the testator's executor and passed to his executors on his death, such executors are properly joined as defendants with the administrator of the daughter after her death without issue in an action to recover the legacy.[22] Where there has been collusion between the personal representative and a debtor of the estate to avoid payment of the debt the debtor may be joined as a party.[23]

(III) *By Representative of Legatee or Distributee.* A bill for a legacy or distributive share belonging to one deceased cannot be maintained by the next of kin but must be brought by his personal representative.[24] The reason is that the distributee has no title to such property but only to the surplus after payment of debts to be acquired through a personal representative.[25]

(IV) *By Purchaser of Distributee's Interest.* One who purchases a distributee's interest may maintain a bill in his own name to compel distribution where the vendor and the other distributees are before the court.[26]

(V) *By Attaching Creditor of a Legatee's Interest.* In a suit by one who has succeeded by operation of law by virtue of attachment proceedings to the rights of a legatee against the executor of the estate to compel payment to him of the legacy, the legatee is a necessary party and the bill will be demurrable for failure to join him as such.[27]

(VI) *By Devisee and Next of Kin of Legatee.* Where there has been no accounting between the executors of a testator and the executors of a legatee under his will, nor between the executors of the legatee and one claiming an interest in the legacy and original estate as next of kin and also as devisee of the legatee, the amount due such claimant cannot be determined in an action to

160, holding that in such suit specific legatees should be made parties unless it satisfactorily appears that their legacies have been satisfied, in which case it is not necessary to join them.

19. Vanderpool *v.* Davenport, 3 N. J. Eq. 120.

20. Watkins *v.* Sansom, 22 Tex. Civ. App. 178, 54 S. W. 1096.

21. Mabry *v.* Stafford, 88 N. C. 602, in which it was said that if it is to be considered as intestate property and goes to the next of kin, the unauthorized payment by the executor to the trustee will be no defense to him against the rightful demand of plaintiffs.

22. Auburn Theological Seminary *v.* Cole, 18 Barb. (N. Y.) 360.

23. Haywood *v.* Currie, 9 Baxt. (Tenn.) 357.

24. *Alabama.*— Sullivan *v.* Lawler, 72 Ala. 68; Plunkett *v.* Kelly, 22 Ala. 655.

Kentucky.— Kellar *v.* Beelor, 5 T. B. Mon. 573.

New York.— Palmer *v.* Green, 63 Hun 6, 17 N. Y. Suppl. 441.

North Carolina.— Haglar *v.* McCombs, 66 N. C. 345.

South Carolina.— Strickland *v.* Bridges, 21 S. C. 21.

Tennessee.— Puckett *v.* James, 2 Humphr. 565; Trafford *v.* Wilkinson, 3 Tenn. Ch. 449.

Virginia.— Hays *v.* Hays, 5 Munf. 418. See also Jenkins *v.* Freyer, 4 Paige (N. Y.) 47.

25. Trafford *v.* Wilkinson, 3 Tenn. Ch. 449.

26. Kavanaugh *v.* Thacker, 2 Dana (Ky.) 137.

Effect of reassignment.— Where a widow assigned notes and claims of her husband, to which she was entitled, to a married woman, and on the death of the latter her husband and children reconveyed the notes and claims to the widow, who then brought suit against the administrator of her deceased husband to compel a settlement of the estate, the widow was not entitled to have a distribution of the assets in the administrator's hands without bringing into court as a party the personal representative of the deceased assignee of the notes and claims. Cornell *v.* Hartley, 41 W. Va. 493, 23 S. E. 789.

27. Drake *v.* Delliker, 24 Fed. 527.

which the only parties are the claimant and the executors of the original testator.[28]

5. Suits For Marshaling Assets. In cases where a suit is instituted for marshaling assets, executor or administrator must be made a party.[29] So legatees are proper parties to a bill in equity to marshal the assets of their testator.[30]

6. Suits to Enforce Contribution For Overpayment on Distribution. Distributees of an estate who have voluntarily contributed the respective sums with which they are chargeable by reason of over advances made by the administrator in a partial distribution of the estate are not necessary parties to a bill filed by him to recover contribution from another distributee who refuses to reimburse him.[31]

7. Actions on Joint Right of Action in Favor of Decedent and Others. Where one of two or more persons having a joint right of action dies, the right of action vests in the survivor or survivors.[32] In consequence, the action must be brought in the name of the survivor or survivors alone, and it is error to join as plaintiff the personal representative of decedent.[33] Nor can the personal representative sue separately, for the entire legal interest survives. He must resort to a court of equity to obtain from the survivor the decedent's share of the amount recovered.[34]

8. Actions or Suits on Joint or Joint and Several Obligations of Decedent and Others. If the contract is joint and several, the personal representative of one may be sued at law in a separate action.[35] Where the practice remains unaffected by statute if a contract is joint or joint and several, the personal representative of the deceased obligor cannot be joined with the survivor as a defendant in an action at law on the contract.[36] The reason given as respects both classes of contracts is that the same judgment cannot be rendered against the survivor and

28. Duchesse d'Auxy *v.* Soutter, 35 Fed. 809.

29. Cooper Eq. Pl. 34; Story Eq. Pl. § 171.

30. Fraser *v.* Charleston City Council, 19 S. C. 384.

31. Alexander *v.* Fisher, 18 Ala. 374.

32. Jones *v.* Yates, 9 B. & C. 532, 4 M. & R. 613, 7 L. J. K. B. O. S. 217, 17 E. C. L. 241.

33. *Alabama.*— Waters *v.* Creagh, Minor 128.

Kentucky.— Clark *v.* Parish, 1 Bibb 547; Morrison *v.* Winn, Hard. 480.

Massachusetts.— Smith *v.* Franklin, 1 Mass. 480; Walker *v.* Maxwell, 1 Mass. 104.

New Jersey.— Freeman *v.* Scofield, 16 N. J. Eq. 28.

United States.— Crocker *v.* Beal, 6 Fed. Cas. No. 3,396, 1 Lowell 416.

England.— Anderson *v.* Martindale, 1 East 497, 6 Rev. Rep. 334; Rolls *v.* Yate, Yelv. 177; 1 Chitty Pl. (16th Am. ed.) 31. But see Hardwood Log Co. *v.* Coffin, 130 N. C. 432, 41 S. E. 931, which seems to maintain a contrary doctrine.

34. Freeman *v.* Scofield, 16 N. J. Eq. 28.

35. Eggleston *v.* Buck, 31 Ill. 254; Moore *v.* Rogers, 19 Ill. 347; New Haven, etc., Co. *v.* Hayden, 119 Mass. 361.

36. *Alabama.*— Murphy *v.* Mobile Branch Bank, 5 Ala. 421; Gayle *v.* Agee, 4 Port. 507. And see Rupert *v.* Elston, 35 Ala. 79.

California.— May *v.* Hanson, 6 Cal. 642; Humphreys *v.* Crane, 5 Cal. 173.

Florida.— Orlando *v.* Gooding, 34 Fla. 244, 15 So. 770.

Illinois.— Eggleston *v.* Buck, 31 Ill. 254; Moore *v.* Rogers, 19 Ill. 347.

Massachusetts.— Cochrane *v.* Cushing, 124 Mass. 219; New Haven, etc., Co. *v.* Hayden, 119 Mass. 361; Foster *v.* Hooper, 2 Mass. 572.

Mississippi.— Poole *v.* McLeod, 1 Sm. & M. 391.

New Jersey.— Sindle *v.* Kiersted, 3 N. J. L. 926.

New York.— Jenkins *v.* De Groot, 1 Cai. Cas. 122.

Ohio.— Burgoyne *v.* Ohio L. Ins., etc., Co., 5 Ohio St. 586.

Pennsylvania.— Githers *v.* Clarke, 158 Pa. St. 616, 28 Atl. 232. But see Alcorn *v.* Cook, 101 Pa. St. 209; Philadelphia Loan Co. *v.* Elliott, 15 Pa. St. 224.

South Carolina.— Ayer *v.* Wilson, 2 Mill 319, 12 Am. Dec. 677.

United States.— U. S. *v.* Bullard, 103 Fed. 256.

England.— Kemp *v.* Andrews, Carth. 170; Hall *v.* Huffan, 2 Lev. 228.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1783.

Compare White *v.* Johnson, 4 Dana (Ky.) 595; Quince *v.* Quince, 5 N. C. 169; Tipton *v.* Harris, Peck (Tenn.) 414.

In Texas the decisions are not harmonious. In Wiley *v.* Pinson, 23 Tex. 486, and Martin *v.* Harrison, 2 Tex. 456, it was held that one of several joint obligors cannot be joined in an action against the surviving obligor unless the claim has been presented and rejected, and the decisions were based on the ground that claims against an estate of deceased persons must be presented and rejected before an action will lie. In Henderson *v.* Kissam, 8 Tex. 46, it was held that a surviving partner or a joint obligor and the

personal representative because one is to be charged *de bonis testatoris* and the other *de bonis propriis*.[37] As respects contracts which are joint only, and not joint and several, a still stronger reason is that the death of one joint obligor extinguishes all remedy at law against his estate and casts the legal liability under the contract on the surviving obligor.[38] It remains to be considered how far the rule has been affected by the codes of procedure and by special statutory provisions. In most of the code states there are, according to a learned commentator on code pleading, no direct provisions on the subject,[39] and in some jurisdictions it has been held that the common-law rule is not affected by the adoption of the code system of pleading.[40] In others, however, the rule is considered to have been abolished by the code, and it is held that in actions on joint or joint and several obligations the personal representative of a deceased obligor may be joined as defendants with the surviving obligors.[41] So in some jurisdictions the

representatives of a deceased partner or joint obligor may as a general rule be joined as defendants in the same suit, the reason assigned being that under the system of procedure, the principles and practice of both the common law and equity jurisdictions were blended. In Bennett *v.* Spillars, 9 Tex. 519, it is held that where one of several defendants sued jointly on a promissory note dies pending the action, his personal representatives are properly on suggestion of his death made parties to the action.

Death of all coöbligors.—Whether the contract or obligation be joint or joint and several, their representatives cannot be joined in one action (Head *v.* Oliver, 1 A. K. Marsh. (Ky.) 254; Grymes *v.* Pendleton, 4 Call (Va.) 130; Watkins *v.* Tate, 3 Call (Va.) 521); the action survives against the surviving obligor and his representative (Head *v.* Oliver, *supra*. See also Catlin *v.* Underhill, 5 Fed. Cas. No. 2,524, 4 McLean 337).

Objection for suing wrong party.—No advantage can be taken by the executor of one obligor of being sued alone on a joint obligation, without pleading in abatement, unless it appear on the record that the other obligor is alive or survived the testator. Geddis *v.* Hawk, 10 Serg. & R. (Pa.) 33.

37. *California.*—May *v.* Hanson, 6 Cal. 642; Humphreys *v.* Crane, 5 Cal. 173.

Florida.—Orlando *v.* Gooding, 34 Fla. 244, 15 So. 770.

Illinois.—Eggleston *v.* Buck, 31 Ill. 254.

Massachusetts.—New Haven, etc., Co. *v.* Hayden, 119 Mass. 361.

Ohio.—Burgoyne *v.* Ohio L. Ins., etc., Co., 5 Ohio St. 586.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1783.

38. Moore *v.* Rogers, 19 Ill. 347; New Haven, etc., Co. *v.* Hayden, 119 Mass. 361, Barnes *v.* Seligman, 55 Hun (N. Y.) 339, 8 N. Y. Suppl. 834; Jenkins *v.* De Groot, 1 Cai. Cas. (N. Y.) 122; Burgoyne *v.* Ohio L. Ins., etc., Co., 5 Ohio St. 586. And see CONTRACTS, 9 Cyc. 653.

39. Bliss Code Pldg. (3d ed.) § 106.

40. Miller *v.* Blake, 6 Colo. 118; Mattison *v.* Childs, 5 Colo. 78; Barlow *v.* Scott, 12 Iowa 63; Marsh *v.* Goodrell, 11 Iowa 474; Childs *v.* Hyde, 10 Iowa 294, 77 Am. Dec. 113; Wapello County *v.* Bigham, 10 Iowa 39, 74 Am. Dec. 370; Barnes *v.* Seligman, 55 Hun (N. Y.) 339, 8 N. Y. Suppl. 834 [*affirmed* in 130 N. Y. 372, 29 N. E. 760]; Morehouse *v.* Ballou, 16 Barb. (N. Y.) 289; Hulbert *v.* Ferguson, 40 How. Pr. (N. Y.) 474. See also Pope *v.* Cole, 55 N. Y. 124, 14 Am. Rep. 198. *Contra*, Churchill *v.* Trapp, 3 Abb. Pr. (N. Y.) 306. In a number of New York decisions it was also held that the personal representatives of a deceased partner cannot be joined with the surviving partner in an action at law to collect a debt against the partnership. Pope *v.* Cole, 55 N. Y. 124, 14 Am. Rep. 198; Richter *v.* Poppenhausen, 42 N. Y. 373; Voorhis *v.* Childs, 17 N. Y. 354. In Barnes *v.* Seligman, 55 Hun (N. Y.) 339, 8 N. Y. Suppl. 834 [*affirmed* in 130 N. Y. 372, 29 N. E. 760], it was expressly stated that the rule as to joinder was not limited to cases of partnership contract.

Where one of the makers of a joint and several note dies pending suit thereon, his administrator cannot be substituted and joined with the surviving maker as a defendant. Marsh *v.* Goodrell, 11 Iowa 474; Pecker *v.* Cannon, 11 Iowa 20.

How objection taken advantage of.—Under the Colorado code, the objection that a surviving obligor and the administrator of the deceased joint obligor are improperly joined should be taken by demurrer. Where the objection is raised by motion and arrest of judgment plaintiff should be allowed to dismiss as to survivor. Miller *v.* Blake, 6 Colo. 118. To the same effect see Mattison *v.* Childs, 5 Colo. 78.

41. *California.*—Lawrence *v.* Doolan, 68 Cal. 309, 5 Pac. 484, 9 Pac. 159; Bostwick *v.* McEvoy, 62 Cal. 496, based on provisions authorizing the rendition of separate judgments.

Indiana.—Corbaley *v.* State, 81 Ind. 62; Milam *v.* Milam, 60 Ind. 58; Hays *v.* Crutcher, 54 Ind. 260; Owen *v.* State, 25 Ind. 107; Braxton *v.* State, 25 Ind. 82, 85, based on provisions abolishing the distinction between actions at law and suits in equity and providing that "any person may be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question

common-law rule has been abrogated by express statutory provisions or rules of court and the joinder of a surviving obligor and personal representatives of the deceased obligor authorized.[42]

9. Actions For Tort Committed by Decedent and Others. In an action for trespass committed by several where one of the defendants die, pending suit, his personal representatives cannot be brought by scire facias on the record, as the same judgment cannot be rendered and the same execution asserted against the surviving defendants and the personal representative of the dead one.[43]

10. Actions Based on Wrongful Acts of Personal Representative. Where an executor has been guilty of fraudulent conduct in dealing with the assets of the estate, his co-executors may bring suit against him for an accounting without joining creditors next of kin or legatees.[44] Creditors, legatees, and distributees may maintain an action against the personal representative of an administrator or executor for waste or conversion of the assets of the estate,[45] and it is not necessary to join the administrator *de bonis non* of the testator or intestate,[46] who, at common law, cannot sue the representative of a former executor or administrator either at common law or in equity for assets wasted and converted by the first executor or administrator,[47] and when a suit is instituted or a bill filed to recover property sold illegally by the administrator out of the hands of those who had purchased or possess the same, the sureties on his bond are neither proper nor necessary parties.[48] Where the wrongful acts complained of consist

involved." A recent statute of this state has abrogated the rule adopted under the code and provides that no action can be brought against a personal representative on any contract executed jointly or jointly and severally by decedent and another person, but that the holder of such contract can enforce it against the estate only by filing his claim thereon, and where an executor and two other persons are sued on a contract made by decedent and the other decedents, the executor has a right to a dismissal of the action as to himself but not as to all defendants. State *v.* Cunningham, 101 Ind. 461.

Nevada.— Maples *v.* Geller, 1 Nev. 233.

Ohio.— Burgoyne *v.* Ohio L. Ins., etc., Co., 5 Ohio St. 586; Batavia Bank *v.* Sewell, 8 Ohio Dec. (Reprint) 210, 6 Cinc. L. Bul. 288, based on provisions making the estate of the deceased joint debtor liable to every legal remedy as fully as if the contract had been joint and several, providing that persons severally liable on the same obligation may all be included in the same action, and authorizing a several judgment to be given against any of the defendants as the nature of the case may require.

South Carolina.— Wiesenfeld *v.* Byrd, 17 S. C. 106; Trimmier *v.* Thomson, 10 S. C. 164, based on provisions providing for the prosecution of actions at law and suits in equity with the same forms and authorizing entry of separate judgments against the different defendants.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1783.

Heirs not proper parties.— In an action on a guaranty of payment of a note executed by a husband and his wife, the wife and the administrator of the deceased husband but not the husband's heirs are proper parties defendant. Batavia Bank *v.* Sewell, 8 Ohio Dec. (Reprint) 210, 6 Cinc. L. Bul. 288.

42. Davis *v.* Wilkinson, 2 N. C. 334; Brown *v.* Clary, 2 N. C. 107. See also Bliss Code Pl. (3d ed.) § 106.

Under the statutes of Pennsylvania (Act of March 22, 1861, Pamphl. Laws 186) if a joint debtor dies pending suit in which both were served, the administrator may on plaintiff's motion be substituted and the suit may proceed to trial and judgment against the administrators and surviving defendant jointly. Githers *v.* Clarke, 158 Pa. St. 616, 28 Atl. 232; Ash *v.* Guie, 97 Pa. St. 493, 39 Am. Rep. 818; Dingman *v.* Amsink, 77 Pa. St. 114. Plaintiff cannot, however, be compelled to do this nor can decedent's representatives be substituted without plaintiff's consent. Ash *v.* Guie, *supra*. And see Githers *v.* Clarke, *supra*.

43. Mechanics', etc., Ins. Co. *v.* Spang, 5 Pa. St. 113.

44. Wood *v.* Brown, 34 N. Y. 337. To the same effect see Price *v.* Brown, 60 How. Pr. (N. Y.) 511.

45. Thomas *v.* Hardwick, 1 Ga. 78; Sibley *v.* Williams, 3 Gill & J. (Md.) 52; Smith *v.* Carrere, 1 Rich. Eq. (S. C.) 123; Coleman *v.* McMurdo, 5 Rand. (Va.) 51.

46. Smith *v.* Carrere, 1 Rich. Eq. (S. C.) 123.

47. Thomas *v.* Hardwick, 1 Ga. 78; Coleman *v.* McMurdo, 5 Rand. (Va.) 51. *Compare* Gibbs *v.* Hodge, 65 Ala. 366, holding that where creditors of a deceased debtor not having reduced their claims to judgment as against the estate seek by a bill in equity to reach property alleged to have been fraudulently conveyed by the executor, who was also the sole devisee, and who has been removed from office, a personal representative of the estate must be made a party.

48. Nutting *v.* Boardman, 43 Ga. 598.

in the sale of personal property belonging to the testator's estate all purchasers and the personal representative sought to be made liable should be united in the same suit.[49] If heirs bring a suit against the administrator charging a fraudulent conversion of the assets of the estate all the heirs are necessary parties.[50] Where, in an action by a judgment creditor of an administrator in the nature of a creditor's bill, plaintiff seeks to subject to the payment of his judgment land the legal title to which was in a third person at the time of intestate's death and which the administrator fraudulently caused to be conveyed to defendant such third person and the administrator are necessary parties.[51]

11. Suits For General Administration of Estate. Where suit is brought for a general administration of an estate a properly constituted personal representative of the estate is always a necessary party;[52] consequently if a personal representative is out of the jurisdiction the suit cannot proceed,[53] and the court will not decree a general account and administration in a suit in which the deceased is represented by an administrator *ad litem* merely.[54] So where a bill is brought for an administration of the estate and the executor dies the suit cannot be revived against his personal representative, but there must be a representative of the testator before the court.[55]

12. Joinder of Co-Executors or Co-Administrators — a. In Actions at Law by Executors — (i) *The Common-Law Rule, Its Limitations, and Statutory Changes Thereof.* The common-law doctrine is well settled that in actions at law executors named in the will who are living must join in the action, although some have refused or omitted to prove the will or to administer the estate. This question has been frequently before the courts which have been practically uniform in maintaining the necessity of such joinder.[56] This rule has been held to apply even though one or more of the executors are infants.[57] If the renouncing executor will not join in the suit, the practice is to issue the writ in his name and then to summon or rule him to proceed, and if he will not, the court will give

49. Jones *v.* Clark, 25 Gratt. (Va.) 642.

50. Bland *v.* Fleeman, 29 Fed. 669.

51. Huneke *v.* Dold, 7 N. M. 5, 32 Pac. 45.

52. Rowsell *v.* Morris, L. R. 17 Eq. 20, 43 L. J. Ch. 97, 29 L. T. Rep. N. S. 446, 22 Wkly. Rep. 67; Cary *v.* Hills, L. R. 15 Eq. 79, 42 L. J. Ch. 100, 28 L. T. Rep. N. S. 6, 21 Wkly. Rep. 166; Donald *v.* Bather, 16 Beav. 26, 51 Eng. Reprint 685; Penny *v.* Watts, 16 L. J. Ch. 146, 2 Phil. 149, 22 Eng. Ch. 149, 41 Eng. Reprint 898; 1 Daniel Ch. Pr. 196. And see Hansford *v.* Elliott, 9 Leigh (Va.) 79.

53. Donald *v.* Bather, 16 Beav. 26, 51 Eng. Reprint 685.

54. Croft *v.* Waterton, 13 Sim. 653, 36 Eng. Ch. 653. And see Dowdeswell *v.* Dowdeswell, 9 Ch. D. 294, 48 L. J. Ch. 23, 38 L. T. Rep. N. S. 828, 27 Wkly. Rep. 241.

55. Barber *v.* Walker, 15 Wkly. Rep. 728.

56. *Alabama.*— Martin *v.* Nall, 22 Ala. 610; Williams *v.* Sims, 8 Port. 579. But see Cleveland *v.* Chandler, 3 Stew. 489.

Kansas.— Insley *v.* Shire, 54 Kan. 793, 39 Pac. 713, 45 Am. St. Rep. 308.

Kentucky.—Mitchell *v.* Rice, 6 J. J. Marsh. 623.

New Jersey.— Hill *v.* Smalley, 25 N. J. L. 374; Hunt *v.* Kearney, 3 N. J. L. 721.

New York.— Bodle *v.* Hulse, 5 Wend. 313.

England.— Webster *v.* Spencer, 3 B. & Ald. 360, 22 Rev. Rep. 427, 5 E. C. L. 211; Hensloe's Case, 9 Coke 36*a*; Swallow *v.* Emberson, 1 Lev. 161; Walters *v.* Pfeil, M. & M. 362, 22 E. C. L. 544; Scott *v.* Briant, 6 N. & M. 381, 1 Saund. 291, 36 E. C. L. 644; Brockes *v.* Stroud, 1 Salk. 3; Kilby *v.* Stanton, 2 Y. & J. 75.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1767 *et seq.*

Reason for rule.— The reasons assigned for the rule at law are that the executors constitute but one person; that each executor derives his interest from the will itself; that the probate is merely operative as the authenticated evidence, and not as the foundation of the executor's title; and that the renunciation is a renunciation of probate merely and not a renunciation or waiver of title. Mitchell *v.* Rice, 6 J. J. Marsh. (Ky.) 623; Hill *v.* Smalley, 25 N. J. L. 374; Rinehart *v.* Rinehart, 15 N. J. Eq. 44; Webster *v.* Spencer, 3 B. & Ald. 360, 22 Rev. Rep. 427, 5 E. C. L. 211.

Waiver of objection.— It has been held that where the action is brought by one executor alone and the others are made defendants and no question is raised on account of the misjoinder before judgment is rendered the failure to name them as plaintiffs is not a fatal objection. Insley *v.* Shire, 54 Kan. 793, 39 Pac. 713, 45 Am. St. Rep. 308.

57. Foxwist *v.* Tremaine, 1 Lev. 299, 2 Saund. 212, 1 Sid. 449, T. Raym. 198; Smith *v.* Smith, Yelv. 130. But see Colborne *v.*

judgment of severance.[58] The rule does not apply to actions which an executor can maintain in his individual capacity. It has accordingly been held that an executor may, without joining with him his co-representatives, maintain an action to recover a loan,[59] or to recover money had and received to his use,[60] or on a sealed note given to himself,[61] and it has been held that no more should be joined than those who made the contract sought to be enforced.[62] So it has been held that where a will appointing several executors makes provision for one acting alone and only one proves the will, he alone can maintain an action in behalf of the estate.[63] So the rule has been changed by statute in a number of jurisdictions.[64]

(II) *OBJECTIONS FOR NON-JOINDER, HOW AVAILED OF.* Where all the defendants are not joined, the defect may be availed of by plea in abatement setting up that there are other executors living not named,[65] and it has been held that the defect can only be taken advantage of in this manner, unless the practice is changed by statute.[66] On a plea in abatement for non-joinder of a co-executor as plaintiff, it is sufficient to allege that the person who was not joined was constituted executor and is still living, and it is unnecessary to allege that he has

Wright, 2 Lev. 239, holding that where one executor is under age the other may bring an action alone.

58. Hill *v.* Smalley, 25 N. J. L. 374; Bodle *v.* Hulse, 5 Wend. (N. Y.) 313; Tooker *v.* Oakley, 10 Paige (N. Y.) 288.

59. Brassington *v.* Ault, 2 Bing. 177, 9 E. C. L. 534, 1 C. & P. 302, 12 E. C. L. 181, 3 L. J. C. P. O. S. 243, 9 Moore C. P. 340, 27 Rev. Rep. 581.

60. Heath *v.* Chilton, 12 M. & W. 632.

61. Foote *v.* Noland, 9 Fed. Cas. No. 4,915, 5 Cranch C. C. 399.

62. Brassington *v.* Ault, 2 Bing. 177, 9 E. C. L. 534, 1 C. & P. 302, 12 E. C. L. 181, 3 L. J. C. P. O. S. 243, 9 Moore C. P. 340, 27 Rev. Rep. 581; Heath *v.* Chilton, 12 M. & W. 632.

63. Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 19 L. ed. 566.

64. **In Alabama** it has been said that at common law all who are appointed as a rule were considered as executors for the purpose of prosecuting suit, while under the influence of the statutes of this state, those alone are esteemed as such who are qualified according to the requirements (Williams *v.* Sims, 8 Port. 579); and it was accordingly held error to join as plaintiff, an executor who had not qualified (Cleveland *v.* Chandler, 3 Stew. 489). But *compare* Martin *v.* Nall, 22 Ala. 610, which seems to support the common-law doctrine.

In Kentucky under statutes requiring executors to give bond and take an oath for insuring faithful administration only an executor who has qualified can sue. Mitchell *v.* Rice, 6 J. J. Marsh. 623.

In North Carolina it has been held that only the executors who are qualified by taking the necessary oaths are required to join in an action for a debt or demand due to their testator. Alston *v.* Alston, 25 N. C. 447; Burrow *v.* Sellers, 2 N. C. 501. In the first mentioned case it was said that the practice may have originated in consequence of a statute providing "that no person do presume to enter upon the administration of any deceased person's estate, until they have obtained a commission of administration or letters testamentary," etc.

In New York a statute was enacted which specially provides that in actions by executors, it is not necessary to join those as parties to whom letters testamentary shall not have been issued and who are not qualified. Moore *v.* Willett, 2 Hilt. 522. It is held, however, that notwithstanding this statute an executor who has proved the will to whom letters have been issued generally with another is a necessary party to a suit brought by the latter. Scrantom *v.* Farmers', etc., Bank, 33 Barb. 527 [*affirmed* in 24 N. Y. 424]. So under a statute relating to a special proceeding to discover property of a decedent withheld from his representative and providing that "an executor or administrator" may present to a surrogate's court a petition praying an inquiry, one of two co-representatives may proceed alone without alleging a demand upon and refusal of the other to unite with him or otherwise explaining the non-joinder. Tracey *v.* Slingerland, 3 Dem. Surr. 1.

65. Foxwist *v.* Tremaine, 1 Lev. 299, 2 Saund. 212, 1 Sid. 449, T. Raym. 198; Walters *v.* Pfeil, M. & M. 362, 22 E. C. L. 544; Smith *v.* Smith, Yelv. 130.

66. Macon, etc., R. Co. *v.* Davis, 27 Ga. 113; Packer *v.* Willson, 15 Wend. (N. Y.) 343; Gordan *v.* Goodwin, 2 Nott & M. (S. C.) 70, 10 Am. Dec. 573; 1 Chitty Pl. (16th Am. ed.) 22; 1 Saunders 291 note.

A motion for nonsuit or non-joinder of an executor as plaintiff does not lie. Gordon *v.* Goodwin, 2 Nott & M. (S. C.) 70, 10 Am. Dec. 573.

Since the code the objection that another person should have joined in the suit as being co-executor with plaintiff, if it does not appear on the face of the complaint so that the question can be raised by demurrer, can only be raised by answer; and if not so raised it will be deemed waived. Scrantom *v.* Farmers', etc., Bank, 33 Barb. (N. Y.) 527 [*affirmed* in 24 N. Y. 424].

administered upon the estate,[67] because all the executors named in the will must join in the action, although some have omitted or refused to prove the will or to administer the estate.[68] Where, however, this rule has been changed by statute, so that executors who have not qualified cannot sue, it is of course necessary to allege that the executor not joined has qualified.[69]

b. In Actions at Law by Administrators. Where there are several administrators their power is joint only and the general rule is that they must sue jointly.[70] Nevertheless an administrator may without joining his co-administrators maintain an action for the price of property belonging to the estate sold by him,[71] and where an administrator makes an unauthorized loan an action to recover it back should be brought in his name alone.[72] So on a note payable to intestate, or bearer, an administrator need not sue in his representative character nor join his co-administrator as plaintiff;[73] and where subsequent to a decree in favor of several administrators some of them are removed action may be brought on the decree in the name of the remaining administrator.[74] It has also been held that an administrator suing to recover damages for breach of covenant, broken after intestate's death, cannot unite with him one who was a joint administrator with him in another state, since the authority of a foreign administrator to sue is not recognized.[75]

c. In Actions at Law Against Executors or Administrators. At common law all named as executors in the will may be joined as parties defendant, although they have not proved the will,[76] but it is necessary to join as defendants only those who have administered.[77] The reason is said to be that a stranger is bound to take notice of those only as executors who have acted as such.[78] Where a co-executor has administered he should be joined as defendant, although he refused to prove the will.[79] It has been held, however, without any special statutory authorization therefor that non-residence of a co-executor is sufficient to relieve plaintiff from the necessity of joining him in an action against his co-executor,[80] and that if one of two executors has in his hands the balance remaining for distribution an action may be maintained against him without joining his co-execu-

67. Cole *v.* Smalley, 25 N. J. L. 374. And see Webster *v.* Spencer, 3 B. & Ald. 360, 22 Rev. Rep. 427, 5 E. C. L. 211; Hensloe's Case, 9 Coke 36*a*; Brookes *v.* Stroud, 1 Salk. 3.

68. Cole *v.* Smalley, 25 N. J. L. 374. And see *supra*, XIV, G, 12, a, (I).

69. Gilman *v.* Gilman, 54 Me. 453; Burrow *v.* Sellers, 2 N. C. 501.

70. Smith *v.* Smith, 11 N. H. 459; Dickerson *v.* Robinson, 6 N. J. L. 195, 10 Am. Dec. 396.

Where one administrator refuses to prosecute suit.— The practice at law is to bring the suit in the first place in the name of all the administrators, and if either of them is unwilling to have the suit prosecuted in his name afterward, the one who has instituted the suit may then upon a summons have a judgment of severance and continue the suit in his own name only. Tooker *v.* Oakley, 10 Paige (N. Y.) 288. But under a code provision providing that if the consent of one who should be joined as plaintiff cannot be obtained, he may be made a defendant, on the reason therefor being stated in the petition, if one of two administrators refuses to join in an action on a cause of action belonging to the estate the other may bring the action in joining as defendant stating in the petition the reason therefor. Rizer *v.* Gillpatrick, 16 Kan. 564.

71. Aiken *v.* Bridgman, 37 Vt. 249.

72. Thornton *v.* Smiley, 1 Ill. 34.

73. Packer *v.* Willson, 15 Wend. (N. Y.) 343.

74. Green *v.* Foley, 2 Stew. & P. (Ala.) 441.

75. Lee *v.* Gause, 24 N. C. 440.

76. Williams *v.* Sims, 8 Port. (Ala.) 579.

77. Mitchell *v.* Rice, 6 J. J. Marsh. (Ky.) 623; Hill *v.* Smalley, 25 N. J. L. 374; Swallow *v.* Emberson, 1 Lev. 161; Alexander *v.* Mawman, Wills 40. And see Rawlinson *v.* Shaw, 3 T. R. 557, 1 Rev. Rep. 768.

78. Mitchell *v.* Rice, 6 J. J. Marsh. (Ky.) 623. And see Hill *v.* Smalley, 25 N. J. L. 374, in which it was said that the executor who has in fact administered, that is to say received the assets, should be responsible to the creditor, whether he has proved the will or not without regard to others who have not interfered with the estate, although entitled by the will to do so.

79. Hensloe's Case, 9 Coke 36*a*.

Where all the executors contract for the services of an accountant in settling the estate, an action against one executor will not lie, another being living. Douglas *v.* Leonard, 14 N. Y. Suppl. 274.

80. Williams *v.* Sims, 8 Port. (Ala.) 579. And see Wheeler *v.* Bolton, 54 Cal. 302, holding that where only one of two executors has acted and the decree of distribution re-

tor.[81] An action at law will not lie against one of two or more administrators. All must be joined as defendants,[82] and it has been held that the objection for non-joinder may be taken advantage of by a motion for nonsuit.[83]

d. In Suits in Equity by Executors or Administrators. The rule in equity is that all the executors who prove the will must be joined as complainants and that those who have not proved the will need not be joined.[84] If, however, an executor or administrator who should join as a co-plaintiff refuses to join in the suit, he should be joined as a defendant and the suit cannot be carried on in his name as plaintiff without his consent.[85] So if one executor renounces, the others may file a bill in their name and may make him a party defendant if necessary to bring him before the court, stating in the bill the fact of his refusal to join as complainant.[86] Where a suit is brought by one of two co-executors against the other for a debt due from the latter to the estate, the latter should not be made a complainant, but should be made a defendant in the character in which he owes the debt.[87]

e. In Suits in Equity Against Executors and Administrators. Where there are several executors or administrators, it is not ordinarily permissible to sue any number less than all,[88] unless perhaps, where from special reasons shown, the character of the relief sought makes it unnecessary to join them.[89]

13. Joinder of Representatives of Different Estates. Where a person is administrator of the estates of husband and wife and it is doubtful whether the right to a fund is in the estate of husband or wife, he may sue for it in equity in

fers to him alone, the other absent from the state is not a necessary party to an action against the former by a distributee to recover his share in the estate.

Removal of executor from state.— Under a statute providing that in case one of the executors has removed the one remaining in the jurisdiction may be sued, removal means a change of residence and not temporary absence on a journey. Bledsoe *v.* Hudleston, 5 Yerg. (Tenn.) 295.

81. Negley *v.* Gard, 20 Ohio 310.

82. Dickerson *v.* Robinson, 6 N. J. L. 195, 10 Am. Dec. 396; Ryerson *v.* Ryerson, 4 N. J. L. 363.

If one only be summoned and the other return non est inventus, he that is summoned may and must plead for both, but the plea must be joint and the judgment for or against them in their joint capacity. Dickerson *v.* Robinson, 6 N. J. L. 195, 10 Am. Dec. 396.

83. Ryerson *v.* Ryerson, 4 N. J. L. 363.

84. Rinehart *v.* Rinehart, 15 N. J. Eq. 44 [*citing* 1 Daniel Ch. Pr. 273; 2 Williams Ex. 1626]; Marsh *v.* Oliver, 14 N. J. Eq. 259; *In re* Coursen, 4 N. J. Eq. 408; Thompson *v.* Graham, 1 Paige (N. Y.) 384; Davies *v.* Williams, 13 East 232, 1 Smith K. B. 5; Cramer *v.* Morton, 2 Molloy 108. See also Kilby *v.* Stanton, 2 Y. & J. 75.

One of two executors may apply for money in the hands of the court to pay undisputed claims when any reason appears for not joining the other executor. Hattersley *v.* Bissett, 52 N. J. Eq. 693, 30 Atl. 86.

When nothing is involved but the appropriation of money a single executor may ask aid of the court for that purpose, especially where the other executor is personally interested in the fund and is brought into court so that he can answer and protect the fund in which he is interested in its entirety. Personette *v.* Johnson, 40 N. J. Eq. 173.

85. Mulford *v.* Allen, 2 N. J. Eq. 288; Tooker *v.* Oakley, 10 Paige (N. Y.) 288; Blount *v.* Burrow, 3 Bro. Ch. 90, 29 Eng. Reprint 424. And see Finch *v.* Winchelsea, 1 Eq. Cas. Abr. 2, 21 Eng. Reprint 828.

86. Thompson *v.* Graham, 1 Paige (N. Y.) 384.

Where land devised to be sold has been sold by one of several executors, all the executors ought to be parties in a suit to foreclose the mortgage existing on such lands. Mayo *v.* Tomkies, 6 Munf. (Va.) 520.

87. Ransom *v.* Geer, 30 N. J. Eq. 249.

88. Clements *v.* Kellogg, 1 Ala. 330. And see Spencer *v.* Ragan, 9 Gill (Md.) 480; *In re* Coursen, 4 N. J. Eq. 408, in which it was said that where executors have all taken out letters they must be sued jointly in the same manner as if they had all proved the will at the same time and before the same officer.

After bill filed against one executor, if the other executor qualify, he ought to be made a party to the suit as soon as it is known that he has so qualified. Eustace *v.* Gaskins, 1 Wash. (Va.) 188.

89. Clements *v.* Kellogg, 1 Ala. 330.

Illustration.— Where a bill seeks discovery and relief against the acts of one only of the executors of an estate, the other need not be made a party in the first instance but may be made a party during the progress of the suit if it prove necessary. Footman *v.* Pray, R. M. Charlt. (Ga.) 291.

Suit against personal representatives of one executor where two executors of a will are dead and the third and only surviving one resides out of the jurisdiction, and the estate has gone into the hands of the personal representatives of one of the deceased exec-

both characters.[90] However, a count for money had and received or for money paid to the use of one person as administrator of a certain decedent and to another person as administrator of another decedent is bad, and judgment cannot be rendered thereon against defendants either jointly or severally.[91]

14. Personal Representative as Plaintiff and Defendant in the Same Action. The courts do not permit a party to be both plaintiff and defendant in the same action and therefore it is not competent for a personal representative acting in his representative capacity to sue himself in his individual capacity.[92] The rule is not altered by the fact that his co-representative is joined with him as co-plaintiff, but the pleading may be amended by striking out his name as co-complainant.[93] On the other hand a personal representative cannot maintain a suit in his individual capacity against himself in his representative capacity.[94]

15. Intervention. In a suit by a creditor against a personal representative to recover a claim against the estate, other creditors have no right to intervene and become co-defendants.[95] The personal representative may insist on being made a party to a bill against the heir for the discovery of assets and their application to the payment of debts,[96] and one who is an acknowledged representative of a party deceased should be allowed on application to intervene in a special proceeding in the surrogate court to which the decedent was a party.[97] So where one of several makers of a note dies, his representative may appear as a party defendant to contest the validity of the note.[98] Where a personal representative asking permission to intervene alleges his representative capacity and the same is not denied nor any proof given that he had not been appointed, it is not proper to admit him as a party without first compelling him to prove his legal appointment.[99] Where a mortgage and the debt secured thereby pass from the intestate as a gift *causa mortis*, the administrator can only interpose in the suit on the mortgage at the request of the donees and for their benefit;[1] and where one heir sues the others on an alleged contract with the ancestor whereby after administration plaintiff would be entitled to a distribution of all the property remaining in the hands of the administrator, the latter has no interest in the controversy and violates no obligation of his trust by not intervening.[2] Where a suit is brought for partition

utors (the testator having left no debts) persons entitled to legacies under the will may maintain a bill in equity for such legacies against the personal representatives of the deceased executor. Rushin *v.* Young, 27 Ga. 325. *Compare* Baughman *v.* Kunkle, 8 Watts (Pa.) 483.

Waiver of objection for non-joinder.— Where one of two executors also made trustees in their individual capacity fails to qualify, the failure to join him as defendant in a suit to foreclose a mortgage given by testator does not invalidate a sale in such proceedings where neither the heirs, legatees, *cestuis que trustent*, nor the widow as individually vested with the remainder or as sole executrix, and trustee, made any objection to the foreclosure proceedings to which they were necessary parties. Steinhardt *v.* Cunningham, 55 Hun (N. Y.) 375, 8 N. Y. Suppl. 627.

90. Brent *v.* Washington, 18 Gratt. (Va.) 526.

91. Sibbit *v.* Lloyd, 11 N. J. L. 163.

92. Thomas *v.* Thomas, 3 Litt. (Ky.) 8; Harris *v.* Pickett, 37 La. Ann. 741; McKnight *v.* Calhoun, 36 La. Ann. 408; Johnson *v.* Dubel, (N. J. Ch. 1886) 3 Atl. 705.

93. Johnson *v.* Dubel, (N. J. Ch. 1886) 3 Atl. 705.

94. Byrne *v.* Byrne, 94 Cal. 576, 29 Pac. 1115, 30 Pac. 196; Harris *v.* Pickett, 37 La. Ann. 741; Farmer's Succession, 32 La. Ann. 1037; Black *v.* Shreeve, 7 N. J. Eq. 440; Perkins *v.* Se Ipsam, 11 R. I. 270.

Under special statutes.— Notwithstanding a statute providing that a personal representative if a creditor of decedent may bring action on a claim against the estate when it has been rejected, a personal representative cannot in his individual capacity bring suit against himself in his representative capacity on a claim paid by him personally after decedent's death. The statute only includes claims existing at the time of decedent's death. Phillips *v.* Phillips, 18 Mont. 305, 45 Pac. 221.

95. Hassinger *v.* Hassinger, 20 Pa. Co. Ct. 485.

96. Cosby *v.* Wickliffe, 7 B. Mon. (Ky.) 120.

97. Merritt *v.* Jackson, 2 Dem. Surr. (N. Y.) 214. See also Van Alen *v.* Hewins, 5 Hun (N. Y.) 44; Lafferty *v.* Lafferty, 5 Redf. Surr. (N. Y.) 326.

98. Womack *v.* Shelton, 31 Tex. 592.

99. Hamilton *v.* Lamphear, 54 Conn. 237, 7 Atl. 19.

1. Borneman *v.* Sidlinger, 18 Me. 225.

2. *In re* Healy, 137 Cal. 474, 70 Pac. 455.

between heirs of decedent the administrator cannot intervene asking for a sale of the land to make assets nor interfere in the proceeding in any manner.[3]

16. Question of Parties as Affected by Death of Personal Representative — a. In Actions by Personal Representative. At common law, all personal actions abated by the death of either party before judgment;[4] but by virtue of statutory provisions the rule is almost universal that where suit is brought by a personal representative, and he dies pending suit it does not abate on his death,[5] and this is true whether the forum be legal[6] or equitable.[7] Where the personal representative sues in his individual capacity the suit on his death must be continued in the name of his personal representative and not in the name of his successor.[8] Where the cause of action is such that the representative can only sue on it in his representative capacity, it must be continued on his death by his successor in office.[9] Where the personal representative sues in his representative capacity on a cause of action which he could sue on either individually or as representative and the amount recovered would be assets of the estate, it has been held that on his death suit should be continued by his successor.[10]

3. Clayton *v.* Bough, 93 Ind. 85.

4. Portevant *v.* Pendleton, 23 Miss. 25.

5. *Alabama.*— Reynolds *v.* Crook, 95 Ala. 570, 11 So. 412; *Ex p.* Jones, 54 Ala. 108.

Arkansas.— State *v.* Murray, 8 Ark. 199.

New Jersey.— Crane *v.* Alling, 14 N. J. L. 593.

New York.— Wood *v.* Flynn, 30 Hun 444; Bain *v.* Pine, 1 Hill 615.

Tennessee.— Brasfield *v.* Cardwell, 7 Lea 252.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1789.

A claim filed by an administratrix under order of court against the estate of another decedent and pending in that court for allowance or rejection is a suit or action within the rule. Reynolds *v.* Crook, 95 Ala. 570, 11 So. 412.

6. See cases cited *supra*, note 5.

7. Fletcher *v.* Sanders, 7 Dana (Ky.) 345, 32 Am. Dec. 96; Owen *v.* Curzon, 2 Vern. Ch. 237, 23 Eng. Reprint 753; Mitford Pl. 64.

8. Tate *v.* Shackelford, 24 Ala. 510, 60 Am. Dec. 488; Arrington *v.* Hair, 19 Ala. 243; Horskins *v.* Williamson, T. U. P. Charlt. (Ga.) 145, 4 Am. Dec. 703.

Where an administrator sues in his individual capacity and recovers judgment and after issuance of execution thereon an affidavit of illegality is filed and he dies, an administrator *de bonis non* cannot be made a party to the proceeding. Saffold *v.* Bank, 69 Ga. 289.

Limitations of rule.— It has been held that where an administrator obtains a judgment and after the estate has been fully settled and the debts paid he dies pending scire facias sued out by him on the judgment, the proceedings may be revived in the name of the distributee, who are the real parties in interest; that this is not prejudicial to the rights of defendant. Crane *v.* Crane, 51 Ark. 287, 11 S. W. 1.

9. Brasfield *v.* Cardwell, 7 Lea (Tenn.) 252. And see Morrow *v.* Taggart, 45 Ala. 293.

Where an administrator continues an action commenced by decedent and dies, the administrator *de bonis non* is the only proper party to continue the action. Stephenson *v.* Peebles, 77 N. C. 364.

Death of administratrix after judgment.— Where an administratrix recovers judgment for a debt due by reason of a loss of money to decedent's estate by the negligence of the agent of the administratrix, and dies, the administrator *de bonis non* is properly substituted as plaintiff under a statute giving an administratrix *de bonis non* the right to sue out writs of execution or scire facias on judgments obtained by or in the name of the executors or administrators into whose place they may have come. Lea *v.* Hopkins, 7 Pa. St. 385.

Creditors cannot continue a suit originally brought by the administrator against the heirs to have land sold to make assets. On the death of the administrator, suit can only be continued by the administrator *de bonis non.* Brittain *v.* Dickson, 111 N. C. 529, 16 S. E. 326.

Where an administrator de bonis non declines to prosecute an action in which the administrator was plaintiff, one who makes affidavit that the suit was originally brought for his use is not entitled to be made plaintiff, but on giving indemnity to secure costs he is entitled to have the administrator *de bonis non* made plaintiff, and the action prosecuted in his name. Stephenson *v.* Peebles, 77 N. C. 364.

Prerequisites to continuance of suit.— Under a statute requiring a public administrator to give bond and take out letters of administration in each particular case before he is invested with any control over the estate, a public administrator has no authority to prosecute a suit commenced by an administrator who has died until he has given bond and taken out letters of administration in the case of that particular estate. Thomas *v.* Adams, 10 Ill. 319.

10. Hemphill *v.* Hamilton, 11 Ark. 425. But see Wood *v.* Tomlin, 92 Tenn. 514, 22 S. W. 206, holding that where an adminis-

b. In Actions Against Personal Representative. In actions against personal representatives suit cannot be revived on death of the representative unless there is statutory authority therefor;[11] but by virtue of statutory provisions suit does not ordinarily abate on the death of the personal representative pending suit.[12] A suit may be[13] and ordinarily should be continued,[14] against the administrator *de bonis non* and not against the administrator of the personal representative.[15] If, however, the object of the suit is to fasten a liability on a personal representative for a devastavit, the suit should be revived against his administrator;[16] and it has been held that where an administrator who dies pending an action against him by a creditor for a settlement of the estate had in his hands the money to pay plaintiff's claim, it was proper to render judgment against his administrator therefor.[17] So in a proceeding against an administrator to hold him accountable for maladministration his administrators and not the administrator *de bonis non* of his intestate is the proper party against whom to revive a suit.[18] A statute which authorizes the making of the successor of an executor a party by scire facias to a suit against him prevents abatement of such suit even when pending in a different county from that where an administration *de bonis non* is granted.[19] An action commenced by a widow against the administrator of her husband for the year's support and the exempt property cannot be revived against the representatives of the administrator, but only against the administrator *de bonis non* of the husband.[20] Where a suit was pending by the next of kin against an administrator for the distribution of his estate and defendant dies, the action could not be continued by the next of kin, as no one but an administrator *de bonis non* could call the representative of the deceased administrator to account for the assets.[21]

c. On Death of One of Several Personal Representatives. The widow of an intestate cannot come into court on an open unliquidated claim against the representative of one administrator while there is another living, nor can she do so even upon a joint judgment or decree previously obtained against both.[22] Where suit is brought by or against two or more personal representatives and one of them dies, the whole action or grounds of relief survive in favor of or against the survivor or survivors.[23] In consequence on the death of one of several personal

trator sues in his representative capacity, upon a note taken, payable to himself as administrator for a debt due his intestate's estate, the suit may be revived upon his death during its pendency, either in the name of his own administrator or in the name of an administrator *de bonis non* of the first decedent.

11. Portevant *v.* Pendleton, 23 Miss. 25.

12. See Portevant *v.* Pendleton, 23 Miss. 25; Parks *v.* Lubbock, (Tex. Civ. App. 1899) 50 S. W. 466. And see cases cited in following notes.

13. *Georgia.*— Roe *v.* Doe, 30 Ga. 775.

Maryland.— Mitchell *v.* Williamson, 9 Gill 71.

Virginia.— Dabney *v.* Smith, 5 Leigh 13.

West Virginia.— Jones *v.* Reid, 12 W. Va. 350, 29 Am. Rep. 455.

United States.—Owen *v.* Blanchard, 18 Fed. Cas. No. 10,628, 2 Cranch C. C. 418.

14. Jones *v.* Jones, 8 Humphr. (Tenn.) 705.

15. Jones *v.* Jones, 8 Humphr. (Tenn.) 705.

16. Clopton *v.* Haughton, 57 Miss. 787. And see Rodgers *v.* Rushin, 30 Ga. 934, holding that where an executor dies pending a suit to fix a personal liability on him on account of an alleged devastavit, it is proper that his representative should be made a party to the proceedings.

17. Caldwell *v.* Hampton, 53 S. W. 14, 21 Ky. L. Rep. 793.

18. Leonard *v.* Cameron, 39 Miss. 419.

19. Walton *v.* Gill, 46 Ga. 600.

Where an administrator who is sued dies before levy of execution his administrator does not become a party to the record and is not privity to the subject-matter of the execution and can take no legal steps to defeat the execution. Henderson *v.* Winchester, 31 Miss. 290.

20. Holliday *v.* Holland, 41 Miss. 528.

21. Merrill *v.* Merrill, 92 N. C. 657.

22. Wade *v.* Potter, 14 N. J. L. 278.

23. Lachaise *v.* Libby, 21 How. Pr. (N. Y.) 362.

Several executors and administrators are regarded in the light of an individual person. They have a joint and entire interest in the testator's effects which is incapable of being divided. And in case of death such interest vests in the survivor. 3 Bacon Abr. Ex. D; Toller Law Ex. 188, Shook *v.* Shook, 19 Barb. (N. Y.) 653.

Effect of want of service on survivor.— Where an action is brought against two ex-

representatives, the suit is properly continued by or against the survivor or survivors,[24] and it is error to revive the suit against the representatives of the deceased representative.[25]

17. Question of Parties as Affected by Resignation, Removal, or Discharge of Personal Representative. The resignation, removal, or discharge of a personal representative pending a suit brought by him does not operate to abate the action,[26] although after his removal he cannot himself continue the suit.[27] The suit should be continued in the name of his successor in office,[28] and the cause cannot be proceeded with further until he is made a party.[29] The same rules apply where a personal representative dies pending a suit against him.[30]

ecutors and service is had on one for whom there is a special appearance a trial and judgment after the death of the executor on whom the writ was served is erroneous; the other executor never having been in court as a party, it would be unjust to permit plaintiff to hold him as such. Greiner *v.* Hummel, 2 Watts (Pa.) 345.

Suits to recover legacies.— If one of two co-executors has died, his personal representatives are not necessary parties to a bill to recover a legacy (Dehart *v.* Dehart, 3 N. J. Eq. 471; Richardson *v.* Richardson, 9 Pa. St. 428); especially where it charges that all the assets of the testator are in the hands of the surviving executor (Goble *v.* Andruss, 2 N. J. Eq. 66); but such representatives are proper parties whenever the deceased executor is charged with having assets or where fraud and collusion is charged between the executors or in a case of insolvency (Goble *v.* Andruss, *supra*).

24. Wright *v.* Land, 66 Ala. 389; Elliott *v.* Eslava, 3 Ala. 568; Castor *v.* Pace, 24 Ga. 137; Hicks *v.* Harris, 26 Miss. 420; Patterson *v.* Copeland, 52 How. Pr. (N. Y.) 460. And see Gadsden *v.* Whaley, 14 S. C. 210.

25. Hicks *v.* Harris, 26 Miss. 420.

26. Russell *v.* Erwin, 41 Ala. 292; Elliott *v.* Eslava, 3 Ala. 568; Carley *v.* Barnes, 11 Ark. 291; Cole *v.* Hebb, 7 Gill & J. (Md.) 20; Burlington, etc., R. Co. *v.* Crockett, 17 Nebr. 570, 24 N. W. 219. *Contra*, Gormly *v.* Skinner, Wright (Ohio) 680. And *compare* Vaugh *v.* Cox, 27 Miss. 701.

27. Knight *v.* Hamaker, 33 Oreg. 154, 54 Pac. 277, 659.

28. Lunsford *v.* Lunsford, 122 Ala. 242, 25 So. 171; Russell *v.* Erwin, 41 Ala. 292; Townsend *v.* Jeffries, 24 Ala. 329; Elliott *v.* Eslava, 3 Ala. 568; Iowa L. & T. Co. *v.* Holderbaum, 86 Iowa 1, 52 N. W. 550; Cole *v.* Hebb, 7 Gill & J. (Md.) 20; Burlington, etc., R. Co. *v.* Crockett, 17 Nebr. 570, 24 N. W. 219.

Where a public administrator resigns or his office is otherwise terminated pending an action brought by him it may be revived in the name of his successor. Russell *v.* Erwin, 41 Ala. 292; Carley *v.* Barnes, 11 Ark. 291; Cox *v.* Martin, 75 Miss. 229, 21 So. 611, 65 Am. St. Rep. 604, 36 L. R. A. 800.

Revival by administrator as his own successor.— Where pending an action by an administrator his letters are revoked, the action may be revived by him on his reinstatement. Hill *v.* Bryant, 61 Ark. 203, 32 S. W. 506.

Presumption as to propriety of substitution.— Where plaintiff is an administrator substituted by order of court for another who was also an administrator, it will be presumed in the absence of evidence to the contrary that the substitution was properly made. Jones *v.* Pearl Min. Co., 20 Colo. 417, 38 Pac. 700.

Notice of revivor in the name of the successor must be given to the adverse party. Bishop *v.* Stoddard, 4 Ohio Dec. (Reprint) 276, 1 Clev. L. Rep. 201. And see *Ex p.* Jones, 54 Ala. 108.

Where one who has never qualified as administrator resigns after bringing suit an administrator who is thereafter appointed and who qualifies may procure himself to be substituted as plaintiff under a statute providing that no civil suit should be dismissed for want of necessary parties before the court shall have power to strike out or insert in the writ and pleadings the names of either plaintiffs or defendants so as to have the proper parties before it. Person *v.* Fidelity, etc., Co., 92 Fed. 965, 35 C. C. A. 117 [*reversing* 84 Fed. 759].

29. Trimmer *v.* Todd, 52 N. J. Eq. 426, 28 Atl. 583; Taylor *v.* Savage, 1 How. 282, 11 L. ed. 313, 2 How. (U. S.) 395, 11 L. ed. 132.

If an administrator resigns after rendition of a decree against him and an administrator *de bonis non* is appointed but is not made a party to the pending suit, either by bill of revivor or amendment, the court is without jurisdiction to proceed against him on complainant's motion for a summary judgment because of his failure to follow the direction of the decree rendered against the administrator as to the disposition of assets of the estate. Passmore *v.* Ellington, 122 Ala. 559, 26 So. 144.

Effect of failure to subject dismissal.— Where an executor is discharged pending suit against him and an administrator *de bonis non* appointed, but there is no suggestion or plea by the executor setting up the discharge and plaintiff obtains a verdict against him, the administrator *de bonis non* cannot by means of a rule to show cause be made a party to the suit as of a date prior to the verdict and judgment be thus entered against him. Weddington *v.* Huey, 80 Ga. 651, 6 S. E. 281.

30. Skinner *v.* Frierson, 8 Ala. 915; Troy Nat. Bank *v.* Stanton, 116 Mass. 435; Burras *v.* Looker, 2 Edw. (N. Y.) 499.

18. Question of Parties as Affected by Marriage of Administratrix or Executrix. The common-law rule is well settled that if a *feme sole* who has been appointed a personal representative subsequently marries, her husband becomes co-executor or co-administrator with her,[31] or as it is sometimes expressed he becomes executor in her right;[32] and in actions or suits subsequently brought by or against either in a representative capacity, the other is a necessary party;[33] neither can sue or be sued alone.[34] It has been held, however, that in cases where an administrator may be charged in his own right the action lies against the husband alone.[35] Where there are several personal representatives, one of whom is a married woman, she should be joined with the other representatives whether she was constituted one before or after marriage,[36] and her husband should be joined in an action against them.[37] Where a *feme sole* personal representative marries pending an action commenced by her the action cannot be allowed to proceed unless the husband is joined as plaintiff;[38] but in the absence of statute providing otherwise the action may proceed if the husband is joined.[39] So where an action is brought against a *feme sole* representative the action may be further prosecuted on making the husband a party.[40] In a number of jurisdictions, by virtue of statutory enactment, marriage of a *feme sole* personal representative operates as an extinguishment of her authority;[41] and she cannot further prosecute a suit brought by her,[42] even though her husband join;[43] and if she is

Where the birth of a posthumous child is the ground for revocation of letters testamentary, the newly appointed administrator cannot be made a party defendant to a suit pending against the removed executor. He is not an administrator *de bonis non,* but to all intents and purposes an original administrator on an intestate estate. Martin *v.* Brooch, 6 Ga. 21, 50 Am. Dec. 306.

Removal pending appeal.— Where an administrator defendant pending his appeal is removed, his successor has the right to prosecute the appeal and defend the action. Kerns *v.* Dean, 77 Cal. 555, 19 Pac. 817.

No judgment can be rendered against a representative who has been removed. Troy Nat. Bank *v.* Stanton, 116 Mass. 435; Matter of Dunham, 8 Ohio Cir. Ct. 160, 4 Ohio Cir. Dec. 325. See also More *v.* More, 127 Cal. 460, 59 Pac. 823 [*affirming* (1898) 53 Pac. 1077].

31. Dowty *v.* Hall, 83 Ala. 165, 3 So. 315; Williamson *v.* Hill, 6 Port. (Ala.) 184; Buck *v.* Fischer, 2 Colo. 709; Wiggin *v.* Swett, 6 Metc. (Mass.) 194, 39 Am. Dec. 716; Wood *v.* Chetwood, 27 N. J. Eq. 311; Bacon Abr. tit. "Executors and Administrators," A, 8.

32. Wiggin *v.* Swett, 6 Metc. (Mass.) 194, 39 Am. Dec. 716.

33. *Alabama.*— Williamson *v.* Hill, 6 Port. 184.

Colorado.— Buck *v.* Fischer, 2 Colo. 709.

Maryland.— See Linthicum *v.* Polk, 93 Md. 84, 48 Atl. 842.

Massachusetts.— Barber *v.* Bush, 7 Mass. 510.

New Jersey.— Oliva *v.* Bunaforza, 31 N. J. Eq. 395; Wood *v.* Chetwood, 27 N. J. Eq. 311.

North Carolina.— Moore *v.* Suttril, 2 N. C. 16; Buller Pl. (3d ed.) 166; 1 Chitty (16th Am. ed.) 47; Dicey Parties (2d Am. ed.) 298; 3 Williams Ex. 520.

34. Williamson *v.* Hill, 6 Port. (Ala.) 184; 1 Chitty (16th Am. ed.) 47; 2 Comyns Dig. v.

35. Williamson *v.* Hill, 6 Port. (Ala.) 184 [*citing* 2 Saunders Pl. & Ev. 184].

If the bond be given to husband and wife administratrix, the husband may declare on it alone as on a bond made to himself. Ankerstein *v.* Clarke, 4 T. R. 616.

36. Gratz *v.* Phillips, 1 Penr. & W. (Pa.) 333.

37. Ludlow *v.* Marsh, 3 N. J. L. 983.

38. Memphis, etc., R. Co. *v.* Womack, 84 Ala. 149, 4 So. 618. And see Townshend *v.* Townshend, 10 Gill & J. (Md.) 373; Swan *v.* Wilkinson, 14 Mass. 295.

39. Memphis, etc., R. Co. *v.* Womack, 84 Ala. 149, 4 So. 618.

40. Henderson *v.* McClure, 2 McCord Eq. (S. C.) 466. *Compare* Bobe *v.* Frowner, 18 Ala. 89, holding that if an administratrix marries pending suit against her as such, plaintiff may proceed to judgment without making the husband a party.

Prosecution by administrator de bonis non. — A statute providing that where an administrator is removed from office pending a suit in which he is a party it may be prosecuted by the administrator *de bonis non* applies where the authority of a sole administratrix to sue is extinguished by her marriage pending suit. Brown *v.* Pendergast, 7 Allen (Mass.) 427.

41. Whittaker *v.* Wright, 35 Ark. 511; Young *v.* Duhme, 4 Metc. (Ky.) 239; Wiggin *v.* Swett, 6 Metc. (Mass.) 194, 39 Am. Dec. 716; Vielhaber *v.* Eyermann, 1 Mo. App. 115.

42. Whittaker *v.* Wright, 35 Ark. 511.

43. Vielhaber *v.* Eyermann, 1 Mo. App. 115, holding further that when an executrix marries or becomes non-resident, her suit cannot be further prosecuted until an administrator with the will annexed is appointed.

one of two joint representatives and the other sues alone it is not necessary to amend by adding her as a party.[44]

H. Process and Appearance — 1. Process — a. In General. To give a court jurisdiction to render judgment against a personal representative, service of process on him is necessary;[45] and a recital in an order making the administrator a party on the death of decedent that he had been served does not prevent his showing that he neither was served nor appeared.[46] Where persons not residents of a state are appointed personal representatives on their petition by a court of that state the court may require them to submit to service of summons in an action to determine the liability of the estate on a claim not provable in course of administration.[47] Statutory provisions as to the time of serving process must be strictly complied with.[48]

b. Co-Executors and Co-Administrators. Where suit is brought against two or more personal representatives, they must all be served with process in order to make them parties.[49] Service of process on one will not authorize a judgment against all,[50] and according to some decisions service must be made upon all to authorize a judgment against any one of them,[51] although the contrary view also finds support.[52] The rule requiring service as to all is subject to some limitations. Thus it has been held that if process is served on one and returned "not found" as to the others plaintiff may take judgment against all,[53] and where one is a non-resident process may be served on those who are residents and plaintiff may proceed to judgment against them.[54]

c. Defects, Objections, and Amendments. A citation may issue against "the estate of [naming the decedent]."[55] Process defective for failure to allege defend-

44. Mason, etc., R. Co. *v.* Davis, 27 Ga. 113. And see Teschemacher *v.* Thompson, 18 Cal. 11, 79 Am. Dec. 151.

45. Manley *v.* Union Bank, 1 Fla. 160; Dozier *v.* Richardson, 25 Ga. 90; Crabb *v.* Atwood, 10 Ind. 322.

As party to cross bill.— Where an administrator became a party complainant to a bill by his intestate to enjoin a sale of mortgaged property and defendants filed a cross bill and bill of revivor against the administrator and intestate's heirs and devisees to obtain a sale of the property, the administrator must be served with process to make him a party to the cross bill. Paulling *v.* Creagh, 63 Ala. 398.

Administrator de bonis non appointed after suit brought cannot be made a party to it by mere suggestion, although the record of such suggestion and of his having been made a party be served upon him. Manley *v.* Union Bank, 1 Fla. 160.

Where defendant is sued both as executor and in his individual capacity, he need not be served with more than one copy of the citation. Owsley *v.* Paris Exch. Bank, 1 Tex. Unrep. Cas. 93.

46. Dozier *v.* Richardson, 25 Ga. 90.

47. State *v.* Rock County Probate Ct., 66 Minn. 246, 68 N. W. 1063.

48. Carter *v.* Spencer, 4 Ind. 78; Jones *v.* Roland, 8 Blackf. (Ind.) 272.

49. **Service on resigned executor.**— Where one of four executors resigned, the service of notice on him eight months after his resignation, in an action against the executors as such, conferred no jurisdiction to enter judgment by default. U. S. Rolling Stock Co. *v.* Potter, 48 Iowa 56; Owen *v.* Brown, 2 Ala. 126; Jones *v.* Wilkinson, 3 Stew. (Ala.) 44. *Compare* Howard *v.* Daniel, 6 J. J. Marsh. (Ky.) 125.

50. Breckenridge *v.* Mellon, 1 How. (Miss.) 273; Lobb *v.* Lobb, 26 Pa. St. 327; Myrick *v.* Adams, 4 Munf. (Va.) 366. See also Terry *v.* Lindsay, 3 Stew. & P. (Ala.) 317.

51. Barnes *v.* Jarnagin, 12 Sm. & M. (Miss.) 108. See also Owen *v.* Brown, 2 Ala. 126.

52. Lobb *v.* Lobb, 26 Pa. St. 327, holding that if judgment be rendered against both, it will be reversed as to the one not summoned and affirmed as to the other. See also Hunt *v.* Anderson, 33 Miss. 559, which sustains the view stated in the text and makes no mention of Barnes *v.* Jarnagin, 12 Sm. & M. (Miss.) 108.

53. Moore *v.* Paul, 2 Bibb (Ky.) 330; Rous *v.* Etherington, 2 Ld. Raym. 870, 1 Salk. 312.

Under the Georgia statutes service on one executor and the return of not found as to the others is good, as they are "joint contractors as to their testator's contracts" and plaintiff may proceed to judgment against those served. Wynn *v.* Booker, 26 Ga. 553.

54. Hansom *v.* Jacks, 22 Ala. 549; Tappan *v.* Bruen, 5 Mass. 193. And see Owen *v.* Brown, 2 Ala. 126.

On discontinuance of the writ as to a non-resident administrator, in the declaration, on the ground of non-residence, it is the same as if the writ had been sued out originally against the resident administrator alone which would have been the correct mode of procedure. English *v.* Brown, 9 Ala. 504.

55. New Orleans *v.* Stewart, 28 La. Ann. 180, holding that the constitution and statutes contemplate that a succession may be a plaintiff or defendant, and "estate" is synonymous with "succession."

ant's representative capacity may be amended.[56] Irregularities in process against a personal representative cannot be taken advantage of by a stranger to the suit.[57]

2. APPEARANCE. An appearance by attorney is a sufficient appearance by an administrator in an action on a claim against an estate where a judgment is rendered by agreement against the estate,[58] and an administrator by moving to dismiss for want of demand thereby enters his appearance to the action.[59] Process is not necessary to make a personal representative a party to the suit when he comes voluntarily into court and asks to be made such;[60] and by voluntarily appearing and answering an administrator against whom a suit in which his intestate was defendant is sought to be revived waives want of proper service on intestate,[61] or failure to file claims in accordance with statutory requirements.[62] So appearance and answer waive the defense that suit against an executor is prematurely brought,[63] and appearance affects the personal representative with notice of all the subsequent proceedings.[64] An appearance by one executor does not bind a co-executor.[65]

I. Forms of Action. Where a personal representative brings suit or is sued, the form of action is ordinarily the same as that by or against a person suing or sued in his own right. For injury to or conversion of property after decedent's death, the personal representative may maintain trover, replevin, detinue, or trespass.[66] And, when entitled to the possession of real property belonging to the estate, he may maintain such actions as unlawful retainer, ejectment, trespass to try title, or writ of entry.[67] In actions against personal representatives on simple contracts entered into by decedent debt will lie.[68] This action also lies on an obligation of decedent that his executor shall pay after his death.[69] It cannot, however, be maintained by an administrator *de bonis non*, upon an unsatisfied judgment recovered by the original administrator the remedy is by scire facias.[70] If rents are by statute made liable for claims against the estate, assumpsit and not an action on the administration bond is the proper remedy of a creditor.[71] Where an action may be maintained in a court of law for a legacy, assumpsit,[72] debt,[73] or case[74] will lie. So assumpsit lies against an executor by one entitled under the will to the rents and profits, where they are withheld by the executor.[75] For torts committed by decedent, any form of action which might have been maintained against him will be proper in actions against his representative based thereon, provided the action is one which survives.[76] Case is the proper remedy by decedent's widow for the refusal of the adminis-

56. Richardson *v.* Hickman, 32 Ark. 406. See also Lester *v.* Lester, 8 Gray (Mass.) 437, holding that process against defendant personally may be amended so as to charge him in a representative capacity.

57. Helfrich *v.* Stem, 17 Pa. St. 143.

58. Collins *v.* Rose, 59 Ind. 33.

59. Tipton *v.* Richardson, 54 S. W. 738, 21 Ky. L. Rep. 1195.

60. Bowen *v.* Bonner, 45 Miss. 10.

61. Daykin *v.* Emery, 10 Ohio Cir. Ct. 652, 5 Ohio Cir. Dec. 121. See also Clark *v.* Stoddard, 3 Ala. 366.

62. Morrison *v.* Kreamer, 58 Ind. 38 [*overruling* Stanford *v.* Stanford, 42 Ind. 485]. *Compare* Madison County Bank *v.* Suman, 79 Mo. 527.

The ten days' notice required by the Arkansas statute of 1825 to be given to the personal representative of the prosecution of a claim to the probate court is in the nature of process to bring the representative into court, and is waived by his voluntary appearance. McCoy *v.* Lemons, 1 Fed. Cas. No. 8,730*a*, Hempst. 216.

63. Hill *v.* Fly, (Tenn. Ch. App. 1899) 52 S. W. 731.

64. Duffee *v.* Buchanan, 8 Ala. 27.

65. Terry *v.* Lindsay, 3 Stew. & P. (Ala.) 317.

66. See *supra*, XIV, A, 1, b, (IX).

67. See *supra*, XIV, A, 1, b, (VIII).

68. Tupper *v.* Tupper, 3 Ohio 387; McEwen *v.* Joy, 7 Rich. (S. C.) 33; Thompson *v.* French, 10 Yerg. (Tenn.) 452; Childress *v.* Emory, 8 Wheat. (U. S.) 642, 5 L. ed. 705.

69. Harrison *v.* Vreeland, 38 N. J. L. 366.

70. Paine *v.* McIntyre, 32 Me. 131.

71. Davis *v.* Rawlins, 3 Harr. (Del.) 346.

72. Colt *v.* Colt, 32 Conn. 422; Knapp *v.* Hanford, 6 Conn. 170; Miles *v.* Boyden, 3 Pick. (Mass.) 213; Tappan *v.* Tappan, 30 N. H. 50; Clark *v.* Herring, 5 Binn. (Pa.) 33.

73. Peddigrew *v.* Peddigrew, 1 Stew. (Ala.) 580; Knapp *v.* Hanford, 6 Conn. 170; Dubois *v.* Dubois, 6 Cow. (N. Y.) 494.

74. Farwell *v.* Jacobs, 4 Mass. 634.

75. Guthrie *v.* Wheeler, 51 Conn. 207.

76. Brummett *v.* Golden, 9 Gill (Md.) 95.

trator to set apart for her the property to which she is entitled.[77] If he has converted the property into money, she may sue in assumpsit for money had and received.[78]

J. Joinder of Causes of Action — 1. In Actions by Personal Representatives — a. Causes of Action in Individual and Causes of Action in Representative Capacity — (I) *Statement of Rule.* It is elementary law that an executor or administrator cannot join a cause of action in his individual right with a cause of action in his representative capacity.[79] The courts will not take cognizance of distinct and separate claims or liabilities of different persons in the same action,[80] The rule applies to suits in equity as well as actions at law.[81]

(II) *How Misjoinder Availed of.* The objection that a personal representative has joined a cause of action in his individual capacity with one in his representative capacity, although it is pleadable in abatement, is fatal also in every stage of the suit.[82] The declaration is bad on demurrer, motion in arrest, and on error.[83]

b. Causes of Action Accruing to Decedent and Causes of Action Accruing to Representative in Representative Capacity. While it was formerly held that an executor or administrator could not join a cause of action accruing to decedent with one accruing to himself in his representative capacity,[84] the present doctrine is that such counts may be joined whenever the money recovered will be assets;[85]

77. Neely *v.* McCormick, 25 Pa. St. 255, holding that she has neither such a general nor special property in the articles as will enable her to maintain trespass against the administrator.

78. Neely *v.* McCormick, 25 Pa. St. 255.

79. *Arkansas.*— Governor *v.* Evans, 1 Ark. 349.

California.— Dias *v.* Phillips, 59 Cal. 293.

Connecticut.— Bulkley *v.* Andrews, 39 Conn. 523.

Massachusetts.— Brown *v.* Webber, 6 Cush. 560.

Missouri.— Yates *v.* Kimmel, 5 Mo. 87.

New York.— Groh *v.* Hammer, 89 N. Y. App. Div. 28, 85 N. Y. Suppl. 305; Lucas *v.* New York Cent. R. Co., 21 Barb. 245; Hall *v.* Fisher, 20 Barb. 441; Wiltsie *v.* Beardsley, Lalor 386. *Compare* Hood *v.* Hood, 6 N. Y. St. 684.

North Carolina.— May *v.* Smith, 45 N. C. 196, 59 Am. Dec. 594.

Wisconsin.— Robbins *v.* Gillett, 2 Pinn. 439, 2 Chandl. 96.

United States.— Picquet *v.* Swan, 19 Fed. Cas. No. 11,132, 3 Mason 469.

England.— Petrie *v.* Hannay, 3 T. R. 659.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1673.

Illustration.— A count upon an account stated with plaintiffs, "executrix and executors," (not saying "as" executrix and executors) cannot be joined with counts on promises to the testator; for there is no allegation that the promises were made to plaintiffs in their representative capacity; and under such a count proof might be given of an account stated with them in their individual characters. Henshall *v.* Roberts, 5 East 150.

Limitations of rule.— Where a statute authorizes the uniting in the same complaint of several causes of action when they all arise out of the same transaction or transactions connected with the same subject of action, provided they affect all the parties to the action, plaintiff may unite a cause of action as executrix with one as devisee where both accrue under a contract made by the testator with defendant growing out of the same matter. Armstrong *v.* Hall, 17 How. Pr. (N. Y.) 76, in which it was said that plaintiff had a common interest as executrix and devisee.

80. Yates *v.* Kimmel, 5 Mo. 87; 1 Chitty Pl. 8, 31.

81. May *v.* Smith, 45 N. C. 196, 59 Am. Dec. 594; Adams Eq. (2d ed.) 567.

The reason assigned is that different decrees and proceedings might be required; for convenience therefore the joinder will not be permitted. May *v.* Smith, 45 N. C. 196, 59 Am. Dec. 594.

82. Picquet *v.* Swann, 19 Fed. Cas. No. 11,132, 3 Mason 469.

83. Bulkley *v.* Andrews, 39 Conn. 523; Brown *v.* Webber, 6 Cush. (Mass.) 560; Peries *v.* Aycinena, 3 Watts & S. (Pa.) 64.

84. Hosier *v.* Arundel, 3 B. & P. 7; Herrenden *v.* Palmer, Hob. 121; Nicolas *v.* Killigrew, 1 Ld. Raym. 436; Betts *v.* Mitchell, 10 Mod. 316; Rogers *v.* Cook, 1 Salk. 10.

85. *Arkansas.*— Lyon *v.* Evans, 1 Ark. 349.

Indiana.— Lowe *v.* Bowman, 5 Blackf. 410.

Kentucky.— Wilson *v.* Hunt, 6 B. Mon. 379.

New Hampshire.— French *v.* Merrill, 6 N. H. 465.

New York.— Welles *v.* Webster, 9 How. Pr. 251; Fry *v.* Evans, 8 Wend. 530; Valleau *v.* Cahill, 1 N. Y. City Ct. 47.

Pennsylvania.— Lea *v.* Hopkins, 7 Pa. St. 492; State Bank *v.* Haldeman, 1 Penr. & W. 161; Stevens *v.* Gregg, 10 Serg. & R. (Pa.) 234.

Vermont.— Pope *v.* Stacy, 28 Vt. 96.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1673.

but to authorize a joinder it must be alleged that the cause of action arising after decedent's death accrued to plaintiff in his representative capacity.[86]

c. Counts For Goods of Representative and Counts For Goods of Decedent. As a personal representative may sue in his own right on contracts made with him in his representative capacity, he may join counts for goods sold of which he was owner with counts for goods sold which he held as executor.[87]

d. Miscellaneous. In an action by a widow for the rent of her dower interest after its assignment the fact that a claim for rent derived from a lease made by her husband during his lifetime was joined with a claim for rent against the administrators personally did not render the bill objectionable as multifarious.[88] So a bill by a single person as administrator, when the will includes two estates which are so nearly the same that it is necessary to proceed under both wills at the same time and which asks the direction of the court on the administration of the estate and also for contribution from the legatees for the payment of debts is not multifarious.[89] Where the decree of a surrogate's court was against plaintiff as administrator and the docketing and levying reached his individual property, it was proper for plaintiff to sue both in his representative and in his individual capacity in an action to declare the decree satisfied.[90]

2. In Actions Against Personal Representatives — a. Causes of Action in Individual and Causes of Action in Representative Capacity — (i) *Statement of Rule and Reason For Rule.* A cause of action against a personal representative in his representative capacity cannot be joined with a cause of action against him in his individual capacity,[91] and it has been held that this rule is operative in

"The criterion whether the counts are misjoined is, whether the money, if recovered, will be assets in the hands of the executor." Thompson *v.* Stent, 1 Taunt. 322.

Application of rule.— An administrator or executor may join in the same declaration counts on promises to himself as executor or administrator and counts on promises to the intestate or testator (Sullivan *v.* Holker, 15 Mass. 374; Wiltsie *v.* Bearsly, Lalor (N. Y.) 386; Stevens *v.* Gray, 10 Serg. & R. (Pa.) 243; Brown *v.* Lewis, 9 R. I. 497; Partridge *v.* Court, 5 Price 412), if the money recovered on the counts on the premises to himself will be assets (Fry *v.* Evans, 8 Wend. (N. Y.) 530; Sebring *v.* Keith, 2 Bailey (S. C.) 192; Powley *v.* Newton, 6 Taunt. 452); so a count for money had and received to the use of testator and a count for money had and received to plaintiff's use as executor may be joined (Flowers *v.* Kent, Brayt. (Vt.) 134; Petrie *v.* Hannay, 3 Term 659); and counts on promises made to an intestate may be joined with counts on promissory notes given to the administrator as such (Court *v.* Partridge, 7 Price 591). "A count on an *insimul computasset* with the plaintiff as executor may be joined with a count for goods sold by the testator." Thompson *v.* Stent, 1 Taunt 322. Where an executor in his capacity as such, sued on the common counts in general assumpsit, there was no misjoinder of causes because some of the counts, as for work and labor, were in their nature such that the right of action accrued to him in his own right and not in the right of the testator. Bulkley *v.* Andrews, 39 Conn. 523.

86. Lyon *v.* Evans, 1 Ark. 349; Peries *v.* Aycinena, 3 Watts & S. (Pa.) 64; Sebring *v.* Keith, 2 Bailey (S. C.) 192; Henshall *v.* Roberts, 5 East 150.

87. Haskell *v.* Bowen, 44 Vt. 579.

88. Boyd *v.* Hunter, 44 Ala. 705. *Compare* Danaher *v.* Brooklyn, 4 N. Y. Civ. Proc. 286, holding that a personal representative of two decedents cannot join in one action causes of action belonging to the two estates.

89. Carter *v.* Balfour, 19 Ala. 814.

90. Laney *v.* Laney, 58 Hun (N. Y.) 601, 11 N. Y. Suppl. 319.

91. *Alabama.*— Godbold *v.* Roberts, 20 Ala. 354; Jefford *v.* Ringgold, 6 Ala. 544.

Arkansas.— McDaniel *v.* Parks, 19 Ark. 671.

California.— Schlicker *v.* Hemenway, 110 Cal. 579, 42 Pac. 1063, 52 Am. St. Rep. 116; Mesmer *v.* Jenkins, 61 Cal. 151.

Delaware.— Farmers' Bank *v.* Cullen, 4 Harr. 289.

Kentucky.— Maddox *v.* Williams, 5 Ky. L. Rep. 695.

Louisiana.— Hemken *v.* Ludwig, 12 Rob. 188.

Maryland.— Grahame *v.* Harris, 5 Gill & J. 489.

New Jersey.— Terhune *v.* Bray, 16 N. J. L. 53; Mason *v.* Norcross, 1 N. J. L. 242.

New York.— Sortore *v.* Scott, 6 Lans. 271; Pugsley *v.* Aikin, 14 Barb. 114; Benjamin *v.* Taylor, 12 Barb. 328; Ross *v.* Harden, 44 N. Y. Super. Ct. 26; Hayward *v.* McDonald, 7 N. Y. Civ. Proc. 100, 1 How. Pr. N. S. 229; *In re* Randall, 8 N. Y. Suppl. 652, 2 Connoly Surr. 29; Clark *v.* Coles, 50 How. Pr. 178; McMahon *v.* Allen, 12 How. Pr. 39 [*affirmed* in 3 Abb. Pr. 89]; Wiltsie *v.* Beardsley, Lalor 386; Gillet *v.* Hutchinson, 24 Wend. 184; Demott *v.* Field, 7 Cow. 58.

Pennsylvania.— Bogle *v.* Kreitzer, 46 Pa.

suits in equity as well as in actions at law.[92] The reason for this is that different

St. 465; Seip *v.* Drach, 14 Pa. St. 352; Strohecker *v.* Grant, 16 Serg. & R. 237; Schott *v.* Sage, 4 Phila. 87.

Vermont.— Smith *v.* Purmort, 63 Vt. 378, 20 Atl. 928.

Virginia.— Kayser *v.* Disher, 9 Leigh 357; Epe *v.* Dudley, 5 Rand. 437.

England.— Wheeler *v.* Collin, Cro. Eliz. 406; Herrenden *v.* Palmer, Hob. 121; Hall *v.* Huffam, 2 Lev. 228.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1691.

Applications of rule.— In applying the rule, it has been held that the following causes of action cannot be joined: A count on a claim against the decedent and a count on a promise by a personal representative in his capacity as such for money had and received by him as such (Farmers' Bank *v.* Cullen, 4 Harr. (Del.) 289; Wilson *v.* Harvey, 3 Harr. (Del.) 500; Moody *v.* Ewing, 8 B. Mon. (Ky.) 521; Seip *v.* Drach, 14 Pa. St. 352; Ashby *v.* Ashby, 7 B. & C. 444, 6 L. J. K. B. O. S. 41, 1 M. & R. 180, 31 Rev. Rep. 242, 14 E. C. L. 202); a cause of action on a claim against decedent and a cause of action on a promise by the personal representative as such on an action for moneys due from himself (Gillet *v.* Hutchinson, 24 Wend. (N. Y.) 184; Reynolds *v.* Reynolds, 3 Wend. (N. Y.) 244); a cause of action on a claim against the decedent and a cause of action on a promise made by an executor to pay for services performed for him as such (Vaughn *v.* Gardner, 7 B. Mon. (Ky.) 326); a cause of action against executors on their covenants in a deed executed under a power in the will to perform an agreement made by the testator and a count against him on a covenant of the testator (Strohecker *v.* Grant, 16 Serg. & R. (Pa.) 237); a count for a conversion by the decedent and a count for a conversion by his personal representatives (Terhune *v.* Bray, 16 N. J. L. 53); a demand for damages arising from the individual acts of defendant with a demand for damages arising from their misconduct as executors (Newcombe *v.* Chicago, etc., R. Co., 8 N. Y. Suppl. 366); a demand of an executrix for an account and tableau of distribution with one to render her individually liable for maladministration (Hemken *v.* Ludewig, 12 Rob. (La.) 188); and a count on a promise made by the testator and a count on a promise by the personal representative for services performed at his request for work and labor about the funeral of the decedent (Myer *v.* Cole, 12 Johns. (N. Y.) 349; Demott *v.* Field, 7 Cow. (N. Y.) 58. *Contra*, Hapgood *v.* Houghton, 10 Pick. (Mass.) 154). An action for waste against one in possession of land as executor under the will of the former owner is improperly joined with one for the partition of the property to which he has been made a party in his individual capacity. Lilly *v.* Menke, 126 Mo. 190, 28 S. W. 643, 994.

New York statutory provisions.— The code of civil procedure, section 1815, provides that an action may be brought against an executor or administrator personally and also in his representative capacity where the complaint sets forth a cause of action against him in both capacities or states facts which render it uncertain in which capacity the cause of action exists against him. Under this provision a complaint may contain a cause of action against a representative personally and in his representative capacity without there being any misjoinder of causes of action. Murphy *v.* Naughton, 68 Hun (N. Y.) 424, 23 N. Y. Suppl. 52; Newcombe *v.* Lottimer, 12 N. Y. Suppl. 381. Thus a person who intrusts money to another to be invested by him may after the latter's death maintain an action against his widow who is the sole legatee and devisee of his property and the administratrix of the will individually and as administratrix to recover such moneys. De Crano *v.* Moore, 50 N. Y. App. Div. 361, 63 N. Y. Suppl. 585, 64 N. Y. Suppl. 3. In an action against defendant individually and as executor of the last will and testament of Catherine A. McDonald, deceased, to recover certain taxes and rent due under the terms of a lease and an extension thereof, where a copy of the lease annexed to the complaint showed it to have been made with the "executor of the estate of Catherine A. McDonald, deceased," and signed, "Estate Catherine A. McDonald, Saml. W. McDonald, Exetor," it was held that these facts render it uncertain in which capacity defendant is liable under the clauses authorizing an action to be brought against an executor personally and in his representative capacity where the facts stated render it uncertain in which capacity he is liable. Metropolitan Trust Co. *v.* McDonald, 52 N. Y. App. Div. 424, 65 N. Y. Suppl. 260. But where plaintiff sued an executrix personally and as executrix for damages on a covenant for quiet enjoyment in a lease to plaintiff from the testator broken by proceedings for dispossession by the executrix, it was held that the case was not within the statute; the facts alleged not showing a liability in a representative capacity nor making it uncertain whether it so existed or was against defendant personally. Blum *v.* Dabritz, 78 N. Y. Suppl. 207 [*affirmed* in 39 Misc. 800, 81 N. Y. Suppl. 315].

Surplusage.— Where in an action against administrators it is apparent from the whole declaration that defendants are charged in their representative character it is good on general demurrer, although it also allege a promise by the administrators. Curtis *v.* Bowrie, 6 Fed. Cas. No. 3,498, 2 McLean 374.

92. Wren *v.* Gayden, 1 How. (Miss.) 365, 367 (in which it was said: "It is a well understood general rule, that courts of equity, as well as courts of law, will not take cognisance of distinct and separate claims or liabilities of different persons in one suit; and this, though they stand in the

judgments would be required; the first *de bonis testatoris* and the other *de bonis propriis.*[93] There would of necessity be two judgments entirely dissimilar. In the one the assets of the estate of the deceased would be charged while in the other the estate both real and personal of defendant would be subjected to its payment.[94] It is only where the counts are of the same nature and the same judgment is to be given on them all that they may be joined.[95]

(II) *How Misjoinder Availed of.* The objection for such misjoinder may be taken advantage of by general demurrer to the whole declaration,[96] or on error.[97]

b. Counts on Promise of Decedent and Promise of Representative on Consideration Connected With Estate. It is well settled that where the consideration of the promise or undertaking by the personal representative in his capacity as such arose in the lifetime of the decedent or in other words springs from or is connected with the estate itself, a cause of action thereon may be joined with one on a promise or undertaking of the decedent.[98] There are also decisions which go further and hold without any qualification as to the consideration arising in decedent's lifetime that a count on a promise by a personal representative in his capacity as such may be joined with a count on a promise by decedent.[99]

same relative situation"); Davoue *v.* Fanning, 4 Johns. Ch. (N. Y.) 199 (holding that where a bill joined a demand by plaintiff as executor with the demand by plaintiff in his private capacity against defendant in his individual character, it is demurrable for multifariousness). Latting *v.* Latting, 4 Sandf. Ch. (N. Y.) 31. But see Day *v.* Stone, 5 Daly (N. Y.) 353, 15 Abb. Pr. N. S. (N. Y.) 137.

93. Terhune *v.* Bray, 16 N. J. L. 53; Clark *v.* Coles, 50 How. Pr. (N. Y.) 178; Demott *v.* Field, 7 Cow. (N. Y.) 58; Boyle *v.* Kreitzer, 46 Pa. St. 465; Seip *v.* Drach, 14 Pa. St. 352; Epe *v.* Dudley, 5 Rand. (Va.) 437.

94. Jefford *v.* Ringgold, 6 Ala. 544; Sibbit *v.* Lloyd, 11 N. J. L. 163.

95. Vaughn *v.* Gardner, 7 B. Mon. (Ky.) 326.

96. Godbold *v.* Roberts, 7 Ala. 662; Jefford *v.* Ringgold, 6 Ala. 544; Kayser *v.* Disher, 9 Leigh (Va.) 357; Epe *v.* Dudley, 5 Rand. (Va.) 437.

97. McDaniel *v.* Parks, 19 Ark. 671.

Under the Maryland practice defendant may move to instruct the jury that plaintiff cannot recover because of misjoinder. Grahame *v.* Harris, 5 Gill & J. 489.

Under the North Carolina code, section 272, in case of misjoinder of causes of action, the judge should order the action divided and not dismissed. Martin *v.* Goode, 111 N. C. 288, 16 S. E. 232, 32 Am. St. Rep. 799.

98. *Kentucky.*— Vaughn *v.* Gardner, 7 B. Mon. 326; McKinley *v.* Call, 1 T. B. Mon. 54.

Maryland.— Bonaparte *v.* State, 63 Md. 465.

Massachusetts.— Hapgood *v.* Houghton, 10 Pick. 154.

Missouri.— See State *v.* Petticrew, 19 Mo. 373.

New Jersey.— Cawley *v.* Reeve, 17 N. J. L. 415.

New York.— Tradesmen's Nat. Bank *v.* McFeely, 61 Barb. 522; Benjamin *v.* Taylor, 12 Barb. 328; Gillet *v.* Hutchinson, 24 Wend. 184; Carter *v.* Phelps, 8 Johns. 440.

Ohio.— Howard *v.* Powers, 6 Ohio 92.

Pennsylvania.— Malin *v.* Bull, 13 Serg. & R. 441.

Virginia.— Bishop *v.* Harrison, 2 Leigh 532; Epe *v.* Dudley, 5 Rand. 437.

United States.— Wilkings *v.* Murphey, 29 Fed. Cas. No. 17,663, 3 N. C. 282.

England.— Secar *v.* Atkinson, 1 H. Bl. 102.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1690, 1691.

Damages for breach of a covenant for quiet enjoyment accruing both before and after the death of the covenantor may be recovered in one and the same action against his administrator. Hovey *v.* Newton, 11 Pick. (Mass.) 421.

Demands for rent accruing before and after decedent's death.— Where the demised premises for which a tenant from year to year paid an annual rental pass to his executors, and they become liable for rent by continued possession, a demand against them for rent may be joined with a demand for rent which accrued during the life of the tenant. Pugsley *v.* Aikin, 11 N. Y. 494 [*reversing* 14 Barb. 114].

Demands for taxes due before and after decedent's death.— In assumpsit against an executor to recover taxes due on the estate of his testatrix, it is not a misjoinder to unite a count for taxes due by the testatrix in her lifetime with a count for taxes due from the executor on the same property while in his hands as executor. Bonaparte *v.* State, 63 Md. 465.

99. Hapgood *v.* Houghton, 10 Pick. (Mass.) 154; Gregory *v.* Hooker, 8 N. C. 394, 407, 9 Am. Dec. 646 (in which it was said: "It is true, the precedents furnish only cases where the testator gave birth to the obliga-

c. Miscellaneous. The personal representative cannot bind the estate by an arrangement with one having a demand against it and also one against a third party to submit the question of liability and amount thereof on both demands directly in a single suit.[1] Counts on promises by decedent and another on promises by decedent alone may be joined, although the surviving promisor be living, where such procedure is authorized by statute.[2] Where an administrator of the decedent on the death of the distributee was also appointed administrator of the distributee's estate persons entitled as distributees to a portion of both estates may unite both claims in one bill against the administrator.[3] If heirs bring suit to annul an administrator's sale of land and at the same time ask that he be ordered to file his account, that he be removed from office, and that they be put in possession of the property of the estate the demands are not inconsistent with one another.[4] Where an executor is directed by will to sell all real and personal property the surviving husband's cause of action for an allotment to him of one third of the land for life was properly joined with his cause of action against the executor for one-half the surplus personalty.[5] Where plaintiff brought an action to recover a portion of real estate from defendant as executrix of the estate of her husband, allegations that the testator was in possession, holding the same under a lease from plaintiff and that he wrongfully encroached on an additional portion of the premises and occupied the same at the time of his death, which possession had been retained by the executrix ever since, did not show an improper joinder of a cause of action against the executrix in her representative capacity with one against her in her individual capacity.[6]

K. Pleading[7] — **1. Rules Applicable to Actions Generally — a. Declaration, Petition, Complaint, or Bill** — (i) *Allegations of Representative Capacity and Authority to Sue or Be Sued* — (a) *In Actions at Law* — (1) Allegations of Representative Capacity — (a) In Actions by Personal Representatives — aa. *Necessity and Sufficiency of Allegations.* If an executor or administrator sues in a representative capacity, it must appear from the declaration, petition, or complaint that the suit is brought by him in such capacity.[8] There is considerable confusion and uncertainty in the decisions as to what is necessary to distinguish when an action is brought in the name of the individual and when in his representative capacity.[9] Some decisions hold, seemingly without any qualification, that the mere use of the word "executor" or "administrator" of a designated

tion, or received the consideration of the promise, but the reason of the thing applies to all obligations thrown upon the executor by virtue of his office"); Dixon *v.* Ramsay, 7 Fed. Cas. No. 3,932, 1 Cranch C. C. 472.

1. Barry *v.* Davis, 33 Mich. 515.

Where a surviving partner qualifies as administrator of the deceased partner, he may be sued both in his individual and in his representative capacity on an obligation upon which he was jointly liable with decedent. It is not necessary to sue an administrator separately from one who was jointly liable with the decedent, and the case is not altered merely because the joint obligor and the administrator of decedent are the same person. Little Grocer Co. *v.* Johnson, 50 Ark. 62, 6 S. W. 231.

2. Hamlet *v.* Bates, 10 B. Mon. (Ky.) 437.

3. Breckinridge *v.* Floyd, 7 Dana (Ky.) 456. But see McNeill *v.* Burton, 1 How. (Miss.) 510, holding that administrators and executors of different estates and their sureties in incurring different responsibilities and requiring different examinations and accounts cannot be made defendants to the same bill, founded on a claim against one estate.

4. Thompson *v.* Barrow, 33 La. Ann. 1225.

5. Brand *v.* Brand, 109 Ky. 721, 60 S. W. 704, 22 Ky. L. Rep. 1366.

6. Pabst Brewing Co. *v.* Small, 83 Minn. 445, 86 N. W. 450.

7. **Forms.**— For form of declaration or complaint held sufficient to show that suit is brought in a representative capacity see Rhodes *v.* Walker, 44 Ala. 213; Williams *v.* Eikenbary, 36 Nebr. 478, 54 N. W. 852; Pope *v.* Stacy, 28 Vt. 96.

8. *Alabama.*— Wyatt *v.* Rambo, 29 Ala. 510, 68 Am. Dec. 89.

Arkansas.— Mohr *v.* Sherman, 25 Ark. 7; Sabin *v.* Hamilton, 2 Ark. 485.

Louisiana.— Hatcher's Succession, 23 La. Ann. 136.

Missouri.— Smith *v.* Zimmerman, 29 Mo. App. 249.

New York.— Worden *v.* Worthington, 2 Barb. 368.

England.— 1 Saunders Pl. & Ev. 498.

9. Lucas *v.* Pittman, 94 Ala. 616, 10 So. 603.

person following plaintiff's name in the caption or commencement of the pleading sufficiently shows that the suit is brought in a representative capacity.[10] Nevertheless the weight of authority is clearly to the contrary. Many decisions hold that where a suit is one which plaintiff may bring either in his individual or representative capacity and the caption of the pleading describes plaintiff, "executor" instead of "as executor," and the body of the pleading contains no averment showing representative capacity the suit will be considered as brought in plaintiff's individual capacity.[11] There are also decisions which go further and hold that whether the suit is one which plaintiff can bring only in his representative capacity, or is one which may be brought either individually or in his representative capacity his description of himself, "executor" or "administrator," instead of "as executor" or "as administrator," in the caption of the complaint, does not show that suit was brought in a representative capacity, but the contrary.[12] While it has been said that it is better pleading to describe plaintiff "as executor" or "as administrator" in the caption or commencement of the pleading,[13] it is very generally held that it will be sufficient if the allegations in the body of the pleading show that plaintiff sues in a representative capacity.[14] In

10. Jordan *v.* Hamlink, 21 D. C. 189; Bowler *v.* Lane, 3 Metc. (Ky.) 311; Lawson *v.* Lawson, 16 Gratt. (Va.) 230, 80 Am. Dec. 702.

11. *Arkansas.*— Mohr *v.* Sherman, 25 Ark. 7; Hemphill *v.* Hamilton, 11 Ark. 425.

Georgia.— Daniel *v.* Hollingshead, 16 Ga. 190; Gilbert *v.* Hardwick, 11 Ga. 599.

Maine.— Bragdon *v.* Harman, 69 Me. 29.

New York.— Sheldon *v.* Hoy, 11 How. Pr. 11.

Texas.— Guesh *v.* Phillips, 34 Tex. 176.

England.— Hempshall *v.* Roberts, 5 East 150.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1814 *et seq.*

Reason for rule.—If plaintiff describes himself "executor" this only shows that the debt sued on was contracted with him in that character, but does not show that he elected in his suit to treat it as a debt of the estate. On a contract of this character he may sue either in his personal or representative capacity; hence the necessity of showing definitely the character in which he intends to sue. Daniel *v.* Hollingshead, 16 Ga. 190.

12. *Alabama.*— Lucas *v.* Pittman, 94 Ala. 616, 10 So. 603; Freeman *v.* McCann, 37 Ala. 714; George *v.* English, 30 Ala. 582. But see Graham *v.* Gunn, 45 Ala. 577.

Florida.— Branch *v.* Branch, 6 Fla. 314, in which case it appeared that the cause of action was one which plaintiff might sue on either in his individual or representative capacity, but the language of the opinion was broad enough to support the rule stated in the text.

Indiana.— Hamilton *v.* Ewing, 6 Blackf. 88.

New York.— Stilwell *v.* Carpenter, 2 Abb. N. Cas. 238.

Texas.— See Roundtree *v.* Stone, 81 Tex. 298, 16 S. W. 1035.

Contra.— Hemphill *v.* Hamilton, 11 Ark. 425 [expressly *overruling* Watkins *v.* McDonald, 3 Ark. 266], holding that the word "executor" in the caption will be sufficient if the declaration discloses a cause of action which could only accrue to plaintiff in his representative capacity.

Use of words "as administrators," etc., without naming decedent.— The words "as administrators," following the names of plaintiffs in the marginal statement of the parties and in the commencement of the complaint without an averment of the intestate's name, are mere surplusage, and do not indicate the character in which plaintiffs sue. Ikelheimer *v.* Chapman, 32 Ala. 676.

13. Wyatt *v.* Rambo, 29 Ala. 510, 68 Am. Dec. 89; Beers *v.* Shannon, 12 Hun (N. Y.) 161 [*citing* 1 Chitty Pl. 315]; Cordier *v.* Thompson, 8 Daly (N. Y.) 172; 1 Saunders Pl. & Ev. 498.

14. *Alabama.*— Englehart *v.* Richter, 136 Ala. 562, 33 So. 939; Lucas *v.* Pittman, 94 Ala. 616, 10 So. 603; Rhodes *v.* Walker, 44 Ala. 213; Dubberly *v.* Black, 38 Ala. 193; Watson *v.* Collins, 37 Ala. 587.

Arkansas.— Sabin *v.* Hamilton, 2 Ark. 485.

Georgia.— Laughter *v.* Butt, 25 Ga. 177.

Indiana.— See Durham *v.* Hudson, 4 Ind. 501.

Kentucky.— Quinn *v.* Newport News, etc., Co., 22 S. W. 223, 15 Ky. L. Rep. 74.

Missouri.— State *v.* Bartlett, 68 Mo. 581; Bird *v.* Cotten, 57 Mo. 568.

Nebraska.— Williams *v.* Eikenbary, 36 Nebr. 478, 54 N. W. 852.

New York.— Beers *v.* Shannon, 73 N. Y. 292 [*affirming* 12 Hun 161]; Scrantom *v.* Farmers', etc., Bank, 33 Barb. 527; Cordier *v.* Thompson, 8 Daly 172; Stilwell *v.* Carpenter, 2 Abb. N. Cas. 238.

Vermont.— Pope *v.* Stacy, 28 Vt. 96.

Wisconsin.— Moir *v.* Dodson, 14 Wis. 279.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1824 *et seq.*

Allegations sufficient to show suit brought in representative capacity.— Allegations of the death of B, the execution and probate of his will, plaintiffs' appointment as executors, issuance of letters testamentary to them and their qualification and acceptance (Marshall *v.* Bresler, 1 How. Pr. N. S. (N. Y.) 217;

other words if the title of the action does not declare the character in which plaintiff sues it may be supplied from the body of the declaration.[15] It follows therefore that, although the caption or commencement describes plaintiff "executor" instead of "as executor," the action will nevertheless be considered as brought in a representative capacity if the allegations of the pleading are sufficient to show such fact,[16] and the same is the case, although the caption contains no descriptive words of any character.[17] Some decisions hold that the words "as executor" or "as administrator" in the caption sufficiently show that suit is brought in a representative capacity and that these words need not be repeated in the body of the pleading.[18] Others hold that no issue can be taken to the description of the parties in the title and that there must be a direct allegation in the body of the pleading that suit is brought in a representative capacity.[19] If there are several counts in a declaration and the first describes the cause of action as accruing to plaintiff as executor the other counts need not describe him as executor or allege that the right of action accrued to him as such.[20]

bb. *Rejection of Words Descriptive of Capacity as Surplusage.* If a personal representative brings suit on a cause of action which he must or may bring in his individual capacity and the pleading states a good cause of action in that capacity, the use of the words "executor or administrator" will be considered merely descriptive of the person and not being essential in the pleading to his right of recovery, may be rejected as surplusage.[21] No amendment is necessary as the

Moir *v.* Dodson, 14 Wis. 279); allegations of the death of B intestate, plaintiff's appointment as administrator and qualification as such by reason of which defendant became liable to pay him the sum of $—— (Quinn *v.* Newport News, etc., Co., 22 S. W. 223, 15 Ky. L. Rep. 74); an allegation in the breach that defendant "has not paid to the intestate in his lifetime nor to plaintiff as administrator aforesaid" (Sabin *v.* Hamilton, 2 Ark. 485); an allegation that a tax certificate counted upon is "now lawfully possessed and owned by said administrator and plaintiff" (Hyde *v.* Keonshe County, 43 Wis. 129); an allegation that plaintiff's husband died after bringing suit, that she was shortly thereafter appointed executrix of his estate, and that at the time of his death he was plaintiff (Williams *v.* Eikenbary, 36 Nebr. 478, 54 N. W. 852); and an allegation that the money sued for will when collected be assets of decedent's estate (Watson *v.* Collins, 37 Ala. 587).

15. Stilwell *v.* Carpenter, 2 Abb. N. Cas. (N. Y.) 238.

16. Lucas *v.* Pitman, 94 Ala. 616, 10 So. 603; Beers *v.* Shannon, 73 N. Y. 292 [*affirming* 12 Hun 161]; Cordier *v.* Thompson, 8 Daly (N. Y. 172.

17. Williams *v.* Eikenbary, 36 Nebr. 478, 54 N. W. 852.

18. Lucas *v.* Pitman, 94 Ala. 616, 10 So. 603; Crimm *v.* Crawford, 29 Ala. 623. And see Ketchum *v.* Morrell, 2 N. Y. Leg. Obs. 58.

19. Dodson *v.* Scroggs, 47 Mo. 185; Smith *v.* Zimmerman, 29 Mo. App. 249; Forrest *v.* New York, 13 Abb. Pr. (N. Y.) 350; Sheldon *v.* Hoy, 11 How. Pr. (N. Y.) 11; Neil *v.* Cherry, 2 Ohio Dec. (Reprint) 28, 1 West. L. Month. 143; Guest *v.* Phillips, 34 Tex. 176.

20. Bulkley *v.* Andrews, 39 Conn. 523. To the same effect see Ketchum *v.* Morrell, 2 N. Y. Leg. Obs. 58.

21. *Alabama.*— James *v.* Johnston, 44 Ala. 629; Williams *v.* Moore, 32 Ala. 506; Farrow *v.* Bragg, 30 Ala. 261; Agee *v.* Williams, 27 Ala. 644; King *v.* Griffin, 6 Ala. 387. And see Warren *v.* Rist, 16 Ala. 686.

Arkansas.— Bailey *v.* Gatton, 14 Ark. 180; Brown *v.* Hicks, 1 Ark. 232.

California.— Burling *v.* Thompkins, 77 Cal. 257, 19 Pac. 429; Lewis *v.* Adams, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423; Munch *v.* Williamson, 24 Cal. 167.

District of Columbia.— Campbell *v.* Wilson, 2 Mackey 497.

Georgia.— Wheelus *v.* Long, 73 Ga. 110; Kenan *v.* Du Bignon, 46 Ga. 258. *Compare* Gilbert *v.* Hardwick, 11 Ga. 599.

Illinois.— Wolf *v.* Beaird, 123 Ill. 585, 15 N. E. 161, 5 Am. St. Rep. 565; Laycock *v.* Oleson, 60 Ill. 30; Higgins *v.* Halligan, 46 Ill. 173.

Indiana.— Daniels *v.* Ritchie, 7 Blackf. 391; Campbell *v.* Baldwin, 6 Blackf. 364; Capp *v.* Gilman, 2 Blackf. 45; Helm *v.* Van Vleet, 1 Blackf. 342, 12 Am. Dec. 248.

Kentucky.— Reid *v.* Watts, 4 J. J. Marsh. 440; Spurgen *v.* Robinet, 4 Bibb 75.

Maine.— Bragdon *v.* Harmon, 69 Me. 29.

Maryland.—Barton *v.* Higgins, 41 Md. 539; Sasscer *v.* Walker, 5 Gill & J. 102, 25 Am. Dec. 272.

Massachusetts.— Talmage *v.* Cappel, 16 Mass. 71; Clark *v.* Lowe, 15 Mass. 476.

Mississippi.—Falls *v.* Wilson, 24 Miss. 168.

Missouri.— Rittenhouse *v.* Ammerman, 64 Mo. 197, 27 Am. Rep. 215; State *v.* Kaime, 4 Mo. App. 479.

New York.— Litchfield *v.* Flint, 104 N. Y. 543, 11 N. E. 58; Merritt *v.* Seaman, 6 N. Y. 168 [*reversing* 6 Barb. 330]; Collins *v.* Steuart, 2 N. Y. App. Div. 271, 37 N. Y. Suppl. 891; Bingham *v.* Marine Nat. Bank,

court will consider that the words are not in the declaration.[22] It has also been held that where an administrator sues properly in his capacity as such, his allegation of another capacity (as for instance that he is attorney in fact for the heirs) may be treated as surplusage.[23] But where a declaration by the representative of a deceased person alleges in the commencement that plaintiff was decedent's executor and in a subsequent part that he took out letters of administration the declaration is insufficient, since it fails to show whether plaintiff is executor or administrator.[24] So it has been held that where the declaration is in a representative capacity, but concludes the *ad damnum* to the representative personally, it is bad, since it cannot be determined whether the recovery was sought by plaintiff as administrator or in his own right.[25]

cc. *Amendments.* When the pleading is filed in the name of one suing in his individual capacity, it may be amended so as to make the suit stand in his representative capacity and *vice versa*.[26]

41 Hun 377, 17 Abb. N. Cas. 431; Scott *v.* Parker, 5 N. Y. Suppl. 753; Wick *v.* Wick, 9 N. Y. St. 477; Bright *v.* Carrie, 5 Sandf. 433. But see Farrington *v.* American L. & T. Co., 18 Civ. Proc. 135, 9 N. Y. Suppl. 433.

North Carolina.— Beaty *v.* Gingles, 53 N. C. 302; Cotten *v.* Davis, 48 N. C. 355.

Oregon.— Burrell *v.* Kern, 34 Oreg. 501, 56 Pac. 809.

South Carolina.— Jerkowski *v.* Marco, 56 S. C. 241, 34 S. E. 386; Willis *v.* Tozer, 44 S. C. 1, 21 S. E. 617.

Tennessee.— McCallum *v.* Woolsey, 6 Baxt. 308; Page *v.* Cravens, 3 Head 383.

Texas.— Roundtree *v.* Stone, 81 Tex. 229; Rider *v.* Duval, 28 Tex. 622; Gayle *v.* Ennis, 1 Tex. 184; Nelson *v.* Bagby, 25 Tex. Suppl. 305; Hayden *v.* Kirby, 31 Tex. Civ. App. 441, 72 S. W. 198.

United States.— Biddle *v.* Wilkins, 1 Pet. 686, 7 L. ed. 315; White *v.* Pulley, 27 Fed. 436.

Wisconsin.— Robbins *v.* Gillett, 2 Pinn. 439, 2 Chandl. 96.

England.— Hornsey *v.* Dimock, Vent. 119.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1816.

Application of rule.— Where an administrator sues on a contract made with himself the word "administrator" appearing in the pleading may be rejected as mere description and does not vitiate the declaration (Falls *v.* Wilson, 24 Miss. 168; Walt *v.* Walsh, 10 Heisk. (Tenn.) 314. And see Knoche *v.* Perry, 90 Mo. App. 483); so where an executor sues as executor when in fact the action is brought upon his own possession, the words "as executor" do not prevent him from recovering in his own right (Munch *v.* Williamson, 24 Cal. 167; Cotten *v.* Davis, 48 N. C. 355; Hornsey *v.* Dimocke, 1 Vent. 119. And see Comyns Dig. Pl. 2, d). In trespass *quare clausum* by an administrator the declaration charged that defendants broke and entered the close of plaintiff "administrator as aforesaid" and throughout alleged the injury to have been done to plaintiff's close. It was held that the quoted words were mere description of the person and that the declaration was in his individual and not his representative capacity. Robbins *v.* Gillett, 2 Pinn. (Wis.) 439, 2 Chandl. (Wis.) 96.

Limitation of rule.— In a complaint to the judge of probate for embezzlement of the estate of a person deceased the complainant having described himself as "administrator and creditor," and it appearing that he was not entitled to act as administrator, it was held that the words "administrator and" were material and could not be rejected as surplusage. "It may have been upon this ground alone that the judge took jurisdiction." Arnold *v.* Sabin, 4 Cush. (Mass.) 46, 48.

22. Cotten *v.* Davis, 46 N. C. 355.

23. McNeil's Succession, 9 La. Ann. 113.

24. Rowan *v.* Lee, 3 J. J. Marsh. (Ky.) 97. But see Fuggle *v.* Hobbs, 42 Mo. 537, holding that a description of plaintiff as administrator in the caption may be disregarded where in the body of the complaint plaintiff is executor of deceased.

25. Duncan *v.* Whedbee, 4 Colo. 143.

26. *Alabama.*— Lucas *v.* Pitman, 94 Ala. 616, 10 So. 603; Crimm *v.* Crawford, 29 Ala. 623.

Connecticut.— Stanley *v.* Stanley, 42 Conn. 539.

New York.— Haddow *v.* Haddow, 3 Thomps. & C. 777.

Pennsylvania.— Wolfenden *v.* Pennsylvania Schuykill Valley R. Co., 2 Pa. Co. Ct. 243. *Contra*, McPartland *v.* Pennsylvania R. Co., 2 Pa. Co. Ct. 244, 18 Wkly. Notes Cas. 79.

Tennessee.— Winningham *v.* Crouch, 2 Swan 170.

Texas.— Whitehead *v.* Herron, 15 Tex. 127, 65 Am. Dec. 145.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1847.

Amending complaint to conform to summons.— Where plaintiff is described in the summons as suing in his representative capacity as administrator and in the complaint as suing individually, the complaint may be so amended as to make it conform to the summons. Ikelheimer *v.* Chapman, 32 Ala. 676.

Where the complaint shows suit in representative capacity, both in its body and in the marginal statement of the parties, it may

(b) In Actions Against Personal Representatives — aa. *Necessity and Sufficiency of Allegations.* In an action against an executor or administrator it is necessary to state that he is sued as executor or administrator if it is sought to hold him liable as such.[27] The word "as" prefixed to the title of defendant indicates that he is sued in his representative capacity.[28] If, however, he is described "executor" without the word "as" prefixed, the word "executor" will be considered merely description of the person and the action will be considered as brought against him in his individual capacity,[29] unless the pleading contains other averments showing that he is sued in his representative capacity which will be sufficient as no particular form of words is required.[30] Defendant need not be described in his representative capacity in the beginning of the declaration if in a subsequent part thereof he is declared against as such.[31] Where the complaint in an action against an executor contains several causes of action separately stated an allegation showing defendant's representative character need not be contained in each count. One allegation at the conclusion of the complaint is sufficient.[32]

bb. *Rejection of Words Descriptive of Capacity as Surplusage.* Where suit is brought against a personal representative on a cause of action for which he can be held liable only in his individual capacity the description of him in the pleading as executor or administrator will be considered surplusage and may be rejected as such. It does not vitiate the pleading.[33] The naming of him as executor or

be so amended as to describe the cause of action with more particularity, and thus authorize a recovery by him in his representative capacity. Farrow *v.* Bragg, 30 Ala. 261.

27. Brown *v.* Hicks, 1 Ark. 232; Bishop *v.* Harrison, 2 Leigh (Va.) 532. See also McNeill *v.* Cook, 33 Ala. 278; Hawkins *v.* Forrest, 1 Tex. Unrep. Cas. 167.

Reason for rule.— If the rule was different, defendant could not plead *ne unques executor* or if he was not an administrator or anything else that would abate the suit or writ. Brown *v.* Hicks, 1 Ark. 232.

Death of one of several defendants.—Where the facts stated and the prayer for relief fully characterize the actions against him and defendants as one against them in their representative capacity this is enough to sustain a judgment against the survivors notwithstanding the death of one. Patterson *v.* Copeland, 52 How. Pr. (N. Y.) 460.

28. Austin *v.* Munroe, 47 N. Y. 360. And see Yates *v.* Hoffman, 5 Hun (N. Y.) 113.

29. *Arkansas.*— Brown *v.* Hicks, 1 Ark. 232.

Georgia.— Glisson *v.* Weil, 117 Ga. 842, 45 S. E. 221. But see Jennings *v.* Wright, 54 Ga. 537.

Kentucky.— Hood *v.* Link, 2 B. Mon. 37.

New York.— Bannon *v.* McGrane, 45 N. Y. Super. Ct. 517.

Vermont.— Rich *v.* Sowles, 64 Vt. 408, 23 Atl. 723, 15 L. R. A. 850.

30. Stoner *v.* Devilbliss, 70 Md. 144, 16 Atl. 440; Giles *v.* Perryman, 1 Harr. & G. (Md.) 164; Smith *v.* Bobb, 12 Sm. & M. (Miss.) 322; Yates *v.* Hoffman, 5 Hun (N. Y.) 113; Kley *v.* Higgins, 33 Misc. (N. Y.) 367, 68 N. Y. Suppl. 453.

Illustration.— Where plaintiff alleged that she filed her claim with defendants as executors, and that defendant served her with a written notice refusing to pay the claim, the omission of the word "as" between defendants' names and "executor," etc., in the caption of the complaint, did not render the word "executor," etc., *descriptio personæ*, and the action one against defendants individually and not as executors, since the allegation was sufficient to show that defendants were sued in their representative capacities. Kley *v.* Higgins, 33 Misc. (N. Y.) 367, 68 N. Y. Suppl. 453.

31. Dean *v.* Guyse, 1 Saund. 114.

32. Moseley *v.* Heney, 66 Cal. 478, 6 Pac. 134. And see Epe *v.* Dudley, 5 Rand. (Va.) 437, holding that if all the counts are laid against defendant as administrator, they will be held applicable to him in that capacity, although some of them omit to aver that the claim is for money due from the intestate.

33. *Alabama.*— Johnson *v.* Gaines, 8 Ala. 791; Peters *v.* Heydenfeldt, 3 Ala. 205.

California.— Heydenfeldt *v.* Jacobs, 107 Cal. 373, 40 Pac. 492.

Kentucky.— King *v.* Beeler, 4 Bibb 83.

Tennessee.— Braden *v.* Hollingsworth, 8 Humphr. 19.

Virginia.— Belvin *v.* French, 84 Va. 81, 3 S. E. 891; Fitzhugh *v.* Fitzhugh, 11 Gratt. 300, 62 Am. Dec. 653.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1816.

But see Beaty *v.* Gingles, 53 N. C. 302; Hailey *v.* Wheeler, 49 N. C. 159, in which it was held that in an action in which a personal representative must be sued in his individual and not in his representative capacity, the words "as executor" cannot be rejected as surplusage.

Illustrations of rule.—In a suit for a devastavit, it is not necessary to style defendant as administrator but declaring against him as administrator is but description of the person and does not vitiate the pleading (King *v.* Beeler, 4 Bibb (Ky.) 83); so where executors are sued personally for wrongfully

administrator neither adds to nor diminishes his individual responsibility and is matter of form and not of substance.[34] So where an action is brought, the object of which is to charge defendant individually and a legal ground for the individual liability of the representative is set forth in the pleading, the fact that he was named therein as executor does not vitiate the pleading and this allegation may be treated as surplusage.[35] Under these circumstances it is not improper to name defendant as administrator by way of description or for the purpose of showing the circumstances of the transaction and the origin of the liability.[36]

cc. *Amendments.* If defendant is sued in a representative character the pleading may be amended so as to permit a recovery against him personally,[37] and if sued personally the pleading may be amended so as to charge him in his capacity as administrator.[38] So if defendant is improperly described as a personal representative of the estate of a person designated when he is in fact the administrator of the estate of another person, this is a mere misdescription of the representative capacity and may be amended.[39]

(c) Methods of Raising Objection For Failure to Allege Representative Capacity.[40] If plaintiff's incapacity to sue in a representative capacity does not clearly appear from the statement of the declaration or complaint the objection cannot be taken by demurrer but only by plea or answer,[41] or motion to make the allegation more certain and specific.[42] But if the declaration or complaint shows on its face that plaintiff has not capacity to sue as a personal representative, objection must be taken by demurrer or it will be considered waived.[43]

collecting the proceeds of an insurance policy payable to the heirs, the statement in the complaint that when they collected such proceeds defendants were acting as executors is immaterial (Heydenfeldt *v.* Jacobs, 107 Cal. 373, 40 Pac. 492).

34. Johnson *v.* Gaines, 8 Ala. 791.

35. Williamson *v.* Stevens, 84 N. Y. App. Div. 518, 82 N. Y. Suppl. 1047; Fleischman *v.* Shoemaker, 2 Ohio Cir. Ct. 152, 1 Ohio Cir. Dec. 415; Miltenberger *v.* Schlegel, 7 Pa. St. 241. And see Malone *v.* Davis, 67 Cal. 279, 7 Pac. 703; People *v.* Houghtaling, 7 Cal. 348. But *compare* Fitzhugh *v.* Fitzhugh, 11 Gratt. (Va.) 300, 62 Am. Dec. 653, holding that if the demand may possibly be maintained against the personal representative as such, the description of him as such cannot be treated as surplusage, and if the action cannot be maintained against him in his representative capacity it must fail.

36. Waldsmith *v.* Waldsmith, 2 Ohio 156.

37. Lucas *v.* Pittman, 94 Ala. 616, 10 So. 603 [*overruling* Christian *v.* Morris, 50 Ala. 585; Taylor *v.* Taylor, 43 Ala. 649]; McDonald *v.* Ward, 57 Conn. 304, 18 Atl. 51; Tighe *v.* Pope, 16 Hun (N. Y.) 180. *Contra*, Sterrett *v.* Barker, 119 Cal. 492, 51 Pac. 695.

Discretion in allowing amendment.— On failure to recover against executors as such the court is not bound to allow plaintiff to amend his petition so as to make a case against them as individuals; it not being shown to be in furtherance of justice, and such amendment substantially changing the nature of plaintiff's claim. Fleischman *v.* Shoemaker, 2 Ohio Cir. Ct. 152, 1 Ohio Cir. Dec. 415.

On a bill asking a decree against defendant as administrator it was held that a demurrer to an amendment charging him individually should have been sustained. Smith *v.* Ardis, 49 Ga. 602.

In an action against an executor as such on a note executed by him as executor the complaint may be amended on demurrer filed for failure to show a cause of action against him as executor by adding counts stating an indebtedness by testator in his lifetime and striking out the count on the note described in the original complaint. Taylor *v.* Perry, 48 Ala. 240.

Amendment after trial.— Where the declaration alleges promises by the intestate, plaintiff cannot recover for services after his death, but after a full trial and a referee's report in plaintiff's favor under such counts, plaintiff may be permitted to amend by adding the proper counts on paying costs of the motion to set aside the report. Smith *v.* Proctor, 1 Sandf. (N. Y.) 72.

38. Poole *v.* Hines, 52 Ga. 500; Hutchinson *v.* Tucker, 124 Mass. 240.

39. McElwain *v.* Corning, 12 Abb. Pr. (N. Y.) 16. See also Kendall *v.* Riley, 45 Tex. 20.

40. See *infra*, XIV, K, 1, a, (II), (A), (4), (b).

41. Locke *v.* Klunker, 123 Cal. 231, 55 Pac. 993; Louisville Trust Co. *v.* Louisville, etc., R. Co., (Ky. 1897) 43 S. W. 698; Paterson *v.* Pagan, 18 S. C. 584. *Compare* Stover *v.* Reading, 29 N. J. Eq. 152, holding that, if a bill, declaration, or complaint by a personal representative is defective on its face for failure to show plaintiff's capacity to sue as such, the objection may be taken by demurrer.

42. Ohio, etc., R. Co. *v.* McClure, 47 Ind. 317.

43. *Kentucky.*—Warfield *v.* Gardner, 3 Ky. L. Rep. 423.

The objection cannot be raised by general demurrer,[44] but only by special demurrer.[45]

(2) Allegations Showing Authority to Sue as Personal Representative — (a) Necessity of Allegations. There is much conflict of authority as to the necessity of alleging authority to sue as a personal representative and the allegations essential to show it and decisions even in the same state are not always harmonious. Many decisions clearly hold that in actions by personal representatives as such all that is necessary to be shown is that they are suing in a representative capacity and that nothing need be alleged to show their right or authority to sue in that capacity.[46] This also seems to be the rule deducible from other decisions, although not so stated in so many words.[47] On the other hand there are many decisions which hold that plaintiff must state in a direct and issuable form the facts showing his right or authority to sue in a representative capacity.[48]

Missouri.— Fuggle *v.* Hobbs, 42 Mo. 537.

New York.— Nanz *v.* Oakley, 122 N. Y. 631, 25 N. E. 263; Varnum *v.* Taylor, 59 Hun 554, 14 N. Y. Suppl. 242; Robbins *v.* Wells, 1 Rob. 666.

South Carolina.— Mickle *v.* Congaree Constr. Co., 41 S. C. 394, 18 S. E. 725.

Wisconsin.— Moir *v.* Dodson, 14 Wis. 279.

Want of jurisdiction of court to appoint.— Where the petition in an action by an administrator affirmatively shows that the court appointing the administrator had no jurisdiction to grant administration, objection may be made by special demurrer. Louisville Trust Co. *v.* Louisville, etc., R. Co., (Ky. 1897) 43 S. W. 698.

Where the complaint shows that plaintiff is a foreign administrator or executor the objection will be considered waived unless taken by demurrer. Robbins *v.* Wells, 1 Rob. (N. Y.) 666; Moir *v.* Dodson, 14 Wis. 279.

In Indiana objections based on failure of the complaint to show capacity to sue cannot be raised by demurrer. Under the statutes of this state plaintiff's right to sue in a representative capacity can only be questioned by plea verified by affidavit. Hansford *v.* Van Auken, 79 Ind. 157.

44. Gibson *v.* Ponder, 40 Ark. 195. But see Toner *v.* Wagner, 158 Ind. 447, 63 N. E. 859.

A demurrer alleging that the complaint fails to show a cause of action does not raise the question that the complaint does not sufficiently show legal capacity to sue. Secor *v.* Pendleton, 47 Hun (N. Y.) 281.

45. De Haven *v.* De Haven, 104 Ky. 41, 46 S. W. 215, 47 S. W. 597, 20 Ky. L. Rep. 663; Warfield *v.* Gardner, 3 Ky. L. Rep. 423; Boyle *v.* Southern R. Co., 36 Misc. (N. Y.) 289, 73 N. Y. Suppl. 465.

Objection that plaintiff's appointment is void if apparent on the face of the complaint must be taken by special demurrer. Cochran *v.* Thompson, 18 Tex. 652.

46. *District of Columbia.*—Jordan *v.* Hamlink, 21 D. C. 189.

Indiana.— Toner *v.* Wagner, 158 Ind. 447, 63 N. E. 859; Kelley *v.* Love, 35 Ind. 106; McDowell *v.* North, 24 Ind. App. 435, 55 N. E. 789; Chicago, etc., R. Co. *v.* Cummings, 24 Ind. App. 192, 53 N. E. 1026.

Kentucky.— Walton *v.* Kindred, 5 T. B. Mon. 388.

Maine.— Brown *v.* Nourse, 55 Me. 230, 92 Am. Dec. 583.

Massachusetts.— Langdon *v.* Potter, 11 Mass. 313.

Missouri.— Duncan *v.* Duncan, 19 Mo. 368.

Rhode Island.— Ellis *v.* Appleby, 4 R. I. 462.

Virginia.— Lawson *v.* Lawson, 16 Gratt. 230, 80 Am. Dec. 702.

United States.— Champlin *v.* Tilley, 5 Fed. Cas. No. 2,586, Brunn. Col. Cas. 71, 3 Day (Conn.) 303.

The title of an administrator to letters of administration need not appear in pleadings to entitle them to be read in evidence. Beale *v.* Hall, 22 Ga. 431.

47. *Alabama.*— Lucas *v.* Pittman, 94 Ala. 616, 10 So. 603; Watson *v.* Collins, 37 Ala. 587; Crimm *v.* Crawford, 29 Ala. 623.

Arkansas.— Hemphill *v.* Hamilton, 11 Ark. 425; Sabin *v.* Hamilton, 2 Ark. 485.

Pennsylvania.— Oram *v.* Rothermel, 98 Pa. St. 300.

Vermont.— Pope *v.* Stacy, 28 Vt. 96.

United States.— Cawood *v.* Nichols, 5 Fed. Cas. No. 2,531, 1 Cranch C. C. 180.

48. *California.*— Barfield *v.* Price, 40 Cal. 535.

Illinois.— Foster *v.* Adler, 84 Ill. App. 654. And see Collins *v.* Ayers, 13 Ill. 358.

Minnesota.— Hamilton *v.* McIndoo, 81 Minn. 324, 84 N. W. 118; Chamberlain *v.* Tiner, 31 Minn. 371, 18 N. W. 97.

Mississippi.— Cushing *v.* Gibson, Walk. 87.

Missouri.— Headlee *v.* Cloud, 51 Mo. 301; Dodson *v.* Scroggs, 47 Mo. 285; State *v.* Matson, 38 Mo. 489.

New York.— Secor *v.* Pendleton, 47 Hun 281; Kingsland *v.* Stokes, 25 Hun 107; Forrest *v.* New York, 13 Abb. Pr. 350; Sheldon *v.* Hoy, 11 How. Pr. 11; Beach *v.* King, 17 Wend. 197.

Ohio.— Neil *v.* Cherry, 2 Ohio Dec. (Reprint) 28, 1 West. L. Month. 155.

Texas.— Beal *v.* Batte, 31 Tex. 371; Boyle *v.* Forbes, 9 Tex. 35; Wilson *v.* Hall, 13 Tex. Civ. App. 489, 30 S. W. 327.

United States.— Campbell *v.* U. S., 13 Ct. Cl. 108.

Showing proof of will.— A complaint by an

(b) Sufficiency of Allegations.[49] No particular form of words is absolutely essential to show plaintiff's authority to sue in a representative character, but the fact must appear substantially so that issue may be made upon the allegation if proper to do so.[50] The pleading must allege the appointment of plaintiff as executor or administrator,[51] or facts from which appointment will be necessarily inferred;[52] but the mere statement that plaintiff has been duly appointed executor or administrator is not enough.[53] A proper and sufficient way to show authority is to allege that plaintiff is executor by virtue of letters issued by a probate court of some county, giving the name of the court and the time at which the letters were issued.[54] It is not necessary to set forth the fact showing that the probate court has jurisdiction.[55] While it would be better to allege directly that letters

executor for injuries to land is bad on demurrer unless it shows that the will has been proved. Pott *v.* Pennington, 16 Minn. 509.

A complaint on a note by an assignee of a non-resident executor is demurrable as failing to state sufficient facts to constitute a cause of action, where it fails to allege that the will has been probated in this state. Heyward *v.* Williams, 57 S. C. 235, 35 S. E. 503.

49. For form of declaration or complaint held sufficient to show authority to sue in a representative capacity see the following cases:

Kansas.— Central Branch Union Pac. R. Co. *v.* Andrews, 37 Kan. 162, 14 Pac. 509.

Minnesota.— Chamberlain *v.* Tiner, 31 Minn. 371, 18 N. W. 97.

Montana.— Knight *v.* Le Beau, 19 Mont. 223, 47 Pac. 952.

New York.—Brenner *v.* McMahon, 20 N. Y. App. Div. 3, 46 N. Y. Suppl. 643.

South Carolina.— Nohrden *v.* Northwestern R. Co., 54 S. C. 492, 32 S. E. 524.

50. Hamilton *v.* McIndoo, 81 Minn. 324, 84 N. W. 118; Chamberlain *v.* Tiner, 31 Minn. 371, 18 N. W. 97.

51. Chamberlain *v.* Tiner, 31 Minn. 371, 18 N. W. 97; Kingsland *v.* Stokes, 25 Hun (N. Y.) 107; Sheldon *v.* Hoy, 11 How. Pr. (N. Y.) 11; Neil *v.* Cherry, 2 Ohio Dec. (Reprint) 28, 1 West. L. Month. 155.

52. Bird *v.* Cotton, 57 Mo. 568.

53. Judah *v.* Fredericks, 57 Cal. 389; Hamilton *v.* McIndoo, 81 Minn. 324, 84 N. W. 118; Secor *v.* Pendleton, 47 Hun (N. Y.) 281; Sheldon *v.* Hoy, 11 How. Pr. (N. Y.) 11; Beach *v.* King, 17 Wend. (N. Y.) 197; Bliss Code Pl. § 264. See also Boyle *v.* Southern R. Co., 36 Misc. (N. Y.) 289, 73 N. Y. Suppl. 465. But see San Francisco, etc., Land Co. *v.* Hartung, 138 Cal. 223, 71 Pac. 337; Collins *v.* O'Laverty, 136 Cal. 31, 68 Pac. 327 [which cases *distinguish* Judah *v.* Fredericks, 57 Cal. 389, and hold such averment sufficient under a provision enacted since the decision of that case].

Renewal of appointment.— Where by statute an administrator's powers continue but one year unless renewed and an administrator sues thirteen years after appointment he must allege and prove a renewal of his appointment. Boyle *v.* Forbes, 9 Tex. 35.

54. *Minnesota.*— Hamilton *v.* McIndoo, 81 Minn. 324, 84 N. W. 118; Chamberlain *v.* Tiner, 31 Minn. 371, 18 N. W. 97.

Missouri.— Dodson *v.* Scroggs, 47 Mo. 285.

North Carolina.— Hurst *v.* Addington, 84 N. C. 143, holding that where a complaint states such facts a demurrer on the ground that it does not show the probate of the will and qualification of the executor before suit brought is frivolous.

Ohio.— Neil *v.* Cherry, 2 Ohio Dec. (Reprint) 28, 1 West. L. Month. 155.

South Carolina.— Dial *v.* Tappan, 20 S. C. 167, holding that such allegations include an averment of all that is necessary to warrant the court in making the appointment and include an averment that the will has been admitted to probate. And see Cohu *v.* Husson, 113 N. Y. 662, 21 N. E. 703 [*affirming* 14 Daly 200, 6 N. Y. St. 292].

Where it appears from the caption of a complaint that the action was in a certain county and it alleges the appointment of plaintiff as administrator in such county, it is sufficient as against an objection that it fails to set forth the county in which the appointment was made which is made for the first time on appeal. Hughes *v.* Meehan, 84 Minn. 226, 87 N. W. 768.

Failure to allege date of death.— In an action by an administratrix, an allegation that her decedent died intestate, and that on a certain date plaintiff was appointed administratrix of decedent's estate was not objectionable for failure to allege the date of decedent's death and by reason thereof failing to show that deceased did not die until after plaintiff was appointed administratrix of his estate since such a contingency would not be presumed. Stanley *v.* Sierra Nevada Silver Min. Co., 118 Fed. 931.

In an action by the trustees under a non-intervention will, an averment that they have duly qualified and accepted the trust and are the acting executors sufficiently shows that they are executors, although it is not alleged that letters testamentary have been granted to them. Boyer *v.* Robinson, 26 Wash. 117, 66 Pac. 119.

Omission of word "county."—An allegation that plaintiffs have "qualified as executors in Probate Court of Darlington, S. C.," has been construed to mean the probate court of the county of Darlington. Jerkowski *v.* Marco, 56 S. C. 241, 34 S. E. 386.

55. Cohu *v.* Husson, 113 N. Y. 662, 21 N. E. 703 [*affirming* 14 Daly 200, 6 N. Y. St. 292].

testamentary or of administration have been issued,[56] such allegation is unnecessary if this fact appears from other facts stated.[57] Acceptance of the trust and qualification, it has been held, need not be alleged; both are implied in the grant and issuance of letters testamentary.[58] If the suit is brought by an administrator *de bonis non*, the complaint must state the name of the former representative and allege non-payment to him.[59] It should also allege his death, resignation, revocation of letters, or discharge by the court, since a court has no power to appoint an administrator *de bonis non* while there is an original administrator.[60] So if the suit is brought by an administrator with the will annexed, during the executor's absence, it must be alleged that the executor continued absent at the time of bringing the action.[61]

(3) Allegations Showing Defendant's Authority to Act as Personal Representative.[62] According to some decisions, where a person is sued as executor or administrator, the pleading must allege his appointment as such and that he was acting in that capacity.[63] These decisions are, however, against the weight of authority, it being very generally held that it is sufficient to allege that the suit is brought against defendant in his representative capacity without setting forth facts to show that he has authority to act in that capacity.[64]

(b) *In Suits in Equity.* Complainants who file a bill in equity as personal representatives must show on the face of the bill their authority to sue as such.[65]

56. Chamberlain *v.* Tiner, 31 Minn. 371, 18 N. W. 97. See also Dodson *v.* Scroggs, 47 Mo. 285.

57. Chamberlain *v.* Tiner, 31 Minn. 371, 18 N. W. 97.

58. Mattison *v.* Childs, 5 Colo. 78. And see cases cited *supra*, note 57. But see Wilson *v.* Hall, 13 Tex. Civ. App. 489, 36 S. W. 327, which hold the contrary.

59. Griffith *v.* Fischli, 4 Blackf. (Ind.) 427; Vanblaricum *v.* Yeo, 2 Blackf. (Ind.) 322.

60. Hamilton *v.* McIndoo, 81 Minn. 324, 84 N. W. 118; State *v.* Green, 65 Mo. 528. And see Cummings *v.* Edmunson, 5 Port. (Ala.) 145.

Where an estate has been under the charge of two administrators, the petition in a suit by an administrator *de bonis non* should show that the administration of both has been brought to a close. State *v.* Green, 65 Mo. 528.

Allegations held sufficient.— A complaint alleging testator's death, the probate of his will, the issuance of letters to his executors, their resignation, and the acceptance thereof by the court; that plaintiff was appointed administrator by the probate court of a designated county; that he qualified and that letters were issued to him; and that he was still administrator sufficiently shows his authority to sue. Lucas *v.* Todd, 28 Cal. 182.

Continuance of authority.— Where a complaint in an action by an administrator shows that plaintiff was appointed as administrator only six days before the action was brought, and it is not shown that he has since been discharged, it need not be alleged that he is still qualified to act as administrator. Nohrden *v.* Northeastern R. Co., 54 S. C. 492, 32 S. E. 524.

61. Lewis *v.* Ewing, 3 Serg. & R. (Pa.) 44.

62. For form of complaint held sufficient to show defendant's authority to act as executor see Kirsch *v.* Derby, 96 Cal. 602, 31 Pac. 567.

63. Barfield *v.* Price, 40 Cal. 535. See also Crimm *v.* Townsend, 9 Ala. 403; Flinn *v.* Gouley, 139 Cal. 623, 73 Pac. 542.

64. *California.*—Wise *v.* Williams, 72 Cal. 544, 14 Pac. 204. But see California cases cited *supra*, note 63.

Mississippi.— Quinn *v.* Moss, 12 Sm. & M. 365.

Missouri.— Dodson *v.* Scroggs, 47 Mo. 285.

New Jersey.— Durbrow *v.* Eppens, 65 N. J. L. 10, 46 Atl. 582.

England.— Holliday *v.* Fletcher, 2 Ld. Raym. 1510.

Reason for rule.— It has been said in support of this rule that plaintiff is not supposed to know the particulars and that it is therefore sufficient to allege in general terms that he was executor or administrator of the particular estate (Dodson *v.* Scroggs, 47 Mo. 285), and that suing one as administrator necessarily implies that administration was granted to him, since no person can be administrator except by having letters of administration granted to him (Holliday *v.* Fletcher, 2 Ld. Raym. 1510).

In an action to foreclose a mortgage purporting to be executed by an executor and trustee in his representative capacity the complaint need not allege that the mortgagor was in fact such executor and trustee and the facts relating to his appointment (Kingsland *v.* Stokes, 25 Hun (N. Y.) 107; Skelton *v.* Scott, 18 Hun (N. Y.) 375); he is estopped to deny his appointment (Skelton *v.* Scott, *supra*).

65. *Colorado.*— Buck *v.* Fischer, 2 Colo. 182.

Michigan.— Middlesworth *v.* Nixon, 2 Mich. 425, 57 Am. Dec. 136.

New Jersey.— Stover *v.* Reading, 29 N. J.

Mere description of themselves as executor or administrator in the commencement of the bill is not sufficient,[66] nor is it sufficient to allege that complainant was duly appointed administrator.[67] If the bill is filed by one as executor the will must be pleaded or exhibited,[68] and it must be alleged that the will has been proved, or the bill is demurrable.[69] So the bill will be demurrable if it shows that the will was proved in an improper court.[70] A bill by a personal representative as such must show that letters testamentary or of administration had been granted to complainant,[71] and it must be alleged that he has qualified as such.[72] It is not usual or necessary, however, to state when testator or intestate died.[73] If the bill contains proper allegations to show that complainant is entitled to relief as executor or administrator he need not be so styled in the process[74] or in the bill itself.[75] It is not necessary that a defendant to a bill in equity sought to be charged as a personal representative be described as executor or administrator in the process,[76] or in the commencement or conclusion of the bill,[77] where the bill

Eq. 152; Pelletreau *v.* Rathbone, 1 N. J. Eq. 331.

North Carolina.— Belloat *v.* Morse, 3 N. C. 157.

England.— Humphreys *v.* Ingledon, 1 P. Wms. 752, 24 Eng. Reprint 599.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1815.

Showing in an exhibit to the bill that the complainants have authority to sue as personal representatives is not sufficient. This fact must be shown by the bill itself. Buck *v.* Fischer, 2 Colo. 182.

66. Middlesworth *v.* Nixon, 2 Mich. 425, 57 Am. Dec. 136.

67. Otto *v.* Regina Music-Box Co., 87 Fed. 510.

68. Trapnall *v.* Burton, 24 Ark. 371.

69. *Michigan.*— Middlesworth *v.* Nixon, 2 Mich. 425, 57 Am. Dec. 136.

New Jersey.— Pelletreau *v.* Rathbone, 1 N. J. Eq. 331.

North Carolina.— Belloat *v.* Morse, 3 N. C. 157.

United States.— Armstrong *v.* Lear, 12 Wheat. 169, 6 L. ed. 589; Trecothick *v.* Austin, 24 Fed. Cas. No. 14,164, 4 Mason 16.

England.— Humphrey *v.* Ingledon, 1 P. Wms. 752, 24 Eng. Reprint 599; Mitford Eq. Pl. by Jeremy 155–156; Story Eq. Pl. § 260.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1815.

On revival of suit.— If a person seeks to revive a suit as executor, he must state in his bill that he has proved the will; otherwise the bill will be demurrable. Story Eq. Pl. § 625.

70. Mitford Eq. Pl. by Jeremy 155–156; Story Eq. Pl. § 260. And see Pelletreau *v.* Rathbone, 1 N. J. Eq. 331.

71. Trapnall *v.* Burton, 24 Ark. 371; Stover *v.* Reading, 29 N. J. Eq. 152.

Amendment.— An administrator appointed in one state who has brought suit in the courts of another before he has obtained letters therefrom and has afterward obtained letters there may allege the fact by way of amendment. Giddings *v.* Green, 48 Fed. 489; Black *v.* Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433; Swatzel *v.* Arnold, 23 Fed. Cas. No. 13,682, Woodw. 383.

72. Belloat *v.* Morse, 3 N. C. 157.

73. Bosbell *v.* Thigpen, 75 Miss. 308, 92 So. 823.

74. Matthews *v.* Hoagland, 48 N. J. Eq. 455, 21 Atl. 1054; Plaut *v.* Plaut, 44 N. J. Eq. 18, 13 Atl. 849; Evans *v.* Evans, 23 N. J. Eq. 71.

75. Buck *v.* Fischer, 2 Colo. 182; Walker *v.* Cady, 106 Mich. 21, 63 N. W. 1005; Matthews *v.* Hoagland, 48 N. J. Eq. 455, 21 Atl. 1054; Plaut *v.* Plaut, 44 N. J. Eq. 18, 13 Atl. 849; Evans *v.* Evans, 23 N. J. Eq. 71. *Compare* Capehart *v.* Hale, 6 W. Va. 547, in which it was held that it is not proper for an executor who sues to describe himself merely as "personal representative," but he should describe himself as "executor" in order that defendant may be informed as to the particular character in which he professes to act and may conveniently ascertain and prove or controvert the reality of the character and the consequences resulting from it and that the court and clerk may conveniently shape and enter the decree in conformity to the statement.

Sufficient and insufficient bills illustrated. — The complainants in a bill described themselves as "administrators of the goods and chattels, rights, credits, moneys and effects which were of Henry Ossum, late of Huntington county, deceased, who died intestate." The bill further stated that "on or about the 1st day of October, 1848, said Henry Ossum died intestate, and that your orators were duly appointed," etc. It was held that the bill sufficiently showed that the complainants were administrators of Henry Ossum, deceased. English *v.* Roche, 6 Ind. 62. The allegation that the complainant "hath taken upon himself the burthen of executing the trusts and duties required of him by the will, and become duly qualified as executor" is not sufficient to show his authority to sue. Pelletreau *v.* Rathbone, 1 N. J. Eq. 331.

76. Matthews *v.* Hoagland, 48 N. J. Eq. 455, 25 Atl. 1054; Evans *v.* Evans, 23 N. J. Eq. 71.

77. Matthews *v.* Hoagland, 48 N. J. Eq. 455, 21 Atl. 1054; White *v.* Davis, 48 N. J. Eq. 22, 21 Atl. 187; Plaut *v.* Plaut, 44 N. J. Eq. 18, 13 Atl. 849.

sets forth facts sufficient to show that he is liable in that capacity. A bill alleging the death of a designated person and that defendant was thereafter appointed and acted as his administratrix sufficiently charges defendant's representative capacity.[78] A further allegation that he accepted the trust is not necessary.[79] Title to revive the suit against defendant is not shown by the mere statement that such defendant is the representative of a party who had answered the original bill.[80]

(II) *PROFERT AND OYER* — (A) *Profert* — (1) NECESSITY. If an executor or administrator sues in his individual capacity it is unnecessary for him to make profert of his letters testamentary or of administration.[81] Many decisions lay down the rule without qualification that where an executor or administrator sues as such he must make profert of his letters testamentary or of administration.[82] Others hold that where the suit is one which must be brought in a representative capacity, plaintiff must make profert of his letters.[83] There are, however, decisions holding that profert is only necessary where suit must be brought in a representative capacity.[84] In some jurisdictions independently of any statutory provisions profert has never been necessary.[85] In others it has been dispensed with by express statutory provisions.[86] And in some of the code states where the question has arisen it has been declared that, whatever the common-law rule might have been, it is no longer necessary to make profert.[87]

(2) OBJECT AND EFFECT. The object of profert is to notify defendant not only of the character plaintiff asserts but of the source of his authority,[88] and to afford him an opportunity of taking advantage of any impropriety in the granting of the letters or of any defect to which they may be liable.[89] The effect of profert is to bring the letters testamentary or of administration into court and operates the same as if they had been set out in the declaration.[90]

78. Manning *v.* Drake, 1 Mich. 34; Winsor *v.* Pettis, 11 R. I. 506.

79. Manning *v.* Drake, 1 Mich. 34.

80. Griffith *v.* Ricketts, 3 Hare 476, 25 Eng. Ch. 475.

81. Brent *v.* Shook, 36 Ill. 125.

82. *Florida.*— Sullivan *v.* Honacker, 6 Fla. 372.

Illinois.— Collins *v.* Ayers, 13 Ill. 358; Foster *v.* Adler, 84 Ill. App. 654.

Mississippi.— Ligon *v.* Bishop, 43 Miss. 527.

North Carolina.— Hyman *v.* Gray, 49 N. C. 155; —— *v.* Oldham, 2 N. C. 165.

Pennsylvania.— McDonald *v.* Browning, 4 Phila. 21. *Contra,* Axers *v.* Musselman, 2 Browne 115, holding that in a suit by an executor for a cause of action arising in the testator's lifetime plaintiff need not make profert of the letters testamentary.

South Carolina.— Trapier *v.* Mitchell, 2 Nott & M. 64.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1819.

83. Worthington *v.* McRoberts, 7 Ala. 814; Trapnall *v.* Craig, 19 Ark. 243; Hynds *v.* Imboden, 5 Ark. 385; Campbell *v.* Baldwin, 6 Blackf. (Ind.) 364; Beaty *v.* Gingles, 53 N. C. 302.

84. Hill *v.* Huckabee, 52 Ala. 155; Riddle *v.* Hill, 51 Ala. 224; Caller *v.* Dade, Minor (Ala.) 20; Anderson *v.* Wilson, 13 Ark. 409; Campbell *v.* Baldwin, 6 Blackf. (Ind.) 364; Savage *v.* Merian, 1 Blackf. (Ind.) 176; Thames *v.* Richardson, 3 Strobh. (S. C.) 484.

Where a contract is made with an administrator as such if he sues on it no profert is necessary because the making of a contract with a personal representative in his representative capacity admits such capacity. Hill *v.* Huckabee, 52 Ala. 155; Riddle *v.* Hill, 51 Ala. 224; Harbin *v.* Levi, 6 Ala. 399; Caller *v.* Dade, Minor (Ala.) 20; Knott *v.* Clements, 13 Ark. 335; Walt *v.* Walsh, 10 Heisk. (Tenn.) 314.

In a suit on a judgment recovered by an administrator in his own name no profert of letters is necessary, although he describes himself as administrator. Capp *v.* Gilman, 2 Blackf. (Ind.) 45; Biddle *v.* Wilkins, 1 Pet. (U. S.) 686, 7 L. ed. 315.

85. Langdon *v.* Porter, 11 Mass. 313; Ellis *v.* Appleby, 4 R. I. 462; Champlin *v.* Tilley, 5 Fed. Cas. No. 2,586, 1 Brunn. Col. Cas. 71, 3 Day (Conn.) 303.

86. Hansford *v.* Van Auken, 79 Ind. 157; Cromwell *v.* Barnes, 58 Ind. 20; Wyant *v.* Wyant, 38 Ind. 48. And see Walton *v.* Kindred, 5 T. B. Mon. (Ky.) 388.

Under the Arkansas statutes which prescribe the form of a petition in debt it has been held unnecessary for an administrator to make profert of his letters. Rawlings *v.* Paty, 23 Ark. 204.

87. Judah *v.* Fredericks, 57 Cal. 389; Hamilton *v.* McIndoo, 81 Minn. 324, 84 N. W. 118; Chamberlain *v.* Tiner, 31 Minn. 371, 18 N. W. 97; Bright *v.* Currie, 5 Sandf. (N. Y.) 433.

88. Vickery *v.* Bier, 16 Mich. 50; Reynolds *v.* Torrance, 2 Brev. (S. C.) 59.

89. Reynolds *v.* Torrance, 2 Brev. (S. C.) 59.

90. Carr *v.* Wyley, 23 Ala. 821.

(3) Form and Requisites.[91] A formal statement in the declaration or complaint that plaintiff brings into court letters showing his qualification as executor or administrator is sufficient,[92] without alleging that the will had been proven or showing by what authority it had been admitted to probate.[93] The profert of the letters of administration in construction of law places them in the hands of the court of whom oyer is craved and not of the party, and the court is sufficiently informed of the right to sue and that the letters were granted by the proper jurisdiction by the inspection of them.[94] Where the original declaration makes profert, it is not essential that the amended declaration repeat such a profert.[95]

(4) Effect of Failure to Make Profert and Methods of Reaching or Curing Defect. Failure to make profert renders the pleading fatally defective on special demurrer,[96] but it has been held that this defect cannot be reached otherwise than by special demurrer.[97] Objection for want of profert is waived by pleading to the merits,[98] because the plea is interposed after the profert has enabled defendant to judge of the sufficiency of the latter.[99] After verdict it is too late to object to the want of profert of letters of administration. The defect is cured by verdict,[1] and an arrest of judgment will not be granted because of such defect.[2] The fact that the administrator was made a party after abatement of the suit by the death of plaintiff does not alter the rule.[3] Although objection for failure to make profert is properly raised, it may be cured by amendment.[4]

(b) *Oyer.* Although plaintiffs name themselves administrators yet if they have not made profert of their letters of administration they are not bound to give oyer of them.[5] And if profert is unnecessarily made, it may be treated as

91. For forms of profert held sufficient see Linder *v.* Monroe, 33 Ill. 388; Brown *v.* Jones, 10 Gill & J. (Md.) 334; McMillan Marble Co. *v.* Black, 89 Tenn. 118, 14 S. W. 479; Thompson *v.* Reynolds, 3 C. & C. 123, 14 E. C. L. 484.

92. Cocke *v.* Walters, 6 Ark. 404; Linder *v.* Monroe, 33 Ill. 388; Brown *v.* Jones, 10 Gill & J. (Md.) 334; McMillan Marble Co. *v.* Black, 89 Tenn. 118, 14 S. W. 479. But see *dictum* in Hynds *v.* Imboden, 5 Ark. 385.

If defendant desires to question the validity of the probate or the regularity of the grant of letters he should crave oyer and make them part of the record. Cocke *v.* Walters, 6 Ark. 404.

Where letters of administration had been granted to the predecessor of one suing as administrator, the profert should set forth such facts and that the letters had been revoked. Ketchum *v.* Morrell, 2 N. Y. Leg. Obs. 58.

Variance.— Where plaintiff makes profert of letters of administration as having been granted to him by the probate court of a particular county, and those given on oyer were granted to him by the clerk of such court in vacation, the variance is immaterial. Knott *v.* Clements, 13 Ark. 335.

93. Cocke *v.* Walters, 6 Ark. 404.

94. Brown *v.* Jones, 10 Gill & J. (Md.) 334.

95. McMillan Marble Co. *v.* Black, 89 Tenn. 118, 14 S. W. 479.

96. *Florida.*— Sullivan *v.* Honacker, 6 Fla. 372.

Indiana.— Campbell *v.* Baldwin, 6 Blackf. 364.

Mississippi.— Ligon *v.* Bishop, 43 Miss. 527.

Pennsylvania.— McDonald *v.* Browning, 4 Phila. 21.

South Carolina.— Trapier *v.* Mitchell, 2 Nott & M. 64.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1819, 1821.

97. Sullivan *v.* Honacker, 6 Fla. 372; McMillan Marble Co. *v.* Black, 89 Tenn. 118, 14 S. W. 479; Kane *v.* Paul, 14 Pet. (U. S.) 33, 10 L. ed. 341. And see Mitchell *v.* Woodward, 2 Marv. (Del.) 311, 43 Atl. 165.

In Arkansas failure to make profert is no cause of demurrer, but should be reached by a rule to produce the letters or a copy thereof. Surginer *v.* Paddock, 31 Ark. 528.

98. Mitchell *v.* Woodward, 2 Marv. (Del.) 311, 43 Atl. 165; Vickery *v.* Beir, 16 Mich. 50; McMillan Marble Co. *v.* Black, 89 Tenn. 118, 14 S. W. 479.

99. Vickery *v.* Beir, 16 Mich. 50.

1. Worthington *v.* McRoberts, 7 Ala. 814; Copewood *v.* Taylor, 7 Port. (Ala.) 33; Sullivan *v.* Honacker, 6 Fla. 372; Vandersmith *v.* Washmein, 1 Harr. & G. (Md.) 3; Matheson *v.* Grant, 2 How. (U. S.) 263, 11 L. ed. 261; Kane *v.* Paul, 14 Pet. (U. S.) 33, 10 L. ed. 341; Biddle *v.* Wilkins, 1 Pet. (U. S.) 686, 7 L. ed. 315; Gardner *v.* Lindo, 9 Fed. Cas. No. 5,231, 1 Cranch C. C. 78.

Objection made for the first time on appeal for want of profert is too late. McMillan Marble Co. *v.* Black, 89 Tenn. 184, 14 S. W. 749.

2. Gardner *v.* Lindo, 9 Fed. Cas. No. 5,231, 1 Cranch C. C. 78 [*reversed* on another point in 1 Cranch 343, 2 L. ed. 130].

3. Copewood *v.* Taylor, 7 Port. (Ala.) 33.

4. Ligon *v.* Bishop, 43 Miss. 527.

5. Mason *v.* Lawrason, 16 Fed. Cas. No. 9,242, 1 Cranch C. C. 190 [*affirmed* in 3 Cranch 492, 2 L. ed. 509].

surplusage and plaintiff is not bound to produce them on prayer of oyer,[6] even though he sue in his representative character.[7] Nevertheless if he grants oyer of them, they become part of the record and defendant may avail himself of any defense in reference to them that he could have done had oyer been necessarily granted of them in the first instance.[8] Where plaintiff sues in a representative character and necessarily makes profert of his letters, defendant is entitled as a matter of right to a grant of oyer of them,[9] provided the demand therefor is seasonably made, and it will be in time if made before the expiration of the time to plead had expired,[10] but it cannot be made after issue joined.[11] Where demand is seasonably made the declaration is not complete until oyer has been furnished,[12] and failure to produce the letters on demand puts an end to the suit.[13] Upon filing the prayer of oyer of the letters of administration it is the duty of plaintiff to respond thereto as to any other pleading; but the court upon application and a proper showing has the discretionary power to grant plaintiff a reasonable time to respond to the prayer of oyer.[14] On grant of oyer the letters testamentary or a certified copy of them without the proof establishing the will is sufficient *prima facie* evidence of the authority of the representative to sue.[15] Certificates attached to the letters need not be shown as they form no part of the letters and are merely evidence.[16] On production of the letters defendant may take any exceptions to them by pleading or otherwise which he may think proper.[17] By demurring to the declaration defendant may reach any substantial defect apparent on the face of the letters,[18] and may thus take advantage of any material variance between the letters produced on oyer and the statement of

6. Anderson *v.* Wilson, 13 Ark. 409; Knott *v.* Clements, 13 Ark. 335; Collins *v.* Ayers, 13 Ill. 358.

7. Anderson *v.* Wilson, 13 Ark. 409.

8. Knott *v.* Clements, 13 Ark. 335.

9. *Arkansas.*— Trapnall *v.* Craig, 19 Ark. 243.

Delaware.— Prettyman *v.* Ratcliffe, 4 Del. 29.

Illinois.— Collins *v.* Ayers, 13 Ill. 358.

New York.— Varick *v.* Bodine, 3 Hill 444.

North Carolina.— Hyman *v.* Gray, 49 N. C. 155.

South Carolina.— Trapier *v.* Mitchell, 2 Nott & M. 64.

United States.— North *v.* Clark, 18 Fed. Cas. No. 10,308, 3 Cranch C. C. 93.

England.—Soresby *v.* Sparrow, 2 Str. 1186.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1822.

Tender of an order of appointment by the probate court is not a sufficient compliance with a demand of oyer. The letters must be produced. Caradine *v.* Balfour, Walk. (Miss.) 532.

10. Varick *v.* Bodine, 3 Hill (N. Y.) 444; North *v.* Clark, 18 Fed. Cas. No. 10,308, 3 Cranch C. C. 93 [*criticizing dictum* in Roberts *v.* Arthur, 2 Salk. 497].

11. —— *v.* Oldham, 2 N. C. 165; Berry *v.* Pulliam, 2 N. C. 16; Fisher *v.* Condy, 4 McCord (S. C.) 344; Trapier *v.* Mitchell, 2 Nott & M. (S. C.) 64.

12. Varick *v.* Bodine, 3 Hill (N. Y.) 444, holding that if plaintiff without complying with the demand enters defendant's default for want of plea, the proceedings will be set aside as irregular.

13. Prettyman *v.* Waples, 4 Harr. (Del.) 299; Sullivan *v.* Honacker, 6 Fla. 372; Soresby *v.* Sparrow, 2 Str. 1186.

Presumptions on appeal.— Where the court discontinues the action for the failure of plaintiff to respond to the prayer of oyer of letters of administration the appellate court will presume in favor of the correctness of the judgment, unless plaintiff puts such facts upon the record as makes it appear that the court erred. Trapnall *v.* Craig, 19 Ark. 243.

14. Trapnall *v.* Craig, 19 Ark. 243.

15. Diamond *v.* Shell, 15 Ark. 26; Collins *v.* Ryers, 13 Ill. 358. To the same effect see Bales *v.* Binford, 6 Blackf. (Ind.) 415; Beach *v.* Pears, 1 N. J. L. 288.

On exhibition of letters duly authenticated plaintiff's right to sue cannot be impeached without showing a revocation of the letters or matter avoiding them. Carter *v.* Menifee, 4 Ark. 152.

16. Collins *v.* Ayers, 13 Ill. 358.

17. Trapier *v.* Mitchell, 2 Nott & M. (S. C.) 64.

18. Trapnall *v.* Craig, 19 Ark. 243; Collins *v.* Ayers, 13 Ill. 358; Foster *v.* Adler, 84 Ill. App. 654; —— *v.* Oldham, 2 N. C. 165. And see Philbrick *v.* Hazen, 3 N. H. 120.

Want of jurisdiction.—If a declaration does not set forth proper jurisdiction for granting the letters and they appear to be granted by an improper jurisdiction defendant may demur. —— *v.* Oldham, 2 N. C. 165.

A demurrer based on the ground that letters produced were not stamped cannot be sustained, because it is sufficient to stamp either the letters or administration bonds which need not be produced and the objection if good should be made by plea. Miller *v.* Henderson, 24 Ark. 344.

them in the declaration.[19] So defendant may avail himself of plaintiff's want of title by plea where the defects are not such as can be reached by demurrer,[20] and if oyer has been seasonably demanded, a plea to plaintiff's capacity as soon as the letters have been filed is in time.[21]

(III) *Allegation as to Presentation, Verification, and Rejection of Claim*—(A) *Necessity.* According to the weight of authority where the statutes require presentation of a claim against an estate to the personal representative the declaration or complaint in an action on such claim must allege presentation,[22] and it has been held that this rule applies as well in suits in equity as in actions at law.[23] In some jurisdictions, however, this rule is not recognized and it is held that no allegation of the presentation of claims is necessary,[24] the view being taken that this is a matter of defense.[25] So it has been held that if a statute requires rejection of the claim before suit brought it is necessary in an action on a claim to allege that it has been rejected.[26] Notwithstanding a statute requires verification or an affidavit of the justice of a claim as a condition to bringing suit thereon, it is not necessary that the petition in an action on the claim allege that a proper affidavit had been presented to the personal representative.[27]

(B) *Sufficiency.* In alleging presentment an averment that notice of the claim

19. Collins *v.* Ayers, 13 Ill. 358; Foster *v.* Adler, 84 Ill. App. 654.

20. Sullivan *v.* Honacker, 6 Fla. 372; —— *v.* Oldham, 2 N. C. 165.

If the letters are properly authenticated, but defendant has been advised that they had been unduly obtained or that for any other cause they had no right to institute suit, he may avail himself of their want of title by putting in the proper plea. Sullivan *v.* Honacker, 6 Fla. 372.

21. Lovering *v.* McKinney, 7 Tex. 521.

22. Hearn *v.* Kennedy, 85 Cal. 55, 24 Pac. 606; Hentsch *v.* Porter, 10 Cal. 555; Grant *v.* Grant, 63 Conn. 530, 29 Atl. 15, 38 Am. St. Rep. 379; Stevens *v.* Haskell, 72 Me. 244; Maine Cent. Institute *v.* Haskell, 71 Me. 487; Eaton *v.* Buswell, 69 Me. 552; Leverett *v.* Wherry, (Tex. App. 1890) 15 S. W. 121; Walters *v.* Prestidge, 30 Tex. 65; Fulton *v.* Black, 21 Tex. 424.

Excuse for non-presentation.—A petition in a suit against an executor on a claim which had not been presented for acceptance which fails to allege why it had not been so presented is insufficient to sustain a judgment against the executor. Rogers *v.* Harrison, 1 Tex. App. Civ. Cas. § 494.

Amendment.—Where in an action against executors on a claim plaintiffs fail to allege that the claim was presented in writing to defendants as required by statute, the declaration may be amended. Maine Cent. Institute *v.* Haskell, 71 Me. 487.

23. Grimball *v.* Mastin, 77 Ala. 553; Morgan *v.* Morgan, 68 Ala. 80; Foster *v.* Holland, 56 Ala. 474; Fretwell *v.* McLemore, 52 Ala. 124.

Claims secured on homestead.—Under a statute requiring all claims secured by liens or encumbrances on the homestead of a person deceased to be presented and allowed as other claims against the estate a complaint in an action on a note given by defendant and her deceased husband and secured on their homestead which asks for a personal judgment and a sale of the mortgaged property is bad on general demurrer, where it fails to allege that the claim had been presented for allowance. Hearn *v.* Kennedy, 85 Cal. 55, 24 Pac. 606.

In cases of purely equitable cognizance or in which purely equitable relief is sought the cause of action is not a claim which is required by statute to be presented to the administrator before suit brought and therefore it is not necessary to allege presentation of such claim. Toulouse *v.* Bukett, 2 Ida. (Hasb.) 184, 10 Pac. 26.

24. Rogers *v.* Mitchell, 1 Metc. (Ky.) 22; Thomas *v.* Thomas, 15 B. Mon. (Ky.) 178; Kittridge *v.* Folsom, 8 N. H. 98; Durbrow *v.* Eppens, 65 N. J. L. 10, 46 Atl. 582.

Bill for relief against fraudulent conveyance by decedent.—An allegation of presentation of the claim to the executor is not necessary in order to establish the right to relief on a bill against the executors and the alleged fraudulent grantee of decedent's lands, where the allegations in the bill admitted by the demurrer show complainant to be a creditor of decedent. Rutherford *v.* Alyea, 53 N. J. Eq. 580, 32 Atl. 70. See also Merchants', etc., Transp. Co. *v.* Borland, 53 N. J. Eq. 282, 31 Atl. 272.

25. Holland *v.* Lowe, 101 Ky. 98, 39 S. W. 834, 41 S. W. 9, 19 Ky. L. Rep. 97; Durbrow *v.* Eppens, 65 N. J. L. 10, 46 Atl. 582.

26. Hentsch *v.* Porter, 10 Cal. 555; Walters *v.* Prestidge, 30 Tex. 65; Fulton *v.* Black, 21 Tex. 424.

An allegation of the executor's failure to take action on a claim presented is proper to take the cause out of the statute requiring suit within a designated time after rejection of a claim. Slocum *v.* Wilbour, 23 R. I. 97, 49 Atl. 489.

27. Rogers *v.* Mitchell, 1 Metc. (Ky.) 22; Thomas *v.* Thomas, 15 B. Mon. (Ky.) 178. And see Jones *v.* Rich, 20 Mont. 289, 50 Pac. 936; Dean *v.* Duffield, 8 Tex. 235, 58 Am. Dec. 108.

was given in writing is not equivalent to an averment that the claim was presented in writing and is insufficient.[28] The complaint should state the facts constituting the presentation.[29] If the statute requiring presentation is also a statute of non-claim and bars the right of action if the claim is not presented within the prescribed time, the declaration, complaint, or bill should show that it was filed in the prescribed time,[30] or state grounds excepting the claim from the operation of the statute;[31] but it has been held that if the declaration or complaint alleges that the claim was properly presented failure to allege that it was filed in the prescribed time,[32] or a defective allegation in this regard,[33] will not render the complaint bad on general demurrer.

(iv) *Allegations Negativing Premature Commencement of Suit.* In many jurisdictions personal representatives are in some cases protected by express statutory provision from suit for a designated period after the grant of letters of administration. It has been held that the declaration or complaint in an action against a personal representative must show that the suit is brought after expiration of the period during which the personal representative is protected from suit, or that it is within the exceptions provided by the statute granting exemption.[34] The contrary view has, however, been maintained.[35]

(v) *Variance Between Process and Declaration.* If plaintiff sues in his individual capacity and the process is to answer to him "as administrator" there is such a variance as will justify a plea in abatement.[36] But it is not a material variance that the writ describes a party as administrator and the declaration as administrator with the will annexed.[37] A variance between the relief asked and that specified in the citation is amendable.[38]

(vi) *Variance Between Declaration and Proof.* In suits by and against executors and administrators, as in all other suits, the pleadings and proofs must correspond. There can be no recovery if there is a substantial variance,[39]

28. Maine Cent. Institute *v.* Haskell, 71 Me. 487.

Defective averment, how cured.— In an action against an administratrix the complaint alleged that plaintiff duly presented her claim to defendant as administratrix, which claim contained a copy of said promissory note, and was duly verified by the oath of plaintiff in the form prescribed by law. It was held that if this averment was not sufficiently definite and certain the defect would not be fatal to a judgment for plaintiff, in the absence of demurrer or any averment in the answer that the claim was not supported by proper evidence. Chase *v.* Evoy, 58 Cal. 348.

29. Janin *v.* Browne, 59 Cal. 37, holding that a complaint alleging that the claim sued on was presented to the administrator within the time limited and that a copy of the claim was given to him with the verification annexed, together with the indorsement thereon which was also attached to the complaint, sufficiently alleges presentation of the claim.

30. Owens *v.* Corbitt, 57 Ala. 92. See Page *v.* Bartlett, 101 Ala. 193, 13 So. 768.

Declarations held sufficient.— The allegation that plaintiff first presented to the executor his claim in writing and demanded payment thereof more than thirty days before the commencement of the action and within two years after notice given by the executor of his appointment is good. Dexter Sav. Bank *v.* Copeland, 72 Me. 220.

31. Owens *v.* Corbitt, 57 Ala. 92.

32. McCann *v.* Pennie, 100 Cal. 547, 25 Pac. 158.

33. Wise *v.* Hogan, 77 Cal. 184, 19 Pac. 278.

34. Wells *v.* Applegate, 10 Oreg. 519; Rhodes *v.* Doggett, 2 Ohio Dec. (Reprint) 451, 3 West. L. Month. 134; Green *v.* Ulwatt, 2 Ohio Dec. (Reprint) 427, 3 West. L. Month. 44. And see Levi *v.* Buchanan, 2 Cinc. Super. Ct. 144, holding that where in a suit against an administrator on a claim against the estate, the petition shows on its face that suit is brought before the expiration of the time during which he is by statute ordinarily exempt from suit, and does not show that the suit is within any of the exceptions to the statute, a demurrer will lie.

35. Granjang *v.* Markle, 22 Ill. 250. And see Lemmal *v.* Puska, 54 Tex. 505, holding that, although an executor is not obliged to plead to a suit within twelve months from the date of probate, yet if he does plead, he waives his privilege and a judgment rendered against him is valid.

36. Mohr *v.* Sherman, 25 Ark. 7. And see Blanchard *v.* Strait, 8 How. Pr. (N. Y.) 83, holding that it is a fatal variance.

37. Brockman *v.* McDonald, 16 Ill. 112.

38. Spencer *v.* Popham, 5 Redf. Surr. (N. Y.) 425.

39. Roberts *v.* Levy, (Cal. 1892) 31 Pac. 570; Richards *v.* Richards, 46 Pa. St. 78.

Amendment.— A variance between the relief petitioned for and that specified in the

but a variance which is immaterial will not prevent a recovery.[40] In applying these general rules it has been held that where suit is brought by a personal representative in his individual capacity he cannot recover by showing a cause of action accruing to him in his representative capacity,[41] and if he sues in his representative capacity he cannot recover on a cause of action accruing to him in his individual capacity.[42] So if a personal representative is sued as such, proof of a claim against him individually will not sustain the declaration,[43] and a suit against him in his individual capacity cannot be maintained by showing a cause of action against decedent.[44] Where plaintiff has a suit pending against defendant as executor all proceedings in other courts intended to create evidence to be used in such suit should be against him in the same character and not in the character of administrator, since an executor represents primarily the devisees and legatees and the administrator represents the heirs at law.[45] If plaintiff describes himself as administrator *de bonis non*, proof of issuance of general letters of administration to him is not a fatal variance where it is shown that there had been a previous administration,[46] and, where issue is joined on a plea denying that plaintiff is administrator, proof that he is administrator with the will annexed supports the issue.[47] If plaintiff declares as administrator, proof that he was administrator *de bonis non* is an immaterial variance.[48] So there is no material variance between a complaint to recover money alleged to have been loaned by plaintiffs individually and evidence that the money was loaned by them as executors,[49] nor between the allegations that plaintiff who sues only in his individual capacity recovered a judgment and proof which shows that the judgment was recovered by him in a representative capacity as administrator.[50] Proof that limited letters of administration were granted to plaintiff does not sustain an allegation that unrestricted letters were granted to him, so as to authorize him to maintain an action not designated by the letters,[51] and to authorize a joint judgment against two who are sued jointly as executors, the proof must show a joint liability as such.[52] Where a bill against an administrator avers exhaustion of personal assets and the proof shows a misapplication of those assets, although a liability exists, a decree cannot be granted for the misapplication unless the allegations and prayer shall be amended.[53]

b. Plea or Answer — (i) *Denial of Representative Capacity* — (A) *Plea of Ne Unques Executor or Administrator* — (1) Propriety or Necessity of Plea — (a) In General. Plaintiff's capacity to sue as executor or administrator

citation is amendable. Spencer *v.* Popham, 5 Redf. Surr. (N. Y.) 425.

40. Moseley *v.* Mastin, 37 Ala. 216; McDonald *v.* Webster, 71 Vt. 392, 45 Atl. 895.

41. Freeman *v.* McCann, 37 Ala. 714; Ikelheimer *v.* Chapman, 32 Ala. 676; Barnum *v.* Stone, 27 Mich. 332; Glenn *v.* McCullough, 2 McCord (S. C.) 212.

42. Stanley *v.* Stanley, 42 Conn. 539; Hoover *v.* Wells, 35 Miss. 159; Sarell *v.* Wine, 3 East 409; Dean *v.* Crane, 6 Mod. 309, 1 Salk. 28.

43. Anderson *v.* Rice, 20 Ala. 239; Beard *v.* Cowman, 3 Harr. & M. (Md.) 152; Fleischman *v.* Shoemaker, 2 Ohio Cir. Ct. 152, 1 Ohio Cir. Dec. 415; Bedford *v.* Ingram, 5 Hayw. (Tenn.) 155. And see Bartlett *v.* Hatch, 17 Abb. Pr. (N. Y.) 461.

44. Ross *v.* Harden, 44 N. Y. Super. Ct. 26. And see Shangle *v.* Runk, 17 N. J. L. 372, holding that where a writ is against defendants as executors the declaration against them in their individual capacity and the evidence wholly tends to show a liability in their representative capacity there is a fatal variance.

Proof of services rendered decedent sustains a declaration alleging that decedent was indebted to plaintiff for services rendered "defendant." The pleading, although inartificial, shows that the estate and not the administrator in his individual capacity is declared against for an indebtedness of decedent. McDonald *v.* Webster, 71 Vt. 392, 45 Atl. 895.

45. Fulghum *v.* Carruthers, 87 Ga. 484, 13 S. E. 597.

46. Moseley *v.* Mastin, 37 Ala. 216; State *v.* Price, 21 Mo. 434. And see Steen *v.* Bennett, 24 Vt. 303.

47. Owings *v.* Beall, 1 Litt. (Ky.) 257.

48. Barkman *v.* Duncan, 10 Ark. 465.

49. Myers *v.* Weger, 62 N. J. L. 432, 42 Atl. 280, since he can sue either in his individual or representative capacity on such a cause of action.

50. Allen *v.* Lyman, 27 Vt. 20.

51. Kirwin *v.* Malone, 45 N. Y. App. Div. 93, 61 N. Y. Suppl. 844.

52. Moody *v.* Ewing, 8 B. Mon. (Ky.) 521. But see Gray *v.* White, 5 Ala. 490.

53. Rowan *v.* Bowles, 21 Ill. 17.

may be denied by special plea,[54] which is called in the books on common-law pleading the plea of *ne unques executor* or *administrator*,[55] but it is not a good plea where plaintiff sues in his individual capacity,[56] nor where he sues on a contract made with himself in his representative capacity, irrespective of whether he sues individually or in his representative capacity.[57] On the other hand where one is sued as the personal representative of another he may plead *ne unques executor* or *administrator*.[58] If defendant desires to raise the objection that plaintiff has not the capacity to sue as executor or administrator and the suit is based on a cause of action arising in decedent's lifetime plaintiff's representative capacity must be put in issue by a special plea denying it.[59] So the language of many decisions is broad enough to make a special plea necessary whether the cause of action arose in decedent's lifetime or after his death,[60] although others recognize a limitation of the rule in certain causes of action arising after decedent's death.[61]

(b) Effect of Pleading to the Merits. The rule is well settled that where a personal representative sues on a cause of action which he must sue on in his representative capacity, that is, a cause of action accruing to decedent in his lifetime, a plea of the general issue or other plea to the merits operates as an admission of

54. Worthington *v.* McRoberts, 7 Ala. 814; Weathers *v.* Newman, 1 Blackf. (Ind.) 232.

A plea that the original plaintiff is not dead is a good plea in scire facias to revive a suit in the name of plaintiff as administrator. French *v.* Frazier, 7 J. J. Marsh. (Ky.) 425.

55. McDonald *v.* Cole, 46 W. Va. 186, 32 S. E. 1033.

56. Governor *v.* Evans, 1 Ark. 349; Spurgen *v.* Robinet, 4 Bibb (Ky.) 75.

57. Riddle *v.* Hill, 51 Ala. 224, because the making of a contract is an admission that he is a representative.

58. See Witcher *v.* Wilson, 47 Miss. 663.

Notice to produce letters.— Where the plea *ne unques executor* is interposed plaintiff should serve defendants with notice to produce their letters testamentary in order to lay the foundation for the introduction of secondary evidence. Witcher *v.* Wilson, 47 Miss. 663.

59. *Georgia.*— Mettitt *v.* Cotton States L. Ins. Co., 55 Ga. 103; Hazelhurst *v.* Morrison, 48 Ga. 397; Macon, etc., R. Co. *v.* Davis, 18 Ga. 679.

Kentucky.— Willis *v.* Willis, 6 Dana 48; Henderson *v.* Clark, 4 Bibb 391.

South Carolina.— Mickle *v.* Congaree Constr. Co., 41 S. C. 394, 19 S. E. 725; Reynold *v.* Torrance, 2 Brev. 59.

Tennessee.— McMillan Marble Co. *v.* Black, 89 Tenn. 118, 14 S. W. 479; Cheek *v.* Wheatly, 11 Humphr. 556.

England.— Thynne *v.* Protheroe, 2 M. & S. 553.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1839.

Contra.— Gilmore *v.* Morris, 13 Mo. App. 114, holding that an allegation in the petition that plaintiff is administrator is put in issue by a general denial.

Amendment.— It has been held that defendant should be permitted to amend his plea filed by adding to the plea of the general issue the plea of *ne unques executor*. Vermilyea *v.* Beatty, 2 How. Pr. (N. Y.) 57.

In Indiana by express statutory provision (Rev. St. § 2498) the question of plaintiff's capacity to sue can only be raised by sworn answer. Hansford *v.* Vanauken, 79 Ind. 302; Kelley *v.* Love, 35 Ind. 106.

60. *Alabama.*— Louisville, etc., R. Co. *v.* Trammel, 93 Ala. 350, 9 So. 870. And see Johnson *v.* Kyser, 127 Ala. 309, 27 So. 784.

California.— Liening *v.* Gould, 13 Cal. 598.

Illinois — Chicago Legal News Co. *v.* Browne, 103 Ill. 317; Steele *v.* Thatcher, 79 Ill. 400; Collins *v.* Ayers, 13 Ill. 358; Ballance *v.* Flisby, 3 Ill. 63; Dye *v.* Gritton, 29 Ill. App. 54.

Iowa.— Mayes *v.* Turley, 60 Iowa 407, 14 N. W. 731.

Maine.— Brown *v.* Nourse, 55 Me. 230, 92 Am. Dec. 583.

Massachusetts.— Langdon *v.* Potter, 11 Mass. 313.

New York.— Stone *v.* Groton Bridge, etc., Co., 77 Hun 99, 28 N. Y. Suppl. 446.

Texas.— Callahan *v.* Hendrix, 79 Tex. 494, 15 S. W. 593; Dignowitty *v.* Coleman, 77 Tex. 98, 13 S. W. 857; Cochran *v.* Thompson, 18 Tex. 652.

West Virginia.— McDonald *v.* Cole, 46 W. Va. 186, 32 S. E. 1033.

Wisconsin.— Ewen *v.* Chicago, etc., R. Co., 38 Wis. 613.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1838, 1839.

But see Hazelhurst *v.* Morrison, 48 Ga. 397; Macon, etc., R. Co. *v.* Davis, 18 Ga. 679.

Where plaintiff alleges that he is administrator de bonis non and the note in suit is payable to another person as administrator of the same estate, plaintiff need not prove that he was administrator *de bonis non* in the absence of a plea denying his allegation to that effect. Tobler *v.* Stubblefield, 32 Tex. 188.

61. See *infra*, XIV, K, 1, b, (I), (A), (1), (b).

his representative capacity and he need not prove it.[62] By such plea plaintiff's character is not questioned but only his right to recover on the merits.[63] So there are many decisions which lay down the rule broadly that in an action by a personal representative in his capacity as such a plea to the merits admits his representative capacity and obviates the necessity of proving it and the weight of authority sustains this view.[64] While it is true that most of these decisions were in cases where the cause of action arose prior to the death of testator or intestate,

62. *Colorado.*— Denver, etc., R. Co. *v.* Woodward, 4 Colo. 1.

Delaware.—Mitchell *v.* Woodward, 2 Marv. 311, 43 Atl. 165.

Indiana.— Pollard *v.* Buttery, 3 Blackf. 239.

Kentucky.— Willis *v.* Willis, 6 Dana 48; Thomas *v.* Tanner, 6 T. B. Mon. 52; Kerley *v.* West, 3 Litt. 362; Henderson *v.* Clark, 4 Bibb 391; Floyd *v.* Breckenridge, 4 Bibb 14.

South Carolina.— Reynolds *v.* Torrance, 2 Brev. 59.

Tennessee.—McMillan Marble Co. *v.* Black, 89 Tenn. 118, 14 S. W. 479; Cheek *v.* Wheatly, 11 Humphr. 556.

Vermont.— Walker *v.* Wooster, 61 Vt. 403, 17 Atl. 792.

West Virginia.— McDonald *v.* Cole, 46 W. Va. 186, 32 S. E. 1033.

United States.— Champlin *v.* Tilley, 5 Fed. Cas. No. 2,586, Brunn. Col. Cas. 71, 3 Day (Conn.) 303.

England.— Marsfield *v.* Marsh, 2 Ld. Raym. 824; Thynne *v.* Protheroe, 2 M. & S. 553; Gidley *v.* Williams, 1 Salk. 37.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1841.

Contra.— Gilmore *v.* Morris, 13 Mo. App. 114.

Representative capacity is admitted by pleas of *non assumpsit* (Mitchell *v.* Woodward, 2 Marv. (Del.) 311, 43 Atl. 165; Cheek *v.* Wheatly, 11 Humphr. (Tenn.) 556), in equity (Cheek *v.* Wheatly, *supra*), *non est factum* (Kerley *v.* West, 3 Litt. (Ky.) 362), *non detinet* (Willis *v.* Willis, 6 Dana (Ky.) 48; Floyd *v.* Breckenridge, 4 Bibb (Ky.) 14), covenant performed (Helm *v.* Jones, 9 Dana (Ky.) 26), or a plea in bar (Pollard *v.* Buttery, 3 Blackf. (Ind.) 239; Clark *v.* Pishon, 31 Me. 503), except, of course, pleas *ne unques executor* or *administrator* which are generally considered pleas in bar, and are the appropriate pleas for denying representative capacity.

63. Denver, etc., R. Co. *v.* Woodward, 4 Colo. 1.

64. *Alabama.*— Louisville, etc., R. Co. *v.* Trammell, 93 Ala. 350, 9 So. 870; Clarke *v.* Clarke, 51 Ala. 498; Worsham *v.* Goar, 4 Port. 441.

Arkansas.— Kowanachi *v.* Askew, 17 Ark. 595.

Florida.—Sullivan *v.* Honacker, 6 Fla. 372; Raney *v.* Baron, 1 Fla. 327.

Georgia.— Kenan *v.* Du Bignon, 46 Ga. 258.

Illinois.— Chicago, etc., R. Co. *v.* Smith, 180 Ill. 453, 54 N. E. 325 [*affirming* 77 Ill. 492]; Union R., etc., Co. *v.* Shacklet, 119 Ill. 232, 10 N. E. 896; Chicago Legal News Co. *v.* Browne, 103 Ill. 317; Collins *v.* Ayers, 13 Ill. 358; McKinley *v.* Braden, 2 Ill. 64; Harte *v.* Fraser, 104 Ill. App. 201; Dye *v.* Gritton, 29 Ill. App. 54.

Iowa.— Mayes *v.* Turley, 60 Iowa 407, 14 N. W. 731.

Kansas.— Atchison, etc., R. Co. *v.* McFarland, 2 Kan. App. 662, 43 Pac. 788.

Louisiana.— Dirmeyer *v.* O'Hern, 39 La. Ann. 961, 3 So. 132.

Maine.— Stewart *v.* Smith, 98 Me. 104, 56 Atl. 401; Brown *v.* Nourse, 55 Me. 230, 92 Am. Dec. 583; Clark *v.* Pishon, 31 Me. 503.

Massachusetts.— Langdon *v.* Potter, 11 Mass. 313.

Michigan.— Vickery *v.* Beir, 16 Mich. 50.

New York.— Smith *v.* Ludlow, Anth. N. P. 174.

Pennsylvania.— McKimm *v.* Riddle, 2 Dall. 100, 1 L. ed. 306.

South Carolina.— Hutchinson *v.* Bobo, 1 Bailey 546; Brockington *v.* Vereen, 1 Bailey 447; Trapier *v.* Mitchell, 2 Nott & M. 64.

Tennessee.— Glass *v.* Stovall, 10 Humphr. 453.

Texas.— Callahan *v.* Hendrix, 79 Tex. 494, 15 S. W. 593; Dignowitty *v.* Coleman, 77 Tex. 98, 13 S. W. 857; Cheatham *v.* Riddle, 12 Tex. 112.

Vermont.— Clapp *v.* Beardsley, 1 Vt. 168.

West Virginia.— McDonald *v.* Cole, 46 W. Va. 186, 32 S. E. 1033.

Wisconsin.— Ewen *v.* Chicago, etc., R. Co., 38 Wis. 613.

United States.— Yeaton *v.* Lynn, 5 Pet. 224, 8 L. ed. 105; Hodges *v.* Kimball, 91 Fed. 845, 34 C. C. A. 103.

England.— Gidley *v.* Williams, 1 Salk. 37.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1841.

Reason for rule.— Preliminary objections like the denial of plaintiff's right to be heard in court or the want of capacity in either of the parties should be interposed and determined *in limine*. The rules of pleading demand that such defenses should be heard before the merits are reached so as to prevent unnecessary costs and delay. Stewart *v.* Smith, 98 Me. 104, 56 Atl. 401; Clark *v.* Pishon, 31 Me. 503.

The rule applies whether the action be *ex contractu* or *ex delicto*. Hutchinson *v.* Bobo, 1 Bailey (S. C.) 546.

Limitations of rule.— Although a plea of the general issue in a suit by an administrator is an admission of plaintiff's right to sue, the same rule does not apply where the cause is revived in the name of an administrator after the plea has been filed. In such a case the representative character of plain-

the language of the decisions was broad enough to include all causes of action sued on by the representative in his capacity as such and some of them expressly declared that the rule is applicable, although the cause of action arose after decedent's death.[65] There are, however, decisions which recognize a limitation of the rule in certain classes of actions arising subsequent to decedent's death; thus it has been held that if the representative brings an action of trover or detinue counting on his own possession instead of that of defendant he must, whether he sues in his individual or representative capacity, show title in himself to the property sued for, although defendant has pleaded to the merits, and that this can only be done by producing competent evidence of his appointment as executor or administrator,[66] and it has also been held that where an administrator declares in ejectment upon his own seizin, it is essential for him to prove his appointment as such as part of his title in order to make out his case.[67] In an action against an executor or administrator as such if he pleads to the merits plaintiff need not prove his representative capacity.[68]

(2) NATURE OF PLEA. Some decisions consider the plea a plea in abatement.[69] The weight of authority, however, is that it is a plea in bar.[70] The

tiff is in issue in the trial and defendant may disprove it. Vickery *v.* Beir, 16 Mich. 50.

The general issue may be rejected in an action by one suing in a representative capacity if it purports to reserve to defendant the right of denying that plaintiff is administrator. Clark *v.* Pishon, 31 Me. 503.

65. Lowe *v.* Bowman, 5 Blackf. (Ind.) 410; Cheatham *v.* Riddle, 12 Tex. 112; Watson *v.* King, 4 Campb. 272. And see McMillan Marble Co. *v.* Black, 89 Tenn. 118, 14 S. W. 479; Cheek *v.* Wheatly, 11 Humphr. (Tenn.) 556, in which cases it is said that on principle the rule of practice should be uniform and apply in the same manner to cases where the cause of action originated after the death of the testator or intestate.

66. *Colorado.*— Denver, etc., R. Co. *v.* Woodward, 4 Colo. 1.

Georgia.— Macon, etc., R. Co. *v.* Davis, 18 Ga. 679.

Kentucky.— Thomas *v.* Tanner, 6 T. B. Mon. 52; Floyd *v.* Breckenridge, 4 Bibb 14.

North Carolina.— Davis *v.* Taylor, 49 N. C. 499.

South Carolina.— Reynolds *v.* Torrance, 2 Brev. 59.

England.— Marsfield *v.* Marsh, 2 Ld. Raym. 824; Hunt *v.* Stevens, 3 Taunt. 113.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1841.

Admissibility of facts not inconsistent with admission.— Although defendant, by pleading over to the action, admits generally the right of plaintiff to sue as administrator, yet he is not thereby precluded from giving in evidence a fact not inconsistent with that admission, viz., that the administrator has no right to recover because there is an executor. Chew *v.* Travers, 2 Brev. (S. C.) 146.

67. Austin *v.* Downer, 25 Vt. 558; Aldis *v.* Burdick, 8 Vt. 21.

68. *Alabama.*— Espalla *v.* Richard, 94 Ala. 159, 10 So. 137.

Georgia.— Bray *v.* Parker, 82 Ga. 234, 7 S. E. 922.

Louisiana.— Hays *v.* Compton, 19 La. Ann. 434; Cheevers *v.* Burke, 19 La. 429.

Pennsylvania.— Hantz *v.* Sealy, 6 Binn. 405.

South Carolina.— Greenville, etc., R. Co. *v.* Joyce, 8 Rich. 117; Lomax *v.* Spierin, Dudley 365.

Texas.— Tolbert *v.* McBride, 75 Tex. 95, 12 S. W. 752. See also Harris *v.* Harris, 2 Harr. (Del.) 354.

69. Brown *v.* Nourse, 55 Me. 230, 92 Am. Dec. 583; Hummel *v.* Brown, 24 Pa. St. 310; Clapp *v.* Beardsley, 1 Vt. 168; Childress *v.* Emory, 8 Wheat. (U. S.) 642, 5 L. ed. 705.

In an action by two as executors it is a good plea in abatement that one of plaintiffs was not executor; the other only having proved the will and taken out letters testamentary. Call *v.* Ewing, 1 Blackf. (Ind.) 301.

Substituted executor.— The objection that one substituted as executor or one who had died pending suit had not been appointed executrix is waived if not taken by plea in abatement. Murray *v.* Murray, 6 Oreg. 26.

70. *Alabama.*— U. S. Rolling Stock Co. *v.* Weir, 96 Ala. 396, 11 So. 436; Cotton *v.* Ward, 45 Ala. 359; Watson *v.* Collins, 37 Ala. 587; Miller *v.* Jones, 26 Ala. 247; Sorrell *v.* Craig, 15 Ala. 789; Worthington *v.* McRoberts, 7 Ala. 814; Stallings *v.* Williams, 6 Ala. 509.

Arkansas.— Governor *v.* Evans, 1 Ark. 349.

Indiana.— Codding *v.* Whitaker, 5 Blackf. 470.

New York.— Flinn *v.* Chase, 4 Den. 85; Varick *v.* Bodine, 3 Hill 444; Thomas *v.* Cameron, 16 Wend. 579.

North Carolina.— Shown *v.* Barr, 33 N. C. 296.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1838, 1839.

In scire facias to revive in the name of plaintiff as administrator a plea that he is not administrator is a good bar. French *v.* Frazier, 7 J. J. Marsh. (Ky.) 425.

After issues have been joined in an action by administrators, and the case been opened to the jury, defendant cannot plead in abatement that no letters of administration have

reason is that the plea cannot give plaintiff a better writ but defeats the action absolutely by establishing the fact that he is not the representative of decedent.[71] It has been held, however, that if the plea begins and concludes in abatement, it will be considered a plea in abatement.[72]

(3) Requisites and Sufficiency of Plea. A plea not denying the averment that letters of administration were issued but stating facts to show that they should not have been granted is bad on demurrer.[73] So a plea alleging only that defendant was not executor at the time suit was brought is insufficient. It should be alleged that defendant never was executor and that he never administered on any of the goods and chattels belonging to deceased at the time of his death.[74] A plea alleging that plaintiff's intestate was a non-resident at the time of his death and had no effects in the state at that time does not show that the letters are void for want of jurisdiction in the court granting them.[75] It has been held, however, that the allegation that plaintiff has been duly appointed administrator, etc., is put in issue by an answer denying the complaint and "each and every part and portion thereof."[76]

(4) Time of Interposing Plea. It is too late to plead plaintiff's want of representative capacity after pleading to the merits,[77] or after judgment by default.[78]

(5) Evidence Admissible Under Plea. A plea of *ne unques administrator* is a denial only that plaintiff was administrator at the commencement of the suit, and defendant cannot under this plea show the termination of plaintiff's authority as administrator pending the suit.[79] So under this plea questions whether the court granted the letters to the right or the wrong person or acted irregularly in revoking letters issued to defendant and granting letters to plaintiff cannot be considered.[80]

(B) *Plea That Defendant Is Administrator and Not Executor.* Where one who has been executor *de son tort* takes out letters of administration and is afterward sued as executor *de son tort* he may plead in abatement that he is administrator and not executor,[81] but where one who has been sued as executor *de son tort* takes out administration pending suit he cannot plead in abatement that he is administrator and not executor.[82] The fact that defendant is administrator and not executor can only be pleaded in abatement.[83]

been granted to plaintiffs but the matter must then be pleaded in bar. Langdon *v.* Potter, 11 Mass. 313.

71. Sorrell *v.* Craig, 15 Ala. 789; Stallings *v.* Williams, 6 Ala. 509; Governor *v.* Evans, 1 Ark. 349; Thomas *v.* Cameron, 16 Wend. (N. Y.) 579.

72. U. S. Rolling Stock Co. *v.* Weir, 96 Ala. 396, 11 So. 436; Governor *v.* Evans, 1 Ark. 349.

73. Rogers *v.* Duval, 23 Ark. 77.

74. Lively *v.* Ballard, 2 W. Va. 496.

75. Miller *v.* Jones, 26 Ala. 247, in which it was said that the court of probate has jurisdiction to grant letters if property belonging to the estate is brought in the county after intestate's death, although he was not a resident of the state and had no property in the state at the time of his death.

76. Fogle *v.* Schaeffer, 23 Minn. 304, in which it was said that such denial was not confined to the denial of the principal fact on which the complaint is founded, but is equivalent to a denial of each allegation thereof just as though the pleading had traversed the several allegations in detail.

77. *Indiana.*—Scanland *v.* Ruble, 4 Blackf. 481.

Kentucky.— Cox *v.* Robertson, 1 Bibb 604.

Louisiana.— Dirmeyer *v.* O'Hern, 39 La. Ann. 961, 3 So. 132.

North Carolina.— Spencer *v.* Cahoon, 14 N. C. 80.

United States.— Barras *v.* Bidwell, 2 Fed. Cas. No. 1,039, 3 Woods 5.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1840.

After plea of condition performed, replication, rejoinder, and special demurrer in an action of debt on a bond, defendant is not entitled to plead that plaintiff is not executor. Grahame *v.* Cooke, 10 Fed. Cas. No. 5,678, 1 Cranch C. C. 116.

After issue joined on nul tiel record and after the cause is called for trial on that issue defendant will not be permitted to plead that plaintiff was never administrator. Duvall *v.* Wright, 8 Fed. Cas. No. 4,212, 4 Cranch C. C. 169.

78. Cheevers *v.* Burke, 19 La. 429; Barras *v.* Bidwell, 2 Fed. Cas. No. 1,039, 3 Woods 5.

79. Wilson *v.* Bothwell, 50 Ala. 378.

80. Sadler *v.* Sadler, 16 Ark. 628.

81. Clements *v.* Swain, 2 N. H. 475; Rattoon *v.* Overacker, 8 Johns. (N. Y.) 126.

82. Clements *v.* Swain, 2 N. H. 475.

83. Granwell *v.* Sibly, 2 Lev. 190; Harding *v.* Salkill, 1 Salk. 296. *Compare* Shillaber *v.*

(c) *Plea of Termination of Authority Pending Suit.*[84] Where the authority of one suing as executor or administrator determines pending suit by reason of his resignation, removal, or discharge, this fact must be brought to the knowledge of the court by a plea in abatement *puis darrein continuance* or a judgment rendered against defendant will bind him.[85] Suit cannot be dismissed on the mere suggestion that plaintiffs have been removed as administrators.[86] On the other hand if one is sued as executor he may plead *puis darrein continuance* that he has been removed or discharged.[87] This according to some authorities abates the suit,[88] and according to others is a good plea in bar.[89] To take advantage of such facts, it is necessary that they should be pleaded *puis darrein continuance*,[90] in default of which a judgment should be entered on a verdict against defendant.[91]

(II) *PLENE ADMINISTRAVIT* — (A) *Propriety and Necessity of Pleading* — (1) GENERAL PLEAS — (a) AT COMMON LAW. If a personal representative is sued in his individual capacity he cannot plead *plene administravit*. This plea is never appropriate except when he is sued in his representative capacity.[92] Nor is the plea a proper one where a defendant dies when the cause is at issue and his personal representative is brought in to defend,[93] except where the practice is changed by statute.[94] *Plene administravit* is a good defense, when a personal representative is sued in his representative capacity,[95] provided he has done all that the law requires as a protection to him in the payment of debts and lega-

Wyman, 15 Mass. 322, holding that to a scire facias on a judgment against an executor *de son tort* it is a good plea in bar of execution that defendant has taken out letters of administration, that the deceased is insolvent, and that a decree of distribution has been passed in the probate court.

84. **Form of plea setting up revocation of defendant's letter held sufficient** see Morrison *v.* Cones, 7 Blackf. (Ind.) 593.

85. *Ex p.* Jones, 54 Ala. 108; Hall *v.* Pearman, 20 Tex. 168; Yeaton *v.* Lynn, 5 Pet. (U. S.) 224, 8 L. ed. 105. See also Wilson *v.* Bothwell, 50 Ala. 378; Witherington *v.* Brantley, 18 Ala. 197.

Requisites and sufficiency of plea.— An executor or administrator of a solvent estate cannot allege that he has resigned or been removed, or that his letters have been revoked, or his authority has ceased from any cause, in defense to any action or proceeding, without an averment that he has settled his accounts, and delivered over the assets of the estate as required by law; but a plea that, before the commencement of the suit, his authority had ceased, the estate had been declared insolvent, and there was an administrator *de bonis non*, would bar the action, because the appointment of the latter would revoke any former grant of letters, and vest in him the property of the estate. Cogburn *v.* McQueen, 46 Ala. 551.

86. Winslett *v.* McLemore, 6 Ala. 416.

87. *Florida.*— Parkhill *v.* Union Bank, 1 Fla. 110.

Georgia.— Broach *v.* Walker, 2 Ga. 428.

Indiana.— Morrison *v.* Cones, 7 Blackf. 593.

Massachusetts.— Jewett *v.* Jewett, 5 Mass. 275.

Ohio.— Gormly *v.* Skinner, Wright 681.

88. Gormly *v.* Skinner, Wright (Ohio) 681.

89. Parkhill *v.* Union Bank, 1 Fla. 110; Jewett *v.* Jewett, 5 Mass. 275.

90. Weddington *v.* Huey, 80 Ga. 651, 6 S. E. 287; Jones *v.* Hammett, 5 S. C. 41.

91. Weddington *v.* Huey, 80 Ga. 651, 6 S. E. 281.

92. Glisson *v.* Weil, 117 Ga. 842, 45 S. E. 221; Slaughter *v.* McClain, 1 A. K. Marsh. (Ky.) 485.

93. Borden *v.* Thorpe, 35 N. C. 298.

94. See XIV, K, 1, b, (II), (A), (1), (b).

95. Com. *v.* Richardson, 8 B. Mon. (Ky.) 81; Griffith *v.* Com., 1 Dana (Ky.) 270; Clarkson *v.* Com., 2 J. J. Marsh. (Ky.) 19; Peckham *v.* Hoag, 57 Mich. 289, 23 N. W. 818.

Rule in Connecticut.— It was held in an early case that *plene administravit* could not be pleaded in that state (Olcott *v.* Graham, Kirby (Conn.) 246); afterward it was held that an executor *de son tort* might plead it (Olmsted *v.* Clark, 30 Conn. 108); in a later decision the court quoted from Swift's Digest (a commentary on Connecticut law) which says in effect that the plea is available in only one instance — where the whole estate is absorbed in the payment of debts due the estate and the expenses of the last sickness and the funeral, which are preferable debts (Davis *v.* Weed, 7 Fed. Cas. No. 3,658, 44 Conn. 569).

In New Jersey the plea is still a proper one (Haines *v.* Price, 20 N. J. L. 480. And see Speer *v.* Van Houten, 19 N. J. L. 46; Dickerson *v.* Robinson, 6 N. J. L. 195, 10 Am. Dec. 396; Bellerjeau *v.* Kotts, 4 N. J. L. 359), although in consequence of statutory provisions it may not be available under precisely the same circumstances nor to the same extent as at common law (Haines *v.* Price, *supra*). The fact that lands are made liable to the payment of debts of decedent does not affect the validity of the plea where

cies,[96] and may be pleaded even by an executor *de son tort*, thereby exempting himself from liability beyond the extent of the goods which he has administered.[97] So the rule is well settled at common law (subject to a few exceptions which will be hereafter noted) that if he wishes to avail himself of the defense that he has not sufficient assets to satisfy the claim in suit, he must plead *plene administravit*. His failure to make this plea operates as a conclusive admission of assets sufficient to satisfy the claim and he will not afterward be permitted to deny that he has such assets;[98] but he will be ultimately liable to discharge the judgment recovered,[99] his liability being fixed by the presumption that if there had not been assets sufficient he would have pleaded it in the first instance.[1] The rule is, however, subject to the limitation that when from the nature of the proceedings the personal representative has not had the opportunity of making the defense previous to the rendition of a decree against him he has the right to plead fully administered to a scire facias sued out to charge him *de bonis propriis*,[2] and in some decisions it has been held that the rule in equity differs from the rule at law and that in a court of equity assets in the representative's hands must be alleged and if denied or not admitted must be proved.[3] So where there is a suggestion of insolvency it seems that a failure to plead *plene administravit* does not admit assets,[4] and it has been held that unless the declaration alleges that assets came into defendant's hands a plea of *plene administravit* is not necessary.[5]

the lands are not by force of the statute made assets in the hands of the administrators. Haines *v.* Price, *supra*.

If a defendant dies after office judgment and writ of inquiry awarded, his administrator cannot plead *plene administravit* because "after an office judgment in the lifetime of intestate, the defendant cannot plead any plea which the intestate could not have pleaded." Janney *v.* Mandeville, 13 Fed. Cas. No. 7,213, 2 Cranch C. C. 31.

96. Stuart *v.* Carr, 6 Gill (Md.) 430.

Compliance with statute requiring notice. — The plea of *plene administravit* will not protect an administrator, unless he has given the six months' notice to creditors required by statute. Glenn *v.* Smith, 17 Md. 260; Stuart *v.* Carr, 6 Gill (Md.) 430.

97. Olmsted *v.* Clark, 30 Conn. 108; 1 Saunders 265 note.

98. *Illinois.*— Judy *v.* Kelley, 11 Ill. 211, 50 Am. Dec. 455.

Indiana.— Goodwin *v.* Wilson, 1 Blackf. 344.

Maryland.— Evans *v.* Iglehart, 6 Gill & J. 171; Contee *v.* Dawson, 2 Bland 264.

Mississippi.— Howard *v.* Cousins, 7 How. 114; Vick *v.* House, 2 How. 617.

New Jersey — Howell *v.* Potts, 20 N. J. L. 569; Haines *v.* Price, 20 N. J. L. 480; Howell *v.* Potts, 20 N. J. L. 1.

New York —Butler *v.* Hempstead, 18 Wend. 666.

North Carolina.— Parker *v.* Stephens, 2 N. C. 218, 1 Am. Dec. 557.

South Carolina.— Parker *v.* Latimer, 59 S. C. 330, 37 S. E. 918; Huger *v.* Drawson, 3 S. C. 328; Thomas *v.* Dyott, 1 McCord 76.

Tennessee.— Ford *v.* Woltering, 10 Heisk. 203.

Vermont — Sharon First Cong. Soc. *v.* Lovell, Brayt. 113.

England.— Ramsden *v.* Jackson, 1 Atk. 292, 26 Eng. Reprint 187; Rock *v.* Leighton, 1 Salk. 310; Erving *v.* Peters, 3 T. R. 685, 1 Rev. Rep. 794; Skelton *v.* Hawling, 1 Wils. K. B. 258.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1831 *et seq.*

If an administrator suffers judgment by default he cannot afterward, in an action against him suggesting a devastavit, plead *plene administravit* as the default is a confession of assets. Moore *v.* Martindale, 2 Blackf. (Ind.) 353; Goodwin *v.* Wilson, 1 Blackf. (Ind.) 344; Baracliff *v.* Griscom, 1 N. J. L. 195.

Where set-off pleaded.— In an action by an administrator for a debt due the estate if a set-off pleaded by defendant exceeds the debt, the administrator should reply *plene administravit* to the surplus. Mayhew *v.* Flake, 2 Nott & M. (S. C.) 398.

Effect of repeal of statute conferring authority.— Where pending suit against an ordinary who had taken charge of a derelict estate, the statute by virtue of which he acquired authority was repealed, a plea setting up such repeal in abatement was insufficient without a further plea of *plene administravit* or *plene administravit præter*. Strobhart *v.* Norrall, 7 Rich. (S. C.) 140.

99. Howell *v.* Potts, 20 N. J. L. 569; Haines *v.* Price, 20 N. J. L. 480.

1. Vick *v.* House, 2 How. (Miss.) 617.

2. Wray *v.* Williams, 2 Yerg. (Tenn.) 302. And see Dance *v.* McGregor, 5 Humphr. (Tenn.) 428.

3. Stevens *v.* Gordy, 9 Gill (Md.) 405; Dugan *v.* Gittings, 3 Gill (Md.) 138, 43 Am. Dec. 306; Evans *v.* Iglehart, 6 Gill & J. (Md.) 171; Contee *v.* Dawson, 2 Bland (Md.) 264.

4. Ford *v.* Woltering, 10 Heisk. (Tenn.) 203.

5. Sergeant *v.* Ewing, 30 Pa. St. 75; O'Connor *v.* Weeks, 9 Wkly. Notes Cas. (Pa.) 461.

(b) Under Special Statutory Provisions. Statutes in some jurisdictions have modified or abrogated the common-law rule; thus, under statutes providing that neither mispleading nor lack of pleading shall render an executor or administrator personally liable, failure to plead *plene administravit* does not constitute an admission of assets;[6] and in an action on a judgment suggesting a devastavit, defendant may show that he has fully administered, although he failed to plead *plene administravit*.[7] Where by statute the effect of a judgment against a personal representative merely establishes the debt against the estate to be paid in due course of administration and the creditor is not entitled to execution against the representative or the property of decedent, the plea of *plene administravit* is in effect abolished and is neither necessary nor effectual.[8] So where the statute makes it the duty of the administrator to inventory and sell real estate when necessary to pay debts no such plea as *plene administravit* (without showing a dividend) is good except in one particular case — where the privileged debts have absorbed the whole estate.[9]

(2) Special Pleas. Where defendant admits a balance in his hands of a certain sum he must plead specially (*plene administravit præter*) that except such sum he has fully administered,[10] and the same is the case where he sets up the right of retainer of the sum admitted for the payment of other debts to which they are legally appropriated or has paid debts of an inferior nature without notice of plaintiff's claim;[11] but it has been said that these are the only cases in which a special plea of *plene administravit* is necessary.[12] Pleas of this character are appropriate and necessary wherever a general plea of *plene administravit* would be appropriate and necessary, and when made it is erroneous to disregard them.[13]

(B) *Requisites and Sufficiency of Plea.*[14] The plea should allege that defendant had not, at the time of the plea pleaded, nor at the commencement of the suit, nor at any time since, had any of the goods of decedent in his hands as executor or administrator to be administered,[15] and it has been held that this will be suffi-

6. Goodwin *v.* Wilson, 1 Blackf. (Ind.) 344; Howard *v.* Cousins, 7 How. (Miss.) 114; Vick *v.* House, 2 How. (Miss.) 617; Conner *v.* Burd, 1 Leg. Chron. (Pa.) 17.

These statutes apply to executors de son tort as well as to regularly appointed representatives. Hill *v.* Henderson, 13 Sm. & M. (Miss.) 688.

Judgments rendered previous to enactment of statutes.—A statute enacting that no mispleading or lack of pleading shall thereafter render any executor or administrator personally liable does not apply to judgments rendered previously to its enactment. Martindale *v.* Moore, 3 Blackf. (Ind.) 275.

7. Goodwin *v.* Wilson, 1 Blackf. (Ind.) 344.

8. Judy *v.* Kelley, 11 Ill. 211, 50 Am. Dec. 455; Allen *v.* Bishop, 25 Wend. (N. Y.) 414; Butler *v.* Hempstead, 18 Wend. (N. Y.) 666; Parker *v.* Gainer, 17 Wend. (N. Y.) 559; Covington *v.* Burnes, 6 Fed. Cas. No. 3,291, 1 Dill. 16.

Rule in Florida.— Since the statutes in effect excerpt the question of assets by an executor as an issue in suits by creditors to reduce their claims to judgment, that issue and the consequent personal liability or nonliability of the executor and his sureties being postponed to another suit on the judgment recovered in which the issue of assets or no assets is directly made, the pleas *plene administravit* and *plene administravit præter* in suits against an executor to reduce a claim to judgment are nugatory. Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526; Barnes *v.* Scott, 29 Fla. 285, 11 So. 48.

Rule in New York.—Code Civ. Proc. § 1824, expressly dispenses with the necessity of pleading want of assets in actions against executors. Pache *v.* Oppenheim, 84 N. Y. Suppl. 926.

9. Bates *v.* Kimball, 1 Aik. (Vt.) 95.

10. Bassett *v.* Granger, 136 Mass. 174; U. S. *v.* Hoar, 26 Fed. Cas. No. 15,373, 2 Mason 311.

11. U. S. *v.* Hoar, 26 Fed. Cas. No. 15,373, 2 Mason 311.

12. U. S. *v.* Hoar, 26 Fed. Cas. No. 15,373, 2 Mason 311.

13. Clark *v.* Crout, 34 S. C. 417, 13 S. E. 602.

14. **Forms of plea of plene administravit** held sufficent see McKinley *v.* Call, 1 T. B. Mon. (Ky.) 54; Seighman *v.* Marshall, 17 Md. 550; Lee *v.* Beaman, 73 N. C. 410; Fowler *v.* Sharp, 15 Johns. (N. Y.) 323; Potter *v.* Dolan, 19 R. I. 514, 34 Atl. 1116; Noell *v.* Nelson, 2 Saund. 214; Martin Civ. Proc. 389; 3 Chitty Pl. (ed. 1872) 945.

15. Iglehart *v.* State, 2 Gill & J. (Md.) 235; Cogan *v.* Duncan, 23 Miss. 274; Hewlet *v.* Framingham, 3 Lev. 28. See also Reid *v.* Nash, 23 Ala. 733; Gregory *v.* Hooker, 4

cient without a further formal allegation that defendant has fully administered the goods,[16] although this averment is found in the form of plea given by Chitty in his work on pleading.[17] The plea need not allege that there was no real estate of decedent at the time of his death to be administered as it is not assets in the hands of the personal representative,[18] except where so provided by statute. But where this is the case a plea that defendant has fully administered the personal estate will be insufficient.[19] If required by statute or rule of court, the plea should be accompanied by a full and particular account of his administration with a certified copy of the inventory and appraisement.[20] If defendant pleads *plene administravit præter*, it is usual to state some certain sum as the value of the goods, but this allegation is not material and traversable.[21] A plea of *plene administravit* should not conclude to the country but with a verification, but this defect is cured by verdict.[22] If pleaded singly it need not be signed by counsel; otherwise, however, if pleaded with the general issue.[23] If a plea amounts to no more than a plea of *plene administravit* allegations not essential to its validity will be disregarded as surplusage.[24]

(c) *Time of Pleading.* Defendant may in the discretion of the court be permitted to plead *plene administravit* after plea of the general issue,[25] or issue joined,[26] or at any time before judgment, provided plaintiff suffers no disadvan-

N. C. 215. But *compare* Nixon *v.* Bullock, 9 Yerg. (Tenn.) 414, 416, holding that a plea that defendants have fully administered all the goods and chattels, rights and credits of decedent which have come to their hands to be administered, "shall be intended to speak as to the time when the plea is filed," and although informal is good especially after verdict.

Failure to allege that defendant had no goods of defendant ever since the suing out of the writ renders the plea bad. Gewen *v.* Roll, Cro. Jac. 131.

A plea of plene administravit of assets which had come to defendant's hand "in this state" is demurrable because he is chargeable with assets received by him in any part of the world. Conover *v.* Chapman, 2 Bailey (S. C.) 436.

Where a scire facias charges that a certain sum came into defendant's hands as assets, a plea denying that such sum came into his hands but not denying that a less sum, sufficient to pay plaintiff's judgment, came into his hands is bad. Rumbarger *v.* Stiver, 6 Ohio 99.

A plea that the administrator had no assets to pay a judgment against him at the time of its rendition is insufficient in an action against him as administrator for failure to pay such judgment. The plea should either deny that there were assets at any time belonging to the estate or show that they had been applied to claims having a prior right to satisfaction. Cogan *v.* Duncan, 23 Miss. 274.

Allegations of amount disputed or admitted.— Notwithstanding a statute which requires a defendant to make affidavit that his pleas are true and to state the amount of defendant's demand, if anything, admitted to be due or owing, and the amount disputed, the pleas of *plene administravit*, and that the claim has been paid supported by affidavit are sufficient. The statement of the amount due if anything and the amount disputed would add nothing to the meaning of an affidavit explicitly alleging the complete satisfaction of plaintiff's claim. Furthermore it is doubtful whether the statute has any application to executors who seldom have and are not supposed to have personal knowledge of testator's indebtedness. May *v.* Wolvington, 69 Md. 117, 14 Atl. 706.

16. Fowler *v.* Sharp, 15 Johns. (N. Y.) 323, 2 Saund. 221 note 3.

17. See Fowler *v.* Sharp, 15 Johns. (N. Y.) 323, in which it was said that the form of the replication as given by Chitty takes issue on defendant having assets in his hands to be administered on the day of exhibiting the bill; and that this shows that the material and essential part of the plea is the possession of unadministered assets.

18. Potter *v.* Dolan, 19 R. I. 514, 34 Atl. 1116.

19. Brattle *v.* Willard, 4 Fed. Cas. No. 1,815, Smith (N. H.) 374.

20. Willis *v.* Tozer, 44 S. C. 1, 21 S. E. 617; Ford *v.* Rouse, Rice (S. C.) 219.

21. Burr *v.* Baldwin, 2 Wend. (N. Y.) 580, in which it was said that if plaintiff should prove the value of the goods to be more than it is alleged to be he will thereby gain nothing. To entitle him to recover he must prove their value to be more than the sum defendant can retain to satisfy the judgment previously obtained against him.

22. Eppes *v.* Smith, 4 Munf. (Va.) 466.

23. Satterlee *v.* Satterlee, 8 Johns. (N. Y.) 327.

24. Potter *v.* Dolan, 19 R. I. 514, 34 Atl. 1116.

25. Sawyer *v.* Sexton, 3 N. C. 67. But see Martin *v.* Sarles, 4 Cow. (N. Y.) 24.

26. Woolford *v.* Simpson, 3 N. C. 132; Reid *v.* Hester, 1 N. C. 488; Haig *v.* Smith, 1 Brev. (S. C.) 529.

After jury sworn.— Where, after a cause of action taken by appeal to a surrogate

tage by reason of defendant's failure to plead it earlier.[27] He may plead *plene administravit*, although several terms have elapsed, if he alleges that he can show that he had no assets at the time suit was commenced or at any time since.[28] So where the declaration in an action on a judgment recovered against the administrator suggests a devastavit which accrued after rendition of the judgment, the executor may plead a special *plene administravit*.[29] Where a reference is had on a plea of *plene administravit* and a report made charging him with assets, he cannot at a subsequent term be allowed to strike out the plea and plead *plene administravit* anew.[30] So he cannot plead fully administered since the last continuance.[31]

(D) *Time to Which Plea Relates.* Every plea of *plene administravit* must have reference to the commencement of the action or at least to the time of service of the process,[32] in the absence of statutory provisions changing the rule,[33] and he cannot avail himself of voluntary payment of a debt after notice of a writ sued out.[34]

(E) *Joinder of Several Defendants in Plea.* Two administrators may join in a plea of *plene administraverunt*, although their defenses under that plea are different.[35]

(F) *Amendments.* A defective plea of *plene administravit præter* may be amended,[36] and defendant should be permitted to amend his plea by setting up *plene administravit* at any time before trial, if it appears that the plea is not made for delay.[37] So in scire facias against administrators on a judgment against the intestate they should after an agreement that the merits of the original judgment be tried without regard to the pleading be allowed to amend by pleading *plene administravit* and no assets.[38]

(G) *Evidence Admissible Under Plea.* Under a plea of *plene administravit* defendant may show payment of preferred debts, funeral expenses, and expenses of administration,[39] and may give in evidence the record of a judgment confessed by him.[40] He may also give in evidence a debt due himself,[41] and may show that the estate had been settled and distributed in accordance with proceedings under a commission in insolvency.[42] So returns of administrators of legatees who were deceased at the time of the trial charging themselves with sums received from the

court, defendant dies and the cause is revived against his executrix she should be permitted to plead *plene administravit* after the jury is sworn. Ford *v.* Woltering, 10 Heisk. (Tenn.) 203.

27. Sawyer *v.* Sexton, 3 N. C. 67.

28. Sawyer *v.* Sexton, 3 N. C. 67.

29. Ruffin *v.* Pendleton, 2 Wash. (Va.) 184.

30. Wright *v.* Flanner, 64 N. C. 510, because this would give him the benefit of any payments of debts of equal dignity with plaintiff's made by him since his first plea.

31. Smoot *v.* Wright, 1 N. C. 374. And see Hall *v.* Gully, 26 N. C. 345; Collins *v.* Underhill, 4 N. C. 381.

32. White *v.* Arrington, 25 N. C. 166; Gregory *v.* Hooker, 4 N. C. 215; Wilcox *v.* ——, 2 N. C. 484; Smoot *v.* Wright, 1 N. C. 374. See also Reid *v.* Nash, 23 Ala. 733; Hall *v.* Gully, 26 N. C. 345.

33. Bryan *v.* Miller, 32 N. C. 129, holding (under a statute providing that the executor may have nine months to plead and that then he may plead relative to the assets anything which could be pleaded had the suit been instituted at that time) that the plea does not relate to the commencement of the suit or any other point of time prior to that at which the executor is bound to plead after the expiration of the nine months.

34. White *v.* Arrington, 25 N. C. 166.

35. More *v.* Tandy, 3 Bibb (Ky.) 97, holding that the general rule that if two defendants join in a plea sufficient for one and not for the other, the plea is bad as to both, does not apply in a case of a joint plea of *plene administravit* by executors, and that in such plea each is only liable to pay the assets found by the jury to be in his own hands.

36. Parker *v.* Salmons, 113 Ga. 1167, 39 S. E. 475.

37. Chisholm *v.* Anthony, 1 Hen. & M. (Va.) 27.

38. Robeson *v.* Whitesides, 16 Serg. & R. (Pa.) 320.

39. Haines *v.* Price, 20 N. J. L. 480. See also Hickey *v.* Hayter, 1 Esp. 313, 6 T. R. 384, 3 Rev. Rep. 213.

The record of the debts allowed, required to be kept by statute, is competent to support a plea of no assets by the administrator. Seighman *v.* Marshall, 17 Md. 550.

40. Reynolds *v.* Puney, 8 N. C. 318.

41. Sebring *v.* Keith, 2 Hill (S. C.) 340.

42. Potter *v.* Dolan, 19 R. I. 514, 34 Atl. 1116.

executors is admissible.[43] Defendant cannot show under such plea, receipt for payment of money, which payment had been disallowed by the probate court.[44] So he cannot give in evidence outstanding judgments,[45] or the existence of debts of a superior quality,[46] or a deed of trust to prove that certain property is not to be considered as assets;[47] and in an action by a legatee against an executor the executor cannot give in evidence proof that he had equally or proportionately distributed the residue of the personal estate after payment of debts among his several legatees.[48] Under this plea plaintiff may show assets not included in the inventory, or, where there is no inventory returned, may show assets in the hands of the administrator.[49] He may also show waste by the administrator.

(III) *General and Special Statutes of Limitations*—(A) *Necessity of Pleading.* The general rule is well settled that one who desires to avail himself of the defense of the general statutes of limitation must plead them and show affirmatively that he comes within their provisions.[50] This rule applies as well to executors and administrators as to persons sued in their own right,[51] in the absence of some statutory provision to the contrary. But by virtue of statute in a number of jurisdictions a personal representative may avail himself of the general statutes of limitations under the general issue.[52] Nevertheless defendant may plead the statute specially if he elects to do so, and the sustaining of a demurrer to a plea stating a good defense is available error.[53] So unless it clearly appears from the complaint that the cause of action is barred by a special statute of limitations in favor of personal representatives,[54] such statutes like the general statutes of limitations must be specially pleaded to be availed of in the absence of some statute dispensing with the necessity therefor,[55] and even where by virtue of statute a

43. Willingham *v.* Chick, 14 S. C. 93.

44. Union Bank *v.* Parkhill, 2 Fla. 660.

45. Hines *v.* Craig, 12 Fed. Cas. No. 6,518, 1 Cranch C. C. 340.

46. Kerley *v.* West, 3 Litt. (Ky.) 362, in which it was said that it is a general rule that an executor is bound to plead specially every debt or demand of greater dignity belonging to others to protect the assets in his hands.

47. Taylor *v.* Richards, 3 Munf. (Va.) 8.

48. Morgan *v.* Slade, 2 Harr. & J. (Md.) 38.

49. Seighman *v.* Marshall, 17 Md. 550; Marr *v.* Rucker, 1 Humphr. (Tenn.) 348.

50. See, generally, LIMITATIONS OF ACTIONS.

Real estate as well as personal protected by plea.— Where a bill is filed to charge both realty and personalty with decedent's debts a plea of the statute of limitations by the personal representative goes to the defense of both the personal and real estate. It is not necessary that the heirs should also plead it. When the administrator defends the personalty he defends the realty. If a debt does not bind personalty, neither does it bind the realty of a decedent; its defeat as to one is defeat as to the other. Findley *v.* Cunningham, 53 W. Va. 1, 44 S. E. 472.

51. Harrison *v.* Harrison, 39 Ala. 489; White *v.* Judson, 2 Root (Conn.) 301; Cundy *v.* Coppock, 85 Ind. 594; Minzesheimer *v.* Bruns, 1 N. Y. App. Div. 324, 37 N. Y. Suppl. 261.

52. Perrill *v.* Nichols, 89 Ind. 444; Zeller *v.* Griffith, 89 Ind. 80; Purviance *v.* Purviance, 14 Ind. App. 269, 42 N. E. 364; McBride *v.* Ulmer, 30 Ind. App. 154, 65 N. E. 610; Sanders *v.* Robertson, 23 Miss. 389; Wren *v.* Span, 1 How. (Miss.) 115; Martin *v.* Martin, 108 Wis. 284, 84 N. W. 439, 81 Am. St. Rep. 895.

Statutes dispensing with the necessity of special pleading.— The necessity of specially pleading the general statute of limitations is dispensed with by a statute providing that all matters of valid defense except set-off may be given in evidence without any special pleading (Zeller *v.* Griffith, 89 Ind. 80. And see other Indiana cases cited in the preceding paragraph), or by a statute forbidding the allowance of a claim shown to be barred by the statute of limitation (Martin *v.* Martin, 108 Wis. 284, 84 N. W. 439, 81 Am. St. Rep. 895).

53. Niblack *v.* Goodman, 67 Ind. 174.

54. Wise *v.* Hogan, 77 Cal. 184, 19 Pac. 278; Wise *v.* Williams, 72 Cal. 544, 14 Pac. 204; Coney *v.* Horne, 93 Ga. 723, 20 S. E. 213.

A general demurrer will lie where it appears from the petition in a suit on a claim against an estate that the suit was not brought within the statutory period after its rejection. Page *v.* Findley, 5 Tex. 391.

55. Mardis *v.* Smith, 2 Ala. 382; Easton *v.* Somerville, 111 Iowa 164, 82 N. W. 475, 82 Am. St. Rep. 502; Munday *v.* Leeper, 120 Mo. 417, 25 S. W. 381; Stiles *v.* Smith, 55 Mo. 363; Wiggins *v.* Lovering, 9 Mo. 262.

Set-off in suit by administrator.— Where an executor or administrator sues in debt or assumpsit, it is incumbent on him to plead non-presentation of the claim within the statutory time, where the estate he represents is sought to be charged under the plea of set-off. Smith *v.* Huie, 14 Ala. 201.

special plea is not necessary, if the representative prefers to present his defense by special plea instead of giving evidence under the general issue he will be held to the strictness of pleading.[56]

(B) *Requisites and Sufficiency of Plea.* A plea of the general statute of limitations by a personal representative need not allege that decedent was a resident of the state for the statutory period prior to his death.[57] In order that a statute of limitations specially relating to suits against personal representatives shall be available as a defense, a special plea is necessary, or, if the representative elects to plead specially, must set forth facts showing that the representative has complied with its provisions. If the defense relied on is that suit was not brought within the period required by statute, after grant of administration, the plea must show that notice of the grant of administration was given,[58] and in the manner required by statute,[59] unless the requirement in this regard is construed to be merely directory.[60] In alleging the giving of bond it will be sufficient for the plea to state that defendant gave bond to the judge of probate for the faithful administration of the estate according to law without setting out the bond.[61] It is not necessary for the plea to allege that defendant delivered the assets to the distributees or has taken refunding bonds.[62] In an action against a personal representative a plea of the statute of limitations should not notice the period which is in effect added to the period of limitation for bringing suits against personal representatives, the provision for such additional period not being intended to alter the form of pleading.[63]

(IV) *FAILURE TO GIVE NOTICE OF OR PRESENT CLAIM.* The objection that plaintiff has failed to comply with the statutory requirement as to notice or presentment of his claim to the personal representative as a prerequisite to bringing suit thereon cannot be taken by plea in abatement but only by plea in bar, as a compliance with the statute is essential to the right of recovery.[64] Under the

The rule is different in a court of equity; the defense may then be made by plea, answer, or demurrer, and when it is interposed in the one mode or the other, if there are any special circumstances or any reason for excepting the case out of the statute it must be introduced by an amendment to the bill. McDowell *v.* Brantley, 80 Ala. 173; Owens *v.* Corbitt, 57 Ala. 92; Fretwell *v.* McLemore, 52 Ala. 124.

Statutes dispensing with necessity of pleading.—In one jurisdiction it has been held that the necessity of specially pleading statutes of limitations governing suits against personal representatives is dispensed with by statute allowing personal representatives to give in evidence under the general issue any special matter of defense (Sanders *v.* Robertson, 23 Miss. 389; Wren *v.* Span, 1 How. (Miss.) 115); but in another jurisdiction it is held that a statute of this character does not obviate the necessity of a special plea, the view being taken that the object of the statute is to give greater facilities to those sued in another's right and whom the law presumes not to be so conversant with the facts as the original actor in the transaction, and that this reason can have no application in cases where the facts are peculiarly within the knowledge of the personal representative as must be the case when the defense is a failure of presentation of the claim to him within the required time (Mardis *v.* Smith, 2 Ala. 382).

56. Wren *v.* Span, 1 How. (Miss.) 115.

57. Saxton *v.* Musselman, (S. D. 1903) 95 N. W. 291.

58. Wren *v.* Span, 1 How. (Miss.) 115; Munday *v.* Leeper, 120 Mo. 417, 25 S. W. 381; Stiles *v.* Smith, 55 Mo. 363; Wiggins *v.* Lovering, 9 Mo. 262; Ryan *v.* Flanagan, 38 N. J. L. 161.

59. Wren *v.* Span, 1 How. (Miss.) 115.

Plea of notice held sufficient.—It has been held sufficient for an administrator pleading limitations to allege that he posted up notifications of his appointment in public places in a designated town or city without specifying the places. Burditt *v.* Grew, 8 Pick. (Mass.) 108; Sewall *v.* Valentine, 6 Pick. (Mass.) 276.

60. Crabaugh *v.* Hart, 3 Yerg. (Tenn.) 431.

61. Sewall *v.* Valentine, 6 Pick. (Mass.) 276.

62. Goodman *v.* Smith, 15 N. C. 450.

63. Benjamin *v.* De Groot, 1 Den. (N. Y.) 151.

64. Rawson *v.* Knight, 71 Me. 99; Eaton *v.* Buswell, 69 Me. 552.

Sufficient pleas illustrated.—Where, in a suit against executors upon a claim against decedent, plaintiff alleges in his complaint that on the 9th day of December, 1881, his claim duly verified was duly presented to defendants, as executors, for allowance, and defendants "deny that on the ninth day of December, at said city and county, or elsewhere, the claim of the plaintiff for the sum of thirty-six thousand dollars . . . or

statutory provisions of one jurisdiction, it is held that evidence of non-compliance with the statutory requirement may be given either under a special plea or a brief statement under the general issue.[65] And in another jurisdiction it has been held, irrespective of any statutory provisions to that effect, that where the general issue is pleaded plaintiff must in order to entitle himself to a verdict prove that he has exhibited his demand to the personal representative before bringing suit.[66]

(v) *Premature Commencement of Action.* It is a good plea to an action against an executor that the action was commenced within the period during which he is by statute exempt from suit.[67] There is a conflict of authority as to the character of this plea. In one case it has been held a plea in bar,[68] while in another it was considered in the nature of a dilatory plea.[69] After a plea of the statute of limitations by an administrator, in an action against him for a debt of the estate it is too late to urge that the suit was prematurely brought, he never having refused to acknowledge the debts.[70]

(vi) *Filing and Withdrawal of Pleas.* Statutes allowing personal representatives a designated time in which to plead have no application to suits in equity.[71] An administrator should not any more than other defendants be permitted to file additional pleas without showing that the justice of the case requires it, and if no circumstances are shown to prove that he was not culpably negligent his application to file additional pleas should be denied.[72] As a plea of discharge in bankruptcy is a personal defense to be set up by the debtor or his administrator the latter when sued on a claim against his intestate may withdraw a plea of intestate's discharge in bankruptcy.[73] A plea of *ne unques executor* is a plea to the merits within a statute authorizing a defendant on his demurrer being overruled to withdraw the same and plead to the merits.[74]

c. Replication and Rejoinder — (i) *Replication* — (a) *To Plea of Statute of Limitations.* An unanswered plea of the statute of limitations is a *prima facie* bar to a recovery.[75] If a personal representative sues or is sued in his individual capacity, a replication to a plea of the statute of limitations framed on the theory that he sues or is sued in his representative capacity is a departure and is fatally defective on demurrer.[76] Conversely if a personal representative sues or is sued

the claim as in plaintiff's complaint set forth, or the claim upon which this action is founded, or any claim whatever, was duly presented to these defendants for allowance," the denial, although open to criticism, is sufficient to raise an issue. Rowland *v.* Madden, 72 Cal. 17, 20, 12 Pac. 226, 870. So where the complaint alleges that the claim duly verified had been presented, presentation is sufficiently denied by an affirmative allegation in the answer that the claim was not presented or verified as required by answer. Derby *v.* Jackman, 89 Cal. 1, 26 Pac. 610.

When demurrer lies.— Where the statute requires an averment that the claim has been presented in accordance with the statutory requirements, the absence of such averment may be taken advantage of by general demurrer. Maine Cent. Institute *v.* Haskell, 71 Me. 487.

65. Rawson *v.* Knight, 71 Me. 99.

66. Kittredge *v.* Folsom, 8 N. H. 98; Mathes *v.* Jackson, 6 N. H. 105.

67. Ferrand *v.* Walker, 5 Blackf. (Ind.) 424; Carson *v.* Bryant, 2 Brev. (S. C.) 159.

In the District of Columbia and in Maryland in an action against an executor he may be ruled to plead before the expiration of the year after letters granted. Buckley *v.* Beatty, 4 Fed. Cas. No. 2,091, 1 Cranch C. C. 245; Frazier *v.* Brackenridge, 9 Fed. Cas. No. 5,071, 1 Cranch C. C. 203.

68. Ferrand *v.* Walker, 5 Blackf. (Ind.) 424.

69. O'Daniel *v.* Lehre, 2 Strobh. Eq. (S. C.) 83, in which it was said that the long established practice in the courts of equity is not to dismiss the bill but to order plaintiff to pay costs and let the bill stand over.

70. Bird *v.* Pate, 4 La. Ann. 225.

71. Marsh *v.* Grist, 62 N. C. 349, the reason is that courts of equity have peculiar jurisdiction and a course of proceeding subject to be modified by the chancellor to suit the justice of each case.

72. Hulett *v.* Hall, Litt. Sel. Cas. (Ky.) 83.

73. Lee *v.* Eure, 93 N. C. 5.

74. Stallings *v.* Willims, 6 Ala. 509.

75. Vandiver *v.* Hodge, 4 Bush (Ky.) 538.

76. Williams *v.* Moore, 32 Ala. 506; Worden *v.* Worthington, 2 Barb. (N. Y.) 368.

Application of rule.— Where administrators declare in their individual capacity and defendants plead the six years' statute of limitations, to which plaintiff replies that in-

in his representative capacity, a replication to a plea of the statute of limitations, framed on the theory that he sues or is sued in his individual capacity, is bad on demurrer.[77] If plaintiff wishes to avoid the effect of a plea of the statute of limitations by an executor or administrator by showing facts which take the case out of the operation of the statute, such, for instance, as non-administration,[78] or delay at the request of the executor,[79] or that by reason of the statutory exemption of the representative from suit for a designated period after death of decedent or qualification of the administrator the period fixed by the statute of limitations had not expired,[80] a special replication setting up such facts is necessary. If to a declaration for money paid to defendant's use as executor he pleads statutory proceedings to bar creditors, a reply that the money was paid after the time limited for presentation of payment had expired is good without also alleging that assets remained in the executor's hands. It devolves on him to allege want of assets.[81] Where a replication in an action against an administrator avers the pendency of a previous action against defendant's intestate at the time of the latter's death, that such action was brought before the statute of limitations had run, the appointment of commissioners after decedent's death and the presentation of the claim within one year after the death, it sufficiently denies the running of the statute of limitations.[82] To a plea of limitations by an executor of an estate represented insolvent it is not a sufficient answer to say that the estate is solvent and that after the lapse of the statutory period for bringing suit a further time was allowed by the judge of probate for creditors to exhibit and prove their claims, under which the demand in suit was duly proved.[83] A replication to a plea of the statute of non-claim which shows that the demand was not presented within the statutory period is bad on demurrer.[84] Where a statute makes legacies or distributive shares not attached or paid to the person entitled thereto assets for the payment of a ratable proportion of the debts of a creditor who has not presented his claim within the time limited, a replication to a plea setting up his presentation of the claim in suit must allege that there has been a final settlement of the executors' accounts, for until that is done it cannot be determined whether there will be any surplus with which to pay legacies or distributive shares.[85] Variance in immaterial dates as stated in the declaration and in the replication is not such a departure as will sustain a general demurrer.[86]

(B) *To Plea of Plene Administravit.*[87] It is a good replication to a plea of *plene administravit* that defendant has not fully administered the assets which came into his hands,[88] and it is not necessary that the replication should specify

testate died and letters of administration were issued within six years and so the promises were made within six years, is bad on demurrer. Worden *v.* Worthington, 2 Barb. (N. Y.) 368.

77. Worden *v.* Worthington, 2 Barb. (N. Y.) 368; Benjamin *v.* De Groot, 1 Den. (N. Y.) 151; Bedford *v.* Ingram, 5 Hayw. (Tenn.) 155; Hickman *v.* Walker, Willes 27. But see Wilkings *v.* Murphey, 29 Fed. Cas. No. 17,663, Brunn. Col. Cas. 21, 3 N. C. 282, holding that where in an action against an administrator there is a plea of limitations the replication is not defective where it joins a count upon the intestate's promise, and upon that of the administrator to pay the debt of the intestate.

Application of rule.— Where the statute of limitations is pleaded to a count on promises to the testator a replication of a promise to the executor within the statutory period is a departure (Hickman *v.* Walker, Willes 27); and where the declaration counts upon a promise by the testator plaintiff cannot reply to a plea of limitations a new promise made by defendant (Benjamin *v.* De Groot, 1 Den. (N. Y.) 151).

78. Webster *v.* Newbold, 41 Pa. St. 482, 82 Am. Dec. 487.

79. Hubbard *v.* Marsh, 29 N. C. 204.

80. Langford *v.* Gentry, 4 Bibb (Ky.) 468. To the same effect see Hiatt *v.* Hough, 11 Ind. 161. *Contra*, Nelson *v.* Lounsbury, 3 Barb. (N. Y.) 125; Howell *v.* Babcock, 24 Wend. (N. Y.) 488.

81. Wakeman *v.* Paulmier, 39 N. J. L. 340.

82. Walker *v.* Wooster, 61 Vt. 403, 17 Atl. 792.

83. Parkman *v.* Osgood, 3 Me. 17.

84. Clark *v.* Washington, 44 Ala. 291.

85. Cunningham *v.* Stanford, 68 N. J. L. 7, 52 Atl. 374.

86. Wakeman *v.* Paulmier, 39 N. J. L. 340.

87. For form of replication to plea of *plene administravit* see Sanford *v.* Wicks, 3 Ala. 369.

88. Bishop *v.* Hamilton, 4 J. J. Marsh. (Ky.) 548; Johnson *v.* Johnson, 1 Bailey

the assets unadministered.[89] It is not a good replication that decedent at the time of his death was seized of real estate which defendant if necessary could have reduced to assets for the payment of debts, since he has no such power.[90] So a replication to a plea of *plene administravit* which tenders an issue on publication is bad where the statute of non-claim creates a complete bar on omission to exhibit a demand within the specified time whether the administrator dies or does not make publication as required by statute.[91] Where an administratrix sued as such alleges in a plea *puis darrein continuance* that she has fully administered, a replication which seeks a recovery on the faith of the assets received by her as "an administratrix *de bonis non*" after a new grant of administration without joining the co-administrator or co-administratrix *de bonis non* is bad as amounting to a departure.[92] If an administrator pleads fully administered except a certain sum and as to that sets forth judgments confessed by him giving the particulars of each, plaintiff cannot impeach them for fraud except on a special replication.[93]

(c) *To Plea Denying Representative Capacity.* Where by the practice an executor or administrator need not set forth in his declaration specially his title to the office in which he sues or make profert of his letters testamentary or of administration, an executor or administrator suing in that character may properly reply to a plea of *ne unques executor* or *administrator* his special title to that character and make profert of his letters in his replication concluding the same on account of his new matter with a verification.[94] When one was sued as executor of a designated person and he pleaded in abatement that such person died intestate and that letters of administration were afterward granted to defendant a replication alleging that before letters of administration were granted defendant made himself executor *de son tort* is bad on demurrer.[95] Where to a plea by one sued as administrator, denying representative capacity, plaintiff replies that defendant was appointed and qualified as administrator, but refused to pay the claim in suit, although he had sufficient assets and admitted its validity, and there is no rejoinder the only issue presented by the pleading is whether or not defendant was administrator when sued.[96]

(d) *To Other Pleas.* Upon a scire facias issued to show cause why plaintiff should not have judgment to be levied *de bonis propriis* if an administrator plead judgment and no assets *ultra*, replication thereto may be either *nul tiel record*, or assets *ultra*, or *per fraudem*, or any other fact properly triable by jury.[97] Where on a petition for a legacy against an administrator he pleads that the will had been set aside by the probate court and distribution ordered among

(S. C.) 601. See also Sanford *v.* Wicks, 3 Ala. 369.

89. Johnson *v.* Johnson, 1 Bailey (S. C.) 601.

90. Joiner *v.* Sanders, 5 Blackf. (Ind.) 378.

91. Thrash *v.* Sumwalt. 5 Ala. 13.

92. Parkhill *v.* Union Bank, 1 Fla. 110.

93. Bell *v.* Davidson, 13 N. C. 397, holding further, however, that in an action against an administrator where defendant pleads fully administered except a certain sum and as to that sum pleads that he has confessed sundry judgments at a certain term of the court, without giving any particulars of them, plaintiff may under a general replication impeach any judgment offered by the defendant in support of his plea. *Compare* Sherwood *v.* Johnson, 1 Wend. (N. Y.) 443.

94. Ellis *v.* Appleby, 4 R. I. 462.

Conclusion of replication.— Where the plea in a suit by an administrator truly sets forth plaintiff's title as such and impeaches it by alleging that his intestate was not at the time of his death a resident of the town whose court of probate granted to plaintiff his letters, but was at that time a resident of another town in the state named in the plea, and plaintiff in his replication affirms that his intestate resided at the time of his death in the town whose court of probate granted to him his letters and denies that he resided in the town named in the plea he should conclude his replication to the country, notwithstanding he unnecessarily makes profert therein of his letters of administration and states all the particular circumstances attending the grant of them. Ellis *v.* Appleby, 4 R. I. 462.

95. Rattoon *v.* Overacker, 8 Johns. (N. Y.) 126.

96. Barr *v.* Sullivan, 75 Miss. 536, 23 So. 536.

97. Teasdale *v.* Branton, 23 Fed. Cas. No. 13,813, Brunn. Col. Cas. 28, 3 N. C. 377.

his heirs a reply that the revocation by the court was void as being decreed without an issue to try the validity of the will and without notice and proof is good on demurrer.[98] Where an assumpsit against an executor defendant pleads that the testator devised land to plaintiff in satisfaction of his demand and that plaintiff accepted the devise, plaintiff protesting that testator did not make the devise in satisfaction of the demand and that the will was not proved, replies that he did not accept the land devised, the replication is good.[99] Where to an action against an estate, defendant pleads a return of insolvency of the estate pending the action (which by statute is a good defense to all suits against the estate except for designated debts) a replication failing to show how much of the demand sued for is within the excepted class of debts is bad.[1]

(E) *Evidence Admissible Under Replication.* Under a replication to a plea of *plene administravit* that assets have and ought to have come to the administrator's hands plaintiff is entitled to prove a devastavit.[2] So in assumpsit by an administrator where plaintiff to a plea of limitations replies a promise to decedent within the statutory period evidence of a promise to plaintiff is admissible to maintain the replication.[3]

(II) *Rejoinder.* If the replication in a suit against a personal representative is a departure from the declaration plaintiff cannot object that a rejoinder answering it is a departure from the plea because if the rejoinder does depart from the plea the fault lies with plaintiff.[4] Where an executor pleads in bar a devise in satisfaction of plaintiff's claims and a refusal by him to elect whether to take or refuse it and plaintiff replies a refusal to accept and traverses the refusal to elect, a rejoinder that the devise has not been waived is bad for departure.[5] A rejoinder alleging that defendant has assets but not more than sufficient to pay a judgment of a designated amount is not a departure in pleading from a plea of *plene administravit præter* alleging the unadministered assets to be of considerably less value than the sum designated in the rejoinder. An averment of value is a mere matter of form and not traversable.[6]

2. Rules Applicable to Particular Classes of Actions — a. Actions on Claims in Favor of Estate — (I) *Declaration or Complaint.* Where one sues in a representative capacity on a writing purporting to be executed to his intestate a declaration or complaint which fails to show the death of intestate is fatally defective.[7] A count on an indebtedness to decedent with a promise to the representative is good without showing any promise to decedent,[8] and in assumpsit by an administrator *de bonis non*, the promise may be laid to have been made to the former administrator.[9] In a suit on a note or other obligation in decedent's favor the declaration should show non-payment both to decedent and his personal representative or representatives.[10] But it has been held that a general allegation that the note or obligation is due and unpaid is sufficient without specially alleging that the note

98. Quinn *v.* Moss, 12 Sm. & M. (Miss.) 365.

99. Hapgood *v.* Houghton, 8 Pick. (Mass.) 451.

1. Fennell *v.* Patrick, 3 Stew. & P. (Ala.) 244.

2. Seighman *v.* Marshall, 17 Md. 550; Shannon *v.* Denkins, 2 Strobh. (S. C.) 196.

3. Buswell *v.* Roby, 3 N. H. 467. This is based on the peculiar rules of practice in this state and is not in line with the weight of authority.

4. Parkhill *v.* Union Bank, 1 Fla. 110.

5. Hapgood *v.* Houghton, 8 Pick. (Mass.) 451.

6. Burr *v.* Baldwin, 2 Wend. (N. Y.) 580.

7. Phelps *v.* Risk, 4 Ky. L. Rep. 893.

8. Black *v.* Reybold, 3 Harr. (Del.) 528.

9. Sullivan *v.* Holker, 15 Mass. 374.

10. Stallings *v.* Williams, 6 Ala. 509.

In suit by an administrator de bonis non against a debtor of the original intestate, the declaration must state the name of the previous administrator and aver that the money had not been paid to him nor to the original intestate nor to plaintiff. Griffith *v.* Fischli, 4 Blackf. (Ind.) 427; Vanblaricum *v.* Yeo, 2 Blackf. (Ind.) 322.

In an action by a surviving executor for a debt due the testator in his lifetime, the declaration must aver not only that the debt was not paid to plaintiff, but also that it was not paid to the testator nor to either of the co-executors. Buckner *v.* Blair, 2 Munf. (Va.) 336.

has not been paid to deceased.[11] If an administrator acquires a note by assignment in the settlement of the estate and sues on it as administrator it is not necessary to allege that the note is an asset of the estate as this fact is obvious.[12] As an administrator may sue in his own name on a note payable to bearer, although transferred to his intestate during the lifetime of the latter, the complaint need not state the source of his title and if stated it need not be proved.[13] If the cause of action is work done for testator the executor in assumpsit therefor need not set out the contract specially.[14] Where an administrator sues for rent under a statute, vesting him with authority to receive rents in the absence of heirs, a complaint for rent by the administrator alleging that he had authority to and did rent the property is a sufficient allegation of authority under the statute.[15] A declaration alleging that money was received by defendant to the use of decedent in his lifetime and alleging a promise to decedent may be amended so as to allege that the money was received for the use of the administrator and the promise made to her.[16] So it has been held that a defective allegation of a promise to the administrator, although a good ground for demurrer, cannot be taken advantage of after verdict.[17]

(II) *Plea or Answer and Demurrer.* A plea in a suit by executors on a note given to them that the consideration was the sale of testator's title to land to which plaintiffs represented that testator had a right when in fact he had no title thereto is sufficient without an allegation that plaintiffs warranted title and that they knew that the title was not good.[18] In an action of debt by two executors on a note given to them a plea that defendant was appointed executor and qualified will not abate the suit.[19] A statute requiring verification of a plea denying execution of an instrument applies where the declaration alleges that plaintiffs were administrators of a designated person deceased at the time the promises were made and that the promises were made to them personally by that description.[20] To a suit by an executor on a claim due deceased, an answer that defendant had paid deceased the amount due and that it was paid in goods in satisfaction of the claim and so received by deceased is good either as a plea of payment or accord and satisfaction.[21] Where an administrator sues as such on a note payable to him as administrator, it is a sufficient answer that the note is not the property of the estate but the individual property of the administrator.[22] To an action by an administrator for money in defendant's hands, belonging to the estate, a plea that defendant's wards were entitled as distributees to a portion of the estate, without alleging that there were no debts, or what that interest amounted to, presents no defense.[23] To entitle defendant to avail himself of an

11. Cromwell *v.* Barnes, 58 Ind. 20.

12. Dowing *v.* Carr, 38 S. W. 1044, 18 Ky. L. Rep. 979.

A complaint alleging that plaintiff as administrator had indorsed a note and was the legal holder of it and giving a description of the note states facts sufficient to constitute a cause of action. Elliott *v.* Pollitzer, 24 S. C. 81.

13. Sanford *v.* McCreedy, 28 Wis. 103.

14. Peries *v.* Aycinena, 3 Watts & S. (Pa.) 64.

A bill by an administrator to recover the value of certain personalty of decedent's estate sold by plaintiff to defendant alleged that sale of the property was made at such price as could be agreed upon by arbitrators selected, but that before the arbitrators had acted the purchaser declared that he would not abide by their decision. It was not shown that any price was agreed upon or that any inventory or appraisement of the property or any order of court for private sale thereof was made or that either party to the contract was uninformed as to the facts. It was held that the bill was demurrable. Ramey *v.* McCain, 51 Ind. 496.

15. Guynn *v.* Jones, 12 Ind. 486.

16. Stanley *v.* Stanley, 42 Conn. 539.

17. Vandersmith *v.* Washmein, 1 Harr. & G. (Md.) 4.

18. Baker *v.* Baker, 4 Bibb (Ky.) 346.

19. Baker *v.* Baker, 4 Bibb (Ky.) 346, in which it was said by Boyle, C. J., delivering the opinion of the court, that as the note was given to the executors they could only sue thereon in their own right and that consequently a plea that there was another executor could not abate the suit.

20. Adams *v.* King, 16 Ill. 169, 61 Am. Dec. 64.

21. Hart *v.* Crawford, 41 Ind. 197.

22. Harte *v.* Houchin, 50 Ind. 327.

23. Holliday *v.* Strickland, 60 Ga. 150.

approved claim due him from the estate as an offset against the price of property sold him by the administrator, the answer must show that he is the only creditor entitled to the fund in which he seeks to apply the offset, or if other creditors are interested in the fund, it must state the extent and character of such other claims so that the court may determine whether such relief can be allowed.[24] To a suit by an administrator *de bonis non* a plea alleging, first, payment to the administrator who had afterward deposited it with defendant in his own name, and second, that such sum had been paid out on the orders of the administrator is bad as setting up inconsistent defenses.[25] In a suit on a note by an administratrix, an objection that the declaration does not allege to whom the note was made payable or that defendant owes plaintiff as administratrix is not available unless taken by demurrer.[26]

(III) *EVIDENCE ADMISSIBLE UNDER PLEADINGS.* In suits by personal representatives as such they must allege a promise made to decedent in his lifetime to admit proof of that fact,[27] and in an action by an executor to recover money alleged to have been paid by testatrix in her lifetime evidence of payment made by himself after her death is inadmissible.[28] In debt on a judgment by executors, defendants cannot prove under the plea of payment that testator had renounced his interest in certain of defendants' lands and that his devisee had since sold a part thereof.[29] In the absence of a statute providing otherwise, an administrator relying on a new promise to avoid the plea of limitations must insert in the declaration a count on the promise made to himself or to his intestate as the case may be.[30] If an administrator is substituted as plaintiff in an action commenced by his intestate and defendant pleads a set-off of moneys due from plaintiff evidence of an indebtedness of intestate to defendant is inadmissible.[31] An agreement by an administratrix to credit on a note held by her the value of certain work done by the maker should be pleaded as a counter-claim and cannot be interposed as a defense by payment.[32]

b. Actions on Claims Against Estate — (I) *DECLARATION OR COMPLAINT* — (A) *For Money Had and Received.* In assumpsit against an executor for money paid by a cosurety of the testator after his death the declaration should set forth the facts specially.[33] A count for money paid out and expended for the use of a person designated as administrator of another, deceased, is bad because the administrator is personally liable and the declaration should be so drawn.[34] So a count for money had and received by a person designated as administrator of another, deceased, is bad for the same reason.[35] Where an administratrix paid part of a debt for which intestate was liable as surety and after her marriage she and her husband pay the balance she may as administratrix recover the whole of the debt from the principal in assumpsit for money paid by husband and wife as administrators without counting separately for the money paid by the administratrix before marriage.[36]

(B) *For Services Performed.* In a petition to establish a rejected claim for services rendered an estate under contract the administrator must allege the contract, rendition of the services, and that they were for the benefit of the estate, and that the price charged was reasonable.[37]

24. Alford *v.* Smith, 40 Tex. 77.
25. Smith *v.* Culligan, 74 Mo. 387.
26. Osborn *v.* Osborn, 114 Mass. 515.
27. Merritt *v.* Keeler, 75 Mich. 314, 42 N. W. 941; Barnum *v.* Stone, 27 Mich. 332.
28. Turner *v.* Maddock, 3 Gill (Md.) 190.
29. Matlack *v.* Read, 2 Yeates (Pa.) 71.
30. Felty *v.* Young, 18 Md. 163, holding that under the act of 1856, chapter 112, a declaration containing counts for money payable as administrator for money loaned and found due on account stated is sufficient to admit proof of a new promise to the administrator.
31. Lawson *v.* Fischer, 5 Ark. 52.
32. Cook *v.* Cook, 24 S. C. 204.
33. Bachelder *v.* Fiske, 17 Mass. 464.
34. Sibbit *v.* Lloyd, 11 N. J. L. 163. And see Sterrett *v.* Barker, 119 Cal. 492, 51 Pac. 695.
35. Sibbit *v.* Lloyd, 11 N. J. L. 163.
36. Williams *v.* Moore, 9 Pick. (Mass.) 432.
37. Adriance *v.* Crews, 45 Tex. 181.

(c) *Miscellaneous.* No claim other than the one directly covered by the pleading can be proved.[38] In an action on a money claim "due from deceased in his lifetime" a declaration which fails to allege that the money was due plaintiff is defective.[39] If the complaint alleges presentation to and rejection of a claim by an administrator the specific allegation of non-payment is unnecessary as this fact will be presumed from a rejection of the claim.[40] In suits on claims against an estate it is not necessary to allege that there are assets in the hands of the representative.[41] Since the surviving obligor of a joint obligation is primarily liable, a complaint against the executors of his coöbligor must allege the insolvency of the surviving obligor;[42] but an averment that he is entirely insolvent is sufficient without alleging the issue and return unsatisfied of an execution against him.[43] Where a statute provides that an executor or administrator, if the estate be insolvent, may institute suit before a probate court, and by giving notice compel the creditors to exhibit their claims, to be adjudged and paid *pro rata*, and that no suit shall afterward be brought against the executor or administrator, unless plaintiff allege that such executor or administrator has been guilty of fraud, negligence, or waste, such allegation, in a subsequent suit, must be contained in plaintiff's declaration.[44] A count against an executor on the death of testator alleging a promise by one of the executors who was then the only executor who had qualified and that afterward letters were granted to the other executors whereby an action had accrued against both as executors is good.[45] While debt cannot be brought against executors on a simple contract they cannot make the objection after verdict if they plead to the issue.[46]

(II) *Plea or Answer and Demurrer.* *Non est factum* is a good plea in an action against an executor on an obligation of deceased.[47] The general denial

Showing power of executors to make contract.— In an action against executors to recover commissions on the sale of lands under a contract made with them an allegation that defendants are executors of the will of A, independent of the control of the county court, and that there is no restriction in the contract as to the sale of the lands "save that it was requested by defendants that they should be sold as soon as practicable for cash, as provided by the will of defendants' testator, at a fair price," is sufficient on general demurrer as to the power of the executors to make the contract. O'Brien *v.* Gilleland, 79 Tex. 602, 15 S. W. 681.

Amendment.—One suing on a claim against an estate for services rendered may amend his complaint so as to increase the amount sought to be recovered to an amount greater than the claim presented without changing the claim from that originally presented. Field *v.* Field, 77 N. Y. 294.

38. Hurley *v.* Hewett, 87 Me. 200, 32 Atl. 875.

Where the particulars of a claim lie rather within defendant's knowledge than plaintiff's, as where he has acknowledged in writing the receipt from decedent of "various claims" amounting to, etc., to be collected, in a suit on a receipt by the administrator it is enough to set out the claims generally. Moore *v.* Gholson, 34 Miss. 372.

39. Merryman *v.* Ryder, 34 Md. 98.

40. Wise *v.* Hogan, 77 Cal. 184, 19 Pac. 278.

Establishment of claim.— Under a statute providing for the payment by an administrator of claims which have either been admitted by the judge or allowed by the executor plaintiff in an action on a claim founded on a judgment in alleging that the probate court had ordered payment of his demand, alleged a sufficient establishment of his claim and it was immaterial that he did not sufficiently allege a judgment. State *v.* Bowden, 3 Ind. 504.

41. Giles *v.* Perryman, 1 Harr. & G. (Md.) 164; Malin *v.* Bull, 13 Serg. & R. (Pa.) 441.

In suing an executor administering independently in the county court on a claim against the testator it is unnecessary to allege the existence of assets. Smith *v.* Caswell, 65 Tex. 379.

42. Barnes *v.* Brown, 130 N. Y. 372, 29 N. E. 760; Barnes *v.* Seligman, 55 Hun (N. Y.) 339, 8 N. Y. Suppl. 834.

43. Stahl *v.* Stahl, 2 Lans. (N. Y.) 60.

44. Walker *v.* Johnson, 29 Fed. Cas. No. 17,074, 2 McLean 92.

45. Benjamin *v.* Taylor, 12 Barb. (N. Y.) 328, in which it was said that on qualification of the second executor he acquired all the rights and subjected himself to all the liabilities of an executor.

46. Carson *v.* Hood, 4 Dall. (Pa.) 108, 1 L. ed. 762. It will be presumed that everything was done at the trial necessary to support the action, unless the contrary appears of record. Carson *v.* Hood, *supra*.

47. Langford *v.* Frey, 8 Humphr. (Tenn.) 443.

Verification.— Where the complaint is founded on an instrument alleged to have been executed by decedent, the administrator need not deny decedent's signature on oath.

puts in issue the execution of a note by decedent,[48] unless a special plea is required by statute.[49] In an action on a promise of decedent a plea of not guilty by his administrator is insufficient.[50] So in such action a plea of outstanding judgments recovered against testator jointly with other persons must allege that testator was the survivor.[51] Where a claim is not presented to the commissioners of an insolvent estate in accordance with a statute prohibiting suit thereon, unless the claim has been so presented, objection for non-presentation may be taken by plea in bar, or by a brief statement, and need not be taken by a plea in abatement.[52] If the laws of a state give a preference to its citizens in the payment of the debts of the deceased, the representative if sued by a foreign creditor should plead such preference,[53] and if he wishes to avail himself of a statutory provision that suit to establish a money demand against the estate must be brought in the county where the estate is being administered he must in order to assert his privilege state in what county the estate is being administered.[54] Where in an action against an administrator on a former judgment against decedent the complaint did not allege and it did not appear that intestate had any real estate a demurrer to the answer on the ground that it did not state what disposition if any had been made of the real estate is insufficient,[55] and where in such action the answer states the date and terms of the sale of decedent's property by the administrator and alleges that the purchase-money was paid when due, it is not demurrable for failure to state at what time the money was received.[56]

(III) *EVIDENCE ADMISSIBLE UNDER PLEADINGS.* Under a statute permitting a personal representative to give any special matter in evidence under the general issue, an administrator sued on a note executed by decedent need not plead payment specially, but may prove it under the general issue.[57] So under this statute set-off may be shown under the general issue.[58] If, however, a statute requires notice at the time of pleading the general issue that a set-off will be insisted on in evidence, a set-off cannot be given in evidence under the general issue unless such notice is given.[59] In an action against the executor of one of several makers of a promissory note defendant may give in evidence the survivorship of the other makers without pleading it.[60] If the action is based on the promise of decedent a promise by the representative cannot be given in evidence to establish the demand.[61] In an action on a promise of decedent in which the statute of

Heath *v.* Lent, 1 Cal. 410; Knight *v.* Knight, 9 Fla. 283. *Compare* Vincent *v.* Pitman, 1 Mo. 712. But where a statute provides that one sued as maker of a note signed in his name by agent cannot deny the agency, except by plea verified by oath, an administrator denying that an agent had authority to sign his intestate's name to a note must do so on oath. Ellis *v.* Planters' Bank, 7 How. (Miss.) 235.

A rule of court that the execution of the note may be taken as admitted at the trial unless defendant or someone in his behalf shall deny its execution on oath does not apply to executors and administrators, because in no ordinary case would it be possible for a personal representative to set out on oath in specific detail the nature and incidents of a transaction to which his decedent had been a party and to which he was a stranger. Perkins *v.* Humes, 200 Pa. St. 235, 49 Atl. 934.

48. Cawood *v.* Lee, 32 Ind. 44. And see Ruddell *v.* Tynor, 87 Ind. 529; Wells *v.* Wells, 71 Ind. 509.

Waiver of proof of execution.— Where the execution of a note is put in issue by the general denial, proof thereof is not waived by the fact that the administrator allowed it to be read in evidence without objection. Cawood *v.* Lee, 32 Ind. 44.

49. Thornton *v.* Alliston, 12 Sm. & M. (Miss.) 124, holding that where this is the case a special plea is necessary, notwithstanding a statute which permits executors to give any special matter in evidence under the general issue.

50. Morrison *v.* Kelly, 6 Blackf. (Ind.) 224.

51. Douglass *v.* Satterlee, 11 Johns. (N. Y.) 16.

52. Dillingham *v.* Weston, 21 Me. 263.

53. De Sorby *v.* De Laistre, 2 Harr. & J. (Md.) 191, 3 Am. Dec. 555.

54. McKie *v.* Echols, 1 Tex. App. Civ. Cas. § 1282.

55. Lee *v.* Beaman, 73 N. C. 410.

56. Lee *v.* Beaman, 73 N. C. 410.

57. Gray *v.* Thomas, 12 Sm. & M. (Miss.) 111.

58. Herrington *v.* Herrington, Walk. (Miss.) 305.

59. Boyd *v.* Thompson, 2 Yeates (Pa.) 217.

60. Osgood *v.* Spencer, 2 Harr. & G. (Md.) 133.

61. Quarles *v.* Littlepage, 2 Hen. & M. (Va.) 401, 3 Am. Dec. 637. And see Yar-

limitations is pleaded, evidence of a promise made by defendant to pay the claim in suit is not admissible to take the case out of the statute of limitations where the declaration does not allege that the promise was made by him as administrator.[62]

c. Actions by Representative to Set Aside Fraudulent Conveyance of Decedent or Gift Donatio Causa Mortis. In a suit by a personal representative on behalf of creditors to set aside a fraudulent conveyance of decedent the bill must state a case clearly within the statute under which he derives his authority to sue.[63] It must show that suit is brought within the period fixed by statute for instituting suits of this character,[64] that the suit is brought in behalf of creditors,[65] and if the statute requires a request from creditors to bring the suit the bill must also allege such request.[66] So it must state substantially the same facts as the decedent's creditors would have been required to allege if they had sued to set aside the fraudulent conveyance.[67] The bill must show that the conveyance was in fraud of creditors.[68] It should show that there is a deficiency of assets to meet the payment of claims against the estate,[69] or that the estate was insolvent;[70] and if the statute requires a suggestion of insolvency this also must be alleged.[71] It is not a sufficient answer to a suit of this character that other property conveyed by decedent was equally liable with that conveyed to defendant.[72] Where an administrator sues in behalf of creditors to recover a gift made by his intestate in view of death, it sufficiently appears that there are creditors interested in having the property recovered where it is alleged that there are outstanding and

rington *v.* Robinson, 141 Mass. 450, 6 N. E. 382 (holding that where the suit is against defendants in their capacity as administrators their personal liability on the contract sued on cannot be tried under the declaration); Smith *v.* Proctor, 1 Sandf. (N. Y.) 72 (holding that where plaintiff counts on a promise by decedent he cannot recover for services completed after his death, although commenced and conducted before his death).

62. Chapman *v.* Dixon, 4 Harr. & J. (Md.) 527.

63. Crittenden *v.* Basom, 46 Mich. 33, 8 N. W. 573; Boxly *v.* McKay, 4 Sneed (Tenn.) 286; Lant *v.* Manley, 71 Fed. 7.

Suit to avoid sale for fraud practised on decedent.— In an action by an administrator to avoid a sale for fraud practised by the buyer on the intestate, an allegation that the intestate was induced to make the sale in fraud of his creditors does not make the action one by the administrator as trustee for the creditors. Curry *v.* Brockway, 12 Daly (N. Y.) 17.

64. Cox *v.* Hunter, 79 Ind. 590.

65. Boxly *v.* McKay, 4 Sneed (Tenn.) 286.

66. Lant *v.* Manley, 71 Fed. 7.

67. Cox *v.* Hunter, 79 Ind. 590.

68. Threlkel *v.* Scott, 89 Cal. 351, 26 Pac. 879; Cox *v.* Hunter, 79 Ind. 590; Crittenden *v.* Basom, 46 Mich. 33, 8 N. W. 573; Walker *v.* Pease, 17 Misc. (N. Y.) 415, 41 N. Y. Suppl. 219.

Fraudulent intent will not be inferred from facts set out in the complaint that the conveyance was voluntary and that intestate was insolvent. Voluntary conveyance by an insolvent debtor is not necessarily fraudulent. Threlkel *v.* Scott, 89 Cal. 351, 26 Pac. 879. And the general allegation that decedent delivered the deed in escrow for the purpose of distributing the property among his heirs without will or administration and reserving the power to destroy the instruments is not sufficient to show fraud. Crittenden *v.* Basom, 46 Mich. 33, 8 N. W. 573.

Amendments.— Where an administrator sues to set aside certain conveyances by his intestate on the ground that they were procured by fraud he may at the trial be allowed to amend his bill and claim relief on the ground of the insolvency of the estate and that consequently the conveyances were fraudulent as to creditors. Clark *v.* Clough, 65 N. H. 43, 23 Atl. 526.

69. Kellogg *v.* Beeson, 58 Mich. 340, 25 N. W. 300. And see Ackerman *v.* Merle, 137 Cal. 157, 69 Pac. 982; Radabaugh *v.* Silvers, 135 Ind. 605, 35 N. E. 694.

Allegation sufficient to show deficiency.— In an action to set aside an alleged fraudulent conveyance of decedent a complaint is sufficient which alleges that claims allowed against the estate amount to five hundred dollars and claims pending for two hundred and fifty dollars more and that the personal estate is only fourteen dollars without further alleging that the claims are valid (Radabaugh *v.* Silvers, 135 Ind. 605, 35 N. E. 694); and a complaint alleging a deficiency of assets to meet the payment of claims is sufficient, at least in the absence of a special demurrer, without alleging that all the property so fraudulently conveyed was needed to pay the debts and that between the time of the conveyance and the institution of the suit the debtor remained without sufficient property to satisfy the creditors (Ackerman *v.* Merle, 137 Cal. 157, 69 Pac. 982).

70. Boxly *v.* McKay, 4 Sneed (Tenn.) 286.

71. Boxly *v.* McKay, 4 Sneed (Tenn.) 286.

72. Kaufman *v.* Elderd, 154 Ind. 157, 56 N. E. 215.

unpaid claims, which have been duly presented, allowed by the administrator, and approved by the county judge, and that there is no property other than that in possession of defendants out of which they can be satisfied.[73]

d. Actions to Recover Real Estate. In ejectment by an executor the declaration or complaint must show his title to the premises.[74] Where an administrator sues to recover lands from a purchaser holding under the heir at law and seeks to avoid that sale on account of the necessity of paying debts, the debts and the creditors must be set forth in his bill in order that defendant may be put on notice as to the facts on which his property is sought to be condemned.[75]

e. Actions to Foreclose Mortgages. On a bill by an executor to foreclose a mortgage, it must be alleged that the mortgage is part of the estate of decedent.[76] It is not necessary to allege that he is the owner and holder of the mortgage, but it is sufficient that it is in his possession as executor and is on its face made to decedent.[77] If it is sought to foreclose a mortgage given by an executor on testator's property, an allegation that "the will authorized and directed said executor to administer upon said estate without the intervention, order, or advice of any court and to fully execute all its terms and provisions" sufficiently shows that its terms dispense with letters of administration;[78] and his power to make the mortgage is shown where it appears from the complaint that it was decedent's intent that the estate should be administered without the aid of any court, that the executor had performed all the terms and conditions of the will, had executed the note and mortgage, and that his action therein had been fully confirmed by the court.[79] If one suing as executrix to recover the surplus proceeds of a foreclosure sale of property of the estate is without power to maintain such suit, this fact is apparent on the face of the complaint and must be taken advantage of by demurrer or the objection is waived.[80]

f. Actions For Injuries to Land. Where an administrator sues for injuries to decedent's land after his death the facts on which the administrator's right to sue depends must be alleged.[81] In an action by an administrator for injury to decedent's land under a statute vesting him with control thereof during the settlement of the estate an allegation that plaintiff was administrator, etc., and in lawful possession of the land sufficiently alleges that the injury occurred during the settlement of the estate and that the land belongs to the estate of which he was administrator.[82]

g. Suits For Specific Performance. On a bill against an executor and devisees to compel the conveyance of property which testator contracted to convey upon the execution of certain notes performance of conditions precedent on the part of complainants is sufficiently shown by alleging generally that they are ready to execute the notes upon receiving the conveyance.[83] In an action by an executor

73. Bright *v.* Ecker, 9 S. D. 192, 68 N. W. 326.

74. Sturgeon *v.* Underwood, 2 S. W. 655, 8 Ky. L. Rep. 606.

Complaint held sufficient.— In an action for possession of real estate brought by the executors of a will it is sufficient to allege that they have a legal estate in the premises, and are entitled to the immediate possession thereof, and that defendant unlawfully keeps them out of possession. Martin *v.* Spurrier, 23 Ohio Cir. Ct. 110.

75. Seabrook *v.* Brady, 47 Ga. 650.

76. Peck *v.* Mallams, 10 N. Y. 509.

77. Locke *v.* Klunker, 123 Cal. 231, 55 Pac. 993.

78. Miller *v.* Borst, 11 Wash. 260, 39 Pac. 662.

79. Miller *v.* Borst, 11 Wash. 260, 39 Pac. 662.

80. Warfield *v.* Hume, 91 Mo. App. 541.

81. Pott *v.* Pennington, 16 Minn. 509 (holding that the pleading should show that the will purports to devise the land in question since otherwise it would descend to the heirs at law); Forist *v.* Androscoggin River Imp. Co., 52 N. H. 477 (holding that if the administrator's right to sue depends on the insolvency of the estate this fact must be alleged).

82. Smith *v.* Moodus Water Power Co., 33 Conn. 460.

83. Deglow *v.* Meyer, 15 S. W. 875, 12 Ky. L. Rep. 974, in which it was said that it was not necessary to allege an offer to perform by a tender of the notes to executor as he had no power to convey.

Amendment.— A bill against an executor for specific performance defective for failure to allege petitioner's performance of the

to recover on notes given decedent as payments for land purchased a complaint is insufficient which does not show the right of plaintiff to make a deed.[84]

h. Actions Based on Misfeasance or Malfeasance of Personal Representative.[85] A declaration in debt for a devastavit should allege that goods and chattels sufficient to pay the debt had come to the hands of the representative to be administered,[86] and the charges of waste, etc., must be specific. General charges are insufficient.[87] If a distributee seeks to charge an administrator after final settlement, for waste, the petition must allege that there are no creditors and that the property alleged to have been wasted was not applicable to the payment of debts.[88] Where the complaint charges that a co-executor who had been removed purchased stock sued for in his own name with the funds of the estate which he pledged for his own debt, and alleged that such executor and his wife transferred their interest in the stock to plaintiff, the complaint should also allege the date of such transfer.[89] The complaint of the administrator of a life-tenant under a will to recover rents and profits belonging to her, but converted to his own use by one named in the will as executor but who did not qualify as such, need not allege that the estate of testator had been settled and his debts paid.[90] Where an administrator sells land of the estate subject to a mortgage, but fails to take a bond from the purchaser to pay the mortgage as he is required by statute to do, a complaint by the widow against him for damages for neglect to take a bond does not state a cause of action if it fails to allege that the whole property was worth more than the amount of the mortgage.[91] In an action to subject an executor to a penalty for failure to file the will within the time prescribed by statute the declaration need not allege that the omission was intentional,[92] but it must be alleged in the language of the statute that the neglect was without "just excuse made and accepted by the judge of probate for such delay" and a failure to make this allegation is not cured by verdict.[93] In an action to recover property bequeathed to plaintiff and alleged to be unlawfully detained by the executor the answer may properly set up facts showing an excuse for the detention of the property.[94] In an action by an administrator *de bonis non* to recover property alleged to have been illegally sold by his predecessor or, if the sale is valid, to foreclose the statutory mortgage for the price, the bill must allege the amount of money to be recovered or an excuse must be given for not doing so.[95] In

agreement on his part or his readiness and willingness to perform may be amended. Chess' Appeal, 4 Pa. St. 52, 45 Am. Dec. 668.

84. Acton *v.* Walker, 74 S. W. 231, 24 Ky. L. Rep. 2377.

85. For other matters related to this topic see *infra*, XIV, T.

86. Griffith *v.* Com., 1 Dana (Ky.) 270, holding that an allegation that the estate of intestate to a large amount came into the possession or knowledge of the administrator sufficient to pay, etc., is insufficient because he may have knowledge of goods of decedent sufficient to pay the debt and yet be unable to reduce them to possession.

Failure to inventory property.— In a complaint against an executor for neglecting to inventory and sell certain property, it must be expressly averred that the property has come to his knowledge. State *v.* Scott, 12 Ind. 529.

87. Davis *v.* Yerby, Sm. & M. Ch. (Miss.) 508.

Allegation sufficient to show devastavit.— A bill against an administrator averring that he received money arising from a sale of decedent's property, which he did not appropriate to any legal purpose, and that the complainants, who were judgment creditors, made frequent demands on him to pay their claims which he refused after the return *nulla bona* of executions issued on their judgments sufficiently alleges a devastavit without further averring that the assets of the estate were misapplied and wasted by the administrator. Whitfield *v.* Evans, 56 Miss. 488.

In jurisdictions where the civil law obtains an action by a creditor of a testator against his executor charging him with a devastavit without alleging proceedings to compel defendant to exhibit a tableau of distribution cannot be maintained. McGill *v.* Armour, 11 How. (U. S.) 142, 13 L. ed. 638.

88. Foster *v.* Kenrick, 71 Mo. 422.

89. Ruggles *v.* O'Brien, 79 N. Y. App. Div. 641, 79 N. Y. Suppl. 940.

90. Niehaus *v.* Cooper, 22 Ind. App. 610, 52 N. E. 761.

91. Sparrow *v.* Kelso, 92 Ind. 514.

92. Smith *v.* Moore, 6 Me. 274.

93. Smith *v.* Moore, 6 Me. 274.

94. Roberts *v.* Stuart, 80 Tex. 379, 15 S. W. 1108.

95. Prestidge *v.* Pendleton, 24 Miss. 80.

an action against an executor suggesting a devastavit the plea of *nil debet* is good as well as that of not guilty.[96] In trespass *quare clausum* by the widow against the administrator a plea of justification "that he entered to remove the goods of the intestate" must allege that the goods of intestate were on the premises.[97] A bill against an administrator for not collecting accounts alleged to have been solvent at the time he received them cannot be so amended as to include a claim for the balance of the year's support, which had been set aside for testator's children, especially as it had been allowed and approved by the ordinary of the county for that amount.[98] In an action by heirs to recover land illegally purchased by the representative at a sale thereof to pay debts, he cannot without pleading it avail himself of the defense that the heirs were estopped by their conduct from attacking the validity of the purchase.[99]

i. Actions Based on Conversion of or Injuries to Personal Property.[1] If a personal representative brings an action based on the conversion of personal property belonging to the estate the declaration or complaint must describe the property or it will be fatally defective.[2] An allegation that defendant "took and carried away certain chattels of the plaintiff's intestate" sufficiently alleges property in the intestate.[3] So it has been held that the alternative averment that the property was received "by the decedent or by the defendants for his use" is good.[4] A complaint alleging that decedent held in trust for plaintiff certain securities which he bequeathed by his will and that his executors had converted them and, although requested have refused to account to plaintiff for them, states a good cause of action against the executors.[5] A bill for the recovery of bonds deposited to secure the performance by the pledgor of a contract with the pledgee cannot be maintained against the administrator of the pledgee, where it is not alleged that the bonds had ever come into the administrator's possession.[6] In trespass for an injury to personal property, the declarations should allege that the property belonged to plaintiff as administrator, but a complaint which merely alleges that the property belonged to decedent will be good after verdict.[7] An answer in an action by the representative to recover certain property, denying decedent's title to it and asserting a lien should specifically state the nature of the lien,[8] and in an action by an administrator for the conversion of a certain sum of money left by decedent an answer that defendant loaned decedent the identical money described, that decedent's widow took possession of it on his death and told defendant that she would take out letters of administration and requested him to take back the money and deliver to her a note decedent had given therefor, which he did, is insufficient.[9]

j. Actions of Covenant. The declaration in an action by an executor for breach of a covenant real must show a breach in the lifetime of the testator, since otherwise the right of action belongs to the heir.[10] Where there are two covenantees, the administrator of one of them cannot sue for breach of the covenant

96. Archer *v.* Duval, 1 Fla. 255.

97. Finley *v.* Broadwell, 4 J. J. Marsh. (Ky.) 257.

98. Adkins *v.* Hutchings, 79 Ga. 260, 4 S. E. 887.

99. Wood *v.* Nicholls, 33 La. Ann. 744.

1. Form of statement of demand in trover under Indiana statute held sufficient. Davis *v.* Davis, 6 Blackf. (Ind.) 394.

2. Union Trust Co. *v.* Soderer, 171 Mo. 675, 72 S. W. 499.

In an action by an administrator to recover goods belonging to the estate the allegation of the complaint, "bonds to the amount of $2,100, issued by the county of Wilson, State of Tennessee, and known as Wilson county bonds," is not a sufficient description of the bonds. David *v.* David, 66 Ala. 139.

3. Stanley *v.* Gaylord, 10 Metc. (Mass.) 82.

An allegation that the estate owned and possessed the property is equivalent to an allegation that the administrator owned and possessed it. Ham *v.* Henderson, 50 Cal. 367.

4. Gerard *v.* Jones, 78 Ind. 378.

5. King *v.* Lawrence, 14 Wis. 238.

6. Angus *v.* Robinson, 62 Vt. 60, 19 Atl. 993.

7. Hutchins *v.* Adams, 3 Me. 174.

8. Matter of Motz, 5 N. Y. St. 343.

9. Robinson *v.* Isenhower, 47 Ind. 199.

10. Ashby *v.* Moore, 7 J. J. Marsh. (Ky.) 166; Abney *v.* Brownlee, 2 Bibb (Ky.) 170.

without showing in his declaration that the other covenantee is dead.[11] Where one covenants with executors as such they need not in a suit thereon allege their interest in its enforcement as their interest will be assumed.[12] A declaration in covenant against an administrator which barely avers a non-performance by the intestate is insufficient, as he may have died before the time for performance.[13] An executor sued in covenant may under a general plea to the merits, such as covenant performed, give any special matter in evidence, where a statute provides that executors may give any special matter in evidence under the general issue.[14]

k. Actions For Legacies or Distributive Shares. One who sues for a legacy or distributive share need not negative the existence of matters of defense;[15] nor is it necessary to allege that plaintiff had demanded his legacy where it is alleged that the executors have refused to pay it.[16] So it has been held unnecessary to allege that a refunding bond was executed and tendered before suit.[17] The declaration or bill should allege that a surplus sufficient to satisfy the legacy or distributive share remains or will remain after payment of debts of the estate,[18] or that the unpaid claims are barred,[19] especially where the estate has been declared insolvent.[20] So if under the will title to a legacy does not pass to the legatee until the executor has assented thereto his assent or refusal must be alleged, although the estate owes no debts.[21] If suit is brought on a decree of the probate court to recover a legacy, it is not necessary to allege that the executor has it in his possession.[22] If suit is brought by an heir to recover a legacy to the ancestor death of the ancestor must be alleged.[23] And a bill against the administrator of complainant's father to recover the distributive shares of their brothers, alleged to have died during minority, is demurrable no reason being shown why there was no administration on their estates.[24] The complaint need not set forth the will under which the legacy is claimed in an action by the legatee against the administrator and a creditor of the estate in which a fraudulent payment of the creditor's claim is alleged.[25] In an action by a guardian to recover a legacy bequeathed to his ward, the complaint need not allege that the legacy had been paid into the surrogate's court.[26] Where the action is to recover a balance alleged to be due on a legacy an answer setting up that such balance has been paid as a collateral inheritance tax by order of court is not objectionable for failure to state the order to have been duly made.[27] So in such action an answer denying that any demand

11. Waln *v.* Cuthbert, 54 N. J. L. 1, 22 Atl. 1007.

12. Farnham *v.* Mallory, 2 Abb. Dec. (N. Y.) 100, 3 Keyes (N. Y.) 527, 3 Transcr. App. (N. Y.) 171, 5 Abb. Pr. N. S. (N. Y.) 380.

13. Warner *v.* Bledsoe, 4 Dana (Ky.) 73.

14. Martin *v.* White, 1 Stew. (Ala.) 473.

15. Sherwood *v.* Thomasson, 124 Ind. 541, 24 N. E. 334, holding that, in an action by a widow against the administrator of her husband's estate to recover her distributive share, it is not necessary that she should aver that she did not desert her husband and was not living in adultery at the time of his death.

16. Dilley *v.* Henry, 25 N. J. L. 302, in which it was said that a refunding bond may be waived by defendant, and if one is not given he should plead it in abatement if he wishes to object to the action on that ground.

17. Foulks *v.* Foulks, 2 Silv. Supreme (N. Y.) 516, 6 N. Y. Suppl. 112.

18. Norwood *v.* Holliman, 27 Ark. 445; Coulter *v.* Bradley, 30 Ind. App. 421, 66 N. E. 184; Dewitt *v.* Schoonmaker, 2 Johns. (N. Y.) 243.

Limitation of rule.— Where a suit to recover a legacy is based on a decree of the probate court, it is not necessary to allege that the debts of the estate have been paid. This question is *res judicata*. Weeks *v.* Sowles, 58 Vt. 696, 6 Atl. 603.

19. Wright *v.* Dunklin, 83 Ala. 317, 3 So. 597.

20. Wright *v.* Dunklin, 83 Ala. 317, 3 So. 597. And see McMillan *v.* Rushing, 80 Ala. 402.

21. Lester *v.* Stephens, 113 Ga. 495, 39 S. E. 109.

22. Weeks *v.* Sowles, 58 Vt. 696, 6 Atl. 603, this fact is *res judicata*.

23. King *v.* King, 42 Ga. 512.

24. Tuggle *v.* Tuggle, 52 Ga. 475.

25. Bell *v.* Ayres, 24 Ind. 92.

26. Wall *v.* Bulger, 46 Hun (N. Y.) 346, in which it was held that if a proceeding had been instituted before that court for an accounting and to compel defendants to pay this legacy to plaintiff, then payment into that court would doubtless have been a bar to this action; but it would constitute an affirmative defense and would have to be pleaded as such.

27. Kennagh *v.* McColgan, 4 N. Y. Suppl. 230.

has been made for such balance raises an issue which must be tried under a statutory requirement that if after a certain time a personal representative refuses on demand to pay over a legacy an action may be maintained therefor.[28]

l. Actions to Charge Representative Individually. While a promise in writing is necessary in order to charge an executor individually, such written promise need not be alleged in declaring against him.[29] If it is sought to charge an administrator personally on a promise to pay a debt of decedent, in consideration of forbearance by the creditor to sue the estate, an allegation that defendant is administrator of the decedent debtor is surplusage and does not make it necessary to allege that he has assets.[30]

m. Suits For Distribution of Estate. On a bill for distribution, the bill must show that complainants are distributees.[31] If the suit is brought by an administrator and sole distributee, an allegation that decedent died in the county where suit was brought does not give the court jurisdiction, the complaint failing to allege where decedent was domiciled at the time of his death.[32] A bill by an administrator with the will annexed for distribution of the estate according to the provisions of the will is not rendered multifarious by the joinder of legatees who were also debtors and creditors of the estate, with a prayer for a settlement of their accounts, and for a surrender by one of them of papers which he held as agent of testator.[33]

n. Suits Between Personal Representatives. A petition by an administrator *de bonis non* in an action against his predecessor for property not accounted for which alleges the value of the estate which came into defendant's hands as shown by the inventory is sufficient, without setting up the entire inventory of the estate, where the amount paid over to creditors by defendant and the value of the assets turned over to plaintiff are both alleged and from these a balance appears not to have been accounted for.[34] If the basis of the suit is a devastavit in failing to redeem stock belonging to the estate which had been sold under a decree subject to redemption within a designated time, it must be alleged that there were assets in defendant's hands available and applicable for the purpose of redemption and that the proper court order the redemption to be made.[35] If an administrator is appointed to administer on assets left unadministered on the death of the executor and brings suit against an executor of the former executor, the complaint need not allege that assets ever came into defendant's hands.[36] In an action by an administrator *de bonis non* against his predecessor for an alleged conversion of money belonging to the estate defendant cannot show under the general issue payments and expenditures for the estate, as such matter is in confession an avoidance.[37]

o. Proceedings to Sell Lands of Decedent. A bill by an executor asking leave to sell real estate to pay debts must allege that the personal estate is exhausted.[38]

p. Miscellaneous Actions. Where a petition by heirs seeks to revise proceedings in the administration of the estate, it is subject to demurrer, unless a copy of the proceedings complained of is attached thereto.[39] Where an administrator seeks to enjoin a surrogate from disregarding, in a decree on final settlement, certain sealed instruments, executed by the next of kin, releasing him from liabil-

28. Kennagh *v.* McColgan, 4 N. Y. Suppl. 230.
29. Pettigrew *v.* Pettigrew, 1 Stew. (Ala.) 580.
30. Pratt *v.* Humphrey, 22 Conn. 317.
31. Hopkins *v.* Claybrook, 5 J. J. Marsh. (Ky.) 234.
32. Minkler *v.* Woodruff, 12 Nebr. 267, 11 N. W. 296.
33. Triplett *v.* Woodward, 98 Va. 187, 35 S. E. 455.
34. Dwyer *v.* Kalteyer, 68 Tex. 554, 5 S. W. 75.
35. Steel *v.* Holladay, 20 Oreg. 70, 25 Pac. 69, 10 L. R. A. 670.
36. Walton *v.* Walton, 4 Abb. Dec. (N. Y.) 512, 1 Keyes (N. Y.) 15, 2 Abb. Pr. N. S. (N. Y.) 428.
37. Grothaus *v.* Witte, 72 Tex. 124, 11 S. W. 1032.
38. Wiley *v.* Wiley, 63 N. C. 182.
39. Ward *v.* Ward, 1 Tex. Unrep. Cas. 123.

ity for their distributive shares, the complaint must contain averments as to the validity of the releases.[40] In an action by an administrator to set aside a contract with his intestate on the ground of insanity, and to recover money paid thereunder, an allegation that the widow consented to a surrender of the contract, without averment of release or assignment, is not a sufficient ground for omitting to make her a party.[41] Conceding that an administrator who advances his own funds to pay demands against the estate acquires a right of action against the heirs of the intestate, the purpose of the advance should be affirmatively alleged, that the court may determine from the complaint whether it constitutes a sufficient cause of action.[42]

q. Answers in Actions Against Several Personal Representatives. Joint executors must agree as to the mode of conducting suits and cannot file separate pleas which place them in a hostile attitude to each other.[43] Under the statutes of one jurisdiction[44] where an action is brought against several personal representatives, such of them as are first served with process, or first appear, are entitled to answer for the estate, and it is irregular for their co-executors to put in an answer afterward.[45] It has been held, however, that an executor not served, but who has appeared by counsel and participated in a trial of the issues raised by his co-executors and answers, may be allowed upon terms and without prejudice to the proceedings already had to serve a separate answer raising new issues.[46]

L. Evidence — 1. Presumptions and Burden of Proof — a. Presumptions — (i) *In General.* Various presumptions may arise in favor of or adverse to the personal representative, in actions by or against him, depending of course upon the circumstances of the particular case.[47] Thus in the absence of allegation or proof to the contrary it will be presumed that one shown to be at one time an administrator continued in that capacity until the estate was administered by the payment of debts and collection of assets;[48] that he properly performed his duty;[49] that the possession of property of the estate by the representative is

40. Wright *v.* Fleming, 76 N. Y. 517 [*affirming* 12 Hun 469].

41. Riggs *v.* American Tract Soc., 19 Hun (N. Y.) 481, 7 Abb. N. Cas. (N. Y.) 433.

42. McClure *v.* McClure, 19 Ind. 185.

43. Hilligsberg's Succession, 5 La. Ann. 118.

44. N. Y. Code Civ. Proc. § 1817, provides that in actions against two or more personal representatives those first served with process, or who first appear, must answer, and that separate answers by different personal representatives cannot be required or allowed except by direction of the court.

45. Salters *v.* Pruyn, 15 Abb. Pr. (N. Y.) 224, holding further that collusion between plaintiff and the executor who first answers does not give his co-executor the right to answer, at least not without leave of court on a direct application for that purpose.

46. Guernsey *v.* Cheyne, 18 Abb. N. Cas. (N. Y.) 361.

47. **Presumption as to regularity of appointment of personal representative** see *supra*, II, L, 2.

Presumption as to value of land. — Where an administrator who entered on leasehold property of the intestate and received the rents and profits is sued as an assignee of the lease, although it is a good defense that he has no assets, or that the land is not worth the sum due, the presumption is that the land is worth more than the sum demanded. *In re* Galloway, 21 Wend. (N. Y.) 32, 34 Am. Dec. 209.

Heirs are presumed to continue in life until facts are proved from which a different presumption arises, and it is therefore not necessary for an administrator to show affirmatively that his intestate's heirs are living, in order to sustain an action for land conveyed by the intestate conditionally, after the condition is broken. Austin *v.* Downer, 27 Vt. 636.

The fact that previously rendered accounts had been paid by the testator raises no presumption against the allowance of a subsequent account consisting of previous charges, and which is set up as a defense in a suit by an executor against defendant, where it appears that the former accounts were for disbursements only and the latter for services. Merritt *v.* Seaman, 6 Barb. (N. Y.) 330 [*reversed* on other grounds in 6 N. Y. 168].

48. Barr *v.* Sullivan, 75 Miss. 536, 23 So. 772.

49. Jones *v.* Linton, 34 Ga. 429; Sherman *v.* American Cong. Assoc., 113 Fed. 609, 51 C. C. A. 329 [*affirming* 98 Fed. 495], holding that where the bill in a suit by an heir to recover a sum given as a legacy and alleged to have been wrongfully paid to defendant as legatee fails to allege that the payment was not made at the time required by the will, or that an annuity on which such

legal;[50] that a party shown to have had possession of a decedent's property subsequent to his death still has possession;[51] that a demand for payment of a claim has been made, where a special request for delay in payment is made by the representative;[52] and that a delay in payment in such case was in consequence of such request;[53] that property delivered in payment of debts of the estate, and described as property of the estate, belonged to the estate;[54] or that returns and accounts to the court were made by the representative in his representative capacity, where he has no power to make them in any other.[55] But it will not be presumed that the representative performed a wrongful act in dereliction of his official duty, as that he appropriated as assets emblements of the land to which the widow and children were entitled;[56] that he failed to give notice of his appointment where he seeks to use such failure in his own favor;[57] or that there are creditors, in a suit by the representative to assert a right which is good in favor of creditors, but not in favor of heirs.[58] Presumptions in favor of testimony arising from the failure of the opposite party to rebut it, where it is obvious that the means to do so are readily accessible to him, do not hold so strongly against the representative as they might against the decedent, if living, in a matter in which the administrator might be at fault for want of knowledge of facts necessary to enable him to make a full defense.[59]

(II) *As to Settlement of Estate and Payment of Claims.* After the lapse of a considerable length of time, usually twenty years, from the grant of letters, combined with other circumstances, it will be presumed in the absence of evidence to the contrary that all legacies and claims against the estate have been paid,[60]

legacy was conditioned was not duly paid, there is a presumption that such payment was properly made.

In an action for the amount of a book-account for goods furnished to an administrator who represents two undivided estates, plaintiff is not bound to prove that the goods were properly applied, or in what proportion they were divided between the two estates, as it is to be presumed that the representative applied them to the purposes for which they were purchased. Jones *v.* Linton, 34 Ga. 429.

50. Tuskaloosa Cotton-Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635; Butt *v.* Clark, 23 Ind. 548, holding that where the complaint in an action against an administrator avers that he has taken possession of real estate of the decedent it will be presumed that it was a legal possession.

51. Howell *v.* Howell, 37 Mo. 124, holding this to be true in an action under Mo. Rev. Code (1865), p. 13, § 7, for the recovery of goods of a decedent which had been embezzled.

In a proceeding to recover personal property belonging to the estate of a decedent, of which defendant had taken possession and which he had delivered to others, claiming to have done so in accordance with decedent's wishes, the burden is on defendant to show that the property is not under his control; and where he gives no evidence that he sought to regain the property after he became aware that his action was illegal, and a finding that the property would have been restored to him on request is warranted by the evidence, the property will be considered under his control. Matter of Nickerson, 5 N. Y. Suppl. 841, 2 Connoly Surr. (N. Y.) 6.

Possession prior to decedent's death.— The fact that the legatee had his legacy in his possession prior to the decedent's death affords no conclusive evidence that he had it in his possession at the time of the decedent's death, and in an action therefor the burden is upon the personal representative to show that the legatee had possession at the latter time. Enders *v.* Enders, 2 Barb. (N. Y.) 362.

52. Farmers', etc., Bank *v.* Leath, 11 Humphr. (Tenn.) 515.

53. Farmers', etc., Bank *v.* Leath, 11 Humphr. (Tenn.) 515.

54. Williams *v.* Troop, 17 Wis. 463.

55. Stewart *v.* Richardson, 32 Miss. 313.

56. Tucker *v.* Murphy, 71 Ind. 576.

57. Aiken *v.* Morse, 104 Mass. 277.

58. Bradshaw *v.* Mayfield, 18 Tex. 21.

59. Chandler *v.* Meckling, 22 Tex. 36.

60. Jones *v.* Brevard, 59 Ala. 499; Langworthy *v.* Baker, 23 Ill. 484 (holding that after a lapse of twenty-seven years a claim against an estate will be presumed to have been satisfied unless the laches is explained, even though the administrator does not plead the statute); Shearin *v.* Eaton, 37 N. C. 282; Peters' Appeal, 106 Pa. St. 340. And see, generally, PAYMENTS.

Presumption of payment of claims and of settlement of accounts as affecting time for distribution see *supra*, XI, E, 6.

A citation on executors to settle their accounts issued at the instance of a legatee within twenty years from the time his legacy became payable is a claim of such legatee and hence will constitute a bar to the presumption of payment in an action to recover the legacy. Foulk *v.* Brown, 2 Watts (Pa.) 209.

and that the estate has been fully settled and distributed by the executor or administrator.[61]

b. Burden of Proof — (i) *In General.* The general rule that the burden of proof is on whoever has the affirmative of an issue as determined by the pleadings, or by the nature of the investigation [62] applies to actions by or against a personal representative.[63] Thus in an action against the personal representative the burden is upon plaintiff to establish all facts necessary to prove his claim,[64]

The presumption of payment of a judgment quando acciderint from lapse of time is rebutted by a statement that no assets have ever come to the representative's hands. Austin *v.* Tompkins, 3 Sandf. (N. Y.) 22.

61. Bass *v.* Bass, 88 Ala. 408, 7 So. 243; Austin *v.* Jordan, 35 Ala. 642; Hooper *v.* Howell, 52 Ga. 315. See *infra*, XV, B, 3, b.

A distributive share will be presumed to have been paid after the lapse of twenty years from the time it was demandable (Com. *v.* Snyder, 62 Pa. St. 153); and this presumption is not rebutted by the settlement of an administration account showing a balance, that being no admission that the amount is in the hands of the accountants and that it has not been paid over (Com. *v.* Snyder, *supra*).

The fact of administration is sometimes presumed from lapse of time in order to protect *bona fide* holders of the decedent's property (Woolfolk *v.* Beatly, 18 Ga. 520) but not where the records furnish no evidence that administration had been granted (Gardner *v.* Cumming, Ga. Dec. 1).

62. See Evidence, 16 Cyc. 926 *et seq.*

63. See Buford *v.* Shinkle, 12 Ky. L. Rep. 686 (holding that in an action by an administrator to recover certain property alleged to belong to the estate, where defendant alleges a purchase from the decedent a short time before his death, the burden is on him to establish title); Smith *v.* Loafman, 145 Pa. St. 628, 23 Atl. 395.

In a suit on a note payable to plaintiff as administrator where plaintiff was so described in the writ, the burden of showing that the note was a debt due to the estate of plaintiff's intestate is on defendant, if he wishes to enforce a set-off in the same right. Lovell *v.* Nelson, 11 Allen (Mass.) 101, 87 Am. Dec. 706.

Where in ejectment against devisees the latter claim title on the ground that they are also heirs of the deceased, that fact must be affirmatively proved and will not be inferred from the fact that they are near relatives of the deceased, unless it be shown that no nearer relatives survive him. Hunt *v.* Payne, 29 Vt. 172, 70 Am. Dec. 402.

64. *California.*— Barthe *v.* Rogers, 127 Cal. 52, 59 Pac. 310 (holding also that if plaintiff's evidence fails, defendant is entitled to submit the case on claimant's testimony, rather than move for a nonsuit); Lichtenberg *v.* McGlynn, 105 Cal. 45, 38 Pac. 541.

Illinois.— Edwards *v.* Harness, 87 Ill. App. 471.

Indiana.— See Stanley *v.* Pence, 160 Ind. 636, 67 N. E. 441, 66 N. E. 51.

Maine.— Goodell *v.* Buck, 67 Me. 514, holding that to maintain a bill against an administrator of an insolvent estate for property received by him, on the ground that it was held by his intestate in trust for plaintiff, the burden is on plaintiff to identify the property claimed as held by the intestate in trust for him.

Michigan.— See Blakley *v.* Cochran, 117 Mich. 394, 75 N. W. 940, holding that a claimant against an estate upon a note need not show affirmatively, where he was agent for the decedent for several years before her death, that he had properly accounted to her as to all matters between them, as the failure so to account is matter of defense.

Missouri.— State *v.* Collier, 15 Mo. 293, holding that in an action against an administrator *de bonis non*, the onus is upon plaintiff to show the amount of assets that went into his hands and his failure to account for them.

Pennsylvania.— Foulk *v.* Brown, 2 Watts 209.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1862.

Action on promise of representative.— Where in assumpsit under plea of limitations, plaintiff proved that defendant administrator, in answer to demand for payment, said he thought the debt had been paid, but if it was correct, it should be paid, he must also prove the debt before he could avail himself of the promise. Kent *v.* Wilkinson, 5 Gill & J. (Md.) 497.

In an action by heirs against a personal representative for devastavit, the burden is on the heirs to show an injury to themselves as heirs. Herbert *v.* Harbert, (Tex. Civ. App. 1900) 59 S. W. 594.

In a suit for payment for services to the decedent the burden is on plaintiff to show that they were furnished as a consideration for a legal obligation. Johnson *v.* Kimball, 172 Mass. 398, 52 N. E. 386. See Williams *v.* Williams, 132 Mass. 304.

In an action for the payment of a legacy plaintiff must show either by proof or admissions of executors that there are sufficient assets to pay the legacy after payment of debts, funeral charges, etc. (Bush *v.* Cunningham, 37 Ala. 68; Stevens *v.* Gordy, 9 Gill (Md.) 405); and where by the terms of the bequest a debt due to the legatee from the testator is to be deducted therefrom, he must also show the amount of the indebtedness to him (Bush *v.* Cunningham, *supra*).

A bank deposit standing in the name of the decedent will be presumed to be his, and the burden of proof is upon the person claiming a title thereto adverse to the representative. Staib's Estate, 11 Pa. Super. Ct. 447.

and upon the representative to prove all matters relied upon by way of defense.[65] If the action is against the representative for a neglect or breach of trust or duty, the burden is generally on plaintiff to prove such neglect or breach;[66] but where the action is for failure to collect debts due the estate it is incumbent upon the representative to prove that he used reasonable diligence and prudence in attempting to make the collection.[67] Under statutes providing that no action shall be brought on a claim not presented to the personal representative within a certain time, it is held in some jurisdictions that inasmuch as presentation is essential to the creditor's right of recovery, he must on the plea of the general issue affirmatively prove presentation as a part of his case, although he does not allege it.[68] In other jurisdictions, however, it is held that where the representative sets up such statute as a bar to the claim he must show that the time limited by statute has expired and that he had advertised according to law.[69]

(II) *As to Fact of Payment.* Where in an action upon a claim against a decedent's estate plaintiff has proved the existence of his debt within the period of statutory limitation, he need not prove non-payment, although he alleges it;[70]

65. Edwards *v.* Daley, 14 La. Ann. 384, holding that where an administrator of one upon whom an order for funds in his hands was given contests the consideration of such an order, the burden is on him to establish want of consideration.

A want of assets to pay a claim when relied upon as a defense by the representative must be proved by him. Troy Bank *v.* Topping, 13 Wend. (N. Y.) 557 (holding that a note given by the representative *prima facie* imports a sufficiency of assets and the burden is upon him to show that there was in fact a deficiency); McSorley *v.* Leary, 1 N. Y. Leg. Obs. 410.

On the issue of devastavit and where the representative fails to plead *plene administravit* the burden is on him to show that assets formerly in his hands were taken away from him without his fault or that without fault he failed to realize on them. Parker *v.* Latimer, 59 S. C. 330, 37 S. E. 918.

66. Gadsden *v.* Jones, 1 Fla. 332; Johnson's Estate, 11 Phila. (Pa.) 83.

The burden of proving maladministration by administrators is on the one who charges it, except that when the administrators admit, or it is shown that they have received, assets, they must account for or produce them. Ladd *v.* Stephens, 147 Mo. 319, 48 S. W. 915.

67. Peytavin's Succession, 7 Rob. (La.) 477; Longbottom *v.* Babcock, 9 La. 44; Collins *v.* Andrews, 6 Mart. N. S. (La.) 190.

68. Amoskeag Mfg. Co. *v.* Barnes, 48 N. H. 25; Kittredge *v.* Folsom, 8 N. H. 98; Mathes *v.* Jackson, 6 N. H. 105. *Compare* Pepper *v.* Sidwell, 36 Ohio St. 454.

An allegation that a verified claim was presented to the representative in accordance with the statute and rejected by them is material and must be proved. Rowland *v.* Madden, 72 Cal. 17, 12 Pac. 226, 870.

69. Clark *v.* Sexton, 23 Wend. (N. Y.) 477 (holding that to subject a creditor to the short limitation of six months created by the statute concerning executors and administrators, it is incumbent upon the latter to show the publication of notice to creditors to come in); Cox *v.* Cox, 84 N. C. 138; Gilliam *v.* Willey, 54 N. C. 128.

Burden of proving general statute of limitations see LIMITATIONS OF ACTIONS.

To establish the bar of the statute of non-claim all the elements of notice of letters of administration must be specially proved. Loder's Estate, 5 Pa. Co. Ct. 276.

In Iowa it has been held that the burden is on defendant representative who pleads such statute to establish the bar, as the plea is an affirmative one. McConaughy *v.* Wilsey, 115 Iowa 589, 88 N. W. 1101. But this case seems to be based on McDonald *v.* Bice, 113 Iowa 44, 84 N. W. 985, in which it was held that the burden of proving the general statute of limitations is on defendant pleading it.

In Alabama it has been held that where an issue is joined by general replication to a plea of the statute of non-claim, the burden is on plaintiff to show that he presented his claim within the time limited by such statute (Mitchell *v.* Lea, 57 Ala. 46; Evans *v.* Norris, 1 Ala. 511); but where plaintiff replies specially to such plea, that the advertisement was not made by defendant within the proper time after administration granted, such replication, as it would admit that no presentation had been made, would present a new issue, the affirmative of which would be cast on defendant (Evans *v.* Norris, 1 Ala. 511).

70. Hurley *v.* Ryan, 137 Cal. 461, 70 Pac. 292; Melone *v.* Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127 (holding that an allegation of non-payment of a debt, although necessary to make the complaint perfect, need not be proved); Matter of Rowell, 45 N. Y. App. Div. 323, 61 N. Y. Suppl. 382; Kartoghian *v.* Harboth, (Tex. Civ. App. 1900) 56 S. W. 79.

In an action for compensation for services rendered to the decedent where plaintiff has proven the rendition of such services and their value, he is not required to prove non-payment. Ralley *v.* O'Connor, 71 N. Y. App. Div. 328, 75 N. Y. Suppl. 925 [*affirmed* in 173 N. Y. 621, 66 N. E. 1115]; Hicks-Alix-

but the burden of proof is upon defendant representative to prove payment of the claim, where such defense is relied upon.[71]

(III) *In Actions on Written Instruments.* Under some statutes it is held that the general rule that in an action on a note or other written instrument plaintiff is not bound to prove its execution unless denied by proper plea[72] applies to actions against a personal representative on notes or instruments executed by decedent.[73] Under other statutes, however, it is held otherwise; and that such note or instrument cannot be admitted in evidence until plaintiff has proved its execution by the decedent, although not denied by a proper plea.[74] But where the execution of a note by the decedent is proved a consideration therefor is presumed,[75] and the burden of proving want of consideration is on defendant representative.[76] In an action against an estate for the amount of a note given by defendant as representative, the burden is upon plaintiff to show that the cause of action arose upon a contract made by the decedent in his lifetime, that the original claim or debt was not extinguished by the acceptance of the note, and that there was an assignment to him of the original claim to the extent of the note.[77]

(IV) *On Plene Administravit and No Assets.* Where in an action against a personal representative the latter pleads no assets and *plene administravit* and an issue is joined thereon, the burden is on plaintiff to show assets unadministered in defendant's hands at the time the action was commenced, applicable to the payment of his claim;[78] to produce a copy of the inventory of

anain *v.* Walton, 14 N. Y. App. Div. 199, 43 N. Y. Suppl. 541.

71. Hurley *v.* Ryan, 137 Cal. 461, 7 Pac. 292; Melone *v.* Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127; Griffith *v.* Lewin, 125 Cal. 618, 58 Pac. 205; Best *v.* Best, 74 S. W. 738, 25 Ky. L. Rep. 93 (holding that in an action by an administrator to have a claim for board and nursing furnished a decedent ascertained, the administrator has the burden of proving payment of the board when it is shown that the claimant furnished it to the decedent); Lerche *v.* Brasher, 104 N. Y. 157, 10 N. E. 58; Matter of Rowell, 45 N. Y. App. Div. 323, 61 N. Y. Suppl. 382. And see, generally, PAYMENTS.

The promise to pay, implied from valuable services rendered to a decedent, must be answered by satisfactory affirmative evidence that they were gratuitously rendered before the right of the claim can be defeated. Matter of Oatman, 5 N. Y. Leg. Obs. 378. See Guild *v.* Guild, 15 Pick. (Mass.) 129 *quære.*

72. See COMMERCIAL PAPER, 8 Cyc. 216.

73. Knight *v.* Knight, 9 Fla. 283; Foster *v.* Nowlin, 4 Mo. 18.

In an action on an official bond signed by the decedent the acknowledgment of the bond as provided for by statute is *prima facie* evidence of the signature and execution of the bond and plaintiff need not introduce extrinsic proof of the decedent's signature, unless defendant introduces evidence to overcome the *prima facie* proof of execution made by the acknowledgment. Ramsey *v.* People, 197 Ill. 572, 64 N. E. 549, 90 Am. St. Rep. 177 [*affirming* 97 Ill. App. 283].

74. Smith *v.* King, 88 Iowa 105, 55 N. W. 88; Perkins *v.* Humes, 200 Pa. St. 235, 49 Atl. 934; Campion *v.* Schinnick, 93 Wis. 111, 67 N. W. 11.

In Indiana it is held that the statute (Thornton Rev. St. § 369) requiring the execution of written instruments to be denied under oath does not apply in an action against a personal representative upon a note executed by the decedent; and that, in order that a plaintiff may recover upon such a note, the burden is upon him to prove its execution by the decedent, although the representative does not deny its execution under oath. Ruddell *v.* Tyner, 87 Ind. 529; Wells *v.* Wells, 71 Ind. 509; Cawood *v.* Lee, 32 Ind. 444; Barnett *v.* Cabinet Makers' Union, 28 Ind. 254; Mahon *v.* Sawyer, 18 Ind. 73; Riser *v.* Snoddy, 7 Ind. 442, 65 Am. Dec. 740; Bowen *v.* O'Hair, 29 Ind. App. 466, 64 N. E. 672 (holding that where an administrator in an action against him on a note alleged to have been given by his decedent, defends without answer, as is authorized by Horner Rev. St. (1901) § 2324, in cases where no counter-claim or set-off is relied upon, plaintiff must prove the execution of the note); Kennedy *v.* Graham, 9 Ind. App. 624, 35 N. E. 925, 37 N. E. 25.

75. See COMMERCIAL PAPER, 8 Cyc. 222 *et seq.*

76. Thompson *v.* Thompson, 140 Cal. 545, 74 Pac. 21. And see COMMERCIAL PAPER, 8 Cyc. 225.

77. Cary *v.* Gregory, 38 N. Y. Super. Ct. 127.

78. *Kentucky.*—Wallace *v.* Barlow, 3 Bibb 168.

Maryland.— Morgan *v.* Slade, 2 Harr. & J. 38.

New York.— Vultee *v.* Rayner, 2 Hall 407; Bentley *v.* Bentley, 7 Cow. 701. But see Platt *v.* Robins, 1 Johns. Cas. 276, 1 Am. Dec. 110, holding that a plea of *plene administravit* is an affirmative plea and therefore it is incumbent on defendants to show that they had fully administered according to the

the estate from the public records, if he wishes thereby to charge the administrator with assets;[79] and to show notice of his claim by the representative before distribution.[80]

(v) *As to Necessity of Proving Representative Capacity.* Except so far as the pleadings or special circumstances may have shown a waiver of such proof,[81] a personal representative who brings an action should prove his appointment as part of his title, and to substantiate his right of action,[82] unless the cause

inventory which they were bound to make when they assumed the administration.

North Carolina.— Ray *v.* Patton, 86 N. C. 386; McKeithan *v.* McGill, 83 N. C. 517.

South Carolina.— Shannon *v.* Dinkins, 2 Strobh. 196.

Tennessee.— Gilpin *v.* Noe, 9 Heisk. 192. And see May *v.* Wright, 1 Overt. 385.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1863.

Order of proof.— Upon such issue the representative begins by showing that he has administered something and then the burden of proof is upon plaintiff to show by inventory or otherwise assets to a greater amount than is prudent to be administered. Anonymous, 3 N. C. 14.

79. Vultee *v.* Rayner, 2 Hall (N. Y.) 407, holding this to be true where plaintiff objected to the administrator's introducing evidence before he had produced such an inventory.

80. Willingham *v.* Chick, 14 S. C. 93, 95, in which Wallace, J., says: "If a plaintiff comes into court and establishes his claim, and the executor pleads *plene administravit*, and that all funds have been paid out, and his accounts balanced, if he satisfies the jury that he has fully administered, unless notice of the claim be brought home to him, he is entitled to a verdict. If, however, such notice be brought home to him, the plea of *plene administravit* is no answer; but it is incumbent upon the plaintiff to show that he had such notice."

81. See *supra*, XIV, A, 1, b, (I), (A), (1), (b).

Where the granting of letters of administration to plaintiff is admitted, the onus is on one disputing his title to show that the court making the appointment had no jurisdiction. Welch *v.* New York Cent. R. Co., 53 N. Y. 610.

82. *Illinois.*— When the representative character of an administrator is put in issue, he will be required to exhibit a copy of the letters of administration authenticated as the act of congress directs, together with the certificate of the proper officer that the same were granted in pursuance of, and conformable to, the laws of the state in which they were granted. Collins *v.* Ayers, 13 Ill. 358.

Louisiana.— To sustain an order of seizure and sale at the suit of the administrator of a succession, authentic evidence of plaintiff's appointment as administrator is necessary. De Brueys *v.* Freret, 18 La. Ann. 80; Landry *v.* Landry, 12 La. Ann. 167.

New York.— Ketchum *v.* Morrell, 2 N. Y. Leg. Obs. 58, holding that in an action by a public administrator, he must, to substantiate his right of action, adduce evidence of his special character.

North Carolina.— Kesler *v.* Roseman, 44 N. C. 389.

Ohio.— Matter of Dunham, 8 Ohio Cir. Ct. 160, 4 Ohio Cir. Dec. 325.

South Carolina.—Kerby *v.* Quinn, Rice 264; Browning *v.* Huff, 2 Bailey 174.

Texas.— Under Paschal Dig. Art. 1286, prescribing the evidence necessary to make proof of the appointment and qualification of an executor and administrator, if on the trial of an action the authority of an executor or administrator be denied he must produce his letters of administration, duly signed and sealed, or if lost then the certificate of the clerk that such letters have issued. Werbiskie *v.* McManus, 31 Tex. 116.

Vermont.— Austin *v.* Downer, 25 Vt. 558; Aldis *v.* Burdick, 8 Vt. 21.

Wisconsin.— Wittmann *v.* Watry, 37 Wis. 238.

United States.— Campbell *v.* U. S., 13 Ct. Cl. 108.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1864.

But see Wetzell *v.* Waters, 18 Mo. 396, in which it was held that a public administrator is regarded like any other administrator in bringing suits, and that defendant cannot require him to show that the facts exist which authorize him to administer.

Where special provisions of the will constitute the basis of his authority in bringing the suit, the will or a duly attested copy thereof should be produced in evidence. Horn *v.* Johnson, 87 Ga. 448, 13 S. E. 633; Mays *v.* Killen, 56 Ga. 527; Sorrell *v.* Ham, 9 Ga. 55; Partee *v.* Caughran, 9 Yerg. (Tenn.) 460; Aldis *v.* Burdick, 8 Vt. 21.

In ejectment by a representative his appointment becomes part of his title to recover and must be shown by him (Horn *v.* Johnson, 87 Ga. 448, 13 S. E. 633; May *v.* Killen, 56 Ga. 527; Sorrell *v.* Ham, 9 Ga. 55; Austin *v.* Downer, 25 Vt. 558; Aldis *v.* Burdick, 8 Vt. 21); and if he fails to do so by competent evidence, it is proper to grant a nonsuit (Lay *v.* Sheppard, 112 Ga. 111, 37 S. E. 132).

Appearance by representative upon revivor of action.— After the appearance of an administrator or executor has been entered, his right to appear must be proved, in the same manner as though the suit had been commenced in his name, but his right cannot be questioned before he has become a party. Moore *v.* Rand, 1 Wis. 245.

of action is one which arose after the decedent's death;[83] and the same is true in actions against him, in which he relies upon a matter of defense dependent upon his representative character.[84] Where the suit is against the representative as such, the burden is on plaintiff to prove not only the representative's appointment, but also that he had taken upon himself the trust;[85] unless the suit is upon a decree of the probate court against the representative, in which case such decree is of itself evidence of the appointment, and plaintiff need not prove it.[86]

2. Admissibility — a. In General. The admissibility of evidence in actions by or against a personal representative depends upon the nature of the fact sought to be proved.[87] For example evidence is admissible in an action for a legacy which tends to show that property existed, subject to such legacy, during the life of the

83. In such cases the representative may under some circumstances sue in either his individual or representative capacity (see *supra*, XIV, A, 1) and where he may sue in either capacity, it seems that it is immaterial to defendant whether or not he proves his representative capacity, although he sues in that form. Sears *v.* Daly, 43 Oreg. 346, 73 Pac. 5, holding that, in an action by an executor on a note alleged to have been given after the death of his testator, his failure to prove his representative capacity, or that the note was the property of the estate of which he was executor, was immaterial, as the averment as to plaintiff's representative character may be regarded as surplusage, and the complaint still state a good cause of action in his favor as an individual.

84. Partee *v.* Caughran, 9 Yerg. (Tenn.) 460, holding that where one sued as executor relies upon a retainer he must produce the letters testamentary and show that he is the rightful executor.

85. Witcher *v.* Wilson, 47 Miss. 663, holding that in an action against executors, this may be shown by proving that they had proved the will, or given bond and taken the oath, or in case they are charged as executors *de son tort*, by proving acts of intermeddling with the estate. See also Picard *v.* Brown, 6 T. R. 550.

86. Dubois *v.* Dubois, 6 Cow. (N. Y.) 494, holding that a surrogate's decree against an executor to pay a pecuniary legacy makes the claim a personal claim against the executor; and it is of itself evidence that there was a will and that defendant was executor; so that plaintiff need not prove such facts on the trial.

87. See Sanford *v.* Howard, 29 Ala. 68, 68 Am. Dec. 101; Jones *v.* Linton, 34 Ga. 429 (evidence in an action against an administrator on a book-account is held admissible to show that the goods were sold to the administrator in his representative capacity, although charged to him individually); White *v.* Edmondson, 15 Ga. 301; Slade *v.* Leonard, 75 Ind. 171; Garretson *v.* Kinkead, 118 Iowa 383, 92 N. W. 55 (evidence held competent on issue of no indebtedness); Bond *v.* Corbett, 2 Minn. 248; Farrer *v.* Farmers' L. & T. Co., 85 N. Y. App. Div. 478, 83 N. Y. Suppl. 218; Beddoe *v.* Wadsworth, 21 Wend. (N. Y.) 120; Goss *v.* Dysant, 31 Tex. 186 (holding that in an action against an administrator for fraud, in a sale of a land certificate by the intestate to plaintiff, the claim against the estate which has been rejected by the administrator is admissible for the purpose of showing that it had been presented and rejected so as to authorize suit).

Admissions and declarations by testators and intestates as evidence against the personal representative see Evidence, 16 Cyc. 991, 997.

Admissions by administrator or executor as evidence against the estate or the representative's successor in office see Evidence, 16 Cyc. 1036, 1037.

Evidence is admissible, in an action to recover the value of land sold, to show that the sale was fair and that it brought its true value (Stripling *v.* Stripling, 49 Ga. 95) or to show its amount and value at the time the decedent went to reside with defendant, to whom the property was sold, and at whose house decedent died (Simmons *v.* Rust, 39 Iowa 241). In an action for personal property which plaintiff claimed as a gift from decedent, evidence that she was threatened with imprisonment or otherwise coerced into giving it up to the administrator is admissible in explanation. Pryor *v.* Morgan, 170 Pa. St. 568, 33 Atl. 98.

To prove notice by a representative of acceptance of his trust evidence other than the affidavit required by statute is admissible. Green *v.* Gill, 8 Mass. 111.

To prove conversion by a deceased son of personalty belonging to his deceased father, testimony that the father's widow continued in possession of property at the homestead is admissible. Howard *v.* Patrick, 43 Mich. 121, 5 N. W. 84.

On the issue of negligence on the representative's part, in keeping property, evidence of how people ordinarily prudent kept their property under like circumstances is admissible. Greenwell *v.* Crow, 73 Mo. 638.

Evidence held inadmissible.— In an action by an administrator to recover moneys belonging to the estate of his intestate, evidence is not admissible for the defense to show payment, settlement, and distribution of the moneys, by a family arrangement, before administration granted. Ebbs *v.* Com., 11 Pa. St. 374. See also McCartney *v.* Finnell, 106 Mo. 445, 17 S. W. 446. As against a debt with interest due from a decedent, evidence that he has left a legacy to plaintiff equal

testator,[88] or that assets came into the hands of the executor,[89] or by the exercise of due diligence on his part might have come into his hands.[90] So in an action for services rendered, or board and lodging furnished the decedent, evidence is admissible to show the financial condition of the decedent,[91] the value of the services rendered,[92] that a bequest or devise was made in favor of plaintiff,[93] or that the employment was made by another than the decedent;[94] or if such services are rendered by a member of decedent's family, or a near relative, to show either an express agreement, or facts from which an implied agreement to pay therefor may be inferred.[95] Plaintiff in an action against the representative may

to the principal of the debt is not admissible to prove satisfaction. Parker *v.* Coburn, 10 Allen (Mass.) 82.

Hearsay evidence as to whether the person on whose estate administration was granted was actually alive cannot be set up collaterally, to defeat the administrator's right of action. Hummel *v.* Brown, 24 Pa. St. 310.

In an action on notes executed by the decedent, evidence of the amount of the payee's claim against the estate or against the representative personally is inadmissible (Daggett *v.* Simonds, 173 Mass. 340, 53 N. E. 907, 46 L. R. A. 332); nor is it error to exclude evidence of the financial condition of the parties at the time of the execution of the notes, where no fraud in procuring the notes is alleged or proved (Perkins *v.* Humes, 200 Pa. St. 235, 49 Atl. 934; Hartman *v.* Shaffer, 71 Pa. St. 312).

Where the question of limitations is in issue in an action by an administrator *de bonis non* with the will annexed, evidence that the executor of the decedent was notified to bring the action but refuses is immaterial. Nissley *v.* Brubaker, 192 Pa. St. 388, 43 Atl. 967.

In an action by an owner of land to recover rents and profits from a representative, evidence is admissible to show the rental value of the property (Oliver *v.* Hammond, 85 Ga. 323, 11 S. E. 655), or to show that the decedent was in possession and cultivated the land (Parker *v.* Salmons, 113 Ga. 1167, 39 S. E. 475); but evidence by the executor that prior to the testator's death he placed plaintiff on another and distinct tract of land, and allowed her to occupy the same as her home and receive the profits thereof, is not, standing alone, admissible; nor is the fact that testator conveyed other land to plaintiff for love and affection (Parker *v.* Salmons, *supra*).

Evidence of the insolvency of an estate is admissible in a suit by a representative on a claim payable to the decedent, where defendant pleads a set-off (Bass *v.* Gobert, 113 Ga. 262, 38 S. E. 834; Ray *v.* Dennis, 5 Ga. 357), or in a suit for the recovery of property out of the hands of a fraudulent grantee, in order to pay creditors (Andruss *v.* Doolittle, 11 Conn. 283); but it is inadmissible in an action against the widow for conversion of personalty, where no creditor is interested in the estate, or the result of the action (Fellows *v.* Smith, 130 Mass. 378). Where such evidence is admissible, the fact of insolvency may be proved by other evidence than the orders and decrees of the probate court; this fact being a proper question for the jury. Andruss *v.* Doolittle, *supra*.

88. Knapp *v.* Hanford, 7 Conn. 132.

89. Knapp *v.* Hanford, 7 Conn. 132. See Snelling *v.* Darrell, 17 Ga. 141.

90. Smith *v.* Griffin, 32 Ga. 81.

91. Snow *v.* Moore, 107 Mass. 512; Gall *v.* Gall, 27 N. Y. App. Div. 173, 50 N. Y. Suppl. 563; Horne *v.* McRae, 53 S. C. 51, 30 S. E. 701. But see Platt *v.* Hollands, 85 N. Y. App. Div. 231, 83 N. Y. Suppl. 556.

92. Gill *v.* Donovan, 96 Md. 518, 54 Atl. 117; Jack *v.* McKee, 9 Pa. St. 235, holding that, where plaintiff declared upon a contract by the decedent, in consideration of plaintiff continuing to live with him and taking care of his house until he died, he would give her certain land, it was competent to prove that a note was given plaintiff by the decedent payable after his death, without producing or accounting for the note for the purpose of showing the value the testator placed on plaintiff's services.

93. See Cunningham *v.* Hewitt, 84 N. Y. App. Div. 114, 81 N. Y. Suppl. 1102 [*affirmed* in 177 N. Y. 541, 69 N. E. 1122]. And see, generally, WILLS.

94. Gerlach *v.* Terry, 75 Cal. 290, 17 Pac. 207, holding that where in an action for medical services rendered the decedent, evidence that plaintiff was employed by one living with the deceased as her husband, and that plaintiff looked to him for payment is admissible. See also Elwell *v.* Roper, 72 N. H. 254, 56 Atl. 342.

95. Gill *v.* Donovan, 96 Md. 518, 54 Atl. 117; Lillard *v.* Wilson, 178 Mo. 145, 77 S. W. 74; Allen *v.* Allen, 101 Mo. App. 676, 74 S. W. 396; Gay *v.* Mooney, 67 N. J. L. 27, 50 Atl. 596 [*affirmed* in 67 N. J. L. 687, 52 Atl. 1131]; Disbrow *v.* Durand, 54 N. J. L. 343, 24 Atl. 545, 33 Am. St. Rep. 678; Wessinger *v.* Roberts, 67 S. C. 240, 45 S. E. 169 (conversations between decedent and plaintiff admissible); Dash *v.* Inabinet, 53 S. C. 382, 31 S. E. 297; *Ex p.* Aycock, 34 S. C. 255, 13 S. E. 450.

Where, in an action against an estate for services rendered by a young girl, defendant's proof proceeded on the theory that plaintiff was with the decedent as a member of the family, and not as a domestic, and testimony had been offered that she was a niece of decedent, there was no error in admitting evidence that the relationship was of the half blood. Gill *v.* Donovan, 96 Md. 518, 54 Atl. 117.

introduce evidence as to the validity of his claim at the time the indebtedness was incurred, and if he sees proper may show the subsequent conduct of the decedent or his representative;[96] and to reduce his personal liability, the representative may prove payments which the probate court through mistake has disallowed,[97] but he cannot give in evidence his own acts or admissions or those of his decedent subsequent to contracting the debt for the purpose of discharging the estate from liability.[98] A claim filed against an administrator is admissible in an action against him for a certain sum, although the claim filed exceeds the sum by the amount of interest due.[99]

b. Receipts or Writing in General. Subject to the general rules of documentary evidence,[1] and of best and secondary evidence,[2] which have been fully discussed elsewhere, receipts and vouchers given or taken by a representative or his decedent are admissible in actions by or against the representative[3] to show payments made by him or his decedent,[4] provided such receipts are connected with the matter in issue by other evidence.[5] Affidavits,[6] judgments or orders,[7] wills,[8] or other docu-

The expression of an intention by decedent to pay both plaintiff (a daughter-in-law) and her husband is admissible in order to prove a promise to pay plaintiff for her services. Allen *v.* Allen, 101 Mo. App. 676, 74 S. W. 396.

96. Johnston *v.* Hawkins, 31 Ohio St. 137.

97. Hendricks *v.* Mitchell, 37 Ga. 230.

98. Johnston *v.* Hawkins, 31 Ohio St. 137.

99. Parker *v.* Eufaula Nat. Bank, 121 Ala. 516, 25 So. 1001.

1. See EVIDENCE, 17 Cyc. 296 *et seq.*

2. See EVIDENCE, 17 Cyc. 465 *et seq.*

3. See Kimball *v.* Kimball, 16 Mich. 211, holding that, in an action to recover a claim founded on certain receipts which had been signed by an intestate jointly with others, they are admissible as a foundation or other evidence of the several liability, but not to fix the liability of the intestate's estate, it being a joint undertaking.

4. Smith *v.* Kimball, 105 Mass. 499; Melvin *v.* Stephens, 82 N. C. 283, holding receipts for payments admissible in an action against a representative for non-payment of a decree, whether they purport to be prior or subsequent to the date of the decree.

5. Field *v.* Bevil, 12 Ala. 608, holding that receipts and vouchers found among the decedent's papers are inadmissible as proof of payment, without connection with other facts and circumstances pertinent to the issue.

6. Under the rule of the courts of common pleas of Allegheny county, admitting as evidence such portions of the affidavit of claim as are not denied by the affidavit of defense, the affidavit of claim of an administrator suing in his representative capacity is admissible. Schupp *v.* Schupp, 1 Pa. Cas. 283, 2 Atl. 870. See Adkins *v.* Hutchings, 79 Ga. 260, 4 S. E. 887, holding that affidavits of accounts found among a deceased administrator's papers connected with the intestate's estate are *ex parte* and merely hearsay, and are inadmissible in an action against an administrator, appointed in his place, for not collecting certain debts.

7. See Floyd *v.* Wallace, 31 Ga. 688; Cook *v.* Stevenson, 30 Mich. 242; Reber *v.* Gilson, 1 Pa. St. 54 (holding the record of a former judgment against lessees for non-performance of covenants admissible in an action by them against administrators on a bond given by the intestate for performance of covenants in the lease); Bright *v.* Ecker, 9 S. D. 192, 68 N. W. 326 (citation and order of court directing parties to deliver assets to administrator is competent evidence (under Comp. Laws, § 5776) to charge defendants in a subsequent action by the administrator for the value of assets); Smyth *v.* Caswell, 67 Tex. 567, 4 S. W. 848 (holding that in an action against an executor upon a note it is competent for defendant who denies the execution of the note under oath to introduce the record of a former judgment in his favor against the executor, in a proceeding in which the debt sued on could have been pleaded as an offset, and was not).

On an issue whether decedent was indebted to plaintiff on a note destroyed by fire, the auditor's report and decree of the the orphans' court granting leave to mortgage real estate are inadmissible to show that decedent did not have personal property sufficient to pay his debts, and that consequently the claim must be a just one. Simpson *v.* Irvin, 5 Pa. Super. Ct. 471.

A decree setting aside a deed which had been given to plaintiff as compensation for services rendered the decedent is admissible in an action for such services to show that they had not been paid or provided for. Davis *v.* Duval, 111 N. C. 422, 16 S. E. 471, 112 N. C. 833, 17 S. E. 528.

8. A will is admissible in evidence where its provisions are pertinent to the action in question. See Hughes *v.* Keichline, 168 Pa. St. 115, 31 Atl. 887.

Thus a will is admissible in an action for services rendered or board furnished the decedent, to show whether or not plaintiff took a bequest thereunder, and as bearing upon the supposed undertaking to pay wages (Allen *v.* Field, 124 Mich. 466, 83 N. W. 151; Cowell *v.* Roberts, 79 Mo. 218; Allen *v.* Allen, 101 Mo. App. 676, 74 S. W. 396; Hughes *v.* Keichline, 168 Pa. St. 115, 31 Atl. 887); but it is properly excluded in an action against an executor to recover rent of land,

ments or writings[9] taken or given by the decedent or the representative are also admissible in such actions for what they purport to express.

c. Letters of Appointment. In actions by or against a personal representative his letters of administration[10] properly authenticated by the official seal of the probate court,[11] or certified copies thereof,[12] even though the letters were granted on a defectively verified petition,[13] are admissible as evidence in any court in the state in which they are granted,[14] for the purpose of showing the representative's authority to act for and enforce or protect the rights of the estate he assumes to represent. Where such letters are excluded for want of a seal, the seal may

where there is no question of the fact that plaintiff was the owner of the land (Parker *v.* Salmons, 113 Ga. 1167, 39 S. E. 475).

Where the construction of an executor's contract is altogether foreign from his authority under the will, the will is inadmissible. Sanford *v.* Howard, 29 Ala. 684, 68 Am. Dec. 101.

9. See Jones *v.* Jones, 41 Hun (N. Y.) 163 (holding that where an executor sued to recover money claimed by defendant as a gift from the testator, he might, to show fraud, put in evidence a note given by the testator to himself before the time of the gift): Poncin *v.* Furth, 15 Wash. 201, 46 Pac. 241 (holding that in an action on a note against the administrator of a deceased maker it was competent for plaintiffs to introduce the claim that had been rejected by the administrator, and the letter accompanying the rejection, to show that no vouchers had been required from plaintiffs).

An arbitration bond given by administrators individually is inadmissible in an action against them as administrators. Mahaffey *v.* Mahaffey, 13 Serg. & R. (Pa.) 163.

Plaintiff's unsworn statement of a debt, which consisted of copies of the notes, and the statement that the decedent promised to pay, but did not do so, is inadmissible in an action against an executor on notes alleged to have been executed by the testator. Perkins *v.* Humes, 200 Pa. St. 235, 49 Atl. 934.

A note given by one of several administrators, admitting a sum of money to be due from the intestate's estate, is not admissible in evidence in a suit against a co-administrator unless accompanied by proof of an original indebtedness upon which such note was founded. Weston *v.* Murnan, 4 Ind. 271.

Bank-book.— Direct proof should be alleged to support a claim for trust moneys against the decedent, and the decedent's own deposit book, without other earmark or evidence, is inadmissible to sustain such a claim. Bagnall *v.* Roach, 76 Cal. 106, 18 Pac. 137.

On plene administravit.— A settlement by executors with the county court is admissible in a contest between a creditor and the personal representatives, whether made before or after suit brought, as *prima facie* evidence on the issue of *plene administravit*; but such settlement will prove nothing, unless it shows the dates of the payments, and whether made on judgments, specialties, or simple contracts. Cochran *v.* Davis, 5 Litt. (Ky.) 118. See also Mountjoy *v.* Lowry, 4 Hen. & M. (Va.) 428; Atwell *v.* Milton, 4 Hen. & M. (Va.) 253. To disprove such a plea a lease duly executed to the testator, at annual rent, may be read in evidence, although it had not been returned in the inventory to the orphans' court, and although no notice had been given to defendant that it was intended to be offered in evidence, to show fraud or want of truth in the inventory. Dukehart *v.* State, 4 Harr. & J. (Md.) 506.

In Massachusetts, where an administrator assumes the defense of an action brought against his intestate, it becomes an action against him, within St. (1896) c. 445, providing that, where an action by an administrator is supported by oral testimony of a promise or statement made by his intestate, evidence of the latter's written or oral statement, memoranda, and entries written by him, and of his act and habits of dealings, shall be admissible to disprove such statement or promise. Brooks *v.* Holden, 175 Mass. 137, 55 N. E. 802.

Where the insolvency of the estate is a prerequisite to the representative's right to maintain an action for waste or trespass on the lands of the deceased, the only proper evidence of the insolvency is documentary evidence from the probate office. Bates *v.* Avery, 59 Me. 354, holding such evidence sufficient.

10. Sanford *v.* Hayes, 19 Conn. 591; Farrand *v.* Caton, 69 Mich. 235, 37 N. W. 199; John Hancock Mut. L. Ins. Co. *v.* Moore, 34 Mich. 41; Cook *v.* Stevenson, 30 Mich. 242 (holding that an objection to the admission of the letters of administration that no facts were shown to the probate court authorizing the appointment of plaintiff as administrator is untenable); Pick *v.* Strong, 26 Minn. 303, 3 N. W. 697; Dickinson *v.* McCraw, 4 Rand (Va.) 158.

11. Tuck *v.* Boone, 8 Gill (Md.) 187 (holding that letters of administration *de bonis non* with the will annexed are inoperative unless authenticated by the official seal of the orphans' court by which they were granted; and hence, unless so authenticated, are not admissible in an action by the administrator to prove his authority to sue); Maloney *v.* Woodin, 11 Hun (N. Y.) 202.

12. Farrand *v.* Caton, 69 Mich. 235, 37 N. W. 199.

13. Shaw *v.* New York Cent., etc., R. Co., 101 N. Y. App. Div. 246, 91 N. Y. Suppl. 746.

14. Dickinson *v.* McCraw, 4 Rand. (Va.) 158.

thereafter be affixed so as to render them admissible.[15] In ejectment against an executor or administrator, his letters are admissible, although they do not mention realty; for they prove his appointment, and the law clothes him with authority.[16]

d. Inventory and Appraisement. An inventory and appraisement of a decedent's estate duly made and returned by a representative[17] or a certified copy thereof from the record[18] is admissible for or against the representative, either for the purpose of releasing him from liability for certain assets, or of charging him therewith. But the parties in adverse interest seeking to charge the representative or his estate may prove the facts purporting to be shown by such inventory without reference to it.[19]

3. Weight and Sufficiency — a. In General. The weight and sufficiency of evidence in actions by or against a personal representative is governed by the general rules of evidence, which have been fully discussed elsewhere.[20] Subject to such rules the sufficiency of evidence in these actions depends entirely upon the nature of the issue or matter to be proved.[21] Declarations against interest may be

15. Maloney *v.* Woodin, 11 Hun (N. Y.) 202.

16. Lamar *v.* Sheffield, 66 Ga. 710.

17. Middleton *v.* Carrol, 4 J. J. Marsh. (Ky.) 143; Chalfant *v.* Hart, 1 A. K. Marsh. (Ky.) 572; Green *v.* Johnson, 3 Gill & J. (Md.) 389 (assumpsit by a child of decedent); Emory *v.* Thompson, 2 Harr. & J. (Md.) 244; Bogie *v.* Nolan, 96 Mo. 85, 9 S. W. 14 (holding that in an action against an administrator on notes alleged to have been executed by his intestate, where the defense is want of consideration, in order to prove that after the death of the intestate no trace of such a sum as that alleged to have been borrowed could be found among the assets, the administrator may testify as to an inventory made by him of all the personal estate, and the reading of the names and amounts from such paper as part of his testimony is not reversible error). The inventory required by law to be made and returned by an administrator is partly for information of creditors of the estate; and where the administrator of one of the creditors is sued for failing to collect from the administrator of the debtor, the inventory made and returned by the latter is admissible in evidence to show means of information of which the former might have availed himself touching the debtor's estate and the particular property of which it apparently consisted. Thompson *v.* Thompson, 77 Ga. 692, 3 S. E. 261.

But an inventory made and returned by an administrator, after he has commenced an action for the recovery of the property included therein, is not competent evidence for him at the trial of the cause; he being personally liable to costs. Allender *v.* Riston, 2 Gill & J. (Md.) 86.

An appraisement made by commissioners appointed for that purpose may not be admissible as evidence against the representative, unless he connects himself with it in some way; yet, if he makes it the basis of a petition for the sale of property, this is a sufficient adoption of it as his inventory, no other inventory being shown. Glover *v.* Hill, 85 Ala. 41, 4 So. 613.

18. Glover *v.* Hill, 85 Ala. 41, 4 So. 613; Chalfant *v.* Hart, 1 A. K. Marsh. (Ky.) 572. See also Emory *v.* Thompson, 2 Harr. & J. (Md.) 244.

19. McDonald *v.* Jacobs, 77 Ala. 524.

20. See Evidence, 17 Cyc. 753 *et seq.*

21. See Thompson *v.* Thompson, 140 Cal. 545, 74 Pac. 21 (evidence held insufficient to show want of consideration for a note given by decedent); Ellis *v.* Ford, 5 Blackf. (Ind.) 554 (holding that, in an action by an executor on a promise by defendant to pay testator a certain sum annually for rent during testator's lifetime, proof of defendant's promise and payment of one year's rent without any evidence as to the time when testator died is not sufficient to sustain the action); Liter *v.* Johnson, 78 S. W. 905, 25 Ky. L. Rep. 1783 (evidence held sufficient to establish, as against an executor, the ownership of a house and lot claimed by the executor as a part of his intestate's estate); Taylor *v.* Harrison, 35 S. W. 908, 18 Ky. L. Rep. 164 (evidence held sufficient to support a judgment for defendant upon the issue that an allowance to him for services was wrongfully made by the court); Gandy *v.* Bissell, (Nebr. 1903) 97 N. W. 632; Roberts *v.* Stuart, 80 Tex. 379, 15 S. W. 1108 (insufficient proof of conversion of assets); *In re* Macdonald, 29 Wash. 422, 69 Pac. 1111 (evidence in an action to subject the assets in the hands of an executrix to the payment of a judgment considered, and held sufficient to warrant a finding that she had in her possession funds belonging to the estate sufficient to pay the judgment, and that such judgment was the only claim). See also Rhule *v.* Davenport, 5 Lack. Leg. N. (Pa.) 69.

To charge a representative with a devastavit the failure of an executor to pay a debt when the estate is solvent, and his allowing judgment to be taken and stay to be entered, is *prima facie* evidence of waste, if the estate subsequently became insolvent (Smith *v.* Slaughter, 3 Heisk. (Tenn.) 565); but where it is attempted to charge him for the payment of a debt barred by limitations, and it is acknowledged that the debt was just,

sufficient,[22] as also may circumstantial evidence,[23] to make out at least a *prima facie* case for the one offering it.[24] The acknowledgment by an administrator

the executor will not be put to so strict proof that the delay was at his request, as where a creditor of the estate is attempting to enforce a claim against the executor (Puckett *v.* James, 2 Humphr. (Tenn.) 565).

In an action to recover land under a statute authorizing the representative to recover possession of any part of an estate from the heirs or their purchasers, when necessary for the purpose of paying debts or making distribution, an order of sale granted by the court of ordinary is at least *prima facie* evidence that such sale was necessary to pay debts, and is sufficient to sustain a verdict for so much of the land sued for as is embraced in such order; but is not sufficient to sustain a verdict for the parcels to which the order does not relate. Dixon *v.* Rogers, 110 Ga. 590, 35 S. E. 781.

To sustain a plea of property in a defendant as administrator the evidence should be such that the jury should believe from it not only that defendant was defending as administrator in good faith, but also that the property in controversy belonged to the estate of his intestate, and not plaintiff. Prewitt *v.* Lambert, 19 Colo. 7, 34 Pac. 684.

Proof of set-off.— Proof of the existence merely of a debt which might have been applied as a set-off to a demand against the estate of a deceased person does not raise a presumption that the debt was so applied, when neither the minutes of the probate court nor the account presented and allowed against the estate shows anything in relation to the set-off, although the claimant on presenting his claim filed the affidavit prescribed by statute that he had allowed all just credits against the claim. Sweet *v.* Maupin, 47 Mo. 323.

Proof of payment.—The payment of money to a representative by one holding a single bill made by the decedent, as so much in his hands belonging to the decedent's estate, is admissible as evidence of money had and received under a notice of set-off, in an action by such holder on the bill, it being presumptive evidence that the holder had retained in his own hands the amount of the bill. Beekman *v.* Beekman, Anth. N. P. (N. Y.) 169. And see, generally, PAYMENT.

Proof of jurisdiction.— The approbation of the county judge, which is necessary under an Iowa statute, section 2395, to enable the district court to entertain original jurisdiction in certain claims against estates, cannot be proven by the certificate of the county judge where he has omitted to enter such approbation of record; but the omitted fact might, it seems, be established by a *nunc pro tunc* record thereof, properly authenticated. Goodrich *v.* Conrad, 24 Iowa 254.

Proof of administration bond.— Evidence of the clerk of probate that he had been unable to find in his office any bond relating to the administration of an estate fifteen years before, and that he did not know whether any such bond had been filed, as at that early day no papers were recorded, and attorneys frequently took out and kept such papers for months, does not show conclusively that no bond was given. Harris *v.* Chipman, 9 Utah 101, 33 Pac. 242.

Avoidance of statute of non-claim.—Where plaintiff avers in a writ begun against the administrator more than two years after notice of his appointment that the cause of action had been fraudulently concealed from plaintiff by defendant, plaintiff's testimony that defendant promised before he was appointed administrator that he would see to plaintiff's account against the estate and that defendant had neglected to do so is not sufficient evidence from which a jury could find such fraudulent concealment. Given *v.* Whitmore, 73 Me. 374.

In trespass, replevin, or trover by a representative for the recovery of a chattel or its value, his possession of the chattel at the time it was taken or converted is *prima facie* proof of his title. Cheek *v.* Wheatly, 11 Humphr. (Tenn.) 556. And see *supra*, VIII, P, 1, c.

In an action against an executor for money of the testator, collected by defendant before testator's death, the testimony of defendant's wife that she saw defendant pay the money to testator is sufficient to exonerate defendant, in absence of evidence to the contrary. Hill *v.* Fly, (Tenn. Ch. App. 1899) 52 S. W. 731.

Evidence sufficient to take the case to the jury on the fact of a loan made by decedent (see Motz *v.* Motz, 85 N. Y. App. Div. 4, 82 N. Y. Suppl. 926); or on the theory of an implied promise made by the decedent to pay for services rendered by a relative (see Wright *v.* Reed, 118 Iowa 333, 92 N. W. 61; Elwell *v.* Roper, 72 N. H. 254, 56 Atl. 342); or, in an action by an administrator for services rendered by his decedent, on the theory that defendant had agreed to pay decedent a definite sum for such services (see Lewis *v.* Roulo, 93 Mich. 475, 53 N. W. 622).

22. A statement in an executor's petition for the probate of the will that a part of the estate consisted of a sum of money in his hands is sufficient, where he died without rendering an account, to sustain a finding that such sum came into his hands while acting as executor. Raskin *v.* Robarts, (Cal. 1894) 35 Pac. 763. See also EVIDENCE, 17 Cyc. 814.

23. Sovern *v.* Yoran, 15 Oreg. 644, 15 Pac. 395, where circumstantial evidence of conversion was held sufficient to go to the jury. See also EVIDENCE, 17 Cyc. 817. To rebut the presumption that money found in the decedent's house at the time of his death belonged to him, evidence that his widow had borrowed the money and given her note therefor is sufficient. Weiss' Appeal, 133 Pa. St. 84, 19 Atl. 311.

24. See Grimes *v.* Booth, 19 Ark. 224.

that an account is just is not sufficient evidence to warrant a judgment *de bonis testatoris*.[25] A transcript of record from the probate court of all the proceedings, showing that a settlement was ordered, but not showing that it was ever made, or that the administrators had ever resigned, died, or been removed, is affirmative evidence of no vacancy of the administrator's office.[26] An inventory of the estate is *prima facie* evidence of the solvency of those stated therein to owe the estate,[27] and of the fact that such persons are indebted to the estate.[28]

b. Existence of Indebtedness. Public policy requires that claims against the estate of a deceased person should be carefully scrutinized and admitted only upon very satisfactory proof,[29] and it is therefore generally held that evidence to establish such an indebtedness should be clear, certain, and satisfactory.[30] A written acknowledgment of a debt by the decedent is in general sufficient to show an indebtedness due by the estate in the hands of the personal representative,[31] in

25. Ciples *v.* Alexander, 3 Brev. (S. C.) 558.

26. Bean *v.* Chapman, 73 Ala. 140.

27. Grant *v.* Reese, 94 N. C. 720.

28. Rittenhouse *v.* Levering, 6 Watts & S. (Pa.) 190. See also *supra*, IV, I.

29. Van Slooten *v.* Wheeler, 140 N. Y. 624, 35 N. E. 583 [*reversing* 21 N. Y. Suppl. 329]; Kearney *v.* McKeon, 85 N. Y. 136; Forbes *v.* Chichester, 8 N. Y. Suppl. 747.

30. *Arkansas.*— Jefferson *v.* Edrington, 53 Ark. 545, 14 S. W. 99, 903, evidence held insufficient.

California.— Brooks *v.* Lawson, 136 Cal. 10, 68 Pac. 97; Roddan *v.* Doane, 92 Cal. 555, 28 Pac. 604 (evidence insufficient); Bagnall *v.* Roach, 76 Cal. 106, 18 Pac. 137 (holding that in an action against an administrator for money alleged to have been received for plaintiff's use by defendant's intestate, and deposited by her with other moneys in her own name in a savings bank, where plaintiff fails to show when such deposit was made, or how much remained in the bank at the time of intestate's death, although it appears that intestate had prior to her death received money to plaintiff's use, he is not entitled to recover); Thompson *v.* Thompson, 140 Cal. 545, 74 Pac. 21.

Iowa.— See Wickham *v.* Wickham, (1902) 90 N. W. 527.

New Hampshire.— See Elwell *v.* Roper, 72 N. H. 254, 56 Atl. 342.

New Jersey.— Varick *v.* Hitt, (Ch. 1903), 55 Atl. 139 (note held not to represent a valid indebtedness); Harrison *v.* Patterson, (Ch. 1901) 50 Atl. 113 (evidence held insufficient).

New York.— Van Slooten *v.* Wheeler, 140 N. Y. 624, 35 N. E. 583 [*reversing* 21 N. Y. Suppl. 329]; Kearney *v.* McKeon, 85 N. Y. 136; Dougall *v.* Dougall, 61 N. Y. App. Div. 282, 70 N. Y. Suppl. 336; Rowland *v.* Howard, 75 Hun 1, 26 N. Y. Suppl. 1018; Davis *v.* Seaman, 64 Hun 572, 19 N. Y. Suppl. 260.

Texas.— George *v.* Ryon, (Civ. App. 1901) 61 S. W. 138.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1873.

Sufficiency of evidence to prove claims for services rendered the decedent see *supra*, X, A, 3.

The testimony of an executrix given twenty-six months after the probate of the will that no debts are outstanding against the estate, in which no commissioners on claims have been appointed, is *prima facie* evidence that there are no such debts. Ewers *v.* White, 114 Mich. 266, 72 N. W. 184.

In a suit to establish a note given by the decedent in payment of a judgment against him, as a claim against his estate, it is not necessary for the holders to show that the judgment had not been paid where there is no evidence that the payees of the note had any connection therewith or that the judgment was kept on foot as security for the note. George *v.* Ryon, (Tex. Civ. App. 1901) 61 S. W. 138.

Judgment as evidence.— In Pennsylvania it is held that a judgment against the personal representative is conclusive evidence of indebtedness as to the personal estate but only *prima facie* evidence as to the land descended or devised. Steele *v.* Lineberger, 59 Pa. St. 308; Sergeant *v.* Ewing, 36 Pa. St. 156. "Heirs and devisees have a right to a day in court before their interests can be affected by a judgment against the administrator, and they may question and disprove any and every item concluded in or constituting the judgment against the administrator, if they can; so that in fact, the only importance of the judgment against the administrator, so far as an interest in the realty is concerned, is, that it is *prima facie* evidence of a debt due by the estate, and the foundation for a proceeding to try whether or not the realty is chargeable with it." Steele *v.* Lineberger, 59 Pa. St. 308, 313.

The claim of a surety of the decedent, although primarily based upon a summary judgment, will be sustained by proof of the claim itself, if the bill is filed in time. Jordan *v.* Maney, 10 Lea (Tenn.) 135.

The verified account of an administrator, and the duly vouched claim of a claimant, *prima facie* establish the genuineness and validity of the claim, and throw the burden of proof on those contesting it, although the claimant is a relative of the decedent, and of the administrator. Valentine *v.* Valentine, 4 Redf. Surr. (N. Y.) 265.

31. Moore *v.* Moore, 32 Misc. (N. Y.) 68, 66 N. Y. Suppl. 167; McCullough *v.* Barr,

the absence of proof of payment,[32] even though the debt is denied by the representative on information and belief.[33] But the weight and sufficiency of such acknowledgment may be overcome by proof of subsequent statements made by plaintiff that the "decedent did not owe him anything."[34] Admissions of the representative are *prima facie* evidence of the liability of his decedent's estate for a claim made upon it,[35] as is also his inventory of the debts stated therein.[36] The fact of an indebtedness to the estate may be shown either by direct or circumstantial evidence. Whether or not the evidence is sufficient depends upon the circumstances of the particular case.[37] A will directing payment of a debt alleged to be due to the testator, within a certain time, is not in itself such evidence of the indebtedness as will support an action of assumpsit thereon by the executor.[38]

c. As to Representative Capacity. In accordance with the rule that letters testamentary and of administration are *prima facie* evidence of all they purport to show, and in the absence of evidence to the contrary, are conclusive of the appointment and qualification of the legal representative,[39] such letters properly authenticated, or duly certified copies thereof, unless revoked,[40] or rebutted by other evidence, are sufficient proof of the representative's right to enforce or protect rights of the estate he assumes to represent.[41] The record, showing his

145 Pa. St. 459, 22 Atl. 962. But a note found among decedent's papers and never delivered, while slight evidence of admission, is insufficient to establish a contract to pay. Robinson *v.* Cushman, 2 Den. (N. Y.) 149.

For general rules as to sufficiency of admissions, see EVIDENCE, 16 Cyc. 1043 *et seq.*; 17 Cyc. 806 *et seq.*

A distinct and unequivocal acknowledgment of an indebtedness contained in the debtor's will suffices to establish the debt against his estate, unless there be opposing evidence. Perkins *v.* Seigfried, 97 Va. 444, 34 S. E. 64.

A sworn statement of the decedent is sufficient to show an indebtedness, although as a matter of fact it was not true. Reiter *v.* Rothschild, (Cal. 1893) 33 Pac. 849.

32. Moore *v.* Moore, 32 Misc. (N. Y.) 68, 66 N. Y. Suppl. 167.

33. McCullough *v.* Barr, 145 Pa. St. 459, 22 Atl. 962.

34. See Robinson *v.* Dugan, (Cal. 1894) 35 Pac. 902.

35. Matoon *v.* Clapp, 8 Ohio 248.

36. As to debts therein recited there is presumed to be an indebtedness, and even where a debt is returned as "desperate," it is sufficient for a creditor to prove that the debtor was solvent, in order to throw upon the executor or administrator the burden of showing that the debt could not be collected from any cause. Huntington *v.* Spears, 25 N. C. 450. And see *supra*, IV, I.

37. Williams *v.* Young, 71 Ark. 164, 71 S. W. 669 (evidence in suit on notes by representative held insufficient to show payment in view of plaintiff's possession of the notes); McCartney *v.* Finnell, 106 Mo. 445, 17 S. W. 446; Hair *v.* Edwards, 104 Mo. App. 213, 77 S. W. 1089 (evidence held insufficient in an action by an executrix on a note to show that decedent was the owner of the note, found among his effects); Matter of Baker, 42 N. Y. App. Div. 370, 59 N. Y. Suppl. 121 (evidence held insufficient to warrant the surrogate in finding the maker of a note liable thereon for the amount testified to by a certain witness); Jones *v.* Walker, (Tenn. Ch. App. 1900) 57 S. W. 384 (evidence held insufficient to establish a debt due by a creditor to the estate, as a cross account in a suit to enjoin the sale of decedent's real estate to pay such creditor).

38. Zimmerman *v.* Zimmerman, 47 Pa. St. 378.

39. See *supra*, II, L, 2.

40. Dean *v.* Wade, 8 La. Ann. 85; Hurlburt *v.* Van Wormer, 14 Fed. 709, decided under N. Y. Code Civ. Proc. § 2591.

41. *Alabama.*— Sands *v.* Hickey, 135 Ala. 322, 33 So. 827; Wolfe *v.* Underwood, 97 Ala. 375, 12 So. 234; Tarver *v.* Boykin, 6 Ala. 353.

California.— Garthwaite *v.* Tulare Bank, 134 Cal. 237, 66 Pac. 326. See also Ralphs *v.* Hensler, 97 Cal. 296, 32 Pac. 243.

Colorado.— Salazar *v.* Taylor, 18 Colo. 538, 33 Pac. 369, holding also that it is not necessary that the letters of administration be formally read to the jury.

Florida.— Davis *v.* Shuler, 14 Fla. 438.

Louisiana.— Dean *v.* Wade, 8 La. Ann. 85. A clerk's certificate, which has his signature and official seal, is complete evidence of the appointment of an administrator of a succession, as the clerk has authority to grant letters except where there is opposition to the appointment, when the action of the judge is required. Davie *v.* Stevens, 10 La. Ann. 496.

Maryland.— Wilson *v.* Ireland, 4 Md. 444, holding that the original letters of administration and the bond duly filed and recorded are sufficient evidence of the right of the administrator to sue in behalf of the estate.

Massachusetts.— See Newman *v.* Jenkins, 10 Pick. 515.

Michigan.— Farrand *v.* Caton, 69 Mich. 235, 37 N. W. 199 (certified copy); James *v.*

appointment and qualification, and his acts of administration thereunder may also constitute sufficient evidence of the representative's authority.[42] It has also been held that one's representative capacity may be shown by his own testimony,

Emmett Min. Co., 55 Mich. 335, 21 N. W. 361. See Albright *v.* Cobb, 30 Mich. 355.

Minnesota.— Pick *v.* Strong, 26 Minn. 303, 3 N. W. 697; Moreland *v.* Lawrence, 23 Minn. 84.

Missouri.— The possession of letters of administration by the person to whom they purport to be granted is *prima facie* evidence of delivery; and no proof being offered to rebut that presumption it must be held conclusive. Hensley *v.* Dodge, 7 Mo. 479; McNiar *v.* Dodge, 7 Mo. 404.

New Hampshire.— Jeffers *v.* Radcliff, 10 N. H. 242.

New York.— Carroll *v.* Carroll, 60 N. Y. 121, 19 Am. Rep. 144 [*reversing* 2 Hun 609]; Farley *v.* McConnell, 52 N. Y. 630; Belden *v.* Meeker, 47 N. Y. 307 [*affirming* 2 Lans. 470]; More *v.* Finch, 65 Hun 404, 20 N. Y. Suppl. 164; Parhan *v.* Moran, 4 Hun 717 [*affirmed* in 71 N. Y. 596]. Letters of administration even though granted on an unverified petition are *prima facie* proof that they were properly issued, and it is incumbent on a person claiming that they were improperly issued to establish that fact by affirmative proof. Shaw *v.* New York Cent. R. Co., 101 N. Y. App. Div. 246, 91 N. Y. Suppl. 746. Code Civ. Proc. § 2591, provides that letters testamentary and of administration granted by the court or officer having jurisdiction to grant them are conclusive evidence of the authority of the person to whom they are granted, until the decree granting them is reversed upon appeal or the letters are revoked in the manner prescribed by statute.

North Carolina.— In an action by an executor, plaintiff's executorship can be proven only by the letters testamentary, unless it be shown that they are lost or destroyed. —— *v.* Oldham, 2 N. C. 165.

Tennessee.— Eller *v.* Richardson, 89 Tenn. 575, 15 S. W. 650; Wright *v.* Mongle, 10 Lea 38; Smith *v.* Mabry, 7 Yerg. 26.

Vermont.— Seymour *v.* Beach, 4 Vt. 493.

Wisconsin.— Where one sues as executor, certified copies of his letters testamentary and his bond, duly approved and filed, are sufficient *prima facie* evidence of his qualification as executor, without evidence of the will and the probate thereof. Wittmann *v.* Watry, 45 Wis. 491.

United States.— Hurlburt *v.* Van Wormer, 14 Fed. 709.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1874.

Where defendants sued as executors plead ne unques executors proof by plaintiff that defendants had received letters testamentary under a grant thereof by the county court will throw upon defendants the burden of sustaining their plea. Tarver *v.* Boykin, 6 Ala. 353.

Letters of administration granted upon the mere presumption of the death of another by seven years' absence, where the basis of the presumption does not clearly appear, will not, without more positive proof of death, entitle the administrator to recover money owing the absent person. McElroy *v.* Philadelphia Sav. Fund Soc., 2 Pa. Co. Ct. 643, 19 Wkly. Notes Cas. (Pa.) 289.

Where two sets of letters of administration are offered in a case, one to the court only, to lay the foundation for the second set by showing the expiration of the first, and the second to the jury, to show a substitution of their grantee as administrator, and as conclusive proof of his right to sue, it is not error in the court to charge that the second set was conclusive of the right of their grantee to sue. Beale *v.* Hall, 22 Ga. 431.

42. Halbert *v.* Carroll, (Tex. Civ. App. 1894) 25 S. W. 1102, holding that where the record shows the appointment and qualification of an administrator, his annual reports, recognition of him by the court, his final settlements, discharge, and also a contest and compromise with him by the heirs in regard to the final report his final status must be recorded as settled.

Under a statute authorizing the sheriff to act as administrator in certain cases, when ordered by the probate court, a certified copy of the order directing him to act as such is proper evidence of his authority. Davis *v.* Shuler, 14 Fla. 438.

An order appointing an administrator, and directing that letters issue to him accordingly, on his giving bond, is not sufficient evidence of his appointment without proof that the required bond had been given. O'Neal *v.* Tisdale, 12 Tex. 40.

Public administrator.—In Louisiana the exhibition of a decree of the court in which the succession was opened, authorizing plaintiff to administer the same according to law in his capacity of public administrator, and, as such, an officer of the parish as well as of the court, is at least a *prima facie* showing of capacity and authority to sue and stand in judgment in another parish. Morse *v.* Griffith, 25 La. Ann. 213.

The appointment of executors is sufficiently shown by a certified copy of the will, and of the proceedings of the court probating the will and appointing the executors, and their qualification thereunder (Wolfe *v.* Underwood, 97 Ala. 375, 12 So. 234; Blaen Avon Coal Co. *v.* McCulloh, 59 Md. 403, 43 Am. Rep. 560; Wright *v.* Mongle, 10 Lea (Tenn.) 38), and by the exhibition and passage by the court of their accounts as executors showing among other matters the specific allowance of a fee paid by them to the register for issuing the letters (Blaen Avon Coal Co. *v.* McCulloh, *supra*); but proof of the execution of the will alone, without showing that probate was granted to the one claiming to be the executor, is insufficient

without objection;[43] or by a deed from him, describing himself as representative;[44] or by his appearance in an action against him as administrator.[45] An admission by a representative, in an action against him, is not sufficient proof of his representative capacity;[46] nor is his refusal to accept or protest an order presented to him for payment of a debt of the estate, nor his appearance and resistance to a suit on it, sufficient proof of such capacity.[47]

d. As to Assets. Where in an action against a personal representative, the existence of assets is in issue, a *prima facie* case is made out as to their existence by showing that the representative had filed an inventory showing more assets in his hands than the amount sued for;[48] or by showing that he had received property of the estate and had omitted to file or exhibit any inventory;[49] or by showing that a judgment had been rendered in his favor;[50] or where an executor, who is sole residuary legatee, gives bond to pay all debts and legacies, by showing his appointment and the giving of such bond.[51] A plea of *plene administravit* is sustained by proof that the legal assets had been fully administered,[52] and this can be shown only by regular probate proceedings.[53]

e. Allowance or Rejection of Claim. Under a statute allowing suit on a rejected claim, it has been held that the fact of rejection, when in issue, must be shown to have been decided, unequivocal, and absolute;[54] and that no rejected claim shall be allowed by any court except upon competent evidence other than the testimony of the claimant.[55]

f. Effect of Admissions.[56] The general rule is that admissions made by a personal representative prior to his assumption of official duties are not evidence

(Newton *v.* Cocke, 10 Ark. 169; —— *v.* Oldham, 2 N. C. 165).

43. Alabama Great Southern Ry. Co. *v.* Blevins, 92 Ga. 522, 17 S. E. 836.

44. A deed from an administratrix, describing her as such, to defendant, in a proceeding in equity to enforce her lien on the property for the purchase-money, is sufficient evidence of the capacity in which she sues. Bratt *v.* Bratt, 21 Md. 578.

45. Squires *v.* Martin, 24 Ohio Cir. Ct. 232, holding that where in an action against an administrator before a justice of the peace, defendant as such administrator appears and contests plaintiff's claim, such appearance is sufficient evidence of his capacity as administrator, and a claim on appeal that there was no evidence on the trial that he was the administrator cannot be considered.

46. Howard *v.* Daniel, 6 J. J. Marsh. (Ky.) 125, holding also that even though such an admission were good as against the one making it, it would not be sufficient evidence of the representative capacity of his alleged corepresentatives.

47. Howard *v.* Daniel, 6 J. J. Marsh. ((Ky.) 125.

48. Fitch *v.* Randall, 163 Mass. 381, 4 N. E. 182.

49. Knapp *v.* Hanford, 7 Conn. 132. And see *supra*, IV, K. See also Stephens *v.* Barnett, 7 Dana (Ky.) 257.

50. A judgment in ejectment, recovered by an administrator, is *prima facie* evidence of assets in an action against him for breach of covenant of his intestate; and the introduction in evidence of a quit-claim deed of the same premises from the intestate to defendant will not rebut this presumption of assets, since the natural presumption would be that the judgment in ejectment was on a title of intestate accruing subsequent to the deed to defendant. Blodget *v.* Brinsmaid, 7 Vt. 9.

51. Jones *v.* Richardson, 5 Metc. (Mass.) 247, holding that no other proof beyond the appointment and giving of such bond is needed by a creditor or legatee to the point of establishing assets of the estate, in such a case.

52. Cloudas *v.* Adams, 4 Dana (Ky.) 603.

53. Woodbridge *v.* Tilton, 84 Me. 92, 24 Atl. 582.

54. Matter of Miller, 9 N. Y. Suppl. 60, 2 Connoly Surr. (N. Y.) 134, evidence held insufficient to show such a decided, unequivocal, and absolute rejection of the claim as to bring it within Code Civ. Proc. § 1822, which provides that suit must be brought on a claim rejected by the executor within six months after its rejection. See also Hoyt *v.* Bonnett, 50 N. Y. 538; Kidd *v.* Chapman, 2 Barb. Ch. (N. Y.) 414; Barsalou *v.* Wright, 4 Bradf. Surr. (N. Y.) 164.

Under a statute of Texas it is held that in the absence of a plea of *non est factum* an indorsement upon a claim rejecting it, and signed by a name identical with defendant who is sued as administrator upon such rejected claim, is deemed sufficient evidence of such rejection. Tolbert *v.* McBride, 75 Tex. 95, 12 S. W. 752.

55. Quinn *v.* Gross, 24 Oreg. 147, 33 Pac. 535, evidence held sufficient.

Identity of claim sued on with that presented to and disallowed by the county commissioners held sufficiently established by the evidence. McDonald *v.* Webster, 71 Vt. 393, 45 Atl. 895.

56. See EVIDENCE, 16 Cyc. 1036, 1037.

against him in his representative capacity;[57] but an admission made by him while engaged in the discharge of his duties as such binds the estate to that extent.[58] He cannot, however, render the estate liable for a claim otherwise invalid by his admissions.[59]

M. Trial — 1. Course and Conduct of Trial in General. In an action by or against a representative the issues framed are sometimes tried by the jury as in other suits, although questions of fact as well as of law are frequently determined by the court alone.[60] Under some statutes such actions are entitled to a preference on the court calendar.[61] In the course of the proceedings the complainant may be entitled to an accounting;[62] and if an examination of accounts and calculations is necessary to ascertain plaintiff's demand, the usual practice is to make a reference to a master or an auditor, so as to reduce the points to be disputed to as few a number as possible.[63] A stay or continuance of the proceedings may be

57. Thomasson *v.* Driskell, 13 Ga. 253; Gilkey *v.* Hamilton, 22 Mich. 283; Gaines *v.* Alexander, 7 Gratt. (Va.) 257; Fenwick *v.* Thornton, M. & M. 51, 22 E. C. L. 470. But see Smith *v.* Morgan, 2 M. & Rob. 257.

58. *Idaho.*— Meinert *v.* Snow, 3 Ida. 851, 27 Pac. 677.

Louisiana.— Reynaud *v.* Peytavin, 13 La. 121. And see Wilson *v.* Early, 18 La. Ann. 219.

Maine.— Piper *v.* Goodwin, 23 Me. 251.

Massachusetts.— Faunce *v.* Gray, 21 Pick. 243; Hill *v.* Buckminster, 5 Pick. 391.

New York.— Whiton *v.* Snyder, 88 N. Y. 299; Church *v.* Howard, 79 N. Y. 415.

See 22 Cent. Dig. tit. "Executors and Administrators," § 832.

59. Rhodes *v.* Seymour, 36 Conn. 1.

60. See Lynch *v.* Johnson, 33 N. C. 224, holding that the act of 1826 (Rev. St. c. 31, § 119), authorizing references for the statements of accounts of representatives in actions on their bonds, leaves the trial of an issue upon *plene administravit* to the jury. In an action against a representative by a legatee for the amount due, and for an order directing the conversion of the estate into money, and payment of the legacy out of the proceeds, it has been held that defendant's representative is not entitled to a trial by jury as a matter of right and that such a trial may be refused, especially where the evidence is not sufficient to be submitted to the jury. Gilbert *v.* Morrison, 53 Hun (N. Y.) 442, 6 N. Y. Suppl. 491.

Under a Tennessee statute (Acts (1784), c. 11) it has been held that if a personal representative pleads "fully administered" in an action against him, the plea will be tried by the jury if the action is tried in the county court (now circuit court), but by the justice alone if the cause is tried in the justice's court where the plea is properly pleaded. Anderson *v.* Clark, 2 Swan 156.

Affidavit of assets.— Where in an action against an administrator there has been ascertained the debt of the creditors and the account of assets in defendant's hands, reserving for further consideration a certain amount with which it was supposed defendant was wrongfully charged, and the complainant asks leave to file a supplemental bill, the court may require him to show by affidavit that the assets which he proposed to charge were not charged in the former bill and that assets were in defendant's hands. Campbell *v.* Harlston, 3 N. C. 157.

61. Haux *v.* Dry Dock Sav. Inst., 150 N. Y. 581, 44 N. E. 1099, holding, however, that Code Civ. Proc. § 791, subs. 5, which entitles a cause in which an executor or administrator is sole plaintiff or sole defendant to the preference on the court calendar does not apply to an action brought by an executor suing in both his representative and individual capacities.

62. A complaint disclosing defendant's possession of money and property of the estate of a decedent, to which complainant is entitled as administratrix, and his refusal to settle, entitles complainant to an accounting. Shrum *v.* Simpson, 155 Ind. 160, 57 N. E. 708, 49 L. R. A. 792. And see Coates *v.* Muse, 5 Fed. Cas. No. 2,916, 1 Brock. 529.

Waiver of accounting.— Where, on an accounting with an administratrix as to money held by her decedent, it is admitted that decedent in his life made a formal statement of his account with complainant, and that such account was unpaid, complainant may waive his right to an accounting, and stand on the balance shown by such statement, where his remedy is sufficient without it. Moore *v.* Moore, 32 Misc. (N. Y.) 68, 66 N. Y. Suppl. 167.

63. Apperson *v.* Hazelrigg, 2 Ky. L. Rep. 64; Putnam *v.* Burrill, 62 Me. 44; Bellerjeau *v.* Kotts, 4 N. J. L. 359; Gill *v.* Drummond, 4 N. J. L. 295; Grant *v.* Hughes, 94 N. C. 231.

A North Carolina statute (Act (1826), Rev. St. c. 31, § 119), authorizing references to be made in courts of law to state the accounts of administrators, executors, etc., applies only to suits brought upon their bonds respectively; and not to suits brought on bonds given by a testator or intestate, in which fully administered is pleaded. Anderson *v.* Jernigan, 33 N. C. 414; Lynch *v.* Johnson, 33 N. C. 224.

In New Jersey where a creditor brings a bill to enforce a testamentary charge to pay debts, the court of chancery will not take an account of the personal estate but will leave the orphans' court in which the account has

had under some statutes for the purpose of allowing the representative's account to be settled,[64] of permitting proper persons to be made parties to the proceedings,[65] of permitting an answer to be filed upon prescribed terms and conditions,[66] or for the appointment and substitution as plaintiff of the administrator *de bonis non*, where the original administrator has become disqualified.[67] Where a plea of *plene administravit* is found for a representative and scire facias issued to the heirs, the representative is continued in court until the heirs come in to make up an issue;[68] and the representative is not compelled to try the issue at the same term at which it is made up.[69] A plea of the statute of non-claim in a proceeding in chancery against several defendants may be allowed at the time of the argument, or the court may let it stand over until the final hearing of the cause.[70] Where several bills are pending against the representative over essentially the same cause of litigation they should all be brought to a hearing at the same time if possible, in order that a final disposition may at the same time be made of all the questions arising on all of them.[71]

2. Reception of Evidence. The representative may waive formal mode of proof in a suit to which he is a party.[72] But in general it is his duty to object to a witness or to proof where proper,[73] and if he fails to do so, whether through ignorance, inadvertence, collusion, or fraud, any other person interested in the suit may make such objection.[74]

3. Questions of Law and Fact. It is a question for the jury, in an action by or against a representative, to determine whether the representative had prudently and in good faith invested certain trust funds of the estate;[75] whether a certain claim was allowed by the commissioners, whose report has been destroyed;[76] whether services rendered to the decedent by a relative or one living as a member of his family were intended as a gratuity or were rendered under an implied contract to pay therefor;[77] whether the representative had made payment of the claim for which he is sued;[78] or as to the ownership of an unindorsed note, made to the order of the decedent.[79] The sufficiency of the notice required by statute to be given by a representative to his creditors is in the first instance for the court to determine;[80] but where the court has any doubt as to its sufficiency it

been filed to complete it, where circumstances do not require the court of chancery to act. Suydam *v.* Voorhees, 58 N. J. Eq. 157, 43 Atl. 4.

64. Hall *v.* Hurford, 2 Pa. L. J. Rep. 291, 4 Pa. L. J. 44.

Where several suits are brought by different legatees against the executor for legacies, and the estate is insufficient to pay them all, the court will allow the suit in which the account can be taken most advantageously to those interested to proceed for the benefit of all the legatees, and the other suits will be stayed. Ross *v.* Crary, 1 Paige (N. Y.) 416.

65. Jones *v.* Britton, 16 La. Ann. 320.

66. Ducker *v.* Rapp, 67 N. Y. 464 [*reversing* 41 N. Y. Super. Ct. 235].

67. Moore *v.* Estes, 23 Ark. 152, by marriage.

68. Alston *v.* Sumner, 2 N. C. 359.

69. Alston *v.* Sumner, 2 N. C. 359.

70. State *v.* Shall, 23 Ark. 601.

71. Armstrong *v.* Lear, 8 Pet. (U. S.) 52, 8 L. ed. 863.

72. Anderson *v.* Washabaugh, 43 Pa. St. 115.

Where no demand is necessary in an action against a representative on a claim, objection to the formal proof of the claim comes too late after the trial on the merits. Tipton *v.* Richardson, 54 S. W. 738, 21 Ky. L. Rep. 1195.

73. Tate *v.* Tate, 75 Va. 522. See Thurber *v.* Miller, 14 S. D. 352, 85 N. W. 600.

74. Tate *v.* Tate, 75 Va. 522.

75. Smith *v.* Byers, 41 Ga. 439.

76. Hardwick *v.* Richardson, 28 Mich. 508.

77. Wright *v.* Reed, 118 Iowa 333, 92 N. W. 61; Lillard *v.* Wilson, 178 Mo. 145, 77 S. W. 74; Whaley *v.* Peak, 49 Mo. 80; Hart *v.* Hess, 41 Mo. 441; Smith *v.* Myers, 19 Mo. 433; Shannon *v.* Carter, 99 Mo. App. 134, 72 S. W. 495; Elwell *v.* Roper, 72 N. H. 254, 56 Atl. 342; Winings *v.* Hearst, 17 Pa. Super. Ct. 314. See also cases cited *supra*, X, A, 3, b.

78. The question of payment should be submitted to the jury under proper instructions. Tennison *v.* Platt, 50 Kan. 631, 32 Pac. 369. And see, generally, Payment.

79. As against an administrator suing to get possession of an unindorsed note to the order of his intestate for the balance of the purchase-money of land sold by him, an indorsement or assignment is not necessary to give title, and the question of ownership is one of fact for the jury. Thompson *v.* Onley, 96 N. C. 9, 1 S. E. 620.

80. Rawlings *v.* Adams, 7 Md. 26.

may submit the matter to the jury.[81] Where a representative contests plaintiff's claim and also pleads fully administered, the better practice seems to be to leave to the jury both the question of assets and plaintiff's right to his claim.[82] The construction of letters or orders of appointment is a matter for the determination of the court, and it is erroneous to leave it to the jury.[83]

4. Instructions. Instructions in actions by or against a personal representative are regulated entirely by the general rules of instructions in civil actions, and by the facts and issues of the particular case.[84] The court should in case of dispute instruct the jury as to whether the alleged appointment of the personal representative was valid or not.[85] It should also charge the jury as to the legal effect of the evidence,[86] as that the jury should not consider an admission of

81. Rawlings *v.* Adams, 7 Md. 26.

82. Ray *v.* Patton, 86 N. C. 386, holding that where an administrator denies an alleged debt, pleads *plene administravit,* and no assets applicable to the same, the issue as to the contestant's indebtedness must be determined by the jury; and this being settled an inquiry as to the assets and the disposition thereof must be had by reference or upon issue to a jury.

The Maryland statutes (Code, art. 26, §§ 26, 27) provide that when an administrator is sued he may plead that he has not assets sufficient to discharge plaintiff's claim "and a trial by jury shall thereupon be had"; and that if the jury shall find for plaintiff upon any other issue than that of assets for an amount greater than the assets, the jury shall declare the amount to be paid to plaintiff, regard being had to the amount of assets in hand, and the debts due from the deceased. See Gill *v.* Staylor, 93 Md. 453, 49 Atl. 650, holding, however, that where the assets are shown to be insufficient, but the record shows that the parties agreed that the judgment was only to bind the assets, the failure to submit the issue as to the effect of insufficiency of assets is not erroneous. But see Hellen *v.* Beatty, 11 Fed. Cas. No. 6,336, 2 Cranch C. C. 29, construing an earlier Maryland statute.

In Pennsylvania, however, under the act of Feb. 24, 1834, section 54, it has been held that, where pleas of want of assets and others are filed, the jury can only pass upon plaintiff's right to the claim and its amount, and leave it to the orphans' court to determine the question of assets. Breden *v.* Gilliland, 67 Pa. St. 34.

83. Sims *v.* Boynton, 32 Ala. 353, 70 Am. Dec. 540; Fells Point Sav. Inst. *v.* Weedon, 18 Md. 320, 81 Am. Dec. 603. Whether plaintiff or defendant is or is not the true and *bona fide* representative of the estate can only arise in a proceeding to review the action of the probate court, and is not a question for the jury. Sadler *v.* Sadler, 16 Ark. 628.

84. See, generally, Trial.

In a suit to recover for services performed by decedent, as claimed, under a special agreement as to the amount of compensation to be paid therefor plaintiff is entitled to an instruction that if he fails to establish that agreement he is entitled to recover upon a *quantum meruit,* if the jury find that he was employed to perform the services. Lewis *v.* Roulo, 93 Mich. 475, 53 N. W. 622.

On the issue of devastavit and where the representative does not plead *plene administravit* it is error to instruct that as the pleading showed that the representative had property of the decedent in his hands at the time a judgment on which he is sued was recovered, he could only relieve himself by showing that he had expended it on prior liens, funeral expenses, and judgments, and to fail to charge that he would not be liable if he had judgments in favor of the estate, but was unable to collect the same. Parker *v.* Latimer, 59 S. C. 330, 37 S. E. 918.

The court's instruction to a jury to disregard stale items of an account is tantamount to actually expunging such items, and is therefore sufficient. Hoskins *v.* Wright, 1 Hen. & M. (Va.) 377.

In an action against an administrator on a note executed by his intestate, an instruction that it is the duty of an administrator to put in every lawful defense he may have to a note filed against the estate which he represents is not erroneous. Ray *v.* Moore, 24 Ind. App. 480, 56 N. E. 937.

For instructions held sufficient in an action for a claim against decedent's estate see Stanley *v.* Pence, 160 Ind. 636, 66 N. E. 51, 67 N. E. 441. For instructions held sufficient in an action for services rendered the decedent by a relative see Van Slambrook *v.* Little, 127 Mich. 61, 86 N. W. 402; Sprague *v.* Sea, 152 Mo. 327, 53 S. W. 1074.

For instructions held insufficient in action for services rendered decedent by a relative see Moore *v.* Renick, 95 Mo. App. 202, 68 S. W. 936.

85. Sims *v.* Boynton, 32 Ala. 353, 70 Am. Dec. 540; Fells Point Sav. Inst. *v.* Weedon, 18 Md. 320, 81 Am. Dec. 603.

86. The court may tell the jury that it is immaterial when plaintiff first informed defendant of his claim under the agreement in suit, provided they believed that the agreement was made, and the demand was presented to the administrator in time. Clark *v.* Cordry, 69 Mo. App. 6. Where an administrator of an assignor is made a party to answer as to the assignment of the note sued on, an instruction that if the jury returned a general verdict for plaintiff on the note sued on, the effect would be a finding that the estate had no interest in such note is not

indebtedness of the estate, by one only of two or more co-representatives.[87] But it should not give instructions that are inapplicable to the issues, and misleading[88] or unwarranted by the evidence,[89] or on immaterial matters,[90] or which are likely to exclude from the consideration of the jury important matters.[91] Nor need the court give further instructions on matters that are already covered by other instructions.[92]

5. Verdict or Finding — a. In General. The verdict or finding of the jury should correspond to the issues involved or submitted to them,[93] although a general verdict is not defective for failing to dispose of issues submitted, which by reason of rulings of the court were practically excluded;[94] and such a verdict on

erroneous. Johnson *v.* Johnson, 156 Ind. 592, 60 N. E. 451.

87. Forsyth *v.* Ganson, 5 Wend. (N. Y.) 558, 21 Am. Dec. 241.

88. Fitzpatrick *v.* Phelan, 58 Wis. 250, 16 N. W. 606, instruction held inapplicable to the issues and misleading in an action on a claim against the estate, consisting of an account for board and care of decedent.

In an action against a personal representative on a personal contract for services made by him with plaintiff, an instruction that the personal representative cannot bind the estate by the employment of a third person, but that when he represented his accounts to the surrogate, he had a right to offer the expense of such employment as a proper disbursement and that it was for the surrogate to allow or disallow the same, although correct as a proposition of law, is inapplicable to the case. Douglass *v.* Leonard, 17 N. Y. Suppl. 591 [*reversing* 14 N. Y. Suppl. 274].

89. Fullam *v.* Rose, 181 Pa. St. 138, 37 Atl. 197, holding that, in an action by an executor on a sealed instrument, merely produced by plaintiff, a statement in the instructions that such paper "was found among the belongings of" the testator, was unwarranted by the evidence, and erroneous. Where the evidence shows that bonds received by a legatee from the executor were received as bonds, a charge directing the jury to determine whether they were accepted as "good money" is error. Dillard *v.* Ellington, 57 Ga. 567.

90. The existence or non-existence of demands against the estate is immaterial in an administrator's action to recover trust moneys, and special interrogatories should not be addressed to the jury in that regard. Langsdale *v.* Woollen, 99 Ind. 575.

91. An instruction implying that the fact of an unexplained three-years' delay in presenting a claim against an estate need not be considered by the jury is erroneous and ground for reversal of a judgment allowing the claim. O'Connor *v.* O'Connor, 52 Ill. 316. See McNeill *v.* McNeill, 35 Ala. 30, erroneous instruction under a statute (Code, §§ 1675, 2494), declaring that a certain length of time after decedent's death is not to be taken as any part of the time limiting the commencement of actions by or against his representative.

92. Where the court charged that a promise by an administrator that plaintiff should be paid could not create a claim against the estate, but that, if in writing, it might bind the administrator, it need not charge that the admissions or promises of the administrator were not to be considered. Fuller *v.* Mowry, 18 R. I. 424, 28 Atl. 606.

93. See Curran *v.* Kennedy, 89 Cal. 98, 26 Pac. 641, finding held sufficient in an action against the representative for failing to account for money received on decedent's life-insurance policy. And see, generally, Trial.

Illustrations.— A finding that defendant is indebted to plaintiff instead of that the "defendant detains from the plaintiff as administrator," etc., is sufficient. Glass *v.* Stovall, 10 Humphr. (Tenn.) 453. A verdict need not find the value of the estate devised, where, in an action against the executor and heir and devisees, the issue and verdict taken together constitute a finding of estate devised more than sufficient to pay the debt sued for. Jameson *v.* Martin, 3 J. J. Marsh. (Ky.) 330. The omission to find the amount of assets in the representative's hands is no objection to a verdict for defendant in a suit against him by the decedent and revived by his representatives, in which defendant had filed a set-off for more than the decedent's demand. Adams *v.* Evans, 4 Blackf. (Ind.) 247. Where, under an issue as to assets, plaintiff, suing an administrator, offered evidence of a devastavit, causing a failure of assets, the jury must find assets to the amount of the failure, and not find a devastavit. Shannon *v.* Dinkins, 2 Strobh. (S. C.) 196. A finding that decedent did not promise to pay for services performed is not outside the issues, where the complaint alleges that decedent promised to pay for such services, and the answer denies the promise. Watson *v.* Miller, (Cal. 1899) 58 Pac. 135. A finding that on a certain day letters of administration of intestate's estate were issued by a certain court to "plaintiff herein, that said letters have not since been revoked," is sufficient on the issue that an order of said court was duly given, made, and entered, appointing plaintiff administrator of said estate. Curran *v.* Kennedy, 89 Cal. 98, 26 Pac. 641.

Where the question of presentation within the time prescribed by statute is in issue, the finding must show when the claim became due. Elliott *v.* Peck, 53 Cal. 84.

A verdict for money only can be rendered in an action to recover a legacy of personal property which had already been distributed. Snelling *v.* Darrell, 17 Ga. 141.

94. Hunicke *v.* Thomas, 102 Mo. App. 129, 76 S. W. 659.

several counts may be amended within a reasonable time so as to apply to the count under which evidence is given.[95]

b. On Issue of Plene Administravit or No Assets. Upon the issue of *plene administravit* or no assets, a verdict for plaintiff should find not only the amount of plaintiff's claim, but also the amount of assets in the hands of the representative; otherwise the court cannot render a judgment upon the verdict.[96]

6. Dismissal and Nonsuit. A nonsuit or dismissal of an action by or against a representative may be granted under proper circumstances,[97] as for want of the proof required by statute;[98] or where plaintiff has admitted that he had funds belonging to the decedent in his possession but refuses to disclose the amount thereof;[99] or where the action was improperly instituted,[1] or misjoins

95. Where a general verdict is rendered upon two counts, in one of which the representative sues in his representative capacity, and in the other in his individual capacity, and evidence is introduced on the former count only, the verdict may be amended within a reasonable time by an entry *nunc pro tunc* to correspond to that count. Murphy *v.* Stewart, 2 How. (U. S.) 263, 11 L. ed. 261.

96. *Arkansas.*— Jarrett *v.* Wilson, 1 Ark. 137.

Indiana.— Gaston *v.* Hiatt, 5 Blackf. 44; Johnson *v.* Hawkins, 2 Blackf. 459; King *v.* Anthony, 2 Blackf. 131.

Kentucky.— Ely *v.* Com., 3 Dana 137; Bishop *v.* Hamilton, 4 J. J. Marsh. 548; Buckner *v.* Morris, 2 J. J. Marsh. 121; McKinley *v.* Call, 1 T. B. Mon. 54; Young *v.* Whitaker, 1 A. K. Marsh. 398; Porter *v.* Glenn, 3 Bibb 86; Forbes *v.* Scoby, 1 Bibb 281.

Pennsylvania.— Strohecker *v.* Drinkle, 16 Serg. & R. 38, holding also that it is not usual to find the whole amount of what is unadministered, but only a sum sufficient to cover what is found due. On a plea of no assets in this state the practice is for the jury to find for defendant, and for plaintiff to pray judgment *de terris*, etc., and of assets *quando acciderint*. Wilson *v.* Hurst, 30 Fed. Cas. No. 17,809, Pet. C. C. 441.

Tennessee.— Marr *v.* Rucker, 1 Humphr. 348, holding that a verdict upon the issue of fully administered should find the assets to be co-extensive with the entire verdict, and therefore a finding that defendant had received assets which he had not paid out to an amount much larger than plaintiff's debt as found and assessed by the jury was too vague.

Virginia.— A verdict upon the plea of fully administered ought to ascertain the amount of assets in the hands of defendant at the commencement of the suit and at the time of the plea pleaded; and a verdict which merely finds that assets sufficient to pay plaintiff's demand "have come" to defendant's hands, without saying when, is erroneous. Gardner *v.* Vidal, 6 Rand. 106.

United States.— Fairfax *v.* Fairfax, 5 Cranch 19, 3 L. ed. 24.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1882.

97. In an action by an executor to foreclose a mortgage to his testator, which the evidence shows to have been improperly released by a former co-executor, the court should either dismiss the action without prejudice to plaintiff's right to bring a new one, or, upon proper application and upon terms, should direct an amendment to the complaint, so that the release may be vacated in such action. Weir *v.* Mosher, 19 Wis. 311. See also Jones *v.* Britton, 16 La. Ann. 320. And see Dismissal and Nonsuit, 14 Cyc. 431 *et seq.*

A refusal to dismiss an action brought by two executors is proper, where one of the executors petitions for its dismissal and the other executor insists that it shall proceed, and questions are involved in the application which ought not to be decided on motion or petition. Ewing *v.* Handley, 4 Litt. (Ky.) 346, 14 Am. Dec. 140

Where the representative obtains a formal discharge, after an action against and an answer by him and no mention thereof is made in any pleading of the case, it is error, on proof of the discharge, to nonsuit plaintiff. Jones *v.* Hammett, 5 S. C. 41.

The failure to have the letters of administration read is not ground for nonsuit in an action by an administrator who had stated that his evidence was all in, but he may be allowed to read them after defendant moves for nonsuit on that ground. Huston *v.* Becknell, 4 Mo. 39.

A voluntary dismissal as to one of two co-representatives who is the active representative of the estate is a dismissal as to both. Willard *v.* Wood, 164 U. S. 502, 17 Sup. Ct. 176, 41 L. ed. 531.

98. Hayden *v.* Kale, 7 Ky. L. Rep. 375.

99. Hebert *v.* Lacour, 5 La. Ann. 599, holding that where a party being present at the taking of an inventory admitted that he had funds of the deceased in his possession but refused to state the amount, afterward brings suit for a debt alleged to be due to him from the estate, he will be nonsuited unless he shows the amount of such funds in his possession, and in such case the representative is not bound to propound interrogatories to compel a disclosure concerning such funds.

1. Hyatt *v.* Mavity, 34 Ind. 415, holding that where under 2 Gavin & H. St. p. 501, § 62, p. 503, § 66, a complaint shows on its face that the action is to recover a claim against the estate of decedent, and the proceeding has been commenced by complaint and summons as an ordinary action, and not

parties;[2] or where the record does not show that defendant was such a one as was liable to be sued;[3] although the dismissal should be without prejudice to the right to bring another action.[4] But a legatee who has filed a bill against the executor and other legatees for his share cannot, after an interlocutory decree establishing his right, voluntarily dismiss his bill to the prejudice of the legatees who are benefited by the decree.[5]

N. New Trial. On suitable grounds a new trial is sometimes granted in suits by or against the executor or administrator, as in other actions in law or equity.[6]

O. Judgment[7] **— 1. Rendition, Form,**[8] **and Requisites — a. In General.** The circuit court has power, in an action against an administrator, to classify the claim in suit and order it to be paid as a claim of that class.[9] Erroneous directions in a judgment for a *pro rata* payment of the claim sued on do not necessarily vitiate the judgment, but may be rejected as surplusage.[10] If one item of an account against a decedent's estate is properly proved in an action thereon, it is error to dismiss the entire claim.[11] On a bill by a distributee against an administrator for his distributive share a decree is erroneous which directs complainant's share to be paid to him without taking notice of the shares of other distributees.[12] In some states certain demands against an estate cannot be prosecuted to judgment before the expiration of a certain time from the granting of letters testamentary or letters of administration.[13] In some states and under some conditions judg-

by filing a claim, the suit should be dismissed on motion.

2. Beaty *v.* Downing, 96 Va. 451, 31 S. E. 612.

3. See Wilson *v.* Shelton, 9 Leigh (Va.) 342, holding that under 1 Rev. Code (1819), p. 380, c. 104, §§ 24, 42, a suit against a curator would be dismissed where it was not shown by the record that he was liable to be sued. See also Wynn *v.* Wynn, 8 Leigh (Va.) 264. But by Code (1904), § 2534, it seems that a curator may be sued the same as an executor or administrator.

4. Hayden *v.* Kale, 7 Ky. L. Rep. 375. The dismissal of a suit by a legatee of a decedent against his personal representative and debtor of the estate for the purpose of holding the debtor to account, while a separate suit was pending against the personal representative for the settlement of his account, should be without prejudice to the right of the legatee to have the personal representative charged in the other suit for any sum which it was his duty to collect. Beaty *v.* Downing, 96 Va. 451, 31 S. E. 612.

5. Collins *v.* Taylor, 4 N. J. Eq. 163.

6. See Reed *v.* Reed, 25 Ohio St. 422; Thurber *v.* Miller, 14 S. D. 352, 85 N. W. 600, failure of court to rule on objection to evidence. In an action against executors for the funeral expenses of the testator, it is not ground for a new trial that the amount of the verdict embraced an item not included in plaintiff's statement; the item being connected with the transaction, and needed to make up the aggregate claim. Smith *v.* Teacle, 8 Pa. Co. Ct. 150. See, generally, New Trial.

Defect in pleadings.— Where the writ describes defendant as administrator, but declares against him personally, and the verdict is that defendant's intestate promised to pay as alleged, a new trial will not be granted, if the evidence sustains the verdict, and plaintiff amends his declaration so as to sustain the verdict. Perkins *v.* Hix, (Me. 1888) 13 Atl. 131. Where an executor is sued in his individual capacity for money received by him as administrator, by a creditor of the estate, and he answers that he holds the money as administrator and not as an individual, and a trial is had upon the merits, such defendant will not be granted a new trial because of defect of parties defendant, and be allowed to file an answer as administrator. Ten Eick *v.* Dye, 9 Ohio Dec. (Reprint) 511, 14 Cinc. L. Bul. 214. See also Fritz *v.* McGill, 31 Minn. 536, 18 N. W. 753.

An excessive verdict for board and services rendered the decedent may be grounds for a new trial. Lockwood *v.* Onion, 48 Ill. 325.

7. See, generally, Judgments.

Decrees in equity see, generally, Equity, 16 Cyc. 471 *et seq.*

8. **Form of judgment of revival** see *infra*, XIV, O, 6.

9. Bradwell *v.* Wilson, 158 Ill. 346, 42 N. E. 145.

10. Hart *v.* Jewett, 11 Iowa 276, holding that, although in a suit on a claim against an administrator the court has simply to allow or disallow the claim, without fixing the per cent to be paid thereon, except in cases where the assets are determined and the several claims ascertained as contemplated in the code, yet the judgment for *pro rata* payment is not void.

11. Collingsworth *v.* Davidson, 10 Ky. L. Rep. 312.

12. Buckley *v.* Buckley, 9 Gill (Md.) 497.

13. Smith *v.* Rhodes, 29 Me. 360, holding that a judgment upon such claim obtained before the expiration of that time will be reversed in error.

Void and voidable judgments.— A statute declaring that a judgment against an exec-

ment cannot be rendered against a personal representative.[14] In an action against an executor to recover money that testator had received as guardian of plaintiff, a judgment ordering a sale of land to pay the claim is erroneous.[15] In a suit against an administrator to enforce a debt, however, a decree declaring certain property to be assets of the estate should also direct a sale thereof to discharge the debt.[16] In some states by statute judgment may be rendered, although the demand in suit is not due at the time of trial.[17] The amount of the judgment depends of course on the peculiar circumstances of the particular case.[18] In an

utor or administrator by confession or default within six months after his qualification shall be "void" is intended only to prevent favoritism on the part of the personal representative by which a preference might be given some creditors over others, and the word "void" is not used absolutely but means merely that the judgment shall be inoperative for the time limited, so that no such advantage shall be taken. Roche *v.* Washington, 7 Humphr. (Tenn.) 142. See also Gorman *v.* Swaggerty, 4 Sneed (Tenn.) 560; Woolley *v.* Sullivan, 92 Tex. 28, 45 S. W. 377, 46 S. W. 629, holding that, although under Rev. St. (1895) art. 1996, an executor need not plead to a suit against him for money until a year has expired from the probate of the will, yet a judgment against him in a suit brought before the year has expired is merely voidable.

14. Newkirk *v.* Burson, 21 Ind. 129 (holding that, where suit is instituted against the heirs and administrator of a deceased mortgagor to foreclose a mortgage, no judgment can be rendered against the administrator for the balance of the debt not satisfied by the sale of the premises); Paterson *v.* Shinn, 17 N. J. L. 322 (holding that where both parties are executors or administrators, suing and sued in their representative capacity, and defendant pleads payment with notice of a set-off exceeding in amount plaintiff's claim, judgment cannot be entered up against plaintiff for the balance, but that it nevertheless becomes a debt of record, to be enforced by an action of debt or a scire facias); Duhme *v.* Mehner, 18 Ohio Cir. Ct. 706, 6 Ohio Cir. Dec. 78 (holding that where the petition against an administratrix for the cancellation of receipts alleged to have been fraudulently obtained and for the payment of plaintiff's claim fails to allege any settlement of the estate by the administratrix and the balance found due plaintiff, no money judgment can be rendered).

Stipulation.— Where an administrator *de bonis non* entered into an agreement with his predecessor that the issue as to whether there were any assets in his hands should be tried in an amicable action, the fact found, and a certificate transmitted to the orphans' court, it was error to enter judgment against the former administrator on a verdict finding that there was a certain sum due. Finney *v.* Moore, 8 Serg. & R. (Pa.) 345.

15. Murray *v.* Barden, 132 N. C. 136, 43 S. E. 600.

16. Ewing *v.* Handley, 4 Litt. (Ky.) 346, 14 Am. Dec. 140.

17. Traylor *v.* Cabanne, 8 Mo. App. 131, holding accordingly that a judgment for rent against an executor for land leased to testator may be rendered prospectively for the part not due at the time of trial, the judgment distinguishing between the amounts presently and prospectively payable.

18. *Michigan.*— Maney *v.* Casserly, 134 Mich. 252, 96 N. W. 478, holding that where an administrator and an intestate's widow fraudulently concealed from the probate court that complainants were heirs of intestate and as such entitled to a one-half interest in certain real estate, complainants were entitled to one half of the rental value of such real estate from the time their bill was filed to the date of the decree, with interest allowed for the average time at six per cent, less the value of necessary repairs.

Mississippi.— Tatum *v.* McLellan, 56 Miss. 352, holding that a decree should not be rendered against an administrator for the whole of the trust fund in his hands at the suit of a single legatee, but only for a sufficient amount to pay complainant.

New Jersey.— Wier *v.* Lum, 5 N. J. L. 823, holding that, in an action by a distributee to recover his distributive share of his administrators, judgment cannot be rendered also to include plaintiff's distributive share in the distributive share of the widow of intestate, who has since deceased, although the same distributees are entitled to such share of the widow in the same proportion.

New York.— Hayward *v.* Place, 4 Silv. Supreme 390, 7 N. Y. Suppl. 523, holding that an executor and a legatee who have misappropriated the estate are liable for no more than is proved to have remained in the hands of the executor and to have been received by the legatee beyond what he was entitled to; and that a judgment against them transcending this liability, without showing in what manner or upon what evidence it is done, so that its modification is impracticable, will be reversed.

Virginia.— Martin *v.* Fielder, 82 Va. 455, 4 S. E. 602, holding that where a guardian *de facto* is dead, in a proceeding by the wards against his administrator, it is not error to decree the whole amount due them for rents and profits against the administrator, although the deceased guardian's land, including the land of such wards, had been partitioned among his heirs, and one of them in particular held the wards' shares, since his coheirs would have to contribute to his compensation, and such a decree avoids circuity of action.

action against a personal representative, interest may be allowed in a proper case as part of the damages.[19]

b. Judgment by Confession. The personal representative of a deceased person may confess judgment both at law and in equity.[20]

c. Judgment by Default. A judgment by default may be taken against an administrator the same as against any other party,[21] in the absence of statute to the contrary.[22] So the complainant in a bill against an executor or administrator may in a proper case take a decree *pro confesso*.[23]

d. Judgment For Payment in Due Course of Administration. In many states it is provided by statute that a judgment against the personal representative of a decedent shall be paid only in due course of administration, and the judgment should therefore so direct and not be in the form of an absolute general money judgment against the representative.[24] So, when a judgment establishes a claim

19. Maney *v.* Casserly, 134 Mich. 252, 96 N. W. 478. See also Rogers *v.* Holley, 19 Wend. (N. Y.) 624, holding that in a suit against an executor, where a report of referees is made in favor of plaintiff, although the court may not see fit to award costs to plaintiff, he may take judgment for the interest of the sum reported due in the same manner as if costs had been awarded, if he has been delayed by defendant in entering judgment by a motion to set aside the report.

20. Ruggles *v.* Sherman, 14 Johns. (N. Y.) 446; Mactier *v.* Lawrence, 7 Johns. Ch. (N. Y.) 206; Anonymous, 2 N. C. 295; Smith *v.* Eyles, 2 Atk. 385, 26 Eng. Reprint 633; Waring *v.* Danvers, 1 P. Wms. 295, 24 Eng. Reprint 396. See, however, Marrin *v.* Marrin, 27 Hun (N. Y.) 601, holding that a statement by defendant that, "on accounting . . . as said executor, and on examination of my accounts as said trustee, it appears that there is now due and owing said plaintiffs the sum of two thousand five hundred dollars, and that the same is justly due," is not sufficient whereon to found a confession of judgment; it not showing that the sum was due, but that, upon examination, it would "appear."

Judgment by consent.— Where, on a bill by decedent's widow and two infant children against the administrator, a decree is entered by consent that the administrator is indebted to the estate in a certain sum, and that of this sum one third belongs to the widow and two thirds to the infant children, the decree is not erroneous in failing to require refunding bonds to be given by plaintiffs, since this would be incompatible with the evident intent and legal effect of the decree. Harman *v.* Davis, 30 Gratt. (Va.) 461.

21. Chase *v.* Swain, 9 Cal. 130. See also Piper *v.* Goodwin, 23 Me. 251.

22. Parker *v.* Farr, 2 Browne (Pa.) 39; Lawall *v.* Love, 1 Leg. Rec. (Pa.) 257; Wright *v.* Cheyney, 10 Phila. (Pa.) 469 (all holding that a judgment entered against administrators, in a suit upon a contract of their decedent, for want of an affidavit of defense, is void, and will be stricken off on motion); Honeywell *v.* McGuire, 8 Pa. Co. Ct. 396; Johnston *v.* Shurtleff, 1 Lack. Leg. N. (Pa.) 255 (holding that a judgment for want of a sufficient affidavit of defense cannot be taken against an administrator *de bonis non*, where the matters out of which the action grew happened in the lifetime of his intestate); Hendrix *v.* Hendrix, 46 Tex. 6 (holding that where, in an action against the executor of an insolvent estate, an exception was sustained to the answer, it was error to assume the facts alleged in the petition to be true for want of an answer, and to render judgment thereon without the introduction of evidence); O'Keefe *v.* Foster, 5 Wyo. 343, 40 Pac. 525 (holding that where an administrator appears in a suit against him for foreclosure of a mortgage, the petition in which does not aver presentation of the claim in suit, nor waive recourse against the estate, judgment by default against him for a deficiency and for attorney's fees is erroneous).

23. Kennedy *v.* Creswell, 101 U. S. 641, 25 L. ed. 1075.

24. *California.*— Moore *v.* Russell, 133 Cal. 297, 65 Pac. 624, 85 Am. St. Rep. 166; Preston *v.* Knapp, 85 Cal. 559, 24 Pac. 811; Laurence *v.* Doolan, 68 Cal. 309, 5 Pac. 484, 9 Pac. 159; Drake *v.* Foster, 52 Cal. 225; Kelly *v.* Bandini, 50 Cal. 530; Atherton *v.* Fowler, 46 Cal. 323; Rice *v.* Innskeep, 34 Cal. 224; De Racouillat *v.* Sansevain, 32 Cal. 376.

Colorado.— Mattison *v.* Childs, 5 Colo. 78.

Illinois.— Albee *v.* Wachter, 74 Ill. 173; Le Moyne *v.* Quimby, 70 Ill. 399; Bull *v.* Harris, 31 Ill. 487; Granjang *v.* Merkle, 22 Ill. 249; Peacock *v.* Haven, 22 Ill. 23; Stillman *v.* Young, 16 Ill. 318; Judy *v.* Kelly, 11 Ill. 211, 50 Am. Dec. 455; McDowell *v.* Cochran, 11 Ill. 31; Peck *v.* Stevens, 10 Ill. 127; Powell *v.* Kettelle, 6 Ill. 491.

Louisiana.— Anderson *v.* Birdsall, 19 La. 441; Wooter *v.* Turner, 6 Mart. N. S. 442; Baillio *v.* Wilson, 5 Mart. N. S. 214; Herman *v.* Flood, 2 Mart. N. S. 659.

New Jersey.— Montgomery *v.* Reynolds, 14 N. J. L. 283; Woodruff *v.* Woodruff, 4 N. J. L. 375; Sindle *v.* Kiersted, 3 N. J. L. 926; Murphy *v.* Davis, 3 N. J. L. 843. See also Paterson *v.* Shinn, 17 N. J. L. 322.

New York.— See Brown *v.* King, 63 Hun 158, 17 N. Y. Suppl. 678.

North Carolina.— See Grant *v.* Bell, 91 N. C. 495; Wall *v.* Fairley, 73 N. C. 464; Dunn *v.* Barnes, 73 N. C. 273.

against the estate, the creditor should be remitted to the probate court for satisfaction.[25]

e. Judgment De Bonis Testatoris. In an action brought against an executor or administrator in his representative capacity on an obligation of his decedent, the judgment should ordinarily be *de bonis testatoris* or *intestati*,[26]

Texas.— Goff *v.* Hauser, 33 Tex. 430; Wilcox *v.* State, 24 Tex. 544; Cook *v.* Jordan, 21 Tex. 221; Mott *v.* Ruenbuhl, 1 Tex. App. Civ. Cas. 599.

Wyoming.— Fisher *v.* Hopkins, 4 Wyo. 379, 34 Pac. 899, 62 Am. St. Rep. 38.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1887.

However, the fact that a judgment against a succession is written as absolute, and not a judgment to be paid in the due course of administration, is not ground for reversal. Spears *v.* Spears, 27 La. Ann. 537. So an absolute judgment against the administrator of a surety on the official bond of a federal official, rendered by a federal court sitting in Louisiana, is not objectionable on the theory that it should have been against the administrator, payable only in due course of administration, since, if by the law of that state the judgment is so payable, it will be thus interpreted and enforced. Smythe *v.* U. S., 188 U. S. 156, 23 S. Ct. 279, 47 L. ed. 425 [*affirming* 107 Fed. 376, 46 C. C. A. 354]. See also Chase *v.* Swain, 9 Cal. 130.

25. Jones *v.* Perot, 19 Colo. 141, 34 Pac. 728; Watson *v.* Blymer Mfg. Co., 66 Tex. 558, 2 S. W. 353; McCormick *v.* McNeel, 53 Tex. 15 (holding that a decree of the district court ordering the sheriff to make sale of mortgaged property of an estate in process of settlement is irregular, since after the court has established the mortgage, the creditor should be remitted to the county court for satisfaction of his claim in due course of administration); Fortson *v.* Caldwell, 17 Tex. 627.

Sufficiency of certification of judgment to probate court see *infra*, XIV, O, 2, a.

26. *California.*— Stockton Bank *v.* Howland, 42 Cal. 129.

Florida.— Phillips *v.* Sanchez, 35 Fla. 187, 17 So. 363; Cooper *v.* Livingston, 19 Fla. 684.

Georgia.— Justices Irwin County Inferior Ct. *v.* Sloan, 7 Ga. 31.

Indiana.— Steinmetz *v.* State, 47 Ind. 465; Horrall *v.* Mattingly, 27 Ind. 500; Horrall *v.* Scudder, 27 Ind. 499; Flagg *v.* Winans, 2 Ind. 123; Phipps *v.* Addison, 7 Blackf. 375; Priest *v.* Martin, 4 Blackf. 311; Raymond *v.* Simonson, 4 Blackf. 77. In no case, however, can a judgment be rendered against an administrator, to be levied on the assets of the estate, except where, under 2 Ind. Rev. St. p. 199, § 411, cl. 2. it directs a sale of specified articles thereof. Johnson *v.* Meier, 62 Ind. 98.

Iowa.— Hodgdon *v.* Heidman, 66 Iowa 645, 24 N. W. 257; Lawton *v.* Buckingham, 15 Iowa 22; Voorhies *v.* Eubank, 6 Iowa 274.

Kansas.— Insley *v.* Shire, 54 Kan. 793, 39 Pac. 713, 45 Am. St. Rep. 308.

Kentucky.— Lusk *v.* Anderson, 1 Metc. 426; Vaughn *v.* Gardner, 7 B. Mon. 326; Morton *v.* Fox, 4 Bibb 392.

Maine.— Ticonic Nat. Bank *v.* Turner, 96 Me. 380, 52 Atl. 793.

Michigan.— Peckham *v.* Hoag, 57 Mich. 289, 23 N. W. 818, holding that, in an action against an administrator on an order directing payment of a claim, judgment should be rendered for only so much as the assets will warrant, since the order should direct payment only to the extent of the assets.

Mississippi.— Barrow *v.* Wade, 7 Sm. & M. 49; Hill *v.* Robeson, 2 Sm. & M. 541.

Missouri.— Blondeau *v.* Sheridan, 81 Mo. 545; Finney *v.* State, 9 Mo. 227.

New Hampshire.— Pillsbury *v.* Hubbard, 10 N. H. 224, holding that where an executor or administrator institutes a suit for a cause of action purporting to have arisen in the lifetime of the testator or intestate, and defendant prevails on the merits, judgment is to be entered against the goods and estate of the testator or intestate.

New Jersey.— Monfort *v.* Vanarsdalen, 5 N. J. L. 686; Imlay *v.* Hamilton, 3 N. J. L. 997; Murphy *v.* Davis, 3 N. J. L. 843; Nelson *v.* Golden, 3 N. J. L. 625; Quicksall *v.* Quicksall, 3 N. J. L. 50, 457.

New Mexico.— Senescal *v.* Bolton, 7 N. M. 351, 34 Pac. 446.

New York.— Cooperstown Bank *v.* Corliss, 1 Abb. Pr. N. S. 412; People *v.* Erie County, 4 Cow. 445.

North Carolina.— Usry *v.* Suit, 91 N. C. 406; Hogg *v.* White, 2 N. C. 298; Parker *v.* Stevens, 2 N. C. 218, 1 Am. Dec. 557.

Pennsylvania.— Dickey *v.* Trainer, 43 Pa. St. 509.

Tennessee.— Massingale *v.* Jones, 3 Hayw. 36.

Texas.— Thorn *v.* State, 10 Tex. 295.

Virginia.— Hite *v.* Paul, 2 Munf. 154; Spotswood *v.* Price, 3 Hen. & M. 123.

West Virginia.— Jones *v.* Reid, 12 W. Va. 350, 29 Am. Rep. 455.

Wisconsin.— Lightfoot *v.* Coles, 1 Wis. 26.

United States.— Boyce *v.* Grundy, 9 Pet. 275, 9 L. ed. 127.

England.— Mounson *v.* Bourn, Cro. Car. 518.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1892.

Judgment by default.— Judgment in favor of a creditor of the intestate against an administrator who enters no appearance and makes no plea should be *de bonis testatoris*. Jennings *v.* Wright, 54 Ga. 537.

Judgment for funeral expenses.— Under a statute placing funeral expenses among debts to be first paid out of the estate, and providing that an action for them may be brought against an executor, even within the six

and as a general rule a judgment against the representative *de bonis propriis* in such an action is improper.[27]

f. Judgment Quando Acciderint. A judgment against an executor or admin-

months which is generally allowed him to examine into the condition of the estate, judgment may be entered *de bonis testatoris.* Campfield *v.* Ely, 13 N. J. L. 150.

Judgment in action revived against administrator.— Where a defendant dies, and the suit is revived against his administrator, the decree against him should be *de bonis intestati* only. Myers *v.* Mott, 29 Cal. 359, 89 Am. Dec. 49; Cocke *v.* Gilpin, 1 Rob. (Va.) 20; Hunt *v.* Martin, 8 Gratt. (Va.) 578. See, however, Greenlee *v.* Bailey, 9 Leigh (Va.) 526.

Judgment in foreign attachment.— As a general rule a judgment against an administrator on a debt due from the intestate's estate should be against the estate, and the same rule prevails in a process of foreign attachment against an administrator. Quigg *v.* Kittredge, 18 N. H. 137.

Judgment on plea of plene administravit.— On a verdict against an executor on a plea of *plene administravit* the judgment should be *de bonis testatoris.* Jameson *v.* Martin, 3 J. J. Marsh. (Ky.) 330. The verdict in such a case should find the amount of assets unadministered, and the judgment should be *de bonis testatoris.* Siglar *v.* Haywood, 8 Wheat. (U. S.) 675, 5 L. ed. 713. See Fairfax *v.* Fairfax, 5 Cranch (N. S.) 19, 3 L. ed. 24 [*reversing* 8 Fed. Cas. No. 4,612, 1 Cranch C. C. 292]. Where a decedent's estate is solvent, including his real estate, and his administrators neglect to apply for a sale of the real estate, and pay out all the personal estate to one creditor to the exclusion of the rest, it is a devastavit, and the judgment must be *de bonis testatoris,* notwithstanding the plea of *plene administravit,* which is an immaterial plea. Abbott *v.* Cole, 5 Ohio 86.

Necessity of fixing executor with assets.— A decree cannot properly be made against an executor for a debt of his testator until he has, by confession or the report of a master, been fixed with assets. Moody *v.* Sitton, 37 N. C. 382. See also Washington Bank *v.* Peltz, 2 Fed. Cas. No. 952, 2 Cranch C. C. 241. If, however, an administrator does not plead want of assets, the judgment of *de bonis testatoris* is awarded. Hogg *v.* White, 2 N. C. 298; Parker *v.* Stephens, 2 N. C. 218, 1 Am. Dec. 557. So in suits against executors it is not regular to enter a decree to be levied on the goods of the testator, without an account. McRae *v.* Bates, 4 Hen. & M. (Va.) 490. If, however, plaintiff's claim is proved or admitted, and the executor confesses assets, plaintiff may, at the hearing, have a decree for payment, without taking a decree for an account. Duerson *v.* Alsop, 27 Gratt. (Va.) 229.

Necessity of direction as to payment out of assets.— A judgment against an administrator as such is sufficient, if the recitals therein show that it was rendered against him in his representative capacity, although there is no express direction that the money is to be levied of the goods and chattels of his intestate in his hands to be administered. Cake *v.* Woodbury, 3 App. Cas. (D. C.) 60; Guice *v.* Sellers, 43 Miss. 52, 5 Am. Rep. 476, *Contra,* Thorn *v.* State, 10 Tex. 295; Hite *v.* Paul, 2 Munf. (Va.) 154. So a judgment against an executor or administrator, where there is no plea that the sum recovered "be levied of the goods and chattels, lands and tenements, of the testator or intestate," is sufficient, on an affidavit of illegality interposed to the execution, without adding the words, "in the hands of," etc., "to be administered." Woolfolk *v.* Kyle, 48 Ga. 419.

Construction of judgment.— If a suit is instituted and progresses against defendant as executor or administrator, and the judgment is against "said defendant," it is a judgment *de bonis testatoris.* Stone *v.* Kaufman, 25 Ark. 186; Jones *v.* Gardner, 4 Watts (Pa.) 416; Burd *v.* McGregor, 2 Grant (Pa.) 353; Clapp *v.* Walters, 2 Tex. 130. See also Crossan *v.* Glass, 4 Harr. (Del.) 342; Moore *v.* Lunney, 3 Harr. (Del.) 28; Snead *v.* Coleman, 7 Gratt. (Va.) 300, 56 Am. Dec. 112. See, however, McCalley *v.* Wilburn, 77 Ala. 549; Curtis *v.* Somerset Bank, 7 Harr. & J. (Md.) 25; Simmons *v.* Ingram, 60 Miss. 886; Pinney *v.* Johnson, 8 Wend. (N. Y.) 500; Smith *v.* Lockwood, 10 Johns. (N. Y.) 366; Peabody *v.* Hutton, 5 Wyo. 102, 37 Pac. 694, 39 Pac. 980, in all of which cases the personal representative was held to be bound individually. A judgment against a person "as administrator" binds him in his representative capacity. Sharpe *v.* Morgan, 44 Ill. App. 346; Egbert *v.* State, 4 Ind. 399; Howcott *v.* Collins, 23 Miss. 398; Neeley *v.* Planters' Bank, 4 Sm. & M. (Miss.) 113. See, however, Hardy *v.* Call, 16 Mass. 530 (holding that where judgment is rendered against one "in his capacity of administrator," it should not be considered as against the estate of the intestate in the hands of the administrator, but the words, being ambiguous, should be so construed as to comport with a legal judgment *de bonis propriis*); Rich *v.* Sowles, 64 Vt. 408, 23 Atl. 723, 15 L. R. A. 850 (holding that a judgment, following a writ and declaration against A "as administrator," is not a judgment against the estate but against A personally). Where executors are sued as "J's executors," without naming them, and they confess judgment generally, the judgment binds the estate only, and not themselves personally. Jones *v.* Gardner, 4 Watts (Pa.) 416. In order to ascertain whether a judgment against an administrator was intended to bind him *de bonis propriis,* or only *de bonis testatoris,* reference may be had to the pleadings in the case. Tyler *v.* Langworthy, 57 Iowa 555.

Exceptions to rule see *infra,* XIV, O, 1, g.

27. See *infra,* XIV, O, 1, g.

istrator should provide for its satisfaction out of the estate to the extent that assets may be found in defendant's hands, and as to the balance out of assets which may subsequently come into his hands.[23] If a plea of *plene administravit* is confessed by plaintiff or found in defendant's favor, plaintiff is entitled to a judgment *quando acciderint* for the full amount of his claim.[29] So on a plea of no assets plaintiff may pray judgment of assets when they shall come into the hands of the administrator.[30] If a judgment against a personal representative is presented for payment within the time prescribed by statute, it is to be satisfied out of the estate then inventoried; otherwise it is to be satisfied out of subsequently inventoried assets.[31]

g. Judgment De Bonis Propriis. Ordinarily a judgment cannot be rendered against an executor or administrator *de bonis propriis*,[32] but it should be rendered

28. *Kentucky.*— Botts *v.* Fitzpatrick, 5 B. Mon. 397.

Maine.— Brown *v.* Whitmore, 71 Me. 65.

Maryland.— Scott *v.* Dorsey, 1 Harr. & J. 227.

New York.— People *v.* Erie County, 4 Cow. 445; Douglass *v.* Satterlee, 11 Johns. 16.

North Carolina.— Gregory *v.* Haughton, 12 N. C. 442. See also Grant *v.* Bell, 91 N. C. 495.

Virginia.— Nimmo *v.* Com., 1 Hen. & M. 470.

England.— Bridgman *v.* Lightfoot, Cro. Jac. 671; Bull *v.* Wheeler, Cro. Jac. 647.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1888.

29. *Alabama.*— Skinner *v.* Frierson, 8 Ala. 915.

Indiana.— Wilt *v.* Bird, 7 Blackf. 258.

Kentucky.— Miller *v.* Towles, 4 J. J. Marsh. 255, holding that it is error, on an issue of *plene administravit vel non*, found for defendant, to render judgment in bar of the action.

Maine.— Brown *v.* Whitmore, 71 Me. 65.

New York.— Ford *v.* Crane, 6 Cow. 71; Osterhout *v.* Hardenbergh, 19 Johns. 266.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1888.

30. Brown *v.* Whitmore, 71 Me. 65. See also Skinner *v.* Frierson, 8 Ala. 915, holding that upon the confession of the plea of *plene administravit* the judgment should be *quando*.

31. Peacock *v.* Haven, 22 Ill. 23; Bradford *v.* Jones, 17 Ill. 93.

32. *Alabama.*— Pope *v.* Robinson, 1 Stew. 415; Greening *v.* Brown, Minor 353; Bowie *v.* Foster, Minor 264; Armstrong *v.* Johnson, Minor 169.

Arkansas.— Vance *v.* State, 35 Ark. 176.

California.— Atherton *v.* Fowler, 46 Cal. 323; Rice *v.* Inskeep, 34 Cal. 224.

Colorado.— Jones *v.* Perot, 19 Colo. 141, 34 Pac. 728.

Florida.— Phillips *v.* Sanchez, 35 Fla. 187, 17 So. 363.

Indiana.— Horrall *v.* Mattingley, 27 Ind. 500; Horrall *v.* Scudder, 27 Ind. 499.

Iowa.— Hodgdon *v.* Heidman, 66 Iowa 645, 24 N. W. 257; Lawton *v.* Buckingham, 15 Iowa 22.

Kansas.— Insley *v.* Shire, 54 Kan. 793, 39 Pac. 713, 45 Am. St. Rep. 308.

Kentucky.— Lusk *v.* Anderson, 1 Metc. 426; Dawson *v.* Clay, 1 J. J. Marsh. 165; Rece *v.* May, 2 A. K. Marsh. 23.

Mississippi.— Barrow *v.* Wade, 7 Sm. & M. 49; Hill *v.* Robeson, 2 Sm. & M. 541.

Missouri.— Finney *v.* State, 9 Mo. 227; Laughlin *v.* McDonald, 1 Mo. 684.

New Hampshire.— Pillsbury *v.* Hubbard, 10 N. H. 224.

New Jersey.— Montfort *v.* Vanarsdalen, 5 N. J. L. 686; Sindle *v.* Kiersted, 3 N. J. L. 926.

New York.— Rhodes *v.* Evans, Clarke 168.

North Carolina.— Usry *v.* Suit, 91 N. C. 406.

Pennsylvania.— Maurer *v.* Kerper, 102 Pa. St. 444 (holding that while a legacy or distributive share may be reached in the executor's hands by attachment execution, only the orphans' court can determine the amount due on the settlement of the decedent's estate, and hence judgment should not be rendered in the common pleas for a sum certain against the executor *de bonis propriis*); Lorenz *v.* King, 38 Pa. St. 93 (holding that, where administrators are garnishees, it is error to enter judgment against them *de bonis propriis*).

Tennessee.—Dance *v.* McGregor, 5 Humphr. 428.

Texas.—Keowne *v.* Love, 65 Tex. 152 (holding that the fact that an administrator died testate, and that his executrix took possession of the estate in process of administration, does not authorize a judgment *de bonis propriis*, against the executrix); Thorn *v.* State, 10 Tex. 295.

Utah.— Bacon *v.* Thornton, 16 Utah 138, 51 Pac. 153.

Virginia.—Staples *v.* Staples, 85 Va. 76, 7 S. E. 199; Pugh *v.* Jones, 6 Leigh 299; Hite *v.* Paul, 2 Munf. 154.

West Virginia.— Jones *v.* Reid, 12 W. Va. 350, 29 Am. Rep. 455.

Wisconsin.— Viles *v.* Green, 91 Wis. 217, 64 N. W. 856 (holding that, although the statute provides that an administrator may be sued to foreclose a lien, it is error to enter a personal judgment against an administrator in an action to foreclose a lien); Woodward *v.* Howard, 13 Wis. 557.

United States.— Smith *v.* Chapman, 93 U. S. 541, 23 L. ed. 795; Boyce *v.* Grundy, 9 Pet. 275, 9 L. ed. 127; Lewis *v.* Parrish, 115 Fed. 285, 53 C. C. A. 77.

against him *de bonis testatoris*,[33] and in some states to be paid in due course of administration.[34] This rule is, however, subject to various exceptions and qualifications.[35] If for example an executor or administrator has been guilty of a violation of duty in the administration of the estate committed to his charge,[36]

See 22 Cent. Dig. tit. "Executors and Administrators," § 1893.

Judgment by default.— Judgment *de bonis propriis* by default is erroneous, under a statute providing that administrators shall not, as at common law, be liable personally on failure to plead. Phillips *v.* Munsell, 5 J. J. Marsh. (Ky.) 253.

Partial invalidity.— A joint judgment on a note against the administrator of a deceased maker and the surviving makers is erroneous as to the administrator, if it is not made payable *de bonis testatoris*; but this error does not invalidate it as to the other defendants. Stockton Bank *v.* Howland, 42 Cal. 129.

Construction of judgment see *supra*, note 26.

33. See *supra*, XIV, O, 1, e.

34. See *supra*, XIV, O, 1, d.

35. *Alabama.*— Pettigrew *v.* Pettigrew, 1 Stew. 580, holding that judgment against an executor for a legacy in his hands is *de bonis propriis*.

Kentucky.— Markham *v.* Allen, 8 B. Mon. 417, holding by implication that a judgment *de bonis propriis* may be rendered against an executor if there was a previous judgment *de bonis testatoris* and a return of *nulla bona*.

New Hampshire.— Moulton *v.* Wendell, 37 N. H. 406; Pillsbury *v.* Hubbard, 10 N. H. 224, both holding that if the cause of action is alleged to have accrued after the decease of the testator or intestate, and the executor or administrator might sue in his own right, judgment may be entered against him *de bonis propriis*.

Virginia.— Greenlee *v.* Bailey, 9 Leigh 526 (holding that where an administrator of a defendant in detinue, who dies *pendente lite*, consents that the case shall stand revived against him, and goes to trial on the plea put in by his intestate, the judgment against him should be personal for the property or its alternative value, while the costs and damages should be levied *de bonis testatoris*); Templeton *v.* Fauntleroy, 3 Rand. 434 (holding that in equity a decree against an administrator having assets, or acknowledging assets, should be *de bonis propriis*).

United States.— Kennedy *v.* Creswell, 101 U. S. 641, 25 L. ed. 1075, holding that in a creditors' suit against the debtor's executor for an accounting of the personal property and a discovery of the real property, where the executor pleads in bar that he has assets sufficient to pay all claims, and the allegations of the plea prove untrue, the admission of assets renders him personally liable, and a decree against him is proper without a discovery.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1893.

Judgment after probate decree for payment of debts.— A judgment against an administrator on a debt due from the intestate's estate may be *de bonis propriis*, where there has been a decree of the probate court requiring the administrator to make payment, and nothing remains to be done but to pay the money. Quigg *v.* Kittredge, 18 N. H. 137; Wachter's Case, 1 Walk. (Pa.) 267. See also Peckham *v.* Berrien Cir. Judge, 74 Mich. 287, 41 N. W. 926.

Judgment on contract or due-bill of personal representative.— A judgment against an administrator on a due-bill signed by him as administrator is properly rendered against him *de bonis propriis*. Ellis *v.* Merriman, 5 B. Mon. (Ky.) 296. See, however, Staples *v.* Staples, 85 Va. 76, 7 S. E. 199, holding that in a creditors' suit to enforce claims against a decedent's estate, where an accepted order by an executor is rejected as against the estate, the creditor is not entitled to a decree against the executor personally. Judgment will be against an executor personally on a contract made by him for the benefit of the estate. Doolittle *v.* Willet, 57 N. J. L. 398, 31 Atl. 385.

Judgment on false plea.— An executor or administrator may subject himself to the payment of a debt of the deceased *de bonis propriis* by his false plea when sued in a representative capacity. Harrison *v.* Taylor, 1 Brev. (S. C.) 233; Bacon Abr. tit. "Executor," B, 3; 1 Wm. Saund. 336*b* note 10. See also Justices Irwin County Inferior Ct. *v.* Sloan, 7 Ga. 31; People *v.* Erie County, 4 Cow. (N. Y.) 445; Lansing *v.* Lansing, 18 Johns. (N. Y.) 502.

Judgment on personal obligation.— If the executor or administrator is personally liable on the claim in suit, a judgment *de bonis propriis* is proper. Offut *v.* Bradford, 4 Bush (Ky.) 413 (holding that on the dissolution of an injunction sued out by an executrix for her own benefit as devisee, the judgment for damages is properly rendered against her personally and not against the assets); Taylor *v.* Tatum, 30 Miss. 701 (holding that an administrator can be sued in that character only for those duties which his intestate was bound to perform, and that it is error, in suing him in detinue, which could only lie against him individually, to render judgment to be levied out of the intestate's goods); Bacon *v.* Thornton, 16 Utah 138, 51 Pac. 153 (*semble*); Martin *v.* Stover, 2 Call (Va.) 514 (holding that in assumpsit against executors for money had and received by them to plaintiff's use, it seems that judgment should be *de bonis propriis* and not *de bonis testatoris*).

36. Dawson *v.* Clay, 1 J. J. Marsh. (Ky.) 165 (*semble*); Collins *v.* Sanders, 5 Ky. L. Rep. 860 (holding that where an executor has

as by committing a devastavit,[37] the judgment may be rendered against him personally.

h. Alternative Judgment. If an executor or administrator has become personally liable, a judgment may be rendered against him in the alternative, to be satisfied out of the goods of the testator or intestate if sufficient, and if not, then out of the goods of the personal representative himself,[38] and if those are insufficient, then out of his real estate.[39] A court of equity may render judgment in the alternative that the executor shall execute the trust imposed on him by the will, or, in case of default, be personally liable.[40] A judgment against a personal representative and heirs jointly is to be satisfied first out of the assets in the hands of the executors if sufficient, and if not, then out of the assets descended to the heirs.[41]

i. Parties.[42] The power of co-administrators is joint, and not joint and several, and there cannot be several judgments against them.[43] At common law judgment cannot be rendered on a joint obligation against surviving obligors and the representative of a deceased obligor.[44] Where heirs have the same interest in the personalty, which has not been distributed, as they have in the realty, which has been partitioned, a decree in a suit against the administrator and heirs on a debt of the ancestor may be rendered against the administrator alone, since payment of the debt out of the personalty will avoid litigation between the heirs for contribution.[45] No decree can be made against an administrator *ad litem*, where he is not obligated by bond or affidavit and has no power to bind any one in interest.[46] However, the fact that one to whom letters of administration have issued has not duly qualified as administrator does not invalidate a judgment against him as

never been charged in a settlement of his transactions with the purchase-price of land which, without authority, he sold with warranty of title as executor, he cannot be prejudiced by a judgment in favor of the purchaser against him individually, and not as executor); Woodward *v.* Howard, 13 Wis. 557 (*semble*).

37. Shorter *v.* Hargroves, 11 Ga. 658; Saunders *v.* Smith, 3 Ga. 121; Dawson *v.* Clay, 1 J. J. Marsh. (Ky.) 165 (*semble*); Dance *v.* McGregor, 5 Humphr. (Tenn.) 428 (*semble*); Smith *v.* Chapman, 93 U. S. 41, 23 L. ed. 795 (*semble*).

Who may take advantage of devastavit.— Where the assets are insufficient to pay all claims against the estate, plaintiff is not entitled to a judgment *de propriis* against the administrator on proof that the latter has paid demands inferior in dignity to that of plaintiff, if there exists outstanding and unpaid a claim of higher dignity than his, sufficient in amount to absorb the entire assets; for, although such payments constitute a devastavit for which the administrator is personally liable, such liability exists only in favor of a creditor injured by the making of such payments. Gwinn *v.* Trotter, 112 Ga. 703, 38 S. E. 49.

38. People *v.* Erie County, 4 Cow. (N. Y.) 445; Boyce *v.* Grundy, 9 Pet. (U. S.) 275, 9 L. ed. 127. See also Stroud *v.* Barnett, 3 Dana (Ky.) 391; Lansing *v.* Lansing, 18 Johns. (N. Y.) 502.

39. Lansing *v.* Lansing, 18 Johns. (N. Y.) 502.

40. Guiou *v.* Guiou, 5 Ohio Dec. (Reprint) 205, 3 Am. L. Rec. 476.

41. Chalfant *v.* Monroe, 3 Dana (Ky.) 35; Leather *v.* McGlasson, 3 T. B. Mon. (Ky.) 223. See also Stroud *v.* Barnett, 3 Dana (Ky.) 391. However, a judgment against executors, heirs, and devisees need not recite that execution is to be levied first of the assets, next of the estate descended, and lastly of the estate devised; but the sheriff is to take notice of the law to that effect. Morgan *v.* Morgan, 2 Bibb (Ky.) 388.

42. **Judgment for or against persons not parties to suit** see *supra*, XIV, G.

Right to judgment where less than all of several defendants are served see *supra*, XIV, H, 1.

43. Dickerson *v.* Robinson, 6 N. J. L. 195, 10 Am. Dec. 396. Where, however, after ascertaining the amount of assets in the hands of executors subject to distribution, the court rendered judgment against one of the executors in favor of some of the legatees and against the other in favor of the remaining legatees, such judgment, although irregular and voidable, is not void. Elliott *v.* Mayfield, 3 Ala. 223.

44. Stockton Bank *v.* Howland, 42 Cal. 129; Brown *v.* King, 1 Bibb (Ky.) 462. See, however, Myers *v.* State, 47 Ind. 293; Bennett *v.* Spillars, 7 Tex. 600, holding that where one of two joint defendants died pending suit, and the executors of the deceased defendant were made parties, it was proper for the court to render judgment against defendants jointly, with an order that execution should issue against the surviving defendant, and that the executors should pay the judgment in due course of administration.

45. Martin *v.* Fielder, 82 Va. 455, 4 S. E. 602.

46. Russell *v.* Umphlet, 27 Ark. 339.

such.[47] A plaintiff cannot object to a decree because it was rendered against him in the name and capacity in which he sued.[48] If a person sues and recovers as administrator, the judgment cannot be sustained as individual judgment.[49] *Prima facie* a judgment in favor of a person as executor or administrator is his individual property.[50] A judgment must specify with certainty the parties in whose favor it is rendered.[51]

j. Conformity to Process, Pleadings, Proof, and Report, Findings, or Verdict —(I) *In General.* The judgment in a proceeding by or against the personal representative of a deceased person must conform to the process, pleadings, proof, and report, findings, or verdict.[52]

47. Ryan *v.* American Freehold Land Mortg. Co., 96 Ga. 322, 23 S. E. 411.

48. Sowles *v.* Sartwell, 76 Vt. 70, 56 Atl. 282.

49. Garman *v.* Glass, 197 Pa. St. 101, 46 Atl. 923.

50. Dozier *v.* McWhorter, 117 Ga. 786, 45 S. E. 61 (holding, however, that the presumption may be removed by evidence that he holds the same in trust); Marshall *v.* Charland, 109 Ga. 306, 34 S. E. 671; Wynn *v.* Irvine's Georgia Music House, 109 Ga. 287, 34 S. E. 582; Kenan *v.* Du Bignon, 46 Ga. 258; Hall *v.* Pearman, 20 Tex. 168 (so holding where it does not appear that he could not have recovered in his own right).

51. Kyle *v.* Mays, 22 Ala. 673 (holding that a decree against an administrator in favor of "the legal representative" of a distributee is void for uncertainty); Betts *v.* Blackwell, 2 Stew. & P. (Ala.) 373 (holding that a judgment rendered against an administrator in favor of "the estate or the legal representatives thereof" is void for uncertainty).

52. *Illinois.*— McDowell *v.* Wight, 5 Ill. 403, holding that judgment cannot be rendered against the lands of an intestate in a proceeding *in personam* against the administrator.

Kentucky.— Blackerby *v.* Holton, 5 Dana 520, holding that a decree for partition of land not designated in a bill against an administrator for distribution is erroneous.

Maryland.— Neale *v.* Hermanns, 65 Md. 474, 479, 5 Atl. 424, holding that under a statute directing the court, in suits against administrators, "to enter judgment against the defendant for the penalty of the bond or damages laid in the plaintiff's declaration, . . . to be released upon payment of the sum ascertained to be paid by the verdict," the court should not enter the judgment for the penalty of the bond, when the bond is not in suit.

New York.— Camp *v.* Smith, 117 N. Y. 354, 22 N. E. 1044 [*affirming* 49 Hun 100, 1 N. Y. Suppl. 372], holding that where an action as for money had and received against an executor by a legatee who received notes of the executor in payment of the legacy is tried on the theory that defendant, while being an executor, became personally liable for the payment of the legacy, the judgment for plaintiff cannot be sustained on the theory that the action was on the notes, although the notes were offered in evidence, there being no count upon them.

South Carolina.— Quick *v.* Campbell, 44 S. C. 386, 22 S. E. 479, holding that in an action against an administrator a decree for plaintiff cannot be made subject to the plea of *plene administravit*, when such plea has not been interposed.

Texas.— Lott *v.* Cloud, 23 Tex. 254, holding that where a claim against a decedent's estate is already allowed, and entitled to be paid in due course of administration, a judgment for defendant for his claim in a suit brought in the district court for setting aside and annulling the allowance of the claim is unnecessary, and will be set aside on appeal, if defendant is not entitled to it on his pleadings.

Vermont.— White *v.* White, 69 Vt. 360, 37 Atl. 1114, holding that on appeal from the probate court to the county court, where the cause has been tried by a referee, judgment must be rendered according to the facts reported, although plaintiff recovered interest on the common money counts in assumpsit, as the county court could have allowed such amendments to the declaration as the nature of the demand required.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1890.

See, however, Jahns *v.* Nolting, 29 Cal. 507 (holding that where an administrator brings an action under section 116 of the California Probate Act against one who has embezzled or alienated the personal property of the intestate between the death of the latter and the grant of letters of administration, but fails to bring the case within said section by his proof, so as to recover the enhanced damages therein given, he is still entitled to recover for a wrongful conversion as in the action of trover at common law); Bogle *v.* Kreitzer, 46 Pa. St. 465 (holding that where, in an action against executors, incongruous counts requiring different judgments are joined in the same declaration, as when two counts in the narr. against them on their personal promise are joined with one on the promise of the testator, and there is a special finding on the last count, or no evidence on the first two, a judgment specially entered on the last is good).

A judgment de bonis testatoris is supported by a declaration for money paid for the use of defendant as executor and at his request (Wakeman *v.* Paulmier, 39 N. J. L.

(II) *Capacity in Which Executor or Administrator Is Allowed to Recover or Is Held Bound.* It has been held that if an executor or administrator sues as such, he cannot recover in his individual right;[53] and if a person sues individually he cannot recover as executor or administrator.[54] So a judgment can be rendered against a party only in the capacity in which he is sued.[55] Hence if a person is sued as executor or administrator, he cannot ordinarily be held liable as an individual in the suit so brought;[56] and conversely if suit is

340), by a count for money paid by plaintiff after testator's death on a bond in which plaintiff was surety of testator (Cawley *v.* Reeve, 17 N. J. L. 415), or by a count alleging an implied promise by an administratrix to refund the moneys expended for her use as such by paying a debt of intestate for which he and plaintiff were jointly liable (Collins *v.* Weiser, 12 Serg. & R. (Pa.) 97). So where an action was brought by an administrator, an account filed in set-off by defendant, and both submitted to a referee, who reported that defendant recover a certain sum as debt or damage, and costs, against plaintiff, instead of against the goods and estate of the intestate, and judgment was rendered by the court of common pleas on such report against the goods, etc., of the intestate, it was no error. Eaton *v.* Cole, 10 Me. 137. And where in an action against an executor plaintiff states testator's indebtedness, and that the executor, after the death of testator, in consideration, etc., promised to pay, the judgment will be *de bonis testatoris* and not *de bonis propriis*; the mode of declaring being merely to save limitations and not to prevent defendant from making any defense which he might have made had the declaration stated the promise of testator and his liability only. Whitaker *v.* Whitaker, 6 Johns. (N. Y.) 112.

A judgment de bonis propriis is authorized by a count alleging that goods were in possession of testator, and in effect averring that they came to the possession of defendants as executors and were converted by them. Schott *v.* Sage, 4 Phila. (Pa.) 87. Where a declaration sets out as the cause of action a promise made by defendant as administrator, etc., the judgment must be *de bonis propriis*, and if rendered *de bonis testatoris* it will be reversed on error and the correct judgment rendered. Oliver *v.* Hearne, 4 Ala. 271; Vaughn *v.* Gardner, 7 B. Mon. (Ky.) 326. So a count in assumpsit by a legatee against an executor for a legacy which alleges a promise by defendant as executor to pay the legacy is a count against the executor in his representative capacity, upon which the judgment can only be *de bonis testatoris*. Kayser *v.* Disher, 9 Leigh (Va.) 357. And where an executor obtained a judgment for a debt due his testator against the administrator of the debtor to be levied on the goods and chattels of the intestate, and afterward brought an action of debt against the administrator suggesting a devastavit, and declared in detinue only, he could not have a judgment *de bonis propriis* but only *de bonis testatoris*. Spotswood *v.* Price, 3 Hen. & M. (Va.) 123. If the declaration contains a count founded on the promise of a testator, and also a count founded on an assumpsit by the executrix, it is error, under a general verdict, to render judgment against the executrix individually. Luke *v.* Marshall, 6 J. J. Marsh. (Ky.) 458.

53. Burdyne *v.* Mackey, 7 Mo. 374. *Contra*, Childress *v.* Davis, 15 La. 492; Bingham *v.* Marine Nat. Bank, 18 Abb. N. Cas. (N. Y.) 135.

Descriptio personæ.— Where a person sued on a note payable to D or bearer, setting forth that he was the holder, but describing himself as "administrator of the estate of L, deceased," the quoted words were held to be *descriptio personæ* only, and in no way militating against his right to a judgment in his own name. Rider *v.* Duval, 28 Tex. 622.

54. Mason *v.* Lord, 20 Pick. (Mass.) 447, where plaintiff, one of four sureties on a note, paid half the amount due on it with funds of the principal and the other half as administrator of the estate of a cosurety, and this last sum was allowed him in the settlement of his administration accounts, and it was held that, in an action against the other cosureties for contribution, brought in his own name, he could not recover in his capacity as administrator of his cosurety, although he filed an instrument claiming to recover in trust for the heirs and binding himself to pay them the sum recovered, provided he was not entitled to retain it to his own use.

55. Singleton *v.* Gayle, 8 Port. (Ala.) 270, holding that a party to a bill cannot be decreed against as executor *de son tort*, where the bill does not make him a party in that capacity.

56. *Alabama.*— Singleton *v.* Gayle, 8 Port. 270, holding that where, in a bill to foreclose a mortgage on a slave, defendant is charged as administrator of the estate of the mortgagor, a decree cannot be entered against him as a purchaser of the property belonging to the estate.

Delaware.— Cloud *v.* Whiteman, 2 Harr. 401, holding that, on a bill to recover a legacy against the executor as such, the court cannot decree against him as devisee, on the ground that the legacy was charged on land devised to him.

Iowa.— Lawton *v.* Buckingham, 15 Iowa 22.

Kentucky.— Monroe *v.* Wilson, 6 T. B. Mon. 122, holding that in an action against an executor as such he cannot be charged as devisee. See also Moody *v.* Ewing, 8 B. Mon. 521.

brought against a person individually he cannot be charged in that suit as a personal representative.[57]

2. Record and Amendment — a. Entry and Transcript. The judgment entry must conform to the judgment as rendered.[58] The construction of an entry of judgment is a question for the court.[59] In some states when a judgment is recovered against a personal representative as such, a transcript thereof must be filed in the probate court.[60]

b. Amendment and Correction. Clerical errors in a judgment against the personal representative of a decedent may be corrected by amendment.[61] If through clerical error a judgment is entered against a person in another capacity than that in which he is sued, the defect may ordinarily be cured by amend-

Missouri.— Ranney *v.* Thomas, 45 Mo. 111, holding that ordinarily where an administrator sues or is sued in his official character, the judgment should be entered against him in the same character, to be levied out of the assets of the testator or intestate.

Nebraska.— Burton *v.* Williams, 63 Nebr. 431, 88 N. W. 765.

North Carolina.— Allison *v.* Davidson, 21 N. C. 46 (holding that, where an executor is brought into court by scire facias as executor merely, he cannot in the same suit, without a supplemental bill, be charged on his own acts); Shearin *v.* Neville, 18 N. C. 3.

Ohio.— Flieschman *v.* Shoemaker, 2 Ohio Cir. Ct. 152, 1 Ohio Cir. Dec. 415.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1891.

Contra.— *Louisiana.*— Russell *v.* Cash, 2 La. 185.

Maryland.—Baugher *v.* Wilkins, 16 Md. 35, 77 Am. Dec. 279.

New York.— Donohue *v.* Kendall, 50 N. Y. Super. Ct. 386.

Pennsylvania.— Patterson *v.* McCarty, 1 Pennyp. 491.

Virginia.— Belvin *v.* French, 84 Va. 81, 3 S. E. 891.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1891.

In equity the rule is otherwise. Irving *v.* Melton, 27 Ga. 330.

Where one is sued both personally and as administrator, a judgment properly rendered against him individually will not be reversed because of failure of the court to render judgment against him as administrator, especially when no motion for such latter judgment has been made, nor any objection offered to entering the personal judgment against him. Carter *v.* Zenblin, 68 Ind. 436.

Descriptio personæ.— Where, in a suit before a justice of the peace, the warrant directed the officer to summon "George Braden, administrator of John Braden," and proceeded to state a personal liability of A, the words "administrator of John Braden" might be rejected as personal description, and judgment rendered George Braden in his individual right. Braden *v.* Hollingsworth, 8 Humphr. (Tenn.) 19.

57. Middlebrook *v.* Pendleton, 47 Conn. 9; Davis *v.* Davis, 13 Ky. L. Rep. 46; Shiff *v.* Wilson, 3 Mart. N. S. (La.) 91.

58. Woodruff *v.* Woodruff, 4 N. J. L. 375, holding that a judgment rendered against executors as such, if entered against them generally, will be reversed on certiorari.

59. McVay *v.* Krebs, 7 Ala. 456, holding that a judgment entry as to a plea of insolvency reciting that "the same is overruled" means that the court declared the plea bad as a defense.

60. See Kennedy's Estate, 93 Cal. 16, 28 Pac. 839 (holding that, where a transcript is filed as required by statute, it is not necessary, on the subsequent affirmance of the judgment on appeal, that a transcript of the judgment subsequent to the coming down of the remittitur should be filed); Green *v.* Taney, 16 Colo. 398, 27 Pac. 249 (holding that the filing of a "transcript of the judgment docket" is a sufficient compliance with a statute requiring a "transcript of the record of the judgment entry" to be filed).

Necessity of certifying judgment to probate court for payment in due course of administration see *supra*, XIV, O, 1, d.

61. Lunsford *v.* Baskins, 6 Ala. 512, where defendant, an administratrix, pleaded that the estate was adjudged insolvent, and the jury found the plea to be true, assessed plaintiff's damages, and judgment was rendered that the suit abate and be referred to the orphans' court, and it was held that, although the statute required that judgment in such case should be that plaintiff is entitled to the sum found due him, but that no execution shall issue, and the judgment shall be certified to the proper orphans' court, yet the defect was a mere clerical misprision, amendable at plaintiff's costs.

Judgment against one who has died pendente lite.— Where an action was prosecuted on the death of defendant against his administrator, and in entering up judgment the substitution of the administrator was overlooked, the court has no power eighteen months thereafter to enter an order correcting the judgment without notice to the administrator. Rauh *v.* Ritchie, 1 Ill. App. 188. Where, however, on motion for a rehearing, it appeared that the suit was originally brought by an administrator, who died before judgment in the court below, and an administrator *de bonis non* was made plaintiff, but that the final judgment was erroneously rendered in favor of the deceased administrator, instead of the administrator *de bonis non*, the judgment was reformed and

ment.[62] Thus a judgment entered against a person as executor or administrator in a suit against him individually may be amended to conform to the summons and complaint;[63] and a similar amendment may be made where a person is sued as personal representative on a cause of action against the decedent and judgment is entered against him individually.[64] A judgment against an executor or administrator *de bonis propriis* may be amended, in a proper case, so as to made it *de bonis testatoris* or *intestati*,[65] and *vice versa*.[66] So a general judgment *de bonis testatoris*, if entered through clerical error, may be amended so as to made it *quando*.[67] A judgment against an executor who has made himself liable *de bonis propriis* by pleading a false plea may be amended at a subsequent term by adding the words, "to be levied *de bonis testatoris si*," etc., "*et si non, de bonis propriis*;"[68] and in case the execution cannot be made from the personal chattels of the executor, the judgment may be amended so as to provide for its satisfaction from his real estate.[69] A judgment against a personal representative may be amended so as to subject decedent's real estate to levy and sale in satisfaction,[70] when that course is allowed by statute.[71] The court may also amend a judgment against an executor or administrator so as to make it payable in due course of administration.[72] However, where the holder of a mortgage sued to foreclose without presenting it to the administrator of the mortgagor, and without waiving recourse against other property, a decree of foreclosure providing for an attorney's fee, although there was no deficiency judgment, cannot be modified by striking out the provision for an attorney's fee, so as to

rendered in favor of the administrator *de bonis non*. Dawson *v.* Hardy, 33 Tex. 198.

62. Terry *v.* Lindsay, 3 Stew. & P. (Ala.) 317, holding that where persons are sued as executors and they answer as such, a judgment against them as administrators will be deemed a clerical error and amendable.

63. Pool *v.* Minge, 50 Ala. 100 (so holding where the summons and complaint are against defendant individually, but add to his name the words "administrator of A B, deceased," etc., and the complaint shows a cause of action against him individually, while the judgment is against him as the administrator of said A B, deceased, but does not direct the execution to be levied *de bonis intestati*); Irby *v.* Brown, 59 Ga. 596 (holding that where a judgment was entered against an administrator individually only, although he was sued in his representative capacity also, and execution issued against him in both capacities, a motion made ten years after the entry of the judgment to amend it so that it will conform with the pleadings will be allowed).

64. Ware *v.* St. Louis Bagging, etc., Co., 47 Ala. 667; Adams *v.* Re Qua, 22 Fla. 250, 1 Am. St. Rep. 191; Hoggatt *v.* Montgomery, 6 How. (Miss.) 93. See however, Matter of Seaman, 63 N. Y. App. Div. 49, 71 N. Y. Suppl. 376, holding that where a decree was rendered and execution issued against an administratrix personally for money in the hands of deceased as executor, the error in charging the administratrix personally, instead of in her representative capacity, was not a mistake or clerical error, but affected a material matter, and after the time to appeal had expired the court had no power to amend the decree so as to charge the administratrix only to the extent of deceased's property in her hands.

Amendment after execution sale.— Where a judgment revived after the debtor's death directs execution against his executors, instead of against his estate in their hands, and executions issue accordingly and sales thereunder are made, it is too late to amend the judgment and executions. McKay *v.* Paris Exch. Bank, 75 Tex. 181, 12 S. W. 529, 16 Am. St. Rep. 884.

65. Boykin *v.* Cook, 61 Ala. 472; Yarborough *v.* Scott, 5 Ala. 221; Redd *v.* Davis, 59 Ga. 823; Pryor *v.* Leonard, 57 Ga. 136 (so holding, although the judgment has been partly satisfied); Jennings *v.* Wright, 54 Ga. 537; Ticonic Nat. Bank *v.* Turner, 96 Me. 380, 52 Atl. 793; People *v.* McDonald, 1 Cow. (N. Y.) 189.

Operation of amendment.— Where a judgment was entered against an executor so as to bind him personally, and afterward it was ordered to be amended so as to make it a lien on the estate of testator, the judgment as amended did not relate back to the date of the first judgment, so as to encumber property of testator which had been purchased of his executor between the dates of the original and amended judgments, in good faith, for a valuable consideration, and without notice. Ligon *v.* Rogers, 12 Ga. 281.

66. Hicks *v.* Barrett, 40 Ala. 291.

67. Skinner *v.* Frierson, 8 Ala. 915.

68. Harrison *v.* Taylor, 1 Brev. (S. C.) 233.

69. Lansing *v.* Lansing, 18 Johns. (N. Y.) 502.

70. Smith *v.* Vining, 1 Brev. (S. C.) 376.

71. Hoxie *v.* Kennedy, 2 N. Y. Suppl. 643, 15 N. Y. Civ. Proc. 185.

72. *In re* Schroeder, 46 Cal. 304.

allow the judgment to stand as if the suit had been brought under a statute which authorizes the holder of a mortgage against a decedent's property to enforce it against the particular property subject thereto, when all recourse against other property is waived in the complaint, but which provides that no counsel fee shall be recovered, unless the claim is presented to the administrator.[73]

3. Relief Against Judgment — a. Opening and Vacating. A judgment against a personal representative, whether taken by default[74] or otherwise,[75] may be opened or vacated when proper grounds for relief exist.[76] Thus a judgment procured through the fraud or collusion of an executor or administrator will not be allowed to stand against the objection of a party in interest.[77]

b. Equitable Relief. In cases where no remedy at law exists,[78] a court of equity may, upon sufficient grounds being shown,[79] grant relief, by way of injunction or otherwise,[80] against the enforcement of a judgment at law against an executor or administrator, upon suit being brought in seasonable time for such relief,[81]

73. Sonoma County Bank *v.* Charles, 86 Cal. 322, 24 Pac. 1019.

74. Philips *v.* Hawley, 6 Johns. (N. Y.) 129 (holding that a regular judgment against an administrator by default will be set aside on payment of costs to let the administrator plead so as to prevent his being made liable *de bonis propriis* through the ignorance or negligence of his attorney, although more than a term has elapsed since defendant first knew of the default); Nitchie *v.* Smith, 2 Johns. Cas. (N. Y.) 286 (holding that, where a judgment by default is regularly obtained against an administratrix, she may be allowed to come in and plead, but that the judgment ought to stand as security for the assets in her hands beyond the amount of other judgments). See also Alexander *v.* West, 1 Fed. Cas. No. 177, 1 Cranch C. C. 88, holding that an office judgment may be set aside after the first term on the term of "never executrix."

75. Hays *v.* Spann, 2 Brev. (S. C.) 494 (where, after a decree entered on summary process on demurrer, the district court on the same day rescinded the decree and gave defendant leave to withdraw his plea on payment of costs and to plead *de novo* upon cause shown, he being an administrator, and sued as such, and it appearing that he had not pleaded amiss for delay, and that he had a just defense); Todd *v.* Caldwell, 10 Tex. 236 (holding, under a statute giving the probate court power to decree performance of the land contracts of decedents, but providing that such decree may be set aside in the district court on petition of any person having an interest therein within two years for good cause shown, that such a decree obtained with the consent of the administrator will be set aside by the district court upon a showing by decedent's widow that her husband had repudiated the contract upon the drafts given for the price being protested for non-payment, and that the vendee was insolvent, and that the land has since materially advanced in value).

76. Tremper *v.* Wright, 2 Cai. (N. Y.) 101 (holding that where an administrator by his plea admits assets, on which there is a regular judgment entered, it will not be set aside on pleading a judgment confessed in favor of another plaintiff in another court after plea in the case at bar); Mitchell *v.* Albright, 10 Ohio Dec. (Reprint) 301, 20 Cinc. L. Bul. 101 (holding that where one ineligible to be appointed administratrix has received letters and entered on her duties, a judgment rendered against her as administratrix will not be vacated on her motion because she had not given the bond required by law); Caldwell *v.* Micheau, 1 Speers (S. C.) 276 (where defendant in the previous recovery had neglected to plead *plene administravit*, and a motion to open the judgment and for leave to file the plea on an affidavit of instructions to the attorney in the former suit was refused in the trial of the action of devastavit on that judgment); Walter *v.* Radcliffe, 2 Desauss. (S. C.) 577 (holding that an executor is not bound to plead the statute of limitations to a debt which he considers justly due, and the court will not set aside the judgment, in such case, to allow devisees to insist upon the statute).

77. Hoboken First Baptist Church *v.* Syms, 52 N. J. Eq. 545, 31 Atl. 717 [*reversing* 51 N. J. Eq. 363, 28 Atl. 461]; Nagle *v.* Groff, 1 Pa. L. J. Rep. 366, 2 Pa. L. J. 363, holding that a judgment against an executor on a sealed note of testator more than twenty years old will be opened, on the application of creditors of testator, on a petition alleging fraud and collusion between the judgment creditor and the executor, without requiring the parties to stipulate not to take advantage of the lapse of time, although an executor is not bound to plead limitations on the request of creditors. See, however, Cadwallader *v.* Cadwallader, 26 Mo. 76, holding that, while an administrator in defending an action of foreclosure should demand the fullest proof, his failure to do so will not raise a presumption of fraud.

78. Roche *v.* Washington, 7 Humphr. (Tenn.) 142, holding that, if a judgment against an executor or administrator is absolutely void, ample relief may be obtained in a court of law, and therefore equity will not interpose to grant relief against it.

79. See cases cited *infra*, note 83 *et seq.*

80. See cases cited *infra*, note 81 *et seq.*

81. Hamilton *v.* Newman, 10 Humphr. (Tenn.) 557; Caliaway *v.* Alexander, 8 Leigh

by a party in interest.[82] It is sufficient ground for the intervention of a court of equity that the judgment defendant had no legal defense to the action at law,[83] or that, having a legal defense, he was unable for sufficient reason to present it,[84] as where he was afforded no opportunity to prove it.[85] However, equity will not as a rule lend its aid to secure the benefit of a defense available at law which the administrator neglected to interpose;[86] and a defendant is not justified in failing to present his defense at law simply because plaintiff verbally assures him that he will not be held responsible according to the terms of the judgment prayed for.[87] So in a proper case an executor or administrator may be relieved in equity from personal liability under a judgment at law, as where there are no assets or there is a deficiency of assets.[88] So in a proper case equitable relief may be granted

(Va.) 114, 31 Am. Dec. 640, where complainant was held guilty of laches.

82. Washington *v.* Barnes, 41 Ga. 307, holding that a bill will lie by a surety of an administrator to declare void a judgment illegally rendered against the latter and to enjoin further proceedings thereon. However, equity will not restrain collection of a judgment against an administrator at the suit of an heir because a release of the claim on which the judgment was recovered had been executed to the intestate in his lifetime, no excuse being shown why it was not interposed as a defense at law, and no fraud or collusion on the part of the administrator being alleged. Gold *v.* Bailey, 44 Ill. 491, 92 Am. Dec. 190.

83. Lyon *v.* Howard, 16 Ga. 481, holding that one holding funds belonging to an estate, but having an equitable claim against it of which he cannot avail himself as a defense in an action at law by the administrator to recover the funds, may, on a recovery against him, where the legatees are residents of different states, maintain a bill in equity, joining the administrator and legatees, to restrain the enforcement of the judgment until an accounting is had between himself and the legatees.

84. Pendleton *v.* Stuart, 6 Munf. (Va.) 377; Pickett *v.* Stewart, 1 Rand. (Va.) 478. See Wilson *v.* Bastable, 30 Fed. Cas. No. 17,788, 1 Cranch C. C. 304.

85. Smith *v.* Nelson, 6 Ala. 320, where an administrator employed counsel who appeared in the suit at law, and subsequently the case was taken up out of its order without notice and judgment rendered, and it was held that equity might enjoin the judgment. See also Pickett *v.* Stewart, 1 Rand. (Va.) 478.

86. Gold *v.* Bailey, 44 Ill. 491, 92 Am. Dec. 190. And see Walker *v.* Tyson, 52 Ala. 593. See, however, Hendricks *v.* Mitchell, 37 Ga. 230.

87. Weakley *v.* Gurley, 60 Ala. 399 (holding that an administrator, having allowed judgments at law to be rendered against him, cannot obtain equitable relief against them on an averment that they were rendered on an agreement that no effort was to be made to charge him personally, or to charge the sureties upon his bond with the amount of such judgments); Wilson *v.* Randall, 37 Ala. 74, 76 Am. Dec. 347 (holding that an administrator is not entitled to equitable relief from a decree for the payment of a legacy because he had a claim in set-off against the legatee which he forbore to make in the probate court on account of repeated assurances by the legatee that he would do what was right in the matter).

88. Gause *v.* Walker, 55 Ga. 129 (holding that, although a judgment *de bonis testatoris* is conclusive of assets against an executor in a court of law, yet in a proper case a court of equity will grant relief against a suit to make the executor individually liable thereon); Hendricks *v.* Mitchell, 37 Ga. 230 (holding that where an executor, while suits were pending against the estate, neglected to file any of the usual pleas for avoiding personal liability, because the estate was then solvent, but the property was afterward made valueless while in his hands through the effects of the war without negligence on his part, he is entitled to relief in equity from personal liability); Mosier *v.* Zimmerman, 5 Humphr. (Tenn.) 62 (holding that by statute an administrator may, at any time before his personal liability is fixed by a judgment against him, individually enjoin all judgments against him as administrator, and have a *pro rata* distribution of the assets of the estate, if it be insolvent); Pendleton *v.* Stuart, 6 Munf. (Va.) 377 (holding that administrators will be relieved in equity against a judgment at law recovered on a debt, and a subsequent judgment against them personally in an action suggesting a devastavit, where the bill alleges that complainants never had any assets out of which they could properly pay the debt, and that the existence of several chancery suits prevented their pleading fully administered); Pickett *v.* Stewart, 1 Rand. (Va.) 478 (holding that equity will afford relief against a personal judgment against an administrator on a charge of a devastavit, where it was rendered in the absence of his counsel, and the condition of the estate was so complicated as to make it nearly impracticable for the administrator to plead at law in relation to the assets); Royall *v.* Johnson, 1 Rand. (Va.) 421 (holding that an executor will be relieved in equity against judgments at law on the ground that assets which came to his hands sufficient to pay all the debts of the estate have since been recovered of him by a paramount title).

Equitable relief denied see the following cases:

Georgia.— Page *v.* Haines, 56 Ga. 263

against a judgment at law in favor of an executor or administrator.[89] In a proper case a bill will lie to review a decree in equity against a personal representative.[90]

4. Operation and Effect — a. Persons[91] and Property[92] Bound. A judgment rendered against an executor or administrator in his representative capacity does not as a rule bind him personally,[93] but only the estate of the decedent is bound

(holding that an administrator is not entitled to relief in equity against a judgment at law because he did not know that the assets were insufficient or that a judgment was evidence of assets); Bostwick *v.* Perkins, 1 Ga. 136 (holding that after a judgment *de bonis testatoris* has been recovered at law against an administrator by default, and, on the return of *nulla bona* on an execution issued thereon, judgment is rendered against him by default *de bonis propriis*, equity will not relieve him).

Oregon.— Brenner *v.* Alexander, 16 Oreg. 349, 19 Pac. 9, 8 Am. St. Rep. 301, holding that where an executor, on a miscalculation of assets in his hands, confesses judgment against himself for a debt of testator, in a suit in which it is alleged that he has assets sufficient to pay the claims, he will not be relieved in equity against the judgment, upon a showing that the assets are insufficient to satisfy it, under Code, § 1135, providing that where the complaint alleges or the executor admits assets in his hands, the judgment may be enforced against him.

Tennessee.— Hamilton *v.* Newman, 10 Humphr. 557, holding that an administrator cannot, six years after administration granted, protect himself against judgments issued against him as administrator by a suggestion of the insolvency of the estate and praying an injunction on the ground of having exhausted the assets.

United States.— Wilson *v.* Bastable, 30 Fed. Cas. No. 17,788, 1 Cranch C. C. 304, holding that equity will not relieve against a judgment at law upon *plene administravit* on the ground that defendant at law could not produce vouchers to support his plea, unless the bill alleges fraud, mistake, surprise, or accident; and that a general allegation of difficulty in procuring vouchers, or of unavoidable delay in settling an administration account, without stating from what circumstances that difficulty and delay arose, is not sufficient ground to enjoin the judgment.

England.— Vincent *v.* Godson, 3 De G. & S. 717.

Canada.— Doner *v.* Ross, 19 Grant Ch. (U. C.) 229.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1898.

Perpetual injunction.— A decree enjoining a judgment at law against an administrator because of a deficiency of assets should not be made perpetual, but only until assets shall come into his hands, reserving to the creditors to show the assets by scire facias at law. Haydon *v.* Goode, 4 Hen. & M. (Va.) 460.

Burden of proof on motion to dissolve injunction.— Where an administrator enjoins a judgment against him as such, on the ground that he is a creditor of the estate, he must, on motion to dissolve the injunction, be prepared to show from his accounts that he is a creditor. Deloney *v.* Hutcheson, 2 Rand. (Va.) 183.

89. Link *v.* Link, 48 Mo. App. 345, holding that a petition against an administrator to set aside a judgment obtained by him against the estate alleging that plaintiffs were coheirs with defendant and that he procured the judgment upon a false and fraudulent account, concealing from plaintiffs all knowledge thereof until two and one half years after the rendition of the judgment, sufficiently alleges the facts constituting the fraud.

Equitable relief denied see Walker *v.* Tyson, 52 Ala. 593 (holding that the fact that an administrator to whom a note was due knew or connived at the purpose of the principal not to defend the suit, with the view that the surety, who depended on the principal to make defense, would thereby be misled and fail to appear, is not such an excuse for the failure to defend at law as will enable the surety to come into equity to enjoin the judgment); Fowler *v.* Williams, 20 Ark. 641 (holding that where one against whom a decree has been rendered in favor of an administrator for money due intestate is notified by the proper representatives that the administrator has ceased to be such and has no right to collect the money, his proper course, if he has good ground to believe that it would be unsafe to pay it over to the judgment plaintiff, is to file a bill in the nature of a bill of interpleader and bring the money into court, and that he is not entitled to enjoin the judgment).

90. Head *v.* Perry, 1 T. B. Mon. (Ky.) 253 (holding, however, that distributees cannot have a revision of a decree against an administrator, where there is no circumstance showing that he was guilty of fraud or gross negligence in defending the suit, and where they cannot show that the defense which he failed to make was good); Taylor *v.* Sewall, 69 Me. 148 (holding, however, that Rev. St. c. 87, §§ 4–6, providing that scire facias, debt, and writ of error will lie either by or against an administrator *de bonis non* on a judgment for or against his predecessor, do not bring such administrator into privity with his predecessor, and therefore he cannot maintain a bill to review a judgment against his predecessor).

91. See also *infra*, XIV, O, 4, b, (IV).

92. See also *infra*, XIV, O, 4, c.

93. Egbert *v.* State, 4 Ind. 399; Mendenhall *v.* Robinson, 56 Kan. 633, 44 Pac. 610; Burd *v.* McGregor, 2 Grant (Pa.) 353; Con-

thereby.[94] A judgment confessed by one of two joint administrators is not binding on the other.[95] A judgment against an executor or administrator as such binds the personal property of the estate,[96] but not the realty.[97]

b. Estoppel by Judgment — (i) *Merger and Bar of Actions and Defenses.* If judgment is rendered for or against an executor or administrator, the cause of action is merged, and no suit can subsequently be brought thereon.[98] So a judgment negativing a right of action precludes the unsuccessful party from subsequently asserting it in a subsequent proceeding between the same parties;[99]

ner *v.* Burd, 1 Leg. Chron. (Pa.) 17, holding that a judgment against the estate of a decedent does not bind the executor or administrator personally, although he may have omitted to plead. See also Crossan *v.* Glass, 4 Harr. (Del.) 342. And see *supra*, XIV, O, 1, e, g. Where, however, judgments are obtained against an executor after service of a writ in another case and before plea, they make him responsible for the assets he had when served with the writ, although such judgments are entered up *quando*, the executor having sold the property of testator under the statute between the time of the service of the writ and the judgments *quando*. Littlejohn *v.* Underhill, 4 N. C. 377. And where a widow possessed of a life-estate in a moiety of the real property of her deceased husband, under authority from the orphans' court to mortgage the real estate of her intestate to raise funds for the payment of debts, procured the loan by executing to the lender a bond and warrant of attorney, upon which judgment was regularly entered, the judgment was held to bind the interest of the widow, although invalid against the rest of the estate. Barger *v.* Cassidy, 4 Phila. (Pa.) 324. And if a bill for foreclosure makes a certain person defendant as executor and as guardian, and the return of process shows that he was served as executor and guardian, and the bill states that he has an individual interest in the mortgaged land, a decree of foreclosure binds him as well in his individual as in his representative capacity. Cornell *v.* Green, 43 Fed. 105.

94. Ten Eick *v.* Dye, 9 Ohio Dec. (Reprint) 511, 14 Cinc. L. Bul. 214 (holding that where a judgment is rendered for the payment of money against an individual in a case wherein he has answered, alleging that he holds the funds as administrator, the estate is bound by the judgment equally with defendant in his individual capacity); Jordan *v.* Polk, 1 Sneed (Tenn.) 430 (holding that a judgment against a special administrator appointed solely to enable the court to proceed in the cause binds the estate). See, however, Buckingham *v.* Owen, 6 Sm. & M. (Miss.) 502 (holding that a judgment recovered against administrators after they have resigned their trust is a nullity, not binding upon the estate or the administrator *de bonis non*); Bostwick *v.* Brush, 4 N. Y. St. 100 (holding that the estate is not bound by a judgment in a suit which makes the executor individually a party); Pinney *v.* Johnson, 8 Wend. (N. Y.) 500 (holding that a judgment against administrators on bond and warrant of attorney executed by them does not bind the estate so that it can be taken upon an execution issued thereon); Griffith *v.* Frazier, 8 Cranch (U. S.) 9, 3 L. ed. 471 (holding that a judgment against one as executor who is not executor does not bind the estate).

95. Heisler *v.* Knipe, 1 Browne (Pa.) 319.

96. Greenwood *v.* Spiller, 3 Ill. 502; Packwood *v.* Elliott, 43 Miss. 504; Langston *v.* Abney, 43 Miss. 161.

97. Greenwood *v.* Spiller, 3 Ill. 502; Packwood *v.* Elliott, 43 Miss. 504; Langston *v.* Abney, 43 Miss. 161; Baker *v.* Webb, 2 N. C. 43. See also McDonough *v.* Cross, 40 Tex. 251 (holding that a sale under a judgment against the administrator of land which has been partitioned among the heirs prior to the suit in which the judgment is rendered is void and passes no title); Thompson *v.* Cragg, 24 Tex. 582.

98. Brown *v.* Equitable L. Assur. Soc., 112 Fed. 845. See, however, Drane *v.* Gunymere, 2 Tex. Unrep. Cas. 496, holding that a proceeding in the probate court of another state against an administratrix to obtain necessary orders for settling the estate, and the issuance of such orders in administration proceedings, under which execution or fieri facias would issue against her in case of her failure to comply, does not merge a prior cause of action in favor of her resident creditor for damages.

99. *Connecticut.*— Sheldon *v.* Bradley, 37 Conn. 324.

Kentucky.— Buford *v.* Pawling, 5 Dana 283.

New York.— Crabb *v.* Young, 92 N. Y. 56, holding that where an action was brought against an executor by beneficiaries under a will to recover damages for delay in the execution of a trust imposed by the will, judgment merely ordering a sale within a certain time, and suspending one of the executors, but not allowing damages, conclusively established that plaintiff was not entitled to damages, or to the removal of the trustee on the facts existing prior to its rendition.

South Carolina.— Kerr *v.* Webb, 9 Rich. Eq. 369, so holding as to a compromise judgment.

Vermont.— Probate Ct. *v.* Rogers, 7 Vt. 198, holding that where the supreme court, on petition of the heirs of an estate, on the ground of fraud, accident, or mistake, orders an appeal from the decision of commissioners

and a judgment establishing a right of action precludes defendant therein from subsequently disputing it on any ground of defense that was or might properly have been urged in the action in which it was rendered.[1]

(II) *JUDGMENT AS ESTABLISHING PARTICULAR FACTS* — (A) *General Rule.* A judgment in an action by or against an executor or administrator is conclusive,

allowing a claim to be entered in the county court, which is accordingly done by the clerk, whereupon claimant files his declaration and proceeds to prosecute his suit from term to term, and finally suffers a nonsuit, he cannot afterward sustain an action against the administrator for the original allowance of the commissioners, although no record of an appeal appears in the probate court.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1900.

The two causes of action must be the same else the judgment is not a bar. Sheldon *v.* Bradley, 37 Conn. 324 (holding that where a conveyance by deed absolute in form was intended in part to secure a debt and in part to defraud creditors, the property exceeding in value the amount of the debt, and on a bill by the grantor's administrator against the grantee to set aside the conveyance a decree was entered declaring the deed to be valid and vesting the title absolutely in the grantee, it was conclusive as against the grantor's administrator as to the fraudulent character of the instrument, but did not estop him from claiming, in a suit subsequently brought to compel the grantee to account for moneys received from a sale of the premises, that the conveyance was intended as a mortgage); Buford *v.* Pawling, 5 Dana (Ky.) 283 (holding that where a suit was brought against A as executor and revived against his executors, and judgment was rendered with an entry of an agreement that neither the executors of A nor his estate should in any event be liable on the judgment, it was a bar to a proceeding for a devastavit but not to a bill for a discovery of assets).

Rights subsequently accruing are not barred. Thus where it appears in an action against an administrator that his account has been settled and that there are no assets in his hands, and a judgment is consequently rendered for him, although plaintiff has a valid claim, it does not bar another action if new assets come into his hands. Keith *v.* Molineux, 160 Mass. 499, 36 N. E. 476. And a decree by an ordinary against an administrator is no bar to a bill founded on the after misconduct of the administrator. Taylor *v.* Taylor, 2 Rich. Eq. (S. C.) 123.

Pleading. — In an action by an executor against an attorney to recover money belonging to the estate, which was received by the attorney and which he claims the right to appropriate in payment for services rendered by him for plaintiff's co-executor, an answer alleging that theretofore, in proceedings before the surrogate to secure an order directing the payment of a sum of money to another attorney, it was represented to the surrogate that defendant attorney had collected and retained the sum sued for, but which does not allege that the surrogate approved the retention or acted on it in any way, is demurrable. Arkenburgh *v.* Little, 176 N. Y. 551, 68 N. E. 1114 [*affirming* 49 N. Y. App. Div. 636, 64 N. Y. Suppl. 742].

1. *Alabama.* — Wright *v.* Phillips, 56 Ala. 69 (holding that a decree in chancery against an administrator in favor of one of the distributees for his share of a specific fund is conclusive as to any set-off on account of such distributee's appropriation of assets which might have been available to the administrator in defense of that suit, and which was in fact then adjudicated); Dent *v.* Smith, 15 Ala. 286 (holding that, where an execution was levied on slaves under a judgment against decedent's executor, one who interposed a claim by virtue of a trust executed by decedent during his life could not attack the validity of the judgment, but could only show that the property claimed was not subject to execution).

Arkansas. — Fowler *v.* Williams 20 Ark. 641.

Florida. — Gilchrist *v.* Meacham, 3 Fla. 219.

Missouri. — Greenabaum *v.* Elliott, 60 Mo. 25, holding that where an administrator has recovered and collected a judgment on a note given to the intestate, the maker of the note cannot subsequently sue to recover back the money on the ground that the debt had already been paid to the intestate, his failure to set up such defense in the action by the administrator being a conclusive bar to the subsequent action.

South Carolina. — Trimmier *v.* Thomson, 19 S. C. 247.

Virginia. — Scott *v.* Tankersley, 10 Leigh 581, holding that where, on a motion against a sheriff's administrator for the default of the sheriff's deputy, the executor of the deputy was notified to defend the motion, and promised to attend to it, but failed to do so, and judgment by default was rendered, the executor could not, in an action against him by the sheriff's administrator to recover the amount of the judgment, raise the objection that the statute of limitations would have been a defense to the motion.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1900. See also *infra*, XIV, O, 4, b, (II).

Contradiction of record. — Executors who plead *plene administravit* in a suit for their testator's debt cannot, when afterward sued individually on the judgment, show that no evidence was taken under the plea, and that the only question controverted at the trial was as to the validity of plaintiff's claim against testator. Trimmier *v.* Thomson, 19 S. C. 247.

as between the parties, of every matter that was determined in the action in which it was rendered.[2]

(B) *Capacity as Executor or Administrator.* A judgment for or against an executor or administrator in his representative capacity establishes his character as such.[3]

(C) *Existence of Assets.* At common law a judgment against an executor or administrator on a debt due from his decedent is a conclusive admission that he has assets on hand sufficient to pay it; and he cannot dispute this fact in a subsequent proceeding between him and the creditor.[4] This rule, however, is subject

2. *Indiana.*— Eggleston *v.* Barnes, 12 Ind. 604.

Kentucky.— Norton *v.* Marksberry, (1897) 5 S. W. 482.

Mississippi.— Parker *v.* Whiting, 6 How. 352.

South Carolina.— Summers *v.* Tidmore, 1 McCord 270.

Virginia.— Montague *v.* Turpin, 8 Gratt. 453.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1903.

However, an adjudication by a surrogate that an administrator was decedent's next of kin, in a contest between him and another as to the grant of letters of administration, is not conclusive on the question of distribution. Caujolle *v.* Ferrie, 5 Fed. Cas. No. 2,525, 5 Blatchf. 225, 2 Abb. Pr. N. S. 3 [*affirmed* in 13 Wall. 465, 20 L. ed. 507].

Judgment quando acciderint.— In an action against an administrator, a judgment *quando acciderint* is *prima facie* an adjudication that there are no debts known to the administrator which would take precedence of plaintiff's claim, and that assets subsequently coming into possession of the estate will be *prima facie* applicable to plaintiff's judgment. Willis *v.* Tozer, 44 S. C. 1, 21 S. E. 617.

Title.— A default confesses plaintiff's title as administrator, if well alleged. Curtis *v.* Herrick, 14 Cal. 117, 73 Am. Dec. 632. Where, however, suit was brought by an administrator to recover moneys deposited in a savings bank in the name of defendant as trustee for plaintiff's intestate, and the surrogate passed an order deciding that the administrator by virtue of his office as such was entitled to the custody of the bank-book, this was not an adjudication of his title to the funds. Westervelt *v.* Westervelt, 46 N. Y. Super. Ct. 298. And a decree against an executor in a suit by heirs to compel him to inventory land to which he claimed title is not a conclusive adjudication of the title thereto in a subsequent suit by the heirs against the executor's heirs, after his death, to recover the property. White *v.* Shepperd, 16 Tex. 163.

Necessity of actual determination.— Important matters which a decree does not profess on its face to dispose of, and upon which it fails to show any affirmative action by the court, it being apparent from the record that the cause was not in condition to be heard as to those matters, will be presumed not to have been considered or embraced in the decree; and it is therefore not final and conclusive as to these matters. Shegogg *v.* Perkins, 34 Ark. 117.

3. Fowler *v.* Williams, 20 Ark. 641; Rogers *v.* Rogers, 3 Paige (N. Y.) 379; Borer *v.* Chapman, 119 U. S. 587, 7 S. Ct. 342, 30 L. ed. 532. See also Whitney *v.* Pinney, 51 Minn. 146, 53 N. W. 198.

A sister state judgment has the same effect. Davis *v.* Connelly, 4 B. Mon. (Ky.) 136. *Contra*, Pierce *v.* Strickland, 26 Me. 277, holding that a sister state judgment is *prima facie* evidence that the person suing as administrator had regularly taken out letters of administration in the state in which the judgment was recovered, but is subject to be rebutted by proof.

Decree granting letters of administration. — In an action against an administrator on a debt due from the intestate, a decree granting letters of administration is admissible as evidence that defendant is administrator and bound to pay the debt. Day *v.* Floyd, 130 Mass. 488.

Order for revival of suit.— An administrator is not obliged to be always ready with proof of his authority, and an order of court permitting him to revive a suit is conclusive proof of his authority. McNair *v.* Ragland, 16 N. C. 533.

Qualification of administrator see Clark *v.* Tabor, 22 Vt. 595.

4. *Alabama.*— Banks *v.* Speers, 97 Ala. 560, 11 So. 841.

Georgia.— Phipps *v.* Alford, 95 Ga. 215, 22 S. E. 152; Gibson *v.* Robinson, 90 Ga. 756, 16 S. E. 969, 35 Am. St. Rep. 250.

Illinois.— Judy *v.* Kelley, 11 Ill. 211, 50 Am. Dec. 455.

Maryland.— Gaither *v.* Welch, 3 Gill & J. 259; Post *v.* Mackall, 3 Bland 486; Ellicott *v.* Welch, 2 Bland 242; Dorsey *v.* Hammond, 1 Bland 463.

New Jersey.—Southard *v.* Potts, 22 N. J. L. 278; Howell *v.* Potts, 20 N. J. L. 569.

New York.— Matter of Waring, 1 N. Y. App. Div. 29, 36 N. Y. Suppl. 529.

South Carolina.— Caldwell *v.* Micheau, 1 Speers 276. See also Young *v.* Kennedy, 2 McMull. 80.

Tennessee.— Simons *v.* Page, 96 Tenn. 718, 36 S. W. 843.

Virginia.— Eppes *v.* Smith, 4 Munf. 466.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1903½.

A judgment by confession is conclusive proof that the executor or administrator has assets sufficient to satisfy it. People *v.*

to some qualifications,[5] and in some states it has been abrogated or modified by statute.[6] A judgment against an executor or administrator in favor of legatees or heirs may also be conclusive of the existence of assets in his hands.[7] So if an administrator sues as such on his own possession, the judgment affords evidence

Erie County, 4 Cow. (N. Y.) 445; Griffith *v.* Chew, 8 Serg. & R. (Pa.) 17, 11 Am. Dec. 556. See also Lockyer *v.* De Hart, 6 N. J. L. 450, holding that a *cognovit actionem* by an executor is an admission of assets. See, however, Ruggles *v.* Sherman, 14 Johns. (N. Y.) 446; Hussey *v.* White, 10 Serg. & R. (Pa.) 346.

A judgment by default is an admission of assets to the extent charged in the complaint (Garrow *v.* Emanuel, 3 Stew. (Ala.) 285; Walker *v.* Kendall, Hard. (Ky.) 404; Howell *v.* Potts, 20 N. J. L. 569; Platt *v.* Swartwout, 1 Johns. Cas. (N. Y.) 276, 1 Am. Dec. 110; Brown *v.* McKee, 108 N. C. 387, 13 S. E. 8; Mosier *v.* Zimmerman, 5 Humphr. (Tenn.) 62; Dickson *v.* Wilkinson, 3 How. (U. S.) 57, 11 L. ed. 491. *Contra*, Chouteau *v.* Hooe, 1 Pinn. (Wis.) 663), in the absence of statute to the contrary (Loftus *v.* Locker, 1 J. J. Marsh. (Ky.) 297; Brown *v.* McKee, *supra*). See also Nicholas *v.* Jones, 3 A. K. Marsh. (Ky.) 385 (holding that the failure of an executor to answer a bill for the discovery of assets is an implied admission of assets); Mason *v.* Peter, 1 Munf. (Va.) 437 (holding that a judgment by default against an executor is *prima facie* an admission of assets).

Sister state judgment.—In an action against executors on a judgment against an administrator *de bonis non* of another state, the former judgment is sufficient proof of assets authorizing the entry of a judgment *de bonis propriis*. —— *v.* Person, 3 N. C. 301.

5. Vick *v.* House, 2 How. (Miss.) 617 (holding that a decree of a court of equity that complainant recover a sum certain of an administrator and have execution of the goods and of the estate of the intestate in his hands to be administered, etc., is not alone sufficient evidence to establish a devastavit); Howell *v.* Potts, 20 N. J. L. 569 (holding that a judgment against an executor or administrator by default on demurrer, or on any plea except one denying assets, does not preclude the executor or administrator from traversing an allegation, in an action on the judgment, that he has eloigned and wasted the assets of decedent); Moore *v.* Kerr, 10 Serg. & R. (Pa.) 348 (holding that if judgment is entered against an executor *de bonis non*, execution to be levied of the lands of testator for a certain sum, it is to be considered as a judgment *de terris*, and is not evidence of devastavit against the executor, on a return of *nulla bona* and devastavit, where a levy has been made on lands and part payment received); Caldwell *v.* Micheau, 1 Speers (S. C.) 276 (holding that a matter arising subsequent to the former discovery, showing a destruction of the assets or a removal of them from the hands of the executor or administrator without his fault, may be set up); Lenoir *v.* Winn, 4 Desauss. (S. C.) 65, 6 Am. Dec. 597 (holding that it seems that judgment against an administrator is conclusive evidence of assets only when rendered upon a simple contract debt, where there are also specialty debts).

Declaration not alleging assets.— Where an administrator suffers judgment to be rendered against him in an action wherein the declaration does not charge him with having received estate sufficient to pay the debt sued for, he does not thereby make such an admission of assets as will charge him personally. Senescal *v.* Bolton, 7 N. M. 351, 34 Pac. 446; Sinclair *v.* Wilson, 3 Penr. & W. (Pa.) 167.

A scire facias against an executor of a defendant before final judgment is merely to make the executor a party to the record; and, although the judgment be against the executor, it is not a judgment fixing him with assets, but a second scire facias is necessary for that purpose, to which the executor may plead a want of assets or make any other defense which he might have made if sued on a judgment against his testator. Borden *v.* Thorpe, 35 N. C. 298.

6. *Alabama.*— Quigley *v.* Campbell, 5 Ala. 76, 12 Ala. 58, holding that a judgment obtained against a plaintiff administrator under the statute of set-off is no evidence of assets.

Illinois.— Judy *v.* Kelley, 11 Ill. 211, 50 Am. Dec. 455.

Kentucky.— Loftus *v.* Locker, 1 J. J. Marsh. 297.

Mississippi.— Dobbins *v.* Halfacre, 52 Miss. 561; Howard *v.* Cousins, 7 How. 114, holding that a judgment against an administrator, and proof that assets came to his hands, are only *prima facie* evidence to charge the administrator, which he may rebut by showing that he has no assets in his hands unadministered, although he has not reported the estate insolvent.

North Carolina.— Brown *v.* McKee, 108 N. C. 387, 13 S. E. 8.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1903½.

7. Schnader *v.* Bitzer, 9 Lanc. Bar (Pa.) 37 (holding that where in a suit for a legacy *plene administravit* is not pleaded, and the verdict and judgment are general, there is a conclusive admission of assets; and upon such a judgment the sheriff may, if there be no goods of testator shown by defendant, return a devastavit); Harmon *v.* Bynum, 40 Tex. 324 (holding that where an administrator has neither objected to nor appealed from a final judgment against him in favor of minor heirs, he cannot at a subsequent term of court be heard to say that he could not pay the judgment).

against him of assets.[8] A creditor of an estate may be estopped by a judgment to assert the existence of assets.[9]

(D) *Indebtedness of Estate.* A judgment against an executor or administrator as such establishes the amount and validity of the demand in suit, and it cannot be collaterally attacked on any ground that might have been urged in the suit in which it was rendered.[10]

(III) *Requisites of Judgment.* To work an estoppel a judgment in favor of or against an executor or administrator must be valid.[11] It is also necessary

8. Berry *v.* Pulliam, 2 N. C. 16.

9. Wilson *v.* Leigh, 39 N. C. 97; Dupuy *v.* Southgates, 11 Leigh (Va.) 92, holding that a creditor, by accepting a confession of judgment *quando* from the administrator, is estopped from afterward alleging that the administrator, at the time of confessing judgment, had assets applicable to the demand. See, however, Lash *v.* Hauser, 37 N. C. 489.

10. *California.*— Chase *v.* Swain, 9 Cal. 130, so holding as to a default judgment.

Colorado.— Green *v.* Taney, 16 Colo. 398, 27 Pac. 249.

Illinois.— Darling *v.* McDonald, 101 Ill. 370 (holding that a judgment of a circuit court against executors, requiring the claim to be paid in due course of administration, is binding on the county court to which it is certified by order of the circuit court; and that the judgment of the latter court may also direct the classification of the claim); Judy *v.* Kelley, 11 Ill. 211, 50 Am. Dec. 455.

Indiana.— Chicago, etc., R. Co. *v.* Harshman, 21 Ind. App. 23, 51 N. E. 343.

Maine.— Nowell *v.* Bragdon, 14 Me. 320, holding that a judgment against the goods and estate of a deceased intestate in the hands of his administrator is conclusive evidence that he was indebted.

New York.—*In re* Thompson, 41 Barb. 237; Leroy *v.* Bayard, 3 Bradf. Surr. 228, holding that a judgment against administrators on a debt due from the estate establishes the claim as a valid debt, which entitles it to be paid in due course of administration, if there are assets from which to pay it.

North Carolina.— Grant *v.* Bell, 91 N. C. 495; Wall *v.* Fairley, 73 N. C. 464; Dunn *v.* Barnes, 73 N. C. 273.

Pennsylvania.— Steele *v.* Lineberger, 59 Pa. St. 308; Walthaur *v.* Gossar, 32 Pa. St. 259.

United States.— See U. S. Bank *v.* Williams, 2 Fed. Cas. No. 942, 3 Cranch C. C. 240, holding that in an action against an administrator for money received by his intestate, the report of an auditor appointed under Md. Acts (1785), c. 80, § 12, is *prima facie* evidence of the amount due on the principles and evidence stated in the report; and if approved by the court so much of the report may be read to the jury as shows a balance so stated, although before the jury are sworn defendant excepts to the evidence admitted by the auditor.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1903.

Defense of limitations.—A judgment against an executor or administrator on a debt of decedent cannot, in a proceeding to collect it, be attacked because the debt was barred by limitations, since that defense might have been interposed in the former action. Thayer *v.* Hollis, 3 Metc. (Mass.) 369; Posthlewaite *v.* Ghiselin, 97 Mo. 420, 10 S. W. 482; Leroy *v.* Bayard, 3 Bradf. Surr. (N. Y.) 228; West *v.* Smith, 8 How. (U. S.) 402, 12 L. ed. 1130.

11. *Alabama.*— Pickens *v.* Yarborough, 30 Ala. 408, fraud.

Maine.— Nowell *v.* Bragdon, 14 Me. 320, fraud.

Massachusetts.— Coffin *v.* Cottle, 9 Pick. 287.

North Carolina.— Thompson *v.* Badham, 70 N. C. 141; Wilson *v.* Leigh, 39 N. C. 97 (both being cases of fraud); Smith *v.* Downey, 38 N. C. 268 (holding that where an administrator suffered judgment to be recovered against him as administrator without opposition, upon a claim of which he was himself the beneficial owner, the judgment was no proof of the debt).

Tennessee.— Simons *v.* Page, 96 Tenn. 718, 36 S. W. 843, fraud or accident.

Texas.— Parker *v.* Cater, 8 Tex. 318, fraud.

United States.— West *v.* Smith, 8 How. 402, 12 L. ed. 1130, fraud.

Ignorance of defense.— An administrator is not relieved from personal liability on a judgment *de bonis testatoris*, rendered against him for his failure to plead a want of assets, by the fact that he did not know the real condition of the estate, when by the exercise of due diligence he might have known it. Whiddon *v.* Williams, 98 Ga. 310, 24 S. E. 437. However, the acceptance of a judgment *quando acciderint* against an administrator will not estop plaintiff from afterward suing the administrator for the amount of such judgment on the ground that the administrator applied all the assets of his intestate's estate to the payment of a judgment fraudulently confessed by intestate in his favor, where plaintiff did not know of the fraud when he accepted his judgment. Spoon *v.* Smith, 36 S. C. 588, 15 S. E. 800.

Insufficiency of proof.— The court having jurisdiction, a judgment rendered against a succession is not an absolute nullity, whether sufficient proof was adduced or not. Vaughn's Succession, 26 La. Ann. 149.

Non-approval of decree annulling sale.— In a suit by an administrator to enforce a vendor's lien, brought in a district court, a decree rendered by consent annulling the sale is not void by reason of not having been

that the judgment should be final,[12] and the decision must as a rule have been made on the merits.[13]

(iv) *Persons Estopped and Entitled to Urge Estoppel*[14]—(a) *In General.* As in the case of judgments generally,[15] a judgment concerning a decedent's estate works an estoppel between the parties to the suit and their privies,[16] and only between them; strangers to the former litigation who are not in privity with a party thereto are not concluded by the judgment.[17] The estoppel may be urged, on like principle, by the parties to the judgment and their privies,[18] and by them only; strangers not in privity may not take advan-

approved by the probate court having jurisdiction of the estate. Titus *v.* Johnson, 50 Tex. 224.

Right to question validity.— Although a decree *pro confesso* against an administrator is not an admission by him of the averments of the bill, yet he cannot complain that no proof was taken to establish complainant's case, where he is merely a nominal party to the action, and no relief is asked or granted against him, and decrees *pro confesso* are regularly entered against all the other defendants. Thornton *v.* Neal, 49 Ala. 590.

12. Green *v.* Stone, 1 Harr. & J. (Md.) 405 (holding that a judgment which has been reversed works no estoppel); Chaplin *v.* Jenkins, 2 Strobh. Eq. (S. C.) 96 (holding that where the litigation was for the adjustment of the claims of different legatees, and there was no default on the part of the executors, a decree adjusting those claims, but making no order as to costs, is not such a final decree fixing the executors with costs as may be opened only by petition for rehearing or by bill of review, but the costs may afterward be adjusted under an order of court on a rule taken for that purpose).

13. Robbins *v.* Wells, 1 Rob. (N. Y.) 666, holding that a judgment dismissing a supplemental complaint filed by the representative of a plaintiff who has died since the filing of the original complaint, given solely upon the ground that such representative has no legal capacity to sue, is not a bar to further proceedings by the proper representatives. See also Emmett *v.* Stedman, 3 N. C. 15, holding that where a judgment is erroneously entered against executors in an action wherein they pleaded *non assumpsit* and *plene administravit*, and the jury returned a verdict for plaintiff on the first plea but did not make any finding under the second, the executors may, on the issuance of a scire facias, again enter the plea of *plene administravit*; but to sustain such plea they must show a full administration and no assets at the time of the commencement of the original action.

14. See also *supra*, XIV, O, 4, a.

15. See, generally, JUDGMENTS.

16. Fraser *v.* Charleston, 19 S. C. 384; Cope *v.* McFarland, 2 Head (Tenn.) 543. And see cases cited *supra*, notes 98–13, and *infra*, notes 17–33, *passim*.

Persons liable over.— Plaintiff as administrator delivered the assets of the estate to defendant in consideration of a promise to pay all claims arising against plaintiff as administrator. Afterward, on a claim being made against plaintiff, defendant was notified and promised to take care of it if sued, and, suit being brought against plaintiff, defendant neglected to attend to it, and a judgment was obtained against plaintiff, which he was compelled to pay. The claim was one which the estate was bound to pay and defendant had recognized it by promising to pay it. It was held that in a suit by plaintiff to recover the amount paid on the judgment, defendant was precluded from objecting that the claim on which the judgment was obtained was not against plaintiff as administrator. Randall *v.* Kelsey, 46 Vt. 158.

17. Gibson *v.* Robinson, 90 Ga. 756, 16 S. E. 969, 35 Am. St. Rep. 250 (holding that where an administrator is sued on a debt of his intestate, and fails to plead a want of assets, a judgment against him in such suit is, as to a surety on his bond, merely *prima facie* evidence of a sufficiency of assets); Tarbell *v.* Jewett, 129 Mass. 457 (holding that a tenant of property in suit was not bound by the judgment); Soles *v.* Hickman, 29 Pa. St. 342, 72 Am. Dec. 635 (where a purchaser from a devisee was held not bound by a judgment against the executor); Talbot *v.* Shrewsbury, L. R. 14 Eq. 503, 20 Wkly. Rep. 854.

Creditors.— A judgment against an executor or administrator is conclusive on creditors of the estate. Pickens *v.* Yarborough, 30 Ala. 408; Blankenbaker *v.* Bank of Commerce, 85 Ind. 459; Parker *v.* Cater, 8 Tex. 318. See, however, Troy Bank *v.* Topping, 13 Wend. (N. Y.) 557.

Donees of decedent.— A judgment against an executor or administrator is not conclusive against the donees of decedent. Richards *v.* Porter, 6 T. B. Mon. (Ky.) 1; Dozier *v.* Dozier, 21 N. C. 96.

Receiptor.— Where the administrator of a decedent who died during the pendency of the suit, after representing the estate as insolvent, has appeared in the suit as representative of the deceased party and submitted to a general default without suggesting the insolvency or praying for the stay of execution, the judgment awarded against the estate of the intestate in the hands of the administrator cannot be impeached in an action against a receiptor upon a receipt for goods of the original defendant attached on mesne process. Thompson *v.* Dyer, 55 Me. 99.

18. Hunt *v.* Payne, 29 Vt. 172, 70 Am. Dec. 402, holding that a judgment in favor of an executor in ejectment against devisees

tage of it.[19] A judgment against a party in one right or capacity does not estop him when suing in another right or capacity.[20]

(B) *Executors and Administrators.*[21] A judgment for or against an executor is not conclusive on a subsequent administrator *de bonis non.*[22] A judgment against an administrator is not conclusive on a preceding administrator.[23] A judgment against an administrator *de bonis non* is not conclusive on the personal representative of the administrator in chief.[24] A judgment against collectors of an estate appointed pending proceedings to set aside a will is not conclusive on the executors.[25] A judgment against heirs[26] or distributees[27] is not binding on the executor or administrator. However, a recovery in trover against an administrator in favor of one claiming under a deed of a distributee is binding on the distributee's executor.[28]

(C) *Heirs and Devisees, Distributees, and Legatees.*[29] Ordinarily a judgment against an executor or administrator is not conclusive on heirs,[30] devi-

is conclusive evidence in favor of an administrator *de bonis non* appointed to succeed the executor, in an action to recover the same premises.

19. Buford *v.* McKee, 3 B. Mon. (Ky.) 224 (holding that an unsuccessful effort by a creditor to obtain satisfaction out of personal estate in an action at law against an executor alone is no bar to a proceeding in equity against land in the hands of the heirs of a devisee); Wynn *v.* Wynn, 8 Leigh (Va.) 264 (holding that where the probate court appoints a person to collect and preserve an estate until administration is granted, who as such personally cannot properly be sued on a bond of the decedent, a judgment against him in such a suit is no bar to a new action against the administrator on such bond).

20. Hoopes' Estate, 2 Chest. Co. Rep. (Pa.) 67, holding that the fact that a husband, in an action against him by his wife's executor for moneys received by him for her, in which judgment was recovered for plaintiff, did not set off his wife's funeral expenses, which had been paid by him pursuant to a direction in her will, does not prevent his recovering the expenses from her estate, as the claim in that action and the husband's claim to be recouped such expenses were not due in the same right. See also Talbot *v.* Shrewsbury, L. R. 14 Eq. 503, 20 Wkly. Rep. 854.

21. See also *supra*, XIV, O, 4, b, (IV), (A).

22. Graves *v.* Flowers, 51 Ala. 402, 23 Am. Rep. 555; Grout *v.* Chamberlin, 4 Mass. 611, 613.

Under N. C. Rev. Code, c. 46, § 43, letting no action to which an executor or administrator is plaintiff or defendant abate by his death, a judgment against him is conclusive in a renewal action against the administrator *de bonis non.* Thompson *v.* Badham, 70 N. C. 141.

23. McLaughlin *v.* Nelms, 9 Ala. 925.

24. Thomas *v.* Sterns, 33 Ala. 137; Anderson *v.* Irvine, 5 B. Mon. (Ky.) 488.

25. Brick *v.* Brick, 2 MacArthur (D. C.) 256.

26. Warren *v.* Hall, 10 La. 377.

27. Johnson *v.* Longmire, 39 Ala. 143.

28. Kerr *v.* Webb, 9 Rich. Eq. (S. C.) 369.

29. See also *supra*, XIV, O, 4, b, (IV), (A).

30. *Alabama.*— Steele *v.* Steele, 64 Ala. 438, 38 Am. Rep. 15; Scott *v.* Ware, 64 Ala. 174, holding also that where judgment is rendered against an administrator after expiry of limitations, and the creditor does not show that the action was commenced before the limitation expired, no presumption will be indulged as to that time to prevent the bar, in an action against the heir.

California.— Luco *v.* Commercial Bank, 70 Cal. 339, 11 Pac. 650, holding that if there is a vacancy in the office of executor of a deceased person at the time an action is brought, and judgment is rendered therein against the estate, the heirs are not bound thereby. See, however, Cunningham *v.* Ashley, 45 Cal. 485, holding that an administrator who is a party to an action involving the title of his intestate represents the title which the deceased had at his death, and judgment against him binds the heirs.

District of Columbia.— Groot *v.* Hitz, 3 Mackey 247.

Kentucky.— Quinn *v.* Stockton, 2 Litt. 343, holding, however, that a judgment obtained by one administrator against another, touching the estate of the intestate, if allowed in the county court, must be taken as *prima facie* evidence in the court of appeals, and if not impeached must be allowed.

North Carolina.— Carrier *v.* Hampton, 33 N. C. 307.

Pennsylvania.— Colwell *v.* Rockwell, 100 Pa. St. 133 (holding that in scire facias against heirs and devisees to continue the lien of a judgment entered against an executor within five years of decedent's death, defendants may contest the debt but not the lien); Steele *v.* Lineberger, 59 Pa. St. 308; Walthaur *v.* Gossar, 32 Pa. St. 259; Benner *v.* Phillips, 9 Watts & S. 13; Murphy's Appeal, 8 Watts & S. 165.

South Carolina.— Gilliland *v.* Caldwell, 1 S. C. 194.

United States.— Deneale *v.* Archer, 8 Pet. 528, 8 L. ed. 1033.

See, however, D'Aunoy's Succession, 3 La. Ann. 36 (holding that the claim of a creditor of the succession, after having been established by judgment obtained against the executor, cannot thereafter be collaterally at-

sees,[31] or legatees[32] who were not made parties to the suit. Nor is a judgment in favor of an administrator conclusive on the distributees.[33]

c. Lien.[34] In the absence of statute to the contrary,[35] a judgment against an executor or administrator is not a lien either on the lands of the estate[36] or on those belonging to the representative individually.[37] In some states the judgment

tacked in a suit by heirs, but must be classified as a liquidated debt of the succession); Biggerstaff *v.* Loveland, 8 Ohio 44 (holding that under the law authorizing proceedings by scire facias on a mortgage to enforce payment of the mortgage debt against the lands of a deceased mortgagor, a judgment against the personal representative is binding on the heirs); Owen *v.* Shaw, 20 Tex. 81 (holding that a decree for specific performance against one sued as the administrator and guardian of the sole heir, ordering a conveyance "as guardian," binds the heir; the fact that he was administrator being admitted, but the guardianship being neither proved, admitted, nor denied).

31. Saunders *v.* Saunders, 2 Litt. (Ky.) 314; Colwell *v.* Rockwell, 100 Pa. St. 133; Steele *v.* Lineberger, 59 Pa. St. 308; Walthaur *v.* Gossar, 32 Pa. St. 259; Benner *v.* Phillips, 9 Watts & S. (Pa.) 13; Murphy's Appeal, 8 Watts & S. (Pa.) 165; Screven *v.* Joyner, 1 Hill Eq. (S. C.) 252, 26 Am. Dec. 199; Harvey *v.* Wilde, L. R. 14 Eq. 438, 41 L. J. Ch. 698, 27 L. T. Rep. N. S. 471; Willson *v.* Leonard, 3 Beav. 373, 43 Eng. Ch. 373, 49 Eng. Reprint 146; Marten *v.* Whichelo, Cr. & Ph. 257, 10 L. J. Ch. 384, 18 Eng. Ch. 257, 41 Eng. Reprint 488. See, however, Wilkinson *v.* Tuggle, 61 Ga. 381 (holding that where a purchaser of land from an executor sued him to quiet the title, and the executor admitted a valid sale by him, and a decree was entered accordingly, the decree was binding upon the devisees in remainder, being the executor's children and testator's grandchildren); Howard *v.* Johnson, 69 Tex. 655, 7 S. W. 522 (holding that where an executor, one year before the limitation expired, indorsed, as payable in due course of administration, a mortgage note executed by his testator, and two years thereafter the creditor foreclosed the mortgage, the judgment of foreclosure is not impeachable, in an action for the mortgaged premises by a devisee, on the ground that the suit was brought after the note was outlawed).

32. Lamb *v.* Gatlin, 22 N. C. 37 (holding that a decree by consent against an executor is not conclusive in his favor as against a residuary legatee on a settlement of the estate); Redmond *v.* Coffin, 17 N. C. 437 (holding that upon the delivery of a legacy to the legatee the privity between the executor and legatee ceases; and judgment in a suit subsequently commenced against the executor does not bind the legatee); Mathews *v.* Springer, 16 Fed. Cas. No. 9,277, 2 Abb. 283.

However, a decree against the executor of an executor is *prima facie* evidence to charge the legatee of the first testator. McMullin *v.* Brown, 2 Hill Eq. (S. C.) 457. See also Fraser *v.* Charleston, 19 S. C. 384 (holding that judgments obtained by innocent creditors against an executor on notes purporting to bear testator's signature but which had been forged by the executor in testator's lifetime, are conclusive on the executor and on the legatees as his privies); Colt *v.* Colt, 111 U. S. 566, 4 S. Ct. 553, 28 L. ed. 520 (holding that executors who are also made by the will trustees for infant legatees of their legacies, so long as they hold the personal property as part of the estate of testator for the payment of debts or legacies or as a residuum to be distributed, hold it by virtue of their office and are accountable for it as executors; and where they, being made defendants as executors to a suit to determine the interests of distributees in the residuum in their hands, appear as such, and the infants are also represented by guardian, the judgment therein is conclusive on the beneficial interest of the infants, as against the objection that the executors were not before the court in their capacity as trustees).

33. Gwynn *v.* Hamilton, 29 Ala. 233.

34. See also *supra*, XIV, O, 4, a.

Amendment of judgment as to lien see *supra*, XIV, O, 2, b.

35. See cases cited *infra*, note 39.

Statutes limiting and regulating the liens of judgments in general are not applicable to such as are obtained against the representatives of deceased debtors. Payne *v.* Craft, 7 Watts & S. (Pa.) 458.

36. Treadwell *v.* Herrdon, 41 Miss. 38; Lowry *v.* Houston, 3 How. (Miss.) 394; Scott *v.* Whitehill, 1 Mo. 764 (holding that a judgment against an administrator is no lien on the lands of the intestate, although the judgment be *de bonis testatoris*); Cook *v.* Ryan, 29 Hun (N. Y.) 249 (holding that a judgment recovered against executors as such is not a lien on land conveyed to them as executors); Wambaugh *v.* Gates, 11 Paige (N. Y.) 505; Custer *v.* Custer, 17 W. Va. 113.

Equitable lien.— Judgment was recovered against executors on an indebtedness owing by testator in his lifetime, and upon this judgment another judgment was recovered against a receiver of the estate appointed after the removal of the executors. There was no personal estate out of which the latter judgment could be paid. It was held that such judgment was an equitable lien on testator's real estate, to the proceeds of which the creditor was entitled, although the judgment itself might not, under the statutes, have become a lien on the real estate. Platt *v.* Platt, 42 Hun (N. Y.) 592.

37. Williams *v.* Green, 80 N. C. 76; McCulloch *v.* Sample, 1 Penr. & W. (Pa.) 422

is a lien on the assets in the hands of the personal representative.[38] In cases where a lien is allowed, proceedings to establish or enforce it must be seasonably commenced.[39] Where an administrator having a judgment as such records a certificate of lien, the fact that the certificate is signed not only by him but also by those beneficially interested in the judgment does not invalidate it.[40]

5. Satisfaction and Set-Off. Satisfaction of a judgment in favor of a distributee against one to whom the administrator has wrongfully paid the distributee's share has the effect of extinguishing the administrator's liability to the distributee.[41] A judgment against an executor or administrator may in a proper case be set off against a judgment in his favor;[42] and a judgment in favor of an

(holding that where executors sold the real estate of their testator by virtue of authority in the will for the payment of certain legacies, and on settlement of their account in the orphans' court it appeared there were assets to pay the legacies, a judgment obtained by the legatees against the executors did not constitute a lien on the real estate of the executors, and that judgments obtained by legatees who have filed refunding bonds against executors who have accounted and been discharged by the orphans' court are not liens on the real estate of such executors); Gay *v.* Skeen, 36 W. Va. 582, 15 S. E. 64 (holding that a conditional decree directing an executor to pay certain debts due by his testator's estate or due from him in his fiduciary capacity, when he shall have collected certain other specified claims or debts coming to his testator's estate, constitutes no lien upon the real estate of such executor).

38. Treadwell *v.* Herndon, 41 Miss. 38; Lowry *v.* Houston, 3 How. (Miss.) 394; Dancy *v.* Pope, 68 N. C. 147, holding that an absolute judgment against a decedent's estate is a lien, not only upon the assets in hand, but upon such as may come into the hands of the administrator after its rendition. See, however, Prefontaine *v.* McMicken, 16 Wash. 16, 47 Pac. 231, holding that a judgment against an executor or an administrator *de bonis non* is not a lien on the property of the estate, but merely establishes a claim which it is the duty of the representative to pay in due course of administration. And see *supra*, XIV, O, 1, d.

39. Johnson *v.* Peck, 58 Ark. 580, 25 S. W. 865 (holding that one obtaining a judgment against the estate of a deceased person cannot, after delaying to enforce his lien on decedent's land for thirteen years, enforce it as against one who purchases the land at the end of that time); Bowman *v.* Knorr, 206 Pa. St. 272, 55 Atl. 976; Buehler *v.* Buffington, 43 Pa. St. 278 (in both of which cases suit on the debt was not commenced within the time prescribed by statute); Keenan *v.* Gibson, 9 Pa. St. 249 (holding that where a judgment was recovered against executors prior to the Pennsylvania act of 1834, and revived by scire facias against the executors only after that act and within five years, without making the owners of the land parties, the lands of devisees were discharged from the lien). See, however, Keil *v.* Wolf, 7 Pa. St. 424 (holding that under the Pennsylvania act of 1797, requiring debts of a deceased person to be sued upon within seven years to become liens upon his land, but allowing a *feme covert* four years after discoverture to bring such action, a judgment confessed by executors, more than seven years after the death of testator, to a married woman and her husband for her sole and separate use, for money loaned by her during her marriage, is within the exception of the statute and constitutes a lien on the land); Payne *v.* Craft, 7 Watts & S. (Pa.) 458 (holding that a judgment obtained against the administrators of an intestate within seven years after his death, and revived by a note made on the record of the original judgment of the agreement of the parties for that purpose, made within every five years, is such a due prosecution of the claim as will preserve the lien of the debt on the lands of the intestate according to the provisions of the Pennsylvania act of 1797).

40. Ives *v.* Beecher, 75 Conn. 153, 52 Atl. 746.

41. Prater *v.* Stinson, 26 Ala. 456.

42. Wikel *v.* Garrison, 82 Iowa 453, 48 N. W. 803 (holding that a judgment against an administrator on a debt contracted by the intestate and enforceable against him in his lifetime may in equity be set off against a judgment rendered in favor of the administrator against the judgment creditor, although there are no assets other than the judgment, and the estate is indebted to the administrator for costs to an equal amount); Barrett *v.* Barrett, 8 Pick. (Mass.) 342 (holding that a judgment in favor of a judge of probate in a suit on a probate bond brought in his name for the benefit of a legatee against an executor and his sureties may be set off against a judgment recovered by the executor in his individual capacity against the legatee); Abercrombie *v.* Abercrombie, 25 S. C. 45 (holding that distributees who have not received the shares due them under the decree of distribution are entitled, as against a creditor of the estate who did not present his claim or reduce it to judgment until years after the decree of distribution was passed, to have the amounts due them set off against judgments in favor of the administrator on notes given by the husbands of the distributees for the price of property sold by him). See, however, Wikel *v.* Garrison, 82 Iowa 453, 48 N. W. 803, holding

executor or administrator may on the other hand be set off against a judgment against him.[43]

6. Revival of Judgment[44]— a. Judgment Against Decedent.[45] A judgment against one subsequently dying may be revived against his personal representative by scire facias,[46] and in some states this is the only mode in which the judgment may be enforced against the estate.[47] The scire facias must contain a suggestion of the death of the judgment debtor and show the appointment of defendant in the writ as executor or administrator.[48] Nothing can be pleaded in defense of the proceeding that might have been pleaded in the original action.[49] It is a good plea that defendant is not the personal representative of the judgment debtor,[50] or that there are no assets of the estate.[51] It is no defense, however, that the personal representative has not accounted to the surrogate.[52] A judgment of revival may be entered on default.[53] The judgment of revival should require the money to be made first out of the assets in the hands of the executor or administrator, and, failing in this, then out of the lands descended to the heirs.[54]

b. Judgment By or Against Representative. In some states a judgment by or against an executor or administrator may be revived against his successor in

that judgments against an administrator on debts contracted by the intestate cannot be purchased by a debtor of the estate, and alleged as counter-claims to judgments or demands due from him to the estate.

43. Hills *v.* Tallman, 21 Wend. (N. Y.) 674 (holding, however, that an administrator who has purchased a judgment against a plaintiff since the rendition of a judgment against him for a debt owing by the intestate cannot set off such judgment); Dudley *v.* Griswold, 2 Bradf. Surr. (N. Y.) 24 (holding, however, that to authorize a set-off the debts must be mutual, and due to and from the same persons in the same capacity); Reigne *v.* Hunt, 1 Speers (S. C.) 281 (holding, however, that where the assignee of a judgment against decedent brought an action of debt thereon and recovered judgment, it was too late for the executor to claim a set-off against plaintiff in the original judgment).

44. **Revival of action on death of party** see Abatement and Revival, 1 Cyc. 47 *et seq.*

45. **Revival against heirs** see, generally, Judgments.

46. Brearly *v.* Peay, 23 Ark. 172 (holding that a plea to a scire facias to revive a judgment against the administrator of a deceased judgment debtor, setting forth a presentation but not an allowance thereof in the probate court, is bad, for a party may pursue concurrent remedies, although he can have but one satisfaction); Fulcher *v.* Mandell, 83 Ga. 715, 10 S. E. 582 (holding that notwithstanding a judgment creditor may, under the statute, levy on any property of his deceased judgment debtor which he may find, without making the administrator a party, yet he may make the administrator a party to the judgment by scire facias, so as to bind him, in case he has assets which could not be reached by levy).

47. Handley *v.* Fitzhugh, 3 A. K. Marsh. (Ky.) 561 (holding that a judgment against a decedent cannot be enforced by execution against his personal representative unless revived against him by scire facias, and that a revivor in the appellate court against the representative does not revive the judgment in the court below so as to permit execution there against the representative); Brown *v.* Webb, 1 Watts (Pa.) 411; Righter *v.* Rittenhouse, 3 Rawle (Pa.) 273; Gwin *v.* Latimer, 4 Yerg. (Tenn.) 22 (holding that an executor or administrator cannot waive the necessity of a scire facias or revive a judgment, so as to authorize the issuing of an execution against the estate). See, however, cases cited *supra*, note 46.

Revival nunc pro tunc.— The court may, with the consent of the personal representative, permit an amicable action of scire facias to be filed *nunc pro tunc* to cure a sale of land made under a judgment obtained against decedent in his lifetime and not revived against the representative. Diese *v.* Fackler, 58 Pa. St. 109.

48. Walker *v.* Hood, 5 Blackf. (Ind.) 266.

49. Lynch *v.* Inglis, 1 Bay (S. C.) 449, holding that an executor can plead nothing but a release or something arisen since the entering up of the judgment.

50. White *v.* Brown, 1 Dana (Ky.) 104.

51. National Sav. Bank *v.* Welcker, 21 D. C. 324 (holding that a plea of *plene administravit* is not demurrable, but plaintiff should enter up judgment of assets *quando acciderint*); Fulcher *v.* Mandell, 83 Ga. 715, 10 S. E. 582 (holding that an administrator may show that he has no assets, that he has fully administered them, or that the assets in his hands were taken possession of by intestate as sole heir of his deceased wife, and that there are outstanding debts against the wife sufficient to exhaust such assets); Tanner *v.* Freeland, 1 Harr. & M. (Md.) 34 (holding that *plene administravit* is a good plea).

52. Clark *v.* Sexton, 23 Wend. (N. Y.) 477.

53. Middleton *v.* Middleton, 106 Pa. St. 252.

54. Graves *v.* Skeels, 6 Ind. 107. See Mills *v.* Thursby, 2 Abb. Pr. (N. Y.) 432, 12 How. Pr. (N. Y.) 385, holding that a proceeding

office.[55] However, unless the executor or administrator was personally bound by a judgment which has been rendered against him,[56] it cannot be revived after his death against his personal representative.[57] Among other defenses that may be urged against the revival of a judgment against an executor or administrator,[58]

under Code, § 376, providing that in case of the death of a judgment debtor after judgment his executors may be summoned to show cause why the judgment should not be enforced against the estate in their hands, is limited merely to the enforcement of the original judgment against the estate in the executors' hands, and that a judgment therein against the executors as broad as if founded on a summons in an ordinary action in which they could be made personally liable for the whole amount of the judgment is unauthorized.

55. Bowen *v.* Bonner, 45 Miss. 10 (holding that the statute providing for the revival of judgments for or against the successors of executors or administrators by or against whom they were originally recovered is intended to do away with the common-law doctrine that a judgment vested individual rights in executors and administrators); Borland *v.* Dexter, 13 Wkly. Notes Cas. (Pa.) 44 (holding that privity of estate exists between an executor whose letters have been revoked and one to whom letters are granted under another will, and hence that a judgment against the former may be revived against the latter). *Contra,* Bobo *v.* Gunnels, 92 Ala. 601, 8 So. 797, holding that a judgment against an administrator under which an execution against the estate has been returned unsatisfied cannot be revived against the administrator *de bonis non,* since there is no privity between the two.

Procedure.— An administrator *de bonis non* has, under Miss. Rev. Code, a right to appear in court, suggest the death of his predecessor, and ask that a judgment recovered by such predecessor be revived in his name as successor in the administration; he need not resort to the writ of scire facias for that purpose. Bowen *v.* Bonner, 45 Miss. 10; Dibble *v.* Norton, 44 Miss. 158. Prior to the Texas act of 1846 (Hartley Dig. art. 784), an action of debt on the judgment in the name of the administrator *de bonis non* was the proper remedy to revive a judgment recovered by a deceased administrator. Austin *v.* Townes, 10 Tex. 24.

Name in which judgment should be revived. —A judgment rendered in favor of A for the use of B, administrator of C, cannot be revived, on the death of B, in the name of D as administrator *de bonis non* of C; the original judgment not having been recovered by B in his representative character, nor constituting any part of the estate of C. Alexander *v.* Raney, 8 Ark. 324. So where letters of administration have been revoked and an administrator *de bonis non* appointed, a scire facias cannot be sued out in the name of the former administrator to revive a judgment rendered in his favor while in office. Weaver *v.* Reese, 6 Ohio 418.

Time of revival.— A judgment against an administrator can be revived by scire facias against the administrator *de bonis non,* his successor, more than seven years after its rendition, but less than seven years from the issuing of the last preceding execution thereon. Stith *v.* Parham, 57 Miss. 289.

Judgment against person appointed to collect and preserve estate.— Where a court of probate appoints a person to collect and preserve the estate of a decedent until administration is granted, such appointee cannot properly be sued on a bond of the decedent, and if he is so sued and a judgment is rendered against him, a scire facias upon the judgment will not lie, after administration is granted, against the administrator. Wynn *v.* Wynn, 8 Leigh (Va.) 264.

56. Coates *v.* Muse, 5 Fed. Cas. No. 2,916, 1 Brock. 529 (holding that where, in a bill against two persons as joint executors who are also devisees and legatees of the testator, defendants permit a joint decree to be entered against them, the presumption is that they are liable in equal proportions, and, on entering a decree on a revival of the suit against their executors, it should be for a moiety of the joint decree against the representative of each in the first instance); Coates *v.* Muse, 5 Fed. Cas. No. 2,917, 1 Brock. 539 (holding that a decree against two executors jointly *prima facie* charges each executor equally, whether it is so expressed or not, but that where on an application to carry the decree into execution it is shown that they were unequally indebted the decree may be revived against each according to his liability; but that the fact that they were debtors to the estate in unequal sums for purchases made at the sale of the estate is no proof of their unequal liability).

57. Mendenhall *v.* Robinson, 56 Kan. 633, 44 Pac. 610.

58. Clark *v.* Sexton, 23 Wend. (N. Y.) 477, holding that while in scire facias to revive a judgment against testator a plea that the executors have not accounted to the surrogate is not good, yet when scire facias issues on a judgment against the executors the plea is good. See, however, Howell *v.* Potts, 20 N. J. L. 1, holding that an application of an executor to the orphans' court, representing that the real and personal property of decedent are insufficient to pay his debts, will not bar a scire facias issued to revive a judgment entered before the application was made.

Estoppel by plea.— Where the estate had not the means of paying a judgment against it, and one of two executors bought the judgment with his own money and had it assigned to a third person who issued scire facias thereon, naming both executors and also heirs as defendants, a plea of payment

a plea of *plene administravit* may be sufficient when it is supported by the facts.[59]

7. Action on Judgment — a. Right of Action. An executor or administrator may sue on a judgment obtained by himself,[60] by his predecessor in office,[61] or by his decedent.[62] However, an action will not lie against an administrator in one state on a judgment obtained against a different administrator of the same estate appointed in another state.[63]

b. Parties. An administrator is a necessary party to an action on a judgment in his favor.[64] So an administrator *de bonis non* is a necessary party to a suit on a judgment in favor of his predecessor in office.[65] Persons beneficially interested in a judgment in favor of an administrator may properly be joined as plaintiffs in a suit thereon,[66] but heirs cannot be joined as defendants in an action on a judgment against an administrator.[67] A non-joinder of a necessary party defendant should be objected to by plea in abatement.[68]

c. Declaration or Complaint. In an action on a judgment *quando* against an administrator, a declaration alleging that assets have come into defendant's hands since the judgment was rendered is sufficient without alleging that plaintiff is entitled to the assets.[69] The failure to demand a proper judgment in a complaint on a judgment against an intestate does not necessarily defeat the action.[70]

d. Defenses. It is a good defense to a suit on a judgment against a personal representative that the action was not brought within the time limited by statute.[71] In an action on a judgment *quando* against an administrator, defendant

by the executors did not estop the executor who had bought the judgment from showing that it was not in fact paid but that it was intended to be kept alive for his use. McKerrahan *v.* Crawford, 59 Pa. St. 390.

59. Cox *v.* Cox, 2 Yerg. (Tenn.) 305. However, a plea of *plene administravit* is bad on demurrer, where it appears that there is real estate of decedent which might be sold to pay debts, since the administrator is bound to sell such real estate for that purpose. Bates *v.* Kimball, 1 Aik. (Vt.) 95.

60. Oglesby *v.* Gilmore, 5 Ga. 56; Biddle *v.* Wilkins, 1 Pet. (U. S.) 686, 7 L. ed. 315, both holding that after judgment recovered in a suit by an administrator, the debt is due to plaintiff in his personal capacity, and he may declare on it as such.

Suit in sister state.— An administratrix who recovers judgment makes the debt hers individually, and she may sue thereon out of the state where she was appointed, allegations showing representative capacity being treated as surplusage. Newberry *v.* Robinson, 36 Fed. 841.

61. Austin *v.* Townes, 10 Tex. 24, so holding prior to the Texas act of 1846 (Hartley Dig. art. 784).

62. Freeman *v.* Dutcher, 15 Abb. N. Cas. (N. Y.) 431, holding that the right given by Code, § 1376, to an executor to take out execution on a judgment in favor of his intestate does not preclude him from bringing suit on the judgment without leave of court.

63. Stacey *v.* Thrasher, 6 How. (U. S.) 44, 12 L. ed. 337, holding that there is no privity between them. See, however, McLean *v.* Meek, 18 How. (U. S.) 16, 15 L. ed. 277.

64. Ives *v.* Beecher, 75 Conn. 153, 52 Atl. 746, so holding, although other persons are the only ones beneficially interested, and whether they purchased the judgment or acquired it under the will.

65. Ives *v.* Beecher, 75 Conn. 153, 52 Atl. 746.

66. Ives *v.* Beecher, 75 Conn. 153, 52 Atl. 746, so holding, although they own the judgment in several and unequal shares.

67. Nourse *v.* Ramsey, 2 Bibb (Ky.) 547. And see Moore *v.* Nowell, 94 N. C. 265. See, however, *In re* Schwartz, 14 Pa. St. 42.

68. *In re* Schwartz, 14 Pa. St. 42, holding that where a judgment is taken against a personal representative alone, and a subsequent action of debt is brought thereon against the representative and heirs, the non-joinder of an heir can be objected to only by plea in abatement.

69. Southard *v.* Potts, 22 N. J. L. 278.

70. Moore *v.* Nowell, 94 N. C. 265.

71. Jenkins *v.* Wood, 134 Mass. 115 (holding that a creditor who recovers a judgment against an executor in an action upon a debt due from testator, brought within the two years limited by statute, is not entitled, the execution on the judgment not being satisfied, to bring an action on the judgment after the expiration of the two years, although the bond given by the executor, who is also residuary legatee, is one conditioned to pay debts and legacies); McLean *v.* Meek, 18 How. (U. S.) 16, 15 L. ed. 277 (holding that no suit can be maintained against an administrator in one state upon a judgment recovered against the administrator of the same estate in another state, where the original demand upon which the judgment was recovered is barred by the statute of limitations of the state where the suit is brought).

may plead *plene administravit.*[72] Defendant may be estopped to assert the invalidity of the judgment sued on.[73]

e. Burden of Proof and Presumptions. In an action on a judgment *quando* against an administrator, plaintiff need not prove in the first instance that he is entitled to assets which he alleges have subsequently come into defendant's hands;[74] and an allegation in the answer that no assets have come into defendant's hands since the judgment was rendered refutes the presumption of payment arising from lapse of time.[75] If, in an action by an administrator *de bonis non* on a judgment obtained by the executor, plaintiff alleges that the judgment was obtained by the executor, it will be presumed the judgment was for a debt due testator.[76]

P. Execution and Enforcement of Judgment — 1. Enforcement Against Representative as Such — a. In General.[77] In many jurisdictions a judgment rendered against a personal representative on a claim against his decedent's estate can be enforced only by a proper proceeding in the probate court, in due course of administration,[78] and execution thereon, except from the probate court, cannot be issued against the representative.[79] But at common law and under special

72. Southard *v.* Potts, 22 N. J. L. 278.

73. Copeland *v.* Todd, 30 S. C. 419, 9 S. E. 341, holding that where the probate court had jurisdiction to render judgment in favor of a creditor for his *pro rata* part of a claim filed against the estate of a decedent, which is allowed, is immaterial to the sufficiency of a complaint based upon such a judgment, when it is alleged that the amount of the judgment was ascertained to be in the executor's hands in a settlement of his accounts made before said court, and that he has recognized by subsequent payments thereon the validity of the judgment, as by the admission of assets in his settlement he became liable personally to the creditor, and by the payments and his acquiescence in the judgment his personal representative is estopped to deny his liability as against the creditor's executor.

74. Southard *v.* Potts, 22 N. J. L. 278.

75. Austin *v.* Tompkins, 3 Sandf. (N. Y.) 22.

76. Dykes *v.* Woodhouse, 3 Rand. (Va.) 287.

77. **Supplementary proceedings in aid of execution** see Executions, 17 Cyc. 1402 *et seq.*

78. See *supra*, XIV, O, 1, d. And see cases cited in succeeding note.

79. *Arkansas.*— Meredith *v.* Scallion, 51 Ark. 361, 11 S. W. 516, 3 L. R. A. 812; Yonley *v.* Lavender, 27 Ark. 252 [*affirmed* in 21 Wall. (U. S.) 276, 22 L. ed. 536]; Hornor *v.* Hanks, 22 Ark. 572 [*disapproving* U. S. *v.* Drennen, 25 Fed. Cas. No. 14,992, Hempst. 320]; Adamson *v.* Cummins, 10 Ark. 541. The statute which recognized the right to issue an execution against an administrator in his fiduciary capacity (Rev. St. c. 60, § 8), was repealed by the provisions of the constitution of 1874, conferring exclusive jurisdiction over the assets of deceased persons on the probate courts. Since the adoption of that instrument, although courts of law still have jurisdiction to maintain an action against an administrator, the power to execute a judgment recovered therein belongs alone to the probate court, to be exercised in the course of administration. An execution issued on such judgment is therefore without authority of law and a sale made under it is void. Meredith *v.* Scallion, *supra.*

California.— Rice *v.* Inskeep, 34 Cal. 224.

Colorado.— Jones *v.* Perot, 19 Colo. 141, 34 Pac. 728; Lamping *v.* Keenan, 9 Colo. 390, 12 Pac. 434; Mattison *v.* Childs, 5 Colo. 78; Kilpatrick *v.* Haley, 14 Colo. App. 399, 60 Pac. 361.

Illinois.— Darling *v.* McDonald, 101 Ill. 370; Albee *v.* Wachter, 74 Ill. 173; Bull *v.* Harris, 31 Ill. 487; Stillman *v.* Young, 16 Ill. 318; Turney *v.* Gates, 12 Ill. 141; Judy *v.* Kelley, 11 Ill. 211, 50 Am. Dec. 455; Peck *v.* Stevens, 10 Ill. 127; Welch *v.* Wallace, 8 Ill. 490. But see Greenwood *v.* Spiller, 3 Ill. 502.

Louisiana.— Anderson *v.* Birdsall, 19 La. 441; Baillio *v.* Wilson, 5 Mart. N. S. 214.

Michigan.— Peckham *v.* Judge Berrien County Ct., 74 Mich. 287, 41 N. W. 926.

Missouri.— Wernecke *v.* Wood, 58 Mo. 352. See *In re* Simpson, 81 Mo. App. 582. It was otherwise in this state prior to the act, approved Dec. 30, 1826, which took effect from May 1, 1827. Carson *v.* Walker, 16 Mo. 68. See also Sweringen *v.* Eberins, 7 Mo. 421. 38 Am. Dec. 463; Scott *v.* Whitehill, 1 Mo. 691.

New Jersey.— Under the statutes of this state execution on a judgment against the representative cannot issue, where the estate is represented insolvent within the time limited to creditors to bring in their claims. Taylor *v.* Volk, 38 N. J. L. 204.

North Carolina.— No court but the probate court can issue execution against the assets of the decedent upon a judgment against the representative. Vaughn *v.* Stephenson, 69 N. C. 212. For the earlier common-law practice in this state see Pennington *v.* Hayes, 3 N. C. 502; Alston *v.* Harris, 3 N. C. 125; Burnside *v.* Green, 3 N. C. 112; Borden *v.* Nash, 3 N. C. 42.

Texas.— Under the statutes of this state execution cannot issue upon a judgment ren-

statutes in some jurisdictions a judgment obtained against the representative may be enforced by execution against the property of the decedent in his hands to be administered, as in other cases in law or equity,[80] although under some statutes leave of court to issue the execution must first be obtained.[81]

b. Practice in New York. Under the statutes in this state, in order that an execution may issue against a personal representative upon a judgment for money rendered against him in his representative capacity, an order permitting its issuance must be made by the surrogate from whose court the representative's letters were issued, upon proper application therefor by the judgment creditor,[82] and

dered against a personal representative, but it must be certified to the probate court for classification to be paid in due course of administration (Meyers *v.* Evans, 68 Tex. 466, 5 S. W. 66; Paxton *v.* Meyer, 67 Tex. 96, 2 S. W. 817; Hart *v.* McDade, 61 Tex. 208; Lewis *v.* Nichols, 38 Tex. 54; Wilcox *v.* State, 24 Tex. 544; Carroll *v.* Carroll, 20 Tex. 731; Boggess *v.* Lilly, 18 Tex. 200; Forston *v.* Caldwell, 17 Tex. 627; Ansley *v.* Baker, 14 Tex. 607, 65 Am. Dec. 136; Bennett *v.* Spillards, 7 Tex. 600, 9 Tex. 519; Bason *v.* Hughart, 2 Tex. 476; Mott *v.* Ruenbuhl, 1 Tex. App. Civ. Cas. § 599), except where it is rendered against an independent executor — an executor who under the terms of the will is authorized to administer the estate free from the control of the probate court (Roberts *v.* Connellee, 71 Tex. 11, 8 S. W. 626; Hart *v.* McDade, *supra*; Lewis *v.* Nichols, *supra*; Ellis *v.* Mabry, 25 Tex. Civ. App. 164, 60 S. W. 571; Croom *v.* Winston, 18 Tex. Civ. App. 1, 43 S. W. 1072; McKie *v.* Simpkins, 1 Tex. App. Civ. Cas. § 278. See McDonnough *v.* Cross, 40 Tex. 251. And see *infra*, XXIII); or unless, where the judgment is revived against the representative the judgment of revivor authorizes the issuance of execution (see Hart *v.* McDade, *supra*); but a mere provision in the will exempting the executor from giving bond does not authorize the issuance of execution against the estate (Lewis *v.* Nichols, *supra*). A decree of foreclosure against mortgaged property of the decedent is within the application of this rule, since any process under which property may be sold is an execution within the meaning of this statute. Smithwick *v.* Kelly, 79 Tex. 564, 15 S. W. 486. Where the claim is one secured by mortgage and has been rejected by the probate court, it may be carried to judgment in the district court and the property subject to the lien may be seized and sold by the sheriff and the proceeds of such sale be applied to the satisfaction of the judgment. Danzey *v.* Swinney, 7 Tex. 617. And see Givens *v.* Davenport, 8 Tex. 451.

Wyoming.— Peabody *v.* Hutton, 5 Wyo. 102, 37 Pac. 694, 39 Pac. 980.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1910.

80. *Georgia.*— Braswell *v.* Brown, 112 Ga. 740, 38 S. E. 51.

Kansas.— Halsey *v.* Van Vliet, 27 Kan. 474.

Kentucky.— Sherwood *v.* Campbell, 1 B. Mon. 54.

Maine.— Nowell *v.* Bragdon, 14 Me. 320.

Massachusetts.— Steel *v.* Steel, 4 Allen 417.

Virginia.— Nimmo *v.* Com., 1 Hen. & M. 470.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1912.

At common law a judgment against a representative which was entitled to be satisfied out of the assets of administration was for the debt or damages and costs to be levied of the goods of the testator or intestate in the hands of the executor or administrator to be administered. See Darling *v.* McDonald, 101 Ill. 370; U. S. *v.* Drennen, 25 Fed. Cas. No. 14,992, Hempst. 320.

A judgment quando acciderint cannot be enforced by execution (Braxton *v.* Wood, 4 Gratt. (Va.) 25); but plaintiff may proceed immediately by debt or scire facias to ascertain whether there is not a surplus of assets after paying the debts which have priority over his payment; and he thereby converts his judgment into a judgment *de bonis testatoris* and obtains a priority over other creditors in equal degree who have not recovered judgment (Braxton *v.* Wood, *supra*).

A decree directing several co-executors to pay a certain sum to one of their number cannot be enforced by execution. Eisner *v.* Avery, 2 Dem. Surr. (N. Y.) 466.

In Alaska, where judgment has been obtained against an estate, the administrator admitting that he has money on hand to pay it, may be ordered to pay such money into the court. *In re* Gladough, 1 Alaska 649. The court in this case, although admitting that execution against the administrator might be allowed in a proper case, was not disposed to order it under the circumstances of this case.

81. An order to show cause why execution should not issue upon a judgment against the decedent and revived against the representative, or upon a judgment against the representative, is required by some statutes. See Wallace *v.* Holmes, 40 Pa. St. 427.

Practice in New York see *infra*, XIV, P, 1, b.

82. Marine Bank *v.* Van Brunt, 49 N. Y. 160 [*affirming* 61 Barb. 361] (holding also that this rule does not take away from the supreme court the power of controlling execution of its judgments); Matter of Bernardston Cong. Unitarian Soc., 34 N. Y. App. Div. 387, 54 N. Y. Suppl. 269; Matson *v.* Abbey, 70 Hun (N. Y.) 475, 24 N. Y. Suppl. 284; Winne *v.* Van Schaick, 9 Wend. (N. Y.)

after citation or notice to the parties interested.[83] But before leave to issue such execution will be granted, it must be clearly made to appear by the application or by an accounting ordered by the surrogate that the representative has assets of the estate in his hands which are applicable to the payment of the judgment,[84] or that funds of the estate have been misapplied which ought to have been devoted to the payment of the judgment.[85] The burden rests upon the petitioner to satisfy the surrogate that the proper conditions exist to warrant the granting of the order authorizing the execution to issue.[86] The execution, if issued, must substantially require the sheriff to satisfy the judgment out of the personal estate in the hands of the executor belonging to the estate of his testator.[87] But the

448. See also Mills *v.* Thursby, 2 Abb. Pr. (N. Y.) 432, 12 How. Pr. (N. Y.) 385; Butler *v.* Hempstead, 18 Wend. (N. Y.) 666; Melcher *v.* Fisk, 4 Redf. Surr. (N. Y.) 22 (construing 3 Rev. St. p. 96, § 42).

An order in the alternative granting leave to issue execution, unless the representative applies for license to sell realty, is not authorized under such statutes. St. Johns *v.* Voorhies, 19 Abb. Pr. (N. Y.) 53.

A judgment, within the meaning of these statutes, is one against a personal representative in his representative capacity after a trial upon the merits of the case (Schmitz *v.* Langhaar, 88 N. Y. 503; People *v.* Judges Albany Mayor's Ct., 9 Wend. (N. Y.) 486), whether it was recovered for a debt of the decedent or for one contracted by the representative for necessary and reasonable expenses of the administration (*In re* Thompson, 41 Barb. (N. Y.) 237 [*affirming* 1 Redf. Surr. 490]; not including, however, a judgment against him, after he has been discharged on a final accounting, on an indebtedness created by the decedent in his lifetime (*In re* Hathaway, 24 N. Y. Suppl. 468, Pow. Surr. (N. Y.) 447), or a judgment in an action to recover damages for the decedent's death (Matter of Jansen, 9 N. Y. Suppl. 451, 1 Connoly Surr. (N. Y.) 362), or a judgment against a firm composed of a surviving partner and the executor of a deceased partner who was empowered by the will to carry on the testator's business (Columbus Watch Co. *v.* Hodenpyl, 135 N. Y. 430, 32 N. E. 239 [*affirming* 61 Hun 557, 16 N. Y. Suppl. 337], or a judgment in an action originally commenced against the decedent and revived against his personal representatives (Thacker *v.* Bancroft, 15 Abb. Pr. (N. Y.) 243).

The pendency of an appeal from the judgment is no bar to a motion for leave to issue execution unless the proceedings have been stayed. Matter of Morey, 10 N. Y. St. 693, 6 Dem. Surr. (N. Y.) 287; Keyser *v.* Kelley, 4 Redf. Surr. (N. Y.) 157; Smith *v.* Howell, 2 Redf. Surr. (N. Y.) 225.

83. Marine Bank *v.* Van Brunt, 49 N. Y. 160 [*affirming* 61 Barb. 361]; St. John *v.* Voorhies, 19 Abb. Pr. (N. Y.) 53.

Where an account by the executor shows the assets applicable to the judgment, leave to issue execution may be granted the judgment creditor, without citing the executor to account. Smith *v.* Howell, 2 Redf. Surr. (N. Y.) 325.

Objection to failure to issue a citation as required by statute is waived by the representative appearing and accounting and taking an appeal without objection to the irregularity. St. John *v.* Voorhies, 19 Abb. Pr. (N. Y.) 53.

84. Matter of Gall, 40 N. Y. App. Div. 114, 57 N. Y. Suppl. 835; Matter of Bernardston Cong. Unitarian Soc., 34 N. Y. App. Div. 387, 54 N. Y. Suppl. 269; *In re* Thurber, 37 Misc. (N. Y.) 155, 74 N. Y. Suppl. 949; Matter of Lazelle, 16 Misc. (N. Y.) 515, 40 N. Y. Suppl. 343 (holding this to be true, although the representative gave an undertaking in the action, on which defendant cannot sue until he has had execution upon his judgment returned unsatisfied); St. John *v.* Voorhies, 19 Abb. Pr. (N. Y.) 53; Mitchell *v.* Mount, 19 Abb. Pr. (N. Y.) 1; Winne *v.* Van Schaick, 9 Wend. (N. Y.) 448; Matter of Boyle, 9 N. Y. Suppl. 473, 2 Connoly Surr. (N. Y.) 57; Peters *v.* Carr, 2 Dem. Surr. (N. Y.) 22; Hauselt *v.* Gano, 1 Dem. Surr. (N. Y.) 36; Melcher *v.* Fisk, 4 Redf. Surr. (N. Y.) 22. See also Matter of Dougherty, 15 N. Y. St. 743.

An order or decree of a surrogate directing payment by a personal representative is by section 2552 "conclusive evidence that there are sufficient assets in his hands to satisfy the sum" directed to be paid by the decree (Matter of Seaman, 63 N. Y. App. Div. 49, 71 N. Y. Suppl. 376), but by express provision in section 2606 the above section does not apply to a decree ordering payment by an administrator of a deceased executor, and execution in that case cannot issue without leave of the surrogate (Matter of Seaman, *supra*).

85. Matter of Gall, 40 N. Y. App. Div. 114, 57 N. Y. Suppl. 835.

86. Matter of Lazelle, 16 Misc. (N. Y.) 515, 40 N. Y. Suppl. 343.

Where the petition alleges that the representative has in his possession assets sufficient to satisfy the judgment, the burden of showing that they are insufficient to pay all debts, legacies, or other claims of the class to which plaintiff's claim belongs is upon the representative, and if he presents no papers in opposition the surrogate may grant the petition. Matter of Steinau, 23 N. Y. App. Div. 550, 48 N. Y. Suppl. 886.

87. Matter of Lazelle, 16 Misc. (N. Y.) 515, 40 N. Y. Suppl. 343. The surrogate has no power to permit execution against real estate under such statute. Lichten-

surrogate should permit execution to issue only for a proportionate amount of the judgment,[88] unless it appears that other creditors of the estate will not be prejudiced by execution for the full amount of the judgment.[89]

c. Against Administrator De Bonis Non. It has been held that a judgment recovered against an administrator in chief cannot be enforced against an administrator *de bonis non*,[90] unless the judgment is revived against the latter administrator.[91]

d. Enforcement in Equity. A judgment creditor, unless he has estopped himself by electing to rely on other remedies,[92] may also in some cases resort to a court of equity for the purpose of enforcing his judgment,[93] even in those jurisdictions in which execution cannot be issued against the representative.[94] Such bill may be maintained for the purpose of reaching assets which have already been distributed or disposed of by the representative,[95] or for the discovery and production of assets.[96] A judgment against the representative not expressed to be *de bonis testatoris* cannot be enforced in equity unless it is amended in that respect,[97] or unless the conditions of the case are such that it cannot be enforced against the representative, as where he is a non-resident and insolvent and all the assets of the estate have been distributed.[98]

2. Enforcement By or Against Representative After Removal or Resignation. After a personal representative has been removed from office he cannot regularly sue out execution upon a judgment recovered by him as representative;[99] nor can execution be lawfully issued against him, and an execution issued while there exists a vacancy is void and no right of property passes by a sale thereunder.[1]

3. Enforcement Against Representative Individually — a. In General. Where the personal representative has been guilty of waste, and there is a return of

berg *v.* Herdtfelder, 103 N. Y. 302, 8 N. E. 526; Matter of Jansen, 9 N. Y. Suppl. 451, 1 Connoly Surr. (N. Y.) 362.

88. Schmitz *v.* Langhaar, 88 N. Y. 503; Matter of Thurber, 37 Misc. (N. Y.) 155, 74 N. Y. Suppl. 949; Olmsted *v.* Vredenbergh, 10 How. Pr. (N. Y.) 215. See Mitchell *v.* Mount, 17 Abb. Pr. (N. Y.) 265.

89. Sippel *v.* Macklin, 2 Dem. Surr. (N. Y.) 219.

90. Brothers *v.* Gunnels, 110 Ala. 436, 18 So. 3; Graves *v.* Flowers, 51 Ala. 402, 23 Am. Rep. 555. See also Martin *v.* Ellerbee, 70 Ala. 326; Wilson *v.* Auld, 8 Ala. 842. But see Jones *v.* Jones, 8 Humphr. (Tenn.) 705 (holding that where an administrator dies an attachment bill seeking to subject certain property alleged to belong to the estate of the intestate, to the satisfaction of a decree pronounced against such administrator should be brought against the administrator *de bonis non* of the estate, and not against the administrator of the deceased administrator); Garland *v.* Garland, 84 Va. 181, 4 S. E. 334 (holding that a decree against a domiciliary executor may be enforced against an administrator *de bonis non* with the will annexed of the same decedent in any jurisdiction).

91. See Meredith *v.* Scallion, 51 Ark. 361, 11 S. W. 516, 3 L. R. A. 812; Cocke *v.* Foote, 49 Miss. 181.

92. Martin *v.* Harding, 38 N. C. 603.

93. See Martin *v.* Harding, 38 N. C. 603.

A personal judgment at law against a representative for services rendered the estate at the request of the representative cannot be enforced by a suit in equity against the representative as such. Wade *v.* Pope, 44 Ala. 690.

94. In Illinois, since execution cannot issue against the representative so as to reach personal estates, the judgment creditor of an insolvent estate may resort to equity without suing out execution in order to reach real estate, although as a general rule there must be a judgment and an execution returned unsatisfied before a creditor's bill will be entertained for such purpose. Steere *v.* Hoagland, 39 Ill. 264; Bay *v.* Cook, 31 Ill. 346; McDowell *v.* Cochran, 11 Ill. 31.

95. Redd *v.* Davis, 59 Ga. 823; Sherwood *v.* Campbell, 1 B. Mon. (Ky.) 54.

A creditor having an unproductive judgment against the administrator de bonis non of his debtor cannot in equity reach assets of the debtor in the hands of the personal representative of the administrator in chief, against whom a decree settling the estate has been rendered and performed. Thomas *v.* Sterns, 33 Ala. 137.

96. Pilkington *v.* Gaunt, 5 Dana (Ky.) 410. See also Ruth *v.* Owens, 2 Rand. (Va.) 507.

Where an administrator pleads no assets, and judgment is rendered quando, the creditor is entitled to a bill in chancery for the discovery and production of assets. Ewing *v.* Handley, 4 Litt. (Ky.) 346, 14 Am. Dec. 140.

97. Redd *v.* Davis, 59 Ga. 823.

98. Redd *v.* Davis, 59 Ga. 823.

99. Salter *v.* Cain, 7 Ala. 478.

1. Wilson *v.* Auld, 8 Ala. 842; Meredith *v.* Scallion, 51 Ark. 361, 11 S. W. 516, 3 L. R. A. 812; Thompson *v.* Knight, 23 Ga. 399; Tay-

nulla bona or *nulla bona* and devastavit on the original execution against him as representative, it is generally recognized that the judgment may be enforced against him personally; but the means of enforcing such a judgment is not uniform, either at common law,[2] or under the modern statutes.[3] Under some statutes upon leave of the court after proper motion and notice[4] an execution *de bonis propriis* may issue against the representative personally, to be levied upon his individual property, where a return of *nulla bona*,[5] or *nulla bona* and devastavit,[6] is made on the execution *de bonis testatoris*; or where a judgment fixing him with assets is rendered against him.[7] In some jurisdictions a statutory execution may issue as of right against the representative and his sureties upon a return of "no property found."[8]

b. By Scire Facias. In many jurisdictions, both by the common law and by statute, a judgment obtained against a personal representative may be enforced against his individual property, where he has been guilty of waste or there is a return of *nulla bona* on the judgment, by means of a scire facias suggesting a devastavit;[9]

lor *v.* Savage, 2 How. (U. S.) 395, 11 L. ed. 313 [*affirming* 1 How. 282, 11 L. ed. 132].

2. At common law a judgment against a personal representative, as such, could be enforced against him individually by capias ad satisfaciendum or by fieri facias de bonis propriis, where the return on the original execution on the judgment was not only *nulla bona*, but also devastavit (see People *v.* Judge Erie County C. Pl., 4 Cow. (N. Y.) 445; Platt *v.* Robins, 1 Johns. Cas. (N. Y.) 276, 1 Am. Dec. 110; Wheatley *v.* Lane, 1 Saund. 216, 219 note 8); but where the return was merely *nulla bona* the earlier practice was to issue a special inquiry to determine whether the representative had wasted the decedent's property, and if a devastavit was found, a scire facias was issued; later, however, these proceedings were joined into what was called a scire fieri inquiry (see Palmer *v.* Waller, 5 Dowl. P. C. 172, 5 L. J. Exch. 246, 1 M. & W. 689, Tyrw. & G. 1014; Blackmor *v.* Mercer, 2 Saund. 402*a*; Merchant *v.* Driver, 1 Saund. 303; Wheatley *v.* Lane, *supra*. See also State Bank *v.* Hooks, 2 Port. (Ala.) 271; Sims *v.* Nash, 1 How. (Miss.) 271; McDowell *v.* Asbury, 66 N. C. 444, where the early common-law doctrine is reviewed). The more usual remedy, however, was an action of debt on the judgment, suggesting a devastavit, even before a fieri facias was issued, although the usual practice was not to bring such action until such execution had issued and a return of *nulla bona* been made thereon. Wheatley *v.* Lane, *supra*. See also State Bank *v.* Hooks, *supra*; People *v.* Judge Erie County C. Pl., *supra*. And see *supra*, XIV, P, 3, c.

The waiver by the personal representative of a judgment debtor of the scire facias to revive might authorize an execution against the personal representative, but not against the deceased debtor. Gwin *v.* Latimer, 4 Yerg. (Tenn.) 22.

3. In Louisiana (under Code Pr. arts. 1054–1057), execution can issue against a personal representative individually who fails to pay a judgment creditor of the succession only when he has funds on hand wherewith to discharge the debt and does not do so after due demand (Comstock's Succession, 44 La. Ann. 427, 10 So. 850; Querry *v.* Faussier, 6 Mart. 645. And see Payne *v.* Dejean, 32 La. Ann. 888), and where a personal rule or judgment is obtained against him after due notice of the judgment liquidating the debt (Comstock's Succession, 44 La. Ann. 427, 10 So. 850; Castille *v.* Chacere, 13 La. Ann. 561; Carriere *v.* Meyer, 16 La. 126). Or execution may be issued against an administrator personally where he makes a vague and insufficient answer to a rule under articles 1056 and 1088 taken by creditors whose claims have been fixed by a final judgment upon the administrator's account. Philbrick's Succession, 18 La. Ann. 220; Stevens *v.* Stevens, 13 La. Ann. 416.

In Maryland it has been held that an absolute judgment against a personal representative is conclusive of the existence of the debt and of the sufficiency of assets to pay it, and that a fieri facias may be issued thereon and levied upon the lands of the representative as well as upon his goods and chattels. Beall *v.* Osbourn, 30 Md. 8.

4. McDowell *v.* Asbury, 66 N. C. 444.

5. Whetstone *v.* McQueen, 137 Ala. 301, 34 So. 229; Allen *v.* Allen, 80 Ala. 154, holding also that, where such execution is issued against him in the county where the judgment was rendered, it is not necessary that another execution to be levied *de bonis testatoris* should be sent to the county in which the representative was appointed.

6. Schnader *v.* Bitzer, 9 Lanc. Car (Pa.) 37.

7. Gowan *v.* Gentry, 32 S. C. 369, 11 S. E. 82. See also McDowell *v.* Asbury, 66 N. C. 444.

8. Hudson *v.* Modawell, 64 Ala. 481 (holding that under Code, § 2619, plaintiff in a decree of the probate court is entitled to such execution as a matter of right, and that the probate judge is charged with the administerial duty of issuing it on demand); Jewett *v.* Hoogland, 30 Ala. 716. See also *infra*, XVII, H, 2.

9. *Maine.*— Sturgis *v.* Reed, 2 Me. 109.

Maryland.—See State *v.* Goldsmith, 1 Harr. & J. 101.

and upon the proof of a devastavit,[10] or upon the representative's failure to appear or to show cause why execution should not be awarded against him,[11] execution *de bonis propriis* may be awarded against him.[12] The writ must allege or suggest a devastavit by the representative,[13] and also the fact that a judgment was obtained against him in that character,[14] and must notify him to appear and show cause why execution should not issue against his own property,[15] although as to a defect of this character the writ may be amended.[16] It should also be against him in his representative capacity,[17] although, in the absence of pleading or proof to the contrary, it is not necessary to allege or show that defendant is the personal representative.[18] This proceeding is in the nature of an original action against the representative,[19] in which he may set up any legal defense which he had no opportunity of pleading in the original suit.[20] But

Mississippi.— Black *v.* Barton, 6 Sm. & M. 239.

New Hampshire.— Folsom *v.* Blaisdell, 38 N. H. 100; Pillsbury *v.* Hubbard, 10 N. H. 224.

New York.— See People *v.* Judges Erie County C. Pl., 4 Cow. 445; Platt *v.* Robins, 1 Johns. Cas. 276, 1 Am. Dec. 110.

North Carolina.— Dozier *v.* Simmons, 11 N. C. 26; Hunter *v.* Hunter, 4 N. C. 558.

Pennsylvania.— Schnader *v.* Bitzer, 9 Lanc. Bar 37.

Rhode Island.— Carver *v.* Wells, 17 R. I. 688, 24 Atl. 466.

Tennessee.— Hillman *v.* Hickerson, 3 Head 575; Cox *v.* Cox, 2 Yerg. 305.

United States.— Teasdale *v.* Branton, 23 Fed. Cas. No. 13,813, Brunn. Col. Cas. 28, 3 N. C. 377.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1913. And see cases cited in succeeding notes.

The pendency of a commission of insolvency is no bar to a scire facias against an administrator upon a judgment had against him. Hatch *v.* Eustis, 11 Fed. Cas. No. 6,207, 1 Gall. 160. See Howell *v.* Potts, 20 N. J. L. 1.

10. Sims *v.* Nash, 1 How. (Miss.) 271.

The representative's appraisement and account showing that sufficient assets have come into his hands to pay a debt sought to be enforced is sufficient to support a devastavit in a scire facias against him, where there is no evidence of the disposition of the assets. Stewart *v.* Richardson, 32 Miss. 313.

Allegations of a devastavit without proof thereof will not justify a final judgment by default awarding execution *de bonis propriis.* Sims *v.* Nash, 1 How. (Miss.) 271.

A return of nulla bona upon the execution against the estate is not by itself sufficient to support a suggestion of waste. Ring *v.* Burton, 5 Me. 45; Graham *v.* Ruble, 1 Coldw. (Tenn.) 170. But see Platt *v.* Robins, 1 Johns. Cas. (N. Y.) 276, 1 Am. Dec. 110.

11. Folsom *v.* Blaisdell, 38 N. H. 100; Pillsbury *v.* Hubbard, 10 N. H. 224.

12. Sims *v.* Nash, 1 How. (Miss.) 271; Folsom *v.* Blaisdell, 38 N. H. 100; Carver *v.* Wells, 17 R. I. 688, 24 Atl. 466.

13. Graham *v.* Ruble, 1 Coldw. (Tenn.) 170; Hillman *v.* Hickerson, 3 Head (Tenn.) 575; Cope *v.* McFarland, 2 Head (Tenn.) 543; Cox *v.* Cox, 2 Yerg. (Tenn.) 305; Wray *v.* Williams, 2 Yerg. (Tenn.) 302.

A scire facias alleging waste should aver that there are not goods of the estate in the representative's hands sufficient to pay the judgment (Cooper *v.* Hanna, 2 Ind. 97), and should state the amount of assets which came into his hands as representative (Black *v.* Barton, 6 Sm. & M. (Miss.) 239).

Under the statute of New Hampshire, in order to maintain scire facias against an administrator, it is sufficient to allege that the sheriff has made a return of *nulla bona* upon an execution against the goods and estate of the deceased. It is not necessary in addition to allege or suggest any waste or misapplication of the funds. Peaslee *v.* Kelley, 38 N. H. 372.

In Tennessee, however, a return of *nulla bona* upon the execution against the estate is not conclusive that the representative has wasted the estate, and under such circumstances it is error to allow an execution *de bonis propriis* when the scire facias does not suggest a devastavit. Graham *v.* Ruble, 1 Coldw. 170; Hillman *v.* Hickerson, 3 Head 575.

14. Cope *v.* McFarland, 2 Head (Tenn.) 543; Cox *v.* Cox, 2 Yerg. (Tenn.) 305.

15. Cox *v.* Cox, 2 Yerg. (Tenn.) 305; Wray *v.* Williams, 2 Yerg. (Tenn.) 302.

16. Cox *v.* Cox, 2 Yerg. (Tenn.) 305. See, generally, SCIRE FACIAS.

17. Hillman *v.* Hickerson, 3 Head (Tenn.) 575; Cope *v.* McFarland, 2 Head (Tenn.) 543.

18. Stewart *v.* Richardson, 32 Miss. 313; Dimond *v.* Allen, 1 Tyler (Vt.) 10, if defendant is not the personal representative, he should have shown it in his defense to the original suit.

19. Sims *v.* Nash, 1 How. (Miss.) 271.

20. Sims *v.* Nash, 1 How. (Miss.) 271.

Under 2 N. Y. Rev. St. p. 88, § 32, providing that no execution should issue upon a judgment against an executor or administrator until an account of his administration had been rendered and settled, or unless on an order of the surrogate who appointed him, it was held a good plea to a declaration on a scire facias that the representative had not rendered an account of his administration to the surrogate. Dox *v.* Backenstose, 12 Wend. 542.

where the judgment rendered in the original action is considered an admission of assets to the amount of the claim in suit, the representative cannot set up fully administered or want of assets as a defense,[21] unless the nature of the original suit was such that the representative had no opportunity to set up such defense.[22]

c. By Action of Debt Suggesting a Devastavit. The more usual practice, however, at common law and under the statutes is for the judgment creditor to bring an action of debt against the representative on the judgment suggesting a devastavit,[23] even before an issuance of execution and a return of *nulla bona* on the

The insolvency of the estate established since the recovery of the judgment is a good plea to a scire facias against an administrator to have execution by a former judgment recovered against him in that capacity. Coleman *v.* Hall, 12 Mass. 570.

That there are effects of the decedent in the jurisdiction subject to the execution is no answer to a writ of scire facias with the suggestion of devastavit, for if there were such effects, it became the duty of the representative to apply them accordingly. Stewart *v.* Richardson, 32 Miss. 313.

Matters of defense which might have been pleaded to the original action but were not cannot be pleaded in the action by scire facias. Hunter *v.* Hunter, 4 N. C. 558; Cude *v.* Spence, 7 Humphr. (Tenn.) 278; Dickson *v.* Wilkinson, 3 How. (U. S.) 57, 11 L. ed. 491; Hatch *v.* Eustis, 11 Fed. Cas. No. 6,207, 1 Gall. 160.

21. Platt *v.* Robins, 1 Johns. Cas. (N. Y.) 276, 1 Am. Dec. 110; Carver *v.* Wells, 17 R. I. 688, 24 Atl. 466; Cope *v.* McFarland, 2 Head (Tenn.) 543; White *v.* Archbill, 2 Sneed (Tenn.) 588 (applying this rule to a scire facias upon a foreign judgment against the representative); Blount *v.* Hopson, 1 Yerg. (Tenn.) 399. See Coleman *v.* Hall, 12 Mass. 570; Graham *v.* Ruble, 1 Coldw. (Tenn.) 170. *Contra*, Black *v.* Barton, 6 Sm. & M. (Miss.) 239; Dimond *v.* Allen, 1 Tyler (Vt.) 10.

22. Cox *v.* Cox, 2 Yerg. (Tenn.) 305; Wray *v.* Williams, 2 Yerg. (Tenn.) 302. If after verdict and before judgment defendant dies, and his administrator becomes a party to the suit, and judgment passes against him, and execution issues thereon, and is returned unsatisfied, on scire facias against the administrator he may plead no assets or insolvency, for he had no time to plead such plea in the original suit. Hatch *v.* Eustis, 11 Fed. Cas. No. 6,207, 1 Gall. 160.

23. *Georgia.*— Porter *v.* Rountree, 111 Ga. 369, 36 S. E. 761.

Kentucky.— Jeeter *v.* Durham, 6 J. J. Marsh. 228; Harpending *v.* Daniels, 11 Ky. L. Rep. 858.

Minnesota.— Whitney *v.* Pinney, 51 Minn. 146, 53 S. W. 198.

New Jersey.— Howell *v.* Potts, 20 N. J. L. 569; Van Horn *v.* Teasdale, 9 N. J. L. 379.

North Carolina.— See Hunter *v.* Hunter, 4 N. C. 558.

Pennsylvania.— Mead *v.* Kilday, 2 Watts 110.

South Carolina.— Willis *v.* Tozer, 44 S. C. 1, 21 S. E. 617, holding that where a judgment *quando acciderint* is rendered against an administrator who has pleaded *plene administravit* an action of debt suggesting a devastavit may be maintained on such judgment against the representative personally for assets subsequently coming into his hands.

Tennessee.— Hillman *v.* Hickerson, 3 Head 575; Cope *v.* McFarland, 2 Head 543.

Virginia.— Nuttall *v.* McDouall, 6 Call 53. Under Virginia practice it has been held that where execution against the goods of the decedent proves ineffectual, a creditor may elect to proceed at law against a representative for a devastavit, or by bill against him and the legatees or distributees for an account of assets and a proportional contribution to pay the debt. Sampson *v.* Payne, 5 Munf. 176.

Wisconsin.— Rusk *v.* Sackett, 28 Wis. 400.

England.— Wheatley *v.* Lane, 1 Saund. 216, holding that debt lies on a judgment had against an executor upon a bare suggestion of a devastavit.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1912.

It is essential to this action that the judgment should have been rendered against the representative in that capacity. Van Horn *v.* Teasdale, 9 N. J. L. 379; Brown *v.* Hillegas, 2 Hill (S. C.) 447.

One executor may bring debt against another suggesting a devastavit in the life of his testator on a judgment recovered by the testator against defendant. Berwick *v.* Andrews, 2 Ld. Raym. 971.

But such action will not lie against the executor of an executor, because founded on a tort which dies with the person. Griffith *v.* Beasly, 10 Yerg. (Tenn.) 434.

A decree rendered in another state to be levied on the decedent's property, and if there is no such property then on the representative's property, will support an action suggesting a devastavit against the representative. Pennington *v.* Hayes, 3 N. C. 330.

That plaintiff creditor did not present his claim to defendants under oath and affirmation is no defense to such an action. Howell *v.* Potts, 20 N. J. L. 569.

In debt on a judgment against two administrators with a suggestion of a devastavit, a plea that they or either of them did not waste the goods, etc., which came into the hands of one of them is not sufficient, since it does not apply to what came into the hands of the other. Howell *v.* Potts, 20 N. J. L. 569.

Allegation of time and place.— A plea by a defendant that he did not waste, etc., any of

judgment;[24] and if a devastavit is established, an execution *de bonis propriis* may issue.[25] The foundation of this action is a devastavit committed by the personal representative, and without a suggestion or allegation and proof of a devastavit it cannot be maintained.[26] The representative may defend himself in such action by proving that there were goods of the intestate which might have been taken in execution of the judgment;[27] but he will not be allowed to plead any plea which assumes to place his defense merely on the want of assets;[28] or any other matter which he might or ought to have pleaded to the former action.[29] This action in some jurisdictions is a substitute for the writ of scire facias,[30] and in others is a concurrent remedy with that writ.[31] The amount of recovery in such action should in general be for the sum of the principal debt on which the judgment was rendered, together with interest and costs;[32] but if the representative pleads *plene administravit* and shows the real amount of assets in his hands unadministered at the date of the first judgment the amount of recovery should be limited to that amount.[33]

4. Enforcement For Representative's Personal Debts. A judgment against the representative for his individual debt cannot be enforced by execution against the decedent's estate in his hands until there has been a final accounting and settlement of the estate.[34]

the chattels of the deceased which at any time came into his hands to be administered, etc., is not bad for failure to allege time and place, since it is merely a negative averment. Howell *v.* Potts, 20 N. J. L. 569.

A plea setting up an application to settle the estate as insolvent, as a bar to such an action, is insufficient under a statute providing that such application shall not bar an action against the administrator, except when the application is made before action is brought or pending the action, where it fails to allege that the application was made before the judgment was obtained against the administrator. Howell *v.* Potts, 20 N. J. L. 569.

24. Burke *v.* Adkins, 2 Port. (Ala.) 236; Jeeter *v.* Durham, 6 J. J. Marsh. (Ky.) 228; Howell *v.* Potts, 20 N. J. L. 569.

25. Brown *v.* Hillegas, 2 Hill (S. C.) 447.

26. Porter *v.* Rountree, 111 Ga. 369, 36 S. E. 761; Brown *v.* Hillegas, 2 Hill (S. C.) 447; Hillman *v.* Hickerson, 3 Head (Tenn.) 575; Griffith *v.* Beasly, 10 Yerg. (Tenn.) 434; Glenn *v.* Maguire, 3 Tenn. Ch. 695.

Return as evidence of devastavit.— The return of a devastavit by the sheriff is not conclusive evidence of that fact in such an action (Howell *v.* Potts, 20 N. J. L. 569); and a return of "No property to be found," on an execution against a certain person individually, issued on a judgment recovered against him as administrator, is no evidence of a devastavit as to him in that capacity (Forrester *v.* Tift, 84 Ga. 595, 10 S. E. 1015).

27. Griffith *v.* Beasly, 10 Yerg. (Tenn.) 434.

28. Moore *v.* Martindale, 2 Blackf. (Ind.) 353; Cope *v.* McFarland, 2 Head (Tenn.) 543; Hope *v.* Bague, 3 East 2; Erving *v.* Peters, 3 T. R. 685.

29. Walker *v.* Kendall, Hard. (Ky.) 404; Reigne *v.* Hunt, 1 Speers (S. C.) 281; Bastable *v.* Wilson, 2 Fed. Cas. No. 1,097, 1 Cranch C. C. 124.

Collateral attack of judgment.— Where a judgment *de bonis testatoris* is obtained against an executor, execution issued thereon, a return of *nulla bona* made by the sheriff, and a suit brought on the judgment against the executor personally, suggesting a devastavit, the executor cannot in his defense to the suit make a collateral attack upon the judgment by showing fraud or mistake in its rendition; and this is true although the judgment was rendered by the same court in which the suit thereon is pending. Porter *v.* Rountree, 111 Ga. 369, 36 S. E. 761.

30. See cases cited *supra*, 23.

31. Hillman *v.* Hickerson, 3 Head (Tenn.) 575.

32. Young *v.* Lancaster, 5 T. B. Mon. (Ky.) 381; Walker *v.* Kendall, Hard. (Ky.) 404. But it is erroneous to give judgment in such case for running interest upon the debt until paid. Young *v.* Lancaster, 5 T. B. Mon. (Ky.) 381.

A judgment by default in such action admits the truth of the allegation and declaration, and a jury of inquiry is not necessary to ascertain the damages. Greenup *v.* Woodworth, 1 Ill. 232.

33. Com. *v.* Richardson, 8 B. Mon. (Ky.) 81.

34. Burton *v.* Robinson, 3 Houst. (Del.) 154; Worrall *v.* Driggs, 1 Redf. Surr. (N. Y.) 449 (holding that the interest of an executor in the assets of the estate is not vested until an accounting is had so as to be subject to the lien of an execution against him for his personal debts); Farr *v.* Newman, 4 T. R. 621, 2 Rev. Rep. 479; McLeod *v.* Drummond, 17 Ves. Jr. 152, 11 Rev. Rep. 41, 34 Eng. Reprint 59. See also Ray *v.* Ray, Coop. t. Eld. 261, 14 Rev. Rep. 255, 35 Eng. Reprint 553; Whale *v.* Booth, 4 T. R. 625 note, 2 Rev. Rep. 483 note.

In Alabama, however, it has been held that as between the representative and his individual creditor assets of the decedent may be

5. Property Subject to Execution — a. In General. A judgment *de bonis testatoris* rendered against a personal representative as such can be executed only against the goods and chattels of the decedent in the representative's hands to be administered.[35] It cannot be levied upon the individual property of the representative,[36] nor upon personalty of the estate in the hands of a legatee or distributee with the representative's assent,[37] the creditor's remedy in such case being to pursue the representative at law or to follow the property in equity.[38] On the other hand a judgment *de bonis propriis* can only be executed upon the individual property of the representative, and not upon the property of the estate or of any other person.[39]

b. Lands of Decedent. In most jurisdictions a judgment against a personal representative for a debt of the decedent cannot be levied upon lands descended or devised, except, upon a deficiency of the personalty, by means of special statutory proceedings, which must be strictly complied with.[40] In other jurisdictions,

seized and sold on execution wherever the representative has so dealt with the assets as to be responsible for a devastavit, or has used them in a manner inconsistent with his trust. Williamson *v.* Mobile Branch Bank, 7 Ala. 906, 42 Am. Dec. 617.

35. *Georgia.*— Rogers *v.* Bullen, R. M. Charlt. 196.

Mississippi.— Packwood *v.* Elliott, 43 Miss. 504.

Pennsylvania.— Mead *v.* Kilday, 2 Watts 110. See Miller *v.* Ege, 8 Pa. St. 352.

Texas.— This rule applies to execution against an independent executor in this state. Roberts *v.* Connellee, 71 Tex. 11, 8 S. W. 626; Texas Savings-Loan Assoc. *v.* Banker, 26 Tex. Civ. App. 107, 61 S. W. 724.

Virginia.— Tucker *v.* Sweney, Jeff. 5.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1914.

Money in the hands of a debtor of the decedent is not the subject of execution at the suit of a creditor on a judgment rendered against the administrator of such decedent. Hartshorne *v.* Henderson, 3 Pa. L. J. Rep. 511, 6 Pa. L. J. 192.

Property devised to an executor in trust is subject to execution against the trustee in his capacity as executor until it is assigned in accordance with the trust. Myers *v.* Daviess, 10 B. Mon. (Ky.) 394.

As to property transferred from the estate, execution cannot be levied by the creditor with a judgment against the representative; and if such judgment creditor contends that the transfer was fraudulent or void he should first bring a bill to set the transfer aside. Ford *v.* Douglas, 5 How. (U. S.) 143, 12 L. ed. 89. See also Wier *v.* Davis, 4 Ala. 442.

36. Jones *v.* Miles, 1 How. (Miss.) 50.

37. Castellaw *v.* Guilmartin, 58 Ga. 305; Anderson *v.* Irvine, 6 B. Mon. (Ky.) 231; Alston *v.* Foster, 16 N. C. 337; Randolph *v.* Randolph, 6 Rand. (Va.) 194; Burnley *v.* Lambert, 1 Wash. (Va.) 308. *Contra,* Brooks *v.* Lewis, 1 How. (Miss.) 207.

38. Burnley *v.* Lambert, 1 Wash. (Va.) 308.

39. Thomas *v.* Tanner, 6 T. B. Mon. (Ky.) 52; Small *v.* Small, 16 S. C. 64; Moore *v.* Ferguson, 2 Munf. (Va.) 421; Barr *v.* Barr, 2 Hen. & M. (Va.) 26.

A scire facias against an executor which directs the seizure of his property and not the property of the testator cannot be levied upon the effects of the estate, the presumption being that the execution followed the judgment, and consequently that the judgment was against the executor personally. Lemon *v.* Thaxton, 59 Ga. 706.

Property in another county.— Under a Pennsylvania statute (Act March 29, 1832, § 57), where a defaulting executor has no property in the county where the orphans' court having jurisdiction of his accounts sits, execution may issue to take his property in any other county. Helfrich *v.* Stem, 17 Pa. St. 143.

40. *Connecticut.*— Flynn *v.* Morgan, 55 Conn. 130, 10 Atl. 466, execution cannot levy on real estate belonging to the estate. See Welles *v.* Faning, 1 Root. 95.

Georgia.— Where land of an intestate is turned over in good faith by the administrator to the sole heir on final settlement, judgment thereafter against the administrator cannot be enforced against it by levy and sale without further proceedings. Jones *v.* Parker, 55 Ga. 11. See Daniel *v.* Hollingshead, 16 Ga. 190.

Indiana.— Under the statutes of this state a complaint may be made by petition of the judgment creditor to enforce his judgment against land of the decedent, on the allegation that the personal assets are exhausted or insufficient; the legal representative and heirs or devisees being made parties, and ample defense permitted, with due proof requisite of the essential facts. Pauley *v.* Langdon, 83 Ind. 353; Allen *v.* Vestal, 60 Ind. 245; Berry *v.* Bullard, 8 Blackf. 399; Brownfield *v.* Vail, 7 Blackf. 203; Williams *v.* Moorehouse, 6 Blackf. 215; Brown *v.* Rose, 6 Blackf. 69. The petition should also set out and describe the real estate of a debtor against which the creditor seeks execution. Armstrong *v.* Milligan, 6 Blackf. 463. As such proceeding is one at law answers and cross bills are not admissible. Berry *v.* Bullard, *supra.* A judgment by default against some of defendants to such petition is erro-

however, it is held otherwise even though the lands have been partitioned and are in the hands of the heirs or devisees.[41]

neous, where no process appears to have been issued or publication made or where the record does not show the petition to have been proved. Berry *v.* Bullard, *supra.*

Maryland.—Judgments obtained against an executor of an administrator by a creditor of the decedent are not alone such evidences of debt against the heir at law as to entitle the creditor to payment from the proceeds of the real estate; but when such proceeds are in the court, and a creditor wishes to subject them to his claim on the ground of a deficiency of personal assets, he need not exhibit full proof of his claim in the first instance. That may be done under an order *nisi* upon the heirs at law. Gaither *v.* Welch, 3 Gill & J. 259.

Massachusetts.— Real estate of a decedent cannot be levied on. Thayer *v.* Hollis, 3 Metc. 369; Clarke *v.* Tufts, 5 Pick. 337; *Ex p.* Allen, 15 Mass. 58; Borden *v.* Borden, 5 Mass. 67, 4 Am. Dec. 32.

Mississippi.— Packwood *v.* Elliott, 43 Miss. 504; Buckingham *v.* Nelson, 42 Miss. 417; Lowry *v.* Houston, 3 How. 394. On the return of *nulla bona* to an execution against an executor a scire facias will not lie to revive the judgment against the devisees to subject the real estate. Foster *v.* Sumner, 3 Sm. & M. 606.

New Jersey.— Before the statute of 1799, the real estate of a deceased person might be sold on execution against the executors or administrators. Warwick *v.* Hunt, 11 N. J. L. 1. And see Ely *v.* Jones, 1 N. J. L. 131.

New York.— Matter of Lazelle, 16 Misc. 515, 40 N. Y. Suppl. 343 (holding that realty purchased by an executor on a sale under a foreclosure of a mortgage held by him as executor is not subject to execution); *In re* Hesdra, 23 N. Y. Suppl. 842, Pow. Surr. 359 (holding that, under Code Civ. Proc. § 1823, real estate of the decedent is not subject to execution, although the decedent's will directed the sale of such real estate for the purpose of administration and distribution, since in such case the doctrine of equitable conversion does not apply); Matter of Jansen, 9 N. Y. Suppl. 451, 1 Connoly Surr. 362.

North Carolina.— A judgment of execution against the real estate of a deceased debtor in the hands of his representatives cannot issue unless it appears that the executor has fully administered, and had not sufficient assets to satisfy the creditor's demand. Carwell *v.* Brodie, 5 N. C. 97.

Ohio.— Gray *v.* Askew, 3 Ohio 466.

Pennsylvania.— Under Act (1834), § 34, a judgment rendered against a personal representative cannot be levied or paid out of real estate in the hands of the decedent's widow, heirs, or devisees, unless they were made parties to the action in which the judgment was rendered, or unless the judgment is revived against them by a writ of scire facias and, except in exceptional cases, such proceeding is absolutely essential, in order to make a valid sale of such real estate. Leiper *v.* Thomson, 60 Pa. St. 177; Kessler's Appeal, 32 Pa. St. 390; Sample *v.* Barr, 25 Pa. St. 457; McCracken *v.* Roberts, 19 Pa. St. 390; Benner *v.* Phillips, 9 Watts & S. 13; Murphy's Appeal, 8 Watts & S. 165; Payne *v.* Craft, 7 Watts & S. 458. But previous to this act a judgment against a representative, whether adverse or by confession, bound the lands of the decedent without notice to the heirs or devisees. Payne *v.* Craft, *supra*; Pennsylvania Agriculture, etc., Bank *v.* Stambaugh, 13 Serg. & R. 299; Morris *v.* McConaughey, 1 Yeates 9.

Tennessee.— The statutes in this state provide (in the case of domestic judgments only) a remedy against lands in the hands of heirs or devisees where the defense of "fully administered" is disposed of and the personalty is insufficient to meet the demand. Henry *v.* Mills, 1 Lea 144; Woolridge *v.* Page, 1 Lea 135; Saunders *v.* Wilder, 2 Head 577; Gilman *v.* Tisdale, 1 Yerg. 285; Peck *v.* Wheaton, Mart. & Y. 353.

United States.— Schley *v.* Collis, 47 Fed. 250, 13 L. R. A. 567; O'Brien *v.* Woody, 18 Fed. Cas. No. 10,398, 4 McLean 75.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1915. And see DESCENT AND DISTRIBUTION, 14 Cyc. 203; and, generally, WILLS.

Lands devised to an executor for the payment of the testator's debts are equitable assets which a creditor can reach only through the aid of a court of equity, and are not subject to execution on a judgment against the executor. Helm *v.* Darby, 3 Dana (Ky.) 185; Smith *v.* Caswell, 3 N. C. 285. See *In re* Hesdra, 23 N. Y. Suppl. 842, Pow. Surr. (N. Y.) 359. And see, generally, WILLS.

41. In Kentucky, although the personal estate is the primary fund for the payment of debts, when both heir or devisee and representative are sued, and *nulla bona* is returned as to the latter, the creditor may have satisfaction out of the real estate. Litsey *v.* Smith, 10 B. Mon. 74.

In **Maine** an execution issued on a judgment against the goods and estate of a decedent in the hands of his executor or administrator may be legally extended on any lands of which the decedent died seized, although a partition of them among the heirs or devisees may already have been made by order of the probate court. Nowell *v.* Bragdon, 14 Me. 320. An execution issued upon a judgment recovered against an administrator of an estate represented as insolvent may, under Rev. St. c. 76, §§ 13, 43, be legally levied on the real estate of the intestate fraudulently conveyed by him, if the administrator assumed the defense of the action pending against his intestate, and neglected to suggest the insolvency upon the record. Wyman *v.* Fox, 55 Me. 523, 59 Me. 100. See Frost *v.*

c. Under Judgment Quando Acciderint. A judgment *quando acciderint* applies to assets and property which may come into the representative's hands after the judgment is rendered, and it therefore can be levied on all of the decedent's estate except such as was in the hands of the representative at the time of the judgment or such as had been previously administered by him.[42]

6. Issuance, Form, and Requisites of Execution — a. In General. Execution upon a judgment against a personal representative, when permitted, should conform to the judgment upon which it is issued.[43] If the judgment fixes the liability upon the decedent's estate, the execution should issue against the representative as such, and should direct the levy to be made upon the property of the estate in his hands to be administered.[44] On the other hand, if the judgment fixes the liability upon the representative individually, the execution should issue against him individually and should direct the levy to be made upon his individual property.[45] Under some statutes where the judgment is for debt or dam-

Ihsley, 54 Me. 345; Sturgis *v.* Reed, 2 Me. 109.

Under a South Carolina statute it is held that lands of a decedent may be sold under execution upon a judgment against his personal representative without making the heirs or devisees parties thereto, and notwithstanding there may be personal assets. Brock *v.* Kirkpatrick, 60 S. C. 322, 38 S. E. 779, 85 Am. St. Rep. 847; Hendrix *v.* Holden, 58 S. C. 495, 36 S. E. 1010; Martin *v.* Latta, 4 McCord 128; D'Urphey *v.* Nelson, 1 Brev. 289; Smith *v.* Smith, 1 McCord Eq. 134. See Jones *v.* Wightman, 2 Hill 579.

42. Smith *v.* Smith, 59 Ga. 550; Allen *v.* Matthews, 7 Ga. 149; McDowall *v.* Branham, 2 Nott & M. (S. C.) 572. See also Hollis *v.* Sales, 103 Ga. 75, 29 S. E. 482.

Scire facias to reach assets which have come into the representative's hands since the judgment was rendered can issue only on a judgment *quando acciderint.* Miller *v.* Spencer, 6 N. C. 281.

43. See Executions, 17 Cyc. 1009 *et seq.*

44. Boykin *v.* Cook, 61 Ala. 472; Wall *v.* Jones, 62 Ga. 725; Jones *v.* Parker, 60 Ga. 500; Horn *v.* Bird, 45 Ga. 610; Horne *v.* Spivey, 44 Ga. 616; Beazley *v.* Dunn, 8 Rich. (S. C.) 345; Lowndes *v.* Pinckney, 2 Strobh. Eq. (S. C.) 44.

An erroneous judgment against a representative without designating him as such does not warrant an execution against the estate. McCullough *v.* Tidwell, 1 Brev. (S. C.) 479.

A variance in form does not render the execution void, but voidable, and if no motion is made to quash it, it will be good in a collateral suit (Beale *v.* Botetourt Justices, 10 Gratt. (Va.) 278. See Moughon *v.* Brown, 68 Ga. 207), or the execution may be amended, upon motion, to correspond with the judgment (Hollis *v.* Sales, 103 Ga. 75, 29 S. E. 482; Dewey *v.* Peeler, 161 Mass. 135, 36 N. E. 800, 42 Am. St. Rep. 399; McCormack *v.* Meason, 1 Serg. & R. (Pa.) 92).

Execution against representative and surety. — Under an Alabama statute it has been held that where a judgment *de bonis intestatis* is rendered against an appellant who is administrator, and at a subsequent term judgment is rendered against his surety for the appeal, the entries only authorized one execution — *de bonis intestatis* as to the principal, and *de bonis propriis* as to the surety. Bancroft *v.* Stanton, 7 Ala. 351.

An execution against a representative jointly with other defendants on a judgment recovered against the decedent with the other defendants is irregular and void. Blanks *v.* Rector, 24 Ark. 496, 88 Am. Dec. 780.

45. Keniston *v.* Little, 30 N. H. 318, 64 Am. Dec. 297.

Under N. Y. Code Civ. Proc. § 2554, providing that execution upon a decree directing the payment of money should run against "the property of the party directed to make the payment," execution upon a decree directing payment of money by a representative as such must run against the representative's property. Bennett *v.* Crain, 41 Hun 183 [*distinguishing* People *v.* McAdam, 84 N. Y. 294]; Matter of Quackenbos, 38 Misc. 66, 76 N. Y. Suppl. 964; Matter of Waring, 7 Misc. 502, 28 N. Y. Suppl. 393; Davies *v.* Skidmore, 5 Hill 501. In Peyser *v.* Wendt, 2 Dem. Surr. 221, the surrogate of New York took the view that the execution was properly issued against the property of the executor, and cited authorities on the subject. The court of appeals has held the same in Power *v.* Speckman, 126 N. Y. 354, 359, 27 N. E. 474. For form of execution on a surrogate's order or decree for the payment of money by a representative in the supreme court see Davies *v.* Skidmore, *supra.*

The mere addition of the word "executor" or "administrator" to defendant's name in a decree or in the execution thereon, without anything further to indicate that it is against him in his representative capacity, does not prevent the decree from binding his personal goods and chattels and the execution from being levied thereon.

Georgia.— Bagley *v.* Roberson, 57 Ga. 148; Fry *v.* Shehee, 55 Ga. 208; Tinsley *v.* Lee, 51 Ga. 482.

Iowa.— Lepage *v.* McNamara, 5 Iowa 124.

New York.— Olmsted *v.* Vredenburgh, 10 How. Pr. 215.

South Carolina.— Gowan *v.* Gentry, 32 S. C. 369, 11 S. E. 82.

ages and costs, one execution may issue for the debt or damages against the estate of the decedent and another for costs against the representative's individual property.[46]

b. Time of Issuance. Execution upon a judgment rendered against a personal representative must be issued within the time limited by law, if any, after the rendition of the judgment, unless a sufficient cause for delay is shown;[47] but under some statutes it cannot be issued until the expiration of a certain period of time.[48]

7. Lien, Levy, or Extent and Custody of Property. In accordance with the general rules regulating the levy of executions upon judgments[49] the personal representative is entitled to notice to choose the appraiser or appraisers, where appraisement is a requisite to a valid sale of the property,[50] or he may waive an inquisition and condemnation.[51] A suggestion of insolvency of the estate by the representative prevents an execution thereafter levied on the estate from creating a lien thereon, although the teste of the writ was dated prior to such suggestion.[52] A levy collusively made by the representative is void as against another creditor of the estate who makes a regular levy on the same estate.[53]

8. Stay, Quashing, Vacating, and Relief Against Execution.[54] An execution against a personal representative should be suspended where it does not show on its face whether it is to be satisfied out of the individual property of defendant representative or out of the property of his decedent;[55] or until it is determined what amount of assets is applicable thereto;[56] or where it appears that the personal assets are insufficient to pay all debts, until an application for the sale of real estate is made.[57] An execution upon a judgment rendered for or against a

Vermont.— Rich *v.* Sowles, 64 Vt. 408, 23 Atl. 723, 15 L. R. A. 850.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1917.

An execution against a representative personally is presumed to follow the judgment and cannot be levied on the estate until amended. Lemon *v.* Thaxton, 59 Ga. 706; Freeman *v.* Binswanger, 57 Ga. 159.

46. Ludwig *v.* Blackinton, 24 Me. 25; Look *v.* Luce, 136 Mass. 249. And see Beasley *v.* Mott, 12 Rich. (S. C.) 354.

47. Taylor *v.* Daniel, 9 B. Mon. (Ky.) 53, holding that the absence of the clerk was sufficient to excuse a delay of ten days in suing out execution after the time limited.

48. In New Jersey no execution can issue on a judgment in an action commenced against a representative after the making of an order, authorized under the supplement of March 17, 1855, to the Orphans' Court Act, sections 22, 24, limiting creditors to nine months within which to bring in their claims, until ten months after the making of such order. Taylor *v.* Volk, 38 N. J. L. 204. See, generally, Executions, 17 Cyc. 1003.

49. See, generally, Executions, 17 Cyc. 1049 *et seq.*

Equity will relieve an executor from liability for forthcoming bonds given after confession of judgment, where he executed them believing the assets of the estate were ample to meet them, but they proved not to be so by reason of an unexpected depreciation. Miller *v.* Rice, 1 Rand. (Va.) 438.

50. Daniels *v.* Ellison, 3 N. H. 279. See Executions, 17 Cyc. 1105.

51. Bennett *v.* Fulmer, 49 Pa. St. 155; Hunt *v.* Devling, 8 Watts (Pa.) 403. *Compare* Sample *v.* Barr, 25 Pa. St. 457. And see, generally, Executions, 17 Cyc. 1104.

52. Gunn *v.* Boone, 7 Heisk. (Tenn.) 8. And see, generally, Executions, 17 Cyc. 1050 *et seq.*

53. Where a personal representative fraudulently represents both the nominal plaintiff and also the estate in an action against himself as administrator, and in levying execution on the judgment thus obtained he obtains no title thereunder, and a nonsuit is properly entered against him in an action for the recovery of land claimed under such levy. Goddard *v.* Divoll, 1 Metc. (Mass.) 413.

54. **Supersedeas or stay pending appeal** see, generally, Appeal and Error, 2 Cyc. 885 *et seq.*

55. Higgins *v.* Driggs, 21 Fla. 103.

56. Rountree *v.* Britt, 94 N. C. 104, holding that where an administrator recovers judgment on his cause of action, and defendant on his counter-claim, the former is entitled to an execution for the entire amount of his recovery; but the execution on defendant's judgment will be stayed until it is determined what amount of assets is applicable thereto.

57. Dundas *v.* Leiper, 1 Phila. (Pa.) 569, holding, however, that a levari facias on a mortgage is not an execution, within the act of Feb. 24, 1834, section 35, directing that in case of an execution against executors if the personal assets are insufficient to pay all debts the court shall stay proceedings until application is made to the orphans' court for the sale of the real estate, and hence the proceedings will not be stayed to enable execu-

personal representative may also be stayed, under some statutes, by defendant giving a proper bond;[58] or where equitable circumstances exist, as where the estate has been represented insolvent,[59] a court of equity may restrain the execution by an injunction.[60] An execution issued by a representative who only had power to prosecute the action will be vacated;[61] and the fact that he afterward obtains authority to issue such execution will not cure the illegal issuance.[62] Sureties who have been released or discharged from liability on the administration bond may obtain relief from a statutory execution issued against them and

tors to apply to the orphans' court for a sale of the premises as provided by the act. *Compare* Gray *v.* Coulter, 4 Pa. St. 188.

58. Glassford *v.* Hacket, 3 Call (Va.) 193,. holding, however, that the statute does not give a motion on a three months' replevy bond against executors given by them in stay of execution.

Stay by donee of property.— In an action by the administrator of an insolvent estate, acting as representative of the creditors to recover property donated by the intestate, it was proper to stay execution against the donee upon payment by him of the costs and the filing of a bond to pay such sum as should be necessary to discharge the debts and the expenses of administration. Abbott *v.* Tenney, 18 N. H. 109.

In Indiana a judgment against an administrator in his representative capacity is not a repleviable judgment within the meaning of a statute authorizing a stay of execution upon the giving of repleviable bail, and therefore the representative is not liable on such bail given to secure a stay of such a judgment. Egbert *v.* State, 4 Ind. 399. But see Elliott *v.* Moore, 5 Blackf. 270.

59. Lambert *v.* Mallett, 50 Ala. 73; Neibert *v.* Withers, Sm. & M. Ch. (Miss.) 599, holding also that it is no answer to the bill that the representation of insolvency was procured by fraud. *Compare* Leslie *v.* Willey, Wright (Ohio) 145.

60. *Alabama.*— Lambert *v.* Mallett, 50 Ala. 73.

Arkansas.— Fowler *v.* Williams, 20 Ark. 641, holding, however, that where defendant produces no evidence to sustain his allegation, he will, on dissolution of the injunction, be liable under the statute to damages. See also Brice *v.* Taylor, 51 Ark. 75, 9 S. W. 854.

Georgia.— Dobbs *v.* Prothro, 57 Ga. 14.

Kentucky.— An executor is under no legal or moral duty to plead limitations to an action against him, and his failure to do so affords no ground for an injunction against the enforcement of the decree. Lee *v.* Colston, 5 T. B. Mon. 238.

Louisiana.— Although the heirs renounce, a creditor cannot, without letters of curatorship, enjoin an execution sale of the property under a judgment against the deceased. A curator must be appointed, and the injunction prosecuted by him. Vienne *v.* Boissier, 10 Mart. 359.

Maryland.— Kearney *v.* Sascer, 37 Md. 264, holding, however, that where the representative who seeks relief shows that the erroneous execution was attributable to his own culpable negligence or misconduct, and comes into court without having done equity, he will not be relieved by equity.

New Mexico.—Where a creditor recovered judgment against a debtor in his lifetime, but did not sue out execution, on reviving such judgment by scire facias against the administrators of the debtor, after his death, he will be enjoined from enforcing his judgment beyond the *pro rata* share to which he may be entitled. Crenshaw *v.* Delgado, 1 N. M. 376.

North Carolina.— Curtis *v.* Hartsfield, 4 N. C. 114.

Pennsylvania.— See Randalls *v.* Davidson, 1 C. Pl. 13. Where property in the hands of the representative is levied on under an execution against him individually, the probate court will enjoin the sale of the property until the representative accounts and the property belonging to him individually is thereby ascertained. Turner's Estate, 7 Kulp 481; Klein's Estate, 11 Wkly. Notes Cas. 354.

Texas.— Coombs *v.* Lane, 17 Tex. 280.

Virginia.— Hickerson *v.* Helm, 2 Rob. 628; Whitton *v.* Terry, 6 Leigh 189. Where execution against the goods of a testator is levied on property specifically bequeathed by him, and allotted to the legatee by the executor, an injunction ought to be granted to restrain proceedings until an account of the assets remaining unadministered should be taken. Sampson *v.* Bryce, 5 Munf. 175; Scott *v.* Holliday, 5 Munf. 103. See also Chapman *v.* Washington, 4 Call 327.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1923.

Where judgment has been recovered against the executor of the debtor's surety, the creditor may enforce his claim by execution against the property of the executor, although an injunction be pending restraining the creditors generally of the principal debtor from proceeding against him at law. Beall *v.* Osbourn, 30 Md. 8.

Proceedings under a special execution, allowed by statute against the estate of a decedent whose lands have been sold under a prior execution, upon condition that the land be first redeemed from the prior execution sale, will be enjoined where the first execution has been set aside in equity. Cohen *v.* Menard, 136 Ill. 130, 24 N. E. 604.

61. Lambert *v.* Metropolitan St. R. Co., 33 Misc. (N. Y.) 579, 68 N. Y. Suppl. 877.

62. Lambert *v.* Metropolitan St. R. Co., 33 Misc. (N. Y.) 579, 68 N. Y. Suppl. 877.

the representative by a supersedeas,[63] or by motion to the court, if in session, to quash the execution,[64] or if there are equitable circumstances by a bill in equity.[65]

9. Sales Under Execution — a. In General. Except in those jurisdictions in which execution is not permitted to issue against a decedent's estate,[66] a sale of a decedent's property under execution upon a judgment rendered against his personal representative passes a good title to the purchaser only where all the statutory requirements have been complied with,[67] and the sale conforms to the judgment and execution,[68] and is of property subject to such execution.[69] But where the purchaser has acted in good faith and the heirs or devisees have received a benefit from the proceeds of the sale, as by such proceeds being applied to the payment of debts to which the property was subject, equity will not permit the property to be recovered from the purchaser except upon his being reimbursed.[70] A personal representative cannot purchase for himself lands of a decedent sold under an execution created in the latter's lifetime,[71] and where he does so the sale may be set aside upon application of the devisees or heirs made before the acknowledgment of the sheriff's deed.[72]

63. Hudson *v.* Modawell, 64 Ala. 481.

64. Hudson *v.* Modawell, 64 Ala. 481.

65. Hudson *v.* Modawell, 64 Ala. 481.

66. A sale under execution of a decedent's property in such jurisdictions is void (Meredith *v.* Scallion, 51 Ark. 361, 11 S. W. 516, 3 L. R. A. 812; Hornor *v.* Hanks, 22 Ark. 572; Bertin *v.* Phillips, 1 La. Ann. 173; O'Brien *v.* Woody, 18 Fed. Cas. No. 10,398, 4 McLean 75. See McGee *v.* Wallis, 57 Miss. 638, 34 Am. Rep. 484); nor is it rendered valid by the fact that the representative made no objection to the proceedings and received the surplus of the proceeds after payment of the amount of the judgment upon which execution issued (Bertin *v.* Phillips, *supra*. See Emmons *v.* Williams, 28 Tex. 776).

67. Ponder *v.* Moseley, 2 Fla. 207, 48 Am. Dec. 194; Worthy *v.* Hames, 8 Ga. 234; McCormick *v.* Skelly, 201 Pa. St. 184, 50 Atl. 765; Murphy's Appeal, 8 Watts & S. (Pa.) 165; Carroll *v.* Carroll, 20 Tex. 731. See McCarthy *v.* Speed, 16 S. D. 584, 94 N. W. 411.

Where the heirs or devisees are not made parties to a judgment obtained against a representative, in compliance with statute, a sale of the decedent's real estate under such judgment does not divest the title of the heirs. Lepage *v.* McNamara, 5 Iowa 124; McCracken *v.* Roberts, 19 Pa. St. 390; Mangan's Appeal, 20 Wkly. Notes Cas. (Pa.) 257.

68. Anderson *v.* Lyons, 2 Tenn. Ch. 61, holding that where a judgment against a personal representative of a decedent is satisfied by levy of an execution on the right, title, and interest of the personal representative in certain land belonging to the estate, and sale thereof to judgment plaintiff, the purchaser gets nothing, and equity has jurisdiction to set aside the satisfaction.

Where the judgment and execution run against the personal representative de bonis propriis, only his individual interest, if any, can be sold and not the interest of other devisees or heirs (Small *v.* Small, 16 S. C. 64); and a sale of a decedent's land under an execution upon a representative personally, issued on a judgment against him in his representative capacity, is void (Boykin *v.* Cook, 61 Ala. 472).

69. A sale under execution of land devised to an executor in trust to pay debts may be quashed on motion of such executor. Helm *v.* Darby, 3 Dana (Ky.) 185. Where an executor has assented to a specific legacy, and afterward an execution issues against the goods of the testator in his hands, the purchaser of such specific legacy at the sheriff's sale under the execution acquires no title. Alston *v.* Foster, 16 N. C. 337; Burnley *v.* Lambert, 1 Wash. (Va.) 308.

A sale of the representative's individual property under a judgment against him as representative may be set aside on motion of the representative in his individual capacity. McCarthy *v.* Speed, 16 S. D. 584, 94 N. W. 411.

70. McGee *v.* Wallis, 57 Miss. 638, 34 Am. Rep. 484; Alston *v.* Foster, 16 N. C. 337; Evans *v.* Meylert, 19 Pa. St. 402.

Where the purchaser under the execution is afterward ousted by the heirs, he is entitled to a decree against the administrator and heirs for the amount of the purchase-money credited upon the execution, with interest. White *v.* Park, 5 J. J. Marsh. (Ky.) 603. But see Sanders *v.* Sanders, 13 N. C. 193.

Redemption see Smith *v.* Knoebel, 82 Ill. 392.

In Arkansas, although a judgment against an administrator can be enforced only by being brought under administration of the probate court, and execution otherwise issued is void, it will not be declared void after sale thereunder, except that the amount due on the judgment be paid, or so much of the lands as may be necessary to pay the judgment be sold. Hornor *v.* Hanks, 22 Ark. 572.

71. Williamson *v.* Lamb, 2 Miles (Pa.) 383.

Purchase by a representative to satisfy a judgment which he had obtained as representative held valid against a collateral impeachment. Mitchell *v.* Hodges, 87 Ind. 491.

72. Williamson *v.* Lamb, 2 Miles (Pa.) 383.

b. Disposition of Proceeds. The disposition of the proceeds of an execution sale of a decedent's property is regulated entirely by statute,[73] under which it is variously provided that the proceeds shall be applied to all liens of record;[74] or to the satisfaction of the executions under which the property is sold,[75] unless proceedings were taken to declare the estate insolvent before execution issued, in which case the proceeds should be distributed *pro rata* among the decedent's creditors;[76] and that the surplus, if any, shall be paid to the personal representative for distribution according to law.[77]

Q. Appeal and Error — 1. In General. Appeals from judgment or orders in probate matters or on claims against a decedent's estate are governed and controlled by the statutes regulating the settlement of decedents' estates.[78] Judgment or orders against a decedent's estate not provided for by these statutes are not appealable unless they come within the statutes relating to appeals in civil cases.[79]

2. Right and Duty to Appeal. An appeal from a judgment or order rendered against or affecting a decedent's estate may be taken by his personal representative,[80] unless he has resigned or been removed, in which case his successor may

73. See cases cited in following notes.

74. Morrison's Case, 9 Watts & S. (Pa.) 116; Willing *v.* Yohe, 1 Phila. (Pa.) 223 (holding also that no liens except those actually existing of record at the time of decedent's death are liens of record within the meaning of this statute; that the filing of a copy of a contract does not make the debt of a decedent a lien of record). *Compare* Pennsylvania Agriculture, etc., Bank *v.* Stambaugh, 13 Serg. & R. (Pa.) 299. Where the proceeds of realty sold at an orphans' court or execution sale are before an auditor for distribution, an application to the court for an issue to determine how much is due on a judgment against an administrator is proper. Bacon's Estate, 2 Phila. (Pa.) 376.

75. Von Arx *v.* Wemple, 45 N. J. L. 89. See Dibble *v.* Woodhull, 24 N. J. L. 618.

Where an executor does not plead plene administravit, and several judgments, of different dates, are thereupon recovered against him under which the sheriff sells real estate, he is bound to apply the proceeds to the executions in the order of their dates, without regard to the grade of the claims on which the judgments are founded. The rule, it seems, is the same when personal estate is levied on. Huger *v.* Dawson, 3 Rich. (S. C.) 328.

76. Matthews *v.* Williams, 13 Fla. 615; Von Arx *v.* Wemple, 45 N. J. L. 89; Dibble *v.* Woodhull, 24 N. J. L. 618.

77. Vincent *v.* Platt, 5 Harr. (Del.) 164; Robinson *v.* Robinson, 3 Harr. (Del.) 391; Morrison's Case, 9 Watts & S. (Pa.) 116; Com. *v.* Rahm, 2 Serg. & R. (Pa.) 375; Willing *v.* Yohe, 1 Phila. (Pa.) 223.

In South Carolina it has been held that where there is a balance remaining after sale of part of intestate's real estate in satisfaction of executions, the administrator is not entitled to the surplus either in law or equity as assets for payment of debts, although the creditors themselves might have claimed it at law. Garlick *v.* Patterson, Cheves Eq. 27. See also Clifton *v.* Haig, 4 Desauss. 330, as to payment to commissioner of the court.

78. Ohm's Estate, 82 Cal. 160, 22 Pac. 927; Zimmerman *v.* Love, 97 Ind. 602; McCurdy *v.* Love, 97 Ind. 62; Taylor *v.* Burk, 91 Ind. 252; Bell *v.* Mousset, 71 Ind. 347; Seward *v.* Clark, 67 Ind. 289 [*overruling* Hamlyn *v.* Nesbit, 37 Ind. 284].

An order compelling a personal representative to allow his name to be used as plaintiff in an action to recover property alleged to have been fraudulently conveyed by the decedent is not appealable under the California statutes. Ohm's Estate, 82 Cal. 160, 22 Pac. 927.

A judgment in an action of replevin by an administrator growing out of a matter not connected with the decedent's estate is not within a statute governing appeals from orders relating to the settlement of a decedent's estate. Sloan *v.* Lowder, 23 Ind. App. 118, 54 N. E. 135.

79. Ohm's Estate, 82 Cal. 160, 22 Pac. 927; Louisville, etc., R. Co. *v.* Etzler, 4 Ind. App. 31, 34 N. E. 669 (holding also that an action begun by a decedent and prosecuted to judgment by his executrix is not within Rev. St. (1881) § 2155, providing for appeals for matters connected with a decedent's estate); May *v.* Darden, 83 N. C. 237. See Appeal and Error, 2 Cyc. 507 *et seq.*

80. *Colorado.*— Clayton *v.* Cheeley, 5 Colo. 337.

Louisiana.—Allen's Succession, 48 La. Ann. 1036, 20 So. 193, 55 Am. St. Rep. 295; Baumgarden's Succession, 35 La. Ann. 675; Charmbury's Succession, 34 La. Ann. 21; Taylor *v.* Jeffries, 10 La. 435.

Maryland.— Moore *v.* White, 4 Harr. & J. 548.

New York.— Wood *v.* Phillips, 11 Abb. Pr. N. S. 1.

Texas.— Taylor *v.* Barron, 2 Tex. Unrep. Cas. 689, holding, however, that where an administrator is made a party to a suit involving more than one estate, and verdict and judgment are certain as to the estate which he represents, he is not in position to allege

prosecute the appeal, upon his being made a party to the suit.[81] Heirs of a decedent may also appeal from a judgment against the decedent's estate by which they are aggrieved.[82] Under some statutes, if a personal representative declines to appeal, any party interested may do so.[83]

3. TIME FOR APPEAL. The time for taking an appeal from a judgment or order for or against a decedent's estate is regulated by the statutes relating to appeals in matters connected with decedents' estates,[84] or by the statutes relating to appeals in civil cases generally,[85] according to whether the judgment or order appealed from is within one or the other of these statutes.

4. BONDS. In most jurisdictions an appeal-bond need not be given by a personal representative, unless the appeal is from a judgment affecting him personally,[86] and the same is true in some jurisdictions in reference to a supersedeas

error on the ground that they are uncertain as to the other estate, in which he has no interest.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1930. And see APPEAL AND ERROR, 1 Cyc. 640.

An administrator sued before a justice of the peace on a claim against him in his fiduciary capacity has a right, under 2 Gavin & H. St. p. 593, § 64, to appeal from the judgment rendered, although the justice had no jurisdiction of the cause. Palmer *v.* Fuller, 22 Ind. 115.

An executor is not aggrieved by a decree so as to entitle him to appeal therefrom, where he is protected from claims of creditors by such decree, directing him to pay to the widow insurance upon his decedent's life. Schlegel *v.* Sisson, 8 S. D. 476, 66 N. W. 1087.

In federal courts.— An executor may maintain a writ of error to the supreme court of the United States to review the decision of the supreme court of a state so construing a statute of the United States as to sustain a claim of creditors against the estate which he represents. Briggs *v.* Walker, 171 U. S. 466, 19 S. Ct. 1, 43 L. ed. 243 [*affirming* 102 Ky. 359, 43 S. W. 479, 19 Ky. L. Rep. 419].

81. Kerns *v.* Dean, 77 Cal. 555, 19 Pac. 817; Iowa L. & T. Co. *v.* Holderbaum, 86 Iowa 1, 52 N. W. 550; Taylor *v.* Savage, 1 How. (U. S.) 282, 11 L. ed. 132.

In West Virginia it is not necessary for an administrator *de bonis non* to make himself a formal party to the record by an order of the circuit court before petitioning for an appeal from a decree in that court against the administrator in chief, for money to be paid out of the assets in his hands to be administered, where the administrator in chief dies after the decree has been rendered. Miller *v.* Neff, 33 W. Va. 197, 10 S. E. 378, 6 L. R. A. 515.

Where an administrator appeals from an order removing him, it is regular for him to proceed with the suits he has brought until the decision of the appeal; and any default taken while the appeal is pending will be regular, although the order removing him be subsequently affirmed. Thayer *v.* Mead, 2 Code Rep. (N. Y.) 18.

Refusal of new appointee to act.— Where an administrator who is appointed pending an appeal from a judgment against an executor who has been removed refuses to prosecute the appeal, a legatee cannot claim to be substituted as plaintiff to prosecute the appeal, as the removal of the executor did not in itself affect the litigation, and until the administrator is substituted the original plaintiff will continue to be such in his capacity as executor, and he can allow the legatee as party in interest to prosecute the appeal. Place *v.* Hayward, 65 N. Y. Super. Ct. 208, 13 N. Y. St. 288.

82. Brater *v.* Hopper, 77 Hun (N. Y.) 244, 28 N. Y. Suppl. 472.

83. Rutherford *v.* Allen, 62 Vt. 260, 19 Atl. 714.

84. See Mason *v.* Roll, 130 Ind. 260, 29 N. E. 1135; Koons *v.* Mellett, 121 Ind. 585, 23 N. E. 95, 7 L. R. A. 231; May *v.* Hoover, 112 Ind. 455, 14 N. E. 472; Swindle *v.* State, 15 Ind. App. 415, 44 N. E. 60.

In South Carolina a party dissatisfied with a decree of the court of ordinary must appeal within twenty days, and prosecute it with reasonable despatch; and where, after filing a suggestion, the appellant neglects to docket it for two years, it is a discontinuance, and leave to docket cannot be granted. *Ex p.* Thompson, 2 Bailey 116.

85. Koons *v.* Mellett, 121 Ind. 585, 23 N. E. 95, 7 L. R. A. 231; Swindle *v.* State, 15 Ind. App. 415, 44 N. E. 60. The statutes relating to appeals in civil actions, and not those relating to appeals in matters connected with the decedent's estate, regulate the time for appeal in an action by a personal representative for the collection of assets of the estate (Walker *v.* Steele, 121 Ind. 436, 22 N. E. 142, 23 N. E. 271; Rusk *v.* Gray, 74 Ind. 231; Merritt *v.* Straw, 6 Ind. App. 360, 33 N. E. 657); or from a decree in a suit by an executor to quiet his title to land under his testator's will (Mason *v.* Roll, 130 Ind. 260, 29 N. E. 1135), or in an action brought against a person who dies before it is finally determined, and in which his representative is substituted as defendant (May *v.* Hoover, 112 Ind. 455, 14 N. E. 472; Wright *v.* Manns, 111 Ind. 422, 12 N. E. 160; Heller *v.* Clark, 103 Ind. 591, 3 N. E. 844).

86. See APPEAL AND ERROR, 2 Cyc. 823.

An appeal from an award of arbitration may be taken by a personal representative in Pennsylvania without payment of costs or

bond,[87] although in others whether or not such bonds shall be given by the representative is left to the discretion of the court.[88]

5. Parties. All persons interested in the judgment or order appealed from should be made parties to the appeal,[89] or should be served with notice of the appeal.[90] One of two or more representatives cannot appeal from a judgment or decree rendered against the estate, without joining the other representative,[91] unless a severance in pleading appears on the record.[92]

6. Presentation and Reservation of Grounds of Review. Questions or objections not properly raised in the lower court and preserved on the record cannot be considered on appeal from a judgment for or against the personal representative.[93] Thus it cannot be contended for the first time on appeal from such judgment that a claim against the estate had not been authenticated and presented to the representative for allowance or rejection,[94] that the person suing or defending

entering into a recognizance, although he took out the rule for reference. Murray *v.* Sharp, 72 Pa. St. 360; Zerbe *v.* Miller, 1 Pearson (Pa.) 290.

87. See Appeal and Error, 2 Cyc. 897.

88. Mills *v.* Forbes, 12 How. Pr. (N. Y.) 466. And see Appeal and Error, 2 Cyc. 897.

Representative's liability on the bond see Appeal and Error, 2 Cyc. 953 note 14.

Liability of sureties.—The manner in which a judgment against the representative is to be paid does not affect the primary liability of sureties on their bond, although the compliance with the judgment in manner and form expressed may discharge them from all obligation. Mills *v.* Forbes, 12 How. Pr. (N. Y.) 466.

Rights of surety on supersedeas bond on payment of judgment.— A representative's execution of a supersedeas bond creates no privity between the sureties and the estate, and the sureties' payment of the judgment on affirmance gives them no right of action against the estate. They can only recover against property devised or bequeathed by being subrogated to the rights of the representative, who can only recover as for an original deficiency of assets, and not for a deficiency caused by his own want of diligent and prudent administration. Maybury *v.* Grady, 67 Ala. 147.

89. Clarke *v.* West, 5 Ala. 117, holding that, where judgment is rendered against an administrator upon a final settlement of an insolvent estate in favor of several creditors, all of them must be made parties to a writ of error sued out by the administrator.

Heirs are not necessary parties to an appeal, for the purposes of which the representative has full power to represent the whole estate. McCalop *v.* Fluker, 12 La. Ann. 345.

90. Cotes *v.* Smith, 31 How. Pr. (N. Y.) 146. An executrix must give the requisite notice of appeal, notwithstanding she has the privilege by statute to appeal without giving bond. Lockhart *v.* Lockhart, 1 Tex. 199.

An administrator may waive the necessity of citation and make himself party defendant in error. Morrison *v.* Lewis, 13 Tex. 64.

91. Portis *v.* Creagh, 4 Port. (Ala.) 332; Harrington *v.* Roberts, 7 Ga. 510; Lyon *v.* Allison, 1 Watts (Pa.) 161.

92. French *v.* Peters, 177 Mass. 568, 59 N. E. 449.

93. Devol *v.* Halstead, 16 Ind. 287; Scroggs *v.* Alexander, 103 N. C. 162, 9 S. E. 401; Walker *v.* Beal, 9 Wall. (U. S.) 743, 19 L. ed. 814, objection to time of commencement of action against an executor not raised in a state court cannot be considered where the case has been removed to the United States supreme court. An heir cannot charge executors with items not referred to in the briefs and first urged on motion for rehearing. Kearney *v.* Nicholson, (Tex. Civ. App. 1901) 67 S. W. 361. See Appeal and Error, 2 Cyc. 660 *et seq.*

The failure of a non-resident administrator to give bond in the prosecution of an action in this state is a matter in abatement of the action, and cannot be taken advantage of for the first time on appeal. Northwestern Mut. L. Ins. Co. *v.* Lowry, 13 Ky. L. Rep. 205.

That plaintiff cannot sue both as executor and devisee cannot be first urged on appeal. Stilwell *v.* Carpenter, 2 Abb. N. Cas. (N. Y.) 238.

An appeal by one of several creditors in a bill against an administrator for recovery of their debts and an account of the personal assets does not bring up the case of another creditor, whose claim was allowed, so as to allow its validity to be questioned in the higher court. Cooper *v.* Lyons, 9 Lea (Tenn.) 596.

As to method of presenting and reserving objections see Appeal and Error, 2 Cyc. 677 *et seq.*

94. *Arkansas.*— Black *v.* Black, 60 Ark. 390, 30 S. W. 755.

California.— Drake *v.* Foster, 52 Cal. 225; Stockton Bank *v.* Howland, 42 Cal. 129; Peterson *v.* Hornblower, 33 Cal. 266; Coleman *v.* Woodworth, 28 Cal. 567; *In re* Cook, 14 Cal. 129; Hentsch *v.* Porter, 10 Cal. 555.

Indiana.— Hardin *v.* Crist, 7 Ind. 167.

Kentucky.— Lyon *v.* Logan County Bank, 78 S. W. 454, 25 Ky. L. Rep. 1668.

Washington.— Neis *v.* Farquharson, 9 Wash. 508, 37 Pac. 697.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1935. And see *supra*, X, B, 13; XIV, D, 1, n.

as personal representative has no right to sue or defend in that capacity,[95] that there was a defect in the pleading,[96] or that the judgment against the representative was not in the proper form.[97]

7. Dismissal or Withdrawal. The appellate court may dismiss the appeal where there are defects in the proceedings for review,[98] as where the appeal is not brought within the prescribed time,[99] or where an improper party is made appellee,[1] or where the statutory prerequisites of such appeal have not been complied with.[2] But it has been held that a judgment against a personal representative cannot be dismissed by him at his own volition.[3]

8. Determination and Disposition of Cause. The appellate court will presume on an appeal from a judgment for or against a personal representative that all the statutory prerequisites have been complied with;[4] and as a general rule will

95. *Alabama.*— It will be presumed on appeal that one once shown to be the legal representative of the estate is still such, although there has been a final settlement of the estate, where it does not appear that he has been discharged or that a decree of distribution has been made. Ligon *v.* Ligon, 84 Ala. 555, 4 So. 405.

Arkansas.— Complaint cannot for the first time be made on appeal that plaintiff should have sued as administrator, instead of simply denominating himself "administrator," or that he should have shown his official character by profert of letters of administration. Texarkana Gas, etc., Co. *v.* Orr, 59 Ark. 215, 27 S. W. 66, 43 Am. St. Rep. 30.

Illinois.— Breckenridge *v.* Ostrom, 79 Ill. 71.

Indiana.— Rundles *v.* Jones, 3 Ind. 35.

Iowa.— Laverty *v.* Woodward, 16 Iowa 1.

Kentucky.— Illinois Cent. R. Co. *v.* McDonald, 13 Ky. L. Rep. 781.

Louisiana.— Garcia *v.* Kitchings, 11 La. Ann. 642; Allen *v.* May, 11 La. Ann. 627.

Massachusetts.— Stone *v.* Simonds, 131 Mass. 457.

New Jersey.— Oliva *v.* Bunaforza, 31 N. J. Eq. 395.

Texas.— Homuth *v.* Zapp, 33 Tex. 130; Bull *v.* Jones, (Civ. App. 1898) 47 S. W. 474.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1936. See also Appeal and Error, 2 Cyc. 686.

The right to defend a revived action as executrix cannot be questioned in the first instance on a second appeal. Moss *v.* Rowland, 3 Bush (Ky.) 505.

96. Chambers *v.* Wright, 52 Ala. 444 (holding that a bill by the heir at law to recover his share of a particular fund in the hands of the administrator of a solvent estate, although defective, if it seeks relief as to that fund only, and not a final settlement and distribution also, is not without equity; and, if not assailed for its defects in the court below, the objection cannot be raised in the appellate court); Jones *v.* Beverly, 45 Ala. 161.

Failure to bring in all proper parties to the suit is not ground for reversal on appeal where not objected to in the lower court. Alexander *v.* Steele, 84 Ala. 332, 4 So. 281.

Objection that the presentation and rejection of the claim were not alleged in the complaint cannot be raised for the first time on appeal by a representative who has proceeded to the trial of the claim without objecting to the complaint, and who has expressly admitted that the claim was presented in due time, and that she refused to act upon it. Preston *v.* Knapp, 85 Cal. 557, 24 Pac. 811.

97. Hellman *v.* Merz, 112 Cal. 661, 44 Pac. 1079; Simons *v.* Busby, 119 Ind. 13, 21 N. E. 451; De Lavallette *v.* Wendt, 75 N. Y. 579, 31 Am. Rep. 494, holding that objection cannot be raised for the first time on appeal that a judgment against an executor, as such, is not in form *de bonis testatoris.*

The rendition of a personal judgment against the administrator in the enforcement of a claim against the estate is erroneous; but he cannot avail himself of the error on appeal to the supreme court, unless a motion was made to correct it in the court below, and there overruled. Wile *v.* Wright, 32 Iowa 451.

That a judgment against an administrator is also rendered against his securities, who were not parties to the suit, is not ground for reversal on proceedings in behalf of the administrator, the defect not being objected to by him in the trial court, when assigned as error. Harmon *v.* Bynum, 40 Tex. 324.

98. See, generally, Appeal and Error, 3 Cyc. 182 *et seq.*

99. McMillan *v.* Kelch, 16 Tex. 150.

1. Where, after judgment in an action by an executor against the curator, the curator has been discharged without opposition, an appeal making him appellee will be discharged, he having no further right to represent the heirs. Davis *v.* Chapier, 4 La. 133.

2. For want of an affidavit that "it is not for the purpose of delay that the appeal is entered, etc.," the appeal of an administrator from an award of arbitrators will be dismissed. McConnel *v.* Morton, 11 Pa. St. 398.

3. Bingham *v.* Waterhouse, 32 Tex. 468.

4. See Weeks *v.* Coe, 76 N. Y. App. Div. 310, 78 N. Y. Suppl. 477, holding that where a referee has given judgment for a claim against an executor, with costs, it will be presumed, on appeal from an order of the special term granting an extra allowance, that he gave the certificate of unreasonable

not review the lower court's findings of fact.[5] If the record shows that material errors occurred in the proceedings in the lower court the judgment may be reversed,[6] or may be remanded for further proceedings if the justice of the case seems to require such proceedings,[7] as where the lower court erred in sustaining exceptions to a plea.[8] But if no error is found,[9] or the error is a harmless one,[10] or is caused or invited by the appealing party,[11] the judgment will be affirmed.[12] Mere clerical errors,[13] as where the clerk of the lower court enters judgment against the representative instead of against the decedent's estate or *vice versa*,[14] or makes a mistake in the name of the representative,[15] may be amended or corrected by the appellate court.

R. Costs — 1. Personal Liability of Representative For Costs — a. In Actions at Law — (I) *Actions by Personal Representative* — (A) *In Absence of Special Statutory Provisions* — (1) Actions Necessarily Brought in Representative Capacity — (a) The General Rule. Subject to some exceptions, which will be hereafter considered, it is very generally held that a personal representative who sues on a cause of action, which he can bring in his representative capacity only (ordinarily but not necessarily a cause of action accruing in decedent's lifetime) is not personally liable for costs if he fails in his action.[16] Not

resistance or neglect of the executor required by the code of civil procedure, section 1836, as a condition to granting costs against an executor.

As to presumptions on appeal generally see Appeal and Error, 3 Cyc. 266 *et seq.*

5. Niblo *v.* Binsse, 47 Barb. (N. Y.) 435, 31 How. Pr. (N. Y.) 476, 32 How. Pr. (N. Y.) 92. And see Appeal and Error, 3 Cyc. 345 *et seq.*

6. Cowdery *v.* McChesney, 124 Cal. 363, 57 Pac. 221, error in excluding evidence.

7. See Hazelbaker *v.* Clipper Coal Co., 158 Pa. St. 393, 27 Atl. 1051.

In Louisiana, under Code Pr. art. 1042, in a proceeding in the probate court the judge is required to take the testimony of the witnesses and annex it to the record, together with a list of the documents produced by the parties, that they may be read on appeal, and in case he fails or neglects to do so the cause will be remanded for a new trial at the cost of the appellee. Pargoud *v.* Breard, 4 La. Ann. 517; Polk *v.* Childers, 4 La. Ann. 500; Reeve's Succession, 3 La. Ann. 554; Desormes *v.* Desormes, 17 La. 111; Graham *v.* Graham, 16 La. 201; Tompkins *v.* Benjamin, 16 La. 197.

8. Alford *v.* Cochrane, 7 Tex. 485.

9. Borden *v.* Thorpe, 35 N. C. 298; Sixta *v.* Heiser, 14 S. D. 346, 85 N. W. 598.

10. Parker *v.* Salmons, 113 Ga. 1167, 39 S. E. 475; Clark *v.* Young, 74 S. W. 245, 24 Ky. L. Rep. 2395; Low *v.* Hill, 67 Mich. 343, 34 N. W. 588; Stewart *v.* Glenn, 58 Mo. 481. See Searcy *v.* Ocmulgee Bank, 23 Ga. 504.

The joinder of the heirs with the administrator as defendants, in an action to establish a claim against a decedent's estate, is harmless error, where the judgment is against the estate alone. Jenkins *v.* Cain, (Tex. Sup. 1889) 12 S. W. 1114.

11. Although there be some uncertainty as to the correctness of the amount of a judgment rendered by the probate court against an executor, yet, if this uncertainty arises from the executor's own remissness in his rendition of accounts, the appellate court will confirm the judgment. Johnston *v.* Cox, 13 La. 536.

12. Johnston *v.* Cox, 13 La. 536; Borden *v.* Thorpe, 35 N. C. 298.

Form of judgment for damages and costs on affirmance of the judgment of the lower court on appeal by the personal representative. See Borden *v.* Thorpe, 35 N. C. 298; Hawkins *v.* Berkley, 1 Wash. (Va.) 204.

13. English *v.* Brown, 9 Ala. 504.

14. Piper *v.* Goodwin, 23 Me. 251; Kent *v.* Lyles, 7 Gill & J. (Md.) 73. See also Appeal and Error, 3 Cyc. 429.

15. Piper *v.* Goodwin, 23 Me. 251.

16. *Georgia.*— Justices Clark County Inferior Ct. *v.* Haygood, 20 Ga. 847.

Illinois.— Hunter *v.* Bilyeu, 39 Ill. 367; Selby *v.* Hutchinson, 9 Ill. 319; Burnap *v.* Dennis, 4 Ill. 478; Gibbons *v.* Johnson, 4 Ill. 61; Greenwood *v.* Spiller, 3 Ill. 502; Church *v.* Jewett, 2 Ill. 55; Jones *v.* Illinois Cent. R. Co., 106 Ill. App. 597; Masters *v.* Masters, 13 Ill. App. 611.

Indiana.— Cavanaugh *v.* Toledo, etc., R. Co., 49 Ind. 149; Evans *v.* Newland, 34 Ind. 112; Cooper *v.* Thatcher, 3 Blackf. 59; Harrison *v.* Warner, 1 Blackf. 385.

Kentucky.— Turnham *v.* Shouse, 8 Dana 3, 33 Am. Dec. 473; Hughes *v.* Standeford, 3 Dana 285; Hutchcraft *v.* Gentry, 2 J. J. Marsh. 499; Brown *v.* McKee, 1 J. J. Marsh. 471; Caperton *v.* Callison, 1 J. J. Marsh. 396; Holley *v.* Christopher, 3 T. B. Mon. 14; Jameson *v.* Young, 2 Litt. 387; Reed *v.* Beaty, 3 Bibb 208.

Missouri.— Ross *v.* Alleman, 60 Mo. 269; State *v.* Maulsby, 53 Mo. 500; Renney *v.* Thomas, 45 Mo. 111; Wooldridge *v.* Draper, 15 Mo. 470.

New Hampshire.— Pillsbury *v.* Hubbard, 10 N. H. 224.

New Jersey.— Bell *v.* Samuels, 60 N. J. L. 370, 37 Atl. 613; Kinney *v.* Central R. Co., 34 N. J. L. 273; Norcross *v.* Boulton, 16 N. J. L. 310.

being privy to the original transaction the personal representative cannot be presumed to know exactly what the case may turn out to be upon investigation and consequently should not be required to pay the costs himself.[17] "Few administrators would take the risks of suit, if they were required to pay the costs if unsuccessful and estates would thus often suffer by reason of their rights not being properly enforced."[18] It is very generally held, however, that the exemption of a personal representative from liability for defendant's costs is not an exemption from the obligation of his own contracts, or a privilege to procure gratuitous services. In other words he must pay his own costs.[19] If the personal representative is successful in his action, he is not personally liable for costs where defendant proves insolvent.[20]

(b) Extent and Limits of Rule. Ordinarily the general rule that a personal representative necessarily suing in his fiduciary capacity is not liable for costs on failure of his suit applies, although the suit is terminated by nonsuit,[21] and if he has acted in good faith in bringing the suit he will be permitted to discontinue without paying costs upon discovering that he has no cause of action.[22] So the rule applies to suits commenced by decedent and revived by the representative,[23] to suits by an administrator *de bonis non* on a note given to the administrator in chief in that capacity, for goods of the estate,[24] to suits in which the adminis-

New York.— Spencer *v.* Strait, 40 Hun 463; Dean *v.* Roseboom, 37 Hun 310; Fox *v.* Fox, 5 Hun 53; Holdridge *v.* Scott, 1 Lans. 303; McGovern *v.* McGovern, 50 N. Y. Super. Ct. 390; Lindslay *v.* Deafendorf, 43 How. Pr. 90; Van Orden *v.* Reynolds, 18 Wend. 635; People *v.* Judges Albany Mayor's Ct., 9 Wend. 486; Ketchum *v.* Ketchum, 4 Cow. 87; Tilton *v.* Williams, 11 Johns. 403; Carlile *v.* Bates, 8 Johns. 379.

North Carolina.— Collins *v.* Roberts, 28 N. C. 201.

Pennsylvania.— Ammon's Appeal, 31 Pa. St. 311; Callender *v.* Keystone Mut. L. Ins. Co., 23 Pa. St. 471 [*overruling* Ewing *v.* Furness, 13 Pa. St. 531]; Smith's Estate, 11 Pa. Co. Ct. 448; Myers *v.* Barton, 3 Pa. L. J. Rep. 257, 5 Pa. L. J. 142; Ketler's Estate, 16 Phila. 294.

South Carolina.— Buckels *v.* Carter, 6 Rich. 106; Mealer *v.* Meyers, 2 Bailey 53; Bordeaux *v.* Cave, 2 Bailey 6; Jamison *v.* Lindsay, 1 Bailey 79; Murrell *v.* Duncan, 1 Brev. 384; Frink *v.* Luyten, 2 Bay 166, 1 Am. Dec. 638.

England.— Eaves *v.* Mocato, 1 Salk. 314; Goldthwayte *v.* Petrie, 5 T. R. 234.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1951.

See, however, Hicks *v.* Barrett, 40 Ala. 291.

17. Holdridge *v.* Scott, 1 Lans. (N. Y.) 303; Lynch *v.* Webster, 17 R. I. 513, 23 Atl. 27, 14 L. R. A. 696. And see Bordeaux *v.* Cave, 2 Bailey (S. C.) 6, in which it was said a testator may leave behind him the most satisfactory evidence of an existing cause of action, when in truth no cause of action exists — or it may be in the power of the opposite party to show that there has been satisfaction made and accorded. In that case there is no alternative left to the executor, but to sue and procure the adjudication of a competent tribunal, or to assume the responsibility of showing it himself upon a final account of his administration.

18. Smith's Estate, 11 Pa. Co. Ct. 448.

19. Musser *v.* Good, 11 Serg. & R. (Pa.) 247; Buckels *v.* Carter, 6 Rich. (S. C.) 106. And see Matlock *v.* Gray, 11 N. C. 1.

Illustration.— A personal representative is liable for his process and witness' fees and the price of a transcript made out for his appeal without regard to probable cause for bringing or defending the suit or his success therein. Campbell *v.* Doyle, 57 Miss. 292.

20. Janes *v.* Robinson, Dudley (Ga.) 1.

21. *Kentucky.*—Frogg *v.* Long, 3 Dana 157, 28 Am. Dec. 69.

New York.— Purdy *v.* Purdy, 5 Cow. 14; Morse *v.* McCoy, 4 Cow. 551; Ketchum *v.* Ketchum, 4 Cow. 871; Phœnix *v.* Hill, 3 Johns. 249; Fleming *v.* Tyler, 1 Johns. Cas. 102; Slocum *v.* Staples, 2 N. Y. Leg. Obs. 259. *Contra,* Hogeboom *v.* Clark, 17 Johns. 268.

Pennsylvania.— Musser *v.* Good, 11 Serg. & R. 247; Myers *v.* Barton, 3 Pa. L. J. Rep. 257, 5 Pa. L. J. 142.

South Carolina.— Meaker *v.* Meyers, 2 Bailey 53; Bordeaux *v.* Cave, 2 Bailey 6; Vanderhorst *v.* Whitner, 1 Brev. 174.

Wisconsin.— Ladd *v.* Anderson, 58 Wis. 591, 17 N. W. 320.

England.— Eaves *v.* Mocato, 1 Salk. 314.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1952.

22. Fowler *v.* Starr, 3 Den. (N. Y.) 164; Purdy *v.* Purdy, 5 Cow. (N. Y.) 14; Morse *v.* McCoy, 4 Cow. (N. Y.) 551; Phœnix *v.* Hill, 3 Johns. (N. Y.) 249; Bordeaux *v.* Cave, 2 Bailey (S. C.) 6; Vanderhorst *v.* Whitner, 2 Bay (S. C.) 399; Bennet *v.* Coker, 4 Burr. 1927.

23. Brooks *v.* Stevens, 2 Pick. (Mass.) 68; Arrington *v.* Coleman, 5 N. C. 102. But see Clark *v.* Higgins, 2 Root (Conn.) 398.

24. Stewart *v.* Hood, 10 Ala. 600.

trator has been removed before judgment,[25] to proceedings in error in an action brought by the personal representative to recover a debt due his intestate,[26] and to an appeal taken by decedent and prosecuted by his executor.[27] On the other hand, notwithstanding the fact that suit is necessarily brought by the personal representative in his capacity as such, he will if unsuccessful be personally liable for costs, where the suit is vexatious or wanton [28] or known by him to be groundless,[29] where his prosecution of the suit is without the care and inquiry which ordinary prudence would have suggested,[30] or where he sues in a representative capacity without legal authority to do so [31] or unnecessarily takes an appeal.[32] So the costs of an attempt by an executrix to compel her co-executrix to join in a conveyance of real estate improperly sold by the former to her husband must be borne by her and not by the estate.[33] And where judgment, as in case of nonsuit or by default, is rendered for not proceeding to trial and no excuse is shown, costs may be awarded against the personal representative individually.[34] These cases are in principle like interlocutory orders for the payment of costs upon some default or motion.[35] So where the representative seeks the allowance of a fraudulent demand in his own behalf upon final settlement and the heirs prevail in resisting the demand, costs should be taxed against him personally and not against the estate.[36] And where a default judgment in favor of the representative is set aside by motion for irregularity, he will be ordered to pay the costs of the motion.[37]

(2) Actions Which May Be Brought in Individual Capacity. The rule is well settled both in England and in this country that if a personal representative brings suit on a cause of action accruing after decedent's death, that is, on a contract made with himself or for a wrong done to the estate in his possession he is personally liable for costs if he fails in his action.[38] The reason is said to be

25. Baxter *v.* Davis, 3 Abb. Pr. N. S. (N. Y.) 249.

26. Gleason *v.* Clark, 1 Wend. (N. Y.) 303.

27. Hudson *v.* Ross, 1 Wash. (Va.) 74.

28. Reynolds *v.* Carter, 32 Ala. 444; Hutchcraft *v.* Gentry, 2 J. J. Marsh. (Ky.) 499; People *v.* Judges Albany Mayor's Ct., 9 Wend. (N. Y.) 486; Show *v.* Conway, 7 Pa. St. 136; Reeser's Estate, 4 Pa. Co. Ct. 417.

29. Raugh *v.* Weis, 138 Ind. 42, 37 N. E. 331; Harrison *v.* Warner, 1 Blackf. (Ind.) 385; Hill *v.* Mitchell, 40 Mich. 389; Bordeaux *v.* Cave, 1 Bailey (S. C.) 6; Comber *v.* Hardcastle, 3 B. & P. 115. And see Porche *v.* Banks, 8 La. Ann. 65.

30. Pennypacker's Appeal, 57 Pa. St. 114.

31. Lewis *v.* McCabe, 16 Mo. App. 398.

32. Beatty *v.* Cory Universalist Soc., 39 N. J. Eq. 452.

33. Schafer's Estate, 10 Pa. Co. Ct. 100.

34. Harrison *v.* Warner, 1 Blackf. (Ind.) 385; How *v.* Taylor, 1 Wend. (N. Y.) 34; Morse *v.* McCoy, 4 Cow. (N. Y.) 551; Brown *v.* Lambert, 16 Johns. (N. Y.) 148; Rudd *v.* Long, 4 Johns. (N. Y.) 190; Vanderhorst *v.* Whitner, 2 Bay (S. C.) 399; Eaves *v.* Mocato, 1 Salk. 314.

35. Pillsbury *v.* Hibbard, 10 N. H. 224.

36. Garr *v.* Harding, 45 Mo. App. 618.

37. Varick *v.* Bodine, 3 Hill (N. Y.) 444.

38. *Indiana.*—Harrison *v.* Warner, 1 Blackf. 385.

Missouri.— Ross *v.* Alleman, 60 Mo. 269; Wooldridge *v.* Draper, 15 Mo. 470; Lewis *v.* McCabe, 16 Mo. App. 398.

New Hampshire.— Moulton *v.* Wendell, 37 N. H. 406; Pillsbury *v.* Hubbard, 10 N. H. 224.

New Jersey.— Kinney *v.* Central R. Co., 34 N. J. L. 273; Norcross *v.* Boulton, 16 N. J. L. 310.

New York.— Mullen *v.* Guinn, 88 Hun 128, 34 N. Y. Suppl. 625; Bostwick *v.* Brown, 15 Hun 308; Fox *v.* Fox, 5 Hun 53; Ackley *v.* Ackley, 21 N. Y. Suppl. 877; Burhans *v.* Blanchard, 1 Den. 626; Reynolds *v.* Collin, 3 Hill 441; People *v.* Judges Albany Mayor's Ct., 9 Wend. 486; Barker *v.* Baker, 5 Cow. 267.

North Carolina.— Arrington *v.* Coleman, 5 N. C. 102.

South Carolina.— Carter *v.* Estes, 11 Rich. 363; Farley *v.* Farley, 2 Bailey 319; Bordeaux *v.* Cave, 2 Bailey 6; Ford *v.* Travis, 2 Brev. 299; Frink *v.* Luyten, 2 Bay 166, 1 Am. Dec. 638.

Virginia.— Carr *v.* Anderson, 2 Hen. & M. 361; Thornton *v.* Jett, 1 Wash. 138.

England.— Jenkins *v.* Plombe, 6 Mod. 91, 1 Salk. 207; Eaves *v.* Mocato, 1 Salk. 314; Marsh *v.* Yellowly, 2 Str. 1106; Baynham *v.* Matthews, 2 Str. 871.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1953, 1954.

Review of English statutes and decisions. — "In England, in the early practice, an executor or administrator might recover costs if successful in a suit brought by him, but if the decision was against him he was not liable for costs, the reason being that the statute 23 Henry VIII, cap. 15, § 1, by which costs were first given to defendants,

that, inasmuch as the personal representative is a party to the transaction, he is presumed to know all about it, and to act upon his own responsibility, and therefore should not be permitted to burden the estate with costs in case of failure,[39] and even though he sues in his representative capacity on a cause of action of this character he cannot thereby evade liability for costs,[40] the true rule being that if it is not necessary for plaintiff to name himself as executor or administrator he shall pay costs.[41] The doctrine of some of the early decisions to the effect that plaintiff's liability to costs depended on the question whether the money recovered would be assets or not[42] "has long since been exploded and was contrary to older authorities than those by which it was set up."[43] It has also been held that, although the representative is successful in his action, he and not the estate is liable for costs on failure to collect them from defendant.[44]

(B) *Under Special Statutory Provisions.* In some jurisdictions statutes specially affecting the personal liability to costs of personal representatives have been enacted. So far as this liability is concerned some of the statutes abolish the distinction between suits brought in an individual and suits brought in a representative capacity.[45] Under some of these statutes an unsuccessful plaintiff suing in a representative capacity is not personally liable for costs unless the courts shall specially direct it on account of mismanagement or bad faith.[46]

was confined to cases of wrongs done to and contracts made with plaintiff. Now, however, under the statute of 3 & 4 Wm. IV, cap. 42, § 31, an executor or administrator, with respect to costs, is put on the same footing as other suitors, except that if the action be in the right of the testator or intestate the court in which the action is pending or the judge of a superior court may otherwise order. But, independently of the latter statute, and by virtue of the former, if an executor or administrator brought an action on a wrong done in his own time, or upon a contract, express or implied, made with himself, and failed in the action, he was liable to defendant for costs, even though he sued as executor or administrator. Slater *v.* Lawson, 1 B. & Ad. 893, 20 E. C. L. 734; Jobson *v.* Forster, 1 B. & Ad. 6, 20 E. C. L. 375; Dowbiggin *v.* Harrison, 9 B. & C. 666, 17 E. C. L. 299; Tattersall *v.* Groote, 2 B. & P. 253; Cooke *v.* Lecas, 2 East 395; Nicholas *v.* Killigrew, 1 Ld. Raym. 436; Jenkins *v.* Pombe, 6 Mod. 91, 1 Salk. 207; Bollard *v.* Spencer, 7 T. R. 358; Goldthwayte *v.* Petrie, 5 T. R. 234; Lynch *v.* Webster, 17 R. I. 513, 514, 23 Atl. 27, 14 L. R. A. 696.

On declaration demurrable for failure to show capacity.— In an action by an administrator upon a debt due him in his representative capacity, on demurrer sustained to the declaration because it does not show that plaintiff sues in his representative character, judgment against plaintiff *de bonis propriis* for costs is correct. Watkins *v.* McDonald, 3 Ark. 266.

Limitations of rule.— A cause of action on a note made payable to decedent or bearer forms an exception to the general rule that the representative must sue in his capacity as such on a cause of action accruing in the lifetime of decedent, but notwithstanding this fact an administrator suing in his representative capacity on a note of this character is not personally liable for costs if his suit fails. Jamison *v.* Lindsay, 1 Bailey (S. C.) 79.

39. Lynch *v.* Webster, 17 R. I. 513, 23 Atl. 27, 14 L. R. A. 696.

40. Muntorf *v.* Muntorf, 2 Rawle (Pa.) 180; Frink *v.* Luyten, 2 Bay (S. C.) 166, 1 Am. Dec. 638; Buckland *v.* Gallup, 105 N. Y. 453, 11 N. E. 843 [*affirming* 40 Hun 61]; Bostwick *v.* Brown, 15 Hun (N. Y.) 308; Holdridge *v.* Scott, 1 Lans. (N. Y.) 303; Lyon *v.* Marshall, 11 Barb. (N. Y.) 241; Ackley *v.* Ackley, 21 N. Y. Suppl. 877; Feig *v.* Wray, 3 N. Y. Civ. Proc. 159, 64 How. Pr. (N. Y.) 391; Smith *v.* Patten, 9 Abb. Pr. N. S. (N. Y.) 205; Matter of Justices New York Super. Ct., 1 How. Pr. (N .Y.) 200; Van Orden *v.* Reynolds, 18 Wend. (N. Y.) 635; People *v.* Judge Albany Mayor's Ct., 9 Wend. (N. Y.) 486; Ketchum *v.* Ketchum, 4 Cow. (N. Y.) 87; Tilton *v.* Williams, 11 Johns. (N. Y.) 403; Grimstead *v.* Shirley, 2 Taunt. 116; Goldthwayte *v.* Petrie, 5 T. R. 234; Hooker *v.* Quilter, 1 Wils. C. P. 171. And see Turnham *v.* Shouse, 8 Dana (Ky.) 3, 33 Am. Dec. 743, holding that where a plaintiff sues as executor, when the action should or might have been brought in his own right, and is successful, judgment will be given against him for defendant's costs, to be levied of the assets, if any, if none, of his own estate.

41. Norcross *v.* Bolton, 16 N. J. L. 310. And see Hullam Law Costs, p. 174, c. 3, § 1 *et seq.*

42. Hutchinson *v.* Gamble, 12 Ala. 36. See Bull *v.* Palmer, 2 Lev. 165; Cockerill *v.* Kynaston, 4 T. R. 277.

43. Norcross *v.* Bolton, 16 N. J. L. 310 [*citing* Hullam Law Costs 175, 184].

44. Daniel *v.* Hollingshead, 16 Ga. 190.

45. O'Hear *v.* Skeeles, 22 Vt. 152; Knox *v.* Bigelow, 15 Wis. 415. And see cases cited *infra*, notes 46–53.

46. Clark *v.* Wright, 26 S. C. 196, 1 S. E. 814; Wiesmann *v.* Brighton, 83 Wis. 550,

Under other statutes a personal representative who prosecutes an action unsuccessfully is in all cases personally liable for costs.[47] Under the statutes of some of these jurisdictions a personal representative after payment may charge the amount in his account of administration to be allowed or not as it may appear to the judge of probate that the suit was discreet or otherwise.[48] Under the statutes of another, the personal representative is entitled to an allowance for the costs if the court awarding them certify that there were probable grounds for instituting the action in which the costs were awarded. But in the absence of such certificate no allowance can be made.[49] In one jurisdiction the statutes exempt from liability for costs a special administrator in whose name a suit is brought and it is error to render against him a judgment for costs.[50] Under the statutes of another jurisdiction,[51] on return unsatisfied of an execution sued on a judgment for costs upon nonsuit in an action by an administrator, execution may be awarded against the administrator for the seizure of his property if he fails to show cause why it should not be awarded against him.[52] It is good cause why such execution should not be awarded against the administrator personally that he commenced the suit in good faith upon a supposed valid claim, although at the time of suit brought he had administered all the estate and settled his account and had no balance in his hands to be distributed.[53]

(II) *ACTIONS AGAINST PERSONAL REPRESENTATIVE*—(A) *In Absence of Special Statutory Provisions.* As is shown in another section the general rule is that the personal representative who makes an unsuccessful defense is not personally liable for costs, which are payable out of the assets in his hands in the same manner as the debt for which judgment was recovered.[54] There are, however, a few well recognized exceptions to the rule. If the personal representative makes an unsuccessful defense he is liable personally for costs where he has pleaded a false plea,[55] that is to say sets up new matter in avoidance of the action

53 N. W. 911; Ladd *v.* Anderson, 58 Wis. 591, 17 N. W. 320; Hei *v.* Heller, 53 Wis. 415, 10 N. W. 620; Knox *v.* Bigelow, 15 Wis. 415; Lightfoot *v.* Cole, 1 Wis. 36.

The mere failure of one who sues in a representative capacity to appear when the cause is called for trial is not sufficient to warrant the inference of mismanagement or bad faith. Ladd *v.* Anderson, 58 Wis. 591, 17 N. W. 320.

Rule in California and South Dakota.—The California and South Dakota statutes contain a provision nearly identical with those of South Carolina and Wisconsin, but provide further that when a judgment is recovered with costs against the representative he shall be individually liable therefor; but that they must be allowed him in his administration accounts, unless it appears that the suit or proceeding in which the costs were taxed were prosecuted or defended without just cause. It has been held that these provisions are not necessarily conflicting and that where judgment is rendered against an administrator plaintiff for costs but such costs are not by the judgment made chargeable only upon the estate as by the provisions of the statute they may have been, plaintiff is individually liable for the costs and defendant is entitled to an execution against him personally. Stevens *v.* San Francisco, etc., R. Co., 103 Cal. 252, 27 Pac. 146; McCarthy *v.* Speed, 16 S. D. 584, 94 N. W. 411.

47. Ticonic Nat. Bank *v.* Turner, 96 Md. 380, 52 Atl. 793; Taylor *v.* Webb, 2 Cush. (Mass.) 631; Hardy *v.* Call, 16 Mass. 530; Campbell *v.* Doyle, 57 Miss. 292; Williamson *v.* Childress, 26 Miss. 328; Lynch *v.* Webster, 17 R. I. 513, 23 Atl. 27, 14 L. R. A. 696. And see O'Hear *v.* Skeeles, 22 Vt. 152.

48. Hardy *v.* Call, 16 Mass. 530. See also O'Hear *v.* Skeeles, 22 Vt. 152.

49. Taylor *v.* Webb, 56 Miss. 631; Williamson *v.* Childress, 26 Miss. 328.

50. Driver *v.* Hayes, 51 Ark. 82, 9 S. W. 853.

51. N. H. Rev. St. c. 161, § 13, provides that upon return of *nulla bona* or waste in a suit where the cause of action was against decedent an execution may be awarded on a scire facias against the property of the administrator to the amount of the waste if it can be ascertained otherwise for the whole debt.

52. Folsom *v.* Blaisdell, 38 N. H. 100.

53. Folsom *v.* Blaisdell, 38 N. H. 100.

54. See *infra*, XIV, R, 2, a, (II), (A).

55. Scroggin *v.* Scroggin, 1 J. J. Marsh. (Ky.) 362; Pierson *v.* Evans, 1 Wend. (N. Y.) 30; Smith *v.* Goggans, Harp. (S. C.) 52.

What is not a false plea. The pleas of *non assumpsit* or of *non assumpsit infra*, etc., are not technically such false pleas as subject the representative personally to costs where the jury find against him. Pierson *v.* Evans, 1 Wend. (N. Y.) 30; Osterhout *v.* Hardenberg, 19 Johns. (N. Y.) 266; Moore *v.* Hunt, 1 Bailey (S. C.) 370. And see Ford *v.* Crane, 6 Cow. (N. Y.) 71.

and fails in supporting it.[56] He may also render himself liable in case he is guilty of a devastavit,[57] or has been guilty of mismanagement, misconduct, or fraud.[58] In many cases it is held that if the assets of the estate are insufficient to satisfy the costs of an action successfully prosecuted to judgment against a personal representative, then they are to be levied out of his individual estate.[59]

(B) *Under Special Statutory Provisions* — (1) Summary of the Statutes. The New York statutes provide that, where judgments for money only are awarded against a personal representative in his capacity as such, costs may be awarded, either against him personally, or against the estate, having reference to the facts occurring on the trial, where the creditor has presented his demand within the prescribed time, and defendant has unreasonably resisted or neglected payment, or has failed to file at least ten days before the expiration of six months from the rejection of the demand (the time limited for bringing suit on rejected demands), a written consent that it be heard and determined by the surrogate upon settlement of the representative's account, provided, however, that where the action is brought in the supreme court the facts must be certified by the judge or referee before whom the trial took place.[60] The Ohio statutes contain a provision similar to that of New York but include suits for the recovery of specific personal property as well as suits for the recovery of a money judgment.[61] The North Carolina statutes provide that no costs shall be recovered in any action against the personal representative, unless it appears that payment was unreasonably delayed or neglected, or that defendant refused to refer the matter in controversy, in which cases the court may award costs against defendant personally, or against the estate, as may be just.[62]

(2) Actions or Proceedings to Which Statutes Are Applicable. The New York statutes are by their express provisions limited to actions brought against the representative in his capacity as such.[63] They have no application to actions against him on contracts made by himself,[64] nor to actions brought against deceased in his lifetime and revived by his personal representative,[65] nor to an action by a sheriff against an executor in aid of an attachment against the distributive share of a legatee, such action being independent of any matters concerning the administration.[66] In actions to which the statutes are applicable, personal representatives are entitled to one lawful trial and to exemption from costs, saving the excepted cases, which trial must be a binding one determining

56. Pierson *v.* Evans, 1 Wend. (N. Y.) 30.

57. Scroggin *v.* Scroggin, 1 J. J. Marsh. (Ky.) 362.

58. *In re* Corrington, 124 Ill. 363, 16 N. E. 252; Meeker *v.* Arrowsmith, 16 N. J. L. 227; Ackerman *v.* Emott, 4 Barb. (N. Y.) 626; Savage *v.* Gould, 60 How. Pr. (N. Y.) 217. See also Ball *v.* Townsend, Litt. Sel. Cas. (Ky.) 325.

Where litigation is rendered necessary by mismanagement or misconduct of the personal representative he is personally liable for costs on making an unsuccessful defense. *In re* Corrington, 124 Ill. 363, 16 N. E. 252.

Judgment by default.— An executor or administrator who suffers judgment by default is personally liable for costs. Giles *v.* Pratt, 1 Hill (S. C.) 239, 26 Am. Dec. 170.

Where an executor improperly takes second mortgages and on foreclosure by a senior mortgagee is compelled to buy in the property he will be held personally liable for costs. Savage *v.* Gould, 60 How. Pr. (N. Y.)217.

Where defendant fails to plead no assets a judgment against him may, under certain circumstances, be levied *de bonis propriis.* Parker *v.* Stephens, 2 N. C. 218, 1 Am. Dec. 557.

59. Phipps *v.* Addison, 7 Blackf. (Ind.) 375; Priest *v.* Martin, 4 Blackf. (Ind.) 311; Sindle *v.* Kiersted, 3 N. J. L. 926; Quicksall *v.* Quicksall, 3 N. J. L. 457; Senescal *v.* Bolton, 7 N. M. 351, 34 Pac. 446; People *v.* Judges Erie County C. Pl., 4 Cow. (N. Y.) 445.

60. N. Y. Code Civ. Proc. §§ 1822, 1835, 1836.

61. Ohio Rev. St. § 6106.

62. N. C. Code, § 1429.

63. See *supra*, XIV, R, 1, a, (II), (B), (1).

64. O'Brien *v.* Jackson, 42 N. Y. App. Div. 171, 58 N. Y. Suppl. 1044; Smith *v.* Patten, 9 Abb. Pr. N. S. (N. Y.) 205.

65. Benedict *v.* Caffe, 3 Duer (N. Y.) 669; Mitchell *v.* Mount, 17 Abb. Pr. (N. Y.) 213; Tindal *v.* Jones, 11 Abb. Pr. (N. Y.) 258, 19 How. Pr. (N. Y.) 469; Lemen *v.* Wood, 16 How. Pr. (N. Y.) 285. *Contra*, McCann *v.* Bradley, 15 How. Pr. (N. Y.) 79.

66. Dunn *v.* Arkenburgh, 165 N. Y. 669, 59 N. E. 1122 [*affirming* 48 N. Y. App. Div. 518, 62 N. Y. Suppl. 861].

their liability and sufficient to stand the test of an appeal if one is taken.[67] The North Carolina statute has been held not to apply to a proceeding to subject a personal representative to liability for misapplication of the debts.[68]

(3) Grounds of Allowance — (a) In General. These statutes provide for only two grounds for awarding costs in the classes of actions mentioned,[69] and unless one of these grounds is fairly established costs cannot be awarded.[70] If, however, either ground is established, a case is made for the award of costs,[71] provided the steps made necessary by statute as a prerequisite to the allowance have been complied with, as for instance, presentation of the claim sued on in accordance with the statutory requirement,[72] or the giving of a certificate of facts by the judge or referee before whom the trial took place, which is necessary in actions brought in the supreme court.[73]

(b) Unreasonable Resistance of Claim. A personal representative cannot be said to have unreasonably resisted a claim within the meaning of the statutes merely because his defense failed,[74] nor because plaintiff recovers the full amount of his demand,[75] so he is not chargeable with an unreasonable resistance where he succeeds in obtaining a material reduction of the claim,[76] nor where his refusal

67. Benjamin *v.* Ver Nooy, 168 N. Y. 578, 61 N. E. 971 [*reversing* order in 36 N. Y. App. Div. 581, 55 N. Y. Suppl. 796].

68. Valentine *v.* Britton, 127 N. C. 57, 37 S. E. 74.

69. Bullock *v.* Bogardus, 1 Den. (N. Y.) 276.

70. Horton *v.* Brown, 29 Hun (N. Y.) 654; Belden *v.* Knowlton, 3 Sandf. (N. Y.) 758, Code Rep. N. S. (N. Y.) 127; Buckhout *v.* Hunt, 16 How. Pr. (N. Y.) 407; Snyder *v.* Young, 4 How. Pr. (N. Y.) 217; Bullock *v.* Bogardus, 1 Den. (N. Y.) 276; Winne *v.* Van Schaick, 9 Wend. (N. Y.) 448; Nicholson *v.* Showerman, 6 Wend. (N. Y.) 554; Morris *v.* Morris, 94 N. C. 613; May *v.* Darden, 83 N. C. 237.

71. Field *v.* Field, 77 N. Y. 294; Davis *v.* Gallagher, 37 N. Y. App. Div. 626, 55 N. Y. Suppl. 1060; Brinker *v.* Loomis, 43 Hun (N. Y.) 247; Snyder *v.* Snyder, 26 Hun (N. Y.) 324; Nellis *v.* Duesler, 18 N. Y. Suppl. 315; Gansevoort *v.* Nelson, 6 Hill (N. Y.) 389.

72. See *infra*, XIV, R, 1, a, (II), (B), (4), (a).

73. See *infra*, XIV, R, 1, a, (II), (B), (4), (b).

74. Nicholson *v.* Showerman, 6 Wend. (N. Y.) 554.

The justice of plaintiff's cause of action alone, unless the claim as presented gave a proper credit, would not make resistance to the payment of a balance demanded unreasonable. Overheiser *v.* Morehouse, 8 N. Y. Civ. Proc. 11.

75. Ehrenrei *v.* Lichtenberg, 29 Misc. (N. Y.) 305, 60 N. Y. Suppl. 513, in which it was said that a recovery of the full amount is not inconsistent with a reasonable and justified opposition. *Compare* Burns *v.* Fay, 14 Pick. (Mass.) 8 (holding that where the administrator of an insolvent estate gives notice of his dissatisfaction with the sum awarded to a creditor by the commissioners, and the creditor recovers a larger sum than was allowed by the commissioners, he is entitled to an execution for the costs of the action against an administrator *de bonis propriis*, but if the administrator had sufficient reasons for his appeal, the probate judge may allow the costs to be charged in the administration account); Darling *v.* Halsey, 2 Abb. N. Cas. (N. Y.) 105.

76. Johnson *v.* Myers, 103 N. Y. 666, 9 N. E. 55; Ryan *v.* McElroy, 15 N. Y. App. Div. 216, 44 N. Y. Suppl. 196; Anderson *v.* McCann, 14 N. Y. App. Div. 365, 43 N. Y. Suppl. 956; Davis *v.* Myers, 86 Hun (N. Y.) 236, 33 N. Y. Suppl. 352; Pursell *v.* Fry, 19 Hun (N. Y.) 595; Russell *v.* Lane, 1 Barb. (N. Y.) 519; Holcombe *v.* Nettleton, 41 Misc. (N. Y.) 504, 85 N. Y. Suppl. 12; Healy *v.* Murphy, 16 N. Y. Suppl. 541, 21 N. Y. Civ. Proc. 13; Bailey *v.* Schmidt, 5 N. Y. Suppl. 405; Overheiser *v.* Morehouse, 8 N. Y. Civ. Proc. 11; Daggett *v.* Mead, 11 Abb. N. Cas. (N. Y.) 116; Comstock *v.* Olmstead, 6 How. Pr. (N. Y.) 77; Robert *v.* Ditmas, 7 Wend. (N. Y.) 522.

What amounts to a material reduction.— It is a material reduction where a claim is reduced to one fifth of the amount demanded (Russell *v.* Lane, 1 Barb. (N. Y.) 519), or is reduced by one half (Anderson *v.* McCann, 14 N. Y. App. Div. 365, 43 N. Y. Suppl. 956), or where a claim amounting to sixteen hundred and twenty dollars was reduced by five hundred and twenty-five dollars (Ryan *v.* McElroy, 15 N. Y. App. Div. 216, 44 N. Y. Suppl. 196). On the other hand the reduction of a claim for one hundred and ninety-six dollars to one hundred and seventy-eight dollars is not a material reduction. Dukelow *v.* Searles, 20 N. Y. Suppl. 348. So it has been held that there is an unreasonable resistance where the claim is reduced, not by failure of plaintiff to prove the whole amount charged, nor by the establishment of an offset, but by a difference of opinion as to the value of the services resting upon a *quantum meruit*. Fort *v.* Gooding, 9 Barb. (N. Y.) 388.

Where a claimant consents to a material reduction at the trial it is error to tax costs against defendant. Healy *v.* Malcolm, 75

is based on the ground that he has no assets,[77] nor where it appears that the defense would probably have been successful, if at the trial defendant could have procured his witness,[78] nor where suit on a claim is commenced before the representative has a reasonable time to examine it,[79] nor where the credit was originally given and the amount charged to a third person, but it appeared on the hearing to be for the benefit of deceased,[80] nor where resistance is made under advice of counsel.[81] So it has been held that where before the expiration of the period allowed for the payment of debts suit is brought on a claim which he has promised to pay, the conclusion of unreasonable resistance is not warranted, merely because when sued after promise to pay he disputes his liability to the action in his representative capacity.[82] On the other hand he is guilty of an unreasonable resistance where the defense is instituted merely for the purpose of delaying payment rather than in the expectation of defeating a recovery,[83] or where the question of law involved was simple and had been held against him by an appellate court and the expenses of further litigation were likely to amount to considerably more than the claim itself.[84]

(4) Prerequisites to Allowance — (a) Presentation of Claim — aa. *In General.* Under the statutes under consideration costs cannot be recovered in a suit against the personal representative, unless the claim in suit is presented within the time prescribed by statute,[85] and it has been held that it must be presented in writing.[86] The fact that the payment of the claim had been unreasonably resisted does not alter the rule, as presentation within the time limited and unreasonable resistance of the claim must concur to authorize an allowance of costs.[87] To entitle a plaintiff to costs it must appear that the demand which had been presented for payment, or which plaintiff had offered to refer, were substantially the same as that upon which the recovery was had,[88] and if plaintiff serves a bill of particulars claiming other demands it seems that he would lose his costs.[89] So where the claim presented is based upon a special contract for work and labor and a recovery had for a considerably less sum on a *quantum meruit* plaintiff is not entitled to costs.[90] On the other hand the fact that the amount claimed in the account as presented was larger than the amount named in the complaint and much larger than that recovered will not prevent a recovery of costs where it is

N. Y. App. Div. 422, 78 N. Y. Suppl. 315.

Defeat of counter-claim.— Notwithstanding defendant obtains a material reduction, he will be chargeable with costs when he interposes a claim which is wholly defeated. Sutton *v.* Newton, 7 N. Y. Civ. Proc. 333.

77. Bullock *v.* Bogardus, 1 Den. (N. Y.) 276.

78. Stephenson *v.* Clark, 12 How. Pr. (N. Y.) 282.

79. Macy *v.* Williams, 55 Hun (N. Y.) 489, 8 N. Y. Suppl. 658; Buckhout *v.* Hunt, 16 How. Pr. (N. Y.) 407; Knapp *v.* Curtiss, 6 Hill (N. Y.) 386; May *v.* Darden, 83 N. C. 237.

80. Comstock *v.* Olmstead, 6 How. Pr. (N. Y.) 77.

81. Proude *v.* Whiton, 15 How. Pr. (N. Y.) 304. But see Curtis *v.* Poppino, 2 How. Pr. (N. Y.) 182.

82. Patterson *v.* Buchanan, 40 N. Y. App. Div. 493, 58 N. Y. Suppl. 179, 29 N. Y. Civ. Proc. 238.

83. Boyd *v.* Wilkin, 23 How. Pr. (N. Y.) 137.

84. Gross *v.* Moore, 14 N. Y. App. Div. 353, 43 N. Y. Suppl. 945.

85. Nichols *v.* Moloughney, 85 N. Y. App. Div. 1, 82 N. Y. Suppl. 949; Horton *v.* Brown, 29 Hun (N. Y.) 654; Keyser *v.* Kelly, 43 N. Y. Super. Ct. 22; Belden *v.* Knowlton, 3 Sandf. (N. Y.) 758, Code Rep. N. S. (N. Y.) 127; King *v.* Todd, 15 N. Y. Suppl. (N. Y.) 156; Clarkson *v.* Root, 18 Abb. N. Cas. (N. Y.) 462; Chesebro *v.* Hicks, 66 How. Pr. (N. Y.) 194; McCann *v.* Bradley, 15 How. Pr. (N. Y.) 79; Snyder *v.* Young, 4 How. Pr. (N. Y.) 217; Bullock *v.* Bogardus, 1 Den. (N. Y.) 276; Potter *v.* Etz, 5 Wend. (N. Y.) 74; Greene *v.* Day, 1 Dem. Surr. (N. Y.) 45; Beecher *v.* Duel, 14 N. Y. Wkly. Dig. 109; Roe *v.* Hunter, 8 Ohio S. & C. Pl. Dec. 423.

86. King *v.* Todd, 15 N. Y. Suppl. 156. And see Wells *v.* Disbrow, 20 N. Y. Suppl. 518.

87. Clarkson *v.* Root, 18 Abb. N. Cas. (N. Y.) 462.

88. Genet *v.* Binsse, 3 Daly (N. Y.) 239; Hartshorne *v.* King, 1 Den. (N. Y.) 674; Wallace *v.* Markham, 1 Den. (N. Y.) 671.

89. Hartshorne *v.* King, 1 Den. (N. Y.) 674.

90. Wallace *v.* Markham, 1 Den. (N. Y.) 671.

for the same services and disbursements and the representative is in no way misled or prejudiced by the amount.[91] And a creditor does not lose his right to costs by including in the declaration other claims than the one offered to be referred where no attempt was made to give evidence in regard to such other claims.[92] If the claimant has precluded himself from recovering costs against the administrator in an action on a claim he cannot recover costs against a defendant other than the personal representative who was surety for decedent on the claim sued on.[93]

bb. *Effect of Failure to Advertise to Present Claims.* The fact that executors or administrators have never advertised for the presentment of claims does not entitle a creditor to recover costs in a suit brought against them.[94] Conversely the fact that there has been no advertisement to present claims does not prevent an allowance of costs, if the claim has been duly presented and one of the grounds for allowance of costs provided by statute is shown.[95] Nor is it requisite that the claim be presented during the publication of the notice to creditors, because claims may be presented at any time after personal representatives qualify and enter upon their duties.[96]

(b) Certificate of Judge or Referee. Under statutes providing that where an action on a claim against a decedent's estate is brought in the supreme court, it is necessary to entitle claimant to costs for the judge or referee to certify that payment of the claim was unreasonably resisted or neglected, the allowance of costs to plaintiff without such certificate having been made is erroneous,[97] unless it is waived by stipulation.[98] A certificate by a referee that plaintiff is entitled to recover a sum "with the usual costs and disbursements" is not a sufficient certificate within the meaning of the statute.[99] The certificate, however, is required only for the recovery of costs and not of disbursements.[1]

(c) As Respects Time of Commencing Suit. If the claimant commenced his action before the expiration of the time allowed the representative by statute for filing his consent to refer the claim to the surrogate, he waives his right to costs.[2] After the action has been commenced the filing of the consent specified by the statute would be a useless formality.[3] On the other hand, if the claimant brings his action after the expiration of the statutory period for filing the consent, and he recovers judgment, he will be entitled to costs, although the action was commenced before the expiration of the statutory period within which he must have brought his action.[4]

91. Carter *v.* Beckwith, 104 N. Y. 236, 10 N. E. 350. And see Field *v.* Field, 77 N. Y. 294; Genet *v.* Binsse, 3 Daly (N. Y.) 239.

92. Hartshorne *v.* King, 1 Den. (N. Y.) 674.

93. Rhodes *v.* Doggett, 2 Ohio Dec. (Reprint) 451, 3 West. L. J. 134.

94. Snyder *v.* Young, 4 How. Pr. (N. Y.) 217; Bullock *v.* Bogardus, 1 Den. (N. Y.) 276 [*overruling* Harvey *v.* Skillman, 22 Wend. (N. Y.) 571; Knapp *v.* Curtiss, 6 Hill (N. Y.) 386].

Reasons for rule.— An executor is not bound to give this notice in any case, and does not violate his duty by its total omission. He may give notice for his own protection, or for the benefit of the estate he represents, but there is nothing in the statute which makes it compulsory on him to do so nor which subjects him to costs for failure to give the notice. Bullock *v.* Bogardus, 1 Den. (N. Y.) 270.

95. Brinker *v.* Loomis, 43 Hun (N. Y.) 247, 5 N. Y. St. 430. See also Clark *v.* Post, 45 Hun (N. Y.) 265.

96. Field *v.* Field, 77 N. Y. 294.

97. Matson *v.* Abbey, 141 N. Y. 179, 36 N. E. 11; Darde *v.* Conklin, 73 N. Y. App. Div. 590, 77 N. Y. Suppl. 39; Wray *v.* Halliday, 3 Month. L. Bul. (N. Y.) 98. And see German American Provision Co. *v.* Garrone, 73 N. Y. App. Div. 409, 77 N. Y. Suppl. 134.

Conclusiveness of certificate.— The certificate of the referee before whom the trial of a referee took place that before the action was commenced the executor refused to refer the claim is *prima facie* conclusive on the court. Ely *v.* Taylor, 42 Hun (N. Y.) 205.

98. Nellis *v.* Duesler, 18 N. Y. Suppl. 315.

99. Lounsbury *v.* Sherwood, 53 N. Y. App. Div. 318, 65 N. Y. Suppl. 676.

1. Lounsbury *v.* Sherwood, 53 N. Y. App. Div. 318, 65 N. Y. Suppl. 676.

2. Hart *v.* Hart, 45 N. Y. App. Div. 280, 61 N. Y. Suppl. 131; Hoye *v.* Flynn, 30 Misc. (N. Y.) 636, 64 N. Y. Suppl. 252.

3. Hart *v.* Hart, 45 N. Y. App. Div. 280, 61 N. Y. Suppl. 131.

4. De Kalb Ave. M. E. Church *v.* Kelk, 30 Misc. (N. Y.) 367, 62 N. Y. Suppl. 393.

(III) *Where Representatives Are Personally Interested in Litigation.* The mere fact that a representative is personally interested in a suit brought by him in his representative capacity will not render him personally liable for costs in case the suit is unsuccessful if the suit was one which it was his duty to bring in a representative capacity and he was not guilty of mismanagement or bad faith.[5] It has been held, however, that representatives contesting for their own interests the claims of heirs are bound in case of failure to pay the costs of the suit;[6] and where an executrix who is also a legatee appeals from a judgment in her individual capacity as legatee she cannot claim the benefit of a statute providing that costs shall only be taxed against an executor personally in case of mismanagement or bad faith.[7]

b. In Suits in Equity. In suits brought by or against personal representatives in a court of equity costs are always in the discretion of the court.[8] The general rule, however, is in equity as well as at law that personal representatives suing in their capacity as such are not responsible for costs.[9] Ordinarily if the representative is unsuccessful in a suit brought by him in good faith he is not personally liable for costs,[10] although the bill be dismissed upon the merits.[11] On the other hand he will be personally liable in case he brings a vexatious and groundless suit,[12] or where he sues wantonly or is guilty of some wilful default,[13] and is unsuccessful. So where an executor institutes proceedings to be relieved from the amount charged against him in his final accounting on his being refused relief, he is liable to pay costs, although he also asks incidentally for a construction of the will;[14] and where the bill is brought merely in defense of a suit at law, a representative will not in case of failure be excused from costs in the court of equity in a case where costs would be given against him in the action at law.[15] He should not be allowed costs in a cause instituted by him for the purpose of having the instructions of the court upon questions which with reasonable certainty may be solved by counsel nor where they are incurred by making unnecessary parties.[16] In suits brought against a personal representative in his capacity

5. Hone *v.* De Peyster, 106 N. Y. 645, 13 N. E. 778 [*reversing* 44 Hun 487]; Finley *v.* Jones, 6 Barb. (N. Y.) 229. But see Hunn *v.* Norton, Hopk. (N. Y.) 344; Dupont *v.* Johnson, Bailey Eq. (S. C.) 279.

6. Hurtzell *v.* Brown, 5 Binn. (Pa.) 138.

7. Roberts *v.* Lamberton, 117 Wis. 634, 94 N. W. 650. See also Gardner *v.* Gardner, 6 Paige (N. Y.) 455.

8. Daniels *v.* Eisenlord, 10 Mich. 454; Shepard *v.* McClain, 18 N. J. Eq. 128; Garr *v.* Bright, 1 Barb. Ch. (N. Y.) 157; Roosevelt *v.* Ellithorp, 10 Paige (N. Y.) 415; Getman *v.* Beardsley, 2 Johns. Ch. (N. Y.) 274. And see on the question of costs in suits in equity, COSTS, 11 Cyc. 32.

9. Gifford *v.* Thorn, 9 N. J. Eq. 702; Goodrich *v.* Pendleton, 3 Johns. Ch. (N. Y.) 520. And see cases cited in the following notes.

10. Peyton *v.* McDonell, 3 Dana (Ky.) 314; McCamman *v.* Worrall, 11 Paige (N. Y.) 99; Manny *v.* Phillips, 1 Paige (N. Y.) 472. And see Getman *v.* Beardsley, 2 Johns. Ch. (N. Y.) 274.

Illustration.— Thus a court of equity may refuse to allow costs against an executor who has prosecuted a claim resting upon securities found among the papers of his testator and apparently in full force, although the court decreed against him. Williams *v.* Mattock, 3 Vt. 189.

Where an executor has commenced a wrong suit by mistake or ascertained that it would be useless to proceed in consequence of facts subsequently discovered he will be permitted to discontinue without costs. Arnoux *v.* Steinbrenner, 1 Paige (N. Y.) 82.

On revival of bill.— Where an administrator revives a bill brought by his testator, costs should not be decreed against him individually if it be dismissed. Garner *v.* Strobe, 5 Litt. (Ky.) 314.

11. Roosevelt *v.* Ellithorp, 10 Paige (N. Y.) 415.

12. Shepherd *v.* McClain, 18 N. J. Eq. 128; Roosevelt *v.* Ellithorn, 10 Paige (N. Y.) 415; Getman *v.* Beardsley, 2 Johns. Ch. (N. Y.) 273; Isenhart *v.* Brown, 2 Edw. (N. Y.) 341; Wade *v.* Fisher, 10 Heisk. (Tenn.) 490.

Where a bill is filed which on its face is not sustainable and is brought against a stranger to the estate and not for the purpose of obtaining direction of the court as to the manner in which complainant should execute his trust or to settle conflicting claims, the general rules of the court as to costs in suits brought by other persons may be applied. Garr *v.* Bright, 1 Barb. Ch. (N. Y.) 157.

13. Peyton *v.* McDowell, 3 Dana (Ky.) 314.

14. Beatty *v.* Cory Universalist Soc., 39 N. J. Eq. 452.

15. Manny *v.* Phillis, 1 Paige (N. Y.) 472.

16. Colson *v.* Martin, 62 N. C. 125.

as such he is not personally liable for costs on failure of his defense, provided it was interposed in good faith,[17] but he will be personally liable where he has interposed a vexatious or groundless defense,[18] or through his neglect the estate has lost debts,[19] and an executor who makes costs by relying upon an unreasonable objection is personally chargeable therewith.[20] On settlement of an estate, executors should be charged individually with the costs of suit where they have permitted a great and unwarrantable delay in the final settlement of their accounts.[21]

2. Liability of Estate For Costs — a. In Actions at Law — (i) *Actions by Personal Representatives.* Where an action is brought by a personal representative necessarily in his representative capacity and is unsuccessful, judgment for costs must be rendered against him in his representative capacity to be satisfied out of the assets of the estate,[22] except where as already shown he has by his own acts made himself personally liable.[23]

17. Ball *v.* Townsend, Litt. Sel. Cas. (Ky.) 325; Moses *v.* Murgatroyd, 1 Johns. Ch. (N. Y.) 472; Davis *v.* Davis, 2 Hill (S. C.) 377.

On a bill for specific performance of a land contract by a decedent, his executors cannot be charged personally with the costs of such proceeding where they were not contumacious in hesitating to form the contract. Andrews *v.* Tower, 3 Phila. (Pa.) 111.

Descriptio personæ.— Where a note was executed to A, as administrator of R, and judgment was rendered on the note, which was enjoined at the cost of A, in his individual capacity, such provision as to costs was not erroneous, since the words, "as administrator of R," were mere *descriptio personæ.* Reid *v.* Watts, 4 J. J. Marsh. (Ky.) 440.

18. Lee *v.* Pindle, 12 Gill & J. (Md.) 288; Campau *v.* Campau, 25 Mich. 127.

19. Sorrel *v.* Procter, 4 Hen. & M. (Va.) 431.

20. Benick *v.* Bowman, 56 N. C. 314.

21. Egerton *v.* Egerton, 17 N. J. Eq. 419.

Where exceptions are sustained to the charges of executors administering a trust fund they may be held personally liable for the costs of litigating such exceptions. Brokaw *v.* Brokaw, 41 N. J. Eq. 304, 7 Atl. 414.

22. *Georgia.*— Clements *v.* Maloney, 17 Ga. 289.

Illinois.— Gibbons *v.* Johnson, 4 Ill. 61; Masters *v.* Masters, 13 Ill. App. 611.

Indiana.— Cooper *v.* Thatcher, 3 Blackf. 59.

Kentucky.— Corrico *v.* Lilly, 3 A. K. Marsh. 398; Beauchamp *v.* Davis, 3 Bibb 111.

Missouri.— Ross *v.* Alleman, 60 Mo. 269; State *v.* Maulsby, 53 Mo. 500; Ranney *v.* Thomas, 45 Mo. 111; Wooldridge *v.* Draper, 15 Mo. 470.

New Hampshire.— Pillsbury *v.* Hubbard, 10 N. H. 224.

New York.— Dodge *v.* Crandall, 30 N. Y. 294; Collins *v.* Hoxie, 9 Paige 81.

Pennsylvania.— Callander *v.* Keystone Mut. L. Ins. Co., 23 Pa. St. 471; Muntorf *v.* Muntorf, 2 Rawle 180; Jenkins *v.* Cutchens, 2 Miles 65; Myers *v.* Barton, 5 Pa. L. J. 142.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1950.

See, however, Hicks *v.* Barrett, 40 Ala. 291, holding that an action by an administrator, under Ala. Code, § 1938, to recover damages for an assault on his intestate, being not for the benefit of the estate but of the next of kin, a judgment for costs in favor of defendant cannot be levied on the estate, but the administrator is personally liable.

Where an administrator is removed for failure to file bond pending an action by him all costs accruing in the action before such removal must be taxed to the estate. Cuppy *v.* Coffman, 82 Iowa 214, 47 N. W. 1005.

If an administrator prosecutes a suit commenced by decedent and fails to support it, defendant will have costs against the estate. Brooks *v.* Stevens, 2 Pick. (Mass.) 68.

Where a suit commenced against decedent is continued by the court against his personal representatives, plaintiff is entitled to costs against the estate if the verdict be such that he would have recovered costs if defendant had not died. Benedict *v.* Caffe, 3 Duer (N. Y.) 669.

Defense of suit by heirs.— Where a judgment is rendered against an administrator in an action which was defended by the heirs upon his refusal to do so, and they were defeated the costs should be taxed against the heirs and not against the estate. Drummond *v.* Irish, 52 Iowa 41, 2 N. W. 622.

Where while living, the original defendant suffers default and interlocutory judgment, the estate should be charged with costs, on letting the administrators in to plead after his death. Lefevere *v.* Van Vechten, 3 How. Pr. (N. Y.) 201.

Presumption as to liability.— Costs awarded to a plaintiff in an action against an executor will be presumed to be payable out of the estate and not by the executor personally in the absence of proof. Berwick *v.* Halsey, 4 Redf. Surr. (N. Y.) 18.

Suit to recover legacy.— Where a suit to recover a legacy is rendered necessary by the ambiguity of the will the costs should be a general charge upon the whole estate and not upon the legacy. Sawyer *v.* Baldwin, 20 Pick. (Mass.) 378.

23. See *supra*, XIV, R, 1, a, (i), (A), (1), (b).

(II) *Actions Against Personal Representatives* — (A) *The General Rule.* The general rule is that where a personal representative is sued as such and makes an unsuccessful defense, the judgment for costs should be *de bonis testatoris.* He is liable for costs to the same extent that he is liable for the debt of the decedent, to be levied out of the assets in his hands.[24] In any event the assets in his hands are primarily liable for costs.[25]

(B) *Rule as Affected by Special Statutory Provisions* — (1) As to Time of Commencing Action. Under the statutes of some jurisdictions, a claimant who brings action within the time allowed for adjustment and settlement of claims is not entitled to costs, although successful in the action.[26]

(2) As to Amount of Recovery. In some jurisdictions the right to costs is in some cases affected by the amount of recovery. Under the statutes of one state, where suit is brought against a personal representative on an allowed claim, plaintiff is not entitled to costs if he recovers no more than the administrator was willing to allow.[27] In another, the holder of a disputed claim against an estate which has been rejected and referred pursuant to statute must recover more than a designated amount to be entitled to costs. If he recovers less, defendant is entitled to costs.[28] On the other hand, where personal representatives sue in the supreme court and recover less than the amount designated they are not entitled to costs.[29] A statute of another state which provides that plaintiff who recovers less than a designated amount in the circuit court shall be liable for costs does not apply to suits by an administrator who is by statute expressly empowered to sue for any sum in the circuit court.[30]

(3) As to Presentation of Claim. The statutes of some jurisdictions provide that one who successfully prosecutes a claim against an estate shall not recover costs unless he has presented his claim for allowance in accordance with the provisions of the statute,[31] and other statutes make him liable for costs in case of non-presentation.[32] These statutes have been held not to apply to actions against the personal representative when sued jointly with coöbligors of the deceased upon joint and several contracts;[33] nor to cases in which the statute of non-claim is immaterial and in which due presentment could not have avoided litigation.[34] If defendant intends to raise the question of presentation he must present it on the record by plea or suggestion so that plaintiff may have an opportunity of proving the presentation and the issue must be tried by the jury. If

24. *Illinois.*— McKay *v.* Riley, 135 Ill. 586, 26 N. E. 525; Burnap *v.* Dennis, 4 Ill. 478.

Indiana.— Mackey *v.* Ballou, 112 Ind. 198, 13 N. E. 715.

Kentucky.— Hughes *v.* Standeford, 3 Dana 285; Scroggin *v.* Scroggin, 1 J. J. Marsh. 362; Lot *v.* Parish, 1 Litt. 393.

Massachusetts.— Healy *v.* Root, 11 Pick. 389. *Compare* Burns *v.* Fay, 14 Pick. 8.

Ohio.— Farrier *v.* Cairns, 5 Ohio 45.

South Carolina.— Frink *v.* Luyten, 2 Bay 166, 1 Am. Dec. 638.

Virginia.— Greenlee *v.* Bailey, 9 Leigh 526.

See, however, *supra*, XIV, R, 1, a, (II), (A).

25. Phipps *v.* Addison, 7 Blackf. (Ind.) 375; Priest *v.* Martin, 4 Blackf. (Ind.) 311; Sindle *v.* Kiersted, 3 N. J. L. 926; Quicksall *v.* Quicksall, 3 N. J. L. 457; Senescal *v.* Bolton, 7 N. M. 351, 34 Pac. 446; People *v.* Judges Erie County C. Pl., 4 Cow. (N. Y.) 445.

26. Cooper *v.* Livingston, 19 Fla. 684; Freer *v.* Love, Wright (Ohio) 414; Kinney *v.* Lockwood, Wright (Ohio) 340. See also Butts *v.* Genung, 5 Paige (N. Y.) 254.

A plea of set-off is not an action within a statute providing that any person who brings an action against an executor within one year shall not recover costs. Pate *v.* Gray, 18 Fed. Cas. No. 10,794*a*, Hempst. 155.

27. Corbett *v.* Rice, 2 Nev. 330.

28. Lamphere *v.* Lamphere, 54 N. Y. App. Div. 17, 66 N. Y. Suppl. 270; Cuylers *v.* Kniffin, 2 Wend. (N. Y.) 243.

29. Mahany *v.* Fuller, 2 Johns. Cas. (N. Y.) 209.

30. Hillenberg *v.* Bennett, 88 Ind. 540; Wheeler *v.* Calvert, 25 Ind. 365.

31. See Rosenthal *v.* Magee, 41 Ill. 371; Granjang *v.* Markle, 22 Ill. 249; Lamson *v.* Vevay First Nat. Bank, 82 Ind. 21.

32. See Mitchell *v.* Lea, 57 Ala. 46.

Purpose of statutes.— The obvious design of the statutes is to prevent estates from being charged with costs on account of demands which would have been paid or arranged without such costs had they been presented to the personal representative of the decedents. Mitchell *v.* Lea, 57 Ala. 46.

33. Lamson *v.* Vevay First Nat. Bank, 82 Ind. 21.

34. Mitchell *v.* Lea, 57 Ala. 46.

no such plea or suggestion is made and plaintiff has a general verdict on the issue joined, he is entitled to full costs.[35] In order to recover costs it is not necessary for the declaration to allege a compliance with the statutory requirement as to presentation of the claims.[36]

b. In Suits in Equity. Except where the representative has by his acts made himself personally liable for costs it is apprehended that the liability of the estate for costs in suits brought by or against it is the same as that of any other suitor in a court of equity in which, notwithstanding the court's discretion in the matter of allowing costs, they are usually awarded to the successful party.[37]

3. When Personal Representative Entitled to Costs. Where the issue on the single plea of *plene administravit* is found for defendant, he is entitled to judgment for general costs in the case, notwithstanding judgment should be rendered in plaintiff's favor for his debt and costs to be levied of the goods of the estate *quando acciderint*.[38] So where the personal representative pleads the general issue and *plene administravit* and issues are joined on both pleas and judgment *quando acciderint* rendered he is entitled to the general costs of the suit.[39] It has also been held that where the representative pleads the general issue and *plene administravit* he will be entitled to costs on a judgment *quando* notwithstanding the plea of *plene administravit* is admitted,[40] but this has been denied in one case which holds that plaintiff is entitled to judgment for costs *de bonis propriis*,[41] and in another in which it is merely held that no costs should be adjudged defendant.[42] Executors who have no interest in the subject-matter

35. Wallace *v.* Nelson, 28 Ala. 282.

36. Granjang *v.* Markle, 22 Ill. 249.

37. See, generally, on this subject Costs, 11 Cyc. 32, 33, 34.

Groundless bills of discovery.— Where the answer to a bill of discovery filed by an executor shows that there was no fact within defendant's knowledge which could in any way aid the executor in his defense, costs are payable by the executor out of decedent's estate which has come into his hands. Williams *v.* Harden, 1 Barb. Ch. (N. Y.) 298; Boughton *v.* Philips, 6 Paige (N. Y.) 334.

In an action against heirs and administrators to compel specific execution of a contract of a decedent where the heirs declare their readiness to lay title and the administrators admit assets on decree for plaintiff the costs should be ordered paid by the administrators out of the assets. Tindall *v.* Mounger, 5 N. C. 290.

Suit for breach of trust.— Costs will not be awarded on a bill against executors of one who had purchased a bond and mortgage given for the purchase-money of a trust estate sold by the trustee pending a suit against him for breach of trust, it not appearing that testator had actual notice of the suit against the trustee. Murray *v.* Lylburn, 2 Johns. Ch. (N. Y.) 441.

Bills to set aside fraudulent conveyance of decedent.— On a bill by an administrator *de bonis non* of a husband against the executor of the wife to set aside conveyances made by the husband to the wife in fraud of his creditors on a decree in favor of plaintiff he is entitled to recover costs against the estate of the wife. Preston *v.* Cutter, 65 N. H. 85, 18 Atl. 92.

On a bill by a legatee where defendant submitted to and asked the direction of the court in a matter proper for it his costs were ordered to be paid out of the fund. Morrell *v.* Dickey, 1 Johns. Ch. (N. Y.) 153.

Taxation of costs to successful party.— Under a statute subjecting costs in chancery cases to the discretion of the court, except in a few cases it was proper in a suit brought in good faith to establish an equitable title in lands belonging to the estate of a deceased person to charge the estate with the taxable costs as part of the necessary expenses in the administration of the estate, although the relief prayed by the bill was denied. Van Wert *v.* Chidester, 31 Mich. 207.

38. Timberlake *v.* Benson, 2 Va. Cas. 348.

39. *Kentucky.*— Burns *v.* Burton, 1 A. K. Marsh. 349.

New York.— Osterhout *v.* Hardenbergh, 19 Johns. 266.

North Carolina.— Battle *v.* Rorke, 12 N. C. 228; Welborn *v.* Gordon, 5 N. C. 502.

Virginia.— Timberlake *v.* Benson, 2 Va. Cas. 348.

England.— Cockson *v.* Drinkwater, 3 Dougl. 239, 26 E. C. L. 163; Hogg *v.* Graham, 4 Taunt. 135.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1945.

But see Speer *v.* Van Houten, 19 N. J. L. 46; Hindsley *v.* Russell, 12 East 232, holding that if executors plead the general issue and also *plene administravit* and *plene administravit præter* plaintiff will be entitled to costs upon a judgment *quando* if the general issue is found in his favor.

40. Lewis *v.* Johnston, 69 N. C. 392.

41. Marshall *v.* Willder, 9 B. & C. 655, 7 L. J. K. B. O. S. 325, 4 M. & R. 607, 17 E. C. L. 294.

42. Timberlake *v.* Benson, 2 Va. Cas. 348.

Withdrawal of replication to plea of plene administravit.— Defendant may object to

of the litigation when made defendants are entitled to costs,[43] and where an executor is sued as trustee and defends on the ground that he was liable only as executor and that the probate court alone had jurisdiction and the court sustains the defense as to the greater part of the estate, it was held that he might be allowed a proportionate share of the expenses.[44] So it has been held that where an executor demands securities of decedent from a trustee and exhibits a certificate of the surrogate showing that he is executor and the trustee refuses to deliver them until an accounting in court, the executor on obtaining judgment against the trustee for the delivery of the securities is entitled to judgment for costs.[45]

4. Items Allowable. Where a disputed claim is referred and a report in claimant's favor confirmed, he is according to some decisions not entitled as matter of right to disbursements necessarily made by him, such as fees of referees, witnesses, etc., but they as well as the costs are to be awarded or withheld by the court in its discretion.[46] The weight of authority, however, is that he is entitled to his disbursements as a matter of right.[47] If a claim based on a note containing a promise to pay attorney's fees is put in suit against an estate the claimant if successful is entitled to an allowance of the attorney's fees provided for therein.[48] So it has been held that expenses and counsel fees reasonably incurred in litigation against the administrator which resulted in the recovery of a portion of the estate are a proper charge against it.[49] And attorney's fees are properly allowed to a widow in enforcing her claim against executors for an allowance under a will directing them to pay her an allowance to be determined by the court, in case of failure to agree on the amount.[50] Where costs have been properly awarded against an executor personally an extra allowance against him will be allowed[51] in extraordinary or difficult cases.[52] A motion for extra allowance will be premature when made before the right to recover the ordinary costs in the action had been determined.[53]

5. Security For Costs. A foreign administrator may be required to give security for costs,[54] and also a non-resident administrator,[55] although he brings suit as an administrator appointed within the jurisdiction.[56] Under the statutes of one jurisdiction, it is discretionary with the court in actions by or against personal representatives to require security for costs from plaintiff.[57] To authorize

plaintiff's withdrawal by consent of court of the replication to the plea of *plene administravit*, unless on terms of plaintiff's payment of the costs occasioned by such replication, but if he neglects so to do at the time of withdrawal it admits that he is not entitled to recover such costs and there can be no judgment at any future term for his separate costs on account thereof if the issue of non assumpsit is found against him. Timberlake *v.* Benson, 2 Va. Cas. 348.

43. Delafield *v.* Colden, 1 Paige (N. Y.) 139.

44. Clement's Appeal, 49 Conn. 519.

45. Farrington *v.* Farmers' L. & T. Co., 21 N. Y. Suppl. 194.

46. Bertholf *v.* Carr, 3 Silv. Supreme (N. Y.) 281, 6 N. Y. Suppl. 254, 17 N. Y. Civ. Proc. 213; Miller *v.* Miller, 32 Hun (N. Y.) 481; Daggett *v.* Mead, 11 Abb. N. Cas. (N. Y.) 116.

47. Krill *v.* Brownell, 10 N. Y. Civ. Proc. 8; Overheiser *v.* Morehouse, 8 N. Y. Civ. Proc. 11; Sutton *v.* Newton, 7 N. Y. Civ. Proc. 333; Hall *v.* Edmunds, 67 How. Pr. (N. Y.) 202.

48. Jewett *v.* Hurrie, 121 Ind. 404, 23 N. E. 262; Price *v.* Jones, 105 Ind. 543, 5 N. E. 683, 55 Am. Rep. 230; Hanna *v.* Fisher, 95 Ind. 383; Bond *v.* Osndorf, 77 Ind. 583.

49. *In re* Simons, 55 Conn. 239, 11 Atl. 36.

50. McLean *v.* Thomas, 159 Ill. 227, 42 N. E. 798 [*affirming* 52 Ill. App. 161].

51. Niblo *v.* Binsse, 31 How. Pr. (N. Y.) 476.

52. Weeks *v.* Coe, 76 N. Y. App. Div. 310, 78 N. Y. Suppl. 477.

53. Mersereau *v.* Ryerss, 12 How. Pr. (N. Y.) 300.

54. Tucker *v.* West, 31 Ark. 643; Podmore *v.* Seaman's Bank, 28 Misc. (N. Y.) 488, 59 N. Y. Suppl. 629.

55. Davis *v.* You, 43 Ala. 691; Chevalier *v.* Finnis, 1 B. & B. 277, 5 E. C. L. 633.

56. Davis *v.* You, 43 Ala. 691.

57. Johnson *v.* Syracuse, etc., R. Co., 92 N. Y. 353; Caccavo *v.* Rome, etc., R. Co., 59 N. Y. Super. Ct. 129, 13 N. Y. Suppl. 884.

Appointment procured in bad faith.— Security may be required where at the time of the appointment the fact that another administrator had been previously appointed was concealed from the court and the estate was insolvent and success of the suit doubtful. Pfeifer *v.* Supreme Lodge Bohemian-

an order requiring security to be given, it is not necessary that there should be evidence of bad faith.[58] It is sufficient that the court considers it proper to require security.[59] Security may be required at any time during the pendency of the suit either before trial or judgment or pending an appeal;[60] and the court may require security for costs already accrued or entered on the judgment appealed from as well as for those that shall thereafter accrue or limit the requisition to the costs which shall accrue in the future.[61] Statutes requiring security from a foreign administrator bringing suit have no application to one who is sued and chooses to defend.[62] The statutes do not apply to actions originally brought by deceased and revived in favor of his personal representative.[63]

6. Suits In Forma Pauperis. The privilege conferred by statutes allowing suits to be brought in *forma pauperis* is a personal one and an administrator cannot so sue on account of the insolvency of the estate;[64] much less can he do so where he would be the sole beneficiary of any recovery.[65]

7. Award of Costs. Under the statutes of New York a defendant in a suit brought by an executor or administrator is entitled to costs without a motion where a successful defense is interposed;[66] but, where actions are brought against an executor or administrator and a judgment obtained, no costs can be recovered unless the court in the exercise of its powers upon motion adjudge that it is a case in which costs should be paid by the estate or its representatives.[67] So in actions prosecuted or defended by an executor or administrator a referee to whom the whole issue or cause is referred has not the right to decide the question of costs or the power to award costs against the executor or administrator personally or against the estate he represents. Such costs can only be allowed by the court upon application therefor,[68] and they can only be allowed by the court on application after trial.[69] It has also been held that the personal liability of an executor for the costs of an appeal in an action originally begun by the testator is not a matter for adjustment on the judicial accounting before the surrogate but must be determined by the court having original jurisdiction of the cause.[70] Under a statute providing for the appointment of an attorney to defend an action on a claim presented against an estate by the personal representative and that if plaintiff recover no judgment he shall pay all costs including reasonable attorney's fees to be fixed by the court, a charge for services rendered by an attorney so appointed for services in the successful defense of such an action is not a part of the bill of costs

Slavonian Benev. Soc., 54 N. Y. App. Div. 200, 66 N. Y. Suppl. 604.

58. Tolman *v.* Syracuse, etc., R. Co., 92 N. Y. 353; Pfeifer *v.* Supreme Lodge Bohemian-Slavonian Benev. Soc., 54 N. Y. App. Div. 200, 66 N. Y. Suppl. 604.

59. Pfeifer *v.* Supreme Lodge Bohemian-Slavonian Benev. Soc., 54 N. Y. App. Div. 200, 66 N. Y. Suppl. 604.

Insolvency.— An administrator prosecuting an action in good faith and with reasonable prospect of success will not be required to give security on the ground that the estate is without assets. Podmore *v.* South Brooklyn Sav. Inst., 27 Misc. (N. Y.) 120, 57 N. Y. Suppl. 406.

60. Gedney *v.* Purdy, 47 N. Y. 676; Knoch *v.* Funke, 19 N. Y. Suppl. 242, 22 N. Y. Civ. Proc. 161.

61. Gedney *v.* Purdy, 47 N. Y. 676.

62. Moss *v.* Rowland, 3 Bush (Ky.) 505.

63. Sullivan *v.* Remington Sewing Mach. Co., 27 Hun (N. Y.) 270.

64. McCoy *v.* Broderick, 3 Sneed (Tenn.) 203.

65. Barbee *v.* Frazier, 9 Lea (Tenn.) 348.

66. Howe *v.* Lloyd, 2 Lans. (N. Y.) 335; Woodbury *v.* Cook, 14 How. Pr. (N. Y.) 481.

67. Howe *v.* Lloyd, 2 Lans. (N. Y.) 335; Ely *v.* Taylor, 42 Hun (N. Y.) 205; Fox *v.* Fox, 22 How. Pr. (N. Y.) 453; Weeks *v.* Wanamaker, 2 How. Pr. (N. Y.) 15; Knapp *v.* Curtiss, 6 Hill (N. Y.) 386.

68. Bailey *v.* Bergen, 5 Hun (N. Y.) 555; Smith *v.* Randall, 67 Barb. (N. Y.) 377; Morgan *v.* Skidmore, 3 Abb. N. Cas. (N. Y.) 92; Mersereau *v.* Ryerss, 12 How. Pr. (N. Y.) 300.

69. Bailey *v.* Bergen, 5 Hun (N. Y.) 555.

Allowance nunc pro tunc.— Although it is irregular to enter judgment for costs against executors upon the report of a referee, without obtaining special leave of court, the judge before whom a motion to strike the costs from the judgment and a cross motion for an extra allowance of costs are made has power to have his order giving costs and the allowance entered *nunc pro tunc*. Niblo *v.* Binsse, 47 Barb. (N. Y.) 435.

70. Harrington *v.* Strong, 49 N. Y. App. Div. 39, 63 N. Y. Suppl. 257.

and the fee therefor is to be fixed by the court.[71] So the allowance of the fee can only be made after termination of the action.[72]

8. JUDGMENT. Where the verdict is against a defendant as administrator judgment for costs must be entered against him in the same character,[73] but notwithstanding the fact that a judgment is erroneously rendered against an administrator for costs individually it is nevertheless effective until corrected on motion or on review or on appeal.[74] There is some diversity of holding as to the proper form of judgment to charge the estate, or the personal representative individually, for costs, and this is due in some degree to a difference in the wording of the statutes relating to costs. Under the statutes of some jurisdictions it is held that, in order to charge the estate with costs, the judgment must contain an express direction that the costs shall be payable out of the estate.[75] Under the statutes of other jurisdictions, where the court orders a judgment to be entered against an executor or administrator for costs without any special instructions, it means that the judgment shall be only *de bonis testatoris*; or in other words, that there must be an express direction in the judgment to charge the personal representative individually for costs.[76] In another jurisdiction the judgment in order to charge the estate with costs must contain a formal direction for the payment of costs out of the estate,[77] and on the other hand if it is sought to charge the administrator personally the judgment must expressly direct the costs to be paid by him personally for mismanagement or bad faith in the action.[78] Where by statute the personal representative is always individually liable for costs, a judgment against a designated person "as administrator," etc., is against him personally for costs.[79] A judgment for costs against the estate should not contain a direction that execution issue for the same, as execution can only issue when allowed by the probate court.[80]

9. EXECUTION. Where a judgment is rendered against a personal representative in his capacity as such for costs, execution cannot issue thereon but the costs should be certified to the probate court for allowance and payment in due course of administration.[81] If a judgment is against the personal representative for costs in his individual capacity, it is a money judgment and therefore enforceable only by execution.[82] On a judgment of this character the property of an heir received from the estate is not liable to execution.[83] By the express provisions of the statutes in some jurisdictions where judgment is rendered against an executor for debt, or damages and costs, two separate executions issue; one for the debt or damages against the goods and estate of deceased and the other for the costs

71. Painter *v.* Painter, 78 Cal. 625, 21 Pac. 433.

72. Painter *v.* Painter, 78 Cal. 625, 21 Pac. 433.

73. Clements *v.* Maloney, 17 Ga. 289.

74. State *v.* Ritter, 20 Ind. 406.

Correction by reviewing court.— Where a judgment is erroneous in form as being against the administrator personally instead of in his representative capacity, it may be corrected in the reviewing court and the proper judgment rendered there. Masters *v.* Masters, 13 Ill. App. 611.

75. Stevens *v.* San Francisco, etc., R. Co., 103 Cal. 252, 37 Pac. 146; McCarthy *v.* Speed, 16 S. D. 584, 94 N. W. 411. *Compare* Reay *v.* Butler, 99 Cal. 477, 33 Pac. 1134.

76. Scroggin *v.* Scroggin, 1 J. J. Marsh. (Ky.) 362; Hone *v.* De Peyster, 106 N. Y. 645, 13 N. E. 778 [*reversing* 44 Hun 487]; Dodge *v.* Crandall, 30 N. Y. 294; Callender *v.* Keystone Mut. L. Ins. Co., 23 Pa. St. 471.

77. Wiesmann *v.* Brighton, 83 Wis. 550, 53 N. W. 911; Ladd *v.* Anderson, 58 Wis. 591, 17 N. W. 320; Hei *v.* Heller, 53 Wis. 415, 10 N. W. 620. And see Lightfoot *v.* Cole, 1 Wis. 26.

78. Wiesmann *v.* Brighton, 83 Wis. 550, 53 N. W. 911; Ladd *v.* Anderson, 58 Wis. 591, 17 N. W. 320.

79. Lough *v.* Flaherty, 29 Minn. 295, 13 N. W. 131.

80. Syms *v.* New York, 105 N. Y. 153, 11 N. E. 369 [*affirming* 50 N. Y. Super. Ct. 289].

81. Dye *v.* Noel, 85 Ill. 290; Peck *v.* Stevens, 10 Ill. 127; Welch *v.* Welch, 8 Ill. 490; Burnep *v.* Dennis, 4 Ill. 478; Syms *v.* New York, 105 N. Y. 153, 11 N. E. 369 [*affirming* 50 N. Y. Super. Ct. 289]; Matter of Boyle, 9 N. Y. Suppl. 473, 2 Connoly Surr. (N. Y.) 57; Davis *v.* Thomas, 5 Tex. 389; Schmidt *v.* Huff, 7 Tex. Civ. App. 593, 28 S. W. 1053.

82. Matter of Feehan, 36 Misc. (N. Y.) 614, 73 N. Y. Suppl. 1126.

83. Daniels *v.* Hollingshead, 16 Ga. 190.

against the goods, estate, and body of the executor.[84] These statutes do not give the creditor a cumulative remedy in respect of costs but deprive him of his right to have an execution for costs against the goods and estate of deceased.[85] It has been held that an execution for costs issued against a personal representative warrants his arrest without affidavit or special instruction to the officer.[86]

S. Liabilities For Conduct of Action or Defense. The heirs and creditors of an estate are generally bound, in the absence of collusion or fraud, as far as third parties are concerned, by the acts of the personal representative in prosecuting or defending a suit concerning the estate,[87] although the representative may also be personally liable for damages caused by his wrongful acts, in course of the proceedings,[88] unless it appears that he was disinterested and acted in good faith for the interests of the estate.[89] As between such heirs and creditors and the representative the latter is bound to act with diligence, prudence, and good faith, and unless he does so he may render himself personally liable for any loss occasioned by his negligence or bad faith in prosecuting[90] or defending[91] proceedings

84. Ticonic Nat. Bank *v.* Turner, 96 Me. 380, 52 Atl. 793; Greenwood *v.* McGilvray, 120 Mass. 516.

Effect of insolvency of estate.— The right to an execution against an executor for costs under the statutes mentioned is not affected by a statute providing that when judgment has been rendered against the estate of a deceased person which has been represented as insolvent no execution shall be issued thereon. Perkins *v.* Fellows, 136 Mass. 294.

85. Ticonic Nat. Bank *v.* Turner, 96 Me. 380, 52 Atl. 793.

Where an execution issued for both debt and costs against the goods, and estate of decedent is satisfied by levying the same on the lands of the testator, such levy is bad, as the costs are collectable only against the executor. Ticonic Nat. Bank *v.* Turner, 96 Me. 380, 52 Atl. 793.

86. Gibbs *v.* Taylor, 143 Mass. 187, 9 N. E. 576.

87. Pauline *v.* Hubert, 14 La. Ann. 161; Matthews *v.* Joyce, 85 N. C. 258, holding that a party cannot be deprived of the fruits of an adjudication, because of the failure of an administrator to set up an available defense, unless such failure was the result of collusion with such party.

88. Schneider *v.* Hesse, 9 Ky. L. Rep. 242, holding that an administrator, plaintiff in an execution, is personally liable for procuring the sale of the property of another than the execution defendant.

89. Berens *v.* Boutte, 31 La. Ann. 112.

Wrongful injunction.— A succession should not be condemned in damages for an abuse by the administrator of the process of injunction; and the administrator, personally liable for his wrongful act, cannot be condemned personally in a proceeding in which he is a party only in his representative capacity. Lamorere *v.* Cox, 32 La. Ann. 246; Berens *v.* Boutte, 31 La. Ann. 112.

90. *Iowa.*— Meyeringh *v.* Wendt, 86 Iowa 465, 53 N. W. 414.

Kentucky.— Russell *v.* Russell, 4 Dana 40.

Ohio.— Chatfield *v.* Swing, 6 Ohio Dec. (Reprint) 666, 7 Am. L. Rec. 326.

South Carolina.— Hudgens *v.* Sullivan, 34 S. C. 99, 12 S. E. 934.

United States.— Pickett *v.* Foster, 36 Fed. 514 [*affirmed* in 149 U. S. 505, 13 S. Ct. 998, 37 L. ed. 829].

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1968, 1969.

Bail-bond.— An administrator is not responsible for the sufficiency of a bail-bond taken by a sheriff in a case where he is plaintiff, even though he expressly accepted such bond. Charleton *v.* Sloan, 64 N. C. 702.

A suit instituted by a public administrator without authority does not charge his successor in office with any official duties in relation to it, and the latter's having the suit called out and dismissed, or his failure to prosecute it, does not make him liable to the heirs. Pickett *v.* Foster, 36 Fed. 514 [*affirmed* in 149 U. S. 505, 13 S. Ct. 998, 37 L. ed. 829].

91. *Alabama.*— Teague *v.* Corbitt, 57 Ala. 529; Pearson *v.* Darrington, 32 Ala. 227.

Georgia.— Skrine *v.* Simmons, 11 Ga. 401; Bomgaux *v.* Bevan, Dudley 110.

Kentucky.— Macey *v.* Fenwick, 4 B. Mon. 306; Hutchcraft *v.* Tilford, 5 Dana 353.

Maryland.— State *v.* Greenwell, 4 Gill & J. 407.

Massachusetts.— Brazier *v.* Clark, 5 Pick. 96, holding, however, that where an action by a legatee is defended by the executor by direction of the heirs and other legatees, such executor cannot be held liable for waste by reason of the defense thereby incurred, although plaintiff was successful.

North Carolina.— If counter-claims were set up in an action by an administrator against the lessors for the amount due from them for the purchase of the unexpired term, and were resisted by the administrator in good faith, and a judgment was rendered against the administrator allowing such claims, he will be exonerated; and it is not necessary, to entitle him to such exoneration, that he shall have taken an appeal. Pate *v.* Oliver, 104 N. C. 458, 10 S. E. 709.

by or against him in his representative capacity, or in intervening in suits instituted between other parties.[92] Thus the representative may be personally liable for a loss occasioned by his failure to record a judgment recovered by him[93] or to issue execution thereon.[94] But if he acts honestly and diligently he is not liable for failure to maintain an unjust[95] or useless suit;[96] or for a failure to insist on mere technicalities,[97] as for failing to plead in abatement,[98] or for omitting to appeal.[99]

T. Actions or Suits Between Personal Representatives.[1] The general rule is well settled that one personal representative cannot maintain an action at law against another personal representative.[2] There are, however, some exceptions and limitations to this rule. Thus it has been held that an executor may maintain an action at law against his joint executor on an express promise,[3] and

South Carolina.— Warley *v.* Warley, Bailey Eq. 397.

Tennessee.— Gorman *v.* Swaggerty, 4 Sneed 560.

Virginia.— See Boyd *v.* Boyd, 3 Gratt. 113.

Canada.— Hutchinson *v.* Edmison, 11 Grant Ch. (U. C.) 477.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1968, 1969.

It is the representative's duty, when sued by a creditor, so to plead as to protect the rights of all the creditors of the estate, according to their priorities, of whose demands he has notice, and if he fails to do so he becomes personally chargeable. Davis *v.* Smith, 5 Ga. 274, 47 Am. Dec. 279.

After judgment against an administrator for payment out of specified assets, any other application of them will render him liable for waste. Davies *v.* Flewellen, 29 Ga. 49.

Failure to plead an outstanding covenant of warranty made by his decedent does not render him personally liable, if at the time of the rendition of the judgment there was no breach of the covenant. Davis *v.* Smith, 5 Ga. 274, 47 Am. Dec. 279.

Statute of frauds.— Where the creditors of a decedent have, by promise of the administrator, been induced to defer bringing actions against the estate, and have finally brought personal actions against the administrator on such promises, he cannot be required to set up thereon the defense of the statute of frauds for the benefit of the next of kin of the intestate. Ames *v.* Jackson, 115 Mass. 508.

92. Bettis *v.* Taylor, 8 Port. (Ala.) 564, holding that an administrator who as such interposes a claim to property levied on by execution will be liable individually for the forthcoming of the property, even if destroyed after the claim is interposed and the property goes into his possession.

Failure to intervene.— An administrator who is aware, or, by the exercise of prudence, should be aware, of the pendency of proceedings for the sale of lands in which his intestate had an interest, is liable on his bond for his failure to intervene therein, so that the proceeds of such interest may come to his hands for the payment of the debts of the estate. Borders *v.* People, 31 Ill. App. 483.

93. Glover's Succession, 2 La. Ann. 4.

94. Glover's Succession, 2 La. Ann. 4.

95. McGuire *v.* Rogers, 74 Md. 192, 21 Atl. 723.

96. Banta *v.* Marcellus, 2 Barb. (N. Y.) 373.

97. McGuire *v.* Rogers, 74 Md. 192, 21 Atl. 723.

98. McDowall *v.* McDowall, Bailey Eq. (S. C.) 324.

99. McDowall *v.* McDowall, Bailey Eq. (S. C.) 324.

1. For jurisdiction in suits between personal representatives see *supra*, XIV, E, 1, k.

2. *Kansas.*— Taylor *v.* Minton, 45 Kan. 17, 25 Pac. 222.

Missouri.— Martin *v.* Martin, 13 Mo. 36.

New Jersey.— Cole *v.* Wooden, 18 N. J. L. 15; Ransom *v.* Geer, 30 N. J. Eq. 249; Ely *v.* Ely, (Ch. 1901) 50 Atl. 657.

New York.— Rogers *v.* Rogers, 75 Hun 133, 27 N. Y. Suppl. 276; Smith *v.* Lawrence, 11 Paige 206.

Pennsylvania.— Simon *v.* Albright, 12 Serg. & R. 429. But see Pringle *v.* Pringle, 130 Pa. St. 565, 18 Atl. 1024, holding that under the system which obtains in Pennsylvania of administering equitable principles in common-law forms of procedure, an executor who has received no part of the assets may sustain as an individual an action at law in the court of common pleas against a co-executor who has received all the assets, to charge the estate with a debt due to plaintiff from the testator.

Virginia.— Rodes *v.* Rodes, 24 Gratt. 256.

United States.— Ransom *v.* Geer, 12 Fed. 607, 20 Blatchf. 535.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1662.

Reason for rule.— Each has the same right to the possession of the fund which belongs to both as the representatives of the estate of which they are joint trustees (Taylor *v.* Minton, 45 Kan. 17, 25 Pac. 222; Rogers *v.* Rogers, 75 Hun (N. Y.) 133, 27 N. Y. Suppl. 276; Smith *v.* Lawrence, 11 Paige (N. Y.) 206); and the effect of a common-law judgment in favor of one against the other would be to give to the former the right to issue an execution and transfer the whole fund to his own exclusive possession (Smith *v.* Lawrence, *supra*).

3. Phillips *v.* Phillips, 1 Stew. (Ala.) 71. See also Cocker *v.* Cocker, 2 Mo. App. 451.

that an action may be maintained by an executor against one who has renounced,[4] or who does not accept the trust,[5] or who has been removed as executor.[6] So in jurisdictions which have no courts of chancery, it seems that an administrator who has made a final settlement of the estate and paid the balance due from him to the persons entitled to receive it may bring an action against the estate of his co administratrix who was also an heir for the amount received by her beyond her share; he cannot, however, maintain such action before a final settlement of the administration account and while a portion of the estate remains in his hands.[7] In equity the same considerations as govern in courts of law do not apply, consequently one personal representative may maintain a bill in equity to compel payment of a debt due from defendant to the estate.[8] So it has been held that equity has jurisdiction of a suit by an executor against his co-executor on a bill for services rendered the testator.[9] And if one of several executors has been guilty of fraudulent misconduct in his dealings with the estate, his co-executors may maintain a suit against him for an accounting.[10] A bill in equity may also be maintained for an account between the executors or administrators of different estates.[11] Where a surviving partner and another are appointed administrators of the deceased partner's estate, a bill does not lie by the surviving partner against his co-administrator for a settlement of the affairs of the firm. This amounts to taking a position on both sides of the case.[12]

Where administrator charged with amount of note sued on.— Where one of two administrators who have given a joint bond takes on himself the sole administration of the estate and on final settlement is charged in cash with the amount of a note taken from his co-administrator and others payable to both as administrators and of the decrees rendered on such settlement, some remained unpaid, the sole equitable title to the note vests in the administrator to which it has been charged and he can maintain an action thereon. Waldrop *v.* Pearson, 42 Ala. 636.

4. Rawlinson *v.* Shaw, 3 T. R. 557.

5. Hunter *v.* Hunter, 19 Barb. (N. Y.) 631.

6. Hendricks *v.* Thornton, 45 Ala. 299, in which it was said that the reason for the rule ceases on removal of the executor. And see Guibert *v.* Saunders, 10 N. Y. St. 43, holding that after the settlement of the accounts, an executor, as heir at law or next of kin, may maintain an action against the co-executor for the property belonging to the testator which has not been taken into the account before the surrogate.

7. Steinman *v.* Saunderson, 14 Serg. & R. (Pa.) 357.

8. Petty *v.* Young, 43 N. J. Eq. 654, 9 Atl. 377, 12 Atl. 392; Ransom *v.* Geer, 30 N. J. Eq. 249; Marsh *v.* Oliver, 14 N. J. Eq. 259; McGregor *v.* McGregor, 35 N. Y. 218; Rogers *v.* Rogers, 75 Hun (N. Y.) 133, 27 N. Y. Suppl. 276; Wurts *v.* Jenkins, 11 Barb. (N. Y.) 546; Decker *v.* Miller, 2 Paige (N. Y.) 149; Peake *v.* Ledger, 8 Hare 313, 32 Eng. Ch. 313. See also Rodes *v.* Rodes, 24 Gratt. (Va.) 256. But see Beall *v.* Hilliary, 1 Md. 186, 54 Am. Dec. 649, which seems to be in direct conflict with the rule stated in the text. *Compare* Rogers *v.* Moore, 1 Root (Conn.) 472 (in which it was said that a court of chancery will not interpose between executors unless it appears to be absolutely necessary for the purpose of justice); Bellamy *v.* Hawkins, 16 Fla. 733 (holding that on a bill filed by an executor against a co-executor to recover a *pro rata* share of compensation and commissions allowed by the order of the probate court and paid to and retained by the co-executor who refuses to pay over the share claimed by the complainant, the remedy at law is plain and adequate; that no discovery is necessary and chancery has no jurisdiction).

Reason for rule.— A court of equity, from its peculiar mode of administering justice, can settle the questions as to the fact of indebtedness and as to the amount due from one of the executors to the estate of which both are trustees whenever the decision of those questions becomes necessary without changing the possession of the fund. And when the amount of such indebtedness is ascertained the court may make such disposition of the fund as justice and equity shall then require. Smith *v.* Lawrence, 11 Paige (N. Y.) 206.

An action to foreclose a mortgage against one who on the death of plaintiff pending the action qualifies as his executor may be revived and continued by the co-executor. McGregor *v.* McGregor, 35 N. Y. 218.

Where executors are directed to pay money into the estate and to pay a legacy to a co-executor, but they failed to pay such money, such co-executor may sue in a court of equity in his individual right against the executors individually. Evans *v.* Evans, 23 N. J. Eq. 71.

9. Ely *v.* Ely, 64 N. J. Eq. 790, 53 Atl. 1125, (Ch. 1901) 50 Atl. 657.

10. Wood *v.* Brown, 34 N. Y. 337; Price *v.* Brown, 60 How. Pr. (N. Y.) 511.

11. Stiver *v.* Stiver, 8 Ohio 217.

12. Smith *v.* Bryson, 62 N. C. 267, 93 Am. Dec. 610.

XV. ACCOUNTING AND SETTLEMENT.[1]

A. Duty to Account — 1. In General. An executor or administrator is bound to keep clear, distinct, and accurate accounts of his management of the estate, like any trustee, which accounts ought in some way to be open to the inspection of persons interested in the estate.[2] Upon the analogies of trusteeship, English courts of equity long exercised a jurisdiction in such matters; and hence, both in England and some of the older American states, creditors' bills have been entertained by way of bills of discovery against the personal representative, forcing him to set forth an account of the assets and the manner in which he has applied them.[3] But under modern statutes jurisdiction of such accounts is usually vested in courts of probate, and such probate jurisdiction includes, under appropriate legislation, the compulsion of a regular accounting by the executor or administrator of an estate.[4] Where no assets or personal property

1. **Account defined.**— An account of a personal representative is a brief statement of the conduct of the administration in the form of debit and credit, with receipts and disbursements itemized. See *infra*, XV, F, 1, a; and ACCOUNTS AND ACCOUNTING, 1 Cyc. 362.

Distinction between final and partial accounts see Burgwyn *v.* Daniel, 115 N. C. 115, 20 S. E. 462; Hubley's Appeal, 19 Pa. St. 138; Chambers' Appeal, 11 Pa. St. 436.

Settlement defined.— The term "settlement," strictly speaking, means the adjustment of the claims and demands in favor of and against the estate of the decedent and does not include the distribution of the estate. Allen *v.* Dean, 148 Mass. 594, 20 N. E. 314; *In re* Batchelor, 119 Mich. 239, 77 N. W. 941; Calkins *v.* Smith, 41 Mich. 409, 1 N. W. 1048; *In re* Creighton, 12 Nebr. 280, 11 N. W. 313. *Compare* Mathews' Appeal, 72 Conn. 555, 45 Atl. 170.

A final settlement is a proceeding in which the amount of the residue subject to distribution is judicially determined and established by an order or decree of the court, but not the rights or shares of those who are entitled to the same. Granger *v.* Bassett, 98 Mass. 462. See also Johnson *v.* Richards, 3 Hun (N. Y.) 454, 5 Thomps. & C. (N. Y.) 654. *Compare* Ashley *v.* Ashley, 15 Ala. 15, 17, in which it is said: "The material requisites therefore, of a final settlement are, first, that there be parties to it, whose rights are bound thereby; secondly, that those rights should be judicially ascertained, and established by the judgment of the court."

Necessity of order or decree.— See Picot *v.* Bates, 39 Mo. 292, 302.

Insufficiency of order.— See Steen *v.* Steen, 25 Miss. 513. *Compare* Fort *v.* Battle, 13 Sm. & M. (Miss.) 133.

2. *In re* Higgins, 15 Mont. 474, 39 Pac. 550, 28 L. R. A. 116; Houser's Estate, 177 Pa. St. 441, 35 Atl. 671; Freeman *v.* Fairlie, 3 Meriv. 24, 17 Rev. Rep. 7, 36 Eng. Reprint 10. See also Schouler Ex. § 518.

Even though a decedent's estate is not in a position to be finally settled, the creditors and other interested persons have a right to know the situation of the property, and to be informed thereof by accounts to be filed by the administrator. Witman's Estate, 2 Woodw. (Pa.) 350. See also Rhett *v.* Mason, 18 Gratt. (Va.) 541.

3. Schouler Ex. §§ 518–520. See *infra*, XV, B, 6, b.

Existence of debt necessary.— Brooks *v.* Headen, 88 N. C. 449.

4. *Alabama.*— Vincent *v.* Daniel, 59 Ala. 602.

Louisiana.— Baumgarden's Succession, 36 La. Ann. 46.

Maryland.—See Cummings *v.* Robinson, 95 Md. 759, 53 Atl. 795.

New Jersey.—Duncan *v.* Barnes, 20 N. J. L. 75, holding that a personal representative may be cited to account notwithstanding he has declared the estate of his decedent insolvent.

New York.— Matter of Wade, 38 Misc. 154, 77 N. Y. Suppl. 163.

Pennsylvania.—Berry's Estate, 8 Pa. Dist. 50.

South Carolina.— Koon *v.* Munro, 11 S. C. 139.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1971; *infra*, XV, B, 2; and Schouler Ex. § 520.

Where there are no creditors and the sole legatee is also executor an appropriation by him of the personal estate is an accounting which relieves the sureties from responsibility. McKim *v.* Harwood, 129 Mass. 75. See also Mattoon *v.* Cowing, 13 Gray (Mass.) 387.

Second account.— When an account has been regularly filed in the proper place, a personal representative will not be compelled to file a second account unless it is shown that the first is lost; and it will be presumed that it is in the proper place until the contrary is shown. Ingraham *v.* Cox, 1 Pars. Eq. Cas. (Pa.) 70.

A testamentary executor is not obliged to account to the heirs or legatees until the end of his administration; but nevertheless when all the assets have come into his hands he should furnish statements of account on demand. Quinn *v.* Fraser, 10 Quebec 320.

Estoppel.— Where an administrator files a final account showing that he has administered the estate, he is estopped to deny his representative character or liability to ac-

come into the hands of the executor or administrator he is not bound to render an account;[5] but an order discharging an administrator who in his petition alleged that he had received no assets will be rescinded when it subsequently appears that assets have been received by him, and he will be required to account as to such assets as come into his hands.[6]

2. Periodical or Further Accounting. Periodical returns are part of the American probate system; a first account being ordered within a stated time, and other accounts, from time to time, as the statute and the representative's bond may designate, until the estate is fully settled.[7]

3. Time For Accounting. It is usual for the statutes to provide that a first account shall be filed within a certain time from the date of appointment, that other accounts shall follow at prescribed intervals, and that a final account shall be filed and settlement made at the expiration of a prescribed period.[8] Where

count. *In re* Osborn, 36 Oreg. 8, 58 Pac. 521.

When accounting unnecessary.—It has been held that an administratrix would not be required to file an account where it appeared that all the money which she had received since her former account was audited had been absorbed by the repayment of a sum which was found due to her at the audit of the first account and by counsel fees. Lee's Estate, 14 Phila. (Pa.) 304.

5. *Dakota.*— Territory *v.* Bramble, 2 Dak. 189, 5 N. W. 945.

Louisiana.— Watterston's Succession, 19 La. Ann. 104.

Maine.—Thurlough *v.* Kendall, 62 Me. 166.

Maryland.—See Cummings *v.* Robinson, 95 Md. 83, 51 Atl. 1105.

Massachusetts.— Walker *v.* Hall, 1 Pick. 20.

New York.—See *In re* O'Brien, 45 Hun 284.

Pennsylvania.—Trout's Estate, 5 Pa. Dist. 761, 18 Pa. Co. Ct. 608; Guinane's Estate, 17 Pa. Co. Ct. 438; Bestford's Estate, 10 Kulp 223. See also Singerly's Estate, 9 Pa. Dist. 261, 23 Pa. Co. Ct. 575.

Virginia.— Perdue *v.* Dillon, 89 Va. 182, 15 S. E. 385.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1971.

6. Cummings *v.* Robinson, 95 Md. 83, 51 Atl. 1105.

7. *In re* Sweetser, 109 Mich. 198, 67 N. W. 130; Matter of Arkenburgh, 11 N. Y. App. Div. 193, 42 N. Y. Suppl. 965 (supplemental account); Glaskin *v.* Sheehy, 2 Dem. Surr. (N. Y.) 289 (intermediate account subject to objection and inquiry); Seeger's Estate, 6 Wkly. Notes Cas. (Pa.) 369 (filing subsequent accounts "when legally required"). See also Schouler Ex. § 526.

Shrinkage of assets.— Where there has been an unexplained shrinkage of assets between any two accounts, the representative will be ordered to file a further account explaining the apparent disappearance of assets. Jennings' Estate, 10 Pa. Dist. 90.

Partial accounts of executors exhibited and allowed by the court will not prevent a person interested in the estate from bringing the executors into court for a final settlement. Merselis *v.* Mead, 7 N. J. Eq. 557.

Additional assets.— In Pennsylvania an executor or administrator who receives assets of the estate after he has filed an account should file a supplementary account thereof; and he may be compelled to do so. Shaffer's Appeal, 46 Pa. St. 131; Witman's Appeal, 28 Pa. St. 376. But in New York the court at its discretion may permit a postponement until the time of formal accounting. Wetmore *v.* Wetmore, 3 Dem. Surr. 414.

Where a legatee has become of age since the last accounting, he may demand a further accounting, as such coming of age is a "new fact" on which such a demand may be predicated. Hood *v.* Hood, 1 Dem. Surr. (N. Y.) 392.

In California it is required by statute that a statement of any receipts and disbursements of the executor or administrator since a rendition of his final account must be reported and filed at the time of making distribution, and under the statute these statements may be settled at the time the decree of distribution is made, without notice, or the court may order notice to be given and refer the same for settlement. *In re* Sheid, 129 Cal. 172, 61 Pac. 920; Firebaugh *v.* Burbank, 121 Cal. 186, 53 Pac. 560.

8. *Alabama.*— Austin *v.* Jordan, 35 Ala. 642. See also Semoice *v.* Semoice, 35 Ala. 295.

Georgia.— Wellborn *v.* Rogers, 24 Ga. 558.

Illinois.— Reynolds *v.* People, 55 Ill. 328.

Kansas.— Musick *v.* Beebe, 17 Kan. 47.

Louisiana.— Reed *v.* Crocker, 12 La. Ann. 445; Lafon *v.* Gravier, 1 Mart. N. S. 243.

Maine.— Ring *v.* Burton, 5 Me. 45, further time may be allowed by probate judge.

New Jersey.— See Pomeroy *v.* Mills, 37 N. J. Eq. 578.

New York.— Menck's Estate, 5 N. Y. St. 341; Woodruff *v.* Woodruff, 17 Abb. Pr. 165. See also *In re* Harris, 1 N. Y. Civ. Proc. 162.

North Carolina.— Ingram *v.* Ingram, 49 N. C. 188; Hobbs *v.* Craige, 23 N. C. 332.

Ohio.— See State *v.* Moore, 3 Ohio Dec. (Reprint) 68, 2 Wkly. L. Gaz. 405 [*reversing* 3 Ohio Dec. (Reprint) 62, 2 Wkly. L. Gaz. 389].

Pennsylvania.— Toner's Estate, 5 Wkly. Notes Cas. 386; Wistar's Estate, 5 Wkly. Notes Cas. 128; Dickson's Estate, 1 Wkly. Notes Cas. 534, 11 Phila. 86; Disston's Es-

there is a controversy over the probate of the decedent's will, during which the court appoints a temporary administrator of the estate, his account should not be judicially settled, on admission of the will to probate, until letters testamentary have been issued and the executors brought in as parties.[9] Notwithstanding a statutory requirement for a final accounting and settlement by the personal representative after a certain length of time, such final accounting may be postponed as justice requires where delay occurs necessarily and without his fault,[10] and it has been held that an executor or administrator ought not to be compelled to make a final settlement before the estate has been fully administered, with collections made and the debts and legacies paid.[11] A personal representative should not make his final settlement before the expiration of the statutory period for filing claims,[12] and if he does so he and his sureties become liable to the creditors of the estate.[13]

4. Who Entitled to Require Accounting — a. In General. An accounting will be ordered upon the application of a person having a sufficient interest and cause of complaint, but in order to entitle a person to demand an accounting it must appear that he has an interest in the estate and a cause of complaint, and is not a mere intermeddler.[14]

tate, 14 Phila. 310; Matter of Harley, 1 Phila. 511. See also Irwin's Appeal, 6 Pa. Cas. 316, 9 Atl. 298, 3 Montg. Co. Rep. 88.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 1973–1974.

Compare Dickinson *v.* Arms, 8 Pick. (Mass.) 394.

An administrator with the will annexed may, under N. Y. Code Civ. Proc. § 2724 (Code Civ. Proc. (1905) § 2726), proceed to a final accounting at the same time that his predecessor could have done so. He need not wait for the lapse of a year after letters were issued to him. Matter of Burling, 5 Dem. Surr. (N. Y.) 47.

Administrator of deceased guardian.— Under N. Y. Code Civ. Proc. § 2606, application for an accounting against the administrator of a deceased guardian may be made immediately on his appointment. *In re* Wiley, 119 N. Y. 642, 23 N. E. 1054.

When administrator resigns.— Under the Alabama statute when an administrator has resigned or been removed, it is his duty to settle his accounts within one month after his authority has ceased and on his failure to do so the court proceeds *ex mero motu* to compel a settlement. Glenn *v.* Billingslea, 64 Ala. 345.

In Canada the account of an administrator who is the creditor of the estate must be filed at least a month before the distribution of the estate. McDonald's Estate, 2 Nova Scotia 342.

Rents.— An executor must have a reasonable time to collect and pay over rents before the court will compel an accounting. Cox's Estate, 8 Montg. Co. Rep. (Pa.) 161.

Partnership settlement involved.— Under a statute providing that the surviving partner may retain firm assets until the business is settled, while paying balances to the executor of the deceased partner from time to time, it is not error to settle an annual account of the executor without an account between him and the surviving partner. *In re* Lux, 100 Cal. 606, 35 Pac. 345, 347.

9. Voorhis' Estate, 1 N. Y. St. 306; Bible Soc. *v.* Oakley, 4 Dem. Surr. (N. Y.) 450.

10. Beers *v.* Strohecker, 21 Ga. 442 (delay caused by litigation); *In re* Whitney, 15 N. Y. Suppl. 468 (delay over a disputed claim). See also Flores *v.* Howth, 5 Tex. 329.

Final accounting postponed by will.—Where a will made a bequest of an annuity for life to the testator's widow, the executor was not bound to render a final account until after her death. Rieman *v.* Peters, 2 Md. 104. See also Owens *v.* Pierce, 5 Lea (Tenn.) 462, holding that under the will of the testator an older child was not entitled, without alleging fraud, to an account with the executor, nor to a distribution of the estate in whole or in part, till the youngest child became of age.

In Alabama it has been decided that, after the lapse of seven years from the grant of administration, a final settlement should not be deferred at the instance of an administrator, because of outstanding debts or unsettled accounts. Ditmar *v.* Bogle, 53 Ala. 169.

In Michigan it has been decided that the time within which an administrator is required to close up an estate under the statutes of that state cannot be extended beyond the period of four and one-half years, during which period the creditors have a lien upon the realty belonging to the estate. Hoffman *v.* Beard, 32 Mich. 218 [*distinguished* in Larzelere *v.* Starkweather, 38 Mich. 96].

11. Allison *v.* Abrams, 40 Miss. 747.

12. Wright's Estate, 2 Pa. Dist. 195, 12 Pa. Co. Ct. 589; Gallen's Estate, 26 Wkly. Notes Cas. (Pa.) 308.

13. Yakel *v.* Yakel, 96 Md. 240, 53 Atl. 914.

14. *Alabama.*— Vincent *v.* Daniel, 59 Ala. 602.

Georgia.— See Cook *v.* Weaver, 77 Ga. 9.

Louisiana.— Giddens' Succession, 48 La. Ann. 356, 19 So. 125; Scott's Succession, 9 La. Ann. 336.

b. Creditors. The right of a lawful and unpaid creditor to obtain an account from those who administer the estate of his deceased debtor will ordinarily be enforced without hesitation.[15]

Mississippi.— Robinson *v.* Gholson, 8 Sm. & M. 392.

New York.— Matter of Emerson, 59 Hun 244, 12 N. Y. Suppl. 788; *In re* Coman, 15 N. Y. St. 442; Becker *v.* Hager, 8 How. Pr. 68; Gratacap *v.* Phyfe, 1 Barb. Ch. 485 (person with a contingent interest); Edwards *v.* Edwards, 1 Dem. Surr. 132 (one acquiring interest since last accounting).

Pennsylvania.— Beeber's Appeal, (1887) 8 Atl. 191; Del Valle's Appeal, 2 Pa. Cas. 270, 5 Atl. 441; Okeson's Appeal, 2 Grant 303; Stewart's Estate, 7 Pa. Co. Ct. 603 ("owner of any contingent interest" in personalty of decedent may demand accounting); Fryer's Estate, 12 Wkly. Notes Cas. 408 (indorsee of a note drawn by decedent to the order of his wife and by her indorsed); *In re* Painter 1 Wkly. Notes Cas. 190; *In re* Heenan, 15 Phila. 588 (contestant under a will); Disston's Estate, 14 Phila. 310; Mazurie's Estate, 11 Phila. 143; McNeal's Estate, 6 Kulp 271.

Vermont.— Davis *v.* Eastman, 68 Vt. 225, 35 Atl. 73.

Canada.— Contant *v.* Mercier, 20 Rev. Lég. 379.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1975.

A bare possibility under a will, depending on the death of the first taker without issue, is not a sufficient interest. Keene's Appeal, 60 Pa. St. 504.

One named in a will as a cestui que trust, in a clause which is void under the statute against perpetuities, is not an "interested person" entitled to compel account. Matter of Wood, 15 N. Y. St. 722.

A surviving trustee may compel the executor of a deceased co-trustee to account, as he is a "person interested in the estate." Matter of Kreischer, 30 N. Y. App. Div. 313, 51 N. Y. Suppl. 802.

Municipal authorities cannot under the New York statute compel an accounting. Matter of Wood, 15 N. Y. St. 722.

An attorney for one who recovers a judgment may be deemed a party sufficiently in interest. Close *v.* Shute, 4 Dem. Surr. (N. Y.) 546.

Right of widow see Stille's Succession, 52 La. Ann. 1538, 27 So. 954; Haddow *v.* Haddow, 3 Thomps. & C. (N. Y.) 777; Ferguson *v.* Stuart, 14 Ohio 140; Melizet's Appeal, 17 Pa. St. 449, 55 Am. Dec. 573; White's Estate, 23 Pa. Super. Ct. 552; Lacey's Estate, 12 Phila. (Pa.) 126; Cornell *v.* Hartley, 41 W. Va. 493, 23 S. E. 789.

Right of a receiver in supplementary proceedings see Matter of Beyea, 10 Misc. (N. Y.) 198, 31 N. Y. Suppl. 200; Matter of Rainey, 5 Misc. (N. Y.) 367, 26 N. Y. Suppl. 892; Worrall *v.* Driggs, 1 Redf. Surr. (N. Y.) 449.

Estoppel.— One who denies that he is interested in an estate may thereby estop himself from subsequently compelling the administrator to account. *In re* Rusko, 34 Hun (N. Y.) 334.

When question of interest determined.— Whether a person claiming to have an interest in an estate is entitled to any standing is a matter which should be determined on the hearing for distribution rather than upon the settlement of an account. *In re* Willey, 140 Cal. 238, 73 Pac. 998.

15. Voinche *v.* Brouillette, 50 La. Ann. 370, 23 So. 318; State *v.* Judge Second Dist. Ct., 20 La. Ann. 580; Williams' Succession, 7 Rob. (La.) 46; Carriere *v.* Meyer, 16 La. 126; Matter of Whitehead, 38 N. Y. App. Div. 319, 56 N. Y. Suppl. 989; Keyser *v.* Kelly, 4 Redf. Surr. (N. Y.) 157; Hart's Estate, 9 Pa. Dist. 347; Agnew's Estate, 8 Pa. Dist. 699; Clinton's Estate, 8 Pa. Dist. 661, 23 Pa. Co. Ct. 209; Love's Estate, 11 Wkly. Notes Cas. (Pa.) 324; Wistar's Estate, 12 Phila. (Pa.) 48; Callender's Estate, 1 Wkly. Notes Cas. (Pa.) 518; Lewis *v.* Parrish, 115 Fed. 285, 53 C. C. A. 77. *Compare* Hall *v.* Mulhollan, 7 La. 283; Locher's Estate, 14 Lanc. L. Rev. (Pa.) 6.

A representative who has been removed cannot be called to account by creditors unless the administrator *de bonis non* is insolvent or colludes with the debtors. Hardwick *v.* Thomas, 10 Ga. 266. See also Matter of Duffy, 3 Dem. Surr. (N. Y.) 251.

Cannot maintain bill in equity.— A creditor of an estate is not such a *cestui que trust* of the executor or administrator as to entitle him to bring a bill in equity in a federal court for the purpose of an accounting, without special averments of fraud, maladministration, or non-administration. Walker *v.* Brown, 58 Fed. 23.

Mere general creditors of an insolvent firm composed of a surviving member and the executors of a deceased member, not being creditors of the estate, cannot compel the executors to account. Frothingham *v.* Hodenpyl, 16 N. Y. Suppl. 341.

Delays in settling an estate to which a creditor contributed give him no ground of complaint. Fatjo's Succession, 52 La. Ann. 1561, 28 So. 135.

Form and contents of creditors' petition see Peters' Estate, 1 Phila. (Pa.) 581.

A creditor of a legatee or distributee who has attached his interest may by virtue of such attachment cite the representative to an account (Raeder's Estate, 10 Pa. Dist. 282; Manigle's Estate, 11 Phila. (Pa.) 39. See also Voinche *v.* Brouillette, 50 La. Ann. 370, 23 So. 318), but a judgment creditor of a legatee who has not attached his interest cannot demand an accounting (Greiner's Estate, 2 Wkly. Notes Cas. (Pa.) 292).

The holder of a claim against the representative personally, on which he is not entitled to sue him in his representative capacity, although the claim is for expenses

c. Heirs, Distributees, and Their Representatives. Heirs or distributees are persons interested who may require the executor or administrator to render acount of his administration,[16] and the assignee or personal representative of an heir or distributee may be similarly entitled.[17]

d. Legatees and Their Representatives. A legatee or his representative has the usual right of a party in interest to an accounting.[18]

incurred or services rendered in connection with the administration of the estate, cannot compel an accounting. Matter of Flint, 15 Misc. (N. Y.) 598, 38 N. Y. Suppl. 188; Lewis' Estate, 23 Wkly. Notes Cas. (Pa.) 492, 6 Pa. Co. Ct. 457.

An injunction restraining alleged creditors from requiring executors to account before the surrogate will not be granted, where the complaint does not show any action of the surrogate detrimental to the executors, nor that he has unjustly refused to hear objections to the claims presented. Hotchkiss *v.* Hotchkiss, 2 N. Y. Suppl. 825, 16 N. Y. Civ. Proc. 129.

In North Carolina a special proceeding, under Battle Rev. c. 45, § 73, by a creditor against a personal representative of a debtor for an accounting must be by summons and complaint in the first instance, and other creditors coming in need not file complaints unless their claims are denied, in which case they must do so. Isler *v.* Murphy, 76 N. C. 52.

16. *Alabama.*— Alexander *v.* Steele, 84 Ala. 332, 4 So. 281 (not necessary to charge a devastavit); Alexander *v.* Alexander, 70 Ala. 212; Gould *v.* Hayes, 19 Ala. 438 (compelling account after removal).

Georgia.— Shorter *v.* Hargroves, 11 Ga. 658.

Louisiana.— Wiemann's Succession, 106 La. 387, 30 So. 893; Touzanne's Succession, 36 La. Ann. 420; Stein *v.* Bowman, 9 La. 281, not until they are recognized as such.

Maine.— Rogers *v.* Marston, 80 Me. 404, 15 Atl. 22.

New Hampshire.— Flanders *v.* Lane, 54 N. H. 390.

New Jersey.— See *In re* Lewis, 32 N. J. Eq. 690.

New York.— Matter of Wood, 5 Dem. Surr. 345.

Pennsylvania.— Bushong's Estate, 11 Wkly. Notes Cas. 107, even though decedent be insolvent.

Rhode Island.— Burch *v.* Champlin, (1900) 52 Atl. 988.

Virginia.— See Graff *v.* Castleman, 5 Rand. 195. 16 Am. Dec. 741.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1980.

Sisters of a decedent who claim through their deceased father are not persons interested. Brooke's Estate, 14 Phila. (Pa.) 325.

Persons whose claim to be heirs or next of kin is denied cannot compel an accounting. *In re* Lewis, 32 N. J. Eq. 690.

Insolvent estate.— Distributees have no such interest in an insolvent estate as will authorize them to proceed against an administrator for a final account. Bird *v.* Furniss, 33 Miss. 44. But see Bushong's Estate, 11 Wkly. Notes Cas. (Pa.) 107.

If the administrator dies an administrator *de bonis non* is necessary to an accounting sought by a distributee. Ward *v.* Huggins, 37 N. C. 135. *Compare* Graff *v.* Castleman, 5 Rand. (Va.) 195, 16 Am. Dec. 741.

After an administrator has been discharged persons claiming to be sole heirs of the decedent cannot demand an account of the administration of the succession, although they attack a judgment homologating an account, where the order discharging the administrator is not assailed, and the person to whom the residue of the estate was paid, and who had been recognized as the sole heir of the deceased, is not made a party defendant. Baron *v.* Baum, 44 La. Ann. 295, 10 So. 766.

17. Matter of Prout, 52 Hun (N. Y.) 109, 4 N. Y. Suppl. 841 (residuary legatee of a deceased distributee); Jenkins *v.* Freyer, 4 Paige (N. Y.) 47; Wright *v.* Lowe, 6 N. C. 354; Emerick's Estate, 6 Pa. Co. Ct. 641 (administrator of deceased heir); Branch *v* Hanrick, 70 Tex. 731, 8 S. W. 539 (purchaser of an heir's interest).

18. *Alabama.*— High *v.* Worley, 32 Ala. 709, administrator of a deceased legatee.

New Jersey.— Bird *v.* Hawkins, 58 N. J. Eq. 229, 42 Atl. 588.

New York.— Matter of Egan, 89 N. Y. App. Div. 565, 85 N. Y. Suppl. 663 (assignee of legatee); Matter of Watts, 68 N. Y. App. Div. 357, 74 N. Y. Suppl. 75; Clark *v.* Ford, 1 Abb. Dec. 359, 3 Keyes 370, 1 Transcr. App. 22, 1 Abb. Pr. N. S. 245, 34 How. Pr. 478; McKenzie *v.* L'Amoureux, 11 Barb. 516; Matter of Jones, 30 Misc. 354, 63 N. Y. Suppl. 726 [*affirmed* in 51 N. Y. App. Div. 420, 64 N. Y. Suppl. 667]; Matter of Fortune, 14 Abb. N. Cas. 415 (assignee of legatee); Woodruff *v.* Woodruff, 17 Abb. Pr. 165; Carroll *v.* Carroll, 2 Edm. Sel. Cas. 158; Crawford *v.* Crawford, 5 Dem. Surr. 37; Bonfanti *v.* Deguerre, 3 Bradf. Surr. 429; Colon's Estate, Tuck. Surr. 244 (a legatee ward who has reached majority, and not his guardian).

North Carolina.— Brotten *v.* Bateman, 17 N. C. 115, 22 Am. Dec. 732.

Pennsylvania.— Alter's Estate, 3 Wkly. Notes Cas. 356; Mackaw's Estate, 1 Wkly. Notes Cas. 203. *Compare* Pratt's Estate, 2 Wkly. Notes Cas. 704.

United States.— Silsby *v.* Young, 3 Cranch 249, 2 L. ed. 429 (unless it be shown that the fiduciary has no assets in his hands which ought to be applied to the purposes prayed for by the bill); Pulliam *v.* Pulliam, 10 Fed. 23.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1981.

e. Remainder-Men and Their Representatives. A remainder-man whose rights in an estate are vested is so interested therein as to be entitled to apply to compel an executor to account, even though the owner of the life-estate be also living and entitled to make similar application.[19]

f. Co-Executors and Co-Administrators. The right of a personal representative to compel his co-representative to account is discussed elsewhere.[20]

g. Successors and Representatives. An administrator *de bonis non* has usually the right to compel an accounting by his predecessor where the latter has resigned or been removed,[21] but he cannot compel the representatives or sureties of a predecessor whose office terminated by death to account with him.[22] It has been decided in New York that no statutory provision in that state authorizes the representatives of a deceased executor to initiate and conduct a proceeding for the accounting of their decedent in the estate whereof he was himself executor.[23]

A devisee cannot call the executor to account for the whole estate, but only as to the fund in which he has an interest. Clifton *v.* Haig, 4 Desauss. (S. C.) 330.

Rule applicable to residuary devisees.—Cook *v.* Farmers Bank Trust Co., 16 Ky. L. Rep. 286; Carroll *v.* Carroll, 11 Barb. (N. Y.) 293 (lands sold to pay debts); Palethorp's Estate, 14 Pa. Co. Ct. 288 (executrix of a devisee). *Compare* Cary *v.* Macon, 4 Call (Va.) 605.

Person occupying dual capacity.— An executrix of an executor, although also a legatee of such executor's testator, cannot as legatee cite herself as such executrix to account, because she cannot sue herself. Popham *v.* Spencer, 4 Redf. Surr. (N. Y.) 399.

The mere appearance of an interest is ordinarily sufficient to entitle a person to an accounting, and so a legatee who has released his interest may compel an accounting if the release is attacked by him as void. Matter of Duffy, 3 How. Pr. N. S. (N. Y.) 240, 4 Dem. Surr. (N. Y.) 366.

The assignee of an executor, or of the administrator of an executor, cannot be called to account by legatees, where there is no fraud or collusion, even though the assets could be traced or identified. Rayner *v.* Pearsall, 3 Johns. Ch. (N. Y.) 578.

19. Matter of Hunt, 84 N. Y. App. Div. 159, 82 N. Y. Suppl. 538 [*affirming* 38 Misc. 30, 76 N. Y. Suppl. 968]; Earle *v.* Earle, 73 N. Y. App. Div. 300, 76 N. Y. Suppl. 851; *In re* Lawrence, 1 N. Y. Suppl. 213 (heir of a devisee of the remainder); Campbell *v.* Purdy, 5 Redf. Surr. (N. Y.) 434; Godwin *v.* Watford, 107 N. C. 168, 11 S. E. 1051; Smith's Estate, 7 Pa. Dist. 754; Albertson's Estate, 1 Wkly. Notes Cas. (Pa.) 188; Bushong's Estate, 14 Phila. (Pa.) 322.

20. See *infra*, XXI, B, 20, b.

21. *Alabama.*— Waring *v.* Lewis, 53 Ala. 615 (accounting for assets wasted or converted); Simmons *v.* Price, 18 Ala. 405; King *v.* Smith, 15 Ala. 264. *Contra*, prior to statute changing the rule, Moore *v.* Armstrong, 6 Port. 697.

California.— Radovich's Estate, 74 Cal. 536, 16 Pac. 321, 5 Am. St. Rep. 466.

Georgia.— Giles *v.* Brown, 60 Ga. 658; Knight *v.* Lasseter, 16 Ga. 151. See also Hardwick *v.* Thomas, 10 Ga. 266; Oglesby *v.* Gilmore, 5 Ga. 56.

Illinois.— Duffin *v.* Abbott, 48 Ill. 17 [*overruling* Stose *v.* People, 25 Ill. 600]. But an administrator *de bonis non* has no authority to call upon the first administrator for an account of assets already administered upon. Rowan *v.* Kirkpatrick, 14 Ill. 1.

Indiana.— Kelly *v.* Weddell, Smith 362.

Louisiana.—Collins *v.* Hollier, 13 La. Ann. 585.

Massachusetts.— Fay *v.* Muzzey, 13 Gray 53, 74 Am. Dec. 619.

New Jersey.— Boulton *v.* Scott, 3 N. J. Eq. 231.

New York.— Harrison *v.* Clark, 87 N. Y. 572; *In re* O'Brien, 45 Hun 284. See also Coman's Estate, 15 N. Y. St. 442; Bunnell *v.* Ranney, 66 How. Pr. 291, 2 Dem. Surr. 327; Matter of Fithian, 5 Dem. Surr. 305; Le Count *v.* Le Count, 1 Dem. Surr. 29.

North Carolina.— State University *v.* Hughes, 90 N. C. 537; Lansdell *v.* Winstead, 76 N. C. 366; Cannon *v.* Jenkins, 16 N. C. 422.

Pennsylvania.— Matter of Bradley, 9 Phila. 327.

South Carolina.— Villard *v.* Robert, 1 Strobh. Eq. 393. See also Thompson *v.* Buckner, 2 Hill Eq. (S. C.) 499, holding that an administrator *de bonis non* would be required to prove not only that debts existed, but that the administrator had notice of them within the year before he could require an account on the ground that judgments remained unsatisfied.

Tennessee.— Whitaker *v.* Whitaker, 12 Lea 393.

Virginia.—See Waddy *v.* Hawkins, 4 Leigh 458.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1984.

22. Bliss *v.* Seaman, 165 Ill. 422, 46 N. E. 279 [*affirming* 59 Ill. App. 236]; Marsh *v.* People, 15 Ill. 284; Bradshaw *v.* Com., 3 J. J. Marsh. (Ky.) 632; Douglas *v.* Day, 28 Ohio St. 175.

23. Bunnell *v.* Ranney, 66 How. Pr. (N. Y.) 291, 2 Dem. Surr. (N. Y.) 327; Spencer *v.*

h. Sureties of Personal Representative. Sureties on the bond of an executor or administrator cannot compel an accounting by their principal,[24] but a surviving administrator may be compelled to account by a surety on the bond of his deceased co-administrator.[25]

i. Probate Court. The probate court, having jurisdiction of the estate, may on its own motion, and without application of any interested party, make an order citing the executor or administrator to render an account, after the lapse of the time fixed by statute or the bond of the fiduciary.[26]

5. Who May Be Required to Account — a. In General. Generally speaking any executor or administrator may be called on to render an account;[27] and, where a man by marrying an executrix becomes executor in his own right and renders himself a trustee with her of the assets of the estate, he may be compelled to account.[28] Persons who without authority assume to administer an estate and receive property of the estate may be compelled to account therefor.[29] An executor or administrator who resigns or is removed from office or whose letters are revoked, as also the representatives of a deceased executor or administrator, may be required to render a final account and turn over the balance due.[30]

Popham, 5 Redf. Surr. (N. Y.) 425; Popham *v.* Spencer, 4 Redf. Surr. (N. Y.) 399.

24. Dunnell *v.* Providence Municipal Ct., 9 R. I. 189. See also McElroy *v.* Hatheway, 44 Mich. 399, 6 N. W. 867. *Compare* Palmer *v.* Ward, 91 N. Y. App. Div. 449, 86 N. Y. Suppl. 990.

25. Matter of Provost, 87 N. Y. App. Div. 86, 84 N. Y. Suppl. 29.

26. *Alabama.*— Vincent *v.* Daniel, 59 Ala. 602.

Georgia.— See Cook *v.* Weaver, 77 Ga. 9.

Mississippi.— Robinson *v.* Gholson, 8 Sm. & M. 392.

New York.—Anonymous, 14 N. Y. St. 490; Woodruff *v.* Woodruff, 17 Abb. Pr. 165; Matter of Uglow, 51 How. Pr. 342; Tucker *v.* McDermott, 2 Redf. Surr. 312.

Wisconsin.— *In re* Campbell, 12 Wis. 369.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1976.

Compare Thompson *v.* Buckley, 1 Tex. 33.

Order by surrogate under New York statute see Matter of Furniss, 86 N. Y. App. Div. 96, 83 N. Y. Suppl. 530; *In re* Macaulay, 27 Hun (N. Y.) 577 (irregularity in service of citation waived by appearance); Matter of Scudder, 21 Misc. (N. Y.) 179, 47 N. Y. Suppl. 101. The order to account rests in the sound discretion of the surrogate, and the appellate division cannot interfere with the exercise of that discretion except in cases where it has been abused. Matter of Merritt, 35 N. Y. App. Div. 337, 54 N. Y. Suppl. 955; Matter of Adler, 60 Hun (N. Y.) 481, 15 N. Y. Suppl. 227. See also Matter of Withers, 23 N. Y. App. Div. 404, 48 N. Y. Suppl. 169. Where an administrator dies the surrogate's court has jurisdiction, on the petition of a person interested in the estate, to compel the administrator of the deceased administrator to account. *In re* Armstrong, 72 N. Y. App. Div. 286, 76 N. Y. Suppl. 37.

Rents and profits.— Where, by consent of heirs or devisees, the executor or administrator enters into possession of real estate and takes rents and profits, he is liable to them only, if the estate is solvent, and the judge of probate cannot call him to account for such rents and profits. Goodrich *v.* Thompson, 4 Day (Conn.) 215.

27. See Taché *v.* Taché, 14 Rev. Lég. 257.

A sheriff appointed ex officio an administrator may be cited in to account like any other administrator. McLaughlin *v.* Nelms, 9 Ala. 925.

The fact that an executrix is also lifetenant does not excuse her failure to file an account. Maxwell *v.* McCreery, 57 N. J. Eq. 287, 41 Atl. 498. *Compare* Rowland *v.* Rowland, 29 S. C. 54, 6 S. E. 902.

Changing domicile.— A person who undertakes the administration of an estate situated in one state cannot exonerate himself from suit by the heirs for the rendition of an account of his administration by removing his domicile and citizenship to another state. McGhee *v.* McGhee, 41 La. Ann. 657, 6 So. 253.

28. Wood *v.* Chetwood, 27 N. J. Eq. 311. See also Draughon *v.* French, 4 Port. (Ala.) 352; Smith *v.* Chapman, 5 Conn. 14; Lindsay *v.* Lindsay, 1 Desauss. (S. C.) 150.

29. Damouth *v.* Klock, 29 Mich. 289. See also Marshall *v.* Strange, 9 S. W. 250, 10 Ky. L. Rep. 410; Pace *v.* Pace, 73 N. C. 119.

Nullity of appointment.— One who has been appointed as administrator of an estate and received letters of administration therein and has seized, misappropriated, and dissipated the property of the estate, cannot evade an accounting upon the ground of the nullity of his appointment. Dobler *v.* Strobel, 9 N. D. 104, 81 N. W. 37, 81 Am. St. Rep. 530.

In Louisiana it has been decided that there is no authority for calling on a *negotiorum gestor*, by an *ex parte* order obtained by the heirs of his deceased wife, to render an account to the court in a fiduciary capacity, as an administrator of a succession and that a surviving husband holding under the law as usufructuary is not to be called on thus for an account of administration. Rentz *v.* Cole, 26 La. Ann. 623.

30. *Alabama.*— Sloan *v.* McKinney, 19 Ala. 115.

b. Co-Executors and Co-Administrators. Where there are two or more executors or administrators of an estate, each has a several right to the assets of the estate, and is responsible and need account only for the assets he receives.[31] Each of several co-executors or co-administrators has a right to settle a separate account of his administration.[32] The liability of co-representatives who jointly settle their final accounts is fully discussed elsewhere.[33] A petition by an executor to compel his co-executor to join in stating an account should be dismissed, where it appears that such co-executor has repeatedly declared his willingness to unite with the petitioner in the statement of an account disposing of the assets in accordance with the proper practice and in such manner as to allow the petitioner full opportunity to establish certain disputed claims held by him against the estate, but that the petitioner has persistently failed to coöperate with him.[34]

California.— Radovich's Estate, 74 Cal. 536, 16 Pac. 321, 5 Am. St. Rep. 466.

Connecticut.— See Smith *v.* Chapman, 5 Conn. 14.

Georgia.— Giles *v.* Brown, 60 Ga. 658; Hardwick *v.* Thomas, 10 Ga. 266.

Kansas.— Hudson *v.* Barratt, 62 Kan. 137, 61 Pac. 737.

Louisiana.—Chaffe *v.* Farmer, 36 La. Ann. 813; Frazier's Succession, 35 La. Ann. 381; Rentz *v.* Cole, 26 La. Ann. 623.

Mississippi.— Noland *v.* Calvit, 12 Sm. & M. 273.

New Jersey.— Schenck *v.* Schenck, 3 N. J. L. 562; Aldridge *v.* McClelland, 34 N. J. Eq. 237.

New York.— Dunford *v.* Weaver, 84 N. Y. 445 [*affirming* 21 Hun 349]; Gerould *v.* Wilson, 81 N. Y. 573 [*affirming* 16 Hun 530]; Foster *v.* Wilber, 1 Paige 537; Rayner *v.* Pearsall, 3 Johns. Ch. 578.

North Carolina.— Pace *v.* Pace, 73 N. C. 119; Thompson *v.* McDonald, 22 N. C. 463; Ralston *v.* Telfair, 22 N. C. 414.

Pennsylvania.— Peeble's Appeal, 15 Serg. & R. 39.

South Carolina.— Thompson *v.* Bailey, 5 Rich. 68 (representatives of deceased's sureties); Villard *v.* Robert, 1 Strobh. Eq. 393.

Tennessee.—Whitaker *v.* Whitaker, 12 Lea 393.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1986.

When the deceased executor received no property of his decedent's estate his representative need not file an account. Thomas' Estate, 9 Pa. Dist. 87.

A discharge of administrators on account of insolvency of themselves and their sureties does not relieve them of the duty to account. Union Nat. Bank *v.* Poulson, 31 N. J. Eq. 239.

Settlement before successor appointed.— A settlement made by an executor or administrator on his resignation is not conclusive as to his successor, if made before such successor was appointed and qualified. Emmons *v.* Gordon, 125 Mo. 636, 28 S. W. 863; (1893) 24 S. W. 146.

Alleged disbursement.— An administratrix who has been dismissed cannot evade the duty of accounting by alleging, in her answer to a petition for account, that she has paid out all the money of the estate which has come into her hands. Lockard's Estate, 10 Pa. Dist. 192.

The burden is upon a removed administrator to show that he has made a full accounting of the assets of the estate. *In re* Glover, 127 Mo. 153, 29 S. W. 982.

31. Gaultney *v.* Nolan, 33 Miss. 569. See also Davis' Appeal, 23 Pa. St. 206.

No assets received.—An accounting and settlement cannot be required from a co-executor or co-administrator who received none of the assets, but in the exercise of prudence and good faith permitted his associate to control them exclusively. *In re* Rust, 3 N. Y. Suppl. 308. *Compare* Matter of Campbell, 21 Misc. (N. Y.) 133, 47 N. Y. Suppl. 29, holding that an executor cannot evade an accounting on the ground that he did not make or join in the making of any inventory of the estate and that no part thereof came into his hands and that he took no part in its management, although it does not follow that he will be liable to make good any waste which may have been committed by his co-executor.

Paying over assets to co-representative.— Where an administrator turns over the property of the estate to his co-administrator, who is also next of kin of intestate, he cannot be required to account therefor by the administrators of his co-administrator. Matter of Van Wert, 3 Misc. (N. Y.) 563, 24 N. Y. Suppl. 719. But one who collects and receives assets is not relieved from an accounting by paying them over to his co-executor when the habits, health, and pecuniary circumstances of such co-executor should have awakened inquiry on his part. Knight *v.* Haynie, 74 Ala. 542.

32. Mercer *v.* Glass, 25 S. W. 114, 15 Ky. L. Rep. 710; *In re* Patterson, 1 Watts & S. (Pa.) 291, joint liability on official bond for acts of co-administrator not affected thereby.

Rights of representative of co-representative.— Where one of two co-representatives who have faithfully administered different parts of their decedent's estate dies his own executor or administrator may settle a separate account of his administration. Barclay *v.* Morrison, 16 Serg. & R. (Pa.) 129.

33. See *infra*, XXI, B, 20, c.

34. Strasbaugh *v.* Dallam, 93 Md. 712, 50 Atl. 417.

c. Representative of Deceased Executor or Administrator. Where an executor or administrator dies without having settled his administration account it is for his own representative and not the administrator *de bonis non* of the first decedent to present and settle the account of the deceased representative;[35] but the representative of a representative is not required to account as the representative of the original decedent[36] when there is no proof that any of the effects of such decedent came to his hands in his representative character.[37]

6. When Representative Acts in Different Capacities — a. Acting as Representative of Different Estates. Where the same person is administrator *de bonis non* with the will annexed of the original decedent and administrator of the original executor he may file his account in the former capacity, although technically he should file the account of his intestate.[38]

b. Acting as Representative and Guardian. When a person acts both as executor or administrator and guardian of the children of the deceased, he should render separate accounts as personal representative and as guardian,[39] and he should first file his account in the former capacity in order that it may be definitely ascertained what amount he should charge himself with in the latter[40]

c. Acting as Representative and Trustee. One who is testamentary trustee as well as executor holds the fund as executor till his final account as such is settled,[41] and he cannot properly assume the rights and duties of trustee until the court has approved his accounts as executor and ordered a distribution of the estate.[42] It seems that executors who are charged with trust duties should, when finally accounting as executors, include all their proceedings in the administration

35. *Alabama.*— Howard *v.* Howard, 26 Ala. 682.

Connecticut.— See State *v.* Osborne, 69 Conn. 257, 37 Atl. 491.

Maine.— Nowell *v.* Nowell, 2 Me. 75.

Maryland.— Muncaster *v.* Muncaster, 23 Md. 286.

Mississippi.— Jarnagin *v.* Frank, 59 Miss. 393; Prestige *v.* Pendleton, 28 Miss. 379; Steen *v.* Steen, 25 Miss. 513.

New York.—*In re* Clark, 119 N. Y. 427, 23 N. E. 1052; Matter of Fithian, 44 Hun 457, 3 N. Y. Suppl. 193, 1 Connoly Surr. 187; Matter of Butler, 9 N. Y. Suppl. 641, 1 Connoly Surr. 58; Herbert *v.* Stevenson, 3 Dem. Surr. 236; Spencer *v.* Popham, 5 Redf. Surr. 425. See also Merritt *v.* Merritt, 161 N. Y. 634, 57 N. E. 1117 [*affirming* 32 N. Y. App. Div. 442, 53 N. Y. Suppl. 127]; Matter of Irvin, 68 N. Y. App. Div. 158, 74 N. Y. Suppl. 443; *In re* Coman, 15 N. Y. St. 442.

Pennsylvania.— Bowman's Appeal, 62 Pa. St. 166; Schoch's Estate, 11 Wkly. Notes Cas. 288; Van Dyke's Appeal, 31 Leg. Int. 69; Montgomery's Estate, 3 Brewst. 306.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1989.

In Wisconsin the executor of a deceased executor cannot be compelled to render and settle the account of the latter. Reed *v.* Wilson, 73 Wis. 497, 41 N. W. 716.

Where an administrator dies pending an appeal from the allowance of his account his administrator cannot be cited to appear before the court where the appeal was pending to settle such account. Wentworth *v.* Wentworth, 12 Vt. 244.

36. Schenck *v.* Schenck, 3 N. J. L. 562. See also Pickett *v.* Pickett, 41 La. Ann. 882, 6 So. 655; Rachal's Succession, 12 La. Ann. 717.

37. Davis *v.* Yerby, Sm. & M. Ch. (Miss.) 508; Dakin *v.* Demming, 6 Paige (N. Y.) 95. See also Barbour *v.* Robertson, 1 Litt. (Ky.) 93; *In re* O'Brien, 45 Hun (N. Y.) 284; Cross *v.* Baskett, 17 Oreg. 84, 21 Pac. 47.

38. Hughes' Estate, 1 Pa. Co. Ct. 179, 17 Wkly. Notes Cas. (Pa.) 160.

Joint administration de bonis non.— Where the administrator of a deceased executor takes out jointly with another letters of administration *de bonis non* on the estate of the testator, he does not exclusively represent both estates, and consequently there can be no transfer by operation of law of the property in his hands as administrator to him as administrator *de bonis non*, and an account should be stated between him as administrator and the estate of the testator. Thomas *v.* Wood, 1 Md. Ch. 296.

39. Foteaux *v.* Lepage, 6 Iowa 123. See also in this connection Thomas' Estate, 2 Kulp (Pa.) 160; Hannah *v.* Boyd, 25 Gratt. (Va.) 692.

40. Davis *v.* Davis, 10 Ala. 299; Fish's Appeal, 3 Pa. Cas. 239, 7 Atl. 222. See also Wells *v.* Cuny, 4 La. 489. *Compare In re* Scott, 36 Vt. 297, holding that where an administrator is also guardian he may charge himself with funds as guardian without an order of the probate court, and this will be a sufficient accounting for the same as administrator.

41. Wallber *v.* Wilmanns, 116 Wis. 246, 93 N. W. 47. See *supra*, VIII, A, 8.

42. *In re* Higgins, 15 Mont. 474, 39 Pac. 506, 28 L. R. A. 116. See also Hall *v.* Cushing, 9 Pick. (Mass.) 395; Cluff *v.* Day, 124 N. Y. 195, 26 N. E. 306 [*reversing* 55 N. Y. Super. Ct. 460, 14 N. Y. St. 729]; *In re* Willets, 112 N. Y. 289, 19 N. E. 690.

of the estate in whatever capacity they have assumed to act.[43] An administrator who collects a trust fund belonging to the estate of his intestate and is subsequently appointed trustee of such fund is liable to account for the same as administrator when it does not appear that he has ever made any transfer of such fund to himself as trustee.[44] An executor who was also an agent or trustee of the testator in his lifetime cannot, after the final settlement of his accounts as executor, be called on to account in equity as such trustee. There can be no separate accounting in the two different capacities.[45]

7. Scope of Liability and Property to Be Included. An executor or administrator must render his account for all the personal property of the decedent which has come into his hands, wherever found or by whatever means collected; and the inventory of the estate constitutes the basis or starting-point for such accounting.[46] The inventory is not, however, conclusive as to the assets for

43. Whitney *v.* Phœnix, 4 Redf. Surr. (N. Y.) 180.

44. *In re* Hodson, 131 N. Y. 575, 30 N. E. 63 [*affirming* 61 Hun 504, 16 N. Y. Suppl. 371].

45. Vanmeter *v.* Jones, 3 N. J. Eq. 520.

46. *California.*— Radovich's Estate, 74 Cal. 536, 16 Pac. 321, 5 Am. St. Rep. 466.

Indiana.— Keister *v.* Howe, 3 Ind. 268.

Kentucky.— Smith *v.* Morgan, 4 Ky. L. Rep. 829.

Louisiana.— Francez's Succession, 49 La. Ann. 1732, 23 So. 254; Plantevignes' Succession, 28 La. Ann. 562. See also Von Hoven's Succession, 46 La. Ann. 911, 15 So. 391; Cason *v.* Cabrara, 4 La. Ann. 538; Grubb *v.* Henderson, 1 Rob. 4.

Massachusetts.— Jennison *v.* Hapgood, 10 Pick. 77; Dawes *v.* Boylston, 9 Mass. 337, 6 Am. Dec. 72.

New Hampshire.— Ella's Appeal, 68 N. H. 35, 38 Atl. 501.

New York.— *In re* Clark, 11 N. Y. Suppl. 911.

Pennsylvania.— Osterhout's Estate, 8 Lanc. L. Rev. 18; Tracy's Estate, 15 Montg. Co. Rep. 30.

Texas.— See Kearney *v.* Nicholson, (Civ. App. 1901) 67 S. W. 361.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1990.

Must account for personal property only. —Shuttleworth *v.* Winter, 55 N. Y. 624; Gardner *v.* Dering, 2 Edw. (N. Y.) 131. *Compare In re* Beecher, 19 N. Y. Suppl. 971. Where, however, the will directs a conversion of real into personal estate, the money arising from the sale becomes assets in the hands of the executor for which he is bound to account. Stagg *v.* Jackson, 1 N. Y. 206; Bloodgood *v.* Bruen, 2 Bradf. Surr. (N. Y.) 8. See also Baldwin *v.* Smith, 3 N. Y. App. Div. 350, 38 N. Y. Suppl. 299.

Where a surviving partner of the testator is his executor, his testamentary account must include a statement of partnership affairs. Marre *v.* Ginochio, 2 Bradf. Surr. (N. Y.) 165. See also Gardere's Succession, 48 La. Ann. 289, 19 So. 134.

The administratrix of a surviving partner cannot be required to account in the state courts for partnership assets which are outside the state until such time as the proceeds thereof actually come into her hands within the state. Scudder *v.* Ames, 142 Mo. 187, 43 S. W. 659.

Fund belonging to widow.— An administrator must account for a fund arising out of his intestate's estate, although it rightfully belongs to the widow when she has directed him to receive it and apply it on the debts of the estate. Wilkinson *v.* Ward, 42 Ill. App. 541.

Receipts and disbursements after filing account.— An administrator's final account may be brought down to include receipts and expenditures subsequent to its filing, on a verified affidavit of such items. Hone *v.* Lockman, 4 Redf. Surr. (N. Y.) 61.

Life-insurance policies.— An executor is not chargeable in his account with the amount of insurance policies in his hands on the lives of debtors of his intestate before he has realized on such policies. Richardson's Estate, 2 Misc. (N. Y.) 288, 23 N. Y. Suppl. 978. And an executor is not chargeable with the sum paid on a life-insurance policy of his testator, when it appears that the policy was made payable to the testator's wife to whom it was paid and that she delivered the proceeds to the executor who deposited them in bank as her agent. *In re* Gordon, 15 N. Y. Suppl. 502.

Liquor license to be accounted for.— Immendorf's Estate, 7 Pa. Dist. 449, 21 Pa. Co. Ct. 268.

In an accounting between an executor or administrator and his successor he must account for chattels included in his inventory (Fay *v.* Muzzey, 13 Gray (Mass.) 53, 74 Am. Dec. 619), and all funds and property which he has received for or on account of such estate (Chaffe *v.* Farmer, 36 La. Ann. 813). An executor *pro forma* is accountable to the testamentary executor only for the surplus remaining after payment of debts. De Sobry *v.* De Laistre, 2 Harr. & J. (Md.) 191, 3 Am. Dec. 555. An administrator in chief on the settlement of his accounts with the succeeding administrator *de bonis non* cannot be charged with a sum of money which is shown to have been deposited by the intestate a short time before his death in the hands of a bailee for safe-keeping and to have been paid over by the bailee to the administrator *de bonis non* himself. Milam *v.* Ragland, 25 Ala. 243.

which an executor or administrator is accountable,[47] but he may be required to account for assets not inventoried or credited by him.[48] It is only as to money or property which an executor or administrator is entitled to receive in his representative capacity that an account should be taken in settling his administration. If he receives money or property to which he is not entitled in his representative capacity he cannot be required to account therefor.[49]

8. Relief From Duty[50]— a. In General. To relieve a personal representative from the duty to account or from the consequences of a failure to account his excuse must be legal and reasonable, and whether it is so is a matter largely for the discretion and judgment of the court in each particular case.[51] A creditor may waive his right to an accounting by acquiescing in a settlement,[52] and so may distributees.[53] Although the personal representative may be entirely relieved from his obligation to account by the terms of the will,[54] he is not so relieved merely because the will gives him absolute discretion as to the management of the estate,[55] or allows him a specified time in which to settle the same.[56] Permission from the court to an administrator to retain in his possession the money of minors does not relieve him from the obligation to make annual and final settlements.[57]

b. Bond to Pay Debts and Legacies. Where an executor who is also the residuary legatee has given bond to pay the testator's debts and legacies, as he may do in some jurisdictions,[58] a bill in equity cannot be maintained against him for an accounting, nor can a probate accounting be compelled.[59]

An infant administrator is responsible for all acts done after he becomes of age and before revocation. A court of equity regards him as a trustee and compels him so far to account, but not with respect to assets which came into his hands during infancy. Carow *v.* Mowatt, 2 Edw. (N. Y.) 57.

Receipt of money by deceased.— Evidence that a testator one year before his death received certain money is not sufficient, without proof connecting his executor with the money, to make him accountable therefor. Matter of Haney, 74 Hun (N. Y.) 205, 26 N. Y. Suppl. 815.

Provisions in the house, which the family consumed immediately after the decedent's death and before the taking of the inventory, are not to be accounted for. Williamson *v.* Williamson, 6 Paige (N. Y.) 298.

47. See *supra*, IV, I.

48. Field *v.* Hitchcock, 14 Pick. (Mass.) 405; Boston *v.* Boylston, 4 Mass. 318; Schick *v.* Grote, 42 N. J. Eq. 352, 7 Atl. 852; Perea *v.* Barela, 5 N. M. 458, 23 Pac. 766.

49. *Alabama.*— Key *v.* Jones, 52 Ala. 238; Pettit *v.* Pettit, 32 Ala. 288; Ashurst *v.* Ashurst, 13 Ala. 781; Smith *v.* Smith, 13 Ala. 329.

Connecticut.— Guinan's Appeal, 70 Conn. 342, 39 Atl. 482.

Iowa.— Berryhill's Estate, 61 Iowa 345, 16 N. W. 198.

Missouri.— Schoeneich *v.* Reed, 8 Mo. App. 356.

New York.— *In re* Soutter, 105 N. Y. 514, 12 N. E. 34; Jones *v.* Corbett, 11 Paige 265.

Pennsylvania.— Rine *v.* Hall, 187 Pa. St. 264, 40 Atl. 1088; Watson's Appeal, 6 Pa. St. 505; Merrick's Estate, 8 Watts & S. 402; Carr's Estate, 3 Pa. Dist. 740, 15 Pa. Co. Ct. 354; Tracy's Estate, 15 Montg. Co. Rep. 30; Osterhout's Estate, 8 Lanc. L. Rev. 18. See also Cassel's Estate, 180 Pa. St. 252, 36 Atl. 744; Walker's Estate, 4 Pa. Dist. 124, 16 Pa. Co. Ct. 160.

Virginia.— Cary *v.* Macon, 4 Call 605.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1990.

50. **By private accounting and settlement** see *infra*, XV, J.

51. *Ex p.* Pearce, 44 Ark. 509; Dundas' Estate, 2 Wkly. Notes Cas. (Pa.) 128; Morrow's Estate, 3 C. Pl. (Pa.) 37; Trevelyan *v.* Lofft, 83 Va. 141, 1 S. E. 901. See also Jones *v.* Williams, 2 Call (Va.) 102.

Illustrations.— It is no defense to a citation to an administrator to file an account of a deceased executor that moneys received by said executor were rents of real estate of his testator, or moneys which vested in him of his own right as devisee. Handbest's Estate, 4 Wkly. Notes Cas. (Pa.) 402. Want of settlement by an administrator of an intestate's estate, caused by his own neglect, is not a valid objection to his accounting for another estate incidentally connected therewith, of which he is also administrator. Johnson *v.* Henagan, 11 S. C. 93.

52. Love's Estate, 11 Wkly. Notes Cas. (Pa.) 324.

53. Powell *v.* Powell, 10 Ala. 900. See also Piatt *v.* Longworth, 27 Ohio St. 159.

54. Maurer *v.* Bowman, 169 Ill. 586, 48 N. E. 823. See also *In re* Runner, 3 Del. Co. (Pa.) 395.

55. Harrison's Estate, 12 Pa. Co. Ct. 388. See also Sellers *v.* Sellers, 35 Ala. 235.

56. Young's Estate, 1 Pa. Co. Ct. 513.

57. Devore *v.* Pitman, 3 Mo. 179.

58. See *supra*, II, J, 1, a, (II), (B).

59. Durfee *v.* Abbott, 50 Mich. 278, 15 N. W. 454; Copp *v.* Hersey, 31 N. H. 317;

c. Pendency of Other Proceedings. The pendency of other proceedings affecting the estate or its settlement does not ordinarily relieve a personal representative from the necessity of accounting as required by law.[60]

9. Consequences of Failure to Account. Under various statutes a representative who fails to account as required may become personally liable for the debts of the estate[61] may have an execution awarded against him for the full value of whatever personal property of the deceased has come to his hands,[62] may incur a penalty,[63] or may subject himself to liability to imprisonment[64] or to indictment.[65]

B. Proceedings For Accounting — 1. In General. A personal representative's account can be settled only in some proceeding appropriate for that purpose, in a court having the requisite jurisdiction.[66] Proceedings by attachment are inapplicable for the purpose of compelling the settlement of an estate,[67] nor can a proceeding provided in case of failure to file an inventory be invoked to compel an account by a personal representative.[68]

2. Jurisdiction — a. In General. An executor or administrator cannot be compelled to account in the common-law courts, but only in a court of probate or of equity.[69]

b. Probate Courts — (i) *In General.* Jurisdiction as to accounting and settlement by personal representatives is usually given to probate courts, or to general courts upon which probate power is expressly conferred;[70] but, as has

Batchelder *v.* Russell, 10 N. H. 39. See also Clarke *v.* Tufts, 5 Pick. (Mass.) 337; McElroy *v.* Hatheway, 44 Mich. 399, 6 N. W. 857; Schouler Ex. §§ 249, 534.

60. *Alabama.*— Chighizola *v.* Le Baron, 21 Ala. 406.

Illinois.— Rucker *v.* Redmon, 67 Ill. 187, suit in chancery in another county to settle right of representative to participate in distribution.

Indiana.— Norwood *v.* Harness, 98 Ind. 134, 49 Am. Rep. 739, suit on joint and several bond executed by decedent.

Maryland.— Jones *v.* Jones, 41 Md. 354, proceedings in equity to have the estate distributed under a decree of that court. But see Barroll *v.* Peters, 20 Md. 172, suit in chancery for settlement is a bar to a suit for final accounting in the orphans' court.

New York.— *In re* Hazard, 51 Hun 201, 4 N. Y. Suppl. 701 (a proceeding for an accounting before the surrogate cannot be defeated by the subsequent commencement of an action for an accounting in the supreme court); *In re* Reeves, 14 N. Y. Suppl. 454 (unsettled appeal from decree entered in last accounting).

Pennsylvania.— Nicholson's Estate, 16 Phila. 267. But see Keily's Estate, 9 Pa. Co. Ct. 175, account not compelled during pendency of suit between co-executors to determine ownership of bank deposits claimed by one of them individually.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1997.

61. Kenner *v.* Duncan, 3 Mart. N. S. (La.) 563; Butler *v.* Ricker, 6 Me. 268.

Neglect to comply with clerk's order.— There is no law which renders an administrator personally liable for a debt of his intestate on his mere neglect to comply with an *ex parte* order of the clerk to file his account. Lockhart *v.* Wall, 14 La. Ann. 273.

62. Williams *v.* Esty, 36 Me. 243.

63. Lippert *v.* Lippert, 110 Iowa 550, 81 N. W. 777; St. Mary's Congregation *v.* Farrelly, 34 La. Ann. 533; Toy's Succession, 14 La. Ann. 536; Dejol *v.* Johnson, 12 La. Ann. 853.

Persons who have induced the violation of a statute prescribing a penalty for failure to account cannot claim the penalty. Plunkett's Succession, 12 La. Ann. 558.

64. *Ex p.* Wright, 65 Ind. 504; Lobit *v.* Castille, 14 La. Ann. 779.

65. State *v.* Parrish, 4 Humphr. (Tenn.) 285.

66. See *infra*, XV, B, 2, b.

67. Metcalf *v.* Clark, 41 Barb. (N. Y.) 45.

68. People *v.* Corlies, 1 Sandf. (N. Y.) 228.

69. *Alabama.*— See Cooper *v.* Tillman, 33 Ala. 332.

Louisiana.— Flint *v.* Wells, 4 La. 537.

Massachusetts.— Tyler *v.* Wheeler, 160 Mass. 206, 35 N. E. 666.

Michigan.— Pitcher *v.* Douglas, 37 Mich. 339.

South Carolina.— Ordinary *v.* Robinson, 1 Bailey 25; Ordinary *v.* Williams, 1 Nott & M. 587. See also Harrington *v.* Cole, 3 McCord 509.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1999.

An action of account by a legatee against a personal representative will not lie at common law. Anonymous, 2 N. C. 226; Merriam *v.* Hemmenway, 26 Vt. 565; Curtis *v.* Curtis, 13 Vt. 517, *aliter* by statute as between co-executors. *Compare* Smith *v.* Chapman, 5 Conn. 14.

Appeals from a probate court on matters involving the settlement of accounts will not be heard in a court of law. Wallis *v.* Gill, 3 McCord (S. C.) 475.

70. *Alabama.*— Hatchett *v.* Billingslea, 65 Ala. 16; Malone *v.* Marriott, 64 Ala. 486; Savage *v.* Benham, 11 Ala. 49.

been shown elsewhere in this work, courts of equity in many instances also have

Arkansas.— *Ex p.* Pearce, 44 Ark. 509.

Connecticut.— Brush *v.* Button, 36 Conn. 292; Beach *v.* Norton, 9 Conn. 182.

District of Columbia.— Keyser *v.* Breitbarth, 3 Mackey 19.

Illinois.— Boyd *v.* Swallows, 59 Ill. App. 635.

Kentucky.— Holland *v.* Lowe, 101 Ky. 98, 41 S. W. 9, 39 S. W. 854, 19 Ky. L. Rep. 97 (county courts); McAfee *v.* Balden, 6 Bush 537.

Louisiana.— Spivey's Succession, 15 La. Ann. 248; Boyce *v.* Davis, 13 La. Ann. 554; Grubb *v.* Henderson, 1 Rob. 4; Humphreys *v.* King, 2 La. 49; Taylor *v.* Hollander, 4 Mart. N. S. 535; Casanovichi *v.* Debon, 10 Mart. 11.

Maine.— Graffam *v.* Ray, 91 Me. 234, 39 Atl. 569; Probate Judge *v.* Quimby, 89 Me. 574, 36 Atl. 1049; Decker *v.* Decker, 74 Me. 465; Gilbert *v.* Duncan, 65 Me. 469; Simpson *v.* Norton, 45 Me. 281; Pierce *v.* Irish, 31 Me. 254; Potter *v.* Cummings, 18 Me. 58.

Massachusetts.— Sargent *v.* Sargent, 168 Mass. 420, 47 N. E. 121.

Michigan.— Fingleton *v.* Kent Cir. Judge, 116 Mich. 211, 74 N. W. 473.

Minnesota.— Betcher *v.* Betcher, 83 Minn. 215, 86 N. W. 1; Starkey *v.* Sweeney, 71 Minn. 241, 73 N. W. 859; Luse *v.* Reed, 63 Minn. 5, 65 N. W. 91; Boltz *v.* Schutz, 61 Minn. 444, 64 N. W. 48; Culver *v.* Hardenbergh, 37 Minn. 225, 33 N. W. 792; State *v.* Ueland, 30 Minn. 277, 15 N. W. 245; Jacobs *v.* Fouse, 23 Minn. 51.

Mississippi.— Foute *v.* McDonald, 27 Miss. 610; Steen *v.* Steen, 25 Miss. 513; Harris *v.* Fisher, 5 Sm. & M. 74, right to refuse to allow accounts in case of devastavit.

Montana.— *In re* Higgin, 15 Mont. 474, 39 Pac. 506, 28 L. R. A. 116. See also Deer Lodge County *v.* Kohrs, 2 Mont. 66.

New Hampshire.— Tappan *v.* Tappan, 24 N. H. 400.

New York.— Sexton *v.* Sexton, 174 N. Y. 510, 66 N. E. 1116 [*affirming* 64 N. Y. App. Div. 385, 72 N. Y. Suppl. 213]; Borrowe *v.* Corbin, 165 N. Y. 634, 59 N. E. 1119 [*affirming* 31 N. Y. App. Div. 172, 52 N. Y. Suppl. 741]; *In re* Callahan, 152 N. Y. 320, 46 N. E. 486; Harris *v.* Ely, 25 N. Y. 138; Matter of Arkenburgh, 11 N. Y. App. Div. 193, 42 N. Y. Suppl. 965; Matter of Robinson, 42 Misc. 169, 85 N. Y. Suppl. 1087; Matter of Plummer, 38 Misc. 536, 77 N. Y. Suppl. 1115; Clark *v.* Clark, 8 Paige 152, 35 Am. Dec. 676; Foster *v.* Wilber, 1 Paige 537. See also *In re* Hurlburt, 43 Hun 311; Richardson's Estate, 2 Misc. 288, 23 N. Y. Suppl. 978, Pow. Surr. 384; Vanderveer *v.* McKane, 11 N. Y. Suppl. 808, 25 Abb. N. Cas. 105; Matter of Uglow, 51 How. Pr. 342; Carman *v.* Cowles, 2 Redf. Surr. 414.

North Carolina.— Gay *v.* Grant, 101 N. C. 206, 8 S. E. 99, 106; *Ex p.* Spencer, 95 N. C. 271; Stancill *v.* Gay, 92 N. C. 455; Hendrick *v.* Mayfield, 74 N. C. 626; Ballard *v.* Kilpatrick, 71 N. C. 281; Hutchinson *v.* Roberts, 67 N. C. 223; Neilig *v.* Foard, 64 N. C. 710; Hunt *v.* Sneede, 64 N. C. 176. See also Pegram *v.* Armstrong, 82 N. C. 326; Herring *v.* Outlaw, 70 N. C. 334.

Ohio.— Voss *v.* Loomis, 1 Ohio Cir. Ct. 20, 1 Ohio Cir. Dec. 12.

Oregon.— Rutenic *v.* Hamakar, 40 Oreg. 444, 67 Pac. 196; Gatch *v.* Simpson, 40 Oreg. 99, 66 Pac. 688.

Pennsylvania.— Reese's Appeal, 116 Pa. St. 272, 9 Atl. 315; Wimmer's Appeal, 1 Whart. 96; Com. *v.* Brady, 3 Serg. & R. 309; Huffman's Estate, 19 Pa. Co. Ct. 558; Parker's Estate, 8 Phila. 217; Apple's Estate, 2 Phila. 171; Peters' Estate, 1 Phila. 581 (estates, whether solvent or insolvent, may be brought into the orphans' court for settlement); Darrach's Estate, 2 Pa. L. J. Rep. 454. See also Walls *v.* Walls, 170 Pa. St. 48, 32 Atl. 649.

Texas.— Shiner *v.* Shiner, 90 Tex. 414, 38 S. W. 1126.

Vermont.— See Wentworth *v.* Wentworth, 12 Vt. 244.

Washington.— *In re* Alfstad, 27 Wash. 175, 67 Pac. 593.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2002–2003; and EQUITY, 16 Cyc. 92.

The court granting letters of administration has generally exclusive jurisdiction over the administrator appointed by it in the settlement of the estate (Taliferro *v.* Bassett, 3 Ala. 670; Boyce *v.* Davis, 13 La. Ann. 554; People *v.* Pelham, 14 Wend. (N. Y.) 48), but where he dies without having rendered an account it can be rendered only in the probate court where his own estate is administered (Thomas *v.* Bourgeat, 6 Rob. (La.) 435).

Leave granted to bring suit upon an administrator's bond for his neglect, upon being cited, to settle his accounts does not divest the court of probate of its jurisdiction for the settlement of the accounts, if no suit has been commenced. Sturtevant *v.* Tallman, 27 Me. 78.

Insolvency courts have no jurisdiction to compel the executors or administrators of deceased trustees to account in these courts for the trust estate. Purviance *v.* Glenn, 8 Md. 202.

In Alabama when the administrator is the actor in bringing about the settlement, he must proceed in the probate court, and cannot resort to the chancery court, unless he shows some special ground of equitable jurisdiction, which the probate court is incompetent to administer. Glenn *v.* Billingslea, 64 Ala. 345; Bush *v.* Cunningham, 37 Ala. 68; Park *v.* Park, 36 Ala. 132; McNeill *v.* McNeill, 36 Ala. 109, 76 Am. Dec. 320; Sellers *v.* Sellers, 35 Ala. 235; Moore *v.* Lesueur, 33 Ala. 237; Stewart *v.* Stewart, 31 Ala. 207; Pearson *v.* Darrington, 21 Ala. 169; Horton *v.* Moseley, 17 Ala. 794; Wilson *v.* Crook, 17 Ala. 59; King *v.* Smith, 15 Ala. 264; Hunley *v.* Hunley, 15 Ala. 91; Scott *v.* Abercrombie, 14 Ala. 270; Dement *v.* Boggess, 13 Ala. 140; Blakey *v.* Blakey, 9 Ala.

jurisdiction as to these matters.[71] The extent of the jurisdiction of probate courts as to such matters depends upon the constitutional and statutory provisions conferring it, and it must be exercised in accordance with such provisions.[72]

391; Leavens *v.* Butler, 8 Port. 380; Portis *v.* Creagh, 4 Port. 332; Dobbs *v.* Cockerham, 2 Port. 328; Cherry *v.* Belcher, 5 Stew. & P. 133. An administrator of one person, who by becoming the personal representative of another sustains dual and antagonistic relations, cannot make a valid settlement of his accounts in probate court; the only remedy is in chancery. Buchanan *v.* Thomason, 70 Ala. 401; Alexander *v.* Alexander, 70 Ala. 357. See also Martin *v.* Atkinson, 108 Ala. 314, 18 So. 888; Hays *v.* Cockrell, 41 Ala. 75. And when an administrator is also the guardian of the distributees of the estate the probate court has no jurisdiction. Cleere *v.* Cleere, 82 Ala. 581, 3 So. 107, 60 Am. Rep. 750; Vaughan *v.* Suggs, 82 Ala. 357, 2 So. 32. See also Tankersly *v.* Pettis, 61 Ala. 354. But the mere fact that the same person is administrator of two estates, one of which is the only creditor of the other, does not deprive the probate court of jurisdiction. Eatman *v.* Eatman, 82 Ala. 223, 2 So. 729.

In California the probate court has no jurisdiction to receive or act upon an account presented by an executor of an executor against the estate of the testator of the deceased executor. Wetzler *v.* Fitch, 52 Cal. 638; Bush *v.* Lindsey, 44 Cal. 121.

71. See EQUITY, 16 Cyc. 91.

72. *Alabama.*— Gayle *v.* Johnson, 80 Ala. 388; Vincent *v.* Martin, 79 Ala. 540; Whorton *v.* Moragne, 62 Ala. 201; Carter *v.* Carter, 39 Ala. 579; Reaves *v.* Garrett, 34 Ala. 558; Gerald *v.* Bunkley, 17 Ala. 170; Brazier *v.* King, 16 Ala. 730.

Arkansas.— Hughes *v.* Pike, 27 Ark. 298.

District of Columbia.—U. S. *v.* Ames, MacArthur & M. 278.

Georgia.— Echols *v.* Almon, 77 Ga. 330, 1 S. E. 269.

Louisiana.—Wise's Succession, 32 La. Ann. 1229; Lawrence *v.* Guice, 9 Rob. 219.

Massachusetts.— Boston *v.* Boylston, 4 Mass. 318.

Mississippi.— West *v.* Gibbs, 42 Miss. 168 (the probate court should so exercise its powers as to settle all questions in controversy if practicable); Thornton *v.* Glover, 25 Miss. 132; Harris *v.* Fisher, 5 Sm. & M. 74; Scott *v.* Searles, 5 Sm. & M. 25.

Missouri.— Johnson *v.* Johnson, 72 Mo. App. 386, probate courts have jurisdiction as to everything necessary to the full and final administration of estates.

Montana.— State *v.* Eighth Judicial Dist. Ct., 26 Mont. 369, 68 Pac. 856 (no jurisdiction to decide dispute as to ownership of property); *In re* Barker, 26 Mont. 279, 67 Pac. 941.

New Jersey.— Martin *v.* Martin, 19 N. J. L. 44; Kinnan *v.* Wight, 39 N. J. Eq. 501 (jurisdiction to inquire into the validity of representative's claim satisfied by retainer); Fennimore *v.* Fennimore, 3 N. J. Eq. 292.

New York.— Alexander *v.* Durkee, 112 N. Y. 655, 19 N. E. 514 [*affirming* 46 Hun 665]; Stilwell *v.* Carpenter, 59 N. Y. 414; Matter of Miles, 61 N. Y. App. Div. 562, 71 N. Y. Suppl. 71 [*reversing* 33 Misc. 147, 68 N. Y. Suppl. 368]; Matter of Mitchell, 61 Hun 372, 16 N. Y. Suppl. 180; Matter of Hazard, 51 Hun 201, 4 N. Y. Suppl. 701; Richardson *v.* Root, 19 Hun 473; White *v.* Bullock, 20 Barb. 91 [*reversed* in 4 Abb. Dec. 578, 15 How. Pr. 102] (within the jurisdiction of a surrogate to find what each of several representatives should be debited and credited with); Farnsworth *v.* Oliphant, 19 Barb. 30; Matter of Cooper, 6 Misc. 501, 27 N. Y. Suppl. 425 (jurisdiction to determine all property rights between a personal representative and the estate which are necessary to a full adjustment of all matters connected with the trust); *In re* Schmidt, 58 N. Y. Suppl. 595 (surrogate court has no jurisdiction to annul or set aside instruments executed by parties who are before it, questioning their validity. See also Sanders *v.* Soutter, 126 N. Y. 193, 27 N. E. 263; *In re* Wagner, 119 N. Y. 28, 23 N. E. 200); Matter of Blow, 11 N. Y. Suppl. 193, 2 Connoly Surr. 360; Banks *v.* Taylor, 10 Abb. Pr. 199; Matter of Cooley, 6 Dem. Surr. 77; Thompson *v.* Mott, 5 Redf. Surr. 574; Gottsberger *v.* Smith, 2 Bradf. Surr. 86.

Oregon.— Dray *v.* Bloch, 29 Oreg. 347, 45 Pac. 772.

Pennsylvania.— *In re* Jacoby, 201 Pa. St. 442, 50 Atl. 935; Lafferty *v.* Corcoran, 180 Pa. St. 309, 36 Atl. 860; Walker's Appeal, 116 Pa. St. 419, 9 Atl. 654; Hamburg Bank *v.* Seidel, 3 Pa. Cas. 332, 6 Atl. 255; Reed's Appeal [*cited* in Torr's Estate, 2 Rawle 250, 256]; Matter of Mitchel, 1 Pearson 428; Titlow's Estate, 3 Pa. Co. Ct. 370, 20 Wkly. Notes Cas. 15; Gillespie's Estate, 13 Phila. 239; Gordon's Estate, 9 Phila. 350 (power to determine the amount due on a judgment in another court); *In re* Schulte, 28 Pittsb. Leg. J. 95.

Rhode Island.— Moulton *v.* Smith, 16 R. I. 126, 12 Atl. 891, 27 Am. St. Rep. 728.

South Carolina.— Walker *v.* Pinson, 12 Rich. Eq. 445.

Texas.— Cobb *v.* Speers, (Civ. App. 1899) 49 S. W. 666.

Washington.—*In re* Alfstad, 27 Wash. 175, 67 Pac. 593.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2002–2003; and COURTS, 11 Cyc. 791.

Personal dealings of executor.— A probate court has no jurisdiction to compel an executor to account for his personal dealings. Byrne *v.* Hume, 73 Mich. 392, 41 N. W. 331.

Refunding excess paid legatee.— Upon an accounting by the representative, the probate court has no jurisdiction to require the

(II) *Matters Incidental to Accounting and Settlement.* Under the statutes of the several states probate courts have jurisdiction as to various matters incidental to accounting and settlement.[73]

(III) *Where Trust Created by Will.*[74] In Alabama it has been decided that when a trust is created by will the probate courts have no jurisdiction to enforce or settle such trust;[75] but this principle does not oust the jurisdiction of the probate court in all cases where a testator by his will devolves testamentary trusts upon the person appointed executor, and in such cases the probate court may properly undertake to settle up such matters as pertain to the executorial duties or office, and decline to take cognizance of the extraordinary trusts which fall outside of the scope or sphere of the ordinary duties of executors and administrators.[76] In New Jersey it has been said that it would seem difficult to create a pure trust by will which could not be administered in the orphans' court.[77] In Pennsylvania, where the trust is not annexed to the office of executor by the

legatee or distributee overpaid, to refund the excess, as the claim to such excess so far as a recovery thereof is concerned is a matter between the representative and such overpaid party. Hatchett *v.* Billingslea, 65 Ala. 16; Echols *v.* Almon, 77 Ga. 330, 1 S. E. 269; *In re* Underhill, 117 N. Y. 471, 22 N. E. 1120, 2 Silv. Supreme (N. Y.) 541, 6 N. Y. Suppl. 133 [*affirming* 9 N. Y. Suppl. 457, 1 Connoly Surr. 313].

Debts due by personal representative to the estate.— In some states the indebtedness of the personal representative to the estate is a matter within the jurisdiction of the probate court. Wood *v.* Tallman, 1 N. J. L. 153; Everts *v.* Everts, 62 Barb. (N. Y.) 577; Matter of Strickland, 5 N. Y. Suppl. 851, 1 Connoly Surr. (N. Y.) 435; Matter of Eisner, 5 N. Y. Suppl. 30, 1 Connoly Surr. 358; Gardner *v.* Gardner, 7 Paige (N. Y.) 112; *In re* Raab, 16 Ohio St. 273. *Aliter* in Missouri. Wilson *v.* Ruthrauff, 82 Mo. App. 435.

Surrogate's jurisdiction as to accounting for real estate sold under a power in a will see Baldwin *v.* Smith, 3 N. Y. App. Div. 350, 38 N. Y. Suppl. 299. See also Stagg *v.* Jackson, 1 N. Y. 206.

Legacies.— In Rhode Island the statutes do not include legacies within an administration account and such inclusion is not within the jurisdiction of probate courts. Williams *v.* Herrick, 18 R. I. 120, 25 Atl. 1099; Arnold *v.* Smith, 14 R. I. 217.

73. *Alabama.*— Cary *v.* Simmons, 87 Ala. 524, 6 So. 416, making allowance for money paid on account of the education and support of minor heirs.

Arkansas.—Brogan *v.* Brogan, 63 Ark. 405, 39 S. W. 58, 58 Am. St. Rep. 124, inquiry and decision whether creditors have lost the right to subject real estate to the payment of their debts.

California.— *In re* Sanderson, (1887) 13 Pac. 497.

Illinois.— Duval *v.* Duval, 153 Ill. 49, 38 N. E. 944.

Louisiana.— *In re* Altemus, 32 La. Ann. 364 (incidental inquiry into partnership settlement); Prudhomme's Succession, 23 La. Ann. 228 (disposition of opposition by creditors).

Mississippi.— Crowder *v.* Shackelford, 35 Miss. 321.

New Hampshire.— Willard *v.* Kingsbury, Smith 223.

New Jersey.— Dunham *v.* Marsh, 52 N. J. Eq. 256, 30 Atl. 473, incidental power to determine who the parties in interest are and to solve any question necessary to reach that end.

New York.— *In re* Schaefer, 171 N. Y. 686, 64 N. E. 1125 [*affirming* 65 N. Y. App. Div. 378, 73 N. Y. Suppl. 57 (*modifying* 34 Misc. 34, 69 N. Y. Suppl. 489)]; Hyland *v.* Baxter, 98 N. Y. 610 (allowing sums advanced and paid to an infant distributee); Gladding *v.* Follett, 2 Dem. Surr. 58 (settlement of account of testamentary trustee). See also Matter of Sistare, 15 N. Y. Suppl. 709, 2 Connoly Surr. 544; Dakin *v.* Demming, 6 Paige 95; Matter of Adams, 2 Redf. Surr. 66.

Ohio.— Phillips *v.* State, 5 Ohio St. 122, 64 Am. Dec. 635.

Pennsylvania.— *In re* Bitler, 1 Leg. Rec. 210.

South Carolina.— Charleston *v.* Mortimer, 7 Rich. 176, amendment of decree as to allowance of interest.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2004.

Jurisdiction to construe a will attaches as incident to the proceeding where a construction becomes necessary to the determination of questions arising on an accounting by a personal representative in a probate court. Small *v.* Thompson, 92 Me. 539, 43 Atl. 509; Matter of French, 52 Hun (N. Y.) 303, 5 N. Y. Suppl. 249; Matter of McCahill, 29 Misc. (N. Y.) 450, 61 N. Y. Suppl. 1071. See also Riggs *v.* Craig, 89 N. Y. 479 [*reversing* 26 Hun 89]; Stevens *v.* Stevens, 2 Redf. Surr. (N. Y.) 265. *Compare* Matter of Chapman, 32 Misc. (N. Y.) 187, 66 N. Y. Suppl. 235.

74. See, generally, Trusts.

75. Johnson *v.* Longmire, 39 Ala. 143; Harrison *v.* Harrison, 9 Ala. 470.

76. Hinson *v.* Williamson, 74 Ala. 180; Foxworth *v.* White, 72 Ala. 224; Pinney *v.* Werborn, 72 Ala. 58, 74 Ala. 591; *Ex p.* Dickson, 64 Ala. 188.

77. Phillips *v.* Phillips, (N. J. Ch. 1889) 18 Atl. 579.

terms of the will, the court of common pleas and the orphans' court have concurrent jurisdiction.[78]

(iv) *Accounting After Removal, Resignation, or Death.* It seems that probate courts generally have jurisdiction to compel personal representatives to account even after they have been removed[79] or have resigned.[80] In Texas it has been held not to be within the jurisdiction of a county court, sitting in probate, to determine the amount due from a deceased personal representative.[81]

(v) *Accounting After Final Settlement.* After the final account of a personal representative has been rendered and allowed, the jurisdiction of the probate court to compel an accounting terminates.[82]

(vi) *Enforcement of Orders or Judgments.* The probate court, after the death of an executor or administrator, loses all jurisdiction to enforce against his personal representative a decree rendered in final settlement against the representative.[83] In South Carolina the jurisdiction of the ordinary extends no further than to take and adjust accounts; he has no authority to enforce the performance of his order or decree.[84]

c. Territorial Jurisdiction. A personal representative should as a general rule be compelled to account in the tribunals of the county in which administration was granted,[85] but when the county in which the decedent resided and in which administration on his estate was granted is divided and a new county formed, in which his estate is situated, jurisdiction of the settlement of such estate may be transferred to the new county.[86] In a bill by heirs for an injunction against the sale of lands and for an accounting, a prayer that the administrator be compelled to deliver the lands to the heirs does not render the suit one respecting title to the lands so as to require a decree from the court in whose jurisdiction the lands lie.[87] In New York the jurisdiction of a surrogate is not limited to the bounds of his county, but he may send a citation to any part of the state to compel a personal representative to account and settle.[88] Where a will has been proved in a foreign state, the executors can be called to account there for their dealings with the estate,[89] but it is otherwise where the will has not been probated in the foreign state.[90] A personal representative who changes his domicile is still bound to account to the court of his former domicile where the administration was granted,[91] and where letters testamentary upon the estate of a resident of one state are granted in that state to a resident of another state,

78. Apple's Estate, 2 Phila. (Pa.) 171.

79. *Indiana.*— See Kelly *v.* Weddle, 1 Ind. 550.

Mississippi.— Denson *v.* Denson, 33 Miss. 560; Davis *v.* Cheves, 32 Miss. 317. *Contra,* Washburn *v.* Dorsey, 8 Sm. & M. 214.

Missouri.— Francisco *v.* Wingfield, 161 Mo. 542, 61 S. W. 842.

New York.— Gerould *v.* Wilson, 16 Hun 530 [*affirmed* in 81 N. Y. 573]; *In re* Lawrence, Tuck. Surr. 68. See also Prentiss *v.* Weatherly, 68 Hun 114, 22 N. Y. Suppl. 680 [*affirmed* in 144 N. Y. 707, 39 N. E. 858].

Pennsylvania.— See *In re* Redcay, 6 Lanc. Bar 57.

Texas.— See Ingram *v.* Maynard, 6 Tex. 130.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2006.

Contra.— Johnson *v.* Brown, 3 Mart. N. S. (La.) 601.

80. Slagle *v.* Entrekin, 44 Ohio St. 637, 10 N. E. 675.

81. McClellan *v.* Mangum, (Tex. Civ. App. 1903) 75 S. W. 840.

82. State *v.* Ramsey County Prob. Ct., 84 Minn. 289, 87 N. W. 783; State *v.* Stephenson, 12 Mo. 178; Portis *v.* Cummings, 14 Tex. 139; Francis *v.* Northcote, 6 Tex. 185. *Compare In re* Moreau, Tuck. Surr. (N. Y.) 470.

83. Dilworth *v.* Carter, 32 Miss. 206.

84. Ordinary *v.* McClure, 1 Bailey (S. C.) 7, 19 Am. Dec. 648. See also Walker *v.* Pinson, 12 Rich. Eq. (S. C.) 445.

85. George *v.* Lee, 6 Humphr. (Tenn.) 61. See also McNew *v.* Martin, 60 S. W. 412, 22 Ky. L. Rep. 1275.

Proceedings to settle estates cannot be transferred from one county to another. *In re* King, 105 Iowa 320, 75 N. W. 187.

86. Flournoy *v.* Flournoy, 1 Bush (Ky.) 515.

87. Williams *v.* Lancaster, 113 Ga. 1020, 39 S. E. 471.

88. People *v.* Pelham, 14 Wend. (N. Y.) 48.

89. Pratt *v.* Douglas, 38 N. J. Eq. 516.

90. Cocks *v.* Varney, 42 N. J. Eq. 514, 8 Atl. 722.

91. Farmer's Succession, 32 La. Ann. 1037.

the estate must be settled in the former state and the courts of the latter state have no jurisdiction over the accounts of the personal representative.[92] After submitting his account to the examination of an auditor appointed by a probate court to audit his administration account, and after a decision by the auditor, it is too late for an executor to object that money accounted for was received for land in another state, and was therefore not within the jurisdiction of the court to which he has submitted his account.[93] A bill in chancery seeking to revive a proceeding against an estate long after its final settlement is properly dismissed where it appears that the parties thereto are non-residents and no property of the estate remains in the state. In this condition of things the courts of their own state should be resorted to for relief.[94]

3. Limitations and Laches — a. Statute of Limitations. The relation of a personal representative and persons entitled to the estate is that of trustee and *cestuis que trustent*, and so long as this relation is acknowledged to exist between the parties and the trust is continued, the statute of limitations does not constitute a bar to a proceeding to compel an accounting and settlement.[95] But when this relation ceases to exist or where the personal representative does some act by which he renounces his trust character and such *cestuis que trustent* have full notice so as to put them on their remedies, and there is no disability or other impediment in the way of their enforcing their rights, the statute of limitations is set in operation.[96] In New York the rule as stated by most of the decisions is

92. Musselman's Appeal, 101 Pa. St. 165.

93. Jennison *v.* Hapgood, 10 Pick. (Mass.) 77.

94. Slaughter *v.* Garland, (Miss. 1889) 6 So. 648.

95. *Alabama.*— Greenlees *v.* Greenlees, 62 Ala. 330; Harrison *v.* Harrison, 39 Ala. 489; Rhodes *v.* Turner, 21 Ala. 210. See also Blackwell *v.* Blackwell, 33 Ala. 57, 70 Am. Dec. 556.

Arkansas.— Jacoway *v.* Hall, 67 Ark. 340, 55 S. W. 12; Brinkley *v.* Willis, 22 Ark. 1.

California.— Sanderson's Estate, 74 Cal. 199, 15 Pac. 753.

Illinois.— Boyd *v.* Swallows, 59 Ill. App. 635.

Kansas.— Allen *v.* Bartlett, 52 Kan. 387, 34 Pac. 1042.

Louisiana.— Courtade *v.* Chamberlain, 4 La. Ann. 368. But see Deranco *v.* Montgomery, 13 La. Ann. 513, construing statute of 1808.

Maryland.—See Fishwick *v.* Sewell, 4 Harr. & J. 393.

Massachusetts.— Fuller *v.* Cushman, 170 Mass. 286, 49 N. E. 631; White *v.* Swain, 3 Pick. (Mass.) 365.

Mississippi.— Cooper *v.* Cooper, 61 Miss. 676; Wren *v.* Gayden, 1 How. 365.

Missouri.— Picot *v.* Bates, 39 Mo. 292.

Ohio.— Gilbert *v.* Marsh, 7 Ohio S. & C. Pl. Dec. 230, 4 Ohio N. P. 338.

Pennsylvania.— Matter of Hoffman, 2 Pearson 491; Creidland's Estate, 2 Phila. 379. See also Logan *v.* Richardson, 1 Pa. St. 372; Landis' Estate, 13 Phila. 305. *Compare* Chandler *v.* Lamborne, 2 Pa. L. J. Rep. 124, 3 Pa. L. J. 367.

South Carolina.— Colburn *v.* Holland, 14 Rich. Eq. 176.

Tennessee.— Carr *v.* Lowe, 7 Heisk. 84; Lafferty *v.* Turley, 3 Sneed 157.

Texas.— McKinney *v.* Nunn, 82 Tex. 44, 17 S. W. 516.

Vermont.— Davis *v.* Eastman, 68 Vt. 225, 35 Atl. 73.

United States.— Pulliam *v.* Pulliam, 10 Fed. 23.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2014, 2015, 2016.

Correction of settlement.— Under the Alabama statute when any error of law or fact has occurred in the settlement of any estate of a decedent, to the injury of any party, without any fault or neglect on his part, such party may correct such error by a bill in chancery within two years after the final settlement thereof. Baldwin *v.* Deming, 51 Ala. 553; Millsap *v.* Stanley, 50 Ala. 319 (when statute not applicable); Ansley *v.* King, 35 Ala. 278.

Under the North Carolina statute a proceeding to compel an accounting must be brought within ten years from the time of the filing and auditing of the final account of a personal representative, and an action to impeach such an account must be brought within the same time. Nunnery *v.* Averitt, 111 N. C. 394, 16 S. E. 683; Wyrick *v.* Wyrick, 106 N. C. 84, 10 S. E. 916; Woody *v.* Brooks, 102 N. C. 334, 9 S. E. 294 [*distinguishing* Grant *v.* Hughes, 94 N. C. 231]. Prior to the enactment of the code there was no statutory limitation in such cases. Davis *v.* Cotten, 55 N. C. 430; McCraw *v.* Fleming, 40 N. C. 348; Bird *v.* Graham, 36 N. C. 196; Salter *v.* Blount, 22 N. C. 218; Ives *v.* Sumner, 16 N. C. 338.

96. Whiting *v.* Leakin, 66 Md. 255, 7 Atl. 688 (personal representative removed); Gilbert *v.* Marsh, 7 Ohio S. & C. Pl. Dec. 230, 4 Ohio N. P. 338 (account heard and passed upon and trust renounced); Colburn *v.* Holland, 14 Rich. Eq. (S. C.) 176; Prince *v.* Towns, 33 Fed. 161.

that formerly, under the provisions of the Revised Statutes, in accordance with the rule established in equity, and now, under the provisions of the code of civil procedure, special proceedings in a surrogate's court to compel an accounting and settlement by a personal representative are barred by the statute of limitations, if not commenced within six years from the time when the right to compel such accounting or settlement accrued.[97] A proceeding by an administrator *de bonis*

Mere neglect to perform the official duty of rendering accounts at the time required by law will not start the running of the statute of limitations. Allen *v.* Bartlett, 52 Kan. 387, 34 Pac. 1042. See also Young *v.* Schelly, (N. J. Ch. 1891) 21 Atl. 1049.

Final accounting may not terminate trust. —A settlement of an estate on what purports to be a final account is not necessarily a termination of the trust setting the statute in operation (Davis *v.* Eastman, 66 Vt. 651, 30 Atl. 1, 68 Vt. 225, 35 Atl. 73. See also Wilson *v.* McCarty, 55 Md. 277), and it has been decided that an order of a probate judge, made on the *ex parte* application of a personal representative granting him a final discharge, sets the statute in operation (Fricks *v.* Lewis, 26 S. C. 237, 1 S. E. 884 [*distinguishing* Dickerson *v.* Smith, 17 S. C. 289; Riddle *v.* Riddle, 5 Rich. Eq. (S. C.) 31]).

When there has been no actual settlement, but "some positive act manifesting a clear intention to terminate his trust" has been done by the trustee, the statute begins to run from this act. Such an act amounts to a claim that the trustee has fully accounted, and the acquiescence in the claim for the statutory period is a bar to any reopening of what has been so long acquiesced in. It must, however, be an act manifesting the intention to throw off the trust, not merely to strangers, but to the beneficiary or *cestui que trust*. Roberts *v.* Johns, 24 S. C. 580, 16 S. C. 171. See also Renwick *v.* Smith, 11 S. C. 294.

97. *In re* Rogers, 153 N. Y. 316, 47 N. E. 589; Butler *v.* Johnson, 111 N. Y. 204, 18 N. E. 643; Loder *v.* Hatfield, 71 N. Y. 92; American Bible Soc. *v.* Hebard, 41 N. Y. 619 [*affirming* 51 Barb. 552]; Clark *v.* Ford, 1 Abb. Dec. (N. Y.) 359; Matter of Schlesinger, 36 N. Y. App. Div. 77, 55 N. Y. Suppl. 514 [*reversing* 24 Misc. 456, 53 N. Y. Suppl. 710]; Matter of Hale, 6 N. Y. App. Div. 411, 39 N. Y. Suppl. 577; *In re* Van Dyke, 44 Hun (N. Y.) 394 [*reversing* 7 N. Y. St. 710]; *In re* Latz, 33 Hun (N. Y.) 618; Drake *v.* Wilkie, 30 Hun (N. Y.) 537; Cole *v.* Terpenning, 25 Hun (N. Y.) 482; Clark *v.* Chadeagne, 10 Hun (N. Y.) 97; Smith *v.* Remington, 42 Barb. (N. Y.) 75; Matter of Boylan, 25 Misc. (N. Y.) 281, 55 N. Y. Suppl. 426; Matter of Barnes, 25 Misc. (N. Y.) 279, 55 N. Y. Suppl. 430; Matter of Bradley, 25 Misc. (N. Y.) 261, 54 N. Y. Suppl. 555; Matter of Campbell, 21 Misc. (N. Y.) 133, 47 N. Y. Suppl. 29; Matter of Miller, 15 Misc. (N. Y.) 556, 37 N. Y. Suppl. 1129, 26 N. Y. Civ. Proc. 13; Matter of Kirkpatrick, 9 Misc. (N. Y.) 228, 30 N. Y. Suppl. 283; Matter of Van Wort, 3 Misc. (N. Y.) 563, 24 N. Y. Suppl. 719; Matter of Perry, 15 N. Y. Suppl. 535, 2 Connoly Surr. (N. Y.) 536; Pitkin *v.* Wilcox, 12 N. Y. Suppl. 322; *In re* May, 9 N. Y. Suppl. 785; *In re* Underhill, 9 N. Y. Suppl. 455, 1 Connoly Surr. (N. Y.) 541; *In re* Nicholls, 8 N. Y. Suppl. 7, 23 Abb. N. Cas. (N. Y.) 479, 2 Connoly Surr. (N. Y.) 156; *In re* Dunham, 6 N. Y. Suppl. 563, 22 Abb. N. Cas. (N. Y.) 479, 1 Connoly Surr. (N. Y.) 323; *In re* Clayton, 5 N. Y. Suppl. 266, 17 N. Y. Civ. Proc. 68, 1 Connoly Surr. (N. Y.) 444; *In re* Gregory, 4 N. Y. Suppl. 235; *In re* Stagg, 6 N. Y. Civ. Proc. 88; McCartee *v.* Camel, 1 Barb. Ch. (N. Y.) 455; House *v.* Agate, 3 Redf. Surr. (N. Y.) 307; Paff *v.* Kinney, 1 Bradf. Surr. (N. Y.) 1. See also Matter of Jordan, 50 N. Y. App. Div. 244, 63 N. Y. Suppl. 911; Garvey *v.* New York L. Ins., etc., Co., 4 Silv. Supreme (N. Y.) 348, 7 N. Y. Suppl. 818.

Contra.—*In re* Camp, 126 N. Y. 377, 27 N. E. 799; Matter of Irvin, 68 N. Y. App. Div. 158, 162, 74 N. Y. Suppl. 443; Matter of Jones, 51 N. Y. App. Div. 420, 64 N. Y. Suppl. 667 [*affirming* 30 Misc. 354, 63 N. Y. Suppl. 726]; Matter of Lyth, 32 Misc. (N. Y.) 608, 67 N. Y. Suppl. 579; Matter of Beyea, 10 Misc. (N. Y.) 198, 31 N. Y. Suppl. 200; Foster *v.* Town, 2 Dem. Surr. (N. Y.) 333. See also Matter of Rothschild, 42 Misc. (N. Y.) 161, 85 N. Y. Suppl. 1084.

Statute as to action by legatee or distributee inapplicable.—*In re* Van Dyke, 44 Hun (N. Y.) 394 [*reversing* 7 N. Y. St. 710]; Matter of Miller, 15 Misc. (N. Y.) 556, 37 N. Y. Suppl. 1129, 26 N. Y. Civ. Proc. 13; *In re* Perry, 15 N. Y. Suppl. 535, 2 Connoly Surr. (N. Y.) 536; *In re* Nichols, 8 N. Y. Suppl. 7, 23 Abb. N. Cas. (N. Y.) 479, 2 Connoly Surr. (N. Y.) 156; *In re* Dunham, 6 N. Y. Suppl. 563, 22 Abb. N. Cas. (N. Y.) 479, 1 Connoly Surr. (N. Y.) 323. *Compare* Collins' Estate, 6 N. Y. Civ. Proc. 85, 3 Dem. Surr. (N. Y.) 30.

The statute does not begin to run until the right to relief has accrued; and so where the estate cannot be settled until the happening of certain contingencies the statute does not begin to run before that time has arrived (*In re* Hodgman, 10 N. Y. Suppl. 491), and where a personal representative (Peltz *v.* Schultes, 64 Hun (N. Y.) 369, 19 N. Y. Suppl. 637) or legatee (Matter of Campbell, 21 Misc. (N. Y.) 133, 47 N. Y. Suppl. 29) is entitled to a life-interest in the estate, the statute does not begin to run during the life of the beneficiary.

Running not prevented by acts of representative.—Neither the acts of a personal representative in enforcing an obligation or

non to compel the representative of his deceased predecessor to account is in New York controlled by the ten years' statute applicable to suits in equity.[98]

b. Presumption From Lapse of Time. It is a well settled rule that a presumption that a personal representative has duly accounted and settled may arise from lapse of time.[99] This presumption, however, is not like the statute of limitations,

liability to the estate (Matter of Miller, 15 Misc. (N. Y.) 556, 37 N. Y. Suppl. 1129), nor a payment made by him to a person having a claim against the estate (Matter of Bradley, 25 Misc. (N. Y.) 261, 54 N. Y. Suppl. 555. But see Matter of Campbell, 21 Misc. (N. Y.) 133, 47 N. Y. Suppl. 29), will prevent the running of the statute where it does not appear that the petitioner has been under any disability or that he has acted in ignorance of or been misled with respect to his rights in the premises, nor that he has remained in repose or been inactive by reason of any promise, statements, or representations made by the personal representative. The statute does not run, however, when the executor by his acts held himself out to the devisees as engaged in winding up the estate and discharging claims that would have been prior to theirs. Carroll *v.* Carroll, 2 Edm. Sel. Cas. (N. Y.) 158.

When statute not a defense.— The six-year statute of limitations forms no defense to an action for an accounting of the administration of testatrix's estate by the life beneficiary, to whom letters *cum testamento annexo* were issued and the estate surrendered five years before the proceedings were instituted, although eleven years have elapsed since the issuance of letters to the executors. *In re* Post, 9 N. Y. Suppl. 449, 2 Connoly Surr. (N. Y.) 243 [*distinguishing In re* Van Dyke, 44 Hun (N. Y.) 394]. Where an executor pays over assets to legatees in advance of the final settlement of the estate, and thereafter a judgment for costs is recovered against the estate in an action brought by him, the statute of limitations is no defense to proceedings to compel an accounting by him, brought by the judgment creditor. *In re* Darling, 13 N. Y. Suppl. 783.

The right of a legatee who has obtained a judgment for his legacy to commence a proceeding for leave to issue execution against a personal representative does not accrue until after the entry of the judgment; and hence the issuing of an order by a surrogate requiring the personal representative to render an immediate account showing the assets in his hands is not prevented by the mere fact that the statute has run against any application for an accounting for the purpose of compelling the personal representative to pay the legacy. Matter of Bernardston Cong. Unitarian Soc., 34 N. Y. App. Div. 387, 54 N. Y. Suppl. 269.

Waiver of statute.— A personal representative who sets up a defense of the statute of limitations in his answer to a proceeding for an accounting does not waive this defense by voluntarily filing an account. *In re* Perry, 15 N. Y. Suppl. 535, 2 Connoly Surr. (N. Y.) 536; *In re* Clayton, 5 N. Y. Suppl. 266, 17 N. Y. Civ. Proc. 68, 1 Connoly Surr. (N. Y.) 444. Where, however, executors many years after their appointment petition for a voluntary account, and those interested are cited to appear, such executors cannot set up the statute of limitations. Matter of Lyth, 32 Misc. (N. Y.) 608, 67 N. Y. Suppl. 579. See also Calkins *v.* Isbell, 20 N. Y. 147; Wyckoff *v.* Van Siclen, 3 Dem. Surr. (N. Y.) 75.

Time and manner of interposing defense.— A personal representative may interpose the defense of the statute of limitations at any time before the close of the evidence, and need not interpose it in a formal manner. Matter of Rothschild, 42 Misc. (N. Y.) 161, 85 N. Y. Suppl. 1084.

98. *In re* Rogers, 153 N. Y. 316, 47 N. E. 589 [*reversing* 36 N. Y. Suppl. 1132]; Matter of Smith, 66 N. Y. App. Div. 340, 72 N. Y. Suppl. 1062; Matter of Longbotham, 38 N. Y. App. Div. 607, 57 N. Y. Suppl. 118 [*overruling* Matter of Taylor, 30 N. Y. App. Div. 213, 51 N. Y. Suppl. 609]; Pitkin *v.* Wilcox, 12 N. Y. Suppl. 322, 20 N. Y. Civ. Proc. 27; *In re* Latz, 33 Hun (N. Y.) 618.

99. *Alabama.*— Greenlees *v.* Greenlees, 62 Ala. 330; Scruggs *v.* Orme, 46 Ala. 533; Harrison *v.* Harrison, 39 Ala. 489; Rhodes *v.* Turner, 21 Ala. 210; Gregg *v.* Bethea, 6 Port. 9.

Arkansas.— State Bank *v.* Williams, 6 Ark. 156.

Louisiana.— McGehee *v.* McGehee, 41 La. Ann. 657, 6 So. 253.

Maryland.— Donaldson *v.* Raborg, 28 Md. 34; Gardner *v.* Simmes, 1 Gill 425.

New Jersey.— See Morgan *v.* Morgan, 50 N. J. Eq. 473, 26 Atl. 331.

New York.— See Leroy *v.* Bayard, 3 Bradf. Surr. 228.

Ohio.— Pennock *v.* Miller, 1 Ohio Dec. (Reprint) 456, 10 West. L. J. 85.

Pennsylvania.— Norris' Appeal, 71 Pa. St. 106; Com. *v.* Snyder, 62 Pa. St. 153; Hubley's Appeal, 19 Pa. St. 138; Foulk *v.* Brown, 2 Watts 209; McLean *v.* Findley, 2 Penr. & W. 97; Phillips' Appeal, 10 Pa. Cas. 249, 13 Atl. 906; Blackman's Estate, 2 Kulp 162; Leibert *v.* McKnight, 32 Leg. Int. 291; Ingraham *v.* Cox, 1 Pars. Eq. Cas. 70; Karns' Estate, 1 Am. L. Reg. 121. See also Hodgdon's Estate, 16 Wkly. Notes Cas. 164.

South Carolina.— Roberts *v.* Johns, 16 S. C. 171, 24 S. C. 580. *Compare* Montgomery *v.* Cloud, 27 S. C. 188, 3 S. E. 196.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2014, 2016.

Compare Petty *v.* Harman, 16 N. C. 191 [*distinguishing* Falls *v.* Torrance, 9 N. C. 490].

In Texas it is expressly provided by statute that no presumption of settlement of a personal representative's account shall arise

a flat bar to a proceeding for an accounting, but it can be overcome either by the acts or admissions of the personal representative or by other competent evidence, its practical effect being merely to shift the burden of proof.[1]

c. Laches. An accounting will be denied where the party seeking it has been guilty of laches, or has allowed his claim to come within the equitable rule against stale claims.[2]

4. Audit or Approval Before Settlement. Approval by the probate court is a needful preliminary to a final settlement and allowance of the administration account; and in some states an audit of the account under direction of the court is considered necessary.[3]

from lapse of time. Blackwell *v.* Blackwell, 86 Tex. 207, 24 S. W. 389; Main *v.* Brown, 72 Tex. 505, 10 S. W. 571, 13 Am. St. Rep. 823; Branch *v.* Hanrich, 70 Tex. 731, 8 S. W. 539.

1. Fuller *v.* Cushman, 170 Mass. 286, 49 N. E. 631; Glen *v.* Kimbrough, 58 N. C. 173; Norris' Appeal, 71 Pa. St. 106; Blackman's Estate, 2 Kulp (Pa.) 162; Nixon's Estate, 14 Phila. (Pa.) 297; Bentley's Estate, 9 Phila. (Pa.) 344; Brown's Estate, 8 Phila. (Pa.) 197.

In Alabama, however, it has been decided that the lapse of twenty years after the time when a settlement could have been coerced is a positive bar to a suit in equity or a proceeding in probate, to compel an accounting, which can only be avoided by the admissions of the personal representative, or the recognition by him of the trust as continuing and unsettled. Werborn *v.* Austin, 82 Ala. 498, 8 So. 280; Holt *v.* Wilson, 75 Ala. 58; Garrett *v.* Garrett, 69 Ala. 429; Greenlees *v.* Greenlees, 62 Ala. 330; Harrison *v.* Heflin, 54 Ala. 552; Ragland *v.* Morton, 41 Ala. 344, 91 Am. Dec. 516; Blackwell *v.* Blackwell, 33 Ala. 57, 70 Am. Dec. 556.

In South Carolina it has been held that the lapse of twenty years balances the account of all antecedent transactions, unless there be some disability of the person entitled to an account, or some act or admission of the party liable to account, showing that it remains unsettled. Weatherford *v.* Tate, 2 Strobh. Eq. 27.

2. *Arkansas.*— Martin *v.* Campbell, 35 Ark. 137.

Delaware.— Hall *v.* Walker, 1 Del. Ch. 241.

Florida.— Anderson *v.* Northrup, 30 Fla. 612, 12 So. 318.

Kentucky.— Bailey *v.* Duncan, 2 T. B. Mon. 20.

Louisiana.— See Oubre's Succession, 109 La. 516, 33 So. 583; McGehee *v.* McGehee, 41 La. Ann. 657, 6 So. 253.

Maryland.— Constable *v.* Camp, 87 Md. 173, 39 Atl. 807. See also Donaldson *v.* Raborg, 28 Md. 34.

Mississippi.— Davis *v.* Yerby, Sm. & M. Ch. 508.

New Jersey.— Bechtold *v.* Read, 49 N. J. Eq. 111, 22 Atl. 1085; Osborne *v.* O'Reilly, 43 N. J. Eq. 647, 12 Atl. 377; Hance *v.* Conover, 31 N. J. Eq. 505.

New York.— See Matter of Schlesinger, 36 N. Y. App. Div. 77, 55 N. Y. Suppl. 514.

North Carolina.— Glen *v.* Kimbrough, 58 N. C. 173. See also Villines *v.* Norfleet, 17 N. C. 167.

Pennsylvania.— *In re* Henry, 198 Pa. St. 382, 48 Atl. 274; *In re* Bordley, 39 Pa. St. 218; Washburn's Estate, 9 Kulp 60; Baxter's Estate, 10 Pa. Dist. 97; Henry's Estate, 8 Pa. Dist. 649, 23 Pa. Co. Ct. 290. See also Haage's Appeal, 17 Pa. St. 181.

Virginia.— Tate *v.* Jones, 98 Va. 544, 36 S. E. 984; Stamper *v.* Garnett, 31 Gratt. 550; Hayes *v.* Goode, 7 Leigh 452; Carr *v.* Chapman, 5 Leigh 164; Parks *v.* Rucker, 5 Leigh 149; Todd *v.* Moore, 1 Leigh 457.

United States.— See Lupton *v.* Janney, 13 Pet. 381, 10 L. ed. 218.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2014.

Persons under disability.— The doctrine of laches is not applicable to persons resting under disabilities. Werborn *v.* Austin, 82 Ala. 498, 8 So. 280; Wilson *v.* McCarty, 55 Md. 277. See also Collins' Estate, 6 N. Y. Civ. Proc. 85, 3 Dem. Surr. (N. Y.) 30.

When representative charged with fraud.— In the application of the doctrine of laches, when the rights of persons who sustain to the personal representative the relation of *cestuis que trustent* are involved, and the representative is charged with fraud, the latitude in favor of such persons is very much more liberal than in other cases where the same defense is relied upon. Bechtold *v.* Read, 49 N. J. Eq. 111, 22 Atl. 1085.

Delay caused by personal representative.— The doctrine of laches is not applicable when the administrator has acquiesced in the delay by refusing to render his accounts and by resisting a suit brought against him for an accounting. Tiernan *v.* Mingini, 28 W. Va. 314. Executors keeping an estate in their hands for many years under the pretense of outstanding debts cannot allege against a demand for an account that the claim is stale. Clifton *v.* Haig, 4 Desauss. (S. C.) 330.

3. See the following cases:

Alabama.— Rhodes *v.* Turner, 21 Ala. 210; Blackwell *v.* Vastbinder, 6 Ala. 218; Robinson *v.* Steele, 5 Ala. 473; Taylor *v.* Reese, 4 Ala. 121.

Kentucky.— Steele *v.* Morrison, 4 Dana 617.

Massachusetts.— Brigham *v.* Morgan, 185 Mass. 22, 69 N. E. 418.

Mississippi.— Cameron *v.* Gibson, Walk. 500.

5. Voluntary Accounting — a. In General. In American probate practice, the executor or administrator usually voluntarily presents his account to the register or clerk, who duly issues a citation directing next of kin, creditors, legatees, and all other persons interested in the estate to appear before the probate court at a day stated, and show cause, if any they have, against its allowance.[4]

b. Parties. All persons interested should be made parties to an accounting and settlement by a personal representative.[5]

c. Citation or Notice — (i) *In General.* Generally, before rendering his account and making a settlement of the estate, a personal representative must cause a citation to issue or give due notice to all persons interested, stating the time and place of such accounting and settlement and such other matters as are required by statute,[6] and it has been held that when due notice is not given

Pennsylvania.— Page's Estate, 3 Pa. Dist. 212; McMahon's Estate, 18 Phila. 188.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2023; and Schouler Ex. § 523.

4. Schouler Ex. § 523.

Purposes for which not allowed.— An executor will not be permitted to settle an account in the probate court for the mere purpose of charging the estate with a debt due to himself by the testator in his lifetime (*In re* Shenck, 5 Watts (Pa.) 84), or for the purpose of having costs, incurred in determining the validity of the will, allowed (Royer's Appeal, 13 Pa. St. 569).

Voluntary accounting under New York statute see Matter of Lawson, 36 Misc. (N. Y.) 96, 72 N. Y. Suppl. 645; Matter of Crowley, 33 Misc. (N. Y.) 624, 68 N. Y. Suppl. 939. And see N. Y. Code Civ. Proc. § 2728. A voluntary proceeding and an involuntary proceeding for an accounting of the same estate may be consolidated whenever such consolidation is shown to be equitable. *In re* Rainforth, 37 Misc. (N. Y.) 660, 76 N. Y. Suppl. 314; Matter of Mulry, 31 Misc. (N. Y.) 78, 64 N. Y. Suppl. 576. *Compare* Baylis *v.* Swartwout, 4 Redf. Surr. (N. Y.) 395.

5. Waller *v.* Ray, 48 Ala. 468 (holding that upon a settlement made by a personal representative who has resigned, the parties are the heirs at law of the deceased, the legatees, distributees, and the administrator *de bonis non*, if the estate is solvent, and if the estate is insolvent the creditors are also proper parties); Sparrow's Succession, 42 La. Ann. 500, 7 So. 611 (right of creditor to intervene); Harrell's Succession, 12 La. Ann. 337 (heirs); Symmes *v.* Libbey, Smith (N. H.) 137 (vested remainder-man); McMahon *v.* Smith, 24 N. Y. App. Div. 25, 49 N. Y. Suppl. 93 [*reversing* 20 Misc. 305, 45 N. Y. Suppl. 663] (surety on administrator's bond); Matter of Sill, 41 Misc. (N. Y.) 270, 84 N. Y. Suppl. 213 (sureties); Matter of Walton, 38 Misc. (N. Y.) 723, 78 N. Y. Suppl. 296; *In re* Quinn, 9 N. Y. Suppl. 550 (persons interested in estate of deceased co-executor); Tilden's Estate, 5 N. Y. Civ. Proc. 449 (assignee of devisee).

Distributees should be made parties (Merrill *v.* Jones, 2 Ala. 192; Boyett *v.* Kerr, 7 Ala. 9); and where a distributee dies before the settlement his personal representative is a necessary party (McMullan *v.* Brazelton, 81 Ala. 442, 1 So. 778; Thomas *v.* Dumas, 30 Ala. 83; Hall *v.* Andrews, 17 Ala. 40; Reynolds *v.* Reynolds, 11 Ala. 1023; Boyett *v.* Kerr, *supra*). The husband of distributee has also been held to be a necessary party. Smith *v.* Hooper, 20 Ala. 245. But creditors of a distributee are not proper parties. Duncan *v.* Guest, 5 Redf. Surr. (N. Y.) 440. See also *In re* Stephens, 64 N. Y. Suppl. 990.

In New York, under the provisions of Code Civ. Proc. §§ 2728–2731, relative to the settlement of the accounts of personal representatives "a person interested in the estate, although not cited, is entitled to appear on the hearing, and thus make himself a party to the proceeding." Matter of Thompson, 41 Misc. 223, 83 N. Y. Suppl. 983. Under these provisions the people may appear and claim payment of the collateral inheritance tax. Matter of Arnett, 49 Hun 599, 2 N. Y. Suppl. 428.

Where property is bequeathed to one in trust for others, the trustee is regarded at law as the legatee, and his *cestuis que trustent* are not necessary parties to a settlement of the administration. Gaunt *v.* Tucker, 18 Ala. 27.

6. *Alabama.*— Robinson *v.* Steele, 5 Ala. 473; Douthitt *v.* Douthitt, 1 Ala. 594. Notice of an intended settlement of a representative's accounts, whether partial or final, is required by statute (Sims *v.* Waters, 65 Ala. 442), and notice of an annual or partial settlement will not support a decree of final settlement (Sims *v.* Waters, 65 Ala. 442; King *v.* Collins, 21 Ala. 363).

Arkansas.— Greely Burham Grocery Co. *v.* Graves, 43 Ark. 171. But see Jones *v.* Graham, 36 Ark. 383.

Georgia.— Head *v.* Bridges, 67 Ga. 227.

Indiana.— Roberts *v.* Spencer, 112 Ind. 81, 13 N. E. 127.

Iowa.— Jordan *v.* Woodin, 93 Iowa 453, 61 N. W. 948.

Louisiana.— Winn's Succession, 30 La. Ann. 702; Hart's Succession, 8 Rob. 121; Millaudon *v.* Cajus, 6 La. 222. See also Capdevielle *v.* Erwin, 13 La. Ann. 286; Bry *v.*

the accounting is void,[7] unless it is waived.[8] In some cases notice may be properly given by publication or posting,[9] while in others personal service is necessary.[10]

(II) *PROOF OF SERVICE OR PUBLICATION.* Service of publication of notice for hearing of the final account of an administrator must be shown affirma-

Dowell, 1 Rob. 111. The notification of the filing of a tableau operates as a citation to all persons concerned therein (creditors as well as legatees), and the homologation of an account and tableau bars all further inquiries as to all matters included in the account. Bougère's Succession, 29 La. Ann. 378; Penniston's Succession, 18 La. Ann. 281; De Egana's Succession, 18 La. Ann. 263. See also Coiron *v.* Millaudon, 3 La. Ann. 664; Peytavin's Succession, 10 Rob. 118; Smith *v.* De Lalande, 1 Rob. 384.

Maryland.— Yakel *v.* Yakel, 96 Md. 240, 53 Atl. 914, necessity of notice to co-representative.

Michigan.— Cole *v.* Shaw, 134 Mich. 499, 96 N. W. 573. See also Hall *v.* Grovier, 25 Mich. 428.

Mississippi.— Treadwell *v.* Herndon, 41 Miss. 38.

Missouri.— State *v.* Donegan, 83 Mo. 374 [*affirming* 12 Mo. App. 190]. See also Brashears *v.* Hicklin, 54 Mo. 102.

New Jersey.— Gray *v.* Myrick, 38 N. J. Eq. 210.

New York.— Matter of De Forest, 86 Hun 300, 33 N. Y. Suppl. 216, 24 N. Y. Civ. Proc. 363, 1 N. Y. Annot. Cas. 234 (creditors); Remington *v.* Walker, 21 Hun 322 (creditors, heirs, and legatees); Keegan *v.* Smith, 39 N. Y. Suppl. 826 (sureties of representative); Brick's Estate, 15 Abb. Pr. 12 (manner of serving citation of a ward); Hallett *v.* Hare, 5 Paige 315. See also Matter of Tredwell, 77 N. Y. App. Div. 155, 79 N. Y. Suppl. 83. A personal representative may sue out a citation running against persons unknown, and a judicial settlement of the accounts of a personal representative is void as against persons interested in the estate, whether known or unknown, who were not duly cited to appear or did not voluntarily appear at such judicial settlement. *In re* Killan, 172 N. Y. 547, 65 N. E. 561, 63 L. R. A. 95 [*reversing* 66 N. Y. App. Div. 312, 72 N. Y. Suppl. 714].

Oregon.— *In re* Osburn, 36 Oreg. 8, 58 Pac. 521.

Virginia.— Campbell *v.* Winston, 2 Hen. & M. 10.

Wisconsin.— Schæffner's Appeal, 41 Wis. 260, notice prescribed by judge.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2020.

The personal representative cannot object to the notice for want of regularity, as such notice is intended for the benefit of creditors and distributees and not for his advantage. Williamson *v.* Hill, 6 Port. (Ala.) 184.

A special administrator, appointed pending the contested probate of a will, may settle, and be discharged, without giving previous notice of the contemplated settlement. Robards *v.* Lamb, 127 U. S. 58, 8 S. Ct. 1031, 32 L. ed. 60 [*affirming* 89 Mo. 303, 1 S. W. 222].

An administrator of a partnership estate must give notice of a final settlement as in the case of other administrators. State *v.* Donegan, 83 Mo. 374 [*affirming* 12 Mo. App. 190].

Effect of legatees' failure to appear.— Where legatees are cited to attend at a final settlement of the accounts of an executor, the only effect of a neglect to appear is to enable the executor to proceed *ex parte* as to those who do not appear. Kellett *v.* Rathbun, 4 Paige (N. Y.) 102.

7. Neylans *v.* Burge, 14 Sm. & M. (Miss.) 201; Fort *v.* Battle, 13 Sm. & M. (Miss.) 133; Neal *v.* Wellons, 12 Sm. & M. (Miss.) 649; Washburn *v.* Phillips, 5 Sm. & M. (Miss.) 600. See also Dogan *v.* Brown, 44 Miss. 235; Githens *v.* Goodwin, 32 N. J. Eq. 286. But see Greely Burnham Grocery Co. *v.* Graves, 43 Ark. 171 (holding that it is an irregularity for the probate court to confirm an administrator's account before notice of filing the account has been given); Scott *v.* Kennedy, 12 B. Mon. (Ky.) 510 (holding requirement as to notice directory only).

8. Donald *v.* McWhorter, 40 Miss. 231. See also Fly *v.* Noble, 37 La. Ann. 667 (irregularity as to notice cured by answer); Perret's Succession, 20 La. Ann. 86.

Voluntary appearance waives any irregularity in the manner of bringing in parties in interest. Barnett *v.* Tarrence, 23 Ala. 463.

9. *Alabama.*— Trawick *v.* Trawick, 67 Ala. 271; Parks *v.* Stonum, 8 Ala. 752.

Florida.— Anderson *v.* Northrop, 30 Fla. 612, 12 So. 318.

Louisiana.— Arrieux *v.* Dugas, 5 Rob. 453.

Mississippi.— Cason *v.* Cason, 31 Miss. 578; Steen *v.* Steen, 25 Miss. 513.

Missouri.— Ratliff *v.* Magee, 165 Mo. 461, 65 S. W. 713.

Oregon.— See *In re* Conant, 43 Oreg. 530, 73 Pac. 1018.

Pennsylvania.—Miller's Estate, 7 Pa. Dist. 762; Kulp *v.* McGreevy, 5 Kulp 134.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2020.

Language of publication.— A notice of final settlement of an estate, published in English in a German newspaper, is not a legal notice (Heitkamp *v.* Biedenstein, 3 Mo. App. 450 [*following* Graham *v.* King, 50 Mo. 22, 11 Am. Rep. 401]); but a notice of final settlement is sufficiently published in a German-English newspaper on the English side thereof (McLean *v.* Bergner, 80 Mo. 414).

10. Hatchett *v.* Billingslea, 65 Ala. 16 (succeeding administrator must have personal notice); Roberts *v.* Roberts, 34 Miss. 322 (distributee residing within county). See also

tively,[11] and a recital in a decree that proof of service of citation was produced is not conclusive.[12] An indorsement by a clerk of a probate court on the petition of an administrator that notice was published on a certain day is not sufficient proof of the publication of the notice required by law.[13]

6. Compulsory Accounting — a. By Probate Proceedings — (i) *In General.* A personal representative who does not render his account will ordinarily be compelled to do so by a citation from the probate court.[14]

(ii) *Parties.* Who are entitled to an administration account, and from whom such an account may be required, are questions which have already been discussed,[15] and this discussion necessarily enumerates most of the persons who may become parties to a probate proceeding for an account. The only general rule that can be stated is that those persons who have an interest in the accounting in a particular case are the proper parties thereto.[16]

(iii) *Petition.* A petition to compel an account and settlement need not conform strictly to the rules of pleading,[17] but the facts relied on for relief should be distinctly averred so that the court may be informed and the personal repre-

Landry *v.* Landry, 105 La. 362, 29 So. 900; Mullen *v.* King, 10 La. Ann. 674.

Personal notice to administrator de bonis non necessary.— Hatchett *v.* Billingslea, 65 Ala. 16.

11. Fort *v.* Battle, 13 Sm. & M. (Miss.) 133. But see Scott *v.* Kennedy, 12 B. Mon. (Ky.) 510, holding that it will be presumed that notice according to the statute has been given until the contrary is shown.

Statutory notice not presumed.— Where the court orders the publication of notice for three consecutive times, and the decree recites that it was so made, it cannot be presumed that publication was made for three consecutive weeks as required by the statute. Jenkins *v.* Jenkins, 16 Ala. 693.

12. Hood *v.* Hood, 85 N. Y. 561 [*reversing* 19 Hun 300]. See also Dogan *v.* Brown, 44 Miss. 235.

13. Taylor *v.* Jeffries, 1 Rob. (La.) 1.

14. Touzanne's Succession, 36 La. Ann. 420; Matter of Arkenburgh, 11 N. Y. App. Div. 193, 42 N. Y. Suppl. 965; Shaffer's Appeal, 46 Pa. St. 131. See also Feltmeyer's Succession, 18 La. Ann. 153; Davis' Estate, 12 Phila. (Pa.) 82; Perkins *v.* Shadbolt, 44 Wis. 574.

Right to proceeding.— In Pennsylvania it has been decided that a citation to personal representatives is a matter of right, and that the court cannot dismiss a petition for an accounting because it is known that the matter has already been determined unless it so appears on the record. Smith *v.* Black, 9 Pa. St. 308. But in New York the surrogate may in certain cases decline to entertain a petition for an accounting in his discretion, and his discretion is not exhausted by the issuance of a citation, but he may thereafter dismiss the proceeding. Matter of Stevenson, 77 Hun 203, 28 N. Y. Suppl. 362.

Consolidation of proceedings.— Where three separate petitions were filed, requiring different surviving executors, and executors of deceased executors, to file accounts, and that all persons interested should be cited to attend a final settlement of the estate, an order requiring an executor to account will not be reversed because the surrogate heard all the proceedings together, when no evil result is shown; and where the rights of all persons were protected. *In re* Hodgman, 10 N. Y. Suppl. 491.

15. See *supra*, XV, A, 4, 5.

16. *In re* O'Brien, 45 Hun (N. Y.) 284; Clock *v.* Chadeagne, 10 Hun (N. Y.) 97 (holding that where the next of kin of a decedent, entitled to a share of his estate, calls the administrator to an account, and claims to be entitled to the share of either of the other next of kin, such persons should be made parties to the proceedings); Matter of Gilligan, 3 N. Y. Suppl. 17, 1 Connoly Surr. (N. Y.) 137 (receiver in supplementary proceedings a proper party to accounting of debtor as administrator of his deceased wife); Welte *v.* Bosch, 6 Dem. Surr. (N. Y.) 364; Southal *v.* Shields, 81 N. C. 28; Easterling *v.* Thompson, Rice (S. C.) 346; Cream *v.* Davidson, 27 Can. Supreme Ct. 362 [*affirming* 6 Quebec Q. B. 34].

A guardian ad litem must be appointed and made a party when minors without a general guardian are interested. Petty *v.* Britt, 46 Ala. 491. See also Matter of Wood, 5 Dem. Surr. (N. Y.) 345.

The widow and the heir may be parties in a joint proceeding for the settlement and distribution of the personalty of an estate. Smith *v.* Hurd, 7 How. (Miss.) 188.

Coheirs not necessary parties.— Any one heir may compel the administrator to render his account without the concurrence of his coheirs, and without making his coheirs parties to the suit. Hickman *v.* Flenniken, 12 La. Ann. 268 [*distinguishing* Douglass *v.* Edwards, 9 La. 234].

Creditors whose claims cannot be thereby prejudiced cannot intervene in proceedings by heirs to compel an administrator to account. Thomas' Succession, 12 Rob. (La.) 215.

The security on an administration bond need not be summoned before the ordinary when the administrator is called on to account. Lyles *v.* Caldwell, 3 McCord (S. C.) 225.

17. Crowder *v.* Shakelford, 35 Miss. 321.

sentative receive notice of all he is required to answer,[18] and only the relief prayed for will be granted.[19] The petitioner should sufficiently show or aver his interest or right to an accounting,[20] and if the allegation of interest is positive, that is, if facts are stated on oath sufficient in the first instance, if uncontroverted, to show a legal interest,[21] an accounting will be ordered notwithstanding the interest of the party applying is denied. Matters in avoidance of the statute of limitations need not be stated.[22] The petition should be verified.[23]

(iv) *Citation or Notice.* The citation or notice to a personal representative, which is generally made necessary in compulsory proceedings for an accounting, should conform to statutory requirements, and should be served in accordance therewith.[24] An error or irregularity in the notice or citation or in the

18. Davis' Estate, 12 Phila. (Pa.) 128. See also Ludlow *v.* Ludlow, 4 N. J. L. 189.

Setting forth grounds of liability.— Where it is desired to charge a personal representative on an account the petition must set forth the grounds of liability with the same certainty as if application had been made to a court of equity to compel the representative to come to a settlement. Tate *v.* Gairdner, 119 Ga. 133, 46 S. E. 73.

When petition sufficient.—A petition which avers that the debts of the deceased have been paid, and that there is an estate to be distributed, presents at least a *prima facie* showing that a final settlement ought to be made. Treadwell *v.* Sorrell, 23 Miss. 563.

19. Westervelt *v.* Gregg, 1 Barb. Ch. (N. Y.) 469, holding that, where a petition by a legatee asked for no relief except that an account be rendered, a new application must be made before a payment of his legacy could be ordered.

20. *Alabama.*— Davis *v.* Davis, 6 Ala. 611.

Michigan.— *In re* Robinson, 6 Mich. 137.

Mississippi.— Robinson *v.* Gholson, 8 Sm. & M. 392.

New York.— *In re* Hurlburt, 43 Hun 311; Wever *v.* Marvin, 14 Barb. 376, 7 How. Pr. 182.

North Carolina.— See Henry *v.* Henry, 31 N. C. 278.

Pennsylvania.— Okeson's Appeal, 2 Grant 303; Davis' Estate, 6 Wkly. Notes Cas. 15.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2029.

If the petitioner claims as an heir or legatee he should state specifically the nature of his interest under the will or intestate law. Davis' Estate, 12 Phila. (Pa.) 128.

If the petitioner be a creditor he should disclose in what manner he became a creditor of the decedent and the nature of the indebtedness. Davis' Estate, 12 Phila. (Pa.) 128. See also Matter of Zeuschner, 15 N. Y. St. 744. In Mississippi it has been held that a creditor cannot call a personal representative to account without averring that his claim is legally authenticated against the estate, and that there is an insufficiency of assets, or that the estate is insolvent. Freeman *v.* Rhodes, 3 Sm. & M. 329.

Defect cured by evidence and facts found see Wilson's Appeal, 3 Walk. (Pa.) 216.

Degree of proof.— Where the duty to file an annual partial account is fixed by statute, proof of one's interest, to the entire satisfaction of the court, is unnecessary. Dickson's Estate, 11 Phila. (Pa.) 86.

Oath as to interest.— An application for an accounting will not be entertained merely on the oath of the petitioner that he has an interest in the estate, where the application shows that he has no interest. Matter of De Pierris, 79 Hun (N. Y.) 279, 29 N. Y. Suppl. 360.

21. Forsyth *v.* Burr, 37 Barb. (N. Y.) 540; Matter of Kipp, 17 Misc. (N. Y.) 491, 41 N. Y. Suppl. 259; Gratacap *v.* Phyfe, 1 Barb. Ch. (N. Y.) 485; Burwell *v.* Shaw, 2 Bradf. Surr. (N. Y.) 322; Peters' Estate, 1 Phila. (Pa.) 581. See also Bonfanti *v.* Deguerre, 3 Bradf. Surr. (N. Y.) 429; Thomson *v.* Thomson, 1 Bradf. Surr. (N. Y.) 24; Stevens' Estate, 6 Lanc. Bar (Pa.) 58; Kern's Estate, 11 Lanc. L. Rev. (Pa.) 15; *In re* Fry, 3 Del. Co. (Pa.) 405.

22. Matter of Underhill, 9 N. Y. Suppl. 455, 1 Connoly Surr. (N. Y.) 541.

23. Okeson's Appeal, 2 Grant (Pa.) 303; Darrach's Estate, 2 Pa. L. J. Rep. 454, 4 Pa. L. J. 245. *Compare In re* Robinson, 6 Mich. 137.

Verification by attorney sufficient.— *In re* Robinson, 6 Mich. 137.

24. *Alabama.*— McRee *v.* McRee, 34 Ala. 165; Kavanaugh *v.* Thompson, 16 Ala. 817, manner of serving administratrix who marries.

Louisiana.— State *v.* Judge Ouachita Parish Ct., 31 La. Ann. 116 (service of order of court is sufficient notice); Caldwell *v.* Glenn, 6 Rob. 9 (citation which mentions neither title of cause, residence of defendant, nor place where office is held where defendant is cited to appear and answer is insufficient).

Mississippi.— Winborn *v.* King, 35 Miss. 157, the fact that proper notice was given should appear from the record.

New Jersey.— Duncan *v.* Barnes, 20 N. J. L. 75.

New York.— Gratacap *v.* Phyfe, 1 Barb. Ch. 485; Mead *v.* Miller, 3 Dem. Surr. 577 (service on absent representative); Boerum *v.* Betts, 1 Dem. Surr. 471.

North Carolina.— Staley *v.* Sellars, 65 N. C. 467.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2031.

Notice to representative who resigns or is removed not necessary.— Glenn *v.* Billingslea, 64 Ala. 345.

service thereof may, however, be waived by the representative's general appearance,[25] or by his rendering his account,[26] or submitting to a settlement.[27]

(v) *Answer or Defense.* The personal representative may set up as a defense that the petitioner has no interest in the estate,[28] or valid claim against it,[29] or that there has been a former accounting and settlement.[30] But in order for the plea or answer to be sufficient it should clearly and fully set out the facts relied upon and distinctly aver all matters necessary to negative the duty to account.[31]

(vi) *Judgment and Execution.* The judgment in a proceeding to compel the administrator of a deceased executor to account for a sum voluntarily concealed by such executor should not determine to whom the fund is payable, but simply that there is a fund and its amount, to be paid over under the decree of the probate court to the proper parties.[32] A legatee is not entitled, in a proceeding brought, under the New York statute, against the representative of a deceased executor, to a decree ordering the property of the estate to be delivered to him. The object of the proceeding is only to enable any one interested to compel the placing of the fund in official custody.[33] Under the Georgia statute in a citation by legatees to compel an executor to settle the estate of his testator, a judgment *de bonis propriis* should not be rendered in the absence of any plea of *ne unques executor*, a release to himself, *plene administravit*, or *plene administravit praeter*.[34] In Louisiana execution may be ordered against an administrator personally if he makes a vague and insufficient answer to a rule taken by creditors whose claims have been fixed by a final judgment upon the administrator's account.[35]

(vii) *Appeal.* No appeal lies from an order of a probate court directing an executor or administrator to render his account,[36] but an appeal will lie from an order refusing to compel a personal representative to settle and distribute an estate which is ready for settlement.[37]

b. By Action — (i) *In General.* Where an accounting and settlement is sought by a bill in equity[38] the bill should be for a general account and settle-

Citation should follow prayer of petitioner. Schlegel *v.* Winckel, 2 Dem. Surr. (N. Y.) 232.

Service by publication see Lyon *v.* Odom, 31 Ala. 234; Ashurst *v.* Fountain, 67 Cal. 18, 6 Pac. 849.

25. Davis *v.* Davis, 6 Ala. 611; Sankey *v.* Sankey, 6 Ala. 607; *In re* Hurlburt, 43 Hun (N. Y.) 311.

26. Hearne *v.* Harbison, 9 Ala. 731; Reynolds *v.* Reynolds, 12 La. 617.

27. Petty *v.* Wafford, 11 Ala. 143.

28. Becker *v.* Hager, 8 How. Pr. (N. Y.) 68 (no ground for relief by injunction); Sayre *v.* Sayre, 3 Dem. Surr. (N. Y.) 264; Koerner's Estate, 19 Phila. (Pa.) 10, 4 Pa. Co. Ct. 478. See also *In re* Williams, 1 Lack. Leg. N. (Pa.) 340.

29. *In re* Callahan, 139 N. Y. 51, 34 N. E. 756 [*affirming* 66 Hun 118, 20 N. Y. Suppl. 824]; Lightner's Estate, 144 Pa. St. 273, 22 Atl. 808. *Compare In re* Fry, 3 Del. Co. (Pa.) 405.

30. *In re* Hood, 90 N. Y. 512 [*reversing* 27 Hun 579]; Brundage *v.* Rust, 3 N. Y. Suppl. 308, 23 Abb. N. Cas. (N. Y.) 78.

31. See Harrison *v.* Harrison, 39 Ala. 489 (holding that in a proceeding against a personal representative of a deceased administrator, a plea that the latter had in his lifetime duly distributed, according to law and by order of the probate court, all of the property and assets of his intestate which ever came to his hands as administrator is bad, since it does not show that he reduced to possession all of the assets with which he might have been chargeable or that he ever made a final settlement of his account); Stagg's Estate, 6 N. Y. Civ. Proc. 88 (holding that an answer is insufficient when it merely alleges the payment of legacies and the distribution of the estate, but contains no definite statement as to what legacies have been paid, or as to how the estate has been distributed).

32. Davis *v.* Eastman, 68 Vt. 225, 35 Atl. 73.

33. Spencer *v.* Popham, 5 Redf. Surr. (N. Y.) 425.

34. Merritt *v.* Merritt, 66 Ga. 324.

35. Stevens *v.* Stevens, 13 La. Ann. 416.

36. Carrière's Succession, 34 La. Ann. 1056; *In re* Callahan, 139 N. Y. 51, 34 N. E. 756; *In re* Halsey, 93 N. Y. 48; *In re* Palethorp, 160 Pa. St. 316, 28 Atl. 689; Eckfeldt's Appeal, 13 Pa. St. 171; French *v.* Winsor, 24 Vt. 402.

37. Bellinger *v.* Ingalls, 21 Oreg. 191, 27 Pac. 1038.

38. **For a general discussion of the right** to bring such a bill see EQUITY, 16 Cyc. 91.

Time for bringing suit.— In Kentucky a suit for the settlement of an estate may be brought as soon as the representative quali-

ment of the estate.[39] Where accounts involved in the settlement of an estate are in confusion, and the evidence as to them conflicting, the court may refuse to adjust the accounts and leave the parties where by their manner of dealing they have placed themselves.[40] To maintain a creditor's bill brought to reach the assets of a decedent[41] it is not necessary that the creditor should have exhausted his remedy at law by judgment and execution,[42] such a case forming an exception to the general rule.[43] A creditor's bill may ask that an administrator be compelled to sell lands of the deceased and apply the proceeds for the payment of debts[44]

(II) *Parties* — (A) *Personal Representatives and Sureties.* The executor or administrator of an estate is a necessary party to an action for an accounting and settlement,[45] and where there are several personal representatives, all should usually be made parties,[46] although it has been held that an executor or administrator who has never actively administered on the estate is not a necessary party to a bill against his co-executor or co-administrator for an accounting.[47] In an action against the first administrator or his representative for an accounting, an administrator *de bonis non*, if such there be, is a necessary party.[48] The sureties

fies (Brand *v.* Brand, 109 Ky. 721, 60 S. W. 704, 22 Ky. L. Rep. 1366; Holland *v.* Lowe, 101 Ky. 98, 39 S. W. 834, 41 S. W. 9, 19 Ky. L. Rep. 97), and in Alabama a bill seeking to have an estate duly administered and thereafter settled and properly distributed may be filed at any time after the grant of letters of administration (Baker *v.* Mitchell, 109 Ala. 490, 20 So. 40).

39. Hester *v.* Lawrence, 102 N. C. 319, 8 S. E. 915; King *v.* Galloway, 58 N. C. 122, bill as to only one article of property cannot be sustained. See also Postlewait *v.* Howes, 3 Iowa 365.

40. Lightner *v.* Speck, (Va. 1897) 28 S. E. 326. See also Taylor *v.* Roulstone, 60 S. W. 867, 61 S. W. 354, 22 Ky. L. Rep. 1515.

41. Yates *v.* Seitz, 7 D. C. 11; Simmons *v.* Tongue, 3 Bland (Md.) 341; Warden *v.* McKinnon, 94 N. C. 378; Renan *v.* Banks, 83 N. C. 483; Herring *v.* Outlaw, 70 N. C. 334; Wilson *v.* Wilson, 93 Va. 546, 25 S. E. 596.

All creditors are entitled to notice to come in and prove claims (Thompson *v.* Brown, 4 Johns. Ch. (N. Y.) 619), and a creditor is not bound by a special proceeding against a personal representative in the nature of a creditor's bill, brought under N. C. Code, § 1448, unless he is personally served with notice or a general notice is published as prescribed by statute (Hester *v.* Lawrence, 102 N. C. 319, 8 S. E. 915).

42. *Iowa.*— Postlewait *v.* Howes, 3 Iowa 365.

New York.— Everingham *v.* Vanderbilt, 12 Hun 75; Malloy *v.* Vanderbilt, 4 Abb. N. Cas. 127.

North Carolina.— Smith *v.* Sheppard, 3 N. C. 163.

South Carolina.— Reeder *v.* Speake, 4 S. C. 293.

United States.— See McRea *v.* Mobile Branch Bank, 19 How. 376, 15 L. ed. 688.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2041.

A judgment creditor may have the proceeds of the property thus obtained applied to the payment of the debts of the intestate in the order prescribed by law, although no execution has been issued upon his judgment and returned unsatisfied. Everingham *v.* Vanderbilt, 12 Hun (N. Y.) 75.

Where the will charges the land with the payment of debts the land is converted into equitable assets which can be reached only by a bill in chancery and the door of equity is opened to creditors of every description to come in and call for an execution of the trust. A suit at law to establish the debt is never a necessary prerequisite to such a bill. Poindexter *v.* Green, 6 Leigh (Va.) 504.

43. See Creditors' Suits, 12 Cyc. 6.

44. Wadsworth *v.* Davis, 63 N. C. 251.

45. Goode *v.* Goode, 6 N. C. 335; Hansford *v.* Elliott, 9 Leigh (Va.) 79; Moring *v.* Lucas, 4 Call (Va.) 577; Donahoe *v.* Fackler, 8 W. Va. 249. See also Reither *v.* Murdock, 135 Cal. 197, 67 Pac. 784; Rabasse's Succession, 49 La. Ann. 1405, 22 So. 767.

Joinder in representative capacity necessary.— Where a legatee, after bringing an action against the executor for an accounting, is appointed administratrix, she becomes a necessary party to the action in her representative, in addition to her individual capacity. Landon *v.* Townsend, 112 N. Y. 93, 19 N. E. 424, 8 Am. St. Rep. 712 [*followed* in Hayward *v.* Place, 7 N. Y. Suppl. 523, 4 Silv. Supreme (N. Y.) 390].

A resident of another county who claims to be executor under void probate proceedings is a proper party defendant, he having a lien on the estate for sums advanced to pay debts and being in possession of the assets of the estate which he holds in trust for the estate. Ashford *v.* Tipton, 53 S. W. 268, 21 Ky. L. Rep. 866.

46. Bregaw *v.* Claw, 4 Johns. Ch. (N. Y.) 452; Brotten *v.* Bateman, 17 N. C. 115, 22 Am. Dec. 732; Conolly *v.* Wells, 33 Fed. 205, non-resident co-executor a necessary party.

47. Shorter *v.* Hargroves, 11 Ga. 658; Clifton *v.* Haig, 4 Desauss. (S. C.) 330; Wills *v.* Dunn, 5 Gratt. (Va.) 384.

48. Gould *v.* Hayes, 19 Ala. 438; Hardy *v.* Miles, 91 N. C. 131; Raby *v.* Ellison, 40 N. C. 265; Strickland *v.* Bridges, 21 S. C. 21; Can-

of an administrator may be made parties to a bill against him for an accounting,[49] and in order that there may be a decree against the sureties as such it is necessary that they should be made parties as sureties, although they are already parties in another capacity.[50]

(B) *Heirs and Devisees.* Ordinarily in an action by a creditor for an accounting the heirs are not necessary parties,[51] but inasmuch as they may be liable in the event of the insufficiency of the personal assets, they have been held proper parties,[52] and to a creditor's bill asking that the administrator be compelled to sell lands of the deceased and apply the proceeds to the debts and that the rents and profits received from the lands by the heirs or devisees be applied in the same manner, all the heirs or devisees must be made parties.[53] If the next of kin and heirs at law have received personal property of the estate, the court may make them parties and compel them to account for what they have received.[54] To a bill by a residuary devisee for an account, an objection that the heir should have been made a party cannot be sustained where it does not appear that the testator left any heir capable of inheriting and where no one had ever claimed the inheritance.[55] The rule that an action cannot be maintained against the heirs and the personal representative jointly does not apply where a creditor has established his demand before the surrogate and the personal estate of the deceased has been concealed or wasted.[56]

(C) *Legatees, Distributees, and Next of Kin.* To a suit brought by a distributee for a settlement of the estate and recovery of his distributive share, all the other distributees of the estate are generally held necessary parties,[57] and where several residuary legacies are to be increased or diminished as the estate may increase or diminish one legatee may file a bill on behalf of himself and the others who may choose to come in against the executor for an account and payment, making all other legatees parties.[58] Distributees are necessary parties to an action brought by an administrator *de bonis non* for the settlement of an estate,[59] but are not proper parties to a bill in equity by an administrator to com-

non *v.* Jenkins, 16 N. C. 422; Easterling *v.* Thompson, 1 Rice (S. C.) 346. See also Henderson *v.* McClure, 2 McCord Eq. (S. C.) 466.

49. Dorsheimer *v.* Rorback, 23 N. J. Eq. 46 (proper but not necessary parties); Taylor *v.* Taylor, 2 Rich. Eq. (S. C.) 123; Payne *v.* Hook, 7 Wall. (U. S.) 425, 19 L. ed. 260; Donohue *v.* Roberts, 1 Fed. 449, 1 McCrary 112. But see Grady *v.* Hughes, 80 Mich. 184, 44 N. W. 1050; Smith *v.* Everett, 50 Miss. 575 [*citing* Judge Limestone County Ct. *v.* Coalter, 3 Stew. & P. (Ala.) 348; Judge Limestone County Ct. *v.* French, 3 Stew. & P. (Ala.) 263; Green *v.* Tunstall, 5 How. (Miss.) 638].

Right of sureties to intervene.—If the sureties have been subjected to their liability to any extent they may intervene and receive credit for the amount paid by them. Moore *v.* Smith, 116 N. C. 667, 21 S. E. 506.

If the only acting administrator is without the jurisdiction, the sureties may be joined, although there are co-administrators within the jurisdiction. McBee *v.* Crocker, McMull. Eq. (S. C.) 485, holding, however, that as a general rule the sureties on an administrator's bond could not be joined with him in a bill for an account of his administration.

50. Lyles *v.* Lyles, 1 Hill Eq. (S. C.) 76.

51. Diversey *v.* Johnson, 93 Ill. 547; Smith *v.* Rotan, 44 Ill. 506; Byrd *v.* Byrd, 117 N. C. 523, 23 S. E. 324. See also Green *v.* Martine, 1 N. Y. Civ. Proc. 129.

52. Diversey *v.* Johnson, 93 Ill. 547.

53. Wadsworth *v.* Davis, 63 N. C. 251.

54. Warden *v.* McKinnon, 94 N. C. 378. See also Quinn *v.* Stockton, 2 Litt. (Ky.) 343.

55. Rogers *v.* Ross, 4 Johns. Ch. (N. Y.) 388, 8 Am. Dec. 575.

56. Littell *v.* Sayre, 7 Hun (N. Y.) 485.

57. Picot *v.* Bates, 39 Mo. 292; Van Mater *v.* Sickler, 9 N. J. Eq. 483; Woodyard *v.* Buffington, 23 W. Va. 195. See also Campbell *v.* Winston, 2 Hen. & M. (Va.) 10, holding that notice to legatees and distributees should be given of the hearing before a commissioner appointed by the court of chancery to settle the administration, or his settlement will be set aside. But see Thornton *v.* Tison, 95 Ala. 589, 10 So. 639.

The surviving husband of a distributee who died without issue is a proper party in a suit by distributees to settle the estate of the deceased wife's father. Baines *v.* Barnes, 64 Ala. 375.

58. Brown *v.* Ricketts, 3 Johns. Ch. (N. Y.) 553. But see Brinkley *v.* Willis, 22 Ark. 1, holding that one legatee cannot bring suit for himself and the other legatees to compel an executor or administrator charged with an express trust to account.

59. Karn *v.* Seaton, 62 S. W. 737, 23 Ky. L. Rep. 101.

pel his co-administrator to pay over money alleged to be due to the estate.[60] Inasmuch as the executor is the trustee and proper representative of all persons interested in the personal estate and has the duty cast upon him by law of protecting it against improper demands,[61] it is held that legatees are not necessary parties to a bill by creditors for an accounting.[62] But on a bill by a creditor against the executor for an account of assets and the legatees for contribution, if there is a dispute between the executor and legatees as to whether he ought not to pay the debt without contribution from them, and all the legatees be not made parties, the bill may well be dismissed as to the legatees.[63] If one of several executors has been guilty of fraudulent misconduct in his dealings with the estate, his co-executors may maintain an action for an accounting against him without joining the creditors, legatees, or next of kin.[64] The necessity or propriety of making legatees or next of kin parties sometimes depends upon statutory provisions.[65]

(D) *Debtors.* Debtors of an estate are not generally proper parties to a suit to settle the estate.[66]

(E) *Creditors.* Creditors are not indispensable parties either in proceedings by the heirs to compel an administrator to render his account[67] or on a bill by an executor against a devisee of land charged with the payment of debts.[68] But in a suit by a creditor all other creditors are proper parties.[69] Creditors who sue for an accounting need not sue separately, but any one may sue for himself and others.[70] Where the creditors of an estate in progress of settlement in chancery are required by an order of court to come in and prove their debts, they become quasi-parties to the cause, and may appeal and assign error on account of the rejection of their claims.[71]

(F) *Persons With Contingent Interests.* One who in a certain event may be interested in the disposition of the estate of a decedent is not a necessary party

60. Whiting *v.* Whiting, 64 Md. 157, 20 Atl. 1030.

61. See Terry *v.* Cape Fear Bank, 20 Fed. 773.

62. Gordon *v.* Small, 53 Md. 550; Lucas *v.* McBlair, 12 Gill & J. (Md.) 1; Brown *v.* Dowthwaite, 1 Madd. 446.

63. Sampson *v.* Payne, 5 Munf. (Va.) 176.

64. Wood *v.* Brown, 34 N. Y. 337.

65. See Word *v.* Word, 90 Ala. 81, 7 So. 412; Harrell *v.* Warren, 105 Ga. 476, 30 S. E. 426.

66. Citizens' Nat. Bank *v.* Boswell, 93 Ky. 92, 19 S. W. 174, 14 Ky. L. Rep. 17; Adams *v.* Corbin, 3 Vt. 372; Wilson *v.* Wilson, 93 Va. 546, 25 S. E. 596.

67. Moreau *v.* Moreau, 25 La. Ann. 214.

68. Potter *v.* Gardner, 12 Wheat. (U. S.) 498, 6 L. ed. 706. But see Payne *v.* Johnson, 95 Ky. 175, 24 S. W. 238, 609, 15 Ky. L. Rep. 522, holding that where the claims of creditors are made a charge on the land by will they or some of them are necessary parties.

69. See Gould *v.* Hays, 19 Ala. 438.

In North Carolina a special proceeding under the statute (Battle Rev. c. 45, § 43) differs from a creditor's bill in that in the latter all the creditors may make themselves parties, while in the former they are required to do so. Patterson *v.* Miller, 72 N. C. 516. See also Ballard *v.* Kilpatrick, 71 N. C. 281. In a proceeding brought under this statute, by creditors on behalf of themselves and all other creditors of the deceased to compel a personal representative to account for his administration, each complaint of the several creditors constitutes a distinct proceeding, to be proceeded in separately. Graham *v.* Tate, 77 N. C. 120.

70. Dana *v.* Western, 2 Edm. Sel. Cas. (N. Y.) 391.

Consolidation of creditors' suits.— If several suits are pending in favor of different creditors, the court will order proceedings in all the suits but one to be stayed, and will require the several parties to come in under the decree of such suit so that only one account of the estate may be necessary. Stephenson *v.* Taverners, 9 Gratt. (Va.) 398. See also Hallett *v.* Hallett, 2 Paige (N. Y.) 15; Ross *v.* Crary, 1 Paige (N. Y.) 416; Kent *v.* Cloyd, 30 Gratt. (Va.) 555.

Where the fact that there will be a deficiency in the fund appears upon the face of a bill brought by creditors, and there are other creditors or legatees who are entitled to a ratable distribution with the complainants, such creditors or legatees should be made parties to the bill, or the suit should be brought by the complainants in behalf of themselves and all others standing in a similar situation. Egberts *v.* Wood, 3 Paige (N. Y.) 517, 24 Am. Dec. 236. See also Bloodgood *v.* Bruen, 2 Bradf. Surr. (N. Y.) 8; Piatt *v.* St. Clair, Wright (Ohio) 526, holding that when the estate is solvent a creditor may proceed to make his own debt and leave other creditors to pursue theirs.

71. Pearson *v.* Darrington, 32 Ala. 227.

to a bill brought by a devisee against the executor praying for an account and construction of the will.[72]

(G) *Personal Representatives and Assignees of Necessary Parties.* If the original executor or administrator be dead, his personal representative is a necessary party,[73] and so also in case a legatee, distributee, or other person who would have been a necessary party to the suit is dead his personal representative becomes a necessary party.[74] The assignee of a legatee and next of kin is a necessary party to an action for an accounting brought by such legatee,[75] and in an action brought by executors and trustees under a will for a final settlement of their accounts and to obtain a construction of the will the assignees of a legatee are properly made parties.[76] To a bill in equity by a devisee and legatee for the settlement of an administration and for a distribution, mortgagees of the undivided interests of other devisees are necessary parties.[77]

(III) *Bill, Petition, or Complaint.* Statutory requirements as to the allegations in the bill, petition, or complaint must be fully complied with.[78] If a bill seeks to compel a final settlement of decedent's estate, it must aver that such estate is ready for a final settlement.[79] In a bill by an heir, devisee, next of kin, legatee, or distributee of an estate, the complainant should state the right, title, or claim and all other necessary matters upon which he relies for relief with accuracy and clearness for the information both of defendant and the court.[80] Under a statute requiring that proceedings should be by summons and complaint neither memoranda of the evidences of debt filed in a special proceeding by a creditor against the executor for an account nor a replication can take the place of a complaint.[81] In an action to compel an administrator to account to his successor

72. U. S. *v.* Gillespie, 8 Fed. 140.

73. Kennedy *v.* Kennedy, 2 Ala. 571; Silsbee *v.* Smith, 60 Barb. (N. Y.) 372; Howth *v.* Owens, 29 Fed. 722. *Compare* Hooper *v.* Holmes, 11 N. J. Eq. 122.

If there be more than one executor or administrator of the deceased personal representative all are necessary parties. Howth *v.* Owens, 29 Fed. 722.

74. Oliver *v.* Wiley, 75 N. C. 320; Haglar *v.* McComb, 66 N. C. 345; Robertson *v.* Gillenwaters, 85 Va. 116, 7 S. E. 371. See also Strickland *v.* Bridges, 21 S. C. 21.

The representative of a deceased attorney of the administrator for whose professional services a large amount is claimed is a necessary party in a bill for an accounting against the estate of the intestate. Jewell *v.* Jewell, 11 Rich. Eq. (S. C.) 296.

Where there are no debts outstanding the personal representative of a deceased distribute is not a necessary party to a bill filed by the living distributees for a settlement of the decedent's estate. Baines *v.* Barnes, 64 Ala. 375.

Death of legatee pending suit.— Where an action was brought by legatees against an executor for an accounting and other legatees were made parties defendant and one of them died during the action, his personal representative was held not a necessary party to further proceedings. Johnson *v.* Hanagan, 11 S. C. 93.

75. Hood *v.* Hood, 85 N. Y. 561 [*reversing* 19 Hun 300].

76. Barnes *v.* Blake, 58 Hun (N. Y.) 525, 12 N. Y. Suppl. 354.

77. Bragg *v.* Beers, 71 Ala. 151.

78. Meyer *v.* Zotel, 96 Ky. 362, 29 S. W. 28, 16 Ky. L. Rep. 506; Hignutt *v.* Cranor, 62 Md. 216.

Facts other than those prescribed by statute need not be set out. Holland *v.* Lowe, 101 Ky. 98, 39 S. W. 834, 19 Ky. L. Rep. 97, 41 S. W. 9.

79. Baker *v.* Mitchell, 109 Ala. 409, 20 So. 40; Acklen *v.* Goodman, 77 Ala. 521.

80. Wood *v.* Mathews, 53 Ala. 1 (necessity for showing will probated); Whitworth *v.* Oliver, 39 Ala. 286; West *v.* Reynolds, 35 Fla. 317, 17 So. 740; Muir *v.* Leake, etc., Orphan House, 3 Barb. Ch. (N. Y.) 477 (must state provisions of will); Hubbard *v.* Urton, 67 Fed. 419 (relationship should be set out in full).

Upon a bill by the next of kin, if his character does not conclusively appear, a reference as to that fact will be directed. Redmond *v.* Coffin, 17 N. C. 437.

Illustrative cases.— A bill alleging fraudulent mismanagement of an estate by a personal representative shows sufficient equity to require an answer. Grady *v.* Hughes, 80 Mich. 184, 44 N. W. 1050. See Anderson *v.* Northrop, 30 Fla. 612, 12 So. 318, as to sufficiency of allegations of fraud. A bill by a legatee or distributee which does not show that the statutory period allowed to the administrator to make distribution or pay legacies has run is insufficient. Harris *v.* Orr, 42 W. Va. 745, 26 S. E. 455. Where the same person is administrator for the estates of a father and son, a petition by the son's distributees asking for an accounting as to certain sums alleged to be due from the father to the son states no cause of action. Davis *v.* Davis, 7 Ky. L. Rep. 42.

81. Isler *v.* Murphy, 76 N. C. 52.

for sums received from the sale of lands, a complaint alleging the receipt of money from the sale of real estate of the intestate and that defendant has refused to account, although often requested, and that he still has the money in his hands is sufficient.[82] To entitle a petitioner to an accounting from the executor of a deceased executor, the petition must aver that there are assets of the estate in the hands of the second executor.[83] Specifications in a bill for the settlement of an estate brought by one executor against his co-executors in whose control the estate was must be particular in order to obtain relief.[84]

(iv) *Plea or Answer, and Defenses.* A personal representative who consents to answer a bill in equity, or, having pleaded, is ordered to answer, must answer fully.[85] When an administrator is called on to account in a court of equity he may exhibit with his answer a copy of the final account.[86] If a personal representative charges himself in a schedule to his answer he cannot discharge himself by another schedule to the same answer stating his disbursements.[87] The administrator may defend by pleading and showing that he has fully administered[88] or that he has properly paid over or expended a certain sum in question.[89] If he pleads to an action by a legatee an account stated between himself and the legatee, the plea must show that the legatee was present when the account was made up and that he examined and approved it.[90] That plaintiff has parted with all his interest in the estate is a perfect defense to his petition for an accounting.[91] Where a foreign administrator, pending the litigation against him for an accounting, settles his accounts in the forum of his appointment such settlement will be conclusive on the rights of the parties.[92] The fact that pending proceedings defendant's letters are revoked is no defense to his liability to account.[93] The pendency of another suit concerning property in which the estate is largely interested and the fact that a sale of the property would result in a sacrifice are not valid objections to the maintenance of a bill by devisees to remove the administration into a court of equity and compel a settlement.[94] A claim for certain

82. Lindley *v.* State, 115 Ind. 502, 17 N. E. 611.

83. Maze *v.* Brown, 2 Dem. Surr. (N. Y.) 217, construing N. Y. Code Civ. Proc. § 2606.

84. Beach *v.* Norton, 9 Conn. 182.

85. Beall *v.* Blake, 10 Ga. 449; Mitchell *v.* Mitchell, 3 Md. Ch. 71; Clement *v.* Riley, 29 S. C. 286, 6 S. E. 932.

86. Mitchell *v.* Mitchell, 3 Md. Ch. 71 (may exhibit and explain the vouchers for the credits therein allowed him); Grant *v.* Bell, 87 N. C. 34 (proper when practicable to annex a copy of the account to the answer). See also Hanlon *v.* Wheeler, (Tex. Civ. App. 1898) 45 S. W. 821.

Representative cannot be compelled to exhibit his account. Mitchell *v.* Mitchell, 3 Md. Ch. 71. See also Hanlon *v.* Wheeler, (Tex. Civ. App. 1898) 45 S. W. 821. *Aliter* in Georgia. Tison *v.* Tison, 14 Ga. 167. Even in this state an answer to a petition which waives discovery and prays for an accounting and settlement cannot be objected to because there is not attached thereto a schedule of the returns of the administrator. Adams *v.* Adams, 113 Ga. 824, 39 S. E. 291.

87. Dodson *v.* Dodson, 6 Heisk. (Tenn.) 110.

88. Bedell *v.* Keethley, 5 T. B. Mon. (Ky.) 598; Rayner *v.* Pearsall, 3 Johns. Ch. (N. Y.) 578; Thompson *v.* Buckner, 2 Hill Eq. (S. C.) 499, Riley Eq. 33. Where the answer shows that an agent of the intestate collected more money than he turned over to the administrator, the administrator having pleaded that he had fully administered, it cannot be objected to on that account, where it is not shown that the administrator actually received the amount of money. Hanlon *v.* Wheeler, (Tex. Civ. App. 1898) 45 S. W. 821.

Averment as to account.— If defendant pleads that he has fully accounted, he must aver that there has been an "account stated" and that the same is just and true. Grant *v.* Bell, 87 N. C. 34.

89. See Siedler *v.* Bell, 20 N. Y. Suppl. 451; Hanlon *v.* Wheeler, (Tex. Civ. App. 1898) 45 S. W. 821.

In a suit for an account of rents it is a sufficient answer that they were consumed in maintaining the realty and in repaying defendant a balance due on the surrogate's decree. Wilcox *v.* Quinby, 20 N. Y. Suppl. 5.

Payment of a dormant justice's judgment is a good defense to an action for an account. Bacon *v.* Berry, 85 N. C. 124.

Delivery of assets to successor a good defense.— Bogle *v.* Bogle, 23 Ala. 544. See also Gayle *v.* Elliott, 10 Ala. 264; Skinner *v.* Frierson, 8 Ala. 915.

90. Meeker *v.* Marsh, 1 N. J. Eq. 198.

91. Price's Estate, 9 Pa. Dist. 511, 24 Pa. Co. Ct. 224.

92. Whittaker *v.* Whittaker, 10 Lea (Tenn.) 93.

93. Henderson *v.* McClure, 2 McCord Eq. (S. C.) 466.

94. Stein *v.* Gordon, (Ala. 1892) 10 So. 631.

credits which the probate court has authorized the administratrix to take at some future settlement to be filed by her cannot be made in an action by creditors to have certain lands, which have been redeemed by the general assets, subjected to the payment of their debts, when she has not asked for a credit in any settlement and her administration is still open.[95]

(v) *EVIDENCE AND BURDEN OF PROOF.* The rule that the evidence must be confined to the issues raised by the pleadings is applicable to an action for an accounting and settlement of an estate,[96] as is also the rule that to entitle a party to relief the allegations and proof must correspond.[97] In a suit in equity brought by a legatee against an executor for account and distribution, if the answer of the executor is vague and unsatisfactory, many years having elapsed since the transaction took place, great latitude should be allowed in offering evidence to charge the executor, and all evidence, not positively illegal, tending even remotely to elucidate the case should be admitted.[98] The admission of an administrator, made in writing but not under oath, that he has collected assets, is evidence against him in an action to which he is a party.[99] In a suit by legatees against an executor for an accounting and payment of their legacies, evidence that some of the heirs at law did not know of or authorize a settlement pleaded by the executor in bar of the suit is admissible on the issue made in regard to the *bona fides* of the settlement.[1] The testimony of an executor that the life-tenant of the estate objected to his suing upon a note due the estate is competent as bearing upon his *bona fides* as to its collection.[2] In a proceeding by an administrator *de bonis non* against the representative of the former administrator to compel final settlement of the first administration, the records of the court, containing a partial settlement, are admissible.[3] Vouchers or official copies of them may be controverted by parol evidence.[4] Where certain creditors of an estate by note received payments thereon and agreed to release the administrator from personal liability on account of a previous improper payment of a note barred by the statute of limitations, such notes were not admissible, in a subsequent suit by a creditor by account against the administrator, to show outstanding debts of higher dignity than plaintiff's.[5] As a general rule the answer of the personal representative when responsive in its averments should be assumed to be true,[6] but an allegation by way of defense which is not responsive to the bill is not to be regarded as proved until rebutted by two witnesses or equivalent evidence, as is the rule in equity.[7] In a creditor's bill against an administrator, when it is found upon a reference to ascertain the debts that the fund is sufficient to pay such debts, a judgment against the administrator, or the admission of the debt, is taken as full proof, for the reason that the other creditors are not interested in the matter.[8] Where evidence is conflicting as to whether an administrator paid a claim out of the estate funds or with his own money, a finding that estate funds were used for that purpose will not be disturbed.[9] Under a vague and unsatis-

95. Salinger *v.* Black, 68 Ark. 449, 60 S. W. 229. See also Hankins *v.* Layne, 48 Ark. 544, 3 S. W. 821.

96. Perkins *v.* Sturdivant, (Miss. 1888) 4 So. 555; Stiles *v.* Burch, 5 Paige (N. Y.) 132; Daniel *v.* Bellamy, 91 N. C. 78.

Where a bill for a general account of the administration is filed by a specific legatee, he is not confined to evidence as to the specified allegations in the bill as he would be in a bill to surcharge and falsify an account or to reopen a settlement. Pulliam *v.* Pulliam, 10 Fed. 53.

97. Julian *v.* Reynolds, 11 Ala. 960. *Compare* Montgomery *v.* Givhan, 24 Ala. 568.

98. Smith *v.* Griffin, 32 Ga. 81.

99. Montgomery *v.* Caldwell, 14 Lea (Tenn.) 29.

1. Kidd *v.* Huff, 105 Ga. 209, 31 S. E. 430.

2. Orr *v.* Orr, 34 S. C. 275, 13 S. E. 467.

3. McDonald *v.* Jacobs, 85 Ala. 64, 4 So. 605. See also Powell *v.* Powell, 10 Ala. 900; McCall *v.* Peachy, 3 Munf. (Va.) 288.

4. McCall *v.* Peachy, 3 Munf. (Va.) 288. And see EVIDENCE, 17 Cyc. 629 note 90.

5. McBride *v.* Hunter, 64 Ga. 655.

6. Barroll *v.* Peters, 20 Md. 172; Price's Estate, 9 Pa. Dist. 511, 24 Pa. Co. Ct. 224; Mead's Estate, 4 Pa. Dist. 750. *Compare* Wellborn *v.* Rogers, 24 Ga. 558.

7. Duncan *v.* Dent, 5 Rich. Eq. (S. C.) 7.

8. Overman *v.* Grier, 70 N. C. 693.

9. Sanguinetti *v.* Gianelli, (Cal. 1900) 61 Pac. 1106.

factory answer it may not be incumbent on the complainant to show that debts due the estate had been collected or were collectable.[10] In an action against an administrator for an account and settlement, if plaintiffs show that defendant has assets in his hands the burden is on defendant to account for the funds.[11] The books of a firm are *prima facie* evidence against a surviving partner who is executor of the deceased member of the firm, and it is incumbent upon the executor to show what corrections, if any, should be made.[12] Distributees to whom an executor submitted his accounts to further an amicable settlement and who retained them for nearly a year without question will have the burden cast on them to surcharge and falsify the accounts,[13] but distributees who had no connection with the examination of the accounts will not be affected.[14]

(VI) *DECREE.* Actions for accounting and for the removal of an administrator may be tried together; and where a petition contains a demand for an accounting and the removal of the administrator, a judgment may validly decree his removal, and that he should pay a certain sum of money for which he is liable to the estate.[15] Where on a bill by a creditor against an executor and the legatees there is a dispute between the executor and the legatees as to whether he should pay the creditor without contribution from them, he will be decreed to pay the debt from his own goods and left to his remedy at law against the legatees, where it appears that he has paid them enough to satisfy the debt.[16] A decree against an administrator who has resigned, rendered in favor of "the present administrator *de bonis non*," is void when there is no such administrator in existence.[17]

(VII) *STAY OF OTHER ACTIONS OR PROCEEDINGS PENDING ACCOUNTING.* After equity has taken jurisdiction of the settlement of an estate and of the accounting of the executor or administrator, proceedings by him to settle an account in the probate court are of no effect;[18] and after a bill has been filed against an executor or administrator he cannot at the same time be proceeded against at law[19] or in the surrogate's court[20] for the same purpose.[21] A decree for an account in one creditor's suit operates as a suspension of all other pending suits, for the other creditors may come in under the decree[22] inasmuch as the account is for the benefit of all.[23] From the date of the decree an injunction will be granted as a matter of course on motion of either party[24] and on due disclosure of assets[25] to stay all proceedings of any creditor at law.[26] But an injunction will not issue until an account has been decreed.[27]

(VIII) *EXECUTION.* A decree against the executor or administrator for the payment of money is enforceable by execution against his goods,[28] not against the

10. Smith *v.* Griffin, 32 Ga. 81.

11. Adams *v.* Adams, 113 Ga. 824, 39 S. E. 291.

12. Matter of Saltus, 3 Abb. Dec. (N. Y.) 243, 3 Keyes (N. Y.) 500.

13. Powell *v.* Powell, 10 Ala. 900.

14. Powell *v.* Powell, 10 Ala. 900.

15. Gray *v.* Waddell, 33 La. Ann. 1021.

16. Sampson *v.* Payne, 5 Munf. (Va.) 176.

17. Martin *v.* Atkinson, 108 Ala. 314, 18 So. 888.

18. Pearson *v.* Darrington, 21 Ala. 169; Wood *v.* Lee, 5 T. B. Mon. (Ky.) 50; Saunders *v.* Saunders, 2 Litt. (Ky.) 314.

19. Valentine *v.* Farrington, 2 Edw. (N. Y.) 53.

20. Matter of De Pierris, 79 Hun (N. Y.) 279, 29 N. Y. Suppl. 360.

21. An action to determine a matter connected with an accounting, which action is pending in another court, need not suspend proceedings in the surrogate's court. People *v.* Rollins, 33 Hun (N. Y.) 47.

22. Stephenson *v.* Taverners, 9 Gratt. (Va.) 398. See also Brooks *v.* Gibbons, 4 Paige (N. Y.) 374; Duerson *v.* Alsop, 27 Gratt. (Va.) 229.

23. Boyd *v.* Harris, 1 Md. Ch. 466; Hazen *v.* Durling, 2 N. J. Eq. 133; Thompson *v.* Brown, 4 Johns. Ch. (N. Y.) 619.

24. Boyd *v.* Harris, 1 Md. Ch. 466. See also Rogers *v.* King, 8 Paige (N. Y.) 210.

25. Boyd *v.* Harris, 1 Md. Ch. 466; Thompson *v.* Brown, 4 Johns. Ch. (N. Y.) 619.

26. Boyd *v.* Harris, 1 Md. Ch. 466; Rogers *v.* King, 8 Paige (N. Y.) 210; Thompson *v.* Brown, 4 Johns. Ch. (N. Y.) 619; Duerson *v.* Alsop, 27 Gratt. (Va.) 229.

27. Mactier *v.* Lawrence, 7 Johns. Ch. (N. Y.) 206.

An administrator cannot be enjoined from paying a particular debt before the decree to account is rendered. Wadsworth *v.* Davis, 63 N. C. 251; Allison *v.* Davidson, 21 N. C. 46.

28. Power *v.* Speckman, 126 N. Y. 354, 27 N. E. 474; Matter of Waring, 7 Misc. (N. Y.)

goods and chattels of the decedent.[29] When judgment is obtained against the personal property of the decedent, the execution should not run against his personal representatives.[30] No execution can be issued on a void decree.[31]

(IX) *Counsel Fees and Costs.* Since it is the right of the persons who are beneficiaries of the estate to have an account and settlement from the administrator they cannot be compelled to pay the costs incurred in settling the estate.[32] A representative is entitled on the settlement of his accounts in equity to an allowance for reasonable counsel fees for services rendered in a suit instituted by him for a settlement and distribution when the condition of the estate and the conflicting trusts united in his person rendered it necessary to resort to a court of equity.[33] Fees of counsel for services rendered solely for the benefit of a legatee[34] or a creditor who brings an action for a settlement will not be paid out of the estate.[35]

C. Charges. In his account the representative should be charged with moneys and other assets of the estate which he has received,[36] including what has been received since the filing of the inventory.[37] But he cannot be charged in his account with money or property received or held by him otherwise than in his fiduciary capacity as the representative of the decedent,[38] or which, although received by him in his fiduciary capacity, does not belong to the estate by reason of the failure of the condition on which it was received,[39] or with money or property which, although in decedent's possession at the time of his death, really

502, 28 N. Y. Suppl. 393; Peyser *v.* Wendt, 2 Dem. Surr. (N. Y.) 221; Moore *v.* Ferguson, 2 Munf. (Va.) 421; Barr *v.* Barr, 2 Hen. & M. (Va.) 26; Catlett *v.* Fairfax, 5 Fed. Cas. No. 2,516, 2 Cranch C. C. 99. See also Philbrick's Succession, 18 La. Ann. 220, under La. Code Proc. art. 1057. *Compare* Taft *v.* Stow, 174 Mass. 171, 54 N. E. 506 [*citing* Tyler *v.* Brigham, 143 Mass. 410, 9 N. E. 750], holding that on a bill by a beneficiary against the executor of a trustee for an accounting, the beneficiary is entitled to an execution as at common law against the estate of the trustee in the hands of the executor for the principal sum found due, and another execution for costs against the executor personally.

29. Matter of Waring, 7 Misc. (N. Y.) 502. 28 N. Y. Suppl. 393; Moore *v.* Ferguson, 2 Munf. (Va.) 421; Barr *v.* Barr, 2 Hen. & M. (Va.) 426.

30. Olmsted *v.* Vredenburgh, 10 How. Pr. (N. Y.) 215.

31. Martin *v.* Atkinson, 108 Ala. 314, 18 So. 888.

32. Ransdell *v.* Threlkeld, 4 Bush (Ky.) 347; Craig *v.* Manning, 8 N. J. Eq. 806.

Costs for neither party see Torbet *v.* McReynolds, 4 Humphr. (Tenn.) 215.

33. Clark *v.* Knox, 70 Ala. 607, 45 Am. Rep. 93.

34. Hood *v.* Maxwell, 66 S. W. 276, 23 Ky. L. Rep. 1791.

35. Miller *v.* Swan, 91 Ky. 36, 14 S. W. 964, 12 Ky. L. Rep. 629. See also Patterson *v.* Miller, 72 N. C. 516.

36. Munden *v.* Bailey, 70 Ala. 63. As to what constitutes assets see *supra*, III.

Amount recovered by executrix under invalid will see Read *v.* Franklin, (Tenn. Ch. App. 1900) 60 S. W. 215.

Price or value of tobacco see McCall *v.* Peachy, 3 Munf. (Va.) 288.

Pledged property.— An executor should not be charged with the value of stock pledged by the testator as additional security for a mortgage debt. Matter of Van Houten, 18 Misc. (N. Y.) 524, 42 N. Y. Suppl. 1115.

Life-estate of widow.— Where testator by will gave his widow all his personal estate during her widowhood and to others all the property that might revert to his estate, the widow was entitled to the possession of all such property and the administrators were chargeable with only so much as was received back by them. Gee *v.* Hasbrouck, 128 Mich. 509, 86 N. W. 621.

Property never in representative's possession.— The executor or administrator is not chargeable for an undivided interest in property which has never been in his possession or control, nor admitted by him to be available assets. Nickerson *v.* Chase, 122 Mass. 296.

Liable for money collected in a foreign state or country.— McPike *v.* McPike, 111 Mo. 216, 20 S. W. 12; Swearinger *v.* Pendleton, 4 Serg. & R. (Pa.) 389; Jones *v.* Jones, 39 S. C. 247, 17 S. E. 587, 802.

37. Squire's Estate, 11 Phila. (Pa.) 110. And see *supra*, IV, E.

"Increase" of the inventory.— In rendering an account the executor must first charge himself with the amount of the inventory; then with "the increase" of the inventory for any cause. If there is no increase, that fact must be stated. *In re* Jones, 1 Redf. Surr. (N. Y.) 263.

38. Offutt *v.* Divine, 53 S. W. 816, 49 S. W. 1065, 20 Ky. L. Rep. 1732; Woodruff *v.* Young, 31 Hun (N. Y.) 420; Jones *v.* East Greenwich Prob. Ct., 25 R. I. 361, 55 Atl. 881.

39. Crawford's Estate, 10 Pa. Super. Ct. 587.

belonged to the representative.[40] The representative should in the first instance be charged with assets at their inventoried or appraised value;[41] but such charge is not conclusive of his liability for that amount,[42] and if such assets have actually realized more [43] or, without fault or negligence on the part of the representative, less,[44] the representative is accountable for the amount so realized. The representative is not as a rule properly chargeable in his account with the rent of his decedent's realty, for if he takes charge of the realty without some testamentary or statutory authority and collects the rents he acts merely as agent of the heirs and does not bind himself in his fiduciary capacity, or if he is a mere wrongdoer as against the heirs he is not amenable to the probate court;[45] but where any rents or profits are received by him in his fiduciary capacity he is of course chargeable therewith.[46] Where culpable loss occurs, the representative should be required to debit himself with the amount;[47] but where the loss was excusable he may leave the amount out of his account altogether, or if it is charged to him, have a corresponding credit allowed.[48] As any personal profit which he has made out of his dealings with the property of the estate belongs to the estate,[49] he is chargeable with such profits in his accounts.[50] The representative may sometimes be charged with money or property received from the decedent during his lifetime, where no transfer of title was intended;[51] but it is otherwise where such money or property was received in payment of an indebtedness or it otherwise appears that it was intended to pass the title.[52] The representative should not be charged with debts, choses in action, proceeds of sale, or the like, until he has received the money,[53] unless the amount has been lost

40. Jones *v.* East Greenwich Prob. Ct., 25 R. I. 361, 55 Atl. 881.

41. Weed *v.* Lermond, 33 Me. 492; Squire's Estate, 11 Phila. (Pa.) 110. See also Crane *v.* Van Duyne, 9 N. J. Eq. 259; and *supra*, IV, I.

Difference in appraisements.— Where there was no evidence that certain goods accounted for by an administratrix were not all the goods which had been received by her intestate, a difference in the estimated value thereof, as appraised by two distinct sets of appraisers, was insufficient to justify a surcharge of the amount of such difference. Delp *v.* Edlis, 190 Pa. St. 25, 42 Atl. 462.

42. Weed *v.* Lermond, 33 Me. 492. And see *supra*, IV, I.

43. Matter of Mitchell, 41 Misc. (N. Y.) 603, 85 N. Y. Suppl. 288; Squire's Estate, 11 Phila. (Pa.) 110. See also Hunt *v.* Smith, 58 N. J. Eq. 25, 43 Atl. 428.

Good-will of business whose value increased by representative.— An administratrix, who on the death of intestate, who had a liquor business, had the license transferred to her, had the stock replenished at her own expense, and after increasing the value of the good-will, sold the business, is not to be charged with the full amount received by her for transfer of the license, stock, and fixtures. *In re* Immendorf, 190 Pa. St. 590, 42 Atl. 959.

44. Horton *v.* Howell, (N. J. Ch. 1903) 56 Atl. 702.

45. Brown *v.* Fessenden, 81 Me. 522, 17 Atl. 709; Trotter *v.* Trotter, 40 Miss. 704; *In re* Hoffman, 185 Pa. St. 315, 39 Atl. 954; Walker's Appeal, 116 Pa. St. 419, 9 Atl. 654; Fross' Appeal, 105 Pa. St. 258; Miller's Estate, 4 Pa. Dist. 408; Anck's Estate, 11 Phila. (Pa.) 118. See also Montier's Estate, 7 Phila. (Pa.) 491; and *supra*, III, C, 3.

Rents which should be distributed to heirs and devisees need not be accounted for to the court. *In re* Gallagher, 7 Ohio S. & C. Pl. Dec. 548, 5 Ohio N. P. 518.

46. Goeppner *v.* Leitzelmann, 98 Ill. 409; Campbell *v.* McCormick, 1 Ohio Cir. Ct. 504, 1 Ohio Cir. Dec. 281; Robertson *v.* Breckinridge, 98 Va. 569, 37 S. E. 8, where he is given credit for all payments of debts made by him for the estate. And see *supra*, III, C, 3.

Charging with rents of land improperly sold.— Where a decree of sale did not in express terms authorize sales of land in another state, and the will was not probated nor the executors qualified there, sales of land there made are invalid, and on an accounting the executors will not be credited with notes taken in payment on such sales, and will be charged with rents as if no sale had been made. Allen *v.* Shanks, 90 Tenn. 359, 16 S. W. 715.

47. Finney's Appeal, 37 Pa. St. 323. And see *supra*, VIII, L.

48. Pitts *v.* Singleton, 44 Ala. 363. And see *supra*, VIII, L.

49. Sugden *v.* Crosland, 2 Jur. N. S. 318, 23 L. J. Ch. 563, 3 Sm. & G. 192, 4 Wkly. Rep. 343. And see *supra*, VIII, J, 1; and, generally, TRUSTS.

50. Walworth *v.* Bartholomew, 76 Vt. 1, 56 Atl. 101.

51. Matter of Brintnall, 40 Misc. (N. Y.) 67, 81 N. Y. Suppl. 250; Lovell's Estate, 21 Pa. Super. Ct. 378.

52. Hughes' Estate, 10 Pa. Super. Ct. 534.

53. *Florida.*— See Sanderson *v.* Sanderson, 20 Fla. 292.

through his negligence or lack of good faith in failing to collect.[54] An executor who in his settlement charges himself with assets is responsible therefor at the demand of heirs or creditors of the estate;[55] but a mistake in the account, in charging himself with items which he did not owe, or amounts which he did not receive, should be corrected on the settlement of the account.[56] Executors filing a joint account are properly surcharged with notes due the estate by one of them.[57] An administrator is chargeable in his annual account with property which he, as lessee under a lease with his intestate, agreed to deliver to him at a certain time, where he failed to make such delivery to himself as administrator.[58] In a proper case the representative may be charged with interest on funds of the estate.[59] The representative should not of course be charged more than once with the same item,[60] nor can he be surcharged with certain items without being given an opportunity to be heard and produce evidence as to the propriety of such surcharge.[61] Where a testator directs his executor to sell certain property or rights, the executor cannot be surcharged with an additional amount which he could have obtained by exceeding his powers under the will.[62] An administrator being entitled to the possession of his decedent's land only as assets for the payment of debts is not accountable for waste in his settlement, however he may be otherwise.[63] An executor who under a power in the will has sold mortgaged land of the estate to pay the debts, and in order to give a clear title has paid off the encumbrance with the proceeds of the sale, should in his account simply charge himself with the balance.[64] Items for which credit is unjustly

Kansas.— *In re* Beam, 8 Kan. App. 835, 57 Pac. 854.

Pennsylvania.— *In re* Smith, 194 Pa. St. 259, 45 Atl. 82.

Virginia.— Fauber *v.* Gentry, 89 Va. 312, 15 S. E. 899 (judgment debt the collection of which is enjoined); Cavendish *v.* Fleming, 3 Munf. 198.

England.— Giles *v.* Dyson, 1 Stark. 32, 18 Rev. Rep. 743, 2 E. C. L. 22.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2061.

Notes inventoried but subsequently missing have been held to be not properly chargeable. Hunt *v.* Smith, 58 N. J. Eq. 25, 43 Atl. 428.

Dividends allowed to be retained in satisfaction of debt not chargeable.— Boome *v.* Van Hook, 1 Redf. Surr. (N. Y.) 444.

Indirect purchase by representative.— An administrator who procured a bidder to buy his intestate's land at a sale made by himself as administrator, and after making a deed to the bidder took a reconveyance to himself individually and reported to the court that the land brought a certain sum is chargeable with such sum and interest from the date of the sale, although no money passed in either transaction and he disclaimed purchasing the land on his own account and immediately after the conveyance to himself contracted to sell to others at a less price. McNeill *v.* Fuller, 121 N. C. 209, 28 S. E. 299.

Where the dates of payments made to an executor are not furnished by him in his account he is chargeable as of the date of the expiration of the year when distribution should have been made. Zweidinger's Estate, 29 Pittsb. Leg. J. (Pa.) 63.

54. Edmonds *v.* Crenshaw, Harp. Eq. (S. C.) 224; Cavendish *v.* Fleming, 3 Munf. (Va.) 198. See also Crouse's Estate, 16 Pa. Super. Ct. 212; and *supra*, VII, O.

Presumption that money was collected see Burbank *v.* Duncan, 53 S. W. 19, 21 Ky. L. Rep. 826.

55. Read *v.* Franklin, (Tenn. Ch. App. 1900) 60 S. W. 215; Davis *v.* Jackson, (Tenn. Ch. App. 1897) 39 S. W. 1067.

Agreement that note be given certain persons.— An executor is not chargeable with a note, at the demand of one who agreed that it might be given to certain persons, and acquiesced in their recovery thereof from the executor. Davis *v.* Jackson, (Tenn. Ch. App. 1897) 39 S. W. 1067.

56. Coey's Estate, Tuck. Surr. (N. Y.) 125 (on objection by sureties); James *v.* Craighead, (Tex. Civ. App. 1902) 69 S. W. 241. See also McLure *v.* Steele, 14 Rich. Eq. (S. C.) 105; and *infra*, XV, D.

57. *In re* Bierly, 81 Pa. St. 419.

58. *In re* More, 121 Cal. 609, 54 Pac. 97.

59. Matter of Adams, 51 N. Y. App. Div. 619, 64 N. Y. Suppl. 591 [*modifying* 30 Misc. 184, 61 N. Y. Suppl. 751, and *affirmed* in 166 N. Y. 623, 59 N. E. 1118], holding that an administrator who appropriates funds of the estate to his own use is properly charged with interest thereon on his final settlement. And see *supra*, VIII, F.

60. Evans *v.* Iglehart, 6 Gill & J. (Md.) 171; *In re* Pope, (Minn. 1904) 97 N. W. 1046; Hughes' Estate, 19 Pa. Super. Ct. 534; Dorscheimer's Estate, 9 Pa. Dist. 46.

61. Tucker *v.* Tucker, 28 N. J. Eq. 223.

62. Allshouse's Estate, 23 Pa. Super. Ct. 146.

63. Reynolds *v.* New Orleans Canal, etc., Co., 30 Ark. 520. And see *supra*, VIII, K; and *infra*, XVII.

64. Millard *v.* Harris, 119 Ill. 185, 10 N. E. 387 [*affirming* 17 Ill. App. 512].

claimed on an intermediate accounting may be surcharged, without awaiting a final accounting.[65]

D. Credits. The representative should receive credit for all proper disbursements, as in the payment of claims or authorized expenditures;[66] and where on the accounting it appears that items of expenditure for which credit is claimed were actually paid by a third person the representative may show that he repaid such person out of the funds of the estate, and upon such showing the credit claimed will be allowed.[67] But the representative can receive no credit for disbursements which he made improperly, such as the payment of claims not existing or not properly established or allowed, or unauthorized expenditures.[68] The

65. Pelham's Estate, 9 Kulp (Pa.) 347.

66. *Alabama.*— Bates *v.* Vary, 40 Ala. 421. See also Benagh *v.* Turrentine, 60 Ala. 557.

Kentucky.— Wood *v.* Nelson, 10 B. Mon. 229.

New York.— *In re* Jones, 1 Redf. Surr. 263. See also Matter of Rogers, 10 N. Y. App. Div. 593, 42 N. Y. Suppl. 133; Matter of Benedict, 13 Abb. N. Cas. 67.

Pennsylvania.— Squires' Estate, 11 Phila. 110. But *compare* Overfield's Estate, 13 Phila. 306.

South Carolina.— Trimmier *v.* Darden, 61 S. C. 220, 39 S. E. 373.

England.— Bacon *v.* Bacon, 5 Ves. Jr. 331, 2 Rev. Rep. 52, 31 Eng. Reprint 614.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2065.

As to what expenditures are authorized see *supra*, VIII, I.

As to liabilities of estate see *supra*, X, A.

Disbursements for benefit of real property see Lambertson *v.* Vann, 134 N. C. 108, 46 S. E. 10.

Arrears of interest on mortgage see Darrah's Estate, 6 Pa. Dist. 178, 19 Pa. Co. Ct. 287.

Where creditors purchase at an executor's sale and credit the purchase-price on their claims the executor is entitled to a corresponding credit on his account. Boyd *v.* Boyd, 9 S. W. 842, 10 Ky. L. Rep. 85.

Payment by setting off against debt due estate.—Where executors seek to credit themselves with the payment of a debt owed by the estate by offsetting such debt against one due the estate, they must show that such offset has actually been allowed and credit given the estate. *In re* Archer, 23 N. Y. Suppl. 1041, Pow. Surr. (N. Y.) 292. But where the persons interested in a decedent's estate knew that the special administrator allowed a set-off against an account due intestate, and approved of the adjustment when such administrator's account was settled, they cannot after his death deny his power to allow the set-off and charge the same to his estate. Foster *v.* Stone, 67 Vt. 336, 31 Atl. 841.

Payment by note.— Where administrators pay a claim against the estate with their note they are entitled to a corresponding credit against the estate. Walworth *v.* Bartholomew, 76 Vt. 1, 56 Atl. 101.

Where it is shown that a debt of the decedent was paid after his death, the representative is entitled to credit therefor, even although there is nothing to indicate by whom the payment was made. Williamson's Estate, 6 Wkly. Notes Cas. (Pa.) 452, 471.

Actual payment necessary.— Williamson's Estate, 6 Wkly. Notes Cas. (Pa.) 452, 471. *Contra*, Vreeland *v.* Schoonmaker, 16 N. J. Eq. 512. No allowance can be made for obligations incurred by the representative in the management of the estate but which have not been actually paid at the time when the account is presented and before his letters are revoked (*In re* Blair, 49 N. Y. App. Div. 417, 63 N. Y. Suppl. 678 [*modifying* and *affirming* 28 Misc. 611, 59 N. Y. Suppl. 1090]).

Debts paid after a decree to account should not be allowed to the administrator, but he is entitled to stand in the place of the creditors paid. Jones *v.* Jukes, 2 Ves. Jr. 517, 2 Rev. Rep. 308, 30 Eng. Reprint 753.

The representative may waive his right to credit for reimbursement for payment of debts of the estate with his own funds in favor of the distributees of the estate. Bates *v.* Vary, 40 Ala. 421.

Costs paid.— A representative will be allowed a credit on settling his accounts for the costs of a suit paid under a judgment recovered against him by a creditor of the estate when it does not appear that in failing to pay the debt without suit he was guilty of any negligence, bad faith, or other improper conduct. Pearson *v.* Darrington, 32 Ala. 227.

Assignment of mortgage securing debt.— Where a testator, by his will, directs that certain debts, for which the testator is secondarily responsible, and which are secured by mortgage upon lands of the original debtor, shall be paid, and that the mortgages shall be charged to a specific share in the distribution of his estate, the executors will not be allowed credit for the payment of those debts until they secure assignments of the mortgages, and are in position to charge themselves with those mortgages for the purposes of distribution. Hurlbut *v.* Hutton, 44 N. J. Eq. 302, 15 Atl. 417.

67. Wooten *v.* House, (Tenn. Ch. App. 1895) 36 S. W. 932.

68. *Illinois.*— *In re* Wincox, 186 Ill. 445, 57 N. E. 1073 [*affirming* 85 Ill. App. 613].

Nevada.— *See In re* Millenovich, 5 Nev. 161.

New York.— Matter of Very, 24 Misc. 139, 53 N. Y. Suppl. 389, 28 N. Y. Civ. Proc. 163;

representative may be credited with interest on proper disbursements where he has been charged with interest on money declared to be assets,[69] but the allowance of interest is not a necessary consequence of the entry of a credit at a particular date.[70] He may also, to offset charges against him as for assets received, receive credit for articles lost, for depreciation, and for debts due the estate which have not been collected, if the loss or depreciation be not due to his negligence or bad faith.[71] The expenses of administration may be allowed to the representative in his account,[72] and he should also be allowed credit for the compensation to which he is entitled.[73] The representative, on filing a second account, is entitled to credit for any balance due him on the first.[74] Where the representative turns over money of the estate to his successor he is entitled to credit therefor in his accounts,[75] and the same is true where he himself takes charge of funds as representative of another estate and duly charges himself with and accounts for the same as representative of the latter estate.[76] Where a representative has through mistake charged himself with money, claims, or property not constituting assets of the estate, he is entitled to a corresponding credit in his accounts.[77] Where a fine is imposed on the representative for the benefit of creditors, he is entitled to credit for the amount of it when paid;[78] but where the amount of a decree against an administrator is collected from one of his sureties and distributed and the decree is subsequently reversed, the administrator is not entitled to credit for the amount collected, pending an action by the surety against the administrator *de bonis non* to recover such amount.[79] Where an executor invests estate funds in the preservation of property of the estate, he should be given credit for the money realized out of such property by reason of such preservation, although the court reserves until final accounting the question whether such investments were necessary.[80] The representative is not entitled to credit for money paid out on a judgment obtained on a doubtful claim where there is no evidence of diligent resistance or genuine good faith in the effort to defeat the claim.[81] Where an executor sells real estate to the widow, who has a right of dower therein, he will not be entitled to a credit on his account equal to the value of her dower, as it will be presumed that the sale was made subject to dower.[82] The jurisdiction

Matter of Smith, 1 Misc. 269, 22 N. Y. Suppl. 1067.

Pennsylvania.— Monroe's Estate, 9 Kulp 334. See also Geiger's Appeal, 1 Mona. 547, 16 Atl. 851.

Texas.— James *v.* Craighead, (Civ. App. 1902) 69 S. W. 241.

West Virginia.— See Dawson *v.* Hemelrick, 33 W. Va. 675, 11 S. E. 31.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2065; and *supra*, VIII, I; X.

69. State *v.* Layton, 3 Harr. (Del.) 469; Scott *v.* Crews, 72 Mo. 261 (interest on disbursements at same rate as interest charged against representative); Royston *v.* McCulley, (Tenn. Ch. App. 1900) 59 S. W. 725, 52 L. R. A. 899 (interest from date of disbursements). *Contra*, Trotter *v.* Trotter, 40 Miss. 704.

70. Durnford's Succession, 1 La. Ann. 92.

71. Ladd *v.* Stephens, 147 Mo. 319, 48 S. W. 915; *In re* Jones, 1 Redf. Surr. (N. Y.) 263 (cause of loss should be stated); Leslie's Appeal, 63 Pa. St. 355; Schwoyer's Estate, 2 Woodw. (Pa.) 456; Squire's Estate, 11 Phila. (Pa.) 110. And see *supra*, XV, C.

72. See *supra*, X, A, 19, h.

Allowance on settlement of distribution account see *In re* Wilson, 2 Pa. St. 325.

Allowance of gross sum.— It has been held improper to allow a gross sum for "expenses of settling the estate" without any items either in the account or in the schedule annexed to it (Fairman's Appeal, 30 Conn. 205), but when one attorney either performs or directs all the legal work in settling an estate, the compensation therefor may be entered in the administrator's account and allowed as one gross sum. Muldrick *v.* Galbraith, 31 Oreg. 86, 49 Pac. 886.

73. See *infra*, XV, E.

74. Schlecht's Estate, 2 Brewst. (Pa.) 397.

75. Allen *v.* Shriver, 81 Va. 174.

76. Alexander *v.* Steele, 84 Ala. 332, 4 So. 281, even though the settlement of the first estate has been held void.

77. Tartt *v.* Wahl, 77 Ill. App. 578. And see *supra*, XV, C.

78. Matter of Pye, 18 N. Y. App. Div. 306, 46 N. Y. Suppl. 350.

79. Price *v.* Simmons, 21 Ala. 337.

80. *In re* Smith, 118 Cal. 462, 50 Pac. 701.

81. Matter of Yetter, 44 N. Y. App. Div. 404, 61 N. Y. Suppl. 175 [*affirmed* in 162 N. Y. 615, 57 N. E. 1129].

82. Matter of Smith, 1 Misc. (N. Y.) 269, 22 N. Y. Suppl. 1067.

to settle an account of personal assets of an estate does not extend to the allowance to the administratrix of charges in her favor beyond the amount of such assets.[83] Where a claim not properly proved is paid by an administrator, but the amount is afterward repaid to and accounted for by him, the item should not appear in his settlement either as a debit or a credit.[84] Where a credit taken by an administrator in his general account is legal in part and in part illegal, and there is no mode of discriminating as to what is legal, the entire credit should be rejected.[85]

E. Compensation — 1. Right to Compensation — a. In General. At common law the office of personal representative was regarded as honorary, to be performed without remuneration.[86] In the United States and Canada, however, the common-law doctrine does not obtain, but executors and administrators are allowed a reasonable compensation for their services.[87]

83. Buxton *v.* Barrett, 14 R. I. 40.

84. Hatfield *v.* Steele, 61 S. W. 999, 22 Ky. L. Rep. 1893.

85. Pearson *v.* Darrington, 32 Ala. 227.

86. *Georgia.*— Walton *v.* Gairdner, 111 Ga. 343, 36 S. E. 666.

Maryland.— Gaines *v.* Reutch, 64 Md. 517, 2 Atl. 913.

New Jersey.— Warbass *v.* Armstrong, 10 N. J. Eq. 263.

New York.— Manning *v.* Manning, 1 Johns. Ch. 527.

North Carolina.— Boyd *v.* Hawkins, 17 N. C. 329.

South Carolina.— Jones *v.* Jones, 39 S. C. 247, 17 S. E. 587, 802. See also Charleston College *v.* Willingham, 13 Rich. Eq. 195.

England.— Brocksopp *v.* Barnes, 5 Madd. 90; Scattergood *v.* Harrison, Moseley 128, 25 Eng. Reprint 310; Robinson *v.* Pett, 3 P. Wms. 249, 24 Eng. Reprint 1049.

See Perry Trusts, § 904; Schouler Ex. § 545; Williams Ex. (7th Eng. ed.) 1853.

In India commissions are allowed to an executor in respect only to the assets collected by him while in India. Campbell *v.* Campbell, 6 Jur. 635, 11 L. J. Ch. 382, 13 Sim. 168, 36 Eng. Ch. 168. See also Cockerell *v.* Barber, 5 L. J. Ch. O. S. 77, 2 Russ. 585, 3 Eng. Ch. 585, 1 Sim. 23, 2 Eng. Ch. 23, 28 Rev. Rep. 181; Denton *v.* Davy, 1 Moore P. C. 15, 12 Eng. Reprint 716.

Where a commission agent becomes the executor of his deceased principal he is entitled to commissions on all moneys received and paid by him prior to the death of the testator; as to all moneys received or paid by him after the death of the testator he is entitled to be paid for any trouble taken by him in regard thereto before the testator's death and at the same rate that any other agent would be entitled for the same services according to the usual course of mercantile employment. Sheriff *v.* Axe, 4 Russ. 33, 38 Eng. Reprint 717.

87. *Alabama.*— Carroll *v.* Moore, 7 Ala. 615; Phillips *v.* Thompson, 9 Port. 664.

Arkansas.— *Ex p.* Bell, 14 Ark. 76.

California.— *In re* Dudley, 123 Cal. 256, 55 Pac. 897.

Connecticut.— Main's Appeal, 73 Conn. 638, 48 Atl. 965.

Delaware.— Bush *v.* McComb, 2 Houst. 546.

Florida.— Shepard *v.* Shepard, 19 Fla. 300.

Georgia.— Walton *v.* Gairdner, 111 Ga. 343, 36 S. E. 666.

Illinois.— *In re* Wincox, 85 Ill. App. 613 [*affirmed* in 186 Ill. 445, 57 N. E. 1073].

Indiana.— Ray *v.* Doughty, 4 Blackf. 115.

Kentucky.— Morton *v.* Morton, 112 Ky. 706, 66 S. W. 641, 23 Ky. L. Rep. 2079; Webb *v.* Webb, 6 T. B. Mon. 163.

Louisiana.— Wells *v.* Alexander, 27 La. Ann. 624; Pomponeau's Succession, 10 La. Ann. 79; Heath *v.* Lambeth, 3 La. Ann. 361; Ball *v.* Hodge, 11 Rob. 390; Pinnell *v.* Scriber, 12 La. 608.

Maryland.— Hall *v.* Griffith, 2 Harr. & J. 483.

Massachusetts.— Newell *v.* West, 149 Mass. 520, 29 N. E. 954.

Michigan.— *In re* Power, 92 Mich. 106, 52 N. W. 298.

Minnesota.— St. Paul Trust Co. *v.* Kittson, 62 Minn. 408, 65 N. W. 74.

Mississippi.— Merrill *v.* Moore, 7 How. 271, 40 Am. Dec. 60.

Missouri.— Elstroth *v.* Young, 94 Mo. App. 351, 68 S. W. 100.

Montana.— *In re* Dewar, 10 Mont. 426, 25 Pac. 1026.

Nevada.— *In re* Nicholson, 1 Nev. 518.

New Hampshire.— Wendell *v.* French, 19 N. H. 205.

New Jersey.— Weeks *v.* Selby, 61 N. J. Eq. 668, 46 Atl. 948; Dickerson *v.* Canfield, 11 N. J. Eq. 259.

New York.— Matter of Prentice, 25 N. Y. App. Div. 209, 49 N. Y. Suppl. 353; Halsey *v.* Van Amringe, 6 Paige 12.

North Carolina.— Peyton *v.* Smith, 22 N. C. 325.

Ohio.— Chatfield *v.* Swing, 6 Ohio Dec. (Reprint) 666, 7 Am. L. Rec. 326.

Pennsylvania.— *In re* Sunderland, 203 Pa. St. 155, 52 Atl. 167; Culbertson's Appeal, 84 Pa. St. 303; Schwoyer's Estate, 2 Woodw. 456; *In re* Thomas, 1 Dauph. Co. Rep. 381.

Rhode Island.— Williams *v.* Herrick, 18 R. I. 120, 25 Atl. 1099.

South Carolina.— Tompkins *v.* Tompkins, 18 S. C. 1.

Tennessee.— *Ex p.* Parker, (Sup. 1881) 19 S. W. 571; German *v.* German, 7 Coldw. 180. See also Bryant *v.* Puckett, 3 Hayw. 252.

b. What Law Governs. The compensation of a personal representative is governed by the law operative at the time of the rendition of his services and not by the law in force at the time of his appointment or the settlement of his accounts.[88] If an administrator goes into a foreign state and there collects assets and voluntarily brings them into the state of his appointment and subjects them to the order of court in such state, his compensation must be regulated by the laws of such state.[89]

c. Effect of Void or Irregular Appointment. It has been held that the validity of an administrator's appointment cannot be questioned on the accounting, and where he has rendered services as such he is entitled to his expenses and commissions.[90] But it has also been held that one is not entitled to compensation where he acts under void letters,[91] procures his appointment as public administrator knowing that he is not by law entitled to it,[92] or is displaced because allowed to qualify without giving the requisite security.[93] One who takes possession of the estate of a relative in time of war when there is no authority competent to grant letters of administration will not be considered as a trespasser but as a trustee acting for the best, and will be allowed commissions on his accounts.[94] One who is entitled to administer, but never actually does so, may be entitled to commissions as against one who does administer, if such result is brought about by the improper conduct of the latter in obtaining a wrongful appointment and in failing to deliver the estate to the rightful administrator.[95] The fact that a will under which one is appointed and acts is afterward found invalid will not deprive him of compensation for services rendered in good faith.[96]

Texas.— Kearney *v.* Nicholson, (Civ. App. 1901) 67 S. W. 361.

Vermont.— *In re* Hall, 70 Vt. 458, 41 Atl. 508.

Virginia.— Fitzgerald *v.* Jones, 1 Munf. 150; Miller *v.* Beverleys, 4 Hen. & M. 415; Granberry *v.* Granberry, 1 Wash. 246, 1 Am. Dec. 455.

Washington.— *In re* Sour, 17 Wash. 675, 50 Pac. 587.

West Virginia.— Hoke *v.* Hoke, 12 W. Va. 427.

Wisconsin.— Cameron *v.* Cameron, 15 Wis. 1, 82 Am. Dec. 652.

United States.— Atkinson *v.* Robbins, 2 Fed. Cas. No. 617, 5 Cranch C. C. 312.

Canada.— McMillan *v.* McMillan, 21 Grant Ch. (U. C.) 369; Thompson *v.* Freeman, 15 Grant Ch. (U. C.) 384; Biggar *v.* Dickson, 15 Grant Ch. (U. C.) 233; Wilson *v.* Proudfoot, 15 Grant Ch. (U. C.) 103; Gould *v.* Burritt, 11 Grant Ch. (U. C.) 523; Chisholm *v.* Barnard, 10 Grant Ch. (U. C.) 479; *In re* Honsberger, 10 Ont. 521; Hoover *v.* Wilson, 24 Ont. App. 424; Thompson *v.* Fairbairn, 11 Ont. Pr. 333.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2069–2070.

Husband or wife of decedent.— A husband (Moulton *v.* Smith, 16 R. I. 126, 12 Atl. 891, 27 Am. St. Rep. 728) or wife (Pelham's Estate, 9 Kulp (Pa.) 347) who serves as personal representative of his or her deceased spouse is entitled to compensation. And the fact that a husband who is appointed administrator of his wife's estate is insolvent is not sufficient to deprive him of this right. Reed's Estate, 4 Phila. (Pa.) 375.

Partner of decedent.— An administrator is not deprived of his right to commissions because he was the intestate's partner, the assets administered not being partnership property. Bewley's Estate, 12 Phila. (Pa.) 56.

An employee who becomes administrator of his deceased employer is entitled to receive the usual commissions. Bewley's Estate, 12 Phila. (Pa.) 56.

One who acts as agent of an estate at the request of the duly qualified personal representative, through motives of humanity and benevolence, is not entitled to compensation. Mason *v.* Roosevelt, 5 Johns. Ch. (N. Y.) 534.

88. Key *v.* Jones, 52 Ala. 238; Pearson *v.* Darrington, 32 Ala. 227; Gould *v.* Hayes, 19 Ala. 438; Gaines *v.* Reutch, 64 Md. 517, 2 Atl. 913; *In re* Tutt, 41 Mo. App. 662. See also *In re* Dewar, 10 Mont. 426, 25 Pac. 1026. *Compare* Dakin *v.* Demming, 6 Paige (N. Y.) 95.

89. Satterwhite *v.* Littlefield, 13 Sm. & M. (Miss.) 302.

90. Carroll *v.* Hughes, 5 Redf. Surr. (N. Y.) 337.

91. *In re* Frey, 52 Cal. 658.

92. Miller's Succession, 27 La. Ann. 574.

93. McDonogh's Succession, 7 La. Ann. 472.

94. Lloyd *v.* Cannon, 2 Desauss. (S. C.) 232.

95. Preval *v.* Debuys, 5 Mart. (La.) 428.

96. *Connecticut.*— Comstock *v.* Hadlyme Ecclesiastical Soc., 8 Conn. 254, 20 Am. Dec. 100.

Kentucky.— Wood *v.* Nelson, 10 B. Mon. 229.

Maryland.— Glass *v.* Ramsey, 9 Gill 456.

North Carolina.— Ralston *v.* Telfair, 22 N. C. 414.

Tennessee.— Read *v.* Franklin, (Ch. App. 1900) 60 S. W. 215. *Compare* Royston *v.*

d. Necessity For Judicial Allowance. Personal representatives have no right to appropriate assets of the estate for the payment of their commissions until an allowance thereof by the court;[97] but they are entitled to retain in their hands a sufficient fund to cover their lawful commissions to be awarded on the settlement of their accounts.[98]

e. Effect of Testamentary Provisions. The right of a testator to fix by his will the compensation of his executor is generally recognized,[99] and where an executor accepts the office with knowledge of a provision in the will fixing his compensation, he is ordinarily entitled only to the amount fixed by the will,[1]

McCulley, (Ch. App. 1900) 59 S. W. 725, 52 L. R. A. 899.

United States.— Bradford *v.* Boudinot, 3 Fed. Cas. No. 1,765, 3 Wash. 122.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2073.

97. McBride *v.* Hunter, 64 Ga. 655; Collins *v.* Tilton, 58 Ind. 374; Matter of Furniss, 86 N. Y. App. Div. 96, 83 N. Y. Suppl. 530; Wheelwright *v.* Rhoades, 28 Hun (N. Y.) 57, 11 Abb. N. Cas. (N. Y.) 382; *In re* Gerow, 23 N. Y. Suppl. 847, Pow. Surr. (N. Y.) 364; *In re* Butler, 9 N. Y. Suppl. 641, 1 Connoly Surr. (N. Y.) 58; Matter of Harris, 4 Dem. Surr. (N. Y.) 463; Carroll *v.* Hughes, 5 Redf. Surr. (N. Y.) 337; Lacey *v.* Davis, 4 Redf. Surr. (N. Y.) 402; Whitney *v.* Phœnix, 4 Redf. Surr. (N. Y.) 180; Wheelwright *v.* Wheelwright, 2 Redf. Surr. (N. Y.) 501. See also Meeker *v.* Crawford, 5 Redf. Surr. (N. Y.) 450; Hodges *v.* Armstrong, 14 N. C. 253.

Interest is chargeable to a personal representative on sums appropriated by him in payment of his commissions in advance of their judicial allowance, from the date of appropriation to the date of allowance. Wheelwright *v.* Rhoades, 28 Hun (N. Y.) 57, 11 Abb. N. Cas. (N. Y.) 382; *In re* Herrick, 12 N. Y. Suppl. 105; *In re* Butler, 9 N. Y. Suppl. 641, 1 Connoly Surr. (N. Y.) 58; Meyer's Estate, 67 How. Pr. (N. Y.) 170; Matter of Peyser, 5 Dem. Surr. (N. Y.) 244; U. S. Trust Co. *v.* Bixby, 2 Dem. Surr. (N. Y.) 494; Lacey *v.* Davis, 4 Redf. Surr. (N. Y.) 402; Freeman *v.* Freeman, 4 Redf. Surr. (N. Y.) 211; Whitney *v.* Phœnix, 4 Redf. Surr. (N. Y.) 180. *Compare* Matter of Ross, 33 Misc. (N. Y.) 163, 68 N. Y. Suppl. 373, holding that adult parties may, for the purpose of permitting a prompt distribution of the assets, where debts and other legacies are paid, compute the amount of commissions properly allowable, and that interest will not be charged as a penalty if commissions finally approved are then paid by the executors to themselves. See also Beard *v.* Beard, 140 N. Y. 260, 35 N. E. 488.

98. Wheelwright *v.* Wheelwright, 2 Redf. Surr. (N. Y.) 501.

Right not lost by failure to retain funds.— Where the commissions of the executors have been fixed by the decree in proceedings for an accounting, the fact that they do not insist upon retaining sufficient funds to pay themselves at once does not deprive them of the right thereto. Matter of Prentice, 25 N. Y. App. Div. 209, 49 N. Y. Suppl. 353.

99. *California.*— *In re* Ringot, 124 Cal. 45, 56 Pac. 781, may provide for payment of portion of compensation at stated intervals.

Massachusetts.— Manning *v.* American Bd. Foreign Missions Com'rs, 8 Metc. 566.

New York.— Ireland *v.* Corse, 67 N. Y. 343; *In re* Tilden, 44 Hun 441 [*affirming* 5 Dem. Surr. 230]; Clinch *v.* Eckford, 8 Paige 412; Secor *v.* Sentis, 5 Redf. Surr. 570. See also Greer *v.* Greer, 5 Redf. Surr. 214.

Pennsylvania.— *In re* Lilly, 181 Pa. St. 478, 37 Atl. 557; *In re* Allen, 125 Pa. St. 544, 17 Atl. 453 [*affirming* 45 Leg. Int. 227]. See also *In re* Hays, 183 Pa. St. 296, 38 Atl. 622.

Washington.— *In re* Smith, 18 Wash. 129, 51 Pac. 348.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2078.

No compensation when bequest expressly in lieu thereof.— Fletcher *v.* Hurd, 14 N. Y. Suppl. 388; Rote *v.* Warner, 17 Ohio Cir. Ct. 342, 9 Ohio Cir. Dec. 536. See also Secor *v.* Sentis, 5 Redf. Surr. (N. Y.) 570; Freeman *v.* Fairlie, 3 Meriv. 24, 17 Rev. Rep. 7, 36 Eng. Reprint 10.

Abatement of legacy as compensation.— A legacy to executors, expressly as a compensation for their trouble, does not, on a deficiency of assets, abate with legacies which are mere bounties, even though the legacy somewhat exceeds what the executors would otherwise have been entitled to demand. Anderson *v.* Dougall, 15 Grant Ch. (U. C.) 405.

1. *California.*— *In re* Runyon, 125 Cal. 195, 57 Pac. 783.

Kentucky.— Brown *v.* Brown, 6 Bush 648.

New York.— Matter of Arkenburgh, 38 N. Y. App. Div. 473, 56 N. Y. Suppl. 523.

Pennsylvania.— *In re* Hays, 183 Pa. St. 296, 38 Atl. 622; Shippen *v.* Burd, 42 Pa. St. 461; Bartolet's Appeal, 1 Walk. 77. See also *In re* Allen, 125 Pa. St. 544, 17 Atl. 453.

Washington.— *In re* Smith, 18 Wash. 129, 51 Pac. 348.

Canada.— *In re* Bossi, 5 Brit. Col. 446.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2079.

"Usual commission."— A provision in a will that an executor shall receive the "usual commission" has been held to mean that he shall receive a five per cent commission on the personalty (*In re* Lilly, 181 Pa. St. 478, 37 Atl. 557) and a two and one-half per cent commission on sales of real estate (Wedekind's Estate, 11 Phila. (Pa.) 68).

"Handsomely paid."— Where a testator directs that his executor shall be "handsomely paid" for his services, only the ordinary com-

although where extraordinary services are performed increased compensation may be allowed.[2] A testator may even deprive his executor of all compensation if he so expressly provides in his will,[3] but testamentary provisions will not be construed as depriving the executor of the right to compensation if they may be construed otherwise with equal reason.[4] The general rule is that before a bequest can be held to be made in compensation for services to be rendered by executors, there must be language in the will from which such an intention can be inferred.[5] The statutes of some jurisdictions give an executor the right to renounce a testamentary provision as to compensation and to take the statutory compensation.[6]

f. Priority of Claim. It has been held that the compensation of the executor or administrator should be allowed to him in preference to debts,[7] and legacies;[8]

mission will be allowed him unless there has been extraordinary trouble. Waddy *v.* Hawkins, 4 Leigh (Va.) 458. See also Kenan *v.* Graham, 135 Ala. 585, 33 So. 699.

2. Young *v.* Smith, 9 Bush (Ky.) 421; Good's Estate, 150 Pa. St. 301, 24 Atl. 624; Matter of Guien, 1 Ashm. (Pa.) 317; Bartolet's Appeal, 1 Walk. (Pa.) 77. See also Nathan's Estate, 6 Pa. Dist. 481. But see *In re* Runyon, 125 Cal. 195, 57 Pac. 783; Williams *v.* Roy, 9 Ont. 534 [*doubting* Denison *v.* Denison, 17 Grant Ch. (U. C.) 306].

3. Matter of Gerard, 1 Dem. Surr. (N. Y.) 244; Secor *v.* Sentis, 5 Redf. Surr. (N. Y.) 570. See also Frazer *v.* Frazer, 76 S. W. 13, 25 Ky. L. Rep. 473, where, however, compensation was allowed because of the loss of an advantage given by the will.

In Maryland, under the statute (Md. Code, art. 93, § 6), when a testator makes a bequest to his executor by way of compensation in lieu of commissions, and the sum bequeathed is less than that which an allowance of the highest rate of commissions fixed by statute would produce, the orphans' court may in its discretion allow the executor such a percentage as reckoning the legacy therein will not exceed the maximum, and not be less than the minimum rate established by law. Renshaw *v.* Williams, 75 Md. 498, 23 Atl. 905. See also Handy *v.* Collins, 60 Md. 229, 45 Am. Rep. 725. And apart from the provisions of this statute it has been explicitly decided that a testator cannot by anything put in his will in any wise affect the commissions which the law allows his executor. He cannot deprive the executor of such commissions or cut them down or take away the discretion vested in the orphans' court. McKim *v.* Duncan, 4 Gill 72. See also Handy *v.* Collins, 60 Md. 229; State *v.* Baker, 8 Md. 44.

4. *In re* Marshall, 67 How. Pr. (N. Y.) 519, 3 Dem. Surr. (N. Y.) 173. See also Thome *v.* Allen, 49 S. W. 1068, 20 Ky. L. Rep. 1728; Fidelity Trust, etc., Co. *v.* Watkins, 42 S. W. 753, 19 Ky. L. Rep. 957.

5. *District of Columbia.*— Sinnott *v.* Kenaday, 14 App. Cas. 1 [*reversed* on other grounds in 179 U. S. 606, 21 S. Ct. 233, 45 L. ed. 339].

Kentucky.— See Thome *v.* Allen, 49 S. W. 1068, 20 Ky. L. Rep. 1728.

New Jersey.— *In re* Haines, 8 N. J. Eq. 506.

New York.— *In re* Kernochan, 104 N. Y. 618, 11 N. E. 149; *In re* Mason, 98 N. Y. 527; Campbell *v.* Mackie, 1 Dem. Surr. 185.

North Carolina.— Oden *v.* Windley, 55 N. C. 440.

Virginia.— Granberry *v.* Granberry, 1 Wash. 246, 1 Am. Dec. 455. *Compare* Jones *v.* Williams, 2 Call 102.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2081.

An executor, who is also tenant for life of the estate of the testator, is entitled to commissions. Blount *v.* Hawkins, 57 N. C. 161.

Bequest of part of residue.— Where there is a bequest of a share of the residue of the estate to executors, it is not to be inferred that the bequest was given in lieu of compensation, as in the case of a legacy of a definite sum. Hamilton Boys' Home *v.* Lewis, 4 Ont. 18.

In Louisiana the rule is that where an executor is a legatee he will not be entitled to commissions unless the testator has formally declared his intention that he should have the legacy over and above his commission. Gardere's Succession, 48 La. Ann. 280, 19 So. 134; Ross' Succession, 1 La. Ann. 129; Cucullu's Succession, 4 Rob. 397. See also Fink's Succession, 13 La. Ann. 103.

6. *In re* Runyon, 125 Cal. 195, 57 Pac. 783; Fink's Succession, 13 La. Ann. 103; Matter of Arkenburgh, 38 N. Y. App. Div. 473, 56 N. Y. Suppl. 523 [*distinguishing* Matter of Hopkins, 32 Hun (N. Y.) 618; Secor *v.* Sentis, 5 Redf. Surr. (N. Y.) 570]; Aspinwall *v.* Pirnie, 4 Edw. (N. Y.) 410.

Written renunciation required— Matter of Arkenburgh, 38 N. Y. App. Div. 473, 56 N. Y. Suppl. 523.

Right not lost by lapse of time.— Matter of Weeks, 5 Dem. Surr. (N. Y.) 194. See also Matter of Arkenburgh, 38 N. Y. App. Div. 473, 56 N. Y. Suppl. 523. But see Arthur *v.* Nelson, 1 Dem. Surr. (N. Y.) 337, holding that an executor's election must be exercised promptly or it will be lost by laches.

7. Williamson *v.* Wilkins, 14 Ga. 416; Fauntleroy *v.* Lyle, 5 T. B. Mon. (Ky.) 266; Logan *v.* Troutman, 3 A. K. Marsh. (Ky.) 66.

8. Williamson *v.* Wilkins, 14 Ga. 416. Commissions are not chargeable on legacies unless indirectly by way of abatement when the general estate is not sufficient to pay them. Westerfield *v.* Westerfield, 1 Bradf. Surr. (N. Y.) 198. See also McKnight *v.* Walsh, 23 N. J. Eq. 136.

and it has even been held that such compensation is entitled to priority in payment over funeral expenses.[9]

2. For What Services Allowed. Where statutory fees are not provided to compensate personal representatives for all services rendered, and other compensation forbidden except in cases especially provided,[10] the general rule seems to be that personal representatives are entitled to reasonable compensation for all services which are necessary to a proper administration and settlement of the estate, or which benefit the estate,[11] but are not entitled to compensation for services which are not properly connected with such settlement or for acts done for their own benefit.[12]

3. From What Fund Payable. The compensation of personal representatives is usually to be paid out of the general personal estate[13] of his decedent.[14] Such

Exoneration of specific legacies.— In the absence of directions in a will, the compensation of the executor and the other expenses of administration are chargeable upon general and residuary legacies, in the first instance, in exoneration of specific legacies. Milly *v.* Harrison, 7 Coldw. (Tenn.) 191.

9. *In re* Nicholson, 1 Nev. 518.

10. See *infra*, XV, E, 5.

11. *Alabama.*— Gerald *v.* Bunkley, 17 Ala. 170; Craig *v.* McGehee, 16 Ala. 41.

Arkansas.— Armstrong *v.* Cashion, (1901) 16 S. W. 666.

Florida.— Sherrell *v.* Shepard, 19 Fla. 30.

Kentucky.— Scarborough *v.* Watkins, 9 B. Mon. 540, 50 Am. Dec. 528.

Maryland.— Lee *v.* Lee, 6 Gill & J. 316.

Missouri.— Hawkins *v.* Cunningham, 67 Mo. 415.

New Hampshire.— Bartlett *v.* Fitz, 59 N. H. 502; Gordon *v.* West, 8 N. H. 444.

Pennsylvania.— Donat's Estate, 3 Pa. Dist. 749, 15 Pa. Co. Ct. 379; Squibb's Estate, 1 Del. Co. 529. *Compare In re* Morrison, 196 Pa. St. 80, 46 Atl. 257.

Tennessee.— Killebrew *v.* Murphy, 3 Heisk. 546.

Vermont.— See Hapgood *v.* Jennison, 2 Vt. 294.

Canada.— *Re* Batt, 9 Ont. Pr. 447.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2084, 2085, 2087.

Caring for property of estate.— A personal representative is entitled to an allowance against the estate for his time and services in taking care of the property of the estate, so long as it remains under his management, and he is accountable for it in that capacity, although the use of the property was bequeathed to another, who during all the time had the income of it. Richardson *v.* True, 28 Vt. 676.

Collection and investment of a fund pending litigation.— Where pending a suit against an administrator to recover specific funds, by consent of all parties the administrator collected and invested them, he was allowed his commissions, it being held to be his duty to take care of the funds until the ownership was determined. Wells *v.* Robinson, 13 Cal. 133.

Services by agent.— In no case will an executor be entitled to an allowance for services performed by an agent gratuitously. Chisholm *v.* Barnard, 10 Grant Ch. (U. C.) 479.

Services performed by attorneys.— Where executors employ attorneys to make collections which they might conveniently make themselves, they ought not to be allowed commissions thereon in addition to those of the attorneys. Carter *v.* Cutting, 5 Munf. (Va.) 223.

Services by representative as attorney see *supra*, VIII, I, 8, g, (IX), (E).

12. *Louisiana.*— Scott's Succession, 9 La. Ann. 336.

Massachusetts.— Miller *v.* Congdon, 14 Gray (Mass.) 114.

Michigan.— Wisner *v.* Mabley, 74 Mich. 143, 41 N. W. 835.

Pennsylvania.— Wissel's Appeal, 4 Pennyp. 236; Franket's Estate, 2 Lehigh Val. L. Rep. 406.

South Carolina.— Griffin *v.* Bonham, 9 Rich. Eq. 71; Esswein *v.* Seigling, Riley Eq. 200.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2084.

Where an executor is instructed in the will to rent a farm belonging to the estate, he is not entitled to compensation for services performed in managing the farm himself. Bartolet's Appeal, 1 Walk. (Pa.) 77.

13. *Georgia.*— Williamson *v.* Wilkins, 14 Ga. 416.

Kentucky.— Logan *v.* Troutman, 3 A. K. Marsh. 66.

Mississippi.— Brandon *v.* Hoggatt, 32 Miss. 335.

New Jersey.— McKnight *v.* Walsh, 23 N. J. Eq. 136.

New York.— Westerfield *v.* Westerfield, 1 Bradf. Surr. 198.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2077.

The indebtedness of an insolvent representative to the estate constitutes assets and will be applied in the discharge of any commissions allowed him. Freeman *v.* Freeman, 4 Redf. Surr. (N. Y.) 211.

14. See State *v.* Ramsey County Prob. Ct., 76 Minn. 132, 135, 78 N. W. 1039, where it was said: "An executor or administrator takes his office with its burdens as well as its benefits, and the fact that the estate he represents is insolvent is no reason why he

compensation is not generally a charge on real estate,[15] but where the personal estate is exhausted or there was none in the first instance compensation for services rendered in selling land for the payment of debts and paying out the proceeds is a charge on such proceeds.[16] Where a representative, under the provisions of a will, acts in relation to a certain fund as a trustee rather than as a representative, his compensation for executing the trust is to be paid out of the income of such fund rather than out of the general estate,[17] and so where the income of a certain fund is given by will to a person for life or for a shorter period, commissions for collecting and paying the income must be paid out of the income and not out of the general estate or out of the principal of the fund.[18]

4. Commissions — a. In General. In many jurisdictions a regular commission on the value of the assets of the estate is allowed to personal representatives.[19]

b. On What Allowed — (i) *In General.* Commissions should generally be allowed to personal representatives upon any and all property of the deceased which is taken into their possession and for which they account. The commissions do not apply to collecting alone but are allowed on all the estate for which they are held responsible in consideration of the risk and trouble attending the entire settlement.[20]

should receive compensation from the opposite party in any litigation which may arise."

15. Newsom *v.* Newsom, 38 N. C. 411. And See *infra*, XV, E, 4, b, (VIII).

Where a testatrix separated her estate into two parts, bequeathing her personalty to one class of persons and disposing of her realty to another, and one executor solely administered the former and another the latter and rendered separate accounts, each class of beneficiaries should bear the expenses of the accounting in regard to the fund in which they are interested, and the executors should have commissions on the fund each represents. Matter of Mansfield, 10 Misc. (N. Y.) 296, 31 N. Y. Suppl. 684.

Land devised for particular purpose.— The expenses and compensation of an executor for managing and selling real estate devised to be sold for the education and advancement of children ought to be paid out of the proceeds of the lands. Mason County Justices *v.* Lee, 1 T. B. Mon. (Ky.) 247.

16. Loftis *v.* Loftis, 94 Tenn. 232, 28 S. W. 1091.

17. Grinnell *v.* Baker, 17 R. I. 41, 20 Atl. 8, 23 Atl. 911. See also Johnson *v.* Holifield, 82 Ala. 123, 2 So. 753.

18. Woodruff *v.* Lounsberry, 40 N. J. Eq. 545, 5 Atl. 99 [*affirmed* in 42 N. J. Eq. 699, 11 Atl. 113]; Danly *v.* Cummings, 31 N. J. Eq. 208; Booth *v.* Ammerman, 4 Bradf. Surr. (N. Y.) 129; Pinckney *v.* Pinckney, 1 Bradf. Surr. (N. Y.) 269; Cammann *v.* Cammann, 2 Dem. Surr. (N. Y.) 211 [*disapproving* Matter of Mount, 2 Redf. Surr. (N. Y.) 406]; *In re* Spangler, 21 Pa. St. 335. See also Hoxie's Estate, 3 Pa. Dist. 296. But see Drake *v.* Price, 5 N. Y. 430.

19. Schouler Ex. § 545.

Interest on commissions.— See Williams *v.* Walter, 3 Ky. L. Rep. 336; *In re* Armstrong, 6 Watts (Pa.) 236.

20. *Arkansas.*— *Ex p.* Bell, 14 Ark. 76.

California.— *In re* Fernandez, 119 Cal. 579, 51 Pac. 851; *In re* Ricaud, 70 Cal. 69, 11 Pac. 471; *In re* Simmons, 43 Cal. 543; *In re* Isaacs, 30 Cal. 105.

Kentucky.— Floyd *v.* Floyd, 7 B. Mon. 290; Quintance *v.* Darnell, 14 Ky. L. Rep. 238, 332.

Louisiana.— Pinnell *v.* Scriber, 12 La. 608 (property coming to hand after inventory taken); Robouam *v.* Robouam, 12 La. 73. See also Labatut *v.* Rogers, 6 Mart. 272.

Maryland.— See McKim *v.* Duncan, 4 Gill 72.

Michigan.— Webb *v.* Peck, 131 Mich. 579, 92 N. W. 104.

Missouri.— Stong *v.* Wilkson, 14 Mo. 116.

New Jersey.— Pomeroy *v.* Mills, 37 N. J. Eq. 578.

New York.— Betts *v.* Betts, 4 Abb. N. Cas. 317.

Virginia.— Hipkins *v.* Bernard, 4 Munf. 83.

United States.— See Harrison *v.* Perea, 168 U. S. 311, 18 S. Ct. 129, 42 L. ed. 478 [*reversing* 7 N. M. 666, 41 Pac. 529].

See 22 Cent. Dig. tit. "Executors and Administrators," § 2090.

Commissions on interest.— An administrator who does not deduct his commissions until a final settlement is entitled to his per centum on the aggregate of his receipts and disbursements, including interest thereon. Drake *v.* Drake, 82 N. C. 443. See also Wright *v.* Wright, 2 McCord Eq. (S. C.) 185. But where an administrator is liable for interest for delaying payment on the principal of the estate, pending suit to determine the title thereto, he is not entitled to commissions on the interest with which he was charged. Thomas *v.* Frederick County School, 9 Gill & J. (Md.) 115.

Commission on notes taken in payment.— An administrator is entitled to his commission on the amount of notes taken by him for property sold at the probate sale of the succession. The commission is allowed not only for the actual trouble he may have had, but for the responsibility incurred. Smith *v.* Cheney, 1 Rob. (La.) 98.

(II) *INVENTORIED PROPERTY.* In some jurisdictions commissions are based on the property inventoried as composing the estate,[21] less deductions for worthless and uncollected assets.[22]

(III) *LEGACIES AND DISTRIBUTIVE SHARES* — (A) *In General.* As a general rule personal representatives are entitled to commissions for paying over legacies and distributive shares as well as debts.[23]

(B) *Specific Legacies and Property Delivered in Kind.* According to the weight of authority a personal representative is not entitled to commissions on a specific legacy, or on property delivered over in kind to distributees;[24] but com-

Taxes collected.— The allowance of commissions on state and county taxes collected by the administratrix of a deceased insolvent sheriff is within the discretion of the court. Clark *v.* Newman, 1 S. W. 880, 8 Ky. L. Rep. 515.

21. McCan's Succession, 49 La. Ann. 968, 22 So. 225; Boyer's Succession, 36 La. Ann. 506; Koch's Succession, 24 La. Ann. 243; Shaffer *v.* Cross, 13 La. Ann. 110; Handy *v.* Collins, 60 Md. 229, 45 Am. Rep. 725; *In re* Stratton, 46 Md. 551; McPherson *v.* Israel, 5 Gill & J. (Md.) 60. But see Matter of Whipple, 81 N. Y. App. Div. 589, 81 N. Y. Suppl. 393.

In California the inventory and appraisement may be considered for the purpose of ascertaining the amount of commissions to be allowed, but the valuation of the inventory is not conclusive. *In re* Coursen, (1901) 65 Pac. 965; *In re* Fernandez, 119 Cal. 579, 51 Pac. 851; *In re* Hinckley, 58 Cal. 457; *In re* Simmons, 43 Cal. 543. See also *In re* Carver, 123 Cal. 102, 55 Pac. 770.

Rents and revenues not included in inventory.— Commissions should be allowed on rents and revenues which have come into the hands of the personal representative in the course of administration, if not covered by the inventory. Robertson's Succession, 49 La. Ann. 80, 21 So. 197.

Excess over appraisement.— Commissions should be allowed on the excess of sales over the appraised value of the assets. Evans *v.* Iglehart, 6 Gill & J. (Md.) 171.

When partnership interest a part of estate. — An executor's commission on the value of the succession's interest in a partnership should not be determined by an inventory made before the partnership affairs have been liquidated, but by the amount of productive property accruing therefrom to the succession after liquidation. Milmo's Succession, 47 La. Ann. 126, 16 So. 772.

22. See *infra*, XV, E, 4, b, (X).

23. Walton *v.* Gairdner, 111 Ga. 343, 33 S. E. 666 (holding, however, that under the statute providing for commissions on all sums paid either to legatees or distributees, commissions cannot be allowed on stocks or bonds delivered to a legatee under authority in the will in the discharge of a legacy); Williamson *v.* Wilkins, 14 Ga. 416; West *v.* Smith, 8 How. (U. S.) 402, 12 L. ed. 1130.

Assets retained by heirs.— An administrator is entitled to commissions on assets which the heirs desire to retain. Park's Estate, 4 Pa. Co. Ct. 560, 21 Wkly. Notes Cas. (Pa.) 227.

In North Carolina it was decided in several early cases that personal representatives were not entitled to commissions upon disbursements to legatees or distributees (Clarke *v.* Cotton, 17 N. C. 51; Arnold *v.* Blackwell, 17 N. C. 1; Potter *v.* Stone, 9 N. C. 30. See also Peyton *v.* Smith, 22 N. C. 325), but according to the later cases it seems that commissions should be allowed for such disbursements (Scroggs *v.* Stevenson, 100 N. C. 354, 6 S. E. 111; Shepard *v.* Parker, 35 N. C. 103).

In Texas it is expressly provided by statute that no commission shall be allowed for paying out money to heirs and legatees. Spofford *v.* Minor, 13 Tex. Civ. App. 534, 36 S. W. 771.

24. *Alabama.*— Jenkins *v.* Jenkins, 33 Ala. 731; Wilson *v.* Wilson, 30 Ala. 670.

Georgia.— *Ex p.* Burney, 29 Ga. 33.

New Hampshire.— Gordon *v.* West, 8 N. H. 444.

New Jersey.— See McKnight *v.* Walsh, 23 N. J. Eq. 136.

New York.— Schenck *v.* Dart, 22 N. Y. 420; Matter of Whipple, 81 N. Y. App. Div. 589, 81 N. Y. Suppl. 393; *In re* Robinson, 37 Misc. 336, 75 N. Y. Suppl. 490; Farquharson *v.* Nugent, 6 Dem. Surr. 296; Hall *v.* Tryon, 1 Dem. Surr. 296. See also Hawley *v.* Singer, 5 Dem. Surr. 82; Hill *v.* Nelson, 1 Dem. Surr. 356. But see Matter of Ross, 33 Misc. 163, 68 N. Y. Suppl. 373; Rowland *v.* Morgan, 15 Abb. N. Cas. 198, 1 How. Pr. N. S. 182, 3 Dem. Surr. 289.

North Carolina.— Scroggs *v.* Stevenson, 100 N. C. 354, 6 S. E. 111; Walton *v.* Avery, 22 N. C. 405; Spruill *v.* Cannon, 22 N. C. 400. See also Sellars *v.* Ashford, 37 N. C. 104.

South Carolina.— Turnipseed *v.* Sirrine, 60 S. C. 272, 38 S. E. 423; Charleston College *v.* Willingham, 13 Rich. Eq. 195; Ruff *v.* Summers, 4 Desauss. 529.

Virginia.— Claycomb *v.* Claycomb, 10 Gratt. 589.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2103.

Contra.— Mayberry's Appeal, 33 Pa. St. 258; McMenamin's Estate, 15 Phila. (Pa.) 510; West *v.* Smith, 8 How. (U. S.) 402, 12 L. ed. 1130. See also Smith *v.* Cheney, 1 Rob. (La.) 98.

Legacy chargeable on real estate specifically devised.— An executor is not entitled to commissions on the share of a legatee that the will directs deducted from the valuation of a

pensation is sometimes provided by statute for such services.[25] Commissions have been allowed in a number of cases where stocks, bonds, or other securities were delivered to general legatees or distributees, such delivery being apparently regarded as equivalent to a payment in money,[26] but where stocks or securities constituted specific legacies commissions have been refused.[27]

(IV) *INVESTMENTS AND INCOME.* Where a fund is given to a personal representative in trust and he is required to receive and disburse the income of the fund, he is entitled to commissions upon such income,[28] and executorial trustees, directed by the will to receive the rents and profits of real estate and apply them to the use and benefit of a person for life, who permit the beneficiary to occupy and use the devised premises, are entitled to commissions on the annual income thereof.[29] An executor is not entitled to commissions on an enhanced value of stocks and other investments made with money on which commissions have been

farm specifically devised to him, on his paying the executor the residue of the appraised value. Burtis *v.* Dodge, 1 Barb. Ch. (N. Y.) 77.

Temporary administrator entitled to commissions on specific legacies.— Matter of Egan, 7 Misc. (N. Y.) 262, 27 N. Y. Suppl. 1009.

Division of perishable property.— Where grain or other perishable property, which by the law the executor is directed to sell, is divided in kind among the legatees, the executor is entitled to a commission upon the appraised value. Claycomb *v.* Claycomb, 10 Gratt. (Va.) 589.

25. **In California** the statute provides that where property of the estate is distributed in kind, personal representatives shall receive commissions computed on all the estate above the value of twenty thousand dollars at one-half the rate otherwise allowed. Cal. Code Civ. Proc. § 1618. See Cudworth's Estate, 133 Cal. 462, 65 Pac. 1041.

In Georgia it is provided by statute that no commission shall be paid to a personal representative for delivering over of any property in kind, but that reasonable compensation may be allowed by the ordinary for such services, and it has been decided in construing this statute that turning over stocks or bonds in discharge of a general legacy is not such a delivering over of property in kind as to entitle a personal representative to compensation. Walton *v.* Gairdner, 111 Ga. 343, 36 S. E. 666.

In Kentucky the rule is, that while a personal representative is not entitled to commissions upon the value of lands, bonds, stocks, notes, and other property, which they are not authorized to sell and reduce to cash, but which are distributed in kind (Renick *v.* Renick, 92 Ky. 336, 17 S. W. 1018, 13 Ky. L. Rep. 600; Garr *v.* Roy, 50 S. W. 25, 20 Ky. L. Rep. 1697), yet under the statute providing compensation for performing extraordinary services, he is entitled to a reasonable allowance for services in caring for and distributing property devised or bequeathed in kind (Glover *v.* Check, 71 S. W. 438, 24 Ky. L. Rep. 1281; Reed *v.* Reed, 66 S. W. 819, 23 Ky. L. Rep. 2186).

26. *Missouri.*— Ladd *v.* Stephens, 147 Mo. 319, 48 S. W. 915, in which case commissions were allowed to the personal representative on the market value of stock.

New York.— Matter of Curtiss, 9 N. Y. App. Div. 285, 37 N. Y. Suppl. 586, 41 N. Y. Suppl. 1111 [*distinguishing* McAlpin *v.* Potter, 126 N. Y. 285, 27 N. E. 475]; Cairns *v.* Chaubert, 9 Paige 160. See also Matter of Johnson, 57 N. Y. App. Div. 494, 67 N. Y. Suppl. 1004.

North Carolina.— Shepard *v.* Parker, 35 N. C. 103, note paid over as cash.

Ohio.— *In re* Duddy, 5 Ohio S. & C. Pl. Dec. 412, 7 Ohio N. P. 589.

Pennsylvania.—Rockafield's Estate, 4 Lanc. L. Rev. 113. See also Coggin's Appeal, 3 Walk. 426. But see Ziegler's Appeal, 2 Pa. Cas. 351, 4 Atl. 837.

South Carolina.— See Gist *v.* Gist, 2 McCord Eq. 473; Deas *v.* Spann, Harp. Eq. 176.

Virginia.— Farneyhough *v.* Dickerson, 2 Rob. 582. See also Hipkins *v.* Bernard, 4 Munf. 83 [*overruling* 2 Hen. & M. 21].

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2102, 2103.

27. Matter of Whipple, 81 N. Y. App. Div. 589, 81 N. Y. Suppl. 393; *In re* Robinson, 37 Misc. (N. Y.) 336, 75 N. Y. Suppl. 490; Charleston College *v.* Willingham, 13 Rich. Eq. (S. C.) 195.

Unspecified stocks of specified amount.— Where a testator bequeaths stock but leaves it to the judgment of his executors to select the particular stock, out of the mass of his estate by which to pay bequests, the legacies are not specific, and the executors are entitled to commissions. Thompson *v.* Pritchard, 12 N. Y. Wkly. Dig. 80.

28. Williamson *v.* Wilkins, 14 Ga. 416; Foote *v.* Bruggerhof, 66 Hun (N. Y.) 406, 21 N. Y. Suppl. 509; Westerfield *v.* Westerfield, 1 Bradf. Surr. (N. Y.) 198. But see Solliday *v.* Bissey, 12 Pa. St. 347.

In South Carolina it has been decided that an executor is not entitled to commissions for paying to a legatee, as directed by the will, the interest on a certain part of the estate, such commissions being allowed only when the executor receives interest annually and lets it out again as principal. Bobo *v.* Poole, 12 Rich. Eq. 224; Howard *v.* Schmidt, Rich. Eq. Cas. 452; Wright *v.* Wright, 2 McCord Eq. 185.

29. *In re* Washbon, 14 N. Y. Suppl. 672.

charged and allowed in a prior account.[30] An executor who is directed by his testator, while holding his estate in trust, to keep all moneys belonging thereto safely and profitably invested, is entitled to commissions on the real value of notes in which he finds the money already safely and profitably invested by the testator, and it is not necessary for him to convert such notes into money and reinvest them.[31]

(v) *Receipts and Disbursements*—(a) *In General.* Commissions of executors and administrators are sometimes based on their receipts and disbursements; and for this purpose receipts and disbursements are generally made separate items, a certain per cent being allowed for receiving and a certain per cent for disbursing assets.[32]

30. *In re* Davidson, 204 Pa. St. 381, 54 Atl. 273.

31. Hardt *v.* Birely, 72 Md. 134, 19 Atl. 606.

32. *Alabama.*— Wright *v.* Wilkerson, 41 Ala. 267; Newberry *v.* Newberry, 28 Ala. 691.

Kentucky.— Beeler *v.* Hill, 5 Dana 37. *Compare* Webb *v.* Webb, 6 T. B. Mon. 163, allowing commissions only on disbursements.

New York.— Matter of Whipple, 81 N. Y. App. Div. 589, 81 N. Y. Suppl. 393; Betts *v.* Betts, 4 Abb. N. Cas. 317.

North Carolina.— Bond *v.* Turner, 4 N. C. 690.

South Carolina.— Jones *v.* Jones, 39 S. C. 247, 17 S. E. 587, 802; Taveau *v.* Ball, 1 McCord Eq. 456; Logan *v.* Logan, 1 McCord Eq. 1.

Texas.— Claridge *v.* Lavenbury, 7 Tex. Civ. App. 155, 26 S. W. 324. See also Spofford *v.* Minor, 13 Tex. Civ. App. 534, 36 S. W. 771.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2097.

In New York the literal interpretation of the statute limiting commissions to cases where there has been both a receipt and disbursement of funds has not been adopted, but the courts have almost uniformly granted one half of such commission for receiving and the other half for disbursing assets. Howes *v.* Davis, 4 Abb. Pr. 71; Matter of Kellogg, 7 Paige 265; Matter of Roberts, 3 Johns. Ch. 43; Rowland *v.* Morgan, 3 Dem. Surr. 289; Matter of Roosevelt, 5 Redf. Surr. 601; Ward *v.* Ford, 4 Redf. Surr. 34. See also *In re* Mason, 98 N. Y. 527; Meacham *v.* Stearnes, 9 Paige 398. But see Matter of Bidgood, 36 Misc. 516, 73 N. Y. Suppl. 1061.

Money disbursed for use of family.— An executor is entitled to commissions for disbursing money found in testator's house after his death for the use of the family or for investing the same. Hipkins *v.* Bernard, 4 Munf. (Va.) 83.

Amount collected and to be distributed.— An administrator is only entitled to his commissions on the amount collected and to be distributed. Fontelieu's Succession, 28 La. Ann. 638.

Disbursements under invalid will.— An executor is entitled to commissions on money paid out pursuant to the will, although such payments afterward appear to have been improper in view of the invalidity of the will. Kelly *v.* Davis, 37 Miss. 76.

In the event of the death of one of the executors of a will prior to the final accounting, his personal representative is entitled to commissions only upon such sums as were received and paid out during his lifetime. Matter of Whipple, 81 N. Y. App. Div. 589, 81 N. Y. Suppl. 393.

No commissions on disbursements not allowed by the court.— Pryor *v.* Davis, 109 Ala. 117, 19 So. 440; Springfield Grocer Co. *v.* Walton, 95 Mo. App. 526, 69 S. W. 477.

A set-off in reduction of a debt due to the decedent does not fall within the description of "receipts" on which commissions are allowable. Walton *v.* Avery, 22 N. C. 405. See also Bedell's Appeal, 85 Pa. St. 398.

Receipt and disbursement of money.— In some jurisdictions it seems commissions are allowable only on receipts and disbursements of money to the exclusion of other property. Wright *v.* Wilkerson, 41 Ala. 267; Jones *v.* Jones, 39 S. C. 247, 17 S. E. 587, 802; Ball *v.* Brown, Bailey Eq. (S. C.) 374; Ruff *v.* Summers, 4 Desauss. (S. C.) 529; Claridge *v.* Lavenburg, 7 Tex. Civ. App. 155, 26 S. W. 324. See also Tompkins *v.* Tompkins, 18 S. C. 1. Even where this is the rule commissions have been allowed upon bonds, notes, accounts, etc., which have been used in lieu of money, the principle being that that which was used as money should in equity and fairness be regarded and considered as money (Jones *v.* Jones, 39 S. C. 247, 17 S. E. 587, 802; Gist *v.* Gist, 2 McCord Eq. (S. C.) 473; Deas *v.* Spann, Harp. Eq. (S. C.) 176. See also Ball *v.* Brown, Bailey Eq. (S. C.) 374); but the delivery of bonds by an executor under an order of court is not such a payment of money as to entitle him to commissions (Rutledge *v.* Williamson, 1 Desauss. (S. C.) 159). Where a creditor of the estate of which defendants were executors purchased property at a sale made by them and gave credit for the amount, it was held that the executors were entitled to commissions on the amount thus settled, although no money was paid. Kiddle *v.* Hammond, Harp. Eq. (S. C.) 223. In New Jersey commissions are not limited to money, but may be allowed upon any property having a money value. Pomeroy *v.* Mills, 37 N. J. Eq. 578. In New York it has been decided that the statute which directs the allowance of commissions for receiving and paying out sums of money is to be so construed as to treat the reception of every variety of assets as a receiving of

(B) *Resulting From Continuance of Decedent's Business.* Where, however, a personal representative carries on the business of his decedent, he is not entitled to commissions on the gross receipts realized or the necessary disbursements made by him while conducting the business,[33] but the proper compensation is a reasonable allowance for the time and labor bestowed in carrying on the business.[34]

(VI) *SURCHARGES.* According to some of the authorities, no commissions should be allowed on sums with which a representative is charged on account of his neglect or other misconduct.[35]

money and the application of such assets to the discharge of debts and legacies and to the establishment of trusts, etc., as a pecuniary disbursement (Rowland *v.* Morgan, 3 Dem. Surr. 289. See also Ogden *v.* Murray, 39 N. Y. 202; Cairns *v.* Chabert, 3 Edw. 312; Matter of De Peyster, 4 Sandf. Ch. 511; Matter of Roosevelt, 5 Redf. Surr. 601; Ward *v.* Ford, 4 Redf. Surr. 34).

Receiving and investing proceeds of real estate.— The receipt of money from the sale of real estate, and its reinvestment to bear interest, is not "receiving and paying out," so as to entitle an executor to commissions. Betts *v.* Betts, 4 Abb. N. Cas. (N. Y.) 317.

Advancements made by the decedent cannot be considered as so received or paid out by the personal representative as to entitle him to commissions thereon. Metcalfe *v.* Colles, 43 N. J. Eq. 148, 10 Atl. 804; Hill *v.* Nelson, 1 Dem. Surr. (N. Y.) 357; Barhite's Appeal, 126 Pa. St. 404, 17 Atl. 617. See also Ziegler's Appeal, 2 Pa. Cas. 351, 4 Atl. 837.

Receipts and disbursements in Confederate money.— Under a statute allowing administrators a commission on receipts and disbursements, it was held that one receiving Confederate money during the Civil war should be allowed commissions in Confederate money and that on receipts and disbursements in United States currency since the war commissions should be allowed in that currency. Dockery *v.* McDowell, 40 Ala. 476. See also May *v.* Green, 75 Ala. 162. *Compare* Trammel *v.* Philleo, 33 Tex. 395.

33. Lamar *v.* Lamar, 118 Ga. 684, 45 S. E. 498; Jones *v.* Jones, 39 S. C. 247, 17 S. E. 587, 802; Dwyer *v.* Kalteyer, 68 Tex. 554, 5 S. W. 75. *Compare* Walker's Estate, 6 Pa. Co. Ct. 515.

Commissions on net income.— Commissions cannot be charged on money disbursed and received from the conduct of a business carried on to produce a net income, but only upon the net income which increases the *corpus* of the estate. Beard *v.* Beard, 140 N. Y. 260, 35 N. E. 488.

An executor is held entitled to commissions on expenditures for necessary permanent improvements on land on which he is conducting farming operations under the provisions of his testator's will. Lambertson *v.* Vann, 134 N. C. 108, 46 S. E. 10.

Replenishing stock of goods.— Where an executor in order to make a better sale of a stock of goods left by his testator added to such stock from his own stock, commissions should be allowed only upon the amount of the personal estate of the testator exclusive of what was added to replenish the stock in trade. Field *v.* Colton, 7 Ill. App. 379.

34. *Georgia.*— Lamar *v.* Lamar, 118 Ga. 684, 45 S. E. 498.

Maryland.— Lee *v.* Lee, 6 Gill & J. 316.

Michigan.— *In re* Brewster, 113 Mich. 561, 71 N. W. 1085.

Oregon.— *In re* Osburn, 36 Oreg. 8, 58 Pac. 521; *In re* Partridge, 31 Oreg. 297, 51 Pac. 82.

Pennsylvania.— See Smith's Estate, 30 Pittsb. Leg. J. 188.

South Carolina.— Jones *v.* Jones, 39 S. C. 247, 17 S. E. 587, 802.

Texas.— Dwyer *v.* Kalteyer, 68 Tex. 554, 5 S. W. 75.

Canada.— Thompson *v.* Freeman, 15 Grant Ch. (U. C.) 384.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2101, 2123.

In New York the rule is that when the business is carried on without any direction in the will a reasonable compensation in addition to legal commissions will be allowed (Lent *v.* Howard, 89 N. Y. 169 [*reversing* 25 Hun 60]; Matter of Moriarity, 27 Misc. 161, 58 N. Y. Suppl. 380; Matter of Braunsdorf, 13 Misc. 666, 35 N. Y. Suppl. 298 [*affirmed* in 2 N. Y. App. Div. 73, 37 N. Y. Suppl. 229]. See also Lawrance *v.* Garner, 1 N. Y. Suppl. 534), but where the will expressly authorized a continuance of the business by executors, services so rendered are regarded as in the line of duty, and no compensation in addition to commissions will be allowed (Matter of Hayden, 54 Hun 197, 7 N. Y. Suppl. 313 [*affirmed* in 125 N. Y. 776, 27 N. E. 409]; Matter of Taft, 5 Silv. Supreme 370, 8 N. Y. Suppl. 282).

In England it seems that an executor will not be allowed any compensation for carrying on his testator's business (Stocken *v.* Dawson, 6 Beav. 371, 49 Eng. Reprint 869; Marshall *v.* Holloway, 2 Swanst. 432, 19 Rev. Rep. 94, 36 Eng. Reprint 681; Burden *v.* Burden, 1 Ves. & B. 170, 12 Rev. Rep. 210, 35 Eng. Reprint 67) in the absence of some contract to that effect between him and the testator (Browne *v.* Collins, 21 Wkly. Rep. 222. But see Forster *v.* Ridley, 4 De G. J. & S. 452, 11 L. T. Rep. N. S. 200, 69 Eng. Ch. 347, 46 Eng. Reprint 993).

Compensation for keeping together and managing estate see Pearson *v.* Darrington, 32 Ala. 227; Gould *v.* Hayes, 19 Ala. 438; Chancellor *v.* Ashby, 2 Patt. & H. (Va.) 26.

35. Gilson's Estate, 18 Wkly. Notes Cas. (Pa.) 570; Bald *v.* Thompson, 17 Grant Ch. (U. C.) 154. *Contra*, Matter of Mount, 2 Redf. Surr. (N. Y.) 405 [*citing* Meacham *v.*

(VII) *INDEBTEDNESS BETWEEN REPRESENTATIVE AND ESTATE.* An executor or administrator is not entitled to a commission for the collection of his own debt due the estate,[36] but it has been held that he is entitled to commissions on a debt due to himself from the decedent and presented and allowed on his accounting.[37]

(VIII) *REAL PROPERTY AND ITS USUFRUCT* — (A) *In General.* Personal representatives are not generally entitled to commissions upon real estate, or the proceeds thereof,[38] or upon rents or profits derived therefrom;[39] but in a few jurisdictions the rule is otherwise.[40]

(B) *Proceeds of Authorized Sales.* A personal representative who receives and accounts for the proceeds of realty sold under the direction of the will, or by a decree of court, is entitled to commissions thereon;[41] but when land is sold

Sternes, 9 Paige (N. Y.) 398]; Edmonds *v.* Crenshaw, Harp. Eq. (S. C.) 224.

36. *Kentucky.*— Worsley *v.* Worsley, 16 B. Mon. 455; Com. *v.* Bracken, 32 S. W. 609, 17 Ky. L. Rep. 785.

Maryland.— Handy *v.* Collins, 60 Md. 229, 45 Am. Rep. 725 [*distinguishing* McKim *v.* Duncan, 4 Gill 72], executrix not entitled to commissions on debt due testator, and specifically bequeathed to her.

North Carolina.— Arnold *v.* Blackwell, 17 N. C. 1. See also Bond *v.* Turner, 4 N. C. 690.

Pennsylvania.— *In re* Hoffer, 156 Pa. St. 473, 27 Atl. 11; Barhite's Appeal, 126 Pa. St. 404, 17 Atl. 617; Muth's Estate, 6 Pa. Co. Ct. 597; Waylan's Estate, 1 Pa. Co. Ct. 366; Spackman's Estate, 2 Chest. Co. Rep. 153; Haines' Estate, 1 Leg. Gaz. 91. See also Brenneman's Estate, 14 York Leg. Rec. 14.

Virginia.— Farneyhough *v.* Dickerson, 2 Rob. 582. See also Carter *v.* Cutting, 5 Munf. 223.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2100.

Contra.— Griffin *v.* Bonham, 9 Rich. Eq. (S. C.) 71.

Commissions for disbursing.— An executor or administrator should not be allowed commissions or compensation for collecting a debt due from himself to the estate; but, if he has faithfully paid such debt into the distinct funds of the estate, he will be entitled to half commissions thereon for responsibility of handling and disposing of it. Stewart's Estate, 1 Lack. Jur. (Pa.) 225. See also *In re* Phillips, 6 N. J. L. J. 371.

37. Matter of Mount, 2 Redf. Surr. (N. Y.) 405. See also Heft's Appeal, 5 Pa. Cas. 573, 9 Atl. 87. *Contra*, Brown *v.* Walker, 38 Tex. 109.

38. Quaintance *v.* Darnell, 14 Ky. L. Rep. 238; Garesche *v.* Levering Invest. Co., 146 Mo. 436, 48 S. W. 653, 46 L. R. A. 232; *In re* McKay, 37 Misc. (N. Y.) 590, 75 N. Y. Suppl. 1069 [*modified* as to other matter in 75 N. Y. App. Div. 78, 77 N. Y. Suppl. 845]; Haley's Estate, 9 Pa. Dist. 116. See also Matter of Ogden, 41 Misc. (N. Y.) 158, 83 N. Y. Suppl. 977.

Real estate treated as personalty.— Where real estate comes into the hands of executors as trustees, and is treated as personalty, and accepted by the legatees as such, the executors are entitled to have it so considered in determining the amount of their commissions. Matter of Buchanan, 5 N. Y. St. 351.

39. Scudder *v.* Ames, 89 Mo. 496, 14 S. W. 525; Myers *v.* Bolton, 157 N. Y. 393, 52 N. E. 114 [*affirming* as to this matter 89 Hun 342, 35 N. Y. Suppl. 577]; Apple's Estate, 2 Phila. (Pa.) 239; Dagg *v.* Dagg, 25 Grant Ch. (U. C.) 542. See also Doan *v.* Davis, 23 Grant Ch. (U. C.) 207.

Where under the will it is the executors' duty to collect rents of real estate they are entitled to commissions thereon. Fisher *v.* Fisher, 1 Bradf. Surr. (N. Y.) 335. See also *In re* Washbon, 14 N. Y. Suppl. 672.

In exceptional cases where personal representatives acting in the interest of the beneficiaries of the estate have collected rents and duly accounted therefor, commissions may be allowed. Haley's Estate, 9 Pa. Dist. 116; Doan *v.* Davis, 23 Grant Ch. (U. C.) 207.

40. Ord *v.* Little, 3 Cal. 287; Girod's Succession, 4 La. Ann. 386. See also *In re* Fernandez, 119 Cal. 579, 51 Pac. 851; *In re* Reck, Myr. Prob. (Cal.) 59; Calloway's Succession, 49 La. Ann. 968, 22 So. 225; Morvant's Succession, 46 La. Ann. 301, 14 So. 922.

In Washington under the provisions of the statute authorizing an administrator to take possession of and care for the real and personal estate of a decedent, and providing for a commission to the administrator on the whole estate accounted for by him, an administrator is entitled to a commission upon the unsold realty of the estate according to its actual value at the time of accounting. *In re* Smith, 18 Wash. 129, 51 Pac. 348; Wilbur *v.* Wilbur, 17 Wash. 683, 50 Pac. 589; Horton *v.* Barto, 17 Wash. 675, 50 Pac. 587.

Commissions on rents see Robertson's Succession, 49 La. Ann. 80, 21 So. 197; Sparrow's Succession, 40 La. Ann. 484, 4 So. 513, administrator the lessee.

No commissions on waste or uncultivated land.— McDonogh's Succession, 7 La. Ann. 475; Girod's Succession, 4 La. Ann. 386; Milne's Succession, 5 Rob. (La.) 48.

41. *Maryland.*— Waring *v.* Darnall, 10 Gill & J. 126; Scott *v.* Dorsey, 1 Harr. & J. 227.

Mississippi.— Shurtliff *v.* Witherspoon, 1 Sm. & M. 613.

Missouri.— Jacobs *v.* Jacobs, 99 Mo. 427, 12 S. W. 457.

New York.— Matter of Prentice, 25 N. Y.

or the proceeds thereof disbursed without his agency he is not entitled to commissions.[42] Although an executor is empowered to sell realty he is not entitled to commissions if no sale is made.[43]

(c) *Realty Subject to Encumbrances.* In allowing commissions on real estate or the proceeds thereof, the value of all lawful encumbrances must be deducted, and the surplus only taken as a basis of computation.[44]

App. Div. 209, 49 N. Y. Suppl. 353; Smith *v.* Buchanan, 5 Dem. Surr. 169.

North Carolina.—Scroggs *v.* Stevenson, 100 N. C. 354, 6 S. E. 111.

Pennsylvania.—Snyder's Appeal, 54 Pa. St. 67; Nathans *v.* Morris, 4 Whart. 389 (proceeds of ground-rent); Sharp's Estate, 9 Pa. Dist. 727, 24 Pa. Co. Ct. 417; Kelly's Estate, 9 Pa. Dist. 387; Pickering's Estate, 4 Pa. Dist. 263; Hoxie's Estate, 3 Pa. Dist. 296; Clark's Estate, 11 Phila. 53.

Canada.— See Bald *v.* Thompson, 17 Grant Ch. (U. C.) 154.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2099.

Commissions on bonds taken in payment and delivered to distributees see Gist *v.* Gist, 2 McCord Eq. (S. C.) 473; Deas *v.* Spann, Harp Eq. (S. C.) 176.

Commissions on debt due purchaser and deducted from purchase-price see Kiddle *v.* Hammond, Harp. Eq. (S. C.) 223.

Where the intestate's lands are sold under written agreement of the heirs, part of the price being paid in cash and the remainder in notes made payable to, and received by, the heirs in payment of their respective shares, the proceeds of such sales or notes are not proper matters of the administrator's accounts, and he is not entitled to commissions thereon. Key *v.* Jones, 52 Ala. 238.

Personal devise to executor.— Where real estate is devised to the executor named in the will in trust for another person, with power of sale, and the devise runs to the executor personally, and not to him in his capacity as executor, he is not entitled to charge executorial commissions on a sale made in pursuance of such power. Matter of Brown, 5 Dem. Surr. (N. Y.) 223.

42. *Alabama.*— Moore *v.* Randolph, 70 Ala. 575.

Louisiana.— Gollain's Succession, 31 La. Ann. 173.

Pennsylvania.— Sloan's Estate, 7 Pa. Co. Ct. 377.

South Carolina.— Ball *v.* Brown, 1 Bailey Eq. 374.

Tennessee.— Loague *v.* Brennan, 86 Tenn. 634, 9 S. W. 693.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2099.

43. Phœnix *v.* Livingston, 101 N. Y. 451, 5 N. E. 70 (no commissions on part of land unsold); Matter of Johnson, 57 N. Y. App. Div. 494, 67 N. Y. Suppl. 1004; Roosevelt *v.* Van Alen, 31 N. Y. App. Div. 1, 52 N. Y. Suppl. 304; Matter of Clinton, 12 N. Y. App. Div. 132, 42 N. Y. Suppl. 674 [*affirming* 16 Misc. 199, 38 N. Y. Suppl. 945]; Bruce *v.* Lorillard, 62 Hun (N. Y.) 416, 16 N. Y. Suppl. 900 (although valuable services rendered as to real estate); Matter of McGlynn, 41 Misc. (N. Y.) 156, 83 N. Y. Suppl. 975; Matter of Ross, 33 Misc. (N. Y.) 163, 68 N. Y. Suppl. 373; Matter of Tucker, 29 Misc. (N. Y.) 728, 62 N. Y. Suppl. 1021; Matter of Hardenbrook, 23 Misc. (N. Y.) 538, 52 N. Y. Suppl. 845; Matter of McLaren, 6 Misc. (N. Y.) 483, 27 N. Y. Suppl. 289, Pow. Surr. (N. Y.) 585; Buxton *v.* Shaffer, 43 W. Va. 296, 37 S. E. 319, naked power of sale. But *compare* Donat's Estate, 3 Pa. Dist. 749, 15 Pa. Co. Ct. 379, holding that where an executor directed by will to sell real estate made repeated but unsuccessful attempts to do so and then died, his personal representative could collect a commission for such service.

Partition by deed in which executor joins not a sale.— Metcalfe *v.* Colles, 43 N. J. Eq. 148, 10 Atl. 804; *In re* Tilden, 44 Hun (N. Y.) 441 [*affirming* 5 Dem. Surr. 230]; Matter of Ross, 33 Misc. (N. Y.) 163, 68 N. Y. Suppl. 373.

Equitable conversion.— When executors are vested with the power of sale which is mandatory, so as to impose a duty upon them to exercise it and thereafter to account for its proceeds as personalty the land is treated as equitably converted into money and its value may be considered not for the purpose of awarding them commissions upon such value in advance of sale, but in order to determine whether the entire estate exceeds one hundred thousand dollars, so as to give to each executor a full commission. Matter of Clinton, 16 Misc. (N. Y.) 199, 38 N. Y. Suppl. 945; Matter of McLaren, 6 Misc. (N. Y.) 483, 27 N. Y. Suppl. 289; Smith *v.* Buchanan, 5 Dem. Surr. (N. Y.) 169. See also Matter of McGlynn, 41 Misc. (N. Y.) 156, 83 N. Y. Suppl. 975. But this rule does not apply when there is a discretionary power of sale which does not work an equitable conversion. Matter of McGlynn, *supra*; Matter of Hardenbrook, 23 Misc. (N. Y.) 538, 52 N. Y. Suppl. 845.

Conversion prevented by beneficiary.— When a conversion of realty is authorized by will, upon a bill brought to restrain the executor from converting the real estate, on the ground that there is no necessity for it and to compel him to convey it to the complainant, commissions will be allowed. Stein *v.* Huesmann, 38 N. J. Eq. 405.

44. Baucus *v.* Stover, 24 Hun (N. Y.) 109 [*reversed* on other grounds in 89 N. Y. 1, and *disapproving* Cox *v.* Schermerhorn, 18 Hun (N. Y.) 16]; Buerhaus *v.* De Saussure, 41 S. C. 457, 19 S. E. 926, 20 S. E. 64. See also *In re* Marvin, Myr. Prob. (Cal.) 163. *Compare In re* Carver, 123 Cal. 102, 55 Pac. 770.

A deduction should be made for a dower charge (Pritchett's Estate, 2 Chest. Co. (Pa.) 158. See also *In re* Lawrence, 37 Misc. (N. Y.) 702, 76 N. Y. Suppl. 702), an irredeemable

(IX) *PROPERTY NOT ASSETS OF ESTATE.* As a general rule a personal representative is not entitled to commissions on property not belonging to the estate, even though taken possession of or inventoried by him;[45] but when he is compelled by law to hold, protect, and guard funds coming into his hands which he has reason to believe to be assets of the estate until the right to such funds can be determined he is entitled to his commissions thereon.[46]

(X) *WORTHLESS OR UNCOLLECTED ASSETS.* An executor or administrator has no right to charge commissions on worthless or uncollected debts or assets,[47] unless perhaps where he has attempted in good faith to realize upon them.[48] And even if he is entitled to anything for his services as to uncollectable debts specific compensation and not commissions should be allowed.[49]

(XI) *ASSETS NOT IN POSSESSION OR UNADMINISTERED.* On assets never in possession of the personal representative nor chargeable to him, and in no sense administered by him, a commission is not allowable.[50]

ground-rent (Brolasky's Appeal, 3 Pennyp. (Pa.) 329), or a homestead portion (*In re* Reck, Myr. Prob. (Cal.) 59).

Full commissions when all proceeds received and disbursed see Crenshaw *v.* Bentley, 31 Mo. App. 75.

Commissions based on value of services.— Where mortgaged realty is purchased by the mortgagee from an administrator of the deceased mortgagor, the administrator is not entitled to any fixed commission, but should receive only what his services are actually worth. Zeiger's Estate, 11 Pa. Co. Ct. 517.

Foreclosure sale.— In Texas a personal representative has been held entitled to commissions on the whole amount bid at a mortgage foreclosure sale of land of the estate, to pay a debt of the estate, although the money was not actually handed over to him. Huddleston *v.* Kempner, 87 Tex. 372, 28 S. W. 936 [*overruling* Watts *v.* Downs, 36 Tex. 116; James *v.* Corker, 30 Tex. 617].

45. Hancock *v.* Fidelity Mut. L. Ins. Co., (Tenn. Ch. App. 1899) 53 S. W. 181.

Thus he is not entitled to commissions on the value of land included in his inventory but subsequently adjudged not to belong to the estate of his decedent (*In re* Delaney, 110 Cal. 563, 42 Pac. 981; Ricaud's Estate, 70 Cal. 69, 11 Pac. 471. See also Blanckenburg *v.* Jordan, 86 Cal. 171, 24 Pac. 1061) or property held by his decedent in trust (Haines *v.* Hay, 67 Ill. App. 445 [*affirmed* as to this point in 169 Ill. 93, 48 N. E. 218]. But see Bohrer *v.* Otterback, 21 D. C. 32; De Peyster *v.* Ferrers, 11 Paige (N. Y.) 13). Neither can commissions and counsel fees for settling an estate be charged to the portion in which the deceased had only a usufruct. Millaudon *v.* Cajus, 9 La. 306.

46. Wells *v.* Robinson, 13 Cal. 133. See also Girod's Succession, 4 La. Ann. 386.

47. *Louisiana.*— Foulkes' Succession, 12 La. Ann. 537; Milne's Succession, 1 Rob. 400.

Michigan.— Webb *v.* Peck, 131 Mich. 579, 92 N. W. 104.

Mississippi.— Moffatt *v.* Loughridge, 51 Miss. 211.

New Jersey.— McKnight *v.* Walsh, 22 N. J. Eq. 136.

Pennsylvania.— Reeser's Appeal, 100 Pa. St. 79; Mayberry's Appeal, 33 Pa. St. 258; Vanderford's Appeal, (1888) 12 Atl. 491; Smithurst's Estate, 18 Phila. 66; Robinson's Estate, 2 Phila. 340.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2096.

Debts due distributees.—Commissions should be allowed on debts due by distributees, although not actually collected when included in the administration account. Elder *v.* Whittemore, 51 Ill. App. 662; Posey's Estate, 1 Chest. Co. Rep. (Pa.) 351.

No commissions on property lost, or which has perished.— Eversfield *v.* Eversfield, 4 Harr. & J. (Md.) 12 (by statute); Jones *v.* Jones, 39 S. C. 247, 17 S. E. 587, 802.

48. Johnston's Succession, 1 La. Ann. 75; Blakey's Succession, 12 Rob. 155; John's Estate, 1 Chest. Co. Rep. (Pa.) 281. See also Behee's Estate, 8 Kulp (Pa.) 157.

49. Kester *v.* Lyon, 40 W. Va. 161, 20 S. E. 933.

50. *Alabama.*— Moore *v.* Randolph, 70 Ala. 575.

Arkansas.— Reynolds *v.* New Orleans Canal, etc., Co., 30 Ark. 520.

California.— *In re* Simmons, 43 Cal. 543.

Kentucky.— See Bickel *v.* Bickel, 79 S. W. 215, 25 Ky. L. Rep. 1945.

Louisiana.— Day's Succession, 22 La. Ann. 366; Powell's Succession, 14 La. Ann. 425; Butterly's Succession, 10 La. Ann. 258; Macarty's Succession, 5 La. Ann. 434; Baillio *v.* Baillio, 5 Mart. N. S. 228. *Compare* McDonough's Succession, 7 La. Ann. 475; Anderson *v.* Anderson, 10 La. 29.

Missouri.— Hitchcock *v.* Mosher, 106 Mo. 578, 17 S. W. 638; Garrison *v.* St. Louis Trust Co., 77 Mo. App. 333.

New Hampshire.— Stevens *v.* Clough, 70 N. H. 165, 47 Atl. 615.

Ohio.— See Williams *v.* Williams, 8 Ohio St. 300.

Oregon.— Steel *v.* Holladay, 20 Oreg. 462, 26 Pac. 562.

Pennsylvania.— Sloan's Estate, 7 Pa. Co. Ct. 377; Sharp's Estate, 11 Phila. 92.

South Carolina.—De Loach *v.* Sarratt, 58 S. C. 117, 36 S. E. 532; Jones *v.* Jones, 39 S. C. 247, 17 S. E. 587, 802.

5. Amount of Compensation — a. In General. The amount of compensation to be allowed personal representatives is either left entirely to the discretion of the court, or to the discretion of the court within certain statutory limits, or is definitely fixed by statute.[51] In exercising its discretion, the court should award an amount which is reasonable under the circumstances of the case, in view of the

Canada.— Bald *v.* Thompson, 17 Grant Ch. (U. C.) 154.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2095.

51. *Alabama.*— Noble *v.* Jackson, 124 Ala. 311, 26 So. 955; Pinckard *v.* Pinckard, 24 Ala. 250.

Iowa.— Foteaux *v.* Lepage, 6 Iowa 123.

Kentucky.— Cabell *v.* Cabell, 1 Metc. 319; Webb *v.* Webb, 6 T. B. Mon. 163.

Louisiana.— Bougere's Succession, 30 La. Ann. 422; Hart's Succession, 26 La. Ann. 662; Young *v.* Chaney, 3 La. 462.

Maryland.— Parker *v.* Gwynn, 4 Md. 423.

Mississippi.— Merrill *v.* Moore, 8 Miss. 271, 40 Am. Dec. 60.

Missouri.— Elstroth *v.* Young, 94 Mo. App. 351, 68 S. W. 100.

New Hampshire.— Wendell *v.* French, 19 N. H. 205.

New Jersey.— Dickerson *v.* Canfield, 11 N. J. Eq. 259.

New York.— Matter of Clinton, 12 N. Y. App. Div. 132, 42 N. Y. Suppl. 674; Lansing *v.* Lansing, 45 Barb. 182, 1 Abb. Pr. N. S. 280, 31 How. Pr. 55; McWhorter *v.* Benson, Hopk. 28.

North Carolina.— Peyton *v.* Smith, 22 N. C. 325; Potter *v.* Stone, 9 N. C. 30; Bond *v.* Turner, 6 N. C. 331.

Ohio.— Chatfield *v.* Swing, 6 Ohio Dec. (Reprint) 666, 7 Am. L. Rec. 326.

Pennsylvania.— *In re* Sunderland, 203 Pa. St. 155, 52 Atl. 167; Miller's Appeal, (1886) 7 Atl. 190; Gable's Appeal, 36 Pa. St. 395; Johnston's Appeal, 8 Pa. Cas. 205, 11 Atl. 78; Hall's Estate, 8 Pa. Dist. 8; Matter of Miller, 1 Ashm. 323; Michael's Estate, 5 Pa. Co. Ct. 321; Lancaster's Estate, 14 Phila. 237; *In re* McCloskey, 11 Phila. 95; Wharton's Estate, 11 Phila. 39; King's Estate, 11 Phila. 26; *In re* Shirk, 4 Del. Co. 214; *In re* Walter, 24 Lack. Jur. 49.

Texas.— Kearney *v.* Nicholson, (Civ. App. 1901) 67 S. W. 361.

Virginia.— Taliaferro *v.* Minor, 2 Call 190.

Washington.— *In re* Sour, 17 Wash. 675, 50 Pac. 587.

England.— Cockerell *v.* Barber, 5 L. J. Ch. O. S. 77, 2 Russ. 585, 3 Eng. Ch. 585, 1 Sim. 23, 2 Eng. Ch. 23, 28 Rev. Rep. 181, rate in India.

Canada.— Torrance *v.* Chewett, 12 Grant Ch. (U. C.) 407.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2109.

Commissions on proceeds of sale of assets see the following cases:

Florida.— Shepard *v.* Sherrell, 19 Fla. 300.

Kentucky.— Ramsey *v.* Ramsey, 4 T. B. Mon. 151.

Pennsylvania.— De Wald's Estate, 13 Phila. 251.

South Carolina.— Norton *v.* Gillison, 4 Rich. Eq. 213.

Virginia.— Triplett *v.* Jameson, 2 Munf. 242.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2111.

Commissions on realty or proceeds thereof see the following cases:

Missouri.— Jacobs *v.* Jacobs, 99 Mo. 427, 12 S. W. 457.

North Carolina.— Graves *v.* Graves, 58 N. C. 280.

Ohio.— Stone *v.* Strong, 42 Ohio St. 53.

Pennsylvania.— Robb's Appeal, 41 Pa. St. 45; Scott's Estate, 18 Pa. Super. Ct. 375; Sharp's Estate, 9 Pa. Dist. 727, 24 Pa. Co. Ct. 417; Pickering's Estate, 4 Pa. Dist. 263; Clark's Estate, 11 Phila. 53; Montier's Estate, 7 Phila. 491; Skinner's Estate, 4 Phila. 189; John's Estate, 2 Chest. Co. Rep. 77; Prichett's Estate, 2 Chest. Co. Rep. 158; Reid's Estate, 2 Chest. Co. Rep. 157; Spear's Estate, 2 Chest. Co. Rep. 156; Scheidt's Estate, 1 Leg. Chron. 25; Rockafield's Estate, 4 Lanc. L. Rev. 113.

Washington.— *In re* Smith, 18 Wash. 129, 51 Pac. 348; Wilbur *v.* Wilbur, 17 Wash. 683, 50 Pac. 589.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2111.

Commissions on interest and income see *In re* Selleck, 111 N. Y. 284, 19 N. E. 66; Drake *v.* Price, 5 N. Y. 430 [*affirming* 7 Barb. 388]; Matter of McLaren, 6 Misc. (N. Y.) 483, 27 N. Y. Suppl. 289; Meeker *v.* Crawford, 5 Redf. Surr. (N. Y.) 450; Slosson *v.* Naylor, 2 Dem. Surr. (N. Y.) 257 (method of computing); Washington *v.* Emery, 57 N. C. 32; Briggs *v.* Holcombe, 3 Rich. Eq. (S. C.) 15; Massey *v.* Massey, 2 Hill Eq. (S. C.) 492.

Where commissions are paid on part of an estate at an intermediate accounting, commissions can only be allowed on the amount which comes into the executor's hands afterward, and such commissions are calculated as if the subsequent receipts were part of the prior receipts. Tucker *v.* Tucker, 33 N. J. Eq. 235 [*affirmed* in 34 N. J. Eq. 292].

When there are several executors the commissions should be computed upon the aggregate sums received and paid out by all collectably and not upon the amount received and disbursed by each individual. Valentine *v.* Valentine, 2 Barb. Ch. (N. Y.) 430.

Annual rests.— A personal representative cannot make annual rests in his account and be allowed full commissions thereon, unless he makes an annual accounting. Lansing *v.* Lansing, 45 Barb. (N. Y.) 182, 31 How. Pr. (N. Y.) 55, 1 Abb. Pr. N. S. (N. Y.) 280; Betts *v.* Betts, 4 Abb. N. Cas. (N. Y.) 317; Cram *v.* Cram, 2 Redf. Surr. (N. Y.) 244.

time, trouble, risk, and responsibility demanded by the nature of the trust, the manner in which the estate is managed, and the faithfulness of the personal representative.[52] Compensation is often allowed according to the amount of the estate administered or the nature of the services rendered by the personal representative.[53] Although personal representatives are usually allowed commissions,[54] their compensation sometimes takes the form of an allowance of a gross

See also Hosack *v.* Rogers, 9 Paige (N. Y.) 461.

52. *Alabama.*— Pearson *v.* Darrington, 32 Ala. 227; Gould *v.* Hays, 25 Ala. 426.

Arkansas.— *Ex p.* Bell, 14 Ark. 76.

Connecticut.—Main's Appeal, 73 Conn. 638, 48 Atl. 965.

Florida.— Sherrell *v.* Shepard, 19 Fla. 300; Moore *v.* Felkel, 7 Fla. 44.

Kentucky.— Morton *v.* Morton, 112 Ky. 706, 66 S. W. 641, 23 Ky. L. Rep. 2079; Carrol *v.* Connet, 2 J. J. Marsh. 195; Reed *v.* Reed, 66 S. W. 819, 23 Ky. L. Rep. 2186; Fidelity Trust, etc., Vault Co. *v.* Watkins, 42 S. W. 753, 19 Ky. L. Rep. 957; Bailey *v.* Penick, 10 Ky. L. Rep. 239.

Mississippi.— Adams *v.* Westbrook, 41 Miss. 385.

New Hampshire.— Gordon *v.* West, 8 N. H. 444.

New Jersey.— Weeks *v.* Selby, 61 N. J. Eq. 668, 46 Atl. 948, trouble and risk rather than *quantum* of estate to be considered.

Pennsylvania.— *In re* Young, 204 Pa. St. 32, 53 Atl. 511; *In re* Betts, 198 Pa. St. 640, 48 Atl. 873; *In re* Wistar, 192 Pa. St. 289, 43 Atl. 1006; *In re* Semple, 189 Pa. St. 385, 42 Atl. 28; Gilpin's Estate, 138 Pa. St. 143, 20 Atl. 713; Carrier's Appeal, 79 Pa. St. 230; Edenborn's Estate, 10 Pa. Dist. 184; Mutchmore's Estate, 9 Pa. Dist. 293, 24 Pa. Co. Ct. 257; Donat's Estate, 6 Pa. Dist. 78; Laubach's Estate, 9 Kulp 150; McCloskey's Estate, 11 Phila. 95; Pennock's Estate, 2 Phila. 141; Barclay's Appeal, 2 Walk. 17; Sheetz's Estate, 2 Woodw. 407; John's Estate, 2 Chest. Co. Rep. 281; *In re* Wirt, 11 York Leg. Rec. 145; Scully's Estate, 31 Pittsb. Leg. J. 307.

Vermont.— Powell *v.* Foster, 71 Vt. 160, 44 Atl. 96; *In re* Hall, 70 Vt. 458, 41 Atl. 508. See also Hapgood *v.* Jennison, 2 Vt. 294.

Virginia.— McCall *v.* Peachy, 3 Munf. 288.

West Virginia.— Kester *v.* Lyon, 40 W. Va. 161, 20 S. E. 933; Hoke *v.* Hoke, 12 W. Va. 427.

Canada.— Thompson *v.* Freeman, 15 Grant Ch. (U. C.) 384; Chisholm *v.* Barnard, 10 Grant Ch. (U. C.) 479; McLennan *v.* Heward, 9 Grant Ch. (U. C.) 178; *Re* Fleming, 11 Ont. Pr. 426.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2107, 2108.

Reasonable compensation for the services of an administrator means what will fairly compensate him when the character of and the effectiveness and ability entering into the service are considered. Powell *v.* Foster, 71 Vt. 160, 44 Atl. 96.

Excessive compensation on part of estate. — Where executors receive an excessive compensation on the real-estate account filed by them, such excessive allowance will be taken into consideration in fixing the compensation in the account of the personalty. *In re* Wirt, 11 York Leg. Rec. (Pa.) 145.

Evidence of amount allowed in similar case inadmissible.— Hawkins *v.* Cunningham, 67 Mo. 415.

53. *Alabama.*— Pinckard *v.* Pinckard, 24 Ala. 250.

Connecticut.— Main's Appeal, 73 Conn. 638, 48 Atl. 965.

Florida.— Sherrell *v.* Shepard, 19 Fla. 300.

Kentucky.— Reed *v.* Reed, 66 S. W. 819, 23 Ky. L. Rep. 2186; Fidelity Trust, etc., Co. *v.* Watkins, 42 S. W. 753, 19 Ky. L. Rep. 957; Quaintance *v.* Darnell, 14 Ky. L. Rep. 238.

Mississippi.— Powell *v.* Burrus, 35 Miss. 605.

New Hampshire.— Wendell *v.* French, 19 N. H. 205.

New Jersey.— Rogers *v.* Hand, 39 N. J. Eq. 270; Pomeroy *v.* Mills, 37 N. J. Eq. 578 [*reversing* 35 N. J. Eq. 442]; *In re* Wolfe, 34 N. J. Eq. 223.

North Carolina.— Graves *v.* Graves, 58 N. C. 280.

Ohio.— Mitchell *v.* Schultz, 8 Ohio Dec. (Reprint) 78, 5 Cinc. L. Bul. 503; Chatfield *v.* Swing, 6 Ohio Dec. (Reprint) 666, 7 Am. L. Rec. 326.

Pennsylvania.— Barhite's Appeal, 126 Pa. St. 404, 17 Atl. 617; Harbester's Appeal, 125 Pa. St. 1, 17 Atl. 204; Wood's Appeal, 86 Pa. St. 346; *In re* Lloyd, 82 Pa. St. 143; Eshleman's Appeal, 74 Pa. St. 42; *In re* Stevenson, 4 Whart. 98; *In re* Walker, 9 Serg. & R. 223; Pusey *v.* Clemson, 9 Serg. & R. 204; Ziegler's Appeal, 2 Pa. Cas. 351, 4 Atl. 837; Stone's Appeal, 3 Walk. 499; Siddall's Estate, 5 Pa. Dist. 102, 17 Pa. Co. Ct. 424; Eby's Estate, 2 Pa. Dist. 326, 12 Pa. Co. Ct. 601; Oliver's Estate, 4 Pa. Co. Ct. 209; Baily's Estate, 2 Chest. Co. Rep. 568; Spackmous's Estate, 2 Chest. Co. Rep. 153; Eachus' Estate, 2 Chest. Co. Rep. 152; Corby's Estate, 5 Kulp 159; Benedict's Estate, 4 Lanc. L. Rev. 99; Bird's Estate, 2 Pars. Eq. Cas. 168; Wilson's Estate, 18 Phila. 123; Wernle's Estate, 13 Phila. 328; McCloskey's Estate, 13 Phila. 254; *In re* Semple, 28 Pittsb. Leg. J. 434; Rogers' Estate, 17 Wkly. Notes Cas. 29; Lang's Estate, 13 Wkly. Notes Cas. 14.

Tennessee.— *Ex p.* Parker, (Sup. 1881) 19 S. W. 571.

Virginia.— Cavendish *v.* Fleming, 3 Munf. 198.

Canada.— Denison *v.* Denison, 17 Grant Ch. (U. C.) 306; Thompson *v.* Freeman, 15 Grant Ch. (U. C.) 384.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2110.

54. See *supra*, XV, E, 4.

sum for all services rendered,[55] or a *per diem* allowance for the time spent in performing the duties of administration.[56]

b. Extra Allowance.[57] When the exact amount of compensation or the maximum amount allowable is fixed by statute, in the absence of a testamentary[58] or statutory provision for increased compensation for extraordinary services, personal representatives can be allowed only the fixed compensation, even although the administration of the estate has been especially difficult, or they have rendered unusual services which have benefited the estate.[59] Special compensation for such services is, however, expressly provided for by statute in several jurisdictions.[60]

55. *Alabama.*— Cummings *v.* Bradley, 57 Ala. 224.

Indiana.— Ray *v.* Doughty, 4 Blackf. 115.

Iowa.— Foteaux *v.* Lepage, 6 Iowa 123.

Kentucky.—Morton *v.* Morton, 112 Ky. 706, 66 S. W. 641, 23 Ky. L. Rep. 2079; Chalfant *v.* Sterns, 4 Dana 602; Stanberry *v.* Robinson, 27 S. W. 973, 16 Ky. L. Rep. 309.

Massachusetts.— Newell *v.* West, 149 Mass. 520, 21 N. E. 954.

Michigan.— *In re* Power, 92 Mich. 106, 52 N. W. 298.

New Jersey.— Andress *v.* Andress, 46 N. J. Eq. 528, 22 Atl. 124; Metcalf *v.* Colles, 43 N. J. Eq. 148, 10 Atl. 804.

Pennsylvania.— McCain's Appeal, 138 Pa. St. 143, 20 Atl. 713; Reeser's Appeal, 100 Pa. St. 79; Montgomery's Appeal, 86 Pa. St. 230; Kennedy's Appeal, 4 Pa. St. 149; Kauffman's Appeal, 7 Pa. Cas. 482, 12 Atl. 31.

Rhode Island.— Williams *v.* Herrick, 18 R. I. 120, 25 Atl. 1099.

Tennessee.— German *v.* German, 7 Coldw. 180.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2113.

56. *In re* Nuckols, 103 Mich. 297, 61 N. W. 506; Wisner *v.* Mabley, 74 Mich. 143, 41 N. W. 835; Higbie *v.* Westlake, 14 N. Y. 281; *In re* Hall, 70 Vt. 458, 41 Atl. 508; Cameron *v.* Cameron, 15 Wis. 1, 82 Am. Dec. 652.

57. See also *supra*, VIII, I, 8, g, (IX), (E); XV, E, 4, b, (V), (B).

58. See *supra*, XV, E, 1, e.

59. *Illinois.*— Askew *v.* Hudgens, 99 Ill. 468; People *v.* Allen, 25 Ill. App. 657.

Louisiana.— Calloway's Succession, 49 La. Ann. 968, 22 So. 225; Turnell's Succession, 34 La. Ann. 888; Sprowl's Succession, 21 La. Ann. 544; New Orleans *v.* Baltimore, 15 La. Ann. 625.

Mississippi.— Satterwhite *v.* Littlefield, 13 Sm. & M. 302.

Missouri.— Scudder *v.* Ames, 89 Mo. 496, 14 S. W. 525; Gamble *v.* Gibson, 59 Mo. 585. See also Booker *v.* Armstrong, 93 Mo. 49, 4 S. W. 727. But *compare* Hawkins *v.* Cunningham, 67 Mo. 415; Lewis *v.* McCabe, 16 Mo. App. 398; *In re* Handfield, 16 Mo. App. 332.

North Carolina.— Parker *v.* Grant, 91 N. C. 338, no extra compensation for personal attention to the estate. See also Morris *v.* Morris, 54 N. C. 326; Schaw *v.* Schaw, 1 N. C. 79.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2117, 2118.

In New York the rule is that a personal representative cannot receive from the estate any greater compensation than the statutory commissions for his own services, however meritorious or extraordinary they may be, if performed in the discharge of the duties prescribed for him by law or by will (Lent *v.* Howard, 89 N. Y. 169; Smith *v.* Albany, 61 N. Y. 444; Collier *v.* Munn, 41 N. Y. 143; Matter of Hosford, 27 N. Y. App. Div. 427, 50 N. Y. Suppl. 550; *In re* Moriarity, 27 Misc. 161, 58 N. Y. Suppl. 380; *In re* Hayden, 5 N. Y. Suppl. 845, 1 Connoly Surr. 454; Morgan *v.* Hannas, 13 Abb. Pr. N. S. 361; Van Sickler *v.* Graham, 7 How. Pr. 208; Clinch *v.* Eckford, 8 Paige 412; Vanderheyder *v.* Vanderheyder, 2 Paige 287, 21 Am. Dec. 86; Fisher *v.* Fisher, 1 Bradf. Surr. 335), but for extraordinary services in excess of his duties he is entitled to compensation beyond his commissions (*In re* Taft, 5 Silv. Supreme 370, 8 N. Y. Suppl. 282; Russell *v.* Hilton, 37 Misc. 642, 76 N. Y. Suppl. 233; Matter of Braunsdorf, 13 Misc. 666, 35 N. Y. Suppl. 298. See also Matter of McCord, 2 N. Y. App. Div. 324, 37 N. Y. Suppl. 852, 3 N. Y. Annot. Cas. 64).

60. *Alabama.*— Noble *v.* Jackson, 132 Ala. 230, 31 So. 450; Ivey *v.* Coleman, 42 Ala. 409; Reese *v.* Gresham, 29 Ala. 91; Newberry *v.* Newberry, 28 Ala. 691; Gould *v.* Hays, 25 Ala. 426.

California.—*In re* Coursen, (1901) 65 Pac. 965. But the allowance of extra compensation is erroneous where the representative has not petitioned the court therefor, and when it does not affirmatively appear that he has rendered any extraordinary services. Firebaugh *v.* Burbank, 121 Cal. 186, 53 Pac. 560; *In re* Delaney, 110 Cal. 163, 42 Pac. 981; *In re* Moore, 96 Cal. 522, 31 Pac. 584. See also Levinson's Estate, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479.

Georgia.—Walton *v.* Gairdner, 111 Ga. 343, 36 S. E. 666.

Iowa.— Fitzgerald *v.* Paisley, 110 Iowa 98, 81 N. W. 181; *In re* Young, 97 Iowa 218, 66 N. W. 163; *In re* Gloyd, 93 Iowa 303, 61 N. W. 975; Patterson *v.* Bell, 25 Iowa 149.

Kentucky.— Glover *v.* Check, 71 S. W. 438, 24 Ky. L. Rep. 1281. See also McCracken *v.* McCracken, 6 T. B. Mon. 342. But see Renick *v.* Renick, 92 Ky. 336, 17 S. W. 1018, 13 Ky. L. Rep. 600.

Michigan.— *In re* King, 113 Mich. 606, 71 N. W. 1080, 110 Mich. 203, 68 N. W. 154; *In re* Brewster, 113 Mich. 561, 71 N. W. 1085; Wisner *v.* Mabley, 74 Mich. 143, 41 N. W. 835; Mower's Appeal, 48 Mich. 441,

An allowance for extra services can only be made when it is shown that they were necessary and were actually performed;[61] but as to what are unusual or extraordinary services for which special compensation will be allowed no general rule can be stated, this being a matter largely within the discretion of the court.[62]

c. Amount Fixed by Agreement. A personal representative may agree with the persons interested in the settlement of the estate as to the compensation he shall receive,[63] and he is bound by an agreement to accept a less sum than the statutory compensation;[64] while, on the other hand, he may enforce an agreement allowing him a sum in excess of that allowed by statute.[65]

12 N. W. 646; Loomis *v.* Armstrong, 63 Mich. 355, 29 N. W. 867.

Ohio.— Matter of Wolfe, 7 Ohio S. & C. Pl. Dec. 220, 4 Ohio N. P. 336; *Re* Johnson, 7 Ohio S. & C. Pl. Dec. 1, 4 Ohio N. P. 156; Chatfield *v.* Swing, 6 Ohio Dec. (Reprint) 660, 7 Am. L. Rec. 326; *In re* Duddy, 5 Ohio S. & C. Pl. Dec. 412, 7 Ohio N. P. 589.

Oregon.— *In re* Partridge, 31 Oreg. 297, 51 Pac. 82; Muldrick *v.* Galbraith, 31 Oreg. 86, 49 Pac. 886.

South Carolina.— Teague *v.* Dendy, 2 McCord Eq. 207, 16 Am. Dec. 643; Logan *v.* Logan, 1 McCord Eq. 1, extra compensation assessed by jury. See also Esswein *v.* Seigling, Riley Eq. 200, 2 Hill Eq. 600; Wallace *v.* Ellerbe, Rich. Eq. Cas. 49.

Texas.— Davenport *v.* Lawrence, 19 Tex. 317.

Wisconsin.— Zentner *v.* Schinz, 90 Wis. 236, 63 N. W. 162; Ford *v.* Ford, 88 Wis. 122, 59 N. W. 464.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2117–2124.

61. James *v.* Craighead, (Tex. Civ. App. 1902) 69 S. W. 241.

62. *In re* Brewster, 113 Mich. 561, 71 N. W. 1085; Matter of Wolfe, 7 Ohio S. & C. Pl. Dec. 220, 4 Ohio N. P. 336; Chatfield *v.* Swing, 6 Ohio Dec. (Reprint) 666, 7 Am. L. Rec. 326.

Extra compensation has been allowed for looking after real estate, collecting rents, and paying taxes (Matter of Wolfe, 7 Ohio S. & C. Pl. Dec. 220, 4 Ohio N. P. 336); for conducting extensive and successful litigation for the benefit of the estate (*In re* Beideman, Myr. Prob. (Cal.) 66); for surveying and subdividing large tracts of land into lots when ordered to sell real estate (Chatfield *v.* Swing, 6 Ohio Dec. (Reprint) 666, 7 Am. L. Rec. 326); for investing funds of the estate and collecting and paying interest to the legatees (Fitzgerald *v.* Paisley, 110 Iowa 98, 81 N. W. 181); for drafting a bill to construe a provision in a will, going outside of the state to settle a partnership business and selling property outside of the state (Wisner *v.* Mabley, 74 Mich. 143, 41 N. W. 835); for keeping an estate together and loaning money of the estate (Reese *v.* Gresham, 29 Ala. 91); and for superintending farming operations (Ivey *v.* Coleman, 42 Ala. 409. But see Jenkins *v.* Fickling, 4 Desauss. (S. C.) 369; Snow *v.* Callum, 1 Desauss. (S. C.) 542).

Extra compensation has been denied when claimed for the risk and care attendant on the custody of certificates of stock forming part of the assets of an estate (*In re* Duddy, 5 Ohio S. & C. Pl. Dec. 412, 7 Ohio N. P. 589, Ohio Prob. 130); for ordinary attendance to a suit brought by the representative (Holman *v.* Sims, 39 Ala. 709); for making inquiries as to evidence in suits against the estate while the representative was on his own business in an adjoining county (Dockery *v.* McDowell, 40 Ala. 476); for making inventories or keeping accounts (O'Neill *v.* Donnell, 9 Ala. 734); and for filing a petition to sell real estate for the payment of charges upon the estate (Chatfield *v.* Swing, 6 Ohio Dec. (Reprint) 666, 7 Am. L. Rec. 326).

No allowance for ordinary duties.— Teague *v.* Dendy, 2 McCord Eq. (S. C.) 207, 16 Am. Dec. 643. See also Wilkinson *v.* Abbott, (N. J. Ch. 1895) 30 Atl. 1098; *In re* Duddy, 5 Ohio S. & C. Pl. Dec. 412, 7 Ohio N. P. 589, Ohio Prob. 130.

63. Koch's Estate, 148 Pa. St. 159, 23 Atl. 1057; Littell *v.* Hackley, 126 Fed. 309, 61 C. C. A. 295.

"Fair compensation."— A promise by a distributee to pay a personal representative a "fair compensation" for his services is a mere promise to pay what may be allowed by the appropriate tribunal according to law. Ratliff *v.* Davis, 38 Miss. 107.

64. *In re* Turfler, 24 N. Y. Suppl. 91, Pow. Surr. (N. Y.) 421; *In re* Hamilton, 29 Nova Scotia 249. See also Matter of Hodgman, 69 Hun (N. Y.) 484, 23 N. Y. Suppl. 725 [*affirmed* in 140 N. Y. 421, 35 N. E. 660].

Agreement to serve without compensation.—A contract by one voluntarily seeking an appointment as administrator of an estate to make no charge for his services is valid. Bate *v.* Bate, 11 Bush (Ky.) 639.

65. Powell *v.* Foster, 71 Vt. 160, 44 Atl. 96; Hubbell *v.* Olmstead, 36 Vt. 619. But see Matter of McCord, 2 N. Y. App. Div. 324, 37 N. Y. Suppl. 852 (holding that an agreement allowing to an executor compensation for his services as executor in excess of his commissions cannot be enforced, but if the executor performs services outside of his official duties he may be allowed compensation, and an agreement to give him such additional compensation is valid); *In re* Hayden, 5 N. Y. Suppl. 845, 1 Connoly Surr. (N. Y.) 454; *In re* Young, 4 Wash. 534, 30 Pac. 643.

In California, by statute, all contracts or agreements by which an executor will receive either directly or indirectly any greater compensation than is fixed by the statute or any compensation other than such as may have been previously ascertained and determined

6. Temporary or Special Administrators. Temporary or special administration is a recognized trust, and entitles one to reasonable compensation.[66]

7. Co-Executors and Co-Administrators. Where there are two or more executors or administrators of an estate, they are usually entitled only to the recompense or commissions payable to a single representative;[67] and it has been held that where one of two executors is not entitled to commissions because he is a legatee, the other executor is entitled to only one half of the regular commissions.[68] The waiver of commissions by one personal representative does not prejudice the rights of his co-representative.[69] As a general rule the compensation is divided in proportion to the services rendered,[70] and a personal representative who has rendered no services receives no compensation.[71] Where only one

by the court are void. Firebaugh *v.* Burbank, 121 Cal. 186, 53 Pac. 560.

66. *Alabama.*— Clark *v.* Knox, 70 Ala. 607, 45 Am. Rep. 93; Wright *v.* Wilkerson, 41 Ala. 267.

California.— Moore's Estate, 88 Cal. 1, 25 Pac. 915, amount in court's discretion.

Kentucky.—Scarce *v.* Page, 12 B. Mon. 311, sheriff acting as administrator.

Louisiana.— See Forstall's Succession, 39 La. Ann. 1052, 3 So. 277; De Lerno's Succession, 34 La. Ann. 40.

Maryland.— See Wilson *v.* Wilson, 3 Gill & J. 20.

Missouri.— Hawkins *v.* Cunningham, 67 Mo. 415; *In re* Handfield, 16 Mo. App. 332.

Montana.— *In re* Ford, 29 Mont. 283, 74 Pac. 735.

New York.— Green *v.* Sanders, 18 Hun 308; Matter of Egan, 7 Misc. 262, 27 N. Y. Suppl. 1009; Matter of Duncan, 3 Redf. Surr. 153.

Texas.— Bell *v.* Goss, (Civ. App. 1903) 76 S. W. 315. See also James *v.* Craighead, (Civ. App. 1902) 69 S. W. 241.

Vermont.— Powell *v.* Foster, 71 Vt. 160, 44 Atl. 96.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2074.

No commission on property delivered to successor.— A special administrator should be allowed a commission only upon moneys actually paid out and in addition to this a reasonable compensation for services rendered the estate. He is not entitled to commissions on money and property delivered to his successor in office. Hawkins *v.* Cunningham, 67 Mo. 415; *In re* Boothe, 38 Mo. App. 456. But see Green *v.* Sanders, 18 Hun (N. Y.) 308; Matter of Duncan, 3 Redf. Surr. (N. Y.) 153.

67. Phillips *v.* Richardson, 4 J. J. Marsh. (Ky.) 212; *In re* Aston, 5 Whart. (Pa.) 228; Haines' Estate, 1 Leg. Gaz. (Pa.) 91.

In New York it is provided by statute that when the personal property of the decedent amounts to one hundred thousand dollars or more over all his debts, each personal representative is entitled to a full commission, unless there are more than three, in which case the compensation to which the three would be entitled must be apportioned among them according to the services rendered. N. Y. Code Civ. Proc. § 2730; McAlpine *v.* Potter, 126 N. Y. 285, 27 N. E. 475 [*reversing* 12 N. Y. Suppl. 662]; Matter of Kenworthy, 63 Hun 165, 17 N. Y. Suppl. 655; Matter of Franklin, 26 Misc. 107, 56 N. Y. Suppl. 858; Matter of Clinton, 16 Misc. 199, 38 N. Y. Suppl. 945; Matter of Newland, 7 Misc. 728, 28 N. Y. Suppl. 496; *In re* Blakeney, 7 N. Y. Suppl. 55, 23 Abb. N. Cas. 32, 1 Connoly Surr. 128; *In re* Hayden, 5 N. Y. Suppl. 845, 1 Connoly Surr. 454; Smith *v.* Buchanan, 5 Dem. Surr. 169; Welling *v.* Welling, 3 Dem. Surr. 511; Waters *v.* Faber, 2 Dem. Surr. 290; Matter of Leggatt, 4 Redf. Surr. 148.

68. Edwards' Succession, 34 La. Ann. 216; Elkins *v.* Elkins, 11 La. 224; Mon *v.* Garnier, 6 La. 324; Lee *v.* Lee, 6 Gill & J. (Md.) 316.

69. Schoeneich *v.* Reed, 8 Mo. App. 356; Porter's Estate, 14 Phila. (Pa.) 290.

70. *California.*— *In re* Carter, 132 Cal. 113, 64 Pac. 123; *In re* Dudley, 123 Cal. 256, 55 Pac. 897; Hope *v.* Jones, 24 Cal. 89.

Kentucky.— Glover *v.* Check, 72 S. W. 302, 24 Ky. L. Rep. 1783, apportionment of compensation for extraordinary services.

Michigan.— Speirs *v.* Wisner, 88 Mich. 614, 50 N. W. 654, 26 Am. St. Rep. 306.

New Jersey.— Andress *v.* Andress, 46 N. J. Eq. 528, 22 Atl. 124; Mount *v.* Slack, 45 N. J. Eq. 129, 17 Atl. 297 [*affirmed* in 45 N. J. Eq. 889, 19 Atl. 622].

New York.— Matter of Kenworthy, 63 Hun 165, 17 N. Y. Suppl. 655; Matter of Newland, 7 Misc. 728, 28 N. Y. Suppl. 496; Matter of Harris, 4 Dem. Surr. 463; Hill *v.* Nelson, 1 Dem. Surr. 357. See also Matter of Mansfield, 10 Misc. 296, 31 N. Y. Suppl. 684; Valentine *v.* Valentine, 2 Barb. Ch. 430. But see White *v.* Bullock, 4 Abb. Dec. 578, 15 How. Pr. 102 [*reversing* 20 Barb. 91]; *In re* Van Nest, Tuck. Surr. 130, both decided before the enactment of the present statute.

North Carolina.— Waddill *v.* Martin, 38 N. C. 562; Hodge *v.* Hawkins, 21 N. C. 564; Perry *v.* Maxwell, 17 N. C. 488; Grant *v.* Pride, 16 N. C. 269. See also Sellars *v.* Ashford, 37 N. C. 104.

Canada.— See *Re* Fleming, 11 Ont. Pr. 426.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2127, 2128.

But *compare In re* Seitz, 6 Mo. App. 250; *In re* Aston, 5 Whart. (Pa.) 228.

71. *California.*— Hope *v.* Jones, 24 Cal. 89.

New York.— *In re* Hayden, 5 N. Y. Suppl. 845, 1 Connoly Surr. 454.

North Carolina.— McAuslan *v.* Green, 1 N. C. 172.

of two executors named in a will qualifies he is entitled to the entire commissions.[72] The portion which the several representatives are to receive is sometimes settled by an agreement entered into by them.[73]

8. Successive Administrations. Where an estate is administered by successive personal representatives, the compensation allowed should be apportioned among them according to the services rendered,[74] and the compensation of one will not be increased because his predecessors received no compensation for their services.[75] A second administrator is not entitled to commissions on assets on which a commission has been paid to a former administrator,[76] and the fact that there are successive administrations should not increase the rate of commissions on any part of the assets;[77] but it has been held that the allowance for compensation made to a special administrator has no effect upon the commissions of the general executor or administrator of the same estate, these being distinct and independent allowances for different services.[78] An executor of an executor is entitled to commissions on pecuniary legacies paid out under the will of the first testator, commissions to be retained out of the fund due to the legatees; but he is not entitled to commissions from the estate of his immediate testator, on the hypothesis that the amount was due as a debt from his estate to the former estate, unless it appears that the last testator claimed the fund adversely to the legatees under the first will.[79] The right of the last personal representative to his commissions, be they large or small, is a direct liability from the estate to himself, and he is entitled to payment from the estate, and cannot be remitted for payment to a settlement between himself and a prior representative who had appropriated

South Carolina.— *Ex p.* Hilton, 64 S. C. 201, 41 S. E. 978, 92 Am. St. Rep. 800.

Virginia.— Claycomb *v.* Claycomb, 10 Gratt. (Va.) 589.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2127.

Contra.— Richardson *v.* Stansbury, 4 Harr. & J. (Md.) 275; Smart *v.* Fisher, 7 Mo. 580.

Readiness to render services.— Where both executors seem to have been willing to do, and to have done whatever was required, the commission should be divided equally between them (Squier *v.* Squier, 30 N. J. Eq. 627. See also Pomeroy *v.* Mills, 40 N. J. Eq. 517, 4 Atl. 768), and although one executor has done all the work, the commission should be divided, if the other was ready to do whatever was required (Garr *v.* Roy, 50 S. W. 25, 20 Ky. L. Rep. 1697. But see Bellamy *v.* Hawkins, 17 Fla. 750; Walke *v.* Hitchcock, 5 Redf. Surr. (N. Y.) 217).

72. Bodenheimer's Succession, 35 La. Ann. 1034.

73. *In re* Carter, 132 Cal. 113, 64 Pac. 123 (holding that the question whether such a contract existed and the rights of the parties under it could not be determined on the final settlement of the executor's accounts); Brown *v.* Stewart, 4 Md. Ch. 368; John *v.* John, 122 Pa. St. 107, 15 Atl. 675 (holding that whether or not there was any such agreement was a question for the jury, and that if there were letters testamentary taken out and responsibility incurred in pursuance of the agreement, there was a sufficient consideration to support it); *In re* Aston, 5 Whart. (Pa.) 228 (holding that an agreement between two executors that one should receive two fifths of a commission charged by the other, who settled a separate account, was not illegal if the executor receiving the two fifths transacted a part of the business of the estate).

74. Kernan's Succession, 105 La. 592, 30 So. 239; Linton's Succession, 31 La. Ann. 130; *In re* Baxley, 47 Md. 555; McPherson *v.* Israel, 5 Gill & J. (Md.) 60; Matter of Depew, 19 N. Y. St. 902, 6 Dem. Surr. (N. Y.) 54; Lyendecker *v.* Eisemann, 3 Dem. Surr. (N. Y.) 72; Scroggs *v.* Stevenson, 100 N. C. 354, 5 S. E. 111.

Commissions of part of estate administered. — Where an estate has been administered by successive personal representatives, each is entitled to commissions on such portions of the estate as have been administered by him. Girod's Succession, 4 La. Ann. 386; Milne's Succession, 1 Rob. (La.) 400.

75. Linton's Succession, 31 La. Ann. 130.

76. *In re* Marvin, Myr. Prob. (Cal.) 163; Bougere's Succession, 30 La. Ann. 422. See also McCan's Succession, 49 La. Ann. 968, 22 So. 225; McGonnigle's Estate, 31 Pittsb. Leg. J. (Pa.) 28. But see Lemmon *v.* Hall, 20 Md. 168; McPherson *v.* Israel, 5 Gill & J. (Md.) 60.

Additional commissions on profits.— Where compensation to executors and administrators was fixed at a certain sum, and that sum was allowed to the first executor and trustee, a subsequent executor and trustee was entitled to an allowance of at least five per cent on the profits realized upon a large and well managed trust fund. Young *v.* Smith, 9 Bush (Ky.) 421.

77. *In re* Waring, 5 Ohio S. & C. Pl. Dec. 415, 7 Ohio N. P. 553.

78. Wilson *v.* Wilson, 3 Gill & J. (Md.) 20.

79. *In re* Jones, 25 Ga. 414.

to himself for commissions the whole amount allowed for the commissions of a full administration.[80]

9. Executor Who Is Trustee or Guardian. While the same person may be entitled to compensation as executor and also as trustee in respect to the same estate, this result does not follow in every instance where trust duties are imposed upon an executor. Where by the terms of the will the two functions with their corresponding duties coexist and run from the death of the testator to the final discharge, interwoven, inseparable, and blended together, so that no point of time is fixed or contemplated in the testamentary intention at which one function should end and the other begin, double commissions or compensation in both capacities cannot be properly allowed.[81] But executors are entitled to commissions as executors and also as trustees where under the will their duties as executors and trustees are separable and, their duties as executors having ended, they take the estate as trustees and afterward act solely in that capacity.[82] One acting as trustee under one will and executor under another, although dealing with the same funds, may receive commissions for services in each capacity.[83]

80. Kernan's Succession, 105 La. 592, 30 So. 239.

81. *In re* Slocum, 169 N. Y. 153, 62 N. E. 130 [*modifying* 60 N. Y. App. Div. 438, 69 N. Y. Suppl. 1036; McAlpine *v.* Potter, 126 N. Y. 285, 27 N. E. 475 [*reversing* 12 N. Y. Suppl. 662]; Johnson *v.* Lawrence, 95 N. Y. 154; Hurlburt *v.* Durant, 88 N. Y. 121; Hall *v.* Hall, 78 N. Y. 535 [*affirming* 18 Hun 358]; Drake *v.* Price, 5 N. Y. 430 [*affirming* 7 Barb. 388]; Matter of Union Trust Co., 70 N. Y. App. Div. 5, 75 N. Y. Suppl. 68 [*reversing* on other grounds 35 Misc. 260, 71 N. Y. Suppl. 844, and appeal *dismissed* in 172 N. Y. 494, 65 N. E. 259]; Matter of Hogarty, 62 N. Y. App. Div. 79, 70 N. Y. Suppl. 839 [*modifying* and *affirming* 34 Misc. 610, 70 N. Y. Suppl. 428]; Matter of Clinton, 12 N. Y. App. Div. 132, 42 N. Y. Suppl. 674; *In re* Lawrence, 37 Misc. (N. Y.) 702, 76 N. Y. Suppl. 653; *In re* Thompson, 1 N. Y. Suppl. 213; Matter of McAlpine, 15 N. Y. St. 532; Valentine *v.* Valentine, 2 Barb. Ch. (N. Y.) 430; Holley *v.* S. G., 4 Edw. (N. Y.) 284; Matter of Townsend, 5 Dem. Surr. (N. Y.) 147; Bacon *v.* Bacon, 4 Dem. Surr. (N. Y.) 5; Matter of Leinkauf, 4 Dem. Surr. (N. Y.) 1; Matter of Starr, 2 Dem. Surr. (N. Y.) 141. See also Ramser *v.* Blair, 123 Ala. 139, 36 So. 341; Albro *v.* Robinson, 93 Ky. 195, 19 S. W. 587, 14 Ky. L. Rep. 124; Sanderson *v.* Pearson, 45 Md. 483.

Executor and guardian.— A person holding at one and the same time the position of testamentary executor of an estate and tutor of the minor heirs thereto cannot receive and disburse a fund in the capacity of executor and charge commissions upon the fund as being in his hands as tutor. Milmo's Succession, 47 La. Ann. 126, 16 So. 772.

In New Jersey it has been decided that if a person be appointed in a will an executor and trustee, such person is entitled to commissions, calculating on the *corpus* of the estate, in each capacity, at such rate as will yield a reasonable compensation for the services in each of such respective offices. Pitney *v.* Everson, 42 N. J. Eq. 361, 7 Atl. 860 [*reversing* 40 N. J. Eq. 539, 5 Atl. 95]. But the rule stated in the text is recognized in Bruere *v.* Gulick, 41 N. J. Eq. 280, 7 Atl. 441; Baker *v.* Johnston, 39 N. J. Eq. 493.

In Pennsylvania it is provided by statute that where one acts both as executor and trustee he shall be allowed but one compensation for his services in both capacities. Barclay's Estate, 11 Phila. 123; *In re* Old, 8 Lanc. L. Rev. 329. But it has been held that where duties which were not capable of performance by the executors at the settlement of their original account and which were clearly separate and distinct from those connected with the original administration of the estate were superimposed by the testator, compensation for such additional services should be allowed. Scull's Estate, 4 Pa. Dist. 699, 17 Pa. Co. Ct. 198.

82. *In re* Crawford, 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71; *In re* Willets, 112 N. Y. 289, 665, 19 N. E. 690 [*affirming* 9 N. Y. St. 321]; Phœnix *v.* Livingston, 101 N. Y. 451, 5 N. E. 70; *In re* Mason, 98 N. Y. 527; Laytin *v.* Davidson, 95 N. Y. 263 [*affirming* 29 Hun 622]; Matter of Johnson, 57 N. Y. App. Div. 494, 67 N. Y. Suppl. 1004; Beard *v.* McCredie, 77 Hun (N. Y.) 111, 28 N. Y. Suppl. 305; Foote *v.* Bruggerhof, 66 Hun (N. Y.) 406, 21 N. Y. Suppl. 509; Matter of Babcock, 52 Hun (N. Y.) 510, 5 N. Y. Suppl. 634; Blake *v.* Blake, 30 Hun (N. Y.) 469; Matter of Tucker, 29 Misc. (N. Y.) 728, 62 N. Y. Suppl. 1021; Matter of Selleck, 1 N. Y. St. 575; Hall *v.* Campbell, 1 Dem. Surr. (N. Y.) 415; Ward *v.* Ford, 4 Redf. Surr. (N. Y.) 34; Matter of Carman, 3 Redf. Surr. (N. Y.) 46. See also Mitchell *v.* Holmes, 1 Md. Ch. 287; Cram *v.* Cram, 2 Redf. Surr. (N. Y.) 244.

On an accounting by executors who are also trustees, in addition to their compensation as executors, they are entitled to one-half commissions for receiving the trust fund and one half on such portions as they have paid out. Matter of Kenworthy, 63 Hun (N. Y.) 165, 17 N. Y. Suppl. 655. See also Cram *v.* Cram, 2 Redf. Surr. (N. Y.) 244.

83. Clermontel's Estate, 13 Phila. (Pa.) 235.

Where a will contemplates that the income of the residuary estate shall be received by the trustees directly and never be held by them as executors, they are not entitled, when accounting as executors, to double commissions on unexpended income in their hands.[84] Where by will one is appointed both executor and trustee, but holds the estate as executor until it is finally settled, never having qualified as trustee, he is entitled to compensation for his services as executor.[85] An executor who is not appointed trustee by the will cannot perform self-imposed duties as such and receive compensation therefor.[86] Where a person is trustee by reason of his being executor, and voluntarily assumes control of a fund willed to minor children, he not being their guardian, he is not entitled to commissions;[87] but where an administrator having the funds of an infant in his hands is appointed his guardian he has the right as administrator to charge commissions for transferring the funds to himself as guardian, and as guardian the right to charge for receiving it.[88]

10. Waiver or Renunciation of Compensation. A personal representative, like any other trustee, may waive or renounce his claim to compensation for performance of the duties of his trust, and a promise or agreement made by him that he will not charge for his services may be regarded as equivalent to a renunciation of his claim.[89] Waiver or renunciation of a claim for compensation

84. Matter of Tucker, 29 Misc. (N. Y.) 728, 62 N. Y. Suppl. 1021.

85. Schinz *v.* Schinz, 90 Wis. 236, 63 N. W. 162.

86. Hepburn's Estate, 11 Phila. (Pa.) 80.

87. Haglar *v.* McCombs, 66 N. C. 345.

88. *Ex p.* Witherspoon, 3 Rich. Eq. (S. C.) 13.

89. *California.*—Davis' Estate, 65 Cal. 309, 4 Pac. 22.

Kentucky.— Doty *v.* Cox, 22 S. W. 321, 15 Ky. L. Rep. 68; Bate *v.* Bate, 11 Bush 639, immaterial that the promise was not made to all the devisees.

Louisiana.— Regan's Succession, 43 La. Ann. 723, 9 So. 753.

Michigan.— Morton *v.* Johnston, 124 Mich. 561, 83 N. W. 369.

New York.— *In re* Hopkins, 32 Hun 618 [*affirmed* in 98 N. Y. 636]; *In re* Turfler, 24 N. Y. Suppl. 91, Pow. Surr. 421.

Pennsylvania.— Frishmuth's Estate, 2 Pa. Dist. 814, 14 Pa. Co. Ct. 49; Mulligan's Estate, 1 Pa. Dist. 511.

South Carolina.— McCaw *v.* Blewit, 2 McCord Eq. 90.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2082, 2083.

Consideration.— A mere promise to make no charge of commissions, in the absence of a consideration to support it, is not binding; but when carried into execution by actual payment without deduction it becomes a gift which, except as against creditors, requires no consideration. Horwitz's Estate, 7 Pa. Dist. 179. See also McCawley's Estate, 14 Wkly. Notes Cas. (Pa.) 260; Barton's Estate, 1 Pars. Eq. Cas. (Pa.) 24. A promise by a person who is not entitled to administer, to serve as administrator without compensation, made to the person entitled to administer, is valid and based upon a sufficient consideration (Davis' Estate, 65 Cal. 309, 4 Pac. 22; Mott *v.* Fowler, 85 Md. 676, 37 Atl. 717. See also Bassett *v.* Miller, 8 Md. 548), but a promise not to charge commissions made by one entitled to administer to one claiming the right to do so is without consideration (Coste's Succession, 43 La. Ann. 144, 9 So. 62. See also Eversfield *v.* Eversfield, 4 Harr. & J. (Md.) 12). Benefit to the estate is a sufficient consideration for a promise of an executor to reduce his commissions. Regan's Succession, 43 La. Ann. 723, 9 So. 753. An administrator with the will annexed who in consideration of being permitted to remain such pending a contest over the validity of the will expressly agrees to relinquish all commissions cannot thereafter be heard to deny such relinquishment. McIntire *v.* McIntire, 14 App. Cas. (D. C.) 337, 20 App. Cas. (D. C.) 104 [*affirmed* in 192 U. S. 116, 24 S. Ct. 196, 48 L. ed. 369 (*distinguishing* Richardson *v.* Stansbury, 4 Harr. & J. (Md.) 275; Eversfield *v.* Eversfield, 4 Harr. & J. (Md.) 125)].

An intention to waive at the time of performing services will not deprive an executor of his right to compensation (King *v.* Whiton, 15 Wis. 684); nor when there is no agreement at the outset that a representative is to act gratuitously, will he be deprived of commissions because of a statement made long after qualifying that he did not intend to claim any compensation (Albro *v.* Robinson, 93 Ky. 195, 19 S. W. 587, 14 Ky. L. Rep. 124).

Withdrawal of waiver.— A waiver of commissions in a petition for letters of administration does not deprive the representative of the right to commissions where the waiver was without objection and by leave of court withdrawn before appointment. *In re* Carver, 123 Cal. 102, 55 Pac. 770.

Co-executor not bound.— The refusal of an executor to charge any commissions cannot prejudice the rights of his co-executor in that respect. Schoeneich *v.* Reed, 8 Mo. App. 356.

Evidence insufficient to show agreement to serve without compensation see Caldwell *v.*

need not be express but may be implied from the acts and conduct of personal representatives.[90]

11. Forfeiture or Deprivation of Compensation — a. In General. While there are a few cases holding that statutes providing for the allowance of commissions to personal representatives are imperative and that the courts are without discretion to withhold them,[91] the right to refuse compensation for proper cause is generally recognized.[92] As a general rule, however, compensation should be allowed unless there has been some act or omission calling for punishment.[93]

b. Mismanagement. An executor or administrator who has been guilty of fraud, wilful default, or gross negligence in the management of the estate may be deprived of recompense, where the estate has suffered in consequence;[94] but

Hampton, 53 S. W. 14, 21 Ky. L. Rep. 793; Eversfield *v.* Eversfield, 4 Harr. & J. (Md.) 12.

90. Frishmuth's Estate, 2 Pa. Dist. 814, 14 Pa. Co. Ct. 49.

Paying out the income received from an estate without retaining or providing for commissions has been held to constitute a waiver. Matter of Tucker, 29 Misc. (N. Y.) 728, 62 N. Y. Suppl. 1021. But see Matter of Mount, 2 Redf. Surr. (N. Y.) 405.

An omission to charge for services in a former settlement does not prove that the personal representative is not entitled to compensation or has waived his claim therefor. Clay *v.* Hart, 7 Dana (Ky.) 1.

Failure to credit.— The right to commissions is not waived by a representative's failure to credit his account with them or to appeal from a decree of the probate court in which none were allowed. Williams *v.* Cubage, 36 Ark. 307.

Depositing funds in safe custody.— An executor does not waive his right to commissions by depositing the securities and funds of the estate in safe custody. Hughes' Estate, 6 Phila. (Pa.) 350.

91. Handy *v.* Collins, 60 Md. 229, 45 Am. Rep. 725; State *v.* Baker, 8 Md. 44; *In re* Fitzgerald, 57 Wis. 508, 15 N. W. 794.

92. Allen *v.* Royster, 107 N. C. 278, 12 S. E. 134. See *infra*, XV, E, 11, b, c, d.

No compensation when no services performed.— Foster *v.* Foster, 71 S. W. 524, 24 Ky. L. Rep. 1396; *In re* Manice, 31 Hun (N. Y.) 119; Matter of Pike, 2 Redf. Surr. (N. Y.) 255; Kernan's Estate, 6 Kulp (Pa.) 73. See also Nicholson *v.* Ogden, 6 La. Ann. 486; *In re* Baker, 35 Hun (N. Y.) 272; *In re* Allen, 29 Hun (N. Y.) 7; *In re* Hayden, 5 N. Y. Suppl. 845, 1 Connoly Surr. (N. Y.) 454; Morris *v.* Kent, 2 Edw. (N. Y.) 175. And see *supra*, XV, E, 7. But see Hopkins' Succession, 33 La. Ann. 1166; Hale *v.* Saulter, 25 La. Ann. 320, in which cases the failure to perform services was caused by the action of the beneficiaries.

Failure to keep regular accounts.— The rule that an administrator who omits to keep regular accounts shall not be allowed commissions is not universal, although very general. Finch *v.* Ragland, 17 N. C. 137.

93. Montier's Estate, 7 Phila. (Pa.) 491. See also Jacobus *v.* Munn, 37 N. J. Eq. 48; Merkel's Estate, 131 Pa. St. 384, 18 Atl. 931; Benedict's Estate, 4 Lanc. L. Rev. (Pa.) 99; Gauff's Estate, 2 Lehigh Val. L. Rep. (Pa.) 245; Willeford *v.* Watson, 12 Heisk. (Tenn.) 476.

Mistake.— A personal representative may be entitled to compensation, although he may have made a mistake in his proceedings, provided the mistake be *bona fide*. *In re* Hoffer, 156 Pa. St. 473, 27 Atl. 11; Merkel's Estate, 131 Pa. St. 584, 18 Atl. 931; *In re* Brennan, 65 Pa. St. 16; Miller's Appeal, 5 Pa. Cas. 492, 8 Atl. 864 (wrong construction put on will); Heft's Appeal, 19 Wkly. Notes Cas. (Pa.) 302.

Inaccurate accounts.—An executor who discharges his duty honestly but, owing to want of business training, keeps his accounts loosely and inaccurately, is entitled to compensation for his care, pains, and trouble, but the amount of compensation should not in such a case be relatively large. Hoover *v.* Wilson, 24 Ont. App. 424. *Compare* Kee *v.* Kee, 2 Gratt. (Va.) 116.

Failure to deposit or account for funds.— Failure to comply with a statute providing a penalty for not depositing or accounting for funds will not deprive a personal representative of his commissions, as such a statute is highly penal, and the penalty provided therein cannot be increased. Baum's Succession, 9 La. Ann. 412; Cresswell's Succession, 8 La. Ann. 122.

94. *Alabama.*— Ivey *v.* Coleman, 42 Ala. 409; Smith *v.* Kennard, 38 Ala. 695; Henderson *v.* Simmons, 33 Ala. 291, 70 Am. Dec. 590; Pearson *v.* Darrington, 32 Ala. 227; Stewart *v.* Stewart, 31 Ala. 207; Bendall *v.* Bendall, 24 Ala. 295, 60 Am. Dec. 469; Gould *v.* Hayes, 19 Ala. 438; Emanual *v.* Draughn, 14 Ala. 303; Hall *v.* Wilson, 14 Ala. 295; Powell *v.* Powell, 10 Ala. 900.

Arkansas.— See Ambleton *v.* Dyer, 53 Ark. 224, 13 S. W. 926.

Florida.— Eppinger *v.* Canepa, 20 Fla. 262.

Louisiana.— Touzanne's Succession, 36 La. Ann. 420; Liles' Succession, 24 La. Ann. 490.

Minnesota.— St. Paul Trust Co. *v.* Kittson, 62 Minn. 408, 64 N. W. 74.

Missouri.— State *v.* Berning, 74 Mo. 87.

New Jersey.— Fluck *v.* Lake, 54 N. J. Eq. 638, 35 Atl. 643; Brewster *v.* Demarest, 48 N. J. Eq. 559, 23 Atl. 271.

New York.— Matter of Rutledge, 162 N. Y. 31, 56 N. E. 511, 30 N. Y. Civ. Proc. 405, 47

unfaithful administration will not deprive a personal representative of his right to compensation for his services so far as they have been beneficial to the estate.[95]

c. Conversion, Misappropriation, or Commingling of Funds. As a rule, where the personal representative unlawfully converts or misappropriates the funds of the estate, or commingles them with his own to the detriment of the estate, he will be denied compensation;[96] but this rule is not arbitrarily applied, and, notwith-

L. R. A. 721; *In re* Wiley, 119 N. Y. 642, 23 N. E. 1054; Matter of Welling, 51 N. Y. App. Div. 355, 64 N. Y. Suppl. 1025; Matter of Matthewson, 8 N. Y. App. Div. 8, 40 N. Y. Suppl. 140; Stevens *v.* Stevens, 80 Hun 514, 30 N. Y. Suppl. 625; Matter of Ingersoll, 41 Misc. 600, 85 N. Y. Suppl. 293 [*modified* in 88 N. Y. Suppl. 698]; Matter of Hayes, 40 Misc. 500, 82 N. Y. Suppl. 792; Matter of Scudder, 21 Misc. 179, 47 N. Y. Suppl. 101; Matter of Conklin, 20 N. Y. Suppl. 59, 2 Connoly Surr. 176; Matter of Harnett, 15 N. Y. St. 725. See also Stevens *v.* Melcher, 152 N. Y. 551, 46 N. E. 965; Cook *v.* Lowry, 95 N. Y. 103; Matter of Yetter, 44 N. Y. App. Div. 404, 61 N. Y. Suppl. 175 [*affirmed* in 162 N. Y. 615, 57 N. E. 1129]; Matter of Wilbur, 27 Misc. 126, 57 N. Y. Suppl. 398. *Compare* Matter of Baker, 72 N. Y. App. Div. 211, 76 N. Y. Suppl. 61 [*affirmed* in 172 N. Y. 617, 64 N. E. 1118].

North Carolina.— Grant *v.* Reese, 94 N. C. 720.

Pennsylvania.— *In re* Clauser, 84 Pa. St. 51; Norris' Appeal, 71 Pa. St. 106; Smith's Appeal, 47 Pa. St. 424; Berryhill's Appeal, 35 Pa. St. 245; Geiger's Appeal, (1889) 16 Atl. 851, 1 Mona. 547, 24 Wkly. Notes Cas. 264; *In re* Swartswalter, 4 Watts 77; Evans' Estate, 1 Pa. Super. Ct. 37; Unruh's Estate, 13 Phila. 337; Steger's Estate, 11 Phila. 158; Bradley's Estate, 11 Phila. 87; Sourin's Estate, 11 Phila. 14. See also Witman's Appeal, 28 Pa. St. 376.

Texas.—Chapman *v.* Brite, 4 Tex. Civ. App. 506, 23 S. W. 514.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2132.

In California it has been decided that the statute does not deprive a personal representative of the compensation provided by law for any fault, mismanagement, neglect, or loss resulting therefrom, but that he should be charged with losses resulting from his default or neglect and allowed his commissions. *In re* Carver, 123 Cal. 102, 55 Pac. 770. See also Moore's Estate, 96 Cal. 522, 31 Pac. 584; Osborn's Estate, 87 Cal. 1.

Misconduct must be wilful and exceptional. Kennedy *v.* Pingle, 27 Grant Ch. (U. C.) 305; Sievewright *v.* Leys, 1 Ont. 375.

Mere neglect of duty will not deprive a representative of his commissions. Matter of Brintnall, 40 Misc. (N. Y.) 67, 81 N. Y. Suppl. 250; Ward *v.* Ford, 4 Redf. Surr. (N. Y.) 34.

The retention of irregular securities, causing loss, is not such a dereliction of duty as to justify a refusal of commissions. Gillespie *v.* Brooks, 2 Redf. Surr. (N. Y.) 349.

Investments.— An administrator is entitled to no commissions when he has neglected to invest funds remaining in his hands, or has converted them to his own use. In all cases such neglect to invest funds is treated as a breach of trust, and commissions are disallowed. McKnight *v.* Walsh, 24 N. J. Eq. 498 [*affirming* 23 N. J. Eq. 136]; Frey *v.* Demarest, 17 N. J. Eq. 71. But see Edmonds *v.* Crenshaw, Harp. Eq. (S. C.) 224. But it is no ground for denying an administrator compensation for his general services that he has made investments which were not authorized by statute, where they have resulted is no loss to the estate. Sanderson *v.* Sanderson, 20 Fla. 292.

Fraud.— Commissions may be refused when the personal representative has been guilty of wilful mismanagement with respect to the estate, although acting without fraud or bad faith. Atherton's Estate, 8 Kulp (Pa.) 150; Robinson's Estate, 5 Phila. (Pa.) 99; Steger's Estate, 33 Leg. Int. (Pa.) 416. *Compare* Merkel's Estate, 131 Pa. St. 384, 18 Atl. 931 [*distinguishing In re* Clauser, 84 Pa. St. 51; Stehman's Appeal, 5 Pa. St. 413]; Miller's Estate, 16 Wkly. Notes Cas. (Pa.) 115.

Commissions refused when property of estate purchased by representative.— Darcus *v.* Crump, 6 B. Mon. (Ky.) 363; Drysdale's Appeal, 14 Pa. St. 531, fact that purchase made for himself concealed from heirs. See also Crosson's Appeal, 125 Pa. St. 380, 17 Atl. 423. But see Vance *v.* Gary, Rice Eq. (S. C.) 2.

95. Jennison *v.* Hapgood, 10 Pick. (Mass.) 77; Campbell *v.* McCormick, 1 Ohio Cir. Ct. 504, 1 Ohio Cir. Dec. 281; Shinn's Estate, 166 Pa. St. 121, 30 Atl. 1026, 1030, 45 Am. St. Rep. 656. See also Jacobus *v.* Munn, 37 N. J. Eq. 48; Chapman *v.* Brite, 4 Tex. Civ. App. 506, 23 S. W. 514; Walworth *v.* Bartholomew, 76 Vt. 1, 56 Atl. 101; Hapgood *v.* Jennison, 2 Vt. 294.

96. *Illinois.*— *In re* Wincox, 85 Ill. App. 613 [*affirmed* in 186 Ill. 445, 57 N. E. 1073].

Missouri.— Garesche *v.* Levering Invest. Co., 146 Mo. 436, 48 S. W. 653, 46 L. R. A. 232.

New Jersey.— Fluck *v.* Lake, 54 N. J. Eq. 638, 35 Atl. 643; Frey *v.* Frey, 17 N. J. Eq. 71.

New York.— Matter of Wotton, 59 N. Y. App. Div. 584, 69 N. Y. Suppl. 753 [*affirmed* in 167 N. Y. 629, 60 N. E. 1123]; Matter of Adams, 51 N. Y. App. Div. 619, 64 N. Y. Suppl. 591 [*affirmed* in 166 N. Y. 623, 59 N. E. 1118]; Matter of Hobson, 61 Hun 504, 16 N. Y. Suppl. 371 [*affirmed* in 131 N. Y. 575, 30 N. E. 63]; Matter of Rainforth, 40 Misc. 609, 83 N. Y. Suppl. 57.

standing the misapplication or commingling of funds of the estate, compensation has been allowed in cases when no fraud or bad faith on the part of the personal representative was shown,[97] or it appeared that on the whole the estate derived benefit from his services.[98]

d. Failure to File Inventory or Accounts. Compensation is sometimes refused to personal representatives who fail to file their inventories or accounts as required by law,[99] although there are authorities holding that when a personal representa-

Pennsylvania.— Milligan's Appeal, 97 Pa. St. 525; *In re* Clauser, 84 Pa. St. 51; Boud's Appeal, 2 Pennyp. 241; Drake's Estate, 2 Kulp 256; Waylan's Estate, 1 Pa. Co. Ct. 366, 17 Wkly. Notes Cas. 375; Schmeyer's Appeal, 3 Walk. 310; Ziegler's Estate, 4 Montg. Co. Rep. 17.

Vermont.— Davis *v.* Eastman, 68 Vt. 225, 35 Atl. 73.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2133.

Fraudulent retention or concealment of assets a ground for refusing compensation. Badillo *v.* Tio, 7 La. Ann. 487; Arnold *v.* Blackwell, 17 N. C. 1; Davis *v.* Eastman, 68 Vt. 225, 37 Atl. 73.

Use of funds of the estate to speculate in claims against the estate see Matter of Rainforth, 40 Misc. (N. Y.) 609, 83 N. Y. Suppl. 57.

97. Tiner *v.* Christian, 27 Ark. 306; Troup *v.* Rice, 55 Miss. 278; Matter of Schaefer, 34 Misc. (N. Y.) 34, 69 N. Y. Suppl. 489 [*modified* in 65 N. Y. App. Div. 378, 73 N. Y. Suppl. 57]; Heft's Appeal, 5 Pa. Cas. 573, 9 Atl. 87; Williamson's Estate, 12 Phila. (Pa.) 64, 7 Wkly. Notes Cas. (Pa.) 82 (commingling caused merely by error in bookkeeping); Sourin's Estate, 32 Leg. Int. (Pa.) 40 (not guilty of gross neglect or fraud). See also Conway's Estate, 18 Lanc. L. Rev. (Pa.) 129.

98. Williamson's Estate, 2 Pa. Co. Ct. 221, 18 Wkly. Notes Cas. (Pa.) 138 (commingling funds for benefit of estate); Walworth *v.* Bartholomew, 76 Vt. 1, 56 Atl. 101 (no commissions on fund commingled, but compensation for services as to other property); Foster *v.* Stone, 67 Vt. 336, 31 Atl. 841. See also Shinn's Estate, 166 Pa. St. 121, 30 Atl. 1026, 1030, 45 Am. St. Rep. 656.

99. *Alabama.*—See May *v.* Carlisle, 68 Ala. 135.

Florida.— Sanderson *v.* Sanderson, 20 Fla. 292; Eppinger *v.* Canepa, 20 Fla. 262; Moore *v.* Felkel, 7 Fla. 44.

Georgia.— It is expressly provided by statute that a personal representative who fails to make annual returns shall forfeit his commissions. Davidson *v.* Story, 106 Ga. 799, 32 S. E. 867; Doster *v.* Arnold, 60 Ga. 316; Kenan *v.* Hall, 8 Ga. 417; Fall *v.* Simmons, 6 Ga. 265.

Kentucky.— See Foster *v.* Foster, 71 S. W. 524, 24 Ky. L. Rep. 1396; Hamilton *v.* Hamilton, 6 Ky. L. Rep. 95.

Massachusetts.— See Brooks *v.* Jackson, 125 Mass. 307.

New York.— See Matter of Matthewson, 8 N. Y. App. Div. 8, 40 N. Y. Suppl. 140; Matter of Baker, 27 Misc. 126, 57 N. Y. Suppl. 398; Eager *v.* Roberts, 2 Redf. Surr. 247.

North Carolina.— See Grant *v.* Reese, 94 N. C. 720.

Pennsylvania.— Palmer's Estate, 2 Del. Co. 180. See also Potts' Appeal, 3 Walk. 135; Barrett's Estate, 31 Pittsb. Leg. J. 53. But see Fox's Estate, 5 Kulp 218.

Tennessee.— Horton *v.* Cope, 6 Lea 155; Bland *v.* Gollaher, (Ch. App. 1898) 48 S. W. 320. *Compare* Guild *v.* Young, (Ch. App. 1901) 62 S. W. 404; Hall *v.* Hall, (Ch. App. 1900) 59 S. W. 203, accounting prevented by the filing of a bill in chancery.

West Virginia.— Estill *v.* McClintic, 11 W. Va. 399.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2134–2136.

In South Carolina under the act of 1789 a personal representative was not entitled to commissions during the years that he neglected to make returns, there having been nothing to prevent it (Roberts *v.* Johns, 24 S. C. 580; Brooks *v.* Brooks, 12 S. C. 422; Brown *v.* McCall, 3 Hill 335; Vance *v.* Gary, Rice Eq. 2; Frazier *v.* Vaux, 1 Hill Eq. 203; Corbin *v.* Jones, Rich. Eq. Cas. 52; Wallace *v.* Ellerbe, Rich. Eq. Cas. 49; Gee *v.* Hicks, Rich. Eq. Cas. 5; Corbin *v.* Howell, 1 Bailey Eq. 183; Wright *v.* Wright, 2 McCord Eq. 185; Black *v.* Blakely, 2 McCord Eq. 1; Edmonds *v.* Crenshaw, Harp. Eq. 224; Benson *v.* Bruce, 4 Desauss. 463; Jenkins *v.* Fickling, 4 Desauss. 369; Ramsay *v.* Ellis, 3 Desauss. 78; Prince *v.* Towns, 33 Fed. 161), but since the repeal of that act by the act of 1872, which contains no provision for forfeiture in such a case, he does not therefore lose his right to commissions (Tompkins *v.* Tompkins, 18 S. C. 1; Davidson *v.* Moore, 14 S. C. 251; Lay *v.* Lay, 10 S. C. 208).

In Virginia prior to the passage of the act of 1867 the statute provided with some exceptions that a personal representative who failed to lay before the proper commissioner a statement of his receipts for any year, for six months after its expiration, should not be entitled to any compensation whatever for his services during that year; and the forfeiture thus prescribed was absolute (Frazier *v.* Frazier, 77 Va. 775; Nelson *v.* Page, 7 Gratt. 160; Morris *v.* Morris, 4 Gratt. 293; Turner *v.* Turner, 1 Gratt. 11; Wood *v.* Garnett, 6 Leigh 271. See also Moses *v.* Hart, 25 Gratt. 795; Boyd *v.* Boyd, 3 Gratt. 113); but by the statute now in force commissions in such a case are not absolutely forfeited, but may be allowed in the discretion of the court; a discretion it is true not arbitrary, but to be reasonably exercised under the circumstances of each case (Moorman *v.* Crock-

tive has acted in good faith and no loss or injury has resulted to the estate he will not lose his compensation for a failure in this respect.[1]

e. Resignation or Removal. Personal representatives who resign or are removed are not entitled to full compensation, but should be allowed a sum commensurate with the services which they have performed, if beneficial to the estate.[2]

12. Jurisdiction, Proceedings, and Review — a. Jurisdiction — (i) *In General.* As a general rule questions as to the allowance of compensation are within the jurisdiction of probate courts, or courts having probate functions.[3] It has been held, however, that an appellate court may allow compensation in a case where none was claimed or allowed below,[4] or it may fix the amount of compensation where the question of compensation was not before the court below for decision on the merits, and all the parties and evidence are before the appellate court.[5] And it has also been held that where a court of equity is in possession of a suit for settling the administration of an estate it will fix the compensation.[6]

(ii) *Apportionment of Commissions.* It seems that probate courts usually have jurisdiction to apportion compensation among co-representatives,[7] but such courts have no jurisdiction after allowing compensation to co-representatives in a gross sum to compel one who has possessed himself of the whole amount to pay the others their shares.[8] According to some of the decisions, the remedy of one

ett, 90 Va. 185, 17 S. E. 875; Trevelyan *v.* Lofft, 83 Va. 141, 1 S. E. 901; Brent *v.* Clevinger, 78 Va. 12). This statute is not applicable where the estate is being administered by the court. Fauber *v.* Gentry, 89 Va. 312, 15 S. E. 899.

Forfeiture for failure to file account when ordered by the court see Putnam *v.* Loeb, 2 Ohio Cir. Ct. 110, 1 Ohio Cir. Dec. 391; Cairns *v.* Hedges, 2 Ohio Cir. Ct. 103, 1 Ohio Cir. Dec. 387; Leow's Estate, 6 Wkly. Notes Cas. (Pa.) 333; West *v.* Providence Municipal Ct., 25 R. I. 84, 54 Atl. 926, satisfactory reasons for delay not given.

1. Gould *v.* Hayes, 19 Ala. 438; Craig *v.* McGehee, 16 Ala. 41; Birkholm *v.* Wardell, 42 N. J. Eq. 337, 7 Atl. 569; *In re* Barcalow, 29 N. J. Eq. 282; Perkins *v.* Caldwell, 79 N. C. 441; Van Winkle *v.* Blackford, 54 W. Va. 621, 46 S. E. 589.

2. *California.*— *In re* Barton, 55 Cal. 87; Ord *v.* Little, 3 Cal. 287.

Kentucky.— Wood *v.* Nelson, 10 B. Mon. 229; Frazier *v.* Cavanaugh, 4 Ky. L. Rep. 711.

Louisiana.—Vogel's Succession, 20 La. Ann. 81; Poindexter's Succession, 19 La. Ann. 22; Rice's Succession, 14 La. Ann. 317; Day's Succession, 3 La. Ann. 624. See also Brown's Succession, 27 La. Ann. 328 [*distinguishing* Lee's Succession, 4 La. Ann. 578].

Mississippi.— Sprott *v.* Baldwin, 34 Miss. 327; Spratt *v.* Baldwin, 33 Miss. 581 (full commissions when estate fully administered before letters revoked); Cherry *v.* Jarratt, 25 Miss. 221.

New York.— Matter of Douglas, 60 N. Y. App. Div. 64, 69 N. Y. Suppl. 687.

Wisconsin.— Brown *v.* McGee, 117 Wis. 389, 94 N. W. 363.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2137; and *supra*, XV, E, 8.

When no compensation allowed.— Where personal representatives resigned for their own convenience after having rendered very little service to the estate, it was held that they were not entitled to any compensation whatever. *In re* Hayden, 5 N. Y. Suppl. 845, 1 Connoly Surr. (N. Y.) 454 [*citing In re* Baker, 35 Hun (N. Y.) 272; *In re* Allen, 29 Hun (N. Y.) 7].

3. *Arkansas.*— Ringgold *v.* Stone, 20 Ark. 526.

Indiana.— Cox *v.* Baker, 113 Ind. 62, 14 N. E. 740.

Maryland.— Hardt *v.* Birely, 72 Md. 134, 19 Atl. 606; Gwynn *v.* Dorsey, 4 Gill & J. 453; Scott *v.* Dorsey, 1 Harr. & J. 227.

Mississippi.— Cherry *v.* Jarratt, 25 Miss. 221.

United States.— West *v.* Smith, 8 How. 402, 12 L. ed. 1130; Smith *v.* Worthington, 53 Fed. 977, 4 C. C. A. 130; Atkinson *v.* Robbins, 2 Fed. Cas. No. 617, 5 Cranch C. C. 312; Nicholls *v.* Hodge, 18 Fed. Cas. No. 10,231, 2 Cranch C. C. 582.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2140.

Executing trusts as to realty.— Allowing compensation to an executor for executing limited and contingent trusts as to realty is not a matter within the jurisdiction of the probate court. *In re* Rickenbaugh, 42 Mo. App. 328.

4. Williams *v.* Cubage, 36 Ark. 307.

5. Hall *v.* Hall, (Tenn. Ch. App. 1900) 59 S. W. 203.

6. Walton *v.* Avery, 22 N. C. 405; Newby *v.* Skinner, 21 N. C. 488, 31 Am. Dec. 397. See also Cameron *v.* Bethune, 15 Grant Ch. (U. C.) 486; McLennan *v.* Heward, 9 Grant Ch. (U. C.) 279.

7. Hope *v.* Jones, 24 Cal. 89; Mount *v.* Slack, 39 N. J. Eq. 230; Matter of Dunkel, 5 Dem. Surr. (N. Y.) 188; Markle's Estate, 11 Pa. Co. Ct. 13; Davis' Estate, 1 Phila. (Pa.) 360; John's Estate, 2 Chest. Co. Rep. (Pa.) 281.

8. Mount *v.* Slack, 39 N. J. Eq. 230; Wickersham's Appeal, 64 Pa. St. 67.

personal representative against another for his share of compensation is by action in the common-law courts;[9] but there also is authority to the effect that equity has jurisdiction in such a case.[10]

b. Proceedings For Allowance. No compensation will be awarded until an account is presented for settlement and an allowance asked.[11] A personal representative should not claim a gross sum for his services, but should specify the items for which he claims compensation.[12] When, however, a gross sum is allowed, the decree need not particularly specify the items for which the allowance was made.[13] It is for the personal representative to show compliance with a statutory provision upon which the allowance of compensation depends;[14] and when extra compensation is asked it is for him to show that he has rendered unusual services meriting such compensation.[15] The question of the allowance of extra compensation is for the court and not for a jury.[16]

c. Time of Allowance. The time of allowance of compensation varies; in some jurisdictions it is not allowed until the settlement of the final account of the personal representative,[17] in others it is allowed when periodical accounts are settled.[18] A probate court cannot, several months after the final settlement of an

9. Bush *v.* McComb, 2 Houst. (Del.) 546; Wickersham's Appeal, 64 Pa. St. 67; John's Estate, 2 Chest. Co. Rep. (Pa.) 281.

Order allowing each representative a specified sum.— An order of the probate court, made on the application of two co-executors, for the allowance to each of a specified sum as annual compensation for his services in the management of the estate will not support an action at law in favor of one of them or his assignee against the other. Carver *v.* Hallett, 26 Ala. 722.

10. Speirs *v.* Wisner, 88 Mich. 614, 50 N. W. 654, 26 Am. St. Rep. 306. See also Huff *v.* Thrash, 75 Va. 546.

11. Effinger *v.* Richards, 35 Miss. 540.

A personal representative must present his claim for his services, in the form prescribed by the statute, to the court having jurisdiction of his decedent's estate; and upon such claim, so presented, and upon satisfactory evidence, the court may allow him just compensation. Collins *v.* Tilton, 58 Ind. 374.

12. Wright *v.* Wilkerson, 41 Ala. 267. But see Main's Appeal, 73 Conn. 638, 48 Atl. 965; Powell *v.* Foster, 71 Vt. 160, 44 Atl. 96; Evarts *v.* Nason, 11 Vt. 122.

A claim for extra services must be itemized fully, so that the court may understand the exact nature of the claim and the services rendered. Matter of Wolfe, 7 Ohio S. & C. Pl. Dec. 220, 4 Ohio N. P. 336. See also Wisner *v.* Mabley, 70 Mich. 271, 38 N. W. 262. *Compare* Sloan *v.* Duffy, 117 Wis. 480, 94 N. W. 342; Ford *v.* Ford, 88 Wis. 122, 59 N. W. 464.

13. *In re* Nuckols, 103 Mich. 297, 61 N. W. 506; Loomis *v.* Armstrong, 63 Mich. 355, 29 N. W. 867.

14. Knight *v.* Watts, 26 W. Va. 175.

15. *Iowa.*— Fitzgerald *v.* Paisley, 110 Iowa 98, 81 N. W. 181.

Kentucky.— McCracken *v.* McCracken, 6 T. B. Mon. 342.

Louisiana.— Young *v.* Chaney, 3 La. 462.

Oregon.— See Steel *v.* Holladay, 20 Oreg. 462, 26 Pac. 562.

Pennsylvania.— Watson's Estate, 6 Luz. Leg. Reg. 13. See also Shaw *v.* Betts, 2 Pa. Cas. 452, 4 Atl. 731.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2143.

Necessity for services and insufficiency of statutory compensation must be shown. *In re* Gloyd, 93 Iowa 303, 61 N. W. 975.

16. Wisner *v.* Mabley, 70 Mich. 271, 38 N. W. 262. See also Baldwin *v.* Carleton, 15 La. 394.

Amount to be fixed by court.— Ford *v.* Ford, 88 Wis. 122, 59 N. W. 464, holding that the court may place the amount at less than any of the witnesses have testified that the services were worth. But see Logan *v.* Logan, 1 McCord Eq. (S. C.) 1.

17. *In re* Carter, 132 Cal. 113, 64 Pac. 123 [*modified* in (1901) 64 Pac. 484]; Levinson's Estate, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479; Rose's Estate, 80 Cal. 166, 22 Pac. 86; *In re* Miner, 46 Cal. 564; Ord *v.* Little, 3 Cal. 287; Taveau *v.* Ball, 1 McCord Eq. (S. C.) 456.

18. *Mississippi.*— Powell *v.* Burrus, 35 Miss. 605. See also Crowder *v.* Shackelford, 35 Miss. 321. But see Rucker *v.* Lambdin, 12 Sm. & M. 230; Merrill *v.* Moore, 7 How. 271, 40 Am. Dec. 60, both decided prior to the statute now in force.

Montana.— *In re* Ricker, 14 Mont. 153, 35 Pac. 960, 29 L. R. A. 622 [*distinguishing* *In re* Dewar, 10 Mont. 426, 25 Pac. 1026].

New York.— *In re* Selleck, 111 N. Y. 284, 19 N. E. 66; Vanderheyden *v.* Vanderheyden, 2 Paige 287, 21 Am. Dec. 86; Hawley *v.* Singer, 3 Dem. Surr. 589. See also *In re* Mason, 98 N. Y. 527.

Pennsylvania.— Stewart's Appeal, 110 Pa. St. 410, 6 Atl. 321; *In re* Parker, 64 Pa. St. 307; Callaghan *v.* Hall, 1 Serg. & R. 241. *Compare In re* Thomas, 1 Dauph. Co. Rep. 381.

Canada.— Hoover *v.* Wilson, 24 Ont. App. 424.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2142.

In Louisiana the entire commissions of **an**

estate, without opening such settlement after due notice to the parties interested, make an allowance in favor of the personal representative for his services in administering the estate.[19] The subject of commissions is closed by the settlement of the administration account, so that personal representatives cannot claim commissions on charges there made, or on interest charged at the settlement of the distribution account on the balance of the administration account.[20]

d. Objections and Exceptions to Allowance. Persons interested in an award have a right within a reasonable time after the account of the personal representative has been passed to appear in the probate court and make their objections to the allowance of compensation,[21] but a person who has consented to the allowance made to a personal representative cannot thereafter object that the compensation was excessive.[22] An attaching creditor of a legatee cannot complain of the allowance of extra compensation, unless it appears that he is entitled to have the fund subjected to the payment of his claim.[23] Where the entire compensation allowed is awarded to one of two executors, distributees cannot object.[24] Under a prayer for general relief in an opposition to a personal representative's account and upon proof received without objection, the court may reject a claim for compensation, although the opposition itself does not present such an issue.[25] Where the matter of compensation is not adjudicated, it is not properly the subject of exception.[26] Where an order of reference to take and state the account of an administrator does not embrace the question of the administrator's compensation, an exception to the allowance of compensation in the master's report is well taken.[27]

e. Review. While the right to appeal from orders or decrees of probate courts as to compensation depends largely upon constitutional or statutory provisions,[28] the action of the court in allowing or refusing compensation is usually

administrator are not properly exigible before the administration is terminated. Prior to this his commissions on sums received and distributed should be paid and his rights to the residue reserved for his final account. Meyer's Succession, 44 La. Ann. 871, 11 So. 532; Sparrow's Succession, 40 La. Ann. 484, 4 So. 513, 42 La. Ann. 500, 7 So. 611. See also Frantum's Succession, 3 Rob. 283.

In Maryland it has been decided that the court has the power to allow commissions, upon the assets passing through the hands of personal representatives, at different times as circumstances may require. *In re* Stratton, 46 Md. 551.

Reservation until complete performance of duty.— Where the final distribution of an estate by an executor is by the will deferred for a considerable time after the settlement of his account, he will not, in the allowance of commissions on that accounting, be paid for that distribution, or be paid commissions at the highest rate permitted by the statute; but the court will reserve a portion of that which it may allow for his final compensation when he shall have completely performed his duty. Conover *v.* Ellis, 49 N. J. Eq. 549, 25 Atl. 701. See also Pomeroy *v.* Mills, 35 N. J. Eq. 442.

When the estate consists of income-producing property and the circumstances are such that its settlement properly covers a number of years, it is within the discretion of the court, even in making a final settlement where no previous accounts have been rendered, to credit the services of the administrator for each year at the end of the year. Walworth *v.* Bartholomew, 76 Vt. 1, 56 Atl. 101.

When not made part of partial account.— If an administrator does not make commissions and counsel fees a part of his partial account, he cannot, upon the audit of such account, claim the same. They must go over for the final settlement. Shipe's Appeal, 114 Pa. St. 205, 6 Atl. 103.

When accounts drawn in question.— Allowance of commissions may be made at any time by any court before which a personal representative's accounts or settlement are drawn in question. Ladd *v.* Stephens, 147 Mo. 319, 48 S. W. 915.

Time for deducting.— The commissions of the administrator are to be deducted as of the date of the settlement of his account, and not as of the date of filing it. Haskin *v.* Teller, 3 Redf. Surr. (N. Y.) 316.

19. Snider *v.* Graham, 14 Ohio Cir. Ct. 386, 8 Ohio Cir. Dec. 3.

20. *In re* Brinton, 10 Pa. St. 408.

21. Hardt *v.* Birely, 72 Md. 134, 19 Atl. 606.

22. Rambo's Estate, 15 Montg. Co. Rep. (Pa.) 25. See also Stump's Estate, 2 Woodw. (Pa.) 162.

23. Morris' Appeal, 42 Leg. Int. (Pa.) 395.

24. Claycomb *v.* Claycomb, 10 Gratt. (Va.) 589.

25. Hughes' Succession, 14 La. Ann. 863.

26. Bradley's Estate, 5 Pa. Co. Ct. 572.

27. Hall *v.* Hall, (Tenn. Ch. App. 1900) 59 S. W. 203.

28. Wisner *v.* Mabley, 70 Mich. 271, 38 N. W. 262; Andress *v.* Andress, 46 N. J. Eq.

subject to appeal, and if erroneous may be corrected.[29] But only persons having an interest, which is injuriously affected by the order allowing compensation, can appeal therefrom,[30] and an objection as to the allowance of compensation cannot ordinarily be taken for the first time in an appellate court.[31] An appeal will usually lie from an order fixing the amount of compensation,[32] but when the amount of compensation is left to the discretion of the court its award will not be interfered with, unless it appears that there has been a manifest abuse of such discretion.[33] A finding of the lower court as to the value of assets for the purpose of estimating commissions will not be disturbed when there is evidence to support such valuation.[34] The action of the court in the allowance of compensation will not be reviewed, where the facts on which it acted do not appear in the record.[35] Although the lower court has erred in allowing compensation,[36] or in refusing to allow it,[37] its decree may be affirmed, if under the circumstances of the case the error is harmless.

528, 22 Atl. 124; Pomeroy *v.* Mills, 37 N. J. Eq. 578; Anderson *v.* Berry, 15 N. J. Eq. 232.

In California it has been decided that an order denying a motion to vacate an order, denying a petition of an executor for allowance of compensation for extraordinary services and to restore the petition to the calendar, is not an appealable order, as it is not mentioned in the statute regulating the right to appeal in probate proceedings. Walkerly's Estate, 94 Cal. 352, 29 Pac. 719.

In Kentucky an appeal lies to the court of chancery from an order of the county court making an allowance to an administrator. Stanberry *v.* Robinson, 27 S. W. 973, 16 Ky. L. Rep. 309.

29. Anderson *v.* Berry, 15 N. J. Eq. 232; Shepard *v.* Parker, 35 N. C. 103; *Ex p.* Haughton, 14 N. C. 441. See also Burns *v.* Ford, 1 Bailey (S. C.) 507; *In re* Alexander, 31 Ont. 167, by statute.

Action on failure to settle accounts.— The discretion of the court to allow or refuse commissions to a personal representative who has failed to settle his accounts is reviewable on appeal. Trevelyan *v.* Lofft, 83 Va. 141, 1 S. E. 901; Brent *v.* Clevinger, 78 Va. 12.

30. Hoffar *v.* Stonestreet, 6 Md. 303; Andress *v.* Andress, 46 N. J. Eq. 528, 22 Atl. 124.

31. Perret's Succession, 20 La. Ann. 86; Estill *v.* McClintic, 11 W. Va. 399. See also Zentner *v.* Schinz, 90 Wis. 236, 63 N. W. 162.

32. Hawkins *v.* Cunningham, 67 Mo. 415 (as the compensation is not within the discretion of the court); Pomeroy *v.* Mills, 37 N. J. Eq. 578; Anderson *v.* Berry, 15 N. J. Eq. 232; Green *v.* Barbee, 84 N. C. 69; Shepard *v.* Parker, 35 N. C. 103.

Review not a matter of right.— Wetherill's Estate, 13 Phila. (Pa.) 273.

33. *Alabama.*— Noble *v.* Jackson, 132 Ala. 230, 31 So. 450.

California.— *In re* Hedrick, 127 Cal. 184, 59 Pac. 590.

District of Columbia.—Sinnott *v.* Kenaday, 14 App. Cas. 1.

Florida.— Sanderson *v.* Sanderson, 20 Fla. 292.

Illinois.— Askew *v.* Hudgens, 99 Ill. 468.

Kentucky.— Cabell *v.* Cabell, 1 Metc. 319; Wood *v.* Lee, 5 T. B. Mon. 50; Ramsay *v.* Ramsay, 4 T. B. Mon. 151; Quaintance *v.* Darnell, 14 Ky. L. Rep. 238.

Maryland.— Dalrymple *v.* Gamble, 68 Md. 156, 11 Atl. 718; Handy *v.* Collins, 60 Md. 229, 45 Am. Rep. 725; Wilson *v.* Wilson, 3 Gill & J. 20.

Michigan.— Wisner *v.* Mabley, 70 Mich. 271, 38 N. W. 262; Mower's Appeal, 48 Mich. 441, 12 N. W. 646.

Mississippi.— Powell *v.* Burrus, 35 Miss. 605; Satterwhite *v.* Littlefield, 13 Sm. & M. 302.

Montana.— *In re* Ford, 29 Mont. 283, 74 Pac. 735, allowance to special administrator.

New Jersey.— Anderson *v.* Berry, 15 N. J. Eq. 232.

New York.— See Riggs *v.* Cragg, 26 Hun 89 [*reversed* on another ground in 89 N. Y. 479].

North Carolina.—Green *v.* Barbee, 84 N. C. 69; Walton *v.* Avery, 22 N. C. 405. See also Whitted *v.* Webb, 22 N. C. 442; *Ex p.* Naughton, 14 N. C. 441 [*overruling* Potter *v.* Stone, 9 N. C. 331].

Oregon.— *In re* McCullough, 31 Oreg. 86, 49 Pac. 886.

Pennsylvania.— Davis' Appeal, 100 Pa. St. 201; Twaddell's Appeal, 81* Pa. St. 221. See also Laubach's Estate, 9 Kulp 150; Scheidt's Estate, 2 Woodw. 355.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2147.

Presumption that allowance properly made. — In the absence of anything to the contrary, it will be presumed that the compensation awarded was rightfully allowed (Patterson *v.* Bell, 25 Iowa 149; McCracken *v.* McCracken, 6 T. B. Mon. (Ky.) 342), but the allowance of a reasonable compensation and expenses to an administrator cannot be presumed in the absence of any showing in the record as to whether they were allowed or not (Dromgoole *v.* Smith, 78 Va. 665).

34. Glover *v.* Holliday, 109 Mo. 108, 18 S. W. 1133.

35. *Ex p.* Hodge, 6 Ind. App. 487, 33 N. E. 980; Morris' Appeal, 42 Leg. Int. (Pa.) 395.

36. Webster *v.* Webster, 7 Ky. L. Rep. 302.

37. Bates *v.* Vary, 40 Ala. 421.

F. Stating and Settling Accounts — 1. Form and Requisites — a. In General. No special form is generally required for the account of a personal representative,[38] but such an account should present briefly a clear and definite statement of the conduct of the administration.[39] The account should ordinarily be stated in the form of debits and credits[40] and the receipts and disbursements should be itemized.[41] In stating an account the income or interest should be sepa-

38. Solomons *v.* Kursheedt, 3 Dem. Surr. (N. Y.) 307. See also Sackett *v.* Wilson, 2 Blackf. (Ind.) 85; Weir *v.* Monahan, 67 Miss. 434, 7 So. 291; Henshaw *v.* Robertson, Bailey Eq. (S. C.) 311, holding that where a party is ordered to render "a full and fair account" it is no objection to the account presented that it is in a book which contains a variety of other matters.

39. *Georgia.*— See Davis *v.* Brookins, 53 Ga. 282.

Kentucky.— See McCracken *v.* McCracken, 6 T. B. Mon. 342.

Louisiana.— Lacroix's Succession, 29 La. Ann. 366; Hickman *v.* Flenniken, 12 La. Ann. 268. And see Kendrick's Succession, 7 Rob. 138.

New Jersey.— See Morgan *v.* Morgan, 48 N. J. Eq. 399, 22 Atl. 545.

New York.— Sheldon *v.* Wright, 7 Barb. 39; Solomons *v.* Kursheedt, 3 Dem. Surr. 307; Bullard *v.* Benson, 1 Dem. Surr. 486 (as to showing amount of residuary estate); *In re* Jones, 1 Redf. Surr. 263. See also Matter of Phyfe, 5 N. Y. Leg. Obs. 331.

Pennsylvania.— Marshall's Estate, 34 Pittsb. Leg. J. 382.

South Carolina.— See Lewis *v.* Price, 3 Rich. Eq. 172.

Tennessee.— See Read *v.* Franklin, (Ch. App. 1900) 60 S. W. 215.

Virginia.— See Cary *v.* Macon, 4 Call 605.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2150.

The correct form of presenting an account of administration is to charge the accountant with the inventory and appraisement, and all moneys received since filing the same, together with any excess over the appraised value realized by the sale of personal property and any proper surcharges. Credit is then to be allowed for preferred debts, expense of administration, allowance to widow, loss on appraisement, and debts of decedent, if undisputed, and then the true balance for distribution will appear. Squire's Estate, 11 Phila. (Pa.) 110.

Where notes and accounts are contained in the inventory of a decedent's estate, the settlement with the administrator should show distinctly which of them have been collected; and, as to those which have not been collected, the causes of the failure to collect them should be satisfactorily explained. Steele *v.* Morrison, 4 Dana (Ky.) 617.

Sales of realty.— It seems that where by will a personal representative is given full authority to dispose of the real estate of the deceased without further proceedings in court relating thereto, either asking for sale or confirmation of the same, it is proper to require the personal representative in making his account to set out with reasonable fulness all such sales, giving the date of the sale, the location of the land, the amount sold, and the name of the purchaser. When, however, the personal representative must secure the order of the court for the sale of his decedent's estate and report and have confirmed the sale of the same, all matters being matters of record and accessible at all times, the account need not be so specific. *In re* Williamson, 7 Ohio S. & C. Pl. Dec. 24, 4 Ohio N. P. 282.

As to what an intermediate account should state see *In re* Dwight, 9 N. Y. Suppl. 927, 2 Connoly Surr. (N. Y.) 180.

A list of all the unpaid claims against the estate and of the names and residences of persons interested in the estate may be required of a personal representative on filing his account, under the Pennsylvania act of 1832. Fettig's Estate, 5 Kulp (Pa.) 152.

In Louisiana an account should declare the nature of the claims of the creditors, and their names and residences should be mentioned. Gautier's Succession, 8 La. Ann. 451.

40. Duncan *v.* Tobin, Cheves Eq. (S. C.) 143, 34 Am. Dec. 605; Pulliam *v.* Pulliam, 10 Fed. 23. See also Maxwell *v.* McCreery, 57 N. J. Eq. 287, 41 Atl. 498; Whitlock *v.* Whitlock, 13 Rich. Eq. (S. C.) 165.

Scaling.— During the period of paper money, all sums of debit and credit in an administration account ought to be stated in due order of time, and to stand as nominally entered, without scaling, when the executor is debtor; but, when there is an excess, it should be scaled. Cary *v.* Macon, 4 Call (Va.) 605.

41. Thurmond *v.* Sanders, 21 Ark. 255; Hutchinson's Appeal, 34 Conn. 300; Fairman's Appeal, 30 Conn. 205; Swan *v.* Wheeler, 4 Day (Conn.) 137. And see Matter of Hunt, 84 N. Y. App. Div. 159, 82 N. Y. Suppl. 538.

In Oregon the statute requires that the final account of an administrator shall contain a detailed statement of the amount of money received and expended by him, from whom received, and to whom paid, and refer to the vouchers for such payments. See *In re* Osburn, 36 Oreg. 8, 58 Pac. 521; *In re* Partridge, 31 Oreg. 297, 51 Pac. 82.

Items of expenditure may be expressed in general terms. Liddel *v.* McVickar, 11 N. J. L. 44, 19 Am. Dec. 369. See also Wheaton *v.* Pope, 91 Minn. 299, 97 N. W. 1046; *In re* McCullough, 31 Oreg. 86, 49 Pac. 886.

Kind of money received.— A representative may be required to specify in his account the kind of money received by him as the prop-

rated from the principal.[42] Expenses of administration and the representative's compensation need not be included in the account, as they are claims which are to be ascertained and adjusted by the court.[43] The account of a domiciliary personal representative as to property in another state, where he has taken out ancillary letters of administration, should be rendered by obtaining a certified copy of the account rendered in the other state, with a certificate of the proper court that the same has been examined, allowed, and confirmed, and that the original account and necessary vouchers are on file.[44] When an account as presented is not sufficiently specific, or is otherwise defective, it may be amended by order of court[45] and mistakes in accounts may be corrected on their settlement.[46] The court cannot command the conscience of the personal representative, so as to compel him to conform his returns under oath to the views of the court. It is for the representative to make returns; the court judges their effect.[47]

b. Blending or Separating Accounts. Blending into one account the transactions of an accountant as administrator with the will annexed and as trustee under appointment by the court is irregular, tends to confusion, and will not be allowed.[48] Neither should the account of an administrator *de bonis non* with the will annexed be blended with the account of the first executor.[49] Where a will creates several distinct trusts in the executors, a separate account should be rendered as to each of such trusts.[50] In a suit by wards and distributees against their father's executors and their guardian for an account, there should be a separate account taken with each distributee and ward.[51] Separate estates cannot be blended by the consent of persons interested therein and only one account rendered and one settlement effected.[52] An account cannot be rejected merely because it mingles statements as to the proceeds of real property with statements as to personal property;[53] but where sureties on an administration bond are not responsible for the proceeds of realty,[54] separate accounts of personalty and of the proceeds of realty should be rendered, when on a settlement the liability of such sureties is to be determined.[55]

erty of the estate. Magraw *v.* McGlynn, 26 Cal. 420.

Details of continued business of decedent. — Where an administrator, without authority, continues the business of his intestate, he need not state the details of the business in his account, since it becomes his individual business. Matter of Munzor, 4 Misc. (N. Y.) 374, 25 N. Y. Suppl. 818.

42. Rankin's Estate, 9 Wkly. Notes Cas. (Pa.) 407; Evans' Estate, 11 Phila. (Pa.) 113.

Dividends on railroad and bank-stock, declared after a decedent's death, should be credited to the income of the estate, and not to the principal, in the account. Cassady's Estate, 13 Phila. (Pa.) 365.

43. Lund *v.* Lund, 41 N. H. 355; Matter of Kane, 64 N. Y. App. Div. 566, 72 N. Y. Suppl. 333; Matter of Collyer, 9 N. Y. Suppl. 297, 1 Connoly Surr. (N. Y.) 546. But see Coggin's Appeal, 3 Walk. (Pa.) 426.

44. *In re* Phelps, 3 Ohio Dec. (Reprint) 13, 2 Wkly. L. Gaz. 120.

45. *California.*— Hirschfeld *v.* Cross, 67 Cal. 661, 8 Pac. 507.

Maine.— See Pettingill *v.* Pettingill, 60 Me. 411, 64 Me. 350.

Michigan.— Jackson *v.* Leech, 113 Mich. 391, 71 N. W. 846 (amended on appeal to circuit court); Loomis *v.* Armstrong, 63 Mich. 355, 29 N. W. 867.

New Jersey.— Maxwell *v.* McCreery, 57 N. J. Eq. 287, 41 Atl. 498.

New York.— Matter of Munzor, 4 Misc. 374, 25 N. Y. Suppl. 818.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2150.

46. Russell *v.* Wheeler, 129 Mich. 41, 88 N. W. 73; James *v.* Craighead, (Tex. Civ. App. 1902) 69 S. W. 241.

Alteration by court.— The orphans' court has no authority to make alterations in the account of an administrator by striking out items on both sides of the account and interlining others, but still preserving in the aspect of the account such an appearance as would indicate that the administrator had sworn to the account as altered, when as a matter of fact he had not; but the court should proceed to state the account *de novo*. Eakin *v.* Brick, 16 N. J. L. 98.

47. Trotter *v.* Trotter, 40 Miss. 704.

48. Simon's Estate, 9 Pa. Dist. 59.

49. Hamaker's Estate, 5 Watts (Pa.) 204.

50. Frame *v.* Willets, 4 Dem. Surr. (N. Y.) 368.

51. Duncan *v.* Petty, 3 Dana (Ky.) 223.

52. Richardson *v.* Richardson, 24 Ala. 395.

53. *In re* Place, 1 Redf. Surr. (N. Y.) 276.

54. See *infra*, XVII, B, 8.

55. Baldwin's Estate, 1 Chest. Co. Rep. (Pa.) 315. See also Strother *v.* Hull, 23 Gratt. (Va.) 652.

c. Verification. Accounts of personal representatives should be duly verified.[56]

2. Objections and Exceptions — a. In General. If a person interested in an estate wishes to contest an account presented for settlement by the executor or administrator, he must make proper objections and take proper exceptions.[57] But whether exceptions are filed or not, the court should carefully examine every account presented for settlement and be satisfied that it is in every respect practically correct before entering an order settling it.[58] A question which is not adjudicated on an accounting is not properly the subject of an exception.[59]

b. Form and Sufficiency. Exceptions must be taken in the manner provided by statute,[60] and it is sometimes required that the exceptions be filed in writing.[61]

56. *Louisiana.*— See Rabasse's Succession, 50 La. Ann. 746, 23 So. 910.

Massachusetts.— Bailey *v.* Blanchard, 12 Pick. 166.

New York.— Matter of Kane, 64 N. Y. App. Div. 566, 72 N. Y. Suppl. 333; Westervelt *v.* Gregg, 1 Barb. Ch. 469; Gardner *v.* Gardner, 7 Paige 112 [*reversed* in 22 Wend. 526]; Williams *v.* Purdy, 6 Paige 166; Kellett *v.* Rathbun, 4 Paige 102. But see Sheldon *v.* Wright, 7 Barb. 39 [*affirmed* in 5 N. Y. 497].

Pennsylvania.— Case's Estate, 1 Kulp 307, verification by representative's attorney insufficient.

South Carolina.— Duncan *v.* Tobin, Cheves Eq. 143, 34 Am. Dec. 605. But see Henshaw *v.* Robertson, Bailey Eq. 311, holding the omission of a formal affidavit immaterial if the personal representative attends in person and is examined on oath as to his account.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2152.

Where there are several personal representatives the affidavit of one of them to the truth of the account is sufficient. Kennedy *v.* Wachsmuth, 12 Serg. & R. (Pa.) 171, 14 Am. Dec. 676.

57. *In re* More, 121 Cal. 635, 54 Pac. 148; Matter of Hart, 60 Hun (N. Y.) 516, 15 N. Y. Suppl. 239. See also Matter of Fithian, 3 N. Y. Suppl. 193, 1 Connoly Surr. (N. Y.) 187; *In re* Jacoby, 201 Pa. St. 442, 50 Atl. 935; Wilbur's Estate, 9 Kulp (Pa.) 327. *Compare* Moore's Estate, 96 Cal. 522, 31 Pac. 584.

If the objections filed are insufficient, the surrogate may allow further objections to be filed from time to time, and it seems that a referee has the power to entertain a motion to amend an objection and to allow a further objection. Boughton *v.* Flint, 74 N. Y. 476; Fithian's Estate, 14 N. Y. Civ. Proc. 52.

Technical objections.— Some injury must be shown before one, although interested in the estate, will be permitted to object to a final account, because some technical requirement has been imperfectly complied with. *In re* Conser, 40 Oreg. 138, 66 Pac. 607.

Confirmation when no opposition.— In Louisiana when legal notices of the filing of the representative's account have been given and the legal delays for opposition have expired, any party in interest may obtain a judgment homologating the account. Rabasse's Succession, 50 La. Ann. 746, 23 So. 910. See also Moise's Succession, 107 La. 717, 31 So. 990.

Subsequently discovered errors.— If the account of an executor or administrator, under a citation from a surrogate, is produced properly authenticated, the adverse party should be called upon by the surrogate to state his objections, if any; but such objections do not absolutely conclude the party from further objecting, if, in the course of the investigation, errors in the account are discovered, which the party objecting had no means of knowing at the time when he was called upon to object to the account. Gardner *v.* Gardner, 7 Paige (N. Y.) 112 [*reversed* in 22 Wend. 526].

Demurrer.— In Indiana the statute provides that exceptions may be filed to an administration account, but does not authorize an answer to such exceptions, and hence no question can be raised by a demurrer to such pleading. Dohle *v.* Stults, 92 Ind. 540.

58. Waller *v.* Ray, 48 Ala. 468; *In re* Willey, 140 Cal. 238, 73 Pac. 998; *In re* Franklin, 133 Cal. 584, 65 Pac. 1081; *In re* More, 121 Cal. 635, 54 Pac. 148; *In re* Spanier, 120 Cal. 698, 53 Pac. 357; Sanderson's Estate, 74 Cal. 199, 15 Pac. 753. See also Jones *v.* Graham, 36 Ark. 383; Slaughter *v.* Slaughter, 8 B. Mon. (Ky.) 482.

59. Bradley's Estate, 5 Pa. Co. Ct. 572.

60. Blackwell *v.* Blackwell, 29 N. J. Eq. 576.

61. Cummings *v.* Bradley, 57 Ala. 224; *In re* Marre, 127 Cal. 128, 59 Pac. 385 (written objections waived); More's Estate, 121 Cal. 635, 54 Pac. 148; Von Hoven's Succession, 46 La. Ann. 911, 15 So. 391. *Compare* Kennedy's Estate, 120 Cal. 458, 52 Pac. 820, holding that it is not improper for the court to listen to objections to such an account in advance of the filing of written objections.

An opposition in the form of an answer in writing is sometimes filed. *In re* Halleck, 49 Cal. 111 (holding that one who files an opposition to the settlement of the final account of an executor and to a decree of distribution on the ground that he has a contingent claim against the estate must state in his opposition facts showing that such claim exists); Bothick's Succession, 47 La. Ann. 613, 17 So. 198; Milmo's Succession, 47 La. Ann. 126, 16 So. 772; Sparrow's Succession, 39 La. Ann. 696, 2 So. 501; Commagere's Succession, 38 La. Ann. 830; Bofenschen's Succession, 29 La. Ann. 711 (holding

When a person interested in a decedent's estate is not satisfied with the account of the personal representative, he must point out to the court clearly and specifically the ground of his objections;[62] and whether or not exceptions filed are sufficiently specific must be determined from the circumstances of the case.[63]

c. Time For Making Objections and Filing Exceptions. The law usually designates a period within which opposition must be made, particularly in excepting to an allowance, and one who objects or excepts should comply with such a requirement.[64]

d. Persons Entitled to Object. Any person interested in the disposition of the property of a decedent embraced in an administration account may object or file exceptions to its allowance.[65] Legatees and distributees come within the scope of

that if the opposition does not contain a general clause indicating opposition to the whole account, the opponent will be confined in his contestation to those items specifically mentioned); Barbour's Succession, 17 La. Ann. 133; Foster's Succession, 4 La. Ann. 479; Filhiol *v.* Hempkin, 16 La. 326.

62. *Alabama.*—Robertson *v.* Black, 74 Ala. 322; Pearson *v.* Darrington, 32 Ala. 227.

California.— *In re* More, 121 Cal. 635, 54 Pac. 148.

Illinois.— Elder *v.* Whittemore, 51 Ill. App. 662.

Indiana.— Conger *v.* Babcock, 87 Ind. 497; Christie *v.* Wade, 87 Ind. 294.

New Jersey.— Holcomb *v.* Holcomb, 11 N. J. Eq. 281.

New York.— Metzger *v.* Metzger, 1 Bradf. Surr. 265.

Pennsylvania.— Harned's Estate, 10 Kulp 183.

Tennessee.— Guild *v.* Young, (Ch. App. 1901) 62 S. W. 404.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2164.

Items excepted to must be specifically stated. Elder *v.* Whittemore, 51 Ill. App. 662; Birkholm *v.* Wardell, 42 N. J. Eq. 337, 7 Atl. 569; Reeside *v.* Reeside, 6 Phila. (Pa.) 507. But see Peck *v.* Sherwood, 56 N. Y. 615.

Surcharging or falsifying.— It is a well settled rule in equity that one who objects to a stated account must surcharge or falsify, that is, must allege an omission in the account or deny the correctness of some or of all the items rendered. An account rendered by a personal representative is a stated account within the meaning of this rule. Tate *v.* Gairdner, 119 Ga. 133, 46 S. E. 73. See also Carey *v.* Monroe, 54 N. J. Eq. 632, 35 Atl. 456.

Credit illegal in part.— On the settlement of the accounts of an administrator, where a credit claimed is legal in part, and in part illegal, an exception to the allowance of such credit need not point out what part is illegal. Pearson *v.* Darrington, 32 Ala. 227.

63. Thompson *v.* Mott, 2 Dem. Surr. (N. Y.) 154. See also *In re* McEvoy, 3 N. Y. Suppl. 207, 6 Dem. Surr. (N. Y.) 71.

64. *Delaware.*— Larkin *v.* Sims, 2 Pennew. (Del.) 543, 46 Atl. 750; Allen *v.* Leach, 7 Del. Ch. 83, 29 Atl. 1050.

Louisiana.— Ball *v.* Ball, 42 La. Ann. 204, 7 So. 567; Scott's Succession, 41 La. Ann. 668, 6 So. 792; Bellande's Succession, 41 La. Ann. 491, 6 So. 505; Price's Succession, 35 La. Ann. 905 (opposition filed at any time before homologation of account); Ostrander's Succession, 26 La. Ann. 450; Hogan's Succession, 25 La. Ann. 331; Macarty's Succession, 3 La. Ann. 383; Chiasson *v.* Dupuy, 9 La. 57; Longbottom *v.* Babcock, 9 La. 44; Marchand *v.* Caurlier, 4 La. 299; McCombs *v.* Dunbar, 3 La. 517.

Mississippi.— If a probate judge states an executor's account in vacation, when it comes forward for allowance and confirmation in term-time, exceptions may be filed to it in court; or, if the account is stated by a commissioner to whom it has been referred, it may in like manner be excepted to in court when it is presented for allowance and confirmation. Smith *v.* Hurd, 8 Sm. & M. 682.

New York.—Matter of Von Glahn, 53 N. Y. App. Div. 164, 65 N. Y. Suppl. 865; Matter of Ferrigan, 42 N. Y. App. Div. 1, 58 N. Y. Suppl. 920 [*affirmed* in 160 N. Y. 689, 55 N. E. 1095].

Texas.— Houston *v.* Mayes, 66 Tex. 297, 17 S. W. 729, at any time before any application or other proceeding is decided by the court opposition may be filed thereto in writing. See also Walker *v.* Kerr, 7 Tex. Civ. App. 498, 27 S. W. 299.

Virginia.— Morriss *v.* Garland, 78 Va. 215, practice to allow exceptions to be taken to report of commissioners, appointed to effect a settlement of estate at any time before the case is heard on it.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2162.

65. *Alabama.*— Spear *v.* Banks, 125 Ala. 227, 27 So. 979.

California.— *In re* Spanier, 120 Cal. 698, 53 Pac. 357 (administrator may contest the account of his predecessor); Rose's Estate, 66 Cal. 241, 5 Pac. 220, guardian.

Indiana.— Swift *v.* Harley, 20 Ind. App. 614, 49 N. E. 1069.

Maryland.— Helms *v.* Franciscus, 2 Bland 544, 20 Am. Dec. 402.

Montana.— *In re* Barker, 26 Mont. 279, 67 Pac. 941.

New Jersey.— Dunham *v.* Marsh, 52 N. J. Eq. 831, 31 Atl. 619; Poulson *v.* Frenchtown Nat. Bank, 33 N. J. Eq. 618, account of discharged or removed representative.

New York.— Buchan *v.* Rintoul, 70 N. Y. 1.

Pennsylvania.— Tracy's Estate, 13 Montg. Co. Rep. 30.

this rule,[66] and a creditor may be a person interested, and so entitled to contest such an account.[67] So also an executor or administrator may contest the account of his co-representative.[68] But where one who objects or excepts has no interest therein his intervention will not be permitted,[69] and one who claims property as belonging to himself and not to the estate of the decedent cannot make objection.[70]

e. Estoppel and Waiver. One may as a result of his acts or agreements be estopped to make objections to or to contest the account of a personal representative,[71] and one who has been paid by a personal representative considerably more

Texas.— Houston *v.* Mayes, 66 Tex. 297, 17 S. W. 729.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2158.

Effect of reversal of decree by appellate court.— The reversal by the appellate court of a decree settling the account of an administrator sets aside such settlement and thereafter any person interested in the estate may appear in the lower court and file exceptions to the account. Rose's Estate, 66 Cal. 241, 5 Pac. 220.

66. Ames' Succession, 33 La. Ann. 1317; Barbour's Succession, 17 La. Ann. 133; Dampf's Appeal, 97 Pa. St. 371. *Compare* Hope's Estate, 34 Pittsb. Leg. J. (Pa.) 251.

Residuary legatees who have no vested rights in the annual profits of an estate have no right to question the account of an executor as to such profits. Martin's Appeal, 23 Pa. St. 433. A residuary legatee is not a claimant against an estate within the meaning of the Oregon statute, but if he were he would have to show some injury before he would be permitted to object to a final account, because some technical requirement has been imperfectly complied with. Conser's Estate, 40 Oreg. 138, 66 Pac. 607.

67. *Alabama.*— Byrd *v.* Jones, 84 Ala. 336, 4 So. 375.

California.— See *In re* Fisher, (1895) 42 Pac. 237.

Louisiana.— Sterry's Succession, 38 La. Ann. 854; Glover's Succession, 2 La. Ann. 4. See also Cabouret's Succession, 9 La. Ann. 520, some proof of being a creditor necessary.

Missouri.— Wilson *v.* Ruthrauff, 82 Mo. App. 435.

New Jersey.—See U. S. Equitable L. Assur. Soc. *v.* Chesley, 63 N. J. Eq. 219, 49 Atl. 718.

New York.— Martine's Estate, 11 Abb. N. Cas. 50.

Pennsylvania. — See Reese's Appeal, 116 Pa. St. 272, 9 Atl. 315.

Wisconsin.— See Robinson *v.* Hodgkin, 99 Wis. 327, 74 N. W. 791.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2160.

Extent of right.— A creditor has no right to oppose each and every item on a tableau of distribution in a thoroughly solvent succession, where, after an amount amply sufficient to meet his claim has been retained, the payment of such items cannot possibly affect or injure him. Gohs' Succession, 37 La. Ann. 428.

A creditor whose claim is barred by reason of his failure to file it within the time prescribed by statute has no interest in an estate which will entitle him to object to an administration account. Schrichte *v.* Stite, 127 Ind. 472, 26 N. E. 77, 1009. But *compare* Martin's Estate, 11 Abb. N. Cas. (N. Y.) 50.

A creditor of a distributee has not such an interest in the decedent's estate as authorizes him to contest an administration account. Owens *v.* Thurmond, 40 Ala. 289.

The mere allegation that one is a creditor of an estate is conclusive for the purpose of entitling him to be heard under a statute giving creditors the right to contest the account of a personal representative. Matter of Miles, 33 Misc. (N. Y.) 147, 68 N. Y. Suppl. 368 [*reversed* on other grounds in 61 N. Y. App. Div. 562, 71 N. Y. Suppl. 71].

68. Mead *v.* Willoughby, 4 Dem. Surr. (N. Y.) 364; Matter of Ritch, 2 Redf. Surr. (N. Y.) 330. *Compare* Eager *v.* Roberts, 2 Redf. Surr. (N. Y.) 247, holding that an executor who has performed no duties in settling the estate has no standing in court to object to the correctness of the account of his co-executor.

69. *Kentucky.*— Bailey *v.* Furnish, 3 Dana 455.

Louisiana.—Poret's Succession, 26 La. Ann. 157.

Mississippi.— Byrd *v.* Wells, 40 Miss. 711, a remainder-man cannot except to an allowance which affects merely the beneficiaries for life.

Nebraska.— Tunnicliffe *v.* Fox, (1903) 94 N. W. 1032.

New York.— See Matter of Sudds, 75 N. Y. App. Div. 612, 77 N. Y. Suppl. 413.

Pennsylvania.— Law's Estate, 140 Pa. St. 444, 21 Atl. 429 [*affirming* 8 Pa. Co. Ct. 296]; Herbein's Estate, 2 Chest. Co. Rep. 449; Stevens' Estate, 3 Lanc. L. Rev. 170.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2158.

70. Cathey *v.* Kerr, 15 La. Ann. 228.

71. *Arkansas.*— See Jacoway *v.* Hall, 67 Ark. 340, 55 S. W. 12.

District of Columbia.— See Sinnott *v.* Kenaday, 14 App. Cas. 1 [*reversed* on other grounds in 179 U. S. 606, 21 S. Ct. 233, 45 L. ed. 339].

Kentucky.— Harber *v.* Green, 7 Ky. L. Rep. 594.

Louisiana.— Brownlee's Succession, 44 La. Ann. 917, 11 So. 590; Ross' Succession, 1 La. Ann. 129.

New Jersey.— Pursel *v.* Pursel, 14 N. J. Eq. 514.

than he had any right to claim from him is not in a position to complain of his accounts.[72] A person appealing generally from the allowance of an administration account is bound to make all objections to the account as it then stands and if he fails to object to an item he waives his objection to it.[73]

f. Exceptions to Partial Accounts. Any account filed by a personal representative is open to be excepted to at the final settlement, and it is not necessary that exceptions should be taken previously, although it may sometimes be expedient to file exceptions to the different accounts as they are from time to time settled,[74] and exceptions, although not groundless, may be overruled where in the judgment of the court they would be more properly exhibited against the final than against a mere partial account.[75] When persons prefer exceptions to a partial account and withdraw them before its confirmation, they have no right to prefer the same exceptions to a subsequent account, but such withdrawal will not prevent other persons from making the same exception.[76]

3. Hearing and Reference — a. In General. The proceedings on the filing of exceptions to an administration account are in the nature of a suit[77] in equity.[78] Whenever applicable the rules of procedure in civil cases should be applied,[79] but in most matters arising in such a proceeding strict formality is not required.[80] The personal representative stands as plaintiff and the objector as defendant in such proceedings,[81] and the former has the right to open and conclude.[82] Such proceedings may be continued for proper cause[83] or stayed pending the determina-

Pennsylvania.— Ginginger's Estate, 2 Woodw. 206; Dolph's Estate, 3 Luz. Leg. Reg. 146.

Virginia.— Radford *v.* Fowlkes, 85 Va. 820, 8 S. E. 817.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2163; and Estoppel, 16 Cyc. 793.

A previous objection made on an accounting by executors that they could not account in the surrogate's court for the proceeds of realty does not estop the objecting parties to afterward claim that such proceeds were personalty, and to demand an accounting. Bolton *v.* Myers, 83 Hun (N. Y.) 259, 31 N. Y. Suppl. 588.

Circumstances not amounting to estoppel. — Where the administrator of an estate sells a crop of cotton belonging to the estate on credit, and takes from the purchaser, who afterward becomes insolvent, a note without sureties, and the husband of one of the distributees actually assists in making the sale, but it is not shown that he knew of or approved the taking of the notes without sureties, she will not be estopped from objecting to the note as a credit to the administrator in final settlement. Walls *v.* Grigsby, 42 Ala. 473. A legatee is not estopped to contest a charge which is made against him by advice of his attorney, who without his knowledge is also attorney for the personal representative. *In re* Cummings, 120 Iowa 421, 94 N. W. 1117. The failure of a creditor of a decedent to object to certain acts of the administrator, it not appearing that he knew his rights, or that his failure to object influenced the administrator's conduct, creates no estoppel in the creditor to object to the accounts of the administrator. Crum *v.* Meeks, 128 Ind. 360, 27 N. E. 722.

72. Williams *v.* Rhodes, 81 Ill. 571.

73. Clement's Appeal, 49 Conn. 519.

74. Steele *v.* Knox, 10 Ala. 608; Dement *v.* Heth, 45 Miss. 388; Picot *v.* O'Fallon, 35 Mo. 29, 86 Am. Dec. 134; *In re* Walker, 3 Rawle (Pa.) 243. But see Weaver's Estate, 5 Lanc. Bar (Pa.) Jan. 24, 1874.

75. Tracy *v.* Card, 2 Ohio St. 431.

76. Light's Appeal, 22 Pa. St. 445.

77. Gray *v.* Harris, 43 Miss. 421.

Special findings of fact.— While the proceeding to test the correctness of a personal representative's account is not in a broad and technical sense a civil action, yet the report and the exceptions from both issues of fact and of law for the court to determine, and the court may make a special finding of facts and state its conclusion of law thereon. Swift *v.* Harley, 20 Ind. App. 614, 49 N. E. 1069. See also Taylor *v.* Wright, 93 Ind. 121; Taylor *v.* McGrew, 29 Ind. App. 324, 64 N. E. 651.

A rule is not the proper mode to dispose of an opposition of heirs to a tableau of distribution when excepted to. Barbour's Succession, 17 La. Ann. 133.

78. *In re* Danforth, 66 Mo. App. 586; *In re* Meeker, 45 Mo. App. 186. See also Loomis *v.* Armstrong, 49 Mich. 521, 14 N. W. 505.

79. Goodbub *v.* Hornung, 127 Ind. 181, 26 N. E. 770.

80. Goodbub *v.* Hornung, 127 Ind. 181, 26 N. E. 770. See also Anderson *v.* Gregg, 44 Miss. 170; Sterrett's Appeal, 2 Penr. & W. (Pa.) 419.

81. Brownlee *v.* Hare, 64 Ind. 311.

82. Taylor *v.* Burk, 91 Ind. 252. See also Yingling *v.* Hesson, 16 Md. 112.

83. Neill *v.* Hodge, 5 Tex. 487. See also Baillio *v.* Wilson, 6 Mart. N. S. (La.) 334.

Continuance when account amended see Hasley's Succession, 27 La. Ann. 586.

tion of an independent suit over matters arising in connection therewith.[84] In proceedings on the settlement of estates such entries should be made as to show at whose instance settlements are ordered, what representatives appear before the court, and who claim under the estate and are actors in the cause.[85]

b. Submission of Issues to Jury. Issues of fact arising in an accounting proceeding in a probate court should generally be determined by the court and not submitted to a jury.[86] There may, however, be cases in which it is very desirable to submit an issue arising on a settlement of an account to a jury, and in such cases the court may doubtless frame an issue for the jury,[87] but the verdict will even then be only advisory to the court.[88]

c. Matters to Be Determined. The matters usually determined on an accounting are the amount of assets with which the personal representative should be charged,[89] the justness and legality of credits claimed against the estate arising from the payment of debts of the decedent, funeral expenses, statutory allowances, and the expenses of administration,[90] and whether the personal representative has managed the affairs of the estate with good faith and ordinary prudence.[91] Beyond these matters it is generally unnecessary to extend investigation. Irregularities which have not been prejudicial to the estate should not be inquired into,[92]

84. Troxler's Succession, 46 La. Ann. 738, 15 So. 153. See also John's Estate, 1 Chest. Co. Rep. (Pa.) 311.

The pendency of an action to recover certain lands alleged to belong to testator is not ground for staying proceedings on exceptions to the account of the executor. Matter of Benedict, 15 N. Y. St. 746.

85. Portis *v.* Creagh, 4 Port. (Ala.) 332.

86. *Alabama.*— Kirksey *v.* Kirksey, 41 Ala. 626. See also Harris *v.* Martin, 9 Ala. 895. But see Savage *v.* Dickson, 16 Ala. 256; Reynolds *v.* Reynolds, 11 Ala. 1023; Willis *v.* Willis, 9 Ala. 330.

California.— Sanderson's Estate, 74 Cal. 199, 15 Pac. 753.

Illinois.— Boyd *v.* Swallows, 59 Ill. App. 635.

Indiana.— Taylor *v.* Wright, 93 Ind. 121. *Compare* Clouser *v.* Ruckman, 89 Ind. 65; Hamlyn *v.* Nesbit, 37 Ind. 284.

Louisiana.— Bozant's Succession, 5 La. Ann. 709.

Missouri.— Schooler *v.* Stark, 73 Mo. App. 301; McClelland *v.* McClelland, 42 Mo. App. 32. See also *In re* Meeker, 45 Mo. App. 186.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2184.

Contra.— *In re* Atwood, 2 App. Cas. (D. C.) 74 [*citing* Pegg *v.* Warford, 4 Md. 385]; Barroll *v.* Reading, 5 Harr. & J. (Md.) 175.

On an appeal from the probate to the circuit court the parties have a right to a trial by jury. Wisner *v.* Mabley, 70 Mich. 271, 38 N. W. 262; Grovier *v.* Hall, 23 Mich. 7.

Matters discretionary with court.— The question of the allowance of an item, the allowance or disallowance of which is entirely discretionary with the court, is not a proper subject for an issue for a jury. Maynadier *v.* Armstrong, 98 Md. 175, 56 Atl. 357; Wisner *v.* Mabley, 70 Mich. 271, 38 N. W. 262; Mower's Appeal, 48 Mich. 441, 12 N. W. 646; Showers *v.* Morrill, 41 Mich. 700, 3 N. W. 193.

Issue of law not to be submitted.— The question whether an amount paid by an administrator out of assets in his hands should be placed to his credit is one of law and not of fact, and should not be submitted to a jury. Hapke *v.* People, 29 Ill. App. 546.

87. Moore's Estate, 72 Cal. 335, 13 Pac. 880; *In re* Pfeffer, 117 Mich. 207, 75 N. W. 454; Thompson's Appeal, 103 Pa. St. 603; Rife *v.* Galbreath, 3 Penr. & W. (Pa.) 204; Mothland *v.* Wireman, 3 Penr. & W. (Pa.) 185, 33 Am. Dec. 71; Sterrett's Appeal, 2 Penr. & W. (Pa.) 419. See also *In re* Rhoads, 3 Rawle (Pa.) 420. The demand of an issue is not, however, a matter of right upon every disputed claim, it must be shown by evidence that there exists in regard to such claim some disputed fact for the determination of which the intervention of a jury is necessary and of this necessity the court must determine from the evidence presented (Evans' Estate, 11 Phila. (Pa.) 113; Beehler's Estate, 3 Phila. (Pa.) 254. See also Sharp's Appeal, 3 Grant (Pa.) 260; Hansell's Estate, 11 Phila. (Pa.) 47), and one cannot take his chance for a favorable finding of facts by an auditor, and when the report is adverse demand as matter of right an issue to try the same facts before a jury (Bradford's Appeal, 29 Pa. St. 513; White's Estate, 11 Phila. (Pa.) 100).

88. Moore's Estate, 72 Cal. 335, 13 Pac. 880; *In re* Pfeffer, 117 Mich. 207, 75 N. W. 454.

89. Vulte *v.* Martin, 44 How. Pr. (N. Y.) 18.

90. *In re* Millenovich, 5 Nev. 161; Vulte *v.* Martin, 44 How. Pr. (N. Y.) 18; Arnold *v.* Smith, 14 R. I. 217. See also Cobb *v.* Speers. (Tex. Civ. App. 1899) 49 S. W. 666. matter to be determined is correctness of account.

91. *In re* Millenovich, 5 Nev. 161. See also Thorne *v.* Underhill, 1 Dem. Surr. (N. Y.) 306.

92. *In re* Millenovich, 5 Nev. 161, holding that whether the appraisers of an estate were

nor should the validity of the appointment of the personal representative be determined.[93] If, however, the interest of a person contesting a settlement is disputed that question may be determined.[94] When proceedings are instituted and conducted for an annual or partial settlement, the court of probate cannot of its own motion convert it into a final settlement and render a final decree.[95] In settling an administration account the payment of legacies or the distribution of the surplus should not be included.[96] Upon a contested settlement of an administration account, the account filed by the personal representative and the objections thereto represent the pleadings of the parties and the issues to be tried are to be determined therefrom.[97] Issues cannot be raised with parties and as to matters not brought into court through the presentation of the account.[98] A distributee cannot by objecting to a final settlement raise and litigate the question whether a personal representative is indebted to the estate, since the latter is entitled to a jury trial on that issue.[99] The right to land or to the rents or profits thereof must be settled by a direct action at law and not in a collateral manner by objecting to an administration account,[1] and one who claims property as belonging to himself and not to the estate administered will not be permitted to assert such claim by way of opposition to the account.[2] An objection to the account of an executor who is also trustee that the decree should provide for the quarterly payment to the objector of the interest payable to him under the will

disinterested parties or not was a question not necessary to be determined in an accounting proceeding.

93. Carroll *v.* Hughes, 5 Redf. Surr. (N. Y.) 337. See also Epperson's Succession, 26 La. Ann. 595.

94. Garwood *v.* Garwood, 29 Cal. 514; Herbein's Estate, 2 Chest. Co. Rep. (Pa.) 449. See also Poulson *v.* Frenchtown Nat. Bank, 33 N. J. Eq. 250. But see *In re* Willey, 140 Cal. 238, 73 Pac. 998.

95. Daughdrill *v.* Daughdrill, 108 Ala. 321, 19 So. 185; Whorton *v.* Moragne, 59 Ala. 641.

96. Ake's Appeal, 21 Pa. St. 320; Arnold *v.* Smith, 14 R. I. 217. See also South *v.* Hoy, 3 T. B. Mon (Ky.) 88; Bradbury *v.* Jefferds, 15 Me. 212.

Where an administration account shows no balance for distribution, the proper practice is to merely audit and settle the account and ascertain its correctness. It is error to hear and determine the claims of creditors, legatees, and distributees, until there is a fund for distribution. Snyder's Estate, 15 Pa. Co. Ct. 253; Jones' Estate, 19 Phila. (Pa.) 228; Hamill's Estate, 36 Leg. Int. (Pa.) 137.

97. Matter of Heuser, 87 Hun (N. Y.) 262, 33 N. Y. Suppl. 831; Matter of Hart, 60 Hun (N. Y.) 516, 15 N. Y. Suppl. 239. See also Pettingill *v.* Pettingill, 64 Me. 350; James *v.* West, 67 Ohio St. 28, 65 N. E. 156. *Compare* Conger *v.* Babcock, 87 Ind. 497, holding that an administration account is not a complaint, nor in the nature of a complaint, and is not the subject of demurrer.

The office of exceptions to administration accounts is not to demand affirmative relief, but to call the attention of the court to errors of omission or commission in the statements of account. The account and objections form the issue to be tried, and involve no more than the correctness of the account presented by the personal representative as such. His individual liability is not involved and claims against him individually must be determined in a jurisdiction other than the court of probate. *In re* Brown, 113 Iowa 351, 85 N. W. 617.

98. *Alabama.*— Jones *v.* Jemison, 4 Ala. 632.

California.— *In re* Vance, 141 Cal. 624, 75 Pac. 323.

Illinois.— Cagney *v.* O'Brien, 83 Ill. 72.

Louisiana.— Oteri's Succession, 108 La. 395, 32 So. 423 (provisional account filed); McCarty's Succession, 5 La. Ann. 434. See also Troxler's Succession, 46 La. Ann. 738, 15 So. 153.

New York.— Van Valkenburg *v.* Lasher, 53 Hun 594, 6 N. Y. Suppl. 775.

Pennsylvania.— Stine's Estate, 16 Pa. Super. Ct. 12.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2166.

Questions should not be determined as to matters which are entirely collateral (Byrd *v.* Jones, 84 Ala. 336, 4 So. 375), the liability as between the personal representatives and their sureties (Brigham *v.* Morgan, 185 Mass. 27, 69 N. E. 418), or agreements between co-representatives as to the division of commissions (*In re* Carter, 132 Cal. 113, 64 Pac. 123 [*modified* in (1901) 64 Pac. 484]). So also matters between the personal representative and the individual heirs or distributees and not between him and the estate are not properly cognizable in an accounting proceeding. Treat *v.* Treat, 80 Me. 156, 13 Atl. 684. See also Dray *v.* Bloch, 29 Oreg. 347, 45 Pac. 772.

99. Wilson *v.* Ruthrauff, 82 Mo. App. 435.

1. West *v.* Smith, 8 How. (U. S.) 402, 12 L. ed. 1130. See also Matter of Blow, 11 N. Y. Suppl. 193, 2 Connoly Surr. (N. Y.) 360; Vulte *v.* Martin, 44 How. Pr. (N. Y.) 18.

2. Cathey *v.* Kerr, 15 La. Ann. 228.

is more properly a matter for disposition upon the settlement of the decree.[3] The allowance of a claim of a personal representative against the estate of his decedent, procured by fraud, cannot be set aside upon exception to his account.[4] When a claim has been adjudicated against an administrator, it is so far binding upon the heirs that they cannot have the allowance set aside as against the claimant by exceptions to the administrator's account.[5] In Louisiana an opposition and not a separate action is the proper proceeding by an heir making a claim against the succession,[6] or by a creditor who demands to be placed on the tableau,[7] or for ascertaining the extent of the personal liability of a representative for acts of maladministration.[8] The question of the widow's right to the marital fourth may be raised and passed on in her opposition to the account when there are no heirs in Louisiana or claiming an interest and when the universal legatee is present and the account exhibits the proposed settlement of the succession.[9] A direct action should be brought to determine whether a legacy is illegal;[10] or to enforce a claim against the administrator of a succession for property belonging to another succession of which he is alleged to be in possession,[11] or an unliquidated claim for property not included in the inventory against a succession under administration.[12] The liability of a widow, as an intermeddler, for her husband's debts cannot be enforced by opposition to her tableau of distribution as his administratrix.[13]

d. Reference[14] — (i) *In General.* In a proper case, upon the settlement of the account of a personal representative, a reference may be ordered by the probate court to a referee, auditor, commissioner, or master.[15]

(ii) *Scope of Inquiry.* All matters submitted by the order under which the

3. Matter of Wolfe, 2 N. Y. Suppl. 494, 1 Connoly Surr. (N. Y.) 102.

4. Ashton *v.* Miles, 49 Iowa 564.

5. McLeary *v.* Doran, 79 Iowa 210, 44 N. W. 360 [*distinguishing* Dessaint *v.* Foster, 72 Iowa 639, 34 N. W. 454, in which case the claim was allowed in the absence of the administrator].

6. Bozant's Succession, 5 La. Ann. 709.

7. Pargoud *v.* Griffing, 10 La. 356.

8. Cooper *v.* Cotton, 15 La. Ann. 214.

9. Leppelman's Succession, 30 La. Ann. 468.

10. Barker's Succession, 10 La. Ann. 28.

11. Blancand's Succession, 48 La. Ann. 578, 19 So. 683.

12. Sanchez's Succession, 41 La. Ann. 504, 6 So. 791.

13. Mouton's Succession, 3 La. Ann. 561.

14. See, generally, REFERENCES.

15. *Arkansas.*— Quinlan *v.* Fitzpatrick, 25 Ark. 471, an auditor cannot be appointed unless exceptions have been filed to the account.

District of Columbia.— Matter of Ames, 3 MacArthur 30.

Georgia.— Gay *v.* Gay, 114 Ga. 361, 40 S. E. 265.

Illinois.— See *In re* Wincox, 186 Ill. 445, 57 N. E. 1073.

Iowa.— *In re* Heath, 58 Iowa 36, 11 N. W. 723.

Kentucky.— Smith *v.* Cochran, 7 Bush 548, reference required by statute. And see Chalfant *v.* Sterns, 4 Dana 602, eligibility of member of county court to act as commissioner.

Massachusetts.— Brigham *v.* Morgan, 185 Mass. 27, 69 N. E. 418.

Mississippi.— Anderson *v.* Gregg, 44 Miss. 170; Crowder *v.* Shackelford, 35 Miss. 321, statute as to references merely directory.

New York.—Matter of Woodward, 69 N. Y. App. Div. 286, 74 N. Y. Suppl. 755; Matter of Hoes, 54 N. Y. App. Div. 281, 66 N. Y. Suppl. 664; *In re* Fithian, 3 Silv. Supreme 282, 6 N. Y. Suppl. 409; Matter of Smith, 40 Misc. 331, 81 N. Y. Suppl. 1035; Matter of Munzor, 4 Misc. 374, 25 N. Y. Suppl. 818 (referee may allow filing of amended account); *In re* Siesel, 2 N. Y. Suppl. 704; Matter of Douglass, 3 Redf. Surr. 538; Matter of Foster, 3 Redf. Surr. 532 (auditor cannot withhold report until his fees are paid).

North Carolina.— Evans *v.* Smith, 84 N. C. 146.

Ohio.— James *v.* West, 67 Ohio St. 28, 65 N. E. 156, time within which causes must be adjudicated by referee.

Pennsylvania.— Spellisy's Estate, 174 Pa. St. 628, 34 Atl. 316; Maxwell *v.* McClintock, 10 Pa. St. 237; Ames' Appeal, 8 Pa. Cas. 332, 11 Atl. 232; Hughes' Estate, 19 Pa. Super. Ct. 534; Rankin's Estate, 5 Pa. Co. Ct. 603 (deducting and directing payment of witness' fees by auditor); John's Estate, 2 Chest. Co. Rep. 281; Marriot *v.* Davey, 1 Dall. 164, 1 L. ed. 83; Hansell's Estate, 11 Phila. 47 (time within which auditor must file his report); Gaul's Estate, 11 Phila. 18; Benner's Estate, 11 Phila. 6 (compensation of auditor); Hutchinson's Estate, 9 Phila. 322 (attaching vouchers to auditor's report). See also Parker's Appeal, 61 Pa. St. 478.

Tennessee.— Hall *v.* Hall, (Ch. App. 1900) 59 S. W. 203.

Texas.— Dwyer *v.* Kalteyer, 68 Tex. 554, 5 S. W. 75.

Virginia.—Nelson *v.* Kownslar, 79 Va. 468.

referee acts should be determined and no others;[16] but the approval and confirmation of an auditor's report by the probate court may cure whatever irregularity there may have been in the auditor's passing upon matters not within the submission to him.[17]

United States.— U. S. Bank *v.* Williams, 2 Fed. Cas. No. 942, 3 Cranch C. C. 240, report of auditor as evidence.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2185, 2187.

Consent references.— Notwithstanding the repeal of the statute authorizing the reference of the final account of a personal representative to a commissioner, such reference may be made by consent of parties. Cunningham *v.* Cunningham, 94 Ind. 557. But such accounts cannot be referred to auditors without the consent of the parties interested. Ludlow *v.* Ludlow, 4 N. J. L. 189.

Intermediate accounts.—The surrogate cannot of his own motion direct the examination of an intermediate account by a referee, the only object of such an account being to ascertain the condition of the estate, and not to determine the propriety or validity of the transactions of the personal representative. Matter of De Russey, 60 Hun (N. Y.) 577, 14 N. Y. Suppl. 177, 20 N. Y. Civ. Proc. 270 [*distinguishing* Buchan *v.* Rintoul, 70 N. Y. 1 (*affirming* 10 Hun 183)].

Commissioner or auditor appointed to state account see Chamberlain *v.* Chamberlain, 16 S. W. 455, 13 Ky. L. Rep. 192; Scott *v.* Dorsey, 1 Harr. & J. (Md.) 227 (holding that an auditor, in stating an account against executors, is not concluded by any allowance made to them by the orphans' court, but must determine from the vouchers whether the allowance was just); Witman's Appeal, 28 Pa. St. 376; Montgomery's Estate, 3 Brewst. (Pa.) 306.

Oath not necessary unless required by statute.— Smith *v.* Cochran, 7 Bush (Ky.) 548; Benoit *v.* Brill, 24 Miss. 83.

Removal.— A referee appointed to pass on the account of a personal representative will not be removed on the motion of the latter in the absence of any showing of bias against him or his attorney. *In re* Rainforth, 37 Misc. (N. Y.) 660, 76 N. Y. Suppl. 314.

Exceptions necessary.— A person desiring to take any part in the contest of an account before a referee must file objections to such account. Matter of Gilman, 2 Connoly Surr. (N. Y.) 78, 7 N. Y. Suppl. 694.

Including evidence in report.— When an order of reference does not require evidence to be reported, an exception on the ground of the failure of the referee to report evidence is not available. Cunningham *v.* Cunningham, 94 Ind. 557. *Compare* Steele *v.* Morrison, 4 Dana (Ky.) 617.

Additional finding.— After a referee has filed his report he cannot make an additional finding. Richardson's Estate, 2 Misc. (N. Y.) 288, 23 N. Y. Suppl. 978.

Decree made by court without report.— Where an administrator's account had been referred to the clerk of a probate court, it is no ground of exception that the court made a final decree without a report from the clerk. Satterwhite *v.* Littlefield, 13 Sm. & M. (Miss.) 302.

Arbitration.— See Caldwell *v.* Caldwell, 121 Ala. 598, 25 So. 825; Holdsombeck *v.* Fancher, 112 Ala. 469, 20 So. 519, both cases construing a statute providing for the reference of all matters of controversy arising on the settlement of a decedent's estate to arbitration.

16. Matter of Mellon, 56 Hun (N. Y.) 553, 9 N. Y. Suppl. 929; Matter of Rothschild, 42 Misc. (N. Y.) 161, 85 N. Y. Suppl. 1084; Matter of Leslie, 3 Redf. Surr. (N. Y.) 280; Coggins' Appeal, 3 Walk. (Pa.) 426; Wetherill's Appeal, 3 Walk. (Pa.) 261; Hughes' Estate, 19 Pa. Super. Ct. 534; Taylor's Estate, 5 Phila. (Pa.) 218; Homer's Estate, 1 Chest. Co. Rep. (Pa.) 319.

Objections filed.— When disputed accounts of an executor are referred to an auditor for examination, it is the duty of the auditor to pass upon the objections filed to the accounts and no others. Boughton *v.* Flint, 74 N. Y. 476 [*reversing* 13 Hun 206]. *Compare* Scheidt's Estate, 2 Woodw. (Pa.) 355.

Payments by way of distribution are not part of an administration account; and auditors appointed to settle such an account have no authority to report distribution. Robins' Estate, 180 Pa. St. 630, 37 Atl. 121.

The private account of the personal representative with the estate may be settled on a reference, although it may not have been specifically and particularly put in issue. Trevelyan *v.* Lofft, 83 Va. 141, 1 S. E. 901; Carter *v.* Cutting, 5 Munf. (Va.) 223.

Reference for correction of fraud.— In referring administration settlements for the correction of fraud, the court should find and designate the points in which the fraud consists and confine the reference to those points. Reinhardt *v.* Gartrell, 33 Ark. 727.

Disputed questions of fact should not be referred to the auditor so far as it may be avoided, but he should be confined as nearly as practicable to a mere statement of account. Dwyer *v.* Kalteyer, 68 Tex. 554, 5 S. W. 75.

Matters as to which no evidence has been submitted cannot be reported upon by an auditor. Bradley's Estate, 11 Phila. (Pa.) 87.

Only questions within the court's jurisdiction can be passed upon by an auditor. Axford's Estate, 11 Phila. (Pa.) 145.

On a rehearing of an executor's account by an auditing judge, in accordance with the opinion of the court, it is irregular to introduce new matter contrary to the findings of the court and not comprised within the purpose of the rehearing. Lafferty's Estate, 5 Pa. Dist. 347.

17. Bloom's Appeal, 106 Pa. St. 498. See also Matter of Mellen, 56 Hun (N. Y.) 553, 9 N. Y. Suppl. 929.

(III) *EXCEPTIONS TO REPORT.* The report of a referee may be excepted to by any party to the accounting proceedings;[18] and before passing upon the report in gross the court should consider in detail the exceptions taken thereto.[19] Exceptions ought to be at least specific enough to point out the error complained of.[20]

(IV) *POWER OF COURT AS TO REPORT.* A referee or auditor does not decide as a court, but is employed simply to aid the court making the reference, and is subject to its directions. His determination is subject to approval or disapproval of the court and his report amounts to nothing until confirmed by it.[21] The court may modify the report,[22] recommit it to the referee,[23] or set it aside.[24] But it has been held that where no exceptions have been taken and filed the court has no alternative but to confirm the report,[25] and the report of a referee has the force and effect of the verdict of a jury and must be allowed to stand, unless without support from the evidence,[26] or unless some plain and obvious error

18. Benoit *v.* Brill, 24 Miss. 83 (distributees); Tindal *v.* Tindal, 1 S. C. 111 (creditors); Dwyer *v.* Kalteyer, 68 Tex. 554, 5 S. W. 75. See also Benedict's Estate, 4 Lanc. L. Rev. (Pa.) 99.

Dismissal of exceptions.—Exceptions to the report of an auditor upon an administrator's account must be dismissed where the error complained of is not the error of the auditor, but of the court, which can only be corrected upon appeal. Taylor's Estate, 12 Phila. (Pa.) 137.

Exception as to parties.— It is not a good exception to the report of a commissioner appointed on a petition against an administrator for an accounting that the proper parties have not been made to the petition. That is an objection against the petition itself. Hobbs *v.* Craige, 23 N. C. 332.

19. *In re* Bedford, 30 Hun (N. Y.) 551.

20. Gay *v.* Gay, 114 Ga. 361, 40 S. E. 265; *In re* Moore, 103 Iowa 474, 72 N. W. 674; Hurlburt *v.* Hutten, 44 N. J. Eq. 302, 15 Atl. 417; Newell *v.* Dody, 33 N. Y. 83; *In re* Levy, 1 Abb. N. Cas. (N. Y.) 177; Ingrem *v.* Mackey, 5 Redf. Surr. (N. Y.) 357.

The surrogate may allow the filing of further objections if the objections filed are insufficient. Boughton *v.* Flint, 74 N. Y. 476.

21. Boughton *v.* Flint, 74 N. Y. 477 [*reversing* 13 Hun 206]; Matter of Mellen, 56 Hun (N. Y.) 553, 9 N. Y. Suppl. 929. See also McCracken *v.* McCracken, 6 T. B. Mon. (Ky.) 342 (ordering report of commissioner to be recorded a confirmation of it); Briscoe *v.* Brady, 6 T. B. Mon. (Ky.) 134.

Findings as to funds received as agent not reviewable.— Where an auditor appointed by the orphans' court to audit an executor's account, by agreement of the parties in interest, audited accounts of moneys received and paid out by the executor as agent for the collection of rents accruing after the testator's death, it was held that the orphans' court was without jurisdiction to revise the findings of the auditor as to moneys thus received as agent. Shisler's Estate, 13 Phila. (Pa.) 333, 37 Leg. Int. (Pa.) 105.

Effect of report when confirmed.— Where, in an action against an administrator, a reference was made to a commissioner to take an account of the administration of the assets, and the commissioner made a report, which was confirmed, stating an outstanding judgment, the amount of which was more than sufficient to cover the balance of the assets in his hands, and plaintiff made use of the report to charge the administrator, it was held that the report was conclusive in favor of the administrator, and that he was not required to produce the record of the judgment. Lee *v.* Patrick, 31 N. C. 135.

22. Matter of Schaefer, 65 N. Y. App. Div. 378, 73 N. Y. Suppl. 57 [*modifying* 34 Misc. 34, 69 N. Y. Suppl. 489].

Opening account taken by master or auditor see Matter of Gorman, 49 N. Y. App. Div. 637, 63 N. Y. Suppl. 123; Evertson *v.* Tappen, 5 Johns. Ch. (N. Y.) 497; Scheetz's Estate, 2 Woodw. (Pa.) 213.

23. *Mississippi.*— Crowder *v.* Shackelford, 35 Miss. 321.

New York.— Matter of Bayer, 54 Hun 189, 7 N. Y. Suppl. 566; Matter of Rothschild, 42 Misc. 161, 85 N. Y. Suppl. 1084 (remitted for further hearing and report); Matter of Pollock, 3 Redf. Surr. 100.

North Carolina.— Barnawell *v.* Smith, 58 N. C. 168; Peyton *v.* Smith, 22 N. C. 325.

Pennsylvania.— Bradley's Estate, 11 Phila. 87; Donnelly's Estate, 3 Phila. 18; *In re* Harlan, 1 Pa. L. J. Rep. 451, 3 Pa. L. J. 116.

Vermont.— *In re* Pierce, 68 Vt. 639, 35 Atl. 546.

Virginia.—Thomas *v.* Dawson, 9 Gratt. 531.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2191.

Compare Hall *v.* Hall, (Tenn. Ch. App. 1900) 59 S. W. 203.

Recommitment to supply omissions see Steele *v.* Morrison, 4 Dana (Ky.) 617 (omission to report evidence); Abercrombie *v.* Holder, 63 N. Y. 628 [*affirming* 4 Hun 141] (accidental omission); Thompson *v.* McDonald, 22 N. C. 463.

24. Hottenstein's Appeal, 2 Grant (Pa.) 301; Hoare *v.* Muloy, 2 Yeates (Pa.) 161.

25. *In re* Leffingwell, 30 Hun (N. Y.) 528.

26. *In re* Heath, 58 Iowa 36, 11 N. W. 723; Newell *v.* West, 149 Mass. 520, 21 N. E. 954; *In re* Young, 204 Pa. St. 32, 53 Atl. 511; Hottenstein's Appeal, 2 Grant (Pa.) 301; Wendt's Estate, 14 Pa. Super. Ct. 644; Wedekind's Estate, 11 Phila. (Pa.) 68; White's Estate, 10 Phila. (Pa.) 100; Huft's Appeal, 32 Leg. Int. (Pa.) 284. See also Matter of

sufficient to warrant the setting aside of the report be made to appear by the party who objects thereto.[27]

4. Evidence[28] — a. Presumptions. In proceedings for stating and settling the accounts of personal representatives the proper presumptions will be indulged.[29] Where the representative's general management of the estate evinces fidelity and prudence, a presumption arises in favor of the correctness of his account;[30] but where he has failed to keep accounts or take vouchers, or otherwise shows carelessness in his general management, obscurity and doubt as to whether a credit should be given in his favor will be resolved against him,[31] and where his accounts are not only untrustworthy, but of a most suspicious character, all presumptions are against him.[32] It will be presumed that some assets were received by the personal representative,[33] that a debt of the decedent was paid with money belonging to his estate,[34] that notes taken by the representative on sales made by him were paid at maturity,[35] that a debt returned in his inventory without comment has been collected in full,[36] and that articles specifically bequeathed have been disposed of conformably to the will.[37]

b. Burden of Proof — (i) *In General.* When a personal representative renders his account and it is contested, the burden is generally on him to sustain and

Bradley, 2 N. Y. Suppl. 751, 1 Connoly Surr. (N. Y.) 106; White's Estate, 11 Phila. (Pa.) 100; Lidderdale *v.* Robinson, 15 Fed. Cas. No. 8,337, 2 Brock. 159 [*affirmed* in 12 Wheat. 594, 6 L. ed. 740].

Conclusiveness of findings of fact.— Where the final accounting of an executor was referred, and the referee's findings of fact objected to, were adopted by the court, such findings are conclusive on the supreme court on appeal. Lambertson *v.* Vann, 134 N. C. 108, 46 S. E. 10.

27. Thompson's Appeal, 103 Pa. St. 603; McBride's Estate, 4 Pa. Co. Ct. 564. See also Nauman's Appeal, 116 Pa. St. 505, 9 Atl. 934; Atkinson's Appeal, 8 Pa. Cas. 292, 11 Atl. 239; Frey's Estate, 12 Phila. (Pa.) 15; Greenwalt's Estate, 9 Lanc. Bar (Pa.) 50; Sweeten's Estate, 4 Lanc. L. Rev. (Pa.) 54; Dolph's Estate, 3 Luz. Leg. Reg. (Pa.) 146; Vandermark's Estate, 2 Luz. Leg. Reg. (Pa.) 83.

28. See, generally, Evidence, 16 Cyc. 821.

Competency of witnesses see Daughdrill *v.* Daughdrill, 108 Ala. 321, 19 So. 185 (an administrator is a competent witness in his own behalf on the settlement of his accounts and may be examined for any purpose); Henderson *v.* Simmons, 33 Ala. 291, 70 Am. Dec. 590 (the surety of a personal representative is not a competent witness for his principal on the final settlement of the latter's accounts to prove an item of credit); McCreeliss *v.* Hinkle, 17 Ala. 459; Booth *v.* Tabbernor, 23 Ill. App. 173; Harding *v.* Canfield, 73 Minn. 244, 75 N. W. 1112 (personal representative may testify as to his good faith in handling funds of the estate); Sheetz *v.* Hanbest, 81 Pa. St. 100 (when legatees competent witnesses); Taylor's Estate, 12 Phila. (Pa.) 137. And see, generally, as to this subject, Witnesses.

29. *California.*—Sanderson's Estate, 74 Cal. 199, 15 Pac. 753, that note due estate collectable.

Louisiana.— Bry *v.* Dowell, 1 Rob. 111.

Massachusetts.—Dickinson *v.* Arms, 8 Pick. 394, as to time of payment of note due by estate.

Mississippi.— Stone *v.* Morgan, 65 Miss. 247, 3 So. 580, as to time when debtor of estate became insolvent.

Missouri.— Myers *v.* Myers, 98 Mo. 262, 11 S. W. 617.

New York.— *In re* Clark, 119 N. Y. 427, 23 N. E. 1052; Mesick *v.* Mesick, 7 Barb. 120.

North Carolina.— Nichols *v.* Dunn, 22 N. C. 287.

Pennsylvania.— Eavenson's Appeal, 84 Pa. St. 172; Brown's Estate, 8 Phila. 197.

Vermont.— Walworth *v.* Bartholomew, 76 Vt. 1, 56 Atl. 101, how presumption of negligence in not collecting notes rebutted.

Virginia.— Tate *v.* Jones, 98 Va. 544, 36 S. E. 984, presumption as to matters embraced in receipt in full from residuary legatees.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2169.

Presumption as to liability for interest see Clark *v.* Knox, 70 Ala. 607, 45 Am. Rep. 93; Caldwell *v.* Kinkead, 1 B. Mon. (Ky.) 228; Mickle *v.* Cross, 10 Md. 352; Bitzer *v.* Hahn, 14 Serg. & R. (Pa.) 232; Staib's Estate, 11 Pa. Super. Ct. 447.

30. Ashbrook *v.* Ashbrook, 28 S. W. 660, 16 Ky. L. Rep. 593; Bauman's Succession, 30 La. Ann. 1138; Wederstrandt's Succession, 19 La. Ann. 494.

31. Hetfield *v.* Debaud, 54 N. J. Eq. 371, 34 Atl. 882.

32. Downie *v.* Knowles, 37 N. J. Eq. 513.

33. Wyatt *v.* Luton, 10 Heisk. (Tenn.) 458.

34. *In re* Orne, 192 Pa. St. 626, 44 Atl. 287.

35. Chesnut *v.* Strong, 2 Hill Eq. (S. C.) 146.

36. Graham *v.* Davidson, 22 N. C. 155.

37. Matter of Pollock, 3 Redf. Surr. (N. Y.) 100.

establish its correctness,[38] unless the exceptions taken thereto are affirmative, in which case the burden of proof is upon the contestant.[39]

(II) *As to Assets.* Upon an accounting the affirmative of establishing more assets than are acknowledged by the inventory or account of a personal representative is with the party objecting,[40] and he must sustain his contention with reasonable certainty and not leave it to mere conjecture or suspicion.[41] When, however, assets are shown or admitted the burden is upon the personal representative to account for their proper disposition.[42]

(III) *As to Disbursements.* When a credit is claimed by a personal representative and its validity is disputed, the law casts on him the burden of supporting it;[43] and in order to sustain such credit he must prove not only the payment

38. *Indiana.*— Taylor *v.* Burt, 91 Ind. 252; Brownlee *v.* Hare, 64 Ind. 311; Hamlyn *v.* Nesbit, 37 Ind. 284.

Kentucky.— Cox *v.* Doty, 45 S. W. 1044, 20 Ky. L. Rep. 287, exact amount of taxes paid.

Louisiana.— Dougart's Succession, 30 La. Ann. 268 (effect of general denial); Lee's Succession, 4 La. Ann. 578 (formal opposition not necessary).

New York.— See Underhill *v.* Newburger, 4 Redf. Surr. 499.

Pennsylvania.— See Kulp's Estate, 1 Leg. Gaz. 37.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2170.

When no opposition.— "When the representative of a succession files an account he is plaintiff. The burden is on him to prove and establish the correctness of the account, and it cannot be homologated without such proof. If no opposition is made, the proof is introduced, and the whole proceeding is *ex parte*, just as in ordinary cases where judgment by default has been taken, and is to be confirmed." Planchet's Succession, 29 La. Ann. 520, 521. The personal representative is not, however, driven to proof of each separate item of his account unless it is opposed. Bougere's Succession, 29 La. Ann. 378. See also Wederstrandt's Succession, 19 La. Ann. 494.

39. Vance's Estate, 141 Cal. 624, 75 Pac. 323; Conery's Succession, 106 La. 50, 30 So. 294. See also Eubank *v.* Clark, 78 Ala. 73; Kirksey *v.* Kirksey, 41 Ala. 626; Gayle's Succession, 27 La. Ann. 547; Borda's Estate, 10 Pa. Dist. 117.

Burden of proof as to negligence.— When an account is attacked, the burden of proving careless or imprudent conduct on the part of the personal representative is on the contestant. Matter of Wagner, 40 Misc. (N. Y.) 490, 82 N. Y. Suppl. 797. See also *In re* Johnson's Estate, 11 Phila. (Pa.) 83.

40. *Kentucky.*— South *v.* Carr, 7 T. B. Mon. 419, assets denied.

Louisiana.— Gagneux's Succession, 40 La. Ann. 701, 4 So. 869, receipt of assets from predecessor must be proved.

New Jersey.— Kirby *v.* Coles, 15 N. J. L. 441.

New York.— Matter of Baker, 42 N. Y. App. Div. 370, 59 N. Y. Suppl. 121; Matter of Ryalls, 74 Hun 205, 26 N. Y. Suppl. 815, 80 Hun 459, 30 N. Y. Suppl. 455; Bainbridge *v.* McCullough, 1 Hun 488, 3 Thomps. & C. 486; Matter of Koch, 33 Misc. 153, 68 N. Y. Suppl. 375; Matter of Taber, 30 Misc. 172, 63 N. Y. Suppl. 728; *In re* Fithian, 3 N. Y. Suppl. 193, 1 Connoly Surr. 187; Matter of Palmer, 3 Dem. Surr. 129; Marre *v.* Ginochio, 2 Bradf. Surr. 165.

Pennsylvania.— Ripple's Estate, 9 Kulp 66; Thomas' Estate, 4 Kulp 446. See also Hart's Estate, 9 Pa. Dist. 347.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2171.

Surcharging inventory.— The inventory of an estate filed with the surrogate on accounting presumptively contains a true and full account of all the personal property of the decedent, and the burden of proof rests with a party seeking to surcharge such inventory either as to the amount or value of the property of the deceased. *In re* Rogers, 153 N. Y. 316, 47 N. E. 589; Matter of Mullon, 145 N. Y. 98, 39 N. E. 821 [*affirming* 74 Hun 358, 26 N. Y. Suppl. 683]; Forbes *v.* Halsey, 26 N. Y. 53. See also Matter of Arkenburgh, 58 N. Y. App. Div. 583, 69 N. Y. Suppl. 125.

Profits of business.— Where it is sought to charge an administrator with profits of a business in which he has used the money of the estate, the burden of proving such profits is on those who make the charge. Matter of Munzor, 4 Misc. (N. Y.) 374, 25 N. Y. Suppl. 818. See also *In re* Suess, 37 Misc. (N. Y.) 459, 75 N. Y. Suppl. 938.

41. Matter of Baker, 42 N. Y. App. Div. 370, 59 N. Y. Suppl. 121; Marre *v.* Ginochio, 2 Bradf. Surr. (N. Y.) 165.

42. Boggan *v.* Walter, 12 Sm. & M. (Miss.) 666; *In re* Eisner, 5 N. Y. Suppl. 30, 1 Connoly Surr. (N. Y.) 358; Evans *v.* Smith, 84 N. C. 146; Halloway's Estate, 13 Phila. (Pa.) 317, 8 Wkly. Notes Cas. (Pa.) 148; Kalbfell's Estate, 26 Pittsb. Leg. J. (Pa.) 394.

43. *Alabama.*— Pryor *v.* Davis, 109 Ala. 117, 19 So. 440; Harwood *v.* Pearson, 60 Ala. 410; Morgan *v.* Morgan, 35 Ala. 303.

California.— See Herteman's Estate, 73 Cal. 545, 15 Pac. 121.

Connecticut.—Robbins *v.* Wolcott, 27 Conn. 234.

Georgia.— Rudolph *v.* Underwood, 88 Ga. 664, 16 S. E. 55, credit claimed for taxes.

Illinois.— Emerick *v.* Hileman, 71 Ill. App. 512.

Kentucky.— See Terrell *v.* Rowland, 86

but also the correctness of the demand.[44] But where a credit has been allowed on an annual or partial settlement, it is presumed to be correct and the burden of overcoming this presumption rests upon the contestants.[45]

c. Admissibility. The general rules of evidence are ordinarily applied in determining whether the evidence offered in such proceedings is admissible;[46]

Ky. 67, 4 S. W. 825, 9 Ky. L. Rep. 258; Clark *v.* Newman, 1 S. W. 880, 8 Ky. L. Rep. 515.

Missouri.— Williams *v.* Petticrew, 62 Mo. 460.

New Jersey.— Kirby *v.* Coles, 15 N. J. L. 441. See also Rechtold *v.* Read, (Ch. 1893) 28 Atl. 264.

New York.— Metzger *v.* Metzger, 1 Bradf. Surr. 265.

Pennsylvania.— See *In re* Kalbfell, 184 Pa. St. 25, 38 Atl. 1007.

Tennessee.— See Ridley *v.* Ridley, 1 Coldw. 323.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2156, 2173.

Degree of proof required see Matter of Koch, 33 Misc. (N. Y.) 153, 68 N. Y. Suppl. 375.

Expenses of administration.—The burden of showing that the expenses incurred were necessary and proper and that the payments made were fair and reasonable is on the personal representative.

Alabama.— Munden *v.* Bailey, 70 Ala. 63.

Mississippi.—Brandon *v.* Hoggatt, 32 Miss. 335.

New York.— Matter of Peck, 79 N. Y. App. Div. 296, 80 N. Y. Suppl. 76 [*affirmed* in 177 N. Y. 538, 69 N. E. 1129]; Matter of Swart, 2 Silv. Supreme 585, 6 N. Y. Suppl. 608; Matter of Rainforth, 40 Misc. 609, 83 N. Y. Suppl. 57; Matter of Arkenburgh, 13 Misc. 744, 35 N. Y. Suppl. 251; Matter of Nockin, 15 N. Y. St. 731; Matter of Harnett, 15 N. Y. St. 725; Matter of Peyser, 5 Dem. Surr. 244; St. John *v.* McKee, 2 Dem. Surr. 236. See also Matter of Archer, 23 N. Y. Suppl. 1041, Pow. Surr. 292. *Compare* Matter of Sewell, 32 Misc. 604, 67 N. Y. Suppl. 456.

Ohio.— *In re* McAlpin, 8 Ohio S. & C. Pl. Dec. 654.

Pennsylvania.— See McGregor's Estate, 131 Pa. St. 359, 18 Atl. 902.

South Carolina.— Johnson *v.* Henagan, 11 S. C. 93.

Tennessee.— Hall *v.* Hall, (Ch. App. 1900) 59 S. W. 203.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2173.

Expenses of carrying on farm.— An executor cannot be allowed for expenses after decedent's death in stocking or carrying on a farm left by decedent, in the absence of evidence that the expenditures were beneficial. Larrour *v.* Larrour, 2 Redf. Surr. (N. Y.) 69.

Advances for infants.— Before an administrator will be allowed for moneys advanced for the support of infants, all the facts must appear, such as his good faith, and the amounts, times, and purposes of the advances. Hyland *v.* Baxter, 31 Hun (N. Y.) 354 [*affirmed* in 98 N. Y. 610].

Evidence to be taken in writing.—In Louisiana it is required by statute that the evidence in support of claims for disbursements shall be taken in writing and annexed to the record. Girardey's Succession, 44 La. Ann. 543, 10 So. 851; Dorville's Succession, 27 La. Ann. 131.

44. *Alabama.*— Jenks *v.* Terrell, 73 Ala. 238; Harwood *v.* Pearson, 60 Ala. 410; Pearson *v.* Darrington, 32 Ala. 227; Gaunt *v.* Tucker, 18 Ala. 27.

Indiana.— Wysong *v.* Nealis, 13 Ind. App. 165, 41 N. E. 388.

Maine.— *In re* Eacott, 95 Me. 522, 50 Atl. 708.

Mississippi.— Haralson *v.* White, 38 Miss. 178. See also Tell City Furniture Co. *v.* Stiles, 60 Miss. 849.

New Jersey.— Brewster *v.* Demarest, 48 N. J. Eq. 559, 23 Atl. 271.

North Carolina.— See Barnawell *v.* Smith, 58 N. C. 168.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2173.

Proper vouchers constitute such *prima facie* evidence as shifts the burden of proof to the contestants. See *infra*, XV, F, 4, e, (II).

45. *Alabama.*— King *v.* Brown, 108 Ala. 68, 18 So. 935; Dickie *v.* Dickie, 80 Ala. 57; Newberry *v.* Newberry, 28 Ala. 691. See also McCreeliss *v.* Hinkle, 17 Ala. 459; Willis *v.* Willis, 16 Ala. 652, 9 Ala. 330.

New York.— Matter of Knab, 38 Misc. 717, 78 N. Y. Suppl. 292.

Pennsylvania.— O'Donnell's Estate, 9 Kulp 123.

South Carolina.— See Cunningham *v.* Cauthen, 37 S. C. 123, 15 S. E. 917.

Virginia.— See Nimmo *v.* Com., 4 Hen. & M. 57, 4 Am. Dec. 488.

West Virginia.— See Dearing *v.* Selvey, 50 W. Va. 4, 40 S. E. 478.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2173.

46. *In re* More, 121 Cal. 609, 54 Pac. 97; Matter of Myers, 36 N. Y. App. Div. 625, 55 N. Y. Suppl. 168; Hall *v.* Hall, (Tenn. Ch. App. 1900) 59 S. W. 203, holding that when credit is claimed for a sum alleged to have been paid on a judgment the transcript of the judgment should be produced as it is the best evidence. But see Matter of Woodward, 69 N. Y. App. Div. 286, 74 N. Y. Suppl. 755; Upson *v.* Badeau, 3 Bradf. Surr. (N. Y.) 13 (holding that in adjusting the accounts of personal representatives the surrogate's court is governed by principles of equity as well as of law, and it is at all times competent for such a representative, unimpeded by technical rules, to show the fairness of his dealings, the real nature of his transactions, and the amount for which he should be held liable); Kennedy's Appeal, 4 Pa. St. 149 (auditors in settling administration accounts do not proceed according to the strict-

evidence which is legally relevant being received[47] and that which is irrelevant being rejected.[48]

d. Weight and Sufficiency. Questions as to the weight and sufficiency of such evidence are also usually to be determined by the general rules upon that subject.[49] Credits claimed by the representative must be supported by testimony

est rules of evidence); Sterrett's Appeal, 2 Penr. & W. (Pa.) 419 (the orphans' court in the settlement of administration accounts is not bound by technical rules of evidence).

47. *Connecticut.*—Guinan's Appeal, 70 Conn. 342, 39 Atl. 482.

Illinois.— Schneider *v.* Westerman, 25 Ill. 514.

Louisiana.— Frank *v.* Frank, 108 La. 201, 32 So. 414; Mandeville *v.* Arnoult, 9 Rob. 447, admissibility of representative's bank-book which is not in his official but his individual name.

Michigan.— *In re* Buchan, 100 Mich. 219, 58 N. W. 1003.

Mississippi.— Donald *v.* McWhorter, 40 Miss. 231, evidence that certain property belonged to the representative.

New York.— Mellen *v.* Wilcox, 56 Hun 553, 9 N. Y. Suppl. 929; Matter of Rothschild, 42 Misc. 161, 85 N. Y. Suppl. 1084; Matter of Grant, 49 N. Y. Suppl. 574, 27 N. Y. Civ. Proc. 21; Ginochio *v.* Porcella, 3 Bradf. Surr. 277, declarations of the decedent.

Pennsylvania.— See *In re* Semple, 189 Pa. St. 385, 42 Atl. 28.

Vermont.— *In re* Brown, 65 Vt. 331, 26 Atl. 638, evidence as to representative's good faith.

Virginia.— Wills *v.* Dunn, 5 Gratt. 384.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2176.

Admissibility of will.— On an issue to try with what amount an executor was chargeable as such, the will was evidence to show his appointment as executor and his duties thereunder. Rife *v.* Galbreath, 3 Penr. & W. (Pa.) 204.

Tax books are admissible to show that the intestate returned for taxes in each of the last two years of his life a certain sum, where the contention is as to the solvency of certain of his open accounts. Adkins *v.* Hutchings, 79 Ga. 260, 4 S. E. 887.

Ex parte affidavit of payee admissible as a receipt.— Williams *v.* Maitland, 36 N. C. 92.

48. *Alabama.*—McDonald *v.* Carnes, 90 Ala. 147, 7 So. 919; Byrd *v.* Jones, 84 Ala. 336, 4 So. 375, self-serving declarations.

California.— *In re* More, 121 Cal. 609, 54 Pac. 97.

Massachusetts.— Brigham *v.* Morgan, 185 Mass. 27, 69 N. E. 418.

Michigan.— Morton *v.* Johnston, 124 Mich. 561, 83 N. W. 369.

Minnesota.— Hanson *v.* Swenson, 78 Minn. 18, 80 N. W. 833.

New York.— Matter of Arkenburgh, 58 N. Y. App. Div. 583, 69 N. Y. Suppl. 125; Matter of Gabriel, 44 N. Y. App. Div. 623, 60 N. Y. Suppl. 87 [*affirmed* in 161 N. Y. 644, 57 N. E. 1110]; Matter of Rose, 35 Misc. 21, 71 N. Y. Suppl. 172; *In re* Williams, 1 Redf. Surr. 208.

Pennsylvania.— Hengst's Appeal, 24 Pa. St. 413. See also *In re* Semple, 28 Pittsb. Leg. J. 434.

Rhode Island.— Jones *v.* East Greenwich Probate Ct., 25 R. I. 361, 55 Atl. 881, communications between representative of his wife's estate and his wife in her lifetime.

South Carolina.— Reeves *v.* Tucker, 5 Rich. Eq. 150.

Tennessee.— Hall *v.* Hall, (Ch. App. 1900) 59 S. W. 203.

Texas.— James *v.* Craighead, (Civ. App. 1902) 69 S. W. 241, evidence as to disbursements which do not appear in account.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2176.

Opinion evidence as to compensation of representative inadmissible.— Kenan *v.* Graham, 135 Ala. 585, 33 So. 699.

49. *Alabama.*— Jay *v.* Mosely, 47 Ala. 227; Milam *v.* Ragland, 25 Ala. 243, 19 Ala. 85.

California.— *In re* Thomas, 140 Cal. 397, 73 Pac. 1059; *In re* Willard, 139 Cal. 501, 73 Pac. 240, 64 L. R. A. 554.

Louisiana.— Oubre's Succession, 109 La. 516, 33 So. 583; Conery's Succession, 106 La. 50, 30 So. 294.

Maryland.— Horwitz *v.* Forbes, (1891) 22 Atl. 267.

New Jersey.— Mulford *v.* Mulford, (Ch. 1902) 53 Atl. 79; Greene *v.* Butterworth, 45 N. J. Eq. 738, 17 Atl. 949.

New York.— Matter of Myers, 36 N. Y. App. Div. 625, 55 N. Y. Suppl. 168; Matter of Sewell, 32 Misc. 604, 67 N. Y. Suppl. 456; *In re* Underhill, 11 N. Y. Suppl. 113.

Pennsylvania.— *In re* Hoffer, 156 Pa. St. 473, 27 Atl. 11; McGeary's Estate, 33 Pittsb. Leg. J. 405.

Tennessee.— Royston *v.* McCulley, (Ch. App. 1900) 59 S. W. 725, 52 L. R. A. 899; Bland *v.* Gollaher, (Ch. App. 1898) 48 S. W. 320.

Washington.— *In re* Mason, 26 Wash. 259, 66 Pac. 435.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2177; and EVIDENCE, 17 Cyc. 753 *et seq.*

When the representative claims funds as against the rights of his decedent fullness of proof and freedom from suspicion should be required. Matter of Barefield, 82 N. Y. App. Div. 463, 81 N. Y. Suppl. 843 [*reversing* 36 Misc. 745, 74 N. Y. Suppl. 472].

Evidence of the contents of unproduced letters, admitted without objection, acknowledging payment, when supplemented by the testimony of the personal representative that he actually made payment, is sufficient proof. *In re* Hilliard, 83 Cal. 423, 23 Pac. 393.

Payment of a note secured by a mortgage on realty will be allowed, when the evidence of the satisfaction of the mortgage necessary in the state where the realty is situated is

substantially sufficient to establish the facts before a jury,[50] and it has been held that, when a credit claimed for the payment of a debt of a decedent is contested, the personal representative must prove it by the same degree of evidence which the creditor himself would have been required to produce, if he had been forced to an action for its recovery.[51]

e. Vouchers and Proof of Payment — (1) *In General.* It is the duty of the representative of an estate to support every charge against it by competent evidence,[52] and for this purpose he is generally required to produce proper vouchers.[53] But such charges may be allowed without vouchers,[54] when the parties interested admit that they are correct,[55] or when on account of the lapse

produced. Hart's Estate, Tuck. Surr. (N. Y.) 133.

50. Edelen *v.* Edelen, 11 Md. 415.

51. Jackson *v.* Wood, 108 Ala. 209, 19 So. 312; McDonald *v.* Carnes, 90 Ala. 147, 7 So. 919; Jenks *v.* Terrell, 73 Ala. 238; Teague *v.* Corbitt, 57 Ala. 529; Kirksey *v.* Kirksey, 41 Ala. 626; Pearson *v.* Darrington, 32 Ala. 227; Gaunt *v.* Tucker, 18 Ala. 27. But see Matter of Myers, 36 N. Y. App. Div. 625, 55 N. Y. Suppl. 168; Matter of Pollock, 3 Redf. Surr. (N. Y.) 100.

In Missouri this rule formerly obtained by express statute (Jacobs *v.* Jacobs, 99 Mo. 427, 12 S. W. 457) which has been repealed (Springfield Grocer Co. *v.* Walton, 95 Mo. App. 526, 69 S. W. 477).

52. *Kentucky.*— See Browning *v.* Earl, 54 S. W. 833, 21 Ky. L. Rep. 1295.

Louisiana.— Planchet's Succession, 29 La. Ann. 520.

Maryland.— Owens *v.* Collinson, 3 Gill & J. 25.

Missouri.— See Williams *v.* Petticrew, 62 Mo. 460.

South Carolina.—Buerhaus *v.* De Saussure, 41 S. C. 457, 19 S. E. 926, 20 S. E. 64; Lewis *v.* Price, 3 Rich. Eq. 172.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2154.

53. *California.*— *In re* Rose, 63 Cal. 349.

Louisiana.— Foulkes' Succession, 12 La. Ann. 537.

Maine.— Pearce *v.* Savage, 51 Me. 410.

Maryland.— See Maynadier *v.* Armstrong, 98 Md. 175, 56 Atl. 357.

Massachusetts.— Hall *v.* Hall, 1 Mass. 101.

New York.— *In re* Selleck, 111 N. Y. 284, 19 N. E. 66; Matter of Wicke, 74 N. Y. App. Div. 221, 77 N. Y. Suppl. 558; Jacques *v.* Elmore, 7 Hun 675; Broome *v.* Van Hook, 1 Redf. Surr. 444. See also Matter of Davis, 43 N. Y. App. Div. 331, 60 N. Y. Suppl. 315.

Pennsylvania.— Romig's Appeal, 84 Pa. St. 235; Fow's Estate, 14 Pa. Co. Ct. 648.

South Carolina.— Each item of disbursement should be vouched by the production of receipts or other competent evidence. Buerhaus *v.* De Saussure, 41 S. C. 457, 19 S. E. 926, 20 S. E. 64. See also McGougan *v.* Hall, 21 S. C. 600; Johnson *v.* Henagan, 11 S. C. 93; Owens *v.* Walker, 2 Strobh. Eq. 289; Duncan *v.* Tobin, Cheves Eq. 143, 34 Am. Dec. 605; Wright *v.* Wright, 2 McCord Eq. 185; Black *v.* Blakely, 2 McCord Eq. 1.

Tennessee.—Stephenson *v.* Yandel, 5 Hayw. 261.

Virginia.—See Street *v.* Street, 11 Leigh 498.

United States.— Lidderdale *v.* Robinson, 15 Fed. Cas. No. 8,337, 2 Brock. 159 [*affirmed* in 12 Wheat. 594, 6 L. ed. 740]. See also Backhouse *v.* Jett, 2 Fed. Cas. No. 710, 1 Brock. 500; Hanson *v.* Cox, 11 Fed. Cas. No. 6,040, 1 Hayw. & H. 167.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2154.

Where an administrator continues his intestate's business without authority, he need not produce vouchers for the disbursements thereof on accounting, since the business becomes his individual business, for which he alone is liable. Matter of Munzor, 4 Misc. (N. Y.) 374, 25 N. Y. Suppl. 818. See also *In re* Suess, 37 Misc. (N. Y.) 459, 75 N. Y. Suppl. 938.

Surrogate's fees allowed without voucher. Birkholm *v.* Wardell, 42 N. J. Eq. 337, 7 Atl. 569.

Vouchers a part of report of settlement.— A reference to the report of the settlement of an administrator's account necessarily implies a reference to the vouchers accompanying the report. Mattingly *v.* Corbit, 7 B. Mon. (Ky.) 376.

Time for examination of vouchers.— Where the executor of an estate and the tutor of a minor heir files one account as executor and tutor combined, and secures its approval by the minor emancipated on the day of its approbation, without affording legal time for an examination of the vouchers, the approbation will be annulled. Ferguson *v.* Chastant, 35 La. Ann. 485.

Vouchers as evidence in suit by or against personal representative see Quigley *v.* Campbell, 12 Ala. 58, construing the Alabama statute.

54. Cases may arise where the orphans' court in the exercise of a reasonable discretion may supply the want of a regular voucher by the oath of a personal representative, but evidence of this kind should be resorted to with great delicacy and even then should be sustained by some corroborating proof. Romig's Appeal, 84 Pa. St. 235; *In re* Mylin, 7 Watts (Pa.) 64; Reeside *v.* Reeside, 6 Phila. (Pa.) 507. See also Bowman *v.* Herr, 1 Penr. & W. (Pa.) 282.

55. *In re* Coursen, (Cal. 1901) 65 Pac. 965; *In re* Langlois, 14 N. Y. Suppl. 146, 26 Abb. N. Cas. (N. Y.) 226, 2 Connoly Surr. (N. Y.) 481.

of time or other special circumstances vouchers cannot be produced.[56] By statute in some jurisdictions a personal representative may be allowed without a voucher any item of expenditure not exceeding a specified amount, if it is supported by his own uncontradicted oath, and if all the items so allowed do not exceed in the aggregate a specified amount.[57] Provision is also sometimes made by statute for proof by oath when vouchers were not taken at the time of payment, or when vouchers have been lost or destroyed.[58]

(II) *WEIGHT AS EVIDENCE.* When proper vouchers are produced they are of themselves *prima facie* evidence of disbursements without any further proof,[59] and the burden is cast upon a contestant to show that the items paid by the personal representative and represented by the vouchers were not just debts or claims against the estate.[60] A voucher may, however, be impeached. It may be

56. Wright *v.* Wright, 2 McCord Eq. (S. C.) 185; Fitzgerald *v.* Jones, 1 Munf. (Va.) 150; Major *v.* Dudley, Jeff. (Va.) 51; Lidderdale *v.* Robinson, 15 Fed. Cas. No. 8,337, 2 Brock. 159 [*affirmed* in 12 Wheat. 594, 6 L. ed. 740]. See also Powell *v.* Powell, 10 Ala. 900.

Presumption of existence.— On a bill to surcharge and falsify an administrator's former settlement, vouchers which cannot be produced may be presumed to have existed, especially after long lapse of time. Campbell *v.* White, 14 W. Va. 122. See also Burwell *v.* Anderson, 3 Leigh (Va.) 348; McCall *v.* Peachy, 3 Munf. (Va.) 288.

57. *In re* Hedrick, 127 Cal. 184, 59 Pac. 590; Rose's Estate, 80 Cal. 166, 22 Pac. 86; *In re* Van Tassel, (Cal. 1885) 5 Pac. 611; Gardner *v.* Gardner, 7 Paige (N. Y.) 112 [*reversed* on other grounds in 22 Wend. 526, 34 Am. Dec. 340]; Williams *v.* Purdy, 6 Paige (N. Y.) 166; Kellett *v.* Rathbun, 4 Paige (N. Y.) 102; Orser *v.* Orser, 5 Dem. Surr. (N. Y.) 21 (if an administrator holds vouchers for items of expenditure under twenty dollars he should file them); Tickel *v.* Quinn, 1 Dem. Surr. (N. Y.) 425; Matter of Nichols, 4 Redf. Surr. (N. Y.) 288 (where the amount of an item is less than twenty dollars and there is no doubt of its payment it will be allowed upon the oath of the personal representative, although he cannot name the payee, or describe him sufficiently for identification); Metzger *v.* Metzger, 1 Bradf. Surr. (N. Y.) 265.

Payment of items under forty shillings could be proved in England by the oath of the personal representative without a voucher provided they did not in the aggregate exceed £100 (Robinson *v.* Cumming, 2 Atk. 409, 26 Eng. Reprint 646. See also Metzger *v.* Metzger, 1 Bradf. Surr. (N. Y.) 265; Reeside *v.* Reeside, 6 Phila. (Pa.) 507), and this rule has been recognized in the United States (Bailey *v.* Blanchard, 12 Pick. (Mass.) 166. See also Reeside *v.* Reeside, *supra*).

58. *In re* Gerow, 23 N. Y. Suppl. 847, Pow. Surr. (N. Y.) 364 [*distinguishing* and *criticizing* Matter of Langlois, 14 N. Y. Suppl. 146 2 Connoly Surr. (N. Y.) 481]; Rose *v.* Rose, 19 N. Y. St. 783, 6 Dem. Surr. (N. Y.) 26 (statute waived by examination of representative by parties objecting to his account); Matter of Rowland, 5 Dem. Surr. (N. Y.) 216 (reasonableness and justness of expenditure must be shown).

59. Frantum's Succession, 3 Rob. (La.) 283; Bainbridge *v.* McCullough, 1 Hun (N. Y.) 488, 3 Thomps. & C. (N. Y.) 486; *In re* Butler, 16 N. Y. Suppl. 103, 2 Connoly Surr. (N. Y.) 572; Metzger *v.* Metzger, 1 Bradf. Surr. (N. Y.) 265. See also Gray *v.* Harris, 43 Miss. 421; Thompson's Estate, Tuck. Surr. (N. Y.) 51; Nimmo *v.* Com., 4 Hen. & M. (Va.) 57, 4 Am. Dec. 488.

The mere production of an instrument purporting to be a receipt without proof of the signature of the party signing it is neither proof of the payment nor of the validity of the debt against the estate. Jenks *v.* Terrell, 73 Ala. 238; Wright *v.* Wright, 64 Ala. 88; Gaunt *v.* Tucker, 18 Ala. 27; Savage *v.* Benham, 11 Ala. 49. See also Landreth *v.* Landreth, 9 Ala. 430.

Where a disbursement is admitted to be correct and the only question at issue is whether the representative has paid it, a receipt signed by the duly authorized agent of the person to whom the payment was made accompanied with proof of his signature and of the removal of both the principal and agent from the state is *prima facie* evidence of the payment. McCreeliss *v.* Hinkle, 17 Ala. 459.

Admission of genuineness of vouchers.— An admission that vouchers filed by a curator are genuine dispenses with other proof of payments claimed by him; but, if made without order of court, he must show that the debts were due, or he cannot be allowed credit therefor. Miller *v.* Miller, 12 Rob. (La.) 88.

60. *In re* Frazer, 92 N. Y. 239; Boughton *v.* Flint, 74 N. Y. 476; Matter of Sprague, 40 N. Y. App. Div. 615, 57 N. Y. Suppl. 1128 [*affirmed* in 162 N. Y. 646, 57 N. E. 1125]; Matter of Stevenson, 86 Hun (N. Y.) 325, 33 N. Y. Suppl. 493.

Where the gross injustice of a charge for legal services is apparent upon the very face of the account, no legal technicalities as to presumption or burden of proof should compel the surrogate to adjudicate as "just and reasonable" what he knows to be unreasonable and unjust. St. John *v.* McKee, 2 Dem. Surr. (N. Y.) 236.

Contents of voucher.— Where a personal representative who has paid out money on

shown that the signature thereto is forged; that the amount it represents was not due to him who executed it; that it has not in fact been paid; or that only a portion of it has been paid.[61]

f. Examination of Executor or Administrator. Statutes provide quite generally for examining an executor or administrator upon oath as to any matter relating to his account.[62]

5. Order or Decree. A decree on the settlement of a personal representative should comply with the statutes and practice of the jurisdiction in which it is rendered.[63] It should be signed by the judge,[64] and should bear date and take effect as of the time when it is officially announced.[65] The fact that a decree is irregular in form does not, however, constitute reversible error when no injury

account of expenses of administration produces a voucher showing the nature of the disbursement and stating facts which if true show the same to have been reasonable and necessary for the good of the estate, a presumption is raised in favor of the correctness of the charge which must be opposed by affirmative evidence on the part of one contesting the demand for credit. Matter of White, 15 N. Y. St. 729, 6 Dem. Surr. (N. Y.) 375 [*approving* Valentine *v.* Valentine, 3 Dem. Surr. (N. Y.) 597]. *Compare* Matter of Harnett, 15 N. Y. St. 725.

61. Westover *v.* Carman, 49 Nebr. 397, 68 N. W. 501 (receipts obtained by fraud); *In re* Butler, 16 N. Y. Suppl. 103, 2 Connoly Surr. (N. Y.) 572; Metzger *v.* Metzger, 1 Bradf. Surr. (N. Y.) 265.

62. *Illinois.*— See Booth *v.* Tabbernor, 23 Ill. App. 173.

Maryland.— Hammond *v.* Hammond, 2 Bland 306.

Massachusetts.— Sigourney *v.* Wetherell, 6 Metc. 553 (as to whether administrator indebted to the estate); Higbee *v.* Bacon, 7 Pick. 14, 8 Pick. 484.

Michigan.— *In re* Rathbone, 44 Mich. 57, 6 N. W. 115.

New York.— *In re* Chamberlain, 140 N. Y. 390, 35 N. E. 602, 37 Am. St. Rep. 568; Fithian's Estate, 14 N. Y. Civ. Proc. 52; Anonymous, 14 N. Y. Civ. Proc. 38; Woodruff *v.* Woodruff, 17 Abb. Pr. 165 (disclosing assets of a partnership of which representative and deceased were members); Westervelt *v.* Gregg, 1 Barb. Ch. 469; Leroy *v.* Bayard, 3 Redf. Surr. 228; Geer *v.* Ransom, 5 Redf. Surr. 578; Wood *v.* Crooke, 5 Redf. Surr. 381 (notwithstanding the representative's verified denial that property has come into his hands); Matter of Rich, 3 Redf. Surr. 177. See also Matter of Freligh, 42 Misc. 11, 85 N. Y. Suppl. 830.

North Carolina.— Ward *v.* Simmons, 46 N. C. 404.

Pennsylvania.— Matter of Bowen, 2 Pa. L. J. Rep. 147, 3 Pa. L. J. 405.

Wisconsin.— *In re* Fitzgerald, 57 Wis. 508, 15 N. W. 794, holding, however, that where disputed charges in an account are not correctly speaking matters of account between the administrator and the estate of his intestate, but are mere personal claims against the heirs of the intestate in respect to which the relation of creditor and debtor exists between the administrator and heirs, the statute providing for the examination of an administrator on oath does not apply.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2168.

Examination though formal objections not filed see Sanderson's Estate, 74 Cal. 199, 15 Pac. 753; Geer *v.* Ransom, 5 Redf. Surr. (N. Y.) 578.

Representative may be examined by counsel for parties interested in the estate. *In re* Rathbone, 44 Mich. 57, 6 N. W. 115; Matter of Rich, 3 Redf. Surr. (N. Y.) 177.

Disposition of balance shown by account.— An executor or administrator may be called and examined by an adverse party for the purpose of showing what disposition he has made of the balance shown by his account. Saxton *v.* Chamberlain, 6 Pick. (Mass.) 422; Stearns *v.* Brown, 1 Pick. (Mass.) 530; Griswold *v.* Chandler, 5 N. H. 492; Kline's Estate, 8 Lanc. L. Rev. (Pa.) 356.

Liability of co-administrator.— An administrator may be required to testify on oath respecting a liability of his co-administrator to the decedent. Davison *v.* Davison, 17 N. J. L. 169.

Admissibility of evidence to disprove answers.— Where an administrator, in answer to interrogatories in the probate court touching his accounts, makes answers thereto, the party at whose instance the interrogatories have been proposed may offer evidence to disprove the answers. Higbee *v.* Bacon, 8 Pick. (Mass.) 484.

Entire statement to be considered.— If a personal representative is examined under oath, for the purpose of charging him, a portion of his statements tending to charge him cannot be taken apart from an accompanying explanation operating in his favor. Ogilvie *v.* Ogilvie, 1 Bradf. Surr. (N. Y.) 356.

63. See Portis *v.* Creagh, 4 Port. (Ala.) 332; Dean *v.* Santa Barbara County Super. Ct., 63 Cal. 473 (the California statute does not require that the judgment or decree should contain copies of vouchers or recite the evidence which shall satisfy the court that the personal representative has delivered all the property of the estate); Matter of Daymon, 47 N. Y. App. Div. 315, 61 N. Y. Suppl. 997.

64. Ashbridge's Succession, 1 La. Ann. 206.

65. Lanier *v.* Richardson, 72 Ala. 134.

appears to have resulted therefrom.[66] Where a personal representative is also guardian of children of the deceased, a separate decree must be rendered on his separate accounts as guardian of each ward and as personal representative.[67] An order of final settlement necessarily means a determination of all matters proper to be included therein, unless they are excepted therefrom in accordance with express statutory provisions;[68] but it is erroneous for a decree to provide for relief not demanded.[69] A decree on the final settlement of a personal representative should ascertain the balance in his hands,[70] and, it has been held, should name specifically the persons in whose favor it is rendered,[71] and should specify a person against whom it can be enforced by proper process of the court.[72] Probate allowances in favor of creditors or third persons are directed, not against the executor or administrator personally or his property, but against the assets of the estate in his hands. The matter of inquiry lies between the creditor or third person and the estate and the executor or administrator has no personal interest or responsibility concerning it;[73] but when it comes to a final settlement the whole contest if any is between the estate and the executor or administrator, and the result of the contest, if adverse to him, charges him personally and the judgment therefore should run not against the estate but against him.[74]

66. Siniard *v.* Green, 123 Ala. 527, 26 So. 661.

67. Forteaux *v.* Lepage, 6 Iowa 123.

68. Green *v.* Brown, 8 Ind. App. 110, 33 N. E. 979, a provision which expressly continues the estate for certain purposes wholly excludes the idea of a final settlement thereof.

69. Finley *v.* Pearson, 76 S. W. 374, 25 Ky. L. Rep. 766.

70. *Alabama.*— Watt *v.* Watt, 37 Ala. 543; Rhodes *v.* Turner, 21 Ala. 210. See also Sankey *v.* Sankey, 18 Ala. 713; Elliott *v.* Mayfield, 3 Ala. 223.

Minnesota.— See Balch *v.* Hooper, 32 Minn. 158, 20 N. W. 124.

Mississippi.— See Coffee *v.* Ragsdale, (1893) 14 So. 454.

New Jersey.— See Sayre *v.* Sayre, 16 N. J. Eq. 505.

Pennsylvania.— See Purviance *v.* Com., 17 Serg. & R. 31.

71. Watt *v.* Watt, 37 Ala. 543; Lyon *v.* Odom, 31 Ala. 234 (a decree in favor of "heirs when known" insufficient); Willis *v.* Willis, 16 Ala. 652; Betts *v.* Blackwell, 2 Stew. & P. (Ala.) 373; Hines *v.* Noah, 52 Miss. 192.

When balance in favor of representative.— If the decree rendered on the final settlement of the account of a personal representative ascertains the amount of his indebtedness and the credits to which he is entitled, showing a balance in his favor, it is valid and binding until reversed, although it is rendered in favor of no one and no execution could have issued on it. Hutton *v.* Williams, 60 Ala. 107.

Decree for one representative against another.— The only case in which a decree is authorized in favor of one personal representative against another is where there has been a removal, resignation, or a revocation of the letters of an executor or administrator, or from some other cause his authority ceases. In such case the decree may be rendered in favor of the remaining or succeeding executor or administrator. Cook *v.* Cook, 69 Ala. 294.

In favor of guardian ad litem.— On the settlement of an estate, a decree may be made in favor of an infant's guardian *ad litem*, and execution may issue thereon, although the proceeds should be paid into court, to be taken out only by a general guardian. Morgan *v.* Morgan, 35 Ala. 303.

Waiver of irregularity.—Although, in a suit by an administrator *de bonis non* against the representative of the first administrator for a settlement of the first administrator's accounts of his administration, it is irregular to decree payment to the administrator *de bonis non*, yet, where the distributees are parties to the suit, and do not complain, so that a payment to the administrator *de bonis non* would be a valid discharge to the representative of the first administrator, the decree will not be reversed for such irregularity. Morris *v.* Morris, 4 Gratt. (Va.) 293.

72. Billings *v.* Perry, 6 S. C. 106.

73. Haeussler *v.* Scheitlin, 9 Mo. App. 303. See also Wills *v.* Dunn, 5 Gratt. (Va.) 384.

74. *Alabama.*— See Davis *v.* Davis, 6 Ala. 611.

Louisiana.— Heffner's Succession, 49 La. Ann. 407, 21 So. 905.

Missouri.— Haeussler *v.* Scheitlin, 9 Mo. App. 303.

Nebraska.— See Lydick *v.* Chaney, 64 Nebr. 288, 89 N. W. 801.

New York.— Matter of Monell, 28 Misc. 308, 59 N. Y. Suppl. 981. See also Sherwood *v.* Judd, 3 Bradf. Surr. 419.

South Carolina.— Verner *v.* Bookman, 53 S. C. 398, 31 S. E. 283, 69 Am. St. Rep. 870; Rhodes *v.* Casey, 20 S. C. 491, upon such judgment supplementary proceedings may be had.

Virginia.— Sheppard *v.* Starke, 3 Munf. 29; Moore *v.* Ferguson, 2 Munf. 421; Barr *v.* Barr, 2 Hen. & M. 26.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2193.

G. Operation and Effect — 1. Final Settlement[75] — a. In General. A decree rendered on the final settlement of a personal representative has the force and effect of a judgment and is conclusive on the parties to the accounting and settlement as to the matters properly determined therein, until it is set aside for proper cause or reversed on appeal.[76]

Assets become property of personal representative.— Under a decree ascertaining and declaring the amount of assets in the hands of a personal representative, the whole amount due, and the sum payable to each creditor out of the assets, and ordering that the assets be placed in the hands of the personal representative, and that he personally pay the sum payable to each creditor, the liability of the personal representative becomes personal and the assets his individual property, in the absence of a showing of some special equity to follow and reach such assets. Paff *v.* Kinney, 5 Sandf. (N. Y.) 380.

Lien on real estate.— In Pennsylvania by statute the real estate of a personal representative becomes subject to a lien upon the filing of a transcript showing the amount appearing to be due and in his hands, on the settlement of his accounts in the orphans' court. McCracken *v.* Graham, 14 Pa. St. 209 (proper form of transcript); Hanson *v.* Penn Tp. Bank, 7 Pa. St. 261 (place of filing); Rosbing *v.* Chandler, 3 Pa. St. 369; Rowland *v.* Harbaugh, 5 Watts 365; Ramsey's Appeal, 4 Watts 71. But the personal estate of the representative is also bound for the payment of a balance decreed to be in their hands by the orphans' court. Burd *v.* McGregor, 2 Grant (Pa.) 353.

Mortgage to secure payment.—An executor, who, upon a balance being found due from him upon his accounting, gives a mortgage, in the nature of a declaration of trust, to hold the balance under the provisions of the will, and afterward pays a larger amount upon a valid outstanding claim against the estate, is entitled to have the mortgage discharged. Harris *v.* Young, 19 S. C. 34.

75. Final settlement does not operate as a discharge see *supra*, II, N, 3.

76. *Alabama.*— Hatcher *v.* Dillard, 70 Ala. 343; Hutton *v.* Williams, 60 Ala. 107; Tarver *v.* Tankersley, 51 Ala. 309; Griffin *v.* Ryland, 45 Ala. 688; Ashley *v.* Ashley, 15 Ala. 15.

Arkansas.— West *v.* Waddill, 33 Ark. 575; Ringgold *v.* Stone, 20 Ark. 526.

California.— Reynolds *v.* Brumagim, 54 Cal. 254.

Delaware.— State *v.* Barnett, 2 Marv. 115, 42 Atl. 420.

Georgia.— See Carter *v.* Anderson, 4 Ga. 516.

Illinois.— People *v.* Medart, 166 Ill. 348, 46 N. E. 1095 [*affirming* 63 Ill. App. 111].

Indiana.— State *v.* Kelso, 94 Ind. 587; Cunningham *v.* Cunningham, 94 Ind. 557.

Iowa.— Kows *v.* Mowery, 57 Iowa 20, 10 N. W. 283.

Louisiana.— Rabasse's Succession, 50 La. Ann. 746, 23 So. 910. See also Robin *v.* Robin, 5 Mart. 515.

Minnesota.— See Kittson *v.* St. Paul Trust Co., 78 Minn. 325, 81 N. W. 7.

Mississippi.— Stubblefield *v.* McRaven, 5 Sm. & M. 130, 43 Am. Dec. 502.

Missouri.— Ro Bards *v.* Lamb, 89 Mo. 303, 1 S. W. 222; Van Bibber *v.* Julian, 81 Mo. 618; Woodworth *v.* Woodworth, 70 Mo. 601; Williams *v.* Petticrew, 62 Mo. 460; Townsend *v.* Townsend, 60 Mo. 246; Lewis *v.* Williams, 54 Mo. 200; Murray *v.* Roberts, 48 Mo. 307; Picot *v.* Bates, 47 Mo. 390; Barton *v.* Barton, 35 Mo. 158; Caldwell *v.* Lockridge, 9 Mo. 362; Weinerth *v.* Trendley, 39 Mo. App. 333; Haeussler *v.* Scheitlin, 9 Mo. App. 303.

New Hampshire.— Hurlburt *v.* Wheeler, 40 N. H. 73.

New Jersey.— *In re* Heath, 52 N. J. Eq. 807, 33 Atl. 46.

New York.— See *In re* Crise, 7 N. Y. Suppl. 202, 2 Connoly Surr. 59; Ball *v.* Miller, 17 How. Pr. 300; Wright *v.* New York M. E. Church Corp., Hoffm. 202.

Ohio.— Banning *v.* Gotshall, 62 Ohio St. 210, 56 N. E. 1030; Swearingen *v.* Morris, 14 Ohio St. 424.

Oregon.— See Bellinger *v.* Thompson, 26 Oreg. 320, 37 Pac. 714, 40 Pac. 229. But *compare* Cross *v.* Baskett, 17 Oreg. 84, 21 Pac. 47.

Pennsylvania.— Schaeffer's Appeal, 119 Pa. St. 640, 13 Atl. 507; Smith *v.* Seaton, 117 Pa. St. 382, 11 Atl. 661, 2 Am. St. Rep. 668. *Compare* Weiting *v.* Nissley, 13 Pa. St. 650.

Rhode Island.— Doringh's Petition, 20 R. I. 459, 40 Atl. 4.

Tennessee.— See Cooper *v.* Burton, 7 Baxt. 406.

Texas.— Watkins *v.* Sansom, 22 Tex. Civ. App. 178, 54 S. W. 1096.

Utah.— Ehrngren *v.* Gronlund, 19 Utah 411, 57 Pac. 268.

United States.— See Newman *v.* Moody, 19 Fed. 858.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2267.

Interest.— When an adjudication upon executors' accounts has been confirmed absolutely, the awards, whether to creditors or legatees, become final judgments, and, if not promptly paid, bear interest from that date. Wainwright's Estate, 37 Leg. Int. (Pa.) 274.

Want of proper parties.— A settlement is not conclusive when there is a total want of appropriate parties and by consequence a defect of jurisdiction. Green *v.* Sargeant, 23 Vt. 466, 56 Am. Dec. 88; Adams *v.* Adams, 22 Vt. 50.

Void settlement inoperative.— Stockton *v.* Ransom, 60 Mo. 535, holding that a settle-

b. Persons Concluded. The personal representative[77] and all other persons who are interested in the estate, of whom the court has acquired jurisdiction by due notice or service of citation, or who personally appear, are concluded by a decree of final settlement, but persons of whom jurisdiction is not acquired are not concluded thereby.[78] A minor is concluded when the court has acquired

ment made in vacation is invalid and of no effect. See also Cloney's Succession, 29 La. Ann. 327.

Reversal on appeal renders settlement inoperative. Appleton *v.* Marx, 62 Fed. 638, 10 C. C. A. 555.

In New York the effect of the judicial settlement of the account of a personal representative is expressly declared by statute. Code Civ. Proc. § 2742. As to the construction of this statute see Mahoney *v.* Bernhard, 169 N. Y. 589, 62 N. E. 1097 [*affirming* 45 N. Y. App. Div. 499, 63 N. Y. Suppl. 642 (*modifying* 27 Misc. 339, 58 N. Y. Suppl. 748)]; Van Rensselaer *v.* Van Rensselaer, 113 N. Y. 207, 21 N. E. 75; *In re* Soutter, 105 N. Y. 514, 12 N. E. 34; *In re* Hood, 90 N. Y. 512 [*reversing* 27 Hun 579]; Poughkeepsie Bank *v.* Hasbrouck, 6 N. Y. 216; Matter of Irvin, 87 N. Y. App. Div. 466, 84 N. Y. Suppl. 707; Skillin *v.* Central Trust Co., 80 N. Y. App. Div. 206, 80 N. Y. Suppl. 188; Matter of Turner, 79 N. Y. App. Div. 495, 80 N. Y. Suppl. 573; Matter of Killan, 66 N. Y. App. Div. 312, 72 N. Y. Suppl. 714; Matter of Union Trust Co., 65 N. Y. App. Div. 449, 72 N. Y. Suppl. 977 [*affirmed* without opinion in 174 N. Y. 541, 66 N. E. 1117]; Kager *v.* Brenneman, 47 N. Y. App. Div. 63, 62 N. Y. Suppl. 339, 30 N. Y. Civ. Proc. 168; Frethey *v.* Durant, 24 N. Y. App. Div. 58, 48 N. Y. Suppl. 839; Baldwin *v.* Smith, 91 Hun 230, 36 N. Y. Suppl. 159; Fulton *v.* Whitney, 5 Hun 16 [*affirmed* in 66 N. Y. 548]; Rose *v.* Lewis, 3 Lans. 320; Wurts *v.* Jenkins, 11 Barb. 546; Shimmel *v.* Morse, 30 Misc. 257, 63 N. Y. Suppl. 322; Matter of Whitbeck, 22 Misc. 494, 50 N. Y. Suppl. 932.

77. *Louisiana.*— See Serret *v.* Labauve, 15 La. Ann. 186; Capdevielle *v.* Erwin, 13 La. Ann. 286.

Maine.— See Treat *v.* Treat, 80 Me. 156, 13 Atl. 684.

Maryland.— See Scott *v.* Burch, 6 Harr. & J. 67.

Massachusetts.— See Davis *v.* Cowdin, 20 Pick. 510; White *v.* Starr, 13 Pick. 380.

Mississippi.— Singleton *v.* Garrett, 23 Miss. 195.

New York.— See Marsh *v.* Avery, 81 N. Y. 29; O'Brien *v.* Heeney, 2 Edw. 242.

Pennsylvania.— See Patton's Estate, 19 Pa. Super. Ct. 545.

South Carolina.— See Wright *v.* Wright, 2 McCord Eq. 185.

United States.— Butterfield *v.* Smith, 101 U. S. 570, 25 L. ed. 868.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2278.

Removed representative not bound when not a party. Reither *v.* Murdock, 135 Cal. 197, 67 Pac. 784.

Settlement not binding on representative of representative who had no notice. Boyd *v.* Kaufman, 6 Munf. (Va.) 45.

One who has rendered services at the instance of the personal representative is concluded, as he claims under the personal representative who is concluded. Lyon *v.* Hays, 30 Ala. 430.

Sureties.— According to the weight of authority a decree of final settlement of a personal representative's account is conclusive not only upon him, but also upon his sureties. Bellinger *v.* Thompson, 26 Oreg. 320, 37 Pac. 714, 40 Pac. 229. See also Slagle *v.* Entrekin, 44 Ohio St. 637, 10 N. E. 675. And see *infra*, XVII.

78. *Alabama.*— Sampey *v.* Sowell, 93 Ala. 447, 9 So. 600; Werborn *v.* Austin, 82 Ala. 498, 8 So. 280; Carter *v.* Carter, 53 Ala. 365; Horn *v.* Grayson, 7 Port. 270. See also Pinney *v.* Werborn, 72 Ala. 58.

Arkansas.— Crowley *v.* Mellon, 52 Ark. 1, 11 S. W. 876.

California.— It is provided by statute that after due notice is given "the settlement of the account and the allowance thereof by the court, or upon appeal, is conclusive against all persons in any way interested in the estate," with a saving in favor of persons under legal disability. Code Civ. Proc. § 1637. See Briggs *v.* Breen, 123 Cal. 657, 56 Pac. 633, 886 (holding that the attorney of the personal representative is not a person interested in the estate); *In re* Couts, 87 Cal. 480, 25 Pac. 685, 100 Cal. 400, 34 Pac. 865; Washington *v.* Black, 83 Cal. 290, 23 Pac. 300; Tobelman *v.* Hildebrandt, 72 Cal. 313, 14 Pac. 20; Williams *v.* Price, 11 Cal. 212; Clarke *v.* Perry, 5 Cal. 58, 63 Am. Dec. 82; *In re* Keenan, Myr. Prob. 186.

Illinois.— Burnett *v.* Burnett, 38 Ill. App. 186.

Indiana.— Shirley *v.* Thompson, 123 Ind. 454, 24 N. E. 253.

Louisiana.—Winn's Succession, 30 La. Ann. 702; Castillo *v.* Elliott, 13 La. Ann. 363; Whitten's Succession, 9 La. Ann. 417; Mann's Succession, 4 La. Ann. 28. Personal citation to the heirs is necessary to render the judgment homologating an administrator's final account binding as between the heirs and the administrator; but as between the heirs and creditors of the succession, it has been held that the homologation is binding without personal citation or notice, when the notice has been given as required by statute. Couder's Succession, 47 La. Ann. 810, 17 So. 317; Vom Hoven's Succession, 46 La. Ann. 911, 15 So. 391; Conrad's Succession, 45 La. Ann. 89, 11 So. 935; Yarborough's Succession, 16 La. Ann. 258; Carter *v.* McManus, 15 La. Ann. 676; Truxillo *v.* Truxillo, 11 La. Ann. 412.

Michigan.— Gee *v.* Hasbrouck, 128 Mich. 509, 87 N. W. 621.

jurisdiction of his regular guardian or when he is represented by a regularly appointed guardian *ad litem*, but not otherwise.[79]

c. Matters Concluded. A final settlement is conclusive as to all matters, the proper subject of account, included in such a settlement or necessarily involved therein;[80] but as to matters not included or necessarily involved it is not conclu-

Mississippi.— Lambeth *v.* Elder, 44 Miss. 80.

Missouri.—Nelson *v.* Barnett, 123 Mo. 564, 27 S. W. 520; Patterson *v.* Booth, 103 Mo. 402, 15 S. W. 543; Van Bibber *v.* Julian, 81 Mo. 618; Sheetz *v.* Kirtley, 62 Mo. 417; Johnson *v.* Johnson, 72 Mo. App. 386.

Nebraska.— Shelby *v.* Creighton, 65 Nebr. 485, 91 N. W. 369.

New Jersey.—See Budd *v.* Hiler, 27 N. J. L. 43; Livingston *v.* Combs, 1 N. J. L. 42; Bray *v.* Neill, 21 N. J. Eq. 343; Adams *v.* Adams, (Ch. 1888) 14 Atl. 575, (Ch. 1889) 17 Atl. 775.

New York.— A judicial settlement of the account of a personal representative is conclusive against all the parties who were duly cited or appeared, and all persons deriving title from any of them at any time. Code Civ. Proc. § 2742. See Denton *v.* Sanford, 103 N. Y. 607, 9 N. E. 490 [*affirming* 39 Hun 487]; Davis *v.* Crandall, 101 N. Y. 311, 4 N. E. 721; Matter of Turner, 79 N. Y. App. Div. 495, 80 N. Y. Suppl. 573; Matter of Gall, 42 N. Y. App. Div. 255, 59 N. Y. Suppl. 254; People *v.* Townsend, 37 Barb. 520; Matter of O'Brien, 33 Misc. 17, 67 N. Y. Suppl. 1116; Shimmel *v.* Morse, 30 Misc. 257, 63 N. Y. Suppl. 322; Matter of Crise, 7 N. Y. Suppl. 202, 2 Connoly Surr. 59; McCunn's Estate, 15 N. Y. St. 712; Wells *v.* Wallace, 2 Redf. Surr. 58; Redmond *v.* Ely, 2 Bradf. Surr. 175.

Pennsylvania.— Garwin's Appeal, 2 Am. L. J. 253.

South Carolina.— Ward *v.* Parker, 19 S. C. 603; Roberts *v.* Johns, 16 S. C. 171.

United States.— Beatty *v.* Maryland, 7 Cranch 281, 3 L. ed. 343; Lipse *v.* Spears, 88 Fed. 952.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2277.

Conclusiveness upon legatees and distributees see the following cases:

Illinois.— Curts *v.* Brooks, 71 Ill. 125.

Louisiana.— Miguez *v.* Delcambre, 109 La. 1090, 34 So. 99; Miller *v.* Rougieux, 20 La. Ann. 577; Bujac *v.* Loste, 12 La. Ann. 96; Bry *v.* Dowell, 1 Rob. 111.

Maryland.— Appler *v.* Merryman, 91 Md. 706, 47 Atl. 1026.

Mississippi.— Crawford *v.* Redus, 54 Miss. 700.

Missouri.— Bishop *v.* Chase, 156 Mo. 158, 56 S. W. 1080, 79 Am. St. Rep. 515; Lycan *v.* Miller, 56 Mo. App. 79.

New Hampshire.— Starkey *v.* Kingsley, 69 N. H. 293, 39 Atl. 1017; Symmes *v.* Libbey, Smith 137.

Ohio.—Clark *v.* Clark, 16 Ohio Cir. Ct. 103, 8 Ohio Cir. Dec. 752.

Pennsylvania.—McCullough *v.* Montgomery, 7 Serg. & R. 17.

United States.— Butterfield *v.* Smith, 101 U. S. 570, 25 L. ed. 868; Lupton *v.* Janney, 15 Fed. Cas. No. 8,607, 5 Cranch C. C. 474 [*affirmed* in 13 Pet. 381, 10 L. ed. 210].

See 22 Cent. Dig. tit. "Executors and Administrators," § 2279.

Conclusiveness upon creditors see Jefferson *v.* Edrington, 53 Ark. 545, 14 S. W. 99, 903; Hood *v.* Hood, 80 Ky. 39, 3 Ky. L. Rep. 515; Bellocq's Succession, 28 La. Ann. 154; Carter *v.* McManus, 15 La. Ann. 676; Elwood *v.* Deifendorf, 5 Barb. (N. Y.) 398; Bogart *v.* Van Velsor, 4 Edw. (N. Y.) 718.

Persons having a life-interest in an estate are bound by the accountings had in the surrogate's court, to which they were regularly cited, although those entitled to the property on the termination of the life-estates were not cited. Elsworth *v.* Hinton, 47 Hun (N. Y.) 625.

Conclusiveness of finding of notice.— A decree of the orphans' court on final settlement of the accounts of an administrator, adjudging that due notice of such settlement was given, is conclusive. Boulton *v.* Scott, 3 N. J. Eq. 231.

Effect of recitals as to notice.— Upon an issue whether the heirs and legatees had notice of a final settlement, recitals of the decree are *prima facie* correct, but are not conclusive of the fact of notice. Crawford *v.* Redus, 54 Miss. 700. *Compare* Pollock *v.* Buie, 43 Miss. 140.

79. *Alabama.*— Watts *v.* Frazer, 80 Ala. 186; Hutton *v.* Williams, 60 Ala. 133; Jones *v.* Fellows, 58 Ala. 343; Stabler *v.* Cook, 57 Ala. 22; Waring *v.* Lewis, 53 Ala. 615; Collier *v.* Slaughter, 22 Ala. 671.

Kentucky.— See Stull *v.* Davidson, 12 Bush 167.

Mississippi.— Dogan *v.* Brown, 44 Miss. 235; Cason *v.* Cason, 31 Miss. 578.

New Hampshire.— Simmons *v.* Goodell, 63 N. H. 458, 2 Atl. 897.

Pennsylvania.— See Tysseur's Estate, 31 Pittsb. Leg. J. 86; Lang's Estate, 30 Pittsb. Leg. J. 97.

Tennessee.— See Allen *v.* Shanks, 90 Tenn. 359, 16 S. W. 715.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2281.

80. *Alabama.*— Waring *v.* Lewis, 53 Ala. 615.

California.— *In re* Stott, 52 Cal. 403.

Colorado.— French *v.* Woodruff, 25 Colo. 339, 54 Pac. 1015.

Connecticut.— See Sellew's Appeal, 36 Conn. 186.

Kentucky.— See Bush *v.* Hampton, 4 Dana 83.

Louisiana.— Hoss' Succession, 42 La. Ann. 1022, 8 So. 833; De Egana's Succession, 18 La. Ann. 263; Peytavin's Succession, 10 Rob.

sive.[81] It follows therefore that such a settlement is not conclusive as to assets not accounted for in such statement or received thereafter and that as to such assets the personal representative may be required to make a further settlement.[82]

118. See also Conrad's Succession, 45 La. Ann. 89, 11 So. 935.

Mississippi.— See Cole *v.* Leak, 31 Miss. 131.

Missouri.— State *v.* Gray, 106 Mo. 526, 17 S. W. 500; Van Bibber *v.* Julian, 81 Mo. 618; Sheetz *v.* Kirtley, 62 Mo. 417; Johnson *v.* Johnson, 72 Mo. App. 386.

Nebraska.— Shelby *v.* Creighton, 65 Nebr. 485, 91 N. W. 369, 101 Am. St. Rep. 630.

New York.— See Douglas *v.* Yost, 64 Hun 155, 18 N. Y. Suppl. 830, 28 Abb. N. Cas. 370; Matter of Chase, 40 Misc. 616, 83 N. Y. Suppl. 62; Sheldon *v.* Sheldon, 11 N. Y. Suppl. 477.

Ohio.— McAfee *v.* Phillips, 25 Ohio St. 374; Sharp *v.* Pontius, 2 Ohio Cir. Ct. 7, 1 Ohio Cir. Dec. 331.

Pennsylvania.— Sager *v.* Lindsey, 118 Pa. St. 25, 13 Atl. 211; McFadden *v.* Geddis, 17 Serg. & R. 336.

Texas.—See Herbert *v.* Herbert, (Civ. App. 1900) 59 S. W. 594.

Vermont.— See Riz *v.* Smith, 8 Vt. 365.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2282.

Payment of debts.— Where a probate court makes an order of final settlement of an estate and discharges the personal representative, such action involves a consideration and approval of payments made by the representative, and if the court has jurisdiction to declare the estate settled such payments are thereby ratified. People *v.* Medart, 166 Ill. 348, 46 N. E. 1095 [*affirming* 63 Ill. App. 111].

Correctness of items of account.— A decree of judicial settlement of an administration account by the orphans' court is conclusive as to the correctness of the items set out in the account and directly acted upon by the court. App *v.* Dreisbach, 2 Rawle (Pa.) 287, 21 Am. Dec. 447.

Allowance of compensation.— A decree allowing compensation to the personal representative and fixing the amount thereof is conclusive as to that matter (Ringgold *v.* Stone, 20 Ark. 526; Simonds *v.* Creswell, 10 La. Ann. 318; Scott *v.* Dorsey, 1 Harr. & J. (Md.) 227; Mount *v.* Slack, 45 N. J. Eq. 129, 17 Atl. 297, 45 N. J. Eq. 889, 19 Atl. 622; Matter of Prentice, 25 N. Y. App. Div. 209, 49 N. Y. Suppl. 353) when not appealed from (Thomas *v.* Frederick County School, 9 Gill & J. (Md.) 115), and cannot be collaterally attacked (Barney *v.* Saunders, 16 How. (U. S.) 535, 14 L. ed. 1047; Campbell *v.* Strong, 4 Fed. Cas. No. 2,367*a*, Hempst. 265). An order of the probate court in the final settlement of the administration of an estate, by joint administrators, awarding a certain sum to one of the administrators for extra services is not, however, a conclusive adjudication against the other administrator as to the right of the one, to whom the allowance was made, to the entire sum so awarded (Oakley *v.* Oakley, 111 Ala. 506, 20 So. 335), and a decree allowing compensation is not conclusive upon persons interested in the estate who are not duly notified of the proceeding or cited to appear (Collins *v.* Tilton, 58 Ind. 374; Baldwin *v.* Carleton, 11 Rob. (La.) 109; Millaudon *v.* Cajus, 6 La. 222. See also Royster *v.* Wright, 118 N. C. 152, 24 S. E. 746.

81. *Colorado.*— Hartsel *v.* People, 21 Colo. 296, 40 Pac. 567.

Connecticut.— See Sellew's Appeal, 36 Conn. 186.

Georgia.— See Davis *v.* Harper, 54 Ga. 180.

Illinois.— Bayless *v.* People, 56 Ill. App. 55. See also Diversey *v.* Johnson, 93 Ill. 547.

Iowa.— Crosley *v.* Calhoon, 45 Iowa 557.

Missouri.— Bramell *v.* Adams, 146 Mo. 70, 47 S. W. 931; Nelson *v.* Barnett, 123 Mo. 564, 27 S. W. 520. See also State *v.* Jones, 131 Mo. 194, 33 S. W. 23.

New York.— See Matter of Haslehurst, 4 Misc. 366, 25 N. Y. Suppl. 827.

Pennsylvania.— Hibshman *v.* Dulleban, 4 Watts 183. See also *In re* Schulte, 28 Pittsb. Leg. J. 95.

Vermont.— Boomhower *v.* Babbitt, 67 Vt. 327, 31 Atl. 838.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2282.

When an account is homologated only in "so far as not opposed" the heirs are not concluded as to items in the account to which opposition was filed by creditors. Schaffer's Succession, 13 La. Ann. 113. See also Cabrol's Succession, 26 La. Ann. 609; Gaines *v.* New Orleans, 6 Wall. (U. S.) 642, 18 L. ed. 950.

As to matters not within the jurisdiction of the court a final settlement is not conclusive.

Alabama.— Gerald *v.* Bunkley, 17 Ala. 170.

Arkansas.— Clark *v.* Shelton, 16 Ark. 474.

Maine.— Mattocks *v.* Moulton, 84 Me. 545, 24 Atl. 1004.

Missouri.— Patterson *v.* Booth, 103 Mo. 402, 15 S. W. 543.

Pennsylvania.— Work *v.* Work, 14 Pa. St. 316.

South Carolina.— Hollady *v.* Hollady, 24 S. C. 521.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2287.

But *compare* Baker *v.* Baker, 51 Wis. 538, 8 N. W. 289.

82. *Maine.*— See Robinson *v.* Ring, 72 Me. 140, 39 Am. Rep. 308.

Maryland.— See Wilson *v.* McCarty, 55 Md. 277.

Michigan.— See Porter *v.* Long, 124 Mich. 584, 83 N. W. 601.

Mississippi.— Smith *v.* Hurd, 7 How. 188. See also Henderson *v.* Winchester, 31 Miss. 290.

d. Effect on Pending Actions. A final settlement made pending litigation against the estate is unwarranted and will not defeat a recovery; but the pending suit may proceed and judgment be rendered against the personal representative notwithstanding such settlement.[83]

e. Effect on Jurisdiction of Probate Court. After a personal representative has made a final settlement and has resigned or been discharged, and the administration has been closed, the jurisdiction of the probate court ceases.[84]

f. Collateral Attack. An order or decree rendered on the final settlement of a personal representative like other judgments is not generally subject to collateral attack. The remedy of a person aggrieved thereby is to seek its reversal on appeal, or when the proper grounds exist to institute a direct proceeding to have it set aside.[85]

Missouri.— State *v.* Stuart, 74 Mo. App. 182. But *compare* Patterson *v.* Booth, 103 Mo. 402, 15 S. W. 543.

New Hampshire.— See Clough *v.* Clark, 63 N. H. 403, 1 Atl. 201.

New York.— See Brown *v.* Brown, 53 Barb. 217; Paff *v.* Kinney, 5 Sandf. 380.

North Carolina.— See McAdoo *v.* Thompson, 72 N. C. 408.

Ohio.— McAfee *v.* Phillips, 25 Ohio St. 374.

Pennsylvania.— Shuman's Appeal, 27 Pa. St. 64, 1 Grant 272. See also Mutchmore's Estate, 9 Pa. Dist. 293, 24 Pa. Co. Ct. 257; *In re* Carpenter, 3 Lanc. L. Rev. 5.

Vermont.— Davis *v.* Eastman, 66 Vt. 651, 30 Atl. 1; Probate Ct. *v.* Merriam, 8 Vt. 234.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2289, 2290.

But *compare* Modawell *v.* Holmes, 40 Ala. 391.

Interest on money received.— A settlement of an administrator's account, in which he does not charge himself with interest on money received, does not preclude a subsequent inquiry as to charging him with such interest; but, if there is an adjudication as to the matter of interest, the settlement is conclusive, unless the administrator was guilty of fraud. Saxton *v.* Chamberlain, 6 Pick. (Mass.) 422.

Evidence of funds unaccounted for.— In an action by the heirs of the testator, the homologation of the executor's account is no bar to the introduction of evidence to show that the executor had received funds for which he had not accounted, or failed to put in any previous account, when it is offered before he has been discharged. Johnston *v.* Cox, 13 La. 536.

83. Ogden *v.* Waller, 24 Miss. 190; Smiley *v.* Cockrell, 92 Mo. 105, 4 S. W. 443. See also Neill *v.* Hodge, 5 Tex. 487.

84. *Alabama.*— Bryant *v.* Horn, 42 Ala. 496. See also Horn *v.* Bryan, 44 Ala. 88; Modawell *v.* Holmes, 40 Ala. 391.

Iowa.— Jordan *v.* Hunnell, 96 Iowa 334, 65 N. W. 302.

Louisiana.— Caire *v.* Judge Twenty-third Dist. Ct., 43 La. Ann. 1133, 10 So. 178; Gillespie *v.* Twitchell, 34 La. Ann. 288; Augustin *v.* Avila, 29 La. Ann. 837; Taylor's Succession, 28 La. Ann. 367.

Maryland.— Binnerman *v.* Weaver, 8 Md. 517.

Texas.— Davis *v.* Harwood, 70 Tex. 71, 8 S. W. 58; Long *v.* Wooters, 18 Tex. Civ. App. 35, 45 S. W. 165.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2276.

85. *Alabama.*— Modawell *v.* Holmes, 40 Ala. 391.

Arkansas.— Dooley *v.* Dooley, 14 Ark. 122.

California.— Tobelman *v.* Hildebrant, 72 Cal. 313, 14 Pac. 20. See also Crew *v.* Pratt, 119 Cal. 131, 51 Pac. 44.

Delaware.— State *v.* Barnett, 2 Marv. 115, 42 Atl. 420.

Georgia.— See Groves *v.* Williams, 68 Ga. 598.

Indiana.— Jones *v.* Jones, 115 Ind. 504, 18 N. E. 20; Carver *v.* Lewis, 104 Ind. 438, 2 N. E. 705, 105 Ind. 44, 2 N. E. 714; Peacocke *v.* Leffler, 74 Ind. 327; Sanders *v.* Loy, 61 Ind. 298; Kuhn *v.* Boehne, 27 Ind. App. 340, 61 N. E. 199.

Iowa.— Harlin *v.* Stevenson, 30 Iowa 371.

Maine.— Harlow *v.* Harlow, 65 Me. 448.

Maryland.— Roberts *v.* Roberts, 71 Md. 1, 17 Atl. 568.

Massachusetts.— Parcher *v.* Bussell, 11 Cush. 107.

Minnesota.— See State *v.* Ramsey County Prob. Ct., 40 Minn. 296, 41 N. W. 1033.

Mississippi.— Austin *v.* Lamar, 23 Miss. 189.

Missouri.— Van Bibber *v.* Julian, 81 Mo. 618; Whittelsey *v.* Dorsett, 23 Mo. 236; State *v.* Roland, 23 Mo. 95; State *v.* Carroll, 101 Mo. App. 110, 74 S. W. 468.

New Jersey.— Voorhees *v.* Voorhees, 18 N. J. Eq. 223 (holding that the final settlement and allowance of an intermediate account cannot be inquired into collaterally); Ordinary *v.* Kershaw, 14 N. J. Eq. 527. *Compare* Lippincott *v.* Bechtold, 54 N. J. Eq. 407, 34 Atl. 1079.

New York.— Matter of Stevens, 40 Misc. 377, 82 N. Y. Suppl. 397; Newcomb *v.* St. Peter's Church, 2 Sandf. Ch. 636. *Compare* Abell *v.* Bradner, 15 N. Y. Suppl. 64.

Pennsylvania.— See McNeal *v.* Holbrook, 25 Pa. St. 189.

Tennessee.— See Grimstead *v.* Huggins, 13 Lea 728.

Texas.— Debrell *v.* Ponton, 27 Tex. 623; Kearney *v.* Nicholson, (Civ. App. 1901) 67 S. W. 361; Ball *v.* Ball, (Civ. App. 1898) 45 S. W. 605.

2. Ex Parte Settlements. *Ex parte* settlements of accounts by personal representatives are *prima facie* evidence of their correctness, but they are not conclusive,[86] and in some jurisdictions this is established as the rule by express statutory provisions.[87]

Wisconsin.— Barker *v.* Barker, 14 Wis. 131.

United States.— Tate *v.* Norton, 94 U. S. 746, 24 L. ed. 222. See also Barney *v.* Saunders, 16 How. 535, 14 L. ed. 1047.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2269.

Collateral attack for want of jurisdiction see Gamble *v.* Jordan, 54 Ala. 432 (holding that an irregularity in the appointment of a guardian *ad litem* for an infant who was a necessary party to the settlement was a mere matter of error, not of jurisdiction, and did not detract from the conclusiveness of the decree pronounced by the court); State *v.* Burkam, 23 Ind. App. 271, 55 N. E. 237; Nash *v.* Sawyer, 114 Iowa 742, 87 N. W. 707.

Collateral attack for fraud in procuring order or decree see Pass *v.* Pass, 98 Ga. 791, 25 S. E. 752 (construing Ga. Code, §§ 2609, 3828, 3594); Voorhees *v.* Voorhees, 18 N. J. Eq. 223. But *compare* Smith *v.* Hauger, 150 Mo. 437, 51 S. W. 1052; State *v.* Carroll, 101 Mo. App. 110, 74 S. W. 468.

Void orders and judgments.— Orders and judgments which the probate court has not the power under any circumstances to make or order are null, and being null their nullity may be asserted in any collateral proceeding where they are relied on in support of a claim of right. Trammel *v.* Philleo, 33 Tex. 395.

86. *Georgia.*— Shine *v.* Redwine, 30 Ga. 780. See Cumming *v.* Fryer, Dudley 182.

Iowa.— Clark *v.* Cress, 20 Iowa 50.

Kentucky.— Thomason *v.* Thomason, 1 Metc. 51; Smith *v.* Hoskins, 7 J. J. Marsh. 502; Logan *v.* Troutman, 3 A. K. Marsh. 66; Burns *v.* Burton, 1 A. K. Marsh. 349; Cochran *v.* Davis, 5 Litt. 118.

Louisiana.— Kendrick's Succession, 7 Rob. 138; Williams' Succession, 7 Rob. 46; Verret *v.* Aubert, 6 La. 350; Marchand *v.* Gracie, 2 La. 147; Ballio *v.* Wilson, 8 Mart. N. S. 344.

Maryland.— Seighman *v.* Marshall, 17 Md. 550; Scott *v.* Fox, 14 Md. 388; Gist *v.* Cockey, 7 Harr. & J. 134. See also Evans *v.* Iglehart, 6 Gill & J. 171; Mitchell *v.* Mitchell, 3 Md. Ch. 71.

Mississippi.— See Vertner *v.* McMurran, Freem. 136.

Nebraska.— Boales *v.* Ferguson, 55 Nebr. 565, 76 N. W. 18.

Ohio.— Muskingum Bank *v.* Carpenter, 7 Ohio 21, 28 Am. Dec. 616.

South Carolina.— Neville *v.* Robinson. 1 Bailey 361; Miller *v.* Alexander, 1 Hill Eq. 25.

United States.— Lupton *v.* Janney, 13 Pet. 381, 10 L. ed. 210.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2268.

The burden of proof is upon the person impeaching the correctness of such a settlement.

Georgia.— Wright *v.* Bessman, 55 Ga. 187; Brown *v.* Wright, 5 Ga. 29.

Illinois.— See Eckley *v.* Clark, 24 Ill. App. 495.

Maryland.— Owens *v.* Collinson, 3 Gill & J. 25.

Virginia.— Wimbish *v.* Rawlins, 76 Va. 48.

United States.— Lupton *v.* Janney, 13 Pet. 381, 10 L. ed. 210.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2268.

A final settlement made without notice is not conclusive, but like an annual settlement is to be treated as *prima facie* correct. Crawford *v.* Redus, 54 Miss. 700; Winborn *v.* King, 35 Miss. 157; Heitkamp *v.* Biedustein, 3 Mo. App. 450. See also Sumrall *v.* Sumrall, 24 Miss. 258.

87. See the following cases:

Kentucky.— Owensboro Deposit Bank *v.* Smith, 109 Ky. 311, 58 S. W. 792, 22 Ky. L. Rep. 808; Turley *v.* Barnes, 103 Ky. 127, 44 S. W. 446, 19 Ky. L. Rep. 1808; Manion *v.* Titsworth, 18 B. Mon. 582; Scott *v.* Kennedy, 12 B. Mon. 510; Calvert *v.* Holland, 9 B. Mon. 458; Cundiff *v.* Zachary, 1 Dana 371; Briscoe *v.* Brady, 6 T. B. Mon. 134; Thome *v.* Allen, 49 S. W. 1068, 20 Ky. L. Rep. 1728; Raison *v.* Williams, 42 S. W. 1108, 19 Ky. L. Rep. 1142; Stanberry *v.* Robinson, 27 S. W. 973, 16 Ky. L. Rep. 310; Carrico *v.* Brummel, 5 Ky. L. Rep. 776; Crow *v.* Crow, 4 Ky. L. Rep. 909; Frazier *v.* Cavanaugh, 4 Ky. L. Rep. 711.

North Carolina.—Allen *v.* Royster, 107 N. C. 278, 12 S. E. 134; Turner *v.* Turner, 104 N. C. 566, 10 S. E. 606; Grant *v.* Hughes, 94 N. C. 231; State University *v.* Hughes, 90 N. C. 537.

Tennessee.— Vaccaro *v.* Cicalla, 89 Tenn. 63, 14 S. W. 43; Alvis *v.* Oglesby, 87 Tenn. 172, 10 S. W. 313; Murray *v.* Luna, 86 Tenn. 326, 6 S. W. 603; Shield *v.* Alsup, 5 Lea 508; Snodgrass *v.* Snodgrass, 1 Baxt. 157; Milly *v.* Harrison, 7 Coldw. 191; Curd *v.* Bonner, 4 Coldw. 632; Elrod *v.* Lancaster, 2 Head 571, 75 Am. Dec. 749; Turney *v.* Williams, 7 Yerg. 172 (circumstances under which such settlement has force and effect of a stated account); Burton *v.* Dickinson, 3 Yerg. 112; Stephenson *v.* Yandel, 5 Hayw. 261; Stephenson *v.* Stephenson, 3 Hayw. 123; Bashaw *v.* Blakemore, 1 Overt. 348; Greenlee *v.* Hays, 1 Overt. 300.

Virginia.— Scott *v.* Porter, 99 Va. 553, 39 S. E. 220; Leavell *v.* Smith, 99 Va. 374, 38 S. E. 202; Robinett *v.* Robinett, 92 Va. 124, 22 S. E. 856; Hurt *v.* West, 87 Va. 78, 12 S. E. 141; Radford *v.* Fowlkes, 85 Va. 820, 8 S. E. 817; Carter *v.* Edmonds, 80 Va. 58; Wimbish *v.* Rawlins, 76 Va. 48; Leake *v.* Leake, 75 Va. 792; Robertson *v.* Wright, 17

3. ANNUAL OR PARTIAL SETTLEMENTS.[88] Annual or partial settlements of personal representatives, when made *ex parte*, as they usually are, have not, like final settlements, the force and effect of judgments and so are not conclusive, but are only *prima facie* evidence of the correctness of the account stated;[89] the burden of overcoming this presumption being, however, upon the party impeaching such a settlement.[90] As to any matters contested and adjudicated on such settlements,

Gratt. 534; Shearman *v.* Christian, 9 Leigh 571; Wyllie *v.* Venable, 4 Munf. 369; McCall *v.* Peachy, 3 Munf. 288; Cavendish *v.* Fleming, 3 Munf. 198; Mountjoy *v.* Lowry, 4 Hen. & M. 428; Atwell *v.* Milton, 4 Hen. & M. 253; Nimmo *v.* Com., 4 Hen. & M. 57, 4 Am. Dec. 488; Anderson *v.* Fox, 2 Hen. & M. 245.

West Virginia.— Van Winkle *v.* Blackford, 33 W. Va. 573, 11 S. E. 26; Seabright *v.* Seabright, 28 W. Va. 412; Kyle *v.* Kyle, 25 W. Va. 376; Leach *v.* Buckner, 19 W. Va. 36; Bruce *v.* Bickerton, 18 W. Va. 342.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2268.

A bill to surcharge and falsify such settlement must specify wherein it is erroneous, and the specifications must be sustained by evidence. Green *v.* Thompson, 84 Va. 376, 5 S. E. 507; Corbin *v.* Mills, 19 Gratt. 438; Newton *v.* Poole, 12 Leigh 112.

The burden of proof is on plaintiff in attacking any item in such settlement to show that it is improper. Dearing *v.* Selvey, 50 W. Va. 4, 40 S. E. 478.

The right to attack a settlement may be lost by a delay for such a length of time and under such circumstances as to constitute laches. Bland *v.* Stewart, 35 W. Va. 518, 14 S. E. 215.

88. Distinction between annual and final settlement.— There is a broad distinction between the annual and the final settlement of an administrator. The one is wholly *ex parte* and without notice; the other can be made only upon due publication of notice to creditors and all persons interested. The one is made annually, or oftener, at the pleasure of the court; the other, only when the estate is fully administered. The one is for the information of the court and the convenience of the administrator in the management of the estate; the other, for the protection of the administrator, is a final adjudication of the respective rights and obligations of administrator, creditors, and heirs. The one is only *prima facie* correct, and is subject to correction of any errors or mistakes thereafter discovered in it, with appeal, or any direct proceeding to review it or set it aside; the other is conclusive and final, unless set aside by appeal or direct proceeding therefor, or impeached for fraud. The one is, so to speak, a judgment *de bene esse*; the other, a final judgment. Musick *v.* Beebe, 17 Kan. 47.

89. *Alabama.*— Tayloe *v.* Bush, 75 Ala. 432; Ditmar *v.* Bogle, 53 Ala. 169; Scruggs *v.* Orme, 46 Ala. 533; Holman *v.* Sims, 39 Ala. 709; Brazeale *v.* Brazeale, 9 Ala. 491. If such settlement is not made in conformity to the statute, it is not even *prima facie* correct. Jones *v.* Jones, 42 Ala. 218. Partial or annual settlements made without notice to the parties interested were not, prior to the adoption of the code, evidence for the administrator on final settlement. Pearson *v.* Darrington, 32 Ala. 227; Duke *v.* Duke, 26 Ala. 673; McCreeliss *v.* Hinkle, 17 Ala. 459; Willis *v.* Willis, 16 Ala. 652. Under the act of 1843 partial or annual settlements were regarded by the court as partaking of the nature of final settlements, so far as to authorize a writ of error to lie to the supreme court. Thompson *v.* Hunt, 22 Ala. 517; Savage *v.* Benham, 11 Ala. 49.

Illinois.— Bliss *v.* Seaman, 165 Ill. 422, 46 N. E. 279; Emerick *v.* Hileman, 71 Ill. App. 512; Clifford *v.* Davis, 22 Ill. App. 316.

Indiana.— Fraim *v.* Millison, 59 Ind. 123; Collins *v.* Tilton, 58 Ind. 374; Goodwin *v.* Goodwin, 48 Ind. 584; State *v.* Brutch, 12 Ind. 381.

Iowa.— *In re* Heath, 58 Iowa 36, 11 N. W. 723.

Louisiana.— *In re* Beecroft, 28 La. Ann. 824.

Maryland.— Bantz *v.* Bantz, 52 Md. 686; *In re* Stratton, 46 Md. 551.

Mississippi.— Dement *v.* Heth, 45 Miss. 388; Harper *v.* Archer, 9 Sm. & M. 71.

Missouri.— Clarke *v.* Sinks, 144 Mo. 448, 46 S. W. 199; McPike *v.* McPike, 111 Mo. 216, 20 S. W. 12; Myers *v.* Myers, 98 Mo. 262, 11 S. W. 617; West *v.* West, 75 Mo. 204 (open to collateral attack); Seymour *v.* Seymour, 67 Mo. 303; Folger *v.* Heidel, 60 Mo. 284; Picot *v.* O'Fallon, 35 Mo. 29; *In re* Ansley, 95 Mo. App. 332, 68 S. W. 609.

Nebraska.— Bachelor *v.* Schmela, 49 Nebr. 37, 68 N. W. 378.

New Jersey.— Jackson *v.* Reynolds, 39 N. J. Eq. 313.

Texas.— Richardson *v.* Kennedy, 74 Tex. 507, 12 S. W. 219; McShan *v.* Lewis, (Civ. App. 1903) 76 S. W. 616.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2292; and *infra*, XV, H, 7.

Personal representative concluded.— It has been decided that the annual account of a personal representative is conclusive against him and in favor of the estate, unless it is shown that errors have arisen from mere oversight, mistake, or miscalculation. Stone *v.* Morgan, 65 Miss. 247, 3 So. 580; Effinger *v.* Richards, 35 Miss. 540. See also Tate *v.* Gairdner, 119 Ga. 133, 46 S. E. 73; Capdevielle *v.* Erwin, 13 La. Ann. 286; Dodson *v.* Dodson, 6 Heisk. (Tenn.) 110. But see Smith *v.* Smith, 13 Ala. 329; Watts *v.* Watts, 38 Ohio St. 480; Seabright *v.* Seabright, 28 W. Va. 412.

90. *Alabama.*— Dickie *v.* Dickie, 80 Ala. 57; Tayloe *v.* Bush, 75 Ala. 432.

however, the usual rule as to adjudications by the courts applies, and the parties contesting are concluded.[91]

4. Settlement on Resignation, Removal, or Death. A settlement made by a personal representative who resigns his trust while the estate remains unsettled is not a final settlement of the estate,[92] but is to be regarded as the final settlement of the outgoing representative,[93] and binds all persons interested as to the matters embraced in such settlement until it is set aside in some direct proceeding.[94] Legatees and distributees are bound by a settlement made in good faith and in the absence of fraud and collusion between the representative of a deceased rep-

Illinois.— Emerick *v.* Hileman, 71 Ill. App. 512.

Iowa.— *In re* Heath, 58 Iowa 36, 11 N. W. 723.

Louisiana.— Caballero's Succession, 25 La. Ann. 646.

Maryland.— Martin *v.* Jones, 87 Md. 43, 39 Atl. 102; Shafer *v.* Shafer, 85 Md. 554, 37 Atl. 167.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2292.

91. Baber *v.* Woods, 39 Ga. 643; Kittson *v.* St. Paul Trust Co., 78 Minn. 325, 81 N. W. 7. See also Turney *v.* Williams, 7 Yerg. (Tenn.) 172.

In California an order "settling an account of an executor or administrator" is appealable (Code Civ. Proc. § 963, subd. 3); and when proper notice has been given it is conclusive as to all items contained in it, except as against persons laboring under some legal disability. In this respect there is no difference between a final account, that is one made with a view to immediate distribution of the estate, and any other account; the code makes no distinction between them as to appealability, or as to the conclusiveness of orders settling them; and it has been expressly decided that the settlement of an annual account when not appealed from is conclusive. *In re* Grant, 131 Cal. 426, 63 Pac. 731; *In re* Fernandez, 119 Cal. 579, 51 Pac. 851; *In re* Marshall, 118 Cal. 379, 50 Pac. 540; *In re* Couts, 87 Cal. 480, 25 Pac. 685, 100 Cal. 400, 34 Pac. 865. See also *In re* Bell, 142 Cal. 97, 75 Pac. 679. But such a settlement is conclusive only as to the items included therein and does not estop the personal representative from including in his final account any item not previously included and passed upon in any annual account, although it be for a demand existing prior thereto. *In re* Adams, 131 Cal. 415, 63 Pac. 838. See also *In re* Hill, 62 Cal. 186; Walls *v.* Walker, 37 Cal. 424, 99 Am. Dec. 290. Semiannual returns of a public administrator, showing the condition of estates in his hands as required by Cal. Code Civ. Proc. § 1736, are not accounts stated and hence are not conclusive on persons interested in such estates, although they made no objection to such returns at the time they were filed. *In re* Hedrick, 127 Cal. 184, 59 Pac. 590.

In Delaware there seems to be no difference between a partial and a final account as to its conclusiveness, as to all matters embraced in it. Pickard *v.* Price, 5 Del. Ch. 239. See also Robinson *v.* Robinson, 3 Harr. 433.

In Michigan partial accounts settled after notice to persons interested, as required by statute, are conclusive as to all matters contained in them and not open to attack in the final accounting, except on the ground of fraud, unknown at the time of accounting. Porter *v.* Long, 124 Mich. 584, 83 N. W. 601; Morton *v.* Johnston, 124 Mich. 561, 83 N. W. 369. Annual accountings by a personal representative consisting of credits to him and charges against him will not, however, preclude inquiry into losses of securities resulting from his negligence on the ground that they were adjudications approving what had been done and thereby binding the estate. Cheever *v.* Ellis, 134 Mich. 645, 96 N. W. 1067.

In Pennsylvania the rule is that the confirmation of a merely partial account is a definitive decree and is conclusive as to the matters embraced in it. Rhoads' Appeal, 39 Pa. St. 186 [*overruling* Lights' Appeal, 22 Pa. St. 445; *In re* Walker, 3 Rawle 243; McGrew's Appeal, 14 Serg. & R. 396; Crouse's Estate, 16 Pa. Super. Ct. 212; Salloway's Estate, 5 Pa. Super. Ct. 272]. See also Bower's Appeal, 2 Pa. St. 432; *In re* Sharp, 37 Leg. Int. 133; Weaver's Estate, 5 Lanc. Bar, Jan. 24, 1874. Such an account is not, however, conclusive as to matters not included in it; it is simply conclusive as to such matters as have been adjudicated under it. Grim's Appeal, 109 Pa. St. 391, 1 Atl. 212; Fross' Appeal, 105 Pa. St. 258; McLellan's Appeal, 76 Pa. St. 231; Leslie's Appeal, 63 Pa. St. 355; Shindel's Appeal, 57 Pa. St. 43.

In Wisconsin the county court may upon notice as prescribed by statute settle and allow an account of a personal representative at any time before the rendition of his final account, and an account thus settled and allowed will be final and conclusive as to all matters embraced in it, and can be impeached or reopened only for fraud or mistake. Schinz *v.* Schinz, 90 Wis. 236, 63 N. W. 162.

92. Lang *v.* State, 67 Ind. 577.

93. Waller *v.* Ray, 48 Ala. 468. But see *In re* Glover, 127 Mo. 153, 29 S. W. 982.

94. Waller *v.* Ray, 48 Ala. 468; Lang *v.* State, 67 Ind. 577; Parsons *v.* Milford, 67 Ind. 489.

Settlement before appointment of successor. —Since a retiring representative must make his settlement with his successor, no final settlement can be made by him until his suc-

resentative and his co-representative,[95] or successor,[96] or between an outgoing representative and his successor,[97] although as to the successor such a settlement is to be regarded as *prima facie* evidence only.[98]

H. Opening, Vacating, or Setting Aside Settlements — 1. Jurisdiction. It is well settled that final settlements of personal representatives like other judgments and decrees may be opened or set aside by courts of equity when sufficient grounds appear,[99] and in some states, either by virtue of inherent equity jurisdiction or as the result of express statutory enactments, probate courts have the same power.[1] In other states, however, the power of a probate court to dis-

cessor is appointed, and a purported final settlement made by him before such appointment will have the force of an annual settlement only. Emmons *v.* Gordon, 125 Mo. 636, 28 S. W. 863.

95. Douglass *v.* Murray, 63 Ga. 369.

96. Austin *v.* Raiford, 68 Ga. 201.

97. Waring *v.* Lewis, 53 Ala. 615.

98. Waring *v.* Lewis, 53 Ala. 615.

99. *Alabama.*— Watts *v.* Frazer, 80 Ala. 186; Waldrom *v.* Waldrom, 76 Ala. 285; Waring *v.* Lewis, 53 Ala. 615; Morrow *v.* Allison, 39 Ala. 70.

Arkansas.— Jones *v.* Graham, 36 Ark. 383.

California.— Cahalan's Estate, 70 Cal. 604, 12 Pac. 427.

Georgia.— A discharge obtained by an executor by means of a fraud practised upon the legatees or the ordinary is void by express statute, and while it may be set aside by motion in the court of ordinary upon proof of the fraud, it may also be collaterally attacked as a nullity by an equitable petition in the superior court. Pass *v.* Pass, 98 Ga. 791, 25 S. E. 752. See also Jacobs *v.* Pou, 18 Ga. 346.

Illinois.— Anderson *v.* Anderson, 77 Ill. App. 533.

Indiana.— Brackenridge *v.* Holland, 2 Blackf. 377, 20 Am. Dec. 123; Allen *v.* Clark, 2 Blackf. 343.

Kansas.— Ladd *v.* Nystol, 63 Kan. 23, 64 Pac. 985; Gafford *v.* Dickinson, 37 Kan. 287, 15 Pac. 175; Shoemaker *v.* Brown, 10 Kan. 383.

Kentucky.— Speed *v.* Nelson, 8 B. Mon. 499.

Mississippi.— The court of chancery may set aside a settlement for fraud and direct a new settlement in the probate court, but it has no power to assume the jurisdiction of the probate court and have the settlement made in its own forum. Foute *v.* McDonald, 27 Miss. 610; Neylans *v.* Burge, 14 Sm. & M. 201; Searles *v.* Scott, 14 Sm. & M. 94; Green *v.* Creighton, 10 Sm. & M. 159, 48 Am. Dec. 742; Turnbull *v.* Endicott, 3 Sm. & M. 302.

Missouri.— Baldwin *v.* Dalton, 168 Mo. 20, 67 S. W. 599; State *v.* Roberts, 60 Mo. 402; Oldham *v.* Trimble, 15 Mo. 225.

North Carolina.— Murphy *v.* Harrison, 65 N. C. 246.

South Carolina.— Harris *v.* Stilwell, 4 S. C. 19.

Wisconsin.— McLachlan *v.* Staples, 13 Wis. 448.

United States.— Griffith *v.* Godey, 113 U. S. 89, 5 S. Ct. 383, 28 L. ed. 934.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2221.

Positive statute necessary to extinguish jurisdiction.— The jurisdiction of courts of equity in this respect is not taken away or abridged by a statute conferring a like jurisdiction upon probate courts (Black *v.* Whitall, 9 N. J. Eq. 572, 59 Am. Dec. 423; Vanmeter *v.* Jones, 3 N. J. Eq. 520; Boulton *v.* Scott, 3 N. J. Eq. 231); such jurisdiction is not extinguished by anything short of direct and positive prohibitory enactment (Baldwin *v.* Dalton, 168 Mo. 20, 67 S. W. 599; Stewart *v.* Colwell, 54 Mo. 536; Dingle *v.* Pollick, 49 Mo. App. 479).

Unconfirmed settlements.— A suit in equity will not be entertained to correct frauds in unconfirmed settlements of an executor's accounts; and if an executor has settled his accounts several times, and another settlement is pending in the probate court, his failure to charge himself with certain assets in any of the settlements cannot be the subject of an equitable suit. Hankins *v.* Layne, 48 Ark. 544, 3 S. W. 821.

1. *California.*— See Wiggin *v.* San Francisco Super. Ct., 68 Cal. 398, 9 Pac. 646.

Connecticut.— See Sellew's Appeal, 36 Conn. 186.

Indiana.— Graham *v.* Russell, 152 Ind. 186, 52 N. E. 806; Williams *v.* Williams, 125 Ind. 156, 25 N. E. 176.

Maine.— Smith *v.* Dutton, 16 Me. 308.

Massachusetts.— Boynton *v.* Dyer, 18 Pick. 1; Stetson *v.* Bass, 9 Pick. 27; Jenison *v.* Hapgood, 7 Pick. 1, 19 Am. Dec. 258. See also Sever *v.* Russell, 4 Cush. 513, 50 Am. Dec. 811; White *v.* Woodberry, 9 Pick. 136.

Mississippi.— Mayo *v.* Clancy, 57 Miss. 674; Bowen *v.* Seale, 45 Miss. 30; Bowers *v.* Williams, 34 Miss. 324; Gadberry *v.* Perry, 27 Miss. 114; Pendleton *v.* Prestridge, 12 Sm. & M. 302; Hooker *v.* Hooker, 10 Sm. & M. 599 (act not retrospective); McCullom *v.* Box, 8 Sm. & M. 619 (act constitutional). Prior to the statute conferring such power probate courts had no jurisdiction to entertain such bills. Harper *v.* Archer, 9 Sm. & M. 71; Jones *v.* Coon, 5 Sm. & M. 751; Washburn *v.* Phillips, 5 Sm. & M. 600; Hendricks *v.* Huddleston, 5 Sm. & M. 422; Harris *v.* Fisher, 5 Sm. & M. 74.

New Jersey.—Stevenson *v.* Phillips, 21 N. J. L. 70, 15 N. J. Eq. 236, only for fraud or mistake. See also Stevenson *v.* Hart, 7 N. J. Eq. 471.

New York.— *In re* Deyo, 102 N. Y. 724, 7

turb a judgment or decree of final settlement after the expiration of the term at which it is rendered has been denied.[2] The probate court may of course open or vacate its decrees at the term at which the same were rendered.[3]

2. Grounds For Relief — a. In General. The grounds, other than statutory ones, on which a court of equity or a court of probate in the exercise of equity jurisdiction will relieve against a final settlement are fraud, accident, or mistake.[4]

N. E. 819; *In re* McGorray, 20 N. Y. Suppl. 366; *In re* Salisbury, 6 N. Y. Suppl. 932.

Pennsylvania.— *In re* Finley, 196 Pa. St. 140, 66 Atl. 443 [*affirming* 8 Pa. Dist. 723]; Scott's Appeal, 112 Pa. St. 427, 5 Atl. 671; Bishop's Appeal, 26 Pa. St. 470.

Rhode Island.— Sherman *v.* Chace, 9 R. I. 166.

Vermont.— Adams *v.* Adams, 21 Vt. 162.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2209.

2. *Louisiana.*— Hacker's Succession, 28 La. Ann. 446; Benoit *v.* Hebert, 1 La. 212.

Michigan.— Grady *v.* Hughes, 64 Mich. 540, 31 N. W. 438.

Missouri.— Smith *v.* Hauger, 150 Mo. 437, 51 S. W. 1052.

Nevada.— Lucich *v.* Medin, 3 Nev. 93, 93 Am. Dec. 376.

North Carolina.— Murphy *v.* Harrison, 65 N. C. 246.

Oregon.— *In re* Conant, 43 Oreg. 530, 73 Pac. 1018; Deering *v.* Quivey, 26 Oreg. 556, 38 Pac. 710. See also Dray *v.* Bloch, 29 Oreg. 347, 45 Pac. 772.

South Carolina.— Harris *v.* Stilwell, 4 S. C. 19.

Texas.— Townsend *v.* Munger, 9 Tex. 300.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2209.

In Alabama a probate court has no jurisdiction at a subsequent term to set aside a decree rendered at a former term on the final settlement of a personal representative, unless the decree is void *ab initio*. Trawick *v.* Trawick, 67 Ala. 271; Cunningham *v.* Thompson, 59 Ala. 158; Seawell *v.* Buckley, 54 Ala. 592; Alexander *v.* Nelson, 42 Ala. 462; Watt *v.* Watt, 37 Ala. 543. Such settlement is void when no guardian *ad litem* was appointed to represent the complainant who was then a minor. Eatman *v.* Eatman, 82 Ala. 223, 2 So. 729; Barwick *v.* Rackley, 45 Ala. 215; Laird *v.* Reese, 43 Ala. 148. The final settlement of a personal representative made during the Civil war and fully carried into effect is not void. Griffin *v.* Ryland, 45 Ala. 688. See also Catterlin *v.* Morgan, 50 Ala. 501.

3. Caldwell *v.* Lockridge, 9 Mo. 362 (notice necessary); Metz's Appeal, 11 Serg. & R. (Pa.) 204.

Where the estate is insolvent the orphans' court has no authority at a subsequent day in the same term to reconsider and alter its final decree settling the claims on the estate, and the amount of assets in the administrator's hands, without notice to or the appearance of the creditors who are interested in the estate and entitled to dividends thereof. Eakin *v.* Brick, 16 N. J. L. 98.

In Ohio it has been held that, as courts of probate are open at all times and no terms thereof are provided by law, they have not the power of vacating their judgments during the term at which they are rendered, as have courts holding regular terms. Kinsella *v.* De Camp, 15 Ohio Cir. Ct. 494, 8 Ohio Cir. Dec. 352. See also Johnson *v.* Johnson, 26 Ohio St. 357; *In re* Koehnken, 25 Ohio Cir. Ct. 245.

4. *Alabama.*— Morrow *v.* Allison, 39 Ala. 70; Williamson *v.* Howell, 4 Ala. 693. See also Hooper *v.* Hooper, 32 Ala. 669.

Arkansas.— Ambleton *v.* Dyer, 53 Ark. 224, 13 S. W. 926; McLeod *v.* Griffis, 51 Ark. 1, 8 S. W. 837, 45 Ark. 505; Jones *v.* Graham, 36 Ark. 383; Shegogg *v.* Perkins, 34 Ark. 117; Osborne *v.* Graham, 30 Ark. 66.

Illinois.— Brandon *v.* Brown, 106 Ill. 519; Anderson *v.* Anderson, 77 Ill. App. 533 [*affirmed* in 178 Ill. 160, 52 N. E. 1038]; Seymour *v.* Edwards, 31 Ill. App. 50. See also Schlink *v.* Maxton, 48 Ill. App. 471 [*affirmed* in 153 Ill. 447, 38 N. E. 1063].

Indiana.— Ray *v.* Doughty, 4 Blackf. 115.

Kansas.— Young *v.* Scott, 59 Kan. 621, 54 Pac. 670 (settlement not impeachable for mere technical illegality in the conduct of the administration); Gafford *v.* Dickinson, 37 Kan. 287, 15 Pac. 175.

Kentucky.— Speed *v.* Nelson, 8 B. Mon. 499; Hammon *v.* Pearl, 6 T. B. Mon. 410; Roll *v.* Stum, 46 S. W. 223, 20 Ky. L. Rep. 661.

Louisiana.— See Ames *v.* Hale, 27 La. Ann. 349.

Massachusetts.— Blake *v.* Ward, 137 Mass. 94; Davis *v.* Cowdin, 20 Pick. 510. See also Bassett *v.* Granger, 103 Mass. 177.

Mississippi.— Vaughn *v.* Hudson, 59 Miss. 421; Foute *v.* McDonald, 27 Miss. 610; Green *v.* Creighton, 10 Sm. & M. 159, 48 Am. Dec. 742.

Missouri.— Baldwin *v.* Davidson, 139 Mo. 118, 40 S. W. 765, 61 Am. St. Rep. 460; Lenox *v.* Harrison, 88 Mo. 491; Houts *v.* Sheperd, 79 Mo. 141; Miller *v.* Major, 67 Mo. 247; Sheetz *v.* Kirtley, 62 Mo. 417; Stong *v.* Wilkson, 14 Mo. 116; Dingle *v.* Pollick, 49 Mo. App. 479. See also James *v.* Withinton, 7 Mo. App. 575.

New Jersey.— Engle *v.* Crombie, 21 N. J. L. 614 [*reversing* 19 N. J. L. 82]; Schweitzer *v.* Bonn, 55 N. J. Eq. 107, 31 Atl. 24; Black *v.* Whitall, 9 N. J. Eq. 572, 59 Am. Dec. 423; Conover *v.* Conover, 1 N. J. Eq. 403.

Ohio.— Rote *v.* Stratton, 3 Ohio S. & C. Pl. Dec. 81, 2 Ohio N. P. 27.

Pennsylvania.— Reeside *v.* Reeside, 6 Phila. 507.

Rhode Island.— Pierce *v.* East Greenwich Prob. Ct., 19 R. I. 472, 34 Atl. 992; Wil-

The burden is upon the person seeking relief to show affirmatively the existence of adequate grounds therefor,[5] and the evidence thereof ought to be clear, positive, and satisfactory.[6] The wilful omission or concealment of assets constitutes fraud for which a settlement may be set aside.[7] A final settlement will not be interfered with on account of mere errors or irregularities,[8] unless they are sufficiently gross to raise the presumption of fraud,[9] nor are mere illegal allowances, unless obtained by fraud, ground for impeaching or setting aside a final settlement.[10]

liams *v.* Herrick, 18 R. I. 120, 25 Atl. 1099. See also Hall *v.* Anthony, 13 R. I. 221.

United States.— Mallett *v.* Dexter, 16 Fed. Cas. No. 8,988, 1 Curt. 178; Pratt *v.* Northam, 19 Fed. Cas. No. 11,376, 5 Mason 95.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2199–2201.

What constitutes fraud.— Such fraud may be positive and actual, with intent to cheat and wrong those interested in the estate, or may consist in any improper act or concealment that operates as a fraud and results in loss, whatever the motive. Clyce *v.* Anderson, 49 Mo. 37.

Fraud in procurement of judgment.— Final settlements like other final judgments can only be set aside for fraud practised on the court in the very procurement of the judgment. State *v.* Shaw, 163 Mo. 191, 63 S. W. 371; Bates *v.* Hamilton, 144 Mo. 1, 45 S. W. 641, 66 Am. St. Rep. 407; Nelson *v.* Barnett, 123 Mo. 564, 27 S. W. 520; Lewis *v.* Williams, 54 Mo. 200; Warden *v.* Busbee, 89 Mo. App. 113; Woodward *v.* Curtis, 19 Ohio Cir. Ct. 15, 10 Ohio Cir. Dec. 400.

A mistake of law is not a ground for disturbing a final settlement. Weinerth *v.* Trendley, 39 Mo. App. 333; Monroe's Estate, 9 Kulp (Pa.) 334.

Mistake caused by complainant.— Equity will not relieve against a mistake which the complainant was instrumental in causing, or which occurred by reason of his negligence. Griffith *v.* Vertner, 5 How. (Miss.) 736.

Mistake as to value of securities.— Where executors filed a final account charging themselves with a certain amount, the fact that a part of that amount consisted of securities which they then supposed were good, but which they afterward failed to collect, is not a mistake for which they can obtain relief in equity six years thereafter. Beatty *v.* Cory Universalist Soc., 39 N. J. Eq. 452.

Whether fraud appears on the face of an administration account is a question for the court and not for the jury. Burns *v.* Burton, 1 A. K. Marsh. (Ky.) 349.

5. Cowan *v.* Jones, 27 Ala. 317; Stone *v.* Stillwell, 23 Ark. 444; Walker *v.* Wootten, 18 Ga. 119; Carroll *v.* Wooley, 24 La. Ann. 495.

6. *Indiana.*— Ray *v.* Doughty, 4 Blackf. 115; Murdock *v.* Holland, 3 Blackf. 114.

Iowa.— Smith *v.* Buchanan, (1903) 96 N. W. 1086.

Kentucky.—See Brown *v.* Wickliffe, 1 A. K. Marsh. 337.

Missouri.—McLean *v.* Bergner, 80 Mo. 414; Picot *v.* Bates, 47 Mo. 390; Cooper *v.* Duncan, 58 Mo. App. 5; Phillips *v.* Boughton, 30 Mo. App. 148.

New Jersey.— Engle *v.* Crombie, 21 N. J. L. 614 [*reversing* 19 N. J. L. 82]. See also Johnson *v.* Eicke, 12 N. J. L. 316.

New York.— Totten's Estate, Tuck. Surr. 115.

Oregon.— *In re* Conant, 43 Oreg. 530, 73 Pac. 1018.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2199.

Sufficiency of proof.— It is competent to prove a fraud in procuring a judgment of discharge by proof of representations made by an administrator, upon which the court acted, that he had fully and faithfully settled the estate and executed his trust and by proof of facts which falsify those representations. Mobley *v.* Mobley, 9 Ga. 247.

7. Stone *v.* Stillwell, 23 Ark. 444; Ringgold *v.* Stone, 20 Ark. 256; Zeek *v.* Reed, 69 Ind. 319; Smiley *v.* Smiley, 80 Mo. 44; Houts *v.* Shepherd, 79 Mo. 141; Merritt *v.* Merritt, 62 Mo. 150; Clyce *v.* Anderson, 49 Mo. 37; *In re* McNeel, 68 Pa. St. 412 [*reversing* decree 18 Pittsb. Leg. J. 154]. *Compare* Dickson *v.* Hitt, 98 Ill. 300.

Failure to account for assets a fraud.— Ridenbaugh *v.* Burnes, 14 Fed. 93, 94, 4 McCrary 522.

A fraudulent concealment or disposition of property is a general and always existing ground for the interposition of equity. Griffith *v.* Godey, 113 U. S. 89, 5 S. Ct. 383, 28 L. ed. 934. See also Tucker *v.* Stewart, 121 Iowa 714, 97 N. W. 148.

8. *Arkansas.*— Jones *v.* Graham, 36 Ark. 383; Reinhardt *v.* Gartrell, 33 Ark. 727; Greely Burnham Grocery Co. *v.* Graves, 33 Ark. 171; Ringgold *v.* Stone, 20 Ark. 526; Ragsdale *v.* Stuart, 8 Ark. 268.

Illinois.— Williams *v.* Rhoades, 81 Ill. 571.

Louisiana.— Fendler *v.* Daigre, 19 La. Ann. 190.

Mississippi.— Smith *v.* Hurd, 7 How. 188.

Missouri.— Standard *v.* Lacks, 25 Mo. App. 64.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2201.

9. Dyer *v.* Jacoway, 42 Ark. 186, 50 Ark. 217, 6 S. W. 902.

10. Mock *v.* Pleasants, 34 Ark. 63; Baldwin *v.* Palton, 168 Mo. 20, 67 S. W. 599; Byerly *v.* Donlin, 72 Mo. 270; Miller *v.* Major, 67 Mo. 247; Lewis *v.* Williams, 54 Mo. 200; Warden *v.* Busbee, 89 Mo. App. 113. See also Patterson *v.* Bell, 25 Iowa 149; Whittelsey *v.* Dorsett, 23 Mo. 236; Jones *v.* Brinker, 20 Mo. 87.

b. Statutory Grounds. In some states the grounds upon which and the circumstances under which the final settlement of a personal representative will be set aside, opened, or otherwise disturbed are especially enumerated by statutes which vary considerably in their provisions;[11] and as they are always subject to

Fraud in obtaining allowance of claim.— It is fraud for an administrator to obtain an allowance to himself for the whole amount of a claim assigned to him by a former administrator of the deceased without deducting the amount in which his assignor is indebted to the estate. He should set off one debt against the other and take the allowance for the difference. Sorrels *v.* Trantham, 48 Ark. 386, 3 S. W. 198, 4 S. W. 281.

11. **In Alabama** it is provided by statute (Ala. Code (1896), § 805) that "when any error of law or fact has occurred in the settlement of an estate of a decedent, to the injury of any party, without any fault or neglect on his part, such party may correct such error by bill in chancery, within two years after the final settlement thereof; and the evidence filed in the court of probate in relation to such settlement must be received as evidence in the court of chancery, with such other evidence as may be adduced; and a failure to appeal from the decree of the probate court shall not be held to be such fault or neglect as will bar the complainant of the remedy herein provided." The last clause of this statute was added by Code (1886), § 3536, and has not been construed, although noted in Hall *v.* Pegram, 85 Ala. 522, 5 So. 209, 6 So. 612. In the earlier constructions of the other provisions of this statute the court was inclined to make it highly remedial and beneficial. See Monninn *v.* Beroujon, 51 Ala. 196; Meadows *v.* Edwards, 46 Ala. 354; Morrow *v.* Allison, 39 Ala. 70; Cowan *v.* Jones, 27 Ala. 317. See also Mock *v.* Steele, 34 Ala. 198, 73 Am. Dec. 455. But this rule soon gave way to stricter requirements, and the later cases hold that when the jurisdiction of the probate court has attached, its decree on final settlement of an administration cannot be vacated or annulled by a resort to equity, unless the complainant shows some equitable ground of relief whereby, by reason of accident, mistake, or fraud unmixed with fault on his part he was prevented from interposing the matters relied on before decree in the probate court. Knabe *v.* Rice, 106 Ala. 516, 17 So. 666; Crumpler *v.* Deens, 85 Ala. 149, 4 So. 826; Tuilwiler *v.* Lane, 82 Ala. 456, 3 So. 104; Watts *v.* Frazer, 80 Ala. 186; Vincent *v.* Martin, 79 Ala. 540; Waldrom *v.* Waldrom, 76 Ala. 285; Massey *v.* Modawell, 73 Ala. 421; Cawthorn *v.* Jones, 73 Ala. 82; Stoudenmire *v.* De Bardelaben, 72 Ala. 300; Foxworth *v.* White, 72 Ala. 224; Lyne *v.* Wann, 72 Ala. 43; Humphreys *v.* Burleson, 72 Ala. 1; Hatcher *v.* Dillard, 70 Ala. 343; Lowe *v.* Guice, 69 Ala. 80; Bowden *v.* Perdue, 59 Ala. 409; Jones *v.* Fellows, 58 Ala. 343; Boswell *v.* Townsend, 57 Ala. 308; Stabler *v.* Cook, 57 Ala. 22; Gamble *v.* Jordan, 54 Ala. 432; Waring *v.* Lewis, 53 Ala. 615; Otis *v.* Dargin, 53 Ala. 178. See also Arnett *v.* Arnett, 33 Ala. 273; Moore *v.* Lesueur, 33 Ala. 237. These decisions have in effect declared that this statute has accomplished no result whatever and gives the same scope and extent in correcting errors as was exercised by the chancery court without the statute. Hall *v.* Pegram, 85 Ala. 522, 5 So. 209, 6 So. 612. See also Bowden *v.* Perdue, 59 Ala. 409. Under this statute, by proper allegations and proof, the party complaining must show that the errors occurred without fault or neglect on his part. Watts *v.* Frazer, 80 Ala. 186; Cawthorn *v.* Jones, 73 Ala. 82; Alexander *v.* Alexander, 70 Ala. 357; Boswell *v.* Townsend, 57 Ala. 308; Robertson *v.* Walker, 51 Ala. 484. A bill will not lie for a set-off which should have been presented in the probate court. Wilson *v.* Randall, 37 Ala. 74, 76 Am. Dec. 347; Duckworth *v.* Duckworth, 35 Ala. 70.

In Indiana the statute (Thornton Rev. St. (1897) § 2609) provides that any person interested in an estate not appearing at the final settlement, nor personally summoned to attend the same, may have such settlement or so much thereof as affects him adversely set aside and the estate reopened by filing in the court in which settlement was made within three years from the date of such settlement his petition particularly setting forth the illegality, fraud, or mistake in such settlement, or in the prior proceedings in the administration of the estate affecting him adversely. For cases construing this statute see generally Gramm *v.* Russell, 152 Ind. 186, 52 N. E. 806; Harter *v.* Songer, 138 Ind. 161, 37 N. E. 595; Crum *v.* Meeks, 128 Ind. 360, 27 N. E. 722; Williams *v.* Williams, 125 Ind. 156, 25 N. E. 176; Dillman *v.* Barber, 114 Ind. 403, 16 N. E. 825. A final settlement, made before the expiration of the time prescribed by statute, is illegal and may be set aside at the instance of a claimant who did not appear and who was not summoned to appear. Shirley *v.* Thompson, 123 Ind. 454, 24 N. E. 253. Where a personal representative by fraudulent statements and promises to pay a claim lulls the creditor into a false security and thus induces him not to file his claim, and then fraudulently and without notice to the creditor makes a final settlement of the estate and is discharged, the estate being solvent, the creditor is entitled to relief under this statute. Chase *v.* Beeson, 92 Ind. 61. See also Kingan *v.* Hawley, 29 Ind. App. 376, 64 N. E. 620. Procuring administration on an estate by a fraudulent representation that the owner thereof is dead warrants the setting aside of the judgment approving the administrator's final account, under this statute. Jaap *v.* Digman, 8 Ind. App. 509, 36 N. E. 50. The allowance to a personal repre-

modification and repeal, it is not thought that any useful purpose would be served by attempting any more extended discussion of them than is found in the note.

sentative of attorney's fees for his personal services in the administration, which is prohibited by law, is an illegality within the meaning of the statute. Pollard *v.* Barklay, 117 Ind. 40, 17 N. E. 294. For cases construing former statutes on this subject see Heaton *v.* Knowlton, 65 Ind. 255; Miller *v.* Steele, 64 Ind. 79; Reed *v.* Reed, 44 Ind. 429; Dufour *v.* Dufour, 28 Ind. 421; State *v.* Overturf, 16 Ind. 261; Beard *v.* Peru First Presb. Church, 15 Ind. 490; West *v.* Reavis, 13 Ind. 294; Camper *v.* Hayeth, 10 Ind. 528.

In Iowa it is provided by statute (Code (1897), § 3398) that mistakes in settlements may be corrected after final settlement and discharge by equitable proceedings on showing such grounds as will justify the interference of the court. Tucker *v.* Stewart, 121 Iowa 714, 97 N. W. 148 [*withdrawing* opinion, (1901) 86 N. W. 371]; McLeary *v.* Doran, 79 Iowa 210, 44 N. W. 360. Under the statute (Code (1897), § 3399) providing that "accounts settled in the absence of any person adversely interested and without notice to him may be opened within three months on his application," it has been decided that after the expiration of three months these settlements cannot be set aside except for fraud, mistake, or other grounds of equitable relief. Dorris *v.* Miller, 105 Iowa 564, 75 N. W. 482; Arnold *v.* Spates, 65 Iowa 570, 22 N. W. 680; Daniels *v.* Smith, 58 Iowa 577, 12 N. W. 599; Kows *v.* Mowery, 57 Iowa 20, 10 N. W. 283; Cowins *v.* Tool, 36 Iowa 82; Patterson *v.* Bell, 25 Iowa 149. And it has been held that a person in interest cannot maintain a suit to impeach the settlement of an administrator even for fraud, without first showing an adequate excuse for not availing himself of the provisions made in the statute for opening the settlement within three months. Kows *v.* Mowery, 57 Iowa 20, 10 N. W. 283. The application provided for in this statute is properly made by petition, and defendant must answer, or the averments of the petition will stand confessed by operation of law. Van Aken *v.* Welch, 80 Iowa 114, 45 N. W. 406. When notice of the settlement is published by order of court, all persons interested are bound thereby. Godes *v.* Hassen, 81 Iowa 197, 46 N. W. 980; Van Aken *v.* Welch, 80 Iowa 114, 45 N. W. 406.

In New Jersey the grounds upon which the orphans' court may by statute open a final settlement are the equitable ones of mistake or fraud. Stevenson *v.* Phillips, 21 N. J. L. 70, 15 N. J. Eq. 236; Black *v.* Whitall, 9 N. J. Eq. 572, 59 Am. Dec. 423; Vanmeter *v.* Jones, 3 N. J. Eq. 520; Boulton *v.* Scott, 3 N. J. Eq. 231.

In New York a surrogate has power under Code Civ. Proc. § 2481, subd. 6, "to open, vacate, modify, or set aside, or to enter, as of a former time, a decree or order of his court; or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error, or other sufficient cause. The powers, conferred by this subdivision, must be exercised only in a like case and in the same manner, as a court of record and of general jurisdiction exercises the same powers." For the construction of this provision see generally *In re* Deyo, 102 N. Y. 724, 7 N. E. 819; Matter of Hodgman, 11 N. Y. App. Div. 344, 42 N. Y. Suppl. 1004; Matter of Patterson, 79 Hun 371, 29 N. Y. Suppl. 451 [*affirmed* in 146 N. Y. 327, 40 N. E. 990]; *In re* Dey Ermand, 24 Hun 1; Matter of Gearns, 27 Misc. 76, 58 N. Y. Suppl. 200; *In re* McGorray, 20 N. Y. Suppl. 366; *In re* Salisbury, 6 N. Y. Suppl. 932. It has been said that "most of the powers here mentioned were exercised by the surrogate before the enactment of the Code, and so far the statute is declaratory of the law as it previously existed." *In re* Henderson, 157 N. Y. 423, 427, 52 N. E. 183 [*affirming* 33 N. Y. App. Div. 545, 53 N. Y. Suppl. 957]. See also Sipperly *v.* Baucus, 24 N. Y. 46; Yale *v.* Baker, 2 Hun 468, 5 Thomps. & C. 10; Campbell *v.* Thatcher, 54 Barb. 382; Decker *v.* Elwood, 3 Thomps. & C. 48; *In re* Wright, 16 Abb. Pr. N. S. 429; Farmers' L. & T. Co. *v.* Hill, 4 Dem. Surr. 41; Strong *v.* Strong, 3 Redf. Surr. 477. Under settled rules of interpretation, the words "or other sufficient cause" must be interpreted to mean causes of like nature with those specifically named. *In re* Hawley, 100 N. Y. 206, 3 N. E. 68 [*affirming* 3 Dem. Surr. 571, and *reversing* 36 Hun 258]; *In re* Tilden, 98 N. Y. 434 [*affirming* 5 Dem. Surr. 230, and *reversing* 67 How. Pr. 447]; Matter of White, 52 N. Y. App. Div. 225, 65 N. Y. Suppl. 168; Matter of Soule, 72 Hun 594, 25 N. Y. Suppl. 270; *In re* Kranz, 41 Hun 463; Matter of McCormick, 27 Misc. 416, 59 N. Y. Suppl. 374; *In re* Mull, 5 N. Y. Suppl. 202; Matter of Soutter, 6 N. Y. St. 531. See also Matter of Engs, 57 Hun 591, 11 N. Y. Suppl. 42. These powers cannot be exercised for the correction of errors of substance or of law; the remedy is by appeal. *In re* Hawley, 100 N. Y. 206, 3 N. E. 68 [*affirming* 3 Dem. Surr. 589, and *reversing* 36 Hun 258]; *In re* Tilden, 98 N. Y. 434 [*affirming* 5 Dem. Surr. 230, and *reversing* 67 How. Pr. 447] (error in allowance of compensation); Matter of Douglas, 52 N. Y. App. Div. 303, 65 N. Y. Suppl. 103; Matter of Humfreville, 8 N. Y. App. Div. 312, 40 N. Y. Suppl. 939; *In re* Walrath, 37 Misc. 696, 76 N. Y. Suppl. 448; Matter of Mount, 27 Misc. 411, 59 N. Y. Suppl. 176; Matter of Monteith, 27 Misc. 163, 58 N. Y. Suppl. 379; Ricard *v.* Laytin, 2 Dem. Surr. 587. The statute, however, expressly authorizes their exercise for the purpose of correcting clerical errors. *In re* Henderson, 157 N. Y. 423, 52 N. E. 183 [*affirming* 33 N. Y. App. Div. 545, 53 N. Y. Suppl. 957]; Matter of Beach, 3 Misc. 393, 24 N. Y. Suppl. 717. A decree cannot be opened merely because it is shown that commissions were

3. Parties to Proceeding. A settlement of the account of a personal representative can be impeached by persons interested in and affected by it, but only

not allowed on a part of the assets of the estate. *In re* O'Neil, 46 Hun 500; *In re* Carr, 19 N. Y. Suppl. 647. In accordance with the limitation imposed by the last clause of the statute a new trial for newly discovered evidence will be refused when lack of diligence is apparent and when such evidence would be insufficient to change the result. Matter of McManus, 66 N. Y. App. Div. 53, 73 N. Y. Suppl. 88 [*reversing* 35 Misc. 678, 72 N. Y. Suppl. 409]. A surrogate is authorized by this statute to open a decree and bring in parties who should have been cited to appear, but have not been, upon a petition for that purpose. Matter of Gall, 42 N. Y. App. Div. 255, 59 N. Y. Suppl. 254. Where a proper case presents itself to a surrogate for the exercise of his power to open a decree, he should not set aside or open the whole decree, but only so much thereof as relates to the alleged error. *In re* Dey Ermand, 24 Hun 1. Under this statute a surrogate has no power to open a decree settling a representative's accounts after an appeal therefrom has been perfected. Matter of May, 2 Silv. Supreme 457, 6 N. Y. Suppl. 357.

In Ohio it is provided by statute (Rev. St. § 6187) that when an account is filed in the absence of any person adversely interested and without actual notice to him, such account may be opened on his filing exceptions thereto at any time within eight months thereafter. See Stayner's Case, 33 Ohio St. 481; Matter of Seeger, 1 Ohio S. & C. Pl. Dec. 96, 7 Ohio N. P. 207.

In Pennsylvania under the act of Oct. 13, 1840, which provides for a review of the account of a personal representative, within five years from the time of its confirmation, it has been decided in a number of cases that, after such an account has been settled and confirmed in the orphans' court, it can only be reviewed as a matter of right for error of law apparent on the face of the record, or for new matter which has arisen since the decree, but that as a matter of grace a review may be granted for new proof discovered after the decree, which proof could not possibly have been used at the time the decree was made. *In re* Finley, 196 Pa. St. 140, 46 Atl. 443 [*affirming* 8 Pa. Dist. 723]; *In re* Thomas, 184 Pa. St. 640, 39 Atl. 567; Priestley's Appeal, 127 Pa. St. 420, 17 Atl. 1084, 4 L. R. A. 503; Meckel's Appeal, 112 Pa. St. 554, 4 Atl. 447; Scott's Appeal, 112 Pa. St. 427, 5 Atl. 671; Le Moyne's Appeal, 104 Pa. St. 321; Milligan's Appeal, 82 Pa. St. 389; Cramp's Appeal, 81 Pa. St. 90; Kinter's Appeal, 62 Pa. St. 318; Green's Appeal, 59 Pa. St. 235; Hartman's Appeal, 36 Pa. St. 70; Russell's Appeal, 34 Pa. St. 258; Yeager's Appeal, 34 Pa. St. 173; Stevenson's Appeal, 32 Pa. St. 318; Bishop's Appeal, 26 Pa. St. 470; *In re* Riddle, 19 Pa. St. 431; Zinn's Appeal, 10 Pa. St. 469; Fish's Appeal, 3 Pa. Cas. 239, 7 Atl. 222; O'Reilly's Appeal, 2 Pa. Cas. 23, 3 Atl. 836; Hartz's Appeal, 2 Grant 83; Bickford's Estate, 16 Pa. Super. Ct. 572; Miller's Estate, 7 Pa. Dist. 762; Martin's Estate, 7 Pa. Dist. 408; Levy's Estate, 3 Pa. Dist. 42, 14 Pa. Co. Ct. 169; Simmon's Estate, 12 Pa. Co. Ct. 139, 30 Wkly. Notes Cas. 503; White's Estate, 12 Pa. Co. Ct. 93; Lee's Estate, 9 Pa. Co. Ct. 655; Costigan's Estate, 13 Phila. 264; Shallcross' Estate, 12 Phila. 158; Smith's Estate, 12 Phila. 87; Frey's Estate, 12 Phila. 15; Garwin's Appeal, 2 Am. L. J. 253; John's Estate, 1 Chest. Co. Rep. 311; Miller's Estate, 5 Lanc. L. Rev. 169; Rostonski's Estate, 7 Northam. Co. Rep. 214; Smith's Estate, 12 York Leg. Rec. 178. See also Fletcher's Appeal, 125 Pa. St. 352, 17 Atl. 340; Dull's Appeal, 10 Pa. Cas. 349, 13 Atl. 961; Myers' Estate, 13 Pa. Super. Ct. 476; Jamison's Estate, 1 Kulp 146; Geiger's Estate, 12 Wkly. Notes Cas. 439; Schmitt's Appeal, 2 Walk. 316; Jones' Estate, 2 Lanc. L. Rev. 389; Crone's Estate, 14 York Leg. Rec. 89. It is expressly stipulated by a proviso to this act that its provisions shall not extend to any case where the balance found due on the settlement shall have been actually paid and discharged. Lehr's Appeal, 98 Pa. St. 25; Miller's Estate, 4 Pa. Dist. 407. This provision has no application to a case in which the distribution and payment were voluntary by the personal representative and made before his account was filed. Whelen's Appeal, 70 Pa. St. 410. And actual distribution is no bar to the proceedings when the object is to effect a surcharge. Duff's Estate, 13 Phila. 216. The provision limiting the time within which a review may be granted does not apply where an unconscionable advantage has been taken of the distributee. Yung's Estate, 9 Pa. Dist. 476. Where an executor's account has been submitted to an auditor and passed on, a party is not entitled to a review of any matter passed on by the auditor. Wachter's Case, 1 Walk. 267. The statute did not confer a new power upon the orphans' court; it merely gave a bill of review as a matter of right in certain cases and limited the time within which it might be exercised in those cases (Johnson's Appeal, 114 Pa. St. 132, 6 Atl. 556. See also Washburn's Estate, 187 Pa. St. 162, 40 Atl. 979; *In re* Downing, 5 Watts 90; McLenachan *v.* Com., 1 Rawle 357), and apart from the statute the orphans' court has power to correct its own decrees when it discovers a palpable mistake produced either by its own inadvertence, or by a blunder of the parties (Seager's Estate, 6 Pa. St. 105. See also Priestley's Appeal, 127 Pa. St. 420, 17 Atl. 1084, 4 L. R. A. 503; Milne's Appeal, 99 Pa. St. 483). If the petitioner for a review of a decree confirming an executor's account does not file a replication, and the case is heard on petition and answer, all the averments in the answer are to be taken as true. Russell's Appeal, 34 Pa. St. 258.

by such persons,[12] and all persons whose interests will be affected by opening, vacating, or setting aside the settlement are proper parties to the proceeding by which this is sought.[13]

4. PLEADINGS — a. In General. In a proceeding to open or set aside the final settlement of a personal representative, proper grounds, such as fraud, accident,

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2199–2206.

12. *Alabama.*— Hall *v.* Pegram, 85 Ala. 522, 5 So. 209, 6 So. 612, bill filed by a domiciliary executor against an ancillary administrator.

Arkansas.— Collins *v.* Warner, 32 Ark. 87, heirs of a deceased legatee cannot sue to set aside such a settlement.

California.— Noah's Estate, 88 Cal. 468, 26 Pac. 361.

Indiana.— Spicer *v.* Hockman, 72 Ind. 120.

Louisiana.— Sallier *v.* Rosteet, 108 La. 378, 32 So. 383; Woods' Succession, 36 La. Ann. 757.

Missouri.— Crowley *v.* McCrary, 45 Mo. App. 350.

North Carolina.— Murphy *v.* Harrison, 65 N. C. 246.

Pennsylvania.— Eby's Estate, 1 Lanc. L. Rev. 129, review on application of guardian of a minor who was not legally represented at the settlement.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2207.

Creditors and distributees.— As a general proposition creditors or distributees are the only persons (except perhaps the sureties of the administrator in certain cases) who have any concern with the accounts or settlements of an administrator, and they alone possess the legal capacity to maintain actions to falsify such settlements. Voshage *v.* Voshage, 45 Mo. App. 172. Creditors of the testator may intervene by petition, and be made parties to a suit by the legatees and devisees, brought for the purpose of surcharging and falsifying the accounts of the executor. Smith *v.* Britton, 2 Patt. & H. (Va.) 124.

Assignee for benefit of creditors.— Where an executor, in violation of duty, has squandered funds of the estate, and, subsequent to the settlement of a partial account, makes an assignment for the benefit of creditors, and then files his final account as executor in the probate court, the assignee may on leave given appear in said court and ask the correction of errors and mistakes in the accounts of said executor. Slagle *v.* Slagle, 3 Ohio Dec. (Reprint) 549.

The heirs or distributees of a distributee cannot maintain a suit to surcharge the accounts of the administrator of the original decedent, as the original distributees, or, after their death, their personal representatives, are the proper parties plaintiff for that purpose. Hordage *v.* Hordage, (Ark. 1886) 1 S. W. 707.

New administrator.— A former administrator or his representatives may be called upon by a new administrator, by a notice or upon a rule, to show cause why his account should not be opened for fraud or mistake. Crombie *v.* Engle, 19 N. J. L. 82 [*reversed* on other grounds in 21 N. J. L. 614].

Who are persons interested.— Under a statute providing for the review of a settlement at the instance of "any one interested" an administrator *de bonis non* cannot bring an action for correction, as the statute means only someone standing in the position of heir, legatee, or other person to be benefited by the estate. Murphey *v.* Menard, 11 Tex. 673. But under such a statute the widow of the decedent may institute a proceeding for the revision of a final settlement. Hefflefinger *v.* George, 14 Tex. 569. In Pennsylvania under the act of 1840 sureties are parties interested and entitled to present a petition for the review of the account of a personal representative. *In re* Bishop, 10 Pa. St. 469; Simmons' Estate, 12 Pa. Co. Ct. 139, 30 Wkly. Notes Cas. 503; Shallcross' Estate, 12 Phila. 158. *Compare* Bush's Appeal, 102 Pa. St. 502.

13. See Williams *v.* Williams, 43 Miss. 430; Van Winkle *v.* Blackford, 33 W. Va. 573, 11 S. E. 26. And see EQUITY, 16 Cyc. 181.

Distributees.— In a suit in equity brought by one distributee against the administrator to set aside a settlement on the ground of fraud, all the distributees must be made parties either plaintiff or defendant. Dillon *v.* Bates, 39 Mo. 292.

Sureties.—The sureties of an administrator are proper parties to a bill to correct his accounts. Reinhardt *v.* Gartrell, 33 Ark. 727. See also Cookus *v.* Peyton, 1 Gratt. (Va.) 431.

Executor.— If an executor refuses to bring an action to surcharge and falsify an account by which his testator's estate has been injured, and such action is brought by the legatees or next of kin, they should make the executor a party defendant. Murphy *v.* Harrison, 65 N. C. 246.

An administrator de bonis non is not a proper party to a proceeding to set aside the settlement of his predecessor. So far as proceedings to set aside their settlements are concerned their accounts are separate and independent and there is no reason why they should be joined. Kerrin *v.* Roberson, 49 Mo. 252.

Service of process on non-residents by publication see Boden *v.* Mier, (Nebr. 1904) 98 N. W. 701.

In Texas in a proceeding, brought under the statute, for the revision and correction of the account of a personal representative, it is not necessary that all creditors or heirs should join as parties; such proceedings may be prosecuted by any one interested in the estate. Hefflefinger *v.* George, 14 Tex. 569; Reese *v.* Hicks, 13 Tex. 162.

or mistake must be alleged,[14] and it must also be alleged that the complainant's rights have been adversely affected by such settlement.[15] A creditor cannot have the settlement of an estate reopened when his petition does not state facts which negative negligence on his part and excuse him from securing the allowance of his claim.[16] The capacity of a party who appears in court as the representative of another must be alleged, but it need not be proved, unless specifically denied.[17]

b. Statutory Allegations. If the proceeding is brought on statutory grounds, such allegations must be made as to bring the case within the provisions of the statute.[18]

c. Certainty and Particularity in Allegations. The complainant's claim or title to relief should be stated with accuracy and clearness and with such certainty that defendant may be distinctly informed of the nature of the case which he is called on to meet, and matters essential to the complainant's right to relief must appear not by inference, but by direct and unambiguous averments.[19] A bill or petition which contains only general charges of fraud, accident, or mistake, without specifying in what the fraud, accident, or mistake consists, is insufficient,[20] and in a proceeding to surcharge and falsify the bill or peti-

14. Hart *v.* Duffy, 2 Redf. Surr. (N. Y.) 151; Redmond *v.* Ely, 2 Bradf. Surr. (N. Y.) 175.

15. Crowley *v.* McCrary, 45 Mo. App. 350.

16. Hazlett *v.* Burge, 22 Iowa 531.

17. Hatcher's Succession, 23 La. Ann. 136.

18. Harter *v.* Songer, 138 Ind. 161, 37 N. E. 595; Shirley *v.* Thompson, 123 Ind. 454, 24 N. E. 253; Dickey *v.* Tyner, 85 Ind. 100; Lyon *v.* Roy, 54 Ind. 300; Jaap *v.* Digman, 8 Ind. App. 509, 36 N. E. 50; Kows *v.* Mowery, 57 Iowa 20, 10 N. W. 283; Matter of Patterson, 79 Hun (N. Y.) 371, 29 N. Y. Suppl. 451; Hood *v.* Hood, 1 Dem. Surr. (N. Y.) 392; Dunson *v.* Payne, 44 Tex. 539.

Under the Indiana statute it must be alleged that the complainant has such an interest in the estate as caused him to be injured by the mistake, fraud, or illegality complained of (Spicer *v.* Hockman, 72 Ind. 120; Smith *v.* Miller, 21 Ind. App. 82, 51 N. E. 508), and where an ordinary individual is the complainant it must be averred that he was not personally served with the process of the court to attend the settlement, and if not so served, that he did not attend the settlement thereof as a party thereto (Graham *v.* Russell, 152 Ind. 186, 52 N. E. 806; Crum *v.* Meeks, 128 Ind. 360, 27 N. E. 722; Williams *v.* Williams, 125 Ind. 156, 25 N. E. 176; Dillman *v.* Barber, 114 Ind. 403, 16 N. E. 825. Where, however, a public officer petitions to set aside a final settlement, in order that the property of the estate may be subject to the payment of delinquent taxes, such averments need not be made. Graham *v.* Russell, *supra*.

Under the Pennsylvania statute it must be alleged that the complainant had no notice of and was not present at the settlement (Le Moyne's Appeal, 104 Pa. St. 321. See also Costigan's Estate, 13 Phila. (Pa.) 264), and that the balance found to be due has not been actually paid and distributed (*In re* Bear, 162 Pa. St. 547, 29 Atl. 856; Lehr's Appeal, 98 Pa. St. 25; Cramp's Appeal, 81 Pa. St. 90 [*reversing* 8 Phila. 204]; Russell's Appeal, 34 Pa. St. 258; Clothier's Estate, 4 Pa. Co. Ct. 214, 20 Wkly. Notes Cas. (Pa.) 379; Wistar's Estate, 15 Phila. (Pa.) 563; Wainwright's Estate, 37 Leg. Int. (Pa.) 274).

Under the Alabama statute a bill which seeks equitable relief against a probate deeree on final settlement must not only clearly point out the errors complained of, but must show that the complainant has thereby suffered injury (Seals *v.* Weldon, 121 Ala. 319, 25 So. 1021; Waldrom *v.* Waldrom, 76 Ala. 285; Massey *v.* Modawell, 73 Ala. 421), and negative all fault or negligence on the part of the complainant (Vincent *v.* Martin, 79 Ala. 540; Cawthorn *v.* Jones, 73 Ala. 82; Stoudenmire *v.* De Bardelaben, 72 Ala. 300; Lyne *v.* Wann, 72 Ala. 43; Humphreys *v.* Burleson, 72 Ala. 1; Bowden *v.* Perdue, 59 Ala. 409; Boswell *v.* Townsend, 57 Ala. 308; Otis *v.* Dargan, 53 Ala. 178; Robertson *v.* Walker, 51 Ala. 484).

19. Watts *v.* Frazer, 80 Ala. 186; Duckworth *v.* Duckworth, 35 Ala. 70; Russell's Appeal, 34 Pa. St. 258; Yeager's Appeal, 34 Pa. St. 173; Kachlein's Appeal, 5 Pa. St. 95; Snyder's Estate, 18 Pa. Super. Ct. 462; Frey's Estate, 12 Phila. (Pa.) 15; Milligan's Appeal, 34 Leg. Int. (Pa.) 168; Fraser *v.* Hext, 2 Strobh. Eq. (S. C.) 250; Murrel *v.* Murrel, 2 Strobh. Eq. (S. C.) 148, 46 Am. Dec. 664.

20. *Arkansas.*— McLeod *v.* Griffis, 51 Ark. 1, 8 S. W. 837; Mock *v.* Pleasants, 34 Ark. 63; Stone *v.* Stillwell, 23 Ark. 444; Ringgold *v.* Stone, 20 Ark. 526.

Indiana.— Pollard *v.* Barklay, 117 Ind. 40, 17 N. E. 294; Reed *v.* Reed, 44 Ind. 429.

Kansas.— Ladd *v.* Nystol, 63 Kan. 23, 64 Pac. 985; Gafford *v.* Dickinson, 37 Kan. 287, 15 Pac. 175.

New Jersey.— Hyer *v.* Morehouse, 20 N. J. L. 125. *Compare* Trimmer *v.* Adams, 18 N. J. Eq. 505.

New York.— See Matter of Baity, 20 N. Y. Suppl. 70, 2 Connoly Surr. 485.

United States.— Badger *v.* Badger, 2 Fed. Cas. No. 718, 2 Cliff. 137 [*affirmed* in 2 Wall. 87, 17 L. ed. 836].

tion must specifically point out the errors, omissions, or false charges complained of.[21]

5. Limitations and Laches. When the time within which relief against a settlement can be obtained is prescribed by statute, it must be sought before the expiration of that period.[22] When, however, there is no positive limitation of the period in which such relief may be sought, a decree of final settlement may be opened or vacated within any reasonable time after its rendition,[23] although such relief will be denied where there has been delay for so long a time or under such circumstances as to cause the application of the doctrine of laches.[24]

See 22 Cent. Dig. tit. "Executors and Administrators," § 2212.

21. *Georgia.*— See Shorter *v.* Hargroves, 11 Ga. 658.

Kentucky.— Terrell *v.* Rowland, 86 Ky. 67, 4 S. W. 825, 9 Ky. L. Rep. 258; Smith *v.* Nuckols, 5 Ky. L. Rep. 426; Crow *v.* Crow, 4 Ky. L. Rep. 909.

Mississippi.— Miller *v.* Womack, Freem. 486.

Tennessee.— Dodson *v.* Dodson, 6 Heisk. 110.

Virginia.— Radford *v.* Fowlkes, 85 Va. 820, 8 S. E. 817; Green *v.* Thompson, 84 Va. 376, 5 S. E. 507; Corbin *v.* Mills, 19 Gratt. 438; Newton *v.* Poole, 12 Leigh 112; Garrett *v.* Carr, 3 Leigh 407.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2210.

Compare McGuire *v.* Wright, 18 W. Va. 507.

Filing specifications of additional items.— If plaintiff in proceedings in equity to surcharge and falsify an *ex parte* account rendered by an administrator does not wish to be confined before the commissioner to the items named in his bill, he should file specifications of additional items which he intends to attack. Seabright *v.* Seabright, 28 W. Va. 412.

22. *Alabama.*— Baldwin *v.* Deming, 51 Ala. 553; Millsap *v.* Stanley, 50 Ala. 319; Ansley *v.* King, 35 Ala. 278, when statute not applicable.

Arkansas.— Hankins *v.* Layne, 48 Ark. 544, 3 S. W. 821; Riley *v.* Norman, 39 Ark. 158; Hordage *v.* Hordage, (1886) 1 S. W. 707.

California.— *In re* Cahalan, 70 Cal. 604, 12 Pac. 427.

Indiana.— Spicer *v.* Hockman, 72 Ind. 120; Reed *v.* Reed, 44 Ind. 429; Potter *v.* Smith, 36 Ind. 231; Beard *v.* Peru First Presby. Church, 15 Ind. 490.

Iowa.— See Arnold *v.* Spates, 65 Iowa 570, 22 N. W. 680, holding, however, that the limitation of three months prescribed by statute within which an account settled in the absence of a person adversely interested and without notice to him may be opened on his application does not apply to a proceeding for equitable relief for fraud or mistake.

Louisiana.— Decuir's Succession, 26 La. Ann. 222.

Michigan.— Duryea *v.* Granger, 66 Mich. 593, 33 N. W. 730.

Mississippi.— Mayo *v.* Clancy, 57 Miss. 674.

Missouri.— Phillips *v.* Broughton, 30 Mo. App. 148.

New York.— See *In re* Tilden, 98 N. Y. 434.

North Carolina.— Woody *v.* Brooks, 102 N. C. 334, 9 S. E. 294; Slaughter *v.* Cannon, 94 N. C. 189. See also Wilkerson *v.* Dunn, 52 N. C. 125.

Pennsylvania.— Anderson's Appeal, 102 Pa. St. 258; Kinter's Appeal, 62 Pa. St. 318; Baggs' Appeal, 43 Pa. St. 512, 82 Am. Dec. 583; Weiting *v.* Nissley, 6 Pa. St. 141; Bunting's Appeal, 4 Watts & S. 469; Robins' Estate, 4 Pa. Dist. 277; Jones' Estate, 28 Pittsb. Leg. J. 375; Hensler's Estate, 17 Lanc. L. Rev. 257. See also Groff's Appeal, 45 Pa. St. 379.

South Carolina.—Roberts *v.* Johns, 24 S. C. 580.

Tennessee.— Alvis *v.* Oglesby, 87 Tenn. 172, 10 S. W. 313.

Texas.— Dunson *v.* Payne, 44 Tex. 539.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2215.

When statute begins to run.— In Arkansas the statute begins to run from the confirmation of the final account by the probate court as to parties then capable of suing (McGaughey *v.* Brown, 46 Ark. 25; Hanf *v.* Whitington, 42 Ark. 491), but as against the estate of a party then deceased, the statute does not begin to run until an administrator of such estate has been appointed (Sorrels *v.* Trantham, 48 Ark. 386, 3 S. W. 198, 4 S. W. 281; Hanf *v.* Whitington, 42 Ark. 491). In South Carolina the statute begins to run from the time of the representative's final discharge by the court (Ariail *v.* Ariail, 29 S. C. 84, 7 S. E. 35) and does not run from the time of a partial settlement (Dickerson *v.* Smith, 17 S. C. 289). In Texas the statute begins to run not from the time orders are made in the progress of administration, but from the date of final settlement. Tindal *v.* McMillan, 33 Tex. 484.

23. *In re* Henderson, 157 N. Y. 423, 52 N. E. 183 (no limitation of time for correcting clerical error in surrogate's decree); Sipperly *v.* Baucus, 24 N. Y. 46. See also Starrett *v.* Keating, 61 Ill. App. 189.

24. *Alabama.*— See Barnett *v.* Tarrence, 23 Ala. 463.

California.— Tynan *v.* Kerns, 119 Cal. 447, 61 Pac. 693.

Iowa.— *In re* Holderbaum, 82 Iowa 69, 47 N. W. 898.

Louisiana.— See Aronstein's Succession, 51 La. Ann. 1052, 25 So. 932; Bobb's Succession, 41 La. Ann. 247, 5 So. 757.

Maryland.— Ridenour *v.* Keller, 2 Gill 134.

6. Effect of Opening or Setting Aside — a. In General. When the settlement of a personal representative is annulled by a court of competent jurisdiction, the rights and liabilities of the parties thereto are the same as if the settlement had never been made.[25] On a petition to open such a settlement and surcharge the account, it is proper so to open it as to correct errors on both sides;[26] and when a settlement is opened at the instance of the personal representative to correct mistakes for his benefit other mistakes inuring to the benefit of persons interested in the estate will be corrected also.[27] Where one of several persons interested in an estate institutes a proceeding to revise the account of the personal representative thereof, if successful, it inures to the benefit of all persons similarly interested.[28] But the fact that a decree discharging a personal representative is vacated as to one distributee against whom the statute of limitations had not run, because of disability, does not inure to the benefit of others not under any disability, since the rights of all the distributees are entirely separate.[29]

b. Distinction Between Opening, and Surcharging and Falsifying. When errors or mistakes only are shown to exist in an account the settlement will not

Nebraska.— Shelby *v.* Creighton, 65 Nebr. 485, 91 N. W. 369, 101 Am. St. Rep. 630.

New Hampshire.— See Childs' Appeal, 23 N. H. 225.

New Jersey.— Wood *v.* Chetwood, 33 N. J. Eq. 9.

New York.— Sipperly *v.* Baucus, 24 N. Y. 46; Matter of Cook, 68 Hun 280, 22 N. Y. Suppl. 969; *In re* Deyo, 36 Hun 512; *In re* Salisbury, 6 N. Y. Suppl. 932; Redmond *v.* Ely, 2 Bradf. Surr. 175.

Ohio.— Pennock *v.* Miller, 1 Ohio Dec. (Reprint) 456, 10 West. L. J. 85.

Pennsylvania.— See Young's Estate, 166 Pa. St. 645, 31 Atl. 373; Pennypacker's Appeal, 14 Pa. St. 430.

Tennessee.— See Burton *v.* Dickinson, 3 Yerg. 112.

Virginia.— See Tidball *v.* Shenandoah Nat. Bank, 98 Va. 768, 37 S. E. 318; Bradley *v.* Bradley, 83 Va. 75, 1 S. E. 477; Gibboney *v.* Kent, 82 Va. 383, 4 S. E. 610; Handly *v.* Snodgrass, 9 Leigh 484, delay of eight years not a bar. *Compare* Garrett *v.* Carr, 3 Leigh 407; Toler *v.* Toler, 2 Patt. & H. 71.

Washington.— Bowen *v.* Hughes, 5 Wash. 442, 32 Pac. 98.

West Virginia.— Hays *v.* Freshwater, 47 W. Va. 217, 34 S. E. 831.

United States.— Lupton *v.* Janney, 13 Pet. 381, 10 L. ed. 210 [*affirming* 15 Fed. Cas. No. 8,607, 5 Cranch C. C. 474].

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2216, 2218; and Equity, 16 Cyc. 150 *et seq.*

What amounts to laches depends upon the circumstances of each case. Richardson *v.* Billingslea, 69 Md. 407, 16 Atl. 65. One who moves to vacate a decree within little over a month from the date of its entry cannot be charged with laches (Matter of Wicke, 74 N. Y. App. Div. 221, 77 N. Y. Suppl. 558; *In re* Walrath, 37 Misc. (N. Y.) 696, 76 N. Y. Suppl. 448), but after the lapse of twenty years and the death of the parties a final account will not be reopened and revised, unless a very strong case of fraud is proved, or of clear accident or mistake (Taylor *v.* Benham, 5 How. (U. S.) 233, 12 L. ed. 130).

Lapse of time with acquiescence or knowledge as laches see the following cases:

Kentucky.— Skinner *v.* Skinner, 1 J. J. Marsh. 594.

Louisiana.— Decuir's Succession, 26 La. Ann. 222.

Maryland.— Yearley *v.* Cockey, 68 Md. 174, 11 Atl. 586.

Michigan.— Grece *v.* Helm, 91 Mich. 450, 51 N. W. 1106.

New York.— *In re* Waack, 5 N. Y. Suppl. 522; Hart *v.* Duffy, 2 Redf. Surr. 151.

Pennsylvania.— *In re* Mylin, 7 Watts 64; Deardorff's Appeal, 6 Watts 159.

South Carolina.— Pinson *v.* Puckett, 35 S. C. 178, 14 S. E. 393; Keitt *v.* Andrews, 4 Rich. Eq. 349.

Virginia.— Green *v.* Thompson, 84 Va. 376, 5 S. E. 507; Bradley *v.* Bradley, 83 Va. 75, 1 S. E. 477; Hudson *v.* Hudson, 3 Rand. 117. *Compare* Garrett *v.* Carr, 3 Leigh 407.

Washington.— Bowen *v.* Hughes, 5 Wash. 442, 32 Pac. 98.

West Virginia.— Bland *v.* Stewart, 35 W. Va. 518, 14 S. E. 215.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2217.

Negligence as to mistake.— The final settlement of an intestate estate will not be disturbed because of an overpayment by a debtor to the administrator, where the debtor has been negligent in allowing the mistake to be made, and has not shown reasonable diligence in seeking its correction after ascertaining it. Dickey *v.* Tyner, 85 Ind. 100.

25. Thacker *v.* Dunn, 26 La. Ann. 442; Macomber *v.* Macomber, (R. I. 1894) 31 Atl. 753; Leake *v.* Leake, 75 Va. 792.

26. Floyd *v.* Priester, 8 Rich. Eq. (S. C.) 248.

27. Gibbons *v.* Jones, 56 Ga. 297; Saxton *v.* Chamberlain, 6 Pick. (Mass.) 422.

28. Charlton's Appeal, 34 Pa. St. 473, 75 Am. Dec. 673; Martin's Appeal, 33 Pa. St. 395; Hefflefinger *v.* George, 14 Tex. 569. See also Bardsley's Estate, 3 Wkly. Notes Cas. (Pa.) 548.

29. Fitzsimmons *v.* Johnson, 90 Tenn. 416, 17 S. W. 100.

be opened, as will be done where fraud or accident affecting the entire action of the probate court is shown; but the person alleging the error or mistake in the account will be permitted to surcharge and falsify it. The distinction between opening an account and surcharging and falsifying it is that when an account is opened the whole of it becomes subject to review, while when it is merely surcharged and falsified the inquiry is limited to particular items alleged to have been improperly included or omitted and in all other respects the account is left to stand as it is.[30]

7. Annual or Partial Settlements. An annual or partial settlement, being usually *ex parte* and only *prima facie* correct, is liable to be impeached, surcharged and falsified, or opened for correction either on a subsequent annual or partial settlement or upon the final settlement itself,[31] but as to matters which were disputed, heard, and adjudicated when such annual or partial settlement was made it is conclusive.[32]

30. Cowan *v.* Jones, 27 Ala. 317; McLeod *v.* Griffis, 51 Ark. 1, 8 S. W. 837; Shorter *v.* Hargroves, 11 Ga. 658. See also Hyer *v.* Moorehouse, 20 N. J. L. 125; Matter of Morris, 65 N. J. Eq. 699, 56 Atl. 161; Trimmer *v.* Adams, 18 N. J. Eq. 505; Stevenson *v.* Phillips, 15 N. J. Eq. 236.

Where an executor's account is set aside as having been improvidently allowed, it should be set aside in its entirety, and the parties allowed to contest every item of it. Trimmer *v.* Adams, 18 N. J. Eq. 505.

31. *Alabama.*— Tayloe *v.* Bush, 75 Ala. 432; Moore *v.* Lesueur, 33 Ala. 237; Smith *v.* Smith, 13 Ala. 329.

Colorado.— Clemes *v.* Fox, 6 Colo. App. 377, 40 Pac. 843.

Connecticut.— Clement's Appeal, 49 Conn. 519; Mix's Appeal, 35 Conn. 121, 95 Am. Dec. 222. See also Potwine's Appeal, 31 Conn. 381.

Illinois.— Marshall *v.* Coleman, 187 Ill. 556, 58 N. E. 628 [*modifying* 89 Ill. App. 41]; Smith *v.* Smith, 174 Ill. 52, 50 N. E. 1083, 43 L. R. A. 403; Bliss *v.* Seaman, 165 Ill. 422, 46 N. E. 279; Bennett *v.* Hanifin, 87 Ill. 31; Long *v.* Thompson, 60 Ill. 27; Bond *v.* Lockwood, 33 Ill. 212; Ford *v.* Stuart First Nat. Bank, 100 Ill. App. 70; Strauss *v.* Phillips, 91 Ill. App. 373.

Iowa.— Dessaint *v.* Foster, 72 Iowa 639, 34 N. W. 454; Latha *v.* Miles, 57 Iowa 519; Cowins *v.* Toole, 36 Iowa 82; Clark *v.* Cress, 20 Iowa 50.

Louisiana.— *In re* Beecroft, 28 La. Ann. 824.

Maine.— Arnold *v.* Mower, 49 Me. 561; Coburn *v.* Loomis, 49 Me. 406.

Maryland.— Geesey *v.* Geesey 94 Md. 371, 51 Atl. 422, 96 Md. 630, 54 Atl. 616; Hoffman *v.* Armstrong, 90 Md. 123, 44 Atl. 1012; Hoffman *v.* Hoffman, 88 Md. 60, 40 Atl. 712; Martin *v.* Jones, 87 Md. 43, 39 Atl. 102; Shafer *v.* Shafer, 85 Md. 554, 37 Atl. 167; Gavin *v.* Carling, 55 Md. 530; Wilson *v.* McCarty, 55 Md. 277; Bantz *v.* Bantz, 52 Md. 686; *In re* Stratton, 46 Md. 551; Scott *v.* Fox, 14 Md. 388; Edelen *v.* Edelen, 11 Md. 415. See also Maynadier *v.* Armstrong, (1903) 56 Atl. 357; Donaldson *v.* Raborg, 28 Md. 34. *Compare* Bennett *v.* Rhodes, 58 Md. 78.

Massachusetts.— Stetson *v.* Bass, 9 Pick. 27; Stearns *v.* Stearns, 1 Pick. 157.

Mississippi.— Demont *v.* Heth, 45 Miss. 388; Harper *v.* Archer, 9 Sm. & M. 71. See also Crowder *v.* Shackelford, 35 Miss. 321.

Missouri.— North *v.* Priest, 81 Mo. 561; Julian *v.* Wrightsman, 73 Mo. 569; Seymour *v.* Seymour, 67 Mo. 403; *In re* Davis, 62 Mo. 450; Sheetz *v.* Kirtley, 62 Mo. 417; Gamble *v.* Gibson, 59 Mo. 585; Springfield Grocer Co. *v.* Walton, 95 Mo. App. 526, 69 S. W. 477; McClelland *v.* McClelland, 42 Mo. App. 32.

Nevada.— Lucich *v.* Medin, 3 Nev. 81, 93 Am. Dec. 376.

New Hampshire.— Probate Judge *v.* Lane, 51 N. H. 342; Allen *v.* Hubbard, 8 N. H. 487.

New Jersey.— Liddel *v.* McVickar, 11 N. J. L. 44, 19 Am. Dec. 369.

Pennsylvania.— See Ludlam's Estate, 1 Pars. Eq. Cas. 116, 3 Pa. L. J. Rep. 332, 5 Pa. L. J. 276.

Rhode Island.— Sherman *v.* Chace, 9 R. I. 166.

South Carolina.— See Gee *v.* Humphries, 28 S. C. 606, 5 S. E. 615.

Texas.— Ingraham *v.* Rogers, 2 Tex. 465; McShan *v.* Lewis, (Civ. App. 1903) 76 S. W. 616, approval of annual exhibits by the probate judge does not prevent a reëxamination as to items of expenses of administration.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2234.

A statute limiting the time within which application may be made to open up accounts settled in the absence of parties in interest has no application to mistake or fraud in the settlement of an administrator's intermediate account. Dorris *v.* Miller, 105 Iowa 564, 75 N. W. 482.

Allowance of commissions.— The orphans' court may open an intermediate settlement to correct an error in the allowance of excessive commissions. Jackson *v.* Reynolds, 39 N. J. Eq. 313 [*reversing* 36 N. J. Eq. 515]. See also Griggs *v.* Shaw, 42 N. J. Eq. 631, 9 Atl. 578.

Revision of partial settlements under Texas statute see Birdwell *v.* Kauffman, 25 Tex. 189.

32. *District of Columbia.*— See Mercer *v.* Hogan, 4 Mackey 520.

I. Review — 1. Nature and Form of Remedy. The decrees and orders of probate courts rendered upon the settlements of personal representatives are, like other decrees and orders, subject to review by appeal or writ of error,[33] and in a proper case a writ of certiorari will lie.[34]

2. Orders and Decrees Reviewable. As a general rule only orders or decrees which are final are reviewable.[35] Usually the allowance of an annual or partial

Louisiana.— Triche's Succession, 39 La. Ann. 289, 2 So. 52.

Minnesota.— See Kittson *v.* St. Paul Trust Co., 78 Minn. 325, 81 N. W. 7.

New Hampshire.— Allen *v.* Hubbard, 8 N. H. 487.

Rhode Island.— Sherman *v.* Chace, 9 R. I. 166.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2234.

Correction for fraud or mistake.— The probate court has the power and it is its duty upon the proof of fraud, accident, or mistake in the adjustment of any item in a former account to alter and correct it in such manner as to make it what it ought to be. Adams *v.* Adams, 21 Vt. 162.

In Indiana it is provided by statute (Thornton St. (1897) § 2610) that "in every settlement of an account rendered by an executor or administrator, all his former accounts may be so far opened as to correct any error or mistake therein; excepting that any matter in dispute between two parties, which had been previously heard and determined by the Court, shall not be brought again in question by either of the same parties, without notice to the opposite party and by leave of the Court." See Harrell *v.* Seal, 121 Ind. 193, 22 N. E. 983; Collins *v.* Tilton, 58 Ind. 374; Goodwin *v.* Goodwin, 48 Ind. 584; Sherry *v.* Sansberry, 3 Ind. 320; Murdock *v.* Holland, 3 Blackf. 114; Brackenridge *v.* Holland, 2 Blackf. 377, 20 Am. Dec. 123; Allen *v.* Clark, 2 Blackf. 343.

In Massachusetts it is provided by statute (Rev. St. c. 67, § 10) that upon every settlement of an account by an executor or administrator all his former accounts may be so far opened as to correct any mistake or error therein, excepting that any matter in dispute between two parties which has been formerly heard and determined by the court shall not be again brought in question, without leave of the court. See Brigham *v.* Morgan, 185 Mass. 27, 69 N. E. 418; Denholm *v.* McKay, 148 Mass. 434, 19 N. E. 551, 12 Am. St. Rep. 574. Under this statute opening former accounts is limited to accounts in the course of the settlement of the same estate. Granger *v.* Bassett, 98 Mass. 462. In order to avail himself of the benefit of the exception in this statute and show that a question has been once judicially considered and decided, an administrator must take care that the matter thus adjudicated should be so stated as to appear in the decree of the court allowing and disallowing specific items of the account. Wiggin *v.* Swett, 6 Metc. 194, 39 Am. Dec. 716; Field *v.* Hitchcock, 14 Pick. 405. Even then the account may be opened by leave of the court, although undoubtedly the court would be cautious in exercising such a power in regard to a subject once controverted and judicially settled. Wiggin *v.* Swett, *supra*; Stetson *v.* Bass, 9 Pick. 27.

In Ohio the statute provides that "upon every settlement of an account by an executor or administrator, all his former accounts may be so far opened as to correct any mistake or error therein; excepting that any matter in dispute between two parties, which has been previously heard and determined by the court, shall not again be brought in question, by either of the same parties, without leave of the court." See Stayner's Case, 33 Ohio St. 481, 487; Slagle *v.* Slagle, 3 Ohio Dec. (Reprint) 549; Campbell *v.* McCormick, 1 Ohio Cir. Ct. 504, 1 Ohio Cir. Dec. 281. If therefore there was any error or mistake, either in the debit or credit side of the former accounts, not theretofore adjudicated, it was subject to correction in a subsequent account, whether that error or mistake consisted in omitting proper charges or credits, or in including incorrect charges or credits, and whether made by the court or the representative. Watts *v.* Watts, 38 Ohio St. 480.

33. Atwater *v.* Barnes, 21 Conn. 237; Edmond *v.* Canfield, 8 Conn. 87; Goodrich *v.* Thompson, 4 Day (Conn.) 215; People *v.* Kohlsaat, 168 Ill. 37, 48 N. E. 81 [*affirming* 66 Ill. App. 505]; Freeman *v.* Rhodes, 3 Sm. & M. (Miss.) 329; Mitchell *v.* Connolly, 1 Bailey (S. C.) 203 [*reviewing* and *limiting* Wallis *v.* Gill, 3 McCord (S. C.) 475]. And see, generally, Appeal and Error, 2 Cyc. 474. But see Turner *v.* Johnson County Ct., 14 Bush (Ky.) 411; Denis *v.* Cordeviella, 4 Mart. (La.) 344.

The proceeding of a motion for a new trial does not apply to a probate order settling the account of a personal representative. *In re* Franklin, 133 Cal. 584, 65 Pac. 1081 [*citing* Sanderson's Estate, 74 Cal. 199, 15 Pac. 753; Herteman's Estate, 73 Cal. 545, 15 Pac. 121; Moore's Estate, 72 Cal. 335, 13 Pac. 880, and *distinguishing* Leach *v.* Pierce, 93 Cal. 624, 29 Pac. 238; Bauquier's Estate, 88 Cal. 302, 26 Pac. 178, 532].

34. Graham *v.* Abercrombie, 8 Ala. 552; State *v.* Mayhew, 9 N. J. L. 70. And see Certiorari, 6 Cyc. 730.

35. *Alabama.*— Watt *v.* Watt, 37 Ala. 543.

Kansas.— *In re* Bigge, 52 Kan. 184, 34 Pac. 782.

Kentucky.— Scott *v.* Kennedy, 12 B. Mon. 510; Hart *v.* Hart, 2 Bibb 609.

Louisiana.— Calloway's Succession, 49 La. Ann. 968, 22 So. 225; State *v.* Judge Second

settlement is not regarded as a final decree or order from which an appeal can be taken,[36] nor will an appeal lie from the refusal of the probate court to allow an account informally presented by a personal representative without a settlement in due form,[37] or from its refusal to make an order as to a matter entirely within its discretion.[38] An appeal will lie from an order or decree of the probate court setting aside,[39] or refusing to set aside,[40] a former decree rendered on the final

Dist. Ct., 32 La. Ann. 300; Planchet's Succession, 29 La. Ann. 520; McLean's Succession, 5 La. Ann. 671.

Massachusetts.— Cook *v.* Horton, 129 Mass. 527.

Missouri.— Branson *v.* Branson, 102 Mo. 613, 15 S. W. 74; Seymour *v.* Seymour, 67 Mo. 303.

New Jersey.— Cooley *v.* Vansyckle, 14 N. J. Eq. 496.

Pennsylvania.— Long's Estate, 168 Pa. St. 341, 31 Atl. 1093.

Vermont.— Adams *v.* Adams, 21 Vt. 162.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2236.

Test of finality.— The question underlying all of the cases which consider the subject of the finality of the judgment is, Did that which the court entered determine a matter disputed between the parties so that it is no longer open to contention? Clemes *v.* Fox, 6 Colo. App. 377, 40 Pac. 843. See also Perrin *v.* Lepper, 72 Mich. 454, 40 N. W. 859.

Illustrations.— An order of the orphans' court disallowing the account of a previous administrator in a settlement with the administrator *de bonis non* (Shortridge *v.* Easley, 10 Ala. 520), an order fixing the compensation of a personal representative (*In re* Sour, 17 Wash. 675, 50 Pac. 587. See also Lemar *v.* Lemar, 118 Ga. 684, 45 S. E. 498), an order directing a personal representative to pay a certain fee to his attorney (*In re* Kruger, 123 Cal. 391, 55 Pac. 1056; *In re* Kasson, 119 Cal. 489, 51 Pac. 706), and an order disallowing a claim by an administrator for money paid for a burial lot for decedent on objection of decedent's creditors (Clemens *v.* Fox, 6 Colo. App. 377, 40 Pac. 843) are final and reviewable. A decree cannot be regarded as final where the true amount to be made by the execution thereon is to be determined by future inquiry. Tuggle *v.* Gilbert, 1 Duv. (Ky.) 340.

An appeal may be taken from a part of a final order or judgment if the part whereby the appellant is aggrieved is so far distinct and independent that it may be adjudicated on appeal without bringing up for review the entire order or judgment. St. Paul Trust Co. *v.* Kittson, 84 Minn. 493, 87 N. W. 1012. See also Gunn *v.* Newcomer, (Kan. App. 1899) 57 Pac. 1052. But see Showers *v.* Morrill, 41 Mich. 700, 3 N. W. 193, holding that an appeal will not lie from a disallowance of certain items in an administrator's account, but must be taken from the order itself, so as to bring up the entire matter and permit a rehearing upon each and every item of the account.

Void order appealable.—Bullock's Estate, 75 Cal. 419, 421, 17 Pac. 540. But see *In re* Barker, 26 Mont. 279, 67 Pac. 941.

Order not appealable because of inadvertent omission.— Where an item in an administrator's account is allowed by the court, but inadvertently omitted from its order, an appeal is not justified, since the order could no doubt be corrected by calling the court's attention to such omission. *In re* Byrne, 122 Cal. 260, 54 Pac. 957.

In New York an appeal lies to the general term from such orders of the surrogate court as affect a substantial right (*In re* Gilbert, 104 N. Y. 200, 10 N. E. 148; Matter of Burnett, 15 N. Y. St. 116), and it is not essential to such appeals that the orders be final as is requisite to authorize a review thereof in the court of appeals (*In re* Gilbert, 104 N. Y. 200, 10 N. E. 148. See also *In re* Halsey, 93 N. Y. 48).

36. Goodwin *v.* Goodwin, 48 Ind. 584; North *v.* Priest, 81 Mo. 561; Baker *v.* Shoeneman, 41 Mo. 391; Picot *v.* O'Fallon, 35 Mo. 29, 86 Am. Dec. 134.

In Alabama the rule stated in the text now obtains (Thompson *v.* Hunt, 22 Ala. 517), *aliter* under the statute of 1843 (Thompson *v.* Hunt, 22 Ala. 517 [*overruling* Stewart *v.* Price, 16 Ala. 40]; Savage *v.* Benham, 11 Ala. 49).

In California under the statute providing that an order settling an account of a personal representative is appealable, there is no distinction as to appealability between orders settling final accounts and those settling annual accounts. *In re* Grant, 131 Cal. 426, 63 Pac. 731; Burdick's Estate, 112 Cal. 387, 44 Pac. 734; *In re* Delaney, 110 Cal. 563, 42 Pac. 981; Couts' Estate, 87 Cal. 480, 25 Pac. 685; Sanderson's Estate, 74 Cal. 199, 15 Pac. 753; Dean *v.* Santa Barbara County Super. Ct., 63 Cal. 473.

In Pennsylvania a decree of the probate court confirming an account of a personal representative, whether final or partial, is a final decree from which an appeal will lie. Rhoads' Appeal, 39 Pa. St. 186 [*overruling* Light's Appeal, 22 Pa. St. 445].

37. Trammell *v.* Trammell, 50 Ala. 39.

38. Moore *v.* Raggi, 32 N. J. Eq. 273.

39. Bruce *v.* Strickland, 47 Ala. 192; Davis *v.* Cowdin, 20 Pick. (Mass.) 510. But see *In re* Cahalan, 70 Cal. 604, 12 Pac. 427 (holding that an order setting aside a decree settling the final account of an executor, although not directly appealable, may be reviewed on an appeal by the executor from a subsequent decree settling his final account); *In re* Dean, 62 Cal. 613; *In re* Dunne, 53 Cal. 631.

40. Githens *v.* Goodwin, 32 N. J. Eq. 286. But see Lutz's Estate, 67 Cal. 457, 8 Pac. 39.

settlement of an administration account, and from the denial of a motion made on the final accounting of a personal representative to direct him to pay counsel fees.[41]

3. Persons Entitled to Review — a. In General. The general rule that any party aggrieved by a judgment or decree may appeal therefrom and that in a legal sense a party is aggrieved by a judgment or decree whenever it operates on his rights of property or bears directly upon his interest[42] is applicable in proceedings for the settlement of administration accounts,[43] and it follows as the converse of this general rule that it is not the privilege of a party to appeal from a judgment or order rendered in such a proceeding unless he is, either as an individual or in a representative capacity, aggrieved thereby, and that no one is in a legal sense aggrieved by such a judgment or order unless it prejudicially affects his rights of property, or pecuniary interests, or those of others for whom he is, with relation to such proceeding, the duly constituted representative.[44]

b. Legatees, Distributees, and Creditors. Legatees, distributees,[45] or credit-

41. Seaman *v.* Whitehead, 78 N. Y. 306.

42. See Appeal and Error, 2 Cyc. 633.

43. *California.*— *In re* Heaton, (1903) 73 Pac. 185.

Delaware.— State *v.* Layton, 3 Harr. 348.

Indiana.— Taylor *v.* Burk, 91 Ind. 252; Reed *v.* Reed, 44 Ind. 429.

Louisiana.— Hartigan's Succession, 51 La. Ann. 126, 24 So. 794; Scott's Succession, 41 La. Ann. 668, 6 So. 792.

Maine.— Sturtevant *v.* Tallman, 27 Me. 78.

Massachusetts.— See Livermore *v.* Bemis, 2 Allen 394.

Michigan.— Fingleton *v.* Kent Cir. Judge, 116 Mich. 211, 74 N. W. 473; Grady *v.* Hughes, 64 Mich. 540, 31 N. W. 438.

Montana.— *In re* Barker, 26 Mont. 279, 67 Pac. 941.

Nebraska.— Gannon *v.* Phelan, 64 Nebr. 220, 89 N. W. 1028.

New Hampshire.— Bryant *v.* Allen, 6 N. H. 116.

New York.— Matter of Sullivan, 84 N. Y. App. Div. 51, 82 N. Y. Suppl. 32, construing Code of Civ. Proc. § 2569, giving persons interested but not parties to the proceeding the right to intervene and appeal.

Vermont.— See Barker *v.* Rogers, 2 Vt. 440.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2237.

A person with a contingent interest in realty under the will may appeal from a decree of the probate court allowing the account of the executor, which will probably require a sale of such land. Paine *v.* Goodwin, 56 Me. 411.

A grantee of real estate from the residuary legatee under a will, where there is no property of the testator which can be reached to satisfy the debts and claims against his estate, except such real estate, is interested in the settlement of the account of the executor or administrator of the estate, and has a right of appeal from the decree of the judge of probate allowing the account. Blastow *v.* Hardy, 83 Me. 28, 21 Atl. 179.

The assignee of land charged by will with the payment of a legacy may appeal from a decree of the court of probate allowing the account of the executrix. Leavitt *v.* Wooster, 14 N. H. 550.

44. *California.*— Burdick's Estate, 112 Cal. 387, 44 Pac. 734, (1895) 40 Pac. 35.

Georgia.— Lamar *v.* Lamar, 118 Ga. 684, 45 S. E. 498.

Louisiana.— See Barrett's Succession, 43 La. Ann. 61, 8 So. 438.

Michigan.— Labar *v.* Nichols, 23 Mich. 310.

Montana.— State *v.* Eighth Judicial Dist. Ct., 26 Mont. 369, 68 Pac. 856.

Nebraska.— Merrick *v.* Kennedy, 46 Nebr. 264, 64 N. W. 989.

Tennessee.— Glosson *v.* Glosson, 104 Tenn. 391, 58 S. W. 121.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2237.

A surety on an administrator's bond cannot appeal from a decree of the judge of probate settling the account of his principal. Tuxbury's Appeal, 67 Me. 267.

A purchaser of land from an heir before final settlement of the administration account has not such interest in the settlement as entitles him to appeal from an order directing the administrator to file the vouchers for moneys paid by him as stated in his final account, or from an order discharging him from further liability. Gunn *v.* Green, 14 Wis. 316.

45. Tillson *v.* Small, 80 Me. 90, 13 Atl. 402; Pierce *v.* Gould, 143 Mass. 234, 9 N. E. 568; Danforth's Estate, 66 Mo. App. 586. See also *In re* Lee, 18 Pick. (Mass.) 285; Labar *v.* Nichols, 23 Mich. 310.

Heirs or next of kin.—Where there is property of a testator not devised or bequeathed, his heirs or next of kin may appeal from the allowance of the executor's account. Smith *v.* Haynes, 111 Mass. 346.

The children of a deceased heir at law of an intestate may appeal from a decree of the judge of probate by whom the account of the administrator of such intestate has been allowed. Mathes *v.* Bennett, 21 N. H. 188.

Distributee of residuary legatee.— One who is entitled to a distributive share of the estate of a residuary legatee is not the proper party to appeal from a decree allowing the administration account of the executor of

ors of the decedent,[46] when aggrieved by such a judgment or decree, may appeal therefrom.

c. Personal Representatives.[47] The right of a personal representative to appeal, like that of other persons, depends upon whether or not he is aggrieved by the judgment or decree.[48] He cannot appeal from a judgment which rejects a claim against the estate which he has not paid, or become personally liable to pay;[49] but where he has paid claims placed on his account he has a direct interest in sustaining such payments and may appeal from a judgment adverse to their validity.[50] A personal representative cannot in his official capacity appeal from an order disallowing his individual claim against the estate; the appeal allowed by law in such case is by him personally.[51]

4. Presentation and Reservation in Lower Court of Grounds of Review. In order that a question may be passed upon by the appellate court it must as a general rule have been raised in the court below and an appropriate exception to the court's ruling thereon reserved.[52]

such legatee's devisor. Downing *v.* Porter, 9 Mass. 386. See also Reed *v.* Foster, 54 Me. 499.

46. Lacroix's Succession, 29 La. Ann. 366; Cloney's Succession, 29 La. Ann. 327; Bellocq's Succession, 28 La. Ann. 154; Higbie *v.* Westlake, 14 N. Y. 281 (holding that creditors may appeal from a surrogate's decree, although they have received dividends under it); Davenport *v.* Hervey, 30 Tex. 308.

Creditors made parties by order of court.— Where the creditors of an estate in progress of settlement in chancery are required by an order of court to come in and prove their claims, they become quasi-parties to the cause, and may appeal and assign error on account of the rejection of their claims; but the administrator, not being injured by such rejection, cannot complain of it on error. Pearson *v.* Darrington, 32 Ala. 227.

Person rendering services to representative not a creditor of estate.— Burke *v.* Terry, 28 Conn. 414.

47. See Appeal and Error, 2 Cyc. 640.

48. Matter of Hodgman, 69 Hun (N. Y.) 484, 23 N. Y. Suppl. 725 [*affirmed* in 140 N. Y. 421, 35 N. E. 660]. See also Chew's Appeal, 3 Grant (Pa.) 308.

When appealable interest exists.— An executor has an interest to appeal whenever it is sought to wrest from him property belonging to the succession, or to impose a debt upon it which will diminish its assets in the fund to be distributed among the heirs or creditors; and his right to appeal exists independently of the heirs or creditors. Cassidy's Succession, 40 La. Ann. 827, 5 So. 292.

Succession must be aggrieved.— It is only where a judgment is rendered by which a succession can be aggrieved that a succession representative can in his official capacity appeal from the same. Payne *v.* Dejean, 32 La. Ann. 889. See also Hartigan's Succession, 51 La. Ann. 126, 24 So. 794; Mausberg's Succession, 37 La. Ann. 126; Lundy's Estate, 3 C. Pl. (Pa.) 139. *Compare* Ames' Succession, 33 La. Ann. 1317.

An administrator de bonis non may appeal from a decree of the judge of probate allowing the administration accounts of the original executor or administrator. Wiggin *v.* Swett, 6 Metc. (Mass.) 194, 39 Am. Dec. 716.

One who is co-executor and legatee is in either capacity entitled to appeal from an order of the orphans' court passing a separate account of the other executor, in which the latter is allowed a large claim against the estate. Hesson *v.* Hesson, 14 Md. 8.

Right of representative's assignee for benefit of creditors to appeal see Slagle *v.* Slagle, 3 Ohio Dec. (Reprint) 549.

49. Hartigan's Succession, 51 La. Ann. 126, 24 So. 794 (the appeal allowed by law is by the aggrieved creditor); Kellett *v.* Rathbun, 4 Paige (N. Y.) 102.

50. Heffner's Succession, 49 La. Ann. 407, 21 So. 905.

51. Hartigan's Succession, 51 La. Ann. 126, 24 So. 794; *In re* Barker, 26 Mont. 279, 67 Pac. 941.

52. *Alabama.*—Clack *v.* Clack, 20 Ala. 461; Long *v.* Easly, 13 Ala. 239; King *v.* Cabiness, 12 Ala. 598. See also Forrester *v.* Forrester, 40 Ala. 557.

Illinois.—Marshall *v.* Coleman, 187 Ill. 556, 58 N. E. 628 [*affirming* 89 Ill. App. 41]; Elder *v.* Whittemore, 51 Ill. App. 662.

Indiana.— Price *v.* Cavins, 50 Ind. 122.

Kentucky.— Polly *v.* Covington, 10 Ky. L. Rep. 361.

Louisiana.— Blakey's Succession, 12 Rob. 155.

Massachusetts.— See Morse *v.* Meston, 152 Mass. 5, 24 N. E. 916.

New Jersey.— Trimmer *v.* Adams, 18 N. J. Eq. 505.

Texas.— Davenport *v.* Hervey, 30 Tex. 308.

Vermont.— *In re* Hall, 70 Vt. 458, 41 Atl. 508; Pelton *v.* Johnson, 52 Vt. 138.

Virginia.— Wills *v.* Dunn, 5 Gratt. 384; Jones *v.* Watson, 3 Call 253.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2244; and Appeal and Error, 2 Cyc. 660, 714.

Procuring rulings of court.— It is the duty of a party appealing to procure to be made such findings or refusals as will present, through appropriate exceptions, the questions which he desires to argue. Deegan *v.* Von Glahn, 75 Hun (N. Y.) 39, 26 N. Y. Suppl.

5. TIME FOR INSTITUTING PROCEEDING. The appeal or other proceeding to review such a decree or order must be taken and perfected within the time prescribed by statute.[53] But the trial judge has sometimes a discretion to extend the time fixed by law if he deems that the circumstances require it,[54] and in some jurisdictions the statutes provide for relief in case of an excusable failure to appeal in time.[55]

6. REQUISITES FOR REVIEW. The giving of notice to the proper parties is as a general rule an essential step in perfecting such a proceeding,[56] and the filing of

989; Matter of Hesdra, 4 Misc. (N. Y.) 37, 23 N. Y. Suppl. 846, construing Code Civ. Proc. § 2545, as to exceptions taken in a trial before a surrogate.

Special findings.— A party cannot on appeal first object that the court below had no authority to make special findings. Swift *v.* Harley, 20 Ind. App. 614, 49 N. E. 1069.

Exceptions to rule.— It has been held that in the final settlement of an estate the omission to make the personal representative of a deceased distributee a party may be taken advantage of on appeal, although no objection was made in the probate court (McMullan *v.* Brazelton, 81 Ala. 442, 1 So. 778), and that, although an administrator makes no objection on the ground of defective notice before the clerk, he can do so on appeal to the superior court (Hester *v.* Lawrence, 102 N. C. 319, 8 S. E. 915).

53. *Alabama.*— Thomas *v.* Dumas, 30 Ala. 83; Binford *v.* Binford, 22 Ala. 682; Bohannan *v.* Watts, 14 Ala. 574.

California.— *In re* Franklin, 133 Cal. 584, 65 Pac. 1081.

Indiana.— Webb *v.* Simpson, 105 Ind. 327, 4 N. E. 900; Browning *v.* McCracken, 97 Ind. 279.

Louisiana.— See Calloway's Succession, 49 La. Ann. 968, 22 So. 225.

New York.— Smith *v.* Van Kuren, 2 Barb. Ch. 473; Guild *v.* Peck, 11 Paige 475; Bronson *v.* Ward, 3 Paige 189.

Ohio.— Falconer *v.* Martin, 66 Ohio St. 352, 64 N. E. 430.

Pennsylvania.— See *In re* Sherwood, 206 Pa. St. 465, 56 Atl. 20; Candor's Appeal, 27 Pa. St. 119.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2241; and APPEAL AND ERROR, 2 Cyc. 789.

Statute not applicable.— The California statute providing that where an appeal is not taken within sixty days after the rendition of the judgment, the evidence upon which the decision rests cannot be reviewed, does not apply to an order settling the account of a personal representative. Levinson's Estate, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479. See also Rose's Estate, 80 Cal. 166, 22 Pac. 86, 20 Pac. 712.

An appeal by motion in open court is improper except during the term at which the judgment was rendered; but if the appeal is thus taken at a subsequent term, and the appellee appears and files an answer, the defect will be cured, and the appeal maintained. Planchet's Succession, 29 La. Ann. 520.

Commencement of period of limitation see Chorn *v.* Chorn, 98 Ky. 627, 33 S. W. 1107, 17 Ky. L. Rep. 1178; Boyd *v.* Boyd, 9 S. W. 842, 10 Ky. L. Rep. 85.

Premature appeal.— An appeal from an order settling the account of an administrator, taken before the order is entered in the minute-book of the court, is premature and will be dismissed. Rose's Estate, 72 Cal. 577, 14 Pac. 369.

Appeal before final discharge.— Under Ind. Rev. St. (1881) §§ 2454, 2455, giving to one aggrieved by a decision of the circuit court in a matter growing out of the settlement of a decedent's estate the right to appeal, one aggrieved by the allowance of a personal representative's final account may appeal without waiting for his final discharge from the duties of his trust. Taylor *v.* Burk, 91 Ind. 252.

54. Calloway's Succession, 49 La. Ann. 968, 22 So. 225.

55. Howell Annot. St. Mich. § 6784, provides that the circuit court may grant an appeal from any act of the judge of probate even after the statutory period, to any party aggrieved, if he has not been guilty of default in omitting to prosecute his appeal according to law, and if it shall appear that justice requires a revision of the case. See Sanborn *v.* Mitchell, 94 Mich. 519, 54 N. W. 295. N. H. Pub. St. c. 200, § 7, provides that any person aggrieved by a decision of a judge of probate, who was prevented from appealing therefrom within the sixty days prescribed by statute for taking appeals from such decisions through mistake, accident, or misfortune and not from his own neglect, may petition the supreme court at any time within two years thereafter, to be allowed an appeal, setting forth his interest, his reasons for appealing, and the causes of his delay. See Ahearn *v.* Mann, 63 N. H. 330 (no relief when settlement agreed to); Holton *v.* Olcott, 58 N. H. 598; *In re* Rice, 58 N. H. 200 (petition denied where it appeared that decree must be affirmed); Grout *v.* Cole, 57 N. H. 547 (relief granted where appeal papers were mislaid by attorney after timely preparation); Tilton *v.* Tilton, 35 N. H. 430 (a misapprehension as to the law concerning appeals is a mistake); Matthews *v.* Fogg, 35 N. H. 289; *In re* Wilcomb, 26 N. H. 370; Buffum *v.* Sparhawk, 20 N. H. 81 (it must be shown that injustice has been done by decree); *In re* French, 17 N. H. 472; Parker's Appeal, 16 N. H. 24 (mistake may be either of fact or of law).

56. *In re* Bullard, 114 Cal. 462, 46 Pac. 297; Casserly *v.* Casserly, 123 Mich. 44, 81 N. W. 930; Perkins *v.* Shadbolt, 44 Wis. 574. See also *In re* Delaney, 110 Cal. 563, 42 Pac. 981; Romero's Succession, 25 La. Ann. 534.

an appeal-bond, when review is sought by appeal, is also generally held to be necessary.[57]

7. Parties to Proceeding. It has been held that all persons interested in maintaining the judgment or order rendered upon the settlement of an administration account should be made parties to the appeal or it will be dismissed,[58] but that it is not necessary that all the distributees who filed objections to the final settlement of a personal representative should join in an appeal from the judgment rendered on that settlement.[59]

8. Record on Review. The general rules as to the contents of the record,[60] and as to the necessity for a bill of exceptions, case, or statement of facts,[61] apply when an appeal is taken in such a proceeding.

And see Appeal and Error, 2 Cyc. 852 *et seq.* But *compare In re* Danforth, 66 Mo. App. 586.

57. *Georgia.*— Adams *v.* Beall, 60 Ga. 325.

Illinois.— See People *v.* Kohlsaat, 168 Ill. 37, 48 N. E. 81 [*affirming* 66 Ill. App. 505].

Nebraska.—Gannon *v.* Phelan, 64 Nebr. 220, 89 N. W. 1028, who the proper obligee.

New York.— *In re* Dumesnill, 47 N. Y. 677.

Ohio.— Taylor *v.* McCullom, 8 Ohio Dec. (Reprint) 66, 5 Cinc. L. Bul. 414; *In re* Ziegler, 6 Ohio S. & C. Pl. Dec. 54, 3 Ohio N. P. 307, amount of bond and amendment.

Vermont.— Lambert *v.* Merrill, 56 Vt. 464.

Wisconsin.— Perkins *v.* Shadbolt, 44 Wis. 574.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2246; and Appeal and Error, 2 Cyc. 818.

Exemption of personal representative from the necessity of giving bond see Yearley *v.* Sharp, 96 Ind. 469; Taylor *v.* McCullom, 8 Ohio Dec. (Reprint) 66, 5 Cinc. L. Bul. 414; Hudgins *v.* Leggett, 84 Tex. 207, 19 S. W. 387; Kleinsmith *v.* Northcut, (Tex. Civ. App. 1900) 56 S. W. 557.

58. Forsyth's Succession, 20 La. Ann. 33; Broussard *v.* Robin, 13 La. Ann. 560; Perry's Succession, 4 La. Ann. 577. *Compare* Montgomery's Succession, 2 La. Ann. 469, holding that absent creditors who never appeared in the court below, nor claimed to be such, and who were placed on the account of the representative for the protection of his own interest, need not be made appellees, although their claims were opposed by the appellants.

59. *In re* Swan, 54 Mo. App. 17. *Compare* Merrill *v.* Jones, 2 Ala. 192.

60. See Appeal and Error, 2 Cyc. 1025 *et seq.*

The record must show the interest or concern of the party who excepts to an administration account. Johnson *v.* Johnson, 2 Harr. (Del.) 273.

Representation of minors by guardian.— Where the record shows that there are minor heirs, it must also show that they were represented at the settlement by a guardian or guardian *ad litem*. Clack *v.* Clack, 20 Ala. 461.

The petition and account filed by a personal representative in order to make a final settlement of his administration constitute a part of the record to be used on appeal, without being made so by a bill of exceptions. *In re* Isaacs, 30 Cal. 105.

Inventory.— The filing of an account by a personal representative makes the inventory on which it is predicated a part of the record, and it is properly included in the transcript on appeal, although not offered in evidence. *In re* Osburn, 36 Oreg. 8, 58 Pac. 521.

The petition for letters, the order appointing the administrator, his bond, and the order of distribution, not being necessary parts of the administrator's report, are not a part of the record unless offered in evidence, and if included in the transcript on appeal will not be considered. *In re* Osburn, 36 Oreg. 8, 58 Pac. 521.

61. *Alabama.*— See King *v.* Brown, 108 Ala. 68, 18 So. 935; Long *v.* Easly, 13 Ala. 239.

California.— Levinson's Estate, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479, construing Code Civ. Proc. § 648.

Indiana.— Cunningham *v.* Cunningham, 94 Ind. 557.

Kentucky.— Polly *v.* Covington, 10 Ky. L. Rep. 361.

Missouri.— Branson *v.* Branson, 102 Mo. 613, 15 S. W. 74.

South Carolina.— Jones *v.* Jones, 39 S. C. 247, 17 S. E. 587, 802.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2248; and Appeal and Error, 2 Cyc. 1076.

Necessity of bringing up evidence see the following cases:

Alabama.— Bendall *v.* Bendall, 24 Ala. 295, 60 Am. Dec. 469.

Indiana.— Bristow *v.* McClelland, 122 Ind. 64, 22 N. E. 299; Brownlee *v.* Hare, 64 Ind. 311.

Kentucky.— Bowling *v.* Cobb, 6 B. Mon. 356, evidence as to services of attorney.

Louisiana.—Short's Succession, 45 La. Ann. 1485, 14 So. 184, evidence as to allowance of a claim by court.

Mississippi.— Gray *v.* Harris, 43 Miss. 421.

Ohio.— *In re* Raab, 16 Ohio St. 273, evidence as to costs.

Oregon.— Rostel *v.* Morat, 19 Oreg. 181, 23 Pac. 900.

South Carolina.— Clark *v.* West, 1 Strobh. Eq. 185.

Texas.— Wright *v.* Pate, (Sup. 1886) 1 S. W. 661.

9. Scope and Extent of Review — a. In General. Appeals from courts of probate jurisdiction are generally regulated by statutory provisions peculiar thereto,[62] on which depends in a measure the extent to which orders and decrees made upon the settlements of personal representatives will be reviewed.[63] In some jurisdictions upon appeal to a superior court there will be a hearing *de novo* of the whole case,[64] while in others the appellant is restricted to the investigation of matters stated in the reasons of appeal filed in the case.[65]

b. Presumptions in Support of Order or Decree. The order or decree of which a review is sought is as a general rule presumed to be right, in the absence of any affirmative showing in the record to the contrary, and every reasonable presumption will be indulged in favor of the correctness of the proceedings below.[66]

c. Discretion of Lower Court.[67] Determinations of the lower court as to matters which are properly within its discretion will not be disturbed on appeal, except for manifest abuse of such discretion.[68]

Virginia.— Farneyhough *v.* Dickerson, 2 Rob. 582, evidence as to allowance for services of clerk.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2248.

62. See Appeal and Error, 3 Cyc. 262.

63. *Indiana.*— See Reed *v.* Reed, 44 Ind. 429.

New Jersey.— Luse *v.* Rarick, 34 N. J. Eq. 212; Stevenson *v.* Phillips, 8 N. J. Eq. 593.

New Mexico.— Clancey *v.* Clancey, 7 N. M. 405, 37 Pac. 1105, 38 Pac. 168.

New York.— Matter of Mayer, 84 Hun 539, 32 N. Y. Suppl. 850; Ross *v.* Ross, 6 Hun 80.

North Carolina.— *Ex p.* Spencer, 95 N. C. 271.

Pennsylvania.— Bierly's Appeal, 33 Leg. Int. 296.

Texas.— Rahm *v.* Bergstrom, (Civ. App. 1896) 36 S. W. 494.

Wisconsin.— Gunn *v.* Green, 14 Wis. 316.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2249.

64. *In re* Boothe, 38 Mo. App. 456. See also Clark *v.* Clark, 21 Vt. 490.

In Illinois on an appeal from the county to the circuit court the hearing is *de novo* as to all matters investigated on appeal (Richardson *v.* Emberson, 96 Ill. App. 403); but where an appeal is taken as to particular items of an account it does not bring before the circuit court the whole account, but such hearing will be confined to the items appealed from (Morgan *v.* Morgan, 83 Ill. 196; Curts *v.* Brooks, 71 Ill. 125; Wilkinson *v.* Ward, 42 Ill. App. 541. See also Elder *v.* Whittemore, 51 Ill. App. 662). The dismissal of an appeal in the circuit court as to certain items of such account leaves the judgment of the county court standing as to them, and binding upon the parties to the appeal. Wilkinson *v.* Ward, 42 Ill. App. 541.

In Oregon it is provided by statute that on appeal to the circuit court from a decree of the county court, the suit shall be tried *de novo* on the transcript of the evidence accompanying it. See *In re* Plunkett, 33 Oreg. 414, 54 Pac. 152.

In Texas by statute persons interested in the estate of a decedent may have the proceedings in the county court corrected on certiorari from the district court, where the cause shall be tried *de novo*. Kalteyer *v.* Wipff, (Civ. App. 1899) 49 S. W. 1055.

65. Cowden *v.* Jacobson, 165 Mass. 240, 43 N. E. 98; Harris *v.* Harris, 153 Mass. 439, 26 N. E. 1117; Boynton *v.* Dyer, 18 Pick. (Mass.) 1; Dodge *v.* Stickney, 60 N. H. 461; Caswell *v.* Hill, 47 N. H. 407; French *v.* Currier, 47 N. H. 88.

66. *Alabama.*— Where the correctness of the ruling of the court below depends on the proof, and the record does not set out all the evidence that was adduced, the appellate court will presume that the decision of the court below was justified by the evidence. Mims *v.* Mims, 39 Ala. 716; Roundtree *v.* Snodgrass, 36 Ala. 185.

California.— *In re* Weringer, 100 Cal. 345, 34 Pac. 825; Tompkins *v.* Weeks, 26 Cal. 50, presumption that it was correctly determined in the probate court that the contestant was a creditor.

Kentucky.— Vaugh *v.* Drye, 12 Ky. L. Rep. 358, presumption that claims allowed by probate court were valid.

Mississippi.—Scott *v.* Porter. 44 Miss. 364; Gray *v.* Harris, 43 Miss. 421.

Pennsylvania.— See Robb's Appeal, 41 Pa. St. 45.

Washington.— *In re* Alfstad, 27 Wash. 175, 67 Pac. 593; *In re* Mason, 26 Wash. 259, 66 Pac. 435, presumption that the action of the probate court as to the allowance made the personal representative fully met the statutory requirements.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2250; and Appeal and Error, 3 Cyc. 275.

67. See also *supra*, XV, E, 12, e.

68. Moore *v.* Raggi, 32 N. J. Eq. 273; *In re* Holladay, 18 Oreg. 168, 22 Pac. 750; St. Clair's Appeal, (Pa. 1888) 15 Atl. 914. And see Appeal and Error, 3 Cyc. 325.

Allowing and awarding costs see *In re* Selleck, 111 N. Y. 284, 19 N. E. 66 (construing Code Civ. Proc. §§ 2557, 2558, 2570, 2589); *In re* Niles, 12 N. Y. Suppl. 157 (construing Code Civ. Proc. § 2561).

Allowances for services of attorneys see the following cases:

d. Findings of Fact. The general rules as to reviewing findings of fact, by appellate courts,[69] apply on the review of such proceedings.[70]

e. Former Accounts. Former accounts, from the allowance of which no appeal was taken, and the matters passed upon in them, are not subject to revision and readjustment upon an appeal from the allowance of a later account in which the same questions were not before the probate court for consideration.[71]

10. Determination and Disposition.[72] When an appeal is taken from an order or decree rendered on an administration settlement, the appellate court may dismiss such appeal;[73] or affirm,[74] modify,[75] or reverse the order or decree,[76] and when

California.— *In re* Adams, 131 Cal. 415, 63 Pac. 838; *In re* Byrne, 122 Cal. 260, 54 Pac. 957; *In re* Gasq, 42 Cal. 288.

Kentucky.— See Miller *v.* Simpson, (1886) 2 S. W. 171.

Missouri.— Scudder *v.* Ames, 142 Mo. 187, 43 S. W. 659.

New York.— Hannahs *v.* Hannahs, 68 N. Y. 610.

Pennsylvania.— Good's Estate, 150 Pa. St. 307, 24 Atl. 623; Harbster's Appeal, 125 Pa. St. 1, 17 Atl. 204; Kalbfell's Estate, 17 Pa. Super. Ct. 255; Mutchmore's Estate, 9 Pa. Dist. 702; Simon's Estate, 9 Pa. Dist. 59.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2251.

Allowances for commissioners see *Ex p.* Carter, 27 Ark. 532.

69. See Appeal and Error, 3 Cyc. 345 *et seq.*

70. **Review of verdict of jury** see Doster *v.* Arnold, 60 Ga. 316; Fisk *v.* Cushman, 6 Cush. (Mass.) 20, 52 Am. Dec. 761.

Review of findings by lower court see the following cases:

Indiana.— Cooper *v.* Williams, 109 Ind. 270, 9 N. E. 917.

Maine.— Small *v.* Thompson, 92 Me. 539, 43 Atl. 509; Manning *v.* Devereux, 81 Me. 560, 18 Atl. 290.

Mississippi.— Price *v.* Mitchell, 10 Sm. & M. 179.

Montana.— *In re* Ford, 29 Mont. 283, 74 Pac. 735.

New York.— *In re* O'Brien, 145 N. Y. 379, 40 N. E. 18; Hovey *v.* Smith, 1 Barb. 372.

Pennsylvania.— Fiscus' Estate, 13 Pa. Super. Ct. 615; Stotler *v.* McGary, 31 Leg. Int. 373.

Wisconsin.— Robinson *v.* Hodgkin, 99 Wis. 327, 74 N. W. 791.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2252.

Findings based on conflicting evidence not disturbed.—Levinson's Estate, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479; Mayhew's Estate, 155 Pa. St. 94, 25 Atl. 1017.

Conclusiveness of findings of fact by lower court see Gee *v.* Hasbrouck, 128 Mich. 509, 87 N. W. 621; Clark *v.* Clark, 21 Vt. 490.

Review of both law and facts see Springfield Grocer Co. *v.* Walton, 95 Mo. App. 526, 69 S. W. 477; *In re* Ansley, 95 Mo. App. 332, 68 S. W. 609; *In re* Danforth, 66 Mo. App. 586; *In re* Meeker, 45 Mo. App. 186; Matter of Morris, 65 N. J. Eq. 699, 56 Atl. 161 [*distinguishing* Engle *v.* Crombie, 21 N. J. L. 614].

71. McLoon *v.* Spaulding, 62 Me. 315; Arnould *v.* Mower, 49 Me. 561; Coburn *v.* Loomis, 49 Me. 406; Sturtevant *v.* Tallman, 27 Me. 78. See also Peters *v.* Clendenin, 12 Mo. App. 521, holding that the annual settlement of an administrator cannot be corrected in the circuit court on appeal from an order of distribution. But see Williams *v.* Petticrew, 62 Mo. 460, holding that on appeal from a final settlement of an administrator mistakes in annual settlements can be corrected.

72. See Appeal and Error, 3 Cyc. 403 *et seq.*

73. Sherman *v.* Chace, 9 R. I. 166. See also *In re* Heaton, (Cal. 1903) 73 Pac. 185; Romero's Succession, 25 La. Ann. 534. And see Appeal and Error, 3 Cyc. 182 *et seq.*

74. Reeves *v.* McMillan, 101 N. C. 479, 7 S. E. 906. See Appeal and Error, 3 Cyc. 412 *et seq.*

Errors merely of form will not prevent affirmance. *In re* Phillips, 38 Mo. App. 509.

75. Willis' Succession, 109 La. 281, 33 So. 314; James *v.* West, 67 Ohio St. 28, 65 N. E. 156; Cary *v.* Macon, 4 Call (Va.) 605. See Appeal and Error, 3 Cyc. 424 *et seq.*

Correction of errors.— When a decree allowing a final account is found upon appeal to be erroneous as to an item or items the appellate court may direct the decree to be corrected, and as corrected affirm it. *In re* Adams, 131 Cal. 415, 63 Pac. 838. Where a decree of a probate court allowing an administrator's account contains a manifest error in computation, such error will be corrected in the decree rendered in the supreme judicial court, although such error is not made one of the reasons for the appeal. Newell *v.* West, 149 Mass. 520, 21 N. E. 954. Upon an appeal from the allowance of an administrator's account mistakes made in the account to the prejudice of the administrator may be corrected, although he did not appeal. Birkholm *v.* Wardell, 42 N. J. Eq. 337, 7 Atl. 569.

76. *In re* More, 121 Cal. 635, 54 Pac. 148; *In re* Runyon, 53 Cal. 196; Overstreet *v.* Potts, 4 Dana (Ky.) 138. See Appeal and Error, 3 Cyc. 440 *et seq.*

Errors which are not prejudicial no ground for reversal.— Canfield *v.* Bostwick, 21 Conn. 550. See also Tunnicliffe *v.* Fox, (Nebr. 1903) 94 N. W. 1032; Stonebraker *v.* Friar, 70 Tex. 202, 7 S. W. 799. Where the effect of reversal, on an accounting without notice to one of the heirs, would be to remand the cause for a new accounting, and it appears

proper remand the proceedings to the lower court.[77] But when an appeal is taken to a superior court and not to a court having purely appellate jurisdiction,[78] such court, in some states, tries the cause *de novo* and renders such a decree, or makes such an order as the probate court should have rendered or made.[79]

11. Operation and Effect of Decree. The decree of the appellate court operates as a termination of the controversy involved in the appeal, and the account of the personal representative should be stated and a settlement made in accordance therewith.[80] But such a decree is not conclusive as to matters not passed upon on appeal.[81]

J. Private Accounting and Settlement. Provided there are no creditors[82] or none whose debts are not paid,[83] legatees, distributees, and other persons entitled to the estate may enter into agreements among themselves,[84] or with the personal representative[85] as to the settlement of the estate, which will be sustained

that an accounting has actually been made upon full proof, and with all parties represented, the error will not be held prejudicial. Allen *v.* Shanks, 90 Tenn. 359, 16 S. W. 715.

In New York power is given by statute to the appellate division of the supreme court to reverse, affirm, or modify such orders or decrees. *In re* Kellogg, 104 N. Y. 648, 10 N. E. 152 [*affirming* 39 Hun 27] (construing Code Civ. Proc. § 2587); Freeman *v.* Coit, 27 Hun 447 [*affirmed* in 96 N. Y. 63].

77. *In re* Runyon, 53 Cal. 196; Overstreet *v.* Potts, 4 Dana (Ky.) 138.

Effect of issuance of remittitur.— When the remittitur has been duly and regularly issued, without inadvertence, the supreme court loses jurisdiction of the cause, and has no power to recall it, except in a case of mistake, or of fraud or imposition practised upon the court. Levinson's Estate, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479.

When unnecessary to remand.— On appeal from a decree of the probate court adjudging that it has no jurisdiction to hear and determine an administrator's accounts after a distribution by agreement of the intestate's estate, the superior court, acting as an appellate court of probate, on reversing such decree may settle the administration account as fully as could be done by the probate court without remanding it to that court. Mathews' Appeal, 72 Conn. 555, 45 Atl. 170.

78. *Michigan.*— *In re* Sanborn, 109 Mich. 191, 67 N. W. 128; Walker *v.* Hull, 35 Mich. 488; Hall *v.* Grovier, 25 Mich. 428.

North Carolina.— *Ex p.* Spencer, 95 N. C. 271.

Rhode Island.— McGinity *v.* McGinity, 19 R. I. 510, 34 Atl. 1114.

Texas.— Houston *v.* Mayes, 77 Tex. 265, 13 S. W. 1036.

Wisconsin.— Perkins *v.* Shadbolt, 44 Wis. 574.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2254.

Consolidation of appeals by executor and legatee see Wisner *v.* Mabley, 70 Mich. 271, 38 N. W. 262.

79. See Hamlyn *v.* Nesbit, 37 Ind. 284; Seymour *v.* Seymour, 67 Mo. 303. And see Appeal and Error, 3 Cyc. 262.

Right to jury trial on appeal see Wisner *v.* Mabley, 70 Mich. 271, 38 N. W. 262; Mower's Appeal, 48 Mich. 441, 12 N. W. 646; Showers *v.* Morrill, 41 Mich. 700, 3 N. W. 193; Grovier *v.* Hall, 23 Mich. 7. See also Ward *v.* Tinkham, 65 Mich. 695, 32 N. W. 901.

Admissibility of evidence see Grovier *v.* Hall, 23 Mich. 7.

80. Duhé's Succession, 42 La. Ann. 252, 7 So. 327; State *v.* Judge Ouachita Parish Ct., 30 La. Ann. 183; Wright *v.* Wright, 72 N. Y. 149 (holding that where the decision of a surrogate rejecting certain claims is reversed on appeal, such claims should be allowed); Cary *v.* Macon, 4 Call (Va.) 605. See also Baggott *v.* Boulger, 2 Duer (N. Y.) 160.

81. Young *v.* Cabell, 27 Gratt. (Va.) 761.

82. Hoff's Estate, 7 Pa. Dist. 93.

83. Amis *v.* Cameron, 55 Ga. 449. See Descent and Distribution, 14 Cyc. 132.

84. Hatcher *v.* Cade, 55 Ga. 359; Mason *v.* Myer, Wright (Ohio) 641; Zacharias' Estate, 2 Woodw. (Pa.) 149. See Descent and Distribution, 14 Cyc. 131.

Where the sole heir to a succession and all the creditors make an extrajudicial settlement of the succession and involve its affairs in confusion, the court will leave them where they have placed themselves and dismiss the suit for a settlement. Engelman *v.* Coco, 42 La. Ann. 923, 8 So. 610.

85. *Alabama.*— Brazeale *v.* Brazeale, 9 Ala. 491. *Compare* Smilie *v.* Siler, 35 Ala. 88, holding that a private agreement made by some of the heirs at law, one of whom is administrator of the estate, which does not appear ever to have received the sanction of the probate court, cannot be considered a final settlement or a legal discharge of the administrator.

District of Columbia.— Patten *v.* Glover, 1 App. Cas. 466.

Iowa.— *In re* Mansfield, 80 Iowa 681, 46 N. W. 65.

Kentucky.— White *v.* Staten, 10 Ky. L. Rep. 726.

Louisiana.—Hodge *v.* Durnford, 13 La. 187.

Maryland.—See Hanson *v.* Worthington, 12 Md. 418, a release for money due parties as residuary legatees does not release from liability for a specific legacy bequeathed in trust.

Michigan.— See Eccard *v.* Brush, 48 Mich. 3, 11 N. W. 756.

by the courts if they are open, fair, and honest, and the parties of full age and under no disability. But such an agreement is of course not binding upon one who is not a party to it.[86] As the result of an agreement entered into by the personal representative and persons interested in the settlement of the estate, he may be relieved from his duty to render an account.[87] The validity of a written agreement set up by a personal representative as a release from his duty to account and settle may, however, be inquired into,[88] and it will be of no avail if obtained by misrepresentation or fraud,[89] or entered into under a mistake of fact.[90] A receipt, although reciting a settlement in full, may be open to explanation and is not necessarily conclusive upon legatees or distributees in a suit brought by them to compel an accounting.[91] An administrator who is cited to make a final settlement cannot protect himself by setting up a written agreement entered into between himself and the executors and legatees before letters of administration were granted to him, which would change the whole course of administration and keep the estate in process of administration for fifteen years.[92]

K. Costs and Expenses — 1. In General. The costs and expenses of account-

New York.— Jacot *v.* Emmett, 11 Paige 142.

Ohio.— Piatt *v.* Longworth, 27 Ohio St. 159.

Pennsylvania.— *In re* Hertzler, 192 Pa. St. 531, 43 Atl. 1027; Barber's Estate, 142 Pa. St. 476, 21 Atl. 986; Shartel's Appeal, 64 Pa. St. 25; Root's Estate, 8 Pa. Dist. 223. See also Riddle's Estate, 18 Phila. 222.

South Carolina.— See Reid *v.* Clark, Speers Eq. 343.

Virginia.— See Kent *v.* Kent, (1899) 34 S. E. 32.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2293–2294.

Intention to settle.— It must clearly appear from the acts of the parties that it was their intention to consider the estate settled and distributed, or to consider the personal representative discharged from further duty to them. Kells *v.* People's Trust Co., 82 N. Y. App. Div. 548, 81 N. Y. Suppl. 513.

A bond given by a legatee to exonerate the executor is evidence of a settlement. Ives *v.* Sumner, 16 N. C. 338.

86. McCune *v.* McCune, 29 Mo. 117; *In re* Pruyn, 141 N. Y. 544, 36 N. E. 595 [*affirming* 76 Hun 128, 27 N. Y. Suppl. 572]; Kells *v.* People's Trust Co., 82 N. Y. App. Div. 548, 81 N. Y. Suppl. 513. See also Smilie *v.* Siler, 35 Ala. 88; Powell *v.* Powell, 10 Ala. 900; Clinton's Estate, 8 Pa. Dist. 661, 23 Pa. Co. Ct. 209.

87. *Massachusetts.*— See Fuller *v.* Wilbur, 170 Mass. 506, 49 N. E. 916, agreement dispensing with account is revocable.

New York.— *In re* Pruyn, 141 N. Y. 544, 36 N. E. 595 [*affirming* 76 Hun 128, 27 N. Y. Suppl. 572]; *In re* Wagner, 119 N. Y. 28, 23 N. E. 200 [*affirming* 52 Hun 23, 4 N. Y. Suppl. 761]. See also Matter of Hale, 6 N. Y. App. Div. 411, 39 N. Y. Suppl. 577.

Pennsylvania.— Mershon's Estate, 8 Pa. Dist. 154, 22 Pa. Co. Ct. 278; Hoff's Estate, 7 Pa. Dist. 93; Harlan's Estate, 3 Pa. Dist. 809, 16 Pa. Co. Ct. 51; Armstrong's Estate, 16 Montg. Co. Rep. 9. See also Gardiner's Estate, 18 Wkly. Notes Cas. 148.

United States.— Littell *v.* Hackley, 126 Fed. 309, 61 C. C. A. 295.

Canada.— Newton *v.* Seale, 4 Montreal Q. B. 158.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1993.

Compare Clarke *v.* Clay, 31 N. H. 393 [*distinguishing* Hibbard *v.* Kent, 15 N. H. 516; Giles *v.* Churchill, 5 N. H. 337].

The persons for whose benefit an account is required may dispense therewith, whether they be creditors, legatees, or distributees, for the filing of an account by a personal representative is a matter with which the public has no concern. Harlan's Estate, 3 Pa. Dist. 809, 16 Pa. Co. Ct. 51. See also Hess *v.* Frankenfield, 106 Pa. St. 440; Weaver *v.* Roth, 105 Pa. St. 408; Walworth *v.* Abel, 52 Pa. St. 370; Hoff's Estate, 7 Pa. Dist. 93.

A release by the next of kin to the widow of the intestate of the net income of the realty and personalty of the estate on condition that she relinquish all her right of dower, "the whole to be under the direction" of the administrator, does not affect the administrator's liability to account. Newport Probate Ct. *v.* Hazard, 13 R. I. 1.

88. Harris *v.* Ely, 25 N. Y. 138.

89. *In re* Read, 41 Hun (N. Y.) 95; *In re* Fischer, 28 Pittsb. Leg. J. (Pa.) 383.

A surrogate has no jurisdiction to pass upon the question whether a release was obtained by fraud (*In re* Wagner, 119 N. Y. 28, 23 N. E. 200. See also Matter of Hodgman, 11 N. Y. App. Div. 344, 42 N. Y. Suppl. 1004); but where it is alleged that the release was fraudulent and collusive an action may be maintained in the supreme court to annul the release and compel an accounting (Sanders *v.* Soutter, 126 N. Y. 193, 27 N. E. 263).

90. Clinton's Estate, 8 Pa. Dist. 661, 23 Pa. Co. Ct. 209.

91. Watts *v.* Baker, 78 Ga. 622, 3 S. E. 773; Bard *v.* Wood, 3 Metc. (Mass.) 74; Hanlon *v.* Wheeler, (Tex. Civ. App. 1898) 45 S. W. 821. See also Kellett *v.* Rathbun, 4 Paige (N. Y.) 102.

92. George *v.* Goldsby, 23 Ala. 326.

ing and settlement and of proceedings or actions necessitated thereby should be borne by the general estate when incurred in the just interests of the whole estate,[93] and when in the interest of the estate an audit of the account of a personal representative appears necessary, the costs of such audit will be charged to the estate.[94]

2. Counsel Fees and Expenses of Settlement. Executors or administrators are usually entitled to their reasonable costs and expenses in the settlement of accounts, so far as they are not at fault,[95] including an allowance for fees of an attorney to assist them in preparing and settling their accounts.[96] Where unusual

93. *Alabama.*— Clark *v.* Knox, 70 Ala. 607, 45 Am. Dec. 93.

California.— *In re* Mullins, 47 Cal. 450.

Florida.— Sanderson *v.* Sanderson, 20 Fla. 292.

Kentucky.— See Thirlwell *v.* Campbell, 11 Bush 163; Stoll *v.* Stoll, 7 Ky. L. Rep. 289.

New Jersey.— Craig *v.* Manning, 8 N. J. Eq. 806.

New York.— Matter of Arkenburgh, 58 N. Y. App. Div. 583, 69 N. Y. Suppl. 125; *In re* Laramie, 2 Silv. Supreme 539, 6 N. Y. Suppl. 175; *In re* Meeker, 9 Daly 556; *In re* Vandevoort, 11 N. Y. Suppl. 764, 19 N. Y. Civ. Proc. 355, expenses of a reference. See also Gillespie *v.* Brooks, 2 Redf. Surr. 349.

Pennsylvania.— Potts' Appeal, 3 Walk. 135; Francis' Estate, 5 Kulp 17, 21; *In re* McFarland, 1 Phila. 378; *In re* Harlan, 1 Pa. L. J. Rep. 451, 3 Pa. L. J. 116. See also Rankin's Estate, 5 Pa. Co. Ct. 603; *In re* Thomas, 1 Dauph. Co. Rep. 381.

Texas.— See Richardson *v.* Kennedy, 74 Tex. 507, 12 S. W. 219, construing Texas statute as to administration expenses.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2257.

Allowance to guardian ad litem out of general fund see *In re* Farmers' L. & T. Co., 49 N. Y. App. Div. 1, 63 N. Y. Suppl. 227 (erroneous in so far as exceeds taxable costs); Matter of Robinson, 40 N. Y. App. Div. 30, 57 N. Y. Suppl. 523; Gunning *v.* Lockman, 3 Redf. Surr. (N. Y.) 273.

The expenses of settlement constitute a lien on the entire estate and the lien is not divested by partition. *In re* Cary, 10 Kulp (Pa.) 227.

Practice as to payment and allowance.— A personal representative is individually liable for expenses contracted by him in the settlement of the estate. Taylor *v.* Mygatt, 26 Conn. 184. And if he employs counsel it is the duty of such counsel to present his account for payment before the final accounting, and for the representative to fix upon the amount which is reasonable to be paid and pay it on his own responsibility, and have such payment allowed on his final accounting. Osborne *v.* McAlpine, 4 Redf. Surr. (N. Y.) 1. In New York the costs of an accounting by a representative in a surrogate's court have no place in the account filed in that proceeding, as they must be fixed by the decree. Charges for counsel fees paid on the accounting should be separately stated and accompanied with an affidavit showing conformity to Code Civ. Proc. § 2562. Carroll *v.* Hughes, 5 Redf. Surr. 337; Harward *v.* Hewlett, 5 Redf. Surr. 330. See also *In re* Goetschius, 2 Misc. 278, 23 N. Y. Suppl. 970, Pow. Surr. 371.

Amount of estate as affecting allowance.— The amount of an estate within the meaning of N. Y. Code Civ. Proc. § 2557, providing that "costs other than actual expenses cannot be awarded to be paid out of an estate or fund which is less than one thousand dollars in amount or value," is not the balance left after the funeral expenses, etc., are paid, but the gross amount at the time of the decedent's death, with any increase up to the time of accounting. Chalker *v.* Chalker, 5 Redf. Surr. 480.

94. *In re* Heath, 52 N. J. Eq. 807, 33 Atl. 46; Smith's Appeal, 47 Pa. St. 424; Sheetz's Estate, 2 Woodw. (Pa.) 407; *In re* Griffiths, 1 Lack. Leg. N. (Pa.) 311; Bolick's Estate, 2 Leg. Rec. (Pa.) 187; Reed's Estate, 4 Montg. Co. Rep. (Pa.) 173.

Amount of auditor's fee see Moffett's Estate, 11 Phila. (Pa.) 109; Bradley's Estate, 11 Phila. (Pa.) 87 (an auditor claiming a fee agreed upon by the parties must annex the agreement to his report); Benner's Estate, 11 Phila. (Pa.) 6 (an agreement of counsel fixing the compensation of an auditor must be in writing); Matter of Ward, 9 Phila. (Pa.) 332; Waugh's Estate, 9 Phila. (Pa.) 329; *In re* Bewley, 35 Leg. Int. (Pa.) 120; *In re* Shirk, 8 Leg. Gaz. (Pa.) 11.

95. Ray *v.* Van Hook, 9 How. Pr. (N. Y.) 427.

Stenographer's fees for services rendered in a proceeding for settlement are not, it seems, to be charged to an estate except by agreement of the persons entitled to the estate. Matter of Maritch, 29 Misc. (N. Y.) 270, 61 N. Y. Suppl. 237. *Compare* Du Bois *v.* Brown, 1 Dem. Surr. (N. Y.) 317.

96. Smith *v.* Cheney, 1 Rob. (La.) 98; Matter of Hodgeman, 69 Hun (N. Y.) 484, 23 N. Y. Suppl. 725 [*affirmed* in 140 N. Y. 421, 35 N. E. 660]; Matter of Kenworthy, 63 Hun (N. Y.) 165, 17 N. Y. Suppl. 655; Matter of Selleck, 1 N. Y. St. 575; Chatfield *v.* Swing, 6 Ohio Dec. (Reprint) 666, 7 Am. L. Rec. 326. See also Fink's Succession, 19 La. Ann. 258, deductions for amounts previously paid attorneys. But see Willcox *v.* Smith, 26 Barb. (N. Y.) 316 [*approving* Burtis *v.* Dodge, 1 Barb. Ch. (N. Y.) 77], decided prior to the enactment of the present statute.

When account partially sustained.— Where the final settlement of a personal repre-

skill and labor is required in preparing an account an allowance may be made a personal representative for the services of an accountant,[97] but ordinarily it is his duty to keep books showing the receipts and expenditures of the estate and to prepare his account personally, without any allowance for assistance.[98]

3. ALLOWANCE OR ASSESSMENT TO CONTESTANTS. Persons contesting the account of a representative may be taxed with a part or all of the costs of the proceeding

sentative is contested and some of the objections thereto are sustained and others disallowed the personal representative is entitled to a reasonable allowance for attorney's fees for defending the settlement (Pinkard *v.* Pinkard, 24 Ala. 250; *In re* Meeker, 45 Mo. App. 186); but he is not entitled to an allowance for attorney's fees for services rendered as to items which are successfully contested (Clark *v.* Eubank, 80 Ala. 584, 3 So. 49).

Action caused by representative's delay.— The charge made by a personal representative for lawyer's fees for the preparation of his account will not be allowed when by his delay he has compelled the heirs to sue for its rendition. Bass *v.* Chambliss, 9 La. Ann. 376.

An executor, whose account has been confirmed without exception, holds the balance in his hands as a mere stakeholder; and the fees of his counsel for services before the auditor appointed to make final distribution are not chargeable on the fund. Bracken's Estate, 138 Pa. St. 104, 22 Atl. 20.

When a deceased representative's surety files his account counsel fees will not be allowed his representative. Haley's Estate, 9 Pa. Dist. 116.

Where an administrator on resigning failed to file a proper account, and the one filed was rejected, he was not entitled to be allowed an attorney's fee for services in filing a new account and in representing him on a contest thereof. James *v.* Craighead, (Tex. Civ. App. 1902) 69 S. W. 241.

Fees allowed for defending final settlement. — Jacobs *v.* Jacobs, 99 Mo. 427, 12 S. W. 457. See also McFarland *v.* Stewart, 109 Iowa 561, 80 N. W. 657. But see Taylor *v.* Minor, 90 Ky. 544, 14 S. W. 544, 12 Ky. L. Rep. 479.

Undisputed matters.— In the settlement of an administrator's account he is not entitled to the services of an attorney as to matters as to which the liability of the estate is not questioned or disputed by the heirs. *In re* McAlpin, 8 Ohio S. & C. Pl. Dec. 654.

Allowance made to representative and not directly to attorney.— McKee *v.* Soher, 138 Cal. 367, 71 Pac. 438, 649; Levinson's Estate, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479; Willcox *v.* Smith, 26 Barb. (N. Y.) 316; Matter of Gates, 2 Redf. Surr. (N. Y.) 144. See also *In re* Kruger, 123 Cal. 391, 55 Pac. 1056. But see Gunning *v.* Lockman, 3 Redf. Surr. (N. Y.) 273.

Amount of fee see Levinson's Estate, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479; Halsey *v.* Van Amringe, 6 Paige (N. Y.) 12; Taylor's Estate, 3 Pa. Dist. 691 (holding that where there is a fee bill the amount to be allowed as attorney's fees in settling an estate should be determined thereby rather than by the testimony of attorneys as to the value of the services rendered); *In re* Greenwalt, 2 Lehigh Val. L. Rep. (Pa.) 246.

In New York the statute authorizes the surrogate, upon rendering a decree, to allow certain costs to the personal representative, and in his discretion to allow in addition such a sum as he deems reasonable for the personal representative's counsel fees and other expenses, not exceeding ten dollars for each day occupied in the trial and necessarily occupied in preparing his account and otherwise preparing for the trial. Code Civ. Proc. §§ 2561, 2562; Seaman *v.* Whitehead, 78 N. Y. 306; Matter of O'Keeffe, 80 N. Y. App. Div. 513, 81 N. Y. Suppl. 118; Matter of Hagarty, 62 N. Y. App. Div. 79, 70 N. Y. Suppl. 839 [*modifying* and *affirming* 34 Misc. 610, 70 N. Y. Suppl. 428]; Matter of Welling, 51 N. Y. App. Div. 355, 64 N. Y. Suppl. 1025, 53 N. Y. App. Div. 639, 65 N. Y. Suppl. 1060; *In re* Reeves, 48 Hun 606, 1 N. Y. Suppl. 17, 21 Abb. N. Cas. 289; Matter of Van Kleeck, 20 N. Y. Suppl. 85, 2 Connoly Surr. 14; Hall *v.* Campbell, 1 Dem. Surr. 415; Du Bois *v.* Brown, 1 Dem. Surr. 317; Stokes *v.* Dale, 1 Dem. Surr. 260; Matter of Miles, 5 Redf. Surr. 110; Osborne *v.* McAlpine, 4 Redf. Surr. 1; Matter of Nockin, 15 N. Y. St. 731 (allowance for attorney of next of kin refused); Matter of Collamer, 5 N. Y. St. 196. It has been decided that these provisions do not restrict the authority of the surrogate to allow as a credit upon representative's accounting, a sum in excess of the statutory limit, paid by him to his counsel for services in respect to accounting, where it appears that services beyond the ordinary preparation of the account or for trial were rendered and were necessary. Matter of Mitchell, 39 Misc. 120, 78 N. Y. Suppl. 976, 12 N. Y. Annot. Cas. 146; Matter of Smith, 26 Abb. N. Cas. 56, 1 N. Y. Suppl. 88 [*distinguishing* and *explaining In re* Bailey, 47 Hun 477; *In re* Clark, 36 Hun 301; Willcox *v.* Smith, 26 Barb. 316; Burtis *v.* Dodge, 1 Barb. Ch. 77; Halsey *v.* Van Amringe, 6 Paige 12; Hall *v.* Campbell, 1 Dem. Surr. 415; Walton *v.* Howard, 1 Dem. Surr. 103; Carroll *v.* Hughes, 5 Redf. Surr. 337; Harvard *v.* Hewlett, 5 Redf. Surr. 330; Matter of Miles, 5 Redf. Surr. 110; Osborne *v.* McAlpin, 4 Redf. Surr. 1].

97. Harrison *v.* McAdam, 38 Misc. (N. Y.) 18, 76 N. Y. Suppl. 701; Rankin's Estate, 9 Wkly. Notes Cas. (Pa.) 407. See also More's Estate, 121 Cal. 609, 54 Pac. 97; *In re* Greenwalt, 9 Lanc. Bar (Pa.) 50.

98. Kernan's Succession, 105 La. 592, 30 So. 239; *In re* Wolfe, 34 N. J. Eq. 223; Ran-

where the decision is against them, if it appears that the contest was brought upon insufficient grounds;[99] but the costs of proceedings in which the contestant is successful, or which were brought in good faith and upon reasonable grounds, may be paid out of the estate.[1] Where a settlement of an account shows that the estate owes the representative more than he has been surcharged as the result of a contest, contestants are not entitled to costs.[2] A creditor calling an administrator to an account cannot recover costs unless he obtains a dividend.[3] The court may in its discretion in a proper case divide the costs between the contestants.[4] Costs will not be awarded to one who is not a party to the proceeding for accounting.[5]

4. Personal Liability of Executor or Administrator. Costs and expenses of proceedings for accounting and settlement may be charged to the personal representative individually, when he has rendered it necessary that such costs and expenses should be incurred by his misconduct or negligence as to accounting or settling, or when on a contested settlement the finding is against him;[6] and he may also incur individual liability for the costs of a compulsory proceeding for

kin's Estate, 9 Wkly. Notes Cas. (Pa.) 407; Logan *v.* Logan, 1 McCord Eq. (S. C.) 1.

99. *Alabama.*— Jones *v.* Deyer, 16 Ala. 221.

Kentucky.— Beeler *v.* Hill, 5 Dana 37.

New York.— *In re* Adams, 166 N. Y. 623, 59 N. E. 1118 [*affirming* 51 N. Y. App. Div. 619, 64 N. Y. Suppl. 591].

Pennsylvania.— Galloway's Estate, 5 Pa. Super. Ct. 272; Frey's Estate, 6 Pa. Co. Ct. 84; Gauff's Estate, 2 Lehigh Val. L. Rep. 245; Rambo's Estate, 15 Montg. Co. Rep. 25.

South Carolina.— Chaplin *v.* Jenkins, 2 Strobh. Eq. 96.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2258.

1. Goetschius' Estate, 3 Misc. (N. Y.) 155, 23 N. Y. Suppl. 975; Matter of Collamer, 5 N. Y. St. 196 Gillespie *v.* Brooks, 2 Redf. Surr. (N. Y.) 349; *In re* Hodgson, 158 Pa. St. 151, 27 Atl. 878; Kennedy's Estate, 8 Pa. Co. Ct. 376.

Allowance for attorney's fees see Taylor *v.* Minor, 90 Ky. 544, 14 S. W. 544, 12 Ky. L. Rep. 479.

2. Matter of Eadie, 39 Misc. (N. Y.) 117, 78 N. Y. Suppl. 967.

3. Griffith *v.* Beecher, 10 Barb. (N. Y.) 432.

4. Barry's Succession, 48 La. Ann. 1143, 20 So. 656.

Auditor's fees apportioned see Pyle's Estate, 2 Chest. Co. Rep. (Pa.) 569; Baily's Estate, 2 Chest. Co. Rep. (Pa.) 568; McCann's Estate, 2 Chest. Co. Rep. (Pa.) 235.

5. Parker *v.* Parker, 99 Ala. 239, 13 So. 520, 42 Am. St. Rep. 48; Matter of Reed, 12 N. Y. St. 139, surety's administrator.

6. *Alabama.*— Pearson *v.* Darrington, 32 Ala. 227. See also Smyley *v.* Reese, 53 Ala. 89, 25 Am. Rep. 598.

Illinois.— Marshall *v.* Coleman, 187 Ill. 556, 58 N. E. 628 [*modifying* 89 Ill. App. 411].

New Jersey.— King *v.* Foerster, 61 N. J. Eq. 584, 47 Atl. 505; Aldridge *v.* McClelland, 36 N. J. Eq. 288, charges excepted to plainly not allowable. See also Pursel *v.* Pursel, 14 N. J. Eq. 514.

New York.— *In re* Holmes, 176 N. Y. 603, 68 N. E. 1118 [*affirming* 79 N. Y. App. Div. 264, 79 N. Y. Suppl. 592]; *In re* Gabriel, 161 N. Y. 644, 57 N. E. 1110 [*affirming* 44 N. Y. App. Div. 623, 60 N. Y. Suppl. 87]; *In re* Hobson, 131 N. Y. 575, 30 N. E. 63; Matter of Matthewson, 8 N. Y. App. Div. 8, 40 N. Y. Suppl. 140; Willcox *v.* Smith, 26 Barb. 316; Griffith *v.* Beecher, 10 Barb. 432; *In re* Lamb, 21 N. Y. Suppl. 343 (cost of special accounting on resignation); Matter of Conklin, 20 N. Y. Suppl. 59, 2 Connoly Surr. 176; *In re* Mull, 2 N. Y. Suppl. 23; Matter of Harnett, 15 N. Y. St. 725; Matter of Woodard, 13 N. Y. St. 161; Ray *v.* Van Hook, 9 How. Pr. 427; Rogers *v.* Rogers, 3 Wend. 503, 20 Am. Dec. 716; Halsey *v.* Van Amringe, 6 Paige 12; Manning *v.* Manning, 1 Johns. Ch. 527; Christie's Estate, Tuck. Surr. 81.

Pennsylvania.— *In re* Parker, 64 Pa. St. 307; *In re* Spangler, 21 Pa. St. 335; Moss' Estate, 4 Kulp 235; Fell's Estate, 13 Phila. 289; Bradley's Estate, 11 Phila. 87; *In re* Dolph, 3 Luz. Leg. Reg. 146; *In re* Schiehl, 29 Pittsb. Leg. J. 38; *In re* Wirt, 11 York Leg. Rec. 145. See also *In re* Sharp, 5 Lanc. L. Rev. 176.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2260, 2262.

Where an administrator has a personal interest in litigation between himself and distributees upon the final settlement of the estate and a decision is made in favor of the distributees, the representative is personally liable for costs of the proceedings. Jones *v.* Deyer, 16 Ala. 221; Sherman *v.* Angel, 2 Hill Eq. (S. C.) 26.

Good faith as to contest a reason for not charging.— Barclay's Appeal, 2 Walk. (Pa.) 17. See also Walker *v.* Dow, 3 N. Y. Suppl. 132, 6 Dem. Surr. (N. Y.) 265; *In re* Young, 204 Pa. St. 32, 53 Atl. 511.

When representative not charged.— The representative should not pay counsel fees when acquitted of dereliction of duty (King *v.* Foerster, 61 N. J. Eq. 584, 47 Atl. 505), nor should he pay costs made necessary by unsustained exceptions to the account (Fieser's Estate, 15 Pa. Super. Ct. 447), and he has been held not chargeable with costs when the opposition was only partly sustained

accounting brought after undue delay on his part in accounting and settling.[7] The costs of an audit may be included in the costs which are charged to a personal representative individually.[8]

5. Costs of Appeal From Accounting. Representatives are personally liable for costs when they unsuccessfully appeal in their own interest from a settlement of their accounts,[9] or when an appeal results from their fault or misconduct.[10] Costs should not be taxed either for the representative or the other party to the appeal when neither party is entirely in the right.[11] Where an executor holding funds of the testator in trust for a special purpose appeals from a decree relating to such funds, claiming no interest in them except as trustee, and the decree is affirmed in part and reversed in part, the questions being sufficiently important to authorize the appeal, costs should be taxed for the executor.[12] On an appeal by the personal representative from an erroneous probate decree, made without any fault on his part, costs should be taxed against the estate.[13] Counsel fees and expenses incurred in good faith in resisting appeals from orders auditing his account should be allowed the personal representative.[14] Where an administrator has appealed from an order commanding him to render an account, but after filing his bond he has abandoned the appeal, damages should not be granted for the frivolous appeal, as this would be to the detriment of the creditors and heirs of the decedent, and not of the administrator.[15]

XVI. Foreign and Ancillary Administration.

A. Appointment — 1. Foreign Appointment — a. In General. The phrase "foreign representative" does not refer to the mere non-residence of the indi-

(Conery's Succession, 106 La. 50, 30 So. 294). He cannot be charged with any costs except such as arise from his wrongful acts. *In re* Heath, 58 Iowa 36, 11 N. W. 723.

Apportionment of costs.— Costs of the audit of an administrator's accounts are properly apportioned where his failure to keep proper accounts made a reference necessary, and the audit was needlessly prolonged by the beneficiaries of the estate. *In re* Morrison, 196 Pa. St. 80, 46 Atl. 257.

Attachment for costs.— In Pennsylvania the payment of costs awarded against a personal representative may be enforced by process of attachment against the representative's person. Patton's Estate, 19 Pa. Super. Ct. 545; Hoffman's Estate, 10 Pa. Super. Ct. 113; Lundy's Estate, 3 C. Pl. 139.

7. *California.*—Moore's Estate, 72 Cal. 335, 13 Pac. 880.

Kentucky.— Ransdell *v.* Threlkeld, 4 Bush 347.

New Jersey.— Post *v.* Stevens, 13 N. J. Eq. 293.

New York.— Matter of Briggs, 31 Misc. 486, 65 N. Y. Suppl. 660; Goetschius' Estate, 3 Misc. 155, 23 N. Y. Suppl. 975; Peltz *v.* Schultes, 20 N. Y. Suppl. 336, 64 Hun 369, 19 N. Y. Suppl. 637; *In re* Williams, 2 N. Y. Suppl. 669, 15 N. Y. Civ. Proc, 270, 1 Connoly Surr. 99. *Compare* Wells *v.* Disbrow, 20 N. Y. Suppl. 518; Shultz *v.* Pulver, 3 Paige 182.

Ohio.— *In re* Klumperink, 3 Ohio Dec. (Reprint) 344. *Compare* Myers *v.* Bryson, 153 Pa. St. 246, 27 Atl. 986 (holding that the omission of executors to account over six months when no demand was made upon them for an account was not such an omission of an absolute or peremptory duty as would justify the imposition of the costs of an equity suit upon them); *In re* Sharp, 5 Lanc. L. Rev. 176.

Pennsylvania.— Fox's Estate, 5 Kulp 218; Stewart's Estate, 12 Phila. 150.

United States.— Norman *v.* Storer, 18 Fed. Cas. No. 10,301, 1 Blatchf. 593.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2261.

8. Dunford *v.* Weaver, 84 N. Y. 445 [*affirming* 21 Hun 349] (under statute when accounting is compulsory); Barhite's Appeal, 126 Pa. St. 404, 17 Atl. 617; *In re* Price, 81 Pa. St. 263; McClintock's Appeal, 71 Pa. St. 365; Martin's Appeal, 23 Pa. St. 433; Sterrett's Appeal, 2 Penr. & W. (Pa.) 419; Miller's Estate, 16 Wkly. Notes Cas. (Pa.) 115; Robinson's Estate, 5 Phila. (Pa.) 99; Smith's Estate, 4 Phila. (Pa.) 377; Kleinfelter's Appeal, 1 Pittsb. (Pa.) 376; *In re* Harlan, 1 Pa. L. J. Rep. 451, 3 Pa. L. J. 116; *In re* Gorgas, 4 Lanc. Bar Nov. 30, 1872.

9. Matter of Clinton, 12 N. Y. App. Div. 132, 42 N. Y. Suppl. 674. See also McClelland *v.* Bristow, 9 Ind. App. 543, 35 N. E. 197.

10. Smith *v.* Scofield, 19 Conn. 533; John's Estate, 1 Chest. Co. Rep. (Pa.) 311; James *v.* Craighead, (Tex. Civ. App. 1902) 69 S. W. 241.

11. Phelps *v.* Slade, 10 Vt. 192.

12. Marston *v.* Marston, 21 N. H. 491.

13. Moody *v.* Hemphill, 71 Ala. 169; Smith *v.* Scofield, 19 Conn. 533.

14. Rose's Estate, 80 Cal. 166, 82 Pac. 86.

15. Girouard *v.* Broussard, 28 La. Ann. 626.

vidual holding the office but to the foreign origin of the representative character.[16] So if a representative appointed in one jurisdiction takes out ancillary letters of administration in another, he thereupon becomes a domestic representative within that jurisdiction.[17]

b. Extent of Authority Conferred. It is a well settled principle of the common law that letters of administration have no extraterritorial force and confer no authority upon the representative to administer upon property outside of the state or country of his appointment,[18] and in the absence of statute any recognition which the representative may receive outside of the jurisdiction of his appointment is due solely to the principle of comity,[19] which each state or country may extend or withhold according to its own pleasure and policy.[20] No state will recognize a foreign representative to the prejudice of its own

16. Hopper *v.* Hopper, 125 N. Y. 400, 26 N. E. 457, 12 L. R. A. 237 [*affirming* 53 Hun 394, 6 N. Y. Suppl. 271, 17 N. Y. Civ. Proc. 214]; Flandrow *v.* Hammond, 13 N. Y. App. Div. 325, 43 N. Y. Suppl. 143, 4 N. Y. Annot. Cas. 56.

17. Hopper *v.* Hopper, 125 N. Y. 400, 26 N. E. 457, 12 L. R. A. 237 [*affirming* 53 Hun 394, 6 N. Y. Suppl. 271, 17 N. Y. Civ. Proc. 214].

18. *Alabama.*— Barclift *v.* Treece, 77 Ala. 528.

Colorado.— Corrigan *v.* Jones, 14 Colo. 311, 23 Pac. 913.

Connecticut.— Perkins *v.* Stone, 18 Conn. 270; Riley *v.* Riley, 3 Day 74, 3 Am. Dec. 260.

District of Columbia.— Plumb *v.* Bateman, 2 App. Cas. 156.

Illinois.— Walker *v.* Welker, 55 Ill. App. 118.

Kansas.— Denny *v.* Faulkner, 22 Kan. 89.

Kentucky.— Fletcher *v.* Wier, 7 Dana 345, 32 Am. Dec. 96.

Louisiana.— *In re* Lewis, 32 La. Ann. 385; Burbank *v.* Payne, 17 La. Ann. 15, 87 Am. Dec. 513; Henderson *v.* Rost, 15 La. Ann. 405; Lytle's Succession, 1 Rob. 268; McRae *v.* McRae, 11 La. 571; Chiapella *v.* Couprey, 8 La. 84; Lincoln *v.* Ball, 6 La. 685; Morris *v.* Thames, 8 Mart. N. S. 687; Deshon *v.* Jennings, 5 Mart. 568.

Maine.— Gilman *v.* Gilman, 54 Me. 453; Smith *v.* Guild, 34 Me. 443.

Massachusetts.— Beaman *v.* Elliot, 10 Cush. 172; Campbell *v.* Sheldon, 13 Pick. 8.

Michigan.—Reynolds *v.* McMullen, 55 Mich. 568, 22 N. W. 41, 54 Am. Rep. 386.

Mississippi.— Rucks *v.* Taylor, 49 Miss. 552; Riley *v.* Mosely, 44 Miss. 37; Satterwhite *v.* Littlefield, 13 Sm. & M. 302.

Missouri.— Naylor *v.* Moffatt, 29 Mo. 126.

Nebraska.— Burton *v.* Williams, 63 Nebr. 431, 88 N. W. 765; Creighton *v.* Murphy, 8 Nebr. 349, 1 N. W. 138.

Nevada.— Price *v.* Ward, 25 Nev. 203, 58 Pac. 849, 46 L. R. A. 459.

New Hampshire.— Willard *v.* Hammond, 21 N. H. 382.

New York.— Parsons *v.* Lyman, 20 N. Y. 103; Brown *v.* Brown, 1 Barb. Ch. 189; Vroom *v.* Van Horne, 10 Paige 549, 42 Am. Dec. 94; Williams *v.* Storrs, 6 Johns. Ch. 353, 10 Am. Dec. 340; Stewart *v.* O'Donnell, 2 Dem. Surr. 17; Matter of Jones, 3 Redf. Surr. 257.

North Carolina.— Grant *v.* Reese, 94 N. C. 720; Hyman *v.* Gaskins, 27 N. C. 267.

Pennsylvania.— Hohweisner *v.* Kern, 3 Leg. Chron. 173; Hohweisner *v.* Kerr, 1 Leg. Rec. 202.

South Carolina.— Burkhim *v.* Pinkhussohn, 58 S. C. 469, 36 S. E. 908; Stoddard *v.* Aiken, 57 S. C. 134, 35 S. E. 501; Stevenson *v.* Dunlap, 33 S. C. 350, 11 S. E. 1017; Tillman *v.* Walkup, 7 S. C. 60; Carmichael *v.* Ray, 1 Rich. 116; Reynolds *v.* Torrance, 2 Brev. 59.

Tennessee.— State *v.* Fulton, (Ch. App.) 1898) 49 S. W. 297.

Vermont.— Vaughn *v.* Barret, 5 Vt. 333, 26 Am. Dec. 306; Lee *v.* Havens, Brayt. 93.

Washington.— Barlow *v.* Coggan, 1 Wash. Terr. 257.

United States.—Overby *v.* Gordon, 177 U. S. 214, 20 S. Ct. 603, 44 L. ed. 741 [*affirming* 13 App. Cas. (D. C.) 392]; Lawrence *v.* Nelson, 143 U. S. 215, 12 S. Ct. 440, 36 L. ed. 130; Aspden *v.* Nixon, 4 How. 467, 11 L. ed. 1059; Vaughan *v.* Northup, 15 Pet. 1, 10 L. ed. 639.

England.— Atkins *v.* Smith, 2 Atk. 63, 26 Eng. Reprint 436.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2297.

In Pennsylvania it is expressly provided by statute that foreign letters of administration shall not confer upon the person to whom they are granted any of the powers and authorities possessed by a representative appointed under the laws of the state. Sayre *v.* Helme, 61 Pa. St. 299; Moore *v.* Fields, 42 Pa. St. 467; Com. *v.* Ware, 6 Phila. 258.

19. *Kansas.*— Denny *v.* Faulkner, 22 Kan. 89.

Michigan.—Reynolds *v.* McMullen, 55 Mich. 568, 22 N. W. 41, 54 Am. Rep. 386.

New York.— Vroom *v.* Van Horne, 10 Paige 549, 42 Am. Dec. 94.

North Carolina.— Hyman *v.* Gaskins, 27 N. C. 267.

United States.— Vaughan *v.* Northup, 15 Pet. 1, 10 L. ed. 639.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2297.

20. Hyman *v.* Gaskins, 27 N. C. 267; Olney *v.* Angell, 5 R. I. 198, 73 Am. Dec. 62; Vaughan *v.* Northup, 15 Pet. (U. S.) 1, 10 L. ed. 639.

citizens,[21] as where such recognition will conflict with the rights of local creditors,[22] or a local administration;[23] but in the absence of such circumstances the tendency of the modern authorities is to recognize a foreign representative for many purposes,[24] although of course he will not be permitted through comity to exercise powers which he could not exercise in the state of his appointment.[25]

c. Statutory Provisions. In a number of jurisdictions the statutes authorize a foreign representative to sue,[26] or be sued,[27] or upon complying with certain conditions to act as a local representative;[28] but any conditions provided for by these statutes must be substantially complied with before a foreign representative will be recognized.[29]

2. Ancillary Appointment — a. Ancillary and Domiciliary Appointment Distinguished. The right of granting administration is not confined to the state or country in which the deceased last dwelt but it is very common and often necessary for administration to be taken out elsewhere.[30] Where different adminstrations are granted in different jurisdictions, that which is granted in the jurisdiction of the decedent's last domicile is termed the principal or domiciliary administration, and any other administration granted in any other state or country is termed ancillary,[31] and this without regard to which is granted first.[32] The ancillary administration is not dependent upon the domiciliary;[33] but each is distinct and

21. Du Val *v.* Marshall, 30 Ark. 230; Hyman *v.* Gaskins, 27 N. C. 267.

22. Broughton *v.* Bradley, 34 Ala. 694, 73 Am. Dec. 474; *In re* Viosca, 197 Pa. St. 280, 47 Atl. 233, 51 L. R. A. 876.

23. Du Val *v.* Marshall, 30 Ark. 230.

24. Putnam *v.* Pitney, 45 Minn. 242, 47 N. W. 790, 11 L. R. A. 41. See also Marcy *v.* Marcy, 32 Conn. 308; Gove *v.* Gove, 64 N. H. 503, 15 Atl. 121; Luce *v.* Manchester, etc., R. Co., 63 N. H. 588, 3 Atl. 618.

Title of foreign representative see *infra*, XVI, B, 1, b.

Right to collect assets see *infra*, XVI, B, 2, b.

Rights as to disposition and control of property of the estate see *infra*, XVI, B, 3.

25. Limekiller *v.* Hannibal, etc., R. Co., 33 Kan. 83, 5 Pac. 401, 52 Am. Rep. 523.

26. See *infra*, XVI, G, 1, c.

27. See *infra*, XVI, H, 3.

28. Wedderburn's Succession, 1 Rob. (La.) 263; State *v.* New Orleans Probate Judge, 18 La. 570; McIntosh *v.* Marathon Land Co., 110 Wis. 296, 85 N. W. 976.

29. Hatchett *v.* Berney, 65 Ala. 39; Lucas *v.* Tucker, 17 Ind. 41; Butler's Succession, 30 La. Ann. 887; Young's Succession, 21 La. Ann. 394; Dangerfield *v.* Thruston, 8 Mart. N. S. (La.) 232.

A new bond must be given by a foreign executor (Withers' Succession, 45 La. Ann. 556, 12 So. 875; Bodenheimer's Succession, 35 La. Ann. 1034; Young's Succession, 21 La. Ann. 394; Wedderburn's Succession, 1 Rob. (La.) 263); but the failure to do so does not *ipso facto* vacate the trust (Withers' Succession, *supra*).

A new oath is not necessary where the representative has already been sworn at the place of his appointment. Bodenheimer's Succession, 35 La. Ann. 1034; Wedderburn's Succession, 1 Rob. (La.) 263.

30. Stevens *v.* Gaylord, 11 Mass. 256; Reynolds *v.* McMullen, 55 Mich. 568, 22 N. W. 41, 54 Am. Rep. 386.

31. *Alabama.*— Fretwell *v.* McLemore, 52 Ala. 124; Childress *v.* Bennett, 10 Ala. 751, 44 Am. Dec. 503.

Arkansas.— Shegogg *v.* Perkins, 34 Ark. 117.

Colorado.— Corrigan *v.* Jones, 14 Colo. 311, 23 Pac. 913.

Connecticut.— Perkins *v.* Stone, 18 Conn. 270.

Illinois.— Young *v.* Wittenmyre, 123 Ill. 303, 14 N. E. 869 [*reversing* 22 Ill. App. 496]; Ramsay *v.* Ramsay, 97 Ill. App. 270.

Indiana.— McCord *v.* Thompson, 92 Ind. 565.

Iowa.— *Re* Gable, 79 Iowa 178, 44 N. W. 352, 9 L. R. A. 218; Chamberlin *v.* Wilson, 45 Iowa 149.

Kentucky.— Fletcher *v.* Sanders, 7 Dana 345, 32 Am. Dec. 96.

Maryland.— Williams *v.* Williams, 5 Md. 467.

Massachusetts.— Fay *v.* Haven, 3 Metc. 109; Stevens *v.* Gaylord, 11 Mass. 256; Dawes *v.* Boylston, 9 Mass. 337, 6 Am. Dec. 72.

Missouri.— Spraddling *v.* Pipkin, 15 Mo. 118.

Nebraska.— Creighton *v.* Murphy, 8 Nebr. 349, 1 N. W. 138.

New York.— Matter of Newell, 38 Misc. 563, 77 N. Y. Suppl. 1116; Carroll *v.* Hughes, 5 Redf. Surr. 337.

North Carolina.— Plummer *v.* Brandon, 40 N. C. 190.

South Carolina.— Graveley *v.* Graveley, 25 S. C. 1, 60 Am. Rep. 478.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2299.

32. Stevens *v.* Gaylord, 11 Mass. 256; Green *v.* Rugely, 23 Tex. 539.

33. Fretwell *v.* McLemore, 52 Ala. 124; Harvey *v.* Richards, 11 Fed. Cas. No. 6,184, 1 Mason 381.

The term "ancillary" serves only to distinguish the one administration from the other and does not indicate a dependence of the ancillary administration on that of the

separate,[34] and may properly be considered as a principal one with reference to the limits of its exclusive authority.[35] The ancillary administrator becomes invested with the same powers and is subject to the same liability with respect to the assets within the jurisdiction of his appointment as other administrators.[36]

b. When Ancillary Appointment Proper — (I) *In General.* An ancillary administration is proper whenever a person dies leaving, in a state or country other than that of his last domicile, property to be administered,[37] or which is in danger of being wasted or lost,[38] or debts owing to him which must be collected by suit,[39] or where there are provisions of his will to be carried out with respect to property in such jurisdiction.[40] In most cases where a decedent leaves property in different jurisdictions an ancillary administration is not only proper but necessary,[41] since the domiciliary letters have no extraterritorial force,[42] and the principal representative cannot, in the absence of statute, sue to collect assets outside of the jurisdiction of his appointment.[43] The chief object, however, of an ancillary administration is to collect and preserve local assets for the benefit of local creditors.[44]

(II) *Situs of Assets.*[45] To authorize a grant of ancillary administration it must appear that there is property in the jurisdiction where the grant is applied for,[46] which at the time of the application is unadministered,[47] and also that it is of such a character as may be denominated local assets, or such as has its *situs* for purposes of administration in that jurisdiction.[48] Ancillary administration may be granted, although the decedent left only real property in the jurisdiction where the grant is applied for,[49] and it is usually held that property brought into the jurisdiction after the decedent's death is sufficient ground for granting ancillary administration, although he owned no property there at the time of his

domicile. Fretwell *v.* McLemore, 52 Ala. 124.

34. Equitable L. Assur. Soc. *v.* Vogel, 76 Ala. 441, 52 Am. Rep. 344; Fretwell *v.* McLemore, 52 Ala. 124; Keaton *v.* Campbell, 2 Humphr. (Tenn.) 224. See also Grant *v.* Rogers, 94 N. C. 755; Graveley *v.* Graveley, 25 S. C. 1, 60 Am. Rep. 478.

35. Parker's Estate, 6 Phila. (Pa.) 369; Carr *v.* Lowe, 7 Heisk. (Tenn.) 84; Keaton *v.* Campbell, 2 Humphr. (Tenn.) 224; Harvey *v.* Richards, 11 Fed. Cas. No. 6,184, 1 Mason 381. See also Hyman *v.* Gaskins, 27 N. C. 267.

36. Smith *v.* New York City Second Nat. Bank, 169 N. Y. 467, 62 N. E. 577; Carr *v.* Lowe, 7 Heisk. (Tenn.) 84. See also Lees *v.* Wetmore, 58 Iowa 170, 12 N. W. 238.

37. *Connecticut.*— Lawrence's Appeal, 49 Conn. 411.

Massachusetts.— Stevens *v.* Gaylord, 11 Mass. 256.

New Jersey.— Banta *v.* Moore, 15 N. J. Eq. 97.

North Carolina.— Hyman *v.* Gaskins, 27 N. C. 267.

Pennsylvania.— Mansfield *v.* McFarland, 202 Pa. St. 173, 51 Atl. 763.

Texas.— Simpson *v.* Knox, 1 Tex. Unrep. Cas. 569.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2300.

38. Becraft *v.* Lewis, 41 Mo. App. 546.

39. Becraft *v.* Lewis, 41 Mo. App. 546. See also Grant *v.* Rogers, 94 N. C. 755.

40. Jackson *v.* Jeffries, 3 A. K. Marsh. (Ky.) 309.

41. Stevens *v.* Gaylord, 11 Mass. 256.

42. See *supra*, XVI, A, 1, b.

43. See *infra*, XVI, G, 1, a.

44. McCully *v.* Cooper, 114 Cal. 258, 46 Pac. 82, 55 Am. St. Rep. 66, 35 L. R. A. 492.

45. See *supra*, I, J, 4, c.

46. *Connecticut.*—Beach's Appeal, 76 Conn. 118, 55 Atl. 596.

District of Columbia.— *In re* Coit, 3 App. Cas. 246.

Indiana.— McCord *v.* Thompson, 92 Ind. 565.

Maine.— Shaw, Appellant, 81 Me. 207, 16 Atl. 662.

Massachusetts.—Martin *v.* Gage, 147 Mass. 204, 17 N. E. 310.

New York.— Evans *v.* Schoonmaker, 2 Dem. Surr. 249.

Pennsylvania.— Schley's Estate, 2 Wkly. Notes Cas. 684.

United States.— McKinzie *v.* U. S., 34 Ct. Cl. 278.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2300.

If it appears that all the property has been removed or legally disposed of before the date of the application a grant of ancillary administration should be denied. Shaw, Appellant, 81 Me. 207, 16 Atl. 662; Martin *v.* Gage, 147 Mass. 204, 17 N. E. 310.

47. Townsend *v.* Bell, 3 Dem. Surr. (N. Y.) 367.

48. *In re* Coit, 3 App. Cas. (D. C.) 246; McCord *v.* Thompson, 92 Ind. 565; Schley's Estate, 2 Wkly. Notes Cas. (Pa.) 684.

49. Prescott *v.* Durfee, 131 Mass. 477; Partee *v.* Kortrecht, 54 Miss. 66; Hanford *v.* Davies, 1 Wash. 476, 25 Pac. 329.

death.[50] After property has vested in a representative in one jurisdiction, its removal into another is no ground for granting ancillary administration there,[51] and the representative may sue in his own name for its recovery;[52] but where a debtor moves into another jurisdiction the debt becomes assets in that jurisdiction.[53]

(III) *Dependence on Domiciliary Appointment.* While ancillary administration is not generally granted until after a representative has been appointed in the place of the decedent's domicile,[54] jurisdiction to grant ancillary letters is in no way dependent upon a prior domiciliary grant,[55] nor is it affected by the fact that a domiciliary grant has been made and that the foreign representative is by statute authorized to sue.[56]

c. Persons Entitled to Appointment. Ancillary letters should ordinarily be granted to the domiciliary representative, if he applies therefor,[57] or to his nominee,[58]

50. Morefield *v.* Harris, 126 N. C. 626, 36 S. E. 125. See also Kohler *v.* Knapp, 1 Bradf. Surr. (N. Y.) 241. See *supra*, I, J, 4, c, (VI).

51. Ramey *v.* Green, 18 Ala. 771; Treadwell *v.* Rainey, 9 Ala. 590; Matter of McCabe, 84 N. Y. App. Div. 145, 82 N. Y. Suppl. 180 [*affirmed* in 177 N. Y. 584, 69 N. E. 1126]. See also Sawyer *v.* Seaver, 166 Mass. 447, 44 N. E. 505. And see *infra*, XVI, B, 1, b.

52. Crawford *v.* Graves, 15 La. Ann. 243; Beckham *v.* Wittkowski, 64 N. C. 464; Giddings *v.* Green, 48 Fed. 489.

53. Saunders *v.* Weston, 74 Me. 85; Pinney *v.* McGregory, 102 Mass. 186; Stearns *v.* Wright, 51 N. H. 600; Fox *v.* Carr, 16 Hun (N. Y.) 434.

54. Stevens *v.* Gaylord, 11 Mass. 256.

55. *Kentucky.*— Henderson *v.* Clarke, 4 Litt. 277.

Massachusetts.— Stevens *v.* Gaylord, 11 Mass. 256.

Missouri.—Spraddling *v.* Pipkin, 15 Mo. 118.

New York.— Wise's Estate, 2 N. Y. Civ. Proc. 230 note; Langbein's Estate, 2 N. Y. Civ. Proc. 226, 1 Dem. Surr. 448.

Texas.— Green *v.* Rugely, 23 Tex. 539; Simpson *v.* Knox, 1 Tex. Unrep. Cas. 569.

Vermont.— Abbott *v.* Coburn, 28 Vt. 663, 67 Am. Dec. 735.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2301.

Probate of a will need not be made at the domicile before ancillary letters can be issued. Hyman *v.* Gaskins, 27 N. C. 267. *Aliter* by statute in New York. Winnington's Estate, 1 N. Y. Civ. Proc. 267.

56. Broughton *v.* Bradley, 34 Ala. 694, 73 Am. Dec. 474; Henderson *v.* Clark, 4 Litt. (Ky.) 277; Purcell *v.* Heinberger, 3 Ohio Dec. (Reprint) 343. See *infra*, XVI, G, 1, c, (I).

57. *California.*— *In re* Bergin, 100 Cal. 376, 34 Pac. 867. See also *In re* Brundage, 141 Cal. 538, 75 Pac. 175.

Connecticut.— Lawrence's Appeal, 49 Conn. 411; Hartford, etc., R. Co. *v.* Andrews, 36 Conn. 213.

Iowa.— *In re* Miller, 92 Iowa 741, 61 N. W. 229.

Kentucky.— Fletcher *v.* Sanders, 7 Dana 345, 32 Am. Dec. 96.

Louisiana.— State *v.* New Orleans Probate Judge, 17 La. 486. See also State *v.* New Orleans Probate Judge, 18 La. 570.

Minnesota.— Babcock *v.* Collins, 60 Minn. 73, 61 N. W. 1020, 51 Am. St. Rep. 503.

Pennsylvania.— Mackin's Estate, 11 Wkly. Notes Cas. 207.

United States.— Berney *v.* Drexel, 12 Fed. 393.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2302.

In California in the absence of an application by the executors named in the will, letters must be granted "to a person interested in the will," who applies in preference to the public administrator (*In re* Bergin, 100 Cal. 376, 34 Pac. 867); and as between persons equally entitled males must be preferred to females (*In re* Coan, 132 Cal. 401, 64 Pac. 691). See *supra*, II, B, 2, d, (II).

In Louisiana where the executor named in a foreign will refuses to serve, the foreign dative testamentary executor cannot be appointed but the public administrator must be appointed. Taylor's Succession, 23 La. Ann. 22.

In New York the persons entitled to ancillary appointment are specified by Code Civ. Proc. § 2695 *et seq.* See Gavin's Estate, 2 N. Y. Suppl. 670, 15 N. Y. Civ. Proc. 390, 1 Connoly Surr. 117; Wise's Estate, 2 N. Y. Civ. Proc. 230 note; Lussen *v.* Timmerman, 4 Dem. Surr. 250; Hendrickson *v.* Ladd, 2 Dem. Surr. 402; Weed *v.* Waterbury, 5 Redf. Surr. 114.

In South Carolina a non-resident cannot be appointed. Burkhim *v.* Pinkhussohn, 58 S. C. 469, 36 S. E. 908.

Refusal of domiciliary letters to one executor.— Where a will devising real property in Minnesota and admitted to probate in a foreign country is allowed in the probate court of the proper county in Minnesota, it becomes the duty of the court to issue letters testamentary to a resident executor named in the will if duly qualified, although such letters were refused him by the court where the will was originally proved. Bloor *v.* Myerscaugh, 45 Minn. 29, 47 N. W. 311.

58. Wise's Estate, 2 N. Y. Civ. Proc. 230 note.

In California it is discretionary with the court as to appointing the nominee of the person entitled to the appointment. *In re* Harrison, 135 Cal. 7, 66 Pac. 846; *In re* Richardson, 120 Cal. 344, 52 Pac. 832; *In re* Murphy, Myr. Prob. 185. See *supra*, II, B, 2, h.

or attorney;[59] but in the absence of express statutory requirement the court may in its discretion appoint some other person.[60] In cases where no domiciliary letters have been granted, the ancillary letters will ordinarily be issued to the person who would be entitled thereto, under the local statutes, in case of domestic administration,[61] and if those entitled to preference do not apply, administration may be granted in the discretion of the court.[62] The domiciliary representative may renounce his right to the ancillary appointment,[63] and the court may appoint some other suitable person on his failure or refusal to act[64] or in case of his death.[65]

d. Time For Appointment. Statutes limiting the time for taking out original letters of administration do not apply to ancillary administration.[66] Each case must be governed by its own facts and circumstances, and where the delay is sufficiently explained the court may grant such letters at any time;[67] but where a person who would be entitled to ancillary letters fails to make application therefor until after the domiciliary representative has taken possession of and administered all the assets he will be deemed to have waived his right to such administration.[68]

e. Proceedings For Appointment—(i) *In General.* Proceedings for the appointment of an ancillary administrator are instituted by a petition addressed to the surrogate, which must be verified,[69] and must contain statement of facts sufficient to show the jurisdiction of the court in the particular case.[70] The names and residences of creditors or persons claiming as such and residing in the state must be given.[71] If the decedent died testate, a copy of the judgment, decree, or order admitting the will to probate in the jurisdiction of the domicile should be presented,[72] together with an exemplified copy of the will.[73] If domiciliary letters have been issued, an exemplified copy thereof should be produced.[74]

59. Matter of Hanover, 3 Redf. Surr. (N. Y.) 91; St. Jurjo *v.* Dunscomb, 2 Bradf. Surr. (N. Y.) 105.

60. Hardin *v.* Jamison, 60 Minn. 112, 61 N. W. 1018; Lussen *v.* Timmerman, 4 Dem. Surr. (N. Y.) 250.

61. Wise's Estate, 2 N. Y. Civ. Proc. 230 note. Persons entitled to appointment generally see *supra*, II, B, 2.

62. Dalrymple *v.* Gamble, 66 Md. 298, 7 Atl. 683, 8 Atl. 468. See *supra*, II, B, 2, g.

63. Keith *v.* Proctor, 114 Ala. 676, 21 So. 502; Hooper *v.* Moore, 50 N. C. 130. Renunciation of right generally see *supra*, II, B, 4, a.

The renunciation need not be express or formal but may be implied from silence and inaction. Keith *v.* Proctor, 114 Ala. 676, 21 So. 502; Lawrence's Appeal, 49 Conn. 411.

64. Keith *v.* Proctor, 114 Ala. 676, 21 So. 502; Langton's Estate, 14 Wkly. Notes Cas. (Pa.) 46.

65. Jackson *v.* Jeffries, 3 A. K. Marsh. (Ky.) 309.

66. Woodruff *v.* Schultz, 49 Iowa 430; Henry *v.* Rowe, 83 Tex. 446, 18 S. W. 806; Dolton *v.* Nelson, 7 Fed. Cas. No. 3,976, 3 Dill. 469.

67. Ives *v.* Jacksonville Nat. Bank, 28 Ill. App. 563. See also Keith *v.* Proctor, 114 Ala. 676, 21 So. 502; McKee *v.* Simpson, 36 Fed. 248, holding that ancillary letters are not invalid because granted twelve years after the decedent's death.

68. Marcy *v.* Marcy, 32 Conn. 308.

69. Winnington's Estate, 1 N. Y. Civ. Proc. 267.

70. Langbein's Estate, 2 N. Y. Civ. Proc. 226, 1 Dem. Surr. (N. Y.) 448.

The facts conferring jurisdiction must be stated directly, and not left to inference. Winnington's Estate, 1 N. Y. Civ. Proc. 267. See also Thompson's Estate, 1 N. Y. Civ. Proc. 264.

71. Winnington's Estate, 1 N. Y. Civ. Proc. 267.

Naming the firms to which creditors belong instead of the creditors individually is insufficient. Thompson's Estate, 1 N. Y. Civ. Proc. 264.

72. Thompson's Estate, 1 N. Y. Civ. Proc. 264; Matter of Hudson, 5 Redf. Surr. (N. Y.) 333.

Affidavits insufficient.— A motion to grant ancillary letters testamentary to one alleging that he is executor of a will duly probated in another state will not be granted on affidavits. Gavin's Estate, 2 N. Y. Suppl. 670, 15 N. Y. Civ. Proc. 390, 1 Connoly Surr. (N. Y.) 117.

73. Winnington's Estate, 1 N. Y. Civ. Proc. 267; Thompson's Estate, 1 N. Y. Civ. Proc. 264; *In re* Levy, Tuck. Surr. (N. Y.) 20.

A will of real estate must be shown to have been executed according to the laws of the state where the ancillary letters were applied for, but this is not necessary in case of a will of personal property. Langbein's Estate, 2 N. Y. Civ. Proc. 226, 1 Dem. Surr. (N. Y.) 448.

74. Winnington's Estate, 1 N. Y. Civ. Proc. 267; Thompson's Estate, 1 N. Y. Civ. Proc. 264.

(II) *Appeal.* The domiciliary representative has such an interest as entitles him to appeal from a decree appointing an ancillary representative in another jurisdiction;[75] and other persons interested in the estate have the same right.[76]

f. Bond. An ancillary representative is usually required by statute to give a bond in the jurisdiction where such letters are taken out,[77] but the failure to file a bond renders the letters voidable only and not void.[78]

g. Revocation of Letters and Removal. The court having power to grant ancillary letters has also the right to revoke such letters where they have been improvidently granted.[79] The letters may be revoked where they have been procured through fraud,[80] and, where general ancillary letters have been granted and it appears that the decedent left a will, they may be revoked and letters with the will annexed issued;[81] but the probate of a foreign will does not of itself annul the ancillary letters previously granted.[82] The power of the court to revoke ancillary letters is not arbitrary, but is a legal discretion to be exercised only upon a state of facts warranting it.[83] A petition for the removal of an ancillary representative can be presented only by a person interested in the estate,[84] and must make a specific allegation of facts showing sufficient cause for removal.[85] It has been held that the revocation of the domiciliary letters does not affect ancillary letters taken out in another jurisdiction.[86]

3. Relation Between Ancillary and Domiciliary Representatives. There is no privity between administrators of the same estate appointed in different jurisdictions,[87] or between an executor in one jurisdiction and an ancillary administrator

75. Shaw, Appellant, 81 Me. 207, 16 Atl. 662; Martin *v.* Gage, 147 Mass. 204, 17 N. E. 310; Smith *v.* Sherman, 4 Cush. (Mass.) 408; Graves *v.* Tilton, 63 N. H. 192.

The ground on which the right to appeal is based is that the principal representative should be allowed to contest burdening the estate with an unnecessary administration (Smith *v.* Sherman, 4 Cush. (Mass.) 408) or having it intrusted to an improper person (Graves *v.* Tilton, 63 N. H. 192).

76. Shaw, Appellant, 81 Me. 207, 16 Atl. 662, holding that the widow of the decedent may appeal.

77. *In re* Prout, 128 N. Y. 70, 27 N. E. 948, 13 L. R. A. 104 [*affirming* 12 N. Y. Suppl. 64, 19 N. Y. Civ. Proc. 435]; Govan's Estate, 2 Misc. (N. Y.) 291, 23 N. Y. Suppl. 766.

Amount of bond.— The surrogate in fixing the amount of the bond of an ancillary administrator may ignore a disputed claim probably not enforceable. Matter of Musgrave, 5 Dem. Surr. (N. Y.) 427.

In Pennsylvania if an executor is a resident he will not be required to give bond. Mackin's Estate, 11 Wkly. Notes Cas. 207.

If an executor is relieved by the will from giving a bond no bond will be required where he takes out ancillary letters in another jurisdiction. Leatherwood *v.* Sullivan, 81 Ala. 458, 1 So. 718. In New York it is provided by statute that if the will requests that no security is required ancillary letters may be issued without security if the representative has his usual place of business in that state, but in other cases a bond must be given. Van Wyck *v.* Van Wyck, 22 Hun 9.

78. Leatherwood *v.* Sullivan, 81 Ala. 458, 1 So. 718.

79. Dalrymple *v.* Gamble, 66 Md. 298, 7 Atl. 683, 8 Atl. 468.

80. Bradley *v.* Broughton, 34 Ala. 694, 73 Am. Dec. 474; Mackin's Estate, 14 Phila. (Pa.) 328, 11 Wkly. Notes Cas. (Pa.) 207.

81. Bradley *v.* Broughton, 34 Ala. 694, 73 Am. Dec. 474; Clark *v.* Holt, 16 Ark. 257; Dalrymple *v.* Gamble, 66 Md. 298, 7 Atl. 683, 8 Atl. 468.

Until the will is admitted to probate the general ancillary letters will not be revoked. Gavin's Estate, 2 N. Y. Suppl. 670, 15 N. Y. Civ. Proc. 390, 1 Connoly Surr. (N. Y.) 117.

82. Clark *v.* Holt, 16 Ark. 257.

83. Dalrymple *v.* Gamble, 66 Md. 298, 7 Atl. 683, 8 Atl. 468. See also Mackin's Estate, 14 Phila. (Pa.) 328, 11 Wkly. Notes Cas. (Pa.) 207.

Failure to qualify and give bond within the time prescribed is not sufficient ground for removal, where the party has exercised reasonable diligence and gives a satisfactory explanation of the delay. *In re* Miller, 92 Iowa 741, 61 N. W. 229.

Non-residence is not ground for the removal of an ancillary administrator, where it is not shown to be actually prejudicial to the rights of those interested in the estate. White *v.* Spaulding, 50 Mich. 22, 14 N. W. 684.

84. White *v.* Spaulding, 50 Mich. 22, 14 N. W. 684. See also *In re* Lewis, 32 La. Ann. 385.

85. White *v.* Spaulding, 50 Mich. 22, 14 N. W. 684.

86. Huntington *v.* Moore, 1 N. M. 489. But see Matter of Gilleran, 50 Hun (N. Y.) 399, 3 N. Y. Suppl. 145, 15 N. Y. Civ. Proc. 406.

87. *Alabama.*— Johnston *v.* McKinnon, 129 Ala. 223, 29 So. 696; Hatchett *v.* Berney, 65 Ala. 39.

Illinois.— Smith *v.* Goodrich, 167 Ill. 46, 47

in another;[88] and a judgment against the one is no evidence against the other, for the purpose of affecting assets received by the latter under his administration,[89] and cannot be made the basis of an action against him,[90] even where the offices are held by the same person.[91] The rule is different, however, as to executors appointed in different states by the same will.[92]

B. Collection and Disposition of Assets — 1. Title to Assets — a. Ancillary Representative. Immediately upon his appointment and qualification, an ancillary representative becomes vested with title to all the assets belonging to his decedent within the jurisdiction of his appointment,[93] and as to such assets his title is exclusive,[94] notwithstanding the evidence of his title may be in the hands of the domiciliary representative.[95] But the title of an ancillary representative extends only to the property of the decedent which is within the jurisdiction of his appointment,[96] and which is properly assets for the purpose of administra-

N. E. 316; Rosenthal *v.* Renick, 44 Ill. 202; Ramsay *v.* Ramsay, 97 Ill. App. 270.

Indiana.— McCord *v.* Thompson, 92 Ind. 565.

Iowa.— Creswell *v.* Slack, 68 Iowa 110, 26 N. W. 42.

Maine.— Fowle *v.* Coe, 63 Me. 245.

Montana.—Braithwaite *v.* Harvey, 14 Mont. 208, 36 Pac. 38, 43 Am. St. Rep. 625, 27 L. R. A. 101.

Nebraska.— Creighton *v.* Murphy, 8 Nebr. 349, 1 N. W. 138.

New Hampshire.— Taylor *v.* Barron, 35 N. H. 484.

Pennsylvania.— Brodie *v.* Bickley, 2 Rawle 431.

South Carolina.— Graveley *v.* Graveley, 25 S. C. 1, 60 Am. Rep. 478.

Tennessee.— State *v.* Fulton, (Ch. App. 1898) 49 S. W. 297.

United States.— Stacy *v.* Thrasher, 6 How. 44, 12 L. ed. 337. See also Hill *v.* Tucker, 13 How. 458, 14 L. ed. 223.

88. Low *v.* Bartlett, 8 Allen (Mass.) 259. *Compare* Latine *v.* Clements, 3 Ga. 426.

89. *Alabama.*— Johnston *v.* McKinnon, 129 Ala. 223, 29 So. 696.

Illinois.— Smith *v.* Goodrich, 167 Ill. 46, 47 N. E. 316; Rosenthal *v.* Renick, 44 Ill. 202.

Iowa.— Creswell *v.* Slack, 68 Iowa 110, 26 N. W. 42.

Massachusetts.— Low *v.* Bartlett, 8 Allen 259.

Montana.—Braithwaite *v.* Harvey, 14 Mont. 208, 36 Pac. 38, 43 Am. St. Rep. 625, 27 L. R. A. 101.

Tennessee.— State *v.* Fulton, (Ch. App. 1898) 49 S. W. 297.

United States.— Johnson *v.* Powers, 139 U. S. 156, 11 S. Ct. 525, 35 L. ed. 112; McLean *v.* Meek, 18 How. 16, 15 L. ed. 277.

90. *Indiana.*— Slauter *v.* Chenowith, 7 Ind. 211.

Massachusetts.— Low *v.* Bartlett, 8 Allen 259.

Montana.—Braithwaite *v.* Harvey, 14 Mont. 208, 36 Pac. 38, 43 Am. St. Rep. 625, 27 L. R. A. 101.

Nebraska.— Creighton *v.* Murphy, 8 Nebr. 349, 1 N. W. 138.

Pennsylvania.— Brodie *v.* Bickley, 2 Rawle 431.

Texas.— Carrigan *v.* Semple, 72 Tex. 306, 12 S. W. 178; Cherry *v.* Speight, 28 Tex. 503.

United States.— Stacy *v.* Thrasher, 6 How. 44, 12 L. ed. 337.

91. Johnston *v.* McKinnon, 129 Ala. 223, 29 So. 696; Brodie *v.* Bickley, 2 Rawle (Pa.) 431 (holding that the privity must be official and not merely personal to sustain such an action); State *v.* Fulton, (Tenn. Ch. App. 1898) 49 S. W. 297.

92. Creighton *v.* Murphy, 8 Nebr. 349, 1 N. W. 138; Hill *v.* Tucker, 13 How. (U. S.) 458, 14 L. ed. 223; Goodall *v.* Tucker, 13 How. (U. S.) 469, 14 L. ed. 227. See also Low *v.* Bartlett, 8 Allen (Mass.) 259.

An administrator with the will annexed in one jurisdiction is in privity with the executor in another. Latine *v.* Clements, 3 Ga. 426.

93. Grayson *v.* Robertson, 122 Ala. 330, 25 So. 229, 82 Am. St. Rep. 80; Barclift *v.* Treece, 77 Ala. 528; Naylor *v.* Moffatt, 29 Mo. 126.

94. *Alabama.*— Grayson *v.* Robertson, 122 Ala. 330, 25 So. 229, 82 Am. St. Rep. 80; Barclift *v.* Treece, 77 Ala. 528.

Kentucky.— Cosby *v.* Gilchrist, 7 Dana 206.

Mississippi.— McIlvoy *v.* Alsop, 45 Miss. 365.

Missouri.— Naylor *v.* Moffatt, 29 Mo. 126.

New Jersey.— Banta *v.* Moore, 15 N. J. Eq. 97.

New York.— Holyoke *v.* Union Mut. L. Ins. Co., 22 Hun 75 [*affirmed* in 84 N. Y. 648].

Pennsylvania.— Willing *v.* Perot, 5 Rawle 264.

United States.— New York L. Ins. Co. *v.* Smith, 67 Fed. 694, 14 C. C. A. 635.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2318.

95. McIlvoy *v.* Alsop, 45 Miss. 365. *Compare* Chamberlin *v.* Wilson, 45 Iowa 149.

The domiciliary representative may be sued by the ancillary representative for possession of such evidence of indebtedness if he comes into the jurisdiction of the latter's appointment. McCully *v.* Cooper, 114 Cal. 258, 46 Pac. 82, 55 Am. St. Rep. 56, 35 L. R. A. 492.

96. Willard *v.* Wood, 1 App. Cas. (D. C.) 44; Ramsay *v.* Ramsay, 97 Ill. App. 270; Spoon *v.* Baxter, 31 Mich. 279; Cureton *v.* Mills, 13 S. C. 409, 36 Am. Rep. 700.

tion in that jurisdiction,[97] and he has no authority whatever over assets situated elsewhere.[98]

b. Domiciliary Representative. The title of a domiciliary representative differs from that of an ancillary representative in that it extends to all of the decedent's personal estate wherever situated, while that of the ancillary representative is limited strictly to the assets within the jurisdiction of his appointment.[99] This title, however, is not commensurate with that of the owner while living.[1] It will not authorize the representative to sue outside of the jurisdiction of his appointment,[2] or to interfere in any way with an ancillary administration;[3] but when there is no local administration, it is a title which other jurisdictions will recognize through comity,[4] which debtors of the estate in other jurisdictions may recognize and will be protected in recognizing,[5] and which will give validity to many acts of administration in other jurisdictions which can be performed without recourse to the courts.[6] Property of the estate coming from a foreign jurisdiction into that of the domicile immediately vests in the domiciliary representative,[7] provided administration has not previously been taken out in such foreign jurisdiction,[8] and when title to property has once vested in the domiciliary representative, it is not divested by the property being sent into another jurisdiction.[9]

2. Collection of Assets — a. Ancillary Representative. It is the duty of an ancillary representative to collect all the assets of the estate within the jurisdiction of his appointment,[10] and his right to do so is superior to that of a foreign domiciliary representative,[11] even though in that jurisdiction a foreign representative is authorized by statute to sue,[12] for even where such statutes exist, it

97. Moore *v.* Jordan, 36 Kan. 271, 13 Pac. 337, 59 Am. Rep. 550; Ellis *v.* Northwestern Mut. L. Ins. Co., 100 Tenn. 177, 43 S. W. 766.

98. Willard *v.* Wood, 1 App. Cas. (D. C.) 44.

99. Ramsay *v.* Ramsay, 97 Ill. App. 270; Klein *v.* French, 57 Miss. 662; Cureton *v.* Mills, 13 S. C. 409, 36 Am. Rep. 700; Wilkins *v.* Ellett, 9 Wall. (U. S.) 740, 19 L. ed. 586. *Compare* Murphy *v.* Crouse, 135 Cal. 14, 66 Pac. 971, 87 Am. St. Rep. 90.

1. Cureton *v.* Mills, 13 S. C. 409, 36 Am. Rep. 700.

2. Klein *v.* French, 57 Miss. 662; Wilkins *v.* Ellett, 9 Wall. (U. S.) 740, 19 L. ed. 586. See *infra*, XVI, G, 1.

3. Grayson *v.* Robertson, 122 Ala. 330, 25 So. 229, 82 Am. St. Rep. 30; Banta *v.* Moore, 15 N. J. Eq. 97; Willing *v.* Perot, 5 Rawle (Pa.) 264; New York L. Ins. Co. *v.* Smith, 67 Fed. 694, 14 C. C. A. 635.

4. State *v.* Fulton, (Tenn. Ch. App. 1898) 49 S. W. 297.

5. Marcy *v.* Marcy, 32 Conn. 308; Ramsay *v.* Ramsay, 97 Ill. App. 270; Klein *v.* French, 57 Miss. 662. See *infra*, XVI, B, 2, b.

6. Ramsay *v.* Ramsay, 97 Ill. App. 270; Klein *v.* French, 57 Miss. 662. See *infra*, XVI, B, 2, b; XVI, B, 3.

7. Wells *v.* Miller, 45 Ill. 382; Collins *v.* Bankhead, 1 Strobh. (S. C.) 25.

8. See Wells *v.* Miller, 45 Ill. 382.

9. Crescent City Ice Co. *v.* Stafford, 6 Fed. Cas. No. 3,387, 3 Woods 94. See *supra*, XVI, A, 2, b, (II).

10. Shegogg *v.* Perkins, 34 Ark. 117; Stevens *v.* Gaylord, 11 Mass. 256; Fay *v.* Haven, 3 Metc. (Mass.) 109; Shields *v.* Union Cent. L. Ins. Co., 119 N. C. 380, 25 S. E. 951.

The ancillary representative must use due diligence in collecting all the assets within the jurisdiction of his appointment, although there was another administrator first appointed in the state where the intestate was domiciled at his death. State *v.* Gregory, 88 Ind. 110.

11. *Alabama.*— Barclift *v.* Treece, 77 Ala. 528; Equitable L. Assur. Soc. *v.* Vogel, 76 Ala. 441, 52 Am. Rep. 344.

Kentucky.—Cosby *v.* Gilchrist, 7 Dana 206.

Massachusetts.— Merrill *v.* New England Mut. L. Ins. Co., 103 Mass. 245, 4 Am. Rep. 548.

Missouri.— Naylor *v.* Moffatt, 29 Mo. 126.

New Jersey.— Banta *v.* Moore, 15 N. J. Eq. 97.

New York.— Stone *v.* Scripture, 4 Lans. 186.

North Carolina.— Shields *v.* Union Cent. L. Ins. Co., 119 N. C. 380, 25 S. E. 951.

Ohio.— Purcell *v.* Heinberger, 3 Ohio Dec. (Reprint) 343.

Pennsylvania.— Willing *v.* Perot, 5 Rawle 264.

United States.— New York L. Ins. Co. *v.* Smith, 67 Fed. 694, 14 C. C. A. 635.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2311.

Debts due from the United States are not local assets in the District of Columbia, and an ancillary representative appointed there has no absolute right to receive the same, but the government may pay the debt to either the ancillary or the principal administrator. Wyman *v.* Halstead, 109 U. S. 654, 3 S. Ct. 417, 27 L. ed. 1068.

12. Walker *v.* Welker, 55 Ill. App. 118; Purcell *v.* Heinberger, 3 Ohio Dec. (Reprint) 343; Willing *v.* Perot, 5 Rawle (Pa.) 264.

remains the universal policy to preserve local assets for the satisfaction in the first instance of local claims.[13] A voluntary payment to the domiciliary representative will not bar a suit brought by the ancillary representative to recover the same debt,[14] unless such payment was made prior to the appointment of the ancillary representative.[15] The ancillary representative, however, can collect only what is properly assets of his jurisdiction,[16] and statutes permitting a foreign representative to sue do not authorize him to sue for assets situated elsewhere,[17] nor will a voluntary payment to him by a debtor of another jurisdiction discharge the debt.[18]

b. Domiciliary Representative. Letters of administration extend only to the assets in the jurisdiction where the letters are granted,[19] and do not confer as a matter of right any authority to collect assets in another.[20] But since a foreign domiciliary representative has a title to assets wherever situated which may be recognized in the absence of local creditors or a local administration,[21] he may under such circumstances take possession of property of the estate if he can do so peaceably and without suit,[22] and his possession will be recognized as rightful and protected as fully as if he had taken out local letters of administration.[23] He may also collect a debt due to the estate if voluntarily paid,[24] and such payment

13. Plumb *v.* Bateman, 2 App. Cas. (D. C.) 156; Willing *v.* Perot, 5 Rawle (Pa.) 264.

If there are no local creditors and no other debts to collect except the claim sued on, the domiciliary representative may sue, and it is not error to refuse an application of an ancillary representative to be substituted as a party. Greenwalt *v.* Bastian, 10 Kan. App. 101, 61 Pac. 513.

14. Equitable L. Assur. Soc. *v.* Vogel, 76 Ala. 441, 52 Am. Rep. 344; Walker *v.* Welker, 55 Ill. App. 118; Reynolds *v.* McMullen, 55 Mich. 568, 22 N. W. 41, 54 Am. Rep. 386. *Compare* Weizell *v.* Cincinnati Sav. Inst., 1 Ohio Dec. (Reprint) 55, 1 West. L. J. 393, holding that where a creditor promised to pay his debt to a foreign domiciliary representative before he had notice that a local ancillary appointment had been made but paid after such notice, the payment was a good defense to an action by the ancillary representative.

If there are no local creditors a payment made to a foreign domiciliary representative is a good discharge of the debt, although an ancillary representative was appointed prior to such payment if the payment was made in good faith and without notice of the ancillary appointment. Maas *v.* German Sav. Bank, 176 N. Y. 377, 68 N. E. 658, 98 Am. St. Rep. 689 [*affirming* 73 N. Y. App. Div. 524, 77 N. Y. Suppl. 256 (*reversing* 36 Misc. 154, 72 N. Y. Suppl. 1068 [*affirming* 35 Misc. 193, 71 N. Y. Suppl. 483])].

15. See *infra*, XVI, B, 2, b.

16. McCord *v.* Thompson, 92 Ind. 565; Morrisson *v.* Mutual L. Ins. Co., 57 Hun (N. Y.) 97, 10 N. Y. Suppl. 445; Ellis *v.* Northwestern Mut. L. Ins. Co., 100 Tenn. 177, 43 S. W. 766; Ellis *v.* Ellis, (Tenn. Ch. App. 1899) 54 S. W. 666.

Insurance taken out by a domiciliary representative on property of the estate within his jurisdiction in a company located in another jurisdiction where the decedent left debts cannot be collected by an ancillary representative in the latter jurisdiction. Abbott *v.* Miller, 10 Mo. 141.

17. Moore *v.* Jordan, 36 Kan. 271, 13 Pac. 337, 59 Am. Rep. 550.

18. Moore *v.* Jordan, 36 Kan. 271, 13 Pac. 337, 59 Am. Rep. 550; Steele *v.* Connecticut Gen. L. Ins. Co., 31 N. Y. App. Div. 389, 52 N. Y. Suppl. 373 [*reversing* 22 Misc. 249, 49 N. Y. Suppl. 647, and *affirmed* in 160 N. Y. 703, 57 N. E. 1125].

19. Riley *v.* Moseley, 44 Miss. 37; *In re* Crawford, 68 Ohio St. 58, 67 N. E. 156, 96 Am. St. Rep. 648.

20. *Mississippi.*— Satterwhite *v.* Littlefield, 13 Sm. & M. 302.

New Jersey.— Banta *v.* Moore, 15 N. J. Eq. 97.

New York.— Parsons *v.* Lyman, 20 N. Y. 103, 18 How. Pr. 193.

Ohio.— *In re* Crawford, 68 Ohio St. 58, 67 N. E. 156, 96 Am. St. Rep. 648.

United States.— Vaughan *v.* Northup, 15 Pet. 1, 10 L. ed. 639.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2311, 2312.

The court will not allow compensation for collecting assets in another jurisdiction. Satterwhite *v.* Littlefield, 13 Sm. & M. (Miss.) 302.

21. See *supra*, XVI, B, 1, b.

22. Denny *v.* Faulkner, 22 Kan. 89; Martin *v.* Gage, 147 Mass. 204, 17 N. E. 310; Putnam *v.* Pitney, 45 Minn. 242, 47 N. W. 790, 11 L. R. A. 41; Parsons *v.* Lyman, 20 N. Y. 103; Vroom *v.* Van Horne, 10 Paige (N. Y.) 549, 42 Am. Dec. 94; Brown *v.* Brown, 1 Barb. Ch. (N. Y.) 189.

23. Denny *v.* Faulkner, 22 Kan. 89; Martin *v.* Gage, 147 Mass. 204, 17 N. E. 310; Putnam *v.* Pitney, 45 Minn. 242, 47 N. W. 790, 11 L. R. A. 41.

24. *Connecticut.*—Selleck *v.* Rusco, 46 Conn. 370; Marcy *v.* Marcy, 32 Conn. 308.

Iowa.—Bull *v.* Fuller, 78 Iowa 20, 42 N. W. 572, 16 Am. St. Rep. 419.

Louisiana.— Thorman *v.* Broderick, 52 La. Ann. 1298, 27 So. 735.

is a valid discharge of the debt,[25] and a protection against an action to collect the same debt by a domestic representative subsequently appointed;[26] and since debts due from the United States have no *situs* at the seat of government, they may be received by a domiciliary representative at any place where the government may choose to pay them.[27]

3. Disposition of Property — a. Personal Property Generally. Where a foreign domiciliary representative has taken possession of property of the estate, there being no local representative, he may sell the same.[28] In such case the purchaser will acquire a title which through comity will be respected,[29] and he cannot be compelled to pay to an ancillary representative subsequently appointed any indebtedness on account of such purchase.[30] But a domiciliary representative cannot dispose of any property in another jurisdiction where a local administration is pending.[31]

b. Bills and Notes. In some jurisdictions it is held that a representative appointed in one jurisdiction cannot indorse and transfer bills and notes payable in another so as to give the indorsee a right of action thereon.[32] But the weight of authority supports the view that while as a general rule a foreign representative cannot himself sue,[33] the disability is not a defect of title but a mere personal incapacity;[34] and if he has the note or other negotiable instrument in his

Maryland.— Citizens' Nat. Bank *v.* Sharp, 53 Md. 521.

Minnesota.— Dexter *v.* Berge, 76 Minn. 216, 78 N. W. 1111; Putnam *v.* Pitney, 45 Minn. 242, 47 N. W. 790, 11 L. R. A. 41.

Mississippi.— Riley *v.* Moseley, 44 Miss. 37.

New York.— Parsons *v.* Lyman, 20 N. Y. 103, 18 How. Pr. 193 [*reversing* 4 Bradf. Surr. 268]; Schluter *v.* Bowery Sav. Bank, 1 N. Y. Suppl. 655; Vroom *v.* Van Horne, 10 Paige 549, 42 Am. Dec. 94.

Pennsylvania.— Gray's Appeal, 116 Pa. St. 256, 11 Atl. 66, 70.

United States.— U. S. *v.* Cox, 18 How. 100, 15 L. ed. 299.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2312.

25. *Connecticut.*—Marcy *v.* Marcy, 32 Conn. 308.

Maryland.— Citizens' Nat. Bank *v.* Sharp, 53 Md. 521.

Minnesota.— Putnam *v.* Pitney, 45 Minn. 242, 47 N. W. 790, 11 L. R. A. 41.

Mississippi.— Riley *v.* Moseley, 44 Miss. 37.

New York.— Peterson *v.* Chemical Bank, 29 How. Pr. 240.

United States.— Wilkins *v.* Ellett, 108 U. S. 256, 2 S. Ct. 641, 27 L. ed. 718; U. S. *v.* Cox, 18 How. 100, 15 L. ed. 299.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2312.

Contra.— Reeside *v.* Reeside, 6 Phila. (Pa.) 507, decided under a statute expressly providing that no letters testamentary or of administration granted out of the state shall confer on the executor or administrator any of the powers of an executor or administrator in the state.

A collusive payment made to a foreign representative appointed after the institution of suit by the local representative does not discharge the debt and is no bar to the action. Amsden *v.* Danielson, 18 R. I. 787, 31 Atl. 4.

26. Ramsay *v.* Ramsay, 97 Ill. App. 270; Bull *v.* Fuller, 78 Iowa 20, 42 N. W. 572, 16 Am. St. Rep. 419; Citizens' Nat. Bank *v.* Sharp, 53 Md. 521; Wilkins *v.* Ellett, 108 U. S. 256, 2 S. Ct. 641, 27 L. ed. 718.

In Alabama where a foreign representative was authorized by statute to sue upon complying with certain conditions it has been held that the same conditions must be complied with before he could receive a voluntary payment; and if they were not complied with the payment would not bar an action by a local representative subsequently appointed. Ferguson *v.* Morris, 67 Ala. 389; Hatchett *v.* Berney, 65 Ala. 39. *Compare* Equitable L. Assur. Soc. *v.* Vogel, 76 Ala. 441, 52 Am. Rep. 344.

27. Wyman *v.* Halstead, 109 U. S. 654, 3 S. Ct. 417, 27 L. ed. 1068; U. S. *v.* Cox, 18 How. (U. S.) 100, 15 L. ed. 299.

28. Martin *v.* Gage, 147 Mass. 204, 17 N. E. 310.

29. Peterson *v.* Chemical Bank, 29 How. Pr. (N. Y.) 240.

30. Paramore's Estate, 15 N. Y. St. 449.

31. Du Val *v.* Marshall, 30 Ark. 230, holding that the assignment of a judgment by a foreign representative under such circumstances is void.

32. Stearns *v.* Birnham, 5 Me. 261, 17 Am. Dec. 228; McCarty *v.* Hall, 13 Mo. 480; Lee *v.* Havens, Brayt. (Vt.) 93.

The reasons for this view are that since he cannot himself sue in another jurisdiction, he cannot confer that right upon another (Stearns *v.* Birnham, 5 Me. 261, 17 Am. Dec. 228), and that to allow such a proceeding might be the means of diverting assets from the jurisdiction where they properly belong (Stearns *v.* Birnham, *supra*; McCarty *v.* Hall, 13 Mo. 480).

33. Riddick *v.* Moore, 65 N. C. 382; Leake *v.* Gilchrist, 13 N. C. 73; Solinsky *v.* Grand Rapids Fourth Nat. Bank, 82 Tex. 244, 17 S. W. 1050.

When representative may sue see *infra*, XVI, G, 1, b, (III).

34. Gove *v.* Gove, 64 N. H. 503, 15 Atl. 121; Solinsky *v.* Grand Rapids Fourth Nat. Bank, 82 Tex. 244, 17 S. W. 1050.

possession he may indorse and transfer it so as to give the indorsee the right to sue thereon.[35]

c. Choses in Action. So also, although a foreign representative cannot himself sue on a chose in action of his decedent,[36] his disability is a personal incapacity and not a defect of title,[37] and he may assign a chose in action so that the assignee may sue thereon in his own name,[38] provided the statutes of the state where the action is brought permit the assignee of a chose in action to sue in his own name.[39]

d. Corporate Stock. A domiciliary representative may assign shares of stock in a foreign corporation belonging to the estate,[40] and no local grant of administration is necessary to compel a transfer on the books of the corporation.[41]

e. Real Property. A representative cannot by virtue of his appointment in one state or country make a conveyance of land of his decedent situated in another,[42] or assign a mortgage on land situated in another state or country;[43] but he may without taking out letters where the land is situated execute a power

35. *Mississippi.*— Andrews *v.* Carr, 26 Miss. 577.

New Hampshire.— Gove *v.* Gove, 64 N. H. 503, 15 Atl. 121 [*overruling* Thompson *v.* Wilson, 2 N. H. 291].

North Carolina.— Riddick *v.* Moore, 65 N. C. 382; Grace *v.* Hannah, 51 N. C. 94; Leake *v.* Gilchrist, 13 N. C. 73.

Rhode Island.— Mackay *v.* St. Mary's Church, 15 R. I. 121, 23 Atl. 108, 2 Am. St. Rep. 881.

Texas.— Solinsky *v.* Grand Rapids Fourth Nat. Bank, 82 Tex. 244, 17 S. W. 1050; Abercrombie *v.* Stillman, 77 Tex. 589, 14 S. W. 196; Keller *v.* Alexander, 24 Tex. Civ. App. 186, 58 S. W. 637.

United States.— Wilkins *v.* Ellett, 108 U. S. 256, 2 S. Ct. 641, 27 L. ed. 718; Harper *v.* Butler, 2 Pet. 239, 7 L. ed. 410.

Canada.— Hard *v.* Palmer, 20 U. C. Q. B. 208.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2319.

When transfer not sustainable.— It seems that such a transfer would not be sustained where it would operate to the prejudice of local creditors or conflict with a local administration. See Gove *v.* Gove, 64 N. H. 503, 15 Atl. 121.

36. See *infra*, XVI, G, 1, a.

37. Equitable L. Assur. Soc. *v.* Vogel, 76 Ala. 441, 52 Am. Rep. 344; Petersen *v.* Chemical Bank, 32 N. Y. 21, 88 Am. Dec. 298 [*affirming* 2 Rob. 605, 27 How. Pr. 491].

38. *Alabama.*— Equitable L. Assur. Soc. *v.* Vogel, 76 Ala. 441, 52 Am. Rep. 344.

Minnesota.— Putnam *v.* Pitney, 45 Minn. 242, 47 N. W. 790, 11 L. R. A. 41.

New York.— Petersen *v.* Chemical Bank, 32 N. Y. 21, 88 Am. Dec. 298 [*affirming* 2 Rob. 605, 27 How. Pr. 491]; Smith *v.* Tiffany, 16 Hun 552.

Utah.— Camp *v.* Simon, 23 Utah 56, 63 Pac. 332.

Washington.— Waldo *v.* Milroy, 19 Wash. 156, 52 Pac. 1012.

Contra.— A contrary view obtains in South Carolina. Heyward *v.* Williams, 57 S. C. 235, 35 S. E. 503; Dial *v.* Gary, 24 S. C. 572; Dial *v.* Tappan, 20 S. C. 167; Dial *v.* Gary, 14 S. C. 573, 37 Am. Rep. 737.

39. Petersen *v.* Chemical Bank, 32 N. Y. 21, 88 Am. Dec. 298 [*affirming* 2 Rob. 605, 27 How. Pr. 491]; Wilkins *v.* Ellett, 108 U. S. 256, 2 S. Ct. 641, 2 L. ed. 718.

40. Brown *v.* San Francisco Gaslight Co., 58 Cal. 426; Luce *v.* Manchester, etc., R. Co., 63 N. H. 588, 3 Atl. 618; Middlebrook *v.* Merchants' Bank, 3 Abb. Dec. (N. Y.) 295, 3 Keyes (N. Y.) 135 [*affirming* 41 Barb. 481, 18 Abb. Pr. 109, 27 How. Pr. 474 (*affirming* 24 How. Pr. 267)]. *Compare* Murphy *v.* Crouse, 135 Cal. 14, 66 Pac. 971, 87 Am. St. Rep. 90.

41. Brown *v.* San Francisco Gaslight Co., 58 Cal. 426; Luce *v.* Manchester, etc., R. Co., 63 N. H. 588, 3 Atl. 618; Middlebrook *v.* Merchants' Bank, 3 Abb. Dec. (N. Y.) 295, 3 Keyes (N. Y.) 135 [*affirming* 41 Barb. 481, 18 Abb. Pr. 109, 27 How. Pr. 474 (*affirming* 24 How. Pr. 267)].

42. *Kentucky.*— Simpson *v.* Hawkins, 1 Dana 303.

Massachusetts.— Cutter *v.* Davenport, 1 Pick. 81, 11 Am. Dec. 149.

Michigan.— Sheldon *v.* Rice, 30 Mich. 296, 18 Am. Rep. 136.

Texas.— League *v.* Williamson, (1903) 77 S. W. 435.

United States.— Watkins *v.* Holman, 16 Pet. 25, 10 L. ed. 873.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2317.

A lease of land belonging to the estate of a non-resident decedent cannot be made by a foreign representative. Potter *v.* Bassett, 35 Mo. App. 417; Crockett *v.* Althouse, 35 Mo. App. 404.

43. Cutter *v.* Davenport, 1 Pick. (Mass.) 81, 11 Am. Dec. 149; Reynolds *v.* McMullen, 55 Mich. 568, 22 N. W. 41, 54 Am. Rep. 386. *Compare* Solinsky *v.* Grand Rapids Fourth Nat. Bank, 82 Tex. 244, 17 S. W. 1050, holding that a foreign administrator may assign a promissory note and that a mortgage given as security for the note will pass as an incident thereto.

The law which governs the title to and disposition of land is always that of the place where the land is situated. Simpson *v.* Hawkins, 1 Dana (Ky.) 303; Cutter *v.* Davenport, 1 Pick. (Mass.) 81, 11 Am. Dec. 149.

of sale contained in a mortgage on such land,[44] since in such case his authority is not derived from the probate court of another state but from the contract of the parties.[45] For a similar reason[46] a foreign executor may without taking out local letters of administration make a sale of land under a power contained in the will.[47] It is necessary, however, that the will should be proved and recorded in the jurisdiction where the land is situated;[48] but such probate may be made after the date of the conveyance and will relate back and render it valid,[49] provided no rights of third persons have intervened.[50]

C. Sales Under Order of Court — 1. When Authorized. The courts of one state or country have no jurisdiction to order a sale of a decedent's realty situated in another,[51] and an order procured by a representative in the jurisdiction of his appointment confers upon him no authority to sell land outside of that jurisdiction.[52] Neither, in the absence of statute, can a representative appointed in one jurisdiction maintain in another a proceeding for the sale of land situated in that jurisdiction.[53] There are, however, in some states statutes providing that a foreign executor may be permitted by order of court to make a sale of land where no local representative has been appointed,[54] but statutes merely permitting a foreign representative to sue do not authorize such a proceeding.[55] An order may be made authorizing an ancillary representative to sell lands located in his own jurisdiction where there is an insufficiency of assets to pay debts,[56] and

44. Holcombe *v.* Richards, 38 Minn. 38, 35 N. W. 714; Averill *v.* Taylor, 5 How. Pr. (N. Y.) 476; Doolittle *v.* Lewis, 7 Johns. Ch. (N. Y.) 45, 11 Am. Dec. 389; Thurber *v.* Carpenter, 18 R. I. 782, 31 Atl. 5; Hayes *v.* Frey, 54 Wis. 503, 11 N. W. 695.

45. Holcombe *v.* Richards, 38 Minn. 38, 35 N. W. 714; Doolittle *v.* Lewis, 7 Johns. Ch. (N. Y.) 45, 11 Am. Dec. 389; Thurber *v.* Carpenter, 18 R. I. 782, 31 Atl. 5.

46. Green *v.* Alden, 92 Me. 177, 42 Atl. 358; Crusoe *v.* Butler, 36 Miss. 150; Babcock *v.* Collins, 60 Minn. 73, 61 N. W. 1020, 51 Am. St. Rep. 503; Pollock *v.* Hooley, 67 Hun (N. Y.) 370, 22 N. Y. Suppl. 215; Bromley *v.* Miller, 2 Thomps. & C. (N. Y.) 575.

47. *Arkansas.*—Apperson *v.* Bolton, 29 Ark. 418.

Kansas.— Calloway *v.* Cooley, 50 Kan. 743, 32 Pac. 372, under express statute.

Maine.— Green *v.* Alden, 92 Me. 177, 42 Atl. 358.

Mississippi.— Crusoe *v.* Butler, 36 Miss. 150.

New York.—Pollock *v.* Hooley, 67 Hun 370, 22 N. Y. Suppl. 215; Bromley *v.* Miller, 2 Thomps. & C. 575.

Pennsylvania.— Hoysradt *v.* Tionesta Gas Co., 194 Pa. St. 251, 45 Atl. 62.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2317.

Only the executor named in the will can execute the power of sale, and if he declines to serve an administrator with the will annexed appointed in his place cannot do so. Wills *v.* Cowper, 2 Ohio 124, 3 Ohio 486. *Contra,* Hoysradt *v.* Tionesta Gas Co., 194 Pa. St. 251, 45 Atl. 62. See, generally, *infra,* XIX, C.

A foreign corporation which is executor cannot make a conveyance of land under a power in the will unless it has complied with the requirements necessary to enable it to do business in the state where the land is situated. Pennsylvania L. Ins., etc., Co. *v.* Bauerle, 143 Ill. 459, 33 N. E. 166.

Ratification of sale.—Statutes requiring domestic executors to report their sales of land for ratification to the court from which they obtained letters do not apply to a sale made by a foreign executor under a direction in the will. Smith *v.* Montgomery, 75 Md. 138, 23 Atl. 145.

48. Apperson *v.* Bolton, 29 Ark. 418; Norment *v.* Brydon, 44 Md. 112; Crusoe *v.* Butler, 36 Miss. 150; Simpson *v.* Foster, 46 Tex. 618.

The reason for this requirement is that a conveyance of real estate must be made according to the law of the place where it is situated. Crusoe *v.* Butler, 36 Miss. 150. See also Lucas *v.* Tucker, 17 Ind. 41.

49. Green *v.* Alden, 92 Me. 177, 42 Atl. 358; Babcock *v.* Collins, 60 Minn. 73, 61 N. W. 1020, 51 Am. St. Rep. 503; Crusoe *v.* Butler, 36 Miss. 150; Brooks *v.* McComb, 38 Fed. 317. See also Dorsey *v.* Banks, 88 Iowa 595, 55 N. W. 574; Smith *v.* Callaghan, 66 Iowa 552, 24 N. W. 50; Allison *v.* Cocke, 106 Ky. 763, 51 S. W. 593, 21 Ky. L. Rep. 434.

50. See Brooks *v.* McComb, 38 Fed. 317.

51. Seldner *v.* Katz, 96 Md. 212, 53 Atl. 931.

52. Sheldon *v.* Rice, 30 Mich. 296, 18 Am. Rep. 136; Nowler *v.* Coit, 1 Ohio 519, 13 Am. Dec. 640; Brown *v.* Edson, 23 Vt. 435; Watkins *v.* Holman, 16 Pet. (U. S.) 25, 10 L. ed. 873.

53. McAnulty *v.* McClay, 16 Nebr. 418, 20 N. W. 266.

54. Rapp *v.* Matthias, 35 Ind. 332; Higgins *v.* Reed, 48 Kan. 272, 29 Pac. 389.

55. McAnulty *v.* McClay, 16 Nebr. 418, 20 N. W. 266.

56. Lawrence's Appeal, 49 Conn. 411; Hobson *v.* Payne, 45 Ill. 158; Cowden *v.* Jacobson, 165 Mass. 240, 43 N. E. 98; Comstock

it has been held that to authorize such a sale it is not necessary to show that the personal estate at the domicile has been exhausted.[57] The court may also make an order for the sale by an ancillary representative of lands which the decedent has by his will directed to be sold.[58]

2. Application and Proceedings. Where application is made for an order for the sale of land by an ancillary representative to pay debts, the petition must show that the situation exists which authorizes the proceeding;[59] namely, that claims have been regularly presented and allowed in the jurisdiction where the application is made,[60] and that the personal estate is insufficient to pay the same.[61] Where the application is made for the sale of lands in the ancillary jurisdiction, to pay claims allowed in the domiciliary jurisdiction, the time within which the application must be made will be governed by the law of the domicile where the claims were allowed,[62] which in the absence of evidence to the contrary will be presumed to be the same as in the jurisdiction where the application is made.[63] Notice of the application must be given if required by statute, unless waived by the parties entitled thereto.[64] The statutes authorizing a foreign representative to apply for an order of sale[65] provide what the petition must show, and these requirements must be complied with.[66] A new bond need not be required of the foreign representative if the amount of the bond already given is sufficient to cover the proceeds of the sale.[67]

D. Payment of Claims — 1. In General. It is the duty of an ancillary representative after collecting the assets within the jurisdiction of his appointment to apply the same to the payment of the claims of local creditors,[68] and in some states also to the payment of claims of non-resident creditors who prove their claims in the ancillary jurisdiction, regard being had to the solvency or insolvency of the estate as a whole.[69] In the payment of claims he is governed exclusively by the law of the jurisdiction in which he was appointed.[70]

2. Claims of Local Creditors. While the chief object of an ancillary administration is the protection of local creditors,[71] and no transmission of assets will be

v. Crawford, 3 Wall. (U. S.) 396, 18 L. ed. 34.

A bill in chancery cannot be maintained by creditors to subject lands to the payment of debts where there is no ancillary representative if a representative can be appointed. Partee *v.* Kortrecht, 54 Miss. 66.

57. Lawrence's Appeal, 49 Conn. 411; Rosenthal *v.* Renick, 44 Ill. 202. *Contra,* Livermore *v.* Haven, 23 Pick. (Mass.) 116, holding that such a sale should not be ordered unless it appears that the creditors in the exercise of due diligence have been unable to obtain payment from the principal administrator. See also Cowden *v.* Jacobson, 165 Mass. 240, 43 N. E. 98.

58. Massey's Succession, 46 La. Ann. 126, 15 So. 6.

59. Hobson *v.* Payne, 45 Ill. 158.

60. Hobson *v.* Payne, 45 Ill. 158.

61. Comstock *v.* Crawford, 3 Wall. (U. S.) 396, 18 L. ed. 34, holding, however, that, unless otherwise provided by statute, a general statement to this effect is sufficient to give the court jurisdiction, without specifying all the debts and property of the decedent, and that any further particularity necessary to guide the court in making the order may be obtained upon the hearing of the application.

62. Hadley *v.* Gregory, 57 Iowa 157, 10 N. W. 319.

63. Hadley *v.* Gregory, 57 Iowa 157, 10 N. W. 319.

64. Bacon *v.* Chase, 83 Iowa 521, 50 N. W. 23.

65. See *supra,* XVI, C, 1.

66. Rapp *v.* Matthias, 35 Ind. 332.

67. Rapp *v.* Matthias, 35 Ind. 332; Higgins *v.* Reed, 48 Kan. 272, 29 Pac. 389.

68. Gibson *v.* Dowell, 42 Ark. 164; Shegogg *v.* Perkins, 34 Ark. 117; Fay *v.* Haven, 3 Metc. (Mass.) 109; Dawes *v.* Head, 3 Pick. (Mass.) 128; Stevens *v.* Gaylord, 11 Mass. 256.

In New York under the present statute the court may order an ancillary representative to pay local creditors, but unless so ordered it is the duty of the representative to transmit all assets to the place of principal administration. Smith *v.* New York City Second Nat. Bank, 70 Hun 357, 24 N. Y. Suppl. 419.

Voluntary payments from foreign debtors of the estate cannot be applied to the domestic indebtedness of decedent so as to exclude foreign creditors. Jones *v.* Jones, 39 S. C. 247, 17 S. E. 587, 802.

69. See *infra,* XVI, D, 3.

70. Goodall *v.* Marshall, 11 N. H. 88. 35 Am. Dec. 472; Churchill *v.* Prescott, 3 Bradf. Surr. (N. Y.) 233; Moye *v.* May, 43 N. C. 131, 54 N. C. 844; Smith *v.* Union Bank, 5 Pet. 518, 8 L. ed. 212 [*affirming* 24 Fed. Cas. No. 14,362, 4 Cranch C. C. 21].

71. Ramsay *v.* Ramsay, 97 Ill. App. 270.

made until they have received at least their *pro rata* share,[72] it cannot be made the means of giving such creditors any superior rights in case the estate as a whole is insolvent,[73] it being the general policy of the law that in such cases all the property of the decedent applicable to the payment of his debts should be distributed among creditors *pro rata* according to the classification of their claims without regard to where the assets may be found or the creditors reside.[74] It follows that if the estate as a whole is solvent, the ancillary representative may proceed to pay the claims of local creditors in full,[75] but if it is not, local creditors are entitled to receive only such an amount as represents their *pro rata* share of the whole estate,[76] although they are entitled to receive that amount from the ancillary representative, who need not transmit the assets in his hands to the domiciliary representative but may retain them until the amount to which each claimant is entitled is ascertained.[77]

3. Claims of Foreign Creditors. In a few jurisdictions it is held that only local creditors can prove their claims in the ancillary jurisdiction;[78] but in most jurisdictions it is held that non-residents as well as residents may prove their claims against the ancillary estate,[79] leaving the question of payment to be dealt with afterward when the solvency or insolvency of the whole estate is to be considered.[80] In these states the fact that a claim has been presented and allowed at the domicile,[81] or that it has been presented and disallowed,[82] is no bar to its allowance in the ancillary jurisdiction; but an allowance at the domicile is not conclusive upon the ancillary representative as to the validity of the claim.[83] A creditor who has received a part payment of his claim in the ancillary jurisdiction will not be allowed to share equally with other creditors of the same class at the domicile until after they have received the same proportionate amount as he has recovered in the ancillary jurisdiction;[84] but if he has received a full payment in the ancillary jurisdiction, he cannot be compelled to refund any part thereof for

72. Mitchell *v.* Cox, 28 Ga. 32. See also Lewis *v.* Rutherford, 71 Ark. 218, 72 S. W. 373.

73. Ramsay *v.* Ramsay, 196 Ill. 179, 63 N. E. 618 [*affirming* 97 Ill. App. 270]; Dawes *v.* Head, 3 Pick. (Mass.) 128. See *supra*, X, D, 2, c, (II), (B), (11).

74. Ramsay *v.* Ramsay, 196 Ill. 179, 63 N. E. 618 [*affirming* 97 Ill. App. 270]; Dawes *v.* Head, 3 Pick. (Mass.) 128. The true principle which should govern in all cases of double administration is so to marshal the different funds under administration as to produce equality among all creditors, whether foreign or domestic. Lawrence *v.* Elmendorf, 5 Barb. (N. Y.) 73.

75. Miner *v.* Austin, 45 Iowa 221, 24 Am. Rep. 763; Churchill *v.* Boyden, 17 Vt. 319.

76. Ramsay *v.* Ramsay, 196 Ill. 179, 63 N. E. 618 [*affirming* 97 Ill. App. 270]; Davis *v.* Estey, 8 Pick. (Mass.) 475; Churchill *v.* Boyden, 17 Vt. 319.

77. Mitchell *v.* Cox, 28 Ga. 32; Dawes *v.* Head, 3 Pick. (Mass.) 128.

78. Shegogg *v.* Perkins, 34 Ark. 117; Barry's Appeal, 88 Pa. St. 131. See also Warrington's Estate, 7 Pa. Dist. 712, holding further that the fact that a creditor who resided at the decedent's domicile at the time the debt was contracted has since become a resident of the ancillary jurisdiction does not make him a local creditor or change the operation of the rule.

79. *Illinois.*— Ramsay *v.* Ramsay, 97 Ill. App. 270.

Iowa.— Miner *v.* Austin, 45 Iowa 221, 24 Am. Rep. 763.

Kentucky.— Gray *v.* Lewis, 3 Ky. L. Rep. 234.

Maryland.—De Sobry *v.* De Laistre, 2 Harr. & J. 191, 3 Am. Dec. 555.

Mississippi.— Carroll *v.* McPike, 53 Miss. 569.

New Hampshire.— Taylor *v.* Barron, 35 N. H. 484; Goodall *v.* Marshall, 11 N. H. 88, 35 Am. Dec. 472.

Vermont.— Hicks *v.* Clark, 41 Vt. 183; Prentiss *v.* Van Ness, 31 Vt. 95. *Aliter* prior to statutory change. Churchill *v.* Boyden, 17 Vt. 319.

Canada.— Milne *v.* Moore, 24 Ont. 456.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2327, 2328.

An exclusion of creditors of other states is prohibited by the constitution of the United States, which provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. Goodall *v.* Marshall, 11 N. H. 88, 35 Am. Dec. 472.

80. Ramsay *v.* Ramsay, 97 Ill. App. 270.

81. State *v.* Rock County Probate Ct., 67 Minn. 51, 69 N. W. 609, 908. See also Fellows *v.* Lewis, 65 Ala. 343, 39 Am. Rep. 1.

82. Taylor *v.* Barron, 35 N. H. 484; Goodall *v.* Marshall, 14 N. H. 161.

83. Strauss *v.* Phillips, 91 Ill. App. 373 [*affirmed* in 189 Ill. 9, 59 N. E. 560].

84. Ramsay *v.* Ramsay, 196 Ill. 179, 63 N. E. 618 [*affirming* 97 Ill. App. 270].

distribution among other creditors of the domicile where the principal estate is insolvent.[85] The law of the ancillary jurisdiction governs all questions as to the payment of claims in that jurisdiction,[86] and in the case of claims of non-residents it will not recognize and enforce priorities provided for by the laws of other states to the prejudice of its own citizens.[87]

E. Transmission of Residue to Domicile. As a general rule assets remaining in the hands of an ancillary representative after paying the claims of local creditors will be transferred to the place of the domicile for distribution.[88] This rule, however, is not absolute or inflexible, but on the contrary the transfer will or will not be made as the court may deem proper in the exercise of a sound judicial discretion according to the circumstances of the case.[89] In the absence

85. Schneller *v.* Vance, 8 La. 506, 28 Am. Dec. 140.

86. See *supra*, XVI, D, 1.

87. Goodall *v.* Marshall, 11 N. H. 88, 35 Am. Dec. 472; Moye *v.* May, 43 N. C. 131, 54 N. C. 84; Smith *v.* Union Bank, 5 Pet. (U. S.) 518, 8 L. ed. 212 [*affirming* 24 Fed. Cas. No. 14,362, 4 Cranch C. C. 21].

Assets removed from domicile.— Where assets belonging to the domicile have been removed into the ancillary jurisdiction and there is no domiciliary representative to whom they can be transmitted the ancillary representative in paying claims should to the extent of such assets regard the priorities provided for by the law of the domicile. Rowland's Estate, 1 N. Y. St. 308.

88. *Alabama.*— Wright *v.* Phillips, 56 Ala. 69; Childress *v.* Bennett, 10 Ala. 751, 44 Am. Dec. 503.

Arkansas.— Gibson *v.* Dowell, 42 Ark. 164; Williamson *v.* Furbush, 31 Ark. 539.

Connecticut.— Lawrence *v.* Kitteridge, 21 Conn. 577, 56 Am. Dec. 385; Perkins *v.* Stone, 18 Conn. 270.

Georgia.— Sanford *v.* Thompson, 18 Ga. 554.

Illinois.— Young *v.* Wittenmyre, 123 Ill. 303, 14 N. E. 869 [*reversing* 22 Ill. App. 496].

Iowa.— *Re* Gable, 79 Iowa 178, 44 N. W. 352, 9 L. R. A. 218.

Louisiana.— Gravillon *v.* Richard, 13 La. 293, 33 Am. Dec. 563.

Maryland.— Williams *v.* Williams, 5 Md. 467.

Missouri.— Spraddling *v.* Pipkin, 15 Mo. 118.

New York.— Cummings *v.* Banks, 2 Barb. 602; Trimble *v.* Dzieduzyiki, 57 How. Pr. 208; Carroll *v.* Hughes, 5 Redf. Surr. 337; Clark *v.* Butler, 4 Dem. Surr. 378.

Ohio.— Meswald *v.* Marks, 19 Ohio Cir. Ct. 605, 10 Ohio Cir. Dec. 355.

Pennsylvania.— Barry's Appeal, 88 Pa. St. 131; *In re* Robb, 4 Pa. Co. Ct. 337.

South Carolina.— Hamilton *v.* Levy, 41 S. C. 374, 19 S. E. 610.

Tennessee.— See Carr *v.* Lowe, 7 Heisk. 84, holding, however, that the transfer can only be made upon a bill filed for that purpose to which all the persons interested must be made parties.

Vermont.— Probate Ct. *v.* Kimball, 42 Vt. 320.

United States.— Swatzel *v.* Arnold, 23 Fed. Cas. No. 13,682, Woolw. 383.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2322.

In Mississippi the statute provides that personal property shall descend and be distributed according to the laws of that state and any surplus remaining after the payment of creditors will not be transmitted but will be distributed to the next of kin according to the laws of that state. Partee *v.* Kortrecht, 54 Miss. 66.

The rule applies only to the proceeds of personal property and not to the proceeds of a sale of land made for the purpose of partition among heirs. Smith *v.* Smith, 174 Ill. 52, 50 N. E. 1083, 43 L. R. A. 403 [*affirming* 63 Ill. App. 534].

89. *Alabama.*— Fretwell *v.* McLemore, 52 Ala. 124; Cochran *v.* Martin, 47 Ala. 525.

Connecticut.— Lawrence *v.* Kitteridge, 21 Conn. 577, 56 Am. Dec. 385.

Louisiana.—Gaines' Succession, 46 La. Ann. 252, 14 So. 602, 49 Am. St. Rep. 324; Gravillon *v.* Richard, 13 La. 293, 33 Am. Dec. 563.

Maryland.— Dalrymple *v.* Gamble, 66 Md. 298, 7 Atl. 683, 8 Atl. 468; Williams *v.* Williams, 5 Md. 467; Cassilly *v.* Meyer, 4 Md. 1.

New Jersey.— Lewis *v.* Grognard, 17 N. J. Eq. 425.

New York.— *In re* Hughes, 95 N. Y. 55; Despard *v.* Churchill, 53 N. Y. 192; Parsons *v.* Lyman, 20 N. Y. 103; Dammert *v.* Osborn, 65 Hun 585, 20 N. Y. Suppl. 474; Matter of Braithwaite, 19 Abb. N. Cas. 113. *Compare* Matter of Conkling, 15 N. Y. St. 748.

Ohio.— Swearingen *v.* Morris, 14 Ohio St. 424.

Pennsylvania.— Parker's Appeal, 61 Pa. St. 478; *In re* Adlum, 22 Pa. St. 514; Weaver's Estate, 4 Pa. Dist. 260; Irey's Estate, 11 Wkly. Notes Cas. 207.

Tennessee.— Carr *v.* Lowe, 7 Heisk. 84.

Vermont.— Porter *v.* Heydock, 6 Vt. 374.

Virginia.— Moses *v.* Hart, 25 Gratt. 795.

United States.— Harvey *v.* Richards, 11 Fed. Cas. No. 6,184, 1 Mason 381.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2322.

The question is not one of jurisdiction but of judicial discretion under the circumstances of the particular case. Wright *v.* Phillips, 56 Ala. 69; Dammert *v.* Osborn, 65 Hun (N. Y.) 585, 20 N. Y. Suppl. 474; Matter of Braithwaite, 19 Abb. N. Cas. (N. Y.) 113.

If there are unpaid debts in the jurisdiction of the domiciliary administration which are chargeable on the assets according to the

of special circumstances making a local distribution proper the general rule should prevail,[90] since the distribution, wherever made, must be according to the law of the decedent's domicile,[91] and comity requires that it should be accorded to that jurisdiction;[92] but the court may, even in cases where a transmission of the residue is proper, refuse to so order until the domiciliary representative has given a sufficient bond to secure its proper administration.[93] While there is no question as to the authority of the court in the ancillary jurisdiction to order a residue of assets in that jurisdiction transmitted to the domiciliary representative,[94] the court of one jurisdiction has no authority over the representative of the other to compel him to bring in such assets whether it be the court of the domiciliary[95] or of the ancillary[96] jurisdiction.

F. Distribution in Ancillary Jurisdiction. The court may in its discretion order that the residue of assets remaining in the hands of an ancillary representative after paying the claims of local creditors be retained and distributed by him instead of being transmitted to the principal representative,[97] and in a number of cases it has been held that under the circumstances of the particular case a retention of the assets was proper.[98] But since the distribution

law of the domicile, they should be transmitted (Fretwell *v.* McLemore, 52 Ala. 124; Troxell's Estate, 15 Montg. Co. Rep. (Pa.) 29), but unless it is affirmatively shown that there are such debts it will be presumed that none exist (*In re* Hughes, 95 N. Y. 55).

Where the validity of a will is disputed and must be made the subject of litigation and decided according to the law of the domicile the residue of assets should be transmitted. Parsons *v.* Lyman, 20 N. Y. 103; Matter of Dunn, 39 N. Y. App. Div. 510, 57 N. Y. Suppl. 444; Ruebsam's Estate, 26 Wkly. Notes Cas. (Pa.) 311.

After the ancillary representative has filed his final account and been discharged and the fund in his hands awarded to the domiciliary representative, the court has no longer any jurisdiction to order it retained. Mingle's Estate, 4 Pa. Co. Ct. 493. See also Emery *v.* Batchelder, 132 Mass. 452.

In Massachusetts it is now provided by statute that the residue shall be distributed or transmitted as the court in its discretion may direct (Welch *v.* Adams, 152 Mass. 74, 25 N. E. 34, 9 L. R. A. 244; Newell *v.* Peaslee, 151 Mass. 601, 25 N. E. 26; Emery *v.* Batchelder, 132 Mass. 452), but the court cannot order assets to be transmitted until the claims of local creditors are all paid and it has no jurisdiction to determine that there are no unpaid creditors until the time fixed by law within which they may present such claims has expired (Newell *v.* Peaslee, *supra*).

90. *Alabama.*— Wright *v.* Phillips, 56 Ala. 69.

Louisiana.— Gravillon *v.* Richard, 13 La. 293, 33 Am. Dec. 563.

Maryland.— Williams *v.* Williams, 5 Md. 467.

Missouri.— Spraddling *v.* Pipkin, 15 Mo. 118.

Ohio.— Swearingen *v.* Morris, 14 Ohio St. 424.

South Carolina.— Hamilton *v.* Levy, 41 S. C. 374, 19 S. E. 610.

Texas.— Simpson *v.* Knox, 1 Tex. Unrep. Cas. 569.

Vermont.— Probate Ct. *v.* Kimball, 42 Vt. 320.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2322.

91. See DESCENT AND DISTRIBUTION, 14 Cyc. 21 note 54.

92. Wright *v.* Phillips, 56 Ala. 69; Gravillon *v.* Richard, 13 La. 293, 33 Am. Dec. 563; Spraddling *v.* Pipkin, 15 Mo. 118.

93. Hamilton *v.* Levy, 41 S. C. 374, 19 S. E. 610, holding that while the court of the ancillary jurisdiction cannot require the domiciliary representative to give a bond, it may order the assets to be retained unless such a bond is given. See also Carroll *v.* Hughes, 5 Redf. Surr. (N. Y.) 337.

94. Childress *v.* Bennett, 10 Ala. 751, 44 Am. Dec. 503; Gravillon *v.* Richard, 13 La. 293, 33 Am. Dec. 563.

95. Lewis *v.* Grognard, 17 N. J. Eq. 425.

96. Freeman's Appeal, 68 Pa. St. 151.

97. See *supra*, XVI, E.

98. *Alabama.*— Fretwell *v.* McLemore, 52 Ala. 124.

Louisiana.— Gaines' Succession, 46 La. Ann. 252, 14 So. 602, 49 Am. St. Rep. 324.

Maryland.— Cassilly *v.* Meyer, 4 Md. 1.

New York.— *In re* Hughes, 95 N. Y. 55; Matter of Braithwaite, 19 Abb. N. Cas. 113; Suarez *v.* New York, 2 Sandf. Ch. 173.

Pennsylvania.— Welles' Estate, 161 Pa. St. 218, 28 Atl. 1116, 1117; Parker's Appeal, 61 Pa. St. 478; *In re* Adlum, 22 Pa. St. 514; Del Valle's Appeal, 2 Pa. Cas. 270, 5 Atl. 441 [*affirming* 17 Wkly. Notes Cas. 30]; Weaver's Estate, 4 Pa. Dist. 260; Irey's Estate, 11 Wkly. Notes Cas. 207.

United States.— Harvey *v.* Richards, 11 Fed. Cas. No. 6,184, 1 Mason 381.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2329.

When retention proper.— A retention is proper where it appears that those entitled to distribution are within the ancillary jurisdiction and that there are no unpaid claims at the domicile (Fretwell *v.* McLemore, 52 Ala. 124; Cassilly *v.* Meyer, 4 Md. 1; *In re* Hughes, 95 N. Y. 55; Welles' Estate, 161 Pa. St. 218, 28 Atl. 1116, 1117;

of and succession to personal property, wherever situated, is governed by the laws of the state or country where the owner had his domicile at the time of his death,[99] the distribution when made by the ancillary representative must be according to the law of the domicile.[1]

G. Actions by Foreign Representatives — 1. Right of Action — a. General Rule. It is well settled that in the absence of statute an executor or administrator cannot in his representative capacity maintain a suit in one state or country by virtue of letters granted in another.[2] As a matter of right this follows naturally

Parker's Appeal, 61 Pa. St. 478; *In re* Adlum, 22 Pa. St. 514), where no administration has been taken out at the domicile and those entitled to distribution apply for payment in the ancillary jurisdiction (Weaver's Estate, 4 Pa. Dist. 260), or where there are no special reasons for transmission and a local distribution would avoid expense and delay (Fretwell *v.* McLemore, *supra*; Cassilly *v.* Meyer, *supra*; Matter of Braithwaite, 19 Abb. N. Cas. (N. Y.) 113; Welles' Estate, *supra; In re* Adlum, *supra*; Irey's Estate, 11 Wkly. Notes Cas. 207; Harvey *v.* Richards, 11 Fed. Cas. No. 6,184, 1 Mason 381).

Local distributees should be protected as far as can be done without injustice to others interested, and assets may be retained in the ancillary jurisdiction for distribution to them until it appears whether any transmission to the domicile will be necessary. Yerkes' Estate, 8 Pa. Dist. 36.

99. See Descent and Distribution, 14 Cyc. 21 note 54.

1. *Alabama.*— Equitable L. Assur. Soc. *v.* Vogel, 76 Ala. 441, 52 Am. Rep. 344.

Connecticut.— Holcomb *v.* Phelps, 16 Conn. 127. See also Lawrence *v.* Kitteridge, 21 Conn. 577, 56 Am. Dec. 385.

Illinois.— Ramsay *v.* Ramsay, 97 Ill. App. 270.

Maryland.— See De Sobry *v.* De Laistre, 2 Harr. & J. 191, 3 Am. Dec. 555.

Massachusetts.— Stevens *v.* Gaylord, 11 Mass. 256.

Missouri.— See Spraddling *v.* Pipkin, 15 Mo. 118.

New Hampshire.—See Goodall *v.* Marshall, 11 N. H. 88, 35 Am. Dec. 472.

New York.— *In re* Hughes, 95 N. Y. 55; Matter of Braithwaite, 19 Abb. N. Cas. 113; Suarez *v.* New York, 2 Sandf. Ch. 173; Churchill *v.* Prescott, 3 Bradf. Surr. 233.

North Carolina.— See Grant *v.* Reese, 94 N. C. 720.

Ohio.— Swearingen *v.* Morris, 14 Ohio St. 424.

Pennsylvania.— Welles' Estate, 161 Pa. St. 218, 28 Atl. 1116, 1117; *In re* Adlum, 22 Pa. St. 514.

South Carolina.— Graveley *v.* Graveley, 25 S. C. 1, 60 Am. Rep. 478; Cureton *v.* Mills, 13 S. C. 409, 36 Am. Rep. 700.

United States.— Harvey *v.* Richards, 11 Fed. Cas. No. 6,184, 1 Mason 381.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2329.

If an ancillary representative disregards the law of the domicile in making distribution the fact that he has rendered a final accounting of his administration is no bar to an action to compel him to make a proper distribution. Swearingen *v.* Morris, 14 Ohio St. 424.

Where the place of the decedent's domicile is in dispute the question as to who shall make the distribution must be decided by the court having jurisdiction of the subject-matter and the validity of a distribution made under such a decision cannot be questioned by the courts of other jurisdictions. Holcomb *v.* Phelps, 16 Conn. 127.

2. *Alabama.*— Broughton *v.* Bradley, 34 Ala. 694, 73 Am. Dec. 474; Gayle *v.* Blackburn, 1 Stew. 429.

Arkansas.— Fairchild *v.* Hagel, 54 Ark. 61, 14 S. W. 1102; Gibson *v.* Ponder, 40 Ark. 195.

California.— Lewis *v.* Adams, (1885) 8 Pac. 619, 7 Pac. 779.

Connecticut.— Hobart *v.* Connecticut Turnpike Co., 15 Conn. 145; Perkins *v.* Williams, 2 Root 462. *Compare* Nicole *v.* Munford, Kirby 270.

District of Columbia.— U. S. *v.* Wyman, 2 Mackey 368.

Georgia.— Southwestern R. Co. *v.* Paulk, 24 Ga. 356.

Illinois.— People *v.* Peck, 4 Ill. 118.

Iowa.— McClure *v.* Bates, 12 Iowa 77.

Kentucky.— Marrett *v.* Babb, 91 Ky. 88, 15 S. W. 4, 12 Ky. L. Rep. 652.

Louisiana.—Mason *v.* Nutt, 19 La. Ann. 41.

Maryland.—Wright *v.* Gilbert, 51 Md. 146; Glenn *v.* Smith, 2 Gill & J. 493, 20 Am. Dec. 452.

Massachusetts.—Beaman *v.* Elliot, 10 Cush. 172; Goodwin *v.* Jones, 3 Mass. 514, 3 Am. Dec. 173.

Michigan.— Vickery *v.* Beir, 16 Mich. 50; Thayer *v.* Lane, Walk. 200.

Mississippi.— Boyd *v.* Lambeth, 24 Miss. 433.

Missouri.— Gregory *v.* McCormick, 120 Mo. 657, 25 S. W. 565; May *v.* Burk, 80 Mo. 675; Naylor *v.* Moffatt, 29 Mo. 126.

Nebraska.— Creighton *v.* Murphy, 8 Nebr. 349, 1 N. W. 138.

New Hampshire.—Sabin *v.* Gilman, 1 N. H. 193; Carpenter *v.* Wild, Smith 365.

New Jersey.— Porter *v.* Trall, 30 N. J. Eq. 106.

New York.— Taylor *v.* Syme, 162 N. Y. 513, 57 N. E. 83, 31 N. Y. Civ. Proc. 1; *In re* Webb, 11 Hun 124; Middlebrook *v.* Merchants' Bank, 41 Barb. 481, 18 Abb. Pr. 109, 27 How. Pr. 474 [*affirming* 14 Abb. Pr. 462 note, and *affirmed* in 3 Abb. Dec. 295, 3 Keyes 135]; Smith *v.* Webb, 1 Barb. 230; Farrington *v.* American L. & T. Co., 9 N. Y. Suppl. 433, 18 N. Y. Civ. Proc. 135; Pe-

from the principle previously stated that letters of administration granted in one jurisdiction have no extraterritorial force;[3] but the rule that a foreign representative will not be permitted to sue is also based upon the principle that to allow him to do so might be the means of exhausting or diverting local assets to the injury or inconvenience of local creditors,[4] and although the reason of the rule has little force in cases where there are no local creditors it is nevertheless universally recognized and enforced.[5] Under this rule a foreign representative cannot maintain a special proceeding,[6] dismiss an appeal taken by the decedent and pending at the time of his death,[7] or sue jointly with a local representative;[8] nor do statutes providing that if a party dies pending an action the cause of which will survive, his personal representative may take upon himself the prosecution of the action apply to a foreign representative in jurisdictions where a foreign representative is not authorized by statute to sue.[9] By taking out ancillary letters a foreign representative becomes a domestic representative and entitled to sue,[10] and such letters may be taken out after the suit is

terson *v.* Chemical Bank, 29 How. Pr. 240; Chapman *v.* Fish, 6 Hill 554; Robinson *v.* Crandall, 9 Wend. 425; Matter of Jones, 3 Redf. Surr. 257.

North Carolina.— Morefield *v.* Harris, 126 N. C. 626, 36 S. E. 125; Plummer *v.* Brandon, 40 N. C. 190; Hyman *v.* Gaskins, 27 N. C. 267; Leake *v.* Gilchrist, 13 N. C. 73; Helme *v.* Sanders, 10 N. C. 563; Anonymous, 2 N. C. 355; Butts *v.* Price, 1 N. C. 201. *Compare* Stevens *v.* Smart, 4 N. C. 83.

Pennsylvania.— Mansfield *v.* McFarland, 202 Pa. St. 173, 51 Atl. 763; Sayre *v.* Helme, 61 Pa. St. 299 [*disapproving* McCullough *v.* Young, 1 Binn. 63, 4 Dall. 292, 1 L. ed. 838]; Græne *v.* Harris, 1 Dall. 456, 1 L. ed. 221; Mansfield *v.* McFarland, 24 Pa. Co. Ct. 591; Com. *v.* Ware, 6 Phila. 258.

South Carolina.— Stoddard *v.* Aiken, 57 S. C. 134, 35 S. E. 501; Patterson *v.* Pagan, 18 S. C. 584; Kirkpatrick *v.* Taylor, 10 Rich. 393; Cockleton *v.* Davidson, 1 Brev. 15.

Texas.— Terrell *v.* Crane, 55 Tex. 81; Moseby *v.* Burrow, 52 Tex. 396; Simpson *v.* Foster, 46 Tex. 618; Davis *v.* Phillips, 32 Tex. 564; Green *v.* Rugley, 23 Tex. 539; Hynes *v.* Winston, (Civ. App. 1899) 54 S. W. 1069; Summerhill *v.* McAlexander, 1 Tex. App. Civ. Cas. § 584.

Vermont.— Dodge *v.* Wetmore, Brayt. 92.

Virginia.— Dickinson *v.* McCraw, 4 Rand. 158.

Wisconsin.— Smith *v.* Peckham, 39 Wis. 414; Johnson *v.* Wilson, 1 Pinn. 65.

United States.— Johnson *v.* Powers, 139 U. S. 156, 11 S. Ct. 525, 35 L. ed. 112; Noonan *v.* Bradley, 9 Wall. 394, 19 L. ed. 757; Kerr *v.* Moon, 9 Wheat. 565, 6 L. ed. 161; Lewis *v.* McFarland, 9 Cranch 151, 3 L. ed. 687; Dixon *v.* Ramsay, 3 Cranch 319, 2 L. ed. 453 [*affirming* 7 Fed. Cas. No. 3,932, 1 Cranch C. C. 472]; Mills *v.* Knapp, 39 Fed. 592; Allen *v.* Fairbanks, 36 Fed. 402; Eells *v.* Holder, 12 Fed. 668, 2 McCrary 622; Bartlett *v.* Rogers, 2 Fed. Cas. No. 1,079, 3 Sawy. 62; Champlin *v.* Tilley, 5 Fed. Cas. No. 2,586, 1 Brunn. Col. Cas. 71, 3 Day 303; Picquet *v.* Swan, 19 Fed. Cas. No. 11,132, 3 Mason 469; Trecothick *v.* Austin, 24 Fed. Cas. No. 14,164, 4 Mason 16; Wood *v.* Gold, 30 Fed. Cas. No. 17,947, 4 McLean 577. *Compare* Glassell *v.* Wilson, 10 Fed. Cas. No. 5,477, 4 Wash. 59, which is, however, based upon a Pennsylvania decision which is not now the law of that state. See Sayre *v.* Helme, 61 Pa. St. 299.

Canada.— White *v.* Hunter, 1 U. C. Q. B. 452.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2330.

Rule applies to executors as well as administrators. Swatzel *v.* Arnold, 23 Fed. Cas. No. 13,682, Woolw. 383.

Where a state is divided after letters of administration are granted the representative cannot thereafter sue in the part constituting the new jurisdiction. Fenwick *v.* Sears, 1 Cranch (U. S.) 259, 2 L. ed. 101.

An action of ejectment cannot be maintained by a foreign executor without proving the will and taking out local letters of administration. Sims *v.* Hodges, 65 Miss. 211, 3 So. 457.

A suit to revoke an ancillary appointment cannot be maintained by a foreign representative. *In re* Lewis, 32 La. Ann. 385.

3. See *supra*, XVI, A, 1, b.

4. Doolittle *v.* Lewis, 7 Johns. Ch. (N. Y.) 45, 11 Am. Dec. 389; Leake *v.* Gilchrist, 13 N. C. 73; Sayre *v.* Helme, 61 Pa. St. 299; Terrell *v.* Crane, 55 Tex. 81.

The disability is not a want of title but a personal incapacity of the foreign representative to sue. Smith *v.* Peckham, 39 Wis. 414. See *supra*, XVI, B, 3, b, c.

5. Taylor *v.* Syme, 162 N. Y. 513, 57 N. E. 83, 31 N. Y. Civ. Proc. 1. See also Putnam *v.* Pitney, 45 Minn. 242, 47 N. W. 790, 11 L. R. A. 41.

6. Stewart *v.* O'Donnell, 2 Dem. Surr. (N. Y.) 17.

7. Warren *v.* Eddy, 13 Abb. Pr. (N. Y.) 28.

8. Dickinson *v.* McCraw, 4 Rand. (Va.) 158.

9. Goodwin *v.* Jones, 3 Mass. 514, 3 Am. Dec. 173.

10. Hopper *v.* Hopper, 125 N. Y. 400, 26 N. E. 457, 12 L. R. A. 237 [*affirming* 53 Hun 394, 6 N. Y. Suppl. 271, 17 N. Y. Civ. Proc. 214].

instituted, and in such case the fact that they have been so taken out averred by amendment.[11]

b. Exceptions to Rule — (i) *Claim Not a Subject of Local Administration.* A foreign representative may sue to collect a claim where under the law of the state where the action must be brought the claim could not be made the subject of local administration,[12] since in such cases the reasons for the rule prohibiting suits by foreign representatives do not apply.[13]

(ii) *Actions on Foreign Judgments.* Where a representative has recovered a judgment in an action brought by him in his representative capacity in the jurisdiction of his appointment he may sue thereon in his own name in another jurisdiction without taking out ancillary letters of administration.[14]

(iii) *Actions on Bills and Notes.* A foreign representative may sue in his own name on a negotiable bill or note belonging to his decedent's estate if the note is payable to bearer,[15] or if it is payable to the order of the decedent and indorsed by him in blank,[16] or where the note matures after the death of the decedent;[17] and the judgment recovered will be a bar to any subsequent proceeding against defendant on the note.[18] The action, however, is subject to any defense originally open to the promisor,[19] and as the note is the property of the estate, any proper claim which defendant has against the estate may be presented as a set-off in the action in the same manner as though the action were brought by plaintiff as representative.[20] If the note is not negotiable or is made payable to the order of the payee and not indorsed an action thereon can be brought by the representative only in his representative capacity.[21]

(iv) *Actions For Death by Wrongful Act.* In most jurisdictions a

11. Henry *v.* Roe, 83 Tex. 446, 18 S. W. 806; Hodges *v.* Kimball, 91 Fed. 845, 34 C. C. A. 103 [*reversing* 87 Fed. 545]; Black *v.* Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433; McAleer *v.* Clay County, 38 Fed. 707; Swatzel *v.* Arnold, 23 Fed. Cas. No. 13,682, Woolw. 383. *Compare* Wright *v.* Gilbert, 51 Md. 146.

12. Doud *v.* Wolf, 1 Pittsb. (Pa.) 107; Purple *v.* Whithed, 49 Vt. 187.

13. Purple *v.* Whithed, 49 Vt. 187.

14. *Arizona.*— Arizona Cattle Co. *v.* Huber, 4 Ariz. 69, 33 Pac. 555.

California.— Lewis *v.* Adams, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423.

Maryland.— Barton *v.* Higgins, 41 Md. 539.

Massachusetts.— Talmage *v.* Chapel, 16 Mass. 71.

Mississippi.— Rucks *v.* Taylor, 49 Miss. 552.

Missouri.— Tittman *v.* Thornton, 107 Mo. 500, 17 S. W. 979, 16 L. R. A. 410.

Nevada.— Rogers *v.* Hatch, 8 Nev. 35.

Pennsylvania.— Moore *v.* Fields, 42 Pa. St. 467. See also Shakespeare *v.* Fidelity Ins., etc., Co., 97 Pa. St. 173.

Tennessee.— Page *v.* Cravens, 3 Head 383.

Texas.— Cherry *v.* Speight, 28 Tex. 503.

United States.— Wilkins *v.* Ellett, 108 U. S. 256, 2 S. Ct. 641, 27 L. ed. 718.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2331.

Basis of rule.— While this rule is based upon the ground that the action is maintainable because brought by the representative in his personal capacity (Lewis *v.* Adams, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423; Tillman *v.* Thornton, 107 Mo. 500, 17 S. W. 979, 16 L. R. A. 410), it is important to the purposes of justice that it should be so, since a local representative not being a privy to such judgment could not sue thereon (Talmage *v.* Chapel, 16 Mass. 71. See also Lewis *v.* Adams, *supra*).

Judgment for costs.— A foreign administrator sued in the state of his appointment who prevails in the action and recovers judgment for costs may sue in another state on such judgment without filing an exemplified copy of his letters of administration. Green *v.* Heritage, 63 N. J. L. 455, 43 Atl. 698.

A representative who is made a party to a judgment recovered by the decedent under statutes providing that he may be made a party and sue thereon in his own name may sue in another jurisdiction in the same manner as if the judgment had been recovered by him personally. Greasons *v.* Davis, 9 Iowa 219.

If the foreign representative dies pending suit on the judgment the action may be revived in the name of his representative. Tittman *v.* Thornton, 107 Mo. 500, 17 S. W. 979, 16 L. R. A. 410.

15. Gage *v.* Johnson, 20 Me. 437; Knapp *v.* Lee, 42 Mich. 41, 3 N. W. 244; Robinson *v.* Crandall, 9 Wend. (N. Y.) 425; Patchen *v.* Wilson, 4 Hill (N. Y.) 57; Sanford *v.* McCreedy, 28 Wis. 103.

16. Barrett *v.* Barrett, 8 Me. 353.

17. Giddings *v.* Green, 48 Fed. 489.

18. Knapp *v.* Lee, 42 Mich. 41, 3 N. W. 244.

19. Barrett *v.* Barrett, 8 Me. 353.

20. Knapp *v.* Lee, 42 Mich. 41, 3 N. W. 244.

21. See Knapp *v.* Lee, 42 Mich. 41, 3 N. W. 244.

foreign representative may sue to recover damages for the wrongful death of the decedent.[22] This is the law under statutes providing that the action shall be brought by the personal representative and that the recovery shall be for the exclusive benefit of the widow and children or next of kin,[23] since in such cases the action is not to recover assets of the estate,[24] and the representative does not sue in his representative capacity but as a trustee deriving his authority from the statute.[25] A foreign representative cannot sue, however, if under the statute the recovery becomes assets of the decedent's estate,[26] or if under the law of the state of his appointment those entitled to the recovery must sue therefor in their own names.[27]

(v) *ACTIONS IN PERSONAL CAPACITY.* The rule that a representative cannot sue outside of the jurisdiction of his appointment applies only to actions which he must bring in his representative capacity and not where he sues as an individual.[28] If the cause of action is one which did not accrue to the decedent in his lifetime but to the representative after the former's death the representative

22. *Illinois.*—Wabash, etc., R. Co. *v.* Shacklet, 105 Ill. 364, 44 Am. Rep. 791 [*reversing* 10 Ill. App. 404].

Indiana.— Memphis, etc., Packet Co. *v.* Pikey, 142 Ind. 304, 40 N. E. 527; Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48.

Kansas.— Kansas Pac. R. Co. *v.* Cutter, 16 Kan. 568.

New York.— See Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48, 38 Am. Rep. 491.

Pennsylvania.— Boulden *v.* Pennsylvania R. Co., 205 Pa. St. 264, 54 Atl. 906.

United States.— Florida Cent., etc., R. Co. *v.* Sullivan, 120 Fed. 799, 57 C. C. A. 167, 61 L. R. A. 410; Popp *v.* Cincinnati, etc., R. Co., 96 Fed. 465; McCarty *v.* New York, etc., R. Co., 62 Fed. 437. *Contra,* Maysville St. R., etc., Co. *v.* Marvin, 59 Fed. 91, 8 C. C. A. 21; Mackay *v.* Central R. Co., 4 Fed. 617.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2332.

23. Memphis, etc., Packet Co. *v.* Pikey, 142 Ind. 304, 40 N. E. 527; Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48; Kansas Pac. R. Co. *v.* Cutter, 16 Kan. 568; Boulden *v.* Pennsylvania R. Co., 205 Pa. St. 264, 54 Atl. 906; McCarty *v.* New York, etc., R. Co., 62 Fed. 437. *Contra,* Mackay *v.* Central R. Co., 4 Fed. 617.

24. Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48; Kansas Pac. R. Co. *v.* Cutter, 16 Kan. 568; Boulden *v.* Pennsylvania R. Co., 205 Pa. St. 264, 54 Atl. 906; McCarty *v.* New York, etc., R. Co., 62 Fed. 437.

25. Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48; Boulden *v.* Pennsylvania R. Co., 205 Pa. St. 264, 54 Atl. 906; McCarty *v.* New York, etc., R. Co., 62 Fed. 437.

26. Maysville St. R., etc., Co. *v.* Marvin, 59 Fed. 91, 8 C. C. A. 21.

27. Limekiller *v.* Hannibal, etc., R. Co., 33 Kan. 83, 5 Pac. 401, 52 Am. Rep. 523 [*distinguishing* Kansas Pac. R. Co. *v.* Cutter, 16 Kan. 568].

28. *California.*— Fox *v.* Tay, 89 Cal. 339, 24 Pac. 855, 26 Pac. 897, 23 Am. St. Rep. 474; Lewis *v.* Adams, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423.

Maine.— Barrett *v.* Barrett, 8 Me. 346.

Mississippi.— Rucks *v.* Taylor, 49 Miss. 552.

Missouri.— Tittman *v.* Thornton, 107 Mo. 500, 17 S. W. 979, 16 L. R. A. 410; Morton *v.* Hatch, 54 Mo. 408; State *v.* Kaime, 4 Mo. App. 479.

New York.— Smith *v.* Webb, 1 Barb. 230; Lawrence *v.* Lawrence, 3 Barb. Ch. 71.

United States.— Trecothick *v.* Austin, 24 Fed. Cas. No. 14,164, 4 Mason 16.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2333.

Although the right be derived under a foreign will if the representative sues in his own right no local administration need be taken out. Trecothick *v.* Austin, 24 Fed. Cas. No. 14,164, 4 Mason 16.

Actions or suits maintainable.— A foreign representative may sue in his own name on any contract made by himself with defendant (Barrett *v.* Barrett, 8 Me. 346; Wolf *v.* Sun Ins. Co., 75 Mo. App. 306; Lawrence *v.* Lawrence, 3 Barb. Ch. (N. Y.) 71); to foreclose a mortgage given to him as representative (Tyer *v.* Charleston Rice Milling Co., 32 S. C. 598, 10 S. E. 1067); to collect a note payable to himself as representative taken in the course of his administration (Trotter *v.* White, 10 Sm. & M. (Miss.) 607); to recover damages for the infringement of a patent granted to him for an invention of the decedent (Goodyear *v.* Hullihen, 10 Fed. Cas. No. 5,573, 2 Hughes 492); to recover property of the estate to which he is personally entitled as a legatee (Morton *v.* Hatch, 54 Mo. 408; Smith *v.* Webb, 1 Barb. (N. Y.) 230), or title to which he has acquired by purchases from other legatees (Smith *v.* Webb, *supra*); or to recover lands devised to him in trust (Lewis *v.* McFarland, 9 Cranch (U. S.) 151, 3 L. ed. 687. See also Chapman *v.* Headley, (Ky. 1887) 4 S. W. 189). He may also sue to recover possession of property which is assets of the estate and which after vesting in him as representative has been removed into another jurisdiction (Crawford *v.* Graves, 15 La. Ann. 243; Beckham *v.* Wittkowski, 64 N. C. 464; Giddings *v.* Green, 48 Fed. 489), but this principle does not apply where the representative himself wrongfully removes the property from the jurisdiction where it properly belongs, since

may sue thereon in his own name,[29] and the fact that in such an action he styles himself as representative will not defeat the action but may be disregarded as surplusage.[30]

c. Statutory Authority to Sue — (i) *Statutory Provisions.* In a number of jurisdictions the right to sue has been conferred upon foreign representatives by statute.[31] Under these statutes a foreign representative may sue out an execution on a judgment rendered in favor of the decedent in his lifetime,[32] or may prosecute an action commenced by the decedent where the cause of action survives and no local representative has been appointed;[33] but such statutes do not confer upon foreign representatives any greater power in reference to property of the estate than is conferred by their letters of administration,[34] and do not authorize them to maintain any suit which they would not be authorized to bring in the court of the state where they were appointed.[35] Where under the statutes the right to sue is not general it can be exercised only under the conditions[36] and with regard to the particular causes of action specified;[37] but a general right of action applies to actions for torts as well as those arising out of contract.[38] Statutes authorizing foreign representatives to sue do not oust the jurisdiction of probate courts to appoint ancillary representatives,[39] who when appointed have the superior right to sue in the jurisdiction of their appointment;[40] and such an

by so doing he forfeits his title thereto (Kilpatrick *v.* Bush, 23 Miss. 199).

29. Fox *v.* Tay, 89 Cal. 339, 24 Pac. 855, 26 Pac. 897, 23 Am. St. Rep. 474; Barrett *v.* Barrett, 8 Me. 346; Lawrence *v.* Lawrence, 3 Barb. Ch. (N. Y.) 71.

30. Lewis *v.* Adams, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423; Barton *v.* Higgins, 41 Md. 539; State *v.* Kaime, 4 Mo. App. 479; Page *v.* Cravens, 3 Head (Tenn.) 383.

31. *Alabama.*— Bell *v.* Nichols, 38 Ala. 678; Manly *v.* Turnipseed, 37 Ala. 522; Broughton *v.* Bradley, 34 Ala. 694, 73 Am. Dec. 474; Carr *v.* Wyley, 23 Ala. 821; Harrison *v.* Mahorner, 14 Ala. 829.

Arkansas.— Fairchild *v.* Hagel, 54 Ark. 61, 14 S. W. 1102; Clark *v.* Holt, 16 Ark. 257.

Delaware.— Fidelity Ins., etc., Co. *v.* Niven, 5 Houst. 416.

District of Columbia.— Weaver *v.* Baltimore, etc., R. Co., 21 D. C. 499.

Florida.— Margarum *v.* J. S. Christie Orange Co., 37 Fla. 165, 19 So. 637; Blewitt *v.* Nicholson, 2 Fla. 200.

Georgia.— Patterson *v.* Blanchard, 98 Ga. 518, 25 S. E. 572; Mechanics', etc., Bank *v.* Harrison, 68 Ga. 463; Buck *v.* Johnson, 67 Ga. 82; Mansfield *v.* Turpin, 32 Ga. 260; Averitt *v.* Pope, 30 Ga. 660.

Illinois.— Hickox *v.* Frank, 102 Ill. 660; Bonnell *v.* Holt, 89 Ill. 71; Keefer *v.* Mason, 36 Ill. 406; Walker *v.* Walker, 55 Ill. App. 118.

Indiana.—Jeffersonville R. Co. *v.* Hendricks, 26 Ind. 228; Matlock *v.* Powell, 14 Ind. 378; Naylor *v.* Moody, 2 Blackf. 247.

Iowa.— Karrick *v.* Pratt, 4 Greene 144.

Kansas.— Dunlap *v.* McFarland, 25 Kan. 488; Ravenscraft *v.* Pratt, 22 Kan. 20.

Kentucky.— Loval *v.* Johnson, 9 B. Mon. 556; Huling *v.* Fort, 2 Litt. 193.

Maryland.— Mangun *v.* Webster, 7 Gill 78.

Minnesota.— Babcock *v.* Collins, 60 Minn. 73, 61 N. W. 1020, 51 Am. St. Rep. 503.

Mississippi.—Sims *v.* Hodges, 65 Miss. 211, 3 So. 457.

Ohio.— Purcill *v.* Heinberger, 3 Ohio Dec. (Reprint) 343; *In re* McCreight, 9 Ohio S. & C. Pl. Dec. 454, 6 Ohio N. P. 481.

Wisconsin.— Murray *v.* Norwood, 77 Wis. 405, 46 N. W. 499; Smith *v.* Peckham, 39 Wis. 414.

United States.— Hayes *v.* Pratt, 147 U. S. 557, 13 S. Ct. 503, 37 L. ed. 279; Blydenburgh *v.* Lowry, 3 Fed. Cas. No. 1,582, 4 Cranch C. C. 368; Price *v.* Morris, 19 Fed. Cas. No. 11,414, 5 McLean 4.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2330.

In Tennessee the act of 1809 authorizing foreign representatives to sue (see Smith *v.* Mabry, 7 Yerg. 26) was repealed by the act of 1840. Williams *v.* Saunders, 5 Coldw. 60.

32. Keefer *v.* Mason, 36 Ill. 406.

33. Noonan *v.* Bradley, 12 Wall. (U. S.) 121, 20 L. ed. 279. *Compare* Jones *v.* Lamar, 77 Ga. 149.

If the foreign representative dies pending an action instituted by him, an administrator *de bonis non* cannot be substituted as a party. Jones *v.* Lamar, 77 Ga. 149. See also Isbell *v.* Blanchard, 94 Ga. 678, 21 S. E. 720.

34. Jones *v.* Cliett, 114 Ga. 673, 40 S. E. 719.

35. Jones *v.* Cliett, 114 Ga. 673, 40 S. E. 719.

36. Southwestern R. Co. *v.* Paulk, 24 Ga. 356.

37. Louisville, etc., R. Co. *v.* Brantley, 96 Ky. 297, 28 S. W. 477, 16 Ky. L. Rep. 691, 49 Am. St. Rep. 291; Maysville St. R., etc., Co. *v.* Marvin, 59 Fed. 91, 8 C. C. A. 21.

38. Averitt *v.* Pope, 30 Ga. 660.

39. Broughton *v.* Bradley, 34 Ala. 694, 73 Am. Dec. 474; Purcell *v.* Heinberger, 3 Ohio Dec. (Reprint) 343; Brown *v.* Wright, 4 Yerg. (Tenn.) 57.

40. Walker *v.* Welker, 55 Ill. App. 118; Conner *r.* Paul, 12 Bush (Ky.) 144; Purcell *v.* Heinberger, 3 Ohio Dec. (Reprint) 343.

appointment made after an action is instituted by a foreign representative presents a good defense to a further maintenance of the action.[41] In some states the statutes expressly restrict the right of a foreign representative to sue to cases where no local representative has been appointed.[42] Where there is no local representative, the right of a foreign domiciliary representative to sue is superior to that of a foreign ancillary representative.[43]

(II) *FILING LETTERS OF ADMINISTRATION.* In some states the statutes authorizing foreign representatives to sue make no distinction between such representatives and those appointed under their own laws.[44] In others the foreign representative is required to file his original letters of administration or an authenticated copy thereof in some court of the state where the action is brought.[45] This requirement, however, is merely to furnish evidence of plaintiff's representative character,[46] and may be complied with after the suit is instituted,[47] unless the statute expressly provides that such letters shall be filed before commencing the action.[48] The failure of a foreign representative to comply with the statutory requirements as to filing his letters of administration is a matter of defense which unless specially pleaded is waived.[49]

(III) *BOND.* Under some of the statutes a foreign executor or administrator bringing an action in a state court is required to give a bond,[50] in some cases a bond for costs being required,[51] and in others the requirement being that before

See also Smith *v.* Cuyler, 78 Ga. 654, 3 S. E. 406.

Where a debtor has been appointed a representative he may plead his appointment in bar of an action brought by the foreign representative to collect the debt. Kennedy *v.* Kennedy, 8 Ala. 391.

41. Broughton *v.* Bradley, 34 Ala. 694, 73 Am. Dec. 474.

In Illinois the statute provides that where a suit is commenced by a foreign representative and before final judgment a local representative is appointed he may be substituted as a party and the proceeds of the judgment shall be assets in his hands. Walker *v.* Welker, 55 Ill. App. 118.

42. Walker *v.* Welker, 55 Ill. App. 118; Conner *v.* Paul, 12 Bush (Ky.) 144. See also Patterson *v.* Blanchard, 98 Ga. 518, 25 S. E. 572.

If the cause of action accrued to the foreign representative in his personal capacity he may sue thereon notwithstanding a local representative has been appointed. Smith *v.* Cuyler, 78 Ga. 654, 3 S. E. 406.

43. Harrison *v.* Mahorner, 14 Ala. 829.

44. Fairchild *v.* Hagel, 54 Ark. 61, 14 S. W. 1102; Clark *v.* Holt, 16 Ark. 257; Weaver *v.* Baltimore, etc., R. Co., 21 D. C. 499; Mangun *v.* Webster, 7 Gill (Md.) 78.

In Indiana it was formerly necessary that a foreign representative should have his letters recorded in a circuit court of that state (Naylor *v.* Moody, 2 Blackf. 247), but this is not necessary under the later statutes (Upton *v.* Adams, 27 Ind. 432. See also Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48).

45. *Alabama.*— Harris *v.* Moore, 72 Ala. 507; Hatchett *v.* Berney, 65 Ala. 39.

Georgia.— Buck *v.* Johnson, 67 Ga. 82; Turner *v.* Linam, 55 Ga. 253; Mansfield *v.* Turpin, 32 Ga. 260.

Illinois.— Walker *v.* Welker, 55 Ill. App. 118.

Iowa.— Karrick *v.* Pratt, 4 Greene 144.

Minnesota.— Babcock *v.* Collins, 60 Minn. 73, 61 N. W. 1020, 51 Am. St. Rep. 503; Fogle *v.* Schaeffer, 23 Minn. 304; Pott *v.* Pennington, 16 Minn. 509.

Mississippi.— Sims *v.* Hodges, 65 Miss. 211, 3 So. 457; Hope *v.* Hunt, 59 Miss. 174.

Wisconsin.— Murray *v.* Norwood, 77 Wis. 405, 46 N. W. 499; Smith *v.* Peckham, 39 Wis. 414.

United States.— Hayes *v.* Pratt, 147 U. S. 557, 13 S. Ct. 503, 37 L. ed. 279.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2334.

In Tennessee the statute provides that the representative "shall produce" a certified copy of his letters. Smith *v.* Mabry, 7 Yerg. 26.

46. Smith *v.* Peckham, 39 Wis. 414.

47. Buecker *v.* Carr, 60 N. J. Eq. 300, 47 Atl. 34; Smith *v.* Peckham, 39 Wis. 414.

Probate of the foreign will of a deceased mortgagee may be made after a suit to foreclose has been commenced by his executor. Gray *v.* Franks, 86 Mich. 382, 49 N. W. 130.

48. Fogle *v.* Schaeffer, 23 Minn. 304.

49. Berlin *v.* Sheffield Coal, etc., Co., 124 Ala. 322, 26 So. 933.

After the jury is sworn it is too late to move to dismiss the suit of a non-resident executor because he has not filed his letters testamentary. Thomas *v.* Tanner, 6 T. B. Mon. (Ky.) 52.

50. See Harris *v.* Moore, 72 Ala. 507; Northwestern Mut. L. Ins. Co. *v.* Lowry, 13 Ky. L. Rep. 205; and cases cited in the following notes.

51. Walker *v.* Welker, 55 Ill. App. 118; Swift *v.* Donohue, 104 Ky. 137, 46 S. W. 683, 20 Ky. L. Rep. 446.

Failure to file bond for costs should be pleaded in abatement. Newton *v.* Cocke, 10 Ark. 169.

Waiver of objection.— An objection that a bond for costs was not filed is waived by

judgment can be rendered the executor or administrator must give a bond for the proper administration of the amount recovered.[52]

2. Waiver of Objection as to Incapacity. The objection that a foreign representative cannot sue is waived by failure to take it at the proper time and in the proper manner.[53]

3. Limitations.[54] Where a foreign representative is authorized by statute to sue without taking out ancillary letters of administration the statute of limitations begins to run against the right of action from the date of his foreign appointment,[55] but where ancillary letters must be taken out the statute does not begin to run until the date of the ancillary appointment.[56]

4. Parties. A domestic representative need not be made a party to an action brought by a representative appointed in another state, where the foreign representative is authorized by statute to sue;[57] and where a foreign representative takes out ancillary letters and brings an action in the ancillary jurisdiction it is not necessary to make a foreign co-representative who did not also take out ancillary letters a party.[58]

5. Pleading — a. Declaration or Complaint. Where foreign representatives are authorized by statute to sue, such actions are subject to the same rules of pleading as actions brought by domestic representatives.[59] Letters of administration may be pleaded with a profert where the representative is plaintiff,[60] and where a profert is made the effect is the same as if the letters were set out in the declaration and it is not necessary to aver in what state they were granted.[61] Where a foreign executor takes out ancillary letters and sues as an ancillary representative it is sufficient for him to allege his ancillary appointment without alleging that the will has been admitted to probate.[62]

b. Plea or Answer. Where foreign representatives are not authorized to sue the fact that plaintiff is a foreign representative should ordinarily be pleaded in abatement,[63] and if not so pleaded will be waived;[64] but if the fact appears upon the face of the complaint the objection may be taken by demurrer,[65] and will be waived if not so taken.[66] Where a foreign representative is authorized to sue, his right to do so can be questioned only by a plea under oath denying his representative capacity;[67] but defendant may by demanding oyer of the letters and demurring to the declaration take advantage of any material variance between

failure to file a special demurrer or to ask a rule requiring its execution. Swift *v.* Donohue, 104 Ky. 137, 46 S. W. 683, 20 Ky. L. Rep. 446.

52. Hatchett *v.* Berney, 65 Ala. 39; Loval *v.* Johnson, 9 B. Mon. (Ky.) 556.

Where the representative sues in his personal capacity this bond is not required. Wayland *v.* Porterfield, 1 Metc. (Ky.) 638; Steitler *v.* Hellenbush, 61 S. W. 701, 23 Ky. L. Rep. 174.

53. Gregory *v.* McCormick, 120 Mo. 657, 25 S. W. 565; Robbins *v.* Wells, 1 Rob. (N. Y.) 666, 18 Abb. Pr. (N. Y.) 191, 26 How. Pr. (N. Y.) 15; Johnson *v.* Wilson, 1 Pinn. (Wis.) 65; McAleer *v.* Clay County, 38 Fed. 707. See also Sparks *v.* National Masonic Acc. Assoc., 100 Iowa 458, 69 N. W. 678; Champlin *v.* Tilley, 5 Fed. Cas. No. 2,586, Brunn. Col. Cas. 71, 3 Day 303.

On appeal it will be presumed that plaintiff was duly authorized to sue, where no objection was made on the trial. Bertron *v.* Stuart, 43 La. Ann. 1171, 10 So. 295.

Manner of pleading objection see *infra*, XVI, G, 5, b.

54. See, generally, Limitations of Actions.

55. Bell *v.* Nichols, 38 Ala. 678; Manly *v.* Turnipseed, 37 Ala. 522.

56. Hobart *v.* Connecticut Turnpike Co., 15 Conn. 145.

57. Isbill *v.* Blanchard, 94 Ga. 678, 21 S. E. 720.

58. Lawrence *v.* Townsend, 88 N. Y. 24.

59. Collins *v.* Ayers, 13 Ill. 358. See *supra*, XIV.

60. Collins *v.* Ayers, 13 Ill. 358.

61. Carr *v.* Wyley, 23 Ala. 821.

62. Leland *v.* Manning, 4 Hun (N. Y.) 7.

63. Johnson *v.* Wilson, 1 Pinn. (Wis.) 65; McAleer *v.* Clay County, 38 Fed. 707.

64. Johnson *v.* Wilson, 1 Pinn. (Wis.) 65; McAleer *v.* Clay County, 38 Fed. 707.

65. Gregory *v.* McCormick, 120 Mo. 657, 25 S. W. 565; Robbins *v.* Wells, 1 Rob. (N. Y.) 666, 18 Abb. Pr. (N. Y.) 191, 26 How. Pr. (N. Y.) 15; Duchesse d'Auxy *v.* Porter, 41 Fed. 68.

66. Gregory *v.* McCormick, 120 Mo. 657, 25 S. W. 565; Robbins *v.* Wells, 1 Rob. (N. Y.) 666, 18 Abb. Pr. (N. Y.) 191, 26 How. Pr. (N. Y.) 15.

67. Jeffersonville R. Co. *v.* Hendricks, 26 Ind. 228; Matlock *v.* Powell, 14 Ind. 378. See also Hope *v.* Hurt, 59 Miss. 174.

the letters produced and the statement of them in the declaration.[68] If plaintiff's representative capacity is not questioned and the only objection is that he has not complied with some statutory requirement this fact should be pleaded in abatement.[69] A motion to dismiss a suit because the plaintiff was appointed administrator in another state is too late after a plea on the merits.[70]

6. Proof of Representative Capacity. The foreign representative need not on the trial make any proof of his representative capacity unless the fact is put in issue by defendant,[71] but if it is put in issue he must make proof of his foreign appointment.[72] It is provided by statute in several jurisdictions that a duly authenticated copy of his foreign letters is sufficient proof.[73] In the absence of statute the fact is sufficiently established by the production of his foreign letters,[74] or of a certified copy of the record of the probate court and a certificate of the probate judge to the effect that such letters were issued.[75]

7. Defenses. In an action by a foreign representative on a cause of action accruing to the decedent in his lifetime defendant is entitled to the same rights of defense as if the action had been instituted under local letters of administration.[76]

H. Actions Against Foreign Representatives — 1. General Rule. The general rule is that a representative appointed in one jurisdiction cannot be sued in his representative capacity in any other jurisdiction,[77] nor can an action pending

68. Collins *v.* Ayers, 13 Ill. 358.

69. Smith *v.* Peckham, 39 Wis. 414.

A plea under oath is not necessary where the only objection is that he has not filed an authenticated copy of his foreign appointment. Hope *v.* Hunt, 59 Miss. 174.

70. McGrew *v.* Browder, 2 Mart. N. S. (La.) 17.

71. Collins *v.* Ayers, 13 Ill. 358; Jeffersonville R. Co. *v.* Hendricks, 26 Ind. 228; Matlock *v.* Powell, 14 Ind. 378.

72. Collins *v.* Ayers, 13 Ill. 358; Jeffersonville R. Co. *v.* Hendricks, 26 Ind. 228.

73. Collins *v.* Ayers, 13 Ill. 358; Jeffersonville R. Co. *v.* Hendricks, 26 Ind. 228; Jelly *v.* Stevens, 4 Ind. 510; Mangun *v.* Webster, 7 Gill (Md.) 78.

74. Cheney *v.* Stone, 29 Fed. 885.

75. Carmichael *v.* Saint, 16 Ark. 28.

76. Russell *v.* Hubbard, 76 Ga. 618.

77. *Alabama.*— Jefferson *v.* Beall, 117 Ala. 436, 23 So. 44, 67 Am. St. Rep. 177.

Arkansas.—Greer *v.* Ferguson, 56 Ark. 324, 19 S. W. 966.

Connecticut.— Russell *v.* Hooker, 67 Conn. 24, 34 Atl. 711, 35 L. R. A. 495; Hedenberg *v.* Hedenberg, 46 Conn. 30, 33 Am. Rep. 10.

District of Columbia.— U. S. *v.* Wyman, 2 Mackey 368; Plumm *v.* Bateman, 2 App. Cas. 156.

Florida.— Sloan *v.* Sloan, 21 Fla. 589; Gordon *v.* Clarke, 10 Fla. 179.

Georgia.— Jackson *v.* Johnson, 34 Ga. 511, 89 Am. Dec. 263; Davis *v.* Smith, 5 Ga. 274, 47 Am. Dec. 279.

Illinois.— Elting *v.* Biggsville First Nat. Bank, 173 Ill. 368, 50 N. E. 1095; Judy *v.* Kelley, 11 Ill. 211, 50 Am. Dec. 455.

Kentucky.— Baker *v.* Smith, 3 Metc. 264; Curle *v.* Moor, 1 Dana 445.

Massachusetts.—Norton *v.* Palmer, 7 Cush. 523; Campbell *v.* Sheldon, 13 Pick. 8; Borden *v.* Borden, 5 Mass. 67, 4 Am. Dec. 32.

Mississippi.— Winter *v.* Winter, Walk. 211.

Nebraska.— Burton *v.* Williams, 63 Nebr. 431, 88 N. W. 765; Creighton *v.* Murphy, 8 Nebr. 349, 1 N. W. 138.

New Jersey.— Durie *v.* Blauvelt, 49 N. J. L. 114, 6 Atl. 312; Van Dyke *v.* Van Dyke, 36 N. J. Eq. 521.

New York.— Flandrow *v.* Hammond, 13 N. Y. App. Div. 325, 43 N. Y. Suppl. 143, 4 N. Y. Annot. Cas. 56; Murphy *v.* Hall, 38 Hun 528; Field *v.* Gibson, 20 Hun 274; Metcalf *v.* Clark, 41 Barb. 45; Vermilya *v.* Beatty, 6 Barb. 429; Ferguson *v.* Harrison, 27 Misc. 380, 58 N. Y. Suppl. 850; Hankinson *v.* Page, 3 How. Pr. N. S. 323.

North Carolina.— Brookshire *v.* Dubose, 55 N. C. 276.

Ohio.— Pedan *v.* Robb, 8 Ohio 227.

Pennsylvania.— Magraw *v.* Irwin, 87 Pa. St. 139, 5 Wkly. Notes Cas. 557 [*disapproving* Evans *v.* Tatem, 9 Serg. & R. 252, 11 Am. Dec. 717; Swearinger *v.* Pendleton, 4 Serg. & R. 389]; Brodie *v.* Bickley, 2 Rawle 431; Laughlin *v.* Solomon, 5 Pa. Dist. 282. But see Laughlin *v.* Solomon, 180 Pa. St. 177, 36 Atl. 704, 57 Am. St. Rep. 633, holding that a foreign executor within the jurisdiction of the Pennsylvania courts is liable to suit by a resident creditor of his decedent, and such suit will be sustained unless it would trench unduly on the jurisdiction of another court already attached or would expose parties subject to such jurisdiction to inequitable burdens.

South Carolina.— Garden *v.* Hunt, Cheves Eq. 42.

Tennessee.— Sparks *v.* White, 7 Humphr. 86; Allsup *v.* Allsup, 10 Yerg. 283.

Virginia.— Fugate *v.* Moore, 86 Va. 1045, 11 S. E. 1063, 19 Am. St. Rep. 926.

West Virginia.— Oney *v.* Ferguson, 41 W. Va. 568, 23 S. E. 710; Crumlish *v.* Shenandoah Valley R. Co., 40 W. Va. 627, 22 S. E. 90.

United States.— Vaughan *v.* Northup, 15 Pet. 1, 10 L. ed. 639; Skiff *v.* White, 127 Fed.

against the decedent at the time of his death be revived against a foreign representative of his estate.[78] According to the weight of authority a foreign representative cannot in his representative capacity even voluntarily submit to a suit,[79] and if he does so a judgment rendered against him will not bind the estate,[80] or estop him from disputing the claim on which the action is brought when sued thereon in his own jurisdiction.[81]

2. Exceptions to Rule — a. In General. Exceptions to the rule that a foreign representative cannot be sued have been made in a number of cases, but these exceptions are not universally recognized.[82] Practically all the cases have been suits in equity where peculiar circumstances were involved,[83] and which were permitted upon the ground of their necessity to prevent a failure of justice.[84] The proper rule has been said to be that an action at law should never be allowed to recover a mere money demand,[85] and that suits in equity should be allowed only when necessary to prevent a complete failure of justice.[86] Such suits have been allowed where a foreign representative came into another jurisdiction and

175; Wilson *v.* Smith, 126 Fed. 916, 61 C. C. A. 446 [*affirming* 117 Fed. 707]; Filer, etc., Co. *v.* Rainey, 120 Fed. 718; Lewis *v.* Parrish, 115 Fed. 285, 53 C. C. A. 77; Scruggs *v.* Scruggs, 105 Fed. 28; Caldwell *v.* Harding, 4 Fed. Cas. No. 2,301, 5 Blatchf. 501; Mellus *v.* Thompson, 16 Fed. Cas. No. 9,405, 1 Cliff. 125; Security Ins. Co. *v.* Taylor, 21 Fed. Cas. No. 12,607, 2 Biss. 446.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2344.

Federal courts sitting in one state apply the general rule as to suits against representatives appointed in another state. Filer, etc., Co. *v.* Rainey, 120 Fed. 718.

78. Flandrow *v.* Hammond, 13 N. Y. App. Div. 325, 43 N. Y. Suppl. 143, 4 N. Y. Annot. Cas. 56; Lampton *v.* Nichols, 2 Cinc. Super. Ct. 55.

79. *Arkansas.*— Greer *v.* Ferguson, 56 Ark. 324, 19 S. W. 966.

Florida.— Sloan *v.* Sloan, 21 Fla. 589.

Illinois.— Judy *v.* Kelley, 11 Ill. 211, 50 Am. Dec. 455.

Montana.—Braithwaite *v.* Harvey, 14 Mont. 208, 36 Pac. 38, 43 Am. St. Rep. 625, 27 L. R. A. 101.

New York.— Flandrow *v.* Hammond, 13 N. Y. App. Div. 325, 43 N. Y. Suppl. 143, 4 N. Y. Annot. Cas. 56.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2344.

Contra.— Davis *v.* Connelly, 4 B. Mon. (Ky.) 136; Newark Sav. Inst. *v.* Jones, 35 N. J. Eq. 406; Ellis *v.* Northwestern Mut. L. Ins. Co., 100 Tenn. 177, 43 S. W. 766. See also Moss *v.* Rowland, 3 Bush (Ky.) 505.

On the death of a defendant pendente lite his representative appointed in another state cannot appear and defend the action. Greer *v.* Ferguson, 56 Ark. 324; Flandrow *v.* Hammond, 13 N. Y. App. Div. 325, 43 N. Y. Suppl. 143, 4 N. Y. Annot. Cas. 56.

80. Elting *v.* Biggsville First Nat. Bank, 173 Ill. 368, 50 N. E. 1095; Judy *v.* Kelley, 11 Ill. 211, 50 Am. Dec. 455.

81. Braithwaite *v.* Harvey, 14 Mont. 208, 36 Pac. 38, 43 Am. St. Rep. 625, 27 L. R. A. 101.

82. See Judy *v.* Kelley, 11 Ill. 211, 214, 50 Am. Dec. 455, where the court said: "It may be doubted whether these decisions can be supported on principle or authority."

83. *Alabama.*— Colbert *v.* Daniel, 32 Ala. 314; Julian *v.* Reynolds, 8 Ala. 680; Calhoun *v.* King, 5 Ala. 523.

Georgia.— Lake *v.* Hardee, 57 Ga. 459.

Kentucky.— Manion *v.* Titsworth, 18 B. Mon. 582.

New York.— Montgomery *v.* Boyd, 78 N. Y. App. Div. 64, 79 N. Y. Suppl. 879; Gulick *v.* Gulick, 33 Barb. 92, 21 How. Pr. 22; McNamara *v.* Dwyer, 7 Paige 239, 32 Am. Dec. 627; Slatter *v.* Carroll, 2 Sandf. Ch. 573.

Virginia.— Powell *v.* Stratton, 11 Gratt. 792.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2344.

Where a representative has purchased lands in a jurisdiction other than that of his appointment he may be sued there to compel him to disclose with what funds he purchased them and to declare whether he holds them as trustee and for what uses and trusts. Clopton *v.* Booker, 27 Ark. 482. See also Powell *v.* Stratton, 11 Gratt. (Va.) 792.

Possession under invalid testamentary disposition.— Where land is in possession of a foreign representative under a testamentary disposition which is invalid according to the laws of the state where the land is situated the heirs may sue the foreign representative for its possession. Atkinson *v.* Rogers, 14 La. Ann. 633.

84. Colbert *v.* Daniel, 32 Ala. 314; Montgomery *v.* Boyd, 78 N. Y. App. Div. 64, 79 N. Y. Suppl. 879; McNamara *v.* Dwyer, 7 Paige (N. Y.) 239, 32 Am. Dec. 627.

85. Metcalf *v.* Clark, 41 Barb. (N. Y.) 45; Field *v.* Gibson, 56 How. Pr. (N. Y.) 232. See also Falke *v.* Terry, 32 Colo. 85, 75 Pac. 425. But see Laughlin *v.* Solomon, 180 Pa. St. 177, 36 Atl. 704, 57 Am. St. Rep. 633.

86. Collins *v.* Steuart, 2 N. Y. App. Div. 271, 37 N. Y. Suppl. 891; Kanter *v.* Peyser, 51 N. Y. Super. Ct. 441; Brown *v.* Brown, 1 Barb. Ch. (N. Y.) 189; Brown *v.* Brown, 4 Edw. (N. Y.) 343; Lewis *v.* Parrish, 115 Fed. 285, 53 C. C. A. 77. See also Julian *v.* Reynolds, 11 Ala. 960; Graveley *v.* Graveley, 20 S. C. 93.

took possession of assets belonging to that jurisdiction,[87] or brought with him assets from another jurisdiction,[88] or where he left the jurisdiction of his appointment and became a resident of another jurisdiction.[89] Where a representative appointed in one jurisdiction moves into another, taking with him assets of the foreign appointment, a bill in equity will lie in the latter jurisdiction to compel him to account for such assets to the persons lawfully entitled thereto,[90] where but for the interference of a court of equity there would manifestly be a failure of justice.[91] In such cases, however, he is not held to account as executor or administrator but as a trustee for those entitled to the effects in his hands,[92] and, to authorize such a proceeding, it must appear that he has assets within the jurisdiction of the court,[93] and that he is accountable to the complaining party as a trustee under a will or as a trustee *ex maleficio*.[94] In cases where a suit against a foreign representative is allowed the nature and extent of his liability will be governed by the laws of the jurisdiction of his appointment,[95] at least to the extent of the assets belonging to that jurisdiction.[96]

b. Actions Against Representative Personally. The rule prohibiting suits against a foreign representative applies only where he is proceeded against in his representative capacity.[97] So he may be sued on any contract which he has himself made,[98] or he may be sued as a trustee,[99] or where he has rendered himself liable as an executor *de son tort*.[1]

87. Marcy *v.* Marcy, 32 Conn. 308, holding that as to such property he might be sued even by a creditor. See also Hedenberg *v.* Hedenberg, 46 Conn. 30, 33 Am. Rep. 10.

88. Julian *v.* Reynolds, 8 Ala. 680; Williamson *v.* Mobile Branch Bank, 7 Ala. 906, 42 Am. Dec. 617; Gulick *v.* Gulick, 33 Barb. (N. Y.) 92, 21 How. Pr. (N. Y.) 22; McNamara *v.* Dwyer, 7 Paige (N. Y.) 239, 32 Am. Dec. 627.

A suit to prevent waste of property brought by a foreign representative from another jurisdiction may be maintained by a distributee. Calhoun *v.* King, 5 Ala. 523.

A bill to compel distribution of property brought in from another jurisdiction may be maintained by a distributee entitled thereto. Julian *v.* Reynolds, 8 Ala. 680.

A creditor cannot sue to subject such property, which properly belongs to another jurisdiction, to the payment of his claim. Hedenberg *v.* Hedenberg, 46 Conn. 30, 33 Am. Rep. 10.

If no assets are brought in by the foreign representative he cannot be sued. Falke *v.* Terry, 32 Colo. 85, 75 Pac. 425; Olney *v.* Ferguson, 41 W. Va. 568, 23 S. E. 710.

89. Colbert *v.* Daniel, 32 Ala. 314; Manion *v.* Titsworth, 18 B. Mon. (Ky.) 582; Keiningham *v.* Keiningham, 71 S. W. 497, 24 Ky. L. Rep. 1330.

A creditor is not entitled to sue under such circumstances. Baker *v.* Smith, 3 Metc. (Ky.) 264.

90. *Alabama.*— Colbert *v.* Daniel, 32 Ala. 314.

Kentucky.— Hussey *v.* Sargent, 116 Ky. 53, 75 S. W. 211, 25 Ky. L. Rep. 315.

New Jersey.— Rennie *v.* Crombie, 12 N. J. Eq. 457.

New York.—Marshall *v.* Bresler, 1 How. Pr. N. S. 217; McNamara *v.* Dwyer, 7 Paige 239, 32 Am. Dec. 627; Ordronaux *v.* Helie, 3 Sandf. Ch. 512.

Tennessee.— Beeler *v.* Dunn, 3 Head 87, 75 Am. Dec. 761; Dillard *v.* Harris, 2 Tenn. Ch. 196.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2352.

91. Colbert *v.* Daniel, 32 Ala. 314; Hussey *v.* Sargent, 116 Ky. 53, 75 S. W. 211, 25 Ky. L. Rep. 315.

92. Beeler *v.* Dunn, 3 Head (Tenn.) 87, 75 Am. Dec. 761; Dillard *v.* Harris, 2 Tenn. Ch. 196; Lewis *v.* Parrish, 115 Fed. 285, 53 C. C. A. 77.

93. Lewis *v.* Parrish, 115 Fed. 285, 53 C. C. A. 77.

94. Lewis *v.* Parrish, 115 Fed. 285, 53 C. C. A. 77.

95. Hoskins *v.* Sheddon, 70 Ga. 528; Johnson *v.* Jackson, 56 Ga. 326, 21 Am. Rep. 285; Manion *v.* Titsworth, 18 B. Mon. (Ky.) 582; McNamara *v.* Dwyer, 7 Paige (N. Y.) 239, 32 Am. Dec. 627. See also Falke *v.* Terry, 32 Colo. 85, 75 Pac. 425.

96. McNamara *v.* Dwyer, 7 Paige (N. Y.) 239, 32 Am. Dec. 627.

97. Lewis *v.* McCabe, 6 Mo. App. 600; Johnson *v.* Wallis, 112 N. Y. 230, 19 N. E. 653, 8 Am. St. Rep. 742, 2 L. R. A. 828 [*affirming* 41 Hun 420]; Taylor *v.* Benham, 5 How. (U. S.) 233, 12 L. ed. 130.

98. Johnson *v.* Wallis, 112 N. Y. 230, 19 N. E. 653, 8 Am. St. Rep. 742, 2 L. R. A. 828 [*affirming* 41 Hun 420].

99. Atchison *v.* Lindsey, 6 B. Mon. (Ky.) 86, 43 Am. Dec. 153; Marshall *v.* Bresler, 1 How. Pr. N. S. (N. Y.) 217; Patton *v.* Overton, 8 Humphr. (Tenn.) 192; Allsup *v.* Allsup, 10 Yerg. (Tenn.) 283.

1. Densler *v.* Edwards, 5 Ala. 31; Campbell *v.* Tousey, 7 Cow. (N. Y.) 64.

In New York the office of executor *de son tort* has been abolished and an action on this ground is no longer maintainable against a foreign executor or administrator. Metcalf *v.* Clark, 41 Barb. 45.

3. Statutory Liability to Suit. In a few jurisdictions actions against foreign representatives are expressly authorized by statute.[2] Statutes allowing foreign representatives to sue do not authorize them to be sued,[3] but do authorize them to appear and assert any affirmative right in favor of the estate, although in so doing they must in form appear as defendants.[4]

4. Parties. In cases where a suit against a foreign representative can be maintained, if such a suit is brought by a legatee or distributee to recover property of the estate to which he is entitled, all the distributees or legatees who are interested therein should be made parties,[5] and any person claiming an interest in the property in question is a proper party.[6] In a suit against a foreign executor it is not necessary to make those who were named as co-executors but who never proved the will parties.[7]

I. Accounting[8] — **1. In General.** A representative appointed in one jurisdiction cannot be required to account for his administration under that appointment by the courts of any other jurisdiction,[9] and where different administrations are granted in different states, each administration must be settled where it is granted and each representative is accountable only in the courts of the state of his appointment.[10] Where there is no ancillary representative and a foreign domiciliary representative takes possession of assets or receives debts voluntarily paid he is accountable only to the court of the domicile where he was appointed,[11] and even if he subsequently takes out ancillary letters in the jurisdiction where such assets were collected he cannot be held to account there except as to assets collected after his ancillary appointment.[12]

2. By Ancillary Representative. It is the duty of an ancillary representative to render an account of his ancillary administration to the proper court of the jurisdiction in which he was appointed,[13] and it is no excuse for his failure to do

2. Cady *v.* Bard, 21 Kan. 667; Donifelser *v.* Heyl, 7 Kan. App. 606, 52 Pac. 468; Swearingen *v.* Morris, 14 Ohio St. 424; *In re* McCreight, 9 Ohio S. & C. Pl. Dec. 454, 6 Ohio N. P. 481; Craig *v.* Toledo, etc., R. Co., 3 Ohio S. & C. Pl. Dec. 146, 2 Ohio N. P. 64. See also Adams *v.* Adams, 7 Ohio St. 83; Netting *v.* Strickland, 18 Ohio Cir. Ct. 136, 9 Ohio Cir. Dec. 841.

Such statutes are constitutional. Craig *v.* Toledo, etc., R. Co., 3 Ohio S. & C. Pl. Dec. 146, 2 Ohio N. P. 64.

3. *Arkansas.*— Greer *v.* Ferguson, 56 Ark. 324, 19 S. W. 966.

Florida.— Sloan *v.* Sloan, 21 Fla. 589; Gordon *v.* Clarke, 10 Fla. 179.

Nebraska.— Burton *v.* Williams, 63 Nebr. 431, 88 N. W. 765.

Ohio.— Pedan *v.* Robb, 8 Ohio 227.

Tennessee.— Allsup *v.* Allsup, 10 Yerg. 283.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2344.

Compare Decker *v.* Patton, 20 Ill. App. 210 [*affirmed* in 120 Ill. 464, 11 N. E. 897].

4. Decker *v.* Patton, 20 Ill. App. 210 [*affirmed* in 120 Ill. 464, 11 N. E. 897]. See also Hamilton *v.* Taylor, 2 Cinc. Super. Ct. 402.

5. Colbert *v.* Daniel, 32 Ala. 314; Julian *v.* Reynolds, 8 Ala. 680. See also Newark Sav. Inst. *v.* Jones, 35 N. J. Eq. 406.

6. Gulick *v.* Gulick, 33 Barb. (N. Y.) 92.

7. Newark Sav. Inst. *v.* Jones, 35 N. J. Eq. 406.

8. Accounting generally see *supra*, XV.

9. *Iowa.*— Snyder *v.* Hochstetler, 88 Iowa 621, 55 N. W. 573.

Massachusetts.— Fay *v.* Haven, 3 Metc. 109.

Michigan.— Woodruff *v.* Young, 43 Mich. 548, 6 N. W. 85.

New Jersey.— Brownlee *v.* Lockwood, 20 N. J. Eq. 239; Banta *v.* Moore, 15 N. J. Eq. 97.

New York.— Kohler *v.* Knapp, 1 Bradf. Surr. 241.

Tennessee.— Beeler *v.* Dunn, 3 Head 87, 75 Am. Dec. 761.

West Virginia.— Oney *v.* Ferguson, 41 W. Va. 568, 23 S. E. 710.

United States.— Lewis *v.* Parrish, 115 Fed. 285, 53 C. C. A. 77.

Canada.—Jessup *v.* Simpson, 14 U. C. Q. B. 213.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2350 *et seq.*

10. Equitable L. Assur. Soc. *v.* Vogel, 76 Ala. 441, 52 Am. Rep. 344; Hubbard *v.* Hinkley, 1 Root (Conn.) 413; Lewis *v.* Grognard, 17 N. J. Eq. 425.

Where same person is ancillary and domiciliary representative see *infra*, XVI, I, 3.

11. Parsons *v.* Lyman, 20 N. Y. 103, 18 How. Pr. (N. Y.) 193; Coley's Estate, 14 Abb. Pr. (N. Y.) 461; Gray's Appeal, 116 Pa. St. 256, 11 Atl. 66, 70; Hooper *v.* Hooper, 29 W. Va. 276, 1 S. E. 280; Pratt *v.* Northam, 19 Fed. Cas. No. 11,376, 5 Mason 95. See also McNamara *v.* McNamara, 62 Ga. 200.

12. Parsons *v.* Lyman, 20 N. Y. 103, 18 How. Pr. (N. Y.) 193; Coley's Estate, 14 Abb. Pr. (N. Y.) 461.

13. Mylin's Estate, 18 Phila. (Pa.) 65; Carr *v.* Lowe, 7 Heisk. (Tenn.) 84.

so that he sent the assets collected by him to the representative of the domicile and that they were there accounted for.[14]

3. Where Same Person Is Ancillary and Domiciliary Representative — a. How Accounts Rendered. Where the same person is both principal and ancillary representative he must account for his ancillary administration in the jurisdiction of the ancillary appointment,[15] and must also render a general accounting at the domicile.[16] The assets belonging to each jurisdiction are to be separately accounted for,[17] and the representative cannot be compelled to account in the ancillary jurisdiction for assets of the domicile,[18] or at the domicile for assets of the ancillary jurisdiction,[19] although assets which he has collected in some other jurisdiction where no administration was granted should be accounted for at the domicile.[20]

b. Conclusiveness of Different Accountings. Where accountings are had in different jurisdictions the judgment on the accounting in one jurisdiction is conclusive upon the courts of the other as to all matters adjudicated which were within the jurisdiction of the court,[21] but in so far as one settlement includes assets belonging to the other jurisdiction the judgment is not conclusive,[22] and will not relieve the representative from accounting for such assets where they properly belong.[23] If in one settlement the representative through mistake charges himself with assets which he did not in fact receive he may be allowed credit therefor on his other settlement.[24]

XVII. Liability on Administration Bonds.[1]

A. Nature and Extent of Liability — 1. In General. Where an administration bond is given with sureties, the principal and sureties are equally and primarily liable in case of a breach of its conditions.[2] The obligation of the sureties, however, rests solely in contract and they cannot be held liable contrary to or

Where same person is ancillary and domiciliary representative see *infra*, XVI, I, 3.

14. Mylin's Estate, 18 Phila. (Pa.) 65; Carr *v.* Lowe, 7 Heisk. (Tenn.) 84.

If there are no creditors in the ancillary jurisdiction the assets may be paid over to the representative of the domicile and if there accounted for the ancillary representative will not be required to account. Thomas' Estate, 8 Pa. Dist. 385.

15. Jennison *v.* Hapgood, 10 Pick. (Mass.) 77; Duffy *v.* Smith, 1 Dem. Surr. (N. Y.) 202 (holding that he cannot relieve himself of this duty by accounting for his whole administration at the domicile); *In re* Crawford, 68 Ohio St. 58, 67 N. E. 156, 96 Am. St. Rep. 648 [*affirming* 21 Ohio Cir. Ct. 554, 11 Ohio Cir. Dec. 605]; Porter *v.* Heydock, 6 Vt. 374.

The pendency of proceedings at the domicile for an accounting there is no bar to requiring an ancillary accounting as the accountings affect different assets. Parker's Estate, 6 Phila. (Pa.) 369; Jennison *v.* Hapgood, 2 Aik. (Vt.) 31.

16. Clark *v.* Blackington, 110 Mass. 369; *In re* Crawford, 21 Ohio Cir. Ct. 554, 11 Ohio Cir. Dec. 605.

Any residue remaining in the representative's hands after the ancillary accounting must be accounted for at the domicile. Clark *v.* Blackington, 110 Mass. 369; Jennison *v.* Hapgood, 10 Pick. (Mass.) 77.

17. Lewis *v.* Grognard, 17 N. J. Eq. 425; Parsons *v.* Lyman, 20 N. Y. 103, 18 How. Pr. (N. Y.) 193; Baldwin's Appeal, 81 Pa. St. 441. See also Hubbard *v.* Hinkley, 1 Root (Conn.) 413.

18. Fay *v.* Haven, 3 Metc. (Mass.) 109; Boston *v.* Boylston, 2 Mass. 384; Hamilton *v.* Carrington, 41 S. C. 385, 19 S. E. 616.

19. Lewis *v.* Grognard, 17 N. J. Eq. 425. See also Rizer's Estate, 11 Wkly. Notes Cas. (Pa.) 563. *Compare In re* Stokely, 19 Pa. St. 476; Cureton *v.* Mills, 13 S. C. 409, 36 Am. Rep. 700.

20. Tunnicliffe *v.* Fox, (Nebr. 1903) 94 N. W. 1032.

21. Clark *v.* Blackington, 110 Mass. 369; Jennison *v.* Hapgood, 10 Pick. (Mass.) 77; *In re* Crawford, 68 Ohio St. 58, 67 N. E. 156, 96 Am. St. Rep. 648 [*affirming* 21 Ohio Cir. Ct. 554, 11 Ohio Cir. Dec. 605].

22. Clark *v.* Blackington, 110 Mass. 369; Duffy *v.* Smith, 1 Dem. Surr. (N. Y.) 202.

23. Baldwin's Appeal, 81 Pa. St. 441.

24. Jones *v.* Warren, 70 Miss. 227, 14 So. 25.

1. As to necessity and furnishing of bond see *supra*, II, J.

2. *Connecticut.*— Wattles *v.* Hyde, 9 Conn. 10.

Kentucky.— Hobbs *v.* Middleton, 1 J. J. Marsh. 176.

Massachusetts.— Bassett *v.* Maryland Fidelity, etc., Co., 184 Mass. 210, 68 N. E. 205, 100 Am. St. Rep. 552.

New Hampshire.— Probate Judge *v.* Sulloway, 68 N. H. 511, 44 Atl. 720, 73 Am. St. Rep. 619, 49 L. R. A. 347.

New York.— Deobold *v.* Opperman, 111 N. Y. 531, 19 N. E. 94, 7 Am. St. Rep. 760,

beyond the condition of the bond.[3] So a bond which omits some condition required by statute, although it will be binding in equity upon the principal,[4] is not binding upon the sureties as to the omitted condition.[5] The omission of a condition required by statute does not, however, affect the liability of the sureties as to the other conditions properly included.[6] The sureties are in general jointly and severally liable *in solido* to those interested in the estate.[7] The bond must, to be binding, have a sufficient consideration.[8]

2. Liability as Affected by Sufficiency of Assets. Under the usual tenor of an administration bond, the principal and his sureties are only bound to pay creditors, legatees, or heirs, according to assets which come to hand and the resources which arise in the course of an honest, prudent, and well advised administration.[9] But the bond to pay all debts and legacies sometimes given by an executor who is the residuary legatee[10] renders the executor and his sureties absolutely liable

2 L. R. A. 644; Beckett *v.* Place, 12 Misc. 323, 33 N. Y. Suppl. 634.

Oklahoma.—Greer *v.* McNeal, 11 Okla. 526, 519, 69 Pac. 893, 891.

United States.— Stovall *v.* Banks, 10 Wall. 583, 19 L. ed. 1036.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2355.

Until the principal fails in the performance of a duty required of him by law the liability of the sureties is contingent, but it becomes absolute upon such failure. McDowell *v.* Jones, 58 Ala. 25.

Bond taken contrary to testator's request. — If the court ignores a request of the testator that security be required only for the payment of a particular legacy, and takes a bond in the usual form, it will be binding accordingly and the sureties will be liable for the faithful discharge of all the duties of the executor. Sharpe *v.* Rockwood, 78 Va. 24.

Fixing a devastavit on the administrator does not release him from the obligation of his official bond. It only establishes his accountability more clearly and makes it personal as well as fiducial. Hobbs *v.* Middleton, 1 J. J. Marsh. (Ky.) 176.

3. *Georgia.*— Webster *v.* Thompson, 55 Ga. 431.

Illinois.— People *v.* Huffman, 182 Ill. 390, 55 N. E. 981 [*reversing* 78 Ill. App. 345]; Salomon *v.* People, 89 Ill. App. 374.

Indiana.— State *v.* Hood, 7 Blackf. 127.

Kentucky.— Carr *v.* Bob, 7 Dana 417; Carrol *v.* Connet, 2 J. J. Marsh. 195; Barbour *v.* Robertson, 1 Litt. 93.

Louisiana.— Chretien *v.* Bienvenu, 41 La. Ann. 728, 6 So. 553.

Maryland.— Edes *v.* Garey, 46 Md. 24; Waters *v.* Riley, 2 Harr. & G. 305, 18 Am. Dec. 302.

Michigan.—Grady *v.* Hughes, 80 Mich. 184, 44 N. W. 1050.

Ohio.— State *v.* Cutting, 2 Ohio St. 1; McGovney *v.* State, 20 Ohio 93; Murphy *v.* Dorsey, 23 Ohio Cir. Ct. 157.

South Carolina.— Kennedy *v.* Adickes, 37 S. C. 174, 15 S. E. 922.

West Virginia.— Hooper *v.* Hooper, 32 W. Va. 526, 9 S. E. 937.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2355.

The nature of the sureties' liability is fixed by the terms of the bond and not by the remedies which may be pursued for its enforcement. McDowell *v.* Jones, 58 Ala. 25.

The liability of the sureties cannot be changed into another and different one from that expressed in the bond by any act of the other parties in interest. Webster *v.* Thompson, 55 Ga. 431; Weir *v.* People, 78 Ill. 192.

Presumption as to condition.— In the absence of contrary evidence, it will be presumed that the bond of an executor was in the usual form, conditioned "for the faithful discharge by him of the duties of his trust." Reherd *v.* Long, 77 Va. 839.

A bond conditioned to "obey all orders of the surrogate" touching the administration of the estate is more than a mere bond of indemnity and a right of action accrues against the sureties immediately on the refusal of the principal to comply with such an order. Baggott *v.* Boulger, 2 Duer (N. Y.) 160.

Where new or additional duties are required of a public administrator by a statute passed after the execution of his bond the sureties are not liable for the performance of such new duties. State *v.* Cheaney, 52 Mo. App. 258.

The sureties are under no obligation to render an account and before they can be held liable on their bond the liability of the principal must first be ascertained and established. Cadwallader *v.* Longley, 1 Disn. (Ohio) 497, 12 Ohio Dec. (Reprint) 756.

4. Baltzell *v.* Hall, 1 Litt. (Ky.) 97.

5. Baltzell *v.* Hall, 1 Litt. (Ky.) 97; Barbour *v.* Robertson, 1 Litt. (Ky.) 93; Small *v.* Com., 8 Pa. St. 101.

6. Carrol *v.* Connet, 2 J. J. Marsh. (Ky.) 195.

7. Ball *v.* Hodge, 11 Rob. (La.) 390; Brown *v.* Gunning, 19 La. 462.

8. Tate *v.* Gate, 35 Ark. 289; Pierce *v.* Wallace, 48 Tex. 399.

9. State *v.* Cutting, 2 Ohio St. 1. See also Allen *v.* Graffius, 8 Watts (Pa.) 397.

10. See Kreamer *v.* Kreamer, 52 Kan. 597, 35 Pac. 214; Lafferty *v.* People's Sav. Bank, 76 Mich. 35, 43 N. W. 34; Hatheway *v.* Weeks, 34 Mich. 237; Probate Ct. *v.* Matthews, 6 Vt. 269. And see *supra*, II, J, 1, a, (II), (B).

for such payment to the extent of the penalty, regardless of the amount or value of the estate.[11]

3. Effect of Statutory Penalty. The usual effect of a statutory penalty is to add to the legal liability of the executor or administrator for maladministration, and not to exclude indemnity by action on the bond itself.[12]

4. Effect of Irregular or Invalid Issuance of Letters. The fact that the issuance of the letters of administration was irregular or invalid does not as a rule affect the liability of either principal or sureties on the administration bond.[13]

5. Execution Induced by Fraud or Misrepresentation. The liability of the sureties on an administration bond is not affected by the fact that they were induced to sign the bond through the fraud or misrepresentation of the principal, of which the beneficiaries of the estate in whose interest the liability is sought to be enforced are innocent;[14] but they will not be liable as to any beneficiary who participated in the fraud.[15]

6. Bonds of Co-Representatives. Where co-executors or co-administrators unite in giving the same bond, they are jointly and severally liable, not only each as principal for his own acts, but also each as surety for the acts of his co-representative,[16] unless the bond itself shows that they did not intend to become so

11. Kreamer *v.* Kreamer, 52 Kan. 597, 35 Pac. 214; State *v.* Nicols, 10 Gill & J. (Md.) 27; State *v.* Snowden, 7 Gill & J. (Md.) 430; Stebbins *v.* Smith, 4 Pick. (Mass.) 97; Hatheway *v.* Weeks, 34 Mich. 237.

The signing of such a bond is an estoppel to deny a sufficiency of assets. Stebbins *v.* Smith, 4 Pick. (Mass.) 97. See also Hatheway *v.* Weeks, 34 Mich. 237.

12. State *v.* French, 60 Conn. 478, 23 Atl. 153; Beall *v.* Territory, 1 N. M. 507.

13. Mitchell *v.* Hecker, 59 Cal. 558; McChord *v.* Fisher, 13 B. Mon. (Ky.) 193 (bond upheld as common-law bond); Foster *v.* Com., 35 Pa. St. 148; Zeigler *v.* Sprenkle, 7 Watts & S. (Pa.) 175; State *v.* Anderson, 16 Lea (Tenn.) 321.

Where administration is fraudulently procured upon the estate of a person who is not dead, the sureties on the bond are liable for the acts of the administrator. Williams *v.* Kiernan, 25 Hun (N. Y.) 355.

Where a will is produced after administration is granted, or a will on which letters issued is afterward set aside, the sureties are liable with their principal. Jones *v.* Jones, 14 B. Mon. (Ky.) 464; Hunt *v.* Hamilton, 9 Dana (Ky.) 90; Gibson *v.* Beckham, 16 Gratt. (Va.) 321.

14. *Georgia.*— Brown *v.* Davenport, 76 Ga. 799.

Kentucky.— Sebastian *v.* Johnson, 2 Duv. 101.

Massachusetts.— Fuller *v.* Dupont, 183 Mass. 596, 67 N. E. 662.

New York.— Casoni *v.* Jerome, 58 N. Y. 315.

Ohio.— McGaughey *v.* Jacoby, 54 Ohio St. 487, 44 N. E. 231.

Pennsylvania.— Dayton's Estate, 4 Kulp 451.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2360.

15. Campbell *v.* Johnson, 41 Ohio St. 588.

16. *Alabama.*— Pearson *v.* Darrington, 32 Ala. 227; Little *v.* Knox, 15 Ala. 576, 50 Am. Dec. 145.

Connecticut.— Babcock *v.* Hubbard, 2 Conn. 536.

Kentucky.— Collins *v.* Carlisle, 7 B. Mon. 13; Anderson *v.* Miller, 6 J. J. Marsh. 568.

Maryland.— Clarke *v.* State, 6 Gill & J. 288, 26 Am. Dec. 576.

Massachusetts.— Ames *v.* Armstrong, 106 Mass. 15. See also Bassett *v.* Granger, 136 Mass. 174.

Mississippi.— Jeffries *v.* Lawson, 39 Miss. 791.

New Hampshire.— Newton *v.* Newton, 53 N. H. 537.

North Carolina.— State *v.* Hyman, 72 N. C. 22.

Ohio.— Seymour *v.* Stone, 2 Ohio Dec. (Reprint) 648, 4 West. L. Month. 323 [*overruling* Channel *v.* Stone, 2 Ohio Dec. (Reprint) 475, 3 West. L. Month. 205], joint and several bond.

Pennsylvania.— Boyd *v.* Boyd, 1 Watts 365.

South Carolina.— Lucas *v.* Curry, 2 Bailey 403; Wilks *v.* Davis, Rich. Eq. Cas. 390.

Tennessee.— Jamison *v.* Lillard, 12 Lea 690; Fulton *v.* Davidson, 3 Heisk. 614; Hughlett *v.* Hughlett, 5 Humphr. 453.

Vermont.— Essex Dist. Prob. Ct. *v.* May, 52 Vt. 182; Sparhawk *v.* Buell, 9 Vt. 41.

Virginia.— Caskie *v.* Harrison, 76 Va. 85; Boyd *v.* Boyd, 3 Gratt. 113; Morrow *v.* Peyton, 8 Leigh 54.

West Virginia.— Hooper *v.* Hooper, 29 W. Va. 276, 1 S. E. 280.

United States.— Lidderdale *v.* Robinson, 12 Wheat. 594, 6 L. ed. 740 [*affirming* 15 Fed. Cas. No. 8,337, 2 Brock. 159]; Green *v.* Hanberry, 10 Fed. Cas. No. 5,759, 2 Brock. 403.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 509, 510, 2364, 2365; and *infra*, XXI, B, 2.

Even when the will exempts executors from giving sureties on their bonds, if they execute a joint and several bond they are liable

bound.[17] Where, however, they give separate bonds, they are separately and not jointly liable.[18]

7. SUCCESSIVE OR ADDITIONAL BONDS. Where an executor or administrator is required to give a new or additional bond the new bond ordinarily relates back and the sureties thereon become liable for breaches of condition prior to its execution,[19] the two sets of sureties being considered as parties to a common undertaking with reciprocal rights of contribution.[20]

8. PUBLIC OFFICER'S BOND. The general bond of a public administrator renders the sureties thereon responsible for the faithful discharge of his duties in administering each and all of the estates which may be committed to him as public administrator,[21] and when a sheriff or other public officer acts *ex officio* as a public administrator, the sureties on his official bond are liable for all of his acts as administrator.[22] This is true even where a special administration bond has been required;[23] and the liability continues until the officer has been discharged as administrator, notwithstanding the fact that his original term of office has expired.[24]

each for the other's acts. Ames *v.* Armstrong, 106 Mass. 15.

Where one of the co-executors or co-administrators dies, the suretyship continues in force, on such a bond, as to acts of the survivor, unless proper steps are taken to have the bond made inoperative for future defaults. Stephens *v.* Taylor, 62 Ala. 269; Lancaster *v.* Lewis, 93 Ga. 727, 21 S. E. 155; Dobyns *v.* McGovern, 15 Mo. 662. *Compare* Brazier *v.* Clark, 5 Pick. (Mass.) 96.

Where one of two joint administrators is discharged by order of court he is not liable on their joint bond for a subsequent default of the other administrator. Com. *v.* Smith, 4 Phila. (Pa.) 270.

The executors are jointly liable as principals to indemnify a surety on the bond for a loss occasioned through the default of one of them. Dobyns *v.* McGovern, 15 Mo. 662.

In Indiana and New York it is held that where co-representatives execute a joint bond it is in effect the same as if each had given a separate bond with the same sureties and they are jointly liable only for joint acts, neither being a surety for the separate acts of the other (State *v.* Wyant, 67 Ind. 25 [*overruling* Moore *v.* State, 49 Ind. 558; Braxton *v.* State, 25 Ind. 82]; Nanz *v.* Oakley, 120 N. Y. 84, 24 N. E. 306, 9 L. R. A. 223 [*reversing* 37 Hun 495]).

17. Pearson *v.* Darrington, 32 Ala. 227; Elliott *v.* Mayfield, 4 Ala. 417.

18. McKim *v.* Aulbach, 130 Mass. 481, 39 Am. St. Rep. 470. See also Hughlett *v.* Hughlett, 5 Humphr. (Tenn.) 453.

19. *Arkansas.*— Dugger *v.* Wright, 51 Ark. 232, 11 S. W. 213, 14 Am. St. Rep. 48.

California.— Lacaste *v.* Splivalo, 64 Cal. 35, 30 Pac. 571.

Kansas.— Brown *v.* State, 23 Kan. 235.

Missouri.— Wolff *v.* Schaeffer, 74 Mo. 154.

North Carolina.— Pickens *v.* Miller, 83 N. C. 543.

Ohio.— Corrigan *v.* Foster, 51 Ohio St. 225, 37 N. E. 263.

Virginia.— Lingle *v.* Cook, 32 Gratt. 262.

West Virginia.— Perry *v.* Campbell, 10 W. Va. 228.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2368; and *infra*, XVII, B, 2.

It is not necessary to exhaust the first bond before having recourse to the second. Pinkstaff *v.* People, 59 Ill. 148. *Compare* Lane *v.* State, 24 Ind. 421.

20. Dugger *v.* Wright, 51 Ark. 232, 11 S. W. 213, 14 Am. St. Rep. 48; State *v.* Fields, 53 Mo. 474. *Compare* Corrigan *v.* Foster, 51 Ohio St. 225, 37 N. E. 263 (holding that the sureties on the first bond are primarily liable for a devastavit committed before the execution of the second bond); Bobo *v.* Vaiden, 20 S. C. 271 (holding that as between the two sets of sureties those on the second bond are primarily liable).

Discharge of original sureties by giving of new bond see *infra*, XVII, D, 6.

Where an additional bond is given specially for the sale of real estate, it has been held that the liability on the second bond is subsidiary to the original and that no action can be maintained thereon until the penalty of the original bond is exhausted and that securities on the original bond are not entitled to contribution (Salyers *v.* Ross, 15 Ind. 130); but it has also been asserted that the two sets of sureties assume a common burden with mutual rights of contribution (Powell *v.* Powell, 48 Cal. 234).

21. Olsen *v.* Rich, 2 Ky. L. Rep. 257. See also State *v.* Purdy, 67 Mo. 89.

In Alabama the sureties on the bond of a general administrator under the act of 1859, relating to public administrators in Mobile county, were liable only as to estates committed to him during the term for which the bond was given, although the same person was reappointed; but this rule did not apply to bonds given under the code of 1876. Buckley *v.* McGuire, 58 Ala. 226.

22. Governor *v.* Gantt, 1 Stew. (Ala.) 388; Williams *v.* Collins, 1 B. Mon. (Ky.) 58.

Extent of liability.— The liability of the sureties is limited by the law regulating the duties of ordinary administrators and applies only to such assets as he might rightfully receive as administrator. Heeter *v.* Jewell, 6 Bush (Ky.) 510.

23. Burnett *v.* Nesmith, 62 Ala. 261; State *v.* Watts, 23 Ark. 304.

24. State *v.* Watts, 23 Ark. 304; Dabney *v.* Smith, 5 Leigh (Va.) 13.

But when administration does not devolve upon the officer by virtue of his office, but is granted to him as an individual, the sureties on his official bond are not liable.[25]

9. Estoppel. Sureties who voluntarily sign an administration bond and on the faith of whose security persons interested in the estate have relied and acted will be estopped to set up any defect or irregularity in the proceedings as a defense to their liability,[26] and they will also be estopped as against such persons from setting up any private agreement between themselves and the principal limiting or qualifying the nature of their liability.[27] Conversely a beneficiary or creditor of the estate may by his conduct estop himself from enforcing any liability against the sureties.[28]

10. Indemnity to Sureties. In some jurisdictions it is provided by statute that, where a surety on an administration bond is in danger of loss on account of his suretyship, the principal may be required to furnish counter security for his protection,[29] and in case such security is not furnished the court may remove the executor or administrator from office,[30] or order the property delivered up to the surety.[31] In the absence of such provision an executor or administrator cannot be required to furnish counter security unless it has been contracted for,[32]

25. McNeil *v.* Smith, 55 Ga. 313.

26. Mundorff *v.* Wangler, 44 N. Y. Super. Ct. 495; Field *v.* Van Cott, 5 Daly (N. Y.) 308; State *v.* Anderson, 16 Lea (Tenn.) 321; Franklin *v.* Depriest, 13 Gratt. (Va.) 257. See also Bloomfield *v.* Ash, 4 N. J. L. 314.

Where one's name has been signed as surety without his authority and after being informed of the fact he does not object, he cannot, after the administrator has committed waste, deny his liability. State *v.* Hill, 50 Ark. 458, 8 S. W. 401.

If all named as sureties in the bond do not sign the others may retract, but they must do so before the bond has been delivered and the judge, creditors, and administrator have acted on it. Bryan *v.* Austin, 10 La. Ann. 612; Canal, etc., Co. *v.* Brown, 4 La. Ann. 545.

27. Berkey *v.* Judd, 34 Minn. 393, 26 N. W. 5; Wolff *v.* Schaeffer, 74 Mo. 154.

28. See Diehl *v.* Miller, 56 Iowa 313, 9 N. W. 240; Thayer *v.* Finnegan, 134 Mass. 62, 45 Am. Rep. 285; McMillon *v.* McMillon, 7 Lea (Tenn.) 78.

A distributee who voluntarily accepts the individual obligation of the representative in payment of his distributive share is estopped, in case of its non-payment, to maintain an action on the bond. Riggin *v.* Creath, 60 Ohio St. 114, 53 N. E. 1100.

When no act or omission on the part of the sureties is induced by the failure of the legatees to object to the failure of an executrix to include certain property in the inventory the legatees are not estopped to claim that the property omitted was a part of the estate. Murray *v.* Kluck, 87 Wis. 566, 59 N. W. 137.

29. *District of Columbia.*— McKnight's Estate, 1 App. Cas. 28.

Georgia.— Girardey *v.* Dougherty, 18 Ga. 259, the court may grant relief "by counter security or otherwise"— as shall seem just and equitable.

Kentucky.— Roope *v.* Rodes, 7 B. Mon. 109; Caldwell *v.* Hedges, 2 J. J. Marsh. 485; Horseley *v.* Hopkins, 2 J. J. Marsh. 53.

Maryland.— March *v.* Fidelity, etc., Co., 79 Md. 309, 29 Atl. 521; Sifford *v.* Morrison, 63 Md. 14 (holding the statute providing that the court "may" require counter security to be imperative); Brown *v.* Murdock, 16 Md. 521. See also Wright *v.* Williams, 93 Md. 66, 48 Atl. 397.

Mississippi.— Russell *v.* McDougall, 3 Sm. & M. 234.

North Carolina.— Governor *v.* Gowan, 25 N. C. 342.

Pennsylvania.— Mullin's Estate, 15 Phila. 613; Seitzinger's Estate, 2 Woodw. 223; Vogt's Estate, 10 Lanc. Bar 71.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2373.

Where duties are omitted at the suggestion of the sureties, they are not entitled to counter security as a protection against liability for such omissions. Mullin's Estate, 15 Phila. (Pa.) 613.

Additional security may if necessary be demanded by sureties who have once obtained counter security, and the counter security may also demand counter security of the executor or administrator. Caldwell *v.* Hedges, 2 J. J. Marsh. (Ky.) 485.

30. Roope *v.* Rodes, 7 B. Mon. (Ky.) 109.

31. McKnight's Estate, 1 App. Cas. (D. C.) 28; Combs *v.* Church, 1 J. J. Marsh. (Ky.) 330.

The surety does not become administrator when the property is delivered into his hands, but he becomes responsible for its safe-keeping. Combs *v.* Church, 1 J. J. Marsh. (Ky.) 330.

In case of misconduct of the surety after the property is delivered to him by which a loss is sustained by the principal the remedy of the latter is an action on the case for the damage sustained. Scott *v.* Burch, 6 Harr. & J. (Md.) 67.

32. Delaney *v.* Tipton, 3 Hayw. (Tenn.) 14.

although he may do so voluntarily, in which case, however, the bond affords no greater protection than its conditions import.[33]

B. Property Covered — 1. In General. The sureties on the bond of an executor or administrator are responsible only for what might properly come into his hands as assets,[34] which as a general rule includes only such assets as have actually come into his possession or which he could have collected by the exercise of due diligence.[35] But for all property collected and not accounted for, or not collected for want of due diligence, the bond is liable,[36] and this liability is not affected by the fact that assets to the amount of the penalty of the bond have been accounted for.[37]

2. Property Received or Converted Before Execution of Bond. The sureties are liable for assets of the estate which their principal has received before as well as after the execution of the bond, in case of the principal's conversion or maladministration in respect of such assets or failure to render due account thereof.[38]

3. Debts of Representative to Estate. A debt due to the estate from an executor or administrator becomes assets of the estate[39] and is covered by the administration bond;[40] and in some jurisdictions it is held that the sureties on the

33. See Boyle *v.* Boyle, 106 N. Y. 654, 12 N. E. 709, holding that a voluntary counter indemnity bond for "any loss or expense — by reason of their suretyship" does not cover expenses voluntarily incurred by the sureties in seeking to be relieved from their suretyship.

Where one of two joint administrators voluntarily gives a mortgage to the sureties on his bond for their protection, it will be construed as relating only to misconduct on the part of that administrator. Potter *v.* Webb, 6 Me. 14.

34. Jackson *v.* Wilson, 117 Ala. 432, 23 So. 521; Heeter *v.* Jewell, 6 Bush (Ky.) 510; Brown *v.* Glascock, 1 Rob. (Va.) 461. See also Miller *v.* Gee, 4 Ala. 359.

The fact that the representative improperly charges himself with property not properly receivable by him as assets of the estate will not render the sureties liable. People *v.* Petrie, 191 Ill. 497, 61 N. E. 499, 85 Am. St. Rep. 268 [*affirming* 94 Ill. App. 632].

Money recovered by an administrator as damages for injuries resulting in the death of the intestate is assets of the estate for which the sureties on the bond are liable. Goltra *v.* People, 53 Ill. 224; Glass *v.* Howell, 2 Lea (Tenn.) 50.

Where an administrator is released from paying a debt of the decedent by the statute of limitations the law does not donate to him assets equal to the amount of the debt, but other creditors or distributees are entitled to receive that much more, for the payment of which the sureties on the bond are liable. Smith *v.* Morgan, 4 Ky. L. Rep. 829.

35. Wright *v.* Lang, 66 Ala. 389.

Debts of representative to estate see *infra*, XVII, B, 3.

36. Choate *v.* Arrington, 116 Mass. 552; Chouteau *v.* Hill, 2 Mo. 177; Beall *v.* Territory, 1 N. M. 507; Morton *v.* Ashbee, 46 N. C. 312.

37. Probate Judge *v.* Heydock, 8 N. H. 491.

38. *Louisiana.*— Goode *v.* Buford, 14 La. Ann. 102 [*distinguishing* Parmele *v.* Brashaer, 16 La. 72].

Massachusetts.— Choate *v.* Arrington, 116 Mass. 552; Dawes *v.* Edes, 13 Mass. 177.

Missouri.— State *v.* James, 82 Mo. 509; Sherwood *v.* Hill, 25 Mo. 391.

New York.— Scofield *v.* Churchill, 72 N. Y. 565; Schofield *v.* Hustis, 9 Hun 157. See also Gottsberger *v.* Taylor, 19 N. Y. 150.

Ohio.— Foster *v.* Wise, 46 Ohio St. 20, 16 N. E. 687, 15 Am. St. Rep. 542.

Oklahoma.— Greer *v.* McNeal, 11 Okla. 519, 526, 69 Pac. 891, 893.

Oregon.— Bellinger *v.* Thompson, 26 Oreg. 320, 37 Pac. 714, 40 Pac. 229.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2377.

Compare State *v.* Hood, 7 Blackf. (Ind.) 127.

Where a public administrator succeeds himself and gives a new bond the second bond covers liabilities for misappropriation of funds during its life, although the funds came into his hands during the life of his former bond. State *v.* Holman, 93 Mo. App. 611, 67 S. W. 747.

Liability of sureties on new or additional bond for acts of principal prior to its execution see *supra*, XVII, A, 7.

39. See *infra*, III, B, 5, b.

40. *Alabama.*— Wright *v.* Lang, 66 Ala. 389.

California.— Treweek *v.* Howard, 105 Cal. 434, 39 Pac. 20.

Indiana.— State *v.* Gregory, 119 Ind. 503, 22 N. E. 1.

Maryland.— Lambrecht *v.* State, 57 Md. 240. See also Kealhofer *v.* Emmert, 79 Md. 248, 29 Atl. 68.

Massachusetts.— Chapin *v.* Waters, 110 Mass. 195; Winship *v.* Bass, 12 Mass. 199.

Missouri.— Wilson *v.* Ruthrauff, 82 Mo. App. 435.

New Hampshire.— Probate Judge *v.* Sulloway, 68 N. H. 511, 44 Atl. 720, 73 Am. St. Rep. 619, 49 L. R. A. 347.

bond are liable for the payment of the debt without regard to the principal's solvency or ability to pay.[41] In others it is held that the liability of the sureties is the same as with regard to the debts of other persons,[42] and that they are not liable where the executor or administrator is at all times insolvent and unable to pay.[43] If, however, the executor or administrator, while solvent, fails to pay, the sureties will be liable in case he subsequently becomes insolvent.[44]

4. Property of Estate Purchased by Representative.[45] If an executor or administrator becomes a purchaser at his own sale, the sureties on his official bond will be liable for the value of the property purchased,[46] notwithstanding the unauthorized purchase is ratified by the heirs.[47]

5. Property Not Assets of Estate. According to the weight of authority, where an executor or administrator receives property to which he is not legally entitled in the discharge of his duties as personal representative, his administra-

New Jersey.— Ordinary *v.* Kershaw, 14 N. J. Eq. 527; Harker *v.* Irick, 10 N. J. Eq. 269.

New York.— Baucus *v.* Barr, 45 Hun 582 [*affirmed* in 107 N. Y. 624, 13 N. E. 939]; Keegan *v.* Smith, 33 Misc. 74, 67 N. Y. Suppl. 281 [*reversing* 31 Misc. 651, 64 N. Y. Suppl. 1117]; Keegan *v.* Smith, 39 N. Y. Suppl. 826.

Ohio.— James *v.* West, 67 Ohio St. 28, 65 N. E. 156 (holding that there is no difference between debts of administrators and debts of executors as to the liability of the sureties); McGaughey *v.* Jacoby, 54 Ohio St. 487, 44 N. E. 231; Campbell *v.* Johnson, 41 Ohio St. 588; McCoy *v.* Allen, 9 Ohio Cir. Ct. 607, 6 Ohio Cir. Dec. 659; Perkins *v.* Scott, 9 Ohio Cir. Ct. 207, 6 Ohio Cir. Dec. 226.

Pennsylvania.— Piper's Estate, 15 Pa. St. 533.

Tennessee.— Spurlock *v.* Earles, 8 Baxt. 437.

Virginia.— Edmunds *v.* Scott, 78 Va. 720.

United States.— Wilson *v.* Rose, 30 Fed. Cas. No. 17,831, 3 Cranch C. C. 371; U. S. *v.* Rose, 27 Fed. Cas. No. 16,193, 2 Cranch C. C. 567.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2386.

If the surety of a defaulting representative is made his successor, the surety's indebtedness on the bond is assets in his hands, with which he and his own sureties are chargeable, although the amount has not been fixed by account or by judgment or by a charge made by himself. Choate *v.* Thorndike, 138 Mass. 371.

41. *Alabama.*— Wright *v.* Lang, 66 Ala. 389.

Maryland.— Lambrecht *v.* State, 57 Md. 240.

Massachusetts.— Bassett *v.* Maryland Fidelity, etc., Co., 184 Mass. 210, 68 N. E. 205, 100 Am. St. Rep. 552, holding that where an executor is a member of a firm which is indebted to the estate the sureties are liable for the debt, notwithstanding the firm and the executor were insolvent at the time of the testator's death.

New Hampshire.— Probate Judge *v.* Sulloway, 68 N. H. 511, 44 Atl. 720, 73 Am. St. Rep. 619, 49 L. R. A. 347.

Ohio.— McGaughey *v.* Jacoby, 54 Ohio St. 487, 44 N. E. 231; Perkins *v.* Scott, 9 Ohio Cir. Ct. 207, 6 Ohio Cir. Dec. 226. *Contra,* McCoy *v.* Allen, 9 Ohio Cir. Ct. 607, 6 Ohio Cir. Dec. 659.

South Carolina.— Twitty *v.* Houser, 7 S. C. 153.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2386.

42. McCarty *v.* Frazer, 62 Mo. 263; Wilson *v.* Ruthrauff, 82 Mo. App. 435; Rader *v.* Yeargin, 85 Tenn. 486, 3 S. W. 178; Spurlock *v.* Earles, 8 Baxt. (Tenn.) 437; Lyon *v.* Osgood, 58 Vt. 707, 7 Atl. 5.

43. *California.*— Sanchez *v.* Forster, 133 Cal. 614, 65 Pac. 1077 [*distinguishing* Treweek *v.* Howard, 105 Cal. 434, 39 Pac. 20].

Indiana.— State *v.* Gregory, 119 Ind. 503, 22 N. E. 1.

Missouri.— McCarty *v.* Frazer, 62 Mo. 263.

New Jersey.— Harker *v.* Irick, 10 N. J. Eq. 269.

New York.— Keegan *v.* Smith, 39 N. Y. Suppl. 826; Baucus *v.* Barr, 45 Hun 582 [*affirmed* in 107 N. Y. 624, 13 N. E. 939]; Keegan *v.* Smith, 33 Misc. 74, 67 N. Y. Suppl. 281 [*reversing* 31 Misc. 651, 64 N. Y. Suppl. 1117].

Pennsylvania.— *In re* Piper, 15 Pa. St. 533; Garber *v.* Com., 7 Pa. St. 265.

Vermont.— Lyon *v.* Osgood, 58 Vt. 707, 7 Atl. 5.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2386.

Although an insolvent executor treats his own debt as available assets in his accounting and the probate court decrees distribution accordingly, a court of equity will grant the surety relief. Lyon *v.* Osgood, 58 Vt. 707, 7 Atl. 5.

44. Harker *v.* Irick, 10 N. J. Eq. 269; Rader *v.* Yeargin, 85 Tenn. 486, 3 S. W. 178.

If an administrator is able to pay a debt due by him to the estate and does not do so the sureties on his bond are liable, although his property was not subject to legal process and he was thereby insolvent. Gay *v.* Grant, 101 N. C. 206, 8 S. E. 99, 106.

45. **Right of representative to purchase** at sale of property of the estate see *supra,* VIII, O, 9, d, (VI), (B); VIII, P, 2, f, (I); XII, M, 4.

46. Todd *v.* Sparks, 10 La. Ann. 668; Gay *v.* Grant, 101 N. C. 206, 8 S. E. 99, 106.

47. Todd *v.* Sparks, 10 La. Ann. 668.

tion bond does not cover such property and his sureties are not liable in respect to it.[48]

6. Foreign Assets. The liability of the sureties on an executor's or administrator's bond is limited to such assets as rightfully come or ought to have come into his hands in the state of his appointment.[49] Therefore, while as to all assets which he has a right to receive and does receive, although coming from a foreign jurisdiction, the sureties on the bond will be liable,[50] they will not be liable for such assets which he receives without lawful authority.[51]

7. Equitable Assets.[52] It has been asserted that as the obligation imposed by the bond of an executor or administrator is altogether legal, the sureties cannot be liable for any other breach than that of the legal duties embraced by the condition of the bond, and that hence the sureties are not liable for equitable assets coming into the hands of the representative;[53] but this rule has been practically abrogated by statutes requiring administration bonds to embrace all the duties and powers of the representative,[54] and it is further to be noted that as, at least in the United States, the distinction between legal and equitable assets is rarely enforced,[55] the doctrine under consideration has but little practical importance.

8. Proceeds of Sale of Realty — a. In General. The liability of sureties on the general bond of an executor or administrator for the proceeds of the sale of real estate that have come into his hands is governed by the conditions of the bond.[56] In some jurisdictions it is held that the ordinary conditions cover the proper administration of such proceeds,[57] and that if a special bond be required it

48. *Florida.*— Pace *v.* Pace, 19 Fla. 438.

Georgia.— Johnson *v.* Hall, 101 Ga. 687, 29 S. E. 37.

Illinois.— People *v.* Petrie, 191 Ill. 497, 61 N. E. 499, 85 Am. St. Rep. 268 [*affirming* 94 Ill. App. 652].

Kentucky.—Warfield *v.* Brand, 13 Bush 77; Campbell *v.* Sacray, 44 S. W. 980, 19 Ky. L. Rep. 1912.

Missouri.— Orrick *v.* Vahey, 49 Mo. 428.

Ohio.— Murphy *v.* Dorsey, 23 Ohio Cir. Ct. 157.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2378.

But *compare* Matter of Hobson, 61 Hun (N. Y.) 504, 16 N. Y. Suppl. 371 (where the representative had treated the property as assets); Clark *v.* Pence, 111 Tenn. 20, 76 S. W. 885.

The executor or administrator may become personally liable but not on his bond so as to affect the sureties. Morris *v.* Morris, 9 Heisk. (Tenn.) 814.

49. Fletcher *v.* Sanders, 7 Dana (Ky.) 345, 32 Am. Dec. 96; Governor *v.* Williams, 25 N. C. 152, 38 Am. Dec. 712.

50. *Connecticut.*— Strong *v.* White, 19 Conn. 238.

Florida.— Woodfin *v.* McNealy, 9 Fla. 256.

Kentucky.— Fletcher *v.* Sanders, 7 Dana 345, 32 Am. Dec. 96.

New Hampshire.— Probate Judge *v.* Heydock, 8 N. H. 491.

Virginia.— Andrews *v.* Avery, 14 Gratt. 229, 73 Am. Dec. 355.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2389.

51. Fletcher *v.* Sanders, 7 Dana (Ky.) 345, 32 Am. Dec. 96; Smith *v.* Smyser, 2 Ky. L. Rep. 440; Cabanne *v.* Skinker, 56 Mo. 357; Snodgrass *v.* Snodgrass, 1 Baxt. (Tenn.) 157.

Domiciliary and ancillary administration.— The liabilities of sureties on the bonds of domiciliary and ancillary administrators vary according to the assets which the principals are lawfully entitled to receive (Fletcher *v.* Saunders, 7 Dana (Ky.) 345, 32 Am. Dec. 96; Governor *v.* Williams, 25 N. C. 152, 38 Am. Dec. 712), and the same rule applies to the sureties on the different bonds where the same person acts in both capacities (State *v.* Osborn, 71 Mo. 86; Probate Ct. *v.* Matthews, 6 Vt. 269).

52. See also *infra*, XVII, B, 8.

53. Heeter *v.* Jewell, 6 Bush (Ky.) 510; Speed *v.* Nelson, 8 B. Mon. (Ky.) 499; Clay *v.* Hart, 7 Dana (Ky.) 1; Barksdale *v.* Butler, 6 Lea (Tenn.) 450; Wall *v.* Allen, 4 Baxt. (Tenn.) 210; Hughlett *v.* Hughlett, 5 Humphr. (Tenn.) 453.

54. See Speed *v.* Nelson, 8 B. Mon. (Ky.) 499.

55. See *supra*, III, A, 2.

56. See Speed *v.* Nelson, 8 B. Mon. (Ky.) 499; Governor *v.* Chouteau, 1 Mo. 771; Com. *v.* Gilson, 8 Watts (Pa.) 214; Beales *v.* Com., 17 Serg. & R. (Pa.) 392.

57. *Alabama.*— Pettit *v.* Pettit, 32 Ala. 288; Clarke *v.* West, 5 Ala. 117.

California.—Evans *v.* Gerken, 105 Cal. 311, 38 Pac. 725.

Maryland.— Campbell *v.* State, 62 Md. 1. *Contra*, prior to the act of 1831. Cornish *v.* Willson, 6 Gill 299.

Missouri.— Lewis *v.* Carson, 93 Mo. 587, 3 S. W. 483, 6 S. W. 365; Governor *v.* Chouteau, 1 Mo. 771.

North Carolina.— Reaves *v.* Davis, 99 N. C. 425, 6 S. E. 715. See also Lafferty *v.* Young, 125 N. C. 296, 34 S. E. 444.

is to be regarded merely as additional security.[58] In others the sureties on the general bond are not liable,[59] and a special bond must be given to cover such proceeds as a distinct liability.[60]

b. Sale Under Testamentary Authority. The liability of sureties for the proper administration of the proceeds of real estate sold by an executor or administrator with the will annexed under a power or direction in the will is determined largely by the conditions of the bond and the law in force at the time of its execution.[61] There is, however, a conflict of authority on this subject not reconcilable by reason of the differences in the form of the bonds considered in the several cases.[62] In most jurisdictions it is held that the sureties on the original bond will be liable,[63] but in others it is held that they are not liable and

Ohio.—Wade *v.* Graham, 4 Ohio 126; Campbell *v.* English, Wright 119; Buckwalter *v.* Klein, 5 Ohio Dec. (Reprint) 55, 2 Am. L. Rec. 347; Kehnast *v.* Daum, 6 Ohio S. & C. Pl. Dec. 401, 4 Ohio N. P. 366.

Virginia.— See Reherd *v.* Long, 77 Va. 839. *Contra,* under earlier statute. Strother *v.* Hull, 23 Gratt. 652.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2381.

Money paid by devisees to prevent a sale of real property of the real estate for the payment of debts is assets of the estate for which the sureties on the bond are liable. Fay *v.* Taylor, 2 Gray (Mass.) 154.

Money received on appropriation for public use.— Where real estate which an administrator has levied on to satisfy a debt due the estate is taken for public use after the time for redemption by the judgment debtor has expired, the sureties are liable for the money received therefor by the administrator. Phillips *v.* Rogers, 12 Metc. (Mass.) 405.

58. Clarke *v.* West, 5 Ala. 117; Kehnast *v.* Daum, 6 Ohio S. & C. Pl. Dec. 401, 4 Ohio N. P. 366.

59. *Illinois.*— People *v.* Huffman, 182 Ill. 390, 55 N. E. 981 [*reversing* 78 Ill. App. 345].

Indiana.— Reno *v.* Tyson, 24 Ind. 56; Worgang *v.* Clipp, 21 Ind. 119, 83 Am. Dec. 343. *Compare* Sayler *v.* State, 5 Ind. 202.

Kentucky.— Speed *v.* Nelson, 8 B. Mon. 499; Stuart *v.* Hathaway, 4 Ky. L. Rep. 438.

Pennsylvania.— The rule is as stated in the text with respect to sales under order of court. Com. *v.* Hilgert, 55 Pa. St. 236; Com. *v.* Gilson, 8 Watts 214; Beales *v.* Com., 17 Serg. & R. 392; Com. *v.* Winters, 4 Wkly. Notes Cas. 346; Baldwin's Estate, 1 Chest. Co. Rep. 315. But as to sales under testamentary authority the rule is otherwise. See *infra,* note 63.

South Carolina.— Wiley *v.* Johnsey, 6 Rich. 355.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2381.

If an administrator makes an unauthorized sale of real property under an order of court for the sale of personalty, the proceeds are not rightfully in his hands as administrator and the sureties on his bond are not liable. Young *v.* People, 35 Ill. App. 363.

Where an administrator confesses judgment on which real estate of the intestate is sold for the payment of debts the sureties on the bond are not liable. Reed *v.* Com., 11 Serg. & R. (Pa.) 441.

60. People *v.* Huffman, 182 Ill. 390, 55 N. E. 981 [*reversing* 78 Ill. App. 345]; Worgang *v.* Clipp, 21 Ind. 119, 83 Am. Dec. 343; Com. *v.* Hilgert, 55 Pa. St. 236. And see *supra,* XII, I, 5.

61. See White *v.* Ditson, 140 Mass. 351, 4 N. E. 606, 54 Am. Rep. 473; Newport Probate Ct. *v.* Hazard, 13 R. I. 3; Reherd *v.* Long, 77 Va. 839.

If the devisees accept the proceeds of the sale and approve the action of the executor and there are no creditors, the sureties are not liable, without regard to the power of the executor to sell. Homes *v.* O'Conner, 9 Tex. Civ. App. 454, 29 S. W. 236.

62. People *v.* Huffman, 182 Ill. 390, 55 N. E. 981 [*reversing* 78 Ill. App. 345]; White *v.* Ditson, 140 Mass. 351, 4 N. E. 606, 54 Am. Rep. 473.

63. Dix *v.* Morris, 66 Mo. 514 [*affirming* 1 Mo. App. 93]; Hood *v.* Hood, 85 N. Y. 561 [*reversing* 19 Hun 300]; Shalter's Appeal, 43 Pa. St. 83, 82 Am. Dec. 552; Hartzell *v.* Com., 42 Pa. St. 453; Wetherill *v.* Com., 1 Pa. Cas. 22, 1 Atl. 185; Zeigler *v.* Sprenkle, 7 Watts & S. (Pa.) 175; Com. *v.* Forney, 3 Watts & S. (Pa.) 353.

In Virginia it was formerly held that the sureties were not liable for the proceeds of land sold by an executor under the will (Murphy *v.* Carter, 23 Gratt. 477; Burnett *v.* Harwell, 3 Leigh 89; Jones *v.* Hobson, 2 Rand. 483), but the law is now otherwise under the code provisions as to the form of bond to be given (Reherd *v.* Long, 77 Va. 839).

A distinction between an express direction and a discretionary power to sell has been made, it being held that in the latter case the sureties are not liable, although in the former they would be. Clay *v.* Hart, 7 Dana (Ky.) 1. But see Dix *v.* Morris, 66 Mo. 514 [*affirming* 1 Mo. App. 93]; Zeigler *v.* Sprenkle, 7 Watts & S. (Pa.) 175.

The bond is not liable for the proceeds of land sold in a foreign state under a power conferred by the will where the will was not probated in that state. Emmons *v.* Gordon, 140 Mo. 490, 41 S. W. 998, 62 Am. St. Rep. 734.

As to the proceeds of property not sold under the directions of the will the sureties are not liable. Reno *v.* Tyson, 24 Ind. 56.

that whenever real estate is to be sold by the personal representative a new bond should be given.[64]

9. Proceeds of Insurance. The proceeds of insurance on the life of the decedent is not ordinarily assets of the estate or properly receivable by the representative in his representative capacity, and if collected by him the sureties on the bond are not liable therefor,[65] nor are they liable for the proceeds of insurance on buildings of the estate.[66]

10. Income, Interest, Rents, and Profits. The sureties on a bond given by an executor or administrator are liable, like the principal himself, for the income and profits which may accrue during the period of administration upon property for which he becomes responsible.[67] Interest on assets, in the sense of accruing profit or income, and interest chargeable to the executor or administrator for use or misuse of the property in his hands, are usually covered by the administration bond, both as to principal and sureties.[68] As to rents and profits from real estate, if the executor or administrator is made accountable therefor by statute the sureties on the bond will be liable,[69] although this liability is not expressly set out in the bond;[70] and when real estate is devised to executors in trust to sell and invest the proceeds the sureties on the bond are liable for any rents collected from such property.[71] But in the absence of any such statutory or testamentary provision the rule in most jurisdictions is that, although the executor or administrator might be held personally liable to the heirs as trustee,[72] the sureties on his bond will not be liable,[73] and that whenever it becomes necessary for an

64. Newport Probate Ct. *v.* Hazard, 13 R. I. 3. See also White *v.* Ditson, 140 Mass. 351, 4 N. E. 606, 54 Am. Rep. 473; Robinson *v.* Millard, 133 Mass. 236.

Under a testamentary power to sell real estate for the purpose of reinvestment, the executor acts as a trustee and the sureties on his administration bond are not liable. People *v.* Huffman, 182 Ill. 390, 55 N. E. 981 [*reversing* 78 Ill. App. 345].

65. Pace *v.* Pace, 19 Fla. 438; People *v.* Petrie, 191 Ill. 497, 61 N. E. 499, 85 Am. St. Rep. 268 [*affirming* 94 Ill. App. 652]; Murphy *v.* Dorsey, 23 Ohio Cir. Ct. 157.

When rule does not apply.— The sureties are liable where the representative is charged with the duty of collecting and paying such proceeds to the persons entitled thereto, although the amount is by statute exempt from the payment of debts (Kelley *v.* Mann, 56 Iowa 625, 10 N. W. 211; State *v.* Anderson, 16 Lea (Tenn.) 321); or where the decedent has made the policy payable to his personal representative and he in his representative capacity has collected the proceeds (Conway *v.* Carter, (N. M. 1902) 68 Pac. 941).

66. Harrison *v.* Harrison, 4 Leigh (Va.) 371.

67. Sanford *v.* Gilman, 44 Conn. 461; Hood *v.* Hood, 85 N. Y. 561; Watson *v.* Whitten, 3 Rich. (S. C.) 224.

68. Sanford *v.* Gilman, 44 Conn. 461; Clay *v.* Hart, 7 Dana (Ky.) 1; Shalter's Appeal, 43 Pa. St. 83, 82 Am. Dec. 552; Strother *v.* Hull, 23 Gratt. (Va.) 652.

Where an administrator lends money for more than the legal rate of interest the sureties are accountable for the amount of interest actually received, but as to money used by himself they are chargeable only with the legal rate of interest. Clay *v.* Hart, 7 Dana (Ky.) 1.

An administrator's bond is liable for interest on balances as they become due, but not for interest on the aggregate sum of principal and interest found due on any former accounting. Chick *v.* Farr, 31 S. C. 463, 10 S. E. 176, 390.

69. State *v.* Waples, 5 Harr. (Del.) 257; Brooks *v.* Jackson, 125 Mass. 307.

The word "rents" in the bond required by the Kentucky statute applies to only such rents as at the decedent's death passed to his personal representative and not to his heirs, and does not render the sureties liable for rents collected under a lease made by an administrator after the decedent's death. Wilson *v.* Unselt, 12 Bush (Ky.) 215.

If the executor or administrator is removed from office, the sureties on the bond will not be liable for rents subsequently collected by him. Brooks *v.* Jackson, 125 Mass. 307.

70. State *v.* Waples, 5 Harr. (Del.) 257.

71. Hood *v.* Hood, 85 N. Y. 561 [*reversing* 19 Hun 300].

72. See Smith *v.* Bland, 7 B. Mon. (Ky.) 21.

73. *Indiana.*— State *v.* Barrett, 121 Ind. 92, 22 N. E. 969.

Kentucky.— Denton *v.* Crouch, 101 Ky. 386, 41 S. W. 277, 19 Ky. L. Rep. 588; Smith *v.* Bland, 7 B. Mon. 21; Oldham *v.* Collins, 4 J. J. Marsh. 49; Slaughter *v.* Froman, 2 T. B. Mon. 95; Campbell *v.* Sacray, 44 S. W. 980, 19 Ky. L. Rep. 1912; Williams *v.* Walters, 3 Ky. L. Rep. 336.

New Hampshire.— Gregg *v.* Currier, 36 N. H. 200.

South Carolina.— Jennings *v.* Parr, 62 S. C. 306, 40 S. E. 683.

executor or administrator to collect or receive the rents from real estate a new bond must be given.[74]

11. Property Held in Some Other Capacity[75]— a. In General. As a rule the official bond of the executor or administrator is not construed to cover his responsibility with respect to property held by him in some other and distinct capacity.[76] Where an executor or administrator also occupies some other character with regard to the estate, such as guardian or trustee, it will be presumed that the property in his hands is held in that capacity in which he ought to receive it,[77] and upon the termination of his duties in one capacity the property is transferred by operation of law to his possession in the other so as to release the sureties on the bond in the former capacity from further liability.[78] It is in some cases difficult to say when the transfer of possession from one capacity to another takes place,[79] but it is well settled that where property has been received in one capacity the change, in order to shift the responsibility of the sureties, must be evidenced by some overt act or express election to hold the property in the other capacity.[80]

b. As Guardian. The sureties on the bond of an executor or administrator are not liable for property held by him in the capacity of guardian of one of the heirs or distributees of the estate.[81] Upon the termination of the representative's

Virginia.— Hutcherson *v.* Pigg, 8 Gratt. 220.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2387.

In Missouri, although ordinarily an executor or administrator has nothing to do with land except in case of a deficiency of assets, yet if he does in fact retain possession and collect rents his bond will be liable therefor. Dix *v.* Morris, 66 Mo. 514 [*affirming* 1 Mo. App. 93]; Gamble *v.* Gibson, 59 Mo. 585; Stong *v.* Wilkson, 14 Mo. 116.

For rents due the decedent at his death or collected on a contract made by him which passed into the hands of his personal representative, the sureties on the bond will be liable. Wilson *v.* Unselt, 12 Bush (Ky.) 215.

74. State *v.* Barrett, 121 Ind. 92, 22 N. E. 969.

75. See also *infra*, XVII, D, 8.

76. *Connecticut.*— Spencer *v.* Root, 2 Root 80.

Georgia.— Johnson *v.* Hall, 101 Ga. 687, 29 S. E. 37.

Illinois.— People *v.* Allen, 86 Ill. 166; Weir *v.* People, 78 Ill. 192.

Kentucky.—Shields *v.* Smith, 8 Bush 601; Clay *v.* Hart, 7 Dana 1; Flannery *v.* Givens, 52 S. W. 962, 21 Ky. L. Rep. 705.

Massachusetts.— Forbes *v.* Allen, 166 Mass. 569, 44 N. E. 1065; Brooks *v.* Jackson, 125 Mass. 307.

Missouri.— Fielder *v.* Rose, 61 Mo. App. 189, holding that where property is devised for life to the executor and he wastes the property after payment of the debts his bondsmen are not liable.

North Carolina.— Roper *v.* Burton, 107 N. C. 526, 12 S. E. 334; Fanshaw *v.* Fanshaw, 44 N. C. 166.

Pennsylvania.— Com. *v.* Miller, 1 Pittsb. 51.

Tennessee.— Pardue *v.* Barnes, 7 Heisk. 356; Fulton *v.* Davidson, 3 Heisk. 614; Reeves *v.* Steele, 2 Head 647.

Virginia.— Andrews *v.* Avory, 14 Gratt. 229, 73 Am. Dec. 355.

United States.— Norman *v.* Buckner, 135 U. S. 500, 10 S. Ct. 835, 34 L. ed. 252.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2390, 2391.

77. Kirby *v.* State, 51 Md. 383; State *v.* Cheston, 51 Md. 352; Seegar *v.* State, 6 Harr. & J. (Md.) 162, 14 Am. Dec. 265; Porter *v.* Moores, 4 Heisk. (Tenn.) 16.

78. State *v.* Cheston, 51 Md. 352; Watkins *v.* State, 2 Gill & J. (Md.) 220; Seegar *v.* State, 6 Harr. & J. (Md.) 162, 14 Am. Dec. 265. See also Ennis *v.* Smith, 14 How. (U. S.) 400, 14 L. ed. 472.

This presumption is not conclusive but is subject to be rebutted. See Porter *v.* Moores, 4 Heisk. (Tenn.) 16.

79. Scituate Prob. Ct. *v.* Angell, 14 R. I. 495.

80. Perkins *v.* Moore, 16 Ala. 9; Joy *v.* Elton, 9 N. D. 428, 83 N. W. 875; Scituate Prob. Ct. *v.* Angell, 14 R. I. 495; Pratt *v.* Northam, 19 Fed. Cas. No. 11,376, 5 Mason 95.

All that is necessary to make the transfer where substantial assets are in the hands of the fiduciary, or he is solvent and able to pay over his indebtedness in the one capacity to himself in the other capacity, is for him to make an election to hold it in the latter capacity and manifest such election by some act, admission, or declaration, and such election will bind the sureties on the bond given in the latter capacity. Gilmer *v.* Baker, 24 W. Va. 72.

81. Bell *v.* People, 94 Ill. 230; Downes *v.* State, 3 Harr. & J. (Md.) 239; State *v.* Jordan, 3 Harr. & M. (Md.) 179; Allen *v.* Burton, 1 McMull. (S. C.) 249.

Where an administrator assumes without authority to act as guardian under the impression that by virtue of his office as administrator he became the guardian of the wards of the decedent, the sureties on his bond are not liable for property belonging

duties as executor or administrator the property is transferred by operation of law into his hands as guardian and the sureties on the former bond are released from further liability,[82] and conversely if the wards become of age and entitled to distribution before the amount for distribution is ascertained the administrator becomes indebted to them and not to himself as guardian, and the sureties on the administration bond are liable.[83] Where a guardian becomes the administrator of the estate of a deceased ward the sureties on the administration bond become liable for the proper administration of all assets then on hand which he formerly held as guardian.[84]

c. As Trustee. Where the same person is both executor and trustee under a will the sureties on his bond as executor are not liable for property held by him in the capacity of trustee,[85] unless they are made so by express statute.[86]

d. As Devisee Charged With Payment of Legacy. Where an executor is also a devisee who takes the devise charged with the payment of a legacy, he is liable for such payment as devisee only, and his sureties are not liable.[87]

e. As Surviving Partner. Where a surviving partner is appointed executor or administrator of his deceased copartner, partnership funds coming into his hands are presumed to be in the capacity of surviving partner, for which the sureties on his bond as executor or administrator will not be liable.[88] But by becoming executor or administrator he assumes the responsibility of collecting what is due by him to the estate as surviving partner,[89] and the sureties on his bond are liable for his failure to do so after such amount is ascertained,[90] or if he

to such wards of which he obtained possession. Williamson *v.* Lippincott, 10 N. J. L. 35.

82. Watkins *v.* State, 2 Gill & J. (Md.) 220; Seegar *v.* State, 6 Harr. & J. (Md.) 162, 14 Am. Dec. 265. See also State *v.* Cheston, 51 Md. 352.

When transfer of liability takes place.— After the time limited by law for the settlement of the estate the law will adjudge the ward's portion of the property to be held in the capacity of guardian whether a final account has been passed upon by the court or not. Watkins *v.* State, 2 Gill & J. (Md.) 220.

In Tennessee it is provided by statute that "no executor or administrator, having in his hands, as such, any estate of an infant, shall be appointed his guardian until he shall have first settled his accounts as executor or administrator." The settlement draws the line between the two fiduciary relationships and fixes the liability of the sureties on the respective bonds. Ezell *v.* Hamilton, 4 Baxt. 304.

83. Burnside *v.* Robertson, 28 S. C. 583, 6 S. E. 843.

84. Baker *v.* Wood, 42 Ala. 664.

85. Perkins *v.* Lewis, 41 Ala. 649, 94 Am. Dec. 616; Hinds *v.* Hinds, 85 Ind. 312; Givens *v.* Flannery, 105 Ky. 451, 49 S. W. 182, 20 Ky. L. Rep. 1355; Warfield *v.* Brand, 13 Bush (Ky.) 77; Neely *v.* Merritt, 9 Bush (Ky.) 346; Sims *v.* Lively, 14 B. Mon. (Ky.) 433; Warren *v.* Benton, 3 Ky. L. Rep. 332; State *v.* Tubb, 22 Mo. App. 91. But *compare* Prior *v.* Talbot, 10 Cush. (Mass.) 1; Bellinger *v.* Thompson, 26 Oreg. 320, 37 Pac. 714, 40 Pac. 229.

The sureties of an administrator with the will annexed are not liable for the misapplication of funds turned over to him as trustee by order of the probate court. Barker *v.* Stanford, 53 Cal. 451.

Where a will directs an executor to invest the personal estate and apply the income to certain purposes, there is not such a trust superadded to his duties as executor as to absolve the surety on his bond as executor from liability. Hall *v.* Cushing, 9 Pick. (Mass.) 395.

86. See Porter *v.* Moores, 4 Heisk. (Tenn.) 16; Lester *v.* Vick, 2 Heisk. (Tenn.) 476.

Statutory change.— The Tennessee act of 1838 which made sureties on the bond of an executor liable for his acts as trustee is omitted from the code and they are now not so liable unless the bond is conditioned so as to cover this liability. Walker *v.* Potilla, 7 Lea (Tenn.) 449.

87. *Connecticut.*— Olmstead *v.* Brush, 27 Conn. 530.

Kentucky.— Smith *v.* Smith, 10 Ky. L. Rep. 636.

Maryland.— State *v.* Hewlett, 48 Md. 138.

Massachusetts.— Thayer *v.* Finnegan, 134 Mass. 62, 45 Am. Rep. 285.

New Hampshire.— Leavitt *v.* Wooster, 14 N. H. 550.

Virginia.— Arrington *v.* Cheatham, 2 Rob. 492.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2394.

Compare Towner *v.* Tooley, 38 Barb. (N. Y.) 598.

88. Pearson *v.* Keedy, 6 B. Mon. (Ky.) 128, 43 Am. Dec. 160. *Compare* Hooper *v.* Hooper, 32 W. Va. 526, 9 S. E. 937.

89. Caskie *v.* Harrison, 76 Va. 85. See also Knowlton *v.* Chick, 56 Me. 228.

90. Knowlton *v.* Chick, 56 Me. 228.

Where there are no partnership debts there should be an immediate transfer to the part-

sells property of the estate for the payment of partnership debts while having partnership funds in his possession.[91]

C. Functions and Acts Covered. The functions and acts covered by an administration bond and for which the sureties are liable embrace generally all the duties which the executor or administrator is called upon to discharge in the course of the administration,[92] but not acts which do not come within the discharge of his official duties as representative;[93] and so do not include unauthorized acts,[94] breaches of merely personal duties,[95] or acts done with respect to the property of the estate in some other and distinct capacity.[96] The bond does not ordi-

ner in his capacity of executor or administrator and the sureties on his bond will be liable accordingly. Caskie *v.* Harrison, 76 Va. 85.

91. Boyle *v.* Boyle, 4 B. Mon. (Ky.) 570.

92. Deobold *v.* Oppermann, 111 N. Y. 531, 19 N. E. 94, 7 Am. St. Rep. 760, 2 L. R. A. 644; Beckett *v.* Place, 12 Misc. (N. Y.) 323, 33 N. Y. Suppl. 634. Whenever a representative does what the law prohibits or fails to exercise reasonable care and diligence in the endeavor to do what the law enjoins, he and his sureties are liable for the damage consequent upon such act or omission. McNabb *v.* Wixom, 7 Nev. 163.

"Due administration of the estate" comprises the due payment of its obligations and the handing over of the balance to the persons entitled. Cunningham *v.* Souza, 1 Redf. Surr. (N. Y.) 462.

A declaration of insolvency of an estate does not *ipso facto* terminate the administrator's authority, and if no successor be appointed the sureties remain liable for his subsequent acts of administration. Clay *v.* Gurley, 62 Ala. 14.

Where a judgment in a replevin suit is rendered against an administrator, the sureties on his bond are liable to the sureties on the replevin bond in case of his failure to comply with an order of court to return the property or its value. State *v.* Farrar, 77 Mo. 175; State *v.* Dailey, 7 Mo. App. 548.

Where the same person is administrator of two estates, one of which is indebted to the other, and he wastes assets of the debtor estate which he was bound but failed to pay over to the creditor estate, his sureties for a due administration of the creditor estate are liable for such default and waste. Morrow *v.* Peyton, 8 Leigh (Va.) 54.

93. *Georgia.*— Johnson *v.* Hall, 101 Ga. 687, 29 S. E. 37; Bird *v.* Mitchell, 101 Ga. 46, 28 S. E. 674.

Kentucky.— Denton *v.* Crouch, 101 Ky. 386, 41 S. W. 277, 19 Ky. L. Rep. 588; Warfield *v.* Brand, 13 Bush 77; Warren *v.* Benton, 3 Ky. L. Rep. 332.

Maine.— Nelson *v.* Woodbury, 1 Me. 251.

Michigan.—Robbins *v.* Burridge, 128 Mich. 25, 87 N. W. 93.

Missouri.— Orrick *v.* Vahey, 49 Mo. 428.

New Hampshire.— Gregg *v.* Currier, 36 N. H. 200.

Ohio.— Flickinger *v.* Saum, 40 Ohio St. 591.

Tennessee.— Carter *v.* Young, 9 Lea 210.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2395.

Delivery of the report of commissioners on an insolvent estate is no part of the official duty of an administrator, and his failure to carry out an agreement to do so will not render the sureties liable. Nelson *v.* Woodbury, 1 Me. 251.

Deceptive and misleading conduct by the administrator to induce creditors to defer filing their claims within the statutory period is not a breach of the bond. Nagle *v.* Ball, 71 Miss. 330, 13 So. 929.

94. McCampbell *v.* Gilbert, 6 J. J. Marsh. (Ky.) 592; Campbell *v.* Sacray, 44 S. W. 980, 19 Ky. L. Rep. 1912; Gregg *v.* Currier, 36 N. H. 200; *In re* Givens, 34 N. J. Eq. 191; Curtis *v.* Farmers' Nat. Bank, 39 Ohio St. 579. *Compare* Lewis *v.* Carson, 93 Mo. 587, 3 S. W. 483, 6 S. W. 365.

The sureties on the bond of an administrator pendente lite are not liable for the acts of their principal where he assumes to act as a general administrator. Stevenson *v.* Wilcox, 16 S. C. 432.

95. Bird *v.* Mitchell, 101 Ga. 46, 28 S. E. 674; Nelson *v.* Woodbury, 1 Me. 251; McLean *v.* McLean, 88 N. C. 394.

The personal contract of an executor or administrator in the course of settling the estate is not binding upon the sureties. Erwin *v.* Carroll, 1 Yerg. (Tenn.) 145; Childress *v.* Morris, 23 Gratt. (Va.) 802. *Compare* Murdock *v.* Matthews, Brayt. (Vt.) 100.

Agreements with distributees.— Where the distributees of an estate agree with the administrator, who is also a distributee, to hold certain of the property and dispose of the same at private sale for their mutual profit or loss the surety is not liable for the nonperformance of such agreement by the administrator. Kennedy *v.* Adickes, 37 S. C. 174, 15 S. E. 922.

96. *California.*— Barker *v.* Stanford, 53 Cal. 451.

Illinois.— People *v.* Huffman, 182 Ill. 390, 55 N. E. 981 [*reversing* 78 Ill. App. 345].

Kansas.— Carr *v.* Catlin, 13 Kan. 393.

Kentucky.— Warfield *v.* Brand, 13 Bush 77; Warren *v.* Benton, 3 Ky. L. Rep. 332.

Missouri.— Orrick *v.* Vahey, 49 Mo. 428; State *v.* Anthony, 30 Mo. App. 638.

North Carolina.— Fanshaw *v.* Fanshaw, 44 N. C. 166.

Tennessee.— Carter *v.* Young, 9 Lea 210.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2395.

narily secure the payment of debts contracted by the executor or administrator in the settlement of the estate,[97] nor are the sureties ordinarily liable for the payment of costs awarded against the principal.[98]

D. Discharge of Sureties From Liability — 1. In General. As a general rule whatever operates to release the executor or administrator from liability also releases the sureties,[99] but the rule is subject to exception in cases where the liability of the principal is extinguished by operation of law.[1] The sureties are also released by any conduct on the part of the persons interested in the estate or by agreements between such persons and the representative by which the sureties' liability would be altered and increased.[2] An alteration in the bond after its execution increasing the penal sum, made by the probate judge with the consent of the principal but without the knowledge of the sureties, releases the latter from liability thereon.[3] Whether the imposition of new or additional duties on a public administrator by a statute passed after the execution of his bond will release the sureties from their original liability will depend upon whether the performance of his original duties is materially interfered with.[4]

2. Settlement and Discharge of Principal. The final settlement of the accounts of an executor or administrator and his discharge ordinarily terminate the lia-

Carrying out personal trust in will.— The bond of an executor is not liable for the performance of provisions in the will in the nature of a personal trust (Armstrong *v.* Martin, 18 N. C. 397), unless specially conditioned so as to cover the duties imposed by such provisions (see Prescott *v.* Pitts, 9 Mass. 376).

Management of decedent's business.— Where a testator by his will directs that the executors continue his business for a certain period for the benefit of the estate they act in so doing not as executors but as trustees, and the sureties on the bond are not liable for any losses (Carter *v.* Young, 9 Lea (Tenn.) 210); but if he permits them to conduct it for their own benefit, the fund invested to be returned and administered, it is a loan to them and remains a part of the estate for the return and proper administration of which the sureties are liable (State *v.* Wilmer, 65 Md. 178, 3 Atl. 252).

97. Taylor *v.* Mygatt, 26 Conn. 184.

For services rendered an executor in settling the estate one can only recover against him individually and not upon his bond. Baker *v.* Moor, 63 Me. 443.

An order for the payment of attorney's fees, made pursuant to a statute authorizing the court to allow a claim for attorney's fees, is in effect a judgment against the estate and a failure of the administrator to discharge it renders the sureties liable. State *v.* Walsh, 67 Mo. App. 348.

98. Ferguson *v.* Cappeau, 6 Harr. & J. (Md.) 394.

A bond to pay all debts and legacies of the testator given by an executrix who is sole legatee must respond for the costs awarded out of the estate to the contestants of the will. Cole's Will, 52 Wis. 591, 9 N. W. 664.

Where the bond is conditioned to obey all orders of the court touching the administration of the estate, and the court has jurisdiction to award costs either against the estate or the representative, an order for the payment of costs is within the condition of the bond. Beckett *v.* Place, 12 Misc. (N. Y.) 323, 33 N. Y. Suppl. 634; West *v.* Crosby, 2 N. Y. City Ct. 305.

99. McBroom *v.* Governor, 6 Port. (Ala.) 32; Austin *v.* Raiford, 68 Ga. 201; People *v.* White, 11 Ill. 341.

1. McBroom *v.* Governor, 6 Port. (Ala.) 32; People *v.* White, 11 Ill. 341.

A creditor's failure to present his claim to the administrator of the principal debtor within the proper time does not discharge the sureties. Minter *v.* Mobile Branch Bank, 23 Ala. 762, 58 Am. Dec. 315.

2. *Alabama.*— Pyke *v.* Searcy, 4 Port. 52.
Georgia.— Collier *v.* Leonard, 59 Ga. 497.
Louisiana.— Hebert *v.* Hebert, 22 La. Ann. 308. But *compare* Perkins *v.* Cenas, 15 La. Ann. 60.
Massachusetts.—Forbes *v.* Allen, 166 Mass. 569, 44 N. E. 1065.
Missouri.— See Seitz *v.* Hill, 9 Mo. App. 122.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2406 *et seq.*

Agreement for improper use of funds.— A secret agreement between the distributees and the administrator that the latter may use the funds of the estate in his private business will discharge the sureties from all liability to the distributees. Rutter *v.* Hall, 31 Ill. App. 647.

Coöperation of heirs with representative.— The fact that the representative and the heirs agreed to resist the payment of certain claims and that the administrator with their consent held the assets pending the litigation and afterward wasted them and became insolvent will not discharge the sureties, since the heirs had a right to coöperate with the administrator in resisting the claims of creditors by all lawful means. McMahon *v.* Paris, 87 Ga. 660, 13 S. E. 572.

3. Howe *v.* Peabody, 2 Gray (Mass.) 556.

4. State *v.* Cheaney, 52 Mo. App. 258, holding, however, that in neither case will the sureties incur any liability as to the new duties imposed.

bility on the bond;[5] it has the force and effect of a judgment and precludes any action on the bond unless impeached and set aside in an appropriate proceeding.[6]

3. Death of Principal or Surety. Sureties of a deceased executor or administrator are not discharged at his death with respect to his acts or defaults concerning the estate in his lifetime;[7] and it has been held that their liability extends even to the acts or defaults of the personal representative of the deceased executor or administrator with regard to the original estate.[8] The liability of a surety is not discharged by his own death but extends to defaults of the principal subsequently committed.[9]

4. Revocation of Letters — Resignation or Removal of Principal. Where the letters of an executor or administrator are revoked or he is removed or resigns the sureties are ordinarily released from liability as to the subsequent administration,[10] but they are released from liability only with respect to future acts of

5. *Alabama.*— Turner *v.* Cole, 24 Ala. 364.
Georgia.— Austin *v.* Raiford, 68 Ga. 201.
Kansas.—Proctor *v.* Dicklow, 57 Kan. 119, 45 Pac. 86; Smith *v.* Eureka Bank, 24 Kan. 528.
Kentucky.— Hessey *v.* Hessey, 1 Ky. L. Rep. 424.
Missouri.— State *v.* Gray, 106 Mo. 526, 17 S. W. 500; State *v.* Anthony, 30 Mo. App. 638.
North Carolina.— See Tulburt *v.* Hollar, 102 N. C. 406, 9 S. E. 430.
See 22 Cent. Dig. tit. "Executors and Administrators," § 2404.
Compare Mighton *v.* Dawson, 38 Ohio St. 650.

A settlement and discharge procured by practising a fraud upon the ordinary is void and is no bar to an action on the bond. Pollock *v.* Cox, 108 Ga. 430, 34 S. E. 213.

Where a discharge on final accounting is made conditional upon the payment of a certain sum and filing vouchers therefor, the discharge from liability is not effectual until these conditions have been complied with. Cosgrove *v.* U. S., 33 Ct. Cl. 167.

Settlement while suit pending.— Where an administrator makes a settlement of his account while a suit by a creditor is pending against him, the debt in suit not being taken into account, such premature settlement and discharge will not relieve the sureties from liability on the bond. Dean *v.* Portis, 11 Ala. 104.

Where a representative is directed to retain certain funds to be paid over at a future date and he retains the same in his representative capacity, the sureties are not discharged from their liability until the amount is finally paid over as directed. McCloud *v.* Hewlett, 135 Cal. 361, 69 Pac. 333; Betts *v.* Avery, 46 N. Y. App. Div. 342, 61 N. Y. Suppl. 525.

An allowance of a certain sum "retained to pay legacies," in the first account of an administrator is not an absolute credit or discharge of the legacies, but an admission of funds for their payment; and an allowance in his second account "for sundry payments made, as stated in the last account," although with the consent of the legatees, does not discharge the obligation of the administrator's bond to pay the legacies according to the will. Fay *v.* Taylor, 2 Gray (Mass.) 154.

A settlement made by the representative at the time of his resignation, which does not close the business of the estate in his hands, is not a final settlement which will preclude any further liability on the bond (Lang *v.* State, 67 Ind. 577; Parsons *v.* Milford, 67 Ind. 489. *Compare* Tulburt *v.* Hollar, 102 N. C. 406, 9 S. E. 430); and where an administrator who has resigned is reappointed as his own successor, and a balance is ascertained against him on the first administration, distributees may at their election proceed against the sureties on either the first or second bonds (Modawell *v.* Hudson, 80 Ala. 265).

6. Proctor *v.* Dicklow, 57 Kan. 119, 45 Pac. 86; State *v.* Gray, 106 Mo. 526, 17 S. W. 500; Woodworth *v.* Woodworth, 70 Mo. 601. See also Smith *v.* Eureka Bank, 24 Kan. 528.

7. See, generally, Principal and Surety.

8. O'Gorman *v.* Lindeke, 26 Minn. 93, 1 N. W. 841; Williams *v.* State, 68 Miss. 680, 10 So. 52, 24 Am. St. Rep. 297. *Contra,* Jones *v.* Hobson, 2 Rand. (Va.) 483. And see State *v.* Rottaken, 34 Ark. 144.

Misapplication of estate of original representative.— The sureties of an executor or administrator are not chargeable with a misapplication by his representative of the assets of his estate. Williams *v.* State, 68 Miss. 680, 10 So. 52, 24 Am. St. Rep. 297.

9. Hightower *v.* Moore, 46 Ala. 387; Mundorff *v.* Wangler, 44 N. Y. Super. Ct. 495; Bergstroem *v.* State, 58 Tex. 92.

10. Norton *v.* Wallace, 1 Rich. (S. C.) 507; Waterman *v.* Bigham, 2 Hill (S. C.) 512; Lingle *v.* Cook, 32 Gratt. (Va.) 262. See also People *v.* Lott, 27 Ill. 215; De Lane's Case, 2 Brev. (S. C.) 167.

Co-executors or co-administrators.—Where the letters of one co-executor or co-administrator are revoked, or one resigns and the sole administration devolves upon the other, the sureties on the joint bond continue liable for the subsequent acts of the other (State *v.* Rucker, 59 Mo. 17. See also Davenport *v.* Reynolds, 6 Ill. App. 532), but where one co-administrator resigns and accounts to the

the executor or administrator, and as to acts or defaults of the principal previously committed the sureties remain liable.[11]

5. Expiration of Term of Office or Time Limited For Administration. The authority of a public administrator as to unfinished business in his official custody continues after the expiration of his term of office[12] and the sureties on his bond remain liable.[13] Where the time for completing administration is expressly limited by statute,[14] the sureties are released from liability at the expiration of such period,[15] and where special or temporary administration is granted they are released when the reason of the grant ceases to exist.[16] But if a bond is conditioned to administer an estate according to the will, a further condition in the bond that it shall be administered within a certain time will not be construed as a release from liability as to acts which it appears from the face of the will cannot be so performed.[17]

6. Giving New Bond. Whether the giving of a new bond will operate to discharge the sureties on a former bond is governed in some cases by the purpose of the new bond,[18] and in others by express statutory provision.[19] It is in many cases provided that the sureties on the former bond shall be discharged from any

other and is discharged and the other is reappointed under a new bond the sureties on the joint bond are discharged (Veach *v.* Rice, 131 U. S. 293, 9 S. Ct. 730, 33 L. ed. 163).

Reappointment of same person.—Where the original letters are revoked and the same person reappointed as administrator *de bonis non*, the sureties on the original bond are discharged and a corresponding liability substituted in the sureties of the second. Enicks *v.* Powell, 2 Strobh. Eq. (S. C.) 196. But see Modawel *v.* Hudson, 80 Ala. 265, holding that where an administrator resigned and was reappointed giving a new bond, and a balance was found against him on the first administration, the distributees might at their election proceed against the sureties on either bond. See also Steele *v.* Graves, 68 Ala. 17.

A public administrator, although he resigns his office, continues the representative of estates committed to his hands before his resignation and the sureties on his bond remain liable for the discharge of his duties as to such estates. Olsen *v.* Rich, 79 Ky. 244.

Where an order dismissing an administrator is rescinded and the administrator reinstated the sureties continue bound. Collier *v.* Cross, 20 Ga. 1.

11. *Illinois.*— See People *v.* Lott, 27 Ill. 215.

Maryland.— State *v.* Blackistone, 2 Harr. & G. 139.

Pennsylvania.— See Stewart *v.* Moody, 4 Watts 169.

South Carolina. — Norton *v.* Wallace, 1 Rich. 507; Waterman *v.* Bigham, 2 Hill 512; Cureton *v.* Shelton, 3 McCord 412.

Texas.— Brown *v.* Seaman, 65 Tex. 628.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2410, 2411.

If the representative is removed pending the settlement of his accounts, the probate court may still proceed with the settlement and hold his sureties liable for his failure to pay a decree thereafter entered. Nevitt *v.* Woodburn, 160 Ill. 203, 43 N. E. 385, 52 Am. St. Rep. 315.

Failure to pay over to successor.— Where an administrator who has resigned or been removed fails to pay over to his successor the funds of the estate in his hands his bond is liable at the suit of the successor, but not at the suit of a creditor. State *v.* Heinrichs, 82 Mo. 542.

Delivery by a resigning administrator to his successor of a purchaser's note for a sale on credit which should have been for cash does not relieve the predecessor and his sureties from liability with respect to such sale. Foster *v.* Thomas, 21 Conn. 285.

12. See *supra*, II, G, 6.

13. *In re* Aveline, 53 Cal. 259.

14. See *supra*, II, N, 1.

15. Brown *v.* Gunning, 19 La. 462; Rison *v.* Young, 7 Mart. N. S. (La.) 294; Jones *v.* Perkins, 8 Tex. 337; Flores *v.* Howth, 5 Tex. 329.

If an executor sells property for notes not maturing until after the expiration of his appointment and fails to account for them, his surety will be liable. Verret *v.* Belanger, 6 La. Ann. 109.

16. State *v.* Craddock, 7 Harr. & J. (Md.) 40. See *supra*, II, N, 5.

17. Holbrook *v.* Bentley, 32 Conn. 502.

18. See Veach *v.* Rice, 131 U. S. 293, 9 S. Ct. 730, 33 L. ed. 163, where it is said that if the new bond is given as a new and different undertaking to be a substitute for the first, the original sureties will be discharged from further liability; but if given for the purpose of strengthening the existing security their liability will not be affected. See also Atkinson *v.* Christian, 3 Gratt. (Va.) 448.

19. State *v.* Stroop, 22 Ark. 328; Pepper *v.* Donnelly, 87 Ky. 259, 8 S. W. 441, 10 Ky. L. Rep. 140; Russell *v.* McDougall, 3 Sm. & M. (Miss.) 234; Wood *v.* Williams, 61 Mo. 63.

Under the Alabama statute the sureties on the first bond are discharged from further liability when the second bond is given on their application, but not otherwise. Jones *v.* Ritter, 56 Ala. 270.

liability accruing after the giving of the new bond,[20] but liabilities already incurred are not affected.[21] As a rule, however, when not otherwise provided, a new or additional bond is merely cumulative and does not release the sureties on the first bond.[22]

7. Giving Special Bond For Payment of Distributive Share. Where an executor or administrator under an agreement with a distributee gives the latter a special bond[23] or note[24] for the payment of his distributive share the sureties on the original bond are discharged as to this amount.

8. Retention of Property by Principal in Another Capacity. As previously stated the bond of an executor or administrator does not cover property held or acts done by him in some other and distinct capacity.[25] It follows that where property of the estate is transferred to and retained by the representative in another capacity the sureties on the administration bond are released from further liability with respect thereto.[26] They will not be released, however, unless a

Under the Illinois statute of wills a new bond given under section 78 where the original security is insufficient does not release the former sureties (People *v.* Curry, 59 Ill. 35), but a new bond under section 79 for the protection of the sureties on the first and which the statute provides shall relate back to the grant of letters releases the former sureties from all liability both past and present (People *v.* Lott, 27 Ill. 215).

20. *Arkansas.*— State *v.* Stroop, 22 Ark. 328.

Kentucky.— Pepper *v.* Donnelly, 87 Ky. 259, 8 S. W. 441, 10 Ky. L. Rep. 140.

Mississippi.— Russell *v.* McDougall, 3 Sm. & M. 234.

Missouri.— Haskell *v.* Farrar, 56 Mo. 497.

Virginia.— Lingle *v.* Cook, 32 Gratt. 262.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2407.

It will be presumed in the absence of proof to the contrary that a default on the part of the administrator occurred after the execution of the second bond. May *v.* Kelly, 61 Ala. 489; Beard *v.* Roth, 35 Fed. 397. See also Phillips *v.* Brazeal, 14 Ala. 746. *Compare* McMeekin *v.* Hudson, 3 Strobh. (S. C.) 327.

The sureties on the bond of a public administrator are not within the application of the statute providing for the release of sureties on an administrator's bond when a second bond is filed. State *v.* Wolff, 10 Mo. App. 95.

21. State *v.* Stroop, 22 Ark. 328; Pepper *v.* Donnelly, 87 Ky. 259, 8 S. W. 441, 10 Ky. L. Rep. 140; McKim *v.* Bartlett, 129 Mass. 226; Corrigan *v.* Foster, 51 Ohio St. 225, 37 N. E. 263. And see *supra*, XVII, A, 7.

Under the Mississippi statute when a new bond is given as a substitute for the first the sureties on the first bond are discharged from all liability except only as to actions then pending on that bond. Russell *v.* McDougall, 3 Sm. & M. 234.

Under the Tennessee statute where the sureties on the first bond are released by order of the court and a new bond given, the sureties on the second are primarily liable to the extent of their bond for all defaults whether before or after the execution of the second bond, and the sureties on the first are only liable for defaults occurring previously in case the second bond proves insufficient. Morris *v.* Morris, 9 Heisk. 814.

A bill of discovery may be maintained against the principal and both sets of sureties in order to ascertain the time of a devastavit and charge each set of sureties according to their respective liabilities on their bonds. Alexander *v.* Mercer, 7 Ga. 549.

22. Lacoste *v.* Speivalo, 64 Cal. 35, 30 Pac. 571; Pinkstaff *v.* People, 59 Ill. 148; State *v.* Berning, 74 Mo. 87; Haskell *v.* Farrar, 56 Mo. 497; State *v.* Fields, 53 Mo. 474; State *v.* Berning, 6 Mo. App. 105; Pickens *v.* Miller, 83 N. C. 543.

Where the court requires a new bond on its own motion and not on the application of the former sureties for relief the former sureties are not discharged. Ward *v.* State, 40 Miss. 108.

If the second bond is not given for a statutory cause the effect will be merely to add an additional security and the original bond will remain in full effect. Wood *v.* Williams, 61 Mo. 63.

23. Com. *v.* Shryock, 15 Serg. & R. (Pa.) 69; Beckham *v.* Pride, 6 Rich. Eq. (S. C.) 78.

24. Hubbard *v.* Ewing, 4 Baxt. (Tenn.) 404. See also Hoge *v.* Vintroux, 21 W. Va. 1, holding that while it will be presumed that a note given a distributee is merely collateral security, if it be proved to have been given in payment of the claim the liability of the sureties will be discharged.

25. See *supra*, XVII, B, 11; XVII, C.

26. *Georgia.*— Freeman *v.* Brown, 115 Ga. 23, 41 S. E. 385.

Illinois.— Bell *v.* People, 94 Ill. 230.

Iowa.— Taylor *v.* McArthur, 87 Iowa 155, 54 N. W. 228.

Kentucky.— Adams *v.* Adams, 11 B. Mon. 77; Allen *v.* Kennedy, 8 S. W. 882, 10 Ky. L. Rep. 336; Walker *v.* Spalding, 1 Ky. L. Rep. 64.

Maryland.— State *v.* Cheston, 51 Md. 352.

Massachusetts.— See Mattoon *v.* Cowing, 13 Gray 387.

Missouri.— State *v.* Anthony, 30 Mo. App. 638.

New York.— Hood *v.* Hayward, 48 Hun 330, 1 N. Y. Suppl. 566.

North Carolina.— Ruffin *v.* Harrison, 81 N. C. 208.

transfer has been made and a new liability incurred;[27] and while a transfer by operation of law will sometimes be presumed,[28] the presumption is subject to rebuttal.[29]

9. Discharge by Order of Court — a. Power to Grant Discharge. In most jurisdictions it is provided by statute that the court may in certain cases release the sureties on the bond of an executor or administrator from further liability,[30]

Pennsylvania.— Vandever's Appeal, 42 Pa. St. 74.

Rhode Island.— Sarle *v.* Scituate Prob. Ct., 7 R. I. 270.

South Carolina.— Simkins *v.* Cobb, 2 Bailey 60; Crenshaw *v.* Crenshaw, 4 Rich. Eq. 14.

Virginia.— Odell *v.* Howle, 77 Va. 361; Myers *v.* Wade, 6 Rand. 444.

United States.— Alston *v.* Munford, 1 Fed. Cas. No. 267, 1 Brock. 266; Taylor *v.* Deblois, 23 Fed. Cas. No. 13,790, 4 Mason 131.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2427.

An executor cannot transfer a mere liability from one set of sureties to another by charging himself in one capacity with debts due from himself on account of a devastavit committed in the other, although where he has funds actually on hand he may fix the responsibility therefor by an express election as to the capacity in which they shall be held. Smith *v.* Gregory, 26 Gratt. (Va.) 248.

An order of court is not indispensable to transfer the funds from one capacity to the other, but it is sufficient if the representative manifests an intention to treat the funds as transferred. Bell *v.* People, 94 Ill. 230.

27. *Delaware.*— Burton *v.* Anderson, 5 Harr. 221.

Massachusetts.— Newcomb *v.* Williams, 9 Metc. 525.

Michigan.— Cranson *v.* Wilsey, 71 Mich. 356, 39 N. W. 9.

North Carolina.— Clancy *v.* Carrington, 14 N. C. 529.

Ohio.— Wilson *v.* Wilson, 17 Ohio St. 150, 91 Am. Dec. 125.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2427.

A formal transfer is not essential, but it is sufficient if the representative declares his election to hold the property in his other capacity. State *v.* Whitehouse, 75 Conn. 410, 53 Atl. 897.

What will amount to a change of capacity where the same persons are executors and trustees so as to exonerate the sureties on the executorship bond depends upon the circumstances of the particular case. Newcomb *v.* Williams, 9 Metc. (Mass.) 525.

The transfer must be clearly established so as to leave no doubt of the liability of the substituted sureties before the original sureties will be released. Potter *v.* Ogden, 136 N. Y. 384, 33 N. E. 228 [*affirming* 65 Hun 27, 19 N. Y. Suppl. 594].

The administration sureties may compel an administrator who is also guardian and has given bond in both capacities to transfer the liability by passing a guardianship account. Burton *v.* Anderson, 5 Harr. (Del.) 221.

Where the same person is administrator and also guardian of the next of kin, his return of an account of his administration and acknowledging a balance due his ward is not a performance of the condition of his administration bond unless the money to pay the balance is identified and retained by the guardian as the property of the ward. Harrison *v.* Ward, 14 N. C. 417.

Where the court directs an executor to retain and invest as trustee, according to the trusts of the will, a balance in his hands, but does not in terms discharge the trustee, the executor will be considered as holding the fund in the capacity of executor until it is invested as trustee, and the sureties on the executor's bond will be liable in case it is wasted instead of invested. Cluff *v.* Day, 124 N. Y. 195, 26 N. E. 306 [*reversing* 55 N. Y. Super. Ct. 460].

28. Woolley *v.* Price, 86 Md. 176, 37 Atl. 644; State *v.* Cheston, 51 Md. 352; Ruffin *v.* Harrison, 81 N. C. 208; Carroll *v.* Bosley, 6 Yerg. (Tenn.) 220, 27 Am. Dec. 460; Taylor *v.* Deblois, 23 Fed. Cas. No. 13,790, 4 Mason 131.

When transfer presumed.— After the time limited by law for settlement of the estate has elapsed, a transfer of possession by operation of law will be presumed. Woolley *v.* Price, 86 Md. 176, 37 Atl. 644; State *v.* Cheston, 51 Md. 352. After the lapse of a year property of a decedent held by an executrix who is also guardian of the legatees will be presumed to have been transferred to herself as guardian and to be held by her in the latter capacity. Downes *v.* State, 3 Harr. & J. (Md.) 239.

29. Wilson *v.* Wilson, 17 Ohio St. 150, 91 Am. Dec. 125.

30. *Arkansas.*— Valcourt *v.* Sessions, 30 Ark. 515.

Illinois.— Clark *v.* American Surety Co., 171 Ill. 235, 49 N. E. 481.

Indiana.— State *v.* Gregory, 88 Ind. 110; Lane *v.* State, 27 Ind. 108.

Kentucky.— Johnson *v.* Fuquay, 1 Dana 514.

Louisiana.— Boutte's Succession, 32 La. Ann. 556; Sanders *v.* Edwards, 29 La. Ann. 696.

Massachusetts.— McKim *v.* Blake, 132 Mass. 343.

New Jersey.— Allen *v.* Sanders, 34 N. J. Eq. 203.

New York.— Bick *v.* Murphy, 2 Dem. Surr. 251; Shook *v.* Goddard, 2 Dem. Surr. 201; Lewis *v.* Watson, 3 Redf. Surr. 43. See also Matter of Sogaard, 39 Misc. 519, 80 N. Y. Suppl. 379.

the principal being required to furnish new security,[31] under penalty of having his letters revoked upon failure to do so.[32] But the court cannot ordinarily release the sureties from any liabilities already incurred,[33] nor can it grant a valid release without making provision for the protection of the estate.[34] In the absence of statute the court is without authority to discharge a surety.[35] The authorities are not uniform as to whether public administrators are within the general statutory provisions relating to the discharge of sureties on official bonds.[36]

b. Proceedings. The proceedings for obtaining a discharge from liability as surety by order of court are regulated by statute,[37] the requirements of which

Ohio.— Howenstine *v.* Sweet, 13 Ohio Cir. Ct. 239, 7 Ohio Cir. Dec. 498.

South Carolina.— Gilliam *v.* McJunkin, 2 S. C. 442; McKay *v.* Donald, 8 Rich. 331; Waterman *v.* Bigham, 2 Hill 512; Trimmier *v.* Trail, 2 Bailey 480.

Tennessee.— Gower *v.* Shelton, 16 Lea 652; Morris *v.* Morris, 9 Heisk. 814; Polk *v.* Wisener, 2 Humphr. 520; Harrison *v.* Turbeville, 2 Humphr. 242.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2428.

The fact that the surety and his relatives are indebted to the estate and intend to have a new administrator appointed with a view to avoiding payment does not affect the right of the surety to be released. Lewis *v.* Watson, 3 Redf. Surr. (N. Y.) 43.

Errors of judgment of an administrator not amounting to malfeasance are not sufficient causes to authorize the release of one of his sureties from his bond. Sparrow's Succession, 39 La. Ann. 696, 2 So. 501.

31. *Arkansas.*— Valcourt *v.* Sessions, 30 Ark. 515.

Indiana.— Lane *v.* State, 27 Ind. 108.

Louisiana.— Sanders *v.* Edwards, 29 La. Ann. 696.

New Jersey.— Allen *v.* Sanders, 34 N. J. Eq. 203.

New York.— Shook *v.* Goddard, 2 Dem. Surr. 201; Lewis *v.* Watson, 3 Redf. Surr. 43.

Ohio.— Howenstine *v.* Sweet, 13 Ohio Cir. Ct. 239, 7 Ohio Cir. Dec. 498.

South Carolina.— Gilliam *v.* McJunkin, 2 S. C. 442; Owens *v.* Walker, 2 Strobh. Eq. 289.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2428.

32. *Arkansas.*— Valcourt *v.* Sessions, 30 Ark. 515.

Louisiana.— Sanders *v.* Edwards, 29 La. Ann. 696.

New Jersey.— Allen *v.* Sanders, 34 N. J. Eq. 203.

New York.— Shook *v.* Goddard, 2 Dem. Surr. 201; Lewis *v.* Watson, 3 Redf. Surr. 43.

South Carolina.— Gilliam *v.* McJunkin, 2 S. C. 442.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2428.

33. McKim *v.* Blake, 132 Mass. 343; Waterman *v.* Bigham, 2 Hill (S. C.) 512; Trimmier *v.* Trail, 2 Bailey (S. C.) 480.

Under the Tennessee statute the court may release the sureties from past as well as future liability (Polk *v.* Wisener, 2 Humphr. 520), unless the second bond proves insufficient, in which case the released sureties will be responsible for past liabilities to the extent of such deficiency (Morris *v.* Morris, 9 Heisk. 814).

34. Polk *v.* Wisener, 2 Humphr. (Tenn.) 520.

Order of discharge ineffectual until sufficient new bond given.— Howenstine *v.* Sweet, 13 Ohio Cir. Ct. 239, 70 Ohio Cir. Dec. 498.

The court cannot give a money decree against the administrator but must require a new bond or revoke the letters of administration. Gilliam *v.* McJunkin, 2 S. C. 442.

35. Com. *v.* Rogers, 53 Pa. St. 470; Owens *v.* Walker, 2 Strobh. Eq. (S. C.) 289. See also Carroll *v.* Moor, 7 Ala. 615; Cowperthwaite's Estate, 5 Pa. Co. Ct. 59, 20 Wkly. Notes Cas. (Pa.) 504.

36. See Mitchell *v.* Nelson, 49 Ala. 88 (holding that a county administrator is not a public officer within the application of the statute relating to the discharge of sureties on the bond of "any public officer"); State *v.* Nolan, 99 Mo. 569, 12 S. W. 1047 (holding that the sureties on the bond of a public administrator may be discharged under the statute providing for the discharge of the sureties on the "bond given by any officer").

37. *Illinois.*— Clark *v.* American Surety Co., 171 Ill. 235, 49 N. E. 481.

New Jersey.— Allen *v.* Sanders, 34 N. J. Eq. 203.

New York.— Bick *v.* Murphy, 2 Dem. Surr. 251; Stevens *v.* Stevens, 3 Redf. Surr. 507.

South Carolina.— Gillman *v.* McJunkin, 2 S. C. 442.

Tennessee.— Gower *v.* Shelton, 16 Lea 652; Harrison *v.* Turbeville, 2 Humphr. 242.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2430.

A formal order of discharge is not necessary where a proper application for a release has been made in response to which the administrator has filed a new bond which the court has approved. Lane *v.* State, 27 Ind. 103.

The surety cannot be released on the application of the principal but only where the petition for release is filed by himself. Clark *v.* American Surety Co., 171 Ill. 235, 49 N. E. 481 [*reversing* 66 Ill. App. 284].

Joinder of applications.— An application by persons interested in the estate to require a new bond cannot be united in the same proceeding with an application by sureties to

must be complied with,[38] and the facts necessary to confer jurisdiction should appear of record.[39]

E. Breach of Bond — 1. In General. As a general rule any default on the part of an executor or administrator in the performance of his official duties in administering the estate is a breach of the administration bond,[40] except where he has proceeded in good faith and the default is due to causes which he could not have prevented, in the exercise of due diligence,[41] or the error is merely technical and has not prejudiced the estate.[42]

2. Failure to Make and File Inventory.[43] The failure of an executor or administrator to make and file an inventory of the estate within the time required by law,[44] or by the condition of the bond,[45] or a failure to return a true and complete inventory,[46] is a breach of the administration bond.

be discharged from further liability. Bick *v.* Murphy, 2 Dem. Surr. (N. Y.) 251.

38. Clark *v.* American Surety Co., 171 Ill. 235, 49 N. E. 481.

If an administrator appears without notice the failure to give it is immaterial, the requirement being solely for his benefit. Harrison *v.* Turbeville, 2 Humphr. (Tenn.) 242.

Personal service on a non-resident executor is sufficient where the statute does not provide for substituted service. Stevens *v.* Stevens, 3 Redf. Surr. (N. Y.) 507.

The application may be dismissed if the sureties do not appear on the day set for the hearing. Allen *v.* Sanders, 34 N. J. Eq. 203.

39. Gower *v.* Shelton, 16 Lea (Tenn.) 652.

40. *Alabama.*— Fretwell *v.* McLemore, 52 Ala. 124.

Connecticut.—Adams *v.* Spalding, 12 Conn. 350.

Illinois.— People *v.* Miller, 2 Ill. 83.

Indiana.— Stanton *v.* State, 82 Ind. 463.

Kentucky.— Chaplin *v.* Simmons, 7 T. B. Mon. 337.

New Hampshire.— Probate Judge *v.* Heydock, 8 N. H. 491.

New York.— People *v.* Dunlap, 13 Johns. 437.

South Carolina.— Wiley *v.* Johnsey, 6 Rich. 355.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2431.

A breach may consist in disposing of assets of the estate without taking proper security (White *v.* Moe, 19 Ohio St. 37), making an unauthorized loan of funds of the estate (Johnston *v.* Maples, 49 Ill. 101), or lending money of the estate without requiring security (Probate Judge *v.* Mathes, 60 N. H. 433). The failure of an executor to invest funds for the benefit of infant legatees as directed by the will has been held a breach of the bond. U. S. *v.* Parker, 2 MacArthur (D. C.) 444. Where an executor gave a specific legatee a certificate of deposit in payment of his legacy and after the payment of debts distributed the balance of the estate among the residuary legatees who were not entitled to distribution until the specific legacy was paid in full, and the maker of the certificate became insolvent, it was held that the executor was guilty of a devastavit for which the legatee might maintain an action on the bond. Graffenreid *v.* Kundert, 34 Ill. App. 483.

41. Gay *v.* Grant, 101 N. C. 206, 8 S. E. 99, 106.

The non-performance of an act rendered impossible by an act of God or of an enemy is not a breach of the bond. Ordinary *v.* Corbett, 1 Bay (S. C.) 328.

Where property is given up in good faith by the representative to a surviving partner of decedent, on his claim of a right to dispose of it in closing the partnership, the sureties on the administration bond are not to be held responsible. People *v.* White, 11 Ill. 341.

42. State *v.* Schleiffarth, 9 Mo. App. 431.

43. **Duty to make and file inventory** see *supra*, IV, A.

44. *Connecticut.*— State *v.* French, 60 Conn. 478, 23 Atl. 153; Moore *v.* Holmes, 32 Conn. 553.

Maine.— Potter *v.* Titcomb, 10 Me. 53.

Massachusetts.— Forbes *v.* McHugh, 152 Mass. 412, 25 N. E. 622.

Pennsylvania.—Com. *v.* Bryan, 8 Serg. & R. 128.

Vermont.— Wilson *v.* Keeler, 2 D. Chipm. 16.

Wisconsin.— Ellis *v.* Johnson, 83 Wis. 394, 53 N. W. 691.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2432, 2450.

The failure of an executor who is sole legatee to file an inventory within the time prescribed by law is a technical breach of the bond which, there being no creditors, is cured by filing the inventory before suit brought. McKim *v.* Harwood, 129 Mass. 75.

No citation to file an inventory is necessary in order to render a failure to file the same within the proper time a breach of the bond. Bourne *v.* Stevenson, 58 Me. 499; Com. *v.* Bryan, 8 Serg. & R. (Pa.) 128. *Compare* Hurlburt *v.* Wheeler, 40 N. H. 73.

45. Warren *v.* Powers, 5 Conn. 373; Bourne *v.* Stevenson, 58 Me. 499.

46. State *v.* French, 60 Conn. 478, 23 Atl. 153; Williams *v.* Morehouse, 9 Conn. 470; Bisco *v.* Bishop, 1 Day (Conn.) 15; Bourne *v.* Stevenson, 58 Me. 499; Potter *v.* Titcomb, 10 Me. 53; Sherwood *v.* Hill, 25 Mo. 391. See also Edwards *v.* Gibbs, 11 Ala. 292.

A breach may consist in a failure to inventory money of the estate received before the granting of letters (Sherwood *v.* Hill, 25 Mo. 391), or a failure of the administrator to include a debt due from himself (Williams

3. Failure to Collect Assets.[47] The failure to collect assets, so far as the exercise of good faith and due prudence and diligence on his part permits, is a breach of the bond;[48] but there is no breach from a failure to collect which was not due to the fault of the representative, but to causes which he in the exercise of due diligence could not have prevented.[49]

4. Failure to Pay Allowance to Surviving Wife, Etc. Where a special allowance to the surviving wife, husband, or children is provided for by statute,[50] a failure on the part of the executor or administrator to pay such allowance as the statute or order of court may direct is a breach of the bond.[51]

5. Failure or Refusal to Pay Claims — a. In General. In England it has been held that the failure of an executor or administrator to pay claims against the estate is not a breach of the administration bond.[52] But in this country these decisions have been expressly disapproved,[53] and it is well settled that a failure or refusal to pay claims which have been legally established, to the extent of the assets, is a breach of duty on the part of the executor or administrator for which an action on the administration bond may be maintained;[54] and in

v. Morehouse, 9 Conn. 470. *Compare* State *v.* Gregory, 119 Ind. 503, 22 N. E. 1, holding such failure immaterial where no damage has resulted therefrom). But the failure to include property of which the representative has no knowledge is not a breach of the bond (Booth *v.* Patrick, 8 Conn. 106), nor where the selection of exemptions is not dependent upon the filing of an inventory, can the failure of an administrator to include certain property in the inventory the existence of which was known to the person claiming the exemption be assigned by such person as a breach (Hardin *v.* Pulley, 79 Ala. 381).

Where an estate has been declared insolvent suit cannot be maintained against an executor upon his official bond, assigning as a breach that he has not made a full inventory of the assets. Edwards *v.* Gibbs, 11 Ala. 292.

47. **Duty to collect assets** see *supra*, VII, A.

48. State *v.* Wilmer, 65 Md. 178, 3 Atl. 252; Hellmann *v.* Wellenkamp, 71 Mo. 407; Chouteau *v.* Hill, 2 Mo. 177; Beall *v.* Territory, 1 N. M. 507; Keowne *v.* Love, 65 Tex. 152. See also State *v.* Ruggles, 23 Mo. 339.

An executor's failure to collect a debt due from himself, he being solvent at the time of his appointment, is a breach of the bond, and he cannot on becoming insolvent return the debt as uncollectable so as to relieve his bondsman. State *v.* Gregory, 119 Ind. 503, 22 N. E. 1.

The appointment of a receiver to collect the assets of the estate after the refusal of the executor to do so does not affect the liability of the sureties on the bond. State *v.* Wilmer, 65 Md. 178, 3 Atl. 252.

49. State *v.* Ruggles, 23 Mo. 339; Gay *v.* Grant, 105 N. C. 478, 10 S. E. 891, 11 S. E. 242 [*modifying* 101 N. C. 206, 8 S. E. 99, 106]; State *v.* Brower, 93 N. C. 344; Syme *v.* Badger, 92 N. C. 706. See also Sanchez *v.* Forster, 133 Cal. 614, 65 Pac. 1077.

50. See *supra*, IX.

51. Choate *v.* Jacobs, 136 Mass. 297; Com. *v.* Longenecker, 1 Chest. Co. Rep. (Pa.) 202. *Contra*, Rocco *v.* Cicalla, 12 Heisk. (Tenn.) 508.

An order to retain a balance in the hands of an administrator after settlement and apply the same to the support of infant heirs is illegal and the sureties on the administration bond are not liable after such settlement and discharge in case the administrator converts the balance to his own use. State *v.* Anthony, 30 Mo. App. 638.

52. Wallis *v.* Pipon, Ambl. 183, 27 Eng. Reprint 124; Browne *v.* Canterbury, 1 Lutw. 882; Canterbury *v.* Wills, 1 Salk. 315. But see Greerside *v.* Benson, 3 Atk. 248, 26 Eng. Reprint 944; Canterbury *v.* House, Cowp. 140, Lofft 622.

The condition "to well and truly administer" the estate, in a bond given under St. 22 Car. II, applies only to the bringing in of a true inventory and account and not to the payment of claims against the estate. Canterbury *v.* Wills, 1 Salk. 315.

53. *Massachusetts.*— Coney *v.* Williams, 9 Mass. 114.

New Jersey.— Dickerson *v.* Robinson, 6 N. J. L. 195, 10 Am. Dec. 396.

New York.— People *v.* Dunlap, 13 Johns. 437.

North Carolina.— Washington *v.* Hunt, 12 N. C. 475.

South Carolina.— Lining *v.* Giles, 3 Brev. 530.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2444.

54. *Alabama.*— Grimmet *v.* Henderson, 66 Ala. 521.

Connecticut.— Clark *v.* Mix, 15 Conn. 152; Willey *v.* Paulk, 6 Conn. 74; Warren *v.* Powers, 5 Conn. 373.

Illinois.— People *v.* Allen, 8 Ill. App. 17.

Indiana.—Pence *v.* Makepeace, 75 Ind. 480; State *v.* Mason, 21 Ind. 171.

Louisiana.— Parmele *v.* Brashear, 16 La. 72.

Massachusetts.— Coney *v.* Williams, 9 Mass. 114. See also Baylies *v.* Chace, 1 Pick. 230.

Minnesota.— Johanson *v.* Hoff, 70 Minn. 140, 72 N. W. 965.

Mississippi.— Cannon *v.* Cooper, 39 Miss. 784, 80 Am. Dec. 101.

Missouri.— State *v.* James, 82 Mo. 509; State *v.* Walsh, 67 Mo. App. 348.

some jurisdictions an action on the bond by a creditor of the estate is expressly allowed by statute.[55]

b. Barred Claims. It is not a breach of the bond for an executor or administrator to refuse to pay a claim against the estate which is barred by the statute of limitations[56] or by failure of the claimant to present the same within the time provided by statute.[57]

6. Wrongful Payment of Claims. It is a breach of the bond to wrongfully pay claims to the detriment of creditors, distributees, or others interested in the estate, as by paying claims for which the estate is not liable,[58] disregarding legal priorities among claimants where the assets are not sufficient to pay all in full,[59] or failing to make a *pro rata* distribution among claimants of the same class;[60] and failure to resist payment of an unjust or unfounded claim against the estate is a breach of the bond, so far as the beneficiaries of the estate may suffer from the culpable negligence or bad faith of the representative in this respect.[61]

7. Failure to Sell Land For Payment of Debts. It is not a breach of an ordinary administration bond for the executor or administrator to fail or refuse to apply for a license to sell land of the decedent for the payment of debts,[62] to fail to sell the lands when authorized to do so,[63] or, after having made a sale,

New Hampshire.— Probate Judge *v.* Heydock, 8 N. H. 491. See also Probate Judge *v.* Locke, 6 N. H. 396.

New Jersey.— Hazen *v.* Durling, 2 N. J. Eq. 133 [*distinguishing* Dickerson *v.* Robinson, 6 N. J. L. 195, 10 Am. Dec. 396].

New York.—Hood *v.* Hayward, 48 Hun 330, 1 N. Y. Suppl. 566; Thayer *v.* Clark, 4 Abb. Dec. 391 [*affirming* 48 Barb. 243]; People *v.* Dunlap, 13 Johns. 437. See also Behrle *v.* Sherman, 10 Bosw. 292.

North Carolina.— Washington *v.* Hunt, 12 N. C. 475.

South Carolina.— Lining *v.* Giles, 3 Brev. 530.

Texas.— Gray *v.* McFarland, 29 Tex. 163. *Compare* Wheeler *v.* Goffe, 24 Tex. 660.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2444.

A failure to pay attorney's fees which have been allowed in the representative's expense account and ordered to be paid is a breach of the bond. Smith *v.* Rhodes, 68 Ohio St. 500, 68 N. E. 7.

Where the bond is conditioned to "obey all orders of the surrogate touching the administration of the estate" a failure to pay a claim ordered by the surrogate to be paid is a breach of the bond. Scofield *v.* Churchill, 72 N. Y. 565 [*affirming* 9 Hun 157]; Brewster *v.* Balch, 41 N. Y. Super. Ct. 63.

Although an administrator has been allowed credit for a claim in his final settlement yet if it appears that it was not in fact paid he and his sureties are liable therefor on the bond. Williamson *v.* Whittington, (Ark. 1887) 4 S. W. 449.

Where a discharge of a claim given through mistake, which is discovered before the close of administration, the liability of the administrator in his official character, and thus of his surety, remains. Murdock *v.* Matthews, Brayt. (Vt.) 100.

Contested claim.— A refusal to pay a claim which the executor has never admitted to be justly due and the validity of which has not been settled by a judgment is not a breach of the bond. Probate Judge *v.* Locke, 6 N. H. 396.

Judgment on note of representative.— An administrator cannot bind the estate by giving his negotiable note as administrator and his refusal to pay a judgment recovered on such a note after settlement in favor of an innocent holder is not a breach of his bond. Curtis *v.* Farmers' Nat. Bank, 39 Ohio St. 579.

If the estate is insolvent a creditor cannot, under the Massachusetts statute, sue on the bond for his own benefit unless the amount due him has been ascertained by a decree of distribution and an ineffectual demand for payment made. Barton *v.* White, 21 Pick. (Mass.) 58.

55. See State *v.* Mason, 21 Ind. 171; Coney *v.* Williams, 9 Mass. 114; Berkey *v.* Judd, 31 Minn. 271, 17 N. W. 618.

56. Crabtree *v.* Graham, 81 Ga. 290, 6 S. E. 426; Robinson *v.* Hodge, 117 Mass. 222; Dawes *v.* Snell, 15 Mass. 6, 8 Am. Dec. 80.

57. Gookin *v.* Sanborn, 3 N. H. 491.

If the bar of the statute is not absolute but provision is made for equitable relief under peculiar circumstances, and a claim not presented in time is approved by the administrator and allowed by the court, the failure to pay the same is a breach of the bond for which the sureties will be liable. Weber *v.* Noth, 51 Iowa 375, 1 N. W. 652.

58. Worthy *v.* Brower, 93 N. C. 344. See also Burruss *v.* Fisher, 23 Miss. 228.

59. State *v.* Brown, 80 Ind. 425; State *v.* Mason, 21 Ind. 171; State *v.* Taylor, 100 Mo. App. 481, 74 S. W. 1032; Worthy *v.* Brower, 93 N. C. 344.

60. Evans *v.* Taylor, 60 Tex. 422; Morrison *v.* Lavell, 81 Va. 519.

61. Smith *v.* Cuyler, 78 Ga. 654, 3 S. E. 406; Gold *v.* Bailey, 44 Ill. 491, 92 Am. Dec. 190; Parsons *v.* Mills, 1 Mass. 431.

62. Freeman *v.* Anderson, 11 Mass. 190; Hawkins *v.* Carpenter, 88 N. C. 403. See also Nelson *v.* Jaques, 1 Me. 139.

63. State *v.* Smith, 68 Mo. 641.

to refuse to receive the purchase-money and execute a deed to the purchaser for the land.[64]

8. Wrongful Sale of Land. It is a breach of the administration bond for an executor or administrator by falsely representing the condition of the estate to obtain an order for the sale of land to pay debts and to make a sale thereunder when such sale is not necessary,[65] or to sell on credit instead of for cash;[66] but where a sale is made under a void decree, no title passes to the purchaser, and there is no injury for which an action on the bond can be maintained.[67]

9. Failure or Refusal to Pay Legacies.[68] The failure or refusal of an executor or an administrator with the will annexed, having sufficient assets, to pay a legacy after it has become his legal duty to do so is a breach of the bond;[69] but until it has become his legal duty to make such payment his failure to do so is not a breach,[70] nor is the failure of an executor to pay from money in his hands legacies which were chargeable upon the testator's land a breach.[71]

10. Failure or Refusal to Make Distribution.[72] The failure or refusal of an administrator to pay over or distribute the estate as required by the decree of distribution is a breach of the bond for which he and his sureties are answerable;[73] but it is not a breach of the bond to refuse to make distribution before

64. Nelson *v.* Jacques, 1 Me. 139.

65. Chapin *v.* Waters, 110 Mass. 195. See also Bisco *v.* Bishop, 1 Day (Conn.) 15.

66. Foster *v.* Thomas, 21 Conn. 285.

67. Thayer *v.* Winchester, 133 Mass. 447.

68. Duty to pay legacies see *supra*, XI, A, 1.

69. *Alabama.*—Perkins *v.* Moore, 16 Ala. 9.

Connecticut.— Foreign Missions American Bd. of Comrs. Appeal, 27 Conn. 344; Adams *v.* Spaulding, 12 Conn. 350.

Indiana.— Gould *v.* Steyer, 75 Ind. 50; Heady *v.* State, 60 Ind. 316.

Kansas.— Kreamer *v.* Kreamer, 52 Kan. 597, 35 Pac. 214.

Maryland.— State *v.* Wilson, 38 Md. 338.

Massachusetts.— Conant *v.* Stratton, 107 Mass. 474.

New Hampshire.— Probate Judge *v.* Emery, 6 N. H. 141, where executor has assented to legacy and has sufficient assets to pay the same.

North Carolina.— McLane *v.* Peoples, 20 N. C. 133.

Virginia.— Almond *v.* Mason, 9 Gratt. 700.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2448.

If only an ordinary administration bond is given by an administrator with the will annexed, such bond containing no condition for the payment of legacies, a failure to pay legacies is not a breach. Fulcher *v.* Com., 3 J. J. Marsh. (Ky.) 592.

Improper payment by executor of executor. — Where the executor of an executor does not pay the assets of the first estate to the legatees of the first testator, but distributes them among the legatees of the executor, his testator, the sureties of the first executor are responsible for the amount so distributed, but not until an effort has been made to recover the amount from the sureties of the second executor. Aylett *v.* King, 11 Leigh (Va.) 486.

70. Probate Judge *v.* Kimball, 12 N. H. 165, holding that without any evidence of assent by the executor or of any judgment against him or demand upon him for payment of the legacy, its non-payment was not a breach of the condition of the bond.

In the case of a residuary legacy, the residuary balance cannot be known or ascertained until the final settlement of the executor's accounts, and until such settlement by the probate court and decree for payment no action can be maintained on the bond to recover the legacy. Jones *v.* Irvine, 23 Miss. 361.

When order of court necessary.—Where the bond is conditioned to pay such legacies "as shall be ordered and decreed to be paid by said court," there is no breach of condition until there has been an order of court to that effect and a failure to comply therewith. Caledonia Dist. Prob. Ct. *v.* Kimball, 42 Vt. 320. Under the Minnesota statute a refusal to pay a legacy is not a breach of the bond unless there has been an order or decree of the probate court directing payment. Huntsman *v.* Hooper, 32 Minn. 163, 20 N. W. 127.

Where an annuity has been assigned by a voidable assignment, the executor is not liable on his bond for refusing to pay it to the assignor so long as the assignment is not legally rescinded. Ames *v.* Clarke, 106 Mass. 573.

71. Gookin *v.* True, 3 N. H. 288. *Compare* Thornton *v.* Fitzhugh, 4 Leigh (Va.) 209.

72. Duty to make distribution see *supra*, XI, A, 1.

73. *Illinois.*— Ralston *v.* Wood, 15 Ill. 159, 58 Am. Dec. 204.

Indiana.— Stanton *v.* State, 82 Ind. 463.

Kentucky.— Com. *v.* Blanton, 2 B. Mon. 393; Jackson *v.* Bourbon Justices, 2 Bibb 292.

Maryland.— Jenkins *v.* State, 76 Md. 255, 23 Atl. 688, 790.

Nebraska.— Mortenson *v.* Bergthold, 64 Nebr. 208, 89 N. W. 742.

South Carolina.— Burnside *v.* Robertson, 28 S. C. 583, 6 S. E. 843.

the amount for distribution and the persons entitled thereto have been ascertained and an order or decree for distribution made,[74] nor, in cases where a refunding bond is required,[75] to refuse distribution where such bond has not been given or tendered.[76]

11. Conversion or Waste of Estate. It is a breach of the bond for the principal to convert to his own use or waste the estate committed to him, and for acts of this character, manifesting misconduct or culpable negligence, whereby loss accrues to the estate, he and his sureties are liable on the bond.[77]

12. Failure to Account. There is a breach of the bond where the executor or administrator fails to render accounts of his administration as required by law or by the conditions of his bond,[78] or where in making settlements for the purpose of showing the condition of the estate he fails to render a true and

Texas.— Stewart *v.* Morrison, 81 Tex. 396, 17 S. W. 15, 26 Am. St. Rep. 821.

Vermont.— Probate Court *v.* Niles, 32 Vt. 775; Probate Judge *v.* Fillmore, 1 D. Chipm. 420.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2447.

Where an administrator's account has been adjusted on appeal and a balance ordered to be paid over, a failure to do so is a breach of the bond. Dawes *v.* Sweet, 14 Mass. 105.

It is the representative's duty to apply for an order of distribution within a reasonable time after settlement of his account and if a loss to the estate occurs through his neglect to do so his bond is liable therefor (Sanford *v.* Thorp, 45 Conn. 241), and it is not necessary that he should have been requested by the distributees to make such application (Davenport *v.* Richards, 16 Conn. 310).

If the bond contains no clause securing the interests of distributees, the sureties will not be liable for failure or refusal to distribute (Arnold *v.* Rabbit, 5 J. J. Marsh. (Ky.) 665), notwithstanding the bond is conditioned "to well and truly administer according to law" (Barbour *v.* Robertson, 1 Litt. (Ky.) 93; Moore *v.* Waller, 1 A. K. Marsh. (Ky.) 488).

Where the statutory provisions are not followed in the settlement and distribution of the estate the fact that the administrator proceeded under the instructions of the orphans' court will not prevent a liability on the bond to an excluded distributee. Shriver *v.* State, 65 Md. 278, 4 Atl. 679.

Refusal to comply with a void decree of distribution is no breach of the bond. Hancock *v.* Hubbard, 19 Pick. (Mass.) 167.

On the death of an administrator no action can be maintained on his bond for not taking and distributing certain property belonging to the intestate's estate, because it passes to the administrator *de bonis non* by whom the settlement of the estate is to be completed. Williams *v.* Britton, 33 N. C. 110.

74. Ordinary *v.* Smith, 15 N. J. L. 92; Ordinary *v.* Martin, 1 Brev. (S. C.) 552.

75. See *supra*, XI, G.

76. Judge Limestone County Ct. *v.* Coalter, 3 Stew. & P. (Ala.) 348; Carmichael *v.* Browder, 3 How. (Miss.) 252. See also Kavanaugh *v.* Thacker, 2 Dana (Ky.) 137.

77. *Alabama.*— Thomson *v.* Searcy, 6 Port. 393.

Connecticut.— Strong *v.* White, 19 Conn. 238.

Georgia.— Dowling *v.* Feeley, 72 Ga. 557.

Illinois.— People *v.* White, 11 Ill. 341.

Indiana.— State *v.* Bennett, 24 Ind. 383.

Massachusetts.— Hutchins *v.* State Bank, 12 Metc. 421.

Michigan.— Cranson *v.* Wilsey, 71 Mich. 356, 39 N. W. 9.

Mississippi.— Burruss *v.* Fisher, 23 Miss. 228.

New York.— Potter *v.* Ogden, 136 N. Y. 384, 33 N. E. 228 [*affirming* 65 Hun 27, 19 N. Y. Suppl. 594]; People *v.* Dulap, 13 Johns. 437.

North Carolina.— Grant *v.* Edwards, 92 N. C. 442.

Pennsylvania.— Com. *v.* Keil, 9 Phila. 140.

Tennessee.— Summers *v.* Wilson, 2 Coldw. 469.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2439.

Such waste or conversion may consist in the improvement of the real estate of an intestate with the funds of the estate. Byrd *v.* Governor, 2 Mo. 102. And if the executor permits his wife to appropriate to her own use money which belongs to the estate such appropriation becomes his own act and makes him chargeable for the money upon his administration bond. Smith *v.* Jewett, 40 N. H. 513. But the fact that the representative takes security in his own name for a debt due the estate will not in the absence of fraud render him liable for waste. Syme *v.* Badger, 92 N. C. 706. And the commission of waste or trespass by third persons, with the consent of the administrator, upon the real estate of the deceased will not constitute a breach of a condition to account for thrice the amount of waste and trespass committed with his consent after representation of insolvency, unless the estate has been represented insolvent to the judge of probate. Gilbert *v.* Duncan, 65 Me. 469.

78. *Connecticut.*— Warren *v.* Powers, 5 Conn. 373.

Iowa.— Clark *v.* Cress, 20 Iowa 50.

Maine.— Webb *v.* Gross, 79 Me. 224, 9 Atl. 612; Williams *v.* Esty, 36 Me. 243.

Massachusetts.— Forbes *v.* McHugh, 152 Mass. 412, 25 N. E. 622; McKim *v.* Bartlett,

accurate account.[79] But it has been held that a refusal to account for a particular sum of money, either on the ground that it was never received, or was not received on account of the estate, or has already been included in an account settled is not a breach of the condition of the bond.[80]

13. Failure to Turn Over Assets to Successor. Failure of an executor or administrator to turn over assets of the estate to his successor in office upon a revocation of his letters or his resignation or removal is a breach of the bond.[81]

F. Conclusiveness of Adjudications Against Principal. By the weight of authority, a judgment or decree against an executor or administrator is, in the absence of fraud or collusion, conclusive against the sureties on the bond,[82]

129 Mass. 226; Coney *v.* Williams, 9 Mass. 114; White *v.* Swain, 3 Pick. 365.

Missouri.— Devore *v.* Pitman, 3 Mo. 179.

Nevada.— McNabb *v.* Wixom, 7 Nev. 163.

New Jersey.— Ordinary *v.* Barcalow, 36 N. J. L. 15.

North Carolina.— State *v.* Davidson, 79 N. C. 423.

Pennsylvania.— Hartzell *v.* Com., 42 Pa. St. 453; Com. *v.* Bryan, 8 Serg. & R. 128.

Rhode Island.— Westerly Prob. Ct. *v.* Potter, 22 R. I. 326, 47 Atl. 889; West Greenwich Probate Ct. *v.* Carr, 20 R. I. 592, 40 Atl. 844; Providence Municipal Ct. *v.* McElroy, 18 R. I. 749, 30 Atl. 796; Providence Municipal Ct. *v.* Henry, 11 R. I. 563.

Tennessee.— Newsom *v.* Dickerson, Peck 285.

Vermont.— Probate Ct. *v.* Bates, 10 Vt. 285; Matthews *v.* Page, Brayt. 106; Wilson *v.* Keeler, 2 D. Chipm. 16.

England.— Canterbury *v.* Wills, 1 Salk. 315.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2450.

Where an executor is sole legatee and there are no creditors, a failure to file an account within the time required by law is merely a technical breach which is cured by filing the account before suit brought. McKim *v.* Harwood, 129 Mass. 75.

A settlement after an action on the bond is instituted will not cure the breach of condition or bar the action. Clark *v.* Cress, 20 Iowa 50; Wilson *v.* Keeler, 2 D. Chipm. (Vt.) 16.

The allowance of an account by request of the parties in interest after the time limited by law is a waiver of the breach. Loring *v.* Kendall, 1 Gray (Mass.) 305.

The sureties are under no obligation to render an account, and before they can be held liable the liability of their principal must be first ascertained and established. Cadwallader *v.* Longley, 1 Disn. (Ohio) 497, 12 Ohio Dec. (Reprint) 756.

Where it does not appear that the delay was contumacious or so continued as to work injury or that any good will be accomplished by a suit on the bond it is not usual for the ordinary to direct it to be prosecuted, although it is lawful for him to do so. Lee's Case, 43 N. J. Eq. 172, 11 Atl. 125.

A settlement out of court, between the heirs and the administrator of an estate, is not a compliance with the condition of the bond given to the judge of probate, to render an account when required in the probate court. Clarke *v.* Clay, 31 N. H. 393.

Citation or order to account and failure to comply therewith as condition precedent to action see *infra*, XVII, I, 1, b, (III).

79. Dickerson *v.* Robinson, 6 N. J. L. 195, 10 Am. Dec. 396.

80. Probate Judge *v.* Briggs, 5 N. H. 66.

81. *Maryland.*— State *v.* Smith, 64 Md. 101, 20 Atl. 1037.

Minnesota.— Balch *v.* Hooper, 32 Minn. 158, 20 N. W. 124.

Missouri.— State *v.* Creusbauer, 68 Mo. 254.

New York.— Gerould *v.* Wilson, 81 N. Y. 573 [*affirming* 16 Hun 530].

Ohio.— Slagle *v.* Entrekin, 44 Ohio St. 637, 10 N. E. 675.

Oklahoma.— Greer *v.* McNeal, 11 Okla. 526, 519, 69 Pac. 893, 891.

Pennsylvania.— Hartzell *v.* Com., 42 Pa. St. 453.

Tennessee.— Coleman *v.* Raynor, 3 Coldw. 25.

Texas.— Boulware *v.* Hendricks, 23 Tex. 667; Baldwin *v.* Dearborn, 21 Tex. 446.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2436.

A public administrator is not liable upon his bond for a failure to pay over the assets of an estate to the administrators appointed by the probate court, until the court has adjusted his accounts and ordered him to pay over the balance in his hands. Baker *v.* State, 21 Ark. 405.

An executor's refusal to pay money into the probate court upon his resignation is not a breach of the bond, it being the duty of the court in such cases to appoint a successor who alone would be competent to receive the estate. Willson *v.* Hernandez, 5 Cal. 437.

82. *Alabama.*— Martin *v.* Tally, 72 Ala. 23; Grace *v.* Martin, 47 Ala. 135; Perkins *v.* Moore, 16 Ala. 9; Williamson *v.* Howell, 4 Ala. 693.

California.— Irwin *v.* Backus, 25 Cal. 214, 85 Am. Dec. 125. See also Chaquette *v.* Ortet, 60 Cal. 594.

Connecticut.— Willey *v.* Paulk, 6 Conn. 74; Goodrich *v.* Thompson, 4 Day 215.

Illinois.— Nevitt *v.* Woodburn, 160 Ill. 203, 43 N. E. 385, 52 Am. St. Rep. 315 [*affirming* 56 Ill. App. 346]; Ralston *v.* Wood, 15 Ill. 159, 58 Am. Dec. 604.

Indiana.— Salyer *v.* State, 5 Ind. 202.

Kentucky.— Hobbs *v.* Middleton, 1 J. J.

although they were not parties to the proceeding,[83] and cannot be collaterally questioned by them in an action on the bond,[84] their only remedy being by way

Marsh. 176; Frazer *v.* Frazer, 76 S. W. 13, 25 Ky. L. Rep. 473; Kennedy *v.* Crawley, 1 Ky. L. Rep. 346. *Compare* Stuart *v.* Hathaway, 4 Ky. L. Rep. 438.

Maine.— Bourne *v.* Todd, 63 Me. 427.

Maryland.— Jenkins *v.* State, 76 Md. 255, 23 Atl. 608, 790.

Massachusetts.— White *v.* Weatherbee, 126 Mass. 450; Heard *v.* Lodge, 20 Pick. 53, 32 Am. Dec. 197.

Michigan.— Clark *v.* Fredenburg, 43 Mich. 263, 5 N. W. 306.

Missouri.— State *v.* Creusbauer, 68 Mo. 254.

Montana.— Kenck *v.* Parchen, 22 Mont. 519, 57 Pac. 94, 74 Am. St. Rep. 625.

New Hampshire.— Probate Judge *v.* Sulloway, 68 N. H. 511, 44 Atl. 720, 73 Am. St. Rep. 619, 49 L. R. A. 347.

New Jersey.— Ordinary *v.* Kershaw, 14 N. J. Eq. 527.

New Mexico.— Conway *v.* Carter, (1902) 68 Pac. 941.

New York.— Power *v.* Speckman, 126 N. Y. 354, 27 N. E. 474 [*affirming* 12 N. Y. Suppl. 25]; Scofield *v.* Churchill, 72 N. Y. 565; Keegan *v.* Smith, 60 N. Y. App. Div. 168, 70 N. Y. Suppl. 260 [*affirming* 33 Misc. 74, 67 N. Y. Suppl. 281 (*reversing* 31 Misc. 651, 64 N. Y. Suppl. 1117)]; Matter of Gall, 42 N. Y. App. Div. 255, 59 N. Y. Suppl. 254; Baggott *v.* Boulger, 2 Duer 160; Field *v.* Van Cott, 15 Abb. Pr. N. S. 349.

North Dakota.— Joy *v.* Elton, 9 N. D. 428, 83 N. W. 875.

Ohio.— Smith *v.* Rhodes, 68 Ohio St. 500, 68 N. E. 7.

Oklahoma.— Greer *v.* McNeal, 11 Okla. 519, 526, 69 Pac. 891, 893.

Oregon.— Bellinger *v.* Thompson, 26 Oreg. 320, 37 Pac. 714, 40 Pac. 229.

Pennsylvania.— Com. *v.* Ruhl, 199 Pa. St. 40, 48 Atl. 905; *In re* Yung, 199 Pa. St. 35, 48 Atl. 692; Hartzell *v.* Com., 42 Pa. St. 453; Garber *v.* Com., 7 Pa. St. 265.

Texas.— Stewart *v.* Morrison, 81 Tex. 396, 17 S. W. 15, 26 Am. St. Rep. 821.

Wisconsin.— Wallber *v.* Wilmanns, 116 Wis. 246, 93 N. W. 47; Barney *v.* Babcock, 115 Wis. 409, 91 N. W. 982; Roberts *v.* Weadock, 98 Wis. 400, 74 N. W. 93; Meyer *v.* Barth, 97 Wis. 352, 72 N. W. 748, 65 Am. St. Rep. 124; Holden *v.* Curry, 85 Wis. 504, 55 N. W. 965.

United States.— Stovell *v.* Banks, 10 Wall. 583, 19 L. ed. 1033.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2462.

In South Carolina the authorities are conflicting. In some cases the judgment or decree has been held not to be conclusive but *prima facie* evidence only (Kaminer *v.* Hope, 9 S. C. 253; Stewart *v.* McCully, 5 Rich. 80; Ordinary *v.* Carlile, 1 McMull. 100; Buckner *v.* Archer, 1 McMull. 85; Ordinary *v.* Condy, 2 Hill 313), while in others it has been held conclusive (Norton *v.* Wallace, 2 Rich. 460 [*qualifying* Norton *v.* Wallace, 1 Rich. 507]; Chambers *v.* Patton, 1 Bailey 130; Lyles *v.* Brown, Harp. 31) and subject to impeachment by the surety only on the ground of fraud or collusion (Boyd *v.* Caldwell, 4 Rich. 117. But see Norton *v.* Wallace, 2 Rich. 460).

There are some exceptions to the rule that the sureties are bound by a judgment recovered against the principal, as where he fails to plead the statute of limitation or allows himself to be defaulted or the judgment is suffered collusively. McKim *v.* Haley, 173 Mass. 112, 53 N. E. 152.

The sureties on the official bond of a sheriff who has been appointed administrator by virtue of his office of sheriff and has qualified and acted as such under said bond are, in the absence of fraud, concluded by a decree of a probate court against their principal in the final settlement of his accounts as such administrator. Ragland *v.* Calhoun, 36 Ala. 606.

Where the action was against the administrator personally and on a cause of action for which the estate was not liable the fact that judgment was by mistake entered against the administrator as representative will not make it conclusive against the sureties. Williams *v.* Hinkle, 15 Ala. 713.

Matters concluded.— While the decree of the probate court on final settlement equally concludes the sureties and the principal as to matters of the account, it is otherwise as to the due execution of the bond or other defenses personal to the sureties. Martin *v.* Tally, 72 Ala. 23.

83. *California.*— Irwin *v.* Backus, 25 Cal. 214, 85 Am. Dec. 125.

Illinois.— Ralston *v.* Wood, 15 Ill. 159, 58 Am. Dec. 604.

Maryland.— Jenkins *v.* State, 76 Md. 255, 23 Atl. 608, 790.

Pennsylvania.— *In re* Yung, 199 Pa. St. 35, 48 Atl. 692.

Wisconsin.— Meyer *v.* Barth, 97 Wis. 352, 72 N. W. 748, 65 Am. St. Rep. 124.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2462.

84. *Connecticut.*— Goodrich *v.* Thompson, 4 Day 215.

Illinois.—Nevitt *v.* Woodburn, 160 Ill. 203, 43 N. E. 385, 52 Am. St. Rep. 315 [*affirming* 56 Ill. App. 346].

Massachusetts.— White *v.* Weatherbee, 126 Mass. 450.

New Jersey.— Ordinary *v.* Kershaw, 14 N. J. Eq. 527.

New York.— People *v.* Downing, 4 Sandf. 189; Field *v.* Van Cott, 15 Abb. Pr. N. S. 349.

North Dakota.— Joy *v.* Elton, 9 N. D. 428, 83 N. W. 875.

Oklahoma.— Greer *v.* McNeal, 11 Okla. 519, 526, 69 Pac. 891, 893.

Pennsylvania.— Garber *v.* Com., 7 Pa. St. 265.

of appeal, writ of error, or application for a new trial,[85] or by a direct proceeding in equity.[86] Thus a judgment establishing a devastavit against the representative is conclusive against the sureties;[87] a judgment on final settlement in the probate court is conclusive as to the existence and amount of assets,[88] and a judgment or decree against the representative in favor of a creditor, legatee, or distributee is conclusive as to the nature and validity of the claim,[89] although not

United States.— Stovall *v.* Banks, 10 Wall. 583, 19 L. ed. 1036.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2462 *et seq.*

85. Goodrich *v.* Thompson, 4 Day (Conn.) 215; Ralston *v.* Wood, 15 Ill. 159, 58 Am. Dec. 604; Garber *v.* Com., 7 Pa. St. 265; Lyles *v.* Brown, Harp. (S. C.) 31.

86. Ordinary *v.* Kershaw, 14 N. J. Eq. 527; Schnell *v.* Schroder, 1 Bailey Eq. (S. C.) 334. *Compare* Williamson *v.* Howell, 4 Ala. 693; Worsham *v.* McKenzie, 1 Hen. & M. (Va.) 342.

87. Grimmet *v.* Henderson, 66 Ala. 521; Salyer *v.* State, 5 Ind. 202; Governor *v.* Shelby, 2 Blackf. (Ind.) 26; Lowe *v.* Carlisle, 33 S. C. 597, 11 S. E. 438. *Contra*, under a statute relating specifically to actions for devastavit. Fauntleroy *v.* Lyle, 5 T. B. Mon. (Ky.) 266.

In an action by creditors for the non-payment of claims against the estate, a judgment establishing the fact that personal property sufficient to pay the claims has been wasted by the representative is conclusive as to the devastavit and is a bar to any order for the sale of lands for the payment of the same. Banks *v.* Speers, 103 Ala. 436, 16 So. 25.

Showing real amount of assets.— Where it is provided by statute that in an action on the bond for a devastavit an administrator may show the real amount of assets at the time the original judgment was rendered against him the sureties should be allowed the same privilege, although not mentioned in the act. Fauntleroy *v.* Lyle, 5 T. B. Mon. (Ky.) 266.

88. *Alabama.*— Jones *v.* Ritter, 56 Ala. 270; Holley *v.* Acre, 23 Ala. 603; Kyle *v.* Mays, 22 Ala. 692; Watts *v.* Gayle, 20 Ala. 817.

Arkansas.— George *v.* Elms, 46 Ark. 260.

Connecticut.— Goodrich *v.* Thompson, 4 Day 215.

Illinois.—Nevitt *v.* Woodburn, 160 Ill. 203, 43 N. E. 385, 52 Am. St. Rep. 315 [*affirming* 56 Ill. App. 346]; Housh *v.* People, 66 Ill. 178; Ralston *v.* Wood, 15 Ill. 159, 58 Am. Dec. 604.

Maine.— Thurlough *v.* Chick, 59 Me. 395.

Michigan.— Clark *v.* Fredenburg, 43 Mich. 263, 5 N. W. 306.

Missouri.— Dix *v.* Morris, 66 Mo. 514; Taylor *v.* Hunt, 34 Mo. 205; State *v.* Holt, 27 Mo. 340, 72 Am. Dec. 273; State *v.* Donegan, 12 Mo. App. 190.

New Jersey.— Ordinary *v.* Kershaw, 14 N. J. Eq. 527.

New York.— Harrison *v.* Clark, 87 N. Y. 572; Kelly *v.* West, 80 N. Y. 139; Power *v.* Bermester, 12 N. Y. Suppl. 25.

Ohio.— Slagle *v.* Entrekin, 44 Ohio St. 637, 10 N. E. 675; Perkins *v.* Scott, 9 Ohio Cir. Ct. 207, 6 Ohio Cir. Dec. 226. *Compare* Todd *v.* Lewis, 2 Handy 280, 12 Ohio Dec. (Reprint) 443.

Pennsylvania.— Garber *v.* Com., 7 Pa. St. 265; Miles *v.* Com., 2 Walk. 64.

Texas.— Williams *v.* Robinson, 63 Tex. 576.

United States.—Stovall *v.* Banks, 10 Wall. 583, 19 L. ed. 1036.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2471.

Annual accounts, as distinguished from the final account and settlement, are *prima facie* evidence only. State *v.* Wilson, 51 Ind. 96; State *v.* Lankford, 55 Mo. 564.

In an action against the representative for a debt of the decedent the only question is that of the decedent's liability and no issue as to the amount of assets is presented, and consequently a judgment establishing the indebtedness is not conclusive on the sureties as to the sufficiency of assets to pay the same. Banks *v.* Spears, 97 Ala. 560, 11 So. 841.

Receipts in depreciated currency should be stated and explained fully by administrators in their accounts that allowance may be made to them therefor on settlement; and if they do not they will not be allowed to show such matter in defense on their bonds after a decree charging them for the full amount. Bailey *v.* Dilworth, 10 Sm. & M. (Miss.) 404, 48 Am. Dec. 760.

89. *Alabama.*— Watts *v.* Gayle, 20 Ala. 817; Lamkin *v.* Heyer, 19 Ala. 228.

Illinois.—People *v.* Stacy, 11 Ill. App. 506.

Kentucky.— Hobbs *v.* Middleton, 1 J. J. Marsh. 176. *Compare* Helm *v.* Donnelly, 5 Ky. L. Rep. 517.

Missouri.— State *v.* Berning, 74 Mo. 87.

New Hampshire.—Probate Judge *v.* Tillotson, 6 N. H. 292; Probate Judge *v.* Robins, 5 N. H. 246.

New York.— Thayer *v.* Clark, 4 Abb. Dec. 391 [*affirming* 48 Barb. 243].

Pennsylvania.— Miller *v.* Com., 2 Pa. Cas. 152, 5 Atl. 438.

South Carolina.— Chambers *v.* Patton, 1 Bailey 130.

West Virginia.— Although a judgment against the principal is ordinarily only *prima facie* evidence against the sureties yet a judgment establishing a creditor's debt is conclusive as to its existence, amount, and justness. Crim *v.* England, 46 W. Va. 480, 33 S. E. 310, 76 Am. St. Rep. 826.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2469.

The confession of a judgment for a claim which is barred by the statute of limitations is not conclusive upon the sureties on the

of the existence or sufficiency of assets to pay the same.[90] The sureties cannot set up in an action on the bond any irregularities in the decree against the principal,[91] or in the proceedings upon which it was based;[92] but they are not precluded from showing that the decree was obtained through fraud or collusion,[93] or that the court exceeded its jurisdiction.[94] In a few jurisdictions, however, it is held that a judgment or decree against the principal is not conclusive against the surety but only *prima facie* evidence;[95] and in jurisdictions where the general rule is followed it is held not to apply to sureties on the bond of a deceased executor or administrator where the decree is based upon a settlement made by his personal representative,[96] or by an administrator *de bonis non*,[97] or in cases where judgment is rendered against the representative after his authority as such has terminated,[98] or after the sureties have been discharged from liability.[99]

G. Who May Enforce Liability on Bond — 1. In General. The general rule is that as an administration bond is intended for the benefit and protection of all persons interested in the administration of the estate and the proper application of its assets,[1] an action thereon may be maintained by any person so interested who has sustained an injury by any breach of its conditions.[2]

administrator's bond. Dawes *v.* Shed, 15 Mass. 6, 8 Am. Dec. 80.

An allowance of claims by commissioners in favor of persons who are not judgment creditors may be contested by sureties in an action on the bond. Williams *v.* Fitch, 2 Root (Conn.) 520.

90. A judgment by confession is not conclusive but only *prima facie* evidence of a sufficiency of assets to pay the same. Kearney *v.* Sascer, 37 Md. 264; Iglehart *v.* State, 2 Gill & J. (Md.) 235. See also Vanhook *v.* Barnett, 15 N. C. 268, holding that a judgment confessed by an administrator is not even *prima facie* evidence of assets.

91. McClellan *v.* Downey, 63 Cal. 520; Harrison *v.* Clarke, 20 Hun (N. Y.) 404; Baggott *v.* Boulger, 2 Duer (N. Y.) 160; Garber *v.* Com., 7 Pa. St. 265; Lyles *v.* Robinson, 1 Bailey (S. C.) 25.

92. Clark *v.* Fredenburg, 43 Mich. 263, 5 N. W. 306; Lyles *v.* Brown, Harp. (S. C.) 31. See also Jenkins *v.* State, 76 Md. 255, 23 Atl. 608, 790.

93. *Illinois.*— See Housh *v.* People, 66 Ill. 178; Ralston *v.* Wood, 15 Ill. 159, 59 Am. Dec. 604.

Maine.— Burgess *v.* Young, 97 Me. 386, 54 Atl. 910; Hayes *v.* Seaver, 7 Me. 237.

Massachusetts.— See Heard *v.* Lodge, 20 Pick. 53, 32 Am. Dec. 197.

New York.— Harrison *v.* Clark, 87 N. Y. 572; Annett *v.* Terry, 35 N. Y. 256 [*affirming* 2 Rob. 556, 28 How. Pr. 324]; People *v.* Townsend, 37 Barb. 520. *Compare* People *v.* Downing, 4 Sandf. 189.

Ohio.— Todd *v.* Lewis, 2 Handy 280, 12 Ohio Dec. (Reprint) 443.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2462 *et seq.*

Compare Norton *v.* Wallace, 2 Rich. (S. C.) 460.

94. Browning *v.* Vanderhover, 4 Abb. N. Cas. (N. Y.) 166; Buckner *v.* Archer, 1 McMull. (S. C.) 85. See also State *v.* Drake, 52 Ark. 350, 12 S. W. 706.

95. *Georgia.*— Brown *v.* Wiley, 107 Ga. 85, 32 S. E. 905; Gibson *v.* Robinson, 90 Ga. 756, 16 S. E. 969, 35 Am. St. Rep. 250; Bennett *v.* Graham, 71 Ga. 211; Dunagan *v.* Dunagan, 38 Ga. 554, decree in equity.

Louisiana.— Canal, etc., Co. *v.* Brown, 4 La. Ann. 545.

Mississippi.— Lipscomb *v.* Postell, 38 Miss. 476, 77 Am. Dec. 651 [*distinguishing* Singleton *v.* Garrett, 23 Miss. 195].

Tennessee.— Seat *v.* Cannon, 1 Humphr. 471. See also Young *v.* Hare, 11 Humphr. 303.

Virginia.— Hobson *v.* Yancey, 2 Gratt. 73; Craddock *v.* Turner, 6 Leigh 116.

West Virginia.— Crim *v.* England, 46 W. Va. 480, 33 S. E. 310, 76 Am. Dec. 826.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2462 *et seq.*

96. Street *v.* Henry, 124 Ala. 153, 27 So. 411; Means *v.* Hicks, 65 Ala. 241; Stallworth *v.* Farnham, 64 Ala. 259; Gray *v.* Jenkins, 24 Ala. 516. See also Brooks *v.* Hope, 139 Mass. 351, 31 N. E. 728.

97. Crouch *v.* Edwards, 52 Ark. 499, 12 S. W. 1070; Reither *v.* Murdock, 135 Cal. 197, 67 Pac. 784.

98. Bourne *v.* Todd, 63 Me. 427.

99. Rutter *v.* Hall, 31 Ill. App. 647.

1. Stewart *v.* Phenice, 65 Iowa 475, 22 N. W. 636; Rives *v.* Patty, 43 Miss. 338; Prosser *v.* Yerby, 1 How. (Miss.) 87.

In the case of intestacy without heirs or known kindred the bond inures to the benefit of the state in the same manner as to the heirs in other cases. Crawford *v.* Com., 1 Watts (Pa.) 480.

Purchasers of property of the estate are not immediately interested in the faithful administration of the estate, as are heirs and creditors, and cannot sue on the bond for a loss occasioned by the failure of the representative to comply with statutory requirements in making the sale. Longpre *v.* White, 6 La. 388.

2. *Connecticut.*— Blakeman *v.* Sherwood, 32 Conn. 324.

Iowa.— Stewart *v.* Phenice, 65 Iowa 475, 22 N. W. 636.

2. Heirs and Distributees. An administration bond inures to the benefit of heirs and distributees as well as creditors,[3] and they may sue for any breach of condition by which they have been injured.[4] If the representative has died, resigned, or been removed, and the estate owes no debts, an heir or distributee may sue without the necessity of the appointment of an administrator *de bonis non*;[5] but where there are creditors whose claims have not been paid only an administrator *de bonis non* can sue.[6]

3. Legatees and Devisees. A legatee or devisee may sue on an administration bond where he has been injured by a breach of its condition.[7]

Kentucky.— Com. *v.* Barstow, 3 B. Mon. 290.

Massachusetts.— Paine *v.* Gill, 13 Mass. 365.

Mississippi.— Rives *v.* Patty, 43 Miss. 338; Prosser *v.* Yerby, 1 How. 87.

Missouri.— State *v.* Campbell, 10 Mo. 724.

Montana.— Territory *v.* Cox, 3 Mont. 197.

North Carolina.— Murphy *v.* McKay, 28 N. C. 397.

South Carolina.— McCorkle *v.* Williams, 43 S. C. 66, 20 S. E. 744; Kaminer *v.* Hope, 9 S. C. 253.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2519.

Where an administrator refuses to pay over money which has escheated to the state and the court does not remove him and appoint a successor to proceed against him for its recovery the attorney-general may sue on the administration bond. Fuhrer *v.* State, 55 Ind. 150.

A receiver appointed to collect assets of the estate in danger of being lost by reason of the refusal of the executor to collect them may maintain a suit against the sureties of the executor in the name of the state for his failure to make such collection. State *v.* Wilmer, 65 Md. 178, 3 Atl. 252.

The assignee of a decree against the administrator may maintain a suit as relator on the administrator's bond. The commonwealth is technically plaintiff and the use is to the relator. Com. *v.* Barstow, 3 B. Mon. (Ky.) 290.

3. Goux *v.* Moucla, 30 La. Ann. 743; Ward *v.* Ward, 1 Tex. Unrep. Cas. 123. See also Blakeman *v.* Sherwood, 32 Conn. 324.

4. *Connecticut.*— Blakeman *v.* Sherwood, 32 Conn. 324.

Georgia.— Williams *v.* Lancaster, 113 Ga. 1020, 39 S. E. 471.

Indiana.— Owen *v.* State, 25 Ind. 371; State *v.* Bennett, 24 Ind. 383; State *v.* Mason, 21 Ind. 171.

Missouri.— State *v.* Campbell, 10 Mo. 724.

South Carolina.— McCorkle *v.* Williams, 43 S. C. 66, 20 S. E. 744; Kaminer *v.* Hope, 9 S. C. 253.

Tennessee.— Newsom *v.* Dickerson, Peck 285.

Texas.— Ward *v.* Ward, 1 Tex. Unrep. Cas. 123.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2525.

So far as a widow takes by descent from her husband under the provisions of the statute, she takes as his heir, and therefore may maintain an action against an executor or administrator on his bond. State *v.* Mason, 21 Ind. 171.

The heirs must show an injury to them as such in order to maintain an action on the bond, and if there are creditors an injury to the estate is *prima facie* an injury to the creditors and not to the heirs. Peveler *v.* Peveler, 54 Tex. 53; Remick *v.* Luter, 32 Tex. 797.

A guardian of infant distributees may sue in the name of the state on an administrator's bond. State *v.* Campbell, 10 Mo. 724.

The widow or heir of a deceased heir cannot sue on the bond for such heir's distributive interest, but the action must be by the personal representative of the deceased heir. George *v.* Elms, 46 Ark. 260.

Where a distributee has assigned his interest an action on the bond to recover the same should ordinarily be brought on the relation of the assignor to the use of the assignee (Burch *v.* Clark, 32 N. C. 172), but the assignee is a "party aggrieved" within the meaning of a code provision permitting the party aggrieved to sue in his own name (Jacobs *v.* Bogart, 128 Ala. 678, 29 So. 645).

5. State *v.* Thornton, 56 Mo. 325; Fort *v.* Fitts, 66 Tex. 593, 1 S. W. 563; Ward *v.* Ward, 1 Tex. Unrep. Cas. 123. *Compare* State *v.* Fulton, 35 Mo. 323; Gilliam *v.* Watkins, 104 N. C. 180, 10 S. E. 183.

6. Peveler *v.* Peveler, 54 Tex. 53. See *infra*, XVII, G, 5.

Where an administrator has left the state and there are creditors whose claims are unpaid an heir in order to sue on the bond must become administrator *de bonis non* and sue in that capacity. Remick *v.* Luter, 32 Tex. 797.

7. Graffenreid *v.* Kundert, 34 Ill. App. 483; Nelson *v.* Corwin, 59 Ind. 489; State *v.* Scott, 12 Ind. 529; Paine *v.* Gill, 13 Mass. 365; Mighton *v.* Dawson, 38 Ohio St. 650. But *compare* Newcomb *v.* Williams, 9 Metc. (Mass.) 525.

In the case of an infant devisee the action should be brought by his next friend (Stevens *v.* Cole, 7 Cush. (Mass.) 467) or by his lawfully authorized attorney (Territory *v.* Cox, 3 Mont. 197).

The administrator of a devisee may maintain an action against the surety of the testator's executor for a conversion of the devise. Nelson *v.* Corwin, 59 Ind. 489.

A devisee having only a contingent estate or a present interest defeasible upon a condition subsequent is not entitled to bring an action on the administration bond. Stevens *v.* Cole, 7 Cush. (Mass.) 467.

4. Creditors. A creditor of the estate is a person interested in its proper administration and may sue on the bond for a breach of its conditions by which he had been injured,[8] but a creditor of an heir has no direct interest in the bond and is not entitled to sue thereon.[9]

5. Administrator De Bonis Non. At common law an administrator *de bonis non* could not maintain an action on the bond of his predecessor,[10] the bond being considered as indemnity only to those interested in the estate as creditors, legatees, or distributees,[11] and such is apparently still the law in some jurisdictions;[12] but in most jurisdictions this rule has now been changed and the administrator *de bonis non* may sue,[13] and indeed it has been held that, where an administrator *de*

When action should be brought for benefit of estate.— Where the breaches alleged consist of the executor's failure to return an inventory, and wasting and converting the assets to his own use, the action for such breaches should be brought for the benefit of the estate and not for the benefit of a particular legatee or distributee. Dawson *v.* Dawson, 25 Ohio St. 443.

The assignee of a decree for a legacy cannot sue on the bond to recover the same, since a legacy is not assignable at law and such action can only be maintained on the relation of the person who has the legal right. Burnett *v.* Harwell, 3 Leigh (Va.) 89.

8. *Indiana.*— Embree *v.* State, 85 Ind. 368.
Minnesota.— Forepaugh *v.* Hoffman, 23 Minn. 295.
New Jersey.— *In re* Honnass, 14 N. J. Eq. 493.
New York.— Matter of Gall, 47 N. Y. App. Div. 490, 62 N. Y. Suppl. 420; Thayer *v.* Clark, 4 Abb. Dec. 391, 2 Keyes 620 note [*affirming* 48 Barb. 243]; People *v.* Dunlap, 13 Johns. 437.
Texas.— Frank *v.* De Lopez, 2 Tex. Civ. App. 245, 21 S. W. 279.
Virginia.— Franklin *v.* Depriest, 13 Gratt. 257; Bush *v.* Beale, 1 Gratt. 229.
Wisconsin.— Johannes *v.* Youngs, 45 Wis. 445.
See 22 Cent. Dig. tit. "Executors and Administrators," § 2531.

Creditors by decree as well as those by judgment are entitled to sue. Bush *v.* Beale, 1 Gratt. (Va.) 229. See also Franklin *v.* Depriest, 13 Gratt. (Va.) 257.

Prejudice of other creditors.— One creditor cannot sue for his individual debt and recover for the full amount thereof to the prejudice of other creditors equally entitled. Newcomb *v.* Wing, 3 Pick. (Mass.) 168; Dickerson *v.* Robinson, 6 N. J. L. 195, 10 Am. Dec. 396.

A creditor who has received a third person's note in payment of his debt has no further claim on the estate which can entitle him to an action on the administrator's bond, although the maker of the note subsequently becomes insolvent. Rawson *v.* Piper, 34 Me. 98.

Right excluded by that of administrator de bonis non see *infra*, XVII, G, 5.

9. Fay *v.* Hunt, 5 Pick. (Mass.) 398.

10. Brice *v.* Taylor, 51 Ark. 75, 9 S. W. 854; State *v.* Rottaken, 34 Ark. 144; State *v.* Gooding, 8 Blackf. (Ind.) 567; Blizzard *v.* Filler, 20 Ohio 479; Chatfield *v.* Faran, 1 Disn. (Ohio) 488, 12 Ohio Dec. (Reprint) 750; U. S. *v.* Walker, 109 U. S. 258, 3 S. Ct. 277, 27 L. ed. 927.

11. Rives *v.* Patty, 43 Miss. 338; Prosser *v.* Yerby, 1 How. (Miss.) 87; Thomas *v.* Stanley, 4 Sneed (Tenn.) 411; Johnson *v.* Hogan, 37 Tex. 77; U. S. *v.* Walker, 109 U. S. 258, 3 S. Ct. 277, 27 L. ed. 927.

12. *Arkansas.*— Brice *v.* Taylor, 51 Ark. 75, 9 S. W. 854; State *v.* Rottaken, 34 Ark. 144. *Compare* State *v.* Ferguson, 8 Ark. 172.
Illinois.— Stose *v.* People, 25 Ill. 600; *In re* Richart, 58 Ill. App. 91. An administrator *de bonis non* appointed to succeed an administrator whose letters have been revoked is authorized by statute to sue on the former administrator's bond, but in cases where the former administrator dies the rule remains as at common law. Marsh *v.* People, 15 Ill. 284.
Kentucky.— Feltz *v.* Brown, 7 J. J. Marsh. 147; Bradshaw *v.* Com., 3 J. J. Marsh. 632.
Mississippi.— Rives *v.* Patty, 43 Miss. 338; Prosser *v.* Yarby, 1 How. 87.
Rhode Island.— Scituate Probate Ct. *v.* Smith, 16 R. I. 444, 17 Atl. 56.
Tennessee.— Thomas *v.* Stanley, 4 Sneed 411.
United States.— U. S. *v.* Walker, 109 U. S. 258, 3 S. Ct. 277, 27 L. ed. 927; Beard *v.* Roth, 35 Fed. 397.
See 22 Cent. Dig. tit. "Executors and Administrators," § 2521.

Failure to turn over assets.— In a few jurisdictions an administrator *de bonis non* may sue on his predecessor's bond for a refusal to turn over specific property of the deceased remaining unadministered but not for former acts of maladministration. Prosser *v.* Yerby, 1 How. (Miss.) 87. See also Waterman *v.* Dockray, 78 Me. 130, 3 Atl. 49.

Except as to the unadministered assets of the estate, the administrator *de bonis non* is not a "party interested," and it is only with respect to such property that he can sue on the bond of his predecessor. Meservey *v.* Kalloch, 97 Me. 91, 53 Atl. 876.

13. *California.*— Slater *v.* McAvoy, 123 Cal. 437, 56 Pac. 49.
Georgia.— Giles *v.* Brown, 60 Ga. 658.
Indiana.— Sheeks *v.* State, 156 Ind. 508, 60 N. E. 142; Duffy *v.* State, 115 Ind. 351, 17 N. E. 615; Myers *v.* State, 47 Ind. 293; State *v.* Porter, 9 Ind. 342.

bonis non has been appointed, his right to sue for a breach of the bond of the former representative excludes that of the heirs or creditors.[14]

6. Probate Court or Judge. The probate court cannot voluntarily move in the prosecution of probate bonds, since the prosecutor or real plaintiff must be one who was or may have been injured by the alleged breaches of the condition.[15]

7. Co-Representative. Where one co-representative has died, resigned, or been removed from office, the other may sue on the former's bond for any breach committed by him, where they have given separate bonds,[16] or if they have given a joint and several bond he may, as the representative of the estate, sue on such bond,[17] notwithstanding any individual liability to the sureties on the bond for the acts of his co-representative.[18] One co-representative cannot of course sue on the bond for his own benefit where he is himself in default,[19] but it has been held that an innocent co-representative who is also a legatee may sue on the bond for the default of the other, although by virtue of the bond both might be sued by a creditor or other legatee.[20]

8. Right of Principal to Enforce Liability of Sureties. It has been said that an insolvent administrator may recover against his own sureties for the benefit of the creditors of the estate,[21] but he cannot sue on the bond to recover for his individual benefit.[22]

H. Nature and Form of Remedy —1. In General. The usual method of

Iowa.— Stewart *v.* Phenice, 65 Iowa 475, 22 N. W. 636.

Kansas.— American Surety Co. *v.* Piatt, 67 Kan. 294, 72 Pac. 775.

Minnesota.— Balch *v.* Hooper, 32 Minn. 158, 20 N. W. 124.

Missouri.— State *v.* Heinrichs, 82 Mo. 542; State *v.* Hunter, 15 Mo. 490.

New Hampshire.— Prescott *v.* Farmer, 59 N. H. 90; Probate Judge *v.* Claggett, 36 N. H. 381, 72 Am. Dec. 314.

New Mexico.— Beall *v.* Territory, 1 N. M. 307.

New York.— Dunne *v.* American Surety Co., 43 N. Y. App. Div. 91, 59 N. Y. Suppl. 429; Dunne *v.* American Surety Co., 34 Misc. 584, 70 N. Y. Suppl. 391; Flanagan *v.* Maryland Fidelity, etc., Co., 32 Misc. 424, 66 N. Y. Suppl. 544.

North Carolina.— Neal *v.* Becknell, 85 N. C. 299; Lansdell *v.* Winstead, 76 N. C. 366.

Ohio.— Foster *v.* Wise, 46 Ohio St. 20, 16 N. E. 687, 15 Am. St. Rep. 542; O'Conner *v.* State, 18 Ohio 225; Webb *v.* Roettinger, 4 Ohio Cir. Dec. 270; Chatfield *v.* Faran, 1 Disn. 488, 12 Ohio Dec. (Reprint) 750.

Texas.— Johnson *v.* Morris, 45 Tex. 463 [*distinguishing* Johnson *v.* Hogan, 37 Tex. 77]; Martel *v.* Martel, 17 Tex. 391.

Virginia.— Allen *v.* Cunningham, 3 Leigh 395.

Wisconsin.— Golder *v.* Littlejohn, 23 Wis. 251.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2521.

A public administrator who has succeeded to the rights of a special administrator and to whom the bond of the latter has been duly assigned for the purpose of prosecution may bring an action as public administrator upon the bond. Dayton *v.* Johnson, 69 N. Y. 419.

14. State *v.* Cox, 45 Mo. 311; State *v.* Dulle, 45 Mo. 269; State *v.* Fulton, 35 Mo. 323; Gilliam *v.* Watkins, 104 N. C. 180, 10 S. E. 183; Tulburt *v.* Hollar, 102 N. C. 406, 9 S. E. 430; State University *v.* Hughes, 90 N. C. 537; State *v.* Goodman, 72 N. C. 508; Ferebee *v.* Baxter, 34 N. C. 64; Spencer *v.* Moore, 33 N. C. 160, 53 Am. Dec. 401; Baldwin *v.* Johnston, 30 N. C. 381; Fort *v.* Fitts, 66 Tex. 593, 1 S. W. 563; Collins *v.* Warren, 63 Tex. 311; Peveler *v.* Peveler, 54 Tex. 53.

If the administrator de bonis non refuses to sue, the creditor may bring suit making the administrator *de bonis non* a party defendant. Thornton *v.* Park, 61 Ga. 549; Wilson *v.* Pearson, 102 N. C. 290, 9 S. E. 707.

15. Randolph Dist. Probate Ct. *v.* Brainard, 48 Vt. 620. See also Williams *v.* Stoutz, 92 Ala. 516, 9 So. 155; Perkins *v.* Moore, 16 Ala. 9.

16. Burton *v.* Tunnell, 5 Harr. (Del.) 182.

17. State *v.* Wyant, 67 Ind. 25; Nanz *v.* Oakley, 120 N. Y. 84, 24 N. E. 306, 9 L. R. A. 223 [*reversing* 37 Hun 495]; Sperb *v.* McCoun, 110 N. Y. 605, 18 N. E. 441, 1 L. R. A. 490; Boyle *v.* St. John, 28 Hun (N. Y.) 454.

18. Sperb *v.* McCoun, 110 N. Y. 605, 18 N. E. 441, 1 L. R. A. 490; Boyle *v.* St. John, 28 Hun (N. Y.) 454.

Liability of co-representatives who have given joint bond for the acts of each other see *supra*, XVII, A, 6.

19. Stephens *v.* Taylor, 62 Ala. 269; Edwards *v.* White, 12 Conn. 28; Municipal Ct. *v.* Whaley, 25 R. I. 289, 55 Atl. 750.

20. Municipal Ct. *v.* Whaley, 25 R. I. 289, 55 Atl. 750. *Compare* Stephens *v.* Taylor, 62 Ala. 269.

21. See Wolfinger *v.* Forsman, 6 Pa. St. 294.

22. Edwards *v.* White, 12 Conn. 28.

enforcing the liability on an administration bond is by an action brought on the bond in a court of law,[23] although in some jurisdictions other forms of remedy are provided by statute,[24] and in others proceedings in equity are allowed in some cases.[25]

2. **Summary Proceedings.** In Alabama it is provided by statute that a final decree of the orphans' court shall have the force and effect of a judgment,[26] and that, where execution is issued on such decree and returned "no property found," generally, or in part, execution may forthwith issue against the sureties.[27] This summary remedy fails as to any surety who dies before a final decree is rendered against the principal,[28] or before a return of no property is made,[29] and cannot be extended to his personal representative.[30] The facts essential to authorize the issuance of the execution must appear of record or the execution may be quashed on motion.[31] There are somewhat similar statutory provisions for summary proceedings to enforce the liability on the bond in a few of the other states.[32]

23. *Arkansas.*— Moren *v.* McCown, 23 Ark. 93.

Illinois.— People *v.* Medart, 166 Ill. 348, 46 N. E. 1095 [*affirming* 63 Ill. App. 111].

Maryland.— Edes *v.* Garey, 46 Md. 24.

Michigan.— Hatheway *v.* Sackett, 32 Mich. 97.

Mississippi.— Halfacre *v.* Dobbins, 50 Miss. 766; Smith *v.* Everett, 50 Miss. 575; Buckingham *v.* Owen, 6 Sm. & M. 502.

New Jersey.— Rorback *v.* Dorsheimer, 25 N. J. Eq. 516.

South Carolina.— Teague *v.* Denby, 2 McCord Eq. 207, 16 Am. Dec. 643; Bague *v.* Blacklock, 2 Desauss. 602.

England.— Bolton *v.* Powell, 14 Beav. 275, 16 Jur. 24, 51 Eng. Reprint 292.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2485.

24. See *infra*, XVII, H, 2.

25. See *infra*, XVII, I, 3, c, (III).

26. Jenkins *v.* Gray, 16 Ala. 100; Thompson *v.* Bondurant, 15 Ala. 346, 50 Am. Dec. 136.

27. Hanna *v.* Price, 23 Ala. 826; Little *v.* Heard, 16 Ala. 358; Jenkins *v.* Gray, 16 Ala. 100; Cawthorn *v.* Knight, 11 Ala. 579.

In whose name execution issues.— Execution does not issue in favor of the obligee, but the parties in whose favor the decree is rendered are entitled to executions in their own names against the sureties of defendant in the decree. Cawthorn *v.* Knight, 11 Ala. 579.

Execution against representative of deceased executor.— A return of "no property" on an execution issued against the administrator of a deceased executor upon final settlement of his intestate's administration will not authorize the issuance of execution against the securities of the executor. Jenkins *v.* Gray, 16 Ala. 100.

Judgment obtained by administrator against his co-administrator.— An administrator who as distributee of the estate obtains a decree and execution against his co-administrator for assets received and not accounted for cannot, on a return of "no property," have execution against the joint securities of himself and his co-administrator. Little *v.* Heard, 16 Ala. 358.

The official bond of a sheriff becomes an administration bond when the administration of an estate is committed to him *ex officio* and his sureties are liable to an execution for his default, without a previous suit on the bond. Payne *v.* Thompson, 48 Ala. 535.

Premature issuance.— A summary execution against the sureties issued before the return-day of the execution against the administrator individually is voidable only, and a sale made thereunder would be valid until set aside. Steele *v.* Tutwiler, 68 Ala. 107.

28. Thompson *v.* Bondurant, 15 Ala. 346, 50 Am. Dec. 136.

29. Kirby *v.* Anders, 26 Ala. 466.

30. Kirby *v.* Anders, 26 Ala. 466.

31. Hanna *v.* Price, 23 Ala. 826; Poacher *v.* Weisinger, 20 Ala. 102; Little *v.* Heard, 16 Ala. 358; Thompson *v.* Bondurant, 15 Ala. 346, 50 Am. Dec. 136.

What must appear.— To authorize the issuance of execution there must be: (1) A decree of the orphans' court against the representative on final settlement of his account; (2) an execution issued on such decree with return of "no property found" generally, or as to part; (3) a bond by which the securities are bound for the representative's default. Hanna *v.* Price, 23 Ala. 826; Little *v.* Heard, 16 Ala. 358. See also Poacher *v.* Weisinger, 20 Ala. 102.

A writ of error will not lie where execution has improperly issued but the execution may be quashed. Watkins *v.* Bassett, 3 Ala. 707.

32. **In Iowa** the statute provides that "if the executors fail to make payment of any kind in accordance with the order of the court, any person aggrieved by that failure may, on ten days' notice to the executors and their sureties, apply to the court for judgment against them on the bond of the executors. The court shall hear the application in a summary manner, and may render judgment against them on the bond for the amount of money directed to be paid, and costs, and issue execution against them therefor." See Rainwater *v.* Hummell, 79 Iowa 571, 573, 44 N. W. 814; Hart *v.* Jewett, 17 Iowa 234; Wheelhouse *v.* Bryant, 13 Iowa 160. In such a proceeding, it is not necessary to file a petition alleging a breach of the bond. Hart *v.* Jewett, 17 Iowa 234.

I. Actions on Administration Bonds — 1. Right of Action — a. Actual Injury Necessary. No action for a mere technical breach of an administration bond can be maintained by or for the benefit of a person to whom no injury has resulted,[33] nor is an action on the bond maintainable for an act of the representative where the injury is remote and altogether in the nature of consequential damages.[34]

b. Conditions Precedent — (I) *Establishing Liability of Estate.* Before a creditor, legatee, or distributee can sue on an administration bond to enforce payment of his claim against the estate the liability of the estate must be established.[35] So a creditor cannot sue on the bond until his claim has been established by a judgment,[36] or has been ascertained and allowed by the probate court;[37] nor

In Tennessee the statute provides that an order of distribution shall operate as a judgment against the representative upon which execution may be issued, and, on a return of execution unsatisfied against the representative, any creditor may on motion have judgment entered against the sureties on the bond. See Cooper *v.* Burton, 7 Baxt. 406.

33. *Connecticut.*— State *v.* Smith, 52 Conn. 557; Olmstead *v.* Brush, 27 Conn. 530.

Louisiana.— Rison *v.* Young, 7 Mart. N. S. 294.

Missouri.— State *v.* Tubb, 22 Mo. App. 91.

New Hampshire.— Gookin *v.* Hoit, 3 N. H. 392.

North Carolina.— Worthy *v.* Brower, 93 N. C. 344.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2484.

But *compare* Forbes *v.* McHugh, 152 Mass. 412, 25 N. E. 622.

The complaint must show that plaintiff has been actually damaged by the breach complained of. Weihe *v.* Statham, 67 Cal. 245, 7 Pac. 673.

Not even nominal damages can be recovered where plaintiff has sustained no actual injury. Olmstead *v.* Brush, 27 Conn. 530. *Contra,* Edwards *v.* White, 12 Conn. 28.

The payment of debts in an order different from that provided is not a breach of the bond unless a creditor of the estate or the estate has suffered by reason of such payment. Masterson *v.* Cauble, 15 Ind. App. 515, 41 N. E. 477, 44 N. E. 377.

The failure of an administrator to take refunding bonds on dividing property among the distributees, although technically a devastavit, will not render him and his sureties liable on his administration bond where deceased had ample other property to pay all his debts (Worthy *v.* Brower, 93 N. C. 344); but where an administrator without having sufficient assets distributed slaves without taking refunding bonds it was held that the fact that the slaves might have been lost by emancipation if the administrator had retained them constituted no defense to a suit on the bond (Morrison *v.* Lavell, 81 Va. 519).

34. State *v.* Todd, 57 Mo. 217.

35. *Colorado.*— Metz *v.* People, 6 Colo. App. 57, 40 Pac. 51.

Indiana.— Eaton *v.* Benefield, 2 Blackf. 52.

New Hampshire.—Probate Judge *v.* Couch, 59 N. H. 39.

New York.— Garvey *v.* U. S. Fidelity, etc., Co., 77 N. Y. App. Div. 391, 79 N. Y. Suppl. 337.

South Carolina.—Jones *v.* Anderson, 4 McCord 113.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2492.

36. *Alabama.*— Thomson *v.* Searcy, 6 Port. 393.

Georgia.— Justices Irwin County Inferior Ct. *v.* Sloan, 7 Ga. 31.

Indiana.— Eaton *v.* Benefield, 2 Blackf. 52.

Kentucky.—Young *v.* Duhme, 4 Metc. 239; Lee *v.* Waller, 3 Metc. 61.

Mississippi.— Dinkins *v.* Bailey, 23 Miss. 284.

Missouri.—State *v.* St. Gemme, 23 Mo. 344.

Rhode Island.— Municipal Ct. *v.* Wilbour, 23 R. I. 95, 49 Atl. 488.

South Carolina.— Jones *v.* Anderson, 4 McCord 113.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2492.

But *compare In re* Honnass, 14 N. J. Eq. 493 [*explaining In re* Webster, 5 N. J. Eq. 89].

A return of nulla bona on an execution issued on the judgment is not essential. Young *v.* Duhme, 4 Metc. (Ky.) 239.

37. *Colorado.*— Metz *v.* People, 6 Colo. App. 57, 40 Pac. 51.

Michigan.— Blackmore *v.* Perkins, 95 Mich. 446, 54 N. W. 945.

Minnesota.— St. Paul First Nat. Bank *v.* How, 28 Minn. 150, 9 N. W. 626; Waterman *v.* Millard, 22 Minn. 261; Wood *v.* Myrick, 16 Minn. 494.

Missouri.— State *v.* St. Gemme, 23 Mo. 344.

New Hampshire.— Probate Judge *v.* Couch, 59 N. H. 39.

Rhode Island.— Providence Municipal Ct. *v.* Wilbour, 23 R. I. 95, 49 Atl. 488.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2492.

An action for failure to inventory a claim against himself cannot be maintained upon the administration bond of an executor until the claim has been established by the orphans' court. U. S. *v.* Rose, 27 Fed. Cas. No. 16,194, 3 Cranch C. C. 174.

Taking possession of partnership assets.— Where the administrator of the individual estate of a member of a firm who dies intestate gives the further bond required by the Kansas statute and takes possession of the entire property of the partnership for the

can a distributee or residuary legatee sue on the bond until the amount for distribution and the persons entitled thereto have been ascertained by the probate court.[38]

(II) *FINAL SETTLEMENT AND ACCOUNTING.* By the weight of authority no action on an administration bond can be maintained by a legatee or distributee for the non-payment of his legacy or distributive share until after a final settlement and accounting in the probate court,[39] for the reason that until then the amount applicable to such payments and the persons entitled thereto are not definitely ascertained;[40] and the same has been held as to suits by creditors for the non-payment of claims against the estate;[41] but a creditor may before final settlement sue on the bond for the non-payment of a claim which has been judicially ascertained and ordered to be paid,[42] or to recover damages for acts of maladministration constituting a breach of the conditions of the bond.[43] A suit

purpose of settling the partnership estate and thereafter converts such property to his own use, an action can be maintained against him and the sureties on such bond by any partnership creditor without any allowance of such creditor's claim in the probate court, or any settlement of the partnership affairs in such court. Carr *v.* Catlin, 13 Kan. 393.

38. Judge Madison County Ct. *v.* Looney, 2 Stew. & P. (Ala.) 70; Dobbins *v.* Half-acre, 52 Miss. 561; Thornton *v.* Glover, 25 Miss. 132.

Where the legacy is specific, the amount definite and certain, and the liability of the obligors absolute according to the conditions of the bond, no allowance by the court is necessary as a condition precedent to an action on the bond for a failure to pay the same. Kreamer *v.* Kreamer, 52 Kan. 597, 35 Pac. 214.

If defendant confesses a forfeiture of the bond he cannot afterward object that the legatee's demand was not reduced to a certainty by a judgment of court or otherwise. White *v.* Stanwood, 4 Pick. (Mass.) 380.

39. *Alabama.*— Judge Limestone County Ct. *v.* Coalter, 3 Stew. & P. 348.

California.— Weihe *v.* Statham, 67 Cal. 84, 7 Pac. 143.

Delaware.— State *v.* Waples, 5 Harr. 257.

Louisiana.— Chapron *v.* Chapron, 41 La. Ann. 486, 6 So. 810; Kemper *v.* Splane, 4 La. Ann. 486.

Mississippi.— Jones *v.* Irvine, 23 Miss. 361.

Missouri.— Ridgway *v.* Kerfoot, 22 Mo. App. 661.

New Jersey.— O'Neil *v.* Freeman, 45 N. J. L. 208; Ordinary *v.* Barcalow, 36 N. J. L. 15.

Ohio.— Pickaway County Treasurer *v.* Hall, 3 Ohio 225.

South Carolina.— Davant *v.* Pope, 6 Rich. 247; Ordinary *v.* McClure, 1 Bailey 7, 19 Am. Dec. 648.

Texas.— Buchanan *v.* Bilger, 64 Tex. 589.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2453.

Contra.— Robinson *v.* Elam, 11 Ky. L. Rep. 307; Williams *v.* Hicks, 5 N. C. 437.

Where no accounting can be had, as in the case of a representative who converts the assets of the estate to his own use and dies insolvent in a foreign jurisdiction, a court of equity will enforce the liability of the sureties without requiring an accounting. Bischoff *v.* Engel, 10 N. Y. App. Div. 240, 41 N. Y. Suppl. 815.

Where a representative dies, absconds, or is beyond the jurisdiction of the court, the proper method in order to ascertain whether he is liable and to what extent so as to bind the sureties on his official bond is by a proceeding in the nature of a civil action wherein the sureties are made parties. Reither *v.* Murdock, 135 Cal. 197, 67 Pac. 784.

In an equitable suit on the bond to recover legacies which were a charge upon real estate devised to the administrator with the will annexed who converted the personalty to his own use and died insolvent, the complaint charging that nothing remained of the estate of the testator or of the administrator which could be reached, an accounting was not necessary as the basis of equity jurisdiction. Towner *v.* Tooley, 38 Barb. (N. Y.) 598.

Unless a distributee has tendered a refunding bond he cannot sue until after final settlement. Judge Limestone County Ct. *v.* Coalter, 3 Stew. & P. (Ala.) 348.

Where the administrator has converted the funds of the estate it is not necessary that he should have been actually removed from office in order for the distributees to be entitled to sue. Owen *v.* State, 25 Ind. 371.

40. Jones *v.* Irvine, 23 Miss. 361; O'Neil *v.* Freeman, 45 N. J. L. 208; Ordinary *v.* Barcalow, 36 N. J. L. 15.

41. Reed *v.* Hume, 25 Utah 248, 70 Pac. 998; Marlboro Dist. Prob. Ct. *v.* Chapin, 31 Vt. 375. *Compare* Bonny *v.* Brashear, 19 La. 383.

Deceased executor.— Creditors cannot proceed against the sureties on the bond of a deceased executor without proceeding against the administrator *de bonis non* for an accounting. Easterling *v.* Thompson, 1 Rice (S. C.) 346.

If the principal has left the state and the court cannot get jurisdiction over him to compel an accounting an action may be maintained against the sureties. Scharmann *v.* Schoell, 23 N. Y. App. Div. 398, 48 N. Y. Suppl. 306.

42. Parmlee *v.* Brashear, 11 La. 329.

43. Ford *v.* Kittredge, 28 La. Ann. 113; Parmele *v.* Brashear, 16 La. 72; Probate Judge *v.* Lee, 72 N. H. 247, 56 Atl. 188.

on the bond for failure to pay over assets of the estate to a successor in office may, it has been held, be maintained before final settlement.[44]

(III) *CITATION TO ACCOUNT.* In some jurisdictions an action on the bond for a failure to account cannot be maintained until there has been a citation or order for an accounting and a failure to comply therewith,[45] but in others no citation or order is necessary.[46]

(IV) *PRIOR JUDGMENT AGAINST PRINCIPAL.* In some jurisdictions it is held that an action cannot be brought on an administration bond until after a judgment against the principal establishing his liability,[47] but in others an action may be maintained on the bond in the first instance against both principal and sureties without prior judgment against the administrator alone;[48] and in jurisdictions

Suit for waste.— A creditor cannot sue on the bond for waste unless it appears that the administration is closed, or that there are no assets in the representative's hands, subject to the orders of the probate court, sufficient to pay the debts of the creditor who sues. Hall *v.* McGehee, 34 Tex. 386.

44. State *v.* Flynn, 48 Mo. 413; State *v.* Porter, 9 Mo. 356; Douglas *v.* Day, 28 Ohio St. 175; Chapman *v.* Brite, 4 Tex. Civ. App. 506, 23 S. W. 514. *Contra*, Hudson *v.* Barratt, 62 Kan. 137, 61 Pac. 737; Adams *v.* Petrain, 11 Oreg. 304, 3 Pac. 163.

45. *Alabama.*— Judge Madison County Ct. *v.* Looney, 2 Stew. & P. 70.

California.— Ashurst *v.* Fountain, 67 Cal. 18, 6 Pac. 849.

Maine.— Gilbert *v.* Duncan, 65 Me. 469; Potter *v.* Cummings, 18 Me. 55; Potter *v.* Titcomb, 7 Me. 302.

New Hampshire.— Probate Judge *v.* Couch, 59 N. H. 39; Hurlburt *v.* Wheeler, 40 N. H. 73.

Rhode Island.— Pawtucket Probate Ct. *v.* Williams, 23 R. I. 515, 51 Atl. 101; Providence Municipal Ct. *v.* McCulla, 21 R. I. 273, 43 Atl. 182; Glocester Prob. Ct. *v.* Eddy, 8 R. I. 339.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2490.

Insolvent estates are not within the application of the rule. Webb *v.* Gross, 79 Me. 224, 9 Atl. 612. *Contra*, Georgia Dist. Prob. Ct. *v.* Vanduzer, 13 Vt. 135.

46. *Massachusetts.*— Richardson *v.* Oakman, 15 Gray 57. See also Fuller *v.* Cushman, 170 Mass. 286, 49 N. E. 631.

North Carolina.— State *v.* Davidson, 79 N. C. 423.

Pennsylvania.— Com. *v.* Bryan, 8 Serg. & R. 128.

South Carolina.— Ordinary *v.* Hunt, 1 McMull. 380 [in effect *overruling* Simkins *v.* Powers, 2 Nott & M. 213; Ordinary *v.* Williams, 1 Nott & M. 587; Lining *v.* Giles, 3 Brev. 530].

England.— Canterbury *v.* Wills, 1 Salk. 315.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2490.

47. *Alabama.*— Judge Benton County Ct. *v.* Price, 6 Ala. 36; Moore *v.* Armstrong, 9 Port. 697; Judge Limestone County Ct. *v.* Coalter, 3 Stew. & P. 348.

Louisiana.— Ricks *v.* Gantt, 35 La. Ann. 920; Pickett *v.* Gilmer, 32 La. Ann. 991.

Pennsylvania.— Com. *v.* Stub, 11 Pa. St. 150, 51 Am. Dec. 515.

South Carolina.— Hoell *v.* Blanchard, 4 Desauss. 21.

Virginia.— Taylor *v.* Stewart, 5 Call 520.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2458.

Exceptions to this rule have been made in cases where the representative absconded, concealed himself, or resided without the jurisdiction of the court (Com. *v.* Wenrick, 8 Watts (Pa.) 159), and where a removed administrator had settled his administration account, and a balance was ascertained to remain in his hands which he refused to pay over (Treasurer *v.* McElvain, 5 Ohio 200).

The reversal of a judgment in favor of an administrator is sufficient to enable the party against whom the prior judgment was rendered to maintain an action on the bond to recover money paid in satisfaction of the judgment without obtaining any further judgment against the administrator. Smoot *v.* Bigstaff, 32 S. W. 410, 17 Ky. L. Rep. 760.

A judgment against an administrator who has died need not be revived against his personal representative in order to make it the basis of an action against the sureties of the first administrator. Pilcher *v.* Drennan, 51 Miss. 873.

The securities on the administration bond of a sheriff acting as administrator are only liable after a judgment fixing liability against him as administrator. Territory *v.* Redding, 1 Fla. 242.

48. *Georgia.*— Johnson *v.* Koockogey, 23 Ga. 183.

Indiana.— Heady *v.* State, 60 Ind. 316.

Massachusetts.— Where the action is brought not for the benefit of a creditor but for the benefit of an administrator *de bonis non* no prior judgment against the representative is necessary. Fuller *v.* Dupont, 183 Mass. 596, 67 N. E. 662.

New Mexico.— Beall *v.* Territory, 1 N. M. 507.

North Carolina.— Strickland *v.* Murphy, 52 N. C. 242 [*distinguishing* Ferebee *v.* Baxter, 34 N. C. 64]; Chairman of Ct. *v.* Moore, 6 N. C. 22.

Ohio.— It seems that the rule formerly in force requiring a judgment against the administrator before suit on the bond (see Treasurer *v.* Kemp, 5 Ohio 240; Stewart *v.* Treasurer, 4 Ohio 98) has now been changed

where a judgment against the principal is a condition precedent to an action at law on the bond it has been held that the liability of the sureties might be enforced in equity without such prior judgment.[49]

(v) *Return of Execution Against Principal.* In some jurisdictions there must be not only a judgment against the representative but also an attempt to enforce the same against him before an action on the bond can be maintained,[50] but in others a judgment establishing the principal's liability is sufficient without the necessity of a return of execution against him unsatisfied.[51]

by statute. See State *v.* Humphreys, 7 Ohio 223.

Tennessee.— Newsom *v.* Dickerson, Peck 285.

Vermont.— Probate Judge *v.* Fillmore, 1 D. Chipm. 420.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2458.

49. Moore *v.* Armstrong, 9 Port. (Ala.) 697; Moren *v.* McCown, 23 Ark. 93; Clark *v.* Shelton, 16 Ark. 474.

A bill in equity praying a discovery of the amount and time of a devastavit in order to charge successive sets of sureties according to their respective liabilities may be maintained without first obtaining a judgment against the principal. Alexander *v.* Mercer, 7 Ga. 549.

A suit against the sureties alone to which neither the administrator nor his representative is made a party cannot be maintained without a prior judgment against the administrator (Moren *v.* McCown, 23 Ark. 93; Glenn *v.* Conner, 1 Harp. Eq. (S. C.) 267), except where such joinder is impossible and plaintiff unless allowed to proceed against the sureties alone would be left remediless (Moore *v.* Armstrong, 9 Port. (Ala.) 697).

50. *Louisiana.*— It is provided by statute that an action on the bond against the sureties cannot be maintained "until the necessary steps shall have been taken to enforce payment against the principal" (Ricks *v.* Gantt, 35 La. Ann. 920; Gaillard *v.* Bordelon, 35 La. Ann. 390; Pickett *v.* Gilmer, 32 La. Ann. 991; Lobit *v.* Castille, 13 La. Ann. 563; Wilson *v.* Murrell, 6 Rob. 68), the "necessary steps" being suit, judgment, and execution (Ricks *v.* Gantt, *supra*) unless the representative be insolvent (Lynch's Succession, 14 La. Ann. 235), which fact to take the case out of the general rule must be judicially established (Gaillard *v.* Bordelon, *supra*; Pickett *v.* Gilmer, *supra*); but if execution against the principal has been returned unsatisfied or his insolvency judicially established no further proceedings before suit on the bond are necessary (Ricks *v.* Gantt, *supra*; Bougeat *v.* Adams, 11 La. Ann. 78. See also Hayes *v.* Dugas, 51 La. Ann. 447, 25 So. 121).

Maryland.— It is provided by statute that no creditor can maintain an action against the administrator of his debtor upon his administration bond before a *non est* returned upon a capias ad respondendum against the administrator, or a fieri facias returned *nulla bona* or other apparent insolvency (Seegar *v.* State, 5 Harr. & J. 488), and this statute is in force in Washington county, D. C. (U. S. *v.* Kenedy, 26 Fed. Cas. No. 15,520, 4 Cranch C. C. 592; U. S. *v.* Queen, 27 Fed. Cas. No. 16,019, 3 Cranch C. C. 420), but the act refers in express terms to creditors and does not apply to distributees or other classes of claimants (U. S. *v.* King, 1 MacArthur (D. C.) 499).

New York.— See Haines *v.* Meyer, 25 Hun 414.

Virginia.— Taylor *v.* Stewart, 5 Call 520.

West Virginia.— State *v.* Hudkins, 34 W. Va. 370, 12 S. E. 495.

Where the letters of an executor have been revoked an action on his bond may, under the New York statute, be maintained without the necessity of a return of execution unsatisfied. Hood *v.* Hayward, 124 N. Y. 1, 26 N. E. 331 [*modifying* 48 Hun 330, 1 N. Y. Suppl. 566].

Where compliance impossible.— Where the statutory prerequisite of return of execution against the principal cannot from the nature of the case be complied with the liability of the sureties on the bond may be enforced in a proceeding in equity. Haines *v.* Meyer, 25 Hun (N. Y.) 414.

Sufficiency of return.— A fieri facias on a judgment against an administrator returned "no unadministered or unincumbered effects found," etc., is a sufficient return of *nulla bona* to entitle plaintiff to an action on the administration bond. Allen *v.* Cunningham, 3 Leigh (Va.) 395. Where a fieri facias against an administrator directs the sheriff to levy the amount of the goods, etc., of the deceased and of defendant, a return that "the defendant has no property upon which to levy this execution" does not show a devastavit. Beasley *v.* Mott, 12 Rich. (S. C.) 354. The surety on an administrator's bond cannot object to the return of *nulla bona* on a writ of fieri facias against the principal on the ground that the sheriff made his return after the return-day of the writ had passed. Soldini *v.* Hyams, 15 La. Ann. 551.

An execution against the administrator in his individual capacity, on his failure to pay the judgment creditors of the succession out of the funds of the estate adjudged to be in his hands, is sufficient to authorize proceedings by a creditor against the surety on the administrator's bond. Christian *v.* Lassiter, 23 La. Ann. 573.

51. Ward *v.* Yonge, 45 Ala. 474; Emmerson *v.* Herriford, 8 Bush (Ky.) 229; Lee *v.* Waller, 3 Metc. (Ky.) 61; McCalla *v.* Patterson, 18 B. Mon. (Ky.) 201 [*disapproving* Thomas *v.* Com., 3 J. J. Marsh. (Ky.) 121]; Smoot *v.* Bigstaff, 32 S. W. 410, 17 Ky. L. Rep. 760; Governor *v.* Choutear, 1 Mo. 771.

(VI) *ESTABLISHING DEVASTAVIT IN SEPARATE SUIT AGAINST PRINCIPAL.* At common law no action could be brought on an administration bond for a devastavit until after the devastavit was established in a separate suit against the principal,[52] and such appears still to be the law in some jurisdictions.[53] In most jurisdictions, however, although in some of them the earlier decisions supported the common-law rule,[54] an action for a devastavit may now be brought on the bond in the first instance without the necessity of a previous suit against the principal.[55]

(VII) *ORDER FOR PAYMENT.* By the weight of authority there must be not

Compare Judge Limestone County Ct. *v.* Coalter, 3 Stew. & P. (Ala.) 348.

The principal need not be pushed to insolvency, but a judgment at law or a decree of the orphans' court is all that is necessary as a prerequisite to a suit on the bond. Com. *v.* Stubb, 11 Pa. St. 150, 51 Am. Dec. 515; Com. *v.* Dill, 1 Phila. (Pa.) 556.

52. Territory *v.* Bramble, 2 Dak. 189, 5 N. W. 495; People *v.* Miller, 2 Ill. 83.

Suits in equity are generally subject to the same rule that a devastavit must first be fixed by a separate suit against the principal, yet in special cases where from some necessity a plaintiff is obliged to come into equity in the first instance the court will, in order to prevent circuity of action, make the sureties parties to the suit. Carow *v.* Mowatt, 2 Edw. (N. Y.) 57; Bacheldor *v.* Elliott, 1 Hen. & M. (Va.) 10. *Contra,* Rorback *v.* Dorsheimer, 25 N. J. Eq. 516.

53. *Dakota.*— Territory *v.* Bramble, 2 Dak. 189, 5 N. W. 495.

New York.— Haight *v.* Brisbin, 100 N. Y. 219, 3 N. E. 74 [*reversing* 7 N. Y. Civ. Proc. 152, 1 How. Pr. 199]; Hood *v.* Hood, 85 N. Y. 561 [*reversing* 19 Hun 300].

Pennsylvania.— Com. *v.* Moltz, 10 Pa. St. 527, 51 Am. Dec. 499; Com. *v.* Fretz, 4 Pa. St. 344; Com. *v.* Evans, 1 Watts 437.

South Carolina.— Wilbur *v.* Hutto, 25 S. C. 246; Jones *v.* Anderson, 4 McCord 113; Lining *v.* Gile, 2 Treadw. 720.

United States.— Gilpin *v.* Crandell, 10 Fed. Cas. No. 5,449, 2 Cranch C. C. 57; Gilpin *v.* Oxley, 10 Fed. Cas. No. 5,450, 1 Cranch C. C. 568; Young *v.* Mandeville, 30 Fed. Cas. No. 18,161, 2 Cranch C. C. 444.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2459.

The mode of establishing a devastavit after the death of the representative is, under the present practice in New York, by the decree of the surrogate on the accounting of his successor, and this applies to bonds given before the enactment of the code. Potter *v.* Ogden, 136 N. Y. 384, 33 N. E. 228 [*affirming* 65 Hun 27, 19 N. Y. Suppl. 594].

What sufficient to show devastavit.— A decree establishing the receipt of sufficient assets and a return of *nulla bona* on execution sufficiently establishes a devastavit and authorizes a suit on the bond. Ordinary *v.* Hunt, 1 McMull. (S. C.) 380; Ordinary *v.* Carlisle, 1 McMull. (S. C.) 100.

54. *Illinois.*— Biggs *v.* Postlewait, 1 Ill. 198.

Kentucky.— Clark *v.* Com., 5 T. B. Mon. 99.

Mississippi.— Probate Judge *v.* Phipps, 5 How. 59.

Ohio.— Treasurer *v.* Kemp, 5 Ohio 240; Stewart *v.* Treasurer, 4 Ohio 98; Cadwallader *v.* Longley, 1 Disn. 497, 12 Ohio Dec. (Reprint) 811.

Virginia.— Hairston *v.* Hughes, 3 Munf. 568; Catlett *v.* Carter, 2 Munf. 24; Gordon *v.* Frederick Justices, 1 Munf. 1; Turner *v.* Chinn, 1 Hen. & M. 53; Bacheldor *v.* Elliott, 1 Hen. & M. 10; Braxton *v.* Winslow, 4 Call 308, 1 Wash. 31; Call *v.* Ruffin, 1 Call 333.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2459.

Where an administrator has died or been removed, a creditor may establish his claim against the estate by an action against the administrator *de bonis non* and make this judgment the basis of a suit upon the bond of the original administrator for a devastavit committed by him. Pilcher *v.* Drennan, 51 Miss. 873.

A judgment against the administrator in chief cannot be made the foundation of a suit against an administrator *de bonis non* and his surety for a devastavit, but he may be made liable to the extent of the assets in his hands by a revival of the judgment against him. Ruff *v.* Smith, 31 Miss. 59.

An action against the administrator alone could be brought on the bond without a previous suit against him personally suggesting a devastavit. Mead *v.* Brooking, 3 Munf. (Va.) 548.

55. *Alabama.*— Dean *v.* Portis, 11 Ala. 104; Thomson *v.* Searcy, 6 Port. 393.

Colorado.— Howe *v.* People, 7 Colo. App. 535, 44 Pac. 512.

Georgia.— Code, § 3398, provides that "no prior judgment, establishing the liability of the administrator for a devastavit by him, shall be necessary before suit against the sureties on the bond" (Morgan *v.* West, 43 Ga. 275), but some doubt has been expressed as to the application of this section (Henderson *v.* Levy, 52 Ga. 35), since it is provided by the Civil Code, § 3503, that in actions by a creditor a prior judgment against the representative is necessary except in certain specified cases (Richardson *v.* Whitworth, 103 Ga. 741, 30 S. E. 573), one of which is where the representative "shall remove from the state" (Giles *v.* Brown, 60 Ga. 658).

Illinois.— People *v.* Miller, 2 Ill. 83.

Kentucky.— Lee *v.* Waller, 3 Metc. 61;

only a final settlement,[56] but also an order of court directing payment to be made, and a failure to comply therewith, before an action on the bond can be brought by a distributee,[57] a legatee,[58] a person entitled to allowance for support,[59] or a creditor [60] for the non-payment of his claim; but no order to pay over assets of the estate to a successor in office is necessary.[61]

Clarkson *v.* Com., 2 J. J. Marsh. 19; Hobbs *v.* Middleton, 1 J. J. Marsh. 176.

Mississippi.— Dobbins *v.* Halfacre, 52 Miss. 561.

Missouri.— Governor *v.* Chouteau, 1 Mo. 731. See also Oldham *v.* Trimble, 15 Mo. 225.

North Carolina.— Lewis *v.* Fagan, 13 N. C. 298.

Ohio.— Stewart *v.* Treasurer, 4 Ohio 98 note. See also State *v.* Humphreys, 7 Ohio 223.

Tennessee.— Newson *v.* Dickerson, Peck 285.

Texas.— Francis *v.* Northcote, 6 Tex. 185.

Virginia.— Bush *v.* Beale, 1 Gratt. 229; Dabney *v.* Smith, 5 Leigh 13; Allen *v.* Cunningham, 3 Leigh 395.

Wisconsin.— Wallber *v.* Wilmanns, 116 Wis. 246, 93 N. E. 47.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2459.

A suit in chancery lies against an administrator and the sureties on his general administration bond, and upon a bond given by him for the faithful application of the proceeds of lands without alleging or first having established the devastavit. Whitfield *v.* Evans, 56 Miss. 488.

Where an administrator has been removed from office a suit for waste may be brought against him and the sureties on his administration bond on relation of his successor in office, without recovering a previous judgment against the administrator. State *v.* Johnson, 7 Blackf. (Ind.) 529.

56. See *supra*, XVII, I, 1, b, (II).

57. *Alabama.*— Judge Limestone County Ct. *v.* French, 3 Stew. & P. 263.

New Jersey.— See Ordinary *v.* Barcalow, 36 N. J. L. 15.

Rhode Island.— See Providence Municipal Ct. *v.* Henry, 11 R. I. 563.

South Carolina.— Ross *v.* Pettus, 11 Rich. 543.

United States.— Alexander *v.* Bryan, 110 U. S. 414, 4 S. Ct. 107, 28 L. ed. 195.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2454.

But *compare* State *v.* Matson, 44 Mo. 305.

The administrator's failure to pay over rents of real estate received by him to the heirs will not authorize an action on the bond where there has been no order of the court directing such payment. Choate *v.* Jacobs, 136 Mass. 297.

Sufficiency of order or decree.— The decree for payment must definitely ascertain the person or persons to whom the payment is to be made (Kyle *v.* Mays, 22 Ala. 673. *Compare* Ordinary *v.* Mortimer, 4 Rich. (S. C.) 271), a decree merely ascertaining the aggregate amount due will not authorize a suit on the bond by one distributee to recover his share (Browder *v.* Faulkner, 82 Ala. 257, 3 So. 30).

A discharge of the representative is not necessary but only that the amount for distribution should have been ascertained and ordered to be paid. Stewart *v.* Morrison, 81 Tex. 396, 17 S. W. 15, 26 Am. St. Rep. 821.

58. *Mississippi.*— Jones *v.* Irvine, 23 Miss. 361.

New Hampshire.— Probate Judge *v.* Adams, 49 N. H. 150.

New York.— Loop *v.* Northrup, 59 Hun 75, 13 N. Y. Suppl. 144.

Ohio.— Dawson *v.* Dawson, 25 Ohio St. 443.

Vermont.— Probate Ct. *v.* Kimball, 42 Vt. 320.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2454.

Contra.— Gould *v.* Steyer, 75 Ind. 50; Heady *v.* State, 60 Ind. 316; Ordinary *v.* Barcalow, 36 N. J. L. 15; Providence Municipal Ct. *v.* Henry, 11 R. I. 563.

Where an executor is also a residuary legatee and has given bond to pay all debts and legacies, no order for payment is necessary. Hatheway *v.* Sackett, 32 Mich. 97.

Sufficiency of order.— Where the probate court makes a judgment of the superior court the basis of its decree and orders the amount of the judgment paid, such order is equivalent to a finding by the probate court and an order for distribution. Gandolfo *v.* Walker, 15 Ohio St. 251.

59. Hamlin *v.* Kinney, 2 Oreg. 91.

60. Hall *v.* Brewer, 40 Ark. 433; State *v.* Stafford, 73 Mo. 658; State *v.* Modrell, 15 Mo. 421; People *v.* Barnes, 12 Wend. (N. Y.) 492; Manchester Dist. Probate Ct. *v.* Kent, 49 Vt. 380; Marlboro Dist. Probate Ct. *v.* Chapin, 31 Vt. 373.

In Minnesota an order directing payment was formerly a prerequisite to an action on the bond by a creditor (Waterman *v.* Millard, 22 Minn. 261; Wood *v.* Myrick, 16 Minn. 447), but it is not essential under the present statute (Johanson *v.* Hoff, 70 Minn. 140, 72 N. W. 965).

In the settlement of an insolvent estate, a creditor cannot sue on the bond until the report of the commissioners has been accepted by the court and an order for payment made. Probate Judge *v.* Couch, 59 N. H. 506.

Where it is shown that there are sufficient assets an action on the bond may be brought for failure to pay after demand a claim duly established, although there has been no order of court for payment. State *v.* Shelby, 75 Mo. 482; Governor *v.* Chouteau, 1 Mo. 731; Wiley *v.* Johnsey, 6 Rich. (S. C.) 355.

61. Balch *v.* Hooper, 32 Minn. 158, 20 N. W. 124; State *v.* Porter, 9 Mo. 356. *Compare* People *v.* Corlies, 1 Sandf. (N. Y.) 228.

(VIII) *DEMAND.* Where an executor or administrator has failed to pay creditors, legatees, or distributees it is held in most jurisdictions that no demand for payment is necessary in order to maintain an action on the bond.[62] In a few jurisdictions, however, a demand against the representative is necessary;[63] but no demand is necessary against the sureties,[64] even in jurisdictions where it is necessary against the principal.[65]

(IX) *TENDER OF REFUNDING BOND.* The tender of a refunding bond by a distributee is not a condition precedent to a right of action on the administration bond, but the question whether the want of such bond was an obstacle to the settlement of the estate is for the consideration of the jury.[66]

(X) *ORDER GRANTING LEAVE TO SUE*—(A) *Necessity.* As the general rule an order of court granting leave to sue is a necessary condition precedent to an action on the bond,[67] although in a few jurisdictions this is not required,[68] and

62. *Alabama.*— Ward *v.* Yonge, 45 Ala. 474; Kyle *v.* Mays, 22 Ala. 692.

Connecticut.— Rowland *v.* Isaacs, 15 Conn. 115; Warren *v.* Powers, 5 Conn. 373.

Indiana.— Pence *v.* Makepeace, 75 Ind. 480; Lane *v.* State, 27 Ind. 108. *Compare* State *v.* Bowden, 3 Ind. 504.

Missouri.— State *v.* Crow, 8 Mo. App. 596.

New York.— People *v.* Rowland, 5 Barb. 449.

North Carolina.— Hoover *v.* Berryhill, 84 N. C. 132; Pickens *v.* Miller, 83 N. C. 543.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2489.

When an administrator resigns it is his duty to pay the money in his hands belonging to the estate into court, or to his successor, and no demand is necessary before suit is brought upon his bond by the administrator *de bonis non.* Lane *v.* State, 27 Ind. 108.

63. Rogers *v.* Mitchell, 1 Metc. (Ky.) 22; Paine *v.* Moffit, 11 Pick. (Mass.) 496; Paine *v.* Stone, 10 Pick. (Mass.) 75; Coffin *v.* Jones, 5 Pick. (Mass.) 61; Dawes *v.* Head, 3 Pick. (Mass.) 128; Prescott *v.* Parker, 14 Mass. 429; Lanier *v.* Irvine, 24 Minn. 116; Wood *v.* Myrick, 16 Minn. 494; State *v.* Cowles, 5 Ohio St. 87; McGovney *v.* State, 20 Ohio 93.

In Massachusetts a demand is necessary where the action is brought under Pub. St. c. 143, § 10 (McIntire *v.* Cottrell, 185 Mass. 178, 69 N. E. 1091; Fuller *v.* Dupont, 183 Mass. 596, 67 N. E. 662), but not where it is brought under Pub. St. c. 143, § 13 (Fuller *v.* Dupont, 183 Mass. 596, 67 N. E. 662).

In Illinois a demand is necessary in an action for a devastavit (People *v.* Admire, 39 Ill. 251) or in a proceeding against a defaulting executor or administrator brought under section 115 of the Administration Act but not in an action under section 39 against a representative who has had his letters revoked (Nevitt *v.* Woodburn, 160 Ill. 203, 43 N. E. 385, 52 Am. St. Rep. 315 [*affirming* 56 Ill. App. 346]).

If the demand is rendered impossible by the death of the representative, his sureties cannot, in an action on the bond by the distributees, avail themselves of a failure to make the demand. People *v.* Admire, 39 Ill. 251.

64. Rogers *v.* Mitchell, 1 Metc. (Ky.) 22; Wood *v.* Barstow, 10 Pick. (Mass.) 368; Elwell *v.* Prescott, 38 Wis. 274.

65. Rogers *v.* Mitchell, 1 Metc. (Ky.) 22. See also Wood *v.* Barstow, 10 Pick. (Mass.) 368.

66. Mayo *v.* Mayo, 9 N. C. 329. See also *In re* Green, 8 N. J. Eq. 550, holding that the question of the necessity of a refunding bond as a condition precedent to an action on the administration bond cannot be considered by the probate court on a petition for leave to sue.

67. *Maine.*— See Bulfinch *v.* Waldoboro, 54 Me. 150.

Massachusetts.— McKim *v.* Roosa, 183 Mass. 510, 67 N. E. 651; Robbins *v.* Hayward, 16 Mass. 524.

Minnesota.— Lanier *v.* Irvine, 24 Minn. 116; Wood *v.* Myrick, 16 Minn. 494.

Mississippi.— Washburn *v.* Phillips, 6 Sm. & M. 425.

New Hampshire.— Prescott *v.* Farmer, 59 N. H. 90; Probate Judge *v.* Kimball, 12 N. H. 165; Probate Judge *v.* Tillotson, 6 N. H. 292.

New Jersey.— *In re* Green, 8 N. J. Eq. 550; *In re* Webster, 5 N. J. Eq. 89.

New York.— Prentiss *v.* Weatherly, 68 Hun 114, 22 N. Y. Suppl. 680 [*affirmed* in 144 N. Y. 707, 39 N. E. 858]; Hood *v.* Hayward, 48 Hun 330, 1 N. Y. Suppl. 566; People *v.* Rowland, 5 Barb. 449; Scofield's Estate, 3 N. Y. Civ. Proc. 323; Scofield *v.* Adriance, 1 Dem. Surr. 196.

Ohio.— Everett *v.* Waymire, 30 Ohio St. 308.

Vermont.— Probate Ct. *v.* Sawyer, 59 Vt. 57, 7 Atl. 281; Rutland Probate Ct. *v.* Hull, 58 Vt. 306, 3 Atl. 472.

Wisconsin.— Johannes County Judge *v.* Youngs, 48 Wis. 101, 4 N. W. 32; Elwell *v.* Prescott, 38 Wis. 274.

United States.— Beall *v.* New Mexico, 16 Wall. 535, 21 L. ed. 292.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2494.

Objection that suit brought without leave must be by plea in abatement.— Johannes County Judge *v.* Youngs, 48 Wis. 101, 4 N. W. 32.

68. State *v.* Wilson, 38 Md. 338; Bartels *v.* Gove, 4 Wash. 632, 30 Pac. 675.

even in those jurisdictions where it is necessary as a general rule circumstances may render it unnecessary.[69]

(B) *Application and Proceedings.* The proper course in procuring leave to sue upon an administration bond is to make a written application to the court asking for such authority,[70] which should be made by the person aggrieved by the breach of the bond complained of,[71] and should state the facts upon which the application is based[72] and the interest and claim of the applicant,[73] and be duly verified.[74] The application is *ex parte* in its character,[75] and it is not necessary to give the obligors notice thereof,[76] or to cite the representative to show cause why it should not be granted.[77] In some cases the applicant is required to give a bond for costs[78] and to file his certificate of leave in the county court.[79]

(C) *Form and Effect of Order.* The order granting leave to sue must be in writing.[80] If not in conformity with the statute it may be amended by the court.[81] The order when granted is conclusive in all collateral proceedings and its validity cannot be questioned in an action on the bond.[82]

69. *Maine.*— Leave to sue is necessary in cases where the claims of creditors or distributees have not been ascertained by judgment (Groton *v.* Tallman, 27 Me. 68), but the rule does not apply to residuary legatees (Williams *v.* Cushing, 34 Me. 370).

Massachusetts.— There are three cases in which suit may be brought on a bond without obtaining leave of the probate court: (1) By a creditor who has recovered judgment against a solvent estate; (2) by a creditor of an insolvent estate who has obtained a decree of distribution in his favor; and (3) by a person who is next of kin to recover his share of the personal estate after a decree of the probate court ascertaining the amount due to him. White *v.* Weatherbee, 126 Mass. 450.

New Hampshire.— A claim on a probate bond before a commissioner in insolvency may be prosecuted by an administrator *de bonis non* without an order by the probate judge permitting it. Prescott *v.* Farmer, 59 N. H. 90.

New York.— A successor in office need not obtain an order of court granting leave to sue on the bond of his predecessor. Hood *v.* Hayward, 48 Hun 330, 1 N. Y. Suppl. 566; Dunne *v.* American Surety Co., 34 Misc. 584, 70 N. Y. Suppl. 391.

Ohio.— Suit may be brought without an order of court by a creditor, legatee, or distributee, provided his claim has been first liquidated by allowance, judgment, or award. State *v.* Cutting, 2 Ohio St. 1.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2494.

70. Fay *v.* Rogers, 2 Gray (Mass.) 175.

71. *In re* Webster, 5 N. J. Eq. 89; *In re* Webster, 4 N. J. Eq. 558; Probate Ct. *v.* Sawyer, 59 Vt. 57, 7 Atl. 281. See also *In re* Northampton County Sav. Bank, 32 N. J. Eq. 689.

72. *In re* Webster, 4 N. J. Eq. 558.

73. Probate Judge *v.* Tillotson, 6 N. H. 292.

74. *In re* Webster, 4 N. J. Eq. 558.

The want of verification of the facts stated in a petition for leave to prosecute an administration bond is not sufficient ground for vacating the order for prosecution. *In re* Green, 8 N. J. Eq. 550.

75. Washburn *v.* Phillips, 6 Sm. & M. (Miss.) 425; Elwell *v.* Prescott, 38 Wis. 274.

76. Bulfinch *v.* Waldoboro, 54 Me. 150; Fuller *v.* Cushman, 170 Mass. 286, 49 N. E. 631; Richardson *v.* Oakman, 15 Gray (Mass.) 57; Probate Judge *v.* Kimball, 12 N. H. 165; Roberts *v.* Weadock, 98 Wis. 400, 74 N. W. 93; Elwell *v.* Prescott, 38 Wis. 274.

77. People *v.* Rowland, 5 Barb. (N. Y.) 449.

78. Rutland Prob. Ct. *v.* Hull, 58 Vt. 306, 3 Atl. 472.

To whom bond delivered see Dickerson *v.* Miller, 13 N. J. L. 3.

79. Probate Ct. *v.* Niles, 32 Vt. 775, holding, however, that the requirement that it be filed at the time the writ is returned need not be strictly complied with but that it may in the discretion of the court be filed later.

80. Fay *v.* Rogers, 2 Gray (Mass.) 175.

If the decree bears date prior to the bringing of the action evidence is not admissible at the trial to show that it was not reduced to writing till after the action was brought; the proper remedy is by an application to the judge of probate to amend the record. Richardson *v.* Hazleton, 101 Mass. 108.

An indorsement on a certified copy of the bond that it appeared to the satisfaction of the court that the petitioner was a creditor of the estate and that the administrator had neglected to file an inventory or to render an account as required by law and that on the petitioner's request an action is authorized to be brought on the bond is a sufficiently formal authority. Johannes County Judge *v.* Youngs, 48 Wis. 101, 4 N. W. 32.

81. Bennett *v.* Russell, 2 Allen (Mass.) 537.

82. Bennett *v.* Woodman, 116 Mass. 518; Ordinary *v.* Poulson, 43 N. J. L. 33; *In re* Webster, 4 N. J. Eq. 558. *Contra*, People *v.* Corlies, 1 Sandf. (N. Y.) 228, holding that in a suit upon an administrator's bond, ordered by the surrogate, defendants are at liberty to show that there was no previous proceeding which authorized the surrogate to order the bond to be prosecuted.

2. Time to Sue and Limitations — a. Time to Sue. Subject to certain conditions precedent that in some cases must be complied with,[83] an action on an administration bond may be brought as soon as there has been a breach of its conditions,[84] and statutes providing that an action cannot be maintained against a representative by a creditor for a certain period do not apply to actions on the bond.[85] An action on the bond cannot be brought pending an appeal from the order on which the right of action is based,[86] but a mere right to appeal from the order does not suspend the right of action on the bond during the period allowed for taking such appeal.[87]

b. Limitations — (i) *Period of Limitation.* The statutes relating to suits or claims by creditors of the estate do not apply to actions on the administration bond,[88] but in a number of the states there are special statutes limiting the time within which actions on administration bonds must be brought after the right of action accrues, the periods prescribed varying in the different states.[89]

(ii) *When Statute Begins to Run.* No cause of action accrues on an administration bond until there has been a breach of its conditions and the statute of limitations begins to run only from the time such right of action accrues.[90] In jurisdictions where such conditions precedent[91] are essential, the statute will not begin to run until there has been a judgment or order establishing plaintiff's claim as a liability of the estate,[92] a final accounting,[93] an order of distribu-

83. See *supra*, XVII, I, 1, b.

84. Greer *v.* State, 2 Ohio St. 574.

For failing to file an inventory within the time specified in the conditions of the bond an action may be maintained as soon as that time expires and it is not necessary to wait for a final accounting. Minor *v.* Mead, 3 Conn. 289.

85. Greer *v.* State, 2 Ohio St. 574. *Compare* Hammerle *v.* Kramer, 12 Ohio St. 252.

86. Wiren *v.* Nesbitt, 85 Tex. 286, 20 S. W. 128.

87. Lesly *v.* Osborn, 2 Rich. (S. C.) 90.

88. Fuller *v.* Dupont, 183 Mass. 596, 67 N. E. 662.

89. See the following cases:

Alabama.— Harrison *v.* Heflin, 54 Ala. 552.

Arkansas.— Hall *v.* Cole, 71 Ark. 601, 76 S. W. 1076.

Connecticut.— Edwards *v.* White, 12 Conn. 28.

Kentucky.—Craddock *v.* Browning, 70 S. W. 684, 24 Ky. L. Rep. 1074.

Maryland.— State *v.* Boyd, 2 Gill & J. 365.

Missouri.— Nelson *v.* Barnett, 123 Mo. 564, 27 S. W. 520; Martin *v.* Knapp, 45 Mo. 48; State *v.* Ennis, 79 Mo. App. 12.

North Carolina.— Gill *v.* Cooper, 111 N. C. 311, 16 S. E. 316; Brawley *v.* Brawley, 109 N. C. 524, 14 S. E. 73; Reaves *v.* Davis, 99 N. C. 425, 6 S. E. 715; Vaughan *v.* Hines, 87 N. C. 445.

Virginia.— Morrison *v.* Lavell, 81 Va. 519; Sharpe *v.* Rockwood, 78 Va. 24; Leake *v.* Leake, 75 Va. 792; Tilson *v.* Davis, 32 Gratt. 92; Franklin *v.* Depriest, 13 Gratt. 257.

West Virginia.— Hoge *v.* Vintroux, 21 W. Va. 1.

Wisconsin.— McGonigal *v.* Colter, 32 Wis. 614.

United States.— Alexander *v.* Bryan, 110 U. S. 414, 4 S. Ct. 107, 28 L. ed. 195.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2513.

Proceedings by way of citation and attachment are barred by the lapse of the same time as would bar an action at law on the bond. Philips *v.* State, 5 Ohio St. 122, 64 Am. Dec. 635.

A suit on the bond of a public administrator is governed by the statutes relating to private administrators and not the statute relating to actions against a sheriff, coroner "or other officer" (State *v.* Ennis, 79 Mo. App. 12), and where a sheriff acts as public administrator by virtue of his office of sheriff the statute limiting actions on the official bonds of sheriffs does not apply (Ragland *v.* Calhoun, 36 Ala. 606).

The limitation prescribed by the Pennsylvania statute of April 4, 1797, is not applicable to an original administration bond taken by the register, but only to an additional bond given by the executor or administrator by order of the orphans' court. Com. *v.* Miller, 195 Pa. St. 230, 45 Atl. 921; Miltenberger *v.* Com., 14 Pa. St. 71; Com. *v.* Patterson, 8 Watts (Pa.) 515.

90. Frank *v.* People, 47 Ill. App. 248; Carr *v.* Catlin, 13 Kan. 393; State *v.* Pratte, 8 Mo. 286, 40 Am. Dec. 140. See also McGonigal *v.* Colter, 32 Wis. 614.

As soon as the cause of action accrues, which is as soon as the party has a right to apply to the proper tribunals for relief, the statute begins to run. Ganser *v.* Ganser, 83 Minn. 199, 86 N. W. 18, 85 Am. St. Rep. 461.

91. See *supra*, XVII, I, 1, b.

92. Craddock *v.* Browning, 114 Ky. 298, 70 S. W. 684, 24 Ky. L. Rep. 1074; State *v.* St. Gemme, 23 Mo. 344.

93. Hall *v.* Cole, 71 Ark. 601, 76 S. W. 1076; George *v.* Elms, 46 Ark. 260; Vaughan *v.* Hines, 87 N. C. 445.

In case of the non-payment of a residuary legacy, if all prior claims have been satisfied, the time for contesting the will has expired, and there are assets solely applicable to the

tion,[94] or demand for payment;[95] but it has been held that an order granting leave to sue, although essential, is no part of the cause of action but merely a step in the remedy and that the statute will begin to run from the date of the decree of distribution.[96] For failing to include property in a report of assets, the statute begins from the filing of the report;[97] for converting property of the estate, from the date of conversion;[98] for failure to pay over assets to a successor in office, from the time of demand for payment;[99] for a failure to account, from the time when an accounting is demanded and refused;[1] and for failing to comply with an order of court, from the time limited in the order for such compliance.[2] In Alabama the statute begins as to an action on the bond against the sureties only from the time the default of the principal is judicially ascertained.[3]

3. Jurisdiction — a. In General. Ordinarily, in the absence of statute,[4] or of special circumstances making equitable interference necessary,[5] courts of law have exclusive jurisdiction of actions to enforce the liability on administration bonds.[6] The particular court having jurisdiction varies as to its designation in the different states,[7] and as between different courts of the same state the amount

payment of the legacy, a right of action accrues and the statute begins to run, although there has been no final settlement or decree of distribution. State *v.* Grigsby, 92 Mo. 419, 5 S. W. 39.

Where an administrator dies before final settlement, the statute does not begin to run from his death but from the decree of the court on the final settlement made by his representative. Williams *v.* State, 68 Miss. 680, 10 So. 52, 24 Am. St. Rep. 297.

94. George *v.* Elms, 46 Ark. 260; Mortenson *v.* Bergthold, 64 Nebr. 208, 89 N. W. 742.

Where the time for settlement and distribution is limited by statute and the court neglects at the expiration of this period to make a decree of distribution the statute of limitations begins from the time the right to compel a distribution accrues. Biddle *v.* Wendell, 37 Mich. 452.

95. Lanier *v.* Irvine, 24 Minn. 116; Wood *v.* Myrick, 16 Minn. 494.

In Illinois where a representative has failed to pay over money in pursuance of an order of court the statute begins to run thirty days after refusal to pay on demand the amount ordered. Frank *v.* People, 147 Ill. 105, 35 N. E. 530 [*affirming* 47 Ill. App. 248].

96. Ganser *v.* Ganser, 83 Minn. 199, 86 N. W. 18, 85 Am. St. Rep. 461 [*overruling* Lanier *v.* Irvine, 24 Minn. 116; Wood *v.* Myrick, 16 Minn. 494].

97. People *v.* Ochiltree, 48 Ill. App. 220.

98. Carr *v.* Catlin, 13 Kan. 393.

99. Gill *v.* Cooper, 111 N. C. 311, 16 S. E. 316.

1. Stonestreet *v.* Frost, 123 N. C. 290, 31 S. E. 718.

2. Avery *v.* Miller, 81 Mich. 85, 45 N. W. 503.

3. Eatman *v.* Eatman, 82 Ala. 223, 2 So. 729; Bonner *v.* Young, 68 Ala. 35; Fretwell *v.* McLemore, 52 Ala. 124; Alexander *v.* Bryan, 110 U. S. 414, 4 S. Ct. 107, 28 L. ed. 195 [*affirming* 4 Fed. Cas. No. 2,064, 14 Woods 529].

A probate decree merely ascertaining the amount due the legatee but making no valid order directing its payment will not start the running of the statute. Bryan *v.* Alexander, 4 Fed. Cas. No. 2,064, 14 Woods 529 [*affirmed* in 110 U. S. 414, 4 S. Ct. 107, 28 L. ed. 195].

4. See *infra*, XVII, I, 3, b, c.

5. See *infra*, XVII, I, 3, c.

6. *Maryland.*— Edes *v.* Garey, 46 Md. 24.

Michigan.— Hatheway *v.* Sackett, 32 Mich. 97.

Mississippi.— Halfacre *v.* Dobbins, 50 Miss. 766; Smith *v.* Everett, 50 Miss. 575.

New Jersey.— Rorback *v.* Dorsheimer, 25 N. J. Eq. 516.

England.— Bolton *v.* Powell, 14 Beav. 275, 16 Jur. 24, 51 Eng. Reprint 292.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 2485, 2507 *et seq.*

7. **District court.**— Jenkins *v.* Shields, 36 Iowa 526; Wheelhouse *v.* Bryant, 13 Iowa 160; Brown *v.* Gunning, 16 La. 238; Ingram *v.* Stokes, 10 La. 26; Zander *v.* Pile, 8 La. 211; Elliott *v.* White, 5 La. 322. A statutory provision for summary proceedings against the principal and sureties on the bond is not exclusive and does not affect the jurisdiction of the district court. Wheelhouse *v.* Bryant, 13 Iowa 160. A statute providing that courts of probate shall have power to compel the representatives to account and pay over what they may be found to owe does not affect the jurisdiction of the district court to entertain an action on the bond for failure to make such payment. Brown *v.* Gunning, 16 La. 238.

Circuit court.— State *v.* Shelby, 75 Mo. 482; State *v.* Rankin, 4 Mo. 426.

Superior court.—State *v.* Berryhill, 84 N. C. 132.

Court of common pleas.— Dawson *v.* Dawson, 25 Ohio St. 443; Chatfield *v.* Faran, 1 Disn. 488, 12 Ohio Dec. (Reprint) 750.

A bond which the probate judge was not authorized or required to take, by virtue of his office, although good as a common-law bond, is not technically a probate bond, and an action thereon is not governed by the statutes regulating actions on probate bonds. Thomas *v.* White, 12 Mass. 367.

claimed is sometimes the controlling element in determining which is entitled to take jurisdiction.[8]

b. Probate Courts. Probate courts have no jurisdiction of actions on administration bonds,[9] except where such jurisdiction is conferred by statute;[10] nor has an ordinary any jurisdiction to call the sureties to account for the conduct of their principal or to render any decree against them.[11]

c. Equity Jurisdiction. It is now held in most jurisdictions that the liability on an administration bond may be enforced in a court of equity.[12] In a few jurisdictions this is by virtue of statutory provisions,[13] but in others the decisions are based merely on the ground of avoiding multiplicity of suits and circuity of action where plaintiff was obliged to come into equity in the first instance,[14] and in still others it is held that the liability may be enforced in equity where the remedy at law is inadequate or not available,[15] but that in the absence of special circumstances making equitable interference necessary the remedy at law is exclusive.[16]

8. Brown *v.* Seaman, 65 Tex. 628.

In Texas the district court has jurisdiction where the amount claimed is over five hundred dollars. Fort *v.* Fittes, 66 Tex. 593, 1 S. W. 563.

Where a scire facias is sued out on a judgment rendered for the penalty of the bond the amount of the penalty and not the amount of the damages sustained determines the jurisdiction. Hoit *v.* Bradley, 1 D. Chipm. (Vt.) 262.

9. *Louisiana.*— Larue *v.* Van Horn, 25 La. Ann. 445; Hemken *v.* Ludewig, 12 Rob. 188.

Mississippi.— Washburn *v.* Phillips, 6 Sm. & M. 425; Green *v.* Tunstall, 5 How. 638.

Missouri.— State *v.* Shelby, 75 Mo. 482; State *v.* Maulsby, 53 Mo. 500. See also State *v.* Waters, 54 Mo. 112.

Ohio.— Dawson *v.* Dawson, 25 Ohio St. 443.

Pennsylvania.—Maguire's Estate, 12 Phila. 12.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2508.

10. See State *v.* Stafford, 73 Mo. 658, holding that under the Missouri act of 1860, establishing the probate court of Carroll county, and giving it jurisdiction of all cases where administrators are necessarily parties, that court has jurisdiction of a suit on an administrator's bond.

11. Ordinary *v.* Bonner, 2 Hill (S. C.) 468; Ross *v.* Chambers, 1 Bailey (S. C.) 548; Schnell *v.* Schroder, Bailey Eq. (S. C.) 334.

12. *Alabama.*— Martin *v.* Ellerbe, 70 Ala. 326.

Arkansas.— Reinhardt *v.* Gartrell, 33 Ark. 727; Osborne *v.* Graham, 30 Ark. 66; Moren *v.* McCown, 23 Ark. 93.

Georgia.— Alexander *v.* Mercer, 7 Ga. 549.

Illinois.— People *v.* Lott, 27 Ill. 215.

Indiana.— Anthony *v.* Negley, 2 Ind. 211; Persons *v.* Crane, 2 Ind. 157.

Kentucky.— Carrol *v.* Connet, 2 J. J. Marsh. 195; Moore *v.* Waller, 1 A. K. Marsh. 488.

Mississippi.— Clopton *v.* Haughton, 57 Miss. 787; Whitfield *v.* Evans, 56 Miss. 488; Buie *v.* Pollock, 55 Miss. 309.

New York.— Onondaga Trust, etc., Co. *v.* Pratt, 25 Hun 23; Carow *v.* Mowatt, 2 Edw. 57.

South Carolina.—Taylor *v.* Taylor, 2 Rich. Eq. 123; McBee *v.* Crocker, McMull. Eq. 485; Gayden *v.* Gayden, McMull. Eq. 435 [*disapproving* Teague *v.* Dendy, 2 McCord Eq. 207, 16 Am. Dec. 643; Glenn *v.* Conner, Harp. Eq. 267].

Virginia.— Spottswood *v.* Dandridge, 4 Munf. 289.

West Virginia.— Thompson *v.* Nowlin, 51 W. Va. 346, 41 S. E. 178.

United States.— Payne *v.* Hook, 7 Wall. 425, 19 L. ed. 260; Kendall *v.* Creighton, 23 How. 90, 16 L. ed. 419; McLaughlin *v.* Potomac Bank, 7 How. 220, 12 L. ed. 675.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2485.

Contra.— Rorback *v.* Dorsheimer, 25 N. J. Eq. 516; Bolton *v.* Powell, 14 Beav. 275, 16 Jur. 24, 51 Eng. Reprint 292.

13. Anthony *v.* Negley, 2 Ind. 211; Persons *v.* Crane, 2 Ind. 157; Clopton *v.* Houghton, 57 Miss. 787; Whitfield *v.* Evans, 56 Miss. 488; Brunini *v.* Para, 54 Miss. 649.

In Mississippi prior to the code of 1871, it was held that the liability on the bond could not be enforced in equity. See Halfacre *v.* Dobbins, 50 Miss. 766; Smith *v.* Everett, 50 Miss. 575; Buckingham *v.* Owen, 6 Sm. & M. 502.

14. *Alabama.*— Gerald *v.* Miller, 21 Ala. 433; Moore *v.* Armstrong, 9 Port. 697.

Arkansas.—Moren *v.* McCown, 23 Ark. 93; Clark *v.* Shelton, 16 Ark. 474.

Kentucky.— Moore *v.* Waller, 1 A. K. Marsh. 488.

South Carolina.—Taylor *v.* Taylor, 2 Rich. Eq. 123; McBee *v.* Crocker, McMull. Eq. 485; Knox *v.* Pickett, 4 Desauss. 92, 199.

United States.— Kendall *v.* Creighton, 23 How. 90, 16 L. ed. 419.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2485.

15. People *v.* Lott, 27 Ill. 215; Onondaga Trust, etc., Co. *v.* Pratt, 25 Hun (N. Y.) 23; Carow *v.* Mowatt, 2 Edw. (N. Y.) 57; Spottswood *v.* Dandridge, 4 Munf. (Va.) 289; Payne *v.* Hook, 7 Wall. (U. S.) 425, 19 L. ed. 260.

16. People *v.* Medart, 166 Ill. 348, 46 N. E. 1095 [*affirming* 63 Ill. App. 111]; Edes *v.*

4. Venue. An action against an administrator and the sureties on his bond may be brought in the county of the residence of any of the parties, as the obligation of the principal and sureties on the bond is joint and several.[17] Where a bond is given in one state and the principal and sureties afterward become residents of another, a suit on the bond based on a decree rendered in the latter state may be brought in the courts of that state.[18]

5. Defenses — a. In General. In an action on an administration bond the sureties are subrogated to all defenses which would have been available to the principal.[19] They may plead and prove any fact which would negative the liability of the principal,[20] and also any facts which would discharge them from liability,[21] regardless of what the liability of the principal alone might be;[22] but they cannot set up a defense which inures exclusively to the estate and not to the representative.[23] In an action for failing to pay a claim against the estate it is a good defense to show that plaintiff has in his possession[24] or has converted to his own use[25] sufficient funds of the estate to pay the claim, or that the person for whose benefit the action is brought has made a valid settlement of his claim with the representative.[26] It is no defense that in committing the breach complained of the representative acted under advice of counsel,[27] or that since the action was instituted he has been removed from office and a successor appointed,[28] or, where the suit is brought for the general benefit, that the person on whose representation it was instituted will not be entitled to share in the recovery.[29] The fact that certain property of the estate is claimed by a third person is no defense to an action for failing to include it in the inventory.[30] The bond being a continuing obligation, each breach of which furnishes a cause of action, the waiver of any number of breaches is no bar to an action for a subsequent breach.[31]

b. Want of Assets. The want of assets is a good defense to an action on the bond for failure to pay claims against the estate,[32] unless the representative has had assets and his inability to pay the claim in question is due to his own neglect or misconduct;[33] but to entitle a representative to defend upon the ground of insufficiency of assets there must be an inventory filed and a settlement of his

Garey, 46 Md. 24; Hood *v.* Hood, 85 N. Y. 561 [*reversing* 19 Hun 300]; Scharmann *v.* Schoell, 38 N. Y. App. Div. 528, 56 N. Y. Suppl. 498; Thomson *v.* Mann, 53 W. Va. 432, 44 S. E. 246. See also Hoell *v.* Blanchard, 4 Desauss. (S. C.) 21.

The death of an executor does not affect the liability of his sureties as surviving obligors in an action at law, so as to give a court of equity jurisdiction of an action on the bond. Edes *v.* Garey, 46 Md. 24.

17. Williams *v.* Lancaster, 113 Ga. 1020, 39 S. E. 471.

18. Johnson *v.* Jackson, 56 Ga. 326, 21 Am. Rep. 285, holding, however, that the liability will be determined and enforced according to the law of the state where the bond was given.

19. Baines *v.* Barnes, 64 Ala. 375. See also Fauntleroy *v.* Lyle, 5 T. B. Mon. (Ky.) 266.

20. Bird *v.* Mitchell, 101 Ga. 46, 8 S. E. 674.

21. Bird *v.* Mitchell, 101 Ga. 46, 28 S. E. 674. See also Burgess *v.* Young, 97 Me. 386, 54 Atl. 910.

The principal's failure to comply with a parol agreement with his sureties made at the time of their signing his bond that he would furnish them with an indemnity bond and procure other sureties does not affect their liability and is no defense to the sureties when sued on the bond. State *v.* Modrel, 69 Mo. 152.

22. Burgess *v.* Young, 97 Me. 386, 54 Atl. 910.

23. Johnston's Succession, 1 La. Ann. 75.

24. King *v.* Johnson, 94 Ga. 665, 21 S. E. 895; Everett *v.* Waymire, 30 Ohio St. 308.

25. Bowen *v.* Groover, 77 Ga. 126.

26. Cheever *v.* Congdon, 34 Mich. 296. See also State *v.* Jones, 131 Mo. 194, 33 S. W. 23.

27. Bourne *v.* Stevenson, 58 Me. 499.

28. State *v.* Bloxom, 1 Houst. (Del.) 446.

29. Bennett *v.* Woodman, 116 Mass. 518.

30. Bourne *v.* Stevenson, 58 Me. 499.

31. Thayer *v.* Keyes, 136 Mass. 104.

32. State *v.* White, 33 Ind. 298; Burgess *v.* Young, 97 Me. 386, 54 Atl. 910; Thurlough *v.* Kendall, 62 Me. 166; Fuller *v.* Connelly, 142 Mass. 227, 7 N. E. 853. See also Coleman *v.* Hall, 12 Mass. 570.

33. Woodward *v.* Fisher, 11 Sm. & M. (Miss.) 303.

Want of assets at the time suit is instituted is not alone a defense. Outlaw *v.* Yell, 8 Ark. 345.

That the estate was exhausted in paying debts is not a defense in an action for a distributive share unless it appears that the debts paid were lawful demands against the estate (Clement *v.* Hawkins, 96 Ga. 811, 22 S. E. 951), nor, as against a creditor, is it

account in the probate court,[34] and in some jurisdictions the defense is not available unless prior to the action on the bond a representation of insolvency was made.[35]

c. Invalidity of Principal's Appointment. Neither principal nor sureties can set up as a defense to their liability on the bond the invalidity of the appointment under which the principal has acted,[36] for not only is the grant of administration not subject to collateral attacks in an action on the bond,[37] but both principal and sureties are estopped from questioning the validity of the appointment[38] by the recitals of the bond,[39] its voluntary execution,[40] and the fact that the principal has acted thereunder and obtained possession of assets of the estate.[41]

d. Performance of Conditions After Suit Commenced. Performance of the conditions of the bond after commencement of the suit thereon will not bar the action,[42] but plaintiff is entitled to recover at least nominal damages for the breach committed.[43]

e. Limitations and Laches.[44] The statute of limitations is a good defense to an action on an administration bond,[45] but as in other cases it cannot be taken advantage of unless pleaded.[46] A representative is not precluded on the ground of being a trustee from pleading the statute,[47] nor does the principle which prevents the statute of limitations from running against the state apply to administration bonds given nominally to the state but really for the benefit of others.[48] The fact, however, that a claim was barred at the time judgment was rendered thereon against the estate is no defense to an action on the bond for failure to pay the judgment.[49] A plaintiff may also be barred on the ground of laches from bringing an action on an administration bond,[50] and a presumption of payment or satisfaction arises after a lapse of twenty years;[51] but the defense of laches is not

any defense that the estate was exhausted in paying claims entitled to priority unless such claims were duly exhibited and allowed (Outlaw *v.* Yell, 8 Ark. 345).

34. McKim *v.* Haley, 173 Mass. 112, 53 N. E. 152.

35. Phelps *v.* Swan, Kirby (Conn.) 428; Providence Municipal Ct. *v.* McElroy, 19 R. I. 712, 36 Atl. 717.

A representation made after suit is instituted is no bar, the remedy of defendants in such a case being to have the case continued until it is ascertained whether the proceedings under that representation will result in an adjudication of insolvency. McKim *v.* Roosa, 183 Mass. 510, 67 N. E. 651.

36. *Alabama.*— Kling *v.* Connell, 105 Ala. 590, 17 So. 121, 53 Am. St. Rep. 144; Burnett *v.* Nesmith, 62 Ala. 261; Plowman *v.* Henderson, 59 Ala. 559.

Illinois.— Pritchett *v.* People, 6 Ill. 525.

Massachusetts.— White *v.* Weatherbee, 126 Mass. 450.

New Jersey.— Bloomfield *v.* Ash, 4 N. J. L. 314.

New York.— Power *v.* Speckman, 126 N. Y. 354, 27 N. E. 474 [*affirming* 12 N. Y. Suppl. 25]; People *v.* Falconer, 2 Sandf. 81; Field *v.* Van Cott, 5 Daly 308.

Pennsylvania.— Shalter's Appeal, 43 Pa. St. 83, 82 Am. Dec. 552.

Tennessee.—State *v.* Anderson, 16 Lea 321.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2501.

37. Pritchett *v.* People, 6 Ill. 525. And see *supra*, II, L, 4.

This rule is subject to exception in cases where the letters were granted upon the estate of a person who was not in fact dead (see *supra*, I, J, 3, a), or where another representative has been already appointed, or where the record or papers in the case show a lack of jurisdiction. Nash *v.* Sawyer, 114 Iowa 742, 87 N. W. 707.

38. Nash *v.* Sawyer, 114 Iowa 742, 87 N. W. 707; Hoffman *v.* Fleming, 66 Ohio St. 143, 64 N. E. 63.

39. Plowman *v.* Henderson, 59 Ala. 559; Cutler *v.* Dickinson, 8 Pick. (Mass.) 386.

40. People *v.* Falconer, 2 Sandf. (N. Y.) 81; Field *v.* Van Cott, 5 Daly (N. Y.) 308.

41. Bloomfield *v.* Ash, 4 N. J. L. 314; Hoffman *v.* Fleming, 66 Ohio St. 143, 64 N. E. 63; State *v.* Anderson, 16 Lea (Tenn.) 321.

42. State *v.* White, 33 Ind. 298; Clark *v.* Cress, 20 Iowa 50; Wilson *v.* Keeler, 2 D. Chipm. (Vt.) 16.

43. Clark *v.* Cress, 20 Iowa 50.

44. See *supra*, XVII, I, 2, b.

45. People *v.* Ochiltree, 48 Ill. App. 220; State *v.* Pratte, 8 Mo. 286, 40 Am. Dec. 140. *Compare* Gold *v.* Bush, 4 Baxt. (Tenn.) 579; Georgia Dist. Probate Ct. *v.* Chandler, 7 Vt. 111.

If the liability is barred which the bond was meant to secure, action on the bond to enforce that liability is barred also. Biddle *v.* Wendell, 37 Mich. 452.

46. Maddox *v.* State, 4 Harr. & J. (Md.) 539.

47. People *v.* Ochiltree, 48 Ill. App. 220.

48. State *v.* Pratte, 8 Mo. 286, 40 Am. Dec. 140.

49. Christian *v.* Lassiter, 23 La. Ann. 573.

50. Rudolph *v.* Underwood, 88 Ga. 664, 16 S. E. 55.

51. Harrison *v.* Heflin, 54 Ala. 552; Thompson *v.* Nations, 112 N. C. 508, 17 S. E.

available to defeat an action which is brought within the period prescribed by the statute of limitations.[52]

6. Set-Off and Counter-Claim. In an action on an administration bond assigning as breaches of the bond acts of misconduct on the part of the representative, the damages to be recovered are not necessarily liquidated and the action is not therefore one in which a set-off is allowable.[53] Furthermore, since an action on the bond is against the obligors individually, they cannot set off as against their personal liability an indebtedness of plaintiff to the estate,[54] nor can the sureties in an action against them set off a claim of the principal against the estate,[55] or against plaintiff.[56] It has been held, however, that in an action for failing to account for property of the estate received by a representative he may set up by way of counter-claim a claim of his own against the estate which has been duly allowed and is entitled to payment.[57]

7. Parties — a. Plaintiff. The question in whose name an action on an administration bond should be instituted is largely regulated by statute and the rule varies in the different jurisdictions.[58] In some jurisdictions the action should be brought in the name of the state[59] or people,[60] or of the governor,[61] ordinary,[62] or probate judge,[63] or the successor in office of such officer;[64] while in others the

432; Diemer *v.* Sechrist, 1 Penr. & W. (Pa.) 419. *Compare* Potter *v.* Titcomb, 7 Me. 302.

The presumption begins to run not from the date of the bond but from the time when plaintiff is entitled to resort to it. Backestoss *v.* Com., 8 Watts (Pa.) 286.

The presumption is not conclusive but is subject to rebuttal. Miles *v.* Com., 2 Walk. (Pa.) 64; Burnside *v.* Donnon, 34 S. C. 289, 13 S. E. 465.

52. Poullain *v.* Brown, 80 Ga. 27, 5 S. E. 107.

Where plaintiff is obliged to come into equity to enforce the liability on the bond he will not be required to sue within a shorter period than that prescribed by the statute of limitations, especially where the loss of his legal remedy was without his own fault. Hagerty *v.* Mann, 56 Md. 522.

53. State *v.* Modrill, 15 Mo. 421.

The remedy of a representative as to his labor and expenses in the management of the estate is by settlement of his account with the court of probate and set-off cannot be allowed in an action on his bond. Wattles *v.* Hyde, 9 Conn. 10.

54. Vastine *v.* Dinan, 42 Mo. 269; State *v.* Modrell, 15 Mo. 421. See also Probate Ct. *v.* Gale, 47 Vt. 473. *Compare* Rudolph *v.* Underwood, 88 Ga. 664, 16 S. E. 55.

55. Vastine *v.* Dinan, 42 Mo. 269.

56. Norton *v.* Wallace, 2 Rich. (S. C.) 460.

57. State *v.* Barrett, 121 Ind. 92, 22 N. E. 969.

Where there has been no decree of distribution determining the amount of his distributive share a representative cannot set up any claim therefor in an action on the bond. Vastine *v.* Dinan, 42 Mo. 269.

A claim for compensation is forfeited when the representative is removed from office for maladministration, and therefore he cannot set up such claim in reduction of the damages in an action on the bond. Dryfoos *v.* Cullinan, 17 Kan. 452.

58. See 1 Williams Ex. 645.

59. State *v.* Shelby, 75 Mo. 482; Woodworth *v.* Wòodworth, 70 Mo. 601; Sickles *v.* McManus, 26 Mo. 28; State *v.* Campbell, 10 Mo. 724; Brown *v.* McKee, 108 N. C. 387, 13 S. E. 8; Norman *v.* Walker, 101 N. C. 24, 7 S. E. 468.

It was formerly the law in Missouri that the action must be brought in the name of the governor (see Spear *v.* Thompson, 1 Mo. 581) or probate judge (see Oliver *v.* Crawford, 1 Mo. 263).

60. People *v.* Stacey, 6 Ill. App. 521.

61. Merrit *v.* Governor, 4 Yerg. (Tenn.) 489; Arkansas *v.* Ball, 1 Fed. Cas. No. 530, Hempst. 541.

The name of the person occupying the office and not the name of the office must be used. Arkansas *v.* Ball, 1 Fed. Cas. No. 530, Hempst. 541. *Compare* Merrit *v.* Governor, 4 Yerg. (Tenn.) 489.

62. Halsted *v.* Fowler, 22 N. J. L. 48; Williamson *v.* Updike, 14 N. J. L. 270.

63. Smith *v.* Russell, 17 Conn. 105; Prescott *v.* Farmer, 59 N. H. 90; Parker *v.* Colcord, 2 N. H. 36.

64. Smith *v.* Russell, 17 Conn. 105.

On an administration bond made payable to the governor and his successors, any subsequent governor may maintain an action, and declare as the "successor" to the governor named in the bond; and he may allege that the bond was made "to the plaintiff." Phillips *v.* Governor, 2 Ark. 382.

If the succeeding judge is disqualified by interest or position the action may be prosecuted in the name of the judge of an adjoining district. Smith *v.* Russell, 17 Conn. 105.

An action on a bond which does not conform to the statute and is enforceable only as a common-law bond can be maintained only in the name of the officer to whom it was given or his personal representative, and not in the name of his successor. Frye *v.* Crockett, 77 Me. 157; Cleaves *v.* Dockray, 67 Me. 118; Hibbits *v.* Canada, 10 Yerg. (Tenn.) 465.

injured person may sue in his own name.[65] In a few states the action may be brought in the name of either the person injured or the nominal obligee for the use of such person.[66] The name of the nominal plaintiff is a matter of form and not of substance and a mistake in that respect is not reached by a general demurrer.[67] A suit may be instituted on the relation of one creditor without joining the others as plaintiffs, but the judgment must be made to inure to the benefit of the estate generally and not to the individual creditor,[68] unless the estate is admitted to be solvent and sufficient to pay all its debts.[69] So also a suit by a legatee should be prosecuted for the benefit of all interested in the fund where there is an insufficiency of assets.[70] Where there are no creditors, a sole heir may sue on the bond of a deceased administrator without having an administrator *de bonis non* appointed and making him a party,[71] and, after the amount due to each distributee is definitely ascertained, each has a separate right of action and may sue therefor without joining the others.[72] Distributees are not necessary parties plaintiff to a suit brought by an administrator *de bonis non* on the bond of his predecessor.[73] Where a particular right of action is given by statute to a particular class of claimants other persons, although interested in the estate, are not necessary parties.[74] All persons interested in the subject of the action and in obtaining the relief demanded may join as plaintiffs.[75] So several distributees

65. *Alabama.*— Jacobs *v.* Bogart, 128 Ala. 678, 29 So. 645; Amason *v.* Nash, 24 Ala. 279.

Kansas.— Hudson *v.* Barratt, 62 Kan. 137, 61 Pac. 737.

Minnesota.— Lanier *v.* Irvine, 24 Minn. 116.

Nebraska.— Buel *v.* Dickey, 9 Nebr. 285, 2 N. W. 884, but prior to the act of 1873 the action was brought in the name of the judge of probate.

New Mexico.— Conway *v.* Carter, (1902) 68 Pac. 941.

New York.— Williams *v.* Kiernan, 25 Hun 355; Rowe *v.* Parsons, 6 Hun 338; Baggott *v.* Boulger, 2 Duer 160; Cridler *v.* Curry, 44 How. Pr. 345. *Compare* Bos *v.* Seaman, 2 Code Rep. 1.

Ohio.— Mighton *v.* Dawson, 38 Ohio St. 650.

South Carolina.— McCorkle *v.* Williams, 43 S. C. 66, 20 S. E. 744; Kaminer *v.* Hope, 9 S. C. 253.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2538.

A succeeding administrator is the real party in interest in an action on the bond of his predecessor for failing to pay over a balance in his hands and the successor is entitled to maintain such action in his own name. Dayton *v.* Johnson, 69 N. Y. 419.

The complaint may be amended so as to substitute the real party in interest as plaintiff, where the action is improperly instituted in the name of the state. Hudson *v.* Barratt, 62 Kan. 137, 61 Pac. 737.

66. Amason *v.* Nash, 24 Ala. 279.

In Minnesota under Gen. St. (1878) c. 55, actions on probate bonds may be prosecuted "in the name of any person interested therein" whenever the judge of probate so directs (Balch *v.* Hooper, 32 Minn. 158, 20 N. W. 124), but actions for refusing to obey orders of the probate judge are properly brought in the name of the probate judge (O'Gorman *v.* Lindeke, 26 Minn. 93, 1 N. W. 841).

In New York the action may be brought either in the name of the real party in interest (Williams *v.* Kiernan, 25 Hun 355; Rowe *v.* Parsons, 6 Hun 338; Cridler *v.* Curry, 44 How. Pr. 345) or in the name of the people as trustee of an express trust (People *v.* Struller, 16 Hun 234; People *v.* Townsend, 37 Barb. 520; People *v.* Laws, 4 Abb. Pr. 292; People *v.* Laws, 3 Abb. Pr. 450).

In South Carolina the action was brought in the name of the county court judges prior to the act of 1799 and subsequently in the name of the ordinary (Hamilton *v.* Bostwick, 1 Brev. 221; Fairfield County Judges *v.* Phillips, 2 Bay 519); but under the present code the action may be brought by the party in interest in his own name (Kaminer *v.* Hope, 9 S. C. 253) or in the name of the probate judge to whom the bond is payable (Johnson *v.* Dawkins, 20 S. C. 528).

67. Governor *v.* Davis, 9 Ala. 917.

68. Embree *v.* State, 85 Ind. 368.

69. Bonny *v.* Brashear, 19 La. 383.

70. Towner *v.* Tooley, 38 Barb. (N. Y.) 598.

71. Glover *v.* Hill, 85 Ala. 41, 4 So. 613.

72. Bramley *v.* Forman, 15 Hun (N. Y.) 144; Hoover *v.* Berryhill, 84 N. C. 132.

73. Slaughter *v.* Froman, 2 T. B. Mon. (Ky.) 95; Dunne *v.* American Surety Co., 43 N. Y. App. Div. 91, 59 N. Y. Suppl. 429.

74. Bridges *v.* Maxwell, 34 Miss. 309, holding that under a statute authorizing the "heirs of the testator or intestate" to sue on the bond for the removal of property out of the state the widow is not a necessary party plaintiff.

75. Pilcher *v.* Drennan, 51 Miss. 873; McCorkle *v.* Williams, 43 S. C. 66, 20 S. E. 744.

Persons interested may be made parties while the action is pending, and any person who may have obtained an order for that

may join in the same action,[76] at least where the action is brought before a final decree of distribution;[77] and the representative of a deceased legatee may join in an action with the other legatees.[78]

b. Defendant. Administration bonds are ordinarily joint and several, and either one or all of the obligors may be sued.[79] This was the rule at common law,[80] although it was necessary to treat the bond either as a joint or several obligation and to bring the action either against one obligor or against all of the obligors jointly and not against any intermediate number.[81] This rule is now changed in most jurisdictions and plaintiff may at his option proceed against any number of the obligors.[82] So the principal may be sued without joining the sureties,[83] or the sureties may be sued without joining the principal[84] or the representative of a deceased principal;[85] or some of the sureties may be sued without joining the others.[86] The change in the common-law rule, however, applies only to actions at law and not where the liability is enforced in equity,[87] in which case all the obligors, or their representatives, who are able to respond to plaintiff should be made parties.[88] The representative of a deceased principal or surety may be joined in an action on the bond against the surviving obligors,[89] and in a suit to correct a final settlement the sureties may be joined and their liability as to the amount found due enforced in the same proceeding.[90] The sureties on

purpose from the judge of probate may have his name indorsed upon the original writ after the cause is removed into the superior court. Probate Judge *v.* Tillotson, 6 N. H. 292.

An action in the name of the people may be brought for the benefit of more than one person. People *v.* Stacey, 6 Ill. App. 521.

76. Murphy *v.* McKay, 28 N. C. 397. *Contra*, Jackson *v.* Bourbon Justices, 2 Bibb (Ky.) 292.

Where either the probate judge or the party in interest may sue, the probate judge and certain of the distributees may join in the same suit. McCorkle *v.* Williams, 43 S. C. 66, 20 S. E. 744.

77. State *v.* Thornton, 56 Mo. 325.

78. Maddox *v.* State, 4 Harr. & J. (Md.) 539.

79. State *v.* Bennett, 24 Ind. 383; O'Gorman *v.* Lindeke, 26 Minn. 93, 1 N. W. 841; Devore *v.* Pitman, 3 Mo. 182.

If one of the obligors die after an action is instituted against all of them, the action may proceed as if he had not been originally a defendant. Lanier *v.* Irvine, 24 Minn. 116.

80. State *v.* Bennett, 24 Ind. 383.

81. People *v.* Miller, 2 Ill. 83; Gridler *v.* Curry, 66 Barb. (N. Y.) 336, 44 How. Pr. (N. Y.) 345; Field *v.* Van Cott, 15 Abb. Pr. N. S. (N. Y.) 349. See also Blackerby *v.* Holton, 5 Dana (Ky.) 520.

82. *California.*— Slater *v.* McAvoy, 123 Cal. 437, 56 Pac. 49.

Colorado.— McAllister *v.* People, 28 Colo. 156, 63 Pac. 308.

Illinois.— Curry *v.* People, 54 Ill. 263; People *v.* Miller, 2 Ill. 83.

Kentucky.— Robinson *v.* Elam, 11 Ky. L. Rep. 307.

New York.—Cridler *v.* Curry, 66 Barb. 336, 44 How. Pr. 345; Field *v.* Van Cott, 15 Abb. Pr. N. S. 349.

See 22 Cent. Dig. tit. "Executors and Administrators." § 2541.

In Texas the statute requires that the principal shall be joined with the surety except in certain specified cases. Strickland *v.* Sandmeyer, 21 Tex. Civ. App. 351, 52 S. W. 87. One of two joint principals and the sureties cannot be sued without joining the other principal (Farris *v.* Berry, 33 Tex. 701), but the representative of a deceased obligor need not be joined in an action against the survivors (Stephenson *v.* McFaddin, 42 Tex. 322; Strickland *v.* Sandmeyer, 21 Tex. Civ. App. 351, 52 S. W. 87).

83. Robinson *v.* Elam, 11 Ky. L. Rep. 307.

84. Bonny *v.* Brashear, 19 La. 383; Devore *v.* Pitman, 3 Mo. 182; Field *v.* Van Cott, 15 Abb. Pr. N. S. (N. Y.) 349. *Compare* Phelps *v.* Sawyer, 7 La. Ann. 551.

The action may be dismissed as to the principal and continued as to the surety without discharging the latter from his liability. McAllister *v.* People, 28 Colo. 156, 63 Pac. 308.

85. Embree *v.* State, 85 Ind. 368; Flack *v.* Dawson, 69 N. C. 42.

86. People *v.* Miller, 2 Ill. 83; State *v.* Bennett, 24 Ind. 383.

87. People *v.* Lott, 27 Ill. 215.

88. Towner *v.* Tooley, 38 Barb. (N. Y.) 598.

Principal must be joined in a suit against sureties. Lee *v.* Waller, 3 Metc. (Ky.) 61.

The representative of a deceased obligor must be joined in a suit against the survivors. People *v.* Lott, 27 Ill. 215; Mitchell *v.* Miller, 6 Dana (Ky.) 79; Hutcherson *v.* Pigg, 8 Gratt. (Va.) 220.

If a deceased principal has no representative the sureties may be sued alone. Carrol *v.* Connet, 2 J. J. Marsh. (Ky.) 195. *Compare* Lee *v.* Street, Speers Eq. (S. C.) 373, holding that a representative should be appointed.

89. Myers *v.* State, 47 Ind. 293; Braxton *v.* State, 25 Ind. 82; Chatfield *v.* Faran, 1 Disn. 488, 12 Ohio Dec. (Reprint) 750. See also Embree *v.* State, 85 Ind. 368.

90. Ponton *v.* Bellows, 22 Tex. 681; Donohue *v.* Roberts, 1 Fed. 449, 1 McCrary 112.

two separate bonds given by the same principal may be joined in the same action,[91] but successive administrators of the same estate cannot.[92] It has been held that in a suit in equity to enforce the liability of the sureties for the benefit of creditors, the devisees of the testator are necessary parties unless represented by an administrator *de bonis non*.[93] A misjoinder of parties defendant can be taken advantage of only by those who should not have been made parties.[94]

8. PLEADING — a. Declaration or Complaint — (I) *ALLEGATIONS AS TO PLAINTIFF'S INTEREST.* The declaration must show in what right or capacity plaintiff sues,[95] the person for whose benefit the action is brought,[96] the nature of his interest or claim,[97] and that the prerequisites necessary to establish the same so as to authorize an action on the bond have been complied with.[98]

(II) *ALLEGATIONS AS TO CONDITIONS PRECEDENT.* Where there are certain conditions precedent which must be complied with before an action on the bond can be maintained,[99] the complaint must allege a compliance therewith in order to state a good cause of action.[1] So where such conditions are essential, it must

91. Whitfield *v.* Evans, 56 Miss. 488. *Compare* Lewis *v.* Gambs, 6 Mo. App. 138.

92. Governor *v.* Hays, 3 Mo. 434.

93. People *v.* White, 11 Ill. 341.

94. Leggett *v.* Bennett, 48 Ala. 380.

95. Morton *v.* State, 25 Ark. 46; State *v.* Matson, 38 Mo. 489 (holding that the right of plaintiff to sue upon the cause of action stated in the petition must be set forth by averments so as to tender an issue); Cabell *v.* Hardwick, 1 Call (Va.) 345.

The want of a proper statement in the caption of the complaint as to the capacity in which plaintiff sues is not fatal where this is set out in the body of the complaint. State *v.* Bartlett, 68 Mo. 581.

An allegation of the assignment of the bond is sufficient without stating that it was for the purpose of prosecution. The surrogate having no power under the statute to assign the bond for any other purpose, this fact will be presumed. Hauenstein *v.* Kull, 59 How. Pr. (N. Y.) 24.

96. Blakeman *v.* Sherwood, 32 Conn. 324; Songer *v.* Mainwaring, 1 Blackf. (Ind.) 251; Probate Judge *v.* Johnson, 4 How. (Miss.) 680; Cabell *v.* Hardwick, 1 Call (Va.) 345. *Compare* Clark *v.* Mix, 15 Conn. 152; Clark *v.* Russell, 2 Day (Conn.) 112.

The proper place for stating at whose instance the action is instituted is at the beginning and not at the conclusion of the declaration. Porter *v.* State, 9 Ark. 226.

97. Morton *v.* State, 25 Ark. 46; State *v.* Ritter, 9 Ark. 244; Phillips *v.* Governor, 2 Ark. 382; Eaton *v.* Benefield, 2 Blackf. (Ind.) 52; Songer *v.* Mainwaring, 1 Blackf. (Ind.) 251; Probate Judge *v.* Johnson, 4 How. (Miss.) 680; Hooe *v.* Lockwood, 3 Pinn. (Wis.) 42, 3 Chandl. (Wis.) 41. *Compare* Giles *v.* Brown, 60 Ga. 658.

The allegation must be positive, and in an action by a distributee the petition must allege that plaintiff is a distributee. It is not sufficient to state that in a proceeding to settle the administrator's accounts it has been adjudged that plaintiff is a distributee. Helm *v.* Donnelly, 5 Ky. L. Rep. 517.

If the declaration merely shows the relator to be a creditor of the estate, but does not allege that he had recovered a judgment against the estate or show the nature or amount of his demand, it is insufficient. Wright *v.* State, 8 Blackf. (Ind.) 385.

Defective allegation cured by verdict.—Beal *v.* State, 77 Ind. 231.

A creditor need not allege the class to which his claim belongs where it is alleged that the assets were largely in excess of all liabilities and that they have been wasted by defendant. Frank *v.* De Lopez, 2 Tex. Civ. App. 245, 21 S. W. 279.

An allegation that judgment was rendered against the administrator as such to be levied *de bonis intestati* is sufficient, and it is not necessary to allege that it was rendered on a debt which was a proper charge against the estate. Reid *v.* Nash, 23 Ala. 733.

Where the claim is alleged to have been allowed and approved, it is not necessary to state the items of which it is composed. Frank *v.* De Lopez, 2 Tex. Civ. App. 245, 21 S. W. 279.

A statement that plaintiff is decedent's widow and entitled under the statute to certain personal property of the estate which she had demanded of the administrator, the statement being filed with a copy of the bond as the cause of action is sufficient, in a suit before a justice. Walker *v.* Prather, 3 Ind. 112.

98. State *v.* Cutting, 2 Ohio St. 1.

99. See *supra*, XVII, I, 1, b.

1. *Arkansas.*— Morton *v.* State, 25 Ark. 46; State *v.* Ritter, 9 Ark. 244; State *v.* Ferguson, 8 Ark. 172.

Colorado.— Howe *v.* People, 7 Colo. App. 535, 44 Pac. 512.

Kentucky.— Thomas *v.* Com., 3 J. J. Marsh. 121.

Maryland.— Dorsey *v.* Pannell, 4 Gill & J. 471.

Mississippi.— Probate Judge *v.* Thompson, 2 How. 808.

New Hampshire.— Probate Judge *v.* Couch, 59 N. H. 39.

New Jersey.—Ordinary *v.* White, 43 N. J. L. 22.

Rhode Island.— Pawtucket Prob. Ct. *v.* Williams, 23 R. I. 515, 51 Atl. 101.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2551.

be alleged that there has been a final accounting and settlement [2] or an order to account and a failure to comply therewith,[3] that plaintiff's claim has been established [4] either by the recovery of a judgment [5] or an allowance thereof,[6] that there has been an order for payment,[7] a demand and failure to comply therewith,[8] a tender of a refunding bond,[9] or in an action for a devastavit that the devastavit has been established in a separate suit against the principal.[10]

(III) *Allegation of Execution of Bond.* It must be alleged that defendant executed the bond upon which the action is brought.[11]

(IV) *Allegation of Conditions of Bond.* In some states it is held to be unnecessary to set out the conditions of the bond in the declaration,[12] while in others it is held that, in order to state a cause of action against the sureties, the conditions of the bond must be set out,[13] and a mere allegation that the bond was conditioned according to law is insufficient.[14]

(V) *Allegations as to Breach of Conditions.* At common law it was not necessary for plaintiff to assign breaches in the declaration, but he might declare on the penalty and then make the assignment in the replication in case defendant should plead performance of the condition as a defense.[15] The modern practice, however, is to set forth the condition and assign the breach in the decla-

2. Probate Judge *v.* Thompson, 2 How. (Miss.) 808.

3. State *v.* Ferguson, 8 Ark. 172; Probate Judge *v.* Couch, 59 N. H. 39; Pawtucket Probate Ct. *v.* Williams, 23 R. I. 515, 51 Atl. 101; West Greenwich Prob. Ct. *v.* Carr, 20 R. I. 592, 40 Atl. 844; Glocester Prob. Ct. *v.* Eddy, 8 R. I. 339; Georgia Dist. Prob. Ct. *v.* Vanduzer, 13 Vt. 135.

4. Probate Judge *v.* Couch, 59 N. H. 39.

5. Gilbreath *v.* Manning, 24 Ala. 418.

6. See Gordon *v.* State, 11 Ark. 12; State *v.* Ritter, 9 Ark. 244; St. Paul First Nat. Bank *v.* How, 28 Minn. 150, 9 N. W. 626.

Where the executor is residuary legatee and has given bond for the payment of all debts and legacies, under the Ohio act of March 23, 1840, section 4, the petition need not show a presentment of the claim to the executor, to allow the bringing of the action specified in section 98 of the same act. Stevens *v.* Hartley, 13 Ohio St. 525.

7. *Alabama.*— Gilbreath *v.* Manning, 24 Ala. 418.

Arkansas.— State *v.* Roth, 47 Ark. 222, 1 S. W. 98; Morton *v.* State, 25 Ark. 46; Gordon *v.* State, 11 Ark. 12; State *v.* Ritter, 9 Ark. 244; State *v.* Ferguson, 8 Ark. 172.

Colorado.— Howe *v.* People, 7 Colo. App. 535, 44 Pac. 512.

Missouri.— State *v.* Modrell, 15 Mo. 421.

New Hampshire.— Probate Judge *v.* Couch, 59 N. H. 39.

Vermont.— Chittenden Dist. Prob. Ct. *v.* Saxton, 17 Vt. 623; Georgia Dist. Prob. Ct. *v.* Vanduzer, 13 Vt. 135.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2551.

Averment held sufficient.— The fact that an order was made to pay over money to a successor is sufficiently averred by alleging a refusal to pay over the money "in violation of the order of said court." Rutenic *v.* Hamakar, 40 Oreg. 444, 67 Pac. 196.

8. Gordon *v.* State, 11 Ark. 12; State *v.* Ritter, 9 Ark. 244; Stratton *v.* McCandless, 27 Kan. 296.

A general averment that the administrator did not pay over the sum in his hands to the persons entitled thereto, "though often requested so to do," is sufficient on general demurrer. State *v.* Cowles, 5 Ohio St. 87.

Either a demand or an excuse for the omission to make a demand must be averred. State *v.* Cowles, 5 Ohio St. 87; Woodson *v.* State, 17 Ohio 161.

9. Probate Judge *v.* Thompson, 2 How. (Miss.) 808; Ordinary *v.* White, 43 N. J. L. 22.

10. Wilbur *v.* Hutto, 25 S. C. 246. See also Burnside *v.* Robertson, 28 S. C. 583, 6 S. E. 843.

11. Jeffree *v.* Walsh, 14 Nev. 143.

Sufficiency of allegation.— A complaint alleging that letters were directed to be issued to an executor on "executing a bond according to law," etc., and that he and defendants "duly made and executed the bond required by said order," is good, as against a general demurrer, and need not allege that the bond was approved, filed, and recorded. Evans *v.* Gerken, 105 Cal. 311, 39 Pac. 725.

12. Woodbridge *v.* Grant, 1 Root (Conn.) 173; Rice *v.* Thomson, 2 Bailey (S. C.) 339. See also Davis *v.* Dickson, 2 Stew. (Ala.) 370 [*overruling* Fuqua *v.* Stone, 1 Stew. (Ala.) 435].

13. Mountjoy *v.* Pearce, 4 Metc. (Ky.) 97; Brewer *v.* Hill, 9 Ky. L. Rep. 329; Whitfield *v.* Evans, 56 Miss. 488.

Where more than one bond is given and the action is on the second bond the purpose of the bond must be stated in order to show for what acts the sureties are liable. Lane *v.* State, 24 Ind. 421.

14. Whitfield *v.* Evans, 56 Miss. 488.

15. Rice *v.* Thomson, 2 Bailey (S. C.) 339; Calhoun *v.* Lillard, 4 Hayw. (Tenn.) 56. See also Davis *v.* Dickson, 2 Stew. (Ala.) 370 [*overruling* Fuqua *v.* Stone, 1 Stew. (Ala.) 435].

An assignment of breaches must appear in some part of the record in order to sustain the judgment. Ward *v.* Fairfax Justices, 4 Munf. (Va.) 494.

ration,[16] and plaintiff may assign any number of breaches.[17] The breach of the condition must be directly and positively averred,[18] the particular breach or breaches relied on being specifically stated,[19] together with the facts necessary to show the commission of the breach,[20] and that plaintiff has been injured thereby.[21] In other words a specific cause of action must be alleged with reasonable certainty and precision.[22] This, however, is all that good pleading requires,[23] and plaintiff

16. Calhoun *v.* Lillard, 4 Hayw. (Tenn.) 56. See also Phillips *v.* Governor, 2 Ark. 382.

17. See Phillips *v.* Governor, 2 Ark. 382; West Greenwich Prob. Ct. *v.* Carr, 20 R. I. 592, 40 Atl. 844.

At common law only one breach could be assigned. West Greenwich Prob. Ct. *v.* Carr, 20 R. I. 592, 40 Atl. 844.

18. Phillips *v.* Governor, 2 Ark. 382; Fitch *v.* Lothrop, 1 Root (Conn.) 88.

19. Newsom *v.* Dickerson, Peck (Tenn.) 285.

20. Porter *v.* State, 9 Ark. 226; Phillips *v.* Governor, 2 Ark. 382. *Compare* Ordinary *v.* Phillpot, 1 Bay (S. C.) 462.

The receipt of sufficient assets must be alleged in order to show a breach of condition in failing to pay claims against the estate (Lee *v.* Waller, 3 Metc. (Ky.) 61; State *v.* Cutting, 2 Ohio St. 1; Chittenden Prob. Ct. *v.* Saxton, 17 Vt. 623. *Compare* Thomson *v.* Searcy, 6 Port. (Ala.) 393), but a formal averment to this effect is not necessary where the fact appears from the other allegations (Hoggatt *v.* Montgomery, 6 How. (Miss.) 93. *Compare* Lee *v.* Waller, 3 Metc. (Ky.) 61).

A petition against the executor of a deceased executor for breach by the decedent of his bond as executor should allege that neither the deceased executor in his lifetime, nor his executor since, has performed the acts required by law or the order of the court non-performance of which is alleged to constitute the breach. State *v.* Petticrew, 19 Mo. 373.

Complaints held insufficient.— A complaint alleging that an executor failed to inventory property of the estate is insufficient where it does not allege that he had knowledge of such property. State *v.* Scott, 12 Ind. 529. A complaint alleging as breaches "failure to return a true inventory" and "unreasonable delay" in selling certain real estate without alleging in what respect the inventory was untrue or the delay unreasonable is too indefinite. Stratton *v.* McCandless, 27 Kan. 296. Where a legacy was not to be paid until the legatee attained a certain age, a complaint in an action on the bond for failure to pay the same which fails to allege that plaintiff has attained that age and that there are sufficient assets to pay the legacy is insufficient. Rogers *v.* State, 26 Ind. App. 144, 59 N. E. 334.

21. Stratton *v.* McCandless, 27 Kan. 296.

22. *Arkansas.*—Phillips *v.* Governor, 2 Ark. 382.

Indiana.— Nicholson *v.* Carr, 3 Blackf. 104.

Kansas.— Stratton *v.* McCandless, 27 Kan. 296.

Kentucky.— Lee *v.* Waller, 3 Metc. 61.

Tennessee.— Newsom *v.* Dickerson, Peck 285.

Vermont.— Probate Ct. *v.* Hull, 58 Vt. 306, 3 Atl. 472.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2551.

Where plaintiff is interested in only a particular class of assets a complaint alleging a devastavit must specify the particular class. Altheimer *v.* Hunter, 56 Ark. 159, 19 S. W. 496.

A complaint merely alleging the recovery of a judgment against the administrator for a devastavit without stating that it has not been paid is fatally defective. Irvine *v.* Williams, 6 Dana (Ky.) 41.

A petition which fails to allege when a devastavit occurred is demurrable, where, under the law then in force, if the devastavit occurred after its passage the action would not lie. Collins *v.* Warren, 63 Tex. 311.

In an action to charge an administrator for failing to account for money received, it should be alleged that it was received before the account was rendered or that he has since been cited in and has not accounted. Paine *v.* Fox, 16 Mass. 129.

The authority of the surrogate to issue the letters of administration must be alleged. Mahoney *v.* Gunter, 10 Abb. Pr. (N. Y.) 431.

23. Whitfield *v.* Evans, 56 Miss. 488; Calhoun *v.* Lillard, 4 Hayw. (Tenn.) 56. See also Probate Judge *v.* Thompson, 2 How. (Miss.) 808; Finney *v.* State, 9 Mo. 632; Franklin County Treasurer *v.* McElvain, 5 Ohio 200.

The declaration is sufficient if it properly avers facts which, with the legal presumptions arising thereon, make a *prima facie* case; and a declaration which avers that the administrator was discharged and his letters revoked by the county court is sufficient without averring facts showing that the court had jurisdiction of the parties and of the subject-matter. People *v.* Lane, 36 Ill. App. 649.

For illustrations of sufficient assignments see the following cases where the assignment was held sufficient to show a breach of the bond in failing to file an inventory (Edwards *v.* White, 12 Conn. 28), failure to render accounts (O'Connor *v.* State, 18 Ohio 225; Providence Municipal Ct. *v.* McElroy, 18 R. I. 749, 30 Atl. 796), failure to pay claims of creditors (Matthews *v.* Council, 96 Ga. 780, 22 S. E. 335), failure to pay legacies (Perkins *v.* Moore, 16 Ala. 9; Heady *v.* State, 60 Ind. 316), and the commission of a devastavit (Kyle *v.* Mays, 22 Ala. 692; State *v.* Bennett, 24 Ind. 383).

need not anticipate and negative matters of defense[24] nor set out matters lying more properly within the knowledge of defendant.[25] Setting out the condition in the language of the bond and alleging its non-performance has been held to be sufficient,[26] but in some cases merely negativing the condition is not sufficient to show a breach.[27] Although only one of several breaches relied on be properly assigned the complaint is good against a general demurrer.[28]

(VI) *EXHIBITS.* It is not necessary, unless required by statute or rule of court,[29] to file with the complaint a copy of the bond,[30] of the will,[31] or of the settlement made by the representative;[32] and even where a copy of the bond is required to be filed, it does not become a part of the record for the purposes of pleading, but is merely notice to defendant of the cause of action and will not cure a defective statement in the declaration.[33]

b. Plea or Answer — (I) *IN GENERAL.* The plea or answer must meet the allegations of the declaration or complaint,[34] and must answer the whole cause of action stated therein[35] by stating facts and not merely conclusions without the

The time when the representative received property alleged to have been misappropriated, whether before or after the execution of the bond, is immaterial and need not be alleged. Owen *v.* State, 25 Ind. 371.

Where the disobedience of a decree of the surrogate is assigned as the breach the complaint need not state the grounds of the decree (Field *v.* Van Cott, 15 Abb. Pr. N. S. (N. Y.) 349) nor the steps preliminary to making the same (People *v.* Falconer, 2 Sandf. (N. Y.) 81).

24. Thomas *v.* Searcy, 6 Port. (Ala.) 393; Blagden *v.* U. S., 18 App. Cas. (D. C.) 370.

Failure to explain the non-joinder of certain parties plaintiff does not affect the sufficiency of the cause of action alleged. Bischoff *v.* Engel, 10 N. Y. App. Div. 240, 41 N. Y. Suppl. 815.

25. Thomson *v.* Searcy, 6 Port. (Ala.) 393; Hoggatt *v.* Montgomery, 6 How. (Miss.) 93; People *v.* Dunlap, 13 Johns. (N. Y.) 437. See also Ordinary *v.* Phillpot, 1 Bay (S. C.) 462.

26. Porter *v.* State, 9 Ark. 226; Gutridge *v.* Vanatta, 27 Ohio St. 366; Carroll *v.* Foster, 3 Yerg. (Tenn.) 468. See also Clark *v.* Russell, 2 Day (Conn.) 112.

All the words of the condition need not be negatived if it is stated in substance and a denial of the performance of that particular duty alleged. Probate Judge *v.* Thompson, 2 How. (Miss.) 808.

Where the bond does not follow the statutory form the breach must be assigned according to the condition as expressed in the bond given, and if the non-performance of duties not covered by the condition be added the assignment is bad. Ordinary *v.* Cooley, 30 N. J. L. 179.

27. See Walker *v.* Hall, 1 Pick. (Mass.) 20; Probate Judge *v.* Lane, 6 N. H. 55; Probate Judge *v.* Tillotson, 5 N. H. 413.

In assigning an omission to render an inventory or account, it is necessary to aver that some property came into the administrator's hands. Walker *v.* Hall. 1 Pick. (Mass.) 20; Probate Judge *v.* Tillotson, 5 N. H. 413.

28. Whitehall *v.* State, 19 Ind. 27; State *v.* Scott, 12 Ind. 529; Probate Judge *v.* Thompson, 2 How. (Miss.) 808; Providence Municipal Ct. *v.* McElroy, 19 R. I. 712, 36 Atl. 717; Carroll *v.* Foster, 3 Yerg. (Tenn.) 468; Newsom *v.* Dickerson, Peck (Tenn.) 285.

The proper remedy in a case where the averment of one breach is defective is to move on the trial to exclude all evidence relating to that breach. State *v.* Porter, 9 Mo. 356.

29. See Rice *v.* Thompson, 2 Bailey (S. C.) 339.

30. Gibson *v.* Robinson, 90 Ga. 756, 16 S. E. 969, 35 Am. St. Rep. 250.

31. Braxton *v.* State, 25 Ind. 82.

32. State *v.* Bartlett, 68 Mo. 581.

33. Rice *v.* Thompson, 2 Bailey (S. C.) 339.

34. Outlaw *v.* Yell, 8 Ark. 345; State *v.* Tomlinson, 16 Ind. App. 662, 45 N. E. 1116, 59 Am. St. Rep. 335; Probate Judge *v.* Lane, 50 N. H. 556; Harris *v.* Davis, 1 N. H. 248.

A plea of nul tiel record in an action not founded on a record but upon a misapplication or wasting of assets presents no issue on the substantial matter in controversy. Cogan *v.* Duncan, 23 Miss. 274.

In an action for failing to pay claims of creditors, it is not sufficient to allege that the assets have not been wasted or misapplied, since a mere retention of the funds after it was the duty of the representative to pay the claims would constitute a breach of the bond. Cannon *v.* Cooper, 39 Miss. 784, 80 Am. Dec. 101.

35. State *v.* Tomlinson, 16 Ind. App. 662, 45 N. E. 1116, 59 Am. St. Rep. 335; Harris *v.* Davis, 1 N. H. 248. See also Clark *v.* Cress, 20 Iowa 50; Probate Ct. *v.* Potter, 25 R. I. 204, 55 Atl. 524.

It is not necessary that one plea should answer the whole declaration or cause of action, it being only necessary that the whole matter of defense pleaded shall cover the whole complaint, and defendant may therefore plead several matters of defense in several pleas, and if all taken together form a sufficient answer to the whole matter of the complaint, the defense is complete. Probate Ct. *v.* Potter, 25 R. I. 204, 55 Atl. 524 [*quot-*

facts on which they are based.[36] A plea which neither controverts the allegations of the declaration nor presents any matter in avoidance of them is bad on demurrer,[37] as is also a plea which tenders an immaterial issue.[38] Where a settlement and accounting with the proper court is relied on as a defense, a copy or transcript of the records referred to should be filed with the answer.[39]

(II) *PERFORMANCE.* A general plea of performance in an action on an administration bond where special breaches are assigned is bad on demurrer,[40] but if the declaration does not assign a breach defendant may plead performance and plaintiff must then assign breaches in his replication.[41]

(III) *PLENE ADMINISTRAVIT.* There are very few cases in which the plea of *plene administravit* is admissible,[42] unless expressly allowed by statute;[43] but where the plea of *plene administravit* is no longer in use, the facts necessary to show that the estate has been fully administered may be set up in the answer.[44] It may be pleaded by the sureties where by statute their liability is limited to the amount of the assets,[45] or by the principal where certain claimants are entitled to preference and after exhausting the assets in paying claims in the proper order he is sued for the non-payment of a claim of an inferior class.[46] It is not a good plea where it does not answer the declaration or raise any material issue,[47] and where a judgment is rendered against the principal in an action suggesting a devastavit it is conclusive that he had assets and wasted them and neither he nor the sureties can thereafter plead *plene administravit* in an action on the bond.[48] A plea of *plene administravit* must state the time when the administrator was without assets to satisfy the demand in question and should allege that he did not have such assets at the time of the issuing of the original writ or at any time thereafter.[49]

(IV) *NIL DEBET.* A plea of *nil debet* in an action on an administration bond where breaches are assigned is bad on demurrer,[50] the breaches assigned being in the nature of several causes of action to which defendant should

ing Gould Pl. (4th ed.) c. 6, pt. 2, §§ 102, 103].

36. Reid *v.* Nash, 23 Ala. 733.

37. Outlaw *v.* Yell, 8 Ark. 345; Cogan *v.* Duncan, 23 Miss. 274; Harris *v.* Davis, 1 N. H. 248.

38. Byrd *v.* State, 15 Ark. 175.

Plea tendering immaterial issue may be stricken out. Probate Ct. *v.* Potter, 25 R. I. 204, 55 Atl. 524.

39. State *v.* Marshall, 20 Ind. 287.

40. *Alabama.*— Reid *v.* Nash, 23 Ala. 733.

Arkansas.— Byrd *v.* State, 15 Ark. 175.

Delaware.— State *v.* Short, 2 Harr. 152.

Kentucky.— Griffith *v.* Com., 1 Dana 270.

Maryland.— Shriver *v.* State, 65 Md. 278, 4 Atl. 679.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2556.

Compare Dawes *v.* Gooch, 8 Mass. 488.

The plea of defendant must state a special performance showing when, where, and how he performed. Calhoun *v.* Lillard, 4 Hayw. (Tenn.) 56.

If defendant traverses the specific breaches assigned affirming that he has in these particulars performed the conditions of the bond there is a good issue between the parties and the plea is sufficient. Stewart *v.* McCully, 5 Rich. (S. C.) 80.

41. State *v.* Short, 2 Harr. (Del.) 152; Stewart *v.* McCully, 5 Rich. (S. C.) 80.

42. Randolph *v.* Singleton, 12 Sm. & M. (Miss.) 439. See also Daviess *v.* Mead, 2 Bibb (Ky.) 397.

43. Com. *v.* Richardson, 8 B. Mon. (Ky.) 81; Griffith *v.* Com., 1 Dana (Ky.) 270.

44. McKim *v.* Haley, 173 Mass. 112, 53 N. E. 152.

45. *Alabama.*— Amason *v.* Nash, 24 Ala. 279; Williams *v.* Hinkle, 15 Ala. 713.

Florida.— See State *v.* Crawford, 23 Fla. 289, 2 So. 371.

Maine.— Burgess *v.* Young, 97 Me. 386, 54 Atl. 910.

Minnesota.— See St. Paul First Nat. Bank *v.* How, 28 Minn. 150, 9 N. W. 626.

Tennessee.— See Calhoun *v.* Lillard, 4 Hayw. 56.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2503.

Where the plea is not pleaded by name, in which case all material averments would have been considered as duly made, it must be alleged that the administration of the assets was made before the suit on the bond was instituted, and this notwithstanding the record states that the plea was taken "in short by consent." Reid *v.* Nash, 23 Ala. 733.

46. Randolph *v.* Singleton, 12 Sm. & M. (Miss.) 439.

47. Probate Judge *v.* Lane, 50 N. H. 556.

48. Goodwin *v.* Wilson, 1 Blackf. (Ind.) 344.

49. Iglehart *v.* State, 2 Gill & J. (Md.) 235.

50. *Alabama.*— Reid *v.* Nash, 23 Ala. 733.

respond;[51] but the plea is not a nullity, and if issue is taken thereon it is incumbent upon plaintiff to prove all the material allegations of his declaration except the execution of the bond.[52]

(v) *Non Est Factum.* The plea of *non est factum* puts in issue only the execution of the bond.[53] It admits every other allegation in the declaration,[54] and is a waiver of any legal defense of which the defendant could have availed himself under the condition.[55]

(vi) *Pleas in Abatement.* Where leave to sue is a condition precedent to suit on the bond, an objection that suit was brought without such leave can be taken only by a plea in abatement,[56] and if not so taken it will be deemed to be waived.[57] The fact that the action is brought by a married woman alone without joining her husband can also be taken advantage of only by a plea in abatement.[58]

(vii) *Severance in Pleading.* In an action on the bond against both principal and sureties defendants need not plead jointly but may sever and each plead as many pleas as he may deem necessary to his defense.[59]

c. Replication or Reply. In modern practice breaches are usually assigned in the declaration and issue joined on the plea,[60] but if not and defendant pleads performance the specific breaches must be assigned in the replication.[61] Where defendant pleads performance the replication must state facts sufficient to show a breach of condition.[62] The replication in such cases performs the office of a declaration,[63] and there must be the same certainty of averment as would be necessary in the declaration.[64]

d. Rejoinder and Surrejoinder. The rejoinder to be sufficient must answer the whole cause of action set out in the replication,[65] and must support the plea, any departure therefrom being ground for demurrer.[66] If plaintiff files a surrejoinder, it must conform to the replication, and if it sets up another and different breach from the one therein assigned it is bad for departure.[67]

Indiana.— Kirkpatrick *v.* State, 3 Ind. 521.
Kentucky.— Griffith *v.* Com., 1 Dana 270.
Mississippi.— State *v.* Bowen, 45 Miss. 347.
United States.— Alexander *v.* Bryan, 110 U. S. 414, 4 S. Ct. 107, 28 L. ed. 195.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2556.

51. State *v.* Bowen, 45 Miss. 347.

52. Kirkpatrick *v.* State, 3 Ind. 521.

53. Pritchett *v.* People, 6 Ill. 525; People *v.* Rowland, 5 Barb. (N. Y.) 449.

The delivery as well as the signing of the bond is included in its execution and is raised by a plea of *non est factum*. Cully *v.* People, 73 Ill. App. 501.

54. People *v.* Rowland, 5 Barb. (N. Y.) 449.

55. Rice *v.* Thomson, 2 Bailey (S. C.) 339.

56. Prindle *v.* Holcomb, 45 Conn. 111; Johannes County Judge *v.* Youngs, 48 Wis. 101, 4 N. W. 32.

57. Prindle *v.* Holcomb, 45 Conn. 111.

Pleading to the merits is a waiver of the right to object that conditions precedent were not complied with. Ross *v.* Chambliss, 5 La. Ann. 158.

58. Probate Ct. *v.* Sawyer, 59 Vt. 57, 7 Atl. 281.

59. Williams *v.* Hinkle, 15 Ala. 713.

60. Calhoun *v.* Lillard, 4 Hayw. (Tenn.) 56.

61. See State *v.* Short, 2 Harr. (Del.) 152.

62. Griffin *v.* Pratt, 3 Conn. 513.

In an action for failing to file an inventory a replication to a plea of special performance that the administrator did not exhibit an inventory and concluding to the country is good. Proprietary *v.* Gibbs, 1 Harr. & M. (Md.) 62.

A replication to a plea of omnia performavit which states in detail sufficient facts to show that defendant was guilty of fraudulent conduct in the sale of property of the estate is sufficient. Probate Judge *v.* Lane, 50 N. H. 556.

63. State *v.* Gaither, 11 Gill & J. (Md.) 160.

64. Isaacs *v.* Stevens, 13 Conn. 499; State *v.* Gaither, 11 Gill & J. (Md.) 160.

Sufficiency.— A replication showing the existence of a debt due from the intestate and that the administrator was insolvent would render the surety liable, unless he could prove that the estate of the deceased had been duly administered. State *v.* Cox, 2 Harr. & G. (Md.) 379.

In an action by a creditor for the nonpayment of his claim the replication must state the nature and character of the claim and not merely its amount. Isaacs *v.* Stevens, 13 Conn. 499.

65. Edwards *v.* White, 12 Conn. 28.

66. Proprietary *v.* Cockshut, 1 Harr. & M. (Md.) 40; Ordinary *v.* Bracey, 1 Brev. (S. C.) 191. See also State *v.* Hanson, 2 Harr. & G. (Md.) 437; Probate Judge *v.* Lane, 50 N. H. 556; Lewis *v.* Spann, 1 Rich. (S. C.) 429.

After a plea of performance a rejoinder of matters in excuse of non-performance is a departure. Warren *v.* Powers, 5 Conn. 373.

67. Dawes *v.* Winship, 16 Mass. 291.

e. Amendments to Pleading. Where the action must be instituted in the name of the state or other nominal plaintiff,[68] the complaint may be amended so as to substitute the proper nominal plaintiff where the action is improperly brought in the name of the real party in interest,[69] and if brought by the proper nominal plaintiff but for the benefit of the wrong person the record may be amended to show the real party in interest;[70] but any amendment must be consistent with the original pleading, and cannot be allowed where it would constitute a new suit against new parties.[71]

9. Issues, Proof, and Variance. There can be no recovery except upon the issues raised by the pleadings.[72] The proof must establish the cause of action as alleged,[73] and must show a compliance with any conditions precedent essential to the maintenance of the action;[74] but all material averments in the declaration not denied or controverted by the plea are admitted, and plaintiff need not introduce proof of matters not put in issue by the pleadings.[75] The proof must correspond to the allegations of the pleadings,[76] but an immaterial variance may be disregarded,[77] and will be considered as waived if not objected to on the trial.[78] Under the general issue defendant may show that the person on whose estate the letters of administration were granted was not in fact dead, and that the court was therefore without jurisdiction.[79]

10. Evidence — a. Presumptions. It will be presumed in an action on an administration bond that the representative has performed the duties of his office according to law,[80] that where sales were made on credit good security was taken,[81] and after a reasonable time that the amount was duly collected.[82] Where the representative acted in different capacities with regard to property of the estate it will be presumed to have been in his hands in that capacity in which it ought at the time to have been held,[83] and, where he received property of the estate under an agreement to take administration, it will be presumed that he retained possession thereof until after his appointment.[84] Where a representative is cited to file a final account it will be presumed in an action for failing to obey the order that accounts previously filed were not final although they were so styled.[85] It will be presumed that the order requiring the bond was authorized,[86] and the possession and approval of such bond by the probate judge raises the presumption that it was duly executed and delivered.[87]

b. Burden of Proof. In an action on the bond to recover damages for any act of maladministration, the burden is upon plaintiff to prove the damages alleged,[88]

68. See *supra*, XVII, I, 7, a.

69. State *v.* Shelby, 75 Mo. 482.

70. Cranson *v.* Wilsey, 71 Mich. 356, 39 N. W. 9.

71. Leggett *v.* Bennett, 48 Ala. 380.

72. Allen *v.* Corbett, 51 Iowa 703, 1 N. W. 771; Edelen *v.* State, 4 Gill & J. (Md.) 277; Bergstroem *v.* State, 58 Tex. 92. See also State *v.* Edwards, 78 Mo. 473.

73. Bergstroem *v.* State, 58 Tex. 92.

In an action against the sureties for a devastavit committed by their principal it is essential to show what amount of assets came into the hands of the executor or administrator (Miller *v.* Gee, 4 Ala. 359) except where the amount is admitted by the pleadings (Hoggatt *v.* Montgomery, 6 How. (Miss.) 93).

74. State *v.* Hudkins, 34 W. Va. 370, 12 S. E. 495. See also Behrle *v.* Sherman, 10 Bosw. (N. Y.) 292.

Assignment of bond to plaintiff must be proved. Burgess *v.* State, 12 Gill & J. (Md.) 64.

75. People *v.* Gray, 72 Ill. 343; Glocester Prob. Ct. *v.* Eddy, 8 R. I. 508; Roberts *v.* Weadock, 98 Wis. 400, 74 N. W. 93.

76. Rogers *v.* Jones, 51 Ala. 353; State *v.* Short, 2 Harr. (Del.) 152; State *v.* Seabright, 15 W. Va. 590.

77. Woodward *v.* Fisher, 11 Sm. & M. (Miss.) 303; Gabie *v.* Meilan, 4 N. C. 346. See also Grant *v.* Rogers, 94 N. C. 755.

78. Curry *v.* People, 54 Ill. 263.

79. Ross *v.* White, 29 N. C. 116. See *supra*, I, J, 3, a.

80. Lockhart *v.* White, 18 Tex. 102.

81. Gordon *v.* Gibbs, 3 Sm. & M. (Miss.) 473; Lockhart *v.* White, 18 Tex. 102.

82. Gordon *v.* Gibbs, 3 Sm. & M. (Miss.) 473.

83. Kirby *v.* State, 51 Md. 383. See generally *supra*, XVII, B, 11; XVII, D, 8.

84. People *v.* Hascall, 22 N. Y. 188, 78 Am. Dec. 176.

85. Providence Municipal Ct. *v.* Henry, 11 R. I. 563.

86. Owen *v.* State, 25 Ind. 371.

87. Wright *v.* Lang, 66 Ala. 389.

88. Choate *v.* Arrington, 116 Mass. 552.

and also to show that at the time of the alleged default the principal was acting in his representative capacity.[89] A distributee suing for the non-payment of his distributive share has the burden of proving that he is a person entitled to distribution and also that he is entitled to the particular amount claimed,[90] and any claimant suing for the non-payment of his claim must show a receipt of assets by the representative,[91] but where such receipt is proved or admitted the burden is upon defendant to show that the assets were properly disposed of.[92] Where a representative has failed to collect debts due the estate he has the burden of showing that the failure was unavoidable,[93] and also that he exercised due care and diligence in the attempt to collect.[94]

c. Admissibility. In actions on administration bonds whatever is competent as evidence upon which to charge the principal is admissible against the sureties,[95] but as in other cases evidence is not admissible unless it tends to support or contradict some allegation of the pleadings,[96] and to prove or disprove the particular fact in issue,[97] and the best evidence of the particular fact in question must be produced.[98] The inventory and accounts filed by the representative are admissible to show for what property he and the sureties on the bond are liable,[99] and evidence of the receipt of sums of money as income from the personal estate and of any property which at any time has come or ought to have come into the representative's hands is admissible against both him and the sureties.[1] In an action for the non-payment of a legacy the will of the decedent is admissible as

89. Cluff *v.* Day, 55 N. Y. Super. Ct. 460, 14 N. Y. St. 729.

90. Shriver *v.* State, 65 Md. 278, 4 Atl. 679.

91. Wilson *v.* Slade, 2 Harr. & J. (Md.) 281; Morgan *v.* Slade, 2 Harr. & J. (Md.) 38.

Where the bond is conditioned to pay all debts and legacies, the executor being residuary legatee, plaintiff need not show assets (State *v.* Snowden, 7 Gill & J. (Md.) 430; Buel *v.* Dickey, 9 Nebr. 285, 2 N. W. 884), the voluntary execution of a bond in this form being a conclusive admission of assets (Colwell *v.* Alger, 5 Gray (Mass.) 67).

92. Miller *v.* Gee, 4 Ala. 359; Johnston *v.* Maples, 49 Ill. 101; Johnston's Succession, 1 La. Ann. 75; Choate *v.* Arrington, 116 Mass. 552. But see State *v.* Price, 17 Mo. 431.

In an action by a succeeding administrator against his predecessor for failing to pay over a balance, where it is shown that such balance was in the hands of the preceding administrator, the presumption is that it was not paid over, and if it was paid to the successor in office the burden is upon defendant to prove this fact. Dayton *v.* Johnson, 69 N. Y. 419.

93. Gordon *v.* Gibbs, 3 Sm. & M. (Miss.) 473.

Where a representative fails to pay a debt due from himself if he relies upon the inability to pay as a defense he has the burden of proving the fact. Keegan *v.* Smith, 60 N. Y. App. Div. 168, 70 N. Y. Suppl. 260 [*affirming* 33 Misc. 74, 67 N. Y. Suppl. 281, and *affirmed* in 172 N. Y. 624, 65 N. E. 1118].

94. Peytavin's Succession, 7 Rob. (La.) 477.

95. Choate *v.* Arrington, 116 Mass. 552.

96. People *v.* Hunter, 89 Ill. 392; Burch *v.* State, 4 Gill & J. (Md.) 444; State *v.* Pare, 28 Mo. App. 512.

97. Taylor *v.* Smith, 1 Brev. (S. C.) 230.

In an action for failing to account for certain property of the estate evidence as to whether certain claims against the estate were properly allowed is inadmissible. State *v.* Farmer, 54 Mo. 439.

Evidence as to the time of the receipt of assets is properly excluded since the bond covers assets received before its execution. Scofield *v.* Churchill, 72 N. Y. 565.

98. Millers *v.* Catlett, 10 Gratt. (Va.) 477, holding that the best evidence as to the person to whom a legacy should be paid is the will of the testator and that where this can be produced parol evidence is inadmissible. See also Emory *v.* Thompson, 2 Harr. & J. (Md.) 244.

A certified copy of the bond is, by statute in Illinois, admissible as evidence. See People *v.* Lott, 27 Ill. 215.

Where bonds are required to remain on file in the office where they are recorded a certified copy of the record is original evidence. Richardson *v.* Whitworth, 103 Ga. 741, 30 S. E. 573.

99. Choate *v.* Arrington, 116 Mass. 552; State *v.* Kennedy, 163 Mo. 510, 63 S. W. 678; Lewis *v.* Gambs, 6 Mo. App. 138.

Reports of a representative, although never acted on by the court, are admissible as admissions as to the disposition and management of the assets of the estate. Beal *v.* State, 77 Ind. 231.

Where a special bond is given for the sale of real estate a general account, in which no separate and distinct account of the proceeds of the real estate and the disbursements made therefrom is made, is inadmissible in an action against the sureties on the real estate bond. Com. *v.* Hilgert, 55 Pa. St. 236.

1. Choate *v.* Arrington, 116 Mass. 552. Testimony as to the amount and kinds of property owned by the decedent just prior to his death is admissible as evidence of what

evidence of plaintiff's right of action,[2] and in an action for failure to pay the amount allowed for the support of minor heirs where defendants set up as a defense that no notice was given the representative to appear before the commissioners it is competent to show by parol, as evidence of a waiver of notice, that the representative was present and consented to or aided in the commissioner's report.[3] Where an administrator has made an unauthorized sale of property of the estate, evidence of the price received is admissible to show the value of the property converted.[4] The representative's report of a sale is not conclusive as to the price but parol evidence is admissible to show the amount actually received.[5] Where defendant pleads that the bond as originally executed was in a different and smaller sum from that sued on, evidence is admissible to show that he knew the value of the estate and that the bond was required to be in double that value.[6] A judgment or decree against the principal is admissible in an action against the sureties.[7] In an action against the sureties to recover the amount of a decree any evidence tending to show that plaintiff has received payment in whole or in part out of the assets of the estate of the principal debtor is admissible;[8] and, in an action on the bond of an administrator whose letters have been revoked, evidence of proper payments made by him and of losses of money by theft should be admitted in exoneration of his liability.[9]

d. Weight and Sufficiency. The inventory filed by a representative, although not conclusive,[10] is *prima facie* evidence of the assets received and their value,[11] but the return of appraisers where the representative has no right or opportunity

went into the hands of the representative. Beal *v.* State, 77 Ind. 231.

Settlement after appointment of successor. — Where an administrator has refused to give counter security and a successor has been appointed, a settlement made by the former after such appointment is admissible against him and his sureties. Slaughter *v.* Froman, 2 T. B. Mon. (Ky.) 95.

In an action for failure to render a true inventory and account of the goods and chattels, rights and credits of the deceased evidence that the administratrix was seen in possession of money left with her by her husband prior to his death and money supposed to be his, brought to her by a person sent to ascertain the circumstances of his death, was properly admitted. Governor *v.* Byrd, 2 Mo. 194.

2. Ruby *v.* State, 55 Md. 484.

3. Butts *v.* Pugh, 54 Ga. 465.

4. State *v.* Scholl, 47 Mo. 84.

5. State *v.* Lindley, 98 Ind. 48.

6. Jackson *v.* Johnson, 67 Ga. 167.

7. *Connecticut.*— Willey *v.* Paulk, 6 Conn. 74.

Kansas.— Hefferlin *v.* Struckslager, 6 Kan. 166.

Maryland.— Ruby *v.* State, 55 Md. 484.

Mississippi.— Lipscomb *v.* Postell, 38 Miss. 476, 77 Am. Dec. 651; Woodward *v.* Fisher, 11 Sm. & M. 303.

South Carolina.— Lucas *v.* Guy, 2 Bailey 403; Cureton *v.* Shelton, 3 McCord 412; Lyles *v.* Caldwell, 3 McCord 225.

United States.— McLaughlin *v.* Potomac Bank, 7 How. 220, 12 L. ed. 675.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2566.

But *compare* Nicholson *v.* Carr, 3 Blackf. (Ind.) 104.

In North Carolina a judgment against the principal is not admissible in evidence in an action against the sureties (Governor *v.* Carter, 25 N. C. 338; Chairman Washington County Ct. *v.* Harramond, 11 N. C. 339; Chairman Mecklenburg County Ct. *v.* Clark, 11 N. C. 43), and conversely a judgment in his favor is not admissible in favor of the sureties (Governor *v.* Carter, *supra*).

A decree on a settlement by the representative of a deceased principal to which the sureties were not parties is not admissible to show a liability of their principal for which they are responsible. Means *v.* Hicks, 65 Ala. 241. *Contra*, Williams *v.* State, 68 Miss. 680, 10 So. 52, 24 Am. St. Rep. 297.

A judgment against an administrator reviving a dormant judgment rendered against the intestate is evidence of assets. Ansley *v.* Glendenning, 52 Ga. 347, 56 Ga. 286.

In an action founded on a decree of the surrogate's court, the decree is not admissible unless the record of the proceedings upon which the decree was based is produced to show that the surrogate had acquired jurisdiction. Nanz *v.* Oakley, 60 Hun (N. Y.) 431, 15 N. Y. Suppl. 1, 21 N. Y. Civ. Proc. 71.

8. Thompson *v.* Bailey, 5 Rich. (S. C.) 68.

Receipts showing payment to plaintiff by a former administrator are admissible in evidence and their effect cannot be defeated by showing waste by the former administrator. Gordon *v.* Clapp, 5 Vt. 129.

9. Annett *v.* Kerr, 2 Rob. (N. Y.) 556.

10. Hilton *v.* Briggs, 54 Mich. 265, 20 N. W. 47; McNabb *v.* Wixon, 7 Nev. 163; *In re* Mullon, 145 N. Y. 98, 39 N. E. 821 [*affirming* 74 Hun 358, 26 N. Y. Suppl. 683]. And see *supra*, IV, I.

11. Williams *v.* Esty, 36 Me. 243; *In re* Mullon, 145 N. Y. 98, 39 N. E. 821 [*affirming* 74 Hun 358, 26 N. Y. Suppl. 683]; Chairman

to object to the return on the ground of a deficiency of assets is not evidence to charge him with assets,[12] unless by his conduct he has adopted the appraisement as his inventory.[13] The representative's accounts are *prima facie* evidence in an action on the bond.[14] Where the penalty of the bond is required to be fixed according to the appraisal of the estate, the sum expressed therein is *prima facie* evidence of the value of the property for which the representative is responsible.[15] Since the representative is lawfully in possession of the assets proof of the failure to pay a claim against the estate on demand is not sufficient to show conversion,[16] but a creditor who proves a debt against the estate and a devastavit or misapplication of assets is *prima facie* entitled to recover,[17] and need not show that there are no other assets from which his claim will ultimately be paid.[18] Proof of a sale of property which was lost because insufficient security was taken is *prima facie* evidence of a devastavit.[19] The final settlement of a representative in which certain persons are designated as the heirs entitled to distribution is sufficient proof of the fact that the persons so named are heirs.[20] There is much conflict of authority as to the effect in evidence of judgments and decrees against the principal when offered against the sureties in an action on the bond,[21] and the subject has already been treated at length.[22] At common law a judgment at law against the principal establishing a claim against the estate was an admission of assets sufficient to pay the same,[23] and a return of *nulla bona* on an execution issued thereon established a devastavit;[24] but in most jurisdictions the law is now otherwise and the judgment is not an admission of assets,[25] nor is the return of execution unsatisfied sufficient to establish a devastavit;[26] but where an administrator's account shows a balance in his hands a return of *nulla bona* is sufficient evidence of a devastavit.[27]

11. Trial — a. Questions For Jury. In an action of debt on an administration bond it is error to render final judgment without the intervention of a jury.[28] Where a representative may in his discretion make sales on credit, whether he has abused his discretion in so doing is a question of fact for the jury.[29] After verdict in an action upon a probate bond for the penal sum thereof, it is discretionary with the court, upon a hearing in equity, to fix the amount for which execution shall be awarded or to submit the question to a jury.[30]

Washington County Ct. *v.* Harramond, 11 N. C. 339. And see *supra*, IV, I.

12. King *v.* Johnson, 94 Ga. 665, 21 S. E. 895.

13. Glover *v.* Hill, 85 Ala. 41, 4 So. 613, holding that where an appraisement of the estate is made by commissioners and the representative makes it the basis of a petition for the sale of the property and does not return any other inventory it is a sufficient adoption of the appraisement as his inventory to make it *prima facie* evidence against him and the sureties of the assets for which he is responsible.

14. Lane *v.* State, 27 Ind. 108; Ruby *v.* State, 55 Md. 484. An account in which the administrator charged himself with the fund in question and an admitted default in not paying out the money in accordance with a decree of distribution based thereon are *prima facie* sufficient to establish a devastavit in an action against the sureties. Wetherill *v.* Com., 17 Wkly. Notes Cas. (Pa.) 104.

Statements and admissions made by a representative in his settlements with the probate court may be overcome by proof of the actual facts. State *v.* Elliott, 157 Mo. 609, 57 S. W. 1087, 80 Am. St. Rep. 643.

15. Eggleston *v.* Colfax, 4 Mart. N. S. (La.) 481.

16. Embree *v.* State, 85 Ind. 368.

17. Curry *v.* People, 54 Ill. 263; Wiley *v.* Johnsey, 6 Rich. (S. C.) 355; Ordinary *v.* Hunt, 1 McMull. (S. C.) 380.

18. Curry *v.* People, 54 Ill. 263.

19. Curry *v.* People, 54 Ill. 263.

20. Beal *v.* State, 77 Ind. 231.

21. Williams *v.* State, 68 Miss. 680, 10 So. 52, 24 Am. St. Rep. 297.

22. See *supra*, XVII, F.

23. Outlaw *v.* Yell, 5 Ark. 468; Lee *v.* Gardiner, 26 Miss. 521.

24. Lee *v.* Gardiner, 26 Miss. 521.

25. Outlaw *v.* Yell, 5 Ark. 468; Lee *v.* Gardiner, 26 Miss. 521.

26. Outlaw *v.* Yell, 5 Ark. 468; King *v.* Johnson, 94 Ga. 665, 21 S. E. 895; O'Bannon *v.* Cord, 3 Ky. L. Rep. 183; Lee *v.* Gardiner, 26 Miss. 521.

27. Givens *v.* Porteous, 1 McCord (S. C.) 379.

28. Amason *v.* Nash, 24 Ala. 279.

An administrator's plea of "fully administered and no assets," in an action on a bond found due and unpaid, must be disposed of by submitting an issue to a jury or by reference. Little *v.* Duncan, 89 N. C. 416.

29. Spence *v.* Dasher, 63 Ga. 430.

30. Defriez *v.* Coffin, 155 Mass. 203, 29 N. E. 516.

b. Instructions. In an action on an administration bond the court must correctly instruct the jury as to the nature of defendant's liability.[31]

c. Verdict. In an action for a devastavit, although the sureties can only be charged to the extent of the assets actually wasted, the verdict of the jury need not ascertain the exact amount of the devastavit,[32] but where defendant pleads *plene administravit* in an action for failing to pay a claim against the estate the verdict must find that defendant had assets sufficient to satisfy the demand or the value of the assets if they were not sufficient.[33]

d. Reference or Arbitration. Where the bond is given to a judge of probate he is merely a trustee of the bond for the benefit of the persons interested in the estate and he cannot submit their rights under it to reference or arbitration;[34] but where, in an action on the bond, it is admitted or proved that there came into the hands of the representative assets belonging to the estate it is proper to order a reference to take an account of his administration of the same, unless some defense is interposed which bars the right to such account.[35]

12. Judgment. The rule in most jurisdictions is that for breach of an administration bond there can be only one judgment,[36] and this judgment is for the whole penalty of the bond.[37] The judgment is not for the exclusive benefit of the person by whom the action is instituted,[38] but it stands as security for all who may be interested therein,[39] whether such persons were named in the original suit or not.[40] The judgment also stands as security for subsequent acts of maladministration.[41] In some jurisdictions, however, judgment need not be for the full penalty of the bond but only for the damages which the party suing has sustained,[42] and such a judgment will not bar another action on the bond, but suits may continue to be prosecuted thereon until the whole amount of the penalty

31. Bergstroem *v.* State, 58 Tex. 92, holding further that where the court submits to the jury an erroneous and misleading test of defendant's liability, it is not necessary in order to entitle defendant to take advantage of the error that he should have discovered it and asked for further instructions.

32. Dean *v.* Portis, 11 Ala. 104; Miller *v.* Gee, 4 Ala. 359.

33. Booth *v.* Armstrong, 2 Wash. (Va.) 301, holding that a verdict that "we of the jury find for the plaintiff the debt in the declaration mentioned" should be set aside as being uncertain and insufficient in not finding on the issue.

34. Paine *v.* Ball, 3 Mass. 235; Thomas *v.* Leach, 2 Mass. 152.

35. Neal *v.* Becknell, 85 N. C. 299.

36. Probate Judge *v.* Lee, 72 N. H. 247, 56 Atl. 188; Probate Judge *v.* Lane, 51 N. H. 342; Arrison *v.* Com., 1 Watts (Pa.) 374; Carl *v.* Com., 9 Serg. & R. (Pa.) 63.

The bond becomes merged in the first judgment and no suit can be afterward maintained on the bond unless authorized by statute. Arrison *v.* Com., 1 Watts (Pa.) 374.

37. *Arkansas.*— Taylor *v.* State, 23 Ark. 225; Byrd *v.* State, 15 Ark. 175.

Massachusetts.— Bennett *v.* Woodman, 116 Mass. 518; Glover *v.* Heath, 3 Mass. 252.

Michigan.— Cranson *v.* Wilsey, 71 Mich. 356, 39 N. W. 9.

Missouri.— State *v.* Ruggles, 20 Mo. 99.

New Hampshire.— Probate Judge *v.* Lee, 72 N. H. 247, 56 Atl. 188; Probate Judge *v.* Lane, 51 N. H. 342.

New Jersey.— Williamson *v.* Snook, 10 N. J. L. 65.

North Carolina.—Reaves *v.* Davis, 99 N. C. 425, 6 S. E. 715.

Pennsylvania.— Arrison *v.* Com., 1 Watts 374.

Vermont.— Hoit *v.* Bradley, 1 D. Chipm. 262.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2577.

The proper form of judgment is, under the Arkansas statute, for the penalty of the bond with a further judgment that plaintiff have execution for the damages assessed (Taylor *v.* State, 23 Ark. 225), and, under the Pennsylvania statute, a judgment in favor of the commonwealth for the amount of the penalty and in favor of plaintiff in issue for the amount of damages assessed for the breach complained of (Miltenberger *v.* Com., 14 Pa. St. 71).

38. State *v.* Ruggles, 20 Mo. 99.

39. Potter *v.* Titcomb, 12 Me. 55; Conant *v.* Stratton, 107 Mass. 474; Probate Judge *v.* Lee, 72 N. H. 247, 56 Atl. 188; Probate Judge *v.* Lane, 51 N. H. 342; Com. *v.* Kean, 19 Pa. Super. Ct. 576.

40. Potter *v.* Titcomb, 12 Me. 55; Com. *v.* Kean, 19 Pa. Super. Ct. 576.

41. Conant *v.* Stratton, 107 Mass. 474; Probate Judge *v.* Lane, 51 N. H. 342; Arrison *v.* Com., 1 Watts (Pa.) 374; Hoit *v.* Bradley, 1 D. Chipm. (Vt.) 262.

42. State *v.* French, 60 Conn. 478, 23 Atl. 153; Rowland *v.* Isaacs, 15 Conn. 115; People *v.* Summers, 16 Ill. 173; O'Connor *v.* Such, 9 Bosw. (N. Y.) 318.

In Mississippi the statute provides that if the whole penalty shall be recovered the chancery court shall apportion the recovery

is finally recovered.[43] Actions on the bond are not against the representative in his representative capacity and the judgment must be *de bonis propriis*.[44] A judgment which is merely irregular and not void may be amended.[45] The judgment becomes a lien upon the representative's land,[46] or upon land purchased by him with funds belonging to the estate and fraudulently conveyed.[47]

13. Execution and Enforcement of Judgment. Although judgment is entered for the full penalty of the bond execution does not issue for this amount, but only for the damages assessed for the breaches assigned.[48] Persons interested may be entitled to execution on the judgment, although their claims were not perfected at the time the suit was brought,[49] or even when the judgment was rendered;[50] and any person interested may sue out a scire facias and have execution thereon,[51] whether named in the original writ or not.[52] Where breaches occur subsequently to the rendition of the original judgment persons injured thereby may sue out a scire facias on the judgment and have their damages assessed as in the original suit,[53] no other judgment being necessary than the usual one on a scire facias of an award of execution.[54] Unless required by statute the writ need not expressly state that plaintiff is an heir, creditor, or legatee, it being sufficient if it appears that he is a person interested in the bond or the judgment rendered thereon.[55] In an action against principal and sureties, the sureties have a right to an order directing that execution be first levied on the property of the principal.[56] On a second scire facias to have a further execution of a judgment for the penalty of the bond a plea of payment of the penalty must show that such payment was pursuant to a decree of the probate court or a judgment at law or was otherwise compulsory against defendants.[57] The recovery where suit is instituted for the general benefit is to be treated as assets of the estate and distributed accordingly.[58]

14. Damages — a. In General. Whenever a breach of the conditions of the bond is shown the recovery of damages follows as a matter of course.[59] The measure of damages is the loss actually sustained by the breach complained of[60]

according to the rights of the parties. Jones *v.* Patty, 73 Miss. 179, 18 So. 794.

43. People *v.* Summers, 16 Ill. 173; Jones *v.* Patty, 73 Miss. 179, 18 So. 794.

44. McNulty *v.* Marcus, 57 Ga. 507. See also Carrol *v.* Connet, 2 J. J. Marsh. (Ky.) 195.

45. Pryor *v.* Leonard, 57 Ga. 136.

46. Arrison *v.* Com., 1 Watts (Pa.) 374.

47. Duffy *v.* State, 115 Ind. 351, 17 N. E. 615.

48. Arrison *v.* Com., 1 Watts (Pa.) 374.

49. Probate Judge *v.* Lane, 51 N. H. 342. See also Hooker *v.* Olmstead, 6 Pick. (Mass.) 481.

50. Probate Judge *v.* Lane, 51 N. H. 342.

51. Potter *v.* Titcomb, 12 Me. 55; Conant *v.* Stratton, 107 Mass. 474.

A second administrator de bonis non may sue out a scire facias on a judgment recovered by a former administrator *de bonis non* in an action on the bond of the original administrator. Com. *v.* Strohecker, 9 Watts (Pa.) 479.

Where the heirs at law have been admitted to prosecute an administrator's bond and have recovered judgment thereon for their share of the amount due, without a decree of distribution, the widow may sue out a scire facias to recover her share without first obtaining a decree of distribution in her favor. Potter *v.* Titcomb, 22 Me. 300.

52. Potter *v.* Titcomb, 12 Me. 55; Com. *v.* Kean, 19 Pa. Super. Ct. 576.

53. Conant *v.* Stratton, 107 Mass. 474; Probate Judge *v.* Lane, 51 N. H. 342; Arrison *v.* Com., 1 Watts (Pa.) 374; Hoit *v.* Bradley, 1 D. Chipm. (Vt.) 262.

54. Arrison *v.* Com., 1 Watts (Pa.) 374.

55. Potter *v.* Titcomb, 12 Me. 55.

56. Prichard *v.* State, 34 Ind. 137.

57. Potter *v.* Webb, 5 Me. 330.

58. Bennett *v.* Russell, 2 Allen (Mass.) 537; Newcomb *v.* Williams, 9 Metc. (Mass.) 525; Hood *v.* Haywood, 124 N. Y. 1, 26 N. E. 331.

If the representative is not a proper person to receive this amount for distribution and there is no co-representative, the court should remove him and appoint another, and may suspend entry of judgment for this purpose. Bennett *v.* Russell, 2 Allen (Mass.) 537.

Preferred claims are entitled to the same preference in making such distribution as in the probate court. Com. *v.* Meyerhaven, 17 Phila. (Pa.) 108.

59. Rowland *v.* Isaacs, 15 Conn. 115.

60. Scarborough *v.* State, 24 Ark. 20; State *v.* French, 60 Conn. 478, 23 Atl. 153.

A fair measure of damages for failure to render a final account within the time required by law is, if the property was lying idle and unproductive, the interest thereon. McKim *v.* Barlett, 129 Mass. 226.

When a bond is enforced as a common-law obligation the obligors are not subject to the penal provisions of the statute, but are liable

unless otherwise provided by statute,[61] and where plaintiff shows a breach of condition but fails to show any special damages resulting therefrom he can recover only nominal damages.[62] Where property of the estate is lost through the neglect or misconduct of the representative the measure of damages is the value of the property.[63] In an action for failing to include certain property in the inventory the rule of damages is a sum not exceeding the value of the property omitted,[64] and in an action for failing to pay creditors the damages are limited to the value of the assets which should be in the hands of the representative.[65] In an action of debt where judgment is rendered for the penalty of the bond the recovery is not limited to the damages laid in the declaration,[66] and, in assessing the damages after a breach has been established and judgment for the penalty rendered, matters may be considered in mitigation of the damages which would not amount to a legal defense to the breach.[67]

b. Interest. Interest is ordinarily allowable as an element of plaintiff's damages,[68] but only simple interest can be recovered.[69] It has been asserted that there can be a recovery for interest beyond the penalty of the bond,[70] but

only for the actual damages sustained by the breach complained of. Cleaves *v.* Dockray, 67 Me. 118.

61. Bridges *v.* Maxwell, 34 Miss. 309, holding that under the Mississippi statute giving a right of action on the bond to heirs where a representative has removed property of the estate out of the state the recovery is not intended merely as compensation to the heirs but as a punishment to the representative and that plaintiff may recover the full value of the property regardless of the actual injury, together with any other damages actually sustained if in excess of that amount.

62. *Arkansas.*— Scarborough *v.* State, 24 Ark. 20.

Connecticut.—Edwards *v.* White, 12 Conn. 28.

Delaware.— State *v.* Bloxom, 1 Houst. 446.

Illinois.— People *v.* Hunter, 89 Ill. 392.

Missouri.— See State *v.* Reinhardt, 31 Mo. 95.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2575.

63. State *v.* Berning, 6 Mo. App. 105; McNabb *v.* Wixom, 7 Nev. 163.

64. Minor *v.* Mead, 3 Conn. 289.

A distributee can recover only his proportionate share of the value of the property omitted. Ordinary *v.* Bracey, 2 Bay (S. C.) 542. *Compare* Blakeman *v.* Sherwood, 32 Conn. 324.

65. Reaves *v.* Davis, 99 N. C. 425, 6 S. E. 715.

A creditor can only recover for his distributive share in a suit on the administrator's bond, unless he sues for assets not distributed but wasted. State *v.* Bowen, 45 Miss. 347.

Where a representative refuses to pay a judgment which he has sufficient assets to pay the rule of damages is the amount of the judgment. Washington *v.* Hunt, 12 N. C. 475.

Where the estate has been declared insolvent, the rule of damages in an action by a creditor for the non-payment of his claim will be the average allowed the creditors on the commissioners' report. Warren *v.* Powers, 5 Conn. 373.

66. Byrd *v.* State, 15 Ark. 175.

67. Probate Ct. *v.* Bates, 10 Vt. 285, holding that in an action for failing to account for the proceeds of a sale the fact that a part of the proceeds actually went into the hands of an administrator *de bonis non* and was distributed to creditors might be considered and this amount deducted from the amount received and not accounted for.

68. *Connecticut.*— Huntington *v.* Mott, 1 Root 423.

Massachusetts.— Chapin *v.* Waters, 116 Mass. 140.

Michigan.— Cranson *v.* Wilsey, 71 Mich. 356, 39 N. W. 9.

Missouri.— See State *v.* Berning, 6 Mo. App. 105.

New York.— Hood *v.* Hayward, 48 Hun 330, 1 N. Y. Suppl. 566.

North Carolina.—See Washington *v.* Hunt, 12 N. C. 475.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2576.

In an action for failing to pay over a balance to a successor in office, interest may be allowed from the time payment was demanded until the rendition of judgment. Webb *v.* Roetinger, 12 Ohio Cir. Ct. 730, 4 Ohio Cir. Dec. 270.

Where partial payments have been made on a judgment against an executor or administrator and an action on the bond is brought for the non-payment of the balance the partial payments should be first applied to keep down the interest and the interest computed on the balance remaining after each payment. Fay *v.* Bradley, 1 Pick. (Mass.) 194.

The fact that the complaint does not contain a demand for interest does not preclude the court from awarding interest if the facts justify it. Rutenic *v.* Hamakar, 40 Oreg. 444, 67 Pac. 196.

69. Chapin *v.* Waters, 116 Mass. 140; Cranson *v.* Wilsey, 71 Mich. 356, 39 N. W. 9.

70. Probate Judge *v.* Heydock, 8 N. H. 491, holding that where the whole penalty has become a debt which the obligors unjustly detain the recovery may be for the entire amount of the penalty with interest

in Pennsylvania it has been held that interest is not demandable beyond the penal sum of the bond.[71]

15. Costs.[72] In an action on the bond by a creditor for the non-payment of a judgment debt he is entitled to recover the costs of the action as a part of the damages.[73] It has been held that on dismissal of an action in the name of the people for the use of an administrator on the official bond of another administrator the entry of judgment for costs against plaintiffs was error.[74]

16. Appeal and Error. In actions on administration bonds, the general principles relating to appeals in other civil actions apply.[75] Thus matters are not ordinarily assignable as error which were not objected to in the court below,[76] or which could have been taken advantage of by a plea in abatement;[77] and nothing can be assigned as error which contradicts the record.[78] Under a statute authorizing any person aggrieved by a decree of the orphans' court to appeal, the sureties may appeal from a decree against the principal.[79] An order refusing leave to sue on an administration bond is a judicial decree from which the applicant may appeal,[80] but an order granting leave to sue, which may be made in an *ex parte* proceeding without any notice to the obligors in the bond,[81] does not determine any question as to their liability,[82] and hence they are not entitled to appeal therefrom.[83]

17. Equitable Relief Against Judgment. Where a representative having matters proper for a defense to an action on the bond neglects to make it, equity will not ordinarily relieve against the judgment; nor are the mistakes or negligence of counsel in the conduct of a defense a sufficient ground for relief.[84]

XVIII. Administrators De Bonis Non.[85]

A. Assets to Be Administered — 1. In General. In the absence of statutory change of the common-law rule an administrator *de bonis non* administers only upon the assets which have not been administered by his predecessor, and conversely is not entitled to assets which have been administered wholly or in part.[86] In some jurisdictions, however, the common-law rule has been changed

thereon for the time so detained. And see Bonds, 5 Cyc. 851 note 95.

71. Com. *v.* Meyerhaven, 17 Phila. (Pa.) 108.

72. See Costs, 11 Cyc. 1.

73. McKim *v.* Haley, 173 Mass. 112, 53 N. E. 152.

74. People *v.* Cloud, 50 Ill. 439, where the court said that if the people were considered as plaintiffs a judgment for costs could not be rendered against them; while if the administrator was considered as plaintiff the judgment should not be against him personally but to be paid in due course of administration.

75. See Appeal and Error, 2 Cyc. 474.

76. Wetmore *v.* Plant, 5 Conn. 541; Conway *v.* Carter, (N. M. 1902) 68 Pac. 941. See also Deblanc *v.* Levasseur, 26 La. Ann. 541.

77. Wetmore *v.* Plant, 5 Conn. 541.

78. Wetmore *v.* Plant, 5 Conn. 541.

79. Garber *v.* Com., 7 Pa. St. 265.

80. See Fay *v.* Rogers, 2 Gray (Mass.) 175; Robbins *v.* Hayward, 16 Mass. 524.

81. See *supra*, XVII, I, 1, b, (x), (b).

82. Hilton *v.* Briggs, 54 Mich. 265, 20 N. W. 47.

83. Bulfinch *v.* Waldoboro, 54 Me. 150; *In re* Jones, 8 Pick. (Mass.) 121.

84. O'Keefe *v.* Rice, 1 Bailey Eq. (S. C.) 179. But see Wall *v.* Gressom, 4 Munf. (Va.) 110.

85. Appointment and qualification see *supra*, II, D.

86. *Alabama.*— Weeks *v.* Love, 19 Ala. 25.

Connecticut.— American Bd. Commissioners' Appeal, 27 Conn. 344.

Georgia.— Gilbert *v.* Hardwick, 11 Ga. 599; Echols *v.* Barrett, 6 Ga. 443.

Maine.— Meservey *v.* Kallock, 97 Me. 91, 53 Atl. 876; Hodge *v.* Hodge, 90 Me. 505, 38 Atl. 535, 60 Am. St. Rep. 285, 44 L. R. A. 33.

Maryland.— Baker *v.* Bowie, 74 Md. 467, 22 Atl. 133; Stewart *v.* Baltimore Fireman's Ins. Co., 53 Md. 564; Donaldson *v.* Raborg, 26 Md. 312, 28 Md. 34; West *v.* Chappell, 5 Gill 228; Gardner *v.* Simmes, 1 Gill 425.

Massachusetts.— Blake *v.* Dexter, 12 Cush. 559.

Mississippi.— Andrews *v.* Brumfield, 32 Miss. 107; Searles *v.* Scott, 14 Sm. & M. 94; Morse *v.* Clayton, 13 Sm. & M. 373.

Missouri.— State *v.* Hunter, 15 Mo. 490.

New York.— Matter of Manhardt, 17 N. Y. App. Div. 1, 44 N. Y. Suppl. 836 [*affirming* 16 Misc. 522, 40 N. Y. Suppl. 206]; Caulkins *v.* Bolton, 31 Hun 458 [*affirmed* in 98 N. Y. 511].

North Carolina.— Carson *v.* Duffy, 55 N. C. 507.

by statute, and an administrator *de bonis non* is entitled to administer upon all the assets in the hands of his predecessor.[87]

2. What Constitutes Unadministered Assets. Unadministered assets which go to the administrator *de bonis non* consist of the goods, effects, and credits which belonged to the decedent at the time of his death and which remain in specie, unaltered or unconverted by any act of the former representative.[88]

Pennsylvania.— Carter *v.* Trueman, 7 Pa. St. 315; Com. *v.* Strohecker, 9 Watts 479; Kendall *v.* Lee, 2 Penr. & W. 482; Thomas *v.* Reigel, 5 Rawle 266; Potts *v.* Smith, 3 Rawle 361, 24 Am. Dec. 359.

South Carolina.— Miller *v.* Alexander, 1 Hill Eq. 25.

Texas.— Todd *v.* Willis, 66 Tex. 704, 1 S. W. 803; Murphy *v.* Menard, 11 Tex. 673.

Utah.— Reed *v.* Hume, 25 Utah 248, 70 Pac. 998.

Virginia.— Coleman *v.* McMurdo, 5 Rand. 51.

United States.— U. S. *v.* Walker, 109 U. S. 258, 3 S. Ct. 277, 27 L. ed. 927; Beall *v.* New Mexico, 16 Wall. 535, 21 L. ed. 292.

England.— Catherwood *v.* Chaband, 1 B. & C. 154, 8 E. C. L. 65; Packman's Case, 6 Coke 18*b*; Wankford *v.* Wankford, 1 Salk. 299; Barker *v.* Talcott, 1 Vern. Ch. 473, 23 Eng. Reprint 600.

See 22 Cent. Dig. tit. "Executors and Administrators," § 485.

Debt from original representative to decedent.— An administrator *de bonis non* may recover of the original administrator a debt due from him to the intestate in his lifetime (Kelsey *v.* Smith, 1 How. (Miss.) 68; Utterback *v.* Cooper, 28 Gratt. (Va.) 233) unless such debt has been extinguished by some act of the administrator by which his indebtedness was acknowledged, as returning it in the inventory (Kelsey *v.* Smith, 1 How. (Miss.) 68).

Where an administrator is dismissed and adjudged to pay interest and damages, these amounts are payable to his successor in office and not to the creditor who procured his dismissal. Lobit *v.* Castille, 14 La. Ann. 779.

87. State *v.* Hunter, 15 Mo. 490. See also State *v.* Fulton, 35 Mo. 323; State *v.* Porter, 9 Mo. 356; Slaymaker *v.* Farmers' Nat. Bank, 103 Pa. St. 616; Starr *v.* York Nat. Bank, 55 Pa. St. 364, 93 Am. Dec. 759; Carter *v.* Trueman, 7 Pa. St. 315; Weld *v.* McClure, 9 Watts (Pa.) 495; Drenkle *v.* Sharman, 9 Watts (Pa.) 485.

An administrator de bonis non takes the estate where his predecessor left it, and his administration is a continuation of that commenced by the former administrator. Slocum *v.* English, 62 N. Y. 494; *In re* Kingsland, 60 Hun (N. Y.) 116, 14 N. Y. Suppl. 495.

88. *Alabama.*— Abney *v.* Pickett, 21 Ala. 739; Swink *v.* Snodgrass, 17 Ala. 653, 52 Am. Dec. 190; Nally *v.* Wilkins, 11 Ala. 872; Willis *v.* Willis, 9 Ala. 721; King *v.* Griffin, 6 Ala. 387; Judge Benson County Ct. *v.* Price, 6 Ala. 36.

Georgia.— Paschall *v.* Davis, 3 Ga. 256.

Illinois.— Short *v.* Johnson, 25 Ill. 489.

Kentucky.— Oldham *v.* Collins, 4 J. J. Marsh. 49; Bradshaw *v.* Com., 3 J. J. Marsh. 632; Carrol *v.* Connet, 2 J. J. Marsh. 195; Slaughter *v.* Froman, 5 T. B. Mon. 19, 17 Am. Dec. 33; Graves *v.* Downey, 3 T. B. Mon. 353.

Maine.— Meservey *v.* Kallock, 97 Me. 91, 53 Atl. 876; Hodge *v.* Hodge, 90 Me. 505, 38 Atl. 535, 60 Am. St. Rep. 285, 40 L. R. A. 33.

Maryland.— Baker *v.* Bowie, 74 Md. 467, 22 Atl. 133 (holding that where an executrix, who is also residuary legatee, pays the legacies, practically all the debts, and converts a portion of the estate to her own use, the estate is so far administered by her as that an administrator *de bonis non* of the testator is entitled to receive from her executor only such of the estate as she had not collected or appropriated at her death); Stewart *v.* Baltimore Fireman's Ins. Co., 53 Md. 564; Neale *v.* Hagthrop, 3 Bland 551.

Mississippi.—Byrd *v.* Holloway, 6 Sm. & M. 323; Prosser *v.* Yerby, 1 How. 87.

Missouri.— Harney *v.* Dutcher, 15 Mo. 89, 55 Am. Dec. 131.

New Jersey.— Roy *v.* Squier, 61 N. J. Eq. 182, 48 Atl. 233; Hartson *v.* Elden, 58 N. J. Eq. 478, 44 Atl. 156; Thiefes *v.* Mason, 55 N. J. Eq. 456, 37 Atl. 455; Carrick *v.* Carrick, 23 N. J. Eq. 364; Brownlee *v.* Lockwood, 20 N. J. Eq. 239. The act of April 9, 1897, amending the act of March 27, 1874 (Gen. St. p. 1425), by authorizing every administrator *de bonis non* with the will annexed to demand of the executor of a deceased executor all the "unadministered" assets of the first testator, does not change the common-law rule that such administrator can only administer such personalty as remains in specie in the form in which it existed at the death of deceased. Roy *v.* Squier, 61 N. J. Eq. 182, 48 Atl. 233.

Pennsylvania.— Potts *v.* Smith, 3 Rawle 361, 24 Am. Dec. 359.

South Carolina.— Villard *v.* Robert, 1 Strobh. Eq. 393.

Tennessee.— Cheek *v.* Wheatley, 3 Sneed 484; Bell *v.* Speight, 11 Humphr. 451.

Utah.— Reed *v.* Hume, 25 Utah 248, 70 Pac. 998.

United States.— Beall *v.* New Mexico, 16 Wall. 535, 21 L. ed. 292.

England.—Atty.-Gen. *v.* Hooker, 2 P. Wms. 338, 24 Eng. Reprint 756; Waukford *v.* Waukford, 1 Salk. 299.

See 22 Cent. Dig. tit. "Executors and Administrators," § 486.

Assets must be distinguishable as such. An administrator *de bonis non* cannot maintain an action against the estate of his predecessor for money wrongfully received by him prior to his appointment as administra-

3. Particular Classes of Assets — a. Notes and Bonds. Under the old rule an administrator *de bonis non* could not take possession of, collect, or sue on a bond, note, or other evidence of indebtedness running to his predecessor as such, and this rule seems still to obtain in some jurisdictions.[89] In equity, however, the administrator *de bonis non* was held entitled to the proceeds of such a note or bond, although not to the possession of the instrument itself.[90] The more modern authorities in most jurisdictions, based to some extent upon statute, adopt a different view as to these matters, and allow the administrator *de bonis non* to take possession of, collect, and sue on such obligations.[91]

tor, in the absence of allegation and proof that such money is distinguishable as a part of the intestate's property. Hodge *v.* Hodge, 90 Me. 505, 38 Atl. 535, 60 Am. St. Rep. 285, 40 L. R. A. 33.

What constitutes administration.— The word "administer," when applied to the disposition of the assets of a decedent's estate, is equivalent to "alter," "change," or "convert." The change or alteration of the goods necessary to amount to an administration of them by one administrator, so that they would be beyond the reach and control of the succeeding administrator *de bonis non*, is not a change in specie, but a change in the property of the goods. Adams *v.* Internal Imp. Fund, 37 Fla. 266, 20 So. 266. A sale of property is a conversion and the administrator *de bonis non* cannot at common law sue for the proceeds (Gilbert *v.* Hardwick, 11 Ga. 599; Clarke *v.* Wells, 6 Gratt. (Va.) 475; Calder *v.* Pyfer, 4 Fed. Cas. No. 2,299, 2 Cranch C. C. 430), but in equity the proceeds of the sale may be treated as unadministered assets (Clarke *v.* Wells, *supra*). Where a widow who was administratrix conveyed property to a trustee for herself and the next of kin, this was an act of administration preventing the administrator *de bonis non* from recovering the property. Quince *v.* Nixon, 51 N. C. 289. But under similar circumstances if the widow and executrix dies before any expressed or implied acceptance of the legacy, the property is unadministered and goes to the administrator *de bonis non*. Floyd *v.* Breckenridge, 4 Bibb (Ky.) 14.

Property delivered to life-tenant.— Where a personal chattel is bequeathed to one for life, with no limitation over, the reversion vests, as in other cases of intestacy, in the next of kin, and a distribution and delivery to the tenant for life is a complete act of administration and distribution to the next of kin, and hence an administrator *de bonis non* cannot recover such property as unadministered effects belonging to the estate of the testator. Andrews *v.* Brumfield, 32 Miss. 107. See also Bates *v.* Woolfolk, 5 Ga. 329.

Property purchased with decedent's money. — Where stock was purchased with money belonging to a decedent, the fact that the stock was not in existence at the time of his death does not rob it of its character of an unadministered asset. Michigan Trust Co. *v.* Probasco, 29 Ind. App. 109, 63 N. E. 255.

Presumption of administration from lapse of time.— When a division of an estate of an intestate was made by the distributees, who were all *sui juris* at the time, and twenty-seven years have elapsed, an administration will be presumed in a suit by an administrator *de bonis non* to recover of one of the distributees the portion allotted him. Desverges *v.* Desverges, 31 Ga. 753. See also Breckinridge *v.* Waters, 4 Dana (Ky.) 620.

89. *Missouri.*— Harney *v.* Dutcher, 15 Mo. 89, 55 Am. Dec. 131. But see Cowgill *v.* Linville, 20 Mo. App. 138.

New Jersey.— A note belonging to the estate of a decedent, but made payable to the executrix, is an administered asset, and does not pass to an administrator *de bonis non* with the will annexed, appointed to administer on unadministered assets. Roy *v.* Squier, 61 N. J. Eq. 182, 48 Atl. 233.

New York.— Matter of Manhardt, 17 N. Y. App. Div. 1, 44 N. Y. Suppl. 836 [*affirming* 16 Misc. 522, 40 N. Y. Suppl. 206]; Caulkins *v.* Bolton, 31 Hun 458 [*affirmed* in 98 N. Y. 511].

Vermont.— Nason *v.* Potter, 6 Vt. 28.

United States.— Beall *v.* New Mexico, 16 Wall. 535, 21 L. ed. 292.

England.— Barker *v.* Talcot, 1 Vern. Ch. 473, 23 Eng. Reprint 600.

See 22 Cent. Dig. tit. "Executors and Administrators," § 486.

Consent to payment to administrator de bonis non.— Where executors took a note to themselves as such for the effects, and were then removed by the probate court, and an administrator *de bonis non* appointed, who took a new note to himself for the amount, which was paid, the presentment by the survivor of the first executors of his account for allowance to the probate court, claiming the amount of the debt as a credit, was *prima facie* evidence of consent to the payment to the administrator *de bonis non*. Nason *v.* Potter, 6 Vt. 28.

90. Williams *v.* Seabrook, 3 McCord (S. C.) 371; Miller *v.* Alexander, 1 Hill Eq. (S. C.) 25. See also Burrus *v.* Roulhac, 2 Bush (Ky.) 39.

When immediate distribution proper.— A petition by the administrator *de bonis non* may properly be refused and immediate distribution awarded of the proceeds of a note if they are not needed to pay debts. Bellamy *v.* Bellamy, 3 Bush (Ky.) 109.

91. *Alabama.*— Barron *v.* Vandvert, 13 Ala. 232; Spence *v.* Rutledge, 11 Ala. 590; White *v.* Beard, 5 Port. 94, 30 Am. Dec. 552; Caller *v.* Boykin, Minor 206.

Indiana.— Sheets *v.* Pabody, 6 Blackf. 120, 38 Am. Dec. 132.

b. Money and Balances Due From Predecessor. A specific sum of money set apart as cash for the estate, and identifiable, may be claimed by the administrator *de bonis non*,[92] but money not so specially set apart, such as a balance due from the former representative, the result of his administration, is not, in the absence of statute, unadministered assets, and the administrator *de bonis non* is not entitled to such funds.[93] In many jurisdictions, however, statutes exist whereby an admin-

Kentucky.— Burrus *v.* Roulhac, 2 Bush 39; Maraman *v.* Trunnell, 3 Metc. 146, 77 Am. Dec. 167. Formerly the common-law rule prevailed. Saffran *v.* Kennedy, 7 J. J. Marsh. 188.

Mississippi.— Morse *v.* Clayton, 13 Sm. & M. 373.

North Carolina.— Eure *v.* Eure, 14 N. C. 206; Cuttar *v.* Quince, 3 N. C. 60.

Pennsylvania.— Slaymaker *v.* Farmers' Nat. Bank, 103 Pa. St. 616; Little *v.* Walton, 23 Pa. St. 164; Carter *v.* Trueman, 7 Pa. St. 315; State Bank *v.* Haldeman, 1 Penr. & W. 161. But see Kendall *v.* Lee, 2 Penr. & W. 482.

South Carolina.— Redfearn *v.* Craig, 57 S. C. 534, 35 S. E. 1024, holding that an administrator *de bonis non* was vested with the title to a bond and mortgage taken by the former administrator to secure money of the estate lent out by him, although the obligations ran to "M., administrator," and not to "M., as administrator." But see Williams *v.* Seabrook, 3 McCord 371; Miller *v.* Alexander, 1 Hill Eq. 25.

Tennessee.— Abingdon *v.* Tyler, 6 Coldw. 502.

Texas.— Williams *v.* Verne, 68 Tex. 414, 4 S. W. 548; Miller *v.* Jasper, 10 Tex. 513.

Virginia.— Clarke *v.* Wells, 6 Gratt. 475; Heffernan *v.* Grymes, 2 Leigh 512. See also Tyler *v.* Nelson, 14 Gratt. 214, holding that where administration *de bonis non* is committed to a sheriff, which administration goes into the hands of his deputy, the latter is chargeable with the amount of bonds taken by the first administrator, and payable to him as such, and after his death delivered by his personal representative to such deputy as unadministered assets.

See 22 Cent. Dig. tit. "Executors and Administrators," § 486.

Notes for which the administrator has accounted in his settlement cannot be recovered by the administrator *de bonis non*. Searles *v.* Scott, 14 Sm. & M. (Miss.) 94; Smith *v.* Waugh, 84 Va. 806, 6 S. E. 132. But see State Bank *v.* Haldeman, 1 Penr. & W. (Pa.) 161. See also *infra*, XVIII, B, 4.

92. Smithers *v.* Hooper, 23 Md. 273; Lemmon *v.* Hall, 20 Md. 168 (statute); Hackney *v.* Steadman, 46 N. C. 207; Clarke *v.* Wells, 6 Gratt. (Va.) 475; Blydenburgh *v.* Lowry, 3 Fed. Cas. No. 1,582, 4 Cranch C. C. 368.

Moneys deposited.— The administrator *de bonis non* is entitled to a fund on deposit which can be identified as the money of the decedent. Matter of Manhardt, 17 N. Y. App. Div. 1, 44 N. Y. Suppl. 836 [*affirming* 16 Misc. 522, 40 N. Y. Suppl. 206]; Hackney *v.* Steadman, 46 N. C. 207; Stair *v.* York Nat. Bank, 55 Pa. St. 364, 93 Am. Dec. 759. But in the absence of proof as to what portion of a bank deposit in the name of a deceased executor belongs to his decedent's estate and what portion belongs to the estate of the executor, as charges for expenditures and commissions, the administrator *de bonis non* cannot draw out such deposit in gross, he being entitled only to the balance due his decedent's estate. Slaymaker *v.* Farmers' Nat. Bank, 103 Pa. St. 616. An administrator *de bonis non* may not recover a deposit made by the decedent if the first administrator has withdrawn a portion and surrendered the certificate. Brooks *v.* Mastin, 69 Mo. 58. Where a bank-account was, after the depositor's death, continued in his name by his administrator, who occasionally made deposits of money derived from the estate, it was held that if such balance was a part of the assets of the estate of the original decedent, and his deceased administrator did not distribute the same nor finally settle the estate, then it was an unadministered asset of the original decedent. Getty *v.* Long, 82 Md. 643, 33 Atl. 639. And see *In re* Hall, 1 Hagg. Eccl. 139.

The proceeds of a sale of the decedent's property go to the administrator *de bonis non*, where such proceeds have been kept intact. Meservey *v.* Kallock, 97 Me. 91, 53 Atl. 876; Hodge *v.* Hodge, 90 Me. 505, 38 Atl. 535, 60 Am. St. Rep. 285, 40 L. R. A. 33.

Money recovered on the bond of the former representative constitutes assets for the administrator *de bonis non*. People *v.* Corlies, 1 Sandf. (N. Y.) 228.

Moneys collected in another state.— An administrator *de bonis non* in one state is not entitled to moneys collected by the administrator in another state. Dorsey *v.* Dorsey, 5 J. J. Marsh. (Ky.) 280, 22 Am. Dec. 33.

93. *Alabama.*— Whitworth *v.* Oliver, 39 Ala. 286; Hanna *v.* Price, 23 Ala. 826 (holding that a judgment rendered in favor of an administrator *de bonis non*, before the passage of a statute giving him the right to sue, was absolutely void); Nolly *v.* Wilkins, 11 Ala. 872; Willis *v.* Willis, 9 Ala. 721; Judge Benton County Ct. *v.* Price, 6 Ala. 36. See also Price *v.* Simmons, 13 Ala. 749.

Arkansas.— Brice *v.* Taylor, 51 Ark. 75, 9 S. W. 854.

District of Columbia.—U. S. *v.* Ames, MacArthur & M. 278.

Georgia.—Gilbert *v.* Hardwick, 11 Ga. 599.

Kentucky.— Saffran *v.* Kennedy, 7 J. J. Marsh. 188; Dorsey *v.* Dorsey, 5 J. J. Marsh. 280, 22 Am. Dec. 33; Oldham *v.* Collins, 4 J. J. Marsh. 49; Bradshaw *v.* Com., 3 J. J. Marsh. 632.

Maine.— Hodge *v.* Hodge, 90 Me. 505, 38 Atl. 535, 60 Am. St. Rep. 285, 40 L. R. A. 33.

istrator *de bonis non* is entitled to and may recover the balance due from his predecessor to the estate.[94] Under some statutes it is essential that the account of

Maryland.— Gardner *v.* Simmes, 1 Gill 425.

Mississippi.— Dement *v.* Heth, 45 Miss. 388; Sloan *v.* Johnson, 14 Sm. & M. 47.

New Jersey.— Bradway *v.* Holmes, 50 N. J. Eq. 311, 25 Atl. 196; Carrick *v.* Carrick, 23 N. J. Eq. 364; Brownlee *v.* Lockwood, 20 N. J. Eq. 239. *Aliter* as to a substituted administrator. McDonald *v.* O'Connell, 39 N. J. L. 317.

Pennsylvania.— Carter *v.* Trueman, 7 Pa. St. 315; Com. *v.* Strohecker, 9 Watts 479; Thomas *v.* Riegel, 5 Rawle 266; Potts *v.* Smith, 3 Rawle 361, 24 Am. Dec. 359.

Vermont.— Curtis *v.* Curtis, 13 Vt. 517.

Virginia.— Smith *v.* Waugh, 84 Va. 806, 6 S. E. 132; Coleman *v.* McMurdo, 5 Rand. 51.

United States.— Wilson *v.* Arrick, 112 U. S. 83, 5 S. Ct. 75, 28 L. ed. 617; U. S. *v.* Walker, 109 U. S. 258, 3 S. Ct. 277, 27 L. ed. 927.

England.— Packman's Case, 6 Coke 18b; Wankford *v.* Wankford, 1 Salk. 299.

See 22 Cent. Dig. tit. "Executors and Administrators," § 486.

Money collected by an agent or attorney of the former administrator is deemed at common law to be an administered asset, which the administrator *de bonis non* cannot recover from the agent or attorney. Sloan *v.* Johnson, 14 Sm. & M. (Miss.) 47; Wilson *v.* Arrick, 112 U. S. 83, 5 S. Ct. 75, 28 L. ed. 617. But see Blydenburgh *v.* Lowry, 3 Fed. Cas. No. 1,582, 4 Cranch C. C. 368.

Where balance voluntarily paid.— If the balance due from the administrator in chief be voluntarily rendered by him to the probate court on his final settlement, it becomes assets of the estate when paid into the hands of his successor for which he and his sureties are liable. Whitworth *v.* Oliver, 39 Ala. 286; Brice *v.* Taylor, 51 Ark. 75, 9 S. W. 854.

When it becomes necessary to remit to the probate court for administration a balance recovered in another tribunal from an executor or administrator in chief, it must be paid to the administrator *de bonis non* as assets of the estate. Brice *v.* Taylor, 51 Ark. 75, 9 S. W. 854.

When fund ready for distribution.— If it can be ascertained from the records of the probate court that the fund is ripe for distribution, nothing is in the way of an order to that effect in the tribunal where it is recovered, and it is then unnecessary to encumber it with costs and delay by remitting it to the probate court. Brice *v.* Taylor, 51 Ark. 75, 9 S. W. 854; Gray *v.* Harris, 43 Miss. 421.

In South Carolina it has been held that an administrator *de bonis non* was entitled to a balance due from his predecessor, as being only partially administered assets. Miller *v.* Alexander, 1 Hill Eq. 25.

94. *Alabama.*— Whitworth *v.* Oliver, 39 Ala. 286; Long *v.* Easley, 13 Ala. 239.

Maryland.— Donaldson *v.* Raborg, 26 Md. 312, holding that the court may order a balance remaining in the hands of the first administrator to be paid over, although an action on his bond is barred by the statute of limitations. Lemmon *v.* Hall, 20 Md. 168. Prior to 1820 the law was otherwise. Gardner *v.* Simmes, 1 Gill 425.

Massachusetts.— Foster *v.* Bailey, 157 Mass. 160, 31 N. E. 771; Minot *v.* Norcross, 143 Mass. 326, 9 N. E. 662; Marvel *v.* Babbitt, 143 Mass. 226, 9 N. E. 566; Sewall *v.* Patch, 132 Mass. 326; Buttrick *v.* King, 7 Metc. 20; Wiggin *v.* Swett, 6 Metc. 194, 39 Am. Dec. 716.

Minnesota.— Palmer *v.* Pollock, 26 Minn. 433, 4 N. W. 1113.

Missouri.— State *v.* Heinrichs, 82 Mo. 542; Morehouse *v.* Ware, 78 Mo. 100; State *v.* King, 76 Mo. 510; Wickham *v.* Page, 49 Mo. 526; State *v.* Dulle, 45 Mo. 269; State *v.* Fulton, 35 Mo. 323; Cowgill *v.* Linville, 20 Mo. App. 138.

New York.— Walton *v.* Walton, 4 Abb. Dec. 512, 1 Keyes 15, 2 Abb. Pr. N. S. 428.

North Carolina.— Ham *v.* Kornegay, 85 N. C. 119; Latta *v.* Jones, 53 N. C. 111. And see Morton *v.* Ashbee, 46 N. C. 312.

Ohio.— Tracy *v.* Card, 2 Ohio St. 431; Blizzard *v.* Fuller, 20 Ohio 479 (holding that there can be no action except under statute); O'Connor *v.* State, 18 Ohio 225; Herckelrath *v.* Van Nes, 31 Cinc. L. Bul. 35.

Pennsylvania.— Slaymaker *v.* Farmers' Nat. Bank, 103 Pa. St. 616; Little *v.* Walton, 23 Pa. St. 164; Carter *v.* Trueman, 7 Pa. St. 315 [*affirming* 3 Pa. L. J. Rep. 101, 4 Pa. L. J. 462]; Weld *v.* McClure, 9 Watts 495; Drenkle *v.* Sharman, 9 Watts 485; Schlecht's Estate, 2 Brewst. 397; Pierce's Estate, 11 Montg. Rep. 110; Montgomery's Estate, 7 Phila. 504; Croyell *v.* Blackfan, 1 Pittsb. 327.

Texas.— Boulware *v.* Hendricks, 23 Tex. 667; Murphy *v.* Menard, 11 Tex. 673, 14 Tex. 62; Mott *v.* Ruenbuhl, 1 Tex. App. Civ. Cas. § 599.

Where there are no debts, it has been held that a balance found due from the former administrator on an accounting should be ordered paid to the distributees, and not to the administrator *de bonis non* (Dement *v.* Heth, 45 Miss. 388; Gray *v.* Harris, 43 Miss. 421. And see Duffy *v.* State, 115 Ind. 351, 17 N. E. 615), but this does not seem in accordance with the general line of authorities (Duffy *v.* State, *supra*; Miller *v.* Alexander, 1 Hill Eq. (S. C.) 25). The Pennsylvania statute of 1834, authorizing an administrator *de bonis non* to sue the former administrator for a balance in his hands, applies to cases where the account was settled before the passage of the act, and regardless of the existence of outstanding debts. Carter *v.* Trueman, 7 Pa. St. 315 [*affirming* 3 Pa. L. J. Rep. 101, 4 Pa. L. J. 462]. And see New Jersey Mut. L. Ins. Co. *v.* Corbin, 12 Phila. 257.

the former administrator be first settled before the administrator *de bonis non* can maintain a suit for the balance.[95] When a prior executor or administrator after his discharge from office collects money for the estate, it may be treated as money had and received to the use of the administrator *de bonis non*, who may sue the former representative in assumpsit.[96]

c. Assets Wrongfully Administered — (i) *Illegal and Fraudulent Sales and Transfers.* A sale, transfer, or payment made without authority passes no title and does not constitute an administration. Therefore an administrator *de bonis non* may pursue assets so disposed of.[97] Not only may this be done where the sale or transfer is contrary to law,[98] but also where it is fraudulent, in which case the administrator *de bonis non* may avoid it,[99] unless the persons interested

As to moneys which cannot be identified as the specific property of the estate the administrator *de bonis non* has no preference and stands as a general creditor. Gamble *v.* Hamilton, 7 Mo. 469.

In Louisiana the second administrator may call upon the succession of the first for a general accounting, but cannot sue for a money judgment. Granger *v.* Reid, 36 La. Ann. 845.

95. Foster *v.* Bailey, 157 Mass. 160, 31 N. E. 771; Esher *v.* Fulmer, 2 Miles (Pa.) 463; Ingraham *v.* Cox, 1 Pars. Eq. Cas. (Pa.) 70, 1 Pa. L. J. Rep. 464, 3 Pa. L. J. 128; Matter of Bradley, 9 Phila. (Pa.) 327; King *v.* Devoe, 6 Phila. (Pa.) 551; Ewing *v.* Lewis, 1 Phila. (Pa.) 112.

In Maryland an order must first be obtained from the probate court directing payment to the administrator *de bonis non.* State *v.* Robinson, 57 Md. 486; State *v.* Hart, 57 Md. 234.

In Ohio there need be no prior accounting. Douglas *v.* Day, 28 Ohio St. 175.

96. Salter *v.* Cain, 7 Ala. 478.

97. Reed *v.* Reeves, 13 Bush (Ky.) 447, holding that where an executor assigned a note belonging to the estate in payment of a gambling debt due from him to the assignee, the assignment was void, and did not defeat the right of the administrator *de bonis non* thereto.

Payment of an unfounded claim in good faith, the administrator and claimant both believing it to be valid, will not ground an action by the administrator *de bonis non* to recover it back. Mayhew *v.* Stone, 26 Can. Supreme Ct. 58.

Payments by way of distribution but not in fact made to the next of kin do not protect the former administrator from a suit by the administrator *de bonis non* for the sums so paid. Carter *v.* Trueman, 7 Pa. St. 315 [*affirming* 3 Pa. L. J. Rep. 101, 4 Pa. L. J. 462]. But payments to certain distributees of more than their share of the estate distributed by the former administrator will not ground an action by the administrator *de bonis non* if the shares can be equalized in future distributions. Patterson *v.* Bell, 25 Iowa 149. Where distribution has been made under a void decree to the prejudice of creditors, the administrator *de bonis non* is entitled to payment by the former administrator only to the extent necessary properly to settle the estate. Browne *v.* Doolittle, 151 Mass. 595, 25 N. E. 23.

98. *Alabama.*— McArthur *v.* Carrie, 32 Ala. 75, 70 Am. Dec. 529; Hopper *v.* Steele, 18 Ala. 828.

Georgia.— Paschal *v.* Davis, 3 Ga. 256.

Mississippi.— Forniquet *v.* Forstall, 34 Miss. 87; Hull *v.* Clark, 14 Sm. & M. 187; Byrd *v.* Holloway, 6 Sm. & M. 323.

Missouri.— Cowgill *v.* Linnville, 20 Mo. App. 138.

Tennessee.— Bell *v.* Speight, 11 Humphr. 451. *Compare* Cheek *v.* Wheatley, 3 Sneed 484.

Vermont.— Green *v.* Sargeant, 23 Vt. 466, 56 Am. Dec. 88.

See 22 Cent. Dig. tit. "Executors and Administrators," § 487.

99. *Alabama.*— McArthur *v.* Carrie, 32 Ala. 75, 70 Am. Dec. 529; Gantt *v.* Phillips, 23 Ala. 275; Swink *v.* Snodgrass, 17 Ala. 653, 52 Am. Dec. 190.

Indiana.— Duffy *v.* State, 115 Ind. 351, 17 N. E. 651; Talbott *v.* Dennis, 1 Ind. 471.

Mississippi.— Searles *v.* Scott, 14 Sm. & M. 94; Scott *v.* Searles, 7 Sm. & M. 498, 45 Am. Dec. 317.

North Carolina.— Hendrick *v.* Gidney, 114 N. C. 543, 19 S. E. 598.

Tennessee.— Bell *v.* Speight, 11 Humphr. 451, holding that fraud and collusion would entitle the administrator *de bonis non* to recover in equity. But see Cheek *v.* Wheatley, 3 Sneed 484, where a recovery at law was denied.

Texas.— Williams *v.* Verne, 68 Tex. 414, 4 S. W. 548; Todd *v.* Willis, 66 Tex. 704, 1 S. W. 803; Giddings *v.* Steele, 28 Tex. 732, 91 Am. Dec. 336; Pearson *v.* Burdett, 26 Tex. 157, 80 Am. Dec. 649; Cochran *v.* Thompson, 18 Tex. 652; Burdett *v.* Silsbee, 15 Tex. 604; De Witt *v.* Miller, 9 Tex. 239; Evans *v.* Oakley, 2 Tex. 182. *Compare* Johnson *v.* Morris, 45 Tex. 463; Brown *v.* Franklin, 44 Tex. 559; McDonald *v.* Alford, 32 Tex. 35; De Witt *v.* Miller, 9 Tex. 239.

Virginia.— Heffernan *v.* Grymes, 2 Leigh 512.

England.— Cubbidge *v.* Boatwright, 1 Russ. 549, 46 Eng. Ch. 489, 38 Eng. Reprint 212.

See 22 Cent. Dig. tit. "Executors and Administrators," § 487.

The statute of limitations does not begin to run against such an action by the administrator *de bonis non* until his appointment.

in the estate have ratified it,[1] or the administrator *de bonis non* has elected to take the proceeds.[2]

(II) *Property Wasted or Converted.* At the common law an administrator *de bonis non* had no right of action against his predecessor for a devastavit by him committed, such right belonging to creditors and distributees alone;[3] but in accordance with the general policy now prevailing statutes have in many jurisdictions conferred upon the administrator *de bonis non* powers sufficient to sustain an action by him against his predecessor for waste or conversion of the

Hopper *v.* Steele, 18 Ala. 828. But see Paschal *v.* Davis, 3 Ga. 256, holding that the purchaser's possession is adverse to that of the original administrator, and that the statute runs from the delivery of possession.

The declarations of the former administrator as to the validity of the sale are not admissible to support the action. McArthur *v.* Carrie, 32 Ala. 75, 70 Am. Dec. 529.

Confirmation of the sale or transfer by the probate court will not make it such an administration as will defeat the title of the administrator *de bonis non.* Giddings *v.* Steele, 28 Tex. 732, 91 Am. Dec. 336; Pearson *v.* Burdett, 26 Tex. 157, 80 Am. Dec. 649; Cochran *v.* Thompson, 18 Tex. 652; Burdett *v.* Silsbee, 15 Tex. 604; De Witt *v.* Miller, 9 Tex. 239; Evans *v.* Oakley, 2 Tex. 182. *Compare* Johnson *v.* Morris, 45 Tex. 463; Brown *v.* Franklin, 44 Tex. 559; McDonald *v.* Alford, 32 Tex. 35.

In South Carolina it has been held that where the administrator has the right to dispose of property belonging to the estate, the fact that a disposition is made with fraudulent motives and in collusion with the purchaser will not entitle the administrator *de bonis non* to follow the property into the hands of the purchaser, such right being possessed by the legatees and creditors only. Knobeloch *v.* Germania Sav. Bank, 43 S. C. 233, 21 S. E. 13; Steele *v.* Atkinson, 14 S. C. 154, 37 Am. Rep. 728; Johnston *v.* Lewis, Rice Eq. 40, 33 Am. Dec. 74. But where actual fraud is practised on the administrator, whereby he is induced to dispose of property belonging to the estate, it seems that the administrator *de bonis non* may follow the property into the hands of the purchaser. Steele *v.* Atkinson, 14 S. C. 154, 37 Am. Rep. 728; Johnston *v.* Lewis, Rice Eq. (S. C.) 40, 33 Am. Dec. 74.

1. McArthur *v.* Carrie, 32 Ala. 75, 70 Am. Dec. 529 (holding that receipt of property by the distributees, bought with the proceeds of the illegal sale, was not a ratification unless such distributees were of lawful age at the time they received the property, and knew with what funds it was bought); Elliott *v.* Mobile Branch Bank, 20 Ala. 345; Kavanaugh *v.* Thompson, 16 Ala. 817.

2. Wales *v.* Newbould, 9 Mich. 45. But see Woods *v.* Legg, 91 Ala. 511, 8 So. 342, holding that the administrator *de bonis non* cannot exercise the election to which the heirs are entitled, to ratify an illegal sale of land, and he cannot therefore sue his predecessor for the proceeds of such sale.

3. *Alabama.*— Nolly *v.* Wilkins, 11 Ala. 872; Willis *v.* Willis, 9 Ala. 721; Judge Benton County Ct. *v.* Price, 6 Ala. 36; Chamberlain *v.* Bates, 2 Port. 550, 27 Am. Dec. 667.

Arkansas.— Brice *v.* Taylor, 51 Ark. 75, 9 S. W. 854; Green *v.* Byrne, 46 Ark. 453; Ludlow *v.* Flournoy, 34 Ark. 451; State *v.* Rottaken, 34 Ark. 144; Finn *v.* Hempstead, 24 Ark. 111.

Connecticut.— American Bd. Commissioners' Appeal, 27 Conn. 344.

Florida.— Gregory *v.* Harrison, 4 Fla. 56.

Georgia.— Knight *v.* Lasseter, 16 Ga. 151; Oglesby *v.* Gilmore, 5 Ga. 56; Paschal *v.* Davis, 3 Ga. 256; Thomas *v.* Hardwick, 1 Ga. 78.

Illinois.— Stose *v.* People, 25 Ill. 600; Short *v.* Johnson, 25 Ill. 489; Newhall *v.* Turney, 14 Ill. 338; Rowan *v.* Kirkpatrick, 14 Ill. 1.

Indiana.— Lucas *v.* Donaldson, 117 Ind. 139, 19 N. E. 758; Kemp *v.* Smith, 7 Ind. 471; Young *v.* Kimball, 8 Blackf. 167; Anthony *v.* McCall, 3 Blackf. 86.

Kentucky.— Warfield *v.* Brand, 13 Bush 77; Felts *v.* Brown, 7 J. J. Marsh. 147; Karn *v.* Seaton, 62 S. W. 737, 23 Ky. L. Rep. 101.

Maryland.— Baker *v.* Bowie, 74 Md. 467, 22 Atl. 133; Hagthrop *v.* Hook, 1 Gill & J. 270.

Mississippi.— Rives *v.* Patty, 43 Miss. 338; Searles *v.* Scott, 14 Sm. & M. 94; Byrd *v.* Holloway, 6 Sm. & M. 323; Stubblefield *v.* McRaver, 5 Sm. & M. 130, 43 Am. Dec. 502.

Missouri.— Gamble *v.* Hamilton, 7 Mo. 469.

New Jersey.— Roy *v.* Squier, 61 N. J. Eq. 182, 48 Atl. 233; Hartson *v.* Elden, 58 N. J. Eq. 478, 44 Atl. 156; Thiefes *v.* Mason, 55 N. J. Eq. 456, 37 Atl. 455; Carrick *v.* Carrick, 23 N. J. Eq. 364; Brownlee *v.* Lockwood, 20 N. J. Eq. 239.

Ohio.— Douglas *v.* Day, 28 Ohio St. 175; O'Conner *v.* State, 18 Ohio 225.

Pennsylvania.— Kendall *v.* Lee, 2 Penr. & W. 482; Potts *v.* Smith, 3 Rawle 361, 24 Am. Dec. 359; Allen *v.* Irwin, 1 Serg. & R. 549.

South Carolina.— Smith *v.* Carrere, 1 Rich. Eq. 123.

Tennessee.— Cheek *v.* Wheatley, 3 Sneed 484; Stott *v.* Alexander, 2 Sneed 650.

Texas.— Ward *v.* Ward, 1 Tex. Unrep. Cas. 123.

Utah.— Reed *v.* Hume, 25 Utah 248, 70 Pac. 998.

Vermont.— Curtis *v.* Curtis, 13 Vt. 517.

Virginia.— Cheatham *v.* Bufoot, 9 Leigh 580; Coleman *v.* McMurdo, 5 Rand. 51.

United States.— U. S. *v.* Walker, 109 U. S. 258, 3 S. Ct. 277, 27 L. ed. 927; Beall *v.* New Mexico, 16 Wall. 535, 21 L. ed. 292.

assets.[4] Such right of action is, however, purely statutory, and must be pursued and confined within the terms of the statute.[5]

d. Realty. An administrator *de bonis non* in general succeeds to such interests and rights in and concerning realty as devolved upon his predecessor.[6] Thus

England.— Packman's Case, 6 Coke 18*b*; Wankford *v.* Wankford, 1 Salk. 299.

See 22 Cent. Dig. tit. "Executors and Administrators," § 488.

Administrator de bonis non may not sue for waste committed by administrator of predecessor. Ferguson *v.* Sweeney, 6 Blackf. (Ind.) 547.

A public administrator may sue his predecessor in office. He is not an administrator *de bonis non.* State *v.* Watts, 23 Ark. 304.

Where the predecessor acted under a void appointment, the legal administrator may sue him. O'Bannon *v.* Cord, 3 Ky. L. Rep. 183. See also Anderson *v.* ——, 3 N. C. 22.

4. *Alabama.*— Whitworth *v.* Oliver, 39 Ala. 286.

California.— Horton *v.* Jack, (1894) 37 Pac. 652.

Georgia.— Oglesby *v.* Gilmore, 5 Ga. 56.

Indiana.— Duffy *v.* State, 115 Ind. 351, 17 N. E. 615; Ormes *v.* Brown, 22 Ind. App. 569, 52 N. E. 1005.

Kansas.— American Surety Co. *v.* Piatt, 67 Kan. 294, 72 Pac. 775.

Minnesota.— Palmer *v.* Pollock, 26 Minn. 433, 4 N. W. 1113.

Oregon.— Gatch *v.* Simpson, 40 Oreg. 90, 66 Pac. 688.

Pennsylvania.— Lewis *v.* Ewing, 18 Pa. St. 313; Parrish *v.* Brooks, 4 Brewst. 154.

Texas.— Dwyer *v.* Kalteyer, 68 Tex. 554, 5 S. W. 75; Martel *v.* Martel, 17 Tex. 391; Francis *v.* Northcote, 6 Tex. 185. But see apparently to the contrary Johnson *v.* Hogan, 37 Tex. 77; McDonald *v.* Alford, 32 Tex. 35; Murphey *v.* Menard, 11 Tex. 673.

See 22 Cent. Dig. tit. "Executors and Administrators," § 488.

Trover will lie by an administrator *de bonis non* against his predecessor for goods converted (Foster *v.* Brown, 1 Bailey (S. C.) 221, 19 Am. Dec. 672), but only when the goods can be specifically distinguished (Stott *v.* Alexander, 2 Sneed (Tenn.) 650).

When suit improper.— An administrator *de bonis non* cannot sue a former administrator for negligence in the collection of claims, where the only party whom the administrator *de bonis non* represents has already received all to which he is entitled. Shurtleff *v.* Ferry, 138 Mass. 259.

5. *Alabama.*— Nolly *v.* Wilkins, 11 Ala. 872; Willis *v.* Willis, 9 Ala. 721, holding that the statute confers a right to sue only when the estate is insolvent.

Illinois.— Marsh *v.* People, 15 Ill. 284, holding that the action lies only against an administrator who has been removed, and not against the representatives of one who dies.

Indiana.— Lucas *v.* Donaldson, 117 Ind. 139, 19 N. E. 758; Ormes *v.* Brown, 22 Ind. App. 569, 52 N. E. 1005, holding that the action must be upon the bond of the former administrator.

Maine.— Meservey *v.* Kalloch, 97 Me. 91, 53 Atl. 876, holding that the right is not conferred by a statute giving the right to sue to "a person interested personally or in any official capacity."

New Jersey.— McDonald *v.* O'Connell, 39 N. J. L. 317, holding that only a substituted administrator may sue, and that an administrator *de bonis non* may not. See also Hartson *v.* Elden, 58 N. J. Eq. 478, 44 Atl. 156.

Ohio.— Jones *v.* Willis, 66 Ohio St. 114, 63 N. E. 605; Douglas *v.* Day, 28 Ohio St. 175; Curtis *v.* Lynch, 19 Ohio St. 392; Blizzard *v.* Filler, 20 Ohio 479; Montgomery *v.* Goepper, 7 Ohio Dec. (Reprint) 581, 4 Cinc. L. Bul. 67; Entrekin *v.* Slagle, 3 Ohio Dec. (Reprint) 550, holding that the action lies only on the official bond.

Texas.— Murphey *v.* Menard, 11 Tex. 673, holding that the action lies only in the cases expressly provided for by statute, and seeming to hold that the action must be upon the bond. This case is explained in Murphy *v.* Menard, 14 Tex. 62, as holding merely that the action lay only in accordance with the statute, but not necessarily upon the bond. See also Dwyer *v.* Kalteyer, 68 Tex. 554, 5 S. W. 75, holding that an administrator excused from giving bond may be sued.

Virginia.— Helsey *v.* Craig, 33 Gratt. 716, holding that a curator may be sued but not an administrator.

See 22 Cent. Dig. tit. "Executors and Administrators," § 488.

6. See Kline *v.* Moulton, 11 Mich. 370, holding that an administrator *de bonis non* succeeds to the statutory rights of the administrator to hold possession of the land and receive the rents and profits, and such right cannot be aliened by the administrator so as to prevent the administrator *de bonis non* from recovering possession.

After twenty years' acquiescence it will be presumed that a sale of land by heirs was consented to by the then administrator, and the administrator *de bonis non* cannot assert a right thereto. Breckinridge *v.* Waters, 4 Dana (Ky.) 620.

When no debts remain unpaid the title vests in the heirs. Ward *v.* Ward, 1 Tex. Unrep. Cas. 123.

Execution sale.— In Pennsylvania an administrator *de bonis non* may recover from his predecessor the surplus proceeds of real estate sold on execution and paid to the predecessor. Carter *v.* Trueman, 7 Pa. St. 315 [*affirming* 3 Pa. L. J. Rep. 101, 4 Pa. L. J. 462.] *Contra,* in North Carolina. Alexander *v.* Wolfe, 88 N. C. 398.

Interest as devisee and testamentary trustee.— The administrator *de bonis non* takes no right in land held by the former admin-

he is entitled to administer upon land purchased by his predecessor with funds of the estate,[7] and he may collect the purchase-money of land sold by his predecessor,[8] or decedent,[9] or he may maintain a suit to set aside an illegal sale made by his predecessor when necessary in order to subject the land to the payment of debts.[10] The appointment of an administrator *de bonis non* does not start anew the period during which land may be sold for the payment of debts, and the limitation in that respect continues to run as under the previous administration.[11]

B. Powers, Duties, and Liabilities — 1. In General. So far as concerns the assets to which an administrator *de bonis non* is entitled he represents the estate[12] and has all the powers and is subject to all the responsibilities of a general administrator.[13]

2. Powers and Duties — a. Collection of Assets — (i) *In General.* It is the duty of the administrator *de bonis non* to take possession of unadministered effects of the decedent,[14] and to this end he may maintain any action necessary or proper for the recovery of such assets.[15] While there is, as has been

istrator as devisee and trustee under the will and not as administrator. Carson *v.* Duffy, 55 N. C. 507. See also Myers *v.* Forbes, 74 Md. 355, 22 Atl. 410.

7. Haynes *v.* Bessellieu, 25 Ark. 499; Tiernan's Estate, 31 Pittsb. Leg. J. (Pa.) 185.

A mortgage taken by an administrator in his own name may after his death be enforced only by his own representative (Caulkins *v.* Bolton, 98 N. Y. 511), but one taken by an executor to himself as such and to his successors passes to the administrator *de bonis non* (Luers *v.* Brunges, 56 How. Pr. (N. Y.) 282).

8. Hudgens *v.* Cameron, 50 Ala. 379; Hefferman *v.* Grymes, 2 Leigh (Va.) 512.

Interest on moneys obtained from a sale of real estate and wrongfully retained by the administrator belongs to the administrator *de bonis non.* Smithers *v.* Hooper, 23 Md. 273.

9. White *v.* Beard, 5 Port. (Ala.) 94, 30 Am. Dec. 552, where the decedent had made the sale and the former administrator had taken a note for the price.

10. Seabrook *v.* Brady, 47 Ga. 650; Forniquet *v.* Forstall, 34 Miss. 87. *Contra,* Brown *v.* Franklin, 44 Tex. 559.

11. Slocum *v.* English, 62 N. Y. 494; *In re* Topping, 60 Hun (N. Y.) 116, 14 N. Y. Suppl. 495. See also Waters *v.* Crossen, 41 Iowa 261; McCrary *v.* Tasker, 41 Iowa 255.

12. Grant *v.* Bell, 87 N. C. 34; Smith *v.* Billing, 22 Fed. Cas. No. 13,014, 3 Cranch C. C. 355.

A dismissed administrator must settle with his successor, and not with the creditor provoking his dismissal. Lobit *v.* Castille, 14 La. Ann. 779.

Suit for conversion.— The administrator *de bonis non* and not the legatees should sue for a conversion of the assets by strangers after the death of the administrator. Barlow *v.* Nelson, 157 Mass. 395, 32 N. E. 359.

13. *Indiana.*— Ormes *v.* Brown, 22 Ind. App. 569, 52 N. E. 1005.

Kentucky.— Williams *v.* Collins, 1 B. Mon. 58.

New York.— Whitlock *v.* Bowery Sav. Bank, 36 Hun 460; McMahon *v.* Allen, 4 E. D. Smith 519.

North Carolina.— Alexander *v.* Wolfe, 88 N. C. 398.

Tennessee.— Shackelford *v.* Runyan, 7 Humphr. 141.

See 22 Cent. Dig. tit. "Executors and Administrators," § 485.

The advice of the court may be sought and obtained by an administrator *de bonis non* in difficult and doubtful matters. Sellers *v.* Sellers, 35 Ala. 235; Hartson *v.* Elden, 58 N. J. Eq. 478, 44 Atl. 156.

Inventory.— It is the duty of the administrator *de bonis non* to return an inventory of assets coming to his hands. Alexander *v.* Stewart, 8 Gill & J. (Md.) 226; Fay *v.* Muzzey, 13 Gray (Mass.) 53, 74 Am. Dec. 619.

14. Whitworth *v.* Oliver, 39 Ala. 286 (within a reasonable time); Alexander *v.* Stewart, 8 Gill & J. (Md.) 226. The right of the administrator *de bonis non* to the assets cannot be defeated by the sole distributee paying the debts of the estate, and taking possession of the property. Kelly *v.* Kelly, 9 Ala. 908, 44 Am. Dec. 469.

In New Jersey the powers of an administrator *de bonis non* are restricted to unadministered assets, but a substituted administrator under Laws (1901), p. 303, is entitled to the entire personal estate which is undistributed. Hoagland *v.* Cooper, 65 N. J. Eq. 407, 56 Atl. 705.

Issue of letters de bonis non to original administrator.— Where letters of administration have been revoked, and other letters granted to the same person on a new bond, the funds in his hands as administrator are transferred to him as administrator *de bonis non.* Enicks *v.* Powell, 2 Strobh. Eq. (S. C.) 196.

15. *Connecticut.*— Chamberlin's Appeal, 70 Conn. 363, 39 Atl. 734, 41 L. R. A. 204.

Massachusetts.— Cunningham *v.* Davis, 175 Mass. 213, 56 N. E. 2, holding that an administrator *de bonis non* is entitled to the benefit of a statute permitting a personal

seen,[16] considerable diversity in the law as to what constitutes assets for the administrator *de bonis non*, especially as regards claims against his predecessor, the difficulties on that subject arise as to the title of the administrator *de bonis non*, and not as to his right of action where title exists,[17] and so far as the law confers upon him rights to assets or demands against his predecessor, he may maintain actions against him or his personal representative for their enforcement.[18] It is not, however, the duty of an administrator *de bonis non* to cause a reëxamination of his predecessor's accounts.[19] In some states statutes provide for a summary order from the probate court requiring assets in the predecessor's hands to be delivered to the administrator *de bonis non*.[20]

(II) *JUDGMENTS IN FAVOR OF PREDECESSOR.* At common law an administrator *de bonis non* could not enforce a judgment recovered by his predecessor during his administration,[21] but in some jurisdictions provision is made by statute for the enforcement of such a judgment by the administrator *de*

representative to maintain forcible entry and detainer to obtain possession of premises mortgaged to the decedent.

North Carolina.— Grant *v.* Bell, 87 N. C. 34.

Ohio.— Jelke *v.* Goldsmith, 52 Ohio St. 499, 40 N. E. 167, 49 Am. St. Rep. 730.

Pennsylvania.— Lea *v.* Hopkins, 7 Pa. St. 385.

Texas.— Evans *v.* Oakley, 2 Tex. 182, holding that, where an intestate pledged property to secure the payment of borrowed money, an action to recover such property should have been brought by the administrator *de bonis non*, and not by the heirs.

See 22 Cent. Dig. tit. "Executors and Administrators," § 486.

A plea in abatement is the only method of questioning the right of an administrator *de bonis non* to sue. Michigan Trust Co. *v.* Probasco, 29 Ind. App. 109, 63 N. E. 255.

16. See *supra*, XVIII, A, 2.

17. Weld *v.* McClure, 9 Watts (Pa.) 495.

18. *Arkansas.*— Wilson *v.* Hinton, 63 Ark. 145, 38 S. W. 338.

Kansas.— American Surety Co. *v.* Piatt, 67 Kan. 294, 72 Pac. 775.

New Jersey.— Hoagland *v.* Cooper, 65 N. J. Eq. 407, 56 Atl. 705.

Pennsylvania.— Lewis *v.* Ewing, 18 Pa. St. 313; Carter *v.* Trueman, 7 Pa. St. 315; Weld *v.* McClure, 9 Watts 495.

South Carolina.— Miller *v.* Alexander, 1 Hill Eq. 25.

United States.— Beall *v.* New Mexico, 16 Wall. 535, 31 L. ed. 292.

See 22 Cent. Dig. tit. "Executors and Administrators," § 488.

Enforcement of surrogate's decree.—An administrator *de bonis non* may maintain an action to enforce a surrogate's decree made on an accounting. Clapp *v.* Meserole, 1 Abb. Dec. (N. Y.) 362, 1 Keyes (N. Y.) 281, 27 How. Pr. (N. Y.) 600 note. But see Clark *v.* Ford, 1 Abb. Dec. (N. Y.) 359, 3 Keyes (N. Y.) 370, 1 Transcr. App. (N. Y.) 22, 3 Abb. Pr. N. S. (N. Y.) 245, 34 How. Pr. (N. Y.) 478.

Debt due from former representative.—An administrator *de bonis non* may recover from the former administrator a debt due from him to the decedent. Kelsey *v.* Smith, 1 How. (Miss.) 68; Utterback *v.* Cooper, 28 Gratt. (Va.) 233.

Suit for property received as statutory trustee.— Where the husband has been appointed administrator of his wife, but her estate is not taken and held by him as such, and no actual administration on her estate is had, the administrator appointed for her estate on the death of the husband may sue his administrator for the wife's personalty received by the husband as statutory trustee. Connecticut Trust, etc., Co. *v.* Security Co., 67 Conn. 438, 35 Atl. 342, holding further that the fact that the wife's administrator delayed for eighteen months after the husband's death before applying for his letters of administration did not constitute laches barring his recovery from the husband's administrator of the wife's personalty, the delay having resulted in no injury.

The account of the former administrator showing an indebtedness to the estate is *prima facie* evidence in favor of the administrator *de bonis non*. Wilson *v.* Hinton, 63 Ark. 145, 35 S. W. 338.

Where the appointment of an administrator de bonis non is void for a failure to comply with the law in removing the former administrator, a judgment of the probate court against the former administrator and in favor of the administrator *de bonis non* is unauthorized and void. Goodwin *v.* Hooper, 45 Ala. 613.

19. Yale *v.* Baker, 2 Hun (N. Y.) 468, 5 Thomps. & C. (N. Y.) 10; Brown *v.* Franklin, 44 Tex. 559.

In Alabama it is the duty of an administrator *de bonis non* to participate in the accounting of his predecessor, and he is liable for assets in the latter's hands. Waller *v.* Ray, 48 Ala. 468; Whitworth *v.* Oliver, 39 Ala. 286; Taylor *v.* Benham, 5 How. (U. S.) 233, 12 L. ed. 130.

20. State *v.* Hart, 57 Md. 234; Foster *v.* Bailey, 157 Mass. 160, 31 N. E. 771; Wickham *v.* Page, 49 Mo. 526; Miller *v.* Jasper, 10 Tex. 513, summary method of recovering papers belonging to the estate.

21. Grout *v.* Chamberlin, 4 Mass. 611, 613; Allen *v.* Irwin, 1 Serg. & R. (Pa.) 549; Yaites *v.* Gough, Yelv. 33.

bonis non.[22] Where the administrator *de bonis non* is entitled to enforce the judgment by execution, he is also entitled to supplementary and ancillary remedies.[23]

b. Distribution. Having collected the unadministered assets, it is the duty of the administrator *de bonis non* to distribute the same to the persons entitled.[24]

3. Liabilities. The administrator *de bonis non* is not chargeable generally with all the undistributed assets of the estate, but only with such as came into his hands, or would have come into his hands had he used good faith and reasonable diligence.[25] Nor is he chargeable with moneys collected by his predecessor, for which parties

Where the administrator de bonis non requires such protection because of the insolvency of the former administrator's sureties and the existence of a balance against him, it seems that the court will order the judgment entered to the use of the administrator *de bonis non,* but not in the absence of such circumstances. Magruder's Case, 16 Fed. Cas. No. 8,962, 2 Cranch C. C. 626.

Administrator de bonis non may maintain a new action. Grout *v.* Chamberlin, 4 Mass. 613; Smith *v.* Pearce, 2 Swan (Tenn.) 127; Dykes *v.* Woodhouse, 3 Rand (Va.) 287. This would seem contrary to the strict rule of the common law by which the administrator *de bonis non* took only assets remaining in specie unaltered by any act of the former administrator. See *supra,* XVIII, A, 1.

22. Duncan *v.* Hargrove, 18 Ala. 77; Warren *v.* Rist, 16 Ala. 686; Ellison *v.* Andrews, 34 N. C. 188; Meiser *v.* Eckhart, 19 Pa. St. 201; Lea *v.* Hopkins, 7 Pa. St. 385; Hunt *v.* Payne, 29 Vt. 176.

Payment to the representative of the former administrator after notice given by the administrator *de bonis non* before letters issued is no protection to the judgment debtor. Meiser *v.* Eckhart, 19 Pa. St. 201.

23. Talbott *v.* Dennis, Smith (Ind.) 357 (holding that an administrator *de bonis non* may maintain a bill to set aside the satisfaction of a decree); Shell *v.* Boyd, 32 S. C. 359, 11 S. E. 205 (holding that an administrator *de bonis non* may maintain a bill to set aside a fraudulent conveyance and satisfy the judgment from the land). The administrator *de bonis non* is an essential party to a bill to enforce a decree to which his predecessor was a party. Griffin *v.* Spence, 69 Ala. 393.

24. Chamberlin's Appeal, 70 Conn. 363, 39 Atl. 734, 41 L. R. A. 204, holding that where personal property had been delivered to a testamentary trustee when it was in fact intestate, the administrator *de bonis non* should recover it and distribute it to the persons rightfully entitled thereto. Alexander *v.* Stewart, 8 Gill & J. (Md.) 226.

Commissions of former administrator.—The administrator *de bonis non* is not bound to pay commissions allowed to the former administrator unless there is an order of court or a demand of payment, and he will be discharged from liability if he distributes the estate under such circumstances, without paying such commissions. Patton *v.* Patton, 32 Miss. 331.

25. *Illinois.*— People *v.* Allen, 25 Ill. App. 657.

Maryland.— Smithers *v.* Hooper, 23 Md. 273.

Missouri.— State *v.* Ruggler, 23 Mo. 339.

New York.— *In re* Place, 1 Redf. Surr. 276, 7 N. Y. Leg. Obs. 217.

North Carolina.— Roper *v.* Burton, 107 N. C. 526, 12 S. E. 334.

Texas.— Higgs *v.* Garrison, (Civ. App. 1894) 27 S. W. 34.

Presumption as to receipt of proceeds of sale by predecessor.— When, on the sale of property by an administrator, part of the price is due before and part after the appointment of his successor, the latter is presumed to have received the proceeds, and, in order to escape liability, must show as a special defense his inability to collect from his predecessor the portion in his hands. New Orleans Gaslight, etc., Co. *v.* Webb, 2 La. Ann. 526.

Money paid by mistake.— Where a general administrator, through mistake, pays to an administrator *de bonis non* money which was not an asset of the estate, the administrator *de bonis non* is not liable as such for the money so paid. Weeks *v.* Love, 19 Ala. 25; Sellers *v.* Smith, 11 Ala. 264; Houston *v.* Frazer, 8 Ala. 81.

Successive administrations by same person. — Where the original administrator was superseded by another, but later again invested with the trust, he must account for all assets received by him on his first administration, and not delivered to his immediate successor. Willis *v.* Willis, 16 Ala. 652. Where letters of administration have been revoked and other letters granted to the same person he holds the bonds in his hands under the first letters as administrator *de bonis non.* Knicks *v.* Powell, 2 Strobh. Eq. (S. C.) 196.

A sheriff to whom special administration is granted is chargeable in the same manner as an administrator *de bonis non,* and upon his bond as sheriff, with moneys received upon notes given to the former administrator. Williams *v.* Collins, 1 B. Mon. (Ky.) 58.

Surety on former administrator's bond succeeding.— Where the surety on the first administrator's bond was made administrator *de bonis non,* and the former administrator held assets in excess of the penalty of the bond, the administrator *de bonis non* was required to charge himself with the entire penalty. Jacobs *v.* Morrow, 21 Nebr. 233, 31 N. W. 739.

in interest have their remedy against such predecessor or his representatives[26] or with the value of chattels in the use of which a life-estate is given by the will, as to which the parties in remainder have their remedy by requiring security.[27] The inventory and settlement in court of the former administrator do not bind, even presumptively, the administrator *de bonis non* as to assets coming into his hands,[28] but a settlement between the administrator *de bonis non* and his predecessor is *prima facie* correct.[29] The administrator *de bonis non* is not responsible for the failure to realize moneys insecurely invested by his predecessor and thereby lost.[30] His liability is for his own acts,[31] and he cannot be called to account for the maladministration of his predecessor.[32] The measure of duty on the part of an administrator *de bonis non* is the exercise of good faith and ordinary care and diligence, and he is liable for failure to reach that standard but not beyond.[33] He cannot be charged with assets which he failed to realize because of excusable ignorance of their existence,[34] but he is required to exercise ordinary diligence both in discovering and in obtaining possession of assets, without special demand or request so to do.[35]

4. Effect of Contracts and Transactions of Predecessor. While at common law there was no privity between an administrator *de bonis non* and his predecessor, the former's rights and duties concerning only assets not administered at all by the predecessor, and being therefore practically independent of his predecessor's acts,[36] the effect of the modern extensions of the rights of the administrator *de bonis non* is to bind him by all acts of his predecessor lawfully performed within the scope of his duties.[37] He is not, however, bound by acts of his prede-

26. *In re* Place, 1 Redf. Surr. (N. Y.) 276, 7 N. Y. Leg. Obs. 217.

27. *In re* Place, 1 Redf. Surr. (N. Y.) 276, 7 N. Y. Leg. Obs. 217.

28. Saffran *v.* Kennedy, 7 J. J. Marsh. (Ky.) 188; Solomons *v.* Krusheedt, 3 Dem. Surr. (N. Y.) 307. See also Grant *v.* Reese, 94 N. C. 72. And see as to inventory generally *supra*, IV, I.

29. Grant *v.* Reese, 94 N. C. 720.

30. Scarborough *v.* Watkins, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 528; Bentley's Estate, 15 Wkly. Notes Cas. (Pa.) 160.

31. Alsop *v.* Mather, 8 Conn. 584, 21 Am. Dec. 703, holding that an administrator *de bonis non* was not liable for the payment of a decree obtained against his predecessor for acts performed by the predecessor.

The liability for taxes assessed against an administrator is a liability of the estate, and is not personal to the administrator, and it devolves upon his successor. San Francisco *v.* Pennie, 93 Cal. 465, 29 Pac. 66.

32. *Illinois.*— Bliss *v.* Seaman, 165 Ill. 422, 46 N. E. 279.

Maryland.— Smithers *v.* Hooper, 23 Md. 273.

New Jersey.— Brownlee *v.* Lockwood, 20 N. J. Eq. 239.

Pennsylvania.— *In re* Small, 5 Pa. St. 258.

Tennessee.— Cheek *v.* Wheatley, 3 Sneed 484.

33. *Alabama.*— Eubank *v.* Clark, 78 Ala. 73; Waller *v.* Ray, 48 Ala. 468; Whitworth *v.* Oliver, 39 Ala. 286; Wilkinson *v.* Hunter, 37 Ala. 268.

Georgia.— Bowers *v.* Grimes, 45 Ga. 616.

Missouri.— State *v.* Ruggles, 23 Mo. 339.

North Carolina.— Roper *v.* Burton, 107 N. C. 526, 12 S. E. 334; Grant *v.* Reese, 94 N. C. 720.

Texas.— Higgs *v.* Garrison, (Civ. App. 1894) 27 S. W. 34.

United States.— Taylor *v.* Benham, 5 How. 233, 12 L. ed. 130. And see as to personal representatives generally, *supra*, VIII, A, 1.

Payments received as creditor from predecessor.— It is error to charge an administrator *de bonis non* with moneys paid to him as a creditor of the estate by a former administrator, without proof that they were improperly paid. Daughdrill *v.* Daughdrill, 108 Ala. 321, 19 So. 185.

34. State *v.* Ruggles, 23 Mo. 339.

35. Grant *v.* Reese, 94 N. C. 720. The administrator *de bonis non* may be charged with the resultant loss to the estate if he fails to collect assets within a reasonable time. Whitworth *v.* Oliver, 39 Ala. 286; Lidderdale *v.* Robinson, 12 Wheat. (U. S.) 594, 6 L. ed. 740 [*affirming* 15 Fed. Cas. No. 8,337, 2 Brock. 159].

Sale by predecessor for distribution.— An administrator *de bonis non* is liable for moneys actually received upon notes taken by his predecessor at sales made not for administration, but for distribution, but he is not liable for a failure to collect such notes. Roper *v.* Burton, 107 N. C. 526, 12 S. E. 334.

36. See *supra*, XVIII, A, 1.

37. *Alabama.*— Martin *v.* Ellerbe, 70 Ala. 326.

Maryland.— Hagthorp *v.* Neale, 7 Gill & J. 13, 26 Am. Dec. 594.

Mississippi.— Duncan *v.* Watson, 28 Miss. 187.

North Carolina.— Badger *v.* Jones, 66 N. C. 305.

South Carolina.— Nettles *v.* Elkins, 2 McCord Eq. 182.

See 22 Cent. Dig. tit. "Executors and Administrators," § 492.

cessor which were fraudulent[38] or illegal.[39] An administrator *de bonis non* may enforce by action a contract of his predecessor which the latter might have sued on in his representative capacity.[40] So, while by the common law the administrator could bind only himself and not the estate by obligations created by him,[41] now such obligations created on behalf of the estate can usually be enforced against an administrator *de bonis non* to the extent of the available assets in his hands.[42]

C. Administrators De Bonis Non With the Will Annexed. In the case of an administrator *de bonis non* with the will annexed, any question arising out of his *de bonis non* character or based upon the fact that there has been a prior administration is governed by the same rules as though he were an ordinary administrator *de bonis non*,[43] while in his capacity as administrator with the will annexed he stands upon the same footing as any other administrator with the will annexed as to the powers which he may exercise and the duties which devolve upon him.[44]

XIX. ADMINISTRATORS WITH THE WILL ANNEXED.[45]

A. Powers and Duties in General. As a general rule, both at common law and in many jurisdictions by virtue of express statute, an administrator with the will annexed possesses the same rights and powers, and is subject to the same

38. Martin *v.* Ellerbe, 70 Ala. 326.

39. Masterson *v.* Pullen, 62 Ala. 145 (holding that an administrator *de bonis non* may, when necessary to pay debts, enforce notes which the administrator has surrendered); Sellars *v.* Cheney, 70 Ga. 790 (holding that an administrator *de bonis non* is not estopped from claiming property which the former administrator stood by and permitted to be sold under a void execution); Badger *v.* Jones, 66 N. C. 305; Bell *v.* Speight, 11 Humphr. (Tenn.) 451 (holding that an administrator *de bonis non* is not estopped from claiming property by the fact that the former administrator concurred in an illegal execution sale thereof).

An administrator de bonis non may buy in the title of heirs to property wrongfully sold by the administrator and claim it as against the purchasers at the sale. Walbridge *v.* Day, 31 Ill. 379, 83 Am. Dec. 227.

Estoppel.— In New York it has been held that the administrator *de bonis non* may not assert a claim which the administrator was estopped from asserting. Whitlock *v.* Bowery Sav. Bank, 36 Hun 460.

Assets improperly included in administration.— An administrator *de bonis non* is liable for assets of a partnership of which the decedent was a member which the former administrator took into his possession and administered into the estate. Marlatt *v.* Scantland, 19 Ark. 443.

40. Hemphill *v.* Hamilton, 11 Ark. 425; Parker *v.* Fay, 61 N. J. Eq. 167, 47 Atl. 499; Stair *v.* York Nat. Bank, 55 Pa. St. 364, 93 Am. Dec. 759; McGuinness *v.* Whalen, 17 R. I. 619, 24 Atl. 44. *Contra*, Ross *v.* Sutton, 1 Bailey (S. C.) 126, 19 Am. Dec. 660.

Administrator de bonis non may declare upon promise as made to first administrator. Hirst *v.* Smith, 7 T. R. 182, 4 Rev. Rep. 415.

41. Savage *v.* Benham, 11 Ala. 49; Tyson *v.* Walston, 83 N. C. 90; McBeth *v.* Smith, 3 Brev. (S. C.) 511; Pearce *v.* Smith, 2 Brev. (S. C.) 360, 4 Am. Dec. 588.

42. Habersham *v.* Huguenin, R. M. Charlt. (Ga.) 376; Shawhan *v.* Loffer, 24 Iowa 217. An administrator *de bonis non* cannot repudiate his predecessor's contract without compensating the party injured. Cock *v.* Carson, 38 Tex. 284.

Attorney's fees.— Fees for services rendered as an attorney in connection with the estate may be collected from the administrator *de bonis non*. Bell *v.* Welch, 38 Ark. 139; *In re* Young, 3 Md. Ch. 461; *In re* Watson, 53 L. J. Ch. 305, 50 L. T. Rep. N. S. 205, 32 Wkly. Rep. 477. *Contra*, Mellen *v.* West, 5 Ohio Cir. Ct. 89, 3 Ohio Cir. Dec. 46, administrator *de bonis non* not liable for note given by former administrator.

Costs.— An administrator *de bonis non* is not bound for the costs of a capias ad satisfaciendum sued out by his predecessor and discontinued. Hampton *v.* Cooper, 33 N. C. 580.

Garnishment.— An administrator *de bonis non* is bound by garnishment proceedings against his predecessor. Simonds *v.* Harris, 92 Ind. 505.

43. Pinney *v.* Barnes, 17 Conn. 420. See *supra*, XVIII, A, B.

44. See the following cases:

Illinois.— Nicoll *v.* Scott, 99 Ill. 529.

Indiana.— Rubottom *v.* Morrow, 24 Ind. 202, 87 Am. Dec. 324.

Maine.— Knight *v.* Loomis, 30 Me. 204.

Massachusetts.— Blake *v.* Dexter, 12 Cush. 559.

Mississippi.— Cohea *v.* Johnson, 69 Miss. 46, 13 So. 40; King *v.* Talbert, 36 Miss. 367; Bartlett *v.* Sutherland, 24 Miss. 395.

North Carolina.— Grant *v.* Reese, 94 N. C. 720. See *infra*, XIX.

45. Appointment and qualification see *supra*, II, C.

duties and liabilities as though he had been nominated executor by the will.[46] For example he may collect assets and pay debts,[47] sue or be sued,[48] or sell property to pay debts by leave of court.[49] But he cannot exercise any powers which the executor named in the will could not have exercised.[50]

B. Exercise of Discretionary Powers. Where the will gives to the executor named discretionary powers and duties involving personal trust and confidence, and which do not ordinarily come within the scope of administrative functions, they do not pass to an administrator with the will annexed,[51] although

46. *Alabama.*— Henderson *v.* Simmons, 33 Ala. 291, 70 Am. Dec. 590; Lucas *v.* Doe, 4 Ala. 679.

California.— Crouse *v.* Peterson, 130 Cal. 169, 62 Pac. 475, 615, 80 Am. St. Rep. 89; *In re* Li Po Tai, (1895) 39 Pac. 30.

Illinois.— Penn *v.* Fogler, 182 Ill. 76, 55 N. E. 192 [*reversing* on other grounds 77 Ill. App. 365].

Indiana.— Davis *v.* Hoover, 112 Ind. 423, 14 N. E. 468; Landers *v.* Stone, 45 Ind. 404.

Iowa.— Hodgin *v.* Toler, 70 Iowa 21, 30 N. W. 1, 59 Am. Rep. 435 (also holding that section 2351 of the code, relating to probate of foreign wills, and the powers of executors thereunder, confers no power upon an administrator with the will annexed); Lees *v.* Wetmore, 58 Iowa 170, 12 N. W. 238; Shawhan *v.* Loffer, 24 Iowa 217.

Kentucky.— De Haven *v.* De Haven, 104 Ky. 41, 46 S. W. 215, 47 S. W. 597, 20 Ky. L. Rep. 663; Simpson *v.* Hawkins, 1 Dana 303; Jackson *v.* Jeffries, 1 A. K. Marsh. 88.

Massachusetts.— Tarbell *v.* Jewett, 129 Mass. 457; Blake *v.* Dexter, 12 Cush. 559; Farwell *v.* Jacobs, 4 Mass. 634.

Mississippi.— Cohea *v.* Johnson, 69 Miss. 46, 13 So. 40; King *v.* Talbert, 36 Miss. 367; Bartlett *v.* Sutherland, 24 Miss. 395.

Nebraska.— Koopman *v.* Carroll, 50 Nebr. 824, 70 N. W. 395; Schroeder *v.* Wilcox, 39 Nebr. 136, 57 N. W. 1031.

New Jersey.— Hoagland *v.* Cooper, 65 N. J. Eq. 407, 56 Atl. 705.

New York.— Bain *v.* Matteson, 54 N. Y. 663; Simmons *v.* Taylor, 19 N. Y. App. Div. 499, 46 N. Y. Suppl. 730; *In re* Baker, 26 Hun 626; Bowers *v.* Emerson, 14 Barb. 652; Dominick *v.* Michael, 4 Sandf. 374; Matter of Kick, 11 N. Y. St. 688; Luers *v.* Brunges, 56 How. Pr. 282; Peterson *v.* Chemical Bank, 29 How. Pr. 240. And see Merritt *v.* Merritt, 161 N. Y. 634, 57 N. E. 1117 [*affirming* 32 N. Y. App. Div. 442, 53 N. Y. Suppl. 127]; McMahon *v.* Allen, 4 E. D. Smith 519.

North Carolina.— Saunders *v.* Saunders, 108 N. C. 327, 12 S. E. 909; Creech *v.* Grainger, 106 N. C. 213, 10 S. E. 1032; Syme *v.* Broughton, 86 N. C. 153.

Pennsylvania.— Evans *v.* Chew, 71 Pa. St. 47; Ross *v.* Barclay, 18 Pa. St. 179, 55 Am. Dec. 616; Cornell *v.* Green, 10 Serg. & R. 14.

Rhode Island.— Belcher *v.* Branch, 11 R. I. 226.

Tennessee.— Harrison *v.* Henderson, 7 Heisk. 315. And see Lewis *v.* Woodfolk, 2 Baxt. 25; Perry *v.* Gill, 2 Humphr. 218.

Virginia.— McCall *v.* Peachy, 3 Munf. 288; Archer *v.* Saddler, 2 Hen. & M. 370.

Wisconsin.— *In re* Besley, 18 Wis. 451.

See 22 Cent. Dig. tit. "Executors and Administrators," § 493.

Property undisposed of by the will may be administered upon by an administrator with the will annexed. Landers *v.* Stone, 45 Ind. 404; Sullivan *v.* Fosdick, 10 Hun (N. Y.) 173. But see Dean *v.* Biggers, 27 Ga. 73; Harper *v.* Smith, 9 Ga. 461.

Personal property given to a trustee by the will must be protected and preserved by the administrator with the will annexed until a trustee is appointed. Casperson *v.* Dunn, 42 N. J. Eq. 87, 6 Atl. 488.

A foreign administrator with the will annexed does not succeed to the powers and duties of the executor in the state in which he seeks to exercise such powers unless reappointed by a competent court of such state. Simpson *v.* Hawkins, 1 Dana (Ky.) 303; Jackson *v.* Jeffries, 1 A. K. Marsh. (Ky.) 88.

47. Drury *v.* Natick, 10 Allen (Mass.) 169 (even though the will directs trustees to do so); Sullivan *v.* Fosdick, 10 Hun (N. Y.) 173; Scott *v.* Monks, 16 R. I. 225, 14 Atl. 860.

He may pay legal expenses and reasonable fees incurred in having the will probated. Henderson *v.* Simmons, 33 Ala. 291, 70 Am. Dec. 590.

He cannot pay out money by way of compromise. Henderson *v.* Simmons, 33 Ala. 291, 70 Am. Dec. 590.

48. Varnum *v.* Taylor, 59 Hun (N. Y.) 554, 14 N. Y. Suppl. 242; Syme *v.* Broughton, 86 N. C. 153.

He may sue for possession of land belonging to the estate (De Haven *v.* De Haven, 104 Ky. 41, 46 S. W. 215, 47 S. W. 597, 20 Ky. L. Rep. 663), but not unless he holds the legal title (O'Connell *v.* Dougherty, 32 Cal. 458; Emeric *v.* Penniman, 26 Cal. 119), or has statutory power to do so (Cornell *v.* Green, 10 Serg. & R. (Pa.) 14; Scott *v.* Monk, 16 R. I. 225, 14 Atl. 860).

49. Syme *v.* Broughton, 86 N. C. 153.

50. Matter of Blow, 11 N. Y. Suppl. 193, 2 Connoly Surr. (N. Y.) 360.

51. *Alabama.*— Anderson *v.* McGowan, 42 Ala. 280.

Illinois.— Penn *v.* Folger, 182 Ill. 76, 55 N. E. 192 [*reversing* on other grounds 77 Ill. App. 365].

Indiana.— Rubottom *v.* Morrow, 24 Ind. 202, 87 Am. Dec. 324.

Kentucky.— Warfield *v.* Brand, 13 Bush 77. But see Shields *v.* Smith, 8 Bush 601.

Maine.— Knight *v.* Loomis, 30 Me. 204.

such administrator is by statute or a decree of court, expressly invested with all the rights and powers of and subjected to the same duties as an executor named in the will,[52] unless it clearly appears from the will that the testator intended to confer the powers and duties upon the executor merely *virtute officii*, and that they should be exercised in any event.[53]

C. Power of Sale Under Will. As a general rule a power of selling real estate conferred by will upon a named executor is one of personal trust and confidence which cannot be exercised by an administrator with the will annexed.[54] But it is otherwise where the will clearly evinces an intention to confer the power

Massachusetts.— Farwell *v.* Jacobs, 4 Mass. 634.

Mississippi.— Cohea *v.* Johnson, 69 Miss. 46, 13 So. 40.

New Jersey.— Brush *v.* Young, 28 N. J. L. 237; Stoutenburgh *v.* Moore, 37 N. J. Eq. 63.

New York.— Merritt *v.* Merritt, 161 N. Y. 634, 57 N. E. 1117 [*affirming* 32 N. Y. App. Div. 442, 53 N. Y. Suppl. 127]; Bain *v.* Matteson, 54 N. Y. 663.

North Carolina.— Newsom *v.* Newsom, 38 N. C. 411.

Pennsylvania.— Maus *v.* Maus, 80 Pa. St. 194; Waters *v.* Margeram, 60 Pa. St. 39; Ross *v.* Barclay, 18 Pa. St. 179, 55 Am. Dec. 616; Ebert's Appeal, 9 Watts 300; Hepburn's Estate, 8 Phila. 206.

Rhode Island.— Belcher *v.* Branch, 11 R. I. 226.

South Carolina.— See Johnson *v.* Henegan, 11 S. C. 93.

Tennessee.— Harrison *v.* Henderson, 7 Heisk. 315; Armstrong *v.* Park, 9 Humphr. 195.

Texas.— Frisby *v.* Withers, 61 Tex. 134; Vardeman *v.* Ross, 36 Tex. 111; Tippett *v.* Mize, 30 Tex. 361, 94 Am. Dec. 313.

Wisconsin.— *In re* Besley, 18 Wis. 451.

United States.— Ingle *v.* Jones, 9 Wall. 486, 19 L. ed. 621.

England.— Lambert *v.* Rendle, 3 New Rep. 247.

See 22 Cent. Dig. tit. "Executors and Administrators," § 493.

A personal trust to provide for the widow, charged upon the executor by the will, does not devolve upon the administrator with the will annexed. Lindsley *v.* Personette, 35 N. J. Eq. 355. *Contra,* Sanders' Estate, 5 Kulp (Pa.) 521.

An application for the appointment of a trustee to carry out the provisions of the will, which do not devolve upon an administrator with the will annexed, may be made by such administrator to a court of equity. Penn *v.* Fogler, 182 Ill. 76, 55 N. E. 192 [*reversing* on other grounds 77 Ill. App. 365]; Mulligan *v.* Lambe, 178 Ill. 130, 52 N. E. 1052.

Management of trust property without authority by an administrator with the will annexed constitutes him a trustee *de son tort.* Penn *v.* Fogler, 182 Ill. 76, 55 N. E. 192 [*reversing* on other grounds 77 Ill. App. 365].

52. Penn *v.* Fogler, 182 Ill. 76, 55 N. E. 192 [*reversing* on other grounds 77 Ill. App. 365]; Hodgin *v.* Toler, 70 Iowa 21, 30 N. W. 1, 59 Am. Rep. 435; Creech *v.* Grainger, 106 N. C. 213, 10 S. E. 1032; Harrison *v.* Henderson, 7 Heisk. (Tenn.) 315; *In re* Besley, 18 Wis. 451.

53. *Illinois.*— Wenner *v.* Thornton, 98 Ill. 156.

Massachusetts.— Blake *v.* Dexter, 12 Cush. 559.

Mississippi.— Cohea *v.* Johnson, 69 Miss. 46, 13 So. 40.

New York.— Varnum *v.* Taylor, 59 Hun 554, 14 N. Y. Suppl. 242; *In re* Baker, 26 Hun 626; Matter of Post, 9 N. Y. Suppl. 449, 2 Connoly Surr. 243, holding that a direction to invest a specified sum "upon bond and mortgage of real estate, or such stocks as they may regard safe and permanent," evinces no intention to repose any such special trust and confidence as will disable an administrator with the will annexed from fully administering the trust.

North Carolina.— Creech *v.* Grainger, 106 N. C. 213, 10 S. E. 1032; Jones *v.* Jones, 17 N. C. 387.

Pennsylvania.— Olwine's Appeal, 4 Watts & S. 492; Sanders' Estate, 5 Kulp 521.

Rhode Island.— Belcher *v.* Branch, 11 R. I. 226.

United States.— Ingle *v.* Jones, 9 Wall. 486, 19 L. ed. 601.

See 22 Cent. Dig. tit. "Executors and Administrators," § 493.

54. *Alabama.*— Posey *v.* Conaway, 10 Ala. 811; Lucas *v.* Doe, 4 Ala. 679.

California.— Crouse *v.* Peterson, 130 Cal. 169, 63 Pac. 475, 615, 80 Am. St. Rep. 89.

Delaware.— Chandler *v.* Delaplaine, 4 Del. Ch. 503; Lockwood *v.* Stradley, 1 Del. Ch. 298, 12 Am. Dec. 97.

Illinois.— Bigelow *v.* Cady, 171 Ill. 229, 48 N. E. 974, 63 Am. St. Rep. 230; Nicoll *v.* Scott, 99 Ill. 529; Hall *v.* Irwin, 7 Ill. 176; Penn *v.* Fogler, 77 Ill. App. 365, without an order of court.

Massachusetts.— Greenough *v.* Welles, 10 Cush. 571; Dunbar *v.* Tainter, 7 Cush. 574; Tainter *v.* Clark, 13 Metc. 220.

Mississippi.— Montgomery *v.* Milliken, Sm. & M. Ch. 495.

Missouri.— Compton *v.* McMahan, 19 Mo. App. 494.

New Jersey.— McDonald *v.* King, 1 N. J. L. 432; Naundorf *v.* Schumann, 41 N. J. Eq. 14, 2 Atl. 609; Stoutenburgh *v.* Moore, 37 N. J. Eq. 63; Lanning *v.* Sisters of St. Francis, 35 N. J. Eq. 392.

New York.— Cooke *v.* Platt, 98 N. Y. 35; Horsfield *v.* Black, 40 N. Y. App. Div. 264, 57 N. Y. Suppl. 1006; Simmons *v.* Taylor, 19

upon the executor *virtute officii*, and not as involving any personal discretion,[55] and in some jurisdictions such power is conferred upon him by statute where the will directs a sale for administrative purposes, or to pay legacies or make distribution.[56]

N. Y. App. Div. 499, 46 N. Y. Suppl. 730; Fay *v.* Taylor, 31 Misc. (N. Y.) 32, 63 N. Y. Suppl. 572; Conklin *v.* Egerton, 21 Wend. 430.

North Carolina.— Ferebee *v.* Procter, 19 N. C. 439.

Pennsylvania.— Waters *v.* Margerum, 60 Pa. St. 39; Ross *v.* Barclay, 18 Pa. St. 179, 55 Am. Dec. 616; Moody *v.* Fulmer, 3 Grant 17; Moody *v.* Vandyke, 4 Binn. 31, 5 Am. Dec. 385.

Tennessee.— Harrison *v.* Henderson, 7 Heisk. 315; Armstrong *v.* Parks, 9 Humphr. 195, except by the advice and consent of the chancellor.

Texas.— Tippett *v.* Mize, 30 Tex. 361, 94 Am. Dec. 313.

England.— *In re* Clay, 16 Ch. D. 3, 43 L. T. Rep. N. S. 402, 29 Wkly. Rep. 5. But see Wyman *v.* Carter, L. R. 12 Eq. 309, 40 L. J. Ch. 559.

See 22 Cent. Dig. tit. "Executors and Administrators," § 493½.

Power to divide the estate given to the executor does not authorize an administrator with the will annexed to sell the land. Montague *v.* Carneal, 1 A. K. Marsh. (Ky.) 351; McDowell *v.* White, 68 N. C. 65.

An order of court is necessary to authorize a sale by an administrator with the will annexed where the latter comes into a court of equity, files his claim as creditor against the estate, and seeks to sell the real estate of his testator. Watson *v.* Fletcher, 7 Gratt. (Va.) 1.

An application for the appointment of a trustee to sell and make distribution may be made by an administrator with the will annexed to a court of equity where the terms of the will cannot be carried out without converting the land into money. Mulligan *v.* Lambe, 178 Ill. 130, 52 N. E. 1052; Stoff *v.* McGinn, 178 Ill. 46, 52 N. E. 1048.

55. *Kentucky.*— Rutherford *v.* Clark, 4 Bush 27.

Mississippi.— Cohea *v.* Johnson, 69 Miss. 46, 13 So. 40; King *v.* Talbert, 36 Miss. 367.

New Hampshire.— Rollins *v.* Rice, 59 N. H. 493, holding that, where a will authorizes a sale of land by any person legally qualified to administer the estate, an administrator with the will annexed may sell without a license from the probate court.

New Jersey.— Drummond *v.* Jones, 44 N. J. Eq. 53, 13 Atl. 611.

New York.— Carpenter *v.* Bonner, 26 N. Y. App. Div. 462, 50 N. Y. Suppl. 298; Clifford *v.* Morrell, 22 N. Y. App. Div. 470, 48 N. Y. Suppl. 83; Bingham *v.* Jones, 25 Hun 7; Scott *v.* Douglas, 39 Misc. 555, 80 N. Y. Suppl. 354; Campbell *v.* Jennings, 22 Misc. 406, 50 N. Y. Suppl. 278; *In re* Kick, 11 N. Y. St. 688. But see Conklin *v.* Egerton, 21 Wend. 430 [*affirmed* in 25 Wend. 224].

See 22 Cent. Dig. tit. "Executors and Administrators," § 493½.

The fact that an appraisal is directed to precede the sale does not make the power of sale discretionary and so not exercisable by an administrator with the will annexed. Clifford *v.* Morrell, 22 N. Y. App. Div. 470, 48 N. Y. Suppl. 83.

56. *Alabama.*— Anderson *v.* McGowan, 45 Ala. 462 [*overruling* Anderson *v.* McGowan, 42 Ala. 280].

California.— Kidwell *v.* Brummagim, 32 Cal. 436.

Delaware.— Curran *v.* Ruth, 4 Del. Ch. 27.

Indiana.— Davis *v.* Hoover, 112 Ind. 423, 14 N. E. 468.

Kentucky.— Gulley *v.* Prather, 7 Bush 167 (even where discretionary power to sell was conferred by the will on the executor); Rutherford *v.* Clark, 4 Bush 27; Owens *v.* Cowan, 7 B. Mon. 152; Steele *v.* Moxley, 9 Dana 137.

Maryland.— Venable *v.* Mercantile Trust, etc., Co., 74 Md. 187, 21 Atl. 704.

Mississippi.— Sandifer *v.* Grantham, 62 Miss. 412.

Missouri.— Francisco *v.* Wingfield, 161 Mo. 542, 61 S. W. 842; Evans *v.* Blackiston, 66 Mo. 437; Dilworth *v.* Rice, 48 Mo. 124; *In re* Rickenbaugh, 42 Mo. App. 328.

Nebraska.— Koopman *v.* Carroll, 50 Nebr. 824, 70 N. W. 395; Schroeder *v.* Wilcox, 39 Nebr. 136, 57 N. W. 1031.

New Jersey.— Howell *v.* Sebring, 14 N. J. Eq. 84. Under the act of April 6, 1838, an administrator *de bonis non* with the will annexed may make sale of the realty of the testator if the will conferred power upon the executors named therein to make such sale. *In re* Devine, 62 N. J. Eq. 703, 49 Atl. 138; Griggs *v.* Veghte, 47 N. J. Eq. 179, 19 Atl. 867. But the power of such administrator is declared by this act not to be valid until the terms of sale shall have been submitted to the orphans' court of the county in which the lands proposed to be sold lie and approved by such court. The jurisdiction of the orphans' court to approve or disapprove of the terms of a sale can only be invoked by one who exhibits by proof a right to make sale, if the will has conferred power of sale upon the executors named therein. If the will is one probated within the state, the application must show that he has been duly appointed administrator with the will annexed by some court having jurisdiction to make such appointment. If the will is a foreign one, it must appear that the applicant has been appointed with the will annexed, and also that he has taken such proceedings within the state as will give him a right to act in New Jersey. In a proceeding under this statute the court has not authority to consider or adjudicate upon a claim

XX. Temporary or Special Administrators and Receivers.[57]

A. Administrators Durante Minoritate. An administrator *durante minoritate* has, during the minority of the executor, the same authority as an ordinary administrator.[58] He may exercise a power of sale given by a testator to his executors or administrators,[59] and has the power to assent to a legacy if there were assets for the payment of debts.[60] He has the same authority as an ordinary executor or administrator to retain for his own debt,[61] and he has a further right to retain for a debt due the infant executor.[62] Under the old practice scire facias might issue against the executor, upon his reaching majority, upon a judgment obtained against the administrator *durante minoritate*.[63] The administrator *durante minoritate* is liable for a devastavit to the executor who qualifies after coming of age.[64]

B. Administrators Durante Absentia. An administrator *durante absentia* is such a legal representative as to be empowered to assign a leasehold of the deceased.[65] The authority of an administrator *durante absentia* does not become

that the lands descended to testator's heirs at law or were specifically devised by his will and were not within the power of sale conferred by the will, for if the administrator had no authority to sell under the will, an order of the orphans' court under this statute would not confer it upon him. *In re* Devine, 62 N. J. Eq. 703, 49 Atl. 138.

New York.— Mott *v.* Ackerman, 92 N. Y. 539; Campbell *v.* Jennings, 22 Misc. 406, 50 N. Y. Suppl. 278.

North Carolina.— Creech *v.* Grainger, 106 N. C. 213, 10 S. E. 1032; Gay *v.* Grant, 101 N. C. 206, 8 S. E. 99, 106; Council *v.* Averett, 95 N. C. 131.

Pennsylvania.— Tarrence *v.* Reuther, 185 Pa. St. 279, 39 Atl. 956 [*affirming* 13 Montg. Co. Rep. 162]; Potts *v.* Breneman, 182 Pa. St. 295, 37 Atl. 1002; Jackman *v.* Delafield, 85 Pa. St. 381; Lantz *v.* Boyer, 81 Pa. St. 325; Evans *v.* Chew, 71 Pa. St. 47 [*affirming* 8 Phila. 103]; Waters *v.* Margerum, 60 Pa. St. 39; Keefer *v.* Schwartz, 47 Pa. St. 503; Moody *v.* Fulmer, 3 Grant 17; Still's Estate, 2 Pa. Dist. 105, 12 Pa. Co. Ct. 379, 31 Wkly. Notes Cas. 252; Meredith's Estate, 1 Pars. Eq. Cas. 433; Kline's Estate, 2 Leg. Chron. 137.

Rhode Island.— Bailey *v.* Brown, 9 R. I. 79.

South Carolina.— Robinson *v.* Ostendorff, 38 S. C. 66, 16 S. E. 371, sale for reinvestment.

Tennessee.— Blakemore *v.* Kimmons, 8 Baxt. 470; Green *v.* Davidson, 4 Baxt. 488; Harrison *v.* Henderson, 7 Heisk. 315. But see McElroy *v.* McElroy, 110 Tenn. 137, 73 S. W. 105, holding that a direction in a will that real estate be sold and the proceeds divided among certain legatees does not authorize an administrator with the will annexed to treat the estate as personal property and sell it under the doctrine of equitable conversion.

Virginia.— Miller *v.* Jones, 9 Gratt. 584; Brown *v.* Armistead, 6 Rand. 594.

United States.— Peters *v.* Bowman, 98 U. S. 56, 25 L. ed. 91 [*affirming* 19 Fed. Cas. Nos. 11,028, 11,029].

See 22 Cent. Dig. tit. "Executors and Administrators," § 493½.

A foreign administrator with the will annexed cannot sell lands under a statutory provision in the state where the lands are situated. Steele *v.* Moxley, 9 Dana (Ky.) 137; Brown *v.* Hobson, 3 A. K. Marsh. (Ky.) 380, 13 Am. Dec. 187.

A power of sale to carry out a collateral trust cannot be exercised by an administrator with the will annexed, even under such statutes. Crouse *v.* Peterson, 130 Cal. 169, 62 Pac. 475, 615, 80 Am. St. Rep. 89; Nicoll *v.* Scott, 99 Ill. 529; Gehr *v.* McDowell, 206 Pa. St. 100, 55 Atl. 851; Evans *v.* Chew, 71 Pa. St. 47; Waters *v.* Margerum, 60 Pa. St. 39; Harrison *v.* Henderson, 7 Heisk. 315.

57. **Appointment and qualification** see *supra*, II, E.

58. *In re* Cope, 16 Ch. D. 49, 50 L. J. Ch. 13, 43 L. T. Rep. N. S. 566, 29 Wkly. Rep. 98; *In re* Thompson, [1896] 1 Ir. 356.

Power to sell.— An administrator *durante minoritate* had, during the minority of the executor, the power to sell the estate if necessary in course of administration. *In re* Thompson, [1896] 1 Ir. 356. But see Robinson *v.* Sords, 13 L. R. Ir. 429.

59. Monsell *v.* Armstrong, L. R. 14 Eq. 423, 41 L. J. Ch. 715, 20 Wkly. Rep. 921.

60. 1 Williams Ex. (7th Am. ed.) 583.

61. Priers *v.* Goddard, Hob. 351; Roskelley *v.* Godolphin, T. Raym. 483.

62. Franks *v.* Cooper, 4 Ves. Jr. 763, 31 Eng. Reprint 394.

63. Sparkes *v.* Crofts, 1 Ld. Raym. 265.

64. Herndon *v.* Pratt, 59 N. C. 327, holding, however, that if the executor abstained for ten years from bringing suit, his cause of action was presumed to have been satisfied, released, or abandoned so that persons having a contingent interest in remainder which was injured by the devastavit, must look to the executor and not to the administrator *durante minoritate* or the sureties on his administration bond.

65. See Webb *v.* Kirby, 7 De G. M. & G. 376, 3 Jur. N. S. 73, 26 L. J. Ch. 145, 5 Wkly. Rep. 189, 44 Eng. Reprint 147.

void upon the death of the absent executor but only voidable.[66] A suit begun *durante absentia* does not fall to the ground upon the return of the executor, but goes on, the executor being made a party in the usual course.[67]

C. Administrators Pendente Lite.[68] An administrator *pendente lite* has been said to be not properly the representative of the deceased, as is the general administrator, but rather an appointee or officer of the court,[69] his office closely resembling that of a receiver in chancery.[70] His duties were originally merely to collect the effects,[71] file an inventory,[72] and hold and care for the property of the estate until the pending suit terminated;[73] but in the more modern practice he sometimes has the right to pay debts of the estate,[74] and may even sell the effects of the estate where a sound discretion warrants such action.[75] His authority does not, however, extend to the payment of legacies or making distribution of the estate.[76] Inasmuch as it is his duty to collect the effects of the estate, he is entitled to the possession of the personalty of the deceased,[77] and may maintain an action to recover a debt due the estate.[78] He has also been held entitled to bring ejectment against any person, whether the heir or next of kin or any other person whatsoever, who keeps possession of the testator's real or leasehold estate.[79] An administrator *pendente lite* is not liable for interest on money in his hands during pendency of the contest,[80] or at least he should be allowed to keep a reasonable sum to meet contingencies, without being subject to the liability for interest on the sum retained.[81] If proceedings are begun against the administrator *pendente lite*, they will be continued against the proper representative of the deceased when the duties of the administrator *pendente lite* have come to an end.[82] When the account of the administrator *pendente lite* is settled, the proper practice is to award the fund belonging to the estate to the general administrator.[83]

D. Special Administrators Under Modern Practice. Under the modern practice the different kinds of special administrators are generally known simply as special or temporary administrators whose powers are usually definitely fixed

66. Taynton *v.* Hannay, 3 B. & P. 26, construing 38 Geo. III, c. 87.

67. See Rainsford *v.* Taynton, 7 Ves. Jr. 460, 32 Eng. Reprint 186.

68. An administrator appointed to act during the heir's delay for deliberating has the same powers and is subject to the same duties and liabilities as the curator of a vacant estate. Self *v.* Morris, 7 Rob. (La.) 24. See Ogden's Succession, 10 Rob. (La.) 457.

69. Winpenny's Estate, 11 Phila. (Pa.) 20; Webb's Estate, 20 Wkly. Notes Cas. (Pa.) 275; Kaminer *v.* Hope, 9 S. C. 253. See also Houston *v.* Houston, 3 Humphr. (Tenn.) 652.

70. See *In re* Toleman, [1897] 1 Ch. 866, 66 L. J. Ch. 452, 76 L. T. Rep. N. S. 381, 45 Wkly. Rep. 548, holding, however, that under Prob. Act (1857), § 70, the position of administrator and of receiver did not correspond and that the administrator *pendente lite* could be sued without leave of court.

71. Baldwin *v.* Mitchell, 86 Md. 379, 38 Atl. 775; *In re* Colvin, 3 Md. Ch. 278; *In re* Ellmaker, 4 Watts (Pa.) 34.

72. *In re* Ellmaker, 4 Watts (Pa.) 34.

73. Baldwin *v.* Mitchell, 86 Md. 379, 38 Atl. 775; *In re* Ellmaker, 4 Watts (Pa.) 34. See also *In re* Colvin, 3 Md. Ch. 278; Houston *v.* Houston, 3 Humphr. (Tenn.) 652.

The administrator may take charge of and rent land belonging to the estate and affected by the will. *In re* Soulard, 141 Mo. 642, 43 S. W. 617.

74. Baldwin *v.* Mitchell, 86 Md. 379, 38 Atl. 775; *In re* Ellmaker, 4 Watts (Pa.) 34; Webb's Estate, 20 Wkly. Notes Cas. (Pa.) 275. See also Thompson *v.* Tracy, 60 N. Y. 174. *Contra*, *In re* Wincos, 186 Ill. 445, 57 N. E. 1073 [*affirming* 85 Ill. App. 613].

Expenses for establishment of the will cannot be credited in his account. Dietrich's Appeal, 2 Watts (Pa.) 332.

75. See Fluck *v.* Lake, 54 N. J. Eq. 638, 35 Atl. 643.

76. Fluck *v.* Lake, 54 N. J. Eq. 638, 35 Atl. 643; *In re* Ellmaker, 4 Watts (Pa.) 34; Winpenny's Estate, 11 Phila. (Pa.) 20; Houston *v.* Houston, 3 Humphr. (Tenn.) 652.

77. Cain *v.* Warford, 7 Md. 282.

78. Kaminer *v.* Hope, 18 S. C. 561; Walker *v.* Woollaston, 2 P. Wms. 576, 24 Eng. Reprint 868. See also *In re* Colvin, 3 Md. Ch. 278.

79. See *In re* Colvin, 3 Md. Ch. 278. See, however, *infra*, XX, D.

80. Com. *v.* Mateer, 16 Serg. & R. (Pa.) 416; Gallivan *v.* Evans, 1 Ball & B. 191.

If the administrator makes use of the money, he should be charged interest. Com. *v.* Mateer, 16 Serg. & R. (Pa.) 416.

81. Dietrich's Appeal, 2 Watts (Pa.) 332. See *infra*, XX, D.

82. See *In re* Toleman, [1897] 1 Ch. 866, 66 L. J. Ch. 452, 76 L. T. Rep. N. S. 381, 45 Wkly. Rep. 548.

83. Wiley's Estate, 8 Pa. Dist. 419, 22 Pa. Co. Ct. 547.

by statute. Like the limited administrators under the old practice, their duties are generally to collect and preserve the property and to hand over the assets to the general representative when appointed or qualified.[84] Special administrators generally have the authority to bring suit for the protection or preservation of the estate,[85] but under a statute which gives a temporary administrator the power to sue for the collection of debts or personal property of decedent, the temporary administrator cannot institute and maintain an action to recover land alleged to

84. Henderson *v.* Clarke, 27 Miss. 436; *In re* Ford, 29 Mont. 283, 74 Pac. 735; State *v.* Second Judicial Dist. Ct., 18 Mont. 481, 46 Pac. 259; Baskin *v.* Baskin, 4 Lans. (N. Y.) 90; *In re* Parish, 29 Barb. (N. Y.) 627, 8 Abb. Pr. (N. Y.) 336. But see Underhill *v.* Mobile Fire Dept. Ins. Co., 67 Ala. 45, holding that a special administrator appointed with reference to a particular pending suit has the same power of collecting and preserving the assets that a general administrator has.

Obtaining aid of equity.— The temporary administrator of a deceased insolvent who was indebted on accounts as administrator and whose estate was further complicated should obtain from a court of equity authority to keep the estate of the decedent unmolested in his hands until general administration can be granted and all conflicting claims against the estate investigated. Johnson *v.* Brady, 24 Ga. 131.

85. *Alabama.*— Briarfield Iron Works Co. *v.* Foster, 54 Ala. 622.

California.— Forde *v.* Exempt F. Co., 50 Cal. 299.

Georgia.— Wheelus *v.* Long, 73 Ga. 110; Ewing *v.* Moses, 50 Ga. 264.

Indiana.— Bruning *v.* Golden, 159 Ind. 199, 64 N. E. 657.

Iowa.— Masterson *v.* Brown, 51 Iowa 442, 1 N. W. 791.

Maine.— Libby *v.* Cobb, 76 Me. 471.

Mississippi.— See Henderson *v.* Clarke, 27 Miss. 436.

New York.— McMahon *v.* Allen, 4 E. D. Smith 519; Delafield *v.* Parish, 4 Bradf. Surr 24; *In re* Christy, Tuck. Surr. 24.

See 22 Cent. Dig. tit. "Executors and Administrators," § 495.

The scope of his power to bring actions for the preservation of the estate, or for matters relating to the estate, must be ascertained from the statute from which he obtains his authority. Larson *v.* Johnson, 72 Minn. 441, 75 N. W. 699. Thus a statute authorizing the special administrator to maintain actions for the purpose of collecting goods, chattels, and credits, or actions which will aid him in caring for, gathering, or securing crops, or in preserving the property, does not authorize him to maintain an action in his official capacity to set aside a deed made, executed, and delivered to a third person by a decedent in his lifetime (Larson *v.* Johnson, 72 Minn. 441, 75 N. W. 699), nor does the statute authorize him to sue for and recover goods and chattels which have been fraudulently conveyed by the deceased in his lifetime, although the assets of the estate may be insufficient to pay the debts (Richmond *v.* Campbell, 71 Minn. 453, 73 N. W. 1099).

Compromise of suit.— Where a claim for damages in litigation is the only asset of the estate, there being no money to meet the expenses of the suit, the administrator is not bound to continue it, but may compromise with defendant. Grece *v.* Helm, 91 Mich. 450, 51 N. W. 1106. But see Tomlinson *v.* Wright, 12 Ind. App. 292, 39 N. E. 884.

Submitting claims to arbitration.— Under a statute authorizing a special administrator to "do all needful acts under the direction of the court" for the preservation of the property, but forbidding him to take any steps as to the allowance of claims against the estate, he has no power to submit such claims to arbitration. Sullivan *v.* Nicoulin, 113 Iowa 76, 84 N. W. 978.

He may maintain a bill in equity to redeem land of the estate from a mortgage, if the right to redeem might be barred by foreclosure before a general administrator would be qualified. Libby *v.* Cobb, 76 Me. 471.

He may institute suit in chancery for the appointment of a receiver of property in which the estate is interested, to protect the property from destruction or removal beyond his reach. Briarfield Iron Works Co. *v.* Foster, 54 Ala. 622.

An equitable petition to prevent insolvent persons from wasting assets of the estate in their possession may be maintained by a temporary administrator of one who had been an heir at law of another decedent. Pollock *v.* Cox, 108 Ga. 430, 34 S. E. 213.

A suit in equity to have a deed declared a mortgage should be revived after the death of plaintiff, not by the administrator *ad litem*, but by the heirs and general administrator. Grace *v.* Neel, 41 Ark. 165.

Upon the trial of a case made upon an affidavit of illegality, it is not only the right but the duty of the temporary administrator, affiant, the affidavit having been made to arrest the progress of an execution against the estate, to represent the interests of the estate. Barfield *v.* Hartley, 108 Ga. 435, 33 S. E. 1010.

In Texas, under Rev. St. art. 1878, providing that the probate court shall "define the powers" of temporary administrators appointed by it, and article 1882, declaring that they shall have only such powers as are specifically committed to them, a probate court may authorize a husband, as temporary administrator of his wife's property, to prosecute an action already begun by the husband and wife to recover land belonging to her separate estate. Callahan *v.* Houston, 78 Tex. 494, 14 S. W. 1027.

belong to the estate.[86] Special administrators have no power, in the absence of statute, to pay debts[87] or to sell property for their payment;[88] but under the statutes of some states the court may in a proper case direct the special or temporary administrator to pay the debts of the estate,[89] and to sell property for their payment.[90] But even in those jurisdictions where the court has this power, it is limited to the occasions for which provision is made in the statute.[91] In some jurisdictions the temporary administrator has only such powers as the court grants him upon appointment.[92] If the temporary administrator, without authority to institute a suit, begins an action, no subsequent order of the court authorizing the suit can make his act valid.[93] The special administrator has no authority to invest any money of the estate in his hands.[94] He should deposit the money, except

86. Banks *v.* Walker, 112 Ga. 542, 37 S. E. 866.

87. *In re* Wincox, 186 Ill. 445, 57 N. E. 1073 [*affirming* 85 Ill. App. 613]; Supple's Succession, 23 La. Ann. 24; Henderson *v.* Clarke, 27 Miss. 436; *In re* Ford, 29 Mont. 283, 74 Pac. 735 (holding that expenses incurred by a special administrator in the appointment of appraisers were improperly allowed to him in his final settlement, and that he should not receive credit on his final account for expenses incurred by him in publishing notice to creditors); State *v.* Second Judicial Dist. Ct., 18 Mont. 481, 46 Pac. 259; *In re* Parish, 29 Barb. (N. Y.) 627, 8 Abb. Pr. (N. Y.) 336. See also Erwin *v.* Mobile Branch Bank, 14 Ala. 307.

Family allowance to widow.— A special administrator appointed pending proceedings for the removal of the general administrator, the estate being solvent, may be directed to pay the amount which has become due the widow, under an order directing the payment to her of a certain sum for a family allowance. *In re* Welch, 106 Cal. 427, 39 Pac. 805.

If a special administrator pay a note which had been given by him for property purchased for the benefit of the estate and appropriated and used for the benefit thereof, he may claim the right to be reimbursed out of the property of the estate on a proper case made; but the holder of the note cannot look to the estate for the payment of the note unless the special administrator be insolvent. Funderburk *v.* Gorham, 46 Ga. 296.

Under an authority to make reasonable expenses, an item of expense must be shown to have been made in the exercise of prudence by the special administrator; it is not sufficient to show that he incurred the expense in good faith for what he believed was for the best interest of the estate. Powell *v.* Foster, 71 Vt. 160, 44 Atl. 96.

88. Supple's Succession, 23 La. Ann. 24; Henderson *v.* Clarke, 27 Miss. 436. See, however, *supra*, XX, C.

89. Hamersley's Estate, 15 Abb. N. Cas. (N. Y.) 187, 3 Dem. Surr. (N. Y.) 285.

Counsel fees.— When a temporary administrator applies for an order, under N. Y. Civ. Proc. § 2672, to pay his counsel for legal services a certain specified sum, it is the better practice, although section 2672 would justify the order asked for, to permit the administrator to withdraw from deposit funds not exceeding an amount specified, and afford him an opportunity to exercise his own discretion as to a reasonable amount to be paid to counsel, subject to an accounting, and that an order should be granted accordingly. Stokes *v.* Dale, 1 Dem. Surr. (N. Y.) 260.

Prior to the New York act of 1870, chapter 359, the surrogate could not require a special administrator to distribute assets among the creditors of the estate. Berdell *v.* Schell, 2 Dem. Surr. (N. Y.) 292.

90. Matter of Gihon, 27 Misc. (N. Y.) 626, 59 N. Y. Suppl. 494.

91. Kruse *v.* Fricke, 2 Dem. Surr. (N. Y.) 264 (holding that no power exists to order the temporary administrator to pay for the attendance of experts to testify in proceedings for the probate of the will upon the question of the testator's sanity); Matter of Haskett, 3 Redf. Surr. (N. Y.) 165.

Costs of probate proceedings.— The surrogate is without authority to direct a temporary administrator of a decedent's estate to pay thereout any sum as costs of a special proceeding instituted to procure probate of the will. Matter of Aaron, 5 Dem. Surr. (N. Y.) 362. See also Henry *v.* Nevada County Super. Ct., 93 Cal. 569, 29 Pac. 230; Taylor *v.* Minor, 90 Ky. 544, 14 S. W. 544, 12 Ky. L. Rep. 479.

That the administrator exceeded the amount allowed for repairs is not a ground for disallowing the excess, provided the expenditure was reasonable and necessary to keep the property in repair. Moore's Estate, 88 Cal. 1, 25 Pac. 915.

92. Dull *v.* Drake, 68 Tex. 205, 4 S. W. 364; Willis *v.* Pinkard, 21 Tex. Civ. App. 423, 52 S. W. 626 (holding that where the administrator was appointed to "take charge of and care for" the estate, he could not, on levy of execution upon goods alleged to be a part of the estate, file a claimant's oath and bond and enter into litigation in behalf of the estate); Germania L. Ins. Co. *v.* Peetz, (Tex. Civ. App. 1898) 47 S. W. 687.

Paying out money.— He has no authority independent of his order of appointment to pay out the money of the estate for any purpose. Sackett's Estate, 78 Cal. 300, 20 Pac. 863; *In re* Wincox, 186 Ill. 445, 57 N. E. 1073 [*affirming* 85 Ill. App. 613].

93. Willis *v.* Pinkard, 21 Tex. Civ. App. 423, 52 S. W. 626.

94. People *v.* Salomon, 184 Ill. 490. 56 N. E. 815; Baskin *v.* Baskin, 4 Lans. (N. Y.) 90.

such an amount as may be necessary to defray current expenses,[95] with some solvent bank or trust company which will refund the money on demand,[96] but he should try to obtain interest on the money and he will be charged with interest which he might have realized where he has failed so to do through neglect.[97] A special administrator for the collection of a debt is not a representative of the decedent so far as to be liable to an action for the non-performance of the decedent's contracts.[98] The special administrator has no right to the possession or control of the realty of the estate, unless the court so orders and the property is needed for the payment of debts of the estate.[99] The authority of a special or temporary administrator ceases on the appointment of a general administrator,[1] who succeeds to all the rights of the special administrator,[2] and to whom the temporary administrator must, upon the settlement of his account, pay any balance in his hands.[3] If the general administrator sues for property in possession of the former special administrator, the latter may show that the property does not in fact belong to the estate and that the possession belongs to him in capacity of guardian.[4] A proceeding by a temporary administrator for a judicial settlement of his accounts abates upon his death.[5]

E. Receivers. At one time it was the practice in England for the court of chancery to appoint a receiver while litigation was pending, although the ecclesiastical court by granting an administration *pendente lite* might have provided for the collection of the effects of the estate,[6] but now under the statutes[7] the court of chancery will not appoint a receiver when an administrator *pendente lite* has been appointed by the court of probate.[8] Under certain circumstances receivers are appointed in this country.[9] When a receiver is appointed he does not repre-

95. Harrington *v.* Libby, 6 Daly (N. Y.) 259, holding that it is proper for him to retain in his hands a reasonable sum to defray current expenses, upon which sum he should not be charged interest.

96. Baskin *v.* Baskin, 4 Lans. (N. Y.) 90, holding that a deposit payable only after a certain time is a loan, for the failure to pay which by the depositary the administrator is liable.

Deposit with an incorporated trust company is required by N. Y. Code Civ. Proc. § 2678, if the administrator was appointed by the surrogate of the county of New York. See Livermore *v.* Wortman, 25 Hun (N. Y.) 341.

97. Harrington *v.* Libby, 6 Daly (N. Y.) 259.

If he retains the money in his possession instead of depositing as required by law, he will be charged interest at the rate a trust company would have paid unless it appears that he has used the money or made profit on it. Livermore *v.* Wortman, 25 Hun (N. Y.) 341.

98. Nashville, etc., Turnpike Co. *v.* Harris, 8 Humphr. (Tenn.) 558, holding that, although any equity growing out of the liability sought to be enforced by the special administrator may be set up against him, yet an equity arising upon an independent cause of action cannot be set off.

99. Union Trust Co. *v.* Soderer, 171 Mo. 675, 681, 72 S. W. 499 [*distinguishing* and *limiting In re* Soulard, 141 Mo. 642, 43 S. W. 617]. See also Lee *v.* Lee, 74 N. C. 70, holding that the special administrator has no power to enter upon and make leases of land which, on the death of the intestate, descended to the heir at law.

No power to mortgage the realty.— Duryea *v.* Mackey, 151 N. Y. 204, 45 N. E. 458.

1. Cadman *v.* Richards, 13 Nebr. 383, 14 N. W. 159; Matter of Eisner, 5 Dem. Surr. (N. Y.) 383 (holding, however, that his official bond is not, *ipso facto, functus officio*). See also Hayes *v.* Hayes, 175 Ind. 395.

Pending an appeal from the grant of permanent letters he may exercise his authority. Gresham *v.* Pyron, 17 Ga. 263. See, however, Hayes *v.* Hayes, 75 Ind. 395.

2. Cowles *v.* Hayes, 71 N. C. 230.

3. Matter of Philp, 29 Misc. (N. Y.) 263, 61 N. Y. Suppl. 241, holding that N. Y. Code Civ. Proc. § 2743, relating to a decree for distribution after an accounting by an administrator, does not apply to an accounting by a temporary administrator.

4. Burnett *v.* Roberts, 15 N. C. 81; Yarborough *v.* Harris, 14 N. C. 40.

5. Matter of Steencken, 51 N. Y. App. Div. 417, 64 N. Y. Suppl. 660.

6. Blackett *v.* Blackett, 24 L. T. Rep. N. S. 276, 19 Wkly. Rep. 559. See also King *v.* King, 6 Ves. Jr. 172, 31 Eng. Reprint 997.

7. Judicature Act, 20 & 21 Vict. c. 77, §§ 70, 71; Prob. Act (1857).

8. Veret *v.* Duprez, L. R. 6 Eq. 329, 37 L. J. Ch. 552, 18 L. T. Rep. N. S. 501, 16 Wkly. Rep. 750. See also *In re* Parker, 54 L. J. Ch. 694.

9. Boynton *v.* Payrow, 67 Me. 587 (holding that where one since deceased delivered a savings-bank book to a third person as security for a debt, unless his administratrix, within the time fixed by the court, should tender the amount of the pledge, with interest to the date of the tender and costs of process, the court would appoint an officer

sent the legatees,[10] but the property passes into the possession of the court.[11] The receiver may be required to list and pay taxes upon the property of which he has charge.[12]

XXI. Co-Executors and Co-Administrators.

A. Authority — 1. In General. With respect to the representation and management of their decedent's estate, co-executors[13] and co-administrators[14] are regarded in law as one person, and consequently the acts of one of them in relation to the regular administration of the estate are deemed to be the acts of all, inasmuch as they have a joint and entire authority over the whole property.[15] Some cases distinguish between the powers of the two classes of representatives on the ground that, although each executor represents the testator, all the administrators represent the intestate, and hence a single administrator cannot bind his associates,[16] but this distinction has not been followed generally.[17] Where, however, assets or funds arising from the disposal thereof are in the joint custody of the representatives, some cases hold that their action with relation thereto must be joint.[18]

2. Executors Acting as Trustees. As a general rule executors, although clothed

to receive the amount of the deposit and make proper disposition thereof); Harman *v.* McMullen, 85 Va. 187, 7 S. E. 349 (holding that the appointment of a receiver for decedent's estate is the proper remedy where it appears that the administrator has been removed and the sheriff appointed administrator *de bonis non*, that the administered assets will not pay the debts, and that the remaining assets will have to be drawn on, which being once administered, the administrator *de bonis non* could not receive and hold).

10. Fraser *v.* Charleston, 13 S. C. 533.

11. Fraser *v.* Charleston, 11 S. C. 486.

Leave of court to sue.— Before suit can be brought against a receiver, leave of the court by which he was appointed must be obtained. Spalding *v.* Com., 88 Ky. 135, 10 S. W. 420, 10 Ky. L. Rep. 714.

12. Spalding *v.* Com., 88 Ky. 135, 10 S. W. 420, 10 Ky. L. Rep. 714.

13. *Alabama.*— Scruggs *v.* Driver, 31 Ala. 274.

Georgia.— Wilkerson *v.* Wootten, 28 Ga. 568.

Louisiana.— Clark *v.* Farrar, 3 Mart. 247.

Mississippi.— Bodley *v.* McKinney, 9 Sm. & M. 339.

New Jersey.— New York Mut. L. Ins. Co. *v.* Sturges, 33 N. J. Eq. 328.

New York.— Barry *v.* Lambert, 98 N. Y. 300, 50 Am. Rep. 677; Douglass *v.* Satterlee, 11 Johns. 16.

South Carolina.— Chapman *v.* Charleston, 30 S. C. 549, 9 S. E. 591, 3 L. R. A. 311.

United States.— Edmonds *v.* Crenshaw, 14 Pet. 166, 10 L. ed. 402.

England.— Charlton *v.* Durham, L. R. 4 Ch. 433, 20 L. T. Rep. N. S. 467, 17 Wkly. Rep. 995 [*affirming* 38 L. J. Ch. 183]; Owen *v.* Owen, 1 Atk. 494, 26 Eng. Reprint 313; Smith *v.* Everett, 27 Beav. 446, 5 Jur. N. S. 1332, 29 L. J. Ch. 236, 7 Wkly. Rep. 605; Simpson *v.* Gutteridge, 1 Madd. 609, 16 Rev. Rep. 276; *Ex p.* Rigby, 2 Rose 224, 19 Ves. Jr. 463, 34 Eng. Reprint 588; Jacomb *v.* Harwood, 2 Ves. 265, 28 Eng. Reprint 172.

See 22 Cent. Dig. tit. "Executors and Administrators," § 496.

14. *Alabama.*— Scruggs *v.* Driver, 31 Ala. 274.

Delaware.— Lank *v.* Kinder, 4 Harr. 457.

Georgia.— Scruggs *v.* Gibson, 40 Ga. 511.

Indiana.— Herald *v.* Harper, 8 Blackf. 170.

Kentucky.— Hord *v.* Lee, 4 T. B. Mon. 36.

New York.— Matter of Bradley, 25 Misc. 261, 54 N. Y. Suppl. 555; Murray *v.* Blatchford, 1 Wend. 583, 19 Am. Dec. 537; Douglass *v.* Satterlee, 11 Johns. 16.

Pennsylvania.— Reber *v.* Gilson, 1 Pa. St. 54.

South Carolina.— Gage *v.* Johnson, 1 McCord 492.

Texas.— Dean *v.* Duffield, 8 Tex. 235, 58 Am. Dec. 108.

United States.— Boudereau *v.* Montgomery, 3 Fed. Cas. No. 1,694, 4 Wash. 186.

England.— Willand *v.* Fenn, 2 Selw. 767 [*cited* in Jacomb *v.* Harwood, 2 Ves. 265, 267, 28 Eng. Reprint 172]. *Contra*, Hudson *v.* Hudson, 1 Atk. 460, 26 Eng. Reprint 292.

See 22 Cent. Dig. tit. "Executors and Administrators," § 496.

15. Dean *v.* Duffield, 8 Tex. 235, 58 Am. Dec. 108.

16. Jordan *v.* Spiers, 113 N. C. 344, 18 S. E. 327; Gordon *v.* Finlay, 10 N. C. 239; Mangrum *v.* Simms, 4 N. C. 160; Hudson *v.* Hudson, 1 Atk. 460, 26 Eng. Reprint 292. But *compare* Jacomb *v.* Harwood, 2 Ves. 267, 28 Eng. Reprint 172.

17. Hord *v.* Lee, 4 T. B. Mon. (Ky.) 36; Murray *v.* Blatchford, 1 Wend. (N. Y.) 583, 19 Am. Dec. 537; Dean *v.* Duffield, 8 Tex. 235, 58 Am. Dec. 108.

18. Bagby *v.* Hudson, 11 Ky. L. Rep. 581; De Haven *v.* Williams, 80 Pa. St. 480, 21 Am. Rep. 107; Williams *v.* De Haven, 9 Phila. (Pa.) 173; Barton *v.* North Staffordshire R. Co., 38 Ch. D. 458, 57 L. J. Ch. 800, 58 L. T. Rep. N. S. 549, 36 Wkly. Rep. 754. And see Child *v.* Thorley, 16 Ch. D. 151, 29 Wkly. Rep. 417, holding that, without regard to the authority of a co-executor to act in-

with an ultimate duty to act as trustees, are not, until they so act, compelled to act jointly as is the case of trustees generally;[19] but special duties imposed by the will may be such as to demand joint or majority action.[20]

3. Collection and Custody of Assets — a. Collection of Assets.[21] Each executor[22] or administrator[23] has the right to receive all debts due the estate or other assets which may come into his hands and may discharge the debtors. The right to enforce claims due the estate is, however, joint to the extent that a bar as against one representative is a bar as against all.[24]

b. Custody of Assets.[25] Generally speaking the rights of co-executors or co-administrators to the custody and control of assets belonging to the estate are equal,[26] and a representative has apparently no right to prevent his associates from collecting the assets of the estate or holding them in their possession for the purposes of administration,[27] unless in case of mismanagement or of existing or impending insolvency, when a representative may be enjoined from acting further and compelled to restore the assets in his hands,[28] or a receiver may be

dividually, acquiescence of the associate executors in similar acts may protect the person dealing with him. *Contra*, People *v.* Miner, 37 Barb. (N. Y.) 466, 23 How. Pr. (N. Y.) 223; Fesmier *v.* Shannon, 143 Pa. St. 201, 23 Atl. 898; D'Invilliers *v.* Abbot, 4 Wkly. Notes Cas. (Pa.) 124.

A note to the representatives jointly cannot be transferred by one (Smith *v.* Whiting, 9 Mass. 334; Johnson *v.* Mangum, 65 N. C. 146), nor can the maker be released by one (Clark *v.* Gramling, 54 Ark. 525, 16 S. W. 475).

19. Bogert *v.* Hertell, 4 Hill (N. Y.) 492; Fesmier *v.* Shannon, 143 Pa. St. 201, 22 Atl. 898.

20. Werborn *v.* Austin, 77 Ala. 381; Port Gibson Bank *v.* Baugh, 9 Sm. & M. (Miss.) 290; Holcomb *v.* Coryell, 11 N. J. Eq. 476; Holcomb *v.* Holcomb, 11 N. J. Eq. 281.

Construction of wills creating trusts see, generally, Wills.

21. **As to representatives** generally see *supra*, VII.

22. *Kentucky.*— Bagby *v.* Hudson, 11 Ky. L. Rep. 581.

Maine.— Gilman *v.* Healy, 55 Me. 120.

Maryland.— Mitchell *v.* Williamson, 6 Md. 210.

New Jersey.— Duncan *v.* Davison, 40 N. J. Eq. 535, 5 Atl. 93.

New York.— Arkenburgh *v.* Arkenburgh, 27 Misc. 760, 59 N. Y. Suppl. 612.

North Carolina.— Hoke *v.* Fleming, 32 N. C. 263.

Pennsylvania.— Devling *v.* Little, 26 Pa. St. 502.

Rhode Island.— Stone *v.* Union Sav. Bank, 13 R. I. 25.

South Carolina.— Hyatt *v.* McBurney, 18 S. C. 199.

Virginia.— Mills *v.* Mills, 28 Gratt. 442, holding that without deciding whether all executors must join in a deed of release of the reversion, it was not necessary that they join in the receipt of a gross sum paid under the terms of a lease to extinguish the rent.

United States.— Edmonds *v.* Crenshaw, 14 Pet. 166, 10 L. ed. 402.

England.— Charlton *v.* Durham, L. R. 4 Ch. 433, 20 L. T. Rep. N. S. 467, 17 Wkly. Rep. 995 [*affirming* 38 L. J. Ch. 183]; *Ex p.* Shakeshaft, 3 Bro. Ch. 198, 29 Eng. Reprint 488.

See 22 Cent. Dig. tit. "Executors and Administrators," § 498.

A note payable to one executor which belongs to the estate may be enforced by the co-executors without indorsement to them. Leland *v.* Manning, 4 Hun (N. Y.) 7.

23. *Kentucky.*— Bryan *v.* Thompson, 7 J. J. Marsh. 586.

Maine.— Shaw *v.* Berry, 35 Me. 279, 58 Am. Dec. 702.

New York.—Murray *v.* Blatchford, 1 Wend. 583, 19 Am. Dec. 537.

South Carolina.— Gage *v.* Johnson, 1 McCord 492.

Vermont.— Gleason *v.* Lillie, 1 Aik. 28.

See 22 Cent. Dig. tit. "Executors and Administrators," § 498.

Contra.— Hudson *v.* Hudson, 1 Atk. 460, 26 Eng. Reprint 292, holding that one administrator cannot release a debt so as to bind his fellow; otherwise as to an executor, for each entirely represents the testator. But one administrator may bar both by his release, if the releasee is accountable to them in their own right, and not as administrators. *Compare* Willand *v.* Fenn, 2 Selw. 767; Jacomb *v.* Harwood, 2 Ves. 265, 28 Eng. Reprint 172.

Distraint for rent may issue on the affidavit of one administrator. Scruggs *v.* Gilson, 40 Ga. 511.

24. Turner *v.* Debell, 2 A. K. Marsh. (Ky.) 383.

25. **As to representatives** generally see *supra*, VIII, A, 2.

26. Gates *v.* Whetstone, 8 S. C. 244, 28 Am. Rep. 284; Edmonds *v.* Crenshaw, 14 Pet. (U. S.) 166, 10 L. ed. 402.

27. Hall *v.* Carter, 8 Ga. 388; Sanford *v.* Sanford, 45 N. Y. 723; Burt *v.* Burt, 41 N. Y. 46.

Contracts as to custody between the executors may be sustained. Berry *v.* Tart, 1 Hill (S. C.) 4.

28. Wood *v.* Brown, 34 N. Y. 337; Elmendorf *v.* Lansing, 4 Johns. Ch. (N. Y.) 562.

appointed,[29] who may act with the remaining solvent executors if they consent; otherwise there should be an appointment generally.[30] By statute, in New York, the surrogate may compel moneys of the estate to be deposited to the joint credit of co-executors.[31]

4. Custody of Books and Papers.[32] The title of co-executors to books and papers is equal; each is entitled to inspect and to know what they contain,[33] but it appears a majority may agree in whose manual custody they shall be.[34]

5. Sale and Transfer or Assignment of Assets — a. In General.[35] As a general rule one of two or more executors possesses the power of selling and disposing of the personal assets of the estate as fully as if all join in the act of transfer,[36] and the same is true of administrators.[37] In some cases an exception to this rule has been made in case of obligations taken to the representatives jointly;[38] but there would seem to be no reason therefor where the obligation is in fact an asset of the estate.[39]

b. Indorsement and Transfer of Negotiable Instruments.[40] One co-executor[41] or co-administrator[42] may assign a note made payable to the testator.

6. Payment of Debts. The authority of one of several representatives to allow or pay a claim against the estate is treated elsewhere.[43]

29. Jenkins *v.* Jenkins, 1 Paige (N. Y.) 243; Middleton *v.* Dodswell, 13 Ves. Jr. 266, 33 Eng. Reprint 294.

30. Jenkins *v.* Jenkins, 1 Paige (N. Y.) 243.

31. *In re* Hoagland, 51 N. Y. App. Div. 347, 64 N. Y. Suppl. 920; Matter of Eisner, 6 N. Y. App. Div. 563, 39 N. Y. Suppl. 718; Matter of Adler, 60 Hun (N. Y.) 481, 15 N. Y. Suppl. 227; Chambers *v.* Cruikshank, 5 Dem. Surr. (N. Y.) 414. See *supra*, VIII, A, 5.

Limitation of surrogate's power.— The surrogate can direct and control the conduct of executors only in the manner prescribed by statute. He cannot compel one executor to transfer to the other funds of the estate for the purpose of paying counsel. Thompson *v.* Mott, 1 Dem. Surr. (N. Y.) 32.

32. As to representatives generally see *supra*, VIII, A, 3.

33. Matter of Stein, 33 Misc. (N. Y.) 542, 68 N. Y. Suppl. 933, holding that an application for an order directing a co-executor to permit inspection of books and papers by an associate was not a special proceeding which must be commenced by citation, but that a remedy was afforded under the section of the statutes conferring on the surrogate authority to give directions when two or more co-executors disagree respecting the custody of the property of the estate.

34. Bronson *v.* Bronson, 48 How. Pr. (N. Y.) 481.

35. As to representatives generally see *supra*, VIII, P, 2.

36. Dwight *v.* Newell, 15 Ill. 333; New York Mut. L. Ins. Co. *v.* Sturges, 33 N. J. Eq. 328; Bogert *v.* Hertell, 4 Hill (N. Y.) 492 [*reversing* 9 Paige 52]; Wheeler *v.* Wheeler, 9 Cow. (N. Y.) 34; Chalfont *v.* Johnston, 3 Yeates (Pa.) 16.

An assignment of a mortgage, the property of the estate, may be made by one executor. George *v.* Baker, 3 Allen (Mass.) 326 note.

Corporate stock registered in the joint names of the executors forms an exception to the rule stated in the text, such a case being governed by the peculiar rules fixing the liability of a corporation with regard to the transfer of its stock. Barton *v.* North Staffordshire R. Co., 38 Ch. D. 458, 57 L. J. Ch. 800, 58 L. T. Rep. N. S. 549, 36 Wkly. Rep. 754, holding that where a co-executor transferred stock registered in the names of himself and his co-executor by forging the signature of his associate, the innocent executor might bring an action against him and the corporation which made the transfer on its books.

37. Beecher *v.* Buckingham, 18 Conn. 110, 44 Am. Dec. 580. *Contra*, Gordon *v.* Finlay, 10 N. C. 239.

38. Clark *v.* Gramling, 54 Ark. 525, 16 S. W. 475 (holding that one administrator could not release the maker of a note payable to the administrators jointly for less than the amount due); Sanders *v.* Blain, 6 J. J. Marsh. (Ky.) 446, 22 Am. Dec. 86; Smith *v.* Whiting, 9 Mass. 334; Johnson *v.* Mangum, 65 N. C. 146.

39. See Bogert *v.* Hertell, 4 Hill (N. Y.) 492 [*reversing* 9 Paige 52] (holding that one executor had authority to transfer a bond and mortgage given the executors as proceeds of conversion of realty); Mackay *v.* St. Mary's Church, 15 R. I. 121, 23 Atl. 108, 2 Am. St. Rep. 881. *Compare* Sutherland *v.* Brush, 7 Johns. Ch. (N. Y.) 17, 11 Am. Dec. 383.

40. As to representatives generally see *supra*, VIII, P, 2, a, (III), (B).

41. Dwight *v.* Newell, 15 Ill. 333; Wheeler *v.* Wheeler, 9 Cow. (N. Y.) 34; Geddes *v.* Simpson, 2 Bay (S. C.) 533.

42. Sanders *v.* Blain, 6 J. J. Marsh. (Ky.) 446, 22 Am. Dec. 86; Mackay *v.* St. Mary's Church, 15 R. I. 121, 23 Atl. 108, 2 Am. St. Rep. 881; Mosely *v.* Graydon, 4 Strobh. (S. C.) 7.

43. See *supra*, X, B, 14, a, (V).

7. Contracts, Deposits, and Investments — a. Contracts Generally.[44] Since, as the rule is generally stated, a co-executor or co-administrator cannot act singly with regard to those acts which may affect the personal responsibility of his co-representative,[45] he cannot, by his individual act, create a debt against the estate[46] or make a new contract with respect thereto so as to bind his associates.[47]

b. Acknowledgment of or New Promise to Pay Debt. The power of one of several representatives to make a valid new promise to pay a debt barred by the statute of limitations has already been discussed.[48]

c. Deposits.[49] Where a deposit has been made by the executors to their joint account, one cannot make a valid check thereon or receipt therefor.[50]

d. Investments.[51] When a power of investment is conferred on the executors by the will, they become subject to the rule applicable to trustees requiring joint action.[52]

8. Admissions. The effect of admissions by one representative as against his associates and the estate is elsewhere treated.[53]

9. Compositions, Compromises, and Releases.[54] The power to collect the assets of the estate confers on a single representative the power to release an obligation by which a debt is secured,[55] and by later authorities the same power is possessed, even in cases where the obligation has been taken to the representatives jointly.[56] A single representative cannot, however, release a security except on payment,[57]

44. As to representatives generally see *supra*, VIII, D.

45. Scruggs *v.* Driver, 31 Ala. 274.

46. Cayuga County Bank *v.* Bennett, 5 Hill (N. Y.) 236; McIntire *v.* Morris, 14 Wend. (N. Y.) 90; Forsyth *v.* Ganson, 5 Wend. (N. Y.) 558, 21 Am. Dec. 241; Hammon *v.* Huntley, 4 Cow. (N. Y.) 493; James *v.* Hackley, 16 Johns. (N. Y.) 273; Hall *v.* Boyd, 6 Pa. St. 267.

Borrowing for benefit of estate must be with consent of the co-executor, which cannot be presumed from the purpose of the loan. Bryan *v.* Stewart, 83 N. Y. 270.

Execution of notes.— One of several executors acting alone cannot bind the estate by making or indorsing notes, even though in renewal of notes made by testator. Bailey *v.* Spofford, 14 Hun (N. Y.) 86.

Contracts for services made by an executor are not binding on the estate (Freeman *v.* Brunswick, 14 Wkly. Notes Cas. (Pa.) 327), but they may be binding *inter sese* (Arkenburgh *v.* Arkenburgh, 27 Misc. (N. Y.) 760, 59 N. Y. Suppl. 612, holding that an attorney for one of two executors, who collected money belonging to the estate, is entitled thereto, as against the co-executor, where he had performed services for the estate in excess of the amount collected, and had claimed a lien on the sum collected, and thereafter the executor at whose request he had rendered his services agreed that he should retain it and apply it on account of such services).

Contracts to purchase property by one of two joint executors without the concurrence of his co-executor are not binding on the estate. Scruggs *v.* Driver, 31 Ala. 274. And see Wilson *v.* Mason, 158 Ill. 304, 42 N. E. 134, 49 Am. St. Rep. 162.

An agreement terminating a lease may be made by one of several administrators if he believes continuance to be injurious to the estate, and such agreement being entered on the lease and bond securing rent binds the estate, and may be enforced by an action of debt on the bond against all the administrators. Reber *v.* Gilson, 1 Pa. St. 54.

47. Turner *v.* Hardey, 1 Dowl. P. C. N. S. 954, 11 L. J. Exch. 277, 9 M. & W. 770.

48. See *supra*, X, A, 18, b, (III).

49. As to representatives generally see *supra*, VIII, A, 5.

50. De Haven *v.* Williams, 80 Pa. St. 480, 21 Am. Rep. 107. See also Allen *v.* Louisiana Nat. Bank, 50 La. Ann. 366, 23 So. 360, holding that this could not be done over the positive protest of a co-executor.

51. As to representatives generally see *supra*, VIII, E.

52. Wilson *v.* Mason, 158 Ill. 304, 42 N. E. 134 [*affirming* 57 Ill. App. 325]; Holcomb *v.* Coryell, 11 N. J. Eq. 476; Holcomb *v.* Holcomb, 11 N. J. Eq. 281. But see Fesmier *v.* Shannon, 143 Pa. St. 201, 22 Atl. 898.

Investments by executors as trustees see, generally, Trusts.

53. See Evidence, 16 Cyc. 1036, 1037.

54. As to representatives generally see *supra*, VII, K, L.

55. Stuyvesant *v.* Hall, 2 Barb. Ch. (N. Y.) 151 (holding that he may release a portion of the premises included in a mortgage); Weir *v.* Mosher, 19 Wis. 311.

56. People *v.* Miner, 37 Barb. (N. Y.) 466, 23 How. Pr. (N. Y.) 223 [*reversing* 32 Barb. 612]; Arkenburgh *v.* Arkenburgh, 27 Misc. (N. Y.) 760, 59 N. Y. Suppl. 612; Fesmire *v.* Shannon, 143 Pa. St. 201, 22 Atl. 898; De Invilliers *v.* Abbott, 12 Phila. (Pa.) 462, 4 Wkly. Notes Cas. (Pa.) 124. *Contra*, Pearce *v.* Savage, 51 Me. 410.

57. Stuart *v.* Abbott, 9 Gratt. (Va.) 252. But see New York Mut. L. Ins. Co. *v.* Sturges, 33 N. J. Eq. 328, holding that a single executor intrusted with the active management of the estate may agree to postpone the lien of a mortgage held by the estate.

nor can he compromise a debt,[58] or release a promise made to an associate individually.[59]

10. Submission to Arbitration.[60] One of several representatives may submit to arbitration a matter which would have been properly submitted had he been the sole representative.[61]

11. Confession of Judgment.[62] An individual executor has no power to confess a judgment which will bind the estate or his associates,[63] nor has an individual administrator.[64]

12. Sale and Conveyance of Real Property.[65] At common law a mere naked power of sale as distinguished from a power coupled with an interest could not be exercised by less than the entire number of executors appointed.[66] This rule was modified by statute as to cases in which a portion of the executors refused,[67] and as so modified was adopted as a portion of the common law of the United States,[68] and it may now be said to be the general rule in the United States that a power of sale unless expressly restricted may be exercised by the representatives who qualify or survive.[69] In some jurisdictions the renunciation of executors

58. Jordan *v.* Spiers, 113 N. C. 344, 18 S. E. 327 (holding that since one of several administrators had no authority to compromise a judgment for damages and extend the time of payment, an agreement by him attempting so to do did not operate to discharge a surety on a bond given for the payment of such damages); Mangrum *v.* Simms, 4 N. C. 160. But *compare* Smith *v.* Everett, 27 Beav. 446, 5 Jur. N. S. 1332, 29 L. J. Ch. 236, 7 Wkly. Rep. 605.

Ratification by one of two administrators of an agreement by the other administrator to compromise a claim due the estate is not shown where his only positive act was the repudiation thereof by a reply to a supplemental answer setting it up. Jordan *v.* Spiers, 113 N. C. 344, 18 S. E. 327.

59. Gleason *v.* Lillie, 1 Aik. (Vt.) 28.

60. As to representatives generally see *supra*, V, I.

61. Lank *v.* Kinder, 4 Harr. (Del.) 457; Grace *v.* Sutton, 5 Watts (Pa.) 540. See also McIntire *v.* Morris, 14 Wend. (N. Y.) 90.

62. As to representatives generally see *supra*, V, J.

63. Hall *v.* Boyd, 6 Pa. St. 267 (so holding when the debt was barred by limitations); Karl *v.* Black, 2 Pittsb. (Pa.) 19; Nason *v.* Smalley, 8 Vt. 118; Elwell *v.* Quash, 1 Str. 20; Lepard *v.* Vernon, 2 Ves. & B. 51, 13 Rev. Rep. 605, 35 Eng. Reprint 237; Commercial Bank *v.* Woodruff, 21 U. C. Q. B. 602. *Contra*, Simpson *v.* Guttridge, 1 Madd. 609, 16 Rev. Rep. 276.

64. Heisler *v.* Knipe, 1 Browne (Pa.) 319.

65. As to representatives generally see *supra*, VIII, O, 9, d.

66. Holcomb *v.* Coryell, 11 N. J. Eq. 476; Holcomb *v.* Holcomb, 11 N. J. Eq. 281; Sharpsteen *v.* Tillou, 3 Cow. (N. Y.) 651; Ferre *v.* American Bd. Com'rs, 53 Vt. 162.

Where a testator authorized his executors or a majority of them to sell and convey the land, a deed made by less than a majority did not pass the title at law. Carmichal *v.* Elmendorf, 4 Bibb (Ky.) 484.

Where no appointment is made by the will as to who is to execute a power of sale, a purchaser from the surviving executor acquires a good title, and such sale will be held valid. Lloyd *v.* Taylor, 1 Yeates (Pa.) 422, 2 Dall. (Pa.) 223, 1 L. ed. 357.

67. St. 21 Hen. VIII, c. 4.

68. Clinefelter *v.* Ayres, 16 Ill. 329.

69. *Alabama.*— Leavens *v.* Butler, 8 Port. 380. The statute does not apply to a discretionary power of sale held by the executors as a personal trust. Tarver *v.* Haines, 55 Ala. 503.

Florida.— Stewart *v.* Mathews, 19 Fla. 752.

Georgia.— Wolfe *v.* Hines, 93 Ga. 329, 20 S. E. 322.

Illinois.— Wardwell *v.* McDowell, 31 Ill. 364; Clinefelter *v.* Ayres, 16 Ill. 329, holding that the refusal of co-executors to act must be shown satisfactorily by the record.

Kentucky.— The English statute has been substantially adopted (Ross *v.* Clore, 3 Dana 189; Muldrow *v.* Fox, 2 Dana 74; Anderson *v.* Turner, 3 A. K. Marsh. 131; Wooldridge *v.* Watkins, 3 Bibb 349), and has been held not to extend to discretionary powers (Smith *v.* Moore, 6 Dana 417; Muldrow *v.* Fox, 2 Dana 74).

Michigan.— Herrick *v.* Carpenter, 92 Mich. 440, 52 N. W. 747.

Mississippi.— Bartlett *v.* Sutherland, 24 Miss. 395 (holding that the statute does not apply to a discretionary power); Bodley *v.* McKinney, 9 Sm. & M. 339. But see Clark *v.* Hornthal, 47 Miss. 434.

Missouri.— Phillips *v.* Stewart, 59 Mo. 491.

New Jersey.— Weimer *v.* Fath, 43 N. J. L. 1; Corlies *v.* Little, 14 N. J. L. 373; Rutherford Land, etc., Co. *v.* Sanntrock, (Ch. 1899) 44 Atl. 938; Denton *v.* Clark, 36 N. J. Eq. 534; Coykendall *v.* Rutherford, 2 N. J. Eq. 360, holding that a provision in a will giving full power to the executors "and to a majority of them, and to a majority of the survivors of them," does not indicate an intention of the testator against allowing a sole executor who qualified to sell.

New York.— Correll *v.* Lauterbach, 12 N. Y. App. Div. 531, 42 N. Y. Suppl. 143 [*affirmed* in 159 N. Y. 553, 54 N. E. 1089]; House *v.* Raymond, 3 Hun 44, 5 Thomps. & C. 248

who fail to act must be formal and of record to enable the other executor to convey,[70] but in others it may be established as any other fact.[71] All who have qualified must join in conveying,[72] unless it is otherwise provided by statute.[73] On the refusal of a co-executor to join in a proper sale by his associate he may be compelled by the court to do so.[74] A co-executor may dispose of what personal interest he possesses in the estate without the consent of his associates.[75]

(holding the statute applicable to discretionary powers); Meakings *v.* Cromwell, 2 Sandf. 512 [*affirmed* in 5 N. Y. 136]; Roseboom *v.* Mosher, 2 Den. 61; Jackson *v.* Ferris, 15 Johns. 346; Bunner *v.* Storm, 1 Sandf. Ch. 357. *Compare* Matter of Bull, 45 Barb. 334, 31 How. Pr. 69.

North Carolina.— Smith *v.* McCrary, 38 N. C. 204; Wood *v.* Sparks, 18 N. C. 389, holding that a formal renunciation need not be established.

Ohio.— Collier *v.* Grimesey, 36 Ohio St. 17; Taylor *v.* Galloway, 1 Ohio 232, 13 Am. Dec. 605.

Pennsylvania.— Heron *v.* Hoffner, 3 Rawle 393; Taylor *v.* Adams, 2 Serg. & R. 534, 7 Am. Dec. 665. But see Zebach *v.* Smith, 3 Binn. 69, 5 Am. Dec. 352.

Rhode Island.— Wood *v.* Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198.

South Carolina.— Jennings *v.* Teague, 14 S. C. 229; Uldrick *v.* Simpson, 1 S. C. 283; Chanet *v.* Villeponteaux, 3 McCord 29; Britton *v.* Lewis, 8 Rich. Eq. 271.

Tennessee.— Bedford *v.* Bedford, 110 Tenn. 204, 75 S. W. 1017; Fitzgerald *v.* Standish, 102 Tenn. 383, 52 S. W. 294; Robertson *v.* Gaines, 2 Humphr. 367.

Texas.— Johnson *v.* Bowden, 43 Tex. 670; McCown *v.* Terrell, 9 Tex. Civ. App. 66, 29 S. W. 484.

Virginia.— Davis *v.* Christian, 15 Gratt. 11 (holding that a power will survive, although a discretion is given in regard to its exercise); Geddy *v.* Butler, 3 Munf. 345.

See 22 Cent. Dig. tit. "Executors and Administrators," § 525.

A statute of a seceding state attempting to authorize resident executors to convey without joinder of those resident in non-seceding states does not validate a sale made under its sanction. Lipse *v.* Spears, 88 Fed. 952.

70. Clinefelter *v.* Ayres, 16 Ill. 329; Neel *v.* Beach, 92 Pa. St. 221; Heron *v.* Hoffner, 3 Rawle (Pa.) 393.

71. Roseboom *v.* Mosher, 2 Den. (N. Y.) 61; Robertson *v.* Gaines, 2 Humphr. (Tenn.) 367, holding that a neglect to qualify is *prima facie* evidence of refusal to act and will validate a sale by the acting executor.

A presumption of renunciation by an executor may arise from acquiescence of heirs and lapse of time. Eskridge *v.* Patterson, 78 Tex. 417, 14 S. W. 1000.

72. *Illinois.*— Wilson *v.* Mason, 158 Ill. 304, 42 N. E. 134, 49 Am. St. Rep. 162 [*affirming* 57 Ill. App. 325].

Kentucky.— Smith *v.* Shackleford, 9 Dana 452.

North Carolina.— Wassom *v.* King, 19 N. C. 262.

Ohio.— Fleischman *v.* Shoemaker, 2 Ohio Cir. Ct. 152, 1 Ohio Cir. Dec. 415.

Pennsylvania.— Kling *v.* Hummer, 2 Penr. & W. 349.

Texas.— Hart *v.* Rust, 46 Tex. 556.

Virginia.— Nelson *v.* Carrington, 4 Munf. 332, 6 Am. Dec. 519; McRae *v.* Farrow, 4 Hen. & M. 444.

See 22 Cent. Dig. tit. "Executors and Administrators," § 505.

But see Stockdale *v.* McKown, 1 Nott & M. (S. C.) 41.

An executor who has renounced his office may unite with another who has not done so in the execution of a joint discretionary trust. Robinson *v.* Redman, 2 Duv. (Ky.) 82.

Mistake.— A contract of sale of realty entered into by one executor under a mistaken belief that his co-executor acquiesces therein will not be specifically enforced. Sneesby *v.* Thorne, 7 De G. M. & G. 399, 1 Jur. N. S. 1058, 3 Wkly. Rep. 605, 56 Eng. Ch. 309, 44 Eng. Reprint 156.

Ratification of acts of associate.— If a written agreement for a sale of land by executors be signed by the purchaser and one only of two acting executors the other may by his conduct so assent to the sale as to make it his own act, as by delivering possession and the like. Nelson *v.* Carrington, 4 Munf. (Va.) 332, 6 Am. Dec. 519.

Executors who have qualified in a foreign state need not join the sole resident qualified executor in a sale of realty within the state. Correll *v.* Lauterbach, 12 N. Y. App. Div. 531, 42 N. Y. Suppl. 143.

A sale to executors themselves over the dissent of a co-executor cannot be sustained. Holcomb *v.* Holcomb, 11 N. J. Eq. 281.

Equitable title.— A deed made under order of court and reciting payment of the purchase-money is, it seems, sufficient to convey an equitable title, although a co-administrator does not join. Harrison *v.* McMurray, 71 Tex. 122, 8 S. W. 612, so holding but deciding the deed to be of importance only as establishing the boundaries of a tract to which title might be claimed by adverse possession.

73. Carroll *v.* Stewart, 4 Rich. (S. C.) 200, holding that under the act of 1837 (5 St. at L. p. 15), making it lawful for the executors of a will "or the majority of such executors as shall qualify" in certain cases to sell and convey the lands of their testator, one of two cannot sell and convey.

74. Love *v.* Love, 3 Hayw. (Tenn.) 13.

75. *Ex p.* Sheffield Union Banking Co., 13 L. T. Rep. N. S. 477.

Effect of conveyance.— Where a power to convey either jointly or separately is con-

13. Lease.[76] One executor[77] or administrator[78] may assign a lease. A statutory requirement of majority action by co-representatives is applicable to their execution of a lease.[79]

14. Mortgage or Pledge — a. Personal Property.[80] The power of individual disposition of the decedent's personalty empowers a representative to pledge the assets of the estate for the payment of its debts,[81] and although a pledge has been collusive for the payment of the representative's individual obligation, yet, where the assets have passed to an innocent purchaser they cannot be recovered from him without reimbursing him.[82]

b. Real Property.[83] A testamentary power to mortgage must be exercised in pursuance of its terms.[84] With regard to his ultimate beneficial interest, the executor may act individually.[85]

B. Liabilities — 1. In General. As a general rule the liability of an executor or administrator extends only to the assets actually received by him.[86] A

ferred on the executor, a conveyance by one only, while operative to transfer his interest, does not transfer the interest of the others unless made in pursuance of the authority given by the will. Hite *v.* Shrader, 3 Litt. (Ky.) 444.

76. As to representatives generally see *supra*, VIII, O, 10.

77. Simpson *v.* Gutteridge, 1 Madd. 609, 16 Rev. Rep. 276.

78. Lewis *v.* Ringo, 3 A. K. Marsh. (Ky.) 247.

79. Utah L. & T. Co. *v.* Garbutt, 6 Utah 342, 23 Pac. 758, holding that under statutes requiring the majority action of co-executors, and also requiring a written authority to authorize an agent to execute a lease for more than one year, such a lease could not be executed by a single executor without a written authorization from his associates.

80. As to representatives generally see *supra*, VIII, P. 3.

81. Wheeler *v.* Wheeler, 9 Cow. (N. Y.) 34, holding that one of several executors may assign a note belonging to the estate of the testator as collateral security for a judgment obtained against the estate, and his act will bind his co-executors.

82. Bailie *v.* Kinchley, 52 Ga. 487 (holding that an authority "to sell, exchange, or otherwise dispose of any portion or all of my estate," is broad enough to empower the executors to raise money by pledging notes of the estate to a reasonable amount as collateral security, and if such money is advanced to one executor in good faith, the other cannot, without repayment, maintain trover for the notes, although the money was not used for the benefit of the estate); Wood's Appeal, 92 Pa. St. 379, 37 Am. Rep. 694 (so holding, although certificates of stock pledged showed on their face that title came from the executor).

83 As to representatives generally see *supra*, VIII, O, 11.

84. Port Gibson Bank *v.* Baugh, 9 Sm. & M. (Miss.) 290, holding that where the testator conferred a power to mortgage and also directed that the executors should exercise their powers jointly, an individual executor could not bind the estate by the execution of a note and mortgage.

85. *Ex p.* Sheffield Union Banking Co., 13 L. T. Rep. N. S. 477, holding that one of two executors who has a beneficial interest in property may create a good equitable mortgage of such interest by depositing the title deeds relating thereto and signing a memorandum of deposit, although he makes the deposit without the consent of his co-executor. But *compare In re* Ingham, [1893] 1 Ch. 352, 62 L. J. Ch. 100, 68 L. T. Rep. N. S. 152, 3 Reports 126, 41 Wkly. Rep. 235.

86. *Kentucky.*—Young *v.* Wickliffe, 7 Dana 447, holding that whether or not one executor can be made liable for a devastavit committed by another depends upon facts which must be submitted to a jury, as to his exercise of executorial authority over the assets wasted, his aid in their acquisition or disposal, etc.

New Jersey.—Bellerjeau *v.* Kotts, 4 N. J. L. 359; Bechtold *v.* Read, (Ch. 1893) 28 Atl. 264; Young *v.* Schelly, (Ch. 1891) 21 Atl. 1049; King *v.* Foerster, 61 N. J. Eq. 584, 47 Atl. 505.

New York.— White *v.* Bullock, 20 Barb. 91.

Pennsylvania.— Ripple's Estate, 9 Kulp 66.

South Carolina.— Gates *v.* Whetstone, 8 S. C. 244, 28 Am. Rep. 284.

Tennessee.— Adams *v.* Gleaves, 10 Lea 367.

United States.— U. S. Bank *v.* Beverley, 1 How. 134, 11 L. ed. 75; Peter *v.* Beverly, 10 Pet. 532, 9 L. ed. 522.

Canada.— Darling *v.* Brown, 2 Can. Supreme Ct. 26, 21 L. C. Jur. 125; Miller *v.* Coleman, 25 L. C. Jur. 196.

See 22 Cent. Dig. tit. "Executors and Administrators," § 522.

Where separate custody of assets is not established, the representatives will be charged equally, as where the accounts are kept so loosely that it cannot be determined in whose hands the particular assets are (Brotten *v.* Bateman, 17 N. C. 115, 22 Am. Dec. 732), or where it does not appear how much of the purchase-money each executor who joined in a conveyance received (Bechtold *v.* Read, (N. J. Ch. 1893) 28 Atl. 264).

A receipt given to a co-executor and certified by the ordinary for the whole estate of the testator is conclusive as between the executor and the legatees in the absence of fraud.

co-executor who has not had possession of the assets of the estate, and who has not concurred in or negligently permitted a devastavit by his associates is not liable therefor,[87] and the same rule applies to a co-administrator under similar circumstances.[88] The representative is of course liable for his own acts,[89] or those of his co-representatives in which he concurs.[90]

2. As Dependent on Nature of Bond. When representatives give a joint bond, they are responsible each for the acts of the other,[91] but this does not change the

Edmonds *v.* Crenshaw, Harp. Eq. (S. C.) 224.

Under the Louisiana code executors are liable jointly and severally for the property subject to the executorship. Doriocourt *v.* Jacobs, 1 La. Ann. 214; Baldwin *v.* Carleton, 11 Rob. 109. See also St. Andre *v.* Rachal, 3 La. Ann. 574, holding that administrators who qualify jointly and whose duties are not severed are liable *in solido* for the proceeds of property coming into their hands. Where one seeks to escape liability, he must show that the dilapidation of the funds received was not the result of his neglect of duty.

87. *Alabama.*— Turner *v.* Wilkins, 56 Ala. 173.

Georgia.— Kerr *v.* Waters, 19 Ga. 136; Hall *v.* Carter, 8 Ga. 388; Cameron *v.* Justices Richmond County Inferior Ct., 1 Ga. 36, 44 Am. Dec. 636.

Kentucky.— Lawrence *v.* Lawrence, Litt. Sel. Cas. 123; Moore *v.* Tandy, 3 Bibb 97.

New Jersey.— Van Pelt *v.* Veghte, 14 N. J. L. 207; Fennimore *v.* Fennimore, 3 N. J. Eq. 292.

New York.— Wilmerding *v.* McKesson, 103 N. Y. 329, 8 N. E. 665 [*reversing* 28 Hun 184]; Croft *v.* Williams, 88 N. Y. 384; Sutherland *v.* Brush, 7 Johns. Ch. 17, 11 Am. Dec. 383; Cocks *v.* Barlow, 5 Redf. Surr. 406.

North Carolina.— Kerr *v.* Kirkpatrick, 43 N. C. 137; Williams *v.* Maitland, 36 N. C. 92; Worth *v.* McAden, 21 N. C. 199; Clarke *v.* Cotton, 17 N. C. 51.

Pennsylvania.— Graham's Estate, 8 Pa. Dist. 479, 22 Pa. Co. Ct. 540.

South Carolina.— Anderson *v.* Earle, 9 S. C. 460; Gates *v.* Whetstone, 8 S. C. 244, 28 Am. Rep. 284; Clarke *v.* Jenkins, 3 Rich. Eq. 318.

Tennessee.— Fulton *v.* Davidson, 3 Heisk. 614.

Vermont.— Sparhawk *v.* Buell, 9 Vt. 41.

Virginia.— Boyd *v.* Boyd, 3 Gratt. 113; Myrick *v.* Adams, 4 Munf. 366.

United States.— U. S. Bank *v.* Beverley, 1 How. 134, 11 L. ed. 75; Peter *v.* Beverly, 10 Pet. 532, 9 L. ed. 522.

England.— Littlehales *v.* Gascoyne, 3 Bro. Ch. 73, 29 Eng. Reprint 416; Hargthorpe *v.* Milforth, Cro Eliz. 318.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 508, 522.

88. *Delaware.*— State *v.* Belin, 5 Harr. 400.

Indiana.— Davis *v.* Walford, 2 Ind. 88; Ray *v.* Doughty, 4 Blackf. 115, holding that although the administratrix who committed a devastavit was a minor, her co-administratrix was not liable therefor.

Kentucky.— Roach *v.* Hubbard, Litt. Sel. Cas. 235; Moore *v.* Tandy, 3 Bibb 97.

New York.— Matter of Hall, 14 N. Y. St. 540; Matter of Hall, 5 Dem. Surr. 42.

South Carolina.— O'Neall *v.* Herbert, McMull. Eq. 495; Knox *v.* Picket, 4 Desauss. 92; Lenoir *v.* Winn, 4 Desauss. 65, 6 Am. Dec. 597.

See 22 Cent. Dig. tit. "Executors and Administrators," §§ 508, 522.

89. *California.*— *In re* Sanderson, (1887) 13 Pac. 497; Abila *v.* Burnett, 33 Cal. 658.

Illinois.— Crain *v.* Kennedy, 85 Ill. 340.

Indiana.— Call *v.* Ewing, 1 Blackf. 301.

Kentucky.— McCampbell *v.* Gilbert, 6 J. J. Marsh. 592.

New Jersey.— Van Pelt *v.* Veghte, 14 N. J. L. 207.

New York.— Williams *v.* Holden, 4 Wend. 223; Douglas *v.* Satterlee, 11 Johns. 16.

Virginia.— Templeman *v.* Fauntleroy, 3 Rand. 434.

United States.— Edmonds *v.* Crenshaw, 14 Pet. 166, 10 L. ed. 402.

Canada.— Hoffman *v.* Pfeiffer, 7 Quebec 125.

See 22 Cent. Dig. tit. "Executors and Administrators," § 508.

90. Bechtold *v.* Read, 49 N. J. Eq. 111, 22 Atl. 1085; *In re* Irvine, 203 Pa. St. 602, 53 Atl. 502; Geiger's Appeal, 1 Mona. (Pa.) 547, 16 Atl. 851; Williams *v.* Mower, 29 S. C. 332, 7 S. E. 505; Mathews *v.* Mathews, McMull. Eq. (S. C.) 410; Johnson *v.* Johnson, 2 Hill Eq. (S. C.) 277, 29 Am. Dec. 72; Waring *v.* Purcell, 1 Hill Eq. (S. C.) 193; Hughlett *v.* Hughlett, 5 Humphr. (Tenn.) 453; Deaderick *v.* Cantrell, 10 Yerg. (Tenn.) 263, 31 Am. Dec. 576.

Where co-executors joined in a sale of the land of the testator and the proceeds thereof came to the hands of one with the assent of the other and they joined in a settlement with the purchaser they were equally liable to legatees, etc., for the price of the land. Hauser *v.* Lehman, 37 N. C. 594. But see Atcheson *v.* Robertson, 3 Rich. Eq. (S. C.) 132, 55 Am. Dec. 634.

Admissions of liability for the acts of an associate are binding in the absence of any evidence showing that they were founded in mistake. Jeffries *v.* Lawson, 39 Miss. 791.

Signing of joint checks may impose liability. Palmer *v.* Ward, 91 N. Y. App. Div. 449, 86 N. Y. Suppl. 990.

Accounts kept in the joint names of executors will not impose liability on all in the absence of evidence of concurrence in the receipts or payments of the active executor. Clarke *v.* Jenkins, 3 Rich. Eq. (S. C.) 318.

91. See *supra*, XVII, A, 6.

rule as to the accountability of the representatives in the first instance[92] or *inter sese*.[93]

3. Delivery of Assets to Associate. Where one executor has assets of the decedent's estate in his hands, and hands them over to a co-executor without a good reason for so doing, he will be liable for any misapplication by his co-executor,[94] although he may have acted in good faith.[95]

4. Permitting Possession of Assets by Associate. A wrong done or a duty omitted by the person sought to be charged must lie at the foundation of liability of one representative for the acts or omissions of his associate.[96] It follows that

A devastavit must have been established. Cameron *v.* Justices Richmond County Inferior Ct., 1 Ga. 36, 44 Am. Dec. 636.

92. O'Neall *v.* Herbert, McMull. Eq. (S. C.) 495; Gayden *v.* Gayden, McMull. Eq. (S. C.) 435. And see Wilks *v.* Davis, Rich. Eq. Cas. (S. C.) 390.

93. Slaughter *v.* Froman, 5 T. B. Mon. (Ky.) 19, 17 Am. Dec. 33 (holding that the sureties of a widow administratrix and her co-administrator are not liable for her distributive share of the chattels collected and converted by her co-administrator but the latter alone is liable to her); McDivitt *v.* McDivitt, 4 Watts (Pa.) 384 (holding that an administrator cannot maintain an action against his co-administrator on a bond by which they are jointly and severally bound).

94. *New York.*— Adair *v.* Brimmer, 74 N. Y. 539; Thompson *v.* Hicks, 1 N. Y. App. Div. 275, 37 N. Y. Suppl. 340; Mesick *v.* Mesick, 7 Barb. 120; Dixon *v.* Storm, 5 Redf. Surr. 419.

Pennsylvania.— Sterrett's Appeal, 2 Penr. & W. 419; Power's Estate, 15 Phila. 539.

South Carolina.— Johnson *v.* Johnson, 2 Hill Eq. 277, 29 Am. Dec. 72, holding that there is no distinction between the liability to creditors and that to legatees.

Vermont.— Sparhawk *v.* Buell, 9 Vt. 41.

England.— Candler *v.* Tillett, 22 Beav. 257, 25 L. J. Ch. 505, 4 Wkly. Rep. 160, 52 Eng. Reprint 1106; Townsend *v.* Barber, Dick. 356, 21 Eng. Reprint 307.

See 22 Cent. Dig. tit. "Executors and Administrators," § 511.

Sufficiency of delivery to impose liability. — Under a statute providing that an executor shall not be charged with moneys receipted for by his co-executor, unless shown to have come into his hands, where two executors went together to a bank and caused the decedent's deposit to be equally divided, and one half credited to one and the other half to the other, and neither afterward had possession of the other's half, one was not liable for the other's defalcation. Nettman *v.* Schramm, 23 Iowa 521, where the court was equally divided. But it has been held sufficient to impose liability that an executor to whom a bag of coin was handed in the presence of his associates should hand it to a co-executor. Langford *v.* Gascoyne, 11 Ves. Jr. 333, 8 Rev. Rep. 170, 32 Eng. Reprint 1116.

Division of assets consisting of bonds, notes, and accounts for the purpose of collecting and disbursement will not impose joint liability. Kerr *v.* Kirkpatrick, 43 N. C. 137.

Merely formal acts, such as the indorsement to an associate of negotiable instruments payable to the representatives jointly will, apparently, not impose liability. Paulding *v.* Sharkey, 88 N. Y. 432 [*affirmed* in 21 Hun 276]; Palmer *v.* Ward, 91 N. Y. App. Div. 449, 86 N. Y. Suppl. 990; Matter of Provost, 87 N. Y. App. Div. 86, 84 N. Y. Suppl. 29; Hovey *v.* Blakeman, 4 Ves. Jr. 596, 31 Eng. Reprint 306.

Payment of individual debt to co-representative.— An executor who purchases a farm originally belonging to the estate, and who pays his co-executor the balance of the purchase-price still due the estate, is not liable for his co-executor's misappropriation of the payments, it appearing that when he made the payments the executor had no reason to suspect his co-executor's honesty or financial responsibility. Matter of Demarest, 9 N. Y. Suppl. 292, 1 Connoly Surr. (N. Y.) 200.

A co-executor who proved the will but never acted cannot be charged by receiving a bill by the post on account of the estate, and sending it immediately to the acting executor. Balchen *v.* Scott, 2 Ves. Jr. 678, 3 Rev. Rep. 29, 30 Eng. Reprint 838.

Creditors only, and not legatees, can hold an executor liable for surrendering assets to his associate. *In re* Verner, 6 Watts (Pa.) 250.

95. *In re* Storm, 28 Hun (N. Y.) 499; Croft *v.* Williams, 23 Hun (N. Y.) 102; Sterrett's Appeal, 2 Penr. & W. (Pa.) 419; Langford *v.* Gascoyne, 11 Ves. Jr. 333, 8 Rev. Rep. 170, 32 Eng. Reprint 1116. But see Osborn's Estate, 87 Cal. 1, 25 Pac. 157, 11 L. R. A. 264; Clarke *v.* Cotton, 17 N. C. 51.

96. MacDonald *v.* Hanna, 100 Mich. 412, 59 N. W. 171 (holding that an executor who took no part in the administration of an estate and who by the will was not to do so unless the testator's widow (the executrix) remarried, was not liable for a misappropriation of its funds by her and that he was not bound on her remarriage to demand from her the administration of the trust); Croft *v.* Williams, 88 N. Y. 384; Matter of Demarest, 9 N. Y. Suppl. 292, 1 Connoly Surr. (N. Y.) 200.

Where the will intrusted the greater portion of the assets to one executor, he being

a passive acquiescence in the possession of assets by an associate will not impose liability for his misapplication,[97] unless the co-representative had reason to suspect that it would occur[98] or was negligent in failing to discover it.[99] But where assets are actually in joint control or possession, one of the co-representatives cannot avoid responsibility for their proper application by turning them over to the sole control of the other,[1] unless the latter is entitled to possession as distributee or trustee.[2] Liability will not in any event extend to funds not received by the associate as executor or administrator.[3]

5. Permitting Breach of Trust by Associate. Although in general one executor or administrator is not bound to exercise supervision over another,[4] he must use vigilance to protect the funds if the circumstances are such as to create a doubt as to their safety,[5] and he is responsible for a loss resulting from the waste or maladministration of his co-representative where he could have prevented the same, and by his negligence failed to do so.[6] It has been held to be no excuse that he

required to carry on decedent's business, his co-executors were not liable for losses occasioned by his mismanagement where they were guilty of no fraud, and had no reason to believe that he was wasting or misappropriating the assets. Walker *v.* Walker, 88 Ky. 615, 11 S. W. 718, 11 Ky. L. Rep. 80.

97. Croft *v.* Williams, 88 N. Y. 384; Wright *v.* Dugan, 15 Abb. N. Cas. (N. Y.) 107; Taylor *v.* Shuit, 4 Dem. Surr. (N. Y.) 528; Worth *v.* McAden, 21 N. C. 199; Latham *v.* Blakemore, 4 Heisk. (Tenn.) 276; Stearn *v.* Mills, 4 B. & Ad. 657, 2 L. J. K. B. 106, 1 N. & M. 434, 24 E. C. L. 289; Langford *v.* Gascoyne, 11 Ves. Jr. 333, 8 Rev. Rep. 170, 32 Eng. Reprint 1116.

98. Cocks *v.* Haviland, 124 N. Y. 426, 26 N. E. 976 [*reversing* 57 Hun 592, 9 N. Y. Suppl. 872]; Matter of Hoagland, 79 N. Y. App. Div. 56, 79 N. Y. Suppl. 1080; Myer *v.* Myer, 187 Pa. St. 247, 41 Atl. 24; Irwin's Appeal, 35 Pa. St. 294; Sterrett's Appeal, 2 Penr. & W. (Pa.) 419; Robinson's Estate, 7 Phila. (Pa.) 61.

99. *In re* Adams, 166 N. Y. 623, 59 N. E. 1118 [*affirming* 51 N. Y. App. Div. 619, 64 N. Y. Suppl. 591 (*modifying* 30 Misc. 184, 61 N. Y. Suppl. 751)]; Matter of Hunt, 38 Misc. (N. Y.) 613, 78 N. Y. Suppl. 105. An executor who does not know that the assets received by his co-executor are not applied according to the trusts of the will or in a due course of administration is not liable for waste or misapplication when he had reason to believe that the heirs acquiesced in his decision not to act in the settlement of the estate. English *v.* Newell, 42 N. J. Eq. 76, 6 Atl. 505 [*affirmed* in 43 N. J. Eq. 295, 14 Atl. 811].

1. *New York.*— *In re* Niles, 113 N. Y. 547, 21 N. E. 687; Matter of Hunt, 88 N. Y. App. Div. 52, 84 N. Y. Suppl. 790 [*reversing* 38 Misc. 613, 78 N. Y. Suppl. 105]; Brown's Accounting, 16 Abb. Pr. N. S. 457. A business man familiar with the values of property and accustomed to making investments is not justified in leaving the entire management of the estate in the hands of his co-executrix without supervision or inquiry, she being a woman unacquainted with business and whose time is occupied with domestic duties. Earle *v.* Earle, 93 N. Y. 104.

Pennsylvania.— Sterrett's Appeal, 2 Penr. & W. 419.

Tennessee.— Allen *v.* Shanks, 90 Tenn. 359, 16 S. W. 715.

United States.— Edmonds *v.* Crenshaw, 14 Pet. (U. S.) 166, 10 L. ed. 402.

England.— Lees *v.* Sanderson, 4 Sim. 28, 6 Eng. Ch. 28.

See 22 Cent. Dig. tit. "Executors and Administrators," § 511; and *supra*, XXI, B, 3.

2. Heppenstall's Estate, 144 Pa. St. 259, 22 Atl. 860; Anderson *v.* Earle, 9 S. C. 460.

3. Carlile's Appeal, 38 Pa. St. 259. And see Young *v.* Wickliffe, 7 Dana (Ky.) 447; Geddis *v.* Irvine, 5 Pa. St. 508 (holding that where a testator directed the sale of his land, and one third of the proceeds to be invested, the interest to be paid to his widow, or to his executors for her use, the receipt of such interest by the executors would raise a personal liability to the widow, and that the executor receiving the interest would be alone liable); Scholey *v.* Walton, 13 L. J. Exch. 122, 12 M. & W. 510.

Receipt as agent of heir or legatee.— If one of a number of executors after paying an heir or legatee his share or legacy becomes his agent or bailee, and receives the share or legacy so paid to hold for any purpose, the estate of his testator is discharged, and his co-executors are not liable for his embezzlement or other default. Soley's Estate, 11 Phila. (Pa.) 144.

4. Kerr *v.* Kirkpatrick, 43 N. C. 137; Matter of Hall, 14 N. Y. St. 540.

5. Earle *v.* Earle, 93 N. Y. 104. See also Wilmerding *v.* McKesson, 103 N. Y. 329, 8 N. E. 665 [*reversing* 28 Hun 184], holding that an executor would be liable for a loss resulting from the use of funds of the estate in business by his co-executor even although he had not actual knowledge of such use, where he could have ascertained the fact by making due inquiries.

Delay in failing to compel investment by a co-representative to whom funds have been delivered until after judicial proceedings, and with knowledge of the irresponsibility of the associate, will impose liability. Thompson *v.* Hicks, 1 N. Y. App. Div. 275, 37 N. Y. Suppl. 340.

6. *California.*— Osborn's Estate, 87 Cal. 1, 25 Pac. 157, 11 L. R. A. 264.

was apparently justified in relying on the integrity of his associate,[7] even although testator induced the reposal of confidence.[8]

6. Insolvency of Co-Representative. The insolvency of an associate does not impose liability on an executor who has not had possession of the assets,[9] unless, after discovery of the insolvency or danger thereof, he has permitted the associate to retain the fund.[10]

7. Joint Receipt or Inventory. The early rule at common law making a joint receipt conclusive of the joint liability of executors[11] is now departed from and the receipt is but *prima facie* evidence that assets came into joint possession and may be contradicted.[12] Even the early cases made a distinction between creditors and legatees, holding co-executors uniting in a receipt liable only to the former.[13] A joint inventory obligatory upon all the executors does not of itself show assets in the hands of either of the executors so as to charge them, without more;[14] nor does it prove a joint possession of the evidences of debt due to the decedent, but leaves the actual possession in the one or the other, or in both, open to proof.[15]

8. Release of Co-Representative. The persons solely interested in the acts of the representatives may of course release their liability,[16] but since the duties of

Georgia.— Whiddon *v.* Williams, 98 Ga. 310, 24 S. E. 437; Head *v.* Bridges, 67 Ga. 227.

Kansas.— Insley *v.* Shire, 54 Kan. 793, 39 Pac. 713, 45 Am. St. Rep. 308.

Mississippi.— Gaultney *v.* Nolan, 33 Miss. 569.

New Jersey.— English *v.* Newell, 42 N. J. Eq. 76, 6 Atl. 505; Smith *v.* Pettigrew, 34 N. J. Eq. 216; Fisher *v.* Skillman, 18 N. J. Eq. 229.

New York.— Matter of Niles, 113 N. Y. 547, 21 N. E. 687; Wilmerding *v.* McKesson, 103 N. Y. 329, 8 N. E. 665 [*reversing* 28 Hun 184]; Earle *v.* Earle, 93 N. Y. 104; Croft *v.* Williams, 88 N. Y. 384; Adair *v.* Brimmer, 74 N. Y. 539; Matter of Peck, 31 N. Y. App. Div. 407, 52 N. Y. Suppl. 1028; Cocks *v.* Haviland, 57 Hun 592, 9 N. Y. Suppl. 872; *In re* Brown's Accounting, 16 Abb. Pr. N. S. 457; Johnson *v.* Corbett, 11 Paige 265; Clark *v.* Clark, 8 Paige 152, 35 Am. Dec. 676; Lacey *v.* Davis, 5 Redf. Surr. 301; Matter of Macdonald, 4 Redf. Surr. 321.

North Carolina.— Worth *v.* McAden, 21 N. C. 199.

England.— Williams *v.* Nixon, 2 Beav. 472, 9 L. J. Ch. 269, 17 Eng. Ch. 472, 48 Eng. Reprint 1264.

See 22 Cent. Dig. tit. "Executors and Administrators," § 522.

7. Bates *v.* Underhill, 3 Redf. Surr. (N. Y.) 365. But *compare* Weyman *v.* Thompson, 50 N. J. Eq. 8, 25 Atl. 205.

8. Dover *v.* Denne, 3 Ont. L. Rep. 664. But see Cressman's Estate, 2 Phila. (Pa.) 76.

9. Clarke *v.* Cotton, 17 N. C. 51; Brown's Appeal, 1 Dall. (U. S.) 311, 1 L. ed. 152; Churchill *v.* Hobson, 1 P. Wms. 241, 24 Eng. Reprint 370.

10. *In re* Osborn, 87 Cal. 1, 25 Pac. 157, 11 L. R. A. 264; Smith *v.* Pettigrew, 34 N. J. Eq. 216.

11. Leigh *v.* Barry, Ambl. 219 note, 27 Eng. Reprint 145, 3 Atk. 583, 26 Eng. Reprint 1136; Sadler *v.* Hobbs, 2 Bro. Ch. 114, 29 Eng. Reprint 66, 3 Bro. Ch. 92, 29 Eng. Reprint 425; Neal *v.* Hanbury, Prec. Ch. 173, 24 Eng. Reprint 83; Churchill *v.* Hobson, 1 P. Wms. 241, 24 Eng. Reprint 370; Fellows *v.* Mitchell, 1 P. Wms. 81, 83 note, 24 Eng. Reprint 302; Doyle *v.* Blake, 2 Sch. & Lef. 231, 9 Rev. Rep. 76; Joy *v.* Campbell, 1 Sch. & Lef. 341, 9 Rev. Rep. 39; Murrell *v.* Cox, 2 Vern. Ch. 570, 23 Eng. Reprint 971; Moses *v.* Levy, 3 Y. & C. 359, 367.

12. Hall *v.* Carter, 8 Ga. 388; Ochiltree *v.* Wright, 21 N. C. 336; Wilson's Appeal, 115 Pa. St. 95, 9 Atl. 473; McNair's Appeal, 4 Rawle (Pa.) 148; Hess' Estate, 2 Phila. (Pa.) 243.

A joint release of a mortgage, signed by two executors, is only *prima facie* evidence that the money derived therefrom came into the possession or under the control of both, and may be rebutted by proof that the money was in fact received by one, and that the other joined only as matter of form. McKim *v.* Aulbach, 130 Mass. 481, 39 Am. Rep. 470; Wilmerding *v.* McKesson, 28 Hun (N. Y.) 184 [*reversed* in 103 N. Y. 329, 8 N. E. 665].

13. Hall *v.* Carter, 8 Ga. 388; Brown's Appeal, 1 Dall. (Pa.) 310, 1 L. ed. 152; Gibbs *v.* Herring, Prec. Ch. 49, 24 Eng. Reprint 25; Shipbrook *v.* Hinchinbrook, 16 Ves. Jr. 477, 33 Eng. Reprint 1066; Price *v.* Stokes, 11 Ves. Jr. 324, 32 Eng. Reprint 1111.

14. Hall *v.* Carter, 8 Ga. 388; Ochiltree *v.* Wright, 21 N. C. 336.

15. Hall *v.* Carter, 8 Ga. 388.

16. *In re* Pruyn, 141 N. Y. 544, 36 N. E. 595; *In re* Wagner, 119 N. Y. 28, 23 N. E. 200; Tillinghast *v.* Brown University, 25 R. I. 284, 55 Atl. 758; Murrel *v.* Murrel, 2 Strobh. Eq. (S. C.) 148, 49 Am. Dec. 664.

Sufficiency of release.— Where the settlement of a joint account by two executors showed a balance in their hands, division of the balance equally between them and acceptance by each of the legatees of half the interest due on the balance does not sever the joint liability. Ducommun's Appeal, 17

co-representatives with regard to the estate impose a several liability, a discharge of one will not release the rest.[17]

9. Contracts — a. In General.[18] A representative is individually liable on contracts made by him without his associates.[19]

b. Services.[20] Joint contracts for services impose joint personal liability.[21]

10. Deposits, Investments, and Loans — a. Deposits.[22] A representative negligently permitting funds to remain on deposit under the sole control of his associate may be liable for any resulting loss.[23]

b. Investments.[24] Where one representative knows or has the means of knowing of irregular investments by an associate, he is liable therefor in the absence of fraud or misrepresentation.[25] Where the executors cannot agree as to investments directed to be made by the will, they should apply to the proper court for instructions within a reasonable time.[26] Where an executor has been intrusted with the entire charge of an investment, his co-executors cannot hold an instrument taken by him, either on his private account or in his representative capacity, free from the taint of usurious interest which he has reserved to himself.[27]

c. Loans.[28] A representative is not responsible for a loan made by his associates without his knowledge where he does not appear to have been negligent with relation thereto.[29]

Pa. St. 268. The fact that the money and sole management of the estate was turned over to one executor, with the concurrence of one having a power of attorney to collect moneys due non-resident beneficiaries of the estate, in no way relieves the co-executor from responsibility. Osborn's Estate, 87 Cal. 1, 25 Pac. 157, 11 L. R. A. 264.

17. Sanderson's Estate, 74 Cal. 199, 15 Pac. 753. A suit by heirs against administrators to recover for a breach of trust in conspiring together to sell lands of the estate, which they severally acquired in separate portions, each for his own benefit, under the sale, is several as well as joint, and is not barred as to one of the administrators by a settlement with the other. Piatt *v.* Longworth, 27 Ohio St. 159.

18. As to representatives generally see *supra*, VIII, D, 1.

19. Shreve *v.* Joyce, 36 N. J. L. 44, 13 Am. Rep. 417 (holding that a co-executor is not made personally liable by the new promise of another executor, unless in case of devastavit); Freeman *v.* Brunswick, 14 Wkly. Notes Cas. (Pa.) 327.

20. As to representatives generally see *supra*, VIII, D, 2.

21. Long *v.* Rodman, 58 Ind. 58 (holding that where one of several co-executors, with the knowledge and consent of the others, employs an attorney, without a special agreement with him to look to the estate alone for payment, they all become personally liable for the value of his services); Mygatt *v.* Wilcox, 45 N. Y. 306, 6 Am. Rep. 90 (holding that administrators who retained an attorney to attend for them in proceedings against them on a final accounting before the surrogate are jointly liable to such attorney, although their interests upon the distribution are different).

22. As to representatives generally see *supra*, VIII, A, 5.

23. Wilmerding *v.* McKesson, 28 Hun (N. Y.) 184 [*reversed* in 103 N. Y. 329, 8 N. E. 665], holding that where an executor allows his co-executor to deposit moneys with a firm of which he is a member, he becomes personally liable for any loss thereby sustained by persons interested in the estate.

Failure to examine the bank-account of the acting executor for two years is not in itself culpable negligence. Irwin's Appeal, 35 Pa. St. 294.

A representative who deposits funds in a bank of which his associate is president, and which is at the time in good standing, is not liable where it fails before certain distributees have cashed checks made payable to them, although they have had opportunity to do so. Maffet's Estate, 7 Kulp (Pa.) 153.

24. As to representatives generally see *supra*, VIII, E.

25. *In re* Niles, 113 N. Y. 547, 21 N. E. 687; Matter of Peck, 31 N. Y. App. Div. 407, 52 N. Y. Suppl. 1028; Weldy's Appeal, 102 Pa. St. 454, holding that where, instead of investing a fund as directed by the will, executors divide it between themselves without security, each becomes liable for a loss by the other. See also Lacey *v.* Davis, 5 Redf. Surr. (N. Y.) 301.

Failure to invest.— Executors charged with a duty to invest a fund for the securing of an annuity who pay the fund to one of their number and make no effort to see to its investment are liable for its loss. Thompson *v.* Hicks, 1 N. Y. App. Div. 275, 37 N. Y. Suppl. 340.

26. Holcombe *v.* Holcombe, 13 N. J. Eq. 413.

27. O'Neil *v.* Cleveland, 30 N. J. Eq. 273.

28. As to representatives generally see *supra*, VIII, G.

29. Cocks *v.* Barlow, 5 Redf. Surr. (N. Y.) 406; Lacey *v.* Davis, 5 Redf. Surr. (N. Y.) 301.

11 FRAUD.[30] Fraud by an associate with which the representative is not connected and which he has not permitted does not impose liability.[31]

12. INTEREST ON FUNDS OF ESTATE.[32] In case of a devastavit representatives permitting it may be charged with interest,[33] although in some cases they may be excused by having acted in good faith.[34] A disagreement as to the manner of investment will not prevent an executor from being charged with interest where he made no application to the court for directions.[35]

13. INDIVIDUAL INTEREST IN TRANSACTIONS.[36] The co-representatives should not purchase property of the estate from themselves either directly or indirectly,[37] unless upon full disclosure and with the consent of all persons in interest,[38] and they are liable to the estate for any profits made by such transactions.[39] A sale to one of their number is, however, usually regarded as merely voidable.[40] Contracts made with the acting executor by executors who have not qualified may be sustained in the absence of fraud.[41] Where an executor has employed the property of the estate in his personal business, in determining the liability incurred by him in a case where it is to be based on the extent of his property interest he will be regarded as a joint tenant.[42]

14. COLLECTION OF ASSETS.[43] Generally speaking, each executor may collect assets and his co-executor is not liable therefor.[44] Where assets are doubtful, the

30. As to representatives generally see *supra*, VIII, N.

31. Heath *v.* Allin, 1 A. K. Marsh. (Ky.) 442, holding that one of two executors does not, by practising a fraud in the sale of his testator's estate, subject his co-executor to an action.

32. As to representatives generally see *supra*, VIII, F.

33. Whitney *v.* Phœnix, 4 Redf. Surr. (N. Y.) 180; Bates *v.* Underhill, 3 Redf. Surr. (N. Y.) 365. Where one of three administrators mingled funds of the estate with his own and used them in his own business, the administrators were chargeable with interest on the funds of the estate thus treated. Gilbert's Appeal, 78 Pa. St. 266; Brown's Estate, 11 Phila. (Pa.) 127.

34. *In re* Wyckoff, 3 Dem. Surr. (N. Y.) 75.

35. Holcombe *v.* Holcombe, 13 N. J. Eq. 413.

36. As to representatives generally see *supra*, VIII, J.

37. Candler *v.* Clarke, 90 Ga. 550, 16 S. E. 645; Inman *v.* Foster, 69 Ga. 385 (holding that where three executors buy land of the estate, two of them cannot discharge themselves of liability to the beneficiary by showing that the other, who was the beneficiary's trustee, was allowed for the beneficiary the amount of purchase-money he was to pay, and gave his receipt for that amount as paid to the beneficiary); Gordon *v.* Finlay, 10 N. C. 239.

As to representatives generally see *supra*, VIII, O, 9, d, (VI), (B); VIII, P, 2, f, (I); XII, M, 4.

An agreement to sell realty to a partnership of which the executor's associates are members is voidable at the option of the beneficiaries of the estate. Colgate *v.* Colgate, 23 N. J. Eq. 372.

38. Mosley *v.* Floyd, 31 Ga. 564, holding that when the heirs, legatees, or distributees of an estate permit an executor to purchase property belonging to the estate and sold by his co-executor, the former is not liable for money paid to the co-executor upon notes given for the purchase-money and which is subsequently wasted by such co-executor.

39. Bechtold *v.* Read, (N. J. Ch. 1895) 32 Atl. 694, holding that where executors convey property of testator so that one of them makes a profit, the one receiving the profit is primarily liable therefor, and if it cannot be collected of him the others will be required to respond.

40. Colgate *v.* Colgate, 23 N. J. Eq. 372; Geyer *v.* Snyder, 140 N. Y. 394, 35 N. E. 784 [*affirming* 69 Hun 115, 23 N. Y. Suppl. 200, and in effect *overruling* Case *v.* Abeel, 1 Paige 393].

A sale of partnership property to the surviving partner who is also an administrator at a price less than the value is voidable at the election of any party in interest, and all the administrators are chargeable with the actual value. That they acted in good faith and under the advice of counsel does not justify the transaction. Gilbert's Appeal, 78 Pa. St. 266.

41. Bowden *v.* Pierce, 73 Cal. 459, 14 Pac. 302, 15 Pac. 64.

42. Hanschell *v.* Swan, 23 Misc. (N. Y.) 304, 51 N. Y. Suppl. 42, holding that where testator appointed three executors, one executor's liability on a claim against a vessel in which testator owned an interest, arising while it was being employed in his own business, was measured by the extent of the testator's interest.

43. As to representatives generally see *supra*, VII.

44. Hall *v.* Carter, 8 Ga. 388 (holding that where there is a joint return of an inventory of debts made by executors, and the possession of the debts is in one, and he, through negligence, without participation by the others, fails to collect them, he is solely

representatives should schedule them as such in their inventory to avoid responsibility for their collection,[45] although failure to do so will not impose liability in the absence of negligence in collection.[46]

15. Negligence or Bad Faith. Representatives are jointly liable for losses to the estate from their concurrent negligence or bad faith.[47] A representative, in the exercise of a sound discretion, may, it seems, redeem assets wrongfully disposed of by his associate instead of bringing an action therefor.[48]

16. Debts Due From Associate to Estate. As a general rule a representative is not bound to collect debts owing by his associates to the estate,[49] but notwithstanding co-executors are equally entitled to the possession of the funds of the estate, a note given by one to the other for a debt due to the estate may be upon a sufficient consideration.[50] Where the administrator would have been liable on his bond for the debt of an associate, he may be compelled to account therefor.[51]

17. Liabilities Inter Sese and Contribution. As between himself and his associates each representative is responsible for his own acts of maladministration,[52] but this responsibility may be varied or released by contracts *inter sese*.[53] Con-

liable for such devastavit); Fennimore *v.* Fennimore, 3 N. J. Eq. 292; Sutherland *v.* Brush, 7 Johns. Ch. (N. Y.) 17, 11 Am. Dec. 383; Tompkins *v.* Tompkins, 18 S. C. 1 (holding that where one executor misappropriates the proceeds of a joint sale, the other is not chargeable with the loss, he not having himself been in any way in fault). But see Bechtold *v.* Read, 49 N. J. Eq. 111, 22 Atl. 1085, holding that where executors all joined in the assignment of a bond and mortgage, and acknowledgment of the receipt of the money therefor, and allowed one of their number to complete the transaction, in doing which he repaid a large portion of the purchase-money received, they were all accountable for the loss.

45. Metz's Appeal, 11 Serg. & R. (Pa.) 204.

46. Barclay *v.* Morrison, 16 Serg. & R. (Pa.) 129.

47. Grundy *v.* Drye, 104 Ky. 825, 48 S. W. 155, 49 S. W. 469, 20 Ky. L. Rep. 970, 1337 (holding that executors are liable for the devastavit of a co-executor where they permitted him to use in his business a fund which the testator directed to be paid to a trustee, and united with him in resisting suits by the *cestui que trust* to get the money out of their hands); Blackwell *v.* Blackwell, 29 N. J. Eq. 576 (holding that executors who allow the widow and executrix to value her dower right too high and retain the amount, and to buy personal property of the estate at too low a price, are liable to make good to the estate the sum it thus lost); *In re* Goetschius, 2 Misc. (N. Y.) 278, 23 N. Y. Suppl. 970; Clark *v.* Clark, 8 Paige (N. Y.) 152, 35 Am. Dec. 676; Whitney *v.* Phœnix, 4 Redf. Surr. (N. Y.) 180; *In re* Irvine, 203 Pa. St. 602, 53 Atl. 502.

Non-concurrence must be pleaded. Kincade *v.* Conley, 64 N. C. 387.

Repayment of advances by associate.— Where an executor allows his co-executor to apply the assets of the estate in full payment of his own advances, instead of *pro rata* with other creditors, he is equally liable. McCormick *v.* Wright, 79 Va. 524.

48. Wright *v.* Dugan, 15 Abb. N. Cas. (N. Y.) 107.

49. Tichenor *v.* Tichenor, 43 N. J. Eq. 163, 10 Atl. 867 (holding that where an executor occupies real estate belonging to the estate, under an agreement with his co-executor, at a monthly rental, and the occupant fails to account for the rent, the co-executor is not responsible for such rent, there being nothing to show that the occupant was irresponsible, or that the rent was not safe in his hands); Clarke *v.* Cotton, 17 N. C. 51. But see Weigand's Appeal, 28 Pa. St. 471, holding that where an obligation of one of the executors to decedent is set apart by the will as a trust fund and the executors are directed to secure it they are jointly liable for a failure to do so.

50. Deloach *v.* Youmans, 3 Rich. (S. C.) 278 (holding that one executor was entitled to recover against the other on a note given by him for the purchase-price of property belonging to the estate and sold to him before he qualified as executor); Berry *v.* Tart, 1 Hill (S. C.) 4 (holding that to render such a note void defendant must show that he was in advance to the estate and plaintiff had the funds in his hands).

51. Beckley's Appeal, 3 Pa. St. 425.

52. Jordy's Succession, 5 La. Ann. 37; Marshall's Estate, 34 Pittsb. Leg. J. (Pa.) 382; Massey *v.* Cureton, Cheves Eq. (S. C.) 181; Knox *v.* Picket, 4 Desauss. (S. C.) 92.

Where all are equally in the wrong, the loss will be divided equally between them. Fisher *v.* Skillman, 18 N. J. Eq. 229.

53. See Jones *v.* Ward, 10 Yerg. (Tenn.) 160.

Construction and effect of agreements.— A bond given by an administratrix who received the assets from her co-administrator to indemnify him in case she should fail to pay certain claims of third persons against the estate, or any claims that might be brought against him as administrator, creates no new personal obligation to pay the debts beyond the available assets of the estate, and he can only allege a breach after his liability growing out of the administration of the estate

tribution may be enforced by a representative who has discharged more than his proportion of a joint liability.[54]

18. Subrogation. Where one representative pays a liability incurred through the default of his associate, he is entitled to all the remedies which the payee or creditor possessed against the associate.[55] But subrogation to the rights of an executor as legatee cannot be permitted where the interest of the legatee has passed to an innocent third person by foreclosure of a mortgage executed by the legatee.[56]

19. Accounting and Liability Thereon[57] — a. Accounting by Co-Representatives.[58] An accounting by co-representatives is in general subject to the same rules as govern accountings by sole representatives, save as to rights and liabilities *inter sese* arising out of their relations.[59]

b. Accounting as Between Co-Representatives. While in some cases doubt has been expressed as to the authority of a representative to compel his associates to account,[60] it would seem to be the rule that he may do so in equity,[61] especially

has been ascertained. Pittman *v.* Myrick, 16 Fla. 692. An agreement between three co-administrators that certain notes made by their intestate, on which one of the administrators was indorser, should be paid in full, with the understanding that if, upon a final settlement of the estate, the assets should prove insufficient for that purpose, the indorsing administrator should make good the deficiency, is binding on the indorsing administrator. Kilgore *v.* Moore, 1 Rich. (S. C.) 192.

A mortgage on his own land given by one executor to himself and his associate does not exonerate him from liability for delinquencies when nothing is realized from the property conveyed. Storms *v.* Quackenbush, 34 N. J. Eq. 201.

54. Wilks *v.* Davis, Rich. Eq. Cas. (S. C.) 390; Marsh *v.* Harrington, 18 Vt. 150. Money awarded to an executor on an assignment of his co-executor for creditors, to reimburse him for money paid on a balance due the estate by both executors, is not assets of the estate, but of the executor to whom it is paid. Miller's Appeal, 127 Pa. St. 95, 17 Atl. 866.

Contribution by solvent associates.—Where two of four joint executors become insolvent, and one of the remaining two is compelled by a decree to pay for property, which without fault on his part has been seized by one of the insolvent executors, he may recover from the other solvent executor one-half the amount so paid by him, together with all expenses incurred by him in defending the suit in which the decision was made. Marsh *v.* Harrington, 18 Vt. 150.

Payment must be alleged in a bill for contribution. Huey *v.* Stewart, 69 Ga. 768.

55. Reber *v.* Gundy, 13 Fed. 53.

56. Drake *v.* Paige, 127 N. Y. 562, 28 N. E. 407. *Compare* Clapp *v.* Meserole, 1 Abb. Dec. (N. Y.) 362, 1 Keyes (N. Y.) 281.

57. As to representatives generally see *supra*, XV.

58. See also *supra*, XV, A, 5, b; XV, E, 7.

59. See Waldrop *v.* Pearson, 42 Ala. 636 (holding that where an administrator is charged, on his final settlement, with a note payable to his co-administrator and himself, the equitable title thereto, entitling him to sue thereon in his name alone, is vested in him); O'Neil's Estate, 12 Wkly. Notes Cas. (Pa.) 463 (holding that the liability of an executor for the acts or negligence of his co-executor will not be determined on a citation to file an account).

Laches may bar the right to force a compulsory accounting. Matter of Barrett, 58 N. Y. App. Div. 45, 68 N. Y. Suppl. 589.

As to funds converted by a co-executor, he is accountable in the probate court as if never so converted. Baldwin *v.* Carleton, 15 La. 394.

Parties.—Where a co-administrator, against whom a balance is reported, is not before the court, he is not bound, and the administrator who is before the court cannot be charged with the amount in such proceeding. Green *v.* Hanberry, 10 Fed. Cas. No. 5,759, 2 Brock. 403.

The administrator of a deceased executor must be made a party before a distribution of assets or decree as to costs may be made, where the deceased executor was also a legatee and the assets are insufficient to pay all legacies in full, although in his absence the accounts of the survivor may be adjusted. Matter of Koch, 33 Misc. (N. Y.) 672, 68 N. Y. Suppl. 938.

60. Clarke *v.* Cotton, 17 N. C. 51; Hendricks *v.* Thornton, 45 Ala. 299. *Compare* Chandler *v.* Shehan, 7 Ala. 251.

61. *Kentucky.*— Chamberlain *v.* Chamberlain, 16 S. W. 456, 13 Ky. L. Rep. 151.

North Carolina.— Moffit *v.* Moffitt, 36 N. C. 124.

Ohio.— Stiver *v.* Stiver, 8 Ohio 217.

Pennsylvania.— Chew's Appeal, 3 Grant 294.

South Carolina.— Wright *v.* Wright, 2 Desauss. 242.

Texas.— Davis *v.* Thorn, 6 Tex. 482.

See 22 Cent. Dig. tit. "Executors and Administrators," § 1983.

Contra.— Whiting *v.* Whiting, 64 Md. 157, 20 Atl. 1030 [*following* Beall *v.* Hilliary, 1 Md. 186, 54 Am. Dec. 649], holding that a representative cannot maintain a bill in equity against his co-representative to com-

where he is a creditor[62] or legatee,[63] and the right in some states has been established by statutes which also provide as to procedure.[64] The amount for which each executor is liable may be determined on a joint accounting.[65]

c. Liability on Joint or Several Settlement of Account. While in some states the settlement of a joint account fixes a joint liability for the amount found due thereunder,[66] the better rule apparently is that such settlement is not conclusive as to individual liability but may be rebutted by evidence showing with what amounts each representative should properly be charged.[67] Where accountings are separate, liabilities merely consequent upon joint possession of assets do not attach,[68] but where a joint liability of co-executors or co-administrators in fact

pel the latter to account for and pay over money alleged to be due from him to the estate.

62. King *v.* Shackleford, 13 Ala. 435.

63. Wright *v.* Wright, 2 Desauss. (S. C.) 242.

64. Beach *v.* Norton, 9 Conn. 182; Ludlow *v.* Ludlow, 4 N. J. L. 189; Wood *v.* Brown, 34 N. Y. 337; Buchan *v.* Rintoul, 10 Hun (N. Y.) 183; *In re* Rumsey, 18 N. Y. Suppl. 402; *In re* Hodgman, 10 N. Y. Suppl. 491. And see Smith *v.* Lawrence, 11 Paige (N. Y.) 206.

65. White *v.* Bullock, 20 Barb. (N. Y.) 91, holding that the decree upon such accounting is conclusive between the executors as to the amounts received and paid out by each, and cannot be contradicted by the sworn accounts of the executors, produced by them upon the accounting.

The joint account may be surcharged with the amount of the indebtedness of one of the representatives to the estate. *In re* Maloney, 11 Pittsb. Leg. J. (Pa.) 341.

Credits may be given an executor chargeable with funds misappropriated by a co-executor of such amounts as the co-executor would have received under the will, but not for payments made to the estate by the co-executor after a time when the first executor was not chargeable for misappropriations, such later payments being properly applied to later misappropriations. Adair *v.* Brimmer, 95 N. Y. 35.

Where an administrator assumes to pay a claim by giving his note therefor as administrator, without purporting to bind his co-administrator, the liability is not imposed on the co-administrator, although the maker of the note be personally liable, and it should be allowed the maker on an accounting. Boyer *v.* Marshall, 5 N. Y. St. 431.

Presumptions on accounting.—When a joint account has been passed by two co-executors in which are included assets jointly held and assets charged to the executors severally and there is no evidence showing specifically how the several items of the assets charged were disposed of, it is proper to apply what are the most natural and reasonable presumptions with respect to the order of application as between different classes of assets. These presumptions seem to be: (1) That, the debts being credited as if paid by both executors, the payments were made with assets jointly held so far as these may go; and (2) that as to the application of assets charged to the executors severally, inasmuch as both are equally credited with the payment of the debts and held assets at the time it is presumable that each contributed equally to such payment. Conner *v.* McIlvaine, 4 Del. Ch. 30.

66. Hengst's Appeal, 24 Pa. St. 413; Ducommun's Appeal, 17 Pa. St. 268; Metz's Appeal, 11 Serg. & R. (Pa.) 204; Sprenkle's Appeal, 1 Walk. (Pa.) 365; Bitler's Estate, 1 Leg Rec. (Pa.) 221; Buerkle's Estate, 28 Pittsb. Leg. J. (Pa.) 398. But see Lightcap's Appeal, 95 Pa. St. 455, holding that executors, uniting in an account, are not liable for uncollected securities for which credit is taken therein; and if securities are taken in their name, and collected by one of them, the other is not liable to the legatees therefor, in absence of proof of culpable negligence. In Young's Appeal, 99 Pa. St. 74, it is stated that while the filing of a joint account is an admission of joint liability for the balance, such joint liability is not a continuing obligation which remains fixed and established as a judicial decree and without regard to subsequent circumstances.

The rule is not applicable where the accounting, although purporting to be joint, is in fact separate. English *v.* Newell, 42 N. J. Eq. 76, 6 Atl. 505 [*affirmed* in 43 N. J. Eq. 295, 14 Atl. 811]; Beatty *v.* Cory Universalist Soc., 41 N. J. Eq. 563, 7 Atl. 338. It is to be observed that the rule of the text does not now obtain in New Jersey. See *infra*, note 67.

67. Conner *v.* McIlvaine, 4 Del. Ch. 30; Effinger *v.* Richards, 35 Miss. 540; Gaultney *v.* Nolan, 33 Miss. 569; Weyman *v.* Thompson, 52 N. J. Eq. 263, 29 Atl. 685, 30 Atl. 249 [*reversing* 50 N. J. Eq. 8, 25 Atl. 205, and *overruling* Tehan *v.* Maloy, 45 N. J. Eq. 68, 16 Atl. 686; Suydam *v.* Bastedo, 40 N. J. Eq. 433, 2 Atl. 808; Schenck *v.* Schenck, 16 N. J. Eq. 174; Laroe *v.* Douglass, 13 N. J. Eq. 308; Fennimore *v.* Fennimore, 3 N. J. Eq. 292]. And see Wilson *v.* Fisher, 5 N. J. Eq. 493; Goble *v.* Andruss, 2 N. J. Eq. 66.

Admissions of possession of assets or investments in joint accounts establish *prima facie* liability. Glacius *v.* Fogel, 88 N. Y. 434 [*affirming* 25 Hun 227]; Lacey *v.* Davis, 4 Redf. Surr. (N. Y.) 402.

68. Merselis *v.* Mead, 7 N. J. Eq. 557; Irwin's Appeal, 35 Pa. St. 294; Davis' Appeal, 23 Pa. St. 206; Rife *v.* Galbreath, 3 Penr. & W. (Pa.) 204.

exists it cannot be discharged as to one or more of such representatives by means of making separate accountings.[69]

C. Acting Executor or Administrator — 1. In General. As has been noted in many of the duties of administration the representative may act severally and with regard to such duties the question of whether associates act or qualify becomes immaterial.[70]

2. Mutual Agreements or Arrangements. A co-representative cannot by contract absolve his associate or associates from their responsibility to the estate for its proper administration,[71] nor can the associates by a division of their duties apportion their responsibilities,[72] although power to do formal or ministerial acts may be delegated.[73]

3. Failure or Refusal to Qualify. A failure or refusal of some of the persons named as executors to qualify will not prevent the others from acting unless there is an express testamentary provision to that effect.[74]

4. Resignation, Removal, Discharge, Etc. The accepted resignation or removal of a representative casts the burden of the administration on those who remain,[75] and the retiring representative is not responsible for their further acts.[76] In case one of the representatives has become bankrupt, or wasted or misapplied the

69. Hinson *v.* Williamson, 74 Ala. 180; Fonte *v.* Horton, 36 Miss. 350; McCoy *v.* Porter, 15 Serg. & R. (Pa.) 57, holding that where executors, in settling an account, charge themselves jointly, they cannot, after a lapse of six years, settle another account in which they are charged separately, so as to discharge some of them as to creditors. Hess' Estate, 2 Phila. (Pa.) 243.

70. See *supra*, XXI, A.

71. Wilson *v.* Lineberger, 94 N. C. 641, 55 Am. Rep. 628; Lees *v.* Sanderson, 4 Sim. 28, 6 Eng. Ch. 28.

Rule as to sureties.— Sureties may consent to become liable for the joint administration of two administrators under an arrangement that one of them shall do no more than sign all papers presented to her by the other, and if they do so she cannot be held in default as to them for acting accordingly. Palmer *v.* Ward, 91 N. Y. App. Div. 449, 86 N. Y. Suppl. 990.

72. Fonte *v.* Horton, 36 Miss. 350 (holding that if executors agree that certain things shall be done by one in the name of both, both are responsible); *In re* Irvine, 203 Pa. St. 602, 53 Atl. 502; Allen *v.* Shanks, 90 Tenn. 359, 16 S. W. 715.

73. Roe *v.* Smith, 42 Misc. (N. Y.) 89, 85 N. Y. Suppl. 527, holding that where two executors were authorized by will to sell the lands of the estate as trustees, a written, unsealed agreement, purporting to be that of such executors, signed by one only of them, who had been authorized by the other executor to act for him in signing the contract, was enforceable.

74. Muldrow *v.* Fox, 2 Dana (Ky.) 74 (holding that a peremptory direction to testator's executors as executors should be construed as meaning those who undertake the office and act as executors); Clark *v.* Farrar, 3 Mart. (La.) 247.

Trust powers necessary to the settlement of the estate may be exercised by the executors who qualify. Treadwell *v.* Cordis, 5 Gray (Mass.) 341; Steinhardt *v.* Cunningham, 55 Hun (N. Y.) 375, 8 N. Y. Suppl. 627.

Representatives who qualify may sue in behalf of estate. Clark *v.* Farrar, 3 Mart. (La.) 247; Alexander *v.* Rice, 52 Mich. 451, 18 N. W. 214; Thompson *v.* Graham, 1 Paige (N. Y.) 384 (holding that where one executor renounces the others may file a bill in their own names and if it is necessary bring in the executor who refuses to accept the trust before the court by making him a party defendant); Goodyear *v.* Providence Rubber Co., 10 Fed. Cas. No. 5,583, 2 Cliff. 351.

75. Marsh *v.* People, 15 Ill. 284; Columbus Banking, etc., Co. *v.* Humphries, 64 Miss. 258, 1 So. 232; Matter of Crossman, 20 How. Pr. (N. Y.) 350.

Marriage of an executrix may by statute terminate her authority and enable a co-executor to act alone. Urban *v.* Hopkins, 17 Iowa 105. See *supra*, II, N, 6.

Actions may be brought in the name of the continuing representative, it being averred that the associates have been removed. Green *v.* Foley, 2 Stew. & P. (Ala.) 441; State *v.* Tunnell, 5 Harr. (Del.) 182, holding that on the removal of an administrator the co-administrator or succeeding administrator, being entitled to recover all the assets, may sue for them on the administration bond.

The title to a note made to two executors jointly, upon the settlement and discharge of one, vests in the other, and he may maintain an action upon it in his own name, although the executors gave separate bonds, and each administered separately from the other, and the note was taken by the executor discharged, in the transactions of his separate administration. Grinstead *v.* Fonte, 32 Miss. 120.

76. Marsh *v.* People, 15 Ill. 284.

Where executors resign after a devastavit by a co-executor, they are not primarily liable for the amount of the devastavit where the continuing executor pays to the estate more than he was liable for when they resigned, although upon his final accounting he fails

assets, or dissipated them through misconduct or negligence, a receiver may be appointed.[77]

D. Surviving Executor or Administrator — 1. In General. Where the administration of an estate is granted to several and one dies, the entire authority and control remains with the survivors.[78] And where several executors are nominated in the will, and one dies before the testator or before qualification, the others are entitled to qualify.[79]

2. Collection of Assets. The surviving representative is entitled to collect and hold the custody of the assets of the estate,[80] and may sue to recover them from the representatives of his deceased associate,[81] unless the latter has so

to account for the entire estate. Bostick *v.* Elliott, 3 Head (Tenn.) 507.

77. Jenkins *v.* Jenkins, 1 Paige (N. Y.) 243 (holding that a receiver would be appointed to act with a solvent executor if he consented, and if he did not consent there would be a reference to a master to appoint a receiver generally); Middleton *v.* Dodswell, 13 Ves. Jr. 266, 33 Eng. Reprint 294.

Termination of receivership.—Where an executor qualifies after a misapplication of the assets by a co-executor, and subsequently a receiver is appointed without objection, the court will not, on the death of the executor who was guilty of the misapplication, restore the management of the estate to the co-executor. Fraser *v.* Charleston, 19 S. C. 384.

78. *Florida.*— Hart *v.* Smith, 17 Fla. 767.

North Carolina.— McDowell *v.* Clark, 68 N. C. 117.

Pennsylvania.— Chew's Appeal, 3 Grant 294, holding that in equity, remaining executors can demand the enforcement of a decree against the late co-executor.

Tennessee.— Lewis *v.* Brooks, 6 Yerg. 167.

Texas.— Saul *v.* Frame, 3 Tex. Civ. App. 596, 22 S. W. 984.

United States.— Hayes *v.* Pratt, 147 U. S. 557, 13 S. Ct. 503, 37 L. ed. 279.

England.— Flanders *v.* Clark, 3 Atk. 509, 26 Eng. Reprint 1093, 1 Ves. 9, 27 Eng. Reprint 875; Balwyn *v.* Johnson, 3 Bro. Ch. 455, 29 Eng. Reprint 640; Hudson *v.* Hudson, Cas. t. Talb. 127, 25 Eng. Reprint 700; Moodie *v.* Bainbridge, 6 Madd. 107; Adams *v.* Buckland, 2 Vern. Ch. 514, 23 Eng. Reprint 929. But see Jacomb *v.* Harwood, 2 Ves. 265, 28 Eng. Reprint 172.

See 22 Cent. Dig. tit. "Executors and Administrators," § 527.

Discretionary powers given to "executors" by official designation only, not expressly joint, survive. Viele *v.* Keeler, 129 N. Y. 190, 29 N. E. 78 [*reversing* 13 N. Y. Suppl. 196]; Davis *v.* Christian, 15 Gratt. (Va.) 11.

79. Burks *v.* Beall, 77 Ga. 271, 3 S. E. 155; Anderson *v.* Stockdale, 62 Tex. 54. See *supra*, II, A, 1, a.

80. Shook *v.* Shook, 19 Barb. (N. Y.) 653 (holding that a surviving executor has an exclusive right to the possession of the property, and, if he is insolvent, an application for relief must be made by the *cestui que trust*, and not by strangers, such as are the executors of a co-executor); Matter of Aymar, 5 Dem. Surr. (N. Y.) 428; Cook *v.* Cook, 34 Fed. 249 (holding that the refusal of a co-administrator to proceed against the estate of a deceased associate, to recover for a devastavit, was not in itself a sufficient ground for a federal court to remove the matter from the surviving administrator's hands, in advance of any action by the surrogate court of the state).

Note to representatives jointly.— A surviving administrator may maintain a suit in his representative capacity to recover on a promissory note executed to him jointly with his co-administrator. Wood *v.* Evans, 43 Tex. 175. Where a note is made to two executors, not described as such, after the death of one of them his executor cannot join with the survivor in an action thereon. Waters *v.* Creagh, Minor (Ala.) 128.

Settlement by representative of deceased representative.— Where an action pending on a note of the estate by two administrators is, on the decease of one, settled by his representatives, and money received by them from the debtor under the settlement, the surviving representative has an election to affirm the settlement and pursue the representatives of his associate, or disaffirm it and hold the original debtor still liable. Weathers *v.* Ray, 4 Dana (Ky.) 474.

Satisfaction of judgment.— Where joint executors recover judgment on a mortgage due their testator, and one of them dies, the survivor has the right to receive payment and satisfy the judgment. Packer *v.* Owens, 164 Pa. St. 185, 30 Atl. 314.

Where executors who are also sole legatees effect a settlement with a debtor of the estate and take his notes in their individual names, for which they sign a release of the indebtedness as executors, and one of the notes is afterward repudiated by the maker, an action on the portion of the debt represented by it may be brought in the name of an executor who survives for the use of the administrator of the deceased executor payee, and it need not be authorized by the surviving executor where he makes no complaint as to the use of his name. Saeger *v.* Runk, 148 Pa. St. 77, 23 Atl. 1006.

81. Lawrence *v.* Lawrence, Litt. Sel. Cas. (Ky.) 123; Davis *v.* Thorn, 6 Tex. 482.

The surviving administrator's individual liability to contribute with the deceased administrator upon their joint bond as administrators cannot be determined in a proceeding by the survivor against the legal representatives of her co-administrator to recover funds be-

mingled the assets with his own property that they can no longer be distinguished, in which case the right of recovery for the devastavit is in the persons entitled to the fund and not in the surviving representative for their benefit.[82]

3. Debts Due From Deceased Representative. The estate of a deceased representative is to be charged with the assets which were in his hands,[83] and the survivor should present a claim therefor.[84] The estate of a deceased representative is liable only for those acts of administration which occurred during the lifetime of the decedent.[85]

4. Real Property and Interests Therein. The powers of a surviving representative with reference to a disposal of the realty of the estate have been elsewhere treated.[86]

XXII. Representatives of Deceased Executors or Administrators.

A. In General. At common law the executor of a deceased executor succeeds as executor of the will of the first testator;[87] but the deceased executor's administrator does not so succeed; nor does a deceased administrator's executor or administrator succeed to the administration of the estate of the original intestate.[88] In the United States the common-law rule has been followed in a few of the states;[89] but in a majority of the states the courts now hold that the personal

longing to the estate. Matter of Scudder, 21 Misc. (N. Y.) 179, 47 N. Y. Suppl. 101.

82. Lawrence *v.* Lawrence, Litt. Sel. Cas. (Ky.) 123; Rorke *v.* McConville, 4 Redf. Surr. (N. Y.) 291; Bowen *v.* Miller, 5 Pa. L. J. 270; Matter of McWilliams, 5 Pa. L. J. 265. *Compare* Lawrence *v.* Lawrence, 3 Barb. Ch. (N. Y.) 71.

83. Adams *v.* Gleaves, 10 Lea (Tenn.) 367 (holding that where a co-administrator dies with funds in his hands belonging to certain legatees, and his estate is solvent, the surviving co-administrator is not liable to account for the funds in the first instance, but recourse should be had to the executor of the deceased administrator and to the sureties on the executor's bond); Carter *v.* Cutting, 5 Munf. (Va.) 223.

Where one representative dies before the other qualifies.— Where of two executors nominated by will one qualifies and misapplies the assets, and after his death the other qualifies, the latter is not responsible for the misapplication of the funds by the first executor; but the estate of the first executor being solvent, it is the duty of the second executor to collect from it the amount which should have come to his hands as assets of the testator, and for his failure to do so he is liable. Wise *v.* Murphy, 5 Redf. Surr. (N. Y.) 365.

Where both representatives dead.— Where one executor has paid over assets to a co-executor, and both have died, an administrator *de bonis non* must join the representatives of both in a suit on account of the estate in order to avoid circuity of action. Quince *v.* Quince, 5 N. C. 160.

84. Smith's Estate, 108 Cal. 115, 40 Pac. 1037, holding that where J, an executor and legatee who received moneys of the estate, died, and W, surviving executor, presented no claim against his estate for the same, the court cannot, on the death of W, after the time for presenting claims against the estate of J had expired, deduct upon distribution the amount collected by J out of the share due his estate.

Time for presentation of claim.— A claim for such funds in the possession of a deceased executor should be presented by testator's surviving executor when the account of decedent as testator's executor is filed in court by decedent's administrator, and the presentation of the claim before that time is premature. Hanbest's Estate, 3 Wkly. Notes Cas. (Pa.) 520.

85. Conner *v.* McIlvaine, 4 Del. Ch. 30; Towne *v.* Ammidown, 20 Pick. (Mass.) 535; Brazier *v.* Clark, 5 Pick. (Mass.) 96; Young's Appeal, 99 Pa. St. 74. *Compare* Hengst's Appeal, 24 Pa. St. 413.

86. See *supra*, XXI, A, 12.

87. Brooke *v.* Haymes, L. R. 6 Eq. 25; *In re* Delacour, Ir. R. 9 Eq. 86; Barr *v.* Carter, 2 Cox Ch. 429, 2 Rev. Rep. 98, 30 Eng. Reprint 199; Fowler *v.* Richards, 6 L. J. Ch. 185, 5 Russ. 39, 5 Eng. Ch. 39, 38 Eng. Reprint 941. And see Barker *v.* Railton, 6 Jur. 549, 11 L. J. Ch. 372; Jossaume *v.* Abbot, 15 Sim. 127, 38 Eng. Ch. 127; Jernegan *v.* Baxter, 5 Sim. 568, 9 Eng. Ch. 568.

Probate of will essential.— Where the executor dies before probate of the will, his executor cannot prove it, but administration with the will annexed must be granted to the residuary legatee, if any, or to the next of kin. Day *v.* Chatfield, 1 Vern. Ch. 200, 23 Eng. Reprint 412. See also Wilcocks *v.* Doughty, 29 L. R. Ir. 17.

88. *In re* Bridger, 4 P. D. 77, 47 L. J. P. & Adm. 46, 39 L. T. Rep. N. S. 123; *In re* Martin, 3 Swab. & Tr. 1. See also Twyford *v.* Trail, 7 Sim. 92, 8 Eng. Ch. 92; *In re* Hughes, 4 Swab. & Tr. 209, holding that the chain of executorship is not continued by the appointment of an executor by a married woman in the will made under a power.

89. White School House *v.* Post, 31 Conn. 240; Hart *v.* Smith, 20 Fla. 58; Windsor *v.*

representative of a deceased executor or administrator cannot, as such, administer on the estate of the first testator, but that an administrator *de bonis non* should be appointed.[90]

B. Duties and Liabilities — 1. In General. The general rule is that the personal representative of a deceased executor or administrator should surrender the unadministered assets of the original decedent's estate to the survivor in the original administration or to the administrator *de bonis non* when appointed;[91] and, for waste and misappropriation by a deceased personal representative, his own estate may be made to respond by appropriate proceedings against his personal representative.[92] In at least one jurisdiction the statute gives the probate court power to compel the executor of a deceased executor to account for unad-

Bell, 61 Ga. 671; Burch *v.* Burch, 19 Ga. 174; Carrol *v.* Connet, 2 J. J. Marsh. (Ky.) 195; Dean *v.* Dean, 7 T. B. Mon. (Ky.) 304. See also Sebre *v.* Eve, 1 A. K. Marsh. (Ky.) 402, holding that an administrator of an administrator cannot in that capacity recover a demand due the first intestate. But see Arline *v.* Miller, 22 Ga. 330.

90. *California.*— Chevassus *v.* Burr, 134 Cal. 434, 66 Pac. 568; Wetzler *v.* Fitch, 52 Cal. 638.

Illinois.— Kinney *v.* Keplinger, 172 Ill. 449, 50 N. E. 131 [*reversing* 71 Ill. App. 334].

Maine.— Prescott *v.* Moss, 64 Me. 422.

Massachusetts.— Tallon *v.* Tallon, 156 Mass. 313, 31 N. E. 287. See also Brooks *v.* Rice, 131 Mass. 408.

Michigan.— Robbins *v.* Burridge, 128 Mich. 25, 87 N. W. 93; Perrin *v.* Lepper, 49 Mich. 342, 13 N. W. 767.

Mississippi.— Miller *v.* Womack, Freem. 486, holding also that administrators of an administrator are liable only to the administrator *de bonis non* of a former estate, and are not liable to the distributees.

New Jersey.— Garret *v.* Stilwell, 10 N. J. Eq. 313.

New York.— Foster *v.* Wilber, 1 Paige 537; Fosdick *v.* Delafield, 2 Redf. Surr. 392; Kilburn *v.* See, 1 Dem. Surr. 353.

North Carolina.— Duke *v.* Ferebee, 52 N. C. 10; Ferebee *v.* Baxter, 34 N. C. 64; Conrad *v.* Dawlton, 14 N. C. 251. But see Saunders *v.* Gatlin, 21 N. C. 86; Roanoke Nav. Co. *v.* Green, 14 N. C. 434.

South Carolina.— Easterly *v.* Thompson, 1 Rice 346. But see Uldrick *v.* Simpson, 1 S. C. 283.

See 22 Cent. Dig. tit. "Executors and Administrators," § 531.

91. *Illinois.*— Kinney *v.* Keplinger, 172 Ill. 449, 50 N. E. 131 [*reversing* 71 Ill. App. 334].

Indiana.— Ray *v.* Doughty, 4 Blackf. 115.

New York.— *In re* Fithian, 5 N. Y. St. 375, holding, however, that an executrix of an executor can only be compelled to deliver over such property as has come into her possession or is under her control.

North Carolina.— Ferebee *v.* Baxter, 34 N. C. 64.

Pennsylvania.— Marshall *v.* Hoff, 1 Watts 440.

South Carolina.— Davis *v.* Wright, 2 Hill 560, holding, however, that the personal representative is not liable for interest while there is no representative of the original estate authorized to receive the assets.

Tennessee.— See Williams *v.* McClund, 6 Heisk. (Tenn.) 443.

Virginia.— Stark *v.* Lipson, 29 Gratt. 322; Burnley *v.* Duke, 2 Rob. 102, holding also that where the administrator of an administrator pays over to the administrator *de bonis non* of the first estate assets converted by his intestate, with the assent of the parties entitled to recover them of him, and under a decree of a court of competent jurisdiction, he is thereby completely protected in such payments.

See 22 Cent. Dig. tit. "Executors and Administrators," § 531.

92. *Alabama.*—Draughon *v.* French, 4 Port. 352, holding, however, that the action should be brought by the distributees or creditors of the estate, and not by the administrator *de bonis non.*

Arkansas.— Finn *v.* Hempstead, 24 Ark. 111.

Florida.— Brockenbrough *v.* Campbell, 5 Fla. 83.

Georgia.— Arline *v.* Miller, 22 Ga. 330; Welman *v.* Armour, R. M. Charlt. 6.

Illinois.— Newhall *v.* Turney, 14 Ill. 338, holding, however, that the action must be brought by the creditors or distributees.

New Jersey.— Crane *v.* Howell, 35 N. J. Eq. 374 (holding that where one of two executors wastes funds of the estate and dies without accounting, the surviving executor may recover therefor from the deceased executor's personal representative); Moore *v.* Smith, 5 N. J. Eq. 649.

New York.— Price *v.* Brown, 10 Abb. N. Cas. 67 (holding that a surviving executor may maintain an action in equity against the foreign executor of the deceased co-executor to compel him to account to the extent of the assets in his hands for the misconduct and breach of trust of the co-executor); Foster *v.* Wilber, 1 Paige 537.

North Carolina.— Morton *v.* Ashbee, 46 N. C. 312.

Oregon.— Gatch *v.* Simpson, 40 Oreg. 90, 66 Pac. 688.

South Carolina.— Trescot *v.* Trescot, 1 McCord Eq. 417.

Virginia.— Allen *v.* Cunningham, 3 Leigh 395.

ministered property in his hands belonging to the first estate, and pay the same into court or to his successor in office.[93] Save in exceptional circumstances,[94] heirs, distributees, or legatees cannot maintain a suit against the personal representative of a deceased executor or administrator to recover property of the estate, but an administrator *de bonis non* should be appointed to bring the action.[95] In no case is the executor of an administrator liable at law to the creditors of the intestate, but it seems that in a proper case he may be made responsible to them in equity on the ground that he is in possession of funds liable to the payment of debts.[96]

2. Collection and Disposition of Assets — a. Lien and Retention For Settlement. In some jurisdictions a lien on assets of the original decedent for charges and outlays on behalf of the original representative is allowed for the benefit of his own estate, and should be enforced by his representative;[97] and the latter cannot be compelled to turn over the estate to the administrator *de bonis non* of the original estate until he has effected a settlement of his own decedent's estate.[98]

b. Participation in Administration. In jurisdictions where the common-law rule has not been adhered to, the representative of the deceased executor or administrator cannot collect or sue upon assets of the first estate, nor proceed with its general administration,[99] beyond clearing up such personal liability as

United States.— Coates *v.* Muse, 5 Fed. Cas. No. 2,917, 1 Brock. 539.

See 22 Cent. Dig. tit. "Executors and Administrators," § 531.

Liability to sureties on original representative's bond.— The representative of a deceased administrator is responsible to the sureties on the administration bond for what they have been compelled to pay on account of a defalcation. Dobyns *v.* McGovern, 15 Mo. 662.

93. *In re* Moehring, 154 N. Y. 423, 48 N. E. 818; Mount *v.* Mount, 68 N. Y. App. Div. 144, 74 N. Y. Suppl. 148 [*reversing* 35 Misc. 62, 71 N. Y. Suppl. 199]; Matter of Trask, 49 N. Y. Suppl. 825, 27 N. Y. Civ. Proc. 7. See also Budd *v.* Hardenbergh, 36 Misc. (N. Y.) 90, 72 N. Y. Suppl. 537.

94. Wathen *v.* Glass, 54 Miss. 382 (holding that rents accruing after the death of the ancestor constitute no part of his estate but belong to the heir as an issue out of the land, and accordingly if the administrator collects such rents and dies without accounting, his personal representative is accountable therefor in a suit by the heir); Buchan *v.* James, Speers Eq. (S. C.) 375 (holding that the next of kin of an intestate may maintain a suit against the representative of the deceased administrator and his estate, without an administration *de bonis non*, where from the lapse of time, after the death of the administrator, all other concerns of the estate may be presumed to be settled).

A legatee whose share has been converted by the deceased executor to his own use may recover directly of the executor's personal representative. Clawson *v.* Riley, 34 N. J. Eq. 348; Tucker *v.* Green, 5 N. J. Eq. 380; Auburn Theological Seminary *v.* Kellogg, 16 N. Y. 83.

If a deceased executor held funds as trustee under the will and died without accounting to the beneficial legatee, his personal representative is liable directly to the legatee. Felton *v.* Sawyer, 41 N. H. 202; Auburn Theological Seminary *v.* Kellogg, 16 N. Y. 83; Goodyear *v.* Bloodgood, 1 Barb. Ch. (N. Y.) 617.

95. Boulton *v.* Scott, 3 N. J. Eq. 231 (holding that an administrator of the executor is not accountable to legatees for the payment of legacies; but such administrator must account with an administrator *de bonis non* of the testator, and the latter with the legatees); Piatt *v.* St. Clair, 5 Ohio 555; Gilliland *v.* Bredin, 63 Pa. St. 393; Drenkle *v.* Sharman, 9 Watts 485; Trueman *v.* Trueman, 3 Pa. L. J. Rep. 101, 4 Pa. L. J. 462. See also Finn *v.* Hempstead, 24 Ark. 111. See, generally, *supra*, II, D, 2. In Smith *v.* Moore, 4 N. J. Eq. 485 [*affirmed* in 5 N. J. Eq. 649], the personal representative of an executor was compelled to account to a legatee of the original testator in due course of the administration for the assets which came into his hands; and in Young *v.* Schelly, (N. J. Ch. 1891) 21 Atl. 1049, a legatee was allowed to maintain a bill against the personal representative of the deceased executor for an order to sell lands which were made subject to the legacy; but in the latter case an administrator *de bonis non* with the will annexed was appointed pending the action and brought before the court, and in neither case was any question raised as to the right to bring the suit.

96. Conrad *v.* Dalton, 14 N. C. 251.

97. Ray *v.* Doughty, 4 Blackf. (Ind.) 115; Foster *v.* Bailey, 157 Mass. 160, 31 N. E. 771; Munroe *v.* Holmes, 13 Allen (Mass.) 109 [*reversing* 9 Allen 244]; Slaymaker *v.* Farmers' Nat. Bank, 103 Pa. St. 616. See also Bowman's Appeal, 62 Pa. St. 17; Pendergrass *v.* Pendergrass, 26 S. C. 19, 1 S. E. 45.

98. Foster *v.* Bailey, 157 Mass. 160, 31 N. E. 771. See also Baldwin *v.* Dalton, 168 Mo. 20, 67 S. W. 599; Sibbs *v.* Philadelphia Sav. Fund Soc., 153 Pa. St. 345, 25 Atl. 1119.

99. *Alabama.*— Dempsey *v.* Stapleton, 46 Ala. 383.

Michigan.— Robbins *v.* Burridge, 128 Mich. 25, 87 N. W. 93.

may have been incurred by his own decedent,[1] and realizing upon what should enter properly into a final account and settlement on his part so as to clear his own decedent's estate from further liability for the trust.[2] So far as the expense of settlement of a deceased administrator's account is made necessary by his improper conduct, it falls upon his estate, but otherwise it may be charged in his account.[3]

XXIII. INDEPENDENT EXECUTORS.

A. Administration Independent of Control of Courts.[4] Administration may be had independent of the control of courts of probate jurisdiction under the statutes of Texas[5] and Washington,[6] where the testator has clearly indicated by his will that such is his desire,[7] and the persons taking under the will have assented.[8] An independent administration may be had in a suitable case although

Missouri.— Harney *v.* Dutcher, 15 Mo. 89, 55 Am. Dec. 131.

New Jersey.— Chambers *v.* Tulane, 9 N. J. Eq. 146, holding that the power to sell given by a will to the executor is not transmitted to his executor.

New York.— Smith's Estate, 17 Abb. N. Cas. 78; Renaud *v.* Conselyea, 7 Abb. Pr. 105 [*reversing* 5 Abb. Pr. 346]; Campbell *v.* Bowne, 5 Paige 34; Gaffney *v.* Public Administrator, 4 Dem. Surr. 223; Stewart *v.* O'Donnell, 2 Dem. Surr. 17.

North Carolina.— Ballinger *v.* Cureton, 104 N. C. 474, 10 S. E. 664, attempt to sue on note executed to original executor as such.

Pennsylvania.— Stair *v.* York Nat. Bank, 55 Pa. St. 364, 93 Am. Dec. 759; Brooks *v.* Smyser, 48 Pa. St. 86; Tucker *v.* Horner, 10 Phila. 122; Com. *v.* Mears, 5 Leg. & Ins. Rep. 67.

Virginia.— Hinton *v.* Bland, 81 Va. 588; Allen *v.* Cunningham, 3 Leigh 395.

See 22 Cent. Dig. tit. "Executors and Administrators," § 532.

1. *Alabama.*— See Dempsey *v.* Stapleton, 46 Ala. 383.

Georgia.— Worrill *v.* Taylor, 27 Ga. 398.

New York.— See Montross *v.* Wheeler, 4 Lans. 99, holding that the surrogate has no power to compel an executor to account for property which has been received by his testator as executor, unless it has come into his possession, and then only to the extent that he has received it.

North Carolina.— Jarratt *v.* Lynch, 106 N. C. 422, 11 S. E. 261; Irvin *v.* Hughes, 82 N. C. 210.

Ohio.— McCoy *v.* Gilmore, 7 Ohio 268.

Pennsylvania.— Sibbs *v.* Philadelphia Sav. Fund Soc., 153 Pa. St. 345, 25 Atl. 1119; Marshall *v.* Hoff, 1 Watts 440.

Vermont.— Crampton *v.* Seymour, 67 Vt. 393, 31 Atl. 889; Bottam *v.* Morton, Brayt. 108.

Virginia.— Turnbull *v.* Claibornes, 3 Leigh 392.

See 22 Cent. Dig. tit. "Executors and Administrators," § 532.

2. *Mississippi.*— Prestige *v.* Pendleton, 28 Miss. 379.

Missouri.— Cook *v.* Holmes, 29 Mo. 61, 77 Am. Dec. 548, holding that where a promissory note is made to an administrator in his representative character and he dies, a suit thereon may be properly brought in the name of his executor.

New York.— Caulkins *v.* Bolton, 31 Hun 458, holding that if an executor lends funds of the estate he represents, and takes securities for the loan in his own name, his executors are entitled to collect them.

North Carolina.— Lancaster *v.* McBryde, 27 N. C. 421 (holding that where two co-executors died, the executor of the one who died last might recover from the executor of the one who died first a bond belonging to the estate of the first testator); Alston *v.* Jackson, 26 N. C. 49.

Pennsylvania.— Sibbs *v.* Philadelphia Sav. Fund Soc., 153 Pa. St. 345, 25 Atl. 1119; Slaymaker *v.* Farmers' Nat. Bank, 103 Pa. St. 616. See also Marshall *v.* Hoff, 1 Watts 440; Williamson's Estate, 6 Wkly. Notes Cas. 452.

South Carolina.— Williams *v.* Seabrook, 3 McCord 371.

United States.— Daly *v.* James, 8 Wheat. 495, 5 L. ed. 670.

See 22 Cent. Dig. tit. "Executors and Administrators," § 532.

3. Walworth *v.* Bartholomew, 76 Vt. 1, 56 Atl. 101.

4. See *supra*, I, H, 7.

5. Todd *v.* Willis, 66 Tex. 704, 1 S. W. 803; Freeman *v.* Tinsley, (Tex. Civ. App. 1897) 40 S. W. 835.

6. Newport *v.* Newport, 5 Wash. 114, 31 Pac. 428.

7. Smithwick *v.* Kelly, 79 Tex. 564, 15 S. W. 486, holding, however, that an intention to remove the administration from the control of the probate court cannot be inferred from the fact that the executors are relieved from giving bond.

Such wills are termed non-intervention wills. *In re* Macdonald, 29 Wash. 422, 69 Pac. 1111.

The will is to be liberally construed so as to confer on the executor powers requisite to prevent the taking of the estate into court, where the will is specific with regard to the testator's intention that there shall be no administration in court. Cooper *v.* Horner, 62 Tex. 356.

8. Henderson *v.* Van Hook, 25 Tex. Suppl. 453.

In case the heirs and legatees do not elect to make the will effectual by giving a bond,

the estate is insolvent.[9] The executor is in such case termed an independent executor,[10] and need not qualify by taking an oath.[11]

B. Powers and Liabilities in General. Independent executors have the powers of ordinary executors, free from the supervision and control of the courts, being restrained only by the will.[12] Where they have exercised reasonable discretion they are not responsible for errors in judgment.[13] They cannot delegate discretionary powers.[14]

C. Sale of Property.[15] The executor may, without express authority, sell the property for the payment of the debts of the estate or the discharge of any other trust which is directly or exclusively committed to him by the will,[16] and a statute requiring executors in all cases to report sales of real estate to the superior

the estate is to be settled as in other cases. Hogue *v.* Sims, 9 Tex. 546.

9. Shackleford *v.* Gates, 35 Tex. 781.

The right to have such administration is vested at the death of testator and cannot be taken away by a subsequent statute providing for an ordinary administration in case the estate appears to be insolvent. State *v.* Kings County Super. Ct., 21 Wash. 186, 57 Pac. 337.

10. Ellis *v.* Mabry, 25 Tex. Civ. App. 164, 60 S. W. 571.

11. Connellee *v.* Roberts, 1 Tex. Civ. App. 363, 23 S. W. 187.

12. Carlton *v.* Goebler, 94 Tex. 93, 58 S. W. 829; McDonough *v.* Cross, 40 Tex. 251; Hall *v.* Reese, 24 Tex. Civ. App. 221, 58 S. W. 974; Newport *v.* Newport, 5 Wash. 114, 31 Pac. 428.

In case of joint executors those surviving or remaining after failure of others to qualify may exercise the powers granted by the will (Johnson *v.* Bowden, 43 Tex. 670), especially where the will provides that, in case one of the executors named refuses to act, the other shall not be required to give bond (Terrell *v.* McCown, 91 Tex. 231, 43 S. W. 2 [*reversing* (Civ. App. 1897) 40 S. W. 54]).

Community property of the testator and his deceased wife may be administered by an independent executor under a will empowering him to manage the estate of the testator. Carlton *v.* Goebler, 94 Tex. 93, 58 S. W. 829. As to administration of community property in general see HUSBAND AND WIFE.

Title to the property passes to the executor as trustee. State *v.* Kings County Super. Ct., 21 Wash. 186, 57 Pac. 337.

13. Dwyer *v.* Kalteyer, 68 Tex. 554, 5 S. W. 75.

14. Terrell *v.* McCown, 91 Tex. 231, 43 S. W. 2 [*reversing* (Civ. App. 1897) 40 S. W. 54], holding, however, that an executor with discretionary power to sell land exercised the power where he determined to sell particular land in small tracts, authorized an attorney in fact to negotiate sales and subdivide to suit purchasers, and considered the sales made by such agent to be advantageous to the estate and assented thereto as they were made and the facts concerning them were reported to him from time to time as the business progressed although the deeds were executed by the attorney in fact.

15. As to sales of the property of decedents generally see *supra*, VIII, O, 9, d; VIII, P, 2; XII.

16. McDonough *v.* Cross, 40 Tex. 251. When authorized to sell personalty, and from the proceeds to pay debts, taxes, and expenses of the support and education of testator's children, the executor may contract to give a person procuring the location of an unlocated land certificate belonging to the estate, one-half the land located. Murrell *v.* Wright, 78 Tex. 519, 15 S. W. 156.

Executor may sell community property to pay community debts. Carlton *v.* Goebler, 94 Tex. 93, 58 S. W. 829.

An implied power of sale for that purpose may arise from a testamentary direction to pay debts (Carleton *v.* Hausler, 20 Tex. Civ. App. 275, 49 S. W. 118), or from the mere existence of debts (Masterson *v.* Stevens, (Tex. Civ. App. 1896) 37 S. W. 364). An implication of power to sell is not excluded by a provision that the executor shall "manage" the testator's estate "to the best advantage for the benefit of" his creditors. Carlton *v.* Goebler, 94 Tex. 93, 58 S. W. 829 [*distinguishing* Blanton *v.* Mayes, 58 Tex. 422]; Carleton *v.* Hausler, *supra*.

Indebtedness for the payment of which sale may be made may include taxes due and accruing, together with money borrowed to pay them (Blanton *v.* Myers, 72 Tex. 417, 10 S. W. 452), but not a mere claim of the executor unsupported by evidence (Freeman *v.* Kingsley, (Tex. Civ. App. 1897) 40 S. W. 835), or a liability arising from the testator's unexecuted parol agreement to convey land (Masterson *v.* Stevens, (Tex. Civ. App. 1896) 37 S. W. 364).

Where no inventory has been filed, a purchaser from the executor will be protected, heirs and creditors having for a long time failed to assert their rights to secure its filing. Cooper *v.* Horner, 62 Tex. 356; Willis *v.* Ferguson, 46 Tex. 496.

Termination of power.— A provision that after payment of debts and the sale of so much of the estate as shall be necessary for the support and education of the children the remainder shall be divided when an older child attains his majority does not terminate the executor's power of sale on the arrival of such child at his majority. Hallum *v.* Silliman, 78 Tex. 347, 14 S. W. 797.

A conveyance by the vendee at an unauthorized sale to his wife in consideration of

court and giving the court power to set aside or confirm such sale has been held not inconsistent with a power given independent executors by another statute to make sales without reports.[17] Where the executor has only an implied power of sale the purchaser must show that the sale was authorized by the facts,[18] but such proof is unnecessary in case of an express power.[19] The purchaser is not bound to see that a proper disposition is made of the proceeds of sale.[20]

D. Filing and Enforcement of Claims. Statutory provisions with reference to the presentation of claims against the estates of decedents do not apply to an estate settled outside of the probate court by an independent executor;[21] nor is it necessary that such an executor should give notice to creditors to present their claims.[22] Action may be brought on the claim and execution issued against the executor if he have assets of the estate in his possession,[23] without prior presen-

an antecedent debt and the assumption of a community debt does not constitute the wife a *bona fide* purchaser for value without notice. Freeman *v.* Tinsley, (Tex. Civ. App. 1897) 40 S. W. 835.

17. Philadelphia Provident L. & T. Co. *v.* Mills, 91 Fed. 435, construing the Washington statutes.

18. Freeman *v.* Tinsley, (Tex. Civ. App. 1897) 40 S. W. 835.

19. Terrell *v.* McCown, 91 Tex. 231, 43 S. W. 2 [*reversing* (Civ. App. 1897) 40 S. W. 54], holding that in such case the burden of proof is on the heirs claiming the land, as against *bona fide* purchasers and grantees of the executors, to show that there were no debts when the deeds were made.

20. Blanton *v.* Myers, 72 Tex. 417, 10 S. W. 452; Cooper *v.* Horner, 62 Tex. 356. This is the general rule as to all sales by personal representatives. See *supra*, VIII, O, 9, d, (IX), (D); VIII, P, 2, i; XII, V, 6.

21. *In re* Smith, (Oreg. 1904) 75 Pac. 133 (construing the Washington statute and holding that notice given would not operate to bar a claim not presented within a year); Bell *v.* Farmers', etc., Nat. Bank, (Tex. Civ. App. 1902) 76 S. W. 798.

Verification of the claim by affidavit is unnecessary. Pleasants *v.* Davidson, 34 Tex. 459.

22. *In re* Macdonald, 29 Wash. 422, 69 Pac. 1111; Moore *v.* Kirkman, 19 Wash. 605, 54 Pac. 24.

23. Hart *v.* McDade, 61 Tex. 208; Lewis *v.* Nichols, 38 Tex. 54; McKie *v.* Simpkins, 1 Tex. App. Civ. Cas. § 278.

Bond must have been given by the devisees showing an election to take advantage of the provision of the will removing the administration from the control of the court in order that a suit may be maintained against the executors or the heirs and legatees in possession of the estate. Carroll *v.* Carroll, 20 Tex. 731; Hogue *v.* Sims, 9 Tex. 546.

After the executor has delivered the property to the devisees, free from any claim of his for the purposes of administration, it cannot be contended that it remains in his hands so as to be subject to execution against him on a judgment against him in his representative capacity, although in the proper discharge of his duty he should have retained it in his hands for the payment of debts; and where the executor has sold land belonging to the estate and taken notes in payment in such amounts as represent the individual shares of the devisees and delivered such notes to the devisees, the land cannot subsequently be sold on execution on a judgment obtained against the executor by a creditor of the estate. McDonough *v.* Cross, 40 Tex. 251. But see Baker *v.* Beach, 85 Fed. 836, holding that the widow of a deceased stockholder of an insolvent national bank, who by authority of the will undertook to settle the estate as executrix without judicial proceedings, but failed to transfer such stock to herself or other person, could not, on the ground that the estate was fully settled, escape liability as executrix for assessments on such stock to the extent of assets of the estate under her control.

A judgment against the executor in a federal court in an action to enforce the testator's personal liability on corporate stock is enforceable as is any other claim against the estate. *In re* Macdonald, 29 Wash. 422, 69 Pac. 1111.

The pleadings need not aver that the executor has assets of the estate in his hands. Pleasants *v.* Davidson, 34 Tex. 459. A general averment, not excepted to, that defendant was the qualified and acting executrix authorizes proof that she was an independent executrix and will support an award of execution against her as such. Ellis *v.* Mabry, 25 Tex. Civ. App. 164, 60 S. W. 571. In foreclosure of a mortgage executed by an independent executor, an allegation that the will authorized the executor to administer upon the estate without the intervention, order, or advice of any court is sufficient to show that letters testamentary were not required in the settlement of the estate. Miller *v.* Borst, 11 Wash. 260, 39 Pac. 662. An allegation in one part of a complaint that a person named as executor has executed a note and mortgage will be read with an allegation that he has executed and performed all the terms and conditions of the will, and it will be presumed that such execution was within the administrator's power where it further appears that there was to be an independent administration. Miller *v.* Borst, 11 Wash. 260, 39 Pac. 662.

In a collateral action the question of whether a judgment was such as to authorize

tation of the claim as against the estate.[24] Since the probate court is without power, except such as is especially conferred on it by statute, to control the administration of estates under non-intervention wills, a purported discharge of the executor will not prevent the enforcement of a judgment against him where he has funds of the estate in his hands.[25]

E. Removal or Resignation. Provision is made under the statutes for the removal of a malfeasant executor,[26] after which, or in case of resignation, the administration proceeds under the control of the court as *de bonis non*.[27] The persons interested may compel an accounting on the executor's removal.[28]

XXIV. EXECUTORS DE SON TORT.

A. Definition and Nature of Office. An executor *de son tort* is a person who without authority intermeddles with the estate of a decedent and does such acts as properly belong to the office of an executor or administrator,[29] and thereby becomes a sort of quasi-executor, although only for the purpose of being sued or made liable for the assets with which he has intermeddled.[30] The designation is inapt in that it applies the term "executor" to intestate as well as testate estates, and also in that it gives to a person who has merely incurred a certain liability by reason of his intermeddling an official title corresponding with that of a duly appointed representative,[31] and in many states the so-called office of executor *de son tort* has been abolished by statute, while in others it is considered inconsistent with the prevalent system of administration.[32]

execution to issue against the property of the estate in the hands of the executor may be determined by an examination of the pleadings or evidence thereof. Croom *v.* Winston, 18 Tex. Civ. App. 1, 43 S. W. 1072.

24. Rogers *v.* Harrison, 44 Tex. 169; *In re* McDonald, 29 Wash. 422, 69 Pac. 1111; Moore *v.* Kirkman, 19 Wash. 605, 54 Pac. 24.

25. *In re* McDonald, 29 Wash. 422, 69 Pac. 1111. Where a partition is not sought the county court has no jurisdiction to adjudicate that the estate has been properly administered, to allow the executor compensation, and to discharge him from further liability on what is purported to be the presentation of a final accounting, unless the will fails to provide a means for partition or fails to distribute the entire estate. Lumpkin *v.* Smith, 62 Tex. 249.

26. Newport *v.* Newport, 5 Wash. 114, 31 Pac. 428, holding that where independent executors have failed to pay over income as required by the terms of the will, and have paid it out for other purposes and have not accounted as required by the will, a legatee may maintain an action to require them to take out letters testamentary and administer the estate according to the general law.

A creditor of an heir has no standing to require letters testamentary or of administration to issue, or to have the court cite the executors before it and have the trust faithfully executed. State *v.* Pierce County Super. Ct., 21 Wash. 575, 59 Pac. 483.

27. Todd *v.* Willis, 66 Tex. 704, 1 S. W. 803; Bell *v.* Farmers', etc., Nat. Bank, (Tex. Civ. App. 1903) 76 S. W. 798.

The administrator de bonis non may bring an action against his predecessor for property of the estate, for which the latter has not accounted (Dwyer *v.* Kalteyer, 68 Tex. 554, 5 S. W. 75), or to set aside a sale upon the ground that it was fraudulently made to enable the executors to acquire title in themselves (Todd *v.* Willis, 66 Tex. 704, 1 S. W. 803).

The court is bound to take notice of the proceedings already had by the independent executor and shown in his report. Bell *v.* Farmers', etc., Nat. Bank, (Tex. Civ. App. 1903) 76 S. W. 798.

28. Murrell *v.* Wright, 78 Tex. 519, 15 S. W. 156.

29. Barnard *v.* Gregory, 14 N. C. 223. See also Morrow *v.* Cloud, 77 Ga. 114; Matter of Richardson, 8 Misc. (N. Y.) 140, 29 N. Y. Suppl. 1079.

For other definitions substantially the same see the following cases:

Arkansas.— Barasien *v.* Odum, 17 Ark. 122.

Maine.— Hinds *v.* Jones, 48 Me. 348.

New York.— Mills *v.* Mills, 115 N. Y. 80, 21 N. E. 714.

South Carolina.— *Ex p.* Davega, 31 S. C. 413, 10 S. E. 72.

West Virginia.—Morris *v.* Joseph, 1 W. Va. 256, 91 Am. Dec. 386.

A person acting under void letters of administration may be chargeable as an executor *de son tort*. Bradley *v.* Com., 31 Pa. St. 522.

30. Pryor *v.* Downey, 50 Cal. 388, 19 Am. Rep. 656.

31. See Schouler Ex. § 184.

32. *Alabama.*— Winfrey *v.* Clarke, 107 Ala. 355, 18 So. 141; Draughor *v.* French, 4 Port. 352.

Arkansas.— Barasien *v.* Odum, 17 Ark. 122.

California.— Bowden *v.* Pierce, 73 Cal. 459, 14 Pac. 302, 15 Pac. 64.

Kansas.— Fox *v.* Van Norman, 11 Kan. 214.

B. How Office or Liability Assumed — 1. INTERMEDDLING IN GENERAL. A person makes himself chargeable as executor *de son tort* by acts of such a character as indicate that he is possessed of authority to administer upon the estate.[33] If a debtor or a stranger takes the goods of a decedent, or in any way intermeddles with them, injuriously to the interests of the estate, he becomes an executor *de son tort* and is chargeable accordingly.[34] To constitute intermeddling, the person sought to be charged as executor *de son tort* must take possession or some control of property belonging to the decedent;[35] without this the perform-

Louisiana.— Walworth *v.* Ballard, 12 La. Ann. 245.

Michigan.— Gilkey *v.* Hamilton, 22 Mich. 283.

Minnesota.— Noon *v.* Finnegan, 29 Minn. 418, 13 N. W. 497.

Missouri.— Rozelle *v.* Harmon, 103 Mo. 339, 15 S. W. 432, 12 L. R. A. 187.

New York.— Babcock *v.* Booth, 2 Hill 181, 38 Am. Dec. 578. See also Field *v.* Gibson, 20 Hun 274; Metcalf *v.* Clark, 41 Barb. 45; Matter of Richardson, 2 Misc. 288, 23 N. Y. Suppl. 978.

Ohio.— Dixon *v.* Cassell, 5 Ohio 533.

Oregon.— Rutherford *v.* Thompson, 14 Oreg. 236, 12 Pac. 382.

Texas.— Vela *v.* Guerra, 75 Tex. 595, 12 S. W. 1127; Green *v.* Rugely, 23 Tex. 539; Hunt *v.* Butterworth, 21 Tex. 133, 73 Am. Dec. 223; Ansley *v.* Baker, 14 Tex. 607, 65 Am. Dec. 136.

Vermont.— Roys *v.* Roys, 13 Vt. 543.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2582.

33. *Connecticut.*— Selleck *v.* Rusco, 46 Conn. 370.

Maine.— Hinds *v.* Jones, 48 Me. 348.

Mississippi.— O'Reilly *v.* Hendricks, 2 Sm. & M. 388.

New Hampshire.— See Emery *v.* Berry, 28 N. H. 473, 61 Am. Dec. 622.

South Carolina.— Givens *v.* Higgins, 4 McCord 286, 17 Am. Dec. 743.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2583.

By answering as executor to any action brought against himself, or by pleading any other plea than *ne unques executor*, a person may make himself an executor *de son tort*. Haacke *v.* Gordon, 6 U. C. Q. B. 424. See also Jessup *v.* Simpson, 14 U. C. Q. B. 213. But *compare* State *v.* Rogers, 1 Harr. (Del.) 120, holding that where one of two executors named in a will did not qualify, the fact that he appeared with the executor who had qualified and moved to quash a scire facias issued against both as executors was not evidence that he was an executor *de son tort*.

34. *Alabama.*— Densler *v.* Edwards, 5 Ala. 31.

Connecticut.— Bennett *v.* Ives, 30 Conn. 329; Bacon *v.* Parker, 12 Conn. 212.

Delaware.— Wilson *v.* Hudson, 4 Harr. 168.

Indiana.— Wilson *v.* Davis, 37 Ind. 141.

Kentucky.— Hopkins *v.* Towns, 4 B. Mon. 124, 39 Am. Dec. 497; Gentry *v.* Jones, 6 J. J. Marsh. 148; Brown *v.* Durbin, 5 J. J. Marsh. 170; Johnston *v.* Duncan, 3 Litt. 163, 14 Am. Dec. 54.

Maryland.— Hagthorp *v.* Hook, 1 Gill & J. 270.

New Hampshire.— Emery *v.* Berry, 28 N. H. 473, 61 Am. Dec. 622.

New Jersey.— See McGill *v.* O'Connell, 33 N. J. Eq. 256.

North Carolina.— Turner *v.* Child, 12 N. C. 331, 17 Am. Dec. 555.

South Carolina.— *Ex p.* Davega, 31 S. C. 413, 10 S. E. 72; Givens *v.* Higgins, 4 McCord 286, 17 Am. Dec. 742; Howell *v.* Smith, 2 McCord 516.

Vermont.— Shaw *v.* Hallihan, 46 Vt. 389, 14 Am. Rep. 628.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2583.

A person to whose order money belonging to an estate is paid before an administrator is appointed is accountable therefor, although the money or the avails of it never came to his actual use. Clark *v.* Pishon, 31 Me. 503.

Levy of distress warrant.— A distress warrant abates by the death of the tenant before its execution, and if it is subsequently levied and the goods sold the landlord subjects himself to the liabilities of an executor *de son tort*. Salvo *v.* Schmidt, 2 Speers (S. C.) 512.

Persons who aid or abet or take part in the intermeddling with decedent's estate or who are in collusion with the intermeddler may also be held liable. See Scoville *v.* Post, 3 Edw. (N. Y.) 216.

35. Beavan *v.* Hastings, 2 Jur. N. S. 1044, 2 Kay & J. 724, 4 Wkly. Rep. 785.

One who takes property belonging to himself through a purchase from decedent before his death is not an intermeddler. Cook *v.* Sanders, 15 Rich. (S. C.) 63, 94 Am. Dec. 139.

Intermeddling may consist in collecting or taking possession of the assets (Scoville *v.* Post, 3 Edw. (N. Y.) 216; Hubble *v.* Fogartie, 3 Rich. (S. C.) 413, 45 Am. Dec. 775; Howell *v.* Smith, 2 McCord (S. C.) 516. See also Turner *v.* Child, 12 N. C. 331, 17 Am. Dec. 555), selling the property (Wilson *v.* Hudson, 4 Harr. (Del.) 168; Hubble *v.* Fogartie, *supra*; Padget *v.* Priest, 2 T. R. 97, 1 Rev. Rep. 440. See also Turner *v.* Child, *supra*, 17 Am. Dec. 555), paying the debts or otherwise paying out money of the estate (Scoville *v.* Post, *supra*; Hubble *v.* Fogartie, *supra*; Howell *v.* Smith, *supra*; Shaw *v.* Hallihan, 46 Vt. 389, 14 Am. Rep. 628), or any act which usually evinces a legal control (Hubble *v.* Fogartie, *supra*), such as using the property as one's own (Hubble *v.* Fogartie, *supra*. See also Bacon *v.* Parker, 12 Conn. 212), wasting it (Hubble *v.* Fogartie, *supra*), or carrying on the business of the decedent

ance of acts which are in their nature such as an executor or administrator would do cannot make one an executor *de son tort.*[36] Intermeddling with real estate will not constitute a person executor *de son tort.*[37]

2. **Acts Done in Good Faith or Under Color of Right.** In order for a person's acts to charge him as an executor *de son tort*, they must show an intention on his part to take upon himself the exercise of those duties which appertain to the office of the legal representative alone. If it clearly appears that the person sought to be charged was merely acting in good faith in attempting to protect his own rights, or under color of authority, he will not as a general rule be charged as executor *de son tort.*[38] Thus a person will not be charged as executor *de son tort* where he comes into possession of assets lawfully or with the consent of the rightful administrator,[39] or takes or retains possession of property under color of title in good faith believing his right to be superior to that of the lawful administrator, although his title proves indefensible.[40] But even though one has some color of authority to intermeddle with the goods of a decedent, he becomes executor *de son tort* if he exceeds his authority.[41]

3. **Acts of Kindness and Charity.** To establish the liability of an executor *de son tort* the intermeddling must be of an illegal character.[42] Mere acts of

(Perkins *v.* Sturtivant, (Miss. 1888) 4 So. 555).

36. Carter *v.* Robbins, 8 Rich. (S. C.) 29, holding that payment of the decedent's debts out of one's own money will not render one liable. See also Morris *v.* Lowe, 97 Tenn. 243, 36 S. W. 1098.

37. King *v.* Lyman, 1 Root (Conn.) 104; Mitchel *v.* Lunt, 4 Mass. 654; Ela *v.* Ela, 70 N. H. 163, 47 Atl. 414.

If the heir takes possession of the lands of the deceased and sells the same he is not liable as executor *de son tort.* Johnson *v.* Johnson, 80 Ga. 260, 5 S. E. 629.

Mortgage interest.— Inasmuch as a mortgage is personalty and goes to the administrator of the mortgagee, the heirs of a mortgagee who enter the mortgaged premises to foreclose and take the rents and profits thereof are intermeddlers with the personal property of the estate of the deceased and executors in their own wrong and are liable for the amounts they have received. Haskins *v.* Hawkes, 108 Mass. 379.

38. Willingham *v.* Rushing, 105 Ga. 72, 31 S. E. 130.

Completion of act properly begun.— Where a person sold property as an agent and after the death of his principal collected the proceeds he was not an executor *de son tort*, for the collection of the money had reference to the agency and was the completion of an act proper and lawful in its commencement. Turner *v.* Child, 12 N. C. 25, 17 Am. Dec. 555 [*distinguishing* Padget *v.* Priest, 2 T. R. 97, 1 Rev. Rep. 440].

39. See Gibson *v.* Draffin, 77 S. W. 928, 25 Ky. L. Rep. 1332; Boring *v.* Jobe, (Tenn. Ch. App. 1899) 53 S. W. 763.

40. *Alabama.*—Ward *v.* Bevill, 10 Ala. 197, 44 Am. Dec. 478; Densler *v.* Edwards, 5 Ala. 31.

Georgia.— Willingham *v.* Rushing, 105 Ga. 72, 31 S. E. 130.

Iowa.— Claussen *v.* Lafrenz, 4 Greene 224.

Maine.— Smith *v.* Porter, 35 Me. 287.

Pennsylvania.— Brown *v.* Brown, 1 C. Pl. 8.

South Carolina.— Cook *v.* Sanders, 15 Rich. 413, 94 Am. Dec. 139.

Tennessee.— Morris *v.* Lowe, 97 Tenn. 243, 36 S. W. 1098.

England.— Femings *v.* Jarrat, 1 Esp. 335.

Canada.— Merchants Bank *v.* Monteith, 10 Ont. Pr. 467.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2583.

An assignee for the benefit of the creditors who accepted the trust, went into possession of the goods, and sold them, some before and some after the testator's death, and applied the proceeds to the debts mentioned in the assignment, all in good faith and without fraud, cannot be charged as executor *de son tort* of the deceased assignor, although the deed of assignment was void for want of a proper affidavit as to the list of creditors, etc. Chattanooga Stove Co. *v.* Adams, 81 Ga. 319, 6 S. E. 695.

A widow who takes possession of and claims property bailed to her late husband as belonging to herself and does not claim as administratrix and pays her husband's debts out of her own property is not an administratrix *de son tort.* Morris *v.* Lowe, 97 Tenn. 243, 36 S. W. 1098.

41. Wiley *v.* Truett, 12 Ga. 588; *Ex p.* Davega, 31 S. C. 413, 10 S. E. 72, holding that the attorney of persons who held a mortgage on the entire property of the deceased may be held to be executor *de son tort* as to the excess of the property which remains after satisfying the mortgage debt, even granting that he had authority to seize the property for the purpose of making satisfaction.

Wrongfully retaining property may make one an executor *de son tort*, although his original possession was lawful. Clarke *v.* Goodrum, 61 Miss. 731. See also Root *v.* Geiger, 97 Mass. 178.

42. Brown *v.* Sullivan, 22 Ind. 359, 85 Am. Dec. 421.

kindness and charity, such as directing the funeral, the payment of funeral expenses, protecting the estate from loss or waste by locking up the goods, feeding the stock, and the like, providing for children, and other acts of a similar character, do not render one chargeable as executor *de son tort*.[43] But the exemption from liability extends only to acts of this character, and one who takes over the entire estate for arrangement and distribution, including everything in substance that an administrator would be bound to do, may be charged as executor *de son tort*.[44]

4. Possession Under Conveyance From Decedent. One who holds property under a gift or conveyance void as against the creditors of the deceased donor or grantor, may, so far as defrauded creditors are concerned, be deemed as in a sense an executor *de son tort*.[45] But it is of course otherwise in the case of one who holds under a *bona fide* conveyance for a valuable consideration, coupled with an actual transfer of possession, which is not fraudulent in law.[46]

5. Acts of Foreign Executor or Administrator. It has been held that an executor or administrator appointed or qualified in one state may be held liable as executor *de son tort* if he assumes possession or control of the assets of the decedent in another state in which letters have not been issued to him,[47] but this

43. *Connecticut.*— Bennett *v.* Ives, 30 Conn. 329; Bacon *v.* Parker, 12 Conn. 212.

Illinois.— Rohn *v.* Rohn, 204 Ill. 184, 68 N. E. 369, 98 Am. St. Rep. 185.

Indiana.— Brown *v.* Sullivan, 22 Ind. 359, 85 Am. Dec. 421.

Massachusetts.— Pittengill *v.* Abbott, 167 Mass. 307, 45 N. E. 748 (holding that under the Massachusetts statute the widow may, before letters granted, pay from the estate the ordinary funeral expenses and the reasonable price of a burial lot); Perkins *v.* Ladd, 114 Mass. 420, 19 Am. Rep. 374.

New Hampshire.— Emery *v.* Berry, 28 N. H. 473, 61 Am. Dec. 622.

England.— Camden *v.* Flather, 3 Jur. 57, 1 H. & H. 361, 8 L. J. Exch. 17, 4 M. & W. 378.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2583.

44. Rohn *v.* Rohn, 204 Ill. 184, 68 N. E. 369, 98 Am. St. Rep. 185. See also Bennett *v.* Ives, 30 Conn. 329.

In a wild and unsettled region where there is no organized civil government a greater latitude may be allowed as to acts which may be performed without subjecting one to liability as executor *de son tort* than would be the case in a regularly organized community. See Graves *v.* Poage, 17 Mo. 91.

45. *Alabama.*— Simonton *v.* McLane, 25 Ala. 353; Densler *v.* Edwards, 5 Ala. 31.

Georgia.— Gleaton *v.* Lewis, 24 Ga. 209; Clayton *v.* Tucker, 20 Ga. 452; Trippe *v.* Ward, 2 Ga. 304; Howland *v.* Dews, R. M. Charlt. 383. But see Johnson *v.* Johnson, 80 Ga. 260, 5 S. E. 629.

Maine.— Allen *v.* Kimball, 15 Me. 116.

Maryland.— Baumgartner *v.* Haas, 68 Md. 32, 11 Atl. 588; Dorsey *v.* Smithson, 6 Harr. & J. 61.

Mississippi.— Ellis *v.* McGee, 63 Miss. 168; Garner *v.* Lyles, 35 Miss. 176.

New York.— Babcock *v.* Booth, 2 Hill 181, 38 Am. Dec. 578; Osborne *v.* Moss, 7 Johns. 161. 5 Am. Dec. 252.

North Carolina.— Sturdivant *v.* Davis, 31 N. C. 365; Bailey *v.* Miller, 27 N. C. 444, 44 Am. Dec. 47; Norfleet *v.* Riddick, 14 N. C. 198, 22 Am. Dec. 717.

Pennsylvania.— Stockton *v.* Wilson, 3 Penr. & W. 129.

South Carolina.— Tucker *v.* Williams, Dudley 329, 31 Am. Dec. 561.

England.— Edwards *v.* Harben, 2 T. R. 587, 1 Rev. Rep. 548.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2583.

Contra.— King *v.* Lyman, 1 Root (Conn.) 104.

Fraudulent conveyance in another state.— A widow who has possession of property under color of a fraudulent conveyance from her deceased husband may be held to be executrix *de son tort* in the state whither she has brought the property. Hopkins *v.* Towns, 4 B. Mon. (Ky.) 124, 39 Am. Dec. 497.

Conveyance of exempt property.— A person holding under a conveyance from the decedent property which was in his hands exempt from execution cannot be charged as executor *de son tort* on account of his possession of such property. Winchester *v.* Gaddy, 72 N. C. 115. See also Frierson *v.* Wesberry, 11 Rich. (S. C.) 353.

Fraudulent claim.— A person who neither intermeddles with the estate of the deceased, nor holds any of it in his hands, but only sets up a claim against the estate, is not an executor *de son tort*, although the claim may be a fraudulent one, and although he forbids a sale as a claimant and thereby causes the property to sell for a less price. Barnard *v.* Gregory, 14 N. C. 223.

46. See Mills *v.* Mills, 115 N. Y. 80, 21 N. E. 714; O'Reilly *v.* Hendricks, 2 Sm. & M. (Miss.) 388 [*distinguishing* Edwards *v.* Harben, 2 T. R. 587, 1 Rev. Rep. 548]; Debesse *v.* Napier, 1 McCord (S. C.) 106, 10 Am. Dec. 658.

47. Campbell *v.* Tousey, 7 Cow. (N. Y.) 64.

has been denied on the ground that such representative is not a stranger to the property and cannot be an intermeddler.[48]

6. Acts of Agent or Servant of Intermeddler. One who acts as a mere agent or servant of an executor *de son tort* cannot be held to the liability of his principal.[49]

7. Acts of Surviving Spouse, Heirs, or Devisees. The acts of a surviving spouse, heir, or devisee of the decedent, done in good faith, are treated with indulgence, especially if the estate gains advantage rather than disadvantage therefrom, and the assets are duly accounted for;[50] but acts done in bad faith, injurious to the interests of the estate or with proceeds unaccounted for, are not shielded merely because of such relationship borne to the decedent.[51]

8. Purchase From Executor De Son Tort. An innocent purchaser of property from the executor *de son tort* cannot be held to the liability of his vendor,[52] and there is authority for the doctrine that even a vendee of an executor *de son tort* with notice of his vendor's lack of authority does not thereby become himself an

Charging estate.— Although a person may be liable in such cases to be charged as executor *de son tort*, it does not follow that the creditors can through such an executor charge or bind the estate of the deceased. Campbell *v.* Sheldon, 13 Pick. (Mass.) 8.

48. Marcy *v.* Marcy, 32 Conn. 308 [*criticizing* Campbell *v.* Tousey, 7 Cow. (N. Y.) 64]. See also Caruthers *v.* Moore, 1 Tenn. Cas. 60, Thomps. Cas. (Tenn.) 86.

49. Magner *v.* Ryan, 19 Mo. 196; Givens *v.* Higgins, 4 McCord (S. C.) 286, 17 Am. Dec. 742. See also Rohn *v.* Rohn, 98 Ill. App. 509; Outlaw *v.* Farmer, 71 N. C. 31. But see Stevenson *v.* Valentine, 27 Nebr. 338, 43 N. W. 107 (holding that an attorney acting as agent for another may be liable to the lawful administrator without reference to whether he accounts to his client or not); Sharland *v.* Mildon, 5 Hare 469, 10 Jur. 771, 15 L. J. Ch. 434, 31 Eng. Ch. 469.

Agent of executor.— A person who deals with the goods of the testator as agent of the executor cannot be treated as executor *de son tort*, whether the will has been proved or not. Sykes *v.* Sykes, L. R. 5 C. P. 113, 39 L. J. C. P. 179, 22 L. T. Rep. N. S. 236, 18 Wkly. Rep. 551.

50. *Alabama.*—Ward *v.* Bevill, 10 Ala. 197, 44 Am. Dec. 478.

California.— Valencia *v.* Bernal, 26 Cal. 328.

Connecticut.— Bogue *v.* Watrous, 59 Conn. 247, 22 Atl. 31; Taylor *v.* Moore, 47 Conn. 278.

Georgia.— Johnson *v.* Johnson, 80 Ga. 260, 5 S. E. 629; Barron *v.* Burney, 38 Ga. 264; Semmes *v.* Porter, Dudley 167.

Indiana.— Brown *v.* Benight, 3 Blackf. 39, 23 Am. Dec. 373.

Kentucky.— Risk *v.* Risk, 9 S. W. 712, 10 Ky. L. Rep. 566.

Louisiana.— Dusfreme *v.* Aime, 4 La. 164.

Maryland.— Sindall *v.* Campbell, 7 Gill 66.

Missouri.— Lich *v.* Bernicker, 34 Mo. 93; Magner *v.* Ryan, 19 Mo. 196.

New York.— Ginochio *v.* Porcella, 3 Bradf. Surr. 277.

North Carolina.— Outlaw *v.* Farmer, 71 N. C. 31.

South Carolina.— Frierson *v.* Wesberry, 11 Rich. 353; Givens *v.* Higgins, 4 McCord 286, 17 Am. Dec. 742.

Tennessee.— Morris *v.* Lowe, 97 Tenn. 243, 36 S. W. 1098; Miller *v.* Birdsong, 7 Baxt. 531.

Texas.— Green *v.* Rugely, 23 Tex. 539.

Vermont.— Blodgett *v.* Converse, 60 Vt. 410, 15 Atl. 109.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2584.

A widow may maintain trover for personal property belonging to the estate of her deceased husband of which she had possession several years after his death when no letters of administration had been granted on his estate. Brown *v.* Beason, 24 Ala. 466. See also Williams *v.* Crum, 27 Ala. 468.

51. *Georgia.*— Bryant *v.* Helton, 66 Ga. 477; Semmes *v.* Porter, Dudley 167.

Illinois.— Truett *v.* Cummons, 6 Ill. App. 73.

Indiana.— Wilson *v.* Davis, 37 Ind. 141; Leach *v.* Prebster, 35 Ind. 415; Hawkins *v.* Johnson, 4 Blackf. 21.

Iowa.— Madison *v.* Shockley, 41 Iowa 451; Schaffner *v.* Grutzmacher, 6 Iowa 137.

Louisiana.— Badillo *v.* Tio, 6 La. Ann. 129.

Maine.— White *v.* Mann, 26 Me. 361.

Mississippi.— Wilbourn *v.* Wilbourn, 48 Miss. 38.

New Hampshire.—Emery *v.* Berry, 28 N. H. 473, 61 Am. Dec. 622.

New Jersey.— McGill *v.* O'Connell, 33 N. J. Eq. 256.

Pennsylvania.— Crunkleton *v.* Wilson, 1 Browne 361.

South Carolina.— Hubble *v.* Fogartie, 3 Rich. 413, 45 Am. Dec. 775; Haigood *v.* Wells, 1 Hill Eq. 59.

Vermont.— Walton *v.* Hall, 66 Vt. 455, 29 Atl. 803.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2584.

52. Caruthers *v.* Moore, 1 Tenn. Cas. 60, Thomps. Cas. (Tenn.) 86. But see Brown *v.* Bibb, 2 Coldw. (Tenn.) 434, where the court said, *obiter*, that the alienees of an executrix *de son tort* were in no better position than their vendor.

executor *de son tort* and chargeable as such as if he had directly intermeddled with the property.[53]

9. Administration on Estate of Executor De Son Tort. That a person who administers upon the estate of an executor *de son tort* thereby makes himself liable as executor *de son tort* of the original decedent has been both asserted[54] and denied.[55]

10. Intermeddling With Partnership Assets. One who intermeddles with the assets of a partnership after the death of a member of the firm is usually held liable to account to the surviving partner, and hence cannot be properly regarded as an executor *de son tort* of the deceased partner.[56]

11. When Rightful Representative Exists. As a general rule an intermeddling with the goods of the deceased will not make one liable as an executor *de son tort* in a suit by creditors if there be an executor or administrator already appointed, for in such case the intermeddler is accountable to the lawful representative.[57] If, however, acts have been performed for which a person cannot be responsible to the rightful administrator but which have interfered with the estate to the injury of creditors alone, he may still be liable as executor *de son tort*.[58] The fact that there is a lawful representative in one state does not prevent an intermeddler in another state being held liable as an executor *de son tort*.[59]

C. Rights and Liabilities — 1. In General.[60] Persons who presume with-

A purchaser is not bound to inquire into an executor's title; if there be an appearance of title, it is sufficient. A stranger therefore who sees one acting as executor may fairly presume that there is a will in which the person acting with apparent authority is appointed executor. Johnson *v.* Gaither, Harp. (S. C.) 6.

53. Smith *v.* Porter, 35 Me. 287; Paull *v.* Simpson, 9 Q. B. 365, 15 L. J. Q. B. 382, 58 E. C. L. 364; Hill *v.* Curtis, L. R. 1 Eq. 90, 12 Jur. N. S. 4, 35 L. J. Ch. 133, 13 L. T. Rep. N. S. 584, 14 Wkly. Rep. 125. See also Nesbit *v.* Taylor, Rice (S. C.) 296. *Contra*, Mitchell *v.* Kirk, 3 Sneed (Tenn.) 319; Caruthers *v.* Moore, 1 Tenn. Cas. 60, Thomps. Cas. (Tenn.) 86.

54. McMorine *v.* Storey, 20 N. C. 83, 34 Am. Dec. 374.

55. Alfriend *v.* Daniel, 48 Ga. 154.

56. Hunt *v.* Drane, 32 Miss. 243. See also Palmer *v.* Maxwell, 11 Nebr. 598, 10 N. W. 524. But see Leigh *v.* Birch, 9 Jur. N. S. 1265, 8 L. T. Rep. N. S. 230, 11 Wkly. Rep. 565.

57. Howland *v.* Dews, R. M. Charlt. (Ga.) 383; McMorine *v.* Storey, 20 N. C. 83, 34 Am. Dec. 374; Norfleet *v.* Riddick, 14 N. C. 221, 22 Am. Dec. 717; Armstrong *v.* Armstrong, 44 U. C. Q. B. 615. See also Bacon *v.* Parker, 12 Conn. 212; Willingham *v.* Rushing, 105 Ga. 72, 31 S. E. 130.

But to this there are exceptions, as where a stranger takes the decedent's goods, and, claiming to be executor, pays or receives debts or pays legacies or otherwise does those acts which none but an executor can do, in which case he becomes executor *de son tort*, although there be a rightful executor, or administration has been duly granted. So also one who intermeddles before probate or administration granted may be charged as executor *de son tort*. Howland *v.* Dews, R. M. Charlt. (Ga.) 383.

58. Turner *v.* Child, 12 N. C. 25, 17 Am. Dec. 555.

Fraudulent conveyance.— This is the situation when the person sought to be charged is in possession of goods under a gift or conveyance from the deceased, which is good between the original parties and binding upon the rightful administrator, but fraudulent and void as to creditors. Simonton *v.* McLane, 25 Ala. 353; Densler *v.* Edwards, 5 Ala. 31; Norfleet *v.* Riddick, 14 N. C. 221, 22 Am. Dec. 717; Turner *v.* Child, 12 N. C. 25, 17 Am. Dec. 555. See also Marler *v.* Marler, 6 Ala. 367; Howland *v.* Dews, R. M. Charlt. (Ga.) 383.

In cases of collusion between the rightful representative and a third person, where there is nothing to prevent the former from being held liable, the doctrine stated in the text has no application. Simonton *v.* McLane, 25 Ala. 353.

59. Hopkins *v.* Towns, 4 B. Mon. (Ky.) 124, 39 Am. Dec. 497; Caruthers *v.* Moore, 1 Tenn. Cas. 60, Thomps. Cas. (Tenn.) 86.

One who acts with the consent of the executor in the other state ought not to be liable. Selleck *v.* Rusco, 46 Conn. 370.

Delivering property to foreign administrator.— Where a citizen of one state dies in another state, the person in whose house he died cannot be held liable as an executor *de son tort* in a suit by a creditor living in the state of decedent's domicile, by reason of his taking possession of money which the decedent had with him at the time of his death and paying it over, without notice of the creditor's claim, to the administrator in the state of the decedent's domicile. Nisbet *v.* Stewart, 19 N. C. 24. See also Hopkins *v.* Towns, 4 B. Mon. (Ky.) 124, 39 Am. Dec. 497; Caruthers *v.* Moore, 1 Tenn. Cas. 60, Thomps. Cas. (Tenn.) 86.

60. Right of retainer see *supra*, X, D, 3, a, (I), (B).

out authority to administer an estate and who claim to have fully administered are estopped in a proceeding for an accounting from denying their representative character or their liability to account accordingly.[61] An executor *de son tort* has all the liabilities with none of the privileges which belong to the character of executor;[62] but although he cannot obtain any personal advantage from his intermeddling he can use proper means to protect the assets of the estate.[63] He cannot enforce the collection of notes due the estate of the decedent and therefore cannot be sued for a failure to do so.[64] An executor *de son tort* is held liable in his dealings with and representing the estate to such diligence as prudent men ordinarily bestow on their own affairs.[65] The rule of strict construction is applied to statutes providing a penalty for intermeddling with the estate of a decedent.[66]

2. Extent of Liability. An executor *de son tort* is liable for the value of the goods taken and used,[67] but can be charged only with what actually came into his hands.[68]

3. Who May Enforce Liability.[69] The lawful executor or administrator is as a general rule the proper person to enforce the liability of an executor *de son* tort.[70] According to the common-law rule an executor *de son tort* may also be

61. See Damouth *v.* Klock, 29 Mich. 289; Weaver *v.* Williams, 75 Miss. 945, 23 So. 649.

62. 1 Williams Ex. (7th Am. ed.) 217.

A liability to care for old and disabled slaves imposed upon the owner or his personal representative by statute is not a liability to which an executor *de son tort* is subjected. Hyde County *v.* Silverthorn, 28 N. C. 356.

The estate of an executor de son tort is liable after his decease for his intermeddling during his life. Swift *v.* Martin, 19 Mo. App. 488.

63. McIntire *v.* Carson, 9 N. C. 544, holding that an executor *de son tort* can plead the statute of limitations as to a claim against the estate.

64. Guild *v.* Young, (Tenn. Ch. App. 1901) 62 S. W. 404.

65. Rohn *v.* Rohn, 98 Ill. App. 509.

66. Currie *v.* Currie, 80 N. C. 553, holding that a person who merely takes possession of the property of a decedent, but does not actually enter upon the administration of the estate, is not liable to a statutory penalty provided for persons who enter upon the administration of an estate without first having obtained letters therefor.

67. Spruance *v.* Darlington, 7 Del. Ch. 111, 30 Atl. 663 (liability for appraised value of household goods); Cook *v.* Sanders, 15 Rich. (S. C.) 63, 94 Am. Dec. 139; Leach *v.* House, 1 Bailey (S. C.) 42; Baysand *v.* Lovering, 2 Fed. Cas. No. 1,147, 1 Cranch C. C. 206.

Liability for note.— One who takes a note good and collectable at the time of the owner's death and holds it as executor *de son tort* and neglects to collect it until the maker becomes insolvent is liable to the rightful administrator for the amount of the note; but if the note is worthless at the time of the owner's death, the executor *de son tort* is liable only for the non-delivery of the note. Root *v.* Geiger, 97 Mass. 178.

Liability for rent of land.— A person appointed executor who has received the rent of land devised to be sold, but refuses the appointment as executor, is responsible to the administrator with the will annexed for such rents. Steel *v.* Steel, 4 J. J. Marsh. (Ky.) 231.

Where a creditor becomes executor de son tort of his debtor, the value of the debtor's assets illegally taken into the creditor's hands are regarded as a payment *pro tanto* of the debt. Finnell *v.* Meaux, 3 Bush (Ky.) 449.

Interest.— An executor *de son tort* is liable for interest from the time he took possession of the assets (Kinard *v.* Young, 2 Rich. Eq. (S. C.) 247) at the highest legal rate (Walton *v.* Hall, 66 Vt. 455, 29 Atl. 803).

Delivery of specific articles.— Where a testator devised furniture to his wife for life, remainder to a son who died, and subsequently the wife died leaving the furniture in the house of another son who on coming of age took possession of the house, it was held that he was not to be charged in money for the furniture, but that he might deliver it long after taking possession, to the representative of his deceased brother. Cary *v.* Macon, 4 Call (Va.) 605.

68. Hill *v.* Henderson, 13 Sm. & M. (Miss.) 688; Stockton *v.* Wilson, 3 Penr. & W. (Pa.) 129; Cook *v.* Sanders, 15 Rich. (S. C.) 63, 94 Am. Dec. 139; Kinard *v.* Young, 2 Rich. Eq. (S. C.) 247. See also Barasien *v.* Odum, 17 Ark. 122; Pulliam *v.* Pulliam, 10 Fed. 53; Lowry *v.* Fulton, 3 Jur. 454, 8 L. J. Ch. 314, 9 Sim. 104, 16 Eng. Ch. 104.

One executor de son tort may be liable for the acts of another which he has authorized or directed, and his liability is not limited to the value or amount of goods or money actually received by him. Kenny *v.* Ryan, [1897] 1 Ir. 513.

69. See also *infra*, XXIV, E, 6.

70. *Delaware.*— Spruance *v.* Darlington, 7 Del. Ch. 111, 30 Atl. 663.

Kentucky.— Steel *v.* Steel, 4 J. J. Marsh. 231.

Maine.— Snow *v.* Snow, 49 Me. 159.

Maryland.— See Hagthorp *v.* Hook, 1 Gill & J. 270.

Massachusetts.— Root *v.* Geiger, 97 Mass. 178.

sued by creditors of the decedent;[71] but under modern statutes in a number of states an intermeddler is not liable to the creditors of the deceased but only to the personal representative.[72] By the general rule the heirs or next of kin as such cannot enforce the liability of an executor *de son tort*.[73]

D. Effect of Acts — 1. How Far Binding on Lawful Representative. The true representative is bound by those acts of an executor *de son tort* which are lawful and such as the true representative would be bound to perform in the due course of administration,[74] but not by any other acts of the intermeddler.[75]

2. Sale. A purchaser from an executor *de son tort* gets no better title than his vendor had and therefore such a purchase, although *bona fide*, is no defense as against the rightful administrator seeking to recover in trespass or trover.[76]

Pennsylvania.— Piening's Estate, 15 Wkly. Notes Cas. 384.

Tennessee.— See David *v.* Bell, Peck 135.

United States.— Roggenkamp *v.* Roggenkamp, 68 Fed. 605, 15 C. C. A. 600, under Nebr. St. (1891) § 1244.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2591.

Estoppel.— In an action by the widow of a deceased person as his administratrix to recover against defendant for the conversion of property of the estate, defendant may show that he acted under the direction of the widow, before her appointment as administratrix and that he used the proceeds of the property in payment of debts of the estate. Rutherford *v.* Thompson, 14 Oreg. 236, 12 Pac. 382. But in Sebring *v.* Keith, 2 Hill (S. C.) 340, where at the death of an intestate one present took possession of the cash on hand with a view to its safe-keeping, it was held that an action for money had and received would lie by the administrator, although he was present at the time of the taking of the money and made no objection.

71. *Alabama.*— Densler *v.* Edwards, 5 Ala. 31.

Colorado.—Ebbinger *v.* Wightman, 15 Colo. App. 439, 62 Pac. 963.

Indiana.— Ferguson *v.* Barnes, 58 Ind. 169, holding that when an action is instituted by a creditor, it should not be for his sole benefit, but for the benefit of all the creditors.

Iowa.— Elder *v.* Littler, 15 Iowa 65.

Kentucky.— See McKenzie *v.* Pendleton, 1 Bush. 164. But *compare* O'Bannor *v.* Cord, 1 Ky. L. Rep. 398.

Massachusetts.— See Mitchel *v.* Lunt, 4 Mass. 654.

Mississippi.— Wilbourn *v.* Wilbourn, 48 Miss. 38.

New York.— See Lockwood *v.* Stockholm, 11 Paige 87.

North Carolina.— See Morrison *v.* Smith, 44 N. C. 399.

Pennsylvania.— See Power's Estate, 14 Phila. 289.

England.— Coote *v.* Whittington, L. R. 16 Eq. 534, 42 L. J. Ch. 846, 29 L. T. Rep. N. S. 206, 21 Wkly. Rep. 837.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2592.

72. Winfrey *v.* Clarke, 107 Ala. 355, 18 So. 141 [*overruling* Cameron *v.* Cameron, 82 Ala. 392, 3 So. 148; Dunlap *v.* Newman, 47 Ala. 429]; Rust *v.* Witherington, 17 Ark. 129; Barasien *v.* Odum, 17 Ark. 122; McCoy *v.* Payne, 68 Ind. 327; Rutherford *v.* Thompson, 14 Oreg. 236, 12 Pac. 382.

73. Ferguson *v.* Barnes, 58 Ind. 169; Muir *v.* Leake, etc., Orphan House, 3 Barb. Ch. (N. Y.) 477; Haley *v.* Thames, 30 S. C. 270, 9 S. E. 110, holding that distributees of an estate cannot without administration charge their co-distributees as executors *de son tort* in the court of probate. See also Davis *v.* Davis, 56 Ga. 37; Lee *v.* Wright, 1 Rawle (Pa.) 149.

The proper course for heirs to pursue is to procure the appointment of an administrator and have a suit instituted in his name. Muir *v.* Leake, etc., Orphan House, 3 Barb. Ch. (N. Y.) 477; Farley *v.* Farley, 1 McCord Eq. (S. C.) 506.

74. Thomson *v.* Harding, 2 E. & B. 630, 18 Jur. 58, 22 L. J. Q. B. 448, 1 Wkly. Rep. 468, 75 E. C. L. 630, holding that a proper payment to a creditor of the estate will bind the true representative.

The lawful representative can ratify and make valid by relation all those acts of the executor *de son tort* which would have been valid had he been the lawful administrator. Outlaw *v.* Farmer, 71 N. C. 31.

75. Buckley *v.* Barber, 6 Exch. 164, 15 Jur. 63, 20 L. J. Exch. 114.

The lawful representative cannot be compelled to perform contracts made by persons with an executor *de son tort* of the same estate. Barr *v.* Cubbage, 52 Mo. 404.

An executor de son tort cannot make a settlement by accord and satisfaction of a debt or demand due the estate of a decedent so as to bind the rightful executor or those legally authorized to receive payment or to make such settlement. Caperton *v.* Ballard, 4 W. Va. 420.

76. *Alabama.*—Carpenter *v.* Going, 20 Ala. 587.

Delaware.— Wilson *v.* Hudson, 4 Harr. 168.

Georgia.— See Wylly *v.* King, Ga. Dec. Pt. II, 7.

Massachusetts.— See Campbell *v.* Sheldon, 13 Pick. 8.

New Hampshire.— See Giles *v.* Churchill, 5 N. H. 337.

England.— See Mountford *v.* Gibson, 4 East 441, 1 Smith K. B. 129.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2590.

Nevertheless a *bona fide* purchaser at a public sale acquires at least a possession and a right of possession which he can maintain against all the world except the rightful administrator, and as against him the purchaser acquires an actual possession of which he cannot be lawfully deprived except by suit.[77] A purchaser on credit from an executor *de son tort* can defend against an action by the vendor for the price by showing that he has paid a part thereof to the legally appointed administrator on demand and given his note to the administrator for the balance.[78]

3. Effect of Subsequent Issue of Letters to Executor De Son Tort. Where an executor *de son tort* subsequently takes out letters testamentary or of administration, such letters relate back so as to validate all acts previously performed in the interest of the estate;[79] and contracts previously made by him may be thereafter ratified by him either expressly[80] or impliedly,[81] and when ratified may be enforced.[82] So also a payment to the executor *de son tort* binds the estate, if he is subsequently granted letters;[83] and it has been held that a judgment against an executor *de son tort* will be valid against him after he has regularly administered and will bind the estate unless fraud or collusion be shown.[84] A person who is sued as executor *de son tort* cannot defeat the action by taking out letters pending the suit, although he thus renders legitimate all his acts *ab initio*.[85]

E. Actions and Remedies — 1. Right of Action. An executor *de son tort* is an executor only for the purpose of being sued, or made liable for the assets with which he has intermeddled,[86] and he cannot himself bring an action.[87] And

That the executor de son tort afterward paid debts of the estate with his own money does not make the sale valid so as to pass title to a vendee with notice. Roumfort *v.* McAlarney, 82 Pa. St. 193. But see Hostler *v.* Scull, 3 N. C. 179, where it was said that if an executor *de son tort* takes property and pays debts with it, the rightful executor shall not disturb the purchaser, because if he could recover the property would have to be disposed of to pay the debts.

77. Woolfork *v.* Sullivan, 23 Ala. 548, 48 Am. Dec. 305.

78. Rockwell *v.* Young, 60 Md. 563.

79. *Connecticut.*— Olmsted *v.* Clark, 30 Conn. 108.

Georgia.—Carnochan *v.* Abrahams, T. U. P. Charlt. 196, holding that executorship *de son tort* does not *per se* debar from obtaining letters.

Illinois.— McClure *v.* People, 19 Ill. App. 105; Moore *v.* Wright, 4 Ill. App. 443.

Massachusetts.— Hatch *v.* Proctor, 102 Mass. 351; Shillaber *v.* Wyman, 15 Mass. 322.

Missouri.— Magner *v.* Ryan, 19 Mo. 196.

New Hampshire.—Emery *v.* Berry, 28 N. H. 473, 61 Am. Dec. 622; Giles *v.* Churchill, 5 N. H. 337, holding that where the heirs of an intestate agreed to administer his estate without letters of administration and one of them paid a creditor of the deceased in goods belonging to the estate, and afterward another of the heirs was appointed administrator, he could not maintain trover against the creditor for the goods he had received, having previously assented to the act.

New York.— Priest *v.* Watkins, 2 Hill 225, 38 Am. Dec. 584; Rattoon *v.* Overacker, 8 Johns. 126; Farrell's Estate, Tuck. Surr. 110. See also Ingram *v.* Young, 1 Hun 487, 3 Thomps. & C. 491.

Pennsylvania.— Sellers *v.* Licht, 21 Pa. St. 98.

South Carolina.— Witt *v.* Elmore, 2 Bailey 595.

Texas.— Lockhart *v.* White, 18 Tex. 102.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2593.

Contra.— Wilson *v.* Hudson, 4 Harr. (Del.) 168, holding that the fact that the executor *de son tort* subsequently administered the estate did not give title to a person who bought from him before he was a rightful administrator.

Repudiation of agreement.— An executor *de son tort* to whom administration is subsequently granted may repudiate an agreement made by him to surrender a term of years vested in the intestate. Doe *v.* Glenn, 1 A. & E. 49, 3 L. J. K. B. 161, 3 N. & M. 837, 28 E. C. L. 48.

80. Hatch *v.* Proctor, 102 Mass. 351.

81. See Sellers *v.* Licht, 21 Pa. St. 98.

82. Hatch *v.* Proctor, 102 Mass. 351; Sellers *v.* Licht, 21 Pa. St. 98.

83. Priest *v.* Watkins, 2 Hill (N. Y.) 225, 38 Am. Dec. 584.

84. Walker *v.* May, 2 Hill Eq. (S. C.) 22.

85. Rohn *v.* Rohn, 98 Ill. App. 509; Rattoon *v.* Overacker, 8 Johns. (N. Y.) 126; Vaughan *v.* Browne, And. 328, 2 Str. 1106; Vernon *v.* Curtis, 2 H. Bl. 18, 3 T. R. 587, 1 Rev. Rep. 774.

86. Pryor *v.* Downey, 50 Cal. 388, 19 Am. Rep. 656.

87. Francis *v.* Welsh, 33 N. C. 215; Gadsby *v.* Donelson, 10 Yerg. (Tenn.) 370; Cameron *v.* Cameron, 23 U. C. C. P. 289.

Cannot recover payments in excess of assets received.— Although the amount of the payments made by an executor *de son tort* in discharge of the debts of a decedent is in excess of the assets received by him, he cannot recover from the representative of the decedent whose debts he paid. De la Guerra *v.* Packard, 17 Cal. 182.

since a set-off to a debt is allowed simply to avoid a cross action, an executor *de son tort* cannot, in an action by a creditor, set off a debt due from such creditor to the decedent.[88] The proper course for a creditor who takes out administration on the estate of his debtor who made a fraudulent conveyance is to sue the fraudulent vendee as executor *de son tort*. He cannot seize the property in the vendee's hands.[89] In Louisiana it is not now necessary that a person who has taken unauthorized possession of the effects of a vacant succession or a part thereof, with intent to convert the same to his own use, should be criminally prosecuted and convicted for such action, before a creditor of the succession can institute a suit to hold such person liable for a debt due him by the succession.[90]

2. DEFENSES. Although an executor *de son tort* cannot by his own wrongful act acquire any benefit, yet he is protected in all acts not for his own benefit which a rightful executor might do.[91] He is entitled to be credited with all lawful claims which existed against the estate and which he had discharged, and may therefore show the payment of debts in defense to a suit against him;[92] but it is incumbent upon him to show that he has applied the assets which have come into his hands in the same manner in which they would have been lawfully applied by a rightful representative,[93] and he will be allowed no set-off or credit if the debts which he has discharged were not legal claims against the estate.[94] Where a creditor of a deceased grantor brings a bill in equity against a fraudulent or voluntary grantee on the theory that he is an executor *de son tort*, defendant may set up any defense which might be made by the decedent himself,

88. Cameron *v.* Cameron, 23 U. C. C. P. 289.

89. Osborne *v.* Moss, 7 Johns. (N. Y.) 161, 5 Am. Dec. 252.

90. Peet *v.* Nalle, 30 La. Ann. 949. But formerly this was necessary. Carl *v.* Poleman, 12 La. Ann. 344; Walworth *v.* Ballard, 12 La. Ann. 245; McMasters *v.* Place, 8 La. Ann. 431.

91. Brown *v.* Walter, 58 Ala. 310. And see Risk *v.* Risk, 9 S. W. 712, 10 Ky. L. Rep. 566.

92. *Illinois.*— McConnell *v.* McConnell, 94 Ill. 295.

Indiana.— Reagan *v.* Long, 21 Ind. 264.

Kentucky.— McMeekin *v.* Hynes, 4 Ky. L. Rep. 177.

Louisiana.— Hewes *v.* Baxter, 48 La. Ann. 1303, 20 So. 701, 36 L. R. A. 531.

Maine.— Tobey *v.* Miller, 54 Me. 480.

Maryland.— See Glenn *v.* Smith, 2 Gill & J. 493, 20 Am. Dec. 452.

Massachusetts.— Weeks *v.* Gibbs, 9 Mass. 74.

New Jersey.— McMonigle *v.* McMonigle, 42 N. J. Eq. 64, 6 Atl. 314.

Pennsylvania.— Cooper *v.* Eyrich, 41 Wkly. Notes Cas. 370. See also Meigan *v.* McDonald, 10 Watts 287.

South Carolina.— Cook *v.* Sanders, 15 Rich. 63, 94 Am. Dec. 139. *Contra*, Howell *v.* Smith, 2 McCord 516.

Tennessee.— Winn *v.* Slaughter, 5 Heisk. 191.

United States.— Roggenkamp *v.* Roggenkamp, 68 Fed. 605, 15 C. C. A. 600.

See 22 Cent. Dig. tit. "Executors and Administrators." § 2595.

But see Bryant *v.* Helton, 66 Ga. 477, holding that, since the adoption of the code, debts voluntarily paid by an executor *de son tort* cannot be set off in an action by a distributee.

If the estate is insolvent, it is no defense to an executor *de son tort* that he has paid debts to double the amount of assets received by him. Neal *v.* Baker, 2 N. H. 477.

Payment only to the value of goods sold may be shown in trover by a rightful administrator against an executor *de son tort*; he cannot give in evidence in mitigation of damages payments of debts to the value of goods still in his possession. Hardy *v.* Thomas, 23 Miss. 544, 57 Am. Dec. 152.

Purchaser cannot show payment of debts.— In Carpenter *v.* Going, 20 Ala. 587, without deciding whether or not an executor *de son tort*, when sued in trover by a rightful administrator could show payment of debts of the decedent by him in mitigation of damages, it was held that when such an action is brought against a voluntary purchaser from an executor *de son tort*, the purchaser cannot show in mitigation of damages that since his purchase the executor *de son tort* has paid debts which the administrator was bound to pay in due course of administration.

93. Gay *v.* Lemle, 32 Miss. 309, holding that therefore if it appears that he has paid one particular debt not entitled to preference, leaving others unpaid, he cannot claim that he has done what the law required to be done with the assets in due course of administration but must be liable as executor *de son tort* to the other creditors. See also Bennett *v.* Ives, 30 Conn. 329; Snow *v.* Snow, 49 Me. 159.

94. Holeton *v.* Thayer, 89 Ill. App. 184; Crispin *v.* Winkleman, 57 Iowa 523, 10 N. W. 919; Weaver *v.* Williams, 75 Miss. 945, 23 So. 649. See also Spruance *v.* Darlington, 7 Del. Ch. 111, 30 Atl. 663.

if living, or by his rightful personal representative.[95] If one without authority sells the goods of an estate and receives the money therefor it is no defense to an action for its recovery, instituted against him by the administrator, that the sale was void, and vested no title in the purchaser.[96]

3. Venue. An executor *de son tort* is liable to be sued in any jurisdiction where he is found with property of the decedent.[97]

4. Time to Sue and Limitations. A statute protecting personal representatives from suit until after the expiration of a certain time does not apply to executors *de son tort*, but they may be sued immediately after intermeddling.[98] An action may be brought against an executor *de son tort* if a cause of action existed against his decedent until the action is barred by the lapse of the statutory time after a lawful grant of administration.[99] Where the relationship of the decedent to another was such that the statute of limitations would not run in the decedent's favor, it will not run in favor of his executor *de son tort*.[1]

5. Form of Remedy — a. Action at Law. The rightful administrator may pursue the executor *de son tort* in a court of law either by trespass for unlawfully taking the goods of the intestate,[2] or by trover for their conversion;[3] and debt has been held a proper form of action by a creditor in certain cases.[4] An action against an executor *de son tort* by a creditor has been held to be founded on contract and not on tort,[5] and it has also been held that if a person sells the goods of an estate before administration is granted and receives the money therefor, an administrator subsequently appointed may sue him in trover for conversion, or waive the tort and bring assumpsit for money had and received.[6]

b. Bill in Equity. The rule that a creditor may come into a court of chancery against a personal representative has been recognized as applying to an executor *de son tort*.[7] If the person sought to be charged as executor *de son tort* holds the property in question under a fraudulent conveyance the remedy in equity for the creditor is particularly proper, for the rightful representative is bound by the fraud of the decedent.[8] Bills in chancery against executors *de son tort* by rightful personal representatives,[9] and by heirs and distributees[10] have also been sustained.

95. Means *v.* Hicks, 65 Ala. 241.

96. Upchurch *v.* Norsworthy, 15 Ala. 705.

97. Hopkins *v.* Towns, 4 B. Mon. (Ky.) 124, 39 Am. Dec. 497 (holding that although defendant took the property into another state through her agent, not in person, she was liable precisely to the same extent as if she had gone to the other jurisdiction herself and brought the property to the state of the forum); Foster *v.* Nowlin, 4 Mo. 18.

98. Chambers *v.* Davison, 1 Hill (S. C.) 50.

99. Brown *v.* Leavitt, 26 N. H. 493.

1. Dawson *v.* Callaway, 18 Ga. 573.

2. Rockwell *v.* Saunders, 19 Barb. (N. Y.) 473.

3. Upchurch *v.* Norsworthy, 15 Ala. 705; Rockwell *v.* Saunders, 19 Barb. (N. Y.) 473. See also Peet *v.* Nalle, 30 La. Ann. 949.

4. Bellows *v.* Goodall, 32 N. H. 97. See also Norfolk *v.* Gantt, 2 Harr. & J. (Md.) 435.

5. Martin *v.* Hand, 11 R. I. 306.

6. Upchurch *v.* Norsworthy, 15 Ala. 705.

7. *Alabama.*— Watts *v.* Gayle, 20 Ala. 817.

Kentucky.— Gentry *v.* Jones, 6 J. J. Marsh. 148.

Maryland.— See Baumgartner *v.* Haas, 68 Md. 32, 11 Atl. 588; Bentley *v.* Cowman, 6 Gill & J. 152, plaintiff entitled to an accounting under prayer for general relief.

Tennessee.— Russel *v.* Lanier, 4 Hayw. 289, the court saying that the creditor could either go into equity or could pursue his remedy at law and that a bill in equity was proper both to ascertain the debt and to prove the fraud and to have a decree for satisfaction.

Virginia.— See Hansford *v.* Elliott, 9 Leigh 79.

England.— Newland *v.* Champion, 1 Ves. 105, 27 Eng. Reprint 920.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2594.

Contra.— Pleasants *v.* Glasscock, Sm. & M. Ch. (Miss.) 17 (holding that there is a plain and adequate remedy at law); Ansley *v.* Baker, 14 Tex. 607, 65 Am. Dec. 136.

8. Watts *v.* Gayle, 20 Ala. 817; Ellis *v.* McGee, 63 Miss. 168; Garner *v.* Lyles, 35 Miss. 176.

9. See Thorn *v.* Tyler, 3 Blackf. (Ind.) 504 (under a statute providing that an intermeddler might be pursued either at law or in equity by the creditors or other persons injured); Seay *v.* Shue, 83 Va. 838, 3 S. E. 801. But *compare* Abernathy *v.* Bankhead, 71 Ala. 190.

10. Farve *v.* Graves, 4 Sm. & M. (Miss.) 707. See also Bryant *v.* Peters, 3 Ala. 160.

c. Probate Proceedings. It has been held that an executor *de son tort* cannot be cited to account in a probate court.[11]

6. Parties. It has been held that a bill cannot be maintained by distributees against an executor *de son tort* who has sold property of the decedent, to have an account and obtain a decree for the proceeds, unless the rightful personal representative is a party plaintiff or defendant.[12] A laborer may, however, enforce his lien on crops in the hands of a wrong-doer after the death of his employer, without bringing in the personal representative of such employer.[13] The distributees are not necessary parties to a bill by a creditor against an executor *de son tort* who is a fraudulent vendee.[14] If there be a lawful executor, he and the executor *de son tort* may be joined in an action by a creditor.[15] An executor *de son tort* is not a proper party defendant to a bill for relief against a judgment at law in favor of the deceased.[16] On the death of a defendant in an action of debt a summons may issue to his executor *de son tort* to appear and defend the action, if there be no legal executor or administrator of the deceased.[17]

7. Pleadings. The rule as usually laid down is that in actions against executors *de son tort* the complaint or declaration should charge them as executors generally,[18] but it has been said in a late case that under the practice as it now prevails the creditor of the decedent brings his action against the executor *de son tort*, alleges his intermeddling without lawful appointment and possession of the goods of the deceased, states his cause of action, and prays judgment;[19] and it has also been held that a complaint not alleging that defendant came into possession of property of a decedent unlawfully, or showing that he was an intermeddler in the estate of such decedent, is insufficient to charge him as an executor *de son tort*.[20] The complaint of a creditor against one who is alleged to have intermeddled with and converted the property of the decedent must affirmatively show that the creditors of the decedent were entitled to have the property go into the hands of an administrator.[21] The creditor should allege as nearly as possible the amount of money or property of the decedent in the hands of defendant.[22] In a suit for a penalty under a statute which provides that no person shall enter upon the administration of any decedent's estate until he has obtained letters therefor, under a prescribed penalty, a complaint which fails to state that defendant entered upon the administration of the estate without obtaining letters is demurrable.[23] An amendment of the complaint to conform to the evidence, which does not substantially change the claim or present any new issue, will be allowed.[24]

11. Huff's Estate, 15 Serg. & R. (Pa.) 39; Power's Estate, 14 Phila. (Pa.) 289.

12. Nease *v.* Capehart, 8 W. Va. 95.

13. Pugh *v.* Baker, 127 N. C. 2, 37 S. E. 82.

14. Watts *v.* Gayle, 20 Ala. 817.

15. See Stockton *v.* Wilson, 3 Penr. & W. (Pa.) 129; Chaplin *v.* Hopkins, 3 Strobh. Eq. (S. C.) 182.

16. Pemberton *v.* Riddle, 5 T. B. Mon. (Ky.) 401.

17. Norfolk *v.* Gantt, 2 Harr. & J. (Md.) 435.

18. *Kentucky.*— Brown *v.* Durbin, 5 J. J. Marsh. 170.

Maine.— Sawyer *v.* Thayer, 70 Me. 340.

Mississippi.— Pleasants *v.* Glasscock, Sm. & M. Ch. 17.

Pennsylvania.— Stockton *v.* Wilson, 3 Penr. & W. 129.

South Carolina.— Gregory *v.* Forrester, 1 McCord Eq. 318.

Utah.— Hailey First Nat. Bank *v.* Lewis, 12 Utah 84, 41 Pac. 712.

Vermont.— Buckminster *v.* Ingham, Brayt. 116.

England.— See Meyrick *v.* Anderson 14 Q. B. 719, 14 Jur. 457, 19 L. J. Q. B. 231, 68 E. C. L. 719.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2599.

19. Ebbinger *v.* Wightman, 15 Colo. App. 439, 62 Pac. 963, where, however, the court recognized that the rule is usually laid down as first stated.

20. McAfee *v.* Montgomery, 21 Ind. App. 196, 51 N. E. 957. See also *In re* Lovett, 3 Ch. D. 198, 45 L. J. Ch. 768, 35 L. T. Rep. N. S. 93, 24 Wkly. Rep. 982.

21. Kahn *v.* Tinder, 77 Ind. 147; Goff *v.* Cook, 73 Ind. 351.

22. Ebbinger *v.* Wightman, 15 Colo. App. 439, 62 Pac. 963.

23. Currie *v.* Currie, 90 N. C. 553.

24. Sipe *v.* Sipe, 14 Ind. 477, holding that where the complaint of a rightful administrator against an intermeddler laid the wrongful acts on a day certain, which was after the date of plaintiff's letters of administration, an amendment by substituting a day before the letters were granted was properly allowed.

The commonest pleas by an executor *de son tort* are *ne unques executor*,[25] *plene administravit*,[26] *plene administravit præter*,[27] and *non assumpsit*.[28] Sometimes two or more of these pleas are joined.[29] The pleading of other pleas in addition to *ne unques executor* is not an admission by defendant that he is liable as executor of his own wrong.[30] A plea to an action by a creditor, that since the institution of the suit an administrator had been appointed, is bad unless it contains an averment that the assets in the defendant's hands had been delivered to the administrator either before or after the institution of the action.[31] A plea in abatement comes too late after the cause has been tried on defendant's plea of the general issue and the facts have been found by the court and when a legal judgment is impending.[32]

8. Evidence. In an action against a person alleged to be the fraudulent vendee of the deceased and therefore his executor *de son tort*, a statement made by the vendor after the sale of the property and while it still remained in his possession that the property was his is admissible.[33] Records of judgments against the deceased at the time he made the alleged fraudulent sale are admissible to show his indebtedness at the time.[34] Although a defendant sued as executor *de son tort* may give in evidence under the general issue payments of the decedent's debts, yet his book of original entries is inadmissible to prove the payment of the debts.[35] Evidence to charge a person as executor *de son tort* need not be sufficient to warrant a conviction of felony.[36] Evidence is admissible to show that a defendant is an executor *de son tort*, although it is not so charged in the pleadings.[37]

9. Trial. Whether a person is an executor *de son tort* is partly a question of law and partly a question of fact.[38] The court determines what state of facts will constitute a person executor of his own wrong,[39] and the jury determines whether such facts exist in the particular case.[40] When defendant pleads *plene*

25. See Simonton *v.* McLane, 25 Ala. 353; King *v.* Lyman, 1 Root (Conn.) 104; Johnson *v.* Johnson, 80 Ga. 260, 5 S. E. 629; Caruthers *v.* Moore, 1 Tenn. Cas. 60, Thomps. Cas. (Tenn.) 86.

26. See Bennett *v.* Ives, 30 Conn. 329; State *v.* Rogers, 1 Harr. 120; Glenn *v.* Smith, 2 Gill & J. 493, 20 Am. Dec. 452 (when the suit is by a creditor, but not when the lawful representative sues); McIntire *v.* Carson, 9 N. C. 544; Turner *v.* Child, 12 N. C. 331, 17 Am. Dec. 555; Leach *v.* House, 1 Bailey 42.

In the statutory action for intermeddling with a decedent's goods, if the charge that defendant intermeddled is true he is liable, and a plea of payment of debts is therefore not a proper answer. Collier *v.* Jones, 86 Ind. 342.

27. Hubble *v.* Fogartie, 3 Rich. (S. C.) 411, 45 Am. Dec. 775.

28. See Caruthers *v.* Moore, 1 Tenn. Cas. 60, Thomps. Cas. (Tenn.) 86.

29. Thus defendant may join *ne unques executor* and *plene administravit* (State *v.* Rogers, 1 Harr. (Del.) 120; McIntire *v.* Carson, 9 N. C. 544; Hailey First Nat. Bank *v.* Lewis, 12 Utah 84, 41 Pac. 712), *ne unques executor* and *non assumpsit* (Brodnax *v.* Brown, Dudley (Ga.) 202; Hubble *v.* Fogartie, 3 Rich. (S. C.) 413, 45 Am. Dec. 775), or *ne unques executor*, *plene administravit* and *non assumpsit* (Caruthers *v.* Moore, 1 Tenn. Cas. 60, Thomps. Cas. (Tenn.) 86). And the statute of limitations has been pleaded along with the other pleas. McIntire *v.* Carson, 9 N. C. 544.

30. Alexander *v.* Kelso, 1 Baxt. (Tenn.) 5.

31. McMeekin *v.* Hynes, 4 Ky. L. Rep. 177.

32. Tweedy *v.* Bennett, 31 Conn. 276.

33. Foster *v.* Nowlin, 4 Mo. 18, where it was held that the statement was good evidence to show the nature of the possession of the goods and that inasmuch as it was offered after defendant had proved a previous statement by the vendor that the property was not his, but belonged to defendant, it was admissible as rebutting evidence.

34. Foster *v.* Nowlin, 4 Mo. 18.

35. Saam *v.* Saam, 4 Watts (Pa.) 432.

36. Israel *v.* King, 69 N. C. 373.

37. Harper *v.* West, 11 Fed. Cas. No. 6,093, 1 Cranch C. C. 192.

38. Caruthers *v.* Moore, 1 Tenn. Cas. 60, Thomps. Cas. (Tenn.) 86; Haacke *v.* Gordon, 6 U. C. Q. B. 424.

39. *Illinois.*— Rohn *v.* Rohn, 204 Ill. 184, 68 N. E. 369, 98 Am. St. Rep. 185.

Mississippi.— O'Reilly *v.* Hendricks, 2 Sm. & M. 388.

South Carolina.— Hubble *v.* Fogartie, 3 Rich. 413, 45 Am. Dec. 775.

Tennessee.— Caruthers *v.* Moore, 1 Tenn. Cas. 60, Thomps. Cas. 86.

England.— Padget *v.* Priest, 2 T. R. 97, 1 Rev. Rep. 440.

Canada.— Haacke *v.* Gordon, 6 U. C. Q. B. 424.

See 22 Cent. Dig. tit. "Executors and Administrators," § 2601.

40. Hubble *v.* Fogartie, 3 Rich. (S. C.) 413, 45 Am. Dec. 775; Caruthers *v.* Moore, 1

administravit and the plea is found against him, the verdict should find how much property came into his hands, how much he lawfully administered, how much remains and its value.[41]

10. Judgment. In an action against an executor *de son tort* on a debt of the decedent, the proper judgment at common law was that plaintiff recover the debt and costs to be levied of the assets of the decedent if defendant have so much, but if not, then of defendant's own goods.[42] It is sufficient that the judgment is entered and execution issued against defendant as executor and not as executor *de son tort*.[43] Judgment should be given to plaintiff for the full amount of his debt, although the estate be insolvent.[44] Judgment by default should not be rendered against an executor *de son tort* as garnishee for the debt of a distributee, where it does not appear that there has been a settlement, which alone can determine whether anything will be coming to the distributee.[45]

11. Execution. A judgment against an executor *de son tort* gives the party obtaining it no right to have an execution against the lands of the decedent,[46] for the lands are not in legal contemplation the estate of the decedent in defendant's hands.[47] Goods in the possession of an executor *de son tort* are not subject to be seized for his individual debts.[48] To a scire facias on a judgment against an executor *de son tort* for a debt of the decedent, it is a good plea in bar of execution that defendant has taken letters of administration before the suing out of the scire facias, that the estate of the deceased is insolvent, and that a decree of distribution has been passed in the probate court.[49]

EXECUTORSHIP EXPENSES. Testamentary expenses.[1] (See, generally, Executors and Administrators; Wills.)

EXECUTORY. That which remains to be carried into operation or effect; incomplete; depending upon a future performance or event.[2] (Executory: Agreement, see Contracts. Bequest, see Wills. Consideration, see Contracts. Contract, see Contracts. Contract of Sale, see Sales. Devise, see Wills. Estate, see Estates. Remainder, see Estates. Sale, see Sales. Trusts, see Trusts. Use, see Trusts.)

EXECUTORY CONSIDERATION. See Contracts.

Tenn. Cas. 60, Thomps. Cas. (Tenn.) 86; Padget *v.* Priest, 2 T. R. 97, 1 Rev. Rep. 440; Haacke *v.* Gordon, 6 U. C. Q. B. 424.

The bona fides of one's taking or retaining property under color of right, believing his right to be superior to that of a lawful representative, is a question of fact for the jury, and not a question of law for the court. Ward *v.* Bevill, 10 Ala. 197, 44 Am. Dec. 478; Brown *v.* Durbin, 5 J. J. Marsh. (Ky.) 170; Brown *v.* Brown, 1 C. Pl. (Pa.) 8.

41. Foster *v.* Nowlin, 4 Mo. 18.

42. Parker *v.* Thompson, 30 N. J. L. 311; Hubbell *v.* Fogartie, 1 Hill (S. C.) 167, 26 Am. Dec. 163; Hutchinson *v.* Fulghum, 4 Heisk. (Tenn.) 550; Peters *v.* Breckenridge, 19 Fed. Cas. No. 11,030, 2 Cranch C. C. 578. See also Hawkins *v.* Johnson, 4 Blackf. (Ind.) 21; Chaplin *v.* Hopkins, 3 Strobh. Eq. (S. C.) 182. But *compare* Hill *v.* Henderson, 13 Sm. & M. (Miss.) 688.

In Indiana, by statute, although a creditor may sue an executor *de son tort*, he cannot recover a personal judgment for his debt against such executor, but can only compel him to account for the full value of the decedent's property with which he has unlawfully intermeddled, with ten per cent thereon. Goff *v.* Cook, 73 Ind. 351; McCoy *v.* Payne, 68 Ind. 327.

43. Shotwell *v.* Rowell, 30 Ga. 557.

44. Tweedy *v.* Bennett, 31 Conn. 276.

45. Grider *v.* Phœnix Brewing Co., 7 Ky. L. Rep. 593.

46. Mitchel *v.* Lunt, 4 Mass. 654; Nass *v.* Vanswearingen, 10 Serg. & R. (Pa.) 144, 7 Serg. & R. 192; Warren *v.* Raymond, 17 S. C. 163; Wrathwell *v.* Bates, 15 U. C. Q. B. 391; McDade *v.* Dafoe, 15 U. C. Q. B. 386; Graham *v.* Nelson, 6 U. C. C. P. 280.

The sale of a reversion in a term of years under a fieri facias on a judgment against an executor *de son tort* is a valid sale as against a rightful administrator. Bain *v.* McIntyre, 17 U. C. C. P. 500.

47. Mitchel *v.* Lunt, 4 Mass. 654.

48. Grant *v.* Williams, 28 N. C. 341.

49. Schillaber *v.* Wyman, 15 Mass. 322. But see Green *v.* Dewit, 1 Root (Conn.) 183.

1. Sharp *v.* Lush, 10 Ch. D. 468, 470, 48 L. J. Ch. 231, 27 Wkly. Rep. 528, where it is said: "They are expenses incident to the proper performance of the duty of the executor in the same way as testamentary expenses are, neither more nor less."

2. Black L. Dict.

EXECUTORY CONTRACT. See Contracts.

EXECUTORY CONTRACT OF SALE. See Sales.

EXECUTORY DEVISE. See Wills.

EXECUTORY ESTATE. See Estates.

EXECUTORY PROCESS. In Louisiana, a term applied to an order of seizure and sale when a mortgage imports a confession of judgment.[2]

EXECUTORY TRUST. See Trusts.

EXECUTORY USE. See Trusts.

EXECUTRIX. See Executors and Administrators.

EXEMPLA NON RESTRINGUNT REGULAM, SED LOQUUNTUR DE CASIBUS CREBRIORIBUS. A maxim meaning "Examples do not restrict the rule, but speak of the cases which most frequently occur."[4]

EXEMPLARY. Such as may serve for a warning to others; such as may deter from wrong-doing.[5] (See, generally, Damages.)

EXEMPLARY DAMAGES. See Damages.

EXEMPLIFICATION. A perfect copy of a record or office book.[6] (Exemplification: For Use in Evidence, see Evidence. See also Authentication; Certification; Copy.)

EXEMPLI GRATIA. Literally, "for the purpose of example." Often abbreviated "*ex. gr.*" or "*e. g.*"[7]

EXEMPT.[8] As a noun, a person who is free from any charge, burden, or duty; not liable to, &c.;[9] one who is excused from duty.[10] As a verb, to excuse;[11] to relieve from some requisition, etc., to which others are subject;[12] to take out of or from, and in its ordinary signification to free from, not be subject to any service or burthen to which others are made liable;[13] it does not mean to disqualify.[14] (See, generally, Exemptions.)

3. It is said to be, in substance, a decree of foreclosure and sale. Marin *v.* Lalley, 17 Wall. (U. S.) 14, 17, 21 L. ed. 596. See also Harrod *v.* Voorhies, 16 La. Ann. 254, 256, where it is said that it is a "summary proceeding," and "issues without citation to the adverse party."

"Executory proceedings" is a term applied when seizure is obtained against the property of the debtor, without previous citation, in virtue of an act or title importing confession of judgment, or in other cases provided by law. Garland La. Code, § 98.

4. Trayner Leg. Max.

Aplied in Wilson *v.* Merry, L. R. 1 H. L. Sc. 326, 332, 19 L. T. Rep. N. S. 30.

5. Century Dict.

"'Exemplary,' when it relates to the unlawful sale of intoxicating liquors, has a different legal meaning from its usual meaning when applied to any other wrongful act." Mayer *v.* Frobe, 40 W. Va. 246, 262, 22 S. E. 58.

6. Bouvier L. Dict. [*cited* in Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390, 413].

7. Black L. Dict. See 14 Cyc. 1231.

8. "It is not a technical term; it is a plain English word." *In re* Bradshaw, 60 N. C. 379, 381.

9. *In re* Strawbridge, 39 Ala. 367, 379, distinguishing the word from "detail."

10. Glassinger *v.* State, 24 Ohio St. 206, 207 [*citing* Bouvier L. Dict.].

11. Glassinger *v.* State, 24 Ohio St. 206, 207.

12. Burrill L. Dict. [*quoted* in Church Charity Foundation *v.* People, 6 Dem. Surr. (N. Y.) 154, 156, 11 N. Y. St. 704].

"Exempted," in military circles, is a word sometimes used in the sense of "discharged" or "relieved from." *In re* Bradshaw, 60 N. C. 379, 381.

13. *In re* Bradshaw, 60 N. C. 379, 381.

14. State *v.* Stunkle, 41 Kan. 456, 459, 21 Pac. 675.

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* Author of "Contribution," 9 Cyc. 792; "Court Commissioners," 11 Cyc. 622; "Disorderly Houses," 14 Cyc. 479; "Drunkards," 14 Cyc. 1089; "Dueling," 14 Cyc. 111; "Escrows," 16 Cyc. 560; and joint author of "Factors and Brokers," 19 Cyc. 109.

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CROSS-REFERENCES

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  - Forfeiture, see FORFEITURES.
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  - Individual Liability, see CORPORATIONS.
  - Jury Service, see GRAND JURIES; JURIES.
  - Military Service, see ARMY AND NAVY; MILITIA.
  - Operation of Statutes, see CONSTITUTIONAL LAW; CORPORATIONS.
  - Poll-Tax, see STREETS AND HIGHWAYS; TOLL-ROADS.
  - Search and Seizure, see SEARCHES AND SEIZURES.
  - Service of Process, see PROCESS.
  - Taxation, see MUNICIPAL CORPORATIONS; TAXATION.
  - Testifying, see WITNESSES.
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- Exemption of:
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For Matters Relating to — (*continued*)
Exemptions:
Allowance:
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To Assign, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.
To Surviving Husband, Wife, or Child, see EXECUTORS AND ADMINISTRATORS.
Lien of Garnishment on Debt Accruing After Writ Served, see GARNISHMENT.
Specific Performance of Contract Waiving, see SPECIFIC PERFORMANCE.
Rights in Public Lands, see PUBLIC LANDS.

I. ORIGIN, GENERAL NATURE, AND EXTENT OF THE RIGHT.

A. Definition, Nature, Origin, and Purpose in General. An exemption is defined to be an immunity, freedom from any service, charge, burden, taxes, etc.[1] As used in this article, the term means a privilege or immunity allowed by law to a judgment debtor by which he may hold property to a certain amount, or certain classes of property, free from all liability to levy and sale, on execution, attachment, or other process issued in pursuance of and for the satisfaction of a money judgment.[2] The exemption in personal property is not in the nature of an estate in the property, analogous to the homestead right in land;[3] the debtor's interest, if it can be called an interest at all, and if it is anything beyond a mere negative immunity from disturbance under a particular writ, is in the nature of a chattel interest.[4] It is entirely a creature of statute,[5] and the right of the debtor is determined by the statute of creation, for *prima facie* all property is liable to execution.[6] This immunity given the debtor is founded upon the idea that the exempt property is necessary to support the debtor and his family.[7] It is not intended exclusively for the benefit of the owner of the property, but mainly for the benefit of the family for which he provides.[8]

1. Koenig *v.* Omaha, etc., R. Co., 3 Nebr. 373, 380. See also Maine Water Co. *v.* Waterville, 93 Me. 586, 596, 45 Atl. 830, 49 L. R. A. 294; Bartholomew *v.* Austin, 85 Fed. 359, 368, 29 C. C. A. 568.

Immunity or privilege.— State *v.* Smith, 158 Ind. 543, 553, 63 N. E. 25, 214, 64 N. E. 18, 63 L. R. A. 116; Florer *v.* Sheridan, 137 Ind. 28, 42, 36 N. E. 365, 23 L. R. A. 278; Green *v.* State, 59 Md. 123, 128, 43 Am. Rep. 542; People *v.* Rawn, 90 Mich. 377, 379, 51 N. W. 522; Bartholomew *v.* Austin, 85 Fed. 359, 368, 29 C. C. A. 568.

Synonym of "immunity." — Long *v.* Converse, 91 U. S. 105, 113, 23 L. ed. 233.

Distinguished from "abatement."— State *v.* Armstrong, 17 Utah 166, 171, 53 Pac. 981, 41 L. R. A. 407.

Distinguished from "encumbrance."— Robinson *v.* Wiley, 15 N. Y. 489, 492.

Distinguished from "deduction." — State *v.* Smith, 158 Ind. 543, 553. 63 N. E. 25, 214, 64 N. E. 18, 63 L. R. A. 116; Florer *v.* Sheridan, 137 Ind. 28, 42, 36 N. E. 365, 23 L. R. A. 278.

2. See Black L. Dict.

"Exempt property" is something toward which the eye of the creditor need never be turned. Taylor *v.* Winnie, 59 Kan. 16, 18, 51 Pac. 890, 68 Am. St. Rep. 339.

Process and proceedings against which exemption may be asserted see *infra*, VI, A.

3. **Homestead** generally see HOMESTEADS.

4. State *v.* Harrington, 33 Mo. App. 476.

5. **"At common law,** from which we derived the writ of fieri facias, little mercy was extended to the debtor. Even his wearing apparel might be taken, provided in doing so the sheriff was not obliged to strip it from the debtor's back." Hanna *v.* Bry, 5 La. Ann. 651, 655, 52 Am. Dec. 606. See also Fink *v.* Fraenkle, 14 N. Y. Suppl. 140, 20 N. Y. Civ. Proc. 402.

Serjeant Stephen enumerates the different articles that were exempt from distress for rent. 3 Stephen Comm. (12th London ed. 1895).

6. Wygant *v.* Smith, 2 Lans. (N. Y.) 185; Yates County Nat. Bank *v.* Carpenter, 14 N. Y. Civ. Proc. 372.

Exemption of salary of a public officer through the operation of the doctrine of public policy see *infra*, III, D, 2, a.

7. Wright *v.* Pratt, 31 Wis. 99.

8. Wilcox *v.* Hawley, 31 N. Y. 648. See also McMurray *v.* Shuck, 6 Bush (Ky.) 111, 99 Am. Dec. 662.

Where, on application of a husband, property belonging to him was set apart as an exemption for the benefit of his wife, the latter, although entitled to have the proceeds thereof used for her support, was not entitled to a right to manual possession, since

B. Exemption in Personalty in Lieu of Homestead. In a number of states the debtor is given the right to exemption in personal property or sometimes even in lands if he does not possess a homestead.[9] If the debtor has a homestead he is not entitled to the exemption in personalty.[10] Out of what law, state or national, the homestead right has its origin is immaterial.[11] The owner of a life-estate in lands occupied by him as a family residence is the owner of a homestead so as to be precluded from an exemption in personalty.[12] But a tenancy for a single year of a house, stable, and parcel of land is not a homestead, especially where the tenant does not claim a homestead in the property.[13] If the wife owns a homestead the debtor cannot claim his exemption in personalty or in land.[14] That the homestead is encumbered does not give the debtor

the act of setting it apart did not vest title in the wife, but merely made her a beneficiary. Floyd *v.* Floyd, 111 Ga. 855, 36 S. E. 879.

A debtor cannot be deprived of his right to exemptions, except by his own act, conduct, or assent. Higgins *v.* Dunkleberger, 9 Pa. Dist. 91, 23 Pa. Co. Ct. 291, 16 Montg. Co. Rep. (Pa.) 55.

Economic effect.— In Citizens' Nat. Bank *v.* Green, 78 N. C. 247, 257, the economic effect of exemption laws is explained.

9. Clark *v.* Hicks, 4 Ohio Dec. (Reprint) 413, 2 Clev. L. Rep. 129. See Kuhn *v.* Nieberg, 40 Ohio St. 631. See also Comer *v.* Dodson, 22 Ohio St. 615, where the allowance was made out of the debtor's share of the proceeds of the land sold in the partition suit.

In South Carolina, under the act of Dec. 23, 1879, a judgment debtor is entitled to a homestead in money. Gray *v.* Putnam, 51 S. C. 97, 28 S. E. 149. The act of 1870 allowed an exemption of personal property to the head of a family, whether he owned a homestead or not. See Oliver *v.* White, 18 S. C. 235.

Wife claimant.— Where neither husband nor wife owns a homestead and the only article of personalty possessed by the husband is of less value than the statutory limit of five hundred dollars and the wife owns no property whatever and the personalty of the husband is levied on, the wife may demand and is entitled to have the article exempted and set off in lieu of the homestead. Regan *v.* Zeeb, 28 Ohio St. 483. But a married woman is not entitled to have five hundred dollars in lieu of a homestead in the absence of evidence that she and her husband are living together and that neither of them is the owner of a homestead. Voight Co. *v.* Lafkin, 12 Ohio Cir. Ct. 751, 6 Ohio Cir. Dec. 124.

10. Axtell *v.* Warden, 7 Nebr. 182.

If one employs his money in the purchase of land, the money becomes real estate and he is entitled to a homestead therein but he cannot claim personal property exemption. Dortch *v.* Benton, 98 N. C. 190, 3 S. E. 633, 2 Am. St. Rep. 331.

Nebr. Code Civ. Proc. § 521, provides that heads of families who have neither lands, town lots, nor houses subject to exemption as a homestead shall have five hundred dollars personal property exempt. The words "subject to exemption as a homestead" do not refer to houses alone but apply to the lands and town lots as well. Widemair *v.* Woolsey, 53 Nebr. 468, 73 N. W. 947, opinion of the court by Norval, J.

11. And it is immaterial, if the homestead is held under the laws of congress, whether or not the patent has been issued therefor. Axtell *v.* Warden, 7 Nebr. 182.

12. Biddinger *v.* Pratt, 50 Ohio St. 719, 35 N. E. 795 (where the life-estate was conveyed as an equitable mortgage); Newton *v.* Clarke, 3 Ohio Dec. (Reprint) 165, 4 Wkly. L. Gaz. 109 (where a husband has a life-estate as a tenant by curtesy in his wife's property).

A lease conveying a life-estate in lands including a dwelling-house constitutes the grantee the owner of the homestead so as to deprive him of exemption in personalty. Staley *v.* Woolley, 8 Ohio Cir. Ct. 35, 4 Ohio Cir. Dec. 550, where the lease contained provisions forfeiting only for waste, and nonpayment of taxes, and in case a sale thereof on execution is permitted.

A tenancy by the curtesy may be a homestead so as to preclude an exemption in personalty. Newton *v.* Clarke, 3 Ohio Dec. (Reprint) 165, 4 Wkly. L. Gaz. 109.

13. Colwell *v.* Carper, 15 Ohio St. 279.

14. Lippelman *v.* Boning, 7 Ohio Dec. (Reprint) 450, 3 Cinc. L. Bul. 296. See also Stout *v.* Rapp, 17 Nebr. 462, 23 N. W. 364. *Contra*, Morely *v.* National Loan, etc., Co., 120 Mich. 171, 78 N. W. 1078. Where a married woman resides with her husband and family on land in which she owns an interest as tenant in common, she is entitled to her homestead therein and her husband is precluded from an exemption in personalty. Keys *v.* Young, 4 Ohio S. & C. Pl. Dec. 113, 2 Ohio N. P. 390.

If a homestead is owned by either husband or wife neither can claim exemption in personalty. Dwinell *v.* Edwards, 23 Ohio St. 603.

Removal.— If the wife owned property which had been occupied as a homestead but from which they had removed before levy of execution against the husband, he is entitled to his exemption in personalty. Ryan *v.* Miller, 40 Ohio St. 232.

any right to claim the exemption in personalty,[15] although the encumbrance is for its full value,[16] or even for more than its full value;[17] and this although foreclosure proceedings have been begun, no decree having been taken.[18] After the foreclosure sale[19] and before the confirmation of the sale[20] of the homestead the debtor may claim his exemption in personalty. If the debtor has sold his homestead in good faith before the levy and several days after the levy the contract was fully executed, he was not at the time of the levy the "owner of a homestead," so as to be precluded from his exemption in personalty.[21]

C. The Law Governing the Right — 1. Of What Jurisdiction. It may be laid down as the general rule that exemption laws have no extraterritorial force.[22] They are treated as part of the remedies for the collection of debts and are in furtherance of state policy and can have only a local application.[23] In other words an exemption is a personal privilege as contradistinguished from a right,[24] and it is governed by the law of the place where the contract is sought to be enforced instead of by the *lex loci contractus*.[25] This rule is applied when a debtor endeavors to claim the exemption laws of another jurisdiction;[26] and some

15. Biddinger *v.* Pratt, 50 Ohio St. 719, 35 N. E. 795. See also State *v.* Townsend, 17 Nebr. 530, 23 N. W. 509.

16. State *v.* Krumpos, 13 Nebr. 321, 14 N. W. 409.

17. Bartram *v.* McCracken, 41 Ohio St. 377. See also Lippelman *v.* Boning, 7 Ohio Dec. (Reprint) 450, 3 Cinc. L. Bul. 296. *Contra, In re* May, 16 Fed. Cas. No. 9,326, where the real estate was mortgaged and the condition had been broken.

18. Olding *v.* Kemker, 9 Ohio Dec. (Reprint) 601, 15 Cinc. L. Bul. 310 [*following* Bartram *v.* McCracken, 41 Ohio St. 377].

This is a necessary rule, for "the legislature did not intend to impose upon the sheriff the duty of ascertaining the existence and validity of, and the amount due upon, incumbrances upon the realty of the execution debtor." Bartram *v.* McCracken, 41 Ohio St. 377, 378.

19. Niehaus *v.* Faul, 43 Ohio St. 63, 1 N. E. 87; William H. Holmes Co. *v.* Book, 1 Ohio S. & C. Pl. Dec. 665, 1 Ohio N. P. 58 [*following* Jackson *v.* Reid, 32 Ohio St. 443].

20. Carter *v.* Ross, 8 Ohio Cir. Ct. 139, 4 Ohio Cir. Dec. 333.

21. Muse *v.* Darrah, 2 Ohio Dec. (Reprint) 604, 4 West. L. Month. 149.

Removal from homestead of wife see *supra*, note 14.

22. *Alabama.*— East Tennessee, etc., R. Co. *v.* Kennedy, 83 Ala. 462, 2 So. 852, 3 Am. St. Rep. 755.

Colorado.— Atchison, etc., R. Co. *v.* Maggard, 6 Colo. App. 85, 39 Pac. 985.

Georgia.— Kyle *v.* Montgomery, 73 Ga. 337.

Kentucky.— Stewart *v.* Thomson, 97 Ky. 575, 31 S. W. 133, 17 Ky. L. Rep. 381, 53 Am. St. Rep. 431, 36 L. R. A. 582.

North Carolina.— Balk *v.* Harris, 122 N. C. 64, 30 S. E. 318, 45 L. R. A. 257.

See 23 Cent. Dig. tit. "Exemptions," § 2; and Contracts, 9 Cyc. 692.

23. Kyle *v.* Montgomery, 73 Ga. 337.

24. Kyle *v.* Montgomery, 73 Ga. 337.

25. *Illinois.*— Mineral Point R. Co. *v.* Barron, 83 Ill. 365.

Iowa.— Newell *v.* Hayden, 8 Iowa 140 [*citing* Helfenstein *v.* Cave, 3 Iowa 387, 2 Story Eq. Jur. §§ 556, 557].

Nebraska.— Singer Mfg. Co. *v.* Fleming, 39 Nebr. 679, 58 N. W. 226, 42 Am. St. Rep. 613, 23 L. R. A. 210.

Pennsylvania.— Morgan *v.* Neville, 74 Pa. St. 52.

United States.— Chicago, etc., R. Co. *v.* Sturn, 174 U. S. 710, 19 S. Ct. 797, 43 L. ed. 1144 [*reversing* 58 Kan. 818, 51 Pac. 1100].

See 23 Cent. Dig. tit. "Exemptions," § 2.

26. *Alabama.*—Boykin *v.* Edwards, 21 Ala. 261.

Arkansas.— Swanger *v.* Goodwin, 49 Ark. 287, 5 S. W. 319.

Colorado.— Atchison, etc., R. Co., *v.* Maggard, 6 Colo. App. 85, 39 Pac. 985.

Georgia.— Gamble *v.* Central R., etc., Co., 80 Ga. 595, 7 S. E. 315, 12 Am. St. Rep. 276, where it was held that a waiver of exemption in a note made by the debtor in Georgia, the note to be payable in Alabama, was governed solely by the laws of Georgia where the question came up and was not affected by the laws of Alabama.

Illinois.— Mineral Point R. Co. *v.* Barron, 83 Ill. 365; American Cent. Ins. Co. *v.* Hettler, 46 Ill. App. 416 [*citing* Roche *v.* Rhode Island Ins. Co., 2 Ill. App. 360]; Wabash R. Co. *v.* Dougan, 41 Ill. App. 543.

Iowa.— Oberfelder *v.* Union Pac. R. Co., 60 Iowa 755, 14 N. W. 255; Mooney *v.* Union Pac. R. Co., 60 Iowa 346, 14 N. W. 343, where the wages due to a debtor of a railroad corporation operating in both Iowa and Nebraska were taken in spite of the exemption allowed the debtor in Nebraska. Exemption from garnishment in another state, where the debtor resides, cannot be claimed in Iowa, unless the amount due the debtor from the garnishee is also exempt by Iowa laws. Lyon *v.* Callopy, 87 Iowa 567, 54 N. W. 476, 43 Am. St. Rep. 396; Broadstreet *v.* Clark, 65 Iowa 670, 22 N. W. 919; Mooney *v.* Union Pac. R. Co., 60 Iowa 346, 14 N. W. 343; Leiber *v.* Union Pac. R. Co., 49 Iowa 688.

courts have held the same as to the force of the laws of their own jurisdictions.[27] Sometimes one court has enforced the laws of another by the doctrine of comity;[28] in other instances the forum has denied that there is any room for comity.[29] The pleasure which the courts take in giving to a debtor the exemption of their own jurisdiction which he would not have in another is sometimes very noticeable.[30] The exemption laws of a foreign jurisdiction have been given all their practical force by the forum before which the question was being litigated by the doctrine in attachment and garnishment that the court has nothing to determine, unless it has jurisdiction of the person, or unless the property in question is within the jurisdiction of the court.[31]

Kentucky.— See Barker *v.* Brown, 33 S. W. 833, 17 Ky. L. Rep. 1172.

Michigan.— See Detroit First Nat. Bank *v.* Burch, 80 Mich. 242, 45 N. W. 93.

West Virginia.— Pennsylvania R. Co. *v.* Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178 [*following* Stevens *v.* Brown, 20 W. Va. 450; Mahany *v.* Kephart, 15 W. Va. 609].

See 23 Cent. Dig. tit. "Exemptions," § 2.

27. Baltimore, etc., R. Co. *v.* Hollenbeck, 161 Ind. 452, 69 N. E. 136; Sexton *v.* Phœnix Ins. Co., 132 N. C. 1, 43 S. E. 479; Balk *v.* Harris. 122 N. C. 64, 30 S. E. 318, 45 L. R. A. 257; Morgan *v.* Neville, 74 Pa. St. 52.

28. Kansas City, etc., R. Co. *v.* Cunningham, 7 Kan. App. 47, 51 Pac. 972, where the statutory provisions for the wages exemption in both states were substantially the same; but this was not the only reason for the decision. See also Mason *v.* Beebee, 44 Fed. 556, where a federal court sitting in Iowa enforced the exemption laws of Illinois to protect in garnishment proceedings in Iowa the wages exemption given the debtor by the laws of Illinois.

Under N. J. Rev. p. 1265, § 2, exempting wages due from a resident employer to a non-resident employee at the suit of a non-resident creditor, when wages are exempt from attachment by the laws of the state of which the employee is a resident, an attachment issued at the suit of a non-resident creditor against wages due a resident of another state, where wages are exempt from attachment, will be set aside. Freeman *v.* Coykendall. 2 N. J. L. J. 125.

29. East Tennessee, etc., R. Co. *v.* Kennedy, 83 Ala. 462, 3 So. 852, 3 Am. St. Rep. 755; Stevens *v.* Brown, 20 W. Va. 450.

30. Thus property not exempt in Illinois was held exempt in Iowa. Newell *v.* Hayden, 8 Iowa 140. The garnishment in a foreign jurisdiction of a railroad domiciled there as well as in Mississippi for a debt due an employee resident in Mississippi does not affect the exemption allowed a debtor by the Mississippi law. Both debtor and creditor residing in Mississippi the court will give effect to its own laws regardless of the laws of other states. Illinois Cent. R. Co. *v.* Smith, 70 Miss. 344, 12 So. 461, 35 Am. St. Rep. 651, 19 L. R. A. 577. But see *contra.* Morgan *v.* Neville. 74 Pa. St. 52.

31. Thus a resident of Tennessee had wages due him, earned in that jurisdiction, from a railroad corporation chartered there and in Georgia. In Tennessee his wages were exempt from attachment and he sued for them there and recovered judgment, although a suit was pending in Georgia against him and the corporation as garnishee. It was held that garnishment proceedings could not be maintained in Georgia, for the debtor had neither effects nor a debt due him from the garnishee in Georgia, for to the Georgia corporation he had never rendered any services whatever under any contract either express or implied, entered into or performed there either in whole or in part; that since he had no effects on which the attachment could be levied, the very foundation for attachment was wanting and therefore there was nothing to which the jurisdiction of the Georgia court could attach. Wells *v.* East Tennessee, etc., R. Co., 74 Ga. 548 [*distinguishing* Kyle *v.* Montgomery, 73 Ga. 337, where it was held that the property of a non-resident debtor found in Georgia was subject to attachment and that the debtor was not entitled to claim his exemption in the property allowed by the laws of this state. In that case a non-resident had rendered services to a Georgia corporation under a contract entered into and wholly performed in Georgia]. So in Missouri Pac. R. Co. *v.* Maltby, 34 Kan. 125, 8 Pac. 235, it was held that a debt created and payable in Missouri could not be garnished in Kansas; there all the parties were residents of Missouri and the garnishee's debt to defendant was exempt under Missouri law, the garnishee doing business in Kansas, but plaintiff and defendant being only temporarily there. In Michigan the court seems to have gone even farther. A debt was contracted in Indiana where there was a wages' exemption for one month and both parties were residents of that state. The debtor was an employee of a railroad in that state and his wages were payable there. The debt was assigned to a resident of Michigan where there was not a wages' exemption. Garnishment proceedings were brought in Michigan. It was held that the debtor not being subject to the jurisdiction of the court, the Indiana exemption became a vested right *in rem* and that the debt transferred to evade the exemption law of Indiana could not be reached. Drake *v.* Lake Shore, etc., R. Co., 69 Mich. 168, 37 N. W. 70, 13 Am. St. Rep. 382. In New York in a situation the reverse of the above cases the same principle was sustained.

2. Of What Time. The right to an exemption is governed by the law which is in force when the debt is contracted, not necessarily by the law which is in force when the exemption is claimed.[32] A number of cases, particularly early ones, have taken the ground that an exemption law relates to the remedy and not to the right and that therefore an exemption law could affect debts contracted for prior to the time the law took effect, without impairing the obligation of the contract;[33] but the true rule is as first stated and has the sanction of

Martin *v.* Central Vermont R. Co., 50 Hun 347, 3 N. Y. Suppl. 82. In that case plaintiff sued defendant, a Vermont corporation, for a debt due for work done in New York. The corporation pleaded payment of the amount in an attachment proceeding brought in Vermont. It appeared that one Kelly of New York had brought an action in a justice's court in Vermont against plaintiff in the principal case; attachment issued and the officer returned that plaintiff in the principal case (defendant in attachment) was not in the state and had no known agent or attorney; that he had served a writ by delivering it to the treasurer of the corporation, defendant in the principal case. The action was adjourned to a certain day at which day the attachment defendant did not appear, but the attachment plaintiff did appear and so did the corporation and judgment was rendered for plaintiff in attachment against defendant therein and the corporation paid the judgment. It further appeared that defendant in attachment had no notice of the proceedings in Vermont. It was held that this was not due process of law and that the answer of defendant showed no defense to the action, and that this view was not in conflict of the other constitutional provision that full faith and credit shall be given to the judgments of other states.

32. *Alabama.*— Bell *v.* Hall, 76 Ala. 546; Giddens *v.* Williamson, 65 Ala. 439; Fearn *v.* Ward, 65 Ala. 33; Preiss *v.* Campbell, 59 Ala. 635.

Arkansas.— Moore *v.* Boozier, 42 Ark. 385.

Florida.— Alexander *v.* Kilpatrick, 14 Fla. 450.

Georgia.— Peters *v.* Bradford, 49 Ga. 551.

Indiana.— O'Neil *v.* Beck, 69 Ind 239.

Iowa.— Baugh *v.* Barrett, 69 Iowa 495, 29 N. W. 425 (holding that Laws (1884), c. 23, exempting money in the hands of the pensioner, were enacted for the personal benefit of the pensioner and were not applicable to the money of the pensioner who died before their passage); Goble *v.* Stephenson, 68 Iowa 270, 26 N. W. 433.

Kentucky.— Millay *v.* White, 86 Ky. 170, 5 S. W. 429, 9 Ky. L. Rep. 462; Knight *v.* Whitman, 6 Bush 51, 99 Am. Dec. 652; Jones *v.* McCrocklin, 16 Ky. L. Rep. 285; Woods *v.* Jones, 9 Ky. L. Rep. 241.

Louisiana.— Lavillebeuvre *v.* Frederic, 20 La. Ann. 374.

Massachusetts.—Kellogg *v.* Waite, 12 Allen 529.

North Carolina.— Carlton *v.* Watts, 82 N. C. 212 [*citing* Gamble *v.* Rhyne, 80 N. C. 182].

Pennsylvania.— Reed *v.* Defebaugh, 24 Pa. St. 495.

Tennessee.— Harris *v.* Austell, 2 Baxt. 148.

United States.— The Queen, 93 Fed. 834.

See 23 Cent. Dig. tit "Exemptions," §§ 5, 6.

Compare Burns *v.* Plume, etc., Mfg. Co., 56 Conn. 526, 16 Atl. 260.

An exemption under a later law cannot be greater in amount than that which was allowed at the time the debt was contracted. Alexander *v.* Kilpatrick, 14 Fla. 450, holding, however, that the heirs of the debtor could claim the exemption of which the debtor had been entitled, although the former law had not given the heirs this right since no right to subject the property had existed before and therefore no right of the creditor was impaired.

The California act of March 27, 1897, amending Code Civ. Proc. § 690, by giving an absolute wages' exemption to seamen to an amount not exceeding one hundred dollars cannot be applied to executions upon judgments rendered in suits on contracts prior to the passage of the act. The Queen, 93 Fed. 834.

The federal statute of 1866 exempting sums of money due the pensioner, or that in course of transmission or in the hands of government pension agents, does not protect the money already paid to an agent of the pensioner by his request before the statute was passed and the money may be attached by trustee process served on the agent. Kellogg *v.* Waite, 12 Allen (Mass.) 529.

The laws in force at the husband's death determine the amount of exemption of his property for the payment of his debts in favor of the widow and minor children. Rottenberry *v.* Pipes, 53 Ala. 447. See, however, Alexander *v.* Fitzpatrick, 14 Fla. 450. See also Executors and Administrators.

A delivery bond executed before an exemption went into effect is not governed by that law. Smith *v.* Brown, 28 Miss. 810, holding further that a delivery bond is not a contract in contemplation of the exemption law. Where, however, such a bond is given after the date when the exemption law takes effect it is subject to that law's provision, although the bond existed before that time. Dean *v.* King, 35 N. C. 20.

33. *Alabama.*— Sneider *v.* Heidelberger, 45 Ala. 126.

Georgia.— Maxey *v.* Loyal, 38 Ga. 531.

Michigan.— Rockwell *v.* Hubbell, 2 Dougl. 197, 45 Am. Dec. 246.

Minnesota.— Grimes *v.* Bryne, 2 Minn. 89.

Mississippi.— Stephenson *v.* Osborne, 41 Miss. 119, 90 Am. Dec. 358; Morrison *v.* McDaniel, 30 Miss. 213 [both cases *overruled* in

the supreme court of the United States.[34] Where the debt is contracted before the law takes effect, the fact that a note is given for the debt after the law takes effect does not make the debt subject to the law.[35] The date of a promise to pay a debt discharged by bankruptcy is not the date when the contract is entered into, for it does not create a new contract, but merely revives the old debt which is then governed by the exemption law in force at the time it is made.[36] If a creditor, allowing an account to run on unliquidated, the different items of the account being subject to different exemption laws, passed in different years, sues for the whole amount and recovers judgment, the debtor may claim his exemption according to the provisions of the later exemption law against the whole judgment.[37] Although it is said that the debtor "has no vested rights in statutory provisions and exemptions," the above rule that the exemption right is governed by the law in force at the time the debt is contracted has operated in his favor where there has been a change or a repeal of the exemption law as it existed at the time the debt was contracted, for it cannot be doubted that the debtor may

Lessley *v.* Phipps, 49 Miss. 790 (*followed* in Johnson *v.* Fletcher, 54 Miss. 628, 28 Am. Rep. 388)].

New York.— Morse *v.* Goold, 11 N. Y. 281, 62 Am. Dec. 103 [*overruling* Quackenbush *v.* Danks, 1 Den. 128].

North Carolina.— McKeithan *v.* Terry, 64 N. C. 25; Hill *v.* Kessler, 63 N. C. 437. In Earle *v.* Hardie, 80 N. C. 177, the court took the ground that the exemption law (a constitutional provision) was not void against the debt contracted before the law took effect, where the law did not give a greater exemption than the former law. See Albright *v.* Albright, 88 N. C. 238.

Texas.— Helm *v.* Pridgen, 1 Tex. App. Civ. Cas. § 643.

See 23 Cent. Dig. tit. "Exemptions," §§ 5, 6.

34. Gunn *v.* Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212. See also The Queen, 93 Fed. 834. See Bronson *v.* Kinzie, 1 How. (U. S.) 311, 315, 11 L. ed. 143. See also CONSTITUTIONAL LAW, 8 Cyc. 695; and *infra*, I, C, 4.

Date of process and service thereof.—Where a trustee process was dated a month prior to the enactment of the statute, which exempted the personal earnings of debtors accruing to them after the service of process, but was not served until three months after that enactment, and plaintiff's attorney, who made it, was unable to say that it was not then put into the officer's hands, it did not affirmatively appear that the suit was brought before the passage of the act; hence the act applied. McDaniels *v.* Morton, 34 Vt. 101.

35. Marsh *v.* Alford, 5 Bush (Ky.) 392.

The fact that there was a merger of a simple contract debt into a new security had no effect where there was no intention that the original debt should be considered as satisfied by the new security. Reed *v.* Defebaugh, 24 Pa. St. 495. See also *In re* Weaver, 25 Pa. St. 434, where a note was given before the law took effect and where after the law took effect it was changed for a single bill for the warrant of attorney to enter judgment.

A new note given after the law took effect in place of the former given before the law took effect, the later note being for a greater amount, does not exempt the property of the debtor which was subject to execution for the debt he had before the statute. Kibbey *v.* Jones, 7 Bush (Ky.) 243.

A surety who pays a note after the exemption law has taken effect cannot be regarded as a creditor of the principal until the debt is paid. Caldwell *v.* Stevens, 14 Ky. L. Rep. 894.

36. Nowland *v.* Lanagan, 45 Ark. 108. *Contra*, Willis *v.* Cushman, 115 Ind. 100, 17 N. E. 168, by which construction the court was enabled to give the debtor a six-hundred-dollar exemption instead of one for three hundred dollars.

37. Bachman *v.* Crawford, 3 Humphr. (Tenn.) 213, 39 Am. Dec. 163. But see Harleman *v.* Buck, 30 Pa. St. 267.

Marshaling assets under different laws.— Where judgments were entered at different times and for debts incurred both before and after the date on which the exemption law took effect the assets deducting the amount, three hundred dollars, allowed as exempt should be applied to the judgment according to their priority and the three hundred dollars should be liable for the debts incurred before July 4, 1849, not already satisfied. Smith's Appeal, 23 Pa. St. 310.

Change of status of debtor.— Where, after judgment and order of sale have been duly and regularly entered in an action to foreclose, the mortgagor becomes entitled to the exemption provided by the act of May 1, 1861, by being mustered into the United States service for three years, if the war should last that long, and a sale is made and confirmed, and deed executed to the purchaser, while he is still in such service, the sale and proceedings are not void, but voidable only. Sked *v.* Sedgley, 36 Ohio St. 483. For change of status by marriage see *infra*, II, B, 2, a. In Harleman *v.* Buck, 30 Pa. St. 267, 271, where judgment was recovered against defendant for a debt in part contracted before the law took effect and the remainder contracted since then, it was said that the debtor could not have the benefit of the exemption law except by paying that part of the debt which was contracted before

acquire a vested right, under the operation of the statute, which cannot be affected by its repeal.[38]

3. Construction of Statutes[39]— a. General Principles. Inasmuch as the exemption right is a creature of the statute, the extent or limitation or even the very existence of the right itself is often determined by the usual principles of statutory construction; as for instance, the principles that the intention of the law-maker must prevail over the literal sense of the terms and its reasons and intention must prevail over the strict letter;[40] that all statutes in *pari materia* must be construed together and that the intent of the law-makers must be determined from a consideration of the whole;[41] that a statute must be construed so that if it can be prevented no clause, section, or word should be void, superfluous, or without significance;[42] that where special words are used followed by words of more general import, the general words are to be limited to things of the same kind as are described by the special words, unless an intention may be found to extend their meaning;[43] that where an act provides that a prior statute "should be amended so as to read as follows" the amendatory act is a substitute for the original statute and repeals all those parts of the prior act which are omitted;[44] the principle of *noscitur a sociis*;[45] that repeals by implication are not favored;[46] that a revision of the whole subject-matter repeals former provisions, not because the revision is inconsistent with former provisions, but because it is a substitute for them.[47] But this last rule, as all the others, must yield to the general rule that the intention of the legislature must be discovered and carried out.[48]

b. Liberal Construction. By an all but universal rule the statutes which

the date when the law took effect and by claiming the benefit of the exemption as to the residue.

38. Bramble *v.* State, 41 Md. 435, 442 [*citing* Cooley Const. Lim. § 383], holding that where a law restricted the exemptions given by a former law to residents of the state, a non-resident's exemption in land set apart for him after the levy would be property or right which vested in him which could not be taken away by the repealing or amending statute. In Rierson *v.* Wesberry, 11 Rich. (S. C.) 353, it was held that if the claimant asserted her right to an exemption in the manner prescribed by the statute in existence, at any time before the repeal of that statute, her right became vested and the subsequent repeal of the right could no more affect her title in the case in question than it could in the case of a claim for a homestead.

In Alabama as against debts contracted prior to the adoption of the constitution of 1868, there was no exemption law in force between April 23, 1873, when the former laws were repealed, and Feb. 9, 1877, when they were revised and reënacted as to such debts. Carlisle *v.* Godwin, 68 Ala. 137; Giddens *v.* Williamson, 65 Ala. 439.

In Pennsylvania the act of 1849 provided that it should not affect contracts entered into before the date of its taking effect. The act of April 22, 1846, therefore was held to apply to a contract entered into before the act of 1849 took effect. Mardis *v.* Clarke, 19 Pa. St. 386.

Repeal of a repealing act.— The Georgia act of 1850, providing that the officers of all corporations whose salaries exceed five hundred dollars, except officers of municipal corporations, are subject to garnishment, is not repealed by Acts (1872), p. 43, providing that wages shall be subject to garnishment where the consideration of the debt was provisions for the use of the employee and his family, since Ga. Code, § 3554, repeals such later act. Bailie *v.* Mosher, 72 Ga. 740.

39. **Interpretation of statutes generally** see Statutes.

40. Mallory *v.* Norton, 21 Barb. (N. Y.) 424; Rose *v.* Wortham, 95 Tenn. 505, 509, 32 S. W. 458, 30 L. R. A. 609.

41. Cook *v.* Allee, 119 Iowa 226, 93 N. W. 93; Jordan *v.* Gower, 1 Baxt. (Tenn.) 103.

42. Brown *v.* Balfour, 46 Minn. 68, 48 N. W. 604, 12 L. R. A. 373. See also Russell *v.* Arnold, 25 Ga. 625.

43. McLarty *v.* Tibbs, 69 Miss. 357, 12 So. 557.

44. Shadewald *v.* Phillips, 72 Minn. 520, 75 N. W. 717, where a statute exempted from execution "one sewing machine" and where this statute was amended by adding one bicycle and later the statute was amended so as to read as follows: "one sewing machine and one typewriting machine," it was held that a bicycle was no longer exempt.

45. Martin *v.* Bond, 14 Colo. 466, 24 Pac. 326; Bevitt *v.* Crandall, 19 Wis. 581 [*modified* in Wicker *v.* Comstock, 52 Wis. 215, 9 N. W. 25]. See also Gordon *v.* Shields, 7 Kan. 320, 325, opinion of Brewer, J.

46. Hawkins *v.* Mosher, 8 Colo. App. 31, 44 Pac. 763. See also Mardis *v.* Clarke, 19 Pa. St. 386.

47. Burlander *v.* Milwaukee, etc., R. Co., 26 Wis. 76.

48. Bransom *v.* Bacon, 7 J. J. Marsh. (Ky.) 259. *Compare* Cayce *v.* Stovall, 50 Miss. 396.

create or give the right of exemption to a debtor are held subject to the rule of liberal construction. Indeed it would be more proper to say that they are generally subjected to the most liberal construction which the courts can possibly give them, the courts taking the ground that, since the statutes have a beneficial object, it is their first duty to see that this object is accomplished.[49] Although the courts are willing to go to extremes and, it sometimes seems, to unwarranted

49. *Alabama.*— Kennedy *v.* Smith, 99 Ala. 83, 11 So. 665.

Arizona.—Wilson *v.* Lowry, (1898) 52 Pac. 777.

Arkansas.— St. Louis, etc., R. Co. *v.* Hart, 38 Ark. 112.

Connecticut.— Montague *v.* Richardson, 24 Conn. 338, 63 Am. Dec. 173.

Illinois.—Good *v.* Fogg, 61 Ill. 449, 14 Am. Rep. 71.

Indiana.— Astley *v.* Capron, 89 Ind. 167; Pickrell *v.* Jerauld, 1 Ind. App. 10, 27 N. E. 433, 50 Am. St. Rep. 192.

Iowa.— Cook *v.* Allee, 119 Iowa 226, 93 N. W. 93; Kaiser *v.* Seaton, 62 Iowa 463, 17 N. W. 664; Bevan *v.* Hayden, 13 Iowa 122.

Kansas.— Donmyer *v.* Donmyer, 43 Kan. 444, 23 Pac. 627; Rasure *v.* Hart, 18 Kan. 340, 26 Am. Rep. 772.

Kentucky.— Schillinger *v.* Boes, 85 Ky. 357, 3 S. W. 427, 9 Ky. L. Rep. 18.

Maryland.— See Muhr *v.* Pinover, 67 Md. 480, 10 Atl. 289.

Massachusetts.— Pond *v.* Kimball, 101 Mass. 105.

Michigan.— Hutchinson *v.* Whitmore, 90 Mich. 255, 51 N. W. 451, 30 Am. St. Rep. 431.

Missouri.— Bovard *v.* Ford, 83 Mo. App. 498.

New York.— Stewart *v.* Brown, 37 N. Y. 350, 93 Am. Dec. 578. See, however, Monroe *v.* Button, 20 Misc. 494, 496, 46 N. Y. Suppl. 647. *Contra,* Rue *v.* Alter, 5 Den. 119.

North Carolina.— Shepherd *v.* Murrill, 90 N. C. 208.

Ohio.— Wanzer *v.* The Widow, 2 Ohio Dec. Reprint 323, 2 West. L. Month. 426.

Oklahoma.—Nelson *v.* Fightmaster, 4 Okla. 38, 44 Pac. 213.

Pennsylvania.— Com. *v.* Boyd, 56 Pa. St. 402.

South Carolina.— Parkerson *v.* Wightman, 4 Strobh. 363.

Tennessee.— Byous *v.* Mount, 89 Tenn. 361, 17 S. W. 1037; Webb *v.* Brandon, 4 Heisk. 285.

Texas.—Robinson *v.* Robertson, 2 Tex. App. Civ. Cas. § 253.

Vermont.— Webster *v.* Orne, 45 Vt. 40.

Washington.— Puget Sound Dressed Beef, etc., Co. *v.* Jeffs, 11 Wash. 466, 49 Pac. 962, 48 Am. St. Rep. 885, 27 L. R. A. 808.

Wisconsin.— Heath *v.* Keyes, 35 Wis. 668; Kuntz *v.* Kinney, 33 Wis. 510; Connaughton *v.* Sands, 32 Wis. 387; Gilman *v.* Williams, 7 Wis. 329, 76 Am. Dec. 219.

See 23 Cent. Dig. tit. "Exemptions," § 4.

Reason for rule.— As a general legal truth, a statute in derogation of the common rights of creditors ought to receive a strict construction; but if it concern the public good it should be construed liberally (Alexander Powlter's Case, 11 Co. Rep. 17; Rex *v.* Armagh, 1 Str. 516. Now, the public has a deep interest in the prosperity of mechanical employments, and a sufficient corrective is interposed by the prescribed inquiry, whether the articles claimed to be exempted are necessary. In relation to the natural description of the goods, of which an exemption is demanded, the exposition of the law, in my judgment, ought to be liberal; but so far as respects their protection, in a given case, on the ground that they are necessary for the upholding of life, this is a strict inquiry of fact. Patten *v.* Smith, 4 Conn. 450, 10 Am. Dec. 166. Exemption laws being remedial, beneficial, and humane in their character will be liberally construed. And when it does not clearly appear whether certain property is or is not embraced within the exempting statute the debtor will generally be allowed the benefit of the doubt and suffered to retain the property. Nelson *v.* Fightmaster, 4 Okla. 38, 44 Pac. 213 [*citing* Freeman Ex. § 208]. "The statute allowing exemption is reasonable and beneficent, and ought not to be so constructed as to defeat the intention of the legislature, unless unavoidable." Com. *v.* Boyd, 56 Pa. St. 402, 404.

The contrary rule.— The exemption law, being in derogation of the general law that all the debtor's property is the common pledge of his creditors, must be construed strictly. White *v.* Heffner, 30 La. Ann. 1280, 31 Am. Rep. 238; Boston Belting Co. *v.* Ivens, 28 La. Ann. 695; Crilly *v.* Sheriff, 25 La. Ann. 219; Guillory *v.* Deville, 21 La. Ann. 686; Pitard *v.* Carey, McGloin (La.) 289; Temple *v.* Scott, 3 Minn. 419; Grimes *v.* Bryne, 2 Minn. 89 (statutes of this nature are in derogation of the common law, and must be strictly construed and nothing can be taken by implication); London, etc., Loan, etc., Co. *v.* Connell, 11 Manitoba 115. Statutes exempting a debtor's property from the payment of his debts are not remedial in the ordinary sense so as to require them to be construed with any peculiar liberality. They are in derogation of the common law and confer immunities and privileges contrary to its general maxims. The interpretation therefore is to be according to what is written or what is plainly or manifestly to be implied from what is written. The court is not to speculate on what are the evils to be provided against and thus come to a conclusion in conformity to what a liberal and munificent spirit or perhaps a more enlightened judgment than that displayed in the legisla-

lengths in this policy of liberal construction, they have balked at "construing" a statute so as to extend the right of exemption in one particular specific article to another and different article.[50]

4. Constitutionality.[51] An exemption law must not violate the rule against class or special legislation;[52] nor can it impair the obligation of a contract.[53] A more extended exemption given in an act than in the constitution is unconstitutional and void.[54] On the other hand a statute cannot restrict the exemption allowed by the constitution.[55] Where the legislature has passed exemption laws as authorized by the constitution, it cannot thereafter entirely abrogate the laws without a contemporaneous passage of substitutes therefor, but it has the power to modify the laws within the constitutional limits.[56]

D. Ownership of Property — 1. Necessity of. Only the owner of property can claim an exemption therein.[57] If the debtor's conveyance of his property is set aside as fraudulent the title does not revest in him so as to give him a right to exemptions therein;[58] but where one has in good faith sold the property

tive provision would approve. Rue *v.* Alter, 5 Den. (N. Y.) 119.

50. "When a class of property is exempt, such as 'suitable apparel, bedding, tools, arms, and articles of household furniture, such as may be necessary for upholding life,' the courts take care that the beneficial purposes of the legislature are carried into execution, and give the statute the most liberal construction. But when a specific article is exempt, the court cannot extend the statute by construction to another and different article." Carty *v.* Drew, 46 Vt. 346, 347. See also Dinkins *v.* Crunden-Martin Woodenware Co., 91 Mo. App. 209, where the court refused to construe Rev. St. (1899) § 3158, exempting to persons not the head of a family their wearing apparel and their tools and implements if they are mechanics engaged in their trade to include the salary or wages of such persons.

51. Constitutionality of statutes generally see Constitutional Law; Statutes.

Constitutionality of exemption laws see Constitutional Law, 8 Cyc. 897.

52. A statutory provision that exemption laws should not operate as against the purchase-price of a specific article is not unconstitutional as class legislation (Rogers *v.* Brackett, 34 Minn. 279, 25 N. W. 601. See *infra*, I, F, 2); but a law exempting only certain enumerated property not exceeding a certain amount in value, where the execution has issued on a judgment for labor other than for professional services, is unconstitutional as special legislation (Burrows *v.* Brooks, 113 Mich. 307, 71 N. W. 460).

Under a constitutional provision that "a reasonable amount of property shall be exempt from seizure or sale," the legislature may provide for the exemption of a reasonable amount of property, but cannot discriminate between different classes of creditors or debts. Coleman *v.* Ballandi, 22 Minn. 144.

53. An exemption law which withdraws property from the lien of a judgment previously rendered by increasing the amount of exemption is unconstitutional and void, as it impairs the obligation of a contract. Gunn *v.* Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212.

54. Duncan *v.* Barnett, 11 S. C. 333, 32 Am. Rep. 476.

Where a "reasonable amount" is provided for in the constitution, a statute which places no reasonable limit upon the amount of exemption is unconstitutional. *In re* How, 59 Minn. 415, 61 N. W. 456 [*modified* on rehearing in 61 Minn. 217, 63 N. W. 627].

55. Burrows *v.* Brooks, 113 Mich. 307, 71 N. W. 460.

56. Bull *v.* Conroe, 13 Wis. 233.

57. Cassell *v.* Williams, 12 Ill. 387; Bohn *v.* Weeks, 50 Ill. App. 236; State *v.* Springate, 51 Mo. App. 619; Stotesbury *v.* Kirtland, 35 Mo. App. 148; Larkin *v.* McAnnally, 5 Phila. (Pa.) 17. See Wygant *v.* Smith, 2 Lans. (N. Y.) 185, where it was said that neither the bailee nor mortgagee of property was entitled to claim an exemption therein. *Contra*, Steen *v.* Hamblet, 66 Miss. 112, 5 So. 524.

Assignee.— If, without making claim, the debtor assigns a judgment in which he may have an exemption, his assignee has no right of exemption. Wabash R. Co. *v.* Bowring, 103 Mo. App. 158, 77 S. W. 106. See also Stotesbury *v.* Kirtland, 35 Mo. App. 148.

A wife to whom land has been fraudulently conveyed by her husband cannot claim a portion of it as exempt, or three hundred dollars out of the fund arising from the sale. Carl *v.* Smith, 8 Phila. (Pa.) 569.

Property not belonging to succession.— Where the property of the debtor has been sold under a judgment and a twelve-months' bond given for the price, which was less than the amount of the judgment, the widow and heirs of the deceased debtor cannot claim an exemption in the property, for, having been sold before the death of the debtor, it no longer formed a part of the succession, nor did the bond which was the consideration thereof. Murphy *v.* Rulh, 24 La. Ann. 74.

58. McNally *v.* White, 154 Ind. 163, 54 N. E. 794, 56 N. E. 214. But see *infra*, V, A, 3, a.

claimed to be exempt and subsequently rescinded the sale and regained possession, he may still have his exemption in the property.[59]

2. Joint Ownership — a. Tenancy in Common. A tenant in common is generally allowed to claim an exemption in his undivided interest in a chattel.[60]

b. Partnership Holding — (i) *Claim by a Partner Against Firm Debt* — (A) *While Partnership Continues.* By the great weight of authority individual partners cannot claim exemptions in the partnership property as against a partnership debt.[61] This is held on various different grounds: (1) On the well known ground that partnership property is subject to the payment of partnership debts before all other claims;[62] (2) the impracticability[63] or even inequity[64] of allowing an exemption out of the property; (3) that, under the theory of the civil law that a partnership is an entity[65] — a theory not generally recognized by

59. Boesker *v.* Pickett, 81 Ind. 554.

60. Servanti *v.* Lusk, 43 Cal. 238; Heckle *v.* Grewe, 125 Ill. 58, 17 N. E. 437, 8 Am. St. Rep. 332 [*affirming* 26 Ill. App. 339]; Radcliff *v.* Wood, 25 Barb. (N. Y.) 52; Rutledge *v.* Rutledge, 8 Baxt. (Tenn.) 33. *Contra,* Hawley *v.* Hampton, 160 Pa. St. 18, 28 Atl. 471; Bonsall *v.* Comly, 44 Pa. St. 442.

In Pennsylvania under the act of April 9, 1849, providing that "property to the value of three hundred dollars shall be exempt from levy and sale on execution or by distress for rent," a tenant in common is entitled to his exemption out of the fund raised by a sale of the real estate in proceedings in partition, notwithstanding the funds out of which he claims his exemption were not raised by sale on execution. Reed *v.* Hollibaugh, 3 Pa. Co. Ct. 20.

In Wisconsin the exemption is not allowed where the chattels (horse, buggy, and harness) are incapable of separation or of exclusive possession and ownership. Wright *v.* Pratt, 31 Wis. 99. If the chattels are naturally severable, as for instance grain which may be divided by weight and measure, a tenant in common may claim his exemption therein. Newton *v.* Howe, 29 Wis. 531, 9 Am. Rep. 616.

61. *Alabama.*—Schlapback *v.* Long, 90 Ala. 525, 8 So. 113; Giovianni *v.* Montgomery First Nat. Bank, 55 Ala. 305, 28 Am. Rep. 723. *Contra,* Howard *v.* Jones, 50 Ala. 67.

Arkansas.— Richardson *v.* Adler, 46 Ark. 43.

California.— Cowan *v.* Creditors, 77 Cal. 403, 19 Pac. 755, 11 Am. St. Rep. 294.

Colorado.— McCrimmon *v.* Linton, 4 Colo. App. 420, 36 Pac. 300.

Illinois.— Fingerhuth *v.* Lachmann, 37 Ill. App. 489.

Indiana.— State *v.* Emmons, 99 Ind. 452; Smith *v.* Harris, 76 Ind. 104; Love *v.* Blair, 72 Ind. 281.

Indian Territory.— Hart *v.* Hiatt, 2 Indian Terr. 245, 48 S. W. 1038.

Kansas.— Guptil *v.* McFee, 9 Kan. 30.

Kentucky.— Green *v.* Taylor, 98 Ky. 330, 32 S. W. 945, 17 Ky. L. Rep. 897, 56 Am. St. Rep. 375.

Massachusetts.— Pond *v.* Kimball, 101 Mass. 105.

Minnesota.— Prosser *v.* Hartley, 35 Minn. 340, 29 N. W. 156; Baker *v.* Sheehan, 29 Minn. 235, 12 N. W. 704.

Missouri.— State *v.* Spencer, 64 Mo. 355, 27 Am. Rep. 244; State *v.* Pruitt, 65 Mo. App. 154.

Nebraska.— Lynch *v.* Englehardt-Winning-Davison Mercantile Co., 1 Nebr. (Unoff.) 528, 96 N. W. 524; Miller *v.* Waite, 59 Nebr. 319, 80 N. W. 907; Till's Case, 3 Nebr. 261.

New Hampshire.— Bateman *v.* Edgerly, 69 N. H. 244, 45 Atl. 95, 76 Am. St. Rep. 162; Peaslee *v.* Sanborn, 68 N. H. 262, 44 Atl. 384.

Ohio.— Gaylord *v.* Imhoff, 26 Ohio St. 317, 20 Am. Rep. 762.

Pennsylvania.— Hubbard *v.* Evarts, 12 Pa. Co. Ct. 132; Clegg *v.* Houston, 1 Phila. 352.

South Carolina.— *Ex p.* Karish, 32 S. C. 437, 11 S. E. 298, 17 Am. St. Rep. 865.

Tennessee.— Gill *v.* Lattimore, 9 Lea 381; Spiro *v.* Paxton, 3 Lea 75, 31 Am. Rep. 630.

See 23 Cent. Dig. tit. "Exemptions," §§ 83, 85.

Contra.— McCoy *v.* Brennan, 61 Mich. 362, 28 N. W. 129, 1 Am. St. Rep. 589 (holding that not all the partners need join in an action by one of them who claims an exemption out of the firm assets); Skinner *v.* Shannon, 44 Mich. 86, 6 N. W. 108, 38 Am. Rep. 232; St. Louis Foundry *v.* International Live-Stock, etc., Co., 74 Tex. 651, 12 S. W. 842, 15 Am. St. Rep. 870.

62. Gazette Pub. Co. *v.* McMurtrie, 7 Pa. Super. Ct. 617. See cases cited *supra,* note 61; and especially Pond *v.* Kimball, 101 Mass. 105; Gaylord *v.* Imhoff, 26 Ohio St. 317, 20 Am. Rep. 762. See also Story Eq. Jur. § 1253.

63. See State *v.* Bowden, 18 Fla. 17; Pond *v.* Kimball, 101 Mass. 105; State *v.* Spencer, 64 Mo. 355, 27 Am. Rep. 244.

64. *In re* Handlin, 11 Fed. Cas. No. 6,018, 3 Dill. 290.

65. A partnership is, in contemplation of law, a legal entity separate and distinct from the individual members. Stauffer *v.* Morgan, 39 La. Ann. 632, 636, 2 So. 98; White *v.* Heffner, 30 La. Ann. 1280, 1282, 31 Am. Rep. 238. "Une personne fictive et morale séparée des associés." Troplong Partn. § 68 [*cited* in Smith *v.* McMicken, 3 La. Ann. 319, 322]; Parsons Partn. § 3. "A partnership is a distinct entity, having its own property, debts, and credits. For the purposes for which it was created it is a person, and as such is

the common law and one which is inconsistent with its principles[66] — and that the partnership property does not belong to the individual partners, but to the firm, that is, to the legal entity;[67] (4) that the different exemption statutes contemplate only individuals and have no reference to partnerships.[68] In North Carolina a partner may have his exemption as against the partnership debts provided the other partners consent,[69] but not otherwise.[70] The North Carolina rule has been adopted in Wisconsin,[71] but the general rule cannot be affected in those jurisdictions where it obtains[72] by the fact that the other partners do or do not consent to one of the firm having his exemption out of partnership property.[73]

(B) *After Dissolution.* If the partnership is dissolved before the lien of the judgment against which the exemption is claimed attaches and the dissolution has been *bona fide*, each partner may claim an exemption in the partnership property which has been set off to him.[74] If one member of the partnership becomes the *bona fide* owner of the partnership property, he may claim his exemption,[75] although the purchasing partner has not paid the consideration for the convey-

recognized by the law." Rosenbaum *v.* Hayden, 22 Nebr. 744, 748, 36 N. W. 147.

66. See Blanchard *v.* Paschal, 68 Ga. 32, 34, 45 Am. Rep. 474; Dennis *v.* Kass, 11 Wash. 353, 358, 39 Pac. 656, 48 Am. St. Rep. 880; Parsons Partn. § 4.

67. Green *v.* Taylor, 98 Ky. 330, 32 S. W. 945, 17 Ky. L. Rep. 897, 56 Am. St. Rep. 375; Clegg *v.* Houston, 1 Phila. (Pa.) 352. See also Porch *v.* Arkansas Milling Co., 65 Ark. 40, 45 S. W. 51, 67 Am. St. Rep. 895; State *v.* Bowden, 18 Fla. 17.

68. *Kansas.*— Guptil *v.* McFee, 9 Kan. 30.

Massachusetts.— Pond *v.* Kimball, 101 Mass. 105.

Missouri.— State *v.* Spencer, 64 Mo. 355, 27 Am. Rep. 244.

Nebraska.— Lynch *v.* Englehardt-Winning-Davison Mercantile Co., 1 Nebr. (Unoff.) 528, 96 N. W. 524.

New Hampshire.— Bateman *v.* Edgerly, 69 N. H. 244, 45 Atl. 95, 76 Am. St. Rep. 162.

Ohio.— Gaylord *v.* Imhoff, 26 Ohio St. 317, 20 Am. Rep. 762.

Tennessee.— Spiro *v.* Paxton, 3 Lea 75, 31 Am. Rep. 630.

See 23 Cent. Dig. tit. "Exemptions," § 83.

"A partnership is a legal but not a social entity. It can own property, it can buy and sell, it can sue and be sued, and it can plead and be impleaded in the courts of the land, but it can neither marry or be given in marriage, nor perform any other social function essential to its being elevated to the dignity of becoming the head of a family." Lynch *v.* Englehardt-Winning-Davison Mercantile Co., 1 Nebr. (Unoff.) 528, 532, 96 N. W. 524.

Where each partner owns distinct and separate property which is used in the business in which they share profits, the property is not partnership property so as to be without the exemption allowed by law. Root *v.* Gay, 64 Iowa 399, 20 N. W. 489.

69. Burns *v.* Harris, 67 N. C. 140.

The federal courts sitting in North Carolina have followed this rule of the state courts. *In re* Seabolt, 113 Fed. 766 [*citing* Burns *v.* Harris, 67 N. C. 140].

If the other partners consent the exemption may be allotted to the claimant out of the partnership property, although he has individual property sufficient to make up the exemption. State *v.* Kenan, 94 N. C. 296.

70. Burns *v.* Harris, 67 N. C. 140.

Personal property of a partnership was levied upon under an execution issued on a judgment against the firm. Both partners gave their consent to the sheriff to allot to each his personal property exemption, but before such allotment was made one of the partners withdrew his consent. It was held that such revocation was a bar to the right of the other partner to have his exemptions set apart to him. Stout *v.* McNeill, 98 N. C. 1, 3 S. E. 915.

Surviving partners cannot claim exemptions without the consent of the administrator of a deceased partner. Richardson *v.* Redd, 118 N. C. 677, 24 S. E. 420. But the exemption may be set apart to a surviving partner if he has the consent of the administrator of the deceased partner. *In re* Seabolt, 113 Fed. 766.

71. O'Gorman *v.* Fink, 57 Wis. 649, 15 N. W. 771, 46 Am. Rep. 58.

72. See cases cited *supra*, note 61.

73. Wills *v.* Downs, 38 Ill. App. 269.

74. Worman *v.* Giddey, 30 Mich. 151.

In Michigan a partner can claim an exemption against a firm debt before dissolution. See *supra*, note 61.

In Wisconsin a claim by each individual partner of an exemption against a firm debt is held to work such a severance of the partnership's property that the statutory right of exemption attaches as where the goods are held in severalty. O'Gorman *v.* Fink, 57 Wis. 649, 15 N. W. 771, 46 Am. Rep. 58.

The taking charge of property by a receiver for the purpose of winding up a copartnership estate is not a seizure or a threatened seizure for the payment of the individual debts of the copartners which justifies one of them in making a claim of exemption. Weinrich *v.* Koelling, 21 Mo. App. 133.

75. Levy *v.* Williams, 79 Ala. 171; State *v.* Thomas, 7 Mo. App. 205; Long *v.* Hoban, 7 Ohio Dec. (Reprint) 688, 4 Cinc. L. Bul. 986; *In re* Bjornstad, 3 Fed. Cas. No. 1,453, 9 Biss. 13.

ance of the others' shares to him.[76] But if the lien of the judgment has attached before the dissolution of the partnership there can be no exemption to any partner against a firm debt.[77]

(II) *Claim by Partner Against Individual Debt.* Some courts make no distinction between a claim of exemption out of partnership property when the debt is against the partnership property and when it is against an individual debt, maintaining the rule as stiffly in the latter situation as in the former.[78] But other courts take the contrary and more rational view[79] and have pointed out the difference in the two cases[80] and taken the pains to severely criticize the authorities whom they deem — by reasoning difficult to refute — to have gone astray on this question.[81]

(III) *Claim by Partnership.* For the reason that the exemption laws contemplate only individuals and have no reference to partnerships,[82] the partnership

76. Voight *v.* Lafkin, 12 Ohio Cir. Ct. 751, 6 Ohio Cir. Dec. 124.

If the firm is insolvent at the time the property is conveyed to one partner, the transaction is fraudulent and no exemption will be allowed. Aiken *v.* Steiner, 98 Ala. 355, 13 So. 510, 39 Am. St. Rep. 85; Southern Commission Co. *v.* Porter, 122 N. C. 692, 30 S. E. 119. *Contra*, see Bates *v.* Callender, 3 Dak. 256, 16 N. W. 506.

Partners who have made an assignment for the benefit of creditors cannot claim that any part of the partnership property be set apart to them as exempt from execution. *Ex p.* Hopkins, 104 Ind. 157, 2 N. E. 587.

77. State *v.* Day, 3 Ind. App. 155, 29 N. E. 436. *Contra*, Blanchard *v.* Paschal, 68 Ga. 32, 45 Am. Rep. 474.

Exemption as against copartner.— A partner is entitled to his personal property exemption out of the partnership property before a debt due by him individually to his copartner can be deducted therefrom, on a settlement of the partnership. Evans *v.* Bryan, 95 N. C. 174, 59 Am. Rep. 233.

As against an individual debt a partner may have his exemption out of his share of the partnership property after an action for the dissolution of the firm has been brought against him by his copartner. Dennis *v.* Kass, 11 Wash. 353, 39 Pac. 656, 48 Am. St. Rep. 880.

The property in which the exemption is claimed must be of the kind allowed by law. Thus the tools and the stock in trade of the partnership are not exempt to one of the partners after dissolution and his acquisition of an individual title, unless it is shown that the tools and stock are kept by him for the purpose of carrying on his trade. Prosser *v.* Hartley, 35 Minn. 340, 29 N. W. 156.

78. Porch *v.* Arkansas Milling Co., 65 Ark. 40, 45 S. W. 51, 67 Am. St. Rep. 895; State *v.* Bowden, 18 Fla. 17.

79. Hart *v.* Hiatt, 2 Indian Terr. 245, 48 S. W. 1038; Southern Jellico Coal Co. *v.* Smith, 49 S. W. 807, 20 Ky. L. Rep. 1594; Moyer *v.* Drummond, 32 S. C. 165, 10 S. E. 952, 17 Am. St. Rep. 850, 7 L. R. A. 747. See also Bright *v.* Buhr, 11 Ky. L. Rep. 579, holding that an allegation that plaintiff obtained judgment against defendant's partners is not an allegation that the debt was a partnership debt, or that the judgment was rendered against them as partners; and there is no reason why each defendant may not claim property exempt by statute.

80. *Ex p.* Karish, 32 S. C. 437, 11 S. E. 298, 17 Am. St. Rep. 865.

81. "To hold that one against whom an officer has an execution is entitled to have a certain amount of property, of which he has the entire title, exempted therefrom, and at the same time to hold that he could have no exemptions out of such property if he was not the sole owner, is to do violence to the evident intention of the statute. The different text writers upon the subject, though most of them have fallen into the error of grouping cases of judgments against a partnership with those against the individual members thereof, have come to the conclusion that, upon principle, exemptions should be allowed to the individual partner when the levy is under a judgment against him; and those of such writers who have carefully discriminated between cases of this kind, and those in which the judgments were against the partnership, have arrived at the conclusion that such doctrine is sustained by authority. The others seem to concede that the weight of authority is the other way, but we are not satisfied that such concession was the necessary result of the cases when critically examined." Dennis *v.* Kass, 11 Wash. 353, 358, 39 Pac. 656, 48 Am. St. Rep. 880.

Mr. Thompson, in his work, Homesteads and Exemptions, discusses this subject with ability, and after citing the cases upon each side of the question, sums up his conclusions in section 216 by the statement that the courts which have held that exemptions could not be had out of partnership property when levied upon under an execution against the individual partner have done so in the face of the statutes, for the reason that the rule announced by them is more convenient of execution than would be one which allowed such exemptions. Thompson Homest. & Exempt. [*quoted* in Dennis *v.* Kass, 11 Wash. 353, 354, 39 Pac. 656, 48 Am. St. Rep. 880].

82. See *supra*. I. D. 2, b, (I).

or firm has no right to an exemption as against the enforcement of an execution for the satisfaction of a judgment against the partnership.[83]

3. Ownership of Other Property.[84] Where certain articles are specifically exempt or where an absolute exemption to a certain amount is given in a certain class or in certain classes of articles, the fact that the debtor owns other articles or articles of a different class does not affect his right in the articles in question.[85]

E. Amount of Exemption.[86] Where there is a question of determining the amount of exemption to which the debtor is entitled, the courts are ever ready to apply the rule that exemption statutes should be liberally construed, whether they are construing a single statutory provision or several provisions together.[87] Of course if the whole of the debtor's personalty is not equal in value to the amount allowed by law none of it can be levied upon.[88] Money paid out by the debtor between the time of filing his claim of exemptions and the filing of his inventory will be deducted from the amount of his exemption,[89] unless the pay-

83. *Louisiana.*— White *v.* Heffner, 30 La. Ann. 1280, 31 Am. Rep. 238.

Maine.— Thurlow *v.* Warren, 82 Me. 164, 19 Atl. 158, 17 Am. St. Rep. 472.

Missouri.— State *v.* Spencer, 64 Mo. 355, 27 Am. Rep. 244.

Nebraska.— Wise *v.* Frey, 7 Nebr. 134, 29 Am. Rep. 380.

Wisconsin.—Russell *v.* Lennon, 39 Wis. 570, 20 Am. Rep. 60 [*overruling* Gilman *v.* Williams, 7 Wis. 329, 76 Am. Dec. 219].

United States.— *In re* Lentz, 97 Fed. 486, holding that a partnership cannot be a "head of a family" or a "single person not the head of a family" within the meaning of a statute which allows a certain amount of property selected as claimed as exempt by persons answering to the above description.

See 23 Cent. Dig. tit. "Exemptions," § 84.

Contra.— Stewart *v.* Brown, 37 N. Y. 350, 93 Am. Dec. 578.

By statute in Dakota one partnership exemption was allowed out of partnership property. See Bates *v.* Callender, 3 Dak. 256, 16 N. W. 506.

84. As to the effect of owning other property when exemption is claimed in particular property, such as horses and work animals, animals used for food, and household goods, see *infra*, III, B, 1; III, C, 1, b; III, C, 3. See also *infra*, VI, C, 2, h, (I).

85. State *v.* Beamer, 73 Mo. 37; State *v.* Romer, 44 Mo. 99; Megehe *v.* Draper, 21 Mo. 510, 64 Am. Dec. 245; Smith *v.* Slade, 57 Barb. (N. Y.) 637. Thus where the statute exempted "one slave" to every debtor, the fact that the debtor owned other property is immaterial. Moseley *v.* Anderson, 40 Miss. 49.

Property set apart to a widow as a part of her year's support does not affect or diminish her right under the exemption law. Webb *v.* Brandon, 4 Heisk. (Tenn.) 285.

That the members of a debtor's family own other property does not affect his right to have set off to him for each member of the family a certain amount of attached property in lieu of provisions for the exemption given by the law is to the father. Crigler *v.* Connor, 15 Ky. L. Rep. 751. *Contra*, see Simonds *v.* Gulley, 7 Ala. 721, where it was held that the fact that the wife owned property in her separate estate affected the debtor's right, this on the principle that the exemption given by the law was for the benefit of the family.

Transferring other property cannot render the property levied on exempt, if at the time process is levied it is not exempt. Kilpatrick-Koch Dry Goods Co. *v.* Callender, 34 Nebr. 727, 52 N. W. 403. See Brooks *v.* Hathaway, 8 Hun (N. Y.) 290.

86. As against a debt antedating the Georgia constitution of 1877, one is entitled only to an exemption of personalty of the value of one thousand dollars. Johnson *v.* Dobbs, 69 Ga. 605 [*approved* in Richards *v.* Jernigan, 70 Ga. 650].

87. *Alabama.*— Enzor *v.* Hurt, 76 Ala. 595, construing Code (1876), §§ 2820, 2823.

Indiana.— Citizens' State Bank *v.* Harris, 149 Ind. 208, 48 N. E. 856, construing Horner Rev. St. (1897) § 734.

Kansas.— Donmyer *v.* Donmyer, 43 Kan. 444, 23 Pac. 627, construing Gen. St. c. 38, art. 3.

Missouri.— Rolla State Bank *v.* Borgfeld, 93 Mo. App. 62, construing Rev. St. (1899) § 3162. See also State *v.* Farmer, 21 Mo. 160.

Nebraska.— Johnson *v.* Bartek, 56 Nebr. 422, 76 N. W. 878; Williams *v.* Golden, 10 Nebr. 432, 6 N. W. 766, both construing Code Civ. Proc. §§ 521, 530.

North Carolina.— Campbell *v.* White, 95 N. C. 344 [*citing* Citizens' Nat. Bank *v.* Green, 78 N. C. 247], construing Const. art. 10, § 1.

Pennsylvania.— McFarland *v.* Short, 1 Chest. Co. Rep. 410.

United States.— *In re* Buelow, 98 Fed. 86, construing a Washington statute.

See 23 Cent. Dig. tit. "Exemptions," § 39.

88. Godman *v.* Smith, 17 Ind. 152; State *v.* Kurtzeborn, 2 Mo. App. 335.

Amount of food and provisions exempt to a debtor see *infra*, III, C, 1.

Amount of insurance money allowed the debtor see *infra*, III, E.

89. Pinkus *v.* Bamberger, 99 Ala. 266, 13 So. 578, holding, however, that where a debtor, prior to the attachments against which he

ment was of just debts.[90] This liberal tendency of the courts is generally noticeable in applying the provisions of the statutes exempting animals,[91] but a provision exempting a horse of a certain value has been held not to include one worth more than that amount.[92] Where a statute exempts specific animals *in numero*, their number is not doubled when ownership in them is of an undivided half of each.[93]

F. Liabilities Enforceable Against Exemption Right — 1. Debt Not Founded in Contract — a. Generally. Exemptions can be claimed only as against judgments upon a contract. No exemption is allowed against a judgment for a tort.[94] It is therefore held that a judgment for conversion,[95] for detinue,[96] or a judgment obtained on a replevin bond[97] or for negligence,[98] fixes an obligation against which no exemption can be claimed. A judgment for a penalty,[99] or for alimony,[1] or a judgment fixing the responsibility of a man as father of a bastard

claims exemption, sold book-accounts amounting to two thousand one hundred dollars in payment of a debt of one thousand six hundred dollars, with a provision that if more was realized it should be paid the debtor, no deduction should be made from the debtor's exemption on this account, in the absence of anything to show that any sum would accrue to the debtor from this source.

90. Trager *v.* Feibleman, 95 Ala. 60, 10 So. 213.

91. Good *v.* Fogg, 61 Ill. 449, 14 Am. Rep. 71; Munson *v.* Gashorn, 1 Ohio Dec. (Reprint) 404, 8 West. L. J. 569.

92. Waldo *v.* Gray, 14 Ill. 184; Everett *v.* Herrin, 46 Me. 357, 74 Am. Dec. 455. See also Hughes *v.* Farrar, 45 Me. 72; McClenden *v.* Jungling, 116 Mo. 162, 22 S. W. 688, holding that, although a stallion used only for the stud was a working animal, one worth four hundred and fifty dollars was not exempt under a law exempting from execution "working animals of the value of $150."

In North Carolina, under the term "other property" which may be set apart as exempt, the debtor may include a mare and five hogs provided their value does not exceed fifty dollars. Dean *v.* King, 35 N. C. 20.

93. Thus one who owns an undivided half of a yoke of oxen, of a yoke of steers, and of more than twenty sheep, is entitled to an exemption in either the oxen or the steers, and in ten of the sheep; not in both oxen and steers and in twenty sheep. "The statute exempts from attachment and levy of execution, one yoke of oxen or steers — not both,— and ten sheep in number. It is not the value of a yoke of oxen or steers, or the value of ten sheep. . . . Such holding would change the exemption from that of specific articles to their value, and so contravene the manifest intention of the statute." White *v.* Capron, 52 Vt. 634, 636. See *infra*, III, B, 1.

94. *Alabama.*— Northern *v.* Hanners, 121 Ala. 587, 25 So. 817, 77 Am. St. Rep. 74.

Arkansas.— Massie *v.* Enyart, 33 Ark. 688.

Indiana.— State *v.* Melogue, 9 Ind. 196.

Indian Territory.— Gaines *v.* Toles, 1 Indian Terr. 543, 37 S. W. 946.

Pennsylvania.— Kenyon *v.* Gould, 61 Pa. St. 292; Lane *v.* Baker, 2 Grant 424; Washburn *v.* Baldwin, 10 Phila. 472.

Contra.— Dellinger *v.* Tweed, 66 N. C. 206; Smith *v.* Omans, 17 Wis. 395, a case where the homestead was levied on.

Where a statute provides for the recovery of a wager lost upon any game of chance, exemption cannot be claimed against an action therefor. State *v.* Morgan, 160 Ind. 474, 67 N. E. 186.

95. Smith *v.* Ragsdale, 36 Ark. 297.

The conversion and misappropriation of public funds by a state treasurer is both a tort and a crime and no exemption can be allowed for the amount of the defalcation. Vincent *v.* State, 74 Ala. 274. See also Com. *v.* Lay, 12 Bush (Ky.) 283, 23 Am. Rep. 718 [*approving* Com. *v.* Cook, 8 Bush (Ky.) 220, 8 Am. Rep. 456].

96. Stuckey *v.* McKibbon, 92 Ala. 622, 8 So. 379.

97. These characteristics of a replevin bond (enumerated in opinion) show that the essential requisites of a contract are wanting. Pierce *v.* Lewis, 9 Pa. Co. Ct. 250.

A delivery bond is not a contract against which an exemption can be claimed. Smith *v.* Brown, 28 Miss. 810.

98. De Hart *v.* Haun, 126 Ind. 378, 26 N. E. 61, where the negligence alleged in the complaint was the malpractice of a physician.

A constable who is liable for negligence in the performance of his office is not entitled to an exemption. Kirkpatrick *v.* White, 29 Pa. St. 176.

Extents against delinquent collectors of town taxes are not within the exemptions provided by statute. Hackett *v.* Amsden, 56 Vt. 201.

99. Crawford *v.* Slaton, 133 Ala. 393, 31 So. 940; Keller *v.* McMahan, 77 Ind. 62, holding that under a statute which allows an exemption against any debt growing out of or founded on a contract, express or implied, no exemption can be allowed a person against whom judgment was recovered for a penalty for running by a toll gate to avoid paying toll.

1. Bates *v.* Bates, 74 Ga. 105; Menzie *v.* Anderson, 65 Ind. 239.

As against a decree ordering a pensioner to pay a part of his pension for the support

to pay an allowance to the mother,[2] does not arise out of contract and hence no exemption can be claimed against it. An action for the recovery of the possession of land and for the damages for the wrongful detention thereof is an action which sounds in tort and as against a judgment obtained therein no exemption can be allowed.[3] No exemption can be allowed as against a creditor who succeeds in having a fraudulent conveyance set aside.[4] A debtor who has violated a fiduciary relation cannot have the benefit of the exemption laws.[5] A defendant in action for fraud and deceit is not entitled to an exemption.[6] Whether an action sounds in tort or in contract must be determined by an examination of the plead-

of his wife, no exemption can be claimed under U. S. Rev. St. § 4747. Tully *v.* Tully, 159 Mass. 91, 34 N. E. 79. See *infra*, III, F, 1.

Where a wife obtained a judgment against her husband for her maintenance and support, he cannot have the benefit of the law which allows an exemption to a head of a family. Spengler *v.* Kaufman, 46 Mo. App. 644. But where a woman obtained a divorce from her husband which required him to pay twenty dollars a month for the support of their infant child, and the husband was the father of the child by a former marriage, he was held entitled as the head of a family to claim an exemption when his weekly wages were garnished. Maag *v.* Williams, 92 Mo. App. 674 [*distinguishing* Spengler *v.* Kaufman, *supra*]. See also Jarboe *v.* Jarboe, 106 Mo. App. 459, 79 S. W. 1162.

2. State *v.* Parsons, 115 N. C. 730, 20 S. E. 511.

3. Penton *v.* Diamond, 92 Ala. 610, 9 So. 175; Smith *v.* Wood, 83 Ind. 522; Dorrell *v.* Hannah, 80 Ind. 497; Thomas *v.* Walmer, 18 Ind. App. 112, 46 N. E. 695; Smith *v.* Carter, 17 Phila. (Pa.) 344. See also Hardy *v.* Gunn, 122 Ala. 666, 25 So. 621.

In an action for unlawful detainer under Mansfield Dig. Ark. § 3351, plaintiff executed a bond and obtained a writ of possession. The jury found for defendant and judgment was rendered against plaintiff and his bondsman for damages and costs. It was held that the judgment was founded on a tort, and not on a contract, and that no exemption could be allowed as against it. Gaines *v.* Toles, 1 Indian Terr. 543, 37 S. W. 946.

The statutory cause of action for use and occupation is in the nature of assumpsit at common law, and not an action *ex delicto*. Exemption of personal property can therefore be claimed against a judgment obtained in such an action under Ark. Const. (1874) art. 9, § 1, which provides for an exemption of personal property for "debts by contract." St. Louis, etc., R. Co. *v.* Hart, 38 Ark. 112.

4. Taylor *v.* Dwyer, 131 Ala. 91, 32 So. 509.

Where a widow, by concealing an antenuptial contract whereby she relinquished all interest in her husband's estate, obtained from his administrator personal property in her right as widow and the administrator obtained judgment therefor, the judgment was for a tort. Nowling *v.* McIntosh, 89 Ind. 593.

5. Dangaix *v.* Lunsford, 112 Ala. 403, 20 So. 639 (an executor); Bescher *v.* State, 63 Ind. 302 (holding that, in a suit on the bond of a guardian, the court may add ten per cent damages to the amount found against the latter, and order it to be collected without relief from valuation laws). See also Potter *v.* State, 23 Ind. 550. *Contra*, Green *v.* Simon, 17 Ind. App. 360, 46 N. E. 693 (construing Horner Rev. St. Ind. (1896) §§ 703, 2459, 2460, 2527); Shreck *v.* Gilbert, 52 Nebr. 813, 73 N. W. 276 (holding that, although the library of an attorney at law, a resident of the state, is exempt under Nebr. Code Civ. Proc. § 530, by virtue of section 531, the exemption cannot be claimed against an execution upon a judgment recovered against him for moneys received professionally for the judgment creditor); Woods' Estate, 7 Wkly. Notes Cas. (Pa.) 811 (an administrator). *Compare* Terrill *v.* Allgaier, 21 Pa. Co. Ct. 346, 14 Montg. Co. Rep. (Pa.) 199; Taylor's Estate, 9 Pa. Co. Ct. 293, a guardian who was removed and ordered to pay costs of removal proceeding.

6. Edwards *v.* Mahon, 5 Phila. (Pa.) 531. But in Ashworth *v.* Addy, 7 Wkly. Notes Cas (Pa.) 342, it was held that an exemption may be claimed in proceedings for an attachment, where the judgment is sought on the ground that the debt was fraudulently contracted, and that defendant had fraudulently concealed his goods.

Property obtained by false pretenses.— S. D. Comp. Laws, § 5139, provides that "no exemptions, except the absolute exemptions, shall be allowed any person against an execution or other process issued upon a debt incurred for property obtained under false pretenses." See Hall *v.* Harris, 1 S. D. 279, 282, 46 N. W. 931, 36 Am. St. Rep. 730, holding that in a proceeding by defendant in attachment to have the additional exemptions under the statute set apart to him, an order denying a motion to discharge the attachment, on the ground that the debt for which the attachment issued was incurred for property obtained under false pretenses, is admissible and is a bar to the proceeding. S. D. Comp. Laws, § 5139, denying the right to additional exemptions, as against a debt incurred for property obtained under false pretenses, is not repealed by S. D. Const. art. 21, § 4, declaring the right of a debtor to exemption, from forced sale, of a homestead and a reasonable amount of personal property. Sundback *v.* Griffith, 7 S. D. 109, 63 N. W. 544.

ings.[7] If plaintiff sues in assumpsit and recovers judgment defendant is entitled to claim his exemption, although the foundation of the action was a tort.[8] If the form of the action is tort defendant cannot show for the purpose of claiming an exemption that the judgment was in fact taken upon a claim arising out of contract instead of tort.[9]

b. Costs of Action. Costs recovered in an action *ex delicto* are merely incident to the judgment and therefore no exemption is good against them.[10] An unsuccessful plaintiff in a tort action cannot have an exemption against the costs to which the judgment renders him liable.[11] Under a statute which allows an exemption against the debt growing out of or founded upon a contract, express or implied, a judgment for the costs of the opposite party is not within the statute, for the obligation is one which depends entirely upon the statute and not upon any contract.[12]

c. Obligation of Bail or Surety. According to some authorities the obligation of a surety upon a bond or upon an undertaking in a criminal proceeding is not a contract within the meaning of the exemption laws;[13] but the contrary is also

7. McDaniel *v.* Johnston, 110 Ala. 526, 19 So. 35; Green *v.* Simon, 17 Ind. App. 360, 46 N. E. 693. See De Hart *v.* Haun, 126 Ind. 378, 26 N. E. 61.

A sale of land under execution will not be enjoined on the ground that it is within the exemption from liability for debts founded on contract, unless plaintiff alleges or it is found by the court that the judgment on which the execution issued was founded on contract. Goldthait *v.* Walker, 134 Ind. 527, 34 N. E. 378.

8. Wireman *v.* Mueller, (Pa. 1887) 7 Atl. 592, where there had been an embezzlement.

Where the action was for debt founded on an account rendered by defendant for rent collected, the action was based on a contract and not on a tort, and an exemption could be claimed against it. "Clearly, he based his right to recover, not on a breach of duty growing out of any fiduciary relations which the defendant bore to him (for nothing of the kind is alleged in the pleadings), but upon the latter's implied contract to pay the balance of account which he admitted to be due to the plaintiff. . . . If the defendant's failure to pay over the balance admitted by him to be due involved any other or greater wrong than is involved in every action based on a count for money had and received to the plaintiff's use, or on an account stated, it does not appear in the record and was not made the basis of the plaintiff's demand. The action, therefore, both in form and substance, was based on a contract and not on a tort, and the defendant is entitled to the exemption." Bank *v.* Ziegler, 4 Kulp (Pa.) 407.

9. Smith *v.* Wood, 83 Ind. 522.

Especially is this so where the complaint is unequivocal as to the character of the cause of action. Green *v.* Simon, 17 Ind. App. 360, 46 N. E. 693.

Where the complaint united two causes of action in tort with one in contract, defendant was allowed to treat the judgment as one rendered upon contract and to claim his exemption. Ries *v.* McClatchey, 128 Ind. 125, 27 N. E. 349.

10. Stuckey *v.* McKibbon, 92 Ala. 622, 8 So. 379; Massie *v.* Enyart, 33 Ark. 688; Russell *v.* Cleary, 105 Ind. 502, 5 N. E. 414; Church *v.* Hay, 93 Ind. 323. *Contra*, Harting *v.* Grant, 2 Woodw. (Pa.) 127. See also Lane *v.* Baker, 2 Grant (Pa.) 424. In Clingman *v.* Kemp, 57 Ala. 195, it was held that a debt due for costs was within the exemption laws. But in Stuckey *v.* McKibbon, 92 Ala. 622, 8 So. 379, it was held that this rule was intended to apply only to actions *ex contractu*.

11. Crawford *v.* Slaton, 133 Ala. 393, 31 So. 940; Northen *v.* Hanners, 121 Ala. 587, 25 So. 817, 77 Am. St. Rep. 74; Strohecker *v.* Buffington, 1 Pearson (Pa.) 124. *Contra*, Lane *v.* Baker, 2 Grant (Pa.) 424.

12. Ross *v.* Banta, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732; State *v.* McIntosh, 100 Ind. 439; Donaldson *v.* Banta, 5 Ind. App. 71, 29 N. E. 362; *In re* Owens, 18 Fed. Cas. No. 10,632, 6 Biss. 432, interpreting an Indiana statute. But see Hain *v.* Rhoads, 7 Pa. Co. Ct. 568.

Master's fee.— Where plaintiff's bill to restrain a trespass on his premises was dismissed at his cost, including the master's fee, he may claim an exemption as against the master's fee, for "by invoking the services of the master, said plaintiff impliedly agreed to pay him therefor, and hence no element other than that of debt on contract entered into the decree against him for costs, and he was therefore entitled to the exemption that was accorded to him by the sheriff." Bradley *v.* West Chester St. R. Co., 160 Pa. St. 72, 76, 28 Atl. 500.

13. Com. *v.* Dougherty, 8 Phila. (Pa.) 366. See also Com. *v.* Whiteside, 1 Lanc. Bar (Pa.) Sept. 25, 1869.

Where a statute provides that "there shall be no property exempt from execution for fine and costs for this offense" (carrying concealed weapon under certain circumstances), the surety of the principal is liable for the fine and costs for the offense of his principal and to the same extent; and not property of his, any more than that of his principal, is

held.[14] There is the same disagreement of the authorities where the obligation of a surety is in a civil case.[15]

2. PURCHASE-PRICE. The exemption laws of the different states almost all contain a clause, in the form of a proviso or otherwise, that no exemption can exist against a debt for the purchase-price of property sold the debtor.[16] This right of the seller to enforce his claim for the purchase-price of personal property sold

exempt. It is fine and costs for an offense from which, for the satisfaction of, the state expressly declares there shall be no exemption in property. Irvin *v.* State, 6 Lea (Tenn.) 588.

14. State *v.* Williford, 36 Ark. 155, 161, 38 Am. Rep. 34. See also Com. *v.* Lay, 12 Bush (Ky.) 283, 23 Am. Rep. 718.

15. Thus in Pennsylvania it is held that a claim for exemption cannot be maintained against an execution on a judgment on a recognizance given on an appeal from a magistrate. Edwards *v.* Withrow, 6 Pa. Co. Ct. 13. In Indiana, on the contrary, the undertaking of a replevin bail is held to have all the elements of a contract and the obligation resulting therefrom is one within the exemption laws. Maloney *v.* Newton, 85 Ind. 565, 44 Am. Rep. 46.

A surety on a bond given by an assignee for the benefit of the creditors is entitled to an exemption of three hundred dollars, where suit is brought on default of the assignee to pay out moneys in his hands after distribution by an auditor has been confirmed by the court. Com. *v.* Brown, 17 Pa. Super. Ct. 520, the court approving the distinction made by the lower court between the assignee himself and his sureties, the default of the assignee being in the nature of a tort and therefore not within the exemption act.

16. *Arkansas.*— Friedman *v.* Sullivan, 48 Ark. 213, 2 S. W. 785.

Colorado.— Behymer *v.* Cook, 5 Colo. 395.

Florida.— A debtor cannot, by selecting property as a part of his exemption and excepting it from the operation of a general assignment made by him, render it exempt from sale for the payment of its price. Cator *v.* Blount, 41 Fla. 138, 25 So. 283.

Georgia.— Phelps *v.* Porter, 40 Ga. 485.

Michigan.— Gottesman *v.* Chipman, 125 Mich. 60, 83 N. W. 1026. See also Lillibridge *v.* Walsh, 97 Mich. 459, 56 N. W. 845, 104 Mich. 153, 62 N. W. 172.

New York.— See Smith *v.* State, 57 Barb. 637, to the effect that if the purchase-price is for a horse, it must appear that the horse was used in a "team" or that he was purchased for a "team" or a part of a "team." And *compare* Hoyt *v.* Van Alstyne, 15 Barb. 568, holding that an execution obtained in an action for taking personal property without the consent of the owner, and disposing of it, is not to be deemed as issued on a demand for the purchase-money of the property.

Pennsylvania.— Fehley *v.* Barr, 66 Pa. St. 196; Ulrich's Appeal, 48 Pa. St. 489; Kyle's Appeal, 45 Pa. St. 353; Scott *v.* Kerlin, 1 Del. Co. 545; Denlinger *v.* Burkey, 18 Lanc. L. Rev. 94. See also Wiley's Appeal, 90 Pa. St. 173.

Wisconsin.— Houlehan *v.* Rassler, 73 Wis. 557, 41 N. W. 720.

See 23 Cent. Dig. tit. "Exemptions," § 97.

Contra.— Property exempt from execution cannot be sold on a judgment for debt, although the person owning the judgment has a verbal lien on the property sought to be sold for purchase-money. McGaughey *v.* Meek, 1 Tex. App. Civ. Cas. § 1195. The provision of Ill. Rev. St. p. 497, c. 52, § 3, that "no property" shall be exempt from sale for a liability incurred for the purchase or improvement thereof, relates only to real estate. Shear *v.* Reynolds, 90 Ill. 238; Howard *v.* Lakin, 88 Ill. 36; Wells *v.* Lilly, 86 Ill. 317. But see Friedman *v.* Sullivan, 48 Ark. 213, 2 S. W. 785.

Land, not money, as consideration.— A sold a horse to B, and A being indebted to C for land, B, by agreement of the parties, gave his note to C, who credited A on the land with its amount. It was held that the extinguishment of the debt for the land was the consideration of the note, and not the purchase-money for the horse. Washington *v.* Cartwright, 65 Ga. 177.

Money loaned one for the express purpose of enabling him to make a purchase of certain property, and so used by him, is "purchase-money" of said property, within the meaning of Wis. Rev. St. § 2982, subd. 20, providing that no property shall be exempt from execution for the purchase-money thereof; and such property may be levied on by the lender under a judgment obtained for the money loaned. Houlehan *v.* Rassler, 73 Wis. 557, 41 N. W. 720.

The fact that the property has been set apart as exempt does not prevent the enforcement of the claim for the purchase-money. Loyless *v.* Collins, 55 Ga. 370.

Where a factor makes advances and takes a lien on the growing crops, under Ga. Rev. Code, § 1977, such advances are in the nature of purchase-money, and the lien is superior to the wife's title, where the crop is set apart to her as personalty under the homestead law after it was made. Tift *v.* Newson, 44 Ga. 600.

Where the vendee, in a contract for the conditional sale of a horse, recovered damages of a third party for negligence in killing the horse, with which he purchased another horse, the vendor acquired no title to or lien on the new horse, and hence the vendee could hold it as exempt under the constitution. Smith *v.* Gufford, 36 Fla. 481, 18 So. 717, 51 Am. St. Rep. 37.

the debtor is a quasi-vendor's lien.[17] The right of the creditor to enforce his claim for the purchase-price of property classed as exempt extends only to the property purchased, not to other property.[18] The acceptance by the vendor of a note[19] or even the reducing of the claim to a judgment[20] has been held not to affect his right to enforce his claim for the purchase-money; the debt is nevertheless for purchase-money within the meaning of the statute. Whether the assignee of the debt or of a note given for the debt can enforce the claim for the purchase-money is a question upon which the authorities cannot be reconciled; some authorities hold that the assignee takes all the rights of his assignor,[21] while

17. See Weil *v.* Nevitt, 18 Colo. 10, 31 Pac. 487; Rodgers *v.* Brackett, 34 Minn. 279, 25 N. W. 601.

But in Arkansas it is said that the effect of this law is not to give to the vendor a lien for the purchase-price on the chattel sold, but only to forbid its exemption for his debt and to enable him to seize it at the commencement of its action, if still in the possession or control of the purchaser, without the necessity of alleging any of the ordinary grounds of attachment. It is a statutory process for impounding the chattel to prevent alienation *pendente lite*. Bridgeford *v.* Adams, 45 Ark. 136.

18. Loyless *v.* Collins, 55 Ga. 370; *In re* Tobias, 103 Fed. 68, 4 Am. Bankr. Rep. 555.

In New York under the act of 1842 as amended in 1866, exempting a debtor's team from execution, except when the demand sued for is the purchase-money of such team, in a suit for the purchase-money of a horse the debtor may exempt another horse. Smith *v.* Slade, 57 Barb. 637. But prior to the amendment the property of a householder exempt by the laws of 1842 was liable for the purchase-money of other property also exempt by that law. Craft *v.* Curtiss, 25 How. Pr. 163; Barnes *v.* Anderson, 4 N. Y. Leg. Obs. 346. See Mathewson *v.* Weller, 3 Den. 52. *Contra*, the execution must follow the property sold, as if plaintiff retained a specific lien thereon for the price, and the execution cannot be levied on other exempt property to satisfy the same. Hickox *v.* Fay, 36 Barb. 9 [*disapproved* in Snyder *v.* Davis, 1 Hun 350, 3 Thomps. & C. 596, 47 How. Pr. 147]. But it was held that property exempt under the Revised Statutes could not be taken for the purchase-price of other articles, notwithstanding the proviso clause of Laws (1842), c. 157, § 1. Davis *v.* Peabody, 10 Barb. 91; Cole *v.* Stevens, 9 Barb. 676, 6 How. Pr. 424; Cox *v.* Stafford, 14 How. Pr. 519. But these decisions were not followed in Snyder *v.* Davis, 1 Hun 350, 3 Thomps. & C. 596, 47 How. Pr. 147.

Where a merchant purchases goods of the same class from different persons, and in the ordinary course of business so mingles them that it is impossible to designate the goods purchased from any one person, the entire stock will not be liable to seizure in an action by one of such persons for the purchase-price of goods sold, under N. D. Comp. Laws, § 5137, providing that no exemption shall be allowed against an execution issued for the purchase-money of property that has been seized under the execution. Wagner *v.* Olson, 3 N. D. 69, 54 N. W. 286. See also Mitchell *v.* Simpson Grocery Co., 114 Ga. 199, 39 S. E. 935.

19. Rogers *v.* Brackett, 34 Minn. 279, 25 N. W. 601 (under Minn. Gen. St. (1878) c. 96, § 311); De Loach Mill Mfg. Co. *v.* Latham, 99 Mo. App. 231, 72 S. W. 1080 (under Mo. Rev. St. (1899) § 3170). *Contra*, in New York where it was said that the word "purchase-money," in the statute of 1842, respecting property exempt from levy of execution, should be held to mean the original demand for the property sold as extinguished from the demand on the security. Davis *v.* Peabody, 10 Barb. 91, holding that a surety on the note given might have exemption. See also Smith *v.* Slade, 57 Barb. 637. So in British Columbia in Vye *v.* McNeill, 3 Brit. Col. 24, the debtor was allowed to claim his five-hundred-dollar exemption out of the proceeds of the sale of a horse, although the horse was sold to satisfy a promissory note given in payment thereof.

20. Fox *v.* Delong, 1 Woodw. (Pa.) 137, under the act of April 9, 1849. But see *contra*, State *v.* Lacy, 18 Ohio Cir. Ct. 379, 10 Ohio Cir. Dec. 111. *Compare* Harley *v.* Davis, 16 Minn. 487.

21. State *v.* Orahood, 27 Mo. App. 496. "It seems to us that there is no good reason, founded on either principle or policy, why the vendee should be allowed to hold the property freed from this right, simply because the debt for purchase money has been transferred by the vendor to a third party." Langevin *v.* Bloom, 69 Minn. 22, 23, 71 N. W. 697, 698, 65 Am. St. Rep. 546. But see Harley *v.* Davis, 16 Minn. 487. Under the constitutional provision that "no property shall be exempt from sale for taxes or for the payment of obligations contracted for the purchase of said premises," notes of a third person indorsed and transferred by the vendee of land to the vendor in payment of the purchase-price constitute an "obligation." Whitaker *v.* Elliott, 73 N. C. 186.

"The true test is this: Does the vendee owe the purchase money, or any part of it? and if so, the debt comes within the constitutional provision, and it is immaterial to whom the money is due. The assignee, when it is assigned, becomes the owner of the debt, but it is still a debt incurred in making the purchase. Nor is it material whether the debt exists in the form of a note or bond or

others hold that the privilege is personal to the debtor, that the transfer of the note does not carry with it to the assignee the right to resort to exempt property to satisfy a judgment which he may recover upon the note.[22]

3. **Rent.** The right to exemption is generally subordinate to the right of the landlord to the payment of the rent due him. Particularly is this true in the great agricultural states[23] where the lien on the crops raised by the tenant usually takes priority of all other liens.[24] This priority given to the landlord is personal to him and exists only for his benefit.[25] His rights do not attach as against a debtor of the tenant so as to deprive the tenant's debtor of the benefit of the exemption provisions.[26]

4. **Debts For Necessaries — a. In General.** If a creditor claims that the debt is an exception to the exemption laws in that it is for necessaries furnished the debtor, the articles alleged to be necessaries must have been furnished to the debtor as necessaries[27] to be applied by him directly, not mediately, for his use as

in a verbal contract it is equally capable of being transferred." Lawson *v.* Pringle, 98 N. C. 450, 454, 4 S. E. 188.

22. Weil *v.* Nevitt, 18 Colo. 10, 31 Pac. 487; Shepard *v.* Cross, 33 Mich. 96.

23. *Florida.*— Hodges *v.* Cooksey, 33 Fla. 715, 15 So. 549, 24 L. R. A. 812. See also Cathcart *v.* Turner, 18 Fla. 837. But the exemption of personal property other than agricultural products raised on the land rented, although used on the rented premises, takes precedence over the lien for the rent. Schofield *v.* Liody, 35 Fla. 1, 16 So. 780 [*following* Hodges *v.* Cooksey, 33 Fla. 715, 15 So. 549, 24 L. R. A. 812].

Georgia.— Taliaferro *v.* Pry, 41 Ga. 622; Davis *v.* Meyers, 41 Ga. 95.

Louisiana.— Stewart *v.* Lacoume, 30 La. Ann. 157.

Mississippi.—Ransom *v.* Duff, 60 Miss. 901.

New Jersey.— Hoskins *v.* Paul, 9 N. J. L. 110, 17 Am. Dec. 455.

North Carolina.— Hamer *v.* McCall, 121 N. C. 196, 28 S. E. 297. See also Durham *v* Speeke, 82 N. C. 87.

Pennsylvania.— Williams *v.* Sheridan, 7 Luz. Leg. Reg. 14.

Tennessee.— Hill *v.* George, 1 Head 394.

See 23 Cent. Dig. tit. "Exemptions," § 94.

Contra.— Rudd *v.* Ford, 91 Ky. 183, 15 S. W. 179, 12 Ky. L. Rep. 740; McGaughey *v.* Meek, 1 Tex. App. Civ. Cas. § 1195.

In the nature of purchase-money.— The crop is subject to the lien of the landlord, although set apart as an exemption for the benefit of the family of the tenant; the claim for rent being in the nature of purchase-money. Shirling *v.* Kennon, 119 Ga. 501, 46 S. E. 630; Harrell *v.* Fagan, 43 Ga. 339.

The lien extends to the satisfaction of costs of proceedings to recover the rents and therefore the costs must be paid before the tenant can have any exemption. Slaughter *v.* Winfrey, 85 N. C. 159.

"The object and effect of this statute was to abolish all exemptions against demands for rent, and this consequence follows regardless of the legal process adopted for the collection of such demands. The test of exemption or non-exemption is not the form of action pursued, but the consideration of the debt due." Ransom *v.* Duff, 60 Miss. 901, 903.

Unfinished cloth owned by the lessee of a fulling mill and sent there by him to be wrought is not exempt from distress by the landlord. Hoskins *v.* Paul, 9 N. J. L. 110, 17 Am. Dec. 455.

Where a tenant contracts with a third person to work the land on shares, the grain to be divided, the occupier under the agreement is not entitled to the benefit of the act of March 18, 1851, exempting property to the amount of two hundred dollars from distress, not being a tenant of the lessor, and there not being any privity of contract between them. Guest *v.* Opdyke, 31 N. J. L. 552.

Tex. Rev. St. (1895) art. 3251, giving a landlord a preference lien on the tenant's property that the tenant's right to statutory exemptions from forced sale shall not thereby be affected does not invalidate a judgment foreclosing such a lien on exempt property purchased by one *pendente lite,* where both he and the tenant omitted to claim such exemptions. York *v.* Carlisle, 19 Tex. Civ. App. 269, 46 S. W. 257.

24. 2 Tiffany Real Prop. § 575.

25. Under La. Code Pr. art. 644, exempting from execution instruments used by a dentist, but not exempting them as against a claim for rent by a landlord, a seizure of such instruments by a creditor was invalid, although the landlord afterward entered claim for the proceeds of the sale, as the landlord's right of seizure was personal, and could not be exercised by another. Duperron *v.* Communy, 6 La. Ann. 789.

26. The debtor of the tenant cannot be garnished. Swope *v.* Ross, 29 Ark. 370.

27. Lenhoff *v.* Fisher, 32 Nebr. 107, 48 N. W. 821.

Limited exemption even against debt for necessaries.— Mass. Pub. St. c. 183, § 30, exempts from attachment by trustee process twenty dollars due for wages for personal labor and services, except where the demand is for necessaries furnished to defendant or his family, when only ten dollars is exempt. It was held that a defendant in attachment is entitled to recover ten dollars from the garnishee absolutely, whether it appears that

necessaries.[28] What is included in the term "necessaries" is a question of fact depending upon the circumstances of each case.[29] Debts for legal services,[30] medical attendance,[31] farming utensils,[32] supplies furnished the tenant by the landlord to support the tenant's family,[33] and supplies for making a crop and cultivating the land[34] have all been held to be within the exception to the exemption laws.

b. Board and Lodging. In some jurisdictions a specific provision of the statute excepts from the benefit of the exemption law a debt for board.[35] A statute

the garnishment suit is for necessaries furnished the debtor or not. Sullivan *v.* Hadley Co., 160 Mass. 32, 35 N. E. 103.

28. Groceries furnished an unmarried person, and used in the family in which he is boarding, being taken in payment for his board, are not necessaries "furnished him or his family," within the meaning of Me. Rev. St. c. 86, § 55. McAuley *v.* Tracy, 61 Me. 523.

29. Fisher *v.* Shea, 97 Me. 372, 54 Atl. 846, 61 L. R. A. 567. See Provost *v.* Piche, 93 Me. 455, 45 Atl. 506.

30. Halsell *v.* Turner, (Miss. 1904) 36 So. 531 (holding that money collected by an attorney for wages due his client is not exempt from the attorney's lien for services); Rich *v.* Treu, 25 R. I. 208, 55 Atl. 492 [*citing* Crafts *v.* Carr, 24 R. I. 397, 53 Atl. 275, 96 Am. St. Rep. 721, 60 L. R. A. 128]. See also Fisher *v.* Shea, 97 Me. 372, 54 Atl. 846, 61 L. R. A. 567.

31. Darling *v.* Andrews, 9 Allen (Mass.) 106 [*citing* Wood *v.* O'Kelley, 8 Cush. (Mass.) 406].

The burial expenses of the deceased mother of a defendant in attachment cannot be charged as "necessaries," under Ohio St. § 6489, subd. 9, providing that in attachment against a head of a family, where the debt is for necessaries, ten per cent of the personal earnings of defendant may be attached. Watkins *v.* Schlecter, 9 Ohio S. & C. Pl. Dec. 590, 7 Ohio N. P. 42.

32. Mitchell *v.* Joyce, 69 Iowa 121, 28 N. W. 473.

33. Cathcart *v.* Turner, 18 Fla. 837, where by statute the landlord had a lien.

34. Cathcart *v.* Turner, 18 Fla. 837. Where an open account for supplies furnished to enable the purchaser to make his crop was reduced to judgment and a lien thereby created a subsequent setting apart to the debtor of the produce of the year as exempt personalty, under the constitution and statutes of the state, did not protect the same from sale under the judgment. Stephens *v.* Smith, 62 Ga. 177 [*following* Tift *v.* Newsom, 44 Ga. 600].

Confusion of necessaries and article not necessaries.— "The act of 1843, amending art. 3184 of the code, provides that debts due for necessary supplies furnished to any farm or plantation, shall be entitled to a privilege on the crop, for the making of which those supplies were furnished. It was incumbent upon the opponents to have brought their case within this rule, and, we are unable to say, that we have done so to a larger amount than the sum allowed by the district court as a privilege. Their account is made out in such a manner, as to render it impossible to ascertain their rights with precision. Things, which are clearly plantation supplies, such as corn and pork, are mixed up with other articles, which they are well aware are not supplies, such as cognac, annisette, cigars, and large quantities of ice, the latter article greatly preponderating; and the total amount of each invoice is charged, without showing the cost of the different articles it includes. The uncertainty, thus created by the opponents, may have been prejudicial to them in the district court, but it is not in our power to relieve them from the legal consequences of their negligence. We are of opinion, that the privilege must be limited to necessary supplies furnished to the plantation, and that it does not extend to supplies furnished to the family of the planter, beyond plantation fare." Hollander *v.* His Creditors, 6 La. Ann. 668, 669.

35. See cases cited *infra*, this note.

In Pennsylvania the act of 1889, amendatory of the act of 1876, makes this exception. The act of 1876 made wages liable to attachment execution where the claim was for board, but by an unfortunate wording of the act the court in Smith *v.* McGinty, 101 Pa. St. 402, held that the laborer who had the money and yet would not pay his board bill was still entitled to the benefit of the exemption law, thus rendering the act practically nugatory. To remedy this the legislature passed the act of 1889, and the two acts are thus required to be read together. If judgment has been obtained for more than four weeks' board, there is no exemption against an attachment execution for a judgment. Karnes *v.* Rosena Furnace Co., 5 Pa. Dist. 752, 18 Pa. Co. Ct. 306; Tredennick *v.* Jones, 7 Pa. Co. Ct. 548. Blythan *v.* Rescorla, 1 Kulp (Pa.) 351, decided in 1880, reached the same conclusion as Smith *v.* McGinty, *supra*. It is no defense to a garnishment that the garnishee answered that he owed defendant a certain amount for wages. Karnes *v.* Rosena Furnace Co., *supra*. But plaintiff cannot attach without giving security for damages by reason of a false claim or to prosecute his action, but is authorized to have merely an execution attachment founded on a judgment previously obtained. Serena *v.* Guilfry, 7 Pa. Dist. 141, 20 Pa. Co. Ct. 549, 14 Montg. Co. Rep. 100. In spite of the act of April 4, 1889, providing that no exemption of property from attach-

exempting certain property from general execution has been held not to abrogate the common-law lien of an innkeeper.[36]

5. Wages and Material. A number of states have special statutory provisions that there shall be no exemption in personal property as against a claim for wages of any laborer,[37] of any "laborer or servant,"[38] or of "any clerk, mechanic, laborer, or servant,"[39] according to the jurisdiction. A provision of this character has been held subject to strict construction and one who wishes to avail himself of it must bring himself within its content.[40] Under a provision of this kind a laborer is one who performs manual labor not requiring special knowledge or skill and a servant is one performing menial service.[41] Whether wages which are exempt can be seized under a provision of this character depends upon the jurisdiction.[42]

ment shall be allowed "on judgment" obtained for board, nevertheless when the wages are attached on original process, defendant can still claim wage exemptions, as the last act applies only to attachments "on judgments." Thomas *v.* Glasgow, 2 Pa. Dist. 711 [*following* McGentey *v.* Keefe, 8 Luz. Leg. Reg. 179].

36. Swan *v.* Bournes, 47 Iowa 501, 503, 29 Am. Rep. 492.

The lien given by statute to a boarding-house keeper is not affected by the exemption law. The lien is exactly the same as the common-law lien of the innkeeper. Thorn *v.* Whitbeck, 11 Misc. (N. Y.) 171, 32 N. Y. Suppl. 1088 [*following* Swan *v.* Bournes, 47 Iowa 501, 29 Am. Rep. 492].

Lien of liveryman.— Minn. Gen. St. (1894) § 6249, creating a lien in favor of livery or boarding stable keepers on account of feed and care of animals placed in their charge, does not impinge "section 12, art. 1, of our constitution, which, so far as here material, reads thus: 'A reasonable amount of property shall be exempt from seizure and sale, for the payment of any debt or liability; the amount of such exemption shall be determined by law.'" Flint *v.* Luhrs, 66 Minn. 57, 59, 68 N. W. 514, 61 Am. St. Rep. 391.

37. See Frutchey *v.* Lutz, 167 Pa. St. 337, 31 Atl. 638.

38. See Dickinson *v.* Rahn, 98 Ill. App. 245.

39. Reed *v.* Umbarger, 11 Kan. 206.

As against mechanics' liens.— A judgment debtor is not entitled to the three-hundred-dollar exemption when the fund is not adequate to the payment of mechanics' liens to an amount exceeding three hundred dollars filed between the entry of judgment and the sale. Building Assoc. *v.* O'Connor, 3 Phila. (Pa.) 453.

Provision applicable to homestead alone.— Ark. Const. (1868) art. 12, § 3, defining a homestead, and declaring that it shall be exempt from sale on execution, but that no portion shall be exempt from sale for labor performed for the owner thereof, refers only to the homestead, and does not apply to the exemption of personal property granted by section 1 of the same article. Parham *v.* McMurray, 32 Ark. 261.

40. Dickinson *v.* Rahn, 98 Ill. App. 245; Smith *v.* Kennett, 94 Ill. App. 331. The words "for labor," in a note given a physician for his services, do not import that the consideration was wages due the payee "as laborer or servant," within the meaning of the exemption law. Magers *v.* Dunlap, 39 Ill. App. 618. But a judgment of a justice which states that it is for "the wages of a laborer" is sufficient to authorize levy of execution on property otherwise exempt. Stroup *v.* Hobbs, 65 Ill. App. 296.

41. Dickinson *v.* Rahn, 98 Ill. App. 245.

One employed as a traveling salesman and bookkeeper is not such a laborer. Epps *v.* Epps, 17 Ill. App. 196.

One who manufactured a pair of boots upon the written order of another was an independent contractor, and hence his claim was not within Nebr. Code Civ. Proc. § 531, providing that nothing shall exempt any property from execution for clerks', laborers', or mechanics' wages. Fox *v.* McClay, 48 Nebr. 820, 67 N. W. 888.

The taking of a note by a laborer or servant for wages due him serves merely to liquidate the demand, and not to waive the lien given by the statute. Graves *v.* Ahlgren, 87 Ill. App. 668. See *infra*, V.

42. See cases cited *infra*, this note.

In Illinois no property whatever is exempt from execution for the wages of a laborer or servant. Bohn *v.* Weeks, 50 Ill. App. 236.

In Nebraska Code Civ. Proc. § 531*a*, providing for the exemption of wages of laborers who are heads of families was enacted long after section 531, which provides that no property of a debtor is exempt as against a debt for laborers' wages, and is controlling, and therefore the wages of a laborer cannot be seized under section 531. Snyder *v.* Brune, 22 Nebr. 189, 34 N. W. 364.

In Pennsylvania wages cannot be attached. Frutchey *v.* Lutz, 167 Pa. St. 337, 31 Atl. 638. *Contra*, Meiers *v.* Umla, 6 Kulp (Pa.) 332; Finns *v.* Banker, 5 Kulp (Pa.) 33; Enke *v.* Stine, 4 Kulp (Pa.) 45.

Claims for materials.— Minn. Const. art. 1, § 12, as amended in 1888, provides: "A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law. Provided, however, that all property so exempted

6. Preëxisting Liabilities. Whether a statute which makes an exception to the general exemption law has any effect upon a debtor's right to an exemption as against a liability or an obligation previously incurred or fixed is a question differently decided in different jurisdictions.[43] A devisee of land upon which the lien of a judgment in favor of a creditor of the devisor has attached cannot claim the land exempt from the judgment lien.[44]

7. Debts Due Government.[45] State exemption laws are inapplicable to debts due from a citizen to the United States.[46]

shall be liable to seizure and sale for any debts incurred to any person for work done or materials furnished in the construction, repair, or improvement of the same; and provided further, that such liability to seizure and sale shall also extend to all real property for any debt incurred to any laborer or servant for labor or service performed." This provision is applicable only to a debt for labor and services performed. It does not apply to a debt for materials furnished. Burlington Mfg. Co. *v.* City Hall Com'rs, 67 Minn. 327, 328, 69 N. W. 1091.

Maritime lien for supplies.— In proceedings against a boat, by name, under the water-craft laws (57 Ohio Laws, p. 32), providing that claims for material, supplies, and labor shall be a lien on vessels to which they are furnished, neither the owner nor his wife are entitled, under the homestead laws of this state, to select and hold the craft, its apparel or furniture, exempt from execution in lieu of a homestead. Johnson *v.* Ward, 27 Ohio St. 517.

43. See cases cited *infra*, this note.

In Georgia it is held that an act rendering wages of a debtor liable for a debt for services rendered by a physician or surgeon applies only to services rendered before its passage. Moore *v.* McCown, 64 Ga. 617. See also Hawks *v.* Hawks, 64 Ga. 239. A judgment for the purchase-money of land, where the land has been sold for its satisfaction, but does not fully discharge the debt, is not such an encumbrance or lien on the crop made on the premises, which was matured and gathered before the levy on the land, as will defeat the right of the family of the vendee to the crop as an exemption, etc., under the homestead law. Johnson *v.* Holmes, 49 Ga. 365.

In Indiana it is held that a statute which excepts from the exemption law a judgment rendered in a suit upon a guardian's bond applies to bonds executed before as well as after the passage of the statute. Potter *v.* State, 23 Ind. 607.

In Pennsylvania the exception of a claim for wages from the exemption law was allowed, although judgment was obtained before the enactment of the statute making the exception. Van Wye *v.* Harrington, 1 Pa. Co. Ct. 272. The same was held in Finns *v.* Banker, 5 Pa. Co. Ct. 311, where the judgment was rendered before the passage of the act and the execution was issued subsequent to its passage. But a statute disallowing "from and after the passage of this Act" exemption on judgment obtained for board for four weeks or less does not apply to judgment obtained before the enactment. Brown *v.* Reiser, 8 Pa. Co. Ct. 416. Under the act of April 9, 1849, exempting "from levy and sale on execution or by distress for rent" property to the value of three hundred dollars, a distributee of a fund raised by the sale of real estate in proceedings in partition, against whose interests there were liens prior to the commencement of proceedings, is entitled to his exemption, as against lien creditors in whose favor he had not waived the benefit of the law. Reed *v.* Hollibaugh, 3 Pa. Co. Ct. 20.

In Texas a statute precluding a mortgagor of chattels from claiming them as exempt from sale to satisfy the mortgage applies to mortgages executed before the statute's enactment. Mason *v.* Bumpass, 1 Tex. App. Civ. Cas. § 1338.

44. Graves *v.* Graves, 106 Ind. 118, 5 N. E. 879.

Effect of mortgage upon exempt property see *infra*, IV.

45. **Fines and costs.**— In Kentucky an exemption can be claimed against the sale of property under an execution in favor of the commonwealth for fines and costs. Com. *v.* Lay, 12 Bush (Ky.) 283, 23 Am. Rep. 718. *Compare* Wilcox *v.* Hemming, 58 Wis. 144, 147, 15 N. W. 435, 46 Am. Rep. 625, holding that where the exemption is only from "seizure and sale on execution, or provisional or final process issued from any court, or any proceedings in aid thereof," the expenses incurred by impounding an animal under an ordinance regulating animals are not within the statute of exemption. "The power granted by the legislature to this city in its charter, by ordinance 'to restrain the running at large of cattle, horses, etc., and cause such as may be found running at large to be impounded and sold,' is a police power necessary to the due protection of the public at large in the use and enjoyment of the public streets, to which the private rights of property, and the ordinary exemption thereof from seizure and sale on execution or judgments in actions on contract or other incurred liability, must of necessity be subordinate."

46. U. S. *v.* Howell, 9 Fed. 674, 4 Hughes 483, where judgment was rendered on a warehouse bond.

St. 23 Vict. c. 25, exempting certain articles from seizure, does not bind the crown. Reg. *v.* Davidson, 21 U. C. Q. B. 41.

8. CONSTITUTIONALITY[47] AND CONSTRUCTION[48] OF STATUTES MAKING EXCEPTION. A statutory provision making an exception to the exemption laws is constitutional[49] or not[50] according to the jurisdiction. Statutory provisions making an exception to the general exemption laws are strictly construed.[51]

9. ENFORCEMENT OF LIABILITY.[52] The complaint or declaration should show that plaintiff's claim is within the exception to the exemption law.[53] The same is true of the recitals in the judgment and execution.[54] Nevertheless it has been held that in an action for purchase-money it was not necessary for the complaint, judgment, or execution to state the fact.[55] If plaintiff reduces his claim to a judgment and then sues on the judgment, it is held in some jurisdictions that he is no longer within the exception to the exemption law;[56] nevertheless in other

47. Constitutionality of statutes generally see CONSTITUTIONAL LAW; STATUTES.

48. Interpretation of statutes generally see STATUTES.

49. A provision that none of the personal property mentioned within the exemption laws shall be exempt from attachment or execution for the wages of any clerk, mechanic, laborer, or servant is constitutional. McBride *v.* Reitz, 19 Kan. 123.

50. An exception from the exemption laws in favor of debts or liability for wages due to clerks, laborers, or mechanics is unconstitutional and conflicts with section 12 of the bill of rights, which provides that a reasonable amount of property shall be exempt from seizure for the payment of any debt. Tuttle *v.* Strout, 7 Minn. 465, 82 Am. Dec. 108.

An exception from exemption of debts due for rent is in violation of Const. art. 6, § 48. Donaldson *v.* Voltz, 19 W. Va. 156.

51. State Bank *v.* Holland, 11 Ind. 150.

52. **Beginning action by attachment** is not allowed by the act of May 8, 1876, making wages attachable for a board bill, but the act gives merely a right of an attachment execution after rendition of judgment. Serena *v.* Guilfry, 7 Pa. Dist. 141, 20 Pa. Co. Ct. 549; Gibbons *v.* McCarthy, 16 Pa. Co. Ct. 541.

53. Pioneer Co-operative Co. *v.* Eagle, etc., Mfg. Co., 67 Ga. 38, holding that a complaint should show the character of the action for necessaries where plaintiff attempts to garnish the daily wages of a laborer. See, however, Green *v.* Spann, 25 S. C. 273.

Confusion of exemptions and exceptions to the exemption law.— Where it appears by an account annexed to the writ that necessaries were furnished defendant, the fact that a few articles in the account (which exceeded the amount for which defendant's wages had been attached) are not necessaries does not prevent trustee process for the articles which are necessaries. Pullen *v.* Monk, 82 Me. 412, 19 Atl. 909. Where goods against which a claim for the purchase-money is valid are indistinguishably mingled with those not exempt, the burden is on the person claiming the benefit of the exemption law to make a separation. Rose *v.* Sharpless, 33 Gratt. (Va.) 153.

Necessity of personal service of demand of payment for necessaries out of debtor's wages see K. B. Co. *v.* Batie, 25 Ohio Cir. Ct. 418.

Requisites of affidavit under the Ohio statute for the garnishment of debtor's wages see K. B. Co. *v.* Batie, 25 Ohio Cir. Ct. 418.

54. Hughes *v.* Melville, 60 Ill. App. 419 (holding that a recital that the judgment is for "work and labor" does not comply with the requirements that no personal property shall be exempt from levy when the debt is for wages of any laborer or servant, provided the court shall find that the demand so sued for is "for wages due such person as laborer or servant"); Buis *v.* Cooper, 63 Mo. App. 196 (holding that a judgment and execution must recite that the amount due is for the services of a servant or laborer rendered within six months as prescribed by statute, otherwise the execution cannot be enforced against exempt property); McCourt *v.* Brenaman, 1 Pa. Dist. 783, 11 Pa. Co. Ct. 645 (holding that where the record fails to show that plaintiff is "a proprietor of an hotel, boarding-house or lodging-house," wages cannot be attached on a judgment for board and lodging under the act of May 18, 1876); Paxton, etc., Co. *v.* McDonald, (S. D. 1904) 99 N. W. 1107 (holding that in an action for the purchase-price, the decision and judgment which found that the goods were obtained by false pretenses should recite that fact).

A judgment for more than four weeks' board is not within the act and cannot be split up and an attachment cannot be issued for part of it. Tredennick *v.* Jones, 7 Pa. Co. Ct. 548. See, however, Weisman *v.* Weisman, 133 Pa. St. 89, 19 Atl. 300, where the justice's docket, while showing that the claim of exemption was disallowed on account of the act of 1889, yet failed to show affirmatively that the judgment was for four weeks' board, and where the judgment was affirmed.

55. Rogers *v.* Brackett, 34 Minn. 279, 25 N. W. 601.

56. Brown *v.* West, 73 Me. 23 (holding that a claim for necessaries merged in and extinguished by a judgment rendered in a suit upon a claim and an action upon a judgment is not a suit for necessaries so as to render the wages of defendant liable therefor); *In re* Lumpkin, 14 Fed. Cas. No. 8,606, 2 Hughes 175 (holding that the landlord's specific lien for rent is waived by his

jurisdictions a more rational and just view is taken of this exception to the exemption laws.[57]

II. PERSONS ENTITLED TO THE RIGHT.

A. Debtors or Defendants. Under a statute which makes certain exemptions to a "defendant" or to a "debtor," a terre-tenant who has not been a defendant or a debtor cannot claim exemption out of the proceeds of land bought by him subject to certain judgments.[58]

B. Constituents of a Family — 1. In General. Under a statute which exempts the wages of a member of a family, the word "family" has been held to be a collective body of persons, generally relatives and servants — a household living together in one house or curtilage — and does not embrace separate individuals who have no common home.[59] Under a statute exempting the earnings of a debtor where they are necessary for the use of his family, a debtor who supports kin whom he is not legally obliged to support,[60] or a debtor who has deserted his family in a foreign country and contributes nothing to their support,[61] is not entitled to exemption.

2. "Head of Family" — a. In General. To constitute a person the "head of a family" within the exemption laws there must be a condition of dependence

acceptance of a judgment in lieu of rent and that exemption may be allowed against the judgment).

57. Garside *v.* Colby, 72 N. H. 544, 545, 50 Atl. 50 [*quoting* Freeman Judgm. § 244]: ("Whenever justice requires it, judgments will be generally construed, not as a new debt, but as an old debt in a new form"); Thompson *v.* Roach, 15 R. I. 417, 418, 6 Atl. 790 (where the court said: "The meaning of the statute is that any person who has furnished another with necessaries shall have the right to attach the latter's wages to their full amount. We cannot see any reason why we should not give effect to this meaning when the action is on a judgment as well as when it is on the original promise").

58. Eberhart's Appeal, 39 Pa. St. 509, 80 Am. Dec. 536.

A subtenant who has never been recognized by the landlord has no right to any exemption from a distress levied on his goods where the demand, warrant to distrain, etc., were all in the name of the original tenant. A mere stranger whose goods are on the premises and are distrained cannot claim the exemption. The original tenant might make the claim to protect the goods of his subtenant or the stranger, but neither of the latter persons is a debtor within the letter of the law, nor are they indeed within its spirit. Rosenberger *v.* Hallowell, 3 Phila. (Pa.) 330.

A bachelor debtor in Pennsylvania may have the benefit of the exemption law of 1849. Dieffenderfer *v.* Fisher, 3 Grant 30.

59. Zimmerman *v.* Franke, 34 Kan. 650, 9 Pac. 747.

A father and daughter living together, the mother being dead, constitute a family. Cox *v.* Stafford, 14 How. Pr. (N. Y.) 519, holding that a debt due to the father for labor which is necessary for the support of his family is therefore exempt within the meaning of the code.

A mother and her infant son who lives with her and is dependent upon her for support constitute a family for which she provides. Cantrell *v.* Conner, 6 Daly (N. Y.) 324, 51 How. Pr. (N. Y.) 45.

The father of a bastard has no family within the meaning of Rev. St. § 5430. Moore *v.* Baughman, 8 Ohio S. & C. Pl. Dec. 396, 7 Ohio N. P. 149, holding that a conviction under the bastardy statutes of Ohio does not decide that defendant is the father of the child but merely that he is the reputed father.

The housekeeper of the debtor and her children are not a family supported by the debtor's labor, within the meaning of the statute which exempts personal earnings if necessary for the family. Van Vechten *v.* Hall, 14 How. Pr. (N. Y.) 436.

Laborers hired to cultivate a farm are not a part of the housekeeper's family and no allowance will be made for them. McMurray *v.* Schuck, 6 Bush (Ky.) 111, 99 Am. Dec. 662.

An adult forty years old, residing with his stepmother and transacting her business, is not a member of the family of the person with whom he resides, so as to render his clothing exempt under a statute providing that the necessary wearing apparel of any member of the family of a householder shall be exempt from execution. Bowne *v.* Witt, 19 Wend. (N. Y.) 475.

60. Blake *v.* Bolte, 9 Misc. (N. Y.) 714, 30 N. Y. Suppl. 209, holding that one who supports his orphan nieces, is not entitled to the benefit of N. Y. Code Civ. Proc. § 2463, since he is not legally obliged to support them. See, however, State *v.* Kane, 42 Mo. App. 253.

61. Wright *v.* Ball, 4 Ohio Dec. (Reprint) 231, 1 Clev. L. Rep. 140.

on the part of the other members of the family upon the head and either a legal or moral obligation on his part to support and maintain them.[62] Primarily the husband and father is the head of the family,[63] but it is not necessary that the debtor should be a husband or a father; a man who controls, supervises, and manages about the house may be the head of a family.[64] A debtor who does not sustain the relation of either husband or father toward the persons who are dependent upon him and live with him may be the head of the family.[65] If either of these relations exists, it is held in some jurisdictions that it is not necessary that the debtor's dependents should live with him;[66] but the contrary seems to be more often held,[67] and in some jurisdictions the terms of the statute require that the debtor should reside with his family.[68] But an unmarried debtor who contributes to the support of kin who do not reside with him has been held not

62. Rolater *v.* King, 13 Okla. 37, 73 Pac. 291, holding that a debtor who resides with his widowed mother and two sisters who are wholly dependent upon him for their support is entitled as the head of the family to a wages' exemption. See also Sternberg *v.* Levy, 159 Mo. 617, 60 S. W. 1114, 53 L. R. A. 438.

It is not essential that there should be any legal obligation to support other members of the family, provided the debtor is under a moral obligation which is performed. State *v.* Kane, 42 Mo. App. 253. See, however, Blake *v.* Bolte, 9 Misc. (N. Y.) 714, 30 N. Y. Suppl. 209.

Under the old N. Y. Code Proc. § 297, which gave a wages' exemption, it was necessary for the debtor to show that he had a family dependent upon him, or that he supported the family, "wholly or in part by his labor." Martin *v.* Sheridan, 2 Hilt. 586.

63. See Whalen *v.* Cadman, 11 Iowa 226; Ness *v.* Jones, 10 N. D. 587, 88 N. W. 706, 88 Am. St. Rep. 755; State *v.* Finn, 8 Mo. App. 261 [*citing* Barney *v.* Leeds, 51 N. H. 253, a homestead case].

A woman living with her married daughter and the daughter's husband is not the head of the family, although the daughter is a minor. Briggs *v.* Bell, 8 N. J. L. J. 251.

64. Wade *v.* Jones, 20 Mo. 75, 61 Am. Dec. 584, holding that a man who had his widowed sister and her children living with him, who was keeping house and cultivating a small piece of ground, and who provided for and supported his sister and her four small children, the sister keeping house for him, must be considered as the head of a family. But see *contra*, Sallee *v.* Waters, 17 Ala. 482. And *compare* Whalen *v.* Cadman, 11 Iowa 226.

65. See cases cited *infra*, this note.

An unmarried man whose indigent mother and sisters live with him and are supported by him is the head of the family. Marsh *v.* Lazenby, 41 Ga. 153. See also Harding *v.* Hendrix, 26 Kan. 583; Seymour *v.* Cooper, 26 Kan. 539; Connaughton *v.* Sands, 32 Wis. 387.

An unmarried man who supports his mother who lives with him and keeps house for him is the head of the family. State *v.* Kane, 42 Mo. App. 253; Duffey *v.* Reardon, 70 Ohio St. 328, 71 N. E. 712. But see Riley *v.* Hitzler, 49 Ohio St. 651, 32 N. E. 752.

An unmarried man who with his sister keeps house for and partly supports his younger brothers and sisters is the head of the family. That his mother lives elsewhere and contributes to the support of the children is immaterial. Duncan *v.* Frank, 8 Mo. App. 286.

Maintenance of incapacitated adult kin.— Webster *v.* McGauvran, 8 N. D. 274, 78 N. W. 80.

66. Sallee *v.* Waters, 17 Ala. 482, 488, where it is said that upon the question whether a debtor is the head of a family or not, the relation of parent and child or that of husband and wife must exist to constitute a family and there must be a condition of dependence on the one or the other of these relations, but it is not necessary that all the dependents should live under the same roof or that the family should live together; it is the relation and the dependence on that relation, not the aggregation of the individuals, that constitute a family. See also Rogers *v.* Fox, (Tex. App. 1890) 16 S. W. 781, where the husband had not lived with his wife and children for a year or contributed to their support.

67. Gibson *v.* Gross, 8 Kan. App. 548, 54 Pac. 796; Beitz *v.* Schueller, 8 Ohio S. & C. Pl. Dec. 674, 7 Ohio N. P. 619 (holding that the debtor must show that he is living with and supporting his family, as the mere fact that he is married and has children does not give any exemption); Searcy *v.* Short, 1 Lea (Tenn.) 749 (holding that an itinerant dancing-master having no wife, but a minor son who does not live with him, is not entitled as head of the family to an exemption in household goods, for the provisions of the statute involve the idea of a place of residence where the head of the family sleeps and where his children or other members of the household stay. See also Wright *v.* Ball, 4 Ohio Dec. (Reprint) 231, 1 Clev. L. Rep. 140.

Temporary absence of wife and children from the state does not prevent the debtor from being the head of the family, although he has ceased to keep house. State *v.* Finn, 8 Mo. App. 261.

68. As where a statute provides for exemption of wages to a defendant "who is the

to be the head of the family, within the meaning of the exemption laws.[69] Under a constitutional provision that "each head of a family, or guardian or trustee of a family of minor children" shall have a certain exemption, the guardian of a minor child is entitled to the exemption.[70] Where an exemption is given to the head of a family in certain work animals and in animals used for food and support, the occupation of the head of the family is immaterial.[71] Where the claimant of exemption was not the head of a family at the time the debt was contracted and when execution was levied, the authorities are not in harmony upon the question whether he is entitled to an exemption if he becomes the head of a family after the levy and before the sale.[72]

b. Wife. The husband, not the wife, is presumptively the head of the family.[73] This presumption may be rebutted by showing conditions to exist that place the wife in that position and enable her as such to claim the exemption.[74] The wife of an absconding debtor may in many jurisdictions claim the right of exemption, either under a special statutory provision intended to govern such a case,[75] or

head of a family and resides with the same." Wabash R. Co. *v.* Dougan, 41 Ill. App. 543.

It is for the jury to decide whether the debtor is the head of a family residing with the same. Barnes *v.* Rogers, 23 Ill. 350.

69. Jones *v.* Grey, 13 Fed. Cas. No. 7,463, 3 Woods 494 [*distinguishing* Marsh *v.* Lazenby, 41 Ga. 153].

70. "It is clear that the head of a family, though the family be but one child, would be entitled to the homestead. The family would be the head and the child. In case there should be no father or mother, then the guardian becomes the head of the family, and the minor and himself would constitute the family — the property being for the use of the child." Rountree *v.* Dennard, 59 Ga. 629, 630, 27 Am. Rep. 401.

71. Young *v.* Bell, 1 Kan. App. 265, 40 Pac. 675.

72. See cases cited *infra*, this note.

Some authorities maintain that after the lien has attached, it cannot be affected by the debtor's change of condition. Richardson *v.* Adler, 46 Ark. 43; Pender *v.* Lancaster, 14 S. C. 25, 37 Am. Rep. 420. See also Selders *v.* Lane, 40 Ohio St. 345.

In other jurisdictions a debtor is allowed to claim the exemption if he becomes the head of a family any time before the sale. Robinson *v.* Hughes, 117 Ind. 293, 20 N. E. 220, 10 Am. St. Rep. 45, 3 L. R. A. 383. See also Watson *v.* Simpson, 5 Ala. 233.

73. John V. Farwell Co. *v.* Martin, 65 Ill. App. 55. See Van Doran *v.* Marden, 48 Iowa 186, where the wife was the mother of three children by a former husband, and where her horses were levied on to satisfy her debt, and the husband used these horses in his work in supporting the family. The horses were exempt by law to her as the head of the family before she remarried and upon her remarriage the husband became the head of the family and she was held no longer entitled to the exemption under the law. But see Richardson *v.* Woodward, 104 Fed. 873, 5 Am. Bankr. Rep. 94, 44 C. C. A. 235, holding that under Va. Const. art. 211, which secures to "every householder or head of a family" an exemption, etc., and provides that it should be "liberally construed to the end that all the intents thereof may be fully and perfectly carried out," a married woman holding title to the property, although living with her husband, is entitled to claim an exemption as against her own creditors with whom she has been trading as *feme sole*, for she is the head of a family either alone or jointly with her husband for exemption purposes. See *supra*, note 63.

74. Linander *v.* Longstaff, 7 S. D. 157, 63 N. W. 775.

If, on account of infirmity, disability, or absence of the husband, the wife becomes in fact the head of the family by taking exclusive charge of and managing and controlling the earnings and productions of the family which is dependent upon her for maintenance, the presumption is rebutted. Temple *v.* Freed, 21 Ill. App. 238; State *v.* Houck, 32 Nebr. 525, 49 N. W. 462; Hamilton *v.* Fleming, 26 Nebr. 240, 41 N. W. 1002; Schaller *v.* Kurtz, 25 Nebr. 655, 41 N. W. 642; Linander *v.* Longstaff, 7 S. D. 157, 63 N. W. 775. And see Wilson *v.* Wilson, 101 Ky. 731, 42 S. W. 404, 19 Ky. L. Rep. 925.

The mere fact that the wife conducts a business of her own which contributes to the support of the family does not make her the head of the family. She is not entitled to the exemption unless she is in fact the head of the family. Arnold *v.* Coleman, 88 Ill. App. 608; John V. Farwell Co. *v.* Martin, 65 Ill. App. 55; Ness *v.* Jones, 10 N. D. 587, 88 N. W. 706, 88 Am. St. Rep. 755.

The wife cannot recover in an action against the sheriff for levying on property alleged to be exempt, unless it is affirmatively found that she is the head of the family. Blount *v.* Medbery, 16 S. D. 562, 94 N. W. 428.

75. Berry *v.* Hanks, 28 Ill. App. 51 (holding that a deserted wife was entitled to the exemption, although she had no children); Malvin *v.* Christoph, 54 Iowa 562, 7 N. W. 6 (holding that it was not necessary for the husband to have deserted his family, or left without their knowledge and consent to en-

under the theory that the exemption laws are for the benefit of the debtor's family and are to be liberally construed to that end.[76] Under this latter theory an absconding debtor's minor child has been allowed the benefit of the statutory exemption.[77] The fact that the husband has deserted his wife and absconded does not transfer the title of his exempt property to his wife.[78]

c. Surviving Husband or Wife. A widower[79] or a widow[80] may be the head of a family after the death of the spouse.

title them to the exemption); State *v.* Dill, 60 Mo. 433; State *v.* Chaney, 36 Mo. App. 513. See also Liberal Bank *v.* Redlinger, 95 Mo. App. 279, 68 S. W. 1073. In Lindsey *v.* Dixon, 52 Mo. App. 291, it was held that a wife of an absconding debtor could claim the exemptions of Rev. St. § 4903, or might select and hold as exempt any other property not exceeding three hundred dollars in value, although an absconding husband has not the articles exempted by the statute; that she might sue therefor in her own name, or interplead therefor in an attachment suit against the husband, unless her husband be a non-resident; but if the husband be a non-resident the wife cannot claim the exemption which the statute gives to the wife of an absconding debtor inasmuch as the husband could not have claimed an exemption in the first place.

76. Frazier *v.* Syas, 10 Nebr. 115, 4 N. W. 934, 35 Am. Rep. 466 (where a wife of an absconding debtor claimed a team of horses under a statute which allowed such an exemption to the head of a family engaged in the business of agriculture); Bonnel *v.* Dunn, 29 N. J. L. 435. *Contra*, Betz *v.* Brenner, 106 Mich. 87, 63 N. W. 970, holding that the wife of a merchant who has absconded and abandoned his business cannot recover the value of merchandise set apart to the husband as exempt, but subsequently seized by creditors under an attachment, since the husband's abandonment of his business abandoned the exemption. See also Miller *v.* Miller, 97 Mich. 151, 56 N. W. 348.

Under Wash. Code Civ. Proc. § 489, which excepts from exemption the property of a person who has left the state with intent to defraud his creditors the wife of the fugitive cannot as his agent and representative claim a householder's exemption under the statutory provision applying to cases of mere absence. Carter *v.* Davis, 6 Wash. 327, 33 Pac. 833.

77. Bank *v.* Griffith, 8 Pa. Dist. 333. In White *v.* Swann, 68 Ark. 102, 56 S. W. 635, 82 Am. St. Rep. 282, it was held that where the property of a debtor, the head of a family, was attached on the ground that he had concealed himself that summons could not be served upon him, and the property attached is exempt property, the exemption could be claimed in his absence by his minor children acting by their grandfather as next friend; that it was to be presumed that defendant had not abandoned the premises and that he had left the grandfather in charge. See *infra*, II, E, 2.

78. Farmers', etc., Bank *v.* Hoffman, (Nebr. 1903) 96 N. W. 1044, holding further that an appraisement after the creditor had dismissed his attachment upon the wife's filing an inventory and claiming exemption did not change the title of the exempt property from the husband to the wife.

79. A widower who after the death of his wife kept house just as before, his son and his son's wife living with him, paying no board or compensation, and who had full charge of the household, was held to be the head of a family. Tyson *v.* Reynolds, 52 Iowa 431, 2 N. W. 469. But a man who continues to reside in his dwelling-house after the death of his wife, but has no family there or elsewhere to provide for, is not the head of a family. Chamberlain *v.* Darrow, 46 Hun (N. Y.) 48.

80. A widow keeping a boarding-house and having a woman friend living with her as one of the family and also two domestics, besides boarders, is the head of a family. Race *v.* Oldridge, 90 Ill. 250, 32 Am. Rep. 27. A widow, a mother of several children, residing with her aged father, living in the same house and eating at the same table with him and cultivating, together with her children, portions of his lands is "the head of a family engaged in agriculture" within the statute and is entitled to the exemption of one farm-horse. Bachman *v.* Crawford, 3 Humphr. (Tenn.) 213, 39 Am. Dec. 163.

A widow living alone is not the head of a family. Emerson *v.* Leonard, 96 Iowa 311, 65 N. W. 153, 59 Am. St. Rep. 372. *Contra*, see Collier *v.* Latimer, 8 Baxt. (Tenn.) 420, 35 Am. Rep. 711. But see Brown *v.* Parham, 25 Ohio Cir. Ct. 640 [*distinguishing* Wentzel *v.* Hayes, 16 Ohio Cir. Ct. 110, 8 Ohio Cir. Dec. 756, in that it was decided when the statute "contained no comma after the words 'unmarried female' as it now does, and as found in Whittaker's code it contained a comma after the word 'widow.' This punctuation evidently influenced the court in that decision, as there is no sound reason why a widow should be entitled to an exemption that an unmarried female is not entitled to"], holding that under Ohio Rev. St. § 5441, which provides that every widow and every unmarried female having in good faith the care, maintenance, and custody of any minor children of a deceased relative, may have an exemption for a certain sum, a widow who is not the owner of a homestead and has not in good faith the care, maintenance, and custody of any minor child or children of a deceased relative has no right to an exemption.

d. After Divorce or Separation.[81] If a wife obtains a divorce and is awarded the custody of the children, but the husband continues to support the children, he may still have his exemption as the head of the family.[82] An abandoned wife who lives with and supports her children is the head of the family.[83] A childless man who lives apart from his wife and has not contributed to her support for a period of years is not the head of a family.[84]

3. Surviving Husband, Wife, Children, and Next of Kin.[85] It is not unusual to have a separate provision which continues, for the benefit of the widow and children, the exemption given to the debtor during his lifetime.[86] Where the exempt property of the decedent was exchanged for other property, the widow and children were held to have acquired the same rights in the property received in exchange;[87] and where the exempt property has been sold under attachment, the proceeds in court, undistributed at the death of the debtor, have been held to pass to the widow and children.[88] Whether under a statute of this kind or under one which continues the exemption for the widow alone, the widow's right to exemption depends very often upon circumstances of the case, or upon

81. **Husband separated from wife** claiming exemption as against a judgment for maintenance see *supra*, I, F, 1.

82. Roberts *v.* Moudy, 30 Nebr. 683, 46 N. W. 1013, 27 Am. St. Rep. 426.

In Texas an exemption which a man enjoys while he is a constituent of a family continues in him after the marital relation is dissolved. Withee *v.* Brown, 1 Tex. App. Civ. Cas. § 544.

83. Nash *v.* Norment, 5 Mo. App. 545.

In Texas a man who had lived apart from his wife and children for a year and had not contributed to their support was nevertheless allowed as the head of the family an exemption in a horse and wagon. Rogers *v.* Fox, (App. 1890), 16 S. W. 781.

84. Linton *v.* Crosby, 56 Iowa 386, 9 N. W. 311, 41 Am. Rep. 107.

85. **Surviving husband.**— An exemption of personal property from forced sale, while the debtor has a family, does not continue in his favor, after the other members of the family are dead. "As to the surviving wife, the same right is secured by statute in reference to personal property exempt to the family. Batt Civ. St. art. 2046. But no provision of law, either constitutional or statutory, has been cited, and we have found none, securing the same right to a surviving husband. There may be expressions in the opinion in Cameron *v.* Morris. 83 Tex. 14, 18 S. W. 422, tending to support such contention; but in that case the husband died first, and therefore his rights as a survivor were not involved." Allen *v.* Ashburn, 27 Tex. Civ. App. 239, 242, 65 S. W. 45.

86. *Kentucky.*— Myers *v.* Forsythe, 10 Bush 394, construing Rev. St. c. 30, § 11.

Mississippi.— Hickman *v.* Ruff, 55 Miss. 549 (construing Code, §§ 1290, 1956); Mason *v.* O'Brien, 42 Miss. 420; Wally *v.* Wally, 41 Miss. 657 (construing Rev. Code, p. 469, art. 172, as amended by Acts (1860), p. 375).

North Dakota.— See Fore *v.* Fore, 2 N. D. 260, 50 N. W. 712, construing Comp. Laws, § 5779.

Pennsylvania.— Matter of Wood, 1 Ashm. 314, construing the act of March 26, 1814, and the act of March 31, 1821.

Texas.— Abney *v.* Pope, 52 Tex. 288, construing Paschal Dig. art. 5487.

See 23 Cent. Dig. tit. "Exemptions," § 34.

In New York, in the absence of a statute, the court, through a liberal construction of the exemption laws for the benefit of the debtor's family, held that property which was exempt before the debtor's death continued so afterward in favor of his widow and children. Becker *v.* Becker, 47 Barb. 497.

In Texas, under the provisions making it the duty of the court to allow to the widow and children a certain sum in lieu of exempt property not existing in kind, the value of existing exempt property turned over in kind cannot be deducted from the sum allowed. Cooper *v.* Pierce, 74 Tex. 526, 12 S. W. 211.

As to continued exemption of pension money.— Under a statute providing that pension money is exempt from execution whether the pensioner is the head of a family or not and under Code (1873), § 2371, providing that a widow shall be entitled to such property only as would be exempt in the hands of her husband "as the head of a family," the money received by the widow from the United States government as a pension due the deceased person is not exempt from the decedent's debts. Perkins *v.* Hinckley, 71 Iowa 499, 32 N. W. 469. In New York the unexpended pension money left by the deceased pensioner in the hands of the widow who with children survived the pensioner was held exempt for the benefit of the children upon the decease of the widowed mother. Hodge *v.* Leaning, 2 Dem. Surr. 553. But neither under the state nor the federal statute is pension money exempt after the pensioner's death in favor of descendants other than a family for whom the pensioner provided. Matter of Winans, 5 Dem. Surr. 138. See also *infra*, III, F.

87. Sneed *v.* Jenkins, 90 Tenn. 137, 16 S. W. 64.

88. Myers *v.* Forsythe, 10 Bush (Ky.) 394.

the construction of the laws given by the courts of the different jurisdictions.[89] The widow has been held not entitled to any exemption where she had separated

89. See cases cited *infra*, this note.

Early in Mississippi the exemption continued in favor of the wife. Loury *v.* Herbert, 25 Miss. 101. The widow was entitled to hold the property thus exempt to the exclusion of the administrator. Holliday *v.* Holland, 41 Miss. 528; Whitley *v.* Stephenson, 38 Miss. 113. See EXECUTORS AND ADMINISTRATORS. She was entitled to the exemption in addition to her distributive share of the estate. Wally *v.* Wally, 41 Miss. 657; Coleman *v.* Brooke, 37 Miss. 71. The widow of an insolvent was entitled to the exemption as if her husband had died solvent. Williams *v.* Hale, 12 Sm. & M. 562, construing the law of 1846. A term for years was considered personalty and could be exempted to the widow free from debt if it did not exceed fifteen hundred dollars. Smith *v.* Estell, 34 Miss. 527. Subsequently the law was changed so that the exemption was continued for the benefit of the widow and children. Wally *v.* Wally, 41 Miss. 657. A widow's right, as the head of a family, to property exempt from execution, vests by operation of law and is not affected by the fact that the property has not been formally set off to her. Grafton *v.* Smith, 66 Miss. 408, 6 So. 209.

In North Dakota under Comp. Laws, § 5779, providing that in addition to the homestead, the surviving husband, wife, or children shall be allowed all personal property or money that is exempt by law from levy and execution, when a husband dies without children property so exempt does not become assets of the deceased husband's estate, to be eventually distributed to his heirs, but belongs to the widow absolutely. Fore *v.* Fore, 2 N. D. 260, 50 N. W. 712.

In Ohio a widow whose husband was not the owner of a homestead is not, under Rev. St. §§ 5438, 6165, entitled to an allowance out of his personalty in lieu of a homestead. Wolverton *v.* Paddock, 3 Ohio Cir. Ct. 488, 2 Ohio Cir. Dec. 279.

In Tennessee the statute originally continued the exemption for the benefit of the widow alone. Vincent *v.* Vincent, 1 Heisk. 333. The widow's claim for intestate husband's exempt property was held to be confined to that which was on hand as part of his estate at the time of his death (Johnson *v.* Henry, 12 Heisk. 696); and she was entitled to hold the articles exempted to her by the act of 1833, chapter 80, only as against claims of creditors, and not as against the legatees and distributees of the deceased (Duncan *v.* Duncan, 2 Swan 351). Under Acts (1842), c. 42, § 2, she was authorized to claim only the articles therein specifically exempted as against legatees and distributees of decedent. Duncan *v.* Duncan, *supra*. Code, § 2288, provides that property exempt from execution shall, at the husband's death, be vested in the widow "for herself, and in trust for the benefit of the children." It further provides that "property exempt . . . shall not go to the executor or administrator." Construing this section with sections 2113 and 2285 to 2290, which provide for a year's support, etc., the widow of an insolvent testator is entitled to the same benefit as the widow of an insolvent intestate. "By the concluding words of the section, this property shall not go to the executor or administrator. This shows that the benefit was intended not only for the widows of those dying intestate, but of those dying testate; and also that the benefit was secured without regard to the size or solvency of the estate." Pride *v.* Watson, 7 Heisk. 232, 233 [*citing* Turner *v.* Fisher, 4 Sneed 209]. The exemption which is continued by Code, § 2288, for the benefit of the widow is not restricted to specific articles enumerated in the code, but embraces all property which may at any time be exempted by statute. Merriman *v.* Lacefield, 4 Heisk. 209. Under Milliken & V. Code, § 3128, providing that exempt personal property, on the death of the head of a family who leaves a wife or children surviving, shall go to the widow for herself and in trust for the benefit of her children, of the deceased, or of the widow, or of both, the word "children" means the young sons or daughters of either deceased or his widow who formed a part of the family of which deceased was the head, and in default of such children the widow takes the exempt property absolutely. Compton *v.* Perkins, 92 Tenn. 715, 23 S. W. 66.

In Texas the right of a surviving wife to exempt personal property is paramount to all ordinary claims against the estate. Williams *v.* Hall, 33 Tex. 212. Under Paschal Dig. art. 5487, which provides that "the property reserved from forced sale by the constitution and laws of this state, or its value if there be no such property, does not form any part of the estate of a deceased person where a constituent of the family survives," the surviving widow of one who dies leaving no homestead is entitled to an allowance in lieu of such personal property exempt as her husband did not leave her at the time of his death. Terry *v.* Terry, 39 Tex. 310.

The fact that the widow owns separate property equal in value to her distributive share does not prevent her from claiming her exemption. Darden *v.* Reese, 62 Ala. 311 (and cases cited); Thompson *v.* Thompson, 51 Ala. 493; Coleman *v.* Brooke, 37 Miss. 71.

Selection.— Under Ala. Acts (1872), p. 66, extending the exemption of personal property to the widow or child or children under twenty-one years of age on the death of the owner, and allowing them additional exemptions of enumerated property, the widow has

herself from her husband without cause.[90] Under the statutes of some of the states which continue the debtor's exemption for the benefit of the widow and children the children of a debtor who dies leaving no widow,[91] or the children of a debtor whose widow subsequently dies,[92] have the full benefit of the exemption law. In some jurisdictions the exemption can be enjoyed by the children during only their minority.[93]

C. Married Women. Through the liberal construction of exemption laws or sometimes through statutes which remove the common-law disability of married

a right to select any property on hand at the death of the husband, or choses in action due him, to make up her exemption. Darden *v.* Reese, 62 Ala. 311. See *infra*, VI, C, 2, h, (I).

Waiver by the deceased.— Where a judgment debtor waived the benefit of the act of April 9, 1849, and then subsequently devised all his estate to his wife, who was appointed executor, the wife cannot claim the exemption. Deininger *v.* Schnee, 1 Woodw. (Pa.) 94.

Subsequent marriage.— Under the act of Oct. 20, 1862, which provides that property exempt from execution of a husband who dies intestate shall descend in like manner as other property descends to his widow and children during widowhood, and afterward to all the children alike, the interest and estate of a widow in the property mentioned in the act ceases and determines upon her subsequent marriage to another husband, where there are no children of the former husband. The language used is that the property shall "descend in like manner as other property descends, according to the laws now in force, to the widow and children during widowhood." Her estate rests entirely on this clause, and is manifestly limited by it to her widowhood. Carpenter *v.* Brownlee, 38 Miss. 200.

90. Nye's Appeal, 126 Pa. St. 341, 17 Atl. 618, 12 Am. St. Rep. 873; Fyock's Estate, 9 Lanc. L. Rev. (Pa.) 89. See also Odiorne's Appeal, 54 Pa. St. 175, 93 Am. Dec. 683.

91. Whitcomb *v.* Reid, 31 Miss. 567, 66 Am. Dec. 579.

In Kansas where the statute exempts the library of a professional man, it is further provided that the widow shall be allowed to keep absolutely out of the estate for the use of herself and children all the personal property of the deceased which was exempt to him at the time of his death. . "If there be no children, then the said articles shall belong to the widow; and if there be children and no widow, said articles shall belong to such children." Under this statute the debtor's only survivor, a son, living in another state and more than twenty-one years of age, and not having been dependent upon him at the time of his death, was held entitled to the possession of his deceased father's law library. Taylor *v.* Winnie, 59 Kan. 16, 51 Pac. 890, 68 Am. St. Rep. 339.

92. Sneed *v.* Jenkins, 90 Tenn. 137, 16 S. W. 64, the court holding that upon the death of the widow there remained nothing of her interest in the property to which her second husband could lay claim.

In North Carolina the homestead exemption is continued for the benefit of the widow and children. There is no such provision in regard to the "personal property exemption." Johnson *v.* Cross, 66 N. C. 167. See also Bruton *v.* McRae, 125 N. C. 206, 34 S. E. 397; Welch *v.* Macy, 78 N. C. 240.

In Texas the minor children of a widower are entitled to property exempt from execution and to an allowance in lieu of specific property. Moore *v.* Owsley, 37 Tex. 603. But the minor children of a son of decedent are not entitled to an allowance in lieu of exempt property if the son's family were not constituents of deceased's family at the time of his death. Glasscock *v.* Stringer, (Civ. App. 1896) 33 S. W. 677.

Heirs.— In Florida it was held that the heirs succeeded to their ancestor's rights of exemption, and if the exempted property has been converted into funds, they may claim the value of the property. Carter *v.* Carter, 20 Fla. 558, 51 Am. Rep. 618. See also Baker *v.* State, 17 Fla. 406. In Texas it has been held that the heirs of a deceased surviving widow of a community cannot claim the exemption which existed in her favor in her lifetime, where the claimants were not constituents of her family. Peters *v.* Hood, 2 Tex. App. Civ. Cas. § 376. But in Cameron *v.* Morris, 83 Tex. 14, 18 S. W. 422, it was held that by the decease of the surviving wife the exempt personalty descended to her collateral heirs free from liability of debt.

Widowed stepmother and children.— Batt Civ. St. art 2049, § 4, provides that if there be children of the deceased of whom the widow is not the mother, the share of the children in the exempted property, except in the homestead, shall be delivered to the children. Under this statute if the widowed stepmother sells the children's share of exempt personal property and appropriates all of the proceeds the children may recover from her. Burns *v.* Falls, 23 Tex. Civ. App. 386, 56 S. W. 576.

93. Cofer *v.* Scroggins, 98 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54, construing Const. art. 10, § 3, and Code, §§ 2507, 2537.

The children of the first wife.— Where decedent leaves a second wife and minor children by the first wife, the children are entitled to share in allowance made in lieu of exemptions. Wilson *v.* Brinker, (Tex. Civ. App. 1903) 76 S. W. 213, under Rev. St. (1895) arts. 2037–2041, 2046–2051.

women, a married woman is entitled to claim an exemption independently of whether she is the head of a family, or sometimes whether she has any one dependent upon her.[94]

D. Householder. The term "householder," as used in the statutes of exemption, has been said to have almost the same meaning as the term "head of a family."[95] Nevertheless the term appears, in some instances at least, to have a broader significance than the term "head of a family."[96] A person who claims

94. *Alabama.*— Shuessler *v.* Wilson, 56 Ala. 516, where a married woman's claim for exemption of "articles of comfort and support of the household" was sustained under Rev. Code, § 2376.

Arkansas.—Memphis, etc., R. Co. *v.* Adams, 46 Ark. 159, holding that the word "married" in a constitutional provision applied either to a man or to a woman.

Colorado.— Scott *v.* Mills, 7 Colo. App. 155, 42 Pac. 1021, a married woman carrying on business on her own account as if she were sole under the provisions of Gen. St. p. 695, § 6.

Georgia.— A married woman having the care and support of her dependent daughters, although not the head of a family, is entitled to an exemption in property belonging to her separate estate. Sparks *v.* Shelnutt, 99 Ga. 629, 25 S. E. 853.

Indiana.— Crane *v.* Waggoner, 33 Ind. 83, a married woman being a resident householder.

Kentucky.— The property of a husband exempt from attachment continues exempt for the benefit of the wife, notwithstanding the abandonment of her husband. Baum *v.* Turner, 76 S. W. 129, 25 Ky. L. Rep. 600.

Michigan.— McHugh *v.* Curtis, 48 Mich. 262, 12 N. W. 163, holding that a married woman who supports her family or contributes to its support by the employment of a team may claim the benefit of the laws exempting a team from execution.

Minnesota.— A married woman who lives with her husband on a farm and labors jointly with him in cultivating the farm and caring for the household is entitled to the exemption given by Gen. St. (1894) § 5459, to a debtor and his family, of provisions for one year. Boelter *v.* Klossner, 74 Minn. 272, 77 N. W. 4, 73 Am. St. Rep. 347.

Ohio.— Kimmel *v.* Paronto, 52 Ohio St. 468, 469, 43 N. E. 1040, holding that under Rev. St. § 6319, "to entitle the married woman to such exemptions she must be the head of a family, but that she is entitled to all exemptions that are allowed by law to the head of a family, and it is not essential to her right to them that she shall be living with her husband, or have a child or children living with, or supported by her." This rule was followed in Shaw *v.* Foley, 62 Ohio St. 30, 56 N. E. 475, the court holding that the rule is not confined to a case where the demand is for an allowance of wearing apparel and household goods in lieu of a homestead, but that it applies to a case where the demand is for an allowance of money in lieu of a homestead. But *compare* Lugauer *v.* Weisgerber, 9 Ohio Dec. (Reprint) 458, 13 Cinc. L. Bul. 637, holding that the exemption under Rev. St. § 5440, can only be allowed where the husband and wife are living together.

See 23 Cent. Dig. tit. "Exemptions," § 21.

95. Chamberlain *v.* Darrow, 46 Hun (N. Y.) 48, 51; Peterson *v.* Bingham, 13 Wash. 178, 43 Pac. 42. See also Lowry *v.* McAlister, 86 Ind. 543; Sullivan *v.* Canan, Wils. (Ind.) 532, 534 (where the court said: "A house-holder may, as a general proposition, be said to be the head of a family occupying a house"); Pettel *v.* Muskegon Booming Co., 74 Mich. 214, 215, 41 N. W. 900 (where the court said: "The term 'householder' . . . embraces usually the head of an actual family dependent on him, whether housekeeping or not").

A person having and providing for a household is a householder. See Griffin *v.* Sutherland, 14 Barb. (N. Y.) 456.

"Householder having a family."— A householder may be said to be a person owning or holding and occupying a house; and a family may be defined to be a collection of persons living together under one head. A householder having a family may be characterized as the head of a family occupying a house and living together in one domestic establishment. Pearson *v.* Miller, 71 Miss. 379, 14 So. 731, 42 Am. St. Rep. 470.

96. In Hutchinson *v.* Chamberlin, 11 N. Y. Leg. Obs. 248, the court held that one who rents a house and keeps boarders and servants is a householder within the meaning of the exemption act of 1842, whether he has a family dependent upon him or not.

The term has been held to include: One who is not actually occupying a house, as for instance, one occupying rooms in a hotel with his family, although paying no board. Sullivan *v.* Canan, Wils. (Ind.) 532. A widower living in another man's house and paying the board of himself and his three children. Lowry *v.* McAlister, 86 Ind. 543. A bachelor occupying a house and maintaining a household of hired servants. Kelly *v.* McFadden, 80 Ind. 536. A judgment debtor occupying a house and taking boarders and hiring a woman to take charge of the house. Van Vechten *v.* Hall, 14 How. Pr. (N. Y.) 436; Hutchinson *v.* Chamberlin, 11 N. Y. Leg. Obs. 248. An unmarried white man over twenty-one years of age living with his sister, each owning personal property and each contributing to the household expenses, but

an exemption as a householder need not necessarily be a housekeeper at the time.[97] In Kentucky the statute gives an exemption to a "housekeeper," instead of a "householder." The term was early held by the courts to mean a housekeeper with a family;[98] and by a somewhat stricter construction than is usual it is held that to claim the benefit of the law the debtor must both be a housekeeper[99] and have a family.[1] Whether the statute uses the word "householder" or the word

he directing and controlling the household. Graham *v.* Crockett, 18 Ind. 119. A widower having no one necessarily dependent on him who lives in a house belonging to a married daughter, on which he pays the taxes and keeps up improvements without paying other rent, and who contributes to the living expenses of the daughter who acts as his housekeeper, her husband, and himself. Bipus *v.* Deer, 106 Ind. 135, 5 N. E. 894. A woman having an infant son who lives with her and is dependent upon her for support. Cantrell *v.* Connor, 6 Daly (N. Y.) 224. A widower who employed a family to keep house for him and his adopted daughter, who was dependent upon him for support, even though, at the time of the levy on the debtor's property, the daughter was on a visit to her natural mother. Bunnell *v.* Hay, 73 Ind. 452. A woman who was a widow and householder before her second marriage and who continues to reside on her farm and support her children by her first husband after her second marriage, although her second husband resides with her. Brigham *v.* Bush, 33 Barb. (N. Y.) 596.

The term has been held not to include: A widower living alone in his house and supporting no one, although the wife of his adult son came with her children each week to his house to aid him in keeping the house in order. Chamberlain *v.* Darrow, 46 Hun (N. Y.) 48, 11 N. Y. St. 100. An unmarried man occupying a house as an office and sleeping apartment and supporting a grandfather living and eating at another house, where the statute gave an exemption to a householder having a family. Pearson *v.* Miller, 71 Miss. 379, 14 So. 731, 42 Am. St. Rep. 470. A judgment debtor, none of whose children live with him, some of whom were grown and self-supporting, and whose younger children were mostly supported by their grandmother, and for whom he contributed little except occasional small sums in presents. Gregg *v.* Brickley, 27 Ind. App. 154, 59 N. E. 1072.

A householder who has neither wife nor child is entitled to hold one bed and bedding exempted under a statute exempting beds, bedsteads, bedding, and household utensils of any debtor necessary for himself, his wife, and children, providing the beds and bedding exempted should not exceed one bed, bedstead, and necessary bedding for two persons, and household furniture to the value of fifty dollars. Brown *v.* Wait, 19 Pick. (Mass.) 470, 31 Am. Dec. 154.

Under N. Y. Code Civ. Proc. § 1390, exempting certain articles of personal property when owned by a householder, and under section 1391 exempting other articles "owned by a person being a householder, or having a family for which he provides," and under section 2463 exempting personal earnings of a judgment debtor for services within thirty days when "necessary for the use of a family, wholly or partly supported by his labor," a man who is not a householder and has no family is not entitled to any exemption. Fink *v.* Fraenkle, 14 N. Y. Suppl. 140, 20 N. Y. Civ. Proc. 402.

97. It is enough if he is the head of a family to whose support he contributes. Astley *v.* Capron, 89 Ind. 167.

A person who has temporarily given up housekeeping and has stored his household furniture intending to keep house again is a householder. Griffin *v.* Sutherland, 14 Barb. (N. Y.) 456; Cantrell *v.* Connor, 6 Daly (N. Y.) 224.

One whose family and household goods are in transit from a former abode to a prospective one is still a householder and entitled to his exemption. Mark *v.* State, 15 Ind. 98; Woodward *v.* Murray, 18 Johns. (N. Y.) 400.

98. Gunn *v.* Gudehus, 15 B. Mon. (Ky.) 447.

99. Carter *v.* White, 10 Ky. L. Rep. 588.

1. Gunn *v.* Gudehus, 15 B. Mon. (Ky.) 447.

A debtor whose wife's mother continues to live with him after his wife's death, as she had before, and who is dependent upon him for support, is a housekeeper. Scholl *v.* Laurenz, 13 Ky. L. Rep. 971, 14 Ky. L. Rep. 228.

A debtor who has lived with a woman twenty years, although not married to her, and who still lived with her and had by her a minor son, is a housekeeper under the exemption laws. Bell *v.* Keach, 80 Ky. 42.

No legal obligation to support is necessary; a natural and moral obligation to support the family is sufficient. Scholl *v.* Laurenz, 13 Ky. L. Rep. 971, 14 Ky. L. Rep. 228. But see Carter *v.* Adams, 4 S. W. 36, 9 Ky. L. Rep. 91.

That the person living with the debtor should be dependent on him for support in the narrow and restricted sense of that word is not necessary. Thus, where the debtor's daughter supported herself by teaching school, and when not teaching made her home with him and performed household duties, the debtor was held to come within the statute. Doolin *v.* Dugan, 12 Ky. L. Rep. 749. But *compare* Carter *v.* Adams, 4 S. W. 36, 9 Ky. L. Rep. 91.

An unmarried woman with whom live her sister and her aunt who are not dependent upon the debtor for support is not entitled

"housekeeper" it has been held that the fact that the householder[2] or the housekeeper[3] lives separate from his family need not deprive him of his exemption.

E. Residents or Non-Residents — 1. In General. In a number of jurisdictions the exemption laws protect the property of residents only;[4] but in other jurisdictions a non-resident debtor is entitled to the benefit of the exemption laws unless the statute provides to the contrary.[5] Of course if the statute by its terms requires residence, a non-resident can take no benefit thereunder.[6] A person who moves into the state with his family and personal property for the

to exemption. Robinson *v.* Turner, 14 Ky. L. Rep. 79.

Where a widow was a housekeeper and subsequently married, the husband became a housekeeper and entitled to the benefit of the exemption law. Clark *v.* Miller, 9 Ky. L. Rep. 402.

2. Thus where a married man declared his intention of not living again with his family, he was nevertheless bound by law to support them and was held a householder within the meaning of the law and entitled to his exemption. Roney *v.* Wood, Wils. (Ind.) 378.

3. A widower with two children of tender age whom he provided for, but whom he kept in the care of his mother at her house, he himself occupying a single room about a mile distant as an office and dwelling without servants or other family than the aforesaid children who sometimes were with him at his office where he lodged and cooked and ate his meals, has been held a housekeeper. Seaton *v.* Marshall, 6 Bush (Ky.) 429, 99 Am. Dec. 683.

A mere temporary abandonment of his home and family by a man, and his staying at the house of a sister with nothing to show that he ceased to recognize the residence of his wife and children as his home, will not deprive him of the housekeeper's exemption. Carrington *v.* Herrin, 4 Bush (Ky.) 624.

4. *Alabama.*— Boykin *v.* Edwards, 21 Ala. 261 [*following* Allen *v.* Manasse, 4 Ala. 554]. See also Auerbach *v.* Pritchett, 58 Ala. 451.

Florida.— Post *v.* Bird, 28 Fla. 1, 9 So. 888.

Georgia.— Kyle *v.* Montgomery, 73 Ga. 337.

Indiana.— Hoagland *v.* Roe, 8 Ind. 275. See also Finley *v.* Sly, 44 Ind. 266.

Iowa.— See Lyon *v.* Callopy, 87 Iowa 567, 54 N. W. 476, 43 Am. St. Rep. 396.

Pennsylvania.—Collom's Appeal, 2 Pennyp. 130, 12 Wkly. Notes Cas. 309; Dock *v.* Cauldwell, 19 Pa. Super. Ct. 51; McWilliams *v.* Newlin, 1 Chest. Co. Rep. 50; Wilkins *v.* Rubincam, 15 Wkly. Notes Cas. 128; Snow *v.* Dill, 6 Wkly. Notes Cas. 330. In Linsenmayer *v.* Smythe, 3 Pa. Co. Ct. 400, a non-resident debtor was held entitled to the exemption allowed by the act of 1849.

Tennessee.— Hawkins *v.* Pearce, 11 Humphr. 44.

Wisconsin.— Commercial Nat. Bank *v.* Chicago, etc., R. Co., 45 Wis. 172. See, however, Lowe *v.* Strigham, 14 Wis. 222.

See 23 Cent. Dig. tit. "Exemptions," § 30.

In New Jersey, if the family of the debtor is resident, it is immaterial whether he resides within the state or not. Bonnel *v.* Dunn, 28 N. J. L. 153.

Foreign attachment.—See Yelverton *v.* Burton, 26 Pa. St. 351, holding that a debtor proceeded against by foreign attachment could not claim the benefit of the exemption law as against the foreign attachment because the act exempts property only from levy and sale on an execution or by distress for rent, and a foreign attachment is not an execution.

Wages and earnings.—The exemption given by the act of April 15, 1845, for wages and salaries, is not a mere personal privilege in the nature of an exemption, but is a limitation of jurisdiction, withdrawing wages and salaries altogether from the scope of the writ, and the proviso of the act of May 8, 1874, which denies to non-resident debtors the benefit of exemption laws of the commonwealth, does not apply. Mattson *v.* Bryan, 8 Pa. Co. Ct. 355; Billin *v.* Froment, 3 Pa. Co. Ct. 450. Under a statute which exempts the earnings of all married persons or persons who have to provide for the entire support of the family in the state of Wisconsin, a person who does not reside in the state, and whose family does not reside therein, is not entitled to the exemption. Commercial Nat. Bank *v.* Chicago, etc., R. Co., 45 Wis. 172.

Necessity of residence within the county to give the ordinary jurisdiction see Rutherford *v.* Wright, 41 Ga. 128.

5. *Illinois.*— Mineral Point R. Co. *v.* Barron, 83 Ill. 365; Menzie *v.* Kelly, 8 Ill. App. 259.

Kansas.—Kansas City, etc., R. Co. *v.* Gough, 35 Kan. 1, 10 Pac. 89, where the state of the debtor's residence and the state of the forum had substantially the same law exempting earnings of the debtor.

Nebraska.— Wright *v.* Chicago, etc., R. Co., 19 Nebr. 175, 27 N. W. 90, 56 Am. Rep. 747.

New Hampshire.— Hill *v.* Loomis, 6 N. H. 263.

New York.— Bunn *v.* Fonda, 2 Code Rep. 70.

Ohio.— Sproul *v.* McCoy, 26 Ohio St. 577; State *v.* O'Brien, 14 Ohio Cir. Ct. 300, 7 Ohio Cir. Dec. 386.

Oregon.— Bond *v.* Turner, 33 Oreg. 551, 54 Pac. 158, 44 L. R. A. 430.

Texas.— Bell *v.* Indian Live-Stock Co., (Sup. 1889) 11 S. W. 344.

Vermont.— Haskill *v.* Andros, 4 Vt. 609, 24 Am. Dec. 645.

See 23 Cent. Dig. tit. "Exemptions," § 30.

6. Dinkins *v.* Crunden-Martin Woodenware Co., 99 Mo. App. 310, 73 S. W. 246; Latta *v.* Bell, 122 N. C. 639, 30 S. E. 15.

purpose of residing therein is a resident of the state, within the exemption laws, before he has secured a place of permanent residence.[7]

2. DEBTORS WHO HAVE REMOVED OR ARE ABSENT. As a corollary to the rule that the exemption laws protect the property of residents only, a debtor who leaves the jurisdiction to take up his abode elsewhere is not entitled to the benefit of the exemption laws of the jurisdiction which he has left.[8] A mere temporary absence from the state does not deprive a debtor of his right of exemption;[9] for the general rule of law is, a domicile once acquired continues until it is left with an intention not to return.[10] So long as the debtor maintains his residence within

A non-resident who visits the state occasionally does not come within the terms of the statute allowing exemptions to a resident. *In re* Dinglehoef, 109 Fed. 866.

A resident who assigns his exemption and then becomes a non-resident, without having his exemption allotted to him, cannot take advantage of the exemption law; nor can his assignee. Latta *v.* Bell, 122 N. C. 639, 30 S. E. 15.

A person who has been absent from the state seven or eight years working upon a steamboat in the waters of Florida is not entitled to the exemption. Munds *v.* Cassidey, 98 N. C. 558, 4 S. E. 353, 355.

One who is a resident at the time of the levy, but not at the time of the sale, is not entitled to exemption. Jones *v.* Alsbrook, 115 N. C. 46, 20 S. E. 170.

The debtor need not have been a resident at the time the debt was contracted; it is sufficient if he is a resident at the time of the attempted levy. Gray *v.* Putnam, 51 S. C. 97, 28 S. E. 149 [*citing* Rollings *v.* Evans, 23 S. C. 316; Chaffee *v.* Rainey, 21 S. C. 11], construing Const. (1868) art. 2, § 32.

Residence at time of sale.— In State *v.* Allen, 48 W. Va. 154, 35 S. E. 990, 86 Am. St. Rep. 29, 50 L. R. A. 284, it was held that if a man was a resident at the time of the sale, he was entitled to the exemption, although at the time of the levy he was not a resident.

7. Chesney *v.* Francisco, 12 Nebr. 626, 12 N. W. 94.

Temporary residents.— The exemption laws include persons temporarily resident of the state as well as those permanently residing there. Everett *v.* Herrin, 46 Me. 357, 361, 74 Am. Dec. 455 ("the statute exempts certain property of the 'debtor,' and does not limit the exemption to the property of the citizen, except in the single case of a fishing boat"); Lowe *v.* Stringham, 14 Wis. 222.

8. *Indiana.*— See Ross *v.* Banta, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732.

Louisiana.— Lambeth *v.* Milton, 2 Rob. 81.

Michigan.— McHugh *v.* Curtis, 48 Mich. 262, 12 N. W. 163.

Minnesota.— Orr *v.* Box, 22 Minn. 485, absconding debtor.

Missouri.— See Stotesbury *v.* Kirtland, 35 Mo. App. 148.

Pennsylvania.— Dock *v.* Cauldwell, 19 Pa. Super. Ct. 51.

See 23 Cent. Dig. tit. "Exemptions," § 33.

An intention on the part of the head of the family to abscond from one part of the state to another will not deprive the family of this privilege. Davis *v.* Allen, 11 Ala. 164.

Claim by the wife.— Where a guardian who was a resident householder embezzled funds of his ward and a judgment was obtained against him therefor, but no prosecution was instituted, and he absconded and his whereabouts were unknown, it was held that he did not lose his domicile and his wife might claim exemption in his behalf under Ind. Rev. St. (1894) § 727. Green *v.* Simon, 17 Ind. App. 360, 46 N. E. 693.

That the debtor is keeping himself hidden to avoid a criminal prosecution, he being occasionally seen in the county, and that his family were staying temporarily with his brother, did not show that he had lost his residence or ceased to be a householder in such a sense as to deprive him of his exemption. Norman *v.* Bellman, 16 Ind. 156.

No part of the property left behind by the debtor can be held exempt by him. McHugh *v.* Curtis, 48 Mich. 262, 12 N. W. 163.

9. Birdsong *v.* Tuttle, 52 Ark. 91, 12 S. W. 158, 20 Am. St. Rep. 156; Wymond *v.* Amsbury, 2 Colo. 213; Rice *v.* Wadsworth, 59 N. H. 100. See also Erickson *v.* Drazkowski, 94 Mich. 551, 54 N. W. 283 (where the debtor's wife was compelled to seek shelter in her mother's house which was in a neighboring state, on account of the wrongful seizure of her household property); Griffith *v.* Bailey, 79 Mo. 472 (where a wife whose husband had fled the jurisdiction to escape punishment for crime, shortly after his departure sold some of the household goods, and taking the rest with her went to her father-in-law's house in Kansas, where her husband joined her, and where they resided until he was brought back to Missouri upon requisition in the same year).

10. Griffith *v.* Bailey, 79 Mo. 472 [*citing* Greene *v.* Beckwith, 38 Mo. 384; State *v.* Finn, 4 Mo. App. 347].

Presumption of place of residence.— Under the exemption laws a debtor must be conclusively presumed to reside where his family live with his consent, where there has been no separation between husband and wife, and where they occupy the old home, even though he be voluntarily absent, and he cannot by such voluntary absence deprive his family of their rights in the household property, nor would it cease to be exempt while so held. Freehling *v.* Bresnahan, 61 Mich. 540, 28 N. W. 531, 1 Am. St. Rep. 617.

Evidence.— On an issue whether the debtor

the jurisdiction, together with an *animus revertendi*, he is entitled to his exemption.[11] A protracted absence may become evidence of a change of residence.[12] If the debtor was a resident when the lien of the execution attached, his subsequent removal to and residence in another state does not defeat his right of exemption.[13] In the absence of statutory provision to that effect,[14] an intention on the part of the debtor to leave the jurisdiction,[15] or even preparations to leave,[16] do not deprive the debtor of his exemption.

F. Debtors With Family Out of Jurisdiction. By the very terms of the statute in some jurisdictions, a resident debtor whose family resides without the state is excluded from the benefit of the exemption granted;[17] but where the statute by its terms does not exclude such a case, the debtor whose family resided without the state has been held to have the benefit of the law.[18]

G. Citizenship. Alien residents have been held entitled to the benefit of the exemption law, although they are not citizens.[19]

had lost his residence by the removal into another state he may be asked whether he had removed to engage in business in the other state. Jones *v.* Alsbrook, 115 N. C. 46, 20 S. E. 170.

11. Wymond *v.* Amsbury, 2 Colo. 213.

12. Wymond *v.* Amsbury, 2 Colo. 213.

Where a debtor moved out of the state to obtain more advantageous employment, intending to return as soon as he could, but having no plan of returning at any definite time, and his family being absent from the state for two years, it was held that he was not entitled to the benefit of the exemption laws as a resident of the state. Stotesbury *v.* Kirtland, 35 Mo. App. 148.

Where one, with his family and part of his household goods, left the state for government service in one of the territories, with the intention of returning when the service should terminate, he was held not entitled to the exemption. "The facts found show that Banta, though a resident of Indiana in law, yet that he was not a householder in this State, but was a householder in New Mexico at the time he demanded his exemption and when the sheriff's sale to appellant Ross took place." Ross *v.* Banta, 140 Ind. 120, 141, 34 N. E. 865, 39 N. E. 732.

13. McCrary *v.* Chase, 71 Ala. 540; Caldwell *v.* Renfro, 99 Mo. App. 376, 73 S. W. 340. But see Jones *v.* Alsbrook, 115 N. C. 46, 20 S. E. 170.

14. In some jurisdictions there is a positive statutory provision which takes away the exemption of a debtor starting to leave the state or about to take up his abode in another state. Graw *v.* Manning, 54 Iowa 719, 7 N. W. 150; State *v.* Laies, 46 Mo. 108; Hackett *v.* Gihl, 63 Mo. App. 447; Stein *v.* Burnett, 43 Mo. App. 447 [*citing* State *v.* Chaney, 36 Mo. App. 513]; State *v.* Kingsbury, 33 Mo. App. 519.

15. Winslow *v.* Benedict, 70 Ill. 120; Urquhart *v.* Smith, 5 Kan. 447.

16. Herzfeld *v.* Beasley, 106 Ala. 447, 17 So. 623; Anthony *v.* Wade, 1 Bush (Ky.) 110; Rasco *v.* Sheet, 8 Ky. L. Rep. 703. See also Stirman *v.* Smith, 8 Ky. L. Rep. 781, 10 S. W. 131, 10 Ky. L. Rep. 665, where a debtor had determined to remove from the state and his family had already gone and still remained at his home for business reasons, intending soon to follow his family, but where he was still held entitled to the benefit of the exemption law.

In New Jersey it has been held that where a debtor was absent from the state and his family was at the railroad station with the goods and actually moving, he was still entitled to the benefit of the exemption law. Bonnel *v.* Dunn, 28 N. J. L. 153.

In West Virginia, however, it is held that where a resident, with fixed intention to remove to another state and there reside, sets out for that state in pursuance of his intention, he becomes a non-resident directly he begins his removal and loses his right of exemption. State *v.* Allen, 48 W. Va. 154, 35 S. E. 990, 86 Am. St. Rep. 29, 50 L. R. A. 284.

17. Allen *v.* Manasse, 4 Ala. 454; Schwartz *v.* Birnbaum, 21 Colo. 21, 39 Pac. 416, construing Mills Annot. St. § 2562. See also Hughes *v.* Sausley, 10 Ky. L. Rep. 116, holding that a debtor cannot locate his family in another state and maintain an exemption of such property as he may need for his personal convenience through an indefinite period of residence.

18. Pettit *v.* Muskegon Booming Co., 74 Mich. 214, 41 N. W. 900, where the debtor's family lived in Canada and were supported out of his wages and where the statute gave an exemption when the defendant is a "householder having a family." *Contra*, see Zimmerman *v.* Franke, 34 Kan. 650, 9 Pac. 747.

In New Jersey a debtor's family may be residents of the state and he not and he may nevertheless have his exemption. Bonnel *v.* Dunn, 28 N. J. L. 153.

Where a woman is a resident of Kansas at the time of the marriage and continues to remain so, although her husband has never been a resident there, she may hold property exempt from judicial process as head of the family. Fish *v.* Street, 27 Kan. 270.

19. People *v.* McClay, 2 Nebr. 7. See also ALIENS, 2 Cyc. 106 note 78.

In Texas a statute which gives an exemption of tools, apparatus, etc., to every citi-

H. Persons Engaged in Particular Occupations. In some states provisions are made for the allowance of exemptions to persons who are engaged in certain specified occupations,[20] such as persons engaged in agriculture,[21] teamsters,[22] peddlers,[23] or laborers.[24]

I. Persons in Military and Naval Service. Where, in response to a requisition by the United States government to the governor of the state, a military force is raised to protect the frontier of the state and is mustered into the service of the United States, the officers of the force are not in the service of the state within the meaning of the exemption laws.[25] Where a statute provides that no civil process shall issue or be enforced against any person mustered into the service of the state or of the United States during his term of service or thirty days thereafter, a fieri facias against the former owner of the property can be set aside.[26] A person in the naval service is not entitled to the benefit of the

zen or head of a family, has been construed to include, within its benefit, a person who is not a native-born and naturalized citizen, and the term, "every citizen," was held to have the meaning of its general acceptation as descriptive of the inhabitants of the country. Cobbs *v.* Coleman, 14 Tex. 594.

20. See cases cited *infra*, notes 21–24.

21. It has been held that a person is not considered to be engaged in agriculture, within the meaning of the exemption laws, unless he is so engaged to a considerable extent, or unless that is his principal occupation by which he derives his means of livelihood. Dulgar *v.* Hartmeyer, 6 Ohio Dec. (Reprint) 763, 8 Am. L. Rec. 15, 4 Cinc. L. Bul. 540. Thus where a man whose principal business was that of a butcher, but who cultivated a one-acre garden plot of ordinary vegetables, was held not entitled to an exemption of "five head of sheep and ten head of stock hogs," which the statute gave to a person "engaged in agriculture." Simons *v.* Lovell, 7 Heisk. (Tenn.) 510.

In Pennsylvania it has been held that a person is "actually engaged in the science of agriculture" when he derives the support of himself and family either wholly or in part from the tillage of fields. He must cultivate something more than a garden, although it may be much less than a farm. Springer *v.* Lewis, 22 Pa. St. 191.

Debtor's occupation at the time of the seizure, not afterward, is the test of whether he was a farmer and as such entitled to the exempt property accorded to farmers. Ray *v.* Hayes, 28 La. Ann. 641.

Exemption to person not head of family.— 15 S. C. Gen. St. p. 369, No. 308, allows an exemption of one-third of the yearly products to a laborer engaged in raising a crop; to be entitled to this exemption, he must show that he is not the head of a family, for the very object of the statute was to give an exemption to a person who is not the head of a family, as heads of families were provided for elsewhere in the law. Prince *v.* Nance, 7 S. C. 351.

22. A teamster within the meaning of such a statute is one who is engaged in the business of hauling freight for other persons for a consideration, by which he habitually supports himself and family, if he has one. Brusie *v.* Griffin, 34 Cal. 302, 91 Am. Dec. 695.

If he does not habitually earn his living as teamster or cartman, etc., he cannot claim the exemption. Dove *v.* Neuman, 62 Cal. 399. A keeper of a livery stable, although he constantly drives his own team in carrying persons about town (Edgecomb *v.* His Creditors, 19 Nev. 149, 7 Pac. 533), or a warehouseman, although he employ teams in hauling wheat to and from his warehouse (*In re* Parker, 18 Fed. Cas. No. 10,724, 5 Sawy. 58), is not a teamster.

A person who is a clerk in a store and has purchased horses with a view to giving employment to his son by whom exclusively the team was habitually used for hauling freight for the proprietors of the store and other persons is not a teamster. Brusie *v.* Griffith, 34 Cal. 302, 91 Am. Dec. 695.

The claimant need not drive the team with his own hands to come within the law. Elder *v.* Williams, 16 Nev. 416.

23. Stanton *v.* French, 83 Cal. 194, 23 Pac. 555, holding that a person engaged in delivering bread to the customers of his wife who is the manager, owner, and controller of the business is not a peddler within a statute which exempts certain property of a peddler by means of which he earns his living.

24. One whose only occupation was in having the entire care of a stallion moved from stand to stand for breeding purposes has been held a laborer, within the meaning of the exemption laws. Krebs *v.* Nicholson, 118 Iowa 134, 91 N. W. 923, 96 Am. St. Rep. 370, under Iowa Code, § 4008, exempting from execution certain property to the head of a family, if a laborer.

25. Highsmith *v.* Ussery, 25 Tex. Suppl. 96, holding that they are not entitled to exemption from liability to forced sales of the land of persons in the service of the state of Texas, within the meaning of the act of 1843.

26. Jefferis *v.* Shearer, 5 Phila. (Pa.) 330.

An exemption from imprisonment for debt, given by the statute of 1830 to soldiers of the American Revolution who were upward of seventy years of age, does not prohibit an attachment in debt against their property. Walker *v.* Anderson, 18 N. J. L. 217.

statute exempting the property of "soldiers in actual military service." [27] Where a statute makes an exemption of "such military arms and accoutrements as the debtor is required by law to furnish," the debtor's exemption continues so long as he is bound by law to furnish them and when the obligation ceases the exemption in the particular case ceases.[28]

J. Aged and Infirm Persons. Under a constitutional provision allowing to "every aged and infirm person" a right of exemption, a man sixty-six years old is entitled to an exemption from levy and sale, although he be a hale and hearty man.[29]

III. PROPERTY AND RIGHTS EXEMPT.

A. Money — 1. In General. Whether money can be held as exempt depends upon the statute.[30]

2. Fees. The fees due to a justice as part of the costs in a civil case tried before him may be claimed as exempt.[31]

3. Money in Custody of the Law. By some authorities the debtor may claim his exemption out of money in the custody of the law, as for instance out of a fund paid into court,[32] or money in the hands of the sheriff.[33] On the other hand, the courts in some jurisdictions will not generally allow this, for they require the debtor to be diligent enough to claim his exemption in the property before it has been converted into money.[34] Although exemption cannot be

27. Abrahams *v.* Bartlet, 18 Iowa 513, construing Laws (1862), c. 11.

28. Thus where it appeared that an officer in a militia regiment absconded from the state, he was, through his absence from the state, no longer under obligation to furnish these military accoutrements, and that therefore the exemption of the statute had ceased as to him. Owen *v.* Gray, 19 Vt. 543.

Enrolment of horse for service.— Under the Military Act of 1823, § 100, the written memorandum, made by the captain of a company of horse artillery, of an application to him by a member of his company to enroll his horse for service, is a sufficient enrolment to obtain exemption from seizure on execution. Shields *v.* Craney, 3 Wend. (N. Y.) 274.

29. Allen *v.* Pearce, 101 Ga. 316, 28 S. E. 859, 65 Am. St. Rep. 306, 39 L. R. A. 710.

30. See cases cited *infra*, this note.

In Georgia under the constitution of 1877 a debtor cannot have cash set apart as constituting his exemption. Richards *v.* Jernigan, 70 Ga. 650; Johnson *v.* Dobbs, 69 Ga. 605. Nor can money be set apart for investment by defendant under the homestead exemption. Richards *v.* Jernigan, 70 Ga. 650. Civ. Code (1895), § 2841, provides that there can be no valid allowance of cash as an exemption unless the order of the ordinary provides for its investment in personal property. This section is not applicable where the property exempted was an interest owned and held by the debtor in a judgment. Johnson *v.* Redwine, 105 Ga. 449, 33 S. E. 676. Under Civ. Code (1895), §§ 2866, 2867, there is no exemption of cash or any provision for the investment of cash in property. Rosser *v.* Florence, 119 Ga. 250, 25 S. E. 975.

In Illinois, in Fanning *v.* Jacksonville First Nat. Bank, 76 Ill. 53, it was held that the exemption of one hundred dollars' worth of property suited to the debtor's condition in life may include a bank deposit of less than that amount. But later under the act of July 1, 1877, providing that the selection and exemption of property as exempt shall not be made by the debtor, or allowed to him from any money, wages, or salary due him from any person or corporation, a debtor was not allowed to claim money deposited in a bank as exempt from garnishment (Nichols *v.* Goodheart, 5 Ill. App. 574); and under this statute money due the debtor may be garnished, although his whole property, including said money, is less than is allowed as exemption (Finlen *v.* Howard, 26 Ill. App. 66. See also Monniea *v.* German Ins. Co., 12 Ill. App. 240).

Money in lieu of specific exemption see *infra*, III, K.

31. Dane *v.* Loomis, 51 Ala. 487.

32. Rolla State Bank *v.* Borgfeld, 93 Mo. App. 62; Marchildon *v.* O'Hara, 52 Mo. App. 523.

33. Williamson *v.* Harris, 57 Ala. 40, 29 Am. Rep. 707; Gibbons *v.* Gaffney, 154 Pa. St. 48, 26 Atl. 24. Thus money exempt from garnishment in the hands of the employer is exempt from seizure by a rule against the sheriff after payment to him by the employer on a judgment in favor of the employee. Cox *v.* Bearden, 84 Ga. 304, 10 S. E. 627, 20 Am. St. Rep. 359.

34. Surratt *v.* Young, 55 Ark. 447, 18 S. W. 539; Weaver's Appeal, 18 Pa. St. 307. See also Miller's Appeal, 16 Pa. St. 300; State *v.* Boulden, 57 Md. 314. See *infra*, V, A, 1, c, (III); VI, C, 2, f, (IV).

When the exempt property has been converted into funds by the administrators of the decedent, the heirs may claim the value of the property out of the funds as exempt

claimed as a general rule against a mortgage in the foreclosure thereof,[35] it is held in some jurisdictions at least that the exemption may be allowed out of the surplus proceeds of the sale.[36]

B. Means of Gaining a Living — 1. Horses and Work Animals[37] — a. In General. A horse cannot generally be claimed exempt as a tool or implement of a trade[38] or profession.[39] A horse or a team of a teamster has been held exempt as "tools of his occupation,"[40] and in some jurisdictions a broad provision exempts a certain number of horses to a large class of persons who habitually earn their living by the use of the horses.[41] Under a statute exempting "one farm-horse or mule" a horse used in running a dray for the support of the owner and his family is exempt.[42] The term "horse" has been held to include a colt which could be rendered fit for service,[43] even though it is not shown that the colt has been broken to gear or used in harness.[44] Within the meaning of a statute exempting "two work animals" a mare is a "work animal."[45] A debtor is confined to the number of horses exempted by statute to him[46] or to

from satisfaction of the debts of the decedent. Carter *v.* Carter, 20 Fla. 558, 51 Am. Rep. 618. See *supra*, II, B, 3.

35. See *infra*, VI, A, 5.

36. *In re* Bremer, 4 Ohio S. & C. Pl. Dec. 80, 3 Ohio N. P. 12. See also Yorkshire *v.* Cooper, 10 Brit. Col. 65.

A surplus remaining after the sale of real estate partakes of the nature of realty, and the debtor cannot claim an exemption of personalty out of the surplus, after the foreclosure sale. Beard *v.* Smith, 71 Ala. 568.

37. At common law or under the statute of Marlbridge the landlord had no right to take in distress for rent, beasts of the plow, if there were other movable chattels immediately available, to satisfy the arrears of the rent. Piggott *v.* Bertles, 2 Gale 18, 5 L. J. Exch. 193, 1 M. & W. 441, 1 Tyrw. & G. 729. See 1 Coke Litt. 47*a*, *b*. But if there were no other movable chattels immediately available to satisfy the rent, work beasts were distrainable. Hutchins *v.* Chambers, 1 Burr. 579, 2 Ld. Ken. 204.

38. Wallace *v.* Collins, 5 Ark. 41, 39 Am. Dec. 359 (holding that a horse is not an implement of a tanner's trade); Tucker *v.* Napier, 1 Tex. App. Civ. Cas. § 670. *Contra*, Watson *v.* Lederer, 11 Colo. 577, 19 Pac. 602, 7 Am. St. Rep. 263, 1 L. R. A. 854, holding that a horse, wagon, and harness of an unmarried man engaged in assaying and sampling ores are exempt as tools, etc., of a mechanic, miner, or other person.

Whether a horse and wagon are necessary accessaries to the tools of a carpenter working in the country, for the purpose of moving the tools from one job to another, and therefore exempt, is a question for the jury. Whitmarsh *v.* Angle, 3 Code Rep. (N. Y.) 53.

39. Hanna *v.* Bry, 5 La. Ann. 651, 52 Am. Dec. 606, the horse of a physician.

40. Rice *v.* Wadsworth, 59 N. H. 100. But see Enscoe *v.* Dunn, 44 Conn. 93, 26 Am. Rep. 430.

A horse ordinarily used in the debtor's occupation is a "chattel" within 23 Vict. c. 25, providing that "tools and implements of, or chattels ordinarily used in the debtor's occupation, to the value of sixty dollars," are exempt. Davidson *v.* Reynolds, 16 U. C. C. P. 140.

41. See *In re* Hindman, 104 Fed. 331, 5 Am. Bankr. Rep. 20, 43 C. C. A. 558.

42. Kirksey *v.* Rowe, 114 Ga. 893, 40 S. E. 990, 88 Am. St. Rep. 65.

43. Winfrey *v.* Zimmerman, 8 Bush (Ky.) 587 (under the statute exempting a "work beast" or a "work horse"); Kennedy *v.* Bradbury, 55 Me. 107, 92 Am. Dec. 572 [*citing* Bowzey *v.* Newbegin, 48 Me. 410] (where the debtor owned neither oxen nor horses).

44. Hall *v.* Miller, 21 Tex. Civ. App. 336, 51 S. W. 36. *Contra*, see Durke *v.* Crane, 112 La. 156, 36 So. 306.

In Alabama it was held that it was sufficient if it was shown that the horse performed the common drudgery of the homestead, either by hauling wood, drawing the plow, carrying the family to church, etc., under the saddle or in traces, and that he need not have performed all these services; that if he was intended to be used in any or all of them, or in others of a kindred character, he was within the exemption of "one work horse." Noland *v.* Wickham, 9 Ala. 169, 44 Am. Dec. 435.

In California, under Code Civ. Proc. § 690, subd. 3, exempting from execution instruments of husbandry, also two horses, a debtor is not entitled to an exemption of colts unless he is engaged in farming. Murphy *v.* Harris, 77 Cal. 194, 19 Pac. 377.

In Michigan an unbroken two-year-old colt never used by the debtor, who had two other horses which he used in his business, is not exempt without showing that the owner intended to use the colt in a team. Hogan *v.* Neumeister, 117 Mich. 498, 76 N. W. 65. See Sullivan *v.* Davis, 50 Vt. 648.

45. White *v.* Wilson, 106 Mo. App. 406, 80 S. W. 692.

46. Pardue *v.* Recer, (Tex. Civ. App. 1898) 46 S. W. 112.

Under an early statute in Alabama a horse is exempt from levy on execution where the owner, the head of a family, owned but one horse and no mules or oxen, although he also owned slaves. Cook *v.* Baine, 37 Ala. 350.

his family.[47] Where a statute exempts to the debtor engaged in the business of agriculture "a pair of horses," he is not limited to any particular horses, but may select them.[48]

b. Stallion. A stallion kept solely for stud service is not exempt as a work horse.[49]

c. Oxen, Mules, Asses, and Other Animals. Under a statute which exempts to the debtor a horse, mule, or yoke of oxen, a single ox is exempt if the debtor has neither a horse, mule, nor other oxen.[50] Under a statute which exempts one yoke of oxen to the debtor, the fact that the debtor has an interest in another yoke of oxen which he has sold to another by a conditional sale does not prevent him from holding exempt the yoke remaining to him.[51] An exemption of a yoke of oxen does not necessarily imply cattle already "broke" to work.[52] Statutes which exempt horses have been held to include mules[53] and jackasses[54] within their meaning; and a statute which exempts a mule to the debtor includes within its meaning an ass which the debtor uses for farm work.[55]

d. What Constitutes a "Team." The term "team," as used in an exemption statute, has been construed to mean one horse or more as the case may be, together with the harness and the vehicle which is customarily attached for use.[56] Nevertheless the debtor may, if he so chooses, claim simply one horse, without either the harness or the vehicle, as a working team.[57] Moreover a wagon alone

47. Simonds *v.* Gulley, 7 Ala. 721.

Evidence that the debtor owns other horses is admissible in his action of replevin, for the horse claimed might prove not to be exempt by the proper statutory selection. Gass *v.* Van Wagner, 63 Mich. 610, 30 N. W. 198.

48. Conway *v.* Roberts, 38 Nebr. 456, 56 N. W. 980.

49. Robert *v.* Adams, 38 Cal. 383, 99 Am. Dec. 413; Smith *v.* Dayton, 94 Iowa 102, 62 N. W. 650; Krieg *v.* Fellows, 21 Nev. 307, 30 Pac. 994. *Contra*, Krebs *v.* Nicholson, 118 Iowa 134, 91 N. W. 923, 96 Am. St. Rep. 370; Smith *v.* Dayton, 94 Iowa 102, 62 N. W. 650; State *v.* Jungling, 116 Mo. 162, 22 S. W. 688.

But a stallion used by a farmer about his own farm work, and also for stud service, is exempt under Cal. Code Civ. Proc. § 690, exempting "two horses" used as farm-horses. McCue *v.* Tunstead, 65 Cal. 506, 4 Pac. 510. See also Allman *v.* Gann, 29 Ala. 240, holding that the use is a question of inference to be drawn by the jury on a survey of the evidence.

50. Wolfenbarger *v.* Standifer, 3 Sneed (Tenn.) 659.

Under a statute exempting "one pair of working cattle," a bull used for work is exempt, although the owner has no other cattle. Bowzey *v.* Newbegin, 48 Me. 410. See also Mallory *v.* Berry, 16 Kan. 293, where the debtor was allowed to claim as exempt an unbroken steer twenty months' old.

51. Wilkinson *v.* Wait, 44 Vt. 508, 8 Am. Rep. 391.

52. If the work cattle are intended by the owner for use and are old enough to be used as work cattle, they are within the statute. Mallory *v.* Berry, 16 Kan. 293; Berg *v.* Baldwin, 31 Minn. 541, 18 N. W. 821. See also Nelson *v.* Fightmaster, 4 Okla. 38, 44 Pac. 313 (holding that under an exemption of "one yoke of work oxen," a two-year-old steer and a two-year-old bull which had been yoked together a few times and are being kept by the owner for the purpose of work oxen are exempt); Mundell *v.* Hammond, 40 Vt. 641 (holding that a yoke of steer calves is included under an exemption of "one yoke of oxen or steers, as the debtor may select").

53. State *v.* Cunningham, 6 Nebr. 90; Allison *v.* Brookshire, 38 Tex. 199.

54. Robinson *v.* Robertson, 2 Tex. App. Civ. Cas. § 253.

55. Richardson *v.* Duncan, 2 Heisk. (Tenn.) 220.

56. Brown *v.* Davis, 9 Hun (N. Y.) 43; Cogsdill *v.* Brown, 5 Hun (N. Y.) 341.

57. Wilcox *v.* Hawley, 31 N. Y. 648; Finnin *v.* Malloy, 33 N. Y. Super. Ct. 382 (on the theory that defendant might take any portion of what constitutes a team, the court saying that this was the spirit of the decision of Lockwood *v.* Younglove, 27 Barb. (N. Y.) 505, where it was held that the debtor who has but one horse and hires another to work with it, his own horse, which is his interest in the team thus made, is exempt, if within the statutory limit of value); Hutchinson *v.* Chamberlin, 11 N. Y. Leg. Obs. 248.

The horse of a country physician whose patients reside at too great distance to visit on foot is a necessary team within the statute of 1842. Wheeler *v.* Cropsey, 5 How. Pr. (N. Y.) 288. But *compare* Hanna *v.* Bry, 5 La. Ann. 651, 52 Am. Dec. 606.

Necessary evidence as to value.—It is necessary for a person claiming a horse as his team to show that he is a householder, that his household furniture, workman's tools, and team do not in the aggregate exceed in value two hundred and fifty dollars. Upon these facts being established, he is entitled to his exemption. Wilcox *v.* Hawley, 31 N. Y. 648; Dains *v.* Prosser, 32 Barb. (N. Y.) 290.

may be exempt as part of the team.[58] And it has been held that a colt four months' old and its dam are not properly speaking a span.[59]

e. Use. Under statutes which exempt work horses or a team, the debtor is not entitled to hold them exempt unless he actually uses them in his business.[60] A team kept for pleasure merely is generally not exempt.[61] It need not be used exclusively in the debtor's business.[62] If the debtor employs his horses in his principal business,[63] as husbandry[64] or peddling,[65] the fact that he uses them occasionally in other ways will not deprive him of his right to his exemption, although he cannot claim any exemption unless he habitually earns his living by the use of them.[66] The fact that the debtor is temporarily not engaged in his occupation does not preclude him from having an exemption.[67] It is not necessary that the horse or team be in actual use at the time of the levy or attachment.[68] In New York[69] and in Kansas[70] the head of a family may hold exempt a horse used in any manner to support the family, there being no restriction as to the occupation of debtor.

2. Vehicles, Harness, Etc. The word "wagon" has been construed in some jurisdictions to mean any four-wheeled vehicle, whether covered or placed upon

58. Dains *v.* Prosser, 32 Barb. (N. Y.) 290 [*overruling* Morse *v.* Keyes, 6 How. Pr. 18]; Hutchinson *v.* Chamberlin, 11 N. Y. Leg. Obs. 248. See also Baker *v.* Hayzlett, 53 Iowa 18, 3 N. W. 796.

A horse, harness, and cart belonging to a public carman are exempt as a team under the act of 1842. Harthouse *v.* Rikers, 1 Duer (N. Y.) 606.

59. Ames *v.* Martin, 6 Wis. 361, 7 Am. Dec. 468, construing Rev. St. c. 102, § 58.

60. Corp *v.* Griswold, 27 Iowa 379; Hickok *v.* Thayer, 49 Vt. 372 (holding that the statute exempting "two horses kept and used for team-work, in lieu of oxen," means that the debtor cannot have both oxen and horses exempt); *In re* Parker, 18 Fed. Cas. No. 10,724, 5 Sawy. 58.

A horse required for actual use by a commercial traveler in his business of selling goods by sample is exempt under a statute exempting a horse when "required for farming or teaming purposes, or other actual use." Towne *v.* Marshall, 64 N. H. 460, 13 Atl. 648.

A liveryman who hires out his team and thereby earns his living may hold it exempt. Washburn *v.* Goodheart, 88 Ill. 229; Root *v.* Gay, 64 Iowa 399, 20 N. W. 489.

What constitutes actual use is a question of fact to be determined upon competent evidence. Cutting *v.* Tappan, 59 N. H. 562.

A horse and wagon bought for speculative purposes are not exempt, although the owner is an inventor and the horse and wagon enabled him to carry on his business. Boyle *v.* Walsh, 105 Mich. 237, 63 N. W. 435.

61. Washburn *v.* Goodhart, 88 Ill. 229; Burgess *v.* Everett, 9 Ohio St. 425.

A horse kept and used as a race-horse and not otherwise is not within the exemption of "two horses kept and used for team-work," although they had been used on a few occasions for work and also in taking members of the bankrupt family to and from work or school. *In re* Libby, 103 Fed. 776, 4 Am. Bankr. Rep. 615.

The use to which work beasts are put is immaterial. Young *v.* Bell, 1 Kan. App. 265, 40 Pac. 675.

62. Webster *v.* Orne, 45 Vt. 40.

63. See Kenyon *v.* Baker, 16 Mich. 373, 97 Am. Dec. 158.

64. McCue *v.* Tunstead, 65 Cal. 506, 3 Pac. 863, 4 Pac. 510. See also Webster *v.* Orne, 45 Vt. 40.

65. Stanton *v.* French, 91 Cal. 274, 27 Pac. 657, 25 Am. St. Rep. 174.

66. Murphy *v.* Harris, 77 Cal. 194, 19 Pac. 377; Dove *v.* Nunan, 62 Cal. 399.

67. Forsyth *v.* Bower, 54 Cal. 639 (where a hackman's horses were temporarily at pasture, and the hack at the painter's undergoing repairs); Jaquith *v.* Scott, 63 N. H. 5, 56 Am. Rep. 476 (where the debtor did not require the use of the horse at the time of the levy).

68. If the owner keeps it with the honest intention and purpose of using it for work within a reasonable time, it is exempt. Steele *v.* Lyford, 59 Vt. 230, 8 Atl. 736; Rowell *v.* Powell, 53 Vt. 302 [*distinguishing* Sullivan *v.* Davis, 50 Vt. 648].

If one procures a team or a part of a team intending to complete it for the purposes of using the same in good faith, that is such an "habitual use" as to exempt it from levy whether he had an opportunity to use it much or little. Bevan *v.* Hayden, 13 Iowa 122. See also Cleveland *v.* Andrews, 5 Ida. 65, 46 Pac. 1025, 95 Am. St. Rep. 165, construing Rev. St. § 4480.

69. A horse used in collecting accounts is exempt as a "team" under N. Y. Code Civ. Proc. § 1391. Knapp *v.* O'Neill, 46 Hun 317.

Whether a debtor has more or less property beyond the amount limited by statute is wholly immaterial in determining whether a team is necessary to him. Wilcox *v.* Hawley, 31 N. Y. 648. See also Smith *v.* Slade, 57 Barb. (N. Y.) 637.

70. Wilhite *v.* Williams, 41 Kan. 288, 21 Pac. 256, 13 Am. St. Rep. 281 [*citing* Nuzman *v.* Schooley, 36 Kan. 177, 12 Pac. 829].

springs, or for whatever use it may be employed;[71] but the usual interpretation confines the term, as used in the provisions for exemption, to a vehicle which is suitable for the transportation of goods.[72] The word "cart" includes a four-wheeled wagon.[73] The vehicle of a physician,[74] or the bus of a hotel-keeper, used in connection with his business,[75] comes within the exemption of the necessary tools and instruments kept for the purpose of carrying on trade or business. A teamster's wagon,[76] his sled,[77] and harness[78] are tools of his occupation. A bicycle is not a "tool or apparatus" belonging to the profession of an architect.[79] If the debtor changes his occupation so that his wagon is no longer needed, his exemption therein ceases.[80] If the debtor is entitled to claim his wagon as

71. Nichols *v.* Claiborne, 39 Tex. 363 (where a carriage which was the only vehicle of defendant was held exempt); Rodgers *v.* Ferguson, 32 Tex. 533.

72. Quigley *v.* Gorham, 5 Cal. 418, 63 Am. Dec. 139, holding that a hackney coach is not exempt. See Smith *v.* Chase, 71 Me. 164 (holding that a peddler's wagon for use in trade from place to place, with the body hung upon three elliptic steel springs, with drawer behind and doors at the sides and a railing around the top and dasher in front, is not exempt as one cart or drag or wagon); Gibson *v.* Gibbs, 9 Gray (Mass.) 62 (holding that a wagon with patent couplings attached, used by the owner in carrying on his business of selling couplings, is not exempt as a tool, implement, materials, stocks, or fixtures necessary for carrying on business).

Under this theory a buggy is held not exempt from execution.

Kansas.— Gordon *v.* Shields, 7 Kan. 320.

Minnesota.— Dingman *v.* Raymond, 27 Minn. 507, 8 N. W. 597. *Contra,* Allen *v.* Coates, 29 Minn. 46, 11 N. W. 132.

New Hampshire.— Parshley *v.* Green, 58 N. H. 271.

Ohio.— Dulgar *v.* Hartmeyer, 6 Ohio Dec. (Reprint) 763, 8 Am. L. Rec. 15, 4 Cinc. L. Bul. 540.

United States.— *In re* Peabody, 19 Fed. Cas. No. 10,866.

See 23 Cent. Dig. tit. "Exemptions," § 55.

A dray is included in the meaning of the statute exempting one wagon or one carriage or buggy. Cone *v.* Lewis, 64 Tex. 331, 53 Am. Rep. 767.

A hearse has been held a wagon within the meaning of the exemption law. Spikes *v.* Burgess, 65 Wis. 428, 27 N. W. 184. *Compare* Gordon *v.* Shields, 7 Kan. 320.

A light two-seated vehicle, known as a "surrey," owned and used by the debtor, is exempt under the statute exempting one wagon. Kimball *v.* Jones, 41 Minn. 318, 43 N. W. 74 [*following* Allen *v.* Coates, 29 Minn. 46, 11 N. W. 132].

In New York a wagon is not exempt unless it can be shown to be part of the debtor's "team." "A team 'consists of one horse or two horses with their harness and the vehicle to which they are customarily attached for use;' and a wagon, if exempt, is exempt because it is embraced in the description of a team." Brown *v.* Davis, 9 Hun 43, 44 [*quoting* from Dains *v.* Prosser, 32 Barb. 290]. If it can be shown to be part of a team, it can be held exempt if it does not exceed the statutory limitation of value. Dains *v.* Prosser, 32 Barb. 290. But see Wolf *v.* Farley, 16 N. Y. Suppl. 168.

73. Favers *v.* Glass, 22 Ala. 621, 58 Am. Dec. 272; Webb *v.* Brandon, 4 Heisk. (Tenn.) 285.

74. Farner *v.* Turner, 1 Iowa 53; Richards *v.* Hubbard, 59 N. H. 158, 47 Am. Rep. 188; Van Buren *v.* Loper, 29 Barb. (N. Y.) 388; Eastman *v.* Caswell, 8 How. Pr. (N. Y.) 75. See also Knapp *v.* Bartlett, 23 Wis. 68, 99 Am. Dec. 109.

75. White *v.* Gemeny, 47 Kan. 741, 28 Pac. 1011, 27 Am. St. Rep. 320.

Whether a wagon used chiefly by an itinerant lecturer to carry his apparatus in is a tool of his occupation is a question of fact. Hall *v.* Nelson, 59 N. H. 573.

76. Rice *v.* Wadsworth, 59 N. H. 100.

77. Rice *v.* Wadsworth, 59 N. H. 100. See also Parshley *v.* Green, 58 N. H. 271, holding that a sled used for drawing timber to market is exempt as a tool of one's occupation.

78. Rice *v.* Wadsworth, 59 N. H. 100.

The harness and buggy of an insurance agent, resident of the state, and the head of a family, used and kept by him in carrying on his business, and necessary in it, are exempt to him under Comp. Laws, c. 38, § 3, subd. 8, providing that necessary tools and implements of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, shall be exempt to him. Wilhite *v.* Williams, 41 Kan. 288, 21 Pac. 256, 13 Am. St. Rep. 281. *Contra,* Cotes *v.* McClure, 27 Tex. Civ. App. 459, 66 S. W. 224.

79. Smith *v.* Horton, 19 Tex. Civ. App. 28, 46 S. W. 401.

But under a statute which exempts to the head of a family, if a laborer, a team with a wagon or other vehicle and a proper harness or tackle by the use of which the debtor habitually earns his living, a bicycle used by a painter, paper-hanger, and bill-poster to earn his living is exempt. Roberts *v.* Parker, 117 Iowa 389, 90 N. W. 744, 94 Am. St. Rep. 316, 57 L. R. A. 764, holding that the fact that the bicycle was not known when the statute was enacted is immaterial.

80. Wright *v.* Hollingshead, 23 Ont. App. 1, under a statute which exempted tools and implements ordinarily used in the debtor's occupation.

exempt, his right to the exemption is not affected by the fact that at the time of the levy the wagon had been six weeks at a shop awaiting repair.[81] The exemption of a horse has been said to include not only the horse itself, but everything essential to its beneficial enjoyment.[82]

3. Tools and Implements of Trade — a. In General. The tools and implements of the debtor's trade were early exempt in this country.[83] The object of a provision of this character is as plain as the abolition of imprisonment for debt; that the debtor may not be deprived of the power of paying his debts and of making an honest living.[84] Nevertheless there were some jurisdictions which did not make a provision of this kind until comparatively recently.[85] This exemption sometimes exists in addition to what is allowed the head of a family,[86] or independently of whether the debtor has a family or not.[87]

b. As to Trade — (i) *Meaning of Term.* Under the statutes exempting the tools of a debtor's trade, the term "trade" is frequently, although by no means universally, construed to mean the kind of employment in which mechanics, artisans, and handicraftsmen are engaged.[88] Under this theory a merchant is not

81. Wolf *v.* Farley, 16 N. Y. Suppl. 168.

82. As for instance, shoes, saddle, etc. Cobbs *v.* Coleman, 14 Tex. 594. See also Dearborn *v.* Phillips, 21 Tex. 449, where a rope was held exempt with the horse. *Contra*, to the effect that a statute exempting a yoke of oxen or a horse does not include a harness within its meaning. See Somers *v.* Emerson, 58 N. H. 48; Carty *v.* Drew, 46 Vt. 346. Nor does such a statute include a wagon. Somers *v.* Emerson, 58 N. H. 48.

A road cart and harness appurtenant to a stallion and used to convey defendant from place to place as he was using the stallion for stud service comes within Iowa Code, § 4008, exempting to a laborer a team with the wagon or other vehicle and the harness or other tackle by the use of which he habitually earns his living. Krebs *v.* Nicholson, 118 Iowa 134, 91 N. W. 923, 96 Am. St. Rep. 370.

83. Hendricks *v.* Lewis, R. M. Charlt. (Ga.) 105.

At common law an implement of trade was privileged from distress for rent in only two cases: (1) If it was in actual use at the time; and (2) if there was other sufficient distress upon the premises. Fenton *v.* Logan, 9 Bing. 676, 2 L. J. C. P. 102, 3 Moore & S. 82, 23 E. C. L. 756; Gorton *v.* Falkner, 4 T. R. 565, 2 Rev. 463; Simpson *v.* Hartopp, Willes 512. See 1 Coke Litt. 47*a*, *b*.

84. See Harris *v.* Haynes, 30 Mich. 140.

85. See cases cited *infra*, this note.

In North Carolina a carpenter's tools might be sold under an original attachment, although they were exempt from the operation of a fieri facias. Martindale *v.* Whitehead, 46 N. C. 64, 66. The decision seems to have gone off on the fact that the debtor was attempting to escape process. "It is insisted, that although the words are confined to a 'fieri facias' the exemption by implication extends to an original attachment. This is a *non sequitur*; because the Legislature deemed it expedient to favor a citizen who resides among us, and renders obedience to the ordinary process of the law, by exempting from execution the tools with which he earns a livelihood, or the arms with which he musters, it does not follow that the intention was to extend the like favour to one, who leaves the country or persists in his disobedience to the commands of the State, which is shown by his failing to appear."

In Tennessee the tools of a mechanic might be levied on. Bell *v.* Douglass, 1 Yerg. (Tenn.) 397. This was changed by statute in 1871.

86. Harrison *v.* Martin, 7 Mo. 286.

87. Geiger *v.* Kobilka, 26 Wash. 171, 66 Pac. 423, 90 Am. St. Rep. 733.

88. See cases *infra*, this note.

A baker pursues a trade and may claim exemption to the tools and instruments used by him in his business and reasonably necessary thereto. *In re* Peterson, 95 Fed. 417, 2 Am. Bankr. Rep. 630.

Carpenters, blacksmiths, etc., see Atwood *v.* De Forest, 19 Conn. 513. It would not include the keeping of a meat market and grocery. Wallace *v.* Bartlett, 108 Mass. 52, construing Gen. St. c. 133, § 32, which exempts necessary tools, etc., of the debtor's "trade or business."

A farmer's tools are exempt as "tools of the occupation of the debtor." Wilkinson *v.* Alley, 45 N. H. 551. See also Garrett *v.* Patchin, 29 Vt. 248, 70 Am. Dec. 414. See *infra*, III, B, 6.

A mechanic need not be employed as a journeyman, to entitle him to the exemption. *In re* Robb, 99 Cal. 202, 33 Pac. 890, 37 Am. St. Rep. 48.

Insurance agent is a person engaged in a "trade or profession." Betz *v.* Maier, 12 Tex. Civ. App. 219, 33 S. W. 710.

The business of a contractor is not a trade, occupation, or profession. See *In re* Wetmore, 29 Fed. Cas. No. 17,508, Deady 585.

The business of saddle and harness making is a trade. Nichols *v.* Porter, 7 Tex. Civ. App. 302, 26 S. W. 859.

The business of trucking and carting is not

engaged in trade and therefore his fixtures and other equipment are not exempt[89] — *a fortiori* his merchandise or stock in trade.[90]

(II) *Number of Trades of Debtor.* In some jurisdictions it is held that if the debtor has more than one trade, he may hold exempt the tools or stock in trade appropriate to each.[91] Particularly is this so where the trades are of a kindred nature.[92] If the statute allows to the debtor an exemption of the tools of the trade in which he is "wholly or principally engaged,"[93] his exemption is of course restricted to the tools of one trade;[94] but the fact that the debtor uses his tool or implement in more than one business or trade does not affect his right of exemption if the implement is appropriate and necessary for his principal business.[95]

c. What "Tools or Implements" of Trade Connotes — (I) *In General.* In some jurisdictions the term "tool," as used in exemption statutes, includes only

a trade. Enscoe *v.* Dunn, 44 Conn. 93, 26 Am. Rep. 430.

The business of a warehouseman is not a trade, occupation, or profession. *In re* Parker, 18 Fed. Cas. No. 10,724, 5 Sawy. 58.

"Common tools of trade" is construed to mean simple and indispensable appliances used in the debtor's trade. Kirksey *v.* Rowe, 114 Ga. 893, 40 S. E. 990, 88 Am. St. Rep. 65; Lenoir *v.* Weeks, 20 Ga. 596.

89. Desmond *v.* Young, 173 Mass. 90, 53 N. E. 151; Wilson *v.* Elliot, 7 Gray (Mass.) 69. See McCord-Collins Co. *v.* Lazarus, (Tex. Civ. App. 1899) 50 S. W. 1048, holding that a soda-water fountain used in a confectionery store is not a tool or apparatus belonging to a trade or profession. *Contra*, Harrison *v.* Mitchell, 13 La. Ann. 260; Farmers', etc., Bank *v.* Franklin, 1 La. Ann. 393 (holding that the commercial books and counting-house furniture of a merchant and iron chests, found in his counting-house in which his books and papers are kept are exempt from seizure under execution); Cunningham *v.* Bructson, 101 Wis. 378, 77 N. W. 740.

A bread-box used by a debtor in his business as a peddler of bread is not exempt, as it is not named in the list of articles exempted by Cal. Code Civ. Proc. § 690. Stanton *v.* French, 91 Cal. 274, 27 Pac. 657, 25 Am. St. Rep. 174.

90. Reed *v.* Neale, 10 Gray (Mass.) 242; Files *v.* Stevens, 84 Me. 84, 24 Atl. 584, 30 Am. St. Rep. 333. See *infra*, III, B, 4.

91. Patten *v.* Smith, 4 Conn. 450, 10 Am. Dec. 166; Baker *v.* Willis, 123 Mass. 194, 25 Am. Rep. 61 (holding that a cornet of a debtor who is a musician and a tinner is exempt in addition to his tinner's tools, if the entire exemption amounts to less than the statutory limit of one hundred dollars); Pierce *v.* Gray, 7 Gray (Mass.) 67 (holding that one whose general business was the ice business and who lived in the country might nevertheless hold exempt some farming and gardening implements). See also Garrett *v.* Patchin, 29 Vt. 248, 70 Am. Dec. 414 (holding that under a statute exempting such tools as may be necessary for upholding life, a person whose principal occupation was shoemaking, but who lived rather isolated and did his own mending of sleds, ox-yokes, and other farming implements, was entitled to hold exempt a pitch fork, potato hook, scythe, spade, ax, and other tools). *Contra*, Jenkins *v.* McNall, 27 Kan. 532, 41 Am. Rep. 422; Bevitt *v.* Crandall, 19 Wis. 581, in neither of which cases was there any provision in the statute that the debtor might hold exempt the tools of his trade in which he was principally engaged.

The books and office furniture of a man who earns part of his living by legal work for others in his office were held exempt, although he combined this work with other business and did not advertise as a lawyer or appear in court in the trial of cases. U. S. Equitable L. Assur. Soc. *v.* Goode, 101 Iowa 160, 70 N. W. 113, 63 Am. St. Rep. 378, 35 L. R. A. 690.

92. Nichols *v.* Porter, 7 Tex. Civ. App. 302, 303, 26 S. W. 859 [*quoting* Thompson Homest. & Exempt. § 759]. See also Eager *v.* Taylor, 9 Allen (Mass.) 156.

A jeweler and watch repairer may have exempt articles appropriate to both employments. Howard *v.* Williams, 2 Pick. (Mass.) 80.

93. **The words "principally engaged" in a** provision of this kind must be construed without reference to the productiveness or profit of one kind of business over another, but with reference to the occupation on which the debtor relies for a livelihood and which occupies most of his time throughout the year. Stewart *v.* Welton, 32 Mich. 56.

94. Coville *v.* Bentley, 76 Mich. 248, 42 N. W. 1116, 15 Am. St. Rep. 312; Morrill *v.* Seymour, 3 Mich. 65.

Where a person runs a newspaper and job printing-office and is an agent for loaning money, he cannot claim as exempt from execution a job printing-press owned by him unless he derives his principal support from the business in which the press is used. Jenkins *v.* McNall, 27 Kan. 532, 41 Am. Rep. 422. The statute under which this case was decided made no restriction of its exemption to the trade in which the debtor was "wholly or principally engaged." The court came to its conclusion on general principles.

95. Kenyon *v.* Baker, 16 Mich. 373, 97 Am. Dec. 158.

those simple implements of the artisan which are worked by hand or muscular power.[96] It is usually held that the term does not include machinery used in manufacture, particularly where the business is conducted on a large scale.[97] Some of the cases go further and will not include minor machinery, even though it is worked by hand or foot power;[98] but other authorities take the other view.[99]

(II) *Printing-Press.* As to whether a printer's press, cases, type, etc., may be considered tools or implements of trade, the authorities are divided. Some maintain that they should be so considered;[1] others hold that they are more prop-

96. Batchelder *v.* Shapleigh, 10 Me. 135, 25 Am. Dec. 213; Daniels *v.* Hayward, 5 Allen (Mass.) 43, 81 Am. Dec. 731; Dowling *v.* Clark, 3 Allen (Mass.) 570, where a sewing-machine was held exempt. See also Buckingham *v.* Billings, 13 Mass. 82; Kilburn *v.* Demming, 2 Vt. 404, 406, 21 Am. Dec. 543. The articles of personal property exempted from execution under the clause "implements of the debtor's trade" are the tools of a mechanic used in carrying on his business. Atwood *v.* De Forest, 19 Conn. 513.

A seat in a stock exchange is not exempt, under N. Y. Code Civ. Proc. § 1391, as working tools of a member. Leggett *v.* Waller, 39 Misc. 408, 80 N. Y. Suppl. 13.

Household and kitchen furniture used in hotels and restaurants is not exempt as tools and apparatus. Frank *v.* Bean, 3 Tex. App. Civ. Cas. § 211.

Question for the jury.—Whether specific articles are in a particular case working tools within the meaning of the exemption statutes is a question of fact for the jury. Sammis *v.* Smith, 1 Thomps. & C. (N. Y.) 444.

97. *Alabama.*— Sallee *v.* Waters, 17 Ala. 482.

Connecticut.— Atwood *v.* De Forest, 19 Conn. 513. Although it may include tools of an improved and expensive character. Seeley *v.* Gwillim, 40 Conn. 106.

Louisiana.— Boston Belting Co. *v.* Ivens, 28 La. Ann. 695.

Massachusetts.— Buckingham *v.* Billings, 13 Mass. 82.

Pennsylvania.— Richie *v.* McCauley, 4 Pa. St. 471. But *compare* McDowell *v.* Shotwell, 2 Whart. 26.

Vermont.— Henry *v.* Sheldon, 35 Vt. 427, 82 Am. Dec. 644.

See 23 Cent. Dig. tit. "Exemptions," § 56 *et seq.*

Contra.— Wood *v.* Bresnahan, 63 Mich. 614, 617, 30 N. W. 206.

A machine for shaving and splitting leather, operated by hand, steam, or water, costing two hundred and fifty dollars, weighing from six hundred to nine hundred pounds, operated by a crank requiring two men to work it by hand, and which had to be kept in its place by cleats, is not exempt from attachment as a "tool," although it takes the place of a tool that is exempt. Henry *v.* Sheldon, 35 Vt. 427, 82 Am. Dec. 644.

A threshing-machine, five rods long, and requiring eight horses and ten men to work it, is not a "working tool." Ford *v.* Johnson, 34 Barb. (N. Y.) 364.

Tools and implements, material, stock, and fixtures of a paper-mill are not included in the exemption of Mass. St. (1855) c. 264, by which Rev. St. c. 97, § 22, is "so amended as to exempt from levy on execution the tools and implements, materials, stock, and fixtures of the debtor, necessary for carrying on his trade or business," to the amount of five hundred dollars. Smith *v.* Gibbs, 6 Gray (Mass.) 298, 300.

98. Willis *v.* Morris, 66 Tex. 628, 1 S. W. 799, 59 Am. Rep. 634.

The statutes do not exempt machines (for instance, a peg machine, which can be used by one person, and operated by hand power, and is of no great value) from attachment or sale on execution; such machines not being embraced under the words of the statute, "the tools of any debtor." Knox *v.* Chadbourne, 28 Me. 160. 48 Am. Dec. 487.

A portable machine, called a "Billy and Jenny," used for spinning and manufacturing cloth, and worked by hand, is not exempt from attachment and execution under Vt. Comp. St. p. 208, § 1. Kilburn *v.* Demming, 2 Vt. 404, 406, 21 Am. Dec. 543. *Contra,* McDowell *v.* Shotwell, 2 Whart. (Pa.) 26.

99. *In re* Robb, 99 Cal. 202, 33 Pac. 890, 37 Am. St. Rep. 48, where a lathe was held exempt.

Instruments used by a woman in making cheese, such as presses, vats, and knives, are exempt from seizure under judicial process as "tools and instruments." Fish *v.* Street, 27 Kan. 270.

The word "apparatus" used in the statute may take a wider range and embrace such minor machinery as may be operated by hand, and such as courts of high authority have held not to be included under the term "tools" as used in similar enactments. Willis *v.* Morris, 66 Tex. 628, 1 S. W. 799, 59 Am. Rep. 634.

A fisherman's boat is exempt by a special statute in Connecticut. See Enscoe *v.* Dunn, 44 Conn. 93. 26 Am. Rep. 430. See also Me. Rev. St. (1903) p. 730, tit. 9, c. 83, § 64, subd. 10; 2 Mass. Rev. St. (1903) p. 599, c. 177, § 34, subd. 9; 2 Ballinger Code Wash. (1897) § 5248, subd. 10–11.

1. *Alabama.*— Sallee *v.* Waters, 17 Ala. 482.

Connecticut.— Patten *v.* Smith, 4 Conn. 450, 10 Am. Dec. 166.

erly classed with machinery or apparatus for manufacture;[2] and still others say that the question is one for the jury.[3]

(III) *Photographer's Apparatus.* The vocation of a photographer being considered a trade, his photographic apparatus has been declared to be an implement of trade within the meaning of the exemption statutes.[4]

d. Necessary Tools. The exemption of tools "necessary to carry on the debtor's trade" is not limited to those implements which are absolutely indispensable for such a purpose, but may include those which enable the debtor to carry on his trade conveniently and in the usual manner.[5] Whether a particular implement is or is not necessary to the debtor depends in a large measure upon what his trade, profession, or business may be. Thus a hotel-keeper,[6] watchmaker,[7] tailor,[8]

Kansas.— Bliss *v.* Vedder, 34 Kan. 57, 7 Pac. 599, 55 Am. Rep. 237.

Louisiana.— Prather *v.* Bobo, 15 La. Ann. 524.

Texas.— Green *v.* Raymond, 58 Tex. 80, 44 Am. Rep. 601.

See 23 Cent. Dig. tit. "Exemptions," § 60.

A printing-press and printing materials of a head of a family are exempt under a statute which exempts the necessary tools of mechanics or other persons used and kept for carrying on his trade or business, where the owner, an employer of others, himself works with his employees as a foreman would work, and he has other business. Bliss *v.* Vedder. 34 Kan. 57, 7 Pac. 599, 55 Am. Rep. 237. But he cannot claim as exempt a job printing-press owned by him unless he derives his principal support from the business in which the press is used. Jenkins *v.* McNall, 27 Kan. 532, 41 Am. Rep. 422.

The press and type which are necessarily used by him and his journeymen in the publication of a weekly newspaper are tools or implements of trade; but the paper and ink employed by a printer in his business are stock in trade, and not "tools and implements of trade." Sallee *v.* Waters, 17 Ala. 482.

Where it is shown that a party depends entirely upon his trade as a printer and editor for means of support, his printing-press and materials necessary for the exercise of his trade are exempt from seizure under Code Pr. art. 644. Prather *v.* Bobo, 15 La. Ann. 524.

Limits of rule.— Even under authorities which consider a printer's outfit may be classed as tools or implements of trade, a debtor is entitled to claim as exempt only so much of his outfit as is "necessary to carry on his trade." *In re* Mitchell, 102 Cal. 534, 36 Pac. 840. In Prather *v.* Bobo, 15 La. Ann. 524, a printer's outfit worth eight hundred dollars was held exempt.

2. Danforth *v.* Woodward, 10 Pick. (Mass.) 423, 20 Am. Dec. 531; Buckingham *v.* Billings, 13 Mass. 82; Spooner *v.* Fletcher, 3 Vt. 133, 21 Am. Dec. 579.

3. Patten *v.* Smith, 4 Conn. 450, 10 Am. Dec. 166.

4. Davidson *v.* Hannan, 67 Conn. 312, 34 Atl. 1050, 52 Am. St. Rep. 282, 34 L. R. A. 718, holding that a photographic lens belonging to a photographer and used by him in his business is an implement of trade. *Contra*, Story *v.* Walker, 11 Lea (Tenn.) 515, 47 Am. Rep. 305, holding that in Tennessee a photographer, not being considered a mechanic, cannot claim that his tools are exempt.

A daguerreotype apparatus which the owner has ceased to use for taking likenesses and is using only to teach the art to another is not exempt from attachment as a "tool of his occupation." Norris *v.* Hoitt, 18 N. H. 196.

The building in which a photographer carries on his business is not exempt as "tools" or "instruments," even though it should be considered personal property. Holden *v.* Stranahan, 48 Iowa 70.

5. Howard *v.* Williams, 2 Pick. (Mass.) 80; Kenyon *v.* Baker, 16 Mich. 373, 97 Am. Dec. 158; Healy *v.* Bateman, 2 R. I. 454, 60 Am. Dec. 94. *Contra*, Prather *v.* Bobo, 15 La. Ann. 524.

"Nor is the phrase 'necessary to carry on his trade' used in such strict sense that because some journeyman machinist can get employment with a manufacturer who will supply the implement, therefore it is not necessary to the trade within the meaning of the statute." *In re* Robb, 99 Cal. 202, 203, 33 Pac. 890, 37 Am. St. Rep. 48.

6. To whom a grain drill is not a necessary tool or implement of his business. Reed *v.* Cooper, 30 Kan. 574, 1 Pac. 822.

7. Upon evidence that a safe was necessary to the profitable conduct of watch repairing and that customers would not leave their watches to be repaired unless one were used, a safe was properly set off to the debtor. McManus' Estate, 87 Cal. 292, 25 Pac. 413, 22 Am. St. Rep. 250, 10 L. R. A. 567.

So a lamp and other articles kept by a watchmaker and jeweler would be exempt from attachment and execution, as "tools and implements," provided such articles were necessary for his use in carrying on the business of making and repairing watches and jewelry. Bequillard *v.* Bartlett, 19 Kan. 382, 27 Am. Rep. 120.

8. To whom a sewing-machine was allowed as necessary. Dowling *v.* Clark, 1 Allen (Mass.) 283, 3 Allen (Mass.) 570.

In Minnesota two machines were allowed the debtor as reasonably necessary for carrying on his trade, under Gen. St. (1878)

barber,[9] cigarmaker,[10] milliner,[11] insurance agent,[12] abstracter of titles,[13] or plumber,[14] each requires implements peculiar to his calling, and to them he is entitled. But an implement which is not practically related to the particular calling in question cannot be held exempt on this ground.[15]

e. Necessity of Use of Tools — (i) *In General.* The "tools" of a mechanic or other person must be kept for actual use in his trade.[16] It may not be necessary that they be required for immediate use.[17] If he no longer uses them in carrying on his business,[18] or if he has abandoned his trade,[19] as where he conceives the design of absconding,[20] they are not exempt; but a mere temporary suspension of his trade will not have this result.[21]

(ii) *Personal Use.* It has been held that the tools claimed as exempt must be used by the debtor himself, and that those used by his employees are subject to execution;[22] but this is not the general rule.[23]

c. 66, § 310, exempting tools used in a trade, although subdivision 9 specifically enumerates only "one sewing machine." Cronfeldt *v.* Arrol, 50 Minn. 327, 52 N. W. 857, 36 Am. St. Rep. 648.

9. To whom a chair and mirror (Terry *v.* McDaniel, 103 Tenn. 415, 53 S. W. 732, 46 L. R. A. 559), table (Fore *v.* Cooper, (Tex. Civ. App. 1896) 34 S. W. 341), and foot-rest (Allen *v.* Thompson, 45 Vt. 472) are exempt as "tools."

10. A watch and chain are not exempt to a debtor who is a journeyman cigarmaker as a tool of his trade, although the debtor states that such watch is necessary to enable him to keep his time and that of the cigarmakers under him. Rothschild *v.* Boelter, 18 Minn. 361.

11. A clock, stove, screen, pitcher, and table cover, used by a milliner, should be exempted, if the jury find them to have been necessary and in use in her business. Woods *v.* Keyes, 14 Allen (Mass.) 236, 92 Am. Dec. 766.

12. An iron safe used by an insurance agent to store his policies, etc., is exempt from execution as a "tool" or "apparatus" under Sayles Civ. St. Tex. art. 2337. Betz *v.* Maier, 12 Tex. Civ. App. 219, 33 S. W. 710.

13. One carrying on business as an "insurance agent and abstracter of titles" is entitled to exemption from levy upon execution of one iron safe, one set of abstracts, and one cabinet and table, used in his business. Davidson *v.* Sechrist, 28 Kan. 324.

14. To whom a watch was not allowed without proof that it was necessary to carry on his trade. *In re* Turnbull, 106 Fed. 667.

15. Goozen *v.* Phillips, 49 Mich. 7, 12 N. W. 889.

Contra.— A "mower," not exceeding fifty dollars in value, is within the language of the statute exempting farming utensils within that amount from sale on execution, even though the judgment debtor is not a farmer, nor engaged in any business requiring a mower. Humphrey *v.* Taylor, 45 Wis. 251, 30 Am. Rep. 738; Knapp *v.* Bartlett, 23 Wis. 68, 99 Am. Dec. 109.

16. Prosser *v.* Hartley, 35 Minn. 340, 29 N. W. 156; Bond *v.* Tucker, 65 N. H. 165, 18 Atl. 653; Burgess *v.* Everett, 9 Ohio St. 425.

17. See Wilkinson *v.* Alley, 45 N. H. 551.

Intended use.— That an implement has never yet been applied by the debtor to the use for which he claims it is necessary and by virtue thereof exempt, is no answer to the debtor's claim. If it has been bought and prepared for use and is necessary in the debtor's trade, it is sufficient. Fields *v.* Moul, 15 Abb. Pr. (N. Y.) 6.

"Habitually earning living."— To entitle a mechanic to the exemption of tools provided in Code (1851), § 1898, he need not show that by the use of such tools he habitually earns his living. Perkins *v.* Wisner, 9 Iowa 320.

18. Norris *v.* Hoitt, 18 N. H. 196.

19. McCord-Collins Co. *v.* Lazarus, (Tex. Civ. App. 1899) 50 S. W. 1048. See Willis *v.* Morris, 66 Tex. 628, 1 S. W. 799, 59 Am. Rep. 634.

20. Davis *v.* Wood, 7 Mo. 162.

21. Caswell *v.* Keith, 12 Gray (Mass.) 351.

One who had failed in the hardware and tinning business, and made an assignment, reserving certain tinner's tools and machines as exempt, was held entitled to retain them as exempt, notwithstanding he did little or nothing in the business for four months afterward, in the absence of any showing that he had gone into other business, or relinquished his former occupation. Harris *v.* Haynes, 30 Mich. 140. See also Miller *v.* Weeks, 46 Kan. 307, 26 Pac. 694.

22. Abercrombie *v.* Alderson, 9 Ala. 981.

The wife's "implements or tools" of "trade or calling" are not exempt to the debtor. Smith *v.* Rogers, 16 Ga. 479.

23. Daniels *v.* Hayward, 5 Allen (Mass.) 43, 81 Am. Dec. 731; Dowling *v.* Clark, 3 Allen (Mass.) 570; Parkerson *v.* Wightman, 4 Strobh. (S. C.) 363; *In re* Osborn, 104 Fed. 780, 5 Am. Bankr. Rep. 111; *In re* Petersen, 95 Fed. 417, 2 Am. Bankr. Rep. 630.

Tools used by an apprentice or a journeyman in the jeweler's business are exempted, although the master (the debtor) worked principally on watches, his principal business being that of a jeweler. Howard *v.* Williams, 2 Pick. (Mass.) 80.

4. STOCK IN TRADE.[24] Under statutes exempting the stock in trade of a debtor, some courts have not allowed a merchant an exemption out of the goods in which he deals,[25] giving the phrase a meaning about equivalent to "tools and implements of trade;"[26] but a number of jurisdictions allow the debtor an exemption out of such goods.[27] In Minnesota and some other states "stock in trade" means: (1) Material which the debtor uses in manufacture; that is, material upon which he uses the tools which are exempt by law to him to produce a certain article;[28] and (2) the articles manufactured or in the process of manufacture by the debtor are held exempt.[29] That manufactured articles have been placed on sale by the debtor with non-exempt property, such as mere merchandise, in a jurisdiction where merchandise is held not to be exempt, will not affect the debtor's right of exemption of his own product;[30] but where articles are kept indiscriminately for sale and as stock for manufacture, as opportunity affords, they are not exempt as stock in trade.[31] Material held to be exempt as stock in trade must of course be suitable for the particular trade.[32] If a stock of goods set apart as an exemption is sold in the regular course of trade and other goods purchased with the pro-

Two barber chairs, a mirror in front of, and a table accompanying each, used constantly for five years in carrying on his trade by a barber, are exempt from execution, where he is dependent on his trade for support, and has kept another barber employed to assist him. Fore *v.* Cooper, (Tex. Civ. App. 1896) 34 S. W. 341.

24. **Selection from stock in trade** see *infra*, VI, C, 2, h, (I).

25. See cases cited *infra*, this note.

In Kansas this was held in Bequillard *v.* Bartlett, 19 Kan. 382, 27 Am. Rep. 120. See also *In re* Schwartz, 21 Fed. Cas. No. 12,503, where the federal court was sitting in Kansas. Nevertheless, in Rice *v.* Nolan, 33 Kan. 28, 5 Pac. 437, a merchant tailor who was a resident head of a family was held entitled to an exemption of such a portion of his stock in trade as he might select up to such a statutory limit of value.

In Minnesota see Grimes *v.* Bryne, 2 Minn. 89.

In the federal courts the Colorado (*In re* Peabody, 19 Fed. Cas. No. 10,866) and Wisconsin (*Ex p.* Robinson, 20 Fed. Cas. No. 11,933, 7 Biss. 125) statutes were construed according to the rule of the text, the court in each case having given a construction which is contrary to the rule laid down by the state court (see *infra*, note 27). *Contra*, *In re* Bjornstad, 3 Fed. Cas. No. 1,453, 9 Biss. 13.

26. *In re* Peabody, 19 Fed. Cas. No. 10,866.

27. Brewer *v.* Granger, 45 Ala. 580; Martin *v.* Bond, 14 Colo. 466, 24 Pac. 326; Wicker *v.* Comstock, 52 Wis. 315, 9 N. W. 25.

The liquors of a saloon-keeper are his "stock in trade" under Mills Annot. St. § 2562 (Weil *v.* Nevitt, 18 Colo. 10, 31 Pac. 487); but not if he is keeping a saloon without the license required by law (Walsch *v.* Call, 32 Wis. 159).

The fact that merchandise is of a perishable nature is not a ground for its exemption. Batchelder *v.* Frank, 49 Vt. 90.

28. Prosser *v.* Hartley, 35 Minn. 340, 29 N. W. 156. See also Eager *v.* Taylor, 9 Allen (Mass.) 156; Stewart *v.* Welton, 32 Mich. 56.

Lumber belonging to a carpenter, and by him being used in erecting a house for his own use, may be exempt as stock or material to enable him to carry on his trade. Hutchinson *v.* Roe, 44 Mich. 389, 6 N. W. 870.

Under this construction the exemption becomes a supplement to the exemption of the debtor's tools, that the debtor may have something upon which to use his tools and thus make the exemption of them to him a thing of some practical value. Grimes *v.* Bryne, 2 Minn. 89.

29. Smalley *v.* Masten, 8 Mich. 529, 77 Am. Dec. 467.

Masquerade suits, made by a tailor during his leisure moments, and at periods when he was unable to get work, and used by him for hiring out, are exempt under Howell Annot. St. Mich. § 7686, par. 8, as "materials, stock apparatus, . . . to enable any person to carry on the trade . . . or business in which he is wholly or principally employed." Fischer *v.* McIntyre, 66 Mich. 681, 33 N. W. 762.

Watches and jewelry manufactured by a watchmaker and jeweler, whether completed or not completed, as well as the raw materials kept by such watchmaker and jeweler from which to manufacture watches and jewelry, are exempt from attachment and execution as "stock in trade," to the amount of four hundred dollars. Bequillard *v.* Bartlett, 19 Kan. 382, 27 Am. Rep. 120.

Unfinished burial cases, bought by a manufacturer engaged in the business of buying cases in such unfinished condition and finishing them by lining them on the inside and trimming them on the outside are such manufaturer's stock in trade, within Minn. Gen. St. (1878) c. 66, § 279, subd. 8. McAbe *v.* Thompson, 27 Minn. 134, 6 N. W. 479.

30. Hillyer *v.* Remore, 42 Minn. 254, 44 N. W. 116.

31. Hillyer *v.* Remore, 42 Minn. 254, 44 N. W. 116.

32. Stewart *v.* Welton, 32 Mich. 56.

ceeds, the goods so purchased are exempt to an amount not exceeding the value of the original exemption.[33]

5. Library and Instruments of Professional Man. By a specific statutory provision the library and implements or working tools of a professional man are made exempt in a number of jurisdictions.[34] A professional library is generally held not exempt under a statute exempting the tools or implements of a debtor used in his trade.[35] The surgical instruments of a physician are exempt as his "tools."[36] Dental instruments have been held exempt either as "mechanical tools,"[37] or as "instruments necessary for the exercise" of the dentist's profession;[38] but the instruments claimed as exempt must be appropriate to the practice of dentistry.[39] Under a statute exempting generally the tools and instruments used by a debtor in his trade or calling, a cornet,[40] violin and bow,[41] and a piano[42]

33. Dodd *v.* Thompson, 63 Ga. 393. See also Hanley *v.* O'Donald, 30 Pa. St. 261, 263.

34. See Roberts *v.* Moudy, 30 Nebr. 683, 46 N. W. 1013, 27 Am. St. Rep. 426; Fowler *v.* Gilmore, 30 Tex. 432, and cases cited *infra*, this note.

Under Iowa Code, § 3072, which exempts the "proper tools, instruments, or books, of a debtor, of a . . . lawyer," the debtor who earns part of his living by legal work for others in his office and does not advertise as a lawyer or appear in court to try cases is entitled to the exemption, although he combines his legal work with other business. U. S. Equitable L. Assur. Soc. *v.* Goode, 101 Iowa 160, 70 N. W. 113, 63 Am. St. Rep. 378, 35 L. R. A. 690.

Under N. Y. Code Civ. Proc. § 1391, providing that the necessary working tools and library of a member of the legal profession shall be exempt from execution, a share in the New York law institute, conferring library privileges on a practising lawyer, is exempt to him from execution. Keiher *v.* Shipherd, 4 N. Y. Civ. Proc. 274.

A lawyer's ordinary office furniture, including his table, necessary to enable him to carry on his business, is included in the term "instruments." Abraham *v.* Davenport, 73 Iowa 111, 34 N. W. 767, 5 Am. St. Rep. 665.

Habitual use.— To entitle a physician to the exemption of his books and instruments, as provided by Code, § 1898, it is not necessary that it be shown that by their use he habitually earns his living. Perkins *v.* Wisner, 9 Iowa 320.

The library of a late practising attorney deceased is exempt in Texas. Fowler *v.* Gilmore, 30 Tex. 432.

Professional books as part of a "family library."— The medical books of a surgeon who is head of a family are exempt as a part of his family library. Robinson's Case, 3 Abb. Pr. (N. Y.) 467.

The books used by a minister of the gospel for the purpose of his calling are not liable to seizure and cannot be considered in determining his solvency as a surety. State *v.* St. Paul, 111 La. 71, 35 So. 389, under La. Code Pr. art. 644, forbidding the sheriff to seize the tools and instruments necessary for the exercise of the trade or profession by which a debtor gains a living.

Not all of the library may be exempt. Brown *v.* Hoffmeister, 71 Mo. 411, holding that only so much of a lawyer's library is exempt as he may select within the limits of value fixed by the subdivisions of section 9 of the execution law.

35. Thus a lawyer's library is not exempt under a statute of this kind. Lenoir *v.* Weeks, 20 Ga. 596; Church's Petitioner, 15 R. I. 245, 2 Atl. 761. *Contra*, Lambeth *v.* Milton, 2 Rob. (La.) 81, under La. Code Pr. art. 641.

36. Robinson's Case, 3 Abb. Pr. (N. Y.) 467. *Contra*, Demers *v.* O'Connor, 10 Quebec Super. Ct. 371 [*reversing* 7 Quebec Super. 216], construing the word "trade" (*metier*) as used in Code Civ. Proc. art. 556, which exempts the "tools and implements or other chattels ordinarily used by the debtor in his trade," as not being applicable to a liberal profession.

Knowledge of profession.— Under a statute which provides for an exemption of a horse, with surgical instruments, etc., to every practising physician, it has been held that a charge to the jury that the question to be considered had reference to the business in which the physician was engaged rather than the skill with which he exercised his business was misleading, in that it would allow the jury to infer that if the claimant was occupied in the business of practising medicine, he was within the exemption law, whether he had any knowledge of the business or not. Sutton *v.* Facey, 1 Mich. 243.

37. Maxon *v.* Perrott, 17 Mich. 332, 97 Am. Dec. 191. *Contra*, Whitcomb *v.* Reid, 31 Miss. 567, 66 Am. Dec. 579.

A dentist's chair is not exempt as a common tool of trade. Burt *v.* Stocks Coal Co., 119 Ga. 629, 46 S. E. 828, 100 Am. St. Rep. 203.

38. Duperron *v.* Communy, 6 La. Ann. 789.

39. Smith *v.* Rogers, 16 Ga. 479, holding that pianos and guitars cannot be so claimed.

40. Baker *v.* Willis, 123 Mass. 194, 25 Am. Rep. 61.

41. Goddard *v.* Chaffee, 2 Allen (Mass.) 395, 79 Am. Dec. 796.

42. Amend *v.* Murphy, 69 Ill. 337.

Instruments used by the wife of the debtor in her occupation as music teacher cannot be claimed by him as exempt as the "working

have been held exempt, where it appeared that the debtor depended upon the instrument for support.

6. Farming Utensils and Means of Reproduction. Under some statutes the ordinary implements of husbandry and manual labor are the farmer's "tools of his occupation."[43] A large threshing-machine is not a working tool.[44] Within an exemption of "such tools, etc., as may be necessary for upholding life" may be included such simple mechanic's tools as are indispensable for repairing farming implements.[45] When one claims as exempt "an implement of husbandry," it must appear that the implement in question is suitable for that occupation.[46] Not only must the implements claimed to be exempt be suitable to the occupation of a farmer, but they must be actually used by him in that occupation;[47] but if the debtor uses the implement in question principally in work upon his farm, the fact that it is used in harvesting the crops of others will not take it out of the statute.[48] The debtor is not confined to any one branch of farming, but has an exemption of all the necessary tools used by a debtor in diversified farming;[49] but he is confined to only that number of implements which is necessary.[50] If the implement comes under the head of utensils and implements of husbandry, it is exempt regardless of its value or the amount of land which may be culti-

tools or implements of my trade or calling." Smith *v.* Rogers, 16 Ga. 479.

43. As his plow, cart-wheels, and other rigging, harrows, and drags. Wilkinson *v.* Alley, 45 N. H. 551. Under a statute exempting tools, etc., of "any mechanic, miner or other person," a farmer may hold exempt his implements of husbandry. Knapp *v.* Bartlett, 23 Wis. 68, 99 Am. Dec. 109 [*explaining* Bevitt *v.* Crandall, 19 Wis. 581, which appeared to hold the other way]. *Contra*, Dailey *v.* May, 5 Mass. 313.

A whip owned and used by a debtor on his farm is not exempt from seizure on execution in the absence of special circumstances entitling him to hold it as so exempt. See Savage *v.* Davis, 134 Mass. 401.

44. Ford *v.* Johnson, 34 Barb. (N. Y.) 364, where the machine in question was five rods long and required eight horses and ten men to work it. But *compare In re* Klemp, 119 Cal. 41, 50 Pac. 1062, 63 Am. St. Rep. 69, 39 L. R. A. 340; Muse *v.* Darrah, 2 Ohio Dec. (Reprint) 604, 4 West. L. Month. 149.

45. For instance an ordinary grindstone such as is generally used on the farm. "Very little can be accomplished with an ax, scythe, and many other hand tools in constant use on a farm, without a grindstone to render them serviceable." White *v.* Capron, 52 Vt. 634, 637.

46. See Nelson *v.* Fightmaster, 4 Okla. 38, 44 Pac. 213, where a well-boring apparatus and derrick seldom used on the farm were held not exempt. A reaper and mower is exempt as a "farming utensil" or "instrument of husbandry." Voorhees *v.* Patterson, 20 Kan. 555; Henry *v.* McLean, 1 Tex. App. Civ. Cas. § 1079. So are a threshing-machine, a clover huller, and a wagon used for carrying the machines from place to place. Muse *v.* Darrah, 2 Ohio Dec. (Reprint) 604, 4 West. L. Month. 149. See also *In re* Klemp, 119 Cal. 41, 50 Pac. 1062, 63 Am. St. Rep. 69, 39 L. R. A. 340, where a harvester was held exempt.

What is suitable depends to some extent at least upon the conditions attending agriculture in the jurisdiction where the question arises. A logging capstan and cable and tools used in logging are exempt to one engaged in the occupation of a farmer, where it is necessary to use them in clearing and improving farms. State *v.* Creech, 18 Wash. 186, 51 Pac. 363.

Question for the jury.— Whether a given apparatus is an implement of husbandry within the meaning of the exemption law is a question for the jury under proper instructions of the court. Henry *v.* McLean, 1 Tex. App. Civ. Cas. § 1079.

47. Thus an expensive threshing outfit owned by the debtors and others in common and used by them to a limited extent upon their land, but principally used in doing work for others for hire, is not exempt as a "farming utensil or implement of husbandry." *In re* Baldwin, 71 Cal. 74, 12 Pac. 44. See Nelson *v.* Fightmaster, 4 Okla. 38, 44 Pac. 213, where the implements in question were a well-boring apparatus and a derrick. See also Tucker *v.* Napier, 1 Tex. App. Civ. Cas. § 670.

48. Spence *v.* Smith, 121 Cal. 536, 53 Pac. 653, 66 Am. St. Rep. 62; *In re* Klemp, 119 Cal. 41, 50 Pac. 1062, 63 Am. St. Rep. 69, 39 L. R. A. 340. See also Stanton *v.* French, 91 Cal. 274, 27 Pac. 657, 25 Am. St. Rep. 174. *Contra*, Meyer *v.* Meyer, 23 Iowa 359, 92 Am. Dec. 432, where the court appeared to base its decision somewhat on the fact that a threshing-machine was an expensive machine rather than a "proper tool or implement of a farmer."

In Massachusetts it was held that a shovel, pick-ax, dung fork, and hoe used by a debtor in tilling his land were exempt, although tilling land was not his principal business. Pierce *v.* Gray, 7 Gray 67.

49. *In re* Slade, 122 Cal. 434, 55 Pac. 158.

50. *In re* Baldwin, 71 Cal. 74, 12 Pac. 44.

vated therewith.[51] That the debtor is temporarily not engaged in the occupation of farming need not except him from the benefit of the exemption law if he intends *bona fide* to resume farming.[52] In a number of jurisdictions the farmer is allowed an exemption of the means of reproduction, whether of crops[53] or of animals.[54]

C. Articles Furnishing Means of Support or Comfort — 1. Food, Provisions, and Supplies — a. In General. The term "provisions" as used in the exemption laws has been defined in one state to mean something which is in a condition to be consumed as food, such as meal, flour, lard, meat, and other articles of that kind — articles which need no change for the cooking.[55] Butter made from the milk of a debtor's only cow has been held exempt under a statute which exempted among other animals a cow and forage for keeping them.[56] In some states it is held that the articles claimed exempt as provisions must be such as directly contribute to the sustenance of the debtor or his family; that it is not sufficient that the articles may by sale and exchange indirectly contribute to the support of the family.[57] Corn is one of the articles which may be embraced in "provisions on hand for family use."[58] "Flour" has been held to include corn meal,[59] but not wheat.[60] "Provisions" has been construed to include crops not yet severed from the soil.[61] A statute specifically exempting crops from execu-

51. Spence *v.* Smith, 121 Cal. 536, 53 Pac. 653, 66 Am. St. Rep. 62.

In Wisconsin, the farming utensils, in addition to those specifically allowed him in the statute, are limited in value to fifty dollars. Bevitt *v.* Crandall, 19 Wis. 581, construing Rev. St. c. 131, § 31, subd. 7.

52. Pease *v.* Price, 101 Iowa 57, 69 N. W. 1120 (where the debtor was temporarily residing in town and had sought for employment while there and had even offered a part of his farming implements for sale); Hickman *v.* Cruise, 72 Iowa 528, 34 N. W. 316, 2 Am. St. Rep. 256.

53. Stilson *v.* Gibbs, 46 Mich. 215, 9 N. W. 254; Matteson *v.* Munro, 80 Minn. 340, 83 N. W. 153. See also Hutchinson *v.* Whitmore, 90 Mich. 255, 51 N. W. 451, 30 Am. St. Rep. 431.

54. In Tennessee the statute exempts to the farmer "stock hogs." This term has been held to mean such hogs as are capable of reproduction and not to refer to barrows or spayed sows. Byous *v.* Mount, 89 Tenn. 261, 17 S. W. 1037.

55. "The statute seems to have drawn a distinction between provisions and hogs, cows, etc." Wilson *v.* McMillan, 80 Ga. 733, 735, 6 S. E. 182, holding that a milch cow is not exempt.

This definition was subsequently criticized as too restrictive. "This was discovered when the opinion was first published in the Southeastern Reporter, vol. 6, page 182. The word corn was then stricken from it, but this, it seems, did not carry the correction far enough." Cochran *v.* Harvey, 88 Ga. 352, 355, 14 S. E. 580.

56. Leavitt *v.* Metcalf, 2 Vt. 342, 19 Am. Dec. 718, the court reaching this conclusion through an exemption of the statutes which shows a strong tendency to enlarge the debtor's exemption.

57. George *v.* Hunter, 48 Kan. 651, 29 Pac. 1148, 30 Am. St. Rep. 325. See also Herndon *v.* Waters, 14 Ky. L. Rep. 667.

If the debtor is a boarder, has no family depending on him for support, or is in such a situation that he can have no intention to use corn or grain as food for himself and family, these articles are not necessary for the sustenance of himself and family and are not exempt. Blake *v.* Baker, 41 Me. 78.

58. Atkinson *v.* Gatcher, 23 Ark. 101.

59. Lashaway *v.* Tucker, 61 Hun (N. Y.) 6, 15 N. Y. Suppl. 490, under a statute which exempts "all necessary meat, fish, flour and vegetables actually provided for family use."

60. Salsbury *v.* Parsons, 36 Hun (N. Y.) 12.

Whether unthreshed wheat or oats are provisions has been held a question of fact for the jury. Plummer *v.* Currier, 52 N. H. 287, Ladd, J., dissenting, and holding that the fact that the grain was unthreshed made no difference.

61. Cochran *v.* Harvey, 88 Ga. 352, 14 S. E. 580 (corn on the ear in the shuck); Mulligan *v.* Newton, 16 Gray (Mass.) 211 (crops ripe for harvest); Carpenter *v.* Herrington, 25 Wend. (N. Y.) 370, 37 Am. Dec. 239 (potatoes in the ground).

Crop just visible above the ground. — In King *v.* Moore, 10 Mich. 538, the court was divided as to whether a statute exempting "provisions for the comfortable subsistence of a household and family for six months" exempted growing crops of corn and potatoes recently planted and which had just become visible above the ground.

But a field of standing corn does not constitute provisions actually prepared and designed for the use of the debtor's family so as to be exempt. This was on the principle that the provisions for the family must be claimed at the time of the levy and that if the debtor's family do not require the provisions at that time, they were not exempt then and no change of circumstances could give the debtor a right to have any portion of the crop set aside thereafter. Donahue *v.*

tion has been held to mean only those crops which are suitable for breadstuffs;[62] but this of course would not be true under the statute which allows the debtor to claim property in lieu of provisions for his family.[63] Articles which are in their nature provisions, but which are kept as part of a store of merchandise, and not for the use of the family, are not exempt as provisions.[64]

b. Animals Furnishing Food and Support. A statute which exempts a certain number of hogs, sheep, and cows to the head of a family is for the purpose of furnishing food to the debtor and his family.[65] Statutes exempting a cow for the use of a debtor have been held to include a heifer.[66] A statute which exempts "one swine" to the debtor includes a hog that has been killed.[67] A statute which exempts pork "on foot" includes hogs of all sizes and conditions and at all seasons of the year which may, in due season and at the convenience of the debtor, be prepared for and converted into pork.[68] By the terms of some

Steele, 1 Ohio Dec. (Reprint) 130, 2 West. L. J. 402.

Under bankruptcy act.— Where the homestead laws do not include growing crops, a bankrupt cannot claim as exempt property under the bankruptcy act a crop growing on his homestead at the time of the adjudication in bankruptcy, although an execution could not have been levied on the crop before its severance. *In re* Coffman, 93 Fed. 422, 1 Am. Bankr. Rep. 530.

62. A tobacco crop is not included within the meaning of the statute. Herndon *v.* Waters, 14 Ky. L. Rep. 667; Hayden *v.* Crutchfield, 3 Ky. L. Rep. 83.

63. See Com. *v.* Burnett, 44 S. W. 966, 19 Ky. L. Rep. 1836.

Improvements erected by a debtor on the land of his wife are not personal property which may be set apart by the debtor as exempt in lieu of provisions and provender not on hand. Lawson *v.* S. T. Barlow Co., 51 S. W. 314, 21 Ky. L. Rep. 308.

64. *Massachusetts.*— Where the statute exempts provisions necessary, procured, and intended for the use of the family, and where provisions are procured and kept both for the purpose of sale and for the use of the debtor's family, that portion of them which is for the use of the debtor's family, but which is not set apart or claimed at the time to be held for the family use, is not exempt. Nash *v.* Farrington, 4 Allen 157.

Missouri.— State *v.* Conner, 73 Mo. 572, where the debtor kept a grocery store and was in the habit of carrying home small quantities from the store as needed.

New Hampshire.—Bond *v.* Tucker, 65 N. H. 165, 18 Atl. 653, meat purchased by a dealer to be sold again in his business.

Ohio.—Robinett *v.* Doyle, 2 Ohio Dec. (Reprint) 391, 2 West. L. Month. 585, groceries kept for sale.

United States.— *In re* Lentz, 97 Fed. 486.

See 23 Cent. Dig. tit. "Exemptions," § 41.

The fact that a man is taking his vegetables to market to exchange them for articles of prime necessity in his family, or even to obtain the means to pay his taxes, will not deprive him of his right to insist that such vegetables were in fact actually provided for family use, and exempt from seizure and sale on execution against him. Shaw *v.* Davis, 55 Barb. (N. Y.) 389.

65. Wabash R. Co. *v.* Bowring, 103 Mo. App. 158, 77 S. W. 106, holding that such a statute would not include a hog chiefly valuable and used for exhibition on account of its great size. In Young *v.* Bell, 1 Kan. App. 265, 40 Pac. 675, it was held that the use to which the animals were put was immaterial.

66. As where the debtor has no other animal of the kind. Johnson *v.* Babcock, 8 Allen (Mass.) 583; Freeman *v.* Carpenter, 10 Vt. 433, 33 Am. Dec. 210; Dow *v.* Smith, 7 Vt. 465, 29 Am. Dec. 202. And especially where the owner intends to keep the heifer as a milch cow. Carruth *v.* Grassie, 11 Gray (Mass.) 211, 71 Am. Dec. 707; Nelson *v.* Fightmaster, 4 Okla. 38, 44 Pac. 213.

Under Iowa Code (1873), § 3072, however, exempting from execution "two cows and a calf" does not include a yearling heifer. Mitchell *v.* Joyce, 69 Iowa 121, 28 N. W. 473.

67. Gibson *v.* Jenney, 15 Mass. 205.

But a statute exempting one hog and the pork of the same when slaughtered does not exempt a hog in addition to the pork of the slaughtered hog. Parker *v.* Tirrell, 19 N. H. 201. But see *In re* Libby, 103 Fed. 776, 4 Am. Bankr. Rep. 615, holding that, under a statute exempting a debtor his "best swine or meat of a swine," the fact that a bankrupt has part of the meat of a swine does not deprive him of the right to select his best remaining swine as exempt.

68. Byous *v.* Mount, 89 Tenn. 361, 17 S. W. 1037, where it was unsuccessfully contended that the pigs and shoats which were claimed as exempt were not so in that they were not in fit condition for slaughter.

Hogs, bacon, and pork for a family consisting of more than six persons.— Under Milliken & V. Tenn. Code, § 2932, providing that "ten head of stock hogs" shall be exempt in the hands of each head of a family "engaged in agriculture," and section 2931, providing that twelve hundred pounds of pork "slaughtered or on foot," or nine hundred pounds of bacon, shall be exempt in the hands of each head of a family consisting of more than six persons, a farmer having a wife and five minor children living with him,

statutes the debtor is put to his election in claiming his animals as exempt.[69] In the absence of an election by the debtor, a choice the most favorable to him will be presumed.[70] If a statute exempts without qualification "two cows," a resident head of the family may have his two cows, although they are not used by him and his family and are not necessary to the support of himself or his family.[71]

c. Food For Exempt Animals. Under a statute exempting certain crops for fodder for animals only those crops which are suitable for the purpose are exempt.[72] A statute exempting food necessary for one cow and two swine does not admit of so liberal a construction as to include the food for a team which itself is exempted by another statute which says nothing about the food for the team.[73]

d. Amount — (i) *For Debtor and Family.* If the statute does not set out the time for which the exempted provisions are to last, such an amount of provisions is contemplated as will be necessary until the next annual period for laying up provisions.[74] If the statute exempts provisions to last for a certain length of time, the amount of provisions which the debtor is entitled to must be reckoned by the size of his family.[75] The statute which exempts without qualification the "provisions on hand for family use" exempts all such provisions regardless of what other property the execution debtor may have.[76] A debtor cannot claim property as exempt in lieu of provisions if he has other property remaining sufficient to supply the deficiency in breadstuffs.[77]

and having no slaughtered pork, and only fifteen pounds of bacon, and owning two brood sows, weighing seventy-five pounds each; twelve small pigs weighing eighteen or nineteen pounds each; and six shoats, spayed sows, and barrows, weighing eighty pounds each, on an average, can claim them all as exempt; the two brood sows and eight pigs as "stock hogs," and the others as "pork on foot." Byous *v.* Mount, 89 Tenn. 361, 17 S. W. 1037.

69. Wentworth *v.* Young, 17 Me. 70.

70. Stirman *v.* Smith, 8 Ky. L. Rep. 781. But *compare* Lindsey *v.* Fuller, 10 Watts (Pa.) 144.

If the debtor owns two cows, one of which is mortgaged, the other is exempt from attachment or levy. Tryon *v.* Mansir, 2 Allen (Mass.) 219; Greenleaf *v.* Sanborn, 44 N. H. 16. If both are subject to a mortgage his interest in one of them is exempt from attachment. Howard *v.* Cooper, 45 N. H. 339.

Selection of a portion from each alternative.— Where the debtor had an alternative of twelve hundred pounds of pork or nine hundred pounds of bacon, he was allowed to take both pork and bacon where the aggregate of his selections, when reduced to the value of either alternative, did not exceed the amount given by the statute. Byous *v.* Mount, 89 Tenn. 361, 17 S. W. 1037. See *infra*, VI, C, 2, h, (I).

71. Nuzman *v.* Schooley, 36 Kan. 177, 12 Pac. 829.

72. See cases *infra*, this note.

Cotton seed.— Under Tex. Rev. St. (1895) art. 2395, subd. 15, exempting from forced sale "all provisions and forage on hand for home consumption," cotton seed suitable for feeding stock is exempt, if the supply reserved be not unreasonably excessive, although it may not, in view of other forage on hand, be indispensable; and therefore an instruction that the forage must be "necessary" for home consumption to render it exempt is erroneous. Stephens *v.* Hobbs, 14 Tex. Civ. App. 148, 36 S. W. 287.

Tobacco would not be exempt. Herndon *v.* Waters, 14 Ky. L. Rep. 667.

73. Rue *v.* Alter, 5 Den. (N. Y.) 119.

74. Farrell *v.* Higley, Lalor (N. Y.) 87 (holding that, under a statute which exempts all provisions actually provided for family use and necessary fuel for the use of the family for sixty days, the sixty days' limitation applies only to the fuel); Anderson *v.* Larremore, 1 Tex. App. Civ. Cas. § 947.

"Necessary provisions" is construed in Texas to mean such a quantity "as a provident man would ordinarily keep on hand." See Ward *v.* Gibbs, 10 Tex. Civ. App. 287, 30 S. W. 1125. And the fact that the debtor owns a hundred hogs instead of twenty does not prevent him from claiming the corn he has on hand as necessary for home consumption. Burris *v.* Booth, (Tex. Civ. App. 1897) 40 S. W. 186.

75. Stilson *v.* Gibbs, 53 Mich. 280, 18 N. W. 815.

"Family" in this connection does not include strangers or boarders lodging with the family (Coffy *v.* Wilson, 65 Iowa 270, 21 N. W. 602, where the claimant was a restaurant keeper and made his claim under Iowa Code (1873), § 3072); but the grown children of the claimant who have no home elsewhere may be considered as a part of the debtor's family (Stilson *v.* Gibbs, 53 Mich. 280, 18 N. W. 815).

76. Atkinson *v.* Gatcher, 23 Ark. 101.

77. Turner-Looker Co. *v.* Garvey, 43 S. W. 202, 19 Ky. L. Rep. 1205. See also Lawson *v.* S. T. Barlow Co., 51 S. W. 314, 21 Ky. L. Rep. 308, holding that, to entitle him to hold the particular property in question as exempt, he must not only allege that he has not the

(II) *For Exempt Animals.* An exemption of fodder for animals is held to include only such an amount of fodder as is necessary to keep the animals which the debtor has at the time of the levy;[78] but this rule is not universal.[79] If the statute exempts "necessary" fodder for animals without specifying the length of time the fodder is for, so much is exempt if the season of the year when the levy is made allows any exemption[80] as will maintain them until the foddering season is past.[81] Under a statute allowing an exemption of sufficient fodder for a certain period of time, if the food is not needed at the time of the levy, it is not exempt then[82] or later, although unsold.[83]

2. Wearing Apparel[84] — a. In General. It has been held that at common law the wearing apparel in use by the debtor was exempt from execution.[85] A statute exempting wearing apparel necessary for immediate use has been construed to mean such an amount of clothing as is necessary to meet the varying changes of climate and the customary habits and ordinary necessities of the mass of the people of the jurisdiction which provides for this particular exemption.[86] "Necessary wearing apparel" includes cloth put into the hands of a tailor to be made into clothes for the debtor;[87] and it has been held that "necessary

requisite quantity of provisions, but must show the extent of the deficit.

That the debtor has recovered judgment for a large sum of money, which judgment has been superseded, does not prevent him from claiming exempt, in lieu of provisions for himself and family, chattels which had been seized. Braswell *v.* Rehkoff, 42 S. W. 916, 19 Ky. L. Rep. 1037.

78. Foss *v.* Stewart, 14 Me. 312 (under a statute which exempts two tons of hay, for "the use of said sheep"); King *v.* Moore, 10 Mich. 538.

79. Olin *v.* Fox, 79 Minn. 459, 82 N. W. 858; Kimball *v.* Woodruff, 55 Vt. 229, holding that under a statute exempting a cow, ten sheep, a yoke of oxen, or, in lieu thereof, two horses, "with sufficient forage for the keeping of the same through the winter," a debtor who had only a cow and a horse was entitled to claim as exempt not only forage enough for them, but enough for the other animals specified in the statute, although he did not have them. But see Cowan *v.* Main, 24 Wis. 569, holding that under Rev. St. c. 134, § 131, exempting the necessary food for one year's support, the food for the animals which the debtor does not possess and has no present purpose of obtaining, is not included.

80. "In the summer months, when cattle and sheep are depasturing, no such food as the statute contemplates is necessary, and probably none is protected. But after the grass is cut and converted into hay, I think so much is exempt as will be necessary for the next foddering season." Farrell *v.* Higley, Lalor (N. Y.) 87, 88.

81. Farrell *v.* Higley, Lalor (N. Y.) 87.

If a definite quantity of fodder is exempted by the statute without any reference to the length of time it is supposed to last, the full quantity is exempt, although part of the foddering season is gone. Kennedy *v.* Philbrick, 38 Me. 135.

82. A field of corn levied on in the month of June cannot be claimed by the debtor as exempt as food for his animals. Donahue *v.* Steele, 1 Ohio Dec. (Reprint) 130, 2 West. L. J. 402. See also Farrell *v.* Higley, Lalor (N. Y.) 87.

83. Donahue *v.* Steele, 1 Ohio Dec. (Reprint) 130, 2 West. L. J. 402.

The period of time for which the exempt fodder is to last begins to run from the levy. Donahue *v.* Steele, 1 Ohio Dec. (Reprint) 130, 2 West. L. J. 402.

84. **Masonic uniform.**— Under a state statute exempting from execution "all wearing apparel of the debtor," a bankrupt will be entitled to claim as exempt a masonic uniform, although he does not wear it as an ordinary and usual dress, but on special occasions only. *In re* Jones, 97 Fed. 773.

85. Bumpus *v.* Maynard, 38 Barb. (N. Y.) 626; *In re* Stokes, 4 Am. Bankr. Rep. 560. See also Hendricks *v.* Lewis, R. M. Charlt. (Ga.) 105 (holding that the necessary wearing apparel is exempt, but whether by the common law or by an early statute does not appear); Cook *v.* Gibbs, 3 Mass. 193 (holding that if the sheriff were to strip the debtor's wearing apparel from his body he would be a trespasser, for the apparel when being worn is not liable to execution).

86. Peverly *v.* Sayles, 10 N. H. 356.

87. Ordway *v.* Wilbur, 16 Me. 263, 33 Am. Dec. 663, where the cloth was already cut.

"Wearing apparel" does not include bags (Shaw *v.* Davis, 55 Barb. (N. Y.) 389), or traveling trunks or mahogany cabinet boxes (Towns *v.* Pratt, 33 N. H. 345, 66 Am. Dec. 726).

Cloth in hands of debtor.— The statutes exempting carpeting and manufactured cloth from execution, by construing them so as to effect their object, include cloth not manufactured by the debtor's family, but necessary for their use. Sims *v.* Reed, 12 B. Mon. (Ky.) 51.

Yarn and wool.— Under a statute which enacts that "all sheep, to the number of ten, with their fleeces and the yarn or cloth manufactured from the same," shall be ex-

wearing apparel" will include the trimmings[88] as well as the cloth left in the hands of a tailor for such a purpose.

b. Ornaments and Watches. The term "wearing apparel" generally means garments worn to protect the person from exposure;[89] it does not include articles used for ornament alone.[90] Whether a watch is exempt as wearing apparel depends upon the jurisdiction.[91]

3. Household Furniture and Goods — a. In General. "Household furniture" is a comprehensive term embracing about everything with which a house can be furnished;[92] but it is confined to what is for use in the debtor's household; it does not include the furniture of his shop or office.[93] An exemption of household furniture necessary for the debtor and his family is not confined to things absolutely indispensable to the bare existence of life, but includes whatever may be considered as necessary to comfort and convenience.[94] Nor is it confined to such articles as were necessary when the statute was enacted.[95] A time-

empt, the yarn possessed by a householder is exempt from execution to a certain amount, although he did not own the sheep which produced the wool from which the yarn was made. Hall *v.* Penny, 11 Wend. (N. Y.) 44, 25 Am. Dec. 601. See also Brackett *v.* Watkins, 21 Wend. (N. Y.) 68.

88. Richardson *v.* Buswell, 10 Metc. (Mass.) 506, 43 Am. Dec. 450.

89. Towns *v.* Pratt, 33 N. H. 345, 66 Am. Dec. 726.

A lace shawl is wearing apparel and exempt from execution; and whether it is of greater value than the owner ought to wear in her then condition of life cannot be inquired into. Frazier *v.* Barnum, 19 N. J. Eq. 316, 97 Am. Dec. 666.

90. Towns *v.* Pratt, 33 N. H. 345, 66 Am. Dec. 726 (a breast-pin); Frazier *v.* Barnum, 19 N. J. Eq. 316, 97 Am. Dec. 666 (rings and jewelry).

Diamond shirt stud.— But under Tex. Rev. St. § 2397, exempting all "wearing apparel" of the debtor, a diamond stud worth two hundred and fifty dollars habitually worn by the debtor for several years on the front of his shirt and for the purpose of fastening his shirt together has been held exempt when there were no circumstances connected with the accusation or use tending to show fraud or bad faith toward the debtor's creditors. *In re* Smith, 96 Fed. 832.

91. See cases cited *infra*, this note.

That a watch is exempt was held in Beckett *v.* Wilson, 5 Ohio S. & C. Pl. Dec. 257, 5 Ohio N. P. 155; Stewart *v.* McClung, 12 Oreg. 431, 8 Pac. 447, 53 Am. Rep. 374; Brown *v.* Edmonds, 8 S. D. 271, 66 N. W. 310, 59 Am. St. Rep. 762; *In re* Jones, 97 Fed. 773; Sellers *v.* Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529.

That a watch is not exempt was held in Rothschild *v.* Boelter, 18 Minn. 361; *In re* Turnbull, 106 Fed. 667.

In New York a watch worn merely as an ornament and not necessary in the employment through which the judgment debtor earns his livelihood is not exempt. Peck *v.* Mulvihill, 2 N. Y. City Ct. 424.

An insolvent debtor cannot hold two watches exempt from execution as part of his "wearing apparel." Smith *v.* Rogers, 16 Ga. 479.

92. Rasure *v.* Hart, 18 Kan. 340, 26 Am. Rep. 772.

A traveling trunk, mahogany cabinet box, and breast-pin are not articles exempted from attachment and execution, as household furniture. Towns *v.* Pratt, 33 N. H. 345, 66 Am. Dec. 726.

93. Kessler *v.* McConachy, 1 Rawle (Pa.) 435.

A dentist's chair is not exempt as a chair suitable for the use of the family. Burt *v.* Stocks Coal Co., 119 Ga. 629, 46 S. E. 828, 100 Am. St. Rep. 203.

Furniture and equipments belonging to and used by the debtor in his capacity of third-class postmaster are not exempt, but are protected only in so far as execution thereon would prevent the delivery of the mails. Turrill *v.* McCarthy, 114 Iowa 681, 87 N. W. 667, where, however, no claim of exemption was made under the state statute, but a reservation upon an assignment for the benefit of creditors.

94. Hitchcock *v.* Holmes, 43 Conn. 528; Montague *v.* Richardson, 24 Conn. 338, 63 Am. Dec. 173; Davlin *v.* Stone, 4 Cush. (Mass.) 359. See also Leavitt *v.* Metcalf, 2 Vt. 342, 19 Am. Dec. 718.

But in an early case in New York it was held that under a statute exempting from execution the necessary cooking utensils of a householder, a person claiming such exemption must show affirmatively that the cooking utensils were in fact necessary, and not merely useful. Van Sickler *v.* Jacobs, 14 Johns. 434.

No question of the furniture being necessary.— Under a statute exempting certain specific household furniture together with all other household furniture, not specially enumerated and not exceeding a certain amount, everything with which a house can be furnished is included, whether or not they are necessary to the use of the debtor or family. Rasure *v.* Hart, 18 Kan. 340, 26 Am. Rep. 772.

95. Montague *v.* Richardson, 24 Conn. 338, 63 Am. Dec. 173.

Regard may be had to the improved standard in living, the improvement in the arts,

piece[96] and a cook stove[97] may be considered as necessary furniture. So may beds and bedding.[98] A rifle is not exempt as an article of household and kitchen furniture, although it might be as the furniture of a frontiersman's tent or cabin.[99] Pianos are generally not considered articles of household furniture, within the meaning of the term as used in the exemption laws.[1] Although it must appear that the furniture is kept and used by the debtor and his family or is kept for their use,[2] the fact that the furniture is not in actual personal use by the debtor or his family does not take it out of the statute.[3] Thus it has been held that

and the general tendency to increase the amount of the debtor's exemption. Leavitt *v.* Metcalf, 2 Vt. 342, 19 Am. Dec. 718.

But the meaning ought not to be enlarged by a change in the station in life or previous habits of the individual, as is allowable in determining what are necessaries for a wife or a minor. Hitchcock *v.* Holmes, 43 Conn. 528.

96. Leavitt *v.* Metcalf, 2 Vt. 342, 19 Am. Dec. 718. But not a clock worth fifty dollars. See *supra*, note 91.

A watch and chain habitually carried on the person of the debtor for his own convenience, and not used for the benefit of the family, is not exempt as "household furniture." Brown *v.* Edmonds, 5 S. D. 508, 59 N. W. 731. See also Rothschild *v.* Boelter, 18 Minn. 361. Under N. Y. Laws (1842), c. 157, § 1, exempting "necessary household furniture and working tools" from execution, it was held that whether a watch was necessary to the debtor depended on whether it was necessary in the prosecution of his business. Bitting *v.* Vandenburgh, 17 How. Pr. 80.

It is a question for the jury whether a clock worth one hundred and fifty dollars was a necessary article of household furniture. Wilson *v.* Ellis, 1 Den. (N. Y.) 462.

97. Hart *v.* Hyde, 5 Vt. 328; Crocker *v.* Spencer, 2 D. Chipm. (Vt.) 68, 15 Am. Dec. 652.

But at one time in Massachusetts it was held that unless it appeared that a cooking stove was used "exclusively" for warming a debtor's house, as required by St. (1817) c. 108, it was not exempt. "By the revised statutes the word 'exclusively' is omitted, and that statute, therefore, would probably admit of a different construction." Brown *v.* Wait, 19 Pick. 470, 472, 31 Am. Dec. 154.

98. See Hendricks *v.* Lewis, R. M. Charlt. (Ga.) 105.

Bags are not bedding within the exemption law. Shaw *v.* Davis, 55 Barb. (N. Y.) 389.

The number of beds to which the debtor is entitled as necessary furniture depends upon the size of his family. Thus under the Massachusetts statute of 1805, a debtor whose family consisted of himself, wife, and three young sons was held entitled to only two beds. Glidden *v.* Smith, 15 Mass. 170. A later case in Massachusetts holds that an unmarried debtor cannot claim as exempt his bed and bedding used by persons boarding with him. Brown *v.* Wait, 19 Pick. 470, 31 Am. Dec. 154. Under Wis. Rev. St. c. 134, § 32, par. 6, exempting "all beds, bedsteads and bedding kept and used for the debtor and his family," the exemption of bedsteads and beds actually used by the debtor's family would not be affected by the fact that there were other beds of the debtor not levied upon, unless it affirmatively appears that the number was greater than necessary for the use and comfort of the debtor and his family. Heath *v.* Keyes, 35 Wis. 668.

99. Choate *v.* Redding, 18 Tex. 579.

1. Kehl *v.* Dunn, 102 Mich. 581, 61 N. W. 71, 47 Am. St. Rep. 561; Dunlap *v.* Edgerton, 30 Vt. 224; Tanner *v.* Billings, 18 Wis. 163, 86 Am. Dec. 755. *Contra*, Alsup *v.* Jordan, 69 Tex. 300, 6 S. W. 831, 5 Am. St. Rep. 53.

In New York replevin for a piano, which was seized under execution, and which plaintiff claimed as a part of her necessary furniture, under Code Civ. Proc. § 1391, exempting necessary furniture to the value of two hundred and fifty dollars, may be maintained without express proof of the value of other articles of furniture owned by plaintiff, where there was sufficient proof on the subject to justify a finding that the other articles were of little value. Conklin *v.* McCauley, 41 N. Y. App. Div. 452, 58 N. Y. Suppl. 879.

The fact that the husband keeps a saloon and lodging-house for fishermen is not such evidence of the condition and circumstances of the family as will enable the court to say as a matter of law that a piano given by the husband to his wife is not an article "necessary for her personal use," within the meaning of the statute protecting such articles and the husband's creditors. Hamilton *v.* Lane, 138 Mass. 358, construing St. (1879) c. 133, and holding that whether the piano is "an article necessary" for the personal use of the wife is a question for the jury.

2. Fletcher *v.* Staples, 62 Minn. 471, 64 N. W. 1150, construing Gen. St. (1894) § 5459, subd. 5, and where the claim for exemption was against the insurance money for the articles of furniture which had been consumed by fire.

3. Haswell *v.* Parsons, 15 Cal. 266, 76 Am. Dec. 480, where the furniture in question was a remnant of what had been previously used in keeping a hotel, not exceeding in value one hundred and twenty-eight dollars in all. See *infra*, III, C, 3, b. See also Rasure *v.* Hart, 18 Kan. 340, 26 Am. Rep. 772, where the statute exempted "all other household furniture" not specially enumerated to a value not exceeding five hundred dollars.

furniture, if otherwise exempt, does not become open to attachment by reason of its being stored and not in actual use.[4]

b. Used by Keepers of Boarding-Houses and Restaurants. Household and kitchen furniture used in a hotel or restaurant is not exempt from execution, except so much of it as is used by the family of the debtor.[5] It would seem that the rule would be the same for household furniture used in a boarding-house to carry on the business,[6] but a number of authorities hold that furniture thus employed is exempt as household furniture.[7]

D. Earnings, Wages, Salary[8] **— 1. Of Debtors Generally — a. In General.** The earnings of a debtor are made exempt to him in the great majority of the states. The extent of this exemption either in its amount or in the class of persons included depends of course on the statute in the particular jurisdiction. A common provision is the exemption of the "wages" of a mechanic or laborer.[9] In some jurisdictions a claimant of this particular exemption must be the head of a family.[10] Whether he must be a resident is a question which differs as much when the wages of exemption is claimed as when any other exemption is claimed.[11]

4. Weed *v.* Dayton, 40 Conn. 293.

5. Heidenheimer *v.* Blumenkron, 56 Tex. 308; Dodge *v.* Knight, (Tex. Sup. 1901) 16 S. W. 626; Bond *v.* Ellison, 2 Tex. Unrep. Cas. 387; Frank *v.* Bean, 3 Tex. App. Civ. Cas. § 211. See also Clark *v.* Averill, 31 Vt. 512, 76 Am. Dec. 131. *Contra*, Rasure *v.* Hart, 18 Kan. 340, 26 Am. Rep. 772.

It is not reasonable that one hundred and sixteen mattresses and forty-six bedsteads should be exempted for a private family. Heidenheimer *v.* Blumentrom, 56 Tex. 308.

6. Myers *v.* Esray, 8 Pa. Co. Ct. 281.

7. Weed *v.* Dayton, 40 Conn. 293; Vanderhorst *v.* Bacon, 38 Mich. 669, 31 Am. Rep. 328. *Compare* Mueller *v.* Richardson, 82 Tex. 361, 18 S. W. 693.

Furniture not in use.— A widow supporting herself and daughter by keeping a boarding-house, who stored her furniture and took a furnished room for a year in New York city and went there to keep boarders, intending to return to Connecticut at the end of the year and resume her business there, is not entitled to an exemption of the furniture she had stored as being necessary for the use of her boarders, or on the ground that the boarders were part of the family. Weed *v.* Dayton, 40 Conn. 293.

8. **Wages, salary, or compensation is personal property** within the meaning of the exemption laws. McCormick Harvesting Mach. Co. *v.* Vaughn, 130 Ala. 314, 30 So. 363. See also Karnes *v.* Rosena Furnace Co., 5 Pa. Dist. 752, 18 Pa. Co. Ct. 306. A statute which provides that the head of a family at his election in lieu of other property may select and hold exempt "any other property, real, personal or mixed, not exceeding $150 in value" does not exempt wages under the clause "any other property." Gregory *v.* Evans, 19 Mo. 261, holding that there was no exemption in wages prior to the act of 1853.

Impairing the obligation of contracts.— A statute giving an exemption in wages as against their garnishment, or a statute which takes away the creditor's right of garnishment, cannot affect a debt contracted prior to the adoption of the statute. McCormick Harvesting Mach. Co. *v.* Vaughn, 130 Ala. 314, 30 So. 363. See *supra*, I, C, 4.

9. See McLarty *v.* Tibbs, 69 Miss. 357, 12 So. 557.

Miner.— Mont. Code Civ. Proc. § 1222, subd. 7, provides that the earnings of a judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of an execution or attachment shall be exempt, where such earnings are necessary for the use of his family in the state and supported by his labor, except that only one half shall be exempt for necessaries. The same section exempts to a miner his dwelling and necessary mining appliances to a value of not exceeding one thousand dollars. Const. art. 19, § 4, provides that the legislative assembly shall enact liberal exemption laws; and Civ. Code, § 4660, provides that words and phrases are to be construed according to the context and the approved usage of the language. It was held that in view of the last three provisions the first-mentioned statute exempts to a placer miner the gold dust taken from his claim within thirty days next preceding a levy, when he is a poor man whose family resides in the state and depends for support on his personal services in working the mine, and the debt is not for necessaries. Dayton *v.* Ewart, 28 Mont. 153, 72 Pac. 420, 98 Am. St. Rep. 549.

10. McLarty *v.* Tibbs, 69 Miss. 357, 12 So. 557.

In Missouri Rev. St. (1899) § 3158, exempts to persons not the head of a family their wearing apparel and their tools and implements if they are mechanics engaged in their trade. It has been held that the court cannot extend this exemption to recover the salary or wages of mechanics. Dinkins *v.* Crunden-Martin Woodenware Co., 91 Mo. App. 209.

11. See *supra*, II, E.

In Indiana the non-resident has only the twenty-five dollars' exemption; a resident

The wages of a seaman or an apprentice are declared to be exempt from attachment by a federal statute.[12]

b. Meaning, Limits, and Extent of the Different Terms — (I) *Wages* — (A) *Generally.* The term "wages" is held applicable in some jurisdictions to compensation only for manual labor,[13] and is said not to include what is generally meant by the term "salary."[14] If the services of the debtor consist mainly of work requiring mental skill or business capacity and involve the exercise of intellectual faculties rather than work, the doing of which properly would depend on a mere physical power to perform ordinary manual labor, the debtor is not entitled to an exemption as a laborer.[15]

householder may claim an exemption of six hundred dollars in wages due him and this discrimination is held constitutional. Pomeroy *v.* Beach, 149 Ind. 511, 49 N. E. 370. See also Hart *v.* O'Rourke, 151 Ind. 205, 51 N. E. 330.

In Pennsylvania a non-resident may have the exemption. Little *v.* Balliette, 9 Pa. Super. Ct. 411.

12. U. S. Rev. St. (1878) § 4536 [U. S. Comp. St. (1901) p. 3082].

One who ships for a fishing voyage to be paid at the rate of twenty-five dollars for each thousand fish caught by him and one dollar and fifty cents per day for unloading is not a seaman within the meaning of this section which is found under title 53, which treats of "merchant seamen," and "merchant seamen" have been distinguished from "fishermen" in all the legislation of congress. Telles *v.* Lynde, 47 Fed. 912.

A person serving on board a steam ferry-boat used by an interstate railway to carry trains across a river between two cities is within the statute, for the ferry-boat is a "ship" within section 4612. Hitchcock *v.* St. Louis, 48 Fed. 312.

The wages earned by a seaman in the coastwise trade of the United States are not subject to garnishment at the instance of the creditor of the seaman in an action at law brought in a state court. McCarty *v.* The City of New Bedford, 4 Fed. 818. But this statute is not broad enough to cover the case of a seizure of a seaman's wages on execution, issued on a valid judgment against the seaman in a state court; and the satisfaction of the execution by the employer as authorized by the state laws is a good defense to a subsequent action by a seaman to recover the amount. The Queen, 93 Fed. 834 [*citing* Telles *v.* Lynde, 47 Fed. 912]. But, although a seaman be engaged in the coasting trade, his wages in the hands of his attorney are not exempt from judgment, although that attorney be a proctor in the admiralty court. "The reasons given by Judge Benedict [in McCarty *v.* The City of New Bedford, *supra*], however, do not apply here. In this case the owners had paid the wages to the seaman's own attorney, who was impliedly authorized by the seaman to receive it. There was no longer any claim against the vessel, nor the owners nor the master. The money was not paid into court. The attorney did not hold it as an officer of the court, but as the agent of his client. His being a proctor in an admiralty court imposed on him certain duties to that court, but did not free him from any obligations to his client, or his client's creditors. The defendant had in effect collected his wages, and intrusted and deposited the money with his attorney. We think it was then liable to attachment." Ayer *v.* Brown, 77 Me. 195, 197.

An attachment for the seaman's wages in the hands of the owner is no excuse for delay in payment, and the penalty, under U. S. Rev. St. (1878) § 4529 [U. S. Comp. St. (1901) p. 3077], for the delay is recoverable. The John E. Holbrook, 13 Fed. Cas. No. 7,339, 7 Ben. 356.

This federal statute does not apply where an execution issued in an action against the person claiming to be a seaman is served upon the owners of the vessel and payment is enforced from them by an order made in proceedings supplemental to execution. Telles *v.* Lynde, 47 Fed. 912.

13. Wildner *v.* Ferguson, 42 Minn. 112, 43 N. W. 794, 18 Am. St. Rep. 495, 6 L. R. A. 338; Heebner *v.* Chave, 5 Pa. St. 115. See also State *v.* Land, 108 La. 512, 32 So. 433, 92 Am. St. Rep. 392, holding that the exemption from seizure for debt protects laborers on farms and in factories and other places where workmen possess no particular skill.

14. South Alabama, etc., R. Co. *v.* Falkner, 49 Ala. 115. *Contra*, Bovard *v.* Ford, 83 Mo. App. 498. But see Bell *v.* Indian Live-Stock Co., (Tex. Sup. 1889) 11 S. W. 344, holding that one employed by a live-stock company as manager at a monthly salary of two hundred dollars, although he is also a stock-holder, is entitled to the exemption in current wages.

15. Tabb *v.* Mallette, 120 Ga. 97, 47 S. E. 587, 102 Am. St. Rep. 78; Stothart *v.* Melton, 117 Ga. 460, 43 S. E. 801; Kline *v.* Russell, 113 Ga. 1085, 39 S. E. 477; Hunter *v.* Morgan, 108 Ga. 409, 33 S. E. 986; Oliver *v.* Macon Hardware Co., 98 Ga. 249, 25 S. E. 403, 58 Am. St. Rep. 300; Kyle *v.* Montgomery, 73 Ga. 337; Adcock *v.* Smith, 97 Tenn. 373, 37 S. W. 91, 56 Am. St. Rep. 810.

If the services involve both physical and mental effort, as for hunting up "witnesses and testimony to defeat a recovery on a forged note," the compensation due therefor is exempt as wages or salary. Hartman *v.*

(B) *Earnings Under a Special Form of Contract.* The earnings of a person not engaged under the usual contract of employment as laborer or artisan are often considered wages within the meaning of the statutory exemption. Thus where the remuneration is according to the work done and not according to the length of employment it has been still considered wages.[16] Under a contract by which the debtor exchanges his labor for a consideration other than money, as the rent of a house[17] or a piece of land,[18] the value of his labor is nevertheless considered wages. The fact that there was no agreement that the debtor should receive his wages periodically as is customary,[19] or the fact that there was no agreement whatever as to when he should receive his pay,[20] does not put the debtor without the pale of the exemption. A person who is really a contractor and not an

Mitzel, 8 Pa. Super. Ct. 22, 42 Wkly. Notes Cas. (Pa.) 436.

One of whom special skill and intellectual fitness to direct the work of operators under him is required is not within the statute. Miller *v.* Dugas, 77 Ga. 386, 4 Am. St. Rep. 90.

Not entitled to exemption of wages as laborers are the following: The president of a railroad company (South Alabama, etc., R. Co. *v.* Falkner, 49 Ala. 115), a civil engineer (McPherson *v.* Stroup, 100 Ga. 228, 28 S. E. 157; Pennsylvania, etc., R. Co. *v.* Leuffer, 84 Pa. St. 168, 24 Am. Rep. 189), a physician (Weymouth *v.* Sanborn, 43 N. H. 171, 80 Am. Dec. 144), a teacher (Schwacke *v.* Langton, 12 Phila. (Pa.) 402, 6 Wkly. Notes Cas. (Pa.) 124), mechanical engineers, electrical engineers, clerks, cashiers, and bookkeepers (State *v.* Land, 108 La. 512, 32 So. 433, 92 Am. St. Rep. 392. But see *infra*, this note), a general salesman in a clothing establishment (Ensel *v.* Adler, 110 Ga. 326, 35 S. E. 334 [*following* Oliver *v.* Macon Hardware Co., 98 Ga. 249, 25 S. E. 403, 58 Am. St. Rep. 300]), an agent who sells goods by sample (Wildner *v.* Ferguson, 42 Minn. 112, 43 N. W. 794, 18 Am. St. Rep. 495, 6 L. R. A. 338), one whose business is to travel and sell goods for his employer (Briscoe *v.* Montgomery, 93 Ga. 603, 20 S. E. 40, 44 Am. St. Rep. 192; Wildner *v.* Ferguson, *supra*), a clerk employed in a railway company's office whose services under his contract consisted mainly of work requiring mental skill or business capacity (Boynton *v.* Pelham, 108 Ga. 794, 33 S. E. 876), the captain of a canal-boat (Shimer *v.* Rugg, 7 Northam. Co. Rep. (Pa.) 248).

Entitled to exemption of wages as laborers are the following: A clerk and bookkeeper (Lamar *v.* Chisholm, 77 Ga. 306 [*following* Smith *v.* Johnston, 71 Ga. 748]. See also Butler *v.* Clark, 46 Ga. 466), a clerk in a retail store who is one half of the time employed in drudgery and hard work and one fourth in waiting on customers (Pike *v.* Sutton, 115 Ga. 688, 42 S. E. 58; Williams *v.* Link, 64 Miss. 641, 1 So. 907), a forwarding clerk employed by a railroad (Claghorn *v.* Saussy, 51 Ga. 576), a locomotive engineer who receives his pay monthly according to the time he works (Smith *v.* Walker, 119 Ga. 615, 46 S. E. 831; Sanner *v.* Shivers, 76 Ga. 335) or even by the number of miles he has run (Johnson *v.* Hicks, 120 Ga. 1002, 48 S. E. 383), a brakeman (Franklin *v.* Southern R. Co., 119 Ga. 855, 47 S. E. 344), and a street railway conductor (Stuart *v.* Poole, 112 Ga. 818, 38 S. E. 41, 81 Am. St. Rep. 81).

A physician's earnings are not exempt under Ga. Code, § 2026. Staples *v.* Keister, 81 Ga. 772, 8 S. E. 421. But the pay of a physician employed by a city at a fixed sum per day has been held as exempt in Texas. Sydnor *v.* Galveston, (Tex. App. 1890) 15 S. W. 202.

The funds of an insurance agent deposited in a bank with the funds of his company cannot be regarded as wages or hire of an employee in the hands of his employer, so as to be exempt from attachment. Baltimore First Nat. Bank *v.* Jaggers, 31 Md. 38, 100 Am. Dec. 53.

The compensation received by a master carpenter for supervising the labor of the hands employed by him is not exempt as the wages of a laborer. Smith *v.* Brooke, 49 Pa. St. 147. But under a statute exempting mechanics and laborers from garnishment of their wages, overseers who by agreement are to be paid their wages weekly to supply necessaries for their families are entitled to exemption. Caraker *v.* Matthews, 25 Ga. 571.

Costs due a commissioner in a partition suit are not exempt from execution as wages of a mechanic or laboring man. State *v.* Cobb, 4 Lea (Tenn.) 481.

16. Moore *v.* Hendry, 111 Ga. 863, 36 S. E. 921; Swift Mfg. Co. *v.* Henderson, 99 Ga. 136, 25 S. E. 27. See also Pennsylvania Coal Co. *v.* Costello, 33 Pa. St. 241; Adcock *v.* Smith, 97 Tenn. 373, 37 S. W. 91, 56 Am. St. Rep. 810.

17. Mason *v.* Ambler, 6 Allen (Mass.) 124.

18. Scott *v.* Watson, 36 Pa. St. 342.

19. Prothro *v.* Grubbs, 71 Ga. 863.

20. Dempsey *v.* McKennell, 2 Tex. Civ. App. 284, 23 S. W. 525. In Hartmon *v.* Mitzel, 8 Pa. Super. Ct. 22, 42 Wkly. Notes Cas. (Pa.) 436, although the compensation was fixed after service was rendered, it was held exempt.

But an attorney's fee for legal services, where not hired for a stated period, to be paid at the expiration of such period and not in proportion to the business done, is not "current wages for personal services." Cle-

employee is not within an exemption of this character.[21] If a contractor performs labor and the amount due him for his labor is separable from the amount due to other elements arising out of the contract, the exemption may be allowed for the wages proper;[22] but if the wages proper are not distinguishable from the rest no exemption can be allowed,[23] even though the total amount due is less than the whole exemption allowed by statute.[24]

(II) "*Wages or Salary.*" Some statutes exempt the "wages or salary" of the debtor.[25] Commissions or part profits are not exempt as wages or salary.[26]

(III) *Personal Earnings.* A common provision is an exemption in "personal earnings" or in "earnings for personal services." These exemptions include more classes of debtors than those heretofore noted. A debtor is entitled to hold exempt compensation to the statutory amount irrespective of the character of his employment so long as his compensation is "personal earnings" or "earnings for personal services."[27] But money due a person as a result of his

burne First Nat. Bank *v.* Graham, 3 Tex. App. Civ. Cas. § 462, 22 S. W. 1101.

21. Heebner *v.* Chave, 5 Pa. St. 115. But see Moore *v.* Heaney, 14 Md. 558.

Amounts due to a blacksmith, for work done by him, in carrying on an independent business for himself as the proprietor of a blacksmith shop do not constitute indebtedness for the daily, weekly, or monthly wages of a journeyman mechanic or day laborer. Tatum *v.* Zachry, 86 Ga. 573, 12 S. E. 940.

A person who contracts to make and burn brick for so much per one thousand, he to provide the labor, agreeing also to keep the machinery furnished by the other party in good repair to supply oil therefor, and to feed and care for a team provided for the work, is not a "laborer" within the meaning of Nebr. Code Civ. Proc. § 531, declaring that no property shall be exempt from execution and attachment for laborers' wages. Henderson *v.* Nott, 36 Nebr. 154, 54 N. W. 87, 38 Am. St. Rep. 720.

One who contracted to build a house for a fixed price and who employed others to work under him, although he did part of the work himself, is not a laborer, within Miss. Code (1892), § 1963, exempting a certain sum from the wages of "every laborer or person working for wages." Heard *v.* Crum, 73 Miss. 157, 18 So. 934, 55 Am. St. Rep. 520.

A miner who works himself in a coal-mine at so much per ton and has charge of a chamber, with one or two hands under him, is a laborer and his wages are not attachable. Pennsylvania Coal Co. *v.* Costello, 33 Pa. St. 241 [*distinguishing* Heebner *v.* Chave, 5 Pa. St. 115].

22. Banks *v.* Rodenbach, 54 Iowa 695, 7 N. W. 152; Brainard *v.* Shannon, 60 Me. 342.

23. Gray *v.* Fife, 70 N. H. 89, 47 Atl. 541, 85 Am. St. Rep. 603; Robbins *v.* Rice, 18 N. H. 507. *Contra,* Rikerd Lumber Co. *v.* Chrouch, (Mich. 1904) 98 N. W. 739, where the money was due on a contract for work for a total sum for the job, instead of daily wages, although he had others to aid him in the work.

The gross earnings of a debtor and his team are exempt under a statute which exempts the "earnings" of the debtor for a certain period but without any qualification as to whether the earnings must be personal or not. Kuntz *v.* Kinney, 33 Wis. 510.

24. Brainard *v.* Shannon, 60 Me. 342.

25. See South, etc., R. Co. *v.* Falkner, 49 Ala. 115.

In Pennsylvania under the act of April, 1845, exempting the wages of labor or the salary of a person engaged in public or private employment, the salary of a chorister which was set apart by the board of trustees of a church for the payment of a debt and was in the hands of the treasurer of the trustees could not be garnished. Catlin *v.* Ensign, 29 Pa. St. 264.

26. Brierre *v.* His Creditors, 43 La. Ann. 423, 9 So. 640; Weems *v.* Delta Moss Co., 33 La. Ann. 973; Hamburger *v.* Marcus, 157 Pa. St. 133, 27 Atl. 681, 37 Am. St. Rep. 719. *Contra,* McSkimin *v.* Knowlton, 14 N. Y. Suppl. 283 [*citing* Sandford *v.* Goodwin, Daily Reg. March 11, 1881].

27. McCoy *v.* Cornell, 40 Iowa 457 (holding that the statute made no distinction between the earnings of professional men, mechanics, or common laborers); Beckett *v.* Wishon, 5 Ohio S. & C. Pl. Dec. 257, 5 Ohio N. P. 155 (holding that the salary of a superintendent of a county infirmary, earned within three months, he being the head of a family, is "personal earnings").

The statute applies to the earnings of an artist in painting portraits. Millington *v.* Laurer, 89 Iowa 322, 56 N. W. 533, 48 Am. St. Rep. 385, under Code, § 3074.

Tuition payable in advance to a schoolmaster to the amount of six hundred dollars was held exempt in New York as personal earnings necessary for the support of the family. Miller *v.* Hooper, 19 Hun (N. Y.) 394.

Under a statute which exempts the "earnings" of a debtor for a certain period, a judgment debtor employed in a chamber of commerce to inspect flour when requested by merchants who paid him a certain sum per barrel, the debtor employing by the week a deputy inspector, a laborer, and a bookkeeper, but nevertheless inspecting daily himself and passing upon every sample, is entitled to the exemption of the statute in the

being engaged in a commercial[28] or agricultural[29] pursuit on his own account and not as the hireling of another cannot be considered "personal earnings" or "earnings for personal services."

c. Amount and Period of Exemption. The amount of wages measured in time or in other words the number of days of the earning period differs according to jurisdiction. The statute usually provides that wages earned within a certain number of days next preceding the levy shall be exempt.[30] Some of the statutes which exempt "personal earnings" or "earnings for personal services" for a certain period give the exemption to the extent that it is necessary for the use of the debtor's family.[31] If all his earnings for the statutory period are necessary he may hold all.[32] Other statutes limit the amount earned within the statutory period to a definite sum;[33] still others give the entire amount earned within the set period and without any qualification.[34] The exemption expires at the end of the period and is not extended by leaving the earnings with the employer,[35] or by the fact that the earnings are in the hands of the debtor's

net proceeds of his business. Brown *v.* Hebard, 20 Wis. 326, 91 Am. Dec. 408.

Money paid to a constable serving a writ in a suit for money due for personal services in full payment of the claim is not exempt and may be garnished in an action against the person entitled thereto, since the payment was to the officer as a personal agent and extinguished the debt for personal services. Hewitt *v.* McNerney, 73 Conn. 565, 48 Atl. 424, construing Conn. Gen. St. § 1231, as amended by Pub. Acts (1895), c. 342.

28. As moneys due from customers to a person engaged in retailing ice, in which business he employs two ice carts and several men (Mulford *v.* Gibbs, 9 N. Y. App. Div. 490, 41 N. Y. Suppl. 273); money received by a saloon-keeper in the conduct of his business (Mulford *v.* Gibbs, *supra*); money owed to a boarding-house keeper, although she works about the house besides superintending it (Shelly *v.* Smith, 59 Iowa 453, 13 N. W. 419); debts due the proprietor and keeper of a public hotel for boarding and accommodation of guests (Youst *v.* Willis, 5 Okla. 170, 49 Pac. 56). But money earned by a photographer doing his own work and having little or no assistance is within N. Y. Code Civ. Proc. § 2463, exempting the earnings of a judgment debtor for his personal services, rendered within sixty days next before the institution of supplementary proceedings. McSkimin *v.* Knowlton, 14 N. Y. Suppl. 283.

29. Matter of Wyman, 76 N. Y. App. Div. 292, 78 N. Y. Suppl. 546 [*citing* Prince *v.* Brett, 21 N. Y. App. Div. 190, 21 N. Y. Suppl. 402].

30. *Illinois.*— Mangold *v.* Dooley, 89 Mo. 111, 1 S. W. 126, thirty days.

Maine.— Haynes *v.* Hussey, 72 Me. 448; Parks *v.* Knox, 22 Me. 494, one month.

Minnesota.— Bean *v.* Germania L. Ins. Co., 54 Minn. 366, 56 N. W. 127, thirty days.

Missouri.— See Cooper *v.* Seyoc, 104 Mo. App. 414, 79 S. W. 751, thirty days.

New York.— McCullough *v.* Carragan, 24 Hun 157, sixty days.

Ohio.— Snook *v.* Snetzer, 25 Ohio St. 516, three months.

See 23 Cent. Dig. tit. "Exemptions," § 72.

31. For example see N. Y. Code Civ. Proc. § 2463; Ohio Code Civ. Proc. § 467. See Snook *v.* Snetzer, 25 Ohio St. 516.

For admissibility of evidence on this issue and for sufficiency of evidence to show that the earnings of the debtor were not necessary for the support of his family see Cushing *v.* Quigley, 11 Mont. 577, 29 Pac. 337; New Mexico Nat. Bank *v.* Brooks, 9 N. M. 113, 49 Pac. 947.

32. Vandal *v.* Daiber, 10 Ohio Cir. Ct. 355, 6 Ohio Cir. Dec. 585, construing Ohio Rev. St. §§ 5430, 5433, 6498. But see Driscoll *v.* Kelly, 4 Ohio S. & C. Pl. Dec. 124, 5 Ohio N. P. 243.

33. See Bean *v.* Germania L. Ins. Co., 54 Minn. 366, 56 N. W. 127 (twenty-five dollars in thirty days); Waite *v.* Franciola, 90 Tenn. 191, 16 S. W. 116 (thirty dollars); Bloodgood *v.* Meissner, 84 Wis. 452, 54 N. W. 772 (sixty dollars per month for three months); Lafferty *v.* Sistalla, 11 Wyo. 360, 72 Pac. 192 (fifty dollars).

34. See McCoy *v.* Cornell, 40 Iowa 457, earnings of the debtor, or those of his family for the ninety days next preceding the levy, irrespective of the needs of the debtor's family.

35. Seligmann *v.* Heller Bros. Clothing Co., 69 Wis. 410, 34 N. W. 232.

"Current wages" under Texas statute.— The statute gives to the debtor an exemption in "current" wages. Under this statute wages left in the possession of the employer after they become due ordinarily cease to be "current" and are not exempt. Bell *v.* Indian Live-Stock Co., (Tex. Sup. 1889) 11 S. W. 344. See also Davidson *v.* F. H. Logeman Chair Co., (Tex. Civ. App. 1897) 41 S. W. 824. However, past-due wages left with the employer because the debtor is unable to collect them do not cease to be "current" wages. Davidson *v.* F. H. Logeman Chair Co., *supra*. And wages left with the employer because the debtor did not know the state of his account and that anything was due him do not cease to be "current." Childress *v.* Franks, (Tex. Civ. App. 1898) 44 S. W. 868.

wife,[36] or that the debtor had to bring an action to reduce the wages to his possession.[37] Under a statute which exempts from levy the wages and earnings of any debtor to a certain amount during thirty days, the exemption does not cease when the wages reach the debtor's hands if the period of exemption is not passed.[38] The creditor cannot attach or garnish wages not yet due,[39] nor can he get at the debtor's wages over and above the amount allowed as exempt by making the writ in garnishment returnable to a term of court long subsequent to its execution.[40]

d. Property Purchased With Earnings. Whether the exemption in wages or personal earnings covers property purchased by the wages or personal earnings is a question on which the authorities differ.[41]

2. Of Public Officers — a. By Public Policy — (i) *Public Officers Generally.* Independent of any statutory provision, the salary or compensation of a public officer which has not reached his hands is exempt from the claims of his creditors on the ground of public policy,[42] the courts refusing to allow the money

36. Bloodgood *v.* Meissner, 84 Wis. 452, 54 N. W. 772.

37. Chadwick *v.* Stout, 112 Iowa 167, 83 N. W. 901, 84 Am. St. Rep. 334.

An attorney's fee is not an earning of the debtor within sixty days next preceding the order, so as to make it exempt, under S. C. Code, § 317, where an order for the examination of a judgment debtor in supplementary proceedings is passed eighteen months after the termination of a litigation in which defendant was attorney, and while the amount of his fee was under reference, and during the next month the amount of such fee is fixed by the court, and five months afterward it is required to be paid over to the judgment creditor by the order in supplementary proceedings. Union Bank *v.* Northrop, 19 S. C. 473.

38. Rutter *v.* Shumway, 16 Colo. 95, 98, 26 Pac. 321, where it is said: "It is argued with much ingenuity that the earnings of the laborer, when received by him, are no longer wages, but capital; that the exemption statute has performed its office when it has enabled the laborer to secure his wages from his employer without let or hindrance; and that thereafter the statute cannot be invoked in his favor. The statute cannot be thus reasoned away. Such a construction is narrow and illiberal."

Exemption continues while the earnings are under the control of the debtor, although temporarily in the hands of another who collected them. Elliot *v.* Hall, 3 Ida. 421, 31 Pac. 796, 35 Am. St. Rep. 285, 18 L. R. A. 586.

39. *Illinois.*— Davis *v.* Siegel, 80 Ill. App. 278.

Iowa.— Davis *v.* Humphrey, 22 Iowa 137.

Maryland.— House *v.* Baltimore, etc., R. Co., 48 Md. 130. See also Shryock *v.* Baltimore, etc., R. Co., 56 Md. 519; Hagerstown First Nat. Bank *v.* Weckler, 52 Md. 30.

New York.— Kroner *v.* Reilly, 49 N. Y. App. Div. 41, 63 N. Y. Suppl. 527.

Tennessee.— Weaver *v.* Hill, 97 Tenn. 402, 37 S. W. 142.

In Quebec the fourth part of the wages of a workman (*operarius*) is seizable even for wages not yet due. Chabot *v.* Oneson, 11 Quebec Super. Ct. 223.

40. Chapman *v.* Berry, 73 Miss. 437, 18 So. 918, 55 Am. St. Rep. 546.

Under N. H. Rev. St. c. 208, § 9, providing that debtor's earnings for personal services earned within fifteen days prior to the service of the writ, or earned after such service, shall not be subject to garnishment, where trustee process was served on May 29, and on July 4 plaintiff discharged the trustee without knowledge of defendant, and caused new process to be served on him, such latter process was not valid, as against wages earned between the two dates. Redington *v.* Dunn, 24 N. H. 162.

41. Thus in Iowa a husband who uses his personal earnings in paying for property purchased by his wife has an exemption in the property thus purchased. Robb *v.* Brewer, 60 Iowa 539, 15 N. W. 420. And in Georgia where a head of a family to whom an exemption of personalty had been set apart purchased on credit a wagon, and in so doing did not part with any exempted personalty, the wagon became immediately subject to the lien of an existing judgment against the purchaser, and this lien was not divested by reason of the fact that he subsequently paid part of the price of the wagon with money made by hauling therewith. Anderson *v.* Cook, 105 Ga. 496, 30 S. E. 884.

That property purchased by the salary of a public officer is not exempt on the ground of public policy see *infra*, III, D, 2 a, (I).

42. *Alabama.*— Mobile *v.* Rowland, 26 Ala. 498. But in Montgomery *v.* Van Dorn, 41 Ala. 505, under a statute subsequently passed, the garnishment of the salary of a municipal officer was allowed.

Colorado.— See Troy Laundry, etc., Co. *v.* Denver, 11 Colo. App. 368, 53 Pac. 256.

Georgia.— See McLellan *v.* Young, 54 Ga. 399, 21 Am. Rep. 276.

Kentucky.— Dickinson *v.* Johnson, 110 Ky. 236, 61 S. W. 267, 22 Ky. L. Rep. 1686, 54 L. R. A. 566; Rodman *v.* Musselman, 12 Bush 354, 23 Am. Rep. 724; Divine *v.* Harvie, 7 T. B. Mon. 439, 18 Am. Dec. 194. See also Webb *v.* McCauley, 4 Bush 8.

due a public officer to be attached or garnished or diverted from his hands in any way, as otherwise the government might be deprived of the services of its officers and great injury to the public service might result. This principle has been applied to the salaries of officers of municipal corporations,[43] but this extension of the rule has been lopped off by statutes which render corporations liable to the process of attachment or garnishment and by the construction given to those statutes by the courts.[44] The exemption does not continue after the payment of the salary has been made to the officer or his agent.[45] A person who has ceased to be an officer or an employee of the government cannot insist upon this

Maryland.— See Keyser *v.* Rice, 47 Md. 203, 28 Am. Rep. 448.

Minnesota.— Sexton *v.* Brown, 72 Minn. 371, 75 N. W. 600 [*following* Sandwich Mfg. Co. *v.* Krake, 66 Minn. 110, 68 N. W. 606, 61 Am. St. Rep. 395; Roeller *v.* Ames, 33 Minn. 132, 22 N. W. 177].

Tennessee.— State Bank *v.* Dibrell, 3 Sneed 379. In State *v.* Cobb, 4 Lea 481, it was held that the principle of State Bank *v.* Dibrell, *supra*, did not apply to costs taxed in favor of commissioners appointed by the court to partition land.

Texas.— Sanger *v.* Waco, 15 Tex. Civ. App. 424, 40 S. W. 549, the court holding that it was immaterial what form the officer's compensation was in, whether by fees or by salary, to entitle him to the exemption. But in Thompson *v.* Cullers, (Civ. App. 1896) 35 S. W. 412, the fees of a public weigher of cotton were garnished, the court basing its decision on the ground that the officer might assign these fees, and that if therefore public policy did not prohibit an assignment it did not prohibit their garnishment. In Highland *v.* Galveston, 1 Tex. App. Civ. Cas. § 623, the court refused to allow the garnishment of the salary of a public officer on the ground that Const. art. 16, § 28, forbade the garnishment of current wages for personal services. This case appears to have escaped the notice of the court in each of the above cases.

Virginia.— Blair *v.* Marye, 80 Va. 485.

Canada.—Canada Cent. Bank *v.* Ellis, 20 Ont. App. 364.

See 23 Cent. Dig. tit. "Exemptions," § 64 *et seq.*

Contra.— Waterbury *v.* Deer Lodge County, 10 Mont. 515, 523, 26 Pac. 1002, 24 Am. St. Rep. 67.

In Massachusetts the fees of a juryman are not subject to trustee process against the county. Williams *v.* Boardman, 9 Allen 570. But in Adams *v.* Tyler, 121 Mass. 380, the compensation due a messenger in charge of a county court-house, who was appointed by the county commissioners at a fixed salary, was subjected to trustee process against the county. The court distinguished this case from Williams *v.* Boardman, *supra*, on the ground that in Adams *v.* Tyler, *supra*, the salary of defendant was due him for services rendered under a contract, but in Williams *v.* Boardman, *supra*, the juror did not render his services under any contract, but performed them as a part of the duty of a citizen, and furthermore that the compensation due him was neither goods, effects, nor credits within the meaning of the statute.

Real estate purchased with the salary of a public officer is not exempt. Dickinson *v.* Johnson, 110 Ky. 236, 61 S. W. 267, 22 Ky. L. Rep. 1686, 54 L. R. A. 566.

The salary of a deputy sheriff is exempt from garnishment. Oliver *v.* Athey, 11 Lea (Tenn.) 149.

43. Baird *v.* Rogers, 95 Tenn. 492, 32 S. W. 630.

44. *Alabama.*— Montgomery *v.* Van Dorn, 41 Ala. 505, wages of a policeman in the hands of a municipal corporation.

Kentucky.—Salaries of officers of municipal corporations may be subjected to the payment of their debts if the salary is already earned and set apart. Speed *v.* Brown, 10 B. Mon. 108 [*distinguishing* Divine *v.* Harvie, 7 T. B. Mon. 439, 18 Am. Dec. 194, where the court refused to attach the salary of an auditor of the commonwealth, the distinction being that a city might be sued at law or in equity, but that a sovereign state cannot]. But compensation not due at the commencement of the suit cannot be subjected to the payment of the officer's debts. Bridgeford *v.* Keenehan, 8 Ky. L. Rep. 268.

Montana.— Waterbury *v.* Deer Lodge County, 10 Mont. 515, 26 Pac. 1002, 24 Am. St. Rep. 67.

New Hampshire.— Wardwell *v.* Jones, 58 N. H. 305, the fees of a juror due him from a county.

Ohio.— Newark *v.* Funk, 15 Ohio St. 462, the salary of a city marshal.

Rhode Island.— Wilson *v.* Lewis, 10 R. I. 285.

Restriction to municipal officers.— A statute authorizing the subjection to attachment or garnishment of money due a municipal officer is not extended to any other class of public officers. See Pruitt *v.* Armstrong, 56 Ala. 306.

45. Kennedy *v.* Aldridge, 5 B. Mon. (Ky.) 141; Blake *v.* Bolte, 10 Misc. (N. Y.) 333, 31 N. Y. Suppl. 124, 1 N. Y. Annot. Cas. 78.

But where an officer in the army or navy becomes insane and is declared a lunatic upon inquisition found, and is retired on half pay, his pay primarily is not liable for his debts, but for his support; but after it has been paid into the hands of his committee or guardian appointed by the court any surplus not needed for his support may with the consent of the court be applied to the pay-

exemption given to a public officer, for in such case public policy no longer requires it.[46]

(II) *School-Teachers.* A school-teacher is considered, in some jurisdictions at least, to be a public officer and entitled to the exemption given to public officers on the ground of public policy;[47] but the rule is not universal.[48]

b. By Exemption Laws. Sometimes the salary of a public officer falls within the general provision for the exemption of salaries or personal earnings.[49]

E. Life-Insurance Money.[50] The statutes of the different states generally contain an exemption in the money resulting from a policy or certificate of insurance in favor of beneficiaries of a certain kind, usually the widow or children of the insured, as against the insured's debts.[51] This kind of an exemption does not rest upon contract but upon legislative grant exempting the fund from the claims of the creditors.[52] In the absence of wife or children it is held in some jurisdictions that the fund becomes assets for the payment of creditors;[53] but this rule is not universal.[54] Following the rule a policy payable to the per-

ment of his debts and the committee will not be allowed to claim a three-hundred-dollar exemption. Elwyn's Appeal, 67 Pa. St. 367.

46. Baird *v.* Rogers, 95 Tenn. 492, 32 S. W. 630.

The rule is not applied to an officer of the army or navy retired on half pay, for although retired, he is nevertheless an officer of the government. See Elwyn's Appeal, 67 Pa. St. 367.

47. Hightower *v.* Slaton, 54 Ga. 108, 21 Am. Rep. 273; Allen *v.* Russell, 78 Ky. 105. See also Marathon Tp. School District No. 4 *v.* Gage, 39 Mich. 484, 33 Am. Rep. 421.

48. Seymour *v.* Over-River School-Dist., 53 Conn. 502, 3 Atl. 552.

49. See cases cited *infra*, this note.

In Georgia where a statute provides that all banks, banking companies, and other corporations, except municipal corporations, shall be liable to be garnished for the salaries of their officers in all cases where the salary exceeds the sum of five hundred dollars, a salary under five hundred dollars of a municipal officer is exempt. Holt *v.* Experience, 26 Ga. 113, the court saying that properly the salary of the officer should be exempt irrespective of its amount.

In Louisiana, Civ. Code, art. 1992, and Code, § 647, exempt money due for the salary of an office. Under these sections it is held that the salary of the clerk of the sixth recorder's court is exempt. Moll *v.* Sbisa, 51 La. Ann. 290, 25 So. 141. See also Wild *v.* Ferguson, 23 La. Ann. 752; Chaudet *v.* De Jong, 16 La. Ann. 399.

In New Hampshire a mayor of a city may have the benefit of the exemption of his salary for fifteen days prior to the service of the writ of garnishment or attachment allowed by Rev. St. c. 208, § 9. Robinson *v.* Aiken, 39 N. H. 211.

In Ohio the salary of a superintendent of a county infirmary is "personal earnings" under Rev. St. § 5430. Driscoll *v.* Kelly, 4 Ohio S. & C. Pl. Dec. 124, 5 Ohio N. P. 243.

In Pennsylvania, Laws (1845), § 5, exempt the wages of any laborer or the salary of any person in public or private employment from attachment in the hands of his employer. See Catlin *v.* Ensign, 29 Pa. St. 264.

50. **Life insurance** generally see Life Insurance.

51. For example see Houston *v.* Maddux, 179 Ill. 377, 53 N. E. 599 [*reversing* 73 Ill. App. 203]; Saunders *v.* Robinson, 144 Mass. 306, 10 N. E. 815; Baron *v.* Brummer, 100 N. Y. 372, 3 N. E. 474 [*reversing* 30 Hun 88]; Amberg *v.* Manhattan L. Ins. Co., 56 N. Y. App. Div. 343, 67 N. Y. Suppl. 872 [*reversing* 32 Misc. 89, 65 N. Y. Suppl. 424]; Klinckhamer Brewing Co. *v.* Cassman, 21 Ohio Cir. Ct. 465, 12 Ohio Cir. Dec. 141.

The right defined by the creating statute.— Under a statute authorizing a married woman to cause the life of her husband to be insured for the benefit of herself and children free from the claims of the representatives of the husband, or any of his creditors, a policy procured by her husband in favor of one of his children is not protected against the claims of his creditors. Fearn *v.* Ward, 80 Ala. 555, 2 So. 114.

Exemption without statute.— In Colorado it has been held that life insurance taken out by a husband for the benefit of his wife and children and without any fraudulent intent cannot be subjected by his creditors unless it be to the extent of premiums paid during his insolvency and subsequent to becoming indebted to the creditors. Hendrie, etc., Mfg. Co. *v.* Platt, 13 Colo. App. 15, 56 Pac. 209.

52. The statute is enabling and relates to the remedy, and the state has the right to change and regulate the exemption before the fund reaches the beneficiary, and therefore the proceeds of policies issued before the enactment of a statute can be subject to its provisions. Kittel *v.* Domeyer, 175 N. Y. 205, 67 N. E. 433, 1084 [*reversing* on other grounds 70 N. Y. App. Div. 134, 75 N. Y. Suppl. 150].

53. Hathaway *v.* Sherman, 61 Me. 466. See also Wright *v.* Wright, 100 Tenn. 313, 45 S. W. 672.

54. Coates *v.* Worthy, 72 Miss. 575, 17 So. 606, 18 So. 916, holding that Miss. Code (1892), § 1552, imposing liability for the

sonal representatives of the assured falls into the estate of the deceased and is subject to his debts.[55] An endowment policy by which a company agrees to pay the insured a sum of money after a certain period has been held a life-insurance policy within the exemption allowed in life insurance;[56] but an exemption in this kind of policy is forbidden by some authorities.[57] A fund created by a beneficial association is life insurance.[58] That premiums were paid while the insured was insolvent does not affect the exemption rights of the beneficiary.[59] The terms of the statute giving to the beneficiary an exemption in the money received from life insurance sometimes require that the policy or certificate of insurance must be issued by a company or association incorporated within the state,[60] but this is not a universal or even the usual rule.[61] Generally the beneficiary has no exemption in the insurance money as against the claims of his or her creditors,[62]

debts of a decedent on his exempt property, in the absence of wife or children, is limited by section 1965, which provides that the proceeds of a life-insurance policy, not exceeding five thousand dollars payable to the executor or administrator, shall inure to the heirs or legatees, free from all liability for decedent's debts.

Collateral heirs.— Iowa Code, §§ 1182, 2372, provide that the avails of life insurance are not subject to the debts of deceased but shall inure to the separate use of the deceased's husband or wife and children and be disposed of like other exempt property of deceased. Under these sections the insurance fund is exempt in favor of collateral heirs. Larrabee *v.* Palmer, 101 Iowa 132, 70 N. W. 100.

For proper distribution between widow and son of the proceeds of different policies see Cozine *v.* Grimes, 76 Miss. 294, 24 So. 197.

55. Kennedy's Estate, 2 Wkly. Notes Cas. (Pa.) 492. See also Ceiger *v.* McLin, 78 Ky. 232; Rice *v.* Smith, 72 Miss. 42, 16 So. 417; Yale *v.* McLaurin, 66 Miss. 461, 5 So. 689; Dulaney *v.* Walsh, (Tex. Civ. App. 1896) 37 S. W. 615 [*distinguishing* Mullins *v.* Thompson, 51 Tex. 7, where policy was made payable to widow, child, or heirs]. But in Tennessee insurance effected by a man on his own life, before marriage, payable to his "legal representatives," is, within Milliken & V. Code, §§ 3135, 3335, providing that life insurance effected by a husband on his own life shall inure to the benefit of the widow and next of kin, not subject to the debts of the husband. Rose *v.* Wortham, 95 Tenn. 505, 32 S. W. 458, 30 L. R. A. 609.

56. Briggs *v.* McCullough, 36 Cal. 542. See also Pulsifer *v.* Hussey, 97 Me. 434, 54 Atl. 1076.

57. Ellison *v.* Straw, 119 Wis. 502, 97 N. W. 168. See also Talcott *v.* Field, 34 Nebr. 611, 52 N. W. 400, 33 Am. St. Rep. 662.

58. Coleman *v.* McGrew, (Nebr. 1904) 99 N. W. 663; Mellows *v.* Mellows, 61 N. H. 137; Zinn's Estate, 2 Pa. Dist. 801, 14 Pa. Co. Ct. 33. See also Matter of Palmier, 3 Dem. Surr. (N. Y.) 129, holding that the proceeds of policies in benefit insurance associations will be presumed, against the creditors of the assured, to belong to his family after his death, although coming to the hands of his executors.

Special statutory provisions.— Conn. Pub. Acts (1895), p. 595, c. 255, § 1, defines the term "secret and fraternal society" to include any corporation or voluntary association organized for the sole benefit of its members, not for profit, having a lodge system with a ritualistic form of work and a representative form of government, providing for the payment of benefits in case of death; and section 7 declares that all benefits accruing from such society are exempt from attachment. A mutual aid association composed of odd fellows having a lodge system, but not shown to have a ritual of its own, is not within the statute, and hence benefits payable therefrom are not exempt from attachment. Miles *v.* Odd Fellows Mut. Aid. Assoc., 76 Conn. 132, 55 Atl. 607.

Constitutionality.— Ohio Rev. St. § 3631, exempting funds arising from contracts of insurance in mutual benefit insurance associations from liability for the debts of the beneficiary is constitutional. Williams *v.* Donogh, 9 Ohio S. & C. Pl. Dec. 414, 6 Ohio N. P. 418.

59. Mellows *v.* Mellows, 61 N. H. 137; Mahoney *v.* James, 94 Va. 176, 26 S. E. 384. *Contra*, Houston *v.* Maddux, 179 Ill. 377, 53 N. E. 599 [*reversing* 73 Ill. App. 203].

In Nebraska the rule of the text does not obtain where the policy is in the form of an endowment whereby a certain sum is to be repaid after a number of years. The transaction is considered as being in the nature of a loan, the insurance being a mere incident; and, where the premiums have been paid by an insolvent debtor, the insurance money on the policy received by the wife during the lifetime of the husband is not transmuted so as to be hers as against creditors of the husband, but is subject to their claims. Talcott *v.* Field, 34 Nebr. 611, 52 N. W. 400, 33 Am. St. Rep. 662.

60. Briggs *v.* McCullough, 36 Cal. 542; Presbyterian Mut. Assur. Fund *v.* Allen, 106 Ind. 593, 7 N. E. 317.

61. See Cross *v.* Armstrong, 44 Ohio St. 613, 10 N. E. 160.

62. *Illinois.*— Martin *v.* Martin, 187 Ill. 200, 58 N. E. 230 [*affirming* 87 Ill. App. 365].

Iowa.— Murray *v.* Wells, 53 Iowa 256, 5 N. W. 182.

but this of course depends upon the terms of the statute which grants, allows, or limits the exemption; and the rule has been changed in several jurisdictions.

Maine.— Hathorn *v.* Robinson, 96 Me. 33, 51 Atl. 236.

Mississippi.— Rice *v.* Smith, 72 Miss. 42, 16 So. 417. See also Yale *v.* McLaurin, 66 Miss. 461, 5 So. 689.

Missouri.— Meyer *v.* Supreme Lodge K. & L. of H., 72 Mo. App. 350.

See 23 Cent. Dig. tit. "Exemptions," § 75.

In Kansas, Laws (1895), c. 163, providing that a beneficiary's certificate shall inure to the sole use of the beneficiary's name and shall be free from the claim of the assured and from the claims of the creditors of the person named in the policy, include the beneficiary within their terms and the money resulting from a policy while deposited in a bank is exempt from garnishment by the judgment creditor of the beneficiary. Emmert *v.* Schmidt, 65 Kan. 31, 68 Pac. 1072 [*overruling* Reighart *v.* Harris, 6 Kan. App. 339, 51 Pac. 788, and *following* Crumly *v.* Fuller, (App. 1898) 57 Pac. 47].

In Kentucky it has been held that where the charter of a beneficiary society provides that the funds shall be for the relief of the member's family and shall be exempt from seizure under legal process for the payment of a debt of the deceased member, a certificate payable to the widow of a member is for the benefit of the member's family and cannot be seized by the widow's creditors after the death of the member. Schillinger *v.* Boes, 85 Ky. 357, 3 S. W. 427, 9 Ky. L. Rep. 18.

In Minnesota it is held that Gen. St. (1894) § 3312, providing that the money to be paid by coöperative or assessment life-insurance associations shall be exempt from execution, exempts the money from execution after it has been paid to and while it remains in the hands of the beneficiary named in the certificate or policy. Shakopee Nat. Bank *v.* How, 65 Minn. 187, 67 N. W. 994. See also Brown *v.* Belfour, 46 Minn. 68, 48 N. W. 604, 12 L. R. A. 373.

In New York there is considerable conflict upon this question due, to a considerable extent, to the difference in the statutes under which the decisions have been rendered. In Crosby *v.* Stephan, 32 Hun 478 [*following* Bolt *v.* Keyhoe, 30 Hun 619], the rule of the text that the beneficiary could not claim the exemption as against his own creditors was upheld. See also Commercial Travelers' Assoc. *v.* Newkirk, 16 N. Y. Suppl. 177. In an earlier case, Leonard *v.* Clinton, 26 Hun 288, it was held that the money received by a widow on a policy issued upon the life of her husband for the benefit of herself and children was not subject to the claims of her creditors. The court came to this conclusion from the fact that when the statute authorizing such policies to be issued was first passed a wife could not under ordinary circumstances have creditors; although the law from time to time extended her rights and increased her liabilities, the court thought that it had not changed the nature of her contingent interests in an insurance policy and had not decreased the necessity for preserving this interest for her support. The same conclusion was reached in Austin *v.* McLaurin, 1 N. Y. Suppl. 209. The exemption allowed in the policy of a beneficial society has been changed a number of times by statute. By Laws (1901), c. 397, providing that all moneys which shall be paid by any fraternal insurance society shall be exempt from execution and shall not be liable to seizure to pay any debt of a member or beneficiary, the money due a widow as beneficiary of her husband is exempt from execution. Ettenson *v.* Schwartz, 38 Misc. 669, 78 N. Y. Suppl. 231. Laws (1884), c. 116, and Laws (1889), c. 520, provided an exemption in "that part of such beneficiary fund paid to the widow." Under this statute the widow had a claim of exemption in the fund received against debts contracted either before or after the receipt of the fund. Clark *v.* Lynch. 83 Hun 462, 31 N. Y. Suppl. 1038. Laws (1892), c. 690, § 238, provided that all moneys or other benefits "to be paid, provided, or rendered" by any beneficial association shall be exempt from execution. Under this statute, money which has been paid to the beneficiary is not exempt as against his or her debts. Bull *v.* Case, 41 N. Y. App. Div. 391, 58 N. Y. Suppl. 774 [*distinguishing* Clark *v.* Lynch, *supra*]. Laws (1879), c. 189, authorizing the incorporation of benevolent associations does not exempt a fund received by a beneficiary from being taken for his debts. Bolt *v.* Keyhoe, 30 Hun 619.

Heirs and legatees of beneficiary.—Mo. Acts (1897), p. 135, provides, in regard to fraternal beneficiary societies, that the money to be paid by any association authorized to do business under the act shall not be liable to judgment or execution, and shall not be seized by any legal or equitable process, or by the operation of law, to pay any debt or liability of a certificate holder of any beneficiary named in a certificate, or any person who may have any right thereunder. A sole beneficiary died after the death of the insured. It was held that the administrator, as the quasi-trustee of the heirs, is entitled to the proceeds of the certificate, and that such proceeds, when received by him, cannot be applied to the liabilities of the estate in his hands, but must be accounted for to the heirs at law of his intestate. Grand Lodge A. O. U. W. *v.* Dister, 77 Mo. App. 608.

Property purchased with insurance money. — A provision that the avails of a life or accident policy shall be exempt from all debts of the beneficiary contracted before the death of the assured exempts not only the proceeds of the policy but also any prop-

The amount of the exemption is generally limited.[63] If the statute provides that excess of premiums over a certain amount shall be allowed for the debts of the insured, the amount must be reckoned from premiums paid on all the policies held by the insured.[64] If the premiums exceed the statutory amount, the creditors have a right to subject an amount equal to the excess, with interest thereon, to their claims;[65] but they have no right to the insurance purchased by the excess of premiums; they are limited to the excess in premiums and the interest thereon.[66] If a married woman purchases insurance out of her own money upon the life of her husband, her husband's creditors have no claim against the proceeds, irrespective of any amount paid for premium.[67] Under some statutes the exempted

erty which the beneficiary (widow) may purchase therewith. Cook *v.* Allee, 119 Iowa 226, 93 N. W. 93. In an earlier case it was held that property acquired by an assignment of an insurance policy was not exempt. Friedlander *v.* Mahoney, 31 Iowa 311. On the levy of an execution on land belonging to plaintiff, he interposed a claim as the head of the family, and it appeared that an exemption was formerly set aside to him, a part of which consisted of a portion of amounts due on certain insurance policies. The evidence showed that six hundred and fifty dollars derived from these policies was invested in this land, and that this six hundred and fifty dollars was more by one hundred and nine dollars and three cents than the share of the exemption estate in the proceeds of the policies. There was no equitable pleading in the case, and the court instructed the jury to find the land subject to the fieri facias, to the extent of one hundred and nine dollars and three cents, with costs. It was held error, as the whole property was not subject for a specific sum of money. Vining *v.* Court Officers, 82 Ga. 222, 8 S. E. 185.

63. See the statutes of the several states.

If no limitation is made a law providing for the exemption in a policy of life insurance violates the constitutional provision which declares that the right of the debtor to enjoy the comforts and necessaries of life shall be recognized by wholesome laws and exempting from forced sale a reasonable amount of personal property, the kind and value of which is to be fixed by general laws. Skinner *v.* Holt, 9 S. D. 427, 69 N. W. 595, 62 Am. St. Rep. 878 [*citing In re* How, 59 Minn. 415, 61 N. W. 456].

In Tennessee, Code, § 3135, declares that "a life insurance effected by a husband on his own life shall inure to the benefit of the widow and next of kin, to be distributed as personal property, free from the claims of his creditors." Section 3336 is in substance the same, except that the insurance inures to the widow and children. Under these provisions the life insurance in the sum of fifty-eight thousand dollars effected by a husband on his own life and made payable to his widow is exempt even though he effected the insurance while insolvent and thereafter paid as premiums a larger sum than the amount of the debt sued for, which debt was incurred prior to taking the insurance. Harvey *v.* Harrison, 89 Tenn. 470, 14 S. W. 1083.

64. Bartram *v.* Hopkins, 71 Conn. 505, 42 Atl. 645.

But in Ohio under Rev. St. c. 5427, providing that any beneficial fund not exceeding a certain amount paid by any benevolent association to the family of a deceased member shall be exempt from the payment of his debts, it was held that each policy must be considered alone, and that the amount resulting on the different policies could not be added together in determining the amount that may belong to the creditors. Hinch *v.* D'Utassy, 1 Ohio S. & C. Pl. Dec. 372.

65. Bartram *v.* Hopkins, 71 Conn. 505, 42 Atl. 645.

In California the statute exempts moneys accruing on an insurance policy issued on the life of a debtor if the annual premium does not exceed five hundred dollars. If the premiums exceed that amount the beneficiary can have no exemption at all. *In re* Brown, 123 Cal. 399, 55 Pac. 1055, 69 Am. St. Rep. 74.

66. Kiely *v.* Hickcox, 70 Mo. App. 617.

Under New York Laws (1896), p. 220, c. 272, providing that that portion of the insurance which is purchased by excess of premiums above five hundred dollars, is primarily liable for the husband's debts the beneficiary is not to be deprived of any portion of the insurance moneys until it is determined that the other assets of the estate of the deceased will not satisfy the claims of the creditors; but until the creditors' claims are discharged, they are a lien in the meantime on so much of the insurance money as was purchased by the excess of premium; and in reckoning the amount to which the beneficiary is entitled, premiums on policies assigned by a wife and her husband before his death to secure a debt of the husband cannot be considered as a part of the five hundred dollars, or charged against the wife in determining the amount of the life insurance to which she is entitled after the husband's death. Kittel *v.* Domeyer, 175 N. Y. 205, 67 N. E. 433 [*reversing* in part 70 N. Y. App. Div. 134, 75 N. Y. Suppl. 150].

67. Baron *v.* Brummer, 100 N. Y. 272, 3 N. E. 474 [*reversing* 30 Hun 88]; Jacob *v.* Continental L. Ins. Co., 1 Cinc. Super. Ct. 519, where the insurance was taken in the husband's name and where the court held that he merely acted as his wife's agent.

avails of life insurance may be disposed of by will,[68] and under other statutes they may be subjected to the debts of the deceased by a special contract or arrangement.[69]

F. Pension and Bounty Money and Property Purchased Therewith — 1. Under Federal Statute.[70] The statute [71] provides that "no sum of money due, or to become due, to any pensioner shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the pension office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner." This statute is held not to protect money after it has been received by the pensioner.[72] Nor does it protect a credit arising from the deposit of the pension check or money.[73] The protection of the statute lasts, by its very terms, only so long as the money is in the course of transmission to the pensioner.[74] A different construction has been disapproved by the supreme court of the United

68. Me. Rev. St. c. 75, § 10, gives the fund accruing from a life-insurance policy to the widow and issue, and "if no issue, the whole to the widow, and if no widow the whole to the issue." And it further provides that "it may be disposed of by will though the estate is insolvent." See Hathaway *v.* Sherman, 61 Me. 466, holding that the statute does not empower one dying insolvent and leaving neither widow nor child to dispose of the insurance fund by will, but that in this event it becomes assets for the payment of debts.

Under Ohio Rev. St. § 3628, the avails of the decedent's life-insurance policy cannot be disposed of by will, but after the proceeds have gone to exhaust the exemption under the statute the remainder of the avails must go to the administrator to pay debts and costs of administration and a year's allowance to the widow, and whatever remains after the satisfaction of these liabilities must go to the widow and children according to the statute of descents. Wagner *v.* Karman, 6 Ohio Dec. (Reprint) 753, 7 Am. L. Rec. 671.

69. See Larrabee *v.* Palmer, 101 Iowa 132, 70 N. W. 100, holding that a meeting of the minds of the parties is necessary to establish either a "special contract" or an "arrangement," and that the fact that the insured clearly expressed before his decease his desire that the avails of his policies should go in payment of his debts is insufficient.

70. **A bounty or grant of money for meritorious services in suppressing slave trade** "for the relief of the heirs" of the person who rendered the services is not liable to the claims of his creditors as against the rights of the heirs in the gift or grant. Emerson *v.* Hall, 13 Pet. (U. S.) 409, 10 L. ed. 223.

71. U. S. Rev. St. (1878) § 4747 [U. S. Comp. St. (1901) p. 3279].

72. *Kentucky.*— Johnson *v.* Elkins, 90 Ky. 163, 13 S. W. 448, 11 Ky. L. Rep. 967, 8 L. R. A. 552; Robion *v.* Walker, 82 Ky. 60, 56 Am. Rep. 878; Carter *v.* Strange, 7 Ky. L. Rep. 302; Suter *v.* Stamper, 6 Ky. L. Rep. 745; Herreld *v.* Skillem, 6 Ky. L. Rep. 666; Moxley *v.* Andrews, 5 Ky. L. Rep. 425. *Contra,* see Eckert *v.* McKee, 9 Bush 355.

Maine.— Crane *v.* Linneus, 77 Me. 59; Friend *v.* Garcelon, 77 Me. 25, 52 Am. Rep. 739.

Massachusetts.— Spelman *v.* Aldrich, 126 Mass. 113. But *compare* Kellogg *v.* Waite, 12 Allen 529.

New Jersey.— Jardain *v.* Fairton Sav. Fund, etc., Assoc., 44 N. J. L. 376.

Ohio.— Fulwiler *v.* Infield, 6 Ohio Cir. Ct. 36, 3 Ohio Cir. Dec. 338.

Pennsylvania.— Money which has been received by the pensioner and placed in the hands of a third person for safe-keeping is not exempt. Rozelle *v.* Rhodes, 116 Pa. St. 129, 9 Atl. 160, 2 Am. St. Rep. 591. But in Holmes *v.* Tallada, 125 Pa. St. 133, 17 Atl. 238, 11 Am. St. Rep. 880, 3 L. R. A. 219, the court, although recognizing the authority of Rozelle *v.* Rhodes, *supra,* held that the money when in the pensioner's hands could not be applied to the payment of his debts against his will and that therefore a gift of the money to his wife is not a fraud upon his creditors. See also Clark *v.* Ingraham, 15 Phila. 646.

See 23 Cent. Dig. tit. "Exemptions," § 80.

Contra.— See Folschow *v.* Werner, 51 Wis. 85, 7 N. W. 911 [*following* Eckert *v.* McKee, 9 Bush (Ky.) 355, which was afterward practically overruled].

Funds in the hands of a guardian, belonging to his wards, derived from a pension allowed to them on account of the services and death of their father in the military service of the United States are not exempt from liability for their support; but to justify an order of allowance therefrom to the surviving parent for their past support would require a stronger showing than for a future allowance, and should only be made under special circumstances. Welch *v.* Burris, 29 Iowa 186, 187.

73. Webb *v.* Holt, 57 Iowa 712, 11 N. W. 658; Cranz *v.* White, 27 Kan. 319, 41 Am. Rep. 408; Martin *v.* Hurlburt, 60 Vt. 364, 14 Atl. 649; McCalla *v.* Brennan, 14 Wkly. Notes Cas. (Pa.) 513. *Contra,* Reiff *v.* Mack, 160 Pa. St. 265, 28 Atl. 699, 40 Am. St. Rep. 720.

74. Triplett *v.* Graham, 58 Iowa 135, 12 N. W. 143. See cases cited *supra,* notes 72, 73.

States.[75] It therefore follows that property purchased with pension money is not exempt.[76] But the protection of the statute is absolute until the money reaches the pensioner's hands,[77] and it has been held that pension money in the pensioner's hands at the time of filing his petition in bankruptcy is exempt.[78]

2. Under State Statutes. Where different states have passed statutes providing for an exemption in pension money given by the United States, the pensioner's right to an exemption after the money has been paid to him must be found in the laws of the state where the pensioner resides,[79] for after the money is paid over the federal statute ceases to be operative.[80] The limits of the exemption depend upon the statute of each jurisdiction and the construction given thereto by the court.[81] A number of states have given the pensioner an exemption in

75. McIntosh *v.* Aubrey, 185 U. S. 122, 124, 22 S. Ct. 561, 46 L. ed. 834 [*citing* Crow *v.* Brown, 81 Iowa 344, 46 N. W. 993, 25 Am. St. Rep. 501, 11 L. R. A. 110; Yates County Nat. Bank *v.* Carpenter, 119 N. Y. 550, 25 N. E. 1108, 16 Am. St. Rep. 855, 7 L. R. A. 557].

76. *Indiana.*— Cavanaugh *v.* Smith, 84 Ind. 380.

Kentucky.— Johnson *v.* Elkins, 90 Ky. 163, 13 S. W. 448, 11 Ky. L. Rep. 967, 8 L. R. A. 552; Sims *v.* Walsham, 7 S. W. 557, 9 Ky. L. Rep. 912; Carter *v.* Strange, 7 Ky. L. Rep. 302; Herreld *v.* Skillem, 6 Ky. L. Rep. 666; Hudspeth *v.* Harrison, 6 Ky. L. Rep. 304; Robion *v.* Walker, 5 Ky. L. Rep. 799.

Pennsylvania.— Aubrey *v.* McIntosh, 10 Pa. Super. Ct. 275, 44 Wkly. Notes Cas. 164; Burtch *v.* Burtch, 14 Pa. Co. Ct. 482. *Compare* Lancaster County Poor Directors *v.* Hartman, 9 Pa. Co. Ct. 177.

West Virginia.— Kingwood Bank *v.* Murdock, 48 W. Va. 301, 37 S. E. 548; McFarland *v.* Fish, 34 W. Va. 548, 12 S. E. 548.

United States.— *In re* Stout, 109 Fed. 794. See also McIntosh *v.* Aubrey, 185 U. S. 122, 22 S. Ct. 561, 46 L. ed. 834 [*quoting* Aubrey *v.* McIntosh, 10 Pa. Super. Ct. 275, 44 Wkly. Notes Cas. (Pa.) 164].

See 23 Cent. Dig. tit. "Exemptions," § 73.

Contra.— Cook *v.* Allee, 119 Iowa 226, 93 N. W. 93; Crow *v.* Brown, 86 Iowa 741, 53 N. W. 131, 81 Iowa 344, 46 N. W. 993, 25 Am. St. Rep. 501, 11 L. R. A. 110; Smith *v.* Hill, 83 Iowa 684, 49 N. W. 1043, 32 Am. St. Rep. 329 [*overruling* Foster *v.* Byrne, 76 Iowa 295, 35 N. W. 513, 41 N. W. 22]; Dean *v.* Clark, 81 Iowa 753, 46 N. W. 995. See also Fayette County *v.* Hancock, 83 Iowa 694, 49 N. W. 1040.

Lands conveyed to the wife of the pensioner in consideration of pension money have been held exempt (Marquardt *v.* Mason, 87 Iowa 136, 54 N. W. 72) even in the jurisdiction which interprets the federal statute to give an exemption only so long as the money is in course of transmission to the pensioner (Hissem *v.* Johnson, 27 W. Va. 644, 55 Am. Rep. 327). This was the rule in Iowa when the general rule was that land purchased by the proceeds of a pension check was not exempt. Farmer *v.* Turner, 64 Iowa 690, 21 N. W. 140. See *supra*, note 74. *Contra*, Johnson *v.* Elkins, 90 Ky. 163, 13 S. W. 448, 11 Ky. L. Rep. 967, 8 L. R. A. 552; Coakley *v.* Underwood, 18 S. W. 7, 13 Ky. L. Rep. 654; Burtch *v.* Burtch, 14 Pa. Co. Ct. 482.

77. Therefore a formal payment to one without authority to receive it will not deprive the pensioner of the protection of the act. Payne *v.* Gibson, 5 Lea (Tenn.) 173. Even where the money of a pensioner was paid to an agent appointed by him to receive it from a disbursing agent it was held still under the protection. Adams *v.* Newell, 8 Vt. 190, a case decided in 1836 under another statute.

Payment of a debt due from the pensioner to his wife cannot be objected to by the husband's creditors. Bullard *v.* Goodno, 73 Vt. 88, 50 Atl. 544, holding that the sum of twenty-three dollars paid by the pensioner to his wife over and above the four hundred and seventy-seven dollars borrowed from her would be considered as a payment of interest on the loan.

78. *In re* Bean, 100 Fed. 262, 4 Am. Bankr. Rep. 53 [*distinguishing* Martin *v.* Hurlburt, 60 Vt. 364, 14 Atl. 649, where the pension money had been changed in nature by investment in a savings bank deposit, not for safe-keeping, but to earn dividends].

79. Burgett *v.* Fancher, 35 Hun (N. Y.) 647.

80. See *supra*, III, F, 1.

81. See cases cited *infra*, this note.

In Connecticut, Gen. St. § 1164, exempts any pension moneys received from the United States while "in the hands of the pensioner." Under this statute the proceeds of the pension check deposited all at one time and entered on a pass-book in a mutual savings bank, of the assets of which the pensioner thereby becomes a proportional part owner, are exempt. Price *v.* Savings Soc., 64 Conn. 362, 30 Atl. 139, 42 Am. St. Rep. 198.

In New York pension money is absolutely exempt under Code Civ. Proc. § 1393. Wildrick *v.* De Vinney, 18 N. Y. Wkly. Dig. 355. If the money is deposited in a bank it is still exempt. Stockwell *v.* Malone Nat. Bank, 36 Hun 583; Burgett *v.* Fancher, 35 Hun 647. But one who receives an interest-bearing certificate of deposit receives property in return for his money and thereby loses his right of exemption. Matter of Kennedy, 3 N. Y. Suppl. 18, 1 Connoly Surr. 181.

In Texas the probate act of 1870 providing that property reserved by law from forced sale shall form no part of the estate of

property purchased with the pension money he receives.[82] A person claiming real estate as exempt from execution, because bought with pension money, must prove the right claimed, as inspection of the property or of the records will not determine whether it is exempt or not.[83] Bounty money like pension money is protected on grounds of public policy from seizure for the debts of the person to whom the bounty is due, at least until it has been received in his hands,[84] or even

a deceased person where a constituent of the family survives does not apply to a pension warrant issued to veteran under Acts (1874), p. 114. Heard *v.* Northington, 49 Tex. 439.

Liability of pension money for maintenance of a relative.— Pension moneys exempted by N. Y. Code Civ. Proc. § 1393, which moneys compose the entire property of a father, cannot be subjected to the maintenance of an insane son who is being cared for at the expense of the state, although Code Cr. Proc. § 915, provides that a relative of sufficient ability can be compelled to maintain a poor person. St. Lawrence State Hospital *v.* Fowler, 15 Misc. (N. Y.) 159, 37 N. Y. Suppl. 12. In Iowa pension money in the hands of a conservator of an insane pensioner cannot be appropriated to reimburse the county for expenses incurred by it in support of the pensioner. Fayette County *v.* Hancock, 83 Iowa 694, 49 N. W. 1040.

For the payment of alimony out of pension money see Tully *v.* Tully, 159 Mass. 91, 34 N. E. 79.

82. See cases cited *infra*, this note.

In Iowa, McClain Code, § 4305, gives an absolute exemption in all pension money whether it is in the pensioner's possession or invested by him. This statute was held not to apply where the debt against which the exemption is claimed was contracted before the enactment of the statute. This on the constitutional ground of the impairment of the obligation of contracts (U. S. Const. art. 1, § 10). Foster *v.* Byrne, 76 Iowa 295, 35 N. W. 513, 41 N. W. 22. The act does not affect the property of a pensioner who died before it was enacted. Baugh *v.* Barrett, 69 Iowa 495, 29 N. W. 425. If the money is invested in animals, not all their increase is necessarily exempt. The pensioner is entitled to an exemption only in the money actually "invested." Diamond *v.* Palmer, 79 Iowa 578, 44 N. W. 819. Although by one section pension money loaned or invested is exempt and by another section the proceeds and accumulations are exempt when invested in a homestead, crops grown upon land purchased with pension money do not come within the exemption where it is not shown that the land is a homestead. Haefer *v.* Mullison, 90 Iowa 372, 57 N. W. 893, 48 Am. St. Rep. 451. Where a pensioner trades a horse which is exempt because bought with pension money for another horse of greater value, but gives nothing to boot, the latter horse is also exempt. Smith *v.* Hill, 83 Iowa 684, 49 N. W. 1043, 32 Am. St. Rep. 329. A claimant under this statute must show, not only that the money was invested in the property, but also the exact amount invested. Lee *v.* Teeter, 106 Iowa 37, 75 N. W. 655.

In Nebraska, Code Civ. Proc. § 531*b*, has given the pensioner an exemption in personal property purchased with pension money to an amount not exceeding two thousand dollars. This exemption extends to personal property of less than two thousand dollars in value on which a mortgage lien has been discharged with money received as a pension, and to property taken in exchange for the property thus discharged from the mortgage lien and to the increase of such property. Dargan *v.* Williams, 66 Nebr. 1, 91 N. W. 862.

In New York, under Code Civ. Proc. § 1393, property bought with pension money is exempt. Yates County Nat. Bank *v.* Carpenter, 119 N. Y. 550, 556, 23 N. E. 1108, 16 Am. St. Rep. 855, 7 L. R. A. 557 [*reversing* 49 Hun 40, 1 N. Y. Suppl. 733, and *limiting* Wygant *v.* Smith, 2 Lans. 185, to the facts appearing therein: "In that case the pensioner had embarked his pension in business or trade, and in some transactions had made a profit. It was impossible to identify the fund in the various articles of property in which, through numerous and successive changes, it had become invested, and it was held that the pensioner had lost his right of exemption"]. But real estate bought with pension money is subject to the pensioner's debts after his death. Matter of Liddle, 35 Misc. 173, 71 N. Y. Suppl. 474; Beecher *v.* Barber, 22 N. Y. St. 136, 6 Dem. Surr. 129. *Contra*, Tyler *v.* Ballard, 31 Misc. 540, 65 N. Y. Suppl. 557, 31 N. Y. Civ. Proc. 63, 7 N. Y. Annot. Cas. 465; Hodge *v.* Leaning, 2 Dem. Surr. 553. The exemption of a lot bought with pension money and the house built thereon extends only to the amount of pension money so used, and a mortgage given for a balance due under a contract for the building of the house is valid as to any surplus. Countryman *v.* Countryman, 28 N. Y. Suppl. 258, 23 N. Y. Civ. Proc. 161.

As to waiver see Monroe *v.* Button, 20 Misc. (N. Y.) 494, 46 N. Y. Suppl. 637. See also *infra*, V.

83. Shull *v.* King, 24 N. Y. App. Div. 605, 49 N. Y. Suppl. 1.

84. Manchester *v.* Burns, 45 N. H. 482.

Land bought with bounty.— Me. Laws (1862), c. 106, § 2, allowing an exemption in personal property "during the term of service of such volunteer" does not protect land bought by the debtor with his bounty money, the title being in his wife's name, where question arises long after the debtor's service expired. Knapp *v.* Beattie, 70 Me. 410, 411.

absolutely.[85] If the statute protects bounty money and seizure only until it can be received in his hands, it is subject to execution for the recipient's debts after he[86] or his agent[87] has received it.

G. Proceeds of Exempt Property — 1. By Voluntary Sale or Exchange. When exempt personal property is exchanged for property in kind or like character, the property received in exchange is also exempt;[88] but when property is sold for money or is exchanged for merchandise or other property not exempt under the law, the money[89] or the property received in exchange[90] is liable to execution.

Public policy requires that the bounties voted by a town to encourage enlistments cannot while in the hands of the town be held by the creditors of a volunteer under trustee process. Manchester *v.* Burns, 45 N. H. 482.

That a recipient was already a deserter when he enlisted and that he enlisted under a fictitious name does not affect his right to his exemption in the amount of money he has received. Youmans *v.* Boomhower, 3 Thomps. & C. (N. Y.) 21, under N. Y. Acts (1864), § 4.

85. Whiting *v.* Barrett, 7 Lans. (N. Y.) 106; Youmans *v.* Boomhower, 3 Thomps. & C. (N. Y.) 21.

86. Morse *v.* Towns, 45 N. H. 185.

87. Manchester *v.* Burns, 45 N. H. 482. When a purchaser of a claim against a town for a soldier's bounty receives the pay on it, the money received becomes the property of the purchaser, and he becomes the debtor of the soldier for the price which he agreed to pay, and may be held as trustee of the soldier therefor, although Vt. Gen. St. p. 118, provides that no money payable or received under the act authorizing towns to vote bounties to volunteers shall be subject to the trustee process. Yates *v.* Hurst, 41 Vt. 556.

88. Johnson *v.* Franklin, 63 Ga. 378; Morris *v.* Tennent, 56 Ga. 577; Kingsland *v.* McGowan, 3 Tex. App. Civ. Cas. § 32. *Contra*, Lloyd *v.* Durham, 60 N. C. 282, where the decision went on the ground that the property which had been exchanged was the property allotted to him, and the property received in exchange was not the property allotted to him, the court remarking that if the debtor had procured the article received in exchange to be given to him by a second allotment, it would then have been exempt.

In Kentucky property purchased with the proceeds of exempt property is exempt irrespective of the character or kind of the property thus purchased. Musgrave *v.* Parish, 11 S. W. 464, 11 Ky. L. Rep. 998; King *v.* Tompkins, 15 Ky. L. Rep. 29, holding that notes received in exchange for exempt property are not subject to the claims of the debtor's creditors. But property purchased with the salary of a public officer is not exempt. See *supra*, note 42.

Where part of the purchase-price constituted a part of the debtor's personal property exemption and the real estate was then conveyed to his wife, it was held that on a sale of the land to satisfy the debts of the debtor the creditor had no more right to subject that portion of the purchase-price which constituted a part of the debtor's exemption to the payment of his debts than if it had remained in the hands of the debtor. Bridgers *v.* Howell, 27 S. C. 425, 3 S. E. 790.

89. Charles *v.* Oatman, 2 Pa. L. J. Rep. 452, 4 Pa. L. J. 239.

A debt due from the sale of exempt property is not exempt. Avery Planter Co. *v.* Cole, 61 Ill. App. 494; Reade *v.* Kerr, 52 Ill. App. 467 (both cases decided under a statute which forbade an execution to be allowed a debtor in any money, salary, or wages due him from any person or corporation); Scott *v.* Brigham, 27 Vt. 561. And see Edson *v.* Trask, 22 Vt. 18. See also Harrier *v.* Fassett, 56 Iowa 264, 9 N. W. 217, holding that Iowa Code (1873), § 3244, which provides that the exemption given in property shall apply also to the judgment recovered for its value when wrongfully seized on execution by a creditor does not include a judgment recovered for exempt property sold voluntarily. See *infra*, III, G, 2.

Where a statute allows a wife to claim the personal property of exemption when her husband has absconded, she is entitled to hold the property itself, but not the proceeds thereof, if she converts it into money. This is because the law does not vest in her the title of the property exempt, but gives her only a right of possession, and if the property is converted into money it becomes subject to the debts of the husband just like any other of his property. The wife, however, may claim four hundred dollars of the money as exempt, but the residue will go to the creditors. Steele *v.* Leonori, 28 Mo. App. 675.

90. Pool *v.* Reid, 15 Ala. 826; Connell *v.* Fish, 54 Vt. 381, holding that a colt which is not exempt under the statute as kept for a team is not exempt merely because it was received in exchange for a horse which the debtor held as exempt under the statute. See also Salsbury *v.* Parsons, 36 Hun (N. Y.) 12, 17, where the court said: "It is a familiar rule that property exempt from levy and sale on execution only remains so, so long as it maintains its identity and is kept intact. A horse, under certain circumstances, may be exempt, but, if sold and the proceeds taken and invested in watches, they would not be exempt."

If real estate is received in exchange for exempt personal property it must take its place subject to the laws governing real es-

2. By Wrongful Conversion. A judgment for the wrongful conversion of exempt property cannot be subjected to execution.[91] The costs of the judgment are also held exempt,[92] but not the additional[93] or exemplary[94] damages given over and above the value of the thing converted.

3. Insurance Money. Insurance money received for exempt personal property which has been burned can be claimed as exempt by the judgment debtor.[95]

4. Miscellaneous.[96] Where proceeds of the interests in a judgment duly set apart as exempt were invested in land the land was held exempt.[97] A combined result of the proceeds of exempt property and the labor of the debtor is not subject to execution.[98] The natural increase of exempt animals has been held

tate and be exempt or not as other property of like nature. Bennett *v.* Hutson, 33 Ark. 762, holding that the fact that the title was taken in the wife's name would not affect the rule.

91. *Arkansas.*— See Draffin *v.* Smith, 63 Ark. 83, 37 S. W. 307.

Georgia.— Harrell *v.* Harrell, 77 Ga. 130, 3 S. E. 12.

Iowa.— See Harrier *v.* Fassett, 56 Iowa 264, 9 N. W. 232.

Kansas.— Treat *v.* Wilson, 65 Kan. 729, 70 Pac. 893.

Minnesota.— Wylie *v.* Grundysen, 51 Minn. 360, 53 N. W. 805, 38 Am. St. Rep. 509, 19 L. R. A. 33. *Contra,* Temple *v.* Scott, 3 Minn. 419.

Missouri.— Wabash R. Co. *v.* Bowring, 103 Mo. App. 158, 77 S. W. 106.

New York.— Tillotson *v.* Wolcott, 48 N. Y. 188, holding that the judgment will be protected as exempt property until sufficient time has elapsed to give the debtor opportunity to reinvest in exempt property. See also Andrews *v.* Rowan, 28 How. Pr. 126. But see Mallory *v.* Norton, 21 Barb. 424.

Pennsylvania.— Steele *v.* McKerrihan, 172 Pa. St. 280, 33 Atl. 570; McFarland *v.* Short, 1 Chest. Co. Rep. 410. *Contra,* Knabb *v.* Drake, 23 Pa. St. 489, 62 Am. Dec. 352, where the court was evidently influenced in its decision by the fact that half the sum recovered was given as exemplary damages.

South Dakota.— Long *v.* Collins, 15 S. D. 259, 88 N. W. 571.

Tennessee.— Crawford *v.* Carroll, 93 Tenn. 661, 27 S. W. 1010, 42 Am. St. Rep. 943, 26 L. R. A. 415.

Texas.— Howard *v.* Tandy, 79 Tex. 450, 15 S. W. 578.

Vermont.— Stebbins *v.* Peeler, 29 Vt. 289.

Wisconsin.— Below *v.* Robbins, 76 Wis. 600, 45 N. W. 416, 20 Am. St. Rep. 89, 8 L. R. A. 467.

See 23 Cent. Dig. tit. "Exemptions," § 78.

Contra.— Robinson *v.* Burke, 70 N. H. 2, 45 Atl. 713, 85 Am. St. Rep. 595.

If not all the property converted was exempt, although some of it was, and if there is nothing to show how much of the judgment recovered for the conversion proceeded from the portion of the property which was exempt, the judgment may be garnished. Burke *v.* Hance, 76 Tex. 76, 13 S. W. 163, 18 Am. St. Rep. 28.

92. Long *v.* Collins, 16 S. D. 625, 94 N. W. 700, 102 Am. St. Rep. 724; Below *v.* Robbins, 76 Wis. 600, 45 N. W. 416, 20 Am. St. Rep. 89, 8 L. R. A. 467.

93. Johnson *v.* Edde, 58 Miss. 664.

94. See Knabb *v.* Drake, 23 Pa. St. 489, 62 Am. Dec. 352.

95. Reynolds *v.* Haines, 83 Iowa 342, 49 N. W. 851, 32 Am. St. Rep. 311, 13 L. R. A. 719; Cooney *v.* Cooney, 65 Barb. (N. Y.) 524 [*following* Tillotson *v.* Wolcott, 48 N. Y. 188]; Ward *v.* Goggan, 4 Tex. Civ. App. 274, 23 S. W. 479 (holding that the insurance money was not subject to garnishment even where the creditor has a lien on the property destroyed); Puget Sound Dressed Beef, etc., Co. *v.* Jeffs, 11 Wash. 466, 39 Pac. 962, 48 Am. St. Rep. 885, 27 L. R. A. 808. *Contra,* Monnica *v.* German Ins. Co., 12 Ill. App. 240; Wooster *v.* Page, 54 N. H. 125, 20 Am. Rep. 128.

The debtor's answer to the disclosure of the garnishee of the amount due the debtor under an insurance policy must state the value of the property burned and allege that it was all of the like kind which was owned or used by him when the loss occurred. A mere allegation that the property insured was exempt is insufficient. Winsor *v.* McLachlan, 12 Wash. 154, 40 Pac. 727.

96. **Exemption in property purchased by:** Earnings, wages, or salary see *supra,* III, D, 1, d. Life-insurance money see *supra,* III, E. Pension or bounty money see *supra,* III, F. Proceeds of stock in trade see *supra,* III, B, 4.

97. Johnson *v.* Redwine, 105 Ga. 449, 33 S. E. 676.

98. Reed *v.* Holbrook, 113 Ga. 1168, 39 S. E. 445. See *supra,* III, D. The entire crop of cotton produced by the joint use of exempt property and supplies of the family furnished by the head of the family is not subject to his individual debt. Brand *v.* Clements, 116 Ga. 392, 42 S. E. 711, 94 Am. St. Rep. 133, holding that where the evidence does not show the amount and value so that the part of the debtor may be ascertained the whole must be held not subject to execution. See also Kupferman *v.* Buckholts, 73 Ga. 778.

A judgment for wages recovered by an employee who was wrongfully discharged before the expiration of his term is exempt, where there is an exemption of wages allowed by statute. Cox *v.* Bearden, 84 Ga. 304, 10 S. E. 627, 20 Am. St. Rep. 359.

subject to execution for the owner's debts;[99] but their produce has been held exempt.[1]

H. Choses in Action. The term "personal property" is generally held to include choses in action, whether in statutes making an absolute exemption of a certain amount of property or in statutes allowing the debtor to select a certain amount of property, either generally or in lieu of certain articles specifically exempt.[2] Under other statutes the courts have found it impossible to have the term connote a chose in action.[3]

I. Military Equipment. Early in the last century a number of the states exempted the equipments of a soldier of the militia.[4]

J. Share in Intestate Estate. A debtor who is the head of a family can claim an exemption in his share of an intestate's personal estate,[5] but not as

Money awarded to a defendant out of the proceeds of his real estate, under the exemption law of 1849, and paid over to his attorney by the sheriff, is not liable to be attached in the hands of the attorney. Gery *v.* Ehrgood, 31 Pa. St. 329.

99. Citizens' Nat. Bank *v.* Green, 78 N. C. 247.

1. Thus the butter made from the milk of the debtor's only cow, which was exempt by statute, has been held exempt. Leavitt *v.* Metcalf, 2 Vt. 342, 19 Am. Dec. 718. However, in order to maintain a claim to chattels which is founded solely on the contention that they are the product or increment of duly exempted personalty, it is incumbent upon the claimant to prove affirmatively that the subject-matter of the claim was obtained in exchange for exempted property or the proceeds thereof, or by labor exerted in connection with the use or consumption of such property, so that the newly acquired personalty might with fairness and reason be said to take the place of that which has been set apart. Culver *v.* Tappan, 113 Ga. 525, 38 S. E. 944.

2. *Alabama.*— Kennedy *v.* Smith, 99 Ala. 83, 11 So. 665; Enzor *v.* Hurt, 76 Ala. 595; Randolph *v.* Little, 62 Ala. 396.

Arkansas.— Winter *v.* Simpson, 42 Ark. 410; Probst *v.* Scott, 31 Ark. 652.

Georgia.— See Leggett *v.* Van Horn, 76 Ga. 795.

Kentucky.— Miller *v.* Mahoney, 29 S. W. 879, 16 Ky. L. Rep. 799.

Missouri.—Rolla State Bank *v.* Borgfeld, 93 Mo. App. 62; Wagner *v.* J. H. North Furniture, etc., Co.., 63 Mo. App. 206; State *v.* Finn, 8 Mo. App. 261. *Contra,* under the act of Feb. 6, 1847, see Gregory *v.* Evans, 19 Mo. 261.

Nebraska.— Mace *v.* Heath, 34 Nebr. 54, 51 N. W. 317, a judgment.

North Carolina.—Frost *v.* Naylor, 68 N. C. 325, construing Const. art. 10, § 1. But *contra,* under Rev. Code, c. 45, § 89, see Ballard *v.* Waller, 52 N. C. 84, where the chose in action was a judgment.

Ohio.— Homestead Act, § 8, as amended March 22, 1858 (Swan & C. Annot. St. 1146), which allows the resident head of a family not the owner of a homestead to hold exempt personal property to be selected by him or her, "not exceeding three hundred dollars in value, in addition to the amount of chattel property now by law exempt," includes, when construed in connection with other statutes *in pari materia,* credits and moneys selected by the debtor as against either attachment or garnishee process. Chilcote *v.* Conley, 36 Ohio St. 545.

See 23 Cent. Dig. tit. "Exemptions," § 38.

An equity of redemption in personal property may be claimed by the debtor as exempt. Gaster *v.* Hardie, 75 N. C. 460. *Contra,* Moffett *v.* Sheehey, 52 Ill. App. 376.

La. Civ. Code, art. 1992, exempts the rights of personal servitude of use and habitation from execution. See also La. Civ. Code, art. 646, servitude.

3. Finlen *v.* Howard, 126 Ill. 259, 18 N. E. 560 [*distinguishing* Fanning *v.* Jacksonville First Nat. Bank, 76 Ill. 53]; Leonard *v.* Lawrence, 32 N. J. L. 355; Edson *v.* Trask, 22 Vt. 18.

In British Columbia, under St. (1888) c. 57, § 10, exempting goods and chattels to the debtor, book debts are not exempt before seizure and sale. Hudson's Bay Co. *v.* Hazlett, 4 Brit. Col. 450.

4. Hendricks *v.* Lewis, R. M. Charlt. (Ga.) 105. Under such a statute the arms of an artilleryman were exempt. Crocker *v.* Hunt, 2 McCord (S. C.) 352. But the horse and saddle of a member of a company of cavalry were not within section 32 of the Militia Act, providing that the uniform, arms, ammunition, and accoutrements of enrolled citizens shall be exempt. Fry *v.* Canfield, 4 Vt. 9.

Compliance with statute.— To obtain the benefits of the statute the claimant was obliged to comply with its terms. Southwell *v.* Harley, 3 Rich. (S. C.) 180.

This particular kind of exemption has been held to continue only so long as the debtor is bound by law to furnish the equipments — if the obligation ceases, the exemption ceases. Owen *v.* Gray, 19 Vt. 543, holding that after the debtor absconded his exemption ceased, since being without the jurisdiction he was no longer obliged to furnish the equipments. See *supra,* II, I.

5. Swandale *v.* Swandale, 25 S. C. 389.

Legacies of married women are not subject to execution or attachment under the proviso of the Pennsylvania act of April 13, 1843, which expressly exempts legacies and distributive shares of married women from

against the debts which he owes the estate.[6] In some jurisdictions a debtor is given an exemption in land which is set apart as burial ground.[7]

K. Property or Money in Lieu of Specific Exemption. Whether the debtor can claim money[8] or property[9] in lieu of specific exemptions allowed by the law depends upon the jurisdiction. If a debtor selects a debt due him, the debt becomes exempt, in a jurisdiction where he is allowed this privilege, just as if it had been designated under the statutory provision as to articles specifically exempt.[10]

IV. SALE, TRANSFER, MORTGAGE, OR ENCUMBRANCE.

A. Power to Sell, Transfer, Encumber, or Dispose — 1. In General. Subject to certain exceptions,[11] a debtor has power to sell or dispose of property the status of which as exempt property is determined.[12] The debtor may dispose

foreign attachment. Irwin's Estate, 31 Pittsb. Leg. J. (Pa.) 23.

6. Duffy *v.* Duffy, 155 Mo. 144, 55 S. W. 1002 [*citing* Lietman *v.* Lietman, 149 Mo. 112, 50 S. W. 307, 73 Am. St. Rep. 374].

7. Pawnee City First Nat. Bank *v.* Hazels, 63 Nebr. 844, 89 N. W. 378, 56 L. R. A. 765; Cox *v.* Stafford, 14 How. Pr. (N. Y.) 519. See also CEMETERIES, 6 Cyc. 718. In Pawnee City First Nat. Bank *v.* Hazels, *supra*, it was held that the fact that the owner of the legal title to a portion of the lots in a cemetery dedicated to public use receives a portion of the revenue derived from the sale thereof when required for burial purposes does not render the unsold lots subject to the execution.

8. See Fowler *v.* State, 99 Md. 594, 53 Atl. 444 [*distinguishing* State *v.* Boulden, 57 Md. 314]; Carter *v.* Davis, 6 Wash. 327, 33 Pac. 833.

If a debtor claims an exemption by reserving a certain amount out of an assignment for the benefit of creditors, the claim must be restricted to some property which he owned or in which he had an interest at the time of the assignment, or at the farthest, to the proceeds for which the property was sold. The claim cannot be extended to money made by the assignee's care, management, and use of the assigned property. Bausman's Appeal, 90 Pa. St. 178, holding that the rent which the assignees received after an assignment, not on a term existing at the time of the assignment but on a letting afterward, cannot be allowed to a debtor who has reserved his three-hundred-dollar exemption in the assignment.

The debtor may claim his exemption out of the rents and profits of a life-estate appraised at less than the statutory amount. Sener *v.* Scherff, 10 Pa. Co. Ct. 529 [*followed* in Buchi *v.* Pund, 9 Pa. Dist. 446, 17 Montg. Co. Rep. (Pa.) 11].

9. See cases cited *infra*, this note.

In Kentucky, prior to the exemption act of June 1, 1884, a debtor could not claim anything in lieu of the exemption articles not on hand. The act of 1884 allowed in such cases other personal property to be set apart to the debtor. Miller *v.* Mahoney, 16 Ky. L. Rep. 400. In Northington *v.* Boyd, 12 Ky. L. Rep. 227, it was said that a debtor might sell articles specifically exempt and have an allowance out of other property if he has spent the money.

In Michigan a debtor engaged in a business which would entitle him to claim a team as exempt may select instead of it other property to the value of two hundred and fifty dollars necessary to enable him to carry on the same business, although without a team he would be obliged to change entirely the mode of conducting his business. Wyckoff *v.* Wyllis, 8 Mich. 48.

In Missouri, under section 13 of the Exemption Act, a debtor may select any other property in lieu of specific articles enumerated in the first and second clauses of section 12, provided his whole exemption does not exceed in value one hundred and fifty dollars. Mahan *v.* Scruggs, 29 Mo. 282.

10. Day *v.* Burnham, 82 Mo. App. 538. See, however, Johnson *v.* Redwine, 105 Ga. 449, 33 S. E. 676, holding that the provision for the allowance of cash and its investment by the ordinary is not applicable where the property exempted was an interest owned and held by the debtor in a judgment.

11. See *infra*, IV, A, 1, 2.

Under a statute which abrogates the right of a debtor to assign or transfer his exempt property after suit has been begun for its purchase-price and plaintiff has complied with certain conditions provided in the statute, the right to assign or transfer remains until the conditions are complied with, although action has been begun for the purchase-price. Lillibridge *v.* Walsh, 97 Mich. 459, 56 N. W. 854.

12. *Alabama.*— Cook *v.* Baine, 37 Ala. 350. See also Gamble *v.* Reynolds, 42 Ala. 226.

Georgia.— Powers *v.* Rosenblatt, 113 Ga. 559, 38 S. E. 969.

Illinois.— Washburn *v.* Goodheart, 88 Ill. 229, 232; Vaughan *v.* Thompson, 17 Ill. 78.

Indiana.— Ray *v.* Yarnell, 118 Ind. 112, 20 N. E. 705.

Iowa.— Bevan *v.* Hayden, 13 Iowa 122.

Kentucky.— See Moxley *v.* Ragan, 10 Bush 156, 19 Am. Rep. 61.

Michigan.— Rosenthal *v.* Scott, 41 Mich. 632, 2 N. W. 909.

Missouri.— Day *v.* Burnham, 82 Mo. App. 538.

Tennessee.— Cronan *v.* Honor, 10 Heisk.

of his exempt property by gift or voluntary conveyance.[13] This right of gift or voluntary conveyance exists irrespective of the debtor's motive, whether in fraud of creditors or not.[14] The right to convey still exists, even after the execution is in the hands of the officer,[15] or after the execution lien has attached.[16] It naturally follows that the debtor may pledge or mortgage his exempt property;[17] but an indigent debtor cannot encumber that portion of his property exempt by law for the support of his wife and minor children,[18] nor can he by will dispose of pension money to the exclusion of his creditors.[19]

2. CONSENT OF WIFE OR HUSBAND. It is a usual provision of the exemption laws that property made exempt by them cannot be transferred or encumbered by a man, if he be married, without the consent of his wife; or the statute sometimes provides that neither husband nor wife can transfer or encumber their exempt property without the consent of the other.[20] Such a provision has been

533. In Cox *v.* Ballentine, 1 Baxt. 362, the court said that, although the legislature might restrain creditors from levying execution upon certain property of a debtor's family, it could not prohibit a debtor, the head of a family, from selling any property of which he was the absolute owner.

Virginia.— See Williams *v.* Watkins, 92 Va. 680, 24 S. E. 223.

Canada.— Field *v.* Hart, 22 Ont. App. 449.

See 23 Cent. Dig. tit. "Exemptions," §§ 105–107.

In Georgia the sale of exempt personal property by the head of a family, without an order of court, is void when made after the property has been duly set apart under the exemption laws of the state. Clifton *v.* Northen, 106 Ga. 21, 31 S. E. 782.

A bona fide resident householder possessed with less than six hundred dollars' worth of property over and above encumbrances may, before sale on a judgment founded on a contract, convey his equity in the land free from the lien of the judgment or execution. Citizens' State Bank *v.* Harris, 149 Ind. 208, 48 N. E. 856.

A fund exempt to a widow from the payment of her husband's debts is not made subject to their payment by the fact that she has assigned it. Kramer *v.* Wood, (Tenn. Ch. App. 1899) 52 S. W. 1113.

13. Wright *v.* Smith, 66 Ala. 514; Farmer *v.* Turner, 64 Iowa 690, 21 N. W. 140 (where a check given in settlement of a pension was given by the pensioner to his wife); Ehrisman *v.* Roberts, 68 Pa. St. 308; Carhart *v.* Harshaw, 45 Wis. 340, 30 Am. Rep. 752.

14. Carhart *v.* Harshaw, 45 Wis. 340, 30 Am. Rep. 752. See also Tracy *v.* Cover, 28 Ohio St. 61; Day *v.* Burnham, 82 Mo. App. 538. *Contra*, see Kulage *v.* Schueler, 7 Mo. App. 250; Yeager *v.* Nicholls, 7 Phila. (Pa.) 91. And see FRAUDULENT CONVEYANCES.

15. Pool *v.* Reid, 15 Ala. 826, 828; Barnard *v.* Brown, 112 Ind. 53, 13 N. E. 401; Paxton *v.* Freeman, 6 J. J. Marsh. (Ky.) 234, 22 Am. Dec. 74.

16. Godman *v.* Smith, 17 Ind. 152. *Contra*, see Cassell *v.* Williams, 12 Ill. 387.

17. Gillespie *v.* Brown, 16 Nebr. 457, 20 N. W. 632; Frost *v.* Shaw, 3 Ohio St. 270; Rose *v.* Martin, (Tex. Civ. App. 1895) 33 S. W. 284. See also Hawley *v.* Hampton, 160 Pa. St. 18, 28 Atl. 471.

A mortgage of exempt property is not an unlawful preference. Fournier *v.* Brown, 14 Ky. L. Rep. 204.

Where a chattel mortgage covering certain exempt and certain non-exempt property has not been recorded, the mortgagor, when certain of his creditors have levied execution on the non-exempt property, cannot require the mortgagee or his assignees to exhaust such property before proceeding against the exempt property. Baughn *v.* Allen, (Tex. Civ. App. 1902) 68 S. W. 207.

A debtor who deserts his family cannot in Illinois encumber the exempt property to the detriment of his family in favor of one knowing the facts. Baker *v.* Baker, 69 Ill. App. 461. But in Nebraska it is held that the husband's desertion or absconding does not divest him of the power to create a lien upon his exempt property. Farmers', etc., Bank *v.* Hoffman, (Nebr. 1903) 96 N. W. 1044.

18. Simpson *v.* Robert, 35 Ga. 180.

19. Luthey *v.* Bacon, 5 Ky. L. Rep. 326.

20. *Idaho.*— Kindall *v.* Lincoln Hardware, etc., Co., 8 Ida. 664, 70 Pac. 1056.

Kansas.— Searle *v.* Gregg, 67 Kan. 1, 72 Pac. 544; Alexander *v.* Logan, 65 Kan. 505, 70 Pac. 339, joint consent of husband and wife necessary. See also Skinner *v.* Winfield First Nat. Bank, 63 Kan. 842, 66 Pac. 997.

Kentucky.— Thorn *v.* Darlington, 6 Bush 448. *Contra*, Smith *v.* Wilson, 4 Ky. L. Rep. 719.

Michigan.— Singer Mfg. Co. *v.* Cullaton, 90 Mich. 639, 51 N. W. 687, but the statute applies only to articles enumerated therein.

Nebraska.— Farmers', etc., Bank *v.* Hoffman, (1903) 96 N. W. 1044, consent being required for the transfer of household goods or any interest therein, the statute putting no restriction on the husband's right to mortgage a standing crop.

Ohio.— Slanker *v.* Beardsley, 9 Ohio St. 589. But see Hiser *v.* Dawson, 9 Ohio Dec. (Reprint) 827, 17 Cinc. L. Bul. 318.

See 23 Cent. Dig. tit. "Exemptions," § 110.

Contra.— Mason *v.* Bumpass, 1 Tex. App. Civ. Cas. § 1338.

In Alabama that the restriction does not apply to personal property and that the hus-

held not to apply to a mortgage for the purchase-price.[21] The formalities of giving the consent depend upon the statute.[22] A statute making this restriction against mortgaging exempt property does not apply to a mortgage which is a renewal of a former mortgage given to secure a debt before the passage of the statute.[23]

B. Title and Rights of Transferee or Lienor. If the debtor can transfer at will his exempt property, it logically follows that the title of the transferee in the property cannot be assailed or impaired by the creditor of the transferee. This is the rule followed in many jurisdictions.[24] In other jurisdictions the rule

band may waive the exemption laws by a stipulation in a note see *infra*, V, A, 1, b.

In Florida the restriction does not apply to personal property. Hinson *v.* Booth, 39 Fla. 333, 32 So. 687, construing Const. art. 10, § 1.

In Iowa it is held that the restriction applies only to property which is exempt at the time, and not such as by some contingency may thereafter become exempt. Grover *v.* Younie, 110 Iowa 446, 81 N. W. 684.

In Michigan a husband has the right to sell or mortgage a span of horses exempt from execution under Howell St. § 7686, because necessary to enable him to carry on the business in which he is wholly or principally engaged, without the consent of his wife. Miller *v.* Miller, 97 Mich. 151, 56 N. W. 348. A sale by the husband of a personal chattel exempt by law from execution may be valid, without the written consent of the wife. If any consent is necessary a verbal one is sufficient. Holman *v.* Gillette, 24 Mich. 414. Where a statute exempts to each householder two cows, and where another provision forbids any chattel mortgage on any part of the exempt property unless the mortgage be signed by the wife, a mortgage of two cows by a husband without the wife's signature is good, where he owns five; for it will be presumed that he mortgaged those not exempt. Harley *v.* Procunier, 115 Mich. 53, 72 N. W. 1099, 69 Am. St. Rep. 546, 40 L. R. A. 150.

In Ohio the wife may, under the act of April 17, 1857, "securing to married women such personal property as may be exempt from execution," etc., maintain an action for the recovery of the specific property from the officer holding the same in execution. Colwell *v.* Carper, 15 Ohio St. 279.

21. Paterson *v.* Higgins, 58 Ill. App. 268; Barker *v.* Kelderhouse, 8 Minn. 207.

22. See cases cited *infra*, this note.

In Missouri, in interpreting an Iowa statute, the court held that the signature of the wife to a mortgage need not be acknowledged. Brown *v.* Koenig, 99 Mo. App. 653, 656, 74 S. W. 407 [*citing* Gammon *v.* Bull, 86 Iowa 754, 53 N. W. 340; Genoway *v.* Maize, 163 Mo. 224, 63 S. W. 698].

In Wisconsin the signature of a wife to a chattel mortgage must, by Rev. St. (1898) § 1313, be witnessed by two witnesses. Lashua *v.* Myhre, 117 Wis. 18, 93 N. W. 811.

23. Vollmer *v.* Reid, (Ida. 1904) 77 Pac. 325, where the note for the debt was renewed and a different rate of interest was provided for in the new note and an additional sum for attorney's fees, and it was stated in the new note that it was given to renew the old one.

24. *Connecticut.*— Ketchum *v.* Allen, 46 Conn. 414.

Indiana.— Burdge *v.* Bolin, 106 Ind. 175, 6 N. E. 140, 55 Am. Rep. 724.

Iowa.— Redfield *v.* Stocker, 91 Iowa 383, 59 N. W. 270; Millington *v.* Laurer, 89 Iowa 222, 56 N. W. 533, 48 Am. St. Rep. 385.

Kentucky.— See Fuqua *v.* Ferrell, 3 Ky. L. Rep. 571.

Michigan.— Buckley *v.* Wheeler, 52 Mich. 1, 17 N. W. 216.

Pennsylvania.— Ehrisman *v.* Roberts, 68 Pa. St. 308.

See 23 Cent. Dig. tit. "Exemptions," § 111.

In Indiana a recorded deed of land which had been set apart to the judgment debtor as exempt and then conveyed by him protects the grantee, who is not bound to oppose execution issued against his land or to procure additional schedules to be filed by his grantor. Ray *v.* Yarnell, 118 Ind. 112, 20 N. E. 705. If the property of a resident householder at the time of the rendition of the judgment is less than the statutory amount of exemption and so continues, the grantee takes it exempt from any lien of a judgment or execution, although a statute provides that a judgment is a lien on real estate and chattels real subject to execution. Dumbould *v.* Rowley, 113 Ind. 353, 15 N. E. 463. A note which is exempt in the hands of a husband will not be rendered subject to execution by an assignment to his wife. Pickrell *v.* Jerauld, 1 Ind. App. 10, 27 N. E. 433, 50 Am. St. Rep. 192. The purchaser of real estate which the vendor could have claimed as exempt from sale on execution may maintain an action to quiet his title, if brought before the execution sale, but he cannot bring such action after the execution sale. Moss *v.* Jenkins, 146 Ind. 589, 45 N. E. 789.

Garnishment process will not reach personal property assigned by the principal debtor, if in his hands it would have been exempt from execution. Anderson *v.* Odell, 51 Mich. 492, 16 N. W. 870.

Mortgagee.— Where a mortgagor, at the time of executing the mortgage, had no property subject to execution, the mortgagee could hold the property against an execution issued against the mortgagor. Durbin *v.* Haines, 99 Ind. 463. In Georgia one who obtains a mortgage lien on property known to him to be exempt acquires his lien subject to the exemption right. Johnson *v.* Redwine,

that the purchaser of exempt property stands in the place of the debtor and can assert the latter's right to exemption has been held to apply only to property specifically exempt, and not to property which defendant has a right to select in lieu of the specified property exempt under the statute.[25] And there are a number of jurisdictions which hold that as a right of the debtor to his exemption is personal to him, exempt property loses the quality which the law attached to it in the hands of the debtor as soon as it is transferred;[26] and the vendee is not allowed to assert the exemption claim, but holds the property subject to the debts of his transferrer.[27]

V. WAIVER AND FORFEITURE OF AND ESTOPPEL AS AGAINST RIGHT.

A. In General — 1. WAIVER — a. Power to Waive — (I) *IN GENERAL.* It is laid down as a general proposition by many courts that the exemption right of the debtor is personal to him and may be claimed or waived at will;[28] but if the rule can be said to exist as a general one there are a number of exceptions to it.[29] In some jurisdictions the debtor is not allowed to waive his exemption in property which is exempt for the use of the family.[30]

105 Ga. 449, 33 S. E. 676, where the mortgage was taken on land purchased with the proceeds of exempted property.

The lien for the purchase-price would of course be held superior to the transferee's rights. Buckley *v.* Wheeler, 52 Mich. 1, 17 N. W. 216. See *supra*, notes 11, 21.

The motive of the transfer, whether to defraud creditors or not, cannot affect the transferee's title or rights. Ketchum *v.* Allen, 46 Conn. 414; Burdge *v.* Bolin, 106 Ind. 175, 6 N. E. 140, 45 Am. Rep. 724. See also *supra*, IV, A, 1. And see FRAUDULENT CONVEYANCES.

The purchaser from the wife of an absconding debtor who has deserted his family has the same right to hold the property purchased, as against attaching creditors of the husband, as if he had purchased directly from the husband. Waugh *v.* Bridgeford, 69 Iowa 334, 28 N. W. 626, under the act of 1873, section 3078, providing that the wife of an absconding debtor who has left his family may hold exempt the property which was exempt in the absconding husband's hands.

The debtor must have claimed his exemption as the statute requires, or the title of the purchaser of the debtor's property will be invalid. Chapin *v.* Hoel, 11 Ill. App. 309, where the transfer was made after an execution lien had attached, and where it was held that the debtor must have made a schedule.

Presumption of claim.— In Indiana it was held that where the creditor and officer had notice of the debtor's intention to claim the statutory exemption and they delayed the levy for four months, the presumption would be in favor of the claim without any formal act. Vandibur *v.* Love, 10 Ind. 54.

25. Hombs *v.* Corbin, 20 Mo. App. 497, 507.

26. Howland *v.* Fuller, 8 Minn. 50; Lane *v.* Richardson, 104 N. C. 642, 10 S. E. 189.

The right to claim as exempt real estate which is not a homestead is a personal privilege and lost when the property is parted with. Stewart *v.* Stewart, 65 Mo. App. 663, where the debtor claimed the exemption.

27. Simpson *v.* Simpson, 30 Ala. 225; Howland *v.* Fuller, 8 Minn. 50; Lane *v.* Richardson, 104 N. C. 642, 10 S. E. 189.

The vendee of a tenant's growing crops is not entitled to an exemption to the value of two hundred dollars of goods distrained, under the act of 1851. Such exemption is confined to tenants. Guest *v.* Opdyke, 31 N. J. L. 552.

28. *California.*— Keybers *v.* McComber, 67 Cal. 395, 7 Pac. 838.

Florida.— Patterson *v.* Taylor, 15 Fla. 336.

Indiana.— Moss *v.* Jenkins, 146 Ind. 589, 45 N. E. 789; State *v.* Melogue, 9 Ind. 196.

Kansas.— Kroenert *v.* Mead, 59 Kan. 665, 54 Pac. 684.

Louisiana.— Stockett *v.* Johnson, 22 La. Ann. 89.

Maine.— Fogg *v.* Littlefield, 68 Me. 52.

Massachusetts.— Hewes *v.* Parkman, 20 Pick. 90, holding that his subsequent assent will make the attachment valid.

Pennsylvania.— Kyle's Appeal, 45 Pa. St. 353; Laucks' Appeal, 24 Pa. St. 426; Case *v.* Dunmore, 23 Pa. St. 93; Winchester *v.* Costello, 2 Pars. Eq. Cas. 279.

United States.— Spitley *v.* Frost, 15 Fed. 299, 5 McCrary 43, a homestead case.

See 23 Cent. Dig. tit. "Exemptions," § 112.

This rule is particularly applicable where the exemption is dependent upon whether the debtor makes his claim or not, according to the requirements of the law. See Moss *v.* Jenkins, 146 Ind. 589, 45 N. E. 789. See *infra*, V, A, 1, c, (III).

The federal courts sitting in Pennsylvania have followed the law as laid down by the courts of that state. Wright *v.* Wright, 103 Fed. 580.

29. See *infra*, V, A, 1, a, (II); V, A, 1, b, c.

30. Burke *v.* Finley, 50 Kan. 424, 31 Pac. 1065, 34 Am. St. Rep. 132; Ross *v.* Lister, 14 Tex. 469. See also Powell *v.* Daily, 163 Ill. 646, 45 N. E. 414. See, however, Denny *v.* White, 2 Coldw. (Tenn.) 283, 88 Am. Dec. 596, holding that, although the head of a family has the right to sell or exchange ex-

(II) *By Stipulation in Executory Contract.* It is a general rule that a debtor's waiver of his exemption right, by stipulation of an executory contract, is absolutely void.[31] Thus an agreement by a laborer to waive his exemption in his wages is void.[32] So is a stipulation of this kind in a promissory note.[33] As to

empt property, it cannot be levied on and sold on execution by his consent, for this is a privilege he cannot waive, since the property is held exempt for the benefit of the family.

In Georgia, Code, § 5212, permits the debtor to waive his exemption rights except as to household and kitchen furniture and provisions. See Wilson *v.* McMillan, 80 Ga. 733, 6 S. E. 182. Cotton, although produced by labor performed under sustenance afforded by exempt provisions, is not protected against a waiver under this section, for it does not take the place of the provisions consumed in its production. Butler *v.* Shiver, 79 Ga. 172, 4 S. E. 115. In Flanders *v.* Wells, 61 Ga. 195, it was said that the constitution of 1877, which provided that a husband could not waive exemptions as to certain household and kitchen furniture without the consent of his wife, had no application to the waiver of exemptions in a mortgage given prior to the adoption of the constitution.

Jurisdictional restriction upon waiver.— The Alabama act of Feb. 21, 1893, forbidding a justice of the peace to issue a garnishment on any claim when exemptions have not been waived in writing, and that a waiver shall be given only for necessary bread and meat for support of defendant and his family or for house-rent, is not in contravention of the debtor's constitutional right to waive, but relates only to the restriction of garnishment in justice's courts. Adams *v.* Green, 100 Ala. 218, 14 So. 54.

31. *District of Columbia.*— Wallingsford *v.* Bennett, 1 Mackey 303.

Illinois.— Recht *v.* Kelly, 82 Ill. 147, 25 Am. Rep. 301.

Kentucky.— Moxley *v.* Ragan, 10 Bush 156, 19 Am. Rep. 61.

Nebraska.— Farmers', etc., Bank *v.* Hoffman, (1903) 96 N. W. 1044, yet the debtor may suffer his exempt chattels to be sold under execution.

New York.—Kneettle *v.* Newcomb, 22 N. Y. 249, 78 Am. Dec. 186 [*affirming* 31 Barb. 169].

North Carolina.— Branch *v.* Tomlinson, 77 N. C. 388.

Tennessee.— Mills *v.* Bennett, 94 Tenn. 651, 30 S. W. 748, 45 Am. St. Rep. 763. But see Mynatt *v.* Magill, 3 Lea 72.

Wisconsin.— Maxwell *v.* Reed, 7 Wis. 582.

See 23 Cent. Dig. tit. "Exemptions," § 115; and Waples Homst. & Exempt. p. 40, § 2.

Contra.— Case *v.* Dunmore, 23 Pa. St. 93. When made at the time the debt is created the waiver is based upon the same consideration as that upon which rests the liability to pay, and is therefore irrevocable. Bowman *v.* Smiley, 31 Pa. St. 225, 226, 72 Am. Dec. 738. See also Nevling *v.* Arnot, 42 Leg. Int. (Pa.) 489. But see Pentz *v.* Rooker, 1 Lehigh Val. L. Rep. (Pa.) 151.

Where there is a contract for a lien on a specific thing, a provision of the contract waiving the right of the debtor to exemption out of the thing specified is valid. Such a provision is unlike the provision in a promissory note that the obligor will not claim any benefit from the exemption laws. Marquess *v.* Brandon, 13 Ky. L. Rep. 686.

A contract fraught with such consequences to the family of the debtor is totally at variance with public policy, and therefore void. Harper *v.* Leal, 10 How. Pr. (N. Y.) 276. See also Mills *v.* Bennett, 94 Tenn. 651, 30 S. W. 748, 45 Am. St. Rep. 763.

32. Green *v.* Watson, 75 Ga. 471, 45 Am. Rep. 479; Smith *v.* Johnston, 71 Ga. 748; Firmstone *v.* Mack, 49 Pa. St. 387, 88 Am. Dec. 507; Crump *v.* Com., 75 Va. 922. *Contra,* McCormick Harvesting Mach. Co. *v.* Vaughn, 130 Ala. 314, 30 So. 363.

33. *Florida.*—Carter *v.* Carter, 20 Fla. 558, 51 Am. Rep. 618.

Illinois.— Recht *v.* Kelly, 82 Ill. 147, 25 Am. Rep. 301.

Iowa.— Curtis *v.* O'Brien, 20 Iowa 376, 89 Am. Dec. 543.

Kentucky — Columbia Finance, etc., Co. *v.* Morgan, 44 S. W. 389, 628, 45 S. W. 65, 19 Ky. L. Rep. 1761.

Louisiana.—Levicks *v.* Walker, 15 La. Ann. 245, 77 Am. Dec. 187.

New York.— Kneettle *v.* Newcomb, 31 Barb. 169 [*affirmed* in 22 N. Y. 249, 78 Am. Dec. 186]; Crawford *v.* Lockwood, 9 How. Pr. 547.

See 23 Cent. Dig. tit. "Exemptions," § 115.

Contra.— Brown *v.* Leitch, 60 Ala. 313, 31 Am. Rep. 42 (under a statute); Rosser *v.* Florence, 119 Ga. 250, 45 S. E. 975 (holding that where an execution is founded on a note containing a waiver of homestead and exemption and an administrator has money in his hands belonging to defendant in execution as an heir, the money having come from a conversion of the exempt property by the administrator, there was no exemption in favor of defendant when the administrator was duly served with garnishment). See also Mynatt *v.* Magill, 3 Lea (Tenn.) 72, 74.

In Alabama the restriction of the law as to the husband's transferring or encumbering a homestead without the consent of the wife does not apply to personal property and the husband may waive his exemption in personalty without her consent by a stipulation in a promissory note. See *infra,* V, A, 1, b.

A stipulation in a note for the price of land reciting that the vendor retains a lien on all crops does not operate as a waiver of the vendor's right to an exemption out of the crops of sufficient food for one year. Columbia Finance, etc., Co. *v.* Morgan, 44 S. W. 389, 628, 45 S. W. 65, 19 Ky. L. Rep. 1761 [*following* Moss *v.* Carl, 37 S. W. 580, 18 Ky. L. Rep. 648]. A stipulation in a note that

whether a clause of waiver in a lease is valid, the authorities are in hopeless conflict.[34]

b. Persons Who May Waive. Only the person who has the right of exemption, or his authorized agent,[35] can waive it; thus a wife cannot, without his authority, waive her husband's rights.[36] Nor can the rights of a married woman[37] be affected by an attempted waiver of her husband.[38] A waiver by one

defendant promised to pay without default, and without any relief whatever from the appraisement or valuation laws, will not be given effect by the court, as the parties cannot prescribe the rules of proceeding for the officers, or the mode by which the court shall enforce its judgments. Levicks *v.* Walker, 15 La. Ann. 245, 77 Am. Dec. 187. Although a stipulation in a note for the waiver of exemption be allowed, to take effect it must be clear and unambiguous. O'Nail *v.* Craig, 56 Pa. St. 161.

After a waiver has been made in a judgment note, the debtor cannot afterward claim his exemption in proceedings before a master appointed to distribute the proceeds of real estate sold for the satisfaction of the judgment. Wright *v.* Wright, 103 Fed. 580, decided in U. S. circuit court of Pennsylvania.

One who indorses in blank a note containing a waiver of exemption does not thereby waive his exemptions as against his liability on the indorsement. Jordan *v.* Long, 109 Ala. 414, 19 So. 843.

The benefit of appraisement may be renounced in a twelve-months' bond reciting that if a payment was not made on the day named the property of the principal and the sureties might be used without benefit of appraisement. Stockett *v.* Johnson, 22 La. Ann. 89.

34. See cases cited *infra*, this note.

That such a clause is invalid was held in Powell *v.* Daily, 61 Ill. App. 552; Curtiss *v.* Ellenwood, 59 Ill. App. 110. *Contra*, Fejavary *v.* Broesch, 52 Iowa 88, 2 N. W. 963, 35 Am. Rep. 261 (holding that a stipulation of this kind is good as a mortgage or equitable lien); McKinney *v.* Reader, 6 Watts (Pa.) 34.

A stipulation in a lease, by an unmarried man, giving his landlord a lien on all his property for rent and waiving all exemptions, is a valid waiver. Powell *v.* Dailey, 163 Ill. 646, 45 N. E. 414 [*distinguishing* Recht *v.* Kelly, 82 Ill. 147, 25 Am. Rep. 301, where the debtor who made a stipulation for a waiver of exemption in a promissory note was the head of a family]. Kan. Gen. St. (1901) § 2874, provides that a tenant may make a waiver in favor of his landlord. In Burke *v.* Finley, 50 Kan. 424, 31 Pac. 1065, 34 Am. St. Rep. 132, it was held that a stipulation by the lessee to waive exemption rights did not apply to the exemption given by Gen. St. (1889) par. 4589, for the statutory provision was in the interest of the family of the debtor.

A stipulation in a lease of agricultural lands giving the landlord a lien for rent on the crop does not waive the tenant's right to his exemptions out of the crop for his support. Moss *v.* Carl, 37 S. W. 580, 18 Ky. L. Rep. 648. See also Vinson *v.* Hallowell, 10 Bush (Ky.) 538. But see Brown *v.* Coats, 56 Ala. 439, holding that a verbal promise by a tenant who rented the land on shares that everything he had and the crop should be bound for supplies furnished is a valid waiver.

Effect of waiver on assignee of lessee.—Under Kan. Gen. St. (1901) § 3874, an assignee of the unexpired term of the tenant, who enters with the consent of the landlord under the written lease and pays rent according to its terms, is bound by the waiver which the assignor of the term made to the landlord when he took the lease. Barbyte *v.* New Hampshire Real Estate Co., 66 Kan. 390, 71 Pac. 837.

Extent of waiver in lease.— A waiver in a lease of all "the benefit of all laws or usages exempting any property from distress or executions for rent" applies to any property of the debtor, whether seized upon a landlord's warrant or levied upon by an execution for rent. Beatty *v.* Rankin, 139 Pa. St. 358, 21 Atl. 74 [*distinguishing* Mitchell *v.* Coates, 47 Pa. St. 202]. A similar stipulation in a lease was held operative as to property off the leased property seized on execution under a judgment for rent. Jenkins *v.* Stone, 14 Montg. Co. Rep. (Pa.) 29.

35. Lippman *v.* Anniston First Nat. Bank, 120 Ala. 123, 24 So. 581, 74 Am. St. Rep. 28.

Effect of waiver by head of family.— That a head of a family who, as such, files a claim to exempt property levied upon under an execution issued against him as an individual, afterward withdraws such claim, does not render the property subject to the execution as against the family. Kennedy *v.* Juhan, 102 Ga. 148, 29 S. E. 188.

36. Woodward *v.* Murray, 18 Johns. (N. Y.) 400.

37. A married woman may waive the benefit of the exemption law. Lloyd *v.* Underkofler, 13 Phila. (Pa.) 160. See also Howe Mach. Co. *v.* Hixenbaugh, 30 Pittsb. Leg. J. (Pa.) 469.

38. King *v.* Moore, 10 Mich. 538; Hess *v.* Beates, 78 Pa. St. 429; Balmer *v.* Peiffer, 7 Del. Co. (Pa.) 425.

Waiver without wife's consent.— The exemption rights of a man in a stock of groceries under Howell Annot. St. Mich. § 7686, subd. 8, to enable him to carry on his business may be waived without the consent of his wife. "This exemption, however, is expressly put outside of her interference by the statute, and the use and disposition of

of two partners is good against his individual property, but not against the individual property of another partner.[39]

c. Conduct, Acts, or Omissions Constituting — (i) *Imposition of Mortgage or Other Liens.* Although a mortgage or pledge of exempt property is a waiver of the exemption therein as against the mortgagee or pledgee,[40] no waiver of the exemption results as against the claims of other creditors.[41]

(ii) *Consent to Levy.* If the debtor asks the officer to levy upon a particular piece of property[42] in preference to another,[43] or if the debtor agrees

the right placed entirely in her husband." Charpentier *v.* Bresnahan, 62 Mich. 360, 363, 28 N. W. 916. Although Ala. Code, §§ 2846, 2848, require the signatures of husband and wife, attested by a witness, in order to waive a homestead, a stipulation in the note waiving all exemption laws as to real and personal property is effectual as to the personalty, although void as to the realty. Agnew *v.* Walden, 95 Ala. 108, 10 So. 224; Wagnon *v.* Keenan, 77 Ala. 519; Terrell *v.* Hurst, 76 Ala. 588. See also Neely *v.* Henry, 63 Ala. 261.

Waiver of life-insurance exemption.— A note given by a husband which waived exemptions as to personal property was not a lien on the annual premiums paid by him on a policy of life insurance in favor of his wife, where the premiums paid did not exceed the statutory limit of five hundred dollars. Craft *v.* Stoutz, 95 Ala. 245, 249, 10 So. 647.

39. Terrell *v.* Hurst, 76 Ala. 588. *Contra,* Harvey *v.* Ford, 83 Mich. 506, 47 N. W. 242.

40. Frost *v.* Shaw, 3 Ohio St. 270; Morgan *v.* Noud, 5 Pa. L. J. Rep. 93. See also *supra,* IV, A, B.

A chattel mortgage executed by a partner upon the stock in trade in the firm-name, to secure a firm debt, waives the exemption as against the mortgagee, although the copartner was unaware of the execution. Harvey *v.* Ford, 83 Mich. 506, 47 N. W. 242.

A mortgage of one of the debtor's three teams is valid as a waiver, even though the mortgage be executed without the consent of the wife, for a debtor is allowed by statute an exemption in one team alone, and he has the right to make the selection. Grover *v.* Younie, 110 Iowa 446, 81 N. W. 684.

The exemption of real estate purchased with pension money is waived by the execution of a mortgage thereon by the pensioner, and this in spite of N. Y. Code Civ. Proc. § 1404, as it existed before 1894, providing that unless a waiver of exempt real estate is in writing in the form of a prescribed notice that the debtor cancels all exemptions from levy or sale it is void. Monroe *v.* Button, 20 Misc. (N. Y.) 494, 496, 46 N. Y. Suppl. 637.

If exempt property and non-exempt property are covered by a mortgage, the creditor has no right to sell the exempt property if the non-exempt property is sufficient to satisfy his lien. Sanders *v.* Phillips, 62 Vt. 331, 20 Atl. 104.

Mortgage to one who has no notice, either actual or constructive, of the exemption right is valid in favor of the mortgagee as against the beneficiaries of the homestead. Ford *v.* Fargason, 120 Ga. 606, 48 S. E. 180.

Mechanic's lien.— The provisions of the Pennsylvania exemption act of April 9, 1849, are not operative against claims under the act relating to the lien of mechanics and others upon buildings; therefore a debtor is not entitled to three hundred dollars of the proceeds of sale of a building in opposition to such liens. Lauck's Appeal, 24 Pa. St. 426.

A verbal agreement to pledge personal property will not operate as a waiver against the alleged pledgee where the statute requires a waiver to be made in writing. Knox *v.* Wilson, 77 Ala. 309.

Conditional sale.— An agreement to sell a military uniform to be paid for by the vendee in instalments, the title to remain in the vendor until all payments are made, is not in contravention of Mass. Rev. St. c. 12, § 42, which provides that every officer or private will hold his uniform and equipment exempt from the payment of his debts. Morley *v.* French, 2 Cush. (Mass.) 130, 133.

41. *Kansas.*—Crawford *v.* Furlong, 21 Kan. 698, where mortgage was overdue.

Kentucky.— Collett *v.* Jones, 2 B. Mon. 19, 36 Am. Dec. 586.

Montana.— Cheney *v.* Caldwell, 20 Mont. 77, 49 Pac. 397.

New York.—Livor *v.* Orser, 5 Duer 501.

Oklahoma.— Irwin *v.* Walling, 4 Okla. 128, 44 Pac. 219.

Pennsylvania.— Laub *v.* Shollenberger, 1 Woodw. 18.

Virginia.— Williams *v.* Watkins, 92 Va. 680, 24 S. E. 223.

See 23 Cent. Dig. tit. "Exemptions," § 118; and *supra,* IV, A, 1.

In an action against a sheriff for selling exempt property, the admission in evidence of a chattel mortgage on the property sold, no default under it being shown, was error, since, till default under the mortgage, plaintiff was entitled to possession of the property, and such possession and title were sufficient to support the action. Hartmann *v.* Wood, 57 N. Y. App. Div. 23, 67 N. Y. Suppl. 1046.

42. People *v.* Johnson, 4 Ill. App. 346. *Contra,* Eltzroth *v.* Webster, 15 Ind. 21, 77 Am. Dec. 78, where it is held that the giving up of property to an officer is not a waiver of the right of defendant to claim it as exempt.

43. White *v.* Thompson, 3 Oreg. 115, where the officer was about to levy on wheat in the possession of the debtor which was not ex-

expressly to a sale,[44] his right to his exemption in the property concerned is waived.[45] But to constitute a waiver defendant's acts or words must clearly and unmistakably show that he intends to waive his rights.[46]

(III) *Failure to Assert Claim.* It is the duty of defendant who wishes to rely upon his right to hold property exempt from execution to indicate in some manner his purpose to do so.[47] Failure to make a proper assertion of the right to exemption is a waiver of the right.[48] This rule is particularly applicable where the debtor has to elect from among several articles which he is entitled to hold exempt.[49] If in such case he is present at the sale and makes no objection to the sale of a certain piece of property, his right of election is waived.[50] Although the rule obtains where there is no question of the right of exemption in specific articles,[51] it does not apply as a matter of law where articles specifically exempt have been seized.[52] If the debtor delays unreasonably to assert his claim, so that he may be considered guilty of laches, his right to an exemption will be considered waived;[53] but a delay in the assertion of the right until a levy[54] or an

empt and the debtor asked him to levy on his team which was exempt.

44. Dow *v.* Cheney, 103 Mass. 181. See also Rich *v.* French, 99 Mich. 27, 57 N. W. 1040. *Contra*, Washburn *v.* Goodheart, 88 Ill. 229.

45. Dodge *v.* Knight, (Tex. Sup. 1891) 16 S. W. 626.

If the husband consents to a levy upon community property which is exempt and there is no complaint by the wife that it was fraudulently done to deprive her of the privilege, the exemption is deemed waived. Dodge *v.* Knight, (Tex. Sup. 1891) 16 S. W. 626.

46. Thus a declaration of the debtor at the time of the levy upon exempt property that he would see about it or see an attorney about it tends to show that he did not intend to abandon his right and negatives the presumption of a waiver of the exemption. Green *v.* Blunt, 59 Iowa 79, 12 N. W. 762.

47. Green *v.* Blunt, 59 Iowa 79, 12 N. W. 762 [*citing* Angell *v.* Johnson, 51 Iowa 625, 2 N. W. 435, 33 Am. Rep. 152; Richards *v.* Hains, 30 Iowa 574].

48. *Alabama.*— Wright *v.* Grabfelder, 74 Ala. 460; Rottenberry *v.* Pipes, 53 Ala. 447; Steele *v.* Moody, 53 Ala. 418.

Arkansas.— Chambers *v.* Perry, 47 Ark. 400, 1 S. W. 700.

California.— Stanton *v.* French, 83 Cal. 194, 23 Pac. 355; Barton *v.* Brown, 68 Cal. 11, 8 Pac. 517.

Colorado.— Behymer *v.* Cook, 5 Colo. 395.

Illinois.— Alden *v.* Yeoman, 29 Ill. App. 53.

Indiana.— Wagner *v.* Barden, 13 Ind. App. 571, 41 N. E. 1067.

Iowa.— Moffitt *v.* Adams, 60 Iowa 44, 14 N. W. 88.

Maryland.— State *v.* Boulden, 57 Md. 314.

Nevada.— Hammersmith *v.* Avery, 18 Nev. 225, 2 Pac. 55.

New Hampshire.— Buzzell *v.* Hardy, 58 N. H. 331.

New York.— Russell *v.* Dean, 30 Hun 242.

Pennsylvania.— Weaver's Appeal, 18 Pa. St. 307; Miller's Appeal, 16 Pa. St. 300; Line's Appeal, 2 Grant 197; Kerns *v.* Beam, 11 Lanc. Bar 183.

Tennessee.— Cleveland Nat. Bank *v.* Bryant, (Ch. App. 1899) 54 S. W. 73.

United States.— Hitchcock *v.* The St. Louis, 48 Fed. 312.

See 23 Cent. Dig. tit. "Exemptions," § 117.

Contra.— Rempe *v.* Ravens, 68 Ohio 113, 67 N. E. 282, holding that a mere failure of defendant to assert his exemption right by motion or application to discharge an attachment on the ground that the same is exempt is not an abandonment or waiver of the right to claim such exemption.

Waiver of inquisition under a fieri facias is not a waiver of the right of exemption. Com. *v.* Boyd, 56 Pa. St. 402.

49. Colson *v.* Wilson, 48 Me. 416; Savage *v.* Davis, 134 Mass. 401. See also Johnson *v.* Lang, 71 N. H. 251, 252, 51 Atl. 908, 93 Am. St. Rep. 509; Butt *v.* Green, 29 Ohio St. 667; Sumner *v.* Brown, 34 Vt. 194.

50. Westerland *v.* Mooreland, 3 Ky. L. Rep. 324. See also Buzzell *v.* Hardy, 58 N. H. 331.

51. As where the debtor has a larger amount of provisions than the statutory allowance and he makes no selection for the use of his family. In such a case he has no action against the officer who takes the whole on attachment. Clapp *v.* Thomas, 5 Allen (Mass.) 158.

52. As where the household furniture specifically exempt by the statute is intermingled with similar articles not exempt. Copp *v.* Williams, 135 Mass. 401. See also Woods *v.* Keyes, 14 Allen (Mass.) 236, 92 Am. Dec. 766.

53. Dorland *v.* O'Neal, 22 Cal. 504 (where the debtor delayed four months after notice of the levy); Shaeffer's Appeal, 101 Pa. St. 45; Chilcoat's Appeal, 101 Pa. St. 22. See also Gibbons *v.* Gaffney, 154 Pa. St. 48, 26 Atl. 24; Harlan *v.* Haines, 125 Pa. St. 48, 17 Atl. 248 [*citing* Bittenger's Appeal, 76 Pa. St. 105].

54. Alley *v.* Daniel, 75 Ala. 403. But a delay in the assertion of the claim until after judgment in favor of the attaching or the garnishing creditor against the garnishee is a waiver. Randolph *v.* Little, 62

attempt to sell[55] is not a waiver. If the debtor's delay to claim his exemption at the proper time is due to the fact that he is absent from the jurisdiction, no waiver can be inferred.[56] Under a statute which makes it the duty of appraisers to set off to the assignor for the benefit of creditors so much of his real estate mentioned in his inventory as he may select, up to a certain amount, and so much personal property, within the statutory limits, which he may specify, failure on his part to make his selection and specification as the statute requires is a waiver of his right.[57] If the statute provides that the exemption shall not be defeated except by conveyance, it cannot be waived by a mere failure to give the sheriff notice of the claim.[58]

(iv) *Miscellaneous Acts, Declarations, Etc.* The giving of a delivery bond[59] by an execution debtor or his receipting for the articles levied

Ala. 396 [*overruling* Webb *v.* Edwards, 46 Ala. 17].

The positive refusal of the owner of personal property to make a schedule at the time of the levy, upon due notice and opportunity given, does not of itself prevent him from making a schedule within a reasonable time. The statute provides that "whenever" a debtor against whom an execution is issued may desire to avail himself of its benefits, he may do so by delivering to the officer a proper schedule. Ordinarily this should be done before levy, but the only limitation by the statute of the time for its effectual delivery is that which is necessarily implied, viz., that it must be before the writ is executed and the officer's control of the property lost by sale thereunder, and what is generally implied where time is given without a more specific limitation, viz., that it must be within a reasonable time. Johnston *v.* Willey, 21 Ill. App. 354.

55. McMichael *v.* Grady, 34 Fla. 219, 15 So. 765.

56. Harrington *v.* Smith, 14 Colo. 376, 23 Pac. 331, 20 Am. St. Rep. 272 (where the debtor sent a letter to his creditor asking for a postponement of the case until he could "come down and fix up everything satisfactory," but making no claim for exemption); Dennis *v.* Benfer, 54 Kan. 527, 38 Pac. 806. See also Haswell *v.* Parsons, 15 Cal. 266, 76 Am. Dec. 480.

A debtor failing to answer in an action brought against him in a state other than where he lived, in which action the court had no jurisdiction, does not waive his exemption, although process was served on the bankrupt in his resident state. See Hirshizer *v.* Tinsley, 13 Mo. App. 489.

57. Graves *v.* Hinkle, 120 Ind. 157, 21 N. E. 328.

Where partners make an assignment of all their property "except such as [is] exempt from levy and sale under execution," but file no list of exemptions with the inventory, which includes a stock of goods, or where they make no demands for exemptions for several weeks after the assignment, a waiver of their right to an exemption out of the stock is inferred. Lamont *v.* Wooton, 88 Wis. 107, 59 N. W. 456. See also Bong *v.* Parmentier, 87 Wis. 129, 48 N. W. 243, where the debtor was estopped by the fact that the assignee had expended labor and money upon the property in caring for it, insuring it, and getting it ready to be sold. See *infra*, V, A, 2.

But the rule of the text does not apply if the assignor foregoes his right of selection out of his stock of merchandise, in pursuance of an agreement with the assignee that, in lieu of the property he might select, he shall have the proceeds thereof to an equivalent amount in money when the stock is sold. Faulkner *v.* Jones, 13 Ind. App. 381, 41 N. E. 830.

Absence from appraisement on account of sickness.— Where an assignor for the benefit of creditors was on account of sickness absent from an appraisement made by the assignee, but he had already asked the assignee to set off certain property, there was no waiver. Doherty *v.* Ramsey, 1 Ind. App. 530, 27 N. E. 879, 50 Am. St. Rep. 223.

58. Gray *v.* Putnam, 51 S. C. 97, 28 S. E. 149 [*citing* Myers *v.* Ham, 20 S. C. 522].

59. *Alabama.*— Daniels *v.* Hamilton, 52 Ala. 105.

Arkansas.— Jacks *v.* Bigham, 36 Ark. 481; Atkinson *v.* Gatcher, 23 Ark. 101.

Indiana.— Eltzroth *v.* Webster, 15 Ind. 21, 77 Am. Dec. 78.

Kentucky.— Perry *v.* Hensley, 14 B. Mon. 474, 64 Am. Dec. 164.

Nebraska.— Desmond *v.* State, 15 Nebr. 438, 19 N. W. 644.

Dissolving a garnishment by giving bond and security does not waive the right to set up that the debt seized was not subject to process, and the debtor may insist on the exemption whether the garnishee does so or not, and if his claim be well founded no judgment can be entered on the bond given to vacate the dissolution. Born *v.* Williams, 81 Ga. 796, 7 S. E. 868.

Even where a delivery bond was given voluntarily, it was held that there was no waiver, for the necessity for the bond's execution was produced by an illegal act, and therefore its execution might with propriety be said to have been induced by legal coercion. "Besides, as the property levied on was not subject to execution, the bond is not founded on any consideration either good or valuable. Its execution, under the circumstances, cannot be regarded as an implied admission that the property was liable

upon [60] is not a waiver of his exemption. The indiscriminate sale by the debtor of property, some of which is exempt and some not, and the mingling of the proceeds,[61] or the removal to an auction room of the goods for the purpose of having them sold at auction,[62] is a waiver. A written agreement by partners that the business should be run by others and that all moneys arising therefrom should be devoted to the debts of the firm, share and share alike, and that the succeeding manager should have authority to replenish the stock, but should deposit the proceeds of the business in a bank, to be paid out ratably to the creditors, is a waiver of the exemption in the assets.[63] Delivering property to another, to be worked upon and transformed by his labor for the purpose of sale, renders the debtor's exemption in the property so delivered subject to the lien for the labor bestowed upon it in working the transformation.[64] The debtor's appearing and moving to dissolve an attachment without first having made claim to his exemption [65] or the traverse of an attachment on other grounds before claiming the exemption [66] is not a waiver. No formal language is required to constitute a written waiver.[67] A mere oral agreement to turn over specific exempt property to the creditor,[68] or mere oral declarations of the debtor which tend to show that the debtor does not claim his exemption, but do not express a well defined waiver,[69] are insufficient.

d. Revocation. In a jurisdiction where a waiver is permitted at the time of entering into a contract, the waiver is based upon the same consideration as that upon which rests the liability to pay and is therefore irrevocable.[70] Since an executed contract cannot be revoked by one of the parties in his lifetime and is not revoked by his death, a widow cannot claim an exemption in opposition to a waiver made by her late husband when he entered into the contract.[71] But it is held that if a waiver made without consideration be implied from the conduct of defendant it is revocable.[72]

for the debt." Perry *v.* Hensley, 14 B. Mon. (Ky.) 474, 61 Am. Dec. 164.

60. Vanderhorst *v.* Bacon, 38 Mich. 669, 31 Am. Rep. 328; Heath *v.* Keyes, 35 Wis. 668.

Reason.— Receipting for the property has been held no waiver, because it was merely yielding to a force which the debtor could not resist, and was therefore not a surrender of any right. Vanderhorst *v.* Bacon, 38 Mich. 669, 31 Am. Rep. 328.

61. Although the sale for reinvestment in similar property be not. Rasco *v.* Sheet, 8 Ky. L. Rep. 703. See *supra*, III, G.

62. Kennedy *v.* Baker, 3 Pinn. (Wis.) 295, 4 Chandl. (Wis.) 19, where the goods were the stock in trade of the debtor.

63. Levy *v.* Rosell, 82 Miss. 527, 34 So. 321.

64. Rogers *v.* Raynor, 102 Mich. 473, 60 N. W. 980.

65. State *v.* Gardner, 32 Wash. 550, 73 Pac. 690, 98 Am. St. Rep. 858.

66. Bassett *v.* Inman, 7 Colo. 270, 3 Pac. 383; Etheridge *v.* Davis, 111 N. C. 293, 16 S. E. 232; Ladwig *v.* Williams, 87 Wis. 615, 58 N. W. 1103.

67. Thus a waiver of "appraisement laws" is substantially a promise to pay money "without relief from valuation laws." Vesey *v.* Reynolds, 14 Ind. 444.

A stipulation in a condition of a bond waiving all exemptions is sufficient. Smiley *v.* Bowman, 3 Grant (Pa.) 132. See *supra*, V, A, 1, a.

68. Washburn *v.* Goodheart, 88 Ill. 229.

But an offer to place the property in the hands of a third person to be sold for the benefit of the execution creditor is not evidence of a waiver. Haswell *v.* Parsons, 15 Cal. 266, 76 Am. Dec. 480.

Consent to levy see *supra*, V, A, 1, c, (II).

69. Frey *v.* Butler, 52 Kan. 722, 35 Pac. 782; Rice *v.* Chase, 9 N. H. 178, 32 Am. Dec. 346.

70. Bowman *v.* Smiley, 31 Pa. St. 225, 72 Am. Dec. 738.

Sufficiency of consideration.— Where a debtor expressly waives the right of exemption after levy, and the sheriff thereupon sells the property, the debtor cannot subsequently revoke the waiver as not being based on a sufficient consideration. Winchester *v.* Costello, 2 Pars. Eq. Cas. (Pa.) 279.

71. Barrett *v.* Barrett, 9 Pa. Co. Ct. 454.

72. Thus, upon an objection by defendant that his wagon, which was exempt as a tool of his occupation, could not be taken because the act would be an interference with the United States mail, and defendant was told that he might keep the wagon if he claimed it as exempt and he made no direct waiver, and the day before the sale he demanded the wagon, the court said: "If waiver of the exemption and consent to the attachment could be implied from such mere non-action, being without consideration and no prejudice appearing, such waiver and consent were revoked by the subsequent demand." Johnson *v.* Lang, 71 N. H. 251, 252, 51 Atl. 908, 93 Am. St. Rep. 509.

2. Estoppel.[73] Any conduct or representations of the debtor which influence and change the acts and position of the creditor or the officer to his detriment operate as an estoppel.[74] If at the time of the levy the debtor denies ownership of the property levied upon, he is estopped from claiming the right to exemption therein at a later time.[75] If the debtor voluntarily surrenders property levied upon without claiming the exemption, he is estopped from afterward asserting the claim.[76] The rule that a person who is silent when he should speak will not be heard when he would speak is generally held to apply to a debtor who fails to make his claim at the time of the levy and later endeavors to hold the creditor or the officer responsible for taking his goods.[77] If the debtor demands and receives

73. See, generally, Estoppel, 16 Cyc. 671 *et seq.*

74. Davis *v.* Webster, 59 N. H. 471 (holding that where the debtor leads the sheriff to believe that he has other cows than those attached and does not claim a particular cow as exempt and receives back one of the cows released from the attachment without objection, he cannot hold the sheriff liable for seizing the cow on the ground that it was exempt); Barney *v.* Keniston, 58 N. H. 168 (holding that, where a horse and a yoke of oxen are seized under attachment and the debtor procures a release of the horse, claiming exemption under Laws (1871), c. 30, he is estopped from thereafter denying title to the horse and claiming that the oxen were exempt). See, however, Haskins *v.* Bennett, 41 Vt. 698, where a debtor told his creditor that he had two yoke of oxen and other property subject to attachment, and that he would pay soon, and afterward the creditor attached one yoke of the oxen; and it was held that the debtor was not estopped by his declaration from claiming the yoke attached as exempt.

But the fact that the debtor has declared his intention of leaving the state and has started on his journey with his family does not estop him from claiming property levied on by the sheriff, who relied on the debtor's statements as to leaving the state, for the debtor has the right to change his intention at any time. Tubbs *v.* Garrison, 68 Iowa 44, 25 N. W. 921.

75. Gilleland *v.* Rhoads, 34 Pa. St. 187; Dieffenderfer *v.* Fisher, 3 Grant (Pa.) 30; Frank *v.* Kurtz, 4 Pa. Super. Ct. 233; Markley *v.* Spires, 2 Pa. Co. Ct. 424; Dale *v.* McAlpine, 5 Lanc. L. Rev. (Pa.) 34. See Miles *v.* State, 73 Md. 398, 21 Atl. 51 (where it was adjudicated that the debtor did not have title to the property); Holmes *v.* Donovan, 21 Pa. Co. Ct. 605.

On the contrary it has been held that the fact that the debtor, the head of a family, transferred his exempt property to his wife, who instituted an action of replevin against the officer making the levy, but was unsuccessful in her suit, the property being adjudicated to be that of her husband, will not deprive a debtor of the benefit of exemption laws, even though he may have testified upon the trial that the property belonged to his wife and that he had no interest in it (State *v.* Carson, 27 Nebr. 501, 43 N. W. 361, 20 Am. St. Rep. 681, 9 L. R. A. 523), and that a declaration of the debtor at the time of the levy that he had sold the mare which was levied on to a third person does not prevent recovery in an action against the officer if in point of fact there was no sale and transfer of title (Byrd *v.* Carlin, 1 Humphr. (Tenn.) 466).

The proper practice when goods are seized on execution and the debtor denies ownership, but afterward files written notice of ownership and the claim of exemption, is for plaintiff to indemnify the sheriff to sell the goods and leave the debtor to his remedy on the bond. Fisher *v.* Hummel, 2 Pa. Dist. 233, 12 Pa. Co. Ct. 234.

76. Richards *v.* Haines, 30 Iowa 574. See also Ponder *v.* Webb, 1 Ky. L. Rep. 335, holding that, where a debtor in order to protect the surety on a replevin bond informed the officer that he would surrender certain exempt property and the officer accepted the offer, the debtor cannot afterward withdraw the surrender by claiming his exemption, since this might subject the officer to suit.

Keeping possession of goods seized on execution as bailee of the sheriff, or buying them in at the execution sale, does not estop the owner from prosecuting his claim to them as exempt from execution. Parham *v.* McMurray, 32 Ark. 261.

Procuring the garnishment of a debt due him does not estop the debtor from claiming exemption out of a debt which exceeds the amount of the exemption, for the debtor's conduct is not inconsistent with an intention to appropriate only the excess to the payment of the execution. Marchildon *v.* O'Hara, 52 Mo. App. 523.

77. *Iowa.*— Angell *v.* Johnson, 51 Iowa 625, 2 N. W. 435, 33 Am. Rep. 152.

Minnesota.— See Miller *v.* McCarty, 47 Minn. 321, 50 N. W. 235, 28 Am. St. Rep. 375.

New York.— Twinam *v.* Swart, 4 Lans. 263; Smith *v.* Hill, 22 Barb. 656.

Pennsylvania.— Allemong *v.* Passmore, 14 Wkly. Notes Cas. 124; Scott *v.* Kerlin, 1 Del. Co. 545.

Wisconsin.— Lamont *v.* Wootton, 88 Wis. 107, 59 N. W. 456. See also Bong *v.* Parmentier, 87 Wis. 129, 58 N. W. 243; Roundy *v.* Converse, 71 Wis. 524, 37 N. W. 811, 5 Am. St. Rep. 240.

See 23 Cent. Dig. tit. "Exemptions," § 125.

Contra.— An owner's failure to claim as ex-

a surplus from the sale of his property, he is estopped to claim damages from the officer who seized and sold the property, although at the time of the assignment the debtor asked to have his exemption set off.[78] To estop the debtor by a judgment, the debtor's claim must be *res adjudicata* by the judgment.[79] The mortgagor is estopped to claim an exemption against the mortgagee.[80] The maker of a promissory note containing a waiver of exemption is estopped in those jurisdictions which allow a waiver to be made thus to set up his failure to read the note.[81] A debtor who has transferred his property to another is estopped from claiming an exemption in favor of himself.[82] A constituent of a debtor's family who claims property as his own cannot subsequently plead that the article in question is exempt property.[83] False representations to obtain credit have been held to work an estoppel against the claim for an exemption.[84] A person who holds himself out to a creditor as doing business as a partnership is estopped to set up that he is doing business as an individual so as to be able to claim exemption in the business property.[85] The element of equitable estoppel that the other party must have acted to his prejudice or changed his position in reliance on the

empt personal property attached by an officer does not as a matter of law estop the debtor to claim exemption. Copp *v.* Williams, 135 Mass. 401. See also Alley *v.* Daniel, 75 Ala. 403. The fact that the widow was present at the sale of the deceased debtor's property, which by statute belonged to her and the children after the debtor's death, and the fact that she had a brother-in-law, a lawyer, also present at the sale, and that she did not resist the sale, cannot operate as a waiver of her right to the property. Myers *v.* Forsythe, 10 Bush (Ky.) 394.

Where exempt property is attached the owner does not forfeit his right to it or estop himself from recovering by replevin simply because he fails to avail himself of his right to move for a dissolution of the attachment or a release of the property. Wilson *v.* Stripe, 4 Greene (Iowa) 551, 61 Am. Dec. 138.

78. Merry *v.* Walker, 2 Ohio Dec. (Reprint) 308, 2 West. L. Month. 384. *Contra*, Stanton *v.* French, 83 Cal. 194, 23 Pac. 355.

79. Rempe *v.* Ravens, 68 Ohio St. 113, 67 N. E. 282; Strauss *v.* Cooch, 47 Ohio St. 115, 24 N. E. 1071 [*citing* Close *v.* Sinclair, 38 Ohio St. 530]. See also Boylston *v.* Rankin, 114 Ala. 408, 21 So. 995, 62 Am. St. Rep. 111. See, generally, JUDGMENTS.

80. Matter of White, Ohio Prob. 153.

81. Goetter *v.* Pickett, 61 Ala. 387, where there was no question of fraud and where debtor had ability and opportunity to read the whole of the note. See also Adams *v.* Bachert, 83 Pa. St. 524, holding that to avoid the waiver the debtor must show that he was induced to execute it through fraud or mistake. But this would not be true in jurisdictions which would not allow a waiver to be made thus. Crawford *v.* Lockwood. 9 How. Pr. (N. Y.) 547. See *supra*, V, A, 1, a, (II).

82. Bishop *v.* Johnson, 15 N. Y. St. 579. See State *v.* Pruitt, 65 Mo. App. 154. See also Miles *v.* State, 73 Md. 398, 21 Atl. 51, holding that a defendant who has conveyed land to his wife prior to the levy of the execution cannot claim exemption out of the proceeds of its sale. See *supra*, I, D, 1; *infra*, V, A, 3, a.

An attempt to conceal property which does not result in a transfer of the title before it is attached does not estop the debtor from claiming the right of exemption. Bevan *v.* Hayden, 13 Iowa 122. See *infra*, V, A, 3.

83. Countryman's Estate, 151 Pa. St. 577, 25 Atl. 146; Connor *v.* Hawkins, 64 Tex. 544.

84. John V. Farwell Co. *v.* Patterson, 76 Ill. App. 601; Blount *v.* Medbery, 16 S. D. 562, 94 N. W. 428.

But in Pennsylvania it has been held that dishonest debtors to whom exemptions are denied by the act of 1869 are not debtors fraudulently contracting a debt, but those who fraudulently conceal property liable to execution to hinder and delay creditors. New York, etc., Cut Sole Co. *v.* Zuber, 20 Pa. Co. Ct. 21.

That a surety stated in the justification clause that his property was not exempt from execution does not estop him from claiming the benefit of an exemption conferred upon him because the property was purchased with pension money. King *v.* Warren, 42 Misc. (N. Y.) 317, 86 N. Y. Suppl. 609 [*quoting* Countryman *v.* Countryman, 28 N. Y. Suppl. 258, 23 N. Y. Civ. Proc. 161].

85. Green *v.* Taylor, 98 Ky. 330, 32 S. W. 945, 17 Ky. L. Rep. 897, 56 Am. St. Rep. 375. But see Smith *v.* Brown, 4 Ariz. 358, 42 Pac. 949, holding that the fact that a married woman, a sole trader, does business under the name "Smith & Co.," and that in ordering goods she and her son, who managed the business for her, used the expression "we," and that she, when asked by the salesman selling her the goods who her partners were, answered that "my creditors are my partners," and, when asked why she did business in that name, answered, "That is my business," as a matter of law does not estop her to deny that she was doing business as a partnership, so as to enable her to claim personal exemptions in the property used in the business.

debtor's representations or conduct is as necessary in cases of this character as in others.[86]

3. Forfeiture — a. Fraudulent Conveyance or Concealment. By the more general rule a fraudulent conveyance or concealment of property does not work a forfeiture of the right of exemption therein.[87] Creditors cannot complain of any

86. *Alabama.*— Boylston *v.* Rankin, 114 Ala. 408, 21 So. 995, 62 Am. St. Rep. 111; Jordan *v.* Autrey, 10 Ala. 276.

Illinois.— Johnston *v.* Willey, 21 Ill. App. 354, holding that the owner's declaration at the time his property is levied on that he will not furnish the officer with a list of property claimed as exempt does not estop him from afterward claiming his exemption, since the validity of the levy is not affected by the absence of such schedule.

Iowa.— Ellsworth *v.* Savre, 67 Iowa 449, 25 N. W. 699.

Minnesota.— McAbe *v.* Thompson, 27 Minn. 134, 6 N. W. 279.

New York.— Bliss *v.* Raynor, 91 Hun 250, 36 N. Y. Suppl. 156.

See 23 Cent. Dig. tit. "Exemptions," § 135.

87. *Alabama.*— Pinkus *v.* Bamberger, 99 Ala. 266, 13 So. 578.

Arkansas.— Sannoner *v.* King, 49 Ark. 299, 5 S. W. 327, 4 Am. St. Rep. 49.

Connecticut.— Ketchum *v.* Allen, 46 Conn. 414.

Georgia.— See McWilliams *v.* Bones, 84 Ga. 199, 10 S. E. 723. But see Kirtland *v.* Davis, 43 Ga. 318.

Indiana.— Doherty *v.* Ramsey, 1 Ind. App. 530, 27 N. E. 879, 50 Am. St. Rep. 223. But see Mandlove *v.* Burton, 1 Ind. 39.

Michigan.— See Freehling *v.* Bresnahan, 61 Mich. 540, 38 N. W. 531, 1 Am. St. Rep. 617.

Missouri.— Wagner *v.* J. H. North Furniture, etc., Co., 63 Mo. App. 206. He may nevertheless claim the exemption where he remains in possession and has no other property either at the time of the sale or the time of the levy from which he can select his exemption. State *v.* Koch, 47 Mo. App. 269.

Nebraska.— State *v.* Carson, 27 Nebr. 501, 43 N. W. 361, 20 Am. St. Rep. 681, 9 L. R. A. 523. See also Frazier *v.* Syas, 10 Nebr. 115, 4 N. W. 934, 35 Am. Rep. 466; Derby *v.* Weyrich, 8 Nebr. 174, 30 Am. Rep. 827.

North Carolina.— Gaster *v.* Hardie, 75 N. C. 460; Duvall *v.* Rollins, 71 N. C. 218. See also Cowan *v.* Phillips, 122 N. C. 70, 28 S. E. 961.

South Dakota.— Noyes *v.* Belding, 5 S. D. 603, 59 N. W. 1069.

Texas.— King *v.* Harter, 70 Tex. 579, 8 S. W. 308.

See 23 Cent. Dig. tit. "Exemptions," § 128.

Contra.— Bohn *v.* Weeks, 50 Ill. App. 236; Cassell *v.* Williams, 12 Ill. 387 (where it was said that after a fraudulent transfer the debtor could not claim the property as his own and recover from the officer selling it three times its value); Stevenson *v.* White, 5 Allen (Mass.) 148 (the fraudulent sale, for the purpose of hindering creditors, of material and stock necessary for carrying on the debtor's business and to be wrought in the use thereof, causes the material and stock to lose its character, and exemption cannot thereafter be claimed therein); Imhoff's Appeal, 119 Pa. St. 350, 13 Atl. 279; Huey's Appeal, 29 Pa. St. 219; Carl *v.* Smith, 8 Phila. (Pa.) 569; Moore *v.* Baker, 2 Pa. Dist. 142; Markley *v.* Spires, 2 Pa. Co. Ct. 424; Byrd *v.* Curlin, 1 Humphr. (Tenn.) 466 (after a fraudulent sale by the debtor he cannot claim an exemption in the property when it is subsequently sold by the sheriff on execution).

The federal courts follow the law of the state wherein they are sitting so far as this rule is concerned. *In re* Duffy, 118 Fed. 926; Naumburg *v.* Hyatt, 24 Fed. 898.

In Pennsylvania a debtor who conveys his interest in real estate to his wife to secure her in a portion of the purchase-money which she has contributed from her personal estate does not lose his exemption right. Martin *v.* Kohr, 19 Pa. Co. Ct. 513, holding that the burden of establishing that a debtor has so acted as to have forfeited his right to exemption is upon him who alleges it and is never presumed. And where a debtor collects outstanding claims, using them to pay debts and costs of livelihood, there is no fraud upon the creditors and the exemption right is not lost. New York, etc., Cut Sole Co. *v.* Zuber, 20 Pa. Co. Ct. 21. The conversion of a large amount of securities into money by a debtor who left home, but left sufficient personal property behind him to satisfy an execution, is not such fraud as hinders and delays the creditor, so as to estop him from claiming his entire exemption from the land when levied on. McNair *v.* Rieshar, 8 Pa. Co. Ct. 494.

A debtor who has reserved to himself a large amount of money and has not scheduled it is not entitled to an exemption. McNally *v.* Mulheim, 79 Ga. 614, 4 S. E. 332, holding that the debtor could not withhold any amount of money which he deems necessary for attorney's fees and expenses.

The fraudulent vendor cannot claim the exemption for the fraudulent vendee. Hoodinpyle *v.* Bagby, 104 Ill. App. 620. Where a wife mingles funds conveyed to her by her husband in fraud of his creditors with her own, there can be no separation of the property, if she is a party to the fraud and ratifies the conveyance. Alt *v.* Lafayette Bank, 9 Mo. App. 91.

The mere holding of money or property and not turning it over to the officer is not a waiver. Haslage *v.* Hoover, 16 Ohio Cir. Ct. 570, 9 Ohio Cir. Dec. 404.

dealings with exempt property,[88] for the possession of property exempt from execution creates no false basis of credit.[89] Some courts go even to the extent of holding that a fraudulent sale or transfer of other property does not work a forfeiture;[90] but this rule is by no means universal.[91] It is said that the maxims, "He who seeks equity must do equity," and "A party must come into a court of equity with clean hands," apply to a situation of this kind; and therefore when the debtor, the applicant for equity, withholds property to a value equal to or greater than that exempted by law he will be held to have elected to hold such property as exempt and will be estopped from claiming in addition thereto the property levied on.[92]

b. Miscellaneous Acts. The fact that the debtor was about to use[93] or had contracted to use[94] his exempt property in another state does not affect his right to exemption. That the debtor left his current wages for personal services due him from a city in the city's treasury after demand had been made for the wages by him and the demand of the entire amount refused does not work a forfeiture of his right to exemption.[95] That a woman who claims as a householder is the keeper of a bawdy-house is not ground for forfeiture of her exemption right.[96]

B. Operation and Effect — 1. In General. The waiver of exemption in a written lease subjects, where such waiver is allowed, the exempt property of the tenant to the satisfaction of a judgment for the rent.[97] A waiver of exemptions

88. Freehling *v.* Bresnahan, 61 Mich. 540, 38 N. W. 531, 1 Am. St. Rep. 617. See also *supra*, IV. And see FRAUDULENT CONVEYANCES.

89. Noyes *v.* Belding, 5 S. D. 603, 59 N. W. 1069.

90. *Alabama.*— Calloway *v.* Carpenter, 10 Ala. 500.

Dakota.— Bates *v.* Callender, 3 Dak. 256, 16 N. W. 506.

Mississippi.— Moseley *v.* Anderson, 40 Miss. 49.

Missouri.— Megehe *v.* Draper, 21 Mo. 510, 54 Am. Dec. 245. But see State *v.* Koch, 40 Mo. App. 635, where it was held that the debtor who had made a fraudulent conveyance of his goods could not claim the goods under the exemption laws after attachment by a creditor unless he affirmatively showed that they constituted all the property owned by the debtor at the time of the sale and were not of a kind specifically exempted by statute.

Nevada.— Elder *v.* Williams, 16 Nev. 416.

See 23 Cent. Dig. tit. "Exemptions," § 128.

Disposing of other property not exempt to invest proceeds in exempt property.— The fact that plaintiff in replevin of property levied on had disposed of all the property he had which was subject to execution for the very purpose of investing the proceeds in, or converting them into, that kind of property which was exempt under the statute, does not deprive him of the exemption, so long as his occupation is really such as the statute requires, and the particular property is needed in that occupation; nor does it constitute legal fraud. O'Donnell *v.* Segar, 25 Mich. 367.

91. Thus where a man transferred a large quantity of his property and thus reduced the tangible property to the amount allowed by the exemption law, it was held that he could not claim exemption in the property untransferred. Bishop *v.* Johnson, 15 N. Y. St. 579; Rose *v.* Sharpless, 33 Gratt. (Va.) 153. If a debtor, being possessed of several cows, sells all but one, and, that one being attached and sold on execution, brings trover against the attaching officer, the question may be submitted to the jury whether the sale of the other cows was intended to operate an actual transfer of the property, or was merely colorable, without intention to change the ownership. It is not sufficient, to entitle defendant to recover, to prove merely that the sale of the other cows was fraudulent in fact; for if so those cows might be taken by plaintiff's creditors. Sanborn *v.* Hamilton, 18 Vt. 590.

92. Hoover *v.* Haslage, 7 Ohio S. & C. Pl. Dec. 98, 5 Ohio N. P. 90 [*quoting* Waples Homest. & Exempt. p. 528].

A promise to convey the property claimed as exempt as against one creditor to another creditor as soon as the debtor should obtain possession of it does not defeat the debtor's right to his exemption. Kriesel *v.* Eddy, 37 Nebr. 63, 55 N. W. 224 [*citing* Gillespie *v.* Brown, 16 Nebr. 457, 20 N. W. 632, to the point that the debtor has the right to convey or mortgage his exempt property as he pleases]. See *supra*, IV.

93. Wood *v.* Bresnahan, 63 Mich. 614, 30 N. W. 206.

94. Whicher *v.* Long, 11 Iowa 48.

95. Snyder *v.* Galveston, (Tex. App. 1890) 15 S. W. 202.

96. Bowman *v.* Quackenboss, 3 Code Rep. (N. Y.) 17.

97. Hoisington *v.* Huff, 24 Kan. 379.

But where the waiving clause stipulated that all property on the premises should be liable to distress and that all right of exemption should be waived, the waiver was held to extend only to the property on the premises and not to choses in action. Mitchell *v.* Coates, 47 Pa. St. 202.

The waiver extends no further than for the rent due. Therefore, after goods were sold

in a promissory note does not amount to a lien or pledge of any of the debtor's exempt property or confer any estate or interest in it. There must be a judgment and execution to give the waiver any operation.[98] A release of exemption is a release of the right to appraisement of property seized on execution.[99] If the exemption is waived in a judgment the debtor cannot divest his property from liability under the judgment by transferring it to his wife.[1] If an agreement to submit to arbitration is accompanied by a bond containing a waiver of exemption, the waiver follows and attaches to a judgment obtained in default of abiding by the award.[2]

2. As to Junior Judgment Creditors. It has been held that a waiver of exemption for the benefit of a junior judgment creditor works a waiver in favor of all judgment creditors. The debtor is not allowed to determine priorities by this means.[3] Whatever the debtor does not claim for himself or his family goes into the general fund, to be distributed according to law;[4] for among creditors having existing liens upon the same property the law regulates their priority and not the will of the debtor.[5] Of course the waiver will not inure to the benefit of the creditors beyond its amount.[6] The rule is not applicable to a mortgage foreclosure, for although the debtor cannot claim exemption against the mortgage, he may nevertheless claim exemption against subsequent judgment creditors.[7] It is held even that the implied waiver by the execution of a mortgage does not amount to a waiver of exemption as against general judgment creditors whose liens had attached prior to its execution.[8] The rule does not apply to

and an excess for the rent due realized, an attachment by plaintiff with a view to holding it for subsequently accrued rent could not prevent the tenant from claiming a part of the amount of the exemption. Simes *v.* Steadwell, 12 Wkly. Notes Cas. (Pa.) 292.

98. *In re* Tune, 115 Fed. 906 [*following In re* Moore, 112 Fed. 289]. But see Mynatt *v.* Magill, 3 Lea (Tenn.) 72.

99. For the latter is inseparable from the former. Bowman *v.* Smiley, 31 Pa. St. 225, 72 Am. Dec. 738.

1. Tillis *v.* Deam, 118 Ala. 645, 22 So. 804.

2. Quick *v.* Geitman, 3 Pa. Co. Ct. 610.

Where judgment was rendered on a note waiving the benefit of the exemption law, and the property was claimed by the wife of defendant in execution, and a bond filed, defendant in execution being a party thereon, and judgment was rendered on the forthcoming bond, defendant in execution, on the forthcoming bond, was not entitled to any exemption. The suit on bond was not a new suit. Lorenz *v.* Wright, 6 Wkly. Notes Cas. (Pa.) 539.

3. Miller *v.* Getz, 135 Pa. St. 558, 19 Atl. 955, 20 Am. St. Rep. 887; Hallman *v.* Hallman, 124 Pa. St. 347, 16 Atl. 871; Bower's Appeal, 68 Pa. St. 126; Lauck's Appeal, 44 Pa. St. 395; Shelly's Appeal, 36 Pa. St. 373; Garrett's Appeal, 32 Pa. St. 160, 72 Am. Dec. 779; Bowyer's Appeal, 21 Pa. St. 210; Keetley *v.* Campbell, 15 Pa. Super. Ct. 415; Knoll's Appeal, 11 Wkly. Notes Cas. (Pa.) 511; Denlinger *v.* Burkey, 18 Lanc. L. Rev. (Pa.) 94. *Contra*, Johnston's Appeal, 25 Pa. St. 146; McCowan *v.* Eisenhuth, 2 Pearson (Pa.) 262; Irwin's Estate, 31 Pittsb. L. J. (Pa.) 23, See also Bishop *v.* Johnston, 15 N. Y. St. 597.

4. Bowyer's Appeal, 21 Pa. St. 210. A judgment in favor of a certain person containing a waiver of the debtor's exemption inures to the benefit of a landlord's claim, although the lease was silent upon the subject of waiver. Collins' Appeal, 35 Pa. St. 83; Steininger *v.* Butler, 5 Pa. Dist. 43, 17 Pa. Co. Ct. 97. The rule is the same wherever one of the writs in the sheriff's hands is an attachment. Wiseman's Appeal, 3 Kulp (Pa.) 283.

5. Thomas' Appeal, 69 Pa. St. 120.

A more cautious statement of the rule is, a waiver as to any lien will inure to the benefit of subsequent liens so far as to compel the creditor in whose favor the waiver is made to resort first to the exempted funds. Grover, etc., Sewing Mach. Co. *v.* Gruber, 2 Pearson (Pa.) 288; Ankrim *v.* Kyle, 6 Lanc. Bar (Pa.) 74; Kehler *v.* Miller, 1 Leg. Chron. (Pa.) 35, 4 Leg. Gaz. (Pa.) 125. *Contra*, McCowen *v.* Eisenhuth, 2 Pearson (Pa.) 262. But this does not mean that a creditor to whom such waiver has been given shall insist upon it for the benefit of creditors who have no such waiver. Feak's Appeal, 81* Pa. St. 76.

6. Thus, if the judgment is for less amount than the three-hundred-dollar exemption, the balance will go to the debtor claiming the exemption. Hallman *v.* Hallman, 124 Pa. St. 347, 16 Atl. 871.

7. Quinn's Appeal, 86 Pa. St. 447; Shelley's Appeal, 36 Pa. St. 373 (where the judgment creditors had taken no executions); Hill *v.* Johnston, 29 Pa. St. 362.

8. Bower's Appeal, 68 Pa. St. 126. However, if real estate is sold under a judgment prior to a mortgage, defendant is not entitled to claim his exemption out of the proceeds. Huffort's Appeal, 10 Wkly. Notes Cas. (Pa.) 528.

costs.[9] That the rule should be applied at all, there must be process in the sheriff's hands whereby he can seize all defendant's property and thus take the proceeds into court for distribution before the creditors can take advantage of the waiver.[10]

C. Enforcement.[11] If a waiver is claimed in an action on a note, it must be pleaded and found in favor of plaintiff.[12] An allegation of a waiver of all homestead exemptions does not include personalty.[13] The judgment must contain the waiver or it cannot be taken advantage of.[14] Omission of the waiver in the judgment amounts to an abandonment thereof and a consent to accept a common judgment.[15] If the waiver has not been pleaded, has not been indorsed on the writ, or has not otherwise appeared in the proceedings as required by law, it can-

9. Thus where two executions are issued on judgments by confession, one of which waives exemptions, and the amount realized is less than the exemptions, the costs of the second execution are first deducted, and the balance given to the first execution. It was the second execution with its clause of exemption which created whatever fund there was in court from which the first execution creditor derived the benefit. Kiefer *v.* Kiefer, 3 Pa. Dist. 471, 14 Pa. Co. Ct. 545.

10. The existence of a waiver will not justify the sheriff in disregarding defendant's claim for exemption, unless he has knowledge of its existence through the record. The waiver of the benefit of all exemption laws in a lease cannot inure to the benefit of an execution creditor as to whose debt such exemptions are not waived, although the landlord notifies the sheriff levying such execution that a year's rent is due him by the execution debtor, such notice not being process whereby all defendant's property may be seized and the proceeds brought into court for distribution. Temple *v.* Gough, 9 Pa. Co. Ct. 85.

Where no debt is levied except the one against which the debtor claims exemption and there is no fund in court to be distributed the rule does not apply. Thomas' Appeal, 69 Pa. St. 120.

Priorities.— Two judgments were entered on the same day — one on a debt contracted before the act of 1849, the other containing a waiver of the benefit of the exemption law. It was held that the proceeds of defendant's real estate should be distributed *pro rata.* McAfoose's Appeal, 32 Pa. St. 276. See Johnston's Appeal, 25 Pa. St. 116.

11. **Real party in interest.**— A bond was given conditioned to hold the maker of a note harmless thereon, and provided that on breach of its condition the obligee should recover judgment without relief from valuation or appraisement laws. It was held that the payee of the note, in an action to enforce the bond, was entitled to a judgment without relief. South Side Planing Mill Assoc. *v.* Cutler, etc., Lumber Co., 64 Ind. 560.

Marshaling assets.— If a mortgage cover both exempt and non-exempt property, the mortgagor has a right, both as against the mortgagee and as against a creditor having a lien by judgment or the levy of an execution upon the non-exempt property alone, to demand that the mortgagee first exhaust the non-exempt property before resorting to the exempt. But this is a right which the mortgagor must seasonably assert for himself. The mortgagee is not required to assert it for him or to institute proceedings to protect it. Furthermore the rule, being founded on mere equity, will not be enforced where, from the acts or omissions of the mortgagor, it would be inequitable to do so. Miller *v.* McCarty, 47 Minn. 321, 50 N. W. 235, 28 Am. St. Rep. 375.

12. Fears *v.* Thompson, 82 Ala. 294, 2 So. 719; Taylor *v.* Cockrell, 80 Ala. 236.

Insufficient allegation.— A complaint containing an averment of waiver of exemptions, filed on the return of the writ, but not served, does not, in the absence of the statutory indorsement on the writ, comply with Ala. Code (1876), §§ 2849, 2850, which provides that the complaint must contain an averment of such waiver; and where a writ is sued out, the officer issuing the writ must indorse the fact of waiver thereon. Fears *v.* Thompson, 82 Ala. 294, 2 So. 719.

13. Reed Lumber Co. *v.* Lewis, 94 Ala. 626, 10 So. 333.

14. Courie *v.* Goodwin, 89 Ala. 569, 8 So. 9, where a garnishment suit was brought on the judgment.

15. Agnew *v.* Walden, 95 Ala. 108, 10 So. 224. See Hosea *v.* Talbert, 65 Ala. 173. See also Usaw *v.* Wenrick, 2 Chest. Co. Rep. (Pa.) 467, holding that where suit was brought on a note with a waiver of exemption and on the common counts in assumpsit, and it did not appear upon what count judgment was entered, plaintiff could not avail himself of the waiver. *Contra,* Hoisington *v.* Huff, 24 Kan. 379, in which case, where a lessee waived in his written lease all right of exemption of personal property from seizure for any rent, it was held that such of his property as would otherwise be exempt might be seized on execution, although the judgment for rent contained no reference to the waiver.

Judgment for costs.— Upon a judgment upon a note containing a waiver of appraisement, etc., it is not necessary to render a separate judgment for costs, since the waiver of appraisement relates to both judgment on the debt and for the costs. Martindale *v.* Tibbetts, 16 Ind. 200.

not appear in the judgment, and if the judgment thus improperly contains a waiver it must be modified by omitting the recital thereof.[16] Where, by law, the landlord has no lien on the tenant's property exempt from execution, it is necessary for the landlord to record a lease containing a waiver of exemptions if he wishes to claim the waiver against *bona fide* purchasers of the property.[17] Where there was no stipulation either in the mortgage or in the notes to secure which the mortgage was given, a personal judgment against the mortgagor for recovery of the debt, without relief from valuation or appraisement laws, is erroneous.[18]

VI. PROTECTION, ENFORCEMENT, AND ESTABLISHMENT OF RIGHT.

A. Process and Proceedings Against Which Right May or May Not Be Asserted — 1. EXECUTION.[19] The personal property exemption cannot be reached by execution,[20] and therefore a levy upon exempt property has no more effect on the transfer of the title than a levy upon the property of a person not a party.[21]

2. ATTACHMENT.[22] Where property is exempted by provisions of the constitution or statute from levy and sale, the exemption may be invoked against a seizure under attachment.[23] If property is taken under attachment, it is the duty

16. Fears *v.* Thompson, 82 Ala. 294, 2 So. 719.

17. Richardson *v.* Kurz, (Iowa 1881) 9 N. W. 104.

18. Duckwall *v.* Kisner, 136 Ind. 99, 35 N. E. 697.

19. Execution generally see EXECUTIONS.

20. Duvall *v.* Rollins, 71 N. C. 218.

In Alabama, after a claim of exemptions in specific articles has been filed with the judge of probate, a levy cannot be made on the property unless plaintiff makes affidavit and gives bond as required by Code (1876), § 2830. Totten *v.* Sale, 72 Ala. 488.

An executor who was an insolvent debtor of the testator is entitled to his exemptions as against a fieri facias issued out of the orphans' court. Wilson's Estate, 1 Del. Co. (Pa.) 170.

21. Williams *v.* Miller, 16 Conn. 144. See also Johnson *v.* Babcock, 8 Allen (Mass.) 583. But in Hombs *v.* Corbin, 20 Mo. App. 497, it was held that a levy upon exempt property was not absolutely void, for the exemption right was a personal privilege which might be claimed or waived at the option of the debtor.

Alias execution.— Where a statute provides that the debtor, by filing a schedule of exemptions, may obtain a supersedeas against an execution, the filing of a schedule of exemptions of personal property and obtaining a supersedeas staying an execution will not defeat title acquired under a second execution against the same property, although the second execution was issued within thirty minutes after the supersedeas against the first was allowed. A separate supersedeas must be obtained for each execution issued in order to defeat title acquired thereunder. When under these circumstances executions are repeatedly procured for the sole purpose of annoying and harassing judgment debtors who may be unable to pay off their judgment debts, and who claim the right of exemption which the law gives them, we know of no remedy unless it be by injunction. An alias execution issued upon an unsatisfied judgment, and levied upon personal property that has not been enjoined or superseded by some lawful authority, is as efficacious as the first, and can be defeated in the same way, and upon the same grounds. Parker *v.* Independence Produce Co., 2 Indian Terr. 561, 53 S. W. 335.

22. Attachment generally see ATTACHMENT.

23. *Alabama.*— Hadley *v.* Bryars, 58 Ala. 139.

Indiana.— Haas *v.* Shaw, 91 Ind. 384, 46 Am. Rep. 607.

Michigan.— See Michels *v.* Stork, 44 Mich. 2, 5 N. W. 1034.

North Carolina.— Montgomery County *v.* Riley, 75 N. C. 144.

Ohio.— Close *v.* Sinclair, 38 Ohio St. 530.

Pennsylvania.— Washburn *v.* Baldwin, 10 Phila. 472; Corbit *v.* Long, 2 Woodw. 118. See also Taylor *v.* Worrel, 4 Leg. Gaz. 401; Roberts *v.* Reese, 2 Leg. Op. 7.

See 23 Cent. Dig. tit. "Exemptions," § 131.

An execution on a judgment on attachment under section 27 of the Pennsylvania act of July 12, 1842, abolishing imprisonment for debt, is subject to the exemption law if the original judgment was on a contract. Waugh *v.* Burket, 3 Grant (Pa.) 319. See also Washburn *v.* Baldwin, 10 Phila. (Pa.) 472.

An attachment from a justice's court is subject to the exemption law just as if the attachment had been issued from a court of record. Michels *v.* Stork, 44 Mich. 2, 5 N. W. 1034. See also Crawford *v.* Main, 8 Kulp (Pa.) 67, where the judgment of a justice who disregarded the claim of exemption was reversed and the attachment set aside.

Property seized under attachment is only a legal deposit in the hands of the sheriff to abide the event of the action, and after judgment against defendant he is entitled to his exemptions in the property attached as he would have been had there been no attachment. Gamble *v.* Rhyme, 80 N. C. 183.

of the court, when the fact is brought to its notice, to order the property released.[24]

3. GARNISHMENT.[25] The debtor may claim the benefit of his statutory exemption against process in the nature of garnishment, whether it be called garnishment, attachment execution, or trustee process.[26] Where there are successive services of garnishment, the garnishee or trustee is entitled to reserve for the benefit of the claimant of exemptions the amount allowed by the exemption act.[27]

4. SET-OFF.[28] A debtor's right to exemption cannot be defeated by a set-off by the creditor.[29] To subject the debtor's demand to the creditor's set-off would

The exemption of property of persons in actual military service from levy or sale under legal process does not include levies by attachment which merely create a lien thereon. Ryan *v.* Wessels, 15 Iowa 145; Hannahs *v.* Felt, 15 Iowa 141.

24. Urquhart *v.* Smith, 5 Kan. 447.

25. **Garnishment** generally see GARNISHMENT.

26. *Georgia.*— Russell *v.* Arnold, 25 Ga. 625; Caraker *v.* Matthews, 25 Ga. 571. See also Hill *v.* Arnold, 116 Ga. 45, 42 S. E. 475.

Illinois.— Hoffmann *v* Fitzwilliam, 81 Ill. 521; Bliss *v.* Smith, 78 Ill. 359; Fanning *v.* Jacksonville First Nat. Bank, 76 Ill. 53; Illinois Glass Co. *v.* Holman, 19 Ill. App. 30.

Kansas.—Harding *v.* Hendrix, 26 Kan. 583; Seymour *v.* Cooper, 26 Kan. 539.

Maine.— Bridgton *v.* Lakin, 53 Me. 106.

Massachusetts.— Staniels *v.* Raymond, 4 Cush. 314.

Michigan.— Wilson *v.* Bartholomew, 45 Mich. 41, 7 N. W. 227.

Mississippi.— Chapman *v.* Berry, 73 Miss. 437, 18 So. 918, 55 Am. St. Rep. 546.

Rhode Island.— McKenna *v.* Lucas, 21 R. I. 509, 45 Atl. 101.

Vermont.— Parks *v.* Cushman, 9 Vt. 320. See 23 Cent. Dig. tit. "Exemptions," § 132.

In Pennsylvania the debtor may claim exemption against a domestic attachment execution (Strouse *v.* Becker, 44 Pa. St. 206, 38 Pa. St. 190, 80 Am. Dec. 474; Ashton *v.* Glass, 9 Phila. 510; Kuhn *v.* Warren Sav. Bank, 20 Wkly. Notes Cas. 230. *Contra,* Vezia *v.* Viench, 1 Phila. 176), but not against a foreign attachment under the law of 1849 (Yelverton *v.* Burton, 26 Pa. St. 351). The garnishee may claim the benefit of the statute just as can the debtor defendant. Fisher *v.* Elliott, 11 Phila. 344.

A judgment recovered by the debtor who sued to recover his property which was attached may be reached by trustee process at the instance of a creditor who was not a party to the original attachment proceedings (Robinson *v.* Burke, 70 N. H. 2, 45 Atl. 713, 85 Am. St. Rep. 595), on the principle that the proceeds of exempt property are not exempt from attachment.

Whether the judgment is out of the court of common pleas or a justice's court, the debtor may claim his exemption in his wages or salary given under section 15 of the Pennsylvania act of April 15, 1845. Catlin *v.* Ensign, 29 Pa. St. 264.

27. Sullivan *v.* Hadley Co., 160 Mass. 32, 35 N. E. 103; Hall *v.* Hartwell, 142 Mass. 447, 8 N. E. 333, where the debt was for necessaries and the claim for exemption was in wages, the Massachusetts statute allowing an exemption against necessaries to a certain amount. See *supra,* III, D. But where the writ in garnishment was issued against F, and served twice, each time the sum due defendant being less than the exemption allowed him by Mass. Pub. St. c. 183, § 30, and the garnishee paid nothing to defendant, although he was entitled to his exemptions at each service, and the writ was abandoned and another issued against F and another, the sums in the garnishee's hands were not exempt because of the other services, it not appearing that the abandonment of the first writ and the issuance of the second was not in good faith. Choquette *v.* Ford, 178 Mass. 6, 59 N. E. 454.

The provision in Me. Rev. St. c. 86, § 6, authorizing a further service upon trustees, may have its full and fair effect without applying it to cases in which the garnishee's indebtment would have been securely held by the first service, had it not been specially exempted from attachment by another section of the same statute; thus, a creditor who has procured the detention of a laborer's wages in the hands of his employer by the first service of a trustee process cannot, by making a second service after the lapse of a month, deprive the laborer of the exemption of some portion of his wages granted in chapter 86, section 55. Collins *v.* Chase, 71 Me. 434.

28. **Set-off** generally see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

29. *Arkansas.*— Atkinson *v.* Pittman, 47 Ark. 464, 2 S. W. 114.

Indiana.— Junker *v.* Hustes, 113 Ind. 524, 16 N. E. 197.

Iowa.— Millington *v.* Laurer, 89 Iowa 322, 56 N. W. 533, 48 Am. St. Rep. 385, where the debtor's claim was for earnings.

Kentucky.— Mulliken *v.* Winter, 2 Duv. 256, 87 Am. Dec. 495.

Missouri.— Wagner *v.* J. H. North Furniture, etc., Co., 63 Mo. App. 206. See also State *v.* Hudson, 86 Mo. App. 501; Lewis *v.* Gill, 76 Mo. App. 504; State *v.* Finn, 8 Mo. App. 261.

Nebraska.— Deering *v.* Ruffner, 32 Nebr. 845, 49 N. W. 771, 29 Am. St. Rep. 473.

North Carolina.— Curlee *v.* Thomas, 74

be as much a legal seizure thereof as if a creditor had impounded it under process of garnishment on an execution or attachment. The legal effect would be the same in either case and therefore it cannot be allowed.[30] To allow a set-off against a judgment for trespass or conversion of the exempt property,[31] or against an action for replevin of the property,[32] would be a particularly inexcusable subversion of the exemption laws. Recoupment[33] and counter-claim[34] are allowed in some states, but in other states a plaintiff whose entire property does not exceed the statutory limit may claim even the demand in suit and thus defeat a counter-claim or set-off.[35] A set-off will not be allowed against an assignee of the debtor's claim.[36]

5. Foreclosure Proceedings.[37] Exemption cannot be successfully claimed against a foreclosure proceeding upon a mortgage.[38] Neither can it be claimed

N. C. 51. See, however, Lynn *v.* Stanly Creek Cotton Mills, 130 N. C. 621, 41 S. E. 877.

Pennsylvania.— Thall's Appeal, 119 Pa. St. 425, 13 Atl. 466.

Tennessee.— Collier *v.* Murphy, 90 Tenn. 300, 16 S. W. 465, 25 Am. St. Rep. 698, where the debtor's claim was for earnings.

Texas.— Dempsey *v.* McKennell, 2 Tex. Civ. App. 284, 23 S. W. 525.

See 23 Cent. Dig. tit. "Exemptions," §§ 134, 164.

However, the exemption is not available before judgment so as to destroy the right of set-off in an action of contract. Lynn *v.* Stanly Creek Cotton Mills, 130 N. C. 621, 41 S. E. 877; Kepner *v.* Pierce, 5 Ohio Cir. Ct. 488, 3 Ohio Cir. Dec. 239.

30. Wagner *v.* J. H. North Furniture, etc., Co., 63 Mo. App. 206 [*citing* Waples Homest. & Exempt. p. 829, § 5].

31. *Alabama.*— *Ex p.* Hunt, 62 Ala. 1.

Connecticut.— Talbot *v.* Ellis, 33 Conn. 235.

Kansas.— Treat *v.* Wilson, 65 Kan. 729, 70 Pac. 893, at least where the judgment is in the hands of the original judgment creditor.

Kentucky.— See Collett *v.* Jones, 7 B. Mon. 586.

Nevada.— Elder *v.* Frevert, 18 Nev. 446, 5 Pac. 69.

South Carolina.— Parkerson *v.* Wightman, 4 Strobh. 363.

Texas.— Craddock *v.* Goodwin, 54 Tex. 578; Stagg *v.* Piland, 31 Tex. Civ. App. 245, 71 S. W. 762; Moore *v.* Graham, 29 Tex. Civ. App. 235, 69 S. W. 200. See Wilson *v.* Manning, (Civ. App. 1896) 35 S. W. 1079.

See 23 Cent. Dig. tit. "Exemptions," § 164.

Contra.— Temple *v.* Scott, 3 Minn. 419.

32. Duff *v.* Wells, 7 Heisk. (Tenn.) 17.

33. Corbally *v.* Hughes, 59 Ga. 493.

34. Lynn *v.* Stanly Creek Cotton Mills, 130 N. C. 621, 41 S. E. 877. But see Duff *v.* Wells, 7 Heisk. (Tenn.) 17.

35. Carpenter *v.* Coal, 115 Ind. 134, 17 N. E. 266; Puett *v.* Beard, 86 Ind. 172, 44 Am. Rep. 280; Coppage *v.* Gregg, 1 Ind. App. 112, 27 N. E. 570; Coldwell *v.* Ryan, (Mo. App. 1904) 79 S. W. 743. See also Dumbould *v.* Rowley, 113 Ind. 353, 15 N. E. 463; Butner *v.* Bowser, 104 Ind. 255, 3 N. E. 889. A debtor, plaintiff in an action on a note, and whose property does not exceed six hundred dollars, may claim such note as exempt against a note pleaded as a set-off to his note, and may do this by way of reply to the answer of set-off. Smith *v.* Sills, 126 Ind. 205, 25 N. E. 881; Coffing *v.* Dungan, 6 Ind. App. 386, 33 N. E. 815.

It is a question for the jury whether the allegation of plaintiff is true where he avers that all his property, of which he files a schedule, does not exceed the amount of the statutory exemption and that therefore a judgment cannot be pleaded and set off to his claim. Coppage *v.* Gregg, 1 Ind. App. 112, 27 N. E. 570.

A judgment for costs in favor of defendant cannot be set off against a three-hundred-dollar personal injury judgment recovered by plaintiff, who was head of a family, had no other property, and claimed the judgment as an exemption. Bowen *v.* Holden, 95 Mo. App. 1, 75 S. W. 686, construing the statutory provisions relating to exemption and set-off.

36. Millington *v.* Laurer, 89 Iowa 322, 5 N. W. 533, 48 Am. St. Rep. 385.

The assignor is a proper party plaintiff to claim the exemption against the set-off. Pickrell *v.* Jerauld, 1 Ind. App. 10, 27 N. E. 433, 50 Am. St. Rep. 192.

Where creditors attach and sell community property for a debt of the husband and the debtor's wife obtains judgment against them therefor, the creditors cannot offset their judgment against the judgment obtained by the wife even after the assignment of the wife's judgment to another and even after the wife's death; for the wife's judgment being for the value of exempt property is also exempt. Cullers *v.* May, 81 Tex. 110, 16 S. W. 813.

37. Foreclosure proceedings generally see Chattel Mortgages; Mortgages.

38. *Florida.*— Patterson *v.* Taylor, 15 Fla. 336.

Indiana.— Love *v.* Blair, 72 Ind. 281.

New Jersey.— Conway *v.* Wilson, 44 N. J. Eq. 457, 11 Atl. 734.

New York.— Lantz *v.* Buckingham, 11 Abb. Pr. N. S. 64.

Texas.— Bigger *v.* Jones, 3 Tex. App. Civ. Cas. § 227.

In Pennsylvania, supporting the text, see Morgan *v.* Noud, 1 Phila. 250 (where prop-

against a judgment on a bond accompanying the mortgage.[39] The surplus proceeds of a foreclosure sale have been held exempt against existing judgment creditors under a statute which exempts property to a certain amount.[40]

6. MISCELLANEOUS.[41] The claim for exemption has been held good against distress for rent,[42] a judgment in an action of account rendered by one partner against another,[43] a sale by an administrator of an insolvent estate[44] against an equitable proceeding,[45] against a lien of a creditor upon a fund arising from a partition of land, although the lien had not arisen by an execution or distress,[46] against any sale by operation of law which is necessary for the payment of the debtor's debts.[47] Money exempt from garnishment in the hands of the employer is exempt from seizure by other process, such as a rule against the sheriff, while passing from the employer to the employee.[48]

B. Powers, Duties, and Responsibilities of Officers Serving Process — 1. POWERS MINISTERIAL. When a claim for an exemption is filed the sheriff has no

erty was sold on a levari facias); Craig *v.* Craig, 1 Wkly. Notes Cas. 613. Where property is sold on execution and the proceeds of the sale are less than the amount of two mortgages on the property, the mortgagor is not entitled to his exemption as against the mortgagee. Emery *v.* Phillips, 38 Leg. Int. 126. The exemption act of 1849 is a limitation of the remedies given by law against a debtor's property, but not intended to interfere with such as arise out of an express contract, as where a debtor specifically pledges by mortgage all his estate in the land described therein, thus expressly waiving his right of exemption. Gangwere's Appeal, 36 Pa. St. 466. See also Bower's Appeal, 68 Pa. St. 126. *Contra*, Saving Fund *v.* Creighton, 3 Phila. 58. See *supra*, V.

Foreclosure in absence of soldier.— The appointment of a receiver to take charge of mortgaged premises after judgment for foreclosure, when the mortgagor is in the military service of the United States, is a violation of the Iowa act of April 7, 1862, which exempts the property of volunteers from sale under deeds of trust, mortgages, or judgments. Adair *v.* Wright, 16 Iowa 385.

Mortgage as waiver of exemption see *supra*, V, A, 1, c, (I).

39. McAuley's Appeal, 35 Pa. St. 209; Dornan *v.* McAuley, 3 Phila. (Pa.) 324, 325.

But as against an execution issued on a judgment entered on a warrant of attorney accompanying a bond and mortgage, defendant will be allowed his statutory exemption if it be not expressly waived. Twaddell *v.* Rodgers, 14 Phila. (Pa.) 163.

40. Darbey *v.* Rouse, 75 Md. 26, 22 Atl. 1110; Bower's Appeal, 68 Pa. St. 126.

41. **Exempt liquor wrongfully seized** under a statute providing for the suppression of intemperance cannot be recovered in an action of replevin. Funk *v.* Israel, 5 Iowa 438.

Debt for an advancement.— The son of an intestate mother, who was indebted to her, is not entitled to claim the benefit of the debtor's exemption on distribution of the estate. Maxwell's Estate, 5 Lanc. L. Rev. (Pa.) 4.

42. Caulfield *v.* McAlister, 4 McCord (S. C.) 378, under the act of 1823, exempting certain articles of debtors from levy and sale. *Contra*, Harly *v.* Weathersbee, 21 S. C. 243, holding that S. C. Const. art. 2, § 32, providing that the general assembly shall enact laws exempting from attachment and sale under any mesne or final process issued from any court certain property, does not refer to distress for rent, and property exempted by the legislature as exempt from execution may be subject to such a claim. The Pennsylvania act of April 9, 1849, provided for exemption against distress for rent. See Reed *v.* Hollibaugh, 3 Pa. Co. Ct. 20. See *supra*, page 1374, note 5.

43. McTague *v.* Rehill, 2 Montg. Co. Rep. (Pa.) 35.

44. Kinard *v.* Moore, 3 Strobh. (S. C.) 193.

45. Where a judgment was obtained against an insolvent owning an equitable interest in land, and an action was brought to subject his interest to the judgment, and the court found that the insolvent owned personal property to the value of about one hundred dollars, and was entitled to about two hundred dollars out of the value of his equitable interest to make up the three hundred dollars to which he was entitled as an exemption, and that he owed one hundred dollars which was a lien on the land, and the land was sold and purchased by the judgment plaintiffs, and they tendered the amount of the lien, but did not tender the two-hundred-dollar exemption, an order to convey to the purchaser the equitable estate in fee was unauthorized. Smith *v.* Vanscoten, 20 Ind. 221.

A judgment creditor does not acquire by a suit in equity to subject the proceeds of his debtor's bills and accounts receivable and by the appointment of a receiver for the purpose of collecting them such a lien as will preclude an allowance out of the proceeds to the debtor of an exemption in personal property in lieu of a homestead. Fry *v.* Smith, 61 Ohio St. 276, 55 N. E. 826.

46. Reed *v.* Hollibaugh, 3 Pa. Co. Ct. 20.

47. See Kinard *v.* Moore, 3 Strobh. (S. C.) 193. *Contra*, see McLean *v.* Gillis, 2 Manitoba 113.

48. Cox *v.* Bearden, 84 Ga. 304, 10 S. E. 627, 20 Am. St. Rep. 359.

power to pass on the sufficiency thereof; the law does not vest him with judicial powers.[49]

2. Duty to Notify Debtor of His Rights. It is the duty of the officer having the writ or process in his hands to notify the debtor of his rights of exemption.[50] This rule exists to give defendant a chance to surrender other property not selected or exempt for satisfaction of the judgment,[51] or to give him an opportunity to pay off the judgment.[52] But it is incumbent upon the officer to give notice only where it is practicable for him to notify the debtor;[53] so if the debtor is not in the county, the officer is generally excused from giving notice.[54] In all cases the officer should act fairly and in good faith and not use the exemption law as a trap to catch those debtors who are honestly and in good faith seeking to avail themselves of its benefits.[55]

49. Kennedy *v.* Smith, 99 Ala. 83, 89, 11 So. 665, where it is said: "The only case in which the sheriff can disregard a claim of exemption, however informal or irregular, interposed by a defendant in execution within the time prescribed by the statute, is where the execution is issued upon a judgment based upon tort, or other demand against which the statute does not authorize a claim of exemption to be interposed. It has been held by this court that, where it appears upon the face of the papers that the case is one not governed by the exemption laws, it is the duty of the sheriff to disregard the claim of exemption, and to proceed with the sale of the property."

Where an officer holds property under an execution he cannot ignore a claim made to him merely because it fails to show that the debt was contracted during the existence of the law creating exemptions, that question being a judicial one. Straughn *v.* Richards, 121 Ala. 611, 25 So. 700.

Where in an interpleader issue the claimant alleges that the goods seized include the statutory exemptions, that is a question for trial in the issue and is not to be left to the sheriff to deal with. Field *v.* Hart, 22 Ont. App. 449.

50. Cook *v.* Scott, 6 Ill. 333; State *v.* Romer, 44 Mo. 99; Hombs *v.* Corbin, 20 Mo. App. 497. It is the duty of the officer to require a party claiming election between chattels of which one is exempt from execution to make his selection at the time of the levy. Pyett *v.* Rhea, 6 Heisk. (Tenn.) 136, 138. But see Twinam *v.* Swart, 4 Lans. (N. Y.) 263, holding that a constable need not consult a judgment debtor as to what part of his property is exempt from execution before a levy thereon, but is justified in taking and selling the debtor's property, although exempt, if not informed of the exemption.

In Maryland the officer is not required to notify the debtor of the execution and levy. State *v.* Boulden, 57 Md. 314.

Sufficient notice.— Where defendant's land was advertised for sale under an execution against him, he cannot contend that he was not afforded an opportunity of claiming his exemption. Lahr *v.* Ulmer, 27 Ind. App. 107, 60 N. E. 1009. Where, in attachment, the officer serving the writ serves an inventory on defendant, and tenders him the use of an appraisal to enable him to select his exemptions, this is sufficient, there being no requirement that he shall serve the appraisal. Jones *v.* Peek, 101 Mich. 389, 59 N. W. 659.

Before summoning the garnishee the officer should notify the debtor of his exemption rights. State *v.* Somdag, 15 Mo. App. 312; State *v.* Carroll, 9 Mo. App. 275, holding, however, that no damage results from the failure of the constable to notify a judgment debtor of his exemption rights before summoning the garnishee if no judgment is rendered against the garnishee and no malice or oppression in office is shown.

Duty to give advice.— It is even said that the officer's duty is not discharged by merely notifying the execution debtor of his rights of exemption, but he should give the debtor the benefit of his advice. State *v.* Kane, 42 Mo. App. 253, 255.

51. Cook *v.* Scott, 6 Ill. 333. See also Godman *v.* Smith, 17 Ind. 152.

52. See Godman *v.* Smith, 17 Ind. 152.

53. Foote *v.* People, 12 Ill. App. 94.

54. Foote *v.* People, 12 Ill. App. 94 [*citing* People *v.* Palmer, 46 Ill. 398, 95 Am. Dec. 418].

But if the officer knows of the residence of defendant in an adjoining county and can reach him by the exercise of reasonable diligence, it is then his duty to apprise him of his rights of exemption. Finke *v.* Craig, 57 Mo. App. 393.

55. Langston *v.* Murphy, 31 Ill. App. 188, holding that where the debtor delivered a schedule to the officer and the schedule was by mistake unsigned and the debtor offered to sign it or make another, he was entitled to maintain an action against the officer for recovery of the property named as exempt, as it was the duty of the officer in the first place to call the debtor's attention to the omission. See also Schumann *v.* Pilcher, 36 Ill. App. 43, holding that, where the execution debtor writes his name in the body of the affidavit attached to the schedule, the constable cannot presume that the name was written by the same person who wrote the schedule and affidavit, but he should inquire whether the name was written by the debtor, especially where the handwriting is dissimilar from that of the schedule and affidavit.

3. Responsibility as to Articles Specifically Exempt. It is the duty of the officer to know the statute which enumerates articles specifically exempt and to obey it at his peril. The debtor need not designate such articles.[56] That the execution does not in terms except property exempt by law is no defense to the officer.[57]

C. Establishment of Right — 1. In General. The particular mode pointed out by the statute for obtaining the benefits of the exemption law must be followed.[58]

2. Claim of Exemption[59] — a. Necessity of — (i) *In Property Generally.* If the debtor wishes to have the benefit of the exemption laws, it is almost always necessary for him to claim his right.[60] If, however, the debtor has no property except what is exempt by law, it is unnecessary to make claim.[61] A claim of exemption under one execution may not and usually does not dispense with the necessity of the claim under other different executions where the different executions were issued on different judgments;[62] it is even held that a claim under the original execution will not suffice to protect the debtor upon the levy of an alias,[63] but this rule is by no means universal.[64] And where other property is levied

An ambiguously worded notice by mail from which the debtor may infer that personal demand will be made of him at some time in the future is not in good faith and is insufficient. Boggess *v.* Pennell, 46 Ill. App. 150.

56. Frost *v.* Shaw, 3 Ohio St. 270; Gilman *v.* Williams, 7 Wis. 329, 76 Am. Dec. 219.

Under a statute exempting household furniture to the value of one hundred dollars, an officer attaching such property is bound to leave at least the value of one hundred dollars with the debtor. Mannan *v.* Merritt, 11 Allen (Mass.) 582.

Failure to make inventory. — Under a statute which provides that an officer levying on exempt property shall make an inventory of it and cause it to be appraised, an officer is not liable unless he fails to make an inventory for the appraisal within a reasonable time. Tullis *v.* Orthwein, 5 Minn. 377.

57. Maxwell *v.* Reed, 7 Wis. 582.

58. Johnson *v.* Larcade, 110 Ill. App. 611; Line's Appeal, 2 Grant (Pa.) 197; Sennickson *v.* Fulton, 1 Phila. (Pa.) 220.

If the statute does not contain a form in which the claim or demand for the exemption shall be made the right is nevertheless not affected. Hill *v.* Johnston, 29 Pa. St. 362.

59. Absence at time of sale on account of sickness in debtor's family is a sufficient excuse for not making the claim, where the creditor is aware of the claim from its having been made in a former suit. Haswell *v.* Parsons, 15 Cal. 266, 76 Am. Dec. 480.

60. *Alabama.*—Gresham *v.* Walker, 10 Ala. 370. See also Patillo *v.* Taylor, 83 Ala. 230, 3 So. 558.

Arkansas.— Scanlan *v.* Guiling, 63 Ark. 540, 39 S. W. 713.

Illinois.— Johnson *v.* Larcade, 110 Ill. App. 611; Menzie *v.* Kelly, 8 Ill. App. 259.

Kansas.— Williamson *v.* Kansas, etc., Coal Co., 6 Kan. App. 443, 50 Pac. 106.

Kentucky.— Bank of Commerce *v.* Payne, 86 Ky. 446, 8 S. W. 856, 10 Ky. L. Rep. 43.

Missouri.— Alt *v.* Lafayette Bank, 9 Mo. App. 91.

New York.— Wilcox *v.* Howe, 59 Hun 268, 12 N. Y. Suppl. 783, 20 N. Y. Civ. Proc. 214.

Pennsylvania.— Bair *v.* Steinman, 52 Pa. St. 423; Wolf *v.* Wolf, 3 Lanc. L. Rev. 81.

South Dakota.— Pirie *v.* Harkness, 3 S. D. 178, 52 N. W. 581.

Washington.— Zelinsky *v.* Price, 8 Wash. 256, 36 Pac. 28.

See 23 Cent. Dig. tit. "Exemptions," § 137.

An agreed statement that debtor has claimed his exemption is not a sufficient compliance with the statute requiring a verified claim. Courie *v.* Goodwin, 89 Ala. 569, 8 So. 9.

Where the proceeds of exempt property is in the custody of the court, the claimant must apply to the court for an order to have the money paid over. Linck *v.* Troll, 84 Mo. App. 49.

The debtor cannot maintain an action against the officer for seizing his property, unless he has claimed his exemption. Settles *v.* Bond, 49 Ark. 114, 4 S. W. 286; Sullivan *v.* Farley, 11 Daly (N. Y.) 157. See also Oliver *v.* White, 18 S. C. 235. *Contra*, Parsons *v.* Thomas, 62 Iowa 319, 17 N. W. 526. Neither can an action of replevin be maintained without this prerequisite. Mann *v.* Welton, 21 Nebr. 541, 32 N. W. 599. See also Tullis *v.* Orthwein, 5 Minn. 377.

61. Wallace *v.* Lawyer, 54 Ind. 501, 23 Am. Rep. 661. See also Skinner *v.* Jennings, 137 Ala. 295, 34 So. 622; Grieb *v.* Northrup, 66 N. Y. App. Div. 86, 72 N. Y. Suppl. 481.

62. Krauter's Appeal, 150 Pa. St. 47, 24 Atl. 603; Strouse *v.* Becker, 38 Pa. St. 190, 80 Am. Dec. 474; Dobson's Appeal, 25 Pa. St. 232; Bechtel's Appeal, 2 Grant (Pa.) 375; Wisser *v.* Wisser, 8 Pa. Dist. 673, 15 Montg. Co. Rep. (Pa.) 125. *Compare* McCreary's Appeal, 74 Pa. St. 194. See also Stowers *v.* Mathews, 98 Ga. 371, 25 S. E. 452; Wise *v.* Bucher, 1 Woodw. (Pa.) 373.

63. Finley *v.* Sly, 44 Ind. 266.

64. See McAfoose's Appeal, 32 Pa. St. 276, holding that where a fieri facias was levied

upon under the other execution, a claim of exemption made after the levy of the first execution upon certain property is not sufficient.[65]

(II) *Of Property Specifically Exempt.* Where property specifically exempt is levied upon, by the general rule it is not necessary for the debtor to make any claim,[66] especially where the debtor has specific property only to the amount of exemption allowed by law,[67] or where the person holding or directing the service of the writ knows at the time of the service that the property levied upon is exempt.[68]

b. Persons Who May Make. An exemption being a personal privilege, it can as a general rule be pleaded or taken advantage of only by the execution or attachment debtor.[69] Under this general rule it has been held that a garnishee

on the real estate of the debtor and he claimed his exemption and it was allowed, and the land was appraised and sold under a venditioni exponas, and where after the sale was set aside an alias was levied on the same land and it was subsequently sold by the sheriff, the debtor was entitled to his exemptions out of the proceeds of the sale, for the alias in such a case, although irregular, was not an independent writ; it was in substance a continuance of the first writ.

In Illinois by Starr & C. Annot. St. c. 52, par. 14, a debtor who has presented a sufficient schedule of his exempt property is not compelled, upon the return of the execution unsatisfied and the issuing of an alias, to present an additional schedule before seventy days from the date of the writ, if on a justice's judgment, ninety days before any other, unless additional property has been acquired. This statute does not relieve the debtor from scheduling against an alias issued after the time provided, for the limitation was intended to relieve the debtor who had made one sufficient schedule from the duty of making another during the lifetime of the execution, unless he should acquire additional property. Gullett *v.* Conley, 81 Ill. App. 131.

65. Camp *v.* Ganley, 6 Ill. App. 499. See also Biggs *v.* McKenzie, 16 Ill. App. 286.

In garnishment before a justice of the peace, defendant claimed an exemption admitted by the garnishee and the garnishee was discharged. On appeal the garnishee admitted that it had become indebted to defendant in a further sum. There was no new claim of exemption, but the garnishee was nevertheless discharged. It was held that, although the whole indebtedness accrued under a continuous contract, that part which accrued pending the appeal could not be included in the first claim of exemption, and therefore it was error to discharge the garnishee. Craft *v.* Louisville, etc., R. Co., 93 Ala. 22, 9 So. 328.

66. Frost *v.* Shaw, 3 Ohio St. 270; Gilman *v.* Williams, 7 Wis. 329, 76 Am. Dec. 219. See *supra*, VI, B, 3. See also Frost *v.* Mott, 34 N. Y. 253, holding that if an officer seizes a whole flock of sheep of the debtor and the statute allows him ten sheep as exempt from execution, the officer cannot justify his seizure of the ten by the omission of the debtor to designate any particular portion of the flock as not subject to execution.

Defendant's right in public lands is exempt without any form of claim. Healy *v.* Conner, 40 Ark. 352.

If tools, implements, and fixtures which are exempt from execution are attached, and are plainly distinguishable as articles which are exempt from execution, the owner may maintain an action against the attaching officer, without first demanding or pointing them out to him. Woods *v.* Keyes, 14 Allen (Mass.) 236, 92 Am. Dec. 766. But if such articles have been so intermingled with plaintiff's other property that the officer could not distinguish them, a neglect to claim them when the officer was about to attach the whole might be a waiver. Clapp *v.* Thomas, 5 Allen (Mass.) 158.

Under N. Y. Code Civ. Proc. § 1391, however, providing for an exemption in working tools, teams, etc., when owned by a person being a householder, or having a family, except in certain cases, the exemption must be claimed by the person entitled thereto. Gilewicz *v.* Goldberg, 69 N. Y. App. Div. 438, 74 N. Y. Suppl. 984.

67. Harrington *v.* Smith, 14 Colo. 376, 23 Pac. 331, 20 Am. St. Rep. 272; Murphy *v.* Sherman, 25 Minn. 196. See also Seip *v.* Tilghman, 23 Kan. 289, holding that in replevin to recover exempt property seized on execution, where no similar property is owned by the debtor, and no selection is necessary to distinguish it from non-exempt property, no notice to the officer at the time of the levy that it is claimed as exempt is necessary.

Military arms.— If an officer levies an execution on a gun belonging to defendant, it is the duty of defendant to inform the officer before sale that the gun is kept for the purpose of mustering and is therefore exempt. Henson *v.* Edwards, 32 N. C. 43, 44.

Where all the property which a debtor has, of a kind which is exempted, with a limit as to quantity or amount and not with a limit as to value, does not exceed the quantity or amount which the statute exempts, there is no occasion for the debtor to choose or select the same as exempt. In such case the statute operates to choose and select it for him. Howard *v.* Rugland, 35 Minn. 388, 29 N. W. 63.

68. Lynd *v.* Picket, 7 Minn. 184, 82 Am. Dec. 79; Frost *v.* Mott, 34 N. Y. 253.

69. *Iowa.*— Moore *v.* Chicago, etc., R. Co., 43 Iowa 385.

cannot claim that the property in question is not subject to garnishment because of the exemption laws,[70] but in some jurisdictions the garnishee may interpose the defense of exemption[71] on the theory that he must disclose every fact which would prevent a judgment against it.[72] Neither the bailee or agent,[73] the mortgagee,[74] the trustee in a deed of trust,[75] nor the subtenant or original tenant[76] can claim the privilege of the owner. The debtor can exercise the privilege for only his own and his family's benefit, not for the benefit of any one else.[77] In certain circumstances the wife can in many jurisdictions claim the exemption for the debtor; as where he is temporarily absent,[78] or where he refuses or fails to assert his right,[79] or after his death;[80] but she must make the claim in proper form.[81]

Kentucky.— Belknap *v.* Carpenter, 8 Ky. L. Rep. 358.

Maryland.— Miles *v.* State, 73 Md. 398, 21 Atl. 51.

Missouri.— Howland *v.* Chicago, etc., R. Co., 134 Mo. 474, 36 S. W. 29.

New York.— Earl *v.* Camp, 16 Wend. 562. See also Smith *v.* Hill, 22 Barb. 656.

North Carolina.— See Johnson *v.* Cross, 66 N. C. 167.

Pennsylvania.— See Larkin *v.* McAnnally, 5 Phila. 17.

Canada.— Young *v.* Short, 3 Manitoba 302. See 23 Cent. Dig. tit. "Exemptions," § 139.

Assignee.— The right of the head of a family to claim any property to a certain value as exempt, in lieu of articles specifically exempt, is personal to him and, having assigned a judgment without making the claim, the assignee cannot make it. Wabash R. Co. *v.* Bowring, 103 Mo. App. 158, 77 S. W. 106.

In an action against the constable for failure to collect an execution, he cannot set up as a defense that the property of defendant in execution was exempt. Baker *v.* Brintnall, 52 Barb (N. Y.) 188.

70. Seitz *v.* Starks, (Mich. 1904) 98 N. W. 852. See, generally, GARNISHMENT.

71. Mull *v.* Jones, 33 Kan. 112, 5 Pac. 388.

72. Wright *v.* Chicago, etc., R. Co., 19 Nebr. 175, 27 N. W. 90, 56 Am. Rep. 747 [*citing* Drake Attach. 630].

73. Mickles *v.* Tousley, 1 Cow. (N. Y.) 114. But see Pearce *v.* Loudenberger, 16 Phila. (Pa.) 33, where the wife claimed the exemption in the husband's name. See *infra*, note 78, *et seq.*

74. It is the mortgagor's interest that is attached, not the mortgagee's. Sherrible *v.* Chaffee, 17 R. I. 195, 21 Atl. 103, 33 Am. St. Rep. 853. But where plaintiff testifies that he told the sheriff that the property seized was mortgaged and that the mortgagee was in possession, the testimony is sufficient to show that plaintiff is without the necessary title to assert exemption, although the mortgage is not introduced in evidence. Eisenberg *v.* Burchinell, (Colo. App. 1898) 52 Pac. 220. Where the possession of property subject to an unrecorded chattel mortgage is given to the mortgagee, with instruction to sell part of the property to pay the mortgage debt, and the property is afterward attached, and the mortgagee then withdraws his claim, the right of the owner to claim exemption therein was not defeated. Liberal Bank *v.* Redlinger, 95 Mo. App. 279, 68 S. W. 1073.

75. Terry *v.* Wilson, 63 Mo. 493, where property exempt from execution was conveyed by deed of trust to secure a debt.

76. Rosenberger *v.* Hallowell, 3 Phila. (Pa.) 330.

77. Guntley *v.* Staed, 77 Mo. App. 155, 164 [*citing* Garrett *v.* Wagner, 125 Mo. 450, 28 S. W. 762].

A personal representative was not allowed, in North Carolina, to make the claim after the debtor's death. Johnson *v.* Cross, 66 N. C. 167.

In Arkansas the exemption right passes to the widow by the act of 1887. See Thompson *v.* Ogle, 55 Ark. 101, 17 S. W. 593.

The act of the debtor in asserting an exemption in lieu of a homestead binds his family. Hoover *v.* Haslage, 7 Ohio S. & C. Pl. Dec. 98. But in South Dakota, under Comp. Laws, § 5133, the wife may claim exemption if the husband refuses to exercise the privilege wholly or partially. See Thompson *v.* Donahoe, 16 S. D. 244, 92 N. W. 27; Meyer *v.* Beaver, 9 S. D. 168, 68 N. W. 310. And see Mapp *v.* Long, 62 Ga. 568, for a similar provision.

78. Meitzler's Appeal, 73 Pa. St. 368; McCarthy's Appeal, 68 Pa. St. 217; Wilson *v.* McElroy, 32 Pa. St. 82; Waugh *v.* Burket, 3 Grant (Pa.) 319.

In case of permanent abandonment by the husband of wife, home, and property, the wife cannot claim the exemption. McNair *v.* Riesher, 8 Pa. Co. Ct. 494.

Where a man did not live with his wife, who resided in a house belonging to him, she is entitled to make a claim of exemption unless the husband has expressly waived it. Kerst's Appeal, 2 Walk. (Pa.) 117.

If the husband has abandoned his principal business, the horses which were exempt to him to carry on the business cannot be claimed by his wife in his absence, for she has no further interest in them. Miller *v.* Miller, 97 Mich. 151, 56 N. W. 348.

79. White *v.* Smith, 104 Mo. App. 199, 78 S. W. 51; Thompson *v.* Donahoe, 16 S. D. 244, 92 N. W. 27; Noyes *v.* Belding, 5 S. D. 603, 59 N. W. 1069. See also Meyer *v.* Beaver, 9 S. D. 168, 68 N. W. 310.

80. Thompson *v.* Ogle, 55 Ark. 101, 17 S. W. 593.

81. Mapp *v.* Long, 62 Ga. 568.

c. General Rules as to Form and Requisites — (I) *Should Be Clear and Unequivocal.* The claim should be clear and unequivocal that the officer may understand it;[82] but if the right to the exemption has been substantially asserted it will not be defeated by formal and technical objections.[83]

(II) *Following Statute.* The claim must be made in the manner required by statute.[84] It is not necessary that the claim should be made in the precise language of the statute.[85] If the terms and wording of the law are followed in making the claim it is sufficient.[86] Nor is it necessary for the debtor to cite the law under which he makes his claim.[87] It is sufficient if he indicates clearly to the court the grounds of his claim and the facts to support it.[88]

(III) *Where No Form Is Prescribed.* In a number of jurisdictions it is held that there is no prescribed form in which the debtor should make his claim, provided the claim is understood by the officer.[89] In some jurisdictions the claim need not be in writing.[90] The application need not state that the applicant is a debtor.[91] A notice of claim of exemption from execution, signed by two persons, is sufficient as a claim for either separately.[92]

Form and requisites generally see *infra*, VI, C, 2, c.

Claim by minor children acting through grandfather.— Where property of a debtor who is the head of a family is attached on the ground that he has concealed himself so that summons cannot be served, and the property is exempt, the exemption can be claimed in his absence by his minor children, acting by their grandfather, as next friend; the presumption being that defendant had not abandoned the premises, and that he had left the grandfather in charge. White *v.* Swann, 68 Ark. 102, 56 S. W. 635, 82 Am. St. Rep. 282.

82. Tonsmere *v.* Buckland, 88 Ala. 312, 6 So. 904 [*citing* Franklin *v.* Pollard Mill Co., 88 Ala. 318, 6 So. 685]; Moffitt *v.* Adams, 60 Iowa 44, 14 N. W. 88; Turner *v.* Borthwick, 20 Hun (N. Y.) 119.

83. Burdge *v.* Bolin, 106 Ind. 175, 6 N. E. 140, 55 Am. Rep. 724; Haas *v.* Shaw, 91 Ind. 384, 46 Am. Rep. 607. See also Fick *v.* Mullholland, 48 Wis. 413, 4 N. W. 346.

84. Boesker *v.* Pickett, 81 Ind. 554.

Following statute in making schedule, inventory, and affidavit see *infra*, VI, C, 2, e, (II).

85. Bow *v.* Smiley, 31 Pa. St. 225, 72 Am. Dec. 738.

86. La. Const. art. 219, exempts "on a farm the necessary quantity of corn and fodder for the current year." If the debtor makes claim in these words, he has fulfilled the requirements of the constitutional provision and the court will not increase the requirements. Ducote *v.* Rachal, 44 La. Ann. 580, 10 So. 933.

87. Rolla State Bank *v.* Borgfelt, 93 Mo. App. 62 [*citing* Aull *v.* Day, 133 Mo. 337, 34 S. W. 578; Ray *v.* Stobbs, 28 Mo. 35].

88. Rolla State Bank *v.* Borgfelt, 93 Mo. App. 62.

89. Long *v.* Hoban, 7 Ohio Dec. (Reprint) 688, 4 Cinc. L. Bul. 986; Keller *v.* Bricker, 64 Pa. St. 379; Diehl *v.* Holben, 39 Pa. St. 213. See also Bassett *v.* Inman, 7 Colo. 270, 3 Pac. 383.

A mere demand of the benefit of the exemption laws is sufficient. Wilson *v.* McElroy, 32 Pa. St. 82.

In Georgia when the claim is made by the wife the application must affirmatively disclose whose property it is which is claimed, whether the husband's or the wife's (Mutual Ben. Bldg. Assoc. *v.* Tanner, 96 Ga. 338, 23 S. E. 403; Coffee *v.* Adams, 65 Ga. 347); but this is not necessary when the applicant is the husband and father (Braswell *v.* McDaniel, 74 Ga. 319).

Where partners claim their several exemptions, it is sufficient if each informs the officer making the levy and asks that he be permitted to make his selection. O'Gorman *v.* Fink, 57 Wis. 649, 15 N. W. 771, 46 Am. Rep. 58.

90. Simpson *v.* Simpson, 30 Ala. 225 (unless the debtor wishes to bring action against the sheriff, in which case the claim must be made by affidavit as required by statute); Bassett *v.* Inman, 7 Colo. 270, 3 Pac. 383; Hart *v.* Hart, 167 Pa. St. 13, 31 Atl. 352; Dale *v.* McAlpin, 5 Lanc. L. Rev. (Pa.) 34; Com. *v.* Springer, 13 Wkly. Notes Cas. (Pa.) 305.

This is not the rule of course where a schedule is required. See *infra*, VI, C, 2, e.

A parol demand by a debtor for exemption is good as against subsequent execution creditors as notice of the claim. Wise *v.* Bucher, 1 Woodw. (Pa.) 373.

By plea.— As the garnishment statute does not provide for any pleadings, a claim that money attached is exempt need not be set up by plea. McKenna *v.* Lucas, 21 R. I. 509, 45 Atl. 101.

Plaintiff in execution against realty is entitled to notice by record of the debtor's claim to exemption, and a verbal notice given to the sheriff, not communicated by him to plaintiff, is insufficient. Denlinger *v.* Burkey, 16 Lanc. L. Rev. (Pa.) 94. See also McCloskey *v.* Moulder, 8 Pa. Co. Ct. 156.

91. Braswell *v.* McDaniel, 74 Ga. 319.

92. Stanton *v.* French, 83 Cal. 194, 23 Pac. 355.

(iv) *Furnishing Description and Surrender of Other Property.* In some jurisdictions if the debtor claims an exemption in property not specifically exempt, he must offer to disclose other property liable to execution if he has it, or his exemption cannot be allowed.[93] If, however, the debtor has no more property than the law exempts, he is not required to turn out one piece of it to the officer as a condition on which he may return the residue;[94] and if the property levied upon is specifically exempt, the debtor is not obliged to turn out property or disclose other property.[95]

d. Schedule, Inventory, and Affidavit — (i) *Required by Statute.* It is a common provision to require the claimant to make a schedule of all his property[96] and that the schedule and inventory made by the debtor must be signed[97] and sworn to[98] by him. If an execution issue to one county, the inven-

93. McMasters *v.* Alsop, 85 Ill. 157; Johnson *v.* Larcade, 110 Ill. App. 611; MacVeagh *v.* Bailey, 29 Ill. App. 606. See also Keybers *v.* McComber, 67 Cal. 395, 7 Pac. 838; Bingham *v.* Maxcy, 15 Ill. 290; Cook *v.* Scott, 6 Ill. 333; McGee *v.* Anderson, 1 B. Mon. (Ky.) 187, 36 Am. Dec. 570. *Contra*, Bray *v.* Laird, 44 Ala. 295.

It is error for the court to refuse to allow a full inquiry as to whether the debtor has other personal property in addition to the choses in action attached. Miller *v.* Mahoney, 29 S. W. 879, 16 Ky. L. Rep. 799. See also Trager *v.* Feibleman, 95 Ala. 60, 10 So. 213; Davis *v.* Hays, 89 Ala. 563, 8 So. 131.

A record of the debtor's former examination in supplementary proceedings is admissible to prove his admissions that he had at that time other property which he withheld from the levying officer, notwithstanding that on the examination the debtor had no opportunity by cross-examination to explain the omission, and notwithstanding that the proceeding was between parties other than those in the present controversy. Hasloge *v.* Hoover, 16 Ohio Cir. Ct. 570, 9 Ohio Cir. Dec. 404.

If the other property is in another county the debtor can have his exemption in the property levied on without bringing the other property from the other county (Anderson *v.* Ege, 44 Minn. 216, 46 N. W. 362), especially where the property in the other county is held under execution by the sheriff in that county (Keefer *v.* Guffin, 38 Ill. App. 622).

94. Vaughan *v.* Thompson, 17 Ill. 78.

95. Amend *v.* Murphy, 69 Ill. 337; Stirman *v.* Smith, 10 S. W. 131, 10 Ky. L. Rep. 665. In Bonnell *v.* Bowman, 53 Ill. 460, 462, it was held that where the officer levied upon property specifically exempt and the levy was made without the debtor's knowledge, the debtor must offer to surrender other property not exempt before he can claim his exemption in the property levied on.

96. Ehle *v.* Deitz, 32 Ill. App. 547; Cook *v.* Bohl, 8 Ill. App. 293.

In Alabama an inventory is not necessary in case of garnishment under Code, § 2533. Decatur Mercantile Co. *v.* Deford, 93 Ala. 347, 9 So. 454.

In Georgia only when exemption in personalty is claimed is a schedule necessary under Code, §§ 203, 205. Atwater *v.* Respess, 97 Ga. 283, 22 S. E. 1000.

In Indiana this was not necessary under 2 Rev. St. 336. Mark *v.* State, 15 Ind. 98.

In Michigan the officer must make the schedule. Town *v.* Elmore, 38 Mich. 305.

Against an alias execution the schedule and affidavit must be made. Weller *v.* Moore, 50 Ark. 253, 7 S. W. 130 [*following* Euper *v.* Alkire, 37 Ark. 283]. *Contra*, Lafferty *v.* Sistalla, 11 Wyo. 360, 72 Pac. 192. See, however, *supra*, VI, C, 2, a, (i).

A non-resident who by law has the benefit of the exemption statutes of the state, and who desires an exemption of his property from execution, must make a schedule. Menzie *v.* Kelly, 8 Ill. App. 259.

It is essential to the validity of a schedule filed by the wife for the purpose of having the property of her husband set apart as exempt under Ga. Civ. Code, § 866 *et seq.*, that it affirmatively appear that the husband refused to file the same, otherwise the schedule as recorded is void and may be collaterally attacked. Hirsch *v.* Stimson, 112 Ga. 348, 37 S. E. 365. Failure of the wife to include in the schedule what was given her by her husband will not vitiate her application when it does not appear that the gift was made in anticipation of application and for the purpose of fraudulent conveyance or concealment. Wood *v.* Collins, 111 Ga. 32, 36 S. E. 423.

97. Schumann *v.* Pilcher, 36 Ill. App. 43 (where it was held that the writing by an execution debtor of his name in the body of the affidavit attached to the schedule was a sufficient signing of both the schedule and the affidavit); Cook *v.* Bohl, 8 Ill. App. 293.

98. Casper *v.* People, 6 Ill. App. 28. See also Cook *v.* Bohl, 8 Ill. App. 293.

Although a verbal claim is sufficient to perfect the debtor's right in his work horse, yet an affidavit is necessary if the debtor wishes to retain his right of action against the officer who sells in spite of his claim. Simpson *v.* Simpson, 30 Ala. 225.

An affidavit that the debtor believes the property to be exempt is insufficient unless it is added that his belief is founded on a knowledge of law or advice of counsel. Roberts *v.* Willard, 1 Code Rep. (N. Y.) 100, under N. Y. Code Proc. § 182. The code re-

tory and appraisement need not be made in all the counties where the debtor has property.[99]

(II) *Form, Requisites, and Sufficiency.*[1] In making the schedule or inventory[2] or the affidavit[3] the statutory requirements must be substantially and definitely followed. To entitle the debtor to exemption in any of the articles scheduled, he must make claim therefor,[4] and in many jurisdictions his schedule must show that the claimant is a resident of the state,[5] and in some the head of a family.[6] It must appear by the affidavit that the debt against which exemption is claimed was contracted subsequent to the passage of the exemption laws.[7] If the exemption is claimed on the ground that the debt did not arise out of the contract, this must be clearly alleged.[8] The debtor is generally required to set out his different articles of property with particularity.[9] The property claimed

quirement was that the debtor must "show" that the property is by statute exempt. To "show" means more than simply to allege. The right to the exemption must be shown by stating facts which constitute the exemption. Spaulding *v.* Spaulding, 3 How. Pr. (N. Y.) 297, 1 Code Rep. (N. Y.) 64.

Alleged perjury in the affidavit is no ground for refusal of the sheriff to set apart the property claimed if the schedule is sworn to and the claim is in substantial accordance with the requirements of the statute. Over *v.* Shannon, 91 Ind. 99. The officer can question the validity of neither the signature nor the affidavit filed by the debtor. Smith *v.* Johnson, 43 Nebr. 754, 62 N. W. 217. Nor can he question the correctness of the schedule. State *v.* Cunningham, 6 Nebr. 90.

A wife's affidavit made in her husband's absence is not insufficient for a trifling and immaterial informality. Astley *v.* Capron, 89 Ind. 167. That she adds to her affidavit, which is itself sufficient in law, the statement that there may be something that her husband owns in some other state, of which she had no knowledge, will not defeat the claim for exemption. Eisenhauer *v.* Dill, 6 Ind. App. 188, 33 N. E. 220. Where a wife swears in her affidavit that the property claimed is her husband's, the effect is the same as though she had made the averment in the petition, although it was omitted therefrom. Cartwright *v.* Bessman, 73 Ga. 189.

99. Alvord *v.* Lent, 23 Mich. 369.

1. **Acceptance of a schedule without objection by the constable** to its form or substance precludes him from afterward saying that it was not in compliance with the law. McClellan *v.* Powell, 109 Ill. App. 222.

2. *Alabama.*— Mitchell *v.* Corbin, 91 Ala. 599, 3 So. 810; Block *v.* George, 83 Ala. 178, 4 So. 836; McBrayer *v.* Dillard, 49 Ala. 174.

Arkansas.— Settles *v.* Bond, 49 Ark. 114, 4 S. W. 286; Healy *v.* Conner, 40 Ark. 352.

Illinois.— Finlen *v.* Howard, 126 Ill. 259, 18 N. E. 560; Ehle *v.* Deitz, 32 Ill. App. 547; Biggs *v.* McKenzie, 16 Ill. App. 286; Chapin *v.* Hoel, 11 Ill. App. 309; Cook *v.* Bohl, 8 Ill. App. 293; Blair *v.* Parker, 4 Ill. App. 409.

Indiana.— Guerin *v.* Kraner, 97 Ind. 533; Barkley *v.* Mahon, 95 Ind. 101.

Nebraska.— Mann *v.* Welton, 21 Nebr. 541, 32 N. W. 599.

See 23 Cent. Dig. tit. "Exemptions," § 137.

The omission of the words "within and without the state" did not invalidate the inventory where the affidavit contained a full account of all the debtor's property and alleged that no property had since been disposed of. Gregory *v.* Latchem, 53 Ind. 449.

3. Kahn *v.* Hayes, 22 Ind. App. 182, 53 N. E. 430.

In Illinois the debtor need swear, when making his affidavit, that the schedule contains a list of all his personal property only on the day of the date of the oath. Taylor *v.* Beach, 14 Ill. App. 259.

In Iowa a notice of claim to attach property was required to be under oath only when the claim was made by a third person. Glover *v.* Narey, 92 Iowa 286, 60 N. W. 531.

In Nebraska the affidavit must set out that the schedule was complete and correct, that claimant is a resident of the state, the head of a family, and not possessed of lands, town lots, or houses exempt as a homestead under the laws of the state. Neligh First Nat. Bank *v.* Lancaster, 54 Nebr. 467, 74 N. W. 858. An affidavit to this effect must negative the possession of any of these, and if it fails to do so it will be insufficient. Kilpatrick-Koch Dry Goods Co. *v.* Callender, 34 Nebr. 727, 52 N. W. 403.

4. Guise *v.* State, 41 Ark. 249. See also Porter *v.* Navin, 52 Ark. 352, 12 S. W. 705.

5. Guise *v.* State, 41 Ark. 249. See also Porter *v.* Navin, 52 Ark. 352, 12 S. W. 705; Neligh First Nat. Bank *v.* Lancaster, 54 Nebr. 467, 74 N. W. 858.

6. Neligh First Nat. Bank *v.* Lancaster, 54 Nebr. 467, 74 N. W. 858. *Contra,* Webster *v.* McGauvran, 8 N. D. 274, 78 N. W. 80.

7. Ely *v.* Blacker, 112 Ala. 311, 20 So. 570.

8. Huffman *v.* Thompson, 64 Ark. 196, 41 S. W. 428, holding that an affidavit alleging that "the attachment was for a debt not due upon contract," shows that the debt sued for was under a contract, but was not due.

9. *Alabama.*— Pinkus *v.* Bamberger, 99 Ala. 266, 13 So. 578.

Arkansas.— Friedman *v.* Sullivan, 48 Ark. 213, 2 S. W. 785.

Illinois.—McClellan *v.* Powell, 109 Ill.

as exempt should be described so that it can be identified by the appraisers and officer.[10] Although property not included in the schedule is not exempt,[11] the omission of some articles affects none of the debtor's rights to exemption in the articles actually scheduled,[12] especially where the omission is not done through fraudulent intent.[13] The inventory and the claim should be verified at the very time they are filed and not before.[14]

(III) *AMENDMENT.* In some states an officer is not liable for refusing to allow an execution debtor to amend his schedule.[15] But the mere fact that the debtor delivered his schedule unsigned through inadvertence does not prevent him from enforcing his right to exemption claimed therein, where he subsequently offered to sign the schedule or make another.[16] The debtor cannot amend his petition for exemption by striking anything thence.[17] A mistake of law in scheduling an article of property does not authorize an amendment.[18]

e. Time of — (I) *EXECUTION AND PROCESS GENERALLY* — (A) *At or Near Time of Levy.* The proper time to claim an exemption would seem to be at the time of the levy or within a reasonable time thereafter, and so a number of authorities hold.[19] The question of what is a reasonable time is ordinarily one for the

App. 222; Moffett *v.* Sheehey, 52 Ill. App. 376.

Nebraska.— Farquhar *v.* Hibben, 38 Nebr. 556, 57 N. W. 290.

United States.— *In re* Wilson, 108 Fed. 197, 6 Am. Bankr. Rep. 287.

See 23 Cent. Dig. tit. "Exemptions," § 147.

10. Driggs *v.* Roth, 97 Ill. App. 39.

11. See Brown *v.* Edmonds, 5 S. D. 508, 59 N. W. 731, under Comp. Laws, § 5130.

12. Horton *v.* Smith, 46 Ill. App. 241; Berry *v.* Hanks, 28 Ill. App. 51; Douch *v.* Rahuer, 61 Ind. 64; Paddock *v.* Balgord, 2 S. D. 100, 48 N. W. 840; Mikkleson *v.* Parker, 3 Wash. Terr. 527, 19 Pac. 31.

13. Wagner *v.* Olson, 3 N. D. 69, 54 N. W. 286.

14. Young *v.* Hubbard, 102 Ala. 373, 14 So. 569, under Code, §§ 2525, 2533.

15. Blair *v.* Parker, 4 Ill. App. 409, holding this to be so whether the debtor had omitted certain articles of his property therefrom through fraud or inadvertence.

A schedule filed by a wife under Ga. Civ. Code, § 2867, providing that the wife, in case the husband refuses to file a schedule of property exempt from execution, may file such schedule in his stead, is not later amendable by changing it to make it claim property as exempt as the property of the wife as head of the family, based on the idea that she was living separate from her husband and had a minor child. Ozburn *v.* Flurnoy, 109 Ga. 704, 35 S. E. 139.

16. Langston *v.* Murphy, 31 Ill. App. 188.

If the constable swears the debtor to the schedule and then carries the schedule away, he cannot question its validity on account of the lack of the debtor's signature. Cooper *v.* Payne, 36 Ill. App. 155.

17. McWilliams *v.* Bones, 84 Ga. 199, 10 S. E. 723, holding that the code only permits him to add omitted articles.

An objection to the schedule that it omitted property owned by the head of the family, some of which consisted of debts owing to him by persons unknown to the objector, without further specifying or describing the property charged to have been omitted was properly disallowed for want of fullness and certainty. Wood *v.* Collins, 111 Ga. 32, 36 S. E. 423.

18. Brown *v.* Edmonds, 5 S. D. 508, 59 N. W. 731.

19. Gavitt *v.* Doub, 23 Cal. 78 [*following* Booland *v.* O'Neal, 22 Cal. 504]; MacVeagh *v.* Bailey, 29 Ill. App. 606; Johnston *v.* Willey, 21 Ill. App. 354; Blair *v.* Parker, 4 Ill. App. 409; Zielke *v.* Morgan, 50 Wis. 560, 7 N. W. 651. See also Brooks *v.* Hathaway, 8 Hun (N. Y.) 290; Dale *v.* McAline, 5 Lanc. L. Rev. (Pa.) 34 (holding that a claim is in time, if verbally made when the sheriff presented the execution and followed up by written notice a few days afterward); Lenning *v.* Taylor, 18 Wkly. Notes Cas. (Pa.) 94 (holding that where defendant had knowledge of an attachment in March, but did not technically appear until June, a claim of exemption made after that date is too late).

If not at so late a time as to postpone the sale, a demand of appraisement and exemption should be made after the time of the levy, although the proper time is when the levy is made. Dieffenderfer *v.* Fisher, 3 Grant (Pa.) 30 [*citing* Hammer *v.* Freese, 19 Pa. St. 255].

Against distress.— Under the Pennsylvania act of May 13, 1876, exempting musical instruments leased or hired from execution or distress for rent, the notice required by the act must be given when the leased instrument was put upon the premises; and when given after levy of distraint it is too late. McGeary *v.* Mellor, 87 Pa. St. 461. In Lindley *v.* Miller, 67 Ill. 244, it is said that as against a distress for rent a claim is of no avail unless selection is made in proper time and the property demanded before the suit in replevin.

A claim by a widow at the time of the levy is in time where the husband died pending a suit to recover a debt contracted for family necessaries, the wife having become the head

jury.[20] The debtor is not bound to file a claim until he has notice of levy or until a reasonable time after receiving notice,[21] unless, as is the case in some states, he must file his claim within a certain number of days after notice.[22] The fact that defendant is present at the time of the levy has been held not to make it necessary that he make claim exactly then.[23] If the debtor is misled by the officer, he may file his schedule after the time prescribed by law.[24]

(B) *Before Sale or Advertisement.* In many jurisdictions the claim may be made at any time before sale of property on execution,[25] and generally it

of the family on the death of the husband. White *v.* Wilson, 106 Mo. App. 406, 80 S. W. 692, the contention being that the wife's claim was *res judicata* under Rev. St. (1899) § 4340, which provided that separate property of a wife might be subjected to execution for a debt of the husband contracted for family necessaries, but that before execution should be levied on the property of the wife she should be made a party to the action and all questions involved should be therein determined.

Where upon the severance of a partnership, an individual partner makes his claim before the sale under an attachment of the partnership goods, the claim is made in time, although seventeen days after the seizure of the partnership goods, for the partners were entitled to a reasonable time to sever their interests and claim their exemptions after the seizure. Ladwig *v.* Williams, 87 Wis. 615, 58 N. W. 1103.

In Michigan, since the officer is required by law to appraise the goods and set aside so much as is exempt, the debtor is not obliged to claim at the time of the levy. Vanderhorst *v.* Bacon, 38 Mich. 669, 31 Am. Rep. 328.

20. Johnston *v.* Willey, 21 Ill. App. 354; Brooks *v.* Hathaway, 8 Hun (N. Y.) 290.

21. Behler's Estate, 2 Pa. Dist. 324, 12 Pa. Co. Ct. 393, where claim was not filed until eight months after levy. See also Hart *v.* Hart, 167 Pa. St. 13, 31 Atl. 352; Howard Bldg., etc., Assoc. *v.* Philadelphia, etc., R. Co., 102 Pa. St. 220.

22. See Furrow *v.* Zollars, 8 S. D. 522, 67 N. W. 612, holding that under Comp. Laws, § 5135, as amended by Laws (1893), c. 19, which provides that the debtor must claim the benefit of his exemptions within five days after notice of the levy, the time for making the claim is not extended by the pendency of an action of replevin by a third person to recover the property levied upon, and to which the debtor is not a party.

Claim by wife.— In the absence of a law limiting the time within which the wife must exercise the statutory exemption right in case her husband fails to do so within three days after receiving a notice of levy, a reasonable time thereafter will be allowed her in which to claim property exempt to herself and family, and thirty-two days under the circumstances was held reasonable. Noyes *v.* Belding, 5 S. D. 603, 59 N. W. 1060.

23. Ellsworth *v.* Savre, 67 Iowa 449, 25 N. W. 699; Close *v.* Sinclair, 38 Ohio St. 530; Muse *v.* Darrah, 2 Ohio Dec. (Reprint) 604, 4 West. L. Month. 149 (where the court said that ordinarily the claim should be made at the time of levy if the debtor be present, but that this is not necessary under all circumstances); Bittenger's Appeal, 76 Pa. St. 105; Landis *v.* Lyon, 71 Pa. St. 473. *Contra,* Dieffenderfer *v.* Fisher, 3 Grant (Pa.) 30.

24. Morrissey *v.* Feeley, 36 Ill. App. 556. See also Pelkey *v.* People, 11 Ill. App. 82, holding that where an officer demanded property to satisfy an execution and gave the execution debtor three days to make a schedule and at the end of the three days the officer gave the debtor further time in which to see the execution creditor, he should have been allowed a reasonable time after failure of negotiations to make the schedule, good faith requiring this of the officer.

25. *Alabama.*— Boylston *v.* Rankin, 114 Ala. 408, 21 So. 995, 62 Am. St. Rep. 111, under Code, §§ 2520, 2521.

Arizona.— Wilson *v.* Lowry, (1898) 52 Pac. 777, under Rev. St. § 1956.

Indiana.— State *v.* Read, 94 Ind. 103; Pate *v.* Swann, 7 Blackf. 500; Stout *v.* Price, 24 Ind. App. 360, 55 N. E. 964, 56 N. E. 857.

Kansas.— Gardner *v.* King, 37 Kan. 671, 15 Pac. 920.

Missouri.— State *v.* Emerson, 74 Mo. 607.

Nebraska.— Crans *v.* Cunningham, 13 Nebr. 204, 13 N. W. 176.

North Carolina.— Pate *v.* Harper, 94 N. C. 23; Shepherd *v.* Murrill, 90 N. C. 208; Hathaway *v.* Floyd, 33 N. C. 496.

Pennsylvania.— A claim made four days before the sale will not be held too late, in the absence of proof that debtor had earlier notice of the levy. Kee *v.* Hobensack, 2 Phila. 82.

Washington.— State *v.* Gardner, 32 Wash. 550, 73 Pac. 690, 98 Am. St. Rep. 858, within any reasonable time before sale. See also Messenger *v.* Murphy, 33 Wash. 353, 74 Pac. 480.

See 23 Cent. Dig. tit. "Exemptions," § 145.

In Ohio, 70 Laws, 51, provides that the selection by the debtor may be made "at any time before sale." Close *v.* Sinclair, 38 Ohio St. 530. The right to select and demand property in lieu of a homestead exemption may be asserted at any time before the fund therefrom comes into the custody of the court. Hoover *v.* Haslage, 7 Ohio S. & C. Pl. Dec. 98. A notice of demand four days before the sale, which described the property and claimed to have set off out of it the amount to which in lieu of a homestead plaintiff was entitled was sufficient. Long *v.*

must be before the sale if the debtor has notice.[26] In fairness it should be made before the beginning of the sale;[27] and in some states even before the advertisement of the sale,[28] and if made before that it is in time.[29] These rulings are based on the just principle that an exemption should be allowed when it can be done without prejudice to creditors and therefore the claim should not be delayed until costs which might have been avoided have been incurred.[30] If no costs or expenses have been incurred, the strict rule will not be enforced against the debtor.[31] Although it would follow that a claim out of the proceeds in court would be too late,[32] nevertheless there are circumstances which have been held sufficient to allow a claim then made.[33]

Hoban, 7 Ohio Dec. (Reprint) 688, 4 Cinc. L. Bul. 986.

26. Com. *v.* Burnett, 44 S. W. 966, 19 Ky. L. Rep. 1836 (where the claim was for sufficient provisions for family); Fackler *v.* Bale, 1 Pearson (Pa.) 171. This is so at least if the debtor has property in excess of the exemption allowed by law. Harrington *v.* Smith, 14 Colo. 376, 23 Pac. 331, 20 Am. St. Rep. 272, under Gen. St. (1883) p. 601, § 32. The statutory exemption of personal property on behalf of the widow and minor children must, when the property is not in their possession, and although the entire personal estate does not exceed the statutory allowance, be claimed by them before a valid sale thereof has been made by the personal representative, or the exemption will be deemed waived. Chandler *v.* Chandler, 87 Ala. 300, 6 So. 153.

Lack of notice.— Where defendant files a declaration of exemption of personal property, and plaintiffs make affidavit and give bond for a contest and attachment issues, but written notice of the levy is not served on defendant as required by Ala. Code, § 2520, defendant is not bound to contest; and where he voluntarily enters his appearance and files an inventory of his personalty, it is error for the court to strike it from the files and render judgment against him became the inventory was not filed sooner. Bledsoe *v.* Gary, 95 Ala. 70, 10 So. 502.

After the assignee has converted or sold the goods of a debtor who assigned for the benefit of creditors it is too late to make claim. Pilling *v.* Stewart, 4 Brit. Col. 94.

27. State *v.* Boulden, 57 Md. 314; Rogers *v.* Waterman, 25 Pa. St. 182; Hammer *v.* Freese, 19 Pa. St. 255 [*reversing* 5 Pa. L. J. Rep. 153]. *Contra*, State *v.* Emmerson, 74 Mo. 607. A claim the day of sale of the property under execution is too late. Diehl *v.* Holben, 39 Pa. St. 213; Stewart's Appeal, 7 Pa. Cas. 46, 10 Atl. 833. See Dieffenderfer *v.* Fisher, 3 Grant (Pa.) 30, where claim was made a half hour before sale.

In Kansas the mere failure of the debtor to make claim until the morning preceding the sale made by an officer upon an order of attachment is not a waiver. Rice *v.* Nolan, 33 Kan. 28, 5 Pac. 437.

In Missouri the last day but one before the sale is the latest the debtor can make claim. Linck *v.* Troll, 84 Mo. App. 49.

28. Com. *v.* Boyd, 56 Pa. St. 402; Fackler *v.* Bale, 1 Pearson (Pa.) 171; Johnston Harvester Co. *v.* Fite, 4 Pa. Co. Ct. 415; Kensel *v.* Kern, 4 Phila. (Pa.) 86; Kern *v.* Beam, 11 Lanc. Bar (Pa.) 183; Keiper *v.* Cochenauer, 7 Lanc. Bar (Pa.) 94. *Contra*, State *v.* Carson, 27 Nebr. 501, 43 N. W. 361, 20 Am. St. Rep. 681, 9 L. R. A. 523. This is so unless there are special circumstances, such as absence from home or ignorance of the levy, operating as an excuse for the delay. Diehl *v.* Holben, 39 Pa. St. 213. Even absence from home is not an excuse, for in such case his wife or next friend can give notice. Boas *v.* Fendler, 2 Pearson (Pa.) 361. See also Kern *v.* Beam, 11 Lanc. Bar (Pa.) 183. Generally a claim for the benefit of the exemption is too late after defendant's property has been levied upon and duly advertised for sale by the sheriff. Hubbard *v.* Evarts, 12 Pa. Co. Ct. 132. In the case of an attachment on chattels, the claim of an exemption must be made in time not to delay the sale or to require new advertisements. Yost *v.* Heffner, 69 Pa. St. 68. Where notice of distress is given on the second of the month, and the appraisement is made on the eighth, and the sale is advertised for the fourteenth, a demand made on the eighth, the day the advertisement was posted, was not made in time. Rosenberger *v.* Hallowell, 3 Phila. (Pa.) 330. Where no inquisition is required by law in proceedings for the sale of property, a request for appraisement to obtain the benefit of a three-hundred-dollar exemption from the proceeds of the sale, as provided by the Pennsylvania act of April 9, 1849, should be made before advertisement of the sale. Bowyer's Appeal, 21 Pa. St. 210.

29. Com. *v.* Boyd, 56 Pa. St. 402. See also Scott *v.* Kerlin, 1 Del. Co. (Pa.) 545.

30. Williamson *v.* Krumbhaar, 132 Pa. St. 455, 19 Atl. 281; Cornman's Appeal, 90 Pa. St. 254; Moore *v.* McMorrow, 5 Pa. Super. Ct. 559.

31. Williamson *v.* Krumbhaar, 132 Pa. St. 455, 19 Atl. 281. See also Snyder *v.* Schmick, 166 Pa. St. 429, 31 Atl. 124; Cornman's Appeal, 90 Pa. St. 254; Elliott *v.* Flanigan, 37 Pa. St. 425; Weir's Estate, 10 Pa. Co. Ct. 187; Johnston Harvester Co. *v.* Fite, 4 Pa. Co. Ct. 415.

32. Lancaster Trust Co. *v.* Gouchenauer, 6 Pa. Super. Ct. 209 [*following* Moore *v.* McMorrow, 5 Pa. Super. Ct. 559].

33. As when the officer levying execution does not notify the judgment debtor of his

(II) *Garnishment, Attachment-Execution, or Trustee Process.*[34] The claim must be made at the term at which process is returnable.[35] If the claim is made on trial between the attachment creditor and the garnishee it is too late.[36] A claim made after judgment against the garnishee is of course too late, if the debtor has notice of the garnishment or attachment.[37] If the debtor has not had notice or has not been served he may and must make his claim within a reasonable time after notice.[38]

(III) *Attachment Proceedings.* After final judgment in attachment for

exemptions. Rolla State Bank *v.* Borgfeld, 93 Mo. App. 62. See also Calloway *v.* Calloway, 39 S. W. 241, 19 Ky. L. Rep. 870.

A claim for exemption out of a life-estate cannot be considered until the funds collected by the sequestrator are ready for distribution. Darby First Nat. Bank *v.* Harkins, 8 Del. Co. (Pa.) 134.

Where there has been no appraisement of real estate under a claim of exemption, although the claim was made, defendant cannot come upon the fund raised by the sale of the property. The debtor's only remedy in such a case is by action against the officer. Kershner *v.* Miller, 2 Woodw. (Pa.) 51. The same principle is recognized in the sale of personal property. In the case of real estate, this is accomplished by requiring the claim for exemption to be made before inquisition, while, in the case of personal property, the same end is accomplished by requiring the demand to be made before the day of sale, and probably before the advertisements are issued. McCloskey *v.* Moulder, 8 Pa. Co. Ct. 156, 159.

Before appraisement or inquisition.— Notice by a judgment debtor of his claim under the three-hundred-dollar exemption law may be given at any time before inquisition made. Bowyer's Appeal, 21 Pa. St. 210; Brant's Appeal, 20 Pa. St. 141; Weaver's Appeal, 18 Pa. St. 307; Miller's Appeal, 16 Pa. St. 300; McCloskey *v.* Moulder, 8 Pa. Co. Ct. 156; Kern *v.* Beam, 11 Lanc. Bar (Pa.) 183; Com. *v.* Springer, 13 Wkly. Notes Cas. (Pa.) 305; Kershner *v.* Miller, 2 Woodw. (Pa.) 51.

34. **Premature claim.**— When a rule for judgment against the garnishee upon his answer is undisposed of, a claim for exemption out of moneys in his hands is premature. Leibfried *v.* Morrisey, 9 Pa. Dist. 740.

35. If then the claim is made at the time that the garnishee files his answer it is in time. Kuhn *v.* Warren Sav. Bank, 7 Pa. Cas. 432, 11 Atl. 440; Holmes *v.* Pettingill, 4 Wkly. Notes Cas. (Pa.) 495; Hilbronner *v.* Sternberger, 4 Wkly. Notes Cas. (Pa.) 186, where the claim was put forward in the answer of the garnishee. If the claim is made before the garnishee has answered the interrogatories propounded by plaintiff it is in time. Heathcote *v.* Crassly, 9 Pa. Dist. 137; Evans *v.* Evans, 13 Montg. Co. Rep. (Pa.) 164; McKenna *v.* Lucas, 21 R. I. 509, 45 Atl. 101. If not made until after the filing of the answer to the interrogatories it is too late. Pugh *v.* Bresnahan, 4 Kulp (Pa.) 311; Malany *v.* Entriken, 7 Wkly. Notes Cas. (Pa.) 374. A claim of exemption in attachment execution is made too late when raised by a plea to the scire facias against the garnishee. Strouse *v.* Becker, 44 Pa. St. 206.

After defendant in garnishment has given bonds for dissolution of the garnishment and the fund has been paid over to him by the garnishee, he may interpose his claim. Skews *v.* Vancleave, 119 Ala. 418, 24 So. 850 [*following* Guilford *v.* Reeves, 103 Ala. 301, 15 So. 661].

36. Bancord *v.* Parker, 65 Pa. St. 336; Zimmerman *v.* Briner, 50 Pa. St. 535.

37. Randolph *v.* Little, 62 Ala. 396 [*overruling* Webb *v.* Edwards, 46 Ala. 17]; State *v.* Judge, 39 La. Ann. 622, 2 So. 425; New Mexico Nat. Bank *v.* Brooks, 9 N. M. 113, 49 Pac. 947; Eichert *v.* Schmitt, 15 Wkly. Notes Cas. (Pa.) 454; Huber *v.* Ritter, 2 Montg. Co. Rep. (Pa.) 24. *Contra*, Blass *v.* Erber, 65 Ark. 112, 44 S. W. 1128, 67 Am. St. Rep. 907 [*following* Robinson *v.* Swearingen, 55 Ark. 55, 17 S. W. 365], holding that the claim may be asserted at any time before sale.

Where the issues in an action to set aside an alleged fraudulent conveyance have been submitted and special findings have been made and filed the right to exemption cannot be raised. McNally *v.* White, 154 Ind. 163, 54 N. E. 794, 56 N. E. 214. In Cunningham *v.* Duncan, 5 Pa. Dist. 574, 18 Pa. Co. Ct. 250, 12 Montg. Co. Rep. (Pa.) 181, it was held that after attachment had been levied under the fraudulent debtor's act defendant might make his claim and have appraisement made without waiting until the entry of judgment.

Where a claim was presented against the estate of a decedent garnishee and allowed, an application by defendant thereafter for exemption comes too late. Downing's Estate, 5 Wkly. Notes Cas. (Pa.) 544. See also Morris *v.* Shafer, 93 Pa. St. 489, where a claim was not allowed after an arbitration and where costs had been allowed to pile up previously.

38. Hayes *v.* Lentz, 8 Pa. Dist. 625, 15 Montg. Co. Rep. (Pa.) 39; Cochran *v.* Rockhill, 2 Del. Co. (Pa.) 4, where attachment issued in November and the debtor in January upon having notice of the garnishment gave notice of his claims. The fact that the claim is not made at the term at which the writ is returnable (Howard Bldg., etc., Assoc. *v.* Philadelphia, etc., R. Co., 102 Pa. St. 220) or not until interrogatories and the rule on the garnishee were filed (Field *v.* Streeton,

the sale of the property attached, it is too late for the attachment defendant to claim the property as exempt from sale.[39]

(iv) *Foreclosure and Other Proceedings.*[40] In those jurisdictions allowing an exemption as against a mortgage, the mortgagor should assert his claim at the hearing for the appointment of a receiver.[41] He cannot make claim after the mortgaged property has been ordered to be sold.[42] As against other creditors, a claim made within a reasonable time after the sale, to establish the statutory *quantum* in the surplus proceeds, is good.[43] If an estate is solvent it is too late for the widow to make application for an allowance in lieu of property not subject to forced sale after the estate is ready for partition and distribution among the heirs.[44]

f. Presentation, Delivery, and Filing of Claim, Inventory, Etc. It is a usual provision that the inventory or schedule must be filed or delivered to the officer.[45] When execution process is issued by a justice, the schedule should be filed with the justice.[46] If the inventory which is required by statute to be filed is not filed, plaintiff is entitled, without tendering issue, to an order subjecting the property to process.[47] Leaving the schedule at a place designated by the officer[48] or with the officer's wife with instructions to deliver it to him[49] has been held sufficient. Where notice to plaintiff is required[50] the voluntary appearance of a creditor to contest the right to exemption is a waiver of the notice which has not been given to him.[51]

16 Wkly. Notes Cas. (Pa.) 457) is immaterial so long as the debtor makes his claim within a reasonable time after having notice.

39. Haas *v.* Shaw, 91 Ind. 384, 46 Am. Rep. 607; Perkins *v.* Bragg, 29 Ind. 507; State *v.* Manly, 15 Ind. 8. See, however, *supra*, VI, C, 2, e, (I), (B).

Where goods which have been clandestinely removed were attached under the Pennsylvania act of March 17, 1869, and, as they were perishable, sold by order of court, the claim for exemption is premature before judgment rendered and the order of sale was not a judgment. Martin *v.* Magarry, 8 Wkly. Notes Cas. (Pa.) 145.

40. After payment under court's order.— Where defendant in a pending action was by the court, on the application of a creditor of plaintiff, ordered to hold subject to the court's order any sum for which plaintiff might obtain judgment, and the court ordered defendant to pay the creditor's claim when plaintiff secured a judgment, after payment it is too late to claim exemption of the judgment in lieu of homestead, although an adjustment of an excessive payment is still to be made by plaintiff's creditor. Green *v.* Fischer, 6 Ohio Dec. (Reprint) 1138, 10 Am. L. Rec. 570.

41. Storm *v.* Ermantrout, 89 Ind. 214, holding that he is not entitled to claim as exempt from execution rents accruing from mortgaged property, where a decree has been rendered adjudging that the mortgagee is entitled to the rents, appointing a receiver, and directing him to collect and apply the rents to the mortgage debt.

42. Slaughter *v.* Detiney, 15 Ind. 49.

Whether claim against a mortgage can be made see *supra*, V, A, 1, c, (I).

43. *In re* Bremer, 4 Ohio S. & C. Pl. Dec. 80. But see Gibbons *v.* Cutler, 2 Del. Co. (Pa.) 214, holding that a claim of exemption, made after a sale in proceedings on a mortgage, is too late as against a judgment creditor claiming the balance of the fund.

Where the surplus was paid into court and an auditor appointed to make distribution and the audit allowed to proceed to its close before defendant claimed his exemption, he was too late. Gibbons *v.* Gaffney, 154 Pa. St. 48, 26 Atl. 24.

44. Little *v.* Birdwell, 27 Tex. 688.

45. See Garrett *v.* Wade, 46 Ark. 493; Doyle *v.* Hall, 86 Ill. App. 163; Swenson *v.* Christoferson, 10 S. D. 188, 72 N. W. 459, 66 Am. St. Rep. 712.

The filing of a petition in bankruptcy in the United States district court is not equivalent to delivering a schedule to the officer having the execution or filing it in the court whence the writ issued. Doyle *v.* Hall, 86 Ill. App. 163.

Time of filing.— Exemption claims against garnishment are governed wholly by Ala. Code, § 2533, providing that the debtor may file a claim with the inventory required in section 2525 at any time before condemnation. The time in which the claim may be filed is not governed by section 2525. Roden *v.* Brown, 103 Ala. 324, 15 So. 598. See *supra*, VI, C, 2, e, (I), (B).

46. Taylor *v.* Tomlinson, 65 Ark. 544, 45 S. W. 544.

47. *Ex p.* Redd, 73 Ala. 548.

48. Miller *v.* Rolen, 39 Ill. App. 350.

49. Bryan *v.* Kelly, 85 Ala. 569, 5 So. 346.

50. Leibfried *v.* Morrisey, 9 Pa. Dist. 740. See *supra*, VI, C, 2, c.

A notice of filing is not required if the claim is made by affidavit. Bassett *v.* Inman, 7 Colo. 270, 3 Pac. 383.

51. Garrett *v.* Wade, 46 Ark. 493.

g. Determination of — (I) *Selection* — (A) *Necessity and Right of.* Where a debtor possesses a number of articles, some part or some one of which the law exempts, it is his right and duty to select which one or which part he wishes to retain under the law.[52] If the debtor refuses to make his selection, he cannot afterward complain, if any of his property is taken and sold.[53] No selection is necessary if the debtor's property, either in number or in value, is less than the amount allowed him by law, as the case may need to be considered under the law.[54] The debtor may select any particular property seized, within the amount allowed by statute.[55] The fact that he has other property is immaterial.[56] If a part of the debtor's property is subject to mortgage he may claim his exemption from that portion which is not encumbered[57] — at least he will not be compelled

52. *Alabama.*— Ross *v.* Hannah, 18 Ala. 125.

Iowa.— Parker *v.* Haley, 60 Iowa 325, 14 N. W. 359.

Kentucky.— See Westerland *v.* Moreland, 3 Ky. L. Rep. 324.

Maryland.— State *v.* Boulden, 57 Md. 314.

Michigan.— Town *v.* Elmore, 38 Mich. 305.

New York.— Finnin *v.* Malloy, 33 N. Y. Super. Ct. 382.

Ohio.— Frost *v.* Shaw, 3 Ohio St. 270.

Oregon.— Thibault *v.* Lennon, 39 Oreg. 280, 64 Pac. 449, 87 Am. St. Rep. 657.

See 23 Cent. Dig. tit. "Exemptions," § 154.

If levy is made in the debtor's absence he may make selection on his return. Haskins *v.* Bennett, 41 Vt. 698.

If the debtor's property be indivisible and exceed the statutory allowance, the debtor cannot retain the property by paying the excess to the officer. Cook *v.* Scott, 6 Ill. 333. But where the property is separable, the debtor may take a portion of it; thus the debtor may select from a mower and its reaper attachment the mower alone, where the attachment and the mower are separable and his selection does not exceed the statutory requirement. Ramsey *v.* Barnabee, 88 Ill. 135.

If the officer gives the debtor no opportunity to make a selection, or if the officer denies the debtor's right to any exemption, the right to selection is not lost or waived. Wicker *v.* Comstock, 52 Wis. 315, 9 N. W. 25. See *supra,* V.

That the debtor may select from the community property the number of horses allowed by statute as an exemption, instead of choosing the allowed number from the property belonging to his wife's separate estate, see McClelland *v.* Barnard, (Tex. Civ. App. 1904)) 81 S. W. 591.

The debtor is entitled to one selection only and this must embrace all the property he is entitled to as exempt. Johnson *v.* Larcade, 110 Ill. App. 611.

53. Davis *v.* Webster, 59 N. H. 471.

Where an insolvent debtor pointed out to his assignee two articles, part of his estate, but refused to select which one he was to retain, claiming to be entitled to both, he was estopped from maintaining replevin against the assignee for one of the articles taken by the assignee in the belief that it was a part of the estate. McKenzie *v.* Redman, 87 Me. 322, 32 Atl. 962.

54. *Illinois.*— Cole *v.* Green, 21 Ill. 104.

Kentucky.— Stirman *v.* Smith, 10 S. W. 131, 10 Ky. L. Rep. 665.

Maine.— Bridgton *v.* Lakin, 53 Me. 106. See also Everett *v.* Herrin, 46 Me. 357, 74 Am. Dec. 455.

Minnesota.— Howard *v.* Rugland, 35 Minn. 388, 29 N. W. 63.

Ohio.— Slanker *v.* Beardsley, 9 Ohio St. 589.

Tennessee.— State *v.* Haggard, 1 Humphr. 390.

See 23 Cent. Dig. tit. "Exemptions," § 154.

Duty of the officer to notify the debtor of his right to make the selection see *supra,* VI, B, 2. See also People *v.* Palmer, 46 Ill. 398, 95 Am. Dec. 418; McCluskey *v.* McNelly, 8 Ill. 578; Davis *v.* Williamson, 68 Mo. App. 307 (holding that it was immaterial that the officer did not apprise defendant of his right); Seaman *v.* Luce, 23 Barb. (N. Y.) 240.

55. Bernheim *v.* Andrews, 65 Miss. 28, 3 So. 75.

The right of election is not divested by a levy on one particular article, but the debtor at any time before sale may elect to retain the article levied on without tendering to the officer the articles which he had omitted to seize under execution. Ross *v.* Hannah, 18 Ala. 125.

In Pennsylvania a debtor may claim his entire exemption out of real estate levied on, although the creditor failed to levy on personal property which was sufficient to satisfy the entire execution. This rule of course obtains only where the personal property was not concealed or where the debtor's fraudulent conduct did not hinder or delay the creditor. McNair *v.* Riesher, 8 Pa. Co. Ct. 494.

56. Bray *v.* Laird, 44 Ala. 295; State *v.* Finn, 8 Mo. App. 261; Lockwood *v.* Younglove, 27 Barb. (N. Y.) 505.

Under a statute exempting a working team used by debtor in his business, a debtor may choose either one of two teams he possesses. Finnin *v.* Malloy, 33 N. Y. Super. Ct. 382.

57. Baldwin *v.* Talbot, 43 Mich. 11, 4 N. W. 547 [*citing* Bayne *v.* Patterson, 40 Mich. 658]. See also Ganong *v.* Green, 71 Mich. 1, 38

to accept his exemption out of the encumbered property at its full value.[58] If the officer does not give the debtor opportunity to make selection before sale he may elect the property sold and sue for its value.[59]

(B) *Who May Make.* Selection may be made by the debtor, his agent, clerk, or legal representative.[60] The debtor's wife under certain circumstances has the right to make the selection.[61]

(C) *What Constitutes.* As a general rule any method of selection which the officer cannot or under the circumstances ought not to misunderstand is sufficient.[62] Concealment or removal of property out of reach of process,[63] an objection to the levy upon a particular piece of property in question,[64] a bill of sale of a particular piece of property,[65] and a motion to the court to discharge money held under a garnishment[66] have all been held sufficient to constitute a designation or selection by the debtor. Where a certain portion of a mass is claimed, it is sufficient to select an amount from the mass which will equal the value allowed by the statute.[67] A mere demand of the debtor's right to select has been held not equivalent to making a selection.[68]

(D) *Time of.* In some jurisdictions if the debtor is properly notified[69] or requested by the sheriff he must make his selection before or at the time of the

N. W. 661, holding that the mortgagee of the debtor may as against the execution creditor properly release from his mortgage property selected by the debtor as exempt.

58. Rice *v.* Nolan, 33 Kan. 28, 5 Pac. 437.

Where a prior mortgage covers exempt and non-exempt property, the mortgagor can require the mortgagee in foreclosure to first exhaust the non-exempt property. Baughn *v.* Allen, (Tex. Civ. App. 1902) 68 S. W. 207; Saunders *v.* Phillips, 62 Vt. 331, 20 Atl. 104.

59. Stilson *v.* Gibbs, 53 Mich. 280, 18 N. W. 815.

If the debtor sues the officer for taking a certain piece of his property, he must show that he had exercised his right by selecting the piece sued for. Howard *v.* Farr, 18 N. H. 457; Chamberlain *v.* Whitney, 65 Vt. 428, 27 Atl. 72.

In Canada.— In execution of a judgment against a carter the bailiff left with him a horse and a carriage and seized all his other effects, which were sold. After the sale the bailiff seized another carriage which had been left with another person for repairs and of which he knew nothing at the time of the first seizure. The debtor then made a declaration that he would choose and keep the carriage last seized, and offered to return the one formerly left with him to be sold in its place. The bailiff having refused this offer, the debtor signified to his creditor an opposition *afin d'annuler.* It was held that the debtor, although he had stated to the bailiff in regard to the carriage left at the first seizure that he had nothing but that to enable him to gain a living, had not exercised the choice accorded to him by statute, and was entitled to make such choice when the second carriage was seized. The signature of the debtor to the *proces verbal* does not establish a choice by him, and if there is no choice the bailiff should seize all the effects, leaving it to the debtor to exercise his rights before the sale, but at his own expense. Filion *v.* Chabot, 9 Quebec Super Ct. 327.

60. State *v.* Cunningham, 6 Nebr. 90.

Assignee.— If upon assignment for the benefit of creditors the debtor fails to make selection, the assignee has a right to select such articles as are exempt under the statute. Cloutier *v.* Georgeson, 13 Manitoba 1.

In Michigan the officer is permitted to make the selection if the execution debtor is absent. Murphy *v.* Mulvena, 108 Mich. 347, 66 N. W. 224.

61. As where the husband is insane (Ecker *v.* Lindskog, 12 S. D. 428, 81 N. W. 905, 48 L. R. A. 155), where he refuses to make a selection (Harley *v.* Procunier, 115 Mich. 53, 72 N. W. 1099, 69 Am. St. Rep. 546, 40 L. R. A. 150), or where he has absconded (Malvin *v.* Christoph, 54 Iowa 562, 7 N. W. 6). See also State *v.* Wolf, 81 Mo. App. 586.

62. Northrup *v.* Cross, 2 N. D. 433, 51 N. W. 718 [*citing* Thompson Homest. & Exempt. § 834].

63. Ross *v.* Hannah, 18 Ala. 125; Florida L. & T. Co. *v.* Crabb, (Fla. 1903) 33 So. 523; Haslage *v.* Hooer, 16 Ohio Cir. Ct. 570, 9 Ohio Cir. Dec. 404. See also Robinson *v.* Myers, 3 Dana (Ky.) 441, where it was held that if the debtor has one of his work beasts out of the jurisdiction, although subject to his control, and another in his possession, he cannot select the latter and thus defeat the levy as to both.

64. Clark *v.* Bond, 7 Baxt. (Tenn.) 288. See also Finnin *v.* Malloy, 33 N. Y. Super. Ct. 382; Plimpton *v.* Sprague, 47 Vt. 467.

65. George *v.* Bassett, 54 Vt. 217.

66. Tombow *v.* Haskins, 15 Ohio Cir. Ct. 656, 8 Ohio Cir. Dec. 281.

67. Hill *v.* Brown, 4 Ohio Dec. (Reprint) 80, 1 Clev. L. Rep. 9.

68. Schwartz *v.* Birnbaum, 21 Colo. 21, 39 Pac. 416; Eisenberg *v.* Burchinell, 10 Colo. App. 457, 52 Pac. 220.

69. **If not notified** he may make the selection, at any reasonable time before the sale.

levy.[70] In other jurisdictions he has the absolute right to select any time before sale.[71] In Pennsylvania it is held that the proper time to make selection is after the appraisers have been summoned.[72]

(II) *APPRAISEMENT*— (A) *Necessity of.*[73] After the debtor has made his claim of exemption either by schedule or inventory or by any other appropriate way, the officer is usually obliged to have the property levied upon appraised.[74] The act required of the officer is ministerial; he is without discretion in the matter.[75] There are a number of instances where an appraisement is unnecessary; as where property specifically exempt is levied upon;[76] where debts and wages are garnished;[77] where the property in question is money;[78] where the property is not in any sense subject to execution;[79] or where a demand in suit is claimed as exempt against a judgment pleaded in set-off, plaintiff in reply averring that the whole of his property does not exceed the amount of the statutory exemption, setting out his claim by a proper schedule.[80] The debtor's right's are not affected by the failure of the officer to have the appraisement made[81]

McCluskey *v.* McNeely, 8 Ill. 578. See also Seaman *v.* Luce, 23 Barb. (N. Y.) 240; Frost *v.* Shaw, 3 Ohio St. 270.

No request by sheriff at trial.— Tex. Rev. St. art. 2427, authorizes the debtor to make his selection within a reasonable time after request to do so by the officer. If the sheriff making the levy does not request defendant to select his exemptions defendant may select at the trial. Hall *v.* Miller, 21 Tex. Civ. App. 336, 51 S. W. 36.

70. Amend *v.* Smith, 87 Ill. 198; Wright *v.* Deyoe, 86 Ill. 490. See also Bingham *v.* Maxcy, 15 Ill. 290; Colson *v.* Wilson, 58 Me. 416; Smith *v.* Chadwick, 51 Me. 515.

Selection must be made within a reasonable time and what is a reasonable time should under the circumstances of the case be submitted to the jury. Brooks *v.* Hathaway, 8 Hun (N. Y.) 290. A debtor must make his election within a reasonable time; and if he fails so to elect the officer may make an election for him, and he is bound thereby. Savage *v.* Davis, 134 Mass. 401.

71. State *v.* Emmerson, 74 Mo. 607. See also Ross *v.* Hannah, 18 Ala. 125. See *supra*, VI, C, 2, e.

Selection before the issuance of execution or the rendition of a judgment may be made as against an existing debt. Grover *v.* Younie, 110 Iowa 448, 81 N. W. 684.

72. Bowman *v.* Smiley, 31 Pa. St. 225, 72 Am. Dec. 738.

73. **Failure of creditor to demand appraisement.**— If the debtor furnishes the required schedule of his property and of that which he claimed as exempt and the attachment creditor makes no demand for an appraisement as authorized by the statute within a reasonable time, the sheriff must release the property exempt. State *v.* Gardner, 32 Wash. 550, 73 Pac. 690, 98 Am. St. Rep. 858. See also American Paper Co. *v.* Sullivan, 34 Wash. 390, 75 Pac. 991.

74. State *v.* Kurtzeborn, 2 Mo. App. 335; Neligh First Nat. Bank *v.* Lancaster, 54 Nebr. 467, 74 N. W. 858; Mann *v.* Welton, 21 Nebr. 541, 32 N. W. 599.

That the property claimed as exempt was real property and not susceptible of division furnished no defense to a sheriff who was sued on his bond for failure to have the property appraised. State *v.* Harrington, 33 Mo. App. 476.

Return of nulla bona.— The officer has no right to return the writ, "no goods," although it is plain that the exemption would fully cover all the goods. O'Malley *v.* Dempsey, 3 Leg. Gaz. (Pa.) 225.

75. Pudney *v.* Burkhart, 62 Ind. 179.

If the debtor claims in the manner required by statute, the officer cannot disregard the claim and decline to have an appraisement. Over *v.* Shannon, 91 Ind. 99.

The fact that the debtor committed perjury in swearing to his schedule is no ground for the officer's selling the real estate without an appraisement, and the purchaser will not obtain a valid title. Over *v.* Shannon, 91 Ind. 99. See also State *v.* Cunningham, 6 Nebr. 90.

76. Johnson *v.* Bartek, 56 Nebr. 422, 76 N. W. 878.

77. State *v.* Barada, 57 Mo. 562.

78. Peterman's Appeal, 76 Pa. St. 116.

79. Jones *v.* Motley, 78 Ala. 370.

80. Coppage *v.* Gregg, 1 Ind. App. 112, 27 N. E. 570.

81. Bender *v.* Bame, 40 Nebr. 521, 59 N. W. 105; Hill *v.* Johnston, 29 Pa. St. 362.

In Pennsylvania, where there has been no appraisement and no return that the land levied on could not be divided, the debtor cannot claim out of the proceeds of the real estate. Nyman's Appeal, 71 Pa. St. 447; Kern *v.* Beam, 11 Lanc. Bar 183; Pentz *v.* Rooker, 1 Lehigh Val. L. Rep. 151; Pearson's Appeal, 2 Mona. 678. If the appraisers certify that the land could not be divided the debtor may then claim his exemption out of the proceeds. Coleman's Appeal, 103 Pa. St. 366. At the time of a levy defendant claimed his exemption, but no appraisement was made by the sheriff, who afterward went out of office. At the request of defendant, the next sheriff on the day of the sale had the real estate appraised. It was held that the defendant was entitled to the exemption on the proceeds of the real estate. Seibert's Appeal, 73 Pa. St. 359. And *compare* Peter-

or by his delay in so doing.[82] The debtor may enforce his right to have an appraisement by a suit against the officer for property taken;[83] or he may have mandamus against the officer to compel performance of official duty.[84]

(B) *The Appraisers.*[85] Under a statute which requires that the debtor shall deliver a schedule to the officer and that "thereupon" the officer shall summon the appraisers, it is the duty of the officer to summon the appraisers without delay;[86] he has no discretion in the matter.[87] A statute which provides that the sheriff or other officer making a levy shall, on demand, summon the appraisers, authorizes a constable levying an execution from a justice's court likewise to summon them.[88] Persons who are fitted to determine the value of the property seized on execution should be appointed;[89] and they must be legally appointed.[90] The only authority of the appraisers is to fix a fair value, by inspection and handling, upon what property they can see.[91]

(C) *Conduct and Requisites of.*[92] The appraisement should be made in public,[93] and the debtor is entitled to be present.[94] An appraisement made in the absence of part of the scheduled property is invalid.[95] If the appraisement is

man's Appeal, 76 Pa. St. 116; Mark's Appeal, 34 Pa. St. 36, 75 Am. Dec. 631.

82. Coleman's Appeal, 103 Pa. St. 366. See Smith *v.* Dauel, 29 Ill. App. 290, as to the effect of the officer's delay.

83. Bender *v.* Bame, 40 Nebr. 521, 59 N. W. 105.

84. Neligh First Nat. Bank *v.* Lancaster, 54 Nebr. 467, 74 N. W. 858, holding that pending the application for the writ the attachment creditor may intervene and join with the officer in resisting the application.

85. **Form of oath** to be taken by appraisers see N. C. Code, § 524.

86. Smith *v.* Dauel, 29 Ill. App. 290, holding that the debtor may go from home on the third day, taking a part of the property in question, without forfeiting his rights, where he has no notice of an intended appraisement on that day.

Under a levari facias in Pennsylvania the sheriff has no power to appoint appraisers. See Hill *v.* Johnston, 29 Pa. St. 362.

The property need not be in view of the officer before he appoints the appraisers, and the fact that the property is in another county will not excuse him from appointing them. Lansden *v.* Hampton, 38 Ill. App. 115.

87. State *v.* Cunningham, 6 Nebr. 90.

88. McAuley *v.* Morris, 101 N. C. 369, 7 S. E. 883.

89. Morris *v.* Towns, 1 Wkly. Notes Cas. (Pa.) 51, where the plant of a printer was appraised and only one of the appraisers was a printer, and the court set aside the appraisement, suggesting that it would have been more satisfactory if made by three master printers.

Only disinterested persons who are strangers can be appointed appraisers. The blood kin of defendant are not competent to make the appraisement. Strasburg First Nat. Bank *v.* Keen, 11 Pa. Co. Ct. 47.

The attorney conducting attachment proceedings is not a proper person to act as appraiser under an execution in force at the same time against the same defendant. Bayne *v.* Patterson, 40 Mich. 658.

The appraisement of the property which an assignor elects to keep under the exemption law must be made by the appraisers of the assignee for creditors. Peterman's Appeal, 76 Pa. St. 116.

Where it does not appear that any objection was made on account of an appraiser's incompetency, no presumption of incompetency will be indulged in on appeal. "The law provides that 'in case either party fails to select an appraiser, the same shall be selected by the officer holding the execution.' The failure of a party to select an appraiser, competent to act, does not, therefore, deprive him of the benefit of the statute." Kelley *v.* McFadden, 80 Ind. 536, 539.

90. Ehle *v.* Deitz, 32 Ill. App. 547, holding that the appraisal should show that fact.

Number as required by statute.— Where a sheriff, holding attached property which the debtor claims as exempt, calls two freeholders to appraise it instead of three, as required by Nebr. Code Civ. Proc. § 522, such appraisement affords him no protection for releasing and surrendering the property to the judgment debtor. Johnson *v.* Bartek, 54 Nebr. 787, 75 N. W. 55.

91. Moffett *v.* Sheehey, 52 Ill. App. 376, where the court said that they are not authorized to consider and adjust equities between an execution debtor and third persons or to ascertain whether a mortgage was given for money borrowed for future advances or for indemnity to the mortgagee against a liability which might or might not arise.

A report to the effect that the property claimed as exempt by the debtor is not exempt is a nullity and does not justify the clerk in revoking the supersedeas or protect the sheriff in selling, since the appraisers have no function save to report the value of the property. Parham *v.* McMurray, 32 Ark. 261.

92. See *supra*, VI, C, 2, g, (II), (B).

93. Huddy *v.* Sproule, 4 Phila. (Pa.) 353.

94. Halle *v.* Felsinger, 19 Pa. Co. Ct. 330; Huddy *v.* Sproule, 4 Phila. (Pa.) 353.

95. Smith *v.* Dauel, 29 Ill. App. 290, holding that the debtor may regard the entire

much below the real market value it will be set aside.[96] If the return of the appraisers sets out the different classes of articles and sufficiently enumerates each and attaches the value thereto the return is sufficiently specific.[97]

(D) *Objections to.* If the appraisement is not deemed a proper one by the debtor, he should seek to have it corrected.[98] If the appraisement is accepted by the debtor he waives all imperfections in it and cannot be heard to object to it afterward.[99]

(E) *Conclusiveness and Effect of.* The appraisement does not determine whether the property which has been set apart as exempt is lawfully exempt. That question remains for the determination of the court.[1] Whether the valuation of the appraisers is, in the absence of fraud or collusion, conclusive or not, depends upon the jurisdiction.[2] The court has power to set aside an appraisement for cause.[3] A disclaimer by the debtor of title to property appraised condemns the appraisement.[4]

(III) *ALLOTMENT OR SETTING APART OF EXEMPTION.*[5] A constitutional exemption of a certain amount of personalty from all process for the enforce-

proceeding as a nullity and recover his property levied on by replevin.

96. Sleeper *v.* Nicholson, 1 Phila. (Pa.) 348, 5 Pa. L. J. Rep. 163. As for instance, where later on the same day the goods appraised at less than three hundred dollars sold for four times that amount. Halle *v.* Felsinger, 19 Pa. Co. Ct. 330. But see Norris *v.* Town, 1 Wkly. Notes Cas. (Pa.) 62, where a second appraisement was not set aside by the court on the ground that the articles were worth five hundred dollars, although appraised for three hundred dollars.

97. Ray *v.* Thornton, 95 N. C. 571.

98. Moffett *v.* Sheehey, 52 Ill. App. 376, where the debtor was not allowed to select specific articles at appraised values.

N. C. Code, § 519, provides that a judgment debtor who objects to the valuation and allotment of his personal property or exemption shall "file with the clerk of the superior court of the county where the said allotment shall be made a transcript of the return of the appraisers . . . together with his objections in writing to said return," etc. See McAuley *v.* Morris, 101 N. C. 369, 7 S. E. 883, holding that the provision applies to all cases of laying off personal property exemptions, whether under a judgment in the superior court or in a justice's court.

Objection by a creditor.— If, in an application for homestead and exemption under the Georgia act of 1868, objections are filed to the plat and valuation of the realty, and the matter is postponed by the court to a future day, it is not too late, on that day, for another creditor to appear and file objections to the schedule of personalty. Robson *v.* Lindrum, 47 Ga. 250.

99. Moffett *v.* Sheehey, 52 Ill. App. 376.

Acceptance of property set apart by an officer upon a claim of exemption waives irregularities in the proceedings to ascertain the exemption. State *v.* Conner, 73 Mo. 572.

1. Christopher *v.* Bowden, 17 Fla. 603. See also Parham *v.* McMurray, 32 Ark. 261; Laucks' Appeal, 24 Pa. St. 426.

The action of appraisers in setting apart personal property for a portion of the exemption of a debtor, and finding that his real estate cannot be divided so as to give him the balance of his exemption in land, is not such an adjudication that he is entitled to the residue in money out of the sale of the land as to seat his claim either upon the land or the money obtained by its sale. "The finding merely put him in a position to present his claim upon the fund, so that it might be awarded to him, provided it appeared, to the auditor or court distributing the same, that he was legally entitled thereto." Imhoff's Appeal, 119 Pa. St. 350, 354, 13 Atl. 279.

2. For example in Ohio it is conclusive. Levi *v.* Groves, 7 Ohio Dec. (Reprint) 508, 3 Cinc. L. Bul. 569.

3. Huddy *v.* Sproule, 4 Phila. (Pa.) 353; Wilkins *v.* Rubincam, 15 Wkly. Notes Cas. (Pa.) 128.

4. See Gilleland *v.* Rhoads, 34 Pa. St. 187.

Severing growing crop by appraisement.— Where execution was levied on real and personal estate and defendant claimed his exemption and elected to have the growing grain, which was duly appraised in the presence of one of plaintiffs, and the land was subsequently purchased by plaintiffs, who claimed that the growing grain passed to them, it was held that the appraisement under the circumstances was a severance of the grain from the realty and that plaintiffs were not entitled thereto. Hershey *v.* Metzgar, 90 Pa. St. 217.

5. **Adjustment under different exemption statutes.**— Where, on an assignment being made, there are debts contracted before the Indiana act of March 29, 1879, increasing exemptions from three hundred dollars to six hundred dollars, took effect, and also debts contracted after the taking effect of the act, the additional three hundred dollars' worth of property should be set aside from the bulk of the assets, and the debtor should be allowed such a proportion thereof as his subsequent debts bear to the whole of his debts, and the residue thereof should be distributed to the prior creditors, in addition to what they may receive in common with the subsequent creditors. O'Neil *v.* Beck, 69 Ind. 239.

ment of a debt precludes any necessity for making an allotment of the amount.[6] Where the statute prescribes the manner in which an allotment must be made, it is of the highest importance that all the requirements of the law should be observed.[7] One who takes an exemption can have set apart to him only the property owned by him at the time.[8] If one has the right to have property set apart in kind, he may enforce the right.[9] Property on which there is no lien must be first exhausted in alloting the debtor's exemption.[10] If the garnishees are numerous and the amount due from each is small, the proper method of securing the debtor's exemptions is for the sheriff to appraise and set apart to the debtor such or so much of the claims as he may elect to retain under his exemption.[11] Accepting from the officer levying an execution the articles set apart by him as exempt is a waiver of irregularities in the proceedings to ascertain the exemption.[12]

Setting apart real estate.— The Pennsylvania act of 1849 contemplates setting apart real estate for the use of the debtor and not money arising from its sale. Thus it is only where the return of the appraisers shows that the land cannot be divided that the debtor is permitted to take money. Hufmann's Appeal, 81* Pa. St. 329. See Kearns *v.* Beam, 11 Lanc. Bar 183, holding that a claim under the Pennsylvania act of 1849 amounted to an election to have an exemption in land or out of its proceeds when it is necessary to sell the same. Under the Kentucky act of May 17, 1886, no part of the proceeds of land can be set apart in lieu of exempted articles not on hand. Substitution if made at all must be made out of personal property or money. Peak *v.* Weller, 10 Ky. L. Rep. 153.

Review and correction.— If property belonging to the judgment debtor has been omitted by the appraisers, they have power to correct the allotment. They have this power only so long as the property remains in the officer's hands, for then the allotment is *in fieri*; after the execution has been returned with the allotment, it becomes an estoppel. Pate *v.* Harper, 94 N. C. 23. It is not the duty of the county commissioners, individually or as a board, to revise upon appeal the allotment made by the appraisers. Jones *v.* Rowan, 85 N. C. 278. The proper way to review the action of the commissioners on the question of improper allotment is by a recordari in the nature of a writ of false judgment. Ballard *v.* Waller, 52 N. C. 84.

6. Lockhart *v.* Bear, 117 N. C. 298, 23 S. E. 484. See also Albright *v.* Albright, 88 N. C. 238.

7. Smith *v.* Hunt, 68 N. C. 482, 484, "especially that the freeholders [who made the allotment] should be sworn, and that there should be a descriptive list of the property, and that list registered, so that creditors when they desire to levy their debts, may ascertain by examining the descriptive list the property exempted."

Whether the referee in a creditor's suit should set apart the property see Dickerson *v.* Van Tine, 1 Sandf. (N. Y.) 724.

In Georgia if any portion of the debtor's exemption alloted to him is money, it is necessary that it should be invested in personal property and then returned by schedule as in the cases of other property. An allowance of cash by the ordinary without investing as required by statute is illegal and void. Jones *v.* Ehrlsch, 65 Ga. 546. In Douglass *v.* Boylston, 69 Ga. 186, it was held that the ordinary might order money due to the head of a family to be paid to him, to be invested by him according to law, and after having been thus invested and a schedule of the property made the ordinary might then pass a final order of exemption. Where an insolvent claims exemption of funds in the hands of a receiver the ordinary is not entitled to money to make an investment until the expenses of the receiver in raising the money have been paid, including the reasonable clerk hire and attorney's fees. Hahn *v.* Allen, 93 Ga. 612, 20 S. E. 74. Where it is necessary that the property should not only be selected by the debtor and his wife, but also set apart by the proper official, a mere claim unsupported by official action is inoperative. Sasser *v.* Roberts, 68 Ga. 252.

The fact tnat an allotment is made returnable to the wrong place or officer does not render it void, for the court has the power to direct a return to be made to the proper officer, and it should exercise that power instead of dismissing the proceeding for the defect in the return. McAuley *v.* Morris, 101 N. C. 369, 7 S. E. 883, where it was held that the return should be made to the clerk of the superior court.

8. Smith *v.* Echles, 65 Ga. 326, holding that where one had property which he did not own included in his petition and the claim was allowed, subsequently bought property of the kind described in the petition was not exempt.

9. McMichael *v.* Eckman, 26 Fla. 43, 7 So. 365, especially where it is not shown that the delay incident to setting aside the property claimed as exempt would be fatal to the interests of the parties concerned.

10. Cowan *v.* Phillips, 128 N. C. 70, 28 S. E. 961. See also Bayne *v.* Patterson, 40 Mich. 658.

11. Barker *v.* Johnson, 2 Pa. Co. Ct. 414.

12. State *v.* Conner, 73 Mo. 572.

(iv) *Contest and Hearing.*[13] An adverse ruling in an attachment proceeding upon motion by defendant to have attached property released as exempt does not render the question of exemption *res judicata*,[14] the attachment being merely a provisional remedy.[15] A creditor may attack an exemption by showing it was illegal.[16] And the creditor may appear and object without filing any paper setting forth objections, and if such a paper be filed, it need not be verified or served on the debtor.[17] Under a statute which requires an inventory upon claim of exemption, if the claim of exemption is too indefinite, plaintiff may elect to demand judgment by default against the garnishee or insist upon a fuller inventory; but the allowance of the demand is within the discretion of the court.[18] To support the claim of exemption from trustee process, the property must be shown to be exempt in fact.[19] If a creditor files objections to an allowance of an exemption on the ground that specific articles of personalty are omitted from the schedule, he is confined on the trial to the articles mentioned in his objections.[20] That the claimant appropriated to his own use, after the attachment was levied, a part of the property, of greater value than the exemptions claimed, is a complete defense to his claim.[21]

3. Successive Exemptions. By the usual rule debtors cannot have at the same time more than one exemption;[22] for when the exemption has once been claimed,

13. Equity jurisdiction.— Under Fla. Rev. St. (1892) § 2007, equity has jurisdiction of an application of the judgment creditor, claiming that his debtor owns more than one thousand dollars' worth of personal property above that levied on, which the debtor conceals, to ascertain if the property has been concealed, and to determine what property shall be set aside as exempt, and, pending the proceeding, to enjoin the officer from setting apart as exempt the property levied on. Camp *v.* Mullen, (Fla. 1903) 35 So. 399.

Appearance as waiver to form of proceedings see American Paper Co. *v.* Sullivan, 34 Wash. 391, 75 Pac. 991.

Appointment of receiver under Ga. Code, § 2034, for excess of property remaining to debtor over exempt property see McWilliams *v.* Bones, 84 Ga. 199, 10 S. E. 723.

Necessity of a jury to pass upon the claim of fraud of defendant, this being the ground to set aside an exemption allowed by the sheriff, see Dale *v.* McAlpine, 5 Lanc. L. Rev. (Pa.) 34.

Right of filing bond upon the claim being contested see *Ex p.* Haralson, 75 Ala. 543.

Where exempt personalty is sold subject to the exemption pending an application to set it apart as exempt, it may be recovered from the purchaser, although the application fail, if a subsequent application is successful. Robson *v.* Rawlings, 79 Ga. 354, 7 S. E. 212.

14. Watson *v.* Jackson, 24 Kan. 442, holding that defendant may afterward bring replevin against plaintiff to try the question.

15. Gamble *v.* Rhyne, 80 N. C. 183.

16. Piedmont Nat. Bldg., etc., Assoc. *v.* Bryant, 115 Ga. 417, 41 S. E. 661, and this, although the debt was not contracted until after the return of the schedule and its record by the ordinary.

17. *In re* Baldwin, 71 Cal. 74, 12 Pac. 44.

Notice: Necessity of, to release an attachment upon a claim of exemption see Claflin *v.* Lisso, 31 La. Ann. 171. Misnomer in see Gamble *v.* Central R., etc., Co., 80 Ga. 595, 7 S. E. 315, 12 Am. St. Rep. 276. Proper service of see Allen *v.* Strickland, 100 N. C. 225, 50 S. E. 780, holding that under N. C. Code, § 597, service by mail is insufficient. Waiver of by appearance to contest the claim see Brown *v.* Doneghey, 46 Ark. 497; Garrett *v.* Wade, 46 Ark. 493. See McAbee *v.* Parker, 83 Ala. 169, 3 So. 521.

18. Buckland *v.* Tonsmere, 88 Ala. 312, 6 So. 904, 90 Ala. 503, 8 So. 68.

19. Rollins *v.* Allison, 59 Vt. 188, 10 Atl. 201, holding that it is not sufficient to show that it is of a kind that is exempt from attachment by the statutory provisions.

The question whether defendant habitually earned his living by a harness and buggy which were attached was determined upon affidavits filed and witnesses examined thereon, and the attachment was sustained, defendant being relegated to an action at law to test the liability of the property to seizure under the writ. Brooks *v.* Engle, (Iowa 1900) 83 N. W. 805 [*citing* Cox *v.* Allen, 91 Iowa 462, 59 N. W. 335].

20. Wood *v.* Collins, 111 Ga. 32, 36 S. E. 423.

21. Strange *v.* Gess, 111 Ky. 640, 64 S. W. 458, 23 Ky. L. Rep. 868.

22. Weis *v.* Levy, 69 Ala. 209. See Torrance *v.* Boyd, 63 Ga. 22, holding that where a man having in his family two daughters of full age, depending upon him, acquired an exemption of personalty, he could not on a second or third marriage acquire a second exemption as long as the daughters continued dependent and members of his family. But see Chatten *v.* Snider, 126 Ind. 387, 26 N. E. 166.

In North Carolina, under the act of 1848, the insolvent debtor has a right to have allotments for his benefit made by the freeholders from time to time as his necessities may require, provided the allotment be made at intervals not unreasonably short. Each allot-

the property selected by the debtor and allotted to him, so long as he retains it and it is undiminished in value, he is without right to a further exemption; otherwise double exemptions could be claimed and the whole of the debtor's property exhausted to the prejudice of his creditors. If a part of the debtor's exemption has been set apart under one levy, the residue may be set apart under another,[23] and if the property allotted to the debtor has been taken from him without fault on his part or it has been consumed in maintaining himself or family a subsequent exemption may be claimed.[24] The exemption of wages is one which is peculiarly proper for recurring claims.[25]

D. Proceedings to Enforce and Protect Right — 1. Remedies Against Evasion of the Law by Assignment or Transfer to Another Jurisdiction. In a number of states there are statutory provisions to prevent the evasion of the exemption law by the assignment of the debt to a person in another state.[26] To enforce a provision of this kind, the debtor has various remedies. Thus he has a right of action against the creditor or person making the assignment,[27] and he may sue for an

ment must be complete in itself so as to designate all the articles allowed. Dean *v.* King, 35 N. C. 20.

In Pennsylvania it is held that a debtor who has claimed his exemption under the acts of 1849 and 1859, and had personal property set apart for him, may again claim his exemption against the same judgment out of the proceeds of the sale of real estate under partition proceedings without showing that the property first set apart had been consumed or destroyed. Krauter's Appeal, 150 Pa. St. 47, 24 Atl. 603 [*citing* Hanley *v.* O'Donald, 30 Pa. St. 261]. *Contra,* Vogelsong *v.* Beltzhoover, 59 Pa. St. 57.

Successive exemptions under successive laws.— The allowance to a bankrupt of the full amount to which he is entitled as exempt as head of a family, under the Georgia constitution of 1868, does not prevent him from afterward having set apart the exemption of personalty provided by the Georgia constitution of 1877, since the object of the latter provision is to protect the family, while the former exemption is vested in the bankrupt alone. Holland *v.* Withers, 76 Ga. 667.

Requisites of petition to set aside second appraisement.— Where a defendant has had an appraisement of her property levied on and property set aside for her and subsequently a transcript of the judgment is entered in another county and she again claims personal property levied upon in that county and it is appraised to her, the court on mere petition disclosing these facts will not set aside the second appraisement when it is not shown that the debtor is still in possession of the property first exempted. Koller *v.* Miller, 23 Pa. Co. Ct. 235.

23. State *v.* Carroll, 24 Mo. App. 358. See also Clark *v.* Ismael, 2 Cinc. Super. Ct. 437.

24. Weis *v.* Levy, 69 Ala. 209, 211, it being his right to have and hold at all times exemption of personal property to the value of one thousand dollars of his own selection free from liability of debt.

25. The claim is usually allowed as often as process is served, so long as at the time of the service of the process the exemption does not exceed the statutory limit. For example see Hall *v.* Hartwell, 142 Mass. 447, 8 N. E. 333; Chandler *v.* White, 71 Miss. 161, 14 So. 454. And see *supra,* III, D.

26. Thus Nebr. Laws (1889), c. 25, provides that where exempt wages due employees from a corporation engaged in interstate business are collected by action in another state, the amount may be recovered. See Bishop *v.* Middleton, 43 Nebr. 10, 61 N. W. 129, 26 L. R. A. 445, holding that the term "corporation engaged in interstate business" means one employing men in Nebraska and having in another state a situs as to permit of its being reached by process of garnishment there, and holding further that the law applies to a debt incurred before its passage and assigned in good faith, where the assignee afterward assigns it to be collected out of the state to evade the exemption laws.

27. Kestler *v.* Kern, 2 Ind. App. 488, 28 N. E. 726 (holding that the exact question did not come into consideration in Uppinghouse *v.* Mundel, 103 Ind. 238, 2 N. E. 719, which apparently takes the view that there is no right of action); Stark *v.* Bare, 39 Kan. 100, 17 Pac. 826, 7 Am. St. Rep. 537; O'Connor *v.* Walker, 37 Nebr. 267, 55 N. W. 867, 40 Am. St. Rep. 486, 23 L. R. A. 650. See Hinds *v.* Sells, 63 Ohio St. 328, 58 N. E. 800 (holding that Ohio Rev. St. § 7014, giving the right of action against one who sends a claim out of the state to be collected by attachment thereby to defeat the exemption laws is constitutional). *Contra,* Harwell *v.* Sharp, 85 Ga. 126, 11 S. E. 561, 21 Am. St. Rep. 149, 8 L. R. A. 514, where the court said that the debtor might have had an injunction if he had asked for it.

If there is no proof of the controverted fact that the right of exemption existed there can be no recovery. Stull *v.* Miller, 55 Nebr. 30, 75 N. W. 239.

The good faith of the assignment is always a question for the jury. Karnes *v.* Dovey, 53 Nebr. 725, 74 N. W. 311. For evidence sufficient to show that the assignment was made for the purpose of evading the exemption laws of the state see Frieden *v.* Conkling, (Nebr. 1903) 96 N. W. 615.

injunction,[28] and even prosecute criminally.[29] Where a wage-earner has an action against his employer for paying a claim out of his wages contrary to the exemption law, the rule that injunction will not issue when there is an adequate remedy at law applies and the employer will not be enjoined.[30] Inasmuch as injunction is granted by equity acting *in personam*, there can be no interference by injunction by the courts of the debtor's domicile, when the debtor and creditor are domiciled in different states and the creditor proceeds by attachment in the courts of his domicile against the property of his debtor; and this even though the creditor be temporarily found within the jurisdiction of the state of the debtor's domicile.[31] A statute which provides a penalty for transferring a debt to evade exemption laws is subject to the strict construction usually given to criminal statutes.[32] The rule of strict construction is nevertheless made to yield to a common-sense interpretation.[33] Interstate comity does not preclude the courts of a state from awarding judgment upon a claim assigned from another state to evade the exemption laws of that other state, although the assignment is a misdemeanor of the other state.[34]

28. Injunction issues against the creditor himself when he is attempting to collect his debt in another state; it is not necessary that the claim should have been assigned.

Georgia.— Harwell *v.* Sharp, 85 Ga. 126, 11 S. E. 561, 21 Am. St. Rep. 149, 8 L. R. A. 514.

Indiana.— Wilson *v.* Joseph, 107 Ind. 490, 8 N. E. 616.

Indian Territory.— Biggs *v.* Colby, (1902) 69 S. W. 910, holding that injunction may issue in spite of Mansfield Dig. § 3750, which provides that no injunction shall be issued to stay proceedings on the judgment of a justice of the peace where the judgment is less than twenty dollars. This on the ground that the provision has no extraterritorial effect, the court of equity nevertheless having its right to act in *in personam*.

Iowa.— Mumper *v.* Wilson, 72 Iowa 163, 33 N. W. 449, 2 Am. St. Rep. 238; Hager *v.* Adams, 70 Iowa 746, 30 N. W. 36; Teager *v.* Landsley, 69 Iowa 725, 27 N. W. 739.

Kansas.— Zimmerman *v.* Franke, 34 Kan. 650, 9 Pac. 747.

Kentucky.— Stewart *v.* Thomson, 97 Ky. 575, 31 S. W. 133, 17 Ky. L. Rep. 381, 53 Am. St. Rep. 431, 36 L. R. A. 582.

Maryland.— Keyser *v.* Rice, 47 Md. 203, 28 Am. Rep. 448.

Missouri.— Wabash Western R. Co. *v.* Siefert, 41 Mo. App. 35.

New Jersey.— See Margarum *v.* Moon, 63 N. J. Eq. 586, 53 Atl. 179.

Ohio.— Snook *v.* Snetzer, 25 Ohio St. 516.

Pennsylvania.— Galbraith *v.* Rutter, 20 Pa. Super. Ct. 554.

United States.— See Cole *v.* Cunningham, 133 U. S. 107, 10 S. Ct. 269, 33 L. ed. 538.

See 23 Cent. Dig. tit. "Exemptions," §§ 162, 168.

29. Thus Ind. Rev. St. (1881) § 2163, provides for the fine of a person who directly or indirectly assigns or transfers any claim for debt against a citizen of Indiana for the purpose of having the same collected by proceedings in attachment, garnishment, or other process out of the wages or the personal earnings of the debtor in courts outside of the state where the creditor, debtor, person, or corporation owing the money intended to be reached by the proceeding in attachment each and all are within the jurisdiction of the state of Indiana. See Uppinghouse *v.* Mundel, 103 Ind. 238, 2 N. E. 719. See also Goldsborough *v.* Bolenbaugh, 3 Ohio Cir. Ct. 583, 2 Ohio Cir. Dec. 337.

30. Galbraith *v.* Rutter, 20 Pa. Super. Ct. 554, holding, however, that the creditor himself may be enjoined.

31. Griffith *v.* Langsdale, 53 Ark. 71, 73, 13 S. W. 733, 22 Am. St. Rep. 182, holding further that the debtor has no right of action against the creditor for collecting the debt in violation of an injunction improvidently granted in the state of the debtor's domicile.

32. Thus the transfer of a debt under such conditions was held not to be subject to the penalty provided without showing that the transfer was made for the purpose of collection and to avoid the exemption laws. Drury *v.* High, 8 Ohio Dec. (Reprint) 523, 8 Cinc. L. Bul. 278, where it appeared that the original judgment was by default and that there were no intervening rights and that the debtor had at no time demanded exemption and that a valuable consideration had been paid for the assignment, and where the court said the case was properly taken from the jury. It was held further that the statute did not prohibit a resident of Ohio from selling a claim for debt against another resident to one residing outside of the state, although the assignor knew that the claim would be collected by garnishment proceedings outside of the state, providing the sale was not made for that purpose.

33. Thus under Ind. Rev. St. (1881) § 2162, which provides for the punishment of every person who with intent to deprive a resident of the state of his rights under the exemption laws "sends or causes to be sent" out of the state any claim against the debtor within its jurisdiction for collection by garnishment, one who carries out of the state with intent to deprive the debtor a claim "upon his own person," "sends" it out of the state, and is subject to the penalty. State *v.* Dittmar, 120 Ind. 54, 388, 22 N. E. 88, 299.

34. Stevens *v.* Brown, 20 W. Va. 450.

2. Remedies in Other Instances — a. Extraordinary Remedies. Mandamus is employed in some jurisdictions.[35] By the better rule equity will not enjoin the sale of exempt property unless plaintiff alleges and shows that the sale will work irreparable damage, or that he has no adequate remedy at law.[36]

b. Summary Proceedings. In some jurisdictions the question of the right to exemption cannot be determined in a summary manner as by rule or motion,[37] it being held that defendant cannot thus be deprived of the right to demand the

35. See Meyer *v.* Beaver, 9 S. D. 168, 68 N. W. 310 (alternative writ); State *v.* Lacy, 18 Ohio Cir. Ct. 379, 10 Ohio Cir. Dec. 111. *Contra*, Oliver *v.* Wilson, 8 N. D. 590, 80 N. W. 757, 73 Am. St. Rep. 784, holding that mandamus was not a proper remedy.

Under a statute which provides that mandamus must be issued in all cases "where there is not a plain, speedy, and adequate remedy in the ordinary course of law" and "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station" mandamus will lie to compel a sheriff to release exempt property held by him under attachment, for the reason that replevin does not furnish a speedy remedy, since it may result in withholding possession from the debtor until the end of an extended litigation. State *v.* Gardner, 32 Wash. 550, 73 Pac. 690, 98 Am. St. Rep. 858.

Mandamus generally see Mandamus.

36. *Arkansas.*— Drigg's Bank *v.* Norwood, 49 Ark. 136, 4 S. W. 448, 4 Am. St. Rep. 30.

Indiana.— Mead *v.* McFadden, 68 Ind. 340.

Missouri.— Bailey *v.* Wade, 24 Mo. App. 186.

North Carolina.— Baxter *v.* Baxter, 77 N. C. 118.

Oregon.— Parsons *v.* Hartman, 25 Oreg. 547, 37 Pac. 61, 42 Am. St. Rep. 803, 30 L. R. A. 98.

Compare Muir *v.* Howell, 37 N. J. Eq. 39, where an injunction was denied because the complainant had not claimed her right, the court remarking that if the right had been clear injunction would have been appropriate.

Contra.— Cunningham *v.* Conway, 25 Nebr. 615, 41 N. W. 452 (although debtor may have mandamus or an action); Nichols *v.* Caliborne, 39 Tex. 363.

In Florida injunction has been allowed under the laws of March 7, 1881, enlarging the jurisdiction of equity courts. Smith *v.* Gufford, 36 Fla. 481, 18 So. 717, 51 Am. St. Rep. 37, holding also that a bond is unnecessary, for an injunction granted for this purpose is not an injunction to stay a proceeding at law within the statute prohibiting the granting of injunctions for that purpose without the giving of a bond. In Bryan *v.* Long, 14 Fla. 366, injunction was refused according to the rule of the text.

In New York the collection of a judgment out of real estate purchased with pension money will be enjoined, although the debtor has an adequate remedy at law by motion to set aside the levy in the action in which the judgment was rendered; this, because the debtor's claim to exemption may be controverted and he is entitled to have the question determined on common-law evidence and is not bound to have it disposed of on affidavits. Buffum *v.* Forster, 77 Hun 27, 28 N. Y. Suppl. 285.

Equity has no jurisdiction to enjoin a proceeding to appraise property levied on under a fieri facias for the purpose of claiming an exemption, although it is alleged that the judgment and execution issued are for the purchase-price of the property. Christopher *v.* Bowden, 17 Fla. 603. And this, although Fla. Laws, c. 1944, have made it a felony for any officer to levy on and sell exempt personal property. Phillips *v.* Crichton, 17 Fla. 600.

Complete justice.— An injunction is properly issued to prevent the sale under an execution issued on the judgment of a justice of the peace of property exempt by law from a forced sale; and jurisdiction, once having attached, should be exercised to finally determine the rights involved under the issues made. Stein *v.* Frieberg, 64 Tex. 271.

37. Tasker *v.* Sheldon, 115 Pa. St. 107, 7 Atl. 762; Tioga Cricket Club *v.* Horn, 19 Pa. Co. Ct. 672, holding that a rule to dissolve an attachment execution is not the proper procedure to enforce defendant's claim out of funds in the hands of a garnishee. See also Boland *v.* Spitz, 153 Pa. St. 590, 26 Atl. 22 (holding that where a justice decides against a party making claim to exemptions in garnishment proceedings, the judgment cannot be questioned by a rule to show cause why the money should not be paid to the party claiming, he not having taken his remedy by appeal or certiorari); Ferguson *v.* Moore, 1 Phila. (Pa.) 92 (holding that where a sheriff levies on the joint effects of a firm and deducts three hundred dollars from their joint effects, leaving one hundred and fifty dollars which defendant claimed was exempt, a rule on the sheriff to show cause why venditioni exponas should not issue could not be determined, as no order of the court could have affected the rights of the sheriff or the parties). And *compare* Chandler *v.* Jessup, 132 Ind. 351, 31 N. E. 1109 (holding that where a conveyance of land is set aside on the ground of fraud, a motion to allow defendant his exemption of the proceeds of the sale was properly refused if no issue was tendered on the subject at the trial and no evidence offered that defendant was a resident house-

exemption and upon the neglect or refusal of the officer to comply with that demand to assert that right by an action at law; but in others the contrary is held.[38]

c. Action at Law[39]—(i) *Right of.* Where exempt property is wrongfully seized, a right of action arises in favor of the debtor.[40] The debtor must have complied with the statutory requisites as to filing claim, etc., or his action will not lie.[41] Whether the property in question is exempt and hence whether the debtor has a cause of action must be determined as of the time of the levy.[42]

(ii) *Jurisdiction.* Jurisdiction of the question whether a person is entitled to an exemption and of matters connected with the right depends more or less upon the state in which the questions are to be adjudicated.[43]

holder); Opitz *v.* Winn, 3 Oreg. 9 (holding that where money has been voluntarily paid by the garnishee to the officer, there having been no judgment rendered against the garnishee, it is not error for a justice of the peace to refuse to direct the officer to pay the money to the judgment debtor, who claims it as earnings for thirty days preceding).

An application by plaintiff in execution, asking the opinion of the court as to an order on the sheriff commanding him to sell certain property taken on execution which defendant claims as exempt, will not be determined, as the opinion of the court at such a stage would stand the sheriff in no more stead than that of his counsel. Houston *v.* Smith, 1 Phila. (Pa.) 221.

38. Oliver *v.* Wilson, 8 N. D. 590, 80 N. W. 757, 73 Am. St. Rep. 784, where a motion against the attaching officer to discharge the attachment is valid. Thus if the constable collects wages from a garnishee and on demand refuses to pay over the wages to the laborer, the laborer is entitled to a rule compelling him to do so (Smith *v.* Johnston, 71 Ga. 748); and it is not error to make the judgment creditor a party to the rule (Steele *v.* Parker, 109 Ga. 791, 35 S. E. 167). Where exempt property is attached and the notice is filed, according to Iowa Code (1873), § 3018, for its discharge, no pleading may be filed for the purpose of controverting the motion and if filed may be stricken out. See Joyce *v.* Miller, 59 Iowa 761, 13 N. W. 664.

Where exempt property has been levied on under an execution from a justice's court, the proper remedy is to remove the proceedings in the circuit court by certiorari and there have the levy quashed. The justice had no power to correct the abuse of process, but the circuit court, in virtue of its general revisory jurisdiction, may supersede and quash the levy. Jones *v.* Williams, 2 Swan (Tenn.) 105. See, however, EXECUTIONS, 17 Cyc. 1152 *et seq.*

39. **Interpleader.**—A sheriff sued in the county by an execution debtor for one hundred dollars damages, the value of implements seized and sold by the sheriff without any special direction from the execution creditor and alleged to be exempt, cannot obtain in that court an interpleader order directing the trial of an issue between the execution debtor and the execution creditor, to settle whether the implements were exempt or not. The sheriff acts at his own peril in granting or refusing the exemption. Gould *v.* Hope, 20 Ont. App. 347 [*reversing* 21 Ont. 624].

After judgment disallowing exemption reversed.—Defendant made proper claim for property levied upon in an attachment suit but the sheriff did not notify plaintiff of the claim. Defendant filed a plea setting up her claim of exemptions. Plaintiff recovered judgment in which it was decided that against the recovery there was no claim of exemptions to be allowed. The property was sold under a writ of venditioni exponas issued upon the judgment and the amount of recovery as stated in the judgment was paid. On appeal the supreme court modified the judgment by striking out that portion which provided for waiver of exemptions. It was held that the money paid plaintiff out of the property claimed as exempt, to which it was shown plaintiff had no right and which *ex aequo et bono* belonged to defendant in attachment suit, could be recovered by her in a subsequent action against plaintiff in said suit for money had and received. Anniston First Nat. Bank *v.* Lippman, 129 Ala. 608, 30 So. 19.

40. Cook *v.* Baine, 37 Ala. 350; Albrecht *v.* Treitschke, 17 Nebr. 205, 22 N. W. 418.

In Pennsylvania it is held that after the sheriff has wrongfully sold the property, the only remedy the debtor has is an action against him. Marks' Appeal, 34 Pa. St. 36, 75 Am. Dec. 631; Kearns *v.* Beam, 11 Lanc. Bar 183; Kershner *v.* Miller, 2 Woodw. 51.

41. Gamble *v.* Reynolds, 42 Ala. 226.

42. Watson *v.* Simpson, 5 Ala. 233, holding that it is immaterial that the debtor was not married and the head of the family when the execution came into the hands of the sheriff, as long as he was married and the head of a family when the levy was made, for the statute which gives the right to exemption provides that the exempt article shall be free from levy and sale. See Berry *v.* Nichols, 96 Ind. 287. *Compare* Phillips *v.* Taber, 83 Ga. 565, 10 S. E. 270.

43. See cases cited *infra*, this note.

In Florida under the act of March 7, 1881, the courts of equity are clothed with full and complete jurisdiction over the question of exemptions allowed by the constitution and laws; not only to adjudicate as to the rights of the parties thereto, but to control and di-

(III) *Form of.*[44] When exempt property is seized, the action of trespass,[45] case,[46] trover,[47] or replevin[48] may lie. At the present day the remedy would generally be the ordinary action for damages.[49] The grantee of land exempt from judgments, liens, and execution may maintain an action to quiet his title against a lien by virtue of a judgment against his grantor.[50]

(IV) *Defenses.* In those states where residence is not a prerequisite, the fact that the debtor is about to remove from the state,[51] or that he has already removed from the state,[52] is no defense to an action against the sheriff levying on exempt property. In jurisdictions where residence is a prerequisite the fact that

rect the setting apart and allotment thereof, to restrain interference therewith or sale thereof under any inhibited process of law, and to pass upon and adjudicate the propriety of any exception set apart by any officer and to rectify it if improper. McMichael *v.* Grady, 34 Fla. 219, 15 So. 765.

In Georgia the ordinary has no jurisdiction of an exemption claim, unless the applicant is a resident of the county. Rutherford *v.* Wright, 41 Ga. 128.

In Kansas if execution against an insurance company is directed to the sheriff of any county who attempts to levy on property which is exempt, under Comp. Laws (1879), c. 50*a*, the company, having its place of business in the same county, may apply to the court of that county to prevent the unlawful sale and is not obliged to proceed in the court from which the execution issued. Naill *v.* Kansas Farmers' F. Ins. Co., 47 Kan. 223, 27 Pac. 854.

In Nebraska the county court has jurisdiction under Comp. St. (1885) c. 6, to decide whether personal property is exempt from execution and whether it should be delivered to the assignee. Such inquiry does not involve the question of the title to real estate. Stout *v.* Rapp, 17 Nebr. 462, 23 N. W. 364.

In British Columbia the magistrate sitting as judge of the small debts court has no jurisdiction to decide the validity of the claim of exemption, under the Homestead Act, of goods seized under process of execution issued from that court. Augsberg *v.* Anderson, 5 Brit. Col. 622.

If an equitable defense is put in against a levy, the parties should have their whole case decided in a court of equity. Mynatt *v.* Magill, 3 Lea (Tenn.) 72, where the levy was made upon a judgment rendered on a note which by its terms imposed a lien on the property levied on, and where the maker of the note petitioned to have the levy quashed on the ground that the provision as to the lien was inserted without his knowledge.

44. Appeal from justice.— If a justice of the peace refuses a supersedeas on the filing of a schedule claiming the property seized as exempt, the remedy of the debtor is by appeal. Failure to appeal is a waiver of the right. Cason *v.* Bone, 43 Ark. 17. In Jones *v.* Williams, 2 Swan (Tenn.) 105, it is said that certiorari to the circuit court is the proper remedy where exempt property has been levied on by an execution from a justice's court.

45. Moseley *v.* Anderson, 40 Miss. 49; Bonnel *v.* Dunn, 28 N. J. L. 153; Elder *v.* Frevert, 18 Nev. 446, 5 Pac. 69; Van Dresor *v.* King, 34 Pa. St. 201, 75 Am. Dec. 643; Sanborn *v.* Hamilton, 18 Vt. 590; Dow *v.* Smith, 7 Vt. 465, 29 Am. Dec. 202.

Trespass generally see TRESPASS.

46. Moseley *v.* Anderson, 40 Miss. 49; Van Dresor *v.* King, 34 Pa. St. 201, 75 Am. Dec. 643.

Case generally see CASE, ACTION ON.

47. Harrell *v.* Harrell, 75 Ga. 697 (where trover was maintained against the purchaser of the property, which was sold at a judicial sale subject to the right of exemption and pending an application for the exemption); Ross *v.* McGuffin, 2 Tex. App. Civ. Cas. § 458 (where recovery in conversion was allowed without making a demand and the receiving of a refusal).

Trover generally see TROVER AND CONVERSION.

48. *Indiana.*— See Louisville, etc., R. Co. *v.* Payne, 103 Ind. 183, 2 N. E. 582.

Iowa.— Wilson *v.* Stripe, 4 Greene 551, 61 Am. Dec. 138.

Kansas.— Westenberger *v.* Wheaton, 8 Kan. 169.

Mississippi.— Ross *v.* Hawthorne, 55 Miss. 551 (in spite of having a special statutory remedy by the bond); Moseley *v.* Anderson, 40 Miss. 49.

Tennessee.— Wilson *v.* McQueen, 1 Head 17. See 23 Cent. Dig. tit. "Exemptions, § 166.

Contra.— Saffell *v.* Wash, 4 B. Mon. (Ky.) 92; Reynolds *v.* Sallee, 2 B. Mon. (Ky.) 18; Hawk *v.* Lepple, 51 N. J. L. 208, 17 Atl. 351, 14 Am. St. Rep. 677, 4 L. R. A. 48.

The debtor cannot replevy without statutory authority. Buis *v.* Cooper, 63 Mo. App. 196.

Replevin generally see REPLEVIN.

Claim and delivery is the proper process in some states for the recovery of exempt property wrongfully seized. Wagner *v.* Olson, 3 N. D. 69, 54 N. W. 286; Linander *v.* Longstaff, 7 S. D. 157, 63 N. W. 775.

Validity of judgment is admitted by bringing replevin. Redinger *v.* Jones, 68 Kan. 627, 75 Pac. 997.

49. See Ross *v.* Hawthorne, 55 Miss. 551.

50. Citizens' State Bank *v.* Harris, 149 Ind. 208, 48 N. E. 856, at least if the action is begun before a sale under the judgment.

51. State *v.* Knott, 19 Mo. App. 151.

52. Neeper *v.* Irons, 3 Tex. App. Civ. Cas. § 180.

the debtor has removed from the state is a defense to an action for levying on his property.[53] The ultimate return of the property wrongfully seized is not a defense to an action for the wrongful seizure, but goes only in mitigation of damages.[54] That the title of the property in question was not in the debtor is a good defense to an action by the debtor for its seizure.[55] Under a statute which provides that no exemption shall be allowed against an execution on a debt incurred for property obtained under false pretenses, a sheriff who can show his case within the statute has a good defense.[56] If the debtor is not allowed his right of selection, it is no defense to an action for the property seized that he had other property.[57] A judgment in part for exempt personalty, under a statute rendering certain property otherwise exempt subject to execution, is not a justification for seizing property not within the purview of the statute.[58] Sometimes an estoppel operates against the setting up of a defense.[59] An order for the sale of the attached property does not conclude the question of exemption therein unless the question has been litigated.[60]

(v) *Parties*[61] — (a) *Plaintiff*.[62] Husband and wife may sue jointly for damages for seizure of exempt property.[63] In the absence of the husband from

53. Finley *v.* Sly, 44 Ind. 266. See *supra*, II, E, 2.

54. Castile *v.* Ford, 53 Nebr. 507, 73 N. W. 945.

55. State *v.* Pruitt, 65 Mo. App. 154. See also Larkin *v.* McAnnally, 5 Phila. (Pa.) 17.

A sheriff who has sold lands under execution and received the purchase-price cannot plead as a defense to an action to recover the statutory amount of the proceeds exempted to the debtor that plaintiff-debtor had no legal estate in the property sold. Bramble *v.* State, 41 Md. 435.

That the property was mortgaged is no defense to the officer selling it. McMartin *v.* Hurlburt, 2 Ont. App. 146. See Owens *v.* Bull, 1 Ont. App. 62.

An action by the wife for damages for taking the property of her husband cannot be defeated by showing that the property was turned out by the husband to be levied upon. King *v.* Moore, 10 Mich. 538.

56. Taylor *v.* Rice, 1 N. D. 72, 44 N. W. 1017.

57. Stilson *v.* Gibbs, 53 Mich. 280, 18 N. W. 815; Anderson *v.* Larremore, 1 Tex. App. Civ. Cas. § 947.

58. Grieb *v.* Northrup, 66 N. Y. App. Div. 86, 72 N. Y. Suppl. 481.

59. Kolsky *v.* Loveman, 97 Ala. 543, 12 So. 720, holding that where plaintiff has attached certain property as defendant's in an action for its purchase-price and executes a bond for its return if not found subject to attachment, he is estopped from showing that the claim for exemption is invalid because the property really belonged to plaintiff, it being in defendant's possession on consignment for sale on plaintiff's account.

Particularly is this so where the defense is a technical one. Thus where an officer refused to receive the schedule properly tendered by the debtor, making no objection that it was not in compliance with the law, it was afterward held upon suit brought that he would not be allowed to object to the schedule as not complying with the statute. Pensoneau *v.* Masserang, 8 Ill. App. 298. Where the sheriff and creditor at the time the schedule and claim were filed gave strong assurance that the claim would be granted and that there would be no trouble about its amount, they were held not in a position to urge technical objections to defeat the debtor's right. Eisenhauer *v.* Dill, 6 Ind. App. 188, 33 N. E. 220.

60. Wilson *v.* Stripe, 4 Greene (Iowa) 551, 61 Am. Dec. 138; Berry *v.* Charlton, 10 Oreg. 362. *Contra*, State *v.* Manly, 15 Ind. 8. See *supra*, VI, C, 2, e.

61. **Parties** generally see PARTIES.

62. **The grantor and grantee** of land which the former was entitled to claim as exempt from execution may join in a complaint against creditors of the former who had obtained judgments, issued executions, and filed transcripts of their judgments, which were taken before a justice of the peace, in the clerk's office, prior to such conveyance, the former to have his right to exemption established and the latter to have his title quieted. Barnard *v.* Brown, 112 Ind. 53, 13 N. E. 401.

Mortgagor and mortgagee of exempt property.— The mortgagor may maintain an action for damages when the property has been wrongfully seized and sold upon execution; but in order that defendants may not be subjected to a double liability the mortgagee should be joined as plaintiff. Evans *v.* St. Paul Harvester Works, 63 Iowa 204, 18 N. W. 881.

Neither the claimant's sureties on his bond nor his attorney can be made parties to the claim case where a claim is made for exemption. Kimbrough *v.* Pitts, 63 Ga. 496.

63. Neeper *v.* Irons, 3 Tex. App. Civ. Cas. § 180; Cunningham *v.* Coyle, 2 Tex. App. Civ. Cas. § 422.

Wife and children.— A horse exempted under Ga. Code, § 2040, is for the wife and children as well as for the head of the family; and, where possession has been tortiously obtained from him, they may proceed by possessory warrant to recover the horse. A

the jurisdiction,[64] or sometimes in case of abandonment of the wife by the husband,[65] or sometimes after the death of the husband,[66] the wife or widow is the proper party to sue. In Michigan one partner may maintain trover against the sheriff for the seizure of exempt property of the firm under an execution against all, since the exemption is held to be an individual right.[67]

(B) *Defendant.* The sheriff may be held liable in an action for the wrongful seizure of exempt property;[68] and the creditor may be held liable with him.[69] The purchaser of exempt property sold at a judicial sale subject to the right of exemption is liable in trover to the debtor if the sale took place pending an application by the debtor for an exemption which was subsequently allowed.[70]

(VI) *PLEADING.*[71] If the debtor attempts to enforce his exemption rights by action for damages, or by replevin, or in some other way, he must show by his pleadings facts which entitle him to relief.[72] Ownership in the property

consent extorted from the head of the family while in jail does not affect the rights of the wife and children as to the exemption. Tucker *v.* Edwards, 71 Ga. 602.

Although the exemption is for the wife and children of the debtor, he as well as they may sue for a conversion of the exempt property. Braswell *v.* McDaniel, 74 Ga. 319.

64. Eisenhauer *v.* Dill, 6 Ind. App. 188, 33 N. E. 220.

Under a statute giving the right to the wife to claim when the husband has absconded, an action by a married woman is properly brought in the name of the state to her use. State *v.* Dill, 60 Mo. 433.

65. Baum *v.* Turner, 76 S. W. 129, 25 Ky. L. Rep. 600.

66. Myers *v.* Forsythe, 10 Bush (Ky.) 394, where it was claimed that the personal representatives were the proper parties.

67. McCoy *v.* Brennan, 61 Mich. 362, 28 N. W. 129, 1 Am. St. Rep. 589.

68. Van Dresor *v.* King, 34 Pa. St. 201, 75 Am. Dec. 643; Marks' Appeal, 34 Pa. St. 36, 75 Am. Dec. 631; Kearns *v.* Beam, 11 Lanc. Bar (Pa.) 183; Kershner *v.* Miller, 2 Woodw. (Pa.) 51.

The officer is liable on his official bond. State *v.* Knott, 19 Mo. App. 151.

In an action brought by one member of a partnership to restrain the sale of so much of the partnership property under a judgment against the firm as was exempt to him from execution, the sheriff is not a proper party, for the sheriff is, unless he has a personal interest in the subject of the action, merely a public ministerial officer. Stout *v.* McNeill, 98 N. C. 1, 3 S. E. 915, where an injunction suit was brought upon the consent of the other partner.

69. *Indiana.*— Eisenhauer *v.* Dill, 6 Ind. App. 188, 33 N. E. 220 [*citing* Thompson Homest. & Exempt. § 877], particularly where the creditor had full knowledge of the rights of the debtor and received the benefit for the action of the sheriff.

Kansas.— Mullaney *v.* Humes, 48 Kan. 368, 29 Pac. 691.

Maine.— See Spencer *v.* Brighton, 49 Me. 326.

Minnesota.— Purchase, at sale on execution, by the attaching plaintiff, of exempt property unlawfully attached, and subsequent sale thereof by such purchaser, who then knew that the property was exempt, will be deemed a ratification of the trespass. Murphy *v.* Sherman, 25 Minn. 196.

Nebraska.— Castile *v.* Ford, 53 Nebr. 507, 73 N. W. 945. See also Schaller *v.* Kurtz, 25 Nebr. 655, 41 N. W. 642, where the debtor was held liable alone.

Nevada.— Elder *v.* Frevert, 18 Nev. 446, 5 Pac. 69.

New Jersey.— Bonnel *v.* Dunn, 28 N. J. L. 153.

See 23 Cent. Dig. tit. "Exemptions," §§ 160, 161.

70. Harrell *v.* Harrell, 75 Ga. 697.

71. Pleading generally see PLEADING.

Immaterial allegation.— In an action of trespass for seizure of exempt property, an allegation that the property was mortgaged by defendant is immaterial. Collett *v.* Jones, 2 B. Mon. (Ky.) 19, 36 Am. Dec. 586.

72. McCoy *v.* Brennan, 61 Mich. 362, 28 N. W. 129, 1 Am. St. 589; Cockrum *v.* McCracken, 1 Tex. App. Civ. Cas. § 65. See also Lynd *v.* Picket, 7 Minn. 184, 82 Am. Dec. 79.

Declaration in trover sufficient.— In Hutchinson *v.* Whitmore, 90 Mich. 255, 51 N. W. 451, 30 Am. St. Rep. 431, it was said that the usual declaration in trover was sufficient to enable plaintiff to show the facts essential to a recovery, and that the contrary doctrine pronounced in McCoy *v.* Brennan, 61 Mich. 362, 28 N. W. 129, 1 Am. St. Rep. 589, should be regarded as *obiter*.

In an action for the seizure and sale under execution of corn claimed by plaintiff to be exempt, the allegations of the complaint that he was the head of a family consisting of a wife and six children, and that such corn was all he owned, and was necessary for home consumption and the maintenance of himself and family, were sufficient to justify the admission of evidence that he was a farmer, and owned certain live stock, to be fed on such corn from the date of the levy until the next harvest. Burris *v.* Booth, (Tex. Civ. App. 1897) 40 S. W. 186.

A petition for an injunction alleging that all the debtor's property consists of three hundred bushels of corn, which is insufficient to furnish his family with bread, meat, and such other articles of food as will be neces-

must be averred.[73] If residence within the jurisdiction be a condition of the exemption right, the residence must be pleaded.[74] In some states, if it be alleged that the debtor is head of a family, no allegation that he resides in the state or that he resides in the jurisdiction is necessary.[75] If the exemption is given by statute to a householder or housekeeper,[76] or to the head of a family,[77] or to a member of the family,[78] the allegations must cover this prerequisite. The debtor must show by his pleadings that he has taken all steps required of him by the

sary, is insufficient unless it state the number, ages, etc., of the members of the family. Swisher *v.* Hancock, 31 Tex. 262.

An allegation that the judgment upon which execution was issued is "a judgment for labor" is not equivalent to an allegation that it was a judgment for "laborers' or mechanics' wages." Paddock *v.* Balgord, 2 S. D. 100, 48 N. W. 840. See also State *v.* Power, 63 Nebr. 496, 88 N. W. 769, where it was further held that the wages claimed must be alleged to be for a period not exceeding sixty days.

Allegations as to exempt horses.— Under Tenn. Acts (1833), c. 80, § 1, "one farm horse" was exempted to the debtor. Under Tenn. Acts (1842), c. 44, which was passed to amend and enlarge the effect of the acts of 1833, heads of families were given other exemptions, and by the usual liberal construction of the exemption laws the head of a family was held entitled to a horse where proper for his vocation. Therefore it was not necessary for a plaintiff debtor, in an action of trespass for seizure of his horse, to allege that the horse was a farm horse. Tipton *v.* Pickens, 1 Swan 25. In trespass for taking plaintiff's horse on execution a replication that the horse was his only work beast "not previously levied upon" is bad, as showing that he might have had other horses which were his property, although levied upon. Faulkner *v.* Bradley, 2 Dana (Ky.) 141.

Instrument used in profession.— An allegation that the debtor was a pianist and that he had taught music within three months prior to the time when his piano was seized does not show that teaching music was his business at the time of the seizure. "On the contrary, the special and peculiar manner in which this fact is stated, would indicate that it was not." Tanner *v.* Billings, 18 Wis. 163, 176, 86 Am. Dec. 755.

If in reply to a set-off plaintiff debtor alleges that the property sold by defendant consists of two mules which were exempt, being the only work beasts plaintiff has, and pleads the exemption as a bar to defendant's set-off, defendant is entitled to file a rejoinder denying that the two mules are the only work beasts plaintiff has, as he cannot, if he has other work beasts, refuse to elect which he will retain and then claim as exempt those which are sold. Woolfolk *v.* Lyons, 59 S. W. 21, 22 Ky. L. Rep. 918.

Where the proceeding is a creditor's bill to subject a fund which can be reached only in this way, upon principle, the appropriate way for the debtor to claim his exemption is to set it up in his answer just as he is required by the rules of legal procedure to set up in his answer any other constitutive fact which makes against the right of plaintiff to the relief which he seeks. Furlong *v.* Thomssen, 19 Mo. App. 364.

In an action by the grantor and grantee of land which the former was entitled to claim as exempt from execution as against his creditors, who had issued executions against the land, it is sufficient that the complaint states the value of the grantor's property at the time of the filing of the transcripts of the judgments on which executions were to be issued, and of the conveyance, showing it to be exempt from execution at the time, without stating the value at the time of instituting the action, and no demand need be alleged. Barnard *v.* Brown, 112 Ind. 53, 13 N. E. 401.

Value.— An allegation that "said property does not exceed in value the sum of $600" sufficiently shows the value of the property claimed as exempt. Boesker *v.* Pickett, 81 Ind. 554. Failure to state the value of the property unlawfully taken is a defect, if one at all, of such a formal kind that it is too late to take advantage of it after the trial. State *v.* Beamer, 73 Mo. 37.

73. Taylor *v.* Bertram, 55 S. W. 553, 21 Ky. L. Rep. 1402.

74. Donnelly *v.* Wheeler, 34 Ark. 111. See Loring *v.* Wittich, 16 Fla. 498, for sufficient averments as to residence.

75. State *v.* Hussey, 7 Mo. App. 597.

76. It should be alleged in trespass against the sheriff for seizing exempt property that plaintiff (debtor) is "an actual, *bona fide* housekeeper with a family." Prewit *v.* Walker, 7 J. J. Marsh. (Ky.) 332. An allegation that the debtor is a *bona fide* housekeeper with a family living at home and dependent on him is sufficient to bring him within the statute in connection with the fact that he was proceeded against as a resident of the state. Wolf *v.* Glenn, 8 Ky. L. Rep. 425.

77. State *v.* Power, 63 Nebr. 496, 88 N. W. 769. Averments that a person is and has been a citizen of this state; that he came to this state, bringing with him his family, with the intention of making his permanent home here; and that it has been his home ever since, sufficiently shows that he is "the head of a family residing in this state," so as to entitle him to exemptions. Loring *v.* Wittich, 16 Fla. 498.

78. A petition to enjoin the sale of exempt property is insufficient if it fails to allege that plaintiff is either the head of a family or a member of a family entitled to exemp-

statute for claiming and defining his rights.[79] This rule does not, however, require the debtor to set out his schedule in his pleadings.[80] The usual rule that special damages must be alleged obtains.[81] Facts constituting a defense must be pleaded by answer and not by demurrer.[82] Thus if a waiver of exemption is relied on as a defense it must be pleaded.[83]

(VII) *Burden of Proof and Presumptions.*[84] In an action or proceeding to enforce or establish an exemption right, the burden is upon him who seeks to enforce or establish it.[85] The claimant of exemption has the burden to show that

tions under the acts of the twelfth legislature, page 427. Attoway *v.* Still, 2 Tex. Unrep. Cas. 697.

79. Newcomer *v.* Alexander, 96 Ind. 453.

Filing or delivering schedule.— An allegation that "defendant filed with sheriff a schedule of his property" does not sufficiently show the filing of the schedule as the law requires. Over *v.* Shannon, 75 Ind. 352. But an allegation that defendant filed an affidavit and inventory containing a full account of all his property "at the date of the execution" substantially complies with the statute which requires the affidavit to state the debtor's property "at the date of issuing the writ." Eisenhauer *v.* Dill, 6 Ind. App. 188, 33 N. E. 220.

In replevin before a justice, 2 Ind. Rev. St. p. 464, § 1, requires that an affidavit of plaintiff must state that the property has not been taken under execution or other writ against him. An affidavit that plaintiff was a resident householder of certain personalty, that said property was exempt, that he made a demand that it be set off to him, and that defendant constable refused so to do after levy, is insufficient. Green *v.* Aker, 11 Ind. 223.

80. State *v.* Read, 94 Ind. 103. See also Coppage *v.* Gregg, 1 Ind. App. 112, 27 N. E. 570.

81. Boggan *v.* Bennett, 102 Ala. 400, 14 So. 742; Morris *v.* Williford, (Tex. Civ. App. 1902) 70 S. W. 278.

To recover the penalty of double damages provided by the statute for selling exempt property plaintiff must declare specially. Camp *v.* Ganley, 6 Ill. App. 499 [*citing* Pace *v.* Vaughan, 6 Ill. 30].

82. Keegan *v.* Peterson, 24 Minn. 1, holding that whether a certain harvester is a "farming utensil" and therefore exempt from execution should be raised by answer. See O'Donnell *v.* Segar, 25 Mich. 367, holding that the fact that plaintiff had sold other property to bring himself down to the statutory exemptions or sold any property during the winter prior to the taking by defendant of the property in controversy, are matters of defense to be pleaded as in confession and avoidance.

83. Murphy *v.* Sherman, 25 Minn. 196.

84. **Burden of proof and presumptions** generally see Evidence.

Presumptions as to jurisdiction of the ordinary granting the exemption (Gamble *v.* Central R., etc., Co., 80 Ga. 595, 7 S. E. 315, 12 Am. St. Rep. 276) and of the regularity of proceedings, as that due notice was given to the creditor of the proceedings (Chalker *v.* Thompson, 72 Ga. 478) are proper.

As to married women's exemption.— It will not be presumed that a married woman is entitled to the exemption given her under Ohio Rev. St. § 5441, in the absence of evidence showing that she and her husband are living together and that neither of them is the owner of a homestead. Voight *v.* Lafkin, 12 Ohio Cir. Ct. 751, 6 Ohio Cir. Dec. 124, where an exemption was sought in lieu of the homestead.

As to waiver.— In the absence of proof it will be presumed that the debtor does not waive his exemption. State *v.* Haggard, 1 Humphr. (Tenn.) 390. Where defendant does not have more than the statutory amount of property, and it does not appear that he was notified of his rights of exemption by the officer levying on the property, it will not be presumed that he waived his rights, although he did not assert them until long after the levy. Holliday *v.* Mansker, 44 Mo. App. 465. A note executed in Georgia, the domicile of both parties, and containing "a waiver of all rights of exemption and homestead," is presumed to refer only to the exemptions allowed by the law of Georgia, and does not apply in an action on the note in Alabama. Seay *v.* Palmer, 93 Ala. 381, 9 So. 601, 30 Am. St. Rep. 57. If one draws a bill of exchange on his employer, who owes him only for wages, the presumption is that he waives his right of exemption before acceptance. Bibb *v.* Janney, 45 Ala. 329.

85. *Alabama.*— Ely *v.* Blacker, 112 Ala. 311, 20 So. 570; Kolsky *v.* Loveman, 97 Ala. 543, 12 So. 720.

Arkansas.— Porch *v.* Arkansas Milling Co., 65 Ark. 40, 45 S. W. 51, 67 Am. St. Rep. 895; Blythe *v.* Jett, 52 Ark. 547, 13 S. W. 137.

California.—Murphy *v.* Harris, 77 Cal. 194, 19 Pac. 377; Calhoun *v.* Knight, 10 Cal. 393.

Georgia.— Steele *v.* Parker, 109 Ga. 791, 35 S. E. 167; Blanchard *v.* Paschal, 68 Ga. 32, 45 Am. Rep. 474.

Illinois.— McMasters *v.* Alsop, 85 Ill. 157.

Indiana.— Hartlep *v.* Cole, 101 Ind. 458.

Iowa.— Joyce *v.* Miller, 59 Iowa 761, 13 N. W. 664.

Massachusetts.— Clapp *v.* Thomas, 5 Allen 158. See also Gay *v.* Southworth, 113 Mass. 333.

Minnesota.— Fletcher *v.* Staples, 62 Minn. 471, 64 N. W. 1150.

New York.— Gilewicz *v.* Goldberg, 69 N. Y. App. Div. 438, 74 N. Y. Suppl. 984 [*citing* Knapp *v.* O'Neill, 46 Hun 317]; Tuttle *v.* Buck, 41 Barb. 417; Dains *v.* Prosser, 32

he has fulfilled the statutory requirement as to steps taken to obtain his exemption, such as demand and furnishing a schedule.[86]

(VIII) *EVIDENCE.*[87] Evidence to justify the suing out of the attachment is inadmissible where the issue is as to any legal levy on exempt property.[88] A debtor who before sale demands the return of his property as exempt and objects at the sale on the same ground and sues the sheriff and the purchaser for its return cannot show at the trial that the sale is void on other grounds.[89]

(IX) *SUBMISSION TO AND QUESTIONS FOR JURY.*[90] Unless it be shown in an action of replevin that the property in question was exempt, a nonsuit should

Barb. 290; Griffin *v.* Sutherland, 14 Barb. 456.

Vermont.— Connell *v.* Fisk, 54 Vt. 381; Bourne *v.* Merritt, 22 Vt. 429.

Contra.— Under Wis. St. (1898) §§ 3716, 3719 *et seq.*, which require in garnishment that the party seeking the remedy should show by affidavit that the indebtedness from the corporation to defendant is "not by law exempt from sale on execution" and which provide that from the time of the garnishment the corporation shall "stand liable to the plaintiff to the amount" of its indebtedness to defendant "then due and to become due and not by law exempt from sale on execution," the burden is upon plaintiff to prove that the indebtedness of the garnishee to defendant is not exempt. Eastlund *v.* Armstrong, 117 Wis. 394, 94 N. W. 301.

Burden of showing time when debt was contracted see Todd *v.* McCravey, 77 Ala. 468.

In replevin the burden is on plaintiff to show that the judgment on which the writ issued was rendered on a contract and that plaintiff owned the property. Thompson *v.* Ross, 87 Ind. 156.

The burden is on the garnishee or defendant to establish that earnings due from the garnishee are exempt from liability. Oakes *v.* Marquardt, 49 Iowa 643.

The burden is on plaintiff to prove that the value of all his tools, including the one for the seizure of which he brings trover, do not exceed the statutory limit. Chambers *v.* Halsted, Lalor (N. Y.) 384.

86. Graham *v.* Crockett, 18 Ind. 119.

The presumption that where the husband, wife, and children are living together, the husband is the head of the family is not rebutted by proof that the wife is the owner of the premises on which they live. Clinton *v.* Kidwell, 82 Ill. 427.

Satisfying burden.— The debtor's affidavit as to the necessary facts to entitle him to his exemption in wages is *prima facie* evidence of their truth. Muzzy *v.* Lantry, 30 Kan. 49, 2 Pac. 102. The allegations of the movant in a motion for a rule before a justice of the peace, asking that money received by the creditor and officer be paid over to the movant on the ground that it is exempt as his wages as a day laborer, are not sufficient to carry the burden of proof, where the creditor and officer answer that they cannot, for want of sufficient information, admit or deny that the movant is a day laborer or that the fund in controversy is exempt, and it is not error for the magistrate to award the fund to the judgment creditor. Steele *v.* Parker, 109 Ga. 791, 35 S. E. 167. If the debtor satisfies the burden and the officer alleges that the goods claimed as exempt have been taken for their purchase-price, it is his duty to go forward in his proof. Wagner *v.* Olson, 3 N. D. 69, 54 N. W. 286. Where the debtor has a specific exemption on household goods to a certain amount, he needs to prove, in an action to recover such property, which has been levied on, only that it is not worth more than the statutory limit; it is not necessary for him to show that he does not own any other property. Reinecke *v.* Flecke, 35 N. Y. Super. Ct. 491. Where there is no evidence that any harm was caused by delay in making claim, it is the duty of the creditor to show that the delay alleged by him was unreasonable. Kee *v.* Hobensack, 2 Phila. (Pa.) 82.

87. **Evidence** generally see EVIDENCE. See also *supra*, this article *passim*.

Evidence of damage.— In an action of replevin to recover exempt property taken under an execution and damages, it was not reversible error to admit evidence as to the wages paid to plaintiff's hands while defendant was in possession of the property, or injury to the credit of plaintiff and loss of custom caused thereby. Stonestreet *v.* Crandell, 10 Kan. App. 575, 62 Pac. 249.

Mental distress is not an element of actual damage for seizure and sale of property exempt from execution. Morris *v.* Williford, (Tex. Civ. App. 1902) 70 S. W. 228.

88. Brown *v.* Bridges, 70 Tex. 661, 8 S. W. 502.

Discharge of levy.—In an action for wrongfully seizing property under an attachment, in which the wrong complained of is the seizing of property not subject to the writ, plaintiff need not show that the levy has been discharged by the court. Baum *v.* Turner, 76 S. W. 129, 25 Ky. L. Rep. 600.

89. Redinger *v.* Jones, 68 Kan. 627, 73 Pac. 997.

90. See, generally, TRIAL.

Opening and closing.— When an applicant for exemption presents a schedule, the creditors who attack it are entitled to open and close before a jury. McNally *v.* Mulherin, 79 Ga. 614, 4 S. E. 332.

What are questions for the jury see also *supra*, this article *passim*.

Instructions.— The court cannot charge the jury that they are authorized to find that the property in question is exempt, when there is no evidence tending to prove that

be granted.[91] Whether the debtor is entitled to have the question of his right to an exemption submitted to a jury depends upon the jurisdiction[92] or the issues presented.[93] When there is no conflict as to the facts the question is for the court.[94] In an action for a wrongful seizure and sale of exempt property, whether the property seized was in fact exempt is for the jury.[95]

(x) *Judgment and Amount of Recovery.*[96] The court cannot render judgment on facts not pleaded.[97] In trespass for taking exempt property, plaintiff is entitled to recover its value without being subject to a recoupment of the amount of its proceeds which have been applied in satisfaction of the execution.[98] The measure of damages, when no special damages are alleged, for the wrongful taking of exempt property is ordinarily the value of the property at the time of the taking[99] with interest from the date of the taking.[1] A wilful levy upon exempt property will justify exemplary damages.[2] If, however, plaintiff brings his action to recover a penalty provided by statute, he cannot have exemplary damages, but he is confined to the penalty.[3]

fact. Tuttle *v.* Buck, 41 Barb. (N. Y.) 417. In Matthews *v.* Redwine, 25 Miss. 99, a charge that the jury might without positive evidence infer that a horse was a plow horse was held correct in principle. For a fair presentation of the question of waiver see Carpentier *v.* Bresnahan, 74 Mich. 48, 41 N. W. 856. See also Woodbury *v.* Tuttle, 26 Ill. App. 211.

Verdict.— On an issue before the jury as to whether an applicant is entitled to a homestead and exemption, a finding of "homestead" for the applicant means the entire realty and personalty in issue. Brand *v.* Kennedy, 71 Ga. 707.

Finding.— A finding which does not contain sufficient facts to make the aggregate value of the property that a debtor owned a matter of computation and not of conjecture is insufficient. Emerson, etc., Co. *v.* Marshall, 4 Ind. App. 265, 30 N. E. 1099.

91. Hesse *v.* Hargraves, 74 Wis. 648, 43 N. W. 736, under Rev. St. § 3732, which provides that a judgment defendant cannot maintain an action for the recovery of property seized on execution against him, unless the property is exempt.

92. Becket *v.* Whitlock, 83 Ala. 123, 37 So. 545 (holding that under Ala. Code, § 2838, the court cannot direct an issue unless both parties appear, but in discretion can direct an issue to be made up at a subsequent time); Webb *v.* Edward, 46 Ala. 17 (holding that whether the debtor is entitled to the money in the officer's hands, which money has been collected in garnishment proceedings, is a question for the jury); Swope *v.* Ross, 29 Ark. 370 (holding that the impaneling of the jury to determine whether a person is entitled to an exemption is not authorized by statute).

93. Tasker *v.* Sheldon, 115 Pa. St. 107, 7 Atl. 762, holding that where plaintiff in execution alleges on exceptions to the appraisal of property claimed as exempt a fraudulent removal and concealment of the goods, the allegation strikes at the right of exemption itself and can be determined only by a jury.

94. Fischer *v.* McIntyre, 66 Mich. 681, 33 N. W. 762.

95. Haugen *v.* Younggren, 57 Minn. 170, 58 N. W. 988.

96. Damages generally see Damages.
Judgment generally see Judgments.

97. Paddock *v.* Lance, 94 Mo. 283, 6 S. W. 241, holding that an adjudication that plaintiff's title is invalid because of the failure of the officer to give the debtor notice of his right of exemption and election is unauthorized unless this appears by the pleadings. See also McGuire *v.* Galligan, 53 Mich. 453, 19 N. W. 142, holding that where, in replevin for personalty wrongfully sold on execution, plaintiff disavows title as to part of the property and puts the value of the rest above the statutory limit of exemption, the court cannot determine the fact of exemption and the wrongful refusal of the adverse party to allow it.

98. Hill *v.* Loomis, 6 N. H. 263.

To allow this would be practically to defeat the exemption and indirectly do what the law declares shall not be done. Cone *v.* Lewis, 64 Tex. 331, 53 Am. Rep. 767. See *supra*, VI, A, 4.

99. Howard *v.* Rugland, 35 Minn. 388, 29 N. W. 63; Morris *v.* Williford, (Tex. Civ. App. 1902) 70 S. W. 228. See Murphy *v.* Sherman, 25 Minn. 196.

Where the property is returned before suit in as good condition as when taken, the measure of damages is the net profits lost during the detention of the property and the expenses incurred by plaintiff in the procuring and placing of the property to take the place of that which has been lawfully seized. Wilson *v.* Manning, (Tex. Civ. App. 1896) 35 S. W. 1079. See also Elder *v.* Frevert, 18 Nev. 446, 5 Pac. 69, holding that the measure of damages for the wrongful taking and detention of a team and wagon is the value of the use of the team and wagon during the time they are detained.

1. Murphy *v.* Sherman, 25 Minn. 196.

2. Matteson *v.* Monro, 80 Minn. 340, 83 N. W. 153. See Stonestreet *v.* Crandell, (Kan. App. 1900) 62 Pac. 249, where the exemplary damages awarded were not excessive.

3. Johnson *v.* Laroude, 110 Ill. App. 611.

(xi) *Review.*[4] After a cause has reached the appellate court it is too late for the first time either to urge[5] or to attack a claim of exemption.[6] And an exemption cannot be attacked in the appellate court on grounds not presented at the trial.[7] So an objection to the form of the judgment cannot be made for the first time upon appeal for the judgment is amendable in the court which rendered it.[8] The rule that an appellate court will not disturb a finding upon conflicting testimony[9] or for harmless error[10] obtains.

EXEQUATUR. See Ambassadors and Consuls.

EXERCISE.[1] To put in practice.[2] Sometimes the word is used as equivalent in meaning to "usurp."[3]

EXERCISE DISCRETION. To choose between doing and not doing a thing, the doing of which cannot be demanded as an absolute right of the party asking it to be done.[4] (See Discretion.)

EXERCISING A TRADE. Carrying on a business.[5]

EXERCISING THE RIGHT OF SUFFRAGE. Voting.[6] (See, generally, Elections.)

EXERCITOR. In maritime law, the person to whom the daily profits of a ship belong;[7] the person who receives the earnings of a vessel.[8] (See, generally, Shipping.)

4. Review generally see Appeal and Error.

Under N. C. Acts (1883), c. 347, providing that on appeal from an appraisal on homestead and personal property exemptions the jury shall assess the value of the property embraced therein and the court shall appoint three commissioners to set apart the exemptions in accordance with the verdict of the jury, the commissioners appointed to set apart the exemptions must be guided by the valuation of the jury, whose verdict is final. Shoaf *v.* Frost, 116 N. C. 675, 21 S. E. 409.

5. Richardson *v.* Woodring, 74 Iowa 149, 37 N. W. 122.

6. Weil *v.* Nevitt, 18 Colo. 10, 31 Pac. 487; Bassett *v.* Inman, 7 Colo. 270, 3 Pac. 383.

7. Weil *v.* Nevitt, 18 Colo. 10, 31 Pac. 487.

8. O'Brien *v.* Peterman, 34 Ind. 556, where the judgment erroneously directed the sale of property without relief from the valuation law.

9. Joyce *v.* Miller, 59 Iowa 761, 13 N. W. 664; Wolf *v.* Farley, 16 N. Y. Suppl. 168. See also Savage *v.* Davis, 134 Mass. 401; Gray *v.* Putnam, 51 S. C. 97, 28 S. E. 149.

10. Cronfeldt *v.* Arrol, 50 Minn. 327, 52 N. W. 857, 36 Am. St. Rep. 648.

1. **"The word . . . has an established legal meaning."** Cleaver *v.* Com., 34 Pa. St. 283, 284.

"Any exercise of any of the powers conferred on the local board" relative to highways see Burgess *v.* Northwich Local Bd., 6 Q. B. D. 264, 275, 45 J. P. 256, 50 L. J. Q. B. 219, 44 L. T. Rep. N. S. 154, 29 Wkly. Rep. 931.

"Exercise" of one's usual vocation on Sunday see Voglesong *v.* State, 9 Ind. 112, 113.

"Make, use, exercise, and vend" an invention see Minter *v.* Williams, 4 A. & E. 251, 253, 1 Hurl. & W. 585, 15 L. J. K. B. 60, 5 N. & M. 647, 31 E. C. L. 124; Saccharin Corp. *v.* Reitmeyer, [1900] 2 Ch. 659, 663, 69 L. J. Ch. 761, 83 L. T. Rep. N. S. 397.

Not to "exercise" a particular trade in a covenant see Cooke *v.* Colcraft, 2 W. Bl. 856, 3 Wils. C. P. 380, 388.

The "exercise" of a corporate right, privilege, or franchise embraces the prosecution by a corporation of an action for libel. Milwaukee Mut. F. Ins. Co. *v.* Sentinel Co., 81 Wis. 207, 211, 51 N. W. 440, 15 L. R. A. 627.

To "exercise" corporate powers see Middletown Ferry Co. *v.* Middletown, 40 Conn. 65, 70.

"To exercise the law making power" must mean to make rules for the government of men's actions, and to make rules to define what shall be yours and what shall be mine; to make rules what shall be the consequences of doing and not doing particular acts. State *v.* Fry, 4 Mo. 120, 190.

"To exercise the privileges conferred by the charter" refers to the right of the corporation to transact the business for which it was chartered. Branch *v.* Augusta Glass Works, 95 Ga. 573, 576, 23 S. E. 128.

2. Saccharin Corp. *v.* Reitmeyer, [1900] 2 Ch. 659, 663, 69 L. J. Ch. 761, 83 L. T. Rep. N. S. 397.

3. Cleaver *v.* Com., 34 Pa. St. 283, 284.

4. Alden *v.* Hinton, 6 D. C. 217, 223.

5. Grainger *v.* Gough, [1896] A. C. 325, 343.

"Exercising" trade in United Kingdom see Watson *v.* Sandie, [1898] 1 Q. B. 326, 329, 67 L. J. Q. B. 319, 77 L. T. Rep. N. S. 528, 46 Wkly. Rep. 202.

"Exercise" and occupy the craft, mystery, or manual occupation of a woollen-draper see Rex *v.* Kilderby, 1 Saund. 308, 309.

6. U. S. *v.* Souders, 27 Fed. Cas. No. 16,358, 2 Abb. 456.

7. Trayner Leg. Max. [*citing* Justinian Inst. b. 4, tit. 7, § 2].

8. The Phebe, 19 Fed. Cas. No. 11,064. 1 Ware 263, 265, where it is held that when applied to a ship-owner who has, by contract,

EX FACTO JUS ORITUR.[9] A maxim meaning "The law arises out of the fact."[10]

EX FREQUENTI DELICTO AUGETUR PŒNA. A maxim meaning "Punishment increases with increasing crime."[11]

EXHAUST. To empty.[12]

EXHAUSTER. An aspirator, exhaust-fan, suction-fan, known by many names according to construction or purpose.[13] (See, generally, PATENTS.)

EXHIBIT.[14] As a noun, a paper or document produced and exhibited to a court during a trial or hearing, or to a commissioner taking depositions, or to auditors, arbitrators, etc., as a voucher, or in proof of facts, or as otherwise connected with the subject-matter, and which, on being accepted, is marked for identification and annexed to the deposition, report, or other principal document, or filed of record, or otherwise made a part of the case;[15] a paper referred to in and filed with the bill or answer in a suit in equity.[16] As a verb,[17] to present;[18] to present in a public or official manner;[19] to offer or propose in a formal and public manner; to present or show in legal form; to present to a court;[20] to produce a thing publicly, &c.;[21] to produce a thing publicly, so that it may be

divested himself from all control of the ship, yet receives a certain proportion of the freight and earnings of the vessel, it may mean an "employer."

9. **"A maxim of the common law."**— Stephenson *v.* Fraser, 24 N. Brunsw. 482, 494.

10. Broom Leg. Max.

Applied in Stout *v.* Rassel, 2 Yeates (Pa.) 334, 338; Tyson's Estate, 15 Montg. Co. Rep. (Pa.) 82, 84; Stephenson *v.* Fraser, 24 N. Brunsw. 482, 494; Catterall *v.* Hindle, L. R. 2 C. P. 368, 370.

11. Wharton L. Lex. [*citing* 2 Inst. 479].

12. See 15 Cyc. 1043.

A gale to work a coal mine is "exhausted" within the meaning of 1 & 2 Vict. c. 43, § 61, when there is not enough coal left in it to make it worth working. Ellway *v.* Davis, L. R. 16 Eq. 294, 297, 43 L. J. Ch. 75, 21 Wkly. Rep. 806.

"Exhausted by judicial proceedings" see Globe Pub. Co. *v.* State Bank, 41 Nebr. 175, 194, 59 N. W. 683, 27 L. R. A. 854.

13. Knight Mech. Dict. (1884) [*quoted* in Williames *v.* Barnard, 41 Fed. 358, 362, where the term is considered in connection with a patent right].

14. **"The dictionaries give a meaning to the word . . . which sustains the ordinary professional opinion."** Com. *v.* Anspach, 15 Wkly. Notes Cas. (Pa.) 414.

"Exhibit" may include blood-stained garments as evidence of murder (People *v.* Hughson, 154 N. Y. 153, 165, 47 N. E. 1092); a coupon taken from a town bond (Concord *v.* Derby Line Nat. Bank, 51 Vt. 144, 147).

15. Black L. Dict. See also State *v.* Elia, 108 La. 553, 556, 32 So. 476.

16. Brown *v.* Redwyne, 16 Ga. 67, 72 [*citing* 1 Daniell Ch. Pr. 475, 476].

17. **Distinguished from "read"** in Craig *v.* Smith, 100 U. S. 226, 232, 25 L. ed. 577.

"Exhibit" and "examine" corporation books see Brouwer *v.* Cotheal, 10 Barb. (N. Y.) 216, 218 [*affirmed* in 5 N. Y. 562].

"Exhibit the books" as applied to a duty enjoined upon corporations by statute means showing the contents of the books, and not their outside merely. Brouwer *v.* Cotheal, 10 Barb. (N. Y.) 216, 218 [*affirmed* in 5 N. Y. 562].

"Exhibiting a faro bank for gaming" as used in a statute should not be construed to be synonymous with the words "exhibiting faro bank." Kramer *v.* State, 18 Tex. App. 13.

"Exhibiting a claim for classification and presenting it for allowance, are different steps." Pfeiffer *v.* Suss, 73 Mo. 245, 255.

"Exhibiting" in gaming is the act of displaying a bank or game for the purpose of obtaining betters. Wolz *v.* State, 33 Tex. 331, 336; Kain *v.* State, 16 Tex. App. 282, 307; Whitney *v.* State, 10 Tex. App. 377, 379, construing the term as used in the Texas penal code. But in a restricted sense the word conveys the idea of a single, rather than a continuous act. Kain *v.* State, 16 Tex. App. 282, 306, distinguishing the word from "keeping."

18. *In re* Wiltse, 5 Misc. (N. Y.) 105, 112, 24 N. Y. Suppl. 733, as used in a statute regulating the presentation of claims against a decedent's estate. But see Ellison *v.* Lindsley, 33 N. J. Eq. 258, 260.

19. Webster Dict. [*quoted* in Com. *v.* Anspach, 15 Wkly. Notes Cas. (Pa.) 414].

20. Burrill L. Dict. [*quoted* in Com. *v.* Alsop, 1 Brewst. (Pa.) 328, 345, where it is said: "Worcester adopts this definition, and quotes from Clarendon: 'He suffered his attorney-general to exhibit a charge of high treason against the earl'"].

"Present or exhibit" his claim or demand to the court or commissioners see Fitzgerald *v.* Union Sav. Bank, 65 Nebr. 97, 100, 90 N. W. 994.

"The production and proof of a paper before an examiner makes it an exhibit in fact." Commercial Bank *v.* State Bank, 4 Hill (N. Y.) 516, 519 [*citing* Tomlins Dict.].

21. Bouvier L. Dict. [*quoted* in Com. *v.* Alsop, 1 Brewst. (Pa.) 328, 346, where it is said: "In the English Admiralty, after the return of process, the promovent 'is called upon to exhibit his libel': 1 Conkling Ad. Proc. 417"].

taken possession of, or seized; to file of record.[22] As applied to a complaint, or information, in a criminal case, to present the same to a public officer.[23] (Exhibit: Annexation of — To Deposition, see Depositions; To Order to Take Depositions, see Depositions; To Pleading, see Equity; Pleading. As Part of Record on Appeal, see Appeal and Error. Documentary Evidence, see Evidence. Experiments in Evidence, see Evidence; Trial. Incorporation in Case or Statement of Facts, see Appeal and Error. Printing, as Costs, see Costs. Reference to in Bill of Exceptions, see Appeal and Error. Use by Counsel in Arguments, see Criminal Law; Trial.)

EXHIBITANT. A complainant in articles of the peace.[24]

EXHIBITING OF THE BILL. In practice, a phrase which may be synonymous with the words "commencement of the suit."[25]

EXHIBITION. The act of exhibiting or displaying for inspection; a showing or presenting to view;[26] that which is exhibited; a show.[27]

EXIGENT or EXIGI FACIAS. In England, a writ commanding the sheriff to exact, or call on the defendant at five successive county courts (or hustings, if in London): if he fail to appear he is outlawed.[28]

EXIGI FACIAS. See Exigent.

EXILIUM EST PATRIÆ PRIVATIO, NATALIS SOLI MUTATIO, LEGUM NATIVARUM AMISSIO. A maxim meaning "Exile is a privation of country, a change of natal soil, a loss of native laws."[29]

EXIST. To live, to have life or animation.[30]

22. Com. *v.* Anspach, 15 Wkly. Notes Cas. (Pa.) 414 [*quoting* Bouvier L. Dict., and *citing* Dig. 10, 4, 2; Sellon Pr. 74; Stephen Pl. 52 note].

23. Newell *v.* State, 2 Conn. 38, 40.

24. Bouvier L. Dict. See also Rex *v.* Stanhope, 12 A. & E. 619 note, 40 E. C. L. 310.

25. Rees *v.* Morgan, 5 B. & Ad. 1035, 1039, 3 L. J. K. B. 102, 3 N. & M. 205, 27 E. C. L. 434.

26. Century Dict.

"Exhibition" of an indictment within the statutory period does not require an exhibition to the defendant personally, but only means a public presentation in court by the grand jury. Com. *v.* Anspach, 15 Wkly. Notes Cas. (Pa.) 414. But *compare* Com. *v.* Alsop, 1 Brewst. (Pa.) 328, 344.

"Legal exhibition of a claim against an estate" see Pfeiffer *v.* Suss, 73 Mo. 245, 254.

27. Century Dict. See also People *v.* Royal, 23 N. Y. App. Div. 258, 260, 48 N. Y. Suppl. 742.

"Exhibitions for gain" see Webber *v.* Chicago, 148 Ill. 313, 319, 36 N. E. 70.

"Exhibitions of minstrelsy" see Society for Reformation, etc. *v.* Neusbach, 16 N. Y. Wkly. Dig. 349.

"Exhibition" does not include a school for the teaching of dancing (Com. *v.* Gee, 6 Cush. (Mass.) 174, 179); or piano playing in a liquor saloon (People *v.* Campbell, 51 N. Y. App. Div. 565, 566, 65 N. Y. Suppl. 114).

See, generally, Agriculture; Theaters and Shows.

28. Cochran L. Lex.

29. Wharton L. Lex.

30. Merritt *v.* Grover, 57 Iowa 493, 495, 10 N. W. 879.

In connection with other words the term "existing" has often received judicial interpretation; for example as used in the following phrases: "An existing company" (see Richmond Waterworks Co. *v.* Richmond, 3 Ch. D. 82, 97, 34 L. T. Rep. N. S. 480, 45 L. J. Ch. 441); "existing appraisal" (see Winnipiseogee Lake Cotton, etc., Mfg. Co. *v.* Laconia, 68 N. H. 284, 288, 35 Atl. 252); "existing contract" (see Whitaker *v.* Rice, 9 Minn. 13, 18, 86 Am. Dec. 78); "existing creditor" (see Goll, etc., Co. *v.* Miller, 87 Iowa 426, 431, 54 N. W. 443; McAfee *v.* Busby, 69 Iowa 328, 331, 28 N. W. 623; Fox *v.* Edwards, 38 Iowa 215, 216); "existing debt" (see Severs *v.* Dodson, 53 N. J. Eq. 633, 637, 34 Atl. 7, 51 Am. St. Rep. 641; Wing *v.* Slater, 19 R. I. 597, 601, 35 Atl. 302, 33 L. R. A. 566); "existing estates" (see State *v.* Diveling, 66 Mo. 375, 379); "existing lien" (see St. Louis, etc., R. Co. *v.* Kerr, 153 Ill. 182, 194, 38 N. E. 638); "existing law" (see McKean *v.* Archer, 52 Fed. 791, 793; Curtis *v.* Wortsman, 26 Fed. 36, 37); "existing law of the state" (see 1 Cyc. 616 note 95); "existing laws" (see Lawrie *v.* State, 5 Ind. 525, 526. See also Millen *v.* Guerrard, 67 Ga. 284, 291, 44 Am. Rep. 720; Jonesboro *v.* Cairo, etc., R. Co., 110 U. S. 192, 198, 4 S. Ct. 67, 28 L. ed. 116); "existing railroad corporations" (see Indianapolis, etc., R. Co. *v.* Blackman, 63 Ill. 117, 118); "existing right" (see Godwin *v.* Banks, 87 Md. 425, 440, 40 Atl. 268 [*citing* Jackson *v.* Waldron, 13 Wend. (N. Y.) 221, 222]); "existing rights of others" (see Silver Bow Min., etc., Co. *v.* Clark, 5 Mont. 378, 417, 5 Pac. 570 [*citing* Steel *v.* St. Louis Smelting, etc., Co., 106 U. S. 447, 1 S. Ct. 389, 27 L. ed. 226); "existing settlement" (see Fitchburg *v.* Ashby, 132 Mass. 495, 496, dissenting opinion [*cited* in Worcester *v.* Great Barrington, 140 Mass. 243, 244, 5 N. E. 491]); "existing sewers" (see Falconar *v.* South Shields,

EXISTENCE. That which exists; that which actually is an individual thing; an actuality.[31]

EXITS. A term which may mean doors, or gates, or passages, or a mere right of way.[32] (See ENTRY.)

EXITUS ACTA PROBAT; FINIS, NON PUGNA, CORONAT. A maxim meaning "The conclusion or result proves or justifies the acts; the termination, not the trial, crowns the victory."[33]

EX JUDICORUM PUBLICORUM ADMISSIS, NON ALIAS TRANEUNT ADVERSUS HAEREDES POENAE BONORUM ADEMPTIONIS QUAM SI LIS CONTESTAT ET CONDEMNATIO FUERIT SECUTA; EXCEPTO MAJESTATIS JUDICIO. A maxim meaning "On account of admissions made at public trials, the punishment of confiscation of goods or property does not otherwise pass against heirs than if a contested suit and condemnation followed; excepting in the case of high treason."[34]

EX JUSTIS NUPTIIS PROCREATUS. Born of or in lawful marriage.[35]

EX MALEFICIO NON ORITUR CONTRACTUS. A maxim meaning "A contract cannot arise out of an act radically vicious and illegal."[36]

EX MALIS MORIBUS BONÆ LEGES NATÆ SUNT. A maxim meaning "Good laws arise from evil manners."[37]

EX MALITIA. In its legal signification, a term which imports a publication that is false and without legal excuse.[38] (See, generally, LIBEL AND SLANDER.)

EX MULTITUDINE SIGNORUM, COLLIGITUR IDENTITAS VERA. A maxim meaning "From the great number of signs true identity is ascertained."[39]

EX NIHILO NIHIL FIT. A maxim meaning "From nothing nothing comes."[40]

EX NUDÂ SUBMISSIONE NON ORITUR ACTIO. A maxim meaning "From a bare or naked submission [i. e. to arbitration] no action can arise."[41]

EX NUDO PACTO NON ORITUR ACTIO.[42] A maxim meaning "No cause of action arises from a bare promise."[43]

11 T. L. R. 223); "existing street" (see London County Council *v.* Mitchell, 63 L. J. M. C. 104, 107, 10 Reports 308); "existing suit" (see Blake *v.* Done, 7 H. & N. 465, 472, 7 Jur. N. S. 1306, 31 L. J. Exch. 100, 5 L. T. Rep. N. S. 429, 10 Wkly. Rep. 175).

31. Century Dict.

32. Roberts *v.* Trujillo, 3 N. M. 50, 51, 1 Pac. 855.

33. Adams Gloss.

34. Adams Gloss. [*citing* Halkerston Max. 44].

35. Adams Gloss. [*citing* Broom Leg. Max. 496; Coke Litt. 7*b*]. See also Doe *v.* Vardill, 5 B. & C. 438, 453, 11 E. C. L. 531.

36. Broom Leg. Max.

Applied in Collier *v.* Miller, 62 Hun (N. Y.) 99, 109, 16 N. Y. Suppl. 633; Harris *v.* Harris, 23 Gratt. (Va.) 737, 767; Reg. *v.* McCleverty, L. R. 3 P. C. 673, 687; Petrie *v.* Hannay, 3 T. R. 418, 421; Shove *v.* Webb, 1 T. R. 732, 734. See also Woytas *v.* Hibbs, 10 Kulp (Pa.) 269, 270.

37. Wharton L. Lex. [*citing* 2 Inst.].

Applied in Townsend *v.* Hughes, 2 Mod. 150, 161; Townsend *v.* Hughes, 1 Mod. 232, 233.

38. Dixon *v.* Allen, 69 Cal. 527, 529, 11 Pac. 179 [*citing* Townshend Lib. & Sl. 88].

39. Bouvier L. Dict. [*citing* Bacon Max. Reg. 25; Broom Leg. Max. 638].

40. Bouvier L. Dict.

Applied in the following cases:

Maine.—Bailey *v.* Myrick, 50 Me. 171, 187.

Maryland.—*In re* Bank, 87 Md. 425, 441, 40 Atl. 268.

New York.—Watervliet *v.* Colonie, 27 N. Y. App. Div. 394, 396, 50 N. Y. Suppl. 487; Harlem Gas Light Co. *v.* New York, 3 Rob. 100, 127; Root *v.* Stuyvesant, 18 Wend. 257, 301; Jackson *v.* Waldron, 13 Wend. 178, 221.

Pennsylvania.—Taggart *v.* Fox, 1 Grant 190, 192.

Vermont.—Peabody *v.* Landon, 61 Vt. 318, 328, 17 Atl. 781, 15 Am. St. Rep. 903.

41. Adams Gloss. [*citing* Broom Leg. Max.].

42. "The maxim of the civil law."—Van der Volgen *v.* Yates, 9 N. Y. 219, 222.

43. Broom Leg. Max.

Applied in the following cases:

Connecticut.—Cook *v.* Bradley, 7 Conn. 54, 62, 18 Am. Dec. 79.

Missouri.—Anderson *v.* Stapel, 80 Mo. App. 115, 122.

New York.—Van der Volgen *v.* Yates, 9 N. Y. 219, 222; Farrington *v.* Bullard, 40 Barb. 512, 515.

Pennsylvania.—Thum's Estate, 5 Pa. Dist. 739, 742.

England.—Pillans *v.* Van Mierop, 3 Burr. 1663, 1670; Balfe *v.* West, 13 C. B. 466, 472, 22 L. J. C. P. 175, 1 Wkly. Rep. 335, 22 Eng. L. & Eq. 506, 76 E. C. L. 466; Liversidge *v.* Broadbent, 4 H. & N. 603, 610, 28 L. J. Exch. 332, 7 Wkly. Rep. 615; Sharington *v.* Strotton, 1 Plowd. 298, 305; Carnatic *v.* East India Co., 1 Ves. Jr. 371, 389, 30 Eng. Reprint 391.

EX-OFFICER. An officer who has been in office, but has gone out.[44] (See, generally, Officers.)

EX OFFICIO. From office; by virtue of the office; without any other warrant or appointment than that resulting from the holding of a particular office.[45] (Ex Officio: Powers and Duties, see Officers.)

EXONERATION. The state of being disburdened or freed from a charge. It is something that is supposed to take place after a charge has been made.[46] In Scotch law, a discharge, or a deed by which a person is disburdened.[47] (Exoneration: Of Bail, see Bail. Of Guarantor, see Guaranty. Of Indemnitor, see Indemnity. Of Property or Legacies From Payment of Debts, see Executors and Administrators. Of Surety, see Principal and Surety.)

EXONERETUR. See Bail.

EX P. An abbreviation for Ex Parte,[48] *q. v.*

EX PACTO ILLICITO NON ORITUR ACTIO. A maxim meaning "From an illicit contract no action arises."[49]

EX PARTE. On behalf of.[50]

EX PARTE MATERNA or **EX PARTE PATERNA.**[51] Terms used to denote the line, or blood of the mother or father.[52] (See, generally, Descent and Distribution; Wills.)

EX PARTE PROCEEDING. A proceeding at the instance and for the benefit of one party only and without notice to or contestation by any person adversely interested.[53] (Ex Parte Proceeding: In General, see Motions. Appealability of Orders in, see Appeal and Error. Dismissal or Nonsuit, see Dismissal and Nonsuit. Habeas Corpus, see Habeas Corpus. In Admiralty, see Admiralty. In Bankruptcy, see Bankruptcy. In Insolvency, see Insolvency.)

EXPATRIATION. See Citizens.

EX PAUCIS PLURIMA CONCIPIT INGENIUM. A maxim meaning "From a few words or hints the understanding conceives many things."[54]

EXPECT.[55] This term has been defined as meaning: to look for (mentally);

Canada.— Heckman *v.* Zwicker, 1 Nova Scotia 200, 203.

44. Cordiell *v.* Frizell, 1 Nev. 130, 132.

45. Black L. Dict. See also Brace *v.* Solner, 1 Alaska 361, 379; State *v.* Walker, 97 Mo. 162, 163, 10 S. W. 473; Territory *v.* Ritter, 1 Wyo. 318, 331.

46. Louisville, etc., R. Co. *v.* Com., 114 Ky. 787, 806, 71 S. W. 910, 24 Ky. L. Rep. 1593, 1779. See also Bannon *v.* Burnes, 39 Fed. 892, 898, where it is said: "The term 'exonerated' was, presumably, employed in its ordinary acceptation: 'to be relieved of as a charge; to be discharged or exempted.'"

"In exoneration" of real estate see *In re* Rossiter, 13 Ch. D. 355, 356, 49 L. J. Ch. 36, 42 L. T. Rep. N. S. 353, 28 Wkly. Rep. 238.

"In exoneration of my other real estate" see *In re* Newmarch, 9 Ch. D. 12, 18, 48 L. J. Ch. 28, 39 L. T. Rep. N. S. 146, 27 Wkly. Rep. 104.

47. Burrill L. Dict. [*citing* Bell Dict.].

In connection with other words this term has often received judicial interpretation; for example in the following phrases: "Corporate existence" (see Hurt *v.* Salisbury, 55 Mo. 310, 314); "existence and location" of a cattle chute (see Dorsey *v.* Phillips, etc., Constr. Co., 42 Wis. 583, 602); "existence by actual birth" (see Wallace *v.* State, 10 Tex. App. 255, 270); "the existence of such theory" (see Silver Min. Co. *v.* Fall, 6 Nev. 116, 121).

48. Anderson L. Dict.

49. Bouvier L. Dict. [*citing* Broom Leg. Max. 742].

Applied in De Witt Wire-Cloth Co. *v.* New Jersey Wire-Cloth Co., 16 Daly (N. Y.) 529, 533, 14 N. Y. Suppl. 277; McCortle *v.* Bates, 29 Ohio St. 419, 422, 23 Am. Rep. 758; Stewart *v.* Gibson, 7 Cl. & F. 707, 729, 7 Eng. Reprint 1237.

50. Anderson L. Dict.

51. **The phrases "ex parte materna" and "ex parte paterna"** have a well-known signification in the law. They are found constantly used in the books. Banta *v.* Demarest, 24 N. J. L. 431, 433.

52. And they "have no such restricted or limited sense, as from the mother or father, exclusively." Banta *v.* Demarest, 24 N. J. L. 431, 433 [*citing* Den *v.* Jones, 8 N. J. L. 340, 348; Jackson *v.* Lyon, 9 Cow. (N. Y.) 664; 2 Blackstone Comm. 224 note 25, 225 note 26, etc.]. See also Perot's Appeal, 102 Pa. St. 235, 242.

53. Black L. Dict.

As applied to the examination of witnesses, the term implies an examination in the presence of one of the parties and in the absence of the other. Lincoln *v.* Cook, 3 Ill. 61, 62.

54. Black L. Dict.

55. **"Expected to arrive"** see Abe Stein Co. *v.* Robertson, 167 N. Y. 101, 107, 60 N. E. 329; Corkling *v.* Massey, L. R. 8 C. P. 395, 399, 1 Aspin. 18, 42 L. J. C. P. 153, 28 L. T. Rep. N. S. 636, 21 Wkly. Rep. 680; Smith *v.*

to look forward to, as to something that is believed to be about to happen or come.[56]

EXPECTANCY.[57] The condition of being referred to a future time, or of dependence upon an expected event; contingency as to possession or enjoyment;[58] a mere hope unfounded in any limitation, provision, trust, or legal act whatever;[59] a bare hope of succession to the property of another such as may be entertained by an heir apparent.[60] (Expectancy: Assignability, see Assignments. Curtesy in Estates in, see Curtesy. Estates in, see Estates. Mortgage, see Chattel Mortgages; Mortgages. Of Life, see Damages; Death; Life Insurance. Release of, see Descent and Distribution.)

EXPECTANT HEIR. An heir expecting an inheritance from intestacy or devise.[61]

EXPECTANT RIGHT. A right which depends on the continued existence of the present condition of things until the happening of some future event.[62]

EXPEDITION. A march or voyage with martial,[63] or hostile intentions.[64] (See Enterprise; and, generally, War.)

EXPEDIT REIPUBLICÆ NE QUIS RE SUA MALE UTATUR. A maxim meaning "It concerns the public good that no one should misuse his own property."[65]

EXPEDIT REIPUBLICÆ UT SIT FINIS LITIUM. A maxim meaning "It is to the advantage of the state that there should be an end of litigation."[66]

Myers, L. R. 7 Q. B. 139, 141, 41 L. J. Q. B. 91, 26 L. T. Rep. N. S. 103, 20 Wkly. Rep. 186; Bold *v.* Rayner, 2 Gale 44, 5 L. J. Exch. 172, 173, 1 M. & W. 343, 1 Tyrw. & G. 820.

"Expects" to make a party to an action as used in reference to the taking of a deposition see Matter of Darling, 31 Misc. (N. Y.) 543, 545, 64 N. Y. Suppl. 793.

"Expects" a boat to be completed in connection with an offer of employment see Johnson *v.* McCune, 27 Mo. 171, 174.

56. Atchison, etc., R. Co. *v.* Hamlin, 67 Kan. 476, 484, 73 Pac. 58.

57. "Expectancy of a renewal" see Crittenden, etc., Co. *v.* Cowles, 66 N. Y. App. Div. 95, 96, 72 N. Y. Suppl. 701.

58. Black L. Dict. [*quoted* in Ayers *v.* Chicago Title, etc., Co., 187 Ill. 42, 58, 58 N. E. 318].

59. 2 Fearne Rem. 22 [*quoted* in Jeffers *v.* Lampson, 10 Ohio St. 102, 106].

60. De Hass *v.* Bunn, 2 Pa. St. 335, 338, 44 Am. Dec. 201 [*quoted* in Robbin's Estate, 199 Pa. St. 500, 501, 49 Atl. 223, where the term is distinguished from "contingent interest"].

61. Whelan *v.* Phillips, 151 Pa. St. 312, 322, 25 Atl. 44.

This phrase is sometimes used not in its literal meaning, but as including every one who has either a vested remainder or a contingent remainder in a family property, including a remainder in a portion, as well as a remainder in an estate, and every one who has the hope of succession to the property of an ancestor, either by reason of his being the heir apparent or presumptive, or by reason merely of the expectation of a devise or bequest on account of the supposed or presumed affection of his ancestor or relative. Wells *v.* Houston, 23 Tex. Civ. App. 629, 655, 57 S. W. 584; Beynon *v.* Cook, L. R. 10 Ch. 389, 391 note; 32 L. T. Rep. N. S. 353, 23 Wkly. Rep. 531. See also Aylesford *v.* Morris, L. R. 8 Ch. 484, 497, 42 L. J. Ch. 546, 28 L. T. Rep. N. S. 541, 21 Wkly. Rep. 424.

62. Cooley Const. L. 332 [*quoted* in People *v.* Adirondack R. Co., 39 N. Y. App. Div. 34, 56, 56 N. Y. Suppl. 869; Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 673, 16 S. Ct. 705, 40 L. ed. 838, where the term is distinguished from "contingent rights" and "vested rights"].

63. U. S. *v.* Ybanez, 53 Fed. 536, 538; Johnson Dict. [*quoted* in U. S. *v.* Burr, 25 Fed. Cas. No. 14,694].

64. U. S. *v.* Ybanez, 53 Fed. 536, 538.

In this sense, it does not mean the body which marches, but the march itself. The term is, however, sometimes employed to designate the armament itself, as well as the movement of that armament. U. S. *v.* Burr, 25 Fed. Cas. No. 14,694.

The term is not to be confined to that movement of the troops which immediately precedes the actual conflict and shock of battle. Leathers *v.* Greenacre, 53 Me. 561, 573.

65. Trayner Leg. Max.

Applied in Belcher *v.* Farrar, 8 Allen (Mass.) 325, 329.

66. Bouvier L. Dict. [*citing* Coke Litt. 303*b*].

Applied in the following cases:

Maine.—Walker *v.* Chase, 53 Me. 258, 260; Sturtevant *v.* Randall, 53 Me. 149, 153.

Massachusetts.—French *v.* Neal, 24 Pick. 55, 61; Eastman *v.* Cooper, 15 Pick. 276, 286, 26 Am. Dec. 600.

New York.—Calkins *v.* Calkins, 3 Barb. 305, 310; Tomlinson *v.* Miller, Sheld. 197, 207; French *v.* Shotwell, 5 Johns. Ch. 555, 568.

Pennsylvania.—Marsh *v.* Pier, 4 Rawle 273, 288, 26 Am. Dec. 131; Wells' Estate, 7 Pa. Co. Ct. 354, 361; Crossen *v.* McAllister, 2 Pa. L. J. 199, 201.

United States.—Lawrence *v.* Vernon, 15 Fed. Cas. No. 8,146, 3 Sumn. 20.

EXPEL.[67] To drive or force out, or reject.[68] As applied to membership in an association, to exclude or dismiss.[69]

EXPEND.[70] To dispose of.[71]

EXPENDITURE. The spending of money;[72] the act of expending, a laying out, as of money; disbursement, money expended, EXPENSE,[73] *q. v.*; payment.[74] (Expenditure: In General, see COSTS. By Agent, see PRINCIPAL AND AGENT. By Assignee — In Behalf of Assigned Estate, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; Of Bankrupt's Estate, see BANKRUPTCY; Of Insolvents' Estate, see INSOLVENCY. By Auctioneer, see AUCTIONS AND AUCTIONEERS. By Executor or Administrator, see EXECUTORS AND ADMINISTRATORS. By Guardian, see GUARDIAN AND WARD. By Trustee, see TRUSTS. Lien of Attorney For, see ATTORNEY AND CLIENT. Right as to Expenditures Affected by Lapse of Time, see EQUITY. See also DISBURSEMENTS.)

EXPENSE.[75] That which is spent; money expended; COST,[76] *q. v.*; EXPENDITURE,[77] *q. v.*; money actually paid out;[78] outlay;[79] the disbursement of money,[80] the payment of a price;[81] but it is as well the employment and consumption of time and labor.[82] In common speech and in contracts, the term signifies not only the cost of contemplated services, materials, etc., but also the charges for such as have been performed or furnished.[83] As connected with litigation, the term may have, at least, two meanings — the one including the ordinary costs or taxable expenses, and the other the extraordinary costs also, such as agents' and attorneys' fees, etc.[84] As used in an act appropriating money for

67. **"Ejected," "expelled," "put out," and "removed"** relating to trespass see Perry *v.* Fitzhowe, 8 Q. B. 757, 779, 10 Jur. 799, 15 L. J. Q. B. 239, 55 E. C. L. 757.

68. Smith *v.* Leo, 92 Hun (N. Y.) 242, 243, 36 N. Y. Suppl. 949.

69. Macauley *v.* Tierney, 19 R. I. 255, 263, 33 Atl. 1, 61 Am. St. Rep. 770, 37 L. R. A. 455.

70. **"Expended necessarily"** means actually paid. See Reg. *v.* Marsham, [1892] 1 Q. B. 371, 379, 56 J. P. 164, 61 L. J. M. C. 52, 65 L. T. Rep. N. S. 778, 40 Wkly. Rep. 84.

"Moneys expended" in the execution of a contract see Littlefield *v.* Winslow, 19 Me. 394, 397.

71. Norman *v.* Central Kentucky Lunatic Asylum, 92 Ky. 10, 16, 17 S. W. 150, 13 Ky. L. Rep. 310.

72. Ainsworth *v.* Dean, 21 N. H. 400, 407.

73. Webster Dict. [*quoted* in Ainsworth *v.* Dean, 21 N. H. 400, 408].

74. People *v.* Kane, 43 N. Y. App. Div. 472, 482, 61 N. Y. Suppl. 195.

"What is contemplated is expenditure. What do you 'expend'? You 'expend' that which you have. A man cannot spend what he has not got — he can mortgage or pledge, but he cannot actually spend." *In re* Bristol, [1893] 3 Ch. 161, 166, 62 L. J. Ch. 901, 3 Reports 689.

As used in a statute, the word is entirely equivocal and may, in its natural sense, signify as well the application of money to purposes for which towns have not authority to raise money, as to purposes for which they have such authority. Adams *v.* Mack, 3 N. H. 493, 501 [*cited* in Ainsworth *v.* Dean, 21 N. H. 400, 407]. As used in a statute providing that the state may resume the right and privilege of the corporation in a railroad, paying to the corporation all it may not have received of its expenditures, the term does not mean cost of construction, but what had been expended by the stockholders. State *v.* Manchester, etc., R. Co., 70 N. H. 421, 432, 48 Atl. 1103.

75. **Distinguished from "value"** in Voelz *v.* Breitenfield, 68 Wis. 491, 496, 32 N. W. 757.

"'Expenses' is never used to signify expenses during the life of the testator; they would be debts." *In re* Haines, 8 N. J. Eq. 506, 510.

76. People *v.* Saratoga County, 45 N. Y. App. Div. 42, 50, 60 N. Y. Suppl. 1122.

77. Bowery Bank *v.* Hart, 37 Misc. (N. Y.) 412, 413, 75 N. Y. Suppl. 781 [*citing* Century Dict.]; Williams *v.* U. S., 12 Ct. Cl. 192, 199.

Commission paid to brokers when not included within definition of "expenses" see Texas Land, etc., Co. *v.* Holtham, 63 L. J. Q. B. 496, 1 Manson 429, 10 Reports 398.

78. Mombert *v.* Bannock County, (Ida. 1904) 75 Pac. 239, 243.

79. Bowery Bank *v.* Hart, 37 Misc. (N. Y.) 412, 413, 75 N. Y. Suppl. 781 [*citing* Century Dict.]; Williams *v.* U. S., 12 Ct. Cl. 192, 199.

80. Bowery Bank *v.* Hart, 37 Misc. (N. Y.) 412, 413, 75 N. Y. Suppl. 781 [*citing* Century Dict.]; Matthews, etc., Mfg. Co. *v.* Trenton Lamp Co., 73 Fed. 212, 215; Williams *v.* U. S., 12 Ct. Cl. 192, 199.

81. Williams *v.* U. S., 12 Ct. Cl. 192, 199.

82. Matthews, etc., Mfg. Co. *v.* Trenton Lamp Co., 73 Fed. 212, 215.

83. Sullivan *v.* Triunfo Gold, etc., Min. Co., 39 Cal. 459, 466.

84. Kohn *v.* Zimmerman, 34 Iowa 544, 545 [*quoted* in Bowery Bank *v.* Hart, 37 Misc. (N. Y.) 412, 413, 75 N. Y. Suppl. 781].

"'Expenses' . . . is a word frequently used in the Scotch Courts where the English

salaries and expenses of the national board of health, the term has been construed to mean those expenses which are necessarily incident to the work directed to be done, including payment for clerk hire or office rent.[85] (Expense:

Courts would use the word 'costs.'" Reg. *v.* Vantassel, 5 Can. Cr. Cas. 128, 132.

85. Dunwoody *v.* U. S., 22 Ct. Cl. 269, 280.

In connection with other words this term "expense" or "expenses" has often received judicial interpretation, for example as used in the following phrases: "All expenses for the sale and keep" (see Ferguson *v.* Hogan, 25 Minn. 135, 140); "all expenses incident to such sale" (see Johnson *v.* Glenn, 80 Md. 369, 370, 30 Atl. 993); "all expenses of the company" (see Kane *v.* Schuylkill F. Ins. Co., 199 Pa. St. 205, 208, 48 Atl. 989); "all just and reasonable expenses" (see Brady *v.* Dilley, 27 Md. 570, 582); "all reasonable expenses incurred" (see Hall *v.* Vermont, etc., R. Co., 28 Vt. 401, 407); "all the expenses, if any, in this case" (see Kohn *v.* Zimmerman, 34 Iowa 544, 545); "all the expenses" of locating a new road (see Damon *v.* Reading, 2 Gray (Mass.) 274, 276); "and all other expenses" (see Reg. *v.* Heath, 6 B. & S. 578, 587, 12 L. T. Rep. N. S. 492, 13 Wkly. Rep. 805, 118 E. C. L. 578); "at the expense of the Territory" (see Fisk *v.* Cuthbert, 2 Mont. 593, 603); "costs and expenses" (see Swartzel *v.* Rogers, 3 Kan. 380, 382; Brigham *v.* Worcester County, 147 Mass. 446, 447, 18 N. E. 220; Reg. *v.* St. Mary, 59 L. J. Q. B. 462, 464); "costs, charges and expenses" (see *In re* Smith, 60 L. J. Ch. 613, 616); "of estimated expenses" and "the actual expenses" (see West Ham *v.* Grant, 58 L. J. Ch. 121, 123); "every expense the vessel may incur" (see Sully *v.* Duranty, 3 H. & C. 270, 283, 33 L. J. Exch. 319); "expenses and charges" (see Greer *v.* Greer, 5 Redf. Surr. (N. Y.) 214, 215); "expenses and costs" (see Butchers' Union Slaughterhouse, etc., Landing Co. *v.* Crescent City Live Stock Landing, etc., Co., 41 La. Ann. 355, 363, 6 So. 508); "expense, and free of lighterage to the ship," etc. (see Carr *v.* Austin, etc., R. Co., 14 Fed. 419, 420, 4 Woods 327); "expenses" as used in a contract for the purchase of goods construed in connection with the payment of a fine for undervaluation or for an additional duty and import duties (see Seggermann *v.* Valentine, 61 N. Y. Super. Ct. 248, 250, 19 N. Y. Suppl. 711); "expenses attendant upon or connected with any such alteration" of a street (see Bayley *v.* Wilkinson, 16 C. B. N. S. 161, 193, 10 Jur. N. S. 726, 33 L. J. M. C. 161, 10 L. T. Rep. N. S. 543, 12 Wkly. Rep. 797, 111 E. C. L. 161); "expenses for clerk hire and advertising" (see Foster *v.* Goddard, 9 Fed. Cas. No. 4,970, 1 Cliff. 158, 176); "expenses incident to said estates" (see Stephens *v.* Milnor, 24 N. J. Eq. 358, 373); "expenses incurred" (see Reg. *v.* Kingston Upon Hull, 2 E. & B. 182, 188, 17 Jur. 914, 22 L. J. Q. B. 324, 75 E. C. L. 182); "expenses when used in relation to a [blind] child" (see 56 & 57 Vict. c. 42, § 15); "'expenses,' in relation to the detention of a person in a certified inebriate reformatory" (see 61 & 62 Vict. c. 60, § 27); "expenses" in preparing and printing the burgess list (see Jones *v.* Carmarthen, 10 L. J. Exch. 401, 8 M. & W. 605, 616); "'expenses' in the power of attorney" (see Walker *v.* Denison, 86 Ill. 142, 145); "expenses necessarily incurred" (see Ball *v.* Vason, 56 Ga. 264, 267; People *v.* Saratoga County, 45 N. Y. App. Div. 42, 50, 60 N. Y. Suppl. 1122; Reg. *v.* Gloucester, 5 Q. B. 862, 871, Dav. & M. 677, 8 Jur. 573, 13 L. J. Q. B. 233, 48 E. C. L. 862); "expense necessary to maintain the land in a state to command the rent" (see Reg. *v.* Gainsborough Union, L. R. 7 Q. B. 64, 67, 41 L. J. M. C. 1, 25 L. T. Rep. N. S. 589, 20 Wkly. Rep. 250); "expenses of administration" (see Rose's Estate, 80 Cal. 166, 178, 22 Pac. 86; Gurnee *v.* Maloney, 38 Cal. 85, 87, 99 Am. Dec. 352; Lester *v.* Mathews, 56 Ga. 655, 656); "expenses" of assessment for the cost and expenses of paving done in a city (see Dashiell *v.* Baltimore, 45 Md. 615, 631); "expenses of borrowing, management, &c." (see Glasgow Corp. *v.* Glasgow Tramway, etc., Co., [1898] A. C. 631, 640); "expense of building" (see Voelz *v.* Breitenfield, 68 Wis. 491, 496, 32 N. W. 757); "expenses of courts" (Adam *v.* Wright, 84 Ga. 720, 724, 11 S. E. 893; Adair *v.* Ellis, 83 Ga. 464, 466, 10 S. E. 117. See Houston County *v.* Kersh, 82 Ga. 252, 254, 10 S. E. 199); "expenses of cutting and marketing" (see Stocker *v.* Hutter, 134 Pa. St. 19, 28, 19 Atl. 427, 566); "expenses of leaving her berth" (see Westoll *v.* Carter, 14 T. L. R. 281, 282); "expense of lighting any street" (see Nelson *v.* La Porte, 33 Ind. 258, 261); "expenses of management" (see Clarke *v.* Thornton, 35 Ch. D. 307, 311, 56 L. J. Ch. 302, 56 L. T. Rep. N. S. 294, 35 Wkly. Rep. 603); "expenses of maintaining a minister" (see Atty.-Gen. *v.* Worcester Union Soc., 116 Mass. 167, 168); "expense of obtaining" a patent (see Chemical Electric Light, etc., Co. *v.* Howard, 148 Mass. 352, 361, 20 N. E. 92, 2 L. R. A. 168); "expenses or costs of improvements" (see Vorrath *v.* Hoboken, 49 N. J. L. 285, 288, 8 Atl. 125); "expenses of or incident to making any apportionment" (see Hinchcliffe *v.* Armitstead, 6 Jur. 693, 11 L. J. Exch. 253, 256, 9 M. & W. 155); "expenses" of removing a wreck (see Barraclough *v.* Brown, [1897] A. C. 615, 620, 66 L. J. Q. B. 672, 76 L. T. Rep. N. S. 797; Smith *v.* Wilson, [1896] A. C. 579, 584, 8 Aspin. 197, 65 L. J. P. C. 66, 75 L. T. Rep. N. S. 81; Arrow Shipping Co. *v.* Tyne Imp. Com'rs, [1894] A. C. 508, 524, 7 Aspin. 513, 63 L. J. Adm. 146, 71 L. T. Rep. N. S. 346, 6 Reports 258); "expenses of resisting the bill of [a municipal] corporation" (see Leith *v.* Leith Harbour, etc., Com'rs, [1899] A. C. 508, 517, 68 L. J. P. C. 109, 81 L. T. Rep. N. S. 98); "expenses of sale" (see Thomas *v.* Jones, 84 Ala. 302, 304, 4 So. 270); "expenses be duly paid and satisfied, by my executors" (see *In*

As Element of Damage, see Damages; Death; Eminent Domain. Of Burial, see Dead Bodies; Executors and Administrators. Of Carrying Out Contract, see Contracts. Of Coroner's Inquest, see Coroners. Of Litigation as Ground For Compensatory Damages, see Damages. Of Prosecuting Attorney, see Prosecuting Attorneys. Of Sale of Attached Property, see Attachment. On Divorce, see Divorce. Reimbursement of Attorney For, see Attorney and Client. See Charges; and, generally, Costs.)

EXPENSE BILL. A form of a receipt given by a railroad station agent for all freight charges collected by him.[86]

EXPENSES OF WRITING THE RISK. As applied to an insurance policy, the expense of writing the policy, together with the commission paid by the company to its agent.[87]

EXPENSIVE. In its popular sense, that which would involve or require expense.[88]

EXPERIENTIA PER VARIOS ACTUS LEGEM FACIT. A maxim meaning "Experience by various acts makes laws."[89]

EXPERIMENT. In general, a trial; a test.[90] In chemistry, the bringing together of two organic substances and the noting of the result.[91] (Experiment: As Evidence — In Civil Action, see Evidence; In Criminal Prosecution, see Criminal Law. At Trial, see Trial. In Court, see Evidence. In Examination of Expert Witness, see Criminal Law. In Suit For Infringement, see Patents. Right of Jury to Make, see Criminal Law.)

EXPERT.[92] In a general sense, a person of peculiar knowledge or skill;[93] one

re Haines, 8 N. J. Eq. 506, 509); "expenses to the assisting attorneys" (see Whitlow *v.* Whitlow, 109 Ky. 573, 578, 60 S. W. 182, 22 Ky. L. Rep. 1179); "free from all expen[c]e" (see Gosden *v.* Dotterill, 1 Myl. & K. 56, 60, 39 Eng. Reprint 602); "funeral expenses" (see Shubart's Estate, 154 Pa. St. 230, 237, 26 Atl. 202); "necessary expenses" (see Heublein *v.* New Haven, 75 Conn. 545, 546, 54 Atl. 298; Lee *v.* Dean, 3 Whart. (Pa.) 316, 329); "over and above all expenses and interest" in connection with a mortgage (see Montgomery *v.* Montgomery, 58 Mich. 441, 443, 25 N. W. 390); "such expenses as aforesaid" incident to the stopping or diverting a highway (see United Land Co. *v.* Tottenham Local Bd. of Health, 13 Q. B. D. 640, 53 L. J. M. C. 136, 140, 32 Wkly. Rep. 798); "the actual expenses that may appertain to the goods themselves" (see Foster *v.* Goddard, 1 Black (U. S.) 506, 514, 17 L. ed. 228); "the ordinary current expenses of said corporation" (see Rome *v.* McWilliams, 67 Ga. 106, 111); "traveling expenses to be borne by the defendant" (see Dowd *v.* Krall, 32 Misc. (N. Y.) 252, 253, 65 N. Y. Suppl. 797); "where such expenses are not otherwise provided by law" (see Williams *v.* U. S., 12 Ct. Cl. 192, 199; *Re* Wrexham, etc., R. Co., 80 L. T. Rep. N. S. 648, 650; Proffitt *v.* Wye Valley R. Co., 64 L. T. Rep. N. S. 669, 673; *Re* Cornwall Minerals R. Co., 48 L. T. Rep. N. S. 41, 44); "'working expenses and other proper outgoings" (see *In re* Eastern, etc., R. Co., 45 Ch. D. 367, 385, 63 L. T. Rep. N. S. 604 [*citing Re* Cornwall Minerals R. Co., 48 L. T. Rep. N. S. 41]).

86. Willis *v.* State, 134 Ala. 429, 433, 33 So. 226.

87. State Ins. Co. *v.* Horner, 14 Colo. 391, 394, 23 Pac. 788.

88. Webster *v.* Peck, 31 Conn. 495, 499.

89. Bouvier L. Dict. [*citing* Branch Princ.; Coke Litt. 60].

90. Century Dict.

As used in regard to inventions, it may be a trial, either of an incomplete mechanical structure, to ascertain what changes or additions may be necessary to make in it to accomplish the design of its projector, or of a completed machine to illustrate or test its practical efficiency. Northwestern Fire Extinguisher Co. *v.* Philadelphia Fire Extinguisher Co., 18 Fed. Cas. No. 10,337, 1 Ban. & A. 177.

91. State *v.* Biddle, 54 N. H. 379, 380.

92. **Derivation.**— From the Latin *expertus,* which is the past participle of *experiri,* a word meaning to try, to go through with. Century Dict. See Bouvier L. Dict. [*quoted* in Nelson *v.* Johnson, 18 Ind. 329, 334; Travis *v.* Brown, 43 Pa. St. 9, 12, 82 Am. Dec. 540]. See also 3 Ky. L. Rep. 479, 480.

"He must be an expert, and have an opinion of his own upon the subject of inquiry." Wehner *v.* Lagerfelt, 27 Tex. Civ. App. 520, 522, 66 S. W. 221.

93. Greenleaf Ev. § 440 [*quoted* in Cheney *v.* Dunlap, 20 Nebr. 265, 269, 29 N. W. 925, 57 Am. Rep. 828]; Dole *v.* Johnson, 50 N. H. 452, 454 [*citing* Boardman *v.* Woodman, 47 N. H. 120, 134]; Jones *v.* Tucker, 41 N. H. 546, 547 [*quoted* in Graney *v.* St. Louis, etc., R. Co., 157 Mo. 666, 680, 57 S. W. 276, 50 L. R. A. 153]; Rochester *v.* Chester, 3 N. H. 349, 365; Congress, etc., Spring Co. *v.* Edgar, 99 U. S. 645, 657, 25 L. ed. 487 [*citing* Buster *v.* Newkirk, 20 Johns. (N. Y.) 75].

The method of acquiring the special skill or knowledge, whether by study, experience, observation or practice, is not material (see Parsons *v.* Lindsay, 26 Kan. 426, 432; Nelson

who has peculiar knowledge or skill as to some particular subject,[94] such as any art[95] or science,[96] or particular trade,[97] or profession,[98] or any special branch of learning,[99] and is professionally or peculiarly acquainted with its practices and usages;[1] a person who has technical and peculiar knowledge in relation to matters with which the mass of mankind are supposed not to be acquainted;[2] one who has some special, particular or practical knowledge in relation to some special department of the affairs of men as would qualify him to stand as an expert, skilled enough to teach others;[3] a man of science;[4] a person conversant

v. Sun Mut. Ins. Co., 71 N. Y. 453, 460 [*citing* Goins *v.* Chicago, etc., R. Co., 47 Mo. App. 173, 181; Ellis *v.* Thomas, 84 N. Y. App. Div. 626, 629, 82 N. Y. Suppl. 1064; Pendleton *v.* Saunders, 19 Oreg. 9, 26, 24 Pac. 506; Carter *v.* Boehm, 1 Smith Lead. Cas. 791]; Kelley *v.* Richardson, 69 Mich. 430, 436, 37 N. W. 514); thus he is said to be an expert who is so qualified, either by actual experience or by such careful study, as to enable him to form a definite opinion of his own respecting some division of science, branch of art, or department of trade, about which persons having no particular training or special study are incapable of forming accurate opinions or deducing correct conclusions (Scott *v.* Astoria R. Co., 43 Oreg. 26, 38, 72 Pac. 594, 99 Am. St. Rep. 710, 62 L. R. A. 543 [*citing* State *v.* Simonis, 39 Oreg. 111, 65 Pac. 595; Farmers', etc., Nat. Bank *v.* Woodell, 38 Oreg. 294, 61 Pac. 837, 65 Pac. 520; State *v.* Anderson, 10 Oreg. 448]).

"Knowledge of any kind, gained for and in the course of one's business as pertaining thereto, is precisely that which entitles one to be considered an expert." Buffum *v.* Harris, 5 R. I. 243, 251 [*quoted* in Pendleton *v.* Saunders, 19 Oreg. 9, 26, 24 Pac. 506].

Essential requisites.—"An expert must have made the subject upon which he gives his opinion a matter of particular study, practice, or observation, and he must have particular and special knowledge on the subject." Jones *v.* Tucker, 41 N. H. 546, 548 [*quoted* in Dole *v.* Johnson, 50 N. H. 452, 454; Pendleton *v.* Saunders, 19 Oreg. 9, 26, 24 Pac. 506].

94. Dole *v.* Johnson, 50 N. H. 452, 454 [*citing* Beard *v.* Kirk, 11 N. H. 397]; Jones *v.* Tucker, 41 N. H. 546, 547; Wheeler, etc., Mfg. Co. *v.* Buckhout, 60 N. J. L. 102, 105, 36 Atl. 772 [*citing* Lawson Exp. & Sp. Ev. 210] (where it is said: "Mr. Lawson lays down the rule that one may be qualified as an expert witness by study without practice or by practice without study"); Jones *v.* State, 38 Tex. Cr. 87, 123, 40 S. W. 807, 41 S. W. 638, 70 Am. St. Rep. 719; State *v.* Phair, 48 Vt. 366, 377. See also 3 Ky. L. Rep. 480, 481.

95. Roger Exp. Test. 2 [*quoted* in Turner *v.* Haar, 114 Mo. 335, 344, 21 S. W. 737].

96. Yates *v.* Yates, 76 N. C. 142, 149 [*citing* Greenleaf Ev. § 440].

97. Clark *v.* Rockland Water Power Co., 52 Me. 68, 77; State *v.* Jacobs, 51 N. C. 284, 286; Struthers *v.* Philadelphia, etc., R. Co., 174 Pa. St. 291, 298, 34 Atl. 443; Bouvier L. Dict. [*quoted* in Toomes' Estate, 54 Cal. 509, 514, 35 Am. Rep. 83. 3 Ky. L. Rep. 479, 480];

Roger Exp. Test. 2 [*quoted* in Turner *v.* Haar, 114 Mo. 335, 344, 21 S. W. 737].

"Expert" may include a ship-builder (State *v.* Jacobs, 51 N. C. 284, 286); bankers, bank cashiers, and clerks of courts (Bratt *v.* State, 38 Tex. Cr. 121, 123, 41 S. W. 622 [*citing* Lawson Exp. Ev. 425, 428]); merchants and others who habitually receive and pass the notes of a bank (Yates *v.* Yates, 76 N. C. 142, 149; State *v.* Jacobs, *supra*; State *v.* Cheek, 35 N. C. 114); or a physician (Horton *v.* Green, 64 N. C. 64, 67).

98. Worcester L. Dict. [*quoted* in *In re* Toomes, 54 Cal. 509, 514, 35 Am. Rep. 53]; Heald *v.* Thing, 45 Me. 392, 394 [*citing* Burrill L. Dict., and *cited* in Clark *v.* Rockland Water Power Co., 52 Me. 68, 77]; Flynt *v.* Bodenhamer, 80 N. C. 205, 207 [*quoting* Burrill L. Dict., and *citing* Worcester Dict.]; Roger Exp. Test. 2 [*quoted* in Turner *v.* Haar, 114 Mo. 335, 344, 21 S. W. 737].

"Persons who are much accustomed to attend upon the sick to watch the progress of diseases to their end and to be with the dying, are by their experience enabled to form a better judgment as to the course of disease and its probable effect upon the body and mind in the last hours of life than others who have no such opportunity. Physicians who are in general practice and nurses thus become experts in such matters, so far as experience and observation can furnish knowledge." Fairchild *v.* Bascomb, 35 Vt. 398, 408 [*quoted* in *In re* Toomes, 54 Cal. 509, 514, 35 Am. Rep. 53].

99. Webster Int. Dict. [*quoted* in Wehner *v.* Lagerfelt, 27 Tex. Civ. App. 520, 522, 66 S. W. 221].

1. Strickland Ev. 408 [*cited* in Dole *v.* Johnson, 50 N. H. 452, 454; Jones *v.* Tucker, 41 N. H. 546, 547]. See also 3 Ky. L. Rep. 480.

2. Baltimore, etc., Turnpike Co. *v.* Cassell, 66 Md. 419, 431, 7 Atl. 805, 59 Am. Rep. 175.

3. Ellis *v.* Thomas, 84 N. Y. App. Div. 626, 629, 82 N. Y. Suppl. 1064.

4. Folkes *v.* Chadd, 3 Dougl. 157, 26 E. C. L. 111 [*quoted* in Doe *v.* Johnson, 50 N. H. 452, 454].

"In matters of science, the reasonings of men of science can only be answered by men of science." Folkes *v.* Chadd, 3 Dougl. 157, 159, 26 E. C. L. 111 [*cited* in Dole *v.* Johnson, 50 N. H. 452, 454; Jones *v.* Tucker, 41 N. H. 546, 547; State *v.* Jacobs, 51 N. C. 284, 286]. See also 3 Ky. L. Rep. 479, 480.

"The expert gives the result of a process of reasoning which can be mastered only by special scientists." 3 Ky. L. Rep. 479, 481 [*quoting* 1 Wharton Ev. par. 439].

with the subject;[5] one who has had experience;[6] one who has been instructed by,[7] or become skilled through, use, practice, or experience;[8] a skillful or experienced person;[9] one who by his habits of life and business has a peculiar skill in forming an opinion on some subject;[10] one who by practice or observation has become experienced in any science, art or trade;[11] a person who has made the subject upon which he gives his opinion a matter of particular study, practice or observation.[12] (See, generally, EVIDENCE, WITNESSES.)

EXPERT EVIDENCE. An opinion by a qualified person on facts already proved involving scientific or technical knowledge, and is not evidence of things done or measurements taken which anyone is competent to prove, the weight to be given to his evidence depending upon his ability.[13] (See, generally, EVIDENCE.)

EXPIRATION. Cessation; end;[14] a particular word, peculiarly appropriated to effluxion of time.[15] (Expiration: Of Charter,[16] see CORPORATIONS. Of Copyright, see COPYRIGHT. Of Lease,[17] see LANDLORD AND TENANT. Of Patent, see PATENTS. Of Policy,[18] see INSURANCE; and the insurance titles.)

EXPIRE. To emit the last breath; to perish; to cease; to come to an end; to conclude; to terminate;[19] to cease to exist.[20] (See EXPIRATION.)

5. Best Princ. Ev. § 346 [*quoted* in Dole *v.* Johnson, 50 N. H. 452, 454; Jones *v.* Tucker, 41 N. H. 546, 547; State *v.* Jacobs, 51 N. C. 284, 286].

6. Peterborough *v.* Jaffrey, 6 N. H. 462, 463 [*quoted* in Dole *v.* Johnson, 50 N. H. 452, 454; Jones *v.* Tucker, 41 N. H. 546, 547]; Ardesco Oil Co. *v.* Gilson, 63 Pa. St. 146, 151 [*cited* in Graney *v.* St. Louis, etc., R. Co., 157 Mo. 666, 680, 57 S. W. 276, 50 L. R. A. 153, and Jackson *v.* Grand Ave. R. Co., 118 Mo. 199, 222, 24 S. W. 192]; Wehner *v.* Lagerfelt, 27 Tex. Civ. App. 520, 522, 66 S. W. 221 [*citing* Lawson Exp. & Op. Ev. (2d ed.) 230].

7. 2 Best Ev. 368 [*quoted* in Toomes' Estate, 54 Cal. 509, 514, 35 Am. Rep. 83]; Nelson *v.* Sun Mut. Ins. Co., 71 N. Y. 453, 460 [*citing* Carter *v.* Boehm, 1 Smith Lead. Cas. 791, and *cited* in Ellis *v.* Thomas, 84 N. Y. App. Div. 626, 629, 82 N. Y. Suppl. 1064; Pendleton *v.* Saunders, 19 Oreg. 9, 26, 24 Pac. 506]; State *v.* Jacobs, 51 N. C. 284, 286; Bouvier L. Dict. [*quoted* in Flynt *v.* Bodenhamer, 80 N. C. 205, 207]; Webster Dict. [*quoted* in Toomes' Estate, 54 Cal. 509, 514, 35 Am. Rep. 83; Wehner *v.* Lagerfelt, 27 Tex. Civ. App. 520, 522, 66 S. W. 221].

8. Bouvier L. Dict. [*quoted* in 3 Ky. L. Rep. 479, 480].

9. Heald *v.* Thing, 45 Me. 392, 394.

The highest degree of skill is not necessary. Beckett *v.* Northwestern Masonic Aid Assoc., 67 Minn. 298, 302, 69 N. W. 923; Dole *v.* Johnson, 50 N. H. 452, 454; Yates *v.* Yates, 76 N. C. 142, 149; Richmond Locomotive Works *v.* Ford, 94 Va. 627, 641, 27 S. E. 509; Bratt *v.* State, 38 Tex. Cr. 121, 123, 41 S. W. 622; Congress, etc., Spring Co. *v.* Edgar, 99 U. S. 645, 657, 24 L. ed. 487.

10. White *v.* Clements, 39 Ga. 232, 242.

11. Rogers Exp. Test. 2 [*quoted* in Turner *v.* Haar, 114 Mo. 335, 344, 21 S. W. 737; Goins *v.* Chicago, etc., R. Co., 47 Mo. App. 173, 181].

12. State *v.* Davis, 55 S. C. 339, 341, 33 S. E. 449; Pothier Civ. Proc. (pt. 1, c. 3, art. 3, § 1 [*quoted* in Dole *v.* Johnson, 50 N. H. 452, 454], where it is said that this term applies to the experts appointed by the French courts.

13. Cain *v.* Uhlman, 8 Can. L. T. 373, 374.

14. Bouvier L. Dict. [*quoted* in Marshall *v.* Rugg, 6 Wyo. 270, 290, 44 Pac. 700, 33 L. R. A. 679].

"Expiration" of grant see St. Paul, etc., R. Co. *v.* Greenhalgh, 26 Fed. 563, 568.

15. Wrotesley *v.* Adams, 1 Plowd. 187, 198, where the word is compared with "end." See also Logsdon *v.* Logsdon, 109 Ill. App. 194, 196, where it is said: "We can see no distinction to be drawn between the word 'expiration' and the word 'elapse' or 'intervene.'"

Thus "expiration of the term" has been construed to mean expiration by lapse of time, and not through a breach of condition.

California.— Silva *v.* Campbell, 84 Cal. 420, 423, 24 Pac. 316.

Illinois.— See Stuart *v.* Hamilton, 66 Ill. 253, 255.

Massachusetts.— Farnum *v.* Platt, 8 Pick. 339, 340, 19 Am. Dec. 330.

Minnesota.— See State *v.* Burr, 29 Minn. 432, 433, 12 N. W. 676.

New York.— Finkelmeier *v.* Bates, 92 N. Y. 172, 178; Miller *v.* Levi, 44 N. Y. 489, 494; Beach *v.* Nixon, 9 N. Y. 35, 37; Matter of Guaranty Bldg. Co., 52 N. Y. App. Div. 140, 142, 64 N. Y. Suppl. 1056; Kramer *v.* Amberg, 15 Daly 205, 206, 4 N. Y. Suppl. 613 [*affirmed* in 115 N. Y. 655, 21 N. E. 1119]; Oakley *v.* Schoonmaker, 15 Wend. 226, 230.

United States.— Bonsack Mach. Co. *v.* Smith, 50 Fed. 383, 393.

16. Crease *v.* Babcock, 23 Pick. (Mass.) 334, 346, 34 Am. Dec. 61.

17. State *v.* Burr, 29 Minn. 432, 433, 13 N. W. 676; Philip *v.* McLaughlin, 24 N. Brunsw. 532, 536.

18. Sullivan *v.* Massachusetts Mut. F. Ins. Co., 2 Mass. 318, 328.

19. Stuart *v.* Hamilton, 66 Ill. 253, 255.

20. Bonsack Mach. Co. *v.* Smith, 70 Fed. 383, 392 [*citing* Pohl *v.* Anchor Brewing Co., 134 U. S. 381, 387, 10 S. Ct. 577, 33 L. ed. 953].

EXPLANATION. As applied to charges against a person in office, it may consist either in excusing any delinquency or apparent neglect or incapacity; that is, explaining the favorable appearances, or disapproving the charges.[21]

EXPLODE. To burst forth, as sound; to burst and expand with force and a violent report, as an elastic fluid.[22] (See EXPLOSION; and, generally, EXPLOSIVES.)

EXPLODED. As applied to an argument, decisively rejected.[23]

EXPLORATION. The act of exploring; search, examination, or investigation.[24]

EXPLORE FOR. In mining, the examination and investigation of lands by means of test pitting, drilling, and boring, for the purpose of discovering the presence of ore thereunder, and the extent of the ore body therein.[25] (See, generally, MINES AND MINERALS.)

EXPLOSION.[26] The act of exploding, bursting with a loud noise, or detonation; a sudden inflaming with force and a loud report, as the explosion of gunpowder;[27] a bursting out with a noise;[28] a bursting with violence and loud noise, because of internal pressure;[29] a sudden bursting with noise;[30] a sudden bursting, or breaking up or in pieces, from an internal or other force; a blowing up or tearing apart;[31] a sudden and violent expansion of the parts of a body,[32] by its component parts acquiring a great increase of bulk;[33] a sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report;[34]

"Expire" as applied to a lease see Hall *v.* Comfort, 18 Q. B. D. 11, 14, 56 L. J. Q. B. 135, 55 L. T. Rep. N. S. 550, 35 Wkly. Rep. 48.

"Expire and terminate" as applied to a lease, is an elliptical phrase, meaning expire and terminate at the lessor's option. Bowman *v.* Foot, 29 Conn. 331, 339.

21. People *v.* New York, 72 N. Y. 445, 449 [*quoted* in People *v.* La Grange, 2 N. Y. App. Div. 444, 446, 37 N. Y. Suppl. 991; Matter of Nichols, 6 Abb. N. Cas. (N. Y.) 474, 487].

22. Webster Dict. [*quoted* in Evans *v.* Columbian Ins. Co., 44 N. Y. 146, 151, 4 Am. Rep. 650].

23. Evens *v.* Griscom, 42 N. J. L. 579, 592, 37 Am. Rep. 542.

24. Century Dict.

"Exploration" does not include an entry upon "lands or waters for the purpose of exploring, surveying, leveling, and laying out the route of, and locating any railroad." Morris, etc., R. Co. *v.* Hudson Tunnel R. Co., 25 N. J. Eq. 384, 388.

25. Colvin *v.* Weimer, 64 Minn. 37, 38, 65 N. W. 1079.

26. **Not susceptible of exact definition.**— "The word 'explosion' is variously used in ordinary speech, and is not one that admits of exact definition. Its general characteristics may be described, but the exact facts which constitute what we call by that name, are not susceptible of such statement as will always distinguish the occurrences. It must be conceded that every combustion of an explosive substance whereby other property is ignited and consumed, would not be an explosion within the ordinary meaning of the term." United L., etc., Ins. Co. *v.* Foote, 22 Ohio St. 340, 347, 10 Am. Rep. 735 [*quoted* in Smiley *v.* Citizens' F., etc., Ins. Co., 14 W. Va. 33, 40, and *cited* in Transatlantic F. Ins. Co. *v.* Dorsey, 56 Md. 70, 81, 40 Am. Rep. 403].

It is an idea of degrees, and the true meaning of the word in each particular case must be settled, not by any fixed standard, or accurate measurement, but by the common experience and notions of men in matters of that sort. United L., etc., Ins. Co. *v.* Foote, 22 Ohio St. 340, 348, 10 Am. Rep. 755 [*quoted* in Smiley *v.* Citizens' F., etc., Ins. Co., 14 W. Va. 33, 49].

The term is to be construed in its popular sense, and as understood by ordinary men, and not by scientific men. Mitchell *v.* Potomac Ins. Co., 183 U. S. 42, 52, 22 S. Ct. 22, 46 L. ed. 74.

27. Webster Dict. [*quoted* in Louisville Underwriters *v.* Durland, 123 Ind. 544, 550, 24 N. E. 221, 7 L. R. A. 399].

28. Hobbs *v.* Northern Assur. Co., 8 Ont. 343, 347, where it is said: "An explosion may be produced without the aid of heat or fire, as by the sudden liberation of air from an air gun; by the expansion of gas in a balloon caused by the rising of the balloon into a higher atmosphere; by the expansive force of any gas or vapour bursting its environment; by the contact or mixture of some chemicals; or by the concussion of nitro-glycerine or dynamite, in which last articles the union of the particles is very easily disturbed and trees often explode during a severe frost. Fire is perhaps the principal efficient cause of explosions."

29. Webster Dict. [*quoted* in Wadsworth *v.* Marshall, 88 Me. 263, 269, 34 Atl. 30, 32 L. R. A. 588].

30. Webster Dict. [*quoted* in St. Louis Gaslight Co. *v.* Philadelphia American F. Ins. Co., 33 Mo. App. 348, 385].

31. Century Dict. [*quoted* in Louisville Underwriters *v.* Durland, 123 Ind. 544, 550, 24 N. E. 221, 7 L. R. A. 399].

32. Evans *v.* Columbian Ins. Co., 44 N. Y. 146, 152, 4 Am. Rep. 650.

33. Evans *v.* Columbian Ins. Co., 44 N. Y. 145, 151, 4 Am. Rep. 650.

34. United L., etc., Ins. Co. *v.* Foote, 22 Ohio St. 340, 347, 10 Am. Rep. 735 [*quoted* in Smiley *v.* Citizens' F., etc., Ins. Co., 14 W. Va. 33, 49].

"All explosions caused by combustion are preceded by a fire." United L., etc., Ins. Co.

the result due to the conversion of a solid or liquid into a gas, or the expansion of a gas, which is accompanied with a loud report and the shattering of the material about it;[35] the sudden or extremely rapid conversion of a solid or liquid body of small bulk into gas or vapor occupying many times the volume of the original substance; and, in addition, highly expanded by the heat generated during the transformation.[36] (See Collapse; Explode; and, generally, Accident Insurance; Explosives; Fire Insurance.)

v. Foote, 22 Ohio St. 340, 348, 10 Am. Rep. 755 [*quoted* in Renshaw *v.* Missouri State Mut. F. & M. Ins. Co., 103 Mo. 595, 610, 15 S. W. 945, 23 Am. St. Rep. 904; Smiley *v.* Citizens' F., etc., Ins. Co., 14 W. Va. 33, 49].

When produced by ignition, according to common understanding, it may be accurately enough described for practical purposes as a sudden and rapid combustion causing a violent expansion of the air and producing a report more or less loud according to the resistance offered. Mitchell *v.* Potomac Ins. Co., 16 App. Cas. (D. C.) 241, 270; Transatlantic F. Ins. Co. *v.* Dorsey, 56 Md. 70, 81, 40 Am. Rep. 403.

The term is not synonymous with "combustion" (United L., etc., Ins. Co. *v.* Foote, 22 Ohio St. 340, 347, 10 Am. Rep. 735 [*quoted* in Smiley *v.* Citizens' F., etc., Ins. Co., 14 W. Va. 33, 49]), although it has at least some distinctive characteristics (Transatlantic F. Ins. Co. *v.* Dorsey, 56 Md. 70, 81, 40 Am. Rep. 403).

35. Mitchell *v.* Potomac Ins. Co., 16 App. Cas. (D. C.) 241, 269.

36. Hobbs *v.* Northern Assur. Co., 8 Ont. 343, 346.

Explosion of a boiler has been defined to be "the bursting of a boiler" (Louisville Underwriters *v.* Durland, 123 Ind. 544, 548, 24 N. E. 221, 7 L. R. A. 399); "the shattering of a boiler by a sudden and immense pressure in distinction from rupture" (Webster Dict. [*quoted* in Louisville Underwriters *v.* Durland, 123 Ind. 544, 24 N. E. 221, 7 L. R. A. 399]).

"The difference between the 'collapse' of a flue and the 'explosion' of a boiler is" considered in Louisville Underwriters *v.* Durland, 123 Ind. 544, 550, 24 N. E. 221, 7 L. R. A. 399.

"Explosion of a steam boiler" as used in an insurance risk see St. John *v.* American Mut. F. & M. Ins. Co., 11 N. Y. 516.

"A steam boiler is said to rupture when the failure is not accompanied by the sudden or extraordinary development of elastic force, the material giving way by cracking or splitting open, and affording an outlet for the water and steam. The boiler is said to explode when the failure is accompanied by an extraordinary development of elastic force, the boiler being rent and torn asunder at strong places and weak places frequently without distinction." 20 Encycl. Brit. 634 [*quoted* in Evans *v.* Columbian Ins. Co., 44 N. Y. 146, 151, 4 Am. Rep. 650]. "The explosion is the cause, while the rupture is the effect." Evans *v.* Columbian Ins. Co., 44 N. Y. 146, 151, 4 Am. Rep. 650. "In explosions proper, the boiler is not only ruptured, and often thrown from its place, but fragments of it are usually hurled with terrible force, accompanied by the escape of steam." 15 New Am. Encycl. 60 [*quoted* in Evans *v.* Columbian Ins. Co., 44 N. Y. 146, 151, 4 Am. Rep. 650]; Chicago Sugar-Refining Co. *v.* American Steam-Boiler Co., 48 Fed. 198, 199.